



EMERGENCY COMMITTEE FOR AMERICAN TRADE

December 7, 2007

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

By E-Mail: cfius@do.treas.gov

Dear Mr. Daly:

In accordance with the *Federal Register* notice of October 11, 2007, please find below the comments of the Emergency Committee for American Trade (ECAT) on the national security review process as modified by the Foreign Investment and National Security Act of 2007 (FISIA).

Founded in 1967, ECAT is an association of the chief executives of leading U.S. business enterprises with global operations. ECAT was founded four decades ago to promote economic growth through expansionary trade and investment policies. Today, ECAT's members represent all the principal sectors of the U.S. economy – agriculture, finance, high technology, manufacturing, merchandising, processing, publishing and services. The combined exports of ECAT member companies run into the tens of billions of dollars. The jobs they provide for American men and women – including the jobs accounted for by suppliers, dealers, and subcontractors – are located in every state and cover skills of all levels. Their collective annual worldwide sales total over \$2.5 trillion, and they employ more than six million persons. ECAT companies are strong supporters of negotiations to eliminate tariffs, remove non-tariff barriers and promote trade liberalization and investment worldwide.

Background: The Relationship between Global Investment and U.S. National Security

ECAT strongly supports an objective and fact-based national security review of foreign investments and welcomes the efforts of Congress and the Administration to improve that process. All too often, the recent debate over the effort to reform the foreign investment review process of the Committee on Foreign Investment in the United States (CFIUS) poses a false choice – the choice between preserving national security and welcoming foreign investment. In fact, the United States' national security is strengthened by promoting a vibrant economy and economic growth here at home and abroad, which in turn are fostered by foreign investment into the United States, as well as U.S. investment abroad.

Foreign investment inflows into the United States are a major source of U.S. economic growth. Foreign investment in the United States promotes U.S. exports, economic and employment opportunities and productivity. Based on the most recent data from the Bureau of Economic Analysis, majority-owned U.S. affiliates of foreign companies with operations in the United States employed 5.4 million U.S. workers, accounting for nearly five percent of total U.S. employment in private industries.

U.S. foreign investment outflows are also critically important to supporting growth in the U.S. and global economies. Over the past 20 years, U.S. companies that invest abroad have:

- exported more (accounting for one-half to three-quarters of all U.S. exports)
- expended more on U.S. research and development and physical capital investments, and
- paid their U.S. workers more

than companies not engaged globally. Foreign affiliate sales of U.S. companies invested abroad amount to approximately \$2 trillion, which help to support jobs and business activities in the United States. More than 70 percent of the profits earned by such affiliates are returned to the United States. Moreover, U.S. investment abroad is essential to supporting access to natural resources, as well as the economic growth in foreign countries that is very important, albeit not sufficient, to support stability overseas. In short, U.S. foreign investment is critical for supporting U.S. economic growth and a higher standard of living here in the United States and abroad.

Continued foreign investment in the United States and its corollary, U.S. investment abroad, require policies that support and protect foreign investment. It is, therefore, critical that the implementation of FINSA and the continued operation of the U.S. national security review process foster such investment and not create inappropriate templates for other countries to restrict U.S. investment abroad. This approach is consistent with the Congressionally-defined purpose of FINSA laid out in the report of the House Financial Service Committee, which states that the legislation “strengthens national security *and* promotes a policy of openness toward foreign investment.” Report of the House Committee on Financial Services, 110th Congress, 1st Sess., Rep: 110-24 at 9 (emphasis added).

Key Principles to Guide the Implementation of FINSA

CFIUS plays an important role in ensuring that the United States continues to welcome investment, and its reform through FINSA can continue to ensure that it represents a credible, objective and strong process focused on national security. There are a number of key principles to maintain in reforming and improving the CFIUS process, including ensuring that the national security review process is:

- Objective, fact-based and analytically rigorous.
- Focused on national-security issues.
- Taking into full account existing legislation and regulations that mitigate potential national security issues.
- Taking full account of information provided by the parties and safeguards built into the transaction, while respecting and ensuring their confidentiality.
- Operating on a case-by-case basis and remaining sufficiently flexible to cover new national security issues as they arise.
- Operating in a predictable and timely manner.
- Not a substitute for other more targeted and effective tools to protect U.S. national security.

These principles should also guide the implementation of the FINSA and the resulting should explicitly emphasize that the U.S. system remains objective, fact-based and national-security-focused.

Key Issues in the Reform of the National Security Review Process

Critical Infrastructure

FINSA expands the focus on transactions involving national-security-related “critical infrastructure,” which FINSA defines, subject to mandatory regulations that are to be issued, as “systems and 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.” The FINSA requires investigations of transactions involving critical infrastructure where the CFIUS “Committee determines that the transaction could impair national security, and that such impairment to national security has not been mitigated by assurances provided or renewed with the approval of the Committee.”

In developing the regulations further defining “critical infrastructure” and in implementing the standards incorporated into FINSA, it is vital to maintain the focus on national-security implications. By clarifying “national security” to include “critical infrastructure” in the FINSA, Congress made clear that critical infrastructure, while important to highlight, fundamentally is defined as a subset of national security, not a separate category in and of itself. Overly broad definitions of “critical infrastructure” would ignore this construct, and potentially result in very severe mirror-image language by foreign countries, many of which are interested in limiting investments in important areas, whether or not related to national security.

In the same way, it is important for the regulations to clarify that while “major energy assets” are included as part of the definition of “critical infrastructure,” that the FINSA does not intend, nor require, every energy transaction to undergo CFIUS review. Rather, it is only transactions involving those *major* energy assets that implicate national security that are the focus of CFIUS. Such a clarification is vitally important to ensure that foreign governments do not adopt overly expansive definitions themselves, which could undermine existing and future U.S. energy investments overseas vital to U.S. economy and security.

It is also important that the regulation avoid adopting definitions of critical infrastructure from other areas with very different objectives, such as for example, the Department of Homeland Security’s Chemical Facility Anti-Terrorism Standard, which has a different purpose and is likely to be far more expansive than would be appropriate for the CFIUS process.

Mitigation Agreements.

Even before FINSA was enacted, there was increased use of mitigation agreements by CFIUS. While such agreements are important, it is also critical that they not be over-used, over-reaching or used when other legislation and regulations are available to address perceived threats. FINSA makes clear that the need for and substance of mitigation agreements must be predicated on a risk-based analysis. In conducting that analysis, the regulations should clarify that CFIUS should take into account the extent to which existing laws, regulations and related measures already effectively mitigate or permit the government to mitigate the identified risk that the transaction creates, such that further mitigation measures need not and should not be imposed by CFIUS on an individual transaction. Only when existing laws, regulations or related measures do not provide the authority to mitigate identified risks should mitigation measures be explored and then be developed in a manner proportional to the identified risk that the transaction may create.

Foreign-Government Controlled Transactions.

FINSA also places increased emphasis on foreign-government controlled transactions that are defined as those that “could result in the control of any person engaged in interstate commerce in the United States by a foreign government or an entity controlled by or acting on behalf of a foreign government.” In implementing this provision, it is important to recognize that the mere participation of a foreign government in a transaction does not imply control. Rather, an evaluation must be made of the foreign government’s role in the transaction, its share of ownership and its actual level of control.

Confidentiality

FINSA requires strong confidentiality provisions to be set into place. These are absolutely critical for companies operating in the United States and also to set a strong example for foreign governments and the rules that they adopt. Explicit clarification of the importance of confidentiality should be incorporated into the regulations implementing FINSA.

CONCLUSION

For all of these reasons, ECAT urges the Administration to develop regulations that improve the national-security-review process in a manner that ensures it is a fact-based, objective and national-security focused and that advances U.S. economic and security interests.

Thank you for your consideration of ECAT’s comments.

Sincerely,



Calman Cohen
President