

E-ALERT | International Trade

December 13, 2011

CFIUS 2010 ANNUAL REPORT TO CONGRESS

The Committee on Foreign Investment in the United States (“CFIUS”) recently released its [Annual Report to Congress](#) on transactions filed in 2010. The report provides data on all notices filed with CFIUS during the 2010 calendar year and all reviews or investigations completed during the year. The report will be of considerable interest to anyone seeking insight into the U.S. national security review process for cross-border M&A transactions.

The information in the 2010 annual report is consistent with the trends that we have observed and have reported to you previously. Among other things, the higher percentage of transactions undergoing a second-stage investigation by CFIUS — as reported by us last year and as we have detailed in presentations throughout this year — remained constant in 2010. Additionally, the percentage of notices filed by investors from certain emerging economies (notably, Russia, India, and China) rose in 2010. Among the highlights:

- A total of 93 notices were filed in 2010. This number was meaningfully higher than the 65 notices filed in 2009, consistent with the global economic recovery. Importantly, the number of transactions filed has continued to increase this year, as CFIUS is currently on pace for more than 110 notices in 2011.
- CFIUS conducted a second-stage investigation — in addition to the initial 30-day review — in 35 cases, or 38 percent of the transactions reviewed by CFIUS in 2010. This is identical to the percentage of cases that proceeded to the investigation stage in 2009, but remains considerably higher than the levels from 2008 (only 15 percent) and 2007 (only four percent). Of all the data identified in the annual report, the continued higher percentage of transactions proceeding to a second-stage investigation remains the most notable trend in CFIUS practice.
- In 2010, there were more withdrawals of matters before CFIUS, with six cases withdrawn during the initial 30-day review and six more withdrawn during investigation. Five of these resulted in abandoned transactions, five filed a new notice, and two withdrew and then re-filed in 2011.
- Mitigation measures were negotiated by CFIUS agencies and adopted by parties in nine different covered transactions in 2010, an increase from the five negotiated in 2009. These mitigation measures involved acquisitions of U.S. companies in the computer software, telecommunications, and energy sectors.

In addition to the details on reviews, investigations, withdrawals, and mitigation measures, the CFIUS annual report provides useful data regarding the source and sectors of transactions, and some of the numbers reported are noteworthy in comparison to the previous year. In particular, the data suggest that while certain emerging economies together represent a greater percentage of the overall transactions, a significant percentage of all cases still involve closely allied countries.

- Close allies of the United States — namely, the United Kingdom (26), Canada (9), Japan (7), and Australia (3) — accounted for 48 percent of all cases in 2010, identical to the percentage in 2009.

- The number of transactions involving Russian, Indian, and Chinese investors increased in 2010 and represented 12 percent of all transactions filed during the year, as compared to six percent in 2009, 10 percent in 2008, and six percent in 2007. In 2010, the number of transactions by Russian investors increased from zero to four, there was one transaction involving an Indian investor as compared to zero in 2009, and the number of Chinese investors increased from four to six.
- Transactions from France and Israel – which can present challenging cases for CFIUS notwithstanding the countries’ allied status – remained nearly constant in number as compared with 2009, with 6 and 7 transactions, respectively, but fell in terms of percentage of overall transactions.

Similar to 2009, the sectors involved in the noticed transactions do not clearly explain the current level of investigations conducted. With one exception, the percentage of transactions on a sector-by-sector basis in 2010 was similar to 2009 and 2008. There was a reverse in the trend noted in 2009 with respect to mining, utilities, and construction transactions – from an increase in 2009, the transactions in this sector decreased by 15 percent in 2010 to nearly match the percentage reported in 2008. The manufacturing sector retained the top percentage of foreign investment, followed closely by the finance, information, and services sector – together accounting for 77 percent of transactions filed with CFIUS.

Importantly, the recent report makes clear that CFIUS is still pre-disposed to approve transactions, and the United States remains open to foreign direct investment (“FDI”), with CFIUS taking action to restrict FDI on national security grounds only in exceptional cases. During the past year, senior officials in the Obama Administration – including President Obama, Vice President Biden, and Treasury Secretary Geithner – have affirmatively stated on multiple occasions that the United States welcomes and encourages foreign investment. Several of these public statements have been directed to Chinese investors, but they nevertheless reflect a concerted effort and commitment by the Administration to uphold an open investment policy.

Based on our experience, we expect the trends noted in the recent report – including, in particular, the percentage of cases proceeding to second-stage investigation and the increase in investors from certain emerging economies – to continue. We will continue to monitor developments in this field and will keep you apprised of information that may impact the timing and approval process for M&A transactions.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our international trade practice group:

Mark Plotkin	202.662.5656	mplotkin@cov.com
David Fagan	202.662.5291	dfagan@cov.com
Stuart Eizenstat	202.662.5519	seizenstat@cov.com
Alan Larson	202.662.5756	al Larson@cov.com
Peter Lichtenbaum	202.662.5557	plichtenbaum@cov.com
John Veroneau	202.662.5034	jveroneau@cov.com
Damara Chambers	202.662.5279	dchambers@cov.com
Meena Sharma	202.662.5724	msharma@cov.com

This information is not intended as legal advice. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP, an international law firm, provides corporate, litigation and regulatory expertise to enable clients to achieve their goals. This communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts. © 2011 Covington & Burling LLP, 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401. All rights reserved.