

KIRKLAND ALERT

May 19, 2017

U.S. Senators Raise Questions About CFIUS and Real Estate Transactions

On May 16, 2017, Senators Ron Wyden (D-OR), Sherrod Brown (D-OH), and Claire McCaskill (D-MO) formally [requested](#) that the U.S. Government Accountability Office (“GAO”) undertake a study to assess how the Committee on Foreign Investment in the United States (“CFIUS”) evaluates real estate transactions in the United States. While real estate deals have historically represented a smaller number of covered transactions notified to CFIUS,¹ foreign investment in U.S. real estate has increased substantially in recent years.

Residential, commercial, and industrial real estate deals alike may present CFIUS risk.

Echoing concerns recently expressed by other Members of Congress regarding CFIUS’ review of transactions in other sectors (e.g., finance, transportation, manufacturing), the senators’ request (the “Letter”) calls for GAO to assess whether CFIUS is adequately equipped to identify, evaluate and, when appropriate, mitigate national security risks arising from the “rising tide” of foreign investment in U.S. real estate.

The GAO has until May 31, 2017 to decide whether to accept or decline the senators’ request for the study, which would, if accepted, be the [second study of aspects of the CFIUS process](#) to be conducted by the GAO in the past year. Irrespective, the Letter illustrates the breadth of topics that are top of mind for members of Congress and other government stakeholders with respect to foreign investment in the United States.

We have summarized the key takeaways from the Letter below.

1. **Even a seemingly benign real estate asset may be “sensitive” due to its proximity to U.S. government or military sites, and/or its tenant base.** The Letter requested identification of how CFIUS views national security risks with respect to real estate transactions, “*be they residential, commercial, or industrial properties.*” Further, the Letter requests GAO’s views on how CFIUS determines if a real estate transaction would provide a foreign buyer physical or cyber access to U.S. government personnel and systems.
2. **Complex transaction structures and opaque beneficial ownership chains create risk.** The Letter noted that U.S. regulators have been increasingly concerned about “*the proliferation of transactions involving shell companies*” and the use of real estate investments “*as a conduit for money laundering and other illicit activities.*” A [January 2017 GAO report](#) expressed similar concern that leasing of high-security space to foreign companies may present cyber and physical security risks.² In response to the report, on May 16, 2017, Rep. Stephen Lynch

(D-MA) and Rep. Peter King (R-NY) introduced a bill to require the General Services Administration (“GSA”) to collect beneficial ownership information as part of the leasing process for high-security leased space.³

3. **Even smaller minority investments may entail CFIUS risk.** The Letter requests that the GAO evaluate whether there are real estate transactions that are not “covered transactions” (i.e., they will not result in “control” of a U.S. business by a foreign person) but still present national security threats. (NB: CFIUS currently construes “control” very broadly. Under the regulations, only a transaction that will result in a foreign buyer holding less than 10% of the U.S. target’s voting interest, and holding such interest solely for the purpose of passive investment, is considered to not confer “control.”)
4. **Chinese investment in U.S. real estate continues to encounter skepticism.** China is the only foreign country cited in the Letter, which specifically notes that the *“ownership structure and political ties of some prominent Chinese investors . . . are murky at best.”*

While it remains to be seen whether the GAO will accept the senators’ request and any recommendations offered by the GAO in its study would be non-binding, the Letter reflects ongoing, active debate among U.S. stakeholders about how to handle potential national security challenges presented by foreign investment. Real estate investors and sellers must carefully think through in advance of transactions how CFIUS may be relevant to a potential transaction in order to mitigate risks for deal feasibility, timing, and cost, and reputational hazard.

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- ¹ In 2014, the last year for which data are available, 4 of 147 transactions notified to CFIUS were officially categorized as “real estate” transactions. For more information, please see our [Alert on the 2014 CFIUS Annual Report](#).
- ² See GAO, *Federal Real Property: GSA Should Inform Tenant Agencies when Leasing High-Security Space from Foreign Owners* (January 2017).
- ³ *The Secure Government Buildings from Espionage Act of 2017*, H.R. 2426, 115th Congress (2017).

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