

ALERT

Treasury Proposes Expanding CFIUS Jurisdiction Over Real Estate Transactions Near Military Sites

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On July 8, the U.S. Department of the Treasury (Treasury) issued a Notice of Proposed Rulemaking (NPRM) that would expand the jurisdiction of the Committee on Foreign Investment in the United States (CFIUS) to review purchases, leases, and other real estate transactions involving foreign persons. As detailed below, the NPRM would give CFIUS authority to review certain transactions involving real estate located near an additional 59 military installations and would extend the range of CFIUS's jurisdiction with respect to eight previously listed sites (i.e., from one mile to 100 miles from the military installation's boundary). Comments on the proposed rule are due within 30 days of publication in the Federal Register.

The NPRM is the latest in a series of Administration actions intended to address potential national security threats posed by certain transactions involving foreign persons and real estate located near sensitive military installations. In May 2023, CFIUS proposed a similar rule expanding the list of military installations subject to CFIUS jurisdiction. More recently, President Biden, upon CFIUS's recommendation, took the rare step of ordering the divestment of Chinese-owned real estate near Warren Air Force Base in Wyoming due to national security concerns. If the proposed rule is adopted, CFIUS will have the authority to review transactions involving real estate located near more than a total of 250 designated military installations along with transactions involving real estate located within U.S. airports and maritime ports.

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As background, Congress authorized CFIUS to review, mitigate, and potentially recommend Presidential action to block certain real estate transactions under the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). Treasury's initial regulations implementing FIRRMA established a list of military installations with respect to which certain "covered real estate transactions" located in varying degrees of geographic proximity to such sites would be subject to CFIUS review. The relevant military installations are listed in Appendix A to 31 CFR Part 802. Among other types of transactions, CFIUS has jurisdiction to review certain transactions involving (1) real estate located within one mile of the military installations identified in Part 1 or Part 2 of Appendix A and (2) real estate located within 100 miles of the military installations identified in Part 2 of Appendix A.

The July 8 NPRM represents a significant expansion of CFIUS's jurisdiction over real estate transactions through the designation of 59 additional military installations and by elevating the status of other previously listed sites. Specifically, the NPRM proposes to designate 40 additional sites to Part 1 of Appendix A (for which the applicable geographic range is one mile) and 19 additional sites to Part 2 of Appendix A (for which the applicable geographic range is 100 miles). In addition, the NPRM intends to move eight currently listed military installations from Part 1 to Part 2, allowing CFIUS to review transactions involving real estate located even farther away from these military installations.

Although the NPRM will not have a binding effect until a final rule is adopted, investors should be aware of the potential CFIUS implications of any pending or future transactions involving real estate located near the facilities included in the proposed rule. This is particularly important for transactions involving real estate located within the extended areas surrounding the eight military facilities referenced above.

In a broader sense, at both the federal and state levels, the issue of foreign investments in U.S. real estate has become a bipartisan and growing policy and political concern. At the state level, 26 states have passed laws restricting specific types of foreign investment in real estate, with 15 such laws having been passed in 2023 alone. Further, in Arkansas, Governor Sarah Huckabee Sanders required a subsidiary of Chinese company Syngenta to divest itself of 160 acres of agricultural land. In 2022, North Dakotan state and Grand Forks city officials denied permits for the construction of a manufacturing facility within 13 miles of the Grand Forks Air Force Base to The Fufeng Group based on an assessment by the Department of Defense that the presence of a Chinese Communist Party (CCP)-controlled company near a sensitive military installation posed significant national security risks.

Moreover, many of these state prohibitions have been subject to legal challenges. For example, a Florida law prohibiting land acquisitions by entities closely affiliated with the CCP is being challenged as discriminatory under the Fair Housing Act and Equal Protection Clause. At the federal level, Congress has introduced and passed numerous proposals to further scrutinize foreign real estate investments, including a law President Biden signed to include the Secretary of Agriculture as a voting CFIUS member on a case-by-case basis for certain transactions involving agricultural land, agriculture biotechnology, or the agriculture industry. Rep. John Moolenaar, Chairman of the House Select Committee on Strategic Competition Between the United States and the CCP, also proposed a bill that would mandate disclosure and review of real estate transactions involving CCP-affiliated companies.

The evolving and expanding scope of regulations, legislation and legislative proposals and legal challenges both at the state and federal levels create an enormously complex regulatory landscape for foreign real estate investments in the United States. Wiley's CFIUS and National Security practices have unparalleled capabilities in helping clients navigate the vast array of foreign investment, international trade, and national security laws. Our practice groups, renowned for their expertise, leverage the insights of former senior U.S. government officials and professional experts to support clients' growth strategies and regulatory compliance. Please reach out to any of the authors listed on this alert should you have any questions about the CFIUS regulations governing foreign investment reviews.

Christopher Abbott, a Wiley 2024 Summer Associate, contributed to this alert.