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CFIUS Seeks to Expand its Jurisdiction Over Real Estate Transactions via Proposed New Rule

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On May 5, 2023, the Committee on Foreign Investment in the United States (“CFIUS” or “the Committee”) published a [proposed rule](#) concerning certain acquisitions by foreign persons involving real estate in the United States (the “[Proposed Rule](#)”). Specifically, this Proposed Rule would (i) amend the definition of “military installation” at 31 C.F.R. § 802.227 and (ii) add eight military installations to the list at Appendix A in the regulations that implement the real estate provisions of Section 721 of the Defense Production Act of 1950, as amended.¹ CFIUS is accepting comments on the Proposed Rule through June 5, 2023.

Key Takeaways:

- The Proposed Rule would expand CFIUS’ jurisdiction over certain real estate transactions by adding 8 additional military sites to the scope of CFIUS’ definition of “covered real estate.”
- CFIUS’ real estate regulations do not require any mandatory filing and do not apply when a transaction involves an entity that engages in interstate commerce. The Proposed Rule does not change either of these notable distinctions from CFIUS’ regulations that govern certain acquisitions by a foreign person of an interest in a U.S. business.

1. The Proposed Rule Would Expand the Geographical Coverage of CFIUS’ Jurisdiction Over Certain Real Estate Transactions

Since February 13, 2020, CFIUS has had the authority to review real estate transactions concerning certain locations deemed by CFIUS to be sensitive from a U.S. national security perspective. Currently, CFIUS’ regulations list over 200 such sensitive locations, which consist of various military sites, airports, and seaports, across 4 separate parts to Appendix A. The Proposed Rule would update Part 2 of Appendix A to include the following 8 military sites:

- Air Force Plant 42, located in Palmdale, California (a classified aircraft manufacturing plant);
- Dyess Air Force Base, located in Abilene, Texas (hosts one of only two B-1B Lancer strategic bomber wings in the U.S. Air Force);
- Ellsworth Air Force Base, located in Box Elder, South Dakota (hosts one of only two B-1B Lancer strategic bomber wings in the U.S. Air Force);
- Grand Forks Air Force Base, located in Grand Forks, North Dakota (hosts the only base in Air Mobility Command to receive remotely piloted aircraft systems);

- Iowa National Guard Joint Force Headquarters, located in Des Moines, Iowa (commands all assigned military units ordered to support contingency operations, and coordinates situational awareness and resource requirements with combatant commanders);
- Lackland Air Force Base, located in San Antonio, Texas (conducts basic military training for the active duty Regular Air Force, Air Force Reserve, and Air National Guard);
- Laughlin Air Force Base, located in Del Rio, Texas (conducts combat training operations); and
- Luke Air Force Base, located in Glendale, Arizona (a training base for U.S. Air Force pilots).

Part 2 of Appendix A provides CFIUS jurisdiction over certain transactions involving real estate within 100 miles of the outer boundary of each identified site. As such, the Proposed Rule would extend CFIUS' jurisdiction to review transactions involving real estate located within 100 miles of the outer boundary of any of these 8 military sites.

While it is notable that CFIUS is unilaterally expanding its own jurisdiction, we predict there will be limited ramifications from these changes for several reasons. First, the proposed changes do not trigger any mandatory filing obligations and thus there are no penalties for failing to file any such newly covered transactions voluntarily. Second, CFIUS already has the jurisdiction to review acquisition of land that is actively being farmed, as that almost certainly would constitute an existing U.S. business engaged in interstate commerce. Finally, CFIUS is merely trying to close a gap in its jurisdiction to review potentially problematic (e.g., Chinese) investment in undeveloped land near sensitive U.S. government military facilities. CFIUS likely has no desire to review such transactions unless they involve countries of potential concern.

2. Grand Forks Air Force Base Transaction and Other National Security Concerns

The Proposed Rule follows CFIUS' reported determination in December 2022 that it lacked jurisdiction to review Fufeng Group Limited's ("Fufeng"), a Chinese company, purchase of 370 acres of land 12 miles from the Grand Forks Air Force Base in North Dakota in order to construct a wet corn milling plant. Since Fufeng acquired only vacant land that was not actively engaged in U.S. interstate commerce (*i.e.*, Fufeng made a "greenfield" investment), Fufeng did not acquire a U.S. business. Therefore, CFIUS' regulations concerning a foreign person's acquisition of a U.S. business did not apply and could not afford CFIUS jurisdiction to review the transaction. As such, CFIUS' only other means to assert jurisdiction over the transaction was through its regulations governing certain real estate transactions.

The Grand Forks Air Force Base engages in military air and space operations. This base includes a space networking center that is central to U.S. military communications, as well as a U.S. military drone facility. Understanding these clear national security vulnerabilities and Fufeng's connections to the Chinese government, various U.S. politicians and government agencies publicly expressed concerns regarding the transaction. Specifically, Governor Doug Burgum (ND)² and Senators John Hoeven (ND), Kevin Cramer (ND) and Marco Rubio (FL) requested that CFIUS conduct a review of Fufeng's real estate transaction.³ The U.S. Air Force also unambiguously expressed its opposition to the transaction, given the risk of Chinese government surveillance activities through Fufeng.⁴ These efforts resulted in CFIUS' examining the transaction after which it apparently determined that Fufeng's greenfield investment was outside the scope of its jurisdiction over transactions involving U.S. businesses. Additionally, CFIUS apparently could not rely on its jurisdiction over certain real estate transactions since the Grand Forks Air Force Base is absent from the list of military sites designated as sensitive under CFIUS' regulations. Grand Forks government officials eventually denied Fufeng the necessary permits to proceed with the construction project, although they apparently lacked the authority to require that Fufeng divest the acquired property since Fufeng reportedly still owns 370 acres.

With the addition of the Grand Forks Air Force Base to Part 2 of Annex A via the Proposed Rule, CFIUS would have the authority to review a foreign person's acquisition of land within 100 miles of the Grand Forks Air Force Base's perimeter and would have the ability to mitigate any resulting national security risks, including the ability to recommend that the President exercise his authority to require the foreign person's divestment of the land.

The Proposed Rule demonstrates CFIUS' ability and intent to unilaterally expand its jurisdiction to address evolving geopolitical considerations (such as increasing U.S. efforts to decouple from China and restrict Chinese access to sensitive U.S. technologies, including through the use of [stronger export controls](#)) and account for nascent national security concerns attendant to new and developing U.S. military programs, such as F-35 personnel training and the B-21 strategic bomber.

CFIUS is accepting comments from the public on the Proposed Rule through June 5, 2023.

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¹ See <https://www.federalregister.gov/documents/2023/05/05/2023-09259/provisions-pertaining-to-certain-transactions-by-foreign-persons-involving-real-estate-in-the-united>. See also <https://www.federalregister.gov/citation/85-FR-3158>.

² See <https://www.governor.nd.gov/sites/www/files/documents/Gov.%20Burgum%20letter%20urging%20expedited%20CFIUS%20review%2007.25.2022.pdf>.

³ See <https://www.rubio.senate.gov/public/index.cfm/2022/7/rubio-cramer-hoeven-call-for-national-security-review-of-fufeng-farmland-purchase>.

⁴ See <https://www.hoeven.senate.gov/imo/media/doc/USAIRFORCE-FUFENG-LETTER-HOEVEN.pdf>.

If you have questions concerning the contents of this alert, or would like more information, please speak to your regular contact at Weil or to the authors:

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