

FIRRMA Impact on Real Estate Transactions

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The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) now specifically brings real estate transactions directly under the jurisdiction and review of the Committee on Foreign Investment in the United States (CFIUS). CFIUS is an interagency committee created to review the national security impacts of foreign investments in the United States. CFIUS is empowered to block or impose measures to reduce any threats to U.S. national security. Covered transactions include the purchase, lease, or concession by or to a foreign person of developed or undeveloped land in close proximity to critical infrastructure. The expansion to undeveloped land is a significant change, as purely “greenfield” investments will now be subject to CFIUS review. A concession is not defined, but presumably would include arrangements for the operation of real estate, such as parking concessions. Critical infrastructure is broadly defined, but would include airports, maritime ports, and military installations and other U.S. government facilities. Of particular concern to CFIUS is any transaction that provides a foreign person the ability to collect intelligence or surveillance on the activities being conducted at any of these facilities. For example, CFIUS recently required the Chinese conglomerate HNA Group to sell its stake in a New York City building whose tenants included the police precinct protecting Trump Tower.

What Is Not Covered

Covered transactions would not include the purchase of a “single housing unit,” certain real estate in urbanized areas, or passive investments. Passive foreign investment in equity funds are not included when the funds are managed by a U.S. person and foreign investors are limited from impacting investment decisions. Loans secured by real property are not considered covered transactions, unless the foreign person acquires economic or governance rights characteristic of an equity investment and not a loan.

What Steps Should Be Taken to Comply With the New Law?

First, you must know the identity of all investors to determine if a proposed investment could be subject to CFIUS review. A “foreign person” includes a foreign entity.

Second, you must determine if a proposed property is in close proximity to critical infrastructure. Close proximity is not currently defined, but is subject to definition by further regulations by CFIUS.

Third, you should determine whether to voluntarily submit a short form filing (“declaration”) that will provide basic information regarding the transaction. CFIUS is then required to determine if a full formal filing is necessary within 30 days following the receipt of a declaration. If you decide to submit a formal filing, FIRRMA provides a 45-day review period, with an optional 45-day investigation period and a one-time extension beyond that time frame of 15 days in “exceptional circumstances.” FIRRMA authorizes CFIUS to charge a filing fee of up to 1% of the transaction or \$300,000, whichever is less.

Anticipated Impact on Real Estate Transactions

If it is likely that CFIUS review will be necessary, investors will need to allocate sufficient time for the review process and anticipate all additional costs attributable to compliance with the regulatory process. It will be important to consult with counsel and other experts to anticipate the new CFIUS reach to real estate transactions. It is difficult to anticipate whether the expansion of CFIUS review to real estate transactions will be a significant deterrent to foreign investment in the United States. However, it is likely that the length and cost of the regulatory review will be a deterrent in the most obvious cases, such as any investment in real estate in close proximity to military installations, airports, and maritime ports. The anticipated notice of proposed rulemaking by CFIUS, which is expected by late summer or early fall 2019, will help further define the scope of real estate transactions that will be subject to review. Currently, there is no minimum dollar threshold, so all covered transactions involving real estate that meet the criteria are subject to review. It will be important to stay current and be advised of the impact of these and further developments of CFIUS review.

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