

CFIUS Abruptly Imposes New Notice Filing Fees

by Lawrence Ward

Beginning May 1, 2020, the Committee on Foreign Investment in the United States (“CFIUS”) will require a filing fee in connection with any formal notice of a “covered transaction” or a “covered real estate transaction.” The U.S. Treasury Department made the announcement of the implementation of these filing fees on April 27, 2020 through an interim rule with its request for public comments until June 1, 2020. (See the interim rule [here](#).) As of the date of this alert, CFIUS has set the escalating amount of the filing fee based on the value of the underlying transaction according to the following tiers:

Transaction Value Range	Filing Fee
\$0 to \$499,999.99	\$0
\$500,000 to \$4,999,999.99	\$750
\$5,000,000 to \$49,999,999.99	\$7,500
\$50,000,000 to \$249,999,999.99	\$75,000
\$250,000,000 to \$749,999,999.99	\$150,000
\$750,000,000 or more	\$300,000

Historically, CFIUS has not had any authorization from Congress to charge any filing fee. However, under Section 1723 of the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”), Congress for the first time gave CFIUS the power to begin collecting such filing fees to help offset its expenses in conducting national security reviews and investigations of foreign investments or acquisitions under Section 721 of the Defense Production Act. Under FIRRMA, CFIUS was authorized to collect fees in connection with any formal written notices filed but not with any of the new mandatory

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declarations that were also created by FIRRMA.

However, despite having had this authority for nearly two years, CFIUS had chosen not to announce the adoption of filing fees even as it went ahead with a number of other key changes. (See our earlier alerts here: [February 7, 2020](#); [October 30, 2019](#); [October 23, 2018](#); and [August 15, 2018](#).) In connection with FIRRMA, CFIUS initially implemented a critical technologies Pilot Program in November 2018 that contained no filing fees. Additionally, in October 2019, CFIUS announced further significant amendments to its existing regulations that finally became effective on February 14, 2020, but again without any filing fees. Nevertheless, on March 9, 2020, CFIUS published a notice of proposed rulemaking to establish filing fees for “covered transactions” under the *Regulations Pertaining to Certain Investments in the United States by Foreign Persons* found in 31 CFR Part 800 (“Part 800”) and for “covered real estate transactions” under the *Regulations Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States* (“Part 802”). The proposed rule created a new Subpart K to Part 800 and 802.

Under the proposed rule, CFIUS was accepting comments on the proposed filing fees only until April 3, 2020. CFIUS appears to have received only five comment letters.¹ Importantly, the timing of the release of the proposed rule and the date on which comments were originally due coincided with the time that virtually all U.S. companies were very distracted by the adverse effects of the COVID-19 pandemic. CFIUS itself acknowledged the impact of the COVID-19 pandemic on public comments and so has extended the new comment period until June 1, 2020.

Despite requesting additional comments, given the growing volume of CFIUS’s work and the added government resources that must be devoted to that work, on April 27, CFIUS determined that implementing filing fees in line with the 2018 FIRRMA authorization was appropriate at this time. Moreover, the U.S. Government is now facing massive new federal expenditures to respond to the COVID-19 crisis even as its own income tax revenues will fall sharply because the nation faces a deep recession and many millions of Americans have lost their jobs. CFIUS will only charge the filing fee in connection with formal written notices filed with it but not in connection with mandatory declarations that were also created under FIRRMA. Importantly, however, if the parties to a mandatory declaration ultimately file a formal written notice with CFIUS, then the relevant filing fee would apply to that notice.

In practice, since 2018, in connection with certain mandatory declarations filed under the CFIUS Pilot Program, CFIUS had ultimately still required the parties to those declarations to submit formal written notices after reviewing those declarations, which then elongated the entire CFIUS process and thus significantly delayed closing of those transactions. Because of these potential timing uncertainties created by the added risk CFIUS would still insist upon a formal notice even after a mandatory declaration, many parties strategically opted to skip the mandatory declaration step altogether and just to file a full written notice instead. Now, with the new filing fee requirement and such declaration-type transactions, parties will be faced with a new threshold choice between

paying the filing fee in connection with a written notice or the timing uncertainties involved with filing only a mandatory declaration and then being required by CFIUS to file a full written notice (that would then have further legal costs plus the applicable filing fee).

Under the new rule, the parties must pay the filing fee electronically to the U.S. Treasury Department and CFIUS will not begin its 45-day review until the applicable filing fee has been paid. Under the rule, the transaction value is “the total value of all consideration that has been or will be provided in the context of the transaction by or on behalf of the foreign person that is a party to the transaction, including cash, assets, shares or other ownership interests, debt forgiveness, or services or other in-kind consideration.” The new rule also provides detailed guidance on determining the value of consideration, including determining valuation in connection with multi-phase and contingent equity interest or earn-out transactions. Additionally, the new rule makes clear that CFIUS is not bound by the parties’ determination of the transaction value and so CFIUS might potentially impose a filing fee based upon its own assessment of the transaction value and presumably could force the parties to pay that fee or CFIUS would just refuse to start its review of the transaction.

Dorsey attorneys are available to advise both U.S. and foreign parties to international investments or acquisitions and to navigate these unique national security review procedures under the CFIUS laws and regulations.

¹ One comment letter from an anonymous source requested that filing fees not be implemented at this time. Another comment letter requested that CFIUS lower the proposed filing fees, adjust how the value of the transaction would be calculated, and requested that the filing fee be due within 15 days of CFIUS beginning its review (as opposed to before CFIUS starts its review). Still another comment letter requested that CFIUS determine the transaction value (and thus the filing fee due) based on the U.S. operations of the target company. In its April 27 notice, CFIUS rejected this important comment by indicating that parties to a transaction negotiate and arrive at the overall transaction value in the standard course of dealmaking but did include a very limited exception for transactions where the value of the U.S. business is less than \$5,000,000 but the overall transaction value is \$5,000,000 or greater.