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Committee on Foreign Investment Issues Proposed Rule on Filing Fees

By Ted Posner

On March 4, 2020, the Department of the Treasury, as chair of the Committee on Foreign Investment in the United States (“CFIUS”), issued a proposed rule on fees to be charged on the filing of notices with the Committee (it was published in the Federal Register on March 9, and can be found at 85 Fed. Reg. 13,586). This proposed rule is the latest step to implement the amendments to the CFIUS regime brought about by the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”) enacted in August 2018. In previous International Trade Currents, available [here](#), [here](#), [here](#), and [here](#), we have discussed FIRRMA and the regulations to implement it, most of which entered into force on February 13, 2020. In this International Trade Current, we discuss CFIUS’s filing fee proposal.

Over the more than 30 years that CFIUS has been authorized to review the impact on national security of foreign investment in the United States, it has not charged a fee for parties to submit notices of transactions to it. Section 1723 of FIRRMA authorized CFIUS to start charging a fee based on the value of a notified transaction. In particular, the provision authorized CFIUS to charge a fee up to the lesser of 1% of the value of the transaction or \$300,000 (adjusted annually for inflation). The legislation did not provide guidance on how fees are to be calculated and assessed, leaving those and other details to CFIUS’s discretion in implementing regulations.

In its March 4 proposed rule, CFIUS explained how it plans to exercise its fee-charging authority. In introducing the proposal, CFIUS stated that its goal was to carry out the FIRRMA authorization (which will provide a source of funding for what is expected to be the growing workload of CFIUS) in a way that does not discourage parties from notifying CFIUS of transactions that warrant notice (bearing in mind that the vast majority of deals notified will continue to be notified on a voluntary, rather than mandatory basis). To that end, the proposed rule establishes a six-tiered fee scale, to be applied as discussed below:

- If the transaction value is less than \$500,000, there will be no fee.
- If the transaction value is equal to or greater than \$500,000 but less than \$5,000,000, there will be a \$750 filing fee.
- If the transaction value is equal to or greater than \$5,000,000 but less than \$50,000,000, there will be a \$7,500 filing fee.

- If the transaction value is equal to or greater than \$50,000,000 but less than \$250,000,000, there will be a \$75,000 filing fee.
- If the transaction value is equal to or greater than \$250,000,000 but less than \$750,000,000, there will be a \$150,000 filing fee.
- If the transaction value is equal to or greater than \$750,000,000, there will be a \$300,000 filing fee.

This fee structure is subject to several important conditions. First, a fee will be assessed only in connection with the submission of a full notice, not in connection with the submission of a declaration (*i.e.*, the abridged form of notice newly established through implementation of FIRRMA), or in connection with a review of a transaction initiated unilaterally by CFIUS on the basis of a so-called “agency notice” (*i.e.*, in the absence of a joint voluntary notice submitted by the transaction parties). If CFIUS conducts an assessment of a transaction based on parties’ submission of a declaration and the outcome is inconclusive, potentially leading the parties to submit a full notice, a fee will be assessed for submission of the full notice. (That is, the fact of having begun the process with a declaration will not excuse the fee if the parties later submit a notice.)

Second, if parties seek permission to withdraw and refile their notice (which has the effect of re-setting the CFIUS “clock”), the parties ordinarily will not be charged a second fee. However, if the withdrawal and refiling are precipitated by a material change to the transaction or a material inaccuracy or omission in the original notice, CFIUS may require payment of an additional fee.

Third, a critical issue obviously will be how transaction value is determined. Under the proposed rule, the relevant value ordinarily will be the global value of the transaction (as opposed to the value only of the

investment in the United States). However, if the global value is equal to or greater than \$5,000,000, but the value of the foreign person’s interests or rights acquired in the U.S. business is less than \$5,000,000, the fee will be \$750.

Fourth, transaction value ordinarily will equal the total value of all consideration paid by or on behalf of the foreign person that is a party to the transaction. This includes cash, assets, shares or other ownership interests, debt forgiveness, services, or other in-kind consideration.

Parties will be required to pay the relevant assessment to the Treasury before CFIUS will formally accept a notice and initiate a review. The CFIUS website will provide instructions on making payment. The proposed rule does not specify which party is liable for the assessment. That presumably is a matter that parties will agree upon contractually.

In specified circumstances, CFIUS may refund a cash assessment. For example, if CFIUS determines that a transaction notified to it is not a covered transaction, it will refund the assessment.

In extraordinary circumstances, where the interests of national security warrant it, the CFIUS staff chair may waive the filing fee in whole or in part.

The proposed rule is similar for transactions involving investment in a U.S. business (covered by 31 C.F.R. part 800) and transactions involving investment in U.S. real estate (covered by 31 C.F.R. part 802), but certain details are different, particularly as concerns the methodology for calculating deal value.

Comments on the proposed rule must be submitted by April 8, 2020, and CFIUS is expected to issue a final rule sometime thereafter.

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