

CFIUS Expands Foreign Investments Subject to Scrutiny with Significant Carve-out for Canadian, Australian and U.K. Investors

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On January 17, 2020, the Committee on Foreign Investment in the United States (“CFIUS”) published two new rules that will greatly expand the scope of minority investments by foreign persons in U.S. businesses that are subject to CFIUS review. The rules take effect on February 13, 2020. Importantly for certain Canadian investors, the rules include an exemption for the next two years. These new rules implement changes in U.S. law mandated by Congress in its 2018 Foreign Investment Risk Review Modernization Act (“FIRRMA”).

The first rule expands coverage over minority investments by foreign persons in U.S. businesses that involve critical technologies, critical infrastructure, or sensitive personal data (as those terms are defined in the rules). Depending on the investor involved and the nature of the U.S. business, the parties to the transaction are required to either submit a “mandatory declaration” to CFIUS 30 days before closing or file a voluntary notice with CFIUS. If the investment is subject to this new rule and the parties fail to file a declaration with CFIUS, CFIUS could impose a potential civil penalty in an amount equal to the entire transaction value (and the deal could be potentially unwound if CFIUS were to determine there was a national security threat).

For two years from the rule’s effective date, CFIUS will exempt certain investors from Canada, Australia, and the United Kingdom. However, not all Canadian, Australian, and U.K. investors will benefit from this exemption. The exemption expressly excludes foreign individuals with non-exempt dual nationalities; firms that exceed certain thresholds for foreign ownership, board membership, or voting interests held by persons with non-exempt nationalities; investors who fall under any of the listed national security-related exclusions; and certain investors who lose eligibility for the exemption within three years after completing the relevant transaction.

The second rule addresses foreign investments in most forms of real estate. In general, a foreign real estate investment will now be subject to scrutiny if it involves properties located within, or that function as part of, major U.S. airports or seaports, or that are

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within one mile (about 1.6 km) of a listed military installation in urban environments. Further, outside of urban areas, this “proximity” standard under the new real estate rule extends up to 100 miles (about 160 km) from certain U.S. military facilities and, in certain instances, includes entire counties of a U.S. state. This real estate rule contains the same exemption for Canadian, Australian and U.K. investors and is subject to the same express exclusions as noted for the first new rule.

Foreign investors should understand that both of these new CFIUS rules are in addition to its previous well-known jurisdiction over investments that transfer control of a U.S. business to a foreign party. Moreover, that existing jurisdiction over change-of-control transactions does not contain the above carve-out for Canadian, Australian or U.K. investors.

For more information about the new CFIUS rules, please see this synopsis of the proposed texts released in late 2019 (and which remain mostly unchanged in the final rules as promulgated):

[dorsey.com/newsresources/publications/client-alerts/2019/10/cfius-proposed-regulations-expanding-jurisdiction](https://www.dorsey.com/newsresources/publications/client-alerts/2019/10/cfius-proposed-regulations-expanding-jurisdiction).