CFIUS Issues Final FIRRMA Regulations

January 22, 2020

Introduction

On January 13, 2020, the U.S. Treasury Department promulgated its final regulations implementing the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA") to reform the authority and jurisdiction of the Committee on Foreign Investment in the United States ("CFIUS"). The final regulations were released in two parts: one addressing investments in U.S. businesses by foreign persons (the "**Final Investment Rule**") and the second addressing transactions by foreign persons involving U.S. real estate (the "**Final Real Estate Rule**," and together with the Final Investment Rule, the "Final Rules").

The Final Rules build on non-binding proposed regulations that Treasury issued on September 17, 2019 (the "proposed investment regulations," and the "proposed real estate regulations"), which we summarized in our memo available **here**. In response to public comment, the Final Rules have amended or clarified certain points in the proposed regulations, but have largely retained the framework first introduced in the proposed investment regulations. The Final Rules have also incorporated many of the provisions of the interim "Pilot Program" regulations[1] for transactions involving critical technologies, while amending those interim regulations as well.

In this memo, we have summarized the key changes that the Final Rules make to the proposed investment regulations and the Pilot Program, while also noting significant elements of the proposed investment regulations and the Pilot Program that the Final Rules have retained. In particular, we cover (i) changes to the meaning of "foreign person" and "U.S. business"; (ii) CFIUS's expanded jurisdiction to reach certain non-controlling investments in certain U.S. businesses; (iii) notable carve-outs from CFIUS's expanded jurisdiction; (iv) mandatory filing rules; and (v) select elements of the Final Real Estate Rule.

The Final Rules will become effective on February 13, 2020. Transactions for which certain events occur before February 13, 2020 (including the execution of a binding written agreement establishing the material deal terms) will be subject to regulations in place as of January 12, 2020, including the Pilot Program. As of February 13, 2020, all existing CFIUS regulations, again including the Pilot Program, will be replaced in full by the Final Rules.

Notable Changes Effectuated by the Final Investment Rules

Definition of "Foreign Person" and "U.S. Business"

Although the Final Investment Rule leaves the meaning of "foreign person" largely unchanged, it adds a new interim definition to the previously undefined term "principal place of business."[2] Under both current law and the Final Investment Rule, a foreign person includes any "foreign entity," which in turn is defined as an entity organized under the laws of a foreign jurisdiction if (i) its equity securities are primarily traded on a foreign exchange or (ii) its "principal place of business" is outside the United States. The "principal

[1] *See* 31 C.F.R. part 801. Our memo on the Pilot Program is available **here**.

[2] This definition will be made effective on an interim basis on February 13, 2020. The Treasury Department is seeking comments on this interim rule through February 18, 2020.

place of business" is self-evident for some businesses, but for others—particularly investment funds and businesses incorporated in more tax-friendly jurisdictions that largely conduct business operations elsewhere—application of the concept may be more ambiguous. To resolve this uncertainty, the new interim definition provides that "principal place of business" means the "primary location where an entity's management directs, controls, or coordinates the entity's activities," and for investment funds in particular, "where the fund's activities and investments are primarily directed, controlled, or coordinated by or on behalf of the general partner, managing member, or equivalent."

Notably, in determining principal place of business, an organization may be bound by previous representations it has made to government authorities. Specifically, if the company's most recent government filing or submission identifies a place outside the United States as its principal place of business, principal office, address of headquarters, etc., the location identified in that previous filing "is deemed" to be the entity's principal place of business for CFIUS purposes as well (unless the entity can demonstrate a change in circumstances since the filing was made).

Current law provides that even if an entity otherwise meets the criteria for a "foreign entity" (i.e., organized outside the United States plus principal place of business outside the United States or equity securities traded on a foreign exchange), it will not be considered a foreign entity if it "demonstrates" that a majority of its equity interests are ultimately owned by U.S. nationals. The Final Investment Rule revises this language by replacing "demonstrates" with "can demonstrate." This change arguably removes the affirmative burden on the company to establish that its equity is owned by U.S. nationals, so long as it has the *ability* to establish that point if requested.

The Final Investment Rule retains a potentially significant change to the definition of "U.S. business" first introduced in the proposed investment regulations. As explained in greater detail in our previous memo, existing law defines a "U.S. business" as any entity "engaged in interstate commerce in the United States, but only to the extent of its activities in interstate commerce" (emphasis added). The proposed investment regulations, however, intentionally omit the underlined phrase, which appears to expand the scope of CFIUS's jurisdiction in cases involving acquisitions of or investments in global business with a U.S. presence. Despite receiving numerous comments on this point, CFIUS noted the definition "tracks the language of FIRRMA and is not intended to suggest that the extent of a business's activities in interstate commerce in the United States is irrelevant to the Committee's analysis of national security risk."

Covered Investments: Non-Controlling Investments in "TID" Businesses[3]

The Final Investment Rule implements CFIUS's authority to review certain **non-controlling** investments. Under current law, such investments are outside CFIUS's jurisdiction, except for transactions covered by the Pilot Program. As discussed below, a subset of these new covered investments will trigger a mandatory filing rule, but for most, filings will be voluntary.

"Covered investments" (as opposed to "covered control transactions") are defined as non-controlling equity investments in "unaffiliated"[4] **Technology, Infrastructure and Data businesses** ("TID U.S. Businesses"), defined as U.S. businesses involved in certain activities related to:

[3] Under the Final Investment Rule, covered transactions include: (i) any "covered control transaction" (i.e., "covered transactions" in the existing regulations); (ii) any covered investment; (iii) a change in the rights that a foreign person has with respect to a U.S. business in which the foreign person has an investment, if that change could result in a covered control transaction or a covered investment; or (iv) any other transaction, transfer, agreement, or arrangement, the structure of which is designed or intended to evade CFIUS's jurisdiction.

- "critical **technologies**,"
- "covered investment critical **infrastructure**,"[5] or
- "sensitive personal **data**" of U.S. citizens

where the investment affords a foreign person (other than an "excepted investor," discussed below):

- **access** to certain information in the possession of,
- **certain rights** in, or
- **involvement** in certain decision-making of the TID U.S. Business.

The types of access, rights, or involvement that result in a covered investment are those that afford the foreign person:

- access to material non-public technical information (defined as certain information relating to covered investment critical infrastructure or critical technologies, but not financial information) in the possession of the U.S. business,[6]
- membership or observer rights on, or the right to nominate an individual to a position on, the board of directors (or equivalent body) of the U.S. business, or
- any involvement (other than through voting of shares) in substantive decision-making[7] of the U.S. business related to certain actions involving critical technologies, covered investment critical infrastructure, or sensitive personal data.

The Final Investment Rule's definition of "TID U.S. business" and the subsidiary concepts of "critical technologies," "covered investment critical infrastructure" and "sensitive personal data" are generally consistent with the proposed investment regulations. The small number of notable changes to, or clarifications of, these concepts in the Final Investment Rule are described below.

Critical Technologies

The Final Investment Rule provides that a TID U.S. business includes one that produces, designs, tests, manufactures, fabricates, or develops one or more "critical technologies," the definition of which is substantively unchanged from the proposed investment regulations. Through a new example, the Final Investment Rule clarifies that the word "test" would not include an instance in which a U.S. business verifies the fit and form of a critical technology for purposes of integrating that technology into a separate product. This clarification could be important for U.S. businesses that merely use another company's critical technology in their own products. The Final Investment Rule also clarifies that "manufacturing" a critical technology does not require active production of that technology; rather, so long as a company "retains the ability to manufacture" the critical technology, it will be deemed a TID U.S. business.

(*cont.*)

[4] These exclude entities in which the foreign person already holds a majority of the voting interest or the right to appoint the majority of the entity's board or equivalent governing body.

[5] "Covered investment critical infrastructure" is a subset of "critical infrastructure" that is specifically set out in an Appendix to the Final Investment Rule. The general term "critical infrastructure" is separately defined in the Final Investment Rule as "assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security."

[6] The Final Investment Rule amends the definition of "material nonpublic technical information" to clarify that it applies to knowledge of covered investment critical infrastructure rather than all critical infrastructure.

[7] The Final Investment Rule retains the same definition of "substantive decisionmaking" as the proposed investment regulations.

Sensitive Personal Data

Under both the proposed investment regulations and the Final Investment Rule, the definition of sensitive personal data combines two major elements: the content of the information itself and the characteristics of the individuals, including the likelihood of their link to U.S. national security. With respect to the former element, the proposed investment regulations set forth ten categories of sensitive data, which the Final Investment Rule retains with only slight modifications. For the latter element, the definition of "sensitive personal data" in the proposed regulation included identifiable data that was maintained or collected by a U.S. business that had maintained or collected such data on more than one million individuals at any point in the preceding twelve months. The Final Investment Rule also generally retains this approach, but clarifies that the twelve-month period begins at the earliest of one of several relevant events, including signing the deal agreement or a filing with CFIUS.[8]

The Final Investment Rule also adds several examples to further elucidate the meaning of a TID U.S. business that maintains or collects, directly or indirectly, "sensitive personal data," including the following:

- a business that collects identifiable geolocation data for a short period of time, and then purges the data, still crosses the "one million individuals" threshold if it collected such data on greater than one million individuals cumulatively over the previous year, even if (because of its purging policy) the business only maintains such data on 200,000 individuals when it filed with CFIUS; and
- a business that outsources collection and storage of sensitive personal data to a third-party service provider, and retains the ability to access the collected data on the third party's servers, is a TID U.S. business because it "indirectly" collects or maintains such data.

Mandatory Filings for Certain Covered Transactions

The proposed investment regulations expanded the category of mandatory filings beyond the Pilot Program to cover acquisitions of a "substantial interest" in any TID U.S. Business by a foreign person in which a foreign government has a substantial interest. The Final Investment Rule has largely maintained this framework, with a few changes. Under both the proposed investment regulations and the Final Investment Rule, "substantial interest" has two different thresholds at different stages in this analysis. A foreign investor acquiring a 25 percent or greater voting stake in the TID U.S. Business is deemed to have acquired a substantial interest in the U.S. business, and a foreign government stake[9] of 49 percent or more voting interest in the foreign investor is considered a substantial interest. For partnerships, limited liability companies, and the equivalent, the Final Investment Rule provides that a foreign government has a substantial interest in the entity only where it holds at least 49 percent of the interest in the general partner, managing member, or equivalent. Notably, the Final Investment Rule eliminates language in the proposed investment regulations that would have deemed a foreign government to hold a substantial interest in a partnership if it was a limited partner and owned 49 percent or more of the "voting interest of the limited partners." Accordingly, a government entity will not satisfy the "substantial interest" criteria with respect to an investment fund in which it is merely a limited partner, with no interest in the general partner of the fund.

[8] The Final Investment Rule also provides that if the U.S. business can demonstrate that, at the time of closing, it "had or will have neither the capability to maintain nor the capability to collect any identifiable data within one or more" of the ten sensitive categories on greater than one million individuals, the data maintained or collected by the U.S. business will no longer be considered "sensitive personal data" (unless a separate prong of the definition of "sensitive personal data" applies).

[9] The Final Investment Rule clarifies that a foreign government stake includes an interest held by national or subnational governments of a single foreign state.

The Final Investment Rule generally leaves in place the existing mandatory filing rule in the Pilot Program for covered transactions involving U.S. businesses that produce, design, test, manufacture, fabricate, or develop critical technology that is (i) utilized in connection with the U.S. business's activity in certain specified industries or (ii) designed specifically for use in one of those specified industries (a "Covered Technology Business").[10] Under the Pilot Program, any covered investment or covered control transaction in such a U.S. business automatically triggers a mandatory filing. The Final Investment Rule, however, carves out a handful of exceptions from this rule. Such new exceptions include:

- a covered control transaction by an excepted investor;
- a covered transaction through a subsidiary that operates under a valid security clearance and is subject to a foreign ownership, control, or influence ("FOCI") mitigation agreement; and
- a covered transaction involving a TID U.S. business that qualifies as a TID U.S. business solely because it produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies that is eligible for export, reexport, or transfer (in country) pursuant to License Exception ENC of the Export Administration Regulations (15 CFR § 740.17).

Carve-Outs from Covered Investment Rule

The proposed investment regulations and Final Investment Rule expressly exclude certain types of non-controlling covered investments from CFIUS's jurisdiction. These carve-outs do not apply to foreign person acquisitions of control of a U.S. business.

Excepted Investors

To qualify as an excepted investor, a foreign person must be: (1) solely a foreign national of an excepted foreign state; (2) a foreign government of an excepted foreign state; or (3) a foreign entity that meets certain additional criteria relating to (i) place of organization, (ii) principal place of business, (iii) nationality of the members and observers of the board of directors, and (iv) nationality (for individuals) or place of incorporation and principal place of business (for entities) of significant shareholders. These criteria diverge from the proposed investment regulations in two ways. First, under the Final Investment Rule, the requirements related to members and observers of the board of directors have been eased slightly, by reducing the percentage of such individuals that must meet nationality requirements from 100 percent to 75 percent. Second, the requirements for shareholders under the Final Investment Rule apply only to shareholders who own a 10 percent or greater interest (economic or voting), rather than a 5 percent or greater interest (in both cases, shareholders who otherwise could exercise control over the entity must also meet the requirements).

To qualify as an "excepted investor," a foreign entity must also satisfy "minimum excepted ownership" requirements, meaning that a certain percentage of the equity must be held by persons meeting defined nationality requirements. These requirements also have been eased slightly, but otherwise remain consistent with the proposed investment regulations.[11]

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[10] In the preamble to the Final Rules, the Treasury Department states that it "anticipates issuing a separate notice of proposed rulemaking that would replace this [mandatory declaration] requirement with a mandatory declaration requirement based upon export control licensing requirements."

[11] Minimum excepted ownership means that a specified percentage of the ownership of the entity (consisting of both voting interest and economic interest) must be held by persons who are (i) not foreign persons, (ii) foreign nationals who are nationals of one or more excepted foreign states and not nationals of a foreign state that is not an excepted foreign state, (iii) a foreign government of an excepted foreign state, or (iv) a foreign entity organized under the laws of an excepted foreign state with a principal place of business in an excepted foreign state or the United States.

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Finally, a foreign person will not qualify as an excepted investor if, in the five years prior to the completion date of the transaction under examination, it or any of its parents or subsidiaries committed certain "bad acts." These "bad acts" are substantively unchanged from the proposed investment regulations.

Excepted Foreign State

Concurrently with issuing the Final Investment Rule, CFIUS also identified three initial excepted foreign states: Australia, Canada, and the United Kingdom. In **Frequently Asked Questions** that accompanied the Final Investment Rule, CFIUS stated that it is "initially identifying a limited number of foreign states and may expand the list in the future," and that these three countries were selected because of "their robust intelligence-sharing and defense industrial base integration mechanisms with the United States." Beginning on February 13, 2022—that is, two years after the effective date of the Final Investment Rule—this initial excepted status will terminate, and a foreign state will qualify for excepted status only if CFIUS makes a formal determination that it meets the criteria in § 800.1001(a) of the Final Investment Rule. Under that provision, to be selected, CFIUS must determine that the foreign state has established and is effectively utilizing a robust process to assess foreign investments for national security risks and is coordinating with the Unites States on matters relating to investment security.

Investment Funds

The Final Investment Rule formalizes certain exceptions to its expanded jurisdiction for "investment funds."[12] Specifically, an indirect investment by a foreign person in a TID U.S. Business through an investment fund that affords the foreign person (or a designee of the foreign person) membership as a limited partner or equivalent on an advisory board or a committee of the fund is not considered a covered investment if:

- the fund is managed exclusively by a general partner, a managing member, or an equivalent;
- the general partner, managing member, or equivalent of the fund is not a foreign person;
- the advisory board or committee does not have the ability to approve, disapprove, or otherwise control: (i) investment decisions of the investment fund or (ii) decisions made by the general partner, managing member, or equivalent related to entities in which the investment fund is invested;
- the foreign person does not otherwise have the ability to control the investment fund[13];
- the foreign person does not have access to material non-public technical information as a result of its participation on the advisory board or committee; and
- the investment does not afford the foreign person any of the access, rights, or involvement specified in the definition of covered investment.

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The ownership threshold that must be met to satisfy these requirements varies based on where the entity is located and/or where its shares are traded. For an entity whose equity securities are primarily traded on an exchange in an excepted foreign state or the United States, the minimum excepted ownership is a majority. For an entity whose equity securities are not publicly traded or are not primarily traded on an exchange in an excepted foreign state or the United States, the minimum excepted ownership is 80 percent or more.

[12] "Investment fund" means any entity that is an ''investment company,'' as defined in section 3(a) of the Investment Company Act of 1940 (15 U.S.C. § 80a–1 *et seq.*), or would be an ''investment company'' but for one or more of the exemptions provided in section 3(b) or 3(c) thereunder.

[13] The ability to "control the investment fund" includes the authority (i) to approve, disapprove, or otherwise control investment decisions of the investment fund, or decisions made by the general partner, managing member, or equivalent related to entities in which the investment fund is invested, or (ii) to unilaterally dismiss, prevent the dismissal of, select, or determine the compensation of the general partner, managing member, or equivalent.

The Final Investment Rule also creates specific exceptions from the mandatory filing rule for investment funds. First, for covered transactions that result in the acquisition of a substantial interest in a TID U.S. business by an investment fund in which a non-excepted foreign state has a substantial interest, the Final Investment Rule provides that a filing is not required if:

- the fund is managed exclusively by a general partner, a managing member, or an equivalent;
- the general partner, managing member, or equivalent of the fund is not a foreign person;
- with respect to any foreign person with membership as a limited partner on an advisory board or a committee of the fund, the advisory board or committee does not have the ability to approve, disapprove, or otherwise control: (i) investment decisions of the investment fund or (ii) decisions made by the general partner, managing member, or equivalent related to entities in which the investment fund is invested; and
- with respect to any foreign person with membership as a limited partner on an advisory board or a committee of the fund, that foreign person does not otherwise have the ability to control the investment fund.

Second, where a filing would ordinarily be required because an investment fund entered into a covered transaction with a Covered Technology Business, no filing is necessary if the investment fund in question meets the same criteria described above. In this case, however, the investment fund qualifies for the exception if the general partner, managing member, or equivalent of the fund is not a foreign person or if it is ultimately controlled by U.S. nationals.

A new example in the Final Investment Rule clarifies that, in some circumstances, a limited partner's indirect investment in a TID U.S. business through an investment fund might trigger a mandatory filing even if the investment fund's direct investment does not. In the example, the investment fund is a foreign person (and not an excepted investor) that acquires a ten percent equity interest in a Covered Technology Business, plus the right to appoint a board member. In connection with this investment, a limited partner in the investment fund, who is also a non-excepted foreign person, receives access to the U.S. business's material non-public technical information. Because the investment fund satisfies the criteria for the investment fund exception set out above (managed exclusively by a general partner, the general partner is not a foreign person or is ultimately controlled exclusively by U.S. nationals, etc.), the investment fund's transaction is not subject to the mandatory declaration rule. This exception, however, does not extend to the indirect investment by a limited partner through the fund, which is independently subject to the mandatory declaration rule.

Notable Changes Effectuated by the Final Real Estate Rule

As was true for the proposed real estate regulations, the Final Real Estate Rule adopts or replicates many of the provisions of the Final Investment Rule; indeed, more than half of the defined terms in the Final Real Estate Rule were incorporated wholesale (with non-substantive conforming changes) from the Final Investment Rule. Accordingly, many of the changes effectuated by the Final Investment Rule described above apply to the Final Real Estate Rule as well, including, for example, the definition of "principal place of business" and the definition of "excepted investor" (which for the Final Real Estate Rule is referred to as an "excepted real estate investor"). The sections that follow in this memo focus on the portions of the Final Real Estate Rule that are unique to that particular rule.

Covered Real Estate Transactions

Under the proposed real estate regulations, all "covered real estate transactions" were subject to CFIUS's jurisdiction, and the Final Real Estate Rule largely maintains this framework.[14] In both the proposed and final rules, covered real estate transactions include, unless excepted, any purchase or lease by, or concession to, a foreign person of "covered real estate" that affords the foreign person certain property rights. In general, this concept applies to two categories of transactions:

- specified types of investments in real property by a foreign person in covered real estate that afford the foreign person at least three of a defined list of "property rights;" and
- specified types of investments in real property by a foreign person in covered real estate that, through a subsequent change in the rights of the foreign person, results in the foreign person having at least three of the defined property rights.

In addition to the two primary categories of covered real estate transactions identified above, the Final Real Estate Rule applies to other transactions or arrangements designed or intended to evade or circumvent CFIUS's jurisdiction.

In each case, certain "excepted real estate transactions" (as described further below) are carved out from the definition of covered real estate transactions.

Covered Real Estate

Under the proposed real estate regulations, covered real estate fell into two categories. The first category encompassed real estate located within or functioning as part of an "airport or maritime port." The Final Real Estate Rule combines the definitions of "airport" and "maritime port" into a new term, "covered port," which refers to any port that is listed:

- in the Department of Transportation, Federal Aviation Administration's annual final enplanement data as a ''large hub airport,'' as that term is defined in 49 U.S.C. § 40102;
- in the Department of Transportation, Federal Aviation Administration's annual final all-cargo landed weight data as an airport with annual aggregate all-cargo landed weight greater than 1.24 billion pounds;
- by the Department of Transportation, Federal Aviation Administration as a ''joint use airport,'' as that term is defined in 49 U.S.C. § 47175;
- by the Department of Transportation, Maritime Administration as a commercial strategic seaport within the National Port Readiness Network; or
- by the Department of Transportation, Bureau of Transportation Statistics as a top-25 tonnage, container, or dry bulk port.

Further, to determine whether a port constitutes a "covered port," the Final Real Estate Rule provides that:

- any port that is added to any of the lists of "covered ports" after February 13, 2020 shall be deemed not to be in effect as a covered port until 30 days after the port's addition to the relevant list maintained by the Department of Transportation; and

[14] The term "real estate" means any land, including subsurface and submerged, or structure attached to land, including any building or any part thereof.

- in the context of a particular transaction, the covered ports in effect on the day immediately prior to the earlier of (i) the date on which the parties sign a written document establishing the material terms of the transaction or (ii) the completion date of the transaction, shall apply.

In both the proposed real estate regulations and the Final Real Estate Rule, the second category of covered real estate comprises real estate within a specified distance of certain military installations or other U.S. government facilities. More specifically, such covered real estate consists of the following:

- real estate that is within "close proximity" of a facility or military installation listed in part 1 or part 2 of the Appendix to the Real Estate Proposed investment regulations (the "R.E. Appendix"). Close proximity means the area that extends outward one mile from the boundary of the relevant installation, facility, or property;
- real estate that is within the "extended range" of a military installation listed in part 2 of the R.E. Appendix. "Extended range" means the area that extends 99 miles outward from the outer boundary of close proximity to the installation. Where applicable, extended range does not cover an area exceeding the outer limit of the territorial sea of the United States;
- real estate in any county or other geographic area listed in part 3 of the R.E. Appendix; and
- real estate located within any part of a Navy offshore range complex or offshore operating area listed in part 4 of the R.E. Appendix that is within the territorial sea of the United States.

Transaction Types

The proposed real estate regulations, and now the Final Real Estate Rule, apply only to purchases, leases and concessions.

- a "purchase" is an arrangement conveying an ownership interest of real estate to a person in exchange for consideration.
- a "lease" is an arrangement conveying a possessory interest in real estate that is less than ownership to another person for a specified time and in exchange for consideration (including subleases). The Final Real Estate Rule clarifies that a lease includes assignments in whole or in part.
- a "concession" is an arrangement other than a purchase or a lease by which a "U.S. public entity" grants the right to use real estate for the purpose of developing or operating infrastructure for an airport or maritime port. This definition captures a subsequent assignment of a concession by a party who is not a U.S. public entity. A public entity includes essentially any government entity, whether federal, state, or local. Finally, the Final Real Estate Rule clarifies that concessions include the assignment of part of a concession.

Property Rights

A covered real estate transaction occurs only where the transaction results in a foreign person acquiring at least three of the following property rights:

- to physically access the real estate;
- to exclude others from physical access to the real estate;
- to improve or develop the real estate; and
- to attach fixed or immovable structures or objects to the real estate.

The Final Real Estate Rule provides examples of this definition to illustrate that (i) the right to exclude others from physically accessing the property need not be absolute with respect to all other persons or activities and (ii) a party acquires a right even if that right is not exercisable until a separate regulatory approval is received.

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Excepted Real Estate Transactions

In general, the Final Real Estate Rule maintains the same categories of covered real estate transaction carve-outs as the proposed real estate regulations. As one new exception, the Final Real Estate Rule exempts leases or concessions by "foreign air carriers," as defined in 49 U.S.C. § 40102, provided that the lease or concession is related to the foreign person's activities as a foreign air carrier and that the Department of Homeland Security's Transportation Security Administration has accepted a security program for that carrier under 49 CFR § 1546.105. Additionally, the Final Real Estate Rule revises the proposed exception for retail trade, accommodation, and food service sector establishments by eliminating the reference to the North American Industry Classification System codes ("NAICS"). Instead, the Final Real Estate Rule applies the exception to any lease or concession of real estate that, by its terms, permits the subject real estate to be used only for the purposes of engaging in the retail sale of consumer goods or services to the public.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

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