

New CFIUS Filing Fees Now in Effect: 5 Key Takeaways

The new filing fees can be as high as \$300,000 for covered transactions valued at \$750 million or more.

On April 27, 2020, the US Treasury Department announced in an [interim rule](#) with request for comments that the Committee on Foreign Investment in the United States ([CFIUS](#)) would begin charging filing fees effective May 1, 2020.

Section 1723 of the Foreign Investment Risk Review Modernization Act of 2018 ([FIRRMA](#)) authorizes CFIUS to assess and collect a filing fee not to exceed \$300,000 or 1% of the value of a transaction. On March 9, 2020, the Treasury Department issued [proposed regulations](#) that introduced a tiered filing fee schedule linked to the value of a proposed transaction. CFIUS invited public comments on the proposed regulations until April 3. On April 27, with its interim rule, effective May 1, CFIUS began charging filing fees for many cases submitted to CFIUS for review. On implementing the filing fees so quickly after the publication of the interim rule, CFIUS explained in a [Fact Sheet](#) that “given the intent and expectations of Congress and the growing number of transactions filed with CFIUS, the Treasury Department determined that transaction filing fees are appropriate at this time.” As of the date of this *Client Alert*, in calendar year 2020, CFIUS has accepted over 70 full CFIUS notices.

Here are five key takeaways about the new CFIUS filing fees:

1. Filing fees apply to the submission of a final notice of a covered transaction or covered real estate investment

The new CFIUS filing fees apply to most parties filing a formal final notice of a “covered transaction” or a “covered real estate transaction”. The filing fees apply whether the parties have elected to make a voluntary submission to CFIUS of a covered transaction, or whether the CFIUS filing (in a narrow range of cases) is mandatory. The filing fee must be paid when a notice of a covered transaction or a covered real estate transaction is formally filed with CFIUS, unless the parties have obtained a written waiver of the filing fee. In other words, the fee does not need to be paid when CFIUS notices are submitted as drafts, prior to acceptance as a formal filing.

Notably, the filing of a short-form “Declaration” with CFIUS — whether in a mandatory case or a voluntary submission — does not trigger filing fees. In addition, CFIUS will not charge a fee when parties withdraw and refile their notices unless there has been a material change to the notice or a material inaccuracy or omission in the initial notice. The interim rule also creates a narrow exception from the filing fee

requirement for parties that have received a written waiver from CFIUS. The agency may issue such a waiver if called for by “extraordinary circumstances relating to national security.” Refunds of the filing fee may also be available if CFIUS determines that the transaction is not a covered transaction or if the parties successfully argue in a petition with CFIUS that the parties paid a filing fee in an amount greater than required at the time of the filing.

2. Filing fees are assessed on a tiered fee schedule, ranging from \$0 to \$300,000

The CFIUS filing fee for covered transactions and covered real estate transactions is calculated based on the value of the proposed transaction, according to the following fee schedule:

TRANSACTION VALUE	CFIUS FILING FEE
Under \$500,000	\$0
Between \$500,000 and \$5 million	\$750
Between \$5 million and \$50 million	\$7,500
Between \$50 million and \$250 million	\$75,000
Between \$250 million and \$750 million	\$150,000
\$750 million or more	\$300,000

In response to the proposed regulations, certain commenters expressed concern that filing fees discourage foreign investment in the United States and that “money used for filing fees would detract from money that would otherwise go into US business expansion.” The agency replied that “because the fees represent only a small amount (0.15 percent or less) of the overall value of a given transaction, the Treasury Department does not believe that the imposition of fees will impact the flow of foreign investment into the United States.” Further, the Treasury Department noted that “parties may routinely expend more on legal and accounting fees in connection with a transaction.”

As a point of comparison, the new CFIUS filing fees are similar to — though in some respects more significant than — the filing fees for the review of mergers and acquisitions pursuant to the Hart-Scott-Rodino Antitrust Improvements Act (the HSR Act), as shown below:

TRANSACTION VALUE	HSR FILING FEE
Greater than \$94 million to \$188 million	\$45,000
Greater than \$188 million to \$940.1 million	\$125,000
Above \$940.1 million	\$280,000

3. Parties are responsible for determining the filing fee owed based on the total transaction value

Parties are responsible for determining the filing fee owed. While transaction value has always been an element of the submissions made to CFIUS, the value of the transaction takes on added significance and

requires a clear explanation of the methodology used to calculate it. The filing fee is drawn from the “total value of all consideration” of the transaction, including cash, assets, shares or other ownership interests, debt forgiveness, or services or other in-kind consideration. Notably, the transaction value refers to the value of the overall transaction, and not just the value of the US business that is the target of the covered transaction or covered real estate transaction. The one exception to this rule is that the modest filing fee of \$750 (as compared to \$7,500) applies if the value of the transaction is equal to or greater than \$5 million but the value of the interest acquired in the US business is less than \$5 million.

4. One party must submit the entire filing fee via an ACH debit

In connection with the interim rule, the Treasury Department issued [Filing Fee Payment Instructions](#), which state that there can be only one payor per notice. In other words, the Treasury Department will not accept a partial payment split among the foreign investor and the seller or target US business. Payments must be made in US dollars, and the payor does not need to be a party to the transaction. The applicable filing fee must be paid using an Automatic Clearing House (ACH) debit. Once the payment is submitted, the submitting party will receive an email confirmation from Pay.gov that must be forwarded to the Treasury Department (cfius@treasury.gov) as well as to the relevant case officer.

Parties contemplating the filing of CFIUS notice for a covered transaction or a covered real estate transaction should consider including a provision in their transactional documents that resolves who will be responsible for the CFIUS filing fee, whether the fee will be split among the parties, as well as which party will be responsible for submitting the fee.

5. The new filing fees may provide a boost to the CFIUS Declaration program

The sudden implementation of CFIUS filing fees for a covered transaction or a covered real estate transaction will likely cause a corresponding increase in the number of short-form Declarations submitted to CFIUS, especially in cases where the transaction does not appear to raise national security sensitivities. The submission of a Declaration does not carry with it a filing fee. The impact of COVID-19 on cross-border deal-making may also presumably reduce the number of full notices submitted to CFIUS.

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