

Cross Border Business Law Blog

## **Uncle Sam Is Watching: New Risks in Making Real Estate Deals With Foreigners**

By Paul Hoff on 2.26.20 | Posted in CFIUS, Foreign Investors, Investments

Beginning this month, the U.S. government can now block foreigners from taking possession of real estate anywhere in the country when it concludes the deal may threaten U.S. national security. In the past, only foreign investment in U.S. businesses required the parties to consider the risk that the government would object on national security grounds. Now parties entering into a broad array of real estate deals with foreigners affecting land in particular parts of the country will also have to consider these risks, even if they do not involve any investment in a U.S. business.

Because the government's authority over U.S. real estate transactions is potentially so broad, the Committee on Foreign Investment in the United States (CFIUS) issued a new rule that took effect February 13 specifying which types of real estate deals with foreigners in what precise locations of the country could justify scrutiny on national security grounds. (31 CFR 802) Even if a particular deal does fall within the real estate covered by the rule's criteria, the parties do not have to ask CFIUS for assurance that it has no objection to the real estate transaction on national security grounds. But if the parties fail to do so, they remain vulnerable to CFIUS initiating on its own a review of the deal, and possibly forcing the parties to unwind the transaction after it has closed or to adopt specified mitigation measures to reduce any national security risk identified.

The location of the real estate, not the property's value or size, is the main consideration in determining whether or not the CFIUS rule applies. The current rule focuses on real estate located near large airports and maritime ports, and property within certain distances of listed military installations and firing ranges (ranging from one mile to 100 miles or more, depending on the type of military installation). The rule lists the military installations affected, but it also incorporates by reference lists by the Departments of Transportation and Homeland Security, and the U.S. Census Bureau, that will all affect the rule's coverage. All of these lists will change from time to time, and in many cases without any amendment of the CFIUS rule itself.

The parties to any real estate transaction in the geographic areas the rule designates as covered real estate should be aware that the rule's scope is broad and the exceptions, though significant, may be limited in unforeseen ways. The rule applies whether the foreign person is

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directly or indirectly involved in the deal, thereby potentially affecting any real estate transaction by a U.S. subsidiary of a foreign company. It applies in the case of the sale of real estate to a foreign party, but also rentals and, in the case of air and maritime ports, concessions. There is an exception for certain urban areas in some instances, but the exception does not apply to real estate within one mile of many of the designated military installations. There is an exception for single-family housing units, but not necessarily when that foreign homeowner buys an adjoining vacant lot. There is an exception for rentals of commercial space in multi-unit buildings, but the exception will not apply in many instances, including the rental of office or retail space in smaller buildings.

The recent action by CFIUS has thus added one more issue requiring consideration in the negotiation of any real estate deal with a foreign party. Read our [White Paper on Foster Garvey's website](#) for more about the new rule and a concise step-by-step roadmap for determining whether any particular real estate in the United States is covered, as well as an illustrative list of the real estate covered in Alaska, California, Oregon and Washington.

**Tags:** airports, Committee on Foreign Investment in the United States, cross-border transactions, firing ranges, foreign investment, foreign transactions, maritime ports, military installations, National Security, national security concern, real estate, real estate transactions, U.S. Census Bureau, U.S. Department of Homeland Security, U.S. Department of Transportation