

CFIUS Jurisdiction over Real Estate Transactions Expanded: Foreign Investors Should Take Notice

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The Trump administration continues to expand the powers of the US government to block foreign investment in the U.S. on national security grounds. In 1975, President Gerald Ford established the Committee on Foreign Investment in the United States (CFIUS) to study foreign investment in the U.S. The Committee and its jurisdiction have been expanded several times since then, first in the 1980s, to address fears over Japanese investment, and more recently, in response to concerns over investment from China.

In November, 2019, CFIUS published an annual report providing certain data regarding recent CFIUS filings. According to the report, the number of CFIUS notices filed increased from 143 in 2015 to 237 in 2017. While the largest proportion of notices filed, by far, for the three-year period reviewed involved investors from China, CFIUS also reviewed a large number of transactions involving investors from U.S. allies - investors from Canada, Japan and the UK accounted for the second, third, and fourth most notices filed during that same period.

While the Committee was never particularly focused on real estate, the last two expansions have specifically called out this area, making CFIUS clearance an important "checklist item" for every foreign investor in U.S. real estate.

The most recent regulations were proposed in September of 2019. One of these rules expands the Committee's authority to review transactions involving real estate located within airports and maritime ports or located near certain military installations. For the first time, this regulation defines the distances from military installations that will trigger CFIUS review and also provides a list of specific installations. The second proposed regulation addresses transactions involving critical technologies, infrastructure, and sensitive data, referred to as "TID U.S. businesses" (technology, infrastructure, and data). While this regulation does not explicitly implicate real estate, it still could have an impact on real estate transactions that involve critical technologies, infrastructure or sensitive data. This could have important implications for any foreign investor that seeks to acquire a "data center" in the U.S. Public comment for the regulations ended on October 17, 2019. After Treasury considers those comments, the final regulations will be reissued and go into effect no later than February 13, 2020.

FIRMA - 2018

For a long time, CFIUS had power only to review transactions which would result in control by a foreign person of a U.S. business. "Control" is defined broadly as the "power, direct or indirect,

whether exercised or not exercised, to determine, direct, or decide important matters affecting an entity.” In 2018, however, Congress expanded the Committee’s jurisdiction with the passage of the Foreign Investment Risk Review Modernization Act (FIRRMA). FIRRMA allows CFIUS to reach certain non-controlling investments by foreign persons as well as certain real estate transactions. FIRRMA called on Treasury to issue regulations implementing the statute. Treasury first issued a Pilot Program as an interim rule, which went into effect on November 10, 2018. The Pilot Program expanded the scope of CFIUS review to include certain investments by foreign persons in US businesses that produce, design, test, manufacture, fabricate, or develop “critical technologies” in 27 identified industries and made CFIUS filings mandatory for these transactions. The Pilot Program is set to expire in March, 2020; however, Treasury has indicated that it will address the continuation or modification of the Program alongside its reissuance of the below proposed regulations at the beginning of the year.

Proposed Regulation Covering Real Estate - 2020

Under the proposed regulations, covered real estate transactions include any purchase, lease by, or concession to a foreign person of “covered real estate,” in which the foreign person has at least three of four designated property rights. These property rights include the right to: (1) physically access the real estate, (2) exclude others from physical access to the real estate, (3) improve or develop the real estate, or (4) attach fixed or immovable structures or objects to the real estate. Where three of these property rights are met by a foreign person, transactions involving real estate located within airports or maritime ports or nearby certain military installations will be subject to CFIUS review. An [appendix](#) to the rule specifically lists over 100 of these military installations.

“Covered real estate” includes real estate which is located:

- within, or will function as part of, an airport or maritime port,
- within “close proximity” to (one mile of) a listed military installation ([parts 1 and 2](#) of Appendix A),
- within an extended range (up to 100 miles or 12 nautical miles from the U.S. coastline) of a listed military installation ([part 2](#) of Appendix A),
- within any county or other geographic area identified in connection with a listed military installation ([part 3](#) of Appendix A),
- any part of a military installation identified in [part 4](#) of Appendix A that is located within 12 nautical miles seaward of the U.S. coastline.

These new regulations could have serious implications for any foreign investor seeking to acquire a property, for example, in Orlando, Florida, to the extent it is within 100 miles of the military installation listed on part 2 of Appendix A in Cocoa Beach.

Exceptions

The proposed rule carves out exceptions for certain real estate transactions that would otherwise constitute “covered real estate transactions.” These exceptions include:

- A real estate transaction involving an “excepted real estate investor” with close ties to an “excepted foreign state.” The Treasury Department will eventually designate a list of excepted foreign states subject to a two-thirds vote of approval by the Committee.
- Single housing units intended for occupancy as separate living quarters, including fixtures and adjacent land. For example, a single apartment unit within an apartment building.
- For real estate within an airport or maritime port, where the lease or concession restricts use to retail trade, accommodation, or food service sector establishments.
- Commercial office space within a multi-unit commercial office building where the foreign person and its affiliates do not hold, lease, or have a concession that exceeds 10 percent of the total square footage of the commercial office space and the foreign person and its affiliates do not represent more than 10 percent of the total number of tenants in the building.
- Certain “urbanized areas,” as identified by the U.S. Census unless within an airport, maritime port, or within “close proximity” to (one mile of) a military installation.
- Land owned or held in trust for American Indians, Indian tribes, or Alaska Natives.

These exceptions likely would permit a foreign investor to acquire a restaurant or retail franchise that has leases in one or more airports.

Proposed Regulation Covering TID U.S. Businesses

The new regulations also expand CFIUS jurisdiction to review non-controlling investments in certain technology, infrastructure, and data businesses (“TID U.S. Businesses”). Some of these transactions will trigger a mandatory filing requirement, discussed further below.

- “Critical Technologies” – In the proposed regulation, CFIUS carries over the definition of these technologies from its Pilot Program, which includes defense articles on the United States Munitions List as set forth in the International Traffic in Arms Regulation (ITAR), items included on the Commerce Control List in the Export Administration Regulations (EAR), certain nuclear equipment, facilities, and material, certain agents and toxins, and emerging and foundational technologies set forth in the Export Control Reform Act (ECRA).
- “Critical Infrastructure” – A covered investment involving critical infrastructure is broadly defined as “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.” The proposed regulations include a subset of specific critical infrastructure listed in [Appendix A](#) with specific functions (Column 2) related to 28 categories of critical infrastructure (Column 1). Only a U.S. business performing one of these specific functions related to a listed category is a TID business for critical infrastructure covered investments.
- “Sensitive Personal Data” – CFIUS has jurisdiction to review transactions involving investment by a foreign person in a U.S. business which maintains or collects sensitive personal data of U.S. citizens. The proposed regulation further defines this data to include health records, financial records, biometric data, non-public communications, geolocation data, and data stored for government identification or security clearances. If the US business

that collects the data (1) targets or tailors products or services to a US executive branch agency or military department; (2) has maintained or collected such data on more than one million individuals within the last year; or (3) has a demonstrated business objective to maintain or collect such data on more than one million individuals, the transaction is subject to CFIUS review.

Notification

There is no mandatory notification requirement for real estate transactions covered in the proposed real estate regulation; however, there are mandatory filings for certain TID business transactions involving a foreign government that holds a “substantial interest” (49% or greater voting interest) in the foreign investor when that foreign investor obtains a “substantial interest” (25% or greater voting interest) in a TID U.S. business. There is also mandatory notification for transactions involving critical technologies listed in the Pilot Program. As stated above, that Program will be addressed alongside the reissuance of the final regulations in early 2020.

Parties also may submit a voluntary declaration or full notice. The advantage to volunteering a transaction for CFIUS review is to obtain the safe harbor of legal approval as the Committee may initiate its own review without notice or declaration from the parties. The new voluntary declaration process offers a shorter 30-day review period which commences upon filing. At the conclusion of those 30 days, however, CFIUS may require a full notice, which triggers an additional 45-day period of review.

The proposed regulations have the potential to severely disrupt real estate transactions which previously did not trigger CFIUS review. After review concludes, the Committee may take one of several routes. It may approve a transaction, require that certain mitigation measures take place, or refer the matter to the President who has the authority to block the transaction. It remains to be seen whether the shortened voluntary declaration process will in fact abbreviate review or whether CFIUS will typically tack on the additional 45 days. However, CFIUS has the authority to initiate its own review of a covered transaction, which could significantly delay or entirely defeat the success of a transaction.

Conclusion

It is important to note that these proposed regulations in no way limit the jurisdiction CFIUS retains over transactions which result in a foreign person acquiring “control” over a U.S. business. Nor is the proposed real estate regulation mutually exclusive of the proposed TID Business regulation. In fact, the proposed regulations warn that a real estate transaction may fall under both proposed regulations, in which case it should be analyzed under the TID Business regulation. Although the proposed real estate regulation offers clarity on which transactions will be deemed particularly sensitive, all foreign investors in U.S. real estate should be aware of potential triggers for CFIUS review and should add CFIUS to their “checklist” of items to be analyzed before and during any underwriting and analysis.

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