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

RE: Initial Comments in Response to Notice of Inquiry -- Regulations Pertaining to Mergers, Acquisitions and Takeovers, 72 Fed. Reg. 57,900 (Oct. 11, 2007)

Dear Mr. Daly:

These comments regarding examinations of foreign direct investment for national security reasons, and issues raised by the Foreign Investment and National Security Act of 2007 (the "FINSA") are submitted on behalf of the American Petroleum Institute ("API"). API represents all aspects of America's oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry.

President Bush reemphasized the United States' open investment policy as recently as November 6, 2007. "We welcome foreign investment in our country," he said. "And we want to ensure fair treatment for American investments abroad."

API's initial comments on "Exon-Florio" screening and issues raised by the FINSA build on the U.S. open investment policy. Changes to Exon-Florio regulations should prescribe and facilitate a reasonable, predictable approach to Exon-Florio screening, which observes the limitations of, and congressional intentions behind the FINSA. Beyond the statutory requirements and the overall U.S. open investment policy, this type of measured approach to Exon-Florio screening is needed to promote "fair treatment for American investments abroad." In this regard, authorities in other countries have made it clear that they are monitoring U.S. implementation of the FINSA, and that it could affect their approaches to screening of foreign investment.

API welcomes the opportunity to comment on these issues. As a general matter, it is crucial, in API's view, that new Exon-Florio regulations make the screening process as clear and transparent as possible and foster predictable treatment of foreign direct investment transactions. As an initial matter, API will briefly address in this letter our three foremost concerns.



First, we urge that the regulations provide clear guidance on the meaning and relevance of “critical infrastructure” that comports with the FINSA, its legislative history, and maintenance of a workable, effective screening process to implement the FINSA. The FINSA provides that the term embraces systems and assets “so vital to the United States” that their incapacity or destruction “would have a debilitating impact on national security.” Notably, the Congress consciously omitted from the definition any reference to terms such as “economic security” that could lead to misunderstandings and diversion of the Exon-Florio process from its mission of preserving the national security. Furthermore, regardless of assets that might be involved the question for any given screening is whether the “transaction” -- foreign acquisition of a U.S. business -- “threatens to impair the national security of the United States.”

Second, it is important that new regulations reinforce and clarify the statute’s mandate that Exon-Florio screening and the possibility of action under Exon-Florio be limited to transactions that would result in actual control by a non-U.S. person over a U.S. business. The FINSA confirmed the consensus understanding that transactions that do not result in foreign control of a U.S. business cannot possibly threaten the national security. Consequently, Exon-Florio regulations should include more bright line demarcations to establish with clarity the types of minority investments that need not and should not be notified to the Committee on Foreign Investment in the United States (the “CFIUS”). It should be clear that no passive investment is within the scope of Exon-Florio, even if the investor is government-owned.

Third, new regulations should place limitations on the instances in which mitigation agreements are needed and on the types of mitigation agreement commitments that should be elicited from transaction parties. API is concerned that the CFIUS is moving toward requiring mitigation agreements as a matter of course rather than exercising judgment about when they are called for by special circumstances. In addition, regulations should establish that the CFIUS will negotiate obligations for transaction parties only to the extent needed to address incremental national security risk that is introduced by the transaction itself. The regulations should make clear that agencies cannot use Exon-Florio decision-making as leverage to seek commitments that are not needed to address any such incremental risk.

Please do not hesitate to contact the undersigned if we can clarify or supplement our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Harry M. Ng", written over a light grey rectangular background.

Harry M. Ng