

# CFIUS Submits Annual Report To Congress

*February 1, 2012 by **Sheppard Mullin***

The Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”) recently submitted its annual report to Congress for calendar year 2010. The [report](#), which provides general information on notices filed, reviews and investigations completed by CFIUS during the year, and the types of security arrangements and conditions that the Committee has employed to mitigate national security concerns, reveals that a larger number of reviews are proceeding to the investigation stage and that the Committee is increasingly conditioning its tacit approval of transactions upon the parties’ adoption and implementation of various mitigation measures.

## **Background**

Section 721 of Title VII of the Defense Production Act of 1950, as amended (“Section 721”), authorizes the President to suspend or prohibit transactions that could result in control of a U.S. business by a foreign person (“covered transactions”) if there is credible evidence to suggest that the foreign person might take action that threatens to impair U.S. national security. CFIUS is a multi-agency committee chaired by the Secretary of the Treasury that reviews and advises the President on such transactions. Section 721 authorizes the President to order the divestiture of any assets acquired through a covered transaction if the parties fail to notify CFIUS and obtain a termination letter (which effectively authorizes the transaction) from CFIUS beforehand. Parties therefore generally prefer to file a voluntary notice with CFIUS containing detailed information on the transaction and the parties involved prior to closing the transaction.

The initial CFIUS review period lasts 30 days, after which CFIUS may either “conclude all action” with respect to the transaction or commence an additional 45-day investigation if it determines that the transaction raises national security concerns. Upon completion or termination of the 45-day investigation period, the Committee will either advise the President to suspend or prohibit the transaction or conclude all action with respect to the transaction. The Committee may also require parties to implement measures to mitigate any national security concerns as a precondition to its tacit approval of the transaction. Absent special circumstances, CFIUS and the President are barred from taking any further action under Section 721 once CFIUS has advised the parties that it has concluded all action with respect to a covered transaction.

### ***The Report***

93 notices of covered transactions were filed with CFIUS in 2010—a 43% increase compared to the 65 notices filed in 2009, though significantly fewer than the 155 notices filed in 2008. Because parties often withdraw a filing and submit a new notice in order to restart the 30-day review period if the Committee is unable to reach a decision within the applicable time period, the total number of notices filed does not necessarily equal the number of distinct covered transactions. CFIUS conducted an investigation with respect to 35 of the 93 notices filed in 2010. Twelve of the 93 notices were withdrawn. The parties filed new notices in seven of those cases, and in the remaining five cases the parties decided to abandon their transactions.

Roughly two-thirds of the total notices filed in 2010 were filed by foreign investors in the United Kingdom (26 notices), Canada (9), Israel (7), Japan (7), China (6), and France (6). As in 2009, transactions involving Chinese investors accounted for approximately 6% of all notices filed in 2010. The Committee also reviewed one notice for a covered transaction involving a Hong Kong acquirer. (CFIUS considers Hong Kong and Taiwan separately from China for purposes of determining an acquirer’s home country.) Because CFIUS considers both the nature of the U.S. business over which control is being acquired as well as the identity of the foreign person that is acquiring control, the fact that an acquirer’s home country is a strong ally of the United States does not necessarily mean that a covered transaction does not present national security considerations or that submitting a voluntary notice is not advisable. In 2010, for

example, more than one-third of the total notices filed involved acquirers from the United Kingdom and Canada.

As in 2009, CFIUS investigated approximately 38% of all notified transactions in 2010. In contrast, the Committee investigated only 4% of all notified transactions in 2007 and 15% of all notified transactions in 2008. Investigations beyond the initial 30-day period are thus becoming more customary, with nearly two out of every five cases proceeding to the investigation stage of the CFIUS review process.

The data provided in the report also indicate that CFIUS is increasingly requiring the adoption and implementation of mitigation measures negotiated with various CFIUS member agencies as a precondition to its tacit approval of a covered transaction. In 2010, mitigation measures were utilized in 10% of all covered transactions. In contrast, mitigation measures were utilized in only 1% of all covered transactions in 2008 and 8% of all covered transactions in 2009. As in 2009, the use of mitigation measures in 2010 was limited to acquisitions of U.S. companies in the computer software, telecommunications, and energy sectors. Such measures may require the businesses involved to establish guidelines and terms for handling existing U.S. government contracts and customer information; notify relevant U.S. government parties of any material introduction, modification, or discontinuation of a product or service, as well as any awareness of any vulnerability or security incidents; or establish a corporate security committee, security officers, and other mechanisms to ensure compliance with all required actions. CFIUS may monitor and enforce compliance with mitigation measures by means of on-site compliance reviews, periodic reporting, investigations, and third-party audits.

Although no covered transaction resulted in a Presidential decision in 2010 (the last occurred in 2006), parties to covered transactions typically prefer to withdraw their notices before reaching this stage of the CFIUS review process in order to avoid the negative publicity of an adverse Presidential decision. As we previously reported [here](#), there are a number of recent transactions in which the parties withdrew their notice after receiving indication from the Committee that it intended to recommend that the President block the transaction. Many of these deals involved proposed acquisitions of U.S. businesses by Chinese acquirers. In 2009, for example, the parties to a transaction in which a Chinese company sought to acquire a 51% equity interest in a

U.S. company that operated a mine in Nevada abandoned the deal after CFIUS advised them that the proximity of the mine to a U.S. Naval air base presented insurmountable national security concerns.

The Committee's report also analyzes foreign direct investment in the United States by countries that boycott Israel or do not ban terrorist organizations. The report cites Algeria, Iraq, Iran, Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, Sudan, the United Arab Emirates, and Yemen as countries that boycott Israel (with the caveat that Iraq's status remains under review). The Committee's list is more expansive than the Treasury Department's list of countries that require or may require participation or cooperation in an international boycott. (Treasury's list does not include Algeria, Iran, Iraq, and Sudan.) The report cites Cuba, Eritrea, Iran, North Korea, Syria, and Venezuela as countries that do not ban terrorist organizations. According to the report, seven transactions involving investors from countries that boycott Israel were completed in 2010, and CFIUS reviewed notices for two of them. The remaining five transactions were not notified to CFIUS, and the Committee has not requested – at least to date – that the parties to those transactions provide any additional information or submit a voluntary notice. No transactions involving countries that do not ban terrorist organizations were completed in 2010.

### ***Conclusion***

Because CFIUS considers a number of factors in determining whether a covered transaction raises national security concerns, buyers, sellers, and investors need to be mindful of the CFIUS review process even when the acquirer's home country is a strong ally of the United States. The Committee's 2010 report also suggests that parties to covered transactions should plan for a lengthier CFIUS review process than in previous years. With more Committee reviews proceeding beyond the initial 30-day period to the investigation stage, companies should be prepared for a process that could last up to 75 days or more. Finally, parties to such transactions should be prepared to negotiate and implement mitigation measures to assuage CFIUS of any potential national security concerns, especially when the transaction involves the acquisition of a U.S. company in the computer software, telecommunications, or energy sectors.