

June 9, 2008

Submitted Electronically via [www.regulations.gov](http://www.regulations.gov)

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

**Re: Comment Letter on Proposed Regulations Pertaining to Mergers, Acquisitions, and Takeovers  
by Foreign Persons (RIN 1505-AB88)**

Dear Mr. Daly,

The Securities Industry and Financial Markets Association (“SIFMA”) welcomes the opportunity to comment on the proposed regulations amending 31 CFR Part 800 in order to implement amendments made by the Foreign Investment and National Security Act of 2007. As noted in the Department of the Treasury’s release, the proposed regulations formally establish the structure, role, process, and responsibilities of the Committee on Foreign Investment in the United States (“CFIUS”) in reviewing transactions for national security concerns. SIFMA appreciates the effort involved in drafting the proposed regulations and agrees with the Department of the Treasury that they appear to strike an appropriate balance between maintaining an open investment policy and yet also enabling the government to act as needed to protect national security concerns. It is important for the United States to lead the way in crafting national security safeguards that provide as much transparency and predictability as possible.

While SIFMA is appreciative of the overall balance struck in the proposed regulations, it does have a few technical comments on the provisions regarding pre-notice consultation, minority shareholder protections, lending transactions, personal identifier information required, and the two business day deadline for providing follow-up information. These comments are described in more detail below.

Pre-Notice Consultation

The proposed regulations encourage parties to consult with CFIUS in advance of filing a notice and request that any pre-notice consultation or draft notice be provided at least five business days prior to the filing of the notice of the transaction. SIFMA agrees that such pre-notice consultation can be helpful to the parties and to CFIUS in developing an early understanding of both the transaction and any additional information that CFIUS might request during the transaction review.

However, SIFMA notes that it would be helpful to specify that CFIUS will provide a preliminary determination as to whether the transaction meets the definition of control during the pre-notice consultation period. This would benefit the parties to the transaction, since they would be able to obtain guidance on whether the transaction will meet the definition of control prior to submitting the full notice filing. This will be especially important following adoption of the new regulations, since the amount of information that must be provided in a full notice filing will be significantly more extensive. CFIUS would also benefit if more transactions were reviewed during the pre-notice consultation period with a preliminary determination about control, since it would both provide CFIUS with early notice of transactions and also likely reduce the number of full notice filings that CFIUS will have to review since transactions would not proceed to a full notice filing if CFIUS determines that the transaction does not meet the definition of control.

Accordingly, SIFMA encourages the Department of the Treasury to include a provision in the final regulations specifying that CFIUS will make a preliminary determination as to whether the transaction meets the definition of control during any pre-notice consultation period.

#### Minority Shareholder Protections

In Sections 800.203(c) and (d), the proposed regulations stipulate that CFIUS will consider minority shareholder protections on a case-by-case basis in order to determine whether control exists and enumerate certain minority shareholder protections that will not by themselves constitute control. SIFMA appreciates the effort to address minority shareholder protections and understands that the regulations cannot possibly provide guidance on every possible permutation. However, we would like the regulations to establish the presumption that negative covenants and provisions intended to protect minority investors from fundamental changes in the business without their consent do not constitute control. In addition, SIFMA requests that the regulations include additional examples of minority shareholder protections that by themselves do not constitute control.

Minority investors have a legitimate interest in protecting their investment by ensuring that the company they invest in continues to operate in line with their expectations so that they can get the benefit of their bargain. Since they do not have control of the company in which they are investing, minority shareholder rights are often protected through negative covenants that are intended to ensure that the company cannot change lines of business, sell material assets, incur indebtedness above a specified limit, amend the articles of incorporation to create a class of shares senior to the existing investors, and so forth. Accordingly, the CFIUS regulations should establish the presumption that such minority shareholder rights that are intended to preserve the status quo and restrict fundamental changes to the business do not constitute control since that is the very reason they exist.

Expanding the enumerated examples of minority shareholder protections that do not constitute control in Section 800.203(c) would also be helpful. Some additional examples include the power to protect minority investor expectations regarding:

- Acquisition or disposition of assets material to the business as a whole outside the ordinary course of the business;
- Fundamental changes in the business or operational strategy;

- Changes to the capital structure of the company (either debt or equity) that dilute or impair the rights of existing shareholders;
- Voluntarily filing for bankruptcy or liquidation;
- Fundamental changes in the regulatory, tax, or liability status of the company; and
- Hiring or dismissal of executive officers.

### Lending Transactions

It is our understanding that Section 800.303 of the proposed regulations is intended to restate the current CFIUS presumption that loan agreements are generally not considered to constitute covered transactions in the absence of other indicia of control. However, SIFMA finds the examples of lending transactions provided in Section 800.303(b) too narrow to provide adequate guidance on how common provisions in ordinary lending transactions will be treated under the regulations. As a result, we are concerned that foreign lenders might be discouraged from lending to U.S. business in infrastructure and other sectors that might be subject to CFIUS review.

While the proposed regulations address the example of a covenant by the borrower not to sell or pledge its principal assets to any other person, they do not cover the more extensive covenants that are common market practice in corporate lending transactions. Similar to the situation with minority shareholder protections, negative covenants in lending transactions are necessary to ensure that the lender gets the benefit of its bargain. Since a lender does not generally obtain control of the borrower, a lender needs such covenants to ensure that a borrower does not take actions that threaten to impair its ability to repay the loan unless the lender consents. Thus, such provisions are generally included in any lending transaction and providing clarity regarding how they will be treated should be a priority to ensure both that the regulations do not have a negative impact on U.S. business' access to international credit markets and that CFIUS is not burdened with reviewing routine lending transactions.

Accordingly, SIFMA recommends that the definition of control make clear that negative covenants protecting a lender against actions by a borrower that could reduce the borrower's creditworthiness do not, in and of themselves, constitute control if the lender does not attempt to influence the borrower's ordinary course of operations. To the extent possible, the regulations should also provide additional examples of negative covenants in typical lending transactions that do not constitute control.

In addition, since lending transactions are not generally considered to constitute covered transactions it stands to reason that when the foreign entity engaged in a transaction is a foreign bank then the transaction should also not generally be reviewed by CFIUS. SIFMA believes that it would be appropriate to view foreign bank transactions as a different category because foreign banks are generally in the lending business and, therefore, it should be presumed that the transaction is a bona fide financing transaction and that the bank's interest is not in acquiring control but rather incorporating provisions to protect its financial position. In addition, banking is generally a highly regulated industry and banks are often already subject to extensive restrictions on their ability to exercise operational control over borrowers. Therefore, SIFMA requests that the final regulations incorporate the following presumptions: (1) bona fide lending transactions involving established financial institutions will not be reviewed by CFIUS except under exceptional circumstances; and (2) lending transactions permitted to U.S.-regulated banks or bank holding companies will not be considered to establish control.

One final point that SIFMA would like to make regarding lending transactions is that the final regulations should clarify the treatment of unintentional control acquisition by lenders in the event of borrower default. Lending transactions regularly incorporate valid and enforceable security interests in the borrower's assets in order to enable the borrower to obtain favorable loan terms and protect the lender against the risk of default. The intention in creating the security interest is solely to protect the lender's financial position and, in the event of default, the lender is not likely to have an interest in managing the operations of the U.S. entity or even holding an interest any longer than necessary to recover the loan principal. Accordingly, it would be appropriate for the final regulations to clarify that in the event control is acquired as a result of a loan default and there are national security concerns, CFIUS will ordinarily: (1) permit lenders a reasonable period of time to divest the assets to an acceptable purchaser in an orderly manner; and (2) will take into account regulatory guidance under the federal banking laws regarding such involuntary acquisitions and divestitures.

SIFMA understands that the clarifications and presumptions regarding lending transactions that it is requesting are continuations of the positions that CFIUS has taken under the current rules and will continue to take in the future even if not formally incorporated into the final regulations. However, formally incorporating these points into the final regulations would provide significant predictability regarding the CFIUS process regarding the credit markets and would still allow CFIUS to exercise authority as necessary to protect national security. Furthermore, failing to accord such treatment to lending transactions could have a significant impact on credit costs and access to the credit markets for U.S. issuers.

#### Personal Identifier Information of Board of Directors, Senior Executives, and Others

In Section 800.402(c)(6)(vii), the proposed regulations provide that the notice filing must contain extensive personal identifier information with respect to the Board of Directors and senior executives of the immediate acquirer, its ultimate parent, and "any other entities in the same chain of ownership that could exercise control over the U.S. business being acquired," as well as any natural person who owns more than five percent of the ultimate parent of the acquirer. The requested information includes the following: full name, other names and aliases, business address, country and city of residence, date of birth, place of birth, U.S. social security number, other national identity number and related information, passport number and related information, and dates and nature of foreign government and foreign military service as applicable. The proposed regulations acknowledge that this is sensitive, personal information and specify that the information should be provided in a separate document to ensure limited distribution.

While it is helpful to recognize that the information is sensitive, personal information and should be handled differently during the transaction review, SIFMA notes that the proposed regulations do not take into account that the process of gathering and compiling such an extensive array of personal identifier information will be extremely burdensome and time consuming. This will be especially true if the acquirer is a large corporation and/or has a complex corporate structure.

As such, SIFMA requests that the Department of the Treasury consider reducing the number of persons for which personal identifier information must be provided to only the immediate acquirer and its ultimate parent except in extraordinary circumstances. Since the notice filing would then contain identifying

information about the corporate entities, the persons immediately involved in the transaction, and the persons in ultimate corporate control, CFIUS should have sufficient information about the parties involved to determine whether the transaction raises national security concerns or presents extraordinary circumstances that might merit a request for the full panoply of personal identifier information currently specified in Section 800.402(c)(6)(vii) of the proposed regulations.

#### Two Business Days to Provide Follow-Up Information

Pursuant to Section 800.403(a)(3), parties will have only two business days to provide follow-up information that may be requested by the CFIUS Staff Chairperson during the thirty day review period. If the parties do not provide the requested information within two business days, then CFIUS may reject the notice. The same provision also stipulates that the parties can submit a written request to extend the two business day deadline for follow-up information, but any extensions must be approved by the CFIUS Staff Chairperson in writing.

Subjecting a notice to possible rejection if the parties encounter difficulties in obtaining the requested information and cannot provide it within two business days is draconian. Essentially, the parties would have to resubmit the entire notice, including the follow-up information, and the thirty day review period would start again after CFIUS accepts the new notice filing. Since time is of the essence in consummating contemplated transactions, starting the clock again on the thirty day review period could have significant impact on the contemplated transaction. For example, such a delay could affect the transaction valuation or even cause the parties to reconsider whether to proceed with the transaction.

While SIFMA recognizes that CFIUS has its own deadlines to contend with and must complete the review process in thirty days, it remains that two business days is not a realistic time frame to respond to information requests related to international transactions. Although recent technological advances have vastly improved both the speed and quality of international communications, the time zone and language differences as well as the physical distance still necessarily make such communications more complicated. For example, due to time zone differences, often the only action that might be possible on the first business day the information request is received is to forward it to the office that will be responding for consideration when that office opens the following morning. In many cases this would not leave sufficient time to answer questions related to the information request and respond within the two business day deadline.

Accordingly, SIFMA requests that the two business day deadline for providing follow-up information be extended to five business days. Parties still have every interest in providing information to CFIUS as quickly as possible in order to speed the review process and move the transaction forward, but five business days should provide a more realistic time frame for responding to information requests that will likely involve obtaining information from outside the United States. Alternatively, the final regulations could provide that the thirty day review period is tolled after the two business days have elapsed following the follow-up information request, so that the review period may be extended to reflect the additional time taken to respond to the request but not restarted entirely if the parties encounter difficulty in obtaining the requested information.

In addition, SIFMA requests clarification of how holidays will be treated for purposes of the time limit for providing follow-up information. While the term “business day” implies that holidays will not be included in the time period, this should be made explicit in the final regulations. Furthermore, the final regulations should address not just U.S. holidays but also holidays in the country or countries from which the parties may be responding to the information request.

## Conclusion

We appreciate this opportunity to comment on the Department of the Treasury’s proposed regulations. SIFMA supports the Department of the Treasury’s effort to maintain an open investment policy while protecting national security concerns and has only submitted a few technical comments on the proposed regulations. First, SIFMA requests that CFIUS make a preliminary determination on whether the transaction meets the definition of control during the pre-notice consultation period. Second, SIFMA would like the regulations to establish the presumption that negative covenants and provisions intended to protect minority investors from fundamental changes in the business without their consent do not constitute control and provide additional examples of minority shareholder protections that do not constitute control.

Third, SIFMA provides a number of recommendations regarding the treatment of lending transactions under the CFIUS regulations. SIFMA recommends that the definition of control make clear that negative covenants protecting a lender against actions by a borrower that could reduce the borrower’s creditworthiness do not, in and of themselves, constitute control if the lender does not attempt to influence the borrower’s ordinary course of operations and requests further examples of such negative covenants. SIFMA also requests that the final regulations incorporate the following presumptions: (1) bona fide lending transactions involving established financial institutions will not be reviewed by CFIUS except under exceptional circumstances; and (2) lending transactions permitted to U.S.-regulated banks or bank holding companies will not be considered to establish control. In addition, SIFMA believes that it would be appropriate for the final regulations to clarify that in the event control is acquired as a result of a loan default and there are national security concerns, CFIUS will ordinarily: (1) permit lenders a reasonable period of time to divest the assets to an acceptable purchaser in an orderly manner; and (2) will take into account regulatory guidance under the federal banking laws regarding such involuntary acquisitions and divestitures.

Fourth, SIFMA requests that the Department of the Treasury consider reducing the number of persons for which personal identifier information must be provided under Section 800.402(c)(6)(vii) to only the immediate acquirer and its ultimate parent except in extraordinary circumstances. Finally, SIFMA requests: (a) the two business day deadline for providing follow-up information during the notice review period be extended to five business days; and (b) clarification of how holidays will be treated for purposes of the time limit for providing follow-up information.

If you have any questions regarding this letter, please feel free to call Diana Preston at 202-962-7386 or David Strongin at 212-313-1213.

Sincerely,

A handwritten signature in black ink that reads "Diana L. Preston". The signature is written in a cursive, flowing style.

Diana L. Preston  
Managing Director and Associate General Counsel