

CFIUS Releases Proposed Rule on Filing Fees

March 11, 2020

On March 9, 2020, the U.S. Department of the Treasury (“Treasury”) published a proposed rule (the “Proposed Rule”) implementing the filing fee provisions of the Foreign Investment Risk Review Modernization Act (“FIRREA”).¹ The Proposed Rule would assess tiered filing fees for all voluntary notifications to the Committee on Foreign Investment in the United States (“CFIUS”) and is open for public comment until April 8, 2020. No proposed effective date is included in the Proposed Rule, and so presumably filing fees will not apply to any filing accepted prior to an effective date to be specified in a future rule.

I. Key Takeaways

Under the Proposed Rule, CFIUS would:

- assess fees for full notifications based on the value of the transaction, ranging from no fees for transactions valued at less than \$500,000 to a fee of \$300,000 for transactions valued at greater than \$750 million;
- base the fee on the value of the U.S. business rather than the total transaction value in the case of mergers or joint ventures (but not other transactions);
- cap the fee at \$750 where the value of the U.S. business is less than \$5 million; and
- expand the required content of voluntary notices to include a certification as to the transaction value and an explanation of the valuation methodology.

CFIUS has not imposed (and lacks statutory authority to impose) filing fees for short-form declarations.

II. Proposed Filing Fee Structure

As authorized by FIRREA, the Proposed Rule would amend CFIUS’s regulations to require filing fees for notifications of “covered transactions” under 31 CFR Part 800 and “covered real estate transactions” under 31 CFR Part 802 (effectively, all transactions over which CFIUS has jurisdiction) that are the subject of a full notification

¹ 85 Fed. Reg. 13586 (Mar. 9, 2020). The Proposed Rule is available at: <https://www.federalregister.gov/documents/2020/03/09/2020-04641/filing-fees-for-notice-of-certain-investments-in-the-united-states-by-foreign-persons-and-certain>. To learn more about the regulations implementing FIRREA, please see our alert memorandum, [CFIUS Releases Final FIRREA Regulations](https://client.clearygottlieb.com/36/1496/uploads/2020-01-22-alert-memo---cfius-releases-final-firrea-regulations.pdf) (Jan. 22, 2020), available at: <https://client.clearygottlieb.com/36/1496/uploads/2020-01-22-alert-memo---cfius-releases-final-firrea-regulations.pdf>.

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to CFIUS (whether or not that transaction is covered by mandatory filing rules). The Proposed Rule outlines a tiered filing fee structure based on the value of the notified transaction, as summarized below:

Transaction Value	Proposed Filing Fee
Less than \$500,000	\$0
Between \$500,000 and \$5,000,000	\$750
Between \$5,000,000 and \$50,000,000	\$7,500
Between \$50,000,000 and \$250,000,000	\$75,000
Between \$250,000,000 and \$750,000,000	\$150,000
Greater than \$750,000,000	\$300,000

The Proposed Rule provides for a single fee for each transaction regardless of the number of parties and does not address how it is to be divided among the parties.

Submission of a short-form declaration—either in response to CFIUS’s new mandatory notification requirements or voluntarily—would not require payment of the above filing fee. (Parties may now choose to submit an abbreviated declaration for any transaction). Payment will be required if parties submit a full notification after CFIUS requests that the parties file a notice or after CFIUS declines to provide a “safe harbor” letter following review of a short-form declaration. Payment would also be required where notification is mandatory and the parties choose to submit a full notice instead of a declaration. No additional fees will apply where CFIUS permits parties to withdraw and re-file (absent a material change to the transaction or a material inaccuracy or omission in the filing). No exception is provided where CFIUS “invites” the parties to make a notification.

III. Valuation

Under the Proposed Rule, in most cases the value of a transaction will be the sum of all consideration of any kind that is paid by or on behalf of the foreign party to the transaction.² CFIUS would not be bound by the parties’ characterization of the transaction and its value, though in most cases categorization should be relatively straightforward.

The Proposed Rule provides guidance on calculating the value of any non-cash consideration:

- **Securities.** The relevant value of securities traded on a national securities exchange would be their last closing price before the date of the parties’ notice.
- **Other non-cash assets, services, interests, or in-kind contributions.** These types of consideration would be valued based on their fair market value as of the date of the parties’ notice.
- **Lending transactions.** The relevant value would be the cash value of the loan or similar financing arrangement provided by or made available by or on behalf of the foreign party.
- **Conversion of a contingent equity interest.** If the transaction results from converting a previously acquired contingent equity interest, the value would be the consideration paid to acquire that interest plus any additional consideration paid for conversion.

² This includes cash, assets, shares or other ownership interest, debt forgiveness, services, or other in-kind consideration.

The transaction is valued as a whole, with two exceptions:

1. In the case of a merger or contribution of a business to a joint venture, only the value of the U.S. business is included in the valuation.
2. In any transaction, if the value of the interest being acquired in the U.S. business of the target is less than \$5 million, the filing fee is capped at \$750 regardless of the total value of the transaction.

For real estate transactions that are not “covered transactions” (e.g., raw land or leases), the Proposed Rule provides the following valuation guidance:

- **Purchase transactions.** The value would be the sum of all consideration provided by or on behalf of the foreign purchaser, including cash.
- **Lease transactions.** The value would be the sum of any (i) fixed payments, (ii) variable payments depending on an index or rate (such as a market interest rate), and (iii) non-cash or in-kind consideration from the foreign lessee to the lessor over the term of the lease.
- **Concession transactions.** The value would be the sum of all rent, fees, and charges along with any non-cash or in-kind contributions from the foreign person to the grantor over the term of the concession.

If the consideration has yet to be determined or cannot be determined as of the filing date, the value of the transaction would be the fair market value of the acquired assets as of the day of the parties’ filing.³ Parties can rely on a current (within two quarters) valuation made following GAAP or IFRS or on a valuation from an independent appraiser (unless there has been a significant change); otherwise they may provide a good faith estimate and its basis. For covered real estate transactions, if the parties cannot reasonably determine the value of a lease or concession, the filing fee is set at \$750.

IV. Timing, Manner of Payment, and Refunds

Under the Proposed Rule, filing fees will be due at the time of filing a notification (but not at the time of submitting the pre-filing draft). CFIUS will not accept a notice—and thus will not begin the review period—until payment is made. Where CFIUS accepts a notice but later finds the payment was insufficient (e.g., CFIUS reaches an alternate value determination that pushes a notified transactions into the next tier of fees), the parties will have three business days to make the additional payment before the notice is rejected. No process for appealing the determination is provided.

The Proposed Rule permits parties to seek a partial fee refund if they can demonstrate overpayment at the time of filing. The Proposed Rule also directs Treasury to issue a refund if CFIUS determines that a notified transaction is not within its jurisdiction (as CFIUS would then have no authority to assess a fee).

CFIUS will require filing fees to be paid electronically in U.S. dollars. Payment details will be forthcoming.

³ The Proposed Rule notes that the consideration amount may be determined “notwithstanding minor standard adjustments that are to be made at closing.”

V. Additional Notification Contents

The Proposed Rule amends the notification requirements to require parties to a notification to provide information regarding the value of the transaction and an explanation of the methodology used to determine such valuation.

VI. Conclusion

Although filing fees are modest (no more than 0.15% of transaction value), it is possible to avoid them with a short-form declaration (though there is no guarantee that CFIUS will definitively clear the transactions or will not request a notification, which is difficult to refuse).

Treasury has invited public comment on the Proposed Rule through April 8, 2020. Comments are to be submitted electronically through the Federal Government’s eRulemaking Portal at <https://www.regulations.gov> or by mailing comments to: U.S. Department of the Treasury, Attention: Laura Black, Director of Investment Security Policy and International Relations, 1500 Pennsylvania Avenue, NW, Washington, DC 20220.

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