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

Examining the Operations of the Committee on Foreign Investment in the United States (CFIUS)

Opening Remarks of The Honorable Kevin J. Wolf
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Chairman, Ranking Member, and other distinguished members of the subcommittee. Thank you for convening this hearing and for inviting me to testify on this important national security topic.

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

Although I am now a partner at Akin Gump Strauss Hauer & Feld LLP, the views I express today are my own. I am not advocating for or against any potential changes to CFIUS or its legislation on behalf of another. Rather, I am here to answer your questions about how the CFIUS and export controls systems work and how they could or could not address whatever policy issues you would like to discuss. I will not speak about any specific case that was or is before CFIUS.

My fellow panelists have already described the content and scope of CFIUS, so I will get straight to my main point, which is that the CFIUS and export control systems complement each other. CFIUS has the authority to control the transfer of technology of national security concerns, but only if there is a covered transaction, however defined. The export control rules regulate the transfer of specific or general types of technology of national security, foreign policy, and other concerns regardless of whether there is a covered transaction. This means that if concerns arise about specific or general types of technology -- whether as part of a CFIUS review or from any other source -- then the export control system can and should control the technology to the specific destinations, end uses, and end users of concern.

Identifying, describing, and deciding how or whether to control dual-use technologies – that is, technologies that have both benign commercial applications and applications of concern – is inherently complex. The export control system is also complex, but its authority to control the transfer of technology for national security, foreign policy, or other reasons is not limited by the need for a transaction. Moreover, the system is designed to constantly evolve as new threats are identified, new technologies of concern are discovered, and widespread commercialization makes existing controls unnecessary or impossible to implement.

The Export Administration Regulations (EAR), implemented by the Commerce Department's Bureau of Industry and Security (BIS), have the authority to impose such controls in coordination with other departments, primarily Defense, State, and Energy. The descriptions of technology in the regulations can be as broad or as narrow as the national security or foreign policy concerns warrant. They are generally connected to physical commodities, but do not need to be. They could be based on a technology's technical parameters, end uses, or merely just a reference to the name of the technology. After a technology or other item is identified, the controls on its transfer can be tailored in the regulations to apply to the whole world or to specific destinations, end uses, and end users to address specific concerns. The control choice is a function of a national security and foreign policy judgment to be made on a technology-by-technology basis and regardless of the existence or nature of any underlying commercial transaction.

Most of the EAR implement U.S. commitments to one of four multilateral export control regimes. These are groups of roughly 30-40 countries that have generally agreed to control the transfer of missile, nuclear, chemical/biological, military, and other items of common concern in similar ways. The advantage to such controls is that our regime allies impose essentially the same controls on their exporters. However, the process for achieving consensus from the member states can take a long time, and the limited resources and time available to the regimes limit the number of proposals that can be considered in a review cycle. These disadvantages are outweighed by the well-tested conclusion that unilateral controls -- those that only one country imposes -- are generally counterproductive because they create incentives for foreign companies to develop the technology outside of the country's control. In the long run, they only hurt industry in the country imposing the control and do not deny the technology at issue to the destination of concern. Indeed, this is why the multilateral systems were created decades ago.

The imposition of unilateral controls, however, can be an effective short-term technique for regulating the export of unlisted sensitive technology. It is with this thought in mind that in 2012, I and my colleagues at Commerce created a novel tool in the EAR to quickly and unilaterally control emerging and other unlisted technologies that warranted control, so long as the technology was eventually submitted to the relevant regimes to be controlled multilaterally.[1] This is referred to as the "0Y521" series of controls in the

[1] *See* 77 Fed. Reg. 22191 (Apr. 13, 2012).

EAR, which mirrors similar authority in U.S. Munitions List Category XXI in the State Department's International Traffic in Arms Regulations.[2]

There are many additional tools within the EAR to address technology transfer concerns. For example, BIS could, with or without a public notice and comment process, add unilateral controls over types of emerging technologies to the control list and control them with a licensing or notification requirement to specific destinations. If the concern is about specific end users, then controls can be placed on those end users through the Entity List, the Unverified List, or amending the military end-user controls.[3] Another tool is the "is informed" authority. Basically, BIS has the authority to inform an exporter in certain cases that licenses are required to export otherwise uncontrolled technologies and other items to specific destinations or specific end users.[4] If the existing authorities in the EAR are too narrow to address a new concern, then they can be easily amended. If, for example, a policy concern pertains to types of industrial know-how and capabilities that are hard to define as technologies, then the EAR could be amended to impose notification or licensing controls on specific types of services provided to particular end uses (such as for intelligence activities).

The precursor to using any of these tools is, of course, identifying the emerging or other unlisted technologies of concern. Admittedly, the focus of the previous administration's export control reform effort was defense trade. Hundreds of individuals put in thousands of hours over the course of eight years to develop and refine after massive public input from scores of Federal Register notices revisions to controls affecting hundreds of thousands of defense and related items. Although the revised control lists (intentionally) require constant tweaking, we made the system significantly better and enhanced our national security as a result.

Whether as part of CFIUS reforms, a new export control reform effort focused on dual-use technologies, or just day-to-day good government, there should be a regular, robust, and creative whole-of-government effort, working closely with industry and our allies, to identify technologies that, for national security or foreign policy reasons, warrant control or decontrol. This is already done as part of the regular annual process to propose changes to the multilateral regime controls, but a fair question raised by this hearing is whether a more aggressive, better-resourced effort is needed to analyze novel and emerging unlisted technologies.

In addition, existing export control law enforcement authorities must be used to ensure that those who are developing or transferring technologies of concern have comprehensive programs to ensure compliance with the rules, regardless of whether the company is domestic or owned by a foreign entity. (The export control rules apply equally to companies in the United States regardless of whether they are foreign-owned. U.S. export control rules also apply to and regulate U.S.-origin technology and

[2] *See* 22 C.F.R. § 121.1.
[3] *See* 15 C.F.R. Part 744.
[4] *See id.*

other items even when they are outside the United States and owned by foreign persons.)

Given my combined CFIUS and export control backgrounds, my opening comments have focused on the technology transfer aspects of CFIUS. Other types of national security issues implicated by foreign direct investment include those that:

(i) have co-location issues (e.g., acquisitions next to military facilities);

(ii) create espionage risks or cybersecurity vulnerabilities;

(iii) could reduce the benefit of U.S. Government technology investments;

(iv) reveal personally identifying information of concern;

(v) create security of supply issues for the Defense Department and other government agencies;

(vi) implicate national security-focused law enforcement equities or activities; or

(vii) create potential exposure for critical infrastructure, such as with the telecommunications or power grids.

Each of these topics warrants its own, separate analysis and commentary when considering possible changes to CFIUS.

In my experience, the existing CFIUS structure, authorities, and internal procedures generally allowed for the resolution of these issues quite well. The Treasury Department was an excellent honest broker and facilitated consensus conclusions – often after lengthy interagency discussion and always with the terrific support from the intelligence community. The agencies were always respectful of the need for a whole-of-government decision that accounted for the particular equities and expertise of the other agencies. The career staff were and remain talented, dedicated public servants.

This last point is key. Given the increase in filings and the increase in more complex cases, the staff was stretched thin when I was there, and I expect they are even more stretched now. They need help. They need more resources, particularly aimed at those involved in monitoring mitigation agreements and studying transactions. I make this polite suggestion not only for their benefit but also for the sake of our national security. I also make the suggestion so that the U.S. remains known as a country that welcomes foreign direct investment with the minimum necessary and quickest possible safe-harbor review burden.

Thus, when considering changes to CFIUS to address national security concerns associated with foreign direct investment (such as those in the list I just mentioned), the questions I would ask are whether

(i) the statutory authority already exists to address the issue through a regulatory or process change;

(ii) another area of law -- such as trade remedies, government contracts, or export controls -- could address the issue more directly and without collateral consequences on foreign investments of less concern; or

(iii) the solution lies simply in more resources to the agencies.

If the answer to any of these questions is "no," then that is the sweet spot for consideration of change to CFIUS legislation.

For each possible change in CFIUS's scope, however, it is vital to weigh the costs. For example, if there is even a small expansion in the scope of CFIUS's review authority, then some companies may be less willing to invest in the United States with the actual or perceived extra burden and time involved in closing a transaction, particularly if there is not a significant expansion in staff. Will investing in other countries become more desirable as a result of any changes? With every expansion in scope, there will be a corresponding and exponential expansion in burdens and costs generally. More regulations lead to more words, which leads to more analyses of those words in novel fact patterns, leading to more filings, more reviews, more mitigation agreements, and on and on. Also, if legislation becomes too prescriptive, then it may limit the ability of the Administration and staff to resolve novel national security issues in a creative way. There were many such situations over the course of the last seven years that I suspect could not have been contemplated by the original drafters of the legislation and the regulations.

National security concerns are, of course, paramount and should guide any final decisions. I absolutely agree with my former Defense Department colleague Alan Estevez that the United States never wants to be in a fair fight and the right, aggressively enforced technology transfer, investment, and other controls are a critical part of maintaining that advantage. I am absolutely not suggesting that they be ignored or traded off for other concerns, but only that they are properly calibrated so as not to create unintended or unnecessary consequences. I am also not suggesting that export controls are the solution to all policy concerns, only that they be used to their fullest possible extent because they can be more tailored. These are intensely difficult decisions to make and cannot be made on the fly without a process and without the input of all those with expertise and an equity in the outcome. Also, the right answer for one type of technology will not be the same for another type of technology.

Finally, when considering any changes to the system, it is important to consider how our allies are controlling or considering controls over foreign direct investment into their

respective countries. Just as the objectives of export controls are furthered by multilateral cooperation, multilateral coordination among allies over foreign direct investment issues could be of common benefit. At a minimum, the US CFIUS process could significantly benefit if there were more authority to share facts and concerns with our allies, after business confidential and classified information issues were addressed.

On export control and CFIUS topics, I have a three-minute, a thirty-minute, a three-hour, and a three-day version. So, I will stop here with these general opening comments and look forward to answering your questions. Thank you again for spending the time to think through this complex and important national security issue.