

## 8 Key Takeaways From the CFIUS 2022 Annual Report

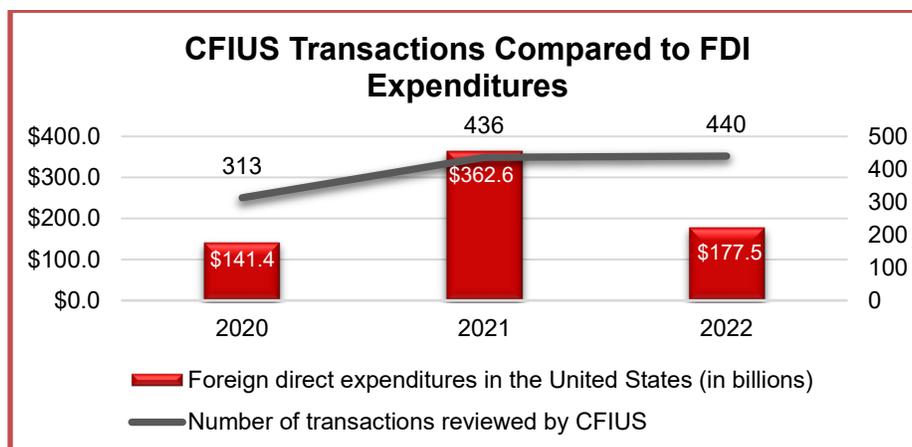
***The Report shows that CFIUS reviewed a record number of filings in 2022 and also required more mitigation as a condition of clearance.***

On July 31, 2023, the Committee on Foreign Investment in the United States (CFIUS) published the public [version](#) of its Annual Report to Congress for Calendar Year 2022 (the Report), which highlights key indicators of the CFIUS process and statistics on transactions filed in calendar year 2022.

This Client Alert presents eight takeaways from the Report.

### 1. CFIUS reviewed a record number of filings in 2022, despite a slowdown in foreign direct investment into the US

The number of filings submitted to CFIUS in 2022 represents a slight increase over 2021, despite an overall decrease in new foreign direct investment in the United States in the second half of the year. CFIUS reviewed 440 filings in 2022 (an increase from 436 in 2021), consisting of 286 full joint voluntary notices (a 5% increase over 2021) and 154 short-form declarations (a decrease of 6% over 2021). In 2021, CFIUS reviewed 272 notices and 164 declarations. Over the same period, according to [statistics](#) released in July 2023 by the US Bureau of Economic Analysis (BEA), expenditures by foreign direct investors to acquire, establish, or expand US businesses totaled \$177.5 billion (preliminary) in 2022, marking a significant drop from 2021 expenditures.



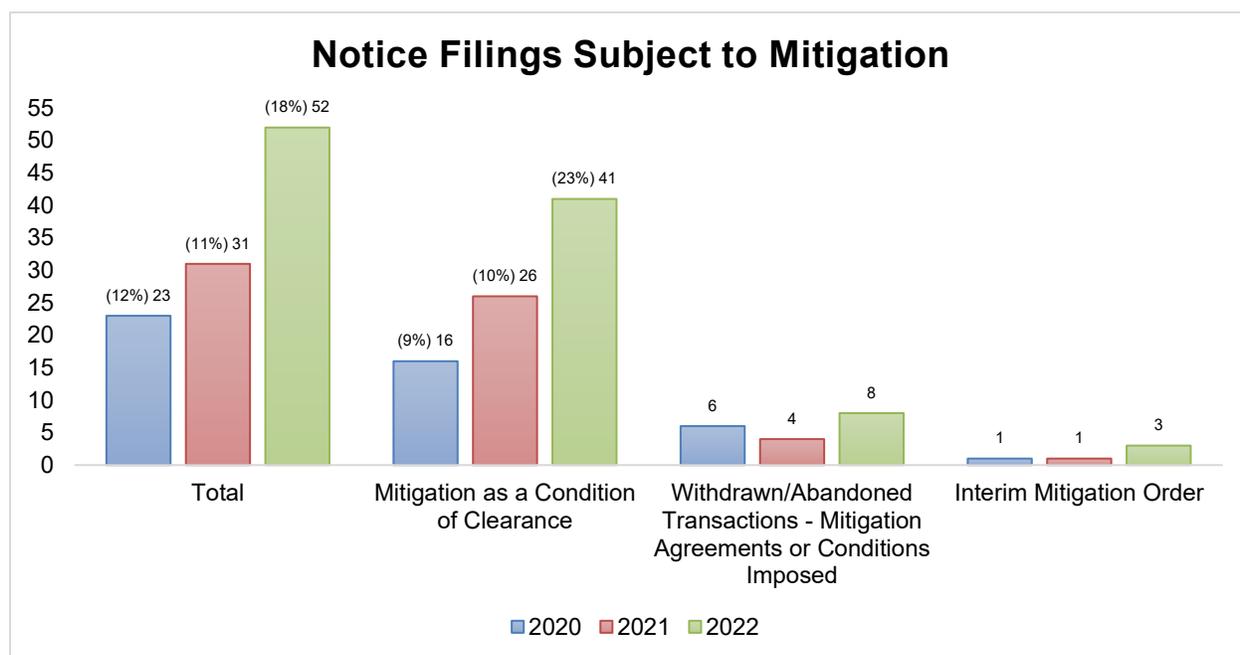
CFIUS' response times for providing comments on draft notices increased by about one business day (to an average of 7.4 in 2022). However, CFIUS was able to start the review period on submitted notices faster, reducing the waiting time from an average of six business days in 2021 to 4.5 business days in 2022. The average response time in which CFIUS accepted declarations submitted in 2022 was 5.6 calendar days — consistent with the average of 5.5 calendar days in 2021.

## 2. More restrictions imposed on deals as a condition of clearance

The percentage of covered notices that were subject to mitigation agreements as a condition of clearance more than **doubled** in 2022 compared to previous years. CFIUS required mitigation measures as a condition of clearance for 23% of notices in 2022 (41 distinct notices), whereas 10% and 9% of notices were subject to mitigation in 2021 and 2020, respectively.

In three cases in 2022, CFIUS adopted mitigation agreements in which the parties voluntarily withdrew and abandoned the transactions (as compared to two in 2021 and three in 2020). In its Report, CFIUS indicated that it had imposed conditions in the letters issued by Treasury granting the withdrawal and abandonment for five notices (up from two in 2021 and three in 2020).

CFIUS imposed interim measures to address risk with respect to three notices in 2022 (up from one in both 2021 and 2020). Such interim orders may include, but not be limited to, blocking access by a foreign person to the US business, removal of board directors or observers, and restrictions on communications between the foreign person and US business.



Mitigation measures and conditions adopted in 2022 were generally consistent with those identified in CFIUS annual reports for previous years. These measures included, among others, the:

- requirement for a US government-approved security officer;
- engagement of a third-party monitor or auditor;

- assurances of continuity of supply to the US government of certain products or services;
- establishment of governance mechanisms to limit foreign influence and ensure compliance; and
- restrictions on access by the foreign person to certain technology, systems, or sensitive information.

Notably, the Report identified two new mitigation conditions:

- requiring prior notification to, and non-objection by, the US government regarding changes to data storage locations; and
- restricting recruitment and hiring of certain personnel.

### **3. Lowest clearance rates since introduction of short-form declaration process**

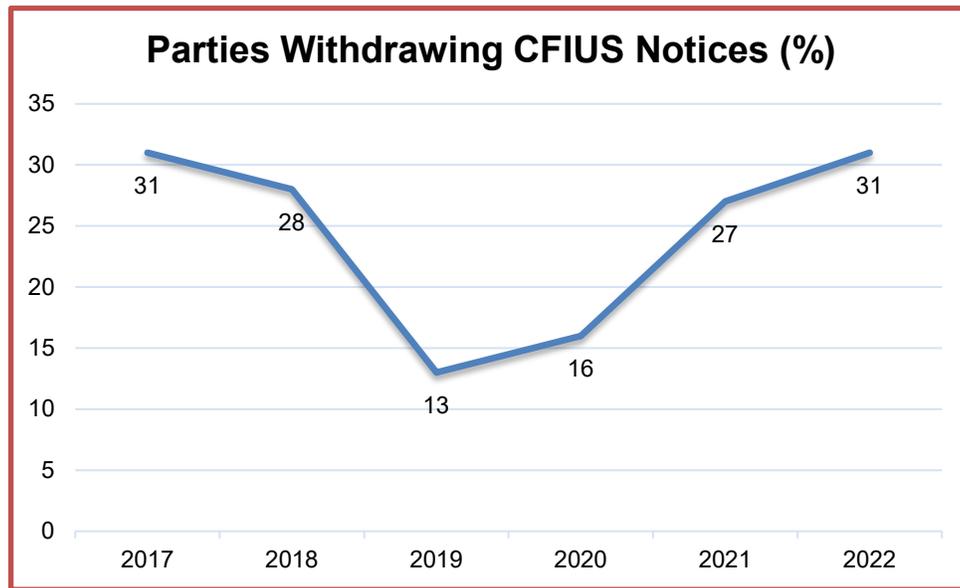
Parties can notify a transaction to CFIUS through a full notice or a short-form declaration. By the end of the review and investigation period for a notice, CFIUS generally must either clear the transaction and provide safe harbor, or refer the case to the President. By contrast, after a 30 calendar day assessment period for a short-form declaration, CFIUS may (1) clear the transaction, (2) request that the parties submit a full notice, (3) initiate a unilateral review, or (4) issue a “no action” letter, stating that CFIUS is unable to conclude action on the basis of the declaration and letting the parties determine whether to file a full notice.

In 2022, CFIUS requested that the parties to 50 declarations (32%) file a full notice at the end of the assessment period. This represents the highest such percentage since the short-form declaration process was implemented following the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). CFIUS provided safe harbor by clearing on 90 declarations in 2022 (58%, down from 73% in 2021), and took no action (e.g., the so-called “shoulder shrug”) with respect to 14 declarations in 2022 (9% versus 7% in 2021).

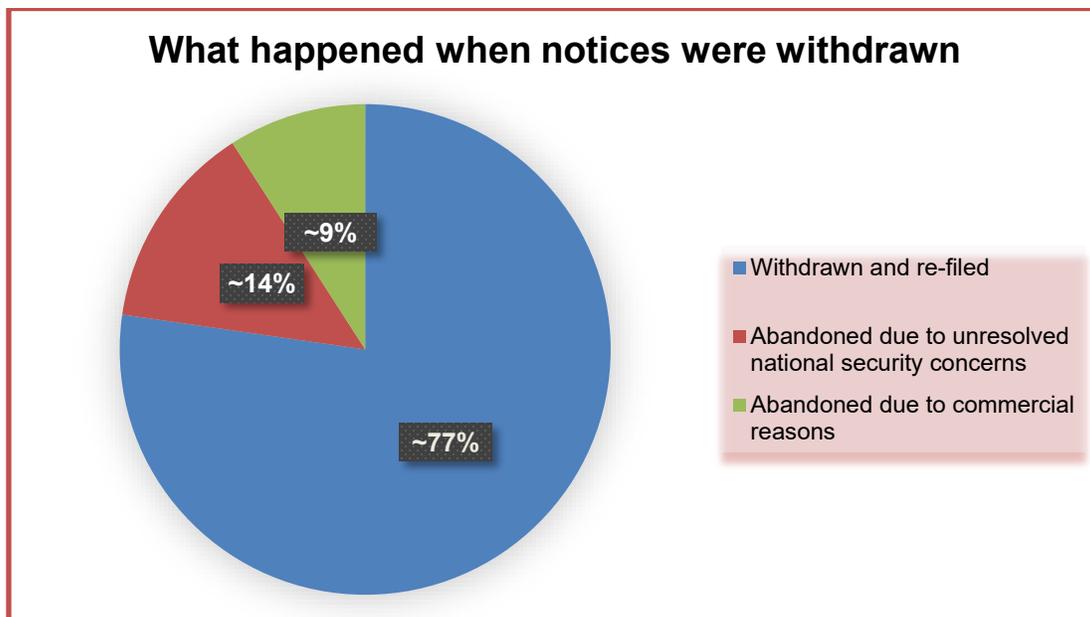
### **4. CFIUS investigated more cases, and parties withdrew more filings**

CFIUS conducted a second-stage “investigation,” of up to 45 calendar days, with respect to nearly 60% of the notices it received in 2022 (162 notices out of 286). In calendar year 2021, slightly less than half of the notices went into investigation.

In 2022, 88 notices (31%) were withdrawn, of which 68 were re-filed (24% of total notices and 42% of cases in investigation). The percentage of withdrawn notices has continued to increase steadily over the past three years (27% in 2021, 16% in 2020, and 13% in 2019) and has now returned to the levels of withdrawals seen in calendar years 2017 and 2018, which reached 31% and 28%, respectively.



As reflected in the chart below, in most instances, parties refiled withdrawn cases. In 12 cases, the parties withdrew the notice and abandoned the transaction after either CFIUS informed the parties that it could not identify mitigation measures that adequately addressed the national security risk, or the parties chose not to accept mitigation. In eight cases, the parties reportedly abandoned the transaction for commercial reasons.

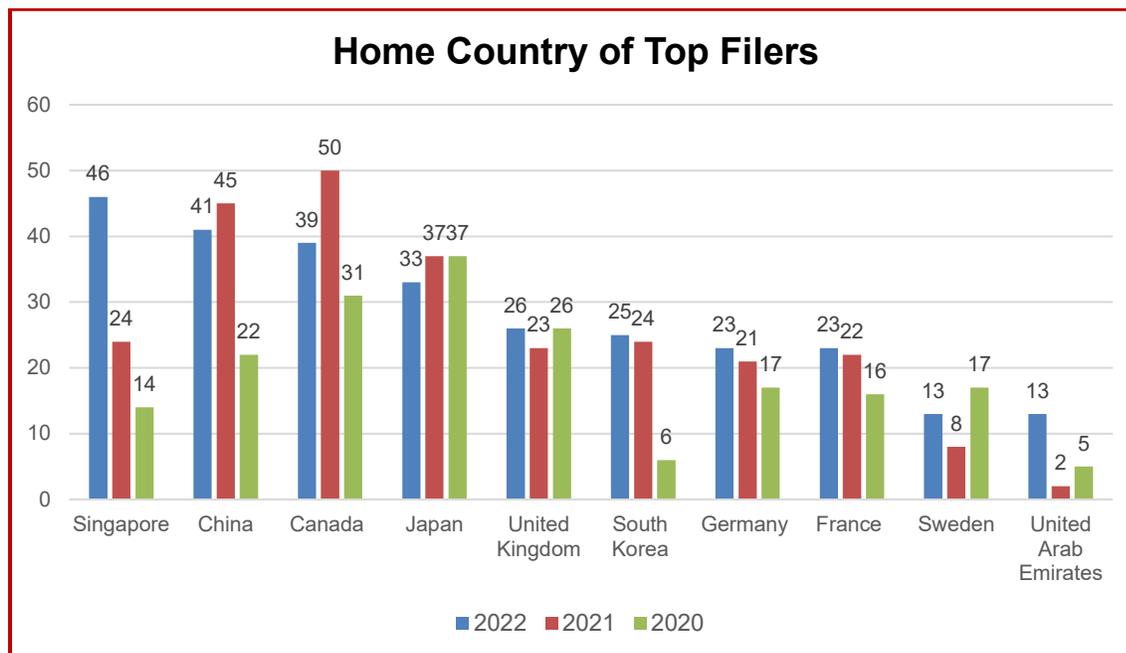


For the second year in a row, President Biden did not take action with respect to transactions filed with CFIUS, likely because parties generally prefer to withdraw a notice if CFIUS has unresolved national security concerns rather than become the subject of a public presidential order that suspends or prohibits the transaction.

## 5. Singaporean and Chinese investors accounted for the largest number of filings, while UAE-related filings increased

Notices and declarations were filed by investors from 52 different countries in 2022. The number of filings involving investors from Singapore and the United Arab Emirates (UAE) significantly increased.

- In first place, the number of filings involving investors from Singapore totaled 46 in 2022, up from 24 in 2021. Transactions involving investors from Singapore accounted for 37 notices and nine declarations (compared to 13 notices and 11 declarations in 2021), representing the country with the highest number of total filings.
- In second place, China accounted for 36 notices and five declarations in 2022, a decrease from 44 notices filed in 2021, but an increase in the number of declarations (with only one China-related declaration filed in 2021).
- Canada was in third place, with 17 notices (28 in 2021) and 22 declarations (22 in 2021). Investors from Canada filed the highest number of declarations, which comes as no surprise since Canada is typically viewed as presenting lower national security risks.
- Other frequent foreign-investor filers with CFIUS include: Japan with 15 notices (26 in 2021) and 18 declarations (11 in 2021) and the United Kingdom with 18 notices (13 in 2021) and eight declarations (10 in 2021).
- Investors from the UAE accounted for 13 filings, which, while relatively low, is still a significant increase from two in 2021.
- Filings involving Russian investors unsurprisingly dropped to just one filing in 2022 (from eight in 2021).



As with previous years, CFIUS did not provide statistics on the outcome of filings made by particular countries before CFIUS.

## 6. Scientific R&D services-related filings doubled

Consistent with previous years, the majority of the CFIUS notices filed in 2022 involved US companies in the finance, information, and services sector, representing 149 (52%) of the covered notices. The other sectors also closely followed the previous year's trends: 84 (29%) of the notices involved manufacturing; 36 (13%) involved mining, utilities, and construction; and 16 (6%) involved wholesale trade, retail trade, and transportation.

The subsector data provides a closer look at which industries had the most active year from a CFIUS perspective. The scientific research and development (R&D) services subsector represented the top business subsector by both the number of declarations and notices filed in 2022, followed by (1) electric power generation, (2) software publishers, (3) semiconductor manufacturing, and (4) computer systems design and related services. This aligns with the [Executive Order](#) on Ensuring Robust Consideration of Evolving National Security Risks by CFIUS, which identified that industries within these subsectors present a heightened risk from a US national security perspective. For example, the Executive Order identified biotechnology and biomanufacturing as well as advanced clean energy as sectors fundamental to US technological leadership. The biotechnology industry falls under the scientific R&D services subsector, and the advanced clean energy industry falls under the electric power generation subsector. The Executive Order confirmed the trends practitioners have noticed regarding CFIUS's views on national security risk. (For more information, see Latham's [Client Alert](#) "New CFIUS Executive Order Outlines 5 Risk Factors: Key Takeaways.")

In 2022, the number of declarations involving the scientific R&D services subsector increased to 15 (from five in 2021), and the number of notices increased to 26 (from 15 in 2021). Other subsectors generally experienced a decline in the number of CFIUS filings year-to-year, except electric power generation. While the total number of filings involving the electric power generation subsector remained the same as in 2021, more transaction parties chose to submit declarations (15 declarations in 2022, compared to nine in 2021).

## 7. Increase in non-notified inquiries that prompted filing requests

CFIUS uses various methods to identify non-notified transactions, including interagency referrals, tips from the public, media reports, commercial databases, and congressional notifications. In 2022, CFIUS identified 84 transactions through the non-notified process and requested filings for 11 such transactions (13%). This represents an increase from eight non-notified inquiries that resulted in a filing in 2021 (6%), but an overall decrease in the number of transactions CFIUS identified through the non-notified process (135 in 2021). In addition to those 11 transactions, CFIUS identified eight non-notified transactions from prior calendar years and requested the parties to submit a filing.

The Report states that CFIUS now primarily focuses on monitoring more recent foreign investments for potential non-notified transactions. In 2020, approximately 80% of the non-notified inquiries were directed at transactions that pre-dated FIRRMA. That number went down to approximately 26% in 2021 and is now below 1%. CFIUS continues to bolster its resources, including hiring dedicated staff and increasing training and attention of existing staff across CFIUS member agencies to further monitor and identify non-notified transactions.

## 8. Recent enforcement focus also suggests more monitoring of compliance with mitigation measures

The Report reflects that CFIUS currently monitors a total of 214 mitigation agreements and conditions, which represents a jump from 187 in 2021. In addition, CFIUS materially modified 22 mitigation agreements and conditions, and terminated 16 of those in 2022.

CFIUS agencies had an active year monitoring the transaction parties' compliance with mitigation measures. The Report stated that 44 site visits occurred in 2022, while 29 site visits took place in 2021. This increase is not surprising given CFIUS's recent focus on monitoring and enforcement, particularly with respect to compliance and remediation, when necessary. (For more information, see Latham's [Client Alert](#) "New CFIUS Enforcement Guidelines: Top 5 Takeaways.")

Consistent with 2020 and 2021, CFIUS did not assess or impose penalties in 2022. However, Paul Rosen, the Assistant Secretary for Investment Security at the US Department of the Treasury, indicated at an industry conference in May 2023 that CFIUS had more recently issued one or more final penalty determinations. The details of the penalties are not public, but we expect CFIUS to include the amount of the penalties it imposed in its next Annual Report covering calendar year 2023. (For more information, see Latham's [Client Alert](#) "New CFIUS Developments Signal Heightened Attention on Enforcement: 4 Areas to Watch.")

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