

5 Key Takeaways From the CFIUS 2023 Annual Report

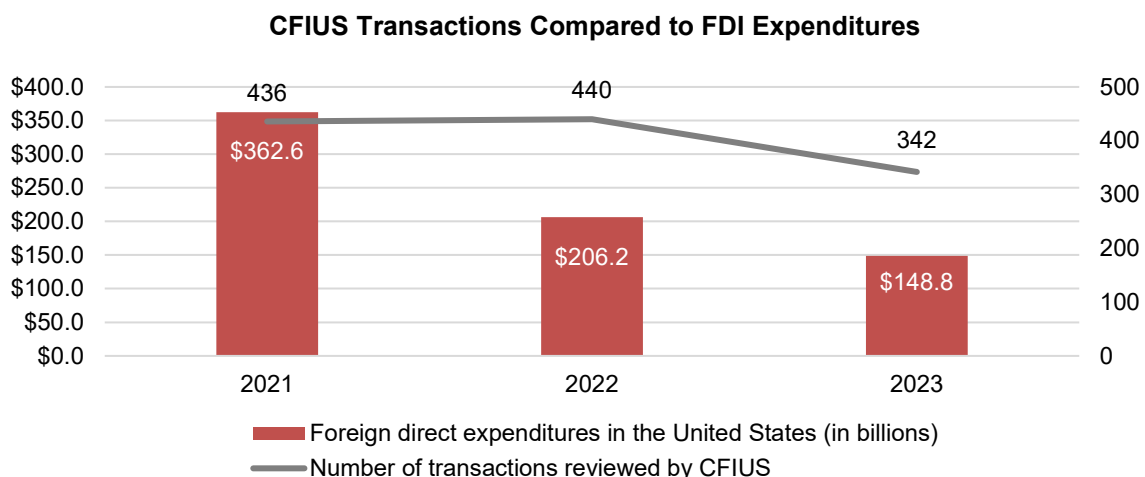
The report shows a decline in filings, new mitigation measures and conditions, and continued emphasis on monitoring and enforcement.

On July 23, 2024, the Committee on Foreign Investment in the United States (CFIUS) published the public [version](#) of its Annual Report to Congress for Calendar Year 2023 (the Report), which highlights key indicators of the CFIUS process and statistics on transactions filed in calendar year 2023.

This Client Alert presents five takeaways from the Report.

1. Overall decline in CFIUS filings

CFIUS reviewed 342 filings in 2023, consisting of 233 full notices (down 19%¹ from 286 in 2022), and 109 short-form declarations (down 29% from 154 in 2022). This marks an overall 22% decline from 440 filings in 2022 and mirrors the downward trend in reported foreign direct investment in the United States, which according to the [US Bureau of Economic Analysis](#), totaled \$148.8 billion in 2023, a decrease of approximately 28% from \$206.2 billion (revised) in 2022.

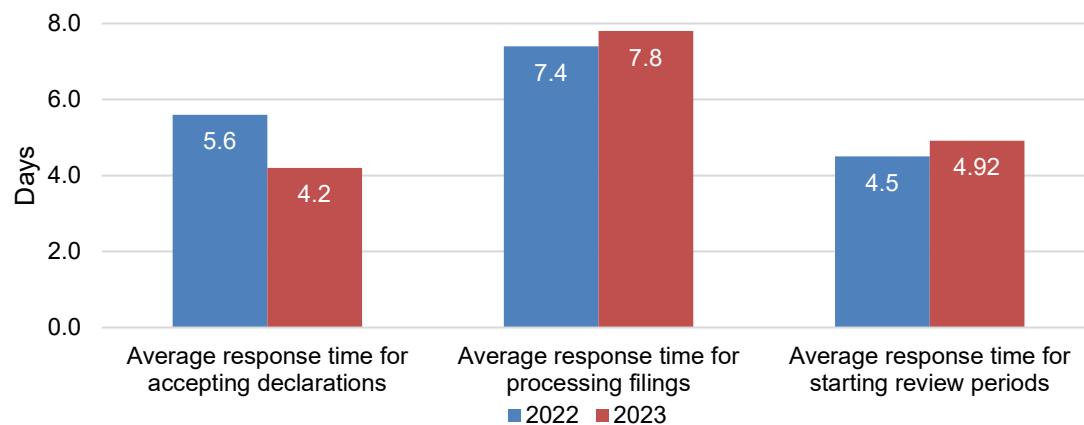


On average, CFIUS accepted declarations about four calendar days after submission of a complete filing, representing a slight decrease of about a day from the 2022 average. The average time for CFIUS to

(i) provide written comments on draft full joint notices was around eight business days and (ii) accept a formal written notice was around five business days. These represent a slight increase from 2022.

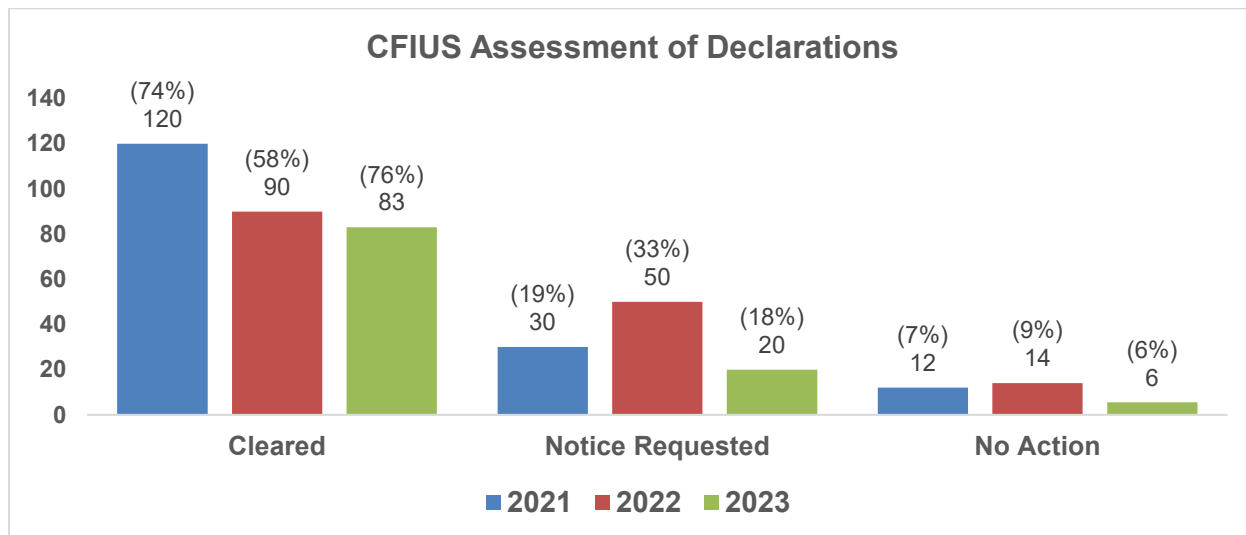
With respect to full joint notices, CFIUS conducted an “investigation” (i.e., an extension of the review period by 45 days) with respect to 128 of the 233 notices filed in 2023 (55%, slightly down from 57% in 2022). CFIUS exercised its authority to extend an investigation² by 15 days for “extraordinary circumstances” in only one case. No presidential decisions were issued on CFIUS cases in 2023.

Processing Times for Notices and Declarations

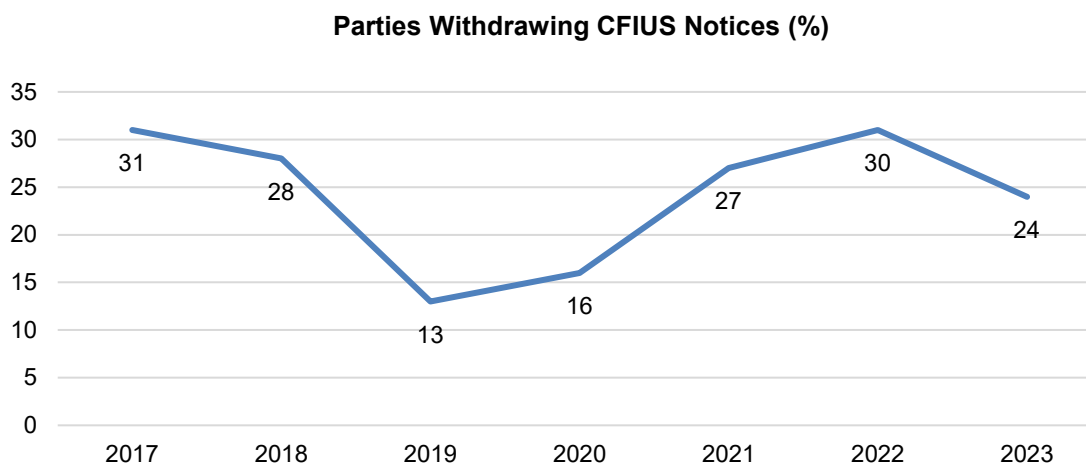


Other interesting statistics from the Report include the following:

- An increase in the percentage of declarations subject to the mandatory filing requirement. In 2023, 33% of declarations (36 out of 109) were filed pursuant to CFIUS’ mandatory filing requirement, compared to 29% (44 out of 154) filed mandatorily in 2022. Parties can choose whether to file a declaration or notice to meet the mandatory filing requirement, though statistics on how many notices were filed to meet the mandatory filing requirement are not available in the Report.
- In 2023, the rate at which CFIUS cleared a transaction on the basis of a declaration was 76% (83 out of 109 declarations were cleared). This marks a significant jump from 2022, when CFIUS provided its clearance on approximately 58% of declarations filed with CFIUS (90 out of 154). The Report also indicated an overall decrease in declarations that resulted in a request for a full notice, from 32% in 2022 (50 out of 154) to 18% in 2023 (20 out of 109).



- CFIUS approved the withdrawal of 24% of notices (57 out of 233); parties refiled in 75% of those instances (43 refiled out of 57 withdrawn notices) and abandoned the transaction in 25% of withdrawn notices and 6% of all notices (14 cases total), as compared to a total of 31% withdrawals in 2022 (88 notices), 23% of which were abandoned (20 cases, comprising 7% of all notices). No declarations were withdrawn in 2023 or 2022.



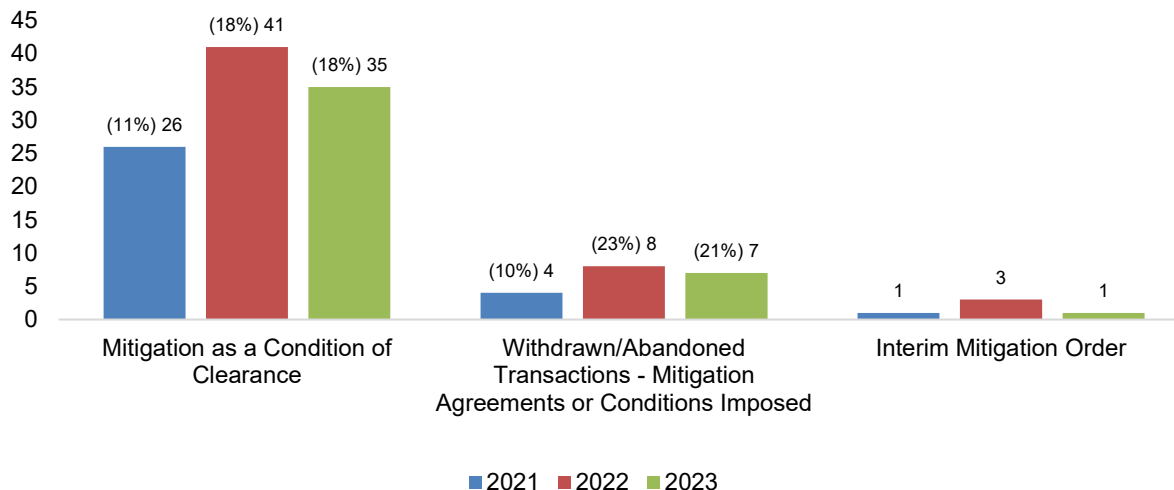
Notably, parties have filed approximately 64 declarations and just over 100 notices with CFIUS to date in 2024, reflecting an overall decrease in the volume of filings compared to this period in 2023 and a continued decline in filings since 2022.

2. New mitigation measures and conditions

CFIUS concluded action after adopting mitigation agreements or orders in 35 cases (21% of distinct notices filed) in 2023. CFIUS also imposed conditions in letters granting a withdrawal and abandonment of six notices and entered into a mitigation agreement to address residual national security concerns for one abandoned transaction. CFIUS imposed an interim order with respect to one transaction, which was subsequently abandoned.

This means about 34% of cases that were pushed into the second phase “investigation” period resulted in some form of mitigation, and a majority of those cases required at least one withdrawal and refile.

Notice Filings Subject to Mitigation



The percentage of covered notices for which CFIUS required mitigation agreements as a condition of clearance in 2023 decreased from 23% in 2022 to 21% in 2023; however, this still represents more than double the percentage in each of 2021 and 2020 (10% and 9%, respectively).

CFIUS reported mitigation measures and conditions that were consistent with those identified in previous annual reports, such as:

- appointment of a US government-approved security officer;
- engagement of a third-party monitor or auditor;
- assurances of continuity of supply to the US government;
- governance mechanisms to limit foreign influence and ensure compliance;
- restrictions on access by the foreign person to certain technology, systems, or sensitive information;
- notification and non-objection by the US government prior to changes to data storage locations; and
- limits on the supply of certain products and services by authorized vendors.

Some mitigation measures and conditions that were new included:

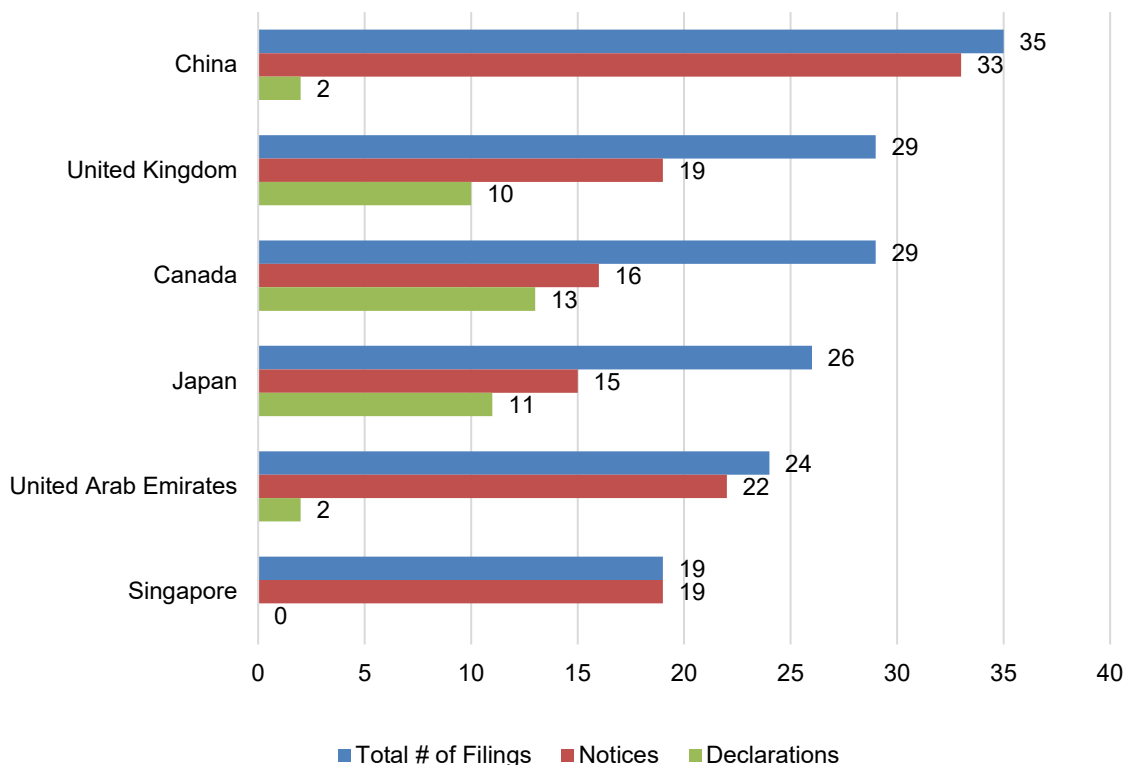
- destroying sensitive information;
- processes to review and approve third-party contracts prior to granting access to systems or data; and
- prior notification to the US government for collaboration agreements with persons in certain countries.

3. Investors from China, Canada, and the UK lead number of filings

Investors from over 40 countries made filings with CFIUS in 2023.

- Investors from China accounted for 33 notices and two declarations, representing the highest number of CFIUS filings in 2023, up from second place in 2022.
- The UK and Canada each represented 29 CFIUS filings in 2023. However, filings from both countries (33 from the UK and 45 from Canada) were down in 2023 compared with 2022.
- Investors from the United Arab Emirates continued an upwards trend in CFIUS filings with 22 notices and two declarations in 2023, compared with 18 filings in 2022 and only two filings in 2021.
- Filings from investors from Singapore dropped significantly, from 40 notices and nine declarations filed in 2022, to 19 notices and no declarations in 2023.
- Investors from Japan also filed less in 2023, with 15 notices and 11 declarations, compared with 15 notices and 18 declarations in 2022.

As in previous years, the Report did not provide statistics on the outcome of CFIUS filings by country. However, it indicated that the highest number of notices in 2023 for distinct transactions were from investors in Canada, Japan, and the UK, which suggests that a number of the filings from China represented withdrawn and refiled notices.



4. Continued proactive approach to identifying non-notified transactions and enforcement actions for noncompliance with mandatory filing requirements

In 2023, CFIUS opened non-notified inquiries for 60 transactions and formally requested filings for 13 transactions (approximately 22%). In three additional cases, parties in receipt of a non-notified inquiry voluntarily filed prior to receiving a formal request. The percentage of CFIUS non-notified inquiries that result in a request for a filing has been steadily increasing since 2021, which indicates that CFIUS continues to focus on identifying transactions that both fall under CFIUS jurisdiction and may raise national security concerns.

CFIUS used various methods to identify non-notified transactions, including interagency referrals, tips from the public, classified reporting, media reports, congressional notifications, and multiple commercial and proprietary databases.

CFIUS also undertook several investigations with respect to compliance with its mandatory filing requirement, and received its first voluntary self-disclosure of a potential failure to file a mandatory declaration. Some of these investigations led to formal determinations of noncompliance. Although they did not result in penalties after CFIUS considered the specific facts and circumstances, they did lead to the Treasury's decision to issue clarifying guidance on how CFIUS determines a transaction's "completion date." (For more information, see this Latham [Client Alert](#).)

5. Continued emphasis on monitoring and enforcement, including new penalties

According to the Report, CFIUS is currently monitoring 246 mitigation agreements and conditions. In 2023, CFIUS materially modified 20 mitigation agreements, including termination of 15 agreements.

The CFIUS Monitoring Agencies (CMAs) use a variety of tools to monitor and enforce compliance. For instance, the CMAs conducted site visits, leveraged third-party monitors and auditors, investigated potential violations, and oversaw remedial action, as appropriate.

In 2023, CFIUS conducted 43 site visits (roughly consistent with last year's 44 visits), which included, among other activities:

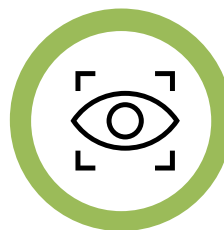
- compliance focused interviews with senior executives and line-level personnel;
- record checks; and
- physical security assessments.



Interviews with both senior executives and line-level employees



Record checks



Physical security assessments

When CMAs identified instances of noncompliance with mitigation agreements and conditions, they assessed the noncompliance and pursued prompt remediation. While most instances of noncompliance did not result in a penalty, CFIUS assessed four civil monetary penalties for breaches of material provisions in mitigation agreements. Previously, CFIUS had issued only two monetary penalties in its nearly 50-year history. CFIUS did not disclose the value of the penalties or the parties involved.

The Report underscores the increased attention by CFIUS on enforcement efforts, as well as the expansion of the staff resources, processes, and procedures to monitor and enforce compliance with mitigation agreements. This builds on CFIUS' momentum from last year, with Treasury's announcement of a [proposed rule](#) to expand CFIUS' enforcement authority. (For more information, see this [Latham Client Alert](#).)

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Endnotes

¹ All percentages have been rounded to the nearest whole number.

² Under the CFIUS statute, CFIUS may refer a transaction to the President of the United States, and the President has 15 days to decide to suspend or prohibit the transaction.