

CFIUS Report Reveals Rise Of Chinese Investments In US Cos.

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In February 2015, the Committee on Foreign Investment in the United States, or CFIUS, issued the unclassified version of its most recent annual report to Congress. CFIUS is an interagency committee of the U.S. government that reviews transactions which may result in control of a U.S. business by a foreign person and evaluates the potential national security risks posed by such transactions.

Due to the important role that foreign direct investment continues to play in Texas' economy, corporate and other attorneys involved in in cross-border mergers and acquisitions and investments should have a basic understanding of CFIUS and its reports to Congress. According to a report published by the Economic Development and Tourism Division of the Office of the Governor, Texas ranked third among all U.S. States in new foreign direct investment from January 2009 to December 2013, while at the same time leading in certain industries, such as energy and chemicals.[1] The report noted that during this time frame, 475 foreign companies announced over 600 separate business openings or expansions in Texas which, when fully operational, are forecasted to generate 59,000 jobs and \$43 billion in combined capital investment.[2]



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This article summarizes some insights, of particular relevance to Texas lawyers and businesses, from the most recent unclassified CFIUS report to Congress.

The most recent unclassified annual CFIUS report to Congress that has been released is for calendar year 2013, and was released in February 2015 (2013 report).[3] According to the 2013 report, CFIUS conducted a review on 97 notices of "covered transactions" (i.e., a merger, acquisition, or takeover by or with any foreign person that could result in foreign control of any person engaged in interstate commerce in the United States)[4] that were filed with CFIUS, and conducted a subsequent investigation on 48 of those 97 notices (49.5 percent).[5] In the five years from 2009 to 2013, CFIUS conducted a review of 480 covered transactions, with 193 of those notices (40.2 percent) resulting in a subsequent investigation.[6]

Based on the information provided in the 2013 report, it is difficult to draw any conclusions concerning discernible trends in the level of scrutiny in CFIUS' reviews. On the one hand, the number of filed notices in 2013 resulting in a subsequent investigation was at a five-year high (both in absolute numbers, and as a percentage of filed notices),[7] which may suggest a more exacting review process. On the other hand, in 2013, only five of the 48 notices which were under an investigation were withdrawn, whereas in

2012, 20 of the 45 notices which were under an investigation were withdrawn (notices may be withdrawn for a variety of reasons, including the parties not wanting to agree to abide by CFIUS' proposed national security risk mitigation measures; a CFIUS determination to recommend that the president prohibit or suspend the transaction; a material change in the terms of the transaction; or commercial or other reasons).[8] CFIUS' annual reports to Congress do not disclose details concerning CFIUS reviews of covered transactions in various states of the U.S.

In 2013, the relative volume of CFIUS notice filings per industry group remained relatively stable, as compared with recent years. CFIUS categorizes industries into the following four industry groups: manufacturing; finance, information and services; mining, utilities and construction; and wholesale, retail and transportation. As can be seen in the table below, during the past few years, there has not been any major changes among the industry groups concerning the relative volume of CFIUS notice filings.

Covered Transactions, Withdrawals, and Presidential Decisions*					
2009 - 2013					
Year	Number of Notices	Notices Withdrawn During Review	Number of Investigations	Notices Withdrawn After Commencement of Investigation	Presidential Decisions
2009	65	5	25	2	0
2010	93	6	35	6	0
2011	111	1	40	5	0
2012	114	2	45	20	1
2013	97	3	48	5	0
Total	480	17	193	38	1

Source: 2013 Report, pg. 4

One of the more interesting observations from a review of the past few CFIUS reports is a change in the number of CFIUS filings made by companies from different home countries. The table below summarizes the most common home countries of acquirers in covered transactions during the years 2008-2013:

Summary of Most Common Home Countries of Acquirers in Covered Transactions, 2008-2013 ⁹							
Country	2008	2009	2010	2011	2012	2013	Total
United Kingdom	48	17	26	25	17	7	140
China	6	4	6	10	23	21	70
Canada	6	9	9	9	13	12	58
France	12	7	6	14	8	7	54
Japan	8	4	7	7	9	18	53

In 2013, the two most common home countries of acquirers in covered transactions were both from Asia (China and Japan), and, for the second year in a row, China was the most common home country of acquirers in covered transactions that had been reviewed, with 21 filings.

According to an April 2014 study by Daniel H. Rosen and Thilo Hanemann, Chinese annual foreign direct investment into the U.S. now exceeds foreign direct investment by U.S. companies into China by most

measures.[9] Texas business leaders and policy makers have increasingly recognized the importance of China companies as a source of investment. For example, from March 30 to April 1, 2015, in Austin, Texas, the 2015 China-U.S. Private Investment Summit took place, at which President Bill Clinton, the Texas secretary of state (Carlos Cascos) and the mayor of Frisco, Texas (Maher Maso), an affluent city that is part of the Dallas-Fort Worth metroplex, spoke. Although Europe, Japan and Canada continue to be the leading source countries for foreign direct investment into the United States (including Texas), the portion from China is continuing to grow.

China's continued strong need for energy to support its manufacturing-heavy economy and large and growing middle class, its limited domestic energy resources, and its increased willingness and ability to invest abroad to acquire energy assets, together suggest that China will continue to be active in investing in foreign companies in the energy industry.

For example, in February 2013, the Chinese majority state-owned company CNOOC Ltd. closed its \$15.1 billion takeover of Canadian upstream oil and gas company Nexen Inc., which was China's largest-ever foreign takeover. The transaction was reviewed (and approved) by CFIUS, as Nexen Inc. held various exploration and production assets in the Gulf of Mexico. Partially due to political and national security considerations — China remembers well the political firestorm surrounding CNOOC's unsolicited \$18.5 billion offer for California-based Unocal Corp., which bid CNOOC subsequently withdrew in August 2005 — investments of China companies into U.S. energy companies within the last decade have more often been in the form of a minority equity position or joint venture. Examples of such transactions include minority investments by Chinese state-owned Sinopec, CNOOC and Sinochem Group in Devon Energy, Chesapeake Energy and Pioneer Natural Resources, respectively.

With China changing from being a net importer of capital from the U.S. into a net exporter of capital into the U.S., China's continued considerable need for energy resources, the energy renaissance in the U.S., and energy companies and assets having lower valuations (and thus being more attractive to buyers) due to the recent collapse in oil and gas prices, it will be interesting to see to what extent China will become more active in attempting to acquire majority ownership of (or minority equity ownership in) U.S. energy companies, whether in the upstream, energy services and equipment or other sectors.

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[1] See Foreign Direct Investment in Texas 2014, Office of the Governor, Economic Development and Tourism Division, pg. 1, available at http://gov.texas.gov/files/ecodev/Foreign_Investment.pdf. According to this report, California and New York were the two states which had more new foreign direct investment projects than Texas between 2009 and 2013.

[2] See id.

[3] The full name of the Report is the Committee on Foreign Investment in the United States Annual Report to Congress, Report Period: CY 2013, Issued: February 2015 (Public/Unclassified Version), and a copy of the 2013 Report can be viewed on the U.S. Department of the Treasury's website at:

<http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-reports.aspx>

[4] See Defense Production Act of 1950, 50 U.S.C. App. 2170., §721(a)(3).

[5] See 2013 Report, pg. 2.

[6] See *id.* at pg. 3.

[7] See *id.*

[8] See *id.* at pg. 3 and 20.

[9] Daniel H. Rosen and Thilo Hanemann, *New Realities in the US-China Investment Relationship*, April 2014, pg. 2, available at:

https://www.uschamber.com/sites/default/files/documents/files/RHG_New%20Realities_29April2014.pdf