

CFIUS Introduces Filing Fees

March 16, 2020

In a sweeping change, the Committee on Foreign Investment in the United States will soon require parties to transactions to pay filing fees in connection with certain CFIUS filings. Under the proposed rule published in the Federal Register on March 9, 2020, CFIUS would implement section 1723 of the Foreign Investment Risk Review Modernization Act of 2018, which amends section 721 of the Defense Production Act of 1950 to allow CFIUS to collect fees in connection with certain CFIUS filings.

CFIUS is an interagency committee of cabinet-level agencies and departments including the Departments of Defense, Justice, Homeland Security and State, and other federal offices with intelligence and national security responsibilities. CFIUS has authority to review a broad range of foreign investment transactions in US businesses and can block, modify or even unwind transactions where it sees security risks.

Transactions that are subject to CFIUS jurisdiction (*i.e.*, covered transactions) may be voluntarily notified to CFIUS or require mandatory pre-closing notifications. Whereas in the past, CFIUS jurisdiction was limited to transactions that could result in foreign control of a US business, recent legislative and regulatory reform has broadly expanded the scope of CFIUS' jurisdiction to include not only M&A deals and majority investments (Covered Control Transactions), but also certain real estate transactions (Covered Real Estate Transactions) and minority investments by foreign investors, including by foreign private equity funds and US funds with foreign LPs (Covered Investments).

In the final regulations implementing FIRRMA, CFIUS provides for two types of filings – short-form declarations subject to an expedited 30-day assessment period and more detailed, comprehensive notices with an extended assessment period of between 45 and 105 days. The proposed rule regarding fees would establish filing fees for covered transactions where the parties voluntarily submit a notice (*i.e.*, the long-form filing) for review by the Committee. In particular, filing fees would be required under the following scenarios:

1. Where a mandatory filing is required pursuant to 31 C.F.R. § 800.401 and the parties to the transaction choose to file a notice instead of a declaration
2. Where parties choose to file a voluntary notice pursuant to 31 C.F.R. § 800.501
3. Where parties have filed a declaration, and upon the conclusion of CFIUS' review of the declaration, CFIUS requests that the parties file a notice for further CFIUS review pursuant to 31 C.F.R. § 800.407
4. Where parties have filed a declaration, and upon the conclusion of CFIUS' review of the declaration, CFIUS does not request a notice but informs the parties that they may submit one voluntarily, and the parties determine to do so

In establishing the amount of a filing fee, CFIUS took into account the burden of fees on small businesses, the expenses of the Committee and the potential adverse effects of fees on levels of foreign investment in the United States. Where a filing fee applies, the proposed rule sets forth a tiered, fixed-fee schedule based on transaction value, as follows:

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

Per the proposed rule, the applicable filing fee must be paid to the Treasury Department before CFIUS will accept a notice for review. The proposed rule would allow the staff chairperson to waive the filing fee in whole or in part if "extraordinary circumstances relating to national security warrant." Additionally, if CFIUS determines that a notified transaction is *not* a covered transaction (*i.e.*, if CFIUS determines that it does not have jurisdiction to review a transaction with respect to which a filing has been made), then CFIUS will refund the filing fee to the parties.

Interestingly, CFIUS has interpreted its authority under FIRRMA to impose filing fees narrowly to not permit CFIUS to collect filing fees for declarations. Accordingly, there will be no fees associated with any declaration submitted to CFIUS for review, regardless of whether the filing is mandatory or voluntary. (As noted above, however, if parties file a notice after CFIUS completes its assessment of a declaration, then a filing fee will be required.) Similarly, there is no filing fee for a unilateral review of a transaction based on an agency notice filed by any member of the Committee.

The imposition of potentially significant filing fees will add to the list of considerations that parties must take into account when determining whether and how to notify a transaction to CFIUS. We anticipate that transaction parties may increasingly utilize declarations as a preferred method of filing, both for their expedited timelines (30-day assessment period) and lack of filing fees.

Written comments on the proposed rule are due by April 8, 2020.

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