



U.S. Department of the Treasury **Office of Public Affairs**

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Contact: Treasury Public Affairs, (202) 622-2960

Fact Sheet: Final Regulations Modifying the Definitions of Excepted Foreign State and Excepted Real Estate Foreign State and Related Actions

Summary

Today, the Department of the Treasury announces final regulations modifying the definitions of excepted foreign state and excepted real estate foreign state and several concurrent actions taken by the Committee on Foreign Investment in the United States (CFIUS).

The final rule extends the effectiveness date for certain CFIUS determinations related to eligible foreign states' foreign investment screening regimes and coordination with the United States on matters relating to investment security. CFIUS separately has determined that Australia and Canada, two foreign states already identified as eligible, have met the determination requirements, which are set forth in part 800 for excepted foreign states and part 802 for excepted real estate foreign states. Lastly, CFIUS has identified New Zealand as an eligible foreign state under parts 800 and 802.

Background

As required by the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), the CFIUS regulations limit the application of CFIUS's jurisdiction over non-controlling "covered investments" and certain real estate transactions by certain foreign persons. These excepted persons are defined as "excepted investors" and "excepted real estate investors." These investors are defined in part based on their close ties to certain "excepted foreign states" and "excepted real estate foreign states," respectively.

The CFIUS regulations define excepted foreign state by a two-criteria conjunctive test, with delayed effectiveness for the second criterion. The first criterion is that CFIUS identify a foreign

state as an eligible foreign state. The second criterion is that, by the end of the two-year delayed effectiveness period (*i.e.*, by February 13, 2022), CFIUS 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 security. The CFIUS regulations define excepted real estate foreign state through an analogous two-criteria test, except that the second criterion is a determination that the foreign state has “made significant progress” toward establishing and effectively utilizing the review process and coordination.

In 2020, CFIUS identified Australia, Canada, and the United Kingdom as the initial eligible foreign states. As detailed in the CFIUS regulations, these countries were deemed excepted foreign states and excepted real estate foreign states without regard to the determination criterion, which was not to be applicable until February 13, 2022.

Rulemaking

On November 10, 2021, the Department of the Treasury issued a proposed rule that would modify the definitions of excepted foreign state and excepted real estate foreign state. Today, the Department of the Treasury issued a final rule without change, which will be effective on February 4, 2022.

The final rule extends the effective date of the determination criterion in each definition by one year, to February 13, 2023. Under the final rule, until the new date, a CFIUS decision to identify a foreign state as an eligible foreign state is all that is needed for a foreign state to meet the definition of excepted foreign state and excepted real estate foreign state. The second, determination criterion will not be an effective part of either definition until February 13, 2023. This extension is desirable given ongoing changes to foreign investment review regimes.

The full text of the final rule can be found on the Department of the Treasury’s website: <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius>.

Other CFIUS Actions

Concurrently with the issuance of the final rule today, the Department of the Treasury also issued notices in the *Federal Register* announcing that CFIUS determined that each of Australia and Canada had satisfied the criteria set forth in 31 C.F.R. § 800.1001(a), with respect to excepted foreign states, and 31 C.F.R. § 802.1001(a), with respect to excepted real estate foreign states. Therefore, Australia and Canada are and will remain excepted foreign states and excepted real estate foreign states absent further Committee action and notice in the *Federal Register*.

Finally, the Department of the Treasury is also announcing CFIUS’s decision to identify New Zealand as an eligible foreign state under 31 C.F.R. § 800.218(a) and 31 C.F.R. § 802.214(a), effective as of today, and has updated its website accordingly. CFIUS identified New Zealand as eligible based, among other factors, on its intelligence-sharing relationship with the United States and its collective defense arrangement and cooperation with the United States.

Consequently, under the amended regulations, New Zealand is deemed to be an excepted foreign state and excepted real estate foreign state without regard to the determination criterion, which is not applicable until February 13, 2023.

The notices can be found on the section of the Department of the Treasury's website that displays the list of excepted foreign states and excepted real estate foreign states:
<https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-excepted-foreign-states>.

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