



December 7, 2007

## **KEY ISSUES FOR THE CFIUS REGULATIONS IMPLEMENTING THE FOREIGN INVESTMENT AND NATIONAL SECURITY ACT OF 2007**

These comments are being submitted by a coalition of international businesses, trade associations and financial services firms, including the Financial Services Forum, the Organization for International Investment (“OFII”), the United States Chamber of Commerce and a number of companies that have filed, or have advised companies that have filed, with the Committee on Foreign Investment in the United States (“CFIUS”) in the past. Together the members of this coalition represent a broad range of companies employing tens of millions of Americans.

The Administration has invited comments regarding forthcoming regulations that will implement the Foreign Investment and National Security Act of 2007 (“FINSAs”), Pub. L. No. 110-049, 121 Stat. 246 (2007). Congress carefully structured FINSAs to provide protection for national security in the context of an open investment environment. The coalition strongly encourages the Administration to maintain the balance in the new CFIUS regulations between protecting national security and encouraging foreign investment. To maintain this balance, the regulations should limit CFIUS action to those instances where national security truly is at risk, provide as much clarity and certainty as possible for companies in the process, and prevent overreaching by CFIUS agencies in the mitigation process. With these broad parameters in mind, the coalition respectfully urges CFIUS to propose regulations that further the following principles:

**Focus on National Security:** FINSAs contemplates that CFIUS should take action against a covered transaction only if national security is threatened, after conducting a risk-based analysis. Economic security and general “public welfare” concerns should not be part of CFIUS’s national security analysis. The definition of critical infrastructure should be limited to comport with this understanding of national security.

**Process:** As a matter of first principles, the coalition believes that the process implemented for reviewing transactions under FINSAs should provide for an adequate review of national security issues while also providing as much clarity and certainty of timing as possible to transaction parties. To this end, FINSAs contemplates that the 30-, 45- and 15-day periods specified in the statute should be strictly applied, thereby providing a time certain by which the CFIUS process should be completed. The regulations should protect these time frames and not incorporate provisions that would extend the timeline, such as mandatory pre-filing periods.

**Mitigation:** Over the last year, the frequency of mitigation agreements demanded by CFIUS has increased dramatically. FINSAs contemplates the appropriate use of mitigation agreements to resolve legitimate national security concerns, but use of such agreements should be governed by

the following principles: (1) they should be used only when a risk-based national security analysis indicates an incremental risk, rather than being used to address existing risks; (2) they should be used only when no other existing laws (other than FINSA and the International Economic Emergency Powers Act) are adequate or appropriate to address the incremental risk; and (3) they should be limited in scope to address only identified incremental risks.

**Scope of Information:** The pre-FINSA regulations require companies to include in their voluntary notices a broad array of information regarding covered transactions. Such information typically is sufficient to provide CFIUS with an understanding of the transaction, and CFIUS retains the ability to request further information. FINSA does not mandate an expansion of the information companies must provide, and the coalition urges CFIUS to maintain the current scope of contents that must be included in voluntary notices.