

Principles for Reforming the Committee on Foreign Investment in the United States (CFIUS)

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My name is Alan Larson. I am delivering testimony today on my personal responsibility. The views presented in this statement and my responses to the Committee's questions should not be taken as representing the views of my present employer, or of its clients.

My views have been informed by experiences during more than a dozen years in the private sector and thirty-two years in government. For the last twelve and a half years I have been a Senior International Policy Advisor at Covington, where my practice has focused on international investment, including transactions under the jurisdiction of the Committee on Foreign Investment in the United States (CFIUS), and on international trade and sanctions issues. Before joining Covington, I was a career Foreign Service Officer for thirty-two years. I was privileged to serve as Ambassador to the Organization for Economic Cooperation and Development (OECD) and, during the Bill Clinton and George W. Bush Administrations, in the top two economic policy jobs at the State Department--Assistant Secretary of State for Economic and Business Affairs and Under Secretary of State for Economic, Business and Agricultural Affairs. In those positions I oversaw the State Department's engagement on CFIUS, sanctions and export controls.

My testimony today will focus on CFIUS. In the Omnibus Trade Act of 1988, Congress gave the President the authority to review and investigate the acquisitions by a foreign person of a U.S. business when such acquisitions would give the foreign person control of that business. The President also was authorized to take actions necessary to protect against any negative impact on the national security of the United States arising from such transactions. This authority then was delegated to CFIUS, a delegation that Congress affirmed through the Foreign Investment and National Security Act of 2007 (FISIA).

Congress and successive administrations have recognized that the United States has benefitted greatly, and continues to benefit, from flows of foreign investment. These investments create jobs and economic activity in the United States. In doing so, foreign investment can contribute to the economic growth and dynamism that is essential to our ability to maintain technological leadership and to generate budgetary resources to fund the military and national security capabilities necessary to provide for our security.

Congress and successive administrations have determined that CFIUS works best when it is focused narrowly on protecting national security. At various times Congress and the executive branch have considered looser and broader standards, such as "economic security," but each time Congress and successive administrations have rejected such looser criteria.

Expanding the mandate of CFIUS to be an instrument of economic policy and to pursue economic goals would not, in my view, be consistent with the proper role or efficient functioning of CFIUS. For example, the principle of reciprocity has a role to play in the negotiation of trade and investment agreements. It is natural that the United States would insist on ensuring that such agreements provide a reasonable balance of benefits for all parties to the agreement. Investment reciprocity, however, is not an appropriate policy objective to pursue through CFIUS. If Congress or an Administration were to use CFIUS to pursue economic goals such as reciprocity, doing so would put CFIUS officials in the position of pursuing multiple objectives and surely undermine its effectiveness as a tool to protect national security.

For similar reasons, I believe using CFIUS as a tool or leverage in trade negotiations also would be a mistake. We have legitimate trade policy grievances and concerns with the trade policy conduct of other countries. Tough negotiations, the well-considered use of trade remedies like anti-dumping and countervailing duty laws and the deployment of other forms of WTO-consistent leverage all have a potential role to play in resolving such grievances and concerns. CFIUS, however, is a national security tool; its use as leverage in trade negotiations would confuse its objectives and make it less effective in accomplishing its core objective of protecting national security.

To be sure, CFIUS needs to be reviewed regularly and, as necessary, reformed and modernized to address emerging threats to national security. For example, a little more than a decade ago, Congress and the executive branch strengthened and enhanced the practices of CFIUS and, importantly, the accountability of CFIUS to Congress, through the Foreign Investment and National Security Act of 2007 (FINSA).

More than ten years after the enactment of FINSA, it is understandable that Congress and the Administration seek to review and consider steps to modernize and reform CFIUS. In my testimony, I will focus on geopolitical and technological changes that can motivate a review of CFIUS.

As one surveys the geopolitical arena, it is clear that the national security challenges facing the United States have evolved significantly during the last decade. China has emerged as an economic competitor, as well as an essential economic partner, of the United States. Naturally China and the United States each have a strong economic interest in developing and maintaining leadership positions in critical emerging technologies including artificial intelligence, semiconductors and robotics.

At the same time, China has become a potential strategic competitor of the United States. Scholars examining the sweep of history are now debating whether the “rise of China” can occur peacefully and in a manner that is consistent with the security interests of the United States. While China is a strategic competitor, it is equally true that China and the United States collaborate to address shared security concerns. For example, China and the United States have been working together to control risks such as those posed by an unrestrained, nuclear weapons-capable North Korea.

A review of changes during the last decade must include a recognition that many of the frontier technologies that appear to be vital for our future economic dynamism also appear to have significant implications for military capabilities and national security. Artificial intelligence, semiconductors and robotics have both commercial and national security applications.

There is broad agreement that technological innovation makes a crucial and indispensable contribution to the economic vitality of the United States, as well as to our military superiority. We need to preserve and promote innovation at home. We need to encourage more U.S. students to pursue science, technology, engineering and mathematics (STEM) studies and we need to welcome immigrants with those skills. We need to maintain an environment conducive to the continued leadership of world class universities operating on the frontiers of these fields.

We also need to ensure that technologies crucial for national security, including dual use technologies, are not pirated, stolen or leaked to potential adversaries. I am personally sensitive to this responsibility; when I served as the Ambassador of the United States to the OECD, I was also responsible for delegations to the Coordinating Committee for Multilateral Export Controls (COCOM), an international organization that helped the United States restrict the flow of militarily sensitive technologies to adversaries.

The question arises as to the role CFIUS should play and how this role would, in the case of dual use technologies, complement but not compete nor conflict with the Export Administration Regulations (EAR). In the case of military technologies, CFIUS should complement but not compete nor conflict with the International Traffic in Arms Regulations (ITAR). It would be natural that a tune-up and modernization of CFIUS would be complemented by a tune-up of trade controls. The operations of CFIUS and of U.S. trade controls regimes should be complementary and consistent, not overlapping and contradictory.

As an initial matter, CFIUS already has the jurisdiction to review foreign acquisitions that would give the investor control of a company possessing a technology critical to the defense posture of the United States. Any new authorities in this space should be carefully crafted to take into account the expertise of executive branch export control officials and the regulatory roles of the EAR and ITAR. Any new authorities should be crafted in a way that promotes clarity and certainty. They should provide clear timelines, not overload the system and ensure continued accountability to the Congress. Any new rules should recognize that foreign investment in frontier technologies can be crucial to the development of these technologies. When such investments are verifiably undertaken as purely passive investments seeking a purely financial return, they should be welcomed.

As Congress reviews CFIUS and trade controls authorities, it will be necessary to ensure that U.S. laws and regulations adequately protect national security while not unnecessarily inhibiting productive foreign investments, exports or new business arrangements. My starting point would be to build on the core strengths established in CFIUS, the EAR and ITAR. If the goal is to regulate new forms of potential exports of dual use or military technology to other countries, I would look first to the EAR and ITAR, with experts at the Department of Defense, Department of State and Department of Commerce, as the institutions most likely to address these risks effectively. Similarly, to address potential new national security risks arising from inward

foreign investment, I would look first to CFIUS, which has had remarkable success in evolving its procedures to meeting new challenges.

As previous witnesses in other hearings have testified, the workload of CFIUS has grown rapidly in recent years, putting stress on the system. Any expansion of the mandate of the Committee should be considered with great care to avoid distracting the focus of CFIUS and reducing its effectiveness in carrying out its core mission.

It is important to manage the resources of CFIUS efficiently, so that it focuses especially intensely on transactions that are the most complex and may pose the most serious potential risks to national security. For this reason, I see merit in proposals for a “short form” CFIUS declarations that could be filed to determine whether CFIUS has sufficient interest or concern to merit a full review.

It is important that CFIUS not block transactions that could proceed without inappropriate risk to national security, so long as the parties commit to and conscientiously implement an effective and enforceable mitigation agreement. Such mitigation agreements are essential in preventing CFIUS from unnecessarily inhibiting foreign investment. Because the government must devote resources to the negotiation, monitoring and enforcement of such mitigation agreements, I support appropriate measures to augment CFIUS budgetary and staffing resources and to assure that “user charges” may be applied wherever possible to ensure that the parties to the transaction bear a fair share of the costs.

As a diplomat and a policy advisor at a law firm, I have observed that CFIUS and U.S. export control laws and regulations are widely misunderstood and heavily criticized abroad. Other countries often greatly exaggerate their impact on legitimate trade and investment. A certain amount of this misunderstanding, criticism and exaggeration is inevitable and I accept it as the price we pay for taking necessary steps to protect U.S. national security.

At the same time, we should seek to minimize unwarranted misunderstanding and criticism and we should make genuine efforts to demonstrate that we welcome legitimate foreign investment. While we recognize, and will take action to protect against, new risks to national security, we also should recognize that legitimate foreign investment generates economic activity, creates jobs, spurs innovation and generates economic growth and budget revenues essential for national security. We should do everything reasonable to show that the United States genuinely welcomes such foreign investment. We must avoid imposing barriers that gratuitously convey the message foreign investors are not welcome.

Taking a clear-eyed, thoughtful and balanced approach toward the review, reform and modernization of CFIUS and export controls is necessary to protect U.S. national security. Acting in a clear-eyed, thoughtful and balanced way is equally necessary if we seek to sustain a dynamic and growing domestic economy. And as a former diplomat, I cannot stress too strongly that a clear-eyed, thoughtful and balanced approach also is necessary to avoid fomenting misunderstandings that could feed the false idea that conflict between China and the United States is inevitable.

A study of the past suggests that significant shifts in the geopolitical balance of power led to conflict when great powers misunderstood the other's goals and intentions. We can learn from the past. We can, must and will do what we need to do to protect national security. At the same time, we can and should work diligently to build deeper and stronger economic and strategic cooperation with China. Reform and modernization of CFIUS and export control laws should be seen, in my opinion, within the frame of reference of such a policy towards China.