

Working  
with **CFIUS** on U.S.  
**Investment  
Transactions**

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# A CFIUS PRIMER

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## Introduction

This year has seen robust Chinese investment in the United States. According to the Rhodium Group, an economic research firm, in the first half of 2016, Chinese companies put more than \$18 billion in direct investment in the United States. This was a threefold increase from the same period in 2015.<sup>1</sup> Despite a slowdown in overall global M&A deal volume, Chinese M&A activity in the United States is on track to increase even more, further demonstrating that China is becoming a significant source of inbound investment for the United States. A Chinese real estate and investment firm is buying the Chicago Stock Exchange. ChemChina is pursuing a record-breaking deal for Syngenta; and HNA Group, through Tianjin Tianhai Investment Co., is acquiring technology distributor Ingram Micro. Chinese investors are investing in a wide range of assets, including notable investments in U.S. real estate; for the first six months of 2016, more than 55 deals were completed.<sup>2</sup> Nevertheless, several Chinese acquisitions have encountered regulatory hurdles.

Substantial cross-border M&A activity amplifies the importance of regulatory considerations in foreign direct investment to increase certainty that a deal will get done. Major transactions in recent years in the United States have thrust the Committee on Foreign Investment in the United States (“CFIUS,” or “the Committee”) – an inter-agency U.S. government committee that reviews foreign inbound investment for potential national security concerns – into the spotlight.

Although CFIUS historically has not had a high profile, it is of critical importance to foreign investors – including Chinese investors – looking to make acquisitions in the United States. The statute that authorizes CFIUS also authorizes the President to block deals that are deemed to threaten U.S. national security. The Committee’s latest annual report shows that, in 2014, it reviewed more transactions involving China than any other country – for the third year in a row. National security reviews by CFIUS are one of the key regulatory challenges Chinese investors face when entering the United States.

This report seeks to increase awareness about, and facilitate an understanding of, the CFIUS process by exploring its basic framework, key aspects of the process, and future trends. It concludes by suggesting key strategies for Chinese acquirers to manage regulatory and political risk in order to enhance the chances of a successful outcome in national security reviews.

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<sup>1</sup> Thilo Hanemann and Cassie Gao, “Chinese FDI in the US: Tripling Down on America,” The Rhodium Group, July 22, 2016, available at: <http://rhg.com/notes/chinese-fdi-in-the-us-tripling-down-on-america>.

<sup>2</sup> *Id.*

# CFIUS and the CFIUS Process

## Brief History

Although CFIUS has existed since 1975, its role in the foreign investment process has expanded over time. Moreover, the scope of its authority – originally established by the President as an advisory body – has also evolved.

When President Gerald Ford established CFIUS by Executive Order in 1975, he charged the inter-agency committee with “primary continuing responsibility within the Executive Branch for monitoring the impact of foreign investment in the United States, both direct and portfolio, and for coordinating the implementation of United States policy on such investment.”<sup>3</sup> At the time, there was widespread concern in the United States about the accumulation of petrodollars by OPEC and the oil-cartel member nations’ purchases of U.S. assets. Establishment by Executive Order, however, meant that CFIUS could be dissolved or restructured unilaterally by any subsequent President.

In 1988, in response to the growth of Japanese investment, Congress amended Section 721 of the Defense Production Act of 1950 to give the President *statutory* authority to review and investigate transactions with foreign persons that may affect national security, and to prohibit foreign takeovers that the President finds present a national security threat. President Ronald Reagan, in turn, issued an Executive Order delegating part of the President’s authority under this amendment – sometimes known as the “Exon Florio Amendment”<sup>4</sup> – to CFIUS.

Twenty years later, in the wake of September 11 and significant controversy over the purchase by Dubai Ports World, a state-owned firm in the United Arab Emirates, of the Peninsular and Oriental Steam Navigation Company (a U.K. company that operated several U.S. port facilities), Congress again enacted legislation amending Section 721 of the Defense Production Act of 1950 (as amended, “Section 721”) and the U.S. Department of the Treasury subsequently reissued the CFIUS regulations. The Foreign Investment and National Security Act of 2007 (“FINS”) made a number of notable changes to the statute. Importantly, it imposed additional Congressional oversight by, among other things, mandating that CFIUS provide certain reports to Congress following approval of a transaction. It also added the concept of “critical infrastructure”(discussed below), essentially adopting the same definition of critical infrastructure as is used in the USA Patriot Act.<sup>5</sup> The fundamental import of these statutory changes and revised regulations was to broaden CFIUS’s statutory mandate while imposing additional oversight.

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<sup>3</sup> Exec. Order No. 11,858, 3 C.F.R. 990 (1971–1975).

<sup>4</sup> The 1988 Defense Production Act Amendment is sometimes referred to as the “Exon-Florio Amendment” after the Congressional sponsors: Senator James Exon of Nevada and Congressman Jim Florio of New Jersey.

<sup>5</sup> USA PATRIOT ACT of 2001 42 U.S.C. § 5195c(e).

## Basic Framework

### *The Committee*

CFIUS is an inter-agency committee that reviews the impact on U.S. national security of mergers, acquisitions, and takeovers that could result in foreign control of a U.S. business. Made up largely of agencies with economic or national security responsibilities, CFIUS is chaired by the Secretary of the U.S. Department of the Treasury, which runs the overall process. Other members include the Secretaries of Defense, State, Energy, Homeland Security, and Commerce, the U.S. Attorney General, the U.S. Trade Representative, and the Director of the Office of Science and Technology Policy. Additionally, the Director of National Intelligence and the Secretary of Labor are non-voting, *ex officio* members of CFIUS.

In addition to the statutory members, the President may appoint non-voting observers. Additional, presidentially appointed CFIUS observers include the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisors, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, and the Assistant to the President for Homeland Security and Counterterrorism.

The President – and only the President – has the authority to suspend or prohibit a transaction when, in the President’s judgment, there is credible evidence to believe that the foreign person exercising control over a U.S. business might take action that threatens to impair the national security if other laws, in the President’s judgment, do not provide adequate and appropriate authority to protect the national security.<sup>6</sup> The Committee is unique within the U.S. government in that it is comprised of individual member agencies, each of which may have its own agenda that has a focus on national security or economics, but that are part of a Committee structure that operates by consensus. As a result, decisions on particular transactions are often the result of robust debate reflecting these sometimes conflicting duties.

- **Of note: legislation was introduced earlier this year that would add the Secretary of Agriculture as a permanent member of CFIUS. The legislation was reportedly triggered by the proposed purchase of Syngenta AG, the Swiss company, by China National Chemical Corp (“ChemChina”).**

### *Voluntary Process—Why File with CFIUS?*

CFIUS review is ostensibly a voluntary process, initiated by the parties to a transaction. Nevertheless, importantly, CFIUS itself may request that parties file when the Committee believes a transaction may be within its jurisdiction and raise national security considerations. In the past few years, the Committee has been more aggressive in reaching out to request that parties file, in some cases even after the closing of a transaction. These types of transactions are typically referred to as “non-notified” transactions.

- **Of note: the Committee has recently reached out to ask for filings in Chinese acquisitions post-consummation.**

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<sup>6</sup> 50 U.S.C. § 2170(d)(1)(4), 31 C.F.R. § 800.101.

Given that the process is voluntary, parties frequently ask how to assess whether a transaction should be filed with CFIUS. Why should one file, and what are the benefits of filing? There are two fundamental questions to consider in assessing whether to file with CFIUS:

- Whether the Committee has jurisdiction over the transaction – i.e., does the transaction constitute a “covered transaction” under the CFIUS statute and regulations; and
- If there is a “covered transaction,” does the acquisition raise potential national security considerations?

Whether to file is in many respects a matter of risk tolerance. Filing and receiving CFIUS approval will provide a “safe harbor” – absent very limited circumstances, CFIUS may not reopen the transaction in the future once it has been reviewed and approved. In contrast, transactions that are not filed with CFIUS remain open *in perpetuity* to U.S. government scrutiny and potential divestment. As noted, any member of CFIUS can initiate a review of a proposed or completed acquisition if the agency believes that the acquisition may be subject to CFIUS review and may raise national security considerations. Therefore, despite the fact that CFIUS notice is voluntary, significant risk potentially attaches to transactions that do not undergo CFIUS review. As a result, even when a transaction is arguably exempt, it is often prudent to notify CFIUS in order to vet the transaction.

Of importance is that CFIUS operates under very strict confidentiality requirements and decisions on particular cases are not made available to the public. Unless disclosed by the parties, information and documentary material filed with the Committee may not be disclosed publicly, except as may be relevant to any administrative or judicial action or proceeding.<sup>7</sup> Given these provisions, quite often the only way to find out about the fact of a CFIUS review of any particular transaction is if the target company is a public company and has reporting obligations – for example, to the U.S. Securities and Exchange Commission. Also as a result, CFIUS practitioners are one of the few sources of information regarding CFIUS reviews, making it critical to consult a practitioner with expertise in this area.

### ***Jurisdiction***

In order for the Committee to review a transaction, certain jurisdictional thresholds need to be met. There is no *de minimis* threshold (no minimum monetary requirement); however, the transaction needs to constitute a “covered transaction” for purposes of the CFIUS statute and regulations before it can be reviewed by CFIUS. Because CFIUS will not give advisory opinions regarding jurisdiction, it is necessary to file with CFIUS in order to confirm with certainty whether the Committee has jurisdiction over any particular transaction. Because CFIUS has a fair amount of discretion in determining jurisdiction, it is important to consult with counsel experienced in assessing CFIUS jurisdiction.

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<sup>7</sup> Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 5021, 102 Stat. 1107, 1425 (1988), codified as amended at 50 U.S.C. App. § 2170(c). There are, however, certain limited circumstances under which CFIUS is permitted to brief select congressional committees after a review has been completed. CFIUS interprets the confidentiality provisions to even preclude acknowledgment that certain transactions are under review by it.

The Committee has the authority to review any transaction that is by, or with, a foreign person, and that could result in control of a U.S. business by a foreign person.<sup>8</sup> The four basic questions are: Is there a transaction? Is there a foreign person? Is there a U.S. business? Could there be control by that foreign person of the U.S. business? A few key points regarding jurisdiction follow:

- The **transaction** must be a “merger, acquisition, or takeover.” Share purchases, purchases of convertible instruments, certain joint ventures (where a U.S. business is being contributed to the joint venture and a foreign person could control that joint venture), and certain types of long-term leases may be covered. CFIUS does not review “greenfield” investments (new investments that do not involve the purchase of an existing business).
  - A **foreign person** includes any “entity” that is organized under the laws of a foreign state if either its principal place of business is outside of the United States or its equity securities are primarily traded on one or more foreign exchanges; a U.S.-incorporated wholly owned subsidiary of a foreign entity will be treated as a foreign person.
  - By design, there is no bright-line definition of what constitutes “**control**;” it is a functional definition that relies on the specific facts and circumstances of the transaction. A target company could be “controlled” by a foreign person even where that foreign person owns only a minority investment, if the ownership interest is accompanied by significant governance rights, such as the ability to make or veto important matters of the target company. “Control” is generally presumed not to exist where foreign ownership in the target company is below 10 percent and *solely for the purposes of passive investment*.
  - A “**U.S. business**” includes an “entity” engaged in interstate commerce in the United States, including assets that are operated as a business undertaking in a particular location or for particular products or services, even where not separately incorporated. The question of whether any particular collection of assets constitutes a “U.S. business” is a fact-specific analysis that will depend on the nature of the assets that are being purchased (employees, intellectual property, contracts, etc...). Note that although, absent other facts, the purchase of unimproved land will generally not be covered, real estate assets can be subject to CFIUS jurisdiction.<sup>9</sup>
- **Of note: A recent transaction in which Unisplendour Corp. Ltd. proposed to buy a 15 percent stake in Western Digital Corporation is a good example of CFIUS asserting jurisdiction where the transaction involved a minority ownership stake. The agreement was terminated once it was clear that CFIUS had taken jurisdiction.**

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<sup>8</sup> *Id.* § 2170(a)(3).

<sup>9</sup> Stroock & Stroock & Lavan LLP, “What Real Estate Cos. Need To Know About CFIUS Reviews,” Law360, Jan. 5, 2016, available at: <http://www.stroock.com/publications/what-real-estate-cos-need-to-know-about-cfius-reviews>.

CFIUS's jurisdiction can also extend to an acquisition by one foreign company of another foreign company, where the latter company has U.S. operations that constitute a U.S. business and the foreign acquirer could control that business.

- **Of note: Several recent Chinese acquisitions of European companies have involved this kind of foreign/foreign acquisition, including the proposed purchase by ChemChina, a Chinese company, of Syngenta AG, a Swiss company with U.S. operations.**

### *National Security Considerations*

If parties believe that there is a covered transaction, the second question is whether that transaction raises national security considerations. There are certain types of transactions that clearly raise such considerations and should definitely be filed with CFIUS, including where the target company holds a facility security clearance, performs classified contracts, is involved in the defense industry or produces defense-related items or critical technologies, or has government contracts that could be viewed as sensitive by the U.S. government. Similarly, transactions involving target companies that are involved with or connected to “critical infrastructure” should be filed.<sup>10</sup>

Importantly, CFIUS has the ability to review a transaction in **any** industry; no industry is automatically included or excluded. Whether a particular transaction should be filed with CFIUS will, instead, depend on the unique facts and circumstances of the transaction. Whereas prior to FINSA, the types of deals that CFIUS looked at typically involved defense industries, today an assessment of whether a deal raises national security considerations is less about a particular industry than about the particular set of facts involved and the interaction of the threat posed by the foreign acquirer and the vulnerability of the assets being purchased. In addition to critical infrastructure, security-related software, identity authentication, aerospace, high-tech assets, critical technologies, and information and communications technology, among others, all now receive scrutiny by CFIUS.

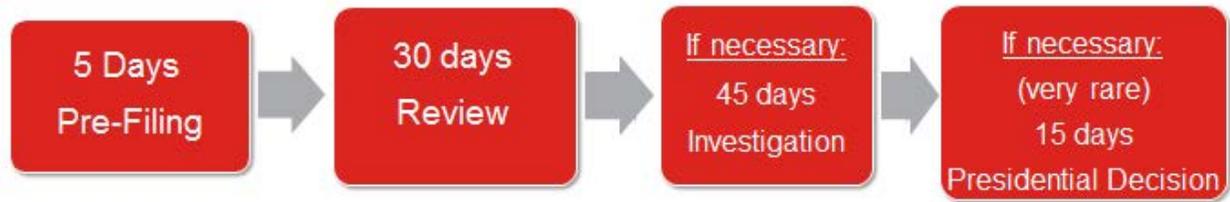
- **Of note: One of the most visible Chinese transactions reviewed by CFIUS in recent years was the purchase of Smithfield Foods, Inc. by Shuanghui International Holdings Limited. Although one might not think that a pork producer could raise national security considerations, certain facts, such as the proximity of Smithfield's facilities to sensitive government installations or provision of food to the military, if present, could suggest a CFIUS filing. U.S. government officials have indicated that food supply can be viewed as critical infrastructure. Parties may also choose to file in order to blunt other possible criticism of the deal, for example by Congress, that may occur later.**

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<sup>10</sup> See *infra* discussion under “National Security Analysis.”

## *The Review and Investigation*

The following schematic summarizes the basic steps of the review and investigation process:



Once parties determine that they wish to file with CFIUS, the basic process involves submitting a filing, termed a “notice,” with CFIUS. The pre-filing period generally lasts five days, followed by an initial 30-day review. At the beginning of the 30-day review, a lead agency or agencies will be designated for the transaction. Upon completion of the 30-day review period, if no concerns are identified by the Committee, CFIUS sends a letter to the parties that it has concluded its review and determined that there are “no unresolved national security concerns” with respect to the transaction. If CFIUS has national security concerns that remain unaddressed after the 30-day review or simply needs more time for due diligence, the transaction moves to an additional 45-day investigation period. For certain transactions (for example, foreign government-controlled transactions), an investigation period is presumed by statute. Although there is a mechanism for a foreign government-controlled transaction to close within 30 days, because senior officials are required to certify that such a transaction “will not impair” national security (a higher standard than is generally required to approve transactions), these instances are less common.

If, after the additional 45-day investigation, the Committee believes that unresolved national security concerns remain, it can recommend that the President reject the transaction or ask the President to make a determination about the transaction. In such cases, the President has 15 days to make a decision. Under these relatively rare circumstances, given the high likelihood of presidential veto, the parties typically withdraw their filing and abandon or unwind the transaction. In the rare circumstance that the parties refuse to withdraw and the matter is referred to the President, the President has the sole authority to “suspend or prohibit” a transaction where there is “credible evidence” that the foreign acquirer “might take action that threatens . . . national security” and there is no other adequate and appropriate legal authority to address an identified national security concern.<sup>11</sup>

- **Of note: A presidential decision is very rare – it has happened only twice in CFIUS’s history. Both times involved Chinese transactions. In 1990, President George H.W. Bush ordered the China National Aero-Technology Import and Export Corporation to divest its interest in MAMCO Manufacturing Inc., a Seattle-based company. Most recently, President Obama prohibited the purchase by the Ralls Corporation, owned and controlled by two senior officials of the Sany Group, a Chinese corporation, of project companies operating wind**

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<sup>11</sup> 50 U.S.C. App. § 2170(d).

**farms in Oregon. Ralls challenged the President’s authority in the first-ever court litigation against CFIUS.<sup>12</sup>**

In more complicated cases, parties can be asked to withdraw and refile their transaction at the end of the 75 days, thereby starting the 30-day cycle again. In such cases, however, it is possible for CFIUS to conclude the review well before the second full 75-day cycle has run. In all cases, if the Committee is satisfied that there are “no unresolved national security concerns,” it will conclude action and approve the transaction; the reviewed transaction benefits from a “safe harbor” and cannot be reopened by CFIUS absent limited circumstances, including fraud, misrepresentation or certain breaches of a mitigation agreement.

- **Of note: because a number of Chinese acquisitions are foreign government-controlled, they frequently will undergo the full 75-day review. Even where there is no government control, however, 75-day reviews should generally be presumed for Chinese acquisitions.**

### *National Security Analysis*

What is CFIUS looking for? According to the Committee, it focuses only on genuine national security concerns presented by a transaction, not on other national interests. Although Section 721 lists certain factors that may be considered by the Committee in reviewing a transaction, Congress purposely did not adopt a definition of “national security,” clearly intending for that term to be read broadly and flexibly. FINSA provides that the term “national security” should be construed to include those issues related to “homeland security,” including its application to “critical infrastructure.” The term “critical infrastructure” is defined to mean:

a system or asset, whether physical or virtual, so vital to the United States that the incapacity or destruction of the particular system or asset of the entity over which control is acquired pursuant to [the] covered transaction would have a debilitating impact on national security.

This typically means major energy, transportation, financial, and telecommunications assets, although determinations of what constitutes “critical infrastructure” are made on a case-by-case basis.

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<sup>12</sup> The *Ralls* litigation ultimately led to a unanimous decision by a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit (“DC Circuit”) that: (1) Section 721 of Exon-Florio (which bars judicial review of the “actions” and “findings” of the President) prevents only review of presidential action, and that the CFIUS determinations that lead to presidential action are judicially reviewable; and (2) the process that led to President Obama’s order had essentially deprived Ralls of a constitutionally protected property interest without due process of law. Specifically on the due process question, the D.C. Circuit held that Ralls’ entitlement to due process meant “at the least” that Ralls should be afforded: (i) notice of the official action; (ii) access to the unclassified information “on which the official actor relied,” and (iii) an opportunity to rebut the evidence. *Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F.3d 294 (D.C. Cir. 2014).

CFIUS uses a three-part analysis to assess national security risk. Under this analysis, national security risk is a function of the interaction between the threat posed by the foreign acquirer (whether a foreign person has the capability or intention to exploit or cause harm)<sup>13</sup> and the vulnerability of the U.S. business (whether the nature of the U.S. business or its relationship to a weakness or shortcoming in a system, entity, or structure creates susceptibility to impairment of national security), along with the potential consequences of the interaction of these two factors for U.S. national security. CFIUS conducts its analysis using criteria identified in the statute – but is not limited by them.

Parties should expect that CFIUS will want to know the nature of the target company in depth (government contracts, operations relevant to security or law enforcement, or deals in certain technologies important to national security, including semiconductors and network and data security products or goods controlled for export). With respect to the foreign acquirer, the Committee will ask, for example, whether the country has a history of cooperating with U.S. efforts on non-proliferation or counterterrorism. Does the foreign acquirer do business in countries subject to U.S. sanctions? In fact, sanctions is an area of strong interest by CFIUS. The Committee will want to know that the foreign acquirer has an effective program in place to deter the possibility that technology from the acquired business might be transferred to a sanctioned country.

A reasonably new but critical factor for CFIUS – illustrated by the *Ralls* transaction referenced above – is whether the assets are located near sensitive military or other government facilities. CFIUS will be concerned, for example, with natural-resource acquisitions close to test and training facilities; locational due diligence is therefore critical in many cases.

- **Of note: the Committee has recently shown particular interest in supply chain integrity, technology transfer, proximity to sensitive U.S. government installations, cybersecurity, personal data protection, and semiconductor-related assets.**

Cybersecurity issues are always a key concern of the Committee. These issues can arise in a number of situations, but the main concern is that the acquisition of software or hardware companies could provide a “back door” for the insertion of malware or the opportunity for economic espionage. As a result, the adequacy of the foreign acquirer’s cybersecurity practices and of the home country’s laws may be at issue – clearly the concern is whether the target company’s sensitive technology will be protected after closing of the transaction.

### ***Mitigation***

If national security risks are identified during the review, CFIUS has broad authority to require certain commitments (called “mitigation”) in order to address any identified national security risk. CFIUS may pursue mitigation only when other authorities do not provide adequate and appropriate authority to address the identified risk. These measures can be put in place as a condition for approval of a transaction and generally are formalized in a national security agreement. Typical mitigation measures may require a security committee, comprised of a

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<sup>13</sup> The “threat” associated with the foreign acquirer is informed by a “threat assessment” that is produced on Day 20 of the review by the intelligence community.

certain number of U.S. citizens appointed with U.S. government consent, appointment of an independent security officer, independent third party compliance audits (reported to the government), compliance measures, and corporate governance requirements.

More onerous measures can include divestment of sensitive contracts, termination of lines of business, access restrictions, and appointment of proxy boards, which can greatly diminish the value of the deal to the foreign acquirer. This is especially true when the acquirer has expected to take a hands-on role in management of the business. In CFIUS's 2014 annual report (the latest date for which information is available), CFIUS mitigated 6 percent of the transactions that it reviewed. Mitigation in 2014 primarily involved acquisitions of U.S. companies engaged in the software, services, and technology industries.<sup>14</sup>

- **Of note: It is important to assess the probability and potential type of mitigation up front when structuring the transaction, so as to better determine the feasibility of the transaction. This is particularly true for Chinese acquisitions. Mitigation measures can change substantially the economics of the deal, and compliance costs can be very high. Assessing potential mitigation should involve consideration of the possible impact of export control regulations.**
- **For example, a company that is organized under the People's Republic of China may not, as a matter of U.S. policy, acquire ownership or control of a company registered under the U.S. International Traffic in Arms Regulations ("ITAR") administered by the U.S. Department of State. It is also important to determine whether the target company's products may be exported to China. China is subject to a U.S. arms embargo, and may not receive products controlled under the ITAR. Similarly, there are "dual use" products that are subject to a policy of denial on exports to China under the Export Administration Regulations ("EAR") administered by the U.S. Department of Commerce. Additional scrutiny will be applied to Chinese transactions in any case where the target company's products and services are export-controlled. A Chinese buyer will not be approved to acquire a company that is registered as a manufacturer or exporter under the ITAR.**

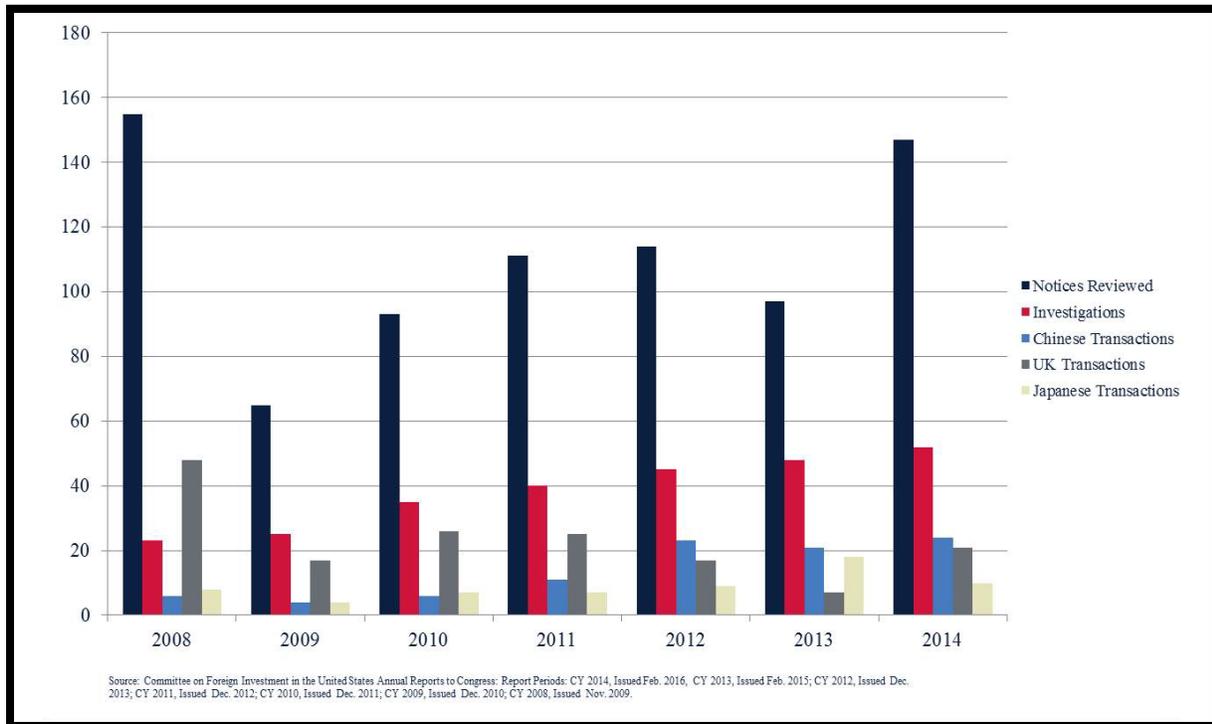
## Highlights of the CFIUS Annual Report

The most recent annual report issued by CFIUS covers transactions reviewed in 2014. In this year, CFIUS reviewed 147 transactions, the greatest number of transactions reviewed in a single year since the 2008 financial crisis.

The following chart shows the total numbers of notices reviewed from 2008-2014, including numbers for China, Japan and the U.K.

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<sup>14</sup> See COMMITTEE ON FOREIGN INV. IN THE UNITED STATES ANN. REP. TO CONGRESS, Report Period: CY 2014 (Feb. 2016), available at <https://www.treasury.gov/resource-center/international/foreign-investment/Documents/Annual%20Report%20to%20Congress%20for%20CY2014.pdf>.



- **Of note: Overall, CFIUS reviews make up a small percentage of M&A transactions involving inbound investment. The number of notices reviewed in any year generally reflects the health of the economy. Based on past experience, it is likely that when the information for the number of notices reviewed for 2015 becomes available, the number reviewed in 2015 will meet or exceed the number reviewed in 2008.**

In 2014, for the third consecutive year, Chinese acquisitions were reviewed the most – 23 in 2012; 21 in 2013 and 24 in 2014. Asia and Europe accounted for roughly 38% and 41% of reviews, respectively. The report also makes clear that CFIUS continues to apply heightened scrutiny. One-third of the reviews went to full investigation, with CFIUS imposing mitigation in nine cases. Twelve notices were withdrawn in 2014, only one of which was re-filed (in 2015), indicating a number of troubled deals. Parties can abandon transactions for a variety of reasons, including commercial ones. Experience suggests, however, that the relatively high number in 2014 reflects transactions that ran into trouble in Committee. There is a good chance that several of these were Chinese deals. Finally, the report reveals that CFIUS reviewed four real estate transactions, continuing a trend that first appeared in the 2012 annual report. Other highlights of the report include the fact that CFIUS reviewed a higher number of notices from non-traditional filers than typically is the case.

What are the lessons of the report?

- Although the Committee approves the majority of transactions that it reviews, it continues to apply heightened scrutiny across the board, which means that deals can on occasion require restructuring or mitigation to pass muster and can often require the full review and investigation period.

- Post-closing reviews present particularly difficult challenges – and can sometimes require unwinding.
  - The definition of “national security” is evolving, with no industry sector “off limits.”
  - Where the asset is located can be as important as the asset itself – or more so.
  - Acquirers – especially those from China and other countries that lack strong defense ties to the United States – are therefore strongly urged to consider at an early stage whether a pending transaction merits CFIUS filing. Increasingly, this will include businesses with real estate assets.
- **Of note: Despite a common perception that Chinese deals often falter in the U.S. market because of political pressure, the annual report actually shows something quite different. It suggests that CFIUS approves a majority of the Chinese transactions that it reviews and ultimately approves even some high-profile Chinese deals, despite political opposition.**

## Key Strategies in Filing with CFIUS

Chinese acquisitions can present unique challenges. Complicated questions often arise in the context of these transactions regarding state ownership (and transparency thereof, including corporate governance structures) and influence, state subsidies and financing, ties to the military, and technology transfer. Hiring experienced CFIUS advisors early on to review the specifics of a transaction – including an assessment of potential mitigation and export control issues, and to conduct national security due diligence that will inform an overall risk assessment – is critical. Chinese acquirers will benefit by considering the following strategies:

- **File with CFIUS before closing a transaction** where national security considerations may be present. It is harder to unwind a transaction, and mitigation may be more onerous post-closing.
- **Develop a comprehensive strategy**, as early as possible when the deal is structured. In high profile deals, this strategy may require a public affairs strategy to deal with potential politicization.
- **Develop a timeline with realistic objectives.** Particularly in a complex transaction, several government approvals may be required or there may be a court timeline to consider where the assets are being purchased out of bankruptcy.
- **Carefully consider deal documentation.** In an atmosphere of heightened scrutiny and mitigation that can significantly affect the economics of a deal, foreign acquirers are wise to consider ways to protect themselves in the underlying deal documentation if CFIUS imposes terms that impact substantially the economics of the acquisition.

- **Be proactive in engaging with CFIUS.** Parties in high-profile cases should engage with the CFIUS agencies during the pre-filing period to resolve potential issues that may hinder the formal review.
- **Implement critical compliance programs, preferably before the deal is filed with CFIUS.** Rigorous and comprehensive export-control and cybersecurity plans, for example, demonstrate that the parties have thought through potential national security issues.
- **A first-time acquirer should consider making a small investment initially in an industry that is not likely to raise concerns.** Success of a small initial investment can often smooth the way for more significant and sensitive investments later on.

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### For More Information

To learn more about the CFIUS process or to inquire about Stroock's [National Security/CFIUS/Compliance Practice Group](#), please contact any one of the following:

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