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CHAIRWOMAN

United States House of Representatives
Committee on Financial Services
Washington, DC 20515

PATRICK McHENRY, NC
RANKING MEMBER

October 17, 2019

The Honorable Steven Mnuchin
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Ave. NW
Washington, D.C. 20220

Dear Secretary Mnuchin:

We are writing to provide our perspective on the proposed rulemaking for 31 CFR parts 800 and 802, as issued on September 17 by the Treasury Department. It is clear that Treasury and other member agencies of the Committee on Foreign Investment in the United States (CFIUS) have put considerable thought into drafting these regulations, much of which demonstrates sensitivity to congressional intent and reflects discussions on CFIUS held between Treasury and the Committee on Financial Services. We appreciate these efforts and look forward to continued work with the Department as you go about implementing the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). As you know, the Committee devoted considerable time to this legislation, with one of the authors of this letter, Congressman Barr, chairing relevant hearings and determining FIRRMA's final text as a member of the conference committee.

Our initial comments on Treasury's draft include the following:

Provisions Pertaining to Certain Investments in the United States by Foreign Persons

Section 800.212 – "Covered Investment Critical Infrastructure"
We appreciate Treasury's efforts here to circumscribe critical infrastructure and enumerate appropriate examples, as FIRRMA requires. The application of particular functions to the subset of critical infrastructure listed in Appendix A is also welcome. As for the merits of including specific types of critical infrastructure listed in the Appendix, we will continue to engage with Treasury and encourage the Department to take stakeholder views into consideration as FIRRMA rulemaking progresses.

Section 800.235 – "Own"
This narrow definition is consistent with the term as Congress employed it in FIRRMA. Anything other than direct possession was not intended under this provision.

Section 800.246 – "Supply"
The supply of critical infrastructure, as described under Sec. 721(a)(4)(B)(iii)(I) and Sec. 721(a)(4)(D)(i)(III)(cc) of the Defense Production Act of 1950 (DPA), means the provision of critical infrastructure itself; otherwise, Congress would have indicated that supplying

critical infrastructure *with* (goods, services, etc.) was intended, and then would have specified the goods and services envisaged. We raise this point in order to highlight that, as proposed in the rule, the supply of "third-party physical or cybersecurity" may not obviously align with these provisions, unless CFIUS is suggesting that such physical or cybersecurity is integral to the critical infrastructure itself. We therefore hope to work with you to more fully understand the rationale behind Section 800.246.

Section 800.241 – "Sensitive personal data"
We appreciate the care with which you have chosen to implement this provision of FIRRMA, especially through the use of a two-step approach targeting specific populations and types of sensitive data. The proposed rule's treatment of identifiable data, encryption, and ordinary consumer transactions, among other issues, strikes us generally as prudent. At the same time, we encourage you to carefully weigh additional feedback you receive from stakeholders in order to reflect real-world circumstances and the need to keep this section's scope narrowly focused on credible national security threats.

Section 800.219 – "Excepted Foreign State"
Section 721(a)(4)(E) of the DPA ("Country Specification"), requires CFIUS to "limit the application" of particular criteria for covered transactions to certain categories of foreign persons. As issued, the proposed rulemaking for 31 CFR parts 800 and 802 establish categories that are not coherent without a list of excepted foreign states. This is therefore a limitation that does not limit; it is both inconsistent with FIRRMA and calls into question a number of significant provisions. For these provisions to work, we urge you to specify excepted foreign states not later than the date of issuance for final rulemaking, utilizing the same effective date. In previous correspondence,[1] the leadership of this Committee stressed that many U.S. allies, including NATO and non-NATO partners, should remain unaffected by FIRRMA's expansions so that CFIUS can devote its limited resources to threats posed by China, Russia, and others.

The draft rule notes that the excepted foreign states list is "a new concept," such that "CFIUS initially intends to designate a limited number of eligible foreign states." However, the U.S. Government, including member agencies of CFIUS, already has extensive regulatory experience targeting countries and end users based on national security risks. While Treasury has opted for a so-called white list interpretation instead of a black list for subparagraph (E), such an approach is not compulsory under FIRRMA and does not justify a delay, nor incompleteness, with respect to countries specified under this section.

Section 800.220 – "Excepted Foreign Investor"
CFIUS should consider revising the ownership threshold described under (a)(3)(iv) upward to make it more consistent with concepts such as minimum excepted ownership, substantial interest, or CFIUS's existing rules on holdings of 10 percent in connection with passive investment. Ultimately, paragraph (iv) should focus on risks emanating from influence by the foreign person. Hurdles to qualify as an excepted foreign investor are inconsistent with

[1] See attached letter from Members of the Committee on Financial Services, dated September 12, 2018.

congressional intent to limit CFIUS's jurisdiction through Section 721(a)(4)(E), if such hurdles have no meaningful relation to national security risks.

Section 800.252 – "U.S. Business"
We are pleased to see existing regulatory examples retained with regard to the definition of "U.S. business." As you know, certain stakeholders have inquired whether there may now be ambiguity to this term, which, because it does not refer exclusively to activities in interstate commerce per CFIUS's existing regulations, might suggest the possibility of new extraterritorial reach when assessing whether a deal is a covered transaction.

There is no such ambiguity, as previously highlighted in the enclosed letter. Section 201 of the House-passed FIRRMA made clear that activities unrelated to interstate commerce have no bearing on the concept of "U.S. business" for the purpose of defining covered transactions, and the sole reason why language emphasizing interstate commerce activities was set aside during conference discussions was to avoid scenarios (as raised by Treasury) where this text might not technically make sense when applying the term "U.S. business" in contexts other than CFIUS's jurisdiction over a covered transaction. Moreover, restricting covered transactions to activities in interstate commerce had previously served as the CFIUS standard, even though Section 2 of the Foreign Investment and National Security Act of 2007 (FINSA, P.L. 110-49) did not explicitly limit covered transactions with regard to such activities. For these reasons, Congress agreed, based on discussions with the Administration, to align the FIRRMA conference report's "U.S. business" definition with FINSA's language ("engaged in interstate commerce in the United States"), understanding that, as before, any nexus to a covered transaction apart from activities in interstate commerce was in no way envisioned.

Section 800.401 – "Mandatory Declarations"
We are disappointed to see the waiver authority granted to CFIUS unused here, as it was evident in the Financial Services Committee's discussions with Treasury when writing FIRRMA that CFIUS has a number of candidates that may merit such waivers. Indeed, the Committee is aware of a number of certified transactions suggesting that certain investors owned by allied governments may not pose the risk of other government-controlled entities. As with Sections 800.219, we hope that the final version of Section 800.401 will come to reflect appropriate consideration for a wide range of U.S. allies, as exceptions for allies could otherwise form part of legislative efforts.

Section 800.1001 – "Determinations"
We are concerned by the ambiguity surrounding the draft rule's linking of excepted foreign states' status with the establishment of foreign investment screening regimes. Some forms of investment screening abroad, even in allied countries, go well beyond CFIUS's narrow scope and would be unacceptable if proposed in the United States. It is unclear how promoting or endorsing such processes would be consistent with our national interest. In fact, a significant motivation behind Congress's efforts to restrain and focus FIRRMA was the knowledge that certain other countries had overreached, or might be about to overreach, with their screening regimes, or that foreign governments could seek to copy CFIUS excesses if FIRRMA were not appropriately tailored.

As Treasury continues its consultations abroad with respect to investment screening regimes, we believe the Department should not only recommend the establishment of screening that is narrowly focused on foreign countries' national security (consistent with U.S. national security), but also urge the reduction or elimination of barriers that may impede investment from U.S. persons and others for reasons unrelated to national security imperatives.

Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States

Section 802.204 – "Close Proximity"
Although a uniform one-mile distance has been proposed as "close proximity," FIRRMA makes clear that this term "refers only to a distance or distances within which the purchase, lease, or concession of real estate could pose a national security risk in connection with a United States military installation or another facility or property of the United States Government [...]." This text, based on the House-passed version of FIRRMA, takes into account the tailoring of close proximity with respect to different installations, facilities, or properties – hence the reference to "a distance or distances." Close proximity was also intended to denote multiple distances relative to different parts of a single property, such as those listed in Appendix A (the proposed rule seems to make room for this nuance as well, e.g. through its treatment of certain Montana counties under Part 3 of the Appendix). Delineating various distances as a perimeter around a single property is straightforward to depict, which was evident to Congress when drafting FIRRMA, and CFIUS should publish maps online with clearly demarcated, appropriately tailored zones of "close proximity" and "extended range."

Section 802.218 – "Extended Range"
It appears that the proposed "extended range" of 99 miles beyond "close proximity" – which would amount to a total radius of 100 miles around a sensitive government facility – may have been issued pursuant to subitem (BB) or (CC) of Sec. 721(a)(4)(B)(ii)(II)(bb) of the DPA. However, the rationale behind a 100-mile radius is unclear, because 1) like the draft definition for "close proximity," it is a one-size-fits-all perimeter around facilities in diverse locations that presumably are subject to varying degrees of surveillance risk; 2) the distance to the horizon even from the top of a 100-foot-tall building is around 12 miles, complicating the notion that surveillance is a risk within 100 miles of every site listed in Part 2 of Appendix A; and 3) in certain cases, real estate within this radius appears to be further separated from sites enumerated in Part 2 by one or more mountain ranges, some of which reach elevations higher than 10,000 feet.

Similarly, the use of counties to define "covered real estate" under Section 802.211 seems unrelated to an assessment of surveillance risk, unless CFIUS is asserting that the boundaries of counties included in Appendix A were demarcated according to such risk. If not, the relationship between FIRRMA and the use of counties and extended range, as proposed in this rulemaking, does not appear to be well established, nor consistent with the Committee's discussions with Treasury on the purposes of Sec. 721(a)(4)(B)(ii)((II)(bb), and could face challenges in implementation. As H. Rept. 115-784 underlined, FIRRMA "is not intended to capture real estate transactions where there is no risk of foreign surveillance."

Questions raised over Section 802.218 or 802.204 may also be viewed in the context of the Government Accountability Office's (GAO) 2016 finding that the Department of Defense (DOD) "had made limited progress in assessing foreign encroachment risks on federally managed land,"[2] as well as GAO's 2014 conclusion that "DOD has not prioritized its ranges or assessed such threats because, among other things, there is no clear guidance on how to conduct assessments of the risks and threats posed by foreign encroachment."[3] As DOD's then-Deputy Assistant Secretary for Manufacturing and Industrial Base Policy noted during testimony just last year before the Committee on Financial Services, DOD was still "working on looking at that issue," and the need for "process improvements" remained.[4] Given the complexities that surround the issue of foreign encroachment, FIRRMA foresaw an approach to surveillance risk that is careful and nuanced. The final rulemaking should adhere to this approach and be able to support its treatment of real estate with all appropriate rigor, including through risk assessments for listed sites.[5]

General Comments

Again, we appreciate the thoughtful efforts that Treasury is devoting to the implementation of FIRRMA. We have also been pleased to learn that the Department has sought to hire additional qualified staff; and the completed reviews of notifications and declarations post-FIRRMA suggest that CFIUS takes seriously the importance of certifying transactions efficiently. We do urge CFIUS to see that this work is reflected in required reporting in an expeditious manner, including through the timely submission of annual reports.

We look forward to further cooperation with you and your colleagues.

Sincerely,

PATRICK MCHENRY
Ranking Member

ANDY BARR
Ranking Member
Subcommittee on Oversight and Investigations

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[2] GAO 16-381R, Government Accountability Office, April 13, 2016. Available at: https://www.gao.gov/assets/680/676528.pdf

[3] "Risk Assessment Needed to Identify If Foreign Encroachment Threatens Test and Training Ranges (GAO-15-149)," Government Accountability Office, December 2014. Available at: https://www.gao.gov/assets/670/667550.pdf

[4] Hearing before the Subcommittee on Monetary Policy and Trade of the Committee on Financial Services, "Evaluating CFIUS: Administration Perspectives," March 15, 2018.

[5] According to GAO-15-149, "Without clear guidance from DOD for the services to follow in conducting a risk assessment, DOD may not be able to determine what, if any, negative impact foreign encroachment may be having on its test or training ranges."

FRENCH HILL
Ranking Member
Subcommittee on National Security,
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and Monetary Policy

STEVE STIVERS
Ranking Member
Subcommittee on Housing,
Community Development
and Insurance

cc: Mr. Thomas Feddo, Assistant Secretary of the Treasury for Investment Security

Enclosure

JEB HENSARLING, TX, CHAIRMAN

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Committee on Financial Services
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MAXINE WATERS, CA, RANKING MEMBER

September 12, 2018

The Honorable Steven Mnuchin
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20500

Dear Secretary Mnuchin:

As you know, the "John S. McCain National Defense Authorization Act for Fiscal Year 2019" includes as Title XVII the "Foreign Investment Risk Review Modernization Act of 2018" (FIRRMA). This Title is the product of extensive negotiations between the House Committee on Financial Services, the Senate Committee on Banking, Housing, and Urban Affairs, and the Treasury Department (Department). This Title makes important updates to the Committee on Foreign Investment in the United States (CFIUS), with the goal of protecting national security and maintaining the country's open investment climate. As the Department embarks on FIRRMA-related rulemaking, we are writing to outline several priorities of the Financial Services Committee, and to confirm congressional intent behind certain provisions.

Non-controlling Investments

During House consideration of FIRRMA, our Committee emphasized that, for the purposes of CFIUS, "critical infrastructure" should only apply to a specific subset of systems and assets important to national security. While the federal government has made note of numerous "critical infrastructure sectors," these sectors encompass virtually every area of economic activity in the United States, and clearly should not serve as the basis for critical infrastructure's scope under CFIUS. This is why the reference to critical infrastructure sectors was removed during conference negotiations. We are pleased that, in discussions with you and your staff during FIRRMA's consideration, the Department confirmed that CFIUS will only scrutinize particular types of U.S. critical infrastructure having an explicit link to national security. FIRRMA's requirements, moreover, underscore the need to narrow CFIUS's scope in this manner.

Country Specification

Given CFIUS's national security objectives, we trust that the "categories of foreign persons" described in subsection (a)(4)(E) of Section 721 of the Defense Production Act, as amended by FIRRMA, will focus on countries or governments that pose the greatest national security risk through investment in the United States. We encourage CFIUS to specify China and Russia in particular. Our NATO allies and other friends around the world – including countries such as Japan, South Korea, Singapore, Australia, New Zealand, and Israel – should not be the target of CFIUS's limited resources given the ongoing risks posed by Beijing and Moscow.

Sensitive Personal Data

Under FIRRMA, CFIUS will have jurisdiction over certain non-controlling investments in a business maintaining or collecting "sensitive personal data of United States citizens that may be exploited in a manner that threatens national security." We would highlight certain limitations imposed by this language, which was preserved in conference from the House-passed version of FIRRMA. The House was deliberate in its use of "sensitive personal data," as opposed to the broader concept of "personally identifiable information," the latter of which may have little or no relevance to national security. Congress's intent is further reinforced by specifying that CFIUS should only be concerned with such data when it "may be exploited in a manner that threatens national security." The bar, in other words, is intentionally high: information that may simply identify individuals, or prove a source of embarrassment if disclosed, is not sufficient to trigger CFIUS jurisdiction without the potential to threaten national security.

Pilot Programs

Through discussions with your staff, the Department made clear that pilot programs authorized under FIRRMA were envisaged for non-controlling investments involving critical technologies and particular foreign investors. The Committee expects to undertake appropriate oversight to ensure that any CFIUS pilot programs are consistent with these discussions and adhere to the explicit authorities laid out in FIRRMA.

United States Business Definition

As you know, CFIUS regulations currently limit jurisdiction to investments in a United States business, but only to the extent of the business's activities in interstate commerce. We believe this limitation is important, and during conference discussions, Treasury staff confirmed that CFIUS has no intention of altering it.

CFIUS Operations

We remain concerned by CFIUS's progress in understanding staffing needs and addressing resource limitations, as documented in two recent reports by the Government Accountability Office.[1] For CFIUS authorities to maintain robust congressional support, the exercise of those authorities must receive appropriate attention in the budgets of CFIUS agencies. Without sufficient resources, CFIUS will be unable to operate effectively, and it will inject uncertainty and delays into the review process, threatening the open investment climate that we all agree is essential to the national interest. FIRRMA therefore requires CFIUS member agencies to detail their spending needs to Congress.

FIRRMA's enactment came with strong bipartisan support. Looking ahead, continued congressional confidence in CFIUS will hinge on tailored rulemaking, just as thoughtful regulations following enactment of the Foreign Investment and National Security Act of 2007 (P.L. 110-49) were key in maintaining lawmakers' support for CFIUS's activities. We look forward to working with you to ensure that the Department drafts the FIRRMA regulations with similar care.

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[1] GAO-18-249 and GAO-18-494.

Sincerely,

JEB HENSARLING
Chairman

MAXINE WATERS
Ranking Member

ANDY BARR
Chairman
Subcommittee on
Monetary Policy and Trade

GWEN MOORE
Ranking Member
Subcommittee on
Monetary Policy and Trade

cc: The Honorable Heath Tarbert, Assistant Secretary for International Markets and Investment Policy

Mr. Thomas Feddo, Deputy Assistant Secretary for Investment Security