

8 Key Takeaways From the CFIUS Annual Report to Congress

FY2014 CFIUS Report reflects significant increase in the number of transactions reviewed for national security risks, with Chinese investors continuing to lead the pack.

The [Committee on Foreign Investment in the United States](#) (CFIUS) recently released the public version of its [Annual Report to Congress](#), which provides a high-level overview of the notices submitted to CFIUS in calendar year 2014 in connection with foreign investment in US businesses — including, in particular, aggregated statistical data with respect to the transactions underlying those notices. Because CFIUS publishes these required annual reports more than a full year after the covered period, the *Report* published this month does not reflect more recent trends, such as possible shifts in the level of CFIUS aggressiveness towards certain types of foreign investors.

This *Client Alert* summarizes some of the key takeaways from the *Report*.

1. In 2014, the number of voluntary notices filed with CFIUS increased significantly from 2013.

In 2014, CFIUS reviewed 147 notices, which represents a roughly 50% increase from 2013, when CFIUS received 97 notices. This is the largest number of notices CFIUS received in a single year since 2008, when CFIUS received a record 155 notices. The *Report* suggests that this increase may be the result of broader macroeconomic trends.

2. At the same time, there was a decrease in the rate at which CFIUS extended its initial 30-day “review” into an “investigation.”

Of the 147 notices filed in 2014, only 51 resulted in an investigation (which can take up to 45 days longer than the initial 30-day review), compared to 48 in 2013. Thus, the “investigation” rate dropped from almost 50% of the notices in 2013 to less than 35% of the notices in 2014.

3. Of all foreign investors, Chinese investors continued to be the most prevalent source of transactions reviewed by CFIUS.

As in 2012 and 2013, Chinese investors submitted more CFIUS notices than investors from any other country. Although the absolute number of filings by investors from China increased slightly (from 21 in 2013 to 24 in 2014), such filings accounted for a slightly lower percentage of total filings (roughly 16% in 2014 versus roughly 22% in 2013). The United Kingdom, Canada, Japan and France were also significant sources of foreign investments reviewed by CFIUS. Based on press reports and other information, we expect to see Chinese investors continue to be a leading or significant consumer of the

CFIUS process in the CFIUS reports for FY2015 and in FY2016 when those reports are released over the next two years.

4. The *Report* again concludes that there is credible evidence of a coordinated strategy to acquire “critical technology” companies.

In each of its annual reports, CFIUS is required to assess the likelihood that a foreign party or parties are engaged in a coordinated strategy to acquire US businesses involved in critical sectors of the US economy — and, in particular, those sectors involving “critical technology.” As it did in its report from 2013, CFIUS concludes that there may be a coordinated strategy among foreign governments or companies to acquire US companies involved in research, development or production of critical technologies for which the United States is a leading producer (e.g., semiconductor technologies).

5. 2014 saw a significant increase in the number of voluntary notices involving US businesses in the Manufacturing category.

In 2014 transactions involving US businesses in the Manufacturing category accounted for 47% of the total notices submitted to CFIUS. The number of notices involving US businesses in the Manufacturing category increased from 35 (36% of the total) in 2013 to 69 in 2014. US businesses in the Computer and Electronic Product subcategory continued to account for roughly half of all filings within the Manufacturing category. The *Report* also reflects smaller but discernable increases in the number of filings in 2014 associated with: (i) the Finance, Information, and Services category; (ii) the Mining, Utilities, and Construction category; and (iii) the Wholesale, Retail, and Transportation category.

6. CFIUS continued to use mitigation techniques to address perceived national security risks, again in connection with only a handful of transactions.

In 2014, as in previous years, CFIUS required parties to accept mitigation measures as a condition of receiving CFIUS clearance. However, CFIUS did so in connection with only nine different transactions, or approximately 6% of cases. This represents a slight decrease in the “mitigation rate” (from 11% in 2013). Although the *Report* does not discuss the prevalence of particular types of mitigation, it does note that CFIUS continued to employ a wide variety of mitigation measures, including solutions designed to:

- Limit unauthorized access to sensitive technology and information
- Limit non-US citizens’ access to key facilities
- Ensure that certain key functions are performed only by US citizens or within US borders
- Establish guidelines for future US government contracting activity
- Facilitate CFIUS’ ongoing monitoring of company operations
- Allow the US government to review future business decisions

7. Parties continued to withdraw filings at a similar rate as in 2013.

In 2014, parties withdrew 12, or approximately 8%, of the 147 notices filed prior to the completion of the CFIUS process. Of these 12 withdrawals, parties only refiled one notice with the Committee. In 2013, parties withdrew eight, or approximately 8%, of the 97 notices filed. Filers in 2014 may have walked away from these 11 transactions for business reasons unrelated to CFIUS review. However, CFIUS also may have proposed mitigation conditions that the filers found unacceptable, or filers may have abandoned transactions after CFIUS referred or indicated it would refer the relevant filings to the President.

8. In assessing factors that could give rise to potential national security threats, the *Report* reaches conclusions similar to those reached in previous annual reports.

Among other things, the *Report* suggests that CFIUS continues to focus on a few areas of concern, including foreign “control” of US businesses to which any of the below apply:

- Provide products and services to government authorities with national security functions
- Provide products or services that could expose national security vulnerabilities, including cyber security and supply chain concerns
- Have operations, produce goods or provide services, the nature of which may implicate US national security (including, in particular, businesses that involve “critical infrastructure,” involve aspects of energy production, affect the national transportation system or significantly and directly affect the US financial system)
- Have access to classified or other sensitive US government or US government contract information
- Are part of the defense, security or law enforcement sectors
- Are involved in activities related to weapons and munitions manufacturing, aerospace, satellite and radar systems
- Produce advanced technologies useful to national security (including semiconductors, network and data security products, and other “dual-use” products)
- Engage in research and development, production or sale of technology, goods, software or services subject to US export controls
- Are in geographic proximity to certain kinds of US government facilities
- May be acquired by foreign persons that are controlled by a foreign government
- May be acquired by foreign persons that are from a country with a record on nonproliferation or other national security-related concerns
- May be acquired by foreign persons that have a history of taking or intending to take actions that could impair national security

Importantly CFIUS is increasingly looking beyond what would ordinarily be perceived as traditional critical infrastructure. For instance, in 2013 CFIUS reviewed the proposed acquisition of US pork producer Smithfield Foods by Shuanghui International Holdings, a Chinese investor. While CFIUS cleared the transaction, media reports suggest the review extended until the end of the 45-day investigation period.

Conclusion

The *Report* encourages parties to transactions that may raise national security concerns to anticipate the need to make a CFIUS filing and progress through the CFIUS review process prior to closing. Latham & Watkins helps both US companies and foreign investors navigate the complex and interrelated federal regulatory regimes designed to safeguard US national security interests, including through all stages of the CFIUS process — from deciding whether to submit a “voluntary” notice to CFIUS, to drafting the

notice and responding to further requests for information, to negotiating a mitigation plan if necessary to address concerns identified during the review.

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