

# Most Recent CFIUS Annual Report to Congress - 2013

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Cross-Border Investment

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The Committee on Foreign Investment in the United States (“CFIUS”) last week released its [Annual Report to Congress](#) covering transactions filed in 2013. The report provides data on all notices of “covered transactions” (i.e., subject to the jurisdiction of CFIUS) filed with CFIUS during the 2013 calendar year and all reviews and investigations completed during that year. The report underscores two trends about which we have written previously—first, the predominance of notifications from Chinese investors; and second, the continued heightened scrutiny applied to cases, as reflected in the fact that nearly half of all notices filed in 2013 proceeded to a second-stage investigation. Nevertheless, the data in the report also makes clear that the United States remains open to foreign investment.

## Chinese Transactions Remain on Top

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For the second year in a row, Chinese acquirers filed the greatest number of notices of covered transactions. While there was a slight decrease in the actual number of notices filed by Chinese acquirers in comparison to 2012 (from 23 to 21 notices), the percentage of notices filed by Chinese acquirers increased from 20.2 percent of total notices filed in 2012 to 21.6 percent of total notices filed in 2013. Looking at the last three years for which CFIUS has published data (2011 to 2013), Chinese investors have filed more notices of covered transactions than any other country (54 notices), followed by the UK (49), Japan and Canada (34 each), and France (29). It is not surprising that acquisitions by Chinese investors remained strong—even as the total number of CFIUS filings decreased to 97 in 2013 from 114 in 2012—given the support for and encouragement of Chinese outbound investment and the attractiveness of the U.S. as a destination for Chinese investment.

## Heightened Scrutiny of Transactions

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At least three data points in the recent report indicate that CFIUS continues to review transactions with heightened scrutiny—and in certain aspects, even more than in prior years.

### Record Number of Second-Stage Investigations

First, CFIUS reported that 48 of the 97 notices filed in 2013 proceeded to a second-stage investigation following the initial 30-day review period. The number of cases going to investigation has increased every year since Congress passed the Foreign Investment and National Security Act of 2007, and 2013 represents a high point with 48 cases (nearly 50 percent of all cases) going to investigation. This is significantly higher than the percentage of notices that went to investigation in 2012 (39.5 percent) and 2011 (36 percent).

Even taking into account CFIUS's explanation that five of the 48 cases proceeded to investigation because CFIUS was not able to complete its review during the temporary suspension of government operations in October 2013, the remaining cases that went to investigation represented 44.3 percent of all notices filed during the reporting period, which is still noticeably higher than each prior year for which data is available.

### **Decrease in Number of Withdrawn Notices But Similar Percentage of Abandoned Transactions**

Second, from the data in the report, it appears that seven transactions were abandoned in 2013 (7.2 percent of covered transactions) in comparison to ten abandoned transactions in 2012 (8.8 percent of covered transactions). While the number of notices withdrawn by parties in 2013 declined significantly in comparison to 2012 (from 22 to eight), only one of the notices withdrawn in 2013 was re-filed, in contrast to 12 notices that were withdrawn in 2012 and then re-filed. Parties abandon transactions for a number of reasons, including for purely commercial reasons or when it becomes clear that CFIUS is likely to recommend that the President suspend or prohibit the transaction.

### **Mitigation Measures Applied to More Transactions**

Finally, a greater number and percentage of cases resulted in legally binding mitigation measures in 2013. In particular, 11 cases resulted in mitigation (representing 11.3 percent of notices filed in 2013), while only eight cases resulted in mitigation in 2012 as well as in 2011 (approximately seven percent of notices filed in those years). In 2013, mitigation measures were applied to acquisitions in the telecommunications, software, mining, oil and gas, manufacturing, consulting, and technology industries. These mitigation measures included, among others, providing the U.S. government with the right to review certain business decisions and object on the grounds of national security concerns. This was the first time CFIUS noted this particular mitigation measure in its report.

## **Intelligence Community Believes There May Be a Coordinated Strategy to Acquire U.S. Critical Technology Companies**

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The U.S. Intelligence Community ("USIC") has revised its assessment from the last report regarding whether there is credible evidence of a coordinated strategy to acquire U.S. critical technology companies. The current report states that the USIC "believes there may be an effort among foreign governments or companies to acquire U.S. companies involved in research, development, or production of critical technologies for which the United States is a leading producer." In contrast, in the report covering transactions from 2012, CFIUS noted that the USIC judged it "unlikely" that there is a coordinated strategy among foreign governments or companies to acquire U.S. critical technology companies. The first time the USIC made a positive assessment of whether there is credible evidence of a coordinated strategy was in the report covering transactions filed during the 2011 calendar year. That report stated that the USIC judges with "moderate confidence" that there is likely a coordinated strategy.

The differences in the USIC's annual assessment as articulated in the recent reports may not actually indicate a difference in the overall assessment but rather may be a consequence of certain other factors. In particular, following the USIC's assessment in last year's report, it was noted that "[i]ndications of a coordinated strategy may go unobserved due to limitations on intelligence collection, or may be hidden or misconstrued because of foreign denial and

deception activities.” Furthermore, the most recent report matches the four prior reports in noting the USIC’s finding that foreign governments are “extremely likely” to continue using a range of collection methods in order to obtain U.S. critical technologies.

## **Other Highlights from the Most Recent Report**

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- The total number of CFIUS notices decreased to 97 in 2013, down from 114 in 2012. This is still higher than the notices filed in 2009 (65 notices) and 2010 (93 notices) but is noticeably lower than 2011 (111 notices) and 2012 (114 notices). (While the data are not yet publicly available for 2014, we can report that the number of notices filed last year was significantly higher than in 2013—and, indeed, was the highest total since 2008 (155 notices).)
- For many years, the United Kingdom has held the top position in terms of the number of acquisitions notified to CFIUS. However, based on data available, acquisitions by UK entities in 2013 dropped to a record low of seven notices (compared with 17 in 2012 and 25 in 2011).
- Acquisitions by Japanese entities continue to increase, with 18 transactions filed in 2013, compared with nine in 2012 and seven in 2011. This is consistent with the general trend in increased outbound investment by Japanese companies.
- Acquisitions from Asia (i.e., China, Hong Kong, India, Japan, Korea, Malaysia, Singapore and Taiwan) represented 47.4 percent of all notices filed in 2013, up from 36.8 percent of notices filed in 2012 and 19.8 percent in 2011.
- As in prior years, the largest concentration of acquisitions were in the manufacturing sector. Across all subsectors, the largest number of acquisitions were in the following: professional, scientific and technical services (15 notices); computer and electronic products (12 notices); and utilities (12 notices).

## **Looking Ahead**

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We expect certain of the trends identified above to be reflected again in the report for the 2014 calendar year, including a significant number of acquisitions involving Chinese entities in 2014. The trend of heightened scrutiny also is likely to continue, particularly as CFIUS continues reviewing transactions in challenging sectors. Perhaps most notable, however, is that CFIUS notices will reflect a greater up-turn in M&A activity in 2014. As noted above, the total number of notices filed with CFIUS increased substantially in 2014 and will be close to, if not surpass, the record number of covered transactions reviewed in 2008 (155 notices).

## Cross-Border Investment

If you have any questions concerning the material discussed in this client alert, please contact the following members of our cross-border investment practice group:

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