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CFIUS Filing Fees Become Effective on May 1

May 1, 2020

When Congress passed the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) to strengthen and expand the jurisdictional reach of the Committee on Foreign Investment in the United States, (CFIUS) we knew that CFIUS would eventually exercise the power granted by Congress to impose filing fees for transactions reviewed by the Committee. Now we know what those fees will look like. Earlier this week, the US Department of the Treasury issued an interim rule implementing the filing fee regimes, which CFIUS will begin administering with respect to all written CFIUS Notices effective May 1, 2020. Recognizing the challenges posed by the ongoing coronavirus pandemic, CFIUS has decided to issue the rule as an interim rule to allow the public time to provide additional comments through June 1, 2020. While the comment period remains open for another 30 days, CFIUS will begin to collect fees starting May 1.

Below we address questions you may have on the rule and how it may impact your transaction:

1. Do I have to pay a filing fee for my transaction?

It depends. For context, note that in the final regulations implementing FIRRMA, parties with transactions subject to CFIUS jurisdiction may choose among two types of filings: (1) short-form Declarations that are subject to an expedited 30-day CFIUS review period and (2) more detailed, comprehensive Notices with an extended assessment period of between 45 and 105 days.

Importantly, filing fees apply only for *Notices* – regardless of whether such Notice is submitted as a mandatory or voluntary filing. There is no filing fee for submitting a short-form *Declaration*. Also note that filing fees apply to Notices for "covered transactions" (submitted under 31 C.F.R. Part 800) and "covered real estate transactions" (submitted under 31 C.F.R. Part 802).

While the type of filing (Declaration or Notice) parties make with CFIUS will determine whether there is a filing fee, parties should be careful not to place too much significance on the prospect of a filing fee when deciding which type of filing is most appropriate for their particular transaction. While it is true that there is no filing fee associated with a Declaration, CFIUS can request or require the parties to submit a Notice after CFIUS completes its 30-day assessment of a Declaration. In such a scenario, the parties would still need to pay a filing fee in connection with filing the Notice.

Accordingly, it is important to think of filing fees as one of several factors in determining which form of filing to make. Other factors include the likelihood of obtaining CFIUS approval based on a Declaration, and the parties' transaction timeline.

2. How much will I have to pay?

The filing fee amount is based on the value of the transaction according to the following tier structure:

Transaction Value	CFIUS Filing Fee
Less than $500,000	$0
$500,000 – $4,999,999	$750

$5,000,000 – $49,999,999	$7,500
$50,000,000 – $249,999,999	$75,000
$250,000,000 – $749,999,999	$150,000
$750,000,000+	$300,000

3. How do I calculate the transaction value?

The transaction value is the total value of all consideration that has been or will be paid by or on behalf of the "foreign person" that is a party to the transaction, such as cash, physical assets, intangible assets (including intellectual property), shares or other ownership interests, debt forgiveness, services or other in-kind consideration.

Note that the transaction value is not limited to just the value of the US-based business operations being acquired, but instead encompasses the total transaction value, including US and foreign operations of the target company. Note that CFIUS has included an exception for transactions involving targets with limited US operations where the total transaction value is equal to or greater than $5 million, and the value of the interest acquired in the US business is less than $5 million. In these cases, the fee will only be $750.

4. Who is responsible for the payment, the buyer or seller?

The rule does not identify a responsible party or establish how the fee payment is to be divided, and only provides that payment is required before CFIUS will begin its review. Transaction parties are free to negotiate among themselves how to cover the cost of a filing fee.

5. When is my payment due?

The Treasury Department must receive payment before a Notice will be accepted for review. In practice, this means that transaction parties will be able to communicate with CFIUS, submit draft filings and hold prefiling consultation meetings with CFIUS (where prudent) all before paying the filing fee. However, CFIUS will not formally start its review of a transaction (*i.e.*, start Day 1 of the review) until Treasury receives the payment.

6. How do I make the payment?

A filing fee must be paid via electronic payment in US dollars through Pay.gov. The payor does not need to be a transaction party (*i.e.*, a law firm or third party can pay on the parties' behalf). However, there can only be one payor per filing; the transaction parties cannot make partial payments or split the payment among multiple payors. Additional instructions for CFIUS filing fees is available on Treasury's website.

7. Do I have to pay a filing fee if I submit a mandatory or voluntary Declaration?

No, there are no filing fees for submitting a Declaration, whether mandatory or voluntary. FIRRMA, which amends section 721 of the Defense Production Act of 1950, only allows CFIUS to collect fees with respect to a formal written Notice. However, if the transaction parties submit a Notice after CFIUS completes its assessment of a Declaration, the transaction parties would have to pay the filing fee for the Notice.

8. Can I get a refund if the deal falls through or if the transaction value changes?

Refunds will be issued if CFIUS determines that the transaction is not a covered transaction or a covered real estate transaction (*i.e.*, if CFIUS determines that it does not have jurisdiction to review the transaction). However,

if transaction parties abandon the transaction before CFIUS completes its assessment CFIUS will not issue a refund of the filing fee.

If a transaction party believes it paid a filing fee in an amount greater than required at the time of filing (*e.g.*, based on a miscalculation of the transaction value), it may petition the Staff Chairperson for a refund. If granted, CFIUS will refund the amount of overpayment.

9. Can I request a waiver if I have insufficient funds to pay the filing fee?

The Staff Chairperson is permitted to waive the filing fee in whole or in part if the Staff Chairperson determines that "extraordinary circumstances relating to national security warrant." We anticipate that CFIUS will rarely use this waiver authority and is unlikely to grant a waiver for financial considerations alone.

10. Will I have to pay the fee more than once if I need to withdraw and refile the CFIUS filing?

Generally, no. If CFIUS allows transaction parties to withdraw and refile their transaction, then there will be no subsequent filing fee unless the Staff Chairperson determines that 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.

11. Can I submit questions or comments on the interim rule?

Yes. The US Department of the Treasury, which chairs the Committee, is accepting written comments on the rule until June 1, 2020. Written comments may be submitted online through the federal government eRulemaking portal or by mail.

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