

The Government's New Oversight of Real Estate Deals With Foreigners: A Roadmap for Applying the CFIUS Rules

White Paper
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For the first time, the U.S. government can now stop any real estate deal with a foreigner if the government concludes the deal threatens the country's national security. Most real estate transactions in the United States will not be affected by the new rule issued in January 2020 by the U.S. Government's interagency committee called the Committee on Foreign Investment in the United States (CFIUS), because it only covers real estate in ports or within specified distance from military installations or ranges. The rule, however, still covers a significant number of real estate transactions, and will apply in a variety of circumstances that may not occur to the parties in a deal. It can affect real estate located as many as 100 miles from certain military installations, and affect even broader swaths of real estate in the range of missile fields. (See [Provisions Pertaining to Certain Transactions by Foreign persons Involving Real Estate in the United States](#), published in the Federal Register January 17, 2020.)

This paper summarizes briefly how the rule works and highlights some traps that may catch the unwary. It then describes how to conduct a step-by-step review of the rule's geographic designations and exceptions to the rule to determine if a particular real estate deal is covered by the rule. This includes links to the relevant government lists that will affect the rule's applicability to particular transactions. In addition, it includes by way of example, a list of the specific ports and military installations and geographic-specific exceptions that will determine the rule's coverage in the four west coast states of Alaska, California, Oregon and Washington.

I. Overview of the Rule

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The rule applies to transactions completed on February 13, 2020, or later in which a foreign party buys or leases U.S. real estate, or additionally obtains in the case of ports a concession to use the land. There is an exception for deals completed on or after February 13 if a binding written agreement was executed before that date. The key threshold step for determining the rule's applicability is to decide whether the real estate is located in the very specific geographic locations designated in the rule. The value of the deal or amount of real estate involved is irrelevant to the rule's coverage in most cases.

Even if a real estate deal is covered by the rule, it is up to the parties to decide whether or not to voluntarily submit information about the contemplated transaction to CFIUS, although if the parties do not notify CFIUS there may be unusual instances when CFIUS initiates review on its own either before the deal closes, or after it is completed. If CFIUS reviews a covered deal and says it will take no action to stop it or place conditions on it proceeding, the parties will be protected from CFIUS action later to try to block the deal or unwind it.

Parties to a covered real estate transaction may want to file with CFIUS before completing the deal if they think it may potentially raise national security concerns and want the added security of CFIUS indicating it will not object. Because the rule singles out only real estate in very precise and limited areas of the country, any deal falling within the rule's coverage should trigger careful consideration by the parties whether to file with CFIUS in light of all the circumstances, including the potential impacts on national security and whether the foreign party is associated with a foreign state actor. If the parties decide to notify CFIUS they will have the option of filing either a fully documented Notice, or a somewhat abbreviated Declaration, which may end CFIUS review or lead to a subsequent submission of a more detailed Notice. CFIUS is likely to take 30 days to review a Declaration and in the case of the full Notice at least 45 days, along with at least an additional 45 days if it then determines the national security issues are significant enough to require a fuller investigation of the transaction. CFIUS has provided guidance on the [process for submitting either a Declaration or Notice](#).

II. Traps for the Unwary

Application of the rule to a particular transaction may require resolving a number of tricky questions such as whether the transaction amounts to a purchase, lease or concession (there is a specific test to determine whether the terms convey at least three property rights to the foreign party as required); whether a foreign party controls the entity entering into the real estate deal (the rule lists 10 examples of a foreigner's authority over any entity in the deal that would show control); whether a foreign loan or mortgage on U.S. property triggers coverage (in most cases it will not); and whether the transaction involves the purchase of a U.S. business rather than just U.S. real estate (in which case the companion CFIUS rule on foreign investments in U.S. businesses applies instead). The rule's fine print on these and similar legal issues may escape the notice of some. In other instances, the rule's inclusion of particular real estate may catch parties unaware where a densely populated urban area or remote rural

settings may obscure the location of a military installation that would trigger the rule's coverage. For example:

- Any U.S. subsidiary or U.S. branch of a foreign corporation may be a U.S. business, but the purchase by the U.S. entity of any U.S. land will still trigger the rule's applicability.
- The rule's lists of locations and exceptions defining the rule's coverage will change as ports increase or lose traffic, the list of military installations and the protected areas adjacent to them is amended, or the urban areas carved out of some of the rule's applicability changes with shifts in the area's population. The changing nature of the rule will require regular consideration of its applicability in the case of each new transaction with a foreign party.
- Because the rule's coverage will be in flux, parties may enter into a deal for real estate that is not covered by the rule, only to see the real estate subsequently become subject to the rule by a change in the rule's provisions. In that case, the rule is unclear whether the Treasury Department, or other agency member of CFIUS, could initiate a review of the completed deal's national security implications. If CFIUS seeks to exercise authority over the completed deal and finds the foreign ownership threatens national security, it could order mitigation or even divestiture of the foreign ownership.
- In the case of covered ports, the rule applies to any concession to a foreign entity to use real estate for the purpose of operating or developing infrastructure for a port facility, in addition to any deal for the actual purchase or lease of land in the port. The rule covers real estate that will function as part of a covered port, even if it is not actually located within the port. U.S. ports entering into any such deal with foreigners will have to exercise special care because CFIUS in related changes in January specified that any port covered by the rule is critical infrastructure. (See [31 CFR 800](#) at Appendix A, paragraphs xxv and xxvi) Generally CFIUS exercises particular time and care to investigate whether any transaction involving critical infrastructure threatens U.S. national security.
- As noted below, the rule contains a variety of bright line exceptions for particular types of real estate deals, but they are limited in scope and may operate in unforeseen ways. The exception for leasing commercial space in a multi-unit building will not apply to a number of otherwise routine commercial leases such as the lease of a storefront in a small building, and the lease of office space if the office building has only a few tenants or the foreign party leases a large portion of the building. Similarly, the rule excepts purchase of a single-family home and lot typical for the area of the home, but if the lot is unusually large or the foreign purchaser subsequently buys an adjoining vacant lot the exception may not apply.

The next two sections provide a roadmap for determining whether the rule covers any particular real estate transaction with a foreign party. The first section ("Identifying Covered Real Estate") provides a step-by-step way to determine whether the real estate is in an area of the United States covered by the rule, and whether any geographic specific exception applies. The second section ("Applying Generic Exceptions to Covered Real Estate") provides a checklist of the non-geographic exceptions for real estate that the rule would otherwise cover because of its geographic location.

III. Identification of Covered Real Estate

Real estate is generally covered by the rule if it located within one of five specified types of areas designated in the CFIUS rule and Parts 1-4 of the Appendix A to the rule. CFIUS has indicated it intends to provide a "web-based tool" to help the public determine the geographic location of the real estate covered by the rules. In the meantime the following is a guide for determining whether particular real estate anywhere in the country meets the rule's geographic criteria. For illustrative purposes Lists 1-4 at the end of this paper also identify the ports and military installations in the west coast states of Alaska, California, Oregon and Washington that will trigger coverage, and the geographic exceptions that may exclude particular real estate from coverage. The five types of real estate covered by the rule are as follows:

1. Real estate that is, is located within or will function as part of, a covered airport or covered maritime port. The rule covers airports designated by the Federal Aviation Administration as (i) a "large hub airport," or (ii) with annual aggregate landed cargo over 1.24 billion pounds, or (iii) a joint-use airport. For the U.S. airports currently designated by the FAA (based on 2018 numbers), see [Passenger Boarding \(Enplanement\) and All-Cargo Data for U.S. Airports](#) and [Joint Civilian/Military \(Joint-Use\) Airports](#). Covered maritime ports are those designated by the Department of Transportation as (i) strategic seaports within the National Port Readiness Network, or (ii) one of the top 25 tonnage, container, or dry bulk ports. For U.S. maritime ports so designated, see [National Port Readiness Network \(NPRN\)](#) and the [Top 25 Tonnage, Container, and Dry Bulk Ports](#) on the Department of Transportation website. List 1, below, identifies the covered airport and maritime ports on the west coast.

There is an exception for a lease or concession to a foreign air carrier in furtherance of its air carrier activities, but only if it has a security program approved by the Transportation Security Administration. The rule also excepts for both airports and maritime ports leases or concessions for space for the retail sale of consumer goods or services to the public, such as food services.

2. Real estate that is within "close proximity" (defined as one mile) of any military installation listed in Part 1 (currently 131 installations) or Part 2 (currently 32 installations) of Appendix A

to the rule. List 2, below, identifies the military installations on the west coast that trigger coverage of real estate within one mile of its border. For the location of the listed military installations throughout the country, see the [map on the U.S. Census Bureau website](#).

3. Real estate that is within the "extended range" of the 32 military installations listed in Part 2 of the rule's Appendix A. This covers any real estate located between land in close proximity to the installation (one mile) and 100 miles from the installation. These military installations generally cover sensitive training ranges or launch sites susceptible to physical or electronic surveillance. A large exception, however, carves out of the rule's coverage real estate within the extended range that is located in areas the U.S. Census has designated an "urbanized area" (population of 50,000 or more) or "urban cluster" (population between 2,500 and 50,000). It does *not*, however, except real estate in ports or an urbanized area or urban cluster that is within one mile of the military installations listed in Parts 1 and 2 of Appendix A. A current inventory of the urbanized areas and urban clusters are available from the U.S. Census. See example during 2020 "Crosswalk of Urban Areas and Places: 2010" in the CHP-2 series of separate U.S. Census reports for each state entitled *Population and Housing Unit Counts*. See also this [Census map](#).

List 2, below, marks with an asterisk military installations on the west coast buffered by the 99 mile extended range. For west coast states List 4, below, identifies the urbanized areas and provides a link to the lengthier list of urban clusters.

4. Real estate located in missile fields in broad areas of 48 counties, as specified in Part 3 of Appendix A of the rule. Urbanized areas and urban cluster within those counties as designated by the U.S. Census are again excepted. The 48 counties covered in whole or in part are found exclusively in one of five states: Colorado (five counties), Montana (19 counties), Nebraska (eight counties), North Dakota (13 counties) and Wyoming (three counties).
5. Real estate on islands and occasional peninsulas located within the 23 offshore military operating, training and range areas listed in Part 4 of Appendix A, as long as the location is within the limits of the territorial sea of the United States (generally 12 nautical miles from the coastline). For maps of all offshore military ranges, see [DOD 2012 Sustainable Ranges Report](#) Appendix C (Figures). A map posted by the National Oceanic and Atmospheric Administration shows the boundaries of the territorial sea of the United States. List 3, below, contains the names of the offshore military ranges off the west coast.

IV. Application of Generic Exceptions to Covered Real Estate

Even if particular real estate falls within the locations covered by the rule, transactions may be excluded from the rule's coverage by one of five generic exceptions, in addition to the geographic specific exceptions noted above:

1. The rule provides a blanket exemption for certain categories of foreign persons from designated "excepted real estate foreign states." These will be foreign states CFIUS designates on the basis of the country's robust national security-based foreign investment review processes and cooperation with the United States on its similar investment reviews. For the first two years the rule, as issued, excepts only parties to deals from Australia, Canada and the United Kingdom. Detailed provisions in the rule determine whether a particular party from those countries meets nationality and eligibility rules to qualify for the exception.
2. The rule does not apply to any real estate transaction that is subsumed in a transaction involving foreign investment in a U.S. business, as governed by CFIUS's companion rule on the review of foreign investment in U.S. businesses. (31 CFR 800) In other words, covered real estate transactions only include transactions that do not constitute a part of a U.S. business.
3. The rule excepts all single housing units, including land surrounding the house that is common for the neighborhood and incidental to the use of the house. A foreigner's separate acquisition of land without a house is unlikely to be excepted from the rule's coverage.
4. The rule excepts commercial space within a multi-unit commercial building, but only if the foreign person and its affiliates (i) do not, in the aggregate, exceed 10 percent of the total square footage of the building *and*(ii) do not represent more than 10 percent of the total number of tenants. The rule covers all other foreign tenants of commercial space within one mile of a military installation listed in Part 1 and Part 2 of the rule's Appendix, including, for example, a one-year lease of 1,500 square feet in a 10,000 square foot office building with a total of nine tenants.
5. The regulations except lands owned by specified types of Alaska Native entities, or held in trust by the United States for American Indians, Indian tribes, Alaska Natives, and Alaska Native entities.

V. Application of the Rule to West Coast States

The following lists illustrate what areas will be affected by the rule in the west coast states of Alaska, California, Oregon and Washington as of the date of this paper. For the most definitive and up-to-date designations in the future, see the listings in the links provided.

List 1 - West Coast Ports Covered

Covered Airports. **ALASKA:** Anchorage (ANC); **CALIFORNIA:** Los Angeles (LAX), Oakland (OAK), Palmdale (Joint-use AF Plant 42), Riverside (Joint-use March ARB), San Diego (SAN), San Francisco (SFO); **OREGON:** Portland (PDX); **WASHINGTON:** Seattle-Tacoma (SEA).

Covered Maritime Ports. **ALASKA:** Anchorage, Ketchikan, Valdez; **CALIFORNIA:** Los Angeles, Long Beach, Oakland, San Diego; **OREGON:** Portland; **WASHINGTON:** Kalama, Longview, Seattle, Tacoma.

List 2 - West Coast Bases Within "Close Proximity" and "Extended Range" Coverage

This list includes west coast military installations listed in Parts 1 and 2 of the rule's Appendix A. All real estate within close proximity (one mile) of any of these installations is covered. An asterisk marks the nine west coast military installations listed in Part 2 of the Appendix that are also protected by the additional 99-mile extended range. The list identifies in italics the location the rule lists for each military installation, but the covered real estate may not be confined to that particular geographic location in the case of larger installations. In each case, the name of the installation is included in parentheses.

ALASKA: *Anchorage* (Joint Base Elmendorf-Richardson), *Anderson* (Clear Air Force Station), *Cape Newenham* (Cape Newenham Long Range Radar Site), *Delta Junction* (Fort Greely),* *Fairbanks* (Fort Wainwright)* and (Eielson Air Force Base), *Fort Yukon* (Fort Yukon Long Range Radar Site), *King Salmon* (King Salmon Air Force Station), *Ketchikan* (Southeast Alaska Acoustic Measurement Facility), *Kodiak Island* (Kodiak Tracking Stations), *Oliktok* (Oliktok Long Range Radar Site), *Point Barrow* (Point Barrow Long Range Radar Site), *Shemya* (Eareckson Air Force Station), *Tin City* (Tin City Long Range Radar Site).

CALIFORNIA: *Edwards* (Edwards Air Force Base),* *El Segundo* (Los Angeles Air Force Base), *Fairfield* (Travis Air Force Base), *Lompoc* (Vandenberg Air Force Base),* *Norco* (Naval Weapons Station Seal Beach Detachment), *Oceanside* (Marine Corps Base Camp Pendleton), *Point Mugu* (Naval Base Ventura County-Point Mugu Operating Facility),* *Port Hueneme* (Naval Base Ventura County-Port Hueneme Operating Facility), *Ridgecrest* (Naval Air Weapons Station China Lake),* *San Bernardino County* (Fort Irwin),* *San Diego* (Marine Corps Air Station Miramar) and (Naval Base Point Loma) and (Naval Base San Diego), *Twentynine Palms* (Marine Corps Air Ground Combat Center Twentynine Palms), *Yuba City* (Beale Air Force Base).

OREGON: *Boardman* (Naval Weapons System Training Facility Boardman).*

WASHINGTON: *Keyport* (Naval Base Kitsap-Keyport),* *Oak Harbor* (Naval Air Station Whidbey Island), *Silverdale* (Naval Base Kitsap Bangor), *Spokane* (Fairchild Air Force Base), *Tacoma* (Joint Base Lewis-McChord).

List 3 - West Coast Maritime Ranges

Part 4 of Appendix A to the rule lists four maritime ranges off the west coast:

OFFSHORE CALIFORNIA: Northern California Range Complex, Point Mugu Sea Range, Southern California Range Complex.

OFFSHORE OREGON and WASHINGTON: Northwest Training Range Complex

List 4 - West Coast Urbanized Areas and Urban Clusters

Urbanized Areas. West coast real estate within the extended 99-mile range of a military installation identified with an asterisk in List 2, above, are not covered real estate if they are located in any of the following urbanized areas as designated by the most recent U.S. Census. For the urbanized areas in the west coast states for 2020, see [Alaska](#), [California](#), [Oregon](#) and [Washington](#). Each urbanized area is identified with one designation, but the urbanized area may include within it a number of smaller cities and census designated places (CDPs) located in whole or in part in the urbanized area (e.g., 43 cities and CDPs are part of the Portland OR-WA urbanized area).

ALASKA: Anchorage, Fairbanks.

CALIFORNIA: Antioch, Arroyo Grande–Grover Beach, Bakersfield, Camarillo, Chico, Concord, Davis, Delano, El Centro–Calexico, El Paso de Robles (Paso Robles)–Atascadero, Fairfield, Fresno, Gilroy-Morgan Hill, Hanford, Hemet, Indio–Cathedral City, Lancaster–Palmdale, Livermore, Lodi, Lompoc, Los Angeles–Long Beach–Anaheim, Madera, Manteca, Merced, Mission Viejo–Lake Forest–San Clemente, Modesto, Murrieta–Temecula–Menifee, Napa, Oxnard, Petaluma, Porterville, Redding, Reno NV-CA (part), Riverside–San Bernardino, Sacramento, Salinas, San Diego, San Francisco–Oakland, San Jose, San Luis Obispo, Santa Barbara, Santa Clarita, Santa Cruz, Santa Maria, Santa Rosa, Seaside–Monterey, Simi Valley, Stockton, Thousand Oaks, Tracy, Turlock, Vacaville, Vallejo, Victorville–Hesperia, Visalia, Watsonville, Woodland, Yuba City, Yuma AZ-CA (part).

OREGON: Albany, Bend, Corvallis, Eugene, Grants Pass, Longview WA-OR (part), Medford, Portland OR-WA (part), Salem, Walla Walla WA-OR (part).

WASHINGTON: Bellingham, Bremerton, Kennewick–Pasco, Lewiston ID-WA (part), Longview WA–OR, Marysville, Mount Vernon, Olympia–Lacey, Portland OR-WA (part), Seattle, Spokane, Walla Walla WA-OR (part), Wenatchee, Yakima.

Urban Clusters. The rule also excepts urban clusters within the extended range of west coast military installations listed in Part 2 of the rule's Appendix A. Alaska, according to the 2010 Census reports has 13 urban clusters, Oregon has 43, Washington has 63 and California has 152. For the list for 2020 of urban clusters for the 4 west coast states, see again "Crosswalk of Urban Areas and Places: 2010" in the following U.S. Census reports for [Alaska](#), [California](#), [Oregon](#) and [Washington](#).