

## CFIUS Filing Fees Go Into Effect May 1

April 28, 2020

CFIUS

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The day we have all been expecting has finally come — CFIUS filing fees are going into effect on May 1, 2020. As discussed in our earlier alert, on March 4, 2020, the Department of the Treasury (“Treasury”) issued a proposed rule regarding CFIUS filing fees, which were authorized under the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”). Today, April 28, 2020, Treasury filed an interim final rule (“the Rule”) implementing those fees, which goes into effect almost immediately, on May 1, 2020. Recognizing that the COVID-19 pandemic may have affected some parties’ ability to provide comments on the earlier proposed rule, however, Treasury has issued the Rule as an interim final rule, not a final rule, in order to allow for additional public comment through June 1, 2020. Below we address some questions we expect parties to have in regard to the new filing fees.

### 1. Who will need to pay a CFIUS filing fee?

The filing fee will apply to parties that submit — on or after May 1, 2020 — formal written notices for “covered transactions” and “covered real estate transactions,” as defined at 31 C.F.R. § 800.213 and 31 C.F.R. § 802.212, respectively, where the value of the notified transaction is \$500,000 or greater. Filing fees are not required for declarations, but will be required if, after submitting a declaration, CFIUS requests a full notice or the parties choose to file one voluntarily. Parties will be collectively responsible for the fees and will need to decide how to apportion such fees among themselves.

The preamble to the Rule makes clear that parties who have filed only in draft, but have not yet filed formally prior to May 1, 2020 will be required to pay the fee. However, because the filing fees amend the CFIUS regulations implementing FIRRMA, which became effective February 13, 2020, the filing fee requirement also is subject to the so-called “applicability rule” in the regulations. Specifically, under the “applicability rule” (contained at 31 C.F.R. § 800.104), certain transactions are still subject to the old CFIUS regulations *in effect as of February 12, 2020*, and not the current regulations. These include transactions where any of the following occurred before February 13, 2020:

1. Completion Date;
2. The parties have executed a binding written document establishing the material terms of the transaction;
3. A party has made a public offer to shareholders to buy shares of the U.S. business;
4. A shareholder has solicited proxies in connection with an election of the board of directors of a U.S. business; or

5. An owner or holder of a contingent equity interest has requested the conversion of the contingent equity interest.

Thus, transactions that meet the foregoing criteria will not be subject to a filing fee, even if formally filed on or after May 1, 2020.

CFIUS may also waive the filing fee, if Treasury “determines that extraordinary circumstances relating to national security warrant,” but we would expect CFIUS to use such waiver authority sparingly.

## **2. How much is the fee?**

The amount of the fee is based on the value of the notified transaction. Those tiers have not changed from the proposed rule, as reflected in our earlier alert:

- 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 would be 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 would be 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 would be 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 would be assessed.
- Where the value of the transaction is equal to or greater than \$750,000,000, a filing fee of \$300,000 would be assessed.

## **3. How is the value of the transaction determined?**

For most transactions, the value of the transaction is based on the total value of all consideration paid by or on behalf of the foreign person. This includes, but is not limited to, cash, assets, shares or other ownership interests, debt forgiveness, services, or other in-kind consideration. As the preamble to the Rule makes clear, this is intended to be the consideration for the entire transaction, not just the value of the U.S. business operations (notwithstanding the requirement in the CFIUS regulations to provide in any CFIUS notice a good faith approximation of the net value of the interest acquired in the U.S. business in U.S. dollars, as of the date of the notice).

The Rule does recognize some exceptions, however:

- Where the consideration to be provided has not been or cannot reasonably be determined as of the date of the notice, the valuation for filing fee purposes should be based on the fair market value of the interest being acquired in the transaction as of the filing date.
- Where the transaction under review involves a merger or the contribution of one or more U.S. businesses to a joint venture, the value of the transaction is the fair market value of the U.S. business(es) being merged or contributed.

- Where the value of the transaction is \$5 million or greater, but the fair market value of the interest acquired in the U.S. business is less than \$5 million, the filing fee will only be \$750.

#### **4. When is the fee due?**

Generally, the fee will be due at the time of submission of the formal notice. Parties can still engage with CFIUS prior to a formal filing, including by submitting draft filings, without paying a fee. However, CFIUS will not formally accept a notice until the fee is paid. CFIUS may also reject a notice if parties pay what CFIUS determines to be an insufficient fee, although the parties will be given notice and an opportunity to pay the remainder of the fee before any rejection.

#### **5. How is the fee to be paid?**

The Rule directs parties to the Treasury CFIUS website for payment instructions. As of this alert, those instructions require parties to submit the payment of the CFIUS filing fee through Pay.gov, a web portal sponsored by the Treasury Department's Fiscal Service, which enables secure electronic payments to the U.S. government. The payment does not have to be made directly by a party to the transaction; for example, the payment for a transaction can be submitted by legal counsel or other third-party representatives.

#### **6. If the parties withdraw from the CFIUS process and refile a notice for their transaction, will they need to pay the fee again?**

Generally, no. CFIUS only requires parties to pay the fee for new transactions. Thus, parties will only have to pay the fee again if there is a material change in the transaction, or if the parties made a material inaccuracy or omission in the prior notice that requires the Committee to consider "new information" under the refiled notice.

#### **7. Are there any circumstances where the fee could be refunded?**

Yes. CFIUS will refund a filing fee if it determines that a transaction is not within its jurisdiction, or if the parties submit a petition and CFIUS concludes that the parties initially overpaid the fee amount required at the time of filing.

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## CFIUS

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