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December 7, 2007

**VIA EMAIL (CFIUS@DO.TREAS.GOV)**

Mr. Nova Daly  
Deputy Assistant Secretary  
U.S. Department of the Treasury  
1500 Pennsylvania Ave. NW  
Washington, DC 20220

Re: Notice of Inquiry Concerning Regulations to Implement the Foreign  
Investment and National Security Act of 2007 and Issues Pertaining to the  
Existing National Security Review Process

Dear Mr. Daly:

Kelley Drye & Warren LLP (“Kelley Drye”), by the undersigned counsel, hereby submits its comments in response to the October 11, 2007 Notice of Inquiry (“NOI”) of the U.S. Department of the Treasury (“Treasury”) in the proceeding captioned above.<sup>1</sup> In this proceeding, Treasury is soliciting comment on issues relating to the implementation of the Foreign Investment and National Security Act of 2007 (“FINSAs”). Treasury also seeks input on the existing process whereby the Committee on Foreign Investment in the United States (“CFIUS”) conducts national security reviews of foreign acquisitions of control of U.S. businesses. Treasury does not propose any new CFIUS regulations or modifications to any existing CFIUS regulations or policies in the NOI.

Kelley Drye has advised numerous foreign entities on the legal and regulatory issues associated with the purchase of a controlling interest in U.S. businesses, most notably U.S. telecommunications companies. In so doing, Kelley Drye has filed several voluntary notices under Section 721 of the Defense Production Act of 1950, negotiated multiple mitigation agreements, counseled parties to mitigation agreements on implementation and compliance

<sup>1</sup> 72 FR 57900 (Oct. 11, 2007).

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issues, participated in CFIUS investigations, and otherwise represented foreign companies before CFIUS. As such, Kelley Drye has a direct and vital interest in this proceeding.

At this time, Kelley Drye is not submitting any comments on the substance of the regulations to be adopted to implement FINSA or the existing CFIUS review process. Kelley Drye reserves the right to submit such substantive comments at a later date, after reviewing other filings made and notices given in this proceeding. At this point in the proceeding, Kelley Drye's primary concern is with the process whereby specific regulations to implement FINSA are developed and adopted and the existing CFIUS regulations and review process are modified. It is Kelley Drye's understanding that Treasury will propose and seek comment on new and modified CFIUS regulations early next year.

Under the Administrative Procedure Act, federal government agencies that engage in rulemaking must give the public a meaningful opportunity to comment and otherwise participate in the rulemaking process.<sup>2</sup> In the NOI, Treasury recognizes the importance of public participation to the development of new and modified CFIUS rules and policies when it states that the purpose of issuing the NOI is "to obtain a wide array of views of businesses active in the international mergers and acquisitions on several broad topics, in order to inform regulatory development."<sup>3</sup> Kelley Drye submits that Treasury can best ensure that the public is given a meaningful opportunity to participate in the development of new and modified CFIUS regulations by permitting and encouraging the public to submit reply comments as well as initial comments. In addition, Treasury must provide adequate time for the submission of initial comments and reply comments, preferably 30 days in each case.

By giving the public the opportunity to comment not only on Treasury's proposed or modified regulations but also on the comments submitted by other parties to the proceeding, Treasury will be better able to obtain the "wide array of views" it seeks. Giving commentators the opportunity to support or dispute the points made by other parties in the proceeding will give Treasury a better understanding of the issues raised and a better sense of the public impact of its proposed regulations.<sup>4</sup> Kelley Drye notes that other federal government agencies (*e.g.*, the Federal Communications Commission) routinely provide two comment rounds in their rulemaking proceedings.

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<sup>2</sup> See *Grand Canyon Air Tour Coalition v. FAA*, 154 F3rd 455 (C.A.D.C. 1998).

<sup>3</sup> NOI at 57901.

<sup>4</sup> Obviously, in order to respond to comments filed, the public must have access to the comments. Kelley Drye assumes that since Treasury plans to post the comments it receives in response to the NOI on its website (NOI at 57900), Treasury plans to post the comments it receives on its proposed regulations as well. Kelley Drye urges Treasury to post any comments on its website promptly following receipt to give parties the maximum possible time to review them.

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Having at least 30 days for each comment round is particularly critical in this proceeding to encourage and enable foreign entities to participate. Developing positions and drafting comments on proposed regulations takes time even when all parties are located in the U.S. Having counsel in the U.S. and affected parties abroad only complicates and adds time to the process. If the comment periods are too short to allow the process to work, Treasury may be denied the benefit of the views of interested persons.

Respectfully submitted,

Kelley Drye & Warren LLP



Joan M. Griffin