

**EVALUATING CONTRACTUAL PROVISIONS
THAT RELATE TO CFIUS REVIEW:
A PROPOSED SOLUTION**

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The Foreign Investment and National Security Act of 2007 (FINSA) is the statute under which the federal government now regulates foreign direct investment into the United States.¹ FINSA applies to certain mergers, acquisitions and takeovers by or with foreign persons, referred to as “covered transactions.”² The essential element of a covered transaction is that control of a U.S. business is transferred or could be transferred to a foreign person. Parties to a covered transaction may voluntarily file a notice with the Committee on Foreign Investment in the United States (CFIUS), the regulatory body, chaired by the Secretary of the U.S. Treasury, that administers and enforces FINSA.³ Once filed, CFIUS reviews and investigates the covered transaction and its participating parties, and then determines whether it will clear the notice. CFIUS refers to the President of the United States those notices as to which it is unable to make its determination. If parties do not file a notice for their transaction, or if CFIUS does not clear the notice, CFIUS has the unilateral authority to block the transaction from occurring or to seek divestment or rescission after it has closed.

Once the parties to a transaction have concluded that they will make the voluntary filing with CFIUS to mitigate the risk of the blocking or unwinding of the transaction, the agreement that governs their transaction will usually contain several provisions referencing FINSA and CFIUS. On the basis of a review of those transaction agreements that parties have filed with the SEC since the effectiveness of FINSA in October 2007 that contemplate CFIUS review, it appears that the agreements do not fully take into account the operation of FINSA and its penalty provisions. Nor do the agreements consistently reflect the full impact that FINSA may have on the transaction, both before and after its completion. Because of FINSA’s complexities and its continued application after the completion of the proposed

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¹ FINSA is now codified at 50 U.S.C. App. §2170 (2008).

² “Covered transaction” is defined at 31 C.F.R. at §800.207 as “any transaction that is proposed or pending after August 23, 1988 by or with any foreign person, which *could result* in control of a U.S. business by a foreign person.” [emphasis added] The final regulations promulgated under FINSA in December 2008 are codified at 31 C.F.R. Part 800 and are referred to *infra* as “Regulations.” U.S. Treasury published the proposed form of the CFIUS regulations on April 23, 2008 (73 Fed. Reg. 21868). All subsequent references to the Regulations are to Part 800 of 31 C.F.R.

³ CFIUS is the agency that receives notices of foreign acquisitions and determines whether national security issues are involved. The voting members of CFIUS are the Secretaries of Treasury, Homeland Security, Commerce, Defense and State and Energy and the Attorney General, or their respective designees, the heads of any other executive agencies that the President determines. By Executive Order, the President has added as additional voting members the U.S. Trade Representative and the Director of the Office of Science and Technology Policy. The Secretary of Labor and the Director of National Intelligence are ex officio, non-voting members. The Secretary of the Treasury chairs CFIUS. The Director of the Office of Investment Security in the U.S. Treasury is the staff chairperson of CFIUS.

transaction, knowledgeable parties may prefer to enter into a separate comprehensive agreement that governs the voluntary filing that they have made with CFIUS as well as the legal consequences arising out of the information presented in the filing.

Penalties and Other Legal Consequences. Briefly, FINSA's regulations provide for civil penalties on "any person who . . . intentionally or through gross negligence, submits a material misstatement or omission in a notice or makes a false certification" ⁴ Only the members of CFIUS, or their delegates, may impose penalties. ⁵ A party who receives notice of an imposition of a penalty may petition for reconsideration to the Chairman of CFIUS, asserting whatever defense or explanation may be appropriate. ⁶ CFIUS then reviews the petition and must issue its final decision within 15 days. ⁷ In addition, submitting false or misleading information to CFIUS, or omitting material information from that submitted to CFIUS, in connection with a national security review or investigation, permits CFIUS and the President to initiate a review of the transaction, whether closed or not. ⁸ This review can ultimately lead to suspension or prohibition of the transaction, or its divestment. ⁹ Other penalties, civil and criminal, may apply if parties have filed false statements with a U.S. governmental agency. The penalties that CFIUS may recover are without prejudice to these other penalties. ¹⁰ Either one party or more than one party may file the notice with CFIUS. Each party who submits the notice must execute the certification, which provides CFIUS with direct recourse against each submitting party.

If more than one party had filed the notice, it may not be practicable to allocate the responsibility for the incorrect or omitted information, in which case CFIUS may well seek to recover penalties from all parties. Similarly, regardless of which party caused the misstatement or omission, divestment, if ordered, will affect all parties to the transaction. Accordingly, the agreement between the parties must address the ramifications of failures to adhere to FINSA and its regulations.

Contractual Provisions Relating to CFIUS. The most common provisions in publicly available transaction agreements entered into since November 2007 that reference a CFIUS clearance condition are:

- an exception to the parties' respective representations and warranties, stating that clearance from CFIUS is one of the consents to be obtained from a governmental authority;
- covenants obligating the parties both to provide the information for the filing and to submit the filing to CFIUS; and
- a condition to the parties' respective obligations to complete the transaction that CFIUS has cleared the transaction.

⁴ Regulations at §800.801(a).

⁵ Id. at §800.801(d).

⁶ Id. at §800.801(e).

⁷ Id.

⁸ 50 U.S.C. App. §2070(b)(1)(D) 2008.

⁹ Id. at §2070(d)(1) and (3).

¹⁰ Regulation at §800.801(f).

1. Representations and Warranties. The drafting of the exception to the representation and warranty generally providing that, except as described or as stated, no governmental consents requires some consideration. As a legal matter, the filing is voluntary, even for those parties who, on the basis of the CFIUS Guidance or their reading of FINSA and its regulations, genuinely believe that either the U.S. business being acquired or the identity of the acquiring foreign party raises serious U.S. national security considerations. Consequently, the filing is truly not “required,” in the strict sense of the word. Excess of caution on the part of either or both parties will nevertheless lead them to except or disclose the CFIUS filing to ensure that the other party is not later able to claim a material breach of a representation. Several recent examples of references to the voluntary filing in the context of a “no governmental consents” representation follow:

As of the date of this Agreement, except as set forth on Schedule 3.03, as of the date hereof, the execution, delivery and performance by [Buyer] of this Agreement and each of the Ancillary Agreements to which [Buyer] will be a Party and the consummation of the transactions contemplated hereby and thereby requires no action by the Parties in respect of, or filing with, any Authority other than . . . informing CFIUS of the transactions contemplated by this Agreement and the Ancillary Agreements and making all filings and submissions required to be made or effected by it pursuant to Exon-Florio.¹¹

The execution and delivery by the Company of the Transaction Documents do not, and the performance of its obligations hereunder and thereunder will not, require any consent, approval, authorization or permit of, or filing with or notification to, any Governmental Entity, except . . . to the extent required, voluntary notice with the Committee on Foreign Investments in the United States (“CFIUS”) pursuant to Section 721 of the Defense Production Act of 1950, as amended¹²

Interestingly, the publicly available agreements do not reveal any cases in which a party expressly represented that a filing with CFIUS was not required. However, in the standard practice for the drafting of representations and warranties in acquisition agreements, the representing party specifies only those filings with governmental agencies that are required, as opposed to providing negative assurance that a particular filing is not required.

Because of the penalties associated with a CFIUS filing and because of other consequences of materially incorrect information being contained in the filing as described above, each party could reasonably require the other to represent and warrant that the information it provided in the filing is true and correct in all material respects. Following the language that is used in the form of certification that CFIUS mandates, the representation can be made “to the best knowledge and belief” of each party.¹³ In an analogous situation – registration rights agreements entered into between issuers of restricted equity securities and the purchasers of those securities – the parties generally represent and warrant to

¹¹ OMX Transaction Agreement, dated as of November 15, 2007 among The Nasdaq Stock Market, Inc., Borse Dubai Limited and BD Stockholm AB, attached as Exhibit 10.1 to Form 8-K filed by The Nasdaq Stock Market, Inc., with the SEC on November 16, 2007.

¹² Purchase Agreement, as of August 21, 2008, by and between Evercore Partners Inc. and Mizuho Corporate Bank, Ltd., attached as Exhibit 10.1 to Form 8-K filed by Evercore Partners, Inc., with the SEC on August 21, 2008.

¹³ www.treas.gov/offices/international-affairs/docs/cert-notice-template.pdf, last visited on April 3, 2009.

each other that the information each provides for inclusion in a securities registration agreement is true and correct in all respects. This practice is logical, given the joint liability of the issuer and selling shareholders under the Securities Act of 1933 for material statements and omission in prospectuses.¹⁴ An indemnity typically backs up this representation and warranty, providing the injured party with a contractual claim for relief that the injured party can expeditiously prosecute in a legal proceeding or arbitration.

2. Pre-Closing Obligations. When it is clear that parties have found it advisable or necessary to prepare and make the CFIUS filing, the parties generally covenant to take those steps that they believe are necessary for the filing process to be initiated and completed. The specific obligations include:

- to provide the necessary information; and
- to make the filing.

Common provisions embodying these obligations read as follows:

Seller and Purchaser shall cooperate in the preparation of a voluntary joint filing of notice of the transaction to the CFIUS and any requested supplemental information (collectively, the "Joint Notice") pursuant to 31 C.F.R. Part 800 and [FINSA] Purchaser shall take the lead in preparing the Joint Notice, and Seller shall provide for inclusion in the Joint Notice all statements called for by 31 C.F.R. § 800.402(c)(2) through (c)(4). Purchaser shall not file any such Joint Notice without Seller's consent. Purchaser shall take the lead in responding to any post-filing requests from the CFIUS or any Governmental Authority that may relate to representations or proposed agreements by Purchaser. Seller and Purchaser shall keep one another informed in a timely manner of communication with any CFIUS or any Governmental Authority with respect to the Joint Notice and each shall provide the other the opportunity to participate in such communication. If at any point in the CFIUS review process, the CFIUS offers the Parties an opportunity to withdraw and resubmit the Joint Notice, and either Seller or Purchaser opts to request withdrawal and resubmission in response to such offer by the CFIUS, then the other Party shall agree to join the request for withdrawal and resubmission.¹⁵

As promptly as practicable, Seller and Buyer shall make all necessary filings, including filings . . . with CFIUS Buyer and Seller shall reasonably cooperate in connection with the making of all such filings, including by providing copies of all such documents to the nonfiling party and its advisors prior to filing and, if requested, accepting all reasonable additions, deletions or changes suggested in connection therewith. Buyer and Seller shall each use all commercially reasonable efforts to furnish or cause to be furnished all information required for any application or other filing to be made pursuant to any Law in connection with the transactions contemplated by this Agreement and the Other Agreements. If any party hereto or Affiliate thereof shall receive a request for additional information or documentary

¹⁴ 17 U.S.C. §§77k, 77l (2009).

¹⁵ Stock and Asset Purchase Agreement, dated May 12, 2008, among Tyco Electronics Group S.A., Cobham Defense Electronic Systems Corporation, and Cobham plc, filed as Exhibit 10.1 to Form 10-Q filed by Tyco Electronics, Ltd. with the SEC on August 1, 2008.

material from any Governmental Authority with respect to the transactions contemplated by this Agreement, then such party shall use its commercially reasonable efforts to make, or cause to be made, as soon as reasonably practicable and after consultation with the other party, an appropriate response in compliance with such request.¹⁶

Each Party shall: (i) inform CFIUS of the transactions contemplated by this Agreement and the Ancillary Agreements and the Parties shall make all filings and submissions required to be made or effected by it pursuant to Exon-Florio, (ii) provide any information requested by CFIUS or any other agency or branch of the United States government in connection with their review of the transactions contemplated by this Agreement and the Ancillary Agreements and (iii) use its reasonable best efforts promptly to take, and cause its Affiliates to take, all actions and steps necessary to obtain (A) a finding by CFIUS of no jurisdiction or (B) clearance or approval required to be obtained from CFIUS in connection with the transactions contemplated by this Agreement and the Ancillary Agreements (such absence of a request for a filing, finding of no jurisdiction, clearance or approval, the "*CFIUS Approval*").¹⁷

In furtherance of the foregoing covenants: . . . The Parties shall file with the Committee on Foreign Investment in the United States ("*CFIUS*"), as promptly as practicable, a joint voluntary notice under Section 721 of the Defense Production Act of 1950, as amended (the "*Exon-Florio Provision*"), in respect of the transactions contemplated hereby. The Parties shall cooperate with each other in the preparation of this filing in such manner as is reasonably necessary and appropriate. Each Party shall promptly furnish the other Party with any necessary information and reasonable assistance that such other Party may reasonably request in connection with this filing. The Parties shall promptly, appropriately and reasonably respond, after consultation between the Parties, to any requests in connection with this filing from CFIUS or its member agencies.¹⁸

As soon as practicable after the date of this Agreement, Buyer and Parent shall prepare and file with the CFIUS a joint voluntary notice under the Exon-Florio Amendment with respect to the transaction contemplated by this Agreement. Buyer and Parent shall provide CFIUS with any additional or supplemental information requested by CFIUS or its member agencies during the Exon-Florio Amendment review process. Buyer and Parent, in cooperation with each other but at Buyer's sole cost, shall take all commercially reasonable steps advisable, necessary or desirable to finally and successfully complete the Exon-Florio Amendment review process as promptly as practicable.¹⁹

¹⁶ Stock Purchase Agreement, dated as of May 7, 2008, by and among Valero Refining and Marketing Company, Alon Refining Krotz Springs, Inc., and Valero Refining Company-Louisiana, filed as Exhibit 10.1 to Form 8-K filed by Alon USA Energy, Inc. on May 7, 2008.

¹⁷ See Note 11 *supra*.

¹⁸ Purchase and Sale Agreement, dated as of December 10, 2007, by and between CED/SCS Newington, LLC, filed as Exhibit 10.2 to Form 8-K filed by Consolidated Edison, Inc. with the SEC on December 10, 2007.

¹⁹ Stock Purchase Agreement, dated as of December 20, 2006, by and among Hawker Beechcraft Corporation, Greenbulb Limited, Raytheon Company, Raytheon Aircraft Holdings, Inc., and Raytheon Aircraft Services

Seller and Buyer shall cooperate to enable the parties to jointly prepare and file, as soon as practicable after execution of this Agreement by both parties, and in any event within twenty (20) Business Days following the date hereof, with CFIUS, a notice of the transactions contemplated by this Agreement and the transactions contemplated hereby, and shall furnish any supplemental information requested by CFIUS in connection therewith pursuant to the DPA, and the applicable regulations thereto.²⁰

The language that typically imposes the obligations does not, however, fully take into account the breadth and the sources of the information that the regulations require for the filing. For example, to comply with the regulations, the acquiring foreign person must be able to include highly specific personal information regarding individuals who are not its employees and may not be employees of its parent entities.²¹ The parties are subject to a risk that the acquiring foreign person may not be able to obtain all requisite information as to itself and all other persons from whom such information is required. Similarly, the annual reports (in translation) and financial statements that the regulations require may not exist in a format suitable for filing.²² As a result, the acquiring foreign party itself, or even its parents, may not have the ability or the authority to cause these external parties to provide the mandated data. Moreover, the nature of certain of the requested data, *e.g.*, future plans for the acquired business, may be highly subjective or variable and questions relating to future operations may be unsettled at the time of the acquisition or investment process.²³ As a result, before undertaking their obligations to provide information necessary for the CFIUS filing, the parties should consider whether other entities or persons should further be obligated to provide the information to the party itself. Alternately, the parties might wish to complete a draft filing while negotiating the definitive acquisition agreement so that each can assess the extent to which the other may still require additional information for the filing.

The same concerns can apply to the U.S. business. If the U.S. business is complex in its operation, *e.g.*, if it has more than one operating unit that interfaces with agencies of the U.S. government, it may be difficult to gather all of the data necessary to complete the notice. The notice requires considerable granular operating and legal information, as well as aggregated information. The ability of businesses to collect and collate the required information will vary. As a result, before agreeing to perform the obligation, the U.S. business should candidly assess its ability to provide all of the requested information.

Conditions to Closing. Not every agreement governing a transaction where a CFIUS filing is a consideration contains a specific representation and warranty or specific pre-closing obligations relating to compliance with the voluntary filing regime. The reference to the necessity to file may appear in a disclosure schedule or may be omitted altogether based on the determination that the filing, however advisable, is nonetheless not required. The general “best efforts” obligations that the parties impose on themselves -- to take all steps necessary to close -- may be read, expressly or implicitly, to include the obligation to

Limited, filed as Exhibit 10.3 to Form S-4 filed by Hawker Beechcraft Acquisition Company, LLC and Hawker Beechcraft Notes Company with the SEC on December 4, 2007.

²⁰ Asset Purchase Agreement, dated as of March 10, 2008, by and between Datascope Corp. and Mindray Medical International Limited, filed as Exhibit 10.1 to Form 8-K filed by Datascope Corp. with the SEC on March 10, 2008. References to “DPA” are to the Defense Production Act, the predecessor legislation of FINSA.

²¹ Regulation at §800.402(c)(6)(vi).

²² Id. at §800.402(g).

²³ Id. at §800.402(c)(6)(ii).

make all filings needed for the transaction to be completed, and, as such, includes the CFIUS filing. Generally speaking, all agreements that govern a transaction as to which a CFIUS filing is to be made provide for a closing condition requiring some action on the part of CFIUS clearing the transaction as a condition to the parties' obligations to close. Several examples of drafting that expresses this type of condition follow:

The obligation of the parties to complete the Stock Purchase shall also be conditioned on the satisfaction or waiver by both the Company and the Investor of the following conditions The Staff of the Committee on Foreign Investment in the United States shall have issued a "clearance letter" with respect to the transactions contemplated by this Agreement, without the imposition of any term, condition or consequence the acceptance of which would constitute a Substantial Detriment.²⁴

The respective obligations of Buyer and Seller to consummate the transactions contemplated hereby shall be subject to the satisfaction at or prior to the Closing of the following conditions, any or all of which may be waived by the parties hereto, in whole or in part, to the extent permitted by Law: . . . Any waiting or review period applicable to the transactions contemplated by this Agreement under applicable . . . investment Law and regulations, including but not limited to . . . CFIUS, shall have expired or been terminated.²⁵

The Parties shall have submitted to the Committee on Foreign Investment in the United States of America ("CFIUS") a joint notification under the Exon-Florio Amendment to the Defense Production Act of 1950 ("Exon-Florio") and any other submissions under Exon-Florio that are required to be made in connection with this Agreement and the transactions contemplated hereby as soon as practicable following the execution of this Agreement, and CFIUS shall have notified the Parties in writing that a determination has been made that there are no issues of national security sufficient to warrant investigation under Exon-Florio, or, if applicable, the President of the United States of America shall have made a decision not to block the transaction.²⁶

Additionally, CFIUS shall have concluded its review of the filing made by the Parties pursuant to the Exon-Florio Provision and a written notice that no action will be taken pursuant to the Exon-Florio Provision shall have been received from CFIUS or the President of the United States.²⁷

Seller shall have received all of the Seller Approvals, including, for the avoidance of doubt: (A) the CFIUS shall have provided notice to the effect that review or investigation of the transaction contemplated hereby has been concluded, and that a determination has been made that there are no issues

²⁴ Securities Purchase Agreement, dated as of September 29, 2008, by and among Morgan Stanley and Mitsubishi UFJ Financial Group, Inc., filed as Exhibit 10.1 to Form 8-K filed by Datascope Corp. with the SEC on March 10, 2008.

²⁵ See Note 16 *supra*.

²⁶ Contribution Agreement, by and between Toshiba Corporation and NRG Nuclear Development Company LLC, filed as Exhibit 10.2 to Form 10-Q filed by NRG Energy, Inc. with the SEC on May 1, 2009.

²⁷ See Note 27 *supra*.

of national security of the United States sufficient to warrant further investigation under [FINSAs], or (B) the President of the United States shall not have taken action to block or prevent the consummation of the transaction contemplated hereby under [FINSAs] and the applicable period of time for the President to take such action shall have expired.²⁸

Post-closing Obligations. As suggested above, the issues related to the CFIUS filing that are often overlooked in the transaction agreement are those that relate to the potential inaccuracy or omission of information for the filing. It is, therefore, in the parties' utmost respective best interests that the information that each provides in the filing be accurate and complete in all material respects and that each provide all the information and all the documents that the regulations require. This raises the question of what recourse or remedy one party has if the information the other provides is sufficiently inaccurate or incomplete as to subject the transaction to blocking or unwinding.

It is typical in merger or acquisition agreements for one or both parties to represent to the other that all information provided in the agreements, its schedules and its exhibits is accurate in all material respects. As long as this representation survives the closing of the transaction (recognizing that in most acquisitions of public companies, the representation will not survive), there may be a remedy. However, without survival there will generally not be a remedy, in the absence of fraud. But even this representation, however, does not extend to the accuracy of filings made with governmental agencies and other third parties, unless the filing party has expressly represented to the other party that the information included in the filing is complete and correct.

As a result, if either party or both parties have agreed to provide indemnification to the other that is to be available after the closing, the indemnity should affirmatively cover material inaccuracies in or omissions from the CFIUS notice, as well as improper certifications. The indemnity from the U.S. business will generally be as reliable as the U.S. business is financially responsible. If the U.S. business enters financial distress after the closing, the indemnity may not have much value. To ensure against the prospect of this eventuality, the acquiring foreign person should consider having the parent entity of the U.S. business, where there is one, be liable for the promised indemnification. There is logic to this position to the extent that the parent of the U.S. business has provided or should have provided information for the filing.

The converse is true for the U.S. business and its intermediate and ultimate parents with respect to material misstatements and omissions by, and defective certifications from, the foreign parties. Frequently, the named foreign buyer may be a shell company or newly created entity, without independent assets to stand behind its obligations. If divestment were to occur and arise out of a willful misstatement by the acquiring foreign party, the U.S. seller might not have meaningful recourse unless the ultimate parent of the foreign party provides the indemnification directly. Since much of the information that the foreign entity provides includes information regarding individuals that are not employees of the foreign persons, those foreign persons can decide, with the advice of the U.S. counsel, whether they in turn should receive indemnities from each person who provides information, with a view to hedging their risk in indemnifying the U.S. business for information that was not under their control.

Because of the complexity that FINSAs and its regulations have introduced into the transaction and its documentation, the best practice to follow may be a separate agreement

²⁸ See Note 20 *supra*.

that addresses FINSA issues exclusively. The separate agreement would be drafted to bind all of those parties whose participation may be required to comply with the requirements of CFIUS, many of whom are not likely to be, or desire to be, parties to the transaction agreement. This separate agreement should resolve the question of how to obtain meaningful participation and indemnification for the preparation and filing of the notice and be adequately protected if there is future CFIUS intervention without requiring numerous parties to become parties to the transaction document. The separate CFIUS filing agreement limits review of and changes to the transaction agreement by persons who may have no direct substantial economic interest in the transaction itself. A separate agreement will also benefit the transaction agreement by allowing it to focus on the transaction. Lastly, because the parties will enter into the separate filing agreement at or prior to the time that they enter into the transaction agreement, if properly drafted, the indemnification provisions will apply whether or not the proposed transaction closes. As a result, if a defective CFIUS filing causes the transaction to collapse, the rights to indemnification remain in place.

Conclusion. A suggested form of CFIUS filing agreement follows and sets forth a comprehensive approach to the issues discussed above. In the absence of a separate comprehensive agreement, however, the legal advisors to the parties may wish to recommend, with respect to the transactional agreement, that:

- to the extent practicable, each person that is required to provide information for the CFIUS filing execute the transactional agreement;
- the transactional agreement include a representation and warranty to the effect that all information provided for inclusion in the CFIUS filing is, to the best knowledge of the person providing it, correct and complete; and
- there be a surviving post-closing obligation under which the parties indemnify, defend and hold harmless each other against the consequences – financial and otherwise -- of inaccurate or incomplete information in the CFIUS filing.

If advisors follow neither approach, then parties will remain at unmitigated risk of CFIUS intervention, before or after the closing, which is hardly a desirable outcome.

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VOLUNTARY NOTICE FILING AGREEMENT

THIS VOLUNTARY NOTICE FILING AGREEMENT, dated as of _____, 200_ (this "Agreement"), is made by and between _____, a [the U.S. business] (the "Company"), [list all parents of the U.S. business who are providing information for the filing] (collectively, the "Company Affiliates"), [the named foreign acquiring person] (the "Buyer") and [list all parents of the acquiring foreign buyer who are providing information for the filing] (collectively, the "Buyer Affiliates").

WITNESSETH:

WHEREAS, the Buyer and the Company have entered into the [name or purchase agreement, merger agreement or other transactional agreement], dated as of the date of this Agreement (the "Transaction Agreement") (terms not otherwise defined in this Agreement shall have the meanings ascribed to them in the Transaction Agreement); and

WHEREAS, the Company and the Buyer have agreed to submit a Voluntary Filing (as defined below) with CFIUS (as defined below) to seek a determination from CFIUS concluding action under FINSA (as defined below) or determining that the transaction subject to the Transaction Agreement (the "Transaction") will not impair the national security of the United States; and

WHEREAS, to induce the parties to execute and deliver the Transaction Agreement and to consummate the Transaction, the parties to this Agreement have agreed to undertake the obligations set forth below.

NOW, THEREFORE, in consideration of the premises and the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties to this Agreement hereby agree as follows:

1. **Definitions.** As used in this Agreement, the following terms shall have the following meanings:

a. "Buyer Affiliate" means each person named above as a Buyer Affiliate and each other Person that, pursuant to the Regulations, is the Parent of the Buyer or as to which or as to whom the Buyer is required to provide information in the Voluntary Notice.

b. "CFIUS" means the Committee on Foreign Investment in the United States, as constituted under FINSA and the Regulations.

c. "Company Affiliate" means each person named above as a Company Affiliate and each other Person that, pursuant to the Regulations, is a Parent of the Company or as to which or as to whom the Company is required to provide information in the Voluntary Notice.

d. "FINSA" means Section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007 and as thereafter amended from time to time.

e. "Person" means "Entity," as defined in the Regulations.

f. "President" mean the President of the United States.

g. "Regulations" means the regulations promulgated under FINSA as codified at 31 C.F.R. Part 800, as in effect from time to time.

h. "Voluntary Notice" means the notice to be filed and filed under this Agreement by the Buyer and the Company with CFIUS satisfying the requirements set forth by CFIUS in the Regulations as to voluntary notices to be filed with it.

2. **Obligations of the Company.** In connection with the Voluntary Filing, each of the Buyer and the Company shall (i) jointly prepare a form of Voluntary Filing that satisfies in full the requirements of the Regulations or (ii) each separately prepare a form of Voluntary Filing which responds to the information to be provided by either the "Foreign Person" or the "U.S. Business" as the case shall be in accordance with the Regulations. In furtherance thereof, the Buyer and the Company shall:

a. promptly collect all information required for the preparation of, and use such information to prepare the Voluntary Filing describing the Transaction and including all other required information in accordance with the Regulations;

b. file the Voluntary Notice with CFIUS not later than _____;

c. cause one or more qualified representatives to attend in person or by telephone one or more pre-notice consultations with CFIUS as reasonably necessary to facilitate review of the Transaction by CFIUS;

d. prepare and file with CFIUS prior to its determination such amendments and supplements to the Voluntary Filing as may be necessary to comply with the Regulations;

e. promptly notify each other when CFIUS has advised that it has made its determination with respect to, or when the Buyer or the Company first becomes aware that CFIUS has taken, any other action with respect to any review or investigation that CFIUS or any of its member agencies or the President may make with respect to the Voluntary Filing or the Transaction;

f. furnish to each other, promptly after the same is prepared and filed with CFIUS, one complete copy of the Voluntary Filing and each amendment or supplement thereto, unless the Buyer and the Company have jointly made the Voluntary Filing;

g. as promptly as practicable after becoming aware thereof, (i) notify each other of the happening of any event of which either has actual knowledge, as a result of which any information that has been included in the Voluntary Filing is inaccurate or incomplete in any material respect, (ii) use its best efforts promptly to prepare a supplement or amendment to the Voluntary Filing to correct such inaccuracy or incompleteness, (iii) file the same with CFIUS and (iv) deliver a copy of such supplement or amendment to each other, unless such filing has been jointly made;

h. take all other actions reasonably necessary to expedite and facilitate any review or investigation by CFIUS with respect to the Transaction or the Voluntary Filing, including the filing or other delivery of information that CFIUS requests; and

i. not take, or omit to take, any actions that would delay, impede or interfere with any review or investigation by CFIUS with respect to the Transaction or the Voluntary Filing.

3. **Obligations of the Company Affiliates.** Each Company Affiliate shall provide to the Company in writing all information requested by the Company for purposes of inclusion in the Voluntary Filing. In connection with the Voluntary Filing, each Company Affiliate shall cooperate with the Company as reasonably requested by the Company in connection with the preparation and filing of the Voluntary Notice and respond to requests for information by the Company within three business days of such requests. The Company will cause its [chief executive officer] to certify the Voluntary Notice, and any amendment of or supplement to the Voluntary Notice, in such form and at such times as the Regulations require. The Company represents and warrants to the Buyer that, to the best of its

knowledge and belief, all information the Company will provide for inclusion in the Voluntary Notice regarding itself and the Company Affiliates and contained in the Voluntary Notice as filed will be accurate and complete in all material respects.

4. **Obligations of the Buyer Affiliates.** Each Buyer Affiliate shall provide to the Buyer in writing all information requested by the Buyer for purposes of inclusion in the Voluntary Filing. In connection with the Voluntary Filing, each Buyer Affiliate shall:

a. furnish to the Buyer such information regarding itself, the members of its board of directors (or comparable body) and each holder of 5 percent or more of its outstanding voting interests as the Buyer shall request for inclusion in the Voluntary Filing; and

b. cooperate with the Buyer as reasonably requested by the Buyer in connection with the preparation and filing of the Voluntary Notice, and respond to requests for information by the Buyer within three business days of such request.

The Buyer will cause its [chief executive officer] to certify the Voluntary Notice, and any amendment of or supplement to the Voluntary Notice, in such form and at such times as the Regulations require. The Buyer represents and warrants to the Company that, to the best of its knowledge and belief, all information that the Buyer will provide for inclusion in the Voluntary Notice regarding itself and the Buyer Affiliates and contained in the Voluntary Notice as filed will be accurate and complete in all material respects.

5. **Expenses of Filing.**

a. All expenses of filing the Voluntary Notice and of participating in any review or investigation that CFIUS or the President may make of the Transaction shall be borne by the party to this Agreement who incurs such expenses.

b. If CFIUS shall impose a filing fee on the filing of the Voluntary Notice, the Buyer and the Company shall each pay one-half of such fee.

6. **Indemnification.**

a. The Company will indemnify and hold harmless the Buyer, and its officers, directors and agents, against any losses, claims, damages, liabilities or expenses (joint or several) incurred (collectively, "Claims") to which any of the Buyer or any of its officers, directors and agents (collectively, the "Buyer Indemnified Parties") may become subject under FINSA or otherwise, insofar as such Claims (or actions or proceedings,

whether commenced or threatened, in respect thereof) arise out of or are based upon: (i) any breach of the Company's representation and warranty in Section 3; (ii) any information contained in the Voluntary Filing regarding the Company or any Company Affiliate that is inaccurate or incomplete in any material respect; or (iii) any violation or alleged violation by the Company or any Company Affiliate of FINSA or any Regulation (the matters in the foregoing clauses (i), (ii) and (iii) being collectively referred to as "Company Violations"). Subject to Section 6(c), the Company shall reimburse the Buyer, promptly as such expenses are incurred and become due and payable, for any legal fees or other reasonable expenses incurred by it in connection with investigating or defending any such Claim. Notwithstanding anything to the contrary contained herein, the indemnification contained in this Section 6(a) shall not apply to (I) any Claim arising out of or based upon a Company Violation which occurs in reliance upon and in conformity with any information furnished in writing to the Company by or on behalf of Buyer or any Buyer Affiliate expressly for use in connection with the preparation of the Voluntary Filing or any amendment thereof or supplement thereto; or (II) any amounts paid in settlement of any Claim by the Buyer if such settlement is effected without the prior written consent of the Company, which consent the Company shall not unreasonably withhold.

b. The Buyer will indemnify the Company and its officers, directors and agents against any Claims to which any of the Company or any of its officers, directors and agents (collectively, the "Company Indemnified Parties") may become subject under FINSA or otherwise, insofar as such Claims (or actions or proceedings, whether commenced or threatened, in respect thereof) arise out of or are based upon: (i) any breach of the buyer's representation and warranty in Section 4; (ii) any information contained in the Voluntary Filing regarding the Buyer or any Buyer Affiliate that is inaccurate or incomplete in any material respect; or (iii) any violation or alleged violation by the Buyer or any Buyer Affiliate of FINSA or any Regulation (the matters in the foregoing clauses (i), (ii) and (iii) being collectively referred to as "Buyer Violations"). Subject to Section 6(c), the Buyer shall reimburse the Company, promptly as such expenses are incurred and become due and payable, for any legal fees or other reasonable expenses incurred by it in connection with investigating or defending any such Claim. Notwithstanding anything to the contrary contained herein, the indemnification contained in this Section 6(b) shall not apply to (I) any Claim arising out of or based upon a Buyer Violation which occurs in reliance upon and in conformity with information furnished in writing to the Company or CFIUS, by or on behalf of such Investor expressly for use in connection with the Voluntary Filing or any amendment thereof or supplement thereto; or (II) any amounts paid in settlement of any Claim by the Company if such settlement is effected without the prior written consent of the Buyer, which consent the Buyer shall not unreasonably withhold.

c. Promptly after receipt by any Buyer Indemnified Person or any Company Indemnified Person, as the case shall be (such person being referred to in this Section as the "Indemnified Person") of any notice of the commencement of any action (including any governmental action) with respect to the Voluntary Filing, if a Claim in respect thereof is to be made against any party having the obligation to indemnify, defend or hold harmless the Indemnified Person under Section 6(a) or 6(b) (the "Indemnifying Person"), the Indemnified Person shall deliver to the Indemnifying Party a written notice of the commencement thereof and the Indemnifying Person shall have the right to participate in, and, if the Indemnifying Person so desires, jointly with any other Indemnifying Person similarly noticed, to assume control of the defense thereof with counsel mutually satisfactory to the Indemnifying Person and the Indemnified Person. If any such action is brought against any Indemnified Person, and if it notifies the Indemnifying Person of the commencement thereof, the Indemnifying Person will be entitled to participate in, and, if it desires, jointly with any other Indemnifying Person similarly notified, assume the defense thereof, subject to the provisions of this Agreement and after written notice from the Indemnifying Person to such Indemnified Person of its election so to assume the defense thereof, the Indemnifying Person will not be liable to such Indemnified Person under this Section for any legal or other reasonable out-of-pocket expenses subsequently incurred by such Indemnified Person or Indemnified Person in connection with the defense thereof other than reasonable costs of investigation, unless the Indemnifying Person shall not pursue the action to its final conclusion. The Indemnified Person shall have the right to employ separate counsel in any such action and to participate in the defense thereof, but the fees and reasonable out-of-pocket expenses of such counsel shall not be at the expense of the Indemnifying Person if the Indemnifying Person has assumed the defense of the action with counsel reasonably satisfactory to the Indemnified Person. The failure to deliver written notice to the Indemnifying Person within a reasonable time of the commencement of any such action shall not relieve such Indemnifying Person of any liability to the Indemnified Person under this Section, except to the extent that the Indemnifying Person is prejudiced in its ability to defend such action. The indemnification required by this Section shall be made by periodic payments of the amount thereof during the course of the investigation or defense, as such expense, loss, damage or liability is incurred and is due and payable.

d. The indemnities contained in Section 6(a) and 6(b) shall remain in full force and effect regardless of any investigation made by or on behalf of the Indemnified Person.

7. **Contribution.** To the extent any indemnification by any Indemnifying Person is prohibited or limited by law, the Indemnifying Person will make the maximum

contribution with respect to any amounts for which it would otherwise be liable under Section 6 to the fullest extent permitted by law; provided, that no contribution shall be made under circumstances where the maker would not have been liable for indemnification under Section 6.

8. **Survival.** The representation and warranties made by the parties to the Agreement to each other in Sections 3 and 4 shall survive any closing under the Transaction Agreement. The obligation of the parties under this Agreement shall survive until performed, whether or not such closing occurs.

9. **Miscellaneous.**

a. Notices required or permitted to be given hereunder shall be given in the manner contemplated by the Transaction Agreement, (i) if to the Company or to the Buyer, to their respective addresses set forth in the Transaction Agreement, and (ii) if to any other party, at such address as such party shall have provided in writing to the Company, or at such other address as each such party furnishes by notice given in accordance with this Section 9(a).

b. Failure of any party to exercise any right or remedy under this Agreement or otherwise, or delay by a party in exercising such right or remedy, shall not operate as a waiver thereof.

c. This Agreement constitutes the entire agreement among the parties to this Agreement with respect to the subject matter of this Agreement. There are no restrictions, promises, warranties or undertakings, other than those set forth or referred in this Agreement. This Agreement supersedes all prior agreements and understandings among the parties hereto with respect to the subject matter of this Agreement. This Agreement may be amended only by an instrument in writing signed by the party to be charged with enforcement thereof.

d. This Agreement shall be governed by and interpreted in accordance with the internal laws of the State of New York without giving effect to conflict of laws principles. Each of the parties consents to the jurisdiction of the federal courts whose districts encompass any part of the City of New York or the state courts of the State of New York sitting in the City of New York in connection with any dispute arising under this Agreement and hereby waives, to the maximum extent permitted by law, any objection, including any objection based on *forum non conveniens*, to the bringing of any such proceeding in such jurisdictions.

e. If any provision of this Agreement shall be invalid or unenforceable in any jurisdiction, such invalidity or unenforceability shall not affect the validity or enforceability of the remainder of this Agreement or the validity or enforceability of this Agreement in any other jurisdiction.

f. This Agreement shall inure to the benefit of and be binding upon the successors and assigns of each of the parties to this Agreement.

g. All pronouns and any variations thereof refer to the masculine, feminine or neuter, singular or plural, as the context may require.

h. The headings in this Agreement are for convenience of reference only and shall not limit or otherwise affect the meaning of this Agreement.

i. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which shall constitute one and the same agreement. This Agreement, once executed by a party, may be delivered to the other party by facsimile transmission of a copy of this Agreement bearing the signature of the party so delivering this Agreement.

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed by their respective officers thereunto duly authorized as of the day and year first above written.

COMPANY:

By: _____

— Name:

Title:

[Add signature blocks for Company Affiliates]

BUYER:

By: _____

— Print Name:

[Add signature blocks for Buyer Affiliates]