What Canadian Investors Need to Know About FIRRMA Before Entering U.S. Real Estate Deals

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As Canadian investors continue to increase their exposure to U.S. commercial real estate, understanding the national security review process for foreign investment has become more important. One critical consideration is the role of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) and the Committee on Foreign Investment in the United States (CFIUS) in regulating certain real estate transactions involving non-U.S. investors.

What Are FIRRMA and CFIUS?

The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) expanded the powers of the Committee on Foreign Investment in the United States (CFIUS). Previously, CFIUS reviewed foreign takeovers of U.S. businesses in sensitive sectors. FIRRMA, among other amendments, extended this authority to include certain real estate transactions, particularly those involving:

- Properties near military bases or government facilities;
- Land close to airports or seaports; and
- Locations within designated proximity zones.

Even minority investments, long-term leases or development rights can be subject to CFIUS review, depending on the property's location and the investor’s rights.

What Happens if a CFIUS Review Goes Poorly?

If CFIUS determines that a transaction poses unresolved national security concerns, it can block the deal or require divestment, even after closing. The result can be significant financial loss, reputational damage and investment disruption, especially when risks are not addressed early.

Canada’s Status as an Excepted Foreign State

Canada is currently designated as an “excepted foreign state” under FIRRMA regulations. This status provides key advantages for Canadian investors, such as:

- **Reduced Regulatory Friction:** Canadian capital is viewed as lower risk compared to other foreign sources.
- **Potential Exemption from Mandatory Filings:** If the investor also qualifies as an excepted investor, they may avoid certain pre-closing filing obligations.

However, being Canadian alone is not enough. The investor, or investment vehicle, must meet ownership and governance criteria to unlock these benefits.

Canadian Entities as Excepted Investors

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Canadian-owned entities (including pension funds, Real Estate Investment Trusts or partnerships) may qualify as excepted investors if they meet the following conditions:

- They are substantially owned and controlled by nationals of Canada, the U.S. or other excepted states; and
- There is no material influence from individuals or entities tied to non-allied countries.

Examples of Canadian entities that may qualify:

- Canadian pension funds investing through U.S. or Canadian entities;
- Canadian Real Estate Investment Trusts acquiring assets in the U.S.;
- Private equity funds with Canadian/U.S. management and governance; and
- Infrastructure or asset managers deploying cross-border capital.

Benefits of excepted investor status include:

- Exemption from mandatory CFIUS filings for certain technology, infrastructure and data-related businesses;
- Lower review risk and fewer regulatory delays; and
- Flexibility to invest in sensitive real estate zones without triggering automatic review.

Important: Even if an entity qualifies as an excepted investor, transactions that result in foreign control of a U.S. business are still within CFIUS's jurisdiction and may warrant a voluntary filing to manage legal risk.

Key Issues for Canadian Investors to Consider

Despite Canada's favorable status, investors should remain alert to the following:

- **Geographic Red Flags** – Is the asset near a sensitive government site?
- **Access and Control** – Does the investment grant rights to sensitive data, technologies, or management decisions?
- **Ownership Structure** – Does the investment vehicle include any non-excepted foreign persons?

An affirmative response to any of these questions may trigger CFIUS review.

How Canadian Investors Can Prepare

1. Map out CFIUS geography risk early in the due diligence process. CFIUS jurisdiction covers real estate in close proximity (1 mile) of major airports, seaports and designated military bases, and within extended range (100 miles) of a more limited set of military facilities, most notably missile ranges in the western United States.
2. Review investor qualifications for excepted investor status.
3. Engage experienced U.S. counsel early to identify filing obligations or risk mitigation strategies. CFIUS review can take from one to as many as four months, depending on the risk profile of the transaction, so awareness and planning are crucial to avoid unforeseen delays in closing a transaction.

Final Thought

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Canada's status as an excepted foreign state, and the ability of Canadian-owned entities to qualify as excepted investors, offers a distinct advantage in the competitive U.S. real estate market. With the right structuring and legal foresight, Canadian investors can continue making strategic investments while minimizing regulatory friction.[1]

Please do not hesitate to contact a member of our Real Estate Transactions group if you have any questions.

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[1] This article is provided for informational purposes only and does not constitute legal advice.

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