

Real Estate Transactions Subject to Federal CFIUS Review

A Lexis Practice Advisor® Practice Note by Kirk Brett, Duval & Stachenfeld LLP



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Under recently implemented regulations, the Federal Government has the authority to review and approve—or decline to approve—certain commercial real estate transactions. The potential for this review, by the Committee on Foreign Investment in the United States (known as CFIUS), means that real estate practitioners must take care to analyze how the new rules may be applicable when negotiating and closing commercial real estate transactions. This article provides a brief background of CFIUS and provides guidance on what types of properties and transactions require an advance analysis of the new CFIUS rules, and discusses how to initiate CFIUS review.

CFIUS, FIRRMA, and the New Regulations

CFIUS has the responsibility of reviewing and investigating any transaction that could result in foreign control over a business that may raise national security concerns or may involve critical infrastructure. CFIUS has the authority to block transactions in advance, or to unwind transactions after the fact, if CFIUS determines that critical infrastructure or the national security of the United States is being jeopardized. See Section 721 of the Defense Production Act of 1950, as amended, codified at 50 U.S.C. § 4565 and [CFIUS Overview](#) for further detail on the authority of CFIUS.

Until 2018, CFIUS seemed to be primarily concerned with acquisitions of operating businesses in the technology or weapons-related areas—and businesses that did not engage in interstate commerce were excluded from CFIUS review. Thus, it appeared as though transactions in real estate generally would not be subject to CFIUS review, except to the extent that real estate was a component of the larger business being acquired.

The Trump administration sought to expand CFIUS' powers in a number of respects. One such area was to clarify that real estate transactions should be subject to CFIUS review because they could implicate national security concerns based solely upon the location of the relevant properties.

In August 2018, Congress authorized the expansion of CFIUS' jurisdiction and operations pursuant to the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). See Section 721 of the Defense Production Act of 1950, as amended, codified at 50 U.S.C. § 4565. The enactment of FIRRMA made headlines among real estate practitioners, as it contemplated that previously unregulated transactions in commercial real estate would be subject to CFIUS review, with attendant uncertainty as to what types of transactions would be scrutinized, the standards of review, and the potential for delays. However, much of the law's applicability to real estate transactions was delayed until more detailed regulations could be prepared. The regulations implementing FIRRMA were thereafter drafted and published by the U.S. Department of the Treasury, and became effective on February 13, 2020. 31 C.F.R. pt. 802, is the relevant recently implemented CFIUS regulation governing real estate transactions.

FIRRMA and the new regulations generally provide that CFIUS is authorized to review transactions involving the purchase or lease by, or concession to, a "foreign person" of

certain “covered real estate.” Purchases and certain other (but not all) types of transactions are referred to as “covered real estate transactions.” Attorneys preparing to handle a real estate transaction should review several threshold issues to determine whether the transaction should be submitted to CFIUS:

- The type and location of the property—that is, whether it is “covered real estate”
- The identity of the persons or entities involved in the transaction—whether a “foreign person” is involved – and–
- The type of transaction—whether it is the type of transaction that would qualify as a “covered real estate transaction”

The rules governing these issues are discussed below. See Subpart B to Part 802, 31 C.F.R. §§ 802.201–802.244 for all relevant definitions.

What Property Triggers CFIUS Jurisdiction?

The first step in a CFIUS analysis is to determine if the property that is the subject of a proposed transaction is of a type—or in a location—that makes it potentially subject to CFIUS review. The properties that may trigger CFIUS review are defined as “covered real estate,” which means real estate that:

- Is within, or functions as part of, a “covered port” (i.e., most large or commercial airports and commercial seaports)
- Is located in “close proximity”—within one mile—of certain designated military installations (which are identified on an appendix to the rules)—examples of which include the Pentagon in Arlington, Virginia, Camp Lejeune in Jacksonville, North Carolina, and Los Angeles Air Force Base in El Segundo, California (see Appendix A to Part 802, Part 1)
- Is located within the “extended range”—up to 99 miles—of certain other designated military installations (which are also identified on an appendix to the rules)—examples of which include Cape Canaveral Air Force Station in Cape Canaveral, Florida, and the Aberdeen Proving Ground in Aberdeen, Maryland (see Appendix A to Part 802, Part 2)
- Is located in a county or other geographic area identified with a military installation (which counties and areas are identified in an appendix to the rules—and consist of ballistic missile ranges in Montana, Wyoming, North Dakota, Nebraska, and Colorado) (see Appendix A to Part 802, Part 3) –or–

- Is part of any one of 23 military installations (listed on an appendix) in the territorial waters of the United States (see Appendix A to Part 802, Part 4)

The Treasury Department has indicated that it will develop a web-based tool to provide assistance to practitioners who for now must consult the appendix to Part 802 to determine whether a particular property is within the scope of “covered real estate.” In the interim, the Treasury Department has directed the public to consult [TIGERweb](#), a tool maintained by the Census Bureau, to view relevant military installations, urbanized areas, and urban clusters on a map. Additionally, the Department of Transportation publishes the relevant lists of airports and maritime ports referenced in Rule 802, and the Bureau of Ocean Energy Management maintains web-based resources that may help parties with transactions in or near offshore areas. See [U.S. Department of the Treasury, Office of Public Affairs, Frequently Asked Questions on Final CFIUS Regulations Implementing FIRRMA, dated January 13, 2020](#).

What Persons or Entities Trigger CFIUS Jurisdiction?

As indicated above, a covered real estate transaction means a purchase or lease by, or concession to, a “foreign person” of covered real estate. It is important to understand, therefore, who (or what) is a foreign person.

The rules define a “foreign person” to mean (1) any foreign national (i.e., an individual who is not a U.S. citizen), (2) any foreign government (including any agency or instrumentality of a foreign government), or (3) any “foreign entity.” Any entity that is under the direction or control over any other foreign national, foreign government, or foreign entity is also considered a “foreign person.”

A “foreign entity” is any corporation, trust, organization, or other entity that is organized under the laws of a foreign state, and that either has its principal place of business located outside of the United States, or that has its equity securities primarily traded on a foreign exchange. The “principal place of business” is where the entity’s activities are directed, controlled, or coordinated. Note however, that this definition is currently an interim rule and is subject to change. As of now, if a majority of the equity interests of the entity are held by U.S. nationals (even if they are traded on a foreign exchange), the entity would not be considered a “foreign entity.” Thus, it is possible that a fund or other entity managed in the U.S., or with a significant number of indirect owners located in the U.S., may not be treated as a foreign person—and the practitioner should examine the structure of the fund/entity carefully before assuming that it is a foreign person and determining how to proceed with CFIUS review, as discussed below.

Recognizing that there are some persons, friendly governments, and entities that do not pose national security risks, the new rules provide carve-outs from CFIUS review for transactions involving “excepted real estate investors.” The test of what constitutes an “excepted real estate investor” is fairly complex. In general terms, excepted real estate investors are nationals of, entities organized under, or the governmental units of “excepted real estate foreign states.” Currently, the only states which have been granted the status of being excepted real estate foreign states are Australia, Canada, and the UK. This list is subject to change over time and the practitioner should check the then current list of [CFIUS Excepted Foreign States](#). Persons who would otherwise be considered excepted real estate investors may be disqualified based upon certain specified conduct, such as making misstatements to CFIUS or violating U.S. laws.

What Types of Transactions Trigger CFIUS Jurisdiction?

The rules provide that a “covered real estate transaction” is subject to CFIUS review. Generally speaking, a purchase or lease of covered real estate by a foreign person will be considered the type of transaction which could trigger CFIUS review. More particularly, however, the rules describe four types of property interests—and if **at least three** of such property interests are to be held by the foreign person, the transaction could be subject to CFIUS review. The four property interests described in the rules are (1) the right to access the property, (2) the right to exclude others from the property, (3) the right to improve or develop the property, and (4) the right to attach fixed or immovable structures or objects to the property. See definition of “property right,” 31 C.F.R. § 802.233.

Practitioners should take note that the grant of a security interest is not the type of transaction that triggers CFIUS jurisdiction. However, if the grantee seeks to acquire the property in question (such as through foreclosure), the acquisition would be the type to trigger CFIUS review.

In addition, transactions involving the grant of fewer than three of the above-described types of property interests should be exempt from CFIUS review.

Exceptions – Transactions Excluded from CFIUS Review

The rules further specify particular exceptions to the types of transactions that would otherwise be subject to CFIUS review. Thus, the following “Excepted Real Estate Transactions” are not subject to CFIUS review:

- Transactions involving single housing units (which include the fixtures and adjacent land incidental to the use of the property as a single housing unit)
- Transactions involving certain commercial office space (a lease of office space in a multiunit building is excluded from CFIUS review, unless the space at issue is more than 10% of the total space in the building (by square footage) or if the proposed tenancy represents more than 10% of the total number of tenants in the building)
- Retail leases—the lease of space for the retail sale of consumer goods or services to the public is exempt from CFIUS review
- Transactions involving properties in urban areas—property located in “urbanized areas” or “urban clusters” (as defined by the U.S. Census Bureau) is excluded from CFIUS review—unless it is within a “covered port” (i.e., airports and commercial seaports) or in “close proximity” (within one mile) of designated military bases (discussed above) –and–
- Transactions involving tribal lands—properties owned by Alaska natives or held in trust for certain native populations are exempt from CFIUS review

Submission of Covered Real Estate Transactions for CFIUS Review

The submission of a real estate transaction to CFIUS is voluntary—there is no mandatory requirement that parties disclose a transaction or seek CFIUS approval of a proposed transaction. However, in certain situations it may be prudent for parties to take advantage of the “safe harbor” afforded by voluntarily notifying CFIUS before closing a transaction that may otherwise be a covered real estate transaction.

CFIUS is authorized to review a covered real estate transaction at any time, even after a closing has occurred. Upon such review, CFIUS may direct the parties to undertake actions to mitigate the national security risks perceived by CFIUS—including by unwinding the transaction. See 50 U.S.C. § 4565(d), (l). By notifying CFIUS of a transaction ahead of time, parties can eliminate the risk of subsequent actions by CFIUS.

Parties to a covered real estate transaction may submit a short-form “declaration” to CFIUS. Such a declaration starts a review period of only 30 days. See 31 C.F.R. § 802.403. CFIUS may ask for more detailed information (including a meeting) as part of its review of the declaration. If the declaration is submitted, and if CFIUS indicates that it has concluded its 30-day review, there is a “safe harbor” for the transaction. See 31 C.F.R. § 800.508(d) and [CFIUS Overview](#).

If CFIUS has concerns about the proposed transaction, CFIUS may respond to the declaration by requesting that the parties submit a “notice” of the proposed transaction. See 31 C.F.R. § 802.405. The form of such a notice is longer and requires more detail than a declaration. Upon the submission of notice, CFIUS has a review period of 45 days, with an option to extend the period for an additional 45 days investigation period. See 31 C.F.R. §§ 802.503, 802.508. Consequently, if parties expect that a particular transaction is unlikely to raise national security concerns (even though it otherwise meets the definition of a covered real estate transaction), the submission of a declaration is a prudent way of notifying CFIUS of the transaction. If the parties expect that the transaction may raise more sensitive issues—such that CFIUS is likely to find a declaration insufficient—then they may wish to begin the CFIUS review process with a full notice.

Considerations for Practitioners regarding CFIUS and Real Estate Transactions

Although all real estate lawyers will have to become familiar with CFIUS related issues, the new CFIUS regulation will impact some practitioners more than others. For example,

lawyers practicing near military installations will routinely have to consider whether transactions are subject to CFIUS review, because the relevant properties will be “covered real estate.” Conversely, lawyers in other geographic areas will be able to readily determine that their transactions do not implicate CFIUS review based upon the location of the relevant properties. Similarly, lawyers representing foreign investment funds are more likely to encounter CFIUS-related issues than lawyers representing only U.S. citizens.

Counsel should also prepare to address potential CFIUS-related issues in real estate transaction documents. Contractual provisions should address issues such as:

- Whether the parties will submit the transaction to CFIUS (and whether such submission would be by declaration or by notice, as discussed above)
- Whether the transaction is conditioned upon CFIUS approval –and–
- The post-closing responsibilities of the parties in the event CFIUS reviews the transaction after closing (assuming CFIUS approval was not obtained beforehand)

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