

## How the Proposed CFIUS Regulations Address Real Estate Transactions

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On September 17, the U.S. Department of the Treasury released two sets of proposed regulations to continue the implementation of the [Foreign Investment Risk Review Modernization Act of 2018](#) ("FIRRMA") and broaden the scope of transactions subject to national security review by the Committee on Foreign Investment in the United States ("CFIUS" or "the Committee"). One set of proposed [regulations](#) describes the scope of review for CFIUS review of real estate transactions, a new authority granted under FIRRMA. Below, we summarize key takeaways of the real estate regulations. The other set of proposed regulations would generally impact investments in U.S. businesses and are described in our [prior briefing](#).

FIRRMA granted CFIUS authority to review real estate transactions involving foreign persons. Previously, such transactions were not subject to CFIUS review unless they simultaneously involved an acquisition of control of a U.S. business. Foreign individuals and organizations that purchase or invest in property, such as land developers, renewable energy developers, oil and gas companies, and manufacturers, should familiarize themselves with these proposed rules.

FIRRMA granted CFIUS the authority, specifically, to review the purchase or lease by, or a concession to, a foreign person of private or public real estate that:

- (1) is located within, or will function as part of, an air or maritime port;
- (2) 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;
- (3) could reasonably provide the foreign person the ability to collect intelligence on activities being conducted at such an installation, facility, or property; or
- (4) could otherwise expose national security activities at such an installation, facility, or property to the risk of foreign surveillance.

To identify real estate transactions within the scope of CFIUS review, proposed regulations (new 31 C.F.R. Part 802) (i) identify covered real estate in very specific geographic terms and (ii) define covered real estate transactions by rights acquired in covered real estate.

**Covered Real Estate.** The proposed regulations define “covered real estate” as real estate:

- located within or functioning as part of an airport or maritime port;
- located within close proximity (one mile) of military installations and other government facilities and properties listed in an Appendix to the regulations;
- located within an extended range (up to 100 miles or 12 nautical miles) of certain military installations listed in the Appendix;
- located within counties or geographic areas identified in connection with military installations identified in the Appendix;
- located within any part of military installations identified in the Appendix, that is within 12 nautical miles seaward of the U.S. coastline.

**Covered Real Estate Transactions.** CFIUS review is limited to transactions that would grant a foreign person certain rights with respect to covered real estate. Specifically, a covered real estate transaction is any purchase or lease by, or concession to, a foreign person of covered real estate, as described above, that affords the person at least three of the following rights:[1]

- (1) The right to physically access
- (2) The right to exclude;
- (3) The right to improve or develop; or
- (4) The right to affix structures or objects.

**Exemptions.** FIRRMA exempts several categories of real estate transactions from CFIUS’s jurisdiction.

- Excepted Real Estate Investors: The proposed regulations exempt transactions involving an “excepted real estate investor” from CFIUS jurisdiction. To qualify as an excepted real estate investor, the foreign person must have a substantial connection (g., nationality of ultimate beneficial owners and place of incorporation) to one or more particular foreign states. A list of the specific excepted real estate foreign states has not yet been released.
- Single Housing Units: FIRRMA requires an exemption for real estate purchase, lease, or concession of a single “housing unit.” The exemption covers fixtures and adjacent land that is conveyed with the housing unit that is incidental to the intended use of the real estate as a housing unit.
- Urbanized Areas: Real estate within an urban area will generally be exempt from review unless it is within one mile of certain listed facilities or will function as part of, an airport or maritime port.
- Retail Trade: Concessions and leases in airports and maritime ports that are restricted to retail trade, accommodation, or food service sector establishments are exempted.
- Commercial Office Space: Commercial office space is exempt, depending on the amount of space occupied by the foreign person and ratio of the foreign person to the total number of tenants in the building.
- American Indian and Alaska Native Lands: Real estate owned by certain Alaska Native entities or held in trust by the United States for American Indians, Indian tribes, Alaska Natives, and Alaska Native entities is not covered real estate.

**No Mandatory Filing.** As currently written, the proposed regulations do not require parties to covered real estate transactions to submit a filing to CFIUS. Parties to covered real estate transactions will be able to submit either a full notice or a shorter declaration. As discussed in our [prior briefing](#), declarations are abbreviated filings which are less burdensome to file but do not guarantee a final decision by CFIUS, while full-form notices require more information but will always result in a determination by CFIUS.

**Penalties and Damages.** The proposed rule allows for the imposition of civil penalties, not to exceed \$250,000 per violation, for material misstatements, omissions, or certifications made by a party under this part.

[1] Also included are changes in rights in an existing relationship that would grant a foreign person three of these same rights, as well as transactions structured to evade or circumvent CFIUS jurisdiction.

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