CFIUS PROPOSAL UNDERSCORES RISKS IN FOREIGN REAL ESTATE ACQUISITIONS IN THE UNITED STATES

Date: 11 August 2023

US Policy and Regulatory Alert

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The Committee on Foreign Investment in the United States (CFIUS or the Committee) recently proposed expanding the scope of its jurisdiction to review real estate transactions to add over 200,000 square miles of land associated with national security-related facilities. CFIUS's proposal would add significantly to the Committee's broad reach over real estate deals, and comes on the heels of proposals in the Congress to potentially expand the focus on such transactions further. Foreign investors in the United States should be attuned to these considerations and the need to conduct thorough diligence on proposed acquisitions. As discussed below, this expansion effort fits within a larger policy trend at the federal and state level to regulate foreign ownership of US real estate, motivated not only by concerns about proximity to sensitive government facilities (as was initially the focus for CFIUS) but also by more economic security driven priorities.

CFIUS is a multi-agency committee of the federal government chaired by the Secretary of the Treasury that has broad authority to examine foreign investments in the United States and take action to mitigate threats to national security. CFIUS traditionally has had authority to examine foreign control acquisitions of US businesses, defined as any entity engaged in interstate commerce in the United States. Acquisitions of real estate were generally exempt from coverage. With the enactment of the Foreign Investment Risk Review Modernization Act of 2018, CFIUS's review capabilities were expanded and enhanced, including creation of new jurisdiction to review covered real estate transactions, defined as certain acquisitions, leases, and concessions of covered real estate that afford a foreign person defined access and control rights in the property.[1] Covered real estate includes, among other things, any real estate that is within defined proximity ranges to US military assets identified in Appendix A to CFIUS's real estate regulations at 31 C.F.R. Part 802. The proximity range is one mile distant from the identified asset, with a subset of assets subject to an extended proximity range of another 99 miles (in other words, 100 miles total).

Under the proposed rule, CFIUS would add the following eight Air Force bases to the list of assets in the Appendix that are subject to the extended 99-mile proximity range:

- Air Force Plant 42, located in Palmdale, California
- Dyess Air Force Base, located in Abilene, Texas
- Ellsworth Air Force Base, located in Box Elder, South Dakota
- Grand Forks Air Force Base, located in Grand Forks, North Dakota

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- Iowa National Guard Joint Force Headquarters, located in Des Moines, Iowa
- Lackland Air Force Base, located in San Antonio, Texas
- Laughlin Air Force Base, located in Del Rio, Texas
- Luke Air Force Base, located in Glendale, Arizona

Some of these identified military bases are near other facilities already on the CFIUS extended proximity list, with overlapping coverage, such that their inclusion would not significantly expand the territory already reviewable under the current real estate rules (although proximity to facilities on the list may present higher risk overall). Other military bases, however, are not close to the facilities currently on the CFIUS list, meaning significant new coverage of land that presently falls outside Committee jurisdiction. For example, the addition of the Iowa National Guard Joint Force Headquarters in Des Moines, Iowa, will capture most of the land area of that state and parts of northern Missouri, and the addition of Ellsworth AFB will capture much of western South Dakota as well as small portions of Montana, Nebraska, and Wyoming. The addition of Luke AFB, located just west of Phoenix, brings all of central Arizona under the rule.

Unlike other transactions that CFIUS has jurisdiction over, foreign acquisitions of covered real estate are not subject to a mandatory CFIUS notice requirement. However, CFIUS would have jurisdiction to conduct a review at its discretion, including at any time after an acquisition has been completed, introducing a potentially significant risk element for real estate transactions that would be captured under the proposed rule. Although the real estate rules would not apply directly to transactions already qualifying as “covered transactions” under the Committee's authority to review foreign acquisitions of US businesses under 31 C.F.R. Part 800, CFIUS would consider the national security risk of real estate assets acquired as part of a covered transaction. Any foreign acquisitions of or investments in US businesses therefore should be reviewed for potential coverage within the new proximity areas in the proposed rule (as well as areas covered under the current real estate rules). Importantly, there are no time bars or statutes of limitations on CFIUS's jurisdiction unless a transaction has been submitted and cleared through CFIUS.

In addition to CFIUS, other federal and state regulatory regimes may impose obligations on foreign investors relating to ownership of US real estate. At the federal level, the Agricultural Foreign Investment Disclosure Act (AFIDA) was enacted in 1978 in large part to create a national system for the collection of information pertaining to foreign ownership of US agricultural land. The regulations promulgated in furtherance of AFIDA require certain foreign investors who acquire, transfer, or hold an interest in US agricultural land to report such holdings and transactions to the Secretary of Agriculture. It is worth noting that the definition of “agricultural land” is broad, such that AFIDA filing obligations may arise in connection with transactions outside of the agribusiness sector.[2] Furthermore, there are at present more than 30 states that have laws that prohibit or restrict foreign ownership and investments in certain types of real property within a state; many of these legislative efforts restrict agricultural land, but some are broader and were enacted legislation to restrict foreign ownership of real estate in general, without limiting this restriction to agricultural land.[3] Moreover, more than 15 states have active reporting requirements applicable to foreign ownership of real property within the state (in addition to any AFIDA reporting obligation that may apply). The laws in place differ by state, each with varying exclusions and exemptions.[4]

To underscore the timeliness of this issue, especially when viewed with the above mentioned expansion effort relating to CFIUS and the broader definition of covered real estate, much of the state-level statutory regimes

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arose from a of recent change in policy. In 2023, states including Alabama, Arkansas, Florida, Idaho, Indiana, Louisiana, Mississippi, Montana, North Dakota, Oklahoma, South Dakota, Tennessee, Utah, and Virginia each signed into law varying restrictions and/or reporting requirements on foreign ownership of real property, including reporting currently held property; in 2022, Indiana and Arkansas enacted legislation in this area. As of the date of this alert there is legislation pending in more other states. At the federal level, there are multiple bills currently pending on similar topics; some of these proposals include amendments to broaden the scope and penal power of AFIDA. Accordingly, in addition to scrutiny under CFIUS, foreign investors may be subject to additional restrictions or reporting obligations at a state or federal level if a transaction implicates real estate.

The K&L Gates CFIUS and Real Estate practice groups can assist with any questions on the matters discussed in this alert.

FOOTNOTES

[1] In particular, the covered real estate transaction must afford the foreign person at least three of the following rights in the covered real estate: (1) the right to physical access, (2) the right to exclude others from physical access, (3) the right to improve or develop the parcel, and (4) the right to attach fixed or immovable structures or objects to the real estate. See 31 C.F.R. §802.212 (citing 31 C.F.R. §802.233(a)).

[2] https://nationalaglawcenter.org/publication/bocci-larson-wu-acquisition-and-disposition-of-u-s-agricultural-land-by-foreign-investors-federal-and-state-legislative-restrictions-limitations-and-disclosure-requirements-23-drake-j-agri-l/

[3] https://legiscan.com/FL/text/S0264/2023

[4] http://nationalaglawcenter.org/state-compilations/aglandownership/

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