

Client Alert



Expansion of CFIUS Review to Real Estate

Foreign Investment Risk Review Modernization Act of 2018

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Seyfarth Synopsis: On August 13, 2018, President Trump signed into law the Foreign Investment Risk Review Modernization Act of 2018 (the “**Act**”), (i) expanding the scope of transactions which the Committee of Foreign Investment in the United States (“**CFIUS**”) is tasked with reviewing and (ii) providing for mandatory notice to CFIUS of certain transactions by the participants.

CFIUS has long reviewed acquisitions of United States industry for their impacts on national security,¹ advising the President of its conclusions regarding the same. The President then had authority to block proposed transactions or order divestiture of completed transactions, in each case if the transaction was determined to be harmful to national security.²

Traditionally, CFIUS’ focus has been on maintaining the United States’ industrial base and technologies critical to national security. In more recent years, CFIUS has ventured also into reviewing foreign transactions which threaten to compromise the safeguarding of information critical to national security. Within that framework, the historical focus has been investments in United States businesses involving infrastructure or technologies critical to national security.

The Act expands the transactions open to CFIUS review. “Covered” transactions now include:

1. the purchase or lease by a foreign person of private or public real estate in the United States that is:
 - (i) located within, or will function as part of, an air or maritime port, or
 - (ii) is in close proximity to a military installation or other government facility that is sensitive for reasons of national security,
 - (iii) could reasonably provide foreign persons the ability to collect intelligence on activities being conducted at nearby facilities, or
 - (iv) could expose national security activities at nearby facilities; and
2. any investment in a United States business maintaining or collecting sensitive personal data of United States citizens that might be used to threaten national security.³

¹ 50 U.S.C. §§ 4565(a)(3) and (b).

² 50 U.S.C. § 4565(d)(1).

³ FIRRMA, § 1703. Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, Title XVII, § 1703.

The Act expressly excludes from the list of covered transactions (i) real estate consisting of single family housing units, and (ii) real estate located in urbanized areas.⁴

In another significant move, the Act authorizes CFIUS to issue regulations identifying transactions of which the parties will be required to notify CFIUS.⁵ Traditionally, CFIUS has relied on the parties to a transaction to advise CFIUS voluntarily of the transaction. While it has been common practice for the parties to an acquisition by foreign persons of United States companies implicating national security to notify CFIUS of the transaction, there was no requirement that they do so. The risk was that if the transaction was covered by CFIUS, the acquiring party could be required to divest and/or face fines and other sanctions.

Tempering the required notice provisions, the Act also authorizes CFIUS to issue regulations providing for notice via “declaration” for select transactions.⁶ The “declaration” requires the submission of certain information regarding the transaction. It is, however, significantly less information than CFIUS traditionally has required for notifications. CFIUS is to issue regulations identifying the transactions which will be subject to the abbreviated declaration process.⁷

The Act also makes a number of other changes - largely procedural - to CFIUS process for reviewing transactions.

Key Takeaways:

1. If you are selling or leasing property to (i) a non-U.S. entity, or (ii) an entity owned or controlled by a foreign entity or government, check to see if the property falls into one of the categories set out in Paragraph 1, above. If so, a filing with CFIUS may be required.
2. If you are a landlord or property manager owned or controlled by a non-U.S. entity, does the rental application you receive contain sensitive personal information that might be used to threaten national security (for example, is the applicant is a government entity or a government contractor)? If so, a filing with CFIUS may be required.
3. If a filing is required, you need to determine whether a full CFIUS filing or merely a declaration is required.
4. If a CFIUS submission is required, this could delay the timing of your transaction by up to 90 days (in rare cases more).
5. Regulations have yet to be promulgated, so stay tuned for further developments.
6. Note that the exclusions of single family housing units and real estate located in urbanized areas may not exempt all foreign acquisitions of such properties. CFIUS retains jurisdiction over any acquisition which may impair national security. Also, laws other than those related to CFIUS (for example those controlling access to classified facilities) may subject acquisitions of these properties to review.

If you have any question about this alert or would like further information, please contact Robert Bodansky at rbodansky@seyfarth.com or Joseph Dyer at jdyer@seyfarth.com.

⁴ *Id.*

⁵ FIRREA, § 1706.

⁶ *Id.*

⁷ *Id.*

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Seyfarth Shaw LLP Client Alert | September 27, 2018

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