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Gay Hartwell Sills
Staff Chair, Committee on Foreign Investment in the United States
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Regulations Pertaining to Mergers, Acquisitions, and Takeovers
31 CFR Part 800 -- Comments in Response to Notice of Inquiry

Dear Ms. Sills:

We are pleased to submit these comments in connection with the development of regulations implementing Public Law 110-49, the Foreign Investment and National Security Act of 2007 ("FINSA"), which amended the provisions of the Defense Production Act that authorize national security reviews concerning foreign acquisitions of U.S. businesses. Since the enactment of the Exon-Florio Amendment that first created this process, Kaye Scholer LLP has served as legal counsel in more than 200 acquisition reviews by the Committee on Foreign Investment in the United States ("CFIUS").

We believe that the CFIUS review process has well served the national security interests of the United States, and we commend CFIUS for its continuing efforts to ensure that the process is fair and does not unduly burden investors with costly and time-consuming inquiries. Foreign investment can bring new capital, new technology, and new expertise to U.S. businesses, helping them to compete aggressively in the world marketplace. At the same time, we know, on the basis of our experience, that it is possible to implement and maintain corporate governance and legal compliance programs to ensure that foreign ownership does not compromise classified information and programs or facilitate the unauthorized transfer of export-controlled information. Indeed, many of the companies that we have counseled in the CFIUS process have proved to be model national security contractors. On balance, therefore, we believe foreign investment strengthens our industrial base and, in the process, our national security.

1. <u>Better definitions are needed in the collection of personal identifier information, together with protections against late inquiries</u>.

In your October 11, 2007, notice (72 Fed. Reg. 57,900), you ask for comments on the collection of information from filers, including "personal identifier information." In our experience, the most problematic issues respecting personal identifier information have concerned requests for information on "senior executives" and individual shareholders.

In its collection of information on the parties to a transaction, CFIUS often solicits personal identifier information on individual investors and "senior executives." (Since the term "senior executive" is not defined in the regulations, CFIUS has sometimes -- but not always -- expanded its request beyond the most senior executives in the company to include other officers and staff.) Because these requests can include detailed and highly personal information -- information that may or may not be readily available from personnel records, and that may or may not be readily available under foreign privacy and investment laws -- responding can be extremely difficult and time-consuming, especially when a request arrives late in the review process. In certain foreign countries, for example, publicly traded companies may not know the identity of their investors below a certain threshold, and may not have any practical means of obtaining this information at all, let alone in a matter of hours or days. In other cases, investments may be held by institutional investors. Obtaining detailed personal identifier information on the shareholders of institutional investors that hold minor interests in an acquiring firm can be difficult, if not impossible.

We do not quarrel with the need to secure personal identifier information. We further understand that events may arise in the course of an investigation that may trigger the need to secure additional information on individual officers and investors. We believe, however, that the information that CFIUS wants and needs on individual investors and senior officers in most cases can be settled on and defined in the regulations, so that applicants are not faced with changing standards and late requests. To this end, we recommend that CFIUS define the term "senior executives" and identify the size or character of the individual investment interests that require full identification, with attention to established definitions under U.S. law and foreign investment laws that may limit information available to publicly traded companies. We would also suggest that the regulations require the approval of the Lead Agency and the chair of CFIUS in any case where there is a request for personal identifier information after the tenth day of the initial 30-day review. This may help ensure that late requests are reserved for truly extraordinary cases, regularize the process, and facilitate efforts to provide CFIUS with full information.

2. Not all "golden shares" rise to the level of "government control."

FINSA gives CFIUS an opportunity to revisit the definition of "control" as applied to government-controlled corporations. Under the statute, "the term 'control' has the meaning given to such term in regulations which the Committee [CFIUS] shall prescribe."

The concept of "control" is broadly defined in the current regulations, and determines both whether an entity is a "foreign" person for the purpose of the statute as well as whether a proposed investment by a foreign person would be subject to the statute. Specifically, 31 C.F.R. § 800.204 defines "control" as "the power, direct or indirect, whether or not exercised, and whether or not exercised or exercisable through the ownership of a majority or a dominant minority of the total outstanding voting securities of an issuer, or by proxy voting, contractual arrangements or other means, to determine, direct or decide matters affecting an entity ..." This definition is understandably broad, in so far as it is intended to sweep in a broad category of investments for review.

One change in the law effected by FINSA, however, is to clarify the provisions of prior law that provided for mandatory investigation of acquisitions by foreign government-controlled entities. Under FINSA, a transaction is deemed to be foreign government-controlled if it would result in control of a U.S. entity by a foreign government or by an entity "*controlled by* ... a foreign government." Such acquisitions are singled out for especial scrutiny.

Historically, the broad definition of control has resulted in a finding of "government control" in cases where the only control exercised by a foreign government is through a "golden" or "special" share that gives a foreign government extraordinary voting or veto rights, generally in companies in the defense or national security sector. In some cases, the only rights effected by the "golden share" mirror the authority provided to CFIUS -- namely, the right to block mergers and acquisitions by foreign persons. In all other respects, the company may operate as a commercial entity. Nevertheless, because a foreign government can "determine, direct, or decide" the acquisition of the entity by a foreign buyer, the entity is deemed "foreign government controlled." In such cases, we respectfully submit, the foreign company is no more "government controlled" than any U.S. company that submits to CFIUS review. The only difference is that the government's power is effected through a "golden share" instead of a regulation.

We recognize that mandatory investigation of acquisitions by "foreign government-controlled" entities is not required in any case where the Secretary of the Treasury and the head of the Lead Agency jointly determine that the investigation will not impair the national security of the United States. Nevertheless, the treatment of certain commercial companies as "foreign government-controlled" going into an inquiry may unfairly prejudice the review process where such "government control" is confined to limited veto rights over foreign acquisitions, and unnecessarily inject a note of uncertainty in the review process. We would recommend, therefore, that CFIUS make clear that a company will not be deemed foreign government controlled where "control" is manifested by a "golden" or "special" share and limited to blocking acquisition by foreign investors.

3. CFIUS should only ask the parties to a transaction to certify to information about which they have direct knowledge.

Current CFIUS procedures require that each party to a joint voluntary notice certify to the truth of all information in the notice ("upon information and belief"). This is unrealistic in most covered transactions, since each party is likely to have only limited access to information about the other party, and CFIUS has allowed parties to limit their certifications to the information each has provided. We think that CFIUS has been right to accept such certifications, and believe it is appropriate to square the language of the regulation with agency practice, allowing each party to certify only to the truth of the information it has itself contributed to the CFIUS petition. This change would acknowledge that CFIUS can secure full certification of all information presented without asking the parties to be, in effect, guarantors for information about which they have no direct knowledge. This will avoid unnecessary confusion for the parties to CFIUS transactions concerning their certification obligations.

4. A better description of the prefiling process is needed.

Currently, at the request of CFIUS, parties are encouraged to follow an informal "prefiling" process, which allows CFIUS to obtain information regarding the transaction anywhere from three to five business days before the formal filing. All parties would benefit from an explanation of the prefiling process and timeline -- and, in particular, a description of the information that CFIUS wants to see at the time of prefiling. For example, it would be useful to know whether exhibits should be routinely included in prefilings, as the compilation of exhibits can be time-consuming, and can delay prefiling notices. Clarity on the prefiling process would be helpful to all concerned.

5. Regulations should state when critical infrastructure is deemed "of or within the United States."

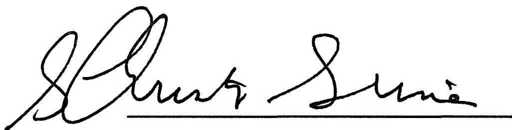
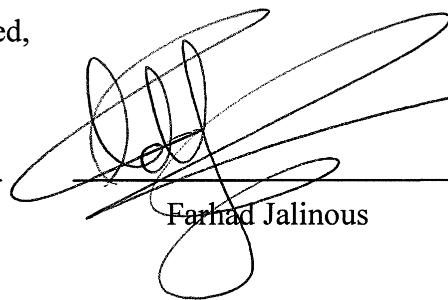
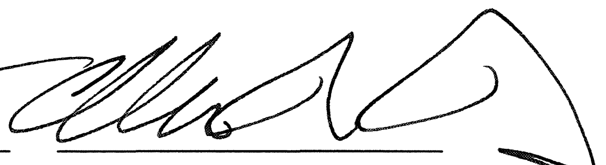
Finally, we note that FINSA has defined the term "critical infrastructure" to mean "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security." FINSA also requires CFIUS to conduct investigations of any covered transaction which "would result in control of any critical infrastructure *of or within* the United States by or on behalf of any foreign person..." Pub. L. No. 110-49, § 2(b)(2)(B)(i)(III)(emphasis added).

In so far as investigations may only be conducted of "covered transactions" -- i.e., transactions with foreign persons that could result in foreign control of any person engaged in interstate commerce in the United States -- we understand the term "of or within" the United States to mean that an investigation may be conducted of covered transactions involving critical infrastructure that is U.S. -owned or -controlled (i.e., "of ... the United States") regardless of its location, or critical infrastructure that is "within" the territorial jurisdiction of the United States. The phrase is nowhere defined in the statute, however, and, we submit, needs to be addressed in

the regulations. Otherwise, there is risk that the term may be read to reach foreign-foreign transactions that may affect the United States national security, even though no U.S. person is involved in the transaction -- for example, the acquisition of a foreign oil pipeline. It is questionable what authority the President could exercise to block such transactions in any case, making them ill-suited to CFIUS review, and inviting backlash by foreign jurisdictions. We believe it is best to make clear at the outset that CFIUS has no intent to assert extraterritorial jurisdiction in the case of foreign acquisitions that do not involve persons engaged in U.S. commerce, or in the absence of U.S. ownership or control of the affected foreign asset.

We thank you for this opportunity to comment on the rulemaking process.

Respectfully submitted,

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