

CFIUS Annual Report Finds a Coordinated Strategy to Acquire Critical U.S. Technology

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The Committee on Foreign Investment in the United States (CFIUS) recently released its Annual Report to Congress regarding its activity during calendar year 2011. CFIUS is the multi-government agency committee charged with reviewing foreign acquisitions of U.S. companies for national security implications. CFIUS' annual report provides valuable insight for both foreign and U.S. companies who are considering investment transactions that could raise U.S. national security considerations.

While CFIUS filings have steadily increased since 2009, CFIUS' scrutiny of such transactions has intensified, with over one-third of all cases proceeding into the 45-day investigation stage. Notably, for the first time, the report found that there is likely a coordinated strategy among foreign governments or companies to acquire critical American technology research, development and/or production know-how. Although the public report does not identify the suspected foreign governments or companies, this finding is significant, and could result in increased security-related conditions for certain mergers and acquisitions. The finding could also lead to CFIUS recommending that the President block additional transactions. Indeed, although not covered by the 2011 report, the President recently determined that national security interests warranted blocking Chinese-owned Ralls Corporation's acquisition of wind farm projects in Oregon, and ordered the Chinese company to remove all property and installations, and divest all interest in the projects that were acquired last year. This is only the second time in history that a President has taken such action under CFIUS authority.

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Practice Areas

International Trade
Privacy, Cyber & Data Governance

Key Highlights of the 2011 Report

CFIUS Filings Increased by 20%

In 2011, CFIUS reviewed 111 cases, up 20% from the 93 reviewed in 2010. Although the number of filings remains below the pre-recession high of 155 notices in 2008, the number of notices continues to increase each year, reflecting greater M&A activity.

Investigation Levels Remain High

Of the 111 notices reviewed in 2011, 40 (or approximately 36%) proceeded into the 45-day investigation stage, a slight decrease from the nearly 40% of cases that went to investigation in 2010. These levels, however, remain significantly higher than the 14% of cases that went into investigation in 2008.

Chinese Filings Increased

Acquisitions of U.S. businesses by Chinese firms continue to increase, rising from four in 2009 to 10 in 2011. Such Chinese acquisitions are expected to increase further in the coming years.

Mitigation Agreements Decreased Slightly

Eight cases resulted in legally binding mitigation measures in 2011, down from nine in 2010. Mitigation agreements, which place conditions on the transactions, involved investments in the software, computer programming, computer and electronic manufacturing, electrical equipment and component manufacturing, aerospace manufacturing and finance sectors. Although down slightly from the 2010 level, these eight cases represent a significantly higher percentage of mitigation agreements than in 2008 (only two cases).

Withdrawals Significantly Decreased

In 2011, there were six withdrawals from the CFIUS review process; one occurred during the 30-day review process and five during the 45-day investigation stage. This is down significantly from 2010 levels, in which six notices were withdrawn at the review stage and six at the investigation stage. All six of the withdrawn notices in 2011, however, were re-filed.

Acquisitions in the Manufacturing Sector Have Increased

Similar to 2010, the greatest number of filings (44%) occurred in the manufacturing sector (up from 32% in 2009), followed by the finance, information and services sectors. Foreign investors continue to see value in high-tech investments, as acquisitions of computer and electronic products companies represented half of all manufacturing sector investments and computer systems design and related services represented 44% of all service sector investments.

The UK Led CFIUS Filings, Followed by France, China and Japan

As has been the historical trend, companies from the United Kingdom had the highest number of filings in 2011, at 25. French companies significantly increased their M&A activity, with 14 notices filed in 2011, up from only six in 2010. China had 10 filings, followed by Japan and the Netherlands with seven filings each, and Israel, Sweden and Canada with six filings each.

Further Background

General Economic Trends

In line with the continuing recovery from the financial crisis that began in 2008, CFIUS filings during the 2009 to 2011 period appear to coincide with improvements in the market. Although CFIUS notice levels have yet to return to the pre-financial crisis high of 155 notices, the growing number of notices are indicative of the increase in foreign investment in the United States, with CFIUS filings rising steadily from 65 in 2009, to 93 in 2010, to 111 in 2011.

Further Information on Covered Transactions by Country

Companies from over 30 countries filed CFIUS notices over the last three years, with more than 20 countries represented in 2011. From 2009 to 2011, companies in the United Kingdom filed 68 notices, accounting for 26% of all CFIUS filings, the highest of any country. France and Canada followed the United Kingdom with 27 filings each, followed by China with 20 and Israel and Japan with 18 filings. Interestingly, Chinese companies have filed increasingly more CFIUS notices in the last three years despite high-profile CFIUS cases such as Huawei's, a Chinese telecom equipment manufacturer, forced divestiture of the U.S. technology company 3Leaf and attempted 3Com investment.

Further Information on Covered Transactions by Business Sector

CFIUS reviews cover foreign investments in a wide range of sectors that are not necessarily concentrated in defense or other traditional national-security related sectors. In 2011, approximately 44% of all investments came in the manufacturing sector, 34% were in the finance, information and services sector, 14% were in the mining, utilities and construction sector and 7% were in the wholesale and retail trade sector. During the three-year period from 2009 to 2011, 50% of CFIUS notices filed within the manufacturing sector involved transactions within the computer and electronic products subsector, while 55% of transactions within the finance, information and services sector involved financial services.

Further Information on Mitigation Measures

In 2011, CFIUS utilized a number of mitigation measures to place conditions on transactions and thereby address national security concerns. Such mitigation measures included:

- establishing a Corporate Security Committee, security officers and other mechanisms to ensure compliance with required actions, including annual reports and independent audits;

- ensuring compliance with established guidelines and terms for handling existing or future U.S. Government (USG) contracts and USG customer information;
- ensuring only U.S. persons handle certain products and services, and ensuring that certain activities and products are located only in the United States;
- notifying relevant USG parties in advance of foreign national visits to the U.S. business;
- notifying relevant USG parties of any material introduction, modification or discontinuation of a product or service, as well as any awareness of any vulnerability or security incidents; and
- ensuring continued production of certain products for relevant USG parties for specified periods;
- requiring a proxy entity to perform certain functions and activities of the U.S. business.

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Wiley Rein has an unparalleled ability to assist U.S. and foreign companies before CFIUS. Partner Daniel B. Pickard is a CFIUS expert and provides comprehensive guidance on multiple trade and investment issues including compliance with the National Industrial Security Program (NISP) and on FOCI issues. Nova J. Daly served as a Deputy Assistant Secretary for Investment, Security and Policy at Treasury. In that capacity, he ran the CFIUS process, oversaw over 350 cases, negotiated the new CFIUS law, and was responsible for the drafting and implementation of the new CFIUS regulations.

Wiley Rein's CFIUS Practice is bolstered by the broad and diverse strength of professionals in the firm's other areas of specialty, including: Government Contracts, Export Controls, Cybersecurity, Economic Sanctions/OFAC, Foreign Corrupt Practices Act (FCPA) and Corporate, and is further strengthened by a host of specialized practice experience in defense, telecommunications, aviation, satellite technology and other sectors.