

# Foreign Investment Alert

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## CFIUS Updates Excepted Foreign State Rules

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### Key Points

- CFIUS added New Zealand to its white list of “excepted foreign states,” joining Australia, Canada and the United Kingdom in the group of countries whose investors may qualify for jurisdictional carve-outs and exemptions from mandatory filing for their investments.
- CFIUS formally determined that Australia and Canada have established and are effectively utilizing a robust process to screen foreign investments for national security risks and, as a result, those countries will remain “excepted foreign states” indefinitely until further notice.
- CFIUS finalized its proposed rule extending its deadline to make determinations regarding the sufficiency of the foreign investment screening mechanism for the countries on the initial list of excepted foreign states. Accordingly, CFIUS now has until February 13, 2023 to make this determination with respect to the United Kingdom and New Zealand and thereby allow them to remain on the list of excepted foreign states.

### Background

The Committee on Foreign Investment in the United States (CFIUS) is the inter-agency body through which the U.S. government formally monitors and reviews foreign investment in the United States for possible national security concerns. In 2020, CFIUS implemented three significant changes pursuant to the Foreign Investment Risk Review Act of 2018 (FIRRMA) that, among other things:

- Expanded CFIUS’s jurisdiction beyond “control” transactions to include certain noncontrolling investments in critical **technology**, critical **infrastructure** and sensitive personal **data** companies (so-called “TID U.S. businesses”).
- Imposed mandatory filing requirements for certain sensitive transactions.
- Expanded CFIUS’s jurisdiction to include certain real estate transactions.<sup>1</sup>

In parallel, FIRRMA also authorized CFIUS to exempt certain categories of foreign persons (i.e., “excepted investors” associated with “excepted foreign states”) from the expanded jurisdiction and mandatory filing requirements.<sup>2</sup> Although there is a high bar

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to qualifying as an “excepted investor,” the initial threshold requirement is that the investor be associated with an “excepted foreign state.”<sup>3</sup>

As a result, CFIUS currently only needs to “identify” countries as excepted foreign states on its website for investors from those countries to be eligible for the “excepted investor” jurisdictional carve-outs and mandatory filing exemptions.<sup>4</sup>

## Recent Developments

On January 5, 2022, CFIUS added New Zealand to its list of excepted foreign states on its [website](#) based on, among other factors, “its intelligence-sharing relationship with the United States and its collective defense arrangement and cooperation with the United States.”<sup>5</sup> Prior to this action, New Zealand was the only member of the “5 Eyes” intelligence sharing pact to be excluded from the CFIUS white list.

In addition, under the [final rule](#) published on January 6, 2022, CFIUS pushed back its deadline for having a functioning CFIUS-style foreign investment screening mechanism in place as a requirement for remaining an excepted foreign state by one year to February 13, 2023. After that date, remaining (or becoming) an excepted foreign state will require a more formal determination by CFIUS 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.”<sup>6</sup>

Finally, notwithstanding that one-year postponement, on January 5, 2022, CFIUS made formal [determinations](#) that both Australia and Canada have met that more robust excepted foreign state criteria.<sup>7</sup> Consequently, Australia and Canada will remain excepted foreign states – and Australian and Canadian investors will remain eligible for “excepted investor” status – indefinitely absent further CFIUS action and notice in the Federal Register.

CFIUS must make similar determinations regarding the United Kingdom and New Zealand before February 13, 2023 (or further extend the deadline to make that determination) for investors from those countries to remain eligible to qualify as “excepted investors” after that date.

## Implications

The recent developments are notable, but ultimately unlikely to significantly reduce the number of transactions that are subject to CFIUS review and mandatory reporting requirements. Though countries have expressed an eagerness to join the group of excepted foreign states, the practical utility for their investors is somewhat limited given the onerous eligibility criteria to qualify as an “excepted investor,” particularly for publicly-traded companies and investment funds. For instance, not only must investors be organized under the laws of, and have their principal places of business in, an excepted foreign state (or the United States), but an investor must also be able to demonstrate with respect to itself and its parents that, among other things, a majority of its voting and economic interests are held by nationals<sup>8</sup> or entities of an excepted foreign state<sup>9</sup> (or the United States) and that any individual or entity holding more than a 10 percent voting or economic interest in it is a national or entity of an excepted foreign state (or the United States). This requirement poses significant challenges for publicly-traded companies, which typically have little visibility into the identity and nationality of under 5 percent individual shareholders. Similarly, investment funds

based in and managed by nationals of excepted foreign states can have difficulty qualifying due to, among other things, the requirement that the investment vehicle and each of its parents be located in an excepted foreign state or the United States, which often is not the case.

Second, although the addition of New Zealand to the CFIUS white list of excepted foreign states demonstrates some willingness by CFIUS to expand the benefits of the jurisdictional carve-outs and mandatory filing exemptions to additional groups of investors, the group remains contained to members of the 5 Eyes. This limited expansion does not provide clearer sense of whether CFIUS is willing to expand this excepted status outside of the countries in the small intelligence pact.

<sup>1</sup> For a more in-depth discussion of these changes, please see our prior alerts on this subject [here](#) and [here](#).

<sup>2</sup> 50 U.S.C. § 4565(a)(4)(E); 31 C.F.R. §§ 800.211, 800.304, 800.401(e)(1) and 31 C.F.R. §§ 802.216, 802.302(a). Note that 31 C.F.R. Part 802 refers to “excepted real estate foreign state” and “excepted real estate investor,” however, for ease of review we use “excepted foreign state” and “excepted investor” for purposes of both Part 800 and Part 802 in this alert.

<sup>3</sup> 31 C.F.R. § 800.219; 31 C.F.R. § 802.215.

<sup>4</sup> 31 C.F.R. § 800.218.

<sup>5</sup> <https://home.treasury.gov/system/files/206/Fact-Sheet-Final-Rule-Revising-EFS-Definitions-2.pdf>

<sup>6</sup> 31 C.F.R. § 800.1001(a). The criteria for “excepted real estate foreign states” is slightly different under the CFIUS real estate regulations. Namely, CFIUS must determine that the eligible foreign state “has **made significant progress toward** establishing and effectively utilizing” a robust foreign investment screening process. 31 C.F.R. § 802.1001(a) (emphasis added).

<sup>7</sup> CFIUS made the same relevant determination for both Australia and Canada under the real estate regulations: <https://www.federalregister.gov/documents/2022/01/07/2022-00234/determination-regarding-excepted-real-estate-foreign-states>.

<sup>8</sup> Dual nationals with a second nationality that is not of an excepted foreign state or the United States are excluded. 31 C.F.R. § 800.219.

<sup>9</sup> To qualify for “excepted investor” status entities must establish both that they are organized under the laws of an excepted foreign state or the United States and have its principal place of business in an excepted foreign state. 31 C.F.R. § 800.219.

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