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Treasury Department Moves to Expand CFIUS's Real Estate Jurisdiction & Implement China-Bound Tech Investment Restrictions

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The U.S. Department of the Treasury (Treasury), as Chair of the Committee on Foreign Investment in the United States (CFIUS), has announced a proposed rule to expand CFIUS's jurisdiction over real estate transactions by foreign persons. The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) granted CFIUS authority to review certain real estate transactions in close proximity to United States military installations or certain or facilities or properties of the U.S. Government.

The proposed rule adds 59 military installations in 30 states to CFIUS's jurisdiction. Most (40) additional military installations would fall within CFIUS's jurisdiction for real estate transactions within a one-mile radius, and 19 additional military installations would fall within CFIUS's "extended range" jurisdiction for real estate transactions within a 100-mile radius. CFIUS's jurisdiction over 8 military installations would also expand from a one-mile radius to the extended 100-mile radius. Treasury Secretary Janet Yellen announced that "CFIUS plays an integral role in U.S. national security by thoroughly reviewing real estate transactions near sensitive military installations, and this proposed rule will significantly expand its jurisdiction and ability to accomplish this vital mission."

This move follows the Treasury's announcement of proposed rules to strengthen CFIUS's regulations and enforcement tools, including increasing the maximum civil monetary penalties and expanding CFIUS's subpoena authority.

The proposed rules would expand the information that CFIUS may request from parties to non-notified transactions—transactions that the parties did not voluntarily report to CFIUS. The proposed rules also provide CFIUS the power to issue a subpoena to compel responses when CFIUS is monitoring compliance with a mitigation agreement, order, or condition, and when CFIUS investigates a potential "material misstatement or omitted material information" by the parties in a concluded review. Second, the proposed rules would expand CFIUS's authority to issue subpoenas "if deemed *appropriate* by the Committee", versus the existing "deemed necessary" criteria—effectively lowering the standard for subpoena issuance.

Third, the proposed rules would provide for an extendable time frame of 3 business days for responses to proposed mitigation terms. Current regulations did not impose a deadline. Finally, the proposed rules increase the set maximum penalty amount from $250,000 per violation to $5,000,000 per violation.

Beyond restricting foreign investments in the United States, the Treasury is also taking steps to limit certain investment into military application technologies in China – creating classes of notifiable transactions *and transactions that are outright prohibited*. Treasury has also announced proposed rules to follow President Biden's August 9, 2023 Executive Order 14105 addressing investments by U.S. persons in certain identified national security technologies in "Countries of Concern," identified in the EO and the rulemaking as The People's Republic of China, The Special Administrative Region of Hong Kong and The Special Administrative Region of Macau.

Concurrent with the August 2023 Executive Order, the Treasury issued an advanced notice of proposed rulemaking outlining the program and inviting public comment. While the proposed rule reflects significant elements of the August 2023 advanced notice, it reflects comments received and varies it important ways, including in key areas such as the scope of AI systems, the knowledge standard, the scope of the prohibition on knowingly directing certain transactions, the scope of LP investments, and an exception involving persons of certain third countries.

Key elements of the proposed rule include:

- A knowledge standard reflecting an requirement to conduct a reasonable and diligent inquiry prior to undertaking a transaction.

- Covered transactions include:
  - certain acquisitions of equity interests or contingent equity interests,
  - certain debt financing that is convertible or affords certain rights to the lender,
  - greenfield investments or other corporate expansions,
  - joint ventures, and
  - certain investments as a limited partner or equivalent in a non-U.S. person pooled investment fund.
- Clarifies the criteria for the scope of Covered Foreign Persons
- Excepted transactions including:
  - publicly traded securities,
  - certain LP investments,
  - buyouts of country of concern ownership,
  - intracompany transactions,
  - binding commitments entered into prior to August 9, 2023,
  - certain syndicated debt financings, and
  - certain transactions involving a person of a third county with certain adequate measures, as determined by the Secretary of the Treasury.
- Allows application for exemption on the basis that a transaction is in the national interest of the United States.
- Creates notification requirement of filing no later than 30 days after a transaction is completed, or 30 days after actual knowledge of a covered transaction if knowledge acquired after completion.

The proposed rule sets out the scope of prohibited transactions and notifiable transactions for the with respect to the technologies and products identified in the EO, including:

- Semiconductors and microelectronics:
  - *Prohibitions related to electronic design automation software, certain fabrication and advanced packaging tools, certain advanced integrated circuits, and supercomputers*.
  - A notification requirement for integrated circuits not otherwise prohibited.

- Quantum information technologies:
  - *Prohibitions related to the development of quantum computers and production of critical components, certain quantum sensing platforms, and quantum networking, and quantum communication systems.*

- Certain Artificial intelligence (AI) systems:
  - *Prohibitions related to development of any AI system designed to be exclusively used for, or intended to be used for, certain end uses, and any AI system of certain specified quantities of computing power using primarily biological sequence data.*
  - A notification requirement for any AI system below certain specified quantities of computing data.

The proposed rule provided for civil and criminal penalties pursuant to the International Economic Emergency Powers Act (IEEPA), along with divestment authority under IEEPA. Treasury will consider voluntary self-disclosure in its penalty determinations.

The Treasury will accept public comments until August 4, 2024.

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- **John R. Ingrassia**
  Partner