

CFIUS Releases Annual Report for Calendar Year 2015

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The U.S. Committee on Foreign Investment in the United States (CFIUS or the Committee)^[1] recently released its annual report to Congress for calendar year 2015.^[2]

The report, among other findings, reveals increases in Chinese investment as a proportion of total investments, investigations as a percentage of cases filed, and cases withdrawn. These findings will likely bear out in subsequent reports as well, as the level of Chinese investment grew to \$15.3 billion in 2015 and \$46.2 billion in 2016,^[3] as CFIUS continues to see increased filings (apparently at least near 175 as of September 2017), and staffing and leadership remain constrained.

Although no Presidential actions were taken in 2015, President Obama and President Trump both blocked Chinese-backed investments in the U.S. semiconductor industry in 2016 and 2017, respectively. The scope of transactions subject to CFIUS review could also be significantly expanded as proposed legislative changes to the CFIUS process continue to make their way through Congress.

Highlights of the 2015 Annual Report

CFIUS filings decreased slightly. 143 notices of covered transactions were filed in 2015, slightly down from the 147 notices filed in 2014. With the exception of 2015 and 2013, the number of notices filed has steadily increased each year since 2009, though the total number of annual filings remains below the pre-recession high of 155 notices filed in 2008. As noted above, filings will continue to show marked increases in subsequent annual reports.

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Practice Areas

International Trade
National Security

The number of investigations increased. Of the 143 notices filed in 2015, 66 (or 46%) proceeded to the 45-day investigation stage, representing an increase from the 35% of cases that went to investigation in 2014. The percentage is somewhat higher than the standard 35-40% range that we have seen in most years since 2009 but lower than the historical high of 49% in 2013. Given the known increases in CFIUS cases, combined with staffing constraints, we expect this percentage to remain relatively high in years 2016 and throughout 2017.

Chinese investment remained high. For the fourth year in a row, acquisitions by investors from China accounted for the largest number of notices filed. 29 notices (20%) involving Chinese parties were filed in 2015, up from the 24 notices (16%) filed in 2014. Acquisitions by investors from Canada (22 or 15%), the United Kingdom (19 or 13%), and Japan (12 or 8%) also accounted for large percentages of notices filed.

Withdrawals increased slightly. 13 notices were withdrawn in 2015. Of these, three were withdrawn during the 30-day review period, and 10 were withdrawn during the 45-day investigation period. This is just slightly higher than the number of withdrawals in 2014, which saw three notices withdrawn during the review period and nine withdrawn during the investigation period. Eight of the notices withdrawn were refiled in 2015, and one was refiled in 2016. Parties to three notices abandoned their transactions after CFIUS informed them that it was unable to identify mitigation measures that would resolve its national security concerns or CFIUS proposed mitigation terms that the parties were not willing to accept, and parties to one notice abandoned their transaction for purely commercial reasons. Additionally, one of the notices was rejected because the parties provided information in their notice that contradicted information available to the U.S. government (USG).

No Presidential veto. None of the notices filed in 2015 resulted in a Presidential decision to suspend or prohibit the underlying transaction. Because CFIUS's annual report is limited to notices filed during calendar year 2015, it does not include President Trump's September 2017 executive order blocking a proposed Chinese acquisition or President Obama's December 2016 executive order blocking the proposed acquisition of a German semiconductor manufacturer, both of which will be addressed in subsequent reports.

More mitigation measures were imposed. In 2015, 11 cases (or 8%) resulted in legally binding mitigation measures, up from 9 such cases in 2014. Examples of mitigation measures that were negotiated and adopted in 2015 include the following:

- Ensuring that only authorized persons have access to certain technology; that only authorized persons have access to USG, company, or customer information, and that the foreign acquirer not have direct or remote access to systems that hold such information.
- Establishing a Corporate Security Committee and other mechanisms to ensure compliance with all required actions, including the appointment of a USG-approved security officer or member of the board of directors and requirements for security policies, annual reports, and independent audits.
- Establishing guidelines and terms for handling existing or future USG contracts, USG customer information, and other sensitive information.

- Ensuring that only U.S. citizens handle certain products and services, and ensuring that certain activities and products are located only in the U.S.
- Notifying security officers or relevant USG parties in advance of foreign national visits to the U.S. business for approval.
- Security protocols to ensure the integrity of goods or software sold to the USG.
- Notifying customers regarding the change of ownership.
- Assurances of continuity of supply for defined periods, and notification and consultation prior to taking certain business decisions, with certain rights in the event that the company decides to exit a business line.
- Established meetings to discuss business plans that might affect USG supply or national security considerations.
- Exclusion of certain sensitive assets from the transaction.
- Providing the USG with the right to review certain business decisions and object if they raise national security concerns.

Leading industry sectors. As in 2014, the greatest number of filings (68, or 48%) occurred in the manufacturing sector, followed by finance, information, and services (42 or 29%); mining, utilities, and construction (21 or 15%); and wholesale, retail, and transportation (12 or 8%). 49% of the manufacturing sector filings (or 23% of all notices filed) pertained to the computer and electronic product manufacturing subsector, evidencing a continued interest in technology-related transactions.

Evidence of a coordinated strategy to acquire critical technology companies. Whereas CFIUS's 2014 annual report noted the U.S. Intelligence Community's (USIC) conclusion that there may be an effort among foreign governments or companies to acquire U.S. companies involved in research, development, or production of critical technologies for which the U.S. is a leading producer, CFIUS's 2015 report does not convey the USIC's assessment of this question on the grounds that a meaningful summary cannot be provided on an unclassified basis. As in prior years, the USIC continues to judge that foreign governments are extremely likely to use a range of collection methods to obtain critical U.S. technologies.

Wiley Rein has an unparalleled ability to assist clients on investments that raise national security concerns. We have more than two decades of experience handling matters involving CFIUS and the Defense Security Service (DSS) and have counseled clients in transactions that involve nearly every industry sector subject to CFIUS review. Our attorneys and consultants have served in nearly every CFIUS department, including the U.S. Departments of Treasury, Homeland Security, Justice, Defense, State, and Commerce, as well as the National Security Council. Senior Public Policy Advisor Nova J. Daly, who served as the Deputy Assistant Secretary for Investment Security and Policy at Treasury from 2006 to 2009, ran the CFIUS process, oversaw the reviews of over 350 cases, and negotiated the Foreign Investment and National Security Act of 2007 (FINSA) and implemented its regulations. 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 foreign ownership, control, or influence (FOCI) issues.

[1] CFIUS is a multi-agency committee, chaired by the U.S. Department of the Treasury, that conducts national security reviews of transactions that could result in control of a U.S. business by a foreign person.

[2] Annual reports provide general information on notices filed, reviews and investigations completed by CFIUS during the year, and the types of security arrangements and conditions that the Committee has employed to mitigate national security concerns, among other findings.

[3] See Rhodium Group, China Investment Monitor.