

**H.R. 4311, THE FOREIGN INVESTMENT RISK
REVIEW MODERNIZATION ACT OF 2017**

HEARING
BEFORE THE
SUBCOMMITTEE ON MONETARY
POLICY AND TRADE
OF THE
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H.R. 4311, THE FOREIGN INVESTMENT RISK REVIEW MODERNIZATION ACT OF 2017

Thursday, April 12, 2018

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MONETARY POLICY AND TRADE,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:03 p.m., in room 2128, Rayburn House Office Building, Hon. Andy Barr [chairman of the subcommittee] presiding.

Present: Representatives Barr, Williams, Lucas, Huizenga, Pittenger, Love, Hill, Emmer, Mooney, Davidson, Hollingsworth, Foster, Sherman, Green, Heck, Kildee, Vargas, and Crist.

Also present: Representatives Hensarling, and Royce.

Chairman BARR. The subcommittee will come to order. Without objection, the Chair is authorized to declare a recess of the committee at any time. All members will have 5 legislative days within which to submit extraneous materials to the Chair for inclusion in the record.

This legislative hearing is entitled “H.R. 4311, the Foreign Investment Risk Review Modernization Act of 2017.” Without objection, the gentleman from California, Mr. Royce, is permitted to participate in today’s subcommittee hearing. Mr. Royce is a member of the Financial Services Committee and is Chairman of the Committee on Foreign Affairs. We appreciate his interest in this topic.

I now recognize myself for 3 minutes to give an opening statement.

The world today is a much more dangerous place than it was at the turn of the century. In 2000, post-Soviet Russia seemed fitfully to be moving toward recovery from nearly a century of communist rule. China, while still communist-run, seemed a useful partner, a low-cost manufacturing platform eager for work. Terrorism had not yet become a global problem.

But today, terrorism is an ever-present threat. Russia has undertaken a disturbing series of military and cyber interventions against its neighbors and the United States, and China has become a global economic powerhouse that will stop at nothing to enhance its military muscle.

Against this backdrop, our colleague, Representative Pittenger, more than a year ago began a thoughtful examination of the process by which the Government screens inbound investment to ensure it presents no threat to national security. The interagency Committee on Foreign Investment in the United States, or CFIUS, last was updated in 2007.

Since then, a number of deals have been broken up when CFIUS detected threats that could not be mitigated by changes in the proposals. Significantly, each denied proposal was rejected because of fears it would result in Chinese control of technology or a business that would have threatened national security.

Not all deals from China are bad, and not all bad deals are from China. But the dramatic increase in the number, size, and complexity of deals CFIUS scanned last year, combined with the notable rise in the percentage of deals that have Chinese ties, is a clear indicator that we should examine ways to modernize the CFIUS process as we had into the third decade of the 21st century.

So today, after three hearings on CFIUS's operations and challenges, we start examining legislation introduced in November, H.R. 4311, the Foreign Investment Risk Review Modernization Act, or FIRRMA as it is commonly known. The Administration supports the legislation, has worked since its introduction to develop updated language in response to constructive feedback and suggestions from interested parties.

Additionally, the authors of FIRRMA have done the same, and the committee is currently reviewing several proposals to enhance the legislation further. As we proceed down this road of much needed CFIUS modernization, my goal is that we continue to work in a bipartisan and bicameral manner through the regular order process, because we all know that CFIUS reform is critical to our national security and we need to make sure we get it right.

We must work quickly, but we must not hastily rush something of this magnitude that could lead to unintended consequences that jeopardize our national security and shackle our economy. We need reforms to effectively target and focus on real threats, rather than all joint ventures and investments. We cannot inadvertently ensnare purely benign investments which do not involve critical or emerging technologies and which are wholly disconnected from U.S. national security concerns.

Together, we must stop troublesome investments by Chinese state-controlled enterprises, bent on securing technology that would threaten our national security, while also being careful not to drive away unobjectionable deals that create jobs and opportunities for Americans of all walks of life.

I am confident that together we can improve our national security without harming our economy, but it will require hard work, patience, and undoubtedly some give-and-take to come up with the right solution.

The Chair now recognizes the gentleman from Washington, Mr. Heck, for 3-1/2 minutes for an opening statement.

Mr. HECK. Thank you very much, Mr. Chairman, and for convening this hearing.

In the 10 years since Congress last authorized CFIUS, our strategic competitors have found gaps in the CFIUS process which they are exploiting. Right now, if foreign intelligence agencies want to buy land to help spy on our most sensitive national security installation, and there is no existing business on the site, CFIUS can't stop them.

Right now, investments that could give our strategic competitors influence and insight into critical technology companies go

unreviewed because they fall just short of control of the company. Right now, if a strategic competitor seizes control of a U.S. business through a change in the legal rights associated with an existing investment, CFIUS can't stop them.

Right now, our strategic competitors can structure transactions to take advantage of a loophole between CFIUS's existing authority over joint ventures involving a whole U.S. business and the export control system's authority over individual pieces of technology and know-how. All of this needs to stop right now if we want to avoid a catastrophic amount of damage to our technological edge in our military readiness.

That is why I was pleased to join with Congressman Pittenger and Senator Feinstein and Senator Cornyn. Fundamentally FIRRMA is about closing each of these specific gaps I just spoke about, while making sure that the U.S. remains welcoming to investments that do not harm our national security.

Throughout this process, Congressman Pittenger and I and our Senate counterparts have been working closely with stakeholders and the CFIUS agencies to refine and perfect the bill. I ask unanimous consent, Mr. Chairman, to enter the latest working draft of FIRRMA into the record.

Chairman BARR. Without objection.

Mr. HECK. While our witnesses are testifying on the bill as introduced, I would urge my colleagues to see how we have addressed many of the issues that have been raised in our revised text. I think my staff and I have already met with all but one of our witnesses who are here today as a part of that process.

Mr. Marchick, our door is open if you would also like to come in. Your input has played an important role in this process, notwithstanding the lack of physical presence thus far.

I am glad we are working on this issue in a bipartisan way. I echo the remarks of the Chair, and I extend to him once again my gratitude for the manner in which we have undertaken this task, this very important task. I am, for my own part, happy to work with anyone who is willing to come to the table in good faith, because at the end of the day, my colleagues, this issue, our national security, is too important for anything less.

Thank you, and I yield back.

Chairman BARR. The gentleman yields back. The Chair now recognizes the author of FIRRMA, the gentleman from North Carolina, Congressman Pittenger, for a 2-minute opening statement.

Mr. PITTENGER. Thank you, Mr. Chairman. Thank you for hosting this very important hearing.

Before I begin my prepared remarks, I would like to thank my good friend, Mr. Heck, for his leadership with me on this bill. He has been a remarkable partner. Also, thank you for submitting to the record the most current version of the bill, 3.0, which has the collective input of many of you. I know, Mr. Kallmer, we have worked with you significantly on that input for the last several months and many other people in the industry.

I would also like to say that our office has worked with Senator Cornyn and the Treasury Department, along with the various members of the industry to make sure that we provide a bill that is responsive, that gets the job done, but also makes sure that we

have open markets. These updates streamline the bill as we have responded to the concerns raised by the industry. It makes it even more laser-focused on national security.

While I would have hoped that we would hear a more clear presentation today, as I understand that perhaps these edits are not included in the testimony, I am happy that we can share this product of our work into the record. Mr. Chairman, I do thank you for offering unanimous consent to enter into the record the update of FIRRMA.

Mr. Chairman, CFIUS reform is an urgent national security requirement. President Trump has endorsed this bill. Secretary Mattis requested the bill and endorsed it. Secretary Mnuchin and his team have worked closely and tirelessly on this bill and have also endorsed it.

FIRRMA is specifically targeted to address national security issues related to defense applicable technology transfers to China and other countries, issues that remain unresolved and outside the scope of existing export control. Those who disagree with the premise of my bill should speak to the five Department of Defense secretaries who have endorsed this bill. Unfortunately, many who profit from modernizing the Chinese military seek—some do to distort the narrative and defeat this bill.

Today, we have many witnesses who will make presentations who notwithstanding represent interests from China, Lenovo, and other major entities. General Dunford has said that China will be the greatest threat to the U.S. by 2025. Yet some companies insist on accelerating that timeline and defeating FIRRMA.

Mr. Chairman, national security experts have spoken. FIRRMA is needed, and I look forward to working with my colleagues to get it passed in its current form. I yield back.

Chairman BARR. The gentleman yields back. The Chair now recognizes the gentleman from California, Mr. Sherman, for a 3-1/2 minute opening statement.

Mr. SHERMAN. This is an important bill. I think it needs to be stronger. I am working with the authors on three ideas that so far are not included, but we continue to try to persuade them.

The first I think will eventually be included. It is a no-brainer. It should be explicit that only under truly extraordinary circumstances would we entertain an application from a company based in any country that is a state sponsor of terrorism. We may want to go further and say we don't want to entertain an application from any company that does business in or with any state sponsor of terrorism. National security starts with clamping down on state sponsors of terrorism.

Second, as to critical technologies, the issue is often that an investment is made when a company does not have critical technologies or hasn't proven it or we don't understand how important it is. Those transactions need to be subject to post-transaction review when a country of special concern is at issue. Otherwise, we can be in a circumstance where our technological crown jewels find their way to Beijing simply because we didn't realize the importance of the technology at the time of the transaction or the company didn't have the technology at the time of the transaction. It

had the elements of the technology and the scientists that would create the technology.

Third, we should consider jobs in every decision we make in Washington, and that includes foreign investment. Every other country I am aware of does just that.

Fourth, is an idea I have not shared with the authors yet, and that is the critical technologies concept needs also to be applied to soft power. Our media, the minds of Americans are just as important as the technology. I, for example, am worried that the Chinese control a big chunk of the movie screens in the United States, AMC in particular.

What that means is that if you make a movie that Beijing doesn't like, not only can't you get it shown in China, you can't get it shown in the United States. At very minimum, before AMC was purchased, there should been a provision where the owners agree not to discriminate against a movie simply because its content is disagreed with by the government of China and a requirement that if when there is a movie made that the Chinese government doesn't like and other movie distributors and screens and theater owners are showing it, that it should be available at AMC theaters.

Again, to give China control of the minds of Americans by controlling the media of the United States was a mistake that we can reverse, perhaps in this bill.

So I look forward to working with the authors to make this bill stronger, and now is not the time to put profits ahead of national security. I yield back.

Chairman BARR. Gentleman yields back. The Chair now recognizes the Chairman of the House Foreign Affairs Committee and a member of this committee, the gentleman from California, Congressman Royce, for 2 minutes for an opening statement.

Mr. ROYCE. Thank you. Our long-term national security and economic interests, Mr. Chairman, are directly tied to how we protect emerging critical technologies. My view remains that the U.S. should pursue a whole-of-government strategy that does not rely exclusively on CFIUS or exclusively on export controls, but builds strength on strength, reforming both complementary approaches which together represents a comprehensive response to a very critical national security challenge that we are facing right now.

One specific issue that I want to raise is the fact that export controls not only restrict the transfer of products, but also of know-how. We should all think long and hard on this. This is current law. Both defense trade controls managed by the State Department and dual-use export controls at Commerce, control the transfer of intangible ideas to foreign persons.

But this is an area where we should strengthen the law. I agree with my good friend from North Carolina, Mr. Pittenger, that greater scrutiny is required with respect to the transfer of know-how, legally or otherwise, to strategic economic competitors, such as Beijing, and that is why the Foreign Affairs Committee export control reform bill, which we consider next week in a markup, explicitly ensures that sensitive know-how, which may include such items as written or oral communication, blueprints, engineering designs and specifications, at any stage of their development prior to production, would be subject to controls.

Likewise that is why our bill will also make clear that export controls apply regardless of the nature of the underlying transaction—we need to think on this—whether through a purchase order or other contract requirement, voluntary decision, whether such a purchase order or other contract or inter-company agreement or during a joint venture or a similar collaborative arrangement exists, all that has to be controlled, and we owe it to the American people to get it right.

I am hopeful that we can take the best of both committees' work and move forward with a comprehensive, whole-of-government strategy that will counter China's efforts and other adversarial efforts to acquire sensitive U.S. technologies. I yield back. Thank you, Chair.

Chairman BARR. Thank you. The gentleman yields back.

Today we welcome the testimony of the Honorable Clay Lowery, Managing Director at Rock Creek Global Advisors, where he focuses on international financial regulation, sovereign debt, macroeconomic policies, exchange rates, and investment policy. Mr. Lowery served as the Assistant Secretary for International Affairs at the U.S. Treasury Department from 2005 to 2009, where he chaired CFIUS and was instrumental in the 2007 CFIUS reform effort.

Jonathan Kallmer, Senior Vice President of Global Policy for the Information Technology Industry Council. Before joining ITI in February 2015, Jonathan was Counsel in the International Trade and International Dispute Resolution Groups of Crowell & Moring, where he helped companies overcome regulatory and market access barriers in foreign markets. From 2007 to 2012, Jonathan served as Deputy Assistant U.S. Trade Representative for Investment, where he was responsible for developing and implementing U.S. international investment policy and negotiating with foreign governments to secure greater market access and better treatment for U.S. companies abroad.

David Marchick is Managing Director and Global Head of External Affairs at the Carlyle Group. Prior to joining Carlyle, Mr. Marchick was a Partner and Vice Chair of the International Practice Group at Covington & Burling. In the Clinton Administration, Mr. Marchick served at the White House, USTR as Deputy Assistant Secretary for Trade Policy and Transportation Affairs at the Department of State, and Principal Deputy Assistant for Trade Development at the Department of Commerce, where he worked extensively on CFIUS matters.

Michael Brown is a Presidential Innovation Fellow for the Defense Innovation Unit Experimental. Through August 2016, Michael was the CEO of Symantec Corporation. During his tenure as CEO, which was from 2014 to 2016, he led a turnaround as the company developed a new strategy focused on its security business. Michael is the former Chairman and CEO of Quantum Corporation, which specialized in computer backup and archiving products. Michael also has served as the Chairman of EqualLogic and Line 6, and has served on the public boards of Nektar Therapeutics, Maxtor Corporation, and Digital Impact.

Ms. Giovanna Cinelli is a Partner at Morgan Lewis & Bockius, where she is a leader on international trade, national security, and

economic sanctions. As a practitioner for more than 25 years, she counsels clients in the defense and high technology sectors on a broad range of issues affecting national security, CFIUS, and export controls, including complex export compliance matters, audits, cross border due diligence, and export enforcement.

Each of you will be recognized for 5 minutes to give an oral presentation of your testimony. Without objection, each of your written statements will be made part of the record. The Honorable Clay Lowery will begin, and you are now recognized for 5 minutes.

STATEMENT OF THE HON. CLAY LOWERY

Mr. LOWERY. Chairman Barr, members of the committee, I want to thank you for the opportunity to testify on FIRRMA. In my written testimony and today, I will discuss my general support for FIRRMA while pointing out what I consider to be several key shortcomings in the current bill, particularly from the perspective of someone who had to implement major reform of CFIUS in the past.

Before I discuss these issues, however, I wanted to say a few words about the rationale behind this bill, which is highlighted by a number of the statements we have just heard, as well as by Michael Brown's report that he did for the DIUX, and that is the growing threat posed by China.

China's strategy incorporates such government efforts to fuse the military and civilian sectors, subsidize industries and individual companies, support cyber espionage, and use restrictions on foreign investment and licensing to coerce technology transfers, and probably much more. The United States must address this issue and growing challenge in a comprehensive manner that goes well beyond the scope of this hearing. The FIRRMA bill is one important step, and I think this bill gets a number of things right, which I have detailed in my written testimony. However, I worry that portions of this bill use vague language, duplicate existing export control authority, and will be overly burdensome for both the private sector and government.

In my previous testimonies or speeches on CFIUS in the past, I have always begun with a litany of statistics about the importance of foreign direct investment (FDI) to economic growth. I am not doing that today, and that is because FIRRMA is only partially about foreign investment in the United States.

Instead, there is a substantial part of the bill that transforms CFIUS into a technology control regime in which there isn't a merger, there isn't an acquisition, there isn't a foreign direct investment in the United States. My concerns stem from my experience in implementing the last CFIUS modernization legislation in 2007, and FIRRMA's language leaves too many terms to be defined and interpreted, such that there is a distinct possibility of unintended changes or unforeseen consequences.

This committee is all too familiar with what that can mean. Let me give you an example. The Volcker rule, which may be a sound idea, but has led to an overly complex rule that is vague, burdensome, and essentially a regulatory nightmare for both the regulators and for the financial institutions they regulate. As members

of this committee, I presume that you have heard from your constituents about these consequences.

I see a similar lesson being learned about FIRRMA. Similar transactions create anomalous results, and we should worry about creating a guessing game for U.S. companies that require hours of legal analysis of complex transactions and structures when their non-U.S. competitors are not burdened with anything even remotely similar.

The FIRRMA bill has left many terms to be undefined or ill-defined. For instance, what is the sector of critical technologies, emerging technologies we should worry about? What are the sub-sectors? Do we need a list?

This leads to my second concern with FIRRMA, which is it duplicates our export control regime. This bill seems to suggest that CFIUS, a group of roughly 100 people who don't have subject matter expertise, will be able to identify emerging technologies better than the roughly 500 people we have at Defense, Commerce, and State that are already working on these export control issues every day.

Which leads to my final concern I would like to highlight, which is the burden. Today, CFIUS reviews approximately 200 transactions a year. Over the preceding few months, I don't think there has been a single government witness, CFIUS practitioner, or CFIUS expert who has testified before this committee or the Senate Banking Committee who has not said that significantly more resources are needed for CFIUS.

With FIRRMA, however, the number of transactions under review will go from 200 a year to several thousand. If this expansion is truly necessary for our national security and cost is the only issue, as Congressman Sherman mentioned, then by all means, let's find a way to pay for it. But this expansion is not driven by national security. Instead, it is the needless result of a bill that is too vague and too duplicative, rendering it practically impossible for CFIUS to accomplish the work it has been tasked to do and that is so vital to our economic and national security.

To conclude, let me reiterate that I am broadly supportive of the CFIUS modernization effort, but I think more work is needed to ensure that the outcome does not have the unintended consequences of chilling investment in the United States and harming our competitiveness around the world, both of which are important to our economic strength, the backbone of President Trump's national security strategy.

In addition, adding the implementation risk, I have tried to identify in my written testimony, could destabilize the excellent and so far targeted work that CFIUS currently performs. In other words, I would humbly suggest that without fixing this bill we could harm our national security, not enhance it. Thank you.

[The prepared statement of Mr. Lowery can be found on page 68 of the appendix.]

Chairman BARR. Thank you. Mr. Kallmer, you are recognized now for 5 minutes.

STATEMENT OF JONATHAN KALLMER

Mr. KALLMER. Thank you. Chairman Barr, members of the subcommittee, thank you for inviting me to discuss this critically important piece of legislation. My name is Josh Kallmer, and I am Senior Vice President for Global Policy at the Information Technology Industry Council, or ITI.

ITI is a collection of 63 of the world's most innovative companies, representing every part of the technology sector. Our companies do business across borders on a daily basis and therefore have a keen interest in this legislation.

Chairman BARR. Sir, can you pull the microphone a little closer to you? Thank you.

Mr. KALLMER. Is that better? I also have a personal perspective on this bill. As you mentioned, several years ago, I served as deputy assistant U.S. trade representative for investment and represented USTR on CFIUS. In that role, I was involved in the review of hundreds of transactions, regularly participated in political-level meetings regarding sensitive deals, and helped draft regulations during the last modernization of CFIUS a decade ago.

Before discussing the bill, let me first say how much we have appreciated the open and constructive spirit in which you and your colleagues, as well as your staffs, have worked during this process. I would particularly like to recognize Representatives Pittenger and Heck for your leadership, as well as that of Senators Cornyn and Feinstein.

While this hearing focuses on the bill as introduced, I would be happy also to discuss the additional ideas that we and others have offered to improve the bill.

I can reduce our position on the bill, as introduced, to three main points. The first is that the national security concerns are real, and FIRRMA is a critical part of the solution. The United States has benefited greatly from its longstanding openness to foreign investment, yet the U.S. Government has no more solemn and important responsibility than to protect the Nation's security. So we have to pursue our commitment to open investment consistent with that imperative.

Our organization and every single one of our companies agree with the national security objectives of this bill. We also agree that the bill's advocates have identified a compelling set of emerging national security risks that the U.S. Government must immediately address. FIRRMA would do that in many important ways, including by enabling CFIUS to review certain real estate transactions near military facilities, expanding the list of national security factors that CFIUS can consider, improving compliance with mitigation agreements, and ensuring that CFIUS is fully resourced.

My second point is that there are nevertheless important differences of view about how to deal with emerging critical technologies. I think we all share the goal of strengthening national security. But we have some healthy disagreements about how best to do so, and we offer our views in a spirit of open and respectful debate.

Our main misgiving with the bill as introduced, relates to the proposed expansion of CFIUS jurisdiction to cover outbound transfers of U.S. intellectual property (IP). As we read it, the language

would capture the constant motion of companies' everyday business, putting them in a position of perpetual uncertainty over whether they are obliged to file with CFIUS simply to go about their daily work. This uncertainty would not only impact companies; it would overwhelm CFIUS with cases, chill the U.S. business environment, and potentially deplete our industrial base.

The core problem is that the risks we are talking about have to do with technology, not transactions. It is true that unfriendly countries could use certain technologies to harm U.S. national security, but that is the case regardless of business arrangement. If the disclosure of technologies would raise national security concerns, we need to address those concerns, full stop.

I will say that on this point in particular, the bill's advocates in both Congress and the Administration have responded meaningfully and in good faith to our proposed improvements. While important distance remains, we are grateful for their responsiveness and we feel good about the trajectory of the discussion.

My final point is that we already have the legal tools we need, but we have to reinforce them with additional commitment, creativity, and resources. We believe that U.S. export control laws already address virtually all, if not all of the national security risks associated with emerging critical technologies. We also recognize that it doesn't matter if export controls can address the risks legally if they can't do so practically.

So our shared objective, in our view, ought to be to bolster our export control system, politically, institutionally, and financially, to ensure that it can meet the challenges we now face.

We think about the challenge here as one of creating connective tissue between FIRRMA and the export control system, so that our export control laws can aggressively and proactively address risks coming over the horizon. I have discussed two possible ideas for doing this in my written testimony, and I would be pleased to discuss them further here. What matters from our perspective is that the export control authorities do the heavy lifting to identify, describe and list critical emerging technologies of concern, while ensuring that CFIUS has visibility into the process and the opportunity to weigh in, as well.

I will conclude my remarks there, but let me thank you again for having me and reiterate our commitment both to the success of FIRRMA and to working constructively with this subcommittee and the Congress as a whole to achieve it. I would be happy to answer any of your questions.

[The prepared statement of Mr. Kallmer can be found on page 56 of the appendix.]

Chairman BARR. Thank you, Mr. Kallmer. Mr. Marchick, you are recognized for 5 minutes.

STATEMENT OF DAVID MARCHICK

Mr. MARCHICK. Thank you, Mr. Chairman, members of the committee. I also want to thank you, Congressman Pittenger, for your good work on this and that of your staff, Congressman Heck, as well. Thank you very much.

I was here in 2006 testifying before this committee on the previous update. I had a little more hair and a smaller waistline at that point, but otherwise the issues are pretty much the same.

So I am going to talk about four principles which I hope you will consider. I haven't read version 3.0, but I do understand that some of these issues were addressed, and I thank you for that.

First point is that CFIUS absolutely needs the tools to block or mitigate investments that have a national security impact. To my knowledge, CFIUS has already been using that authority to great effect. The number of transactions that have been effectively blocked in the last few years has increased significantly. In 2016, there were 27 deals blocked which is a record. I would also understand then that in 2017, according to the Rhodium Group, that more than \$8 billion of investments from China were blocked, also a record.

So I am not familiar with the specifics of these cases that were blocked, but I would just point out that CFIUS is a very powerful tool and they have not been shy in using it.

Second is that CFIUS should be tailored to scrutinize those transactions that raise national security risks, but allow all the rest of the deals that don't raise concerns to go through quickly. I think this is an issue that many members of the committee would agree with in terms of efficiency in government and the efficiency in approval processes.

I have frequently analogized CFIUS to triage in the emergency room. In an emergency room, where you are overwhelmed with patients, a good emergency room will focus intensively on those patients that need the most help, but get the kids out that have a nick or a cut quickly. CFIUS should do the same, and your legislation should allow and direct CFIUS to do this.

In other words, focus on those transactions that matter. In the M&A world, time is money. The uncertainty associated with lengthy regulatory reviews reduces investment. Hopefully your legislation will enable CFIUS to focus on those transactions that matter and push the others through quickly.

Third, casting too wide a net will actually hurt national security rather than help, because the system will be overwhelmed. When I testified in 2006 before this committee, I noted that CFIUS at that point was then overwhelmed with cases and then non-controversial transactions, ones from the U.K., Canada, other allies, were being slowed down. In that year, they reviewed 113, and seven went to a second phase investigation, only seven. Last year, CFIUS reviewed 240 and more than 70 percent went to a second phase. More than half of the transactions were from countries that were NATO allies, the U.K., Canada, and others.

So the question is, how can you design legislation that encourages CFIUS to focus on the cases that matter but allow the others to go quickly through?

Finally, I would encourage the committee to look at the passive investment provisions that are crafted. Passive investment is just that: It is passive. So when you and I invest in a 401(k) or you invest in TSP, or an investor invests with a private equity venture capital real estate firm, they are entrusting money to the man-

agers, and those managers can invest, manage, operate, hire, fire, sell how they want. The investors don't tell them what to do.

As long as those investors are truly passive, then CFIUS should not subject those transactions to its jurisdiction. I think that the language is a little broad. I understand that in the next version you have addressed some of these issues, and I am grateful for that.

I will stop there. Those are the four points I would like to offer. I am grateful for the opportunity to be here.

[The prepared statement of Mr. Marchick can be found on page 74 of the appendix.]

Chairman BARR. Thank you. Mr. Brown, you are now recognized for 5 minutes.

STATEMENT OF MICHAEL BROWN

Mr. BROWN. Thank you, Chairman Barr, and members of the committee. I am pleased to be with you to share findings of work I have led in understanding the role that Chinese investment has in a systematic plan to transfer technology. Because of this work, I am a strong supporter of FIRREA.

I came to this work as a former CEO of two large Silicon Valley companies, Quantum and Symantec, but in my career, I have also worked as an investor, board member, and chairman of several early stage companies, both in Silicon Valley and in the Boston area. I am here today in my personal capacity as a Presidential Innovation Fellow and not as a spokesperson for the Defense Department.

In the fall of 2016 at the request of then-Defense Secretary Carter and Vice Chairman of the Joint Chiefs General Selva, I began researching along with Pavneet Singh whether and how China is transferring technology through investments in early stage firms. In summary, what we learned was that China's participation in venture deal financing was at a record level of 16 percent of all venture deals financed in 2015 and remained at 11 percent in the first 10 months of 2017. This is concerning for several reasons.

First, the growth of these investments is up substantially from a level of 1 percent to 6 percent in the period of 2010 to 2014. We identified more than 500 Chinese-based or affiliated entities investing in U.S. early stage companies.

Second, the technologies where Chinese firms are investing are the same dual-use technologies where U.S. venture firms are investing, those that will be foundational to future innovations, such as AI, autonomous vehicles, augmented reality, block chain, and genetic engineering.

Third, since venture capital investing depends on deal flow, investors see many more deals than they invest in. As a result, it is likely that Chinese investors in aggregate have seen upwards of half of recent U.S. venture financings. In other words, Chinese investors have a broad view of U.S. innovation across a range of technologies.

Fourth, by investing in early stage companies, Chinese investors are learning about these technologies at the same time and at the same rate that we do, which precludes any time-based advantage

for the U.S. Historically, the U.S. military has had exclusive use of critical technology for some period, which could be called overmatch. However, we are not likely to have overmatch in the future if China learns about leading-edge technology from U.S. startups at the same time we do.

Fifth, without FIRRMA, there is no monitoring, reporting, or control of China's investments in technologies important for national security. Last, the Defense Department, In-Q-Tel, or other parts of the U.S. Government will tend to avoid contact with an early stage technology company that has a significant level of foreign ownership, even if the company is developing critical technology.

To mitigate technology transfer from the U.S., there are two primary tools the Government has, CFIUS and export controls. FIRRMA makes CFIUS more effective by expanding its jurisdiction to cover more transaction types that could include technology transfer. As I see it, the goal of FIRRMA is not to ensure that more venture capital investments undergo CFIUS review, but to ensure that foreign investments are truly passive.

Some have argued in Congressional testimony that export controls are sufficient without FIRRMA to deter technology transfer. There are five reasons why I do not believe export controls are a substitute for CFIUS reform. First, export controls have typically been used for products, not critical emerging technologies. In fact, I am not aware of any critical emerging technologies such as AI, quantum computing, or genomics-based engineering which are on the export control list.

Second, because export controls typically focus on products, in general they would be more backward looking.

Third, export controls require coordination with allies to be effective, and this typically takes 2 to 3 years through the Wassenaar arrangement.

Fourth, export controls are ineffective in deterring tech transfer that occurs when China forces companies to form joint ventures in exchange for Chinese market access.

And, fifth, enforcement is voluntary. I am skeptical that a Silicon Valley early stage company is aware of the need for or is dedicating the resources to comply.

Let me conclude with two important points. First, cooperation of allies. Any steps we take to deter tech transfer which include both CFIUS reform and changes to export controls needs to be coordinated with allies to be effective. Otherwise, we create an incentive for talent and companies to move offshore.

Second, investment in science and technology. While defensive measures like CFIUS reform, better export controls are important, they are not the key to winning a technology race with China. The more concerned we are about the national security threat China represents, the more important it is to invest in science and technology, encourage Americans to pursue STEM education, and increase federally funded R&D.

To enable the U.S. to win the last technology race with the Soviet Union, federally funded R&D was 2 percent of GDP in the 1960's. While China increasingly invests a higher percentage of its GDP in R&D, and its economy grows faster than ours, U.S. federally funded R&D has declined today to 0.7 percent of GDP. We

must be proactive to improve our technology base and innovation capability, because our future economic prosperity will be the principal determinant of our national security.

Thank you.

[The prepared statement of Mr. Brown can be found on page 42 of the appendix.]

Chairman BARR. Thank you. Ms. Cinelli, you are now recognized.

STATEMENT OF GIOVANNA CINELLI

Ms. CINELLI. Thank you, Mr. Chairman, distinguished members of the subcommittee. I appreciate the invitation to appear before you today, and I am honored to join my fellow panel members as the subcommittee continues to evaluate the changes needed for CFIUS. Your leadership and that of Congressman Pittenger and Congressman Heck, as well as the bipartisan co-sponsors of FIRREA, demonstrates the foresight needed to manage the challenges we face today and the ones we will face in the future.

I appear today in my personal capacity—this is my disclaimer, I apologize here—not on behalf of my firm or on any client. The views presented in my written testimony and before you are solely my own. Again, I am grateful for the opportunity to share some observations and to respond to any questions you have.

As part of my background, I had the privilege of serving in the United States Navy as a special duty intelligence officer for a number of years. I had the opportunity to see the overlay between the legal issues that arise, as well as those that appear when you are boots on the ground in various situations. That particular perspective coupled with my legal career helps me believe that FIRREA is essential to what this country needs.

In that light, I would like to focus my comments beyond what I have put in my written testimony to two key areas: First, the manner in which technology transfers occur in the cross-border environment and, second, certain gaps in CFIUS's underlying authorities that affect the committee's flexibility to consider cross-border transactions as they shift and change. This is regardless of the construct that we see.

At the outset, it is important to recognize that since 1975 the statute has been amended reactively and generally to address a direct or perceived threat. In at least two of the three amendments, both 1988 and 2007, Congress responded to what it believed to be critical situations—one, related threats affecting U.S. semiconductor leadership and the other involving gaps in the types of the transactions the committee could review and how.

We find ourselves in similar circumstances today. The United States is at an inflection point. Technology leadership, the cornerstone of our U.S. economy, innovation, and security, is under siege. Many have focused the threat posed by China's assertive policies that are designed to close the gap or overtake U.S. leadership in a number of technology fields. But China is not alone in pursuing these objectives, although it is more organized and utilizes among the broadest set of tools to achieve these objectives, including acquisitions or investments in technology assets.

Now, several factors contribute to the crisis, which I believe calls for Congressional action. First, we face a diffusion in access to tech-

nology that continues to evolve and expand, and that is unlikely to change.

Second, the concept of dual-use, or as China refers to it, civil military fusion, may be rapidly losing its relevance and viability. The application of a specific technology may be just as critical as the performance characteristics and therefore, as you examine, for example, as my co-panel members have discussed, the export laws may be important to look at exactly how those controls are utilized and how they affect CFIUS reviews.

So, for example, the same technology used to manage data for tailoring product offerings to customers may also be used to identify trends that reflect terrorist activity. How that technology is discovered, managed, and accounted for remains a critical concern.

Last, extensive cross-border investment occurs each year, much of it outside the purview of CFIUS and other regulatory environments. By some calculations, parties participate in 20,000 to 40,000 cross-border activities a year that result in some form of technology transfer. CFIUS receives and analyzes under these statistics a statistically insignificant number, leaving the majority of cross-border technology transfer activity potentially unreviewed. This lack of visibility affects Government decisionmaking.

FIRRMA elegantly balances the twin goals of encouraging an open investment policy and protecting national security. Yes, it calls for foundational changes because, yes, we have foundational, almost cataclysmic threats and vulnerabilities. The legislation expands CFIUS authorities in a measured way and acknowledges the importance of managing a strong industrial base, employment base, and scientific leadership, as the United States ensures that it has access to that which is essential to protecting its national interests.

The proposed expansion of CFIUS's jurisdiction is a direct result of the threats and vulnerabilities that we face, not an attempt to create an overburdened regulatory environment.

I think it is also important to identify and recognize what FIRRMA does not do. FIRRMA does not limit the ability of the parties to independently assess whether a filing would benefit their transaction, nor does it preclude any specific transaction or establish any blanket presumptions of denials. It does not actually itemize the technologies of concerns, but it does establish a framework through which such technological can be identified, especially in circumstances where in the past to do so has been inadequate.

With that, thank you.

[The prepared statement of Ms. Cinelli can be found on page 48 of the appendix.]

Chairman BARR. Thank you very much. Before we proceed to questions, the Chair wishes to ask unanimous consent to enter into the record a letter sent to the committee by the National Venture Capital Association, which lays out its recommendations to improve FIRRMA. The NVCA is concerned, among other things, with the impact of the bill's passive investment language, writing, quote, "unfortunately, the passive investment exemption is narrowly drafted and will cause harmless investment into U.S. companies to be picked up by FIRRMA, thus causing delay for the company raising capital, needless cost and burden to the investor, and distrac-

tion for CFIUS from the true security concerns,” unquote. Without objection, this letter will be made part of the record.

Chairman BARR. The Chair now recognizes himself for 5 minutes for questioning. I will start with you, Mr. Lowery. In your testimony, you expressed concern that FIRRMA could perhaps unwittingly repeat the regulatory nightmare that is the Volcker rule. Why do you believe that this comparison is warranted?

Mr. LOWERY. Well, my main rationale is for a couple reasons. One, there is a lot of language that is going to have to be defined in a rulemaking process. That rulemaking process is going to be difficult. I went through this back in 2007–2008 when we went through CFIUS. It took us about a year-and-a-half to do that. It is going to take a lot longer to put these rules in place and to define these terms.

It actually leads toward anomalous results. In my testimony, I actually pointed out an example where if an American company was working in a foreign country and they basically transferred their technology and associated support to that country, that would not necessarily go through CFIUS. However, if that same American company was doing the exact same deal and doing the exact same technology and associated support, but it was in a joint venture where the American company actually had some percentage of the deal, that would go through CFIUS.

Now, just metastasize that, and you are going to have an understanding of how difficult this is going to become. I just heard Giovanna say there are 20,000 to 40,000 transactions that are going on with technology cross-border all the time. How many of those are going to be captured under this bill? How many are the ones that shouldn't be captured because the corporate structure happens to be a different corporate structure? To me, at least, that is going to lead toward complications that you see in the Volcker rule.

Chairman BARR. Mr. Marchick, as currently drafted, I think you testified that the FIRRMA bill could cast too wide of a net that would overwhelm CFIUS. How would that perhaps compromise national security?

Mr. MARCHICK. Well, thank you very much for the question. I think as Clay said, the issue is, how can you design a strategy legislation that allows CFIUS to focus on the transactions that matter? I will give you the commercial real estate example. The bill—and I think Congressman Pittenger has addressed this in the latest draft. In the commercial real estate sector, there are about 2,000 foreign investments in commercial real estate a year. Those transactions alone, if they were filed, would increase the number of reviews tenfold.

Therefore, it would overwhelm the system. Most of those transactions are not going to be sensitive at all. It would force CFIUS to focus on non-sensitive transactions, instead of taking the most powerful microscope and focusing on the transactions that truly threaten national security.

Chairman BARR. Let me ask anyone—and, Mr. Brown, I would love to invite you to chime in on this, too—there has been an expression of concern from some of your fellow panelists here that there could be some unnecessary duplication or conflict between

the export control system and CFIUS. You addressed that a little bit about why you think export control alone doesn't do the job.

Are you concerned about potential unnecessary duplication or conflict? How do we need to structure this bill to make sure that there is coordination between CFIUS and the export control system?

Mr. BROWN. Yes, thank you. I think that they are both two sides of the same coin and they both need to be looked at together. So to the point earlier, I think Clay might have said it, that we need a comprehensive look at this problem. I think that is exactly right.

It is not only, what do we do on the defense side, which we talked about, CFIUS and export controls, but what are we doing proactively, because we are in a technology. But to your specific question, I don't think either one of these is a substitute for another, and I think some people are trying to say export controls can do the job alone. We already see that is not working.

So I would say, yes, we need to look at both, reform both. Let's go with FIRREA, because that is right in front of us. Then let's look at export controls. The most important thing that needs to be coordinated is, what are these critical technologies? So, beyond the Government, we need Government experts, as well as folks from academia and the private sector to help us with what those technologies are, to narrow the scope of what we are trying to look at.

Chairman BARR. Mr. Lowery, in the remaining time—or, Mr. Kallmer, Marchick, any one of you—how can we avoid conflict or duplication between CFIUS and the Bureau of Industry and Security?

Mr. KALLMER. Thanks, Mr. Chairman. I think the short answer is by building connective tissue, by building a bridge and by ensuring that it is not two separate regimes working in parallel without communication, but in essence a conjoined whole, where each side is doing what it does best in a way that together enhances national security.

Chairman BARR. OK, my time is expired. The Chair now recognizes the gentleman from California, Mr. Sherman.

Mr. SHERMAN. Mr. Marchick, you talk about most of these investments being made by companies based in allies of the United States. Did your analysis look behind to ultimate ownership? That is to say, the most controversial investment was American Uranium, which was purchased by a Canadian company. Just so happened the Canadian company was owned by Russian interests. Did you do the second-tier analysis in preparing your report?

Mr. MARCHICK. It is a very good question, because CFIUS and any other regulatory authority should ultimately look to the ultimate owner.

Mr. SHERMAN. Does it do that now?

Mr. MARCHICK. It does. I used the data from the CFIUS annual report.

Mr. SHERMAN. So your report did, as well?

Mr. MARCHICK. I believe that they look at the ultimate owner. So if there is an intermediate company in the U.K. or Canada, but it is owned by the Russians, that should be a Russian transaction, not a Canadian transaction.

Mr. SHERMAN. Got you. Does—and I will ask this to any witness—does CFIUS include expertise in protecting American jobs or does it confer regularly with leaders of organized labor? Mr. Lowery?

Mr. LOWERY. In the last bill that was passed on CFIUS reform in 2007, the Department of Labor—

Mr. SHERMAN. The Department of Labor. Very different from organized labor. Go on.

Mr. LOWERY. I understand. The Department of Labor—

Mr. SHERMAN. Especially in this Administration.

Mr. LOWERY. The Department of Labor obviously connects with organized labor every now and then, and so they have an ex officio membership on CFIUS. They don't bring national security expertise. What they bring is to think about some of the issues I think that you are trying to get at. But in terms of, is there someone there who is worried about the economic security or job loss type of issues, that is not part of CFIUS currently.

Mr. SHERMAN. It would be interesting to go and campaign to our constituents and say, I stood firm in the Financial Services Committee against considering American jobs when we make American financial decisions.

China walls off whole parts of their economy from our investment. Should we do something equally? Or does the fact that they wall off parts of their economy have no effect on our CFIUS decisions? I will ask for Mr. Marchick. Or Mr. Brown.

Mr. BROWN. I don't think we should be blanket cutting off a sector of our economy. I think we need to—

Mr. SHERMAN. So China can do whatever they want to us and we don't respond?

Mr. BROWN. Well, I don't feel that way. I think what we need—

Mr. SHERMAN. Well, then how do we respond to them walling off whole areas of their economy from U.S. investment?

Mr. BROWN. I think the work that we did on early stage investment says that we need to look at what we think are the critical technologies and ask ourselves whether we should allow China to invest in our startups. So I wouldn't take an entire sector away.

Mr. SHERMAN. We obviously limit, for national security reasons, a very small portion of our economy. They limit a huge swath of their economy. Should we not limit a huge swath of our economy in response? Or does the fact that they take such extreme action not affect us?

Mr. BROWN. I think the answer there is to work with our allies to get China to change.

Mr. SHERMAN. Yes, we have been working on that for 20 years, and the effect is huge profits for those who don't want China to change.

Mr. BROWN. I would disagree. Getting out of the TPP is an example of not working with allies to effect—

Mr. SHERMAN. Well, look, we have been doing this for—I am going to move on. Now, should we explicitly state in this law that any Chinese company is viewed as an investment by the Chinese government? Or should we engage in the fiction that Chinese companies are independent of their government? Mr. Lowery?

Mr. LOWERY. Well, my own view is that CFIUS is about looking at transactions in foreign direct investment in the American on a transaction-by-transaction basis. So I think that we should actually look in—

Mr. SHERMAN. But should we have a basic rule that if a company is under the control of the Chinese government or is situated in China, we evaluate that transaction as if it is an investment by the Chinese Army and party?

Mr. LOWERY. No, I don't think we should.

Mr. SHERMAN. Or should we engage with China in the fiction that their companies are independent?

Mr. LOWERY. No, I don't believe we should. But however, I will say this—

Mr. SHERMAN. We shouldn't? We should allow—

Mr. LOWERY. I just said it—I just said no. So I—but let me explain. Right now, the way that CFIUS works is there is an analysis done, it is called a threat analysis. The threat analysis is done by our intelligence community. The intelligence—

Mr. SHERMAN. Should the threat analysis be directed by statute to regard Chinese companies as arms of the Chinese government? I would say it should. I will ask any witness, can you mention a single time when a Chinese-based company has refused to do the work of the Chinese intelligence service of the Chinese government? Yes, do you have an answer?

Ms. CINELLI. If I could just answer that, just 2 seconds.

Mr. SHERMAN. Since they always do the work of the Chinese government, why shouldn't they be regarded as arms of the Chinese government?

Ms. CINELLI. I think perhaps if the perspective—we might be imposing the U.S. concept of corporate law on the Chinese. We have distinctions between state-owned enterprises and corporate constructs. The Chinese do not. So perhaps if you are examining it from a statutory perspective, looking at whether it is a state-owned enterprise or part of the PLA—

Mr. SHERMAN. We should regard them all as arms of the Chinese government. I yield back.

Chairman BARR. The time is expired. The Chair now recognizes the vice chairman of the subcommittee, Mr. Williams from Texas.

Mr. WILLIAMS. Thank you, Chairman Barr, and thank you for holding this hearing today and for your leadership on the important issue of CFIUS. This is the fourth hearing this subcommittee has held about this important tool, and I look forward to continuing to work with you and other members of this committee to discuss the legislation before us.

To all the witnesses before us today, thank you for your testimony. Foreign investment in the United States greatly improves the outcomes of millions of Americans by creating jobs and developing ground-breaking technologies. However, nations such as China continue to grow their influence through investment in the U.S. and other forex tactics.

In this discussion, my goal is to find a solution that protects our national security, which is paramount, while at the same time allows the American economy to continue to reap the benefits of foreign investment. So my first question is to you, Mr. Lowery. Every-

one in this room wants to update CFIUS to bolster our national security without harming foreign direct investment that strengthens both our economy and ultimately our military.

That being said, many CFIUS experts, including you, are concerned about the unintended consequences of FIRRMA. In particular, you write that duplication of other Government national security programs may hamper the effectiveness of this legislation. So can you expound upon these concerns?

Mr. LOWERY. Thank you, Congressman. Let me just state very clearly, I have the exact same objectives that you do, that Congressman Pittenger does, that Congressman Heck has, which is to bolster our national security, especially from any type of investments that could create a problem.

The concerns I have are largely—not solely, but largely—about the outward bound provisions within the bill because we, one, it will overwhelm the system that is currently in process. Thousands of transactions will have to be looked at as opposed to hundreds. These are transactions that are in lots of different areas.

You are from Texas. There are energy companies that do joint venture operations around the world. That is considered critical technology. Critical technology transactions. So all of those transactions would now need to go through a CFIUS process. Their competitors, who come from companies like France, by the way, from China and from other countries will not have to go through that process. That to me strikes me as anti-competitive, and I don't think that it necessarily gets us to where we want to get to, which is to try to actually address, as Mr. Marchick said earlier, the focused problems that are real national security concerns, not the everyday transactions from multinational companies.

Mr. WILLIAMS. Thank you. Mr. Brown, our troops should never go into a fair fight and should always be able to overmatch their opponents in the field of battle. You have learned about this during your time at the DOD and refer to it in your testimony. I represent Fort Hood, and one of the largest military bases we have in the world.

The soldiers I represent rely in part on policymakers like me to make sure they are not barely winning their fights, but instead have the tools necessary to dominate their opponents. The military needs to be able to turn out innovation and technology faster than its enemies to maintain overmatch.

So with that being said, to what extent is China already encroaching on our military superiority?

Mr. BROWN. I think to a large extent, many of the officials from DOD have already talked about that, Secretary Mattis, Chairman Dunford, et cetera.

The answer to me is twofold, one on the defensive side. Let's make sure we spend the time to identify what critical technologies we care about, whether it is AI, quantum computing, so that we can narrow the scope of what the CFIUS transactions would be, to the critical ones, and then proactively we have to invest more to make sure that we are leading this race. We want China to be looking to us as the source of future technology, not us chasing them, but that requires us to be much more proactive in terms of what we are investing in.

Mr. WILLIAMS. Next question. Is CFIUS currently equipped to stop important American military technology from being acquired by the Chinese and other bad actors? You might be as detailed as you can on that.

Mr. BROWN. CFIUS needs to be strengthened so that it covers more of these transaction types, because today, CFIUS is largely looking at transactions that involve majority control. But if the Chinese are making investments in a critical technology, a quantum computing startup, say, today CFIUS would not cover that unless there is majority control. So I think that is a huge strategic gap that was talked about before, that we have to close with FIRRMA.

Mr. WILLIAMS. OK, thank you, and I yield my time back.

Chairman BARR. The gentleman yields back. The Chair now recognizes the gentleman from Texas, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman. I thank the Ranking Member, as well, witnesses for appearing. I especially thank my colleagues, Mr. Pittenger and Mr. Heck, for the time and energy and effort that they have put into this piece of legislation.

Mr. Lowery, you indicated that this legislation would cover a circumstance wherein there is no merger, there is no foreign investment. Would you explain, please?

Mr. LOWERY. Yes, sir. This is the provision that is sometimes referred to as the JV provision, but it is basically about capturing outward-bound transactions. So there is no investment into the United States in any way. Instead, it is a United States company doing business in a foreign country. They are doing that business and it is going to be in a technology field or in an infrastructure-related field.

Under the legislation, CFIUS would now need to review it and look through it and do an evaluation as to whether or not that should go forward. That is happening all the time. Thousands of transactions are happening like that from companies all over the map within the United States.

My concern is that if there is technology that is of concern to the United States, we should define it and then control it. That is what the export control regime is for.

CFIUS is about inward bound investment into the United States. So that is why I am supportive of those provisions, largely, within the FIRRMA bill put forward, but not this specific provision where it is about outward bound transactions.

Mr. GREEN. Does someone else have some additional intelligence on the point?

Mr. BROWN. Well, I think just that the outbound transactions are another source of tech transfer. So if, even though it may not involve inbound technology, or investment, we want to have some say on whether critical technology is being transferred through a force joint venture. So I think we have to define, what are those technologies? We need to define, what are the countries we are concerned about? I will just name it. It is China. It is not all countries.

So in the CFIUS process we have to give some credit for the folks running that process to streamline it once they are dealing with thousands of transactions versus hundreds. But I think the joint venture or outbound technology flow is a critical gap we need to fix.

Mr. GREEN. Mr. Kallmer.

Mr. KALLMER. Thank you, Mr. Green. The more we discuss this, the clearer it is to us, I think, that we are all in almost total agreement about the diagnosis here. It is the concern about emerging critical technologies going to China and potentially other places.

I think about David's analogy to the ER, which also seems appropriate in thinking about how one might address that issue in legislation. A patient comes to the ER complaining of chest pain, you don't bring in an orthopedic surgeon. You go to the cardiologist.

This is about finding the right tool. It just seems to us, we have that tool. It is the export control system. As Representative Royce said in the opening comments, export controls aren't just about physical products. They can cover technology. They can cover information. They can cover services. They can even potentially cover transactions through the sanctions law.

They can do so by identifying the destination that people are concerned about, the end use that people are concerned about, the end user that people are concerned about. The infrastructure is there. It is true as a practical matter the infrastructure isn't working the way we need it to, to address this threat. But we have the tool.

In fact, there is authority tomorrow if somebody were to identify an emerging critical technology of concern that was on the verge of being exported, say, to China to actually impose a unilateral control on it. That is not ideal. Ideally we would do that in a multilateral fashion. But as a short-term measure, we have the tools. That is our perspective on this.

Mr. GREEN. I have 22 seconds left. Anyone else? Thank you, Mr. Chairman. I will yield back the balance of my time.

Chairman BARR. The gentleman yields back. In the remaining time of the gentleman, I would invite Mr. Brown to respond to that, if you would.

Mr. BROWN. The adequacy of export controls?

Chairman BARR. Yes.

Mr. BROWN. Yes, I agree that theoretically export controls could be covering a lot more, but I think practically they don't. Let's just think about the voluntary nature of export controls. That means that companies that are quite aware of their obligation and the defense industrial base, for example, devote a lot of resources to making sure they comply.

But I am particularly concerned about emerging technologies and small company development of those technologies. Those companies are not aware and not spending the resources to ensure they comply. How many convictions do we have for violations of export controls? We don't have anywhere near the number of resources looking at what is happening there in critical technology. So I think it is a huge flow of outward technology that theoretically could be covered, is not.

Chairman BARR. OK. The Chair now recognizes the author of the legislation, Mr. Pittenger.

Mr. PITTENGER. Thank you, Mr. Chairman. Mr. Chairman, for the record, with unanimous consent, I would like to enter two letters, one from Oracle and one from Ericsson, in support of FIRRMA. Oracle stating, "Critically, FIRRMA strikes a balance of protecting national security while not chilling the benefits of for-

eign investments in the United States. We appreciate that the language is narrowly tailored to focus on specific national security concerns, distinguishing between investments that are financially motivated and investments that are strategically motivated, such as improving foreign military capabilities or other strategic objectives.”

Ericsson states, in short, FIRMA helps provide the assurance by arming CFIUS with the tools necessary to preserve our national security interest while not discouraging investment in the United States. It is an important effort in the regulatory effort that requires modernization, without which will result in the potential compromise of technology developed by companies like Ericsson and, in turn, our national security.

Chairman BARR. Without objection, those letters are entered into the record.

Mr. PITTENGER. Thank you, sir. Mr. Kallmer, thank you for your testimony. I was correct to say that you do have various entities that are a part of your group. I know that these two are a part of your group, but Lenovo is part of your group, as well. Is that not correct?

Mr. KALLMER. That is right.

Mr. PITTENGER. Does that in any way affect your testimony, do you believe?

Mr. KALLMER. No.

Mr. PITTENGER. Mr. Marchick, you—Carlyle has many investments, probably billions of dollars, in China, maybe 50-plus companies. Do you believe in any way that affects your testimony?

Mr. MARCHICK. No, sir. In fact, my testimony is very similar to my testimony in 2006.

Mr. PITTENGER. Well, we have Asia Satellite Telecom Holdings. We have Caribbean Investment Holdings currently, East River Biochemical, GDC Technological Limited. These are major interests in terms of technology and services. I would just want that for the record.

I think it is important and material that it be known. Mr. Lowery, do you have representation of foreign investments in China?

Mr. LOWERY. No, I do not.

Mr. PITTENGER. Thank you. Mr. Brown, I would like you to elaborate on outbound investments. That seems to be the real sticking point here. The shortcoming, in essence, of what would happen without the CFIUS review and outbound investments—and, frankly, to the reason why we have five secretaries of defense, ministers, secretary of defense, and the current secretary, both parties, stating that we had to reform CFIUS to address these joint ventures and these foreign countries, particularly China?

Mr. BROWN. Yes, happy to. I think the issue is if you have a critical emerging technology which is not yet covered under export controls and a U.S. company wants to enter the Chinese market, and China forces you to have a joint venture, that is a tremendous opportunity not only for IP to leak out, but also know-how, and also an opportunity for China to recruit talent.

Mr. PITTENGER. Could you give us some examples?

Mr. BROWN. Well, there would be lots of examples that would cover some of the military technology we have talked about. So

imagine if it was Boeing or GE with jet engines. I can understand why a company might want to enter a joint venture, to have access to the Chinese market, but I think we need to have a say in whether that makes sense from a national security standpoint.

The closer you get to emerging technologies, where we don't even understand yet where they are all going, artificial intelligence, quantum computing and sensors, areas like that, we need to be hypersensitive that technology is inadvertently leaking—

Mr. PITTENGER. Once it begins as a commercial venture, and with the dual technology objective, it can morph into a military interest. Does export control have the capability to give purview over that?

Mr. BROWN. My understanding is export controls theoretically do, if we were smart enough to put on the export control lists critical emerging technologies. But I would ask us whether that has happened. So I don't think practically we are looking forward enough with export controls. It tends to be more backward looking.

Mr. PITTENGER. CFIUS has a dozen agencies involved, whether it be Commerce, Justice, the intel community, DOD. Do these same eyes look over the shoulder of export control? Or do we have the same type of purview?

Mr. BROWN. Clay might be in a better position to answer that. I don't think it is as broad as CFIUS is.

Mr. PITTENGER. Well, I think that is the concern that many of us have, is that CFIUS by structure, not just Commerce leading the way, but Treasury with multiple agencies has a direct interest in the outcome.

Mr. LOWERY. I will just—in the export control, the Defense Department, the Commerce Department, and the State Department take the lead on export control matters.

Mr. PITTENGER. I would like to say we have addressed oil and gas. They are happy with our bill.

Chairman BARR. The gentleman's time has expired. The Chair now recognizes the gentleman from Washington, Mr. Heck.

Mr. HECK. Thank you, Mr. Chairman. I would like to also note for the record that I personally believe that some, if not many of the comments made here earlier with respect to outward bound relate more appropriately to 2.0, not the latest version of the bill that we have been developing. I know many of you are familiar with it, because many of you are involved in the improvement of 2.0, and I thank you again for that.

Mr. Kallmer, I frankly want to particularly cite the constructive role that ITI played and thank you for that.

We don't really have time to go into a really technical discussion of some of those things, but I would like to ask if you would be willing to respond to some questions for the record about the revised version of the bill that we did enter into the record earlier.

Mr. KALLMER. Happy to do that. There may be some confusion about which version is 2.0 and 3.0.

Mr. HECK. We are going to help you with that.

Mr. KALLMER. OK, that would be great. Dates would help.

Mr. HECK. Trust me, we are going to help you with that.

Mr. KALLMER. Great.

Mr. HECK. Mr. Brown, I have often referred to your work, the report that you co-authored at DIUX about Chinese investment in early stage companies and wider technology transfer. It is an honor to have you here today. Thank you so very much.

Mr. BROWN. Thank you.

Mr. HECK. I actually came to Congress from the private sector. I have been involved in startups. I have grown companies. I have served on board of directors. I acted as an angel investor. I think I am well aware, frankly, of how it is that somebody who makes a less than 50 percent-plus-one investment in a company might gain access to emerging technology or other technologies that would be of interest to us.

So I want to ask you, how does simply making an investment even potentially result in damage?

Mr. BROWN. That is a great question, because I think it takes the next step to see, what are the tools China uses for technology transfer? Some legal, some illegal. So the investment, per se, you could argue—as I think you are suggesting—there is not really a problem with that. But if you use the investment as a view of the landscape—and we talked before about China in aggregate having a view to upwards of half of all the venture activity, which is a lot of innovation happening in the U.S., that gives you a vantage point to then deploy other tools, for example, cyber theft, or placing a foreign national at companies.

There are examples—some classified, some not classified—which are examples of that. A perfect one is the Sinovel-American Superconductor case. “60 Minutes” did a report on that 2 years ago. National Public Radio covered it again just this month. You have a wind turbine manufacturer in China, and you have the controls of the key software coming from a U.S. company, and then that was effectively stolen using industrial espionage. They converted one of the employees to provide the software control tools and put the American company out of business.

John Carlin, assistant attorney general, was asked in the “60 Minutes” report, how often is this happening? Thousands of companies experiencing this. FBI did a survey of 165 companies a couple of years ago, half said they had suffered some form of theft, IP theft. And 95 percent of those cases attributed to China.

So this is a rampant problem happening around us. It is because China has a very systematic, well-funded plan to transfer technology. It is critical for transformation of their economy. It is happening through those illegal means we just talked about, but also through very aggressive recruiting, such as the Spring Light or Thousands Talents programs. It is happening through professional associations, where they do recruiting, joint ventures, research with U.S. academic institutions and with U.S. companies. So they are doing it in a variety of different ways.

Mr. HECK. Well, even, frankly, short of theft, fast rewind. Imagining that the last company I was involved in, which had a couple of modest software proprietary products, if we had an investor that did not have a seat on the board but had 40 percent of equity—hard to imagine they wouldn’t have a seat on the board, but conceivably—it just would be prohibitively impossible to deny the flow

of that information to them in one way or another. That is just straightforward fact of the matter.

Mr. BROWN. That is exactly right.

Mr. HECK. You make some recommendations on how to deal with technologies transfer strategy in the report that you co-authored. But like any good report, you included no action alternative. What happens if we do nothing?

Mr. BROWN. We are in a technology race with China. Our economic security is at stake. So the longer we leave the barn door wide open without taking the appropriate defensive actions, it is as if we are saying we are wide open, please come steal whatever you would like. I think that has to be balanced, as we have already talked about, with what are we doing in the U.S. to proactively invest and make sure we are on the leading edge of technology and innovation. So I think we have to do both.

Mr. HECK. Thank you. I yield back, Mr. Chairman.

Chairman BARR. The gentleman yields back. The Chair recognizes the gentleman from Minnesota, Mr. Emmer.

Mr. EMMER. Thank you, Mr. Chair. Mr. Kallmer, in testimony before the Financial Services Committee and the Senate Banking Committee, officials representing the Department of Commerce in the Trump, Obama, and George W. Bush Administrations have all testified that export controls not only restrict the transfer of products, but even ideas.

According to Commerce Assistant Secretary Richard Ashooh, export controls can make fine distinctions between countries and even end users. Former Commerce Assistant Secretary Kevin Wolf has noted that in contrast to CFIUS reviews, a transaction isn't even necessary. A phone call or an e-mail can be covered through export controls.

Can you explain your member companies' interaction with the export control regime and elaborate on why you believe export controls are more appropriate than CFIUS to protect national security when it comes to outbound transfer of technologies?

Mr. KALLMER. Sure, we would be happy to do so, Representative Emmer. I say this all with humility, because I am not personally an export control expert, but have been fortunate to work with our member companies' experts, as well as some others.

Our companies are on the front lines, as are companies in other sectors, of doing business across borders, of moving things and ideas and services and so forth. All of our 63 members are global sophisticated companies. They have significant departments of people thinking about these things.

I would say uniformly in the discussions that we have had on this issue, people have agreed this is where the solution set lies. In complete agreement with Mr. Brown, actually, we are not there yet practically. The system is not working with the necessary aggressiveness and creativity and resources to help control and discipline the things that we are all worried about.

People from our companies know from personal experience from transactions and exports that their companies rely on that as the tool. That is the tool that is going to get us there.

Mr. EMMER. Thank you. Mr. Lowery, the medical device industry, which is a major driver of my State, Minnesota's economy, has

expressed concerns with the proposed expansion of CFIUS oversight and how it could impact technologies that may not have been initially thought of when this effort began. Of particular concern is the broad application of the term critical technology and the term emerging technologies.

While it's possible that implementing regulations will help define the scope based on the bill's definition, we don't see any guarantees. Based on your experience, is it your sense that medical devices would or would not be covered under the umbrella definition of a critical or emerging technology as proposed in the current legislation?

Mr. LOWERY. Congressman, I don't know.

Mr. EMMER. Should they be?

Mr. LOWERY. My view is probably almost assuredly not, unless there is some way you can relate that back to our national security, which I am not sure if you can.

That is part of my concern is that there are a lot of definitional issues that have to be clarified through a rulemaking process, which will be difficult. We have tried to do lots of different definitions on critical technology in the past, but it is also linking that critical technology, because there is lots of critical technology that has very little to do with national security. How do you link those together? So my unfortunate answer for you is I don't know.

Mr. MARCHICK. May I try, sir?

Mr. EMMER. Absolutely.

Mr. MARCHICK. To me, this goes back to my testimony. Clay is right. The answer is, I don't know. If there is a medical device technology that helps our troops, that is unique, that is something that is in our comparative advantage, that helps our military, the Government should focus on whether we want to let that technology go.

Mr. EMMER. Well, if I can interrupt you, everything that you just said, if there is a medical technology and advance that not only helps our troops, it will help every citizen in the United States, it could help people around the world, why should that be included in critical emerging technologies and denied to other people that may actually survive because of it?

Mr. MARCHICK. I think the point is that the Government, through the export control system or some other—should decide with whom do we want to share this technology. If it is some type of technology that protects troops against chemical weapons, for example, I would think we would want to control that, where it goes, who we want to share it with, and of course it would benefit everybody, but we need to look out for our own troops.

Mr. EMMER. True. We also have to be interested in innovating, and in order to innovate, we may not have all the ideas. We need to bring others in. So I guess my concern is still my concern, that the definitions are not defined. They are too broad. We need to make sure that we are not having unnecessary impacts on industries such as this.

I know that all of you feel the same way, but somehow that has to be addressed. Thank you, Mr. Chair.

Chairman BARR. The Chair recognizes the gentleman from Ohio, Mr. Davidson.

Mr. DAVIDSON. Thank you, Chairman. Thank you all for your expertise. I thank Mr. Pittenger for trying to address this. I share some concerns about how broad the language is and some of the implications that have been already discussed.

To pick up where Mr. Emmer left off, and I guess to continue with you, Mr. Marchick, if I have, as an entrepreneur, an idea that is innovative, perhaps it is critical, how do I know it is critical? Let's say it is deemed critical by you or some other decider on behalf of the United States of America, who owns the idea? Is it my idea? Or is it America's idea?

Mr. MARCHICK. It is certainly your idea, sir.

Mr. DAVIDSON. So I own my intellectual property.

Mr. MARCHICK. Correct.

Mr. DAVIDSON. I decide to—I don't even necessarily want to patent it. I just have it as a trade secret. Somehow somebody discerns that what I am doing might be critical or sensitive, it is not even sold to the military, but it is important to somebody, when can the Government come in and take possession of my intellectual property and decide that I no longer have control of that intellectual property?

Mr. MARCHICK. They should never do that. It is your intellectual property.

Mr. DAVIDSON. So, Mr. Lowery, how does the language in this bill—what implications does that have? We have I think tighter language on the export control protocols. It is already very critical. We have seen problems and gaps, to be sure, with export controls. One of the notable ones to me is when it first moved to Commerce release authority, when Hughes basically gave away the farm on multiple launch vehicles for rockets, to put communication satellites out, because it also has launched warheads with great precision.

So where does that line happen between the tight language of export control and where we are headed with CFIUS?

Mr. LOWERY. So, I think it is a great question. If it was CFIUS the way it currently exists, if your technology and your intellectual property, you decide to sell it to a foreigner, and that foreigner comes in and gets control of it, and that technology or what you have created, your intellectual property, is considered to be something that is of a national security interest, then the Government has a say in allowing that transaction to happen. It may allow it. It may not allow it. But it has a say.

If you take it and you want to provide it overseas, and it is technology that has not been controlled by our Government, whether it is the Defense Department, which has the ability to do this, the Commerce Department or the State Department, then that is something that you are allowed to do.

Under this bill, you would basically—that would be expanded to something so that you would now have to go through another investigation to look at that, even though all you are doing is selling it to somebody in Brazil. That concern is—instead of identifying that your technology is a concern to us from an export control basis or national security basis—we are now basically just saying it because it is a critical technology and we have created something where the people that have no experience at this are now going to

have to look at it, as opposed to the people that did have experience at this.

Mr. DAVIDSON. So do you have any suggestions on how we could tighten that language and make it clear? Because, if you think about it, some of the most innovative minds—a lot of these are like grad students. They are in a PhD program. They are thinking, how do I commercialize this? They don't know that some bureaucrat in Washington, DC, is thinking this might be critical technology. They are just looking at how do I commercialize my idea?

They start talking to somebody. They may not even have a clue what the beneficial ownership of the company is. We criminalized some of this behavior, is the concern. So how could we get that language tighter, in your opinion?

Mr. LOWERY. So I think that Mr. Brown made some really excellent points about this. The export control language right now is not understood very well in the startups type of thing. If you think that is not understood, can you imagine what CFIUS is like?

My own view is that if you are going to tighten that up, then we need to identify those technologies, and we will probably have to do some marketing about that. Right now at least our export control regime tries to do some of that, but probably not as well—and Michael Brown has pointed this out—as they should.

In CFIUS, we have done no marketing practically. You would have to do a ton of it if this bill becomes a law.

Mr. DAVIDSON. Thank you. My concern is, America is the land of innovation. We create all kinds of innovative technologies. I would hate to see the most brilliant minds on the planet find that they should create their intellectual property somewhere else because we have put a regime in place that discourages innovation and capital formation.

Mr. Chairman, I yield.

Chairman BARR. The gentleman yields. The Chair now recognizes the gentleman from Indiana, Mr. Hollingsworth.

Mr. HOLLINGSWORTH. Happy Thursday. I appreciate everybody being here. I will try not to reiterate what everybody else has said, because much of what I wanted to talk about has already been said. But I do want to make a couple of points.

First, my disclaimers. Number one, I think we should do something. The status quo is unacceptable. Number two, the work that Mr. Pittenger and Mr. Heck have put in is really, really great work and much of it I absolutely agree with. But like we have discussed earlier, there are some aspects that I really do disagree with and worry about the chilling effects it may have on U.S. investment abroad, or investment here in the U.S.

I don't think this is—you are either pro-China or pro-America. I am pro-America. I am pro-American business. I am pro-American innovation. I want us to continue to be a leader around the world, and I think we do that because of—as Mr. Davidson said—those trying to develop intellectual property here because they have control of that intellectual property here. I want to make sure that we continue to do that.

I want to empower American business to be able to compete around the world and generate resources around the world that they can invest in R&D right here. But I do want to find a solution

to this problem, like I said. I want to make sure that we get to an answer that works for CFIUS and an answer that works for export controls and ultimately works to keep the American people safe.

I think that is a really important step that we need to take. I do worry—I share many of your concerns that by making CFIUS overly broad we have taken what was working and now we have spread those resources over so much more ground, we are going to do everything with mediocrity instead of doing the things we need to do extremely well, extremely well. I worry about that in many aspects of government. I feel like we are headed in that same direction.

What I have heard from Mr. Brown and others in testimony is, there are some gaps between what we should be doing and what we are doing with export controls. That to me doesn't say, hey, we need a whole new structure that we have to build on top of everything. That says, we need to address those gaps and let's put the things on export controls that need to be on export controls. Let's take the steps we need to take with export controls. But let's not build a new super-structure that catches so many more transactions, that takes valuable resources and spreads them over more and more territory, more and more transactions.

So I wanted to ask Mr. Kallmer specifically, in your testimony, one of things you talked about is my area of exact concern. Section 3(a)(5)(b)(v), and how we might be able to add Section 109 language to the existing bill in order to really narrow that to transactions that could pose a national security threat, rather than having the broad language, the broad net that we are using now. I would hope that you would address that a little bit more than the few sentences that you have in your testimony.

Mr. KALLMER. Sure. Happy to do that, Representative Hollingsworth. I should first say, I appreciate the comments, Representative Heck, about working together. This portion of the bill is the portion that we have been most concerned about, but where I think in recent months we have seen the most good-faith responsiveness to those concerns. Now whether it is 2.0 or 3.0, we are talking about language that—from our vantage point, recognizing we are not in Congress, is moving very much in the right direction.

Mr. HOLLINGSWORTH. Good.

Mr. KALLMER. What we, in my testimony and we have done it more broadly in our proposed edits, envision is in addition to the possible idea of incorporating Section 109 actually putting into FIRRMA—and establishing under CFIUS—a subcommittee, what we call a subcommittee on export controls, to perform the function of being this connective tissue.

One of the beauties of CFIUS as it is today is that I think it has all the export control agencies in it already. I certainly remember—and I am sure Clay does—that there are many transactions where you get in the room, you are looking at the transaction like, wow, can this be dealt with by export controls? You have the experts from the Bureau of Industry and Security sitting right there.

The idea is to essentially turbocharge that process, ensure the two sides are talking to each other, and to the extent that the subcommittee can be a vehicle for increasing funding, political commitment, and institutional expansion of export controls, we believe

that over time it can actually do the hard work that we think we need to do upfront of identifying, describing, and listing emerging critical technologies.

Mr. HOLLINGSWORTH. Well, I want to do that work upfront. I want companies to be able to know the vast majority of technologies that exist out there, the vast majority of transactions that exist out there, the vast majority of countries we are not concerned about. We want you to go about your ordinary course of business and transact as you see fit and do things. It is a narrow band that we are concerned about, and focusing on that narrow band so that we do that well is really, really important, because I am pro-American business. I am pro-American employment. I am pro-American national security.

I think that really means we have to be careful here that we don't dampen U.S. investment or alternatively inhibit our companies from being able to compete around the world to do transactions around the world so they can bring back that money to invest in R&D, so they can bring back technologies from the world right here and make our lives as Americans better off. So I thank you.

I yield back, Mr. Chairman.

Chairman BARR. The gentleman yields back. With the indulgence of the witnesses, there is an interest in a brief second round of questions. I will start that second round of questions.

I think Mr. Brown makes an interesting and important point that I would like the other witnesses to addresses. That point being his view that the export control system is deficient and that FIRMA and an expansion of the CFIUS jurisdiction is necessary to the extent that the export control system remains deficient.

I also would like Mr. Brown to address the very interesting and I think important point that Mr. Lowery makes that the FIRMA bill as currently drafted runs the risk of, quote, "overwhelming the system." So let's start with the first point that Mr. Brown makes. Mr. Lowery, Mr. Kallmer, Mr. Marchick, would you like to address Mr. Brown's point that the export control system is deficient to achieve the objectives we want?

Mr. LOWERY. So Mr. Brown makes, and I know Giovanna has also made some of those points. My own view is that if there are deficiencies, then let's work on them and let's fix them. I think that Congressman Royce's bill has made a very good effort at that, what I just—the dialog we just heard is about, how do we improve the FIRMA bill and link it toward the improvement on export controls?

If our concern is that export controls are not covering enough particularly toward specific countries such as China, then let's address that, instead of creating basically a bill in CFIUS which addresses all countries outside of a few, but mainly all countries, and addresses all technologies even though they are not necessarily ones that are of concern to us.

So I think that there is—so I agree with Mr. Brown. If that is—I think it sounds like he is right, which is we need to work on it. But then work on, as Mr. Kallmer said earlier, the right tool for the right problem.

Chairman BARR. If I could shift back to Mr. Brown, so in response to that, I don't know if you have had an opportunity to look at Chairman Royce's legislation updating the export control system. Would that solve the problem primarily? If it doesn't, why not? Then if you could also address the argue that the FIRRMA bill as currently drafted could potentially overwhelm the system and spread resources too thin, I think Mr. Hollingsworth's concern?

Mr. BROWN. Sure. So my perspective, as I already said, is we need to reform both. Neither is a substitute for the other. Given the scope of the problem and how critical it is for our future, why wouldn't you want more tools in the hands of the U.S. Government? So I am all for improving export controls. I am not an expert on Mr. Royce's bill.

But I very much favor updating export controls and making sure a list of critical technologies that are forward-looking would be included in what we do to update export controls. But I don't think that is a substitute for CFIUS reform and the ability to look at investments that are incoming in the U.S. in these technologies that we might want to be concerned about.

To your question about overwhelming the system, I think we handle that by two things. Number one is to the extent we can define a process to name these critical technologies—and I agree, it is overly broad right now—that process needs to include not just government input, but, again, academia and some private-sector input. Let's make sure we are getting a broad view. And of course, that will have to be dynamic. Once the list is there, it is out of date immediately, so we have to frequently update that list.

Then narrow the list of countries. I think we have used some examples here, was it—some selling to Brazil, let's be very clear about the countries we care about. I don't think the bill is so politically incorrect to name those countries, but I don't mind naming them, China, Russia, Iran, North Korea, Syria. Most of those are irrelevant because they are not investing in our economy, with the exception of Russia and China, and China's investments are an order of magnitude bigger than Russia's investments. So I think getting very specific is a big plus.

Then, second, we need to give credit to the very smart people working on CFIUS. If they have to deal with thousands of transactions and they get the resources from Congress, they are going to figure out how to sort the wheat from the chaff and focus on what are the transactions that we care about. I know they are not going to look at every transaction with equal time. I have met those folks working on CFIUS, and it is a very smart group, and they would adapt.

Chairman BARR. I appreciate the deeper dive on those issues. The Chair now recognizes the gentleman from Washington, Mr. Heck, for a second round.

Mr. HECK. Thank you, Mr. Chairman. Some of my colleagues on committee know I am a movie buff and love to quote lines from movies. I am thinking today about a line the Kevin Costner character in "The Postman" used, which is, "Things are getting better." I think things are getting better in this bill as a consequence of this really incredibly healthy conversation from all points of view.

Again, I want to thank the Chair, and I want to thank my partner, Congressman Pittenger, in his advocacy, but all the people who are bringing their heartfelt concerns to this table.

I cannot help, however—and I am sorry that my friend and colleague from Ohio, Mr. Davidson, left—comment on his concern about placing in law a regime that would thwart innovation—and my words, not his—effectively dilute, demean, appropriate someone's intellectual property, because it is important to note here what it is that requires a society of innovation. It requires investment in research and development. As Mr. Brown pointed out, we are way down from where we used to be, but that previous Federal investment is part of what got us where we are.

It includes the finest post-secondary education system on the face of the planet. That helps create our society of innovation. It includes most importantly—and germane to the subject—freedom of expression. Because you know what? They don't have that in China or North Korea or Russia or Syria or Iran, as a matter of fact.

Last, it requires the rule of law. Indeed, the very concept of intellectual property is a product of Western law, originally Great Britain, but developed through law and case law in America. Intellectual property is the rule of law. It is that which enables innovation and it is, in fact, that which we are trying to protect with CFIUS, as a matter of fact.

So I wanted to make that point, because I don't think it should be overlooked, how we got to where we are at and what is at stake here.

Ms. Cinelli, you haven't been called on in a long time. I think you have a lot to offer. So if I may, ma'am—

Ms. CINELLI. I am feeling left out.

Mr. HECK. No more.

Ms. CINELLI. Thank you.

Mr. HECK. You noted in your testimony that one of the factors that makes it particularly urgent that we act now is the loss of visibility into the technology transfers that are occurring. I want you to elaborate on that. I want you to say a bit more about what you mean by it. How can modernizing CFIUS help solve that problem?

Ms. CINELLI. Happy to do so. I thank my co-panelists here for providing all the background. So if you look at the export control regime and then you look at CFIUS, each is voluntary in a certain sense. If someone does not make a filing to CFIUS, there is no visibility by the Government into the activity. Yes, the committee can reach out and invite a submission, but even in those circumstances it is voluntary.

So governments make decisions on what is critical to needs, what the next generation is, sometimes on the information that they obtain through these processes. Without the filings and without an understanding of how the constructs work, the Government is missing some information.

On the export control side, I must express a little bit of frustration as people were talking about the system, because as a general matter, the export control system is structured to handle some of the outgoing and even incoming exchanges that occur. The challenge arises in that you can control something, but if you do not require an authorization from the Government in order to address

the exchange, to have the exchange occur, then you still have no visibility. In essence, something is put on a list, but there is no need to go to the Government to let them know. You invoke what are called license exceptions or license exemptions.

I know this is not an export hearing, but there is built into especially the Commerce regime at least 18 authorizations that are self-executing, that if a company looks and says I meet these elements, they may proceed with a range of technology transfers without any notice to the Government. There is no filing with customs. There is no filing with census. There is no filing of anything, reporting of any sort to the Government.

So the activity occurs lawfully because the exemption or exception permits it, but the Government is unaware of it. It then proceeds to make decisions, as Mr. Brown was mentioning, you have published a list, and by the time you publish it, it is outdated. This is today's technology and we put it on the list, it takes 6 months to get it on there, and it has already been overcome by events.

So as you look to fix the system, and examine H.R. 5040, one of the things to look at is, how are these exception and exemption processes working? CFIUS in the modernization, what it does is it allows even more visibility into all these different types of activities, and that agencies that are involved in CFIUS are also the ones engaged in the licensing part.

There is a section in the existing bill—I have not seen 3.0—it is I believe 5(c)(iii), which actually says that certain transactions are not covered if there are other laws and regulations that can address it. Again, I am not quite sure what happened in 3.0, but that provision, in and of itself, opens the door to put the contours and framework on preventing the deluge that has been discussed here.

I think perhaps that provision should be looked at a little bit more closely to see how it can be used to cabin in some of these issues. So, thank you.

Chairman BARR. Thank you. Thank you very much. The Chair recognizes the vice chairman of the subcommittee, Mr. Williams.

Mr. WILLIAMS. Mr. Marchick, in your testimony, you advocate for a carefully tailored approach to determine which transactions actually need national security review and allow for speedier review for the rest. So my question would be, how would you effectively determine which transactions do and do not need national security review?

Mr. MARCHICK. It is a very good question. I think that there are criteria in the existing statute. I think FIRRMA expands those criteria. Those criteria give companies guidance on which transactions are the type of transaction that CFIUS needs to review.

Then going back to something that Mr. Brown said, you want to make sure that CFIUS captures those transactions where there is something greater than passive investment. You could have an investment where there is an 80 percent ownership stake and they are completely passive. They just say, give me the financial statements, do a good job. If you do a good job, we will give you more money. If you don't do a good job, that is our last investment with you.

You can also have an investment that is 10 percent or 20 percent, which includes licensing of technology, sharing secrets, being

on boards, access to supply chain information. If that is in there, CFIUS should review it. So I think you look at indicia of control, the type of transaction it involves, whether there is sensitive technology, and that gives you the guideposts for which type of transactions need to be reviewed.

Going back to Mr. Hollingsworth's point, which I think was very well taken, the system has slowed down so much because they are overwhelmed that, frankly, non-sensitive, non-significant transactions are getting slowed down. I will give you one example. We had a transaction of a medium-sized company—it wasn't particularly sensitive—we loved it—it was a good investment that we sold to a NATO ally. It flied through CFIUS.

On the 29th day, we got a call. There were no concerns at all. The 29th day, we got a call that said one of the agencies can't get the signature because this person is traveling around the world. So that added another 30 days to the process.

As Mr. Hollingsworth said, that chills investment. If I am selling my house, and Mr. Lowery bids X and Josh bids X plus 10 percent, and Mr. Brown bids X plus 50 percent, but he is going to take 6 months to close and may not close, I am selling to one of these two, because time is money and that uncertainty and the slowing down of the process is what hurts finance, what hurts investment, and chills the type of innovation that Mr. Hollingsworth has talked about.

Mr. WILLIAMS. OK. Mr. Lowery, let me ask you and Mr. Marchick this. When we consider the option of dividing countries into more concerning and less concerning, is it accurate to say that risky actors may come from friendly countries and still warrant a review by CFIUS?

Mr. LOWERY. Yes, it is. So the way the system works now is that—and I think it should remain this—is that a foreign investment comes into the United States, it comes from a different country, because it is foreign, and the intelligence agencies try to basically figure out how much of a threat is it.

So if the threat is going to be a lighter threat, if it comes from the United Kingdom and happens to be a purely private company, but it may be a much heavier threat if it comes from China, and it is whether it is private—to Mr. Sherman's point earlier—or it is a government-controlled company, the threat level is going to go dramatically up.

That is how CFIUS is actually doing its calculation. They are looking at that threat, and then they look at the vulnerability of the asset that is being purchased. I was involved in a transaction that was coming from a NATO ally, where they were purchasing something in the United States, and we didn't allow that transaction to occur under CFIUS, and it was because the asset that was being purchased was so sensitive. The purchaser wasn't sensitive. It wasn't a problem. It was what they were buying was a problem, and so we didn't allow it to happen.

Now, that had nothing to do with China. I promise you. It was a NATO country. But it just suggests sometimes it is not as clear cut as deciding which countries and what—but that is why there is a process.

Mr. WILLIAMS. I have 16 seconds, Mr. Marchick.

Mr. MARCHICK. I agree with Clay. There is a balancing between the country of origin, the buyer, and the sensitivity of the asset, and CFIUS needs to weigh those factors.

Mr. WILLIAMS. Thank you. I yield my time.

Chairman BARR. Mr. Pittenger is recognized.

Mr. PITTENGER. I would like to thank each of you for being here today. I value your input. We have the last several months and we will continue to modify it. I hope that all the members will take a hard look at version 3.0 and see the modifications we have already made to industry, because I am a free and fair-market guy, and I believe in capital investments. I have the largest Chinese owned hog processing plant in the world in my district. So I welcome those investments. Those are 5,000 people who have good jobs there. I don't want to discourage that whatsoever. So don't hear my interest in this in any other realm.

I would say that we are not alone in our concern. Japan has real concerns in this regard, Germany, the U.K., European Union, Australia. We are all about addressing a major exploitation of our IP. To that end, it is important that we try to lead the way and to get it done right.

I would like to say that one part of our bill that is included as an exemption that really makes it more marketable, more accessible for companies when we have other countries who have the same standards that we have. It is incentive for them to address these issues, and as such, they have a minor form they have to fill out, in essence, and don't have to go through the process.

I would ask you, Mr. Lowery, is the CFIUS process voluntary or mandated?

Mr. LOWERY. It is currently a voluntary process, but there are ways to bring companies into it.

Mr. PITTENGER. Yes, sir. If after the fact that there is some opportunity to review, if a question is raised, but it is really a voluntary process. So we are really not talking about 20,000 applications or concerns that would necessarily come in Treasury. From my discussions, it doesn't expect anything close to that, because it is a voluntary process. It isn't mandated.

So I would say to each of us, let's continue to work together. I would, Ms. Cinelli, you wanted to make a comment earlier I could tell, and I just want to give you a moment to do that.

Ms. CINELLI. Thank you very much, sir. It is a very interesting comment on the transaction that you were talking about. Just from a very practical perspective, when people put deals together and there are CFIUS closing conditions, which some do get inserted, there are usually also provisions for what we call closing over the condition.

So from a very practical perspective, if you were to get the information that Mr. Marchick was talking about where it was a more administrative process that was impeding the finalization, just as a practical matter, the parties believe the risk would be appropriate in that sense, and they would close over the condition, in the sense it would not impede the investment, they would stay to the schedule.

Where some challenges may arise sometimes is if there isn't a particular view from CFIUS, and maybe they haven't been as clear

that it is an administrative matter, then the parties may hesitate. But even in those circumstances, in my experience, a large number of transactions move forward even if there is a CFIUS closing condition. It is considered part of a business calculation, just like tax and any other consideration. Thank you.

Mr. MARCHICK. I would just add, I agree with that. But in our experience, we are a firm that doesn't like to close unless the Government says you can close.

Mr. PITTENGER. Mr. Brown, would you like to make a closing comment?

Mr. BROWN. I am glad that this committee has taken this issue so seriously, so my thanks to Representative Heck, Chairman Barr, you for taking the leadership on this issue to make sure that we do something. Because the fact that the bill has some areas that we may want to improve is certainly no reason not to move forward and strengthen national security. So I am excited about what I am—

Mr. PITTENGER. Do you have any concerns in terms of outcome of what may or may not happen in a bill that would allow further exploitation?

Mr. BROWN. As several of you have already commented, no single action we take is comprehensive. So I think we need to move forward with improving this bill, and then we need to say what else do we need to do to take care of the threat, export controls we have covered here in depth, but then as I became a broken record, we have also have to look at what are we doing to invest to make sure we are the source of innovation in this country.

Mr. PITTENGER. I think we all agree that export control and CFIUS play a vital role, and they both need to be enhanced. Frankly, export control is the front line defense, from my point of view. Thank you. I yield back.

Chairman BARR. Thank you, Mr. Pittenger. And Mr. Hollingsworth, you are recognized for a second round.

Mr. HOLLINGSWORTH. Well, as I said before, much has been said, so I will be the once more with enthusiasm here at the very end. I really appreciate everybody's expertise. A couple of things I wanted to say. I wanted to reiterate exactly what Mr. Heck has been a vocal advocate for and I, as well, in increasing R&D spending, both on the public side and whatever we can do to engender more on the private side. The source of our innovation in the long run are truly those investments.

I wanted to comment on what Ms. Cinelli said, as well. Let's be fair to our friends over at Commerce. The goal is not to have everybody submit a letter to the Government when they seek to do a transaction that is across a border. The goal is to make sure that we limit it to those specific instances and not have everybody suddenly submitting forms just because they happen to go across a random geographic border.

I think it is really important to say there are exemptions in place, but there are exemptions in place for good reason. Again, I think we come back to this point which all of us have talked about in narrowing down the focus so that we capture every single transaction that could be a problem, but not one more transaction than that. That is the goal.

I wanted to reiterate what Mr. Marchick said. I have bought and sold a lot of companies. Nowhere near what Carlyle has, by the way. Trying to—

Mr. MARCHICK. We have a few more you can look at.

Mr. HOLLINGSWORTH. Right, and really healthy valuations, I am sure. Trying to convince a buyer to close over conditions is just one more hurdle in a transaction, and not always an easy proposition, especially with something as big and onerous as Federal Government standing at the side of that.

So I wanted to just come back to this very central thing. One, I don't believe we should do nothing. I think we should take steps to enhance national security. Two, I do think that we should address the gaps in export control and utilize that, as Mr. Pittenger said, front-line measure and have a robust list, a clear list of these are the things that are really important to us to hold onto.

But, three, I want to come back to this underlying point, and I think it was touched on a few minutes ago, which is, what we are really concerned about is technology transfer. CFIUS uses corporate transactions as a proxy to understand what might be happening underneath that, underneath the hood in terms of technology transfer. I think export controls, in a very real way, gets at the actual underlying transaction we are worried about.

I want to make sure that we fully utilize those resources and don't build an extra super-structure over top of that and use a proxy, when we could just use the underlying problem that we want to deal with.

I think the last point—and we have all talked about it—is making sure that we stay very, very focused here, because I did worry—and, Mr. Brown, I agree with so much of what you said and so many great points, but when you started to list the things that could be on an actual export control list, there is so much pure academic research that theoretically sometime in the future could have a military application. I don't want to start putting everything on the list because it might end up in the hands of a military use later on.

I want to make sure that we are really focused on the things that we think are proximate or near-term or could be, because I don't want to end up with a list that just basically says everything. Then we get to the point where everybody is submitting a letter, where everybody feels like they have to go through a process, where everybody pays the \$300,000 fee to enter CFIUS. I want to make sure that we get through and allow American businesses to succeed here, allow them to succeed around the world, so that we can reinvest in all these important things that we talk about in R&D.

Private companies have to pick up the slack from a Federal Government that is not investing in R&D the same way they were 20 or 30 years ago. I don't want to put them at a disadvantage to be able to do that because of the work that we do here. We already fail to fund in the full, robust way I think we should. I don't want to then tie up companies' hands, paying more—and forgive me, for those of you that are lawyers—but paying more legal fees instead of paying more researchers and R&D and more facilities and employing more Hoosiers back home.

I think these are all really important points. As Mr. Brown well said, everybody is taking this very seriously. As Mr. Heck and Mr. Pittenger have both said, they have made tremendous strides, invested unbelievable diligence in making sure we get to the right outcomes here.

I think we are very close. I think Section 109 language is really important to making sure that we narrow the Section 3.5 issue that I have. I just look forward to continuing to work with everybody and appreciate the testimony today.

Chairman BARR. Thank you. Gentleman yields back. I want to thank all of my colleagues for their valuable contributions and important, insightful questions that helped us understand this a little bit better. Thank our witnesses for their excellent testimony today.

The Chair notes that some Members may have additional questions for this panel, which they may wish to submit in writing. Without objection, the hearing record will remain open for 5 legislative days for Members to submit written questions to these witnesses and to place their responses in the record. Also, without objection, Members will have 5 legislative days to submit extraneous materials to the Chair for inclusion in the record.

This hearing is now adjourned.

[Whereupon, at 4:04 p.m., the subcommittee was adjourned.]

A P P E N D I X

April 12, 2018

**Statement before the
Subcommittee on Monetary Policy and Trade
House Financial Services Committee**

Testimony by:

Michael A. Brown
Presidential Innovation Fellow

April 12, 2018
Rayburn House Office Building

Thank you, Chairman Barr, Ranking Member Moore and Members of the Committee,

I'm pleased to be with you today to share findings of work I've led for the Defense Department in understanding the role that Chinese investments in early-stage technology firms have in China's systematic plan to transfer technology. Because of this work, I am a strong proponent of the proposed FIRRMA (Foreign Investment Risk Review Modernization Act) legislation.

I came to this work as a former CEO of two Silicon Valley companies: Quantum, a computer storage provider where I worked for 20 years and Symantec, the cybersecurity firm where I was CEO through the fall of 2016. In my career, I've also worked as an investor, board member and chairman of several early-stage companies in Silicon Valley and in the Boston area. I'm here today in my personal capacity as a Presidential Innovation Fellow and not as a spokesperson for the Defense Department.

In the fall of 2016, at the request of then Defense Secretary Ash Carter and Vice Chairman of the Joint Chiefs, General Paul Selva, I began researching along with Pavneet Singh *whether and how* China is transferring technology through investments in early-stage firms. Last year, the Defense Innovation Unit Experimental (DIUx) produced an unclassified report with our findings that we've shared widely within the U.S. government entitled *China's Technology Transfer Strategy: How Chinese Investments in Emerging Technology Enable a Strategic Competitor to Access the Crown Jewels of U.S. Innovation*. In summary, what we learned was that China's participation in venture deal financing was at a record level of 16% of *all* venture deals financed in 2015 and remained at 10% in 2016 and 11% in the first ten months of 2017. This is concerning for several reasons.

Concerns with Chinese Investment in Early-Stage Companies

First, the *growth* of these investments is up substantially from a level of 1-6% from 2010-2014. We identified more than 500 Chinese-based or affiliated entities investing in U.S. early stage companies in 2017.

Second, the technologies where Chinese firms are investing are the *same* as where U.S. venture capital firms are investing and will be foundational to future innovation such as artificial intelligence, autonomous vehicles, augmented/virtual reality, robotics, blockchain and genetic engineering. Moreover, since these technologies are dual-use--designed for commercial use but also equally important for military applications--these technologies will continue to be critical in advancing U.S. military capability.

Third, since venture investing depends on deal flow, investors see many more deals than they

invest in. As a result, it's likely that Chinese investors, in aggregate, have seen *upwards of half* of recent U.S. venture financings; in other words, Chinese investors have a broad view of U.S. innovation across a range of technologies.

Fourth, by investing in early-stage companies, Chinese investors are learning about these foundational technologies *at the same time and at the same rate* that we do--which precludes any time-based advantage for the U.S. with these technologies. Historically, the U.S. military has had exclusive use of critical technology for some period which could be called a period of overmatch; however, we are not likely to have overmatch in the future if China learns about leading-edge technology from U.S. startups at the same time as the U.S. military. Imagine the security predicament the U.S. faces if China gains an appreciable lead in artificial intelligence, to give a specific example. As we know from history, a country achieving overwhelming technological superiority can have a decisive edge in advancing its geopolitical interests just as the U.S. has in the decades after World War II.

Fifth, without the proposed FIRRMA (CFIUS-reform) legislation, there is no monitoring, reporting or control of investments in technologies important for national security by the U.S. government.

Lastly, the Defense Department, In-Q-Tel or other parts of the U.S. government will tend to avoid contact with an early-stage technology company that has a significant level of foreign ownership even if the company is developing technology important for national security. These are six reasons why the scale of Chinese investment in U.S. early-stage technology companies is concerning.

U.S. Tools to Deter Technology Transfer: CFIUS & Export Controls

To mitigate technology transfer from the U.S. there are two primary tools the U.S. government can employ. The first is CFIUS (the Committee on Foreign Investment in the United States) and the second is export controls. Since CFIUS reviews specific deals on a case-by-case basis (rather than systematic assessments of acquisitions or acquirers) and only deals that involve a controlling interest by foreign investors (usually mergers and acquisitions), CFIUS is only partially effective. The proposed FIRRMA legislation makes CFIUS more effective by expanding its jurisdiction to cover more transaction types that could include technology transfer. As I see it, the goal of FIRRMA is not to ensure that more venture capital investments undergo CFIUS review as covered transactions but to ensure that foreign investments are truly passive. For example, Chinese individual investor participation in U.S. venture funds as a limited partner and passive investor is *not* concerning; on the other hand, Chinese firms making direct investments in early-stage technology companies is problematic as the access it provides to

intellectual property, know-how, applications of technology and talent to recruit can serve as a conduit for technology transfer to China. In other words, truly financial passive investments should be welcomed no matter where they are from while strategic investments from China in critical technologies should be viewed differently.

Another concern I've heard mentioned by some individual companies is whether FIRRMA will chill foreign direct investment in the U.S. I do not believe FIRRMA will reduce direct investment from countries *other than China* where acquisitions from Chinese firms are already receiving additional scrutiny from CFIUS. There is no reason to believe that global investment in the U.S. will slow because of FIRRMA apart from Chinese investment.

A further concern expressed by the venture capital community is whether FIRRMA will slow innovation since there will be more scrutiny of Chinese investment. Chinese aggregate investment in U.S. venture capital is on the order of 5% of all dollars invested and is, therefore, too small by itself to significantly reduce the overall investment in early-stage venture-backed companies.

The second tool the U.S. government has to deter foreign technology transfer is export controls and these are complementary to CFIUS since export controls cover *products* rather than access to technology. Some have argued in Congressional testimony that export controls are sufficient without CFIUS reform to deter technology transfer. There are five reasons why I do not believe export controls are a substitute for CFIUS reform:

- (1) First, export controls have typically been used for *products*—not *critical technologies*; in fact, I am not aware of any critical technologies—such as artificial intelligence, quantum computing or genomics-based engineering—which are on the export control list even though you can find examples of specific products which include a critical technology.
- (2) Second, because export controls typically focus on *products* instead of *technologies*, in general, they will be more backward-looking versus technologies where a national security advantage will be solidified through future development.
- (3) Third, export controls require coordination with allies to be effective and this typically takes 2-3 years through the Wassenaar arrangement to gain allied agreement. By that time, development of a critical technology may have already occurred.
- (4) Fourth, export controls are ineffective in deterring technology transfer that occurs when China forces companies to form joint ventures in exchange for Chinese market access since these joint ventures inevitably involve transfers of both intellectual property and know-how.
- (5) Fifth, it is the company's responsibility to send an inquiry to the Commerce Department to see if it should be governed by an export control as part of the Commercial Control

List. I am skeptical that a Silicon Valley early-stage company is aware of the need for or dedicating the necessary resources to inquire with the Commerce Department to comply.

Both CFIUS reform and export controls are going to be most effective if they are coordinated with each other *and* enforced with allies. Neither is a substitute for the other.

Methods for China's Transfer of Technology

What we found in the course of preparing our DIUX report is that Chinese venture investing is part of a larger story of technology transfer to China--ongoing for decades through both legal and illegal means. To be specific, some of the technology transfer mechanisms China engages in include industrial espionage, cyber theft, forced joint ventures, tracking of open-source innovations, sponsoring professional organizations to target talent and using Chinese foreign national students by placing them to work in sensitive areas of U.S. research. Viewed individually, the legal practices may seem benign but when viewed in combination, and at the scale China is employing them, the composite picture illustrates the intent, design and dedication of a regime focused on technology transfer at a massive scale.

Allowing China unlimited access to U.S.-developed leading-edge technologies not only speeds the decline of *our own* relative technological superiority but may even facilitate *China's* technological ascendance. While strategic competition with China is a long-term threat rather than a short-term crisis, preserving our technological edge is an important national issue today. In fact, the Defense Department is increasingly concerned about the risks today given that:

1. Chinese companies already own significant parts of the military supply chain,
2. Chinese companies already have significant designs of U.S. military equipment as a result of cyber theft and industrial espionage, and
3. China is targeting areas both to catch up to U.S. military capability such as in jet engine aircraft design and areas where China can gain a technology lead--especially where the U.S. military is developing technology through early-stage commercial companies such as in artificial intelligence and quantum computing.

The U.S. government does not have a holistic view--and by that, I mean a coordinated understanding amongst the economic and trade agencies and the purely national security agencies--of how fast this technology transfer is occurring, the level of Chinese investment in U.S. technology, or what technologies we should be protecting.

As a result, given the multiple means of technology transfer China employs today and the rapid pace of technology development, the CFIUS reforms included in FIRRMA are critical to our national security.

Conclusion: Need for Allied Coordination and Investment in Science & Technology

Let me conclude with two important points.

First, any of the steps we take to deter technology transfer from China--which include both CFIUS reform and changes to export controls--needs to be **coordinated with allies** to be effective. Otherwise, we create an incentive for talent and companies to move offshore. Additionally, we simply substitute one of our allies as the target of transferred technology.

Second, while defensive measures like CFIUS reform and better export controls are important, they are not the key to winning a technology race with China. The more concerned we are about the national security threat that China represents, as Chairman of the Joint Chiefs of Staff Dunford indicated when he placed China as the #1 national security threat by 2025, the more important it is to **invest in science and technology, encourage Americans to pursue STEM education and increase federally funded R&D**. To enable the U.S. to win the last technology race with the Soviet Union, federally-funded R&D was 2% of GDP in the 1960s. As China invests a higher percentage of its GDP in R&D as its economy grows faster than ours, U.S. federally-funded R&D has declined today to 0.7% of GDP. We must be proactive to ensure we improve our technology base and innovation capability because our future economic security will be the principal determinant of our national security.

Thank you for your attention to this important issue and I look forward to answering your questions.

Written Testimony of

Giovanna M. Cinelli¹

**Before the Subcommittee on Monetary Policy and Trade of the
Committee on Financial Services
United States House of Representatives**

April 12, 2018

H.R. 4311: The Foreign Investment Risk Review Modernization Act of 2017

Mr. Chairman, Ranking Member Moore and distinguished members of the Subcommittee:

Thank you for the invitation to appear before you today. I am honored to join my fellow panel members today as the Subcommittee continues to evaluate the changes needed to key areas related to foreign direct investment that implicates national security interests of the United States. Your leadership, and that of Congressman Pittenger and the co-sponsors of HR 4311, demonstrates the foresight needed to modernize the current Committee on Foreign Investment in the United States' ("CFIUS", or "the Committee") process to address the challenges and risks we face today and those we will face in the future.

I appear before you today in my personal capacity and the views reflected in this written testimony and before you today are solely my own. My perspectives are drawn from a 34-year career advising organizations and individuals on the legal contours of CFIUS, export controls, compliance, enforcement and policy, as well as government contracts and related classified and unclassified investigations in these areas. My views also reflect 15 years of service in the United States Navy as a Special Duty Intelligence Officer responsible for former Soviet Union naval assets, US industrial base requirements, and situational awareness mandates affecting US Naval assets. I am fortunate to have addressed situations where the delicate balance between national security and legal requirements affected a range of activities. I am grateful for the opportunity to share some observations with you today based on the insights this experience has provided me, and to respond to any questions you may have.

Background

Much has been written about the dangers of today's threat and vulnerability environment – whether military, defense, intelligence, political or financial. But in one sense, every era experiences dangers, and policymakers understand that a nimble and flexible underlying legal system is needed to move effectively and efficiently to meet whatever challenges arise. Laws and regulations are sometimes the most formidable

¹ Ms. Cinelli is a partner in the Washington, DC office of Morgan Lewis & Bockius LLP where she leads the Firm's International Trade and National Security Practice.

tools in the Government toolkit because of their ability to address current and future issues in a coordinated and consolidated way.

At times, circumstances change so dramatically that even effective legislation or regulations require a refresh. The concept of CFIUS – *i.e.*, a process by which cross-border investments are reviewed for national security implications – remains as viable today as it was when President Ford first memorialized it as an Executive branch committee in 1975. Based on the shifting landscape of foreign direct investment – a landscape that has been in dramatic transition since 2010 – it is time to update and modernize CFIUS.

I have been asked to comment on HR 4311 and its effects on national security, economic growth, job creation, innovation and continued foreign investment in the United States. My comments focus on three (3) key areas: the manner in which technology transfers occur in the cross-border environment; the review process; and CFIUS' underlying authorities.

Calls to modernize CFIUS, however, do not mean that the entire process is dysfunctional. As noted in more detail below, CFIUS' strengths include a) the exceptional and dedicated individuals who work tirelessly to manage the national security and transaction related mandates that exist in each filing; b) the more defined process ushered in through the Foreign Investment and National Security Act of 2007 ("FISIA"); c) the coordinated efforts of the intelligence community; and d) the depth of analysis applied to problematic transactions. The Committee remains sensitive to deal based considerations without sacrificing the essential goals of current CFIUS objectives.

These strengths, however, are offset by embedded weaknesses that limit CFIUS' effectiveness when it comes to reviewing more creative investment vehicles, emerging technologies and investments that extend beyond an existing "business". Acknowledging that the foreign investment landscape has changed, as have foreign investor motivations, indicates that the time is right for revisions to the CFIUS process and its authorities.

Historically, CFIUS cleared cross-border investments from a range of foreign countries that include the United Kingdom, Canada, Japan, and Germany within the top fifteen (15) applicant's countries. Each of these countries share democratic values with the United States, are viewed as close allies and share multilateral objectives across a range of foreign policy interests from nonproliferation to anti-corruption.

Within the last five (5) years, however, the top 15 foreign investors have been transformed, with the People's Republic of China ("PRC" or "China") moving to the top of the list as one of the most active countries for foreign direct investment in the US, as noted in CFIUS' Annual Reports of cleared transactions. China challenges some of the underlying assumptions that may have flavored various CFIUS reviews of cross-border investments from the UK, Canada, Japan, or Germany. China's government is not predicated on the same democratic principles nor does it shy away from identifying strategic objectives for technological superiority over the United States. The

implementation of these objectives is reflected in a number of reports² published since 2010 that highlight the need for China to obtain access to foreign technology in order to develop indigenous capability to challenge the primacy of other countries, including the United States. China pursues its objectives through a variety of tools, such as:

1. Acquisitions or mergers
2. Intellectual property licenses
3. Bankruptcy asset purchases
4. Joint ventures and teaming arrangements where the contribution of US partners includes advanced technology or cutting edge manufacturing techniques
5. "Talent acquisition" – the hiring and retention of established experts in certain technical fields
6. The requirement to establish research and development centers or centers of excellence in China; and
7. Direct or indirect investment through Chinese or non-Chinese funds.

See, e.g., *Findings of the Investigation into China's Acts, Policies, and Practices related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974* (USTR, March 22, 2018), pp. 5, 10, 12, 16, and 19-35 ("the Section 301 Report"); see also "National Security: Impact of China's Military Modernization in the Pacific Region," GAO/NSA/IAID-95-84 (Report to Congressional Committees, June 1995) (China "prefers to purchase technology rather than end items" (p. 19); "military and civilian manufacturing activities in some countries are closely connected" (p. 40);³ "China's ability to acquire and absorb technologies needed for wholesale force modernization"). While

² Several policy papers – e.g., *Made in China 2025*; the *12th Five-year Science and Technology Development Plan*; *MIT Guiding Opinions on Accelerating and Promoting Industry Mergers and Restructuring* (2013); the *National Medium- and Long-Term Science and Technology Development Plan Outline (2006-2020)*; *State Council Decision on Accelerating and Cultivating the Development of Strategic Emerging Industries (SEI Decision)*; and the *12th Five-year Strategic Emerging Industries Development Plan (2012)* – provide roadmaps through which the Chinese government encourages its industry (whether state-owned enterprises or other organizations) to advance China's primacy militarily and from a commercial perspective.

³ See also "Asian Aeronautics: Technology Acquisition Drives Industry Development," GAO/NSIAD-94-140 (May 4, 1994). China's interest in technology acquisition and the overlap between the military and civilian sectors has been studied since at least 1993. Today, a range of Government and private organizations have confirmed the ongoing nature of this interest and the manner in which technology acquisition occurs. See, e.g., the Section 301 Report and M. Brown and P. Singh, "China's Technology Transfer Strategy: How Chinese Investments in Emerging Technology Enable a Strategic Competitor to Access the Crown Jewels of U.S. Innovation" (Defense Innovation Unit Experimental, January 2018).

policymakers across administrations have recognized that these strategies existed, addressing the consequences of China's implementation of these strategies remained diffuse, reactive or minimal.

Since 1975, Congress has legislated with respect to CFIUS three (3) times:

1. In 1988 with the passage of the Exon-Florio Amendments to the Defense Production Act ("DPA")
2. In 1993 with the Byrd Amendment to the DPA which addressed the investigatory period for state-owned enterprises or governments; and
3. In 2007 with the Foreign Investment and National Security Act of 2007 ("FINSa") which, among other updates, reinforced CFIUS' authorities and identified critical infrastructure as part of the national security review process.

In each instance, geopolitical, economic, strategic or technology concerns incentivized Congress and the Executive branch to adjust the process.

Today, the United States faces a critical juncture in its national security posture. Several factors, some of which are noted below, contribute to the crisis that the Government must address:

1. The diffusion of technology based on licit and illicit means
2. China's focus on "civil-military fusion" – a concept which draws on commercial technologies for military, defense or intelligence applications
3. The effectiveness and ineffectiveness of US export control laws
4. The loss of visibility into the technology transfers that occur – whether due to policies which deprive the Government of insight into those transfers or through theft of intellectual property, cyber breaches or insider threats
5. The failure to maintain an updated list of technologies critical to US defense, military and intelligence needs; and
6. The press towards "Commercial-Off-The-Shelf" procurements for Department of Defense programs – a push that provides foreign parties (whether commercial and government) who purchase the same or similar products a roadmap to the technologies important to US warfighting or intelligence capabilities.

The current CFIUS process – coupled with the enhancements proposed in HR 4311 – can provide a framework by which the Committee can proactively engage in the transaction before transfers occur.

Addressing the CFIUS “Delta” – Gaps in the CFIUS Process

“Laws are like cobwebs, which may catch
small flies, but let wasps and hornets break through.”
Jonathan Swift

Current CFIUS authorities, while broader under FINSA than they were under Exon-Florio, nonetheless limit the Committee’s ability to review some cross-border transactions that provide access to technology that is vital to US national security interests. These limitations include, but are not limited to the following:

1. The Committee currently cannot review certain important transactions – i.e., greenfield investments; bankruptcy asset transfers; joint ventures where the transfers do not involve a “US business”; and minority investments that do not result in “control.” Although others have commented that CFIUS may review certain transactions such as bankruptcy proceedings, real estate transactions or joint ventures, these reviews currently require the Committee to find that a “US business” exists. The need to indirectly determine that the Committee has jurisdiction results in unreviewed transactions and inconsistent results. Both substance and form do matter.
2. CFIUS filings are voluntary. While the Committee has the discretion to invite parties to submit notices, the Committee does not currently have the authority to “require” parties to file.
3. The manner in which the agencies determine whether “other laws” effectively address national security concerns is diffuse and inconsistent. Circumstances exist where foreign parties attempt to obtain technology or technical data through the export licensing process, the patent prosecution process or through misappropriation of trade secrets. When they are unable to do so, the foreign parties move instead to simply acquire or invest in the US company and access the technology or technical data as “owners” or investors.
4. Allied government concerns may be addressed but it is unclear whether these issues are consistently included in the CFIUS analysis. The same applies to any cross-border investments that occur in other countries. Examples where the United States raised concerns that were addressed late in the acquisition process or post-closing include transactions in the Netherlands, Germany and Singapore.

5. The constituent agencies with technical expertise lack detailed (and sometimes any) visibility into the state of technology development. Secretary of Defense Mattis has moved forward with a project designed to address this gap. As mentioned by other witnesses, technology research and development is no longer solely the province of the US Government or large organizations. Small, nimble start-ups with innovative, out-of-the-box ideas develop solutions to existing technical problems without Government funding. Finding these companies (or individuals) and tracking the technology being developed is a challenge.
6. The current standard for clearing a transaction – “no unresolved national security threats” – is daunting and allows too much to potentially fall through the cracks. It reflects an absolute standard which is difficult, if not impossible, to meet. CFIUS reviews cover a “slice in time.” The questions and filings collect information for the transaction being conducted and the regulations do not require historical beyond that which affects the transaction or relates to previously filed CFIUS notices. CFIUS member agencies sometimes request more detailed information, but time constraints can, at times, limit the depth of responses provided or the Committee’s follow-up engagement.
7. The “slice in time” approach also limits the Committee’s ability to understand whether a foreign company or foreign government has aggregated technical expertise, technology, product development or critical supply chain resources. CFIUS regulations currently ask the parties to indicate whether they had filed CFIUS notices for other transactions. But the regulations do not ask the parties to indicate what transactions the foreign parties completed within the same industry or technical sector for which no notices were filed. This information may not be readily available based on corporate structure since organizations tend to meld acquired assets into existing business units or subsidiaries. Even in instances where the foreign acquirer maintains a separate subsidiary or corporate structure, unless that entity is involved in the transaction, it may not be included in the notice. Without this information, transactions could be cleared that could result in the creation of a potential supply chain or other industry consolidation concern based on the foreign purchaser’s power to control the supply or market access.
8. Mitigation agreements designed to address national security concerns appear to be of limited utility because of constrained resources and a lack of authority to compel compliance with the agreed upon terms. The lack of enforcement authority is particularly acute in circumstances where foreign parties or governments invoke blocking statutes to limit what may be seen as the extraterritorial application of US laws or regulations. Two (2) cases pending before the US Supreme Court may address some of these issues, although the Court’s decisions could also exacerbate the issue.

HR 4311: The Foreign Investment Risk Review Modernization Act of 2017

HR 4311 offers several enhancements to the current process that elegantly balance the need to maintain an open investment posture while achieving the primary goal of protecting national security. The legislation expands CFIUS authorities to address today's threats, provides the mechanism for increasing resources and identifies additional factors relevant to any national security assessments. Like "time, place and manner" restrictions that apply to speech, HR 4311 provides the baseline authorities needed to review cross-border transactions without unnecessarily burdening open investment.

Any investment – whether US or foreign – generally involves a number of steps including, but not limited to: a) discussions among the parties; b) identification of the assets or businesses to be sold/acquired; c) negotiations on price, liabilities, escrows (where relevant), and regulatory requirements; d) patent and other intellectual property assessments; and e) other due diligence. Depending upon the value and size of the deal, these steps may require more or less time. Even in exigent circumstances – a distressed firm, a bankruptcy or failing firm – some diligence is conducted or the investors risk challenges to their business judgment or duties of care or loyalty.

This process may take from three (3) to four (4) weeks to months and parties routinely structure transactions to address both business and regulatory considerations, such as: a) where to incorporate a purchasing vehicle; b) which tax jurisdiction provides most favorable treatment; and c) which deal structure minimizes regulatory filings. Parties consider these factors and among the regulatory issues, include a review of whether the parties should submit a CFIUS notice. While not designed to circumvent requirements, foreign purchasers and US sellers have reconfigured ownership percentages; number of board seats; management positions; access to business assets; timing of asset transfers; and surviving operations (for research and development as well as other business functions) to minimize potential CFIUS concerns. Having structured – or restructured – transactions, the parties may then decide not to file a voluntary notice.

FIRRMA does not limit the ability of the parties to independently assess whether a filing would benefit their transaction. Nor does it preclude any specific transaction or establish any presumption of denials for all parties, countries or types of transactions. The legislation acknowledges the United States' open investment policies (Section 2(1)-2(3)) as well as the importance of maintaining a strong industrial base and employment to ensure that the United States has access to that which is essential to its national security. And of equal importance, FIRRMA remains cognizant of the time constraints that may apply to transactions and addresses that with a 45-day period of review that provides more certainty and limits the need for withdrawals and refiling.

The legislation does expand the types of transactions subject to review but does so in alignment with the threats that have been identified by a range of sources. It clarifies the standards and documentation requirements, identifies additional risk factors, and encourages multilateral information exchanges. Far too many of the criticisms that have

been levied against the legislation sound like commentary based on the outcome of particular transactions or activities. In a time when threats are increasingly asymmetric and carried out by proxies, establishing an "industry based risk assessment" standard to national security evaluations presents an unacceptable high risk whether by errors in judgment or because the threat is underestimated.

Recommendations

As a practitioner, I have had the opportunity to advise on hundreds of cross-border transactions. Based on my experience, Congress may wish to consider some additional authorities or enhancements to HR 4311 to provide more certainty to the parties and more robust justification for some of the actions CFIUS takes:

1. Congress should at least permit, if not require, CFIUS to publish more information in its Annual Reports regarding the transactions it has reviewed and cleared. For example, the December 2008 Annual Report, at p. 33, identifies by name and country, the entities that were most active in acquiring US critical technology firms. The aggregate data concerning industries and countries, while somewhat helpful, does not adequately notify parties that transactions may be of interest to the Committee. This sometimes results in notices being filed that do not raise national security concerns – thereby impacting Committee resources.
2. I concur with other witnesses who have recommended additional resources for CFIUS. The complexity and sophistication of cross-border transactions continues to grow as does the need for Committee resources who maintain a deep understanding of the corporate, business and legal requirements. But additional resources represent only one (1) element of a greater need – one that is focused on identifying the transactions and technologies that currently escape review and thereby negatively affect national security considerations.
3. Congress should grant CFIUS the ability to publish informational press releases concerning cleared transactions in those instances when the parties publicly release information concerning a CFIUS review or clearance. This will place more detailed information in a centralized source that will assist parties in their analysis regarding whether to file a notice.
4. Congress should consider providing CFIUS enforcement authority for parties who breach mitigation agreements. While the mitigation agreement oversight agency can request information and express concerns over potential noncompliance, the process for remedying a breach is currently too limited.

Thank you for the opportunity to provide these observations and I look forward to responding to any questions.

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Written Testimony of

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Senior Vice President for Global Policy
Information Technology Industry Council (ITI)

U.S. House of Representatives
Committee on Financial Services
Subcommittee on Monetary Policy and Trade

***H.R. 4311, the Foreign Investment Risk Review Modernization Act
of 2017***

April 12, 2018



**United States House of Representatives
Committee on Financial Services
Subcommittee on Monetary Policy and Trade**

H.R. 4311, the Foreign Investment Risk Review Modernization Act of 2017

**Opening Remarks of Jonathan (Josh) S. Kallmer
Senior Vice President for Global Policy, Information Technology Industry Council
(ITI)
Former Deputy Assistant U.S. Trade Representative for Investment (2007-2012)**

April 12, 2018

Chairman Barr, Ranking Member Moore, members of the Subcommittee, thank you for your invitation to appear before this distinguished panel to discuss H.R. 4311, the Foreign Investment Risk Review Modernization Act (FIRRMA) of 2017.

My name is Josh Kallmer, and I am Senior Vice President for Global Policy at the Information Technology Industry Council, or ITI. ITI is a collection of 63 of the world's most innovative companies, representing every part of the technology sector – including hardware, software, services, and Internet – as well as companies from other sectors that depend deeply on information technology. Despite their diversity, all of our companies share a single goal, which is to bring about policy environments that enable innovation and maximize all of the benefits that technology provides, including economic growth, job creation, and tools for solving the world's most pressing challenges.

My perspectives on this subject also flow from my time in government. From 2007 to 2012, I served as Deputy Assistant U.S. Trade Representative for Investment. In that role I was



responsible for developing and implementing U.S. international investment policy, served as lead U.S. negotiator for several investment treaties, and represented the Office of the U.S. Trade Representative (USTR) on the Committee on Foreign Investment in the United States (CFIUS). In five years sitting on CFIUS I participated in the review of hundreds of transactions and regularly represented USTR at political-level interagency meetings concerning transactions with particularly sensitive national security implications. I was also deeply involved in the process of drafting regulations during the last modernization of the CFIUS framework in 2007 and 2008.

On the basis of these professional experiences, as well as more than a decade as an international trade attorney in both private practice and government, I look forward to engaging today with the subcommittee and my fellow witnesses to discuss the important role that this legislation might play in addressing new and emerging types of security risks and in advancing U.S. national security overall. In particular, I would like to make three main points.

First, the national security concerns are real and legitimate, and FIRRMA can be an important part of a U.S. government strategy to address those concerns.

The United States has benefitted greatly from its longstanding openness to foreign investment. In 2015, U.S. affiliates of companies headquartered outside the United States employed 6.8 million Americans and paid those workers almost 25 percent more than the U.S. private sector average.¹ During the same year, some 70 percent of foreign investment inflows

¹ See *"Foreign Direct Investment in the United States," U.S. Department of Commerce, Oct. 3, 2017, at 2.*



went to the U.S. manufacturing sector,² and between 2010 and 2014 U.S. affiliates of non-U.S. companies created two thirds of the United States' 656,000 new manufacturing jobs.³ Foreign investment contributes significantly – and frequently disproportionately – to U.S. employment, compensation, exports, and R&D spending, and it is in the national interest to maintain an open investment environment.

At the same time, the U.S. government has no more solemn and important responsibility than to protect the nation's security, and the United States should pursue its commitment to open investment consistent with that imperative. Our organization and the companies we represent respect and agree with the underlying national security objectives of this legislation. We are committed to working with Congress, the Executive Branch, and the entire stakeholder community to achieve these objectives.

We also agree that the proponents of FIRRMA have identified a compelling set of emerging national security risks that demand immediate and effective attention by the U.S. government. The world has changed dramatically since the last reform of the CFIUS legal framework a decade ago. Global business arrangements are more complex and diffuse. International business increasingly depends on the instant, cross-border movement of digital information. Transformational technologies are emerging at an accelerating rate, and the

² See *ibid.*

³ See L. Wroughton and H. Schneider, "Bad" foreign firms drive U.S. manufacturing jobs revival, *Reuters*, Jun. 30, 2017.



security implications of these new technologies are both more significant and more difficult to anticipate. And other countries are working harder than ever to use, exploit, and otherwise take advantage of these technologies to advance their own strategic, security, and economic interests.

FIRRMA contains a number of innovations that would improve the operation of the CFIUS process and enhance U.S. national security. We welcome, for example, the bill's proposed reforms to: (a) enable CFIUS to review certain real estate transactions in the proximity of military facilities; (b) prevent parties from using overly complex or opaque business arrangements to avoid CFIUS review; (c) require the submission of a declaration in situations involving significant foreign government interests; (d) expand the illustrative list of national security factors that CFIUS may consider in evaluating transactions; (e) clarify the role and elements of a CFIUS "risk-based analysis;" (f) improve monitoring of, and compliance with, mitigation agreements; and (g) ensure the availability of funding for CFIUS to function as intended.

Second, there are valid differences among views on how best to address the national security risks associated with "emerging critical technologies."

While I believe that we all agree on the desired destination of this debate – to strengthen U.S. national security in an increasingly complex world with ever more pressing security risks – it is clear there are meaningful disagreements on how we travel to that destination. These disagreements are healthy. Given the complexity of the issues at play, it is critical that we solicit a range of views from experts on security, technology, intelligence, and trade and investment policy to thoughtfully debate these matters in an open setting. Doing so increases the likelihood



that we will reach the best national security result for the country, while enabling the U.S. economy and American workers to realize the many benefits of foreign investment.

We offer our views on possible improvements to the bill in this spirit of open and thoughtful debate. In particular, our principal departure from the proponents of the bill on the best way to address these emerging national security risks relates to the proposed expansion of CFIUS jurisdiction under FIRRMA to cover outbound transfers of U.S. intellectual property to foreign persons. Our concerns relate primarily to Section 3(a)(5)(B)(v), which would expand the definition of “covered transaction” to include “[t]he contribution (other than through an ordinary customer relationship) by a United States critical technology company of both intellectual property and associated support to a foreign person through any type of arrangement, such as a joint venture, subject to regulations prescribed under subparagraph (C).” While it may be appropriate for the government to review outbound investment transactions involving certain technologies, we believe that the language of Section 3(a)(5)(B)(v) is ill-suited to address the very legitimate national security risks that the bill’s proponents have identified.

Specifically, this provision’s sweeping scope over companies and transactions that are not likely to present national security issues would prevent CFIUS from focusing its finite resources on the activities most likely to give rise to genuine national security risks. Most if not all of ITI’s 63 member companies would be considered “United States critical technology compan[ies]” within the meaning of FIRRMA, regardless of whether they are actually providing, or have the ability to provide, “critical technology” in a given transaction. Moreover, virtually all of these companies “contribut[e] . . . both intellectual property and associated support to a foreign



person” in the normal course of business, often countless times a day. For instance, the cross-border sale of computers, servers, and other hardware coupled with technical support; the licensing of business process software alongside security updates to non-U.S. persons; the provision of cloud computing services internationally; the transfer of trademarks outside of the United States – under the existing language, all of these routine business activities would potentially be subject to CFIUS review. The result would be significant uncertainty among U.S. companies regarding their obligations to file with CFIUS. In the face of such uncertainty, companies would likely err on the side of filing and CFIUS would experience an unmanageable increase in its caseload, with the vast majority of new cases presenting no national security risks at all.

We recognize that FIRRMA specifies that several terms – including “intellectual property,” “associated support,” and, for practical purposes, “United States critical technology company” – would be defined in regulations promulgated by CFIUS. We also recognize that Section 3(a)(5)(C)(iii) would allow CFIUS to identify in regulations “circumstances in which contributions otherwise described in subparagraph (B)(v) are excluded from the term ‘covered transaction’ on the basis of a determination that other provisions of law are adequate to identify and address any potential national security risks posed by such contributions.” Putting aside the fact that U.S. trade laws already provide multiple tools to address the theft, appropriation, or other improper



use of U.S. intellectual property,⁴ we have deep misgivings with this approach. We have no doubt that CFIUS agencies would approach the task of promulgating such regulations with care and rigor, but we believe Congress should define these fundamental concepts rather than defer to the Executive Branch. In our view, the purpose of regulations is to provide additional contour, clarity, and guidance within the four corners of the law set forth by Congress. They should not be a vehicle for the agencies to make policy judgments best reserved to Congress, yet that is essentially what including these undefined terms in the bill would compel the Executive Branch to do.

Perhaps more important, the language of Section 3(a)(5)(B)(v) does not reflect the fact that the national security risks at issue relate to technology and information, not business models and business arrangements. The scenarios that FIRRMA supporters have legitimately raised involve the development in the United States, and the subsequent disclosure to non-U.S. interests, of “foundational,” “early stage,” “untested,” “unfinished,” “antecedent,” or other kinds of “emerging” technologies. The bill’s proponents are reasonably concerned that, without proper oversight, countries hostile to the United States could purchase, access, or otherwise obtain the benefit of those technologies in a manner that could harm U.S. national security.

These are valid concerns, but they have little to do with the particular business context in which they arise. In other words, it does not matter whether an unfriendly power obtains

⁴ For example, Section 337 of the Trade Act of 1930, Section 301 of the Trade Act of 1974, and U.S. law implementing the World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) all provide tools to address improper use of U.S. intellectual property.



sensitive U.S. technology through an acquisition, joint venture, contract, license, gift, “ordinary customer relationship” (a term not defined in the bill), or other business arrangement. Regardless of the specific business situation, if the potential disclosure of certain technologies raises national security concerns, then we should ensure that our government has the legal tools to resolve those concerns.

Third and finally, we already have the legal tools to address most, if not all, of the national security risks associated with “emerging critical technologies,” but we need to ensure that we reinforce those tools with the requisite commitment, creativity, and resources.

A central topic of the debate over FIRRMA involves the relationship between CFIUS and the U.S. export control laws and regulations and, in particular, the extent to which the U.S. export control regime is equipped to address the specific concerns that the bill’s proponents have identified. On the basis of extensive discussions with export control experts from our member companies and elsewhere, it is ITI’s view that U.S. export control laws and regulations already have the authority to address virtually all, if not all, of the national security risks associated with the contribution or release of “emerging critical technologies” to foreign persons of concern.

We frequently hear the perspective that U.S. export control laws and regulations cannot fully address these risks because they cannot cover the various kinds of “emerging critical technologies” at issue. We take that view seriously but respectfully disagree. The export control laws already apply to any “export” (including releases to foreign persons in the United States and abroad) of technology, knowledge, or other information, at whatever stage of its development, whether it emanates from a company, a physical product, a human being, a piece of software, or



any other medium. Of course, the government needs to identify, describe, and ultimately list as controlled for export that technology, knowledge, or other information of concern, but the legal authorities to do so already exist. Thus, the obstacles to identifying and controlling such emerging technologies of concern are not legal obstacles.

At the same time, we recognize that it is insufficient simply to say that “the export control laws will take care of the problem.” It is not enough for our export control regime to be able to address these new national security risks as a matter of law if it cannot do so in practice. Instead, our shared objective ought to be to bolster our existing export control authorities – politically, institutionally, and financially – to ensure that they are well-equipped to meet the challenges of “emerging critical technologies.” And we must do so mindful of the frequent and intimate connections between the disclosure of technologies and cross-border business arrangements. In our view, we must build a bridge between the CFIUS world and the export control world in a way that allows each to focus on what it does best, while working together to address novel and complex national security risks.

In months of working with colleagues in Congress, the Executive Branch, and the business community, we and others have spoken of the importance of creating “connective tissue” between FIRRMA and the export control regime. Under this concept, the export control authorities would do the “heavy lifting” to identify, describe, and list “emerging critical technologies,” and regulate their release to the destinations, end users, and end uses of concern, while ensuring that CFIUS has meaningful visibility into that process and (if appropriate) the



opportunity to weigh in as well. There are multiple possible ways to build this “connective tissue.”

For example, one option for Congress to consider would be to enable FIRRMA to serve as a vehicle for Congress to instruct the Executive Branch to, in essence, “turbocharge” the export control system to meet the evolving technology challenges of today and tomorrow. In particular, this approach envisions the establishment in FIRRMA of a “Subcommittee on Export Controls” to support CFIUS in addressing situations involving “emerging critical technologies.” The Subcommittee would serve as a bridge between CFIUS agencies and export control agencies (which already substantially overlap), helping to ensure that the export control system: (a) works vigorously and proactively to identify and describe, and potentially list, “emerging critical technologies;” (b) uses existing legal authorities to unilaterally list “emerging critical technologies” in urgent situations; and (c) seeks to add such technologies to multilateral export control lists, among other functions. (If controls remain unilateral for too long, history has shown that this creates incentives to develop the technology in allied countries without such controls, which ultimately harms the U.S. industrial base.) The ultimate purpose of the Subcommittee would be to enable Congress to ensure that the export control system operates with the creativity, commitment, and aggressiveness necessary to meet the challenges the nation faces, as well as to give CFIUS visibility into how the export control system does so.

We also recommend reviewing how the Export Control Reform Act of 2018 (H.R. 5040), recently introduced by House Foreign Affairs Committee Chairman Royce and Ranking Member Engel, could help to erect this “connective tissue” between CFIUS and the export control system.



We note, in particular, that Section 109 of that bill would direct the President to establish a robust and regular interagency process, involving all key stakeholders from government, industry, and academia, to: (a) systematically identify and describe “emerging critical technologies;” (b) enable the timely listing of such technologies as controlled for export; (c) ensure that the relevant multilateral export control regimes also consider listing such technologies; and (d) provide mechanisms to determine the appropriateness of continued unilateral controls or the eventual removal of such technologies. In short, incorporating Section 109 in some way into FIRRMA would help enable the export control system to address the risks of “emerging critical technologies,” while giving CFIUS a window into its doing so.

* * *

Thank you again for inviting me to participate in this discussion. Let me again reiterate ITI’s commitment to the success of FIRRMA and to working constructively with this subcommittee and Congress achieve the bill’s objectives. I would be pleased to answer any questions you may have.

**Testimony of the Honorable Clay Lowery
Managing Director
Rock Creek Global Advisors LLC**

**House Committee on Financial Services
Subcommittee on Monetary Policy and Trade
April 12, 2018**

H.R. 4311, the Foreign Investment Risk Review Modernization Act of 2017

Chairman Barr, Ranking Member Moore, and Members of the Committee, I thank you for the opportunity to testify on the Foreign Investment Risk Review Modernization Act of 2017 (FIRRMA). My name is Clay Lowery, and I am currently Managing Director of Rock Creek Global Advisors, a consulting firm that advises companies on international economic and financial policy matters. Our clients have views regarding FIRRMA – both positive and negative – however, my testimony today reflects my own views.

My views are largely informed by my prior government experience as well as my own analysis of the FIRRMA bill. I served in the U.S. Government from 1994 to 2009, most of it at the Treasury Department but also at the National Security Council. During my final years in government, from 2005 to 2009, I was the Assistant Secretary of International Affairs for the Treasury Department, and one of my primary responsibilities was overseeing the Committee on Foreign Investment in the United States, or CFIUS, during the last CFIUS modernization effort.

In 2006, I inherited the consequences of one of the most controversial transactions in the history of CFIUS: the Dubai Port World case. This case put a spotlight on the shortcomings in the CFIUS process at that time and the need to modernize it. Over the next few years, I led a reorganization of Treasury to address these shortcomings and assisted with a reorganization of CFIUS across the federal government, including with the intelligence community. As part of this process, I worked with Congress to create the Foreign Investment and National Security Act of 2007 (“FINSA”), worked with the White House to draft the 2008 Executive Order, oversaw the rule-making process that developed the CFIUS regulations of 2008, and led the CFIUS process, including the analysis and disposition of hundreds of transactions.

In my testimony, I will discuss my general support for FIRRMA while pointing out what I consider to be several key shortcomings in the current bill – particularly from the perspective of someone who has had to implement a major reform of CFIUS in the past.

In my remarks today, I will emphasize three main points, which I hope will contribute to your efforts to modernize CFIUS successfully.

1. The FIRRMA bill should be one element of a comprehensive strategy to protect U.S. technology, which should also include reforming and enhancing our export control system.

2. Key parts of the current FIRRMA bill are vague, duplicative and unnecessarily burdensome, and should be amended in order for this legislation to be effective.
3. CFIUS does not have adequate resources or expertise to deal with the massive number of cases that would result from the current draft of FIRRMA.

Before I discuss these issues, however, I wanted to say a few words about the rationale behind this bill.

China is the Rationale

A key rationale behind this bill as highlighted both by the bill's sponsors and by analysis from the executive branch -- such as the effort led by Michael Brown in the Department of Defense DIUX report -- is the growing threat posed by China.

In China, the State exerts much more control over the economy than does the U.S. Government or that of any other major economy. The Chinese government is directing a comprehensive strategy, much of it outlined in the Made-in-China 2025 Plan, to become dominant in emerging technologies not only through development but also acquisition, including from US companies. China's strategy incorporates government efforts to:

- Fuse the military and civilian sectors;
- Subsidize industries of the future and individual companies in these sectors;
- Support cyber espionage to serve commercial and national security objectives;
- Use restrictions on foreign investment and licensing to coerce technology transfers; and
- Impose domestic standards that favor Chinese companies and promote their adoption in other markets, pressuring U.S. manufacturers to conform to Chinese standards.

FIRRMA Bill as a Partial Response

The United States must address this serious and growing challenge in a comprehensive manner that goes well beyond the scope of this hearing. Such a strategy should certainly include enhancing our military and cyber capabilities, upgrading our export control system, and modernizing CFIUS, among other elements.

The FIRRMA bill is one important step. I think this bill gets a number of things right. For example, the bill correctly:

- expands CFIUS' jurisdiction from only reviewing cross-border direct investments into the U.S. where the acquiring party gains control of the asset to reviewing foreign direct investment (i) into certain real estate transactions in the proximity of military facilities, and (ii) where the investor does not necessarily obtain a controlling stake in a national security asset;

- mandates that notice be filed for direct investments by entities with a significant foreign government interest;
- expands the illustrative list of national security factors that CFIUS may consider in evaluating transactions; and
- encourages the Administration to share information with our allies and to work with them on their foreign investment screening regimes to make them more consistent with the U.S. regime.

That said, Congress should review and revise the language in the bill to clarify its intent. For instance, the inbound investment provision should make clear that the concern about minority investments in critical technology or critical infrastructure companies is not about the companies *per se*, but about any critical technology associated with those companies. I also am concerned that the FIRRMA bill appears to exempt CFIUS from judicial review for even procedural matters – potentially limiting due process and review of the government actions.

Such issues can be rectified and clarified by small drafting amendments or by a sound and thorough “rule-making” process that allows for input from the private sector and other interested parties.

Vague, Duplicative, and Burdensome

Addressing my other key concerns will take much more work. Among these are that the bill uses vague language, duplicates existing export control authority, and will be overly burdensome to implement for both the private sector and the government.

In my previous testimony on CFIUS, I have always begun with a litany of statistics about the importance of foreign direct investment to job creation, manufacturing, innovation, and increasing U.S. productivity. However, today, I’m not providing those statistics on the importance of FDI. My rationale is that this bill is only partially about foreign investment into the United States. Instead, there is a substantial part of this bill that transforms the Committee on Foreign Investment in the United States, CFIUS, into a technology control regime in which there isn’t a merger, there isn’t an acquisition, and there isn’t even a foreign investment into the United States.

My concerns about these issues stems from my experience in implementing the last CFIUS modernization legislation in 2007. This process took roughly a year and a half. It required a substantial effort by lawyers and policy makers across the government, and in that case, we were just updating the procedures and substance of a structure that was already in existence. The FIRRMA bill, by contrast, as the Administration and Congressional sponsors have highlighted, is much more far reaching and expansive.

FIRRMA will make for a much more complex rule-making process than the CFIUS modernization effort from 10 years ago. I am apprehensive not just because it will take much longer than a year and a half to promulgate these regulations, but because the legislation uses vague language, and leaves too many terms to be defined and interpreted,

such that there is a distinct possibility of unintended changes or unforeseen consequences resulting from the rule-making process.

This committee is all too familiar with what that can mean. In the 2010 Dodd-Frank bill, a provision was put in to create what is known as the “Volcker Rule.” As a former U.S. Treasury Department official, there are few careers that I respect more than Paul Volcker’s. However, the legislative rule named after him for what may have been a sound idea has led to an overly complex rule that is vague, burdensome and essentially a regulatory nightmare for both the regulators and for the financial institutions they regulate. As members of this committee, I presume you have heard from your constituents about these consequences. Personally, I doubt that this was what was intended by Mr. Volcker’s efforts. I worry that provisions in FIRRMA may, regardless of how well intended, suggest a failure to learn the lessons of the “Volcker Rule” and create substantial implementation problems.

Let me provide a simple example that highlights anomalous results from the FIRRMA bill as drafted that would treat similar transactions differently depending on the corporate form of the end user or licensee. A technology license and associated support provided by a US company to a wholly foreign-owned company is presumably considered an “ordinary customer relationship” and is not subject to CFIUS review. Yet the bill appears to make that same transaction subject to CFIUS investigation if that licensee is a joint venture. Likewise, if that same technology license and associated support constituted part of the US company’s contribution to a joint venture, an investigation would also be triggered. In the end, technology and associated support are being made available by the same US party to a non-US party, but some transactions would trigger an investigation by CFIUS and others would not. We should worry about creating a guessing game for US companies that requires hours of legal analysis of complex transactions and structures – when their non-US competitors are not burdened with anything even remotely similar.

The FIRRMA bill has left many terms undefined or ill defined. For example:

- What is a “critical technology company,” which relates to both the incoming investment provision (Section 3(a)(5)(B)(iii)) and outgoing transactions (Section 3(a)(5)(B)(v))?
- What does “intellectual property” mean?
- What is the definition of “associated support”?
- What is “any type of arrangement”?
- What is an “ordinary customer relationship”?
- What are “critical technologies”?
- What are “emerging technologies”?
- What are the sectors (of critical technologies and emerging technologies?), what are the subsectors – Do we need a list?

In fact, it is this last question that leads to my second concern with FIRRMA -- it duplicates our export control regime, which is better equipped than CFIUS to address the

threat to national security posed by technology exports. Josh Kallmer has provided details on this in his testimony, but one of the concerns that critics of using export controls for emerging technologies have noted is that it is sometimes hard to define the technology that is not already controlled. This bill seems to suggest that CFIUS – a group of roughly 100 people who don't have subject matter expertise – will be able to do that better than the roughly 500 people we have in Defense, Commerce, and State that are already working on these export control issues every day.

This leads to the final concern I would like to highlight, and that is that portions of the FIRRMA bill are overly burdensome. Many observers have expressed concerns that the proposed regime intrudes excessively into the business affairs of US companies and imposes undue burdens on them. While that may be the case, I want to focus more on the burden FIRRMA would impose on our government.

The US Government is not always known for being efficient. CFIUS, even without any expansion of its jurisdiction, is especially prone to inefficiency because it is made up of numerous agencies that must come to a unanimous decision. Moreover, its mandate is focused on protecting national security. For a government employee, while such a mandate clearly “focuses the mind”, it also adds substantial pressure to “getting it right” each and every time – I promise you that this is not a recipe for efficiency.

Today, CFIUS reviews approximately 150 to 200 transactions a year. Over the preceding few months, I don't think there has been a single government witness, CFIUS practitioner witness, or CFIUS experts who have testified before this committee or the Senate Banking Committee who has not said that significantly more resources are needed for CFIUS. Maybe just as importantly, many of them have also said that we need to develop greater subject matter expertise given the rise in complexity of the transactions under review.

With FIRRMA, however, the number of transactions under review will expand from 200 a year to several thousand. If this expansion is truly necessary for our national security and cost is the only issue, then by all means – let us find a way to pay for it. But this expansion is not driven by national security. Instead, it would be the needless result of a bill that is too vague and too duplicative, rendering it practically impossible for CFIUS to accomplish the work it has been tasked to do and that is so vital to U.S. economic and national security.

Most CFIUS practitioners in Washington would tell you that over the last few years, CFIUS reviews have become very slow and the idea that transactions are being handled in a 30-day time period or 75-day time period as defined in legislation is a joke.

Let me be clear that this is not a criticism of the professionalism and efforts of the CFIUS team, who are some of the hardest working people in government, and who have demonstrated over a long period of time that they can be trusted to protect confidential and proprietary information.

Instead, it is an acknowledgement that the number of transactions CFIUS must review has risen and the nature of foreign direct investment has become more complex, making it difficult for the government to keep up. CFIUS members recognize that national security decisions should not be rushed or made lightly, but they also have competing responsibilities other than analyzing CFIUS transactions. And all these challenges exist under the current system, without a single change to the scope of CFIUS.

To conclude, let me reiterate that I am broadly supportive of the CFIUS modernization effort, but I think more work is needed to ensure that the outcome does not have the unintended consequence of chilling investment in the U.S. and harming our competitiveness around the world – both of which are important to our economic strength, which is the backbone of President Trump’s National Security Strategy. In addition, adding the implementation risk I’ve tried to identify in this testimony could destabilize the excellent and, so far, targeted work that CFIUS currently performs. In other words, I humbly suggest that without fixing this bill – we could harm our national security – not enhance it.

Thank you.

**Testimony of
David Marchick
Managing Director, The Carlyle Group
Before the House Committee on Financial Services
April 12, 2018**

Chairman Barr, Representative Moore and Members of the Committee:

Thank you very much for the opportunity to testify, and thank you for your leadership on this important issue. My name is David Marchick and I am a Managing Director at the Carlyle Group, a global investment firm. I also formerly practiced CFIUS law, testified before this committee during the last CFIUS reform process and wrote a book on the subject of national security and foreign direct investment. The book was not a best seller.

Senator Cornyn, Congressman Pittenger and other co-sponsors of FIRRMA deserve enormous credit for highlighting some of the challenges in the CFIUS process in light of the evolving investment and transaction environment. They and their staffs have worked hard on a bill that would strengthen CFIUS and clarify the Committee's authorities.

This Committee is grappling with a complex tradeoff between two important but occasionally competing policy objectives: protecting and preserving US national security and attracting foreign investment to the United States. Nothing is more important than protecting our national security interests. At the same time, Congress and every administration since World War II have also recognized that foreign investment in the United States creates jobs, enhances productivity, fosters innovation and strengthens the US economy. The United States is a huge investor overseas and we would not want our actions restricting foreign direct investment to spur other countries to block US investment abroad. President Reagan was the first US president to establish the principle that foreign investors and domestic investors should be treated equally; Presidents Bush through Obama each issued their own similar statements, and hopefully President Trump will as well.

The stakes are high and the risk of error is significant. The Executive Branch and Congress have not always balanced these policy objectives well.

In the decade after World War I, certain personnel in the Department of Navy were convinced that our next war would be against the United Kingdom. At that time, the UK had superiority in air, at sea and in mass communications, primarily radio. At the encouragement of the Navy, and under threat of action from Congress, President Wilson seized all foreign-owned radio stations, including British owned radio stations, then the largest in the country. Over the next decade, Congress took steps to restrict foreign investment in aviation, shipping and telecommunications, limits that still exist today under US law. Obviously, we never went to war with the UK and actions against the UK at that time, in hindsight, proved to be an overreach.

The United States has also erred in not acting when it should have acted. Prior to and during World War I, the United States seized a range of German assets, particularly in the chemical sector, known as the "high tech" sector in the economy at the time. However, the US developed too lax an attitude toward certain FDI between the two world wars, allowing certain German investments in the United States that were likely utilized for espionage in the U.S.¹

More recently, in the 1980s and 1990s, many in Congress feared that Japan was taking over assets in the United States and eclipsing the United States as the most competitive and largest economy in the world. Many of those investments from Japan turned out to be money-losing investments and none, to my knowledge, compromised US national security. It is hard to imagine today, but some commentators and Members of Congress were up in arms about Japanese acquisitions of golf courses and the Rockefeller center. At one point, seven Members of the House of Representatives held a press conference outside the Capitol where they smashed a Japanese "boom box" with sledgehammers. In hindsight, the United States would have been much better off if Japan, our ally and the second largest economy in the world at the time, grew at a much faster pace than they did over the past

¹ "US National Security and Foreign Direct Investment," by Edward M. Graham and David M. Marchick (Peterson Institute, May 2006), p. 31

25 years. Today, Japanese companies are intertwined into the fabric of local communities throughout our country and Japanese investment represents a net positive for the United States.

At various times over the past four decades, concerns have ebbed and flowed about foreign direct investment from the Middle East, Japan, Dubai and now China. How should Congress legislate with these shifting national security imperatives in mind? Congress should equip CFIUS with all of the necessary tools to protect national security. CFIUS should also have broad discretion to adjust to new threats, as national security priorities change over time. However, the Executive Branch should use those tools judiciously and carefully, since very few foreign investments implicate US national security interests. Further, we should not let the passions of any particular moment restrict investment that the United States wants and needs.

As the Congress considers ways to strengthen Section 721 of the Defense Production Act, allow me to offer a few principles that might guide your thinking:

First, CFIUS absolutely needs the tools to block or address the risk of any foreign investment compromising US national security. To my knowledge, CFIUS has used its authority frequently. Indeed, the number of transactions that have been effectively blocked, including through withdrawal, has increased significantly in the past 18 months. The number of transactions withdrawn or blocked reached 27 in 2016 and 14 in 2015. In other words, the number of blocked or withdrawn transactions doubled in 2016 from 2015 and grew many times over since the early 2000s. The Rhodium Group, a consulting firm that monitors foreign investment in the United States, reported that CFIUS either blocked or forced the abandonment of more than \$8 billion in China-related investments in 2017 alone.² I am not familiar with the facts of these particular cases or the rationale for blocking them, but clearly CFIUS has exercised its authority to block investments frequently and with great impact.

² "Chinese FDI in the US in 2017: A Double Policy Punch" (Rhodium Group, 2018), <http://cim.rhg.com/notes/chinese-fdi-in-the-us-in-2017-a-double-policy-punch>

Second, CFIUS should be designed to scrutinize carefully those transactions that raise concerns, but quickly approve those transactions that do not implicate US national security interests. I have frequently analogized the CFIUS process to triage in an emergency room. An effective emergency room – one overwhelmed with patients – will quickly and thoroughly attend to the patient having a heart attack or a serious wound, but will speedily move out the kid with a minor cut. Similarly, CFIUS should carefully scrutinize those cases that raise national security concerns but quickly approve those cases that do not present such issues.

In the M&A world, time is money. More specifically, time creates uncertainty in closing a transaction. Take the following simple example: imagine you are selling your house and you have three bidders. The first bidder is American, bids \$200,000 and can close in thirty days. The second bidder is British, bids \$210,000 but cannot close for 90 days. The third bid is for \$550,000 but raises national security concerns. They will not be able to close for 6 months, if at all. Who will you go with?

Picking between bidder A and B is a tough call. However, for the context of today's hearing, you want to ensure that bidder A and B operate on a level playing field so that both can close quickly, and the United States does not impede or slow down foreign investment that does not raise national security concerns. Carlyle has sold a number of companies to highly regarded investors from the UK, Germany, Canada, Japan and other allied countries, and on occasion has sold non-sensitive assets to investors from other countries. For any non-sensitive transaction, it is in the United States' interest for those transactions to flow quickly, without delay or cost, through CFIUS.

Current law contemplates a first phase review of 30 days. I would encourage the Committee to maintain a 30-day period for first phase reviews – the same time period for first phase antitrust reviews under the Hart-Scott-Rodino Act. Section 721, as amended by the Foreign Investment and National Security Act of 2007 (FINSAs), grants CFIUS broad discretion to extend any transaction to a second-phase review – any agency can force an investigation. However, as mentioned above, transactions that do not raise national security concerns should be approved quickly, efficiently and without great expense or delay.

Third, any changes in CFIUS's authority should be narrowly tailored to capture precisely those transactions that need national security review. Casting too wide a net will actually undermine national security because the volume of transactions will overwhelm the system and reduce the focus on those transactions that matter from a national security perspective. When I testified before this committee in 2006, I noted that CFIUS was overwhelmed with cases and the system was slowing down non-sensitive transactions. That year, CFIUS received a then modern-era record 113 filings but only 7, or just over 6%, went to investigation.

Last year, CFIUS reviewed nearly 240 cases of which 70% went to a second-phase review, or investigation.³

Returning to the concept of emergency room triage, CFIUS should use the strongest microscope to scrutinize transactions that raise legitimate national security concerns while at the same time promptly approving those that do not. In 2015, as published in the latest CFIUS annual report, CFIUS reviewed 143 cases; 66, or slightly less than half, went to investigations. China accounted for 29 of the total cases, meaning that non-Chinese transactions accounted for almost 80% of the cases. Canada represented 22, the UK - 19, and Japan - 12. In total, investments emanating from investors based in countries that are our closest allies accounted for 93 filings,⁴ yet still more than half of the overall cases went to second-phase investigation. In my view, too many cases are going to investigation and CFIUS should clear the easier cases much more quickly. Certain investments from our closest allies could raise national security concerns while many transactions from China raise no concerns. The key is for CFIUS to focus on those cases that really matter and dispose of the others quickly and favorably.

I hope the committee will explore with Treasury whether the high number of second phase reviews was really due to national security concerns with those transactions, or whether some of the transactions were moved to a second phase review because CFIUS did not have

³ <https://home.treasury.gov/news/press-releases/sm0262>

⁴ This total includes cases originating in the EU, Canada, Japan, South Korea, Singapore, Australia or Switzerland, all of which are close US allies. [https://www.treasury.gov/resource-center/international/foreign-investment/Documents/Unclassified%20CFIUS%20Annual%20Report%20-%20\(report%20period%20CY%202015\).pdf](https://www.treasury.gov/resource-center/international/foreign-investment/Documents/Unclassified%20CFIUS%20Annual%20Report%20-%20(report%20period%20CY%202015).pdf) , pps. 16-17.

sufficient resources to review the high number of cases. I am aware of certain cases that went to investigation simply because CFIUS authorities could not get the right signatures to approve a transaction. One other data point to flag – the Department of Justice and Federal Trade Commission reviewed more than 1,800 filings in 2016, but only 54 cases, or 3%, were subject to a second request.⁵ Obviously, those processes are entirely different, but the point is the same – it is important to clear the easy cases quickly.

FIRRMA would dramatically expand the number of cases that CFIUS reviews. For example, it covers certain real estate transactions – including leases – by foreign persons near a military installation in the United States.⁶ In 2016, there was over \$66 billion in foreign investment US commercial real estate, and foreign buyers acquired almost 300,000 residential properties in 2017 alone.⁷ Even if you exclude residential real estate, the numbers would be high. In 2015, 2016 and 2017, approximately 9.3%, 5.1% and 4.3% of commercial real estate transactions involved cross-border buyers. That equates to 3,153, 1,544 and 1,321, respectively.⁸ The 3-year average is 2,006. In other words, foreign commercial real estate acquisitions alone could overwhelm the CFIUS process – and this does not include the large number of leases that foreign entities presumably execute annually. Furthermore, in many cases, private citizens do not know about the existence of military or national security-sensitive sites. They are all over the Washington DC area, I assume. Does that mean that any commercial real estate investment and/or lease in the greater Washington area that involves a foreign investor needs to be reviewed by CFIUS?

FIRRMA also covers transactions which involve the sharing of intellectual property and associated support related to “critical technology” with foreign persons, including through joint ventures.⁹ It also covers non-controlling investments in “critical technology” or “critical infrastructure” companies.¹⁰ And the legislation potentially creates duplication in government reviews for cases involving export controls. We already have a very detailed review process for licensing of technology exports – one that certainly could be

⁵ <https://www.ftc.gov/news-events/blogs/competition-matters/2017/10/diving-data-hsr-report>

⁶ FIRRMA, Sec. 3(a)(5)(B)(ii)

⁷ <https://www.nar.realtor/sites/default/files/documents/2017-Profile-of-International-Activity-in-US-Residential-Real-Estate.pdf>

⁸ “US Capital Trends, The Big Picture”, Real Capital Analytics, 2016 – 2017 reports.

⁹ FIRRMA, Sec. 3(a)(5)(B)(v)

¹⁰ FIRRMA, Sec. 3(a)(5)(B)(iii)

strengthened. However, this Committee has always focused on improving efficiency in government. I would encourage the Committee to focus on that objective when drafting CFIUS legislation.

To be clear, Senator Cornyn and Congressman Pittenger are correct that CFIUS should conduct national security reviews of transactions where proximity to a sensitive military or intelligence site could compromise US national security. Similarly, CFIUS should have the authority to capture transactions that are designed to evade CFIUS review or where minority investments are undertaken to gain access to, or effectuate the transfer of, sensitive technology.

However, Congress should be careful in designing the breadth of CFIUS jurisdiction to ensure that (i) the system is not overwhelmed with hundreds or thousands of cases, and (ii) CFIUS can carefully identify, pinpoint and scrutinize those transactions that truly raise national security concerns. I would encourage the Committee to draft with precision the definition of covered transactions to pinpoint precisely the type of transactions that are of concern from a national security perspective. I understand that this Committee, your Senate counterparts and the Treasury Department are exploring ways to narrow FIRRMA's focus, an effort which I applaud.

Finally, amendments to CFIUS's authorities should not extend CFIUS jurisdiction to non-controlling investments in the United States.

The United States benefits from both direct foreign investment and passive foreign investment in the United States. Both types of investment create jobs, economic dynamism and vitality in the US economy.

Passive investment is just that – passive. Just like when someone invests in a mutual fund, they entrust their money to that firm or fund, but the firm or fund has total discretion to invest and manage that money. The same is true for investments in private equity, venture capital, real estate, energy and infrastructure funds.

In the last two years alone, private equity firms invested more than \$1.1 trillion in the US economy, with significant investments in energy, infrastructure, manufacturing and consumer

products.¹¹ Over the next few years, private equity investments in the US should grow since US-focused private equity funds have raised a record amount of capital – from 2014-2017, aggregate capital raised reached a \$1.7 trillion.¹² Approximately 21% of capital committed to these funds from 2014-2017 emanate from non-US limited partners.

As you know, Carlyle and other private equity, real estate, venture capital, energy and infrastructure firms all operate with a very similar general partner-limited partner structure. Typically, a limited partner (LP) commits capital to a particular fund managed by a general partner (GP), entrusting that GP to invest, manage, create value and exit investments at its discretion. LPs have no rights to direct, determine, supervise, review or influence a GP's investment decisions. LPs do have the right to receive non-public financial information on their investments on a quarterly basis (or more frequently, in certain cases). The entire private capital industry is highly focused on ensuring that private equity, real estate, venture capital, energy and infrastructure investments managed by US firms and persons continue to be treated as passive, regardless of the origin of our LPs.

While we are sensitive to the issues FIRRMA is trying to address with regard to non-controlling investments, we are concerned that the passive investment carve-out is too narrow and would exclude (i.e., include within CFIUS's jurisdiction) many investments that are, in fact, truly passive. Moreover, most investment review processes in the United States and other countries focus on the concept of "control," and moving away from that concept represents a significant departure from precedent. In the LP-GP context, foreign LPs, regardless of their size or percentage in a particular fund, do not have the ability to control the funds or the businesses in which the funds are invested or gain access to sensitive technology, IP or other non-financial information. Foreign LPs in such funds should always be treated as passive and therefore not subject to CFIUS jurisdiction. Again, I understand that Senators Cornyn and Pittenger, the relevant committees and the Treasury Department are exploring such changes. Thank you for your attention to this important issue.

¹¹ AMERICAN INVESTMENT COUNCIL 2017-Q4 Private Equity Industry Investment Report, located at <http://www.investmentcouncil.org/app/uploads/2017-q4-industry-investment-report.pdf>

¹² <http://www.preqin.com>

Conclusion

I appreciate this committee's thoughtful and thorough manner in approaching this issue – holding hearings, staff briefings, inviting comments from the public and fostering a debate. Similarly, Congressman Pittenger, Senator Cornyn and their staffs deserve credit for the enormous amount of time, effort and thought they have committed to this issue. Hopefully, this testimony and hearing today will better enable to you carefully craft new legislative authority for CFIUS that will both protect US national security and continue the United States' longstanding policy of welcoming foreign direct investment.



April 11, 2018

The Honorable Jeb Hensarling
Chairman
Committee on Financial Services
United States House of Representatives
Washington, D.C. 20515

The Honorable Maxine Waters
Ranking Member
Committee on Financial Services
United States House of Representatives
Washington, D.C. 20515

The Honorable Andy Barr
Chairman
Subcomm. on Monetary Policy and Trade
Committee on Financial Services
United States House of Representatives
Washington, D.C. 20515

The Honorable Gwen Moore
Ranking Member
Subcomm. on Monetary Policy and Trade
Committee on Financial Services
United States House of Representatives
Washington, D.C. 20515

Chairman Hensarling, Ranking Member Waters, Chairman Barr, and Ranking Member Moore:

On behalf of our nation's venture capital investors and the entrepreneurs they support, I write to share our views ahead of your committee's hearing on "H.R. 4311, the Foreign Investment Risk Review Modernization Act (FIRRMA) of 2017." The venture industry believes FIRRMA is well-intentioned legislation that deals with a serious issue. However, key changes should be made to FIRRMA before the committee proceeds, otherwise the legislation could cause unintended consequences that chill investment in high-growth startups.

Challenges to American entrepreneurial leadership

For many years, the United States has been the worldwide leader in startup activity, having produced leading health care and technology companies that improve our lives, cure the deadliest diseases, and provide scientific advancement. Our country has benefitted significantly from robust entrepreneurial activity, with one study finding "that without startups, there would be *no* net job growth in the U.S. economy."¹

¹ "The Importance of Startups in Job Creation and Job Destruction," Kauffman Foundation Research Series: Firm Foundation and Economic Growth," (July 2010), *available at* http://www.kauffman.org/~media/kauffman_org/research%20reports%20and%20covers/2010/07/firm_foundation_importance_of_startups.pdf (Emphasis added).

Other countries have witnessed the benefits entrepreneurship has brought the United States and have sought startup ecosystems of their own. Startup activity has become a global competition, with foreign countries aggressively pursuing the world's top talent and risk-capital to build new companies. As a result, the U.S. has seen its share of global venture capital dollars precipitously drop from 90% in 1990 to 53% last year.² China attracted \$42 billion in venture investment in 2017 and is now the second largest destination in the world for venture capital. In 2017, seven out of the ten largest venture deals in the world—including the top three—occurred in China.³

The reality is investors now have a world of choices on where to deploy capital. Policymakers must ensure the U.S. remains the most attractive destination in the world for new company formation so we can continue to experience the benefits of entrepreneurship. If we fail in this regard, other countries stand ready to take advantage of obstacles we put in place to the free flow of risk capital. It is therefore imperative that as FIRRMA is considered that policymakers are sensitive to its impact on investment in startups.

Structure of venture funds mitigates concerns over Chinese investment

A major motivation of FIRRMA is concern that foreign entities use minority investments into U.S. startups to gain access to critical technology. The venture capital industry shares the goal of this committee and FIRRMA's authors to protect U.S. innovation and ensure that U.S. critical technology is not used to harm our competitiveness or security. It is important to understand, however, that the structure of venture capital funds effectively protects sensitive information of startups from disclosure to investors into the fund. Therefore, it is imperative that FIRRMA ensure that investments into venture funds be treated as passive investments, and therefore not be a "covered transaction," under the legislation.

The relationship between the investors in venture capital funds, termed limited partners (LPs), and the individuals charged with managing the fund and making investments, termed general partners (GPs) is governed by a limited partnership agreement (LPA). The LPA defines not only the economic relationship between the parties, but also the nature of involvement of the LPs in the investment entity. By design, the LPs have very limited rights in the ongoing fund entity—they are expressly entitled to defined economics resulting from the investments and to regular financial reporting from the fund.

It is important to note that LPs have *no* say in investment decisions and *no* ability to garner portfolio company information other than at the discretion of the GPs. In addition, the LPA contains a confidentiality provision that binds the LP to maintain in confidence all such information as provided by the GP. Therefore, as a matter of course, information disclosure to LPs is minimal and largely related to valuation and accounting-related information to ensure that the LP understands its current economic position in the fund.

In addition, in many cases a venture capitalist will sit on the board of directors of the company in which he or she invests and, as a result, will also owe a duty of confidentiality directly to the

² Pitchbook – NVCA data.

³ Id.

shareholders of those companies. Thus, to the extent a venture capitalist were aware of proprietary technology in use or being developed by the company, he or she would not be in a position to share that with LPs. In fact, most LPAs contain an express provision in which LPs acknowledge that GPs may have independent fiduciary duties to their companies such that they may be restricted in being able to share any information with LPs.

As a matter of common practice in the industry, most GPs provide LPs with quarterly financial reports of the fund's performance and, in some cases, investment letters that highlight interesting trends and/or new investments on which the GP may be focused. However, in no case will those updates include details on intellectual property or other proprietary information, as that might violate the GP's duties to the company. Importantly, it would also be against the financial self-interest of the GP to risk disclosing information that might leak to the marketplace and risk impairing the financial value of the asset.

Key changes should be made to protect investment into U.S. startups

FIRRMA expands the mandate of the Committee on Foreign Investment in the United States (CFIUS) to review minority investments into U.S. critical technology companies, unless the investment is a passive investment. Key changes should be made to FIRRMA that maintain the intent of the bill but mitigate damage to U.S. startups that need capital to grow. These changes are necessary because in recent years foreign entities have become an increasingly important component of startup financing, both serving as direct investors into U.S. companies and as LPs in venture funds that go on to invest in startups. American startups need capital to grow and hire and have benefitted significantly from foreign investment that supplements domestic investment. If critical foreign investment were to dry up, it is unclear how that capital would be replaced.

FIRRMA should be amended to reflect true passivity

FIRRMA provides that a "covered transaction" is, *inter alia*, an "investment (other than a passive investment) by a foreign person in any United States critical technology company or United States critical infrastructure company, subject to regulations prescribed under subparagraph (c)."⁴ The legislation recognizes that passive investments into startups do not create national security concerns because an investor does not have access to sensitive information that is the concern of FIRRMA.

Unfortunately, the passive investment exemption is narrowly drafted and will cause harmless investment into U.S. companies to be picked up by FIRRMA, thus causing delay for the company raising capital; needless cost and burden to the investor; and distraction for CFIUS from the true security concerns. For example, the passive investment exemption requires that a foreign person not have "access to any nontechnical information in the possession of the United States business that is not available to all investors."⁵ This is an unnecessarily strict prohibition to keep sensitive technological information out of the hands of foreign investors, and will have the effect of taking truly passive investors outside the exemption. As discussed above, LPs in venture funds—whether foreign or domestic—generally receive valuation and accounting-related

⁴ See FIRRMA, Sec. 3(a)(5)(B)(iii).

⁵ See FIRRMA, Sec. 3 (a)(5)(D).

information about portfolio companies. This information is not publicly available and could have the unfortunate result of pushing foreign LPs outside the exemption when that information provides no technological benefit to any foreign actor.

Furthermore, foreign strategic investors have become an important financing option for U.S. startups and often co-invest alongside U.S. venture investors. The prohibition on access to nontechnical information could similarly push these investors outside the exemption. This would be inappropriate because foreign strategic investors making direct investments frequently gain access to nontechnical information about a company when considering an investment, but that nontechnical information is harmless and should not affect a determination about whether the investment is passive.

FIRRMA should exempt a broader universe of U.S. allies

FIRRMA grants CFIUS the authority to exempt countries from the definition of a covered transaction and directs CFIUS to consider “whether the United States has in effect with that country a mutual defense treaty,” among other factors.⁶ Rather than apply FIRRMA on a global basis and then exempt certain countries, FIRRMA would benefit from *only* applying to certain countries with known problems. The benefit of this formulation is that CFIUS would focus on investments from a dedicated universe of problematic countries and not waste time and resources on minority investments from U.S. allies.

Should FIRRMA continue to apply on a global basis, FIRRMA’s guidance that CFIUS may exempt countries “with a mutual defense treaty” should be broadened to capture a wider universe of U.S. strategic partners that ought to be exempted from the covered transaction definition. For example, some U.S. strategic partners in Asia and the Middle East may not qualify under the current exemption but are nonetheless U.S. allies and important sources of funding for U.S. startups. In addition, a U.S. ally like Switzerland will likely not meet the current exemption due to the lack of a treaty, but is certainly meritorious of an exemption and is a key player in venture and startup investing. This is especially the case in health care, which is capital intensive and in need of considerable resources to bring a new prescription drug or device to market.

FIRRMA should provide better direction to CFIUS on the meaning of critical technology

FIRRMA provides CFIUS jurisdiction over foreign investments into “critical technologies,” which it defines as “technology, components, or technology items that are essential or could be essential to national security, identified for purposes of this section pursuant to regulations prescribed by [CFIUS].”⁷ In addition, FIRRMA sets forth a variety of U.S. government product lists that are included in the definition.

It is important to understand that we are fast approaching a world where technologies like artificial intelligence (AI) and machine learning (ML) will be horizontal technologies that are used in nearly every product and service. Therefore, if FIRRMA applies even to incidental use of technologies like AI/ML by a U.S. company then FIRRMA’s impact may apply more

⁶ See FIRRMA, Section 3(a)(5)(C)(ii).

⁷ See FIRRMA, Section 3(a)(8).

generally than is intended or prudent. For this reason, FIRRMA should cabin off the “critical technologies” definition, lest it provide an incredibly broad mandate to CFIUS.

FIRRMA should not stifle foreign strategic investors that have become a key aspect of startup financing

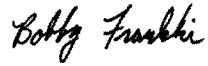
A growing and important component of startup financing is participation by so-called foreign strategic investors, like investment arms of multinational corporations. These investors are increasingly providing capital to U.S. startups alongside U.S. venture funds as co-investors, especially in later-stage deals where the amount of capital raised by the company is significantly larger than would be raised by an early-stage company. These foreign strategic investors are important to the entrepreneurial ecosystem because frequently when a startup is raising capital there will be multiple entities that will participate in the round as co-investors to ensure the startup is able to raise the capital it requires.

It would be an unfortunate outcome if the foreign co-investor of a U.S. venture fund needed approval from CFIUS to participate in an investment round, as that would complicate and slow the round *even* in situations where the foreign investor is taking a minority stake in a round for a minority stake of the company. For example, imagine a U.S. critical technology startup that is raising capital from four entities, three of which are U.S. venture funds and the fourth of which is a foreign strategic investor. In that round, the company sells 20 percent of the company for \$50 million and the foreign investor takes 25 percent of the round, resulting in a 5 percent ownership interest in the company. With a 5 percent ownership stake, the foreign strategic investor will not have access to sensitive information that is the concern of FIRRMA, but it may need to file preemptively with CFIUS out of caution to determine whether the investment is acceptable. Ideally, the foreign strategic investor would clearly meet FIRRMA’s passive investment test and be assured the investment was acceptable, but as described above that test is very narrow and does not reflect true passivity. This scenario could result in a U.S. startup missing out on key investment capital as the company seeks to grow. As a practical matter, investment rounds are very competitive and decisions are often made in a matter of weeks if not days. Thus, filing requirements (or uncertainty) that would jeopardize this timeline are likely to mean that the investors will be prohibited outright from participating in the investment opportunity.

To avoid this situation, FIRRMA should specify that an investment is *not* a covered transaction if a foreign strategic investor takes a *de minimis* stake in the startup (such as in the hypothetical above), as in that scenario the foreign strategic investor is a *de facto* passive investor but might fear it does not meet the tightly drafted passive investment text.

We appreciate the committee's attention to this important topic. The venture industry stands ready to work with the committee and FIRRMA's authors to improve the legislation to ensure harm is not done to American startups as they grow and prosper.

Sincerely,

A handwritten signature in black ink that reads "Bobby Franklin". The signature is written in a cursive, flowing style.

Bobby Franklin
President and CEO

CFIUS Technical Assistance 03/05/18

1 Title: To modernize and strengthen the Committee on Foreign Investment in the United States to
 2 more effectively guard against the risk to the national security of the United States posed by
 3 certain types of foreign investment, and for other purposes.
 4
 5

6 Be it enacted by the Senate and House of Representatives of the United States of America in
 7 Congress assembled,

8 SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

9 (a) Short Title.—This Act may be cited as the “Foreign Investment Risk Review
 10 Modernization Act of 2017”.

11 (b) Table of Contents.—The table of contents for this Act is as follows:

12 Sec.1.Short title; table of contents.

13 Sec.2.Sense of Congress.

14 Sec.3.Definitions.

15 Sec.4.Inclusion of partnership and side agreements in notice.

16 Sec.5.Declarations relating to certain covered transactions.

17 Sec.6.Stipulations regarding transactions.

18 Sec.7.Authority for unilateral initiation of reviews.

19 Sec.8.Timing for reviews and investigations.

20 Sec.9.Monitoring of non-notified and non-declared transactions.

21 Sec.10.Submission of certifications to Congress.

22 Sec.11.Analysis by Director of National Intelligence.

23 Sec.12.Information sharing.

24 Sec.13.Action by the President.

25 Sec.14.Judicial review procedures.

26 Sec.15.Factors to be considered.

27 Sec.16.Actions by the Committee to address national security risks.

28 Sec.17.Modification of annual report.

29 Sec.18.Certification of notices and information.

30 Sec.19.Funding.

31 Sec.20.Centralization of certain Committee functions.

32 Sec.21.Unified budget request.

33 Sec.22.Special hiring authority.

34 Sec.23.Conforming amendments.

CFIUS Technical Assistance 03/05/18

- 1 Sec.24.Assessment of need for additional resources for Committee.
- 2 Sec.25.Other senior officials
- 3 Sec.26.Authorization for Defense Advanced Research Projects Agency to limit foreign access to
- 4 technology through contracts and grant agreements.
- 5 [Sec.27.]
- 6 Sec.28.Effective date.
- 7 Sec.29.Severability.

8 SEC. 2. SENSE OF CONGRESS.

9 It is the sense of Congress that—

- 10 (1) foreign investment provides substantial economic benefits to the United States,
- 11 including the promotion of economic growth, productivity, competitiveness, and job
- 12 creation, and the majority of foreign investment transactions pose little or no risk to the
- 13 national security of the United States, especially when those investments are truly passive in
- 14 nature;
- 15 (2) maintaining the commitment of the United States to open and fair investment policy
- 16 also encourages other countries to reciprocate and helps open new foreign markets for
- 17 United States businesses and their products;
- 18 (3) it should continue to be the policy of the United States to enthusiastically welcome
- 19 and support foreign investment, consistent with the protection of national security;
- 20 (4) at the same time, the national security landscape has shifted in recent years, and so
- 21 have the nature of the investments that pose the greatest potential risk to national security,
- 22 which warrants a modernization of the processes and authorities of the Committee on
- 23 Foreign Investment in the United States;
- 24 (5) the Committee on Foreign Investment in the United States plays a critical role in
- 25 protecting the national security of the United States, and, therefore, it is essential that the
- 26 member agencies of the Committee are adequately resourced and able to hire appropriately
- 27 qualified individuals in a timely manner, and that those individuals' security clearances are
- 28 processed as a high priority;
- 29 (6) the President should conduct a more robust international outreach effort to urge and
- 30 help allies and partners of the United States to establish processes that parallel the
- 31 Committee on Foreign Investment in the United States to screen foreign investments for
- 32 national security risks and to facilitate coordination; and
- 33 (7) the President should lead a collaborative effort with allies and partners of the United
- 34 States to develop a new, stronger multilateral export control regime, aimed to address the
- 35 unprecedented industrial policies of certain countries of special concern, including
- 36 aggressive efforts to acquire United States technology, and the blending of civil and military
- 37 programs.

38 SEC. 3. DEFINITIONS.

39 Section 721(a) of the Defense Production Act of 1950 (50 U.S.C. 4565(a)) is amended to read

1 as follows:

2 “(a) Definitions.—In this section:

3 “(1) ACCESS.—The term ‘access’ means the ability and opportunity to obtain
4 information, subject to regulations prescribed by the Committee.

5 “(2) COMMITTEE; CHAIRPERSON.—The terms ‘Committee’ and ‘chairperson’ mean the
6 Committee on Foreign Investment in the United States and the chairperson thereof,
7 respectively.

8 “(3) CONTROL.—The term ‘control’ means the power to determine, direct, or decide
9 important matters affecting an entity, subject to regulations prescribed by the Committee.

10 “(4) COUNTRY OF SPECIAL CONCERN.—

11 “(A) IN GENERAL.—The term ‘country of special concern’ means a country that
12 poses a significant threat to the national security interests of the United States.

13 “(B) RULE OF CONSTRUCTION.—This paragraph shall not be construed to require the
14 Committee to maintain a list of countries of special concern.

15 “(5) COVERED TRANSACTION.—

16 “(A) IN GENERAL.—Except as otherwise provided, the term ‘covered transaction’
17 means any transaction described in subparagraph (B)(i) or any transaction described in
18 subparagraphs (B)(ii)-(vi) that is proposed, pending, or completed on or after the
19 effective date in accordance with Section 28(b) of the Foreign Investment Risk Review
20 Modernization Act of 2017.

21 “(B) TRANSACTIONS DESCRIBED.—A transaction described in this subparagraph is
22 any of the following:

23 “(i) Any merger, acquisition, or takeover that is proposed or pending after
24 August 23, 1988, by or with any foreign person that could result in foreign control
25 of any United States business.

26 “(ii) The purchase, lease, or concession by or to a foreign person of private or
27 public real estate that—

28 “(I) is located in the United States and is, or is in close proximity to,—

29 “(aa) a United States military installation;

30 “(bb) another facility or property of the United States Government
31 that is sensitive for reasons relating to national security; or

32 “(cc) a land, air, or sea port.

33 “and

34 “(II) meets such other criteria as the Committee prescribes by regulation.

35 “(iii) Any other investment (other than passive investment) by a foreign person
36 in any United States critical technology company or United States critical
37 infrastructure company, subject to regulations prescribed under subparagraph (C).

38 “(iv) Any change in the rights that a foreign person has with respect to a United

1 States business in which the foreign person has an investment, if that change
2 could result in—

3 “(I) foreign control of the United States business; or
4 “(II) an investment described in clause (iii).

5 “(v) The contribution by a U.S. business of intellectual property for a critical
6 technology defined in subparagraph (a)(8)(B)(vi) to a foreign person in
7 conjunction with the provision of associated support to that foreign person
8 pursuant to a joint venture, joint development agreement, or similar collaborative
9 arrangement, other than through an ordinary business transaction, subject to
10 regulations prescribed under subparagraph (C).

11 “(vi) Any other transaction, transfer, agreement, or arrangement the structure of
12 which is designed or intended to evade or circumvent the application of this
13 section, subject to regulations prescribed by the Committee.

14 “(C) FURTHER DEFINITION THROUGH REGULATIONS.—

15 “(i) EXCLUSION OF REAL ESTATE TRANSACTIONS.— A real estate purchase or
16 lease pursuant to subparagraph (a)(5)(B)(ii) does not include—

17 “(I) a lease or purchase of a single ‘housing unit’, as defined by the United
18 States Census Bureau; or

19 “(II) a lease or purchase of real estate in ‘urbanized areas’ as set forth by
20 the United States Census Bureau in its most recent census, except as
21 otherwise prescribed by the Committee in regulations in consultation with the
22 Secretary of Defense.

23 “(ii) CERTAIN INVESTMENTS AND CONTRIBUTIONS.—The Committee shall
24 prescribe regulations further defining covered transactions described in clauses
25 (iii) and (v) of subparagraph (B) by reference to the technology, sector, subsector,
26 transaction type, or other characteristics of such transactions.

27 “(iii) EXEMPTION FOR TRANSACTIONS FROM IDENTIFIED COUNTRIES.—

28 “(I) IN GENERAL.— The Committee may, by regulation, define
29 circumstances and procedures, under which a transaction otherwise described in
30 clause (ii), (iii), or (v) of subparagraph (B) would be excluded from the definition
31 of ‘covered transaction’ if each foreign person that is a party to such transaction,
32 and each foreign person having control of such persons, is from, as described by
33 the Committee in regulations, a country or part of a country identified by the
34 Committee for purposes of this clause based on criteria such as—

35 “(aa) whether, in the sole judgment of the Committee, the country’s
36 foreign investment national security review process and associated
37 international cooperation effectively safeguards national security interests
38 it shares with the United States;

39 “(bb) whether the country is a NATO member state or designated as a
40 ‘major non-NATO ally’ pursuant to section 517 of the Foreign Assistance
41 Act of 1961 (22 U.S.C. 2321(k)); and

1 “(cc) any other criteria that the Committee determines to be
2 appropriate.

3 “(II) RECURRING ASSESSMENT OF IDENTIFIED COUNTRIES.— The
4 Committee shall reconsider on a regular basis its identification of countries
5 described in subclause (I).

6 “(iv) EXEMPTION OF CERTAIN OTHER INVESTMENTS.— ‘Other investments’
7 pursuant to subsection (a)(5)(B)(iii) do not include those involving an ‘air carrier’,
8 as that term is defined in 49 U.S.C. 40102(a)(2), in which the air carrier will
9 continue to be a ‘citizen of the United States’, as that term is defined in 49 U.S.C.
10 40102(a)(15) and hold a certificate under 49 U.S.C. 41102(b).

11 “(v) EXEMPTION OF CERTAIN CONTRIBUTIONS.—

12 “(I) IN GENERAL.— The Committee may, by regulation, define
13 circumstances in which contributions otherwise described in subparagraph (B)(v)
14 are excluded from the term ‘covered transaction’ on the basis of a determination
15 that other provisions of law are adequate to identify and address any potential
16 national security risks posed by such contributions.

17 “(II) SPECIFIC EXEMPTION FOR CERTAIN CONTRIBUTIONS REVIEWED BY
18 OTHER PROVISIONS OF LAW.— ‘Contributions’ pursuant to subparagraph (B)(v) do
19 not include contributions—

20 “(aa) where, at the time the collaborative business arrangement was
21 proposed, pending, or entered into, either the transfer of the intellectual
22 property or the provision of associated support—

23 “(AA) requires an export license or authorization under the
24 Export Administration Act of 1979 (50 U.S.C. 4601-23) as kept in
25 effect under the International Emergency Economic Powers Act (50
26 U.S.C. 1701-08), or regulations related to the foregoing;

27 “(BB) such export license or other authorization has been validly
28 obtained pursuant to the applicable law(s) or regulations(s); and

29 [“(CC) the application to the relevant granting authority describes
30 the collaborative business arrangement as well as the associated
31 intellectual property and associated support that relates to the critical
32 technology defined in subparagraph (a)(8)(B)(vi) that will be
33 contributed to the collaborative business arrangement.]

34 “(bb) where, at the time the collaborative business arrangement was
35 proposed, pending, or entered into, either the transfer of the intellectual
36 property or the provision of associated support is subject to a specific
37 exemption, which is expressly identified by regulations prescribed by
38 the Committee, from an export license or other authorization
39 requirement by the Export Administration Act of 1979 (50 U.S.C.
40 4601-23) as kept in effect under the International Emergency Economic
41 Powers Act (50 U.S.C. 1701-08), or regulations related to the
42 foregoing;

“(cc) of articles, services, or technology on the ‘United States Munitions List’ and made pursuant to a validly obtained export license or other approval under the Arms Export Control Act (22 U.S.C. 2751 et seq.), or regulations related to the foregoing, at the time the collaborative business arrangement was proposed, pending, or entered into; or

“(dd) of nuclear technology, equipment, or material and made pursuant to a validly obtained export license or other approval under the Atomic Energy Act of 1954 (42 U.S.C. 2014 et seq.), Nuclear Non-Proliferation Act of 1978, or Energy Reorganization Act of 1974 (42 U.S.C. 5841) or regulations related to the foregoing, at the time the collaborative business arrangement was proposed, pending, or entered into.

[“(III).]

“(IV) SPECIFIC EXEMPTION FOR CERTAIN CONTRIBUTIONS TO COMPANIES UNDER COMMON OWNERSHIP.—‘Contributions’ pursuant to subsection (a)(5)(B)(v) do not include the contribution of intellectual property for a critical technology defined in subparagraph (a)(8)(B)(vi) and provision of associated support to a wholly owned affiliated entity that has the same ultimate ownership as the U.S. person. Any further transfer of such exempted contributions described herein by the affiliated entity of such intellectual property and provision of associated support to a non-affiliated or partially-owned entity, or to a foreign person that does not have the same ultimate ownership as the U.S. person, other than through an ordinary business transaction, shall be a covered transaction pursuant to subparagraph (a)(5)(B)(vi).

“(vi) TRANSFERS OF CERTAIN ASSETS PURSUANT TO BANKRUPTCY PROCEEDINGS OR OTHER DEFAULTS.—The Committee shall prescribe regulations to clarify that the term ‘covered transaction’ includes any transaction described in subparagraph (B) that arises pursuant to a bankruptcy proceeding or other form of default on debt.

“(D) PASSIVE INVESTMENT DEFINED.—

“(i) IN GENERAL.—For purposes of subparagraph (B)(iii), the term ‘passive investment’ means an investment by a foreign person in a United States business—

“(I) that is not described in subparagraph (B)(i);

“(II) that does not afford the foreign person—

“(aa) access to any nonpublic technical information in the possession of the United States business;

“(bb) access to any nontechnical information in the possession of the United States business that is not generally available to investors;

“(cc) membership or observer rights on the board of directors or

- 1 equivalent governing body of the United States business or the right to
2 nominate an individual to such a position; or
- 3 “(dd) any involvement, other than through voting of shares, in
4 substantive decisionmaking pertaining to any matter involving the
5 United States business;
- 6 “(III) under which the foreign person and the United States business do
7 not have a parallel strategic partnership or other material financial
8 relationship, as described in regulations prescribed by the Committee; and
- 9 “(IV) that meets such other criteria as the Committee may prescribe by
10 regulation.
- 11 “(ii) NONPUBLIC TECHNICAL INFORMATION DEFINED.—For purposes of clause
12 (i)(II)(aa), the term ‘nonpublic technical information’ has the meaning given that
13 term in regulations prescribed by the Committee.
- 14 “(iii) Nontechnical information generally available to investors
15 DEFINED.—For purposes of clause (i)(II)(bb), the term ‘nontechnical information
16 generally available to investors’ has the meaning given that term in regulations
17 prescribed by the Committee and shall include the type of information typically
18 included in a public annual report.
- 19 “(iv) EFFECT OF LEVEL OF OWNERSHIP INTEREST.—A determination of whether
20 an investment is a passive investment under clause (i) shall be made without
21 regard to how low the level of ownership interest a foreign person would hold or
22 acquire in a United States business would be as a result of the investment. The
23 Committee may prescribe regulations specifying that any investment greater than
24 a certain level or amount would not be considered a passive investment.
- 25 “(v) SPECIFIC CLARIFICATION FOR INVESTMENT FUNDS.—The Committee shall
26 prescribe regulations clarifying, with respect to subparagraph (D)(i)(II)(cc), that
27 membership of a foreign person as a limited partner on an advisory board or a
28 committee of an investment fund shall not disqualify the foreign person’s
29 participation in the fund from being a passive investment, provided—
- 30 “(I) the fund is managed exclusively by a general partner that is not a
31 foreign person;
- 32 “(II) the board or committee does not have rights to approve, disapprove,
33 or otherwise control investment decisions of the fund or any of the general
34 partner’s decisions related to companies in which the fund is invested;
- 35 “(III) the foreign person does not have the ability to determine, direct, or
36 decide important decisions of the fund, including the ability to dismiss,
37 prevent the dismissal of, select, or compensate the general partner; and
- 38 “(IV) the foreign person’s interest otherwise satisfies the criteria of
39 subparagraph (D).
- 40 “(vi) REGULATIONS.—The Committee shall prescribe regulations providing
41 guidance on the types of transactions that the Committee considers to be passive

1 investment.

2 “(E) ASSOCIATED SUPPORT DEFINED.— For purposes of subparagraph (B)(v), the
3 term ‘associated support’ means assistance in developing, using, applying, modifying,
4 or enhancing the technology.

5 “(F) UNITED STATES CRITICAL INFRASTRUCTURE COMPANY DEFINED.—For purposes
6 of subparagraph (B), the term ‘United States critical infrastructure company’ means a
7 United States business that is, owns, operates, or primarily provides services to, an
8 entity or entities that operate within a critical infrastructure sector or subsector, as
9 defined by regulations prescribed by the Committee.

10 “(G) UNITED STATES CRITICAL TECHNOLOGY COMPANY.—For purposes of
11 subparagraph (B), the term ‘United States critical technology company’ means a
12 United States business that produces, trades in, designs, tests, manufactures, services,
13 or develops one or more critical technologies, or a subset of such technologies, as
14 defined by regulations prescribed by the Committee.

15 “(6) CRITICAL INFRASTRUCTURE.—The term ‘critical infrastructure’ means, subject to
16 regulations prescribed by the Committee, systems and assets, whether physical or virtual, so
17 vital to the United States that the incapacity or destruction of such systems or assets would
18 have a debilitating impact on national security.

19 “(7) CRITICAL MATERIALS.—The term ‘critical materials’ means physical materials
20 essential to national security, subject to regulations prescribed by the Committee.

21 “(8) CRITICAL TECHNOLOGIES.—

22 “(A) IN GENERAL.—The term ‘critical technologies’ means technology, components,
23 or technology items that are essential or could be essential to national security,
24 identified for purposes of this section pursuant to regulations prescribed by the
25 Committee.

26 “(B) INCLUSION OF CERTAIN ITEMS.—The term ‘critical technologies’ includes the
27 following:

28 “(i) Defense articles or defense services included on the United States
29 Munitions List set forth in the International Traffic in Arms Regulations under
30 subchapter M of chapter I of title 22, Code of Federal Regulations.

31 “(ii) Items included on the Commerce Control List set forth in Supplement No.
32 1 to part 774 of the Export Administration Regulations under subchapter C of
33 chapter VII of title 15, Code of Federal Regulations, and controlled—

34 “(I) pursuant to multilateral regimes, including for reasons relating to
35 national security, chemical and biological weapons proliferation, nuclear
36 nonproliferation, or missile technology; or

37 “(II) for reasons relating to regional stability or surreptitious listening.

38 “(iii) Specially designed and prepared nuclear equipment, parts and
39 components, materials, software, and technology covered by part 810 of title 10,
40 Code of Federal Regulations (relating to assistance to foreign atomic energy
41 activities).

- 1 “(iv) Nuclear facilities, equipment, and material covered by part 110 of title 10,
2 Code of Federal Regulations (relating to export and import of nuclear equipment
3 and material).
4 “(v) Select agents and toxins covered by part 331 of title 7, Code of Federal
5 Regulations, part 121 of title 9 of such Code, or part 73 of title 42 of such Code.
6 “(vi) emerging technology areas, foundational technology areas, and other
7 technology areas that are expected to become or are essential in determining the
8 balance of technological advantage and vulnerability of the United States relative
9 to countries of special concern in areas that have an impact on national defense,
10 intelligence, or other areas of national security.
11 “(10) FOREIGN GOVERNMENT-CONTROLLED TRANSACTION.—The term ‘foreign
12 government-controlled transaction’ means any covered transaction that could result in the
13 control of any United States business by a foreign government or an entity controlled by or
14 acting on behalf of a foreign government.
15 “(11) FOREIGN PERSON.—The term ‘foreign person’ means:
16 “(A) Any foreign national, foreign government, or foreign entity; or
17 “(B) Any entity over which control is exercised or exercisable by a foreign national,
18 foreign government, or foreign entity.
19 “(12) INTELLECTUAL PROPERTY.—The term ‘intellectual property’ has the meaning given
20 that term in regulations prescribed by the Committee.
21 “(13) INTELLIGENCE COMMUNITY.—The term ‘intelligence community’ has the meaning
22 given that term in section 3(4) of the National Security Act of 1947 (50 U.S.C. 3003(4)).
23 “(14) INVESTMENT.—The term ‘investment’ means the acquisition of equity interest,
24 including contingent equity interest, as further defined in regulations prescribed by the
25 Committee.
26 “(15) LEAD AGENCY.—The term ‘lead agency’ means the agency or agencies designated
27 as the lead agency or agencies pursuant to subsection (k)(5).
28 “(16) MALICIOUS CYBER-ENABLED ACTIVITIES.—The term ‘malicious cyber-enabled
29 activities’ means any acts—
30 “(A) primarily accomplished through or facilitated by computers or other electronic
31 devices;
32 “(B) that are reasonably likely to result in, or materially contribute to, a significant
33 threat to the national security of the United States; and
34 “(C) that have the purpose or effect of—
35 “(i) significantly compromising the provision of services by one or more
36 entities in a critical infrastructure sector;
37 “(ii) harming, or otherwise significantly compromising the provision of
38 services by, a computer or network of computers that support one or more such
39 entities;

- 1 “(iii) causing a significant disruption to the availability of a computer or
2 network of computers; or
- 3 “(iv) causing a significant misappropriation of funds or economic resources,
4 trade secrets, personally identifiable information, or financial information.
- 5 “(17) NATIONAL SECURITY.—The term ‘national security’ shall be construed so as to
6 include those issues relating to ‘homeland security’, including its application to critical
7 infrastructure.
- 8 “(18) ORDINARY BUSINESS TRANSACTION.—For purposes of subparagraph (B)(v), the
9 term ‘ordinary business transaction’ means:
- 10 “(i) the sale or license of a finished item and the provision of associated
11 support to a customer, distributor, or reseller;
- 12 “(ii) the sale or license to a customer of a product and the provision of
13 integration or similar services, where the U.S. person generally makes such
14 services available to all of its customers;
- 15 “(iii) the transfer of equipment and the provision of associated support to
16 operate such equipment that could not result in the foreign person using the
17 equipment to produce a critical technology;
- 18 “(iv) the procurement by the U.S. person of goods or services, including
19 manufacturing services, from the foreign person, where the foreign person has no
20 rights to exploit any intellectual property contributed by the U.S. person other
21 than to supply goods or services to the U.S. person; or
- 22 “(v) a transaction identified as such by regulations prescribed by the
23 Committee.
- 24 “(19) PARTY.—The term ‘party’ has the meaning given that term in regulations
25 prescribed by the Committee.
- 26 “(20) UNITED STATES.—The term ‘United States’ means the several States, the District of
27 Columbia, and any territory or possession of the United States.
- 28 “(21) UNITED STATES BUSINESS.—The term ‘United States business’ means a person
29 engaged in interstate commerce in the United States.”.

30 SEC. 4. INCLUSION OF PARTNERSHIP AND SIDE 31 AGREEMENTS IN NOTICE.

32 Section 721(b)(1)(C) of the Defense Production Act of 1950 (50 U.S.C. 4565(b)(1)(C)) is
33 amended by adding at the end the following:

- 34 “(iv) INCLUSION OF PARTNERSHIP AND SIDE AGREEMENTS.—A written notice
35 submitted under clause (i) by a party to a covered transaction shall include a copy
36 of any partnership agreements, integration agreements, or other side agreements
37 relating to the transaction, including any such agreements relating to the transfer
38 of intellectual property, as specified in regulations prescribed by the Committee.”.

39 SEC. 5. DECLARATIONS RELATING TO CERTAIN

1 COVERED TRANSACTIONS.

2 Section 721(b)(1)(C) of the Defense Production Act of 1950 (50 U.S.C. 4565(b)(1)(C)), as
3 amended by section 4, is further amended by adding at the end the following:

4 “(v) DECLARATIONS RELATING TO CERTAIN COVERED TRANSACTIONS.—

5 “(I) VOLUNTARY DECLARATIONS.—Except as provided in this clause, a
6 party to any covered transaction may submit to the Committee a declaration
7 with basic information regarding the transaction instead of a written notice
8 under clause (i).

9 “(II) MANDATORY DECLARATIONS.—

10 “(aa) IN GENERAL. The Committee shall prescribe regulations
11 providing guidance on the types of transactions that the Committee
12 considers to require a declaration pursuant to this subsection.

13 “(bb) CERTAIN COVERED TRANSACTIONS WITH FOREIGN GOVERNMENT
14 INTERESTS.— The parties to a covered transaction shall submit a
15 declaration described in subclause (I) with respect to the transaction if
16 the transaction involves an investment that results in the acquisition,
17 directly or indirectly, of a substantial interest in a United States business
18 by a foreign person in which a foreign government has, directly or
19 indirectly, a substantial interest.

20 “(cc) SUBSTANTIAL INTEREST DEFINED. —The term “substantial
21 interest” has the meaning given to such term in regulations which the
22 Committee shall prescribe, provided that an interest that is a passive
23 investment as defined under Section 721(5)(D) or that is less than ten
24 percent voting interest shall not be considered to be a “substantial
25 interest”.

26 “(dd) OTHER DECLARATIONS REQUIRED BY COMMITTEE.—The
27 Committee shall require the submission of a declaration described in
28 subclause (I) with respect to any covered transaction identified under
29 regulations prescribed by the Committee for purposes of this item, at the
30 discretion of the Committee and based on appropriate factors, such as—

31 “(AA) the technology, industry, economic sector, or economic
32 subsector in which the United States business that is a party to the
33 transaction trades or of which it is a part;

34 “(BB) the difficulty of remedying the harm to national security that
35 may result from completion of the transaction; and

36 “(CC) the difficulty of obtaining information on the type of
37 covered transaction through other means.

38 “(ee) SUBMISSION OF WRITTEN NOTICE AS AN ALTERNATIVE.—Parties
39 to a covered transaction for which a declaration is required under this
40 subclause may instead elect to submit a written notice under clause (i).

1 “(ff) TIMING OF SUBMISSION.—
2 “(AA) IN GENERAL.—A declaration required to be submitted with
3 respect to a covered transaction by item (aa) or (bb) shall be
4 submitted not later than 45 days before the completion of the
5 transaction.
6 “(BB) WRITTEN NOTICE.—If, pursuant to item (cc), the parties to a
7 covered transaction elect to submit a written notice under clause (i)
8 instead of a declaration under this subclause, the written notice shall
9 be filed not later than 90 days before the completion of the
10 transaction.
11 “(III) PENALTIES.—The Committee may impose a penalty pursuant to
12 subsection (h)(3) with respect to a party that fails to comply with this clause.
13 “(IV) COMMITTEE RESPONSE TO DECLARATION.—
14 “(aa) IN GENERAL.—Upon receiving a declaration under this clause
15 with respect to a transaction, the Committee may, at its discretion—
16 “(AA) request that the parties to the transaction file a written
17 notice under clause (i);
18 “(BB) inform the parties to the transaction that the Committee is
19 not able to complete action under this section with respect to the
20 transaction on the basis of the declaration and that the parties may file
21 a written notice under clause (i) to seek written notification from the
22 Committee that the Committee has completed all action under this
23 section with respect to the transaction;
24 “(CC) initiate a unilateral review of the transaction under
25 subparagraph (D); or
26 “(DD) notify the parties in writing that the Committee has
27 completed all action under this section with respect to the transaction.
28 “(bb) TIMING.—The Committee shall endeavor to take action under
29 item (aa) within 30 days of receiving a declaration under this clause.
30 “(cc) RULE OF CONSTRUCTION.—Nothing in this subclause (other than
31 item (aa)(CC)) shall be construed to affect the authority of the President
32 or the Committee to take any action authorized by this section with
33 respect to a covered transaction.
34 “(V) REGULATIONS.—The Committee shall prescribe regulations
35 establishing requirements for declarations submitted under this clause. In
36 prescribing such regulations, the Committee shall ensure that such
37 declarations are submitted as abbreviated notifications that would not
38 generally exceed 5 pages in length.”

39 SEC. 6. STIPULATIONS REGARDING TRANSACTIONS.

40 Section 721(b)(1)(C) of the Defense Production Act of 1950 (50 U.S.C. 4565(b)(1)(C)), as

1 amended by section 5, is further amended by adding at the end the following:

2 “(vi) STIPULATIONS REGARDING TRANSACTIONS.—

3 “(I) IN GENERAL.—In a written notice submitted under clause (i) or a
4 declaration submitted under clause (v) with respect to a transaction, a party
5 to the transaction may—

6 “(aa) stipulate that the transaction is a covered transaction; and

7 “(bb) if the party stipulates that the transaction is a covered
8 transaction under item (aa), stipulate that the transaction is a foreign
9 government-controlled transaction.

10 “(II) BASIS FOR STIPULATION.—A written notice submitted under clause (i)
11 or a declaration submitted under clause (v) that includes a stipulation under
12 subclause (I) shall include a description of the basis for the stipulation.”.

13 SEC. 7. AUTHORITY FOR UNILATERAL INITIATION OF 14 REVIEWS.

15 Section 721(b)(1) of the Defense Production Act of 1950 (50 U.S.C. 4565(b)(1)) is
16 amended—

17 (1) by redesignating subparagraphs (E) and (F) as subparagraphs (F) and (G),
18 respectively;

19 (2) in subparagraph (D)—

20 (A) in clause (i), by inserting “(other than a covered transaction described in
21 subparagraph (E))” after “any covered transaction”;

22 (B) by striking clause (ii) and inserting the following:

23 “(ii) any covered transaction described in subparagraph (E), if any party to the
24 transaction submitted false or misleading material information to the Committee
25 in connection with the Committee’s consideration of the transaction or omitted
26 material information, including material documents, from information submitted
27 to the Committee; or”; and

28 (C) in clause (iii)—

29 (i) in the matter preceding subclause (I), by striking “any covered transaction
30 that has previously been reviewed or investigated under this section,” and
31 inserting “any covered transaction described in subparagraph (E),”;

32 (ii) in subclause (I), by striking “intentionally”;

33 (iii) in subclause (II), by striking “an intentional” and inserting “a”; and

34 (iv) in subclause (III), by inserting “adequate and appropriate” before
35 “remedies or enforcement tools”; and

36 (3) by inserting after subparagraph (D) the following:

37 “(E) COVERED TRANSACTIONS DESCRIBED.—A covered transaction is described in

1 this subparagraph if—

2 “(i) the Committee has informed the parties to the transaction in writing that the
3 Committee has completed all action under this section with respect to the
4 transaction; or

5 “(ii) the President has announced a decision not to exercise the President’s
6 authority under subsection (d) with respect to the transaction.”.

7 SEC. 8. TIMING FOR REVIEWS AND INVESTIGATIONS.

8 Section 721(b) of the Defense Production Act of 1950 (50 U.S.C. 4565(b)), as amended by
9 section 7, is further amended—

10 (1) in paragraph (1)(F), by striking “30” and inserting “45”;

11 (2) in paragraph (2), by striking subparagraph (C) and inserting the following:

12 “(C) TIMING.—

13 “(i) IN GENERAL.—Except as provided in clause (ii), any investigation under
14 subparagraph (A) shall be completed before the end of the 45-day period
15 beginning on the date on which the investigation commenced.

16 “(ii) EXTENSION FOR EXTRAORDINARY CIRCUMSTANCES.—

17 “(I) IN GENERAL.—In extraordinary circumstances (as defined by the
18 Committee in regulations), the chairperson may, at the request of the head of
19 the lead agency, extend an investigation under subparagraph (A) for one 30-
20 day period.

21 “(II) NONDELEGATION.—The authority of the chairperson and the head of
22 the lead agency referred to in subclause (I) may not be delegated to any
23 person other than the Deputy Secretary of the Treasury or the deputy head
24 (or equivalent thereof) of the lead agency, as the case may be.

25 “(III) NOTIFICATION TO PARTIES.—If the Committee extends the deadline
26 under subclause (I) with respect to a covered transaction, the Committee
27 shall notify the parties to the transaction of the extension.”; and

28 (3) by adding at the end the following:

29 “(8) TOLLING OF DEADLINES DURING LAPSE IN APPROPRIATIONS.—Any deadline or time
30 limitation under this subsection shall be tolled during a lapse in appropriations.”.

31 SEC. 9. MONITORING OF NON-NOTIFIED AND NON- 32 DECLARED TRANSACTIONS.

33 Section 721(b)(1) of the Defense Production Act of 1950 (50 U.S.C. 4565(b)(1)), as amended
34 by section 7, is further amended by adding at the end the following:

35 “(H) MONITORING OF NON-NOTIFIED AND NON-DECLARED TRANSACTIONS.—The
36 Committee shall establish a mechanism to identify covered transactions for which—

37 “(i) a notice under clause (i) of subparagraph (C) or a declaration under clause

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- 1 (v) of that subparagraph is not submitted to the Committee; and
 2 “(ii) information is reasonably available.”

3 SEC. 10. SUBMISSION OF CERTIFICATIONS TO 4 CONGRESS.

5 Section 721(b)(3)(C) of the Defense Production Act of 1950 (50 U.S.C. 4565(b)(3)(C)) is
 6 amended—

7 (1) in clause (iii)—

8 (A) in subclause (II), by inserting “and the Select Committee on Intelligence” after
 9 “Urban Affairs”; and

10 (B) in subclause (IV), by inserting “and the Permanent Select Committee on
 11 Intelligence” after “Financial Services”;

12 (2) in clause (iv), by striking subclause (II) and inserting the following:

13 “(II) DELEGATION OF CERTIFICATIONS.—

14 “(aa) IN GENERAL.—Subject to item (bb), the chairperson, in
 15 consultation with the Committee, may determine the level of official to
 16 whom the signature requirement under subclause (I) for the chairperson
 17 and the head of the lead agency may be delegated. The level of official
 18 to whom the signature requirement may be delegated may differ based
 19 on any factor relating to a transaction that the chairperson, in
 20 consultation with the Committee, deems appropriate, including the type
 21 or value of the transaction.

22 “(bb) LIMITATIONS.—The signature requirement under subclause (I)
 23 may be delegated—

24 “(AA) in the case of a covered transaction assessed by the Director
 25 of National Intelligence under paragraph (4) as more likely than not
 26 to threaten the national security of the United States, not below the
 27 level of the Assistant Secretary of the Treasury or an equivalent
 28 official of another agency or department represented on the
 29 Committee; and

30 “(BB) in the case of any other covered transaction, not below the
 31 level of a Deputy Assistant Secretary of the Treasury or an equivalent
 32 official of another agency or department represented on the
 33 Committee.”; and

34 (3) by adding at the following:

35 “(v) AUTHORITY TO CONSOLIDATE DOCUMENTS.—Instead of transmitting a
 36 separate certified notice or certified report under subparagraph (A) or (B) with
 37 respect to each covered transaction, the Committee may, on a monthly basis,
 38 transmit such notices and reports in a consolidated document to the Members of
 39 Congress specified in clause (iii).”

1 SEC. 11. ANALYSIS BY DIRECTOR OF NATIONAL
2 INTELLIGENCE.

3 Section 721(b)(4) of the Defense Production Act of 1950 (50 U.S.C. 4565(b)(4)) is
4 amended—

5 (1) by striking subparagraph (A) and inserting the following:

6 “(A) ANALYSIS REQUIRED.—

7 “(i) IN GENERAL.—The Director of National Intelligence shall expeditiously
8 carry out a thorough analysis of any threat to the national security of the United
9 States posed by any covered transaction, which shall include the identification of
10 any recognized gaps in the collection of intelligence relevant to the analysis.

11 “(ii) VIEWS OF INTELLIGENCE AGENCIES.—The Director shall seek and
12 incorporate into the analysis required by clause (i) the views of all affected or
13 appropriate intelligence agencies with respect to the transaction.

14 “(iii) UPDATES.—At the request of the lead agency, the Director shall update
15 the analysis conducted under clause (i) with respect to a covered transaction with
16 respect to which an agreement was entered into under subsection (l)(3)(A).

17 “(iv) INDEPENDENCE AND OBJECTIVITY.—The Committee shall ensure that its
18 processes under this section preserve the ability of the Director to conduct
19 analysis under clause (i) that is independent, objective, and consistent with all
20 applicable directives, policies, and analytic tradecraft standards of the intelligence
21 community.”;

22 (2) by redesignating subparagraphs (B), (C), and (D) as subparagraphs (C), (D), and (E),
23 respectively;

24 (3) by inserting after subparagraph (A) the following:

25 “(B) BASIC THREAT INFORMATION.—

26 “(i) IN GENERAL.—The Director of National Intelligence may provide the
27 Committee with basic information regarding any threat to the national security of
28 the United States posed by a covered transaction described in clause (ii) instead of
29 conducting the analysis required by subparagraph (A).

30 “(ii) COVERED TRANSACTION DESCRIBED.—A covered transaction is described
31 in this clause if—

32 “(I) the transaction is described in subsection (a)(5)(B)(ii);

33 “(II) the Director of National Intelligence has completed an analysis
34 pursuant to subparagraph (A) involving each foreign person that is a party to
35 the transaction during the 12 months preceding the review or investigation of
36 the transaction under this section; or

37 “(III) the transaction otherwise meets criteria agreed upon by the
38 Committee and the Director of National Intelligence for purposes of this
39 subparagraph.”;

1 (4) in subparagraph (C), as redesignated by paragraph (2), by striking “20” and inserting
2 “30”; and

3 (5) by adding at the end the following:

4 “(F) ASSESSMENT OF OPERATIONAL IMPACT.—The Director may provide to the
5 Committee an assessment, separate from the analyses under subparagraphs (A) and
6 (B), of any operational impact of a covered transaction on the intelligence community
7 and a description of any actions that have been or will be taken to mitigate any such
8 impact.

9 “(G) SUBMISSION TO CONGRESS.—The Committee shall submit the analysis required
10 by subparagraph (A) with respect to a covered transaction to the Select Committee on
11 Intelligence of the Senate and the Permanent Select Committee on Intelligence of the
12 House of Representatives upon the conclusion of action under this section (other than
13 compliance reviews under subsection (l)(6)) with respect to the transaction.”.

14 SEC. 12. INFORMATION SHARING.

15 Section 721(c) of the Defense Production Act of 1950 (50 U.S.C. 4565(c)) is amended—

16 (1) by striking “Any information” and inserting the following:

17 “(1) IN GENERAL.—Except as provided in paragraph (2), any information”;

18 (2) by striking “, except as may be relevant” and all that follows and inserting a period;
19 and

20 (3) by adding at the end the following:

21 “(2) EXCEPTIONS.—Paragraph (1) shall not prohibit the disclosure of the following:

22 “(A) Information relevant to any administrative or judicial action or proceeding.

23 “(B) Information to either House of Congress or to any duly authorized committee
24 or subcommittee of Congress.

25 “(C) Information to any domestic or foreign governmental entity, under the direction
26 of the chairperson, to the extent necessary for national security purposes and pursuant
27 to appropriate confidentiality and classification arrangements.

28 “(D) Information that the parties have consented to be disclosed to third parties.”.

29 SEC. 13. ACTION BY THE PRESIDENT.

30 (a) In General.—Section 721(d) of the Defense Production Act of 1950 (50 U.S.C. 4565(d)) is
31 amended—

32 (1) by striking paragraph (1) and inserting the following:

33 “(1) IN GENERAL.—Subject to paragraph (4), the President may, with respect to a covered
34 transaction that threatens to impair the national security of the United States—

35 “(A) take such action for such time as the President considers appropriate to suspend
36 or prohibit the transaction or to require divestment; and

37 “(B) in conjunction with taking any such action, take any additional action the

1 President considers appropriate to address the risk to the national security of the United
 2 States identified during the review and investigation of the transaction under this
 3 section.”; and

4 (2) in paragraph (2), by striking “not later than 15 days” and all that follows and inserting
 5 the following: “with respect to a covered transaction not later than 15 days after the earlier
 6 of—

7 “(A) the date on which the investigation of the transaction under subsection (b) is
 8 completed; or

9 “(B) the date on which the Committee otherwise refers the transaction to the
 10 President under subsection (l)(2).”.

11 (b) Civil Penalties.—Section 721(h)(3)(A) of the Defense Production Act of 1950 (50 U.S.C.
 12 4565(h)(3)(A)) is amended by striking “including any mitigation” and all that follows through
 13 “subsection (l)” and inserting “including any mitigation agreement entered into, conditions
 14 imposed, or order issued pursuant to this section”.

15 SEC. 14. JUDICIAL REVIEW PROCEDURES.

16 Section 721(e) of the Defense Production Act of 1950 (50 U.S.C. 4565) is amended to read as
 17 follows:

18 “(e) Actions and Findings Nonreviewable.—

19 “(1) ACTIONS AND FINDINGS OF THE PRESIDENT.—The actions and findings of the
 20 President or the President’s designee under this section shall not be subject to judicial
 21 review, including claims under chapter 7 of title 5, United States Code.

22 “(2) ACTIONS AND FINDINGS OF THE COMMITTEE.—

23 “(A) IN GENERAL.—Except as provided in subparagraph (B), the actions and
 24 findings of the Committee under subsection (b) or (l), and any assessment of penalties
 25 or use of enforcement authorities under this section, shall not be subject to judicial
 26 review, including claims under chapter 7 of title 5, United States Code.

27 “(B) PETITIONS.—

28 “(i) DEFINITION.—In this subparagraph, the term ‘classified information’ means
 29 any information or material that has been determined by the United States
 30 Government pursuant to an Executive order, statute, or regulation to require
 31 protection against unauthorized disclosure for reasons of national security and any
 32 restricted data, as defined in section 11 of the Atomic Energy Act of 1954 (42
 33 U.S.C. 2014).

34 “(ii) PETITION.—

35 “(I) IN GENERAL.—Except as provided in subclause (II), not later than 60
 36 days after the date on which the President or the Committee takes an action
 37 with respect to the covered transaction, any party to the covered transaction
 38 may file a petition under this subparagraph alleging that the action of the
 39 Committee is a violation of a constitutional right, power, privilege, or
 40 immunity.

- 1 “(II) NOTIFICATION.—No party to a covered transaction shall be permitted
2 to file a petition or any claim related to a petition under subclause (I)
3 unless—
- 4 “(aa) the party initiated the review of the transaction pursuant to a
5 written notice filed under clause (i) of subsection (b)(1)(C) or a
6 declaration filed under clause (v) of that subsection or the Committee
7 determines that such a notice or declaration was not required; and
- 8 “(bb) the Committee has completed all action under this section with
9 respect to the transaction.
- 10 “(III) RELATED CLAIMS.—Any claims related to a petition filed under this
11 clause shall be filed before the date described in subclause (I).
- 12 “(iii) EXCLUSIVE JURISDICTION.—
- 13 “(I) IN GENERAL.—The United States Court of Appeals for the District of
14 Columbia Circuit shall have exclusive jurisdiction over claims arising under
15 this subparagraph, subject to review by the Supreme Court of the United
16 States under section 1254 of title 28, United States Code, only—
- 17 “(aa) to affirm the action of the Committee; or
- 18 “(bb) to remand the case to the Committee for further consideration.
- 19 “(II) STANDARD OF REVIEW.—The court shall uphold an action challenged
20 under this subparagraph unless the court finds that the action was contrary to
21 a constitutional right, power, privilege, or immunity.
- 22 “(iv) SCOPE OF REVIEW.—In a claim under this subparagraph, the court shall
23 decide all relevant questions based solely on any administrative record submitted
24 by the United States under clause (v).
- 25 “(v) ADMINISTRATIVE RECORD AND PROCEDURES.—
- 26 “(I) IN GENERAL.—Notwithstanding any other provision of law, the
27 procedures described in this clause shall apply to the review of a petition
28 under this subparagraph.
- 29 “(II) ADMINISTRATIVE RECORD.—
- 30 “(aa) FILING OF RECORD.—The United States shall file with the court
31 an administrative record, which shall consist of the information that the
32 parties submitted to the Committee and that the Committee relied upon
33 in support of the action of the Committee under review.
- 34 “(bb) UNCLASSIFIED, NONPRIVILEGED INFORMATION.—All
35 unclassified information contained in the administrative record that is
36 not otherwise privileged or subject to statutory protections shall be
37 provided to the petitioner with appropriate protections for any
38 privileged or confidential trade secrets and commercial or financial
39 information.
- 40 “(cc) DISCOVERY BAR.—Other than the provision of information in

the administrative record described in subparagraph (II)(bb), no discovery shall be permitted.

“(dd) IN CAMERA AND EX PARTE.—The following information may be included in the administrative record and shall be submitted only to the court ex parte and in camera:

“(AA) Unclassified information subject to privilege or statutory protections.

“(BB) Classified information.

“(CC) Sensitive security information.

“(DD) Sensitive law enforcement information.

“(EE) Information obtained or derived from any activity authorized under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), except that, with respect to such information, subsections (c), (e), (f), (g), and (h) of section 106 (50 U.S.C. 1806), subsections (d), (f), (g), (h), and (i) of section 305 (50 U.S.C. 1825), subsections (c), (e), (f), (g), and (h) of section 405 (50 U.S.C. 1845), and section 706 (50 U.S.C. 1881e) of that Act shall not apply.

“(ee) UNDER SEAL.—Any classified information, sensitive security information, law enforcement sensitive information, or information that is otherwise privileged or subject to statutory protections, that is part of the administrative record filed ex parte and in camera, or cited by the court in any decision, shall be treated by the court consistent with the provisions of this subparagraph, and shall remain under seal and preserved in the records of the court to be made available in the event of further proceedings. In no event shall such information be released to the claimant or as part of the public record.

“(ff) RETURN.—After the expiration of the time to seek further review, or the conclusion of further proceedings, the court shall return the administrative record, including any and all copies, to the United States.

“(gg) CONSIDERATION OF CLAIM WITHOUT INFORMATION IN ADMINISTRATIVE RECORD.—If, on motion or sua sponte, the court determines that the claim may be considered without any of the information in the administrative record, the court shall require that only the necessary information, if any, from the record be provided to the parties.

“(vi) EXCLUSIVE REMEDY.—A determination by the court under this subparagraph shall be the exclusive judicial remedy for any claim described in this subparagraph against the United States, any United States department or agency, or any component or official of any such department or agency.

“(vii) RULE OF CONSTRUCTION.—Nothing in this subparagraph shall be construed as limiting, superseding, or preventing the invocation of, any privileges

or defenses that are otherwise available at law or in equity to protect against the disclosure of information.”.

SEC. 15. FACTORS TO BE CONSIDERED.

Section 721(f) of the Defense Production Act of 1950 (50 U.S.C. 4565(f)) is amended—

(1) in paragraph (1), by inserting “including whether the covered transaction is likely to result in the increased reliance by the United States on foreign suppliers to meet national defense requirements,” after “defense requirements,”;

(2) in paragraph (4), by striking “proposed or pending”;

(3) by striking paragraph (5) and insert the following:

“(5) the potential effects of the covered transaction on United States international technological and industrial leadership in areas affecting United States national security, including whether the transaction is likely to reduce the technological and industrial advantage of the United States relative to any country of special concern,”;

(4) in paragraph (6), by inserting “and transportation assets, as defined in Presidential Policy Directive 21 (February 12, 2013; relating to critical infrastructure security and resilience) or any successor directive” after “energy assets”;

(5) in paragraph (7), by inserting “, including whether the covered transaction is likely to contribute to the loss of or other adverse effects on technologies that provide a strategic national security advantage to the United States” after “critical technologies”;

(6) in paragraph (10), by striking “; and” and inserting a semicolon;

(7) by redesignating paragraph (11) as paragraph (20); and

(8) by inserting after paragraph (10) the following:

“(11) the degree to which the covered transaction is likely to increase the cost to the United States Government of acquiring or maintaining the equipment and systems that are necessary for defense, intelligence, or other national security functions;

“(12) the potential national security-related effects of the cumulative market share of any one type of infrastructure, energy asset, critical material, or critical technology by foreign persons;

“(13) whether any foreign person that would acquire an interest in a United States business or its assets as a result of the covered transaction has a history of—

“(A) complying with United States laws and regulations, including laws and regulations pertaining to exports, the protection of intellectual property, and immigration; and

“(B) adhering to contracts or other agreements with entities of the United States Government;

“(14) the extent to which the covered transaction is likely to expose, either directly or indirectly, personally identifiable information, genetic information, or other sensitive data of United States citizens to access by a foreign government or foreign person that may exploit that information in a manner that threatens national security;

- 1 “(15) whether the covered transaction is likely to have the effect of creating any new
- 2 cybersecurity vulnerabilities in the United States or exacerbating existing cybersecurity
- 3 vulnerabilities;
- 4 “(16) whether the covered transaction is likely to result in a foreign government gaining a
- 5 significant new capability to engage in malicious cyber-enabled activities against the United
- 6 States, including such activities designed to affect the outcome of any election for Federal
- 7 office;
- 8 “(17) whether the covered transaction involves a country of special concern that has a
- 9 demonstrated or declared strategic goal of acquiring a type of critical technology that a
- 10 United States business that is a party to the transaction possesses;
- 11 “(18) whether the covered transaction is likely to facilitate criminal or fraudulent activity
- 12 affecting the national security of the United States;
- 13 “(19) whether the covered transaction is likely to expose any information regarding
- 14 sensitive national security matters or sensitive procedures or operations of a Federal law
- 15 enforcement agency with national security responsibilities to a foreign person not
- 16 authorized to receive that information; and”.

17 SEC. 16. ACTIONS BY THE COMMITTEE TO ADDRESS

18 NATIONAL SECURITY RISKS.

- 19 Section 721(l) of the Defense Production Act of 1950 (50 U.S.C. 4565(l)) is amended—
- 20 (1) in the subsection heading, by striking “Mitigation, Tracking, and Postconsummation
- 21 Monitoring and Enforcement” and inserting “Actions by the Committee to Address
- 22 National Security Risks”;
- 23 (2) by redesignating paragraphs (1), (2), and (3) as paragraphs (3), (5), and (6),
- 24 respectively;
- 25 (3) by inserting before paragraph (3), as redesignated by paragraph (2), the following:
- 26 “(1) SUSPENSION OF TRANSACTIONS.—The Committee, acting through the chairperson,
- 27 may suspend a proposed or pending covered transaction that may pose a risk to the national
- 28 security of the United States for such time as the covered transaction is under review or
- 29 investigation under subsection (b).
- 30 “(2) REFERRAL TO PRESIDENT.—The Committee may, at any time during the review or
- 31 investigation of a covered transaction under subsection (b), complete the action of the
- 32 Committee with respect to the transaction and refer the transaction to the President for
- 33 action pursuant to subsection (d).”;
- 34 (4) in paragraph (3), as redesignated by paragraph (2)—
- 35 (A) in subparagraph (A)—
- 36 (i) in the subparagraph heading, by striking “IN GENERAL” and inserting
- 37 “AGREEMENTS AND CONDITIONS”;
- 38 (ii) by striking “The Committee” and inserting the following:
- 39 “(i) IN GENERAL.—The Committee”;

- 1 (iii) by striking “threat” and inserting “risk”; and
- 2 (iv) by adding at the end the following:
- 3 “(ii) ABANDONMENT OF TRANSACTIONS.—If a party to a covered transaction has
- 4 voluntarily chosen to abandon the transaction, the Committee or lead agency, as
- 5 the case may be, may negotiate, enter into or impose, and enforce any agreement
- 6 or condition with any party to the covered transaction for purposes of effectuating
- 7 such abandonment and mitigating any risk to the national security of the United
- 8 States that arises as a result of the covered transaction.
- 9 “(iii) AGREEMENTS AND CONDITIONS RELATING TO COMPLETED
- 10 TRANSACTIONS.—The Committee or lead agency, as the case may be, may
- 11 negotiate, enter into or impose, and enforce any agreement or condition with any
- 12 party to a completed covered transaction in order to mitigate any interim risk to
- 13 the national security of the United States that may arise as a result of the covered
- 14 transaction until such time that the Committee has completed action pursuant to
- 15 subsection (b) or the President has taken action pursuant to subsection (d) with
- 16 respect to the transaction.”; and
- 17 (B) by striking subparagraph (B) and inserting the following:
- 18 “(B) LIMITATIONS.—An agreement may not be entered into or condition imposed
- 19 under subparagraph (A) with respect to a covered transaction unless the Committee
- 20 determines that the agreement or condition resolves the national security concerns
- 21 posed by the transaction, taking into consideration whether the agreement or condition
- 22 is reasonably calculated to—
- 23 “(i) be effective;
- 24 “(ii) allow for compliance with the terms of the agreement or condition in an
- 25 appropriately verifiable way; and
- 26 “(iii) enable effective monitoring of compliance with and enforcement of the
- 27 terms of the agreement or condition.
- 28 “(C) JURISDICTION.—The provisions of section 706(b) shall apply to any mitigation
- 29 agreement entered into or condition imposed under subparagraph (A).”;
- 30 (5) by inserting after paragraph (3), as redesignated by paragraph (2), the following:
- 31 “(4) RISK-BASED ANALYSIS REQUIRED.—
- 32 “(A) IN GENERAL.—Any determination of the Committee to suspend a covered
- 33 transaction under paragraph (1), to refer a covered transaction to the President under
- 34 paragraph (2), or to negotiate, enter into or impose, or enforce any agreement or
- 35 condition under paragraph (3)(A) with respect to a covered transaction, shall be based
- 36 on a risk-based analysis, conducted by the Committee, of the effects on the national
- 37 security of the United States of the covered transaction, which shall include—
- 38 “(i) an assessment of the threat, vulnerabilities, and consequences to national
- 39 security related to the transaction, as these terms are clarified in guidance and
- 40 regulations issued by the Committee; and

- 1 “(ii) an identification of any of the factors described in subsection (f) that the
2 transaction may substantially implicate.
- 3 “(B) ACTIONS OF MEMBERS OF THE COMMITTEE.—
- 4 “(i) IN GENERAL.—Any member of the Committee who concludes that a
5 covered transaction poses an unresolved national security concern shall
6 recommend to the Committee that the Committee suspend the transaction under
7 paragraph (1), refer the transaction to the President under paragraph (2), or
8 negotiate, enter into or impose, or enforce any agreement or condition under
9 paragraph (3)(A) with respect to the transaction. In making that recommendation,
10 the member shall propose the risk-based analysis required by subparagraph (A) or
11 contribute to an existing risk-based analysis.
- 12 “(ii) FAILURE TO REACH CONSENSUS.—If the Committee fails to reach
13 consensus with respect to a recommendation under clause (i) regarding a covered
14 transaction, the members of the Committee who support an alternative
15 recommendation shall produce—
- 16 “(I) a written statement justifying the alternative recommendation; and
17 “(II) as appropriate, a risk-based analysis that supports the alternative
18 recommendation.”;
- 19 (6) in paragraph (5), as redesignated by paragraph (2), by striking “(as defined in the
20 National Security Act of 1947)”; and
- 21 (7) in paragraph (6), as redesignated by paragraph (2)—
- 22 (A) in subparagraph (A)—
- 23 (i) by striking “paragraph (1)” and inserting “paragraph (3)”; and
- 24 (ii) by striking the second sentence and inserting the following: “The lead
25 agency may, at its discretion, seek and receive the assistance of other departments
26 or agencies in carrying out the purposes of this paragraph.”;
- 27 (B) in subparagraph (B)—
- 28 (i) by striking “DESIGNATED AGENCY” and all that follows through “The lead
29 agency in connection” and inserting “DESIGNATED AGENCY.—The lead agency in
30 connection”;
- 31 (ii) by striking clause (ii); and
- 32 (iii) by redesignating subclauses (I) and (II) as clauses (i) and (ii), respectively,
33 and by moving such clauses, as so redesignated, 2 cms to the left; and
- 34 (C) by adding at the end the following:
- 35 “(C) COMPLIANCE PLANS.—
- 36 “(i) IN GENERAL.—In the case of a covered transaction with respect to which an
37 agreement is entered into under paragraph (3)(A), the Committee or lead agency,
38 as the case may be, shall formulate, adhere to, and keep updated a plan for
39 monitoring compliance with the agreement.

- 1 “(ii) ELEMENTS.—Each plan required by clause (i) with respect to an agreement
2 entered into under paragraph (3)(A) shall include an explanation of—
- 3 “(I) which member of the Committee will have primary responsibility for
4 monitoring compliance with the agreement;
- 5 “(II) how compliance with the agreement will be monitored;
- 6 “(III) how frequently compliance reviews will be conducted;
- 7 “(IV) whether an independent entity will be utilized under subparagraph
8 (E) to conduct compliance reviews; and
- 9 “(V) what actions will be taken if the parties fail to cooperate regarding
10 monitoring compliance with the agreement.
- 11 “(D) EFFECT OF LACK OF COMPLIANCE.—If, at any time after a mitigation agreement
12 or condition is entered into or imposed under paragraph (3)(A), the Committee or lead
13 agency, as the case may be, determines that a party or parties to the agreement or
14 condition are not in compliance with the terms of the agreement or condition, the
15 Committee or lead agency may, in addition to the authority of the Committee to
16 impose penalties pursuant to subsection (h)(3) and to unilaterally initiate a review of
17 any covered transaction under subsection (b)(1)(D)(iii)(I)—
- 18 “(i) negotiate a plan of action for the party or parties to remediate the lack of
19 compliance, with failure to abide by the plan or otherwise remediate the lack of
20 compliance serving as the basis for the Committee to find a material breach of the
21 agreement or condition;
- 22 “(ii) require that the party or parties submit any covered transaction initiated
23 after the date of the determination of noncompliance and before the date that is 5
24 years after the date of the determination to the Committee for review under
25 subsection (b); or
- 26 “(iii) seek injunctive relief.
- 27 “(E) USE OF INDEPENDENT ENTITIES TO MONITOR COMPLIANCE.—If the parties to an
28 agreement entered into under paragraph (3)(A) enter into a contract with an
29 independent entity from outside the United States Government for the purpose of
30 monitoring compliance with the agreement, the Committee shall take such action as is
31 necessary to prevent a conflict of interest from arising by ensuring that the independent
32 entity owes no fiduciary duty to the parties.
- 33 “(F) SUCCESSORS AND ASSIGNS.— Any agreement or condition entered or imposed
34 under paragraph (3)(A) shall be considered binding on all successors and assigns,
35 unless and until the agreement or condition terminates on its own terms or is otherwise
36 terminated by the Committee in its sole discretion.
- 37 “(G) ADDITIONAL COMPLIANCE MEASURES.—Subject to subparagraphs (A) through
38 (E), the Committee shall develop and agree upon methods for evaluating compliance
39 with any agreement entered into or condition imposed with respect to a covered
40 transaction that will allow the Committee to adequately ensure compliance without
41 unnecessarily diverting Committee resources from assessing any new covered

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1 transaction for which a written notice under clause (i) of subsection (b)(1)(C) or
 2 declaration under clause (v) of that subsection has been filed, and if necessary,
 3 reaching a mitigation agreement with or imposing a condition on a party to such
 4 covered transaction or any covered transaction for which a review has been reopened
 5 for any reason.”.

6 SEC. 17. MODIFICATION OF ANNUAL REPORT.

7 Section 721(m) of the Defense Production Act of 1950 (50 U.S.C. 4565(m)) is amended—

8 (1) in paragraph (1), by striking “committee” and all that follows through
 9 “Representatives,” and inserting “appropriate congressional committees”;

10 (2) in paragraph (2)—

11 (A) by amending subparagraph (A) to read as follows:

12 “(A) A list of all notices filed and all reviews or investigations of covered
 13 transactions completed during the period, with—

14 “(i) a description of the outcome of each review or investigation, including
 15 whether an agreement was entered into or condition was imposed under
 16 subsection (l)(3)(A) with respect to the transaction being reviewed or
 17 investigated, and whether the President took any action under this section with
 18 respect to that transaction;

19 “(ii) basic information on each party to each such transaction;

20 “(iii) the nature of the business activities or products of the United States
 21 business with which the transaction was entered into or intended to be entered
 22 into; and

23 “(iv) information about any withdrawal from the process.”;

24 (B) by adding at the end the following:

25 “(G) Statistics on compliance reviews conducted and actions taken by the
 26 Committee under subsection (l)(6), including subparagraph (D) of that subsection,
 27 during that period and a description of any actions taken by the Committee to impose
 28 penalties or initiate a unilateral review pursuant to subsection (b)(1)(D)(iii)(I); and

29 “(H) Cumulative and, as appropriate, trend information on the number of
 30 declarations filed under subsection (b)(1)(C)(v), the actions taken by the Committee in
 31 response to declarations, the business sectors involved in the declarations which have
 32 been made, and the countries involved in such declarations.

33 (3) in paragraph (3)—

34 (A) by striking “CRITICAL TECHNOLOGIES” and all that follows through “In order to
 35 assist” and inserting “CRITICAL TECHNOLOGIES.—In order to assist”;

36 (B) by striking subparagraph (B); and

37 (C) by redesignating clauses (i) and (ii) as subparagraphs (A) and (B), respectively,
 38 and by moving such subparagraphs, as so redesignated, 2 ems to the left; and

- 1 (4) by adding at the end the following:
- 2 “(4) BIENNIAL INTELLIGENCE COMMUNITY REPORT.—
- 3 “(A) IN GENERAL.—The Director of National Intelligence shall transmit to the
- 4 chairperson, for inclusion in a classified portion of each report required to be submitted
- 5 under paragraph (1) during calendar year 2018 and every even-numbered year
- 6 thereafter, the report of the interagency group established under subparagraph (C).
- 7 “(B) ELEMENTS.—The report referred to in subparagraph (A) shall, consistent with
- 8 national security, include an identification, analysis, and explanation of the following:
- 9 “(i) Any current or projected major threats to the national security of the United
- 10 States with respect to foreign investment.
- 11 “(ii) Any strategies used by countries of special concern to utilize foreign
- 12 investment to target the acquisition of critical technologies, critical materials, or
- 13 critical infrastructure.
- 14 “(iii) Any economic espionage efforts directed at the United States by a foreign
- 15 country, particularly a country of special concern.
- 16 “(C) INTELLIGENCE COMMUNITY INTERAGENCY WORKING GROUP.—The Director of
- 17 National Intelligence—
- 18 “(i) shall establish an interagency working group, composed of representatives
- 19 of elements of the intelligence community, to prepare the report required under
- 20 this paragraph;
- 21 “(ii) shall serve as the chairperson of the interagency working group; and
- 22 “(iii) may consult with and seek input from any member of the Committee, as
- 23 the Director considers necessary.
- 24 “(5) CLASSIFICATION; AVAILABILITY OF REPORT.—
- 25 “(A) CLASSIFICATION.—All appropriate portions of the annual report required by
- 26 paragraph (1) may be classified.
- 27 “(B) PUBLIC AVAILABILITY OF UNCLASSIFIED VERSION.—An unclassified version of
- 28 the report required by paragraph (1), as appropriate and consistent with safeguarding
- 29 national security and privacy, shall be made available to the public. Information
- 30 regarding trade secrets or business confidential information may be included in the
- 31 classified version and may not be made available to the public in the unclassified
- 32 version.
- 33 “(C) EXCEPTIONS TO FREEDOM OF INFORMATION ACT.—The exceptions to subsection
- 34 (a) of section 552 of title 5, United States Code, provided for under subsection (b) of
- 35 that section shall apply with respect to the report required by paragraph (1).
- 36 “(6) APPROPRIATE CONGRESSIONAL COMMITTEES DEFINED.—In this subsection, the term
- 37 ‘appropriate congressional committees’ means—
- 38 “(A) the Committee on Banking, Housing, and Urban Affairs, the Select Committee
- 39 on Intelligence, the Committee on Armed Services, the Committee on the Judiciary,
- 40 and the Committee on Homeland Security and Governmental Affairs of the Senate;

1 and

2 “(B) the Committee on Financial Services, the Permanent Select Committee on
3 Intelligence, the Committee on Armed Services, the Committee on the Judiciary, and
4 the Committee on Homeland Security of the House of Representatives.”

5 SEC. 18. CERTIFICATION OF NOTICES AND 6 INFORMATION.

7 Section 721(n) of the Defense Production Act of 1950 (50 U.S.C. 4565(n)) is amended—

8 (1) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively,
9 and by moving such subparagraphs, as so redesignated, 2 ems to the right;

10 (2) by striking “Each notice” and inserting the following:

11 “(1) IN GENERAL.—Each notice”; and

12 (3) by adding at the end the following:

13 “(2) EFFECT OF FAILURE TO SUBMIT.—The Committee may not complete a review under
14 this section of a covered transaction and may recommend to the President that the President
15 suspend or prohibit the transaction or require divestment under subsection (d) if the
16 Committee determines that a party to the transaction has—

17 “(A) failed to submit a statement required by paragraph (1); or

18 “(B) included false or misleading information in a notice or information described in
19 paragraph (1) or omitted material information from such notice or information.

20 “(3) APPLICABILITY OF LAW ON FRAUD AND FALSE STATEMENTS.—The Committee shall
21 prescribe regulations expressly providing for the application of section 1001 of title 18,
22 United States Code, to all information provided to the Committee under this section by any
23 party to a covered transaction.”

24 SEC. 19. FUNDING.

25 Section 721 of the Defense Production Act of 1950 (50 U.S.C. 4565) is amended by adding at
26 the end the following:

27 “(o) Funding.—

28 “(1) ESTABLISHMENT OF FUND.—There is established in the Treasury of the United States
29 a fund, to be known as the ‘Committee on Foreign Investment in the United States Fund’ (in
30 this subsection referred to as the ‘Fund’).

31 “(2) APPROPRIATION OF FUNDS FOR THE COMMITTEE.—There are authorized to be
32 appropriated to the Fund such sums as may be necessary to perform the functions of the
33 Committee.

34 “(3) FILING FEES.—

35 “(A) IN GENERAL.—The Committee may assess and collect a fee in an amount
36 determined by the Committee in regulations, to the extent provided in advance in
37 appropriations Acts, without regard to section 9701 of title 31, United States Code, and

1 subject to subparagraph (B), with respect to each covered transaction for which a
 2 written notice is submitted to the Committee under subsection (b)(1)(C)(i).
 3 “(B) LIMITATION ON AMOUNT OF FEE.—The amount of the fee determined under
 4 subparagraph (A) with respect to a covered transaction described in that subparagraph
 5 may not exceed an amount equal to the lesser of—
 6 “(i) 1 percent of the value of the transaction; or
 7 “(ii) \$300,000, adjusted annually for inflation pursuant to regulations
 8 prescribed by the Committee.
 9 “(C) DEPOSIT AND AVAILABILITY OF FEES.—Notwithstanding section 3302 of title
 10 31, United States Code, fees collected under subparagraph (A) shall—
 11 “(i) be deposited as offsetting collections into the Fund for use in carrying out
 12 activities under this section;
 13 “(ii) to the extent and in the amounts provided in advance in appropriations
 14 Acts, be available to the chairperson;
 15 “(iii) remain available until expended; and
 16 “(iv) be in addition to any appropriations made available to the members of the
 17 Committee.
 18 “(4) TRANSFER OF FUNDS.—The chairperson may transfer any amounts in the Fund to any
 19 other department or agency represented on the Committee for the purpose of addressing
 20 emerging needs in carrying out activities under this section. Amounts so transferred shall be
 21 in addition to any other amounts available to that department or agency for that purpose.”.

22 SEC. 20. CENTRALIZATION OF CERTAIN COMMITTEE 23 FUNCTIONS.

24 Section 721 of the Defense Production Act of 1950 (50 U.S.C. 4565), as amended by section
 25 19, is further amended by adding at the end the following:
 26 “(p) Centralization of Certain Committee Functions.—
 27 “(1) IN GENERAL.—The chairperson, in consultation with the Committee, may centralize
 28 certain functions of the Committee within the Department of the Treasury for the purpose of
 29 enhancing interagency coordination and collaboration in carrying out the functions of the
 30 Committee under this section.
 31 “(2) FUNCTIONS.—Functions that may be centralized under paragraph (1) include
 32 monitoring non-notified and non-declared transactions pursuant to subsection (b)(1)(H), and
 33 other functions as determined by the chairperson and the Committee.
 34 “(3) RULE OF CONSTRUCTION.—Nothing in this section shall be construed as limiting the
 35 authority of any department or agency represented on the Committee to represent its own
 36 interests before the Committee.”.

37 SEC. 21. UNIFIED BUDGET REQUEST.

38 Section 721 of the Defense Production Act of 1950 (50 U.S.C. 4565), as amended by sections

1 19 and 20, is further amended by adding at the end the following:

2 “(q) Unified Budget Request.—

3 “(1) IN GENERAL.—The President may include, in the budget of the Department of the
4 Treasury for a fiscal year (as submitted to Congress with the budget of the President under
5 section 1105(a) of title 31, United States Code), a unified request for funding of all
6 operations under this section conducted by some or all of the departments and agencies
7 represented on the Committee.

8 “(2) FORM OF BUDGET REQUEST.—A unified request under paragraph (1) should be
9 detailed and include the amounts requested for each department or agency represented on
10 the Committee to carry out the functions of that department or agency under this section.”

11 SEC. 22. SPECIAL HIRING AUTHORITY.

12 Section 721 of the Defense Production Act of 1950 (50 U.S.C. 4565), as amended by sections
13 19, 20, and 21, is further amended by adding at the end the following:

14 “(r) Special Hiring Authority.—The heads of the departments and agencies represented on the
15 Committee may appoint, without regard to the provisions of sections 3309 through 3318 of title
16 5, United States Code, candidates directly to positions in the competitive service (as defined in
17 section 2102 of that title) in their respective departments and agencies to administer this
18 section.”

19 SEC. 23. CONFORMING AMENDMENTS.

20 Section 721 of the Defense Production Act of 1950 (50 U.S.C. 4565), as amended by this Act,
21 is further amended—

22 (1) in subsection (b)(2)(B)(i)(I), by striking “that threat” and inserting “the risk”; and

23 (2) in subsection (d)(4)(A), by striking “the foreign interest exercising control” and
24 inserting “a foreign person that would acquire an interest in a United States business or its
25 assets as a result of the covered transaction”.

26 SEC. 24. ASSESSMENT OF NEED FOR ADDITIONAL 27 RESOURCES FOR COMMITTEE.

28 The President may—

29 (1) determine whether and to what extent the expansion of the responsibilities of the
30 Committee on Foreign Investment in the United States pursuant to the amendments made
31 by this Act necessitates additional resources for the Committee and members of the
32 Committee to perform their functions under section 721 of the Defense Production Act of
33 1950, as amended by this Act; and

34 (2) if the President determines that additional resources are necessary, include in the
35 budget of the President for fiscal year 2019 submitted to Congress under section 1105(a) of
36 title 31, United States Code, a request for such additional resources.

37 SEC. 25. OTHER SENIOR OFFICIALS.

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1 Section 721(k) of the Defense Production Act of 1950 (50 U.S.C. 4565(n)) is amended—

2 (1) by striking subparagraph (4) and inserting—

3 “(4) OTHER SENIOR OFFICIALS.—

4 “(A) Each member of the Committee, as set forth in subsection (k)(2)(A-G), shall
5 designate an Assistant Secretary, or the equivalent thereof, appointed by the President,
6 by and with the advice and consent of the Senate, whose duties shall include those
7 related to the Committee on Foreign Investment in the United States, as delegated by
8 such member under this section.

9 “(B) In addition to officials of the Department of the Treasury who are otherwise
10 authorized pursuant to 31 U.S.C. § 301 to be appointed by the President, by and with
11 the advice and consent of the Senate, there is authorized at the Department of the
12 Treasury no more than one appointment who shall be compensated at the rate provided
13 for at level III of the Executive Schedule under section 5314 of title 5 and no more
14 than two appointments who shall be compensated at level IV of the Executive
15 Schedule of section 5315 of title 5. The duties of any such officials appointed to this
16 section shall include duties related to the Committee on Foreign Investment in the
17 United States, as delegated by the Secretary of the Treasury under this section.

18 **SEC. 26. AUTHORIZATION FOR DEFENSE ADVANCED**
19 **RESEARCH PROJECTS AGENCY TO LIMIT FOREIGN**
20 **ACCESS TO TECHNOLOGY THROUGH CONTRACTS**
21 **AND GRANT AGREEMENTS.**

22 (a) In General.—The Director of the Defense Advanced Research Projects Agency, or a
23 designee of the Director, may include in any contract or grant agreement that the Director enters
24 into with a person, and that is funded by that Agency, a provision that—

25 (1) limits access by any foreign person to technology that is the subject of the contract or
26 grant agreement under terms defined by the Director, including by limiting such access to
27 specific periods of time; and

28 (2) in a case in which the person violates the prohibition described in paragraph (1),
29 requires the person to return all amounts that the person received from the Agency under the
30 contract or grant agreement.

31 (b) Treatment of Returned Funds.—Any amounts returned to the Defense Advanced Research
32 Projects Agency under subsection (a)(2) shall be credited to the same appropriations account
33 from which payment of such amounts was originally made under the contract or grant agreement
34 described in subsection (a).

35 (c) Exercise of Authority.—The Director, or the designee of the Director, may exercise the
36 authority provided by this section without the need for further approval by, or regulatory
37 implementation within, the Department of Defense.

38 [SEC. 27.]
39

1 SEC. 28. EFFECTIVE DATE.

2 (a) Immediate Applicability of Certain Provisions.—The following shall take effect on the
3 date of the enactment of this Act and apply with respect to any covered transaction the review or
4 investigation of which is initiated under section 721 of the Defense Production Act of 1950 on or
5 after such date of enactment:

6 (1) Sections 4, 6, 8, 12, 13, 14, 15, 18, 20, 21, 22, 24, 25, and 26 and the amendments
7 made by those sections.

8 (2) Section 11 and the amendments made by that section (except for clause (iii) of section
9 721(b)(4)(A) of the Defense Production Act of 1950, as added by section 11).

10 (3) Paragraphs (5)(C)(vi), (7), and (14) of subsection (a) of section 721 of the Defense
11 Production Act of 1950, as amended by section 3.

12 (4) Section 721(m)(4) of the Defense Production Act of 1950, as amended by section 17.

13 (b) Delayed Applicability of Certain Provisions.—

14 (1) IN GENERAL.—Any provision of or amendment made by this Act not specified in
15 subsection (a) shall—

16 (A) take effect on the date that is 30 days after publication in the Federal Register of
17 a determination by the chairperson of the Committee on Foreign Investment in the
18 United States that the regulations, organizational structure, personnel, and other
19 resources necessary to administer the new provisions are in place; and

20 (B) apply with respect to any covered transaction the review or investigation of
21 which is initiated under section 721 of the Defense Production Act of 1950 on or after
22 the date described in subparagraph (A).

23 (2) NONDELEGATION OF DETERMINATION.—The determination of the chairperson of the
24 Committee on Foreign Investment in the United States under paragraph (1)(A) may not be
25 delegated.

26 (c) Authorization for Pilot Programs.—

27 (1) IN GENERAL.—Beginning on the date of the enactment of this Act and ending on the
28 date described in subsection (b)(1)(A), the Committee on Foreign Investment in the United
29 States may, at its discretion, conduct one or more pilot programs to implement any authority
30 provided pursuant to any provision of or amendment made by this Act not specified in
31 subsection (a).

32 (2) PUBLICATION IN FEDERAL REGISTER.—A pilot program may not commence until the
33 date that is 30 days after publication in the Federal Register of a determination by the
34 chairperson of the Committee of the scope of and procedures for the pilot program. That
35 determination may not be delegated.

36 SEC. 29. SEVERABILITY.

37 If any provision of this Act or an amendment made by this Act, or the application of such a
38 provision or amendment to any person or circumstance, is held to be invalid, the application of
39 that provision or amendment to other persons or circumstances and the remainder of the

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1 provisions of this Act and the amendments made by this Act, shall not be affected thereby.
2



January 16, 2018

The Honorable Robert Pittenger
United States House of Representatives
224 Cannon House Office Building
Washington, DC 20515

Dear Congressman Pittenger:

On behalf of the thousands of Ericsson employees here in the United States, I want to thank you for your leadership and service in the U.S. House of Representatives. Like you, we are committed to delivering solutions which drive efficiency, job growth, and entrepreneurship.

Forty percent of the world's mobile traffic is carried over Ericsson networks each day. And at the heart everything we do is innovation. Our solutions – which range from mobile broadband to cloud services to network design, optimization, and management – serve customers across the globe in 180 countries. Our ability to do that though depends on ensuring that there are protections in place for our innovations.

For that reason, we commend you, and Senator John Cornyn, for spearheading the Foreign Investment Risk Review Modernization Act (FIRRMA). This legislation provides critical and overdue updates to the Committee on Foreign Investment in the United States (CFIUS) review process. Our world has changed a great deal since CFIUS was created more than four decades ago - there are new competitors, new challenges, and new concerns. And we must ensure there are adequate safeguards in place to properly vet and scrutinize the efforts by foreign entities to gain access to our markets, and our technology.

In short, FIRRMA helps provide that assurance by arming CFIUS with the tools necessary to preserve our national security interests while not discouraging investment in the United States. It's an important effort in a regulatory area that requires modernization, without which will result in the potential compromise of technology developed by companies like Ericsson and in turn, our national security.

As FIRRMA moves through the legislative process, Ericsson remains committed to working with you and we stand ready to offer our expertise wherever you may find it useful. Thank you again for your leadership on this vital issue.

Sincerely Yours,

A handwritten signature in dark ink that reads "John Moore".

John Moore
Vice President and General Counsel
Ericsson, Inc.

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ORACLE

8 November, 2017

The Honorable John Cornyn
United States Senate
517 Hart Senate Office Building
Washington, DC 20510

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

The Honorable Richard Burr
United States Senate
217 Russell Senate Office Building
Washington, DC 20510

Dear Senator Cornyn, Senator Feinstein, and Senator Burr,

Oracle is grateful to you for the introduction of the Foreign Investment Risk Review Modernization Act (FIRRMA). This important legislation will modernize and update the process used by the Committee on Foreign Investment in the United States (CFIUS) to conduct reviews of transactions that could result in a foreign entity gaining access to critical technologies and related know-how, reducing the U.S. technological and military advantage over potential adversaries.

Oracle supports an open marketplace and recognizes the benefits of foreign investment in the United States, but we also believe caution must be exercised to ensure that such investments are not in effect used to transfer technology and innovative products at the detriment of our national security.

The current CFIUS process does not fully take into consideration evolving strategies used to bypass attempts to acquire control of American businesses in favor of alternative mechanisms to obtain access to leading edge technology via smaller investments or joint ventures. Without reform, CFIUS will fail to address the use of these techniques that circumvent an essential review process, putting at risk critical innovations that bolster and ensure our national security.

Critically FIRRMA strikes a balance of protecting national security while not chilling the benefits of foreign investment in the United States. We appreciate the language is narrowly tailored to focus on specific national security concerns, distinguishing between investments that are financially motivated and investments that are strategically motivated, such as improving foreign military capabilities or other strategic objectives.

Oracle agrees with the need to evolve the CFIUS process as set forth in the FIRRMA, and we thank you for your attention to this issue and introduction of this important legislation.

Sincerely,



Kenneth Glueck
Senior Vice President, Office of the CEO