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Via Email: [cfius@do.treaes.gov](mailto:cfius@do.treaes.gov)

Via Web: [www.regulations.gov](http://www.regulations.gov)

The Honorable Nova Daly  
Deputy Assistant Secretary  
U.S Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, D.C. 20220

Dear Mr. Daly:

We are pleased to submit these comments with respect to the recently proposed regulations regarding the implementation of the Foreign Investment and National Security Act of 2007 ("FINSA") amendments to Section 721 of the Defense Production Act of 1950 ("Exon-Florio").

We are the co-directors of the Global Strategic Finance Initiative at the New America Foundation, a non-partisan non-profit public policy institute based in Washington, D.C. This initiative seeks to address the evolving relationship between global capital flows, financial markets and foreign policy.

Background

As a general matter, we believe that U.S. and global economic health are strengthened by the free flow of investment capital and by the increased liquidity that open markets provide. As significant providers of capital, foreign investors have thus far been a positive influence on U.S. markets and for the economy as a whole.

We recognize, however that economic interests and the free flow of capital, while important, must be balanced against national security interests. Following extensive analysis, we believe that the U.S. Congress, Administration and the American people should be comforted that, as regards foreign investment, this country's national security interests and financial market integrity are well protected and well regulated. We believe that, in determining the potential impact of proposed FINSA regulations, it is important that they are understood in the context of the entirety of the existing laws and regulations that confront a foreign entity or person seeking to invest in the United States. These proposed FINSA regulations represent just one of multiple areas of restriction, oversight and regulation that confront a foreign investor and that attempt to address this balance.



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Comment

Under the express language of Section 721, the President is authorized to review “mergers, acquisitions and takeovers ... which could result in foreign control”. These regulations must obviously be consistent with this legislative language. The Treasury Department deserves credit for reminding us of the legislative history to Exon-Florio, highlighting that “the Conferees in no way intend to impose barriers to foreign investment”. This is an important point to remember when reviewing the proposed regulations.

It is because of the limitations of the scope and intent of the relevant legislation that we express our concern that some of the proposed regulatory language may result in a deterrent, if not an outright barrier, to legitimate foreign investment – even if that is not the intention of either the legislation or regulation.

We recognize the advantages to maintaining flexibility on the part of the Committee on Foreign Investment in the United States (“CFIUS”). We nevertheless believe that the corollary of increased flexibility for the U.S. Government is increased uncertainty on the part of the potential foreign investor. This is likely to discourage consideration of potential investment opportunities and may well have a negative effect on foreign investment into the country.

Our concern emanates from a belief that domestic and foreign investors alike generally reward predictability and certainty, while shying away from uncertainty and the unquantifiable risk it presents. This is likely to negatively impact valuations or even the decision to pursue a given investment at all.

The proposed regulations retain significant flexibility (and therefore uncertainty) and avoid providing a specific “roadmap” or comprehensive “safe harbor” guidance to investors. As a result, there is likely to be a good deal of uncertainty as to whether any individual transaction might, *inter alia*., fall within the definition of a “covered transaction” (Section 800.206) or whether it is structured to afford the investor the necessary level of “control” (Section 800.203) to warrant review by CFIUS.

We believe that uncertainty for potential investors about whether an individual transaction will require CFIUS review is likely to add both cost and risk to a transaction, which may well result in a negative impact on potential investment into the U.S. Investors will be presented with a choice of erring on the side of caution by incurring costs, delays and transaction risks in subjecting their potential investment to CFIUS review and scrutiny, or to assume the risk that a non-reviewed transaction is later determined to have required such approval, and is subject to scrutiny, sanction and disruption after the fact. The alternative is to simply decline to pursue the investment.



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Conclusion

It is clear that there is a need for the U.S. Government, including CFIUS, to retain flexibility in all instances where national security interests are at stake. But it is imperative that we recognize that it is not in our national interest to unnecessarily discourage legitimate foreign investment into the United States. We believe that the proposed regulations would be improved if they created less uncertainty, more predictability and included more explicit “safe harbor” provisions to provide guidance to those international investors who seek to invest their capital in this country. The risk is that they may desire to invest, but will decline to do so for fear of how their investment may be treated under these regulations. Any unnecessary deterrent to foreign investment is neither appropriate under Exon-Florio, nor would it increase our national security. On the contrary, it could endanger our economic security, instead.

Very truly yours,

Douglas A. Rediker  
Co-Director  
Global Strategic Finance Initiative

/s/

Heidi Crebo-Rediker  
Co-Director  
Global Strategic Finance Initiative