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DEPARTMENT OF THE TREASURY

31 CFR Part 800

Office of Investment Security

RIN 1505-AB88

Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons

AGENCY: Department of the Treasury.

ACTION: Final rule.

SUMMARY: This Final Rule amends regulations in part 800 of 31 CFR that implement section 721 of the Defense Production Act of 1950 (“section 721”), as amended by the Foreign Investment and National Security Act of 2007, codified at 50 U.S.C. App. 2170. While the revised regulations retain many features of the prior regulations, a number of changes have been made to implement section 721, increase clarity, reflect developments in business practices over the past several years, and make additional improvements based on experiences with the prior regulations.

DATES: Effective date: This rule is effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

Applicability Date: See §800.103.

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SUPPLEMENTARY INFORMATION:

I. Background

The Foreign Investment and National Security Act of 2007 (“FINSA”), Pub. L. 110-49, 121 Stat. 246, which amends section 721 of the Defense Production Act of 1950 (“DPA”) (50 U.S.C. App. 2170), requires the issuance of regulations implementing its provisions following public notice and comment.

FINSA was passed by Congress as H.R. 556, which adopted the language of S. 1610. Senate Report 110-80, accompanying S. 1610, provides a useful history of the various bills leading to the enactment of FINSA. President Bush signed FINSA into law on July 26, 2007, and it became effective on October 24, 2007.

Section 721 authorizes the President to review mergers, acquisitions, and takeovers by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States, to determine the effects of such transactions on the national security of the United States. FINSA codifies aspects of the structure, role, process, and responsibilities of the Committee on Foreign Investment in the United States (“CFIUS” or “the Committee”) and the role of executive branch

departments, agencies, and offices in CFIUS's review of transactions for national security concerns. A brief summary of major aspects of the statute follows.

FINSA formally establishes CFIUS in statute. (Previously, the sole basis for the existence of CFIUS had been Executive Order 11858 of May 7, 1975, 40 FR 20263, 3 CFR, 1971-1975 Compilation, p. 990). FINSA specifies the following as members of CFIUS: the Secretary of the Treasury (who serves as chairperson), the Attorney General, and the Secretaries of Homeland Security, Commerce, Defense, State, and Energy.

FINSA also provides that CFIUS may include, generally or on a case-by-case basis as the President deems appropriate, the heads of any other executive department, agency, or office. The President designated the U.S. Trade Representative and the Director of the Office of Science and Technology Policy as additional members of CFIUS in Executive Order 11858, as amended most recently by Executive Order 13456, 73 Fed. Reg. 4677 (Jan. 23, 2008). In the same Executive Order, the President directed that "[t]he following officials (or their designees) shall observe and, as appropriate, participate in and report to the President on [CFIUS's] activities": (i) the Director of the Office of Management and Budget, (ii) the Chairman of the Council of Economic Advisors, (iii) the Assistant to the President for National Security Affairs, (iv) the Assistant to the President for Economic Policy, and (v) the Assistant to the President for Homeland Security and Counterterrorism. FINSA also establishes the Director of National Intelligence ("DNI") and the Secretary of Labor as *ex officio* members of CFIUS. FINSA specifies that the DNI is to provide independent analyses of any national security threats posed by transactions and is to have no other policy role. FINSA further provides that, for each transaction before CFIUS, the Department of the Treasury shall designate, as appropriate,

one or more lead agencies. The lead agency, on behalf of CFIUS, may negotiate, enter into or impose, monitor, and enforce mitigation agreements or conditions with parties to a transaction to address any threats to national security posed by the transaction. FINSA requires regulations to provide for an appropriate role for the Secretary of Labor with respect to mitigation agreements.

FINSA also formalizes the process by which CFIUS conducts national security reviews of any transaction that could result in foreign control of a person engaged in interstate commerce in the United States, which FINSA refers to as a “covered transaction.” Specifically, FINSA provides for CFIUS review of covered transactions, which must be completed within 30 days, to determine the effect of the transaction on national security and to address any national security concerns. Subject to certain exceptions discussed below, FINSA requires an additional investigation, which must be completed within 45 days, in the following types of cases: (1) where the transaction threatens to impair U.S. national security and that threat has not been mitigated prior to or during the 30-day review; (2) where the transaction is a foreign government-controlled transaction; (3) where the transaction results in foreign control over critical infrastructure that, in the determination of CFIUS, could impair national security, if that impairment has not been mitigated; or (4) where the lead agency recommends, and CFIUS concurs, that an investigation be undertaken. Executive Order 11858 also provides that CFIUS shall undertake an investigation if a member of CFIUS advises the chairperson that it believes that the transaction threatens to impair the national security and that the threat has not been mitigated.

To ensure accountability for CFIUS decisions, FINSA requires that a senior-level official of the Department of the Treasury and of the lead agency certify to Congress, for any covered transaction on which CFIUS has concluded action under section 721, that CFIUS has determined that there are no unresolved national security concerns. The certification must be made at a level no lower than an employee appointed by the President by and with the advice and consent of the Senate, for transactions on which CFIUS concludes action under section 721 after a review, and at the Deputy Secretary level or above for transactions on which CFIUS concludes action under section 721 after an investigation. If the President makes a decision on a transaction under section 721, then he must announce his decision publicly within 15 days of the completion of the investigation.

In addition, in order for CFIUS to conclude action under section 721 for a foreign government-controlled transaction without proceeding beyond a review to an investigation, the Department of the Treasury and the lead agency must determine, at the Deputy Secretary level or above, that the transaction “will not impair the national security.” Similarly, in cases where the transaction would result in foreign control over critical infrastructure, the transaction could impair national security, but such impairment has been mitigated during the review period, CFIUS may conclude action under section 721 without proceeding beyond a review if the Department of the Treasury and the lead agency determine, at the Deputy Secretary level or above, that the transaction will not impair national security.

Where a covered transaction presents national security risks, FINSA provides statutory authority for CFIUS, or a lead agency acting on behalf of CFIUS, to enter into

mitigation agreements with parties to the transaction or to impose conditions on the transaction to address such risks. This authority enables CFIUS to mitigate any national security risk posed by a transaction rather than recommending to the President that the transaction be prohibited because it could impair U.S. national security. FINSA also provides CFIUS with authority to impose civil penalties for violations of section 721, including violations of any mitigation agreement.

Finally, FINSA increases CFIUS's reporting to Congress concerning the work it has undertaken pursuant to section 721. In addition to the certifications described previously, which CFIUS must provide to Congress after concluding action on a transaction under section 721, CFIUS also must provide annual reports on its work, including a list of the transactions it has reviewed or investigated in the preceding 12 months, analysis related to foreign direct investment and critical technologies, and a report on foreign direct investment from certain countries.

II. Comments on the Proposed Rule

The Final Rule contained in this document is based on the Notice of Proposed Rulemaking published on April 23, 2008 ("Proposed Rule")(73 Fed. Reg. 21868), which proposed amendments to the regulations in part 800 of 31 CFR. The comment period for the Proposed Rule ended on June 9, 2008. The Department of the Treasury received a total of 25 written submissions and some oral comments that were principally provided at a public meeting held at the Department of the Treasury on May 2, 2008. The written and oral submissions comprised approximately 200 distinct comments. The comments represented a wide range of interests, including foreign governments, U.S. business

groups, law firms, and a member of Congress. All comments received by the end of the comment period were posted for public viewing at www.regulations.gov.

Among the comments submitted were a number that welcomed the Proposed Rule as helping the Committee to safeguard U.S. national security in a manner consistent with the U.S. commitment to open investment. Although one commenter believed the Proposed Rule would result in the “great majority” of mergers and acquisitions being subject to reviews, the Committee does not expect the changes to the regulations to materially affect the number of transactions that it reviews. From 2005 through 2007, the Committee reviewed less than ten percent of foreign acquisitions in the United States.

We respond to the comments submitted in the detailed section-by-section analysis, below.

III. Discussion of Final Rule

Overview of Significant Issues

The Final Rule retains many of the basic features of the existing regulations, which were adopted in 1991 after the 1988 enactment of section 721 of the DPA. The system continues to be based on voluntary notices to CFIUS by parties to transactions, although FINSA provides CFIUS with the authority to review a transaction that has not been voluntarily notified. The principal new development with regard to the procedures for filing notices with CFIUS is that the Final Rule makes explicit CFIUS’s current practice of encouraging parties to contact and engage with CFIUS before making a formal filing. By consulting with CFIUS in advance of filing and, where appropriate,

providing CFIUS with a draft notice or some portion of the information that later may be included in the notice, parties can help ensure that their notice, once submitted, will contain the information CFIUS needs to do its work. Such pre-notice consultations can help ensure that reviews of covered transactions are concluded as efficiently as possible. Consistent with the requirement set forth in section 721(b)(2)(E), the Department of the Treasury, as Chairperson of CFIUS, will also be publishing in the *Federal Register* guidance on the types of transactions that CFIUS has reviewed and that have presented national security considerations. The guidance, among other things, will include a discussion of certain types of information the Committee, based on past experience, considers useful for parties filing a notice to provide.

The provisions of Subpart D pertaining to the contents of a voluntary notice have been expanded to reflect information that CFIUS now routinely seeks from notifying parties. By having the relevant information included in each notification, CFIUS will be better prepared to conduct an efficient and in-depth analysis as soon as a notice is accepted. As noted in the proposed regulations, personal identifier information, which is needed to examine the backgrounds of members of the boards of directors and senior company officials of entities in the ownership chain of the foreign acquirer, should be submitted in conjunction with each notification, and should be marked clearly and provided as a separate document to facilitate limited distribution of this information. In addition to the new information requirements, the Final Rule, consistent with FINSA, also requires each of the parties to a notified transaction to provide certifications regarding the accuracy and completeness of their notices, as to information about the party making the certification (including certain affiliated entities), the transaction, and

all follow-up information. A notice will not be deemed complete if it lacks certifications that comply with these requirements, and CFIUS may reject a notice that has previously been accepted if the final certification required under §800.701(d) has not been received. Furthermore, material misstatements or omissions made by a party in connection with a review or investigation may result in the rejection of the notice or the reopening of a completed review or investigation.

Consistent with the new authority provided by FINSA, the Final Rule provides for penalties for material misstatements or omissions made to CFIUS, for false certifications, or for breach of mitigation agreements or conditions entered into or imposed under section 721. The Final Rule also provides that a mitigation agreement may include provisions establishing liquidated damages for violations of the agreement. *See* §800.801. Parties that receive a notice of the imposition of penalties will have the opportunity to submit to CFIUS a petition for reconsideration of the imposition of the penalties.

Additional changes to the regulations have been made, including revisions to or deletions of existing examples or provisions, to take into account FINSA, and to otherwise add clarity to the regulations. The following discussion addresses changes to several of the key concepts of the regulations.

Covered Transaction

FINSA introduced the term “covered transaction” to identify the types of transactions that are subject to review and investigation by CFIUS. The statutory definition of covered transaction maintains the scope of section 721 as pertaining to any merger, acquisition, or takeover by or with a foreign person that is proposed or pending

after August 23, 1988, which could result in foreign control of any person engaged in interstate commerce in the United States (the latter type of person is defined in these regulations as a “U.S. business”).

The Final Rule further clarifies the meaning of the term “covered transaction,” *see* §800.207, by specifying the scope of important elements of the term, including “transaction,” “control,” “U.S. business,” and “foreign person.” The definitions and clarification of these terms appear in Subpart B (Definitions) and in Subpart C (Coverage).

Transaction

The term “transaction” is defined in §800.224, and implements the statutory requirement that a covered transaction be one that involves a “merger, acquisition, or takeover” that is proposed or pending after August 23, 1988, by encompassing both proposed and completed transactions. This definition continues to exclude start-up or “greenfield” investments and includes only a very limited type of long-term lease.

Control

FINSA does not define “control,” but rather requires that CFIUS prescribe a definition by regulation. *See* FINSA, Pub. L. No. 110-49, section 2, adding section 721(a)(2). “Control” is and always has been a key threshold concept in section 721, as the authority provided under that section, from the authority to review or investigate a notified transaction to the authority of the President to take action to suspend or prohibit a transaction, is predicated on foreign *control* of a person engaged in interstate commerce in the United States. This focus on control suggests a fundamental congressional judgment that national security risks are potentially highest in transactions that involve

the acquisition by a foreign person of control of an entity operating in the United States. Indeed, Congress made clear in the 1988 Conference Report that accompanied the originally enacted version of section 721 that “[t]he Conferees in no way intend to impose barriers to foreign investment. . . . [section 721] is not intended to authorize investigations on investments that could not result in foreign control of persons engaged in interstate commerce” *See* H.R. Conf. Rep. No. 100-576, at 926 (1988). Nothing in FINSA or its legislative history suggests any departure from this focus on control. Indeed, FINSA incorporates the concept of control in its definition of the new term “covered transaction,” as discussed above.

The Final Rule maintains the long-standing approach of defining “control” in functional terms as the ability to exercise certain powers over important matters affecting an entity. Specifically, “control” is defined as the “power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach, or cause decisions regarding the [matters listed in §800.204(a)], or any other similarly important matters affecting an entity.” *See* §800.204(a). Two points should be emphasized concerning this definition. First, it eschews bright lines. Consistent with the existing regulations, control is not defined in terms of a specified percentage of shares or number of board seats. Although share holding and board seats are relevant to a control analysis, neither factor on its own is necessarily determinative. Instead, all relevant factors are considered

together in light of their potential impact on a foreign person's ability to determine, direct, or decide important matters affecting an entity. Second, echoing the congressional views expressed in the conference report accompanying the original legislation in 1988, the focus of the statute and therefore of these regulations is *control*. Even acknowledging the considerable flexibility necessarily inherent in a national security regulation, the statutory standard is not satisfied by anything less than control. Acquisition of influence falling short of the definition of control over a U.S. business is not sufficient to bring a transaction under section 721. See §800.302.

Demonstrating its significance to this regulatory framework, the concept of control appears in several different places throughout the regulations, both in those sections that define the nature of the acquirer and those that define the transaction itself. For example, control is a key concept in the definitions of "foreign person" and "foreign government-controlled transaction." A foreign person is any foreign national (*i.e.*, an individual who is not a U.S. national), foreign government, or foreign entity, or any "entity over which *control* is exercised or exercisable by a foreign national, foreign government, or foreign entity." See §800.216 (emphasis added). A foreign government-controlled transaction is a covered transaction that "could result in the *control* of a U.S. business by a foreign government or a person *controlled by* or acting on behalf of a foreign government." See §800.214 (emphases added). Similarly, "covered transaction" is defined in this Final Rule as "any transaction that is proposed or pending after August 23, 1988, by or with any foreign person, which could result in *control* of a U.S. business by a foreign person." See §800.207 (emphasis added).

Conversely, transactions that could not result in foreign control of a U.S. business are not subject to section 721. Thus, a start-up or “greenfield” investment is not subject to section 721. *See* §800.301(c), Example 3. Moreover, as noted below, a foreign person does not control an entity if it holds ten percent or less of the voting interest in the entity and it holds that interest “solely for the purpose of passive investment,” as that term is defined in §800.223. *See* §800.302(b). However, the regulations do not provide, and never have provided, an exemption based solely on whether an investment is ten percent or less in a U.S. business. If a foreign person holds ten percent or less of the voting interest in a U.S. business but does not hold that interest solely for the purpose of passive investment, then the transaction still may be a covered transaction. For example, a transaction involving a foreign person’s acquisition of nine percent of the voting shares of a U.S. business in which the foreign person has negotiated rights to determine, direct, decide, take, reach, or cause decisions regarding important matters affecting that business would be a covered transaction.

Section 800.204 lays out the basic definition of “control,” provides an illustrative list of matters that are deemed to be important, states that CFIUS will consider certain relationships between persons in evaluating whether an entity is considered to be controlled by a foreign person, and identifies certain minority shareholder protections that are not considered in themselves to confer control over an entity. The regulations add a number of examples to provide greater clarity as to the application of this definition.

U.S. Business

Section 800.226 defines “U.S. business,” a term contained in the regulatory definition of “covered transaction,” to mean any entity engaged in interstate commerce in

the United States, but only to the extent of its activities in interstate commerce in the United States. In determining whether a person is a U.S. business, CFIUS first will consider whether the subject of the transaction is an “entity” (which is defined to include any branch, partnership, group or sub-group, association, estate, trust, corporation or division of a corporation, or organization; assets, whether or not organized as a separate legal entity, operated by any one of the foregoing as a business undertaking in a particular location or for particular products or services; and any government). If the subject of the transaction is an entity, CFIUS will consider whether the entity is engaged in interstate commerce.

Foreign Person

The term “foreign person” is defined in §800.216. The Final Rule introduces the new concept of a “foreign entity,” further discussed below in the section-by-section analysis of §800.212, and specifies that an entity that falls within the definition of a “foreign entity” will be deemed a foreign person.

Transactions That Are and Are Not Covered Transactions

Sections 800.301 and 800.302 illustrate the types of transactions that are and are not covered transactions, respectively. Section 800.301(a) further develops the reference in §800.204 to “power, whether or not exercised,” by making clear that, if a foreign person has the ability to exercise control over a U.S. business at the time a transaction is consummated, whether at will or after a particular period of time, then the person cannot avoid a determination that “control” exists for purposes of section 721 by voluntarily forgoing, or delaying, the exercise of control.

Section 800.302(b) provides a very limited qualification to the application of the general control principle. Pursuant to §800.302(b), a foreign person does not control an entity if it satisfies a two-pronged test: (1) it holds ten percent or less of the voting interest in the entity; and (2) its interest is held solely for the purpose of passive investment. Section 800.223 lays out the test for whether an interest is held solely for the purpose of passive investment. Under that test, an interest would be held solely for the purpose of passive investment if the foreign person has no plan or intent to control the entity, neither possesses nor develops any purpose other than passive investment, nor takes any action that is inconsistent with an intent to hold the interest solely for the purpose of passive investment. This special rule applies to all types of investors equally, rather than assuming that certain types of institutions are passive investors.

Sections 800.301(c) and 800.302(c) further illustrate the extent to which particular types of transactions, such as greenfield investments; the acquisition of branch offices, assets from multiple sources, and defunct businesses; and the entry into commodity purchase contracts, service contracts, and technology license agreements, are or are not covered transactions. Section 800.301(d) addresses joint ventures, which may be covered transactions only if they involve the contribution of a U.S. business.

Sections 800.302(d) and (e) and §800.303 establish special rules with regard to securities underwriting, insurance, and lending, to clarify certain circumstances in which a foreign person may obtain, in the ordinary course of its business, an interest in an entity that may not be considered control of that entity because of those circumstances.

Section-by-Section Analysis

§800.101 – Scope

Section 800.101 of the Proposed Rule states that the regulations implement section 721, which authorizes the President and the Committee to take certain actions with respect to covered transactions that threaten to impair U.S. national security. Several commenters noted that the regulations do not define “national security” and other related terms. A commenter suggested that there is a perception that the scope of CFIUS’s reviews is broader than national security. Another suggested that “national security” be specifically defined to encompass economic security. A commenter also suggested that the Committee identify certain excepted industries or businesses, investments in which would not be subject to review.

The Committee will continue its practice of focusing narrowly on genuine national security concerns alone, not broader economic or other national interests. The longstanding policy of the U.S. Government, which was reaffirmed in the President’s Statement on Open Economies on May 10, 2007, is to welcome foreign investment. Section 1 of Executive Order 11858, as amended, applies that policy to the Committee’s work: “It is the policy of the United States to support unequivocally [international] investment, consistent with the protection of the national security.” The Committee reviews transactions for national security concerns on a case-by-case basis. This approach allows the Committee to fully address the national security concerns that a particular transaction may raise, rather than identifying certain sectors in which foreign investment is prohibited, restricted, or discouraged. As directed by FINSA, the Department of the Treasury is also publishing guidance regarding the types of

transactions that the Committee has reviewed and that have presented national security considerations.

§800.103 – Applicability rule / §800.210 – Effective Date

Several commenters expressed concern that new provisions in the regulations will cause uncertainty for transactions completed prior to the effective date of FINSA or this Final Rule and that parties should be given sufficient time to adjust to any new standards.

As provided in section 721 as amended by FINSA and further elaborated in §§800.207 and 800.601(b) of the Final Rule, the Committee has the authority to review any covered transaction. However, to allow parties time to adjust to this Final Rule, the amendments to part 800 made by this Final Rule will become effective thirty days after their publication in the *Federal Register*.

With respect to actions already taken by parties to transactions, the Committee does not intend for this Final Rule to disrupt certain expectations created by the provisions of the regulations, prior to their amendment by this Final Rule. *See* 31 CFR Part 800 (July 1, 2008) (“the prior regulations”), *available at* http://www.access.gpo.gov/nara/cfr/waisidx_08/31cfr800_08.html. Therefore, consistent with §800.103, the provisions of the prior regulations will continue to govern certain questions pertaining to past transactions and acts.

As provided in §800.103(a), the provisions of this Final Rule apply as of the effective date of this Final Rule, with certain exceptions. These exceptions are spelled out in §800.103(b), and consist of the various provisions that relate to whether a particular transaction is a covered transaction. Provisions that pertain to procedural

matters are thus not listed in paragraph (b) but, rather, apply to all CFIUS reviews and investigations as of the effective date. Accordingly, for example, all notices filed with the Committee on or after the effective date of this Final Rule must contain the information specified in §800.402 of this Final Rule, regardless of when the transaction occurred or will occur. Notices filed with the Committee prior to the effective date of this Final Rule are required to contain at least the information specified in §800.402 of the prior regulations.

As provided in §800.103(b), particular sections of subparts B and C of this Final Rule apply to any transaction for which the execution of the agreement, or other comparable action underlying the transaction, occurs on or after the effective date of this Final Rule. As noted above, these provisions concern the assessment of whether a transaction is a “covered transaction.” Paragraphs (b)(1) through (b)(4) of §800.103 specify the particular event that needs to occur on or after the effective date in order for the relevant provision of the Final Rule to apply to the transaction. For example, if a letter of intent establishing the material terms of a transaction is signed on or after the effective date of this Final Rule, then the provisions of the Final Rule will govern the analysis of whether the transaction is a “covered transaction.” Conversely, if the letter of intent was signed before the effective date of this Final Rule, then the Committee will look at the provisions of the prior regulations in analyzing whether the transaction is a “covered transaction,” even if the transaction was notified to the Committee after the effective date of this Final Rule.

Note that if parties sign a letter of intent prior to the effective date of this Final Rule, but the material terms differ in the final definitive agreement signed by the parties,

then the Committee would look to the date on which that final definitive agreement was signed to determine the rules under which the assessment of whether the transaction is a “covered transaction” will be made.

When reviewing any transaction notified to the Committee on or after the effective date that falls within the scope of §800.103(b) and that includes minority shareholder protections listed in §800.204(c), the Committee will take into account §800.204(c) of the Final Rule to the extent that doing so would support a conclusion that the transaction is not a covered transaction.

As provided in subpart H, the provisions concerning penalties will apply to any action after the effective date of this Final Rule that constitutes a violation under subpart H, regardless of when the related transaction occurred or when the mitigation agreement was signed. If, for example, after the effective date of this Final Rule, a party intentionally violates a mitigation agreement signed in 2000, the party may be subject to civil penalties under §800.801(b) of the Final Rule. Damages provisions written into mitigation agreements entered into prior to the effective date of this Final Rule are independent of, and not affected by, this Final Rule.

§800.204 – Control

The Proposed Rule made a number of changes to clarify the definition of “control,” which is now at §800.204. These include, among other revisions, clarification that control depends on powers over “important matters” affecting an entity, expansion of the illustrative list of “important matters,” and the addition or revision of examples to demonstrate what constitutes control. The Overview of Significant Issues, above, like the

preamble to the Proposed Rule, also explains that the acquisition of influence falling short of the definition of control over a U.S. business is not sufficient to bring a transaction under section 721. The Proposed Rule also introduced a new paragraph concerning minority shareholder protections, which is addressed below in the discussion of §800.204(c) of the Final Rule.

Several commenters suggested that the Proposed Rule provided too expansive a definition of control, or, by not providing a more objective standard, risked inappropriate expansion of the definition. A commenter suggested that the definition of control would cause foreign investors to disclaim *pro rata* rights they obtain simply by right of their shareholdings and suggested that this would be detrimental to good governance. Several commenters asked for additional clarification regarding the difference between “control” and “influence falling short of the definition of control.”

The Final Rule makes numerous modifications to the language of §800.204(a) to provide greater clarification of what constitutes “control,” including by clarifying circumstances where influence does not rise to the level of control. Examples in this section show that, although an investor might have influence within a business – for example, through a board seat, exercising *pro rata* voting rights attendant with share ownership, or otherwise – it does not have control unless it is able to determine, direct, take, reach, or cause decisions regarding the types of important matters listed in §800.204(a).

Commenters suggested further clarification of several specific important matters listed in §800.204(a). Several commenters suggested that the power to determine, direct, or decide a single important matter affecting an entity should not constitute control and

that, at the least, the Committee should clarify that it will consider the totality of the circumstances in making its assessment. Another commenter asked whether there is an ownership threshold at which control will always be found.

The Final Rule makes no changes to the list of important matters at §800.204(a) in response to the commenters' requests for specific clarifications. The Committee approaches its analysis of whether a transaction could result in foreign control on a case-by-case basis, considering the level of ownership interest, the rights that emanate from such ownership, other rights held, restrictions on the exercise of such rights, and all other relevant facts and circumstances. The examples in §800.204 demonstrate this approach of considering together all relevant facts and circumstances in light of their potential impact on a person's ability to determine, direct, or decide important matters affecting an entity. As a result of this approach, the regulations provide no ownership threshold or other bright lines above which CFIUS would find control in all circumstances.

Several commenters suggested that the Proposed Rule did not adequately illustrate that ownership and control can be separated through certain transaction structures – for example, in private equity funds structured as limited partnerships. One commenter suggested that the Committee clarify that it will review transactions involving private equity funds. The Final Rule adds Examples 8 and 9 in §800.204, which provide greater clarification of the relationship between ownership and control and make clear that the Committee will focus on “control,” as defined, within any transaction structure rather than formalistically distinguishing among structures.

A commenter asked for clarification of the meaning of “indirect” power in §800.204(a). The Final Rule, like the Proposed Rule, defines “control” in functional

terms. Therefore, for example, a person that has the power to determine important matters of an entity does not avoid having control of that entity by voting the shares of a wholly-owned subsidiary that, in turn, votes the shares of the entity, or by acting through another intermediary or agent.

§800.204(b) – Arrangements to act in concert

The Proposed Rule provided that, in examining questions of control in situations where more than one foreign person has an ownership interest in an entity, consideration will be given, pursuant to what is now §800.204(b), to whether the foreign persons are related or have formal or “informal” arrangements to act in concert. A commenter asked for clarification of what constitutes an “informal” arrangement and whether this would include a voting trust.

The Final Rule makes no change to the proposed language, which is now at §800.204(b), in response to this comment. If a trustee has the legal authority to vote the shares of different parties, even if unrelated, then those shares would be considered as being voted in concert if the trustee can vote the shares according to its discretion or is required to vote all shares in the same way. Example 1 in §800.204 illustrates an informal arrangement to act in concert, where no formal agreement is disclosed but it is clear from other evidence that the foreign persons have agreed to act as a group in the exercise of their powers over important matters affecting the U.S. business.

§800.204(c) – Minority shareholder protections

The Proposed Rule identified several minority shareholder protections at what is now §800.204(c) and provided that the Committee will not deem those negative rights (*i.e.*, rights to prevent certain events from occurring) to confer control in themselves. Many commenters suggested negative rights that they believe should be added to the list of minority shareholder protections.

This Final Rule expands the list of minority shareholder protections, now at §800.204(c), to include two additional negative rights: the power to prevent an entity from voluntarily filing for bankruptcy or liquidation, and the power to prevent the change of existing legal rights or preferences of the particular class of stock held by minority investors as provided in the relevant corporate documents governing such shares.

The list in §800.204(c), however, expressly is not intended to be exhaustive of the rights that shall not in themselves be deemed to confer control over an entity. Section 800.204(c) includes a list of negative rights that the Committee recognizes as minority shareholder protections because they protect the investment-backed expectations of minority shareholders and do not affect strategic decisions on business policy or day-to-day management of an entity or other important matters affecting an entity.

The Committee recognizes, however, that other negative rights proposed by commenters for inclusion in §800.204(c) are often provided to minority shareholders. Section 800.204(d) explicitly provides that the Committee will consider, on a case-by-case basis, whether minority shareholder protections other than those listed in §800.204(c) do not confer control over an entity. Non-inclusion in §800.204(c) of any particular right does not mean that the Committee has determined that such a right necessarily results in control and does not prejudice whether the Committee would

determine under §800.204(d) that such a right does not confer control in a particular transaction.

The Committee will consider favorably in the context of specific transactions notified to the Committee the parties' opinion that the following minority shareholder protections do not in themselves confer control: the power to prevent changes in the capital structure of the entity, including through mergers, consolidations, or reorganizations, that would dilute or otherwise impair existing shareholder rights; the power to prevent the acquisition or disposition of assets material to the business outside the ordinary course of business; the power to prevent fundamental changes in the business or operational strategy of the entity; the power to prevent incursion of substantial indebtedness outside the ordinary course of business; the power to prevent fundamental changes to the entity's regulatory, tax, or liability status; and the power to prevent any amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of an entity. The Committee's favorable consideration of these rights does not preclude it from finding that the existence of one or a combination of these rights confers control under the facts and circumstances of a particular transaction.

§800.204(e) – Incremental acquisitions

A commenter asked that the regulations clarify whether CFIUS will review voluntary notices when a foreign person acquires an additional interest in a U.S. business after the Committee has concluded its review of a prior covered transaction involving the same parties and the President did not prohibit or suspend the transaction. The Proposed Rule did not address this point explicitly. The commenter suggested that clarifying this

point would help to ensure that the Committee is not overburdened and can focus its resources appropriately on transactions that raise national security concerns.

This Final Rule adds §800.204(e) and accompanying Example 7 to clarify the Committee’s approach to incremental acquisitions. Pursuant to §800.204(e), a transaction in which a foreign person acquires an additional interest in a U.S. business that was previously the subject of a covered transaction for which the Committee concluded all action under section 721 will not be considered a covered transaction.

If a prior investment by a foreign person in a U.S. business was not notified to CFIUS, or if CFIUS determined that the prior investment was not a covered transaction, then the subsequent investment may be a covered transaction, depending on whether the subsequent investment could result in the foreign person’s control of the U.S. business.

With respect to any covered transaction, any mitigation agreement or conditions may include, subject to the requirements of section 721 and Executive Order 11858, measures to address any national security risk posed by the covered transaction, including any increased risk if the foreign acquirer were to have a greater ownership interest in the U.S. business.

§800.207 – Covered transaction

The Proposed Rule defined “covered transaction” consistent with the definition of that term in section 721. The Proposed Rule provided additional clarity about what transactions are covered by section 721 in numerous other provisions, including §§800.301 and 800.302 and the definitions of “control,” “foreign person,” and a “U.S. business.” A commenter suggested that the Committee regularly release redacted

descriptions of transactions that have been filed with the Committee, along with descriptions of the Committee's assessment of whether they were covered transactions.

The Final Rule does not adopt this suggestion. Public release of any assessment by the Committee of whether a transaction is a covered transaction would implicate significant potential national security and confidentiality concerns. The Final Rule, at §§800.207, 800.301 and 800.302, provides greater clarity regarding what transactions are covered by section 721. Parties to a transaction, at their own discretion, may make available to the public information about transactions that they have voluntarily notified to the Committee.

§800.208 – Critical infrastructure

The Proposed Rule defined “critical infrastructure” consistent with the definition of that term in section 721 and clarified that, in determining whether a covered transaction involves critical infrastructure, the Committee would consider the “particular” systems or assets involved, rather than defining certain classes of systems or assets as critical infrastructure. Several commenters expressed support for this approach. Others suggested that the scope of “critical infrastructure” be further illustrated by identifying infrastructure that would or would not be considered critical.

The Final Rule, at §800.208, continues the case-by-case approach of section 721 and the Proposed Rule towards identifying critical infrastructure. Under this approach, the Committee determines whether (1) a particular transaction notified to it is a “covered transaction,” (2) that particular covered transaction would result in foreign control of critical infrastructure of or within the United States, and (3) that particular covered

transaction has potential national security effects. Accordingly, the definition of critical infrastructure turns on the national security effects of any incapacity or destruction of the particular system or asset over which a foreign person would have control as a result of a covered transaction. Consistent with this approach, the Committee will not deem classes of systems or assets to be, or not to be, critical infrastructure.

§800.211 – Entity

The Proposed Rule made clear that an entity need not have a distinct legal personality in order to fall within the definition of “entity” under these regulations. A commenter asked for clarification of the circumstances in which assets with no distinct legal personality would be considered an “entity.”

The Final Rule amends the proposed text of §800.211 to add a cross-reference to §§800.301(c) and 800.302(c), which provide additional clarity regarding when assets with no distinct legal personality can constitute an “entity” and, in turn, a “U.S. business.” This additional clarification is provided, in particular, by Examples 6 and 7 in §800.301(c) and Examples 1, 2, 4, and 5 in §800.302(c).

§800.212 – Foreign entity

The Proposed Rule introduced a new term, “foreign entity,” to refer to entities the Committee considers to be foreign persons based on either their place of organization and foreign exchange listing or the extent of their foreign ownership, even if no single foreign person controls the entity. Commenters expressed concern that the definition of “foreign entity” in the Proposed Rule would have captured entities that were incorporated outside

of the United States if they were primarily traded on foreign exchanges, even if the entities were in fact majority-owned by U.S. nationals.

The Final Rule revises the proposed text of §800.212 to cover entities organized under the laws of a foreign state if either its principal place of business is outside the United States or its equity securities are primarily traded on one or more foreign exchanges. The Final Rule excludes from the definition of “foreign entity,” however, any entity that is able to demonstrate to the Committee that a majority of the equity interest in the entity is ultimately owned by U.S. nationals. Note that, under the definition of “foreign person” at §800.216(b), any entity over which control is exercised or exercisable by a foreign person would still itself be deemed a foreign person, even if that entity does not constitute a “foreign entity.” Accordingly, an entity controlled by a foreign person is itself a foreign person, even if it is majority owned by U.S. nationals.

Commenters also asked whether a foreign person’s ownership of shares of an entity could result in that entity being considered a “foreign entity” if the right to vote that person’s shares were transferred to U.S. nationals through a voting trust. Example 3 in §800.301(a) of the Final Rule illustrates that an agreement to delay the exercise of voting rights for a limited period of time does not preclude a finding of control. Similarly, if a voting trust is revocable or time-limited, the Committee would consider the foreign person that placed its shares in such a voting trust as still holding the shares.

Finally, a commenter asked whether the definition of “foreign entity” was intended to be a standard for determining foreign government control. The definition of “foreign entity” is not intended to be a standard for determining foreign government control. If an entity could be controlled by a foreign government, the question of whether

it is a “foreign entity” would never arise, as “foreign entity” is a term that is intended to cover situations where there is significant foreign ownership but ownership is dispersed.

§800. 213 – Foreign government

The Proposed Rule defined the term “foreign government” to include non-elected heads of state with governmental responsibilities. A commenter said that the term “head of state” in §800.213 was unclear.

The Final Rule amends §800.213 to delete the clause referring to certain heads of state, since it imprecisely defined the circumstances under which the Committee may treat an investment by a government official as being an investment by a foreign government. Consistent with the reference in §800.214 to a person “acting on behalf of a foreign government,” the Final Rule permits the Committee to treat investments by foreign government officials as investments by foreign governments where the circumstances so warrant, such as in certain cases where an official invests to advance governmental objectives.

§800. 214 – Foreign government-controlled transaction

The Proposed Rule defined “foreign government-controlled transaction” to mean any covered transaction that could result in control of a U.S. business by a foreign government or a person controlled by or acting on behalf of a foreign government. Commenters suggested that, in considering whether a transaction is foreign government-controlled, the regulations should treat certain types of entities owned by foreign

governments or that have a “government background” as not foreign government-controlled – for example, if they operate on a purely commercial and market-driven basis.

The Final Rule makes no changes to the proposed text of §800.214. “Foreign government-controlled transaction” is defined by statute at section 721(a)(4) and may not be modified by regulation in a manner that is inconsistent with the statute. The statute makes clear that transactions are “foreign government-controlled transactions” if they could result in the control of any person engaged in interstate commerce in the United States by a foreign government or an entity controlled by or acting on behalf of a foreign government, regardless of whether the transaction has a purely commercial and market-driven basis. Accordingly, the regulations do not exclude transactions involving entities controlled by a foreign government, even if the entities operate on a commercial basis, nor entities that are controlled only indirectly by a foreign government through a person controlled by or acting on behalf of a foreign government. Consistent with section 721(b)(2)(E), however, the Department of the Treasury, as Chairperson of the Committee, is publishing guidance regarding the types of transactions that the Committee has reviewed and that have presented national security considerations. That guidance clarifies that whether a foreign government-controlled entity operates on a purely commercial and market-driven basis is among the important factors that the Committee takes into consideration when assessing whether foreign government control in a particular transaction poses concerns about possible impairment of U.S. national security.

§800.216 – Foreign person

The Proposed Rule expanded the definition of “foreign person” to include the term “foreign entity” and added a number of examples. A commenter suggested that the examples in §800.216 and §800.226, which respectively define “foreign person” and “U.S. business,” be expanded to make clear that the two concepts are distinct. A commenter also expressed concern that an acquisition by an investment fund controlled by a foreign bank may be treated differently under the regulations than would an acquisition by an investment fund controlled by U.S. nationals.

The Final Rule makes no changes to the proposed text of §800.216 and §800.226. The terms “foreign person” and “U.S. business” are independent of one another and serve distinct purposes in the Final Rule. Accordingly, it is possible that a particular entity may be just a foreign person, just a U.S. business, both a foreign person and a U.S. business simultaneously, or neither a U.S. business nor a foreign person.

Section 721 and this Final Rule, which implements section 721, cover transactions after a certain date that could result in control of a U.S. business by a foreign person. Accordingly, whether a party that controls an investment fund is, or is not, a foreign person is central to the statutory and regulatory framework.

§800.220 – Party or parties to a transaction

The Proposed Rule provided, at §800.220(f), that any party in a role comparable to a party listed in paragraphs (a) through (e) of §800.220 would also be deemed a “party to a transaction.” A commenter suggested that §800.220(f) provides the Committee with excessive discretion.

The Final Rule makes no change to the proposed text of §800.220. Paragraph (f) of that section does not expand the scope of what constitutes a covered transaction. Rather, it identifies what persons, in circumstances other than those covered by paragraphs (a) through (e), are considered to be a “party to a transaction” and, therefore, may file a voluntary notice with the Committee consistent with the requirements of §800.402.

§800.224 – Transaction

The Proposed Rule replaced the term “acquisition” with the term “transaction,” at §800.224, in order to harmonize the terminology of the regulations with that of FINSA, and provided that a transaction is a “proposed or consummated merger, acquisition, or takeover.” One commenter suggested that the Committee should not have the authority to review transactions after they have been completed. However, if a transaction is proposed after August 23, 1988 and could result in foreign control of a U.S. business, then it would be a “covered transaction,” as defined in section 721, even if the transaction has been consummated by the time of review.

In addition to other clarifications of the definition, the Proposed Rule also clarified that certain joint ventures and long-term leases are “transactions.” In particular, the Proposed Rule provided that long-term leases are transactions when, because of the terms of the lease and the extent of the lessee’s authority over the U.S. business, the lessee operates the business as if it were the owner. A commenter asked whether a long-term lease in which a lessor retained only minimal oversight responsibilities and the

ability to impose penalties in the event of a contractual breach would not constitute a “transaction” under §800.224(f) and the example in §800.224.

The Final Rule makes no change to §800.224(f) or the example in §800.224 in response to the comment. As a general matter, and as reflected in the example in §800.224, the more significant the substantive responsibilities retained by the lessor over the leased property, the likelier that the lease would not be viewed as a transaction.

§800.301(d) – Joint ventures

The Proposed Rule, in §800.301(d), harmonized the application of the term “covered transaction” to joint ventures with its application to all other transactions. Thus, the Proposed Rule provided that the creation of a joint venture is a covered transaction if a U.S. business is contributed to the joint venture and a foreign person could gain control of that U.S. business through the creation of the joint venture. Example 1 in §800.301(d) of the Proposed Rule stated that the creation of a 50/50 joint venture by a foreign person and a party that contributes a U.S. business is a covered transaction, with respect to the U.S. business. A commenter suggested that such a transaction should not be a covered transaction because the power that the foreign person has over the U.S. business is no greater than the other party’s.

The Final Rule makes no change in response to the comment described above. To the extent that a joint venture involves the contribution of a U.S. business, a foreign 50/50 joint venture partner would obtain the same degree of power over the important matters affecting that joint venture – and therefore the U.S. business – as if the foreign person had made a direct investment in that U.S. business to obtain a 50 percent interest. The

acquisition of a 50 percent interest in an existing U.S. business is not viewed differently with regard to foreign control based on whether it is structured as a direct investment or a joint venture. When all ownership interests in a U.S. business are held by two equal partners, each partner is able to veto all important matters affecting the U.S. business, so each partner controls the U.S. business.

§800.302(b) of the Regulations issued in 1991 – Corporate reorganizations

The Proposed Rule omitted a provision that had been included in the 1991 regulations, at §800.302(b). The omitted provision stated that an acquisition is not subject to review under section 721 if the parent of the entity making the acquisition is the same as the parent of the entity being acquired. A commenter suggested reintroducing the omitted provision or confirming that the principle continues to apply.

The Final Rule does not reintroduce the omitted provision. Section 721, as amended by FINSA, requires the Committee to review any transaction notified to it that could result in control of a U.S. business by a foreign person. A corporate reorganization that results in a new foreign person acquiring control of a U.S. business would be a covered transaction, even though the ultimate parent of the U.S. business may not have changed. Thus, the Committee must treat such a reorganization as a covered transaction. Such a reorganization, however, will present national security considerations only in exceptional cases, as is explained in greater detail in guidance that the Department of the Treasury, as Chairperson of the Committee, is publishing on the types of transactions that the Committee has reviewed and that have presented national security considerations.

§800.302(b) – Solely for the purpose of passive investment

The Proposed Rule provided in §800.302(c) that a transaction that results in a foreign person holding ten percent or less of the outstanding voting interests in a U.S. business is not a covered transaction if the transaction is “solely for the purpose of investment.” In §800.223, “solely for the purpose of investment” was defined to refer to ownership interests in which the person holding or acquiring such interests has no plan or intent to exercise control, and takes no actions that indicate otherwise. Some commenters suggested that the term “solely for the purpose of investment” was too vague and created additional uncertainty for portfolio investors. A commenter also suggested clarifying that investors holding less than ten percent of the interests of a business can wield significant influence.

The Final Rule addresses these comments by clarifying that the rule for holdings of ten percent or less of the outstanding voting interests in a U.S. business – which is now at §800.302(b) of the Final Rule – applies only to interests that are held or acquired “solely for the purpose of passive investment.” The addition of the word “passive” emphasizes that this rule does not pertain to a transaction if the foreign person plans or intends to gain control over the U.S. business. The example in §800.223 of the Final Rule also makes clear that the Committee will consider whether the foreign person’s negotiation of rights constitutes evidence that the foreign person possesses a purpose other than passive investment. Under the Final Rule, a transaction would not be a “covered transaction” if the foreign person holds ten percent or less of the voting shares in a U.S. business and the investment is passive such as where, for example, the foreign investor has no affirmative rights other than the ability to vote its shares *pro rata* and no

negative rights other than any minority shareholder protection listed in §800.204(c) or as considered by the Committee on a case-by-case basis under §800.204(d).

A commenter also suggested that the Proposed Rule be revised to identify a mechanism for tracking whether, after the Committee determines that this rule applies to a transaction, the foreign person develops plans or an intent to control the U.S. business or takes action inconsistent with passive intent. The Final Rule makes no change to the proposed language in response to this comment. The Committee will inform the parties if it determines a notified transaction is not a covered transaction because the investment is held or acquired solely for the purpose of passive investment. Should material facts change in the future relating to whether the foreign person has control of the U.S. business, the transaction may become a covered transaction subject to section 721.

A commenter also suggested that the rule regarding transactions solely for the purpose of passive investment should be expressed in terms of whether the foreign person has ten percent or less of the outstanding “ownership interest” in the U.S. business, rather than the “voting interest.”

The Final Rule does not adopt this suggestion because it would not cover an investor whose voting power in a U.S. business is disproportionately large compared to its ownership interest. Such an investor could have the ability to exercise control, even though its ownership interest is under the ten percent threshold. For example, where a company has issued a class of non-voting stock, it is possible that a foreign person may have ten percent or less of the outstanding stock of a company, but still have greater than ten percent of the voting stock, possibly giving it powers that are disproportionate to its share of all outstanding stock.

§800.303 – Lending transactions

The Proposed Rule, at §800.303, established a special rule that described the circumstances in which a foreign lender may obtain ownership of collateral but not be deemed to control that collateral. The Proposed Rule also intended to clarify that a lending transaction, even where accompanied by a security interest in property, ordinarily does not convey control. Several commenters expressed concern that §800.303 could be read to suggest that loans could be considered covered transactions based on the presence of standard negative covenants in the loan documents and requested that the Committee clarify that this is not the case.

This Final Rule revises §800.303 to provide more clearly that loans themselves are not “transactions” (defined in §800.224), except where the foreign person acquires economic or governance rights in the U.S. business characteristic of an equity investment, but not of a loan. Loan covenants that give the lender a negative right over certain decisions of the borrower, therefore, would not result in the loan itself being subject to these regulations, so long as the foreign person does not acquire economic or governance rights in the U.S. business characteristic of an equity investment but not of a loan. Consistent with that rule, and as provided in Example 3 in §800.303 of the Final Rule, if the loan agreement were to extend to the lender the right to be on the board of the borrower and the right to receive dividends from the borrower, the loan would be considered a “transaction” and would be a covered transaction if these or other powers that the lender receives as a result of the loan would constitute “control,” as defined in §800.204. Note that the acquisition of control of a U.S. business by a foreign lender as a

result of a borrower's default on a loan would still be considered a covered transaction, except in the circumstances described in §800.303(c) or where the Committee determines that there is no control as a result of its assessment of the factors identified in §800.303(a)(2).

Several commenters suggested that, in assessing whether a loan could give the lender control over the borrower, the Committee should take into account the fact that lending transactions and banks are subject to other regulatory regimes, both in the United States and abroad. Section 721, however, creates a separate statutory process from that created under banking and other laws, with different purposes and standards. The Committee's determinations regarding control are independent of such other laws.

The Proposed Rule, at §800.303(a)(1), provides that the Committee will accept a notice when default becomes imminent or some "other condition" arises that would result in a "significant possibility" that the foreign lender may obtain control of the U.S. business. One commenter asked for further clarification of what "other conditions" are and what constitutes a "significant possibility." As a general matter, the Committee declines to accept notices of covered transactions where the occurrence of the transaction is speculative or remote. Accordingly, the Final Rule continues to provide that the Committee will accept notices of loans that do not, by themselves, constitute covered transactions, only when, because of imminent or actual default or other condition, there is a significant possibility that the foreign person may obtain control of the U.S. business. Such a "significant possibility" may exist, for example, where several persons other than the foreign lender also have security interests in the same collateral and it is very possible, but not certain, that the foreign lender will obtain control.

Several commenters expressed concern about the possible effect of §800.303 on the validity of lenders' security interests. For example, a security interest, upon default, may result in "control" of the collateral by the lender, and section 721 authorizes the President to suspend or prohibit covered transactions in certain circumstances. To the extent that a security interest may be suspended or prohibited by the President under section 721 upon default, a commenter objected to the limitation on notifying the transaction until default becomes imminent or some other condition arises that would result in a significant possibility that the foreign lender may obtain control of the U.S. business in which it has a security interest. The commenters also requested that the Committee allow a reasonable period of time for a lender to transfer management decisions or day-to-day control over the U.S. business to U.S. nationals.

The Final Rule recognizes in §800.303 that foreign persons that make loans in the ordinary course, such as commercial banks, do not do so in hopes of acquiring control over collateral in the event of default and retaining possession of the collateral indefinitely. Section 800.303(a)(2) allows the Committee to provide the foreign person with the time needed to dispose of collateral of which it has taken possession, so long as the foreign person has made arrangements to transfer management decisions or day-to-day control over the U.S. business to U.S. nationals during the interim period.

§800.304 – Timing rule for convertible voting instruments

Several commenters expressed concern over the treatment of convertible voting instruments in §800.302(b) of the Proposed Rule. One commenter suggested that the Proposed Rule might inadvertently eliminate the Committee's flexibility to determine on

a case-by-case basis whether the acquisition of convertible voting instruments should be deemed to confer control even without the conversion of such instruments. Another commenter suggested that the Proposed Rule's treatment of convertible voting instruments inappropriately would cover transactions that result in foreign influence falling short of control, because it is only upon conversion that the holder receives rights relevant to control.

The Final Rule revises the provision, which now appears at §800.304, to further clarify that the Committee will consider the circumstances of conversion in order to determine whether the Committee will include the rights that the holder will obtain upon conversion in its assessment of whether a notified transaction that includes such instruments could result in control. This rule allows the Committee to consider the rights that would result from the conversion of the instruments at an appropriate time. In some cases, such as where the results of conversion are reasonably ascertainable and the conversion is in the near future, the Committee will consider such rights when the acquisition of the convertible instruments is notified to the Committee. In other cases, such as where conversion is speculative or remote, the Committee may choose not to consider the rights that would result from conversion at the time of the notified transaction. In such cases, however, the Committee consistent with §800.304(b), may, still consider whether the acquisition of the convertible voting instruments is a covered transaction because of any immediate rights that they convey to the holder with respect to the governance of the entity that issued the instruments. Furthermore, once the conversion of the instruments becomes imminent, it may be appropriate for the

Committee to consider the rights that would result from conversion and whether the conversion is a covered transaction.

§800.401 – Procedures for notice

The Proposed Rule, at §800.401, explicitly encouraged parties to a transaction to consult with the Committee prior to filing a notice. The preamble to the Proposed Rule made clear that pre-notice consultations give the Committee an opportunity to understand the transaction and to suggest information that the parties may wish to include in their notice to assist the Committee in addressing any national security considerations as efficiently as possible. Commenters asked for additional information regarding the purpose of such prefiling communications and when such communications would be appropriate.

The Final Rule leaves §800.401(f) unchanged. Prefiling consultations may be particularly helpful where a party to the transaction has not previously prepared a notice for submission to the Committee or where a transaction is unusually complex. Included within the broad spectrum of prefiling consultations that may be helpful are: (1) informing the Staff Chairperson orally or in writing of a transaction that may be filed and the date it may be filed; (2) requesting in writing that the Staff Chairperson modify a requirement in §800.402, as further described below; (3) asking the Staff Chairperson procedural questions orally or in writing; (4) requesting a meeting with the Staff Chairperson, other Treasury official, or other Committee staff, to provide information on a transaction and to allow the Staff Chairperson and others to pose questions that may help the party identify information it may wish to include in a voluntary notice; and (5) providing a draft of the voluntary notice.

Several commenters suggested that the Committee provide a binding decision on whether a transaction is a covered transaction before a full voluntary notice is submitted to the Committee under §800.401. One commenter expressed opposition to this proposal, suggesting that, prior to receipt of a full voluntary notice, the Committee might err on the side of caution in finding that transactions are covered transactions.

The Committee has not made any changes in the Final Rule in response to these comments. The Committee recognizes the potential utility of a preliminary determination on whether a transaction is a covered transaction. The proposal for a timely, yet binding, decision through a new and separate prefiling process, however, would create a substantial new burden on the CFIUS process, thus undermining the Committee's ability to meet its statutory deadlines. As a determination that might fall outside the statutorily defined review and investigation process, it also raises potential concerns regarding consistency with section 721 that would require further examination.

A commenter requested that the Department of the Treasury accept voluntary notices without requiring that they be broken into multiple electronic files. The Final Rule makes no changes to the proposed language of §800.401, which makes no reference to this requirement. The Staff Chairperson does currently request, however, that large submissions be broken into smaller electronic files because information technology capabilities vary widely across the government departments and offices to which the Staff Chairperson forwards each notice. The Department of the Treasury is exploring options to improve the process for receipt and distribution of notices.

§800.402 – Contents of voluntary notice

The Proposed Rule, at §800.402, expanded the information that must be included in a voluntary notice submitted to the Committee to require certain additional information that the Committee routinely has requested of parties. Several commenters argued that the information requirements of §800.402 are onerous and suggested that the significant time and expense that they predicted would be required to prepare a notice may discourage voluntary filings. Commenters stated that some of the information requirements may not be relevant in particular cases and suggested asking only for a narrower set of information in each case, supplemented by additional data based on the type of industry, transaction, or the parties. A commenter also suggested a short-form notice that would provide the parties something less than the safe harbor provided in §800.601 upon the Committee's completion of its review.

The Final Rule makes several significant changes to the proposed language of §800.402(c) to narrow the scope of some of the information required, as discussed further below. In those cases where the information sought under §800.402(c) is not applicable to the notified transaction, the voluntary notice should state so. Except where the Staff Chairperson modifies a particular information requirement for a particular filer as described below or where a party states, and the Staff Chairperson agrees, that a request is not applicable, a voluntary notice will not comply with §800.402 if any information required in §800.402 is missing.

In extraordinary cases, parties may request that the Staff Chairperson modify an information requirement in these Final Rules for a particular transaction. All such requests must be submitted in writing to the Staff Chairperson before filing a notice. The Staff Chairperson will consider accommodating such a request only in the exceptional

case where a requirement would place an extraordinary burden on the parties and where modification would not impair the full and efficient consideration of the transaction. For example, the Staff Chairperson may consider a request by a small company to modify the requirement at §800.701(b), to allow the company to submit a certified translation of only portions of its annual report. The Staff Chairperson, however, will not consider waiving the requirement at §800.402(c)(6)(vi) for personal identifier information regarding certain key personnel. If the Staff Chairperson grants the request for modification, the justification that was provided in the written request must be included in the party's voluntary notice. Even after a request has been granted, the Committee may request the information after the notice has been submitted, in which case §800.403(a)(3) will apply, and completion of the review or investigation, within the constraints of section 721, may take longer than if the information had been provided at the outset.

A commenter requested confirmation that submission of a voluntary notice is not an admission that a transaction is a covered transaction. The Committee will not treat a voluntary filing as an admission that the transaction is a covered transaction. Furthermore, the Final Rule makes a minor change to the proposed language of §800.402(j), clarifying that parties filing a voluntary notice are required to state their "opinion" (rather than "full statement of [their] view," as provided in the Proposed Rule) as to whether the transaction is a covered transaction.

Commenters suggested changes to two proposed information requirements regarding the value of the transaction. The Final Rule modifies the proposed language of §800.402(c)(1)(viii) to request a "good faith approximation of the net value of the interest acquired" rather than a statement of the full value of the transaction and a description of

how it was derived. The Final Rule modifies the proposed language of §800.402(c)(3)(i) to require identification of the methodology used to determine market share, rather than how the estimate was derived, although the Committee may request such an explanation on a case-by-case basis after a review is initiated.

The Proposed Rule, at §800.402(c)(3)(iv), required filers to identify each contract that was in effect within the past three years with any U.S. Government agency. In response to comments suggesting that the Proposed Rule was unnecessarily broad, the Final Rule significantly narrows the proposed language, requiring identification of any contract in effect within the past three years with any U.S. Government agency or component with national defense, homeland security, or other national security responsibilities, including law enforcement as it relates to defense, homeland security, or national security.

The Proposed Rule, at §800.402(c)(3)(vi), required information regarding rebranding or incorporation of the U.S. business's products or services by another company or in another company's products. Several commenters suggested this requirement may prove highly burdensome in some cases. The Final Rule makes no change to the proposed language. In those exceptional cases where the requirement is extraordinarily burdensome, however, the filer may request that the Staff Chairperson modify this requirement, subject to the conditions stated above regarding such requests. Such a request may be considered, for example, where the U.S. business produces and sells a raw material to thousands of manufacturers.

The Proposed Rule, at §800.402(c)(3)(vii), required identification of priority rated contracts or orders for the past three years. A commenter noted that the Proposed Rule

requested information on the target company's plans to ensure that it or any new entity formed at the completion of the transaction would remain in compliance with the Defense Priorities and Allocations System (DPAS) regulations. The commenter suggested that the language be amended to request a statement of the plans of the acquiring party (rather than the U.S. business itself) to ensure compliance of the U.S. business or newly formed U.S. business with the DPAS regulations. The Final Rule makes the suggested changes. Another commenter suggested that the requirement that parties identify all priority rated contracts and orders for the past three years could require a voluminous production. The Final Rule makes no change in this regard. Parties that comply with the three-year record-keeping requirement of the DPAS regulations should not face a significant burden in complying with this subsection.

The Proposed Rule, at §800.402(c)(3)(viii), required a description and copy of cyber security plans. A commenter suggested this may be irrelevant in some cases and could be misinterpreted to suggest that a cyber security plan is expected in conjunction with foreign acquisitions. The Final Rule makes no change to this proposed requirement. The subsection refers to plans that any company may have to protect its information technology systems, regardless of whether the company is in the information technology industry. The subsection requires submission of any such cyber security plan but does not state a view as to the appropriateness of a plan in any particular case.

A commenter interpreted §800.402(c)(4)(i) of the Proposed Rule as requiring filers to identify and classify under the Export Administration Regulations ("EAR") almost every item that the U.S. business produces or trades in, since all items subject to the EAR bear at least the designation EAR99. As noted by other commenters, however,

this subsection, which has not been modified by the Final Rule, allows filers to provide commodity classifications for items by general product categories, which does not require the identification or classification of every individual item produced or traded.

The Proposed Rule, at §800.402(c)(4)(ii)(B), required filers to identify articles and services that have not been, but may be, designated or determined to be covered by the U.S. Munitions List pursuant to 22 CFR 120.3. Commenters suggested that the scope of this requirement was ambiguous. The Final Rule revises this provision to make clear that the requirement includes articles and services “under development” that may be designated or determined in the future to be defense articles or defense services pursuant to 22 CFR 120.3.

The Proposed Rule, at §800.402(c)(5)(i), required filers to identify certain licenses, permits, and authorizations that have been granted by an agency of the U.S. Government. A commenter questioned whether this would extend to sewer permits, motor vehicle licenses, business licenses, and other similar state or local permits, licenses or authorizations. The Final Rule makes no change to the proposed subsection. The requirement applies only to licenses, permits, and authorizations that have been granted by an agency of the “United States Government,” a term which refers only to federal – not state or local – government.

The Proposed Rule, at §800.402(c)(6)(ii), required filers to identify the foreign person’s plans with respect to the U.S. business’s operations. A commenter suggested that this requirement has no relation to national security. The Final Rule makes no change in response to the comment because a foreign person’s intentions with respect to

the operations of the U.S. business may be central to the national security analysis, depending on the relevance of the business to U.S. national security interests.

The Proposed Rule, at §800.402(c)(6)(iv)(D), required filers to state whether a foreign government has any affirmative or negative rights not already identified in the filing that could be relevant to the Committee's determination of whether the notified transaction is a foreign government-controlled transaction. A commenter suggested that the requirement be limited to "material" rights. The Final Rule makes no change to the proposed language because the requirement is already limited to rights "that could be relevant" to the determination of whether the transaction is a foreign government-controlled transaction.

The Proposed Rule, at §800.402(c)(6)(vi) and (vii), required filers to provide certain biographical and personal identifier information for certain key personnel affiliated with the foreign acquirer and its parents. Commenters asked for clarification regarding how the two sections differ. Commenters also suggested that the information be required: only for individuals affiliated with the immediate acquirer, the ultimate parent, and other entities that have control or have a role in the transaction; only if the information has not been provided in connection with another transaction in the preceding six months; or, with regard to shareholders, only at a threshold higher than five percent. Commenters also suggested that the scope of the requirement for information on government and military service be clarified and narrowed.

The Final Rule combines the two proposed subsections into §800.402(c)(6)(vi) and identifies a single group of individuals for whom filers must provide a curriculum vitae or similar professional synopsis as part of the main notice, as well as certain other

personal identifier information in a separate document to facilitate special handling. Such information must be provided for each member of the board of directors and each officer of the foreign person engaged in the transaction and its immediate, intermediate, and ultimate parents (see §800.219 for the definition of “parent”), and for any individual having an ownership interest of five percent or more in the foreign person engaged in the transaction and in its ultimate parent. The Final Rule does not remove this requirement with respect to foreign acquirers that were involved in a transaction within the preceding six months because the storage and retrieval of such information would create substantial new burdens on the Committee. The Final Rule, at §800.402(c)(6)(vi), also narrows the foreign military service information requirement. Filers are not required to provide details of foreign military service where the service was at a rank below the top two non-commissioned ranks of the foreign country. Filers must continue to provide the dates and nature of all other military and government service.

§800.403 – Deferral, rejection, or disposition of certain voluntary notices

The Proposed Rule provided in §800.403(a)(3) that the Staff Chairperson of the Committee may reject a voluntary filing if a party fails to provide any follow-up information requested by CFIUS within two business days. Many commenters suggested that this requirement was too onerous and suggested expansion of the response time to three or five business days. One commenter also asked the Committee to clarify that holidays in both the United States and in the responding foreign party’s home country would not be counted as business days.

The Final Rule revises §800.403(a)(3) to extend the time allowed to a party to respond to a request for follow-up information to three business days, which

appropriately balances the burden to parties to a transaction notified to CFIUS and the needs of the Committee to complete a review or investigation on a timely basis. The Final Rule also adds a definition of “business day” at §800.201 to exclude legal public holidays in the United States. This definition does not exclude other countries’ holidays, so as to encourage a uniformly efficient review process.

§800.503 – Determination of whether to undertake an investigation

The Proposed Rule reiterated in §800.503(a) the standards provided by statute and Executive Order for initiating an investigation. Two commenters suggested that the standards were not clear or objective. They asked that the regulations identify the factors that agencies must consider in assessing whether there is a threat to national security and require disclosure of the rationale for the Committee’s determination. Two commenters suggested that one of the standards in particular – at §800.503(a)(1) – would make investigations inevitable in most cases, since it can be triggered by any one member of the Committee other than an *ex officio* member.

The Final Rule makes no changes to the proposed text of §800.503. The standards for initiation of investigations are drawn directly from section 721(b)(2)(B) and section 6(b) of Executive Order 11858. Even after FINSA became effective on October 24, 2007, the vast majority of cases have been completed within the initial 30-day review period, demonstrating that the standards for initiation of investigations do not make investigations inevitable.

Section 721(f) identifies factors for the Committee to consider, as appropriate, in assessing effects of a covered transaction on national security. Guidance on the types of transactions that have raised national security considerations that the Department of the

Treasury, as Chairperson of the Committee, will publish separately in the *Federal Register* consistent with section 721(b)(2)(E) provides additional context for those factors. The Committee's assessment of the national security effects of covered transactions is based on, among other things, sensitive business information submitted by the parties and classified U.S. Government information. Thus, the rationale for the Committee's determination in any particular case cannot be made public. Safeguards in section 721 and Executive Order 11858, however, ensure that actions taken by the President or the Committee are taken only to address legitimate national security concerns. For example, any risk mitigation must be based on a written analysis of the national security risk posed by the covered transaction and of the risk mitigation measures believed to be reasonably necessary to address the risk. In addition, the President cannot exercise his authority to suspend or prohibit a covered transaction under section 721 unless he finds: (1) that there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security; and (2) that provisions of law, other than section 721 and the International Emergency Economic Powers Act, do not, in the judgment of the President, provide adequate and appropriate authority for the President to protect the national security.

A commenter also noted that the standard for initiating an investigation set forth in §800.503(b)(2) of the Proposed Rule omits a phrase included in section 721(b)(2)(B)(i)(III). The commenter asked that the phrase "by assurances provided or renewed with the approval of the Committee" be added to the proposed text of §800.503(b)(2), to remind parties that national security concerns may be mitigated by

prior mitigation agreements. The Final Rule does not make the requested addition. The point that the commenter wished to emphasize through the addition is correct. Entering into mitigation agreements, however, is not the only means of resolving any national security concerns. The Committee may also determine that any such concerns can be resolved through other applicable laws besides section 721 that adequately address national security risks raised by a covered transaction.

A commenter suggested that foreign government-controlled transactions should not be subject to an automatic investigation trigger. Section 721(b)(2)(B), however, requires that the Committee conduct an investigation of foreign government-controlled transactions. The Committee is allowed, pursuant to section 721(b)(2)(D) to conclude review of such a transaction without initiating an investigation if the Department of the Treasury and the lead agency determine at the Deputy Secretary level or higher that the transaction will not impair the national security of the United States.

A commenter also suggested that the review and investigation schedule be condensed to a shorter period than the statutory maximum 30-day review and 45-day investigation to minimize the impact on covered transactions reviewed by the Committee. Two commenters also asked that the regulations guarantee that the parties to a reviewed transaction will be informed several days before the end of the 30-day review period if risk mitigation will be required. The commenters noted that if the need for risk mitigation is not determined until near the end of the 30-day review, there may be insufficient time to reach resolution of concerns before the end of that period, resulting in an otherwise unnecessary 45-day investigation.

The Final Rule makes no changes to the proposed text of §800.503 or other sections in response to these comments. The Committee seeks to conclude each case, as well as to engage parties regarding the need for risk mitigation, as soon as practicable. The maximum timeframes for reviews and investigations are established by section 721. They have proven in practice to be appropriate for numerous reasons: many officials from the various U.S. Government agencies that comprise the Committee, including senior officials, are involved in the Committee's determinations; the important national security responsibility entrusted to the Committee requires robust, often time-consuming analysis of each case; many of the transactions reviewed by the Committee are complex; and the Committee's caseload is significant.

The Final Rule does implement changes to the CFIUS process that are intended to maximize efficiency and ensure timely consideration of transactions notified to the Committee. These changes include, among others, encouragement of prefiling consultations, expansion of the required contents of voluntary notices to include information that the Committee, in practice, has been requesting during the course of reviews, and requirements that the Staff Chairperson take certain administrative actions promptly or within defined periods of time.

§800.508 – Role of the Secretary of Labor

The Proposed Rule, at §800.508, provided a role for the Secretary of Labor with respect to mitigation agreements, as required by section 721(h)(3)(C). A commenter suggested that the role defined for the Secretary of Labor was too narrow and that the regulations should make clear that the Chairperson can seek the Secretary of Labor's input on other occasions, as appropriate. Another commenter suggested that the meaning

of §800.508 was ambiguous. A commenter also asked that the regulations make clear that mitigation agreements should not violate any U.S. laws, rather than only labor laws.

The Final Rule revises the proposed text of §800.508 to expand the Secretary of Labor's role and to focus it on employment laws, rather than labor laws. The Final Rule also adds language to emphasize that the Secretary of Labor will have no other policy role. This reinforces the Committee's focus, consistent with section 721, on national security alone, rather than broader economic or other national interests, for example, the effect of foreign investment on domestic employment levels.

The Final Rule retains the provision addressing consistency of mitigation agreements with employment laws, rather than all U.S. laws, not because the Committee believes that mitigation agreements may be inconsistent with other applicable U.S. laws, but because §800.508 addresses solely the advice that will be sought from the Secretary of Labor.

§800.601 – Finality of actions under section 721

The Proposed Rule revised §800.601(a) to clarify the circumstances under which the authority under section 721(d) will not be exercised. Paragraph (1) of §800.601(a) pertains to the situation in which the Committee finds that a transaction notified to it is not a covered transaction. Paragraphs (2) and (3) pertain to the situation in which a transaction notified to the Committee is found to be a covered transaction, and either the Committee has advised the parties in writing that it has concluded all action under section 721, or the President has announced his decision not to exercise his authority under section 721 with respect to the covered transaction. These provisions do not preclude exercise of authority under section 721(d) with respect to any other covered transaction.

The following example illustrates a situation in which §800.601(a)(2) would apply and a situation in which it would not apply: Corporation A, a foreign person, owns a non-controlling interest in Corporation B, another foreign person. Corporation B notifies the Committee of a proposed purchase of a controlling interest in Corporation X, a U.S. business. The Committee determines that Corporation B's purchase is a covered transaction, and the parties are advised in writing that the Committee has concluded all action under section 721 with respect to that transaction. Section 800.601(a)(2) would apply to that transaction. Corporation A subsequently engages in another transaction to increase its interest in Corporation B to 51 percent and obtain control of Corporation B. Section 800.601(a)(2) would not apply to this later transaction. This later transaction would be a covered transaction because it results in Corporation A's control of Corporation X, a U.S. business.

The Proposed Rule excluded provisions in the 1991 regulations pertaining to the President's authority that are not necessary to include in regulation because they are already addressed in FINSA. The Proposed Rule also described circumstances under which the Committee may reopen a review of a covered transaction as to which the Committee previously had concluded all action under section 721. A commenter stated that the regulations should incorporate section 721(b)(1)(D)(iii), which permits reopening of a review as a result of certain intentional material breaches of mitigation agreements. Commenters also asked for clarification regarding the process the Committee would follow upon reopening a review.

The Final Rule amends the proposed text of §800.601 to delete the description of circumstances under which the Committee may reopen a review of a covered transaction

as to which the Committee previously had concluded all action. As provided under Executive Order 11858, the Committee may reopen a review of a covered transaction for which the Committee has concluded action only in those extraordinary circumstances authorized under section 721, including section 721(b)(1)(D)(iii). In determining whether to reopen a review for material misstatement or omission, the Committee generally will not consider as material minor inaccuracies, omissions, or changes relating to financial or commercial factors not having a bearing on national security, as provided in the new §800.509.

Where section 721 authorizes the Committee to reopen a review of a covered transaction as to which the Committee previously had concluded all action, the new review will be subject to the same procedural rules and requirements prescribed by section 721 and the regulations for notices of a covered transaction filed with the Committee by an agency under §800.401(c).

§800.702 – Confidentiality

The Proposed Rule, at §800.702, clarified that confidentiality protections apply to information provided to CFIUS during the course of a withdrawal or with regard to a notice that is rejected under §800.403. The preamble to the Proposed Rule noted that, under §800.401(f), information provided during the course of pre-notice consultations is also protected by the confidentiality provisions of section 721(c) and §800.702. In addition, §800.702(c) made clear that public statements of the Chairperson or his designee may reflect information that the parties to the transaction have already themselves publicly disclosed.

Several commenters suggested that the confidentiality provisions of §800.702 were inadequate because they may not extend to information provided during the course of pre-notice consultations if no notice is ultimately filed with the Committee and because they do not provide clear civil remedies to parties for violations of confidentiality. Two commenters also expressed concern over the potential involvement of Congress during the course of the Committee's review of a covered transaction.

The Final Rule amends the proposed text of §800.702 to explicitly extend the confidentiality provisions under the section to information or documentary material provided during the course of pre-notice consultations pursuant to §800.401(f), regardless of whether a notice is ultimately filed with the Committee. Further, the Final Rule makes clear that the confidentiality provisions will continue to apply even when the transaction is no longer before the Committee.

The Final Rule makes no changes in response to the comments regarding civil remedies for violations of confidentiality. The confidentiality requirements under section 721(c) and §800.702 bind the entire Executive Branch. Further, section 721(g)(2)(A) applies section 721(c) to briefings provided to the U.S. Congress under section 721(g)(1), and section 721(g)(2)(B) provides additional confidentiality assurances regarding proprietary information provided to Congress. Nothing in the regulations prevents parties from seeking any remedies available under existing law to prevent or redress violation of these confidentiality provisions. The Committee may also refer violations of these provisions to the Department of Justice for investigation and prosecution under 50 U.S.C. App. 2155(d), which provides for fines and imprisonment. It is also important to note

that FINSA provides for reporting to Congress on each covered transaction only after all deliberative action is complete.

§800.801 – Penalties

The Proposed Rule, at §800.801, provided for the imposition of civil penalties for any violation of section 721, including a violation of any mitigation agreement entered into or conditions imposed pursuant to section 721(l). The preamble to the Proposed Rule made clear that civil monetary penalties could be imposed with regard to transactions entered into on or after the effective date of FINSA, October 24, 2007. In addition, §800.801(c) authorized CFIUS to include in any mitigation agreement described in section 721(l) a liquidated damages provision tied to the harm to the national security that could result from a breach.

A commenter expressed concern that the civil penalties provided for in §800.801 of the Proposed Rule were so high as to potentially discourage parties from filing voluntary notices with the Committee. Another commenter, noting that penalties for certain breaches of mitigation agreements may be up to the value of the transaction, suggested that the Committee set an upper bound to such penalties for particularly large transactions. A commenter also asked whether penalties for violations of mitigation agreements under section 721 will be separate from penalties assessed by the Department of Defense under agreements to mitigate foreign ownership, control, and influence under the National Industrial Security Program Operating Manual (NISPOM).

The Final Rule amends the proposed text of §800.801 to specify that civil penalties may be imposed under the section only if the action that could give rise to civil penalties occurs on or after the effective date of the Final Rule. The Final Rule also adds

a requirement that the determination to impose civil penalties under §800.801 must be made by the members of the Committee named in FINSA and Executive Order 11858, except to the extent delegated by such official.

The Final Rule makes no other changes to the proposed text of §800.801 in response to public comments received. CFIUS retains the discretion to impose less than the maximum penalty identified in §800.801, depending on the nature of the violation. The Final Rule also affords parties the opportunity to submit a petition for reconsideration of any decision to impose a penalty. Furthermore, the maximum penalty amounts provided for in §800.801 are consistent with the statutory penalty scheme under the International Emergency Economic Powers Act, a statute that provides the authority for a number of regulations related to national security.

Mitigation agreements or conditions entered into or agreed to pursuant to section 721(l) are separate from agreements reached under the NISPOM pursuant to separate legal authority of the Department of Defense. In general, the remedy and penalty provisions of the former type of mitigation agreements or conditions have no bearing on the applicability or enforceability of remedy and penalty provisions in the latter type of agreement.

Executive Order 12866

These regulations are not subject to the requirements of Executive Order 12866 because they relate to a foreign affairs function of the United States.

Paperwork Reduction Act

The collection of information contained in this rule has been approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) and assigned control number 1505-0121.

Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”) (5 U.S.C. 601 et seq.) generally requires an agency to prepare a regulatory flexibility analysis unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The RFA applies when an agency is required to publish a general notice of proposed rulemaking under section 553(b) of the Administrative Procedure Act (5 U.S.C. 553(b)), or any other law. As set forth below, because regulations issued pursuant to the Defense Production Act of 1950 (50 U.S.C. App 2170) are not subject to the Administrative Procedure Act, or other law requiring the publication of a general notice of proposed rulemaking, the RFA does not apply.

This regulation implements section 721 of the DPA. Section 709 of the DPA (50 U.S.C. App. 2159, as amended by section 136 of the Defense Production Act Amendments of 1992 (Pub. L. 102-558)), provides that the regulations issued under it are not subject to the rulemaking requirements of the Administrative Procedure Act. Section 709 of the DPA instead provides that any regulation issued under the DPA be published in the *Federal Register* and opportunity for public comment be provided for not less than 30 days. (Similarly, FINSA requires the President to direct the issuance of implementing

regulations subject to notice and comment.) Section 709 of the DPA also provides that all comments received during the public comment period be considered and the publication of the final regulation contain written responses to such comments.

Legislative history demonstrates that Congress intended that regulations under the DPA be exempt from the notice and comment provisions of the Administrative Procedure Act and instead provided that the agency include a statement that interested parties were consulted in the formulation of the regulation. *See* H.R. Conf. Rep. No. 102-1028, at 42 (1992) and H.R. Rep. No. 102-208 pt. 1, at 28 (1991). The limited public participation procedures described in the DPA do not require a general notice of proposed rulemaking as set forth in the RFA. Further, the mechanisms for publication and public participation are sufficiently different to distinguish the DPA procedures from a rule that requires a general notice of proposed rulemaking. In providing the President with the authority to suspend or prohibit the acquisition, merger, or takeover of a domestic firm by a foreign firm if such action would threaten to impair the national security, Congress could not have contemplated that regulations implementing such authority would be subject to RFA analysis. For these reasons, the RFA does not apply to these regulations.

Notwithstanding the inapplicability of the RFA, we certify that this rule would not have a significant economic impact on a substantial number of small entities. These regulations provide for a voluntary system of notification, and historically fewer than 10 percent of all foreign acquisitions of U.S. businesses are notified to CFIUS. Typically, some of the notices filed with CFIUS concern U.S. companies that would qualify as small entities. It is estimated that an average filing requires about 100 hours of preparation time. It is estimated that between 100 and 200 notices will be filed with CFIUS annually

over the next few years. Few cases end with mitigation agreements. There were 16 mitigation agreements in 2006, 14 in 2007, and fewer than 5 to date in 2008. As such, a substantial number of entities are not impacted by these rules regardless of their size. We also note that these regulations, to a substantial degree, merely provide a detailed explanation of the current burdens of complying with CFIUS procedures and do not impose significant new burdens on entities subject to CFIUS.

List of Subjects in 31 CFR Part 800

Foreign investments in the United States, Investigations, National defense, Reporting and recordkeeping requirements.

Accordingly, under the authority at 50 U.S.C. App. 2170(h), for the reasons stated in the preamble, the Department of the Treasury amends 31 CFR chapter VIII as follows:

CHAPTER VIII – OFFICE OF INVESTMENT SECURITY, DEPARTMENT OF THE TREASURY

1. The heading for chapter VIII is revised to read as set forth above.
2. Part 800 is revised to read as follows:

PART 800 – REGULATIONS PERTAINING TO MERGERS, ACQUISITIONS, AND TAKEOVERS BY FOREIGN PERSONS

Subpart A – General

Sec.

- 800.101 Scope.
- 800.102 Effect on other law.
- 800.103 Applicability rule; prospective application of certain provisions.
- 800.104 Transactions or devices for avoidance.

Subpart B – Definitions

- 800.201 Business day.
- 800.202 Certification.
- 800.203 Committee; Chairperson of the Committee; Staff Chairperson.
- 800.204 Control.
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- 800.215 Foreign national.
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- 800.218 Lead agency.
- 800.219 Parent.
- 800.220 Party or parties to a transaction.
- 800.221 Person.
- 800.222 Section 721.
- 800.223 Solely for the purpose of passive investment.
- 800.224 Transaction.
- 800.225 United States.
- 800.226 U.S. business.
- 800.227 U.S. national.
- 800.228 Voting interest.

Subpart C – Coverage

- 800.301 Transactions that are covered transactions.
- 800.302 Transactions that are not covered transactions.
- 800.303 Lending transactions.
- 800.304 Timing rule for convertible voting instruments.

Subpart D – Notice

- 800.401 Procedures for notice.
- 800.402 Contents of voluntary notice.
- 800.403 Deferral, rejection, or disposition of certain voluntary notices.

Subpart E – Committee Procedures: Review and Investigation

- 800.501 General.
- 800.502 Beginning of thirty-day review period.
- 800.503 Determination of whether to undertake an investigation.
- 800.504 Determination not to undertake an investigation.
- 800.505 Commencement of investigation.
- 800.506 Completion or termination of investigation and report to the President.

- 800.507 Withdrawal of notice.
- 800.508 Role of the Secretary of Labor.
- 800.509 Materiality.

Subpart F – Finality of Action

- 800.601 Finality of actions under section 721.

Subpart G – Provision and Handling of Information

- 800.701 Obligation of parties to provide information.
- 800.702 Confidentiality.

Subpart H – Penalties

- 800.801 Penalties.

Authority: 50 U.S.C. App. 2170; E.O. 11858, as amended, 73 FR 4677.

Subpart A – General

§800.101 Scope.

The regulations in this part implement section 721 of title VII of the Defense Production Act of 1950 (50 U.S.C. App. 2170), as amended, hereinafter referred to as “section 721.” The definitions in this part are applicable to section 721 and these regulations. The principal purpose of section 721 is to authorize the President to suspend or prohibit any covered transaction when, in the President’s judgment, there is credible evidence to believe that the foreign person exercising control over a U.S. business might take action that threatens to impair the national security, and when provisions of law other than section 721 and the International Emergency Economic Powers Act (50 U.S.C.

1701-1706), do not, in the judgment of the President, provide adequate and appropriate authority for the President to protect the national security in the matter before the President. It is also a purpose of section 721 to authorize the Committee to mitigate any threat to the national security of the United States that arises as a result of a covered transaction.

§800.102 Effect on other law.

Nothing in this part shall be construed as altering or affecting any other authority, process, regulation, investigation, enforcement measure, or review provided by or established under any other provision of federal law, including the International Emergency Economic Powers Act, or any other authority of the President or the Congress under the Constitution of the United States.

§800.103 Applicability rule; prospective application of certain provisions.

(a) Except as provided in paragraph (b) and otherwise in this part, the regulations in this part apply from the effective date.

(b) Sections 800.204 (Control), 800.205 (Conversion), 800.206 (Convertible voting instrument), 800.211 (Entity), 800.212 (Foreign entity), 800.216 (Foreign person), 800.220 (Party or parties to a transaction), 800.223 (Solely for the purpose of passive investment), 800.224 (Transaction), 800.226 (U.S. business), and 800.228 (Voting interest), and the regulations in subpart C (Coverage) do not apply to any transaction for which the following has occurred before the effective date, in which case corresponding

provisions of the regulations in this part that were in effect the day before the effective date will apply:

(1) The parties to the transaction have executed a written agreement or other document establishing the material terms of the transaction;

(2) A party has made a public offer to shareholders to buy shares of a U.S. business;

(3) A shareholder has solicited proxies in connection with an election of the board of directors of a U.S. business or has requested the conversion of convertible voting securities; or

(4) The parties have, in the Committee's view, otherwise made a commitment to engage in a transaction.

Note to §800.103: See subpart H for specific applicability rules pertaining to that subpart.

§800.104 Transactions or devices for avoidance.

Any transaction or other device entered into or employed for the purpose of avoiding section 721 shall be disregarded, and section 721 and the regulations in this part shall be applied to the substance of the transaction.

Example. Corporation A is organized under the laws of a foreign state and is wholly owned and controlled by a foreign national. With a view towards avoiding possible application of section 721, Corporation A transfers money to a U.S. citizen, who, pursuant to informal arrangements with Corporation A and on its

behalf, purchases all the shares in Corporation X, a U.S. business. That transaction is subject to section 721.

Subpart B – Definitions

§800.201 Business day.

The term *business day* means Monday through Friday, except the legal public holidays specified in 5 U.S.C. 6103 or any other day declared to be a holiday by federal statute or executive order.

§800.202 Certification.

(a) The term *certification* means a written statement signed by the chief executive officer or other duly authorized designee of a party to a transaction filing a notice or information, certifying that the notice or information filed:

(1) Fully complies with the requirements of section 721, the regulations in this part, and any agreement or condition entered into with the Committee or any member of the Committee, and

(2) Is accurate and complete in all material respects, as it relates to:

(i) The transaction, and

(ii) The party providing the certification, including its parents, subsidiaries, and any other related entities described in the notice or information.

(b) For purposes of this section, a *duly authorized designee* is:

- (1) In the case of a partnership, any general partner thereof;
 - (2) In the case of a corporation, any officer or director thereof;
 - (3) In the case of any entity lacking officers, directors, or partners, any individual within the organization exercising executive functions similar to those of an officer or director of a corporation or a general partner of a partnership; and
 - (4) In the case of an individual, such individual or his or her legal representative.
- (c) In each case described in paragraphs (b)(1) through (b)(4) of this section, such designee must possess actual authority to make the certification on behalf of the party to the transaction filing a notice or information.

Note to §800.202: A sample certification may be found at the Committee's section of the Department of the Treasury website at <http://www.treas.gov/offices/international-affairs/cfius/index.shtml>.

§800.203 Committee; Chairperson of the Committee; Staff Chairperson.

The term *Committee* means the Committee on Foreign Investment in the United States. The *Chairperson of the Committee* is the Secretary of the Treasury. The *Staff Chairperson* of the Committee is the Department of the Treasury official so designated by the Secretary of the Treasury or by the Secretary's designee.

§800.204 Control.

(a) The term *control* means the power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding

voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach, or cause decisions regarding the following matters, or any other similarly important matters affecting an entity:

(1) The sale, lease, mortgage, pledge, or other transfer of any of the tangible or intangible principal assets of the entity, whether or not in the ordinary course of business;

(2) The reorganization, merger, or dissolution of the entity;

(3) The closing, relocation, or substantial alteration of the production, operational, or research and development facilities of the entity;

(4) Major expenditures or investments, issuances of equity or debt, or dividend payments by the entity, or approval of the operating budget of the entity;

(5) The selection of new business lines or ventures that the entity will pursue;

(6) The entry into, termination, or non-fulfillment by the entity of significant contracts;

(7) The policies or procedures of the entity governing the treatment of non-public technical, financial, or other proprietary information of the entity;

(8) The appointment or dismissal of officers or senior managers;

(9) The appointment or dismissal of employees with access to sensitive technology or classified U.S. Government information; or

(10) The amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of the entity with respect to the matters described in paragraphs (a)(1) through (9) of this section.

(b) In examining questions of control in situations where more than one foreign person has an ownership interest in an entity, consideration will be given to factors such as whether the foreign persons are related or have formal or informal arrangements to act in concert, whether they are agencies or instrumentalities of the national or subnational governments of a single foreign state, and whether a given foreign person and another person that has an ownership interest in the entity are both controlled by any of the national or subnational governments of a single foreign state.

(c) The following minority shareholder protections shall not in themselves be deemed to confer control over an entity:

(1) The power to prevent the sale or pledge of all or substantially all of the assets of an entity or a voluntary filing for bankruptcy or liquidation;

(2) The power to prevent an entity from entering into contracts with majority investors or their affiliates;

(3) The power to prevent an entity from guaranteeing the obligations of majority investors or their affiliates;

(4) The power to purchase an additional interest in an entity to prevent the dilution of an investor's *pro rata* interest in that entity in the event that the entity issues additional instruments conveying interests in the entity;

(5) The power to prevent the change of existing legal rights or preferences of the particular class of stock held by minority investors, as provided in the relevant corporate documents governing such shares; and

(6) The power to prevent the amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of an entity with respect to the matters described in paragraphs (c)(1) through (5) of this section.

(d) The Committee will consider, on a case-by-case basis, whether minority shareholder protections other than those listed in paragraph (c) of this section do not confer control over an entity.

(e) Any transaction in which a foreign person acquires an additional interest in a U.S. business that was previously the subject of a covered transaction for which the Committee concluded all action under section 721 shall not be deemed to be a transaction that could result in foreign control over that U.S. business (*i.e.*, it is not a covered transaction). However, if a foreign person that did not acquire control of the U.S. business in the prior transaction is a party to the later transaction, the later transaction may be a covered transaction.

Example 1. Corporation A is a U.S. business. A U.S. investor owns 50 percent of the voting interest in Corporation A, and the remaining voting interest is owned in equal shares by five unrelated foreign investors. The foreign investors jointly financed their investment in Corporation A and vote as a single

block on matters affecting Corporation A. The foreign investors have an informal arrangement to act in concert with regard to Corporation A, and, as a result, the foreign investors control Corporation A.

Example 2. Same facts as in Example 1 with regard to the composition of Corporation A's shareholders. The foreign investors in Corporation A have no contractual or other commitments to act in concert, and have no informal arrangements to do so. Assuming no other relevant facts, the foreign investors do not control Corporation A.

Example 3. Corporation A, a foreign person, is a private equity fund that routinely acquires substantial interests in companies and manages them for a period of time. Corporation B is a U.S. business. In addition to its acquisition of seven percent of Corporation B's voting shares, Corporation A acquires the right to terminate significant contracts of Corporation B. Corporation A controls Corporation B.

Example 4. Corporation A, a foreign person, acquires a nine percent interest in the shares of Corporation B, a U.S. business. As part of the transaction, Corporation A also acquires certain veto rights that determine important matters affecting Corporation B, including the right to veto the dismissal of senior executives of Corporation B. Corporation A controls Corporation B.

Example 5. Corporation A, a foreign person, acquires a thirteen percent interest in the shares of Corporation B, a U.S. business, and the right to appoint one member of Corporation B's seven-member Board of Directors. Corporation A receives minority shareholder protections listed in §800.204(c), but receives no other positive or negative rights with respect to Corporation B. Assuming no other relevant facts, Corporation A does not control Corporation B.

Example 6. Corporation A, a foreign person, acquires a twenty percent interest in the shares of Corporation B, a U.S. business. Corporation A has negotiated an irrevocable passivity agreement that completely precludes it from controlling Corporation B. Corporation A does, however, receive the right to prevent Corporation B from entering into contracts with majority investors or their affiliates and to prevent

Corporation B from guaranteeing the obligations of majority investors or their affiliates. Assuming no other relevant facts, Corporation A does not control Corporation B.

Example 7. Corporation A, a foreign person, acquires a 40 percent interest and important rights in Corporation B, a U.S. business. The documentation pertaining to the transaction gives no indication that Corporation A's interest in Corporation B may increase at a later date. Following its review of the transaction, the Committee informs the parties that the notified transaction is a covered transaction, and concludes action under section 721. Three years later, Corporation A acquires the remainder of the voting interest in Corporation B. Assuming no other relevant facts, because the Committee concluded all action with respect to Corporation A's earlier investment in the same U.S. business, and because no other foreign person is a party to this subsequent transaction, this subsequent transaction is not a covered transaction.

Example 8. Limited Partnership A comprises two limited partners, each of which holds 49 percent of the interest in the partnership, and a general partner, which holds two percent of the interest. The general partner has sole authority to determine, direct, and decide important matters affecting the partnership and a fund operated by the partnership. The general partner alone controls Limited Partnership A and the fund.

Example 9. Same facts as in Example 8, except that each of the limited partners has the authority to veto major investments proposed by the general partner and to choose the fund's representatives on the boards of the fund's portfolio companies. The general partner and the limited partners each have control over Limited Partnership A and the fund.

Note to §800.204: See §800.302(b) regarding the Committee's treatment of transactions in which a foreign person holds or acquires ten percent or less of the outstanding voting interest in a U.S. business solely for the purpose of passive investment.

§800.205 Conversion.

The term *conversion* means the exercise of a right inherent in the ownership or holding of particular financial instruments to exchange any such instruments for voting instruments.

§800.206 Convertible voting instrument.

The term *convertible voting instrument* means a financial instrument that currently does not entitle its owner or holder to voting rights but is convertible into a voting instrument.

§800.207 Covered transaction.

The term *covered transaction* means any transaction that is proposed or pending after August 23, 1988, by or with any foreign person, which could result in control of a U.S. business by a foreign person.

§800.208 Critical infrastructure.

The term *critical infrastructure* means, in the context of a particular covered transaction, a system or asset, whether physical or virtual, so vital to the United States that the incapacity or destruction of the particular system or asset of the entity over which control is acquired pursuant to that covered transaction would have a debilitating impact on national security.

§800.209 Critical technologies.

The term *critical technologies* means:

(a) Defense articles or defense services covered by the United States Munitions List (USML), which is set forth in the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120-130);

(b) Those items specified on the Commerce Control List (CCL) set forth in Supplement No. 1 to part 774 of the Export Administration Regulations (EAR) (15 CFR parts 730-774) that are controlled pursuant to multilateral regimes (*i.e.*, for reasons of national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology), as well as those that are controlled for reasons of regional stability or surreptitious listening;

(c) Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology specified in the Assistance to Foreign Atomic Energy Activities regulations (10 CFR part 810), and nuclear facilities, equipment, and material specified in the Export and Import of Nuclear Equipment and Material regulations (10 CFR part 110); and

(d) Select agents and toxins specified in the Select Agents and Toxins regulations (7 CFR part 331, 9 CFR part 121, and 42 CFR part 73).

§800.210 Effective date.

The term *effective date* means _____. [INSERT DATE THAT IS 30 DAYS AFTER THE DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER].

§800.211 Entity.

The term *entity* means any branch, partnership, group or sub-group, association, estate, trust, corporation or division of a corporation, or organization (whether or not organized under the laws of any State or foreign state); assets (whether or not organized as a separate legal entity) operated by any one of the foregoing as a business undertaking in a particular location or for particular products or services; and any government (including a foreign national or subnational government, the United States Government, a subnational government within the United States, and any of their respective departments, agencies, or instrumentalities). (See examples following §§800.301(c) and 800.302(c).)

§800.212 Foreign entity.

(a) The term *foreign entity* means any branch, partnership, group or sub-group, association, estate, trust, corporation or division of a corporation, or organization organized under the laws of a foreign state if either its principal place of business is outside the United States or its equity securities are primarily traded on one or more foreign exchanges.

(b) Notwithstanding paragraph (a), any branch, partnership, group or sub-group, association, estate, trust, corporation or division of a corporation, or organization that demonstrates that a majority of the equity interest in such entity is ultimately owned by U.S. nationals is not a foreign entity.

§800.213 Foreign government.

The term *foreign government* means any government or body exercising governmental functions, other than the United States Government or a subnational government of the United States. The term includes, but is not limited to, national and subnational governments, including their respective departments, agencies, and instrumentalities.

§800.214 Foreign government-controlled transaction.

The term *foreign government-controlled transaction* means any covered transaction that could result in control of a U.S. business by a foreign government or a person controlled by or acting on behalf of a foreign government.

§800.215 Foreign national.

The term *foreign national* means any individual other than a U.S. national.

§800.216 Foreign person.

The term *foreign person* means:

- (a) Any foreign national, foreign government, or foreign entity; or
- (b) Any entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity.

Example 1. Corporation A is organized under the laws of a foreign state and is only engaged in business outside the United States. All of its shares are held by Corporation X, which controls Corporation A. Corporation X is organized in the United States and is wholly owned and controlled by U.S. nationals.

Assuming no other relevant facts, Corporation A, although organized and only operating outside the United States, is not a foreign person.

Example 2. Same facts as in the first sentence of Example 1. The government of the foreign state under whose laws Corporation A is organized exercises control over Corporation A through government interveners. Corporation A is a foreign person.

Example 3. Corporation A is organized in the United States, is engaged in interstate commerce in the United States, and is controlled by Corporation X. Corporation X is organized under the laws of a foreign state, its principal place of business is located outside the United States, and 50 percent of its shares are held by foreign nationals and 50 percent of its shares are held by U.S. nationals. Both Corporation A and Corporation X are foreign persons. Corporation A is also a U.S. business.

Example 4. Corporation A is organized under the laws of a foreign state and is owned and controlled by a foreign national. A branch of Corporation A engages in interstate commerce in the United States. Corporation A (including its branch) is a foreign person. The branch is also a U.S. business.

Example 5. Corporation A is a corporation organized under the laws of a foreign state and its principal place of business is located outside the United States. Forty-five percent of the voting interest in Corporation A is owned in equal shares by numerous unrelated foreign investors, none of whom has control. The foreign investors have no formal or informal arrangement to act in concert with regard to Corporation A with any other holder of voting interest in Corporation A. Corporation A demonstrates that the remainder of the voting interest in Corporation A is held by U.S. nationals. Assuming no other relevant facts, Corporation A is not a foreign person.

Example 6. Same facts as Example 5, except that one of the foreign investors controls Corporation A. Assuming no other relevant facts, Corporation A is not a foreign entity pursuant to §800.212(b), but it is a foreign person because it is controlled by a foreign person.

§800.217 Hold.

The terms *hold(s)* and *holding* mean legal or beneficial ownership, whether direct or indirect, whether through fiduciaries, agents, or other means.

§800.218 Lead agency.

The term *lead agency* means an agency designated by the Chairperson of the Committee to have primary responsibility, on behalf of the Committee, for the specific activity for which the Chairperson designates it as a lead agency, including all or a portion of a review, an investigation, or the negotiation or monitoring of a mitigation agreement or condition.

§800.219 Parent.

(a) The term *parent* means a person who or which directly or indirectly:

(1) Holds or will hold at least 50 percent of the outstanding voting interest in an entity; or

(2) Holds or will hold the right to at least 50 percent of the profits of an entity, or has or will have the right in the event of the dissolution to at least 50 percent of the assets of that entity.

(b) Any entity that meets the conditions of paragraphs (a)(1) or (2) of this section with respect to another entity (*i.e.*, the intermediate parent) is also a parent of any other entity of which the intermediate parent is a parent.

Example 1. Corporation P holds 50 percent of the voting interest in Corporations R and S. Corporation R holds 40 percent of the voting interest in Corporation X; Corporation S holds 50 percent of the voting interest in Corporation Y, which in turn holds 50 percent of the voting interest in Corporation Z. Corporation P is a parent of Corporations R, S, Y, and Z, but not of Corporation X. Corporation S is a parent of Corporation Y and Z, and Corporation Y is a parent of Corporation Z.

Example 2. Corporation A holds warrants which when exercised will entitle it to vote 50 percent of the outstanding shares of Corporation B. Corporation A is a parent of Corporation B.

§800.220 Party or parties to a transaction.

The terms *party to a transaction* and *parties to a transaction* mean:

(a) In the case of an acquisition of an ownership interest in an entity, the person acquiring the ownership interest, and the person from which such ownership interest is acquired, without regard to any person providing brokerage or underwriting services for the transaction;

(b) In the case of a merger, the surviving entity, and the entity or entities that are merged into that entity as a result of the transaction;

(c) In the case of a consolidation, the entities being consolidated, and the new consolidated entity;

(d) In the case of a proxy solicitation, the person soliciting proxies, and the person who issued the voting interest;

(e) In the case of the acquisition or conversion of convertible voting instruments, the issuer and the person holding the convertible voting instruments; and

(f) In the case of any other type of transaction, any person who is in a role comparable to that of a person described in paragraphs (a) through (e) of this section.

§800.221 Person.

The term *person* means any individual or entity.

§800.222 Section 721.

The term *section 721* means section 721 of title VII of the Defense Production Act of 1950, 50 U.S.C. App. 2170.

§800.223 Solely for the purpose of passive investment.

Ownership interests are held or acquired *solely for the purpose of passive investment* if the person holding or acquiring such interests does not plan or intend to exercise control, does not possess or develop any purpose other than passive investment, and does not take any action inconsistent with holding or acquiring such interests solely for the purpose of passive investment. (See §800.302(b).)

Example. Corporation A, a foreign person, acquires a voting interest in Corporation B, a U.S. business. In addition to the voting interest, Corporation A negotiates the right to appoint a member of Corporation B's Board of Directors. The acquisition by Corporation A of a voting interest in Corporation B is not solely for the purpose of passive investment.

§800.224 Transaction.

The term *transaction* means a proposed or completed merger, acquisition, or takeover. It includes:

- (a) The acquisition of an ownership interest in an entity.
- (b) The acquisition or conversion of convertible voting instruments of an entity.
- (c) The acquisition of proxies from holders of a voting interest in an entity.
- (d) A merger or consolidation.
- (e) The formation of a joint venture.
- (f) A long-term lease under which a lessee makes substantially all business decisions concerning the operation of a leased entity, as if it were the owner.

Note to §800.224(b): See §800.304 regarding factors the Committee will consider in determining whether to include the rights to be acquired by a foreign person upon the conversion of convertible voting instruments as part of the Committee's assessment of whether a transaction that involves such instruments is a covered transaction.

Example. Corporation A, a foreign person, signs a concession agreement to operate the toll road business of Corporation B, a U.S. business, for 99 years. Corporation B, however, is required under the agreement to perform safety and security functions with respect to the business and to monitor compliance by Corporation A with the operating requirements of the agreement on an ongoing basis. Corporation B may terminate the agreement or impose other penalties for breach of these operating requirements. Assuming no other relevant facts, this is not a transaction.

§800.225 United States.

The term *United States* or *U.S.* means the United States of America, the States of the United States, the District of Columbia, and any commonwealth, territory, dependency, or possession of the United States, or any subdivision of the foregoing, and

includes the Outer Continental Shelf, as defined in 43 U.S.C. 1331(a). For purposes of these regulations and their examples, an entity organized under the laws of the United States of America, one of the States, the District of Columbia, or a commonwealth, territory, dependency, or possession of the United States is an entity organized “in the United States.”

§800.226 U.S. business.

The term *U.S. business* means any entity, irrespective of the nationality of the persons that control it, engaged in interstate commerce in the United States, but only to the extent of its activities in interstate commerce.

Example 1. Corporation A is organized under the laws of a foreign state and is wholly owned and controlled by a foreign national. It engages in interstate commerce in the United States through a branch or subsidiary. Its branch or subsidiary is a U.S. business. Corporation A and its branch or subsidiary is each also a foreign person should any of them engage in a transaction involving a U.S. business.

Example 2. Same facts as in the first sentence of Example 1. Corporation A, however, does not have a branch office, subsidiary, or fixed place of business in the United States. It exports and licenses technology to an unrelated company in the United States. Assuming no other relevant facts, Corporation A is not a U.S. business.

Example 3. Corporation A, a company organized under the laws of a foreign state, is wholly owned and controlled by Corporation X. Corporation X is organized in the United States and is wholly owned and controlled by U.S. nationals. Corporation A does not have a branch office, subsidiary, or fixed place of business in the United States. It exports goods to Corporation X and to unrelated companies in the United States. Assuming no other relevant facts, Corporation A is not a U.S. business.

§800.227 U.S. national.

The term *U.S. national* means a citizen of the United States or an individual who, although not a citizen of the United States, owes permanent allegiance to the United States.

§800.228 Voting interest.

The term *voting interest* means any interest in an entity that entitles the owner or holder of that interest to vote for the election of directors of the entity (or, with respect to unincorporated entities, individuals exercising similar functions) or to vote on other matters affecting the entity.

Subpart C – Coverage

§800.301 Transactions that are covered transactions.

Transactions that are covered transactions include, without limitation:

(a) A transaction which, irrespective of the actual arrangements for control provided for in the terms of the transaction, results or could result in control of a U.S. business by a foreign person.

Example 1. Corporation A, a foreign person, proposes to purchase all of the shares of Corporation X, which is a U.S. business. As the sole owner, Corporation A will have the right to elect directors and appoint other primary officers of Corporation X, and those directors will have the right to make decisions

about the closing and relocation of particular production facilities and the termination of significant contracts. The directors also will have the right to propose to Corporation A, the sole shareholder, the dissolution of Corporation X and the sale of its principal assets. The proposed transaction is a covered transaction.

Example 2. Same facts as in Example 1, except that Corporation A plans to retain the existing directors of Corporation X, all of whom are U.S. nationals. Although Corporation A may choose not to exercise its power to elect new directors for Corporation X, Corporation A nevertheless will have that exercisable power. The proposed transaction is a covered transaction.

Example 3. Corporation A, a foreign person, proposes to purchase 50 percent of the shares in Corporation X, a U.S. business, from Corporation B, also a U.S. business. Corporation B would retain the other 50 percent of the shares in Corporation X, and Corporation A and Corporation B would contractually agree that Corporation A would not exercise its voting and other rights for ten years. The proposed transaction is a covered transaction.

(b) A transaction in which a foreign person conveys its control of a U.S. business to another foreign person.

Example. Corporation X is a U.S. business, but is wholly owned and controlled by Corporation Y, a foreign person. Corporation Z, also a foreign person, but not related to Corporation Y, seeks to acquire Corporation X from Corporation Y. The proposed transaction is a covered transaction because it could result in control of Corporation X, a U.S. business, by another foreign person, Corporation Z.

(c) A transaction that results or could result in control by a foreign person of any part of an entity or of assets, if such part of an entity or assets constitute a U.S. business. (See §800.302(c).)

Example 1. Corporation X, a foreign person, has a branch office located in the United States. Corporation A, a foreign person, proposes to buy that branch office. The proposed transaction is a covered transaction.

Example 2. Corporation A, a foreign person, buys a branch office located entirely outside the United States of Corporation Y, which is incorporated in the United States. Assuming no other relevant facts, the branch office of Corporation Y is not a U.S. business, and the transaction is not a covered transaction.

Example 3. Corporation A, a foreign person, makes a start-up, or “greenfield,” investment in the United States. That investment involves such activities as separately arranging for the financing of and the construction of a plant to make a new product, buying supplies and inputs, hiring personnel, and purchasing the necessary technology. The investment may involve the acquisition of shares in a newly incorporated subsidiary. Assuming no other relevant facts, Corporation A will not have acquired a U.S. business, and its greenfield investment is not a covered transaction.

Example 4. Corporation A, a foreign person, purchases substantially all of the assets of Corporation B. Corporation B, which is incorporated in the United States, was in the business of producing industrial equipment, but stopped producing and selling such equipment one week before Corporation A purchased substantially all of its assets. At the time of the transaction, Corporation B continued to have employees on its payroll, maintained know-how in producing the industrial equipment it previously produced, and maintained relationships with its prior customers, all of which were transferred to Corporation A. The acquisition of substantially all of the assets of Corporation B by Corporation A is a covered transaction.

Example 5. Corporation A, a foreign person, owns businesses both outside the United States and in the United States. Corporation B, a foreign person, acquires Corporation A. The acquisition of Corporation A by Corporation B is a covered transaction with respect to Corporation A’s businesses in the United States.

Example 6. Corporation X, a foreign person, seeks to acquire from Corporation A, a U.S. business, an empty warehouse facility located in the United States. The acquisition would be limited to the physical facility, and would not include customer lists, intellectual property, or other proprietary information, or

other intangible assets or the transfer of personnel. Assuming no other relevant facts, the facility is not an entity and therefore not a U.S. business, and the proposed acquisition of the facility is not a covered transaction.

Example 7. Same facts as Example 6, except that, in addition to the proposed acquisition of Corporation A's warehouse facility, Corporation X would acquire the personnel, customer list, equipment, and inventory management software used to operate the facility. Under these facts, Corporation X is acquiring a U.S. business, and the proposed acquisition is a covered transaction.

(d) A joint venture in which the parties enter into a contractual or other similar arrangement, including an agreement on the establishment of a new entity, but only if one or more of the parties contributes a U.S. business and a foreign person could control that U.S. business by means of the joint venture.

Example 1. Corporation A, a foreign person, and Corporation X, a U.S. business, form a separate corporation, JV Corporation, to which Corporation A contributes only cash and Corporation X contributes a U.S. business. Each owns 50 percent of the shares of JV Corporation and, under the Articles of Incorporation of JV Corporation, both Corporation A and Corporation X have veto power over all of the matters affecting JV Corporation identified under §800.204(a) (1) through (10), giving them both control over JV Corporation. The formation of JV Corporation is a covered transaction.

Example 2. Corporation A, a foreign person, and Corporation X, a U.S. business, form a separate corporation, JV Corporation, to which Corporation A contributes funding and managerial and technical personnel, while Corporation X contributes certain land and equipment that do not in this example constitute a U.S. business. Corporations A and B each have a 50 percent interest in the joint venture. Assuming no other relevant facts, the formation of JV Corporation is not a covered transaction.

§800.302 Transactions that are not covered transactions.

Transactions that are not covered transactions include, without limitation:

(a) A stock split or pro rata stock dividend that does not involve a change in control.

Example. Corporation A, a foreign person, holds 10,000 shares of Corporation B, a U.S. business, constituting ten percent of the stock of Corporation B. Corporation B pays a 2-for-1 stock dividend. As a result of this stock split, Corporation A holds 20,000 shares of Corporation B, still constituting ten percent of the stock of Corporation B. Assuming no other relevant facts, the acquisition of additional shares is not a covered transaction.

(b) A transaction that results in a foreign person holding ten percent or less of the outstanding voting interest in a U.S. business (regardless of the dollar value of the interest so acquired), but only if the transaction is solely for the purpose of passive investment. (See §800.223.)

Example 1. In an open market purchase solely for the purpose of passive investment, Corporation A, a foreign person, acquires seven percent of the voting securities of Corporation X, which is a U.S. business. Assuming no other relevant facts, the acquisition of the securities is not a covered transaction.

Example 2. Corporation A, a foreign person, acquires nine percent of the voting shares of Corporation X, a U.S. business. Corporation A also negotiates contractual rights that give it the power to control important matters of Corporation X. The acquisition by Corporation A of the voting shares of Corporation X is not solely for the purpose of passive investment and is a covered transaction.

Example 3. Corporation A, a foreign person, acquires five percent of the voting shares in Corporation B, a U.S. business. In addition to the securities, Corporation A obtains the right to appoint one out of eleven seats on Corporation B's Board of Directors. The acquisition by Corporation A of Corporation B's securities is not solely for the purpose of passive investment. Whether the transaction is a covered

transaction would depend on whether Corporation A obtains control of Corporation B as a result of the transaction.

(c) An acquisition of any part of an entity or of assets, if such part of an entity or assets do not constitute a U.S. business. (See §800.301(c).)

Example 1. Corporation A, a foreign person, acquires, from separate U.S. nationals: (a) products held in inventory, (b) land, and (c) machinery for export. Assuming no other relevant facts, Corporation A has not acquired a U.S. business, and this acquisition is not a covered transaction.

Example 2. Corporation X, a U.S. business, produces armored personnel carriers in the United States. Corporation A, a foreign person, seeks to acquire the annual production of those carriers from Corporation X under a long-term contract. Assuming no other relevant facts, this transaction is not a covered transaction.

Example 3. Same facts as Example 2, except that Corporation X, a U.S. business, has developed important technology in connection with the production of armored personnel carriers. Corporation A seeks to negotiate an agreement under which it would be licensed to manufacture using that technology. Assuming no other relevant facts, neither the proposed acquisition of technology pursuant to that license agreement, nor the actual acquisition, is a covered transaction.

Example 4. Same facts as Example 2, except that Corporation A enters into a contractual arrangement to acquire the entire armored personnel carrier business operations of Corporation X, including production facilities, customer lists, technology, and staff. This transaction is a covered transaction.

Example 5. Same facts as Example 2, except that Corporation X suspended all activities of its armored personnel carrier business a year ago and currently is in bankruptcy proceedings. Existing equipment provided by Corporation X is being serviced by another company, which purchased the service contracts

from Corporation X. The business's production facilities are idle but still in working condition, some of its key former employees have agreed to return if the business is resuscitated, and its technology and customer and vendor lists are still current. Corporation X's personnel carrier business constitutes a U.S. business, and its purchase by Corporation A is a covered transaction.

(d) An acquisition of securities by a person acting as a securities underwriter, in the ordinary course of business and in the process of underwriting.

(e) An acquisition pursuant to a condition in a contract of insurance relating to fidelity, surety, or casualty obligations if the contract was made by an insurer in the ordinary course of business.

§800.303 Lending transactions.

(a) The extension of a loan or a similar financing arrangement by a foreign person to a U.S. business, regardless of whether accompanied by the creation in the foreign person of a secured interest in securities or other assets of the U.S. business, shall not, by itself, constitute a covered transaction.

(1) The Committee will accept notices concerning a loan or a similar financing arrangement that does not, by itself, constitute a covered transaction only at the time that, because of imminent or actual default or other condition, there is a significant possibility that the foreign person may obtain control of a U.S. business as a result of the default or other condition.

(2) Where the Committee accepts a notice concerning a loan or a similar financing arrangement pursuant to paragraph (a)(1) of this section, and a party to the

transaction is a foreign person that makes loans in the ordinary course of business, the Committee will take into account whether the foreign person has made any arrangements to transfer management decisions and day-to-day control over the U.S. business to U.S. nationals for purposes of determining whether such loan or financing arrangement constitutes a covered transaction.

(b) Notwithstanding paragraph (a) of this section, a loan or a similar financing arrangement through which a foreign person acquires an interest in profits of a U.S. business, the right to appoint members of the board of directors of the U.S. business, or other comparable financial or governance rights characteristic of an equity investment but not of a typical loan may constitute a covered transaction.

(c) An acquisition of voting interest or assets of a U.S. business by a foreign person upon default or other condition involving a loan or a similar financing arrangement does not constitute a covered transaction, provided that the loan was made by a syndicate of banks in a loan participation where the foreign lender (or lenders) in the syndicate:

(1) Needs the majority consent of the U.S. participants in the syndicate to take action, and cannot on its own initiate any action vis-à-vis the debtor; or

(2) Does not have a lead role in the syndicate, and is subject to a provision in the loan or financing documents limiting its ability to control the debtor such that control for purposes of §800.204 could not be acquired.

Example 1. Corporation A, which is a U.S. business, borrows funds from Corporation B, a bank organized under the laws of a foreign state and controlled by foreign persons. As a condition of the loan, Corporation A agrees not to sell or pledge its principal assets to any person. Assuming no other relevant facts, this lending arrangement does not alone constitute a covered transaction.

Example 2. Same facts as in Example 1, except that Corporation A defaults on its loan from Corporation B and seeks bankruptcy protection. Corporation A has no funds with which to satisfy Corporation B's claim, which is greater than the value of Corporation A's principal assets. Corporation B's secured claim constitutes the only secured claim against Corporation A's principal assets, creating a high probability that Corporation B will receive title to Corporation A's principal assets, which constitute a U.S. business. Assuming no other relevant facts, the Committee would accept a notice of the impending bankruptcy court adjudication transferring control of Corporation A's principal assets to Corporation B, which would constitute a covered transaction.

Example 3. Corporation A, a foreign bank, makes a loan to Corporation B, a U.S. business. The loan documentation extends to Corporation A rights in Corporation B that are characteristic of an equity investment but not of a typical loan, including dominant minority representation on the board of directors of Corporation B and the right to be paid dividends by Corporation B. This loan is a covered transaction.

§800.304 Timing rule for convertible voting instruments.

(a) For purposes of determining whether to include the rights that a holder of convertible voting instruments will acquire upon conversion of those instruments in the Committee's assessment of whether a notified transaction is a covered transaction, the Committee will consider factors that include:

- (1) The imminence of conversion;
- (2) Whether conversion depends on factors within the control of the acquiring party; and

(3) Whether the amount of voting interest and the rights that would be acquired upon conversion can be reasonably determined at the time of acquisition.

(b) When the Committee, applying paragraph (a), determines that the rights that the holder will acquire upon conversion will not be included in the Committee's assessment of whether a notified transaction is a covered transaction, the Committee will disregard the convertible voting instruments for purposes of that transaction except to the extent that they convey immediate rights to the holder with respect to the governance of the entity that issued the instruments.

Example 1. Corporation A, a foreign person, notifies the Committee that it intends to buy common stock and debentures of Corporation X, a U.S. business. By their terms, the debentures are convertible into common stock only upon the occurrence of an event the timing of which is not in the control of Corporation A, and the number of common shares that would be acquired upon conversion cannot now be determined. Assuming no other relevant facts, the Committee will disregard the debentures in the course of its covered transaction analysis at the time that Corporation A acquires the debentures. In the event that it determines that the acquisition of the common stock is not a covered transaction, the Committee will so inform the parties. Once the conversion of the instruments becomes imminent, it may be appropriate for the Committee to consider the rights that would result from the conversion and whether the conversion is a covered transaction. The conversion of those debentures into common stock could be a covered transaction, depending on what percentage of Corporation X's voting securities Corporation A would receive and what powers those securities would confer on Corporation A.

Example 2. Same facts as Example 1, except that the debentures at issue are convertible at the sole discretion of Corporation A after six months, and if converted, would represent a 50 percent interest in Corporation X. The Committee may consider the rights that would result from the conversion as part of its assessment.

Subpart D – Notice

§800.401 Procedures for notice.

(a) A party or parties to a proposed or completed transaction may file a voluntary notice of the transaction with the Committee. Voluntary notice to the Committee is filed by sending:

(1) One paper copy of the notice to the Staff Chairperson, Office of Investment Security, Department of the Treasury, 1500 Pennsylvania Avenue, N.W., Washington, DC 20220, that includes, in English only, the information set out in §800.402, including the certification required under paragraph (1) of that section; and

(2) One electronic copy of the same information required in paragraph (a)(1) of this section. See the Committee's section of the Department of the Treasury website, at <http://www.treas.gov/offices/international-affairs/cfius/> for electronic submission instructions.

(b) If the Committee determines that a transaction for which no voluntary notice has been filed under paragraph (a) of this section may be a covered transaction and may raise national security considerations, the Staff Chairperson, acting on the recommendation of the Committee, may request the parties to the transaction to provide to the Committee the information necessary to determine whether the transaction is a covered transaction, and if the Committee determines that the transaction is a covered transaction, to file a notice under paragraph (a) of such covered transaction.

(c) Any member of the Committee, or his designee at or above the Under Secretary or equivalent level, may file an agency notice to the Committee through the Staff Chairperson regarding a transaction for which no voluntary notice has been filed under paragraph (a) of this section if that member has reason to believe that the transaction is a covered transaction and may raise national security considerations. Notices filed under this paragraph are deemed accepted upon their receipt by the Staff Chairperson. No agency notice under this paragraph shall be made with respect to a transaction more than three years after the date of the completion of the transaction, unless the Chairperson of the Committee, in consultation with other members of the Committee, files such an agency notice.

(d) No communications other than those described in paragraphs (a) and (c) of this section shall constitute the filing or submitting of a notice for purposes of section 721.

(e) Upon receipt of the certification required by §800.402(l) and an electronic copy of a notice filed under paragraph (a) of this section, the Staff Chairperson shall promptly inspect such notice for completeness.

(f) Parties to a transaction are encouraged to consult with the Committee in advance of filing a notice and, in appropriate cases, to file with the Committee a draft notice or other appropriate documents to aid the Committee's understanding of the transaction and to provide an opportunity for the Committee to request additional information to be included in the notice. Any such pre-notice consultation should take place, or any draft notice should be provided, at least five business days before the filing

of a voluntary notice. All information and documentary material made available to the Committee pursuant to this paragraph shall be considered to have been filed with the President or the President's designee for purposes of section 721(c) and §800.702.

(g) Information and other documentary material provided by the parties to the Committee after the filing of a voluntary notice under §800.401 shall be part of the notice, and shall be subject to the certification requirements of §800.402(l).

§800.402 Contents of voluntary notice.

(a) If the parties to a transaction file a voluntary notice, they shall provide in detail the information set out in this section, which must be accurate and complete with respect to all parties and to the transaction. (See also paragraph (l) of this section and §800.701(d) regarding certification requirements.)

(b) In the case of a hostile takeover, if fewer than all the parties to a transaction file a voluntary notice, each notifying party shall provide the information set out in this section with respect to itself and, to the extent known or reasonably available to it, with respect to each non-notifying party.

(c) A voluntary notice filed pursuant to §800.401(a) shall describe or provide, as applicable:

(1) The transaction in question, including:

(i) A summary setting forth the essentials of the transaction, including a statement of the purpose of the transaction, and its scope, both within and outside of the United States;

(ii) The nature of the transaction, for example, whether the acquisition is by merger, consolidation, the purchase of voting interest, or otherwise;

(iii) The name, United States address (if any), website address (if any), nationality (for individuals) or place of incorporation or other legal organization (for entities), and address of the principal place of business of each foreign person that is a party to the transaction;

(iv) The name, address, website address (if any), principal place of business, and place of incorporation or other legal organization of the U.S. business that is the subject of the transaction;

(v) The name, address, and nationality (for individuals) or place of incorporation or other legal organization (for entities) of:

(A) The immediate parent, the ultimate parent, and each intermediate parent, if any, of the foreign person that is a party to the transaction;

(B) Where the ultimate parent is a private company, the ultimate owner(s) of such parent; and

(C) Where the ultimate parent is a public company, any shareholder with an interest of greater than five percent in such parent;

(vi) The name, address, website address (if any), and nationality (for individuals) or place of incorporation or other legal organization (for entities) of the person that will ultimately control the U.S. business being acquired;

(vii) The expected date for completion of the transaction, or the date it was completed;

(viii) A good faith approximation of the net value of the interest acquired in the U.S. business in U.S. dollars, as of the date of the notice; and

(ix) The name of any and all financial institutions involved in the transaction, including as advisors, underwriters, or a source of financing for the transaction;

(2) With respect to a transaction structured as an acquisition of assets of a U.S. business, a detailed description of the assets of the U.S. business being acquired, including the approximate value of those assets in U.S. dollars;

(3) With respect to the U.S. business that is the subject of the transaction and any entity of which that U.S. business is a parent (unless that entity is excluded from the scope of the transaction):

(i) Their respective business activities, as, for example, set forth in annual reports, and the product or service categories of each, including an estimate of U.S. market share for such product or service categories and the methodology used to determine market share, and a list of direct competitors for those primary product or service categories;

(ii) The street address (and mailing address, if different) within the United States and website address (if any) of each facility that is manufacturing classified or unclassified products or producing services described in paragraph (c)(3)(v) of this section, their respective Commercial and Government Entity Code (CAGE Code) assigned by the Department of Defense, their Dun and Bradstreet identification (DUNS) number, and their North American Industry Classification System (NAICS) Code, if any;

(iii) Each contract (identified by agency and number) that is currently in effect or was in effect within the past five years with any agency of the United States Government involving any information, technology, or data that is classified under Executive Order 12958, as amended, its estimated final completion date, and the name, office, and telephone number of the contracting official;

(iv) Any other contract (identified by agency and number) that is currently in effect or was in effect within the past three years with any United States Government agency or component with national defense, homeland security, or other national security responsibilities, including law enforcement responsibility as it relates to defense, homeland security, or national security, its estimated final completion date, and the name, office, and telephone number of the contracting official;

(v) Any products or services (including research and development):

(A) That it supplies, directly or indirectly, to any agency of the United States Government, including as a prime contractor or first tier subcontractor, a supplier to any

such prime contractor or subcontractor, or, if known by the parties filing the notice, a subcontractor at any tier; and

(B) If known by the parties filing the notice, for which it is a single qualified source (*i.e.*, other acceptable suppliers are readily available to be so qualified) or a sole source (*i.e.*, no other supplier has needed technology, equipment, and manufacturing process capabilities) for any such agencies and whether there are other suppliers in the market that are available to be so qualified;

(vi) Any products or services (including research and development) that:

(A) It supplies to third parties and it knows are rebranded by the purchaser or incorporated into the products of another entity, and the names or brands under which such rebranded products or services are sold; and

(B) In the case of services, it provides on behalf of, or under the name of, another entity, and the name of any such entities;

(vii) For the prior three years –

(A) The number of priority rated contracts or orders under the Defense Priorities and Allocations System (DPAS) regulations (15 CFR part 700) that the U.S. business that is the subject of the transaction has received and the level of priority of such contracts or orders (“DX” or “DO”); and

(B) The number of such priority rated contracts or orders that the U.S. business has placed with other entities and the level of priority of such contracts or orders, and the

acquiring party's plan to ensure that any new entity formed at the completion of the notified transaction (or the U.S. business, if no new entity is formed) complies with the DPAS regulations; and

(viii) A description and copy of the cyber security plan, if any, that will be used to protect against cyber attacks on the operation, design, and development of the U.S. business's services, networks, systems, data storage, and facilities;

(4) Whether the U.S. business that is being acquired produces or trades in:

(i) Items that are subject to the EAR and, if so, a description (which may group similar items into general product categories) of the items and a list of the relevant commodity classifications set forth on the CCL (*i.e.*, Export Control Classification Numbers (ECCNs) or EAR99 designation);

(ii) Defense articles and defense services, and related technical data covered by the USML in the ITAR, and, if so, the category of the USML; articles and services for which commodity jurisdiction requests (22 CFR §120.4) are pending; and articles and services (including those under development) that may be designated or determined in the future to be defense articles or defense services pursuant to 22 CFR §120.3;

(iii) Products and technology that are subject to export authorization administered by the Department of Energy (10 CFR part 810), or export licensing requirements administered by the Nuclear Regulatory Commission (10 CFR part 110); or

(iv) Select Agents and Toxins (7 CFR part 331, 9 CFR part 121, and 42 CFR part 73);

(5) Whether the U.S. business that is the subject of the transaction:

(i) Possesses any licenses, permits, or other authorizations other than those under the regulatory authorities listed in paragraph (c)(4) of this section that have been granted by an agency of the United States Government (if applicable, identification of the relevant licenses shall be provided); or

(ii) Has technology that has military applications (if so, an identification of such technology and a description of such military applications shall be included); and

(6) With respect to the foreign person engaged in the transaction and its parents:

(i) The business or businesses of the foreign person and its ultimate parent, as such businesses are described, for example, in annual reports, and the CAGE codes, NAICS codes, and DUNS numbers, if any, for such businesses;

(ii) The plans of the foreign person for the U.S. business with respect to:

(A) Reducing, eliminating, or selling research and development facilities;

(B) Changing product quality;

(C) Shutting down or moving outside of the United States facilities that are within the United States;

(D) Consolidating or selling product lines or technology;

(E) Modifying or terminating contracts referred to in paragraphs (c)(3)(iii) and (iv) of this section; or

(F) Eliminating domestic supply by selling products solely to non-domestic markets;

(iii) Whether the foreign person is controlled by or acting on behalf of a foreign government, including as an agent or representative, or in some similar capacity, and if so, the identity of the foreign government;

(iv) Whether a foreign government or a person controlled by or acting on behalf of a foreign government:

(A) Has or controls ownership interests, including convertible voting instruments, of the acquiring foreign person or any parent of the acquiring foreign person, and if so, the nature and amount of any such instruments, and with regard to convertible voting instruments, the terms and timing of their conversion;

(B) Has the right or power to appoint any of the principal officers or the members of the board of directors of the foreign person that is a party to the transaction or any parent of that foreign person;

(C) Holds any contingent interest (for example, such as might arise from a lending transaction) in the foreign acquiring party and, if so, the rights that are covered by this contingent interest, and the manner in which they would be enforced; or

(D) Has any other affirmative or negative rights or powers that could be relevant to the Committee's determination of whether the notified transaction is a foreign government-controlled transaction, and if there are any such rights or powers, their source (for example, a "golden share," shareholders agreement, contract, statute, or regulation) and the mechanics of their operation;

(v) Any formal or informal arrangements among foreign persons that hold an ownership interest in the foreign person that is a party to the transaction or between such foreign person and other foreign persons to act in concert on particular matters affecting the U.S. business that is the subject of the transaction, and provide a copy of any documents that establish those rights or describe those arrangements;

(vi) For each member of the board of directors or similar body (including external directors) and officers (including president, senior vice president, executive vice president, and other persons who perform duties normally associated with such titles) of the acquiring foreign person engaged in the transaction and its immediate, intermediate, and ultimate parents, and for any individual having an ownership interest of five percent or more in the acquiring foreign person engaged in the transaction and in the foreign person's ultimate parent, the following information:

(A) A curriculum vitae or similar professional synopsis, provided as part of the main notice, and

(B) The following "personal identifier information," which, for privacy reasons, and to ensure limited distribution, shall be set forth in a separate document, not in the main notice:

(1) Full name (last, first, middle name);

- (2) All other names and aliases used;
 - (3) Business address;
 - (4) Country and city of residence;
 - (5) Date of birth;
 - (6) Place of birth;
 - (7) U.S. Social Security number (where applicable);
 - (8) National identity number, including nationality, date and place of issuance, and expiration date (where applicable);
 - (9) U.S. or foreign passport number (if more than one, all must be fully disclosed), nationality, date and place of issuance, and expiration date and, if a U.S. visa holder, the visa type and number, date and place of issuance, and expiration date; and
 - (10) Dates and nature of foreign government and foreign military service (where applicable), other than military service at a rank below the top two non-commissioned ranks of the relevant foreign country; and
- (vii) The following “business identifier information” for the immediate, intermediate, and ultimate parents of the foreign person engaged in the transaction, including their main offices and branches:
- (A) Business name, including all names under which the business is known to be or has been doing business;
 - (B) Business address;
 - (C) Business phone number, fax number, and e-mail address; and
 - (D) Employer identification number or other domestic tax or corporate identification number.

(d) The voluntary notice shall list any filings with, or reports to, agencies of the United States Government that have been or will be made with respect to the transaction prior to its closing, indicating the agencies concerned, the nature of the filing or report, the date on which it was filed or the estimated date by which it will be filed, and a relevant contact point and/or telephone number within the agency, if known.

Example. Corporation A, a foreign person, intends to acquire Corporation X, which is wholly owned and controlled by a U.S. national and which has a Facility Security Clearance under the Department of Defense Industrial Security Program. See Department of Defense, “Industrial Security Regulation,” DOD 5220.22-R, and “Industrial Security Manual for Safeguarding Classified Information,” DOD 5220.22-M. Corporation X accordingly files a revised Form DD SF-328, and enters into discussions with the Defense Security Service about effectively insulating its facilities from the foreign person. Corporation X may also have made filings with the Securities and Exchange Commission, the Department of Commerce, the Department of State, or other federal departments and agencies. Paragraph (d) of this section requires that certain specific information about these filings be reported to the Committee in a voluntary notice.

(e) In the case of the establishment of a joint venture in which one or more of the parties is contributing a U.S. business, information for the voluntary notice shall be prepared on the assumption that the foreign person that is party to the joint venture has made an acquisition of the existing U.S. business that the other party to the joint venture is contributing or transferring to the joint venture. The voluntary notice shall describe the name and address of the joint venture and the entities that established, or are establishing, the joint venture.

(f) In the case of the acquisition of some but not all of the assets of an entity, §800.402(c) requires submission of the specified information only with respect to the assets of the entity that have been or are proposed to be acquired.

(g) Persons filing a voluntary notice shall, with respect to the foreign person that is a party to the transaction, its immediate parent, the U.S. business that is the subject of the transaction, and each entity of which the foreign person is a parent, append to the voluntary notice the most recent annual report of each such entity, in English. Separate reports are not required for any entity whose financial results are included within the consolidated financial results stated in the annual report of any parent of any such entity, unless the transaction involves the acquisition of a U.S. business whose parent is not being acquired, in which case the notice shall include the most recent audited financial statement of the U.S. business that is the subject of the transaction. If a U.S. business does not prepare an annual report and its financial results are not included within the consolidated financial results stated in the annual report of a parent, the filing shall include, if available, the entity's most recent audited financial statement (or, if an audited financial statement is not available, the unaudited financial statement).

(h) Persons filing a voluntary notice shall, during the time that the matter is pending before the Committee or the President, promptly advise the Staff Chairperson of any material changes in plans, facts and circumstances addressed in the notice, and information provided or required to be provided to the Committee under §800.402, and shall file amendments to the notice to reflect such material changes. Such amendments shall become part of the notice filed by such persons under §800.401, and the

certification required under §800.402(l) shall apply to such amendments. (See also §800.701(d).)

(i) Persons filing a voluntary notice shall include a copy of the most recent asset or stock purchase agreement or other document establishing the agreed terms of the transaction.

(j) Persons filing a voluntary notice shall include:

(1) An organizational chart illustrating all of the entities or individuals above the foreign person that is a party to the transaction up to the person or persons having ultimate control of that person, including the percentage of shares held by each; and

(2) The opinion of the person regarding whether:

(A) It is a foreign person;

(B) It is controlled by a foreign government; and

(C) The transaction has resulted or could result in control of a U.S. business by a foreign person, and the reasons for its view, focusing in particular on any powers (for example, by virtue of a shareholders agreement, contract, statute, or regulation) that the foreign person will have with regard to the U.S. business, and how those powers can or will be exercised.

(k) Persons filing a voluntary notice shall include information as to whether:

(1) Any party to the transaction is, or has been, a party to a mitigation agreement entered into or condition imposed under section 721, and if so, shall specify the date and

purpose of such agreement or condition and the United States Government signatories;
and

(2) Any party to the transaction has been a party to a transaction previously notified to the Committee.

(l) Each party filing a voluntary notice shall provide a certification of the notice consistent with §800.202. A sample certification may be found on the Committee's section of the Department of the Treasury website, available at <http://www.treas.gov/offices/international-affairs/cfius/index.shtml>.

(m) Persons filing a voluntary notice shall include with the notice a list identifying each document provided as part of the notice, including all documents provided as attachments or exhibits to the narrative response.

§800.403 Deferral, rejection, or disposition of certain voluntary notices.

(a) The Committee, acting through the Staff Chairperson, may:

(1) Reject any voluntary notice that does not comply with §800.402 and so inform the parties promptly in writing;

(2) Reject any voluntary notice at any time, and so inform the parties promptly in writing, if, after the notice has been submitted and before action by the Committee or the President has been concluded:

(i) There is a material change in the transaction as to which notification has been made; or

(ii) Information comes to light that contradicts material information provided in the notice by the parties;

(3) Reject any voluntary notice at any time after the notice has been accepted, and so inform the parties promptly in writing, if the party or parties that have submitted the voluntary notice do not provide follow-up information requested by the Staff Chairperson within three business days of the request, or within a longer time frame if the parties so request in writing and the Staff Chairperson grants that request in writing; or

(4) Reject any voluntary notice before the conclusion of a review or investigation, and so inform the parties promptly in writing, if one of the parties submitting the voluntary notice has not submitted the final certification required by §800.701(d).

(b) Notwithstanding the authority of the Staff Chairperson under paragraph (a) of this section to reject an incomplete notice, the Staff Chairperson may defer acceptance of the notice, and the beginning of the thirty-day review period, to obtain any information required under this section that has not been submitted by the notifying party or parties or other parties to the transaction. Where necessary to obtain such information, the Staff Chairperson may inform any non-notifying party or parties that notice has been filed with respect to a proposed transaction involving the party, and request that certain information required under this section, as specified by the Staff Chairperson, be provided to the Committee within seven days after receipt of the Staff Chairperson's request.

(c) The Staff Chairperson shall notify the parties when the Committee has found that the transaction that is the subject of a voluntary notice is not a covered transaction.

Example 1. The Staff Chairperson receives a joint notice from Corporation A, a foreign person, and Corporation X, a company that is owned and controlled by U.S. nationals, with respect to Corporation A's intent to purchase all of the shares of Corporation X. The joint notice does not contain any information described under §800.402(c)(3)(iii) and (iv) concerning classified materials and products or services supplied to the U.S. military services. The Staff Chairperson may reject the notice or defer the start of the thirty-day review period until the parties have supplied the omitted information.

Example 2. Same facts as in the first sentence of Example 1, except that the joint notice indicates that Corporation A does not intend to purchase Corporation X's Division Y, which is engaged in classified work for a U.S. Government agency. Corporations A and X notify the Committee on the 25th day of the 30-day notice period that Division Y will also be acquired by Corporation A. This fact constitutes a material change with respect to the transaction as originally notified, and the Staff Chairperson may reject the notice.

Example 3. The Staff Chairperson receives a joint notice by Corporation A, a foreign person, and Corporation X, a U.S. business, indicating that Corporation A intends to purchase five percent of the voting securities of Corporation X. Under the particular facts and circumstances presented, the Committee concludes that Corporation A's purchase of this interest in Corporation X could not result in foreign control of Corporation X. The Staff Chairperson shall advise the parties in writing that the transaction as presented is not subject to section 721.

Example 4. The Staff Chairperson receives a voluntary notice involving the acquisition by Company A, a foreign person, of the entire interest in Company X, a U.S. business. The notice mentions the involvement of a second foreign person in the transaction, Company B, but states that Company B is merely a passive investor in the transaction. During the course of the review, the parties provide information that clarifies

that Company B has the right to appoint two members of Company X's board of directors. This information contradicts the material assertion in the notice that Company B is a passive investor. The Committee may reject this notice without concluding review under section 721.

Subpart E – Committee Procedures: Review and Investigation

§800.501 General.

(a) The Committee's review or investigation (if necessary) shall examine, as appropriate, whether:

(1) The transaction is by or with any foreign person and could result in foreign control of a U.S. business;

(2) There is credible evidence to support a belief that any foreign person exercising control of that U.S. business might take action that threatens to impair the national security of the United States; and

(3) Provisions of law, other than section 721 and the International Emergency Economic Powers Act, provide adequate and appropriate authority to protect the national security of the United States.

(b) During the thirty-day review period or during an investigation, the Staff Chairperson may invite the parties to a notified transaction to attend a meeting with the Committee staff to discuss and clarify issues pertaining to the transaction. During an investigation, a party to the transaction under investigation may request a meeting with the Committee staff; such a request ordinarily will be granted.

(c) The Staff Chairperson shall be the point of contact for receiving material filed with the Committee, including notices.

(d) Where more than one lead agency is designated, communications on material matters between a party to the transaction and a lead agency shall include all lead agencies designated with regard to those matters.

§800.502 Beginning of thirty-day review period.

(a) The Staff Chairperson of the Committee shall accept a voluntary notice the next business day after the Staff Chairperson has:

- (1) Determined that the notice complies with §800.402; and
- (2) Disseminated the notice to all members of the Committee.

(b) A thirty-day period for review of a transaction shall commence on the date on which the voluntary notice has been accepted, agency notice has been received by the Staff Chairperson of the Committee, or the Chairperson of the Committee has requested a review pursuant to §800.401(b). Such review shall end no later than the thirtieth day after it has commenced, or if the thirtieth day is not a business day, no later than the next business day after the thirtieth day.

(c) The Staff Chairperson shall promptly and in writing advise all parties to a transaction that have filed a voluntary notice of:

- (1) The acceptance of the notice;

(2) The date on which the review begins; and

(3) The designation of any lead agency or agencies.

(d) Within two business days after receipt of an agency notice by the Staff Chairperson, the Staff Chairperson shall send written advice of such notice to the parties to a covered transaction. Such written advice shall identify the date on which the review began.

(e) The Staff Chairperson shall promptly circulate to all Committee members any draft pre-filing notice, any agency notice, any complete notice, and any subsequent information filed by the parties.

§800.503 Determination of whether to undertake an investigation.

(a) After a review of a notified transaction under §800.502, the Committee shall undertake an investigation of any transaction that it has determined to be a covered transaction if:

(1) A member of the Committee (other than a member designated as *ex officio* under section 721(k)) advises the Staff Chairperson that the member believes that the transaction threatens to impair the national security of the United States and that the threat has not been mitigated; or

(2) The lead agency recommends, and the Committee concurs, that an investigation be undertaken.

(b) The Committee shall also undertake, after a review of a covered transaction under §800.502, an investigation to determine the effects on national security of any covered transaction that:

(1) Is a foreign government-controlled transaction; or

(2) Would result in control by a foreign person of critical infrastructure of or within the United States, if the Committee determines that the transaction could impair the national security and such impairment has not been mitigated.

(c) The Committee shall undertake an investigation as described in paragraph (b) of this section unless the Chairperson of the Committee (or the Deputy Secretary of the Treasury) and the head of any lead agency (or his or her delegee at the deputy level or equivalent) designated by the Chairperson determine on the basis of the review that the covered transaction will not impair the national security of the United States.

§800.504 Determination not to undertake an investigation.

If the Committee determines, during the review period described in §800.502, not to undertake an investigation of a notified covered transaction, action under section 721 shall be concluded. An official at the Department of the Treasury shall promptly send written advice to the parties to a covered transaction of a determination of the Committee not to undertake an investigation and to conclude action under section 721.

§800.505 Commencement of investigation.

(a) If it is determined that an investigation should be undertaken, such investigation shall commence no later than the end of the thirty-day review period described in §800.502.

(b) An official of the Department of the Treasury shall promptly send written advice to the parties to a covered transaction of the commencement of an investigation.

§800.506 Completion or termination of investigation and report to the President.

(a) The Committee shall complete an investigation no later than the forty-fifth day after the date the investigation commences, or, if the forty-fifth day is not a business day, no later than the next business day after the forty-fifth day.

(b) Upon completion or termination of any investigation, the Committee shall send a report to the President requesting the President's decision if:

(1) The Committee recommends that the President suspend or prohibit the transaction;

(2) The members of the Committee (other than a member designated as *ex officio* under section 721(k)) are unable to reach a decision on whether to recommend that the President suspend or prohibit the transaction; or

(3) The Committee requests that the President make a determination with regard to the transaction.

(c) In circumstances when the Committee sends a report to the President requesting the President's decision with respect to a covered transaction, such report shall include information relevant to sections 721(d)(4)(A) and (B), and shall present the Committee's recommendation. If the Committee is unable to reach a decision to present a single recommendation to the President, the Chairperson of the Committee shall submit a report of the Committee to the President setting forth the differing views and presenting the issues for decision.

(d) Upon completion or termination of an investigation, if the Committee determines to conclude all deliberative action under section 721 with regard to a notified covered transaction without sending a report to the President, action under section 721 shall be concluded. An official at the Department of the Treasury shall promptly advise the parties to such a transaction in writing of a determination to conclude action.

§800.507 Withdrawal of notice.

(a) A party (or parties) to a transaction that has filed notice under §800.401(a) may request in writing, at any time prior to conclusion of all action under section 721, that such notice be withdrawn. Such request shall be directed to the Staff Chairperson and shall state the reasons why the request is being made. Such requests will ordinarily be granted, unless otherwise determined by the Committee. An official of the Department of the Treasury will promptly advise the parties to the transaction in writing of the Committee's decision.

(b) Any request to withdraw an agency notice by the agency that filed it shall be in writing and shall be effective only upon approval by the Committee. An official of the Department of the Treasury shall advise the parties to the transaction in writing of the Committee's decision to approve the withdrawal request within two business days of the Committee's decision.

(c) In any case where a request to withdraw a notice is granted under paragraph (a) of this section:

(1) The Staff Chairperson, in consultation with the Committee, shall establish, as appropriate:

(i) A process for tracking actions that may be taken by any party to the covered transaction before notice is refiled under §800.401; and

(ii) Interim protections to address specific national security concerns with the transaction identified during the review or investigation of the transaction.

(2) The Staff Chairperson shall specify a time frame, as appropriate, for the parties to resubmit a notice and shall advise the parties of that time frame in writing.

(d) A notice of a transaction that is submitted pursuant to paragraph (c)(2) of this section shall be deemed a new notice for purposes of the regulations in this part, including §800.601.

§800.508 Role of the Secretary of Labor.

In response to a request from the Chairperson of the Committee, the Secretary of Labor shall identify for the Committee any risk mitigation provisions proposed to or by the Committee that would violate U.S. employment laws or require a party to violate U.S. employment laws. The Secretary of Labor shall serve no policy role on the Committee.

§800.509 Materiality.

The Committee generally will not consider as material minor inaccuracies, omissions, or changes relating to financial or commercial factors not having a bearing on national security.

Subpart F – Finality of Action

§800.601 Finality of actions under section 721.

(a) All authority available to the President or the Committee under section 721(d), including divestment authority, shall remain available at the discretion of the President with respect to covered transactions proposed or pending on or after August 23, 1988. Such authority shall not be exercised if:

(1) The Committee, through its Staff Chairperson, has advised a party (or the parties) in writing that a particular transaction with respect to which voluntary notice has been filed is not a covered transaction;

(2) The parties to the transaction have been advised in writing pursuant to §800.504 or §800.506(d) that the Committee has concluded all action under section 721 with respect to the covered transaction; or

(3) The President has previously announced, pursuant to section 721(d), his decision not to exercise his authority under section 721 with respect to the covered transaction.

(b) Divestment or other relief under section 721 shall not be available with respect to transactions that were completed prior to August 23, 1988.

Subpart G – Provision and Handling of Information

§800.701 Obligation of parties to provide information.

(a) Parties to a transaction that is notified under subpart D shall provide information to the Staff Chairperson that will enable the Committee to conduct a full review and/or investigation of the proposed transaction, and shall promptly advise the Staff Chairperson of any material changes in plans or information pursuant to §800.402(h). If deemed necessary by the Committee, information may be obtained from parties to a transaction or other persons through subpoena or otherwise, pursuant to 50 U.S.C. App. 2155(a).

(b) Documentary materials or information required or requested to be filed with the Committee under this part shall be submitted in English. Supplementary materials, such as annual reports, written in a foreign language, shall be submitted in certified English translation.

(c) Any information filed with the Committee by a party to a covered transaction in connection with any action for which a report is required pursuant to section 721(l)(3)(B) with respect to the implementation of a mitigation agreement or condition described in section 721(l)(1)(A) shall be accompanied by a certification that complies with the requirements of section 721(n) and §800.202. A sample certification may be found at the Committee's section of the Department of the Treasury website at <http://www.treas.gov/offices/international-affairs/cfius/index.shtml>.

(d) At the conclusion of a review or investigation, each party that has filed additional information subsequent to the original notice shall file a final certification. (See §800.202.) A sample certification may be found at the Committee's section of the Department of the Treasury website at <http://www.treas.gov/offices/international-affairs/cfius/index.shtml>.

§800.702 Confidentiality.

(a) Any information or documentary material filed with the Committee pursuant to this part, including information or documentary material filed pursuant to §800.401(f), shall be exempt from disclosure under 5 U.S.C. 552 and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this part shall be construed to prevent disclosure to either House of Congress or to any duly authorized committee or subcommittee of the Congress, in accordance with subsections (b)(3) and (g)(2)(A) of section 721.

(b) This section shall continue to apply with respect to information and documentary material filed with the Committee in any case where:

(1) Action has concluded under section 721 concerning a notified transaction;

(2) A request to withdraw notice is granted under §800.507, or where notice has been rejected under §800.403;

(3) The Committee determines that a notified transaction is not a covered transaction; or

(4) Such information or documentary material was filed pursuant to §800.401(f) and the parties do not subsequently file a notice pursuant to §800.401(a).

(c) Nothing in paragraph (a) of this section shall be interpreted to prohibit the public disclosure by a party of documentary material or information that it has filed with the Committee. Any such documentary material or information so disclosed may subsequently be reflected in the public statements of the Chairperson, who is authorized to communicate with the public and the Congress on behalf of the Committee, or of the Chairperson's designee.

(d) The provisions of 50 U.S.C. App. 2155(d) relating to fines and imprisonment shall apply with respect to the disclosure of information or documentary material filed with the Committee under these regulations.

Subpart H – Penalties

§800.801 Penalties.

(a) Any person who, after the effective date, intentionally or through gross negligence, submits a material misstatement or omission in a notice or makes a false certification under §§800.402(l) or 800.701(c) may be liable to the United States for a civil penalty not to exceed \$250,000 per violation. The amount of the penalty assessed for a violation shall be based on the nature of the violation.

(b) Any person who, after the effective date, intentionally or through gross negligence, violates a material provision of a mitigation agreement entered into with, or a material condition imposed by, the United States under section 721(l) may be liable to the United States for a civil penalty not to exceed \$250,000 per violation or the value of the transaction, whichever is greater. Any penalty assessed under this paragraph shall be based on the nature of the violation and shall be separate and apart from any damages sought pursuant to a mitigation agreement under section 721(l), or any action taken under section 721(b)(1)(D).

(c) A mitigation agreement entered into or amended under section 721(l) after the effective date may include a provision providing for liquidated or actual damages for breaches of the agreement by parties to the transaction. The Committee shall set the amount of any liquidated damages as a reasonable assessment of the harm to the national security that could result from a breach of the agreement. Any mitigation agreement containing a liquidated damages provision shall include a provision specifying that the

Committee will consider the severity of the breach in deciding whether to seek a lesser amount than that stipulated in the contract.

(d) A determination to impose penalties under paragraph (a) or (b) of this section must be made by the named members of the Committee, except to the extent delegated by such official. Notice of the penalty, including a written explanation of the penalized conduct and the amount of the penalty, shall be sent to the penalized party by U.S. mail.

(e) Upon receiving notice of the imposition of a penalty under paragraph (a) or (b) of this section, the penalized party may, within 15 days of receipt of the notice of the penalty, submit a petition for reconsideration to the Staff Chairperson, including a defense, justification, or explanation for the penalized conduct. The Committee will review the petition and issue a final decision within 15 days of receipt of the petition.

(f) The penalties authorized in paragraphs (a) and (b) of this section may be recovered in a civil action brought by the United States in federal district court.

(g) The penalties available under this section are without prejudice to other penalties, civil or criminal, available under law.

Dated: _____

Clay Lowery
Assistant Secretary (International Affairs)

