

APRIL 1, 2022

# Treasury wants to identify, process non-notified transactions faster



*Sidley partner Jen Fernandez.*

**T**he U.S. Treasury Department has released its “Strategic Plan 2022-2026,” and “enhancing national security” is the second of five major goals. Among the strategies to be employed: “accelerating the timelines for identification

and processing” of covered transactions that aren’t voluntarily filed with CFIUS.

Treasury also intends to improve oversight of national security agreements, provide more timely responses to issues that arise during the monitoring of mitigation agreements, and speed up the remediation and enforcement of “apparent breaches of mitigation agreements.”

Here are all the quick details in outline form:

## WHAT HAPPENED

Janet Yellen, Secretary of the Treasury, unveiled the [Strategic Plan of the Department of the Treasury](#) for Fiscal Years 2022-2026. According to Yellen, the document outlines how the Treasury is readying “and, in some cases, transforming,” in order to address a broad array of challenges, from the pandemic-induced economic downturn and the

decline in labor force participation, to the impact of climate change and more.

## WHY A FOUR-YEAR PLAN?

Federal agencies are required to publish new strategic plans one year after each presidential election, thanks to the [Government Performance and Results Act Modernization Act of 2010](#).

Technically, the plans are supposed to be available the first Monday in February of the year following an election; the plan was posted on the Treasury Department’s website March 28, nearly two months later than required.

## NATIONAL SECURITY TOP AMONG GOALS

Weighing in at 60 pages, the concise document outlines five key goals, or “broad societal impacts” that Treasury aims to achieve:

1. Promote equitable economic growth and recovery
2. Enhance national security
3. Protect financial stability and resiliency
4. Combat climate change
5. Modernize Treasury operations

Because Foreign Investment Watch covers the intersection of foreign investment and national security, we'll focus primarily on the second bullet, above (the full document is [available](#) if you'd like a broader read).

According to the document, an “expanding array of transnational threats, continued instability in weak states, and the malicious use of critical and emerging technologies by adversaries” present national security concerns for the U.S. Foreign Investment Watch readers will of course be familiar with the usage of the term [critical and emerging technologies](#).

## NATIONAL SECURITY: STRATEGIC OBJECTIVES

The document outlined four strategic objectives that support the goal of “enhancing national security”:

1. *Cyber Resiliency of Financial Systems and Institutions*: Harden assets and systems of Treasury and the broader financial system to promote financial system resiliency.
2. *Economic Measures to Advance National Security*: Enhance and

protect national security through the application of targeted financial measures and review of certain foreign investments.

3. *Modernize Sanctions Regime*: Modernize the development, implementation, enforcement, and maintenance of U.S. sanctions to ensure that sanctions remain a streamlined and effective foreign policy and national security tool.
4. *Transparency in the Financial System*: Increase transparency in the domestic and international financial system

Those objectives are supposed to reflect a more focused policy or operational areas where the Treasury Department plans “to make significant improvements.”

## IMPLICATIONS FOR CFIUS

To achieve the second strategic objective, above, Treasury intends to utilize multiple approaches, including some related to combating anti-money laundering and the financing of terror.

But of interest to readers of Foreign Investment Watch will be the approaches and strategies related to CFIUS; specifically, institutionalizing and strengthening the processing of covered transactions “to ensure that [CFIUS] addresses national security risks; and the monitoring and

enforcement of CFIUS national security agreements.”

The Treasury Department intends to measure the success of its strategies through:

1. Accelerated timelines for identification and processing of covered transactions that have not been voluntarily filed with CFIUS.
2. Robust oversight of CFIUS national security agreements and efficient termination of any determined to no longer be necessary to address identified national security risks
3. Timely responses and resolutions to issues that arise during continuous monitoring of mitigation agreements
4. Timely remediation and appropriate enforcement of apparent breaches of mitigation agreements.

Related to the first bullet, above, the document does not provide details on how non-notified transactions would be identified or processed faster. According to one former Treasury official who asked to remain anonymous, this would be part of a process that is already ongoing.

“The NNT group that [former Assistant Secretary of Investment Security] Tom Feddo installed is already quite good at finding and processing non-notifieds,” he said, “so of course their objective is to be faster, more encompassing, and more efficient.”

## INSIGHTS AND CONTEXT

Jen Fernandez, a partner in the Global Arbitration, Trade and Advocacy group at Sidley, says the desire to improve NNT processing times is a logical progression for Treasury. “It is not surprising that Treasury continues to focus on improving the non-notified transaction process,” she says. “CFIUS has been building up its non-notified transaction capabilities since the passage of FIRRMA and now has robust non-notified transaction teams across CFIUS agencies.”

While this has resulted in a notable increase in CFIUS outreach, Fernandez says there is always room for improvement. “By the time parties become involved in the non-notified process,” she adds, “CFIUS has spent weeks, if not months, identifying the non-notified transaction, assessing the potential national security risk, and reaching Committee consensus to engage with the parties.”

Baker & McKenzie partner Rod Hunter agrees, noting that Treasury’s strategic plan reflects the “increasing institutionalization” of CFIUS operations. “It’s important to remember what an unusual regulator CFIUS is and why institutionalization, four years after FIRRMA and 15 years after FINSA, is still at the top of CFIUS’ agenda,” says Hunter, who previously served as Special Assistant to the President

for National Security Affairs at the National Security Council. Because CFIUS is an interagency body, notes Hunter, decision-making can be “time-consuming and challenging,” which [others in these pages](#) have also noted.

Amid this increased complexity, as the organization has grown and the Committee’s mandate has expanded, says Hunter, it makes sense to prioritize continuous improvement. “In recent years,” he says, “CFIUS has become increasingly professionalized, with non-sensitive transactions moving quickly through the process and more sensitive transactions attracting the most management time.”

Fernandez at Sidley also highlights the fact that Treasury intends to improve oversight and enforcement of national security agreements, a topic Foreign Investment Watch has [covered extensively](#). “Prioritizing monitoring and enforcement of mitigation agreements has also been a trend over the last couple of years,” she notes.

But what is perhaps more interesting in Treasury’s strategic plan, Fernandez highlights, is the statement regarding termination of agreements that are no longer necessary. “CFIUS monitoring agreements are enforced in perpetuity, unless CFIUS decides to terminate the agreement,” she says. Fernandez believes that, although there is no publicly available list of active CFIUS monitoring agreements,

there are likely a few that date back ten or 20 years that no longer present a risk to national security. “By terminating these outdated agreements,” says Fernandez, “CFIUS can better allocate its resources to mitigation agreements that still pose national security risks as well as the 20-30 new mitigation agreements that we can expect annually.”

## MORE INFORMATION

The complete [four-year plan](#) is available. The most relevant pages related to the national-security regime are 17-20.