

CFIUS 2023 Annual Report in Context: Focus on Monitoring and Enforcement Continues

October 3, 2024

On July 23, 2024, the Committee on Foreign Investment in the United States (“CFIUS”) [released](#) its Annual Report to Congress, which provides statutorily required information with regard to certain transactions reviewed by CFIUS in calendar year 2023 (the “Annual Report”).

This Debevoise Update provides key takeaways from the Annual Report, considered in the context of developments that suggest that CFIUS is strengthening its monitoring and enforcement tools and is increasingly willing to put those tools into practice.

Key Takeaways

Record Number of Civil Monetary Penalties Issued as CFIUS Signals Increased Focus on Enforcement

In 2023, CFIUS assessed four civil monetary penalties with respect to breaches of material provisions of mitigation agreements or conditions. This is a striking number—it is double the total number of civil monetary penalties issued by CFIUS in its nearly 50-year history (which were two in total, each also with respect to material breaches of mitigation measures).

While this higher number was expected given prior public comments by CFIUS officials, it is still significant, and [data released](#) in connection with an announcement by the Department of the Treasury (“Treasury”) of [new CFIUS website pages related to compliance and enforcement](#) suggests more penalties may be on the horizon. In 2024, CFIUS has already assessed two civil monetary penalties, including the first civil monetary penalty imposed on a transaction party for material misstatements made to CFIUS in its CFIUS filing and during the CFIUS review period.

We expect the number and monetary value of CFIUS penalties to continue to rise. Earlier this year, Treasury [released a Notice of Proposed Rulemaking](#) that would amend the CFIUS regulations to, among other things, broaden the scope of actions that may be

subject to a civil monetary penalty and raise the maximum penalty amounts CFIUS may impose.¹ This recent data suggests that CFIUS is beginning to utilize the sharpened monitoring and enforcement tools it has touted in public comments, including the Enforcement and Penalty Guidelines published in 2022²—tools that will only sharpen if the CFIUS regulations are amended as proposed. While no civil monetary penalties have been imposed to date for failure to make a mandatory filing, the Annual Report notes that, in 2023, CFIUS “undertook several investigations” to confirm compliance with these requirements, “some of which resulted in [the issuance] of formal determinations of noncompliance” and “informed Treasury’s decision to issue clarifying guidance on” how CFIUS determines the “completion date” for transactions where parties agree to “springing rights.”³

Fewer Declarations Filed, but More Cleared CFIUS Review, with Fewer “Shoulder Shrugs”

As shown in the table below, the number of filed declarations—the short-form CFIUS filing option—dropped nearly 30% from the previous calendar year, and nearly 35% from calendar year 2021’s all-time high. While this drop (and a comparable drop in notice filings) can be explained in part by the general decline in global M&A activity in 2023, it may also suggest that filers are getting better at identifying those transactions that are likely to obtain CFIUS approval within the shorter review period statutorily required for declaration filings. Of the total declarations filed, CFIUS concluded all action with respect to 76.1% of filed declarations (83 of 109) and only determined it was unable to conclude action (colloquially referred to as a “shoulder shrug”) for 5.5% of declarations (six of 109), representing the highest and lowest percentages, respectively, for each determination since the declaration filing option became available. In addition, the number of instances where CFIUS requested that parties file a long-form notice dropped from the previous calendar year’s high of 32.5% (50 out of 154) to 18.3% (20 out of 109). Our inference that parties are getting more adept at identifying transactions suitable for a short-form declaration filing is further supported by the data provided in the Annual Report with regard to the home country of filing foreign parties. Investors from Canada, France and Japan, countries allied with the United States and generally viewed as posing limited national security risks, filed the most declarations in 2023.

¹ Interestingly, CFIUS [notes](#) that it imposed the maximum amount authorized under the applicable CFIUS regulations for the 2024 civil monetary penalty for material misstatements in a CFIUS filing and during CFIUS review, perhaps suggesting that the amount would have been higher if the regulations had allowed.

² We note in particular that the information regarding civil monetary penalties assessed in 2023 and 2024 made available on CFIUS’s [website](#) includes a description of relevant aggravating and mitigating factors in accordance with the Enforcement and Penalty Guidelines.

³ See CFIUS Frequently Asked Questions, “How does CFIUS determine the ‘completion date’, in assessing when a mandatory filing should be submitted, where the foreign person first acquires equity interest but will not receive control or covered investment rights until after CFIUS’s review?”, available [here](#).

	Total Number of Declarations Filed	Concluded Action	Unable to Conclude Action	Request for Notice
CY2023	109	83 (76.1%)	6 (5.5%)	20 (18.3%)
CY2022	154	90 (58.4%)	14 (9.1%)	50 (32.5%)
CY2021	164	120 (73.2%)	12 (7.3%)	30 (18.3%)
CY2020	126	81 (64.3%)	16 (12.7%)	28 (22.2%)

Data taken from Table I-1. Covered Transaction Declarations, 2018-2023 (CFIUS Annual Report to Congress, Report Period: CY2023).

Fewer Notices Filed, with More Than Half Continuing to Go into Investigation

As shown in the table below, the total number of notices filed in 2023 dropped nearly 20% from the previous calendar year. While there was a slight drop in the percentage of notices that went into a second-stage investigation period (54.9% compared to the previous calendar year’s 57%), this number still represents more than half of all filed notices, signaling that parties filing a long-form notice should be prepared for a potentially long review period. While transactions involving any nationality can be subject to increased CFIUS scrutiny, data regarding the total number of notice filers by nationality indicates that CFIUS may be spending more time in its review of transactions involving parties from particular jurisdictions. Specifically, investors from China (33 notices), the United Arab Emirates (22 notices) and Singapore (19 notices) represented the top three notice filers for calendar year 2023, but when adjusted to reflect *distinct* transactions (i.e., not double-counting notices that were withdrawn and refiled or filed initially as a declaration and then refiled as a notice), investors from these countries were no longer among the top filers, which instead were investors from Canada, Japan and the United Kingdom. This suggests that investors from countries like China, the United Arab Emirates and Singapore were subjected to longer CFIUS review periods, through either making a notice filing after a declaration filing or having to withdraw and refile a notice. On the declaration point, this inference is supported by the low number of declarations filed by investors from these countries (China only had two, Singapore had zero, and the United Arab Emirates also only had two). Overall, it appears that investors from countries attracting greater scrutiny from CFIUS are making fewer CFIUS filings and being subject to longer CFIUS review periods when they do file.

	Total Number of Notices Filed	Number of Investigations	Presidential Decisions	Withdrawn Notices ⁴	Mitigation Measures Agreed or Imposed ⁵
CY2023	233	128 (54.9%)	0 (0%)	57 (24.5%)	43 (18.5%)
CY2022	286	163 (57.0%)	0 (0%)	88 (30.8%)	52 (18.2%)
CY2021	272	130 (47.8%)	0 (0%)	74 (27.2%)	31 (11.4%)
CY2020	187	88 (47.1%)	1 (0.5%)	29 (15.5%)	23 (12.3%)

Data taken from Table I-5. Covered Transactions, Withdrawals, and Presidential Decisions, 2014-2023 (CFIUS Annual Report to Congress, Report Period: CY2023), unless otherwise noted.

CFIUS Is Increasingly Relying on Mitigation to Regulate Certain Industries on a Transaction-by-Transaction Basis Where There Is an Absence of Industry-Wide Federal Regulation

As shown in the table above, mitigation measures continue to impact a large percentage (nearly 20%) of transactions for which a notice has been filed, and that percentage is increasing. CFIUS and other agencies, like the U.S. Government Accountability Office (“GAO”), have acknowledged the increased volume of covered transactions requiring mitigation. In a recent report assessing CFIUS mitigation practices,⁶ the GAO found that, in addition to their growing frequency, mitigation measures are becoming more intricate. Although Treasury officials attributed this trend to the rise of new national security risks, such as those involving data and information security, as well geopolitical changes that have led both to greater scrutiny of foreign investment in the United States as well mitigation measures that are “more detailed and complex,”⁷ it is also apparent that the U.S. government is using CFIUS to regulate certain industries (such as insurance companies and other companies that collect or maintain large amounts of personal data) on a transaction-by-transaction basis where there is an absence of comprehensive industry-wide federal regulation.

The greater number—and complexity—of adopted mitigation measures has required CFIUS to increase its resources dedicated to monitoring compliance with such measures and, where necessary, taking enforcement action. The Annual Report notes that CFIUS is currently monitoring 246 mitigation agreements and conditions, representing a year-

⁴ The numbers in this column reflect notices withdrawn during CFIUS’s first-stage 45-day review period and notices withdrawn after CFIUS commenced a second-stage investigation period. The majority of notices withdrawn were withdrawn following the commencement of an investigation (for CY2023, all 57; for CY2022, 87 of 88; for CY2021, 72 of 74; for CY2020, 28 of 29).

⁵ Data taken from Section I.F of the CFIUS Annual Report to Congress for the applicable calendar year.

⁶ U.S. Government Accountability Office, *Foreign Investment in the U.S.: Efforts to Mitigate National Security Risks Can Be Strengthened*, GAO-24-107358 (Apr. 18, 2024) (the “GAO Report”). The report is available [here](#).

⁷ GAO Report, page 30.

over-year increase in the total number of active mitigation agreements, despite CFIUS continuing to modify or terminate agreements as national security risks dictate, as it is statutorily required to do.⁸ In addition, the Annual Report notes that officials from CFIUS member agencies conducted 43 site visits in 2023, a number roughly on par with the number of site visits conducted in the prior calendar year (44 site visits) and higher than the number of site visits reported for calendar year 2021 (29 site visits), the first year that this data was incorporated into an annual report to Congress.

CFIUS Member Agencies Continue to Dedicate Resources to the Identification and Review of Non-Notified and Non-Declared Transactions

The Annual Report notes that CFIUS “identified and considered thousands of potential non-notified transactions” in calendar year 2023 and opened non-notified inquiries into 60 of such transactions, while formally requesting filings for 13 of these. CFIUS used various methods to identify such transactions, including interagency referrals, tips from the public, classified reporting, media reports, voluntary self-disclosures, congressional notifications, and multiple commercial and proprietary databases. As in prior years, the Annual Report notes that CFIUS member agencies continue to dedicate staff and resources to CFIUS’s non-notified review work, noting that transactions identified in this process “remain among the most complicated that CFIUS considers, and often require mitigation measures to address national security risks.”

The Number of Filings Made with Respect to Covered Real Estate Transactions Remains Low but May Increase as CFIUS’s Jurisdiction Grows

The Annual Report disclosed that, of the total declaration and notice filings made in calendar year 2023, 2.8% (3 of 109) and 0.9% (2 of 233), respectively, were with respect to real estate transactions. These numbers are roughly consistent with those disclosed in the previous annual report⁹ but may further increase in light of recent and proposed expansions to CFIUS’s jurisdiction with respect to real estate transactions. In his opening message in the Annual Report, Assistant Secretary of the Treasury Paul Rosen highlighted Treasury’s issuance in August 2023 of a final rule adding eight military installations to Appendix A of part 802 to title 31 of the C.F.R., effectively broadening the geographic reach of the definition of “covered real estate” in the CFIUS regulations. On July 8, 2024, Treasury issued a [Notice of Proposed Rulemaking](#) that would further expand CFIUS’s jurisdiction over certain real estate transactions: the proposed rule would add a total of 59 military installations to Appendix A, as well as move eight military installations currently listed in Part 1 to the more significant Part 2 of the Appendix. These expansions—[as well as recent executive action prohibiting the](#)

⁸ The total number of active mitigations and agreements in CY2020 was 166, which grew to 187 in CY2021, and then 214 in CY2022.

⁹ Of the total filed declarations and notices for CY2022, 3.2% (5 of 154) and 0.3% (1 of 286) were with respect to real estate transactions.

[acquisition of sensitive real estate by Chinese-owned cryptocurrency mining company, MineOne](#)—suggest that CFIUS is increasingly alert to national security risks arising out of foreign investment in U.S. real estate.

Review Processes May Be Becoming More Efficient, as Practitioners, Transaction Parties and CFIUS Alike Become More Accustomed to Current CFIUS Statutory Review Framework

Consistent with data provided in prior years, the Annual Report notes that CFIUS technically continues to provide timely review of draft declarations and notice filings within the statutorily mandated 30- or 45-day review period for declarations and notices, respectively, and 45-day review period for investigations. Of course, timely review of CFIUS filings is complicated by the fact that CFIUS may require parties to withdraw and refile notices when more time is required for review, but CFIUS has signaled improvement in that area. In his opening message to the Annual Report, Assistant Secretary Rosen further noted the “improve[d] efficiency” shown in the calendar year 2023 data, including “reducing the withdraw and refile rate for the first time in five years, from 23 percent in 2022 to 18 percent, as well as increasing the number of transactions cleared in the first 30- or 45-day period from 58 percent in 2022 to 66 percent in 2023.” The Annual Report also provides the average timing for other aspects of a CFIUS review, including formally accepting declarations within 4.2 calendar days, returning comments on draft notice filings within 7.86 calendar days and formally accepting final notice filings within 4.92 calendar days. Under these metrics, declaration acceptance for CY2023 was faster than CY2022’s average of 5.59 calendar days, with the return of notice comments and acceptance of final notice filings being slightly slower than CY2022’s averages of 7.4 and 4.5 calendar days, respectively, although both are still less than their 10-day statutory deadlines. The continued improvement in certain timeliness metrics for CFIUS reviews, while maintaining general consistency in others, likely reflects CFIUS, transaction parties, and practitioners becoming familiar with the CFIUS review process as it has developed in the years since the CFIUS regulations were finalized pursuant to the Foreign Investment Risk Review Modernization Act of 2018, which is largely responsible for establishing the current CFIUS review framework that incorporates short-form declarations and other CFIUS filing considerations. Looking to the future, perhaps other aspects of CFIUS review will become more timely as familiarity with the current CFIUS review process grows among all stakeholders.

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The dedicated CFIUS team at Debevoise & Plimpton has extensive experience advising on CFIUS and other national security regulatory issues, including those raised in the Annual Report. We stand ready to assist clients with the legal, policy, and practical dimensions of such issues.

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Please do not hesitate to contact us with any questions.



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