

## Who Will Be an Excepted Investor Under the Proposed CFIUS Regulations?

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Before the proposed regulations were posted on September 17, practitioners and investors were keenly interested in whether CFIUS would develop a “white list” or a “black list.” Foreign investors interested in strategic investment in U.S. tech companies were particularly focused on this question. The mandatory filings under the CFIUS Pilot Program for any non-passive foreign investment in companies producing, developing, or manufacturing certain critical technology has led to some market pressures for such investors. Rather than submit a CFIUS filing, U.S. businesses and investment fund managers have preferred to limit the rights of these foreign investors so that their investments do not trigger CFIUS review.

In the proposed regulations, certain foreign investors would be excepted from the rules describing a “covered investment.” (Note that they will not be excepted from the rules for covered control transactions.) As mentioned in our [September 19 blog](#), a covered investment is an investment in a Technology, Infrastructure, and Data U.S. Business (TID U.S. Business) that afford the foreign person:

- access to material non-public technical information;
- membership or observer rights on the board of directors or an equivalent governing body of the business or the right to nominate an individual to a position on that body; or
- any involvement, other than through voting of shares, in substantive decision-making regarding sensitive personal data of U.S. citizens, critical technologies, or critical infrastructure.

Excepted investors must be either a foreign national of an excepted foreign state, a foreign government of an excepted foreign state, or a foreign entity organized and with its principal place of business in an excepted foreign state. They must also have minimum excepted ownership by persons who themselves essentially qualify as excepted investors.<sup>[1]</sup> CFIUS has warned in the preamble to the proposed regulations that its initial list of excepted foreign states will be short.

Several past and future missteps may disqualify someone as an excepted investor. A foreign person may not be an excepted investor if:

(1) In the past five years, the foreign person or any of its parents or subsidiaries has:

- Made material misstatements or omissions to or violated a mitigation agreement with CFIUS;
- Been subject to section 721 action by the President (i.e., been party to a transaction ordered blocked or divested);
- Violated export control laws or sanctions or been party to a related settlement agreement;
- Been convicted of a crime or entered into a deferred prosecution or non-prosecution agreement with the Department of Justice; or

(2) The foreign person or any of its parents or subsidiaries is on the Bureau of Industry and Security’s Unverified List or Entity List.

These complex requirements to identify an excepted investor likely will require detailed analysis and fact-finding. We expect that fund managers will increase their diligence on potential investors to determine whether such investors would be exempt from CFIUS review and mandatory filings. We also expect that any investors passing such reviews would be subject to fewer restrictions on key rights, such as board or observer seats, when undertaking strategic investment in the U.S. However, it is likely that fund managers will maintain general discretion to take any actions necessary to avoid CFIUS review.

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[1] Note, this is summarized. The regulations are more complex and the actions that would disqualify an excepted investor do not appear to apply to the “minimum excepted ownership” calculation.

2 Min Read

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