

CFIUS Annual Report For 2023 Highlights Increasing Focus on Compliance and Enforcement Despite Reduction in Cases

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The Committee on Foreign Investment in the United States (CFIUS or the Committee) recently released the public version of its Annual Report to Congress for the calendar year 2023. The report shows an increasing emphasis on compliance and enforcement, including an uptick in penalty assessments and the Committee's issuance of determinations of non-compliance for failure to submit a mandatory filing.

CFIUS's caseload remained significant despite a decline in global M&A activity during the 2023 calendar year. The overall number of covered transactions (notices and declarations) reviewed or assessed by CFIUS in 2023 (342 transactions) was less than in 2022 (440 transactions) but remained high by historical standards. The Committee continues to focus on non-notified transactions, as it opened inquiries for 60 transactions and issued requests for filings in 13 of those cases. Notably, CFIUS issued four civil monetary penalties in 2023, double the total number of penalties CFIUS had previously issued in its nearly 50-year history. In addition, the Committee received the first-ever "voluntary self-disclosure" of a potential failure to submit a mandatory filing.

These compliance and enforcement efforts are rooted in the U.S. Department of the Treasury's (Treasury) CFIUS Enforcement and Penalty Guidelines published in October 2022 and reflect the Committee's commitment to promoting compliance with the CFIUS authorizing statute, Section 721 of the Defense Production Act of 1950. This era of heightened enforcement is likely to persist while Treasury considers measures to expand CFIUS's authorities, including new

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Practice Areas

Committee on Foreign Investment in the
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rules to expand CFIUS's jurisdiction to review purchases, leases, and other real estate transactions involving foreign persons. The following provides further highlights from the 2023 Annual Report.

Highlights of the 2023 Annual Report

Declarations

- The volume of declarations filed with CFIUS decreased from 154 in 2022 to 109 in 2023.
- Three of these declarations were for covered real estate transactions.
- For the 109 declarations filed in 2023, the Committee concluded action following a 30-day assessment in 83 cases, requested that the parties file a written notice in 20 cases, and informed the parties that it was unable to conclude action in 6 cases.
- Investors from Canada (13), Japan (11), and France (11) accounted for the most declarations in 2023. Investors from Canada (57), Japan (40), Germany (32), and South Korea (32) accounted for the largest proportion of declarations for the three-year period 2021-2023.

Notices

- The volume of formal notices filed with CFIUS that CFIUS determined to be covered transactions decreased from 286 in 2022 to 233 in 2023.
- Of the 233 notices filed in 2023, 128 cases—approximately 55%—proceeded to the investigation stage.
- No presidential actions were taken in 2023, though in 9 cases the parties withdrew their notices and abandoned the transaction “after CFIUS either informed the parties that it was unable to identify mitigation measures that would resolve its national security concerns or it proposed mitigation measures that the parties chose not to accept.”
- The Committee approved the withdrawal of 57 notices in 2023. Most of these were withdrawn to allow the parties additional time to consider CFIUS's proposed mitigation terms. Parties refiled their notices in 43 of these instances.
 - Parties may withdraw and refile a notice to restart the CFIUS review period if they need additional time to answer questions or attempt to resolve CFIUS's national security concerns or if there has been a material change in the terms of the transaction.
- Only two of the 233 notices were real estate notices.
- Investors from China (33), the United Arab Emirates (22), the United Kingdom (19), Singapore (19), and Canada (16) accounted for the highest number of notices in 2023. For the three-year period 2021-2023, investors from China (115), Singapore (72), and Canada (69) accounted for the highest number of notice filings.

Mitigation Measures

- In 2023, CFIUS adopted mitigation measures and conditions in 43 instances (approximately 18% of all 2023 notices).
- CFIUS concluded action after adopting mitigation agreements or orders with respect to 35 notices (approximately 21% of the distinct 2023 notices).
- CFIUS imposed a mitigation agreement to resolve residual national security concerns with respect to one notice that was withdrawn and abandoned in 2023.
- For six other notices that were withdrawn and abandoned, Treasury issued letters imposing conditions while stopping short of a mitigation agreement.
- The Committee imposed measures to mitigate interim risk with respect to one notice filed in 2023.

Continued focus on non-notified transactions. The Committee continued to use various methods to identify “thousands” of non-notified transactions for potential scrutiny. Of those, CFIUS opened inquiries for 60 transactions through its non-notified process (down from 84 in 2022) and issued a total of 13 requests for filing. In three additional cases, parties filed with CFIUS following CFIUS outreach but before receiving a formal request.

Civil monetary penalties for breaches of material provisions in mitigation agreements. The Committee assessed four civil monetary penalties in 2023 for breaches of material provisions in mitigation agreements. Prior to this, CFIUS had only assessed two civil monetary penalties in its nearly 50-year history, with the most recent being in 2019. Also, for the first time, the Committee issued formal determinations of non-compliance for failure to submit a mandatory filing under 31 C.F.R. § 800.401. Commentary in the report suggests that at least some of these cases involved staged transactions where the foreign person initially acquired a passive ownership interest in the U.S. business and obtained control or other rights with respect to the U.S. business only after CFIUS completed its review. CFIUS clarified in a frequently asked question posted to its website in May 2023 that the “completion date” triggering the deadline for submitting a mandatory filing is the date that the ownership interest is conveyed, not the date on which the foreign person acquires non-passive rights that would otherwise trigger the mandatory filing requirement.

Although the Committee did not assess a penalty in any of these cases “after CFIUS considered the specific facts and circumstances,” the regulations currently allow CFIUS to impose a civil penalty up to the greater of \$250,000 or the value of the transaction for failure to submit a mandatory filing.

In April 2024, Treasury published a Notice of Proposed Rulemaking that would strengthen CFIUS’s existing penalty and enforcement authorities by, among other things, increasing the maximum civil penalty from \$250,000 to \$5 million per violation (or, depending on the violation, the greater of \$5 million, the value of the transaction, or the value of the party’s interest in the U.S. business or covered real estate at the time of the violation or time of the transaction), among other changes.

Compliance Plans and Assessment of Compliance with Mitigation Agreements and Conditions. As of 2023 year-end, the Committee 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. Additionally, in 2023, the Committee received its first ever “voluntary self-disclosure” of a potential failure to file a mandatory declaration. This follows the Committee’s 2022 publication of Enforcement and Penalty Guidelines, which encourage parties engaged in conduct that may be prohibited to submit voluntary self-disclosures to CFIUS.

Wiley has unparalleled CFIUS and National Security practices that draw on senior government-level experience with CFIUS member agencies and numerous representations of domestic and international companies in complex transactions involving nearly every industry sector subject to CFIUS review. Should you have any questions regarding CFIUS’s 2023 Annual Report to Congress or proposed regulations, please do not hesitate to contact any of the members of our CFIUS and national security practices listed on this alert.

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