

INFORMATION CONTACT section of this document.

LaNita Vandyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-109367-06]

RIN 1545-BF52

Section 1221(a)(4) Capital Asset Exclusion for Accounts and Notes Receivable

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Withdrawal of notice of proposed rulemaking.

SUMMARY: This document withdraws a notice of proposed rulemaking relating to the circumstances in which accounts or notes receivable are “acquired * * * for services rendered” within the meaning of section 1221(a)(4).

FOR FURTHER INFORMATION CONTACT: K. Scott Brown, (202) 622-7454 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

On August 7, 2006, the Treasury Department and the IRS published in the **Federal Register** (71 FR 44600) proposed regulations § 1.1221-1(e) under section 1221(a)(4) of the Internal Revenue Code. These regulations sought to clarify the circumstances in which accounts or notes receivable are “acquired * * * for services rendered” within the meaning of section 1221(a)(4).

Written comments were received from interested parties, and public hearings to discuss these regulations were held on November 7, 2006, and August 22, 2007. Most of the comments focused on the decisions in *Burbank Liquidating Corp. v. Commissioner*, 39 T.C. 999 (1963), *acq. sub nom. United Assocs., Inc.*, 1965-1 C.B. 3, *aff’d in part and rev’d in part on other grounds*, 335 F.2d 125 (9th Cir. 1964) and *Federal National Mortgage Association v. Commissioner*, 100 T.C. 541 (1993). The Treasury Department and the IRS considered the comments and have decided to withdraw the proposed regulations.

The IRS will not challenge return reporting positions of taxpayers under

section 1221(a)(4) that apply existing law, including *Burbank Liquidating; Federal National Mortgage Association; and Bielfeldt v. Commissioner*, 231 F.3d 1035 (7th Cir. 2000), *cert. denied*, 534 U.S. 813 (2001). See also Rev. Rul. 80-56 (1980-1 C.B. 154) and Rev. Rul. 80-57 (1980-1 C.B. 157). The IRS and the Treasury Department will continue to study this area and may issue guidance in the future.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirement.

Withdrawal of Notice of Proposed Rulemaking

Accordingly, under the authority of 26 U.S.C. 7805, the notice of proposed rulemaking (REG-109367-06) published in the **Federal Register** on August 7, 2006 (71 FR 44600) is withdrawn.

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

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DEPARTMENT OF THE TREASURY

Office of International Investment

31 CFR Part 800

RIN 1505-AB88

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

AGENCY: Department of the Treasury.

ACTION: Proposed Rule; Notice of Inquiry and Public Meeting.

SUMMARY: This proposed regulation amends regulations in part 800 of 31 CFR that implement section 721 of the Defense Production Act of 1950, as amended. The proposed regulations would implement amendments made by the Foreign Investment and National Security Act of 2007 to section 721 of the Defense Production Act of 1950 (“section 721”). While the proposed regulations retain many features of the existing regulations, a number of changes have been made to increase clarity, reflect developments in business practices over the past several years, and make additional improvements based on experiences with the existing regulations.

DATES: *Comment Date:* Written comments must be received by June 9, 2008.

Public Meeting Date: The public meeting will be held from 10 a.m. until 12 p.m. on May 2, 2008.

ADDRESSES: *Comments:* Written comments on the proposed regulations may be submitted electronically via the federal government E-Rulemaking Portal: www.regulations.gov. Written comments may be submitted by mail to: Nova Daly, Deputy Assistant Secretary, U.S. Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220. All comments and attachments submitted are part of the public record and subject to disclosure. Do not include any material in your comments that you consider to be confidential or inappropriate for public disclosure.

You may view copies of this proposed rule and any comments we receive about this proposal at www.regulations.gov. You may personally inspect and photocopy comments at the Department of the Treasury Library, Room 1428, Main Treasury Building, 1500 Pennsylvania Avenue, NW., Washington, DC. You can make an appointment to inspect comments by calling (202) 622-0990.

A link to written comments will be established on the following Web site: <http://www.treas.gov/offices/international-affairs/cfius/index.shtml>.

Public Meeting Address: The public meeting will be held in the Cash Room of the Treasury Building, at 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

FOR FURTHER INFORMATION CONTACT: For questions about this Proposed Rule or the Notice of Inquiry and Public Meeting, contact: Nova Daly, Deputy Assistant Secretary, U.S. Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220; telephone: (202) 622-2752; or e-mail: Nova.Daly@do.treas.gov, or Welby Leaman, Senior Advisor; telephone: (202) 622-0099; or e-mail: Welby.Leaman@do.treas.gov.

SUPPLEMENTARY INFORMATION:

I. Background With Regard to the Notice of Inquiry and Public Meeting

The President has directed the Secretary of the Treasury to issue regulations implementing section 721 of the Defense Production Act of 1950, as amended. On October 24, 2007, the Department of the Treasury convened a public meeting at the Department of the Treasury to solicit a wide array of views on several broad topics, including from businesses and professionals active in international mergers and acquisitions, in order to inform regulatory development. The purpose of this second notice of inquiry and public meeting is to continue to seek public input on these important matters,

particularly in light of the publication of the proposed regulations.

Treasury announces a public meeting to be held from ten until twelve o'clock (10 a.m.–12 p.m.) on May 2, 2008, in the Cash Room of the Treasury Building, at 1500 Pennsylvania Avenue, NW., Washington, DC 20220, to discuss issues associated with these proposed regulations. The meeting will be open to the public on a first-come, first-served basis. Space is limited. Due to security requirements and to facilitate entry to the meeting site, anyone wishing to attend must contact Ms. Barbara Vaughn at Barbara.Vaughn@do.treas.gov or (202) 622-1935 no later than April 25, 2008, in order to provide the necessary clearance information: Full name, business affiliation, date of birth, and Social Security number. For foreign nationals: Full name, business affiliation, date of birth, passport number, and the country where the passport was issued. When arriving for the meeting, attendees must present photo or passport identification and/or a U.S. Government building pass, if applicable, and should arrive at least one-half hour prior to the start time of the meeting. The public meeting is physically accessible to people with disabilities. Individuals requiring special services, such as sign language interpretation, are asked to indicate this to Ms. Vaughn.

II. Background

The Statute

The Foreign Investment and National Security Act of 2007, Public Law 110-49, 121 Stat. 246 (“FINSA”), which amends section 721 of the Defense Production Act of 1950 (50 U.S.C. App. § 2170 *et seq.*) (“DPA”), 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. S. Rep. 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”) 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, as CFIUS had existed only by executive order. 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 has designated additional members of CFIUS in Executive Order 11858, as amended by Executive Order 13456 on January 23, 2008. 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 requires that the role of the Secretary of Labor, with respect to mitigation agreements, be defined by regulations. FINSA further anticipates 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, and enforce mitigation agreements or conditions with parties to the transaction to address any threats to national security posed by the transaction.

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 a 30-day CFIUS review of covered transactions to determine the effect of the transactions on national security, and address any threat. Subject to certain exceptions (discussed below), FINSA requires an additional 45-day investigation 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) transactions that would result in foreign control over critical infrastructure and that CFIUS determines 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.

To ensure high-level accountability for CFIUS decisions, FINSA requires that a high-level official of the Department of the Treasury and at the lead agency certify to Congress that, for any covered transaction on which CFIUS has concluded action under section 721, CFIUS has determined that there are no unresolved national security concerns. The certification must be made at the Assistant Secretary level or above 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 it is the President who concludes action on a transaction under section 721, then he must announce his decision publicly.

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 national security. Similarly, under sections 721(b)(2)(B)(i)(III) and 721(b)(2)(D)(i), in cases where the transaction would result in foreign control over critical infrastructure that could impair national security, and such impairment has not 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 does present national security concerns, 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 impose conditions on the transaction to address such concerns. 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 provides that CFIUS may reopen its review of a transaction on which it previously concluded action under section 721 if a party to the transaction submitted false or misleading material information or omitted material information. CFIUS may also reopen a review where a party to a transaction intentionally and

materially breaches a mitigation agreement or condition, and there are no other remedies available to address the breach. Any decision by CFIUS to reopen a review must be made at the Under Secretary level or above. 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 must also 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.

III. Discussion of Proposed Regulations

Overview

The proposed CFIUS regulations retain many of the basic features of the existing regulations, which were adopted after the 1988 enactment of the Exon-Florio provision of the DPA. The system continues to be based on voluntary notices to CFIUS by parties to transactions, although CFIUS retains the authority to review a transaction of which it has not been voluntarily notified. The principal new development with regard to the procedures for filing notice to CFIUS is that the proposed regulations make explicit CFIUS's current practice of encouraging parties to contact and engage with CFIUS before formally filing. By consulting with the Staff Chairperson in advance of filing and, where appropriate, providing CFIUS with a draft notice or some portion of the information that may later be included in the notice, parties can help ensure that their notice, once submitted, will provide 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. In addition to these regulations, the Committee is preparing guidance on certain transactions, pursuant to section 721(b)(2)(E). The guidance is to include a discussion of, among other things, certain types of information the Committee considers useful for companies filing a notice to provide, based on past experience.

The provisions of Subpart D pertaining to the contents of a voluntary

notice have been expanded to reflect questions that CFIUS now routinely asks of notifying parties. By laying out these questions in the regulations, and 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 ensure that distribution of the personal identifier information is as limited as possible, as well as to facilitate deletion of this information from CFIUS's records once action under section 721 is concluded. In addition to the new information requirements, the proposed regulations, consistent with FINSA, also require each of the parties to a notified transaction to provide certifications regarding the accuracy and completeness of their notices, with regard 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 section 800.701(d) has not been received. Furthermore, material misstatements or omissions made by a party in connection with a section 721 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 proposed regulations provide for penalties for breach of section 721 or of mitigation agreements or conditions. The proposed regulations also provide 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 appeal the imposition of the penalties to CFIUS.

Certain changes to the existing regulations have been made, including revisions to or deletions of existing examples or provisions, to take into account FINSA and other applicable law.

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 which could result in foreign control of any person engaged in interstate commerce in the United States.

These proposed regulations further clarify the meaning of the term "covered transaction" (see § 800.206) 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 section 800.224, and implements the statutory requirement that a covered transaction be one that involves a "merger, acquisition, or takeover" that is proposed or consummated. This definition continues to exclude greenfield investment, 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. 110-49, section 2, adding § 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 the existence of 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 entail the acquisition of control of an entity operating in the United States. Indeed, Congress made clear in the 1988 Conference Report that accompanied the original Exon-Florio provision that "the 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. Rep. No. 100-576 at 926.) Nothing in FINSA

or its legislative history suggests any departure from this focus on control. Indeed, FINSA introduces the new term “covered transaction,” which, as discussed above, incorporates the concept of control in its definition.

The proposed regulations adopt the long-standing approach of defining “control” in functional terms as the ability to exercise certain powers over important matters affecting a business. 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 * * * important matters affecting an entity[.]” (See §§800.203(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 numbers 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 a company. Second, echoing the congressional views expressed in the conference report accompanying the original legislation in 1988, the focus of the statute and therefore 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.

In light of the significance of the concept of control to this regulatory framework, control appears in several different places throughout the regulations, both in those regulations 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.” (See §§ 800.216 and 800.214, respectively.) A foreign person is any foreign national (*i.e.*, a natural person who is a citizen of

another country), foreign government, or foreign entity, or any “entity over which *control* is exercised or exercisable by a foreign national, foreign government or foreign entity.” A foreign government-controlled transaction is one 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.” Similarly, “covered transaction” is defined in these proposed regulations as “any transaction that is proposed or pending after the effective date [*i.e.*, August 23, 1988] by or with any foreign person, which could result in *control* of any person engaged in interstate commerce in the United States.”

Conversely, transactions that will not result in foreign control over a person engaged in interstate commerce in the United States 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 10 percent or less of the voting interest in the entity and it holds that interest “solely for the purpose of investment,” as that term is defined in § 800.223. (See § 800.302(c).) This rule would not apply if only the first prong is satisfied. For example, a transaction involving a foreign person with an interest of nine percent in a U.S. business who has bargained for rights to determine, direct, take, reach, or cause decisions regarding important matters affecting that business, would be a covered transaction. Thus, the regulations do not provide, and never have provided, an exemption based solely on whether an investment is 10 percent or less in a U.S. business.

Section 800.203 lays out the basic definition of “control,” provides an exemplary 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 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 on the application of this definition.

U.S. Business

Section 800.227 defines “U.S. business,” which is included in the 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 will consider whether the entity (which is defined to include any branch, partnership, group or subgroup, association, estate, trust, corporation or division of a corporation, organization, assets operated by any one of the foregoing as a business undertaking in a particular location or for particular products or services, even though those assets may not be organized as a separate legal entity, or government) that is the subject of the acquisition is engaged in interstate commerce.

Foreign Person

The term “foreign person” is defined in section 800.216. The only significant revision that the proposed regulations make to the definition of foreign person is to introduce the new concept of a “foreign entity,” further discussed in the section-by-section analysis below (see § 800.212), and to specify that an entity that qualifies as 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 section 800.203 to “exercisable” power 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, 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 forbearing from, or delaying, the exercise of control.

Section 800.302(c) provides a special, but very limited, qualification to the application of the general control principle. Pursuant to section 800.302(c), a foreign person does not control an entity if it satisfies a two-pronged test: (1) It holds 10 percent or less of the voting interest in the entity, and (2) its interest is held solely for the purpose of investment. Section 800.223 lays out the test for whether an interest is held solely for the purpose of investment. Under that test, an interest would not be held solely for the purpose of investment if the foreign person has the capability and an intention to control the entity, possesses or develops any purpose other than investment, or acts in a way that is inconsistent with an intent to hold the interest solely for the purpose of 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(b) and 800.302(d) further illustrate the extent to which 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 covered transactions. Section 800.301(d) addresses joint ventures, which may be covered only if they involve the contribution of a U.S. business.

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

Section-by-Section Discussion of Proposed Changes

Section 800.201. The term *certification* has been added as part of the implementation of a provision in FINSA stating that parties that file voluntary notices must certify the accuracy and completeness of their filings with CFIUS. This new requirement applies both to notices and to any follow-up information provided to CFIUS. The Staff Chairperson may reject at any time during a review or investigation a voluntary notice that does not include certifications that comply with the requirements of these regulations. An inaccurate or incomplete certification may give rise, in certain circumstances, to the imposition of penalties under section 800.801(a) and other applicable laws.

Section 800.203. The definition of *control* has been clarified and refined to remove unnecessary wording, but is substantively similar to the prior definition. The remaining changes are generally intended to clarify that control can be exercised in a number of ways, both affirmatively and, in some cases, negatively. At the same time, the definition recognizes that certain types of negative rights that are intended only to protect the investment-backed expectations of minority shareholders, and that do not affect strategic decisions on business policy or day-to-day management of an entity or other important matters affecting the entity, do not constitute control. The focus of CFIUS's analysis of whether a particular transaction could result in the acquisition of foreign control is on the ability of a foreign person to determine, direct, or decide important matters

affecting a U.S. business, including to determine, direct, take, reach, or cause decisions regarding important matters affecting the U.S. business. Numerous examples have been added to illustrate the operation of these principles.

Section 800.207. In defining *critical infrastructure*, the proposed regulations state that a transaction involves critical infrastructure where the incapacity or destruction of the particular assets at issue in the particular transaction under review would have a debilitating impact on national security.

Section 800.208. FINSA requires that regulations implementing section 721 include a definition of critical technologies. The proposed regulations define critical technologies with reference to existing regulatory regimes that deal with the trade or handling of sensitive goods, technology, and services. Section 800.402(c)(4) requires voluntary notices to identify, among other things, any critical technologies produced or traded by the U.S. business that is the subject of the covered transaction.

Section 800.209. This section defines *duly authorized designee*, which the definition of *certification* in section 800.201 uses to identify additional persons besides the chief executive officer who may complete the certifications required by the regulations. This definition makes clear that certifications must come from specified knowledgeable, high-level individuals who have the authority to bind an organization. CFIUS will not accept a certification signed only by outside counsel.

Section 800.211. The term *entity* encompasses the range of persons, other than natural persons, that can comprise a "person" for purposes of section 721. An entity need not have a distinct legal personality, as the term includes branches, partnerships, groups or sub-groups, associations, estates, trusts, corporations or divisions of corporations, organizations, governments, or assets operated by any one of the foregoing as a business undertaking in a particular location or for particular products or services, regardless of whether they are organized as a legal matter. Accordingly, an operating unit or sub-unit of a business—particularly one that includes the business' production facilities, customer or vendor relationships, technology, staff, know-how or other tangible or intangible assets—may be an entity, even if that operating unit or sub-unit is not legally organized.

Section 800.212. A new term, *foreign entity*, has been added to refer to entities organized outside the United States that

CFIUS considers to be foreign persons because of their substantial foreign ownership, even though ownership is widely dispersed among different foreign persons and no single foreign person may control the entity.

Section 800.216. The definition of *foreign person* has been expanded to include "foreign entity." In addition, a number of examples have been added to provide further guidance.

Section 800.218. The definition of *lead agency* specifies, pursuant to FINSA and Executive Order 11858, as amended by Executive Order 13456, that the Department of the Treasury may designate an agency as being responsible for all or any portion of a matter under section 721, including the review, investigation, and negotiation or monitoring of mitigation agreements and conditions. The Department of the Treasury may appoint more than one lead agency for a single transaction.

Section 800.219. The definition of the term *parent* includes immediate, intermediate, and ultimate parents of an entity.

Section 800.224. The term *transaction* replaces the term *acquisition* in order to harmonize the terminology of the regulations with that of the statute. In addition to general clarifications to the definition, the proposed regulations add certain joint ventures and long-term leases as types of transactions. The current regulations already provide that joint ventures involving the contribution of a U.S. person could be covered transactions, though joint ventures are not actually listed in the definition of *acquisition*. Long-term leases are covered when, because of the terms of the lease and the extent of the lessee's authority over the U.S. business, the lease is effectively a transaction for purposes of section 721. A "transaction" is only a "covered transaction" if the other elements of the definition of "covered transaction" are also present.

Section 800.227. The term *U.S. business* replaces and expands upon the term *United States person*, in the manner and for the reasons described above.

Section 800.301. This section is revised to further clarify the types of transactions that are covered transactions under section 721. The principal substantive change in this section relates to joint ventures. The proposed regulations revise section 800.301(d) to harmonize the control standard for joint ventures with the standard used for all other transactions. If the joint venture would result in "control" of a U.S. business by a foreign person under the definition of "control"

in section 800.203, then the joint venture is a covered transaction.

Section 800.302. Paragraph (b) clarifies factors that CFIUS will take into account in determining whether the acquisition of convertible instruments, rather than the conversion of such instruments, would be the transaction that is potentially a covered transaction. The time at which control is conferred, whether at acquisition or conversion, will depend, among certain other factors, on the extent to which the acquirer can control the timing of the conversion. In either case, control will depend on what rights the convertible interests, once converted, will convey to their holder.

Paragraph (c) has been revised and an example added to clarify that the 10 percent threshold is determinative only if the foreign person's acquisition is solely for the purpose of investment, as that term is defined in section 800.223. If the acquisition is not solely for the purpose of investment—which may be reflected by the foreign person's actions, its negotiation of special rights, or other factors—then the rule that an ownership interest of 10 percent or less does not confer control does not apply.

Paragraph (d) combines two previous provisions that addressed the “U.S. business” element of the “covered transaction” definition. In particular, this paragraph elaborates upon the provision in the “entity” definition that an entity, and therefore a U.S. business, may involve the acquisition of assets of an entity, provided that those assets are bound together in a sufficiently cohesive relationship such that they themselves could be readily operated as a separate, stand-alone business.

Section 800.401. The procedures for voluntary notice have been expanded to make explicit the opportunity for interaction between CFIUS and the parties to a transaction before a notice is formally filed. After two decades of experience implementing section 721, CFIUS believes that the review process is most effective and efficient when a notice provides CFIUS with full information regarding a transaction, rather than requiring CFIUS to ask for additional information after the notice is filed. This experience is the reason for the additions to this section and section 800.402, which lays out the required contents of voluntary notice. In particular, with regard to the procedures for notice, CFIUS encourages parties to consult with CFIUS prior to filing a notice. Information provided to CFIUS as part of a pre-notice consultation becomes part of the formal notice and is accorded the confidentiality protections of section 721(c). This gives CFIUS an

opportunity to understand the transaction, and to suggest information that the parties should include in their notice, thereby helping CFIUS resolve any national security issues as efficiently as possible. These new provisions also make clear the circumstances under which CFIUS may contact parties that have not yet filed a notice, and request that they provide information to help CFIUS determine whether a filing may be appropriate.

Section 800.402. This section, which describes the information that must be included in a voluntary notice to CFIUS, is expanded to require additional data that CFIUS routinely has requested of parties. Information submitted to CFIUS in connection with a voluntary notice is entitled to confidentiality under section 800.702, and is exempt from disclosure under 5 U.S.C. 552.

Paragraph (a) has been revised to make clear that a voluntary notice will not be considered complete if any required information is missing. However, in the case of a hostile takeover where a voluntary notice is filed by fewer than all of the parties to a transaction, paragraph (b) provides that CFIUS may accept an otherwise complete notice that does not provide complete information on each non-notifying party, so long as it provides the portion of that information that is known or reasonably available to the notifying parties. (See also § 800.403(b), providing that the Staff Chairperson may require the parties to provide certain information pertaining to the transaction within seven days of the Staff Chairperson's request for such information.)

Paragraph (c) specifies the details relating to the transaction that must be described in a voluntary notice. While the regulations previously required parties to submit many of these details in voluntary notices, some specified in paragraph (c) are newly required. These include, for example, additional information regarding ultimate and intermediate parents of the foreign person making the acquisition; transaction value information; identification of other persons with a role in the transactions; additional information regarding contracts with and goods supplied directly or indirectly to the government; additional product information; identification of any special government rights over the foreign person making the acquisition; description of any agreements among foreign persons to act in concert with respect to parties to the transaction; and personal identifier information for certain key personnel. Subparagraph (c)(ii) requires that the notice include

certain export-control related information, including the identification of emergent technologies that may be designated or determined to be covered by the United States Munitions List, which is set forth in the International Traffic in Arms Regulations (22 CFR parts 120 through 130), and therefore be critical technologies, as defined in section 800.208(a).

Other paragraphs in this section contain new informational requirements for parties filing voluntary notices. These include paragraph (j), which requires an organization chart showing the relationship between the foreign person making the acquisition and its parents, affiliates, and subsidiaries; and paragraph (k), which requires the parties to indicate whether either party has been involved previously in a transaction notified to CFIUS, and whether either party is a party to a mitigation agreement entered into under section 721. Paragraph (j) also requires the parties to provide a full statement of their view as to whether (1) the acquirer is controlled by a foreign government, (2) the acquirer is a foreign person, and (3) the transaction will result in foreign control of a U.S. person.

Paragraph (i), which requires the provision of the purchase agreement or other similar documents establishing the terms of the agreement, has been revised to reflect that such documents must reflect terms as to which there is an actual agreement between the parties, particularly with respect to matters relating to post-closing control and governance. CFIUS reserves the right to reject a voluntary notice in cases in which the deal terms regarding such matters are undecided.

Section 800.403. It is CFIUS's expectation that, in light of the added questions pertaining to the contents of voluntary notice (see § 800.402), the need to request follow-up information from the parties will be reduced. However, in cases where CFIUS requests follow-up information, such information must be provided promptly. This section makes clear that a party's failure to provide promptly any follow-up information requested by CFIUS is grounds for rejecting the notice. If such information cannot be provided within two business days of CFIUS's request, the parties should request an extension of time in writing.

Section 800.501. A new paragraph (c) has been added to this section to clarify the Chairperson's role in overseeing the secretariat function for CFIUS. Parties contemplating filing notices or that have filed notices should therefore work with the Staff Chairperson, who may arrange

contacts or meetings with other member agencies as appropriate.

Section 800.502. Provisions on commencing review (which were previously in section 800.404 of subpart D) have been consolidated with provisions regarding the beginning of the 30-day review period in section 800.502. The proposed regulations also provide that the 30-day review period will commence on the next business day after the Staff Chairperson has determined that the notice is complete and has disseminated the notice to all CFIUS members, which the Staff Chairperson is required to do promptly.

Section 800.503. This section now specifies the triggers for commencing an investigation, which are drawn from FINSA and Executive Order 11858, as amended.

Section 800.506. Executive Order 11858, as amended, specifies the circumstances under which CFIUS will forward a transaction to the President for a final decision. This section repeats these requirements. In all other cases, where CFIUS concludes deliberative action without referring the matter to the President, the Department of the Treasury will send written advice to the parties of the determination to conclude action under section 721. When the President makes the final decision on a transaction, FINSA requires that that decision be announced publicly.

Section 800.507. As under the prior regulations, parties may request that their notices be withdrawn from CFIUS consideration at any time prior to the conclusion of all deliberative action under section 721. However, section 800.507 incorporates the new procedures that FINSA requires CFIUS to follow with regard to withdrawn transactions, including tracking of withdrawn transactions and the establishment of interim protections, as appropriate, to address national security concerns.

Section 800.508. FINSA requires that the regulations provide for an appropriate role for the Secretary of Labor with respect to mitigation agreements. Under the proposed regulations, the Secretary of Labor will identify for CFIUS any risk mitigation provisions proposed to or by CFIUS that would violate U.S. labor laws.

Section 800.601. This section has been substantially shortened to delete provisions pertaining to the President's authority that are not necessary to include in regulation because they are already addressed in FINSA.

Section 800.701. FINSA includes an important provision that requires each notifying party to certify in writing that the information it provides to CFIUS is

complete and accurate as it relates to itself and the transaction. This requirement pertains both to the information in the voluntary notice (*see* § 800.402(k)) and to follow-up information. CFIUS may consider a party's failure to provide a certification with regard to follow-up information to be a material omission. (*See* § 800.601(e).)

Section 800.702. The confidentiality protections have been clarified to emphasize that they apply to information provided to CFIUS during the course of a withdrawal or with regard to a notice that is rejected under section 800.403. (As noted in § 800.401(f), information provided during the course of pre-notice consultations is also protected by the confidentiality provisions of section 721(c) and this section of the regulations.) In addition, paragraph (c) makes clear that the Chairperson's public statements may reflect information that the parties to the transaction have already themselves publicly disclosed.

Section 800.801. This new section implements the FINSA requirement that the regulations provide for the imposition of civil penalties for any violation of section 721, including a violation of any mitigation agreement entered into or conditions subsequent imposed pursuant to section 721(l). This section extends civil monetary penalties to transactions entered into on or after the effective date of FINSA, October 24, 2007. In addition, paragraph (c) authorizes 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.

Executive Order 12866

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

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking (in particular, sections 800.401 and 800.402) have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to

Nova Daly, Deputy Assistant Secretary, U.S. Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220. Comments on the collection of information should be received by June 23, 2008.

In accordance with 5 CFR 1320.8(d)(1), the Department is soliciting comments from members of the public concerning this collection of information to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology.

The burden of the information collections in this proposed rule is estimated as follows:

Estimated total annual reporting and/or recordkeeping burden: 1200 hours.

Estimated average annual burden per respondent: 100 hours.

Estimated number of respondents: 120 per year.

Estimated annual frequency of responses: Not applicable.

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. 102–1028 and H.R. Rep. 102–208(II)). 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 mechanism for publication and public participation is sufficiently different to distinguish the DPA procedures from a rule that requires a general notice of proposed rulemaking. Moreover, in explaining the DPA amendments in 1992, Congress expressed its concerns about the potential threat to our national security preparedness posed by foreign domination of key dual use technologies. 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 Regulatory Flexibility Act, 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 less than ten 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. Based on the number of filings in 2007 and the number filed thus far in 2008, it is estimated that an average of 120 notices can be expected annually over the next few years. Of these notices, it is unlikely that more than 12 will be subject to protracted investigation or a mitigation agreement. As such, a substantial number of entities are not impacted by these rules regardless of their size. We also note that these proposed 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 United States, Investigations, National defense, Reporting and recordkeeping requirements.

Accordingly, under the authority at 50 U.S.C. Appendix 2170(h), for the reasons stated in the preamble, the Department of the Treasury proposes to amend 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 laws.
 - 800.103 Applicability.
 - 800.104 Transactions or devices for avoidance.

Subpart B—Definitions

- 800.201 Certification.
- 800.202 Committee; Chairperson of the Committee; Staff Chairperson.
- 800.203 Control.
- 800.204 Conversion.
- 800.205 Convertible voting instrument.
- 800.206 Covered transaction.
- 800.207 Critical infrastructure.
- 800.208 Critical technologies.
- 800.209 Duly authorized designee.
- 800.210 Effective date.
- 800.211 Entity.
- 800.212 Foreign entity.
- 800.213 Foreign government.
- 800.214 Foreign government-controlled transaction.

- 800.215 Foreign national.
- 800.216 Foreign person.
- 800.217 Hold.
- 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 investment.
- 800.224 Transaction.
- 800.225 United States.
- 800.226 U.S. national.
- 800.227 U.S. business.
- 800.228 Voting interests.

Subpart C—Coverage

- 800.301 Transactions that are covered transactions.
- 800.302 Transactions that are not covered transactions.
- 800.303 Lending transactions.

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.

Subpart F—Presidential 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.
- Appendix to Part 800—Preamble to Regulations on Mergers, Acquisitions, and Takeovers by Foreign Persons (Published [date to be determined], 2008.)

Authority: Section 721 of Pub. L. 100–418, 102 Stat. 1107, made permanent law by section 8 of Pub. L. 102–99, 105 Stat. 487 (50 U.S.C. App. 2170) and amended by section 837 of the National Defense Authorization Act for Fiscal Year 1993, Pub. L. 102–484, 106 Stat. 2315, 2463; E.O. 12661, 54 FR 779, 3 CFR, 1988 Comp., p. 618, and Pub. L. 110–49, 121 Stat. 246 (the Foreign Investment and National Security Act of 2007).

Subpart A—General

§ 800.101 Scope.

The regulations in this part implement section 721 of title VII of the

Defense Production Act of 1950, as amended, hereinafter referred to as "section 721" (see § 800.222). 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 (as defined in these regulations at § 800.227) might take action that threatens to impair the national security, and provisions of law other than section 721 and the International Emergency Economic Powers Act, do not, in the President's judgment, 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 laws.

Nothing in this part shall be construed to alter or affect any existing power, process, regulation, investigation, enforcement measure, or review provided by any other provision of law.

§ 800.103 Applicability.

Section 721 and the regulations in this part apply to transactions proposed or pending on or after the effective date (as defined in § 800.210).

§ 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.

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 Certification.

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:

(a) 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

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

(1) The transaction, and

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

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

§ 800.202 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.

§ 800.203 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;

(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 additional shares to prevent the dilution of an investor's *pro rata* interest in an entity in the event that the entity issues additional interests; or

(5) 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 (4) 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.

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, is acquiring a nine percent interest in the shares of Corporation B, a U.S. business. As part of the transaction, Corporation A is also acquiring 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 an 11 percent interest in the shares of Corporation B, a U.S. business. Under a minority shareholder protection agreement, Corporation A receives the right to participate *pro rata* in future share issuances to prevent dilution of its percentage interest. Corporation A receives no other positive or negative rights with respect to Corporation B. Assuming no other relevant facts, Corporation A does not control Corporation B.

Note to § 800.203: See § 800.302(c) regarding the Committee's treatment of cases where a foreign person acquires 10 percent or less of the outstanding voting interests in a U.S. business solely for the purpose of investment.

§ 800.204 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.

§ 800.205 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.

§ 800.206 Covered transaction.

The term *covered transaction* means any transaction that is proposed or

pending after the effective date by or with any foreign person, which could result in control of a U.S. business by a foreign person.

§ 800.207 Critical infrastructure.

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

§ 800.208 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 Energy Activities regulations (10 CFR part 810), and nuclear facilities, equipment, and material specified in the Export and Import of Nuclear Equipment and Materials regulations (10 CFR part 110); and

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

§ 800.209 Duly authorized designee.

(a) The term *duly authorized designee* means:

- (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 an entity lacking officers, directors, or partners, any individual within the organization exercising similar executive functions; and

- (4) In the case of an individual, such individual.

(b) In each case described in paragraphs (a)(1) through (a)(4) of this

section, such designee must possess actual authority to make the relevant certification on behalf of the person filing a notice or information.

§ 800.210 Effective date.

The term *effective date* means August 23, 1988, the date section 721 became effective.

§ 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); assets operated by any one of the foregoing as a business undertaking in a particular location or for particular products or services, even though those assets may not be organized as a separate legal entity; and any government (including a foreign national or subnational government, the United States Government, a subnational government within the United States, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government sponsored agency).

§ 800.212 Foreign entity.

The term *foreign entity* means:

- (a) A public company organized under the laws of a foreign state whose equity securities are primarily traded on one or more foreign exchanges; or

- (b) Any other entity organized under the laws of a foreign state in which foreign nationals hold, directly or indirectly, at least 50 percent of the outstanding ownership interest in an entity.

§ 800.213 Foreign government.

The term *foreign government* means any government or body exercising governmental functions, other than the government of the United States, a State of the United States, or a political subdivision of the United States or a State. The term includes, but is not limited to, national and subnational governments, including their respective departments, agencies, and instrumentalities, as well as individuals acting as non-elected heads of state with governmental responsibilities.

§ 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 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, 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. Through a branch, Corporation A engages in interstate commerce in the United States. Corporation A (including its branch) is a foreign person. The branch also is a U.S. business.

Example 5. Corporation A is a corporation organized under the laws of a foreign state. Forty-five percent of the voting interests in Corporation A are owned in equal shares by numerous unrelated foreign investors, none of whom has control. The foreign investors have no formal or informal arrangement, with regard to Corporation A, to act in concert with any other holder of voting interests in Corporation A. The remainder of the voting interests in Corporation A is held by U.S. investors. Assuming no other relevant facts, Corporation A is not a foreign person.

Example 6. Same facts as Example 5, except that foreign investors own 55 percent of the voting interests in Corporation A. Assuming no other relevant facts, Corporation A is a foreign entity and, therefore, a foreign person.

§ 800.217 Hold.

The terms *hold(s)* and *holding* mean legal or beneficial ownership, whether direct or indirect, 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 a lead agency, including all or a portion of a review, investigation, or negotiation or monitoring of mitigation agreements or conditions.

§ 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.*, an 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 securities of Corporations R and S. Corporation R holds 40 percent of the voting securities of Corporation X; Corporation S holds 50 percent of the voting securities of Corporation Y, which in turn holds 50 percent of the voting securities of 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 Corporations Y and Z, and Corporation Y is a parent of Corporation Z.

Example 2. Corporation A holds warrants, exercisable at its sole discretion, 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 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, as added by section 5021 of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, 102 Stat. 1107, and as amended by Pub. L. 102-484, 106 Stat. 2463, and the Foreign Investment and National Security Act of 2007, Public Law 110-49, 121 Stat. 246.

§ 800.223 Solely for the purpose of investment.

Ownership interests are held or acquired "solely for the purpose of investment" if the person holding or acquiring such interests has no plans or intention of exercising control, does not possess or develop any purpose other than investment, and does not take any action inconsistent with acquiring or holding such interests solely for the purpose of investment. (See § 800.302(c).)

§ 800.224 Transaction.

The term *transaction* means a proposed or consummated 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.

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. However, Corporation B 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 section 2(a) of the Outer Continental Shelf Lands Act (43 U.S.C. 1131(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. 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.

§ 800.227 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. Each is also a foreign person for purposes of acquiring 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.

§ 800.228 Voting interests.

The term *voting interests* means any interests in an entity that entitle the owner or holder thereof 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 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 retains 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 in this context, by another foreign person, Corporation Z.

(c) A transaction that results or could result in control by a foreign person of assets that constitute a U.S. business. (See § 800.302(d).)

Example 1. Corporation A, a foreign person, proposes to buy a branch office in the United States of Corporation X, which is a foreign person. Corporation X is a U.S. business to the extent of its branch office in the United States. 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 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 of the parties contributes a U.S. business and a foreign person gains control over 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 § 800.203(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 10 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 10 percent of the stock of Corporation B. Assuming no other relevant facts, the acquisition of additional shares is not a covered transaction.

(b) An acquisition of convertible voting instruments that does not involve control. In determining whether an acquisition of convertible voting instruments may involve control, consideration will be given to factors such as whether the date of conversion has been agreed upon by the parties or is within the power of the acquiring entity to determine, and whether the amount of voting interests that would be acquired upon conversion can be reasonably determined at the time of the acquisition of the instruments.

Example 1. Corporation A, a foreign person, buys debentures, options and warrants of Corporation X, a U.S. business. By their terms, the debentures are convertible into common stock, and the options and warrants can be exercised for common stock, only upon the occurrence of an event the timing of which is not in the control of the holder of the stock. Assuming no other relevant facts, the acquisition of those debentures, options and warrants is not a covered transaction. The conversion of those debentures into, or the exchange of those options and warrants for, common stock

could be a covered transaction, depending on what percentage of Corporation X's voting securities Corporation A receives and what powers those securities confer on Corporation A pursuant to § 800.203.

Example 2. Same facts as Example 1, except that the securities at issue are convertible or exercisable at the sole discretion of Corporation A after one year, and if converted, would represent a 50 percent interest in Corporation X. The acquisition of these debentures, options and warrants by Corporation A is a covered transaction.

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

Example 1. In an open market purchase solely for the purpose of 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 investment, and therefore constitutes 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 11 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 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.

(d) An acquisition of assets or any part of an entity in the United States that does 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 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.

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

(f) 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.

(g) An acquisition of a security interest, but not control, in the voting securities or assets of a U.S. business at the time a loan or other financing is extended. (See § 800.303.)

§ 800.303 Lending transactions.

(a) The extension of a loan or similar financing by a foreign person to a U.S. business, accompanied by the creation in the foreign person of a secured interest in securities or other assets of the U.S. business, does not, by itself, constitute a covered transaction. However, if control over a U.S. business is acquired by the foreign person at the time the loan or other financing is extended, then the transaction is a covered transaction.

(1) The Committee will accept notices concerning transactions that involve loans or financing by foreign persons 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.

(2) For purposes of this section, in determining whether a transaction of the type described in paragraph (1) that involves a foreign person that makes loans in the ordinary course of business is a covered transaction, the Committee will take into account whether the foreign person has made any arrangements to transfer management decisions or day-to-day control over the U.S. business to U.S. nationals.

(b) Control will not be deemed to be acquired in cases involving an acquisition of voting interests or assets of a U.S. business by a foreign person upon default, or other condition, involving a loan or other financing, 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 § 800.203 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 other person. Assuming no other relevant facts, this lending arrangement does not 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.

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, NW., Washington, DC 20220, that includes, in English only, the information set out in § 800.402, including the certification required under paragraph (l) 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 Web site, at <http://www.treas.gov/offices/international-affairs/cfius/index.shtml> 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 raises 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, 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. In the event that an agency notice is filed, the Staff Chairperson will promptly furnish the parties to the transaction with written advice of such notice. 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, requests such an agency notice.

(d) No communications other than those described in paragraphs (a) and (c) of this section shall constitute 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, and shall be considered part of any notice filed under section 721(b).

(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:

(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 interests, or otherwise;

(iii) The name, United States address (if any), Web site 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, Web site 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, Web site 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) The price paid for the interest in the U.S. business in U.S. dollars, or, where the price does not accurately reflect the full value provided for the interest in the U.S. business, a statement of such value and a description of how it was derived; 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 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 that is also a subject of the transaction:

(i) Their respective business activities, as, for example, set forth in annual reports, and the product or service lines of each, including an estimate of U.S. market share for primary product or service lines and an explanation of how that estimate was derived, and a list of direct competitors for those primary product or service lines;

(ii) The street address (or mailing address, if different) within the United States and Web site 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) currently in effect, or that was in effect within the past three years, with any agency of the United States Government, 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;

(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) of a particular product or service for 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) regulation (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 its plan to ensure that any new entity formed at the completion of the notified transaction complies with the DPAS regulation;

(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 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, including:

(A) Defense articles, services, and technical data for which commodity jurisdiction determinations (22 CFR 120.4) are pending; and

(B) Defense articles, services, and technical data that have not been, but may be, designated or determined to be covered by the USML, 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 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 (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).

(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. Provide

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;

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

(A) Has or controls ownership interests or convertible voting instruments of the acquiring foreign person or any parent of the acquiring foreign person, and if so, the nature and percentage amount of any such instruments;

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

(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, describe their source (for example, a "golden share," shareholders agreement, contract, statute, or regulation) and the mechanics of their operation;

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

(vi) Biographical information of members of the board of directors,

senior management, and the ultimate beneficial owner of five percent or more of the following:

(A) The foreign person engaged in the transaction;

(B) The immediate parent of the foreign person engaged in the transaction; and

(C) The ultimate parent of the foreign person engaged in the transaction.

(vii) 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, with regard to current members of the board or boards of directors (including boards comprised partially or entirely of external members) and senior executives of the immediate acquirer and its ultimate parent, and any other entities in the same chain of ownership that could exercise control over the U.S. business being acquired, and any natural person having an ownership interest of five percent or more in the ultimate parent of the acquirer:

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

(B) All other names and aliases used;

(C) Business address;

(D) Country and city of residence;

(E) Date of birth;

(F) Place of birth;

(G) U.S. Social Security number (where applicable);

(H) National identity number, including nationality, date and place of issuance and expiration date (where applicable);

(I) U.S. and 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

(J) Dates and nature of foreign government and foreign military service (where applicable);

(viii) The following "business identifier information" for parents of the immediate acquirer, including the ultimate parent, and any other entities in the same chain of ownership that could exercise control over the U.S. business that is the subject of the transaction:

(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;

(D) Employer identification number or other domestic tax or corporate identification number; and

(E) For each branch, the information required in paragraphs (c)(6)(viii)(B) through (D) of this section, if applicable.

(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 441s, and enters into discussions with the Defense Investigative 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, 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 acquisitions of some but not all of the assets of a person, § 800.402(c) requires submission of the specified information with respect to the assets in the United States 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) A full statement of the view of the person as to whether:

(A) It is a foreign person;

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

(C) The transaction has resulted or will 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 was ever 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 § 800.201. A sample certification may be found on the Committee's section of the Department of the Treasury Web site, 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 in writing 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 in writing 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 two 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 in writing any voluntary notice before the conclusion of a review or investigation and so inform the parties promptly in writing, if the party 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(d)(3)(iv) and (v) 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 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 company that is owned and controlled by U.S. nationals, 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's approval would be required before Company X can pursue certain lines of business. This 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 (50 U.S.C. 1701–1706), 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 investigated transaction 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 § 800.601(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 its receipt by the Staff Chairperson, the Staff Chairperson shall send written advice of an agency 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 accepted notice, and any subsequent information filed by the parties.

§ 800.503 Determination of whether to undertake an investigation.

(a) After a review of a covered transaction under § 800.502, the Committee shall undertake an investigation of any 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 (or the Deputy Secretary of the Treasury) and the head of any lead agency (or his or her delegee at the Deputy Secretary or equivalent level) designated by the Chairperson determine at the conclusion of the review that such 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 upon completion or termination of an investigation, 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 shall submit a report of the Committee to the President setting forth the differing views and presenting the issues for decision.

(d) 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 upon completion or termination of an investigation, 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 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, at any time prior to conclusion of all action under section 721, request in writing 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 send written advice of the Committee's decision to the parties.

(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 provide written advice to the parties to the transaction 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 provide written advice of that time frame to the parties.

(d) Written notice of a covered transaction 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, the Secretary of Labor shall identify for the Committee any risk mitigation provisions proposed to or by the Committee that would violate U.S. labor laws.

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 the effective date. Such authority shall not be exercised if:

(1) The Committee, through its Staff Chairperson, has in writing advised a party (or the parties) 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 received written advice 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) Notwithstanding any other provision in the regulations in this part, and in addition to such other penalties as may be provided by law, in any case where one or more parties to a covered transaction submits false or misleading material information to the Committee, or omits material information, including relevant information that is supplied in response to provisions of § 800.402; that is requested specifically by the President or the Committee in the course of a review, investigation, or Presidential determination; or that is actually provided by a party:

(1) The Committee may, consistent with sections 721(b)(1)(D)(ii) and (b)(1)(F), reopen its review of the transaction and exercise all its original authorities under section 721 with respect to the transaction, including revising any recommendation or recommendations submitted to the President; and

(2) The President may take action under section 721 for such time as the President deems appropriate with respect to the covered transaction, and may revise actions earlier taken.

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

(d) Divestment or other relief under section 721 shall not be available with respect to transactions that were completed prior to the effective date.

Subpart G—Provision and Handling of Information

§ 800.701 Obligation of parties to provide information.

(a) Parties to a covered 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 covered 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 § 800.201. A sample certification may be found at the Committee's section of the Department of the Treasury Web site 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 § 800.201.) A sample certification may be found at the Committee's section of the Department of the Treasury Web site 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 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)(B) and (g)(2)(A) of section 721.

(b) In any case where a request to withdraw notice is granted under § 800.507, or where notice has been rejected under § 800.403, § 800.702 shall continue to apply with respect to information and documentary material filed with the Committee.

(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.

(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, intentionally or through gross negligence, submits a material misstatement or omission in a notice or makes a false certification under § 800.402(k) 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, intentionally or through gross negligence, violates a material agreement or condition entered or agreed with 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. Any penalty assessed under this subsection 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 § 800.601(b).

(c) A mitigation agreement entered into under section 721(l) 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 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 paragraphs (a) or (b) of this section must be made by the Committee. 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 paragraphs (a) or (b) of this section, the penalized party may, within 15 days of receipt of the notice of the penalty, submit a written statement of appeal to the Staff Chairperson, including a defense, justification, or explanation for the penalized conduct. The Committee will review the appeal and issue a final decision within 15 days of receipt of the appeal.

(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.

Appendix to Part 800—Preamble to Regulations on Mergers, Acquisition, and Takeovers by Foreign Persons

(Published [date to be determined], 2008.)

[Text of Appendix will appear in the final rule.]

Clay Lowery,

Assistant Secretary (International Affairs).

[FR Doc. 08–1172 Filed 4–21–08; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–0096]

RIN 1625–AA00

Safety Zone; Festival of Sail 2008 Ship's Parade; San Diego Harbor, San Diego, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes a safety zone, on the navigable waters of San Diego Bay in support of the Festival of Sail 2008 Ship's Parade. This temporary safety zone is necessary to

provide for the safety of the participants, crew, spectators, participating vessels, and other vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

DATES: Comments and related material must reach the Coast Guard on or before May 23, 2008.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG–2008–0096 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Online:* <http://www.regulations.gov>.

(2) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(3) *Hand delivery:* Room W12–140 on the Ground Floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(4) *Fax:* 202–493–2251.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call Petty Officer Kristen Beer, USCG, Waterways Management, U.S. Coast Guard Sector San Diego at (619) 278–7233. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to <http://www.regulations.gov> and will include any personal information you have provided. We have an agreement with the Department of Transportation (DOT) to use the Docket Management Facility. Please see DOT's "Privacy Act" paragraph below.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2008–0096), indicate the specific section of this document to which each comment