

# CFIUS Expands Its Coverage of Foreign Investments in U.S. Real Estate

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**PRACTICES** U.S. Inbound Investment, Foreign Corrupt Practices Act FCPA, Export Controls and Trade Compliance, Import Relief, International

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Until now, the United States Government has reviewed the national security implications of foreign investments in U.S. real estate only when the real estate was associated with the acquisition of ownership or control (albeit with a low standard for control) of a U.S. business. Even in such situations, filings by foreign investors with the Committee on Foreign Investment in the United States (CFIUS) have not been mandatory. Instead, in some cases acquirers submitted them to obtain a safe haven from subsequent review by the U.S. Government that could result in imposed mitigation or divestment. These measures have not, however, been seen by the U.S. as providing enough protection from situations in which foreign parties acquire an interest in sensitive U.S. real estate that might implicate national security.

Accordingly, as part of the Foreign Investment Risk Review Modernization Act (FIRRMA), a recent tightening of overall foreign investment rules aimed at international (but largely Chinese) acquisition of critical and emerging U.S. technology, the law governing foreign investments in U.S. real estate was expanded and clarification was provided regarding the types of real estate investments having potential national security implications. CFIUS issued proposed regulations in September 2019 implementing this law, and on January 13, 2020, published final rules that will become effective on February 13, 2020.

Under the new regulations, CFIUS will have jurisdiction over “covered real estate transactions”, even when a U.S. business is not acquired or control is not obtained, if there is a purchase by, or lease or concession to, a foreign person and the real estate (1) "is located within, or will function as part of, a covered port," or (2) is near U.S. military installations or other property owned by the U.S. government that "is sensitive for reasons relating to national security" and the foreign person acquires any three of the following property rights:

- To physically access the real estate;
- To exclude others from physically accessing the real estate;
- To improve or develop the real estate; and
- To attach fixed or immovable structures or objects to the real estate.

The regulations explain that covered ports include airports that handle both military and civilian traffic and also the top 25 seaports by tonnage. Proximity to U.S. military installations is defined to include:

- “Close proximity” (within a mile) to designated military or government property;
- “Extended range” (within 100 miles) of certain combat training and testing facilities;
- Real estate in 48 listed western counties and geographic areas near missile test ranges; and
- Certain identified properties in the U.S. “territorial sea” (generally thought of as the 12-nautical mile Exclusive Economic Zone.)

There are a number of exceptions to this rather expansive coverage, including an exclusion for foreign investors with a specified in-depth connection to an “excepted foreign state” (initially Australia, Canada and the United Kingdom) as well as exclusions encompassing several types/locations of real estate, including:

- Urbanized areas (such as Washington, DC);
- Individual housing units;
- Retail trade, accommodation or food service sector establishments;
- Limited commercial office space;
- American Indian and Alaska Native Lands; and
- Certain activities of foreign air carriers.

As was the case before the enactment of FIRREA, CFIUS filings with respect to real estate are not mandatory. The new regulations, however, provide the option of filing a short on-line declaration in lieu of a full CFIUS notice in the case of real estate investments that fall within the scope of the new rules but which do not involve acquisition of ownership or control of a U.S. business that would previously have been sufficient to trigger CFIUS jurisdiction. (In the latter case any CFIUS filing must still involve a full notice.)

Of note to foreign financial institutions is the provision in the new rules that “the extension of a mortgage, loan, or similar financing arrangement by a foreign person to another person for the purpose of the purchase, lease, or concession of covered real estate, regardless of whether accompanied by the creation in favor of the foreign person of a secured interest in the covered real estate, shall not, by itself, constitute a covered real estate transaction.” The rules go on to provide, however, that the Committee would accept notices or declarations when there is “imminent or actual default” or any other condition that would give rise to “a covered real estate transaction.”