June 9, 2008

Comments on Proposed Rule:
Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons

These comments address the proposed regulations implementing the amendments made by the Foreign Investment and National Security Act of 2007 ("FINSA") to section 721 of the Defense Production Act of 1950 ("Section 721"). They are made on behalf of a coalition of international business associations and financial services firms, including the Financial Services Forum, the Organization for International Investment, the United States Chamber of Commerce, and the Business Roundtable. Together, these associations represent a broad range of companies employing tens of millions of Americans.

We commend the Department of the Treasury ("Treasury") and the Committee on Foreign Investment in the United States ("CFIUS") on their efforts to faithfully implement FINSA through the proposed regulations. Congress carefully structured FINSA to provide protection for national security in the context of an open investment environment. The proposed regulations appropriately maintain this balance. Along with FINSA and the Administration's implementing Executive Order issued last January, the proposed regulations are a net plus for investment, affirming that the United States remains open to foreign investors and providing important clarifications for when and how foreign investments should proceed through the CFIUS process.

We note in particular that the regulations carefully limit "critical infrastructure" for CFIUS purposes to assets that truly might implicate national security. The regulations also affirm that Greenfield investments, lending transactions, and certain minority investments, absent other indicia of control, are not covered transactions subject to Section 721. In addition, the proposed regulations maintain existing timeframes for reviewing transactions and provide helpful additional transparency and clarity with respect to the process for CFIUS reviews and investigations — qualities that had been sought by both the Congress and the private sector.

As described further below, while we strongly support the proposed regulations, we also believe there are instances in which the final regulations could provide even greater clarity and guidance to transaction parties. These include, among other items, providing greater detail on the types of minority economic protections that do not give rise to control, clarifying further that pre-filing is discretionary and may not be necessary or helpful in all cases, and ensuring that the regulations provide a reasonable indication of what information CFIUS requires for its reviews without imposing undue burdens on parties making voluntary filings.

Covered Transactions and Focus on National Security

The proposed regulations provide a number of important clarifications with respect to the scope of Section 721 and what transactions are covered by it. First, we commend Treasury and CFIUS for ensuring that Section 721 applies to mergers, acquisitions, or takeovers of businesses in the United States *only to the extent of their activities in interstate commerce in the United States*. CFIUS has never been, nor should it be, a review process that applies beyond the borders of the United States.

Second, the definition of "transaction" faithfully applies FINSA and continues to focus the CFIUS process on "merger[s], acquisition[s], or takeover[s]" regulations, not Greenfield investments. The exclusion of Greenfield investments appropriately reflects the importance of foreign direct investment to U.S. interests. It was the clear intent of Congress in originally adopting Section 721 and through the FINSA amendments to focus on transactions where foreign control over U.S. businesses may actually impact U.S. national security interest without restricting in any way foreign direct investment that will create wholly new businesses, jobs, and attendant benefits for the U.S. economy.

Third, the proposed definition of the term "critical infrastructure" adds the following underlined language to the definition in FINSA: critical infrastructure means "in the context of a particular covered transaction, systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of the particular systems or assets of the entity over which control is acquired pursuant to that covered transaction would have a debilitating impact on national security." These additions clarify for foreign investors and U.S. businesses that, with respect to critical infrastructure, what matters from CFIUS's perspective is not necessarily the asset class of a U.S. business at issue in a transaction, but rather the specific character of the actual underlying asset or assets. This formulation properly focuses on protecting national security without expanding the appropriate role and scope of CFIUS reviews.

Fourth, the proposed regulations provide further confirmation that the CFIUS process should not interfere with the free flow of capital. In particular, the proposed regulations continue to exclude extensions of credit and other forms of lending transactions from the purview of Section 721 and CFIUS's authority, other than in certain exceptional circumstances such as imminent default or transactions of avoidance (i.e., transactions that are structured as debt in name only and in fact are acquisitions or takeovers providing control to a foreign entity). Moreover, the proposed regulations further clarify the limited circumstances when CFIUS review may be appropriate in the cases of imminent default. Specifically, the proposed regulations provide greater clarity to foreign lenders who regularly engage in the business of lending (i.e., "make[] loans in the ordinary course of business") that, even in cases of default, such lenders may not have to proceed through a CFIUS review if management decisions or day-to-day control over the defaulted U.S. business will remain in hands of U.S. citizens.

Since its original adoption, part 800.303 of the CFIUS regulations has made plain that standard lending transactions are not subject to Section 721. We note CFIUS's intent to maintain this long-standing treatment of lending transactions was evidenced by the absence of any discussion of part 800.303 in the section-by-section preamble to the proposed regulations. This intent also was evidenced by the fact that the language in proposed part 800.303(a) is virtually identical to the current formulation, save for the substitution of certain defined terms

required by FINSA and other clarifications in the proposed regulations (e.g., substitution of the term "U.S. business" for "U.S. person" and "covered transaction" for "subject to section 721"). Notwithstanding this intent, we note there was one subtle change in the proposed text of part 800.303(a). Specifically, the existing regulation provides that if control is otherwise acquired by a foreign person at the time a loan is extended, "then the transaction may be subject to section 721." By comparison, the proposed regulations would provide that in such circumstances, "the transaction is a covered transaction." For consistency and clarity, we would encourage Treasury to revert to the current formulation and state that, in such circumstances, "the transaction may be a covered transaction." In the alternative, if the proposed change from "may be" to "is" simply is a function of using the term "covered transaction" as opposed to "subject to section 721," we urge Treasury to clarify this in the preamble to the final rule. Such a clarification will confirm CFIUS's intent that the proposed part 800.303(a) maintains the long-standing rules for lending transactions.

Definition of "Control"

The revised definition of "control" in the proposed regulations provides greater direction to transaction parties on the types of transactions that may be controlling without improperly expanding CFIUS's jurisdiction or fundamentally altering existing CFIUS practice. The preamble to the proposed regulations and the examples under the new proposed parts 800.203 (definition of control), 800.301 (transactions that are covered transactions), and 800.302 (transactions that are not covered transactions) also provide helpful clarifications, including with respect to the fact that transactions that are solely for the purpose of investment are not subject to CFIUS's jurisdiction.

We likewise commend CFIUS for making explicit, for the first time, that certain minority protections identified in proposed part 800.203(c) will not, by themselves, confer control. We further believe that part 800.203(d), which provides that CFIUS will consider on a case-by-case basis whether other minority shareholder protections do not confer control, is an important addition to the CFIUS regulations.

At the same time, in the interest of transparency and greater clarity for investors and U.S. businesses alike, we encourage CFIUS to consider whether there are additional protections that should be expressly identified in proposed part 800.203(c). The current list of shareholder protections in part 800.203(c) is quite limited; there are many other economic protections commonly negotiated by minority investors that do not confer any control. In addition, state laws may require additional non-controlling rights for minority investors who hold certain classes of stock, such as non-voting, preferred stock. Such common economic protections and rights include, but are not limited to:

- the power to prevent the alteration or change of the rights, preferences, privileges or terms of the particular class of stock held by the minority shareholder;

- the power to prevent the sale or disposition of assets outside the ordinary course or above a certain material threshold (less than "substantially all of the assets"), with the material threshold defined as a percentage of the overall value of assets at the time of the acquisition of minority shares;

- the power to prevent action that would effect a liquidation event of the U.S. business, which would include the termination, liquidation, or dissolution of the U.S. business;

- the power to prevent commencing voluntary bankruptcy proceedings or to consent to the appointment of a receiver, liquidator, assignee, custodian or trustee of the U.S. business for purposes of winding up its affairs;

- the power to prevent fundamental changes in the business or operational strategy of the company;

- the power to prevent fundamental changes in the regulatory, tax or liability status of the company;

- the power to prevent changes in the capital structure of the company (either equity or debt) that would dilute or otherwise impair the rights of existing shareholders; and

- the power to prevent the incursion of indebtedness above a certain defined material threshold.

We also note that standard minority protections, including those required by state law, do not limit the ability of the minority investor to prevent changes to the Articles of Incorporation, By-laws, constituent agreements, or other organizational documents of the entity in which the investment is made. On the contrary, perhaps the most common — and, therefore, most standardized — minority protection is precisely the right to prevent any changes to the underlying corporate organizational documents. This right does not provide the investor with any ability to control the underlying entity, but rather is an essential right to preserve the value of an investment. The right simply ensures the minority investor is protected against the entity altering the legal form of its organization in ways that would diminish the value of the minority investment and the negotiated rights of the investor. We encourage Treasury to consider this standard right of minority investors, as well as the other standard rights noted above, in setting forth the final definition of control in part 800.203.

We also encourage the Treasury to state, in issuing the final regulations, that part 800.203(c) is intended to reflect that CFIUS ordinarily will not deem standard minority protections, which are negotiated with the intent and effect of protecting minority investors from fundamental changes in the entity's business and provide no ability to determine, direct, or decide important matters affecting the daily operations of a business (such as those listed above and those currently listed in part 800.203(c)), to confer control over an entity.

Furthermore, we note that certain of the matters listed in proposed part 800.203(a) as exemplary "important matters" are broadly worded and their scope is unclear. In part because of this breadth, many of these factors listed as potentially indicating control may not, in all circumstances, in fact provide control. For example, proposed part 800.203(a)(8) references the "appointment or dismissal of officers or senior managers." This factor could be indicative of control in certain circumstances, in particular if an entity has the ability to determine, direct, take, reach, or cause decisions regarding the appointment or dismissal of <u>specific</u> officers or senior

managers. However, defining the criteria for certain officer positions in the Articles of Incorporation or corporate By-laws — such as requiring certain senior officers to be U.S. citizens — would not confer control upon minority shareholders who, pursuant to a shareholder agreement or as a matter of state law, must approve amendments to the Articles of Incorporation or corporate By-Laws, as applicable. In such instances, the minority shareholder would have no ability to actually affect the appointment or removal of particular officers of a company. Accordingly, we encourage Treasury to clarify the scope of the matters listed as "important matters" in part 800.203(a). In particular, we encourage Treasury to remove part 800.203(a)(8) or, at a minimum, clarify that part 800.203(a)(8) is focused on the power to control the appointment or removal of particular individuals as officers or senior managers.

Finally, as a general matter, we believe CFIUS should clarify that certain categories of rights may receive more weight than other categories when making control determinations. For example, it makes sense that affirmative rights to determine, direct, take, reach, or cause decisions for important matters would be weighted more heavily than negative rights that offer protections for the status quo. Likewise, we think it sensible that rights affecting the ordinary operations of the entity should be weighted more heavily than rights preventing fundamental changes to the business of the entity.

Convertible Voting Instruments

Proposed part 800.302(b) expands the existing treatment of convertible securities. Specifically, it states that factors for finding control in a transaction involving convertible instruments include whether the date of conversion has been agreed upon by the parties and whether the amount of the voting interests is determinable at the time of the transaction. In certain circumstances, we would agree that convertible voting instruments should be considered transactions for purposes of CFIUS. In many cases, however, the inclusion of convertible instruments is an economic carrot offered to enhance the interest of an investor in the long-term success of a business. Under such circumstances, the convertible instruments would not reasonably be exercised until the far distant future, even if there is a permissible right to convert in the near term. We believe that CFIUS's existing regulation addressing convertible securities — which is currently part 800.302(c) — is a better approach than the proposed regulation for two reasons. First, the existing approach more accurately reflects the commercial reality that convertible securities most often do not provide any control until they are actually converted. Second, the existing approach still preserves CFIUS's ability to determine on a case-by-case basis that an acquisition that includes convertible voting instruments may be a covered transaction depending on the operation of the instruments and the other rights at issue in the transaction. Accordingly, we encourage CFIUS to maintain the existing language in the regulations when it adopts the final regulations on the treatment of convertible voting instruments.

The CFIUS Timeframes and Process

In response to the initial notice of public inquiry issued by Treasury, we previously emphasized the importance of the regulations strictly applying the 30-, 45-, and 15-day statutory timeframes contemplated by FINSA. Preserving certainty in timeframes and confidentiality in the review are vital to maintaining a welcoming environment for investment. Accordingly, we strongly support the confidentiality provisions in the proposed regulations,

including the important clarification that information provided to CFIUS in the course of any pre-notice consultation will receive the full confidential treatment afforded by the statute. We also believe that the proposed regulations intend to preserve the statutory timeframes.

Nevertheless, there are additional clarifications that, in practice, would strengthen the preservation of the statutory timeframes. First, while we are very pleased that the proposed regulations do not mandate any pre-filing consultation or the provision of draft notices by transaction parties, we encourage Treasury to provide even greater clarity on this point in the final regulations. There is a risk that transaction parties and their counsel will interpret the fact that the regulations expressly "encourage[]" consultation with CFIUS before filing a notice to be a *de facto* dictate that such consultation is required. In fact, in the experience of many of associations' members, such pre-notice consultation can be quite valuable in certain cases, but is entirely unnecessary in others. For example, an acquirer that has never participated in the CFIUS process can find such pre-notice consultation to be informative and to facilitate the ultimate filing with and review by CFIUS. On the other hand, a pre-consultation period may be wholly unnecessary for parties that have successfully completed CFIUS reviews within the 30-day initial review period on many prior occasions. We recommend that Treasury state explicitly in part 800.401(f) that pre-notice consultation is not a requirement, but rather may be helpful to transaction parties on a case-by-case basis, such as when the acquirer has not previously undertaken a transaction that has been reviewed successfully by CFIUS. Thus, we would encourage Treasury to revise part 800.401(f) as follows:

> "Parties to a transaction are generally encouraged to consult with the Committee in advance of filing a notice and, in appropriate circumstances, to file with the Committee a draft notice or other appropriate documents to aid the Committee's understanding of the transaction and to provide an opportunity for the Committee to request additional information to be included in the notice. <u>Such pre-notice consultations are particularly useful when the acquirer has not previously undertaken a transaction that has been reviewed successfully by the Committee</u>. Any such pre-notice consultation should take place, or any draft notice should be provided, at least five business days before the filing of a voluntary notice…."

Second, part 800.403(a)(3), as proposed, provides that where CFIUS requests follow-up information from parties during a review or investigation, parties must provide that information within two business days or request an extension. As stated in the preamble to the proposed regulations, "a party's failure to provide promptly any follow-up information requested by CFIUS is grounds for rejecting the notice." 73 Fed. Reg. at 21866. We recognize the importance of transaction parties responding promptly to CFIUS's requests for information in order to enable CFIUS to complete its reviews within the statutorily mandated timeframe. At the same time, the potential penalty for failure to comply with the two business day requirement or to request an extension is severe.

It should be recognized that many foreign transaction parties are located in time zones that have little or no overlap with the U.S. business day. In these circumstances, such parties effectively lose one business day automatically in responding to a request. The imposition of the two business day requirement, and the attendant penalties, increases the

likelihood that parties will regularly request extensions of time, burdening both CFIUS and transaction parties. Accordingly, we recommend to CFIUS that the two business day requirement be lengthened to three business days; the addition of this one additional business day should have little material impact on the CFIUS review process but will effectively give foreign transaction parties the full two business days that CFIUS intends while also reducing the number of requests for extension.

CFIUS should be judicious in its discretion of when to reject notices for a failure to respond to an information request within the required time period or to request an extension. Such rejections should occur only when the failure to respond materially impacts the CFIUS review. In addition, as a matter of practice, we encourage CFIUS to take precautions to ensure that transaction parties do not inadvertently miss the deadline for responding to information requests. These precautions may include stating the deadline for response clearly and conspicuously when CFIUS transmits the information request to parties, copying all transaction parties on the request to the extent possible, requesting confirmation from transaction parties that they have received the information request, and following up with transaction parties to ensure that such requests have been received in the event such confirmation is not forthcoming.

Information Requests

In our earlier comments to Treasury, we encouraged CFIUS to maintain the current scope of contents that must be included in voluntary notices. On this issue, we agree with CFIUS that transparency in the type of information required by CFIUS for its review is important. Such transparency assists transaction parties in their planning purposes. In addition, CFIUS can more readily initiate and conduct reviews in a timely fashion if it has all the information it requires up front. However, these interests must also be balanced against the risks of expanding the scope of information requested by CFIUS for initial filings to a degree that it would impose unnecessary burdens on transaction parties and potentially create confusion over what is and is not critical information to include in initial notices.

We encourage CFIUS to consider this balance in adopting its final regulations. We also believe that certain of the items identified in proposed part 800.402(c) could be clarified to minimize confusion over the scope of the requirements and CFIUS's considerations as well as the burdens on transaction parties.

First, part 800.402(c)(3)(i) would require, for the first time, reporting on the estimated U.S. market share for the primary product or service lines of the U.S. business. We recognize that, depending on the product or service at issue, the degree of market penetration conceivably could be relevant to CFIUS's considerations. However, this would only seem relevant for product or service areas or categories. Defining the market penetration question in this fashion — that is, by reference to product or service "areas" (or, in the alternative, "categories") — will provide CFIUS with the answer it needs for its analysis while avoiding the burden of imposing on companies the nearly impossible task of identifying the market penetration of each product or service line. Likewise, we encourage CFIUS not to require parties to provide in the notice "an explanation for how" the market penetration estimate is derived. It does not seem pertinent to CFIUS's analysis to explain the method in every single case. If CFIUS deems this relevant to particular cases, it can always ask the question of the

transaction parties in those cases. Accordingly, we recommend revising proposed part 800.402(c)(3)(i) as follows:

> "(3) With respect to the U.S. business that is the subject of the transaction, and any entity of which that U.S. business is a parent that is also a subject of the transaction:
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> (i) Their respective business activities, as, for example, set forth in annual reports, and the product or service ~~lines~~ areas of each, including an estimate of U.S. market share for primary product or service ~~lines~~ areas ~~and an explanation of how that estimate was derived~~, and a list of direct competitors for those primary product or service ~~lines~~ areas;"

Second, the proposed regulations clarify that CFIUS may consider government contracts with any U.S. government agency to be relevant to its analysis, not only unclassified contracts with agencies with a national defense responsibility or classified contracts. However, in practice, CFIUS often has applied a materiality and reasonableness standard to the government contracting issue. For example, for a U.S. business that conducts sales strictly on a purchase order basis off the General Supply Schedule, it may not be relevant or necessary to provide a list of all purchase orders made by the government over the prior three years. There also may not be a specific government contracting official for such purchase orders.

A similar point also pertains to part 800.402(c)(3)(iii), which covers classified contracts. The proposed regulation would require information on such contracts dating back five years. The degree to which information, technology, or data is relevant or sensitive can evolve over time, and there are many instances where a contract dated years ago — even one that involves information, technology, or data that was classified or restricted at the time — may not be relevant to a company's current business. For contractors that perform extensive classified business for the U.S. government, a requirement to provide information dating back five years can be particularly burdensome. A three-year time period would be more reasonable. In addition, contractors often are prohibited from providing information on particular contracts based on their classification.

Accordingly, taking into consideration these comments, we recommend revising proposed parts 800.402(c)(3)(iii) and (iv) as follows:

> "(3) With respect to the U.S. business that is the subject of the transaction, and any entity of which that U.S. business is a parent that is also a subject of the transaction:
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> …
>
> (iii) To the extent such information is known and may be provided in accordance with applicable law and contractual requirements, ~~E~~each contract (identified by agency and number) that is currently in effect or that was in effect within the past ~~five~~ three years, with any agency of the United States Government

involving any information, technology or data that is classified under Executive Order 12958, as amended, its estimated final completion date, and the name, office and telephone number of the contracting official;

(iv) To the extent such information is known, ~~A~~a any other contract (identified by agency and number) that is currently in effect or that was in effect within the past ~~three~~ two years, with any agency of the United States Government, its estimated final completion date, and the name, office and telephone number of the contracting official;"

Third, proposed part 800.402(c)(3)(vi) would require parties to provide information on products that are rebranded or incorporated into the product of a purchaser. It also would require information on services that are provided on behalf of, or under the name of, another entity. These are expansive information requests that would not seem relevant in every CFIUS case, let alone the majority. Moreover, in a modern economy where both commoditized and highly tailored products may include components from numerous sources all of the world, where partner branding is a prominent marketing mechanism, and where outsourcing is fundamental to the conduct of business, this particular information item has the potential to be highly burdensome and costly for parties to answer. If there are particular national security concerns related to the rebranding of items or services — such as if software products that could be used by the government are sold under a different name — CFIUS should inquire about and assess those issues on a case-by-case basis, rather than impose the requirement on all transaction parties. Accordingly, we would strongly encourage CFIUS to strike proposed part 800.402(c)(3)(vi) in its entirety in the final regulations.

If CFIUS nevertheless feels compelled to retain this information request in some fashion, we would encourage CFIUS to adopt a more reasonable requirement as follows:

"(vi) To the extent known by the parties filing the notice, ~~A~~a any products or services (including research and development) that:

(A) It supplies in material measure to third parties and it knows are rebranded by the purchaser or incorporated into the products of another entity~~, and the names or brands under which such rebranded products or services are sold~~; and

(B) In the case of services, it provides in material measure on behalf of, or under the name of, another entity, and the name of any such entities;"

Fourth, in addition to identifying contracts for which the U.S. business is a sole source supplier of a product or service to a U.S. government agency, the proposed regulations would add a requirement that the U.S. business also identify single qualified source contracts. The additional requirement for single qualified source contracts seems unnecessary and burdensome. Parties will know if they are sole source suppliers to the government of a particular product or service. They will not necessarily know, however, if there are other suppliers

acceptable to the government. Further, if the government is interested simply in knowing what competition exists in the marketplace, that issue is addressed in proposed 800.402(c)(3)(i). We therefore recommend that proposed part 800.402(c)(3)(v)(B) be revised as follows:

> "(v) Any products or services (including research and development):
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> …
>
> (B) If known by the parties filing the notice, for which it is ~~a single qualified source (i.e., other acceptable suppliers are readily available to be so qualified) or~~ a sole source (i.e., no other supplier has needed technology, equipment, and manufacturing process capabilities) of a particular product or service for such agencies ~~and whether there are other suppliers in the market that are available to be so qualified~~."

Fifth, the proposed regulations would include a requirement for parties to provide information on the priority rated contractor or orders under the Defense Priorities and Allocations System ("DPAS"). The scope of this request is three years. For businesses that have such priority rated DPAS contracts, the number of contracts can be voluminous. Moreover, it is not clear that in all cases CFIUS would need information on DPAS contracts dating back three years to conduct its analysis. A more reasonable and less burdensome requirement would be for parties to provide information on priority rated DPAS contracts *over the previous year*. On a case-by-case basis, and as necessary, CFIUS could then seek additional information on such contracts from prior years.

Sixth, with respect to foreign government ownership, proposed part 800.402(c)(6)(iv)(D) indicates that certain affirmative or negative rights or powers of a government "could be relevant" in determining whether there is foreign government control. We recognize that the "could be relevant" language is intended to provide clarity without indicating that such affirmative or negative rights will, in every case, result in foreign government control. Nevertheless, we believe this intent could be even more clear if the provision also stated that the materiality of the rights at issue will affect whether they are deemed "relevant." Accordingly, we would propose that part 800.402(c)(6)(iv)(D) be revised as follows:

> "(iv) Whether a foreign government or a person controlled by or acting on behalf of a foreign government:"
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> …
>
> "(D) Has any other material affirmative or negative rights or powers that could be relevant to the Committee's determination of whether the notified transaction is a foreign government-controlled transaction; and if there are any such material rights or powers describe their source (for example, a 'golden share,' shareholders agreement, contract, statute, or regulation, where any one of these confers material rights or powers to determine, direct, take, reach,

> or cause decisions affecting the operations of an entity) and the mechanics of their operation …"

Seventh, the proposed regulations would codify CFIUS's practice of requesting personal identifier information for officers and directors of a foreign acquirer. Such identifier information should only be requested of entities that have a role in a particular transaction or that will control the U.S. business. For example, natural persons with a 5.1% interest in the parent will not, in most circumstances, have any role or impact on a particular transaction. For that matter, there may be transactions where, given the size and nature of the transaction, the approval of the board and officers of the ultimate parent may not be required to effect the transaction. Separately, there may be cases where an acquirer makes multiple acquisitions subject to CFIUS review within a short period of time. In those circumstances, it would seem unnecessary to require acquirers to make repeated submissions of the same identifier information. Also, publicly traded companies will likely not know or be able to obtain the personal identifier information of all individual shareholders who own more than 5% of the company. Accordingly, we encourage CFIUS to revise proposed part 800.402(c)(6)(vii) as follows:

> "(6) With respect to the foreign person engaged in the transaction and its parents:
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> …
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> (vii) To the extent that the foreign person has not undertaken a transaction that has been reviewed by the Committee within the prior six months, the following "personal identifier information," … with regard to current members of the board or boards of directors … and senior executives of the immediate acquirer and its ultimate parent, and any other entities in the same chain of ownership that could exercise control over the U.S. business being acquired, and, other than in the case of publicly traded companies, any natural person having an ownership interest of five percent or more in the ultimate parent of the acquirer."

Eighth, the proposed regulations would require certain "business identifier information" for parents of the acquirer and other entities in the same chain of ownership that could exercise control over the U.S. business that is the subject of the transaction. We believe that this request is clear enough with respect to the informational elements that it covers (i.e., those items listed in (A)-(D) of proposed part 800.402(c)(6)(viii)). However, the request also covers the address, phone/fax/email contact information, and employer identification number or other tax or corporate identification number with respect to "each branch." It is not clear what "branch" means in this context, but even if it were clear, it does not seem necessary to require this information since CFIUS will already receive business identifier information for "any other entit[y] in the same chain of ownership that could exercise control." Providing this information for "each branch" could impose a significant burden on transaction parties. We therefore recommend that Treasury drop the additional request for information on "each branch" from proposed part 800.402(c)(6)(viii).

Ninth, we note that FINSA, in its statutory language, described the circumstances in which the Committee would pursue a second-stage investigation; these circumstances include — as set forth in Section 2 of FINSA — those instances in which the "impairment to national security has not been mitigated by assurances provided or renewed with the approval of the Committee …" The proposed regulations, at Section 800.503(b)(2), retain part but not all of the statutory text. We recommend that Section 800.503(b)(2) be revised to include the statutory phrasing "by assurances provided or renewed with the approval of the Committee" as a reminder to transaction parties and CFIUS that prior agreements with CFIUS can often mitigate future national security issues, and that new mitigation is not always required in the presence of adequate prior mitigation. As revised, Section 800.503(b)(2) would read:

> "(2) Would result in control by a foreign person of critical infrastructure of or within the United States, the Committee determines that the transaction could impair the national security and such impairment has not been mitigated by assurances provided or renewed with the approval of the Committee."

Tenth, and finally, there are a number of proposed new information requests that are likely to be inapplicable in most CFIUS cases. These include, for example, whether the U.S. business possesses any Select Agent or Toxin (as defined by applicable U.S. regulations) or has products or technology that are subject to export authorization by the Department of Energy. We recognize that, for some transactions in particular industries, these may be highly relevant items, and overall, we think the addition of these types of industry-specific items provide helpful transparency. However, we believe it would behoove CFIUS and transaction parties alike if the final regulations stated clearly that when a particular information item listed in part 800.402(c) is not relevant to a transaction, it is perfectly acceptable for transaction parties simply to note "not applicable" for the individual item in their voluntary filing.

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Overall, Treasury and CFIUS should be commended for the balance struck in the proposed regulations between protecting national security and preserving an open environment for investment. In this regard, the proposed regulations are a faithful implementation of FINSA. Nevertheless, we believe there are additional clarifications and improvements that can be made to the regulations. We encourage Treasury and CFIUS to adopt the recommendations we have set forth in these comments in the final rule.