

Proposed Rule: Filing Fees for Certain CFIUS Transactions

March 18, 2020



Overview

- The Foreign Investment Risk Review Modernization Act of 2018 (“**FIRRMA**”) authorizes the Committee on Foreign Investment in the United States (“**CFIUS**”) to promulgate regulations providing for the assessment and collection of fees for the purposes of administering the review of covered transactions or covered real estate transactions.
 - FIRRMA limits the fee to the lessor of (1) 1% of the value of the transaction; or (2) \$300,000.
- On March 9, 2020, the U.S. Department of the Treasury released its proposed rule to establish a fee for parties filing voluntary notice of certain transactions for review by CFIUS.
 - The proposed rule is open for public comment until April 8, 2020.
- The **Filing Fees for Notices of Certain Investments in the United States by Foreign Persons and Certain Transactions by Foreign Persons Involving Real Estate in the United States** (the “**Proposed Rule**”) would require parties to a covered transaction or covered real estate transaction to pay a filing fee when submitting a **voluntary notice**.
 - The amount of the fee is determined based on the **transaction value**.
 - The filing fee does not apply to parties who file a mandatory or voluntary **declaration**.

When Must Filing Fees Be Paid?

- The Proposed Rule authorizes CFIUS to collect a filing fee from parties who file a **voluntary notice** for **covered transactions** and **covered real estate transactions**.
- CFIUS will not accept a voluntary notice until the parties pay the filing fee.
- If CFIUS determines that the filing fee is **underpaid**, the CFIUS staffer will inform the parties of the deficiency and provide up to **three (3) business days** for the parties to pay the remainder of the filing fee.
- CFIUS will **refund** the parties if:
 - (1) CFIUS determines that a notified transaction is not a covered transaction or a covered real estate transaction; or
 - (2) The parties can demonstrate that they paid a fee in an amount greater than required at the time of the filing.

Fees are not required for:

- Declarations
- Transactions with a total transaction value of **less than \$500,000**
- Transactions that are **NOT covered transactions** or **covered real estate transactions**
- Transactions where CFIUS has **waived** the filing fee due to extraordinary circumstances relating to national security

CFIUS Notice Filing Fee vs. HSR Filing Fee

Transaction Value (adjusted for inflation)	CFIUS Notice Filing Fee	Antitrust Hart-Scott-Rodino Filing Fee
\$0 – \$500,000	No Fee	No Fee
\$500,000 – \$5 Million	\$750	No Fee
\$5 Million – \$50 Million	\$7,500	No Fee
\$50 Million – \$250 Million	\$75,000	\$45,000 – \$125,000
\$250 Million – \$750 Million	\$150,000	\$125,000
\$750 Million or above	\$300,000	\$125,000 – \$280,000

Determining Transaction Value

- Generally, the **transaction value** for purposes of determining the filing fee is the **total value of all consideration** that has or will be provided by the foreign person.
 - The Proposed Rule provides methods of determining transaction value based on different forms of consideration.
- If the transaction involves one or more non-U.S. businesses, the total value of the consideration is the **global value** of the transaction (including the U.S. and non-U.S. businesses).
- Note, for *covered transactions* only, where the transaction value is greater than \$5 million but the value of rights or interests in the U.S. business is less than \$5 million, the fee will be only \$750.
 - CFIUS has requested comments as to whether this should also apply to covered real estate transactions.
- When submitting a voluntary notice, the Proposed Rule requires the parties to provide CFIUS: (1) a **good faith estimate of the net value of the interest** acquired in the U.S. business by the foreign person; and (2) an **explanation of the methodology** used to determine the valuation and applicable fee.

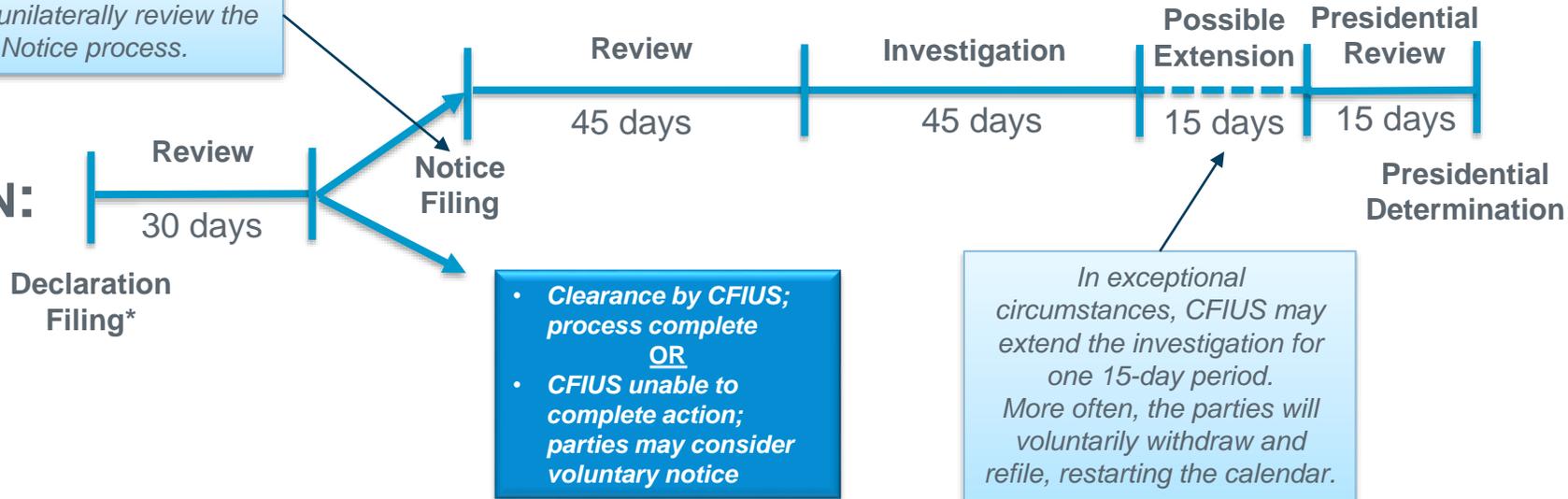
Methods of Determining Transaction Value – Forms of Consideration

Form of Consideration	Method of Determining Transaction Value
Securities Traded on a National Securities Exchange	Value of the transaction 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 that the parties file the notice.
Consideration for the Transaction Has NOT Been Determined	Value of the transaction is based on: <ul style="list-style-type: none"> • The fair market value of the assets / real estate being acquired (as of the date that the parties file the notice); or • The fair market value of the U.S. business being merged or contributed.
Non-Cash Assets, Services, Interest, or In-Kind Consideration	Value of the transaction is based on the fair market value as of the date the parties file the notice.
Lending Transaction	Value of the transaction is the cash value of the loan or similar financing arrangement.
Conversion of Contingent Equity Interests Previously Acquired by the Foreign Person	Value of the transaction includes 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.

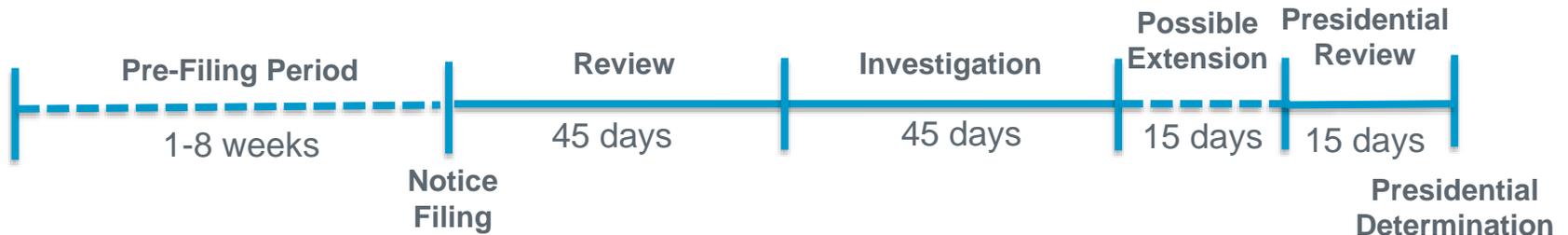
CFIUS Review Process Timeline

After 30 days, CFIUS may require or request the applicant to file a Notice or unilaterally review the declaration under the Notice process.

DECLARATION:



NOTICE:



Strategic Considerations for Interested Parties

Decision	Pros	Cons
File Declaration	<ul style="list-style-type: none">• No filing fee• Expedited CFIUS review• Reduced disclosure requirements	<ul style="list-style-type: none">• No guarantee of CFIUS determination• Risk that CFIUS does not make a final determination or requires parties to file a Voluntary Notice
File Voluntary Notice	<ul style="list-style-type: none">• Guaranteed CFIUS determination	<ul style="list-style-type: none">• Must pay filing fee (unless exempt/waived)• Extended CFIUS review• Increased disclosure requirements
No CFIUS Filing	<ul style="list-style-type: none">• No disclosure• No filing fee	<ul style="list-style-type: none">• Risk that CFIUS may compel parties to file a Voluntary Notice, which will delay the review process and potentially jeopardize the transaction

Davis Polk Contacts

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.*

John B. Reynolds, III	202 962 7143	john.reynolds@davispolk.com
Will Schisa	202 962 7129	will.schisa@davispolk.com
Kendall Howell	202 962 7068	kendall.howell@davispolk.com
Joseph Kniaz	202 962 7036	joseph.kniaz@davispolk.com

**Law clerk Charles Klug contributed to this memo.*