

# PROPOSED REGULATIONS TO IMPOSE FILING FEES ON CFIUS FILINGS

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Legal Briefings - By **Joseph G. Falcone, James Robinson, Jonathan Cross and Christopher Milazzo**

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The US Department of Treasury (“Treasury”) has published [proposed regulations](#) that would impose fees on filings with the Committee on Foreign Investment in the United States (“CFIUS”). The proposed regulations, published March 9, 2020, are intended to implement Treasury’s authority to impose filing fees under the Foreign Investment Risk Review Modernization Act (“FIRRMA”). The proposed regulations follow final regulations (effective February 13, 2020) implementing other FIRRMA provisions, which, as we previously [reported](#), significantly expanded CFIUS’s jurisdiction to review transactions involving US businesses.

As discussed below, the amount of the proposed filing fees would be tethered to the underlying transaction value though notably, CFIUS would minimize the fee impact in a global transaction involving several jurisdictions if the value of the US business in question is less than \$5 million. The proposed regulations are subject to a public comment period through April 8, 2020, after which CFIUS will issue final regulations implementing the fees, although there is no deadline for CFIUS to do so.

## OVERVIEW OF FILING FEE STRUCTURE

The proposed regulations would impose tiered filing fees on the submission of voluntary notices concerning covered transactions (including non-controlling covered investments) and covered real estate transactions.

The fees would not apply to declarations (either mandatory or voluntary), unilateral reviews of a transaction by CFIUS, or resubmissions (if CFIUS permits the parties to withdraw and refile a voluntary notice). However, if CFIUS—after assessment of a declaration, or following a unilateral review—requests that a party submit a voluntary notice (as it is empowered to do), the parties would have to pay the filing fee applicable to their transaction.

Fees generally will be assessed as a function of total transaction value, as follows:

Transaction value	Filing fee
Less than \$500,000	No fee
Greater than or equal to \$500,000 but less than \$5 million	\$750
Greater than or equal to \$5 million but less than \$50 million	\$7,500
Greater than or equal to \$50 million but less than \$250 million	\$75,000
Greater than or equal to \$250 million but less than \$750 million	\$150,000
Greater than or equal to \$750 million	\$300,000

CFIUS may, in undefined “extraordinary circumstances” relating to national security, waive the filing fee.

### **CALCULATING TOTAL TRANSACTION VALUE**

Transaction value here means 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.”

The proposed regulations provide some guidance regarding how assets would be valued, including the following:

- **Securities traded on national exchanges.** Securities would be priced on the trading day immediately prior to the date the parties file notice with CFIUS, or if not traded on that date, according to the last published closing price.

- **Non-cash assets, services, interest, or in-kind consideration.** These assets should be priced according to their fair market value at the time of filing.
- **Lending transactions.** Loans from a non-US person to a US business would be valued at their cash value.
- **Conversion of contingent equity interests by non-US person.** The valuation should include the consideration paid by the non-US person to acquire the contingent interests, in addition to any other consideration paid in connection with conversion of the equity interests.
- **Merger or contribution of US business to a joint venture.** The value of the transaction is the fair market value of the US business.
- **Where the transaction has multiple phases or involves contingent equity interests.** Parties in this scenario would calculate the total value of the transaction including the multiple phases or contingent equity interest, if “such total value can be reasonably determined, the conditions that lead to completion will occur imminently, and the conditions are within the control of the acquiring party.”
- **Where the amount of consideration is unclear.** Where the consideration to be paid has not been or cannot reasonably be determined as of the date the parties file notice, the value of the transaction is the fair market value of the assets being acquired.

The proposed regulations would require that parties submitting a notice include a description of the parties’ assessment of the applicable fee “including an explanation of the methodology used to determine” the transaction value. In addition, the proposed regulations provide guidance concerning the valuation of assets and interests in covered real estate transactions.

## **CROSS-BORDER TRANSACTIONS INVOLVING LIMITED US BUSINESS PRESENCE**

Under the proposed rules, the total value of a transaction generally will be assessed based on the global value of the transaction, which encompasses both US and non-US businesses. The proposed regulations, however, would mitigate the potential for a high filing fee for those cross-border transactions in which the acquisition of a US business is a smaller part of a global transaction (a common example being where a non-US buyer would acquire a non-US company, whose affiliates include a US subsidiary).

More specifically, if the global deal value is \$5 million or more, the transaction includes one or more non-US businesses, and the value of the US business acquired is less than \$5 million, then a filing fee of \$750 is applicable. The value of the US business in that scenario would be the fair market value of its assets. According to the proposed regulations, this “exception was intended to minimize any potential disincentives the fee may pose to parties filing a notice with CFIUS, where the target company has a limited presence in the United States.”

## **TIMING OF FEE PAYMENT AND OTHER CONSIDERATIONS**

Payment must be made at the time of filing. CFIUS will not accept a notice for review until the required fee has been paid, and may reject a notice if it determines that the filing fee paid by the parties was insufficient. CFIUS will post instructions about the method and manner of payment on its website prior to the effective date of the final rules implementing filing fees.

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There is, as noted, no timetable for when CFIUS will issue final regulations or when filing fees would be required. The proposed regulations may also change depending on public comments and further consideration by CFIUS.

We continue to monitor developments in this area. Please contact the authors or your usual Herbert Smith Freehills contact for more information.

## **KEY CONTACTS**

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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