



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

April 15, 2008

The Honorable Max Baucus
Chairman
Committee on Finance
United States Senate
Washington, DC 20510

Dear Chairman Baucus:

This letter provides the views of the Department of the Treasury on S. 2035, "The Free Flow of Information Act of 2007" (FFIA). The Department strongly opposes this proposed legislation, as it would seriously undermine the Treasury Department's programmatic efforts to fight terrorist and other forms of illicit finance, and jeopardize our ability to review foreign investment for national security concerns.

The FFIA proposes to provide a "journalist's privilege" or protection to a broad group of persons against disclosure of confidential source information, including documents or testimony related to the confidential source. We join the Department of Justice in the concerns raised in its letter of September 26, 2007 to the Senate Judiciary Committee, as well as those discussed in the April 2, 2008 letter from the Attorney General and Director of National Intelligence to the Senate Majority and Minority Leaders, which are attached. As evidenced by the two examples discussed below, unauthorized disclosures to the media can cause significant damage to critical Treasury Department programs that protect national security. S. 2035 would make investigations of unauthorized disclosures in the future extremely difficult to pursue, thereby making them more difficult to deter.

Media Leaks Undermined Treasury's Terrorist Finance Tracking Program

Shortly after the September 11, 2001 attacks, as part of an effort to employ all available means to track terrorists and their networks, the Treasury Department initiated the classified Terrorist Finance Tracking Program (TFTP). Under the TFTP, the Treasury Department has issued administrative subpoenas for terrorist-related data to the U.S. operations center of the Society for Worldwide Interbank Financial Telecommunication (SWIFT), which operates a worldwide messaging system used to transmit financial transaction information.

On June 23, 2006, *The New York Times* and two other major U.S. newspapers published articles disclosing the existence of the TFTP. The disclosure of the classified information has adversely affected our national security. From its inception, this classified program has proven valuable by providing unique information that has enabled the U.S. Government to locate and identify terrorist suspects and to map out terrorist networks. For example, the subpoenaed SWIFT information has provided key links in investigations of financiers and charities supporting al

Qaida and other significant terrorist organizations, and has helped locate perpetrators of terrorist attacks.

Though the program has proven to be a valuable tool for tracking terrorist organizations, its value has been diminished by the June 2006 media disclosures. On July 11, 2006, Treasury Under Secretary for Terrorism and Financial Intelligence Stuart Levey testified about the TFTP before the House Financial Services Subcommittee on Oversight and Investigations, describing in his written testimony the exposure of the program as “very damaging” and further attesting: “Despite [their] attempts at secrecy, terrorist facilitators have continued to use the international banking system to send money to one another, even after September 11. This disclosure compromised one of our most valuable programs and will only make our efforts to track terrorist financing -- and to prevent terrorist attacks -- harder. Tracking terrorist money trails is difficult enough without having our sources and methods reported on the front page of newspapers.”

It is also important to note that the harm to the TFTP was not offset by any journalistic imperative. Indeed, *The New York Times* public editor, on October 22, 2006, published a self-described “*mea culpa*” editorial in which he stated that he was “off base” in previously supporting the newspapers’ decision to publish its June 23, 2006 article. Though describing the decision as a “close call,” he concluded: “I don’t think the article should have been published.” Equally noteworthy is the *Washington Post’s* editorial of June 24, 2006, in which the newspaper stated: “[This program] seems like exactly the sort of aggressive tactic the government should be taking in the war on terrorism.”

Media Leaks Undermine CFIUS Cases and Processes

The Committee on Foreign Investment in the United States (CFIUS) is the interagency committee established to assist the President in implementing section 721 of the Defense Production Act of 1950 (“section 721”). Section 721 provides the President with authority to review foreign investment transactions voluntarily notified to CFIUS for national security implications. CFIUS reviews such transactions, and may refer them to the President for action. The President has authority to suspend or prohibit any transaction where he determines that there is credible evidence that the foreign interest might take action that threatens to impair the national security, and no other law is adequate or appropriate to address that threat.

CFIUS review depends heavily on the voluntary submission of substantial information by the parties pertaining to their transaction. Regulations require that parties submitting a notice to CFIUS provide detailed information (personal and proprietary) about themselves and the transaction, including their businesses’ structures, commercial relationships and affiliations, transactional documents, market share and business plans. In recognition of the sensitivity of this information, section 721 prohibits public disclosure of such documents or information, except in the case of an administrative or judicial action or proceeding, and further exempts such documents and information from disclosure under the Freedom of Information Act.

In recent years, there have been several instances in which pending transactions and their related details have been leaked to and reported by the press. Unlawful media disclosure of information provided to CFIUS risks fundamentally undermining the critical national security review process. Companies could become reluctant to submit their transactions for review. Those that

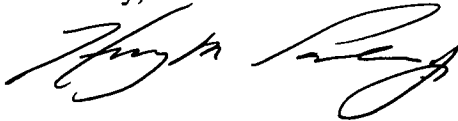
do file may become less forthcoming in the information they provide to CFIUS. Media leaks also undermine the integrity of the interagency deliberative process, chilling the full and open discussion that is essential to CFIUS's decision making.

Breaches of confidentiality could also chill foreign investment. Firms otherwise willing to invest in the United States may become less inclined to do so if submitting to a national security review process risks public exposure of sensitive personal, proprietary, and business information. Also, repeated leaks may make other countries less inclined to provide robust protections for confidential information provided by U.S. companies, putting U.S. companies with international operations at a competitive disadvantage to local companies.

Thank you for considering our concerns. As is evident from the examples above, unauthorized disclosures to the media put at risk effective Treasury Department programs important to the nation's security. S. 2035 would make unauthorized disclosures much harder to investigate and therefore more difficult to deter. For these reasons, we urge you to reject S. 2035 as it is currently drafted.

This letter also has been sent to the Ranking Member of the Senate Finance Committee, the Majority Leader and Minority Leader of the Senate, and the Chairman and Ranking Member of the Senate Banking Committee.

Sincerely,

A handwritten signature in black ink, appearing to read "Henry M. Paulson, Jr.", written in a cursive style.

Henry M. Paulson, Jr.

Enclosures