CFIUS 2013 Annual Report: Sustained Increase in Investigations

March 12, 2015

Authors
Stewart A. Baker, Edward J. Krauland

Overview
On February 26, 2015, the Committee on Foreign Investment of the United States (CFIUS or the Committee) released its 2013 Annual Report. The report provides a detailed overview of CFIUS’s national security reviews of inbound foreign investments during the 2013 calendar year. Steptoe attorneys include former CFIUS officials who have been involved with hundreds of CFIUS cases, and Steptoe closely monitors Committee activities for new trends.

2013 was another active year for CFIUS. Although the Committee conducted fewer reviews than in 2012 or 2011, a higher percentage of cases than ever before proceeded past the initial 30-day review phase to the 45-day investigation phase. Further, for the second year in a row, a notable percentage of cases that were withdrawn from CFIUS review were not refiled, suggesting that CFIUS may have played a role in the abandonment of more than a few transactions. Of the 97 cases filed, eight were withdrawn, perhaps suggesting significant CFIUS concerns with these cases, and only one was refiled. The remaining seven apparently were abandoned, possibly because of CFIUS-related problems.

The potential need to undergo CFIUS review is an important factor for parties to consider when negotiating inbound foreign investments. Parties should file for CFIUS review if: (i) the transaction results in foreign “control” of a US business, with “control” defined broadly; and (ii) the transaction touches on national security, with “national security” also defined broadly. Parties generally should err, if at all, on the side of filing. If they do not, CFIUS can compel filings, and in these cases—so-called “non-notified transactions” that emerge on CFIUS’ radar screen from reviews of media and other sources—it is more inclined to view the transactions with skepticism. The Committee often requires parties to undertake mitigating actions and can even cause unwinding of the investment.

Volume and Source of Filed Cases
In 2013, CFIUS reviewed 97 filings representing $122 billion in proposed investments that would result in foreign “control” of a US entity that touches on national security. As in 2012, Chinese investors filed more cases—twenty-one—than investors from any other country. In a sense, this is a positive development for those supportive of US-China trade. Chinese investments have drawn significant CFIUS scrutiny over the years, and several Chinese “non-notified” transactions have been dealt with harshly by the Committee. The Chinese investing community seems to have learned that filing with the Committee is the better practice.

Also noteworthy, investors from Japan doubled their number of filings from nine in 2012 to eighteen in 2013. Traditional US allies Canada, the United Kingdom, and France rounded out the top five.

Increase in Investigations and Mitigation Measures
If CFIUS does not clear a case after the initial thirty-day review phase, it will launch a second, forty-five day investigation phase. In 2013, CFIUS cleared forty-nine transactions after the thirty-day review phase, but required the other forty-eight transactions to go through the additional forty-five day investigation phase. Conducting investigations on fifty percent of the 2013 transactions represents a high water mark for CFIUS and serves as a reminder to parties that the CFIUS process
can be lengthy.

In addition to reminding parties that they must allow sufficient time to complete the review and investigation processes, CFIUS’ actions in 2013 indicate that parties should be prepared to negotiate with CFIUS regarding mitigation measures with which they must comply in order for CFIUS to approve their transaction. In 2013, CFIUS required parties to agree to mitigation measures in eleven cases, which is a four percent increase from 2012. CFIUS required mitigation measures in a broad swath of transactions covering the telecommunications, software, mining, oil and gas, manufacturing, consulting, and technology sectors.

In each annual report, CFIUS publishes a lengthy list of specific mitigation measures with which it required parties to comply in that year. The mitigation measures in 2013 included requiring certain business activities to occur within the United States, limiting access to certain products and services to only US persons, and notification procedures for foreign visitors. These and other mitigation measures used in 2013 are just a few of the many standard tools that CFIUS has developed over the years.

**Notable Number of Withdrawn Filings Not Refiled**

In 2013, eight cases were withdrawn, and only one was refiled. Cases are often withdrawn if the parties and CFIUS are unable to reach agreement on mitigation terms (if CFIUS deems mitigation measures necessary) by the end of the 75-day CFIUS process, i.e., the initial 30 day review plus the subsequent 45-day investigation. In many instances, the parties refile, resume negotiations, and CFIUS ultimately clears the transaction. But in some cases it becomes apparent to the parties that CFIUS clearance is not in the offing, and they abandon the transaction.

The Committee has emphasized that cases may be withdrawn and transactions abandoned for commercial reasons unrelated to CFIUS. Nevertheless, the significant number of cases withdrawn and not refiled in 2013 — eight withdrawn and only one refiled — suggests that an active Committee weighed heavily on at least a few transactions.

If CFIUS concludes that the national security risks cannot be mitigated, then the Committee will refer the case to the President and recommend that the President block the deal. While blocking by the President is a rare occurrence, President Obama issued a high-profile blocking order in 2012 that could have impacted the calculation of parties electing to withdraw and not refile in 2013. (For more information on the blocking order and the resulting Ralls v. CFIUS litigation, please see Steptoe’s alert here.)

**Acquisition of Critical US Technology Companies**

Section 721(m)(3) of the Defense Production Act of 1950 (50 U.S.C. App. 2170) requires CFIUS to evaluate in its annual report to Congress “whether there is credible evidence of a coordinated strategy by one or more countries or companies to acquire United States companies involved in research, development, or production of critical technologies for which the United States is a leading producer.”[1]

In 2011, CFIUS reported for the first time that the US Intelligence Community (USIC) “judges with moderate confidence that there is likely a coordinated strategy” by foreign entities to acquire companies involved in US critical technologies. However, in 2012 CFIUS reported that the USIC “judges it unlikely that there is a coordinated strategy” by foreign entities to acquire companies involved in US critical technologies.

In 2013, CFIUS carved out a middle ground, reporting that the USIC “believes there may be an effort among foreign governments or companies” to acquire companies involved in US critical technologies. The seemingly shifting assessments may reflect different sensitivities to Chinese investments. But perhaps the more important takeaway from this arcane point is that CFIUS actions and assessments are often unpredictable and sometimes impenetrable.

CFIUS’ report on calendar year 2013 documents a continued aggressiveness in reviewing transactions between foreign and US companies that implicate national security concerns. It also indicates that CFIUS is increasingly inclined to require proposed transactions to undergo the investigation phase of the review, which more than doubles the review timeline. Therefore, parties to potential inbound US investment should plan with an appropriate timeframe in mind.

Steptoe will continue to monitor developments relating to CFIUS reviews. For more of our insights into the CFIUS process, please see our most recent client alert on Navigating Joint CFIUS and Defense Security Service Jurisdiction.

[1] Critical technologies include: defense articles or services covered by the US Munitions List; items on the Commerce Control List of the Export Administration Regulations that are controlled by multilateral regimes or for purposes of regional stability or surreptitious listening; specially designed and prepared nuclear-related items specified in the Export and Import of Nuclear Equipment and Material Regulations; and certain agents and toxins specified in the Select Agents and Toxins Regulations.

**Practices**

**National Security/CFIUS**