

## CFIUS Releases 2023 Annual Report

Article By:

Sevren R. Gourley

Leslie W. Kostyshak

Eric R. Markus

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### What Happened:

On July 23, 2024, the Committee on Foreign Investment in the United States (**CFIUS**) released its annual report for calendar year 2023 (the **Report**). The Report provides to the public the third full year of data regarding CFIUS activities since the implementation of the 2020 rule changes mandated by the Foreign Investment Risk Review Modernization Act (**FIRREA**) and discloses a number of trends and developments regarding CFIUS review of foreign investment in the United States.

### The Bottom Line:

The Report provides key insights for companies considering transactions within CFIUS's jurisdiction, including:

- The CFIUS caseload declined in 2023 during a period of decreased global merger and acquisition activity, with a total of 342 notices and declarations of covered transactions or covered real estate transactions filed in 2023 (inclusive of re-filings) as compared to 440 total notices and declarations (inclusive of re-filings) in 2022.
- In 2023, CFIUS cleared 66% of transactions (exclusive of re-filings) that did not require mitigation measures in either the 30-day assessment period for a declaration or the initial 45-day review period for a notice, an increase from 58% in 2022. However, CFIUS extended its review into the investigation period for 55% of notices in 2023, consistent with the percentage of notices for which review was extended in 2022.
- CFIUS assessed or imposed four civil monetary penalties for violations of material provisions of mitigation agreements, double the number of civil monetary penalties that CFIUS had previously issued during its nearly 50-year history and the first of such penalties imposed post-FIRREA.
- The number of re-filings, i.e., withdrawn and refiled transactions, declined for the first time in five years, from 24% of notices in 2022 to 18% of notices in 2023.
- Consistent with anecdotal reports that mitigation agreements are being requested in a larger

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number of transactions, CFIUS concluded action after adopting mitigation measures with respect to 35 notices (approximately 21% of the distinct 2023 notices), a slight decrease from the 23% of notices that involved mitigation in 2022, but significantly above numbers reported for years 2020 and 2021.

- CFIUS practitioners and stakeholders were provided insights through key actions in 2022; increased public engagement from CFIUS, the publication of enforcement and penalties guidance by the US Department of Treasury (*Treasury*), and Executive Order 14083, which directed CFIUS to consider certain factors in its reviews.

We discuss these highlights further below.

## **The Full Story:**

### **Declarations – Filings Decline as Clearance Rates Increase**

There were 109 declarations filed in 2023 – the lowest level since the 2019 Pilot Program (154 declarations were filed in 2022, 164 in 2021 and 126 in 2020). However, CFIUS cleared 76% of declarations in 2023, a marked increase from the 58% clearance rate reported for 2022 and on par with the 73% rate reported for 2021. The corresponding decline in non-clearance CFIUS responses was split, roughly proportionately, between no-action and notice-requested categories. Parties to declarations stipulated more frequently that such filings were mandatory in 2023—33% of all declarations were stipulated as mandatory in 2023, up from 28% in 2022.

These trends show that the lower clearance rate for declarations in 2022 may have been an aberration. The numbers suggest a return to acceptance of the declaration process on the part of both CFIUS and filers. It is also possible that the 2023 declaration results indicate a better understanding on the part of filers and CFIUS practitioners on when to file a declaration versus when to file a notice for a given transaction or reflect a decreased caseload and increasing efficiency at CFIUS. The decision of whether to file a declaration or a notice remains a key issue when considering a CFIUS filing.

### **Notices – Longer Review Periods Remain Despite Lower Caseload**

There were 233 notices filed in 2023, compared with 286 notices filed in 2022, 272 notices filed in 2021 and 187 notices filed in 2020. CFIUS initiated the second 45-day “investigation” period following an initial 45-day review period with respect to 128 (55%) of notices filed in 2023, on par with the 162 (56%) of notices subject to extended review in 2022. By contrast, CFIUS initiated the “investigation” period with respect to 130 of 272 notices (48%) in 2021. This suggests that longer review periods may be less influenced by CFIUS’s caseload at a given time than suggested by the data from prior years.

Filers withdrew 24% of notices in 2023, a decline in the percentage of withdrawn notices from 31% of notices filed in 2022 and 27% of notices filed in 2021, respectively. In 43 of the 57 instances of withdrawal in 2023, the parties re-filed the notice with CFIUS (compared with 68 of 88 withdrawn notices in 2022 and 63 of 74 withdrawn notices in 2021). The filing parties abandoned the filing in the remaining 14 notices – 9 instances because CFIUS had requested mitigation measures that the parties declined to accept and 5 instances because of unidentified commercial reasons. The rate of abandonment was slightly higher (25%) in 2023 from 2022 (23%). CFIUS rejected two notices in 2023. It appears that one of rejected notices was refiled and addressed as described above. As to the other rejected notice, the parties declined to refile and CFIUS then unilaterally initiated review of

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the proposed transaction, a rare step reflecting CFIUS's continued focus on mitigating national security risks.

The decline in notice filings, along with the decline in declaration filings noted above, reflects a significant drop in the number of transactions filed with CFIUS. Although filings remained relatively stable from 2021 to 2022, foreign direct investment into the United States dropped significantly from 2021 to 2022 according to analysis by the United Nations Conference on Trade and Development (UNCTAD). CFIUS filings remained relatively constant over this same period. Although UNCTAD analysis found foreign direct investment into the United States declined by 3% from 2022 to 2023, CFIUS filings dropped by much more than would have been predicted by this change over the same period.

### **Geographic and Sectoral Distribution Remains Consistent**

Investors from Canada (13 filings), Japan (11 filings), and France (11 filings) accounted for the most declarations in 2023. For the three-year period of 2021-2023, investors from Canada accounted for the largest proportion of declarations (13%) with 57 declaration filings over this period. Investors from Japan (40 filings), Germany (32 filings), and South Korea (32 filings) account for the remaining top five acquirer home countries for the three-year period 2021-2023.

With respect to notice filings, investors from China (33 filings), the United Arab Emirates (22 filings), the United Kingdom (19 filings), Singapore (19 filings), and Canada (16 filings) accounted for the highest number of notices in 2023. Chinese investors remain prominent notice filers with CFIUS, accounting for 14% of all notices filed in 2023, roughly on par with 2022 (13% of all notices filed), while accounting for less than 2% of declaration filings in 2023 (down from 3% of all declarations in 2022). For the three-year period 2021-2023, investors from China (115), Singapore (72), and Canada (69) accounted for the highest number of notice filings.

Among US business sectors seeing the most covered transaction filings in 2023, the finance, information and services sector continues to be a focus, accounting for 50% of all notices filed in 2023. Significant investment activity in US industries (by four-digit NAICS code designation) concerned scientific research and development services (25 notices and 12 declarations), electric power generation, transmission and distribution (20 notices and 6 declarations), and software publishing (19 notices and 1 declaration).

### **Critical Technologies Investment Remains Consistent**

Foreign investment in critical technology business held relatively steady as a percentage of covered transactions. In 2023, CFIUS reviewed 153 covered transactions involving the acquisition of US critical technology businesses (44% of total filings), compared with 181 (41% of total filings) in 2022 and 184 (42% of total filings) critical technology covered transactions in 2021. Of the 153 critical technology covered transactions in 2023, most filers hailed from Canada (14), the United Kingdom (14), Germany (12), Japan (12), and South Korea (12). The largest number of transactions involved acquisition of US businesses in the computer and electronic product manufacturing sector with 33 filings, followed closely by the professional, scientific, and technical services sector with 32 filings.

### **CFIUS Continues to Require Mitigation; Monitoring and Enforcement in Focus**

In 2023, CFIUS cleared 35 notices of covered transactions after adopting agreements to resolve national security concerns—approximately 21% of distinct 2023 notices. This is a slight decline from

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2022, when CFIUS cleared 23% of notices with mitigation, and remains elevated from 2021 levels (when CFIUS cleared just under 10% of notices with mitigation). This indicates that mitigation continues to be a focus for CFIUS and supports observations from our team and other CFIUS practitioners that CFIUS is requesting mitigation in more circumstances than it did prior to 2022.

As of 2023 year-end, CFIUS is currently monitoring 246 mitigation agreements and conditions. In 2023, 20 mitigation agreements and conditions were modified materially, of which 15 were terminated. All 36 mitigation agreements that were entered into for transactions filed in 2023 have compliance plans.

For the first time under the post-FIRRMA rules, CFIUS assessed civil monetary penalties for violations of mitigation agreements. CFIUS assessed four civil monetary penalties for breaches of material provisions in mitigation agreements. The Report notes that monitoring agencies conducted 43 site visits in 2023 to monitor compliance with mitigation agreements and, where noncompliance was identified, pursue remediation and determine whether a civil monetary penalty was appropriate under CFIUS's penalty guidelines. Prior to the four civil monetary penalties assessed in 2023, CFIUS had only assessed two civil monetary penalties in its nearly 50-year history, with the most recent being in 2019. The Report indicates that CFIUS also undertook investigations regarding noncompliance with mandatory filing requirements and, although these matters did not result in penalties after CFIUS considered the specific facts and circumstances, they informed the guidance published by CFIUS on its website in May 2023 with respect to staged transactions. Specifically, CFIUS clarified that the "completion date" triggering the deadline for submitting a mandatory filing is the date that the ownership interest is conveyed, not the later date on which the foreign person acquires the non-passive rights that would trigger the mandatory filing requirement.

According to the report, CFIUS reviewed fewer non-notified transactions but requested filings for a higher percentage (CFIUS reviewed 60 non-notified transactions in 2023, compared with 84 in 2022 and 135 in 2021 and formally requested filings for 22% of those transactions, compared with 13% in 2022 and 6% in 2021). This suggests that CFIUS's efforts in the non-notified transaction investigation process are becoming more targeted.

In 2022 CFIUS published Enforcement and Penalty Guidelines, which encouraged parties engaged in conduct that may be prohibited to submit voluntary self-disclosures to CFIUS. And perhaps related to this development, CFIUS received in 2023 its first "voluntary self-disclosure" related to a potential failure to file a mandatory declaration. Unfortunately, the report does not indicate the disposition of this self-disclosure. In April 2024, Treasury published a Notice of Proposed Rulemaking that would strengthen CFIUS's existing monitoring and enforcement rules by, among other things, substantially increasing the maximum civil penalties for violations. Our earlier coverage of this development is available [here](#).

These developments highlight CFIUS's increasing focus on compliance and enforcement, and companies subject to mitigation agreements, as well as foreign companies seeking to invest in the United States and domestic US companies seeking foreign investors, should consider CFIUS's increasing focus in this area carefully.

### **Real Estate Transaction Filings Remain Rare**

Filers continued to make a limited number of filings with respect to covered real estate made under CFIUS's part 802 rules in 2023; three declarations and two notices were filed for real estate transactions under the part 802 rules. This is roughly consistent with prior years. In 2022, CFIUS

reviewed five declarations and one notice for real estate transactions and in 2021, filers submitted one declaration and six notices for real estate transactions. The number of real estate filings has consistently fallen short of CFIUS's 2020 projections under the then-proposed FIRRMA rules of 150 real estate notices per year and 200 real estate declarations per year. It is not immediately clear why real estate filings continue to comprise so few of the filings in CFIUS's annual caseload as foreign investment in US real estate has held relatively steady 2020 through 2023.

In August 2023, Treasury issued a final rule adding eight military installations to the list appended to the part 802 rules, thereby expanding the realm of covered real estate. CFIUS recently proposed further expansion of the military installations list by Notice of Proposed Rulemaking issued July 8, 2024. Whether these incremental expansions of covered real estate in the United States result in more real estate filings remains to be seen.

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