

## Treasury Department releases 2023 CFIUS annual report

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Report indicates increased focus on mitigation agreement enforcement, broadly steady blocking and investigation rates, longer review timelines in some cases and a decrease in the number of declarations.

On July 23, 2024, the Committee on Foreign Investment in the United States (CFIUS or the Committee) released its [annual report](#) to Congress regarding its review of foreign investment transactions in calendar year 2023 (the 2023 Report). This client update summarizes the highlights from the 2023 Report, including key developments relative to CFIUS's 2022 annual report.<sup>1</sup>

### Summary of 2023 CFIUS activity

#### CFIUS filings: the figures

- **Notices.** CFIUS received 233 full notices of covered transactions in 2023. Of these notices, 35 were withdrawn and re-filed in 2023.<sup>2</sup> After taking out those 35 notices for which another notice was re-filed in the same year and the 15 notices reported in the 2022 annual report as being re-filed in 2023, CFIUS reviewed roughly 183 or fewer distinct new transactions through notices in 2023.<sup>3</sup>
  - CFIUS review of full notices consists of a 45-day review period, followed in many cases by a 45-day investigation period. CFIUS commenced a second-stage investigation for 128 of the notices received in 2023 (55%). This represents a slightly lower proportion of notices proceeding to a second-stage investigation compared to 2022 (57%), but both numbers overstate the number of transactions that actually clear within the first 45 days because of re-filed transactions, described below (i.e., a transaction may clear in the 45-day review period, but it may be the second filing).
  - When CFIUS is unable to clear a transaction within the statutory 45 day plus 45 day review and investigation period, parties may be compelled to withdraw and re-file the notification in order to give CFIUS more time to review (or the parties more time to negotiate a mutually acceptable mitigation agreement). In 2023, 43 notices (18% of all notices) were withdrawn and re-filed either in 2023 or 2024.<sup>4</sup> This represents a decrease in the rate of withdrawal and re-filing from previous years (24% of all notices in 2022 and 23% in 2021).<sup>5</sup>
- **Declarations.** CFIUS received 109 short-form declarations, a ~29% decrease from 2022 (154 declarations) and the lowest number of declarations received in the past four years. At the same time, the share of definitive clearances (as opposed to requests for full filings or decisions to take no position, leaving the parties free to proceed but CFIUS free to re-open the investigation at a later date) was the highest in the past four years.
  - ~76% of declarations resulted in a definitive clearance (up from 58% in 2022 and 73% in 2021).
  - ~18% of declarations resulted in a request for the declarant to submit a full notice.
  - The Committee took no position for ~6% of notices.

- **Mitigation.** In 35 cases, CFIUS cleared the transaction conditioned on mitigation measures or conditions (typically entering into a National Security Agreement, or NSA). CFIUS reports this represented roughly 21% of distinct 2023 transactions (i.e., deduplicating transactions that were the subject of multiple filings, which is common in cases where an NSA is entered into), which is slightly lower than but generally comparable to 23% in 2022.
- **Prohibitions.** As in the past, most transactions that CFIUS does not clear are abandoned by the parties before the President issues an order formally prohibiting the deal; there were no presidential decisions in 2023. CFIUS reports that 9 notices were withdrawn in 2023 and the associated transactions abandoned because CFIUS was unable to identify mitigating measures or proposed mitigating measures that the parties chose not to accept. Based on the implied number of distinct transactions disclosed in CFIUS's discussions of mitigation, this was approximately 5.4% of transactions that were the subject of a full filing. This rate is slightly lower than in 2022, with an implied prohibition rate of 6.7% of unique transactions.
- **Non-notified transactions.** CFIUS continues to be very active in looking for transactions of interest that are not voluntarily notified by the parties. CFIUS reports that it screened thousands of transactions and opened 60 inquiries into non-notified transactions, which resulted in 13 formal requests to file and 3 voluntary filings prior to conclusion of the inquiry.

## Timing

- **Timing.** The timing of CFIUS filings did not change substantially, although anecdotally the process appears to have slowed slightly.
  - The median CFIUS review continues to take essentially the entire statutory period (30 days for a declaration, 45 days for a first-phase review, and 45 days for a second-phase investigation). The mean time to complete an investigation has risen steadily over the past few years and is now 85.8 days, indicating that few transactions are cleared substantially before the deadline.
  - While CFIUS does not provide separate statistics for withdrawn and re-filed transactions, successive review periods also tend to run to the 45-day deadlines.
  - On the other hand, the Committee reports that the share of distinct transactions not requiring mitigation measures that were cleared in the first 30- or 45-day review period has increased from 58% in 2022 to 66% in 2023.<sup>6</sup> However, this figure is inflated by the inclusion of simpler short-form declarations, the bulk of which cleared in 30 days, and the exclusion of the 21% of full notices in which mitigation was imposed, none of which cleared in 45 days. It remains the case that under half of full notifications clear following the first-phase review.
  - Time taken for CFIUS to provide comments on draft notices and to begin the review of final notices remained relatively steady at approximately 8 and 5 days, respectively (though CFIUS sometimes extends the period by providing multiple rounds of comments).

## Country of filers

- **Notices.** Chinese investors continue to be active and accounted for the largest proportion of CFIUS notices in 2023, 14% (33 notices). This is a slightly higher proportion than in 2022 (12.6%). After China, investors from the United Arab Emirates (22 notices), the United Kingdom (19 notices), Singapore (19 notices), and Canada (16 notices) were the most frequently represented.
  - The number of notices attributed to Chinese acquirers is partially influenced by the number of notices that were withdrawn and re-filed, likely due to heightened scrutiny of Chinese acquirers. The most notices for distinct transactions were from acquirers at home in Canada, Japan and the United Kingdom.
  - Investors from the United Arab Emirates have seen the most notable increase in filings, going from zero notices in 2021 and 11 notices in 2022 to 22 notices in 2023 (a year with lower total volume).
- **Declarations.** As in previous years, declarations were largely made by acquirers from countries with close relationships to the United States. The most common home countries for declarants were Canada (13 declarations), France (11), Japan (11) and the United Kingdom (10). In contrast, the number of declarations for Chinese buyers was relatively small (with only two submitted), which likely reflects a strategic decision to file a full notice, given that CFIUS often applies higher scrutiny to Chinese buyers, and may request the parties to file a full notice.

## Key takeaways

Some key takeaways from the report are as follows:

- **Complex filings are not getting any easier (or shorter).** As discussed above, the time to resolve investigations continues to increase, despite growth in CFIUS resources and staffing. In our experience, the increase in the number of questions from and information requested by the Committee during an investigation continues to drive longer timelines.
- **Mitigation measures continue to expand.** While the share of notices that resulted in the imposition of some form of mitigation measures remained the same as in 2022 (roughly 18%), it is significantly higher than in 2020 (12%) and 2021 (11%). Moreover, CFIUS's indicative list of mitigation measures continues to expand, tracking changes to typical NSAs. Expansion has focused largely on data security and increased information and reporting requirements.
- **Expect non-compliance with mitigation measures to be more heavily scrutinized and penalized.** As discussed in our recent [client update](#), CFIUS has increasingly focused on enforcement, and the Treasury Department issued a notice of proposed rulemaking earlier this year to amend its compliance and enforcement provisions to sharpen its enforcement authorities. Consistent with this trend, in 2023, CFIUS assessed or imposed four civil monetary penalties for noncompliance with material provisions of mitigation agreements, double the total number of previous penalties in the entire history of CFIUS, and issued its first formal finding of a violation of the mandatory filing requirements.<sup>7</sup> The report notes that CFIUS member agencies increased investment in monitoring and enforcement resources in 2023.
- **Shifting trends in non-notified transactions.** CFIUS has made clear that investigating non-notified transactions is a priority of the Committee. As forecasted in the Committee's 2022 report, though, the total number of non-notified inquiries has continued to decline, from 135 in 2021 and 84 in 2022 to 60 in 2023, as the Committee uses its increased investigative resources to work through a backlog of historical transactions.<sup>8</sup> That said, the percentage of non-notified inquiries resulting in a formal request for a filing is trending upwards from ~6% in 2021 and ~13% in 2022 to ~22% in 2023, and we expect that CFIUS will continue to closely monitor for transactions of interest.

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- <sup>1</sup> U.S. Department of the Treasury, CFIUS Annual Report to Congress – Calendar Year 2022 (July 2023), available at: [https://home.treasury.gov/system/files/206/CFIUS%20-%20Annual%20Report%20to%20Congress%20CY%202022\\_0.pdf](https://home.treasury.gov/system/files/206/CFIUS%20-%20Annual%20Report%20to%20Congress%20CY%202022_0.pdf).
- <sup>2</sup> Another 8 notices were withdrawn and re-filed in 2024 and 14 notices were withdrawn without being refiled for a total of 57 withdrawn notices. All were withdrawn after commencement of an investigation.
- <sup>3</sup> This is only an estimate of the upper bound for distinct new notices in 2023. There may be other transactions, besides those for which a notice was withdrawn and re-filed, that have multiple notices, possibly because of multiple withdrawals and re-filings or short-form declarations that resulted in full notices. Section I-F of the 2023 Report states that the 35 notices for which CFIUS concluded action after adopting mitigation agreements or orders represent “approximately 21 percent of the distinct 2023 notices.” This would imply roughly 167 distinct new transactions resulting in a notice in 2023.
- <sup>4</sup> 42 of the 43 withdrawn and re-filed notices were re-filed voluntarily. In one case, the Treasury Department filed an agency notice after the parties declined to re-file.
- <sup>5</sup> As discussed in our recent [client update](#), the Treasury Department released a proposed rule in April 2024 that would impose a three business day deadline for parties to respond to proposed mitigating conditions.
- <sup>6</sup> CFIUS has 30 days to initially review a declaration, after which the Committee must either conclude action or take steps that could result in a formal notice and review. CFIUS has 45 days to initially review a notice, which it can extend by opening an investigation.
- <sup>7</sup> CFIUS conducted roughly the same number of site visits to assess compliance in 2023 (43 visits) as in 2022 (44 visits, no penalties) but significantly more than in 2021 (29 visits, no penalties).
- <sup>8</sup> CFIUS stated in its 2022 Annual Report: “The volume of overall non-notified transactions that were put forward to the Committee for consideration may continue to decrease as CFIUS works through its consideration of transactions that pre-date the Committee's current, increased level of resources. For example, in 2020, approximately 80 percent of the Committee's work in this regard focused on pre-FIRRMA transactions, whereas that number reduced to approximately 26 percent in 2021; it is now less than one percent.” CFIUS stated that the “volume of overall non-notified transactions that were put forward to the Committee for consideration may continue to decrease as CFIUS works through its consideration of transactions that pre-date the Committee's current, increased level of resources.” However, CFIUS is now primarily focused on monitoring more

recent foreign investments for potential non-notified and non-declared transactions.