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The Real Estate Roundtable

October 17, 2019

Electronic Submission
via <https://www.regulations.gov>

Mr. Thomas Feddo
Deputy Assistant Secretary for Investment Security
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 200220

Dear Mr. Feddo:

The Real Estate Roundtable¹ (“the Roundtable”) is pleased to provide comments with respect to Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States (the “Treasury Proposal”) proposed by the U.S. Department of the Treasury (“the Treasury”).²

The Roundtable supports and has previously contributed to the rulemaking process to promote secure investment in real estate, project finance and infrastructure while preserving our national security.

We stand ready to assist the Treasury and The Committee on Foreign Investment in the United States (“CFIUS”) in their integrated efforts to finalize national security rulemaking to protect our country.

Commitment to National Security

These comments are a natural extension of longstanding commitments and ongoing efforts by the Roundtable to support policies and regulations which help build a more secure, resilient and safe real estate industry and infrastructure in the United States.

At the outset, we briefly summarize our ongoing work to protect U.S. real estate and infrastructure through a task force and warning system created by the Roundtable to set and reach many of the same goals that CFIUS continues to accomplish.

¹The Real Estate Roundtable is a non-profit, public policy organization based in Washington D.C., which for decades has represented before policymakers, Congress and regulators the interests of real estate with a focus in 2019 on national and homeland security, tax, capital and credit, environment and energy insofar as real estate is concerned. Two-thirds of the Roundtable is comprised of members from public and privately-owned real estate enterprises, an additional 20% of our members hail from the financial services industry, 11% are members from leading real estate trade associations and the remaining 3% come from the asset management industry. See <http://www.rer.org>.

²84 Fed. Reg. 50174 (Sept. 24, 2019)(“Part 800”).

Homeland Security Task Force

We generally support the finalization of the Treasury Proposal to further implement The Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”), which amends Section 721 of the Defense Production Act of 1950.

The Roundtable recognizes the need underscored by the enactment of FIRRMA to review investments and transactions in order to protect our nation from market participants whose intent, through investments, acquisitions or other transactions (or other business activities) is to jeopardize national security, carry out international or domestic terrorism, criminal activities, cyber-attacks, exploit data and information or otherwise to destabilize our country’s borders or homeland security.

The Roundtable continues to help build a more secure and resilient real estate industry to withstand both physical and cyber attacks through its Homeland Security Task Force (“HSTF”). HSTF is focused on enhancing the ability of commercial facilities to meet current and future security-related challenges by analyzing threats, sharing information and fostering resilience through a broad threat matrix of physical and cyber risks. Members of the HSTF meet regularly and brief representatives of non-voting members of CFIUS, such as the Office of the Director of National Intelligence, as well as voting members of CFIUS, such as the Department of Homeland Security. An important objective of HSTF is to address potential national security threats specifically to infrastructure, airports and maritime ports, as well as to other real estate and commerce in the United States more generally.

Real Estate Information Sharing and Analysis Center

The Roundtable recognizes and applauds the efforts of CFIUS and its chair, the Treasury, to scrutinize investments and transactions that may jeopardize or exploit sensitive information or data. The protection of certain personal and other data continues to be a critical national security priority for CFIUS. The Roundtable strongly commends this. We also note our efforts to support data protection for nearly two decades; the Roundtable established in 2003 the Real Estate Information Sharing and Analysis Center (“RE-ISAC” or “the Center”), a public-private partnership between the U.S. commercial facilities sector and federal homeland security officials. RE-ISAC proactively manages risk and strengthens the security and resilience of the U.S. commercial facilities sector.

RE-ISAC’s mission includes providing an early warning system alerting real estate market participants and other Americans of terrorism as well as cyber attacks and natural hazards. The Center also facilitates information sharing between the government and the commercial facilities sector.³

After launching and then operating HSTF and RE-ISAC for many years, we readily acknowledge that it is in our best interests to simultaneously have a secure real estate market and safe country within which to invest. We therefore wholeheartedly commend the efforts of CFIUS, and in particular the Treasury, to promulgate rules for the protection of our markets and country.

³In carrying out these important tasks and accomplishing its mission, RE-ISAC operates in compliance with Presidential Policy Directive 21, “Critical Infrastructure Security and Resilience” (Feb. 12, 2013), which mandates that public and private sectors share information about physical and cybersecurity threats and vulnerabilities to help protect critical infrastructure in the U.S.

The Roundtable also recognizes that investors both in the U.S. and abroad value predictability and transparency in the regulation of real estate and other investments. While we appreciate the need for regulatory flexibility, we discuss in our commentary certain aspects of the proposed rules that not only are unnecessarily complex but undermine predictability and transparency from the standpoint of investors (and may even result in decreased or delayed foreign investment in urban areas).

There are certain aspects of the rules proposed in Part 802 that enhance predictability and add clarity as to which real estate is “covered real estate” on the one hand, and which is outside of the scope of the regulatory jurisdiction of CFIUS, on the other. We appreciate that Section 802.211(b)(1) provides a one-mile “close proximity” measure and clause (b)(2) within the same section describes how real estate can be within an “extended range” (of certain enumerated military installations) between one and 100 miles. Section 802.211(b)(3) focuses on real estate that is within certain listed counties identified in Appendix A of Part 802 insofar as certain military installations are concerned. When it comes to offshore real estate, it is proposed in §802.211(b)(4) that the jurisdiction of CFIUS extends to 12 nautical miles from the U.S. coastline. We support these concepts because they simplify CFIUS rules and add predictability by enabling market participants to better predict what is “covered real estate” (as that term is used in the complex body of CFIUS rules supplemented by the Treasury Proposal).

While all of this helps investors better understand whether a certain parcel of real estate is “covered real estate,” certain exceptions to that term, as written and recently proposed by the Treasury, may discourage investment in urban areas or, at a minimum, add unnecessary complexity and make the term “covered real estate” moot in certain urban areas; we speak of the “urbanized area” and “urban cluster” exceptions (together referred to in our comments as the “Urban Exceptions”).

Urbanized Area

The “urbanized area” (a term defined by the Census Bureau) exception, embodied in Sections 802.217(c) and 802.239 of the proposed rule, excepts from CFIUS jurisdiction covered real estate in an “urbanized area,” but not all real estate in urbanized areas come within the exception because of certain “exceptions to the exception,” one of which is vaguely described as real estate in close proximity to a “sensitive facility or property” (which may not be understood as “sensitive” from a national security perspective, especially by a non-U.S. market participant). The following are the “exceptions to the exceptions,” meaning, these categories of real estate may still be “covered real estate” notwithstanding their location within “urbanized areas”:

- Real estate in “close proximity” to a military installation; or
- Real estate that is in “close proximity” to “another *sensitive facility or property* of the U.S. Government” (as listed in Appendix A of Part 802)(emphasis is our own), or
- Real estate is within, or “will function as part of,” an airport or maritime port.

Urban Cluster

The Treasury Proposal also includes an “urban cluster” exception, which is based on the Census Bureau’s “urban cluster” concept developed for Census 2000, along with carve-outs which are similar to those applicable to the “urbanized area” exception. Urban clusters are those areas containing at least 2,500 but no more than 50,000 people, and urbanized areas are those with more than 50,000. If the rules are adopted, as proposed in their current form, the regulatory regime over real estate investment in urban areas would become less predictable, transparent and workable, as illustrated by an hypothetical investment in a portfolio of multiple real estate properties in Washington D.C., where our headquarters is located.

A non-U.S. investor’s prospective investment in a portfolio of properties located in and around an urban area like Washington D.C. becomes more complicated with the Treasury Proposal due to the carve-outs to the Urban Exceptions. There are several reasons for this.

First, there are nearly thirty (27 to be exact) military installations, each identified in the appendix to the proposed Part 802, which are located in the District of Columbia, Virginia and Maryland and many are within the “extended range” of 100 miles from our nation’s capital where scores of government offices undertake sensitive national security operations (as is also the case with respect to several other large U.S. cities).

For a non-U.S. investor, the task of analyzing each property within our hypothetical Washington D.C. portfolio using each of the “close proximity” and “extended range” tests (as applied to 27 military installations) is a daunting undertaking. The non-U.S. investor is also to be mindful of the several carve-outs to the applicable Urban Exception and while the airport-related carve-out to the urbanized area exception is easy to apply in the case of a property which is within, or which “will function as part of” Ronald Reagan Washington National Airport, in our example, sensitive facilities and properties in and around Washington D.C. are ubiquitous, rendering in all likelihood the urbanized area exception moot in practice -- and potentially resulting in CFIUS review to be triggered in many unnecessary cases where little or no national security aspect otherwise exists in the transaction.

If one part of a hypothetical real estate portfolio is within one-hundred miles of an identified military installation, but the parcel is located in a *rural* area (and the transaction otherwise poses no national security concern), then CFIUS rules and review may still be triggered with respect to that rural property and perhaps this is not what the Treasury intended when it defined “covered real estate.”

The non-U.S. prospective investor in our example would also need to analyze the transaction together with each property in the hypothetical portfolio of Washington D.C. real estate under the Treasury’s recently proposed rules in Part 800, with its considerable complexity, as published on September 24, 2019,⁴ in order to confirm that nothing about the transaction would trigger a CFIUS-related obligation due to the rules in Part 800. The proposed real estate rules embodied in new Part 802 comprise 135 pages and Treasury’s proposed Part 800 amounts to 184 pages, leading market participants to be guided by, and obliged to comply with over 300 pages of recent CFIUS rules implementing FIRRMA. All of this (coupled with the difficulty in determining in urban areas whether a parcel of real estate is “covered real estate”) may have the unintended consequence of either delaying or dissuading investment and foreign investors in and around not only Washington D.C. but many other large urban areas.

⁴84 Fed. Reg. 50174 (“Part 800”).

Exceptions

In the spirit of bringing further transparency to, and simplifying key aspects of the Treasury Proposal, we encourage Treasury to the extent possible to simplify the Treasury Proposal with, for example, more “bright line” tests and concepts such as a “white list” of safe and secure countries, with requisite internal controls, whose market participants are exempt from some or all of the restrictions that would be imposed by the Treasury Proposal in its final form.

As it stands, an investment by a resident of Canada, Australia, the United Kingdom or Singapore undergoes the same national security review and CFIUS regulatory scrutiny as a similar investment made by an individual who resides in, or is associated with a country which in the not so distant past was at war --or was engaged in an armed or other conflict-- with America. While we gather that such a list and other bright line concepts are being formulated, our hope is that the list is published at the time that the Treasury Proposal is promulgated in final form.

We offer further comments on how Treasury might approach the exceptions for trusted investors below.

1. Application of Sections 802.215 and 802.1001

Under section 802.215 of Part 802, an “excepted real estate foreign state” is a state that has met the following two criteria: (i) CFIUS has identified the foreign state as an eligible foreign state; and (ii) CFIUS has determined, under section 802.1001(a), that the state “has made significant progress toward establishing and effectively utilizing a robust process to analyze foreign investments for national security risks and to facilitate coordination with the United States on matters relating to investment security.”

- a. CFIUS should provide clear guidelines identifying the factors CFIUS will apply when identifying a foreign state under criterion (i) and determining whether the foreign state has met criterion (ii). The preamble to the proposed rule indicates that the Treasury will publish on its website the factors which CFIUS will consider with respect to the application of criterion (ii). CFIUS should be as transparent as possible so that states have a clear understanding and guidance with respect to what is expected by CFIUS. CFIUS should also publish factors for consideration with respect to criterion (i).
- b. Section 802.215 states that CFIUS might delay the effective date of criterion (ii) until two years after the effective date of Part 802. During the September 27, 2019 Stakeholder Briefing on the Proposed Regulations Implementing FIRRMA, Assistant Secretary Feddo explained that foreign states identified by CFIUS under criterion (i) will be granted a grace period to meet criterion (ii), and that, until such time as criterion (ii) becomes effective, any foreign state listed by CFIUS pursuant to criterion (i) will qualify as an “excepted real estate foreign state.” In the final rule, CFIUS should explicitly state that until criterion (ii) becomes effective, any state that CFIUS identifies under criterion (i) qualifies as an excepted real estate foreign state.

- c. CFIUS should consult with states seeking to qualify as excepted real estate foreign states and provide an opportunity for each of them to clarify and to demonstrate their qualifications under sections 802.215 and 802.1001. Such an opportunity would ensure that CFIUS makes its excepted real estate foreign state-related determinations with all relevant information. Similarly, CFIUS should give notice and consult with a state when CFIUS considers removing that state from the list of excepted real estate foreign states.
- d. The preamble to the proposed rule indicates that CFIUS intends to designate only a limited number of eligible foreign states under criterion (i), at least initially. CFIUS should, in the course of such designations of eligible foreign states, seek to ensure that investors from states with close strategic partnerships with the United States, such as states that have a mutual defense treaty or defense cooperation agreement with the United States, are not placed at a competitive disadvantage as compared to investors from other states. CFIUS should seek to ensure a level and competitive playing field for investors that do not present security risks.

2. Excepted Trusted Real Estate Investors

Under section 802.216 of the Treasury Proposal, only foreign investors who are foreign persons with certain relationships to excepted real estate foreign states qualify as excepted real estate investors. Other investors do not qualify, even if such investors are established in a country with a close strategic partnership with the United States, frequently engage with CFIUS, and have been found by CFIUS in prior reviews not to pose a national security risk.

In the final rule, CFIUS should allow “excepted trusted real estate investors” who are not from excepted real estate foreign states to be afforded the same exemptions as excepted real estate investors. CFIUS could review and decide applications to be treated as an excepted trusted real estate investor on a case-by-case basis.

CFIUS could also, in its absolute discretion, rescind an investor’s status as an excepted trusted real estate investor at any time in the event that CFIUS determines that an investor no longer satisfies the relevant criteria.

To determine whether an investor should receive or attain the “excepted trusted real estate investor” status, CFIUS could establish a streamlined petition process. We recommend that the Treasury consider, as a part of the final rules in Part 802, the following proposed language:

PETITION FOR EXCEPTED TRUSTED REAL ESTATE INVESTOR

§ 802.xxx Petition Process

(a) An investor may petition for a determination as to whether it qualifies for an exemption under § 802.xx [Excepted Trusted Real Estate Investor].

(b) *Contents of petition.* The petition for a determination shall be no longer than 5 pages, not including any documentation submitted in support of the petition. The petition must explain the basis of the investor’s request for an exemption under § 802.xx.

(c) *Factors for consideration*: In determining whether to grant a petition for excepted trusted real estate investor status, the Committee shall consider all relevant factors, including the place of establishment and principal place of business of the petitioner, the petitioner's history of cooperation with the Committee, the nature of the petitioner's corporate governance, the nationality of the members of the board of the petitioner, the nationality of the shareholders and such other factors as the Committee deems relevant.

(d) *Petition determination*. The Committee shall accept a petition within 5 business days of determining the petition is complete, and must decide whether to grant the exemption within 30 days after accepting the petition. The Committee may request additional information from the investor during the 30-day period. If the Committee denies a request for an exemption, it may in its discretion allow the investor to reapply without prejudice.

(e) *Annual report*. One year after the Committee has granted an exemption or waiver to an excepted trusted real estate investor, and every year thereafter, the petitioner must submit to the Committee a report updating the information that it provided to the Committee in its petition and such other information as the Committee may request.

Distinction between a U.S. Business and Real Estate

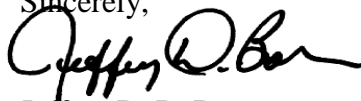
Part 802 applies to investments in real estate, which Section 802.235 of the proposed rule defines as "any land, including subsurface and submerged, or structure attached to land, including any building or any part thereof, that is located in the United States." Part 802 does not apply to acquisitions of a U.S. business (which are instead covered by Part 800).

CFIUS should provide further clarification as to the precise circumstances in which the acquisition of commercial real estate constitutes the acquisition of a U.S. business so that market participants can properly apply Part 800 and Part 802 to their transactions. For example, assume that a foreign person acquires a newly-constructed medical office building, but at the time of the acquisition, there are no tenants. Should that acquisition be treated as the acquisition of (a) a U.S. business, and thereby come within Part 800, or (b) real estate, thereby triggering Part 802? For these reasons, we seek further clarification from the Treasury.

We wholeheartedly support the integrated mission of the Treasury and CFIUS generally, and, in particular, the important task of finalizing rules to protect our national security.

The Real Estate Roundtable appreciates the opportunity to provide these comments as well as the difficult issues and considerations handled by the Treasury. We stand ready to provide any assistance in this process. Should you have any questions concerning this letter, please do not hesitate to contact Clifton E. Rodgers, Jr. or me directly at 202.639.8400, or by email at crodgers@rer.org.

Sincerely,



Jeffrey D. DeBoer

President and Chief Executive Officer