

May 1, 2020

CFIUS Filing Fees

Filing Fees Effective for Transactions Entered Into On or After February 13, 2020

SUMMARY

On April 28, 2020, the U.S. Department of the Treasury (“Treasury”) issued an interim final rule (the “Rule”) establishing filing fees for parties filing a written notice with the Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”) on or after May 1, 2020 (the “Effective Date”) with respect to transactions entered into on or after February 13, 2020.¹ Recognizing the challenges posed by the coronavirus pandemic during the public comment period for the proposed rule, Treasury opted to issue the Rule as an interim final rule and has provided the public until June 1, 2020 to provide additional comments. The Rule establishes a tiered fee structure based on the value of the transaction, and provides guidance as to how the value of a transaction is to be determined.

I. APPLICABILITY

The Rule establishes filing fees for any filing of a written notice of a transaction with the Committee under section 501(a) of part 800 or part 802 of the Regulations (“Part 800” and “Part 802,” respectively) on or after the Effective Date.² There is no fee for the submission of a declaration (whether mandatory or voluntary) under sections 401 and 402 of Part 800 and Part 802,³ or for any unilateral review of a transaction based on an agency notice filed by any member of the Committee.⁴

Parties are not required to pay an additional fee where the Committee allows the parties to withdraw and re-file a written notice, unless the CFIUS Staff Chairperson determines that a material change to the transaction has occurred—or a material inaccuracy or omission was made by the parties in information provided to the Committee—that requires the Committee to consider new information.

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Treasury will begin collecting filing fees on the Effective Date for written notices with respect to transactions entered into on or after February 13, 2020, including from parties that have filed a draft notice pursuant to section 501(g) of Part 800 or Part 802 prior to the Effective Date, but have not filed a written notice on or after the Effective Date.

II. FEE STRUCTURE AND PAYMENT

The Rule establishes a tiered, fixed-fee schedule based on transaction value. The fee structure is set forth in the table below.

Transaction Value:	< \$500,000	≥ \$500,000 – < \$ 5M	≥ \$5M – < \$50M	≥ \$50M – < \$ 250M	≥ \$250M – < \$ 750M	≥ \$750M
Fee:	No fee	\$750	\$7,500	\$75,000	\$150,000	\$300,000

The applicable fee must be paid to Treasury prior to the CFIUS Staff Chairperson accepting the written notice for review.⁵ Parties are permitted to submit a written notice prior to paying any applicable fee, but the 45-day review period will not start until the fee has been paid in full.⁶ The fee must be paid by electronic payment in U.S. dollars pursuant to instructions published on the Treasury website.⁷

As a general matter, Treasury will provide refunds of filing fees only if the Committee determines that a notified transaction is not a covered transaction or a covered real estate transaction. The Rule does, however, permit parties to petition the CFIUS Staff Chairperson to seek a partial refund of fees if the parties can demonstrate that the parties paid a filing fee in an amount greater than required at the time of filing.

III. CALCULATION OF TRANSACTION VALUE

As discussed above, the Rule implements a fixed-fee structure that is based on the value of the transaction, 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.”⁸ In the preamble to the Rule (the “Preamble”), Treasury noted that this includes intangible assets in any form. Though not explicitly stated in the Rule, the value of a transaction should in most cases be the negotiated transaction price, as Treasury has noted that, “in most instances, determining the value of the transaction will be straightforward, based on the amount of money the foreign person is paying in the transaction.”⁹ However, Treasury also recognized that certain types of consideration or transaction structures may present valuation challenges, and thus the Rule seeks to provide clarity as to how the value of a transaction should be calculated in such circumstances, as described below.¹⁰ Although the rules for calculating the value of a transaction for CFIUS filing fee purposes are not identical to the process for calculating the value

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of a transaction under the Hart-Scott-Rodino antitrust process, the differences are not particularly significant.

1. Valuation Guidance

The Rule provides valuation guidance with respect to the following transaction structures:

- ***Mergers and joint ventures.*** Where a covered transaction 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 value¹¹ of the U.S. business(es) being merged or contributed. As noted above, the value of most such transactions will likely be the negotiated transaction price, which should represent the parties' good-faith estimate of the fair market value of the transaction.
- ***Transactions involving both U.S. and non-U.S. businesses.*** Where a covered transaction is part of a larger transaction that includes one or more non-U.S. businesses, the value of the covered transaction will generally be assessed based on the global value of the larger transaction, encompassing both U.S. and non-U.S. businesses. However, where the value of the larger transaction is \$5 million or more, but the value of the interests or rights acquired by the foreign person in the U.S. business is less than \$5 million, the fee is \$750. This exception applies only to covered transactions under Part 800, and not to covered real estate transactions under Part 802.
- ***Multiple-phase transactions.*** Where a covered transaction will be effectuated in multiple phases, the value of the transaction includes the total value of the multiple phases, as reasonably determined as of the date the parties file the written notice.
- ***Leases with respect to covered real estate.*** Covered real estate transactions structured as leases are to be valued according to the sum of fixed payments, certain variable payments, and non-cash consideration to be provided by the foreign person lessee to or for the benefit of the lessor over the term of the lease.
- ***Concessions with respect to covered real estate.*** Covered real estate transactions structured as concessions are to be valued as the sum of all rent, fees, and charges to be paid by the foreign person to the grantor and any non-cash consideration to be provided by such foreign person to or for the benefit of the grantor over the term of a concession agreement.

2. Types of Consideration

The Rule provides additional valuation guidance with respect to the following types of consideration:

- ***Securities.*** Where consideration includes securities that are traded on a national securities exchange, the Rule provides that the value of that consideration should be calculated based on the closing price on the national securities exchange on which the securities are primarily listed on the trading day immediately prior to the date the parties file a written notice with the Committee (or the last published closing price, if the securities were not traded on such day).¹²
- ***Non-cash consideration.*** Where consideration includes other non-cash assets, services, interests, or other in-kind consideration, the value of the consideration is the fair market value of such assets, services, interests, or other in-kind consideration as of the date the parties file the written notice.
- ***Loans.*** Where the transaction is or includes a lending transaction, the consideration includes the cash value of the mortgage, loan, or similar financing arrangement, made available or provided by or on behalf of the foreign person that is a party to the transaction.

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- ***Contingent equity interests.*** Where consideration includes a contingent equity interest, the value of that interest includes the consideration that was paid by or on behalf of the foreign person to acquire the contingent equity interest, and, if the conditions that lead to conversion will occur imminently, the conditions are within the control of the acquiring party, and the consideration for the interest that would be acquired upon conversion or satisfaction of contingent conditions can be reasonably determined at the time of acquisition, any other consideration paid or to be paid in connection with the conversion.
- ***Consideration that cannot be determined.*** Where the consideration to be provided by the foreign person has not been, or cannot reasonably be determined as of the date the parties file the written notice, the value of any transaction being notified pursuant to Part 800 or purchase being notified pursuant to Part 802 is the fair market value of the interest being acquired in the transaction as of the date the parties file the written notice. For any lease or concession being notified pursuant to Part 802 for which the consideration cannot reasonably be determined, the Rule does not specify a valuation, but provides that the filing fee will be \$750.

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ENDNOTES

- 1 85 Fed. Reg. 23736 (Apr. 29, 2020) (*hereinafter*, “Interim Final Rule”).
- 2 As discussed in our prior [memorandum to clients](#), Part 800 applies to covered transactions other than covered real estate transactions, to which Part 802 applies.
- 3 As discussed in our prior [memorandum to clients](#), a declaration is a short form of the typical voluntary notice that, in addition to requiring less detailed information, is also subject to a condensed timeline for Committee review.
- 4 See 85 Fed. Reg. 13586 (Mar. 9, 2020) (*hereinafter*, “Proposed Rule”).
- 5 The Staff Chairperson may waive the filing fee only if the CFIUS Staff Chairperson determines that extraordinary circumstances relating to national security warrant such a waiver.
- 6 If the CFIUS Staff Chairperson accepts a notice but later determines that the fee was underpaid, prior to rejecting the notice the CFIUS Staff Chairperson will inform the parties in writing of the insufficiency of payment and provide the parties three business days to pay the remainder of the filing fee.
- 7 Payment instructions are available at <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-filing-fees>.
- 8 Interim Final Rule at 23728.
- 9 Proposed Rule at 13587.
- 10 The Rule makes a minor amendment to the notice content requirements of Part 800 and Part 802 to add a requirement that the parties provide the Committee with the value of the transaction in U.S. dollars and the applicable fee, as well as an explanation of the methodology used to determine the valuation.
- 11 The Rule defines fair market value as “the price that would be received in exchange for sale of an interest, or paid to receive a service or to transfer liability, in an orderly transaction between market participants.” In determining fair market value of an interest, parties must make a good-faith estimate and are generally permitted to rely on the last valuation as presented in financial statements prepared in accordance with generally accepted accounting principles or other widely recognized accounting principles, such as the International Financial Reporting Standards, or the valuation of an independent appraiser, provided that such valuation occurred within the prior two fiscal quarters, and there have not been significant changes to the fair market value since that valuation. In determining the fair market value of services, parties are permitted to rely on the value of services determined by the parties as set forth in an executed written agreement, or an estimate as of the date of filing based upon rates charged to third parties or upon recent industry reports or other sources of comparable commercial data.
- 12 As previously noted, in a merger context this method of valuation will likely only be relevant where there is no negotiated transaction price—in most cases the negotiated transaction price will likely be considered the parties’ good-faith estimate of the value of the transaction.

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