AMERICAN INVESTMENT COUNCIL
Growth Through Long-Term Investment

December 6, 2018

Submitted electronically to CFIUS.pilotprogram@treasury.gov

Mr. Thomas Feddo
Deputy Assistant Secretary for Investment Security
U.S. Department of the Treasury
1500 Pennsylvania Avenue
Washington, DC 20220

Re: American Investment Council Requests for Clarification on the Interim Rule Regarding Temporary Provisions Pertaining to a Pilot Program to Review Certain Transactions Involving Foreign Persons and Critical Technologies

Dear Mr. Feddo:

The American Investment Council ("AIC"), on behalf of its members in the U.S. private equity community, appreciates your time and consideration of these clarification requests regarding the interim rule that sets forth the scope of and procedures for a Committee on Foreign Investment in the United States ("CFIUS" or "the Committee") pilot program ("Pilot Program") relating to critical technologies pursuant to certain provisions of the Foreign Investment Risk Review Modernization Act ("FIRRMA"). AIC is an advocacy and resource organization established to develop and provide information about the private investment industry and its contributions to the long-term growth of the U.S. economy and retirement security of American workers. Member firms of the AIC consist of the country's leading private equity and growth capital firms united by their successful partnerships with limited partners and American businesses.

We understand, based on the November 26, 2018 meeting between Treasury representatives, members of the CFIUS bar, and members of the private sector (including AIC) as organized by the U.S. Chamber of Commerce, that Treasury is willing to consider clarification requests submitted by email to pilotprogram@treasury.gov and will attempt to address such requests via updates to the "FAQ [Frequently Asked Questions] on the FIRRMA Critical Technology Pilot Program" document published by Treasury on its website. Below are the areas where AIC and its members would respectfully request specific clarification from Treasury regarding the Pilot Program and associated authorities.

1. Can Treasury confirm, for the purposes of assessing Pilot Program and non-Pilot Program jurisdiction, the scope of the "foreign entity" (31 C.F.R. 800.212) and "foreign person" (31 C.F.R. 800.216) definitions as they apply to the the following scenarios?

    a. A fund organized offshore but as to which (a) no single foreign person, or group of foreign persons acting in concert, controls the fund; and (b) the decisions of the fund are ultimately controlled by U.S. persons whose principal place of business is the United States, is not a "foreign entity."

b. Regardless of the principal place of business, if a fund does not have a majority of the limited partners that are foreign persons and no other foreign person controls the fund, then the fund also would not be a "foreign entity" under 31 C.F.R. 800.212(b).
c. While 31 C.F.R. 800.212(b) refers to "a majority of equity interest … is ultimately owned by U.S. nationals," equity interests that are owned by other persons who are not-foreign persons (i.e., institutional U.S. investors that are not controlled by a foreign person) would be treated the same way as any investment owned by a U.S. national.

We believe it would be very helpful to confirm the scope of the "foreign person" and "foreign entity" definitions in these ways. Under the "foreign entity" definition, a private equity-formed general partner or fund organized under the laws of a foreign state is not a foreign entity if, among other things, its principal place of business is within the United States or if a majority of the equity interest in such entity is ultimately owned by U.S. nationals. Any doubt about this interpretation was less acute historically when filings were voluntary and focused on controlling investments, but they assume greater importance given the mandatory nature of the Pilot Program.

2. Can Treasury also include a clarifying illustrative example? We would propose the following language:

> Individuals A, B, and C collectively own and control, directly or indirectly, Business D, which has a principal place of business in the United States and is incorporated in an offshore jurisdiction. Individuals A, B, and C are U.S. citizens, not foreign persons, and no other foreign person controls Business D, directly or indirectly. Business D acts as the general partner of, and fully controls, Fund Vehicle E. Fund Vehicle E includes a diverse set of limited partners, none of whom individually or collectively control the Fund, with the majority of equity coming from diverse foreign limited partners, and no other foreign person controls Fund Vehicle E. Fund Vehicle E is also incorporated in an offshore jurisdiction. U.S. citizens A, B, and C control and manage the administration of Business D and Fund Vehicle E from the United States. Therefore, the principal place of business for Business D and Fund Vehicle E is the United States. Assuming no other relevant facts, neither Business D nor Fund Vehicle E are foreign entities or foreign persons.

For purposes of the Pilot Program, the foregoing confirmations under #1, above, and the example under #2 will be important to ensure that the Pilot Program does not create confusion in the private equity market and is appropriately limited to transactions that truly involve investments where foreign persons, acting individually or in concert, have the ability through an investment to exercise control over a fund, participate as board directors or observers, access material nonpublic technical information, or exercise decisionmaking authority in relation to critical technologies of a Pilot Program U.S. Business.

3. Can Treasury provide guidance regarding the specific circumstances under which it would seek a penalty, as well as how it would calculate the specific penalty for any given violation?

   Specifically, can Treasury confirm that parties who can demonstrate that they have made a good faith effort to comply with the Pilot Program requirements and not filed will not be subject to a civil penalty, or at least not the same penalty as parties who have not made a demonstrably good faith effort, especially if the former immediately file upon request from the Committee?

   Evidence of a good faith effort could include, for example whether the U.S. business has conducted a reasonable examination of the various critical aspects of the Pilot Program, including:

   a. examining the ownership chain of the investor to determine whether the investor is clearly controlled by a foreign person;
   b. evaluating the target U.S. business to assess whether it is producing, designing, testing, manufacturing, fabricating, or developing critical technologies, which also would include an examination of the applicable export controls; and
   c. (c) evaluating the relevant industry of the target U.S. business to determine whether it is reasonably encompassed by any of the 27 NAICS codes identified in the Pilot Program.

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AIC and its members understand the need to adjust the Committee's authorities to address evolving risks related to the potential transfer of critical technologies to those countries who might leverage them to compromise U.S. national security. We suggest, however, that U.S. national security, CFIUS, and the private equity community would be well served if the Committee provided some clarifications regard its authorities and intentions under the Pilot Program. These suggested clarifications build off of AIC's earlier formal comments to the Pilot Program interim rule contained in our letter submitted on November 6, 2018. This letter does not address all of the issues identified in our November 6 letter, only those we assessed might be appropriately addressed via clarification in Treasury's Pilot Program FAQ. We look forward to further engagement with Treasury and CFIUS at an appropriate juncture, however, with regards to the other issues of importance to AIC members that the earlier letter discussed. Again, we hope you find our questions and comments helpful and constructive and appreciate your time and consideration of them.

Sincerely,

Jason Mulvihill
Chief Operating Officer & General Counsel