

To: U.S. Department of the Treasury – Office of Intelligence & Analysis Staff

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Updated Controls on Foreign Investment in Critical U.S. Infrastructure Address Key National Security Vulnerabilities – OIA Plays Crucial Monitoring Role

The capabilities of foreign adversaries to impact critical infrastructure in the United States have expanded substantially in the last several decades. Addressing these vulnerabilities is a key pillar of U.S. national security strategy and oversight of foreign investment in the United States remains an important approach in this aim. Updates to the foreign investment control regime in 2018 provided an effective mechanism for review and enforcement. The Office of Intelligence and Analysis (OIA) plays a key role in providing CFIUS counterparts intelligence to assess the evolving threat landscape as well as the economic impact of these legislative changes.

Inclusion of “Critical Infrastructure” in National Security Legislation Addresses Key Vulnerabilities

Critical infrastructure is a key component of U.S. national security, as it allows for the operation of virtually every system in American civilian and military life. Strategic investment by foreign actors in such systems leaves them vulnerable to control or disruption, the results of which could be potentially devastating. The September 11 terrorist attacks heightened concerns regarding vulnerabilities in U.S. infrastructure and nonmilitary targets. Later in 2006, following public and congressional concern regarding a proposed purchase of six U.S. ports by Dubai Ports World, the U.S. government moved to address these issues legislatively.

The Foreign Investment and National Security Act of 2007 (FISIA) effectively brought critical infrastructure into the foreign investment policy framework and clarified its role in homeland security. Borrowing language from the USA PATRIOT Act (2001) and the Homeland Security Act (2002), FISIA defines critical infrastructure as, “*systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.*” Reference to major energy assets and infrastructure support systems are additionally included. This definition addressed key gaps in the United States’ capabilities for evaluating the potential for foreign actors acquiring control of or critical information regarding America’s infrastructural assets.

The primary mechanism to accomplish this aim is the Committee on Foreign Investment in the United States (CFIUS). CFIUS is an interagency body of nine departments within the United States Government and is chaired by the Department of Treasury. Other government agencies on the committee include the Departments of Commerce, Homeland Security, Justice and Energy. In 2019 alone the inflow of foreign direct investment (FDI) into the United States totaled \$1.39 trillion. CFIUS’ role is to monitor and review those transactions with national security implications, including those related to the infrastructure that American lives depend on. If CFIUS determines that a deal has the potential to be a concern for U.S. national security, it can request changes to the transaction, block the transaction and even undo previous ones retroactively. This ability to review foreign investment activities remains a key safeguard in America’s national security strategy.

Foreign Investment Risk Review Modernization Act Allows for More Effective Action on Infrastructure Security Concerns

In 2018, the U.S. Congress and the Trump Administration passed the Foreign Investment Risk Review Modernization Act (FIRRMA). This expanded the jurisdiction of CFIUS to review certain covered transactions. This was the result of a number of factors including (1) recent increases in the number of transactions CFIUS was reviewing; (2) concerns over Chinese foreign investment activities; (3) recognition of strategic deficiencies in homeland security defense and (4) broader implications for global economic competitiveness.

Regarding U.S. critical infrastructure, FIRRMA enhanced reviews in two key areas. First, it further refined what infrastructure is covered by CFIUS' mandate. Examples include internet protocol networks, specialty metals and chemical manufacturers and public water systems. (A full list can be found in [31 CFR § 800, Appendix A](#)). This also extends to real estate near such facilities. Second, it included within CFIUS jurisdiction "non-passive" investment. This shifted focus away from mere ownership percentages or board voting rights and effectively lowered the threshold for reviewable transactions. Criteria of "non-passive" investments include board observer rights and information privileges and are irrespective of the investment amount. These amendments highlight the need for Treasury to play an increased role in this element of U.S. national security.

Role of the Treasury Department: Ongoing Review and Impact Assessment Required for Optimal Policy Outcome

With the passing of FIRRMA just two years ago, Treasury is enhancing collaboration with its CFIUS counterparts to accurately assess its policy efficacy. On the one hand, threat profiles from strategic foreign investment are shifting and CFIUS must maintain a comprehensive understanding of these risks. On the other, it must be cognizant of the economic and market impact of its enforcement actions on the U.S. private sector.

From 2009 to 2017, CFIUS reviewed 1,179 foreign investment proposals. The number of reviews grew 66% from 2015 to 2017 and CFIUS investigations increased 161% during the same period. CFIUS reviewed over 240 transaction notices in 2019. By reviewing these transactions and identifying evolving typologies, Treasury and its CFIUS counterparts can accurately identify issues as they emerge in the FDI landscape. Treasury will also analyze data and industry comments collected by the U.S. Department of Commerce to ensure that the updated CFIUS review process is still allowing U.S. business to remain competitive in the fast-moving M&A market.

The Treasury Department calls upon the Office of Intelligence and Analysis for assistance in its ongoing CFIUS reviews as well as to help maintain the balance between national security concerns and a free and open investment market for U.S. infrastructure. The OIA is in a critical position to collect, analyze and distribute information that serves this end. It can provide crucial input regarding not only individual transactions, but networks of transactions that may have the same beneficial owners or are controlled by a single foreign government. It will also be tasked with compiling retrospective analyses on the impact FIRRMA has had on the U.S. private sector since 2018. These will be for both internal review and to help form the CFIUS Annual Reports to Congress. Such analysis will be invaluable to maintaining an effective investment policy framework and ensuring a strong and safe America.