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Report from Washington

Update: Treasury Releases Proposed Rules to Impose CFIUS Filing Fees for the First Time

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Introduction

On March 4, 2020, the Office of Investment Security of the U.S. Department of the Treasury (“Treasury”) issued proposed rules to impose filing fees for notices to the Committee on Foreign Investment in the United States (“CFIUS” or “Committee”) regarding certain foreign investments in the United States. Treasury previously issued [two final regulations](#) to implement certain provisions of the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”). These final regulations took effect on February 13, 2020, but did not reference anticipated filing fees for the submission of CFIUS notices, as authorized by FIRRMA. The new proposed rules would establish filing fees for the submission of voluntary notices to CFIUS regarding covered transactions and covered real estate transactions. Notably, abbreviated “declarations” that parties may submit to the Committee in lieu of a full notice will not be subject to any filing fees.

The proposed fees for notices to CFIUS progressively increase from no fee for transactions valued at less than \$500,000 USD to a maximum fee of \$300,000 USD for transactions valued at equal to or greater than \$750 million USD. The progressively increasing nature of the fees is meant to minimize the impact on small businesses and to avoid discouraging foreign investment in the U.S. As explained in the rule, the proposed fees will represent no more than 0.15 percent of the overall value of the notified transactions. The proposed rules also permit CFIUS to waive fees in limited and extraordinary circumstances in the interest of U.S. national security.

Any applicable fee must be paid prior to CFIUS accepting a notice for review. Additionally, the proposed rules allow the Committee to reject a notice if it determines that the fee paid was insufficient.

Proposed Fee Structure

- No fee for transactions valued at less than \$500,000;
- Where the value of the transaction is equal to or greater than \$500,000 but less than \$5,000,000, a filing fee of \$750 is assessed;
- Where the value of the transaction is equal to or greater than \$5,000,000 but less than \$50,000,000, a filing fee of \$7,500 is assessed;
- Where the value of the transaction is equal to or greater than \$50,000,000 but less than \$250,000,000, a filing fee of \$75,000 is assessed;
- Where the value of the transaction is equal to or greater than \$250,000,000 but less than \$750,000,000, a filing fee of \$150,000 is assessed; and
- Where the value of the transaction is equal to or greater than \$750,000,000, a filing fee of \$300,000 is assessed.

Key Takeaways

- The value of a transaction for the purposes of calculating the fee will be based on the total value of all consideration that has or will be paid. This includes cash, assets, shares, any other ownership interests, debt forgiveness, services, or any other in-kind consideration. The proposed rules also modify the content in voluntary notices to require parties to provide the value of the transaction and the methodology used to determine this value and the associated filing fee.
- The value of covered transactions that include both U.S. and non-U.S. businesses will be calculated based on the total global value of the transaction. However, the proposed rules include an exception for transactions equal to or greater than \$5 million USD, but where the value of the U.S. business acquired in the transaction is less than \$5 million USD. This exception imposes a flat fee of \$750 USD for all such transactions.
- The proposed rules provide for refunds for notified transactions if CFIUS determines that such transaction is not a covered transaction or covered real estate transaction. Parties may also petition the Committee for a partial refund if the fee paid is later determined to be greater than required by the proposed rules.
- The proposed rules do not impose an additional fee if the Committee allows a filing party to withdraw and re-file a notice, unless there is a material change to the transaction or a material inaccuracy or omission from the original notice.

Conclusion

These proposed rules were to be expected and represent another incremental step in the full implementation of CFIUS's expanded jurisdiction and authority pursuant to FIRRMA. It is important to note that these rules are not yet in effect and there are no filing fees currently required for any notifications to the Committee. The proposed rules are still subject to a 30-day public comment period. Treasury will then consider all comments on the proposed rules before issuing final rules that will take effect at a later date. Simpson Thacher & Bartlett continues to monitor the regulatory developments regarding these proposed rules and FIRRMA's full implementation and is experienced in assisting parties in understanding and successfully navigating the increasingly complex CFIUS review process.

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