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CFIUS Bears Its Teeth While Demonstrating Further Sophistication: 2023 Annual Report Shows Increased Enforcement and More Efficiency

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The Committee on Foreign Investment in the United States (“CFIUS” or “the Committee”) has released its [annual report](#) to Congress, covering CFIUS’ activity during calendar year 2023 (the “Annual Report”). This Annual Report covers statistical changes related to CFIUS’ review of 2023 transactions (*i.e.*, declarations and joint voluntary notices (“JVNs”)), as compared to prior years.

Key Highlights:

- CFIUS assessed 4 civil monetary penalties in 2023 for breaches of material provisions of mitigation agreements, a significant development because CFIUS had previously assessed only 2 such penalties in its 50 year history. All 6 of these penalties resulted from breaches of mitigation either imposed or required by CFIUS.
- CFIUS reviewed a total of 287 Distinct Transactionsⁱ in 2023, a notable decrease of 14.8% from 2022, although in line with the general decline in U.S. M&A and private equity deal making activity.
- CFIUS required mitigation in 15.0% of Distinct Transactions in 2023, a small decrease from 2022 (15.4%), both of which are still higher than the 2019 – 2021 average (9.6%).
- The President did not issue any orders prohibiting or divesting any transactions in 2023, although President Biden reviewed 1 transaction in 2023.ⁱⁱ
- CFIUS reviewed 35 transactions from China, which on its face is more than from any other country; however, this figure almost certainly overstates the amount of Chinese transactions because it likely includes multiple JVNs withdrawn and refiled. In that case, CFIUS would have reviewed more transactions from Canada and the United Kingdom, each with 29, than any other country.

Bearing Teeth

CFIUS Has Increased Enforcement Activities and Authorities In Multiple Respects

In 2023, CFIUS issued civil monetary penalties in 4 instances, a historically unprecedented amount in an annual timeframe, each as a result of breaches of material provisions of national security risk-mitigation agreements. Previously, CFIUS had imposed penalties only twice, once in 2018 and once in 2019. All 6 of these penalties resulted from violations of mitigation either imposed or required by CFIUS, although CFIUS has not published a brief description of the underlying offense or the monetary amount for the 2023 penalties, as it did for the 2018 and 2019 penalties, signaling a potential reduction in transparency regarding aspects of the penalty process.

CFIUS enforcement surrounding the mandatory filing requirement also notably increased in 2023, with CFIUS instituting multiple investigations of transactions that it found to have violated the same. CFIUS did not issue any penalties as a result of these investigations, which we understand related to the previously widespread practice of using “springing rights” to delay the onset of the mandatory filing requirement. As background, and as further explained in our [previous alert](#) on the topic, if a transaction requires a mandatory filing, parties must file no later than 30 days before the completion of the transaction. Prior to clarification from CFIUS, parties had been able to defer the onset of this filing requirement in certain cases, such that parties could execute definitive transaction documentation, transfer a non-controlling equity interest to the buyer, and then transfer the governance rights and/or the remainder of the equity interest to the buyer only after CFIUS approved the transaction. On the heels of these enforcement investigations, however, CFIUS issued guidance in June 2023 that effectively prohibited the use of such constructs.

CFIUS continues to aggressively interpret matters relating to the mandatory filing requirement. We expect further investigations by CFIUS regarding the mandatory filing requirements, perhaps followed by additional guidance on the topic and, in egregious cases, the imposition of severe penalties.

These enforcement actions exist in the context of CFIUS’ Enforcement and Penalty Guidelines, issued in October 2022, and CFIUS’ [proposed rule](#) to increase the maximum monetary penalty amount in certain cases and expand its subpoena authority.

CFIUS’ mitigation actions remained elevated in 2023 after materially increasing in 2022. While CFIUS required mitigation in a smaller proportion of cases in 2023 (15.0%) than in 2022 (15.4%), CFIUS continued to require mitigation in a much higher proportion of cases than in 2019 – 2021 (averaging 9.6%).

Also, CFIUS recently previewed an expansion of its covered real estate jurisdiction by adding an aggregate 56 locations to the regulation.ⁱⁱⁱ Notwithstanding this increased coverage, we still expect covered real estate transactions to remain a relatively modest aspect of CFIUS’ docket. In 2023, only 2 JVN notified CFIUS of a covered real estate transaction, which is consistent with prior years’ trends. While a covered real estate transaction cannot require a mandatory filing, CFIUS retains the ability to take action, including forced divestment, with respect to any covered real estate transaction that the parties did not notify to CFIUS and that occurred from February 13, 2020, until the present.

Yielding Further Sophistication

CFIUS Built on, and Increased, Certain Prior Efficiency Gains

CFIUS’ generally prompt initial review and acceptance of declarations and JVN continued in 2023, with CFIUS decreasing the acceptance time for declarations to an average of 4.2 days in 2023 from 5.6 days in 2022. While not covered by the annual report, we have noticed that in certain instances CFIUS has begun treating the initial submission of a declaration as a draft declaration. Judicious use of this approach should facilitate CFIUS’ continued timely acceptance of declarations. CFIUS took slightly longer to accept JVN in 2023 (4.9 days) compared to 2022 (4.5 days), but these are still well short of the 10 business day deadline established in the regulations.

CFIUS continued in 2023 to review covered transactions that were not voluntarily notified to the Committee and initiated an inquiry to the parties in 60 instances, a decrease from the 84 inquiries in 2022 and a significant decrease from the 135 inquiries in 2021. This could indicate that certain parties have reduced their risk tolerance with respect to non-notified inquiries in response to CFIUS’ significant expansion after 2020 of its ability to evaluate the tens of thousands of non-notified transactions that nonetheless are subject to its jurisdiction. Also, CFIUS requested a non-notified filing from the parties in a similar number of instances in 2023 (13) as in 2022 (11) and 2021 (8), which could indicate that CFIUS is getting more sophisticated in its non-notified inquiries by increasingly identifying transactions more germane to U.S. national security risks.

For the first time, CFIUS provided in 2023 a clean clearance of transactions notified by declaration in over three-quarters of transactions filed in a given year (76.1%). This continues a positive general trend, excepting 2022 (58.4%), indicating that CFIUS and parties remain comfortable with the declaration form as a viable route to clearance. Interestingly, parties notified only 38.0% of Distinct Transactions as declarations, which appears to demonstrate that parties' use of the declaration form has become more judicious and should indicate a generally maturing declaration process.

CFIUS continues to demonstrate an ability to terminate obsolete national security agreements, with CFIUS terminating 15 such agreements in 2023 after terminating 16 such agreements in 2022. This streamlines CFIUS' activities in this regard, while facilitating the capacity of CFIUS member agencies to enter into and monitor national security agreements.^{iv}

Yes, But

CFIUS' Aggressive Postures May Have Curtailed Certain Efficiency Gains

While CFIUS increased its efficiency in key aspects, certain metrics remain materially elevated by historic standards. In 2023, parties withdrew and refiled 15.0% of JVN^vs, a notable reduction of 25.7% compared to 2022, but still representing an 111.3% increase in the withdraw and refile rate compared to the average of 2019 and 2020.

In certain instances where JVN^s are withdrawn and refiled, the parties elect to withdraw and refile in order to have more time to consider mitigation terms proposed by CFIUS, which CFIUS can propose in the waning days of the investigation period (*i.e.*, as day 90 approaches). In 2023, 12.2% of Distinct Transactions resulted in a national security agreement, and CFIUS imposed interim or residual mitigation in 2.8% of Distinct Transactions. These percentages are roughly in line with those from 2022, during which the percentage of Distinct Transactions requiring mitigation attained its highest level since 2019.

In 2023, parties abandoned 3.1% of Distinct Transactions because of an inability to arrive at acceptable mitigation terms, representing a 13.9% decrease compared to 2022 while remaining 14.8% higher than the average of 2019 – 2021. Overall, CFIUS' review had a post-transaction impact^{vi} on 15.3% of Distinct Transactions in 2023, a slight reduction from the 15.7% of Distinct Transactions in 2022, but 44.3% higher than the average of 2019 – 2021. This figure appears to signal continued aggressive postures by CFIUS. The 35 Chinese transactions mentioned above likely accounted for a disproportionately high amount of transactions with a post-transaction impact.

This demonstrates that CFIUS' increased proclivity to require the parties to execute a national security agreement as a condition of clearance has continued, and this likely has influenced the elevated withdraw and refile rate. If CFIUS implements its proposal of a three business-day deadline for parties to respond to mitigation terms CFIUS proposes, this could reduce the withdraw and refile rate in the coming years.

CFIUS, however, still remains statistically less likely to conclude action during the initial 45-day review period as opposed to the additional 45-day investigation period, with 64.6% of Unique JVN^s^{vii} progressing to the investigation period (and therefore requiring a full 90-day review). While this figure has decreased from 69.5% in 2022, it still remains notably higher than the average investigation rate in 2019 – 2021 (54.4%).

Conclusion:

The Annual Report serves as a strong reminder that parties should conduct thorough CFIUS due diligence when pursuing a transaction implicating CFIUS' jurisdiction, especially when the presence of critical technologies, critical infrastructure, or sensitive personal data could result in a mandatory filing obligation. In 2023, CFIUS increased its clearance rate within the statutory time frames from 54.9% to 71.1%. CFIUS continued to require mitigation in approximately 15.0% of Distinct Transactions, which is much higher than the historical norm and may indicate a stabilization of a new normal with respect to the likelihood of mitigation measures. Most assuredly, CFIUS will continue to look aggressively for instances of non-compliance with its regulations and mitigation measures.

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If you have questions concerning the contents of this alert, or would like more information, please speak to your regular contact at Weil or to the authors:

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- ⁱ This figure represents the total number of transactions reviewed by CFIUS, calculated by summing the number of declarations and Distinct JVNs. As used here, the Distinct JVN figure represents the total number of JVNs filed (233), minus the 20 instances in which parties were instructed by CFIUS to file a JVN after submitting a declaration, minus the 35 instances in which parties withdrew and refiled in 2023. In 6 instances, CFIUS did not make a determination at the end of the 30-day review process, and it is not clear whether the parties filed a JVN in those instances; we have assumed they did not file a subsequent JVN for purposes of calculating these figures. Where applicable, figures were calculated the same way for prior years.
- ⁱⁱ President Biden issued his first prohibition in 2024, which will be included in next year's report for 2024. The underlying transaction is a covered real estate transaction pursuant to which MineOne Partners Limited ("MineOne"), which is ultimately owned by Chinese nationals, purchased real estate located within 1 mile of Francis E. Warren Air Force Base ("Warren AFB"). After closing the transaction, MineOne established specialized cryptocurrency mining operations in close proximity to Warren AFB, a strategic missile base and home to Minuteman III intercontinental ballistic missiles. A covered real estate transaction does not require a mandatory filing with CFIUS, and the parties elected not to file with CFIUS until CFIUS initiated a non-notified inquiry to the parties as a result of a public tip. Due to the real estate's close proximity to the Warren AFB as well as the presence of specialized equipment on the site, CFIUS identified a risk to the national security of the United States, which CFIUS determined it would not be possible to effectively mitigate. Accordingly, President Biden issued an order on May 16, 2024, requiring MineOne to divest the subject real estate and to remove all items, structures, or other physical objects or installations of any kind on, under, or adjacent to the subject real estate. President Biden's order is available here: <https://www.govinfo.gov/content/pkg/FR-2024-05-16/pdf/2024-10966.pdf>.
- ⁱⁱⁱ This Proposed Rule is available here: <https://www.govinfo.gov/content/pkg/FR-2024-07-19/pdf/2024-15221.pdf>.
- ^{iv} Of note is that the Annual Report lists five mitigation terms that were not present in previous annual reports. These relate to destroying sensitive information, segregation of computer networks, disclosure of conflicts of interests related to mitigation agreement monitors, network- and data-related contract approval processes, and notification of collaboration with certain nationalities. These mitigation terms were employed in certain contexts over the course of the last few years and CFIUS' use of these mitigation terms now has become commonplace enough to warrant inclusion on the list of typical mitigation measures.
- ^v This figure includes JVNs withdrawn in 2023 and refiled either in 2023 or 2024. In 2023, parties withdrew no declarations.
- ^{vi} *I.e.*, a national security agreement, abandoned transaction, or prohibited transaction, where applicable.
- ^{vii} This figure represents the total number of JVNs filed (233), minus the 35 instances in which parties withdrew and refiled in 2023. This figure includes the 20 instances in which CFIUS requested parties to file a JVN after submitting a declaration. Where applicable, figures were calculated the same way for prior years.