

### CFIUS Determines it Has No Jurisdiction Over Proposed Chinese-Owned Real Estate in North Dakota

#### Key Notes:

- Real estate projects may be subject to CFIUS national security review if close to sensitive locations.
- Proactive planning can mitigate transaction delays.
- Security concerns may be broader than CFIUS regulatory issues and merit multi-tiered government and public outreach.

Recently, the Committee on Foreign Investment in the United States (CFIUS) reviewed a proposed real estate transaction near Grand Forks, North Dakota and determined that CFIUS did not have jurisdiction to take any action concerning the transaction. Public comments indicate that some would like to see CFIUS jurisdiction expanded or see other national security review authorities developed to address potential sensitive real estate transactions.

#### CFIUS' Statutory Authority to Review Certain Real Estate Transactions

The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) expanded the jurisdiction of the multi-agency CFIUS to address national security concerns regarding certain limitations of CFIUS' traditional jurisdictional scope of review over foreign acquisitions of control over U.S. businesses. So-called greenfield investment was not covered, and several parties were particularly concerned about investments that would develop foreign-owned facilities near sensitive locations. The FIRRMA revisions included allowing CFIUS to review

and take action regarding certain covered real estate transactions. These covered real estate transactions focused on sensitive sites such as designated (1) airports, (2) maritime ports, (3) military installations, (4) real estate within "close proximity" (defined as one mile) and certain installations within an "extended range" (defined as 99 miles) of these designated sites.

To be designated as a covered real estate transaction, the involved foreign person would have to have certain property rights, such as (1) physical access to the real estate, (2) the right to exclude others from physically accessing the property, (3) the right to improve or develop the real estate or (4) the right to attach fixed or immovable structures or objects to the property. The national security review focuses on any potential threats or vulnerabilities that could impair U.S. national security should the foreign person exploit the location and/or use of the land near these sensitive government facilities and locations.

#### Recent Developments with a Potential Chinese Transaction in North Dakota

While these FIRRMA real estate provisions went into effect in February 2020, they have received relatively little attention – until recently. In early 2022, Fufeng USA, a subsidiary of Fufeng Group, a Chinese company, indicated that it would be purchasing approximately 370 acres of vacant land near Grand Forks, North Dakota to build and operate a wet corn milling and biofermentation plant. The plant, however, would be located approximately 12 miles

from Grand Forks Air Force Base. This base is regarded as a sophisticated Intelligence, Surveillance and Reconnaissance (ISR) base that includes a new Space Development Agency ground control system for satellites that will support a low-Earth-orbit satellite mission for U.S. military communications.

In July 2022, the parties to the transaction agreed to file a voluntary notice with CFIUS, and North Dakota Senators John Hoeven and Keven Cramer sent a [letter](#) to the U.S. Treasury and Defense Departments urging such a review to clarify whether the real estate purchase carried national security implications. The letter noted that local officials were seeking federal input about any such concerns and stated that “[Chinese] investments in the United States demand scrutiny.” Shortly thereafter, the senators advised the city against moving forward with the project, citing security concerns. North Dakota Governor Doug Burgum also called for a federal analysis of the transaction. Community opponents raised fears of espionage due to its close proximity to Grand Forks Air Force Base.

Although the CFIUS review process is highly confidential, it was learned in early December 2022, that after conducting its analysis with input from the Departments of the Treasury, Defense and Agriculture, CFIUS determined that this real estate acquisition was not a “covered transaction” and, thus, under CFIUS regulations, the agency had no jurisdiction. As such, CFIUS stated to the parties that it would not be taking any further action with respect to the transaction.

CFIUS commented that it reserved the right to initiate a new review of the matter if information comes to light demonstrating that the transaction parties omitted material information or submitted false or misleading material information in the original investigation. Fufeng USA indicated it was pleased with the outcome of the CFIUS review and looked forward to building its milling plant in Grand Forks, North Dakota.

Despite CFIUS clearance, the story continues as Senators Hoeven and Cramer have announced their continued opposition and concern that “Fufeng operations could provide cover for PRC (People’s Republic of China)

surveillance or interference with the missions located at that installation [the Air Force base], given Fufeng Group’s reported ties to the Chinese Communist Party.” Senator Cramer has stated that the U.S. food supply chain is a national security issue. The senators have reportedly requested a classified briefing from CFIUS staff on the matter and the national security review that was undertaken. Other opponents argue that CFIUS only determined that it had no jurisdiction over the transactions and, thus, the Department of Defense should conduct its own national security analysis.

### Conducting Sufficient Diligence on Real Estate Transactions

While continuing to welcome foreign investment in the United States, the CFIUS process has been modernized to address growing concerns over certain foreign states’ intentions in their investments. So, what are the takeaways from this ongoing concern over Fufeng’s proposed real estate purchase in North Dakota? To begin with, under the FIRRMA-related real estate amendments to the CFIUS process, parties to any corporate, commercial real estate transaction should be assessing whether the involved real estate is located near any U.S. airports, maritime ports or military installations that have been designated under the CFIUS regulations as sensitive installations.

If the property is nearby, or within the extended range of a listed installation, transactional diligence requires further review and analysis to determine whether the nature of the proposed transaction would result in its being considered a covered transaction meriting the filing of a voluntary notice with CFIUS for a national security review. While there remains no mandatory filing requirement for real estate transactions, CFIUS continues to caution that only by filing a voluntary notice (or a short-form declaration) regarding a covered real estate transaction will the involved parties potentially qualify for a safe harbor letter.

Perhaps somewhat unrelated to CFIUS, if the transaction is significant (e.g., substantial investment and development in the related industry and the surrounding community), the parties should consider an outreach and communications strategy to ensure relevant officials and community

members are well informed. As the Grand Forks, North Dakota transaction indicates, even if a real estate transaction falls outside of CFIUS jurisdiction, there may nevertheless be community and political sensitivities to consider.

Finally, in addition to federal CFIUS regulations regarding foreign parties investing in certain U.S. real estate, there may soon be a need to determine if a transaction may trigger foreign investment concerns at the state government level. For example, Governor Kristi Noem of South Dakota has [announced](#) that she will seek state legislation that would create the state equivalent of CFIUS. If approved, the resulting state board would investigate proposed purchases of agricultural land by foreign parties and recommend either approval or denial to the governor.

### Real Estate Transaction Exceptions

As a hopeful and clarifying endnote, given the breadth of authority under the FIRRMA-related revisions to the CFIUS process which is codified under Section 721 of the Defense Production Act of 1950, as amended, there are certain exceptions for real estate transactions in an “urbanized area” or “urban cluster,” as defined by the U.S. Census Bureau. Further exceptions apply to transactions involving a foreign person’s purchase or lease of a single housing unit in transactions involving certain commercial office space inside a multi-unit commercial office building, or for retail trade or food service establishments.

Additional Thompson Hine information on CFIUS and covered real estate transactions is available via our SmarTrade blog posts, [“CFIUS Publishes Final Regulations to Reform National Security Reviews for Certain Foreign Investments and Real Estate Transactions in the United States”](#) and [“CFIUS and Covered Real Estate Transactions: Update on Geographic Reference Tools.”](#)

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