

PERSPECTIVES ON REFORM OF THE CFIUS REVIEW PROCESS

HEARING BEFORE THE SUBCOMMITTEE ON DIGITAL COMMERCE AND CONSUMER PROTECTION OF THE COMMITTEE ON ENERGY AND COMMERCE HOUSE OF REPRESENTATIVES ONE HUNDRED FIFTEENTH CONGRESS

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PERSPECTIVES ON REFORM OF THE CFIUS REVIEW PROCESS

THURSDAY, APRIL 26, 2018

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON DIGITAL COMMERCE AND CONSUMER
PROTECTION,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:15 a.m., in room 2322 Rayburn House Office Building, Hon. Robert Latta (chairman of the subcommittee) presiding.

Members present: Representatives Latta, Kinzinger, Burgess, Lance, Guthrie, McKinley, Bilirakis, Bucshon, Mullin, Walters, Duncan, Schakowsky, Welch, Kennedy, and Green.

Staff present: Samantha Bopp, Staff Assistant; Daniel Butler, Staff Assistant; Melissa Froelich, Chief Counsel, Digital Commerce and Consumer Protection; Adam Fromm, Director of Outreach and Coalitions; Ali Fulling, Legislative Clerk, Oversight & Investigations, Digital Commerce and Consumer Protection; Elena Hernandez, Press Secretary; Zach Hunter, Director of Communications; Paul Jackson, Professional Staff, Digital Commerce and Consumer Protection; Bijan Koohmaraie, Counsel, Digital Commerce and Consumer Protection; Austin Stonebraker, Press Assistant; Greg Zerzan, Counsel, Digital Commerce and Consumer Protection; Michelle Ash, Minority Chief Counsel, Digital Commerce and Consumer Protection; Lisa Goldman, Minority Counsel; and Caroline Paris-Behr, Minority Policy Analyst.

OPENING STATEMENT OF HON. ROBERT E. LATTA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. LATTA. Good morning. I would like to welcome you to the Digital Commerce and Consumer Protection Subcommittee of Energy and Commerce. And before we get started, just to let everyone know the Environment Subcommittee is also running downstairs, so we will have members coming in and out from downstairs from that subcommittee meeting, too.

So I, again, want to welcome you to the subcommittee and I recognize myself for 5 minutes.

And again, good morning and welcome to our witnesses. And we thank you for being with us today to discuss proposed reform of the Committee on Foreign Investment in the United States or CFIUS. CFIUS was first established by the Executive order by President Ford. Over the years, the committee was codified and its members

expanded based on input from this committee under both Republican and Democratic leadership.

CFIUS is tasked with reviewing mergers, acquisitions, or takeovers of U.S. businesses by foreign persons to see if they pose a threat to our national security. If CFIUS determines that a transaction does threaten national security, it can negotiate changes to the terms of the proposed deal. Alternatively, the committee can recommend that the President block a proposed deal.

Until recently, presidents have generally not found it necessary to block a proposed foreign purchase of or controlling interests in U.S. assets. However, in the last 6 years, presidents from both parties have blocked a total of four proposed transactions.

The increase in presidential action to stop foreign takeovers of American companies is one indication of how the world has changed. Foreign direct investment in the United States in 2016 doubled over the previous 10 years. In addition to an increase in monetary investments, foreign investments have also taken new forms, including the joint venture.

While more foreign investment in America is generally a good thing, for example, Honda has a large presence in Ohio, concerns have arisen that some investments could be the work of foreign governments that want to access the U.S. technology or infrastructure. If America's international competitors lack the ability to develop their own technology, they may find it easier to buy it by acquiring an American business or, they might seek to purchase critical U.S. infrastructure as a way to harm American interests.

CFIUS is the organization charged with examining who is investing in national security-related U.S. companies and why. Today, we are going to examine whether CFIUS has the proper tools to do that job, what tasks are already assigned to other government bodies, including export control agencies, and what steps are already being taken through regulation to reform CFIUS.

The most important job of Congress is to ensure the safety and security of our nation. Whether through the CFIUS process or other government programs, it is our duty to be vigilant for the American people. Our security, both economic and national, secures the freedoms that helps Americans thrive.

I look forward to hearing from our witnesses today on their thoughts on the reform processes and proposals for CFIUS, in particular H.R. 4311, the Foreign Investment Risk Review Modernization Act of 2017, and what other considerations policymakers should keep in mind during this debate.

I want to, at this time, yield to the ranking member, the gentlelady from Illinois, the ranking member of the subcommittee.
[The prepared statement of Mr. Latta follows:]

PREPARED STATEMENT OF HON. ROBERT E. LATTA

Good morning and thank you to our witnesses for being here today to discuss proposed reform of the Committee on Foreign Investment in the United States, or CFIUS. CFIUS was first established by Executive Order by President Ford. Over the years, the Committee was codified and its members expanded based on input from this Committee under both Republican and Democratic leadership.

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The increase in presidential action to stop foreign takeovers of American companies is one indication of how the world has changed. Foreign direct investment in the United States in 2016 doubled over the previous 10 years. In addition to an increase in monetary investments, foreign investments have also taken new forms—including the joint venture.

While more foreign investment in America is generally a good thing when more jobs are created for our citizens, concerns have arisen that some other investments could be the work of foreign governments that want access to advanced U.S. technology or infrastructure. If America's international competitors lack the ability to develop their own technology they may find it easier to buy it by acquiring an American business. Or, they might seek to purchase critical U.S. infrastructure as way to harm American interests.

CFIUS is the organization charged with examining who is investing in national security related U.S. companies, and why. Today, we are going to examine whether CFIUS has the proper tools to do that job, what tasks are already assigned to other government bodies—including export control agencies—and what steps are already being taken through regulation to reform CFIUS.

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I look forward to hearing from our witnesses today on their thoughts on reform proposals for CFIUS, in particular H.R. 4311, the Foreign Investment Risk Review Modernization Act of 2017, and what other considerations policymakers should keep in mind during this debate.

Thank you and I yield now to the Ranking Member.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman. My opening comments will certainly reflect what you have said, as well.

American ingenuity attracts investment from around the world. That investment can bring much-needed capital to American companies but foreign interests can also use investment to threaten our national and economic security.

Congress has instructed the Committee on Foreign Investment in the United States to review mergers and acquisitions by foreign investors for potential national security threats. It has been a decade since the last major CFIUS legislation. We are more than due for evaluating how CFIUS is operating.

In 2016, the stock of foreign direct investment in the United States totaled \$7.6 trillion and foreign investors spent more than \$365 billion acquiring U.S. companies. Given the enormity of that investment, we must consider whether the current safeguards for our national security and our nation's workers are sufficient.

State-owned and state-affiliated enterprises in China have sought U.S. intellectual property through mergers and acquisitions, as well as joint venture agreements. Current CFIUS review is inadequate to capture the various ways a foreign interest may try to access sensitive American technologies.

Today, we will be hearing about several bills to reform CFIUS. H.R. 4311, the bipartisan Foreign Investment Risk Review Modernization Act, would expand the investments covered by CFIUS—CFIUS review to protect critical technologies and infrastructure. Congressman Ed Royce and Eliot Engel, the chair and ranking member of the Foreign Affairs Committee, have introduced H.R.

5040, the Export Reform Control Act, to control the outflow of military and dual-use items.

Finally, Congresswoman Rosa DeLauro has introduced H.R. 2932, the Foreign Investment and Economic Security Act, to expand CFIUS' review to greenfield transactions which are new investments, as opposed to acquisitions. Her bill would also ask CFIUS to evaluate not only national security risks but also economic, public health, and safety risks.

Our hearing today occurs within a broader debate over trade. President Trump has placed tariffs on steel and aluminum and the United States is currently renegotiating—it could be today, I hear, we might get some sort of announcement on NAFTA, the North American Free Trade Agreement with Canada and Mexico. Any new NAFTA deal must include strong labor protections for workers in this country, as well as for workers in Mexico and Canada.

Last week, I was among the 107 House Democrats who sent a letter to the U.S. Trade Representative Robert Lighthizer emphasizing our opposition to legislation in the Mexican Senate to weaken labor standards in Mexico. I am encouraged that the legislation has now been tabled.

I believe that Americans benefit from trade relations that are fair. Americans are increasingly aware that corporations have manipulated U.S. trade policy to the detriment of workers and consumers. As we examine our trade policy, we want to keep fairness to American workers and consumers front and center.

Corporations have used trade agreements to fight against countries' labor and environmental laws. We should be fighting for fair trade agreements that protect workers and our environment, rather than encouraging a race to the bottom.

National security is an important consideration as we review foreign investment in the United States but I hope we also spend time today on other risks that unfair trade practices pose to this country.

I look forward to hearing from our two panels of witnesses. I appreciate your being here today. And I want to thank Chairman Latta.

And I yield back.

Mr. Latta. Thank you very much. The gentlelady yields back, and the chair of the full committee, the gentleman from Oregon is not here. Is there anyone on the Republican side that would like to claim his time? Seeing none, and we haven't had—I saw that Mr. Green had checked in but we will go ahead and conclude with member opening statements at this time.

And the chair would like to remind members that pursuant to the committee rules, all members' opening statements will be made part of the record.

And again, I want to thank all of our witnesses for being with us today and taking the time to testify before the subcommittee. Today's witnesses will have the opportunity to give 5-minute opening statements, followed by a round of questions from the members.

Our first panel of witnesses for today's hearing will include the Honorable Heath Tarbert, the Assistant Secretary for International Markets and Investment Policy at the U.S. Department of Treas-

ury, and the Honorable Richard Ashooh, the Assistant Secretary for Export Administration at the U.S. Department of Commerce.

And, again, I thank you both for being here. And Mr. Tarbert, you are recognized for 5 minutes.

STATEMENTS OF HEATH TARBERT, ASSISTANT SECRETARY, INTERNATIONAL MARKETS AND INVESTMENT POLICY, U.S. DEPARTMENT OF TREASURY; AND RICHARD ASHOOH, ASSISTANT SECRETARY, EXPORT ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE

STATEMENT OF HEATH TARBERT

Mr. TARBERT. Chairman Latta, Ranking Member Schakowsky, Vice Chairman Kinzinger, and distinguished members of the subcommittee, thank you for the opportunity to testify in support of FIRRMA and about CFIUS more generally.

The United States has always been a leading destination for investors. Alexander Hamilton argued that foreign capital is precious to economic growth. Foreign investment provides immense benefits to American workers and families, such as job creation, productivity, innovation, and higher median incomes. At the same time, we know foreign investment isn't always benign. On the eve of America's entry into World War I, concerned by German acquisitions in our chemical sector, Congress passed legislation empowering the President to block investments during national emergencies.

During the Depression in World War II, cross-border capital flows fell dramatically. And in the boom years of the 1950s and '60s, investment in the U.S. was modest compared to outflows. During that time, foreign investment also posed little risk. Our main adversaries, the Soviet Union and its satellites, were communist countries that were economically isolated from us.

But when the post-war trend changed in the 1970s, CFIUS was born. The oil shock that made OPEC countries wealthy led to fears that petro dollars might be used to buy strategic U.S. assets.

In 1975, President Ford issued an Executive order creating CFIUS to monitor foreign investments. Then in 1988, a growing number of Japanese deals motivated Congress to pass the Exon-Florio amendment. For the first time, the President could block a foreign acquisition without declaring a national emergency.

For the next 20 years, CFIUS pursued its mission without fanfare but, in the wake of the Dubai Ports controversy, it became clear that CFIUS needed greater procedural rigor and accountability. In 2007, some of you helped enact FINSA, which formally established CFIUS and codified our current structure and process.

Well now we find ourselves at yet another historic inflection point. The foreign investment landscape has shifted more than at any point during CFIUS' 40-year history. Nowhere is that shift more evident than in the caseload CFIUS now faces. The number of annual filings has grown within the last decade from an average of about 95 or so to nearly 240 last year. But it is the complexity, not simply the volume, that has placed the greatest demand on our resources. In 2007, about four percent of the cases went to the

more resource-intensive investigation stage. Last year in 2017, nearly 70 percent did.

This added complexity arises from a number of factors: strategic investments by foreign governments, complex transaction structures, and globalized supply chains. Complexity also results from the ever-evolving relationship between national security and commercial activity. Military capabilities are rapidly building on top of commercial innovations. What is more, the data driven economy has created vulnerabilities never before seen.

And I know the gravity of this last point isn't lost on any of you. Protecting against the disclosure of Americans' sensitive personal data lies at the core of this subcommittee's work. In several cases we have seen, even over the last year, the company being acquired had access to significant amounts of sensitive information capable of exploitation by state actors. Similar sensitivities can arise because a company has concentrations of data regarding American servicemen and women, private information such as medical records, or simply personally identifiable information on such a vast scale that the national security concerns are too large to ignore.

New risk require new tools. The administration has endorsed FIRRMA because it embraces four pillars critical to CFIUS modernization. First, FIRRMA expands the scope of transactions potentially reviewable by CFIUS to include certain non-passive investments, joint ventures, and real estate purchases. These changes lie at the very heart of CFIUS modernization. Right now, we can't review a host of transactions that present identical concerns to those we regularly examine.

Second, FIRRMA allows CFIUS to refine its procedures to ensure the process is tailored, efficient, and effective. Only where existing authorities, like export controls, can't resolve the risk will CFIUS step in.

Third, FIRRMA recognizes that our closest allies face similar threats and incentivizes our allies to work with us to address those threats.

And finally, FIRRMA acknowledges that CFIUS must be appropriately resourced.

Since testifying in the Senate in January and the House in March, I have been meeting regularly with Members of Congress, the business community, and other stakeholders to hear their views on the bill. As a result of these meetings, we have been working on proposed technical amendments to ensure that FIRRMA is even better tailored to address jurisdictional gaps, while also encouraging investment in our country. There is only one conclusion here: CFIUS must be modernized. In doing so, we must preserve our longstanding open investment policy. We must also protect our national security. These twin aims transcend party lines and they demand urgent action.

I look forward to working with this subcommittee on improving and advancing FIRRMA.

Thank you.

[The prepared statement of Mr. Tarbert follows:]

TESTIMONY OF THE HONORABLE HEATH P. TARBERT
Assistant Secretary of the Treasury
Before the U.S. House Energy & Commerce
Subcommittee on Digital Commerce and Consumer Protection
April 26, 2018

Chairman Latta, Ranking Member Schakowsky, Vice Chairman Kinzinger, and distinguished Members of the Subcommittee, thank you for the opportunity to testify in support of the Foreign Investment Risk Review Modernization Act (FIRRMA), H.R. 4311, 115th Cong. (2017). I would also like to thank those members of the subcommittee who have joined FIRRMA as co-sponsors, including Representative Mullin.

My top priority as Assistant Secretary is ensuring that the Committee on Foreign Investment in the United States (CFIUS) has the tools and resources it needs to perform the critical national security functions that Congress intended it to.¹ I believe FIRRMA—a bill introduced with broad, bipartisan support—is designed to provide CFIUS with the tools it needs to meet the challenges of today and those likely to arise in the future. Of particular importance to this subcommittee is the challenge of protecting against the harm that could result from the acquisition of companies that collect or store large pools of sensitive data about individual Americans. Malicious actors could exploit sensitive healthcare, financial, and other personally identifiable information to the detriment of U.S. national security. The Administration believes that FIRRMA will protect our national security from these and other kinds of risks while strengthening America’s longstanding open investment policy that fosters innovation and economic growth.

Importance of Foreign Investment in the United States

From the early days of our Republic, the United States has been a leading destination for investors, entrepreneurs, and innovators. In his famous *Report on the Subject of Manufactures*, Alexander Hamilton argued that foreign capital was not something to be feared or viewed as a rival to domestic investment, but was instead a “precious acquisition” in fostering our economic growth.² Throughout the nineteenth and twentieth centuries, capital from abroad funded the construction of America from our railways to our city skylines, while at the same time helping make such innovations as the automobile a reality.³ Foreign investment has also brought significant benefits to American workers and their families in the form of economic growth and well-paid jobs.

The same is true today, with a total stock of foreign direct investment in the United States standing at a staggering \$7.6 trillion (at market value) in 2016.⁴ Numerous studies have

¹ See *Nomination Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 115th Cong. (May 16, 2017) (testimony of Dr. Heath P. Tarbert).

² Alexander Hamilton, *Report on the Subject of Manufactures* (Dec. 5, 1791), available at <https://founders.archives.gov/documents/Hamilton/01-10-02-0001-0007>.

³ See Mira Wilkins, *The History of Foreign Investment in the United States to 1914* (Harvard Univ. Press 1999).

⁴ U.S. Bureau of Economic Analysis, *U.S. Net International Investment Position at the End of the Period*, Table 1.1. (Dec. 28, 2017), available at <https://bea.gov/scb/pdf/2018/01-January/0118-international-investment-position-tables.pdf>.

demonstrated that the benefits from foreign investment in the United States are substantial. Majority-owned U.S. affiliates of foreign entities accounted for over 23 percent of total U.S. goods exports in 2015.⁵ They also accounted for 15.8 percent of the U.S. total expenditure on research and development by businesses.⁶ They employed 6.8 million U.S. workers in 2015, and provided compensation of nearly \$80,000 per U.S. employee, as compared to the U.S. average of \$64,000.⁷ One study estimated that spillovers from foreign direct investment in the United States accounted for between 8 percent and 19 percent of *all* U.S. manufacturing productivity growth between 1987 and 1996.⁸ As Secretary Mnuchin—echoing his predecessor, Secretary Hamilton—has observed, “we recognize the profound economic benefits of foreign investment” today and place the utmost value on having “industrious and entrepreneurial foreign investors” continue to invest, grow, and innovate in the United States.⁹

Evolution of CFIUS

Despite its many benefits, we are equally cognizant that foreign investment is not always benign. On the eve of America’s entry into World War I, concerned by German acquisitions in our chemical sector and other war-related industries,¹⁰ Congress passed the Trading with the Enemy Act, giving the President broad power to block investments during times of war and national emergency.¹¹

During the Great Depression and World War II, international investment flows dropped dramatically.¹² And in the boom years of the 1950s and 1960s—as many countries devastated by World War II were rebuilding their economies—investment in the United States from abroad was modest compared to outflows. Indeed, for the first time ever, America became a net source

⁵ U.S. Dep’t of Commerce, Economics & Statistics Admin., *Foreign Direct Investment in the United States*, ESA Issue Brief 06-17, Oct. 3, 2017, at 2.

⁶ *Id.*

⁷ *Id.*

⁸ Wolfgang Keller & Stephen R. Yeaple, *Multinational Enterprises, Int’l Trade, and Productivity Growth: Firm Level Evidence from the United States*, 91 Review of Economics & Statistics, November 2009, at 821, 828.

⁹ Steven T. Mnuchin, Secretary, Dep’t of the Treasury, SelectUSA Investment Summit Welcome Address (June 20, 2017).

¹⁰ Edward M. Graham & David M. Marchick, Institute for Int’l Economics, *U.S. Nat’l Security & Foreign Direct Investment* 4-8 (2006). Prior to America’s entry into World War I, it was revealed that the German government made a number of concealed investments into the United States, including establishment of the Bridgeport Projectile Company which “was in business merely to keep America’s leading munitions producers too busy to fill genuine orders for the weapons the French and British so desperately needed.” Ernest Wittenberg, *The Thrifty Spy on the Sixth Avenue El*, American Heritage (Dec. 1965), available at <http://www.americanheritage.com/content/thrifty-spy-sixth-avenue-el>. The company placed an order for five million pounds of gunpowder and two million shell cases “with the intention of simply storing them.” *Id.* The plot was revealed when a German spy inadvertently left his briefcase containing the incriminating documents on a New York City train, with the documents being returned to the custody of the Treasury Department. *Id.*

¹¹ 50 U.S.C. § 4305. TWEA, originally passed in 1917, empowered the President to “investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.” *Id.* § 4305(b)(1)(B).

¹² Graham & Marchick, *supra* note 10, at xvi, 14, 18.

of investment capital instead of its destination.¹³ And what foreign investment did exist posed little risk since our main strategic adversaries—the Soviet Union and its satellites—were communist countries whose economic systems were largely isolated from our own.

When the post-war trend changed in the 1970s, however, CFIUS was born. The oil shock that made OPEC countries wealthy led to concern that petrodollars might be used to purchase key U.S. assets. In 1975, President Ford issued an Executive Order creating CFIUS to monitor and report on foreign investments, but with no power to stop those posing national security threats.¹⁴ Then in the 1980s, a growing number of Japanese acquisitions motivated Congress to pass the Exon-Florio Amendment in 1988.¹⁵ For the first time, the President could block the foreign acquisition of a U.S. company or order divestment where the transaction posed a threat to national security without first declaring an emergency. That law created Section 721 of the Defense Production Act of 1950, which remains the statutory cornerstone of CFIUS today.

Subsequently, in 1992, Congress passed the Byrd Amendment which requires CFIUS to undertake an investigation where two criteria are met: (1) the acquirer is controlled by or acting on behalf of a foreign government; and (2) the acquisition results in control of a person engaged in interstate commerce in the United States that could threaten our national security.¹⁶ In the years that followed, it became evident that CFIUS and Congress did not share the same view on when a 45-day investigation period was discretionary rather than mandatory, a rift that was more clearly exposed in the wake of the Dubai Ports World controversy. In order to instill greater procedural rigor and accountability into CFIUS's process, Congress enacted the Foreign Investment and National Security Act of 2007 (FINSa), which formally established CFIUS by statute and codified its current structure and processes.¹⁷

Critical Need for CFIUS Modernization

Now, more than a decade after FINSa and three decades after Exon-Florio, we find ourselves at another historic inflection point. Within the last few years, the national security landscape as it relates to foreign investment began shifting in ways that have eclipsed the magnitude of any other shift in CFIUS's 40-year history. Nowhere is that shift more evident than in the caseload CFIUS now faces. The resources of CFIUS are challenged by increased case volume and complexity. The average volume of CFIUS cases has been growing steadily from fewer than 100 in 2009 and 2010 (the two years following the financial crisis) to nearly 240 last year. While it is difficult to measure case complexity in real terms, one indicator is the rate at which cases have proceeded to CFIUS's investigation stage, which is more resource intensive. In 2007, approximately 4 percent of cases went to investigation; in 2017, approximately 70 percent did. Another potential measure of complexity is the number of cases in which CFIUS determines that mitigation or prohibition is necessary to address national security concerns, which require significantly more time and resources. From roughly 2008 through 2015, such cases represented fewer than 10 percent of the total covered transactions CFIUS reviewed; this

¹³ *Id.* at 9.

¹⁴ Exec. Order 11,858, 40 F.R. 20,263 (May 7, 1975).

¹⁵ Pub. L. 100-418, Title V, § 5021, 102 Stat. 1107 (1988).

¹⁶ Pub. L. 102-484, 106 Stat. 2315 (1992).

¹⁷ Pub. L. 110-49, 121 Stat. 246 (2007).

figure has risen to approximately 20 percent of total covered transactions CFIUS reviewed in 2017.

The added complexity CFIUS is confronting arises from a number of different factors, including: the way foreign governments are using investments to meet strategic objectives, more complex transaction structures, and increasingly globalized supply chains. Complexity also results from continued evolution in the relationship between national security and commercial activity. Military capabilities are rapidly building on top of commercial innovations. Additionally, the digital, data-driven economy has created national security vulnerabilities never before seen.

The gravity of the last point regarding the vulnerabilities arising from the digital, data-driven economy must not be lost on this subcommittee given your critical role on digital commerce and consumer protection issues. In several cases we have seen even within the last 12 months, the company being acquired—which may, for example, be in the technology hardware, technology services, or financial services industry—has access to significant amounts of sensitive information on Americans that can be exploited by state actors. The sensitivity could arise because a given company has concentrations of data regarding American military servicemen and women, deeply private information such as medical records, or simply personally identifiable information on such a vast scale that the national security concerns are just too large to ignore. Thus today, the acquisition of a Silicon Valley start-up or even a healthcare provider may raise just as serious concerns from a national security perspective as the acquisition of some defense or aerospace companies, CFIUS's traditional area of focus.

CFIUS's exposure to such cases has allowed it to play a critical role in protecting against threats to national security, but has at the same time highlighted gaps in our jurisdictional authorities. We continue to be made aware of transactions we lack the jurisdiction to review but which pose similar national security concerns to those already before CFIUS. These gaps are widening as more threat actors seek to exploit them. The problem lies in the fact that CFIUS's jurisdictional grant is now 30 years old, originating with the Exon-Florio Amendment and maintained in FINSAs. Under current law, CFIUS has authority only to review those mergers, acquisitions, and takeovers that result in foreign "control" of a "U.S. business." That made sense in the 1980s and even in the first decade of this century, but the foreign investment landscape has changed significantly, with non-controlling investments and joint ventures becoming ever more prolific.

Consequently, certain transactions—such as investments that are not passive, but simultaneously do not convey "control" in a U.S. business—that the Committee has identified as presenting a national security risk nonetheless remain outside its purview. Similarly, CFIUS is also aware that some parties may be deliberately structuring their transactions to come just below the control threshold to avoid CFIUS review, while others are moving critical technology and associated expertise from a U.S. business to offshore joint ventures. While we recognize that parties can choose among a variety of transaction structures, purposeful attempts to evade CFIUS review put this country's national security at risk. Finally, we regularly contend with gaps that likely never should have existed at all. For example, the purchase of a U.S. business in close proximity to a sensitive military installation is subject to CFIUS review, but the purchase of real

estate at the same location (on which one could place a business) is not. These gaps can lead to disparate outcomes in transactions presenting identical national security threats.

Support for FIRRMA

The Administration has endorsed FIRRMA because it embraces four pillars critical for CFIUS modernization. First, FIRRMA expands the scope of transactions potentially reviewable by CFIUS, including certain non-passive, non-controlling investments, technology transfers through arrangements such as joint ventures, real estate purchases near sensitive military installations, and transactions structured to evade CFIUS review. The reasons for these changes are twofold: (1) they will close gaps in CFIUS's authorities by expanding the types of transactions subject to CFIUS review; and (2) they will give CFIUS greater ability to prevent parties from restructuring their transactions to avoid or evade CFIUS review when the aspects of the transaction that pose critical national security concerns remain.

Second, FIRRMA empowers CFIUS to refine its procedures to ensure the process is tailored, efficient, and effective. Under FIRRMA, CFIUS is authorized to exclude certain non-controlling transactions that would otherwise be covered by the expanded authority. Such exclusions could be based on whether other provisions of law—like export controls—are determined to be adequate to address any national security concerns. Only where existing authorities cannot resolve the risk will CFIUS step in to act. FIRRMA also allows CFIUS to identify specific types of contributions by technology, sector, subsector, transaction type, or other transaction characteristics that warrant review—effectively excluding those that do not.

Third, FIRRMA recognizes that our own national security is linked to the security of our closest allies, who face similar threats. In light of increasingly globalized supply chains, it is essential to our national security that our allies maintain robust and effective national security review processes to vet foreign investments into their countries. FIRRMA gives CFIUS the discretion to exempt certain transactions from review involving parties from certain countries based on such factors as the nature of the U.S. strategic relationship with the country and the other country's process to review the national security implications of foreign investment. FIRRMA will also enhance collaboration with our allies and partners by allowing information-sharing for national security purposes with domestic or foreign governments.

Fourth, FIRRMA requires an assessment of the resources necessary for CFIUS to perform its critical mission so that Congress has a full understanding of the needs required to fulfill CFIUS's expanded scope. FIRRMA would also establish a "CFIUS Fund," which would be authorized to receive appropriations. Under FIRRMA, these monies are intended to cover work on reviews, investigations, and other CFIUS activities. FIRRMA further authorizes CFIUS to assess and collect fees, which would be set by regulation at a level anticipated not to affect the economics of any given transaction. Once appropriated, these funds could also be used by CFIUS. Finally, FIRRMA grants the Secretary of the Treasury, as CFIUS chairperson, the authority to transfer funding from the CFIUS Fund to any member agencies to address emerging needs in executing requirements of the bill. This approach would enhance the ability of agencies to work together on national security issues.

Since my earlier testimony before the Senate Committee on Banking, Housing, and Urban Affairs on January 25, 2018 and the House Financial Services Subcommittee on Monetary Policy and Trade on March 15, 2018, my colleagues and I have been meeting regularly with members of Congress and the business community to hear their views on CFIUS-related legislation. Notably, while some have suggested technical amendments aimed at improving the core proposal, all agree on one essential point: CFIUS must be modernized through a comprehensive piece of legislation. Based on the feedback we received, we have been working on proposed amendments to ensure that FIRRMA is even better tailored to remedy existing gaps in CFIUS's authority without harming—but rather, encouraging—the foreign direct investment that has benefitted our country so greatly.

In sum, CFIUS must be modernized. In doing so, we must preserve our longstanding open investment policy. At the same time, we must protect our national security from current, emerging, and future threats. The twin aims of maintaining an open investment climate and safeguarding national security are the exclusive concern of neither Republicans nor Democrats. Rather, they are truly American aims that transcend party lines and regional interests. But they demand urgent action if we are to achieve them. I look forward to working with this subcommittee on improving and advancing FIRRMA, and I am hopeful the bill will continue to move forward on a bipartisan, bicameral basis.

Mr. LATTA. Well, thank you very much for your testimony.

And, Mr. Ashooh, you are recognized for 5 minutes. And, again, thank you for being with us this morning.

STATEMENT OF RICHARD ASHOOH

Mr. ASHOOH. Thank you, Mr. Chairman, and thank you also Ranking Member Schakowsky, and the members of the committee for having us here today.

I appreciate the opportunity to testify before the subcommittee today regarding CFIUS. And to share the perspective of the Department of Commerce, not only as a member agency of CFIUS but also, Mr. Chairman you mentioned in your opening statement about export control agencies, and we will bring that perspective to our testimony today as well.

Within Commerce, the International Trade Administration and the Bureau of Industry and Security, or BIS, play important roles in the Department's review of CFIUS matters. BIS is the administrator of the Export Administration Regulations or EAR is the regulatory authority for the licensing and enforcement of controls on dual-use items, which are items that have a civilian end-use but can also be used for a military or proliferation-related purpose, and also includes less-sensitive military items.

The export control system administered by BIS is a process that, like CFIUS, involves multiple agencies, primarily the Departments of Defense, Energy, and State. We work closely with these agencies to review not only license applications submitted to BIS but also to review and clear any changes to the EAR itself, ensuring that the export control system is robust.

The interagency licensing process also takes into account intelligence information to assist in the analysis of the potential threats posed by those proposed exports. Further, the export control system benefits from close cooperation with our international partners through four major multi-lateral export control regimes focused on national security, as well as missile technology, nuclear, and chemical weapons nonproliferation. Through these regimes, the United States and our partners coordinate on which items and technologies merit control and how those controls should be applied.

The EAR's authority covers an array of in-country transfers of technology, as well as exports of goods, software, or technology to foreign countries. For example, the EAR regulates the transfer of controlled technology within the United States or abroad to foreign nationals under what we call deemed exports. It differentiates between countries that range from our closest allies to embargoed nations; thus, allowing the export control system to handle technology transfers under different licensing review policies, depending on the level of concern with the recipient country.

The EAR also includes lists of end-users of concern that trigger extraordinary licensing requirements, as well as prohibitions of certain end uses.

The export control system is also highly adaptable to evolving threats and challenges. BIS is currently reviewing control levels and procedures to specifically address such threats from adversary nations, as well as their interest in emerging critical technologies.

Our export control system includes aggressive enforcement capabilities as well. BIS' special agents are located across the United States and overseas with a primary focus on identifying violations of the EAR and bringing to justice domestic and foreign violators.

Recently, BIS, in conjunction with other federal law enforcement agencies announced a prosecution against two individuals conspiring to violate export control laws by shipping controlled semiconductor components to a Chinese company that was under a Commerce license restriction known as the entity list.

The export control system and CFIUS are complementary tools that we utilize to protect U.S. national security, with CFIUS addressing risks stemming from foreign ownership of companies important to our national security and export controls dealing with the transfer of U.S. goods, technology, and software to foreign nationals, regardless of the mode of transfer.

As with the export control system, it is also crucial that CFIUS remain adaptive to current and evolving security challenges. The FIRRMA legislation introduced in the House and the Senate would, if enacted, take several important steps in this direction, especially the provision requiring mandatory filings for certain transactions involving foreign government-controlled entities, as well as the provision which would facilitate greater cooperation and information-sharing with our allies and partners. Such international cooperation is an essential part of our export control system and would benefit CFIUS as well.

In sum, the export control system and CFIUS are both vital authorities and complementary tools that the United States relies upon to protect our national security. Strengthening CFIUS through FIRRMA, while ensuring that CFIUS and the export control authorities remain distinct, will enable even stronger protections of U.S. technology.

The Department of Commerce looks forward to working with the committee and the bill's cosponsors on this important effort.

And I look forward to taking your questions.

[The prepared statement of Mr. Ashooh follows:]

**Statement of
Richard E. Ashooh
Assistant Secretary of Commerce for Export Administration
Before the Subcommittee on Digital Commerce and Consumer Protection**

**Committee on Energy and Commerce
U.S. House of Representatives
April 26, 2018**

Chairman Latta, Ranking Member Schakowsky, and Members of the Committee:

I appreciate the opportunity to testify before the Subcommittee today regarding the Committee on Foreign Investment in the United States or CFIUS. I am pleased to share the perspective of the Department of Commerce in this area, both as a member agency of CFIUS and as an export control agency.

Since becoming Assistant Secretary of Commerce for Export Administration last year, I have reviewed almost 100 CFIUS cases and participated in policy deliberations on many sensitive and complex transactions. While in the private sector, I worked for a defense company owned by a foreign company, an acquisition that was reviewed by CFIUS. Based on my experience, it is clear that CFIUS plays an important role in protecting our national security.

The International Trade Administration (ITA) and my organization, the Bureau of Industry and Security (BIS), play important roles in Commerce's review of CFIUS matters, reviewing every transaction and bringing different expertise to CFIUS's deliberations. ITA has extensive expertise on U.S. and global market conditions and provides insights into how the foreign investments reviewed by CFIUS fit into the overall market. BIS, on the other hand, has a national security mission, the main element of which is the administration of the U.S. export control system codified in the Export Administration Regulations (EAR), which are often a key factor in CFIUS reviews.

Administering Export Controls

In our role administering the EAR, BIS's responsibilities encompass the entirety of the export control process – we write and implement the regulations, issue export licenses, conduct compliance activities (including overseas end-use checks), and enforce the regulations, including by preventing violations and punishing those who violate.

The EAR has traditionally been the regulatory authority for the control of “dual-use” items, which are items that have a civil end-use but can also be used for a military or proliferation-related use. However, in recent years some less sensitive military items previously controlled under the International Traffic in Arms Regulations (ITAR) have been transferred to the EAR. The dual-use items subject to control and these less sensitive military items are listed on the Commerce Control List (CCL) within the EAR. Additionally, commercial items that are not determined to merit control on the CCL as dual-use items are still subject to the EAR and are controlled to sanctioned destinations and parties as well as to prevent sensitive end uses such as

those relating to developing weapons of mass destruction. We refer to such items as EAR99 items.

It is important to note that the export control system administered by BIS is an instrument of national security that, like CFIUS, involves multiple agencies. We work closely with the Departments of Defense, Energy, and State and these agencies review and clear any changes to the EAR itself as well as license applications submitted to BIS. The different equities, viewpoints and technical expertise that our four agencies bring to the table ensure that the export control system is robust and that national security remains at the forefront.

The EAR's authority covers a wide array of transactions and technology transfers. The goods, software and technology listed for control on the CCL are defined by specific technical parameters. The interagency decisions on where to set these parameters are national security determinations based on when particular items become sufficiently applicable to a military end-use to warrant control. The EAR governs what are considered traditional exports of goods, software or technology to foreign countries, but the EAR also covers the transfers of controlled technology within the United States to foreign nationals under what we call "deemed exports." It is also important to note that the EAR differentiates between countries that range from our closest allies to embargoed countries. This differentiation allows the export control system to treat exports and technology transfers under different licensing review policies depending on the level of concern with the recipient country. The EAR also includes lists of end-uses and end-users of concern that trigger extraordinary licensing requirements if an export is in support of, or destined for, such an end-use or end-user.

In addition to being an interagency national security process, our export control system benefits from close cooperation with our international partners through the four major multilateral export control regimes. Through these regimes – the Wassenaar Arrangement, the Nuclear Suppliers Group, the Missile Technology Control Regime, and the Australia Group – the United States and our partners agree on which items and technologies merit control and how those controls should be applied. It has long been our position that export controls are significantly more effective when they are implemented multilaterally. This helps ensure that these sensitive technologies are controlled by all countries that are capable of producing them to make it more difficult for them to be acquired by parties of concern.

The export control system and CFIUS are complementary tools that we utilize to protect U.S. national security, with CFIUS addressing risks stemming from foreign ownership of companies important to our national security, and export controls dealing with transfer of specific goods and technologies out of the United States or to foreign nationals, regardless of mode of transfer. Some risks, such as the potential transfer of sensitive technology from a United States firm by a new foreign owner, could fall under the purview of both mechanisms. Each mechanism has its strengths, and it is important that each be applied in ways that complement, and not duplicate, the other.

One issue that has received a lot of attention in recent months is the concept of "emerging" technologies that may not yet be well understood but could potentially be sensitive and present national security concerns. Our export control system has been addressing technological

innovation for decades in light of the rapid pace of innovation and the increased overlap between civil and military technologies. Moreover, BIS has existing tools to identify and deal with emerging technologies through its specialized expertise and the EAR. One way that BIS seeks to keep as updated as possible on emerging technologies is through our technical advisory committees (TACs), which are our primary vehicle for interacting with industry in technical areas impacted by our export controls. These TACs cover various technology sectors including transportation, information technology, and sensors.

Not surprisingly, the concept of emerging critical technologies is one that presents challenges to CFIUS as well. The Department of Commerce regularly brings to the CFIUS process the knowledge gained of such technologies through its administration of the Export Administration Regulations. The Department of Commerce shares the Committee's concerns over China's industrial policies and activities. It is important that the export control process continue its role in securing U.S. technology leadership. For this reason, we are currently undertaking a review to better utilize our authorities to combat threats arising from the transfer of this kind of technology.

Similarly, it is also crucial that CFIUS remain adaptive to current and evolving security challenges. As the Subcommittee is aware, legislation has been introduced in the House and Senate which, if enacted, would take several important steps in this direction. The Department supports the legislation, known as the Foreign Investment Risk Review Modernization Act (FIRRMA). There are a few provisions that I would like to highlight that are of particular interest to our Department:

- The Department welcomes the affirmations in FIRRMA of the U.S. policy supporting direct investment in the United States.
- We are supportive of the requirement for mandatory filings for certain transactions involving foreign government-controlled entities. However, we are concerned that the 25 percent threshold in FIRRMA is too high and that transactions could easily be structured to evade it. We encourage the Congress to consider a lower threshold.
- We appreciate that FIRRMA requires an assessment of the resources necessary for CFIUS to carry out its critical work, and would both establish a CFIUS Fund and permit filing fees to help achieve that end. We also appreciate that the bill states that the provisions which would expand CFIUS authorities will not take effect until CFIUS has put in place the regulations and has the resources it needs to implement its expanded role.
- Additionally, we support the provisions of FIRRMA that would facilitate greater cooperation and information sharing with our allies and partners. This would permit increased coordination with like-minded countries, particularly on acquisitions that cross borders, as we attempt to address national security concerns.

We in BIS are committed to continuing to identify and control sensitive emerging technologies and to ensuring that the export control and CFIUS processes relevant to managing security challenges presented by emerging technologies are systematic, proactive, and institutionalized.

In sum, CFIUS and export controls are both vital and robust authorities the United States relies upon to protect our national security. As we strengthen both to meet current challenges, it is important that they remain complementary and not overlap unnecessarily, as that has the potential to overburden the CFIUS process and partially duplicate the more comprehensive coverage of technology transfer under the export control system. Commerce looks forward to working with the Congress on ways to protect sensitive U.S. technologies and assets that provide key advantages to our industrial base and national security.

Thank you.

Mr. LATTA. Well, again, thank you for your testimony. And that will end our presentations from our witnesses. And I will begin the questioning and recognize myself for 5 minutes.

Pardon me, it is allergy time in Washington.

First this is a question for both of you. What are the administration's views on the proper relationship between export controls and CFIUS?

Mr. Tarbert, would you like to start or Mr. Ashooh?

Mr. TARBERT. Sure, I can start. I think Assistant Secretary Ashooh said it right, the administration believes they are complementary and mutually reinforcing tools of the United States Government. And so the stronger export controls are, the better that it makes CFIUS and vice-versa.

Mr. ASHOOH. And I would certainly reiterate that. And the fact that the—not only is CFIUS in need of modernization but our export control authorizing legislation, as well. And right now there are independent efforts to do both. That is very, very important because, as we modernize one, it is important to modernize both because they really are knitted together and rely upon each other to be effective.

Mr. LATTA. Let me follow-up with that, then, Mr. Ashooh, if I could, because do current legislative proposals create a distinction between CFIUS and export controls? And if they don't, should they?

Mr. ASHOOH. The current legislation, the CFIUS legislation?

Mr. LATTA. Right. Right.

Mr. ASHOOH. The latest, and I don't want to pretend to be an expert on what is going on in the committees that are working on the legislation but, as we understand it, the latest draft does do a very good job of not only drawing the line but leveraging each other. There is an acknowledgment that the goals of FIRREA need to be accomplished with several authorities. And export control is specifically carved out and reinforces the relationship that the two have.

Mr. LATTA. Thank you.

Secretary Tarbert, how has foreign direct investment in the United States changed since the last time this committee considered CFIUS legislation in 2006?

Mr. TARBERT. So we are seeing, and I mentioned a few points in my opening testimony but just to give you a little bit more flavor on that, the rise of state-owned enterprises, particularly from certain countries that are buying strategic assets as part of an industrial plan and, in some cases, that industrial plan involves civil military fusion. And so there is this inflow of state-owned enterprise money that is sort of government-backed money that are not purely financial investments but are purchasing U.S. businesses with more military and strategic goals in mind.

The other thing that has changed is that, to go back to this committee and what you all are really specialists in, is the vulnerability side. So there is sort of the sources of the funds coming into the United States and why people are investing but then there is also the U.S. companies. There is much more. We live in a big data economy now. And so when we are looking at a particular U.S. company, a healthcare firm, for example, or even an internet servicing firm, the data on U.S. citizens is much greater than it was

10 years ago and certainly 30 years ago, when the actual jurisdictional provision of CFIUS was created. So it has been 30 years since CFIUS' actual jurisdiction has been revisited.

Mr. LATTA. Thank you.

Secretary Ashooh, do the current export controls administered by your Department adequately prevent the transfer of sensitive goods in intellectual property?

Mr. ASHOOH. They do but they need to be utilized aggressively. This is not a one and done scenario, as we have learned. Not only on the CFIUS side, on the export control side, bad actors seek to evade current restrictions. And they do this all the time and the volume of this activity is also going up.

So the authorities, while they need to be updated, are certainly able to deal with the threats to the technology transfer but they need to be utilized aggressively.

Mr. LATTA. When you talk about utilized aggressively, how would you define that?

Mr. ASHOOH. Well, as I mentioned, one of the things that is important about the export control system is we do have enforcement and we need to utilize our enforcement. And so I referred to one example in my opening statement but that is something that we are relying on Congress to help us make sure is resourced properly because, at the end of the day, this comes down to having the right people doing the job but it also means making sure that we are staying ahead of the technologies that are targets. And we are living in a world now where emerging technologies, which is clearly the strength of the U.S. innovation base.

We are very excited about the technologies that are coming online, most of them for civilian purposes, but which could have national security implications. And so we need to be aggressive about identifying and potentially controlling that category of technology.

Mr. LATTA. In my last 20 seconds, not to be picking on you, one last question.

In your testimony you said that however we are concerned that the 25 percent threshold in FIRRMA is too high and that you might encourage that Congress consider a lower threshold. What would that lower threshold be, in your opinion?

Mr. TARBERT. So we have identified 10 percent, which is similar to what the SEC uses to identify their definition of control. Our view is from an export control perspective. The wider the aperture that proceeds through CFIUS is an opportunity for the export control system to understand and examine those specific transactions for export control purposes. So, we think the overall system benefits from having that wider aperture.

Mr. LATTA. Thank you very much. My time has expired.

And the gentlelady from Illinois, the ranking member of the subcommittee, is recognized for 5 minutes.

Ms. SCHAKOWSKY. I have so many questions. I am going to try and get through some of them, anyway.

So I am interested in hearing from both of you the issues of staffing and resources. It is my understanding that the number of investments or transactions that CFIUS is reviewing is already—you talked about that, how many more there are and that FIRRMA could require CFIUS to review even more transactions.

So, if we could start with you, Secretary Tarbert.

Mr. TARBERT. Sure. So in order to do this, we will need resources, particularly FIRRMA. I mean we are committed to ensuring that the resources are there so that cases can be reviewed adequately for national security purposes.

One thing that FIRRMA does is it has special funding mechanisms, which helps ensure that the resources are there. It also has a special, the legislation would not go into effect until there is a certification by the Treasury Secretary that the new regulations and resources are in place.

So, absolutely, resources are a very important part of this.

Ms. SCHAKOWSKY. So how many transactions per year does CFIUS review now and how many do you expect it would be required to review if the bill became law?

Mr. TARBERT. Right now we had a little under 240 cases before.

Ms. SCHAKOWSKY. Yes, you said that.

Mr. TARBERT. We don't know with exact certainty because the bill is changing. It will certainly be multiples of that but we don't know exactly how many because the bill is changing and we also want to make sure that the regulations really pinpoint those transactions that are most likely to give rise to national security concerns.

Ms. SCHAKOWSKY. And how many staffers work for or are assigned to the committee and how many more staff—so you can't really tell how many more would be required if the law passed.

Mr. TARBERT. Not at this time.

Ms. SCHAKOWSKY. OK. Secretary Ashooh, did you want to respond?

Mr. ASHOOH. Sure. There is actually a good reason why it is difficult to forecast. And that reason is, certainly in the case of Commerce, the majority of people who work CFIUS cases are also working licensing and other export control-related matters. So we are leveraging the expertise of both.

We have got a cadre of about 30 engineers and scientists that help us understand the technology in question and those are people who would work on both. The caseload will go up, there is no question, but I don't think it will be necessarily a one-for-one increase because we will continue to leverage the overall organization to support what we are doing.

Ms. SCHAKOWSKY. So, Secretary Tarbert, we have been, this subcommittee and the Energy and Commerce Committee, has been dealing with the issue in pretty high-profile hearings on security, data security, privacy, that kind of thing.

And the things that you were saying really concern me because then what are the guiding principles? The United States of America has very few real regulations when it comes to data privacy and security. Europe has come up with a new regime on how to do that. So what guides you on whether or not the data that these investments want to have or do have is protected, or how do you balance it?

Mr. TARBERT. Yes, it is a great question. So there is probably a whole other data protection debate that you have raised about that.

What CFIUS looks at are specifically are there national security concerns arising from the vulnerabilities of the target company. So

when we do an assessment of a transaction, we look at the threat, which is an intelligence community analysis of the foreign acquirer, and then we look at the vulnerability, which is essentially an assessment of what the target company has in the U.S. And then we put those two together and say if a threat meets the vulnerability, what are the potential consequences.

So if we have a foreign acquirer——

Ms. SCHAKOWSKY. Well, these all ifs, but have you actually enforced some? Can you tell me about that?

Mr. TARBERT. Absolutely. So we see cases where the foreign acquirer, there may be concerns that they could take American's information and share them with their state authorities in a way that could have intelligence community effects. And so, in some cases, we would require mitigation that effectively doesn't allow certain people from the foreign acquirer to have access to Americans' information.

Ms. SCHAKOWSKY. And then how often does that happen?

Mr. TARBERT. It is happening more often than before. But, again, it has to arise to the level where we need to say there is actually a national security concern. But it is arising more often than certainly 5 years ago and certainly 10 years ago.

Ms. SCHAKOWSKY. And what kind of company would that be?

Mr. TARBERT. It could be any particular company.

Ms. SCHAKOWSKY. What company has there been?

Mr. TARBERT. They are in various industries, health care, for example, where healthcare information is particularly sensitive. And it can be in the financial services industry, as well, where we have seen cases where, again, there is lots of personal data and financial data on Americans, where we are concerned that it could have national security ramifications.

Ms. SCHAKOWSKY. Thank you. I would like to hear more about that but I have run out of time.

Mr. TARBERT. Absolutely, my pleasure.

Mr. LATTA. Thank you very much. The gentlelady yields back.

The chair now recognizes the gentleman from Illinois, the vice chair of the subcommittee for 5 minutes.

Mr. KINZINGER. Thank you, Mr. Chairman, and thank you both for being here. I appreciate it. Obviously, there are a lot of questions we have.

This is an extremely important issue, especially when you deal with the economy. We obviously want to make sure we are protected. At the same time, anytime we make changes in the way our economy works, it could have implications that we know nothing about. And so part of you being here is extremely important for that.

Mr. Tarbert, in your testimony, you emphasized the gravity of potential vulnerabilities arriving from the digital data-driven economy that we live in. Can you explain how countries are exploiting this and how you believe that modernizing CFIUS will help address those concerns?

Mr. TARBERT. Yes. There is only so much I can say because some of that is classified as to how countries may be exploiting the vulnerabilities. But I think if you think about a company that contains lots of personally identifiable data, personal healthcare data

on individual Americans, one can easily see that if that information got into the wrong hands, particularly if those individual Americans work in sensitive U.S. Government positions, that a foreign actor could exploit that.

Mr. KINZINGER. OK.

Mr. Ashooh, in your testimony, you state that our export control system and CFIUS are complementary tools, as the chairman talked about, that we utilize to protect our national security. Given that they complement each other, are there any gaps in the way that they interplay?

Mr. ASHOOH. I think any gaps that might exist are not gaps between the two. I think that FIRRMA is addressing gaps that need to be addressed in certain transactions. That will benefit the export control system.

And I think it is also important you know to illustrate why these two need to be complementary. If we are concerned about a certain technology, oftentimes the concern will be over the nature of the transaction under which that technology would be transferred. CFIUS is very good at understanding, and blocking, or mitigating those transactions.

Once that occurs, though, the technology still exists and may belong to several companies. In fact, it usually does. And so if we have a concern over the technology that was resonant in that transaction, we want to make sure, as an export control agency, we follow it and control it wherever it goes.

So the—

Mr. KINZINGER. Kind of cradle-to-grave, in essence.

Mr. ASHOOH. Yes, really, belt and suspenders, whatever you want to use. It is very important for us to follow the technology of concern wherever it goes.

And I think the changes that we are talking about, if there are gaps, those will be addressed in FIRRMA and that will then help the export control system be more robust.

Mr. KINZINGER. And then let me ask you how does coordination with other agencies, such as DOD, occur with respect to the evaluation of potential military application of a civilian technology?

Mr. ASHOOH. So the export control system is founded on an inter-agency process. And so the agencies that I mentioned, Energy has a nation security role, protects a stockpile; Defense; State all are the member agencies that review export control licenses. That includes an escalation process, meaning if one agency has a concern that it does not feel is being addressed, it can raise that up to the Assistant Secretary level, all the way up to the Cabinet, so we can really drill down into the issues that are of concern.

I would also like to expand on that internationally. We have a similar process where we work with international allies because, again, we are talking about evasion in cases. Where the adversary nation wants to obtain something from the U.S., can't get it, it doesn't do us any good to control it if they can get it from Europe or somewhere else. So we have a number of ways to work with our allies to control technology.

And FIRRMA, again, acknowledges the need to work internationally, as the export control system does, again, creating more complementary natures.

Mr. KINZINGER. And then do you think, for both of you, do you think that CFIUS is capable of addressing emerging technology concerns, given how rapid innovation is occurring? And what changes do you think are necessary to better position it to do so?

In a month we are going to have technology we don't even know exists today.

Mr. TARBERT. I would just say there needs to be a process where emerging technologies are identified, and considered, and made part of the CFIUS review process or certainly the export controls. And so we have been working a lot on that process in the bill with Members of Congress, with the committees of jurisdiction, to make sure that we have such a process and that that process keeps up.

Mr. ASHOOH. Sir, this is a critical issue for us. We are spending a great deal of our resources and focus on adapting to the trend you just identified.

We have technical advisory committees that include private sector individuals and companies that are those early stage innovators. We were relying on them. In fact, we have reorganized them around emerging technologies, one of many. With more time, I would be happy to fill you in on what we are doing to tackle that.

Mr. KINZINGER. Cool.

And Mr. Chairman, to be an example for generations to come, I yield back with time on the clock.

Mr. LATTA. The gentleman yields back.

The chair now recognizes the gentleman from Texas for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman.

The bill contemplates increasing CFIUS scrutiny of certain transactions that involve critical technology or critical infrastructure. While I understand the purpose of CFIUS is to consider each transaction in light of national security, I am interested in how labor issues are considered.

I understand that the Secretary of Labor is a nonvoting member. What is their role in the committee?

Mr. TARBERT. Sure. So if an issue raises to the level of national security, it will be considered. And as you say, the Secretary of Labor has an observer role. And so, therefore, if there is a case—so normally what happens is that if there is a case involving a company where let us say the Labor Department is primarily involved, whether it is a set of ERISA funds or other things, a labor union of some sort, where there is a foreign acquisition there, then we would often ask that Cabinet secretary to sit as the co-chair of the case.

Mr. GREEN. OK. Can CFIUS consider whether a transaction would strip the U.S. of these good high-paying jobs or pose threats to the health or environment of Americans?

Mr. TARBERT. Right now, CFIUS is focused solely on national security. So if there is an issue where it rises to the level of national security, it would be considered.

There are a number of other tools the U.S. Government has to address some of those issues, as well as some of the issues that you raised, Ranking Member Schakowsky, about unfair trade practices and things. But for now, CFIUS is just focused on national security.

Mr. GREEN. Well, and I know I live in a very urban area, an industrial area in Houston. If a foreign company comes in and there is a labor bargaining unit, by federal law they continue that agreement.

Does CFIUS take that into consideration or is that Department of Labor responsibility?

Mr. TARBERT. I believe that is the Department of Labor. We are set up solely to focus on does this pose a national security concern to the United States.

Mr. GREEN. OK. The issue is focused on foreign investment. Obviously, we like to have foreign investment in our country.

And discuss, either of you, do you agree that the U.S. needs to support R and D and infrastructure spending? I mean that ought to be a no-brainer. I think all of us do.

What are you doing to push the administration to make such investments?

Mr. TARBERT. Do you want to?

Mr. ASHOOH. Sure. So I come from the Bureau of Industry and Security, which is dedicated to national security issues within Commerce but we are a very small bureau in a very large agency that is focused on ensuring that we are putting pedal to the metal on innovation, research and development. R and D in the United States exceeded \$500 billion last year, which is an all-time high. Most of that is private and so we want to make sure that we continue to encourage that private investment.

Mr. GREEN. Mr. Tarbert, some have recommended that a net economic benefit test should be added to CFIUS review procedures, like those that some of our allies employ. Would you support such a test being mandated or, if not, why not?

Mr. TARBERT. Sure. So the administration's position is that CFIUS has always been designed and should continue to focus solely on national security.

Mr. GREEN. OK.

Mr. TARBERT. That said, there are other tools available to address economic issues. And so the 301 investigation is something that I think goes to many of the concerns that you have raised.

Mr. GREEN. OK, thank you, Mr. Chairman. I yield back.

Mr. LATTA. Thank you. The gentleman yields back.

And the chair now recognizes the gentleman from Florida for 5 minutes.

Mr. BILIRAKIS. Thank you, Mr. Chairman.

Secretary Ashooh, is that correct?

Mr. ASHOOH. Yes, sir. It rhymes with cashew, if you like cashews.

Mr. BILIRAKIS. Oh, gosh. OK, very good.

When CFIUS law was last amended in 2007, does the term national security include homeland security when analyzing the national security implications of a transaction? And if so, does this include issues related to state and local enforcement agencies, which are often on the front line of homeland security?

Mr. ASHOOH. Yes, sir, it does.

Mr. BILIRAKIS. It does?

Mr. ASHOOH. Yes.

Mr. BILIRAKIS. OK, very good. Thank you.

And Secretary Tarbert, how does CFIUS seek out the input of other federal agencies not included on the committee, such as FTC or other regulators, who review, separately enforce competition and consumer protection?

Mr. TARBERT. Sure. So in many of the cases, you brought up the FTC, and also the FCC, there is often a regulatory process ongoing. So if a company is buying another company, CFIUS will be running, in many cases, in parallel to whatever separate regulatory process there is.

So sometimes we will coordinate with them if they spot a national security issue that we haven't spotted. That is rare because we use the intelligence community and the Defense Department. We will work with them.

The other thing we do is sometimes we will see a case involving an agricultural company, for example. And there, the Secretary of Agriculture doesn't technically sit on the committee, the Department of Agriculture, but because they have unique expertise, we will invite them in to help co-chair the case. And so that has happened a number of times.

Mr. BILIRAKIS. Well thank you very much.

Again, for Secretary Ashooh, how does the Department ensure that the Commerce Control List is keeping up with emerging technologies that we might not want to fall into the wrong hands?

Mr. ASHOOH. Again, this is something we are devoting a great amount of energy to.

Emerging technologies, that is not a new thing. We have always had the concept of new technologies that have yet to be subject to the Commerce Control List but, as we alluded to earlier, it is the volume. And again, this is a good trend. We are seeing amazing innovations occur.

I have already referred to one change that we made structurally just to our technical advisory committees but we have also established a certain control number, a control area within the Commerce Control List specifically designed for emerging technologies. And what this does is allow us to place an immediate control on a technology that may be so new, it has yet to be considered and that we are not clear on what the national security implications might be. This way, we can control it immediately and that then triggers a process, an interagency process that was referred to earlier that will allow us to work under certain time constraints, so we are not going on forever, and adjust the control appropriately, and then, take it the multilateral regime so we are doing it internationally.

This is an area that is going to get much more attention based on this trend and the large volume of emerging technologies.

Mr. BILIRAKIS. Very good. It sounds like you have been very proactive.

Mr. ASHOOH. Devoting a lot of time to it, sir.

Mr. BILIRAKIS. I appreciate that very much.

I yield back, Mr. Chairman.

Mr. LATTA. Thank you. The gentleman yields back.

The chair now recognizes the gentleman from Indiana for 5 minutes.

Mr. BUCSHON. Thank you, Mr. Chairman.

Assistant Secretary Tarbert, obviously you look at governments and investment with direct connections and stuff but, as you know, around the world there are individuals who also have maybe nebulous connections to various governments. Is that the type of thing that would trigger a CFIUS review, potentially, as a specific individual? Tell me what you can tell me.

Mr. TARBERT. Yes, absolutely. No, when someone files with CFIUS, the intelligence community does something called the national security threat assessment. And that national security threat assessment looks at the acquirer, as well as the individuals behind the acquirer to get an understanding of who they are.

At the same time, within the Treasury Department, we have the Office of Terrorist Financing and Intelligence, which runs a check through our systems on the individuals as well, whether they have been involved in anti-money laundering or there are any issues there, and their potential connection.

So that is a very thorough part of the process because I think, as you are intimating, we could have a company from a country who is an ally but had bad people at that company.

Mr. BUCSHON. That is my point. You have people that have people that have maybe nebulous—

Mr. TARBERT. Exactly.

Mr. BUCSHON [continuing]. Connections to other people that aren't necessarily on our side on certain issues.

Mr. TARBERT. Exactly.

Mr. BUCSHON. The other thing is can you briefly describe maybe the chain of command-type decisionmaking process with CFIUS? Because obviously, the ones that we hear about are in the newspaper. The President, himself or herself, whatever the case may be, has made that decision but, obviously, that is kind of unusual probably.

Mr. TARBERT. Right.

Mr. BUCSHON. And whatever you can say publicly about the process because I think, from a representatives perspective, the more that the American people know about a process, the better they understand it, the more people like me are able to help you reform the process.

Mr. TARBERT. Absolutely. And so in the wake of the Dubai Ports controversy, FINSA was passed. And so that statute essentially lays out what the process needs to be.

And so the case comes in. We assign it to case officers and members from all of CFIUS' member agency, case officers work on that particular case. Ultimately, a case cannot be cleared unless a Senate-confirmed official, at least one, signs off on the case.

There are certain cases that require higher level sign-offs at the deputy or even secretary level. And those involve ones that go to the investigation stage, as well as when the acquirer is a foreign-controlled entity, foreign government-controlled entity.

Mr. BUCSHON. All right because I think that is an important concept for people to understand. The only cases you are seeing in the newspaper that the President, him or herself, has decided are not the only cases that you all are looking at. And sometimes I think that that impression is created where people are saying well why did the President make that decision. And to know that there was

a more complicated process that actually ramped up to that level I think is important.

Mr. TARBERT. Right. In less than one-tenth of one percent of the cases, the President blocks. So there are a lot of cases where we review them. They either get cleared or we impose mitigation.

Mr. BUCSHON. Right.

Mr. TARBERT. So, people only read the newspaper story but it is——

Mr. BUCSHON. Yes, and I think also people have the impression that sometimes it is a political decision, not a national security decision that a President, him or her, has made and that is just not the case.

Last question, Secretary Tarbert, in your testimony you touch on the gaps and jurisdictional authority to protect national security. Obviously, those are probably commonly known gaps by people that are trying to get around your process.

Can you describe what those might be and how H.R. 4311 might help to resolve those gaps?

Mr. TARBERT. Sure. And those gaps, in many cases, have been brought to our attention because the parties themselves have said well, if you don't approve our transaction, we will restructure it this way to get around it.

Three gaps are essentially these: number one are real estate in close proximity to military bases and other sensitive U.S. Government. The statute allows us to look at mergers/acquisitions of a U.S. business but if it is vacant land, that is not a business.

So there have been situations where if it has a windmill on it, we can review it; if it doesn't have the windmill on it and they put the windmill on after they buy it, we can't review it.

The second area are non-passive investments. So these are investments that come below the level of control but they involve a board seat, they involve the ability to come on the premises to get all the information they need, and many foreign actors have found that that is even better than even getting control because it is cheaper but they get what they need.

And finally, there is the J.V. provision, where essentially, they replicate the business in the U.S. overseas and, therefore, it is not a U.S. business anymore.

Mr. BUCSHON. I yield back.

Mr. LATTA. Thank you very much. The gentleman yields back.

The chair now recognizes the gentlelady from California for 5 minutes.

Ms. WALTERS. Thank you, Mr. Chairman.

Mr. Ashooh, in general, the Trade Sanctions Reform and Export Enhancement Act of 2000 prohibits unilateral sanctions, restrictions, or conditions on the export of key humanitarian products, such as food, medicine, and medical devices.

Is it your sense that medical device products should generally be excluded from proposed CFIUS reform definitions, in particular, the terms critical technologies and emerging technologies?

Mr. ASHOOH. I would say that that is definitely an issue for the export control system and is one that we have in consideration. But as far as definitions within CFIUS, we believe that those definitions should synch up, just as the two systems should synch up.

And so I mean this is a reasonable policy. It is primarily an issue in the export control system. I don't know that it is one that has really emerged on the CFIUS side.

Ms. WALTERS. OK, is there any reasonable argument that medical device products, including the associated intellectual property are sufficiently relevant to national security to justify subjecting transactions involving such products to CFIUS jurisdiction?

Mr. ASHOOH. It is possible. It is possible. I don't have a crisp answer for you because I don't have any direct experience in that case but it is certainly possible.

Ms. WALTERS. OK. And do you have any suggestions as to how to ensure CFIUS legislation accounts for such a humanitarian exemption?

Mr. ASHOOH. I am sorry, one more time.

Ms. WALTERS. Do you have any suggestions as to how to ensure CFIUS legislation accounts for such a humanitarian exemption?

Mr. ASHOOH. Yes. And again, it gets back to the theme we have been repeating. That is the sort of thing that Department of Commerce would bring to the table, as well as potentially other CFIUS member agencies, HHS, for example. That is why the interagency process in CFIUS is so important. We rely on the expertise where it belongs in the various agencies.

Ms. WALTERS. OK, thank you.

And I yield back the balance of my time.

Mr. LATTA. Thank you. The gentlelady yields back.

And the chair recognizes the gentleman from South Carolina for 5 minutes.

Mr. DUNCAN. Thank you, Mr. Chairman. Thank you guys for being here.

Before I got on Energy and Commerce back in December, I chaired the Western Hemisphere Subcommittee of the Foreign Affairs Committee. And during my time there, we had hearings on the Venezuela situation and especially with their company, PDVSA. And during that time, PDVSA pledged their stake, 49 percent of Citgo, to Russia for a loan of \$1.5 billion, something like that I believe.

Rosneft is the company, the Russian oil company that basically took the collateral. And if Venezuela defaulted on that loan, that would effectively give Russia and their energy company, Rosneft, a 49 percent stake in Citgo, an American-based refinery company and oil producer.

We sent a letter, Ranking Member Albio Sires and I sent a letter to the secretary on April 6th of last year asking you guys at CFIUS to look at this transaction and with the possibility of blocking Russia's ownership of not a majority stake but a dang-near close majority stake in a huge American asset of Citgo Refinery.

So let me ask you what the status of that investigation is and where we may go from here. What is the next step?

Mr. TARBERT. So the statute prohibits us from talking about specific cases in a public setting. So if you are amenable to it, I will give you a confidential briefing to your office whenever you would like.

But let me just say this. The point that you are raising is an important one because right now the statute allows us to look at any-

thing where there will be control. But for a non-passive investment that doesn't pass that threshold of control, particularly for a critical infrastructure asset, CFIUS does not have jurisdiction.

So that was one of the things that we looked at very carefully in crafting the provision of FIRRMA to ensure that transactions similar to the one that you described would absolutely be within our jurisdiction.

Mr. DUNCAN. Thank you. I am going to take you up on that briefing.

Mr. TARBERT. Absolutely.

Mr. DUNCAN. I am no longer chairman of that subcommittee but this is an issue that I have followed for a long time, the situation in Venezuela but also Russia's involvement in energy, in guaranteeing loans and assets that are American assets.

Let me just ask you one more question in the time I have got.

Assistant Secretary Tarbert, in your testimony you touch on gaps and your jurisdictional authority to protect against national security concern. What are these gaps and does H.R. 4311 help resolve those?

Mr. TARBERT. Yes, to the three gaps are land that is not a business but, nonetheless is near a sensitive military installation of some sort or other national security installation.

The second would be the one that we just talked about, where potentially you have an ownership stake that doesn't technically meet the definition of control but, nonetheless, has a lot of influence, has access, has the ability to get information and to influence the decisions of the company. So that is a non-passive investment.

And then the third are when someone essentially tries to replicate a business or a core business capability overseas. That is not a U.S. business and hence, CFIUS doesn't have the authority.

FIRRMA addresses all of these things and is continuing to evolve in a manner that addresses them with more effectiveness.

Mr. DUNCAN. Well, thank you.

Mr. Chairman, because of the jurisdictional boundaries, this committee may not have been aware of the situation I was talking about with Venezuela, and PDVSA, and Rosneft, and Citgo. I would like unanimous consent to enter into the record copies of the letters we sent to CFIUS.

Mr. LATTA. Without objection.

[The information appears at the conclusion of the hearing.]

Mr. DUNCAN. Thank you. With that, I will yield back.

Mr. LATTA. Thank you. The gentleman yields back.

And the chair now recognizes the gentleman from Massachusetts for 5 minutes.

Mr. KENNEDY. Thank you, Mr. Chairman. Thank you to our witnesses for being here. Thank you holding an important hearing.

A couple of topics I wanted to touch on. So first, gentlemen, this is about state-owned enterprises. There has been a bit of discussion as to whether Congress or CFIUS should make a distinction between foreign investments made by private persons or firms as compared to those made by firms that are state-owned or partially state-owned.

During one of the hearings at Financial Services Committee, members commented that it really did not matter in the case of

China because even private firms are influenced by the Chinese Government and would rather make investments or disclose information upon request of the Chinese Government.

So curious as to your thoughts, either one of you. Can you share your thoughts as to whether we should be making such a distinction or whether China is a problem no matter what?

Mr. Tarbert.

Mr. TARBERT. Thank you. Thank you, Congressman Kennedy.

For purposes of state-owned enterprises we think there is a mandatory declaration requirement for those because we think that certainly with state-owned enterprises, there is a clear nexus and, therefore, we think that we should be notified of those transactions.

When we go through the threat analysis and the intelligence community does the national security threat assessment, they look very carefully at the history of a given company and its potential connections to the state.

And so you are exactly right that with respect countries, particularly those with doctrines of civil military fusion, the line between state-owned and private becomes blurred and we take that into account.

Mr. ASHOOH. And certainly, that is an issue we deal with constantly in the export control system. And the system is designed to allow us to examine whether or not that civil military integration, which is a factor certainly in China, and in fact is common to the countries that we find ourselves spending most of your time with, Russia and Iran as well.

Mr. KENNEDY. And I assume then, gentlemen, it would be kind of a similar analysis with regards to investment in a venture capital fund or a private equity fund, in terms of foreign investment going into a partnership with a V.C. that is either buying up potentially strategically important early stage companies. Someone?

Mr. TARBERT. If the venture capital firm itself—so the question is is the venture capital firm, itself, a foreign firm. If the answer is yes, then that would be within our jurisdiction.

If it is an American firm and the foreign investor just has a passive L.P. interest but doesn't control that, then that is out of our jurisdiction.

Mr. KENNEDY. OK. Do you believe that CFIUS can place appropriate conditions on the investments that could critically limit Chinese or any other government their access to critical or emerging technology when investors are Chinese firms? So similar, I guess, followed between the two.

Mr. TARBERT. Yes and we do it nearly every day. Thank you.

Mr. KENNEDY. Pushing a little bit more on the passive investment side, some concerns have been raised about a provision in the bill that would limit investments, even when they are passive and the investor would not have control of the U.S. company and would not have a say in those decisions.

Under such a case, does the committee have a way to ensure that the relationship does not change after a review takes place? So for example, if a foreign investor started to see certain I.P., from what or how at least I understand it, the relationship would already be established. So could such a case get before CFIUS on a secondary review?

Mr. TARBERT. That is a great question. And so we have thought about exactly the point that you made. And so in the FIRRMA bill, there is an additional basis of jurisdiction when an investor's ownership changes you know materially to fall into one of the jurisdictional categories that exist.

Mr. KENNEDY. And forgive me. How would you be notified if that investor's relationship changes?

Mr. TARBERT. Well, if it is a state-owned enterprise, there would be a declaration. But otherwise, CFIUS remains a voluntary process. So we have methods and capabilities of sort of monitoring the landscape but, as a technical matter, it could occur.

Now sort of the ability that we have is if it does occur and they don't notify us, then we have the ability to go in and reopen that transaction at any time.

Mr. KENNEDY. OK.

Anything to add, sir?

Mr. ASHOOH. Only that if there is a case where there is a technology transfer concern in what you are discussing.

The Commerce Department will often place an additional licensing requirement on the companies in question as an important reminder that they are obligated to not transfer that technology, not only to a foreign national but the re-export of that as well. So, again, we keep track. This is how we leverage the CFIUS process to make sure we are keeping track of the technology.

Mr. KENNEDY. Thank you both.

I yield back. Thank you, Chairman.

Mr. LATTI. Thank you. The gentleman yields back.

The chair recognizes the gentleman from Kentucky for 5 minutes.

Mr. GUTHRIE. OK, thank you very much. Thanks, Mr. Chairman. Thanks for having this hearing and thank you guys for being here.

And I have the questions. These two questions are for both of you. One, you mentioned earlier today that about the volume of reviews. Specifically, if the current form of legislation is enacted, how many additional transactions will CFIUS be required to review and can CFIUS handle that increase?

Mr. TARBERT. So I can answer it. We don't know with exact certainty because the bill continues to evolve—

Mr. GUTHRIE. In current form.

Mr. TARBERT [continuing]. In current form. We are still—because then there would be regulations, additionally, that redefine it. We think it would be multiples of what we are currently reviewing and we would need the resources to be able to staff that.

But more importantly, we don't think that the per case/per case officer volume would remain the same, that ratio. Because one of the things that the bill does, which I think is critically important is for those transactions that don't really require an immense amount of government resources, there is a streamlined filing process.

So for example, when our ally buys an American company, there is very little national security issues, we can process those a lot quicker. Today, if you want to file before CFIUS, you have to fill out a 50- to 300-page form listing all this stuff. And so for things that are more likely to be cleared, a much shorter form, more effi-

cient and effective will actually reduce the time spent on each particular case.

So we think that it is really helpful to modernize it.

Mr. GUTHRIE. Because you know the volume goes up and there will be tools to moderate it.

Mr. TARBERT. Absolutely. And this would not go into effect—one of the key provisions in the bill says that nothing will go into effect and become live until the Secretary of the Treasury signs a certification saying the resources and the regulations are in place.

Now at the same time, the argument there is, well, that could take a while. That could take a year. What about stuff we are seeing today that is a concern? It also allows us, potentially, if passed, to have a pilot program. So if we know there are transactions out there of a certain type that we want to stop, the day the bill is passed, we can issue an immediate sort of regulation to address those, while getting the resources in place for the larger jurisdiction.

Mr. GUTHRIE. Well here is another question, too, is we are looking at H.R. 4311 and if the reviewable transactions dramatically do increase—I know you have this streamlined process but let's say it dramatically increases and it is an issue, what do you think that will do to foreign investment in the U.S.? Will it deter it or hamper it?

Mr. TARBERT. We don't think so because America still remains the preeminent destination for investment. And the more we are able to protect those companies, to protect national security, in the long-run, the more attractive that is going to be for investors.

Mr. GUTHRIE. OK.

Mr. TARBERT. But obviously, the reason why CFIUS is chaired by the Treasury Department is we are particularly aware of wanting to attract investment to the United States.

And so in 1988 and 2007 we have always got that balance right and we want to continue to get that balance right by protecting our national security but, obviously, continuing to attract foreign investment.

Mr. GUTHRIE. OK, do you have any comments on this?

Mr. ASHOOH. Yes, I might add it is worth pointing out that, even absent FIRRMA, the caseload under CFIUS has gone up year on year fairly substantially. So the resource issue is one that we have been grappling with and will continue. I don't see, and Secretary Tarbert might agree, we don't see that steady increase slowing. This is being driven by, obviously, some trends regarding nations that see a benefit in pursuing it.

Mr. TARBERT. And one final point. As a Treasury Department, we don't really like to spend a lot of money. We like to collect it.

But I think our view on this is that—

Mr. GUTHRIE. It is like business; you want more money to come in than go out.

Mr. TARBERT. Yes. But well, no, given the amount of money that we spend on the defense of this country, this, to spend whatever we need to spend have people reviewing these critical transactions to ensure that our technological edge isn't lost. In many ways, it is an insurance policy that is well worth the money.

Mr. GUTHRIE. OK, thanks. And I have a question just for you, Secretary Tarbert, or either one.

Can you tell us, in general and obviously in unclassified terms of what you can share, what is the greatest threat to the U.S. that CFIUS is tracking right now? For instance, is it the transfer of technology, foreign control of infrastructure, or something else? Because I did a town hall recently and somebody stood up and said—the hardest question I had to answer was of all the questions I had to answer and they were from left and right—were what keeps you up at night.

Mr. TARBERT. You know the truth is, all of the above that we are seeing threats and vulnerabilities. Obviously, state-owned enterprises as well as other companies that are working in close contact with their states and trying to acquire companies that are critical to our technological edge, that is important. But on the vulnerability side, the personally identifiable information. There are a number of other things we are worried about and we are always worried about infrastructure, you know the purchase of infrastructures.

So I would say, unfortunately, it is all of the above. Every day I come in I see sort of a new threat or a new vulnerability, I feel.

Mr. GUTHRIE. All right, thank you very much.

My time has expired and I will yield back.

Mr. LATTA. Thank you. The gentleman's time has expired and he yields back.

The chair now recognizes the gentleman from Vermont for 5 minutes.

Mr. WELCH. Thank you both. You know this question of imposing a big responsibility without providing the resources to get the job done is of concern to me. So one of the questions that is brought up in this bill is whether there are some ways to streamline without relinquishing review.

And one of those ideas is to have the bill apply only to a limited number of countries or, in the alternative, have a large number of countries listed that are not of concern and they would receive a safe harbor.

I guess I am looking to your reaction to that because we could, over time, have a list of countries that would shift. You know it might have been Japan 10 or 15 years ago, whereas, it probably would be China now.

So, I would ask your thoughts about this. Is this a practical way to try to relieve the burden without sacrificing safety?

Mr. TARBERT. Sure, the bill chooses the second alternative in what is called sort of the good guys list. It doesn't choose a blacklist and the reason is because if you start blacklisting certain countries, it can easily be evaded, particularly in the acquisition context.

So if you had—and then you run into the problem well then, if you are a blacklisted country and then how many investors in a particular entity do you need to make that entity blacklisted, and then we end up sweeping in our allies. And to your point, the threat changes over time.

And the vulnerabilities remain the same. So it is very well possible that we have a U.S. company that is so important that, even

people from countries that we wouldn't necessarily blacklist, still requires review and some kind of mitigation.

But the good guys list is important because there our allies are facing, in many cases, the exact same threats that we are. And so the idea is is that if we can get them to work with us to create similar investment screening regimes, that would actually save us potential concerns because—yes.

Mr. WELCH. Similar protocol—

Mr. TARBERT. Exactly.

Mr. WELCH [continuing]. For them and us because we have a unified interest.

Mr. TARBERT. Correct.

Mr. WELCH. Yes, thank you.

Mr. ASHOOH. And if I might add, you know one of the benefits of CFIUS is that the member agencies bring their expertise and authorities to the CFIUS table. And the export control system is very list-driven. We have got end-users, countries of concern. And I can tell you that lists come with a cost. It takes a fair amount of effort to maintain those lists.

Mr. WELCH. Right.

Mr. ASHOOH. So rather than have multiple and perhaps overlapping lists, you know it is useful, I think, for these agencies to bring them to the table and Commerce certainly does that in the CFIUS context.

Mr. WELCH. OK, thank you. That is all I have. Thank you very much.

I yield back.

Mr. LATTA. Thank you. The gentleman yields back.

The chair recognizes the gentleman from West Virginia for 5 minutes.

Mr. MCKINLEY. Thank you, Mr. Chairman. I am sorry I was at another hearing downstairs and so I have missed a lot of the testimony that perhaps you have given. But one thing that I did hear as I came in was early you made point that CFIUS is a voluntary program. And that concerns me a little bit—a great deal, actually.

And I am hesitant because we went through our classified briefing and then I had another classified briefing on another situation that had to do with CFIUS. So I am hoping I am going to be able to stick to what we can have from open source.

But should we be making it mandatory?

I come from the construction industry, 50 years in construction. You can't start a project without getting your permits for water, sewer, air, archeological digs, what environmental yet we allow a project to begin. Someone, a foreign entity, can invest in a project and it may take you a while before you become engaged. And by that time, it is too late.

The information on energy transporting data is already out there and it is gone. Why is it voluntary and why is it—why would we not make it mandatory that they have to first check the box that they have approached CFIUS for preliminary ruling before they proceed?

Mr. TARBERT. Great. So the first question, you know why has it been voluntary, and it has been voluntary since the start of it—

Mr. MCKINLEY. That doesn't make it right but go ahead.

Mr. TARBERT. Yes, and I think the thought there is that because CFIUS has the ability then to address the transaction, to potentially unwind the transaction, those—

Mr. MCKINLEY. After the fact.

Mr. TARBERT [continuing]. After the fact, that is enough to get people to file.

Now that said, the point you are raising is an important one. And for certain types of transactions, our view, particularly those by state-owned enterprises, and also by particular types of technology, it is so important, just as you said, that we want to get a declaration in advance of that transaction so we know about it. And so the bill actually does that.

The bill has a certain provision in there that there are mandatory declarations, in some cases, for state-owned enterprises.

Mr. MCKINLEY. So under this legislation, will someone that is acquiring an energy company, energy transmission company, they will have to announce that they are going to do this?

Mr. TARBERT. Right now, the bill requires declarations for state-owned enterprises that have some kind of substantial interest. And it may be 25, it may be—

Mr. MCKINLEY. I don't need that.

Mr. TARBERT. But if it is—yes.

Mr. MCKINLEY. If I just have a seat at the board without any investment in that, if I get a seat at that board, I have got access to all the information I need. How are you aware of that?

Mr. TARBERT. So right now, we are monitoring some things but the bill would provide us with the authority. It doesn't mandate us to do that but would provide us with the authority to say that in certain types of transactions, like the one you announced, you have to get a declaration before CFIUS before you can engage in that transaction.

And so during the notice and comment period, we will be soliciting—if the bill passes, be soliciting views of what are the kinds of transactions, to your point, that are so critical and important we don't want to be learning about them after the fact, that we want an advanced declaration before—

Mr. MCKINLEY. Is there any protection, as legislation, that—because the technical information, understanding how our utility markets operate is instantaneous. And by that virtue, your coming is after the fact trying to address that. So will this legislation prevent that transfer of information without an investment, that is just merely a seat at the table? Are you going to be able to prevent that from happening? Because it happens in an instant before you are aware of it.

Mr. TARBERT. Yes, to be frank, it could prevent it in certain instances, it may not prevent it in others. And so there may need to be additional legislation. It may not even require a board seat. Someone could just walk into the energy company, get to know the CEO and—

Mr. MCKINLEY. Thank you.

Mr. TARBERT [continuing]. A relationship starts. So it sounds like for that specific instance, we just deal with foreign investments of various sorts that there may need to be added protection under some other area of the law.

Mr. MCKINLEY. So let me ask you. You just offered to do another classified. I would like to follow up on the conversation you and I had last week and see where we might be able to go with this.

Mr. TARBERT. We are planning that, actually. I think we have got it—we are working to schedule that, the one specific to your state.

Mr. MCKINLEY. You know what I am talking about.

Mr. TARBERT. Yes, sir.

Mr. MCKINLEY. Thank you. I yield back.

Mr. LATTA. And you know what he is talking about, OK.

The gentleman yields back and the chair now recognizes the gentleman from Texas, the chairman of the Health Subcommittee of Energy and Commerce for 5 minutes.

Mr. BURGESS. Thank you, Mr. Chairman, and thanks to our witnesses for being here today. I also thank the subcommittee for putting together the classified briefing that we had on this subject. It was important.

And I will just ask if I ask you a question that really should not be answered in an open setting, I will accept your deflection on that.

I was here in the United States House of Representatives when Dubai Ports World got all the headlines. Most people didn't know what CFIUS was before them and then, of course, everybody knew and became an expert on CFIUS. But what many people didn't know and I didn't know at the time is that this participation in this process is largely voluntary. Is that correct?

And just as a matter of procedure, a notice which is given to you for to answer a possible question, how does that arise? Where do those notices come from? Do the companies make those notices or the company that is involved makes the notices?

Mr. TARBERT. Normally, the acquirer and the target company, the people doing the business combination will come to CFIUS, oftentimes, as they are getting into the initial stages of planning the transaction to tell us about the transaction and to get the notice started. They will send us drafts back and forth of the notice and we will work with them to complete the notice so then we can deem it accepted.

Mr. BURGESS. So that is part of their due diligence in doing the merger and acquisition background. Does it ever come to your attention from another source, through someone else say hey, this is happening and I wonder about it?

Mr. TARBERT. It does. And we have members of the intelligence community that are sort of—and other resources. But that is one of the things that I think this bill acknowledges that we also need to have resources devoted to scanning the investment landscape for things that are not notified to us.

So every now and again, we will get wind of a particular transaction that wasn't notified to us. We will look into the matter and, in some cases, ask the parties to file. If the parties don't want to file or for some reason we don't think they will be cooperative, we have the authority to actually issue the notice ourself and start the case.

Mr. BURGESS. Just as a general matter, of the number of notices that come to your attention, are all of them investigated, a portion

of them investigated, a large portion, a small portion? Could you qualify that?

Mr. TARBERT. Yes, normally not many at all investigated. There is a technical definition of investigation——

Mr. BURGESS. OK.

Mr. TARBERT [continuing]. Which means the second phase. But I would say all of them we look at and we determine whether there needs to be a filing.

One of the things that FIRRMA does, which makes it a lot easier is because the filing costs a lot of money.

Mr. BURGESS. Sure.

Mr. TARBERT. It is 50 to 300 pages. And so for let's say a Canadian company buying an American company, where there is not likely to raise any national security concerns, the parties will often say this is what we are doing here. Do we really need to file with you? We have to then say well, we can't tell you not to file but, based on what you are saying and what we know about the companies, there may not be a national security concern.

But that is difficult. So one of the things that FIRRMA does is it creates the declaration where they can actually file a short version of that that doesn't cost as much money but we can then review that and determine whether we want a full notice of whether we have enough information to say that transaction is OK.

Mr. BURGESS. Well, under the current regime, are there any particular countries that —when you list out the number of countries that are investigating—or where you have notices that you are investigating, do there tend to be a preponderance of countries or is there a single country that is identifiable as this is where we spend a lot of our time?

Mr. TARBERT. What I can tell you is in those cases where we have reached out, where there hasn't been a notice and a transaction has occurred and we have asked the parties to file, required them to file, or filed a notice ourself to get it started, those cases have involved recently China and Russia.

Mr. BURGESS. And just of the transactions involving China, how many are allowed to proceed? Can you quantify that? Is there a percentage? Is it a lot, a little, all of them?

Mr. TARBERT. It is a substantial number but a number of them, there is proceeding without mitigation, there is not proceeding, and then there is sort of proceeding with mitigation, where the Government requires certain things to happen before that transaction can go forward.

Mr. BURGESS. And you may have already answered this or you may have been asked this. I am not sure if I understood or heard the answer. Is this a two-way street? U.S. involvement in other countries, is it blocked from time to time?

Mr. TARBERT. Well, it is. In some countries, U.S. investors are blocked regardless of national security. There are simply investment caps that don't allow our companies to invest in other countries but that is more of an economic issue than an issue.

I am not aware of any situation where for national security reasons another country has blocked an American acquisition of one of their companies.

Mr. BURGESS. For economic reasons, when the President talks about he wants trade to be fair and reciprocal, is this one of those areas?

Mr. TARBERT. That would be potentially one of those areas. And I know that the Treasury Department and other government agencies have talked to different governments about you know if we allow your countries to invest here, why are you preventing our companies from opening their doors in your country or requiring that our company needs to form a joint venture with one of your nation's companies, that if we are going to allow investment in our country, why don't you allow our companies to go and do business in your country without imposing constraints on them. But that is an economic issue.

Mr. BURGESS. Yes, sir.

Mr. ASHOOH. And sir, if I might just add, the concept of CFIUS is still fairly unique in the world. Although we are seeing the EU, and Japan, and other allied countries establish similar procedures, we generally think that is a good thing because this is, again, a national security review. And to the extent we share national security goals, it is helpful to manage the foreign—

Mr. BURGESS. Good enough. As far as the economic goals, I may follow up with you, Mr. Tarbert, just because that is of interest to me.

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

Mr. LATTA. Thank you. The gentleman yields back.

The chair recognizes the gentleman from New Jersey for 5 minutes.

Mr. LANCE. Thank you very much and good morning to our distinguished panel.

Both the Treasury and the Commerce Department maintain lists of prohibited persons and nations for purposes of trade and sanctions. Gentlemen, do you believe that these lists are effective in identifying the entities that pose threats to American interests?

Mr. ASHOOH. Yes, indeed.

Mr. TARBERT. Yes.

Mr. LANCE. And do they provide a model of how CFIUS should view certain types of investment? For example, should CFIUS have a list of nations that will draw special scrutiny?

Mr. TARBERT. On this, we don't think so. And the reason is is that we want to be able to review all transactions involving foreign investors, where relevant. And each transaction is looked at specifically for the threat, the vulnerability, and the consequence. So there is an intelligence analysis of the particular acquirer. And so you could have a situation where you have an acquirer from an allied country but the particular individuals within that are not necessarily friendly to U.S. national security interest.

And so our view is that we have never maintained a blacklist, so to speak, for particular countries. But since every transaction undergoes a very thorough intelligence analysis, the kinds of issues that you are talking about are always unearthed.

Mr. ASHOOH. And sir, if I might, Commerce, through the export control system, does maintain a multiplicity of lists. It can be individuals, companies, technologies, end uses, end-users. And Commerce, as one would hope, we bring those to the CFIUS table. So

you know the experiences and knowledge that we have get brought to the CFIUS table and that way we are not having to overdo it on the list side.

Mr. LANCE. Thank you. Obviously, foreign direct investment has historically been a tremendous boom to our economy. Does the administration seek to ensure that any reforms to the CFIUS process do not create unnecessary hurdles for legitimate and beneficial direct involvement?

Mr. TARBERT. Absolutely, and that is why the Treasury Department of the chair of CFIUS because it recognizes that we are looking at protecting our national security while, at the same time, maintaining an open investment environment.

So while the FIRRMA bill would increase the jurisdiction to certain types of transactions that have been avoiding review, at the same time, it has a number of measures to modernize the process and to streamline it a bit for those transactions that are least likely to raise national security issues.

Mr. LANCE. Thank you.

Mr. ASHOOH. And sir, where there is a technology transfer concern, we spent a lot of time really drilling down to what actually matters from a national security perspective so that we are not over-controlling and being overly restrictive.

Mr. LANCE. Thank you and thank you for your distinguished testimony.

And Mr. Chairman, I yield back 2 minutes.

Mr. LATTA. Well, before the gentleman yields back, would he yield?

Mr. LANCE. Oh, I will be happy to yield to the chair.

Mr. LATTA. Well, thank you very much because I would like to follow up on a question that the gentleman from Texas asked and came back.

How often is a company or companies not cooperative with you when you want to get with them and all of a sudden they say we are not going to cooperate?

Mr. TARBERT. It is very rare. Because CFIUS has the ultimate power to unwind the transaction, impose other things, and in some cases impose fines if there is a violation of a mitigation agreement, most companies seek to comply and work with us.

Mr. LATTA. And you say most. OK. All right. Well, thank you.

The gentleman yields back and I will yield back his time.

And we want to thank you very much for testifying before us today. It has been very, very informative. We appreciate all that you do out there to help keep things straight for Americans and especially when it comes to our security reasons. We really appreciate your testimony today and all you do. So, thanks for being with us today.

And so that will conclude the first panel. And we will get ready to have the second panel come before us.

[Recess.]

Mr. LATTA. Well, good morning and I would like to take this opportunity to thank you all for coming before the subcommittee. And again, we do have the other subcommittee running downstairs, so we do have members coming in and out during the hearing.

And if I could, I would like to introduce our second panel. The Honorable Kevin Wolf, partner at Akin Gump Strauss Hauer and Feld, and former Assistant Secretary for Export Administration at the United States Department of Commerce. Welcome. The Honorable Clay Lowery, Managing Director at Rock Creek Global Advisors, and former Assistant Secretary for International Affairs at U.S. Department of Treasury. Ms. Celeste Drake, Trade and Globalization Policy Specialist at the AFL-CIO. Thank you. And Dr. Derek Scissors, the Resident Scholar at the American Enterprise Institute.

And again, we want to thank you for being with us today because this is a really important subject.

And Mr. Wolf, you are recognized for 5 minutes. So, thank you very much for being with us.

STATEMENTS KEVIN WOLF, PARTNER, AKIN GUMP STRAUSS HAUER AND FELD, LLP; CLAY LOWERY, MANAGING DIRECTOR, ROCK CREEK GLOBAL ADVISORS; CELESTE DRAKE, TRADE AND GLOBALIZATION POLICY SPECIALIST, AFL-CIO; AND DEREK SCISSORS, RESIDENT SCHOLAR, AMERICAN ENTERPRISE INSTITUTE

STATEMENT OF KEVIN WOLF

Mr. WOLF. Thank you, Mr. Chairman, Ranking Member Schawsky, for inviting me to speak today.

As an opening note, the comments I make today are my own views and are not on behalf of anyone else.

First before I begin, a compliment. As I have been following this FIRRMA and CFIUS reform discussion, it has been a genuine, non-partisan, good faith, regular order, civil, spirited public debate over a—this hearing has been too straightforward. Let's see if we can raise it up a little bit.

But no, seriously, these are legitimately difficult issues and on difficult national security and economic security issues, where bright lines are hard.

So in fact, just a summary of where the debate really is. It is sort of between, and apologies for over-generalizing, two camps, two very nonpartisan, good faith camps. There is one view that believes that CFIUS should have substantially expanded jurisdictional authority over far more transactions going in and out of the country to address evolving and emerging threats, particularly with respect to strategic acquisition from China of emerging technologies. Technologies evolve quicker than law or regulations can. Commercial transactions are very creative and more creative than the Government can quickly understand.

And so, therefore, we need substantially more authority to be able to metaphorically look in every box going in and out of the country and decide whether if in that box there is a transaction of concern, technology, or PII, or other types of activity of concern.

And then the other camp does not deny the underlying threat but says that before the Government uses this extraordinary authority to impose additional controls on otherwise commercial transactions, that it should do the hard work first to identify the particular technologies, and threats of concern, and tailor the scope

of the new authorities accordingly, so as not to discourage because fear and uncertainty about what would be controlled discourages investment in the United States. The U.S. is an open investment culture for which there are great benefits to foreign direct investment.

And so that is really what the debate in FIRRMA is going back and forth. In my prepared testimony, I lay out some detail about the benefits of foreign investment and the issues with respect to the strategic plans from China but I also lay out the questions to be asking when considering any changes to CFIUS.

And the first question is: Does the statutory authority exist in some other area of law to address the issue through a regulatory or process change?

And then the second question is: Would what the threat is you are trying to address be better addressed more directly, with fewer collateral consequences, by another area of law, such as the export control system, trade remedies, government contract issues, and intellectual property protection?

And then the third question is: The threat that you are trying to address or the issue that you are trying to resolve, can it be addressed through more investment simply internally in the Government, for example, in identifying more non-notified transactions, to have more and deeper robust review of already filed transactions or to be able to have more staff to monitor mitigation agreements, which are alterations of agreements thereafter? And if the answer to any one of those questions is no, then that is the sweet spot for reform.

The area for which I am the particular expert in, given my background, is with respect to the issues pertaining to technology transfer. And one of the threats identified in the previous panels and in general is the identification of and the control over technology that is being sought, that is emerging, that has dual-use implications, both commercial, and other activities of concern. And my main theme is that with respect to efforts to control outbound investment to please remember that there is an entire area of law, the export control system, which Secretary Ashooh spoke about so well, that exists explicitly to do that, to identify and to regulate through an interagency process for national security purposes technologies of concern without imposing unintended collateral burdens on foreign direct investment, which we want to encourage.

So, I am here to answer your questions about anything involving CFIUS, or export controls, or how they could or would work better together.

And with that, I will stop and turn it over to my colleagues.

[The prepared statement of Mr. Wolf follows:]

**United States House Committee on Energy and Commerce
Subcommittee on Digital Commerce and Consumer Protection**

“Perspectives on Reform of the CFIUS Review Process”

**Prepared Remarks of The Honorable Kevin J. Wolf
Partner, Akin Gump Strauss Hauer & Feld LLP
Former Assistant Secretary of Commerce for Export Administration (2010-2017)**

April 26, 2018

Chairman Latta, Ranking Member Schakowsky, and other distinguished members of the subcommittee. Thank you for convening this hearing and for inviting me to testify on this important national security topic.

For nearly 25 years in both the private sector and government, I have focused my practice on the law, policy, and administration of export control and related foreign direct investment issues. From 2010 to 2017, I was the Assistant Secretary of Commerce for Export Administration. In this role, I was primarily responsible for the policy and administration of the U.S. dual-use export control system and, as a result of the Export Control Reform effort I helped lead, part of the defense trade system. I was also during this time a Commerce Department representative to the Committee on Foreign Investment in the United States (CFIUS), particularly with respect to cases involving technology transfer issues.

Although I am now a partner at Akin Gump Strauss Hauer & Feld LLP, the views I express today are my own. I am not advocating for or against any issue or potential changes to legislation on behalf of another. Rather, given my industry and government background, I am primarily here to answer your questions about how CFIUS and the export control system work together and how they could work even better to address

emerging national security issues. As requested, I am also willing to comment on the Foreign Investment Risk Review Modernization Act (FIRRMA) (H.R. 4311), particularly with respect to technology transfer issues. My suggestions, I believe, will be constructive and supportive of the essential national security policy objectives motivating the bill's introduction.

I. A Compliment

Before beginning my substantive comments, I would like to point out that this topic is a welcome example of a non-partisan, good faith, regular order, and spirited public debate over legitimate and genuinely difficult national security and economic security issues. I thus want to compliment Senator Cornyn, Senator Feinstein, Congressman Pittenger, Congressman Heck, and all the other co-sponsors of FIRRMA, the Administration, and this and the other committees of jurisdiction for doing such a good job of working through the issues. No one I know or have heard from objects to the bill's policy objective of enhancing our national security given emerging threats from countries of concern and the evolution of dual-use technologies. Most, however, have suggestions for different or modified ways of achieving those objectives with the least amount of collateral regulatory and economic burdens. Discussing them as we are is part of the usual process of getting to a good result.

II. High Level Summary of What the FIRRMA Debate is About

As Derek Scissors will describe in more detail, the policy motivations for the bill stem from the comprehensive Chinese strategy described in the 2015 “Made-in-China 2025” plan. In sum, China has announced plans to become dominant in emerging technologies of strategic importance through indigenous development and acquisition from companies in the US and allied countries. The stated goal is not to join the ranks of the leading high-technology countries but to replace them as such. As the government witnesses described, this is in the context of the general situation where there are often not material distinctions in China between planned civil and military applications of commercial technology or between private and state-owned enterprises. There is direct and indirect state subsidization for the acquisition of emerging technologies and state support for commercial cyber espionage. Technology transfer requirements are often imposed as a condition for companies to do business in China. There are similar concerns with other countries, but most of the discussion has pertained to China.

Different people can easily agree or disagree with any particular response to these issues by this Administration or the previous Administration. All can agree, however, that no one area of law or policy can provide the complete response. Technology-based cyber defenses against bad actors must continue to be enhanced. Investigation and prosecution of those involved in such espionage and traditional intellectual property theft must continue to be supported. Bilateral efforts to negotiate and motivate changes in behavior may be frustrating, but are necessary. Explaining with evidence these concerns to our allies so that they are motivated to take similar whole-of-government responses in their countries is critical. Thoughtful WTO cases and

trade remedy actions consistent with the rule of law and international norms are warranted. Updated and tailored derivative technology transfer and use clauses in government contracts and follow-on compliance are vital. Multilateral trade agreements that have intellectual property, labor, and environmental protections are a useful in exerting multilateral leverage over countries of concern. In the other direction, and perhaps even more importantly, massive amounts of support and attention must be given to investments in the United States for STEM education, general R&D, and infrastructure improvements so that we maintain our edge.

I am here today, however, to discuss only two of the tools the government can use in response – (i) the FIRRMA proposal to update and expand the jurisdictional scope of CFIUS to address investment-based technology transfer concerns and (ii) creatively enhancing the use of existing export controls to address the same issue. From my perspective and with apologies for over-generalizing, there are basically two non-partisan camps in this part of the FIRRMA discussion. Both are reasonable and acting in good faith.

On one side are those who say that CFIUS needs to have significantly expanded jurisdiction over outbound and inbound investments in order to be able to review massively more transactions to determine if they might result in the contribution of technologies of concern, particularly in their earliest stages, and that are otherwise the target of strategic acquisition. Broader jurisdictional authority is needed because technology evolves quicker than regulations or laws can be updated. Transactions are more creative than the government can quickly understand. Given that we are dealing with what are, by definition, novel emerging technologies, the government does not

know what it does not know. One must consider national security threats created by such investment over decades rather than with respect to individual transactions. Thus, the government should have the authority to (i) metaphorically look into most investment boxes going in and out of the country to see if they contain technology, particularly early stage technology, implicating an area of concern and (ii) be able to block or mitigate the transfer given the long-term national security threats. If the technology is not of concern to the destination, then the government will let the transaction go forward.

On the other side are those who believe that before the government uses its extraordinary authority to alter the free flow of civilian commerce, it should do the hard work of identifying the specific technologies of concern and then regulate such technologies, at whatever stage of their development, to the specific end uses, end users, and destinations of concern. Without such tailoring, there is a greater harm to the U.S. industrial base caused by the additional regulatory burdens, approval delays, and investment uncertainties. That is, given a choice between investing or partnering with a U.S. company that will involve such baggage, foreign parties will often choose to invest or partner with companies in allied countries that do not impose such burdens. Some U.S.-based multi-nationals will choose to engage in development efforts outside the United States where the regulatory burdens are lower. Moreover, without such tailoring, the U.S. government's finite resources are burdened by the need to review benign transactions submitted by risk-averse companies when the government should be focusing its resources on the transactions of concern. Finally, the U.S. government already has an entire export control system that can better address concerns in FIRRMA regarding the contribution or other release of technologies of concern. This

side does not deny the national security concern, but rather wants to have it addressed more directly.

The essence of this debate is not new to me. It was inherent in the entire Export Control Reform effort.¹ There was and remains a constant tension in the export control system and regulatory systems in general between controls that are broad and general versus those that are tailored and specific. The former have the virtue of being simpler, but they impose unnecessary controls over less sensitive items and transactions. The latter have the virtue of imposing fewer regulatory burdens, but are harder to craft, are more complex, and require regulatory updates. Based on my experience as a government policy maker, it is generally the case that the more tailored controls that are regularly updated to reflect new information, although harder to create, address the threats more directly and thus with fewer collateral harms. Our experience with the imposition of broad controls on the commercial satellite and spacecraft industry, and then their later tailoring to address the negative impacts of over-controls, are a good example of this point, which I would be happy to discuss separately if you would like.

III. Questions to Ask When Considering Changes to CFIUS

The first question to ask with any contemplated piece of legislation or regulation is “what is the problem to be solved?” As discussed, there are many related China investment and technology transfer issues where the solution to each might be slightly different. Thus, when considering changes to the statutory authority for CFIUS with respect to the issues at hand, I would suggest you ask the following questions:

¹ <https://www.bis.doc.gov/index.php/about-bis/newsroom/speeches/speeches-2015/1164-remarks-of-assistant-secretary-kevin-j-wolf-at-the-2016-update-conference>

- (i) Does the statutory authority already exist to address the issue through a regulatory or process change?
- (ii) Would action and related enforcement in another area of law -- such as trade remedies, government contracts, export controls, or intellectual property -- address the issue more directly and without collateral consequences for foreign investments of less concern that we welcome?
- (iii) Does the solution lie in providing more resources to the CFIUS agencies to, for example, identify more non-notified transactions that CFIUS should review, monitor more mitigation agreements, or process more cases more quickly with a deeper review?

If the answer to any of these questions with respect to investment-related concerns is “no,” then that is the sweet spot for consideration of change to CFIUS legislation.

Without commenting on the merits of any particular change, it is nonetheless vital to weigh the costs of each change. For example, if there is even a small expansion in the scope of CFIUS's review authority, then some companies may be less willing to invest in the United States with the actual *or perceived* extra burden and time involved in closing a transaction, particularly if there is not a significant expansion in CFIUS staff and aggressive compliance with deadlines. With every expansion in scope, there will be a corresponding and exponential expansion in burdens and costs generally. More regulations lead to more words, which lead to more analyses of those words in novel fact patterns, leading to more filings, more reviews, more mitigation agreements, and on and on. Also, if legislation becomes too prescriptive, then it may limit the ability of the Administration and staff to resolve novel national security issues in a creative way. Above all, and regardless of whether national security concerns warrant more or fewer controls, the key question to ask with any change is whether it will create more or less certainty. Even without substantive changes, beneficial investment and international trade are harmed by uncertainties in scope, jurisdiction, timeliness, likely outcome, and

possible enforcement.

The questions I have been answering as part of the public debate over FIRRMA pertain to whether and how the export control system can address the technology transfer-related concerns. The short answer is that it, with new resources, creative thinking, and a whole-of-government approach, can and should handle the concerns and could do so better than CFIUS could. Indeed, the very reason for the existence of the export control system is to handle such issues. Moreover, why create within CFIUS a new technology transfer regime when one already exists elsewhere within the government, albeit with the need for enhancement? To the extent the investment issue does not pertain to technology transfers, then the export control system is not the solution. Before I get in to the details of these issues, I want to summarize the importance of foreign direct investment and the basics of CFIUS.

IV. Importance of Foreign Direct Investment

Foreign Direct Investment (FDI) is vital to economic growth and job creation in the United States. Assistant Secretary Tarbert and others have described well the statistics regarding the millions of US workers employed by affiliates of foreign companies, the billions of dollars foreign companies invest in America, and how FDI fuels growth for US companies. It was in recognition of these and the other benefits of the free flow of capital in open and competitive markets that Presidents Obama, Bush, Clinton, Bush, and Reagan explicitly reaffirmed the United States' open investment policy and took steps to ensure that we remain the destination of choice for foreign investment. The United States has, in fact, been the destination of choice for FDI

because of such policies, our rule of law, our economy, and our workforce. Competition to attract FDI, however, has never been stronger and companies have many more options around the world than they once did. Therefore, it is vital to our economic security and prosperity that we continue to take actions to make the United States attractive for investment, including modernizing the CFIUS process.

V. CFIUS

The United States, of course, is obligated to protect its national security. We never want to be in a fair fight, and aggressively enforced and properly staffed technology transfer, investment, and other controls are a critical part of maintaining that advantage. Former Assistant Secretary Clay Lowrey, one of the authors of the current CFIUS regulations, other witnesses, and CFIUS staff² have well described the evolution and current operations of CFIUS. In sum, the statute authorizing CFIUS gives it jurisdiction over foreign investments into U.S. businesses to identify and address national security concerns. This statutory focus reinforces our long-standing commitment to welcoming investment that does not create unresolvable national security concerns.

By law and in my experience on CFIUS, the Committee does not consider industrial policy or political concerns when reviewing foreign investments. Basically, we would ask ourselves three questions with respect to each transaction. First, is it a “covered transaction?” That is, is it within the scope of CFIUS jurisdiction because it

² See Committee on Foreign Investment in the United States, 2015 Annual Report to Congress. [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)

could give a foreign person the ability, directly or indirectly, formally or informally, to control or affect the activities of a U.S. business? Second, does the transaction present a national security concern? The Intelligence Community is the primary lead for advising whether the acquirer and related parties pose a national security concern. The CFIUS agencies take the primary lead in analyzing whether the national security would be made more vulnerable by the acquisition. Although there is not a binding definition of national security and I will not speak about particular cases, common types of questions we would ask ourselves to get to the answer included:

- (i) Are there co-location issues? For example, is the investment in a business near a military facility?
- (ii) Would it create espionage risks or cybersecurity vulnerabilities?
- (iii) Could it reduce the benefit of certain U.S. Government technology investments?
- (iv) Would it reveal personally identifying information that, if exploited, would be harmful to our interests?
- (v) Would it create security of supply issues for the Defense Department or other government agencies?
- (vi) Would it implicate national security-focused law enforcement equities or activities?
- (vii) Would it create vulnerabilities for critical infrastructure, such as with the telecommunications or power grids?
- (viii) Is it from a country with a record of nonproliferation or other national security concerns, or that otherwise has a history of taking or intending to take actions contrary to our national security?
- (xix) Would it allow technology of concern to be released to foreign persons of concern? For example, was a country of concern seeking to acquire specific technology that, if acquired, could reasonably be used to enhance its military or intelligence capabilities?

Such questions were not asked in isolation. Rather, we would analyze together whether

the combination of any identified threats with a vulnerability would risk impairing our national security. Each of these topics warrants its own, separate analysis and commentary when considering possible changes to CFIUS. The third question we would ask is whether a threat was resolvable by another area of law or through mitigation, *i.e.*, through altering the terms of the transaction. The CFIUS agency representatives lead this discussion and contribute their particular expertise and equity to the analysis. If there were an unresolved national security threat, then we would recommend to the President that he block the transaction.

In my experience, the existing CFIUS structure, authorities, and internal procedures generally allowed for the resolution of these issues quite well. The Treasury Department was an excellent honest broker and facilitated consensus conclusions – often after lengthy interagency discussion and always with the terrific support from the intelligence community. The agencies were always respectful of the need for a whole-of-government decision that accounted for the particular equities and expertise of the other agencies. The career staff were and remain talented, dedicated public servants. This last point is key. Given the increase in filings and the increase in more complex cases, the staff was stretched thin when I was there, and I know they are even more stretched now. They need help. They need more resources, particularly aimed at those involved in monitoring mitigation agreements and studying non-notified transactions. I make this polite suggestion not only for their benefit but also for the sake of our national security. I also make the suggestion so that the U.S. remains known as a country that welcomes foreign direct investment with the minimum necessary and quickest possible safe-harbor review burden.

VI. Need for Modernization

FIRRMA's proponents have identified legitimate national security issues the U.S. Government needs to address. The bill contains a number of significant improvements that, if it became law, would improve CFIUS's ability to enhance our national security.

Subject to a little wordsmithing by staff and practitioners, examples include:

- (i) Enabling CFIUS to review certain real estate transactions unrelated to an investment in a U.S. business if near a military facility.
- (ii) Requiring the submission of a declaration if the investment involves significant foreign government interests.
- (iii) Expanding the list of national security factors CFIUS may consider when reviewing transactions.
- (iv) Improving the monitoring of, and compliance with, mitigation agreements.
- (v) Ensuring sufficient funds for additional CFIUS staff at Treasury and its other member agencies.
- (vi) Encouraging the Administration to share information with our allies and to work with them on their foreign investment screening and export control regimes.

In particular, I applaud the FIRRMA sponsors' efforts to bring attention to the need to identify and control to countries and end users of concern emerging critical technologies that are not now controlled for release under the export control system to foreign persons but, after an interagency review and public notice and comment process, should be.

VII. Commentary on the new Outbound and Inbound Investment Provisions

Since this is a legislative hearing, I will, as requested, provide my commentary on the bill as introduced. I know, however, that there are significant draft, informal amendments being discussed by the bill's sponsors, the Administration, and the various committees of jurisdiction. Although I will not know with certainty until there is a final formal proposed mark to the bill, I believe that most of my suggestions and comments are consistent with what may be the Administration's view. My two primary comments pertain to the outbound and inbound investment provisions, and my suggestion to use the export control system to identify and control the emerging critical technologies of concern motivating the two provisions.

A. Outbound Investment Provision – Section 3(a)(5)(B)(v)

This provision 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)." The bill defines "United States critical technology company" as any "United States business that produces, trades in, designs, tests, manufactures, services, or develops one or more critical technologies, or a subset of such technologies, as defined by regulations prescribed by the Committee."

The provision does not require that the arrangement at issue have anything to do with the contribution or release of critical technology to a foreign person for it to be a transaction subject to CFIUS jurisdiction. Rather, it only requires that some part of the company "trades in," "services," "develops," "produces," etc. "critical technology."

Moreover, the term "critical technology" is defined in the bill to include (i) any technology on any export control list, which includes many widely available commercial and dual-use technologies on the Commerce Control List, and (ii) also any "emerging critical technology" that is not listed on any export control or other list. Virtually all technology companies contribute both intellectual property and associated support to a foreign person in the normal course of business. Thus, far more companies and daily transactions would be within the scope of this provision than it may seem upon first reading.

Such a broad jurisdictional scope would discourage many foreign parties from wanting to enter into transactions with U.S. companies because it would impose U.S. jurisdiction over transactions that, by definition, would not involve the release of technology of concern. The burden and uncertainty would be magnified by the absence of a list of, or even a process to create a list, of emerging technologies the government might deem to be critical. Thus, foreign and U.S. parties would not know whether any particular U.S. company involved with such unlisted technology might be declared to be a "critical technology company." Foreign companies would often choose not to enter into transactions where there would be even a low risk that the U.S. government might exercise its non-reviewable extraterritorial jurisdiction to alter the transaction. Others would avoid transactions with U.S. companies where there would be a delay as a result of a regulatory filing not required by other countries. Thus, they would often choose to conduct the same venture with a non-U.S. company for the sake of speed and certainty.

Companies proceeding with a transaction that would want to eliminate any possibility, even for seemingly benign covered transactions, that the U.S. government

might later alter the transaction would play it safe and file with CFIUS. This would, by definition, impose unnecessary regulatory burdens and delays on such companies and would significantly add to the CFIUS workload. This could harm the committee's ability to focus its finite resources on the transactions that could potentially involve national security issues.

Finally, the provision as introduced would exempt from its scope the contribution of unlisted emerging critical technology to a foreign person if it occurred during an "ordinary business relationship." This exclusion would thus permit the release to a foreign person of exactly the same emerging critical technology if it occurred during a direct sale but would control the same contribution if done during a joint venture. If the technology is so sensitive that it warrants the U.S. government's having the jurisdiction to alter or block a venture, it warrants being controlled for release to foreign persons of concern regardless of the nature of the underlying transaction.

B. New Inbound Investment Provision – Section 3(a)(5)(B)(iii)

CFIUS already has jurisdiction over any "transaction, which irrespective of the actual arrangements for control provided for in the terms of the transaction, results or **could result** in control of a U.S. business by a foreign person." 31 C.F.R. § 800.301(a). (emphasis supplied). "Control" is defined as meaning "the power, direct **or indirect, whether or not exercised**, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal **or informal arrangements** to act in concert, **or other means**, to determine, direct, or decide important matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach, or cause

decisions regarding [a list of matters], **or any other similarly important matters affecting an entity. . . .**" Id. § 800.204(a). (emphasis supplied).

FIRRMA would add to the list of covered transactions those that include any "other investment (other than 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)." With this provision, CFIUS jurisdiction would apply to non-passive investments that, by definition, *could not* result in control over a U.S. business, directly or indirectly, formally or informally. Moreover, it would apply to investments at any level into a company, including affiliates such as subsidiaries, that meet the broad definition of "critical technology company" even if the investment is completely unrelated to and would not or could not result in the transfer of emerging critical technology of concern to a foreign person.

I would suggest amending slightly the provision so that it is limited to transactions between unaffiliated entities that would or could result in the release or contribution of critical technology to a foreign person from a country of concern by a U.S. business. The policy motivation behind the provision is essentially the same as paragraph (B)(v), which is to have jurisdiction over transactions that might involve the release of such technology to foreign persons of concern. Thus, its scope should be tied directly to the policy it is designed to achieve and there should be a process requiring the government to identify such technologies for the reasons set forth above. Otherwise, it would impose jurisdiction over transactions that, by definition, would not or could not involve the contribution of critical technology. Also, companies involved in unlisted technologies would not know if foreign investments in them are covered. This would create

unnecessary clouds over foreign investment, regulatory burdens, delays, and unnecessary work for CFIUS.

In addition, I do not believe that the bill's sponsors have identified concerns about inbound intra-company transactions, such as a parent company's investing further in its U.S. subsidiary to do additional research. Thus, I would suggest inserting an exemption for transactions among affiliates or between foreign parents and subsidiaries – *i.e.*, between companies with a common ultimate owner.

VIII. A Technology Transfer Control System Already Exists

The apparent underlying policy motivations for the new outbound and inbound investment provisions is a concern that, as a result of transactions in or by a "critical technology company," listed or unlisted technologies of concern, particularly early stage technologies of strategic interest, could be released to a foreign person from a country of concern without the U.S. government's ability to review and potentially control the release of such technologies. This is a worthy concern. However, the U.S. government already has a system with broad statutory authority to identify and regulate the release of technologies of concern -- at any stage of their development -- to foreign persons. It is the export control system. Export controls are the rules that govern

- (i) the export, reexport, and transfer
- (ii) by U.S. and foreign persons
- (iii) of commodities, information/technology, software, and services
- (iv) to destinations, end users, and end uses
- (v) to accomplish various national security and foreign policy objectives.

In connection with a recent House Foreign Affairs Committee hearing entitled "Modernizing Export Controls: Protecting Cutting-Edge Technology and U.S. National Security," I described the U.S. dual-use export control system in some detail.³ In sum, the Department of Commerce's Bureau of Industry and Security (BIS) administers the Export Administration Regulations (EAR).⁴ These regulations govern the items that warrant control but that are not regulated by another part of the U.S. Government. In essence, they describe on the Commerce Control List (CCL) the commercial, dual-use, and less sensitive military items that warrant control for national security, foreign policy, and other reasons. "Dual-use" items – *i.e.*, commodities, software, and technology – are those that have both benign commercial applications as well as applications of concern. In essence, the EAR controls technology that is required for the development, production, or use of an item. "Development" includes all stages prior to serial production. The controls in the EAR can be as broad or as narrow as the national security concern warrants. The heart of the technology transfer part of the FIRRMA debate is whether there are additional dual-use technologies – *i.e.*, emerging critical technologies – that are not now controlled but that should be in light of the evolving threats that I described earlier.

Identifying and controlling technologies is not the only tool the EAR has to address national security concerns. It also has the authority to impose controls on all exports and reexports of items subject to US jurisdiction to specific foreign persons or companies of concern. It also has the authority to impose controls on specific end uses

³ <https://docs.house.gov/meetings/FA/FA00/20180314/107997/HHRG-115-FA00-Wstate-WolfK-20180314.pdf>

⁴ <https://www.bis.doc.gov/index.php/about-bis/mission-statement>

of items even if the underlying technology is widely available. Controls can be unilateral as needed, but the better controls are those that are multilateral so that our allies are working with us to achieve the same policy objectives.

BIS is responsible for leading interagency efforts to identify and control such technologies. As described in my HFAC testimony in more detail, the Departments of Defense, State, and Energy are the primary participants in this effort, but BIS takes input from all parts of the government with equities and expertise in the topic at hand. The lists are thus regularly evolving to take into account new national security concerns and new facts. After a technology or other item is identified, the controls on its transfer can be tailored in the regulations to apply to the whole world or to specific destinations, end uses, and end users to address specific concerns. The control choice is a function of a national security and foreign policy judgment to be made on a technology-by-technology basis and regardless of the existence or nature of any underlying commercial transaction. That is, export controls apply to exports or other releases of technology regardless of, for example, whether the exporter is owned or controlled by a foreign parent, the transaction is a sale or a joint venture, or the release is tangible or intangible.

In my experience, the existing export control system works well. BIS and its sister agencies are full of talented, dedicated, and motivated public officials. Given the (legitimate) increase in attention to analyzing emerging technologies, at whatever stage of their development, more resources are needed for them to do this work on top of their regular efforts. In my opinion, the answer to the inbound and outbound FIRRMA provision process issues I described earlier is essentially in section 109 of the Export

Control Reform Act of 2018 (H.R. 5040) introduced by Congressmen Royce and Engel.

In sum, it requires the Administration to:

1. enhance the existing export control system with a regular, well-funded interagency effort to get from national security, intelligence, and industry experts information and predictions regarding uncontrolled technologies that are (a) emerging and critical to maintaining our military and intelligence advantages, and (b) the subject of acquisition efforts by countries of concern that, if so acquired, would be harmful to our interests;
2. absent an emergency need to publish unilateral controls immediately, publish proposed amendments to the export control rules for public comment to make sure the descriptions of such technologies are clear and do not contain unintended collateral consequences unrelated to or that would harm our national security;
3. publish final export controls tailored to the destinations, end uses, and end users of concern, regardless of the nature of the underlying transaction;
4. educate the U.S. and foreign public, and our allies, on the controls and the reasons for why they are needed;
5. work with the relevant export control regimes to develop common, multilateral controls over the new technologies – *i.e.*, so that the technologies are controlled by allies as well as when sent from the United States;
6. provide healthy resources and tools to the law enforcement agencies so that they can properly investigate and prosecute violations of the new and the old controls; and
7. institutionalize a system to regularly review, revise, and update the controls so that they do not become outdated as threats evolve and more information is gathered.

My standard joke is that I have a three-minute, thirty-minute, three-hour, and three-day version of every export control topic. So, I will stop here. Thank you again for spending the time to think through this complex and important national security issue. I am happy to answer whatever questions you have.

Mr. LATTA. Thank you very much.

Mr. Lowery, you are recognized for 5 minutes.

STATEMENT OF CLAY LOWERY

Mr. LOWERY. Chairman, Ranking Member, and members of the committee, thank you for the opportunity to testify today on CFIUS and the modernization efforts underway.

In general, I support FIRRMA but I would like to point out what I consider to be several key shortcomings in the current bill, particularly from the perspective of someone who had to implement the major reform of CFIUS that happened about a decade ago.

Before I discuss these issues, however, I did want to say just a few words about CFIUS that goes beyond what Assistant Secretary Tarbert had to say. The easiest way to understand it is to know what its mandate is. And that mandate is to ensure national security while promoting foreign investment. It is not solely about protecting national security. And the reason for this is because welcoming foreign investment, in fact promoting foreign investment, is part of our national security. It is core to our economic growth. It is core to our increasing productivity. And it is core to creating jobs in this country.

There was an earlier discussion about whether it should be a voluntary process. The reason it is a voluntary process, in many respects, is because of that issue. There is usually over 1,200 or 1,500 mergers and acquisitions that happen in the United States every year. Most of them have exactly nothing to do with national security. If we had mandatory process, we would have to be investigating all of those.

The CFIUS is exactly what I said. It is a committee. It is an interagency committee that investigates cross-border mergers and acquisitions that could put our national security at risk.

Mergers and acquisition parties file with CFIUS, and CFIUS determines whether the acquirer will gain control in the U.S. business, and then it does a three-part analysis, as Assistant Secretary Tarbert laid out.

The history of CFIUS is that it addresses complex transactions under very tight timelines, in an orderly process, that protects classified information and proprietary information very well. While most transactions don't raise national security risks, as I just mentioned, those that do are addressed because CFIUS has extraordinary powers to investigate, to mitigate, and, in very rare circumstances, to recommend to the President to block a transaction.

The FIRRMA bill, I think, does a good job of modernizing CFIUS and does a good job of filling in some of the gaps that were mentioned earlier. My worry, though, is that the legislation that we saw back of November is that portions of the bill use vague language, duplicate existing export control authority, and will be overly burdensome for both the private sector and the Government.

There is a substantial part of this bill that transforms the committee on foreign investment in the United States into a technology control regime in which there isn't a merger, there isn't an acquisition, in fact there isn't even a foreign investment into the United States. In this scenario, CFIUS would go from reviewing approximately 200 transactions a year to several thousand. If this expan-

sion is truly necessary for our national security, and cost is the only issue, then, by all means, let's 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 for our U.S. economic and national security.

We have just heard from Assistant Secretary Tarbert and Ashooh that the administration has recognized some of these concerns and is making a serious effort working with Congress to fix bill. And this trajectory, in my mind, is very positive and it suggests that we may actually find a way to modernize CFIUS, make it implementable, and improve our national security. If we don't fix it, though, I fear we will not enhance our security, we will harm it.

Thank you very much.

[The prepared statement of Mr. Lowery follows:]

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

**House Committee on Energy and Commerce
Subcommittee on Digital Commerce and Consumer Protection
April 26, 2018**

Perspectives on Reform of the CFIUS Review Process

Chairman Latta, Ranking Member Schakowsky, and Members of the Committee, I thank you for the opportunity to testify on Reform of the CFIUS process and particularly 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 review process, including the analysis and disposition of hundreds of transactions.

I am pleased to be testifying alongside Kevin Wolf and Derek Scissors, both of whom I respect and of whose views and expertise I think highly.

In my testimony, I will provide some background about CFIUS as well as discuss my general support for FIRRMA while pointing out what I consider to be several key shortcomings in the proposed November 2017 bill – particularly from the perspective of someone who has had to implement a major reform of CFIUS in the past.

I would like to highlight that I know there have been a number of informal updates to FIRRMA by the House Financial Services Committee, the Senate Banking Committee, and the Administration, as well as a companion piece of legislation addressing export controls in the House Foreign Affairs Committee. I think that these updates are addressing a number of the criticisms I have of the November bill, which are highlighted in my testimony today, and the reform agenda seems to be moving in what I consider to be a much more productive and implementable direction.

As an initial matter, I think the most important thing to keep in mind about CFIUS is its purpose: ensuring national security while promoting foreign investment. This mission statement comes directly from the legislation that created CFIUS and has guided it for the last 30 years.

Roughly 7 million American workers, or about 6 percent of total U.S. private-sector workers, are employed directly through foreign direct investment (FDI). These are good, high-paying jobs that provide average compensation per worker 24 percent higher than U.S. private-sector wages. These jobs are disproportionately in the manufacturing sector: 20 percent of all manufacturing employment is due to FDI. And, according to a recent Reuters analysis, two-thirds of the manufacturing jobs created from 2010 to 2014 can be attributed to foreign direct investment.

In short, FDI is in the national interest of the United States and we should not become complacent. While the U.S. remains the largest destination for FDI, our share of attracting such investment has fallen about 40 percent in the past 16 years.¹

This dual mission – to ensure national security while continuing to encourage foreign investment into the United States – should be kept in mind when trying to reform CFIUS. 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 CFIUS review process.

CFIUS Process

CFIUS is an interagency committee that investigates transactions that could result in control of a U.S. business by a foreign person in order to determine the effect, if any, on U.S. national security. CFIUS is chaired by the Treasury Department and is comprised of the Departments of Commerce, Defense, Energy, Homeland Security, Justice, and State, as well as the Office of the U.S. Trade Representative and the Office of Science and Technology Policy. In addition, the Intelligence Community under the leadership of the DNI and the Department of Labor serve as non-voting members of CFIUS.²

¹ United Nations Conference on Trade and Development (UNCTAD) World Investment Report 2017.

² Several offices in the executive office of the president also serve as observers of CFIUS.

Parties submit their transactions to CFIUS for review on a voluntary basis, although CFIUS has the authority to compel a filing if necessary. The statute prescribes strict timelines for CFIUS's review, but parties are encouraged to pre-file with CFIUS to provide the government with an opportunity to begin its analysis before the clock starts running.

CFIUS officials are obligated by law, and subject to the possibility of criminal or civil penalties, not to disclose information regarding transactions. The rationale behind this rule is to protect both proprietary and intelligence information.

Once a transaction has been filed, CFIUS first determines whether it has jurisdiction to review the transaction – that is, does it involve foreign control of a U.S. business in interstate commerce – and, if it does, CFIUS then undertakes a three-part evaluation:

1. Does the acquirer pose a threat to national security? This analysis is led by the Intelligence Community.
2. Is national security made more vulnerable by the acquisition of the U.S. assets? This analysis tends to be driven by the CFIUS agency with applicable subject-matter expertise.
3. Do the consequences of permitting a specific transaction that combines the identified threat and vulnerabilities risk impairing national security?

CFIUS investigates these questions in the first 30 days after it accepts the filing. At the end of those 30 days, CFIUS can undertake a second stage investigation that lasts up to an additional 45 days if it is not satisfied or in most transactions where the acquirer is state-controlled.

The process, the timelines, the composition of CFIUS, the protection of information, and the reforms of 2007/08 have all been designed by Congress and respective Administrations to protect national security and to do so while maintaining the United

States' long-standing policy of openness to investment. In addition, recognizing that some transactions may raise national security issues, Congress has expressly authorized CFIUS to enter into mitigation agreements with the transaction parties to address those concerns. There are many different methods of mitigating a transaction. Examples include establishing special security procedures at facilities that can be verified by the government, implementing certain passivity mechanisms, or even forcing a company to divest specific assets. In short, these mitigation agreements impose measures on the parties intended to address national security risks. These mitigation agreements are the pressure valve that enables CFIUS to find solutions to more difficult transactions in order to fulfill its mission of protecting national security while promoting foreign investment.

If at the end of that 75-day period, CFIUS cannot make a decision or recommends that a transaction should be prohibited, the matter is referred to the President who has 15 days to make a decision. Only the President is authorized to block a transaction.

China as the Rationale for Updating CFIUS

Since CFIUS was reformed ten years ago, it has performed in an exceptionally professional and thoughtful manner. Congress and the American people should be proud of how well the group of individuals across the government have carried out their duties. Their scrutiny of cases is thorough, and they have protected national security while preserving the reputation of the United States as open to investment from around the world. CFIUS in many respects has been a model not only within our government but also for other countries: various nations are now considering how they can emulate the U.S. process.

That said, there is little question that the investment landscape has changed substantially in those ten years. By far, the most important change has been the rise of China as a direct investor in the United States. Ten years ago, CFIUS would review just one or two transactions a year that involved a Chinese acquirer – today, it is dozens and dozens of transactions every year.

As highlighted by the bill's sponsors, the rise of China and its growing threat is the key rationale behind this bill.

Derek will cover this in much more detail in his testimony, but 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 of its own industries but also through acquisitions, including from U.S. 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’s 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.

This results from the fact that the FIRRMA 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 stem 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.

Congress 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. 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 U.S. company to a wholly foreign-owned company is presumptively 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 U.S. 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 U.S. party to a non-U.S. party, but some transactions would trigger an investigation by CFIUS and others would not. We should worry about creating a guessing game for U.S. companies that requires 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 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. Kevin 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 U.S. 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 expert who has testified before Congress 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 continued work on the informal updates I mentioned earlier in my testimony 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.

Mr. LATTA. Well, thank you very much.
And Ms. Drake, you are recognized for 5 minutes. Thank you.

STATEMENT OF CELESTE DRAKE

Ms. DRAKE. Thank you.

Chairman Latta, Ranking Member Schakowsky, and members of the committee, good morning. Is it still morning? Good.

I appreciate the opportunity to testify on behalf of the AFL-CIO on the critical issues of foreign investment and job creation. I have submitted written testimony for the record and will highlight just a few key points here.

The AFL-CIO and its affiliate unions support investment that creates good jobs. In determining the impact of foreign investment on U.S. security, we must recognize that our economic and national security are intricately linked. America's economy is really the source and foundation of our national security and that is also the source of the AFL-CIO's interest in efforts to update and improve the Committee on Foreign Investment in the United States or CFIUS. At the end of the day, for us, it is a jobs issue.

As you know, the U.S. is a premiere destination for foreign investment. In comparison to other countries in which investors are required to create joint ventures for nearly every investment, or pressured to transfer important technology or intellectual property, the U.S. has a very open system and we must make sure that openness does not become a weakness, allowing jobs, and critical technology, and knowhow to bleed away.

While foreign direct investment can contribute to the creation and maintenance of high-quality jobs, we cannot assume this is a given. Some foreign investors may seek to drive U.S. competitors out of the market, or to transfer valuable technology, equipment, and intellectual property overseas, taking jobs with them. State-owned and controlled enterprises, in particular, may not invest with a goal to operate in the U.S. for the long-term but, instead, merely to acquire strategic technology for their home country that could, in the end, jeopardize U.S. security.

Because of these risks, we have long-supported updating CFIUS. CFIUS' current charge is too limited. It reviews mergers and acquisitions but needs broader authority to address new and evolving acquisition strategies and vehicles. It cannot review new or greenfield investments and its definition of national security is too narrow.

Some of these shortcomings are directly addressed by the Foreign Investment Risk Review Modernization Act or FIRRMA, which we believe will benefit American's working people. FIRRMA balances open investment with important national security considerations.

FIRRMA will allow CFIUS to respond more effectively to efforts by China and other nations to buy technological and military components of the United States. Importantly, it will update the definition of a covered transaction, require filings for certain investments by state-owned enterprises, and ensure that mitigation agreements are monitored.

Accordingly, we support FIRRMA as a needed update that recognizes the complex business structures and fast-moving technology development of the 21st century. However, in our view, FIRRMA does not address all of CFIUS' shortcomings. America's working

people have additional concerns. We would expand CFIUS' ability to review greenfield transactions and to consider the net economic benefits of any transaction.

By limiting greenfield reviews to those in proximity to strategic installations, as FIRRMA does, we may miss certain predatory investments or the attacks on our companies piece by piece, rather than wholesale.

The Tianjin Pipe Facility provides a case in point. It is a greenfield investment that we wish we knew more about. If Tianjin uses its own inputs made in China, with illegal subsidies, or sold at less than the cost of production, Tianjin could harm U.S. businesses that make those same inputs, costing jobs, wages, and perhaps whole communities. We could get at those things with trade remedy law but not once Tianjin is producing here in the United States.

And by failing to review economic impacts, we may miss the forest for the trees, allowing investments that drive down wages or leave the U.S. with fewer high-value jobs in the long-run.

Trading partners such as Australia and Canada already require foreign investments to undergo such a review. And cases like the 1990s Magnequench acquisition demonstrate that not all foreign investment creates good jobs.

In sum, we look forward to working with you to advance FIRRMA, to improve CFIUS, and to promote the growth of the American economy through investment that creates high wage, high benefit jobs.

I thank the committee for its time and would be pleased to answer any questions you may have.

[The prepared statement of Ms. Drake follows:]



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AMERICA'S UNIONS

BEFORE THE HOUSE SUBCOMMITTEE
ON DIGITAL COMMERCE AND CONSUMER PROTECTION

TESTIMONY FOR THE HEARING:
"PERSPECTIVES ON REFORM OF THE CFIUS REVIEW PROCESS"

CELESTE DRAKE
THE AMERICAN FEDERATION OF LABOR &
CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO)

APRIL 26, 2018

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Introduction

The AFL-CIO is the umbrella federation for America's unions, with 55 unions representing more than 12 million working men and women in every sector and industry of the American economy. We aim to ensure that all people who work receive the rewards of that work—decent paychecks and benefits, safe jobs, respect, and fair treatment. We work to make the voices of working people heard in the White House, on Capitol Hill, and in state capitals, city councils, and corporate boardrooms across the country.

The AFL-CIO and its affiliate unions support investment that creates good jobs, whether that investment is foreign or domestic. We believe that the value of an investment in the U.S. should be determined not primarily by the nationality of the investor, but by whether the investment will create good job opportunities and provide employees with a voice at work. In determining whether any particular foreign investment would be beneficial for the security of United States, we believe the determination must recognize that our economic and national security are inextricably intertwined. Our economy is the source and foundation of our national security.

While foreign direct investment (FDI) *can* contribute to the creation and maintenance of high-skill, high-paying jobs, such an outcome is not inevitable. The potential failure of some FDI to create and sustain high-wage jobs is a real concern. The goal of some foreign investors may not be to make a long-term or even medium-term investment in the U.S., but rather to drive existing U.S. competitors out of the market or to transfer valuable technology, equipment, intellectual property, and other assets to the home country or other points abroad. Either goal is likely to ultimately cause job loss in the U.S. and injury to national security interests.

Because of these risks, we have long supported updates and improvements to the foreign direct investment reviews performed by the Committee on Foreign Investment in United States

(CFIUS). CFIUS's current charge is quite limited: it reviews mergers and acquisitions (as opposed to "brand new" investments, known as "greenfield" investments), and it very narrowly assesses threats to national security (as opposed to economic security). Even more importantly, CFIUS provides no systematic review process. Parties to a proposed or pending transaction may, but are not required to, jointly file a voluntary notice with CFIUS. Otherwise, the President or the Committee may initiate a review, but first a transaction must come to their attention. There are reportedly thousands of transactions that have never been submitted to CFIUS, but which are potentially subject to later review.

This Subcommittee's attention to CFIUS comes at an important and opportune moment. During the past year, the administration has engaged in a number of studies and enforcement actions aimed at reforming U.S. trade and investment policy. These actions are nominally intended to address the enormous, job-killing U.S. trade deficit, protect our national security, and combat trade cheating by China and others. If these studies and actions represent part of a coordinated, thoughtful strategy, they could help recalibrate trade policy to grow jobs in the cutting-edge manufacturing sector, reduce incentives to outsource, and provide greater benefits of trade to ordinary working families. It remains to be seen if Congress and the administration can work together to reset trade and investment policy in this manner. In the meantime, a focus on FDI is an area ripe for bipartisan cooperation.

We appreciate the opportunity to raise issues important to working people in the context of CFIUS reform. The next section will provide a brief summary of the ways in which the Foreign Investment Risk Review Modernization Act (FIRRMA) will benefit America's working people while enhancing our national security. The final section of this testimony will highlight

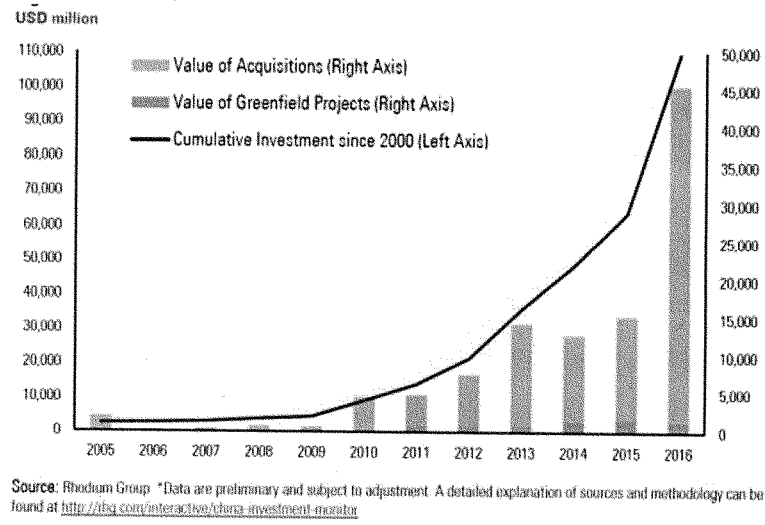
additional issues of special concern to working families in the review of foreign investments in the U.S.

The Foreign Investment Risk Review Modernization Act (FIRRMA)

The Foreign Investment Risk Review Modernization Act (FIRRMA) is reasoned legislation that balances the desire to maintain an open investment climate with important national security interests. We oppose efforts to diminish the scope of the legislation. Indeed, the AFL-CIO would recommend expanding it in a variety of ways.

The United States has witnessed unprecedented foreign investments from strategic competitors including China, which invested a record \$45.6 billion in the U.S. in 2016. (See *Figure 1 for trends in China's investment.*)

Figure 1: China's Foreign Direct Investment Transactions in the United States, 2005-2016 (Source: The Rhodium Group)



In response to this long-term trend, the bipartisan U.S. China Economic and Security Review Commission (USCC) has repeatedly recommended that Congress consider strengthening CFIUS, including by offering these critical recommendations in 2012:

- (1) requiring a mandatory review of all controlling transactions by China's state-owned and state-controlled companies investing in the United States;
- (2) adding a net economic benefit test to the existing national security test that CFIUS uses; and
- (3) prohibiting investment in a U.S. industry by a foreign company whose government prohibits foreign investment in that same industry.¹

Since the 2012 Report, the USCC has reiterated and expanded its recommendations even while the threat has grown. CFIUS has been criticized in the intervening years for not acting to block or mitigate a number of transactions, including with respect to the Chicago Stock Exchange, the Vertex Joint Venture with the China Railroad Rolling Stock Company, and the Ingram Micro acquisition.

FIRRMA represents a critical opportunity to address some of the USCC's long-standing concerns in a bipartisan manner. FIRRMA will provide CFIUS with increased support and flexibility, enabling it to respond more effectively to efforts by China and other nations² to buy the technological and military competencies of the United States. While we had hoped that FIRRMA would recognize the common-sense conclusion that economic security is an inherent component of national security (as does Section 232 of the Trade Expansion Act of 1962 (*see* 19

¹ These recommendations, still unaddressed, come from the 2012 Report to Congress of the U.S.-China Economic and Security Review Commission, Executive Summary and Recommendations, available at https://www.uscc.gov/sites/default/files/annual_reports/2012-Report-to-Congress-Key%20Recs.pdf.

² It is important to note that, while the examples used in this testimony focus on China-based enterprises, the AFL-CIO is concerned with the question of how particular investments will help support or harm national security, broadly construed—not with the country from which investments originate. The discussion focuses primarily on China because of the magnitude of China's investment and the level of participation in such investment by the Government of China, as well as the fact that the USCC is an excellent source of reasoned policy advice with respect to how to appropriately address increased investment that may pose threats to America's long term interests. The AFL-CIO urges the Subcommittee to consider the USCC's recommendations to expand FIRRMA and CFIUS with respect to foreign investors *of any national origin*.

U.S.C. §1862)) and adopt a net economic benefit consideration when reviewing transactions, we believe the bill, as introduced, is an important and necessary step forward.

The United States cannot allow its economic and technological advantages to fall into the hands of foreign companies that engage in efforts to undermine our nation's strength and security, as happened in the Magnequench acquisition.³ As such, the U.S. must strengthen its opportunities, in the words of Ericsson Vice President and General Counsel John Moore, "to properly vet and scrutinize the efforts by foreign entities to gain access to our markets and our technology."⁴

China, though not the only threat to the United States, is of particular concern given its ongoing use of illegal and unfair strategies to deprive the American people of their economic and national security. Such strategies include, but are not limited to: denial of national treatment and refusal to open market access to U.S. firms; the use of prohibited subsidies, forced technology transfer, and improper export controls; preferential debt and equity financing for state-owned and state-controlled enterprises; overcapacity in strategic industries including steel and aluminum that drives U.S. firms out of business; dumping; hacking, cyber espionage, and intellectual property theft; the denial of internationally recognized workers' rights that drives down China's labor costs and retards consumer demand; and predatory lending to developing countries that undermines their opportunities for growth and expansion.

³ For more information on this acquisition of a U.S. firm that made products used in magnets integral to the guidance system of cruise missiles, by a China state-owned enterprise please see Jeffrey St. Clair, "The Saga of Magnequench," in *Counterpunch*, April 7, 2006, available at <https://www.counterpunch.org/2006/04/07/the-saga-of-magnequench/>. A little over a decade after the original 1995 acquisition, Magnequench shuttered operations in the U.S. for good, transferring its remaining machinery to China. See also John Tkacik, Magnequench: CFIUS and China's Thirst for U.S. Defense Technology, May 2, 2008, The Heritage Foundation, <https://www.heritage.org/asia/report/magnequench-cfius-and-chinas-thirst-us-defense-technology>.

⁴ Letter from John Moore to the Honorable Robert Pittenger, dated January 16, 2018.

FIRRMA's reforms, focused on national security concerns, represent a measured approach to troubling trends in FDI that CFIUS is currently ill-equipped to address. As drafted, FIRRMA would:

- Expand CFIUS jurisdiction to include certain joint ventures, minority-position investments, and real estate transactions near sensitive national security facilities;
- Update the definition of "critical technologies" to include emerging technologies that could be essential for maintaining a U.S. technological advantage;
- Authorize CFIUS to exempt certain transactions if all foreign investors are from an allied country;
- Create shorter "light filings" with reduced paperwork burdens, as well as mandatory filings for certain higher risk transactions; and
- Expand the national security factors for CFIUS to consider in its analyses, but not create a net economic benefit test.

Simply put, the time has come to mandate reporting of significant, high-risk FDI transactions. Among the other important changes FIRRMA would make are ensuring that new investment strategies and structures can be addressed by CFIUS, that critical technologies can be identified and protected, and that joint venture and cooperative investments by U.S. companies will be subject to review when they potentially jeopardize U.S. security. Globalization has changed the way business is done. CFIUS must rise to these new challenges.

Some may wonder why the AFL-CIO has an interest in strengthening the ability of CFIUS to review investments on national security grounds—our interest is two-fold. First, as the representative of America's working families, we have an interest in CFIUS because CFIUS is a jobs issue. Second, foreign investments to acquire U.S. assets that undermine our national

security both weaken our country and weaken our defense industrial base, affecting manufacturing jobs and wages even in the absence of a net economic benefits test. Simply put, we want CFIUS to work because that is what is right for America's working families.

Accordingly, we support FIRRMA as a step toward helping ensure that America's competitors cannot take advantage of our openness in an attempt to strip the United States of its global economic and security leadership.

Beyond FIRRMA

FIRRMA does not address all of CFIUS's shortcomings. America's working people have a number of additional concerns.

The United States has benefitted from open markets, but that benefit is not absolute, nor guaranteed. It must be safeguarded and preserved with smart policies. Congress has a responsibility to monitor developments in the U.S. economy and act to protect U.S. residents when market failures injure America's hardworking families. One such market failure is occurring now: unrestrained, unreviewed foreign investments that have the potential to rob us and our children of our economic future.

That is why the AFL-CIO recommends following the USCC's advice to add a net economic benefits test to CFIUS. Already, trading partners including Australia⁵ and Canada⁶

⁵ In Australia, the Foreign Investment Review Board typically considers national security; competition; the impact on other Government policies (including taxation); the impact on the economy and the community; and the character of the investor in determining whether any particular investment is in the national interest. "Australia's Foreign Investment Policy," (January 1, 2018) available at <https://cdn.tspace.gov.au/uploads/sites/82/2017/06/Australias-Foreign-Investment-Policy.pdf>.

⁶ In Canada, investments made to directly acquire ownership and control of certain Canadian businesses with assets above a minimum threshold are approved only if the Minister of Industry determines the transaction is likely to be of "net benefit" to Canada. Factors considered in the determination are: 1) the effect of the investment on economic activity in Canada; 2) the degree of participation by Canadians; 3) the effect of the investment on productivity, efficiency, technological development, innovation and product variety in Canada; 4) the effect on competition; 4) the compatibility of the investment with national industrial, economic and cultural policies; and 6) the contribution to Canada's ability to compete globally. Mathieu Frigon, "Foreign Investment in Canada: The Net Benefit Test," (Library of Parliament), available at <https://lop.parl.ca/content/lop/ResearchPublications/cei-22-e.htm>.

require foreign investments to undergo a similar review. Such a review would consider not just strategic acquisitions that could turn advanced technologies against us, but also strategic acquisitions designed to strip high value-added production jobs from the U.S. Adding an economic benefits test could change an intended “acquire and run” acquisition into a longer-term investment and induce the investor to continue operating the U.S., creating more jobs opportunities for U.S. workers. Limiting CFIUS review to a narrow and outdated definition of national security leaves open the prospect of predatory acquisitions designed to weaken our economy—not just acquire strategic technology and know-how. A weakened economy has fewer jobs and lower wages and creates impediments to making the security investments necessary to keep working families safe.

The AFL-CIO also recommends expanding CFIUS’s ability to review greenfield investments beyond those proximate to a military base or other strategic facility. Given the demonstrated ability of the Government of China to guide and manage foreign investments to achieve long-term goals, it would seem prudent to expand the scope of investments subject to CFIUS review, so that we do not, as a nation, face challenges that could have been prevented or mitigated with appropriate and timely action.

Finally, we encourage the Subcommittee to consider whether remaining unaddressed recommendations from the 2017 USCC report could be adapted in ways that would boost U.S. security, including both national and economic security.⁷

⁷ Those additional recommendations include prohibiting the sale of U.S. assets to China’s state-owned or state-controlled entities, including sovereign wealth funds and prohibiting a transaction that would confer control of critical technologies or infrastructure to a foreign entity. See the 2017 Report to Congress by the U.S.-China Economic and Security Review Commission for a complete list, available at https://www.uscc.gov/sites/default/files/annual_reports/2017%20Executive%20Summary%20and%20Recommendations_1.pdf.

Why Additional Greenfield Investment Review is Important: The Case of Tainjin Pipe

The AFL-CIO has previously raised risks posed by CFIUS's lack of a broad review process for greenfield investments because such investments have the potential to negatively affect both traditional national security-related concerns as well as economic concerns. In the traditional area, intelligence and law enforcement experts have identified issues relating to the proximity of investments to sensitive installations. For example, a greenfield investment near a military base would not fall under the jurisdiction of CFIUS as currently authorized⁸ even though the ability to engage in intelligence activities is extensive given technologies like laser microphones, which are readily available on the Internet. FIRRMA would rectify this omission.

However, greenfield investments raise national security concerns beyond the issue of proximity. On these issues, FIRRMA is silent, but could be improved with added greenfield review responsibilities.

Tainjin Pipe provides a case study that emphasizes how FIRRMA might be improved by including a broader greenfield review. Relevant to this analysis is the President's March 2018 announcement of action under Section 232 of the Trade Expansion Act of 1962 to address the impact of imports of steel and aluminum on our national security. In response to a detailed report by the Department of Commerce, and in consultation with the Department of Defense, the President decided to take action on imports of steel and aluminum. Both products are vital to national defense (e.g., submarines and aircraft) and critical infrastructure (e.g., roads, railroads, airports, and military installations).

⁸ In 2012, citing national security risks, President Obama blocked Ralls, a company owned by Chinese nationals, from taking ownership of a wind farm *near* a Navy base. However, in that case, the key factor was not "proximity," but rather "restricted airspace." FIRRMA would enable the review of real estate transactions "in close proximity to a U.S. military installation or another facility or property of the U.S. Government that is sensitive for reasons related to national security," providing assurance that a greenfield acquisition near a military installation could be reviewed, and, if necessary, modified or blocked, an assurance not available under current law. Other greenfield investments, such as Tainjin Pipe, would not be covered by FIRRMA.

Tainjin Pipe, a state-owned entity that bills itself as “China’s largest seamless steel pipe maker,”⁹ is in the final stages of opening a greenfield investment in a pipe production operation in the Texas Coastal Bend region. This new facility represents a \$1 billion investment with substantial productive capacity that has the benefit of state-supported funding, which may be low cost, or, as is the case with many of China’s state-supported investments, with no capital costs at all, and potentially no repayment obligation. Substantial overseas investments such as this are cleared by the Government of China to make sure they advance the interests of the Chinese Communist Party.

In contrast, U.S. companies must respond to market forces and lack the access to low- or no-cost capital available to Tainjin. Additionally, the inputs that will be utilized by Tainjin could very well be what is known as “green pipe”—pipe that is shipped here needing only minor transformations to be utilized in the U.S. market. If that is the case, Tainjin will profit from having the bulk of its production in China (which may be made contrary to World Trade Organization and International Labor Organization standards) while avoiding the scrutiny of U.S. trade remedy law, including Section 232—as well as the more familiar anti-dumping and countervailing duty laws.

U.S. producers—and by extension their employees—simply cannot compete fairly against such subsidized production, which is one of the principal causes of the broader crisis in the U.S. steel industry and a recognized threat to national security.¹⁰ Following numerous trade cases filed by U.S. industry in the past two decades to respond to predatory and protectionist

⁹ <http://tianjinpipe.com/>.

¹⁰ For more information about the threat to U.S. security from the global overcapacity in steel production, see U.S. Department of Commerce, *The Effect of Imports of Steel on the National Security* (2018), available at https://www.commerce.gov/sites/commerce.gov/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf.

practices by China, state-owned enterprise Tainjin sidestepped trade remedy rules by buying land on which to build a new U.S. production facility.

While it is easy to see why the Tainjin's investment may be in China's national interest, many question whether the investment is in the U.S. national interest. "What will the long-term impact on the U.S. steel industry be?," is a question that remains unanswered. FIRRMA would not empower CFIUS to review this transaction to determine what the facts are, and whether the U.S. should act to mitigate the transaction and ensure that working families benefit. In our view, FIRRMA should do so.

Conclusion

The AFL-CIO strongly supports FIRRMA. We also encourage the Subcommittee to expand the reach of FIRRMA to address greenfield reviews and net economic benefits and to consider the remaining USCC recommendations. We appreciate the opportunity to present our views and look forward to further dialogue on these important issues.

Mr. LATTA. Thank you for your testimony.
And Dr. Scissors, you are recognized for 5 minutes.

STATEMENT OF DEREK SCISSORS

Mr. SCISSORS. Thank you.

So my written testimony presented China facts to show the context for the CFIUS reform discussion. I am going to go straight to the punchline here.

If the amount of money tells us anything, Chinese technology acquisition is not done primarily in the United States. So if you just restrict Chinese investment in the United States, you are not going to block Chinese technology acquisition. You are going to do very little, in fact, to block it.

To protect national security the United States must be able to regulate certain businesses overseas, and particularly businesses involved with China. That is what the facts say. It is not an easy thing to do. I am not arguing that it is easy but that is what the facts say.

On the flip side, the business community's objections are right that you can restrict investment in such a way that you deter beneficial investment. So legislation has to be as narrow and clear as possible.

So I am going to talk about the security requirement and then suggest some ways to make sure that H.R. 4311 or any modification of it does not or does minimal harm to foreign investment.

It is not a good idea to single out China in U.S. law but the policy debate is actually about China. And the reason I feel confident of that is not just the numbers. It is because China is our first security rival which has enough money to use it as a weapon.

All over the world, China uses loans as a political tool. For those following the Belt and Road Program that China has announced that it received some recognition from U.S. foreign policy, is basically using loans as a political tool. In that light, it would be a mistake, in my opinion, to spend too much time thinking about the size of the equity stake or what the definition of passive investment is. If China is providing financing to a firm, they have influence over a firm. And you know that doesn't mean that automatically something nefarious is going on. It means we need to realize that Chinese financing brings Chinese influence. Just like with any firm, if I am providing the money, I get a say in what you are doing.

And the money trail here is actually evaporating. Total Chinese investment in the U.S. was in the \$50 billion range in 2016. This year it is tracking to reach less than, it is not going to even hit \$20 billion annually. So total investment is falling.

There have been no \$100 million technology investments. We track \$100 million investments and up. There have been no \$100 million technology investments since January 2017. So it has been well over a year.

Now Beijing hasn't given up on acquiring technology. So the fact that we are not seeing investments in the U.S. is not a sign like OK, well, problem solved. The problem is obviously not solved and the administration has told us what their primary concern is.

The Section 301 investigation was launched primarily to deal with coercion by China of U.S. firms using access to the Chinese market in order to gain technology. In other words, the primary technology threat is coercing American firms who want access to China; it is not Chinese firms investing here. We know that from the administration's position and we know that from the facts.

And if China is blocked from an investment here, just as an example, it is a trivially easy thing to do to say hey, would you like to set up a joint venture in China? Really favorable terms. You are going to make a lot of money. All we need is to get a look at the technology you are using, for our own regulatory purposes. So, we cannot locate the action here of Chinese technology acquisition as investment in the United States.

Now the hard part is, What do we do? It is easy for me to identify the problem. What do we do about it? I do work in a free market think tank. The U.S. is by far the largest national player in global investment, both coming in the United States and going out. And what investors love is certainty.

So a phrase like country of special concern, that doesn't promote certainty. We need to define high-risk countries, not that they are the only risk countries, but we need to define high-risk countries in a very clear and concrete way that could be updated over time.

And just as an illustration, if we have an arms embargo on a country, that is a higher risk country. That is a good proxy for high risk. It is not perfect. It needs to be changed but it is a lot better than saying countries of special concern.

Similarly, words like critical apply to technology, materials, infrastructure, call out for definitions so business knows what to expect from the U.S. review process. Because we want investment, those definitions should be as narrow and specific as possible. I am happy to talk more about that in Q&A. The goal should be that most countries and most firms have nothing to fear from CFIUS reform because it is not aimed at most countries and most firms.

My last remark applies to all views of what should be done here. Whatever the final bill looks like, whether it is more intervention as to defense of national security or less, if CFIUS isn't budgeted and staffed properly, it doesn't matter.

So I feel like even though we have talked about this, we are not paying enough attention to that issue. In a sense, the budgeting and staffing is the most important thing and then the goals all follow from what you are willing to provide, in terms of resources and people.

Thank you.

[The prepared statement of Mr. Scissors follows:]



United States House of Representatives

Committee on Energy and Commerce

Subcommittee on Digital Commerce and Consumer Protection

“Perspectives on Reform of the CFIUS Review Process”

April 26, 2018

Prepared Remarks of

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Chinese Technology Acquisition Is Not About Investing In the US

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One-page Highlights

The Foreign Investment Risk Review Modernization Act (FIRRMA) is vague with regard to the “critical” technology, materials, and infrastructure to be shielded, vagueness the business community rightly finds worrisome. Investors are generally averse to uncertainty, for instance a justified but as yet unstated mandate to protect personal data. And CFIUS is not a magic wand to wave at the economy or even just foreign investment. It is a considerable challenge just to engage in CFIUS reform that better protects national security while not causing economic harm.

However, some approaches to CFIUS reform do not seem to take the Chinese threat to national security seriously. There has been discussion of time limits on a reform bill, as if the PRC will change its mind about acquiring foreign technology in 2026. Rather than sun-setting CFIUS reform, the emphasis should be on speeding it up, given that technology loss has occurred for many years and the harm to national security is ongoing.

The evidence shows Beijing engaged in a global campaign to offer money to achieve its aims, in part by simply buying foreign assets but also using such tools as below-market lending when there is no formal PRC ownership. Direct Chinese acquisition of technology through investment in the US has always been minor in scope and is probably declining. Yet IP theft has remained heavy, extending first to cyber and later to personal data. Export controls to date have not been effective. And the Chinese government’s goals are certainly unchanged – it believes it can continue to acquire desired technology despite minimal technology investment in the US.

Taking the Chinese threat seriously thus means investment review cannot only occur here. A stricter process here will just relocate the entire problem of PRC technology acquisition elsewhere, rather than most of it being located elsewhere, as is the case now. The Trump administration might expand the national security review process, since Section 301 explicitly targeted the coercion of American companies using access to the Chinese market. But even if the administration does so, a law passed by Congress is much preferable to executive order.

Finally, with regard to export controls, the existing regime has failed to inhibit China’s global acquisition of technology. It’s certainly reasonable to argue that better export controls can play an important role, keeping CFIUS from discouraging investment or being overstretched. However, improved export controls must be actionable, not merely asserted as the superior option. The Export Control Reform Act of 2018 (H.R. 5040) is a positive step, but any progress toward its passage should not be used to justify more delay in upgrading CFIUS.

Chinese Technology Acquisition Is Not About Investing In the US

It may seem contradictory for bills restricting foreign investment to open with findings of its benefits. But that is the right framework – foreign investment has spurred innovation and created jobs in the US. It follows that any policy changes should, as much as possible, be applied with scalpels rather than sledgehammers. Even if the US were to go to the extreme of banning investment from a country, it would be wise to minimize the impact on other foreign investors.

All of this applies to our most controversial economic partner, the People's Republic of China (PRC). In 2005, China started investing sizable amounts of money overseas, including here.ⁱ At that point, the policy environment shifted. The US faced a security competitor with money and (eventually) had to weigh on a much larger scale the economic gains from investment against national security risks. The trade-off was not immediately apparent because the next decade was calm, the amount of Chinese investment in the US and its perceived risk remaining moderate.

In 2015, however, Beijing twice surprised American decision-makers. It announced the now infamous “Made in China 2025” development plan, where long-standing practices of technology acquisition and heavy subsidies were aimed for the first time at advanced sectors like robotics. Then it unintentionally triggered a surge of money out of the PRC, with one consequence being soaring Chinese investment in the US in 2016.ⁱⁱ These changes added fuel to political-military differences in the South China Sea and elsewhere, prompting US consideration of new policies.

In the process of crafting new policy, Congress and the administration should start with the premise that China is a unique challenge. This is not only accurate (there is no Made in Canada 2025), it will make for sharper choices. Restrictions imposed on the PRC should not be imposed on others due to vague language like “countries of special concern.”ⁱⁱⁱ Beyond that, restrictions on the PRC should be crafted to actively minimize the impact on everyone else. The US should seek to prevent Beijing from acquiring technology and other assets that pose a national security risk, while minimizing economic harm to ourselves and our partners.

The difficulty lies in that sweeping action is needed to limit China risk to national security. The PRC does not just acquire technology by investing in the US. In fact, independently compiled data show no large-scale acquisitions of advanced technology through Chinese investment in the US. All Chinese investment in the US, including technology, has slowed sharply in the past 18 months. Yet Beijing has hardly renounced its industrial policy aspirations or methods.

Chinese technology acquisition via theft, both cyber and conventional, calls for preventive and punitive American responses. The other major avenue for Beijing to acquire technology is business transactions outside the U.S. especially in the PRC itself. While the benefits of investment mean great care must be exercised, *Chinese technology acquisition cannot be controlled without restricting US investment in China and ventures with Chinese entities elsewhere*. Among other things, this observation is the foundation for the Trump administration's well-justified Section 301 inquiry into the PRC's coercive practices.^{iv}

The last requirement for useful policy, including all bills to reform the Committee on Foreign Investment in the United States (CFIUS), is far less controversial but even more vital. Whatever Congress decides must incorporate the needed budget and staff, or it is little more than posturing.

China's Global Footprint

The limited role played by the PRC's technology investment in the US proper becomes evident through comparisons utilizing the China Global Investment Tracker (CGIT) from the American Enterprise Institute, the only fully public record of China's outbound investment and construction.^v The CGIT lists all verified investment and construction transactions worth \$100 million or more from 2005 through 2017. It is updated every six months and features over 1300 worldwide investments totaling more than \$1 trillion.

The CGIT shows China's 2017 global investment rising 8 percent, driven by the \$43-billion acquisition of Swiss agro-tech giant Syngenta (see table 1). Absent this one deal, spending would have fallen 17 percent. The total number of investment transactions slid in 2017, as did outlays in many countries and sectors. But the top CGIT story was change rather than decline, change to

larger deals made by state-owned enterprises and new sectors, such as logistics. This led to heavy Chinese investment in Britain, for example.

From 2005-2016, the annual gap between CGIT investment data and those published by China's Ministry of Commerce (MOFCOM) was below 10 percent. In 2017, the numbers diverged. MOFCOM last year reported a 33-percent spending drop, purporting to curb "irrational" investment after a record-setting 2016.^{vi} The ministry does not disclose individual transactions but direct queries and its monthly figures indicate the bulk of the Syngenta deal was not counted, on grounds it was financed outside the PRC. This is unlikely and, in any case, yields the dubious result of excluding China's biggest-ever foreign acquisition. It's always possible for some deals to be placed a year earlier or later but MOFCOM's 2017 total is unreasonably small.

Table 1: Two Views of Chinese Outward Investment (\$ Billion)

	CGIT	Ministry of Commerce
2005	10.2	12.3
2006	19.8	21.2
2007	29.9	26.5
2008	54.7	55.9
2009	57.6	56.5
2010	65.5	68.8
2011	68.8	74.7
2012	80.3	87.8
2013	83.8	92.7
2014	104.3	107.2
2015	113.2	121.4
2016	170.4	181.2
2017	185.4	120.5
Total	1044	1037

* Sources: American Enterprise Institute, China Global Investment Tracker, January 2018 update, <http://www.aei.org/china-global-investment-tracker>; National Bureau of Statistics of the People's Republic of China, State Administration of Foreign Exchange, 2016 Statistical Bulletin of China's Outward Foreign Direct Investment, China Statistics Press, September 2017; and Xinhua, "China 2017 FDI rises to record high, ODI falls," January 16, 2018, http://www.xinhuanet.com/english/2018-01/16/c_136900334.htm

Prior to 2017, the main problem with Chinese numbers has been a national policy to treat Hong Kong as an external port. Funds flow through on the way to their final destination but MOFCOM is required to stop following them in Hong Kong and Hong Kong is then assigned more than half of Chinese outward investment. Other bilateral numbers, such as for Chinese investment in the US, can therefore be far too low. The CGIT follows money to the true recipient country.

In the first quarter of 2018, MOFCOM may be compensating for its exaggerated 2017 decline, boasting of a 24% investment increase.^{vii} The as yet unverified CGIT total for the first quarter is close to the raw MOFCOM number, with a different growth rate due to the different base number. This suggests the ministry has declared success in its loud, politicized rectification campaign and is again willing to report accurate figures.

In many countries, Chinese construction trumps investment. Construction services are provided in the host country but do not involve ownership. The CGIT covers China's global construction with almost 1400 projects totaling over \$700 billion. Construction of power plants, rail lines, ports and so on is the heart of the well-known Belt and Road Initiative and there are more large (\$100+ million) construction deals than large investments.^{viii} PRC construction is not important in the US. But Beijing's pattern of winning influence through financing and executing construction projects without any equity stakes bears directly on American policy choices.

Investment and construction dollars do not have the same economic value but combining them illustrates the PRC's range. Investment is concentrated in developed economies and construction in developing. Chinese companies thus have a presence in every corner of the globe, including places and activities most multinationals shy from. An illustration: 20 countries have received at least \$20 billion in investment or seen \$20 billion in Chinese construction since 2005.

Table 2: China's Sector Patterns, 2005-17 (\$ Billion)

Sector	Investment	Construction	Troubled
Energy and power	354.8	310.6	117.6
Transport	95.1	230.1	44.4
Metals	123.9	32.4	74.9
Real estate	97.7	70.0	19.1
Agriculture	79.5	16.7	10.9
Finance	75.2	-	36.5
Technology	51.1	15.6	27.7
Tourism	36.3	6.6	7.4
Entertainment	38.8	2.0	1.6
Logistics	33.0	4.5	1.0
Chemicals	11.7	14.3	1.9
Other*	47.8	33.7	5.0
Total	1044	736.5	347.9

* In other investment the leading sector is health care; in other construction it is utilities.

Source: American Enterprise Institute, China Global Investment Tracker, <https://www.aei.org/china-global-investment-tracker>.

It is no surprise that energy is the biggest draw for PRC investment and construction. Among subsectors, oil draws the most investment, by itself on par with second-place metals. In construction, coal and hydro plants lead while transportation is a fast-rising second sector. Property investment had been growing strongly until Beijing imposed restrictions in 2017.^{ix} Perhaps most telling, while technology receives a great deal of publicity, it accounted for only five percent of China's worldwide investment from 2005-17.

Chinese Investment in the US, 2005-present

The PRC likes making deals with advanced economies and their firms. The CGIT's properly calculated bilateral figures make clear that neither the Belt and Road nor Hong Kong draws the bulk of Chinese investment. Eight of the top national 10 recipients are wealthy, plus resource-rich Brazil and Russia (see table 2). While the US easily leads in total investment attracted, the American figure is not so impressive when adjusting for population or economic size.

Table 3: Top Recipients of Chinese Investment 2005-17 (\$ Billion)

Country	Investment Volume
United States	170.4
Australia	91.0
Britain	72.4
Switzerland	60.0
Brazil	54.6
Canada	49.4
Russian Federation	38.2
Singapore	30.8
Germany	25.5
Italy	21.5
Subtotal for top 10	613.8
Total for all countries	1044

Source: American Enterprise Institute, China Global Investment Tracker, <https://www.aei.org/china-global-investment-tracker>

Other than the possible 2017 blip, China's global investment has been steadily rising. Not so its spending in the US, which is much choppier. China's global investment was basically launched with the acquisition of IBM's personal computer unit and hit its first bump with the American

rejection of CNOOC's bid for Unocal, both in 2005. From 2007-2010, total Chinese spending in the US was nearly \$30 billion. There was a sharp drop in 2011 due to clashes over Huawei.^x 2012-2015 saw \$58 billion in Chinese investment in the US, a substantial amount but one showing only modestly faster growth than Chinese spending globally. That was just the warm-up for the high-wire act to come.

In 2016, Chinese investment in the US rocketed passed \$50 billion,^{xi} accounting for 30% of the global total. Then in 2017 the figure dropped by half. Thus far in 2018, spending is on pace to drop further, below \$20 billion for the year. While boundaries between years can be artificial – some 2016 investment may be better counted as 2017, for example – the trend is clear: Chinese investment in the US is well off its peak and still falling as of now.

The reason for the initial and sharpest decline was not found in Washington, but in Beijing. In August 2015 and again in January 2016, the People's Bank of China pushed down the value of the yuan against the dollar and hinted at more weakening to come. This was at least in part a response to a PRC economic downturn that was most serious in the fourth quarter of 2015 and first quarter of 2016.^{xii}

The response of many Chinese companies and rich individuals was immediate: get money out of the RMB and out of the country. The single best place to go was obviously the US, which had the dollar rising against the RMB, a large enough economy to easily absorb investment, and attractive opportunities in many sectors. This turned into the 2016 boom, starting in the second half of 2015 with companies scouring America for spending outlets.

Beijing had no response for a shocking amount of time, possibly due in part to corruption. Meanwhile, the PRC's foreign exchange reserves burned. From July 2015 to December 2016, official reserves fell \$680 billion.^{xiii} When Chinese policy-makers finally acted, they targeted the biggest overseas spenders, which were privately-owned firms such as Dalian Wanda. The idea was to deter the rest and it worked.^{xiv} The share of private investment in China's global total rose from almost nothing in 2006 to nearly half in 2016, but dropped the most on record in 2017.

The US has consistently seen more private Chinese participation than the rest of the world enjoys. From 2010-2017, the private share of Chinese investment in the US was almost 60 percent, above the global average for any year. Chinese spending in the US plummeting last year in large part stems from the PRC attacking its own private firms to stop capital outflow.

That's ownership, another element in the rise and fall of Chinese investment in the US is the sector pattern. If you want to switch large amounts of money from a weaker currency to a stronger one, the quickest purchase is expensive buildings, which do not require the same depth of evaluation as a corporation. In 2016, Chinese money swept into American real estate, with \$15 billion spent on hotels alone. In 2017 that figure was zero. A ban on investment in hotels and tight limits on property in general was first informal then made formal.^{xv}

The most controversial sector is technology. Small-scale acquisitions of American technology assets are a legitimate concern. But there has been no large-scale Chinese investment in truly advanced US technology. In 2016, Chinese investment in US technology as a whole exceeded \$10 billion, but the bulk was a \$6-billion acquisition of Ingram Micro, which is an IT distributor not an engineering or research firm.^{xvi} Since Oceanwide took over International Data Group in January 2017, there are no \$100+ million Chinese technology investments in the US at all.

General US Investment Policy

In considering the full Sino-American investment relationship, the US faces unavoidable trade-offs. In the most pointed of these, policy-makers are rightly unhappy with Made in China 2025 but the PRC is also likely to invest north of \$1 trillion globally by 2025.^{xvii} Using Table 3, the American share of this could approach \$200 billion. Chinese spending patterns over time also make clear that, if the US is closed, money will instead flow to Australia and Europe. Do we want our share or does it come with too much bad behavior?

Money has already been left on the table. The CGIT lists over 200 troubled transactions worth \$350 billion in business impaired after commercial agreements were signed. China's investment alone sees an annual average of \$20 billion impaired. Beijing has belatedly unraveled deals and

local or transnational security confrontations have halted them. But the main obstacle is objections by host governments, so it is no surprise that the top recipient of the PRC's investment also leads in terms of lost spending. It can take time for a deal to founder and more troubled China transactions are coming for the US.

Table 4: Most Troublesome Countries 2005-17 (\$ Billion)

Country	Troubled Transactions
United States	65.4
Australia	59.1
Iran	25.2
Germany (mostly one deal)	15.4
Libya	12.7
Nigeria	11.5
Subtotal for top 6	189.3
Total for all countries	347.9

Source: American Enterprise Institute, China Global Investment Tracker, <https://www.aei.org/china-global-investment-tracker>.

The US has always filtered Chinese investments but obviously did so lightly during the 2016 expansion. American policy shifted sharply when a seemingly innocuous Chinese bid for logistics firm Global Eagle was stalled in the middle of 2017. This was quickly followed by a disingenuous claim from Lattice Semiconductor that it was being acquired by an American company, one which was entirely funded by the PRC. The choice to bar the Lattice deal was correct, and raised the ongoing issue of identifying when an investor is China-controlled (below).^{xviii} A rising number of Chinese bids for US assets have stumbled over the past year.

That is the situation on the ground. The ensuing American policy choices should consider three factors, none of which necessarily involve CFIUS reform. First, "good Chinese investment" is in short supply. Beijing has blacklisted property and hotels and private firms are being hounded by PRC authorities.^{xix} A bigger problem stems indirectly from Chinese policy. Because Beijing

seeks foreign assets, including technology, greenfield investment has faded to less than 15 percent of the total. Greenfield spending creates new jobs, while mergers and acquisitions may not and also represent greater potential loss of competitiveness. The US may welcome private greenfield investment, but little is available.

A second factor is lack of reciprocity. Beijing plainly sees competition as good for everyone else; the simplest illustration is centrally-controlled state-owned enterprises being heavily subsidized to make acquisitions overseas but entirely off the table to foreign bidders. Nonetheless, there is little value in simple investment reciprocity. The US does not want to close the same sectors the PRC does, nor would it be useful for Beijing to actually open (much less falsely promise to open) massively overcrowded industries such as steel. In addition, the Trump administration is not especially interested in better conditions for American companies in the PRC.

The third matter is most important: rule of law. Even well-intentioned Chinese companies with a solid record cannot always be trusted to obey American law. They have a good reason for being untrustworthy – all PRC firms are beholden to the Communist Party for survival and their executives' freedom. The distinction between private and state-owned Chinese enterprises is limited here. The latter are far more heavily subsidized but, with regard to rule of law and national security, there is no difference in Party control. Private Chinese companies have no courts or media through which they can resist Party orders to ignore US law or steal technology. They are equally beholden.^{xx}

In other countries, the ugliest manifestation of lack of rule of law has been corruption for the sake of social and political influence. This is no longer limited to poorer countries: both Germany and especially Australia have recently accused Beijing of interfering in their domestic affairs.^{xxi} If they are not immune, neither is the US.

For now, though, the main violation of American law concerns intellectual property (IP). This is commonly associated with technology but also includes trade secrets and simple data theft. American policy falls far short on this score. Estimates of loss to the US from Chinese IP theft can run in the hundreds of billions of dollars yet no PRC firm has been sanctioned even

indirectly, pending Section 301.^{xxii} Even if CFIUS is left untouched by Congressional and administrative action, Chinese companies shown to have benefited from IP theft should face heavy sanctions, or IP theft will only continue.

CFIUS in Particular

In addition to the three issues possibly outside CFIUS' remit, two more are crucial to its operation. The first is dull, technical, and vital. For CFIUS to claim jurisdiction, an investor or partner must be identified as foreign-controlled. And whether such a partner is Chinese must be accurately determined for almost any CFIUS reform to be helpful. Canyon Bridge briefly pretended it was American when trying to buy Lattice. Another example: the PRC's biggest 2017 investment in the US was routed through Avolon, an Irish firm.^{xxiii}

There are ongoing debates over what equity stake constitutes control and how to treat passive investment. These are unwise distractions. CFIUS should determine who controls a firm by identifying how it is financed. Money ultimately traced backed to the PRC guarantees Chinese influence, no matter the company name or location of its headquarters. American policy-makers are now correctly concerned about countries becoming Chinese satellites due to excessive borrowing.^{xxiv} The same applies to companies. One that borrows heavily from a PRC bank, for example, is vulnerable to technology coercion even if there is no formal Chinese ownership.

A last consideration is evolution in the view of national security. The headline event is the US determination that personal data, along with technology and trade secrets, can be a national security concern. This was not an issue as recently as 2014, with a shift prompted by the breach of Office of Personnel Management files along with Chinese companies showing greater interest in acquiring American firms which hold personal data. This interest can be entirely commercial at first, only to have the Party later make demands. Such logic motivated, for example, the CFIUS denial of an Alibaba unit's bid for Moneygram.^{xxv}

All this should not add up to "anything goes" in curbing Sino-American investment. Foreign cooperation is needed if the US is to partly reindustrialize. Investors are averse to uncertainty, for

instance a justified but unstated mandate to protect personal data. The Foreign Investment Risk Review Modernization Act (FIRRMA) is vague with regard to “critical” technology, materials, and infrastructure to be shielded, vagueness the business community rightly finds worrisome. Finally, CFIUS is not a magic wand to wave at the economy or even just at foreign investment. There is a great deal yet to do while limiting CFIUS reform to better protecting national security.

However, some objections to FIRRMA’s goals do not seem to take the threat seriously. There has been discussion about time limits on changes to CFIUS, as if Beijing will in 2026 end its program of acquiring foreign technology. Rather than sun-setting CFIUS reform, the emphasis should be on speeding it up, as technology loss has occurred for many years and harm to national security is ongoing.

Speed is also required if export controls are to play a more constructive role. The existing export control regime has failed to control PRC acquisition of technology. It’s certainly reasonable that better export controls could play a complementary role to CFIUS, keeping that body from discouraging foreign investment or being overstretched in terms of resources. However, improved export controls must be actionable, not merely asserted as the superior option. The Export Control Reform Act of 2018 (H.R. 5040) is a step in the right direction but its future improvement and passage must not be used to delay pressing CFIUS reform.^{xxvi}

The evidence shows the PRC engaged in a legitimate global campaign to offer money to achieve its aims, in part by buying foreign assets but also when there is no formal Chinese ownership. Direct Chinese acquisition of technology through investment in the US has always been minor in scope and is probably declining. Yet IP theft has remained heavy all the while, extending first to cyber and later to personal data. Export controls have not been effective to date. And Beijing’s goals are certainly unchanged – the Chinese government clearly believes it can continue to acquire desired technology without just buying it in the US.

The conclusion is unavoidable: taking the Chinese threat seriously means investment review cannot be confined to the US. A stricter process here will merely relocate the entire problem of the PRC’s technology acquisition elsewhere, rather than most of it being located elsewhere as it

is now. The Trump administration might undertake the needed expansion of national security review, since Section 301 explicitly targeted Beijing's coercion of American companies through access to the Chinese market. But even if the administration does hold course, which is hard to be sure of, a law passed by Congress is much preferable to executive order.

China's program is sophisticated, intense, and has been global for more than a decade. The American response will naturally require additional resources, is already overdue, and must also be global.

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Mr. LATTA. Well, thank you all for your testimony. And we will now move into the Q and A portion of the hearing.

And I will begin the questioning and recognize myself for 5 minutes.

Mr. Lowery, how difficult is it for CFIUS to identify transactions which involve a foreign purchase of a U.S. company?

Mr. LOWERY. I don't think it is that difficult. If it is a foreign purchase, where there is going to be control, the first thing is just kind of, as we heard in the last panel, there is a process. There is a lot of incentive for the companies to come forward and basically present that to the U.S. Government for a review under CFIUS. If it is obviously in a non-national security area, they wouldn't do that.

But beyond that, the Government does spend some of its resources on kind of scouring the M and A Press, which is actually a very robust press for a variety of reasons. And so from that, at least, you can basically have the—CFIUS actually has subpoena authority, if it needs to, to go out and actually bring transactions in.

So my own view is that you actually capture most of the critical controlling M and A transactions under CFIUS currently. That doesn't mean that it doesn't take some effort but I think actually most of them are actually brought in through CFIUS.

Mr. LATTA. So would you say that the notice requirements right now are adequate that are out there already?

Mr. LOWERY. I think they are adequate. I actually do think in the FIRRMA bill the addition of having a mandatory requirement for state-owned enterprises is a very good add.

Mr. LATTA. Thank you.

Mr. Wolf, do export controls create a blacklist of prohibited persons and transactions, or whitelist the permitted goods and transactions, and is this the right approach?

Mr. WOLF. So with respect to individuals—and that is an excellent question because export controls are about controls on information and things, controls on people, end uses, and end users. And as was described in the previous panel, there are lists of proscribed individuals and companies to which the export or re-export of anything is prohibited for national security reasons, in order to get that threat. So that is the blacklist approach. It goes to the certainty point that was very well made a moment ago in that you have to know who you can't deal with to know who you can't deal with.

With respect with the identification of technology, that is done both unilaterally and multi-laterally with our regime allies. And for companies to know what requires a license when, what information is required to get government permission to release, they have to know what it is. And so it is a very explicit list, a very long list, a Commerce Control List, of the types of technologies and related items that are controlled.

To the extent it is sometimes too difficult to describe exactly the term, occasionally, there are notes that say particular technologies in these areas are not caught, such as the whitelist. But the primary approach is a positive list approach of identifying the names of the companies, and the individuals, and the types by technical

description, or other objective terms the technologies that require permission to transfer.

Mr. LATTA. Thank you.

Dr. Scissors, what role does foreign direct investment play in creating economic growth here in the United States?

Mr. SCISSORS. Well, the world changes over time. I think I will——

Mr. LATTA. Yes, thank you.

Mr. SCISSORS. The role changes over time. I will answer that question I think you know in a quick fashion but a very important fashion.

The President and a lot of other national and local politicians have said the U.S. needs to, at least partly, to the extent we can, reindustrialize. There are manufacturing jobs that can and should be created in the U.S. that, to some extent, have been lost to automation or trade and we can bring some of them back here. And I think that is true to some extent. It requires foreign investment. We can't do it without that.

So if you care, as I do, and I think probably almost everyone in this room does, care about reindustrialization, if you deter foreign investment, you are really striking—it is a very difficult task to bring millions of manufacturing jobs to the United States. You can't do it without foreign investment.

So that is the way I would say I would describe it. It is a big question but foreign investment is crucial to the idea of bringing manufacturing jobs, a large number of manufacturing jobs to the economy.

Mr. LATTA. Thank you.

Mr. Lowery, what is the best way to address the question of how to ensure sensitive U.S. technology information that does not fall into foreign hands?

Mr. LOWERY. So I think that it is a combination of factors. One is I think the most important one, which actually really isn't the U.S. Government. It is actually the companies themselves. The companies themselves, they don't want to allow their technology to fall into foreign hands or, by the way, domestic hands, because that is the technology that allows them to make money. And so that is the "secret sauce."

Going beyond that, though, I think the export control regime is probably the best regime we have and it needs to be updated. And that is why I think Congressman Royce's bill is a very positive bill and Congressman Engel's bill. And I think that that helps put more force into what they should be doing, the export control regime.

I think CFIUS also is very helpful but it is my own view that it should be about what is a foreign investment into this country. And so I think the combination of what the private sector does, and then the export control regime, and the CFIUS I think is the best way to address these issues.

Mr. LATTA. My time has expired and I recognize the gentlelady from Illinois, the ranking member of the subcommittee for 5 minutes.

Ms. SCHAKOWSKY. Thank you, Mr. Chairman.

I wanted to explore some things with you, Ms. Drake. Gene Green, I don't know if you were here for the earlier, he raised some questions about labor and about the workforce. And the answers that we heard from Mr. Tarbert at Treasury essentially was we narrowly focus on national security issues. And I would argue that it really is narrowly defining national security issues. And in some ways I think you have tried to broaden that, what is a national security issue, and I would certainly like to see to the extent that jobs are at stake, et cetera, is also a part of a national security issue.

But you mention in your testimony additional shortcomings of CFIUS that are not addressed in FIRRMA, including the issue of greenfield investments. And so what are greenfield investments and why might they present a concern for the United States?

Ms. DRAKE. Thanks. So greenfield investments are when you are not buying a going concern. So you might be buying the land and building a factory from scratch. And in theory, you would think, well this one of the good kinds of foreign investments that we want because if you are building a brand new workplace or factory, you are creating jobs that didn't exist before. And that is potentially the case.

But in the case, I gave the example, in my written testimony and mentioned it briefly, Tianjin, which is a steel pipe producer that is about to open a new facility actually in Texas, near Mr. Green's district, and the problem is that if they behave in such a way, if the whole point of the investment is to evade U.S. trade remedy law, whether it is dumping countervailing duties, Section 232, and then they bring in from their own company their own suppliers in China, which they own, dump subsidized inputs, we are not going to be able to reach those inputs through trade remedy law. And then they are behaving here in a predatory manner that might drive other U.S. competitors out of business.

So we could, in the long-run, be losing jobs, be harming communities, and potentially driving down wages in that sector, if we end up with a monopsony type situation, where there are fewer buyers of labor.

So these are the kinds of things that we want to look at when we are looking at does foreign investment benefit our economic security, which really is linked. I mean whether you talk about a net economic benefits test or you just talk about expanding our view of what national security is, if our economy isn't strong, then certainly our national security is at greater risk.

Ms. SCHAKOWSKY. So right now CFIUS concentrates on this narrow view of national security. And in your testimony, you cited the U.S. China Commission's recommendation for addition of a quote, net economic benefits test, unquote. And do you see that being under CFIUS or some sort of a new regime?

Ms. DRAKE. We would put it under CFIUS, rather than building a new whole regime. And you know Canada does a similar thing. Australia does a similar thing. Those are both popular destinations for foreign investment. So it is not driving away investment but it is a way to say let's make sure, if you are investing, it is not to strip the knowhow and technology and take the jobs elsewhere but you are committing to having the production here for the long-

term. You are committing to hiring U.S. workers, to pay them good wages. These all really matter because if it is really predatory and it ends up killing an entire sector of the U.S. economy, those are jobs but those are, in the long-run, things that we can no longer make. And we have got to rely, then, on imports from some other source.

So these things really should be looked at part and parcel by CFIUS.

Ms. SCHAKOWSKY. And so you think that we have a structure that could add on this whole additional piece. I mean I think it is a really important piece and you know where it gets housed and where it happens. Does the Department of Labor do any of these things now, looking at these investments and how they impact the overall economy and jobs?

Ms. DRAKE. Not in that manner. As you heard from Secretary Tarbert on the first panel, the Secretary of Labor sits on CFIUS but is a nonvoting member and doesn't really look at these sort of workforce, wage, jobs issues. But it could easily be done and I think it would be value added to what CFIUS is already doing.

Ms. SCHAKOWSKY. You know I would really like to talk to you about that. I think these are matters of national security. I would like to work with you and the AFL-CIO on that.

Thank you.

Ms. DRAKE. Thank you.

Mr. LATTA. Thank you. The gentlelady yields back.

The chair recognizes the gentleman from Indiana for 5 minutes.

Mr. BUCSHON. Thank you, Mr. Chairman.

Mr. Lowery, when you were at Treasury, the CFIUS process was substantially revised. How did the process change and does it provide any insight into how policymakers should proceed under the current proposals?

Mr. LOWERY. Thank you, sir. So the way it mainly changed, it didn't change what CFIUS was looking at, which I think Mr. Tarbert talked about. What it did was it made a much more formal review process by the intelligence community.

So the intelligence community was always part of CFIUS but it just, it enhanced it. And then it also enhanced the level of our accountability from the U.S. Government. So it wasn't just signed off on by the career civil servants, not that they don't do a great job but, basically, the people that have to testify before Congress have to now sign off on all transactions.

It also provided a lot more transparency between the executive branch and congressional branch which, frankly, did not exist before that.

So all of those were a lot of process issues. The results of some updates on the types of issues we were looking at, especially on critical infrastructure and some homeland security issues, which was an update from a previous era.

I would say probably the last thing is but it took a lot of time. So in 2007, we passed FINSA, through Congress. It took about a year and a half to do the regulatory process to get it back up into place. And then you had to make sure you had the right personnel because everybody has to have the right clearances and so forth to look at this. So it just takes a long time.

Some of my criticism of the FIRRMA bill, and not all of the FIRRMA bill but parts of it, are that you would take this and metastasize it. And that is the part that I worry about, that we literally wouldn't be able to implement it.

Mr. BUCSHON. Yes, understood.

Mr. Wolf, in your testimony, you said, and this is interesting to me, that one side of the CFIUS debate are folks that believe transactions are more creative than the Government can understand. I am just curious if you thought that when you were at Commerce.

Mr. WOLF. Yes, in fact, which is why I—

Mr. BUCSHON. That is a serious question but it is also kind of in jest because I—

Mr. WOLF. No, technologies are evolving, transactions are evolving. The world is evolving quickly. And in any area of law and regulation, it is difficult for the Government regulations and statutes to keep up.

And I acknowledge that as a serious debate.

Mr. BUCSHON. Let me just say I agree with you. I do think that you know bureaucracies can get behind pretty quickly.

Mr. WOLF. Right.

Mr. BUCSHON. And I would just phrase it in a different way. It is not that the Government can't understand it, it is just that things are evolving so quickly because of the inherent nature of the way agencies and the Government do their business that it is pretty easy for them to quickly get behind.

I am not saying I disagree. I just thought I would ask you whether you thought that when you were at Commerce.

Mr. WOLF. But it is the key philosophical question in this FIRRMA debate—

Mr. BUCSHON. Yes.

Mr. WOLF [continuing]. Which is if, in light of that fact, should you have rather expansive authority with very broad general definitions on inbound and outbound investments, in order to be able to know it when you see it later, whether there is a transaction of concern.

Mr. BUCSHON. Yes.

Mr. WOLF. And then the second question is if that expansive authority does more harm than good with respect to the open investment culture that every President before us has acknowledged. So I have got a longer version of that but that is the essential debate in this question.

Mr. BUCSHON. Yes, understood and I don't disagree. I think we need to balance our ability to accept foreign investment and to make sure that our economy is strong and not inappropriately burdensome on investment by overreaching. That is why we need to strike a balance here.

But that said, based on what people like me are currently hearing in the classified setting on a lot of issues, we have some really pretty serious national security issues to address and that is why getting this right is really important.

So, I yield back, Mr. Chairman.

Mr. LATTA. Thank you very much. The gentleman yields back.

The chair recognizes the gentleman from Kentucky for 5 minutes.

Mr. GUTHRIE. Thank you very much. And just finishing on that, and not my line of questioning, but that is one of the debates we have as the legislative branch. How much authority do we grant? Because it is quicker to react regulatory than legislatively and you get broad definitions, and broad authorities, and you hope that the things go down the way that Congress intended when you do that. But with the Chevron case, it gets to the point where both sides, both have—and if you are in the executive branch, you probably want to do that anyway, taking a lot of liberty, I think, with what Congress intended.

So, unfortunately, we are to the point that we have to be more prescriptive than that because you can't legislate for who is in power now. You have got to legislate for who may be in power in the future.

So, Mr. Wolf, this is the first question to you. One of the reasons cited for the current legislation is the need to deal with emergency situations, such as when a foreign purchaser is actively seeking to acquire U.S. technology.

How long does it take for the export control process to work and is it suited for emergency situations?

Mr. WOLF. And that is the follow-on to my previous point. And the key effort in this effort, in this debate, which I think is very well laid out in a process point in Section 109 of Congressman Royce's bill, is the need to identify the technologies of concern, the emerging technologies that are being sought by countries of concern, identify and regulate them, regardless of the nature of the transaction, whether it is a joint venture, or whether it is a voluntary sale, whether it is a telephone call. If technology is of concern, if it is being sought to be acquired by a foreign government to our detriment, it should be regulated and that is exactly what the export control system does.

Now to the timing question. So I was so concerned about this when, during my time, we created a process that was referred to earlier, the OA521 process that allows the Commerce Department to identify immediately and impose unilateral controls, that is without needing the permission or coordination of other countries over any technologies for any foreign policy or national security reason.

So the legal answer to your question is it can be done as quickly as a reg can be written and published, in a day. The harder question, which is where the process point comes in from Secretary Royce—or Congressman Royce's bill is to identify those technologies that, historically, we are not familiar with. And in this entire debate, artificial intelligence, robotics, driverless vehicle technology, a long list of other technologies are the target of acquisition.

And so my primary advocacy is that the Government devote significantly more creative resources to identifying those technologies, listing them, and tagging their ability to be released to countries and end uses, and end-users of concern, regardless of whether it is an investment, passive or otherwise.

So, it can be done quickly. So the law is there to do it quickly. The hard part is the brain power to think through what really is of concern and without doing it in such a broad way that you dis-

courage investment in the U.S. or U.S. companies from developing this technology in the U.S.

Mr. GUTHRIE. So the law doesn't prevent you from acting quickly, the process, I mean doing the right thing correctly.

Mr. WOLF. It is a function of will, and creativity, and intelligence, and collective efforts.

Mr. GUTHRIE. Up to the point where everybody agrees this is right but we have got to wait so many days because of the law. The law actually allows you to—

Mr. WOLF. The existing regulations with the broad authority that Congress has given the Commerce Department exist to tag and identify something immediately.

One quick follow-on. However, that shouldn't be where it ends because the worst export controls are the ones that stay forever unilaterally, that is, only the U.S. imposes, because what that does is it drives that work, that technology, that development to our allies and then we lose that work because the U.S. is a more restrictive environment than our allies.

And so what I have just described as a short-term unilateral fix but the regulation and also Congressman Royce's bill lays out a process to make it multi-lateral so that our allies are in the same boat with us, and achieving the common objectives, and leveling the playing field with respect to control of the technology of concern.

Mr. GUTHRIE. OK, thanks.

Mr. Lowery, is CFIUS equipped to review not only inbound foreign investment into the U.S. but also outbound transactions, such as the contribution of intellectual property to a joint venture with a foreign entity?

Mr. LOWERY. No, it is not. In the original FIRREA bill provided that authority and that is the biggest problem of the bill. It should not be doing that.

That is, CFIUS should be about foreign investment into this country. And if it is a concern about what is happening that is being exported, whether it is in a joint venture or whether it is just a regular sale, that is when you turn to the authorities that Kevin Wolf just was talking about. That is what the export control system is all set up to do.

That doesn't mean it doesn't need to be modernized, updated, and maybe sometimes having a fire under the you know whats from Congress. And I think that that is kind of what I saw from Congressman Royce and Congressman Engel's bill.

Mr. GUTHRIE. OK, thank you.

And Dr. Scissors, can you please touch on the policy motivations for H.R. 4311 that stem from the Made in China 2025 Plan?

Mr. SCISSORS. Sure. You know one difference in talking about how quickly to move is that you know China has a declared intent to acquire technology, to attain global technological leadership. It is not just to acquire technology to make its people better off. It is to be the leader, ahead of all of you, everyone else in various sectors. And in some of those sectors, we might think of OK, electrical cars. You know we don't want a lot of combustion engines on Chinese streets for 1.4 billion people. But other areas, like semiconduc-

tors, there is an obvious national security component to that, as well as strategic economic component.

So Made in China 2025 is not the first time the Chinese have announced an industrial policy. It is the first time they have announced an industrial policy at the high end, where we are going to get technology at the high end. We are going to subsidize our companies at the high end.

So the challenge to the United States has changed fundamentally because China is now competing with us in areas where we thought we were the undisputed global leader. And their intent is explicitly for that no longer to be true, that we will not be the undisputed global leader.

Mr. GUTHRIE. Ms. Drake, you were shaking your head a couple of seconds ago. Do you have a comment on that, then?

Ms. DRAKE. Oh, I just, I agree with—

Mr. GUTHRIE. You were agreeing, obviously.

Ms. DRAKE [continuing]. Absolutely with those comments and think that we have to adjust what we are doing to respond to what China is doing, absolutely.

Mr. GUTHRIE. OK, thank you.

And I yield back.

Mr. LATTA. Well, thank you very much.

And seeing no other members here to ask questions, first I want to thank you all for being here. Your testimony has been very, very informative. It is an area that I think this committee is delving into and we have got to do something. So I want to thank you for being here.

And before I conclude today, I would also like to make sure that we submit for the record, by unanimous consent, a statement from FCC Commissioner Michael O'Rielly.

[The information appears at the conclusion of the hearing.]

Mr. LATTA. And pursuant to committee rules, we remind members that they have 10 business days to submit additional questions for the record and I ask that witnesses submit their response within 10 business days upon receipt of those questions.

And, without objection, the subcommittee will stand adjourned.

[Whereupon, at 12:26 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

PREPARED STATEMENT OF HON. GREG WALDEN

Good morning and thank you to our witnesses for being here today. Our hearing will examine the Committee on Foreign Investments in the United States and the vital role it plays in ensuring that corporate transactions involving U.S. and foreign persons do not pose threats to our national security.

We are also here to discuss the role foreign direct investment plays in growing the American economy and creating jobs. Perhaps most importantly, we are here to discuss the balance between encouraging global investment in the United States, while preventing those who would do us harm from exploiting our fundamental faith in the free market and the free flow of capital.

Since 2007, the last time Congress reviewed the CFIUS (Siff-i-ous) review process, much has changed. The types of investments made by foreign persons in U.S. companies have diversified; the role of foreign governments in attempting to acquire U.S. assets through companies they partially or wholly own has altered; and technological improvements have increased incentives for other nations to attempt to acquire innovative products and technologies created by American entrepreneurs.

These changes mean new opportunities and new risks. Under the auspices of investing in an American business, a foreign government could acquire a whole or

partial stake in a U.S. company that allows it to access critical information or products that could undermine our national security. Some of our colleagues believe the CFIUS review process, designed to address such risks, has not kept pace with these developments.

At the same time, it must be recognized that much of foreign investment in the United States is beneficial to our country and economy. When a foreign-owned business invests in the U.S., it is acknowledging the tremendous advantages that come from employing American workers and operating in U.S. markets.

Many U.S. companies with foreign ownership not only manufacture their products in the United States, employing American supply chains, but also export these U.S. built products overseas.

According to the most recent U.S. Commerce Department data, majority-owned U.S. affiliates of foreign entities exported \$352.8 billion in goods, accounting for over 23 percent of total U.S. goods exported in 2015¹. These types of ventures reduce our trade deficit while creating jobs for Americans.

In that same report on Foreign Direct Investment in the United States, the Commerce Department noted that the United States had an inward FDI stock of \$3.3 trillion in 2015 and \$3.7 trillion in 2016. The largest investors in the U.S. came from the United Kingdom, Japan, Canada and Germany, countries with whom we have a close and cooperative relationship.

Welcoming foreign investment in the United States has yielded tremendous benefits for our citizens. It is important that we do not make the opportunity to invest in the U.S. so burdensome or uncertain that we discourage a vital source of economic growth.

It is also critical that we remain aware of the reality that not everyone in the world shares our values or is content to see America succeed. The CFIUS review process has historically struck a balance between encouraging investment in America with protecting our citizens from harm. It is our duty to review that process to ensure CFIUS has the tools it needs to continue to strike that balance in a changing world.

I look forward to hearing from our witnesses today on whether H.R. 4311 correctly strikes that balance, what changes or improvements can be made in the legislation, and what equities policymakers should consider as we undertake this process.

Thank you and I yield back the balance of my time.

PREPARED STATEMENT OF HON. FRANK PALLONE, JR.

Today we are here to review the CFIUS process. CFIUS, the Committee on Foreign Investment in the United States, serves as an important check on our generally open investment climate. Simply put, CFIUS reviews certain transactions to ensure that they would not result in adverse national security consequences for the United States.

Investment in American companies, whether foreign or domestic, is a major component of the U.S. economy. It can spur innovation and create good jobs for American workers.

However, some foreign investment is more beneficial to the U. S. economy than others. For example, research has shown that the benefits of investment by acquisitions are ambiguous. In addition, investments that are made based on incentives given at the state or local level can foster a “race to the bottom” among jurisdictions.

And regardless of the potential benefits, foreign investment must never cause harm. Therefore, we need to ensure that such investment is not creating risks to our national security.

Over the last several years, there have been calls to update the CFIUS process, particularly as the global market and our national defense posture evolves. Most recently, a bipartisan bill the Foreign Investment Risk Review and Modernization Act, was introduced by Representatives Pittenger and Heck, which we will discuss at today’s hearing. I look forward to exploring this legislation with our witnesses and hope this bill works its way through the process on a bipartisan basis.

It is imperative that CFIUS is always ready to respond to security threats from any power seeking to have a strategic edge over our nation. CFIUS must be reviewing the right transactions and making sure that our critical infrastructure and intellectual property are being protected. The number of investments that need to go through the CFIUS process is on the rise so a review of the process now makes sense.

¹ <https://www.commerce.gov/news/fact-sheets/2017/10/foreign-direct-investment-united-states>.

While we do not want to drive investment dollars to other countries, we need to protect our technological edge and military readiness. And unfortunately, there are other governments seeking to take away that edge. Recently, Chinese President Xi Jinping reiterated his vision of China's future as a technology power. In a speech this past weekend, he acknowledged his goal of having Chinese companies collaborate with the Chinese military in that pursuit, what some have called civil-military fusion.

I understand those who are concerned about access to capital. U.S. firms and universities do need capital to grow ideas. I agree, and strongly support efforts to increase funding for research and development. For our nation to maintain its technological and strategic edge, we in Congress must work to ensure federal dollars are committed to emerging research and improving our infrastructure.

Mr. Chairman, it is no wonder why the United States is the number one destination for foreign investment. Companies come here because of our workforce, infrastructure, and consumer base. They recognize that it is a great place to do business. I look forward to hearing from our witnesses about how to best strike the balance of strengthening our national security review and maintaining our title as the investment capital of the world.

**Statement for the Record
FCC Commissioner Michael O’Rielly**

**Before the
Subcommittee on Digital Commerce and Consumer Protection
Committee on Energy and Commerce
U.S. House of Representatives**

**Hearing on
“Perspectives of Reform of the CFIUS Review Process”
April 26, 2018**

Dear Chairman Latta and Ranking Member Schakowsky:

I applaud the Subcommittee for convening this important hearing to examine the Committee on Foreign Investment in the United States (CFIUS) and ways to update the review process. As the Subcommittee examines H.R. 4311, the Foreign Investment Risk Review and Modernization Act, I respectfully ask Members to also consider potential reforms to the Executive Branch review process, informally known as “Team Telecom.”

Just as CFIUS requires review of foreign investments proposed in the United States through the lens of national security, Team Telecom (which typically consists of the Departments of Commerce, Justice, State, Homeland Security, Defense, the Federal Bureau of Investigations, and the United States Trade Representative) plays an important role in ensuring that U.S. national security interests are protected as part of the Federal Communications Commission’s (FCC or Commission) licensing process. Specifically, the FCC consults with and considers the views of Team Telecom when reviewing applicable license applications involving foreign ownership. Unfortunately, unlike CFIUS, the Team Telecom process is unnecessarily opaque and uncertain.

Specifically, applications referred to Team Telecom enter a procedural black hole that has been known to take years to complete. Entities stuck in this regulatory abyss all too often have no ability to determine which agency has concerns or how to locate a point of contact to help facilitate a resolution. Basically, there is little to no information available to applicants – or even the Commission for that matter – on the status of the application or a timeline for a response. When entities actually hear from Team Telecom, they have often been subjected to multiple requests for information, some of which are beyond the scope of the foreign ownership being reviewed. Ultimately, this process delays applications substantially and dissuades U.S. companies from considering new opportunities.

It should be clear that efforts to provide greater structure and process reforms to Team Telecom will not increase potential risks to national security or undermine the ability of Team Telecom to provide its views. Indeed, a more effective structure and process will help generate enhanced attention and facilitate improved responses from the requisite agencies.

With this in mind, I hope the Subcommittee will consider Team Telecom reform as part of its larger discussion of ways to improve CFIUS and its review of the legislation before it. More importantly, I stand ready to work with the Committee on this important issue and thank Members for considering such a proposal.



Department of Energy
Washington, DC 20585

April 24, 2018

The Honorable Greg Walden
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you for this opportunity to address the Committee on Energy and Commerce about the Department of Energy's (DOE) role on the Committee on Foreign Investment in the United States (CFIUS) and our support for the bipartisan efforts in both the House and Senate to modernize CFIUS.

One of my top priorities and functions as the Assistant Secretary for the Office of International Affairs at DOE is to oversee the Department's role on CFIUS. DOE was designated as full-time CFIUS member in the Foreign Investment and National Security Act of 2007 (FINSA).

DOE plays a vital part in the national security role that CFIUS has in our country's ability to maintain an open foreign investment policy while also protecting our most sensitive national security interests. The Department has a vast portfolio of national security responsibilities in the Federal Government from protecting our energy infrastructure to maintaining and modernizing our nuclear weapons arsenal. In addition, DOE as part of its national security mission, seeks to keep the U.S. at the cutting edge of emerging technology and innovation through vital research to expand our scientific frontiers while making our economy prosper.

DOE brings a unique set of attributes to CFIUS with the expertise and experience from our National Nuclear Security Administration (NNSA), our traditional program offices that handle electricity, fossil energy, renewables, and nuclear power and our expansive network of 17 National Laboratories across the country that help us fulfill our mission. My office coordinates among these various entities, including the many program offices on a wide range of issues, including CFIUS.

The Department of the Treasury, as the Chair of the CFIUS, is the lead agency on all CFIUS cases and selects a co-lead agency per the CFIUS regulations for each case review. The co-lead agency generally is the agency most closely aligned to the subject matter expertise needed for the transaction subject to CFIUS review. Since 2009, DOE has often been selected as a co-lead agency. Even in matters where DOE is not a co-lead agency, DOE brings a particular set of subject-matter-expertise to the reviews and investigations conducted by CFIUS. DOE provides comprehensive national security

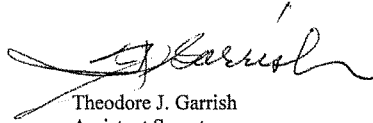


analysis to energy security questions, energy-related infrastructure issues, protecting the supply chain of our nuclear weapons arsenal and securing our country from the risks posed by cyber related threats.

CFIUS has evolved and adapted to the ever changing landscape where foreign investment into the U.S. crosses with our national security interests. However, CFIUS, which was born out of Executive Order 11858 in 1975, codified in the Defense Production Act of 1950 with amendments including Exon-Florio in 1988 and Byrd in 1992, and FINSA in 2007, is an appropriate subject for modernization.

As you proceed in considering an update to the CFIUS process our office is pleased to provide our expertise and experience in order to assist in your efforts. Thank you for your consideration and please do not hesitate to contact me if you have any questions.

Respectfully,



Theodore J. Garrish
Assistant Secretary
Office of International Affairs

cc: The Honorable Joe Barton
Vice Chairman

The Honorable Frank Pallone
Ranking Member

GREG WALDEN, OREGON
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

ONE HUNDRED FIFTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115
Majority (202) 225-2927
Minority (202) 225-3641
May 14, 2018

The Honorable Heath P. Tarbert
Assistant Secretary
International Markets and Investment Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220


Dear Assistant Secretary Tarbert:

Thank you for appearing before the Subcommittee on Digital Commerce and Consumer Protection on, Thursday, April 26, 2018, to testify at the hearing entitled "Perspectives on Reform of the CFIUS Review Process."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. To facilitate the printing of the hearing record, please respond to these questions by the close of business on Tuesday, May 29, 2018. Your responses should be mailed to Ali Fulling, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, DC 20515 and e-mailed in Word format to ali.fulling@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,


Robert E. Latta
Chairman
Subcommittee on Digital Commerce
and Consumer Protection

cc: Jan Schakowsky, Ranking Member, Subcommittee on Digital Commerce and Consumer Protection

Attachment

Additional Questions for the Record

The Honorable Gus Bilirakis

1. How does CFIUS expressly include and implement issues relating to State and local law enforcement agencies?
2. How does CFIUS seek out and accept the assurances of other federal agencies, such as the FTC and other regulators, who review and separately approve such acquisitions under antitrust laws, for example?
3. To the extent current CFIUS regulations do not require market disclosures from the foreign acquirer, are they sufficient to protect a competitive market for critical defense items? Should Congress require parties to provide this information to CFIUS?

GREG WALDEN, OREGON
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May 14, 2018

The Honorable Richard E. Ashooh
Assistant Secretary
Export Administration
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Washington, DC 20230

Dear Assistant Secretary Ashooh:

Thank you for appearing before the Subcommittee on Digital Commerce and Consumer Protection on, Thursday, April 26, 2018, to testify at the hearing entitled "Perspectives on Reform of the CFIUS Review Process."

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May 14, 2018

The Honorable Kevin J. Wolf
Partner
Akin Gump Strauss Hauer and Feld, LLP
1333 New Hampshire Avenue, N.W.
Washington, DC 20036

Dear Mr. Wolf:

Thank you for appearing before the Subcommittee on Digital Commerce and Consumer Protection on, Thursday, April 26, 2018, to testify at the hearing entitled "Perspectives on Reform of the CFIUS Review Process."

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May 14, 2018

The Honorable Clay Lowery
Managing Director
Rock Creek Global Advisors
800 Connecticut Avenue, N.W., Suite 800
Washington, DC 20006

Dear Mr. Lowery:

Thank you for appearing before the Subcommittee on Digital Commerce and Consumer Protection on Thursday, April 26, 2018, to testify at the hearing entitled "Perspectives on Reform of the CFIUS Review Process."

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cc: Jan Schakowsky, Ranking Member, Subcommittee on Digital Commerce and Consumer Protection

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May 14, 2018

Ms. Celeste Drake
Trade and Globalization Policy Specialist
AFL-CIO
815 16th Street, N.W.
Washington DC 20006

Dear Ms. Drake:

Thank you for appearing before the Subcommittee on Digital Commerce and Consumer Protection on, Thursday, April 26, 2018, to testify at the hearing entitled "Perspectives on Reform of the CFIUS Review Process."

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Chairman
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cc: Jan Schakowsky, Ranking Member, Subcommittee on Digital Commerce and Consumer Protection

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May 14, 2018

Dr. Derek Scissors
Resident Scholar
American Enterprise Institute
1789 Massachusetts Avenue, N.W.
Washington, DC 20036

Dear Dr. Scissors:

Thank you for appearing before the Subcommittee on Digital Commerce and Consumer Protection on, Thursday, April 26, 2018, to testify at the hearing entitled "Perspectives on Reform of the CFIUS Review Process."

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Robert E. Latta
Chairman
Subcommittee on Digital Commerce
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cc: Jan Schakowsky, Ranking Member, Subcommittee on Digital Commerce and Consumer Protection

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One Hundred Fifteenth Congress
 House of Representatives
 Committee on Energy and Commerce
 Subcommittee on Digital Commerce and Consumer Protection
 “Perspectives on Reform of the CFIUS Review Process”

Additional Questions for the Record

1. How does CFIUS expressly include and implement issues relating to State and local law enforcement agencies?

Because CFIUS at present is charged only with protecting national security, state and local law enforcement is rarely relevant. Some versions of CFIUS reform legislation note correctly that firms which have broken American law should be considered higher risks to national security. If CFIUS review more fully includes adherence to rule of law in assessing security risks, greater coordination with state and local law enforcement should follow, though only for the sake of gathering the relevant information.

2. How does CFIUS seek out and accept the assurances of other federal agencies, such as the FTC and other regulators, who review and separately approve such acquisitions under antitrust laws, for example.

US enforcement of antitrust laws with regard to Chinese entities is a vital issue which has received much less attention than it deserves, considering that most centrally-controlled Chinese state-owned enterprises rely on antitrust violations in China as part of their business model. However, CFIUS’ exclusive focus on national security means it has had little cause to contact federal agencies not involved in national security.

Again, a (needed) rule of law provision in CFIUS reform would entail more cooperation with federal agencies. In this case, CFIUS could incorporate a very brief standardized check with other agencies of the legal record of potential investors, at the most general level of has or has not broken US law. Chinese telecom company ZTE, for example, should not be allowed to invest, given its track record.

3. To the extent current CFIUS regulations do not require market disclosures from the foreign acquirer, are they sufficient to protect a competitive market for critical defense items? Should Congress require parties to provide this information to CFIUS?

CFIUS is empowered to ask for all pertinent information. Companies that do not provide such information should, and do, see their investments rejected. But the CFIUS process is not intended to protect (prospective) equity share-holders. Moreover, disclosure of an investment transaction at an early stage could be prejudicial to the companies involved, both American and Chinese, and constitute an undesirable barrier to investment.

A national security argument for some form of disclosure could be made with regard to ongoing operations. That is, companies which do not provide basic, accurate information about the status of their operations in the US could be deemed to be higher national security risks in post-transaction monitoring and therefore subject to additional post-transaction CFIUS scrutiny.

With regard to the competitive market for critical defense items, the most important step has nothing to do with CFIUS – it is to expand the number of domestic suppliers. Industry consolidation has reduced competition and increased vulnerability with regard to defense needs. A clear example: it would have been a terrible decision to allow Qualcomm to be acquired by a foreign entity. But the fundamental problem is Qualcomm's dominant position here.

