

Chinese Investment in the U.S. and U.S. National Security Regulations

中国在美投资及美国国家安全规定

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Trends in Chinese Investment and CFIUS Matters

- Increase in major M&A activity – CNOOC-Nexen, Wanda-AMC, ILFC, Wanxiang-A123, Shuanghui-Smithfield
 - Smaller-to-mid size transactions continue (e.g., Enstrom Helicopter), but larger deals are increasing in number
 - Transactions may be truly global, with U.S. representing only one piece – e.g., CNOOC, ICBC-Bank of East Asia
- Areas of focus:
 - Natural resources – CNOOC-Nexen, Sinopec-Chesapeake, Sinochem-Pioneer
 - Clean tech – Wanxiang, Three Gorges, Ralls
 - Aviation – AVIC, Enstrom
 - Auto
 - Industrial

Trends in Chinese Investment and CFIUS Matters

- Investment is increasing; security concerns rising
 - Intelligence community assessment that Chinese are using M&A activity to target critical technologies – 2012 CFIUS report to Congress
 - Heightened attention and concerns over cybersecurity and state-sponsored theft of IP – Mandiant report
 - Concerns over “persistent co-location” – connections between Fallon Naval Air Station (Procon-Lincoln Mining) and Boardman Naval Air Station (Ralls)
- Emphasis on “non-notified” transactions
- Overall, majority of cases are being approved by CFIUS, but several failures within the last year
 - CFIUS remains key focus for Chinese investors considering US investment

Background on CFIUS

- Authority of the Committee on Foreign Investment in the United States (“CFIUS”)
 - to review a foreign investment into an existing U.S. business to determine whether the investment “threatens to impair” U.S. national security
 - only triggered if a foreign person acquires control over a US business and there is a nexus to US national security
- Under Section 721 of the Defense Production Act, CFIUS has authority to take action to mitigate a threat posed by a transaction, but only the President can actually prohibit or unwind a transaction
 - Incentive for CFIUS to find a solution, if possible, to avoid a presidential decision
- CFIUS applies only to a minority of transactions
 - “Greenfield” investments are not covered
 - Debt transactions are not covered

Composition of CFIUS



CFIUS Jurisdictional Flow Chart

How to Identify Whether a Transaction Might be Subject to CFIUS Review

STEP 1: Is a foreign person considering an investment or an acquisition of a U.S. business?

- “Foreign person” defined broadly to include any entity controlled by a foreign national, foreign government or foreign entity
 - “Foreign entity” means any business organized outside the US or whose stock is principally traded outside US
- “U.S. business” defined broadly -- can include asset acquisitions (e.g., facilities, employees, customer contracts and lists, intellectual property)
- JVs may be subject to review if the U.S. contribution is a business or line of business

STEP 2: Will the transaction result in control, directly or indirectly, over that U.S. business?

- “Control” is defined very broadly to mean an ability to determine, direct, take, reach, or cause decisions of the U.S. business
- Even small minority investments can be “controlling” if other factors are present, such as ability to appoint directors or approval rights over certain decisions of the business

STEP 3: If there may be control over a U.S. business, then consult with counsel on whether any U.S. national security issues could arise.

- “National security” is broadly defined and can encompass many factors

What is National Security?

何谓“国家安全”？

- Not precisely defined, but there are factors listed in law and regulations:
没有精确定义，但有列入法律法规的考虑因素：
 - Securing defense industrial base
保护国防工业基地的安全
 - Protecting critical technologies
保护关键技术
 - Protecting critical infrastructure (including energy assets)
保护关键基础设施（包括能源资产）
 - Assuring the government and defense supply chain
保障政府和国防供应渠道
 - Compliance with important U.S. national security policies (counter-terrorism, nonproliferation, export controls)
遵守美国重要的国家安全政策（反恐、不扩散、出口管制）
 - Government ownership
政府所有权

What is National Security? (cont'd)

何谓“国家安全”？（续）

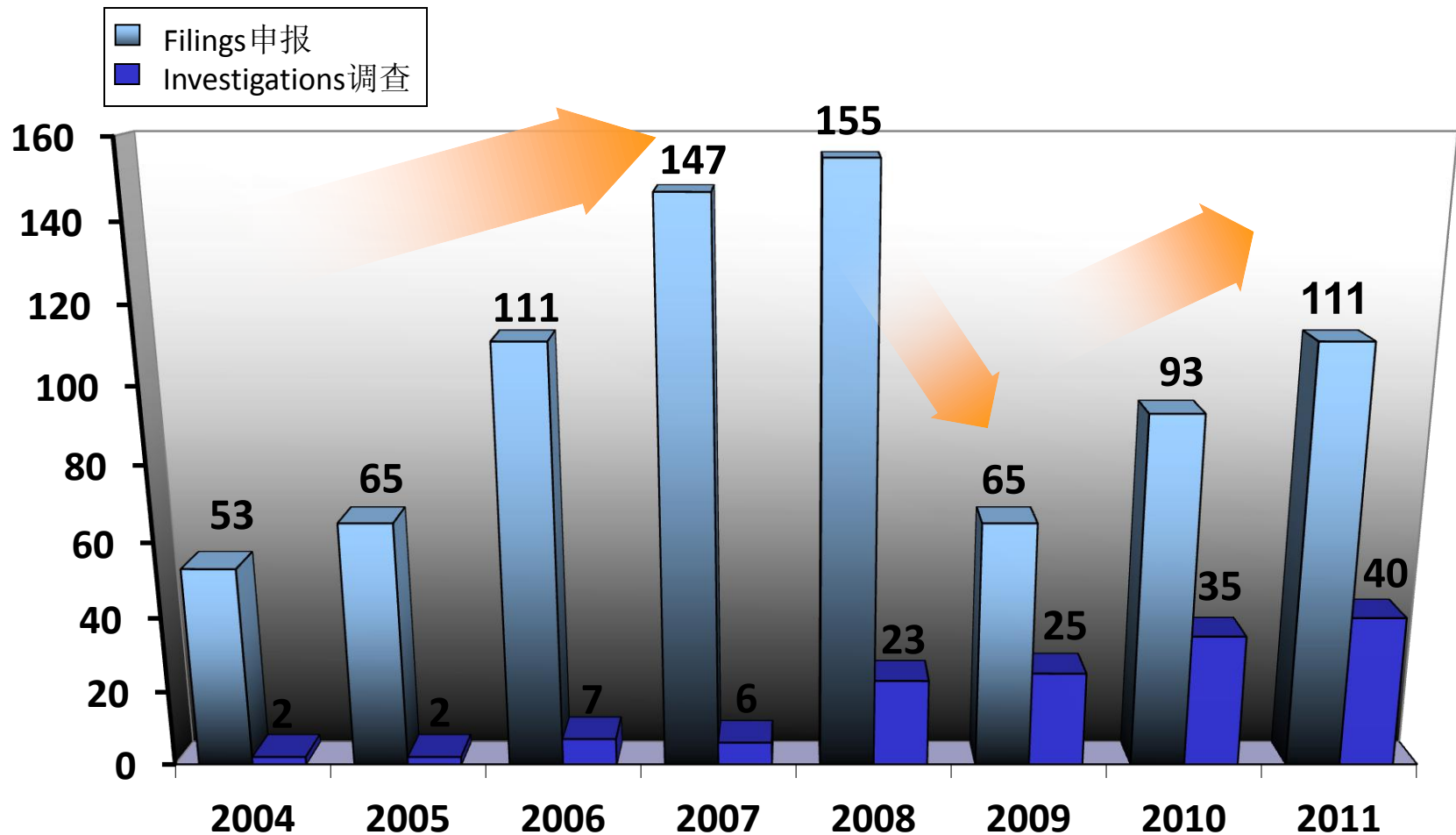
- **Additional factors in practice:**
实践中考虑的其它因素：
 - **USG customers and/or access to USG systems**
美国政府是否为其用户和/或是否能进入美国政府电脑系统
 - **Classified contracts** 保密合同
 - **Industry and assets (e.g., critical infrastructure)**
行业及资产（例如：关键的基础设施）
 - **Supply chain security** 供应链安全
 - **Information assurance/cyber security** 信息保证/信息安全
 - **Law enforcement interests (e.g., in data or telecom networks)**
执法利益（如：数据或电信网络）
 - **Competition (other sources of supply)** 竞争（其它可获得的供应渠道）
 - **Compliance record of U.S. company** 美国公司的合规记录
 - **Reputation of home country** 所在国的声誉
 - **Investor's reputation, including for compliance** 投资者的信誉，包括合规记录
 - **Management, including current or past ties to foreign military** 管理层现在或以前与外国军方的关系
 - **Commitment/ties to U.S. market** 对美国市场的承诺/与美国市场的联系
 - **Business in other countries (e.g., Iran)** 与其他国家的生意往来（例如：伊朗）
 - **Financing** 融资

Conditions for CFIUS Approval: Mitigation Agreements

- If CFIUS concludes there is a threat to national security, it considers whether threat can be mitigated through agreement with the parties
- Such agreements are conditions to approval; vary from one-page letters to 50-page contracts with commitments and penalties
- Potential elements:
 - Governance requirements – e.g., U.S. citizen officers or directors; appointment of a “security officer” for the company
 - Security requirements or commitments – e.g., maintenance of security measures or participation in security programs
 - Administrative processes – recordkeeping and reporting obligations
 - Compliance checks/monitoring – e.g., government inspection or third-party audit
- Important issue in transactional negotiations: What level of mitigation must the investor accept and still be required to complete the transaction?

Trends in CFIUS Filings and Investigations

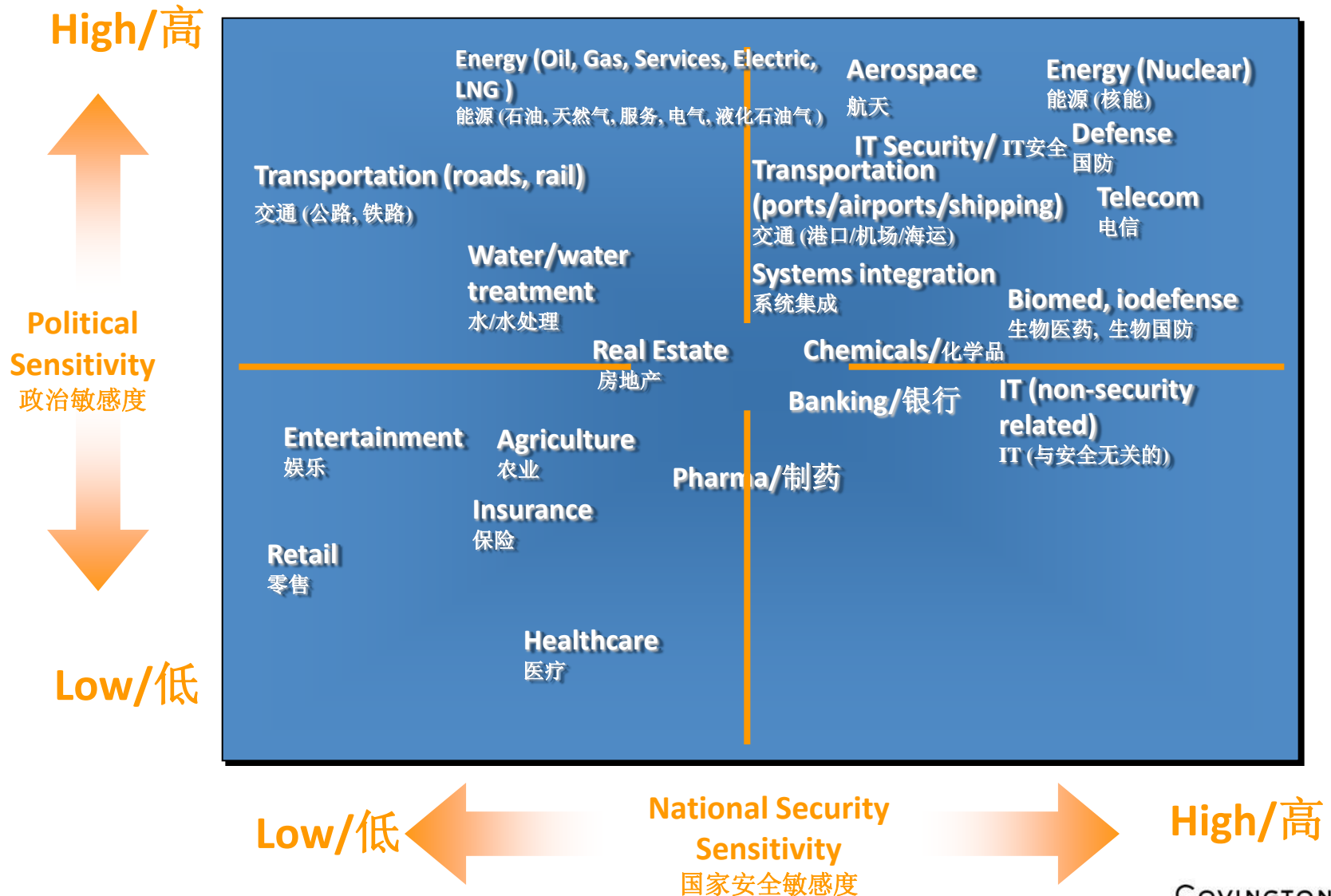
CFIUS申报和调查趋势



Managing Political and Public Affairs

- Investors need strategies for both Congress and Executive Branch, as well as managing public affairs
 - *Understanding the political and public landscape, as well as the Executive Branch regulatory approval process, is critical to success*
- Recognize that there may be many stakeholders that can be helpful or that can stir controversy
 - Employees – union relationships
 - Local officials – state and local governments
 - Congressional Committees
 - Third parties
 - Think tanks
 - Rivals
 - Other interest groups

Sensitivity of Target / 并购目标的敏感度



Comparison of CNOOC-Nexen and Wanxiang America-A123 Systems

对比中海油-尼克森和万向美国-A123 案件

- Similarities:

- 相似点:

- Reputational risk for each buyer.
每位收购方的声誉风险
- Each deal offered patient capital and important investment to the U.S. with the potential to save or grow jobs.
每一交易均可为美国提供长期资本和重要投资，并有可能保留或增加就业机会
- Both transactions faced some opposition within DOD.
两桩交易均在一定程度上遭到国防部的反对
- CFIUS administrative challenges.
CFIUS行政挑战

Comparison of CNOOC-Nexen and Wanxiang America-A123 Systems

对比中海油-尼克森和万向美国-A123 案件

- Differences:
不同点:

- Wanxiang faced stronger political obstacles – competitive bid situation with rival actively seeking to interfere in CFIUS and in Congress; sensitivities over DOE grants
万向面临更强的政治障碍---竞争性招标，且对手公司积极努力干预CFIUS和国会决定；能源部的拨款具有敏感性
 - Nexen – modest letter-writing from small number of Congressional members.
尼克森---来自少数国会议员的保守意见
- Nexen faced deeper security concerns 尼克森面临更深层次的安全隐患
 - Wanxiang – sensitive assets ultimately carved out of transaction that was reviewed by CFIUS; no proximity concerns.
万向---经CFIUS审查，敏感资产最终从交易中剥离；不存在临近性担忧
- Wanxiang was able to anticipate and address security issues in deal structure
万向能够在交易结构中预见到并处理好安全问题
 - CNOOC-Nexen struck deal focusing largely on other jurisdiction (e.g., Canada), not U.S.
中海油-尼克森达成了着重于其他司法辖区（如加拿大）的交易，而非美国

Contrasting Cases: Lenovo vs. Huawei

案例对比分析: 联想 vs. 华为

- IBM/Lenovo (2005)
IBM/联想(2005)
 - Engaged CFIUS counsel months before final deal
在最终签署协议前几个月就开始接触CFIUS律师
 - Consulted CFIUS informally to identify security concerns
CFIUS非正式咨询,了解安全方面的担忧
 - U.S. party took public lead
美国卖家在媒体面前很主动
 - Parties briefed CFIUS and Congress extensively in secret prior to announcing transaction
买卖双方正式公布交易之前,向CFIUS和国会分别广泛而又秘密地说明情况
 - Parties anticipated CFIUS concerns and offered mitigation proposals
买卖双方事先预料到CFIUS的担忧,主动提出缓和措施建议
- Huawei/3Com (2008)
华为/3Com(2008)
 - Engaged CFIUS counsel after deal went public
交易公布之后才向有经验的CFIUS律师咨询
 - No advance consultations with CFIUS
事先没有与CFIUS沟通咨询
 - Huawei was very vocal in press and made light of CFIUS concerns
华为在媒体上很强势,而且不重视CFIUS提出的担忧问题
 - Parties surprised CFIUS, Congress with no advance briefing
由于没有事先沟通,买卖双方让CFIUS和国会都很意外
 - Parties were surprised at CFIUS mitigation demands
买卖双方对CFIUS提出的缓和措施要求也很意外

Ralls Transaction

Ralls交易

- On September 28, President Obama issued an Executive Order prohibiting a transaction – only the second such formal order in history
2012年9月28日，奥巴马总统签发了禁止交易的行政指令，这是有史以来第二个该等正式的指令
- Transaction details:
交易详情:
 - In March 2012, Ralls indirectly acquired four Oregon wind farm projects
2012年3月，Ralls间接收购了俄勒冈州四家风电厂项目的所有权
 - Wind farm was located near restricted air space at Naval Weapons Systems Training Facility
风电厂靠近美国海军武器系统训练场的禁飞区

Ralls Transaction

Ralls交易

- Parties did not file with CFIUS and closed the transaction
双方没有向CFIUS申报，即进行了交割
- CFIUS required filing after transaction closed and ordered certain interim protections to protect national security:
CFIUS要求在交易完成后申报，并命令采取特定临时性保护措施以保护国家安全：
 - Prevented further construction and required demolition of existing construction
阻止进一步施工并要求拆除现有建筑
 - Removal of stockpiled assets 移除堆放的资产
 - Prevent transfer of ownership until removal of stockpile was complete
阻止所有权转让直至完成移除堆放的资产
- President's Order codified protections required by CFIUS and ordered divestment within 90 days 总统命令使得CFIUS 要求的保护入法，并命令在90天内出售资产
 - Ralls sued CFIUS and President – recent judicial rulings in USG's favor
Ralls起诉了CFIUS和总统-近期做出了有利于美国政府的司法判决

Lessons from Case Studies

案例分析总结

- **Careful planning / 细心规划**
 - Anticipate and address issues – critically important for the parties to anticipate and solve problems
事先预料并处理问题 - 预料到并解决好相关问题对双方均及其重要
 - Informal briefings with key agencies to prepare CFIUS for filing and solicit potential questions
向主要部门进行非正式汇报，让CFIUS对申报有所准备，并征询可能提出的问题
- **Proactive engagement of regulators to obtain level of comfort in connection with filing**
主动接触监管部门，以便对申报心中有数
 - Both parties must cooperate and work together to address questions
买卖双方必须通力合作，共同应对问题
- **Active management of Congressional dynamic**
及时掌握国会的动态
- **Significant benefits of not having rival bidders**
没有竞价对手是很大优势
- **U.S. seller can use its relationships to help give comfort to U.S. government officials and political actors**
美国卖家可以利用他们的关系宽慰美国政府和政客们
- **Key items to avoid:**
需要避免的重要事项：
 - ITAR prohibition / ITAR 禁令
 - Proximity to sensitive government facilities/靠近敏感政府设施

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