

考察美国外国投资委员会在后COVID-19时代对房地产市场的影响

Examining CFIUS Implications for the Real Estate Market in the Post COVID-19 World

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由于寻求购买大幅度折扣地产或不良资产的大批房地产投资者的涌现以及房贷抵押被执行数量的预期增长，此次 COVID-19 疫情在全球的爆发及其引发的经济混乱，有可能引发美国房地产市场的震动。美国境外的非美国本土房地产融资贷款人及投资者需要了解其对美国地产的投融资可能会引发美国外国投资委员会（CFIUS）的审查，而 CFIUS 也有可能驳回某些涉及外国投资者的房地产投资和房贷违约救济。

The COVID-19 pandemic and the resulting economic turmoil have the potential to shake up the U.S. real estate market due to an anticipated influx of real estate investors looking to purchase heavily discounted, distressed

assets and an expected increase in real estate foreclosures. Non-U.S. real estate lenders and investors need to be aware of the potential that the Committee on Foreign Investment in the United States (CFIUS) may have jurisdiction to review, and potentially disallow certain investments in real estate and mortgage default remedies where foreign persons are involved.

近期美国外国投资委员会（CFIUS）对房地产交易管辖权的扩大

Recently Expanded CFIUS Jurisdiction Over Real Estate Transactions

CFIUS 是一家美国跨部门的联合委员会，其负责审查涉及外国收购和投资美国企业的交易对国家安全的潜在影响。CFIUS 的管辖权以往限于非美国企业或个人对一家“美国企业”获得“控制”的交易（“可审查的交易”），例如其审查的交易中会包括涉及外国收购或投资的美国企业所拥有的房地产靠近某一敏感政府场所。在 2020 年 2 月 13 日，新的 CFIUS 审查规则生效。该规则实施了《外国投资风险审查现代化法案》（FIRMMA）并扩大了 CFIUS 的管辖权范围以包括“可审查的房地产交易”。根据新规则，关于一项“可审查的房地产交易”，CFIUS 仅在该交易是不属于 CFIUS 传统审查框架下的“可审查的交易”的情况下，CFIUS 才会行使管辖权。换句话说，对于涉及现有美国业务的房地产交易（如：对拥有太阳能农场的公司的投资），CFIUS 首先会根据 CFIUS 的长期传统规则将其作为“可审查的交易”进行审查，而仅在该投资或收购不属于传统“可审查的交易”时，CFIUS 会将其作为“可审查的房地产交易”进行审查。

CFIUS is the U.S. inter-agency committee responsible for reviewing foreign acquisitions and investments in U.S. businesses for their potential impact on national security. CFIUS jurisdiction has historically been limited to transactions where a foreign person (Note, the term foreign “person” hereunder includes both entity and individual)

obtains “control” over a “U.S. business” (“covered transactions”), which can include transactions where real estate held by the U.S. business is in close proximity to sensitive government sites. On February 13, 2020, new CFIUS rules went into effect that implemented the Foreign Investment Risk Review Modernization Act (FIRRMA) and expanded CFIUS jurisdiction to include “covered real estate transactions.” Under the new rules, CFIUS jurisdiction over “covered real estate transactions” is only implicated where the transaction is not a “covered transaction” under the traditional CFIUS framework. In other words, real estate transactions that involve an existing U.S. business (e.g., an investment in a company that owns solar farms) will initially be reviewed as a “covered transaction” under longstanding CFIUS rules, and will only be reviewed as a “covered real estate transaction” if the investment or acquisition is not a traditionally “covered transaction.”

CFIUS“可审查的房地产交易”包括非美国企业或个人通过购买、租赁和经特许权获得 CFIUS “可审查的房地产”，从而获得对该资产的至少下列四项财产权利中的三项权利：

“Covered real estate transactions” include purchases or leases by, or concessions to, a foreign person of “covered real estate” that affords the foreign person at least three of the following four property rights:

- 实际获取/使用该房地产的权利；
The right to physically access the real estate;
- 排除他人实际获取/使用该房地产的权利；
The right to exclude others from physically accessing the real estate;
- 改进或开发该房地产的权利；或
The right to improve or develop the real estate; or
- 在该房地产上附着固定或不可移动结构或物体的权利。
The right to attach fixed or immovable structures or objects to the real estate.

CFIUS“可审查的房地产”由两大类房地产构成：（i）与航空港或海港相连接的房地产，和（ii）与在法规附件中列出的美国军事设施和其他敏感美国政府设施临近的房地产。

“Covered real estate” consists of two general categories of real estate: (i) real estate connected to airports and maritime ports, and (ii) real estate described by its proximity to U.S. military installments and other sensitive U.S. Government facilities that are listed in the annexes to the regulations.

CFIUS 近期发布了一项地理参考工具，其可显示在一个选定地址附近的军事设施和政府场所。

CFIUS recently published a geographic reference tool that shows what military facilities and government sites are in proximity to a given address.

例外房地产交易

Excepted Real Estate Transactions

我们在此列出几项值得注意的例外情况，在该等例外情况下，当交易涉及“可审查的房地产”时将不会受到 CFIUS 的管辖。

There are several notable exceptions when transactions involving “covered real estate” will not fall under CFIUS’ jurisdiction.

1. 位于美国人口普查局定义的“城市区域”或“城市群”内的“可审查的房地产”，除非该等房地产位于航空港或海港，或者距离法规附件中列出的美国军事设施和其他敏感美国政府设施在 1 英里之内。
“Covered real estate” in “urbanized areas” or “urban clusters” as defined by the U.S. Census Bureau, unless

such real estate is located within an airport or maritime port, or within 1 mile of a military installment or other sensitive government facility listed in the annex to the regulations.

- a. 上述 CFIUS 发布的新地理参考工具也指明了由美国人口普查局定义的“城市区域”或“城市群”。

The new geographic reference tool also identifies urbanized areas and urban clusters as designated by the U.S. Census Bureau.

2. 应属于“可审查的房地产”的公寓或独户房屋。
“Covered real estate” that is a “single housing unit.”
3. 向非美国企业或个人出租或特许授予仅为向大众出售消费品或提供服务而使用的“可审查的房地产”；
The lease of or concession to a foreign person of “covered real estate” that is used only for the purpose of engaging in the sale of consumer goods or services to the public.
4. 非美国企业或个人在商业办公建筑中拥有不超过 10% 商业办公空间的“可审查的房地产”。
“Covered real estate” that is commercial office space in a building where the foreign person does not have more than 10% of the commercial office space in a building.

尽管向 CFIUS 进行“可审查的房地产交易”申报为自愿程序，获得审查许可可为交易双方提供一项监管安全港，以防止 CFIUS 在之后为了国家安全原因禁止或叫停交易。

While filing with CFIUS is a voluntary process for “covered real estate transactions,” obtaining clearance provides the parties with a regulatory safe harbor preventing CFIUS from later prohibiting or suspending the transaction for national security reasons.

有关房贷违约和由房地产为担保的融资交易的 CFIUS 考虑事项

CFIUS Considerations for Mortgage Defaults and Lending Transactions Secured by Real Estate

通常来说，房屋抵押贷款、借贷交易以及其他以房地产为担保的融资安排都不属于 CFIUS 的管辖范围，因为 CFIUS “可审查的房地产”仅包括将上文所列的四项财产权利中的三项授予外国投资者或买家的房地产。然而，CFIUS 可能会对如下交易享有管辖权而进行审查：

Generally, mortgages, lending transactions, and other real estate-secured financing arrangements do not fall under CFIUS’ jurisdiction since “covered real estate transactions” only include those that confer three of the four property rights listed above to a foreign investor or buyer. However, CFIUS may have jurisdiction to review a transaction where:

- 贷款违约或触发违约的事件已经发生或即将发生；或
A default or triggering event has occurred or is imminent; or
- 债务赋予贷款人上述房地产权利中的三项权利。
The debt affords the lender three of the four aforementioned property rights in the real estate.

需要注意可能会发生的情形是，非美国企业或个人获得房地产的附条件的或有权益(指不确定的未来权益)是可立即被 CFIUS 审查的，尽管这将取决于对实际情况的个案评估，包括评估转换或有权益的紧急性，转换或有权益是否取决于外国当事人控制范围内的因素，以及经转换或有权益后获得的利益和权利是否能够在购买时合理确定。

Note there may also be situations where acquiring a contingent interest in real estate is immediately reviewable, though this will depend on a case-by-case assessment of the facts, including the imminence of conversion; whether conversion depends on factors within the foreign party's control, and whether the interest and rights that would be acquired upon conversion can be reasonably determined at the time of acquisition.

给外国投资者和贷款人的建议

Recommendations for Foreign Investors and Lenders

寻求购买美国价值低估和不良房地产资产权益的外国投资者应该意识到，CFIUS 对该等交易可能会有管辖权进行审查，并可能不准许赋予外国投资者上文所列四项财产权中三项权利的投资交易。购买 CFIUS “可审查的房地产” 权益的投资者需要在其经协商纳入协议的财产权与增加被 CFIUS 审查风险的两者之间进行权衡。或者，外国房地产投资者可能希望将某些所有权，如对财产的实际获取/使用权，归属于一家 “美国企业或个人” 的第三方地产核查机构。

Foreign investors looking to purchase an interest in undervalued and distressed real estate assets in the U.S. should be aware that CFIUS may have jurisdiction to review, and potentially disallow investments that afford the investor three of the four aforementioned property rights. Investors purchasing an interest in “covered real estate” may want to weigh the property rights they negotiate into an agreement against an increased risk of CFIUS review. Alternatively, foreign real estate investors may want to vest certain ownership rights, such as physical access to the property, in a third-party inspector that is not a foreign person.

类似地，非美国贷款人也需要考虑在通过契据转让以代替行使房地产止赎权或行使附条件的或有利益所涉及的 CFIUS 审查的影响。如果交易可能属于 CFIUS 的管辖，贷款人可能希望优先考虑债务重组或非违约救济。此外，签订融资协议的非美国贷款人应认识到存在其可能不被允许充分 获得既得权益或全部违约救济的风险，包括未经 CFIUS 审查的情况下，行使契据转让以替代止赎权行使。

Similarly, foreign lenders will need to consider the CFIUS implications of exercising a deed in lieu of foreclosure or contingent equity interests in real estate. Lenders may want to prioritize debt restructuring or non-default remedies if the transaction is likely to fall under CFIUS jurisdiction. Additionally, non-U.S. lenders entering into financing agreements should be cognizant of the risk that they may not be permitted to fully take advantage of vesting equity interests or the full scope of default remedies, including exercising a deed in lieu of foreclosure that was negotiated into an agreement, without going through CFIUS review.

外国贷款人和股权投资者应在交易早期向 CFIUS 说明情况并实施全面的风险评估，以审查交易中的房地产是否受到 CFIUS 管辖的 “可审查的房地产”。

Foreign lenders and equity investors should account for CFIUS in the early stages of a transaction and conduct comprehensive risk assessments that examine whether the real estate at issue would be “covered real estate” subject to CFIUS jurisdiction.