

May 11, 2020

CFIUS Imposes Filing Fees

On April 29, 2020, the Treasury Department issued interim regulations implementing the new authority under the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”)¹ for the interagency Committee on Foreign Investment in the United States (“CFIUS”) to impose filing fees in connection with the filing of notices with CFIUS. In early March of this year, CFIUS had issued proposed regulations to impose filing fees,² and the interim regulations are largely similar to the proposed regulations. Although final regulations implementing other elements of FIRRMA went into effect on February 13, 2020,³ CFIUS chose to handle the imposition of filing fees through a separate rulemaking process. The interim regulations (and the associated filing fees) went into effect on May 1, 2020, but CFIUS is accepting comments on the interim regulations through June 1, 2020. In its commentary accompanying the interim regulations, the Treasury Department explained the decision to permit a second round of public comments on the filing fees by noting “the challenges posed by the coronavirus pandemic during the public comment period for the proposed rule.”

Key takeaways from the interim regulations are as follows:

1. Filing fees are imposed only in connection with the filing of notices; there is no filing fee in connection with the filing of short-form declarations. This approach is in line not only with FIRRMA, but also with CFIUS’s effort to encourage transaction parties to make greater use of declarations rather than traditional notices. Although declarations have advantages over notices in terms of both cost and processing time, the potential advantages of filing a declaration are undercut by the broad discretion that CFIUS has in determining how it responds to the filing of a declaration. At the end of the 30-day review period after a declaration has been filed, while CFIUS is empowered under FIRRMA and the implementing regulations to clear the transaction, it is also empowered (i) to ask the parties to file a traditional notice or (ii) to not make a decision with respect to the

¹ Our prior memorandum on the adoption of FIRRMA can be found here: <https://www.paulweiss.com/practices/transactional/mergers-acquisitions/publications/president-trump-signs-cfius-reform-legislation?id=26899>.

² Our prior memorandum on the proposed filing fee regulations can be found here: <https://www.paulweiss.com/practices/litigation/litigation/publications/proposed-regulations-issued-for-cfius-filing-fees?id=31294>.

³ Our prior memorandum on the final regulations implementing FIRRMA can be found here: <https://www.paulweiss.com/practices/transactional/mergers-acquisitions/publications/final-cfius-regulations-implementing-the-foreign-investment-risk-review-modernization-act-of-2018-are-now-in-effect?id=30718>.

transaction (at which point the parties have to decide for themselves whether to file a notice in order to obtain protection against potential future action by CFIUS). Based on the broad discretion that CFIUS has and the manner in which CFIUS has been exercising its discretion to date, it seems likely that most transaction parties will choose to file declarations only where they are confident that a transaction will be easy to clear.

2. The interim regulations set forth the following tiered approach to filing fees for notices, based on the value of the transaction:
 - less than \$500,000 – no fee;
 - equal to or greater than \$500,000 but less than \$5 million – \$750;
 - equal to or greater than \$5 million but less than \$50 million – \$7,500;
 - equal to or greater than \$50 million but less than \$250 million – \$75,000;
 - equal to or greater than \$250 million but less than \$750 million – \$150,000; and
 - equal to or greater than \$750 million – \$300,000.
3. The “value of the transaction” is defined as “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.” Where an acquisition or investment will be effectuated in multiple phases, the value of the transaction consists of the total value of the multiple phases. Where an acquisition or investment involves both a U.S. business and one or more non-U.S. businesses, the value of the transaction is the total value including the non-U.S. businesses. However, where the value of the transaction is \$5 million or more but the value of the interests or rights acquired in the U.S. business is less than \$5 million, the filing fee is set at \$750, regardless of the total value of the transaction.
4. Where a notice is submitted that triggers the filing fee, the fee has to be paid by electronic payment before CFIUS will accept the notice (and therefore before the statutory time clock will begin to run).
5. There is no carve-out for transactions signed before the interim rule went into effect on May 1, nor is there even a carve-out for transactions where the parties had already submitted a draft notice to CFIUS by that date. Rather, notices that are filed after May 1 are subject to the filing fee.
6. Aside from having a transaction valued at less than \$500,000, the only exceptions to the filing fee for notices are as follows:

- where CFIUS determines that a transaction is not a covered transaction or a covered real estate transaction (i.e., not subject to CFIUS jurisdiction), the Treasury Department will refund the filing fee that was paid when the notice was submitted;
- where the parties have paid the filing fee and CFIUS has permitted the parties to pull and re-file a notice, the parties will not have to pay the fee again, provided that the CFIUS Staff Chairperson has not determined that a material change to the transaction has occurred, or a material inaccuracy or omission was made by the parties in information submitted to CFIUS, that requires CFIUS to consider new information; and
- where the CFIUS Staff Chairperson has determined that extraordinary circumstances relating to national security warrant a waiver of the fee, the fee may be waived in whole or in part.

By contrast, the fee requirement fully applies where the parties have filed a notice because they were directed by CFIUS to do so.

7. Going forward, for larger transactions where the risk profile suggests that a notice filing is advisable, transaction parties should consider the question of how they wish to allocate responsibility for the filing fee.

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We will continue to monitor developments related to implementation of FIRRMA, and we will provide further updates as appropriate.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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