

March 9, 2020

Treasury Issues Proposed Rule Implementing CFIUS Filing Fee

On March 6, the U.S. Department of the Treasury released a Proposed Rule that would introduce a filing fee for parties that submit voluntary notices of certain transactions to the Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”). The Proposed Rule, which is not yet effective, was published in the Federal Register on March 9.¹ The Treasury Department has solicited comments on the Proposed Rule from the public through April 8, 2020.

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Background

In August 2018, President Donald Trump signed into law the Foreign Investment Risk Review Modernization Act (“FIRRMA”), which significantly expanded CFIUS’s authority to review certain foreign investments in U.S. businesses. Among other changes, FIRRMA authorized CFIUS to establish a filing fee for parties that notify transactions to the Committee. Pursuant to FIRRMA, the filing fee is not to exceed the lesser of 1% of the transaction value or \$300,000 (adjusted annually for inflation).

Filing Fee

Consistent with FIRRMA, the Proposed Rule would establish a filing fee based on the value of the notified transaction (including both “covered transactions” and “covered real estate transactions”):

Value of Transaction	Filing Fee
< \$500,000	No fee
\$500,000 - \$4,999,999.99	\$750
\$5,000,000 - \$49,999,999.99	\$7,500
\$50,000,000 - \$249,999,999.99	\$75,000
\$250,000,000 - \$749,999,999.99	\$150,000
≥ \$750,000,000	\$300,000

For purposes of determining the filing fee, transaction value “means the total value of all consideration that has been or will be provided in the context of the transaction by or on behalf of the foreign person that is a party to the transaction, including cash, assets, shares or other ownership interests, debt forgiveness, or services or other in-kind consideration.”² Where the consideration paid by the foreign person includes non-cash assets, interests, or services or other in-kind consideration, the transaction value would be determined based on the fair market value as of the date the parties file the notice. Under the Proposed Rule, the parties to a voluntarily notified transaction must include in their notice (1) a good faith estimate of the value of the transaction; and (2) an explanation of the methodology used to determine such valuation and the applicable filing fee.

¹ Filing Fees for Notices of Certain Investments in the United States by Foreign Persons and Certain Transactions by Foreign Persons Involving Real Estate in the United States, 85 Fed. Reg. 13,586 (Mar. 9, 2020).

² *Id.* at 13,591, 13,593.

Of note, where the investment target is comprised of both U.S. and non-U.S. businesses, the transaction value would be assessed based on the global (*i.e.*, U.S. and non-U.S.) value of the transaction, except where (1) the global transaction value for a non-real estate transaction is equal to or greater than \$5,000,000; and (2) the value of the interests acquired in the U.S. business(es) is less than \$5,000,000. Where the foregoing criteria are met, the filing fee would be \$750, in an effort to ensure that investment targets that qualify as “U.S. businesses” (as broadly defined for CFIUS purposes), but have a limited presence in the United States, are not dissuaded from submitting CFIUS filings (where otherwise appropriate to do so).

Exceptions

Importantly, the Proposed Rule would not establish a filing fee for transactions that are notified to CFIUS via a declaration, the abbreviated notification process introduced by FIRRMA. Accordingly, parties to covered transactions (and covered real estate transactions) will have an additional factor to consider in determining whether to submit an abbreviated declaration, versus full-form filing:

- **Abbreviated declaration:** No filing fee, less preparation time, and potential for faster resolution, but no guarantee of final action by the Committee.
- **Full-form notice:** Filing fee, more preparation and review time, but guarantee of final action by the Committee.

The filing fee would also not apply to unilateral reviews initiated by CFIUS. Along similar lines, the filing fee would not apply to re-submitted voluntary notices (*i.e.*, if CFIUS requests that the parties withdraw and refile their notice, the parties will not be required to pay an additional filing fee), *unless* the Committee determines “a material change to the transaction has occurred, or a material inaccuracy or omission was made by the parties in information provided to the Committee.”³ In addition, the Proposed Rule would permit the Staff Chairperson to waive the filing fee if “extraordinary circumstances relating to national security warrant,” although such waivers are likely to be infrequent.⁴

If CFIUS concludes that a voluntarily notified transaction is not a covered transaction (or covered real estate transaction) within its jurisdiction, the Proposed Rule would require the Committee to refund the filing fee.

Timing

Under the Proposed Rule, CFIUS may decline to accept a voluntary notice for review until the applicable filing fee has been paid (suggesting that pre-submission consultations will not be subject to the filing fee). Further, if CFIUS determines that the filing fee was underpaid based on the value of the transaction, the parties would be required to fund the insufficiency upon three days’ written notice (or the Committee may reject the notice).

Conclusion

The Proposed Rule reflects the Department of the Treasury’s efforts to implement one of the final, pending provisions of FIRRMA. By giving interested parties until April to provide comment, the Final Rule (making the filing fees effective) is likely to be issued later this year.

While the Proposed Rule is intended to ensure that filing fees do not present a material obstacle to parties seeking CFIUS review and approval of transactions—and would, consistent with FIRRMA, cap the filing fee for even the largest of transactions at \$300,000—the filing fees contemplated by the Proposed Rule are another consideration that parties will need to take into account as they undergo the CFIUS review process.

³ *Id.* at 13,593, 13,595.

⁴ *Id.*