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Eight Things to Know About Proposed CFIUS Filing Fees

16 March 2020

On March 9, 2020, the U.S. Department of the Treasury ("Treasury"), as chair of the Committee on Foreign Investment in the United States ("CFIUS"), published proposed regulations (the "Proposed Regulations") that would establish, for the first time ever, a filing fee for many voluntary notices submitted to CFIUS. While the Proposed Regulations remain subject to public comment and further revision, they will likely impact transaction parties' risk allocation decisions and, as a technical matter, increase CFIUS scrutiny of the valuation of transactions subject to the new fees.

The View From Washington

The Proposed Regulations are part of Treasury's efforts to implement the *Foreign Investment Risk Review Modernization Act* ("FIRRMA"), which was passed with overwhelming bipartisan support in 2018 in order to "strengthen and modernize" CFIUS. FIRRMA authorized CFIUS to collect filing fees for transactions, in part to offset the need for additional resources to implement FIRRMA (e.g., additional staff). In determining the fee schedule, Treasury considered the potential impact on small businesses and the potential chilling effect on foreign investment into the U.S., and concluded that the fees would not be overly burdensome or discourage voluntary filings.

Below are eight things to know about the Proposed Regulations.

1. **The fees will be calculated on a tiered, fixed fee schedule.** All transactions for which a fee is required will be subject to the same fee schedule. Although FIRRMA authorized fees up to 1% of transaction value to a maximum fee of $300,000, the fees will generally not exceed 0.15% of the transaction value. The proposed fee schedule is as follows:

Transaction Value	Proposed Filing Fee
Under $500,000	No filing fee
Between $500,000 and $5 million	$750
Between $5 million and $50 million	$7,500
Between $50 million and $250 million	$75,000
Between $250 million and $750 million	$150,000
$750 million or more	$300,000

2. **Filing fees will only apply to submission of traditional Joint Voluntary Notices ("JVNs") submitted to CFIUS.** Transaction parties, however, must pay a filing fee if they submit a JVN after Treasury completes its review of a short form "declaration," even if CFIUS requested that parties to the declaration submit the JVN. Nonetheless, declarations, whether mandatory or voluntary, are exempted from the fee schedule, as are "agency notices" unilaterally initiated by CFIUS.
3. **Filing fees will be based on the total value of a transaction.** In most circumstances, the total transaction value will not be limited to the valuation of the U.S. business itself (e.g., the U.S. subsidiaries of a non-U.S. company), but will rather be tied to the total value of an overall deal. Despite this general rule, if a transaction's total value is $5 million or more, but the interests or rights acquired in the U.S. business are valued at less than $5 million, the fee for such transaction will be only $750.[1]
4. **Treasury will evaluate the "value of the transaction" as the total consideration that has been or will be paid by the foreign investor.** Consideration includes cash, assets, shares or other ownership interests, as well as debt forgiveness, services or in-kind consideration. If consideration has not yet been determined for a transaction, parties must use the "fair market value" of the acquired assets or real estate (or, in the case of a merger or joint venture, that of the U.S. business being merged or contributed). In lending transactions, the value of consideration will be the cash value of the loan or financing arrangement. Parties will be required to submit the value of the transaction, as well as an explanation of the methodology used to determine such value.
5. **Refunds will be limited to overpayments due to a flawed valuation and non-covered transactions.** Parties may request a partial refund if they can demonstrate that the filing fee was in excess of what it should have been at

payment. Additionally, Treasury may refund a filing fee if it determines that the transaction is not subject to CFIUS' jurisdiction.

6. **Under certain limited circumstances, fees may be waived or otherwise not required.** Treasury may waive a fee for "extraordinary circumstances relating to national security," as determined by the staff chairperson. Transactions that are withdrawn and refiled will not trigger additional fees, unless the refiling was due to a material inaccuracy or omission.
7. **The Proposed Regulations may introduce a new source of potential delay to transaction timelines.** Parties will be required to assess and explain the transaction value in detail, and submit payment of the appropriate fee before CFIUS starts its review. Treasury expects, however, that the new valuation guidelines will allow parties to estimate a transaction's value with a high degree of certainty.
8. **The Proposed Regulations are subject to public comment and revision.** Interested members of the public and stakeholders may submit comments to Treasury on the Proposed Regulations until April 8, 2020. In particular, Treasury is interested in comments regarding the impact and structure of the proposed fee tiers and how the rule could better fit real estate industry practices.

Faith Dibble was also a contributing author to this publication (*Not admitted to practice law, practice is supervised by principals of the firm).*

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1. This exception does not apply to CFIUS' reviews of "covered real estate transactions," i.e., the purchase, lease or concession to a foreign person of certain real estate located in proximity to sensitive U.S. military or other government facilities.↩

Authors

Mario Mancuso, P.C.

Partner / Washington, D.C. / New York

Shawn B. Cooley

Partner / Washington, D.C.

Lucille Hague

Associate / Washington, D.C.

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