

CFIUS Finalizes Rule on “Excepted Foreign State” Definition and Announces Determinations Related to Australia, Canada, and New Zealand

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The U.S. Department of the Treasury (Treasury), which chairs the Committee on Foreign Investment in the United States (CFIUS or the Committee), recently announced several actions pertaining to its mandate under the Foreign Investment Risk Review Modernization Act (FIRRMA) to limit the application of CFIUS’s jurisdiction over non-controlling “covered investments” and certain “covered real estate transactions” involving certain foreign persons with close ties to an “excepted foreign state” or an “excepted real estate foreign state.”

Under the CFIUS regulations, a foreign person that qualifies as an “excepted investor” or “excepted real estate investor” is exempted from CFIUS jurisdiction (including the mandatory filing requirements for certain transactions) with respect to “covered investments” or “covered real estate transactions,” respectively.

Treasury Final Rule

On January 6, 2022, Treasury published a final rule modifying the definitions of “excepted foreign state” and “excepted real estate foreign state” in its regulations implementing FIRRMA. The final rule is unchanged from the proposed rule, which we summarized in November 2021. The rule extends CFIUS’s deadline – by one year, to February 13, 2023 – to make a determination that an eligible foreign state has “established and is 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

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security” (or, in the case of potential excepted real estate foreign states, that the foreign state has “made significant progress” towards doing so).

New Zealand

Additionally, on January 5, 2022, CFIUS identified New Zealand as an eligible foreign state under the “excepted foreign state” and “excepted real estate foreign state” regulations (at 31 C.F.R. §§ 800.218 and 802.214, respectively). CFIUS identified New Zealand as eligible based “on its intelligence-sharing relationship with the United States and its collective defense arrangement and cooperation with the United States.” CFIUS previously identified Australia, Canada, and the United Kingdom (UK) as eligible foreign states in February 2020 “due to aspects of their robust intelligence-sharing and defense industrial base integration mechanisms with the United States.”

Australia and Canada

Finally, CFIUS issued determinations that Australia and Canada have met the requisite criteria for remaining excepted foreign states and excepted real estate foreign states once the new requirements go into effect. Specifically, the Committee found that both Australia and Canada have established and are 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. Therefore, Australia and Canada will remain excepted foreign states and excepted real estate foreign states absent further Committee action.

Next Steps

For the UK and New Zealand to remain excepted foreign states and excepted real estate foreign states after February 12, 2023, CFIUS must publish the relevant determinations regarding those countries’ foreign investment review processes and coordination with the United States on investment security matters. The UK’s new foreign investment screening law, the 2021 National Security and Investment Act, recently took full effect on January 4, 2022, which suggests that the UK may not yet be effectively utilizing the new process and may explain why CFIUS did not issue such a determination. Additional countries, including Japan and Germany, recently passed laws to strengthen their respective foreign investment review process and may qualify as “excepted foreign states” in the near future.

Wiley has an unparalleled ability to assist clients with investments that raise national security concerns. Our team has direct experience within the government managing the CFIUS process and assisting clients on CFIUS reviews. We have more than two decades of experience handling matters involving national security, including CFIUS, export controls, Team Telecom, and the Defense Counterintelligence and Security Agency (DCSA), and have counseled clients in transactions that involve nearly every industry sector subject to CFIUS review.

Please reach out to any of the authors listed on this alert should you have any questions about the Treasury rule or the CFIUS regulations governing excepted foreign states and excepted real estate foreign states.