

CFIUS & Real Estate - What's the Connection?

October 11, 2023
Russell Menyhart
Taft Stettinius & Hollister LLP

Taft/

1

Committee on Foreign Investment in the United States

- Inter-agency committee of nine federal agencies (Treasury (chair), Justice, State, Homeland Security, Defense, Commerce, Energy, USTR, Office of Science & Technology Policy). NSC and other agencies may advise as well.
- Very broad jurisdiction to review national security risks related to foreign investment.
- Jurisdiction, resources, and activities expanded significantly under 2018 legislation, with implementing regulations in force as of February 2020.
- “Covered transactions” include **all controlling**, some **non-controlling**, and certain **real estate** (based on proximity to sensitive government sites) foreign investment.
- Well-crafted exception for investment funds with foreign LPs.

Taft/

2

2

CFIUS Scope and Process

- Power to block, require mitigation for, or unwind transactions.
- Completely blocking a foreign investment is still very rare. But CFIUS is significantly increasing three types of activities:
 - A) Extended reviews of foreign investment (even from allied countries)
 - B) Requiring mitigation through binding “National Security Agreements”
 - C) Non-notified Transaction investigations
- Filings are not public, exempt from FOIA. A filing may be approved (or withdrawn) and never be publicly known. However, Presidential blocks are public.
- According to CFIUS statistics, 154 Declarations (short-form filings) and 286 Notices (full filings) in 2022.

What businesses might have national security risks?

- ITAR or EAR technology
- Cutting edge technology (biotech, advanced materials, etc.—any company that might receive a government research grant)
- Sensitive personal data (medical/genetic/financial data (PatientsLikeMe Inc., Grindr, etc.)
- Energy grid/resilience – Battery company example
- Access to data – data center operations, back office services, financial services
- Infrastructure (fiber optic cables, ports)
- Cybersecurity/network security
- Food security (Smithfield Farms)

TID U.S. Business – Mandatory and Voluntary Filings

- Critical Technology
- Critical Infrastructure
- Sensitive Personal Data
- If you represent a company that falls into any of these buckets that is looking at accepting foreign investment, CFIUS is highly likely to want to review the transaction.
- My rule of thumb: **“What could a bad guy do with this company?”** (a chance to be creative)
- Most U.S. company clients will say “there is no national security element to my business.” Our job is to question that.

Taft/

5

5

“Critical Infrastructure”

- Can trigger *mandatory* filing for any foreign government investment.
- Also a red flag for CFIUS interest in foreign private investment.
- Laid out in detail in an Appendix to the CFIUS regulations.
- Includes U.S. entity that:
 - Owns/operates fiber optic cables
 - Manufacturer of certain defense materials
 - Owns/operates bulk-power system facilities
 - Owns/operates oil refinery with capacity above 300,000 barrels per day
 - Own/operates natural gas underground storage facility
 - Owns/operates strategic designated rail lines
 - Owns/operates certain interstate oil pipelines
 - Owns/operates public water system

Taft/

6

6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: CFIUS and Real Estate: What's the Connection?

Also available as part of the eCourse

[2023 Special Topics in Commercial Lending: Foreign Ownership; EPA Regulations; and Other Regulatory Issues](#)

First appeared as part of the conference materials for the
57th Annual William W. Gibson, Jr. Mortgage Lending Institute session
"CFIUS and Foreign Ownership"