



Real Estate Asia: Webinar

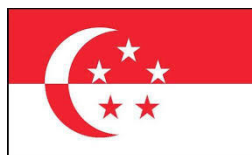
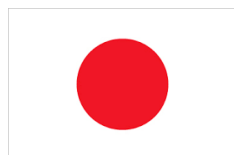
**CFIUS and the Asia Real Estate and Infrastructure Investor:
What You Need to Know Now**

APRIL 23, 2020

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Welcome to Our Webinar

- Today's Attendees
 - Asia-based real estate and infrastructure investment community
 - Real estate developers
 - Private equity/sovereign wealth funds
 - Asset managers
 - Financial institutions
 - Family offices



Welcome to Our Webinar

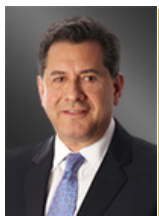
- Your Host

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The Presenters



Joel H. Rothstein

Shareholder, Chair of Asia Real Estate Practice

Tokyo, Shanghai and New York
RothsteinJ@gtlaw.com



Cyril T. Brennan

Shareholder, International Trade & Customs Practice

Washington, D.C.
BrennanCT@gtlaw.com



Renee A. Latour

Shareholder, International Trade & Customs Practice

Washington, D.C.
LatourR@gtlaw.com

The Topic

THE COMMITTEE ON
FOREIGN INVESTMENT
IN THE UNITED STATES
(CFIUS)



The Agenda

- 1 An Introduction and Overview of CFIUS
- 2 Impacts on Real Estate and Infrastructure Transactions
- 3 Special Considerations for Asia-Based Investors
- 4 Case Studies: CFIUS in the News
- 5 Strategies: Planning for and Navigating CFIUS Review
- 6 Q&A

What is CFIUS?

- Existed since 1975
- Amended FINSA (2007), FIRRMA (2018)
- Multi-agency committee includes:
Treasury, Justice, Homeland Security,
Commerce, Defense, State, Energy,
USTR, OSTP
- U.S. President has authority to review,
investigate, block, and unwind deals that
pose “national security” threat



What is “In Scope” for CFIUS?

U.S. real estate, entities, assets
(No percentage or \$\$ thresholds)

+

Non-U.S. investor or buyer

+

Any U.S. national security concern

=

CFIUS can review, regulate, block, and/or order unwind a transaction

CFIUS National Security Examples

- Defense/aerospace industry
- Export-controlled goods, technology, services
- Real Estate Transactions
 - Proximity to sensitive sites, airports, maritime ports, military installations
- Handling personal data of U.S. citizens
- Telecommunications industry
- Leading or emerging technologies
- Government contracts (federal, state, municipal)
- Classified contracts, security clearance
- Critical infrastructure
- Low-tech but sensitive, like food supply chain

EVOLVING AND EXPANSIVE CONCEPTS

CFIUS Has Changed

- **Before 2018:** All CFIUS filings voluntary
- **Real estate transactions** not covered
- **2018:** U.S. Congress enacts FIRRMA, expands CFIUS



- **After 2018:** New mandatory filings for qualifying transactions
- **February 2020:** Expanded CFIUS scope
 - Qualifying **real estate** transactions now covered
 - Buyer/investor is **government owned** (including SOE)
 - **Technology, Infrastructure & Data (TID)**

Mandatory vs. Voluntary CFIUS Filings

- Certain transactions now trigger mandatory CFIUS filing requirements
 - For example, transactions where U.S. target deals in certain “critical technologies”
 - Can include controlling and minority non-controlling investments
- Today’s discussion focuses mainly on transactions subject to voluntary CFIUS filing requirements
 - Real estate transactions are not subject to mandatory declaration requirements

CFIUS Real Estate and Infrastructure

- Not all real estate/infrastructure transactions “covered”
- Case-by-case analysis required for each transaction
- Typical scenarios
 - Acquisition (ownership or control) of U.S. “covered real estate”
 - Acquisition or minority/non-controlling investment in TID U.S. Business (critical technology, *critical infrastructure*, collection of sensitive U.S. person data)
 - Certain minority/non-controlling investment in entity that owns, leases, or manages real estate

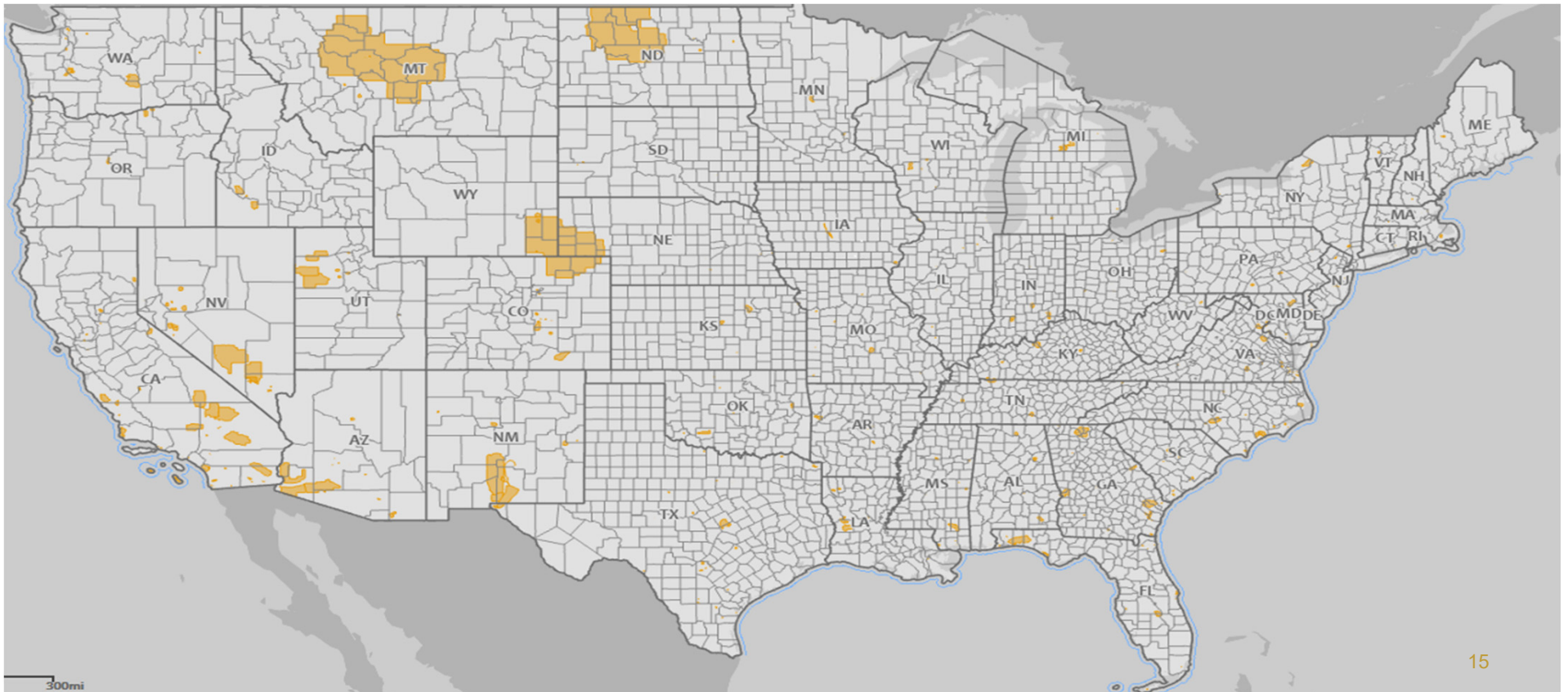
“Covered Real Estate Transaction”

- “Covered Real Estate Transactions” now subject to CFIUS jurisdiction
- Defined as real estate located in the following:
 - Within or part of a covered port/airport
 - Within 1 mile (1.6 KM) of Group 1 U.S. military installation
 - Within 100 miles (160 KM) of Group 2 U.S. military installation
 - Within any of 48 listed U.S. counties/regions
 - Within any of 23 listed offshore military operating areas

What Types of Real Estate Transactions are Included?

- Any transaction that grants non-U.S. investor/buyer **three or more** of the following rights:
 - The right to physically access the real estate
 - The right to exclude others from physical access the real estate
 - The right to improve or develop the real estate
 - The right to attach fixed or immovable objects to the real

Proximity-based Real Estate Jurisdiction



CFIUS Real Estate Exceptions

- “Excepted Real Estate Investors”
 - Australia
 - UK
 - Canada
- Underwriting and Insurance Transactions
- Transactions without 3 or more Property Rights
- “Urban areas”
- Single housing units
- Commercial leases in multi-unit commercial buildings
- Certain leases in airports or maritime ports
- Tribal lands
- Certain loans or mortgages

CFIUS Minority Investments – Critical Infrastructure

- Minority/non-controlling investment in TID U.S. business
 - Technology
 - Critical Infrastructure
 - Sensitive Personal Data
- Transaction grants non-U.S. investor any of the following:
 - Access to “material non-public information”
 - Board membership or observer rights
 - Involvement in “substantive decision making”

Special Consideration – Foreign Government Mandatory Declarations

- 25% or more investment by a non-U.S. government in a TID U.S. Business
- Applies to indirect investment
 - If foreign government has 49% or more interest in foreign investor (acquiring 25% or more interest in U.S. entity)
- Likely applies to investments by **State-Owned Enterprises** (SOEs)
- Very limited exception for investment funds
 - LP/GP structure and no ownership or control of GP/managing partner

Note: Other CFIUS mandatory filing triggers exist

Your Transaction is “Covered” – Now What?

- Risk-based decision of whether to make a CFIUS filing
- Joint decision made by buyer/investor and seller
- Evaluate the pros and cons with assistance of counsel
- Nationality of buyer/investor critical
 - China-related transactions subject to high scrutiny

What are CFIUS Outcomes?

1. Parties make CFIUS filing (mandatory or voluntary)

- CFIUS approval (safe harbor)
- CFIUS requires mitigation
- CFIUS blocks transaction

2. No CFIUS filing (if voluntary)

- CFIUS does nothing
- CFIUS requires filing any time before or after closing
- CFIUS unwinds transaction after closing (no time limit)

3. No CFIUS filing (if mandatory)

- Fines up to the value of the transaction
- Possible investigation and divestment

Major Risks/Reasons for CFIUS Denial

- Access to critical technologies and critical infrastructure
- Proximity to sensitive U.S. sites, airports, maritime ports, and military installations
- Access to personal data, especially health and genetic information
- Attempts to mask true foreign ownership through complicated corporate structures or incorporating entities in other jurisdictions

Considerations for Real Estate and Infrastructure Transactions

- Identification of “problematic” sites for proximity transactions requires heightened due diligence in early states
- Traditional CFIUS mitigation measures may not be available for proximity transactions, so plan for blocking or abandoning transaction in transaction documents
- Be able to explain how status as an SOE affects access to data by Chinese government

Considerations for Asia-Based Entities

- Incorporating entities in multiple jurisdictions will not change CFIUS analysis if ultimate beneficial owner is non-U.S.
- Certain Asian entities, including many Chinese entities, may face heightened scrutiny
- When creating investment partnerships, review CFIUS history of potential partners and ask about previous issues
- Consider implications of including SOEs or state-controlled entities in investment partnerships

Case Study 1: South Korean Real Estate Acquisition

- Facts:
 - South Korean real estate investor
 - Acquisition of a commercial office park in Maryland (close to Washington, DC) via REIT structure
 - Qualified as a “covered real estate transaction”
 - Certain offices leased to the U.S. Department of Defense
 - Parties elected to make a CFIUS filing

Case Study 1: South Korean Real Estate Acquisition

- Result:
 - CFIUS clearance, **but subject to DoD mitigation agreement**
 - Buyer required to appoint third-party, DoD-approved facilities manager
 - Limitations on buyer's access to physical premises
 - DoD approval for service providers (cleaning, officer services, etc.)
- Takeaways
 - Even buyers/investors from close U.S. allies subject to scrutiny
 - All proposed transactions should be vetted well before closing

Case Study 2: Chinese Real Estate Acquisition/Divestiture

- Facts:
 - Chinese real estate investor
 - Acquisition of majority interest in Manhattan office building
 - Building included police substation covering President Trump's personal residence
 - Parties elected not to file a CFIUS notice prior to closing

Case Study 2: Chinese Real Estate Acquisition/Divestiture

- Result
 - Post-closing CFIUS divestiture order
 - Chinese buyer required to sell stake to U.S. buyer
- Takeaways:
 - Chinese investments subject to highest levels of scrutiny
 - Pre-acquisition planning/analysis key
 - Even if no filing made, review CFIUS-related contractual provisions

Recent Deals Involving Asia and CFIUS

- Approved
 - China Oceanwide Holdings' acquisition of Genworth Financial, a U.S. insurance company (Jun. 2018)
 - Naura Microelectronics Equip. Co. Ltd.'s acquisition of Akrion Systems LLC, a U.S. semiconductor manufacturing equipment company (Dec. 2017)

Transaction Management Considerations


- Begin diligence early to determine CFIUS issues and requirements
 - Need sufficient lead time to make necessary filings
 - Additional geographic surveying may be required for proximity transactions
- Contemplate mitigation measures
- Account for risks and delays
 - Right to terminate transaction in the event of unreasonable mitigation proposal
 - Possible reverse break-up fees
 - Outside date
- Post-closing investigations by CFIUS can change value of investment

Managing Through CFIUS Concerns

- Clear and open communication
- Timely responsiveness
- Advocacy and coordination
- Negotiation
- “Hold separate” arrangements
- Agreed asset dispositions



Final Observations



Q&A

THANK YOU

Stay Safe
and
Be Well