

# 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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***September 24, 2013***

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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



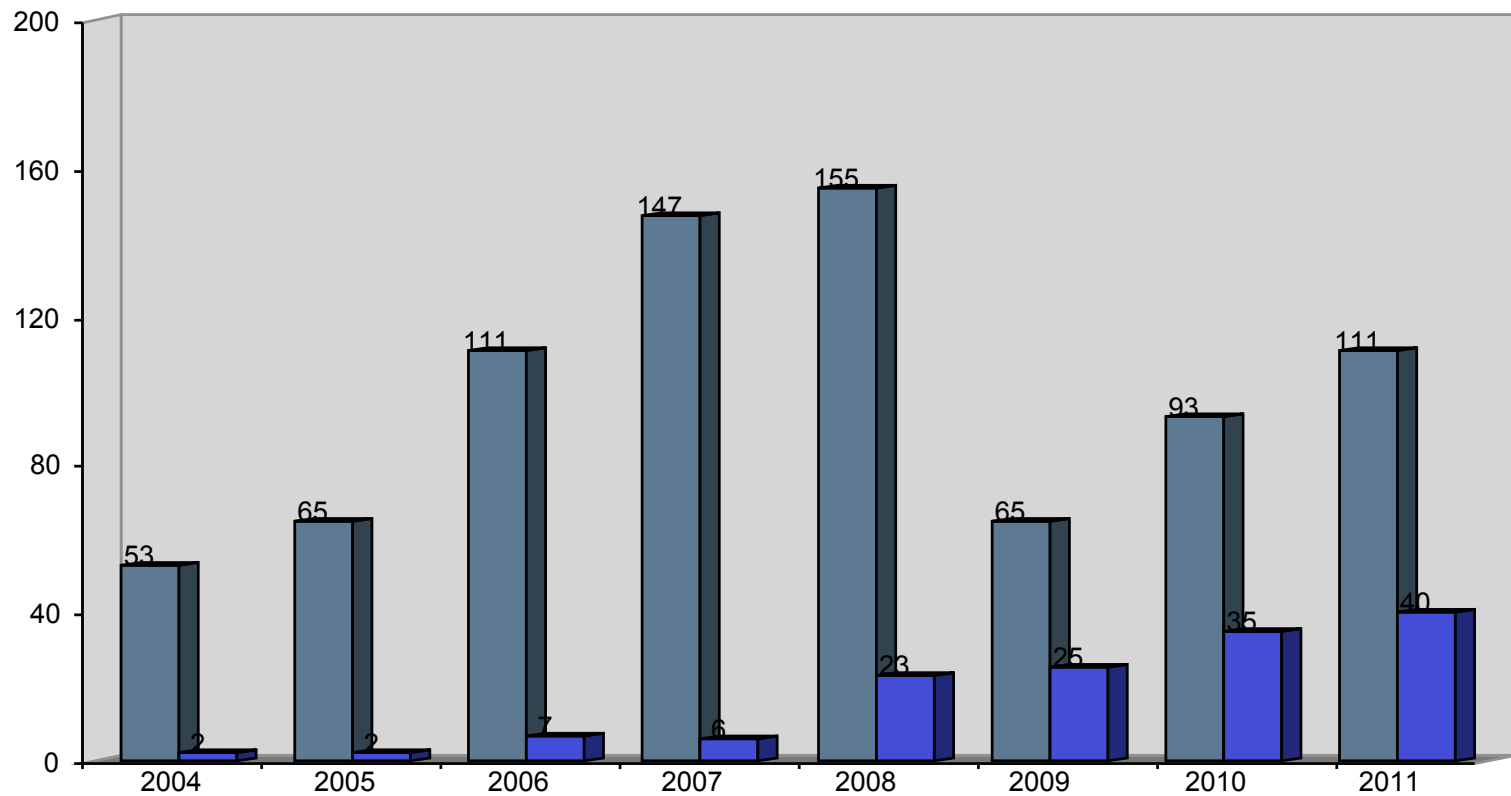
# Conditions for CFIUS Approval: Mitigation Agreements

- 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

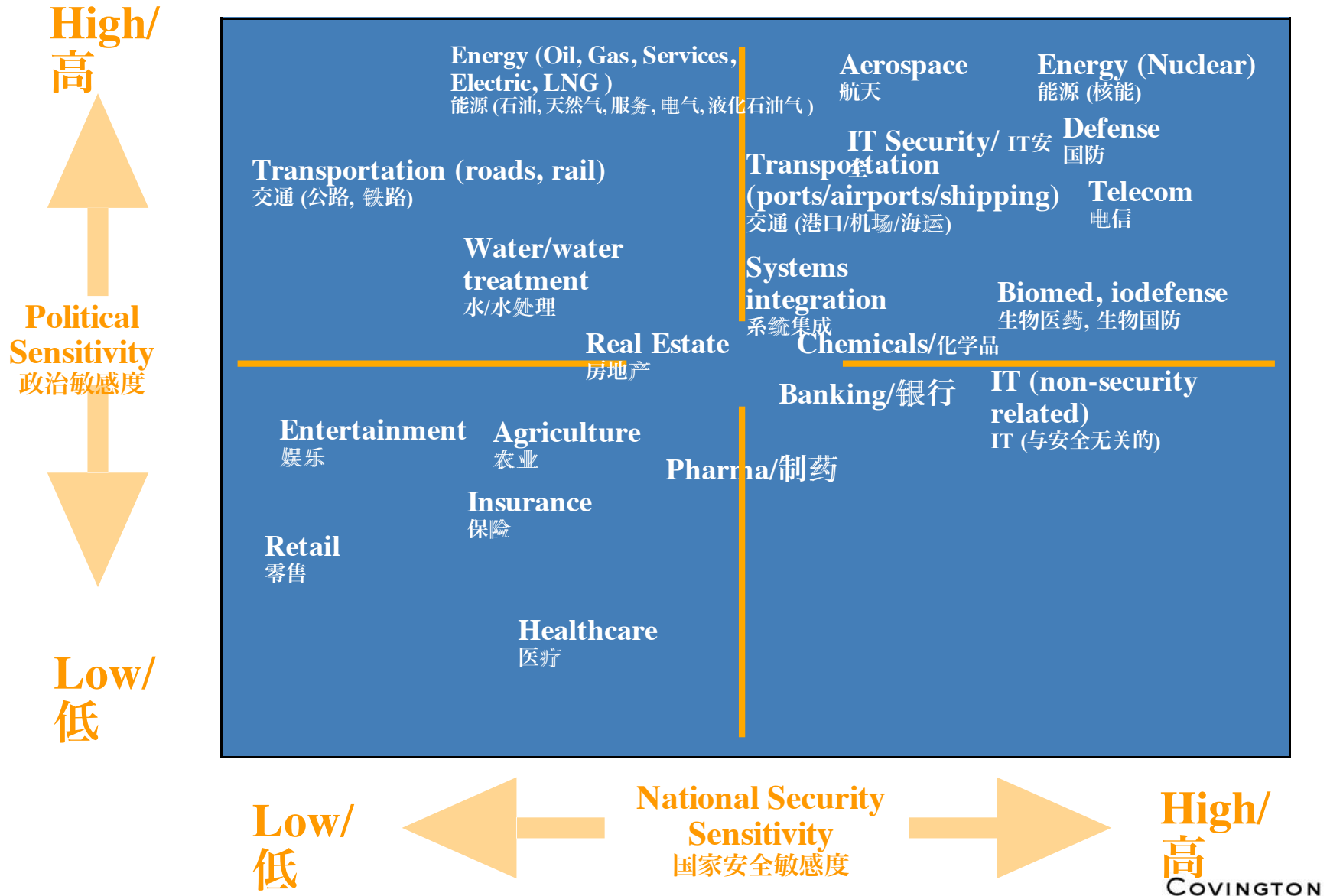
■ Filings申报  
■ Investigations调查



# 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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