

Highlights from the CFIUS Annual Report

August 2024





Highlights from the 2023 CFIUS Annual Report

Key Takeaways

- The U.S. Department of the Treasury's Committee on Foreign Investment in the United States ("CFIUS" or the "Committee") has published its Annual Report to Congress for 2023 (the "Annual Report"), which provides important data on CFIUS' activities, including notices, declarations, mitigation, and enforcement actions through 2023.
- The Annual Report holds important insights for dealmakers contemplating participation by foreign investors for investments in U.S. businesses. Of note, 2023 marked a 22% decline in the number of transactions reviewed by CFIUS as compared to 2022, in which CFIUS reviewed a record number of transactions. However, this decline corresponds to a proportional dip in mergers and acquisitions in the global market over the past year.
- Notwithstanding the dip, the Annual Report demonstrates that it is more complicated than ever to navigate the CFIUS process. CFIUS continues to actively pursue the use of mitigation measures, pursued a record number of enforcement actions in 2023, and has published two notices of proposed rulemaking to strengthen its implementing regulations (which we discuss [here](#) and [here](#)).
- Considering these developments, dealmakers should evaluate CFIUS risks at the start of the transaction process and develop a sophisticated strategy to navigate the CFIUS process. We can help. Below, we highlight key data and takeaways from the Annual Report that dealmakers should know.

2023 at a Glance
As Compared to 2022



Timelines for CFIUS reviews continue to increase.

Absent a withdraw/refile, the longest possible review timeline for CFIUS review is 105 days. This includes an initial review period of 45 days, a possible additional 45-day investigation if determined necessary (in CFIUS' sole discretion) and, in extraordinary circumstances, an additional 15-day extension of the investigation period (prior to submission for presidential consideration). Notably, CFIUS exercised its authority to extend an investigation in extraordinary circumstances once in 2023 (it did not do so in 2022).

CFIUS did not provide guidance in the Annual Report regarding the circumstances that were sufficiently extraordinary to merit the use of this authority. As a practical matter, CFIUS often invites parties to request its approval to withdraw and resubmit filings, which restarts the review clock at day one and allows the parties and the Committee more than 15 days to resolve a review.

As in the recent past, in 2023, slightly more than half of all notices (approximately 55%) were extended into an investigation period. However, investigations now last longer. The average investigation in 2023 lasted 86 days, about a week longer than the average investigation in 2022 (80 days).

Average Length of CFIUS Investigations (2022 vs. 2023)



The Annual Report also provides other valuable data on CFIUS timing. In 2023, it took CFIUS on average about seven business days to provide parties with written comments on draft notices submitted to CFIUS, and about four business days to accept a final notice for review once it

has been submitted. Both time periods are unchanged from 2022.

Given the decrease in transactions reviewed, it is worth noting that CFIUS' response time has nonetheless increased. CFIUS appears to be attempting to address the issue through staffing and other measures; for FY 2024, Treasury requested an additional 39 full-time employees to work on CFIUS activities for a total 141 full-time CFIUS employees in FY 2024. Staffing aside, the data in the Annual Report appears to suggest that the CFIUS review process is increasingly complicated, requiring lengthier review times and accentuates the importance of developing a CFIUS strategy at the earliest stages of a transaction process.

The declaration process has begun to lead to more clarity for certain transaction parties.

When filing a declaration, there is a range of outcomes (as opposed to the filing of a notice, which provides parties with a clear-cut response from the Committee). CFIUS may respond to a declaration by informing parties that it:

- cleared the transaction;
- initiated a unilateral review;
- requested that the parties submit a full formal notice; or
- is unable to reach a decision regarding clearance based on the declaration alone.

The data from the Annual Report shows how these options continue to play out for foreign investors.

In 2023, there was also a larger percentage (76%) of transactions cleared through the declaration process as compared to 2022 (54%), as well as a smaller percentage (18%) of declarations that led to a request for a formal notice as compared to 2022 (32%). CFIUS was also unable to conclude action on a smaller percentage (6%) of the declarations filed, as compared to 9% in 2022. The percentage of declarations filed by parties that did not have a mandatory declaration filing requirement (77%) has also increased as compared in 2022 (72%), albeit only slightly.

Overall, it appears that dealmakers and their advisors have begun to better identify appropriate use cases for declarations in the approximately six years since CFIUS reform legislation introduced the declaration process. Although the Annual Report does not provide data on which parties file declarations for which types of covered transactions, statements from CFIUS officials have hinted that the Committee does not view declarations as appropriate for all investors or for all types of covered transactions, but that some transactions may be better suited for the declaration process (e.g., minority investments by excepted investors from excepted foreign states). Dealmakers should consult with counsel to determine what type of CFIUS review is most appropriate for the nature of their investment.

2023 Declaration Assessments



CFIUS continues to mitigate risks through national security agreements.

In 2023, CFIUS adopted mitigation measures for 18% of notices submitted to the Committee for review. As described further below, the Annual Report also illustrates that such mitigation measures can be imposed at various points in the transaction review timeline (and not just at the conclusion of a review).

CFIUS can impose mitigation measures on a foreign acquirer's investment in or acquisition of a U.S. business to resolve any national security risks that the Committee

identifies during its review. The Annual Report included examples of mitigation measures negotiated in 2023 that required the parties involved to take specific and verifiable actions. These actions included the following:

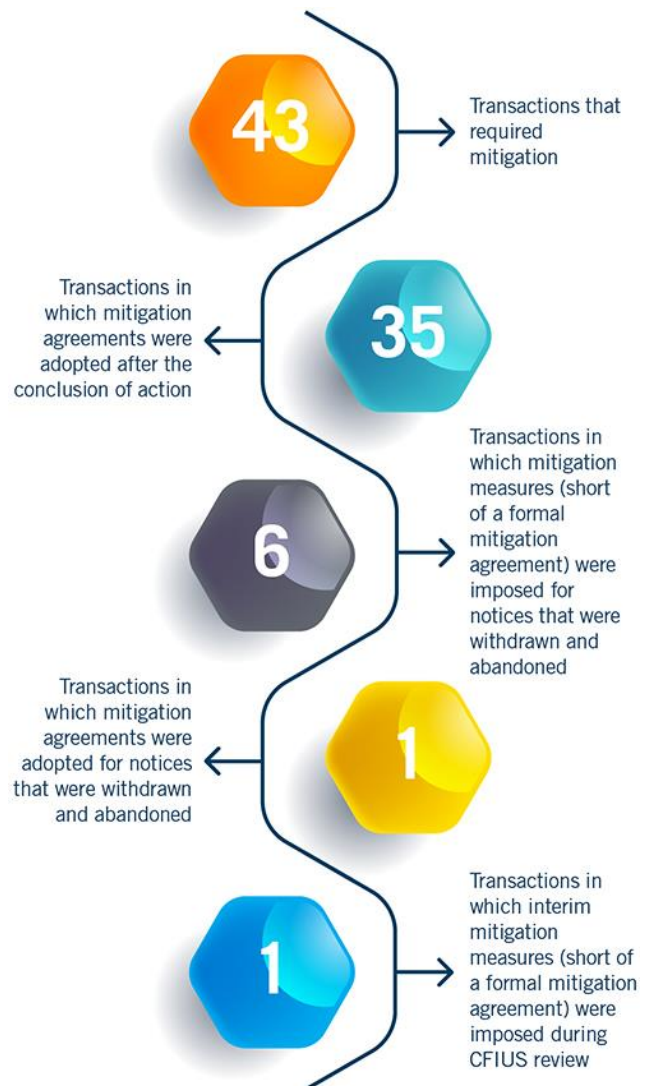
- Prohibiting or limiting the transfer or sharing of certain intellectual property, trade secrets, assets, or technical information;
- Ensuring that only authorized persons have access to certain technology, systems, facilities, projects, or sensitive information;
- Establishing guidelines and terms for handling existing or future contracts with the U.S. government or its contractors;
- Ensuring that computer networks are segregated;
- Ensuring that certain facilities, equipment, and operations are located only in the United States;
- Establishing a corporate security committee, voting trust, and other mechanisms to limit foreign influence and ensure compliance, including the appointment of a U.S. government-approved security officer, member of the board of directors, or board observer;
- Ensuring that only authorized vendors supply certain products or services;
- Requiring prior notification to and approval by relevant U.S. government parties in connection with any increase in ownership or rights by the foreign acquirer; and
- Requiring divestiture by the foreign acquirer of all or part of the U.S. business.

The illustrative list of mitigation measures has also been expanded to include several measures that were not included in the 2022 CFIUS Annual Report and prior examples were expanded or modified. For example, ensuring that computer networks are segregated is a new action. Other new actions include destroying sensitive information, establishing processes to review and approve contracts involving third parties, notifying the U.S. government prior to entering into agreements to collaborate with persons in certain countries, and ensuring that U.S. businesses notify customers regarding the identity of

ultimate beneficial owners. Each of these new actions demonstrates the expanding breadth of restrictions that CFIUS may seek to impose on parties.

Transaction parties should also take note of the various points in the review timeline in which the Committee imposed mitigation measures; not all were imposed at the conclusion of a review. In seven instances, CFIUS adopted mitigation measures and conditions in cases in which parties withdrew their notices and abandoned the transactions. Mitigation measures were also imposed to mitigate interim risk before the conclusion of a review in one instance in 2023. Transaction parties should continue to evaluate what mitigation measures might be required early in the transaction planning process and determine whether, and to what extent, such measures might impact the feasibility of proceeding with the transaction (and on what timetable).

CFIUS Use of Mitigation in 2023



The Annual Report also includes a list of measures that CFIUS can use to monitor and enforce companies' compliance with mitigation measures. They include:

- Periodic reporting to CFIUS;
- Required reporting to CFIUS of actual or suspected violations;
- Required responses to CFIUS requests for information;
- Regular communication with embedded security and compliance personnel and third-party monitors;
- On-site or virtual compliance reviews by CFIUS;
- Third-party audits; and
- Investigations and remedial actions.

The mitigation measures data in the Annual Report aligns with certain of Assistant Secretary of the Treasury for Investment Security Paul Rosen's new priorities for the Committee, namely increasing focus and resources on monitoring and enforcement. CFIUS officials have also emphasized how important it is that U.S. businesses subject to mitigation agreements develop and implement effective compliance programs and focus on doing so in keeping with the timelines agreed to with the Committee. During Treasury's Second Annual CFIUS Conference in September 2023, CFIUS officials expressed that they have identified many potential compliance exceptions during the implementation phase (usually the first few months following the date a mitigation agreement becomes effective).

As evidenced from the list of measures that CFIUS can use to monitor and enforce companies' compliance with mitigation measures, CFIUS has multiple tools in its enforcement toolkit to ensure compliance. Certain of these tools have emerged with new emphasis, such as site visits (the Committee conducted 43 site visits in 2023). When preparing for site visits, Assistant Secretary Rosen has emphasized that mitigated companies should "prepare backward- and forward-looking materials and should expect interviews to be conducted at all levels, including line-level staff, performance of spot checks on records, and

engagement in other measures to actively monitor compliance."

As CFIUS looks at risk more broadly, even if its risk formula has remained unchanged (threat + vulnerability = consequence), dealmakers must ensure that they too employ thoughtful CFIUS risk and mitigation compliance strategies and that they are ready to engage with the Committee's monitoring and enforcement arm on an ongoing basis for transactions that result in a mitigation agreement.

CFIUS is increasingly focused on compliance and enforcement.

As we shared earlier this year, although CFIUS has historically only engaged in enforcement activities sparingly (there have only been two CFIUS enforcement actions disclosed pre-FIRRMA and until 2023 none post-FIRRMA), the Committee has pursued new enforcement actions in 2023. In addition, after almost a year of preview from CFIUS officials, Treasury issued an NPRM in April (which we discuss [here](#)) that sets out a series of amendments to CFIUS' implementing regulations designed to enhance CFIUS' enforcement authority, reduce mitigation negotiation timelines, and increase applicable civil monetary penalties, among other changes.

The Annual Report finally provides more data on these enforcement actions, as well as insight into the Committee's other compliance and enforcement activities. Per the Annual Report, the Committee is currently monitoring 246 mitigation agreements and conditions. In 2023, 20 mitigation agreements and conditions were modified, and 15 were terminated (evidencing that mitigation agreements can be concluded).

Consistent with the CFIUS Penalty and Enforcement Guidelines (which we discuss [here](#)), the Committee assessed four civil monetary penalties in 2023 for "breaches of material provisions in mitigation agreements." In addition, the Annual Report describes how the Committee undertook several investigations with respect to ensuring compliance with CFIUS' mandatory filing requirements, ultimately issuing formal determinations of noncompliance (the exact number is unknown). Although these instances of noncompliance did not result in a formal

penalty, they did result in the publication of a new FAQ regarding the transaction “completion date,” which was an important update for the market (and which we discuss [here](#)). The Annual Report also notes the receipt of the first ever voluntary self-disclosure of a potential failure to file a mandatory declaration under the CFIUS Penalty and Enforcement Guidelines.

The Committee’s increased compliance and enforcement actions highlight the importance of contemplating transactions involving foreign investments in U.S. businesses early in the transaction process, and ensure that if mitigation measures are imposed there is an actionable compliance program developed to oversee compliance with the parties’ obligations. As the Committee continues to make clear, the cost for not doing so may be more than reputational.

2023 CFIUS Compliance and Enforcement Activities



The number of notices withdrawn from CFIUS remains high overall, continuing to signal the increased complexity in navigating the CFIUS process.

In 2023, 57 notices (or 24% of all notices submitted to the Committee for review) were withdrawn from CFIUS review. Although this marks a decrease from 2022, in which 30% of all notices submitted to the Committee for review were withdrawn, the number remains high overall. Although

about three quarters of the notices withdrawn were resubmitted to the Committee for review (43 notices), about one quarter (14 notices) were withdrawn and not resubmitted, suggesting that these transactions were abandoned in the face of CFIUS resistance. In nine such instances, either CFIUS could not identify mitigation measures that would resolve the Committee’s national security concerns, or the parties were unwilling to accept the mitigation measures presented to them. In five such instances, the parties withdrew their notices and abandoned the transactions “due to commercial reasons” (which could also include reasons related to perceived CFIUS risk).

Withdrawing and refiling notices also has implications for parties’ transaction timelines; when a notice is withdrawn and refiled CFIUS can “restart the clock.” This provides the Committee an additional 45 or 90 days (or more) to review the transaction and can add months to the CFIUS review timeline. The withdrawal data from the Annual Report also highlights the increased complexity in the CFIUS process, which further emphasizes that a thoughtful CFIUS strategy should be an important part of the transaction arrangements.

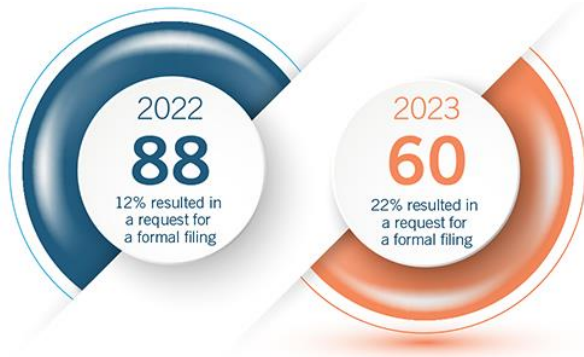
2023 CFIUS Notices Withdrawn



CFIUS’ office of non-notified transactions team remains busy.

According to the Annual Report, CFIUS identified and requested information regarding 60 “non-notified” transactions (meaning transactions that technically fall within CFIUS’ jurisdiction but were not presented to the Committee for review) which is a decrease from 2022 (88 non-notified transactions). From those 60 transactions, however, only 13 resulted in a request for formal filing, although this number does not reflect instances in which parties chose to voluntarily file a declaration or notice after engaging with CFIUS regarding the non-notified transaction.

Identified Non-Notified Transactions (2023 vs. 2022)



Although the data from the Annual Report shows a small number of formal requests for a filing, as we have previously reported, the Annual Report data does not tell the full story. The Annual Report itself bolsters this point, and states that CFIUS member agencies review thousands of transactions over a year. Given the uptick in deals before CFIUS, together with the Committee’s focus on identifying non-notified transactions, it remains important for transaction parties to include CFIUS considerations during the diligence phase.

Non-U.S. investors from “Excepted Foreign States,” U.S. allied countries, and China continue to account for a large share of transactions submitted for CFIUS review.

In 2022, investors from allied nations and “excepted foreign states” dominated the data set. In 2023, such investors are still a large part of the story, but so were investors from China.

With respect to notices, investors from China accounted for 33 notices (or 14%) submitted for review, with investors from the United Arab Emirates (22 notices or 9%) in second place and investors from the United Kingdom and Singapore (each with 19 notices or 8%) tied for third place. With respect to declarations, investors from Canada accounted for 57 declarations (or 13%), with investors from Japan (40 declarations or 9%) in second place and investors from Germany and South Korea (each with 32 declarations or 7%) tied for third place.

In addition, with respect to acquisitions of critical technology, in 2023, investors from Canada and the United Kingdom came in first with such acquisitions (each with 14

acquisitions), with investors from Germany, Japan, and South Korea in second place (each with 12 acquisitions) and investors from France (10 acquisitions) and China (7 acquisitions) rounding out third and fourth place.

2023 Top Foreign Investors by Country



It is also noteworthy that investors from Australia, Canada, the United Kingdom, and New Zealand (despite the countries’ status as “excepted foreign states” under the CFIUS regulations during 2023) accounted for 17% of all CFIUS notices submitted. As nationals of “excepted foreign states,” investors from Australia, Canada, the United Kingdom, and New Zealand enjoy benefits not available to other foreign investors. For example, under certain circumstances, “excepted investors” are not subject to mandatory filing requirements and are shielded from CFIUS’ expanded authority over non-controlling investments in certain U.S. businesses and certain U.S. real estate transactions. In theory, such benefits may enable such “excepted investors” to present to their potential transaction partners fewer impediments to closing as compared to other foreign investors who condition their investments on the receipt of CFIUS’ approval. In practice, investors from these countries continue to submit

transactions for the Committee's review at a higher rate than other countries, making their status seem like it might be a distinction without a difference.

Conclusion

The Committee remains active as it adjusts its mission to protect U.S. national security in a constantly evolving risk landscape. Transaction parties contemplating investments (whether direct or indirect) by foreign investors in U.S. businesses should continue to evaluate CFIUS considerations early in the transaction process to avoid surprises and delays on their preferred path to closing.

Dechert has represented many clients through CFIUS reviews, including major operators and investors in the high tech, telecommunications, energy, defense, and infrastructure industries. We regularly advise foreign and domestic entities ("buyers" and "sellers," as well as other interested third parties) through the CFIUS review process, helping them determine whether or not to bring a transaction before the Committee (and whether or not CFIUS review is required), to assemble the required information and materials for a filing, and then (as necessary) to negotiate national security agreements with CFIUS in a manner that minimizes both delay and the imposition of conditions that might threaten the transaction. We also give counsel on strategies for identifying and addressing political and policy considerations that may arise.



This update was authored by:



Jeremy B. Zucker
Partner
Washington, D.C.
+1 202 261 3322
jeremy.zucker@dechert.com



Darshak S. Dholakia
Partner
Washington, D.C.
+1 202 261 3467
darshak.dholakia@dechert.com



Hrishikesh N. Hari
Partner
Washington, D.C.
+1 202 261 3347
hrishikesh.hari@dechert.com



Betsy Feuerstein
Associate
Washington, D.C.
+1 202 261 3366
betsy.feuerstein@dechert.com



Brooklynn Moore
Associate
Washington, D.C.
+1 202 261 7920
brooklynn.moore@dechert.com



Amy A. Jicha
Associate
Charlotte
+1 704 339 3128
amy.jicha@dechert.com

© 2024 Dechert LLP. All rights reserved. This publication should not be considered as legal opinions on specific facts or as a substitute for legal counsel. It is provided by Dechert LLP as a general informational service and may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome. We can be reached at the following postal addresses: in the U.S.: 1095 Avenue of the Americas, New York, NY 10036-6797 (+1 212 698 3500); in Hong Kong: 27/F Henley Building, 5 Queen's Road Central, Hong Kong (+852 3518 4700); and in the UK: 160 Queen Victoria Street, London EC4V 4QQ (+44 20 7184 7000).

Dechert internationally is a combination of separate limited liability partnerships and other entities registered in different jurisdictions. Dechert has more than 900 qualified lawyers and 700 staff members in its offices in Belgium, China, France, Germany, Georgia, Hong Kong, Ireland, Kazakhstan, Luxembourg, Russia, Singapore, the United Arab Emirates, the UK and the U.S. Further details of these partnerships and entities can be found at dechert.com on our [Legal Notices page](#).