

September 20, 2019

# CFIUS Publishes Proposed FIRRMA Regulations, Part 2: A New Framework for Real Estate Transactions

On September 17, 2019, the U.S. Department of the Treasury published proposed regulations to implement provisions of the Foreign Investment Risk Review Modernization Act (“FIRRMA”), signed into law by President Donald Trump on August 13, 2018, that were not addressed by the critical technology pilot program announced by the Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”) in October 2018.<sup>1</sup>

**Attorneys**  
[Ama A. Adams](#)  
[Brendan C. Hanifin](#)  
[Emerson Siegle](#)

The Proposed Rules would implement FIRRMA’s expansion of the Committee’s authority to review foreign investments in U.S. real estate, with significant implications for non-U.S. and U.S. investors alike.

## I. How We Got Here

CFIUS is an interagency committee with authority to review certain foreign investments in the United States. The Committee received authority to review foreign transactions following passage of the Exon-Florio Amendment, which amended Section 721 of the Defense Production Act of 1950 and granted the President authority to block foreign investments in the United States when “the transaction threatens to impair the national security of the United States.”<sup>2</sup>

Historically, CFIUS has had jurisdiction over real estate transactions only where the transaction could result in control by a foreign person over an entity engaged in interstate commerce in the United States. FIRRMA expanded 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 certain real estate in the United States, even where there is no accompanying investment in a U.S. business. The Proposed Rules were developed to implement the real estate-related aspects of FIRRMA.

## II. New Categories of Covered Transactions

### Covered Real Estate Transactions

As an initial matter, the Proposed Rules would introduce a new term, “covered real estate transactions,” defined to include:

- Any purchase or lease by, or concession<sup>3</sup> to, a foreign person of **covered real estate**, that affords the foreign person at least three **qualifying property rights**;
- A change in the rights that a foreign person has with respect to **covered real estate** in which the foreign person has an ownership or leasehold interest or concession arrangement if that change could result in the foreign person having at least three **qualifying property rights**; or

<sup>1</sup> Provisions Pertaining to Certain Investments in the United States by Foreign Persons (to be codified at 31 C.F.R. § 802), <https://home.treasury.gov/system/files/206/Proposed-FIRRMA-Regulations-Part-802.pdf> [hereinafter the “Proposed Rules”].

<sup>2</sup> 50 U.S.C. § 2170.

<sup>3</sup> The Proposed Rules would define “purchase” and “lease” in line with their ordinary meanings, with “purchase” defined as “an arrangement conveying an ownership interest of real estate to a person in exchange for consideration,” and “lease” defined as “an arrangement conveying a possessory interest in real estate, short of ownership, to a person for a specified time and in exchange for consideration.” 31 C.F.R. §§ 802.226, 802.234. By contrast, the Proposed Rules would limit the definition of “concession” to “an arrangement whereby a U.S. public entity grants a right to use real estate for the purpose of developing or operating infrastructure for an airport or maritime port” (including the assignment of a concession by the party who is not the U.S. public entity). *Id.* § 802.207. However, the Department of the Treasury specifically invited comment on “whether other types of concessions should be included, such as those relating to certain energy generation and oil and gas activities.” Proposed Rules at 12.

- Any other transaction, transfer, agreement, or arrangement, the structure of which is designed or intended to evade or circumvent the application of the CFIUS regulations as relates to real estate.<sup>4</sup>

31 C.F.R. § 802.212(a)-(c).

“Covered real estate,” in turn, is defined to include real estate that is:

- Located within, or will function as part of, an airport or maritime port; or
- Located within:
  - Close proximity (*i.e.*, one mile from the outer boundary) of a designated military installation or another facility or property of the U.S. Government;
  - Extended range (*i.e.*, 100 miles outward from the outer boundary or, where applicable, 12 nautical miles of the U.S. coastline) of certain, specified military installations;
  - Any county or other geographic area identified in connection with certain, specified military installations;
  - Any part of certain, specified military installations located within 12 nautical miles of the coastline of the United States.

31 C.F.R. § 802.211(a), (b). In conjunction with the above definition of “covered real estate,” the Proposed Rules would clarify several definitions:

- The Proposed Rules define “airport” to cover a subset of major passenger and cargo airports in the United States based on volume, as well as “joint use airports” where both military and civilian aircraft make shared use of military airfield. 31 C.F.R. § 802.201.
- The Proposed Rules define “maritime port” to cover the country’s top 25 tonnage, container, and dry bulk ports, as well as certain strategic seaports. 31 C.F.R. § 802.227.
- The Proposed Rules set forth a list of qualifying “military installations,” and their corresponding proximity restrictions, in an appendix. 31 C.F.R. § 802 Appendix A. This list includes almost 200 military installations, located in and around 44 states, the District of Columbia, and Guam.

Rounding out the definition of “covered real estate transaction,” qualifying “property rights” include the right to (1) physically access the real estate; (2) exclude others from physical access to the real estate; (3) improve or develop the real estate; or (4) attach fixed or immovable structures or objects to the real estate. 31 C.F.R. § 802.233(a)-(d). These rights are generally consistent with existing CFIUS regulations’ broad definition of “control.”

Assuming the transaction at issue involves “covered real estate,” any combination of three of the foregoing rights is sufficient under the Proposed Rules to trigger jurisdiction, regardless of whether the rights are exercised (or shared among multiple parties). *See generally* 31 C.F.R. § 802.301.

<sup>4</sup> The Proposed Rules would define the term “real estate” to include “any land, including subsurface and submerged, or structure attached to land, including any building or any part thereof, that is located in the United States.” 31 C.F.R. § 802.235.

### Excepted Real Estate Transactions

The Proposed Rules would incorporate key exceptions based on (1) the identity of the foreign investor; or (2) the type of transaction. *See* 31 C.F.R. § 802.217. In particular, under the Proposed Rules, CFIUS would not have jurisdiction to review the following categories of real estate transactions:

- **Excepted Real Estate Investors:** A purchase or lease by, or concession to, an “excepted real estate investor” of covered real estate, or a change in rights of an excepted real estate investor with respect to covered real estate. 31 C.F.R. § 802.216. The term “excepted real estate investor,” in turn, is defined with reference to a substantial connection (*e.g.*, nationality or place of incorporation) to an “excepted real estate foreign state,” a term defined at 31 C.F.R. § 802.215 and that will be defined with more specificity by the Committee at a later time. These concepts substantially mirror the “excepted foreign state” and “excepted investor” concepts introduced in the proposed regulations implementing other aspects of FIRRMA, and discussed in [Part 1](#). The Proposed Rules state that the list of potential jurisdictions will be “separately published on the Department of the Treasury website” and, “[a]s this is a new concept with potentially significant implications for the national security of the United States, CFIUS initially intends to designate a limited number of eligible foreign states.”<sup>5</sup> Notably, the definition of “excepted real estate investor” would exclude investors that have (1) failed to comply fully with CFIUS-related requirements in connection with prior transactions; or (2) have violated certain U.S. laws, including U.S. economic sanctions and export control laws. 31 C.F.R. § 802.216(c).
- **Investments in U.S. Businesses:** Transactions involving real estate that also qualify as investments in U.S. businesses subject to CFIUS’s jurisdiction are not covered real estate transactions (and should be analyzed as non-real estate transactions, potentially subject to CFIUS’s jurisdiction under 31 C.F.R. Part 800. As discussed in more detail in [Part 1](#), these transactions may be subject to CFIUS’s jurisdiction if the foreign investor obtains control rights or certain qualifying non-control rights).
- **Urban Real Estate:** A purchase, lease, or concession of covered real estate that is within an “urbanized area” or “urban cluster” (each as defined by the Census Bureau), except for real estate that is (1) located in close proximity to a designated military installation or another sensitive facility or property of the U.S. Government or (2) is within, or will function as part of, an airport or maritime port.<sup>6</sup>
- **Single Housing Units:** A purchase, lease, or concession of covered real estate that is a single housing unit, including fixtures and adjacent land as long as the land is incidental to the use of the real estate as a single housing unit.<sup>7</sup>
- **Retail Trade Investments:** A lease by or a concession to a foreign person of covered real estate located within an airport or maritime port that, according to the terms of the concession or lease, may be used only as a retail trade, accommodation, or food service sector establishment.
- **Commercial Office Space:** A purchase or lease by, or concession to, a foreign person of commercial office space within a multi-unit commercial office building, if, upon the completion of the transaction, the foreign person and its affiliates will not (1) hold, lease or have a concession with respect to more than 10% of the building’s total square footage; and (2) represent more than 10% of the building’s tenants.

<sup>5</sup> Proposed Rules at 19.

<sup>6</sup> “Urbanized area” is defined as “a statistical geographic area as identified in the most recent U.S. Census consisting of a densely settled core created from census tracts or blocks and contiguous qualifying territory that together have a minimum population of at least 50,000 individuals,” and “urbanized cluster” is defined as a “statistical geographic area as identified in the most recent U.S. Census consisting of a densely settled core created from census tracts or blocks and contiguous qualifying territory that together have at least 2,500 individuals but fewer than 50,000 individuals.” 31 C.F.R. §§ 802.238, 802.239.

<sup>7</sup> A “housing unit” is defined as “a single family house, townhome, mobile home or trailer, apartment, group of rooms, or single room that is occupied as a separate living quarters, or, if vacant, is intended for occupancy as a separate living quarters.” 31 C.F.R. § 802.224.

- **Native Groups:** A purchase, lease, or concession of land owned by certain Alaska Native entities or held in trust by the United States for American Indians, Indian tribes, Alaska Natives and Alaska Native entities.
- **Lending Transactions:** The extension of a mortgage, loan, or similar financing arrangement by a foreign person to another person for the purpose of the purchase, lease, or concession of covered real estate.

### III. Other Key Changes

The Proposed Rules would **not** introduce a mandatory notice requirement for covered real estate transactions. In addition, parties to covered real estate transactions would face the strategic choice of submitting either an abbreviated declaration (less preparation time and potential for faster resolution, but no guarantee of final action by the Committee) or full-form notice (more preparation and review time, but guarantee of final action by the Committee). In each case, the parties would be required to provide detailed descriptions of the transaction structure, parties to the transaction, location of the subject real estate, and qualifying property rights that would be extended to the participating foreign investor(s).

The Proposed Rules would clarify that parties who submit “a material misstatement or omission in a declaration or notice, or make[] a false certification” may face a civil penalty of up to \$250,000 per violation. 31 C.F.R. § 802.901(a). The Proposed Rules do not yet introduce a filing fee, instead suggesting that the Department of Treasury will address filing fees at a later date.<sup>8</sup>

### IV. Next Steps

CFIUS has provided interested parties one month, or until October 17, 2019, to provide comments that the Committee may consider in finalizing the Proposed Rules. After comments are received, CFIUS has until February 13, 2020 to issue final, binding rules. (Providing interested parties such a brief window to provide comments suggests that the Committee may, consistent with anecdotal reports, be pushing to issue the final rules sooner than technically required under FIRRMA.)

Once final rules are issued, they will become effective immediately, including for pending transactions. The Proposed Rules implementing FIRRMA would significantly expand CFIUS’s jurisdiction over real estate transactions, and may—if implemented in their current form—significantly affect how foreign parties seeking to invest in U.S. real estate assess potential opportunities.

---

<sup>8</sup> Proposed Rule at 7.