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CFIUS REFORM: ADMINISTRATIVE PERSPECTIVES ON THE ESSENTIAL ELEMENTS

HEARING

BEFORE THE

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS UNITED STATES SENATE

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

ON

EXAMINING THE ROLE OF THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES

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C O N T E N T S

THURSDAY, JANUARY 25, 2018

	Page
Opening statement of Chairman Crapo	1
Prepared statement	27
Opening statements, comments, or prepared statements of:	
Senator Brown	3

WITNESSES

Heath P. Tarbert, Assistant Secretary of the Treasury for International Markets and Investment Policy	4
Prepared statement	28
Responses to written questions of:	
Chairman Crapo	37
Senator Menendez	37
Senator Warner	38
Senator Cortez Masto	42
Richard Ashooh, Assistant Secretary of Commerce for Export Administration	6
Prepared statement	31
Responses to written questions of:	
Chairman Crapo	45
Senator Scott	46
Senator Cotton	47
Senator Menendez	48
Senator Warner	49
Senator Cortez Masto	52
Eric Chewning, Deputy Assistant Secretary of Defense for Manufacturing and Industrial Base Policy	7
Prepared statement	34
Responses to written questions of:	
Chairman Crapo	54
Senator Cotton	55
Senator Menendez	55
Senator Warner	56
Senator Cortez Masto	58

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THURSDAY, JANUARY 25, 2018

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
Washington, DC.

The Committee met at 10 a.m., in room 538, Dirksen Senate Office Building, Hon. Mike Crapo, Chairman of the Committee, presiding.

OPENING STATEMENT OF CHAIRMAN MIKE CRAPO

Chairman CRAPO. This hearing will come to order. This morning we will receive testimony for a third time this Congress on the role of the Committee on Foreign Investment in the United States, or CFIUS.

The Committee held a general oversight hearing on CFIUS in September, and last Thursday the Committee began its review of S.2098, the Foreign Investment Risk Review Modernization Act of 2017, or FIRRMA, a comprehensive reform that significantly expands the purview of CFIUS, which has been introduced by Senators Cornyn and Feinstein.

CFIUS authorities cover transactions that result in foreign control of a U.S. business that may threaten the national security of the United States. The focus is currently on inbound investment and technology acquisition.

Today's hearing brings in witnesses from three of the nine Federal agencies and offices that comprise the full voting membership of CFIUS: the Department of Treasury, which chairs—which serves as the chair of the committee; the Department of Defense; and the Department of Commerce's Bureau of Industry and Security, which administers and enforces the dual-use regulations of the U.S. export control regime.

According to their testimony last week, Senators Cornyn and Feinstein, informed by their work on the Senate Intelligence Committee, introduced their bill because of growing concerns arising from China's multilayered threat to U.S. national security, namely threats emanating from a weaponization of its foreign investment strategy to acquire, by design, dual-use technology and know-how from U.S. companies. Our colleagues believe that China has found gaps in both the existing CFIUS process and export control regime, and is exploiting each of them to the detriment of U.S. national security and the U.S. defense industrial base.

To address these concerns, FIRRMA is specifically designed to broaden CFIUS's jurisdiction to review certain high-technology

joint venture and related arrangements, minority position investments, and certain types of real estate transactions.

At last week's hearing, a consensus emerged that much of the bill is focused on national security threats that need to be addressed as China executes its policies borne of its unique civil-military integration that effectively blurs the lines between military and commercial activities.

It is also important to note that the overwhelming majority of foreign investments and transactions provides significant benefit to the United States economy, including those Chinese investments that occur in most sectors of the U.S. economy and do not impact the national security of the United States.

It is that point of inflection between the national security and economic growth realized from an open investment policy that the Banking Committee has been entrusted to debate and oversee throughout the now 42-year evolution of the CFIUS process.

The challenge comes in the continued use of foreign investment to promote economic growth and the next-generation technologies, while shielding those very technologies from foreign threats.

Last week, the panel of witnesses from the private sector offered their perspectives on the potential effects of FIRRMA. During the hearing's question-and-answer period, there were several questions raised that merit feedback from today's panel, including one, would the expansion of CFIUS authority to unwind or alter outbound joint venture-related international commercial activity duplicate or, in any way, undermine the current U.S. export control regime and end up chilling this type of commercial activity?

Two, if there are gaps in the export control process, why should this Committee, which has jurisdiction over both the relevant parts of the U.S. export control regime and CFIUS, opt to create a new export control authority for CFIUS, a traditionally unilateral inward-bound review process?

Three, what would the resource burden look like for each of your agencies for the type of expansion envisioned by this legislation, and what impact would it have on foreign investment if the review period were actually increased by 50 percent to accommodate these new reviews? The three Government agencies represented here today provide a spectrum of viewpoints necessary to understand where the United States must position itself with respect to CFIUS, to assure the national security of the United States.

Given what we have heard in previous hearings, it is apparent, on national security grounds, that legislative fixes to the current system may be warranted, including expanding the authority of CFIUS to monitor certain additional transactions that are evading the process. Preservation of the U.S. defense industrial base, protection of U.S. critical technology, critical infrastructure, and even related American know-how are all legitimate areas of concern.

It is not the intention of the Banking Committee to chill direct foreign investment into the United States, but neither can this Nation's national security interests be subordinated to commercial interests.

I am certain that these fixes can be made with the help of the Administration, the business community, and my colleagues from both sides of the aisle on the Banking Committee.

With that, Senator Brown.

OPENING STATEMENT OF SENATOR SHERROD BROWN

Senator BROWN. Thank you, Mr. Chairman. Thanks to our witnesses. Mr. Chewning, nice to see you. Welcome to the Committee. And Mr. Ashooh and Mr. Tarbert, welcome back to the Committee. Nice to see you.

At last week's hearing we heard several differing views on the advisability of making changes to CFIUS. All the witnesses agreed the current system is not working. As the people charged with making the system work, I look forward to hearing from today's witnesses on whether they agree with that assessment and, if so, why the current system is not working. There is no way we can improve on the current system if we do not understand the reasons that it is failing today.

Some of the questions go to jurisdictions. Senator Cortez Masto and others raised the issue of real estate transactions that might give rise to national security threats that are difficult to reach under the current law. Other issues have been raised about access to sensitive information that might stem from an ownership interest short of control.

But even if we are all in agreement on how to redraw the proper jurisdiction, I think we would still face substantial issues around the appropriate mechanisms for preventing the transfer of sensitive technology and intellectual property.

At last week's hearing, every witness agreed that our adversaries use lawful and unlawful means to close the gaps where they exist between our technological capabilities and theirs. Every witness agreed that China is violating its trade commitments. When China cheats, there must be consequences. Rules mean nothing if they are not enforced. That is why I urge the Administration to take action on unfair dumping by LG and Samsung over the last number of years. Because of these steps, the Administration finally announced this week Whirlpool will add 200 more jobs in a small community south of Toledo, called Clyde, Ohio.

China's cheating also has an impact on our advanced technology companies. Not only do they have to compete in the marketplace against subsidized foreign competitors, they must also defend themselves from cyberattacks, industrial espionage, and a whole range of techniques to steal critical technology.

Last week's witnesses also agreed that the departments with us today are lagging in controlling the export of sensitive technology to our adversaries. As an example, they cited the lack of updates to the militarily critical technologies list, which apparently is not being updated by DoD.

As I mentioned last week, I think our country faces a twofold problem. National security is threatened by the purchase and export of critical intellectual property and technologies. At the same time, our domestic economic security is threatened by foreign investment in the U.S. that falls outside the scope of CFIUS.

I have introduced legislation with Senator Grassley—we both sit on the Finance Committee—called the Foreign Investment Review Act, that would require the Secretary of Commerce to review certain foreign investments. Just as we see in the national security

area, some of these investments, especially coming from State-owned enterprises, are not in our long-term economic interest here in our country.

I hope we can tackle both problems in this process, revising CFIUS to respond to the developments of the last decade, while we also respond to the threats of our economic security.

Thank you.

Chairman CRAPO. Thank you, Senator Brown. We will now proceed to the testimony of our witnesses. First will be The Honorable Heath Tarbert, Assistant Secretary of the Treasury for International Markets and Investment Policy. Following Mr. Tarbert we will hear from The Honorable Richard Ashooh, Assistant Secretary of Commerce for Export Administration. And then we will conclude by hearing from Mr. Eric Chewning, Deputy Assistant Secretary of Defense for Manufactured and Industrial Base Policy.

Gentlemen, we appreciate each of you being here. We look forward to your statements. I encourage you to follow that 5-minute clock so the Senators will have time to engage with you with their 5 minutes as well. And we look forward to learning much from you.

With that, Mr. Tarbert, please begin.

STATEMENT OF HEATH P. TARBERT, ASSISTANT SECRETARY OF THE TREASURY FOR INTERNATIONAL MARKETS AND INVESTMENT POLICY

Mr. TARBERT. Chairman Crapo, Ranking Member Brown, and distinguished Members of the Committee, thank you for the opportunity to testify in support of FIRRMA.

During my confirmation hearing, you asked what my top priority as Assistant Secretary would be. I will repeat now what I said then. My top priority 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 long-standing open investment policy.

The United States has always been a leading destination for investors. Alexander Hamilton argued foreign capital is a precious acquisition to economic growth. Foreign investment provides immense benefits to American workers and families, such as job creation, productivity, innovation, and higher median incomes.

At the same time, we know 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, Congress passed legislation empowering the President to block investments during times of national emergencies. During the Depression and World War II, cross-border capital flows fell dramatically, and in the boom years of the 1960s and '70s, investment in the U.S. was modest compared to outflows, and during that time, foreign investment also posed little risk. Our main adversaries, the Soviet Union and its satellites, were communist countries, economically isolated from our own.

But when the postwar trend changed in the 1970s, CFIUS was born. The oil shock that made OPEC countries wealthy led to fears that petrodollars 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 new Dubai Ports controversy, it became clear that CFIUS needed greater procedural rigor and accountability. In 2007, many of you helped enact FINSA, which formally established CFIUS and codified our current structure and process.

Now we find ourselves at yet another historic inflection point. The foreign investment landscape has shifted more than at any point during CFIUS's 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, not simply the volume, that has placed the greatest demand on our resources. In 2007, about four cases went to the more resource-intensive investigations 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, and what is more, the data-driven economy has created vulnerabilities we have never before seen.

New risks require new tools. The administration endorses FIRRMA because it embraces four pillars critical to 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 cannot review a host of transactions that present identical concerns to those we regularly examine.

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

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

And finally, FIRRMA acknowledges that CFIUS must be appropriately resourced. This last point bears emphasizing. Of course, modernizing CFIUS entails a cost. But any job really worth doing is worth doing right. Besides, we have also got to consider the cost of doing nothing: the potential to lose our military and technological edge, which could cost American lives. That is simply unacceptable.

There is but one conclusion here. CFIUS must be modernized. In so doing, we must preserve our longstanding open investment policy. We must also protect our national security. These twin aims transcend party lines and demand urgent action.

I look forward to working with this Committee and improving and advancing FIRRMA. Thank you very much.

Chairman CRAPO. Thank you very much. Mr. Ashooh.

STATEMENT OF RICHARD ASHOOH, ASSISTANT SECRETARY OF COMMERCE FOR EXPORT ADMINISTRATION

Mr. ASHOOH. Thank you, Mr. Chairman. I am grateful for the opportunity to testify in support of the Foreign Investment Risk Review Modernization Act, or FIRRMA, and the role the Department of Commerce plays in supporting U.S. national security, both as a member of the Committee on Foreign Investment in the United States, or CFIUS, and as an export control agency.

I want to thank Senators Cornyn and Feinstein and Burr, and the other cosponsors for their strong leadership on this issue. The Commerce Department supports the modernization of the CFIUS process and we share Congress' concern about China's policies and activities. FIRRMA takes many positive steps in addressing those concerns.

Within the Department of Commerce, the International Trade Administration and the Bureau of Industry and Security play important roles in Commerce's review of CFIUS matters. BIS, as the administrator of the Export Administration Regulations, or EAR, has extensive experience in export controls, which are often a consideration in CFIUS deliberations.

I would like to highlight a few specific provisions of the legislation.

The Administration welcomes foreign investment in the United States, and the Department supports the affirmations in FIRRMA of that policy. We are supportive of the requirement for mandatory filings for certain transactions involving foreign Government-controlled activities. In fact, we encourage the Committee 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 that the provisions which would expand CFIUS would not take effect until CFIUS has put in place the regulations and has the resources it needs to implement its expanded role.

We encourage the Committee to consider that the provision on contributions of intellectual property and associated support to foreign parties may duplicate existing export control authorities, which I do not believe in the intent.

We support the provisions of FIRRMA that would facilitate greater cooperation and information sharing with our allies and partners to permit increased coordination with like-minded countries.

In our role administrating the EAR, BIS's responsibilities encompass the entirety of the export control process. We write and implement the regulations, issue export licenses, and conduct compliance activities, including overseas end-use checks. We enforce regulations, which includes 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 military or proliferation-related use. The

export control system administered by BIS is a process 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, and ensure that the export control system is robust.

The export control system benefits from close cooperation with our international partners, through four major, multilateral export control regimes. 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 a wide array of transactions and technology transfers and governs what are considered traditional exports of goods, software, or technology to foreign countries, but it also covers the transfers 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 countries, thus allowing 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 list of end uses and end users of concern that trigger extraordinary licensing requirements.

Finally, our export control system includes aggressive enforcement capabilities. BIS's special agents are located across the United States and overseas with a sole focus on identifying violations of the EAR and bringing to justice domestic and foreign violators. In fact, last week, BIS, in conjunction with other Federal law enforcement agencies, announced a prosecution against two individuals conspiring to violate export control laws by shipping controlled semiconductor components to a Chinese company that was also on Commerce's entity list.

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 even stronger protections of U.S. technology.

The Department of Commerce looks forward to working with the Committee and the bill cosponsors on this important effort, and I would be pleased to take your questions. Thank you.

Chairman CRAPO. Thank you very much. Mr. Chewning.

STATEMENT OF ERIC CHEWNING, DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR MANUFACTURING AND INDUSTRIAL BASE POLICY

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

The Department of Defense strongly supports the 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 strong leadership of Senator Cornyn, Senator Feinstein, and Senator Burr on this issue, and appreciate the bipartisan support for the FIRRMA legislation.

To quote Secretary of Defense Mattis, who stated this Department's position in his letter of support to Senator Cornyn, "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."

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 a 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, 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 our industrial base produces.

Simply put, the United States military fights and wins wars through the unmatched performance of our men and women in uniform and through our superior military technology. Knowing this, our competitors are aggressively attempting to diminish our technological advance 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 to its intention to become the world's leader in science and technology and to modernize its military, in part, by strengthening its own defense industrial base.

While some methods, like industrial espionage and cybertheft are clearly illegal, other approaches, including technology and business know-how, transferred through acquisition 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, eroding our technological edge, and ultimately, our military advantage.

The current CFIUS authorities are limited to investments that would result in a foreign controlling interest. There are other nontransaction types, such as certain joint ventures and nonpassive, noncontrolling investments that could pose national security concerns. Additionally, the purchase 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 current scope of review.

The Department of Defense does not view CFIUS as a panacea. Instead, it is a layered defense that can, along with export controls, stem the flow of critical technology to our competitors. In order to

do that, however, CFIUS authorities need to adjust to keep pace with the rapid pace of technology.

Let me add one more point as I conclude my remarks. While the Department of Defense believes defensive measures like CFIUS modernization are important, 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, in his letter of support to Senator Cornyn. "I strongly support FIRRMA. The Department of Defense continues to support foreign investment, consistent with the 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. I look forward to working with this

Committee on improving and advancing FIRRMA.

Chairman CRAPO. Thank you very much, Mr. Chewning, and Mr. Ashooh, I am going to go to you first with my question.

Many concerns have been raised around the need to safeguard critical technologies, in particular, those referred to as emerging or development technologies. Can you discuss to what extent our export control system is equipped to address these concerns? And what I am kind of getting at, specifically, is, does our system include controls on the export of development technology, which is the know-how or the secret sauce that allows for the development of critical capabilities of concern.

Can Commerce, after identifying uncontrolled know-how of concern, control the release of such development information without the need of additional authority?

Mr. ASHOOH. Thank you, Mr. Chairman. The short answer to your three questions is yes. Let me go into detail.

Chairman CRAPO. OK.

Mr. ASHOOH. Certainly the emerging technology issue is one that is the crux of this matter, and it is important to note that our export control system is not a new system. It has been in place throughout the cold war, and in technologies that we consider today to be widely available or commonly known were once emerging, and it has been our export control system that has gone a long way to maintaining U.S. technological leadership.

Having said that, there is a challenge here, and the challenge is two-fold. One is identifying those emerging technologies, and that is not specifically relegated to one agency. That is a shared burden that the interagency faces. But once the technology is identified, the export control system can accommodate it and is flexible enough to deal with it. Let me speak in more detail about that.

Under the current system, we can place controls on individuals, on uses, on technology. The Export Administration Regulation defines technology to include nontangible items that most of us would consider to be know-how, not just the product but the design that goes into the product, the design process, the research that goes into the design. So the nontangibles that we would consider know-how are included in the EAR.

Where the challenge exists is that we identify those. Once we have identified them, we have many tools to apply, including almost immediate controls that we can place on technologies once they have been identified.

Chairman CRAPO. So for export control purposes, we do not need to look at new legislative authorities.

Mr. ASHOOH. I do not believe we need new legislative authorities, but I do not want to suggest any complacency here. The rapid pace of emerging technologies that we are seeing, predominantly in the private sector, requires us to be ever-vigilant to evolving threats, but I do not believe new authorities are necessary to do that.

Chairman CRAPO. Thank you. Mr. Tarbert, there is some concern that CFIUS, under FIRRMA, could become a de facto, one-stop shop for all inbound and outbound investment activity. Can you think of any circumstances where a transaction is permitted under export control authorities but then should be prohibited by CFIUS?

Mr. TARBERT. We have seen certain examples, even during my first 100 days there, where a specific technology may be EAR99, but in the hands of a specific threat actor that technology, along with the threat actor purchasing the U.S. business, raises significant national security concerns.

Now at that point we have often seen the Commerce Department step in and issue an informed letter, but there have been situations where, at least not in advance, we have seen that need. So there is a current overlap but there are many situations where export controls are adequate and appropriate, and FIRRMA envisions that.

Chairman CRAPO. And so you would not see FIRRMA has creating a complete overlap.

Mr. TARBERT. Not at all. We view the two as very much complementary, and we view FIRRMA as strengthening export controls, and not substituting CFIUS for them.

Chairman CRAPO. All right. Thank you. And Mr. Chewning, the Defense Department understandably has concerns with the current CFIUS process regarding the transfer of know-how pertaining to a wide range of emerging technologies, such as artificial intelligence, robotics, and driverless vehicle technology. The exists the OY521 authority and the Export Administration Regulations that can control the export of previously uncontrolled technology, which can also be applied to know-how, at any stage of development, if there is a national security or foreign policy reason to do so, without a proposed rule or any agreement of our allies.

Has Defense ever asked Commerce to use this authority to control the export of know-how of concern in emerging technologies?

Mr. CHEWNING. Thank you, Senator. I think it raises a good point around the complementary nature of export controls and CFIUS, and my colleague from Commerce I think raised a good point in saying that export controls can step in once we have identified the threat. And I think it is important to understand, with the CFIUS process we identify a three-part litmus test for identifying threats. So it is understanding what the exact threat is, which is an assessment that is informed by the intelligence community, understanding the vulnerability, and then understanding the consequences.

And so if we are able to go through that process and identify what exactly we need export controls to step in and do, our colleagues from Commerce are able to do that. In the absence of having those authorities already in place, CFIUS becomes the last line of defense in order for us to stop a transaction.

And so I think a useful frame for thinking about the interplay between CFIUS and export controls is export controls is the first line of defense, CFIUS is the last line of defense.

Chairman CRAPO. All right. Thank you. Senator Brown.

Senator BROWN. Thanks, Mr. Chairman. I would like to, Mr. Ashooh, go back to, on the Chairman's first question, and ask you a little bit more about that. Explain how the identification process would differ from what you seek today through the Export Administration Regs.

Mr. ASHOOH. The notification process?

Senator BROWN. How—if you would explain how the identification process. The FIRRMA bill updates the definition of critical technologies, as you know.

Mr. ASHOOH. Right.

Senator BROWN. CFIUS is charged with identifying emerging technologies that could be important to maintaining our national security advantage. So how does the identification process—how would it differ from what you seek today through the Export Administration Regulations?

Mr. ASHOOH. Well, again, I would suggest that that is another complementary area, because under the EAR, we are looking for emerging and critical technologies all the time, and we work through advisory committees to help us do that, and rely on industry to inform us as well.

When CFIUS considers a case, Commerce, as the administrator of the EAR, we utilize that process to then inform our own processes and whether or not action needs to be taken under the EAR. And so that is the way that the processes complement each other, and any expansion of the number of transactions would, in fact, help us understand the landscape relative to emerging and critical technologies.

Senator BROWN. OK. Mr. Chewning, you were nodding. When it was written a year ago—and I wanted to go somewhere else—the DIUx report made about a dozen recommendations for actions to be undertaken by DoD, apart from what we should do, what Congress might do legislatively. Describe what—could you describe what actions have been taken to date by Defense on these recommendations?

Mr. CHEWNING. Yeah, happy to. So we are currently going through a broader understanding of how we need to approach the issues around countering China, with respect to access to our defense industrial base. The immediate set of recommendations that we have implemented has been strengthening what we have been able to do within the Department of Defense more broadly, in terms of our role within the CFIUS committee and resourcing of that effort. Then we are looking at how to evaluate the broader set of things that DIUx has looked at, as part of that broader campaign.

Senator BROWN. Thank you. Witnesses at last week's hearing were critical of DoD's failure to maintain the militarily critical technologies list, as you know, and I would like your view on whether that criticism last week was fair and why we should not use existing approaches to control technology rather than creating yet another new set of rules.

Mr. CHEWNING. Sure. So my understanding of the criticism from last week focused on the munitions list, which was a State-derived list used for ITAR. The concerns here are primarily around emerging technologies, which are more appropriately handled under the Commerce authorities. And so the munitions list itself is not where we are seeing the threat right not. It is with the emerging technologies that would fall under the Commerce's control of export controls.

Senator BROWN. And their criticism was confined to the munitions list?

Mr. CHEWNING. It is my understanding, Senator.

Senator BROWN. OK. One more question, Mr. Chairman. Mr. Tarbert, you and your office work close with the FBI. Correct?

Mr. TARBERT. Correct.

Senator BROWN. Have you found the men and women of the FBI to be dedicated professionals performing a central role in our national security?

Mr. TARBERT. I have.

Senator BROWN. OK. Thank you.

Chairman CRAPO. Thank you. Senator Shelby.

Senator SHELBY. Thank you. Mr. Tarbert, welcome back to the Committee. You were here at a critical time a number of years back and we have missed you for a long time but we are glad you are back today in your present role.

Could you describe how the evolution of many foreign Governments' acquisition strategies has caused both the Congress and the Administration to want to reexamine and reform CFIUS? The world has changed. Manufacturing has changed. Our threats around the world have changed.

Mr. TARBERT. That is absolutely right, Senator, and it is great to be back.

We are seeing radical changes. I mentioned the shift in foreign investment that we have not seen, that is the largest shift in the 40-year history of CFIUS, and one of the things we are seeing are State-owned enterprises that are funded and subsidized by the State specifically pursuing critical U.S. technologies that are meant to be deployed in either a very competitive way, and even, in some cases, for military means.

We are also seeing, as of recently, and as the Defense Department mentioned the military–commercial fusion, that even non–State-owned enterprises are being called upon to purchase technology so they can share that technology at some point with their Government.

Senator SHELBY. How do we challenge that, in legislation and in implementing the legislation, which all three of you all have been doing?

Mr. TARBERT. As I just explained, there are gaps in CFIUS. Within CFIUS's current jurisdiction, I think CFIUS is doing a fine

job and has done a fine job throughout the years, especially since the FINSA legislation. But there are key gaps where we cannot look at transactions.

Senator SHELBY. That was 11 years ago, though.

Mr. TARBERT. That was 11 years ago, and, in fact, Senator Shelby, if you look at the actual jurisdictional basis for CFIUS, that stems from the 1988 statute, Exon–Florio. So the fundamental jurisdiction of CFIUS has not been updated in 30 years.

Senator SHELBY. Could you expand a few minutes on the challenge of joint ventures between companies overseas that would enter into a joint venture with some of our companies to get inside America?

Mr. TARBERT. Sure. One of the things that I have noticed is people have been saying, "Well, CFIUS only looks at inbound investments." That is actually technically not true. We have a provision right now that has existed for nearly a decade in our regulations that allows CFIUS to look at any situation where a U.S. business is taken out and deposited into a foreign joint venture, where that foreign person would have control over the U.S. business. So in many ways the FIRRMA bill simply modernizes that provision to address some other issues that we are seeing in joint ventures.

But what we are seeing today is that the original statute of 1988, says merger, acquisition, or takeover resulting in foreign control of a U.S. business. So we can review those transactions, and we have had very specific circumstances where a party was going through a merger, acquisition, or takeover. It was very clear CFIUS was either going to impose mitigation or recommend that the President block the transaction, and those individuals have said, "Well, you know what we can do? We can take the important bits out of the business, so it is not a U.S. business we are putting in a JV, but the essential capabilities of the U.S. business. We will stick them in a foreign JV and they will be outside of your jurisdiction."

So it is very problematic, and then we are left with a situation where we have a national security mandate that we have to block or mitigate a certain transaction, but the parties themselves are saying, "We are going to do this because we know you do not have jurisdiction to stop it."

Senator SHELBY. I would like to move over to the Defense side of this for a minute. How important is critical infrastructure to us, and why would we not want somebody, that maybe not be our real friend and ally but a competitor, to be involved in that?

Mr. CHEWNING. That is a terrific question, Senator. We would be concerned with potential foreign acquisition of critical use infrastructure, which is why, within the CFIUS process, we do a risk-based analysis, looking at the context of a specific transaction through three lenses, looking at the specific threat, the vulnerability, and the consequences associated with that. And after we have gone through that process, if we think that that risk cannot be unmitigated, that is when we would have a problem.

Senator SHELBY. Commerce, you got anything to add to this? You agree with both of them?

Mr. ASHOOH. Thank you, Senator. Yes, I do. Commerce spends so much time in the dual-use world, while we do not regulate——

Senator SHELBY. Well, basically, we want to do business in the world.

Mr. ASHOOH. Yes.

Senator SHELBY. But we do not want to give away something that would do us harm—do harm to national security. Is not that the bottom line?

Mr. ASHOOH. It is the bottom line, and our export control system is designed around that. It works best when it is very, very targeted, so that we are not over-controlling and restricting commerce where it needs to, but we are paying attention to the national security implications.

Senator SHELBY. Thank you. My time is up.

Chairman CRAPO. Thank you. Senator Warner.

Senator WARNER. Thank you, Mr. Chairman. Let me thank you and the Ranking Member for taking on this issue. I think some of the—getting this right is one of the most important national security requirements we have. As Vice-Chair of the Intelligence Committee I have really seen, in a very comprehensive way, how some of our near-peer adversaries, specifically China and Russia, are using theft of intellectual property, use of joint ventures. They have a much, much more comprehensive approach than we have. And I think we have seen, in the past, where you would steal secrets and, mysteriously, a peer company would end up having that technology, mysteriously enough.

You have got efforts that Mr. Tarbert made mention of, in terms of direct acquisition. But you have also seen now, with State enterprises and near-State enterprises, using our JV laws in ways that are pretty sophisticated, and I am not sure we have got—well, I conceptually am supportive of the reform legislation, whether we have got it fully right yet.

I want to raise an area that I do not believe is covered. With our open markets, what happens when we have a, particularly in emerging technology fields, where we have a company that may enter into our market, in an open fashion, and it may not trigger any of the CFIUS or traditional export control or import control barriers. I would point out some that have received some attention. Kaspersky Labs, a Russian-based technology firm, that made its way all the way onto the select GSA vendor list, even though large swaths of the American Government realize that there was huge, huge potential problems. And we are now in the process of trying to disentangle with that entity. It will take us years and it will keep us vulnerable during those years.

What I see is an issue that people are not speaking too much about is if you look in China right now, and with their remarkable investments in AI, machine learning, if you look at, just over the last 4 or 5 years the emergence of a dozen-plus Chinese tech companies that all have north of $10 billion valuations. We have heard of the Huaweis and the Alibabas. There are a dozen more that may not come off—maybe you guys know, but most of our colleagues do not know.

And how are we going to ensure that as these companies, who are already starting to kind of be pervasive across Asia, as they enter into the American marketplace, with pricing that is lower than our competitors, because often times they have zero cost of

capital, they become ubiquitous. You know, they penetrate around, like, Internet of things where the next level of connectivity that is coming up. We could wake up and—my fear is that many of these companies, when push comes to shove, are not pure economic plays but directly or indirectly have ties back to the Chinese Government, yet none of the traditional regime of the last 60 years would address that issue.

Does anybody want to take it on? Mr. Tarbert, do you want to take a shot?

Mr. TARBERT. I would say it is a great point, Senator, and I think it highlights the need for a comprehensive approach to the strategic competition that we face. CFIUS deals with a certain set of issues. Export controls deals with complementary issues. But there are other tools available to the U.S. Government, from procurement, from other things, that should be considered in addressing the overall threat. I do not think we can look at specific threats in isolation.

Mr. ASHOOH. Thank you, Senator. It is perhaps worth sharing, as someone who came into this job about 5 months ago, I spend the majority of my day, one way or the other, dealing with the threats you mentioned. They are first and foremost in what we are dealing with. And we need to be evolving with these threats. There is no question. And I really do reinforce Heath's comments about it is a comprehensive solution. It is very important that we, in the agencies with varied responsibilities, not only work together but, in particular, with our Members of Congress where authorities fall short.

I believe we have the authorities to tackle the challenges in front of us, but I do not want to suggest that that is somehow not attentive to the vigorousness of this challenge. China has publicly announced this strategy, and we need to be aggressive in responding to it.

Senator WARNER. I want to make one last point. I know my time is up. I agree with Senator Shelby. We need to make sure America is open for business. But I do not think, over the last few years, I have come to understand, particularly in China and Russia, not only their whole of Government but their whole of society approach about how they intend to wage this economic warfare and competition, with a very different set of rules. And I am really concerned—I am glad to hear—I would love to follow up with each of you.

But I know from the intel community side, I do not feel that there is appropriate responsibility in any single entity that the number of folks I have sat in SCIFs with who say, "Yes, Senator, this is a problem but it is really not our area," and sorting through not only the traditional intellectual property theft or traditional acquisition, or, you know, next-generation JV. But just through the normal course of business, companies that are entering into our marketplace that may have back doors, or that may have made—that may have made agreements with their host Government in a way that they come into this marketplace in a way that could be long-term compromising to our national security. We have to get to it in a much, much higher level of priority.

Thank you, Mr. Chairman.

Chairman CRAPO. Thank you, Senator Warner. Senator Tillis.

Senator TILLIS. Thank you, Mr. Chairman. Thank you, gentlemen, for being here.

I have only a couple of questions. I have got several that I am going to submit for the record, because I think that they could go long and they could have details that I would like to get to.

But one question that I have is, when we think about the global supply chains, the sort of global networks now that come into ultimately producing a technology or a finished good, how much insight do we have? If I were China and it looks like we are doing a good job of really tracking and identifying what may be a maligned intent in terms of some sort of a direct investment in the United States, I would go figure out how to get involved in the supply chain somewhere else, where tangentially I can benefit. How do we deal with that?

Mr. CHEWNING. Senator, if you do not mind, I am happy to take a first cut at it, if you like. So right now we do not have a formal mechanism in place for international cooperation with allies. Per the 2017 National Defense Authorization Act, the Department of Defense was asked to establish the NTIB, or the National Technical and Industrial Base, which is a partnership with Canada, the U.K., and Australia. We are in the process of developing that framework, and one of the pathfinder projects we have identified for that is a thing you have identified, is a way we can jointly work through a protection regime around foreign direct investment into that collective industrial base.

Senator TILLIS. Thank you. The concern that I have, if you take a look—we just passed tax reform, we are seeing economic activity. We are clearly making ourselves more attractive to build investment in the United States. I think we are somewhere around $7 trillion foreign investment, maybe $6.5 trillion investment in the United States. I do not want the productive deal flow to slow down. I actually want it to increase.

And so I think we have to be very careful, particularly with a Nation like China. I am not going to talk about the specific company but there was a proposed acquisition that ostensibly was to purchase a problem asset in the United States, not so much for the asset, because it is not performing, but because of the underlying infrastructure that applied to areas of the Chinese infrastructure that they needed help on. And this had to do with a financial services instrument.

But it sounded like they were getting pushback because they would have majority ownership in a company that also managed personal information of American citizens. So it was not necessarily a national security threat, in terms of defense systems or military applications, but information about our citizens.

How are we going to strike the balance, over time, when China is going to look around and realize that as their economy continues to modernize and grow that they have still got these underlying infrastructures, things like insurance and other infrastructures that they are going to build on. It is easier to buy than build. And how do we make sure that we do not disadvantage a very large base of proven capabilities from being able to fill that need in China? How do we do that right, versus having people say, "We are not even going to pursue any kind of discussion with a Chinese firm

on this sort of acquisition because we do not think we could actually get the deal done"?

Mr. TARBERT. I will comment from the Treasury perspective. First of all, we totally agree. We have no intention of stopping deal flow. We would like to see it increased.

Senator TILLIS. And I am going to submit some questions for the record on the deal flow, specifically to you.

Mr. TARBERT. Last year, even from a country like China, dozens of transactions were, in fact, cleared through CFIUS. So I think that is an important point. When we see a national security issue, in most circumstances we can figure out a way to mitigate that and get the transaction through. So again, we very much favor foreign investment.

Senator TILLIS. And I want to talk more about some the—the ones that you would never see because they just think that it could either be costly or get caught up. So it is really the—it is not—you can tell me about the ones that came through. What we need to do is figure out what ones are not even being discussed because they think it would wade into this area and the deal is just not such that they want that—to me it is another regulatory burden. A lot of M&A activity never occurs because of the anticipated regulatory burden and the time to execute the deal.

And so I am trying to get a better sense of, you know, how we can actually promote more. I want more foreign direct investment from all countries. I want you all to do a good job of tracking down the maligned intent.

Mr. TARBERT. On that note, Senator Tillis, one of the things that I think FIRRMA does that we at Treasury really like is this idea of the short-form declaration. So if there are people out there that want to do a deal, they can file, probably on a computer data base, something around five pages instead of the long notice, to just get a sense as to whether this is something where we would want to require notice or we could approve it—the committee could approve it within 30 days. So that is a way to streamline the process to encourage more deals coming through CFIUS.

Senator TILLIS. And I am going to submit several questions for the record around FIRRMA and kind of get a good, the bad, and the ugly response on some of the attributes and some of the problematic provisions of FIRRMA.

I am sorry. Were you going to comment?

Mr. ASHOOH. No. I would only say that with us, I think the way we should approach it, in all things, Senator, is to focus on the specific area of concern and tailor our system to do that so that we leave unencumbered the very large segment of the economy that is not an area of concern.

Senator TILLIS. The key here is we need lean regulations everywhere. We need to make sure that we got to addressing the problem or the risk, like any regulatory risk, even outside of this subject, but we need to do it in the leanest manner possible so that we are attracting as much foreign direct investment as possible, because it is key to actually driving the GDP growth that we need to get our economy back on sound footing.

Thank you, Mr. Chair.

Chairman CRAPO. Thank you. Senator Cortez Masto.

Senator CORTEZ MASTO. Thank you. Thank you, gentlemen, for being here. Thank you, Chair and Ranking Member for this important discussion.

Let me start with this perspective. I come from Nevada, and in Nevada, as you well know, Mr. Chewning, we have Naval Air Station. We have Nellis Air Force Base. We have Creech Air Force Base. We have Hawthorne Army Depot. And I have been to all of those facilities. Born and raised there. Live there, grown up with them.

One of the things I hear constantly from many there, both at Creech and Nellis, and Naval Air Station, is the concern, national security concerns, because if you have been there you know they are in the middle of the desert, and there is property being purchased near those military installations by foreign nationals, and the concerns that that impact has on our national security.

So I know you talked a little bit about this, but could you also talk about—and I am curious, all three—in the current law, the way it stands, is it—can you prevent somebody from coming in—and this is vacant land that is being purchased. No businesses being put on it. It is vacant land, near a military installation, for purpose of obtaining, I believe, and I think they have concerns about, some of our national security assets and information about it. Can, under the current law, that type of acquisition be stopped?

Mr. TARBERT. Senator, I can speak to CFIUS, and the answer is no. In fact, even during my first 100 days on the job we saw an example. I cannot get into specifics but it was in a rural area and there was vacant land, and, therefore, CFIUS did not have jurisdiction. Now if someone had put a farmer's market on that land, then it would have been a U.S. business, so we could assert jurisdiction. But I think the fact that you could have put a farmer's market on it and had jurisdiction, but the fact that it was vacant, you could not review it, points out one of the concerns we have about the current jurisdiction.

Senator CORTEZ MASTO. And that is true for——

Mr. CHEWNING. Yes, Senator, and just to build on the point, it is great, wide-open country there, and it provides terrific observation to certain sensitive military activities that we may not want observed by certain actors, and that is definitely a concern of ours.

Senator CORTEZ MASTO. And under FIRRMA, this is covered, this would be covered. You would be able to prevent that type of acquisition. Is that correct?

Mr. CHEWNING. Yes, Senator. Yes, it is my understanding.

Senator CORTEZ MASTO. OK. And let me just say, this is not something that happens sporadically. I was literally there over the summer, at Creech. We were just having this conversation. And if you know where Creech Air Force Base is, it is in the middle of nowhere. But at the entrance of Creech there was a number of foreign nationals that had stopped, trying to access, and with cameras. This happens all the time. And so it is a concern, I think, for our national security.

At the same time, I think we need to balance that. I hear this conversation where we need to balance, I believe—and I echo my colleagues—this national security with our economic security. And I know last week, at the CFIUS hearing with businesses, investors,

a witness from IBM said, "If FIRRMA passes, IBM would move its labs outside the U.S." And I am curious. What is your response to industry's concern that FIRRMA would make it more difficult to finance their operations? And I will start with you, sir.

Mr. TARBERT. I do not think that is what the industry argues. In fact, many in industry support this bill because they understand that it helps to protect both American national security but also intellectual property. We have had a CFIUS regime now, as I mentioned, for close to 40 years, and we continue to be an innovation hub. People still want to do business here. They want to innovate here, because we protect intellectual property and we have a number of legal safeguards.

Senator CORTEZ MASTO. And so let me ask you this question, because I think that balance is important. But, more importantly, to achieve that balance, we have to have all of the agencies and actors that are looking at this in an oversight coordinating and working together. And because there is not one agency looking at all of these, I think our concern is how do we ensure that there is that coordination, that collaboration, and that something is not falling through the cracks here? And I think my concern, like many of my colleagues, is how do we ensure that happens?

Mr. TARBERT. CFIUS was created to bring to bear all of those resources throughout the Government, and one of the great things about CFIUS is because it is not a singular agency, but rather a committee of 16, effectively, at least 11 but 16 when you include all the observers, it brings to bear all of that expertise. So if we see a transaction that requires experts at the Department of Energy, at our laboratories, we can bring them in.

So I think CFIUS is really meant to do exactly that, and we value that close coordination. We have weekly meetings, monthly meetings at various levels within the organization, where all of those departments and agencies are represented.

Senator CORTEZ MASTO. And do you feel the same way, gentlemen?

Mr. ASHOOH. Yes, and Senator, I might add, our export control process also is interagency. In fact, we work very closely with the Department of Defense and Department of State in processing our license applications.

But I think that one of the positives about FIRRMA that I do think bears mentioning is, certainly from an export control perspective we are living in a global environment, and it is important that, under this legislation, we are allowed to collaborate more than we are currently with friendly Nations. That is something we do in the export control world. We have multilateral regimes that work all the time, because when we get together on things it is far more impactful. That needs to apply in CFIUS as well.

Senator CORTEZ MASTO. OK.

Mr. CHEWNING. Yes, Senator. We support the committee approach as being holistic.

Senator CORTEZ MASTO. Thank you. I notice my time is up and I have gone a little bit over. Thank you very much for your being here today and, Chair, for the Committee hearing.

Chairman CRAPO. Thank you. Senator Tester.

Senator TESTER. Thank you, Mr. Chairman, and Ranking Member, for the recognition, and I want to thank you all for being here.

I just—I guess I will start out with a general question since we are working something not CFIUS related but something I think deals with national security, and that is the Farm Bill. Would you agree that food security and national security are connected? Any one of you.

Mr. TARBERT. Yes.

Mr. ASHOOH. Yes.

Senator TESTER. Did CFIUS play a role in Bayer's purchaser of Monsanto?

Mr. TARBERT. By law we are unable to talk about any particular transaction publicly, but we can provide briefings to any Member of Congress.

Senator TESTER. Can you give me a nod of the head, then, if you cannot talk about it?

Mr. TARBERT. I am not sure if we are permitted, under the statute, to speak publicly about anything, but what we can provide a confidential briefing on any particular case.

Senator TESTER. Well, let me ask this.

Mr. TARBERT. Sure.

Senator TESTER. Do you believe that CFIUS—and this can be for anybody up there—do you believe that CFIUS currently has enough power to protect the food system here in the United States, currently?

Mr. TARBERT. I would say that it has enough for those transactions that implicate the food system under its jurisdiction. So cases that would implicate food security that come before CFIUS, I would say yes. What I do not know, Senator, is whether there are issues with respect to food security that fall outside the kinds of transactions that we look at.

Senator TESTER. Do you—would the Cornyn bill have an effect on agribusiness transactions?

Mr. ASHOOH. It could, possibly.

Senator TESTER. OK. Well just—I do not—it is kind of odd in this Committee. I mean, it is odd in any committee when we cannot talk about the kind of transactions that you guys deal with. I mean, I do not understand—I get it if you are talking about a potential military conflict, but if you think food security is national security, to ask if you dealt with the Bayer–Monsanto merger and to say you cannot respond to any specific cases, that tells me you dealt with it. Otherwise you would say no, because you did not deal with that case. Enough said.

Mr. TARBERT. I am just going to smile.

Senator TESTER. OK. That is good. Well, I will just tell you that I really—I think one of the reasons we have a Farm Bill and we put out billions of dollars in subsidies is for food security, and I think food security is critically important in this country, and I think it is a national security issue. And I will also tell you that Bayer is a big dog, internationally, and so is Monsanto, and for them to be able to combine, I would really love to know the thought process that went into that, because from a national security standpoint, I think it makes us less secure. It gives control of our food to a select few people.

Mr. TARBERT. And just to be clear, Senator, we are not permitted to speak publicly about a particular transaction, but every Member of Congress and your staff has the ability to request a briefing on a transaction.

Senator TESTER. I got it.

So let us talk about the Chicago Mercantile Exchange. I know that the SEC plays a role. Potentially the Department of Agriculture would play a role in that kind of deal. Maybe the Department of Agriculture would play a role in the Bayer–Monsanto deal. I guess the question is, do you get enough support from agencies in your decision making? Is there adequate reason to adding more input from agencies as you guys make your administrative decisions?

Mr. TARBERT. Sure. On transactions, at least during my first 100 days, there——

Senator TESTER. Yes.

Mr. TARBERT. ——where we have seen cases, let us say, that have dealt with food security issues——

Senator TESTER. Yes.

Mr. TARBERT. ——we have always involved the Department of Agriculture.

Senator TESTER. OK. So you do not—is there any downside to adding more administrative agencies to CFIUS?

Mr. TARBERT. Here is what I would think.

Senator TESTER. Yeah.

Mr. TARBERT. If we added—so, basically, any transaction that comes through CFIUS—and keep in mind we had nearly 240 last year——

Senator TESTER. Right.

Mr. TARBERT. ——every single agency has to review the transaction and sign off, a Senate-confirmed official. So if we have only three cases per year, let us say——

Senator TESTER. Yeah.

Mr. TARBERT. ——that deal with food security——

Senator TESTER. Yeah.

Mr. TARBERT. ——we would be asking the Department of Agriculture to commit all sorts of resources and their time and effort to deal with a bunch of cases that have nothing to do with food security.

Senator TESTER. I got you.

Mr. TARBERT. So that would be the only——

Senator TESTER. So you think it is much more effective to bring them in on an ad hoc basis.

Mr. TARBERT. They absolutely should be brought in when food security is an issue, and we do.

Senator TESTER. OK. And the same thing with agencies like the SEC and things like that.

Mr. TARBERT. Yes, sir.

Senator TESTER. OK. Very good. I have got more questions for the record. Thank you, Mr. Chairman.

Chairman CRAPO. Thank you. Senator Menendez.

Senator MENENDEZ. Thank you. Mr. Secretary, last year, NeST Technologies, a New Jersey-based company, had agreed to be purchased by HNA, a Chinese conglomerate, on the condition that the

transaction received approval from CFIUS. According to a lawsuit filed last month by NeST Technologies, the deal fell apart because HNA, the Chinese conglomerate, provided knowingly false, inconsistent, and misleading information about its ownership and ties to the Chinese Government during the CFIUS review of the acquisition.

But HNA's interest in the United States is not limited to the New Jersey company. They have received CFIUS approval to purchase a California technology distributors, they are actively working to purchase a controlling stake in Skybridge Capital, the investment firm owned by Anthony Scaramucci.

So should not there be severe consequences for parties that either mislead or fail to provide accurate information to CFIUS?

Mr. TARBERT. Yes, there should be. If there are situations where we see a notice that is filled with misleading statements, there is the ability to take action. FIRMA specifically requires a certification for that very——

Senator MENENDEZ. And in that respect, then, should not consequences flow to any previously approved or pending transactions? For example, should CFIUS reopen previously cleared HNA transactions or modify their approach to reviewing pending transactions involving companies like HNA, in light of the information? If they have shown themselves to be a bad actor, and they move from one transaction to the other, should not there be a heightened scrutiny of their efforts to acquire U.S. companies that would fall under the rubric of the CFIUS review?

Mr. TARBERT. I will not specifically—talk to any specific case, but what I will say is——

Senator MENENDEZ. I am not asking about any specific case. I am asking about any other follow-on, regardless of what the transaction is.

Mr. TARBERT. Yes.

Senator MENENDEZ. Should not—whether it is HNA or a similarly situated foreign company that is, in essence, seeking to deceive, because their real purpose is not for a commercial transaction but to create a transfer to the Government that they are ultimately backed by. Should not that raise a higher scrutiny for you?

Mr. TARBERT. Well, it definitely raises scrutiny when you look at the specific tests we use, threat plus vulnerability equals consequence. That plays into the threat issue. If they are materially misleading and misrepresenting who they are, and there are ties to a Government, for example, if we see a company doing that, then that would play into our analysis.

Senator MENENDEZ. Well, I certainly am glad to hear that, and I hope—commend to your attention that this is one company that, in fact, seems to be doing that.

Mr. ASHOOH. Senator, if I might——

Senator MENENDEZ. Yes.

Mr. ASHOOH. ——and again, not to speak to a specific case, but Bureau of Industry and Security within Commerce routinely uses information gleaned from CFIUS process to provide appropriate follow-up for our separate authorities, under the export control regime, but that is a common occurrence.

Senator MENENDEZ. Let me ask, Mr. Secretary, I have been closely following, and raised in this Committee several times, a situation in Venezuela, particularly the loan, in 2016, by the Russian State oil company, Rosneft, to Venezuela State-owned oil company, PDVSA. As collateral for the loan, PDVSA pledged a nearly 50-percent ownership stake in U.S.-based Citgo to Rosneft. And I remain deeply concerned about the potential for a hostile adversary like Russia to have ownership of critical U.S. energy infrastructure.

Last May, Secretary Mnuchin told me, in a hearing, that any Rosneft acquisition of Citgo would be reviewed by CFIUS. I followed up in an inquiry to Treasury in September of last year, but 4 months later I have not had a response.

In your opinion, does CFIUS require any additional statutory authorities to conduct a thorough review of this possible acquisition?

Mr. TARBERT. I will not speak to the specific case, but I will say that FIRRMA has a couple of provisions in there that would ensure that any similar type of transaction would be covered. For example, it specifically talks about assets purchased in bankruptcy, and it also has a provision that addresses nonpassive investments. So if you had a situation where bonds were being converted but there was not control, I believe that FIRRMA would address that situation.

Senator MENENDEZ. Oh, if I took Rosneft out and I just described the nature of the possibility, would you say that you have the authorities necessary, under CFIUS, to review such a transaction?

Mr. TARBERT. I would say that just on the facts provided, I am not able to say that we do.

Senator MENENDEZ. Well, you need to tell the Committee that. You need to let us know.

Mr. TARBERT. Well, again, not the specific, but just based on——

Senator MENENDEZ. Mr. Secretary, please do not play word games with me. I am asking you whether you have the authorities, under any such transaction, whether it be a bankruptcy someplace else, where shares are held, to any critical infrastructure in the United States. If you do not have the authorities then you need to tell——

Mr. TARBERT. No, I would say if it results in a situation where there is not control, then we do not have the authority, and we would need it.

Senator MENENDEZ. Where there is not control.

Mr. TARBERT. Where there is not control.

Senator MENENDEZ. So if—so their pledge, 50 percent, it would have been easy for them to get another percent or two on the open market so they would be over 50 percent and, therefore, a controlling interest. In that case, you are saying you do have the authority.

Mr. TARBERT. If that—if they had—if they had——

[Overlapping speakers.]

Mr. TARBERT. ——that allows them to——

Senator MENENDEZ. ——less than a controlling authority, you need new authority.

Mr. TARBERT. Exactly. That is exactly right.

Senator MENENDEZ. I appreciate that. Yeah, I have other questions but I will submit them.

Mr. TARBERT. And we can—for specific inquiries, again, we make ourselves available to Members of Congress, where we cannot speak publicly on——

Senator MENENDEZ. OK. Well, I hope my request of 4 months ago eventually gets an answer. Thank you.

Chairman CRAPO. Senator Warren.

Senator WARREN. Thank you, Mr. Chairman, and thank you to our witnesses for being here today.

So we are here to talk about CFIUS, which reviews acquisitions by foreign companies to ensure that they do not threaten our national security, because we know that our adversaries are particularly interested in acquiring emerging, early stage technologies and they may be structuring their transactions in order to avoid CFIUS review.

So to prevent that from happening, we have to be able to identify what are our most critical technologies. But GAO found that the Pentagon is no longer updating the military critical technologies list that has the technologies listed that we need to maintain our military superiority.

The CFIUS reform bill that we are discussing would significantly expand the category of covered transactions to include "other emerging technologies that could be essential for maintaining or increasing our technological advantage." I know that both the Chair and the Ranking Member talked a little bit about this, but I want to dig in just a bit more and ask the question, given how rapidly technology is advancing, how do you think your agencies should identify emerging technologies and identify the transactions involving these technologies for CFIUS review?

If you could all just give me a short bite on this it would be helpful. Maybe I could start with you, Secretary Tarbert.

Mr. TARBERT. I think we would want to rely on the interagency process and particularly those experts on all those individual technologies by sector, to really get a thorough idea.

Senator WARREN. So you say go to the experts, ask the experts, and develop a list out of that?

Mr. TARBERT. As well as making use of the notice and comment rulemaking process, after which time we would update the list frequently.

Senator WARREN. OK. It sounds like it is further on down the list, though.

Mr. Ashooh, could you add more?

Mr. ASHOOH. I take your question to be how do we identify——

Senator WARREN. Right.

Mr. ASHOOH. ——those emerging technologies, and——

Senator WARREN. Right. How do you know an emerging technology to know to watch out? That is what I am really trying to ask.

Mr. ASHOOH. That is certainly the crux—emerging technology, especially critically technology used to be led by the national security establishment. It is not now, so it is a challenge, so there is no one way.

I will tell you, within Commerce, we lean heavily on what we call technical advisory committees, which are made up of the folks who are representative of where those emerging technologies come from.

And one of the priorities of the Under Secretary of BIS has been to revisit those advisory committees, to make sure they are fresh, they have got the right people. But that is not the only way.

Senator WARREN. Right.

Mr. ASHOOH. It is just one key way that I thought I would mention.

Senator WARREN. And I worry about it not being systematic, that they are more episodic rather than regularly built in, so that they are alert to the fact that they are the ones that you are counting on.

Mr. ASHOOH. We share that. Yeah, we share the systematic need to do this, and it has to be regimented and are working on ways to do that.

Senator WARREN. Good. And, Mr. Chewning, would you like to add anything to that?

Mr. CHEWNING. Yes, Senator. I think I would just say that the lists are important. They need to be updated. I also would like to point out the complementary nature of the list with the CFIUS process that takes a holistic view on risk, based on threat, vulnerability, and consequence. I think that is a nice interplay between the two, because there are some threats we may not know, that would not be on a list, and that we would want to be able to catch through the RBA process, as well.

Senator WARREN. Fair enough. I am just trying to get this back so you know even the areas to be alert in, and I would be interested in any follow-up you have on that——

Mr. CHEWNING. I would be happy to provide that.

Senator WARREN. ——about how we might be doing this.

I think it is really important for CFIUS to be proactive and not just reactive in identifying these emerging technologies, and the foreign adversaries, I guarantee, are looking at and trying to figure out how they might be able to acquire.

I also would emphasize that if we are going to expand CFIUS mandate for 21st-century economy and the security environment we now face, we have to make sure it has a 21st-century level of resources available to you, to effectively handle the growing volume and complexity of these transactions. You have to grow along with the threat here.

The discussion of CFIUS focuses on protecting our national security while preserving foreign investment, but I want to touch on one other issue that I think affects both priorities, and that is our investment in basic research. Jim Lewis, a former official with the Department of State and Commerce, testified in this Committee last year that CFIUS reforms should be paired with policies that drive innovation here at home, and that means investing in research that helps our economy and helps our military.

He said, our underinvestment in scientific research creates a self-imposed disadvantage in military and economic competition with China, and that maintaining our economic and military superiority requires investment both by encouraging private-sector investment and by governing in those areas, like basic research, where the private sector spending is likely to be insufficient.

So let me just ask this in the quickest possible way, and I will start with you, Mr. Chewning. Would more Government investment

in scientific research support the core objectives of CFIUS in protecting strategic industries from foreign competition and maintaining our technological——

Mr. CHEWNING. Absolutely, Senator, yes.

Senator WARREN. And would you agree with that?

Mr. ASHOOH. Yes.

Senator WARREN. And would you agree with that, Secretary Tarbert?

Mr. TARBERT. Yes.

Senator WARREN. Thank you very much, Mr. Chairman. I appreciate it. I hope that we will push hard on this research point as well, when we are talking about revisions to CFIUS.

Chairman CRAPO. That is an excellent point, and thank you very much for focusing on that.

That concludes the questioning. I have a couple of quick announcements for those Senators who want to ask questions, to follow up on this for the record. Those questions will be due by Thursday, February 1st. And, witnesses, you will be probably asked some follow-up questions too. I ask you to respond to them promptly.

And I am going to take the Chairman's prerogative and give you the first one to put on your list right now. It is one we did not get to. It is one that Senator Warren just alluded to. This question, which I would like you to put first on your list to respond to, is that the legislation, FIRRMA, authorizes CFIUS to impose filing fees on transactions to cover the committee's funding needs. Will these fees be sufficient to address the increased caseload anticipated with FIRRMA, and what new resources will your agencies need to carry out these reforms? How many more cases do you anticipate CFIUS would review as a result of FIRRMA?

So there is your first question.

Senator SHELBY. Mr. Chairman?

Chairman CRAPO. Yes. I do not want to start too much here, but go ahead.

Senator SHELBY. No, no. I hope they have sufficient funds. If they do not have sufficient funds—I am putting on my appropriator's hat now—we will get you the sufficient funds, because I congratulate you and Senator Brown for bringing this hearing together. This is of utmost importance to this country, what you guys do, and you have got to have the resources to do it. Thank you.

Chairman CRAPO. Thank you, Senator. And with that, this hearing is adjourned. Thank you again for being here.

[Whereupon, at 11:19 a.m., the hearing was adjourned.]

[Prepared statements, responses to written questions, and additional material supplied for the record follow:]

PREPARED STATEMENT OF CHAIRMAN MIKE CRAPO

This morning, we will receive testimony for a third time this Congress on the role of the Committee on Foreign Investment in the United States, or "CFIUS".

The Committee held a general oversight hearing on CFIUS in September, and last Thursday, the Committee began its review of S. 2098, the Foreign Investment Risk Review Modernization Act of 2017, or FIRRMA, a comprehensive reform bill that significantly expands the purview of CFIUS, introduced by Senators Cornyn and Feinstein

CFIUS's authorities cover transactions that result in foreign "control" of a U.S. business that may threaten the national security of the United States. The focus is currently on inbound investment and technology acquisition.

Today's hearing brings in witnesses from three of the nine Federal agencies and offices that comprise the full voting membership of CFIUS: the Department of the Treasury, which serves as Chair of the Committee; the Department of Defense; and the Department of Commerce's Bureau of Industry and Security, which administers and enforces the dual use regulations of the U.S. export control regime.

According to their testimony last week, Senators Cornyn and Feinstein, informed by their work on the Senate Intelligence Committee, introduced their bill because of growing concerns arising from China's multilayered threat to U.S. national security.

Namely, threats emanating from a weaponization of its foreign investment strategy to acquire, by design, dual-use technology and know-how from U.S. companies.

Our colleagues believe that China has found gaps in both the existing CFIUS process and export control regime, and is exploiting each of them to the detriment of U.S. national security and the U.S. defense industrial base.

To address these concerns, FIRRMA is specifically designed to broaden CFIUS's jurisdiction to review certain high technology joint venture and related arrangements, minority-position investments and certain types of real estate transactions.

At last week's hearing, a consensus emerged that much of the bill is focused on national security threats that need to be addressed as China executes its policies born of its unique civil–military integration that effectively blurs the lines between military and commercial activities.

It is also important to note that the overwhelming majority of foreign investments and transactions provide significant benefit to the U.S. economy, including those Chinese investments that occur in most sectors of the U.S. economy and do not impact the national security of the United States.

It is that point of inflection, between national security and economic growth realized from an open investment policy, that the Banking Committee has been entrusted to debate and oversee throughout the now 42-year evolution of the CFIUS process.

The challenge comes in the continued use of foreign investment to promote economic growth and next generation technologies while shielding those very technologies from foreign threats.

Last week, the panel of witnesses from the private sector offered their perspectives on the potential effects of FIRRMA.

During the hearing's question and answer period, there were several questions raised that merit feedback from today's panel:

One, would the expansion of CFIUS authority to unwind or alter outbound joint venture-related international commercial activity duplicate or in any way undermine the current U.S. export control regime and end up chilling this type of commercial activity?

Two, if there are gaps in the export control process, why should this Committee, which has jurisdiction over both the relevant parts of the U.S. export control regime and CFIUS, opt to create new export control authority for CFIUS, a traditionally unilateral, inward bound review process?

Three, what would the resource burden look like for each of your agencies for the type of expansion envisioned by this legislation, and what impact would it have on foreign investment if the review period were actually increased by 50 percent to accommodate these new reviews?

The three Government agencies represented here today provide a spectrum of viewpoints necessary to understand where the United States must position itself with respect to CFIUS to assure the national security of the United States.

Given what we have heard in previous hearings, it is apparent on national security grounds that legislative fixes to the current system may be warranted, including expanding the authority of CFIUS to monitor certain additional transactions that are evading the process.

Preservation of the U.S. defense industrial base, protection of U.S. critical technology, critical infrastructure, and even related American know-how are all legitimate areas of concern.

It is not the intention of the Banking Committee to chill direct foreign investment into the United States, but neither can this Nation's national security interests be subordinated to commercial interests.

I am certain that these fixes can be made with the help of the Administration, business community, and my colleagues, from both sides of the dais, on the Banking Committee.

PREPARED STATEMENT OF HEATH P. TARBERT

ASSISTANT SECRETARY OF THE TREASURY FOR INTERNATIONAL MARKETS AND INVESTMENT POLICY

JANUARY 25, 2018

Chairman Crapo, Ranking Member Brown, and distinguished Members of the Committee, thank you for the opportunity to testify in support of the Foreign Investment Risk Review Modernization Act (FIRRMA), S.2098, 115th Cong. (2017).

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 19th and 20th 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. 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

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[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*.

[5] U.S. Dep't of Commerce, Economics and 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 and 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.

"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 little risk since our main strategic adversaries—the Soviet Union and its satellites—were communist countries whose economic systems were largely isolated from our own.

When the post-war trend changed in the 1970s, however, CFIUS was born. The oil shock that made OPEC countries wealthy led to concern that petrodollars might be used to purchase key U.S. assets. In 1975, President Ford issued an Executive Order creating CFIUS to monitor and report on foreign investments, but with no power to stop those posing national security threats. [14] Then in the 1980s, a growing number of Japanese acquisitions motivated Congress to pass the Exon–Florio Amendment in 1988. [15] For the first time, the President could block the foreign acquisition of a U.S. company or order divestment where the transaction posed a threat to national security without first declaring an emergency. That law created Section 721 of the Defense Production Act of 1950, which remains the statutory cornerstone of CFIUS today.

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

Critical Need for CFIUS Modernization

Now, more than a decade after FINSA and three decades after Exon–Florio, we find ourselves at another historic inflection point. Within the last few years, the national security landscape as it relates to foreign investment began shifting in ways that have eclipsed the magnitude of any other shift in CFIUS's 40-year history. No-

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

[10] Edward M. Graham and 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 and Marchick, supra n. 10, at xvi, 14, 18.

[13] Id. at 9.

[14] Exec. Order 11,858, 40 *FR* 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).

where 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 2 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.

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 FINSA. 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 noncontrolling investments and joint ventures becoming ever more popular.

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 there can and should be space for creative deal-making, 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 nonpassive, noncontrolling investments, technology transfers through arrangements such as joint ventures, real estate purchases near sensitive military sites, 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 noncontrolling transactions that would otherwise be covered by the expanded authority. Such exclusions could be based on whether the foreign investors are from a country that meets specified criteria, such as having a national security review process for foreign investment. FIRRMA also allows CFIUS to identify spe-

cific types of contributions by technology, sector, subsector, transaction type, or other transaction characteristics that warrant review—effectively excluding those that do not. Additionally, CFIUS can define circumstances in which certain transactions can be excluded because 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.

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 whether the country has a mutual defense treaty in place with the United States; a mutual arrangement to safeguard national security with respect to foreign investment; and a parallel 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 fulfill its critical mission. FIRRMA would establish for the first time a "CFIUS Fund" (Fund), which would be authorized to receive appropriations. Under FIRRMA, these funds are intended to cover work on reviews, investigations, and other CFIUS activities. FIRRMA also authorizes CFIUS to assess and collect fees, to be deposited into the Fund, for any covered transaction for which a notice is filed. Once appropriated, these funds could also be used by CFIUS. Although the exact amount will be set by regulation, it would be capped at 1 percent of the value of the transaction or $300,000 (indexed for inflation), whichever is less. 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.

Modernizing CFIUS entails a cost, and FIRRMA does not (and cannot) fully address the resource needs of CFIUS and its member agencies. But the cost of funding a modernized CFIUS is not the only consideration. We must all consider the cost of doing nothing: the potential loss of America's technological and military edge, which will have a real cost in American lives in any conflict. That is simply unacceptable.

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.

PREPARED STATEMENT OF RICHARD ASHOOH

ASSISTANT SECRETARY OF COMMERCE FOR EXPORT ADMINISTRATION

JANUARY 25, 2018

Chairman Crapo, Ranking Member Brown, and Members of the Committee: I appreciate the opportunity to testify before the Committee today in support of the Foreign Investment Risk Review Modernization Act (FIRRMA) (S.2098). I would also like to highlight the critical roles the Department of Commerce plays in supporting U.S. national security—both as a member of the Committee on Foreign Investment in the United States (CFIUS) and as an export control agency.

Committee on Foreign Investment in the United States

Let me start by thanking Senator Cornyn, Senator Feinstein, Senator Burr, and the other cosponsors for their strong leadership and dedication on this very important issue. We appreciate the work Senator Cornyn and Congressman Pittenger have done on FIRRMA. The Commerce Department supports the modernization of the CFIUS process to ensure that it has the authorities and capacity required to address risks to our national security from foreign investment. The Department also shares Congress' concern about China's industrial policies and activities. We believe FIRRMA takes many positive steps in addressing those concerns.

I have now had experience with the CFIUS review process in the public and private sectors. 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, whose acquisition by the foreign parent was reviewed by CFIUS. Based on my experience, it is clear that CFIUS plays an important role in protecting our national security. Together with the International Trade Administration (ITA), 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, as the administrator of the Export Administration Regulations (EAR), has extensive experience in export controls, which are often implicated in CFIUS reviews.

I would like to highlight a few specific provisions in the legislation:

- As you are aware, the Administration welcomes foreign investment and the Department of Commerce houses SelectUSA, which helps promote foreign investment in the United States. The Department welcomes the affirmations in FIRRMA of that policy. As we consider how to modernize CFIUS, we should be careful that the U.S. Government not send a signal that we have changed our policy of encouraging foreign direct investment. However, we are also very attuned to the need to protect U.S. national security and feel that CFIUS has an important role to play in that regard.
- 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 committee 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.

The Department of Commerce looks forward to working with the Committee as it continues its CFIUS modernization efforts.

Administering Export Controls

As this Committee well knows, BIS addresses the challenges that arise where business and national security intersect. Our mission is to advance U.S. national security, foreign policy, and economic interests by ensuring an effective export control and treaty compliance system and promoting continued U.S. strategic technology leadership.

In our role administering the Export Administration Regulations (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 set by using specific technical parameters. The interagency decisions on where to set these parameters are national security determinations that define 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. If implemented appropriately, FIRRMA will strike this important balance.

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.

The export control system is flexible and able to address concerns about emerging technologies, and the agencies involved in that process have experience with these issues. CFIUS deals with individual transactions that come before the committee for review. BIS, with the interagency, can prohibit the export of specific controlled technologies from anywhere in the United States and block their access by almost any foreign national.

Finally, the Bureau of Industry and Security contributes to the national security of the United States through its aggressive enforcement of the EAR. Our Special Agents are located in 20 cities across the United States with a sole focus on identifying violations of the EAR and bringing to justice domestic and foreign violators. In addition we have export control officers stationed abroad who conduct end-use checks. Our enforcement efforts have included everything from the successful prosecution of individuals illegally shipping components for Improvised Explosive Devices (IED) into Iraq and illegal sales of U.S. technology to Iran, to stopping the illegal shipment of shotguns, jet engines, night vision equipment, and integrated circuits to prohibited end users or for prohibited end uses.

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. We are currently undertaking a review to better utilize our authorities to combat threats arising from this kind of technology.

Summary

In sum, CFIUS and export controls are both vital and robust authorities the United States relies upon to protect our national security. 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 the technical aspects of FIRRMA to ensure it achieves the intended effect. Commerce is committed to working in both forums to protect sensitive U.S. technologies and assets that provide key advantages to our industrial base and national security.

The Department of Commerce looks forward to working with the Committee and bill sponsors on advancing and improving FIRRMA.

Thank you.

PREPARED STATEMENT OF ERIC CHEWNING

DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR MANUFACTURING AND INDUSTRIAL BASE POLICY

JANUARY 25, 2018

Mr. Chairman, Ranking Member Brown, and Members of the Committee, 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 interagency 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 Senator Cornyn, Senator Feinstein, and Senator Burr on this issue and appreciate the bipartisan support for the Foreign Investment Risk Review Modernization Act (FIRRMA), S.2098, 115th Cong. (2017). The Department shares Congress' 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 Jim Mattis, stating this Department's position, in his letter of support to Senator Cornyn, 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 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 interagency CFIUS process.

I've 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 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 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 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 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 percent of all U.S. venture deals in 2015, up from a 6-percent average participation rate during 2010–2015.[3]

While some facets of our competitors' strategy, like industrial espionage and cybertheft, 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 determining the requirements of national security under the current Foreign Investment and National Security Act (FINSA) 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 percent 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 1970s, 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 nonpassive, noncontrolling investments, that can pose national security concerns, such as transferring technology and critical capabilities. Additionally, the

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

[2] "Ensuring Long Term U.S. Leadership in Semiconductors". Executive Office of the President, President's Council of Advisors on Science and 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.

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

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 to Senator Cornyn. "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.

RESPONSES TO WRITTEN QUESTIONS OF CHAIRMAN CRAPO FROM HEATH P. TARBERT

Q.1. The legislation FIRRMA authorizes CFIUS to impose filing fees on transactions to cover the committee's funding needs.

Will these fees be sufficient to address the increased case load anticipated with FIRRMA and what new resources will your agencies need to carry out these reforms?

A.1. The largest portion of increased work burden resulting from FIRRMA is likely to be in connection with transactions that are much smaller than the mergers and acquisitions currently within the scope of CFIUS. These transactions may generate little, if any, revenue. Thus, while fees may offset some of the costs of administering the CFIUS process, they are unlikely to cover the increased load across the committee. The funds derived from the filing fees are more likely to serve as a supplemental funding source that would enable CFIUS to be better positioned to deal with unexpected increases in case volume, along with ensuring CFIUS's additional functions of monitoring of mitigation agreements and transactions that are not voluntarily notified with CFIUS are sufficiently resourced.

Q.2. How many cases do you anticipate CFIUS would review as a result of FIRRMA?

A.2. The total number of cases under FIRRMA is hard to estimate, but it could be several multiples of CFIUS's current caseload. FIRRMA provides several mechanisms to ensure that the process remains efficient. For example, FIRRMA would give CFIUS the authority to issue regulations to focus the expanded jurisdiction on the technologies and sectors that most warrant application of CFIUS authorities. It also creates a streamlined "declarations" process, which would lower the burden on many parties seeking review of transactions and allow CFIUS to calibrate the resources that it devotes to a transaction based on the likelihood that a particular transaction may pose a national security risk.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR MENENDEZ FROM HEATH P. TARBERT

Q.1. At the CFIUS hearing on January 18, a witness raised the concern that the committee should also consider the national security implications of investments by foreign companies that are not technically owned by a foreign Government, but perhaps show other signs of Government influence—such as loans from State-owned banks, close ties between corporate management and political leaders, or other methods that Governments use to influence corporate behavior.

What are reforms that you would advise the Committee to consider so that we account not only for the national security risks of investments by overtly State-owned companies, but also from foreign firms that may be otherwise influenced or controlled by foreign Governments?

A.1. You raise an important point: foreign firms may not be State-owned but are nonetheless influenced or controlled by foreign Governments. While this is an issue that regularly confronts CFIUS,

we believe that CFIUS has the authority necessary now to consider any factors relevant to assessing whether a particular covered transaction poses a national security risk. This includes consideration of formal and informal ways in which a foreign Government or possible threat actor, even beyond actual ownership, may be able to influence a foreign person that is acquiring a U.S. business. Factors such as prior Government affiliations of corporate management, Government financing, and Government practices of compelling private company cooperation with strategic State interests, among other factors, are regularly considered in the assessment of the threat posed by acquirers. CFIUS will continue to be able to consider these same analytical factors when reviewing transactions under FIRRMA. Moreover, FIRRMA's coverage of nonpassive investments would give CFIUS the authority to review some investments that do not meet the current threshold for control.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR WARNER FROM HEATH P. TARBERT

Q.1. As we search for the most appropriate remedy to the very real problem of foreign countries gaining access to critical U.S. technologies, there are some suggesting that we should be pursuing other changes instead of or in addition to the CFIUS reform.

What role should export controls play in addressing this problem?

A.1. Treasury believes that CFIUS and export controls both play a role in addressing this problem. CFIUS and export controls are complementary and mutually reinforcing processes. Even today, CFIUS does not act when it determines that the national security risk posed by the transaction can be adequately addressed by other laws, including export control laws.

This would continue to be the case under FIRRMA. In circumstances where export controls prove adequate and appropriate to address risks that FIRRMA would allow CFIUS to cover (e.g., involving a specific license granted by the Department of Commerce following appropriate disclosure of information related to the transaction), we would expect to carve those circumstances out of CFIUS's jurisdiction via rulemaking.

Q.2. Could the export control system be modified to address the concern that know-how—not just intellectual property—is being transferred through joint ventures and other partnerships?

A.2. Treasury defers to the export control agencies regarding the extent to which export controls could be modified to address some of the types of risks that the joint venture provision of FIRRMA is intended to address.

Q.3. Are there other changes outside of CFIUS and export controls that should be considered to address this security challenge?

A.3. Ensuring that we have the tools necessary to protect national security is only one element of what is necessary to address this security challenge. As I stated during my testimony, the United States has been a leading destination for investors, entrepreneurs, and innovators. It is important that this remains the case and that we continue to invest in our companies and innovators. The Presi-

dent's National Security Strategy specifically identifies in Pillar II that we must promote American prosperity, which includes leading in research, technology, invention, and innovation, along with promoting the U.S. national security innovation base. One of the strengths of the United States is our ability to foster innovation and develop new technologies.

Q.4. One of the strengths of the U.S. is our ability to foster innovation and develop new technologies.

Would increasing filing times and additional fees for expanded CFIUS jurisdiction, as proposed by the Foreign Investment Risk Review Modernization Act (FIRRMA) significantly inhibit venture capital investments and hurt entrepreneurship by creating excessive barriers, such as prolonged wait times, to foreign investment?

A.4. The United States has remained a leading destination for foreign investment, notwithstanding a robust CFIUS process. Treasury does not anticipate that the addition of 15 days to the first-stage "review" period or an optional one time extension of 30 days in extraordinary circumstances would be a material deterrent to foreign investment. In fact, these changes may allow more transactions to be cleared in the initial "review" period, which would create additional predictability in the process, and still would keep the duration of the CFIUS process well below the duration of similar processes in most other countries. What is more, the option for filing short "declarations" of transactions and the ability of CFIUS to clear a transaction within 30 days based on such a streamlined submission would likely reduce the burden that many investors currently face under the CFIUS process. Finally, CFIUS does not expect to set filing fees in regulations at a level that is likely to have a material impact on investment decisions.

Q.5. Would significantly expanding CFIUS's jurisdiction negatively affect our investment relationship with Europe and other traditional economic allies, who could get caught up in an expansion of CFIUS's scope of review?

A.5. As noted above, CFIUS's current ability to review transactions involving Europe and our other traditional economic partners for national security concerns has not affected the long-standing status of the United States as a leading destination for foreign investment. Today, transactions from these countries that do not warrant CFIUS review are either not filed with CFIUS or, if they are, are cleared by CFIUS within the initial review period. FIRRMA generally maintains the voluntary filing system and provides companies with the option for a more streamlined declarations process in the event they would like formal clearance from CFIUS. FIRRMA also gives CFIUS the discretion to exempt certain transactions from allied countries in certain circumstances.

Q.6. Do you think that significantly expanding CFIUS's jurisdiction and identifying "countries of particular concern" for purposes of CFIUS review could be considered a discriminatory measure by trade partners?

A.6. FIRRMA would not require CFIUS to identify "countries of special concern," and the legislation expressly states that CFIUS is not expected to maintain such a list. Nor would FIRRMA mandate

any outcome with respect to countries of special concern or alter CFIUS's existing practice of reviewing each transaction on its merits and solely for national security purposes. CFIUS would continue to exercise its authority consistent with existing trade agreements. Therefore, we do not believe FIRRMA would be considered a discriminatory measure for trade law purposes.

Q.7. What would be the potential consequences of doing so from a trade perspective?

A.7. Please see the previous answer.

Q.8. Should we expect retaliation?

A.8. CFIUS can reduce the chances of any retaliation by continuing its focus exclusively on national security risks, examining only those risks posed by the transaction under review, and clearing transactions, regardless of origin, that do not pose national security concerns.

Q.9. What forms could that retaliation take?

A.9. Please see the previous answer.

Recent proposed legislation, the Foreign Investment Risk Review Modernization Act (FIRRMA), broadens the Committee on Foreign Investment in the United States' (CFIUS) purview so that the Committee would review transactions that involve critical technologies. According to the bill's definition of "critical technologies", this includes "emerging technologies that could be essential for maintaining or increasing the U.S. technological advantage with respect to national security." And there is an open question as to whether widely available advanced technology made by multiple companies, in many different countries should be covered by this definition given that CFIUS is a unilateral, not multilateral, tool. I have heard from some that this definition may be too broad a category, effectively forcing hundreds, if not thousands, of transactions to be subject to CFIUS review. A related concern is that the term "U.S. business" is not defined, and it is unclear whether a wholly owned foreign subsidiary of a U.S. headquartered company would be considered a "U.S. business" and whether CFIUS would apply to transactions between the U.S. company and its foreign subsidiary.

Q.10. Recent proposed legislation, the Foreign Investment Risk Review Modernization Act (FIRRMA), broadens the Committee on Foreign Investment in the United States' (CFIUS) purview so that the committee would review transactions that involve critical technologies. According to the bill's definition of "critical technologies", this includes "emerging technologies that could be essential for maintaining or increasing the U.S. technological advantage with respect to national security." And there is an open question as to whether widely available advanced technology made by multiple companies, in many different countries should be covered by this definition given that CFIUS is a unilateral, not multilateral, tool. I have heard from some that this definition may be too broad a category, effectively forcing hundreds, if not thousands, of transactions to be subject to CFIUS review. A related concern is that the term "U.S. business" is not defined, and it is unclear whether a wholly owned foreign subsidiary of a U.S.-headquartered company would

be considered a "U.S. business" and whether CFIUS would apply to transactions between the U.S. company and its foreign subsidiary.

Is there a way to narrow the scope of the definition so that it becomes more manageable for CFIUS to monitor?

A.10. Yes. FIRRMA explicitly provides CFIUS with the authority, through the rulemaking process, to narrow the scope of certain definitions and create exemptions, which would ensure that the number of transactions reviewed by CFIUS is manageable. The declarations process included in FIRRMA would also permit streamlined filings that can be reviewed more efficiently, thereby enabling CFIUS to focus its resources on the transactions most likely to raise concerns.

Q.11. Or do you believe that it should be this expansive?

A.11. Treasury believes that there are certain clarifications that can be accomplished through revisions to FIRRMA, and we look forward to working with this Committee on such clarifications. However, Treasury believes that the rulemaking process is a necessary tool in ensuring that the process remains efficient and effective over time.

Q.12. Do you have a sense of how many transactions this legislation would bring into CFIUS's scope?

A.12. The total number of cases under FIRRMA is hard to estimate, but it could be several multiples of CFIUS's current caseload. As mentioned above, FIRRMA offers a number of mechanisms by which CFIUS can ensure that the process remains administrable.

Q.13. And how many new employees you would need?

A.13. We are working to estimate the resource requirements under FIRRMA, but will not have firm estimates on the overall cost or number of covered transactions until any 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. However, certain efficiencies will be gained over time in the processing of cases, partially offsetting the additional resource requirements through a reduction in the per-case processing cost. I will keep you updated on the development of our estimates and look forward to working with you to strengthen and modernize CFIUS.

Q.14. And how much that would cost?

A.14. As mentioned above, Treasury will not have firm estimates on the overall cost or number of covered transactions until any required implementing regulations have been formulated.

Q.15. How long do you think it would take to get that many employees in place?

A.15. As currently drafted, FIRRMA includes direct hiring authority to allow agencies to resource the CFIUS function quickly. This authority will be critical for agencies to implement FIRRMA in a timely manner. Given the unknowns surrounding the number of covered transactions and therefore the number of new employees required, it is difficult to provide a specific timeframe. However, we expect that recruiting would begin immediately upon the enact-

ment of FIRRMA and hiring would commence as soon as appropriations are available.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR CORTEZ MASTO FROM HEATH P. TARBERT

Q.1. *Gaming and Tourism*—Foreign companies are beginning to expand into new industries, including gaming and tourism in the State of Nevada. As an example, foreign companies have been investing in and developing properties on the Las Vegas Strip. In the context of CFIUS reviews, hotel deals previously examined by the committee include the acquisition of New York's Waldorf-Astoria Hotel by Anbang Insurance group in 2014.

Given the importance of the tourism industry to Nevada, could you elaborate on the concerns associated with foreign acquisition of hotels or tourism companies in the United States? How does CFIUS review such transactions, and what is the committee's track record on approving or denying these types of deals?

A.1. An acquisition of land or a building is currently reviewable by CFIUS if it involves the acquisition of a "U.S. business," as defined in CFIUS's regulations. As it pertains to CFIUS's review of any specific transaction involving one or more hotels, Treasury can provide a classified briefing to answer your questions. However, as a general matter, in reviewing such transactions, CFIUS considers the national security "vulnerabilities" related to activities that occur at the property (e.g., does the hotel house or host sensitive U.S. Government operations?) or near the property (e.g., is the hotel near a sensitive training facility?). CFIUS also considers the threat posed by the foreign party (i.e., the capability and intent of the foreign acquirer to harm the national security of the United States) and the national security consequences should a threat actor exploit the vulnerabilities. If CFIUS identifies a risk, then it can seek to enter into an agreement with the parties to mitigate the risk and allow the transaction to proceed. If the risk cannot be mitigated, then it would recommend to the President that he prohibit the transaction.

FIRRMA would expand CFIUS's jurisdiction to allow it to look at certain real estate acquisitions even if a given transaction does not involve the acquisition of a "U.S. business." As was highlighted during our colloquy in the hearing, the proximity risk associated with vacant land that can be rapidly developed is not necessarily significantly different than the risk associated with land that already houses a business. As a reflection of its general "track record," however, CFIUS has historically cleared the majority of transactions that it has reviewed.

As mentioned above, I would be happy to provide you with a classified, confidential briefing on specific transactions.

Q.2. *Greenfield Acquisition*—In Nevada, we're home to a number of technology startups, including drone technology.

Can you discuss the potential positive and negative consequences of expanding CFIUS review to "greenfield" projects—or those involving start-ups?

A.2. Your question raises an important distinction regarding CFIUS's authority to review "greenfield" projects versus investments in "start-ups."

First, CFIUS currently has the authority to review the foreign acquisition of a U.S. business, which includes acquisitions of early-stage start-ups. However, CFIUS cannot review a non-controlling foreign investment in such a company, even if the foreign investor is not passive and can influence or gain access to the company in ways that pose national security concerns. FIRRMA would address this issue by providing CFIUS the authority to review such transactions.

Second, FIRRMA would allow CFIUS to review certain real estate transactions based on proximity concerns even if there is no existing business. We believe that such broad authority is warranted by the current and expected investment landscape as it pertains to national security risks. FIRRMA would not, however, give CFIUS general authority to review the establishment of a new business (commonly referred to as a "greenfield") in the United States by a foreign person.

Q.3. Can you discuss the use of "mitigation agreements"—or conditions placed on acquisitions approved by CFIUS?

A.3. Mitigation agreements are an important tool available to CFIUS to address identified national security concerns arising from a covered transaction that are not otherwise adequately or appropriately addressed by other provisions of law (e.g., export controls, Government procurement authorities). Consistent with the open investment policy of the United States, mitigation agreements enable CFIUS, in most instances, to allow a transaction in which CFIUS identifies national security concerns to proceed by addressing those concerns through tailored and effective mitigation measures in lieu of recommending to the President that he prohibit a transaction.

Q.4. Are they being used appropriately?

A.4. Yes. CFIUS accepts mitigation only if we think the measures will be (1) effective at addressing the national security risk(s) and (2) capable of being monitored and enforced.

Q.5. Does CFIUS have the resources and staffing to ensure adherence to these mitigation agreements?

A.5. Treasury is committed to ensuring that CFIUS has the resources necessary to fulfill its responsibilities to ensure compliance with mitigation agreements. Generally, compliance monitoring is performed by the co-lead agency (alongside Treasury) that negotiated the given mitigation agreement (e.g., the Department of Defense, Department of Homeland Security, etc.).

Q.6. What are the pros and cons of making the filing of CFIUS reviews mandatory—rather than discretionary—for State-controlled acquiring firms?

A.6. Treasury believes that CFIUS should remain a generally voluntary process. We believe that a mandatory process would likely divert CFIUS resources to transactions that do not warrant examination. As it is, CFIUS has the authority to initiate a review where warranted. However, transaction parties should be required to inform CFIUS about certain types of transactions before they

consummate the transaction. FIRRMA accomplishes this by requiring mandatory declarations in two circumstances: (1) certain covered transactions with foreign Government interests; and (2) other covered transactions identified by CFIUS in regulations. This ensures that CFIUS would be aware, in advance, of covered transactions that may be more likely to pose national security concerns or could cause national security harm that is more difficult to remediate after completion of the transaction. As you imply in your question, we believe that transactions involving State-controlled acquiring firms are of the kind that we would like to see subject to an advance notification process. CFIUS can then determine whether such transactions require a review.

Q.7. Should they be reviewed differently than private-firm mergers or acquisitions, or firms that are in part-owned by Nation States?

A.7. The Foreign Investment and National Security Act of 2007 (FINSA), CFIUS's current statute, establishes special procedures for CFIUS review of transactions that could result in foreign Government control of a U.S. business. Specifically, it requires that CFIUS proceed from the "review" stage (30 days) to the "investigation" stage (up to 45 additional days) for foreign Government-controlled transactions unless a determination is made at least at the Deputy Secretary level that the transaction "will not impair the national security of the United States." FIRRMA also would establish a mandatory declaration requirement for certain transactions involving foreign Government investors, as noted above. Treasury believes that this framework provides appropriate authority for CFIUS to address national security risks posed by foreign Government investments.

Q.8. It has been 10 years since Congress last comprehensively considered the statutory framework for CFIUS. As practitioners that have worked in this space for long tenures, has any consensus emerged about what budget, regulatory, or statutory changes may be needed?

A.8. As I outlined in my testimony, 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 sites, and transactions structured to evade CFIUS review.

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.

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 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 fulfill its critical mission, so that Congress has full understanding of the needs required to fulfill CFIUS's expanded scope. FIRRMA would establish for the first time a "CFIUS Fund," which would be authorized to receive appropriations. FIRRMA also 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.

Q.9. Can you delineate the appropriate role for export controls versus CFIUS?

A.9. CFIUS and export controls are complementary and mutually reinforcing processes. Even today, CFIUS does not act when it determines that the national security risk posed by the transaction can be adequately addressed by other laws, including export control laws.

This would continue to be the case under FIRRMA. In circumstances where export controls prove adequate and appropriate to address risks that FIRRMA would allow CFIUS to cover (e.g., involving a specific license granted by the Department of Commerce following appropriate disclosure of information related to the transaction), we would expect to carve those circumstances out of CFIUS's jurisdiction via rulemaking.

RESPONSES TO WRITTEN QUESTIONS OF CHAIRMAN CRAPO FROM RICHARD ASHOOH

Q.1. The legislation FIRRMA authorizes CFIUS to impose filing fees on transactions to cover the committee's funding needs.

Will these fees be sufficient to address the increased case load anticipated with FIRRMA and what new resources will your agencies need to carry out these reforms?

A.1. The largest portion of increased work burden resulting from FIRRMA is likely to be in connection with transactions that are much smaller than the mergers and acquisitions currently within the scope of CFIUS. These transactions may generate little, if any, revenue. Thus, while fees may offset some of the costs of administering the CFIUS process, they are unlikely to cover the increased load across the committee. The funds derived from the filing fees are more likely to serve as a supplemental funding source that would enable CFIUS to be better positioned to deal with unexpected increases in case volume, along with ensuring CFIUS's additional functions of monitoring of mitigation agreements and transactions that are not voluntarily notified with CFIUS are sufficiently resourced.

Q.2. How many cases do you anticipate CFIUS would review as a result of FIRRMA?

A.2. The total number of cases under FIRRMA is hard to estimate, but it could be several multiples of CFIUS's current caseload. FIRRMA provides several mechanisms to ensure that the process remains efficient. For example, FIRRMA would give CFIUS the authority to issue regulations to focus the expanded jurisdiction on the technologies and sectors that most warrant application of CFIUS authorities. It also creates a streamlined "declarations" process, which would lower the burden on many parties seeking review of transactions and allow CFIUS to calibrate the resources that it devotes to a transaction based on the likelihood that a particular transaction may pose a national security risk.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR SCOTT FROM RICHARD ASHOOH

Q.1. On January 22, Secretary Ross stated that, "The CFIUS process must be strengthened to protect our national security, including expanding it to cover joint ventures, and respond to an unprecedented stream of investment from China." My understanding is that CFIUS does not currently cover such joint ventures in places like China.

Please answer the following with specificity:

Do you agree with Secretary Ross' view on the need to expand CFIUS's jurisdiction to cover these joint ventures? Why or why not?

A.1. CFIUS jurisdiction should be periodically reviewed, and if necessary, amended to allow CFIUS to address developments in global markets, in technology, in forms of investment, in foreign policy, and in threats to the national security. Commerce supports efforts to expand CFIUS's visibility into a broader range of investments.

At the same time, we are cognizant that other national security authorities, notably export controls, can also be used to address specific national security risks posed by specific transactions. For example, we believe that export controls are better positioned to address national security issues pertaining to technology transfers given that the export control system is a well-established interagency system that covers all modes of technology transfer.

Q.2. Does the Foreign Investment Risk Review Modernization Act (FIRRMA) enact this expansion of CFIUS jurisdiction in a manner that balances national security and economic interests?

A.2. I believe that it does. As I stated in my testimony, Commerce supports the statement in FIRRMA that the United States retains its longstanding policy of welcoming foreign investment. Even though FIRRMA would expand the scope of CFIUS, it is clearly intended to do so in a manner that maintains the United States' position as a prime destination for foreign investment. Additionally, even with the expanded scope of FIRRMA, CFIUS will remain sharply focused on the small percentage of transactions that present national security concerns.

Q.3. What unique challenges are posed to our export control system with China, a nonmarket economy?

A.3. Many of China's industrial policies pose challenges for the U.S. export control system. For instance, China's policy of civil-

military integration is a particular concern. The agencies involved in our export control system take these policies into consideration when reviewing exports of controlled items to China. The agencies must balance these policies and the concerns they raise with the significant amount of legitimate commercial business that takes place in China when reaching decisions on such reviews.

Q.4. What additional prudential and consumer protection requirements, if any, would you consider as part of the approval process of an ILC application from a FinTech company?

A.4. Response not received in time for publication.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR COTTON FROM RICHARD ASHOOH

Q.1. If someday, many years from now, there was a President (an American "Karl Marx") who actively sought to interfere in the U.S. investment climate, who considered Government involvement in private investment to be a virtue, what guardrails, if any, are written into the bill that would constrain such an anti–free market Administration?

A.1. CFIUS by law is narrowly focused on national security issues and FIRRMA would maintain that focus. As a result, I believe that it would be very difficult for any President or Administration to be able to unduly intervene in the private sector as the national security focus that is part of CFIUS's statutory mandate provides key limitations in that area.

Q.2. Who involved in the CFIUS would lose their job, or at least have a poor annual review, if CFIUS unnecessarily interfered in private enterprise?

A.2. One of the key aspects of CFIUS, an area that was specifically addressed by Congress in the FINSA legislation in 2007, is the requirement that political-appointee level officials engage in CFIUS's review of each transaction. As such, an official appointed by the President, by and with the advice and consent of the Senate (i.e., at Commerce, an Assistant Secretary-level official) from each co-lead agency must sign and submit to Congress a certified notice at the completion of each CFIUS review stating that there are no unresolved national security concerns. If the case has included an investigation by CFIUS, the report on the investigation must be signed by the Secretary or Deputy Secretary, or a person serving in an equivalent position, from each lead agency. This ensures that there is accountability in the CFIUS process in all cases.

Q.3. What automatic processes are in place to gather information on if the CFIUS process is outside its jurisdiction, is taking too long to look at transactions, or is unnecessarily taking up more of the private sector's time and resources?

A.3. I defer to the Department of the Treasury, as CFIUS chair, on this question. However, I will note that CFIUS endeavors in all cases to complete its review in the most expeditious manner possible. Further, CFIUS annually reports to Congress on its activities and is subject to its oversight.

Q.4. My understanding is that CFIUS typically does not cover joint ventures that are based overseas. The sponsors of this bill have circulated a list of endorsements of the bill, including one from Wilbur Ross, the Secretary of Commerce. Sec. Ross said that CFIUS must be strengthened to protect our national security "including expanding it to cover joint ventures."

Do you agree with Sec. Ross (quote below)?

Secretary of Commerce Wilbur Ross (quote provided on 1/22/18): "The CFIUS process must be strengthened to protect our national security, including expanding it to cover joint ventures, and respond to an unprecedented stream of investment from China. Senator Cornyn's and Representative Pittenger's FIRRMA legislation takes many positive steps in that regard, and I look forward to its eventual passage. FIRRMA envisions a robust CFIUS review process that complements our strong current export control regime. It is also important for Congress to fully fund CFIUS's expanded responsibilities and provide a sufficiently stringent threshold of review of transactions that may threaten our national security."

A.4. CFIUS jurisdiction should be periodically reviewed, and if necessary, amended to allow CFIUS to address developments in global markets, in technology, in forms of investment, in foreign policy, and in threats to the national security. Commerce supports efforts to expand CFIUS visibility into a broader range of investments.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR MENENDEZ FROM RICHARD ASHOOH

Q.1. Judging from the Committee's previous CFIUS hearing on January 18, I sense that there is broad agreement among bipartisan members of Congress as well as industry stakeholders that investments by foreign State-owned enterprises in sensitive U.S. technologies warrant a higher level of scrutiny than similar investments made by private foreign companies.

In your testimony, you stated that the 25-percent threshold that would require a foreign controlled entity to file a mandatory filing in the FIRRMA is too high, and that transactions could easily be structured to evade it.

Could you expound on this thought?

A.1. The Department of Commerce is supportive of the requirement in FIRRMA for mandatory filings for certain transactions involving foreign Government-controlled entities. Our concern over the 25-percent threshold in FIRRMA centers on Commerce's belief that CFIUS must have enhanced visibility into transactions that could raise national security concerns. Under the existing statute, we sometimes see transactions in which the foreign acquirer obtains less than 25-percent ownership interest in the U.S. company but still obtains control through governance rights or other mechanism. In those cases, the transaction is appropriately subject to CFIUS review under existing law. Given the national security concerns that may arise from foreign Government ownership of a U.S. firm, it is important that CFIUS be made aware of foreign Government-owned entities acquiring significant stakes in U.S. companies, particularly if those shares are so significant as to allow the foreign Government to control the U.S. company. We believe that requiring

mandatory filings for such transactions to be in the U.S. national security interest.

Q.2. In your opinion, what would be an appropriate threshold?

A.2. One way to address this concern would be to lower the mandatory filing threshold to 10 percent, which corresponds to U.S. Securities and Exchange Commission filing requirements under Section 16 of the Securities Exchange Act of 1934. We are also open to alternative ways to meet the stated objective of strengthening CFIUS's ability to learn of, and potentially review, the acquisition of significant interests in U.S. firms by foreign Government-owned entities, a type of transaction that can raise heightened national security concerns.

Q.3. At the CFIUS hearing on January 18, a witness raised the concern that the committee should also consider the national security implications of investments by foreign companies that are not technically owned by a foreign Government, but perhaps show other signs of Government influence—such as loans from State-owned banks, close ties between corporate management and political leaders, or other methods that Governments use to influence corporate behavior.

What are reforms would you advise the committee to consider so that we account not only for the national security risks of investments by overtly State-owned companies, but also from foreign firms that may be otherwise influenced or controlled by foreign Governments?

A.3. CFIUS considers all types of foreign Government influence and control in determining whether the transaction is subject to CFIUS review and in conducting its national security review, and should retain this ability. CFIUS has existing mechanisms to assess the extent and degree of foreign Government influence over a foreign acquirer, including through the support of the Intelligence Community. This information is considered as CFIUS makes the determinations described above and assesses whether the transaction is foreign Government controlled (a requirement under the Foreign Investment and National Security Act of 2007) and, thus, poses an attendant risk.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR WARNER FROM RICHARD ASHOOH

Q.1. As we search for the most appropriate remedy to the very real problem of foreign countries gaining access to critical U.S. technologies, there are some suggesting that we should be pursuing other changes instead of or in addition to the CFIUS reform.

What role should export controls play in addressing this problem?

A.1. CFIUS and export controls are both vital and robust tools/processes/systems the United States relies upon to protect our national security. CFIUS is a process to review whether certain business transactions present a risk to U.S. national security, with technology transfer being one of several possible factors which may be of concern. The export control system governs technology transfer itself, irrespective of mode of transfer, to protect sensitive U.S.

origin goods, software, and technology. As such, these two authorities are complementary and must continue to work in a parallel, coordinated fashion.

Where technology transfers present concerns, the export control system is best designed to address those concerns. The Export Administration Regulations' (EAR) authority covers a wide array of transactions and technology transfers. The EAR governs both traditional exports of goods, software, or technology to third countries as well as the transfers of controlled technology within the United States to foreign nationals under what we call "deemed exports." The goods, software, and technology listed for control on the Commerce Control List (CCL) are set by using specific technical parameters. The interagency decisions on where to set these parameters are national security determinations that define when particular items become sufficiently applicable to a military end-use to warrant control.

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 determine 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.

Q.2. Could the export control system be modified to address the concern that know-how—not just intellectual property—is being transferred through joint ventures and other partnerships?

A.2. The Export Administration Regulations (EAR), administered by the Department of Commerce, does control "technology," including things like technical know-how, so the export of such technology to a foreign joint venture or partnership would be subject to the license requirements in the export control system.

Our export control system is constantly reviewed and updated, particularly as it relates to the lists of items that are subject to control, to ensure that we are controlling the kinds of critical technologies that merit such measures. BIS is committed to continuing to identify and control sensitive emerging technologies, and ensuring that the process is systematic, proactive, and institutionalized. We are currently undertaking a review to better utilize our authorities to combat threats arising from this kind of technology.

Q.3. Are there other changes outside of CFIUS and export controls that should be considered to address this security challenge?

A.3. The export control system and CFIUS are likely the two authorities that address this security challenge most directly, although other authorities, such as cybersecurity, are also part of the challenge.

Q.4. One of the strengths of the U.S. is our ability to foster innovation and develop new technologies.

Would increasing filing times and additional fees for expanded CFIUS jurisdiction, as proposed by the Foreign Investment Risk Review Modernization Act (FIRRMA) significantly inhibit venture capital investments and hurt entrepreneurship by creating excessive barriers, such as prolonged wait times, to foreign investment?

A.4. FIRRMA recognizes that certain complex transactions take longer to review than the current timelines allow. It is our hope that an increased review period will allow CFIUS to conclude its review of transactions in response to the initial filing in the vast majority of cases, rather than requiring multiple re-filings, as often happens now. This will provide greater predictability and certainty to the investment community. Similarly, the fee authority will help agencies hire and maintain adequate staff to review transactions, which in turn should lead to greater assurance that transactions will not be subject to re-filings.

Q.5. Would significantly expanding CFIUS's jurisdiction negatively affect our investment relationship with Europe and other traditional economic allies, who could get caught up in an expansion of CFIUS's scope of review?

A.5. Even with the expanded scope of FIRRMA, CFIUS will remain sharply focused on the small percentage of transactions that present national security concerns. Investments from our allies traditionally have not presented serious national security concerns, and the increased jurisdiction of CFIUS post-FIRRMA would not change that underlying reality.

FIRRMA would also allow CFIUS to develop regulations to exempt transactions from CFIUS review in appropriate circumstances if the foreign persons are from an allied country. It is worth noting as well that several of our allies are also considering strengthening their investment security review processes in response to current global economic trends and security concerns. FIRMMA's provisions to allow increased cooperation with allies will support CFIUS efforts to encourage a coordinated and likeminded approach to investment security reviews.

Q.6. Do you think that significantly expanding CFIUS's jurisdiction and identifying "countries of particular concern" for purposes of CFIUS review could be considered a discriminatory measure by trade partners?

A.6. FIRRMA defines "country of special concern" to mean "a country that poses a significant threat to the national security interests of the United States." In conducting its national security reviews, CFIUS is acutely aware that the country of origin of an investor has an impact on the potential threat to the national security arising from the transaction. That said, CFIUS does not make arbitrary distinctions between countries, and treats each transaction on a case-by-case basis. FIRRMA states expressly that CFIUS would not be required to maintain a list of countries of special concern.

Q.7. What would be the potential consequences of doing so from a trade perspective?

A.7. CFIUS identifies national security concerns with only a minority of investments that it reviews. Even with an expanded scope post-FIRRMA, we anticipate that CFIUS would only need to mitigate or recommend a prohibition on a small percentage of overall investment. Commerce will work with the other CFIUS agencies as we prepare implementing regulations to ensure that CFIUS review is focused on transactions that are of genuine national security concern and that we continue to welcome foreign investment.

Q.8. Should we expect retaliation?

A.8. It is reasonable to assume that certain Governments may not support an expanded CFIUS mandate, to the extent that such a reform may directly impact their companies or their stated industrial policies. However, it is difficult to predict how specifically they may respond. The United States will continue to push other countries to ensure that trade and investment is fair and reciprocal. The U.S. investment regime is already much more open than many foreign countries' regimes.

Q.9. What forms could that retaliation take?

A.9. It is difficult to speculate on specifically what form retaliation could take. The United States will continue to push other countries to ensure that trade and investment is fair and reciprocal.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR CORTEZ MASTO FROM RICHARD ASHOOH

Q.1. Can you discuss the use of "mitigation agreements"—or conditions placed on acquisitions approved by CFIUS?

Are they being used appropriately?

Does CFIUS have the resources and staffing to ensure adherence to these mitigation agreements?

A.1. The Department does believe that CFIUS mitigation agreements are being used effectively. CFIUS works diligently to ensure that the mitigation measures enacted as part of a CFIUS transaction are effective and targeted at addressing the specific national security risks arising from the transaction so that they are not overly broad or burdensome. CFIUS also takes care to ensure that CFIUS mitigation agreements do not overlap or duplicate other existing authorities (such as Commerce and State's export control and Defense's National Industrial Security Program authorities), but are instead focused on areas that are not adequately or appropriately covered by such authorities.

As the Department of Commerce is not a signatory to any CFIUS mitigation agreements at this time, I would defer to my colleagues at agencies that are responsible for the monitoring of CFIUS mitigation agreements on whether they have adequate resources to effectively monitor them.

Q.2. What are the pros and cons of making the filing of CFIUS reviews mandatory—rather than discretionary—for State-controlled acquiring firms?

A.2. As I stated in my testimony, the Department of Commerce is supportive of the requirement in FIRRMA for mandatory filings for certain transactions involving foreign Government controlled enti-

ties. 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 are interested in ensuring that CFIUS has full visibility into transactions that could raise national security concerns. Under the existing statute, we sometimes see transactions in which the foreign acquirer obtains less than a 25-percent ownership interest in the U.S. company but still obtains control through governance rights or other mechanisms. In those cases, the transaction is appropriately subject to CFIUS review under existing law. Given the national security concerns that may arise from foreign Government ownership of a U.S. firm, it is important that CFIUS be made aware of foreign Government-owned entities acquiring significant stakes in U.S. companies, particularly if those shares are so significant as to allow the foreign Government to control the U.S. company. We believe that requiring mandatory filings for such transactions to be in the U.S. national security interest.

Q.3. Should they be reviewed differently than private-firm mergers or acquisitions, or firms that are in part-owned by Nation States?

A.3. CFIUS reviews each case on a fact-specific, case-by-case basis. However, under existing law, some transactions are subject to heightened scrutiny based on a number of different factors, including whether it is a foreign Government-controlled transaction. Transactions involving a foreign Government-controlled acquirer deserve additional scrutiny because of the foreign Government's ability to influence conduct by the acquirer and potentially the U.S. target. For instance, a foreign Government-controlled entity could be considered more likely than a private company to act on behalf of the foreign Government and take actions in furtherance of the Government's policies, which may be counter to U.S. national security interests.

Q.4. It has been 10 years since Congress last comprehensively considered the statutory framework for CFIUS. As practitioners that have worked in this space for long tenures, has any consensus emerged about what budget, regulatory, or statutory changes may be needed?

A.4. As I stated in my testimony, the Department of Commerce supports FIRRMA and its modernization of CFIUS. The national security and economic landscape have changed significantly since CFIUS was last updated and those changes require that CFIUS be able to respond accordingly to protect U.S. national security. FIRRMA would provide the necessary statutory changes to CFIUS's authorities so that it can address risks arising from a wide variety of transaction types—not just ones where a foreign person gains "control" over a U.S. business, as is currently the case. The expanded scope of CFIUS envisioned by FIRRMA may require additional resources, and Commerce is supportive of FIRRMA delaying the effective date for many provisions until regulations, organizational structure, personnel, and other resources are in place. This will help ensure that CFIUS agencies are prepared to implement its expanded scope.

Q.5. Can you delineate the appropriate role for export controls versus CFIUS?

A.5. CFIUS and export controls are both vital and robust tools/processes the United States relies upon to protect our national security. CFIUS is a process to review whether certain business transactions present a risk to U.S. national security, with technology transfer being one of several possible factors which may be of concern. The export control system governs technology transfer itself, irrespective of the mode of transfer, to protect sensitive U.S. origin goods, software, and technology. As such, these two tools/processes are complementary and must continue to work in a parallel, coordinated fashion. It is important, as Congress reviews both processes (a review that Commerce supports), that they remain complementary as their authorities are modernized and potentially expanded.

Under the BIS-administered export control system, we work closely with the Departments of Defense, Energy, and State. These agencies review and clear any changes to the Export Administration Regulations—including identifying and controlling emerging technology. Those agencies also have a role in reviewing license applications submitted to BIS. The different equities, viewpoints, and technical expertise that these four agencies bring to the table ensure that the export control system is robust and that national security concerns are thoroughly considered for any technology transfer of concern.

RESPONSES TO WRITTEN QUESTIONS OF CHAIRMAN CRAPO FROM ERIC CHEWNING

Q.1. The legislation FIRRMA authorizes CFIUS to impose filing fees on transactions to cover the committee's funding needs.

Will these fees be sufficient to address the increased case load anticipated with FIRRMA and what new resources will your agencies need to carry out these reforms?

A.1. We do not anticipate that the filing fees will generate sufficient revenue to adequately fund CFIUS activities throughout the interagency process. The large volume of additional, small transactions which FIRRMA would subject to CFIUS review are likely to generate very little additional revenue. Instead, the filing fees are likely to provide a supplemental funding source that would better position CFIUS to handle unexpected increases in case volume. Therefore, DoD will certainly need additional resources to accomplish its CFIUS mission. We foresee using those resources to fund additional personnel to manage CFIUS reviews in DoD, as well as a modern, interagency case management and big data analytics platform for processing and triaging CFIUS cases.

Q.2. How many cases do you anticipate CFIUS would review as a result of FIRRMA?

A.2. Precise estimates of the anticipated caseload under FIRRMA are elusive because the bill assigns to implementing regulations significant elements of the covered transaction definition. We believe the annual case volume under FIRRMA, however, could be several multiples of the current caseload.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR COTTON FROM ERIC CHEWNING

Q.1. Last year Cosco Shipping Lines (Cosco), a State-owned entity of the Chinese Government, acquired Hong Kong based Orient Overseas Container Line (OOCL). Among other things, the acquisition includes the Long Beach Container Terminal. Strategic seaports in the United States are designated by DOD because of their ability to support U.S. force and materiel deployments in times of war and national emergency. Long Beach seaports is designated as strategically important.

Chinese investment occurs throughout the United States and, in fact, Cosco already has as presence in a marine terminal in Long Beach. However, that terminal is 100-percent operated by a separate, unaffiliated, American owned company.

It seems logical that the operations of strategic assets at seaports be performed by a company owned, operated, and controlled by U.S. citizens.

Do you believe it is reasonable that this criterion, that operations of foreign-owned shipping apparatuses are operated by a separate, unaffiliated, American-owned company, be part of the CFIUS analysis of foreign acquisitions within strategically important U.S. ports?

A.1. DoD carefully reviews each CFIUS case for national security risks arising from that transaction. Whenever DoD identifies a national security concern, we evaluate possible risk mitigation options in coordination with subject matter experts across DoD. In some instances, the best mitigation tool may be requiring that certain company operations be assigned to an unaffiliated, U.S.-owned company.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR MENENDEZ FROM ERIC CHEWNING

Q.1. As we look at ways to protect critical technologies from falling into the hands of foreign Governments, we need to pay equal attention to the investments we have to make so that the U.S. retains technological superiority and continues to enjoy the economic growth that comes with robust innovation. Earlier this month, Bloomberg released its 2018 Innovation Index, which ranks countries based on research and development spending, value-added manufacturing, educations, and other factors. For the first time in the 6 years since the index began, the U.S. dropped out of the top 10 most innovative economies. You ended your testimony by saying that while defensive measures like CFIUS modernization are necessary, they are not sufficient for keeping America as a technological leader.

What steps should Congress consider in conjunction with CFIUS reform to ensure that we continue to foster an innovation-intensive economy that strengthens our national and economic security?

A.1. As it pertains to foreign investment, we approach this problem with two broad solution strategies: protect and promote. FIRRMA's modernization of CFIUS is part of our protect strategy. The promote strategy identifies relevant, innovative technology companies and funnels the capital to those companies necessary to foster and

sustain innovation. This capital can, in some instances, originate from U.S. Government sources, like grants. Other U.S. Government sources of capital, such as U.S. Government credit facilities, can also support innovation long-term.

More broadly, an innovation-intensive economy requires investments in the workforce and industrial base that can develop and commercialize emerging technologies. Those investments include, for example, funding for U.S. science, technology, engineering, and math education and programs that promote advanced U.S. manufacturing, like DoD's Manufacturing Innovation Institutes.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR WARNER FROM ERIC CHEWNING

Q.1. As we search for the most appropriate remedy to the very real problem of foreign countries gaining access to critical U.S. technologies, there are some suggesting that we should be pursuing other changes instead of or in addition to the CFIUS reform.

What role should export controls play in addressing this problem?

A.1. The National Security Strategy and National Defense Strategy highlight protecting our warfighters' technological superiority as a national priority. Export controls and CFIUS are complementary aspects of a layered defense to accomplish this goal. Export controls function as a first line of defense to counter threats associated with technology transfer to our competitors. Export controls protect both military and dual-use (military and civilian use) technologies that are categorized by way of interagency deliberations, discussions with industry, and in many cases, international negotiations with other participating members of the multilateral export control regimes.

CFIUS is a critical second line of defense. This second line of defense addresses emerging and foundational technologies that may not be currently covered by export control. The second line of defense also enables us to protect the know-how, expertise, and industrial relationships that would enable a competitor to re-create a technology competency on foreign soil. Acting in concert, this layered defense identifies and controls transfers of new and emerging technologies, reviews transfers of sensitive information and capabilities through foreign acquisitions, and engages with foreign partners to ensure they protect the critical technologies we do share.

We have seen examples of these two layers working together in the past. In one instance, CFIUS prevented a country from acquiring a U.S. company with sensitive technology after the export control regime denied export licenses for the same technology to that country. Given that our competitors will continue using all available avenues to fill gaps in their military requirements, we need both strong export controls and a modernized foreign investment review process to maintain our technological advantage.

Q.2. Could the export control system be modified to address the concern that know-how—not just intellectual property—is being transferred through joint ventures and other partnerships?

A.2. For those technology areas where export controls are currently in place, a license is usually required for foreign nationals seeking access to U.S. technology (including know-how), whether outside the United States, as an export, or inside the United States, as a "deemed export." U.S. Government licensing authorities have the ability to require export licenses and investigate compliance with export control laws and regulations. While these authorities are broad, defining a technology with sufficient clarity to control it pursuant to these authorities can be a lengthy processes that challenges efforts to protect emerging technologies. DoD is currently reviewing the recently introduced Export Control Reform Act of 2018 (H.R. 5040) to confirm there is sufficient language to ensure an effective national security review of sensitive technologies.

Q.3. Are there other changes outside of CFIUS and export controls that should be considered to address this security challenge?

A.3. DoD, along with other U.S. Government agencies, is assessing a range of tools to prevent access to critical U.S. technology by foreign nationals from countries such as China and Russia, including more rigorous vetting of visa applications for work in certain technology sectors, cooperative research and development programs, and scientific exchanges.

Q.4. One of the strengths of the U.S. is our ability to foster innovation and develop new technologies.

Would increasing filing times and additional fees for expanded CFIUS jurisdiction, as proposed by the Foreign Investment Risk Review Modernization Act (FIRRMA) significantly inhibit venture capital investments and hurt entrepreneurship by creating excessive barriers, such as prolonged wait times, to foreign investment?

A.4. DoD does not see the increased review times and the addition of filing fees as significant foreign investment inhibitors. FIRRMA would lengthen the current 30 day review period to 45 days. We do not expect the additional 15 days in review and the optional one-time 30-day extension in extraordinary circumstances to have a material impact on foreign investment rates. In fact, we anticipate these extensions would reduce the need for the parties to withdraw and refile more complicated transactions, adding clarity to the process and, overall, shortening timelines for final approval. We do not anticipate that the regulatory process would establish filing fees at a level likely to have a material impact on investment decisions.

Q.5. Would significantly expanding CFIUS's jurisdiction negatively affect our investment relationship with Europe and other traditional economic allies, who could get caught up in an expansion of CFIUS's scope of review?

A.5. Investors from our traditional economic partners have routinely filed cases with CFIUS for years, and the United States has long been a leading destination for foreign direct investment despite the CFIUS review. These investors are making a business calculation that trades a short, statutorily defined CFIUS review for the confidence that the United States will not seek to unwind their transactions at a later date. As FIRRMA generally maintains the voluntary filing system, we anticipate that investors will continue

to seek those safe harbor protections under FIRRMA just as they do today. When they do, we anticipate CFIUS clearing most of those transactions in the initial review period.

Q.6. Do you think that significantly expanding CFIUS's jurisdiction and identifying "countries of particular concern" for purposes of CFIUS review could be considered a discriminatory measure by trade partners?

A.6. As FIRRMA does not mandate any outcome with respect to countries of special concern, CFIUS action on national security grounds cannot be considered discriminatory. CFIUS, focused exclusively on national security risk, operates pursuant to national security exemptions in existing trade agreements, and CFIUS is expected to continue to do so under FIRRMA.

Q.7. What would be the potential consequences of doing so from a trade perspective?

A.7. As DoD does not foresee FIRRMA as a discriminatory measure, we do not foresee consequences from a trade perspective.

Q.8. Should we expect retaliation?

A.8. DoD anticipates that CFIUS under FIRRMA would continue its current practices, which would reduce the chance of retaliation. Those practices are a continued, exclusive focus on national security risks posed by the specific transaction under review and a record of clearing transactions, regardless of the buyer's country, that do not pose national security concerns.

Q.9. What forms could that retaliation take?

A.9. By continuing to follow current CFIUS practices, DoD does not anticipate increased retaliation risk under FIRRMA.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR CORTEZ MASTO FROM ERIC CHEWNING

Q.1. *Mining and Proximity to Military Installations*—As you may know, in Nevada, we have had several concerning investments by Chinese companies near our Air Force and Navy bases. In fact, in 2015, an Air Force commander explained concerns with building near Nellis Air Force Base in Las Vegas.

Do you believe CFIUS's current authorities and processes sufficiently address military concerns regarding Chinese investments near military installations?

A.1. No, current CFIUS authorities and processes do not sufficiently address DoD's concerns associated with foreign investment in proximity to sensitive military activities and installations. Current authorities fall short whenever a transaction involves the acquisition of real property interests, through a purchase or lease, or mineral rights, but does not constitute control of a U.S. business. In these circumstances, sensitive military activities and installations remain vulnerable to persistent observation and information collection. As introduced, FIRRMA addresses this weakness by including land purchases and leases by a foreign person in the definition of a covered transaction.

Q.2. Is CFIUS equipped to combat the most sophisticated techniques for information collection near these installations?

A.2. The CFIUS process is not explicitly designed or intended to mitigate the most sophisticated techniques near sensitive military installations. Further, CFIUS currently has no authority to review foreign purchases or leases of land near these installations when the transaction does not constitute foreign control of a U.S. business. The FIRRMA bill, as introduced, would give CFIUS this authority.

Q.3. What more can be done to mitigate the potential for information collection near these installations?

A.3. We support the expansion of the definition of a covered transaction in the FIRRMA bill, as introduced, as a means of better addressing the risks associated with foreign investment in close proximity to military installations. FIRRMA would expand the definition of the term "covered transaction" under CFIUS to include the purchase or lease of real property in proximity to military installations.

Q.4. Can you discuss the use of "mitigation agreements"—or conditions placed on acquisitions approved by CFIUS?

A.4. Whenever DoD identifies national security risks arising from a transaction, we explore risk mitigation measures that may reduce the risk to an acceptable level. Doing so is consistent with U.S. Government policy, articulated in Executive Order 11858, as amended, of supporting international investment in the United States consistent with the protection of national security. These mitigation measures typically oblige the parties to implement technical, personnel, and management controls. If DoD determines that a mitigation agreement would sufficiently reduce the risk, we, along with the Department of the Treasury, enter into agreement negotiations with the parties. If we cannot reach a mutually acceptable agreement, we prepare a recommendation to the President that he prohibit the transaction. If we do reach a mutually acceptable agreement with the parties, DoD recommends that CFIUS approve the transaction contingent on the parties' compliance with the agreement.

Q.5. Are they being used appropriately?

A.5. Yes, the use of these types of mitigation agreements under the circumstances described above is an appropriate mechanism for realizing the benefits of foreign investment consistent with the protection of national security.

Q.6. Does CFIUS have the resources and staffing to ensure adherence to these mitigation agreements?

A.6. Monitoring the parties' ongoing compliance with mitigation agreements is a critical part of the CFIUS lifecycle. These mitigation agreements are typically effective in perpetuity, absent a material change such as the sale of the mitigated company to a U.S. entity. The number of mitigation agreements that require monitoring increases each year, and the resources necessary to monitor them increases proportionally. Rather than asking the U.S. taxpayer to bear these increasing costs, DoD is exploring how to shift

the burden to the foreign acquirers. We could accomplish that shift by requiring the parties to employ company-compensated, trusted third-party monitors with specific expertise in the necessary mitigation fields.

Q.7. What are the pros and cons of making the filing of CFIUS reviews mandatory—rather than discretionary—for State-controlled acquiring firms?

A.7. The current CFIUS statute establishes a higher standard for clearance for transactions in which the buyer is determined to be foreign Government-controlled. The higher standard reflects Congress's recognition that a foreign Government-controlled transaction is likely to present an elevated threat, and therefore an elevated risk, in comparison to a similar transaction in which the buyer is purely commercial. Making reviews mandatory for foreign Government-controlled transactions guarantees that CFIUS reviews these transactions that are likely to pose an elevated national security risk. Such a guarantee is especially important in the context of venture capital investments in startup companies. Information about these small, private investments is not always readily available, hamstringing CFIUS efforts to identify and review them.

The potential disadvantage of this kind of obligatory filing is that it may bring certain benign transactions before CFIUS that would not have been filed under a strictly voluntary system. This potential disadvantage is unlikely to create significant problems for CFIUS or the parties because the declaration process described in FIRRMA enables CFIUS to triage these transactions rapidly.

Q.8. Should they be reviewed differently than private-firm mergers or acquisitions, or firms that are in part-owned by Nation States?

A.8. As described above, the CFIUS statute currently prescribes a higher standard of clearance for transactions in which the buyer is determined to be foreign Government-controlled. In that sense, foreign Government-controlled transactions are reviewed differently. In another sense, however, CFIUS reviews all cases similarly by applying the same analytical framework to all cases to identify national security risks arising from the transactions. DoD supports the application of a consistent risk analysis methodology to all cases, while holding foreign Government-controlled transactions to a higher standard for clearance.

Q.9. It has been 10 years since Congress last comprehensively considered the statutory framework for CFIUS. As practitioners that have worked in this space for long tenures, has any consensus emerged about what budget, regulatory, or statutory changes may be needed?

A.9. DoD views FIRRMA as the best expression of interagency consensus regarding the changes necessary to modernize CFIUS.

Q.10. Can you delineate the appropriate role for export controls versus CFIUS?

A.10. The National Security Strategy and National Defense Strategy highlight protecting our warfighters' technological superiority as a national priority. Export controls and CFIUS are complementary aspects of a layered defense to accomplish this goal. Export

controls function as a first line of defense to counter threats associated with technology transfer to our competitors. Export controls protect both military and dual-use (military and civilian use) technologies that are categorized by way of interagency deliberations, discussions with industry, and in many cases, international negotiations with other participating members of the multilateral export control regimes.

CFIUS is a critical second line of defense. This second line of defense addresses emerging and foundational technologies that may not be currently covered by export control. The second line of defense also enables us to protect the know-how, expertise, and industrial relationships that would enable a competitor to re-create a technology competency on foreign soil. Acting in concert, this layered defense identifies and controls transfers of new and emerging technologies, reviews transfers of sensitive information and capabilities through foreign acquisitions, and engages with foreign partners to ensure they protect the critical technologies we do share.

We have seen examples of these two layers working together in the past. In one instance, CFIUS prevented a country from acquiring a U.S. company with sensitive technology after the export control regime denied export licenses for the same technology to that country. Given that our competitors will continue using all available avenues to fill gaps in their military requirements, we need both strong export controls and a modernized foreign investment review process to maintain our technological advantage.