

Treasury Releases Proposed Rule to Implement Filing Fee Requirements for CFIUS Voluntary Notices

March 10, 2020

Key Points

- On March 9, 2020, the U.S. Department of Treasury published a Proposed Rule to implement filing fee requirements for voluntary notices filed with CFIUS.
- Under the proposed framework, the value of the transaction dictates the amount of the fee. No filing fee will be required for transactions valued under \$500,000. The minimum fee (for transactions valued between \$500,000-\$5 million) is \$750. The maximum fee (for transactions valued over \$750 million) is \$300,000.
- The proposed fee structure applies to full written notices for transactions involving U.S. businesses and real estate transactions that fall under the Committee's jurisdiction. It does not apply to short-form declarations.
- Treasury is seeking public comment on the Proposed Rule by April 8, 2020. Among other things, Treasury is interested in hearing whether stakeholders believe that this fee structure will discourage foreign investment.

Background

The Committee on Foreign Investment in the United States (CFIUS or the "Committee") is an interagency committee that reviews foreign investments in the United States to assess national security concerns. In August 2018, President Trump signed into law CFIUS reform legislation known as the Foreign Investment Risk Review Modernization Act (FIRRMA) (see our previous [alert](#)). CFIUS implemented most of its expanded FIRRMA authority in February 2020, (see our previous [alert](#)), but it has not yet implemented Section 1723 of FIRRMA allowing the Committee to require parties to pay a fee to file a notice with the Committee.

Overview of the Requirements

On March 9, 2020, the U.S. Department of the Treasury ("Treasury") published a Proposed Rule (the "Proposed Rule") exercising its discretionary authority to implement a filing fee requirement for notices filed with the Committee. Treasury has requested comments on the Proposed Rule by April 8, 2020. Treasury is particularly

Contact Information

If you have any questions concerning this alert, please contact:

Christian C. Davis

Partner

chdavis@akingump.com

Washington, D.C.

+1 202.887.4529

Kevin J. Wolf

Partner

kwolf@akingump.com

Washington, D.C.

+1 202.887.4051

Tatman R. Savio

Registered Foreign Lawyer

tatman.savio@akingump.com

Hong Kong

+852 3694.3015

Washington, D.C.

+1 202.887.4000

Thor Petersen

Associate

tpetersen@akingump.com

Washington, D.C.

+1 202.887.4307

Michael James Adame

Associate

madame@akingump.com

Washington, D.C.

+1 202.887.4323

Cameron Peek

Associate

cpeek@akingump.com

Washington, D.C.

+1 202.887.4518

interested in comments regarding the impact of the proposed fee structure and whether additional tiers or features should be considered.

Under the Proposed Rule, the filing fee requirement would only apply to voluntary notices filed with the Committee. CFIUS would not formally accept a filing until the fee is paid.

No fee would be required for filing a declaration or unilateral reviews initiated by the Committee. However, in cases where the parties submit a declaration, the filing fee would become applicable to the extent that (i) CFIUS subsequently requests that the parties submit a written notice, or (ii) the parties decide to submit a written notice after CFIUS notifies them that it is unable to conclude action on the basis of the declaration. Additionally, if warranted by “extraordinary circumstances relating to national security,” CFIUS would retain the authority to waive the filing fee requirement for any notice, in whole or in part.

Determination of Fees

The Proposed Rule would institute a fee structure (exhibited in *Table 1*, below) under which the filing fee applicable to a proposed transaction would increase in accordance with the value of the transaction. According to the Proposed Rule, the Committee adopted this structure both to minimize the impact on small businesses and to allow CFIUS to recoup the cost of the increased personnel and expenses associated with its expanded jurisdiction under FIRRMA.

Table 1: Filing Fees

Value of Transaction (USD)	Fee (USD)
Less than \$500,000	None
\$500,000 - \$5 million	\$750
\$5 million - \$50 million	\$7,500
\$50 million - \$250 million	\$75,000
\$250 million - \$750 million	\$150,000
Over \$750 million	\$300,000

Generally, the value of a transaction would include “the total value of all consideration that has been or will be provided in the context of the transactions by or on behalf of the foreign person . . . including cash, assets, shares or other ownership interests, debt forgiveness, or services or other in-kind consideration.” The Proposed Rule provides detailed guidance explaining the Committee’s approach to determining the valuation in situations where it may be unclear at the time of filing. As a general matter, if the value cannot be reasonably determined on the date of filing the notice, the transaction is to be valued at the fair market value of the assets being acquired, as of the date of filing.

Generally, the Committee will assess the amount of the fee based on the value of the entire transaction. However, to account for transactions involving only a limited U.S. presence, the Proposed Rule includes an exception for transactions in which the total value of the transaction is equal to or greater than \$5 million, but the value of the interests or rights acquired in the U.S. business is less than \$5 million. In such circumstances, the filing fee would be \$750. This exception would not apply to covered real estate transactions.

Conclusion

While the Proposed Rule requires only modest filing fees for smaller transactions, large transactions would be subject to significant fees that would substantially increase CFIUS-related costs in some cases. As a result, the implementation of filing fees could ultimately discourage parties from submitting written notices, among other potential consequences.

In light of the increased costs and the potential for these fees to change investor and regulator behavior, stakeholders should consider whether to submit comments to Treasury regarding the Proposed Rule. Comments are due by April 8, 2020.

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