

Client Alert

Latham & Watkins
Corporate & Litigation Departments

CFIUS Annual Report for 2010 Offers Insights into National Security Review of Foreign Investment into the United States

The Committee on Foreign Investment in the United States (CFIUS) recently released the public version of its 2010 Annual Report. The Annual Report details how many notices were submitted to CFIUS in connection with investments made by foreign investors in US companies in 2010 and how many triggered investigations or were withdrawn. Although the public version of the report does not include specific information about the transactions at issue, it does offer various insights into foreign investment trends as well as factors CFIUS considers during its national security deliberations. Two notable trends in 2010 are that an increased percentage of CFIUS filings continued to be subjected to a second-level 'investigation' period and a relatively higher percentage of CFIUS reviews required companies to implement mitigation measures.

Background

Through power delegated by the President under the Exon-Florio Amendment to the Defense Production Act of 1950, CFIUS considers the impact on US national security of "any merger, acquisition, or takeover ... by or with a foreign person which could

result in foreign control of any person engaged in interstate commerce in the United States." Control is broadly defined to include "the power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert or other means, to determine, direct or decide important matters affecting an entity." Negative controls or "veto rights" over important matters can and often do give CFIUS jurisdiction over a transaction.

CFIUS is a multi-agency group chaired by the Secretary of the Treasury that includes, among others, the Secretaries of Defense, Homeland Security, State, Commerce and Energy, and the Attorney General. Parties to transactions that are subject to CFIUS jurisdiction make "voluntary" filings with CFIUS to obtain clearance prior to closing, though CFIUS is authorized to commence a review without a filing, including *after* a transaction has closed. If CFIUS determines that a transaction threatens to impair US national security, the President can block or unwind the transaction.

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Once parties to a transaction formally file a voluntary notice with CFIUS (which typically occurs only after pre-filing consultations with CFIUS), the multi-agency Committee has 30 calendar days in which to conduct its review of the transaction and solicit any additional information from the parties. CFIUS also has the option to initiate a further investigation of the transaction during an additional 45-day period. If CFIUS believes the transaction threatens to impair US national security, it can require the parties to agree to conditions to mitigate that perceived risk. In the rare case when these risks cannot be mitigated, the President has 15 days to review the transaction after the 45-day investigation period.

2010 CFIUS Annual Report: Trends

- In 2010, CFIUS received 93 notices, which represents an almost 45 percent increase in filings compared to 2009, when CFIUS received 65 notices. In 2008, the year in which the current CFIUS rules were promulgated, CFIUS received 155 notices.
- In 2010, CFIUS initiated an investigation in 35 of the 93 cases before it, representing approximately 40 percent of its caseload. In percentage terms, these numbers are consistent with the figures from 2009 but reflect a dramatic increase over 2008, when about 15 percent of CFIUS notices proceeded to an investigation. The last CFIUS case to make it to the President's desk for a final decision took place in 2006 (*i.e.*, the proposed merger of Lucent Technologies and Alcatel of France).
- Of the 93 filings made in 2010, 12 were withdrawn — 6 during the initial 30-day review period and 6 during the subsequent investigation phase. Of the 12 withdrawn cases, 5 were re-filed in 2010, 2 were re-filed in 2011 and in the remaining 5 cases, the parties abandoned the transaction.
- During the period from 2008 through 2010, CFIUS received a total of 313 notices. Of these filings:
 - 41 percent (129 notices) related to the manufacturing sector (*e.g.*, computer and electronic products; transportation equipment; primary metal; chemical; electrical equipment, appliances, and computers; fabricated metal products; textile product mills; petroleum and coal products; nonmetallic mineral products; and plastics and rubber products);
 - 32 percent (99 notices) related to the finance, information and services sector (*e.g.*, computer system design and related services; architectural, engineering and related services; management, scientific and technical consulting services; investigation and security services; other professional, scientific and technical services; facilities support services; and waste treatment and disposal services);
 - 18 percent (57 notices) related to mining, utilities and construction (*e.g.*, utilities; mining not including oil and gas; support activities for mining; heavy and civil engineering construction; oil and gas extraction; building construction; and specialty trade contractor);
 - 9 percent (28 notices) related to wholesale and retail trade (*e.g.*, support activities for transportation; durable and non-durable goods merchant wholesalers; electronics and appliance stores; water transportation; transit and ground passenger transportation; truck transportation; pipeline transportation; and warehouse and storage).
- During the period from 2008 through 2010, the United Kingdom accounted for 29 percent of all filings. Canada, France and Israel each accounted for

approximately 8 percent of notified transactions during this period.

Notably, the Annual Report offers insight into industries of interest to CFIUS.

- CFIUS agencies negotiated mitigation measures in transactions involving acquisitions of companies in the computer software, telecommunications and energy sectors. Parties to nine transactions negotiated mitigation measures in 2010, compared to only seven transactions with mitigation measures in 2008 and 2009 combined.
- Mitigation measures required businesses to take specific actions, including establishing guidelines and terms for handling government contracts and customer information, notifying US government parties of any material introduction, modification or discontinuation of a product or service, and establishing a Corporate Security Committee, security officers and other mechanisms to ensure compliance with required actions.
- As highlighted in the Annual Report and elaborated in [guidance](#) published in 2008, areas of particular national security concern to CFIUS have not changed much over the years. They include the following:
- Foreign control of US businesses that:
 - provide products and services to government authorities with national security functions;
 - implicate critical infrastructure, such as businesses in the energy sector that affect the national transportation system or that directly impact the financial system;
 - are involved in activities related to weapons and munitions manufacturing, aerospace and radar systems;
 - produce advanced technologies useful to national security,

including those engaged in the design and production of semiconductors and other equipment or components with both commercial and military applications or those involved in network and data security; and

- engage in activities subject to US export controls or that have access to classified information.
- Transactions involving foreign persons controlled by a foreign government of a country with nonproliferation or that raise other national security-related concerns, or with a history of taking or intending to take actions that could impair national security.

In light of the increase in CFIUS investigations in 2009 and 2010, it is important for companies in industries of national security concern, and particularly those that implicate critical infrastructure, national defense or US export controls, to anticipate possible CFIUS scrutiny and incorporate time for the 30-day CFIUS review and 45-day CFIUS investigation periods into transaction timelines. Latham & Watkins helps both US companies and foreign investors navigate the complex and interrelated federal regulatory regimes designed to safeguard US national security interests, including through all stages of the CFIUS process — from deciding whether to submit a “voluntary” notice to CFIUS, to drafting the notice and responding to further requests for information, to negotiating a mitigation plan if necessary to address concerns identified by CFIUS.

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