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Authors:



Lisa M. Zana

CT: (203) 324-8171

NY: New York: (212) 376-3010

lzana@goodwin.com



Alfredo G. Fernández

(860) 251-5353

afernandez@goodwin.com

CFIUS Regulations Applicable to Real Estate Transactions

Earlier this year, the Department of Treasury's final regulations (31 CFR Part 802) became effective to implement the Foreign Investment Risk Review and Modernization Act of 2018 (FIRRMA), whereby the Committee on Foreign Investment in the United States (CFIUS) can review the purchase by, or lease by, or concession to, a foreign person of certain real estate in the United States. This alert briefly summarizes the pertinent provisions of the Part 802 regulations and recommends a few practice tips based on our experience with covered real estate transactions.

The applicability of Part 802 is narrow and takes effect only when a "foreign person" participates in a transaction that affords it at least three (3) specific "property rights" with respect to "covered real estate" as further explained below. Because the Part 802 regulations are quite detailed, if there is a question as to whether Part 802 applies to a particular real estate transaction, a more detailed review of the transaction should be made under the regulations, explained in part on the Department of Treasury's website: <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-real-estate-instructions-part-802>.

This Note does not summarize non-real estate-related CFIUS regulations regarding foreign investment in industries containing critical technology, infrastructure and sensitive personal data. Even if a real estate transaction would not be reviewable under Part 802, other portions of the transaction, if it involves foreign investment in these industries, may nevertheless trigger other CFIUS requirements.

Definition of Foreign Person

For purposes of Part 802, a foreign person is any foreign national, foreign government or foreign entity. A foreign entity is any entity (even if domestic) directly or indirectly controlled by a foreign national, foreign government or foreign entity. The mere passive investment by a foreign entity in a domestic entity would not cause the domestic entity to be considered a foreign person. For complex businesses and investment funds operating in more than one country, the regulations explain how to apply the control test and have also adopted a principal place of business test. CFIUS favors substance over form and so extensive veto rights by a foreign person, for example, may constitute the exercise of control by the foreign person.

Certain foreign persons from Australia, Canada and the U.K. who meet a specified set of qualifications set forth in Part 802, and foreign air carriers, are exempted from the application of Part 802. Additional countries may also become exempt in the future.



Purchase by, Lease by or Concession to a Foreign Person

To fall within Part 802, the real estate transaction must grant to the foreign person at least three (3) of the following four (4) real property rights: (i) physical access to the property, (ii) the right to exclude others from the property, (iii) the right to improve or develop the property and (iv) the right to affix structures or objects to the property. A typical sale or lease to the foreign person would qualify.

Covered Real Estate

The Department of Treasury's website contains detailed files regarding the real estate covered by Part 802. In summary, covered real estate is:

- Property within one (1) mile of 100 specified military installations
- Property within 99 miles of 32 specified military installations
- Property within a county or region connected to certain United States Airforce bases and military installations in Colorado, Montana, Nebraska, North Dakota and Wyoming
- Property within or functioning as a part of:
 - o large hub airports
 - o cargo airports greater than 1.24 billion pounds
 - o joint use airports
 - o strategic seaports
 - o top 25 tonnage, container or dry bulk ports (Department of Treasury website links to files containing all of these locations)

Property is excepted from being covered real estate if it is:

- in a U.S. Census Bureau "urbanized area" or "urban cluster", unless within a covered port or within one (1) mile of a military installation
- a single housing unit
- real estate within a covered port that can only be used as a retail, hotel or food service establishment
- commercial office space that does not comprise more than 10% of a building or more than 10% of the tenants therein
- real estate held by native groups
- the subject of a lending transaction (unless such transaction includes significant risk of acquisition by a foreign person)

Consequence of Qualifying as a Part 802 Transaction

If the proposed real estate transaction does qualify for review by CFIUS, the parties do not have a mandatory filing requirement, unless the transaction falls into the non-real estate-related CFIUS regulations regarding foreign investment in industries containing critical technology, infrastructure and sensitive personal data. Filing an optional Declaration regarding the proposed transaction with CFIUS in accordance with its detailed procedures provides a safe harbor for the parties. Within thirty (30) days of filing such Declaration, CFIUS will review the transaction and determine if it raises national security concerns, during which its component agencies may request further information. CFIUS will not review draft Declarations. Failure to file such a Declaration could subject the transaction to post-closing



review by CFIUS, a requirement to mitigate national security issues and/or even divestiture of the asset by the foreign person. CFIUS actively seeks out transactions for which it has not been notified.

Practice Tips to Evaluate CFIUS Applicability

Part 802 is a new area of regulation and many real estate buyers, sellers, landlords and tenants are not yet familiar with it or its potentially significant impacts. We offer the below best practices to help determine whether Part 802 will play a factor in a given transaction:

- Determine if the parties can verify early in the process that no foreign persons are involved in the transaction and, if so, have the buyer or tenant verify same
- Verify that the property is sufficiently far from the nearest military installation or other covered real estate
- If a CFIUS filing will be made, budget enough time to prepare and submit the Declaration and allow for review, government questions and approval prior to closing

In summary, it is incumbent upon foreign persons and entities acquiring or leasing property in the United States, and their counterparties, to consider whether the application of Part 802 may justify a Declaration to CFIUS of the proposed transaction. In most cases, the transaction will not qualify for or will otherwise be exempt from Part 802, but we recommend buyers, sellers, landlords and tenants view their transactions on a case-by-case basis to manage compliance risks.

Questions or Information:

For questions about your foreign real estate transaction or the need for a Declaration to CFIUS, please contact: Lisa Zana at (203) 324-8171 or lzana@goodwin.com or Alfredo Fernández at (860) 251-5353 or afernandez@goodwin.com.

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