

CFIUS Publishes 2015 Annual Report and 2016 Statistics Amid More Recent Dynamic CFIUS Environment

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The Committee on Foreign Investment in the United States (CFIUS) recently released the public version of its **Annual Report** covering calendar year 2015 along with some **statistics regarding filings in calendar year 2016**. By statute, CFIUS is required to compile and submit to Congress an annual report on all of the reviews and investigations of covered transactions completed by CFIUS during the reported year. While the 2015 Annual Report fulfills this requirement and updates some aging statistics, its significance lies more in the factors that most likely led to its delayed publication than, at this point, the substance of the information it reports.

In 2017, CFIUS is reviewing a record number of transactions and is on track to review well over 200—the largest amount in the modern CFIUS era. This follows another record year in 2016. Prominent among the large volume of notified transactions are deals involving Chinese investors, continuing a trend that began in 2012 when, for the first time, China led foreign countries represented in CFIUS reviews. Since then, Chinese investments (particularly those involving certain sensitive technologies) have been subject to heavy scrutiny, multiple review and investigation cycles, mitigation measures, and even blocks or divestments. As this dynamic environment continued to evolve, a new presidential administration took office in January 2017, resulting in significant turnover of key leadership positions involved in the CFIUS process—many of which remain vacant. These substantive factors most likely contributed to CFIUS's delay in fulfilling its administrative requirement to publish statistics for a period that concluded nearly two years ago.

With that background in mind, the following are some key takeaways from the 2015 Annual Report and 2016 statistics along with updated observations that provide timely context for the 2015 and 2016 statistics:

- **The high volume of notified transactions continued (and has since increased).** In 2015, 143 transactions were notified to CFIUS, on par with the relatively high 147 transactions notified in 2014. While the large volume for 2015 is notable, the more recent (though unofficial) numbers are even more telling. As we discussed in our [February 2017 client alert](#), CFIUS reviewed 172 transactions in 2016, well eclipsing the record for the modern CFIUS era (155 in 2008). As mentioned above, CFIUS is currently on track to review well over 200 transactions in 2017. With this increase in caseload has come an increase in the CFIUS-process timeline. In particular, whereas CFIUS would previously review a prefiled draft notice and provide feedback within a week or two, parties can now expect the pre-filing phase of the review process to take from two to four weeks, if not longer. In addition, the unprecedented caseload has increased the chances that CFIUS will need to extend a given review

into a 45-day investigation and possibly even require that the notice be withdrawn and resubmitted (both as discussed below).

- **Investigations increased modestly (and do not appear to have abated in subsequent years).** The relative number of cases that proceeded to a 45-day investigation in both 2015 and 2016, following the initial 30-day review, increased somewhat from 2014 to 46% (66 out of 143 in 2015, and 79 out of 172 in 2016). This represents an increase from 35% in 2014 but below the record of 49% in 2013 (a year that could be considered anomalous due to a government shutdown that interrupted in-process CFIUS reviews). Given the current volume of cases—prominent among them Chinese cases—increased use of investigations, for both timing and substantive considerations, are to be expected.
- **For the fourth consecutive reported year, China led foreign countries represented in CFIUS reviews in 2015.** Chinese investors notified 29 transactions to CFIUS in 2015, up slightly from 24 in 2014. Canadian investors had the next highest number of notified transactions with 22, followed by the United Kingdom (19) and Japan (12). While recent reporting—including substantial media coverage—indicates a continued high volume of Chinese deals, there has been a simultaneous increase in the scrutiny applied to such deals—by CFIUS, politicians, and the media. A notable effect of the increased scrutiny has been increased challenges for Chinese investors to obtain CFIUS approval. In several cases, parties to Chinese transactions have been forced to withdraw their CFIUS notices and refile them—a tactic commonly employed to allow time to sort out national-security concerns with CFIUS, including potentially negotiating mitigation terms. Further, as reported in our [September 2017 client alert](#), in the past ten months, two Chinese transactions have been blocked by the President.
- **The number of withdrawn notices has increased (and is likely to continue to do so).** CFIUS approved the withdrawal of 13 notices in 2015, one more than the 12 it approved in 2014. That number increased dramatically to 27 in 2016, however. Of the 13 withdrawn notified transactions in 2015, eight were subsequently refiled and approved, and five were abandoned—three because CFIUS had unresolvable national-security concerns or proposed mitigation the parties chose not to accept, one for commercial reasons, and one for undisclosed reasons. Of the 27 withdrawn notified transaction in 2016, 15 were subsequently refiled (although their approval status is not reported), and 12 were abandoned—five because CFIUS had unresolvable national-security concerns or proposed mitigation the parties chose not to accept, and seven for commercial or other reasons. Withdrawals have likely increased this year. Indeed, recent press reports have highlighted the withdrawals and resubmissions of several notices pertaining to investments from China as well as other countries—some of which had been withdrawn and refiled more than once. Given the recent upticks in both caseload and substantive scrutiny of certain cases, withdrawals and resubmissions are likely to continue to be heavily utilized at least in the near term.
- **The imposition of mitigation measures increased slightly (and possibly continues to increase).** CFIUS imposed mitigation measures in 8% (11 cases) of the transactions it reviewed in 2015, up slightly from the 6% (nine cases) for which mitigation was required in 2014. The 2015 Annual Report noted the general types of mitigation measures that were required. Some of the listed measures were not disclosed in previous annual reports (but nevertheless used in practice), including:
 - requiring that only authorized persons have access to US Government, company, or customer information, and that the foreign acquirer not have direct or remote access to systems that hold such information;
 - establishing security protocols to ensure the integrity of goods or software sold to the US Government;
 - notifying customers regarding the change of ownership;
 - providing assurances of continuity of supply for defined periods, and notification and consultation prior to taking certain business decisions, with certain rights in the event that the company decides to exit a business line;

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- establishing meetings to discuss business plans that might affect US Government supply or national security considerations; and
 - excluding certain sensitive assets from the transaction.

As the CFIUS process and atmosphere evolve, we will continue to report on notable trends and changes to law and policy.

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