

# Foreign Investment In Real Estate Is Getting More Complicated

By **Christian Davis, Laura Black and Katherine Padgett** (June 23, 2023)

On May 5, the U.S. Department of the Treasury issued a notice of proposed rulemaking to add eight military installations to the list of sites around which the Committee on Foreign Investment in the U.S. has jurisdiction to review real estate transactions.[1]

This is the first expansion of CFIUS' real estate authority since it came into effect in 2020.

This incremental expansion of CFIUS' jurisdiction will increase the number of transactions subject to CFIUS review. However, it is unlikely to satisfy members of Congress and state legislators who want to prohibit investments in agricultural and other land by investors from countries of concern such as China.

There are also legislative proposals to prohibit Chinese investment in real estate in dozens of U.S. states, many of which would restrict even indirect holdings through non-Chinese entities. While some proposed restrictions would apply only to agricultural land, others apply to all real property.

For instance, on May 8, Florida became the latest state to target foreign investment into real estate, prohibiting most direct or indirect Chinese investment in real property, with a de minimis exception for certain indirect holdings through publicly traded securities. Violations of the restriction constitute a felony.

A proliferation of restrictions at the state level, with various parameters and definitions, is likely to complicate transactions by even non-Chinese corporations and funds that operate in multiple states and have indirect Chinese investment, and could result in inadvertent violations once the prohibitions become effective.

## Background

CFIUS is the interagency body, chaired by the Treasury Department, through which the U.S. government formally monitors and reviews foreign investment in the U.S. for possible national security concerns.

In 2020, CFIUS implemented significant changes pursuant to the Foreign Investment Risk Review Modernization Act[2] that, among other things, expanded CFIUS' jurisdiction to include certain real estate transactions by foreign persons.[3]

This new jurisdiction addressed long-standing concerns regarding CFIUS' inability to address national security risks arising from foreign persons purchasing real estate in or around ports and military installations that would provide them the ability to collect intelligence or conduct surveillance on national security activities conducted at those locations.

By capturing real estate transactions in those sensitive areas, the CFIUS real estate rules capture certain greenfield transactions that would not otherwise be subject to CFIUS jurisdiction that applies to transactions involving investments in existing U.S. businesses.



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CFIUS implemented its real estate jurisdiction through regulations[4] that define "covered real estate" as real estate that is located within:

- Certain airport or maritime ports;
- Close proximity, i.e., one mile, to — or, for a subset, the extended range, i.e., a total of 100 miles, from — the boundary of identified military installations;
- Certain geographic areas identified in connection with other specified military installations, e.g., military installations that are home to U.S. intercontinental ballistic missile programs; or
- Any part of a specified offshore military range or operating area within the territorial sea of the U.S.[5]

Each of these military installations and categories is identified specifically in an appendix to the regulations.

Subject to certain exceptions,[6] CFIUS has authority to review any purchase or lease by, or concession to, a foreign person of real estate in these areas that gives the foreign person three of four identified property rights.[7]

### **Recent CFIUS Developments**

When issuing these regulations in 2020, CFIUS specifically stated its intention to periodically review and update the list of sites around which it has jurisdiction to review investments.[8]

On May 5, CFIUS issued a notice of proposed rulemaking to add eight military installations to the list that makes transactions involving property within 100 miles of those installations potentially subject to CFIUS jurisdiction.[9] The public had until June 5 to submit comments.

Notably, these installations include the Grand Forks Air Force Base in North Dakota.

In 2022, CFIUS reportedly determined that it did not have jurisdiction to review an acquisition of real estate near this base by Fufeng Group, a company with Chinese ownership. This determination drew congressional and public criticism,[10] and was a catalyst for the proliferation of bills at the state level restricting foreign ownership of real property.

The other installations proposed for inclusion are:

- Air Force Plant 42, located in Palmdale, California;
- Dyess Air Force Base, located in Abilene, Texas;
- Ellsworth Air Force Base, located in Box Elder, South Dakota;

- Iowa National Guard Joint Force Headquarters, located in Des Moines, Iowa;
- Lackland Air Force Base, located in San Antonio;
- Laughlin Air Force Base, located in Del Rio, Texas; and
- Luke Air Force Base, located in Glendale, Arizona.

## **State and Federal Legislation**

In the wake of the Fufeng transaction, dozens of proposals[11] have been introduced in state legislatures to prohibit acquisitions of land by certain entities and persons from China, Russia and a handful of other countries of concern, such as Cuba, Iran, North Korea and the Maduro government of Venezuela.

The scope of the bills varies considerably. While some proposals focus primarily on transactions involving the government of China, many capture transactions involving private businesses and foreign nationals as well. While some focus more narrowly on agricultural land, others cover land more broadly or even real property. Similarly, some have clear exceptions for indirect holdings, while some on their face cover all indirect interests.

A few examples are outlined below.

### ***Florida***

Florida recently enacted legislation, which will become effective on July 1, prohibiting direct and most indirect acquisitions of interest in real property by the Chinese government, Chinese companies and Chinese citizens, with certain exceptions for natural persons.[12]

Investors from other countries of concern are prohibited from acquiring property within 10 miles of a military installation or critical infrastructure facility or any agricultural land.

In both cases, there is a de minimis exception for certain indirect holdings through public securities.

This leaves open the possibility that a small ownership interest by a Chinese company anywhere in the ownership chain of a private corporation or fund that purchases real property, or purchases another U.S. company that holds real property in Florida, could violate the law, which is a felony.

Current holdings will also need to be registered with the state.

### ***Utah***

Recently enacted legislation in Utah, which became effective on May 3, has a similarly broad coverage of real property, but is more narrowly focused in terms of the Chinese entities covered.[13]

This law prohibits restricted foreign entities, including Chinese companies identified by the U.S. Department of Defense as Chinese military companies — the 1260H list[14] — their affiliates and Chinese governmental entities, from acquiring an interest in land, including not only agricultural land but public and private land.

### ***Texas***

Proposed legislation in Texas, on the other hand, has recently been scaled back in terms of

coverage.

The proposed legislation would prohibit direct purchases of agricultural land, quarries and mines — rather than real estate more generally — by the government of China and other countries of concern; companies headquartered in those countries; citizens of these countries who are not also U.S. citizens or lawful permanent residents; and companies owned or controlled by these governments or such citizens, where "control" is defined as majority owned by Chinese entities or persons.

Assuming it remains in any final legislation, a majority threshold will reduce the likelihood of companies and funds inadvertently violating the law.

### **Federal Legislation**

Members of Congress also continue to introduce bills relating to foreign investment in real estate, with recent bills focusing on agricultural land.

In 2023, bills have been introduced that would prohibit<sup>[15]</sup> the purchase of agricultural land by foreign nationals associated with the government of the People's Republic of China or restrict<sup>[16]</sup> purchases by foreign adversaries more generally.

It remains to be seen whether any of these bills will move forward in the near term.

### **Implications**

CFIUS' latest action, if finalized as currently proposed, will increase the number of real estate transactions that are subject to CFIUS review, though not significantly.

The proliferation of restrictions at the state level, however, with various parameters and definitions, is likely to complicate or prevent certain foreign investment.

In fact, where a U.S. company or fund has shareholders or limited partners from China or other countries of concern, even investments into other U.S. companies that hold real property could violate some of these laws.

Such companies and funds must increasingly understand and navigate federal and state laws to avoid unintentional violations, and conduct enhanced due diligence concerning indirect holdings of real property to assess whether they are covered under the applicable set of laws and options for compliance, as relevant.

For investment funds, one option may be establishing separate vehicles for Chinese investors.

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[1] <https://www.federalregister.gov/documents/2023/05/05/2023-09259/provisions-pertaining-to-certain-transactions-by-foreign-persons-involving-real-estate-in-the-united>.

[2] [https://home.treasury.gov/sites/default/files/2018-08/The-Foreign-Investment-Risk-Review-Modernization-Act-of-2018-FIRRMA\\_0.pdf](https://home.treasury.gov/sites/default/files/2018-08/The-Foreign-Investment-Risk-Review-Modernization-Act-of-2018-FIRRMA_0.pdf).

[3] For a more in-depth discussion of FIRRMA and the implementing regulations, please see our prior alert on this subject here: <https://www.akingump.com/en/news-insights/treasury-releases-final-regulations-implementing-cfius-reforms.html>.

[4] <https://home.treasury.gov/system/files/206/Part-802-Final-Rule-Jan-17-2020.pdf>.

[5] See 31 C.F.R. §802.211.

[6] The regulations except certain real estate transactions involving certain urban clusters, single housing units, retail, accommodation or food serve establishments, commercial office space and American Indian land, as well as real estate transactions by certain investors from excepted foreign states (currently, Australia, Canada, New Zealand and the United Kingdom).

[7] "Property rights" means any of the following rights or abilities, whether or not exercised: (i) physically access the real estate; (ii) exclude others from physical access to the real estate; (iii) improve or develop the real estate; or (iv) attach fixed or immovable structures or objects to the real estate. See 31 C.F.R. §802.233.

[8] See Preamble to 31 C.F.R. Part 802.

[9] <https://www.federalregister.gov/documents/2023/05/05/2023-09259/provisions-pertaining-to-certain-transactions-by-foreign-persons-involving-real-estate-in-the-united>.

[10] See, e.g., Press Release by Senator Rubio, available at <https://www.rubio.senate.gov/public/index.cfm/2022/12/rubio-slams-cfius-s-refusal-to-take-action-regarding-fufeng-farmland-purchase>. See also <https://www.grandforksherald.com/news/local/spokesperson-says-air-force-held-off-on-official-fufeng-stance-cfius-assessed-risk> (discussing Senator Cramer's disappointment).

[11] Legislation has been enacted or proposed in at least the following states: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Mississippi, Missouri, Montana, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wyoming. Bills in California and Oklahoma failed.

[12] <https://www.flsenate.gov/Session/Bill/2023/264/BillText/er/PDF>.

[13] See Sections 63L-13-101 and 63L-13-201, Utah Code Annotated. These restrictions apply after May 3, 2023.

[14] <https://media.defense.gov/2022/Oct/05/2003091659/-1/-1/0/1260H%20COMPANIES.PDF>.

[15] <https://newhouse.house.gov/sites/evo-subsites/newhouse.house.gov/files/evo-media-document/2.2.2023-china-act.pdf>.

[16] <https://stefanik.house.gov/2023/2/stefanik-costa-crawford-rounds-tester-work-to-protect-u-s-agriculture-from-foreign-adversaries>.