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ADVISORY

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*If you have any questions about this Advisory, please contact:*

**TAHLIA TOWNSEND**
202.800.2473
ttownsend@wiggin.com

**DAVID HALL**
202.800.2472
dhall@wiggin.com

*This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.*

# CFIUS FILING FEE CLIENT ALERT

On March 9, 2020, the Office of Investment Security issued a proposed rule that would establish filing fees for parties submitting a voluntary notice to the Committee on Foreign Investment in the United States ("CFIUS"). As set forth in the proposed rule "filing a declaration instead of a notice…does not require payment of a fee."[1]

This proposed rule is part of the continued implementation of the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), which was enacted on August 13, 2018. FIRRMA provided that "the Committee may assess and collect a fee in an amount determined by the Committee in regulations . . . with respect to each covered transaction for which a written notice is submitted to the Committee,"[2] and directed that the fee be based on the value of the underlying transaction. FIRRMA further specified that the fee not exceed one percent of the value of the transaction or $300,000, adjusted for inflation.

The fee structure set forth in the proposed rule applies voluntary notices submitted to CFIUS in connection with "covered transactions" under 31 CFR § 800.213 and "covered real estate transactions" under 31 CFR § 802.212.

The proposed fee structure applies to both "covered transactions" and "covered real estate transactions" as follows:

| TRANSACTION VALUE | FILING FEE |
|---|---|
| $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 |

CONTINUED

1 There are, however, circumstances where parties could be required to pay a filing fee in connection with a notice submitted after the filing of a declaration, including: "cases where the Committee requests that the parties file a written notice and in cases where the Committee informs parties that it is not able to conclude action and that the parties may file a written notice." Parties may also be required to pay a filing fee where they "choose to notify CFIUS of a transaction subject to §800.401 through a notice instead of a declaration."

2 *See* FIRRMA § 1723.

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The value of a transaction is generally determined based on the total value of all consideration to be paid by, or on behalf of, the foreign party to the transaction. Where a covered a transaction includes a U.S. business and one or more non-U.S. businesses, the transaction value will generally be assessed based on the total value of the transaction, including both U.S. and non-U.S. businesses.[3] Calculating the value of a transaction, which might include in-kind consideration or equity in a non-public company, may be a complicated proposition. Indeed, the costs associated with valuing the transaction could significantly exceed the underlying fees, unless OIS simplifies the rule in response to comments.

The text of the proposed rule is available **here**. The comment period is set to close on April 8, 2020.

*In previous Advisories, we provided a flowchart for identifying CFIUS triggers in investment transactions* (**https://www.wiggin.com/publication/navigating-the-new-landscape-for-foreign-investment-in-the-u-s/**) *and offered a tool for better understanding new rules regarding critical infrastructure (***https://www.wiggin.com/publication/which-critical-infrastructure-functions-are-covered-by-the-new-cfius-rules/***).*

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3 If the value of the U.S. business involved in a multi-business global transaction is less than $5,000,000, the filing fee will be limited to $750.

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