

International Trade Alert

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CFIUS's 2015 Annual Report and Published 2016 Data Demonstrate Uptick in Review Activity and Scrutiny

On September 19, 2017, the Committee on Foreign Investment in the United States (CFIUS or the "Committee") released its annual report ("Report") to Congress. One day later, CFIUS also released more limited data on foreign investment activity in 2016 (the "2016 Table"). CFIUS is an interagency body with authority to review investments that could result in foreign control of U.S. businesses—referred to as "covered transactions"—for potential national security concerns.

The Report summarizes CFIUS activities in 2015, the most recent year for which complete data on foreign investment activity is available. Notably, CFIUS has historically published its statutorily mandated annual report in the first quarter of the year for the relevant prior calendar year. Its failure to issue the Report for 2015 until now is likely due to a combination of a significant increase in CFIUS filings in 2017 and career staff and political appointee vacancies at the Committee's member agencies. By also releasing the 2016 Table, CFIUS has provided further relevance and context to the 2015 data and has begun to fulfill its reporting obligations for subsequent years.

High-level Takeaways

The Report reflects data from CFIUS review activity of more than two years ago, which took place during President Obama's Administration. Nonetheless, particularly in the context of the 2016 Table, the Report is noteworthy for the continuation of trends it presents from prior years – most notably, a high volume of covered transactions subject to review and the domination of Chinese investment. The Report and 2016 Table also reveal CFIUS's rigor in addressing potential national security risk by escalating its review of transactions to second-stage investigation, making use of mitigation agreements and articulating new grounds for national security concerns. Moreover, the relevant data provides context for the acceleration of these themes in more recent years, including the past several months under the Trump Administration.

We have identified the following points as high-level takeaways with respect to evaluating the new information released by CFIUS and understanding the review numbers and results in today's environment:

Number of Deals Abandoned or Blocked Increasing. The number of transactions abandoned as a result of CFIUS scrutiny has steadily increased, from two in 2014 to three in 2015 to five in 2016. Significantly, one deal was blocked by presidential action in 2016. This case – President Obama's decision to block the acquisition of Aixtron by Chinese investors – marked the first time a President acted on CFIUS's recommendation to prohibit a transaction prior to closing. Prior to 2016, the President had exercised his blocking authority under CFIUS in two other instances (in 2012 and 1990), resulting in the unwinding of already-completed transactions by Chinese acquirers. It is noteworthy that in 2017,

President Trump has already used his CFIUS authority to block another China-backed investment into the United States in the case of Canyon Bridge's proposed acquisition of Lattice Semiconductor earlier this month (see [client alert](#)).

Number of Notices Filed Remains Steady Before Dramatically Increasing. CFIUS reviewed 143 notices of covered transactions in 2015, only four fewer than it reviewed in 2014, and generally continuing a steady upward trend since 2009. In comparison, CFIUS reviews jumped by 20% in 2016, with the Committee reviewing 172 notices. While CFIUS likely will not publish data for 2017 until 2019, it is reportedly on track to review 250 notices or more this year, representing exponential growth in the CFIUS caseload.

China Continues to Dominate CFIUS Transactions, with Canada and the United Kingdom Following Closely. According to the Report, for the fourth year in a row, China accounted for the most covered transactions (29) by a foreign country. As compared to 2014, Canada displaced the United Kingdom with the second most covered transactions, with 22 notices. The United Kingdom rounded out the top three of countries reviewed by CFIUS, with 19 notices filed, followed by Japan with 12 notices.

Sizeable Increase in Percentage of Investigations. Notably, in both 2015 and 2016, CFIUS conducted an investigation (or second-level review) of approximately 46% of covered transactions, marking a more than 10% increase in reviews proceeding to this second stage of review in 2014. On a forward-looking basis, we anticipate that we will see increased instances of CFIUS reviews proceeding to the investigation stage, both because of an increase in CFIUS filings and resource constraints of the Committee.

Slight Increase in Use of Mitigation Measures. In 2015, CFIUS applied mitigation measures to 11 covered transactions, or eight percent of the total number of 2015 notices. In comparison, in 2014, CFIUS required mitigation for nine covered transactions, or six percent of total transactions for that year. While the 2016 Table does not provide information on the use of mitigation agreements, we expect to see a continuation of this trend when that information is released for 2016.

Continued Focus on Key Sectors. The distribution of foreign investment across sectors in 2015 roughly matched overall trends in historical data from 2009-2015, with 48 percent of notices in Manufacturing (and over half of those related to Semiconductor and Other Electronic Component Manufacturing) and 29 percent in Finance, Information and Services. The sectoral data for China, the United Kingdom, and Japan mirrored these general trends, with Manufacturing the most common sector. In contrast, Canada had the most notices in the Mining, Utilities, and Construction sector, followed by the Wholesale Trade, Retail Trade and Transportation sector.

New National Security Considerations. In the Report, CFIUS identifies national security concerns for 2015, not raised in prior annual reports. For instance, the Report highlights CFIUS scrutiny of transactions involving businesses that maintain or have access to potentially sensitive data about U.S. persons and

businesses. According to the Report, businesses that may possess such data could be in a variety of sectors, including insurance, health services and technology services.

Conclusion

The Report demonstrates significant and consistent CFIUS trends that continued into 2016 and will accelerate through 2017. The clear trajectory is for an increased caseload for the Committee and enhanced scrutiny of foreign investment on the whole, particularly with respect to China. Moreover, China has continued to dominate foreign investment in 2017 and likely will do so in the future. Notably, the future of the CFIUS regime will also be subject to a number of political factors, including President Trump's foreign trade policies, particularly his Administration's approach to China, and the substance and success of anticipated legislative amendments to the CFIUS process. If Congress follows through on initiatives to expand the scope of CFIUS review to capture additional transactions and types of national security concerns, we could see a dramatic emphasis of current trends, with CFIUS having implications on a large array of transactions.

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