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# Hughes Hubbard & Reed

## Treasury Proposes Filing Fees for CFIUS Voluntary Notices

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Hughes Hubbard & Reed LLP • A New York Limited Liability Partnership  
One Battery Park Plaza • New York, New York 10004-1482 • +1 (212) 837-6000

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**March 12, 2020** – On Monday, March 9, 2020, the U.S. Department of the Treasury (“Treasury Department”) published a proposed rule in the Federal Register establishing a tiered filing fee system for parties filing voluntary notices with the Committee on Foreign Investment in the United States (“CFIUS”). The proposed rule accompanies other recently implemented regulations issued by the Treasury Department that implement the Foreign Investment Review Modernization Act of 2018 (“FIRRMA”), effective since February 13, 2020. We have previously summarized the FIRRMA implementing regulations here and here.

FIRRMA expanded the scope of transactions subject to CFIUS review and modernized the review process. FIRRMA also authorized CFIUS to collect filing fees up to the lesser of 1 percent of the value of a transaction or \$300,000. The proposed rule establishes a fee structure intended, according to the Treasury Department, to “not discourage filings and...allow parties to continue the practice of determining whether to file a voluntary written notice based on an evaluation of the facts and circumstances of the transaction.” The fees were set to only be a small proportion of the value of any transaction, in order to avoid discouraging voluntary filings. Under the proposed fee structure, the required fees are in proportion to the value of the transaction, as follows:

Value of Transaction	Filing Fee
<\$500,000	\$0
\$500,000—<\$5,000,000	\$750
\$5,000,000—<\$50,000,000	\$7,500
\$50,000,000—<\$250,000,000	\$75,000
\$250,000,000—<\$750,000,000	\$150,000
≥\$750,000,000	\$300,000

The same fee structure applies to both foreign investments under Part 800 and real estate transactions under Part 802. Fee requirements are only in place for voluntary CFIUS notices, however, and there are no filing fees for declarations or for unilateral reviews of transactions self-initiated by CFIUS. Accordingly, parties for whom the filing fee would be particularly burdensome, or parties engaged in low-risk transactions, can take advantage of the mandatory or voluntary declarations authorized by CFIUS under Parts 800 and 802.

The proposed rule requires parties to pay the fee at the time a notice is filed, so parties must calculate the total value of a transaction prior to filing. To calculate the value of a transaction, parties should include “the total value of all consideration that has been or will be paid in the context of the transaction by or on behalf of the foreign person who is a party to the transaction, including cash, assets, shares or other ownership interests, debt forgiveness, services, or other in-kind consideration.” Because transactions often include consideration paid in securities or non-cash assets, the rule provides the following guidance:

- *Value on national securities exchange:* value is 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 notice with CFIUS. If the security was not traded the day prior to the date of filing, then the last published closing price will apply.
- *Non-cash assets, interests, or services or other in-kind consideration:* value is calculated based on the fair market value as of the date the parties file the notice.
- *Lending transaction:* value is calculated based on the cash value of the loan or other similar financing arrangement.
- *Conversion of contingent equity interest previously acquired by a foreign person:* value is calculated including the consideration that was paid by or on behalf of the foreign person to initially acquire the contingent equity interest in addition to any other consideration.
- *Real estate leases:* value is calculated by the sum of fixed payments to be paid by the foreign person over the term of the lease; variable payments that depend on an index or rate over the term of the lease, measured by using the index or rate as of the date of the filing of the notice; and any non-cash or in-kind consideration to be provided by the lessee to the lessor over the term of the lease, as reasonably determined as of the date of the notice.

In light of the calculation requirements, the proposed rule also adjusts the content requirements for joint voluntary notices, requiring parties to provide the value of the transaction and the methodology used to calculate the value, along with the applicable fee.

Because parties are required to pay applicable fees at the time the notice is filed, CFIUS is authorized to delay its review until and unless the fee has been paid. In general, CFIUS will not require parties to submit double payments if it requires parties to withdraw and re-file a notice, absent a material change to the transaction or a material inaccuracy or omission in the initial filing. The proposed rule also allows for fee refunds in certain limited circumstances. CFIUS will refund the filing fee if it later determines that the notified transaction is not a covered transaction, and it may issue partial refunds if parties can demonstrate that they paid a higher filing fee than required by the tiered fee structure. Notably, CFIUS has not indicated that it will refund the filing fees if a transaction is blocked. Although CFIUS is also authorized to waive fees, it may only do so under “extraordinary circumstances relating to national security,” and the proposed rule states that it anticipates infrequent partial or total waivers.

The proposed fee schedule has not yet gone into effect, and it will only apply after the Treasury Department publishes its final rule. Interested parties have until April 8, 2020, to submit comments on the proposed rule. Specifically, the Treasury Department has solicited comments from the public “on the impact of the proposed tiered fixed-fee structure and whether additional tiers or additional features should be considered.”

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