

**EVALUATING CFIUS:
ADMINISTRATION PERSPECTIVES**

HEARING
BEFORE THE
SUBCOMMITTEE ON MONETARY
POLICY AND TRADE
OF THE
COMMITTEE ON FINANCIAL SERVICES
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EVALUATING CFIUS: ADMINISTRATION PERSPECTIVES

Thursday, March 15, 2018

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

The subcommittee met, pursuant to notice, at 10 a.m., in room 2128 Rayburn House Office Building, Hon. Andy Barr [chairman of the subcommittee] presiding.

Members present: Representatives Barr, Williams, Lucas, Huizenga, Pittenger, Hill, Emmer, Mooney, Davidson, Tenney, Hollingsworth, Hensarling (ex officio), Moore, Meeks, Foster, Sherman, Green, Heck, Vargas, and Crist.

Also present: Representative Royce.

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

This hearing is entitled, “Evaluating CFIUS: Administration Perspectives.” I now recognize myself for 4 minutes to give an opening statement.

Today’s hearing is the third time in this Congress that the subcommittee has publicly examined the Committee on Foreign Investment in the United States, or CFIUS. While our first two hearings brought together former CFIUS practitioners, industry representatives, and think tank experts, this morning we will be hearing from Trump Administration officials at three of CFIUS’s key member agencies. These witnesses will discuss the current state of CFIUS, its challenges, and those it is likely to face in the future.

Our colleague, Representative Pittenger from North Carolina, along with the gentleman from Washington, Mr. Heck, have introduced legislation that seeks to update the CFIUS process. Everyone I have met with agrees with the goals of CFIUS reform. First, we must improve our security review process to ensure that bad actors do not get American technology or information that can be used against us; and second, make certain that the CFIUS process does not create disincentives for benign foreign direct investment (FDI) in the United States, killing jobs and much needed capital sources for national security advancements.

There are different views on how to achieve these goals and our hearings are intended to show a path forward that will have broad bipartisan support in the same way this issue has always had in this committee. As we move forward in the legislative process, I want to make it clear that we need to be precise about what na-

tional security is and what the real threats or vulnerabilities are and are not.

The security of this country rests on a strong defense and an equally strong and vibrant economy, but our economy will not remain strong or innovative if we unnecessarily block access to it or try to shield it from a free and fair competition. Down that road eventually lies weakness. American workers and American businesses are the best in the world and can compete with anyone, anywhere, anytime if we remove both barriers to their creativity and regulations that stand in the way of progress.

We are very well aware of the threat that the Chinese pose to the American people. In no way do we want important technologies or know-how, that could be used for military purposes, traded to foes under the justification that it is good for business. At the same time, we must also be keenly aware of the benefits that foreign direct investment can provide to the American people. For example, Toyota, a Japanese company, has its largest automotive manufacturing plant in the world located in my district in Georgetown, Kentucky. Thousands of direct and indirect jobs have been created by this investment.

Our default position should always be that foreign direct investment is good for both our economy, our competitiveness, and our security as it contributes nearly \$900 billion in value to our annual GDP and is responsible for 6.8 million high-paying American jobs.

Overshadowing today's debate is the recent use of Section 232 authorities to invoke national security as a justification to impose steel and aluminum tariffs. As the response to these tariffs on Capitol Hill has made clear, there is significant disagreement over their wisdom and their connection to keeping America safe. The tariffs have reminded members that once authorities are delegated by Congress they are no longer under our control and may be used in unforeseen ways and with unintended consequences.

I have personally heard from constituents who fear that closing ourselves to trade will invite retaliation from abroad, even from our allies, which can undermine rather than strengthen our security. We must keep this in mind as our discussion of CFIUS proceeds. Again I want to thank our witnesses in advance for their contributions to this important discussion on how we can properly balance the needs of our economy and our competitiveness with the imperatives of national security.

With that, the Chair now recognizes the Ranking Member of the subcommittee, the gentlelady from Wisconsin, Gwen Moore, for 5 minutes for an opening statement.

Ms. MOORE. Thank you so much, Mr. Chairman, and as always I really look forward to benefiting from the wisdom of our expert witnesses here today.

I really do want to start out by acknowledging the tremendous work effort that you, Mr. Chairman, have put into this, and others on this committee like Mr. Pittenger and Mr. Heck put into this legislation. We live in a world that is increasingly changing and requires us to continue to refine and enhance our regulations, especially this regulatory tool that has national security implications. I might add, Mr. Chairman, I am relieved to know that the major-

ity does see someplace for regulation and restraint in this ever-changing environment.

Situations have been presented where the current CFIUS regime seems deficient and I think we can easily reach a bipartisan consensus on many of these circumstances and expand CFIUS in ways that address holes while continuing to encourage foreign direct investment in the United States. I think where I may have some pause with some proposals, I think they have moved beyond the intent of CFIUS and require a larger conversation which will include a review of our export regimes and of course it will require a lot more staffing resources.

Now all this can happen, but I don't want to overlay competing regulatory regimes that are not rational and harmonious. I understand that the majority plans to hold a few more hearings on this important issue, so I think we have time to continue this discussion and drum out a product that we can all agree upon and address the concerns of members and stakeholders. I want to thank you again, our witnesses, and I want to yield the last 2 minutes to Mr. Heck.

Mr. HECK. Ranking Member Moore, thank you very much. Chairman Barr, I appreciate your convening this hearing. I want to begin by thanking our witnesses. I appreciate not only your appearance today, but the important work you do in keeping us safe.

I am proud to represent Joint Base Lewis-McChord which is the U.S. military's premier West Coast power projection platform. For me and the community I represent national security is personal. If my friends, family, and neighbors must head into battle I want them to have every advantage possible. I want our capabilities to be strong enough, unique enough to be a deterrent to potential adversaries picking a fight in the first place. CFIUS is how we protect that technological edge. It is obscure but incredibly important. Let's be clear, there are strategic competitors who want what we know. We have seen the DIUx report on Chinese technology transfer strategy and this committee unanimously recognized aggressive Chinese industrial policy as a significant challenge facing CFIUS during our budget view markups last week.

I ask unanimous consent, Mr. Chair, to enter into the record two letters from CFIUS about the recently blocked Broadcom bid to buy Qualcomm which have already been released into the public domain. Our witnesses today are barred by law from discussing specific transactions in an unclassified setting, so I encourage my colleagues to read them. In my view, the letters make clear that Broadcom had taken repeated action in defiance of CFIUS interim orders to preserve the status quo while they reviewed the transaction including initiating steps to redomicile to the United States potentially causing CFIUS to lose jurisdiction.

There are companies who are seeking to do an end run around the rules set in place to ensure foreign investment does not harm our national security. Now if we are in a race for the latest technology, I will be the first to say we are not going to win unless we run faster by investing in our knowledge and our infrastructure and do more to make sure that nobody in this country is left behind. I want the U.S. to remain a great place for foreign investment because we can't accomplish those goals without it.

But I think it is also important to keep the other guys from cheating, and protecting ourselves against underhanded tricks. That is why we need a modernized, well-resourced CFIUS process. Congressman Pittenger, Senator Feinstein, Senator Cornyn, and I worked together on the bill to accomplish that—FIRRMA. Since we introduced that bill in November, we have been working closely with CFIUS to incorporate feedback into the bill to make it stronger and even more tightly focused on the national security gaps we need to address.

The progress we have made is in large part thanks to the critical and constructive engagement of our witnesses today. While we are still working through some issues, principally resources, I look forward to addressing those and to your testimony today. Nobody knows CFIUS like you do and your knowledge will be invaluable as our committee moves forward on this issue. Thank you very much, Mr. Chairman.

Chairman BARR. The gentleman's time has expired and the Chair now recognizes the Vice Chair of the Subcommittee on Terrorism and Illicit Finance, the author of the legislation in question, the gentleman from North Carolina, Robert Pittenger, for 1 minute for an opening statement.

Mr. PITTENGER. Thank you, Chairman Barr, for your leadership and calling this hearing. Thank you to the witnesses for being with us today. There are significant gaps in CFIUS' ability to fulfill its responsibility to protect the U.S. from foreign investments that threaten our national security. Our adversaries, the Chinese Government in particular, are aware of CFIUS deficiencies and are actively exploiting them.

Specifically, the Chinese Government has used weaponized foreign direct investment to evade our safeguards and review processes in order to acquire state-of-the-art, military-applicable technologies from U.S. firms. In recent years, we have seen a massive transfer of dual use technology from U.S. firms to Chinese entities with close ties to the Chinese Government. This technology and know-how has been instrumental in China's military buildup and modernization efforts and has denigrated America's military industrial base and alarmingly depleted our technological superiority.

Mr. Chairman, this is a very serious problem that needs to be addressed with diligent haste. As I detailed in my op-ed for the Washington Journal published this morning, export controls alone are not capable of protecting the U.S. from harmful foreign investment. Last fall, I introduced bipartisan legislation called the Foreign Investment Risk Review and Modernization Act, which modernizes CFIUS' process by addressing national security deficiencies in a measured and highly targeted manner. FIRRMA has been endorsed by the White House and is the product of nearly a year of outreach with close collaboration with Treasury, DOD, DOJ, ODNI, and DHS.

Years of Chinese exploitation of CFIUS and outdated processes has been detrimental to U.S. national security. This is a serious problem that we must address now and my bill does that in a diligent and laser-focused manner.

Thank you, Mr. Chairman. I yield back.

Chairman BARR. Thank you and the gentleman's time is expired. Today we welcome the testimony of the Honorable Heath Tarbert, Assistant Secretary for International Markets and Investment Policy at the U.S. Department of Treasury. Dr. Tarbert oversees a diverse portfolio of issues in Treasury's Office of International Affairs. He focuses on investment security, supporting the work of the Committee on Foreign Investment in the United States to promote U.S. investments while protecting national security. The Assistant Secretary earned his JD and SJD from the University of Pennsylvania and his Ph.D. in Philosophy from Oxford University.

The Honorable Richard Ashooh, Assistant Secretary for Export Administration, U.S. Department of Commerce, in this role he is responsible for the U.S. dual use export control policy and also participates on the Committee on Foreign Investment in the United States. Prior to assuming his current role, he served as the Director of Economic Partnerships at the University System of New Hampshire, the Executive Director of the Warren Rudman Center at the University of New Hampshire School of Law, and was a Senior Executive in the aerospace industry working for both Lockheed Martin and BAE Systems.

Mr. Eric Chewning, Deputy Assistant Secretary for Manufacturing and Industrial Base Policy (MIBP) U.S. Department of Defense, in this capacity he is the Principal Advisor to the Undersecretary of Defense for Acquisition and Sustainment for analyzing the capabilities, overall health, and policies concerning the industrial base on which the Department relies for current and future warfighting capabilities and requirements. MIBP is also responsible for developing the Department's position on the business combinations and transactions, both foreign and domestic, that shape and affect national security. The Deputy Assistant Secretary is a U.S. Army veteran that served in Operation Iraqi Freedom and he has earned his MBA from the University of Virginia.

Each of you will be recognized for 5 minutes to give an oral presentation of your testimony. Without objection, each of your written statements will be made part of the record.

Assistant Secretary Heath Tarbert, you are now recognized for 5 minutes.

STATEMENT OF HON. HEATH TARBERT

Mr. TARBERT. Chairman Barr, Vice Chairman Williams, Ranking Member Moore, and distinguished members of the subcommittee, thank you for the opportunity to testify in support of FIRRMA and about CFIUS more generally. I would also like to thank Representatives Pittenger and Heck for their bipartisan leadership on the bill.

My top priority as Assistant Secretary is ensuring that CFIUS has the tools and resources it needs to perform its critical national security function. I believe FIRRMA, a bill introduced with broad bipartisan support, is designed to provide those tools and resources. FIRRMA will protect our national security and strengthen America's longstanding open investment policy.

The United States has always been a leading destination for investors. Alexander Hamilton argued foreign capital is precious to economic growth. Foreign investment provides immense benefits to

American workers and families such as job creation, innovation, and higher median incomes. At the same time, we know that 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 and World War II, cross-border capital flows fell dramatically. In the boom years of the 1950's and 1960's, 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 economically isolated from us.

But when the post-war trend changed in the 1970's, 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 committee structure and process. Now we find ourselves at another historic inflection point. The foreign investment landscape has shifted more than at any point in 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 95 or so, to nearly 240 last year.

But it is the complexity and not simply the volume that has placed the greatest demand on our resources. In 2007, about 4 percent of the cases went to the more resource-intensive investigation stage. 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 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.

New risk require new tools. 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 to include certain nonpassive 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 national security concerns to those we can 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 simi-

lar threats and incentivizes our allies to work with us to address those threats.

Finally, FIRRMA acknowledges that CFIUS must be appropriately resourced. Since testifying in the Senate in January, I have been meeting regularly with the Members of Congress, the business community and other stakeholders to hear their views on the bill. While some have proposed changes, all agree on an essential point, Congress needs to pass CFIUS in one form or another. As a result of these meetings, we have been working on proposed technical amendments to address jurisdictional gaps while encouraging investment in our country.

There is only one conclusion, CFIUS must be modernized. In doing so, we must preserve our longstanding open investment policy, we must also protect national security. These twin aims transcend party lines and they demand urgent action. I look forward to working with the subcommittee to improving and advancing FIRRMA. Thank you.

[The prepared statement of Mr. Tarbert can be found on page 49 of the appendix.]

Chairman BARR. Thank you, Secretary Tarbert.

Now Assistant Secretary Richard Ashooh, you are now recognized for 5 minutes.

STATEMENT OF HON. RICHARD ASHOOH

Mr. ASHOOH. Thank you, Mr. Chairman, and thanks to you and Ranking Member Moore and the members of the committee and also in particular to the sponsors of FIRRMA for your important leadership on this issue. I appreciate the opportunity to testify before the subcommittee today on CFIUS and to share the perspective of the Department of Commerce in this area both as a member of CFIUS and also as an export control agency.

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, as the regulatory authority for the licensing and enforcement of controls on dual use items, which are items that have civilian end use but could also be used for a military or proliferation related purpose and that also includes less sensitive military items.

The export control system 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. Further, the export control system benefits from close cooperation with our international partners through four major, multilateral 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 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 over the recipient country.

The EAR also includes lists of end users of concern that trigger extraordinary licensing requirements as well as prohibitions on 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. BIS's 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. In fact, just recently BIS, in conjunction with other Federal law enforcement agencies, announced 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 national security and export controls dealing with the transfer of U.S. goods, software, and technologies 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, if enacted, would 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 export control authorities remain distinct, will enable stronger protections of U.S. technology. The Department of Commerce looks forward to working with the committee and bill cosponsors on this important effort. Thank you and I would be pleased to take your questions.

[The prepared statement of Mr. Ashooh can be found on page 40 of the appendix.]

Chairman BARR. Thank you.

Now Deputy Assistant Secretary Chewning, you are now recognized for 5 minutes.

STATEMENT OF ERIC CHEWNING

Mr. CHEWNING. Thank you. Mr. Chairman, Ranking Member Moore, and members of the subcommittee, thank you for the invitation to share the Department of Defense's role in CFIUS. Protection of our national security innovation base from strategic competitors like China and Russia is an increasingly important priority of the Department and I appreciate the opportunity to speak with you this morning.

The Defense Department strongly supports modernization of the CFIUS process to ensure the interagency committee has the authorities required to address the evolving risks to our national security. We are thankful for the broad bipartisan support for the FIRRMA legislation. To quote Secretary of Defense Mattis who stated this Department's position in his letter of support, the DOD depends on critical, foundational, and emerging technologies to maintain military readiness; preserve our technological advantage over potential adversaries, FIRRMA would help close related gaps.

I have spent the last 17 years working at the intersection of national security, industry, and finance in both the private and public sectors. It is important that this bill not be considered an additional regulation on business. Under this bill, the United States should and will likely continue to welcome the vast majority of foreign investment that does not present any threat to our national security. Rather, this bill should be considered a whole of Government response to our critical national security challenge, an insurance policy on the hundreds of billions of dollars per year we invest in our own defense industrial base.

But most importantly, this bill will help safeguard our sons and daughters who volunteer to step into harm's way armed with the weapons that that industrial base produces. Simply put, United States military fights and wins wars through the unmatched performance of our men and women in uniform and our superior military technology. Knowing this, our competitors are aggressively attempting to diminish our technological advantage through a multifaceted strategy by targeting and acquiring the very technologies that are critical to our military success now and in the future.

China in particular publicly articulates its policy of civil-military integration which ties into the intentions for it to become the world leader in science and technology and to modernize its military in part by strengthening its own defense industrial base. While methods like industrial espionage and cybertheft are clearly illegal, other approaches including technology and business know-how transferred through acquisitions of U.S. companies may not be. Acquiring or investing in U.S. companies offers an opportunity for our competitors to gain access and control over technologies with potential military applications, enabling them to create their own indigenous capabilities ultimately eroding our technological edge and military advantage.

The current CFIUS authorities are limited to investments that would result in a foreign controlling interest. There are other transaction types such as certain joint ventures and nonpassive, noncontrolling investments that pose national security concerns such as technology transfer of critical capabilities. Additionally, the purchase of real estate by foreign persons provides opportunities to

potentially establish persistent surveillance near sensitive military sites and this would currently fall outside CFIUS' scope to review.

The Department of Defense does not view CFIUS as a panacea. Instead, it is part of a layered defense that can along with export controls and other regulatory mechanisms stem the flow of critical technologies to our potential adversaries. In order to do that, however, CFIUS authorities need to adjust to keep pace with the rapid change of technology. Let me add one more important point as I conclude my remarks.

While the Department of Defense believes defensive measures like CFIUS modernization are necessary, they alone are not sufficient for winning a technology race. We must be proactive to ensure we improve our technology and innovation base because our future economic security will be a key determinant of our national security.

I would like to close with another statement from Secretary Mattis. I strongly support the Foreign Investment Risk Review Modernization Act of 2017. The Defense Department continues to support foreign investment consistent with protection of national security. However, as the national security landscape changes, the existing processes and authorities must be updated.

Thank you very much for the opportunity to testify on this important topic, and I look forward to working with the subcommittee to improve and advance FIRRMA.

[The prepared statement of Mr. Chewning can be found on page 44 of the appendix.]

Chairman BARR. Thank you all for your testimony, and the Chair now recognizes himself for 5 minutes for questioning. I will start with you Secretary Tarbert. Thank you again for your testimony.

I recognize that you cannot talk about some of the specific circumstances related to the Broadcom Qualcomm decision but, generally speaking, does CFIUS currently have and should it have the authority to block deals that may not in themselves compromise national security but could give an adversary that is unrelated to the specific transaction a competitive edge?

Mr. TARBERT. I think that CFIUS currently is focused solely on national security and our view is that it should continue to be focused solely on national security. It would depend on the various facts and circumstances of the transaction, but if that competitive edge had no major national security implications then I would say no. CFIUS is focused solely on national security.

Chairman BARR. Obviously the definition of national security is really critical in establishing those boundaries and those limits. In the case of 5G wireless technology, can you just discuss how that does implicate national security potentially?

Mr. TARBERT. I am not sure if I can. I think to be most helpful to you, I would recommend a classified briefing on the transaction as well the specific national security rationale for the transaction.

Chairman BARR. OK, thank you for that.

Let me go to Secretary Ashooh. As you discussed in your testimony, both CFIUS and the export control systems are vital in terms of advancing our national security interests and you testified that it is important that remain complementary and not overlap unnecessarily as that has the potential to overburden the CFIUS

process and potentially duplicate the more comprehensive coverage of technology transfer under the export control system.

Could you give us your thoughts in terms of the FIRRMA legislation, how we can structure reform and make the necessary modernization of CFIUS without duplicating your jurisdiction if Commerce already has experienced doing this and doing it quickly and tailoring controls beyond a single transaction?

Mr. ASHOOH. Thank you, Mr. Chairman. In any situation where you are expanding authorities, and by the way I am aware that there is an effort underway in the House Foreign Affairs Committee to expand and modernize the Export Administration Act, so we have a lot of legislating that is necessary. Any time you expand in that way you need to make sure that you are going to continue the good relationships between authorities that have worked so effectively as CFIUS and export controls have.

In this particular case, CFIUS and the export control system are both well designed to do different things. CFIUS is very well designed to be a transactional review which oftentimes is necessary whether or not there is a technology transfer issue, whereas the export control system really is not focused on particular transactions and in fact is agnostic to them. What it does do well is focus on the very specific nature of the national security threat from a technology transfer.

As a participant in both processes, I have the unique experience of seeing how they not only work together but support each other. As we grow authorities that is where we need to make sure that they work as designed.

Chairman BARR. Assistant Secretary Tarbert, could you also offer your views about how we can update CFIUS without duplicating the efforts of the export control system?

Mr. TARBERT. Absolutely, and my colleague is exactly right. We view it, we view the regimes as mutually reinforcing. I think the JV provision which you may be talking about or referring to implicitly, that is meant not to simply be a technology transfer provision but it is very specifically meant to be a situation where you have what is, in effect, an acquisition by another name where someone, a foreign actor, is getting the capability of a U.S. business and replicating it overseas when they could only get that capability if they had otherwise bought the business here in the United States.

We want to make that distinction clear and I think we have some technical amendments that can help clarify that even further to ensure there is no unnecessary duplication.

Chairman BARR. You would contemplate that those technical amendments would clarify which joint venture arrangements look more like a transaction or a concealed, disguised transaction versus those joint ventures that would not be implicated in CFIUS jurisdiction.

Mr. TARBERT. As well as those joint ventures that are already subject to specific licensing under other regimes where there is adequate and independent authority that is addressing them.

Chairman BARR. Thanks for your assistance on that. My time is expired and the Chair now recognizes the Ranking Member, Ms. Moore, for 5 minutes.

Ms. MOORE. Thank you so much, Mr. Chairman. Let me thank the witnesses once again, and welcome to the committee. I have a couple of questions. I would like to, and I indicated this in my opening comments that I was concerned about the expanded jurisdiction that FIRRMA, that this legislation would require. I was wondering if there was any notion about the numbers of full-time employees or budgetary authority that you would need in order to do an adequate job of the expanded responsibilities that are being proposed.

Mr. TARBERT. I will go first, if I may.

Ms. MOORE. Right.

Mr. TARBERT. FIRRMA does very specifically address the resource issue or acknowledge that there needs to be resources. But the other thing before we even get to the resources that FIRRMA does is it allows, as I mentioned in my testimony, the tailoring to make sure that really what FIRRMA does is it acknowledges that CFIUS doesn't need to look at every transaction, but we really only want to be focused on those transactions that are most likely to raise national security concerns.

Before we can even gauge the amount of resources, I think we want to focus on tailoring the bill both on the text itself as well in the regulations so the actual transaction—

Ms. MOORE. OK, I get that. But you would have to look at in order to tailor it or narrow it, you would still have a much broader range of things you were looking at so it would require resources.

Mr. TARBERT. It would, absolutely.

Ms. MOORE. You don't have a number or anything?

Mr. TARBERT. We are working on that now, but I think we—

Ms. MOORE. Anybody else have any notion of some concrete number of employees or departments or offices that would have to be created?

Mr. ASHOOH. We are certainly trying to do some thoughtful planning. But it is important to reiterate that CFIUS, right now the caseload is at a historic high and so we are actively seeking resources to meet the current challenges that we are facing.

Ms. MOORE. Exactly, because sometimes you have to ask people to restart the application process, redo it in order to give yourselves more than that 30-day time. My time is waning, so let me move on.

You say, I think it was Mr. Ashooh, you talked about real estate transactions, something other than intellectual property and sensitive technology, you brought in real estate transactions. I am concerned about real estate and the transactions that are done anonymously through shell corporations and I am thinking now of course of Trump Tower where we have numbers of Russians and Chinese that are buying real estate and I am wondering if these are the kinds of transactions that would trigger a review.

Mr. ASHOOH. It was not I that mentioned the real estate provision so I may defer to my colleague from Defense, but I do believe that is an important provision. There has certainly been in my experience a gap in CFIUS's authorities to be able to address real estate transactions that could pose an opportunity for nations who would appropriate our technology to perform intel activities. But I will ask DOD to reinforce.

Mr. CHEWNING. Yes. No, and I think just to use a hypothetical situation, if there was a piece of real estate outside of Joint Base McChord and it didn't have a business on it, right now somebody could go ahead and buy that if it was just real estate and potentially set up a surveillance operation to surveil what is going on on the post. If it had a lemonade stand on it, it would constitute a business so it would potentially come under current CFIUS jurisdiction.

I think as we are thinking about the need for modernizing CFIUS it is just like let's look at raw real estate purchases next to military installations.

Ms. MOORE. We have seen, for example, just reported in the news recently President Abe in Japan, bought real estate that belonged to the Kushners and it is just sitting there doing nothing. Would that generate some review where there is no activity in an investment?

Mr. CHEWNING. The way we approach CFIUS cases now centered around what we call risk-based analysis has three parts—threat, vulnerability, and consequence—so transactions are viewed along that lens.

Ms. MOORE. OK. All right, well, thank you very much and I yield back.

Chairman BARR. The gentlelady yields back.

The Chair recognizes the Vice Chairman of the subcommittee, Mr. Williams from Texas.

Mr. WILLIAMS. Mr. Chairman, thank you for your leadership on this important issue and to all the witnesses thank you for your testimony this morning and for your committed service to the American people.

Foreign investment in the United States touched each and every American in one way or another and I represent an extremely diverse district with one of the Nation's premier military installations, Fort Hood. I represent a booming technology and a welcoming business environment. These factors are all reasons why it pays to do business in Texas, as I like to tell people, and certainly in our District 25.

The pervasiveness of Chinese influence is growing. As we continue to discuss CFIUS reform we must be committed to finding the right solutions, so such an important tool cannot be left to chance and we must ensure that we do our due diligence. I look forward to your responses this morning; appreciate the ones you have given us in the past.

Secretary Chewning, I just want to continue to talk a little bit about, as I said, I represent Fort Hood, one of the largest military installations in the world. As you are aware, wind energy and foreign energy investment around our Texas bases has been an ongoing point of discussion for several years and it is my hope that any policy change is in the best interest of soldiers and their families in my district.

Some CFIUS observers believe that purchase of real estate which we have been talking about near military bases or other sensitive locations is not a transaction CFIUS can review. My question would be, according to a 2016 GAO (Government Accountability Office) report DOD has made limited progress in conducting risk as-

assessments on foreign encroachment on military bases so how can CFIUS effectively review real estate transactions near such sites if you have not implemented GAO's accounting recommendations?

Mr. CHEWNING. Thank you for the question, Congressman. I spent time at Fort Hood, in my time in the Army, so I appreciate the beautiful hill country there and the concerns you have outlined. We are working on looking at that issue here specifically. It harkens back to a couple of other questions around resources, hypothetically around how we can improve what we are doing isn't just additional resources but it is process improvements.

For example, if there were a transaction that would involve a change of control that has, let's say, 1,400 different subsidiaries in the United States, right now we have to go request the information for all those different locations, physically have an analyst go input those addresses, identify the locations, and then cross-queue them against military installations. As you might imagine that is a very time-intensive effort.

What we would like to do is move to a model where that can be automated where we would require geolocation information to be provided that then we could very quickly do that through a larger technology solution set. Ideas like that in addition to the ability to cover a broader set of transactions are how we plan on balancing.

Mr. WILLIAMS. OK, thank you.

Secretary Tarbert, good to see you. In the subcommittee's oversight hearings we have consistently heard that the CFIUS resources are stretched thin. Again we have talked a little bit about that. The caseload has reached record highs due to enhanced scrutiny and the increased complexity of deals. Do you believe that CFIUS is sufficiently resourced to each of its member agencies and, if not, how does the present Fiscal Year 2019 budget allow CFIUS needs to be fully funded?

Mr. TARBERT. I can't speak for the other agencies in the committee but I can speak for Treasury. Right now we have resources available to meet the statutory obligations and we are meeting the statutory obligations. That said, our people who are absolutely top-notch are working long, hard hours and so we are committed to making sure that there is adequate resources there.

CFIUS at Treasury does not have a specific line item, but we are part of the departmental offices and so one of the things we are looking at is ensuring that all departmental offices meet their obligations and that could mean shifting resources inside of Treasury to ensure that CFIUS has what it needs. It is a big priority to the secretary.

Mr. WILLIAMS. Thank you. Another question for you, Mr. Secretary, is some proposals to modernize CFIUS could increase the time a case could be examined by the committee by nearly half at a time when companies are grumbling the committee already takes far longer to complete its work than the statutory 75 days.

Could you please advise us on the balance between the necessary time for adequate review and the point of which a review just takes too long, recognizing that the review has to have adequate time to be done correctly? Is there a danger that at some point investors just throw up their hands and invest elsewhere?

Mr. TARBERT. Thanks for that question. The number one thing as you said is making sure we actually have adequate time to do the national security review. I actually think with the changes that FIRRMA is bringing the average case time, particularly for those cases that can be cleared more easily, will be shortened. Two reasons for that, one is the review period will be lengthened by 15 days. But, paradoxically, I think it will actually shorten the period because right now we have a lot of cases that normally would be cleared in 30 days that are getting kicked to the 75 days. By making it 45 days I think we will be able to clear a lot more, quicker.

Also there is the declarations provision in there which allows short form filings for those cases that can more easily be put through and again I think that will also shorten the time. Finally, I would mention that many of our other countries that have similar security screening programs are much longer than ours than even now and even what they potentially could be at the longest under FIRRMA.

Mr. WILLIAMS. Thank you for your testimony. I yield back.

Chairman BARR. The gentleman yields back.

The Chair now recognizes the gentleman from New York, Mr. Meeks.

Mr. MEEKS. Thank you, Mr. Chairman. Thank you for your testimony. Thank you for being here today. Let me ask a question. Historically, the CFIUS analysis always focused primarily on, and I guess what you are talking about when you said, national security and now I think what you are also saying that we need to expand the concern, expand CFIUS, its role. I think the Chairman asked a question and where I am getting confused, if we are going to expand CFIUS' role shouldn't we have a clear definition of what is national security or its national security mandate, because otherwise we create uncertainty for companies, for both U.S. companies and foreign companies, and that could have a negative economic impact here in the United States when it comes to foreign direct investments of trade and outbound transactions? My question is can you clarify then what is national security because it seems like we are just broadening what CFIUS is.

Mr. TARBERT. Thank you. Just to be clear, I think for the most part FIRRMA is not trying to broaden the definition of national security but simply broaden the types of transactions that are potentially reviewable. The statute lists a number of factors that constitute national security and we want to make sure they are clear. At the same time, I guess national security concerns are changing over time so we would want some flexibility to keep up with new national security threats.

That said, our concept of national security is based ultimately on a national security threat assessment by the intelligence community which also feeds into the Defense Department's input. It is certainly not any economic benefits test or anything of that nature. I yield to my colleague at the Defense Department to maybe offer some more points on that.

Mr. CHEWNING. If I might, I think that is right. At the heart of CFIUS is the RBA, the risk-based assessment. We think about it in terms of the threat, vulnerability, and consequences, that the threat piece is informed by a national intelligence estimate from

the intelligence community, and then there is dialog on the committee about how to think about what that means, what the potential implications are based on our various stakeholders.

Within the Department of Defense I represent 33 different equity holders who may have a concern with a particular transaction and what I personally appreciate about the process is there is a discussion around those three elements. For a case to go to the President there has, thus far, always been consensus around that.

Mr. MEEKS. All right. My concern just is that I was thinking if there are enough controls currently to prevent CFIUS from misusing its authority to thwart transactions for reasons that may be loosely associated with national security so for other reasons, and it should be tight.

But I am running out of time. I have another question I just want to ask Mr. Tarbert. For decades, the United States has issued a formal open investment policy statement clearly articulating that it is open for foreign direct investment and recognizes the contributions that these investments bring. However, the Administration, the current Administration, has yet to do so.

With 232 tariffs and recent CFIUS action it is time that I think we should reassure the world that we are indeed open for business and want global companies to locate here. As you mentioned, the Administration's commitment to an open investment policy, is the Administration going to formally issue a statement as has been done for decades?

Mr. TARBERT. That is obviously a question for the White House and the President, but we do support an open investment policy. In the endorsement of FIRRMA that came out from the White House there was a specific statement about it, open investment policy.

Mr. MEEKS. I just asked because you said, and I haven't heard it, haven't happened yet, and I know in talking to some of our companies both ways they are waiting for the statement from this Administration. They are concerned when we hear the way the Administration is moving with regards to the tariff issue.

The other concern that I have, because whether we like it or not our economy is global and there is no way of putting that genie back in the box as the way many folks would like to, it is a global economy. Countries can put forth policies to protect their companies from globalization but those countries, I believe, will do so at their own peril.

Considering that many U.S. companies are in fact international in scope, do you have any concerns that CFIUS', or if CFIUS' overreach can disadvantage U.S. companies by limiting their access to non-U.S. technologies and could this encourage the offshoring of research and development?

Mr. Ashooh?

Mr. ASHOOH. I am happy to respond. Thank you for the question. Certainly from an export control perspective, and again this is why export controls and CFIUS need to work well together, we want to be as narrowly focused on what we control so that the things we don't control can be free to be traded and commercialized. That is the primary precept of what informs us as we go forward not only

in reviewing how we need to address emerging threats, but also expanding FIRRMA.

There is no question that there are advantages to having a system, and by that I mean advantages to companies and innovators to do that work here under a system, that does protect technology that is developed here. We believe it is a reassuring state of affairs when we are prepared to protect that technology.

Chairman BARR. The gentleman's time has expired.

The Chair would now recognize the gentleman from Oklahoma, Mr. Lucas.

Mr. LUCAS. Thank you, Mr. Chairman, and I appreciate you holding this hearing as we continue to look at the CFIUS reform process. Just so the panel is aware, I represent a region that is heavy in the oil and gas industry and thus would like to discuss with the panel how CFIUS deals with the purchase of energy assets.

First off, I will note for our witnesses the currently, nearly 30 percent of the U.S. refining capacity is foreign owned and I don't just mean the owners are foreign, but in this situation, in this instance, most such owners are state-owned or state-sponsored enterprises. My concern about this should be obvious. These are primary assets that have a large effect on the American economy and yet they are in the hands of foreign state-owned enterprises. In addition, often foreign owners refit their refineries to match their own product making it harder to refine oil and gas extracted in the United States.

I want to make sure these transactions are accounted for as a part of the CFIUS reform act. One complication, however, is that such transactions are increasingly complicated which makes CFIUS review harder. For example, in order to get a loan from Russia it appears that Venezuela put up energy infrastructure in the United States as collateral. Imagine the consequences of that, the Russians being able to expand their ownership of critical energy infrastructure in the event of a default without a public transaction. I would note also that Saudi Aramco not only attempted to purchase a major facility in Port Arthur, Texas in recent memory, but is currently the owner of one of the largest refining facilities in the country after dividing up a joint venture.

Number one, Mr. Chewning, as an initial matter, do you think it would be fair to characterize refineries and pipelines as critical assets?

Mr. CHEWNING. Thank you, Congressman, and we agree with you. It is complicated, which is why the need for both CFIUS and export controls is necessary as an interlocking defensive system. To your question specifically, we would evaluate that transaction through the same lens of what is the threat, the vulnerability, and the consequence. If the critical infrastructure at the time, given who the potential buyer would be, was evaluated as a potential threat to national security then we would, and then we would want to look at it and have a conversation on the committee.

Mr. LUCAS. In particular, if the enterprise, the transaction involved a state-owned entity it most assuredly would get that review, I would hope.

Mr. CHEWNING. I think that the view on what that threat and the potential vulnerability would probably determine the nature of who the state owner was.

Mr. LUCAS. Mr. Chairman, I also want to point out for everyone here that this is a real concern for the booming and very successful energy industry in the United States. We are on a path to being a net energy exporter in only a couple years. We were net energy exporters until, I believe, 1958 in particular in crude oil. Energy independence depends on being able to maintain our assets and our place.

One other question while I am on the topic, and I would turn to Mr. Ashooh for this, explain to us in general terms, and anyone on the panel who would care to follow up I would appreciate that, how do you make the distinction under present law or the proposed law about how we deal with technology when, say, on one hand it might involve older, more widely available technology; on the other hand cutting-edge technology, things—we don't care about who can make a vacuum tube anymore, but once upon a time it mattered. How do you sort out the difference between new and old, what is relevant and what is not relevant? Thumbnail sketch, if you would.

Mr. ASHOOH. Well, thank you. That is core to what we do at the Bureau of Industry and Security. We are constantly reviewing the commerce control list which is where the things we are concerned about go and the things that we are not concerned about, the vacuum tubes, are removed from. To my earlier point so that we are not over controlling and focus instead on the things that are a threat, we do that through several ways. One important way is certainly the BIS staff, which includes scientists and engineers and subject matter experts, which again also provide their expertise in the CFIUS process.

But then, second, we deeply rely on technical advisory committees which draw from private sector subject matter experts because that is where the new technology is coming from and we actively engage them through these technical advisory committees to help us sort out that very question.

The final point, I would say, is those technical advisory committees also have robust interagency participation so we routinely have Department of Defense, Department of Energy, and other representatives there so that they are also able to understand from that subject matter expert domain what matters and what doesn't.

Mr. LUCAS. Because, after all, we only want to protect the things that must be protected. We don't want to broad brush resources, assets, technology that really doesn't make a difference in our day-to-day existence.

Mr. ASHOOH. Exactly, sir. Exactly.

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

Chairman BARR. Thank you. The gentleman yields back.

The Chair now recognizes the gentleman from Texas, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman. I thank the witnesses for appearing, I thank the Ranking Member as well, and of course I thank the members who have been working on the legislation.

Let's take a hypothetical situation. Let's assume that we have as President a billionaire who has worldwide investments, any resemblance is just coincidental, and let's assume that his worldwide in-

vestments are huge. With this as a possible possibility, can you give me an example of when these worldwide investments might become of concern to CFIUS?

Yes, sir?

Mr. TARBERT. Thank you. I am not sure if we can provide a specific example, but—

Mr. GREEN. No, no. Not a specific example that relates to anything that is in fact in existence, just give me an example of when a worldwide investment would become of concern.

Mr. TARBERT. It might be helpful to give you the analysis that we would go through.

Mr. GREEN. I would really prefer an example. Just give me an example of when a worldwide investment, one of them, a billionaire president, there has to be a circumstance when one of those investments could become of concern. Just give me an example. It doesn't have to relate to anyone. This is a hypothetical.

Mr. TARBERT. I am not sure. Every—

Mr. GREEN. You can think of no example of when that would become of concern to CFIUS?

Mr. TARBERT. I am sure there are instances when potentially some type of transaction—

Mr. GREEN. Give me an example.

Mr. TARBERT. —depending on the specific—

Mr. GREEN. Well, just give me an example.

Mr. CHEWNING. A billionaire, multinational person, Bruce Wayne as an example—

Mr. GREEN. OK. I am good with that.

Mr. CHEWNING. If Bruce Wayne owned a defense company, if that defense company—

Mr. GREEN. He is president, go ahead.

Mr. CHEWNING. No. If that defense company—

Mr. GREEN. In my example he is.

Mr. CHEWNING. If that defense company was acquired by a non, if a non-U.S. entity wanted to make a controlling interest in that defense company that would fall under CFIUS review.

Mr. GREEN. Well, let's take another possible example. Let's assume that this billionaire's son-in-law met with some foreign investors at the White House. Let's assume that after that there was an offer to finance a piece of property that this son-in-law who is an investor had. By the way this is a hypothetical. If we took a real case someone might say well, that never happened so it didn't happen, but would CFIUS be concerned?

Mr. TARBERT. If the case was filed before CFIUS?

Mr. GREEN. Yes.

Mr. TARBERT. National—yes.

Mr. GREEN. Would you be concerned?

Mr. TARBERT. The intelligence community would perform a national security threat analysis that would involve looking at the individuals who purchased the property, their potential intentions and capabilities as well as the vulnerabilities in the property itself and that would yield the committee's analysis.

Mr. GREEN. Given that there are circumstances where you would be concerned, would it be a benefit to know what this hypothetical

billionaire investment actually has invested in on a worldwide scope?

Mr. ASHOOH. Sir, I might jump in to say this is, you are making actually an argument of why FIRRMA is important because right now the way CFIUS works is it is a voluntary filing system. Under certain conditions under FIRRMA there would be more mandatory filings and that would certainly allow CFIUS to increase its scope into transactions, in particular complicated ones. There are a number of ways that CFIUS is not able to review transactions because of the complicated nature of the investments and FIRRMA would approve our ability to do that.

Mr. GREEN. I thank you for that indication because I am concerned about investments that are worldwide that we may not have knowledge of because this billionaire who happens to be President doesn't share a lot of intelligence with us and ultimately makes a lot of decisions about investments that may conflict with what he is doing. I think Mr. Trump ought to be scrutinized a bit closer and I hope that this legislation will help us do that. I yield back.

Chairman BARR. The gentleman yields back. The Chair recognizes an author of FIRRMA, the gentleman from North Carolina, Mr. Pittenger.

Mr. PITTENGER. Thank you, Mr. Chairman, and again thanks to the panelists. Considering the public statements of our adversaries, competitive adversaries, particularly President Xi, can we afford to delay CFIUS any longer even 6 months? What is the impact of their aggressive interest to acquire our intelligence and our technology?

Mr. CHEWNING. Congressman, I don't believe we can delay 6 months. We are very concerned about erosion of our technological advantage.

Mr. ASHOOH. Sir, and I would add, and I assume you mean FIRRMA, a delay in—

Mr. PITTENGER. Yes.

Mr. ASHOOH. I would quote the Secretary of Commerce who essentially said, "a delay, any day that we delay is an additional day of risk."

Mr. TARBERT. As I said in my testimony I believe it demands urgent action.

Mr. PITTENGER. Thank you. For clarification, would you kindly tell us the distinctions between CFIUS and export control? I want to be real clear if updating export control alone would that solve the gaps that we have identified? Dispel the rumor, if you would, please, that CFIUS and export controls are competing functions.

Mr. ASHOOH. Sir, I would be happy to and I thank you for the question because it is an important one. CFIUS is a tool many people understand. Foreign transaction, it is relatively easy to understand, export control system is not. As one who again participates in both processes and in my private life was part of a company that was, if you will, CFIUS, I have a perspective from several angles and I can tell you that both systems are essential. Both systems not only should, but must support each other because they bring different strengths to the table.

As far as one against the other, the threats that we are dealing with—and I took on this role approximately 6 months ago and

since that day I have been dealing day in and day out with the threats you mention—we cannot do it with one authority alone. We need several. Both the export control system and CFIUS need to be adaptable to this wave of threats that we are experiencing. I have said it before, but I am grateful for your leadership on this issue because it is needed.

Mr. PITTENGER. Thank you.

Secretary Talbert, the current CFIUS process, do you believe it is an overwhelming burden to foreign direct investment and will the FIRRMA bill make it an overwhelming burden, overall, do you believe, to FDI?

Mr. TARBERT. Not at all. There is no evidence to suggest that America is anything other than a preeminent destination for investors and I believe the FIRRMA bill will not change that if not enhance that. Having represented foreign investors over the last decade in private practice, one of the things that investors look for is a country that protects its national security. I think that stronger protections on our own national security make America an even better investment environment.

Also some of the specific things that you have in the FIRRMA bill to help speed up that process, to have declarations for those repeat players and things that don't necessarily need to go through the full notice, will only make investment easier.

Mr. PITTENGER. Yes. In this bill which is not included in the current FIRRMA we have a process for a good guys list for our countries who adapt the same type of oversight. Would you clarify how that is really going to open up greater foreign direct investment and make it even more accessible?

Mr. TARBERT. Yes. I think it is absolutely critical because many of our allies—there was just a newspaper, I think, in the Financial Times this morning about how Germany is facing similar risks that we are.

To really be effective CFIUS has to be investment screening the same as our allies. The thought is that if our allies are protecting their investments, we are protecting our investments, and they meet specific criteria that is in our national security, we could potentially exempt some of those investments as well to help facilitate greater investment.

Mr. PITTENGER. Secretary Chewing, just to close out, clarify for us the national security risk that we will face if we do not update CFIUS.

Mr. CHEWNING. Thank you, Congressman. We face the loss of our technological edge. Just to underline how important this is, the last time we lost a U.S. soldier or marine on the ground to enemy air fire was 1953. For the last 60 years, the United States has enjoyed complete air dominance because we have great people flying that aircraft and we have great aircraft and CFIUS is an important part of maintaining that technological advantage that enables our defense industrial base to produce that type of decisive lead.

Mr. PITTENGER. Thank you, sir. I yield back.

Chairman BARR. The gentleman yields back. The Chair now recognizes the gentleman from Washington, another valuable contributor to the reform effort, Mr. Heck.

Mr. HECK. Thank you, Mr. Chairman. Indeed I want to reiterate my expression of gratitude to you for the manner in which you have undertaken this subject in the subcommittee. I am very appreciative. I was sorely tempted to initially begin my questioning with asking you all to reiterate the urgency surrounding the need to modernize CFIUS, but you guys have really done a good job and I thank you for that. I am just not sure that it can be stated too often that there is an urgent need here and the threats we are talking about aren't hypothetical in any way, shape, or form. Thank you for your testimony today.

Instead, I think I want to get back to this issue of the relationship between export control system and the need for a modernized CFIUS regime. Some have suggested that if we update or modernize the export control system that that would abrogate or mitigate the need to update CFIUS. You all have talked about how these things really need to work together. Let's be clear on this point. Assume we update export control system, what is the gap if we don't also modernize CFIUS? Be as specific as possible. Why is it important that we do both, and if we don't, what have we exposed ourselves to? Secretary Tarbert, why don't we start with you, sir.

Mr. TARBERT. Sure. Well, first of all, our jurisdiction hasn't been revisited in 30 years and so we have pointed out the jurisdictional gaps. Several of those jurisdictional gaps have nothing to do with export controls, the real estate provision, for example, next to U.S. military installations, the nonpassive, noncontrol investments.

The only provision that I think gets to the export controls issue is the so-called joint venture where you are depositing intellectual property with associated support. As I mentioned before that is something that is very distinct from export controls. I think strengthening export controls in our view is very important. It helps CFIUS. But not addressing CFIUS and modernizing it not only, in my view, will not help CFIUS but it could also undermine export controls.

Mr. ASHOOH. Sir, thank you again for the important question. One additional gap that would be represented, it exists right now, as I stated earlier the export control system, one of its strengths is our ability to work with partner nations. When we agree over a certain technology that we are going to deny to what we consider to be a common adversary, that is far more potent a solution than just a unilateral control on something we are concerned about.

Well, the same dynamic could apply on CFIUS and it does not now. We are limited to working with partner nations, many of whom if they don't already are coming up with a CFIUS-like process. That is an area that I believe would certainly enhance our CFIUS process in the way that the export control systems work well.

Mr. CHEWNING. Congressman, I tend to think of them as a first line and second line of defense. Export controls, both ITAR and EAR, are the first line of defense. We have a list of technologies, we control the list of the technologies about who can access that. CFIUS is our backstop. If something gets through whether it is a real estate transaction, whether it is actual transition of capability for the replication of an industrial capability in a competitor state

as opposed to just the technology, whether it is our ability to identify something that should have been on the list but wasn't, CFIUS helps us inform what that could look like. There is interaction there.

You have to think about CFIUS as our backstop. I think the other point I would make is a keen difference between CFIUS and export controls is you can mitigate transactions through CFIUS. You can't necessarily do that with export controls. I think our ability to mitigate transactions is also something that is a very powerful tool.

Mr. HECK. Thank you. In my time remaining, Secretary Tarbert, I want to deal with this elephant in the room, get back to something that Congressman Meeks talked about which is the concern some have expressed to be blunt that someone might block a transaction for either political reasons or for protectionist reasons as opposed to the national security reasons. Can you briefly summarize why it is you do not think that concern is valid?

Mr. TARBERT. Yes. There is a statutory and a regulatory process that is focused on national security and there are a number of steps that are taken every single transaction that CFIUS reviews. There is a national security threat assessment made by the intelligence community that is then supplemented by a risk-based analysis which involves all the CFIUS agencies again focused on the specific national security factors laid out in the statute. Only then is a recommendation made to clear or potentially present it to the President.

There is a documented process that focuses on national security and, moreover, under FIRRMA Congress has the ability to request a classified briefing. If there is a transaction where Congress is not sure, well, what was the actual rationale, obviously we can't talk publicly about the rationale in pretty much all cases because of classification, but then Congress has the ability to look at it and to provide that extra check on the process.

Mr. HECK. Thank you, sir.

Chairman BARR. The gentleman's time is expired. The Chair now recognizes the gentleman from Arkansas, Mr. Hill.

Mr. HILL. I thank the Chairman. I thank the Ranking Member. I appreciate the opportunity to follow up on Mr. Pittenger's good work here in the House and Mr. Cornyn's good work in the Senate. There is no doubt that with the changing strategies by our adversaries in finance and economics that CFIUS has to catch up with that and be very clear and intentional in how our review process is done and also not burden the committee's efforts to the point of too much congestion, because you are asking for a very broad increase in the types of transactions that you will review. I hope that Congress is well aware of the staffing that you need in order to adequately do that work should this proposal become law.

I also have said before on this topic, no doubt America for 60 years has led the world in market development, transparency, global trade, and at the same time carefully protected things that we consider integral to our intelligence and security requirements. With that said, I want to bring up this recent transaction on Broadcom Qualcomm because I think this is an issue where we have to be very clear. You have said Congress can request a classi-

fied brief and all this, we have to be very clear about why something is in the national security interest as we look at each of these transactions. Since that one is in the news now, it gives me a chance to talk about something that was in the letter regarding it.

In the Department's concern list it said that Broadcom could take a, quote, "private equity style direction if it acquired Qualcomm, which means reducing long-term investment such as R&D and focusing only on short-term profitability," close quote. That sounds more like an opinion to me and indicting a business strategy or a business model rather than the national security concerns.

Should Congress be suspect of private equity investors from a national security point of view? Who wants to tackle that? Sir?

Mr. TARBERT. I will tackle it. The answer is not at all. Every transaction goes through the specific analysis. I would encourage everyone not to read anything other than the particulars of the transaction as to the specific and I would also encourage you to undertake the classified briefing, because then it will put everything into much greater context. But what I will say is that we regularly clear private equity transactions and I don't suspect that would change.

Mr. HILL. Right. Well, I think that is important because business people, you are right. This right now is a voluntary submission to the committee for review and we want that as clear and transparent and easy for those companies and their lawyers to anticipate this so that we do maintain that international flow of goods and services where America is a leader and not bog down transactions that don't deserve it.

When people see a business model question, you can imagine the lawyers at your former employer's asking, oh my gosh, we have to do a CFIUS review, or are we micromanaging the private sector by this, because you are going to broaden your reach. I think those are things that as we talk about the exact language in the bill we need to be sensitive to that and certainly the report language and the direction to the Executive Branch what we mean in Congress, let's be clear and intentional about what we mean in Congress.

I love the joint venture addition. I think that has been a loophole for a long time. I like the intellectual property licensing piece. I like the careful scrutiny of subsidiaries that are in other countries that have a different ownership. I think those are all improvements. But when you think about joint ventures like a code sharing arrangement in airlines and things like that clearly with national carriers out there they are in countries that are not necessarily always in favor with the U.S. Government.

Can you reflect on that subject when it is, I guess that is a joint venture. It is certainly a memorandum of understanding to share revenue on passengers. But talk about a little bit like that where it is very open. These are for the most part public companies in the United States who are entering into those. What is your—

Mr. TARBERT. Sure. I will be happy to address it.

First of all, I think that the joint venture provision right now in FIRREA is pretty clear. It requires the depositing of intellectual property along with associated support. In many joint ventures that don't have anything to do with intellectual property they

wouldn't be brought into this. Second, we have been meeting with industry groups as I mentioned, other stakeholders, Members of Congress, to make sure that this provision is narrowed through technical amendments to get at those transactions that are really most likely to raise national security issues.

Mr. HILL. Well, we appreciate your service to the country in protecting the national security and intelligence assets of our private sector and public sector, and thanks for the opportunity, Mr. Chairman.

Chairman BARR. Thank you. The gentleman's time is expired. The Chair now recognizes the gentleman from California, Mr. Sherman.

Mr. SHERMAN. I have so many questions that a lot of them will have to be questions for the record. The first is if you could tell us what is the cost of the CFIUS process both in terms of the direct cost, the budget of the agencies you represent, and then some estimate of the indirect costs. The intel community of course does an awful lot of work to support what you do. Then this Congress would have to evaluate whether it is appropriate that the taxpayer pay for the costs caused by businesses that choose to merge or engage in other acquisition transactions or whether those costs should instead be borne by the businesses whose actions are under review.

The second question for review is we already have a requirement that we look in cases involving government controlled entities whether the foreign country's record on cooperating in counterterrorism efforts is what we would like to see. The problem with that is for most of those with bad participation with us in counterterrorism, they don't have our model of separation between business on the one hand and the government on the other. To say that a business in Iran or China is independent to the government is to cast upon their society our legal system. I hope I will convince my colleagues that we should look at these factors based on where the company is based whether or not it claims to be independent of the government.

I want to focus on the media. The question is whether national security should include control of the most important element of soft power, what people hear and see. We already have China exercising control over our studios by their system, and this is outside the scope of this hearing, of only allowing 35 or so movies into China. Every studio has to figure out how they can kiss something in Beijing so that maybe they get five or eight of their movies into the Chinese market.

No one is going to make a movie about Tibet. Not only will that movie not be shown in China, but none of your other movies are going to be shown in China. But it goes worse. CFIUS allowed, and I guess that is because of the statute as much as anything else, AMC Theaters to be controlled by a Chinese enterprise. Even if you could make a movie about Tibet and not worry about your Chinese revenue, who is going to show it, how is that going to pencil out if one-third or one-quarter or one-eighth of the movie screens in the country are not allowed?

Let me ask, do we have a statute adequate to prevent foreign entities from controlling our media either by being in physical control

like owning the studio or being in a position where they can turn on or off the studio's profits so as to thereby exercise soft power over our soft power?

I don't know who it is—Mr. Tarbert?

Mr. TARBERT. I don't believe we have a specific statute that would forbid that. As far as CFIUS goes, so we review foreign acquisitions of U.S. companies where there is control. In the national security threat assessment, the intelligence community would do an analysis of what are the intentions of the foreign acquirer and capabilities and conceivably, if there was a specific intention to utilize media for propaganda purposes or other things to undermine our national security that would be something that would no doubt be analyzed.

Mr. SHERMAN. Let me move on to one more question and then I will have even more questions for the record that will just be for the record.

Keeping jobs in the United States is not explicitly part of CFIUS' mandate, but our industrial base is critical as one of our witnesses pointed out. We haven't been hit on the ground from the air since 1953 for a reason and that is our industrial base. If we lose the factories we lose the know-how, we lose the industrial base. I will ask all three panelists, does anyone here disagree that we should take into account how a foreign investment can result in the loss of American jobs especially when outsourcing means our industrial base and our knowledge goes overseas?

Mr. CHEWNING. I am happy to take a first cut at it. Under FISMA, or the statute in 2007, loss of critical production capability with an adverse impact on national security is one of the factors we are to look at and so access to critical capability within our own domestic industrial base typically would warrant concern.

Mr. SHERMAN. But jobs are not—

Mr. CHEWNING. It would depend on the context of the jobs. Just any job not necessarily, a job that would create a national security concern, would.

Mr. SHERMAN. Let's hear from the other witnesses.

Mr. ASHOOH. Yes, sir, if I might chime in. This is where the value of the interagency nature of CFIUS really, really comes home. Because in addition to as you have heard me go on about the export controls system, one of the other authorities that Commerce holds is management of the Defense Priorities & Allocation System, which is essentially a review of our industrial, defense industrial base to make sure that it is not only adequate but ready. That is a sensibility that we bring into CFIUS transactions.

Chairman BARR. The gentleman's time is expired.

Without objection, the gentleman from California, Mr. Royce, is permitted to participate in today's subcommittee hearing. Mr. Royce is a member of the Financial Services Committee and chairman of the House Foreign Affairs Committee with jurisdiction over the export controls system and we appreciate his interest in this important topic also as the author of the Export Control Reform Act of 2018.

Mr. ROYCE. Thank you very much, Mr. Chairman. I thank the panel for being here. As we have heard today, export controls and CFIUS have different, independently important, and complemen-

tary responsibilities. I think U.S. technological leadership is going to be essential. Personally, I am a little chagrined that we didn't have higher standards a long time ago with respect to chip manufacturers in terms of the security aspect of that and the reliability of that and I think that our leadership with respect to emerging and foundational technologies are absolutely essential to our long-term view as national security concerns here.

My view is that the U.S. should pursue a whole of Government strategy that does not rely exclusively on CFIUS or exclusively on export controls, but builds strength by countering illicit technology transfer and enhancing the U.S. economic competitiveness and enhancing our technological superiority. I think we have to keep an eye on that in its totality. Does anyone disagree with that proposition or want to make a caveat to that?

Mr. ASHOOH. No, sir, heartily endorse what you are saying.

Mr. CHEWNING. Yes, 100 percent.

Mr. ROYCE. I thank the panel.

Secretary Ashooh, then I will ask you. The Export Administration Act was designed to impose trade controls on the Soviet bloc and it was never comprehensively updated. It has been in lapse most of the last quarter century. I have introduced the Export Control Reform Act of 2018, as the Chairman mentioned, which would repeal the expired authorities and replace it with a modern structure, a structure to regulate the export of dual use items and emerging critical technologies.

Do you agree with the proposition that it is time to enact a modern statute that lays out clear policies and procedures for the Administration of our dual use export controls including requirements that such controls are adapted and regularly updated to respond to the evolving demands of the 21st century?

Mr. ASHOOH. Sir, it is not just time, it is overdue. I will reiterate my gratitude for your thoughtful leadership on this issue. The statute that is in lapse refers to cold war anachronistic not only terminology but authorities and so this is a very, very important initiative you have begun. Dual use technology at one time was a fairly slim slice of American technology leadership. It used to be, quite frankly, driven out of the national security establishment. That has changed as we all know and we need to update our authorities to reflect that.

Currently, we are operating under an Executive Order called IEEPA, the International Emergency Economic Powers Act, and that allows us to operate but is not reflective of the challenges we are trying to meet. Your efforts on this are really quite important and we appreciate it.

Mr. ROYCE. Well, thank you. My own view on this and that is reflected in the hearing that we had before the Foreign Affairs Committee yesterday is that it is actually the export control system, in my view, that is best place to lead a whole of Government solution to this, especially when we consider what is necessary to counter Chinese and other adversarial efforts to acquire sensitive U.S. technology, to do this in tandem with CFIUS. Our export in controls and CFIUS both require this attention.

But in terms of how we are going to lead to this to achieve this result, I think it is an important point and I raise it here at the

committee today and I again thank the Chairman for giving me some time to make that point. Thank you very much, panel.

Chairman BARR. Thank you and the gentleman yields back. The Chair now recognizes the gentleman from Ohio, Mr. Davidson.

Mr. DAVIDSON. Thank you, Chairman, and I thank our witnesses. I really appreciate the attention that this topic has received by our whole committee, by the subcommittee, by Mr. Pittenger, and by Mr. Heck as well. I really appreciated Mr. Heck's opening remarks in particular about the sense of urgency that this topic needs.

I was a cadet at West Point when similar topics came to mind to me because that was when release authority for sensitive technology migrated from Defense to Commerce. One of the first actions was for Hughes to transfer the technology to launch multiple vehicles off of one launch platform. One rocket goes up, multiple little satellites go out into precise orbit, obvious applications for warheads and other things. I felt like we started down a bad path with that very decision, I don't know that we have entirely recovered.

But in that same timeframe we have seen that China has figured out a grand strategy in a way that the rest of the world really hasn't. We have been playing in a very different dynamic. In a lot of ways, in my opinion, we haven't figured out a course of action. We have vacillated from the, say, John Bolton school of thought to the John Kerry school of thought and there is a wide gulf in between. But we don't have a unified way to deal with much of our national security. That has implications from everything like we are still on the same authorization for military force that happened days after 9/11 despite missions that we know can't be jammed down it, but we lack the sense of cohesion. Until we really get that top level grand strategy I don't think we will get a lot of things right.

In the meantime, we can't afford to get this wrong or continue to get this wrong because underlying it technology is being used by those people that do employ grand strategy and all the resources of their country, not just militarily but their economy, their academia, to accomplish their stated national objectives. China's One Belt One Road is probably the best example of that though not the only one.

With that a lot has already been said by the time you come to someone in the rank order that I get to question, but Mr. Pittenger and Mr. Royce had good dialog about the concern and the differentiation between export control. Mr. Ashooh, you had a good answer to that but I guess, if you could, just boil it down into the why should CFIUS control intellectual property if that intellectual property is already controlled by Commerce?

Mr. ASHOOH. Well, intellectual property is actually a broader term than just the technology transfers that export control worries about so it is a much larger category. But again I go back and it is less about the subject matter of the technology and more about the method that we are talking about. CFIUS is designed to get at transactions and quite frankly there are a lot of innovative transactions out there that CFIUS has trouble getting at. Again this is why we are here today.

But by the same token, export control system is trying to aim at those technologies that are a problem. In the current state where China is in particular, although let's not forget there are other adversary nations that are also quite aggressive, but China in particular has a strategy to accost our system to appropriate technology. Again that is why they are both necessary, but they are designed to do different things.

Mr. DAVIDSON. Thanks for that.

Mr. Tarbert, some of the country's largest tech firms have been concerned that if CFIUS reform is done incorrectly it could create a parallel export control system so that balance that is there, differentiation, the group believes that the impact of a dual system could greatly hinder the speed of which business transactions are done. Frankly, sometimes because of the structure it has been a little bit ambiguous as to whether the transaction desired would fall under what type of oversight or regulation. Is there a risk that technology companies' fears are justified?

Mr. TARBERT. No. I think every intention was made for the regulations to make sure there is unnecessary duplication. We have been meeting with the technology companies and firms and all sorts of other stakeholders. I think now we are working with a set of technical amendments to make sure that clarification is in the text of the bill itself so we won't create a dual two-tiered system.

Mr. DAVIDSON. Thanks. I think there has been a lot of attention given to that and as my time wraps up I do want to echo Mr. Hill's concerns about the designation of private equity as a suspect way to transfer technology. I hope we can keep the vibrant economy we have and protect the vital technology that we need to. With that, Chairman, I yield.

Chairman BARR. Thank you. The gentleman yields. Now the Chair recognizes the gentleman from Indiana, Mr. Hollingsworth.

Mr. HOLLINGSWORTH. Well, happy Thursday. I appreciate the opportunity to frankly listen to a lot of the testimony and hear some of the remarks and frankly wanted to add that I really appreciate Mr. Pittenger's effort here and the legislation before us to talk about how we might reform some of these programs that, as you well said, haven't been reformed in a long period of time. I am no advocate for the status quo. I think with the emergence of new threats, the emergence of new opportunities, we need to make sure that we are keeping up with the times. But I admittedly do have a lot of concern about the potential unintended effects of creating a larger and larger structure here.

I think one thing that this town does very poorly is we see a problem and there may be an existing solution to that problem that we could revise and fix but instead we layer a whole new superstructure on top of it to layer over the problem and then we get into more and more duplicative work, more and more duplicative regulations that end up having a chilling effect on American competitiveness around the world. I certainly don't believe that we need to put American national security in the backseat but I don't believe that we should put American firms at a competitive disadvantage around the world.

There are so many great things about this legislation and the concern that I continue to have and wanted to really talk through

today with you guys was really about this outbound portion making sure that U.S. firms are still able to work abroad. What I want to be careful of is the insinuation that certain companies or certain firms are engaged in inherently un-American activities, inherently handing away their prized possession, the intellectual property that they have spent decades and billions of dollars developing in some willy nilly approach instead of a thoughtful, dutiful approach.

Taking it as a given that we want to reform the status quo, I guess I want to better understand what the unintended consequences could be to American firms and the American economic competitiveness around the world and their ability to engage with other firms and in other markets around the world. What might be the unintended consequences of taking an expanded CFIUS to outbound transactions as well? Let's just think about the negative, and I will start with Mr. Tarbert.

Mr. TARBERT. Sure. Actually CFIUS now can cover outbound transactions. Our regulation now allows us anytime there is a U.S. business that is being taken outside of the United States and put in a JV we have—

Mr. HOLLINGSWORTH. This is certainly an expansion of the outbound. Yes.

Mr. TARBERT. Yes. I would say what this does is it looks at a business capability, something that falls a little below what we can actually, technically, view as a business. I think we are very mindful of ensuring that our American businesses can compete abroad. Obviously national security is our first priority, but I don't think it is an and/or. I think we can get this right through technical amendments, through rolling up our sleeves working with you and your staff to ensure we do both.

Mr. HOLLINGSWORTH. Yes. Additionally, so we have talked a lot about this legislation and I am a big fan of legislative process. I am a big fan of Article 1 certainly, but legislation takes time. Writing the rules, putting forth the procedures from this legislation isn't something that we are going to pass on day one, day two we are going to get this thing up and running. I continue to come back to some of the existing structures that we have in place, really updating those, really making sure that we can enforce something very quickly. It is two to 3 years that it might take to pull this together from a legislative aspect. That is forever in technology today.

I wondered if Mr. Ashooh might talk a little bit about what we might do in the interim that could be a better, more appointed solution at controlling some of this work that might need to be done on those emerging technologies we don't want to be transferred to other countries.

Mr. ASHOOH. Thank you, sir. Yes, to your point, we can't afford to wait if there are things we can do now, we need to do them now. The Department of Commerce is doing that. We have talked a little bit about emerging technologies. That is clearly an area where we need to up our game. We are not waiting for legislation.

Mr. HOLLINGSWORTH. How do we up our game? Is it going back to export control? Is it making sure that we update these and have new technologies placed on the list instead of a building an ex-

panded CFIUS? How do we do that in the interim? What does up our game mean?

Mr. ASHOOH. Well, we do that now and gratefully we do it with the help of the interagency where we are constantly reviewing our controls. That has always occurred. It is more in terms of what are the challenges we have been facing recently. In one area commonly referred to as emerging technologies, that is this class of technology that really is coming at us at a rapid pace, very broad, very deep, but it is also coming from nontraditional areas, the classic two people in a garage come up with some idea. They know nothing about CFIUS. They know nothing about export controls.

What Department of Commerce does have is an outreach capability to encourage knowledge, so that they comply with the system that we have, that we need to do better at and are.

Mr. TARBERT. May I just chime in? I just want to say, we are modernizing CFIUS so we are not creating a new process, but rather we are taking something that has worked for 30 to 40 years.

Mr. HOLLINGSWORTH. Yes, but it is certainly an expansion of the existing process and it is certainly an expansion of the resources.

Mr. TARBERT. It is.

Mr. HOLLINGSWORTH. What I am really worried about is that in order to continue to build and maintain this competitive advantage companies have to have the ability to work around the world to be able to garner the type of revenues needed to continue the huge amount of R&D that they have to do to compete around the world and to continue this advantage. The more speed bumps we put in their place, the more opportunity we give other countries' firms the opportunity to be able to develop R&D faster than us. To me it is accelerating our own R&D, not just putting speed bumps in place around the world.

Mr. TARBERT. We fully agree and we don't view it as a speed bump.

Mr. HOLLINGSWORTH. All right. With that I will yield back.

Chairman BARR. The gentleman yields back. With the indulgence of the witnesses, and I see Mr. Chewing may have an interest in chiming in on that point as well, just a few more brief questions if we could on related topics.

Let me start again with the Secretary Tarbert. I think you have made a compelling case for the need for modernization of CFIUS. Certainly I applaud the gentleman from North Carolina and his work and Senator Cornyn and Mr. Heck, here, for their work. The case I think has been made that we do need to modernize CFIUS.

But what the committee continues to hear and it dovetails with what Mr. Hollingsworth was saying that is a concern is that if FIRRMA were enacted as it is presently proposed CFIUS cases could rise to an estimated 10,000 cases in short order. Even if that expansion is only a couple thousand additional cases that is still a massive increase and every business that we talk to says that CFIUS resources are already constrained.

The question is both one of caseload, the agency's capabilities to handle increased caseload that very well may be justified by national security developments, but answer that question for us, all of you, the capabilities of handling an increase in caseload and, second, what that means in terms of your resource needs. The current

legislation has a mechanism for a fee. There are some concerns that fees associated with additional costs for benign transactions would create those speed bumps that Mr. Hollingsworth was talking about.

Could you just respond to those concerns and how you would propose this legislation address those concerns?

Mr. TARBERT. Sure, so I will go first. I think again as I have said before, we want to narrow the scope of transactions to those that are most likely to raise national security concerns and not look at other transactions that are not likely to raise national security concerns. The more we can put that tightening in the text of the bill itself the easier that will be for us. It will provide added clarity for the business community. That is number one.

Number two, I would say, is that the fees are an important factor here. I think we want to make sure that the level of the fees, if we decide to charge them, don't impact the economics of the transaction, but at the same time shift some of that burden to the people in the business that are actually doing the transaction instead of the American taxpayer. Those would be my points.

One final point to Mr. Hollingsworth's good question about, look, what are we going to do now. Section 26 of the bill says that this doesn't go into effect until the secretary signs, certifies that we have the resources, the regs in place, but the other thing it does in subsection C is it allows us to conduct pilot programs. If there is a very specific national security risk that we need to focus on, a subset of transactions, we could do that on day one, conceivably the day that a legislation is passed.

Chairman BARR. OK, thank you for your answer there.

Mr. Chewning, I wanted to follow up with you and if you wanted to react to Mr. Hollingsworth's questions, please feel free, but it was very helpful your testimony about thinking of CFIUS as a backstop and I wanted to follow up on that. How does the FIRRMA legislation update CFIUS in a way to capture technology transfers that the export control system might miss and could you maybe give us a scenario of how that would work?

Mr. CHEWNING. Yes. No, I think happy to and I think I can probably respond to both. I think it is important just to reframe the context for why we think this is important from a national security dimension. The National Defense Strategy which recently came out from the Department of Defense said, inter-state rivalry is now the primary national security concern for the Department of Defense.

One of the competitors we are facing is the second largest economy in the world and spends about 2 percent of their GDP on military equipment. They have an industrial policy that is designed to extract technology from Western companies, put up walls to defend their own industry so they can get global scale, and then eventually outcompete our domestic industry. I think it is important to, as we think about this measure, also make the point that ultimately it is about protecting U.S. industry and putting appropriate value on intellectual property so it can't be stolen through technology transfers. That is in the long run good for American business.

Chairman BARR. Thank you.

Secretary Ashooh, did you want to chime in on that?

Mr. ASHOOH. Well, I would certainly go back to the resource question because that is an important one. As has been said, we are already at an all-time high. From a Commerce perspective, one of the ways that I think is an effective way that we approach CFIUS is that we actually have very few, hundred percent dedicated to CFIUS, employees. We leverage the bureaus, science, and technology and business transaction personnel that we have now.

Having said that, in the case of a large scope increase that might occur that means is, it is going to put pressure on the whole organization which does all the other things that we talked about. We do need to be thoughtful about how we go forward. Having said that, we also think it is a really good approach to leverage the organization as a whole rather than have as many dedicated.

Chairman BARR. Thank you. My time is expired and the Chair will now recognize for a second line of questioning, Mr. Pittenger.

Mr. PITTENGER. Thank you, Mr. Chairman. I do appreciate it. To the point of my friend Mr. Hollingsworth's inquiry, I would say that what we have done in this bill, in creating a good guys list, is going to create even greater access to foreign investment, capital investment in this country, to those who subscribe to the same standards that is not correct today.

In consideration of the resources that are needed, I think we should keep in mind the Chinese, particularly, investment, and there are other concerned parties, in 2010 was about \$4 billion, 2016 is \$46 billion. Let's assess the scope of the problem that we are addressing now. Since 2015, they have acquired 43 semiconductor companies, 20 of which have been in the United States. This is a very significant concern. These are supply chains to our DOD very often.

The crisis is there, the concern is there. I would welcome the comments from those on our panel to again show the distinction between export control and CFIUS. CFIUS is prospective. CFIUS looks—this is export control. Apple is CFIUS. It is the company that owns this. I think what gets lost in the maze here is the distinction of what CFIUS is capable of doing that is not consistent with export control, if you would comment on any of those issues.

Mr. ASHOOH. Sure. Sir, sometimes there are just transactions that cause concerns. By that I mean a marriage of two entities may just not be what you want to see done and it could have reasons that go beyond technology transfer and I won't go into specific cases. Having said that and why you need them to work together is if CFIUS denies a transaction that doesn't necessarily stop the technology transfer if there is technology transfer at concern. But most importantly is there are transactions that could be a concern to the United States national security establishment even though there is no technology transfer issue there, so we need both.

Mr. PITTENGER. Are you concerned historically that we have an issue with the transfer of intellectual property in the past and that is why we need to address this today?

Mr. ASHOOH. Oh yes, absolutely. I think it is important to note America is the technology world leader, no question, has been for awhile. That is the result of authorities we have been using to this point. The authorities that we have had, export controls, CFIUS,

those authorities have worked but they have also been adapted along the way and it is time to continue that.

Mr. PITTENGER. Is this a particular concern in China in terms of their enhancing their avionics or their—

Mr. ASHOOH. Yes, in particular in two ways and I think it is important to be specific. Eric has already mentioned the volume of dollars that China is willing to spend. That is clear. But even trickier is they are becoming quite adept at using their massive market as almost a bludgeon to U.S. industries that need access to large markets in order to keep our industrial base secure. That is the path that we need to find a way to—

Mr. PITTENGER. They have accessed that through American markets and through the ability to obtain intellectual property through our own companies.

Mr. TARBERT. Representative Pittenger, I think I am not the best person to speak to your point about the costs because I am from the Treasury Department and we generally don't like to spend money. But I think it would be helpful if maybe the Pentagon could weigh in on the proposition, the value proposition here.

Mr. PITTENGER. Yes, sir.

Mr. CHEWNING. Yes. I think you can look at the costs or the incremental costs, but you also have to look at what it is protecting. If you think about it is an insurance policy on the hundreds of billions of dollars a year we spend on our own defense industrial base, it is a really small investment to make sure that what we are investing for our own military advantage and we are investing in our companies to be able to continue to replicate that still can and that investment doesn't get eroded because of theft.

Mr. PITTENGER. Thank you. I would like to ask if I can quickly, regarding technologies in the avionics industry would you all consider that a critical industry that must be protected and addressed by both our export controls and CFIUS processes?

Mr. TARBERT. Yes, sir.

Mr. CHEWNING. Yes.

Mr. PITTENGER. Well, there are specific firms in China that have been very engaged in this concerns of national security way. Do you think there are scenarios where private sector engagement with Chinese firms could create national security vulnerabilities?

Mr. CHEWNING. Yes.

Mr. PITTENGER. Can you speak to the industries and capabilities in China that have benefited from the gaps identified in our export controls and CFIUS process and which industries in particular have benefited most from the gaps identified in our CFIUS laws?

Mr. CHEWNING. I think to provide a complete context for that we probably need to have a closed door session. I think just in general the way we would view that is, think of the emerging technologies that we all would imagine that would have military application but that may not be on specific military programs right now.

Chairman BARR. The gentleman's time is expired.

Just for the record we are going to clear two, possibly three more members for questions and then we will conclude the hearing. With that we recognize the gentleman from West Virginia, Mr. Mooney.

Mr. MOONEY. Thank you, Mr. Chairman, for hosting this hearing and Congressman Pittenger for putting the bill in. I am already a

cosponsor. Thank you for coming to testify on this important issue with these cyberthreats and advanced technology, this is just a critical, critical issue.

I guess my first question is to Mr. Chewning. In a 2006 report, the Government Accountability Office noted that the Militarily Critical Technologies List, MCTL, and the Developing Science & Technologies List, which your Department manages, have produced critical technology lists of questionable value. In a 2003 report, GAO further found that the MCTL, quote, “remains outdated and updates have ceased. The MCTL is not used to inform export decisions, its original purpose. Export control officials from DOD and the Department of Commerce and State reiterated their long-standing concern that the MCTL is outdated and too broad to meet export control needs,” close quotes.

Mr. Chewning, can CFIUS agencies rely on you to promptly and effectively identify emerging technologies given the Pentagon’s own lack of confidence in the MCTL?

Mr. CHEWNING. Yes. Just to be clear, the MCTL updates to that we have carried through, through on the USML and the CCL. While the MCTL itself we may have stopped updating, by statute we considered updates to USML and CCL as official updates.

But your point, I think, is very accurate when, Congressman, in terms of how to think about the need for updating lists and obviously the role that that has in terms of export control versus the more holistic evaluation that a transaction would go through under FIRRMA and CFIUS. I think attention between knowing that technology has military application ahead of time versus realizing a specific transaction is worrisome based on the threat, the vulnerability, and the consequence evaluation that is done to complete it.

Mr. MOONEY. OK, thank you. This is a separate question for whoever wants to answer, do you believe it would benefit or harm our national security if we included some NATO allies on a CFIUS white list but not other NATO allies on that white list?

Mr. CHEWNING. What we are currently doing with our allies because they recognize a similar set of concerns, the 2017 National Defense Authorization Act asked the Department to establish the NTIB or the National Technology Industrial Base which is a partnership between ourselves, Canada, Australia, and the United Kingdom. That program is beginning to get underway now. One of the pilot programs that we are doing as part of that is a collective FDI protection regime so that we can create a common standard for foreign direct investment protection within that global set of industrial based activities.

Mr. MOONEY. On a follow up to that also, I saw Australia and New Zealand are not part of NATO but they are members of the Five Eyes intelligence alliance, so intelligence and academic reports have noted that China has sought influence in these countries’ political systems through the use of campaign donations. Do you believe Australia and New Zealand should be on a CFIUS white list in light of China’s actions?

Mr. CHEWNING. I think we need to make sure our allies are aligned with us and we have a collective set of protection regimes for our friends who are also under threat from the same set of concerns that we have here.

Mr. TARBERT. Congressman Mooney, first of all, thank you for your cosponsorship of FIRRMA and, second, the criteria for that list hasn't been established yet. It will be established hopefully in FIRRMA and then also further by regulation. But I can tell you that we are working closely with all of our allies now because they are facing similar threats to us and they are starting to do similar processes in their legislatures and their regulatory to beef up their investment security as well. We are having an active dialog.

Mr. MOONEY. OK. Thank you, Mr. Chair. I will yield my time back to the Chair.

Chairman BARR. The gentleman yields back. The Chair now recognizes for a second round, the gentleman from Indiana, Mr. Hollingsworth.

Mr. HOLLINGSWORTH. Back again. I probably won't take the full 5 minutes but I did want to address a few things that were said over the last little bit. The reality is America's technological advantage wasn't created or wasn't enduring because of CFIUS, because of Export Control Act, it was created and enduring because of the R&D of thousands of firms across this country because of the great academic institutions we have, because of the ingenuity of Americans overall.

That is what I am concerned about. What I am concerned about, as the gentleman Mr. Chewing said, was their Chinese goal of reaching global capacity and then competing with us. Well, if we did deny our firms the same capability and say now you can't do business over there, you can't do business over here, you can't do business over there, then we deny them the ability to gain more and more resources to do more and more R&D so that we compete with this advantage.

I think the history of moats has been very poor over time, but the history of doubling down on your advantage, continue in your work, and using older technology, these companies spent billions of dollars investing in and now they can use that as a cash cow so they can pour more money into R&D to develop new technology. I want that to happen in the United States. I want that to happen and be led by U.S. firms. What I am worried about is we are denying them the ability to do that and that things through the regulatory or bureaucratic process will begin to get mired up such that they can't leverage those capabilities that they spent decades and billions of dollars building these platforms for.

I think there have been instances and continue to be instances where we use decades-old technology, go to emerging world countries, go to other countries and begin to sell that relatively low cost, high margin businesses that they can use those dollars to reinvest back here so that we have those advantages in the future. I think that history has shown time and time again that that is what creates enduring competitive advantages and gaps between us and the other world.

I am not in any way saying CFIUS needs to remain unchanged. I am not in any way saying that China doesn't have a comprehensive, thoughtful, and tactful strategy for how they might get at these technologies. What I am simply saying is they will find some way to get in the door. I have seen them hack OPM down the street. We need to make sure that we have the advantage because

our companies are leading the world in the work that they do in their fields and their industries and I am worried we are putting them at a disadvantage in doing this.

With that I will yield back, Mr. Chair.

Chairman BARR. The gentleman yields back.

Does anybody seek—the gentleman from Washington seeks—OK. The gentleman from Washington is recognized.

Mr. HECK. Thank you, Mr. Chairman. I appreciate the comments from my friend from Indiana very much and would like to, however, at least put it within a different context. Namely, our technological advantage was developed over a long period of time which was not within a global economy. We exist today under a much different world than we did at the time in which our technological advantage accelerated. In fact, I think I read recently that global trade has increased fivefold just since 1980. It is a stunning increase in the interweaving of the economies of the nations of the earth in the relatively recent past. We have a different context.

I think it is also important to note that our technological advantage has been brought about in no small part because of public investment in research and development and that is an investment that we need to continue to make. Indeed, I have also read recently that the public investment in basic science research and development as a percentage of GDP is the lowest level that it has been since the early 1950's. There are a lot of dimensions to this in order for us to keep our technological advantage.

Again, those of us who are cosponsors and supportive of FIRRMMA also believe very much that foreign investment in the United States is an important part of our Nation's future and that this bill in fact will enable that by virtue of providing them with the certainty and us with the security that we need in order to do that.

But the essential point remains and it should not be forgotten that what we are talking about here is an existential threat to the national security of our country. For those of you who aren't yet behind that, I strongly encourage you to go back and, for example, be the beneficiary of the classified briefing that could be available to you and to look at as an example the Broadcom effort to acquire Qualcomm. I understand the concerns. That is a part of this process and I am glad they have been brought forward. I think, however, that the theoretical concerns, the hypothetical concerns are materially outweighed by what has clearly been demonstrated to be, as I indicated, an existential threat.

What we should leave here with is consensus on a conclusion. CFIUS needs to be modernized. CFIUS needs to be updated. Let's engage in the give and take about what the specifics of that may look like, but nobody should doubt that in the best national security interest of this country this is something that this Congress should do and should do immediately.

With that I would be glad to yield my time to my friend from North Carolina.

Mr. PITTENGER. Thank you, Mr. Heck, and thank you for your leadership with this important legislation. You have been a real thoughtful individual to work with. I would like, Mr. Chairman, to submit for the record a Department of Justice statement regarding the FIRRMMA bill—

Chairman BARR. Without objection.

Mr. PITTENGER. —Unanimous consent for that. One more question if I could ask the panel, if that is OK.

We just would like for you all to just comment on the importance of the inclusion of joint ventures within the jurisdiction of CFIUS.

Mr. TARBERT. I think it is incredibly important. We have seen a number of cases where people have had an M&A transaction that is under CFIUS jurisdiction and they have simply restructured it as a joint venture to evade our jurisdiction.

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

Thank you very much to each of you.

Chairman BARR. Thanks to all of our witnesses for their testimony today. It has been a very helpful hearing for all members and we appreciate your contributions to this important work.

The Chair notes that some Members may have additional questions for this panel, which they may wish to submit in writing. Without objection, the hearing record will remain open for 5 legislative days for Members to submit written questions to these witnesses and to place their responses in the record. Also, without objection, Members will have 5 legislative days to submit extraneous materials to the Chair for inclusion in the record. I would ask our witnesses to please respond as promptly as you are able. This hearing is now adjourned.

[Whereupon, at 12:04 p.m., the subcommittee was adjourned.]

A P P E N D I X

March 15, 2018

**Statement of
Richard E. Ashooh
Assistant Secretary of Commerce for Export Administration
Before the Subcommittee on Monetary Policy and Trade**

**Committee on Financial Services
U.S. House of Representatives
March 15, 2018**

Chairman Barr, Ranking Member Moore, 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.

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Testimony of Mr. Eric D. Chewning
Deputy Assistant Secretary of Defense for Manufacturing and Industrial Base Policy
Before the Financial Services Committee
Subcommittee on Monetary Policy and Trade
U.S. House of Representatives
March 15, 2018

Mr. Chairman, Ranking Member Moore, and Members of the Subcommittee, thank you for the invitation to share the Department of Defense's role in the Committee on Foreign Investment in the United States (CFIUS) and the national security risks to America arising from inbound foreign direct investment. The protection of our national security innovation base from strategic competitors, in the national security realm like China and Russia, is an increasingly important priority of the Department and I appreciate the opportunity to speak with you this morning.

The Department of Defense strongly supports modernization of the CFIUS process to ensure that the inter-agency Committee has the authorities required to address the evolving risks to our national security from transactions that are currently uncovered. We are thankful for the strong leadership of Congressman Pittenger on this issue and appreciate the bipartisan support for the Foreign Investment Risk Review Modernization Act (FIRRMA), H.R. 4311, 115th Cong. (2017). The Department shares Congress's trepidations about strategic competitors' use of predatory economics and believes FIRRMA will take many positive steps to address these concerns. To quote Secretary of Defense James Mattis, stating this Department's position, in his letter of support, the "DoD depends on critical, foundational, and emerging technologies to maintain military readiness and preserve our technological advantage over potential adversaries. FIRRMA would help close related gaps..."

As the National Security Strategy and the National Defense Strategy make clear, the Department's direction is to compete, deter, and win alongside our allies and partners in conflict and preserve peace through strength. Our defense industrial base is an extension of our military force structure. Only a defense industrial base that is robust, secure, and resilient, is able to support the needs of our military, innovate to retain our technological edge, surge when necessary, and keep our systems

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safe in cyberspace. As the Deputy Assistant Secretary for Manufacturing and Industrial Base Policy, my role within the Department of Defense is to ensure the United States maintains a superior industrial base that supports the Secretary's three priorities, namely (1) enhancing warfighter lethality, (2) strengthening alliances and attracting new partners, and (3) reforming the Department's business practices. In this capacity, I represent the Department in the inter-agency CFIUS process.

I've spent the last seventeen years working at the intersection of national security, industry, and finance, in both the private and public sectors. It is important that this bill not be considered an additional regulation on business. Under this bill, the United States should and will likely continue to welcome the vast majority of foreign investment that does not present any threat to our national security. Rather, this bill, should be considered a whole-of-government response to a critical national security challenge — an insurance policy on the hundreds of billions of dollars per year we invest in our defense industrial base. Most importantly, this bill will help safeguard our sons and daughters who volunteer to step into harm's way, armed with the weapons that our industrial base produces.

Challenge to Technological Advantage

Simply put, the United States military fights and wins wars through the unmatched performance of our men and women in uniform and our superior military technology. Knowing this, our competitors are aggressively attempting to diminish our technological advantage through a multi-faceted strategy by targeting and acquiring the very technologies that are critical to our military success now and in the future. China, in particular, publicly articulates its policy of civil-military integration, which ties into its intentions to become the world leader in science and technology and to modernize its military in part by strengthening the industrial base that supports it.¹ These plans are backed by hundreds of billions of dollars in Chinese state funding. For example, China's efforts to create an indigenous semiconductor

¹ Please see China's "Report on the Work of Government, 2016"

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capability alone enjoy approximately \$150 billion in state-connected funding.² In addition to semiconductors, our long-term strategic competitors have a clear focus in investing in the critical future technologies that are foundational for both commercial and military applications: artificial intelligence, autonomous vehicles, robotics, augmented reality, directed energy, and hypersonics. We see a notable increase in Chinese interest in each of these nascent technology areas, with Chinese entities participating in about 16% of all U.S. venture deals in 2015, up from a 6% average participation rate during 2010-2015.³

While some facets of our competitors' strategy, like industrial espionage and cyber theft, are clearly illegal, other approaches, including technology and business know-how transferred through acquisition in U.S. companies, may not be. Acquiring or investing in U.S. companies offers an opportunity for our competitors to gain access and control over technologies with potential military applications, enabling them to create their own indigenous capabilities, eroding our technological edge, and ultimately our military advantage. Additionally, some investments in the U.S. may also limit the availability of certain capabilities within the U.S. industrial base, potentially depriving our warfighters of access to important technological solutions needed to maintain our overmatch on the battlefield. We believe that the loss of critical technology to a competitor can inflict irreparable damage on our national security in the long-term.

Department of Defense Role in CFIUS

CFIUS is designed to address the national security risks arising from foreign investments that could result in foreign control of a U.S. business. Of the defined factors to be considered when

² "Ensuring Long Term U.S. Leadership in Semiconductors." Executive Office of the President, President's Council of Advisors on Science & Technology, January 2017. Retrieved at https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_ensuring_long-term_us_leadership_in_semiconductors.pdf

³ Michael Brown and Pavneet Singh, "China's Technology Transfer Strategy: How Chinese Investments in Emerging Technology Enable a Strategic Competitor to Access the Crown Jewels of U.S. Innovation", Defense Innovation Unit Experimental, January 2018

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determining the requirements of national security under the current Foreign Investment and National Security Act (FINSAs) statute, several are directly related to defense, military requirements, and technological leadership as it relates to national security. In addition, seven of the fifteen coordinators of the National Security Threat Assessment (NSTA), which is relied upon in every CFIUS case, are DoD intelligence organizations. Moreover, the Defense Intelligence Agency (DIA) makes the statutorily required assessment of the risk of diversion of defense critical technology.

As one of nine voting members of CFIUS, DoD provides significant input related to the impact of foreign investment on U.S. defense requirements and readiness, military competitiveness, and critical technology development, among other things. As such, DoD has been the co-lead alongside the Department of Treasury on a yearly average of 44% of all CFIUS cases filed since 2012, the highest percentage of any Committee member other than Treasury.

Examples of Limitations of CFIUS

Since CFIUS was first instituted in the 1970's, our competitors have discovered methods beyond the Committee's authorities and successfully acquire U.S. technologies and critical business know-how. Our national security competitors' ability to evolve, outpaces our ability to adapt under the current statutory and regulatory system. What's more, the current CFIUS authorities only cover some of the relevant transactions because deals that do not result in a foreign controlling interest are beyond its jurisdiction. There are other transaction types, such as certain joint ventures, and non-passive, non-controlling investments, that can pose national security concerns, such as transferring technology and critical capabilities. Additionally, the purchases of real estate by a foreign person provides opportunities to potentially establish a persistent presence near sensitive facilities, which would currently fall outside of CFIUS's scope to review.

CFIUS Modernization Needed

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The Department of Defense does not view CFIUS as a panacea. Instead, it is part of a layered defense that can, along with export controls and other regulatory mechanisms, stem the flow of critical technologies to our competitors. In order to do that, however, CFIUS's authorities need to adjust to keep pace with the rapid change of technology and nimble, long-term competitors.

The Department is particularly supportive of the proposed adjustments in the FIRRMA legislation that gives CFIUS the discretion to broaden the scope of covered transactions to include certain contributions of intellectual property with associated support by a U.S. critical technology company to a foreign person through a joint venture or other similar arrangement. In addition, the Department appreciates the inclusion of foreign purchases or leases of certain real estate located in close proximity to sensitive facilities and the bill's recognition that enhanced international cooperation is necessary to ensure important technology does not flow to our competitors through our allies and partners.

Conclusion

Let me add one important point as I conclude my remarks. While the Department of Defense believes defensive measures like CFIUS modernization are necessary, they alone are not sufficient for winning a technology race with our long-term strategic competitors. We must be proactive to ensure we improve our technology and innovation base because our future economic security will be a key determinant of our national security.

I would like to close with another statement from Secretary Mattis in his letter of support: "I strongly support the Foreign Investment Risk Review Modernization Act of 2017 (FIRRMA). The Department of Defense (DoD) continues to support foreign investment, consistent with the protection of national security. However, as the national security landscape changes, the existing process and authorities must be updated."

Thank you very much for the opportunity to testify on this important topic. I look forward to working with this Committee on improving and advancing FIRRMA.

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TESTIMONY OF THE HONORABLE HEATH P. TARBERT
Assistant Secretary of the Treasury
Before the U.S. House Financial Services Subcommittee on Monetary Policy and Trade
March 15, 2018

Chairman Barr, Vice Chairman Williams, Ranking Member Moore, 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 particularly like to acknowledge the bipartisan leadership of Representatives Pittenger and Heck on the legislative effort to modernize CFIUS. I would also like to thank other members of the subcommittee who have joined FIRRMA as co-sponsors, including Representatives Mooney and Tenney.

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. FIRRMA will protect our national security and strengthen 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 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.

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>.

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 of investment capital instead of its destination.¹³ And what foreign investment did exist posed

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.

¹³ *Id.* at 9.

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 (FINSAs),¹⁷ which formally established CFIUS by statute and codified its current structure and processes.

Critical Need for CFIUS Modernization

Now, more than a decade after FINSAs 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 figure has risen to approximately 20 percent of total covered transactions CFIUS reviewed in 2017.

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).

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. Today, the acquisition of a Silicon Valley start-up may raise just as serious concerns from a national security perspective as the acquisition of a defense or aerospace company, 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 endorses 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 we anticipate would not 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, 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 Committee on improving and advancing FIRRMA, and I am hopeful the bill will continue to move forward on a bipartisan, bicameral basis.



Department of Justice

STATEMENT OF

EDWARD C. O'CALLAGHAN
PRINCIPAL DEPUTY ASSISTANT ATTORNEY GENERAL
NATIONAL SECURITY DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON FINANCIAL SERVICES
U.S. HOUSE OF REPRESENTATIVES

FOR A HEARING CONCERNING
THE FOREIGN INVESTMENT RISK REVIEW
MODERNIZATION ACT OF 2017

PRESENTED

MARCH 15, 2018

**Statement of
Edward C. O'Callaghan
Principal Deputy Assistant Attorney General
National Security Division
Department of Justice**

**Before the
Committee on Financial Services
U.S. House of Representatives**

**At a Hearing Concerning
The Foreign Investment Risk Review Modernization Act of 2017**

March 15, 2018

On behalf of the United States Department of Justice ("DOJ"), I would like to lend strong support for House and Senate passage of the Foreign Investment Risk Review Modernization Act ("FIRRMA").

As the Attorney General has said, the Committee on Foreign Investment in the United States ("CFIUS" or the "Committee") plays a critical national security role, but its authorities and process require modernization. For more than a year, we at DOJ have been evaluating the changes that are needed to update authorities and processes. Current limitations result in large part from constraints of the Committee's statutory authority, the Foreign Investment and National Security Act ("FINSNA"), which was drafted during a different era of international trade and investment. The threats to our national security have evolved over the years since the activities of CFIUS were codified by FINSNA in 2007. Which nations pose a threat to our national security, and how, has changed with world events. As more of our critical infrastructure and essential government functions depend on computer networks, including the Internet, risks associated with access to our computer networks have increased substantially, and the stakes of strong cybersecurity have become higher. Technologies that are only now emerging may be key to maintaining our military superiority in the future. Even transactions that do not amount to a change in corporate control can present risks resulting from technology transfer, data compromise, and exploitation of proximity. We believe that FIRRMA would modernize and reform FINSNA, allowing CFIUS to push back against abuses of our open investment policy and protect the United States from risks to our national security arising from foreign investment in United States businesses, particularly from countries that do not share our values and respect for free trade and the rule of law.

FIRRMA would modernize the Committee's authorities and processes in a number of critical ways. First, the Committee cannot protect what it cannot see. To ensure that the Committee is aware of transactions that may pose a national security risk, FIRRMA would

require disclosures of certain investments by state-owned enterprises and other transactions meeting specified criteria, enabling the Committee to review transactions of which it might not otherwise be aware (section 5). Second, both the Committee and parties contemplating transactions benefit from a transparent description of national security risks to be assessed in the review process. FIRRMA would make explicit that CFIUS shall consider, as appropriate and among other issues, exposure of sensitive data of United States citizens in a manner that affects U.S. national security, emergence of new cybersecurity vulnerabilities, investors' history of complying with United States law, facilitation of criminal or fraudulent activity affecting United States national security, and exposure of sensitive Federal law enforcement agency information (section 15). Third, the Committee benefits from the different perspectives and expertise of its members, and FIRRMA provides a workable path towards resolving the most complex and challenging transactions when there is a lack of consensus about the type and level of risk they pose (section 16). Finally, many of the transactions that pose risk involve entities that span international borders, and coordinated action by likeminded nations is required if the risk is to be addressed. FIRRMA would clarify that CFIUS may, under appropriate circumstances, share information about pending transactions with allies and other governmental entities. (section 12).

Throughout the bill, FIRRMA recognizes that CFIUS should prioritize its work based on potential risk factors, and that efficient transaction reviews encourage investment. To facilitate the Committee's efficiency in light of its expanded scope, FIRRMA would allow CFIUS to maintain appropriate senior-level clearance of certain transactions, while delegating clearance of other transactions at the discretion of the Department of the Treasury and the co-lead agency for CFIUS review, so that our country and economy can benefit from those investments without undue delay (section 10). While expanding the scope of transactions brought to the Committee's attention, FIRRMA would empower CFIUS to streamline review of the transactions that involve countries that pose less of a threat, such as our allies (section 3). FIRRMA also would provide for the centralization of certain CFIUS functions within the Treasury Department, reducing duplication of effort by United States Government agencies and making CFIUS procedures and functions more efficient and predictable to foreign investors and United States businesses alike (section 20). Finally, FIRRMA would clarify the process and procedures to be followed in any judicial review of CFIUS recommendations to the President (section 14).

As the Attorney General has said, we welcome the prospect of FIRRMA's reforms and thank the Financial Services Committee for its work on this bill. We hope that the Congress will move swiftly forward with it. In modernizing the Committee's authorities and processes, you will demonstrate the importance of protecting against significant national security risks while maintaining our longstanding open investment policy. We at DOJ support FIRRMA and hope that the Congress will deliver robust reforms to protect the United States from those who would use our open investment policy against us, advancing their interests at the expense of our national security.

Emmer QFRs
Monetary Policy and Trade Subcommittee
“Evaluating CFIUS: Administration Perspective”
March 15, 2018

Questions for Honorable Tarbert, Ashooh and Mr. Chewing:

“A number of concerns have been raised that CFIUS reform bills pending in Congress, in terms of scope of products and technology, could include technology that would not appear to be included in CFIUS reviews. One such example is medical technology.

Would it be possible to more clearly define the scope of the bill, so that medical technology companies’ concerns and uncertainty can be address? Could the CFIUS process be opened for notice and comment, so that companies can have a transparent process? Absent any amendments to the underlying bill, are you confident that implementing regulations will successfully define the scope of the bill.”

A: The Department of Commerce agrees that CFIUS reviews should remain focused on national security issues as well as issues and technologies that are most closely linked to national security. The Department also believes that this kind of level of detail is best left to regulation and that the implementing regulations can successfully define the scope of the bill. That process must be open for public comment in order to be fully successful and it is our expectation that the process will be open and transparent to the public.

Emmer QFRs
Monetary Policy and Trade Subcommittee
“Evaluating CFIUS: Administration Perspective”
March 15, 2018

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Would it be possible to more clearly define the scope of the bill, so that medical technology companies’ concerns and uncertainty can be address? Could the CFIUS process be opened for notice and comment, so that companies can have a transparent process? Absent any amendments to the underlying bill, are you confident that implementing regulations will successfully define the scope of the bill.”

- CFIUS operates pursuant to section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007 (FISIA) (section 721) and as implemented by Executive Order 11858, as amended, and regulations at 31 C.F.R. Part 800. Accordingly, CFIUS has the authority to review and investigate any transaction for national security concerns, regardless of technology, that is determined to be “covered.” The statutory definition of a covered transaction is, “any merger, acquisition, or takeover by or with a foreign person that is proposed or pending after August 23, 1988, which could result in foreign control of any person engaged in interstate commerce in the United States.” Accordingly, given CFIUS’ broad subject matter authority, it would not be feasible to provide greater transparency in the regulatory drafting process.

Thursday, March 15, 2018
 Evaluating CFIUS: Administration Perspectives
 Congressman Robert Pittenger (NC-9)

For Assistant Secretary for International Markets and Investment Policy Tarbert:

1. Do the Administration consider the need enact this bill and modernize the authorities of CFIUS to be a pressing national security priority?
2. In recent years, has CFIUS seen circumventions of its jurisdiction through the use of business arrangements overseas, such as joint ventures between U.S. companies and foreign companies?
3. Would you say these arrangements are growing in number in China and elsewhere? Please describe a typical circumvention.
4. Please compare the national security risks present in these arrangements with the risks present in traditional mergers or acquisitions.
5. Have these arrangements managed to circumvent our export control system as well?
6. Under our bill, do you believe you would have adequate resources to manage the workload and keep things moving in a timely manner?
7. Would you also describe the “effective date” provision that is built into the bill to prevent an unfunded mandate?

For Deputy Assistant Secretary for Manufacturing and Industrial Base Policy Chewing:

8. Do you agree that enacting this bill and modernizing the authorities of CFIUS is a pressing national security priority?
 Yes. Modernizing the authorities of CFIUS, specifically the recommendations outlined in the recently introduced Foreign Investment Risk Review Modernization Act (FIRRMA), is essential to our national security. The proposed changes would help close gaps in both the CFIUS and export control processes, which are not keeping pace with today’s rapid technological changes. Those changes include developments in some of the very technologies that will ensure our ability to fight and win the wars of the future, such as advanced computing, big data analytics, artificial intelligence, autonomous systems, robotics, miniaturization, additive manufacturing, meta-materials, directed energy, and hypersonics.
9. What is your assessment of the current trend lines in China’s military capabilities? How worried should we be?
 Our National Defense Strategy clearly states one method China is using to reach its goal to displace the United States and achieve global preeminence is through military modernization. To that end, China recently publicized that its planned defense spending would include an 8.1% growth target, with a budget of \$175B. While smaller than our defense budget, a 2017 International Monetary Fund study showed that China's economy is now the world's largest, when purchasing power parity is taken into account. With the world's largest economy, it will be easier

for China to acquire the military resources it needs to challenge U.S. leadership across the globe.

10. Is China successfully eroding our nation's longstanding technological military advantage? Do you agree that China has successfully weaponized investment for this purpose?

Yes. China's relentless efforts to acquire U.S. technologies with military applications threaten to erode our advantage. According to a 2017 report by DoD's Defense Innovation Unit Experimental (DIUx), Chinese participation in venture-backed startups is at a record level of 7-10% of all completed venture deals. Not only that, China is selectively investing in the critical future technologies with both commercial and military applications: artificial intelligence, robotics, autonomous vehicles, augmented and virtual reality, financial technology, and gene editing, to name a few. China pursues different investment channels to gain access to our critical technologies, targeting U.S. companies for mergers and acquisitions, joint ventures, venture capital investments, and other business structures.

11. Do you see China's investments and their coercive industrial policies as playing a key role in China's aggressive military modernization?

Yes. China exploits the United States' open investment climate to conduct aggressive business practices on our soil, allowing it access to our sensitive emerging technologies and intellectual property. These efforts are certainly feeding China's military modernization. The narrow definition of what can be reviewed by CFIUS plays a role in this, as does our export control system which allows our emerging technologies to leave the United States prior to controls being emplaced. In turn, China imposes unfair domestic market protections and institutionalized business regulations that restrict U.S. and foreign access to Chinese markets. This is particularly true when it comes to handling joint ventures (JV) on its soil, where U.S. businesses often must relinquish control of the JV in order to access the Chinese market. Too often, U.S. firms are lured into JVs with empty promises of open access to the Chinese market, only to see their intellectual property stolen overseas. In some cases, the U.S. firm actually ends up competing with its former JV partner, just as our military faces the very real prospect of competing against an opposing force emboldened by its theft of U.S. ideas.

12. If we don't get this right, what are the long-term consequences for our national security? What will this mean for our country two or three decades from now?

If we do not get this right, the long-term consequence will be a loss of our technological advantage. We will find that innovative technology developed in the United States will be taken off our shores, denying us their potential economic and military advantages.

13. While protecting our technology is crucial, what can we do on the other side of the ledger, in terms of providing you the tools and resources needed to invest in continuing innovation to try to keep pace with the Chinese, wherever possible? What can DoD and Congress do in this together?

DoD and Congress can work together to promote important innovation efforts to keep far ahead of China and maintain our strategic advantage. These initiatives could include: identifying and awarding unique government innovation for emerging technology development and achievements; developing innovation events such as patent and moonshot challenges; assisting in standing up markets for new technologies and other critical products to aid innovators and entrepreneurs to commercialize and sustain capacity; investing in U.S. science, technology, engineering, and math (STEM) education to create the human capital for the 21st century; creating public-private tools such as impact venture capital funds to invest in underserved hardware technology startups and in incubation centers that transition technology to viable commercial firms; and improving defense and other government-related procurement processes. Additionally, Congressional support for passage of legislation such as FIRREA, that gives us greater oversight over foreign investment into our technologies and the ability to place subsequent safeguards in the form of mitigation or other controls, is essential.

Questions for the Record
Submitted by Congressman Andy Barr, Chairman,
Subcommittee on Monetary Policy and Trade
Addressed to The Honorable Heath Tarbert
Department of Treasury
“Examining CFIUS: Administration Perspectives”

Please respond fully to all questions below. Questions that may appear to implicate another agency’s jurisdiction are addressed to you by virtue of the Secretary’s chairmanship of the Committee on Foreign Investment in the United States (CFIUS) and your duties prescribed under Section 721 of the Defense Production Act of 1950; please include a response to these questions.

Representative Barr:

Question 1: In the Foreign Investment Risk Review Modernization Act (FIRRMA), CFIUS filing fees would be established to help fund your operations. Specifically, what do you estimate the annual costs of the FIRRMA legislation to be for the Treasury Department, and how would you structure the fee system accordingly?

Answer: The Administration is working to determine the resource requirements for an efficient and effective implementation of FIRRMA, but will not have firm estimates on the overall cost, number of expected filings, or number of covered transactions until the bill text is finalized and required implementing regulations have been formulated. While there are many unknowns about the impact of the proposed bill, Treasury expects the number of covered transactions to increase significantly. Certain efficiencies are anticipated to be gained over time in the processing of the increased case load.

We anticipate that fee amounts would be set by regulation at a level that does not unduly affect the economics of any given transaction. We expect that the largest increase in work from FIRRMA is likely to be in connection with transactions that are much smaller than the typical mergers and acquisitions currently reviewed by CFIUS. Such transactions may generate little, if any, revenue. Thus, while fees may offset some of the costs of administering CFIUS, they are unlikely to cover the increased load across the CFIUS member agencies. Funds derived from filing fees are more likely to serve as a supplemental resource that would enable CFIUS to respond better to unexpected increases in case volume, and to ensure adequate resourcing of CFIUS’s additional functions of monitoring mitigation agreements and non-notified transactions.

Treasury will keep you apprised on the development of our estimates, and we look forward to working with you to strengthen and modernize CFIUS.

Question 2: If FIRRMA were to be enacted, how many CFIUS employees would Treasury need in order to expeditiously carry out all of the bill’s provisions, and what specific assumptions are built into your estimates?

Answer: As discussed above, we are working to estimate the resource requirements under FIRRMA, but will not have detailed estimates on the overall cost, number of expected filings, or

number of covered transactions until the required implementing regulations have been promulgated. Treasury will keep you apprised on the development of our estimates and we look forward to working with you to strengthen and modernize CFIUS.

Question 3: It's generally agreed that CFIUS cases are getting larger and more complex. Has your department had difficulty quickly hiring the right people, or the adequate number of people, to evaluate proposals?

Answer: The current hiring process for CFIUS staff is not conducive to rapid identification and hiring of qualified personnel. Direct hiring authority, as provided for in FIRRMA, would significantly improve Treasury's ability to identify and hire quickly appropriate, qualified staff to ensure efficient and effective processing of both the expected increased volume of cases as well as transactions that have become increasingly complex.

Question 4: In the FIRRMA legislation, aside from critical technologies, what particular kinds of intellectual property and associated support are you looking for CFIUS to review before being transferred to a foreign person? Please provide specific examples of intellectual property and associated support that would not be subject to export controls, but would be encompassed by FIRRMA.

Answer: After the March 15 hearing, I provided a classified briefing to this Committee's Members during which my colleagues and I provided some examples of critical technologies that were not subject to export controls at the time they were structured to avoid CFIUS review. Furthermore, the current versions of FIRRMA would strengthen export controls to address the national security concerns associated with the transfers of critical technologies through joint ventures.

Question 5: Under the last legislative changes made to CFIUS, rulemaking lasted nearly two years. Changes proposed by FIRRMA could take even longer to finalize in regulations, and much of the legislation cannot take effect until those regulations are in place. If we are truly facing a pressing national security threat from Chinese investment, why should Congress prioritize CFIUS changes that could take two years or longer to get off the ground?

Answer: Regulations for the Foreign Investment and National Security Act (FINSAs) became effective 16 months after FINSAs was passed and 13 months after its effective date. At that time, Treasury had only two to three individuals working full time on the regulations, guidance, and Executive order. Treasury recognizes that the development of regulations under FIRRMA will require substantially more work than what was required under FINSAs. Thus, we expect to dedicate greater resources to this process following enactment of FIRRMA to ensure that exigent national security threats are addressed in the near-term. The Senate bill, would delay the effective date of CFIUS's expanded jurisdiction until the Secretary of the Treasury, as chairperson of CFIUS, certifies that the infrastructure is in place to administer the new provisions. This provides certainty that CFIUS's jurisdiction will not expand until it can handle the expected increase in workload. The Senate bill would also permit CFIUS to implement a pilot program to review a subset of the expanded scope of covered transactions, allowing CFIUS

to gain experience and to address immediate national security risks. We support this language in the Senate's bill.

Question 6: In the FIRRMA legislation, CFIUS would be authorized to mandate the disclosure of transactions based on industry, economic sector, and technology.

Which specific industries, economic sectors, and technologies do you foresee could be subject to mandatory declarations in your rulemaking, and how many additional employees do you expect will be necessary to review these declarations?

Answer: We anticipate developing a mandatory declarations list through a careful and deliberative process, including public notice and comment. It is in CFIUS's interest to draft this list precisely, to avoid generating declarations regarding transactions that do not warrant a national security review.

Question 7: In an article from March 1st, the *Wall Street Journal* reported that Secretary Steven Mnuchin was unsure whether CFIUS had authority to review the Broadcom/Qualcomm deal. Although CFIUS went on to investigate it, it is concerning that regulations are not clear enough for the CFIUS Chairperson to be certain of CFIUS authorities. What are you doing to rectify this regulatory uncertainty under current law, and how can Congress be confident that rulemaking under FIRRMA would not lead to additional uncertainty?

Answer: Given statutory confidentiality rules related to CFIUS, I cannot comment on the facts and circumstances of a matter reviewed by CFIUS, including the veracity of any press reports regarding CFIUS deliberations. We would be happy to brief you in a closed setting on any specific CFIUS matters. As a general matter, it is not unusual that application of law to a particular set of facts and circumstances may raise unique interpretive questions of law and policy, and such a situation does not necessarily suggest infirmity in the law.

Question 8: Singapore is an important U.S. ally. 1) What does the recent Broadcom/Qualcomm deal say about the Department's attitude toward investment from Singapore? 2) How should other U.S. allies interpret CFIUS's actions? 3) Does the action taken with respect to Singapore mean that a "CFIUS white list" would be unworkable and inadvisable – if not, why not?

Answer: CFIUS regularly approves investments from Singapore and welcomes such investments. President Trump's March 12, 2018 order prohibiting Broadcom's proposed takeover of Qualcomm is not intended as a more general statement about Singaporean investments. As stated by Secretary Mnuchin at the time of the issuance of that order, the decision was based on the facts and national security sensitivities related to that particular transaction only.

Question 9: In Treasury's letter on the Broadcom/Qualcomm deal, you not only took issue with Broadcom's financing strategy, but also potential changes to Qualcomm's business model. Treasury wrote: "Changes to Qualcomm's business model would likely negatively impact the core R&D expenditures of national security concern."

Notwithstanding the particularities of the Qualcomm case, what do you believe are the proper limits for CFIUS when passing judgment on a U.S. company's business model, and why should Congress believe that your interest in companies' business models won't lead to government micromanagement of the private sector when CFIUS looks at future deals or designs mitigation agreements?

Answer: CFIUS's sole remit is to identify and address the national security risk(s) posed by the specific facts and circumstances of each transaction under review. This would remain the case under FIRRMA. CFIUS considers potential business decisions of an acquirer when they may pose national security concerns, such as decisions to cease supply of critical goods to the U.S. government or decisions to do business in countries that are subject to U.S. economic sanctions or arms embargoes.

Question 10: The administration imposed controversial steel and aluminum tariffs earlier this month following a Section 232 investigation by Commerce. Although the tariffs were levied in the name of national security, the fact that senior members of Congress, including the Speaker and the Senate Majority Leader, publicly expressed concerns over them, shows that interpretations of national security are not always cut and dry. More recent reporting indicates that additional tariffs against China are being considered, and that Treasury is working on investment restrictions as well.

1) Please explain how the administration's tariffs and investment restrictions would represent a response to legitimate national security factors. 2) If you believe investment restrictions should ever be put in place for *non*-security reasons, please explain how CFIUS would remain immune from being used for such reasons.

Answer: On Section 232 tariffs, I respectfully defer to the Department of Commerce, which is responsible for administering that authority. The basis for investment restrictions pursuant to Section 301 were set forth in the report issued by the U.S. Trade Representative. However, as noted in his June 27, 2018 statement, the President deferred action under Section 301 because FIRRMA, if enacted, would provide the additional tools necessary to protect U.S. national security from new and evolving threats posed by foreign investment. CFIUS, by law, is focused exclusively on national security, and any action taken by CFIUS must be supported by a written risk-based analysis that lays out the national security risk(s) posed by the transaction. This would remain the case under FIRRMA. CFIUS has a rigorous multi-agency process to ensure adherence to law, and the decisions of CFIUS are subject to oversight by Congress.

Question 11: At a Subcommittee hearing on CFIUS held in January, the gentleman from Texas, Congressman Green, asked about the security risks of U.S. oil companies partnering with the Russians. In response, Admiral Dennis Blair, President Obama's Director for National Intelligence and a supporter of FIRRMA, said, "There's a tension there, because the increase of the world oil supply is a good thing for the economy of the United States, and for all other countries." Admiral Blair went on to say: "In general, I think cooperative oil measures are OK and ought to be entered into by U.S. companies that are pretty savvy at not giving away the family jewels when they work with another company."

1) Do you agree with Admiral Blair? 2) Would you support exempting U.S. oil companies and other firms from expanded CFIUS jurisdiction if those companies are – to use Admiral Blair’s phrasing – “pretty savvy at not giving away the family jewels,” and are engaged in increasing the world supply of goods beneficial for the U.S. economy?

Answer: CFIUS examines transactions on a case-by-case basis—that is, according to their particular facts and circumstances—and does not render its decisions based on broad categories of transactions. CFIUS has provided technical advice to Congress on FIRRMA, including refinements to clarify definitions to minimize the risk that the expanded authority will apply to or impact transactions that are not likely to raise the national security concerns that FIRRMA is intended to address.

Question 12: Please respond with yes or no. 1) During your tenure, have you been aware of any investment transaction which was structured to evade CFIUS jurisdiction and which posed a risk to national security? 2) If yes, did you recommend to the President that he use authorities under the International Emergency Economic Powers Act, or any other law, to prevent or unwind the transaction?

Answer: No, but I am aware of transactions of concern that are currently outside CFIUS jurisdiction and that may pose one or more risks to U.S. national security—irrespective of the parties’ intent in structuring the transaction. In some of these instances, there have not been other authorities that could appropriately address the risk. Some of these examples were included in the classified briefing that my colleagues and I provided to this Committee’s Members after the March 15 hearing.

Question 13: The FIRRMA legislation includes a category entitled “countries of special concern.” These are countries that “pose a significant threat to the national security of the United States.” Please answer yes or no to the following:

- a) Do you consider China to be a country of special concern?
- b) Do you consider Russia to be a country of special concern?
- c) Do you consider Saudi Arabia to be a country of special concern?
- d) Do you consider Pakistan to be a country of special concern?
- e) Do you consider Qatar to be a country of special concern?

Answer: FIRRMA would not require CFIUS itself to promulgate a list of countries of special concern. The National Security Threat Assessments produced by the Intelligence Community identify whether a particular country or foreign person is known to pose a national security threat with respect to the particular transaction under review. It is this assessment that is a pillar of the CFIUS risk-based assessment.

Question 14: FIRRMA contains a so-called “white list” for countries that could bypass enhanced CFIUS scrutiny (see Section 3, “Exemption for Transactions from Identified Countries”). These would include countries that have a mutual defense treaty with the United States or other criteria established by CFIUS. I would like to ask you about the following NATO allies. Please answer with a yes or no.

- a) Turkey's state-owned Halkbank has been implicated in a massive sanctions evasion scheme involving Iran, which led to the conviction of a Turkish banker in January. During the trial, the prosecution's star witness testified that Turkey's president had authorized illicit trade with Iran. Yes or no: should Turkey be on a CFIUS white list?
- b) The German political party "Alternative for Germany" has been accused of harboring anti-Semitic members. Prior to last year's elections, the party's co-founder said that Germany should be proud of its soldiers' actions in World War II. Yes or no: if the Alternative for Germany entered government, do you believe Germany should be on a CFIUS white list?
- c) In a foreign policy speech last year, British Labour Leader Jeremy Corbyn said, "No more hand-holding with Donald Trump. Britain deserves better than simply outsourcing our country's security and prosperity to the whims of the Trump White House." Yes or no: if Corbyn were to become prime minister, do you believe the UK should be on a CFIUS white list?
- d) Poland is at risk of being sanctioned by the European Union for undermining the rule of law. This year, Poland also passed its so-called "Holocaust law," which makes it illegal to claim the Polish nation was responsible or complicit for Nazi atrocities. As the *Washington Post* has noted, "The Israeli government has likened the bill to Holocaust denial, and the United States to an attack on freedom of speech." Yes or no: do you believe Poland should be on a CFIUS white list?

Answer: FIRRMA sets forth a representative list of the kinds of factors CFIUS would consider in preparing a list of exempt countries. CFIUS would carefully consider whether to include each of the countries referenced above on the list in light of the factors listed in FIRRMA and any other relevant factors. CFIUS would exercise such an exemption only after determining that it is in U.S. national security interest to do so. It is important to note that the so-called "white list" does not "exempt" all of a country's transactions from a review. Any "control" transaction from a country on the "white list" would remain subject to review by CFIUS.

Question 15: Would the effect on national security be positive, negative, or neutral if some NATO allies were included on a CFIUS white list but not others?

Answer: We believe that inclusion on a list of exempt countries can serve as an incentive to other countries to develop their own capacity to review foreign investment for national security concerns.

Question 16: Australia and New Zealand are not part of NATO, but they are members of the Five Eyes intelligence alliance. Academic and intelligence reports have noted that China has sought influence in these countries' political systems through the use of campaign donations. Yes or no: do you believe Australia and New Zealand should be on a CFIUS white list in light of China's activities?

Answer: Please see previous answers to the “white list” questions.

Question 17: Which specific countries do you envisage would be included in a CFIUS white list, and can you certify that no security threats are likely to emanate from those countries – including, but not limited to, spying and industrial espionage?

Answer: Please see previous answers to the “white list” questions.

Question 18: In the case of a foreign-owned multinational with extensive operations within and outside the U.S., should a CFIUS case be triggered each time its U.S. subsidiary sought to pass technology to the parent or a foreign sister subsidiary, or if U.S. subsidiaries were combined or reorganized?

Answer: The current versions of FIRRMA would strengthen export controls to address the national security concerns associated with the transfers of critical technologies through joint ventures and offshore subsidiaries. CFIUS authorities are utilized to protect U.S. national security when other authorities are not available to mitigate or address the relevant risk(s).

Question 19: Concerns have been raised that, when mitigation agreements are put in place by CFIUS to protect national security but allow a deal to proceed, the monitoring of such agreements is uneven, or tails off after time passes. Are you aware of any instances in which there has been a material breach of such an agreement, and if so, what has been the effect? Are you aware of any intentional breaches?

Answer: Yes, I am aware of one instance during the last 12 months of a material breach of an agreement. CFIUS determined the breach was at least the result of gross negligence. Pursuant to its authorities, CFIUS imposed a monetary penalty in this matter.

Question 20: Should CFIUS be permitted to phase out or otherwise terminate mitigation agreements where a risk that was originally identified in the underlying transaction is no longer present, or where the conditions imposed by CFIUS are otherwise not relevant?

Answer: Yes. Such authority exists under current law, and CFIUS does terminate or modify mitigation agreements in such circumstances.

Question 21: Is there a danger that after some time passes, the CFIUS staff responsible for monitoring such agreements has enough turnover that a breach, intentional or not, may not be noticed? If so, what are you doing to prepare for this contingency?

Answer: CFIUS mitigation agreements include a range of provisions to ensure appropriate monitoring and compliance, such as annual reports and third party audits. CFIUS also has an institutionalized, interagency process to evaluate the compliance status of mitigation agreements on a quarterly basis. These oversight activities supplement steps that individual monitoring agencies take on an on-going basis.

Question 22: In late 2016, President Obama rejected a proposed deal in which a Chinese controlled company sought to buy the U.S. assets of a German company. Some who observe the CFIUS process believe that the statutory authority to share information in similar situations needs to be expanded. Please state specifically where the gaps are, if any, in information sharing, and how we would prevent abuse by foreign governments who obtain business-confidential information.

Answer: The extent to which CFIUS can share information with allies in the interests of U.S. national security is not clearly set forth under current law. In some instances, CFIUS may be unable either to obtain information from U.S. allies that would be critical to assessing the national security implications of transactions, or to provide allies with information that would enable them to take action that is in the national security interests of the United States. The information sharing provision of FIRRMA, together with the confidentiality provisions, would add necessary clarity. Safeguards would include oversight by Treasury, as chair of CFIUS, and other arrangements to ensure appropriate use and protection of such information, including confidential business information.

Question 23: Even if the U.S. makes changes to our export control policy toward China, won't such adjustments likely need to be multilateral in order to be most effective? How can the U.S. most effectively coordinate with and incentivize our allies and other defense partners to make comparable policy adjustments to prevent Beijing from obtaining comparable technologies from U.S. competitors in a way that does not cost American manufacturers jobs and sales?

Answer: The U.S. Commerce Department is best situated to respond to questions about the effectiveness of export controls. We do note, however, that numerous advanced economies share our concerns and are reexamining and strengthening their authorities to protect their national security.

Question 24: Some observers of CFIUS believe the Director of National Intelligence does not currently have adequate time to complete threat assessments. When a company announces its intent to file a notice to begin a CFIUS review, is the DNI notified as soon as CFIUS knows there may be a review, or only after a formal filing is complete and ready to move forward?

Answer: The former, as a general matter. Companies often submit draft filings in advance of submitting formal filings. These draft filings are made available to all CFIUS agencies, including the Office of the Director of National Intelligence (ODNI). In the context of transactions that are expected to be particularly complicated, it is often the case that all CFIUS agencies, including ODNI, will begin their analysis even before the formal initiation of review. However, it is not practical to expect that ODNI can consistently begin its analysis before formal initiation of review and the filing of an accurate and complete notice by the parties.

Question 25: In testimony to the Senate earlier this year, you said you believed CFIUS should review a case only if export controls were insufficient to block any export of technology that should not be exported. That implies a less expansive role for CFIUS than some have proposed. Can you describe which cases should go to which process and if any should go to both?

Answer: The current versions of FIRRMA clearly define the respective roles of CFIUS and export controls and would strengthen export controls to address the national security concerns associated with the transfers of critical technologies through joint ventures.

CFIUS, by Executive order, may not take action if other provisions of law are adequate and appropriate to address the national security risk posed by a given transaction. Therefore, if CFIUS identifies a national security risk upon reviewing a transaction, it considers whether existing authorities (including export controls) are adequate and appropriate in the first instance to address the risk. If they are, then CFIUS will withhold action. If, for whatever reason, they are not, then CFIUS would proceed to determine whether it could mitigate the identified national security risk.

Question 26: It has been proposed that CFIUS receive “declarations” of proposed transactions meeting a broad range of descriptions. In your testimony to the Senate earlier this year, you described this process as a way to “speed up” the CFIUS process. Some have estimated that the number of declarations could top 10,000 annually. Could you describe how that would speed up a process that last year reviewed 250 transactions?

Answer: FIRRMA contains a series of interrelated provisions that would allow rapid adjudication of cases that do not warrant an extended review. Under current law CFIUS may not clear a transaction without a full notice, which are often highly detailed and voluminous. This consequently increases the resource intensity of the review. Under FIRRMA, parties may file declarations, which are short-form filings. CFIUS would be able to clear the transaction on the basis of such a filing, if warranted by the facts and circumstances of the particular case. A related point is that today, every transaction under review requires a full National Security Threat Assessment that is coordinated through the entire Intelligence Community. FIRRMA would instead allow ODNI to provide “basic threat information” in appropriate cases, reducing the Intelligence Community’s review requirements. The combination of declarations and basic threat reviews would allow more expedient processing of transactions that do not raise national security concerns.

Question 27: The Subcommittee has heard from numerous trade groups and witnesses at previous hearings that CFIUS reform that is poorly calibrated could hinder the ability of American companies to compete with their foreign counterparts. Does that sort of result run the risk of U.S. defense capabilities losing their technological edge over, for example, China?

Answer: We believe that FIRRMA is appropriately scoped and would not pose such a risk. FIRRMA explicitly provides CFIUS with the authority, through the rulemaking process, to scale certain definitions and create exemptions, which would help ensure that the volume of transactions reviewed by CFIUS is manageable and continues to afford American companies the ability to compete effectively with their foreign counterparts.

Question 28: According to a 2016 GAO report, DoD has made limited progress in conducting risk assessments on foreign encroachment on military sites.¹ 1) Given Treasury’s leadership role within

¹ “DoD Has Made Limited Progress in Assessing Foreign Encroachment Risks on Federally Managed Land,” GAO, April 13, 2016. <https://www.gao.gov/products/GAO-16-381R>

CFIUS, how would you effectively review real estate transactions near such sites without risk assessments? 2) In the absence of risk assessments, how would you appropriately define “close proximity” to military sites, as prescribed in FIRRMA?

Answer: Real estate risk assessments are facilitated by knowledge of specific information about what property is leased or owned by foreign persons and the identity of those foreign persons. CFIUS member agencies would have to consider the various types of facilities that could be at risk and specify in regulations or other guidance the distances—based on an assessment of the distances from which an adversary could reasonably pose a meaningful threat—that would be considered “in close proximity.” This could ostensibly include any number of metrics, such as specific perimeters for specific types of facilities or for named facilities.

Question 29: According to the General Services Administration (GSA), GSA “owns and leases more than 376.9 million square feet of space in 9,600 buildings in more than 2,200 communities across the U.S. GSA properties include: land ports of entry, courthouses, laboratories, post office, and data processing facilities.”²

- a) Under the provision of FIRRMA, how would you determine which of these federal facilities is, or is not, “sensitive for reasons of national security?” Please be specific.
- b) How would you prevent disclosure of a site that is sensitive for national security reasons, but whose purpose is not public, if you reviewed a transaction involving real estate near that site? How does it enhance national security if a foreign investor learns, directly or indirectly, of the site’s location?

Answer: CFIUS has provided Congress with technical input to FIRRMA that would generally exclude from CFIUS’s jurisdiction the lease or purchase of real estate in “urbanized areas,” as defined by the Census Bureau. This would likely eliminate a substantial portion of GSA space. For facilities outside such areas, CFIUS would have to consider identifying the types of facilities that would be covered. If real estate is acquired in close proximity to a facility, the purpose of which is not publicly known, CFIUS (and the relevant facility occupant) would have to assess the means by which to address the risk without revealing the sensitive information, including the range of alternative methods to mitigate any risk. Such calculations are not unusual across a range of government functions, including CFIUS.

Question 30: Under Section 721(b)(3)(C)(i) of the Defense Production Act of 1950 (“Certification procedures”), each CFIUS certification to Congress shall include “identification of the determinative factors considered under subsection (f).” Why do the certifications submitted by the Department to Congress not specify the factors considered by CFIUS in its reviews and investigations, as prescribed by law?

Answer: Certifications are required when CFIUS concludes action with respect to a transaction. Accordingly, CFIUS has considered the applicable factors listed in subsection (f) and determined that, pursuant to either other U.S. government authorities to protect national security or action by CFIUS to mitigate the risk, prohibition of the transaction is not warranted. For example, CFIUS

² <https://www.gsa.gov/real-estate/gsa-properties>

will have considered whether the transaction involves a good that is necessary for national defense or national security requirements (factors 1, 2, and 3), whether it raises concerns regarding countries of concern (factor 4), whether it raises any relevant technological leadership issues (factor 5), whether it involves critical infrastructure (factor 6), whether it involves critical technologies (factor 7), and/or whether it is foreign government controlled (factor 8). CFIUS also considers factors not listed in (f). By its nature, this process assesses the facts and circumstances of the particular transaction, and CFIUS's certifications expressly affirm that the factors in subsection (f) have been considered. CFIUS makes itself available to provide detailed briefings on CFIUS's analysis of a particular transaction, upon request. We believe that we have maintained a positive working relationship with staff of the committees of jurisdiction and would be pleased to discuss how to ensure that the committees have the information that they need.

Representative Barr:**Questions for Honorable Tarbert, Ashooh and Mr. Chewning:**

“A number of concerns have been raised that CFIUS reform bills pending in Congress, in terms of scope of products and technology, could include technology that would not appear to be included in CFIUS reviews. One such example is medical technology.

Would it be possible to more clearly define the scope of the bill, so that medical technology companies’ concerns and uncertainty can be address? Could the CFIUS process be opened for notice and comment, so that companies can have a transparent process? Absent any amendments to the underlying bill, are you confident that implementing regulations will successfully define the scope of the bill.”

Answer: Since the hearing in March, the Administration has provided technical assistance and feedback to Congress in the course of the bill’s drafting to help address concerns about clarity of the scope of jurisdiction. Additionally, regulations under FIRRMA, where appropriate, would be subject to public notice and comment, which—as you note—would further help to ensure that the scope of the bill is clearly defined and the rulemaking process is transparent. Finally, we believe that event absent any amendments to the underlying bill, the implementing regulations will be successful in defining the scope of the bill to give the business community the clarity it is seeking.

Emmer QFRs
Monetary Policy and Trade Subcommittee
“Evaluating CFIUS: Administration Perspective”
March 15, 2018

Questions for Honorable Tarbert, Ashooh and Mr. Chewing:

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Would it be possible to more clearly define the scope of the bill, so that medical technology companies’ concerns and uncertainty can be address? Could the CFIUS process be opened for notice and comment, so that companies can have a transparent process? Absent any amendments to the underlying bill, are you confident that implementing regulations will successfully define the scope of the bill.”

- CFIUS operates pursuant to section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007 (FISIA) (section 721) and as implemented by Executive Order 11858, as amended, and regulations at 31 C.F.R. Part 800. Accordingly, CFIUS has the authority to review and investigate any transaction for national security concerns, regardless of technology, that is determined to be “covered.” The statutory definition of a covered transaction is, “any merger, acquisition, or takeover by or with a foreign person that is proposed or pending after August 23, 1988, which could result in foreign control of any person engaged in interstate commerce in the United States.” Accordingly, given CFIUS’ broad subject matter authority, it would not be feasible to provide greater transparency in the regulatory drafting process.

Representative Pittenger:

1. Do[es] the Administration consider the need enact this bill and modernize the authorities of CFIUS to be a pressing national security priority?

Answer: Yes. Ensuring that CFIUS has the authorities and resources it needs to perform its critical national security function is a priority for the Administration. As noted in his June 27 statement, the President believes the Foreign Investment Risk Review Modernization Act (FIRRMA), “will enhance our ability to protect the United States from new and evolving threats posed by foreign investment while also sustaining the strong, open investment environment to which our country is committed and which benefits our economy and our people.” Its passage is an essential element to protecting our national security as well as our leadership in critical technology.

2. In recent years, has CFIUS seen circumventions of its jurisdiction through the use of business arrangements overseas, such as joint ventures between U.S. companies and foreign companies?

Answer: As noted in my prior congressional testimony, CFIUS is aware that some parties may be structuring transactions to come just below the control threshold to avoid CFIUS review, while others are moving critical technology and associated expertise from U.S. businesses to offshore joint ventures. Joint ventures and licensing arrangements of concern occur, for example, in emerging technologies, including subsectors that support 5G, the Internet of Things, artificial intelligence, medical technologies, microelectronics, robotics, and semiconductors. While we recognize there can and should be space for creative business transactions, purposeful attempts to evade CFIUS review can put our country’s national security at risk. The Administration supports FIRRMA because it will both close gaps in CFIUS’s authorities by expanding the types of transactions subject to review and give CFIUS greater ability to prevent parties from restructuring transactions that pose critical national security concerns to avoid or evade CFIUS review.

3. Would you say these arrangements are growing in number in China and elsewhere? Please describe a typical circumvention.

Answer: CFIUS has not observed a “typical” circumvention. However, CFIUS has observed certain trends designed to evade its jurisdiction, including those noted above. We believe passage of FIRRMA is necessary to close key gaps in CFIUS’s jurisdiction.

4. Please compare the national security risks present in these arrangements with the risks present in traditional mergers or acquisitions.

Answer: Both traditional mergers and acquisitions as well as newer business arrangements can threaten to impair national security. For example, acquisition of a Silicon Valley start-up may raise just as serious concerns from a national security perspective as the acquisition of a defense or aerospace company. The CFIUS process—which is grounded in an analysis of the national security risk posed by the specific facts and circumstances of each transaction—ensures that the

national security risk presented in any transaction is considered and appropriately addressed. The Administration supports FIRRMA because it will close key gaps in CFIUS's existing authorities by expanding the scope of transactions subject to CFIUS review.

5. Have these arrangements managed to circumvent our export control system as well?

Answer: The Department of Commerce is best positioned to speak to questions regarding the functioning and effectiveness of our export control system. We note only that CFIUS does not act to mitigate national security risks when other provisions of law, including U.S. export controls, provide adequate and appropriate authority to address the national security risks presented by a particular transaction. It is thus important that we modernize CFIUS to ensure that it has the tools and authorities necessary to address national security risks posed by today's evolving foreign investment landscape.

6. Under our bill, do you believe you would have adequate resources to manage the workload and keep things moving in a timely manner?

Answer: The House's bill recognizes CFIUS's need for greater resources to pursue an expanded mandate. We are committed to working with Congress to achieve and maintain the appropriate level of resources necessary for CFIUS to efficiently and effectively fulfill its mandate in a manner that does not unnecessarily impact the economics of a particular transaction.

7. Would you also describe the "effective date" provision that is built into the bill to prevent an unfunded mandate?

Answer: H.R. 5841, the bill that was approved by the House on June 26, 2018, does not include an "effective date" provision. The Senate bill would delay the effective date of CFIUS's expanded jurisdiction until the Secretary of the Treasury, as chairperson of CFIUS, certifies that the infrastructure is in place to administer the new provisions. This provides certainty that CFIUS's jurisdiction will not expand until it can handle the expected increase in workload. The Senate bill would also permit CFIUS to implement a pilot program to review a subset of the expanded scope of covered transactions, allowing CFIUS to gain experience and to address immediate national security risks. We support this language in the Senate's bill.

Representative Waters:**> On CFIUS and the Private Equity business model**

On March 12th, President Trump quashed Broadcom's purchase of Qualcomm in large part because, according to a March 5th letter from CFIUS, it would lead to a reduction in R&D and investment at a militarily important tech leader.

This rationale was extremely unusual in that the issue wasn't whether Singapore's Broadcom itself posed a security risk by favoring the Chinese, but rather, that the purchase might simply reduce Qualcomm's capacity to conduct high-end research, thereby enabling Huawei and other Chinese companies to develop advanced technology before we do, which could give the Chinese a military advantage.

Why would Qualcomm's purchase by Broadcom diminish Qualcomm's commitment to research? Because, in the words of the letter, "Broadcom's statements indicate that it is looking to take a 'private-equity'-style direction if it acquires Qualcomm, which means reducing long-term investment, such as R&D, and focusing on short-term profitability."

So what Treasury is saying is that the private-equity control of companies—a dominant feature of current American capitalism—reduces investment and results in profit extraction. The CFIUS letter goes on to specify the way in which Broadcom follows the private equity model of purchasing companies by taking on debt, and paying off that debt by reducing expenditures and funneling revenue into profits. "Broadcom has lined up \$106 billion of debt financing to support the Qualcomm acquisition," CFIUS writes, "which would be the largest corporate acquisition loan on record. This debt load could increase pressure for short-term profitability, potentially to the detriment of longer-term investments. The volume of recent acquisitions by Broadcom has increased the company's profits and market capitalization, but these acquisitions have been followed by reductions in R&D investment."

- o If we're moving to expand the scope of CFIUS to address as broad a range of national security threats as possible, should we consider having CFIUS review the takeover of militarily important companies by U.S. private equity firms, which according to the Broadcom decision, inherently leads to the funneling of revenues to profits and underinvestment in a manner that is detrimental to U.S. national security?

Answer: The letter referenced in your question was not released by CFIUS, and CFIUS's advice to parties in specific transactions is not intended to provide generalized guidance to the public. Each transaction considered by CFIUS is assessed according to its specific facts and circumstances.

CFIUS has reviewed and cleared numerous private equity transactions in the past decade, including many transactions involving technology companies and companies that provide goods and services to the U.S. government. CFIUS does not view the private equity model as inherently posing national security concerns. In fact, private equity structures often mitigate risks that may be posed by some foreign investment, given that the investors are insulated from decision-making of the U.S. businesses receiving the investment. CFIUS determinations are fully

dependent on a thorough risk-based analysis, which is a function of the threat (i.e., the intent and capability of the foreign acquirer to harm the national security of the United States), the vulnerabilities associated with the U.S. business that have a bearing on national security, and the consequences to the national security of the United States should a threat actor exploit the vulnerabilities. Because every transaction poses a different combination of threat, vulnerability, and consequence, it is not useful to generalize from one CFIUS decision a broader rule or principle about how CFIUS views particular business models.