Will state-level scrutiny on real estate tilt CFIUS toward a country blacklist?

A trend, on the part of federal and state lawmakers, to block investments from certain countries is at odds with CFIUS's traditional 'country agnosticism'. Will state-led actions in the real estate sector precipitate a shift in the way CFIUS reviews acquisitions of and investment in US businesses? Barbara Linney and Scott Jansen set out the background and suggest that CFIUS may take a more explicitly 'blacklist'-focused approach.

The Committee on Foreign Investment in the United States ('CFIUS') has traditionally refrained from 'naming and shaming' certain countries of concern in its regulations, and the US Congress has taken a similar approach to the legislation governing the CFIUS review process. Since the enactment of the Foreign Investment Risk Review and Modernization Act ('FIRRMA') in 2018, CFIUS has recognised certain countries – Australia, Canada, New Zealand, and the United Kingdom – as 'excepted foreign states', with the result that investors from these countries who meet certain criteria can be excused from certain CFIUS requirements (notably, mandatory filings).

However, the creation of this whitelist has not been accompanied by a formal regulatory blacklist of countries of concern. Regulatory review of acquisitions of US businesses is focused on several factors related to the US business (including whether the products and technology of the business are subject to US export controls), as well as factors related to the foreign buyer and its key personnel, but neither the Defense Production Act, as amended (including by FIRRMA) nor the CFIUS regulations call out investors from specific countries as posing specific concerns. Likewise, on the real estate side, the statutory and regulatory focus primarily has been centered on proximity to sensitive US government and military locations rather than the nationality of the buyer. All matters before CFIUS are reviewed on a case-by-case basis. Nevertheless, there is movement in Congress and many state legislatures towards significant (and in many instances total) restrictions on foreign ownership in US real estate, particularly agricultural lands. As discussed below, the blacklist or 'name and shame' approach of both federal and state lawmakers to certain 'countries of concern' appears to be gaining considerable momentum. These 'countries of concern' include countries subject to US sanctions, US trade embargoes, and various US government procurement bans.

Investments involving or associated with Russia and China (both governments and citizens) are key targets. For example, in 2022, a Chinese business purchased 300+ acres of agricultural land 12 miles from Grand Forks Air Force Base, North Dakota, to build a corn-processing plant. The United States Air Force opposed the purchase because it was concerned that Chinese actors might use this facility to collect data on military drone technology flying nearby. After CFIUS determined it had no legal jurisdiction to review the transaction, the Grand Forks City Council denied a building permit for the planned facility.

In 2019, a Chinese businessman (former Chinese military member) purchased approximately 130,000 acres of ranch land near Laughlin Air Force Base, Texas, to build a renewable energy wind farm. Laughlin is a large training base for US Air Force pilots. After CFIUS did not intervene, the Texas governor signed legislation prohibiting Texas businesses and governments from contracting with entities owned or controlled by individuals from China if the contract relates to critical infrastructure such as the Texas energy grid. The wind farm was not built.

As a result of these and other similar acquisitions, as well as general concern about foreign investment in US real estate evidenced by the rising tide of Congressional and state legislative focus on the issue, CFIUS recently proposed expanding its jurisdiction to eight new sites in the United States (Grand Forks and Laughlin Air Force Bases are on the list), but the proposed regulatory change stopped short of adopting a blacklist or total ban approach to regulating foreign ownership of US real estate.[1]

However, as summarised below, there is an increasing focus by state legislatures and Congress on specific nationalities and countries and in some instances total bans on certain acquisitions of, investments in, and leases of, US real estate. The big question is whether this blacklist approach to real estate will impact CFIUS reviews of acquisitions of and investment in US businesses, which have been nation- and nationality agnostic since CFIUS was created in 1975.

CFIUS RECENTLY PROPOSED EXPANDING ITS JURISDICTION TO EIGHT NEW SITES IN THE US, BUT THE PROPOSED REGULATORY CHANGE STOPPED SHORT OF ADOPTING A BLACKLIST OR TOTAL BAN APPROACH TO REGULATING FOREIGN OWNERSHIP OF US REAL ESTATE.

Potential economic and national security risks associated with foreign ownership of US real estate and agricultural lands

Not every foreign acquisition of US real estate or agricultural lands raises national security risks. Indeed, some acquisitions and investments arguably are only net positive; for example, an acquisition or investment that turns a 5,000-acre ranch with 500 cattle or a 1,000-acre desert land area into a windfarm with 100 windmills or solar farm with 1,000 solar panels. However, national security risk may rise substantially if the agricultural or ranch land is near a military base that flies sensitive aircraft out of the base, and that is because the US military is concerned about the potential for installation of communications and other detection equipment to capture US government communication and/or technology capabilities of military aircraft flying overhead.

In addition, increasing foreign ownership of US agricultural lands may conflict with state government interest in prioritising small and medium-sized farms over larger corporate farms, and generate national security concerns over the security of the US food supply and US agriculture technology. In fact, the recent Executive Order 14083 directed CFIUS to consider the impact of a covered transaction on 'elements of the agriculture industrial base that have implications for food security' and related technology and supply chain issues.

Existing and pending state government laws restricting foreign ownership of US non-residential real estate

Approximately 22 US states currently have laws that restrict in some manner foreign ownership or investments in real estate within the state, and six of these states are considering new legislation to change or expand the scope of existing state law related to foreign ownership of real estate. Until recently, foreign ownership restrictions were largely based upon protecting family farms from competition from large commercial foreign farming operations. For example, Mississippi law prohibits non-resident aliens from acquiring private lands that exceed 320 acres for industrial purposes and five acres for residential purposes.[2] Indiana law prohibits foreign businesses from acquiring agricultural lands greater than 320 acres for crop farming or ten acres for timber production purposes.[3]

However, new laws enacted in 2023 highlight a new trend towards greater restrictions on foreign ownership of US real estate (particularly agricultural lands), including restrictions based on countries of concern. Features of some of these new laws include:

- prohibition of all foreign ownership of agriculture lands (see e.g., Idaho, which limits foreign acquisitions and leases of agricultural land, water rights, mining claims, or mineral rights);
- prohibition on ownership of agricultural lands by 'foreign adversaries' (see e.g., Virginia, which defines the term 'foreign adversary' as China, Cuba, Iran, North Korea, Russia, and Venezuela's Maduro regime);
- prohibition on foreign acquisition of any land (or interest in land) in the state (see e.g., Utah, which restricts the Chinese government and Chinese military companies from acquiring any real estate in the state of Utah; or Tennessee, which prohibits non-US citizens who are not lawful permanent residents of the United States, foreign governments, and foreign businesses from acquiring real property (including water and easement rights) if the individual, government, or business is on the US Department of the Treasury's sanctions list (restrictions also apply to citizens of a sanctioned government); and
- prohibition on acquisition or leasing by 'foreign adversaries' (as defined in statute) of agriculture land, critical infrastructure, and homes within a 'direct line of site' of any Montana military installation.

Florida legislation signed into law in May 2023 is the most comprehensive state legislation enacted. If it survives a current federal lawsuit on civil rights, it:

- prohibits foreign principals (defined in statute) from foreign countries of concern (defined in statute to include China and Russia) from purchasing or acquiring certain rights in agricultural land;
- prohibits foreign principals from a country of concern from purchasing or acquiring other rights in real property within ten miles of a military installation or critical infrastructure facility;
- requires foreign principals who acquire agricultural land within ten miles of a military installation or critical infrastructure facility through enforcement of security interests or in connection with collection of debts to sell the land within three years;
- provides an exception for a natural person who has a legal right to reside in the United States who is buying one single family residence (up to two acres) that is more than five miles from a military installation or critical infrastructure facility; and
- requires persons from countries of concern who currently own real estate subject to restrictions to register their ownership of the land with the state (or face financial penalties for failure to report).

In addition, nearly 20 US state legislatures (and likely more in the coming months) are currently considering passing new laws to address potential economic and national security threats posed by new foreign investments in and acquisitions of US real estate. Highlights of legislation currently pending in state legislatures are as follows:

NEARLY 20 US STATE LEGISLATURES (AND LIKELY MORE IN THE COMING MONTHS) ARE CURRENTLY CONSIDERING PASSING NEW LAWS TO ADDRESS POTENTIAL ECONOMIC AND NATIONAL SECURITY THREATS POSED BY NEW FOREIGN INVESTMENTS IN AND ACQUISITIONS OF US REAL ESTATE.

- Georgia (two bills): legislation is currently pending that would: prohibit individuals, governments, and businesses from China, Iran, North Korea, and Russia from owning real property; and prohibit non-US businesses and non-US citizens who are not residents of the United States and are citizens of countries listed on the US Department of Commerce's 'foreign adversary' list in 15 C.F.R. § 7.4 (currently China, Cuba, Iran, North Korea, Russia, and Venezuela's Maduro regime) from owning agricultural lands within 25 miles of a US military base, installation, or airport.[4]
- Hawaii (two bills): legislation is currently pending that would: prohibit the sale or transfer of real estate in Hawaii to the Chinese Communist Party (and its members) or to '[an] other Hostile Foreign Influence' (not defined in the legislation); and prohibit the sale to foreign entities of real estate within two miles of any federal land, 'land deemed critical to either infrastructure or national security', or to individuals and entities from a country that prohibits foreign individuals from owning private real estate in that country.[5]
- Texas (two bills): In December 2022, legislation was introduced in the Texas House of Representatives that would prohibit a foreign government or foreign government state-owned enterprise from purchasing or leasing Texas agricultural lands. In April 2023, legislation passed the Texas Senate that would prohibit citizens, businesses, and governments of China, Iran, North Korea, and Russia from purchasing (or acquiring title to) real property in Texas.

Pending legislation on foreign ownership of non-residential real estate

There are 14 bills currently pending in the United States Congress that address foreign ownership of US real estate. The bills generally contemplate that CFIUS would continue to oversee and review future real estate acquisitions. Highlights from seven of the bills under consideration by Congress are presented here:

Senate Bill 168 and H.R. 683

- Would amend the CFIUS governing legislation to make purchases, leases and