Overview
The recently published CFIUS Report covering calendar year 2014 has coincided with 2016’s record-setting pace of Chinese investments in the US. Companies from many countries have run into CFIUS problems in the past, but China currently is the largest US trading partner that is not a political ally, and the Committee accordingly spends significant resources reviewing Chinese investments for national security implications. That is not a new phenomenon. Taken together, a surge in high-profile Chinese investments in early 2016 and the release of the 2014 Report have produced significant media attention and misunderstanding regarding CFIUS, particularly the perception that CFIUS is more aggressively reviewing Chinese investments.

CFIUS Background
The potential need to undergo CFIUS review is an important factor for parties to consider when negotiating foreign investments in the US. Parties generally should file for CFIUS review if (i) the transaction will result 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.

While notification to CFIUS is voluntary, at least in the first instance, parties generally should err on the side of filing. If they do not, and CFIUS learns of the deal from other sources, CFIUS can compel filings. In these cases – so-called “non-notified transactions” – the likelihood of a blocking or divestment order (generally a rare occurrence) is higher, as is the likelihood that CFIUS will impose conditions on the deal in the form of a risk mitigation agreement.

Key CFIUS Report Facts
To separate fact from fiction, let’s review some of the key facts from the report:
• **Out of the 147 cases filed in 2014, 12 were withdrawn and only one of those was re-filed.** The 11 abandoned cases, which generally means abandoned transactions, is a high-water mark (but only by one: there were 10 abandoned cases in 2012). Although CFIUS emphasizes that cases may be abandoned for many reasons—financing for a deal might evaporate, for example—it is likely that CFIUS was a significant factor in many of the abandonments.
  - CFIUS never says which cases are abandoned (nor which cases are reviewed—it’s a confidential process except for disclosures by transacting parties). In prior years, companies from China, India, Israel, France, and elsewhere have abandoned transactions for CFIUS-related reasons. There is no basis for believing that all 2014 abandoned cases involved Chinese investors, but it is likely that many did.
  - On the other hand, it appears CFIUS cleared most Chinese investments it reviewed.

• **For each of the last three reported years (2012-14), CFIUS has reviewed more cases involving investments from Chinese companies than companies from any other country** (24 reviews of investments from Chinese companies). But investments from US-allied countries such as the United Kingdom and Canada also gave rise to significant numbers of CFIUS reviews (21 reviews and 17 reviews of investments from UK and Canadian companies, respectively).
  - The CFIUS process is structured as nominally voluntary on the part of the transacting parties (but with significant incentives to file) and carries significant risks if transactions not filed with CFIUS are later found to require review. The number of CFIUS reviews reflects primarily a combination of (i) the amount of investment activity from the relevant country and (ii) sensitivity by the parties regarding the need for a CFIUS review.

• **In 2014, CFIUS cleared 95 transactions after an initial 30-day review phase; another 52 transactions required additional time—an “investigation” phase that generally lasts 45 days.** The 35% of cases requiring the longer investigation phase is on par with previous years; in all but one of the last six years reported years (2009-14), 30-40% of cases required the longer investigations.
  - The outlier year was 2013, when nearly 50% of cases required investigations; but this figure was significantly affected by a government shutdown that precluded 30-day clearance of many cases that, but for the shutdown, would have been cleared in 30 days.

• **The number of cases that resulted in “risk mitigation measures”—that is, security-related conditions on the deal that CFIUS deems necessary to clear a transaction—also decreased in 2014 as compared to 2013.** In 2014, nine cases, or 6%, resulted in mitigation measures (as opposed to 11 cases, or 11%, in 2013).
  - Reflecting what may be an increasingly focused scope of CFIUS concern, all nine mitigation agreements in 2014 were in the software, services, and technology industries, suggesting CFIUS is less likely to be concerned with transactions in other sectors.
  - It is likely that some of the 11 cases that were abandoned in 2014 involved proposed mitigation measures by CFIUS that the parties were unwilling to accept, abandoning the deal rather than agreeing to burdensome mitigation measures.

  - The types of mitigation measures CFIUS reported for 2014 are the same general types of mitigation measures CFIUS has used in prior years, including ensuring only authorized persons have access to certain technology and information, establishing terms for US government contracts, and notifying US government agencies in advance of visits to US facilities by foreign nationals. But CFIUS has no standard set of measures for use in all cases and varies the required measures (or adds new measures) on a case-by-case basis.

**Back to the CFIUS Future**

In just the first few months of 2016, announced multi-billion dollar Chinese investments in the United States have included:

• ChemChina’s proposed acquisition of the Swiss company Syngenta for $43 billion (Syngenta has substantial US operations and therefore is considered a US business for CFIUS purposes)
• HNA’s proposed acquisition—via its business unit Tianjin Tianhai Investment Co. Ltd.—of electronics distributor Ingram Micro for $6 billion
• Haier’s proposed acquisition of GE’s appliance business for $5.4 billion
• Zoomlion’s proposed acquisition of crane manufacturer Terex for $3.3 billion
• Chongqing Casin Enterprise Group’s proposed acquisition of the Chicago Stock Exchange for an undisclosed amount

There will almost certainly be more proposed investments in view of the cooler Chinese economy, the drop in the US stock market that has made US companies cheaper, and Chinese government encouragement to invest abroad. But just the set of deals listed above is enough to cause notice—as Senator Everett Dirksen once said, “a billion here, a billion there, pretty soon you’re talking real money.”
A significant misunderstanding – supposedly bolstered by the CFIUS Report – is that CFIUS is more aggressively investigating Chinese investments than previously. As noted above, however, the number of CFIUS reviews reflects primarily a combination of (i) the amount of investment activity from the relevant country and (ii) sensitivity by the parties regarding the need for a CFIUS review – not necessarily CFIUS aggressiveness. Chinese companies over the last several years have recognized that not filing with CFIUS often invites much more risk than filing. The large number of Chinese CFIUS cases in the last few years accordingly reflects greater sophistication among Chinese parties and a view that CFIUS risk can be managed.

That does not mean that Chinese investments face no risk, however. Particularly, as Chinese investors turn toward US companies in the information and communication sector, the CFIUS risk rises. This is due to the particular concern the US government generally harbors regarding the Chinese government, namely that espionage can be facilitated via acquisitions of information and communication companies and technologies. For these acquisitions, the CFIUS risk (including obstacles that can lead to abandonment of a transaction) is very real. Outside of this sphere, there is still risk – as evidenced by the 2015 public abandonment of a proposed Chinese acquisition of Philips’ LumiLEDs joint venture (which may have run aground because of non-obvious defense applications of that business) – but the risk is much lower.

CFIUS risks, of course, exist with regard to investments by non-Chinese companies as well. But CFIUS will be busy in the future, or at least in 2016, with a high level of Chinese investments.

** Steptoe will continue to monitor developments relating to CFIUS reviews.**

**Practices**

**National Security/CFIUS**