October 17, 2019

Thomas Feddo
Assistant Secretary for Investment Security
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

Dear Mr. Feddo:

We the undersigned are corporate venture capital (CVC) investors that are investing heavily in the American innovation economy. Our companies are well-known and respected in the U.S. market. A feature we share is that our parent companies are headquartered in countries that are steadfast U.S. allies on military, intelligence, and economic matters.

Corporate venture investment has become an important piece of the startup ecosystem. A CVC may be organized as an independent arm of a company or as an investment team that invests off the company's balance sheet. These investors compliment traditional venture capital firms and bring to startups in-depth industry knowledge and access to potential customers around the world. CVC investment in U.S. startups is predominantly made by U.S. companies, but key participants in this market include CVCs with a foreign headquartered parent, such as the signatories to this letter.

We commend the Department of Treasury's inclusion of the "excepted foreign state" and "excepted investor" concepts in the proposed rules implementing the *Foreign Investment Risk Review Modernization Act* (FIRRMA). We appreciate that these concepts are derived from the "Country Specification" provision in FIRRMA. By including in FIRRMA a directive to consider differential treatment of investors from certain countries, Congress intended to facilitate investment from U.S. allies and to allow the Committee on Foreign Investment in the United States (CFIUS) to appropriately focus on countries and investors that present serious national security concerns. We believe this is a winning formula that will protect American innovation and national security while ensuring continued investment in the United States.

We also write to emphasize the importance of: (i) broadly designating excepted foreign states to include most countries that are allies of the United States; (ii) issuing a clarification regarding one element of the excepted investor "minimum excepted ownership" test, specifically to confirm that a parent corporation of a CVC does not need to make a showing regarding the corporation's shareholders as long as the corporation is incorporated in, and has its headquarters in, an excepted foreign state; and (iii) to make one change regarding excepted investor board or board observer requirements, specifically to expand the circle of permissible board members and observers to include those from allied states generally and not merely those from excepted foreign states. We believe our suggestions would better maintain U.S. national security without deterring investment from trusted sources.

As background for our comments, we are concerned that CFIUS will determine that non-controlling investments by the undersigned investors are made by a "foreign person," thus satisfying one important element of CFIUS jurisdiction. If a CFIUS filing is needed for routine investments into many American companies, then American startups may be left without the capital and expertise our companies bring. That is because a CFIUS filing may be required 30 days in advance of closing; and even if a filing is not strictly required, to the extent CFIUS has jurisdiction over the investment, that fact could inject sufficient uncertainty, particularly regarding the timing of CFIUS clearance, such that the investor is deterred. High-growth startups operate on timeframes that often are inconsistent with government approval processes of 30 days or more. Furthermore, startups, by their nature, are resource-constrained and are generally averse to accepting investment capital that is conditioned on government approval.

The problem described above can be mitigated by further attention to the excepted investor and excepted foreign state concepts. We are grateful for the obvious effort and care put into drafting these provisions and believe the proposed rule can be improved in a way that promotes national security and avoids unnecessary friction in the startup ecosystem.

Excepted foreign state

We urge Treasury to broadly designate U.S. allies as excepted foreign states. To qualify as an excepted investor that is not treated as a "foreign person" for certain CFIUS purposes, the investor must be closely connected to an excepted foreign state. The proposed rules do not include a proposed list of excepted foreign states, but Treasury officials have stated that a list will accompany publication of the final rules implementing FIRRMA and that an excepted investor associated with an excepted foreign state will benefit immediately from that excepted investor status.[1] We were pleased to hear of Treasury's intention and believe it is important that Treasury publish a robust list of excepted foreign states so that U.S. companies can realize immediate benefits when the final FIRRMA implementation rules are published.

An appropriate initial group of eligible states is the member states of the North Atlantic Treaty Organization ("NATO");[2] countries that are major non-NATO ally pursuant to 517 of the Foreign Assistance Act of 1961 (including Australia, Israel, Japan, and the Republic of Korea);[3] and any country that has a bilateral treaty with the United States and is a member of the European Union or the European Free Trade Association.[4] Treasury has written that CFIUS plans to review this group in the future and potentially expand the number of eligible foreign states.[5] We are encouraged to learn that CFIUS will have flexibility to add countries in the future.

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[1] *See Summary of Public Stakeholder Briefings on Proposed Regulations Implementing FIRRMA by Senior Treasury Officials*, available at https://home.treasury.gov/system/files/206/Proposed-FIRRMA-Regulations-Summary-of-Public-Stakeholder-Briefings.pdf.

[2] *See* North Atlantic Treaty Organization Member Countries, *available at* https://www.nato.int/cps/en/natohq/topics_52044.htm.

[3] *See Major non-NATO ally*, 22 CFR § 120.32, *available at* https://www.law.cornell.edu/cfr/text/22/120.32.

[4] *See* The European Free Trade Association States, *available at* https://www.efta.int/about-efta/the-efta-states. An example of a country that would meet this conjunctive test is Switzerland.

[5] Proposed FIRRMA regulations at 25.

In assessing whether a country will remain an excepted foreign state, Treasury has said in the proposed rules that it will assess whether a government "has established and is effectively utilizing a robust process to assess foreign investments for national security risks and to facilitate coordination with the United States on matters relating to investment security."[6] In conducting this evaluation, it is important for CFIUS to recognize that the features of foreign investment screening regimes will vary country-to-country and differ from CFIUS. We trust that Treasury will not consider a foreign screening regime to be less effective than CFIUS merely because it is different. It is also important that Treasury recognize that designation of a country as an excepted foreign state may foster bilateral cooperation that bolsters the efficacy of both CFIUS and the relevant foreign investment screening regimes.

Excepted investor

Suggested Clarification Regarding Minimum Excepted Ownership. We also urge that Treasury clarify an issue concerning "minimum excepted ownership" – specifically that a parent corporation of a CVC that meets the minimum excepted ownership test does not need to make a showing regarding the corporation's shareholders as long as the corporation is incorporated in, and has its headquarters in, an excepted foreign state.

To qualify as an "excepted investor" – such that the investor is not a "foreign person" for certain purposes under the proposed CFIUS rules – an investor must meet several requirements. These include requirements related to minimum excepted ownership thresholds. The proposed rules provide that (1) for an investor whose shares are primarily traded on an exchange in an excepted foreign state or the United States, the threshold is a majority of voting interest, profits, and assets in the event of dissolution; and (2) for an investor whose shares are not primarily traded on an exchange in an excepted foreign state or the United States, the threshold is 90% of voting interest, profits, and assets in the event of dissolution.

All of the above seems clear enough. It also seems apparent that the minimum excepted ownership must be "held" by an investor that meets one of four distinct requirements. The last of these – found at proposed 31 CFR § 800.220(a)(3)(v)(D) – is that the investor holding the minimum excepted ownership can be a "foreign entity that is organized under the laws of an excepted foreign state and has its principal place of business in an excepted foreign state or in the United States."

For the CVCs that are signatories to this letter, the foreign entity that holds the minimum excepted ownership is the parent company of the CVC. We understand that if the parent that holds the minimum excepted ownership is a company organized under the laws of an excepted foreign state and has its headquarters in that state, these facts are sufficient to meet the requirement at 31 CFR § 800.220(a)(3)(v)(D). In particular, we understand that there is no additional requirement to show that the owners of the parent company are themselves affiliated with the excepted foreign state. In other words, if corporate venture investor X is 100% owned by corporate parent Y, and corporate parent Y is organized under and maintains its headquarters in an excepted foreign state, then the condition set forth in § 800.220(a)(3)(v)(D) is satisfied.

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[6] Id.

We note that some CFIUS rules require looking through a corporation to its shareholders. In particular, the definition of "hold" raises some ambiguity about whether the "minimum excepted ownership" term set forth in § 800.220(a)(3)(v) may be considered to be held "directly or indirectly." Such a look-through, however, is manifestly not entailed in § 800.220(a)(3)(v)(D). Further, a look-through requirement – showing that the parent Y's shareholders are also from an excepted foreign state or the United States – would render the provision virtually useless, particularly for any CVC of a publicly traded foreign company with broadly dispersed shareholders. We do not think CFIUS intends such a result, and the careful language of § 800.220(a)(3)(v)(D) does not yield such a result. We nevertheless request that CFIUS confirm our understanding that no showing must be made with regard to the shareholders of the CVC's parent company.

Suggested Modification Regarding Board Membership and Observers. A requirement to qualify as an excepted investor is that "Each member or observer of the board of directors or similar body of such entity is a U.S. national or, if a foreign national, is a national of one or more excepted foreign states and is not also a national of any foreign state that is not an excepted foreign state." 31 CFR § 800.220(a)(3)(iii). We understand CFIUS concerns about having a national from an adversary state in a position to obtain information from a U.S. company. We are confident, however, that this concern can be addressed with a requirement that board members and observers be from a broad group of allied countries, rather than from the possibly smaller circle of allied countries that are also excepted foreign states.

We suggested above that CFIUS include, as an initial group of excepted foreign states, all states that are NATO member countries; countries that are major non-NATO allies pursuant to 517 of the Foreign Assistance Act of 1961; and any country that has a bilateral treaty with the United States and is a member of the European Union or the European Free Trade Association. We urge Treasury to expand the circle of foreign countries from which board members and observers may permissibly be drawn while still allowing the company to be an excepted investor, specifically to include all allies of the U.S. After all, requiring board members and observers to be from only those countries that have demonstrated effective foreign investment screening mechanisms seems to have no security advantage over a rule that allows board members and observers to be from the broader set of allied countries. Moreover, restricting the circle to board members and observers from excepted foreign states, as currently proposed, likely would significantly reduce the utility of the excepted investor provisions. Between a rule that preserves security and gives reasonable scope to Congress' "Country Specification" mandate, and a rule that likely would limit the utility of that country specification, we urge Treasury to choose the former.

We thank you for your consideration of these comments.

Sincerely,

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