

GIBSON DUNN



International Trade Update

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It's Getting Real – Expanded CFIUS Jurisdiction Over Real Estate Transactions

A proposed rule from the Committee on Foreign Investment in the United States would substantially expand the scope of covered real estate transactions subject to national security review during a time of growing concern around foreign acquisitions of U.S. land.

Over the past year, national security risks associated with foreign acquisitions of certain real estate, including agricultural land, have been an issue of growing concern. This increasing national security concern has manifested in several key developments: (i) a rise in efforts by state and local governments to implement their own real-estate focused national security reviews, which we described in a previous [client alert](#), (ii) a notable and recent presidential block of a major real estate transaction,^[1] and (iii) bipartisan federal legislative support for stronger restrictions on acquisitions of U.S. land by foreign adversaries.^[2]

Most recently, on July 8, 2024, the Committee on Foreign Investment in the United States (“CFIUS”) issued a [Notice of Proposed Rulemaking](#) (“NPRM” or the “proposed rule”) to expand its jurisdiction to review and potentially block certain real estate transactions involving foreign persons. The scope of the update is noteworthy. The proposed rule would add nearly 60 locations to CFIUS’s existing list of military installations whose proximity to a potential real estate purchase could create CFIUS jurisdiction, bringing the total list to over 250 installations—and representing a roughly 30% increase in a single update.^[3]

This alert provides: (i) a brief refresher on CFIUS’s jurisdiction over real estate transactions, (ii) a summary of the proposed rule, (iii) a discussion of historical trends and projections regarding CFIUS’s review of real estate transactions, and (iv) key takeaways for dealmakers.

I. Refresher on CFIUS’s Jurisdiction Over Real Estate Transactions.

The Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”) provided CFIUS with expanded jurisdiction over (among other things) certain real estate transactions. Using that new jurisdiction, CFIUS drafted [rules for “certain transactions by foreign persons involving real estate in the United States”](#) (the “real estate rules”), which became effective in February 2020. The real estate rules provided the process for CFIUS to review acquisitions involving a foreign person purchasing, leasing, or gaining certain other land rights in property close to military installations and other sensitive areas. Specifically, the real estate rules set out four categories of locations that could subject a real estate transaction to CFIUS’s jurisdiction and listed each of these sets of locations in an Appendix to the rules (“Appendix A”).

- Part 1 of Appendix A provides locations for which a property may be subject to review based on being in “close proximity” to (i.e., within one mile of) a listed military installation.
- Part 2 of Appendix A provides locations for which a property may be subject to review based on being within the “extended range” (i.e., between one and one hundred miles from) a listed military installation.
- Part 3 of Appendix A lists missile launch ranges (i.e., geographic areas) for which a property being in the extended area of that range may subject it to CFIUS review.
- Part 4 of Appendix A lists offshore training areas where a property being in the extended range of that area may subject it to CFIUS review.

Congress’s policy rationale for providing CFIUS with authority over real estate transactions was—and remains—driven by intelligence collection risks. As CFIUS’s [press release](#) for the NPRM noted, FIRRMA allows CFIUS to review transactions that could “reasonably provide the foreign person the ability to collect intelligence on activities being conducted at such an installation, facility, or property; or could otherwise expose national security activities at such an installation, facility, or property to the risk of foreign surveillance.”

There are limited exceptions to CFIUS jurisdiction over “covered real estate”; most notably, if such real estate falls within an “urbanized area” or “urban cluster.” Yet, there is a meaningful limitation to this exception, as it does not apply where such real estate is (1) located within, or will function as part of, a covered port or (2) is within “close proximity” to certain military installations or other sensitive government sites.

II. Updates to CFIUS’s List of Sensitive U.S. Military Installations.

The proposed rule seeks to expand the list of covered military installations, the second such expansion of covered real estate installations since the real estate rules were promulgated under FIRRMA. The real estate rules themselves note that the Department of Defense (“DoD”) will continue “on an ongoing basis” to assess and update Appendix A.[\[4\]](#)

A noteworthy transaction served as the precursor to the first update to Appendix A. In January 2023, CFIUS determined that it did not have jurisdiction to review an acquisition of land by Chinese food manufacturer Fufeng Group Ltd. That land was near Grand Forks Air Force Base, which was not among the military installations listed in Appendix A. Ostensibly in response to public outcry around CFIUS's determination that it lacked jurisdiction over this acquisition, in August 2023, DoD issued a [final rule](#) adding eight military installations to Appendix A, including Grand Forks Air Force Base.

This NPRM, coming nearly a year after the prior Appendix A expansion, would add a substantially increased number of military installations, with 59 proposed additions. The proposed rule is not immediately effective. CFIUS provided for a 30-day public comment period, following which CFIUS is expected to promptly publish a final rule. Once implemented, and assuming no changes are made to the proposed list of new military installations, the NPRM will bring the total number of military installations listed in Part 1 of Appendix A to 162 and Part 2 to 65, while making the following updates:

- Expand CFIUS's jurisdiction over real estate transactions to include 40 new military installations in Part 1 of the list ("close proximity," i.e., within a one-mile radius);
- Expand CFIUS's jurisdiction over real estate transactions to include 19 new military installations in Part 2 of the list ("extended range," i.e., within a 100-mile radius);
- Move eight military installations from part 1 to part 2;
- Remove one installation from part 1 and two installations from part 2;
- Revise the definition of the term "military installation," including to expand the definition of an installation to encompass "Army depots, arsenals, and military terminals," "Marine Corps installations, logistic battalions and support facilities," and Space Force bases, and expand other parts of the definition to encompass each of the Armed Forces; and
- Update the names of 14 installations and the location of seven others.

III. Trends and Projections for CFIUS Review of Real Estate Transactions.

Since the CFIUS real estate rules became effective in 2020, there have been very few reviews of "covered real estate transactions." CFIUS's annual report to Congress for 2021 provided data showing that zero of the 272 notices and only one of the 164 short-form declarations filed with the Committee were for a covered real estate transaction. In 2022, only one of the 286 notices and five of the 154 short-form declarations were for covered real estate transactions.

There are likely several reasons why there have been so few covered real estate CFIUS filings in the past years. One possible reason is that many transactions that involved covered real estate also implicate a U.S. target's broader assets and operations, governance rights, or access to technical information or personal data, resulting in CFIUS jurisdiction based on its authority to review "control" transactions and "non-controlling" covered investments.

Another reason is that, following FIRRMA, some transactions require mandatory filings with CFIUS, but covered real estate transactions are subject only to voluntary filings. In fact, a covered real estate transaction for which the parties did not file a voluntary CFIUS notice was the

subject of a recent presidential order. In May 2024, following a CFIUS-initiated review that identified a risk to national security arising from the potential for foreign surveillance and intelligence collection activities, President Biden issued a presidential decision requiring Chinese cryptocurrency mining company MineOne to divest an acquisition of Wyoming real estate located in “close proximity” to a U.S. Air Force base with strategic missile silos.^[5]

We do not expect the overall number of real estate reviews to rise substantially because of the additions in the NPRM, but we do expect CFIUS to closely scrutinize the more limited universe of transactions that implicate covered real estate—whether or not those transactions result in voluntary filings with the Committee—and to take bold action with respect to those transactions when warranted.

CFIUS is likely to consider possibilities to further expand or enhance its jurisdiction over real estate transactions owing, in part, to bipartisan support from U.S. legislators. As is often the case for national security initiatives, there exists bipartisan federal legislative support for tougher scrutiny on foreign acquisitions of U.S. land. In response to the NPRM, Chairman of the House Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party John Moolenaar (R-MI) made a [statement](#) in support of the proposed rule calling for *even tougher measures* to restrict “foreign adversaries” from purchasing land that would “leave our military facilities susceptible to surveillance.” U.S. Senator Sherrod Brown (D-OH) also issued a [statement in support](#), noting the importance of protecting agricultural land near military bases. As the presidential election draws near, lawmakers on both sides of the aisle are likely to maintain focus on national security issues. This continued support paves the way for CFIUS to continue updating its rulemaking around real estate, echoed in Assistant Secretary of the Treasury for Investment Security Paul Rosen’s comments in the NPRM [press release](#) that CFIUS “will remain responsive to the evolving nature of the risks we face to ensure we are protecting our military installations and related defense assets.”

IV. Key Takeaways and Next Steps for Dealmakers.

The proposed rule is likely to be finalized and implemented by fall of this year. Considering this timeline, transaction parties should act now to update their approach to potentially implicated transactions. We recommend taking note of the following:

- **CFIUS will continue its efforts to identify and review non-notified real estate transactions.** Especially given the intense scrutiny of foreign investments in U.S. real estate by U.S. federal, state, and local government authorities, as well as certain segments of the private sector and U.S. media, CFIUS will continue its efforts to identify and review covered real estate transactions. Some reviews could result in CFIUS identifying a threat to national security posed by a prior investment and the need for mitigation measures up to and including divestment.
- **The expanded list of installations should inform current deal diligence.** Because transactions under consideration or negotiation today may not sign until after a final rule is published later this year, transaction parties should immediately begin considering the NPRM when conducting due diligence of real estate investments and acquisitions. Moreover, for transactions subject to CFIUS’s “control” or “covered

investment” jurisdiction, the NPRM provides important insight into the locations that CFIUS considers most sensitive and likely to raise national security considerations.

- **Foreign parties *can* still acquire rights in covered real estate.** Although the proposed rule does not distinguish between investors of different jurisdictions,^[6] CFIUS will continue to evaluate transactions using a case-by-case, transaction-specific approach that accounts for the risk profile of the investors. CFIUS filings for covered real estate transactions remain voluntary, and foreign investors will continue to be able to receive CFIUS approvals for these transactions. Of note, the blocked acquisition we discussed in this alert involved a Chinese-backed acquirer and indications that the real estate could be used for surveillance. Not every covered real estate transaction poses a risk to U.S. national security and, even when CFIUS does identify a threat, in many cases the threat can be mitigated through manageable conditions on the foreign investor’s physical access to, and use of, the land. Moreover, the “urbanized area” and “urban cluster” exceptions discussed above continue to apply.
- **In addition to conducting CFIUS-focused risk analysis, transaction parties must consider state and local foreign investment reviews—at least for now.** Currently, approximately twenty states have implemented some form of restriction on foreign investment in real estate, and over a dozen states are currently considering bills that would establish similar restrictions.^[7] As described in a previous [client alert](#), these state-level restrictions may not ultimately survive legal challenges on the grounds of the U.S. Constitution’s “supremacy clause” —the legal argument being that Congress has already reserved the power to regulate foreign investment in real estate with FIRRMA. However, until successfully challenged, these state and local rules also merit consideration for parties undergoing real estate transactions near U.S. military installations.

^[1] See Order of May 13, 2024, Regarding the Acquisition of Certain Real Property of Cheyenne Leads by MineOne Cloud Computing Investment I L.P., 89 Fed. Reg. 43,301 (May 16, 2024).

^[2] See, e.g., Protecting America’s Agricultural Land from Foreign Harm Act of 2023, S. 926, 118th Cong. (2023); Countering Communist China Act, H.R. 7476, 118th Cong. (2024).

^[3] Note that the proposed rule would not amend the lists of three missile launch areas and twenty-three offshore training “geographic areas” also enumerated in the CFIUS rules, and discussed herein in Section I.

^[4] “The Department of Defense will continue on an ongoing basis to assess its military installations and the geographic scope set under the rule to ensure appropriate application in light of national security considerations.” Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, 85 Fed. Reg. 3,158, 3,160 (Jan. 17, 2020)

^[5] Order of May 13, 2024, Regarding the Acquisition of Certain Real Property of Cheyenne Leads by MineOne Cloud Computing Investment I L.P., 89 Fed. Reg. at 43,301

^[6] Note that CFIUS’s real estate rules do provide for certain “excepted investors” from the United Kingdom, Canada, Australia, and New Zealand.

^[7] See Micah Brown & Nick Spellman, “Statutes Regulating Ownership of Agricultural Land,” The Nat’l Agric. L. Center, <https://nationalaglawcenter.org/state-compilations/aglandownership> (last

updated Nov. 30, 2023); April J. Anderson et al., Cong. Rsch. Serv., LSB11013, State Regulation of Foreign Ownership of U.S. Land: January to June 2023 (2023).

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