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## CFIUS Issues Geographic Reference Tool for Real Estate Transactions

On March 25, 2020, the Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”) published the [CFIUS Part 802 Geographic Reference Tool](#) (the “Reference Tool”) to assist parties to real estate transactions to assess whether the subject real estate is “covered real estate,” within the meaning of the recently published CFIUS regulations. The Reference Tool enables the public to (1) search for U.S. military installations located in close proximity or extended range (*i.e.*, 1-100 miles) of any U.S. street address; and (2) identify “urbanized areas” and “urban clusters” that are partially exempt from the new real estate regulations. However, as discussed herein, the Reference Tool suffers from limitations that reduce its utility as a due diligence tool.

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### Background

Historically, CFIUS has had jurisdiction over real estate transactions only where the transaction could result in control by a foreign person over a U.S. business (defined to include any entity engaged in interstate commerce in the United States). Pursuant to the Foreign Investment Risk Review Modernization Act (“FIRRMA”), the Treasury Department promulgated 31 C.F.R. Part 802 (the “Real Estate Rules”), expanding CFIUS’s jurisdiction to include certain types of real estate transactions involving the purchase or lease by, or a concession to, a foreign person of “covered real estate” in the United States, even where there is no accompanying investment in a U.S. business.<sup>1</sup>

- “Covered real estate” is defined as real estate that is (1) located within, or will function as part of, a “covered port”; or (2) located within (a) one mile of specified military installations or other highly sensitive facilities or properties of the U.S. Government; (b) 100 miles of certain specified military installations; (c) any county or geographic area identified in connection with active Air Force ballistic missile fields; or (d) any part of a U.S. Navy off-shore range complex and off-shore operating area, to the extent located within the limits of the territorial sea of the United States.<sup>2</sup>
- The term “covered port,” in turn, is defined to include any port that is (1) a large hub airport, as defined in 49 U.S.C. § 40102 and based on data from the U.S. Department of Transportation’s Federal Aviation Administration (“FAA”); (2) an airport with annual aggregate all-cargo landed weight greater than 1.24 billion pounds, as defined by FAA data; (3) a joint use airport, as defined in 49 U.S.C. § 47175 and based on a designation by the FAA; (4) a commercial strategic seaport within the National Port Readiness Network, as defined by the U.S. Department of Transportation’s Maritime Administration; or (5) a top 25 tonnage, container, or dry bulk port, based on data from the U.S. Department of Transportation’s Bureau of Transportation Statistics.<sup>3</sup>

Other than “covered ports,” the military installations and other sensitive facilities and properties of the U.S. Government that present proximity concerns under the Real Estate Rules are listed in an appendix to the Real Estate Rules.<sup>4</sup>

<sup>1</sup> For additional information regarding the Real Estate Rules, please see our prior alerts, available [here](#) and [here](#).

<sup>2</sup> 31 C.F.R. § 802.211.

<sup>3</sup> *Id.* § 802.210.

<sup>4</sup> *Id.* § 802 Appendix A.

To trigger CFIUS jurisdiction, a transaction involving covered real estate must afford a foreign person at least three qualifying “property rights,” which include the rights to:

physically access the real estate;

- exclude others from physical access to the real estate;
- improve or develop the real estate; or
- attach fixed or immovable structures or objects to the real estate.<sup>5</sup>

## The Reference Tool

### Overview

To date, a primary challenge for U.S. and non-U.S. parties seeking to apply the Real Estate Rules has been determining whether a particular property qualifies as “covered real estate.” This analysis is complicated by the fact that the Real Estate Rules establish separate proximity thresholds for different categories of military installations and other sensitive facilities or properties. For example, the Real Estate Rules establish a one-mile proximity threshold (“close proximity”) for certain military installations (such as Fort Knox), but a 100-mile proximity threshold (“extended range”) for other military installations (such as Fort Bragg).

In addition, the Real Estate Rules cross-reference technical definitions in separate statutes and regulations administered by other federal agencies. For example, the definition of “covered port” cross-references factual determinations and datasets issued by multiple agencies with the U.S. Department of Transportation.

### Features and Limitations

The Reference Tool represents the U.S. Government’s preliminary effort to publish “a map or other interactive tool . . . to assist the public in understanding the geographic areas that are subject to CFIUS’s jurisdiction.”<sup>6</sup>

Parties can enter a street address, intersection, or geographic coordinates into the Reference Tool, and the Tool will identify military installations in proximity (within 100 miles) of the entered location. The Reference Tool simplifies the proximity searching process, which previously required parties to consult the list of military installations in the annex to the Real Estate Rules in coordination with other publicly available mapping tools. In some cases, this manual approach produced challenges identifying the exact locations and boundaries of specified military installations and other sensitive facilities or properties.

In addition, parties can use the Reference Tool to determine whether real estate is located within an “urbanized area” or “urban cluster,” as defined in the Real Estate Rules (with reference to U.S. Census Bureau designations).<sup>7</sup> If real estate is located within an urbanized area or urban cluster, the real estate would not qualify as covered real estate—within the scope of CFIUS’s jurisdiction under the Real Estate Rules—unless the property is either (1) located within, or will function as part of, a covered port; or (2) located within one mile of certain specified military installations.<sup>8</sup> The

<sup>5</sup> 31 C.F.R. §§ 802.212, 802.233.

<sup>6</sup> Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States, 85 Fed. Reg. 3158, 3160 (Jan. 17, 2020).

<sup>7</sup> 31 C.F.R. §§ 802.239, 802.240.

<sup>8</sup> *See id.* § 802.216(c).

exception for real estate within an urbanized area or urban cluster is important, as many large metropolitan areas (e.g., much of the Los Angeles area) are within 100 miles of specified military installations.

While the Reference Tool is a useful starting place for determining whether real estate qualifies as covered real estate, the Tool has certain limitations.

*First*, as its name implies, the Reference Tool is a “reference” only. The Reference Tool webpage features multiple disclaimers, including that the Tool “should not be interpreted as guidance or an advisory opinion by CFIUS with respect to any particular transaction.”<sup>9</sup> More generally, the Reference Tool does not provide a straightforward answer as to whether a particular location qualifies as covered real estate. Rather, the Reference Tool provides information to assist parties to make the “covered real estate” determination independently (*i.e.*, distance to certain military installations, whether the location lies within an urbanized area or urban cluster). As such, parties cannot rely exclusively on the Reference Tool’s search function for purposes of determining jurisdiction under the Real Estate Rules.

*Second*, the Reference Tool is both over- and under-inclusive.

- *Over-inclusive*: The Reference Tool uses a publicly available dataset of Department of Defense properties that is broader than the list of properties included in the appendix to the Real Estate Rules.<sup>10</sup> As a result, searches performed using the Reference Tool will return “false positive” hits for military installations that have not been designated as sensitive by CFIUS. In addition, for those military installations designated as sensitive by CFIUS, the Reference Tool does not specify whether the one-mile or 100-mile proximity threshold applies. Therefore, parties must cross-reference the Reference Tool search results against the appendix to the Real Estate Rules to determine whether the property at issue qualifies as covered real estate.
- *Under-inclusive*: The Reference Tool does not display the offshore areas identified in part 4 of appendix A to the Real Estate Rules,<sup>11</sup> meaning that certain sensitive locations cannot be identified using the Tool (and will need to be searched separately). CFIUS guidance states that parties may consult a separate online mapping tool provided by the Marine Cadastre—a mapping tool developed by the Bureau of Ocean Energy Management (BOEM) within the U.S. Department of the Interior and the National Oceanic and Atmospheric Administration (NOAA) within the U.S. Department of Commerce—to identify sensitive offshore areas. Along similar lines, the Reference Tool does not display the covered ports (air and maritime ports) relevant to the Real Estate Rules.<sup>12</sup> To identify covered ports, parties must consult data published on various Department of Transportation websites.

*Third*, with the exception of urbanized real estate, the Reference Tool does not account for the various exceptions set forth in the Real Estate Rules, such as those for commercial office space or single housing units.

## Conclusion

The Reference Tool is a useful starting place for determining whether real estate qualifies as covered real estate, and use of the Reference Tool can effectively be used as one component of the CFIUS due diligence approach. However, reliance on the Reference Tool is not a substitute for individualized due diligence of prospective real transactions involving foreign parties, particularly in light of the limitations of the current Reference Tool platform.

<sup>9</sup> Geographic Reference Tool, <https://gis-portal.data.census.gov/arcgis/apps/webappviewer/index.html?id=dc7370ca414b4e15b42c861f4dd5b8a1>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*