

ALERT

Treasury Proposes Rule to Delay CFIUS “Excepted Foreign State” Determinations

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On November 15, 2021, the U.S. Department of the Treasury (Treasury) published a proposed rule that would modify the definitions of “excepted foreign state” and “excepted real estate foreign state” in its regulations implementing the Foreign Investment Risk Review Modernization Act (FIRRMA), a law that significantly expanded the jurisdiction and operational mandate of the Committee on Foreign Investment in the United States (CFIUS). Comments on the proposed rule are due December 15, 2021.

The regulations implementing FIRRMA limit CFIUS’s jurisdiction over non-controlling “covered investments” and certain “covered real estate transactions” involving certain foreign persons – defined as “excepted investors” and “excepted real estate investors,” respectively – with close ties to an “excepted foreign state” or an “excepted real estate foreign state.” To date, CFIUS has identified the United Kingdom (UK), Australia, and Canada as excepted foreign states and excepted real estate foreign states “due to aspects of their robust intelligence-sharing and defense industrial base integration mechanisms with the United States.”

Beginning February 13, 2022, in order to qualify as or remain eligible as an excepted foreign state, CFIUS will be required to have made a determination that the 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 security.” In order to qualify as or remain eligible as an excepted real estate foreign state, CFIUS will be required to have made a determination that the foreign state has “made significant progress” towards doing so. CFIUS has not yet issued any such determinations under these new criteria, and

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Committee on Foreign Investment in the
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Treasury's proposed rule would extend CFIUS's deadline to make these determinations to February 13, 2023.

The Treasury Department did not clarify its reasoning behind the deadline extension, but the proposed rule notes that the delay is "desirable given certain ongoing changes to foreign investment review regimes." In that regard, the UK, for example, passed the National Security and Investment Act earlier this year, which significantly reforms its foreign investment screening regime and will be fully implemented on January 4, 2022. Media reports, however, suggest that Treasury's delay may be attributable to internal CFIUS operations rather than international coordination efforts.

Wiley has an unparalleled ability to assist clients on investments that raise national security concerns. Our team has direct experience within 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 attorneys listed on this alert should you have any questions about the proposed rule.