



ONPOINT / A Legal update from Dechert's International Trade and Government Regulation Group

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CFIUS Issues Proposed Regulations to Expand Jurisdiction to Real Estate Transactions

On September 24, 2019, the U.S. Treasury Department, as chair of the Committee on Foreign Investment in the United States (“CFIUS”), issued proposed regulations to expand its jurisdiction to cover certain transactions by non-U.S. persons involving U.S. real estate – a significant expansion that affects many transactions and transaction parties that previously were outside the scope of CFIUS jurisdiction.

These [Proposed Regulations](#) implement real estate-related provisions of the Foreign Risk Review Modernization Act of 2018 (“FIRRMA”), which was enacted in August 2018, that expand the scope of “covered transactions” subject to CFIUS review to include the purchase or lease by, or concession to, a non-U.S. person of certain real estate in the United States. CFIUS separately issued proposed regulations to implement other provisions of FIRRMA (see our companion OnPoint [here](#)). CFIUS also published [Frequently Asked Questions](#) along with these Proposed Regulations. The comment period for the Proposed Regulations will close on October 17, 2019, and final regulations must take effect by February 13, 2020.

Background

Prior to the enactment of FIRRMA, CFIUS only had the authority to review acquisitions of real estate related to transactions that could result in control by a non-U.S. person of a U.S. business. For example, while the acquisition of a U.S. business and the commercial real estate it holds could be subject to CFIUS review, a stand-alone lease of U.S. real estate that did not involve acquisition of control of a U.S. business would be outside of CFIUS’ scope.

FIRRMA expanded CFIUS' jurisdiction to include certain types of real estate transactions involving the purchase or lease by, or concession to, a non-U.S. person of certain private or public real estate located in the United States. FIRRMA and the proposed regulations focus on two general categories of real estate, including real estate: (i) that is, is located within, or will function as part of, an air or maritime port; or (ii) that is in close proximity to a United States military installation or another facility or property of the United States Government that is sensitive for reasons relating to national security. CFIUS issued the Proposed Regulations to provide further information on the scope of this expanded jurisdiction.

Highlights of Proposed Regulations on Real Estate

The Proposed Regulations, which would be implemented at 31 C.F.R. Part 802, include the following highlights:

- **Covered Real Estate Transactions:** CFIUS is introducing a new term, “covered real estate transactions,” to identify the scope of transactions subject to CFIUS review – this term is defined to include:
 - Any purchase or lease by, or concession to, a foreign person of “**covered real estate**” that affords the foreign person at least three defined “**property rights**”;
 - Any change in the rights that a foreign person has with respect to “**covered real estate**” in which the foreign person has an ownership or leasehold interest or concession arrangement, if that change could result in the foreign person having at least three “**property rights**”; or
 - Any other transaction, transfer, agreement, or arrangement, the structure of which is designed or intended to evade or circumvent the application of the CFIUS regulations as relates to real estate.
- **Covered Real Estate:** “**Covered real estate**” is defined to include real estate that is:
 - Located within, or will function as part of, an airport or maritime port;
 - “**Airport**” is defined to include “large hub airports” or “joint use airports” (as defined under Federal Aviation Authority regulations) as well as any other airport with annual aggregate all-cargo landed weight of greater than 1.24 billion pounds;
 - “**Maritime port**” includes the top 25 tonnage, container, or dry bulk ports according to the most recent U.S. Department of Transportation annual report as well as other strategic seaports within the National Port Readiness Network;
 - Located within:
 - “**Close proximity**” (*i.e.*, one mile from the outer boundary) of more than 100 specified U.S. military installations;
 - “**Extended range**” (*i.e.*, 100 miles outward from the outer boundary or, for ranges that extend offshore, 12 nautical miles from the coastline) of 32 specified U.S. military installations;
 - Specific counties or other geographic areas connected to certain, specified U.S. Air Force bases, military installations in Colorado, Montana, Nebraska, North Dakota, and Wyoming; or
 - Any part of 23 specified U.S. military installations and located within 12 nautical miles of the U.S. coastline.
- **Property Rights:** In order to be considered a “**covered real estate transaction**,” the non-U.S. person generally must be afforded at least three of the following “**property rights**” (whether or not exercised), which include the right to:
 - Physically access the real estate;
 - Exclude others from physical access to the real estate;
 - Improve or develop the real estate; or
 - Attach fixed or immovable structures or objects to the real estate.
- **No Mandatory Filings:** While FIRRMA and related implementing regulations impose mandatory declaration requirements for certain types of transactions, the Proposed Regulation does not impose

any mandatory declaration requirements for covered real estate transactions. Moreover, parties to a covered real estate transaction can choose to submit a short-form declaration or a full voluntary notice (similar to the options available under the so-called CFIUS “Pilot Program” implemented in November 2018). In either case, parties would need to provide specific information related to the covered real estate transaction, including identification of the parties involved, a description of the real estate, and a summary of the rights related to the real estate.

Exceptions from Scope of “Covered Real Estate Transaction”

The Proposed Regulations include a number of exceptions to the scope of “covered real estate transactions.” These exceptions generally are based either on the identity of the non-U.S. investor or on the type of real estate transaction. In particular, CFIUS would not have jurisdiction to review the following types of real estate transactions:

- **Excepted Real Estate Investors:** The Proposed Regulation would create the framework of a “white list” of friendly countries. Real estate transactions involving certain “excepted real estate investors” connected to “excepted real estate foreign states” would not be subject to CFIUS review. Real estate investors that have a substantial connection to an excepted foreign state and meet other criteria (some of which apply on a forward-looking basis) could be considered “excepted” and outside the scope of CFIUS jurisdiction.
 - The U.S. Department of Treasury will publish a list of potential jurisdictions eligible for this treatment at some point in the future. The list of eligible countries is expected to be narrow at this time given the diplomatic and national security implications related to the white list.
- **Certain Securities/Lending Transactions:** An acquisition of securities by a securities underwriter would not be considered a covered transaction as long as such acquisition is in the ordinary course of business and in the process of underwriting. In addition, the extension of a mortgage, loan, or similar financing arrangement by a non-U.S. person to another person for the purpose of the purchase, lease, or concession of covered real estate generally would not be considered a covered transaction. However, if there is a significant possibility that the non-U.S. person might purchase, lease, or be granted a concession to real estate as a result of an imminent or actual default or other condition – or if the non-U.S. person might otherwise be acquiring property rights over covered real estate – such an activity might constitute a covered real estate transaction.
- **Urban Real Estate:** The purchase, lease, or concession of covered real estate that is within an “urbanized area” or “urbanized cluster” (as defined by the U.S. Census Bureau) generally will not be considered a covered real estate transaction, unless such real estate is located in close proximity to a designated military installation or another sensitive facility or property of the U.S. Government or is within, or will function as part of, an airport or maritime port.
- **Transactions that do not Confer Three or more “Property Rights”:** Transactions in which a non-U.S. person acquires fewer than three of the “property rights” defined above (i.e., right to access, exclude, improve/develop, or attach fixtures) would not be a covered real estate transaction.
- **Retail Trade Leases and Concessions at Ports:** The lease by or concession to non-U.S. persons of real estate located within an airport or maritime port would not be a covered transaction if the real estate can only be used as a retail trade, accommodation, or food service establishment under the terms of the concession or lease (but an acquisition of such real estate might still be considered a covered real estate transaction).
- **Certain Commercial Office Space:** A purchase or lease by, or concession to, a non-U.S. person of commercial office space within a multi-unit commercial office building would not be a covered transaction, if, upon the completion of the transaction, the non-U.S. person and its affiliates would not: (1) hold, lease or have a concession with respect to more than 10% of the building’s total square footage; or (2) represent more than 10% of the building’s tenants.
- **Single Housing Units:** A purchase, lease, or concession of covered real estate that is a single housing unit, including fixtures and adjacent land, would not be a covered transaction as long as the land is incidental to the use of the real estate as a single housing unit.
- **Land Owned by Native Groups:** A purchase, lease, or concession of land owned by or held in trust for certain Alaska Native entities, Native groups, American Indians, Indian tribes, Alaska Natives and Alaska Native entities would not be covered.
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Transactions Captured by Other CFIUS Regulations: Transactions involving real estate that also qualify as investments in U.S. businesses subject to CFIUS' jurisdiction – such as the acquisition of a U.S. business that includes the acquisition of that business's facilities – are not covered real estate transactions. They should, however, be assessed under other CFIUS regulations related to the acquisition of control over U.S. businesses and other non-controlling investments involving non-U.S. investors.

Conclusion

The Proposed Regulations represent a significant expansion of CFIUS jurisdiction to real estate transactions that previously were not subject to national security reviews, including certain “greenfield” investments. Any real estate transaction involving non-U.S. investors should be reviewed carefully to assess whether it could be seen to raise potential risks under the proposed regulations.

Dechert regularly represents clients through CFIUS reviews, helping them to: determine whether or not to bring a transaction before the Committee, assemble the required information and materials for a filing and then (as necessary) negotiate national security agreements with CFIUS in a manner that minimizes both delay and the imposition of conditions that might threaten the transaction. The firm also gives counsel on strategies for identifying and addressing political and policy considerations that may arise.

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