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Transportation

New CFIUS Rules Could Have More Effect on Transportation Industry

Transportation Legal Update

2018 Foreign Investment Risk Review Modernization Act

The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee chaired by the Secretary of the Treasury and authorized to review certain transactions involving foreign investment in the U.S. On September 24, 2019, CFIUS issued two sets of proposed regulations published for comment in the Federal Register in response to the 2018 [Foreign Investment Risk Review Modernization Act \(FIRRMA\)](#). Among other measures, FIRRMA imposes mandatory reporting requirements on certain transactions and expands the scope of CFIUS jurisdiction to include review of:

- non-passive, non-controlling investments in U.S. companies involved in “critical infrastructure;” and
- the purchase or lease by, or concession to, a foreign person of certain real estate in the U. S., specifically including both real estate described by (a) its relation to airports and maritime ports and (b) its relation to

U.S. military installations and other facilities or properties of the U.S. Government that are sensitive for national security reasons.

Each set of proposed CFIUS regulations could apply to a transportation business in some way. The important consideration for all companies, particularly transportation-related ones, is that the concept of “critical infrastructure” under FIRRMA is broader than you may otherwise think and a “covered transaction” or certain types of real property transactions will require review by CFIUS.

Covered Investment in Critical Infrastructure

The proposed “covered investment” regulations (revised 31 CFR 800) deal, in part, with CFIUS’s jurisdiction under FIRRMA to review non-controlling investments in U.S. businesses that own, operate, manufacture, supply, or service specified segments of critical infrastructure termed “covered investment critical infrastructure.” The Appendix to that proposed rule provides a list of critical infrastructure and critical functions as guidance to what is considered subject to CFIUS jurisdiction. Among them are ownership or operation of certain airports; ownership or operation of certain maritime ports or any individual terminal at such ports; and ownership or operation of any rail line and associated connector line designated as part of the Department of Defense’s Strategic Rail Corridor Network.¹ Note also that a “transaction” is subject to review more than what might otherwise be thought of as “investment.” For example, the proposed definition covers not only the acquisition of a direct ownership interest or an investment, but also the formation of a joint venture or a “long-term lease or concession arrangement under which a lessee (or equivalent) makes substantially all business decisions concerning the operation of a leased entity (or equivalent), as if it were the owner.”

Covered Real Estate Transactions Include Certain Airports, Ports and Facilities Close to Government Installations

The new real estate jurisdiction, as implemented in the second proposed rule (proposed 31 CFR 802), is generally structured around specific sites — certain airports, maritime ports, military installations, and other facilities or properties of the U.S. Government — and specific areas in or within “close proximity to” those sites. The definitions are technical but more

limited than described in FIRRMA. For example, generally, an airport is any “large hub airport” (49 U.S.C. 40102) or any airport with annual aggregate all-cargo landed weight greater than 1.24 billion pounds; or any “joint use airport” (49 U.S.C. 47175). A maritime port for purposes of the proposed regulation is described in terms of a strategic seaport within the National Port Readiness Network or the top 25 tonnage, container, or dry bulk ports. Also, keep in mind that covered transactions include the sale or lease of the “covered real estate” as well as “concessions” related to such real estate (an arrangement, other than a purchase or lease, whereby a U.S. public entity grants a right to use real estate for the purpose of developing or operating infrastructure for an airport or maritime port. This term includes assignment of a concession by the party who is not the U.S. public entity.) “Close proximity” as used with regard to real property near military installations and/or other U.S. government properties means within one mile of the boundary of such facility. Note, however, that the commentary to the real estate regulation also clearly says that CFIUS has and will continue to retain the authority to assess, and if necessary, take action with respect to any covered transaction under the remaining authority, including with regard to the investments regulation, that gives rise to national security concerns on the basis of proximity to sensitive government sites and activities.

The proposed real estate rules also include proposed exemptions, however, for “excepted real estate investor,” “excepted real estate foreign state,” and “minimum excepted ownership.” Those definitions operate together to exclude from CFIUS’s jurisdiction covered real estate transactions by certain narrowly defined foreign persons who meet specified criteria establishing sufficiently close ties to a defined group of eligible foreign states.

Conclusion

Although the proposed rules are highly technical and not yet effective, now is the time to become familiar with the contours of the rules to assess their impact on, and plan accordingly for, potential transactions.

± We note, however, that no investment in an air carrier, as defined in 49 U.S.C. 40102(a)(2), that holds a certificate issued under 49 U.S.C. 41102 shall be a covered investment.