



**Billing Code 4810-25-P**  
**DEPARTMENT OF THE TREASURY**

**Office of Investment Security**

**31 CFR Parts 800 and 802**

**RIN 1505-AC65**

**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**

**AGENCY:** Office of Investment Security, Department of the Treasury.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would establish a fee for parties filing a voluntary notice of certain transactions for review by the Committee on Foreign Investment in the United States (CFIUS). In establishing a fee for such notices, this proposed rule would implement section 1723 of the Foreign Investment Risk Review Modernization Act of 2018, which amends section 721 of the Defense Production Act of 1950 to allow CFIUS to collect fees.

**DATES:** Written comments must be received by [INSERT DATE 30 DAYS AFTER FILING AT THE OFFICE OF THE FEDERAL REGISTER].

**ADDRESSES:** Written comments on this proposed rule may be submitted through one of two methods:

- *Electronic Submission:* Comments may be submitted electronically through the Federal government eRulemaking portal at <https://www.regulations.gov>.

Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt, and enables the Department of the Treasury (Treasury Department) to make the comments available to the public. Please

note that comments submitted through <https://www.regulations.gov> will be public, and can be viewed by members of the public.

• *Mail:* Send to U.S. Department of the Treasury, Attention: Laura Black, Director of Investment Security Policy and International Relations, 1500 Pennsylvania Avenue NW, Washington, DC 20220.

Please submit comments only and include your name and company name (if any), and cite “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” in all correspondence. In general, the Treasury Department will post all comments to <https://www.regulations.gov> without change, including any business or personal information provided, such as names, addresses, email addresses, or telephone numbers. All comments received, including attachments and other supporting material, will be part of the public record and subject to public disclosure. You should only submit information that you wish to make publicly available

**FOR FURTHER INFORMATION CONTACT:** For questions about this proposed rule, contact: Laura Black, Director of Investment Security Policy and International Relations; Meena R. Sharma, Deputy Director of Investment Security Policy and International Relations; David Shogren, Senior Policy Advisor; or James Harris, Senior Policy Advisor, at U.S. Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, DC 20220; telephone: (202) 622-3425; email: [CFIUS.FIRRMA@treasury.gov](mailto:CFIUS.FIRRMA@treasury.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background and Overview**

On August 13, 2018, the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), Subtitle A of Title XVII of Public Law 115-232, 132 Stat. 2173, was enacted. FIRRMA amends section 721 (section 721) of the Defense Production Act of 1950 (DPA), which delineates the authorities and jurisdiction of the Committee on Foreign Investment in the United States (CFIUS or the Committee). Executive Order 13456, 73 FR 4677 (Jan. 23, 2008), directs the Secretary of the Treasury to issue regulations implementing section 721. This proposed rule is being issued pursuant to that authority.

FIRRMA maintains the Committee’s jurisdiction over any transaction which could result in foreign control of any U.S. business, and it broadens the authorities of the President and CFIUS under section 721 to review and to take action to address any national security concerns arising from certain non-controlling investments and real estate transactions. FIRRMA refers to the transactions over which CFIUS has jurisdiction as “covered transactions.” This statutory reference is implemented in the final rule for 31 CFR part 800 at 85 FR 3112 (Part 800 rule) as the definition of “covered transaction” and in the final rule for 31 CFR part 802 at 85 FR 3158 (Part 802 rule) as the definition of “covered real estate transaction.” FIRRMA also modernizes CFIUS’s processes to better enable timely and effective reviews of transactions falling under its jurisdiction, including by introducing the concept of a declaration—an abbreviated notification to which the Committee must respond within a 30-day assessment period—as an alternative to a voluntary notice, which has been the traditional means of filing a transaction with CFIUS.

FIRRMA further provides 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.” FIRRMA, section 1723. FIRRMA directs that the fee be based on the value of the transaction, taking various factors into account. It also

provides that such fees may not exceed an amount equal to the lesser of one percent of the value of the transaction, or \$300,000, adjusted annually for inflation.

On January 17, 2020, the Treasury Department published two rules implementing FIRRMA. The Part 800 rule continues CFIUS's jurisdiction over transactions that could result in control of a U.S. business. It also implements the provisions of FIRRMA relating to CFIUS's new jurisdiction to review certain non-controlling investments in a U.S. business that afford a foreign person specified access to information in the possession of, rights in, or involvement in the substantive decisionmaking of U.S. businesses with certain activities relating to critical technologies, critical infrastructure, or sensitive personal data. In addition, the Part 800 rule makes certain changes to CFIUS's existing process and procedures, including allowing parties to submit any transaction to CFIUS through a declaration. The Part 802 rule implements the provisions of FIRRMA relating to CFIUS's new jurisdiction to review the purchase or lease by, or concession to, a foreign person of certain real estate in the United States. Those two rules did not include any provisions regarding filing fees.

This proposed rule would establish a filing fee for "covered transactions" under the Part 800 rule and "covered real estate transactions" under the Part 802 rule that are filed with the Committee as voluntary written notices. The proposed fee structure and amounts are the same for the Part 800 rule and the Part 802 rule. In accordance with FIRRMA, there is no fee for any declaration submitted to the Committee, or for any unilateral review of a transaction based on an agency notice filed by any member of the Committee. However, the filing fee does apply to notices filed by parties to a covered transaction or a covered real estate transaction after the Committee has completed its assessment of a declaration and taken action under § 800.407 or § 802.405 (*i.e.*, in 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). The filing fee also applies where parties choose to notify CFIUS of a transaction subject to § 800.401 through a notice instead of a declaration.

The Treasury Department has proposed a fee structure that it believes will not discourage filings and will 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 proposed fees for notices are based on the value of the notified transaction, with the smallest transactions (*i.e.*, those with a value of less than \$500,000) not being assessed a filing fee. For transactions with values equal to or exceeding \$500,000, the filing fee is based on a tiered approach, as follows:

- Where the value of the transaction is equal to or greater than \$500,000 but less than \$5,000,000, a filing fee of \$750 is assessed;
- Where the value of the transaction is equal to or greater than \$5,000,000 but less than \$50,000,000, a filing fee of \$7,500 is assessed;
- Where the value of the transaction is equal to or greater than \$50,000,000 but less than \$250,000,000, a filing fee of \$75,000 is assessed;
- Where the value of the transaction is equal to or greater than \$250,000,000 but less than \$750,000,000, a filing fee of \$150,000 is assessed; and
- Where the value of the transaction is equal to or greater than \$750,000,000, a filing fee of \$300,000 is assessed.

The applicable fee must be paid to the Treasury Department prior to the Staff Chairperson accepting a notice for review, except in certain limited circumstances where the Staff Chairperson waives the filing fee. Payment instructions will be available on the Treasury Department website prior to the effective date of the final rule implementing the filing fees.

The proposed rule describes how a transaction's value is determined, the manner of payment, circumstances in which the Treasury Department may issue a refund, when an

additional fee may be required in the event of the withdrawal and refiling of a notice, and the consequences of fee underpayment.

## **II. Methodology for Establishing the Fee Structure**

### **A. Consideration of Various Factors**

In establishing a filing fee, FIRRMA requires the Committee to take into account the effect of the fee on small business concerns, the expenses of the Committee associated with conducting activities under section 721, the effect of the fee on foreign investment, and any other matters the Committee considers appropriate.

The Treasury Department and CFIUS member agencies considered the effect of a fee on small businesses, and a more detailed discussion of the potential impact of the proposed fee structure on small businesses is included in the Regulatory Flexibility Act discussion, below. The proposed fee structure accounts for and attempts to minimize the impact on small business concerns by not assessing a fee on transactions that are valued at less than \$500,000. Additionally, the fee for transactions valued between \$500,000 and \$5,000,000 is set at only \$750. Should the filing fee pose a concern to a small business, the declaration process, for which there is no filing fee, is available for any transaction. Furthermore, there is the possibility, which is not intended to be used frequently, for the Staff Chairperson to waive the filing fee in whole or in part if extraordinary circumstances relating to national security warrant.

The Treasury Department also considered the expenses of the Committee associated with carrying out section 721. As noted above, the Committee's jurisdiction has expanded through the enactment of FIRRMA. The Treasury Department and CFIUS member agencies are increasing personnel and making infrastructure and other resource expenditures to implement

section 721. In light of this, the Treasury Department determined that the proposed fee amounts were appropriate and has estimated that the fees would allow the Committee to recoup a portion of the costs associated with, but would not exceed the cost of, administering section 721. The Treasury Department will monitor the amount of fees generated and administration costs and will adjust fees as needed, including through new rule making, as appropriate.

The Treasury Department considered alternatives to the proposed fee structure in seeking to assess the impact on foreign investment. In particular, the Treasury Department considered setting a fixed or variable rate to be applied to all notices, as well as a uniform fixed fee amount for all notices—before determining that the proposal in this rule was the most appropriate based on various factors including proportionality, administration, clarity, and impact on parties' decision whether to file a notice. The proposed fees represent only a small amount (0.15 percent or less) of the overall value of the transactions for which a fee will be assessed, and the Treasury Department does not believe the proposed fees will discourage foreign investment in the United States or the filing of written notices with the Committee. However, the Treasury Department is interested in learning from the public about the impact that filing fees may have on a party's decision to engage in a transaction and whether to seek safe harbor through the submission of a voluntary notice.

#### B. Tiered Fixed-Fee Proposal

The proposed rule sets forth a tiered, fixed-fee schedule based on transaction value. This structure allows the Treasury Department to set the fees consistent with the requirements in FIRRMA and is informed by the nature and value of transactions that have typically been filed as notices.

The tiers set a generally consistent fee rate relative to the value of the transaction. Because parties must pay fees prior to the Staff Chairperson accepting a notice for review, the fee tiers are structured in a manner that allows the required fee for a transaction that has not yet closed to be determined with relative certainty. This structure was intended to achieve the Treasury Department's goals of clarity and administrative efficiency.

The Treasury Department expects that the filing fee will represent a relatively small proportion of the total transaction costs associated with any given transaction. In each case, the fee amount set in the proposed rule is no more than 0.15 percent of the overall transaction value. If, however, the filing fee is burdensome in the context of a particular transaction, parties can consider filing a declaration instead of a notice, which does not require payment of a fee.

The Treasury Department is interested in comments from the public on the impact of the proposed tiered fixed-fee structure and whether additional tiers or additional features should be considered.

### C. Calculating Transaction Value

The proposed rule describes with particularity how to determine the value of a transaction for purposes of determining the applicable fee. This determination is relevant only for calculating the applicable filing fee and is not determinative of the Committee's assessment as to what constitutes the "covered transaction" or "covered real estate transaction" subject to its review. The Treasury Department anticipates that, in most instances, determining the value of the transaction will be straightforward, based on the amount of money the foreign person is paying in the transaction.

Generally, for transactions subject to the Part 800 rule and for purchases of real estate subject to the Part 802 rule, the value of a transaction will be 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. Where a covered transaction is a part of a transaction that includes one or more non-U.S. businesses, the total value of the transaction will generally be assessed based on the global value of the transaction encompassing both U.S. and non-U.S. businesses. There is an exception for transactions under the Part 800 rule where the value of the transaction is equal to or greater than \$5,000,000, but the value of the interests or rights acquired in the U.S. business is less than \$5,000,000. In such cases, the fee will be \$750. 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. The Treasury Department is interested in comments on whether a similar approach should be taken for transactions under the Part 802 rule, where the value of the covered real estate is relatively small in the context of the overall transaction.

The proposed rule also specifies how the transaction value for leases and concessions under the Part 802 rule will be determined. Specifically, leases and concessions would be valued according to the sum of the consideration, including lease inducements, fixed payments, certain variable lease payments, and other types of identifiable consideration applicable to real estate transactions. Within the general categories of real estate transactions, certain variations in terms of valuation, payment structures, and other consideration will impact the fee calculation. The Treasury Department welcomes comments on the approach

taken in the proposed rule and whether and how the rule could be further tailored to address industry practices.

The Treasury Department recognizes that, for some transactions, consideration may be paid in securities or other non-cash assets, or even in services or other in-kind consideration, and the proposed rule addresses these scenarios. For transactions where the consideration is a security that is traded on a national securities exchange, the 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 the parties file a notice with the Committee. If the security was not traded on that day, the last published closing price would be used. Where the consideration includes other non-cash assets, interests, or services or other in-kind consideration, the value of the consideration would be the fair market value as of the date the parties file the notice. Where the transaction is a lending transaction, the value of the consideration is the cash value of the loan or similar financing arrangement. Additionally, where the transaction arises from the conversion of a contingent equity interest previously acquired by a foreign person, the value of the transaction would include 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.

In the rare circumstance in which the consideration for a transaction has not been determined, the value of the transaction would be based on the fair market value of the assets or real estate being acquired in the transaction as of the date the parties file the notice, or the fair market value of the U.S. business being merged or contributed. The proposed rule includes a definition of fair market value, which tracks the basic definition described in the Financial Accounting Standards Board Statement No. 157.

In order to assist the parties and the Committee in determining the appropriate fee amount associated with a transaction, the proposed rule also makes modest revisions to the content requirements for joint voluntary notices under the Part 800 rule and the Part 802 rule. Specifically, the proposed rule adds a requirement that, along with a good faith estimate of the net value of the interest acquired in the U.S. business by the foreign person, the parties provide the Committee with the value of the transaction and an explanation of the methodology used to determine such valuation and the applicable fee.

Additionally, as discussed above, the proposed fee rule for Part 800 provides that where a covered transaction is part of a transaction valued at or greater than \$5,000,000 that includes one or more non-U.S. businesses, but the value of the interests or rights acquired in the U.S. business is less than \$5,000,000, the fee will be \$750, regardless of the value of the overall transaction. If the value of the U.S. business equals or exceeds \$5,000,000, then the fee will be determined based on the total value of the overall transaction.

#### D. Other Matters – Timing and Refunds

The proposed rule requires that parties pay any applicable fee at the time they file a notice with the Committee. The Staff Chairperson may decide not to accept a notice, and the Committee may not begin reviewing a notice, until the Treasury Department has received the applicable fee. Where the Staff Chairperson accepts a notice but later determines that the fee was underpaid, prior to rejecting the notice the Staff Chairperson will inform the parties in writing of the insufficiency of payment and provide the parties three business days to pay the remainder of the filing fee. In addition, no waiver will be implied, even where the Staff Chairperson does not reject a voluntary notice for failure to pay the full amount of the filing fee.

Furthermore, while the Treasury Department will not, as a general matter, provide refunds of filing fees, if it determines that a notified transaction is not a covered transaction or a covered real estate transaction, as relevant, it will refund the filing fee to the party that made the payment.

The proposed rule permits parties to petition the Staff Chairperson to seek a partial refund of fees, if the parties can demonstrate that a party or the parties to a transaction paid a filing fee in an amount greater than required at the time of filing. The Treasury Department anticipates that such partial refunds will be made infrequently due to the tiered fee structure. Additionally, the Staff Chairperson may waive the fee, in whole or in part, if the Staff Chairperson determines that extraordinary circumstances relating to national security warrant such a waiver.

Finally, the proposed rule does not require parties to pay an additional fee where the Committee allows the parties to withdraw and re-file a notice, unless the Staff Chairperson determines that a material change to the transaction has occurred, or a material inaccuracy or omission was made by the parties in information provided to the Committee, that requires the Committee to consider new information, in which case the Staff Chairperson will inform the parties in writing.

### **III. Rulemaking Requirements**

#### *Executive Order 12866*

These regulations are not subject to the general requirements of Executive Order 12866, which covers review of regulations by the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB), because they relate to a foreign affairs function of the United States, pursuant to section 3(d)(2) of that order. In addition, these regulations are

not subject to review under section 6(b) of Executive Order 12866 pursuant to section 7(c) of the April 11, 2018 Memorandum of Agreement between the Treasury Department and OMB, which states that CFIUS regulations are not subject to OMB's standard centralized review process under Executive Order 12866.

*Paperwork Reduction Act*

The collection of information contained in this notice of proposed rulemaking has been submitted to the OMB for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1505-0121.

Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, or via email to [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov), with copies to Laura Black, Director of Investment Security Policy and International Relations, U.S. Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, DC 20220. Comments on the collection of information should be received by [INSERT DATE THAT IS 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

In accordance with 5 CFR 1320.8(d)(1), the Treasury Department is soliciting comments from members of the public concerning this collection of information to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology.

The information collection in this proposed rule is in § 800.502(c)(1)(viii) and § 802.502(b)(1)(ix). Specifically, the proposed rule would add a requirement that, along with the existing requirement for a good faith approximation of value of the interest acquired in the U.S. business or covered real estate by the foreign person, the parties provide the Committee with the value of the transaction and an explanation of the methodology used to determine such valuation and the applicable fee. This proposal has been submitted to OMB as a revision to the collection of information approved under 1505-0121 without a change in the total burden hours. The notice requirement was previously approved under the Paperwork Reduction Act with a per respondent burden of 130 hours. This burden should account for the modest increase in reporting under proposed § 800.502(c)(1)(viii) and § 802.502(b)(1)(ix); however, comments are invited from members of the public who believe the burden hours should be revised.

An agency may not conduct or sponsor and an individual is not required to respond to a collection of information unless it displays a valid OMB control number.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) generally requires an agency to prepare an initial regulatory flexibility analysis unless the agency certifies that the rule will not, once implemented, have a significant economic impact on a substantial number of small entities. The RFA applies whenever an agency is required to publish a general notice of proposed rulemaking under section 553(b) of the Administrative Procedures Act (5 U.S.C.

553) (APA), or any other law. As set forth below, because regulations issued pursuant to the DPA, such as these regulations, are not subject to the APA or another law requiring the publication of a general notice of proposed rulemaking, the RFA does not apply.

The proposed rule implements section 721 of the DPA. Section 709(a) of the DPA provides that the regulations issued under it are not subject to the rulemaking requirements of the APA. Section 709(b)(1) instead provides that any regulation issued under the DPA be published in the **Federal Register** and opportunity for public comment be provided for not less than 30 days. Section 709(b)(3) of the DPA also provides that all comments received during the public comment period be considered and the publication of the final regulation contain written responses to such comments. Consistent with the plain text of the DPA, legislative history confirms that Congress intended that regulations under the DPA be exempt from the notice and comment provisions of the APA and instead provided that the agency include a statement that interested parties were consulted in the formulation of the final regulation. See H.R. Conf. Rep. No. 102–1028, at 42 (1992) and H.R. Rep. No. 102–208 pt. 1, at 28 (1991). The limited public participation procedures described in the DPA do not require a general notice of proposed rulemaking as set forth in the RFA. Further, the mechanisms for publication and public participation are sufficiently different to distinguish the DPA procedures from a rule that requires a general notice of proposed rulemaking. In providing the President with expanded authority to suspend or prohibit the acquisition, merger, or takeover of, or certain other investments in, a U.S. business by a foreign person, and certain real estate transactions by a foreign person, if such a transaction would threaten to impair the national security of the United States, Congress could not have contemplated that regulations implementing such authority would be subject to RFA analysis. For these reasons, the RFA does not apply to these regulations.

Regardless of whether the RFA applies to this rulemaking, the Secretary of the Treasury certifies that this proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities.

The proposed rule would implement a fee for filing a notice of a covered transaction and a covered real estate transaction, as those terms are defined in Part 800 and Part 802 of CFIUS's regulations. The Treasury Department attempted to minimize the burden of this fee requirement on small entities. For example, a transaction valued at less than \$500,000 will have no associated filing fee. Additionally, while the Treasury Department has proposed a \$750 fee for transactions valued at or greater than \$500,000 but less than \$5,000,000, which may affect small entities as they are defined by the Small Business Administration (SBA), the fee is relatively small in real terms. At that level, the administrative fee represents only 0.15 percent of the value of the smallest dollar valuation for a transaction that would incur a fee (\$500,000).

Moreover, the fee rules will not impact a "substantial number" of small entities. There is no single source for information on the number of small U.S. businesses that receive foreign investment (direct or indirect), including those involved with critical technologies, critical infrastructure, or sensitive personal data, such that they would be directly impacted by the Part 800 rule. However, the Bureau of Economic Analysis (BEA) within the Department of Commerce collects, on an annual basis, data on new foreign direct investment in the United States through its Survey of New Foreign Direct Investment in the United States (Form BE- 13). While these data are self-reported, and include only direct investments in U.S. businesses in which the foreign person acquires at least 10 percent of the voting shares (and consequently, do not capture investments below 10 percent, which may nevertheless be covered transactions), they

nonetheless provide relevant information on a category of U.S. businesses that receive foreign investment, some of which may be covered by the proposed rule.

According to the BEA, in 2018, the most current year for which data is available, foreign persons obtained at least a 10 percent voting share in 832 U.S. businesses. See U.S. Bureau of Economic Analysis, “Number of Investments Initiated in 2018, Distribution of Planned Total Expenditures, Size by Type of Investment,” available at <https://apps.bea.gov/international/xls/Table15-14-15-16-17-18.xls> (last visited March 2, 2020). The BEA only reports the general size of the investment transaction, not the type of the U.S. business involved, nor whether the U.S. business is considered a “small business” by the SBA, which defines small businesses based on annual revenue or number of employees. The smallest foreign investment transactions that the BEA reports are those with a dollar value below \$50,000,000. While not all U.S. businesses receiving a foreign investment of less than \$50,000,000 are considered “small” for the purposes of the RFA, many might be, and the number of U.S. businesses receiving foreign investments of less than \$50,000,000 can serve as a proxy for the number of transactions involving small U.S. businesses that might be subject to CFIUS's jurisdiction.

Of the above mentioned 832 U.S. businesses receiving foreign investment in 2018, 576 were involved in transactions valued at less than \$50,000,000. Although this figure is under inclusive because it does not capture all transactions that could potentially fall under the rule, it also is over inclusive because it is not limited to any particular type of U.S. business. The Treasury Department believes the figure of 576 is the best estimate based on the available data of the number of small U.S. businesses that may be impacted by this rule, but for the reasons set forth below, the impact on those small U.S. businesses will not be significant.

According to the SBA, there were approximately 30,200,000 small businesses (defined as “firms employing fewer than 500 employees”) in the United States as of 2018. See “2018 Small Business Profile,” available at <https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf> (last visited March 2, 2020). If approximately 600 small U.S. businesses will be potentially impacted by this rule, then the rule may potentially impact less than one percent of all small U.S. businesses.

There is no single source for information on the number of small U.S. businesses that would be involved in some way in the purchase or lease by, or concession to a foreign person of real estate that could be covered under the Part 802 rule. However, the Treasury Department anticipates only 350 real estate transactions, out of the thousands or more of the annual number of real estate transactions in the United States, will be the subject of a declaration or notice of a covered real estate transaction. Further background on this estimate was included in the estimate of burden hours submitted to OMB in accordance with the Paperwork Reduction Act under Document Control Number 1505-0121.

Additionally, as required by FIRREA, the rule takes into account and attempts to minimize the impact it may have on small U.S. businesses. For example, the rule contains no fee for transactions valued at less than \$500,000. In addition, the fee is only \$750 where the value of the transaction is equal to or greater than \$500,000 but less than \$5,000,000, and the fee is \$7,500 where the value of the transaction is equal to or greater than \$5,000,000 but less than \$50,000,000. Therefore, to the extent that small U.S. businesses will incur a fee for a notice, that fee will represent only a fraction of the value of the transaction to the parties. The Treasury Department does not expect this filing fee rule to change the estimate of burden hours for

completing notices which was previously submitted to OMB in accordance with the Paperwork Reduction Act under Document Control Number 1505-0121.

Also, as discussed above, the fee is only incurred when parties file a notice of a transaction with the Committee. The Treasury Department has not proposed any fees to submit a declaration of a transaction, and under the Part 800 rule and Part 802 rule, parties may submit a declaration of any covered transaction or any covered real estate transaction. Declarations will take less time and incur less cost for parties to complete. Additional information about declarations, including the procedures to file them and their content requirements, is available in the final CFIUS rules at 85 FR 3112 (Jan. 17, 2020) and 85 FR 3158 (Jan. 17, 2020).

Accordingly, for the reasons stated above, the Secretary of the Treasury certifies that the proposed rule, if implemented, will not have a “significant economic impact on a substantial number of small entities,” 5 U.S.C. 605(b). Nevertheless, the Treasury Department is interested in any comments on how the proposed rule would affect small entities.

## **List of Subjects**

### **31 CFR Part 800**

Foreign investments in the United States, Investments, Investment companies, National defense, Fees.

### **31 CFR Part 802**

Foreign investments in the United States, Federal buildings and facilities, Government property, Investigations, Investments, Investment companies, Land sales, National defense, Public lands, Real property acquisition, Reporting and Recordkeeping requirements, Fees.

For the reasons set forth in the preamble, the Treasury Department proposes to amend 31 CFR parts 800 and 802 as follows:

**PART 800 - REGULATIONS PERTAINING TO CERTAIN INVESTMENTS IN THE UNITED STATES BY FOREIGN PERSONS**

1. The authority citation for part 800 continues to read:

**Authority:** 50 USC 4565; E.O. 11858, as amended, 73 FR 4677.

**Subpart E – Notices**

**§ 800.501 [Amended]**

2. Amend § 800.501:

a. In paragraph (a) by adding “, and paying the fee required under subpart K of this part” after “including the certification required under paragraph (l) of that section”; and

b. In paragraph (f) by adding “, and payment of the fee required under subpart K of this part,” after “including the certification required by § 800.502(l)”.

3. Amend § 800.502 by revising paragraph (c)(1)(viii) to read as follows:

**§ 800.502 Contents of voluntary notices.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(viii)(A) The value of the transaction in U.S. dollars, as determined pursuant to § 800.1103, and the parties’ assessment of the applicable fee due under § 800.1101, including an explanation of the methodology used to determine such valuation and applicable fee; and

(B) If different than the value of the transaction provided in paragraph (c)(1)(viii)(A) of this section, a good faith approximation of the net value of the interest acquired in the U.S. business in U.S. dollars, as of the date of the notice.

\* \* \* \* \*

4. Amend § 800.503:

- a. In paragraph (a)(1), by removing the word “and”;
- b. By redesignating paragraph (a)(2) as paragraph (a)(3); and
- c. By adding new paragraph (a)(2).

The addition reads as follows:

**§800.503 Beginning of 45-day review period.**

(a) \* \* \*

- (2) Confirmed that the applicable fee required under subpart K of this part has been paid, or waived; and

\* \* \* \* \*

6. Amend § 800.504 by redesignating paragraphs (a)(3) and (4) as paragraphs (a)(4) and (5), respectively, and adding new paragraph (a)(3) to read as follows:

**§800.504 Deferral, rejection, or disposition of certain voluntary notices.**

(a) \* \* \*

- (3) Reject any voluntary notice upon determining that the filing fee paid by the parties was insufficient under subpart K of this part, subject to § 800.1108.

\* \* \* \* \*

7. Add subpart K to read as follows:

**Subpart K—Filing Fees**

Sec.

**800.1101 Amount of fee.**

**800.1102 Timing of payment.**

**800.1103 Valuation.**

**800.1104 Manner of payment.**

**800.1105 Refunds.**

**800.1106 Waiver.**

**800.1107 Resubmissions.**

**800.1108 Rejection of voluntary notice.**

**Subpart K—Filing Fees**

**§ 800.1101 Amount of fee.**

The parties filing a voluntary notice of a transaction with the Committee under § 800.501(a) shall pay a filing fee as follows:

(a) Where the value of the transaction is less than \$500,000: No fee;

(b) Where the value of the transaction is equal to or greater than \$500,000 but less than \$5,000,000: \$750;

(c) Where the value of the transaction is equal to or greater than \$5,000,000 but less than \$50,000,000: \$7,500;

(d) Where the value of the transaction is equal to or greater than \$50,000,000 but less than \$250,000,000: \$75,000;

(e) Where the value of the transaction is equal to or greater than \$250,000,000 but less than \$750,000,000: \$150,000;

(f) Where the value of the transaction is equal to or greater than \$750,000,000: \$300,000.

**§ 800.1102 Timing of payment.**

Subject to §§ 800.1106 through 800.1108, the Staff Chairperson shall not accept a voluntary notice under § 800.503(a) until payment of any fee required under this section is received by the Department of the Treasury in the manner specified on the Committee's section of the Department of the Treasury website.

**§ 800.1103 Valuation.**

(a) Except as provided in paragraph (c) of this section, the value of the transaction for purposes of determining the required fee amount in this section 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.

(b) Determining the value of consideration:

(1) Where the consideration includes securities traded on a national securities exchange, the value of the securities is the closing price on the national securities exchange on which the securities are primarily traded on the trading day immediately prior to the date the parties file the

voluntary notice with the Committee pursuant to § 800.501(a), or if the securities were not traded on that day, the last published closing price.

(2) Where the consideration includes other non-cash assets, services, interests, or in-kind consideration, the value of the assets, services, interests, or in-kind consideration is their fair market value as of the date the parties file the notice.

(3) Where the transaction is a lending transaction, the value of the consideration is the cash value of the loan, or similar financing arrangement, made available or provided by or on behalf of the foreign person that is a party to the transaction.

(4) Where the transaction arises from the conversion of a contingent equity interest previously acquired by a foreign person that is a party to the transaction, the 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 paid in connection with the conversion.

(c) Exceptions:

(1) Where the consideration to be paid by the foreign person has not been, or cannot reasonably be determined as of the date the parties file the notice, the value of the transaction is the fair market value of the assets being acquired in the transaction as of the date the parties file the notice.

Note to § 800.1103(c)(1): The consideration amount may be determined notwithstanding minor standard adjustments that are to be made at closing.

(2) Where the transaction involves a merger or the contribution of a U.S. business to a joint venture, the value of the transaction is the fair market value of the U.S. business being merged or contributed.

(3) Where the value of a transaction is \$5,000,000 or more, but the transaction includes one or more non-U.S. businesses, and the value of the interests or rights acquired in the U.S. business is less than \$5,000,000, the filing fee under § 800.1101(b) is applicable. The value of the U.S. business, for purposes of this paragraph, is the fair market value of the assets of the U.S. business.

(d) Fair market value means the price that would be received in exchange for selling an asset or interest, or paid to receive a service or to transfer liability, in an orderly transaction between market participants.

(1) In determining the fair market value of assets or interests, parties shall make a good faith estimate and generally may rely on the last valuation of the assets as presented in financial statements prepared in accordance with generally accepted accounting principles (GAAP) or other widely recognized accounting principles, such as the International Financial Reporting Standards (IFRS), or the valuation of an independent appraiser; provided, however, that if no valuation has occurred within the prior two fiscal quarters, or if there have been significant changes to the fair market value since the last valuation, the parties shall make a good faith estimate as of the filing date, or, if the parties are filing after the completion of the transaction, the date that the transaction was completed.

(2) In determining the fair market value of services, the parties may rely upon the value of services determined by the parties as set forth in an executed written agreement, or make an estimate as of the date of filing based upon rates charged to third parties or upon recent industry reports or other sources of comparable commercial data; provided, however, if such sources are unavailable, the parties shall make a good faith estimate. If the parties are filing after completion of the transaction, the parties shall make an estimate of the fair market value as of the date the transaction was completed.

(3) The Staff Chairperson is not bound by the parties' characterization of the transaction and its value or the parties' good faith approximation provided to the Committee pursuant to § 800.502(c)(1)(viii).

(e) Examples:

(1) *Example 1.* Corporation A, a foreign person, proposes to acquire all of the issued and outstanding shares of Corporation B, a U.S. business, in exchange for \$100,000,000 in cash. Assuming no other relevant facts, the value of the transaction is \$100,000,000, and the filing fee is \$75,000.

(2) *Example 2.* Corporation A, a foreign person, proposes to acquire all of the issued and outstanding shares of Corporation B, a U.S. business, in a two-for-one stock swap transaction whereby a holder of a share of Corporation B's stock is entitled to receive two shares of Corporation A's stock. Corporation A's stock is listed on the NASDAQ, a national securities exchange. In aggregate, the holders of Corporation B's stock will receive 10,000,000 shares of Corporation A's stock in the transaction. On the trading day immediately prior to the filing of the joint voluntary notice, the closing price of Corporation A's stock on NASDAQ was \$20 per

share. Assuming no other relevant facts, the value of the transaction is \$200,000,000, and the filing fee is \$75,000.

(3) *Example 3.* Corporation B, a U.S. business, is issuing new shares that will represent 50 percent of its issued and outstanding shares. Corporation A, a foreign person, proposes to acquire these shares. As consideration, Corporation A will contribute to Corporation X certain inventory, machines, and other non-cash assets. The parties to the transaction estimate in good faith, based on the most recent quarterly financial statements of Corporation A, which were prepared in accordance with GAAP, that the fair market value of the assets is \$40,000,000. Assuming no other relevant facts, the value of the transaction is \$40,000,000, and the filing fee is \$7,500.

(4) *Example 4.* Corporation A and Corporation B are establishing a joint venture, JV Corp., which will be controlled by Corporation B, a foreign person. Corporation A contributes a U.S. business, the fair market value of which is \$150,000,000, to JV Corp. Corporation B contributes \$150,000,000 in cash to JV Corp. The value of the transaction is \$150,000,000, which is equal to the value of the U.S. business being contributed. Assuming no other relevant facts, the filing fee is \$75,000.

(5) *Example 5.* Corporation A, a foreign person, enters into a stock purchase agreement with Person Z to acquire 100 percent of the issued and outstanding shares of Corporation B, a U.S. business. The value of the consideration has not been determined because it will only be payable once Corporation B achieves certain development and sales milestones, and it will be 10 percent of Corporation B's revenue over a future five-year period. The parties estimate in good faith that the fair market value of Corporation B is \$30,000,000 based on a number of factors,

including application of well-known accounting standards such as Financial Accounting Standards Board Statement 157, a recent valuation conducted by a third-party auditor, and a proposal to acquire Corporation B made by another bidder for approximately \$30,000,000 in cash. Assuming no other relevant facts, the value of the transaction is \$30,000,000, and the filing fee is \$7,500.

(6) *Example 6.* Corporation A, a foreign person, proposes to acquire 100 percent of the equity interest of Corporation B, a foreign person, for \$100,000,000. Corporation B has subsidiaries in several countries, including Corporation C, a U.S. business. The fair market value of Corporation C's assets is \$1,000,000. Assuming no other relevant facts, under paragraph (d)(3) of this section, a \$750 filing fee is required.

(f) Timing rule for calculation of filing fee:

(1) Where a transaction will be effectuated in multiple phases or involves the acquisition of contingent equity interests, the value of the transaction is the total value of the transaction including the multiple phases or contingent equity interests, 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.

(2) *Example:* Corporation A, a foreign person, proposes to acquire Corporation B, a U.S. business. The transaction will be effectuated in two phases. First, Corporation A will acquire 50 percent of the voting interest of Corporation B in exchange for \$30,000,000 (Phase 1). Two months later, Corporation A will have the option to acquire the remaining 50 percent of the voting interest of Corporation B in exchange for another \$30,000,000 (Phase 2). The option to convert is imminent, the option to acquire the remaining voting interest is in the control of

Corporation A, and the amount of voting interest acquired can be reasonably determined. The value of consideration of Phase 2 is part of the consideration of the transaction. Assuming no other relevant facts, the value of the consideration is \$60,000,000 (the total consideration for both stages), and the filing fee is \$75,000.

(g) The determination of the value of the transaction for purposes of calculating the filing fee in no way limits the Committee's jurisdiction or its authority to review, investigate, mitigate, or take any other action regarding any covered transaction.

**§ 800.1104 Manner of payment.**

Parties to a transaction must pay any filing fee by electronic payment. The filing fee must be paid in U.S. dollars. Instructions for paying filing fees are available on the Committee's section of the Department of the Treasury website.

**§ 800.1105 Refunds.**

(a) Except as provided in paragraphs (b) and (c) of this section, the Department of the Treasury shall not refund a filing fee in whole or in part.

(b) If the Committee determines that the transaction is not a covered transaction, the filing fee shall be refunded.

(c) In response to a petition by a party, if the Staff Chairperson determines, based on the information and representations contained in the voluntary notice, as well as any other information provided by the parties, that a party or the parties to a transaction paid a filing fee in an amount greater than required at the time of filing, the Department of the Treasury shall refund the amount of overpayment to the party or parties who paid the filing fee.

**§ 800.1106 Waiver.**

If the Staff Chairperson determines that extraordinary circumstances relating to national security warrant, the Staff Chairperson may waive the filing fee in whole or in part and will notify the parties in writing. No waiver shall be implied, even where the Staff Chairperson does not reject a voluntary notice under § 800.1108 for failure to pay the filing fee.

**§ 800.1107 Resubmissions.**

The parties to a transaction shall not be required to pay an additional filing fee in the event that the Staff Chairperson permits the parties to withdraw and resubmit a notice pursuant to § 800.509(c)(2), unless the Staff Chairperson determines that a material change to the transaction has occurred, or a material inaccuracy or omission was made by the parties in information provided to the Committee, that requires the Committee to consider new information, in which case the Staff Chairperson will inform the parties in writing.

**§ 800.1108 Rejection of voluntary notice.**

The Staff Chairperson may reject a voluntary notice pursuant to § 800.504(a) upon a determination that the amount of the filing fee paid by the parties was insufficient under this section. Prior to rejecting a notice under this paragraph, the Staff Chairperson shall inform the parties in writing of the insufficiency of payment and provide the parties three business days to pay the remainder of the filing fee. If the Staff Chairperson does not reject a voluntary notice pursuant to § 800.504(a) upon a determination that the amount of the filing fee payment paid by the parties was insufficient under this section, the balance of the fee remains payable unless the Staff Chairperson notifies the parties in writing that the payment has been waived in whole or in part.

**PART 802 - PROVISIONS PERTAINING TO CERTAIN TRANSACTIONS BY FOREIGN PERSONS INVOLVING REAL ESTATE IN THE UNITED STATES**

8. The authority citation for part 802 continues to read:

**Authority:** 50 USC 4565; E.O. 11858, as amended, 73 FR 4677

**Subpart E – Notices**

**§ 802.501 [Amended]**

9. Amend § 802.501:

a. In paragraph (a) by adding “, and paying the fee required under subpart K of this part” after “including the certification required under paragraph (h) of that section”;

b. In paragraph (f) by adding “, and payment of the fee required under subpart K of this part,” after “including the certification required by § 800.502(h)”; and

10. Amend § 802.502 by revising paragraph (b)(1)(ix) to read as follows:

**§ 802.502 Contents of voluntary notices.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(ix)(A) The value of the transaction in U.S. dollars, as determined pursuant to § 802.1103, and the parties’ assessment of the applicable fee due under § 802.1101, including an explanation of the methodology used to determine such valuation and applicable fee; and

(B) If different than the value of the transaction provided in paragraph (b)(1)(ix)(A) of this section, a good faith approximation of the fair market value of the interest acquired in the covered real estate in U.S. dollars, as of the date of the notice.

\* \* \* \* \*

11. Amend § 802.503:

- a. In paragraph (a)(1) by removing the word “and”;
- b. By redesignating paragraph (a)(2) as paragraph (a)(3); and
- c. By adding new paragraph (a)(2).

The addition reads as follows:

**§802.503 Beginning of 45-day review period.**

(a) \* \* \*

(2) Confirmed that the applicable fee required under subpart K of this part has been paid or waived; and

\* \* \* \* \*

12. Amend § 802.504 by redesignating paragraphs (a)(3) and (4) as paragraphs (a)(4) and (5), respectively, and adding paragraph (a)(3) to read as follows:

**§802.504 Deferral, rejection, or disposition of certain voluntary notices.**

(a) \* \* \*

(3) Reject any voluntary notice upon determining that the filing fee paid by the parties was insufficient under subpart K of this part, subject to § 802.1108.

\* \* \* \* \*

7. Add subpart K to read as follows:

**Subpart K—Filing Fees**

Sec.

**802.1101 Amount of fee.**

**802.1102 Timing of payment.**

**802.1103 Valuation.**

**802.1104 Manner of payment.**

**802.1105 Refunds.**

**802.1106 Waiver.**

**802.1107 Resubmissions.**

**802.1108 Rejection of voluntary notice.**

**Subpart K—Filing Fees**

**§ 802.1101 Amount of fee.**

The parties filing a voluntary notice of a transaction with the Committee under § 802.501(a) shall pay a filing fee as follows:

(a) Where the value of the transaction is less than \$500,000: No fee;

(b) Where the value of the transaction is equal to or greater than \$500,000 but less than \$5,000,000: \$750;

(c) Where the value of the transaction is equal to or greater than \$5,000,000 but less than \$50,000,000: \$7,500;

(d) Where the value of the transaction is equal to or greater than \$50,000,000 but less than \$250,000,000: \$75,000;

(e) Where the value of the transaction is equal to or greater than \$250,000,000 but less than \$750,000,000: \$150,000;

(f) Where the value of the transaction is equal to or greater than \$750,000,000: \$300,000.

**§ 802.1102 Timing of payment.**

Subject to § 802.1106 through § 802.1108, the Staff Chairperson shall not accept a voluntary notice under § 802.503(a) until payment of any fee required under this section is received by the Department of the Treasury in the manner specified on the Committee's section of the Department of the Treasury website.

**§ 802.1103 Valuation.**

Except as provided in paragraph (e) of this section, the value of the transaction for purposes of determining the required fee amount in this section shall be determined as follows:

(a) For a transaction structured as a purchase, by 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 purchaser in the transaction, including cash, assets, shares or other ownership interests, debt forgiveness, or services or other in-kind consideration.

(b) For a transaction structured as a lease, by the value of the sum of, as applicable:

(1) Any fixed payments to be paid by the foreign person that is a lessee in the transaction to, or for the benefit of, the lessor over the term of the lease;

(2) Any variable payments that depend on an index or a rate (such as a market interest rate) to be paid by the foreign person that is a lessee in the transaction to, or for the benefit of, the lessor, over the term of the lease, measured for purposes of this section by using the index or rate as of the date the parties file the notice; and

(3) Any non-cash or in-kind consideration to be provided by the foreign person that is a lessee in the transaction to, or for the benefit of, the lessor, over the term of the lease, as may be reasonably determined as of the date the parties file the notice.

(c) For a transaction structured as a concession, by the value of the sum of all rent, fees, and charges to be paid by the foreign person to the grantor and any non-cash or in-kind consideration to be provided by such foreign person to, or for the benefit of, the grantor, over the term of a concession agreement, as may be reasonably determined as of the date the parties file the notice.

(d) Determining the value of consideration:

(1) Where the consideration includes securities traded on a national securities exchange, the value of the securities is the closing price on the national securities exchange on which the securities are primarily traded on the trading day immediately prior to the date the parties file the voluntary notice with the Committee pursuant to § 802.501(a), or if the securities were not traded on that day, the last published closing price.

(2) Where the consideration includes other non-cash assets, services, or interests, including real property contributed by a foreign person that is party to a transaction involving the

exchange of land or contribution to a joint venture, the value of the assets, service, or interests is their fair market value at the time of filing.

(3) Where the transaction is a lending transaction, the value of the consideration is the cash value of the mortgage, loan, or similar financing arrangement, made available or provided by or on behalf of the foreign person that is a party to the transaction.

(4) Where the transaction arises from the conversion of a contingent equity interest previously acquired by a foreign person that is a party to the transaction, the 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.

(e) Exceptions:

(1) In the case of a purchase, where the consideration to be provided by the foreign person has not been, or cannot reasonably be determined as of the date the parties file the notice, the value of the transaction is the fair market value of the assets being purchased in the transaction as of the date the parties file the notice.

Note 1 to § 802.1103(e)(1): The consideration amount may be determined notwithstanding minor standard adjustments that are to be made at closing.

(2) In the case of a lease or concession, where the consideration to be provided by the foreign person has not been, or cannot reasonably be determined at the time of filing, or, where the parties cannot reasonably determine the value of rent, fees, charges, or services pursuant to paragraph (c) of this section, the filing fee required shall be that required under § 802.1101(b).

(f) The Staff Chairperson is not bound by the parties' characterization of the transaction and its value or their good faith approximation provided to the Committee pursuant to § 802.502(b)(1)(ix).

(g) Fair market value means the price that would be received in exchange for sale of an asset or interest, or paid to convey a service or to transfer liability, in an orderly transaction between market participants.

(1) In determining the fair market value of assets or interests, parties shall make a good faith estimate and generally may rely on the last valuation as presented in financial statements prepared in accordance with generally accepted accounting principles (GAAP) or other widely recognized accounting principles, such as the International Financial Reporting Standards (IFRS), or the valuation of an independent appraiser; provided, however, that if no valuation has occurred within the prior two fiscal quarters, or if there have been significant changes to the fair market value since the last valuation, the parties shall make a good faith estimate at the time of filing, or, if the parties are filing after completion of the transaction, the date the transaction was completed.

(2) In determining the fair market value of services, the parties may rely upon the value of services determined by the parties as set forth in an executed written agreement, or make an estimate at the time of filing based upon rates charged to third parties or recent industry reports or other sources of comparable commercial data; provided, however, if such sources are unavailable, the parties shall make a good faith estimate. If the parties are filing after completion of the transaction, the parties shall make an estimate of the fair market value as of the date the transaction was completed.

(h) Examples:

(1) *Example 1.* Corporation A, a foreign person, enters into an agreement for the purchase of a parcel of covered real estate (Parcel X) from Corporation B. The purchase is a covered real estate transaction. The fair market value of Parcel X is \$37,000,000. In exchange for ownership of Plot X, Corporation A forgives a debt owed to it by Corporation B that is valued at \$5,000,000 and pays \$35,000,000 to Corporation B. Assuming no other relevant facts, the value of the transaction is \$40,000,000, and the filing fee is \$7,500.

(2) *Example 2.* Corporation A, a foreign person, enters into an agreement to lease a parcel of covered real estate from Corporation B. The lease is a covered real estate transaction. Pursuant to a signed agreement, Corporation A will pay Corporation B a fixed annual payment of \$300,000 for a term of three years, with an option to renew the lease at the end of the term. Assuming no other relevant facts, the value of the transaction is \$900,000, and the filing fee is \$750.

(3) *Example 3.* Corporation A, a foreign person, proposes to enter into a concession agreement with a U.S. public entity for the right to use certain covered real estate for the purpose of developing and operating terminal infrastructure at a covered port. The concession is a covered real estate transaction. The concession agreement is for a five-year term. Under the concession agreement, Corporation A will pay the U.S. public entity a use charge of \$450,000 per year starting in the second year. The concession agreement also requires Corporation A to pay utility fees and common area maintenance charges of \$5,000 per month for the full concession term. Terminal development is scheduled to be completed 12 months after signing of the concession agreement, and Corporation A intends to commence operations immediately.

Assuming no other relevant facts, the value of the transaction is \$2,100,000, based on the \$1,800,000 use charge and \$300,000 in utility fees. The filing fee is \$750.

(4) *Example 4.* Corporation A, a foreign person, pays a lease bonus of \$1,000 per acre as an inducement to execute an oil, gas and mineral lease with respect to a 10-acre parcel of covered real estate. The lease has a 10-year term. Corporation A must pay a royalty of 12.5% in amount or value of oil or gas production removed or sold from the leased land. Prior to such production, the foreign person is obligated to pay a delay rental fee of \$1,000 per acre per year for the first five years and \$2,000 per acre thereafter. A minimum royalty in lieu of the delay rental fee is due once oil or gas has been discovered on the leased land, equal to the annual delay rental fee that would otherwise have been due. Assuming no other relevant facts, the value of the transaction is \$160,000 and there is no filing fee.

(i) Timing rule for calculation of filing fee:

(1) Where a transaction will be effectuated in multiple phases or involves the acquisition of contingent equity interests, the value of the transaction is the total value of the transaction including the multiple phases or contingent equity interests, 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

(2) Example: Corporation A, a foreign person, proposes to purchase Plot X and acquire an option to purchase Plot Y, both of which are covered real estate. The transaction will be completed in two phases. First, Corporation A will acquire Plot X and the option related to Plot Y in exchange for \$30,000,000 (Phase 1). Corporation A informs its shareholders that within two months, Corporation A will exercise its option to purchase Plot Y in exchange for another

\$30,000,000 (Phase 2). The second purchase is imminent and in the control of Corporation A, and the value of acquisition can be reasonably determined. Assuming no other relevant facts, the value of the consideration is \$60,000,000 (the total consideration for both phases), and the filing fee is \$75,000.

(j) The determination of the value of the transaction for purposes of calculating the filing fee in no way limits the Committee's jurisdiction or its authority to review, investigate, mitigate, or take any other action regarding any covered real estate transaction.

**§ 802.1104 Manner of payment.**

Parties to a transaction must pay any filing fee by electronic payment. The filing fee must be paid in U.S. dollars. Instructions for paying filing fees are available on the Committee's section of the Department of the Treasury website.

**§ 802.1105 Refunds.**

(a) Except as provided in this paragraph, the Department of the Treasury shall not refund a filing fee in whole or in part.

(b) If the Committee determines that the transaction is not a covered real estate transaction, the filing fee shall be refunded.

(c) In response to a petition by a party, if the Staff Chairperson determines, based on the information and representations contained in the voluntary notice, as well as any other information provided by the parties, that a party or the parties to a transaction paid a filing fee in an amount greater than required at the time of filing, the Department of the Treasury shall refund the amount of overpayment to the party or parties who paid the filing fee.

**§ 802.1106 Waiver.**

If the Staff Chairperson determines that extraordinary circumstances relating to national security warrant, the Staff Chairperson may waive the filing fee in whole or in part and will notify the parties in writing. No waiver shall be implied by the parties, even where the Staff Chairperson does not reject a voluntary notice under § 802.1108 for failure to pay the filing fee.

**§ 802.1107 Resubmissions.**

The parties to a transaction shall not be required to pay an additional filing fee in the event that the Staff Chairperson permits the parties to withdraw and resubmit a notice pursuant to § 802.509(c)(2), unless the Staff Chairperson determines that a material change to the transaction has occurred, or a material inaccuracy or omission was made by the parties in information provided to the Committee, that requires the Committee to consider new information, in which case the Staff Chairperson will inform the parties in writing.

**§ 802.1108 Rejection of voluntary notice.**

The Staff Chairperson may reject a voluntary notice pursuant to § 802.504(a) upon a determination that the amount of the filing fee paid by the parties was insufficient under this section. Prior to rejecting a notice under this paragraph, the Staff Chairperson shall inform the parties in writing of the insufficiency of payment and provide the parties three business days to pay the remainder of the filing fee. If the Staff Chairperson does not reject a voluntary notice pursuant to § 802.504(a) upon a determination that the amount of the filing fee payment paid by the parties was insufficient under this section, the balance of the fee remains payable unless the Staff Chairperson notifies the parties in writing that the payment has been waived in whole or in part.

Dated: March 2, 2020.

**Thomas Feddo,**

*Assistant Secretary for Investment Security.*

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