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Real Estate Transactions Come Under Increased National Security Scrutiny

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As geopolitical tensions rise and the post-Cold War global order continues to fray, national security has experienced a renewed policymaking focus. The most prominent areas in this regard have been critical technology manufacturing, banking and finance, international trade, sensitive personal data, and cybersecurity; however, areas that have been mostly unaffected by national security concerns are now seeing regulatory activity that could impact commercial interests, and real estate is no exception.

On December 9, 2024, a new final rule from the Department of Treasury's Office of Investment Security became effective, expanding the jurisdiction of the Committee on Foreign Investment in the United States (CFIUS) and permitting it to review real estate transactions in close proximity to covered U.S. military installations.

Since its establishment in 1975, CFIUS has been charged with reviewing corporate transactions involving the foreign acquisition of U.S. companies and assets, but its involvement with real estate transactions is a relatively new development. The Foreign Investment Risk Review Modernization Act (FIRRMA) of 2018 widened the scope of CFIUS review to include real estate transactions, and the recent rulemaking brings into focus the extent of that review. The new rule's appendix contains 228 covered facilities across the U.S.: 162 in Part 1 (where CFIUS jurisdiction over foreign direct investment in real estate extends one mile around the location) and 65 more facilities in Part 2 (where CFIUS jurisdiction extends to 100 miles). This represents a substantial increase in the number of installations that fall within the scope of CFIUS's Part 802 rules. Additionally, the rule contains a list of other geographic designations where real estate transactions could fall under CFIUS jurisdiction.

U.S. real estate has emerged as a safe-haven asset class for international investors fearful of volatility in global capital markets. According to a recent article in *The Regulatory Review*, U.S. properties have attracted over $1.2 trillion in foreign investment over the past 15 years with a significant increase of 50% since 2017. Although recent trends indicate a slight weakening of real estate-related FDI, particularly in residential real estate, the longer-term trend is premised on things unlikely to change relative to other asset classes. The market for U.S. real estate is large and liquid, the underlying economy is strong relative to many other countries, and the legal/regulatory framework is mature and operates in a more or less predictable manner, despite various state-level initiatives that aim to reduce or limit foreign ownership of certain real estate. For these reasons, the expansion of CFIUS jurisdiction is noteworthy and potentially has a multi-billion-dollar impact.

Practical impacts and key considerations

Given the broad geographic reach of CFUIS's jurisdiction, both buyers and sellers of real property should acquaint themselves with the applicable rules and how they could impact transactions. Those impacts could alter the sales process, including an increase in associated legal costs, expanded due diligence process, altered deal timelines, and additional disclosure or reporting requirements.

The rules also create the need for sellers to understand their counterparties. Buyers from countries considered to be strategic adversaries to the U.S. (i.e., China, Russia, etc.) will receive far more scrutiny from regulators; buyers from allied countries, such as the United Kingdom, could be exempted altogether. Transactions that involve a buyer controlled directly by a foreign government are likely subject to mandatory reporting. The rules also make it advisable for sellers to understand how property is or could be used, both from the standpoint of future development as well as existing improvements.

There is a relatively small number of transactions subject to mandatory CFIUS reporting; however, given the committee's broad jurisdiction, its ability to review all transactions (reported and unreported), and its ability to halt or unwind deals, it could be beneficial for parties to file transactions with CFIUS on a voluntary basis. Timely, accurate disclosures could provide a measure of legal and regulatory certainty and demonstrate good-faith efforts to comply with the law. For foreign serial acquirers of U.S. real estate, establishing such bona fides could be an important gesture that helps to limit transaction risks across the entire portfolio.

What this means to you

Both buyers and sellers of U.S. real estate should carefully review the current regulatory framework, including the recently implemented amendments, and adjust their diligence processes accordingly. Notably, the rule is not retroactive and also leaves in place the statutory and regulatory exceptions to the rule found in Section 721(a)(4)(C)(i)) and in Section 802.216.

Contact us

If you have questions regarding the newly implemented CFIUS rules, please contact MaryBeth Heydt, Fang Shen, or your Husch Blackwell attorney.