

Looking Beyond the Recent CFIUS Annual Report

IN SHORT

The Situation: CFIUS recently released its annual report to Congress regarding transactions reviewed by CFIUS during 2015, as well as limited information regarding transactions reviewed during 2016.

The Result: The information released by CFIUS shows a steady, increasing workload at CFIUS; an increase in the number of transactions subjected to the additional 45-day investigation period; limited, but additional mitigation; and new areas of focus.

Looking Ahead: Due to recent developments in the CFIUS process, including a significant increase in the number of notices, an increase in the number and variety of questions from CFIUS, and the lack of political appointees, parties considering transactions within CFIUS's jurisdiction now must consider not only the national security risks presented by a transaction but also the risk of a protracted CFIUS review process.

The Committee on Foreign Investment in the United States ("CFIUS"), an interagency committee with the authority to review transactions that could result in control of a U.S. business by a foreign person, recently released its annual report to Congress regarding transactions reviewed by CFIUS during 2015, as well as limited information regarding transactions reviewed during 2016 ("Report"). Among other things, the Report shows that the percentage of transactions that proceeded to the additional 45-day investigation period increased during 2015 and 2016. Below, we explore issues raised in the Report and recent developments in the CFIUS review process.

Let's begin with issues raised in the Report:

- **Steady, Increasing Workload.** CFIUS reviewed 143 transactions during 2015. This is slightly down from 147 in 2014 but shows a steady workload that increased in 2016, during which 172 notices were filed.
- **More Investigations.** 2015 and 2016 saw an increase in the number of transactions that proceeded to the additional 45-day investigation period. In particular, CFIUS initiated an investigation for approximately 46 percent of notices reviewed during 2015 and 2016, compared to approximately 35 percent during 2014.
- **Limited but Additional Mitigation.** Measures to mitigate national security concerns were imposed in connection with only 11 of the 143 transactions reviewed during 2015. In addition to traditional mitigation measures, including controls on access to certain technology/information and limits on foreign control, the Report identifies several new mitigation measures imposed by CFIUS during 2015. Those measures include supply chain security protocols and requiring target companies to notify their customers of the change in ownership. While CFIUS may have imposed those measures prior to 2015, including them in the Report likely reflects more frequent use during 2015.
- **China Tops the List.** Once again, with 29 of the 143 transactions (approximately 20 percent) reviewed by CFIUS during 2015, transactions involving Chinese buyers accounted for the most notices filed during 2015. This is compared to 24 of the 147 transactions (approximately 16 percent) reviewed by CFIUS during 2014.
- **Areas of Focus.** The Report highlights a few areas of focus not included in the 2014 report, including foreign control of U.S. businesses: (i) in fields with significant national security implications in which there are few alternative suppliers or in which a loss in U.S. technological competitiveness would be detrimental to national security; and (ii) that hold substantial pools of potentially sensitive data about U.S. persons and businesses that have national security importance, including businesses in the insurance sectors, health services, and technology services.



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Now let's look beyond the Report to recent developments in the CFIUS review process.

- **Significant Increase in the Number of Notices.** CFIUS has initiated more than 180 reviews in the first nine months of their year—more than in any other complete year to date. This unprecedented number of reviews could be due, at least in part, to parties' perception of increased CFIUS risk under the Trump Administration.

- **Increase in the Number and Variety of Questions from CFIUS.** CFIUS has taken longer to review and comment on draft voluntary notices and has asked more and different questions during the pre-filing stage and the formal review period.
- **Lack of Political Appointees.** There has been a delay in the confirmation of political appointees at certain of the CFIUS member agencies. In the meantime, the responsibility for clearing transactions often has fallen to the career person serving in an acting capacity. Such persons have been more cautious in approving transactions. Notably, the Assistant Secretary of the Treasury for International Markets and Development, Heath Tarbert, recently was confirmed by Congress.

The increase in the number of filings, coupled with the delay in confirmation of responsible personnel, has led to a resource gap at CFIUS. As a result, CFIUS has taken longer to start its statutorily dictated review timeline following submission of draft pre-file notices. Also, the number of transactions subjected to the additional 45-day investigation period has increased, perhaps due to CFIUS's inability to complete its review in 30 days. Further, there has been an increase in the number of parties withdrawing and re-filing notices with CFIUS, which has the effect of restarting the statutory clock and providing CFIUS with additional time to review the transaction.

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TWO KEY TAKEAWAYS

1. The CFIUS caseload is trending upward. The committee reviewed 172 transactions in 2016, up from 143 during 2015. Through the first nine months of 2017, CFIUS initiated more than 180 reviews.
2. The increase in the number of filings and a delay in the confirmation of personnel have combined to create a resource gap at CFIUS, leading to a protracted CFIUS review process.

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