October 17, 2019

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

Re: Comments on the Proposed Rule Implementing the Foreign Investment Risk Review Modernization Act of 2018

Dear Deputy Assistant Secretary Feddo:

In response to a request from the Office of Investment Security of the U.S. Department of the Treasury, the American Iron and Steel Institute (AISI), on behalf of its U.S. producer member companies, provides the following comments on the proposed rule to implement the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). AISI serves as the voice of the North American steel industry in the public policy arena and advances the case for steel in the marketplace as the preferred material of choice. The domestic iron and steel industry plays a significant role in the U.S. economy, directly accounting for 387,000 American jobs and directly and indirectly supporting nearly two million American jobs. Additionally, the iron and steel industry is a large purchaser of domestic products and inputs for the steelmaking process.

AISI appreciates the efforts being made by Treasury to implement FIRRMA. Of particular interest to U.S. steelmakers are the provisions in the proposed rule concerning mandatory CFIUS filings. In the proposed section 800.401(b), parties involved in a covered transaction must submit a CFIUS filing for any transaction that would result from acquiring a “substantial interest” in a U.S. business involved in critical technology, infrastructure or data (TID) by a foreign person with which a foreign government directly or indirectly holds a “substantial interest.” AISI is concerned that the proposed definition of “substantial interest” in the proposed rule is extremely narrow and fails to capture a significant volume of foreign government...
investments that could threaten to impinge the national security interests of the United States and thus allow certain investments by foreign governments to escape the scrutiny of CFIUS.

As passed by Congress, FIRRMA directs CFIUS to identify what constitutes a “substantial interest,” but the statute itself provides significant guidance in defining the term, directing that CFIUS “shall consider the means by which a foreign government could influence the actions of a foreign person, including through board membership, ownership interest, or shareholder rights.” As proposed in section 800.244, CFIUS does not address these factors laid out in the statute, but instead focuses exclusively on voting interests. While FIRRMA provides that voting interests of less than 10 percent “shall not be considered a substantial interest,” the definition in section 800.244 significantly expands the voting interest threshold to a voting interest of 49 percent or more by a foreign government in a foreign person and a voting interest of 25 percent or more by a foreign person in a U.S. business. These unreasonably high thresholds will likely allow certain investments in critical U.S. TID businesses by foreign governments to bypass review by CFIUS, contrary to the intent of Congress in enacting FIRRMA.

As Treasury finalizes this rule, AISI recommends that the thresholds for what constitutes a “substantial interest” be reduced to align more closely with those outlined in FIRRMA. AISI also urges that the final rule expressly permit CFIUS to consider other “means by which a foreign government could influence the actions of a foreign person” in accordance with the regulatory mandate provided by FIRRMA. If there are concerns that revising the “substantial interest” definition will overly broaden the mandatory filing requirement, AISI notes that FIRRMA authorizes CFIUS to waive the mandatory filing requirement if certain circumstances are met, such as if the foreign person can demonstrate that the investments have not been directed by a foreign government and if the subject has a history of cooperation with CFIUS. As the proposed regulations do not include any provision for such waivers, the broadening of the mandatory filing requirements could be accompanied with the option for a waiver in such circumstances.

Thank you for the opportunity to submit these comments.

Sincerely,

Kevin M. Dempsey
Senior Vice President, Public Policy and General Counsel