

# CFIUS Trends Inform Cross-Border Activity

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In a reflection of current M&A activity, Committee on Foreign Investment in the United States (CFIUS) cases have shifted in their geographic and industry focuses over the years, from the United Kingdom and other locations to China, and to information and communications technologies (ICT) and related services.

Careful due diligence, advance planning and a proactive approach to the CFIUS process will be vital to the success of cross-border investments targeting U.S. businesses.

## 2015 Highlights

Some of the most publicized CFIUS-approved transactions of 2015 included the acquisition of the Waldorf-Astoria New York Hotel and Towers by China's Anbang Insurance, the acquisition of Freescale Semiconductor by the Netherlands' NXP, and the acquisition of telecommunications equipment vendor Alcatel-Lucent by Finland's Nokia. These transactions attracted attention for reasons including size, structure and prominence of the target assets, but they also reflect the emerging trends within CFIUS described below.

## Shifts in Caseload and Geographic Focus

CFIUS' caseload generally has tracked the level of mergers and acquisitions activity in the marketplace. However, the caseload represents only a fraction of cross-border M&A activity, reflecting the fact that participation in the CFIUS process is mainly voluntary.

The complexity of acquired businesses and the security issues implicated by their technology and services likely have contributed to an increase in second-stage investigations by CFIUS.

Another indication of the broader M&A market is the origin of CFIUS cases. For several years through 2011, acquirers in the United Kingdom, Canada, France and Israel led CFIUS' caseload. In recent years, however, the geography of CFIUS has changed; the United Kingdom has been the source of fewer cases, while in 2012, China leapfrogged other countries to become the leading originator of CFIUS-reviewed transactions. Japan, a consistent source of CFIUS-reviewed transactions over the years, also became more active in 2013, the most recent year for which we have official statistics. Based on our direct experience, we believe CFIUS' caseload in 2015 was close to,

if not greater than, the level reported for 2007, which was CFIUS' second-busiest year in the past two decades. We also expect that when CFIUS statistics for 2015 become available, China will again be the leading source of transactions reviewed by CFIUS.

However, even before this geographic shift, another notable change in CFIUS' caseload was becoming apparent: Starting in 2009, a consistently greater percentage of CFIUS cases (nearly 40 percent from 2009 to 2012, and 49 percent in 2013) were not completed within the initial 30-day review period and required second-stage investigations of up to 45 additional days. The implication for participants in cross-border M&A is that it would be imprudent to budget fewer than 75 days, plus preparation time, for the process.

## Growing Attention on ICT Transactions

Part of the increase in CFIUS' use of second-stage investigations may be the number of acquisitions of companies providing ICT and related services. CFIUS has had to develop an understanding of the technologies, services and applications in each of these

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cases and find the tools to mitigate any related national security risks. Meanwhile, data breaches and cybersecurity issues associated with ICT and communications services have attracted greater government and public attention. The complexity of the acquired businesses and the security issues implicated by their technologies and services likely contributed to the number of CFIUS cases requiring second-stage investigations.

Nevertheless, CFIUS has allowed an increasing number of these transactions to move forward. In 2013, it cleared the acquisition of one of the main four telecommunications carriers, Sprint Nextel, by Japan's SoftBank. In 2014, CFIUS permitted the acquisition of Alcatel-Lucent's enterprise business by China Huaxin Post and Telecommunications, in the first major telecommunications acquisition by a Chinese entity. In 2015, CFIUS cleared the acquisition by Nokia of Alcatel-Lucent.

The semiconductor industry, years ago the impetus behind the 1988 enactment of the Exon-Florio amendment to the Defense Production Act of 1950, has returned as a focus of CFIUS cases in recent years. This reflects significant M&A activity in the sector generally, augmented by new Chinese government policy and resources aimed at acquiring integrated circuit technologies. In 2015 alone, CFIUS reviewed and cleared foreign acquisitions of Broadcom, Freescale, OmniVision and Integrated Silicon Solution. Reviews of similar transactions can be expected in 2016 and beyond.