

Client Alert

March 2020

Treasury Proposes Rules to Establish Fees for CFIUS Filings

What Happened: On February 13, 2020, the most significant portion of the final rules implementing the Foreign Investment Risk Review Modernization Act (**FIRRMA**) became effective.¹ One provision of FIRRMA that did not become effective on that date was the provision authorizing the Committee on Foreign Investments in the United States (**CFIUS**) to begin collecting a filing fee for certain submissions. On March 4, 2020, the US Department of Treasury released for public comment rules implementing a filing fee under FIRRMA (**Fee Rule**).² Interested parties have until April 8, 2020, to provide comments.

The Bottom Line: As proposed, the Fee Rule would establish for the first time a filing fee that the parties would have to pay before CFIUS commences review of a notification filing submitted by the parties. This filing fee is payable both with respect to covered transactions under the Part 800 rules and covered real estate transactions under the Part 802 rules. Parties to transactions that may be subject to CFIUS review should consider including provisions in their transactional documents specifying who is responsible for the payment of the filing fee and under what circumstances; in certain instances, they may also want to give more serious consideration to making their initial submission to CFIUS as a declaration because of the absence of a filing fee for declarations.

The Full Story

To simplify the calculation of the filing due to CFIUS in connection with notification filings submitted by the parties, CFIUS has proposed a tiered fee schedule.

Where the value of the transaction is:	The filing fee is:
< \$500,000	\$0.00
≥ 500,000 but < \$5,000,000	\$750.00
≥ \$5,000,000 but < \$50,000,000	\$7,500.00
≥ \$50,000,000 but < \$250,000,000	\$75,000.00
≥ \$250,000,000 but < \$750,000,000	\$150,000.00
≥ \$750,000,000	\$300,000.00

Given that FIRRMA had authorized CFIUS to charge a fee not to exceed the lesser of \$300,000 or 1 percent of the value of the transaction, the fees proposed by the Fee Rule are generally well under the maximum amounts authorized in the legislation. On the other hand, depending on the precise value of the

¹ For a discussion of the rules that became effective on February 13, 2020, please see our January 2020 client alert [here](#) (**Prior Alert**). As discussed in the Prior Alert, those rules broadened and changed certain of CFIUS's authorities related to investments in US businesses by foreign persons under Section 721 of the Defense Production Act of 1950.

² A copy of the proposed Fee Rule is available [here](#).

transaction, the CFIUS fee may be more or less than the fee assessed for a review of a premerger notification filing under the Hart-Scott-Rodino Antitrust Improvements Act (**HSR**).

The filing fee must be paid to the Department of Treasury before CFIUS may commence review of a notification submitted to it by the parties with respect to covered transactions under the Part 800 rules and covered real estate transactions under the Part 802 rules.³ *No fee is payable with respect to short-form declaration submissions⁴ or for notification filings made in response to a unilateral review of a transaction initiated by CFIUS.* The fact that declaration filings will not require a fee may create new incentives to consider this infrequently used submission method where the parties believe that completion of the transaction will not result in significant national security issues and/or are already expecting a substantial delay between signing and closing (e.g., a lengthy HSR review).

The largest part of the Fee Rule addresses the calculation of the “value of the transaction.” As a general matter, the value of the transaction will be the total value of all consideration that has been or will be paid by the foreign person in connection with the transaction. The Fee Rule includes detailed guidance for a variety of transaction types including transactions structured as purchases, transactions structured as leases, lending transactions and transactions involving a convertible security. In addition, where the transaction involves both US and non-US businesses, the value for Fee Rule purposes will generally be the value being given for the businesses *on a worldwide basis* subject to one important qualification. Where the worldwide value is greater than \$5,000,000 but the value of the US business is less than \$5,000,000, the rules propose that the filing fee—for filings under Part 800 for covered transactions—will be \$750.00. Treasury has requested comment on whether a similar exception should be applied to filings under Part 802 for covered real estate transactions.

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Foreign investors and US businesses that are potential investment targets for foreign persons should review this alert.

The mergers and acquisitions, competition and international and cross-border transactions practice at Hunton Andrews Kurth LLP will continue to monitor the development of this rule-making and other CFIUS and cross-border investment matters. Please contact us if you have any questions or would like further information regarding the Fee Rule or CFIUS.

Contacts

Eric R. Markus
ericmarkus@HuntonAK.com

Leslie W. Kostyshak
lkostyshak@HuntonAK.com

Chelsea Lomprey
clomprey@HuntonAK.com

Sevren R. Gourley
sgourley@HuntonAK.com

³ Under the proposed rule, Department of the Treasury will refund the filing fee if it later determines that a notified transaction is not a covered transaction or a covered real estate transaction.

⁴ The CFIUS rules that went into effect on February 13, 2020, extended the availability of a short-form declaration filing to all covered transactions under Part 800 and all covered real estate transactions under Part 802. Prior to February 13, 2020, the declaration filing was available only for transactions subject to the “pilot program” rules under Part 801. The declaration submission process has the potential of producing a faster clearance of a transaction (as the completion of an initial declaration review must be completed within 30 days). The declaration filing is shorter and simpler than a notification filing. However, where the declaration process does not produce a clearance, it has the potential of extending the total time required to obtain CFIUS approval as the parties may then be required to make a full notification submission and go through the 45-day notification review and, possibly, the 45-day notification investigation.