

ALERT

Treasury Publishes Proposed Rule to Create a Filing Fee Schedule for CFIUS Voluntary Notices

March 12, 2020

On March 9, 2020, the U.S. Department of Treasury's Office of Investment Security (Treasury) published a proposed rule that would establish a fee for parties filing a voluntary notice with the Committee on Foreign Investment in the United States (CFIUS). The proposed regulations will amend the current CFIUS regulations at 31 CFR part 800 and part 802. The proposed rule sets out a tiered, fixed-fee schedule that is based on the value of the underlying transaction. Public comments on the proposed rule must be submitted to Treasury by April 8, 2020.

The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) authorized CFIUS to assess and collect a fee "with respect to each covered transaction for which a written notice is submitted to the Committee." FIRRMA requires any such fee to be based on the value of the transaction. In addition, FIRRMA directs Treasury to consider several other factors when crafting the fee regulations, including the effect of the fee on small business concerns, certain expenses of the Committee, the effect of the fee on foreign investment, and any other matters the Committee considers appropriate.

CFIUS's proposed filing fee structure:

- Transaction is less than \$500,000: no fee
- Transaction is equal to or greater than \$500,000 but less than \$5,000,000: **\$750 fee**
- Transaction is equal to or greater than \$5,000,000 but less than \$50,000,000: **\$7,500 fee**

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Practice Areas

Committee on Foreign Investment in the United States (CFIUS)
Government Contracts
International Trade
National Security

- Transaction is equal to or greater than \$50,000,000 but less than \$250,000,000: **\$75,000 fee**
- Transaction is equal to or greater than \$250,000,000 but less than \$750,000,000: **\$150,000 fee**
- Transaction is equal to or greater than \$750,000,000: **\$300,000 fee**

Highlights of the proposed rule include:

- Fees would be assessed on covered transactions, including covered real estate transactions, that are filed with CFIUS as voluntary written notices. There would be no fee for declarations submitted to CFIUS or unilateral CFIUS review of non-notified transactions. However, a fee would be required if, after assessing a declaration, CFIUS requests that the parties submit a written notice or informs parties that it is unable to conclude action and that the parties may file a written notice.
- Content requirements for voluntary notices would be revised to require parties to provide the value of the transaction in addition to an estimate of the net value of the interest acquired in the U.S. business by the foreign person.
- In determining the value of a transaction and the applicable fee, the proposed regulations note that generally, “the value of a transaction will be the total value of all consideration that has been or will be paid in the context of the transaction by or on behalf of the foreign person who is a party to the transaction.” Further, “[w]here a covered transaction is a part of a transaction that includes one or more non-U.S. businesses, the total value of the transaction will generally be assessed based on the global value of the transaction encompassing both U.S. and non-U.S. businesses.”
- Parties would be required to pay the applicable fee when they file a notice with CFIUS. Review of a notice would not begin until Treasury received the fee payment.

Treasury expressed specific interest in receiving comments from the public on the following:

- The impact of the proposed tiered fixed-fee structure and whether additional tiers or additional features should be considered.
- The approach to calculating transaction value taken in the proposed rule.
- Whether and how the rule could be further tailored to address industry practices.
- What approach should be taken for transactions under the Part 802 rule where the value of the covered real estate is relatively small in the context of the overall transaction.

Paul Coyle, a Law Clerk in Wiley's International Trade Practice, contributed to this alert.