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6 PERSPECTIVES ON REFORM OF

7 THE CFIUS REVIEW PROCESS

8 THURSDAY, APRIL 26, 2018

9 House of Representatives

10 Subcommittee on Digital Commerce and Consumer

11 Protection

12 Committee on Energy and Commerce

13 Washington, D.C.

14

15

16

17 The subcommittee met, pursuant to call, at 10:15 a.m., in

18 Room 2322 Rayburn House Office Building, Hon. Robert Latta

19 [chairman of the subcommittee] presiding.

20 Members present: Representatives Latta, Kinzinger, Burgess,

21 Lance, Guthrie, McKinley, Bilirakis, Bucshon, Mullin, Walters,

22 Duncan, Schakowsky, Welch, Kennedy, and Green.

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

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

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

45 And again, good morning and welcome to our witnesses. And
46 we thank you to for being with us today to discuss proposed reform
47 of the Committee on Foreign Investment in the United States or
48 CFIUS. CFIUS was first established by the Executive Order by
49 President Ford. Over the years, the committee was codified and
50 its members expanded based on input from this committee under both
51 Republican and Democratic leadership.

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

58 Until recently, Presidents have generally not found it

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59 necessary to block a proposed foreign purchases of or controlling
60 interests in U.S. assets. However, in the last 6 years,
61 Presidents from both parties have blocked a total of four proposed
62 transactions.

63 The increase in presidential action to stop foreign
64 takeovers of American companies is one indication of how the world
65 has changed. Foreign direct investment in the United States in
66 2016 doubled over the previous 10 years. In addition to an
67 increase in monetary investments, foreign investments have also
68 taken new forms, including the joint venture.

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

78 CFIUS is the organization charged with examining who is
79 investing in national security-related U.S. companies and why.
80 Today, we are going to examine whether CFIUS has the proper tools

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81 to do that job, what tasks are already assigned to other government
82 bodies, including export control agencies, and what steps are
83 already being taken through regulation to reform CFIUS.

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

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

94 I want to, at this time, yield to the ranking member, the
95 gentlelady from Illinois, the ranking member of the subcommittee.

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

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

102 Congress has instructed the Committee on Foreign Investment

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103 in the United States to review mergers and acquisitions by foreign
104 investors for potential national security threats. It has been
105 a decade since the last major CFIUS legislation. We are more than
106 due for evaluating how CFIUS is operating.

107 In 2016, the stock of foreign direct investment in the United
108 States totaled \$7.6 trillion and foreign investors spent more than
109 \$365 billion acquiring U.S. companies. Given the enormity of
110 that investment, we must consider whether the current safeguards
111 for our national security and our national workers -- and our
112 nation's workers are sufficient.

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

118 Today, we will be hearing about several bills to reform
119 CFIUS. H.R. 4311, the bipartisan Foreign Investment Risk Review
120 Modernization Act, would expand the investments covered by CFIUS
121 -- CFIUS review to protect critical technologies and
122 infrastructure. Congressman Ed Royce and Eliot Engel, the chair
123 and ranking member of the Foreign Affairs Committee, have
124 introduced H.R. 5040, the Export Reform Control Act, to control

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125 the outflow of military and dual-use items.

126 Finally, Congresswoman Rosa DeLauro has introduced H.R.
127 2932, the Foreign Investment and Economic Security Act, to expand
128 CFIUS' review to greenfield transactions which are new
129 investments, as opposed to acquisitions. Her bill would also ask
130 CFIUS to evaluate not only national security risks but also
131 economic, public health, and safety risks.

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

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

144 I believe that Americans benefit from trade relations that
145 are fair. Americans are increasingly aware that corporations
146 have manipulated U.S. trade policy to the detriment of workers

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147 and consumers. As we examine our trade policy, we want to keep
148 fairness to American workers and consumers front and center.

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

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

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

160 And I yield back.

161 Mr. Latta. Thank you very much. The gentlelady yields
162 back, and the chair of the full committee, the gentleman from
163 Oregon is not here. Is there anyone on the Republican side that
164 would like to claim his time?

165 Seeing none, and we haven't had -- I saw that Mr. Green had
166 checked in but we will go ahead and conclude with member opening
167 statements at this time.

168 And the chair would like to remind members that pursuant to

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169 the committee rules, all members opening statements will be made
170 part of the record.

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

176 Our first panel of witnesses for today's hearing will include
177 the Honorable Heath Tarbert, the Assistant Secretary for
178 International Markets and Investment Policy at the U.S.
179 Department of Treasury, and the Honorable Richard Ashooh, the
180 Assistant Secretary for Export Administration at the U.S.
181 Department of Commerce.

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

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

188

189

190 STATEMENT OF HEATH TARBERT Mr. Tarbert. Chairman Latta,
191 Ranking Member Schakowsky, Vice Chairman Kinzinger, and
192 distinguished members of the subcommittee, thank you for the
193 opportunity to testify in support of FIRRMA and about CFIUS more
194 generally.

195

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

205

During the Depression in World War II, cross-border capital

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206 flows fell dramatically. And in the boom years of the 1950s and
207 '60s, investment in the U.S. was modest compared to outflows.
208 During that time, foreign investment also posed little risk. Our
209 main adversaries, the Soviet Union and its satellites, were
210 communist countries that were economically isolated from us.

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

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

220 For the next 20 years, CFIUS pursued its mission without
221 fanfare but, in the wake of the Dubai Ports controversy, it became
222 clear that CFIUS needed greater procedural rigor and
223 accountability.

224 In 2007, some of you helped enact FINSA, which formally
225 established CFIUS and codified our current structure and process.

226 Well now we find ourselves at yet another historic inflection
227 point. The foreign investment landscape has shifted more than

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228 at any point during CFIUS' 40-year history. Nowhere is that shift
229 more evident than in the caseload CFIUS now faces. The number
230 of annual filings has grown within the last decade from an average
231 of about 95 or so to nearly 240 last year. But it is the
232 complexity, not simply the volume, that has placed the greatest
233 demand on our resources. In 2007, about four percent of the cases
234 went to the more resource-intensive investigation stage. Last
235 year in 2017, nearly 70 percent did.

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

244 And I know the gravity of this last point isn't lost on any
245 of you. Protecting against the disclosure of American's
246 sensitive personal data lies at the core of this subcommittee's
247 work. In several cases we have seen, even over the last year,
248 the company being acquired had access to significant amounts of
249 sensitive information capable of exploitation by state actors.

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250 Similar sensitivities can arise because a company has
251 concentrations of data regarding American servicemen and women,
252 private information such as medical records, or simply personally
253 identifiable information on such a vast scale that the national
254 security concerns are too large to ignore.

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

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

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

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

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

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

285 Thank you.

286 [The prepared statement of Mr. Tarbert follows:]

287

288 *****INSERT 1*****

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289 Mr. Latta. Well, thank you very much for your testimony.

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

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292 STATEMENT OF RICHARD ASHOOH

293

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

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

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

312 The export control system administered by BIS is a process
313 that, like CFIUS, involves multiple agencies, primarily the

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314 Departments of Defense, Energy, and State. We work closely with
315 these agencies to review not only license applications submitted
316 to BIS but also to review and clear any changes to the EAR itself,
317 ensuring that the export control system is robust.

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

328 The EAR's authority covers an array of in-country transfers
329 of technology, as well as exports of goods, software, or
330 technology to foreign countries. For example, the EAR regulates
331 the transfer of controlled technology within the United States
332 or abroad to foreign nationals under what we call deemed exports.
333 It differentiates between countries that range from our closest
334 allies to embargoed nations; thus, allowing the export control
335 system to handle technology transfers under different licensing

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336 review policies, depending on the level of concern with the
337 recipient country.

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

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

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

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

356 The export control system and CFIUS are complementary tools
357 that we utilize to protect U.S. national security, with CFIUS

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358 addressing risks stemming from foreign ownership of companies
359 important to our national security and export controls dealing
360 with the transfer of U.S. goods, technology, and software to
361 foreign nationals, regardless of the mode of transfer.

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

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

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

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380

And I look forward to taking your questions.

381

[The prepared statement of Mr. Ashooh follows:]

382

383

*****INSERT 2*****

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

387 Pardon me, it is allergy time in Washington.

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

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

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

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

404 Mr. Latta. Let me follow-up with that, then, Mr. Ashooh,
405 if I could, because do current legislative proposals create a

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406 distinction between CFIUS and export controls? And if they
407 don't, should they?

408 Mr. Ashooh. The current legislation, the CFIUS
409 legislation?

410 Mr. Latta. Right. Right.

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

419 Mr. Latta. Thank you.

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

423 Mr. Tarbert. So we are seeing, and I mentioned a few points
424 in my opening testimony but just to give you a little bit more
425 flavor on that, the rise of state-owned enterprises, particularly
426 from certain countries that are buying strategic assets as part
427 of an industrial plan and, in some cases, that industrial plan

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428 involves civil military fusion. And so there is this inflow of
429 state-owned enterprise money that is sort of government-backed
430 money that are not purely financial investments but are purchasing
431 U.S. businesses with more military and strategic goals in mind.

432 The other thing that has changed is that, to go back to this
433 committee and what you all are really specialists in, is the
434 vulnerability side. So there is sort of the sources of the funds
435 coming into the United States and why people are investing but
436 then there is also the U.S. companies. There is much more. We
437 live in a big data economy now. And so when we are looking at
438 a particular U.S. company, a healthcare firm, for example, or even
439 an internet servicing firm, the data on U.S. citizens is much
440 greater than it was 10 years ago and certainly 30 years ago, when
441 the actual jurisdictional provision of CFIUS was created. So it
442 has been 30 years since CFIUS' actual jurisdiction has been
443 revisited.

444 Mr. Latta. Thank you.

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

448 Mr. Ashooh. They do but they need to be utilized
449 aggressively. This is not a one and done scenario, as we have

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450 learned. Not only on the CFIUS side, on the export control side,
451 bad actors seek to evade current restrictions. And they do this
452 all the time and the volume of this activity is also going up.

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

456 Mr. Latta. When you talk about utilized aggressively, how
457 would you define that?

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

469 We are very excited about the technologies that are coming
470 online, most of them for civilian purposes, but which could have
471 national security implications. And so we need to be aggressive

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472 about identifying and potentially controlling that category of
473 technology.

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

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

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

487 Mr. Latta. Thank you very much. My time has expired.

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

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

492 So I am interested in hearing from both of you the issues
493 of staffing and resources. It is my understanding that the number

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494 of investments or transactions that CFIUS is reviewing is already
495 -- you talked about that, how many more there are and that FIRRMA
496 could require CFIUS to review even more transactions.

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

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

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

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

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

511 Mr. Tarbert. Right now we had a little under 240 cases
512 before.

513 Ms. Schakowsky. Yes, you said that.

514 Mr. Tarbert. We don't know with exact certainty because the
515 bill is changing. It will certainly be multiples of that but we

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516 don't know exactly how many because the bill is changing and we
517 also want to make sure that the regulations really pinpoint those
518 transactions that are most likely to give rise to national
519 security concerns.

520 Ms. Schakowsky. And how many staffers work for or are
521 assigned to the committee and how would many more staff -- how
522 many more staff -- so you can't really tell how many more would
523 be required if the law passed.

524 Mr. Tarbert. Not at this time.

525 Ms. Schakowsky. Okay. Secretary Ashooh, did you want to
526 respond?

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

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

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538 organization to support what we are doing.

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

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

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

553 What CFIUS looks at are specifically are there national
554 security concerns arising from the vulnerabilities of the target
555 company. So when we do an assessment of a transaction, we look
556 at the threat, which is an intelligence community analysis of the
557 foreign acquirer, and then we look at the vulnerability, which
558 is essentially an assessment of what the target company has in
559 the U.S. And then we put those two together and say if a threat

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560 meets the vulnerability, what are the potential consequences.

561 So if we have a foreign acquirer --

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

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

571 Ms. Schakowsky. And then how often does that happen?

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

576 Ms. Schakowsky. And what kind of company would that be?

577 Mr. Tarbert. It could be any particular company.

578 Ms. Schakowsky. What company has there been?

579 Mr. Tarbert. They are in various industries, health care,
580 for example, where healthcare information is particularly
581 sensitive. And it can be in the financial services industry, as

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582 well, where we have seen cases where, again, there is lots of
583 personal data and financial data on Americans, where we are
584 concerned that it could have national security ramifications.

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

587 Mr. Tarbert. Absolutely, my pleasure.

588 Mr. Latta. Thank you very much. The gentlelady yields
589 back.

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

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

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

601 Mr. Tarbert, in your testimony, you emphasized the gravity
602 of potential vulnerabilities arriving from the digital
603 data-driven economy that we live in. Can you explain how

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604 countries are exploiting this and how you believe that modernizing
605 CFIUS will help address those concerns?

606 Mr. Tarbert. Yes. There is only so much I can say because
607 some of that is classified as to what the -- how countries may
608 be exploiting the vulnerabilities. But I think if you think about
609 a company that contains lots of personally identifiable data,
610 personal healthcare data on individual Americans, one can easily
611 see that if that information got into the wrong hands,
612 particularly if those individual Americans work in sensitive U.S.
613 Government positions, that a foreign actor could exploit that.

614 Mr. Kinzinger. Okay.

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

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

624 And I think it is also important you know to illustrate why
625 these two need to be complementary. If we are concerned about

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626 a certain technology, oftentimes the concern will be over the
627 nature of the transaction under which that technology would be
628 transferred. CFIUS is very good at understanding, and blocking,
629 or mitigating those transactions.

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

635 So the --

636 Mr. Kinzinger. Kind of cradle-to-grave, in essence.

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

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

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

647 Mr. Ashooh. So the export control system is founded on an

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648 interagency process. And so the agencies that I mentioned,
649 Energy has a nation security role, protects a stockpile; Defense;
650 State all are the member agencies that review export control
651 licenses. That includes an escalation process, meaning if one
652 agency has a concern that it does not feel is being addressed,
653 it can raise that up to the Assistant Secretary level, all the
654 way up to the Cabinet, so we can really drill down into the issues
655 that are of concern.

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

663 And FIRRM, again, acknowledges the need to work
664 internationally, as the export control system does, again,
665 creating more complementary natures.

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

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670 so?

671 I mean you know in a month, we are going to have technology
672 we don't even know exists today.

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

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

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

689 Mr. Kinzinger. Cool.

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

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692 Mr. Latta. The gentleman yields back.

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

695 Mr. Green. Thank you, Mr. Chairman.

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

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

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

712 Mr. Green. Okay. Can CFIUS consider whether a transaction
713 would strip the U.S. of these good high-paying jobs or pose threats

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714 to the health or environment of Americans?

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

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

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

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

729 Mr. Tarbert. I believe that is the Department of Labor. We
730 look solely on -- we are set up solely to focus on does this pose
731 a national security concern to the United States.

732 Mr. Green. Okay. The issue is focused on foreign
733 investment. Obviously, we like to have foreign investment in our
734 country.

735 And discuss, either of you, do you agree that the U.S. needs

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736 to support R and D and infrastructure spending? I mean that ought
737 to be a no-brainer. I think all of us do.

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

740 Mr. Tarbert. Do you want to?

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

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

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

756 Mr. Green. Okay.

757 Mr. Tarbert. That said, there are other tools available to

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758 address economic issues. And so the 301 investigation is
759 something that I think goes to many of the concerns that you have
760 raised.

761 Mr. Green. Okay, thank you, Mr. Chairman. I yield back.

762 Mr. Latta. Thank you. The gentleman yields back.

763 And the chair now recognizes the gentleman from Florida for
764 5 minutes.

765 Mr. Bilirakis. Thank you, Mr. Chairman.

766 Secretary Ashooh, is that correct?

767 Mr. Ashooh. Yes, sir. It rhymes with cashew, if you like
768 cashews.

769 Mr. Bilirakis. Oh, gosh. Okay, very good.

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

775 Mr. Ashooh. Yes, sir, it does.

776 Mr. Bilirakis. It does?

777 Mr. Ashooh. Yes.

778 Mr. Bilirakis. Okay, very good. Thank you.

779 And Secretary Tarbert, how does CFIUS seek out the input of

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780 other federal agencies not included on the committee, such as FTC
781 or other regulators, who review, separately enforce competition
782 and consumer protection?

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

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

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

798 Mr. Bilirakis. Well thank you very much.

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

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

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

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

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

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824 Mr. Bilirakis. Very good. It sounds like you have been
825 very proactive.

826 Mr. Ashooh. Devoting a lot of time to it, sir.

827 Mr. Bilirakis. I appreciate that very much.

828 I yield back, Mr. Chairman.

829 Mr. Latta. Thank you. The gentleman yields back.

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

832 Mr. Bucshon. Thank you, Mr. Chairman.

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

840 Mr. Tarbert. Yes, absolutely. No, so we take that -- when
841 someone files with CFIUS, we do the, the intelligence community
842 does something called the national security threat assessment.
843 And that national security threat assessment looks at the
844 acquirer, as well as the individuals behind the acquirer to get
845 an understanding of who they are.

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

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

854 Mr. Bucshon. That is my point. You have people that have
855 people that have maybe nebulous --

856 Mr. Tarbert. Exactly.

857 Mr. Bucshon. -- connections to other people that aren't
858 necessarily on our side on certain issues.

859 Mr. Tarbert. Exactly.

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

866 Mr. Tarbert. Right.

867 Mr. Bucshon. And whatever you can say publicly about the

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868 process because I think, from a representatives perspective, the
869 more that the American people know about a process, the better
870 they understand it, the more people like me are able to help you
871 reform the process.

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

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

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

885 Mr. Bucshon. All right because I think that is an important
886 concept for people to understand. The only cases you are seeing
887 in the newspaper that the President, him or herself, has decided
888 are not the only cases that you all are looking at. And sometimes
889 I think that that impression is created where people are saying

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890 well why did the President make that decision. And to know that
891 there was a more complicated process that actually ramped up to
892 that level I think is important.

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

897 Mr. Bucshon. Right.

898 Mr. Tarbert. So, people only read the newspaper story but
899 it is --

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

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

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

910 Mr. Tarbert. Sure. And those gaps, in many cases, have
911 been brought to our attention because the parties themselves have

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912 said well, if you don't approve our transaction, we will
913 restructure it this way to get around it.

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

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

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

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

931 Mr. Bucshon. I yield back.

932 Mr. Latta. Thank you very much. The gentleman yields back.

933 The chair now recognizes the gentlelady from California for

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934 5 minutes.

935 Ms. Walters. Thank you, Mr. Chairman.

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

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

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

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

952 Ms. Walters. Okay, is there any reasonable argument that
953 medical device products, including the associated intellectual
954 property are sufficiently relevant to national security to
955 justify subjecting transactions involving such products to CFIUS

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956 jurisdiction?

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

960 Ms. Walters. Okay. And do you have any suggestions as to
961 how to ensure CFIUS legislation accounts for such a humanitarian
962 exemption?

963 Mr. Ashooh. I am sorry, one more time.

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

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

972 Ms. Walters. Okay, thank you.

973 And I yield back the balance of my time.

974 Mr. Latta. Thank you. The gentlelady yields back.

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

977 Mr. Duncan. Thank you, Mr. Chairman. Thank you guys for

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978 being here.

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

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

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

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

999 Mr. Tarbert. So I can -- the statute prohibits us from

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1000 talking about specific cases in a public setting. So I will give
1001 you, if you are amenable to it, I will give you a confidential
1002 briefing to your office whenever you would like.

1003 But let me just say this. The point that you are raising
1004 is an important one because right now the statute allows us to
1005 look at anything where there will be control. But for a
1006 non-passive investment that doesn't pass that threshold of
1007 control, particularly for a critical infrastructure asset, CFIUS
1008 does not have jurisdiction.

1009 So that was one of the things that we looked at very carefully
1010 in crafting the provision of FIRRMA to ensure that transactions
1011 similar to the one that you described would absolutely be within
1012 our jurisdiction.

1013 Mr. Duncan. Thank you. I am going to take you up on that
1014 briefing.

1015 Mr. Tarbert. Absolutely.

1016 Mr. Duncan. I am no longer chairman of that subcommittee
1017 but this is an issue that I have followed for a long time, the
1018 situation in Venezuela but also Russia's involvement in energy,
1019 in guaranteeing loans and assets that are American assets.

1020 Let me just ask you one more question in the time I have got.

1021 Assistant Secretary Tarbert, in your testimony you touch on

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1022 gaps and your jurisdictional authority to protect against
1023 national security concern. What are these gaps and does H.R. 4311
1024 help resolve those?

1025 Mr. Tarbert. Yes, to the three gaps are land that is not
1026 a business but, nonetheless is near a sensitive military
1027 installation of some sort or other national security
1028 installation.

1029 The second would be the one that we just talked about, where
1030 potentially you have an ownership stake that doesn't technically
1031 meet the definition of control but, nonetheless, has a lot of
1032 influence, has access, has the ability to get information and to
1033 influence the decisions of the company. So that is a non-passive
1034 investment.

1035 And then the third are when someone essentially tries to
1036 replicate a business or a core business capability overseas.
1037 That is not a U.S. business and hence, CFIUS doesn't have the
1038 authority.

1039 FIRMA addresses all of these things and is continuing to
1040 evolve in a manner that addresses them with more effectiveness.

1041 Mr. Duncan. Well, thank you.

1042 Mr. Chairman, because of the jurisdictional boundaries, this
1043 committee may not have been aware of the situation I was talking

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1044 about with Venezuela, and PDVSA, and Rosneft, and Citgo. I would
1045 like unanimous consent to enter into the record copies of the
1046 letters we sent to CFIUS.

1047 Mr. Latta. Without objection.

1048 [The information follows:]

1049

1050 *****COMMITTEE INSERT 3*****

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1051 Mr. Duncan. Thank you. With that, I will yield back.

1052 Mr. Latta. Thank you. The gentleman yields back.

1053 And the chair now recognizes the gentleman from
1054 Massachusetts for 5 minutes.

1055 Mr. Kennedy. Thank you, Mr. Chairman. Thank you to our
1056 witnesses for being here. Thank you holding an important
1057 hearing.

1058 A couple of topics I wanted to touch on. So first,
1059 gentlemen, this is about state-owned enterprises. There has been
1060 a bit of discussion as to whether Congress or CFIUS should make
1061 a distinction between foreign investments made by private persons
1062 or firms as compared to those made by firms that are state-owned
1063 or partially state-owned.

1064 During one of the hearings at Financial Services Committee,
1065 members commented that it really did not matter in the case of
1066 China because even private firms are influenced by the Chinese
1067 Government and would rather make investments or disclose
1068 information upon request of the Chinese Government.

1069 So curious as to your thoughts, either one of you. Can you
1070 share your thoughts so whether we should be making such a
1071 distinction or whether China is a problem kind of no matter what?

1072 Mr. Tarbert.

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1073 Mr. Tarbert. Thank you. Thank you, Congressman Kennedy.

1074 For purposes of state-owned enterprises we think there is
1075 a mandatory declaration requirement for those because we think
1076 that certainly with state-owned enterprises, there is a clear
1077 nexus and, therefore, we think that we should be notified of those
1078 transactions.

1079 When we go through the threat analysis and the intelligence
1080 community does the national security threat assessment, they look
1081 very carefully at the history of a given company and its potential
1082 connections to the state.

1083 And so you are exactly right that with respect countries,
1084 particularly those with doctrines of civil military fusion, the
1085 line between state-owned and private becomes blurred and we take
1086 that into account.

1087 Mr. Ashooh. And certainly, that is an issue we deal with
1088 constantly in the export control system. And the system is
1089 designed to allow us to examine whether or not that civil military
1090 integration, which is a factor certainly in China, and in fact
1091 is common to the countries that we find ourselves spending most
1092 of your time with, Russia and Iran as well.

1093 Mr. Kennedy. And I assume then, gentlemen, it would be kind
1094 of a similar analysis with regards to investment in a venture

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1095 capital fund or a private equity fund, in terms of foreign
1096 investment going into a partnership with a V.C. that is either
1097 buying up potentially strategically important early stage
1098 companies. Someone?

1099 Mr. Tarbert. If the venture capital firm itself -- so the
1100 question is is the venture capital firm, itself, a foreign firm.
1101 If the answer is yes, then that would be within our jurisdiction.

1102 If it is an American firm and the foreign investor just has
1103 a passive L.P. interest but doesn't control that, then that is
1104 out of our jurisdiction.

1105 Mr. Kennedy. Okay. Do you believe that CFIUS can place
1106 appropriate conditions on the investments that could critically
1107 limit Chinese or any other government their access to critical
1108 or emerging technology when investors are Chinese firms? So
1109 similar, I guess, followed between the two.

1110 Mr. Tarbert. Yes and we do it nearly every day. Thank you.

1111 Mr. Kennedy. Pushing a little bit more on the passive
1112 investment side, some concerns have been raised about a provision
1113 in the bill that would limit investments, even when they are
1114 passive and the investor would not have control of the U.S. company
1115 and would not have a say in those decisions.

1116 Under such a case, does the committee have a way to ensure

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1117 that the relationship does not change after a review takes place?
1118 So for example, if a foreign investor started to see certain I.P.,
1119 from what or how at least I understand it, the relationship would
1120 already be established. So could such a case get before CFIUS
1121 on a secondary review?

1122 Mr. Tarbert. That is a great question. And so we have
1123 thought about exactly the point that you made. And so in the
1124 FIRREA bill, there is an additional basis of jurisdiction when
1125 an investor's ownership changes you know materially to fall into
1126 one of the jurisdictional categories that exist.

1127 Mr. Kennedy. And forgive me. How would you be notified if
1128 that investor's relationship changes?

1129 Mr. Tarbert. Well, if it is a state-owned enterprise, there
1130 would be a declaration. But otherwise, CFIUS remains a voluntary
1131 process. So we have methods and capabilities of sort of
1132 monitoring the landscape but, as a technical matter, it could
1133 occur.

1134 Now sort of the ability that we have is if it does occur and
1135 they don't notify us, then we have the ability to go in and reopen
1136 that transaction at any time.

1137 Mr. Kennedy. Okay.

1138 Anything to add, sir?

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1139 Mr. Ashooh. Only that if there is a case where there is a
1140 technology transfer concern in what you are discussing.

1141 The Commerce Department will often place an additional
1142 licensing requirement on the companies in question as an important
1143 reminder that they are obligated to not transfer that technology,
1144 not only to a foreign national but the re-export of that as well.
1145 So, again, we keep track. This is how we leverage the CFIUS
1146 process to make sure we are keeping track of the technology.

1147 Mr. Kennedy. Thank you both.

1148 I yield back. Thank you, Chairman.

1149 Mr. Latta. Thank you. The gentleman yields back.

1150 The chair recognizes the gentleman from Kentucky for 5
1151 minutes.

1152 Mr. Guthrie. Okay, thank you very much. Thanks, Mr.
1153 Chairman. Thanks for having this hearing and thank you guys for
1154 being here.

1155 And I have the questions. These two questions are for both
1156 of you. One, you mentioned earlier today that about the volume
1157 of reviews. Specifically, if the current form of legislation is
1158 enacted, how many additional transactions will CFIUS be required
1159 to review and can CFIUS handle that increase?

1160 Mr. Tarbert. So I can answer it. We don't know with exact

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1161 certainty because the bill continues to evolve --

1162 Mr. Guthrie. In current form.

1163 Mr. Tarbert. -- in current form. We are still -- because
1164 then there would be regulations, additionally, that redefine it.
1165 We think it would be several -- it would be multiples of what we
1166 are currently reviewing and we would need the resources to be able
1167 to staff that.

1168 But more importantly, we don't think that the per case/per
1169 case officer volume would remain the same, that ratio. Because
1170 one of the things that the bill does, which I think is critically
1171 important is for those transactions that don't really require an
1172 immense amount of government resources, there is a streamlined
1173 filing process.

1174 So for example, when our ally buys an American company, there
1175 is very little national security issues, we can process those a
1176 lot quicker. Today, if you want to file before CFIUS, you have
1177 to fill out a 50- to 300-page form listing all this stuff. And
1178 so for things that are more likely to be cleared, a much shorter
1179 form, more efficient and effective will actually reduce the time
1180 spent on each particular case.

1181 So we think that it is really helpful to modernize it.

1182 Mr. Guthrie. Because you know the volume goes up and there

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1183 will be tools to moderate it.

1184 Mr. Tarbert. Absolutely. And this would not go into effect
1185 -- one of the key provisions in the bill says that nothing will
1186 go into effect and become live until the Secretary of the Treasury
1187 signs a certification saying the resources and the regulations
1188 are in place.

1189 Now at the same time, the argument there is well, that could
1190 take a while. That could take a year. What about stuff we are
1191 seeing today that is a concern? It also allows us, potentially,
1192 if passed, to have a pilot program. So if we know there is
1193 transactions out there of a certain type that we want to stop,
1194 the day the bill is passed, we can issue an immediate sort of
1195 regulation to address those, while getting the resources in place
1196 for the larger jurisdiction.

1197 Mr. Guthrie. Well here is another question, too, is we are
1198 looking at H.R. 4311 and if the reviewable transactions
1199 dramatically do increase -- I know you have this streamlined
1200 process but let's say it dramatically increases and it is an issue,
1201 what do you think that will do to foreign investment in the U.S.?
1202 Will it deter it or hamper it?

1203 Mr. Tarbert. We don't think so because America still
1204 remains the preeminent destination for investment. And the more

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1205 we are able to protect those companies, to protect national
1206 security, in the long-run, the more attractive that is going to
1207 be for investors.

1208 Mr. Guthrie. Okay.

1209 Mr. Tarbert. But obviously, the reason why CFIUS is chaired
1210 by the Treasury Department is we are particularly aware of wanting
1211 to attract investment to the United States.

1212 And so in 1988 and 2007 we have always got that balance right
1213 and we want to continue to get that balance right by protecting
1214 our national security but, obviously, continuing to attract
1215 foreign investment.

1216 Mr. Guthrie. Okay, do you have any comments on this?

1217 Mr. Ashooh. Yes, I might add it is worth pointing out that,
1218 even absent FIRREA, the caseload under CFIUS has gone up year on
1219 year fairly substantially. So the resource issue is one that we
1220 have been grappling with and will continue. I don't see, and
1221 Secretary Tarbert might agree, we don't see that steady increase
1222 slowing. This is being driven by, obviously, some trends
1223 regarding nations that see a benefit in pursuing it.

1224 Mr. Tarbert. And one final point. As a Treasury
1225 Department, we don't really like to spend a lot of money. We like
1226 to collect it.

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1227 But I think our view on this is that --

1228 Mr. Guthrie. It is like business; you want more money to
1229 come in than go out.

1230 Mr. Tarbert. Yes. But well, no, given the amount of money
1231 that we spend on the defense of this country, this, to spend
1232 whatever we need to spend have people reviewing these critical
1233 transactions to ensure that our technological edge isn't lost.
1234 In many ways, it is an insurance policy that is well worth the
1235 money.

1236 Mr. Guthrie. Okay, thanks. And I have a question just for
1237 you, Secretary Tarbert, or either one.

1238 Can you tell us, in general and obviously in unclassified
1239 terms of what you can share, what is the greatest threat to the
1240 U.S. that CFIUS is tracking right now? For instance, is it the
1241 transfer of technology, foreign control of infrastructure, or
1242 something else? Because I did a town hall recently and somebody
1243 stood up and said -- the hardest question I had to answer was of
1244 all the questions I had to answer and they were from left and right
1245 -- were what keeps you up at night.

1246 Mr. Tarbert. You know the truth is, all of the above that
1247 we are seeing threats and vulnerabilities. Obviously, sort of
1248 state-owned enterprises as well as other companies that are

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1249 working in close contact with their states and trying to acquire
1250 companies that are critical to our technological edge, that is
1251 important. But on the vulnerability side, the personally
1252 identifiable information. There are a number of other things we
1253 are worried about and we are always worried about infrastructure,
1254 you know the purchase of infrastructures.

1255 So I would say, unfortunately, it is all of the above. Every
1256 day I come in I see sort of a new threat or a new vulnerability,
1257 I feel.

1258 Mr. Guthrie. All right, thank you very much.

1259 My time has expired and I will yield back.

1260 Mr. Latta. Thank you. The gentleman's time has expired and
1261 he yields back.

1262 The chair now recognizes the gentleman from Vermont for 5
1263 minutes.

1264 Mr. Welch. Thank you both. You know this question of
1265 imposing a big responsibility without providing the resources to
1266 get the job done is of concern to me. So one of the questions
1267 that is brought up in this bill is whether there are some ways
1268 to streamline without relinquishing review.

1269 And one of those ideas is to have the bill apply only to a
1270 limited number of countries or, in the alternative, have a large

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1271 number of countries listed that are not of concern and they would
1272 receive a safe harbor.

1273 I guess I am looking to your reaction to that because we
1274 could, over time, have a list of countries that would shift. You
1275 know it might have been Japan 10 or 15 years ago, whereas, it
1276 probably would be China now.

1277 So, I would ask your thoughts about this. Is this a
1278 practical way to try to relieve the burden without sacrificing
1279 safety?

1280 Mr. Tarbert. Sure, the bill chooses the second alternative
1281 in what is called sort of the good guys list. It doesn't choose
1282 a blacklist and the reason is is because if you start blacklisting
1283 certain countries, it can easily be evaded, particularly in the
1284 acquisition context.

1285 So if you had -- and then you run into the problem well then,
1286 if you are a blacklisted country and then how many investors in
1287 a particular entity do you need to make that entity blacklisted,
1288 and then we end up sweeping in our allies. And to your point,
1289 the threat changes over time.

1290 And the vulnerabilities remain the same. So it is very well
1291 possible that we have a U.S. company that is so important that,
1292 even people from countries that we wouldn't necessarily

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1293 blacklist, still requires review and some kind of mitigation.

1294 But the good guys list is important because there our allies
1295 are facing, in many cases, the exact same threats that we are.
1296 And so the idea is is that if we can get them to work with us to
1297 create similar investment screening regimes, that would actually
1298 save us potential concerns because -- yes.

1299 Mr. Welch. Similar protocol --

1300 Mr. Tarbert. Exactly.

1301 Mr. Welch. -- for them and us because we have a unified
1302 interest.

1303 Mr. Tarbert. Correct.

1304 Mr. Welch. Yes, thank you.

1305 Mr. Ashooh. And if I might add, you know one of the benefits
1306 of CFIUS is that the member agencies bring their expertise and
1307 authorities to the CFIUS table. And the export control system
1308 is very list-driven. We have got end uses, end-users, countries
1309 of concern. And I can tell you that lists come with a cost. It
1310 takes a fair amount of effort to maintain those lists.

1311 Mr. Welch. Right.

1312 Mr. Ashooh. So rather than have multiple and perhaps
1313 overlapping lists, you know it is useful, I think, for these
1314 agencies to bring them to the table and Commerce certainly does

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1315 that in the CFIUS context.

1316 Mr. Welch. Okay, thank you. That is all I have. Thank you
1317 very much.

1318 I yield back.

1319 Mr. Latta. Thank you. The gentleman yields back.

1320 The chair recognizes the gentleman from West Virginia for
1321 5 minutes.

1322 Mr. McKinley. Thank you, Mr. Chairman. I am sorry I was
1323 at another hearing downstairs and so I have missed a lot of the
1324 testimony that perhaps you have given. But one thing that I did
1325 hear as I came in was early you made point that CFIUS is a voluntary
1326 program. And that concerns me a little bit -- a great deal,
1327 actually.

1328 And I am hesitant because we went through our classified
1329 briefing and then I had another classified briefing on another
1330 situation that had to do with CFIUS. So I am hoping I am going
1331 to be able to stick to what we can have from open source.

1332 But should we be making it mandatory?

1333 I come from the construction industry, 50 years in
1334 construction. You can't start a project without getting your
1335 permits for water, sewer, air, archeological digs, what
1336 environmental yet we allow a project to begin. Someone, a foreign

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1337 entity, can invest in a project and it may take you a while before
1338 you become engaged. And by that time, it is too late.

1339 The information on energy transporting data is already out
1340 there and it is gone. Why is it voluntary and why is it--why would
1341 we not make it mandatory that they have to first check the box
1342 that they have approached CFIUS for preliminary ruling before they
1343 proceed?

1344 Mr. Tarbert. Great. So the first question, you know why
1345 has it been voluntary, and it has been voluntary since the start
1346 of it --

1347 Mr. McKinley. That doesn't make it right but go ahead.

1348 Mr. Tarbert. Yes, and I think the thought there is that
1349 because CFIUS has the ability then to address the transaction,
1350 to potentially unwind the transaction, those --

1351 Mr. McKinley. After the fact.

1352 Mr. Tarbert. -- after the fact, that is enough to get
1353 people to file.

1354 Now that said, the point you are raising is an important one.
1355 And for certain types of transactions, our view, particularly
1356 those by state-owned enterprises, and also by particular types
1357 of technology, it is so important, just as you said, that we want
1358 to get a declaration in advance of that transaction so we know

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1359 about it. And so the bill actually does that.

1360 The bill has a certain provision in there that there are
1361 mandatory declarations, in some cases, for state-owned
1362 enterprises.

1363 Mr. McKinley. So under this legislation, will someone that
1364 is trying -- acquiring an energy company, energy transmission
1365 company, will they -- they will have to announce that they are
1366 going to do this?

1367 Mr. Tarbert. Right now, the bill requires declarations for
1368 state-owned enterprises that have some kind of substantial
1369 interest. And it may be 25, it may be --

1370 Mr. McKinley. I don't need that.

1371 Mr. Tarbert. But if it is -- yes.

1372 Mr. McKinley. If I just have a seat at the board without
1373 any investment in that, if I get a seat at that board, I have got
1374 access to all the information I need. How are you aware of that?

1375 Mr. Tarbert. So right now, we are monitoring some things
1376 but the bill would provide us with the authority. It doesn't
1377 mandate us to do that but would provide us with the authority to
1378 say that in certain types of transactions, like the one you
1379 announced, you have to get a declaration before CFIUS before you
1380 can engage in that transaction.

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1381 And so during the notice and comment period, we will be
1382 soliciting -- if the bill passes, be soliciting views of what are
1383 the kinds of transactions, to your point, that are so critical
1384 and important we don't want to be learning about them after the
1385 fact, that we want an advanced declaration before --

1386 Mr. McKinley. Is there any protection, as legislation, that
1387 -- because the technical information, understanding how our
1388 utility markets operate is instantaneous. And by that virtue,
1389 it is after the -- your coming is after the fact trying to address
1390 that. So how do you -- will this legislation prevent that
1391 transfer of information without an investment, that is just merely
1392 a seat at the table? Are you going to be able to prevent that
1393 from happening? Because it happens in an instant before you are
1394 aware of it.

1395 Mr. Tarbert. Yes, to be frank, it could be prevent it in
1396 certain instances, it may not prevent it in others. And so there
1397 may need to be additional legislation. It may not even require
1398 a board seat. Someone could just walk into the energy company,
1399 get to know the CEO and --

1400 Mr. McKinley. Thank you.

1401 Mr. Tarbert. -- a relationship starts. So it sounds like
1402 for that specific instance, we just deal with foreign investments

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1403 of various sorts that there may need to be added protection under
1404 some other area of the law.

1405 Mr. McKinley. So let me ask you. You just offered to do
1406 another classified. I would like to follow-up on the
1407 conversation you and I had last week and see where we might be
1408 able to go with this.

1409 Mr. Tarbert. We are planning that, actually. I think we
1410 have got it -- we are working to schedule that, the one specific
1411 to your state.

1412 Mr. McKinley. You know what I am talking about.

1413 Mr. Tarbert. Yes, sir.

1414 Mr. McKinley. Thank you. I yield back.

1415 Mr. Latta. And you know what he is talking about, okay.

1416 The gentleman yields back and the chair now recognizes the
1417 gentleman from Texas, the chairman of the Health Subcommittee of
1418 E and C for 5 minutes.

1419 Mr. Burgess. Thank you, Mr. Chairman and thanks to our
1420 witnesses for being here today. I also thank the subcommittee
1421 for putting together the classified briefing that we had on this
1422 subject. It was important.

1423 And I will just ask if I ask you a question that really should
1424 not be answered in an open setting, I will accept your deflection

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1425 on that.

1426 I was here in the United States House of Representatives when
1427 Dubai Ports World got all the headlines. Most people didn't know
1428 what CFIUS was before them and then, of course, everybody knew
1429 and became an expert on CFIUS. But what many people didn't know
1430 and I didn't know at the time is that this participation in this
1431 process is largely voluntary. Is that correct?

1432 And just as a matter of procedure, a notice which is given
1433 to you for to answer a possible question, how does that arise?
1434 Where do those notices come from? Do the companies make those
1435 notices or the company that is involved makes the notices?

1436 Mr. Tarbert. Normally, the purchaser and the acquirer--the
1437 acquirer and the target company, the people doing the business
1438 combination will come to CFIUS, oftentimes, before the -- as they
1439 are getting into the initial stages of planning the transaction
1440 to tell us about the transaction and to get the notice started.
1441 They will send us drafts back and forth of the notice and we will
1442 work with them to complete the notice so then we can deem it
1443 accepted.

1444 Mr. Burgess. So that is part of their due diligence in doing
1445 the merger and acquisition background. Does it ever come to your
1446 attention from another source, through someone else say hey, this

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1447 is happening and I wonder about it?

1448 Mr. Tarbert. It does. And we have members of the
1449 intelligence community that are sort of -- and other resources.
1450 But that is one of the things that I think this bill acknowledges
1451 that we also need to have resources devoted to scanning the
1452 investment landscape for things that are not notified to us.

1453 So every now and again, we will get wind of a particular
1454 transaction that wasn't notified to us. We will look into the
1455 matter and, in some cases, ask the parties to file. If the parties
1456 don't want to file or for some reason we don't think they will
1457 be cooperative, we have the authority to actually issue the notice
1458 ourself and start the case.

1459 Mr. Burgess. Just as a general matter, of the number of
1460 notices that come to your attention, are all of them investigated,
1461 a portion of them investigated, a large portion, a small portion?
1462 Could you qualify that?

1463 Mr. Tarbert. Yes, normally not many at all -- oh, I am sorry
1464 -- investigated. There is a technical definition of
1465 investigation --

1466 Mr. Burgess. Okay.

1467 Mr. Tarbert. -- which means the second phase. But I would
1468 say all of them we look at and we determine whether there needs

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1469 to be a filing.

1470 One of the things that FIRRMA does, which makes it a lot
1471 easier is because the filing costs a lot of money.

1472 Mr. Burgess. Sure.

1473 Mr. Tarbert. It is 50 to 300 pages. And so for let's say
1474 a Canadian company buying an American company, where there is not
1475 likely to raise any national security concerns, the parties will
1476 often say this is what we are doing here. Do we really need to
1477 file with you? We have to then say well, we can't tell you not
1478 to file but, based on what you are saying and what we know about
1479 the companies, there may not be a national security concern.

1480 But that is difficult. So one of the things that FIRRMA does
1481 is it creates the declaration where they can actually file a short
1482 version of that that doesn't cost as much money but we can then
1483 review that and determine whether we want a full notice of whether
1484 we have enough information to say that transaction is okay.

1485 Mr. Burgess. Well under the current regime, are there any
1486 particular countries that sort of -- when you list out the number
1487 of countries that are investigate -- or where you have notices
1488 that you are investigating, are there -- do there tend to be a
1489 preponderance of countries or is there a single country that is
1490 identifiable as this is where we spend a lot of our time?

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1491 Mr. Tarbert. What I can tell you is in those cases where
1492 we have reached out, where there hasn't been a notice and a
1493 transaction has occurred and we have either required -- asked the
1494 parties to file, required them to file, or filed a notice ourself
1495 to get it started, those cases have involved recently China and
1496 Russia.

1497 Mr. Burgess. And just of the transactions involving China,
1498 how many are allowed to proceed? Can you quantify that? Is there
1499 a percentage? Is it a lot, a little, all of them?

1500 Mr. Tarbert. It is a substantial number but a number of
1501 them, there is proceeding without mitigation, there is not
1502 proceeding, and then there is sort of proceeding with mitigation,
1503 where the Government requires certain things to happen before that
1504 transaction can go forward.

1505 Mr. Burgess. And you may have already answered this or you
1506 may have been asked this. I am not sure if I understood or heard
1507 the answer. Is this a two-way street? U.S. involvement in other
1508 countries, is it blocked from time to time?

1509 Mr. Tarbert. Well, it is. In some countries, U.S.
1510 investors are blocked regardless of national security. There are
1511 simply investment caps that don't allow our companies to invest
1512 in other countries but that is more of an economic issue than an

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1513 issue.

1514 I am not aware of any situation where for national security
1515 reasons another country has blocked an American acquisition of
1516 one of their companies.

1517 Mr. Burgess. For economic reasons, when the President talks
1518 about he wants trade to be fair and reciprocal, is this one of
1519 those areas?

1520 Mr. Tarbert. That would be potentially one of those areas.
1521 And I know that the Treasury Department and other government
1522 agencies have talked to different governments about you know if
1523 we allow your countries to invest here, why are you preventing
1524 our companies from opening their doors in your country or
1525 requiring that our company needs to form a joint venture with one
1526 of your nation's companies, that if we are going to allow
1527 investment in our country, why don't you allow our companies to
1528 go and do business in your country without imposing constraints
1529 on them. But that is an economic issue.

1530 Mr. Burgess. Yes, sir.

1531 Mr. Ashooh. And sir, if I might just add, the concept of
1532 CFIUS is still fairly unique in the world. Although we are seeing
1533 other -- seeing the EU, and Japan, and other allied countries
1534 establish similar procedures, we generally think that is a good

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1535 thing because this is, again, a national security review. And
1536 to the extent we share national security goals, it is helpful to
1537 manage the foreign --

1538 Mr. Burgess. Good enough. As far as the economic goals,
1539 I may follow up with you, Mr. Tarbert, just because that is of
1540 interest to me.

1541 Thank you, Mr. Chairman, I will yield back.

1542 Mr. Latta. Thank you. The gentleman yields back.

1543 The chair recognizes the gentleman from New Jersey for 5
1544 minutes.

1545 Mr. Lance. Thank you very much and good morning to our
1546 distinguished panel.

1547 Both the Treasury and the Commerce Department maintain lists
1548 of prohibited persons and nations for purposes of trade and
1549 sanctions. Gentlemen, do you believe that these lists are
1550 effective in identifying the entities that pose threats to
1551 American interests?

1552 Mr. Ashooh. Yes, indeed.

1553 Mr. Tarbert. Yes.

1554 Mr. Lance. And do they provide a model of how CFIUS should
1555 view certain types of investment? For example, should CFIUS have
1556 a list of nations that will draw special scrutiny?

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1557 Mr. Tarbert. On this, we don't think so. And the reason
1558 is is that we want to be able to review all transactions involving
1559 foreign investors, where relevant. And each transaction is
1560 looked at specifically for the threat, the vulnerability, and the
1561 consequence. So there is an intelligence analysis of the
1562 particular acquirer. And so you could have a situation where you
1563 have an acquirer from an allied country but the particular
1564 individuals within that are not necessarily friendly to U.S.
1565 national security interest.

1566 And so our view is that we have never maintained a blacklist,
1567 so to speak, for particular countries. But since every
1568 transaction undergoes a very thorough intelligence analysis, the
1569 kinds of issues that you are talking about are always unearthed.

1570 Mr. Ashooh. And sir, if I might, Commerce, through the
1571 export control system, does maintain a multiplicity of lists. It
1572 can be individuals, companies, technologies, end uses, end-users.
1573 And Commerce, as one would hope, we bring those to the CFIUS table.
1574 So you know the experiences and knowledge that we have get brought
1575 to the CFIUS table and that way we are not having to overdo it
1576 on the list side.

1577 Mr. Lance. Thank you. Obviously, foreign direct
1578 investment has historically been a tremendous boom to our economy.

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1579 Does the administration seek to ensure that any reforms to the
1580 CFIUS process do not create unnecessary hurdles for legitimate
1581 and beneficial direct involvement?

1582 Mr. Tarbert. Absolutely, and that is why the Treasury
1583 Department of the chair of CFIUS because it recognizes that we
1584 are looking at protecting our national security while, at the same
1585 time, maintaining an open investment environment.

1586 So while the FIRREA bill would increase the jurisdiction to
1587 certain types of transactions that have been avoiding review, at
1588 the same time, it has a number of measures to modernize the process
1589 and to streamline it a bit for those transactions that are least
1590 likely to raise national security issues.

1591 Mr. Lance. Thank you.

1592 Mr. Ashooh. And sir, where there is a technology transfer
1593 concern, we spent a lot of time really drilling down to what
1594 actually matters from a national security perspective so that we
1595 are not over-controlling and being overly restrictive.

1596 Mr. Lance. Thank you and thank you for your distinguished
1597 testimony.

1598 And Mr. Chairman, I yield back 2 minutes.

1599 Mr. Latta. Well, before the gentleman yields back, would
1600 he yield?

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1601 Mr. Lance. Oh, I will be happy to yield to the chair.

1602 Mr. Latta. Well, thank you very much because I would like
1603 to follow-up on a question that the gentleman from Texas asked
1604 and came back.

1605 How often is a company or companies not cooperative with you
1606 when you want to get with them and all of a sudden they say we
1607 are not going to cooperate?

1608 Mr. Tarbert. It is very rare. Because CFIUS has the
1609 ultimate power to unwind the transaction, impose other things,
1610 and in some cases impose fines if there is a violation of a
1611 mitigation agreement, most companies seek to comply and work with
1612 us.

1613 Mr. Latta. And you say most. Okay. All right. Well,
1614 thank you.

1615 The gentleman yields back and I will yield back his time.

1616 And we want to thank you very much for testifying before us
1617 today. It has been very, very informative. We appreciate all
1618 that you do out there to help keep things straight for Americans
1619 and especially when it comes to our security reasons. We really
1620 appreciate your testimony today and all you do. So, thanks for
1621 being with us today.

1622 And so that will conclude the first panel. And we will get

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1623 ready to have the second panel come before us.

1624 [Recess.]

1625 Mr. Latta. Well, good morning and I would like to take this
1626 opportunity to thank you all for coming before the subcommittee.
1627 And again, we do have the other subcommittee running downstairs,
1628 so we do have members coming in and out during the hearing.

1629 And if I could, I would like to introduce our second panel.
1630 The Honorable Kevin Wolf, partner at Akin Gump Strauss Hauer and
1631 Feld, and former Assistant Secretary for Export Administration
1632 at the United States Department of Commerce. Welcome.

1633 The Honorable Clay Lowery, Managing Director at Rock Creek
1634 Global Advisors, and former Assistant Secretary for International
1635 Affairs at U.S. Department of Treasury.

1636 Ms. Celeste Drake, Trade and Globalization Policy Specialist
1637 at the AFL-CIO. Thank you.

1638 And Dr. Derek Scissors, the Resident Scholar at the American
1639 Enterprise Institute.

1640 And again, we want to thank you for being with us today
1641 because this is a really important subject.

1642 And Mr. Wolf, you are recognized for 5 minutes. So, thank
1643 you very much for being with us.

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1644 STATEMENTS KEVIN WOLF, PARTNER, AKIN GUMP STRAUS HAUER AND FELD,
1645 LLP; CLAY LOWERY, MANAGING DIRECTOR, ROCK CREEK GLOBAL ADVISORS;
1646 CELESTE DRAKE, TRADE AND GLOBALIZATION POLICY SPECIALIST,
1647 AFL-CIO; AND DEREK SCISSORS, RESIDENT SCHOLAR, AMERICAN
1648 ENTERPRISE INSTITUTE

1649

1650 STATEMENT OF KEVIN WOLF

1651 Mr. Wolf. Thank you, Mr. Chairman, Ranking Member
1652 Schakowsky, for inviting me to speak today.

1653 As an opening note, the comments I make today are my own views
1654 and are not on behalf of anyone else.

1655 First before I begin, a compliment. As I have been following
1656 this FIRREA and CFIUS reform discussion, it has been a genuine,
1657 nonpartisan, good faith, regular order, civil, spirited public
1658 debate over a --

1659 Voice. Oh, we can change that.

1660 Mr. Wolf. Yes, I will see what I can do. This hearing has
1661 been too straightforward. Let's see if we can raise it up a little
1662 bit.

1663 But no, seriously, these are legitimately difficult issues
1664 and on difficult national security and economic security issues,
1665 where bright lines are hard.

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1666 So in fact, just a summary of where the debate really is.
1667 It is sort of between, and apologies for over-generalizing, two
1668 camps, two very nonpartisan, good faith camps. There is one view
1669 that believes that CFIUS should have substantially expanded
1670 jurisdictional authority over far more transactions going in and
1671 out of the country to address evolving and emerging threats,
1672 particularly with respect to strategic acquisition from China of
1673 emerging technologies. Technologies evolve quicker than law or
1674 regulations can. Commercial transactions are very creative and
1675 more creative than the Government can quickly understand.

1676 And so, therefore, we need substantially more authority to
1677 be able to metaphorically look in every box going in and out of
1678 the country and decide whether if in that box there is a
1679 transaction of concern, technology, or PII, or other types of
1680 activity of concern.

1681 And then the other camp does not deny the underlying threat
1682 but says that before the Government uses this extraordinary
1683 authority to impose additional controls on otherwise commercial
1684 transactions, that it should do the hard work first to identify
1685 the particular technologies, and threats of concern, and tailor
1686 the scope of the new authorities accordingly, so as not to
1687 discourage because fear and uncertainty about what would be

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1688 controlled discourages investment in the United States. The U.S.
1689 is an open investment culture for which there are great benefits
1690 to foreign direct investment.

1691 And so that is really what the debate in FIRREA is going back
1692 and forth. In my prepared testimony, I lay out some detail about
1693 the benefits of foreign investment and the issues with respect
1694 to the strategic plans from China but I also lay out the questions
1695 to be asking when considering any changes to CFIUS.

1696 And the first question is: Does the statutory authority
1697 exist in some other area of law to address the issue through a
1698 regulatory or process change?

1699 And then the second question is: Would what the threat is
1700 you are trying address be better addressed more directly, with
1701 fewer collateral consequences, by another area of law, such as
1702 the export control system, trade remedies, government contract
1703 issues, and intellectual property protection?

1704 And then the third question is: The threat that you are
1705 trying to address or the issue that you are trying to resolve,
1706 can it be addressed through more investment simply internally in
1707 the Government, for example, in identifying more non-notified
1708 transactions, to have more and deeper robust review of already
1709 filed transactions or to be able to have more staff to monitor

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1710 mitigation agreements, which are alterations of agreements
1711 thereafter?

1712 And if the answer to any one of those questions is no, then
1713 that is the sweet spot for reform.

1714 The area for which I am the particular expert in, given my
1715 background, is with respect to the issues pertaining to technology
1716 transfer. And one of the threats identified in the previous
1717 panels and in general is the identification of and the control
1718 over technology that is being sought, that is emerging, that has
1719 dual-use implications, both commercial, and other activities of
1720 concern. And my main theme is that with respect to efforts to
1721 control outbound investment to please remember that there is an
1722 entire area of law, the export control system, which Secretary
1723 Ashooh spoke about so well, that exists explicitly to do that,
1724 to identify and to regulate through an interagency process for
1725 national security purposes technologies of concern without
1726 imposing unintended collateral burdens on foreign direct
1727 investment, which we want to encourage.

1728 So, I am here to answer your questions about anything
1729 involving CFIUS, or export controls, or how they could or would
1730 work better together.

1731 And with that, I will stop and turn it over to my colleagues.

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1732

[The prepared statement of Mr. Wolf follows:]

1733

1734

*****INSERT 4*****

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1735

Mr. Latta. Thank you very much.

1736

Mr. Lowery, you are recognized for 5 minutes.

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1737 STATEMENT OF CLAY LOWERY

1738

1739 Mr. Lowery. Chairman, Ranking Member, and members of the
1740 committee, thank you for the opportunity to testify today on CFIUS
1741 and the modernization efforts underway.

1742 In general, I support FIRREA but I would like to point out
1743 what I consider to be several key shortcomings in the current bill,
1744 particularly from the perspective of someone who had to implement
1745 the major reform of CFIUS that happened about a decade ago.

1746 Before I discuss these issues, however, I did want to say
1747 just a few words about CFIUS that goes beyond what Assistant
1748 Secretary Tarbert had to say. The easiest way to understand it
1749 is to know what its mandate is. And that mandate is to ensure
1750 national security while promoting foreign investment. It is not
1751 solely about protecting national security. And the reason for
1752 this is because welcoming foreign investment, in fact promoting
1753 foreign investment, is part of our national security. It is core
1754 to our economic growth. It is core to our increasing
1755 productivity. And it is core to creating jobs in this country.

1756 There was an earlier discussion about whether it should be
1757 a voluntary process. The reason it is a voluntary process, in
1758 many respects, is because of that issue. There is usually over

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1759 1,200 or 1,500 mergers and acquisitions that happen in the United
1760 States every year. Most of them have exactly nothing to do with
1761 national security. If we had mandatory process, we would have
1762 to be investigating all of those.

1763 The CFIUS is exactly what I said. It is a committee. It
1764 is an interagency committee that investigates cross-border
1765 mergers and acquisitions that could put our national security at
1766 risk.

1767 Mergers and acquisition parties file with CFIUS, and CFIUS
1768 determines whether the acquirer will gain control in the U.S.
1769 business, and then it does a three-part analysis, as Assistant
1770 Secretary Tarbert laid out.

1771 The history of CFIUS is that it addresses complex
1772 transactions under very tight time lines, in an orderly process,
1773 that protects classified information and proprietary information
1774 very well. While most transactions don't raise national security
1775 risks, as I just mentioned, those that do are addressed because
1776 CFIUS has extraordinary powers to investigate, to mitigate, and,
1777 in very rare circumstances, to recommend to the President to block
1778 a transaction.

1779 The FIRREA bill, I think, does a good job of modernizing CFIUS
1780 and does a good job of filling in some of the gaps that were

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1781 mentioned earlier. My worry, though, is that the legislation
1782 that we saw back of November is that portions of the bill use vague
1783 language, duplicate existing export control authority, and will
1784 be overly burdensome for both the private sector and the
1785 Government.

1786 There is a substantial part of this bill that transforms the
1787 committee on foreign investment in the United States into a
1788 technology control regime in which there isn't a merger, there
1789 isn't an acquisition, in fact there isn't even a foreign
1790 investment into the United States. In this scenario, CFIUS would
1791 go from reviewing approximately 200 transactions a year to several
1792 thousand. If this expansion is truly necessary for our national
1793 security, and cost is the only issue, then, by all means, let's
1794 find a way to pay for it. But this expansion is not driven by
1795 national security. Instead, it would be the needless result of
1796 a bill that is too vague and too duplicative, rendering it
1797 practically impossible for CFIUS to accomplish the work it has
1798 been tasked to do and that is so vital for our U.S. economic and
1799 national security.

1800 We have just heard from Assistant Secretary Tarbert and
1801 Ashooh that the administration has recognized some of these
1802 concerns and is making a serious effort working with Congress to

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1803 fix bill. And this trajectory, in my mind, is very positive and
1804 it suggests that we may actually find a way to modernize CFIUS,
1805 make it implementable, and improve our national security. If we
1806 don't fix it, though, I fear we will not enhance our security,
1807 we will harm it.

1808 Thank you very much.

1809 [The prepared statement of Mr. Lowery follows:]

1810

1811 *****INSERT 5*****

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1812

Mr. Latta. Well, thank you very much.

1813

And Ms. Drake, you are recognized for 5 minutes. Thank you.

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1814 STATEMENT OF CELESTE DRAKE

1815

1816 Ms. Drake. Thank you.

1817 Chairman Latta, Ranking Member Schakowsky, and members of
1818 the committee, good morning. Is it still morning? Good.

1819 I appreciate the opportunity to testify on behalf of the
1820 AFL-CIO on the critical issues of foreign investment and job
1821 creation. I have submitted written testimony for the record and
1822 will highlight just a few key points here.

1823 The AFL-CIO and its affiliate unions support investment that
1824 creates good jobs. In determining the impact of foreign
1825 investment on U.S. security, we must recognize that our economic
1826 and national security are intricately linked. America's economy
1827 is really the source and foundation of our national security and
1828 that is also the source of the AFL-CIO's interest in efforts to
1829 update and improve the Committee on Foreign Investment in the
1830 United States or CFIUS. At the end of the day, for us, it is a
1831 jobs issue.

1832 As you know, the U.S. is a premiere destination for foreign
1833 investment. In comparison to other countries in which investors
1834 are required to create joint ventures for nearly every investment,
1835 or pressured to transfer important technology or intellectual

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1836 property, the U.S. has a very open system and we must make sure
1837 that openness does not become a weakness, allowing jobs, and
1838 critical technology, and knowhow to bleed away.

1839 While foreign direct investment can contribute to the
1840 creation and maintenance of high-quality jobs, we cannot assume
1841 this is a given. Some foreign investors may seek to drive U.S.
1842 competitors out of the market, or to transfer valuable technology,
1843 equipment, and intellectual property overseas, taking jobs with
1844 them. State-owned and controlled enterprises, in particular,
1845 may not invest with a goal to operate in the U.S. for the long-term
1846 but, instead, merely to acquire strategic technology for their
1847 home country that could, in the end, jeopardize U.S. security.

1848 Because of these risks, we have long-supported updating
1849 CFIUS. CFIUS' current charge is too limited. It reviews mergers
1850 and acquisitions but needs broader authority to address new and
1851 evolving acquisition strategies and vehicles. It cannot review
1852 new or greenfield investments and its definition of national
1853 security is too narrow.

1854 Some of these shortcomings are directly addressed by the
1855 Foreign Investment Risk Review Modernization Act or FIRRMA, which
1856 we believe will benefit American's working people. FIRRMA
1857 balances open investment with important national security

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1858 considerations.

1859 FIRRMA will allow CFIUS to respond more effectively to
1860 efforts by China and other nations to buy technological and
1861 military components of the United States. Importantly, it will
1862 update the definition of a covered transaction, require filings
1863 for certain investments by state-owned enterprises, and ensure
1864 that mitigation agreements are monitored.

1865 Accordingly, we support FIRRMA as a needed update that
1866 recognizes the complex business structures and fast-moving
1867 technology development of the 21st century. However, in our
1868 view, FIRRMA does not address all of CFIUS' shortcomings.
1869 America's working people have additional concerns. We would
1870 expand CFIUS' ability to review greenfield transactions and to
1871 consider the net economic benefits of any transaction.

1872 By limiting greenfield reviews to those in proximity to
1873 strategic installations, as FIRRMA does, we may miss certain
1874 predatory investments or the attacks on our companies piece by
1875 piece, rather than wholesale.

1876 The Tianjin Pipe Facility provides a case in point. It is
1877 a greenfield investment that we wish we knew more about. If
1878 Tianjin uses its own inputs made in China, with illegal subsidies,
1879 or sold at less than the cost of production, Tianjin could harm

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1880 U.S. businesses that make those same inputs, costing jobs, wages,
1881 and perhaps whole communities. We could get at those things with
1882 trade remedy law but not once Tianjin is producing here in the
1883 United States.

1884 And by failing to review economic impacts, we may miss the
1885 forest for the trees, allowing investments that drive down wages
1886 or leave the U.S. with fewer high-value jobs in the long-run.

1887 Trading partners, such as Australia and Canada, already
1888 require foreign investments to undergo such a review. And cases
1889 like the 1990's Magnequench acquisition demonstrate that not all
1890 foreign investment creates good jobs.

1891 In sum, we look forward to working with you to advance FIRRMA,
1892 to improve CFIUS, and to promote the growth of the American economy
1893 through investment that creates high wage, high benefit jobs.

1894 I thank the committee for its time and would be pleased to
1895 answer any questions you may have.

1896 [The prepared statement of Ms. Drake follows:]

1897

1898 *****INSERT 6*****

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1899

Mr. Latta. Thank you for your testimony.

1900

And Dr. Scissors, you are recognized for 5 minutes.

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1901 STATEMENT OF DEREK SCISSORS

1902

1903 Mr. Scissors. Thank you.

1904 My written testimony presented China facts to show part of
1905 the context for the CFIUS reform discussion.

1906 Sorry, I apologize. I can't believe people don't hear me
1907 anyway.

1908 So my written testimony presented China facts to show the
1909 context for the CFIUS reform discussion. I am going to go
1910 straight to the punchline here.

1911 If the amount of money tells us anything, Chinese technology
1912 acquisition is not done primarily in the United States. So if
1913 you just restrict Chinese investment in the United States, you
1914 are not going to block Chinese technology acquisition. You are
1915 going to do very little, in fact, to block it.

1916 To protect national security, the United States must be able
1917 to regulate certain businesses overseas, and particularly
1918 businesses involved with China. That is what the facts say. It
1919 is not an easy thing to do. I am not arguing that it is easy but
1920 that is what the facts say.

1921 On the flip side, the business community's objections are
1922 right that you can restrict investment in such a way that you deter

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1923 beneficial investment. So legislation has to be as narrow and
1924 clear as possible.

1925 So I am going to talk about the security requirement and then
1926 suggest some ways to make sure that H.R. 4311 or any modification
1927 of it does not or does minimal harm to foreign investment.

1928 It is not a good idea to single out China in U.S. law but
1929 the policy debate is actually about China. And the reason I feel
1930 confident of that is not just the numbers. It is because China
1931 is our first security rival which has enough money to use it as
1932 a weapon.

1933 All over the world, China uses loans as a political tool.
1934 For those following the Belt and Road Program that China has
1935 announced that it received some recognition from U.S. foreign
1936 policy, is basically using loans as a political tool. In that
1937 light, it would be a mistake, in my opinion, to spend too much
1938 time thinking about the size of the equity stake or what the
1939 definition of passive investment is. If China is providing
1940 financing to a firm, they have influence over a firm. And we need
1941 to be -- you know that doesn't mean that automatically something
1942 nefarious is going on. It means we need to realize that Chinese
1943 financing brings Chinese influence. Just like with any firm, if
1944 I am providing the money, I get a say in what you are doing.

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1945 And the money trail here is actually evaporating. Total
1946 Chinese investment in the U.S. was in the \$50 billion range in
1947 2016. This year it is tracking to reach less than, it is not going
1948 to even hit \$20 billion annually. So total investment is falling.

1949 There have been no \$100 million technology investments. We
1950 track \$100 million investments and up. There have been no \$100
1951 million technology investments since January 2017. So it has
1952 been well over a year.

1953 Now Beijing hasn't given up on acquiring technology. So the
1954 fact that we are not seeing investments in the U.S. is not a sign
1955 like okay, well, problem solved. The problem is obviously not
1956 solved and the administration has told us what their primary
1957 concern is.

1958 The Section 301 investigation was launched primarily to deal
1959 with coercion by China of U.S. firms using access to the Chinese
1960 market in order to gain technology. In other words, the primary
1961 technology threat is coercing American firms who want access to
1962 China; it is not Chinese firms investing here. We know that from
1963 the administration's position and we know that from the facts.

1964 And if China is blocked from an investment here, just as an
1965 example, it is a trivially easy thing to do to say hey, would you
1966 like to set up a joint venture in China? Really favorable terms.

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1967 You are going to make a lot of money. All we need is to get a
1968 look at the technology you are using, you know for our own
1969 regulatory purposes. So, we cannot locate the action here of
1970 Chinese technology acquisition as investment in the United
1971 States.

1972 Now the hard part is, What do we do? It is easy for me
1973 identify the problem. What do we do about it? I do work in a
1974 free market think tank. The U.S. is by far the largest national
1975 player in global investment, both coming in the United States and
1976 going out. And what investors love is certainty.

1977 So a phrase like country of special concern, that doesn't
1978 promote certainty. We need to define high-risk countries, not
1979 that they are the only risk countries, but we need to define
1980 high-risk countries in a very clear and concrete way that could
1981 be updated over time.

1982 And just as an illustration, if we have an arms embargo on
1983 a country, that is a higher risk country. That is a good proxy
1984 for high risk. It is not perfect. It needs to be changed but
1985 it is a lot better than saying countries of special concern.

1986 Similarly, words like critical apply to technology,
1987 materials, infrastructure, call out for definitions so business
1988 knows what to expect from the U.S. review process. Because we

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1989 want investment, those definitions should be as narrow and
1990 specific as possible. I am happy to talk more about that in Q&A.

1991 The goal should be that most countries and most firms have
1992 nothing to fear from CFIUS reform because it is not aimed at most
1993 countries and most firms.

1994 My last remark applies to all views of what should be done
1995 here. Whatever the final bill looks like, whether it is more
1996 intervention as to defense of national security or less, if CFIUS
1997 isn't budgeted and staffed properly, it doesn't matter.

1998 So I feel like even though we have talked about this, we are
1999 not paying enough attention to that issue. In a sense, the
2000 budgeting and staffing is the most important thing and then the
2001 goals all follow from what you are willing to provide, in terms
2002 of resources and people.

2003 Thank you.

2004 [The prepared statement of Mr. Scissors follows:]

2005

2006 *****INSERT 7*****

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2007 Mr. Latta. Well, thank you all for your testimony. And we
2008 will now move into the Q and A portion of the hearing.

2009 And I will begin the questioning and recognize myself for
2010 5 minutes.

2011 Mr. Lowery, how difficult is it for CFIUS to identify
2012 transactions which involve a foreign purchase of a U.S. company?

2013 Mr. Lowery. I don't think it is that difficult. If it is
2014 a foreign purchase, where there is going to be control, the first
2015 thing is just kind of, as we heard in the last panel, there is
2016 a process. There is a lot of incentive for the companies to come
2017 forward and basically present that to the U.S. Government for a
2018 review under CFIUS. If it is obviously in a non-national security
2019 area, they wouldn't do that.

2020 But beyond that, the Government does spend some of its
2021 resources on kind of scouring the M and A Press, which is actually
2022 a very robust press for a variety of reasons. And so from that,
2023 at least, you can basically have the -- CFIUS actually has subpoena
2024 authority, if it needs to, to go out and actually bring
2025 transactions in.

2026 So my own view is that you actually capture most of the
2027 critical controlling M and A transactions under CFIUS currently.
2028 That doesn't mean that it doesn't take some effort but I think

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2029 actually most of them are actually brought in through CFIUS.

2030 Mr. Latta. So would you say that the notice requirements
2031 right now are adequate that are out there already?

2032 Mr. Lowery. I think they are adequate. I actually do think
2033 in the FIRREA bill the addition of having a mandatory requirement
2034 for state-owned enterprises is a very good add.

2035 Mr. Latta. Thank you.

2036 Mr. Wolf, do export controls create a blacklist of prohibited
2037 persons and transactions, or whitelist the permitted goods and
2038 transactions, and is this the right approach?

2039 Mr. Wolf. So with respect to individuals -- and that is an
2040 excellent question because export controls are about controls on
2041 information and things, controls on people, you know end-uses,
2042 and end uses. And as was described in the previous panel, there
2043 are lists of proscribed individuals and companies to which the
2044 export or re-export of anything is prohibited for national
2045 security reasons, in order to get that threat. So that is the
2046 blacklist approach. It goes to the certainty point that was very
2047 well made a moment ago in that you have to know who you can't deal
2048 with to know who you can't deal with.

2049 With respect with the identification of technology, that is
2050 done both unilaterally and multi-laterally with our regime

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2051 allies. And for companies to know what requires a license when,
2052 what information is required to get government permission to
2053 release, they have to know what it is. And so it is a very explicit
2054 list, a very long list, a Commerce Control List, of the types of
2055 technologies and related items that are controlled.

2056 To the extent it is sometimes too difficult to describe
2057 exactly the term, occasionally, there are notes that say
2058 particular technologies in these areas are not caught, such as
2059 the whitelist. But the primary approach is a positive list
2060 approach of identifying the names of the companies, and the
2061 individuals, and the types by technical description, or other
2062 objective terms the technologies that require permission to
2063 transfer.

2064 Mr. Latta. Thank you.

2065 Dr. Scissors, what role does foreign direct investment play
2066 in creating economic growth here in the United States?

2067 Mr. Scissors. Well, the world changes over time. I think
2068 I will --

2069 Mr. Latta. I think -- yes, thank you.

2070 Mr. Scissors. The role changes over time. I will answer
2071 that question I think you know in a quick fashion but a very
2072 important fashion.

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2073 The President and a lot of other national and local
2074 politicians have said the U.S. needs to, at least partly, to the
2075 extent we can, reindustrialize. There are manufacturing jobs
2076 that can and should be created in the U.S. that, to some extent,
2077 have been lost to automation or trade and we can bring some of
2078 them back here. And I think that is true to some extent. It
2079 requires foreign investment. We can't do it without that.

2080 So if you care, as I do, and I think probably almost everyone
2081 in this room does, care about reindustrialization, if you deter
2082 foreign investment, you are really striking -- it is a very
2083 difficult task to bring millions of manufacturing jobs to the
2084 United States. You can't do it without foreign investment.

2085 So that is the way I would say I would describe it. It is
2086 a big question but foreign investment is crucial to the idea of
2087 bringing manufacturing jobs, a large number of manufacturing jobs
2088 to the economy.

2089 Mr. Latta. Thank you.

2090 Mr. Lowery, what is the best way to address the question of
2091 how to ensure sensitive U.S. technology information that does not
2092 fall into foreign hostile -- foreign hands?

2093 Mr. Lowery. So I think that it is a combination of factors.
2094 One is I think the most important one, which actually really isn't

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2095 the U.S. Government. It is actually the companies themselves.
2096 The companies themselves, they don't want to allow their
2097 technology to fall into foreign hands or, by the way, domestic
2098 hands, because that is the technology that allows them to make
2099 money. And so that is the quote, secret sauce, unquote.

2100 Going beyond that, though, I think the export control regime
2101 is probably best regime we have and it needs to be updated. And
2102 that is why I think Congressman Royce's bill is a very positive
2103 bill and Congressman Engel's bill. And I think that that helps
2104 put more force into what they should be doing, the export control
2105 regime.

2106 I think CFIUS also is very helpful but, it is my own view,
2107 is that it should be about what is a foreign investment into this
2108 country. And so I think the combination of what the private
2109 sector does, and then the export control regime, and the CFIUS
2110 I think is the best way to address these issues.

2111 Mr. Latta. My time has expired and I recognize the
2112 gentlelady from Illinois, the ranking member of the subcommittee
2113 for 5 minutes.

2114 Ms. Schakowsky. Thank you, Mr. Chairman.

2115 I wanted to explore some things with you, Ms. Drake. Gene
2116 Green, I don't know if you were here for the earlier, he raised

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2117 some questions about labor and about the workforce. And the
2118 answers that we heard from Mr. Tarbert at Treasury essentially
2119 was we narrowly focus on national security issues. And I would
2120 argue that it really is narrowly defining national security
2121 issues. And in some ways I think you have tried to broaden that,
2122 what is a national security issue, and I would certainly like to
2123 see to the extent that jobs are at stake, et cetera, is also a
2124 part of a national security issue.

2125 But you mention in your testimony additional shortcomings
2126 of CFIUS that are not addressed in FIRRMA -- right, FIRRMA --
2127 including the issue of greenfield investments. And so what are
2128 greenfield investments and why might they present a concern for
2129 the United States?

2130 Ms. Drake. Thanks. So greenfield investments are when you
2131 are not buying a going concern. So you might be buying the land
2132 and building a factory from scratch. And in theory, you would
2133 think well this one of the good kinds of foreign investments that
2134 we want because if you are building a brand new workplace or
2135 factory, you are creating jobs that didn't exist before. And
2136 that is potentially the case.

2137 But in the case, I gave the example, in my written testimony
2138 and mentioned it briefly, Tianjin, which is a steel pipe producer

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2139 that is about to open a new facility actually in Texas, near Mr.
2140 Green's district, and the problem is is that if they behave in
2141 such a way, if the whole point of the investment is to evade U.S.
2142 trade remedy law, whether it is dumping countervailing duties,
2143 Section 232, and then they bring in from their own company their
2144 own suppliers in China, which they own, dump subsidized inputs,
2145 we are not going to be able to reach those inputs through trade
2146 remedy law. And then they are behaving here in a predatory manner
2147 that might drive other U.S. competitors out of business.

2148 So we could, in the long-run, be losing jobs, be harming
2149 communities, and potentially driving down wages in that sector,
2150 if we end up with a monopsony type situation, where there are fewer
2151 buyers of labor.

2152 So these are the kinds of things that we want to look at when
2153 we are looking at does foreign investment benefit our economic
2154 security, which really is linked. I mean whether you talk about
2155 a net economic benefits test or you just talk about expanding our
2156 view of what national security is, if our economy isn't strong,
2157 then certainly our national security is at greater risk.

2158 Ms. Schakowsky. So right now CFIUS concentrates on this
2159 narrow view of national security. And in your testimony, you
2160 cited the U.S. China Commission's recommendation for addition of

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2161 a quote, net economic benefits test, unquote. And do you see that
2162 being under CFIUS or some sort of a new regime, you know regimen?

2163 Ms. Drake. We would put it under CFIUS, rather than building
2164 a new whole regime. And you know Canada does a similar thing.
2165 Australia does a similar thing. Those are both popular
2166 destinations for foreign investment. So it is not driving away
2167 investment but it is a way to say let's make sure, if you are
2168 investing, it is not to strip the knowhow and technology and take
2169 the jobs elsewhere but you are committing to having the production
2170 here for the long-term. You are committing to hiring U.S.
2171 workers, to pay them good wages. These all really matter because
2172 if it is really predatory and it ends up killing an entire sector
2173 of the U.S. economy, those are jobs but those are, in the long-run,
2174 things that we can no longer make. And we have got to rely, then,
2175 on imports from some other source.

2176 So these things really should be looked at part and parcel
2177 by CFIUS.

2178 Ms. Schakowsky. And so you think that we have a structure
2179 that could add on this whole additional piece. I mean I think
2180 it is a really important piece and you know where it gets housed
2181 and where it happens. Does the Department of Labor do any of these
2182 things now, looking at these investments and how they impact the

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2183 overall economy and jobs?

2184 Ms. Drake. Not in that manner. As you heard from Secretary
2185 Tarbert on the first panel, the Secretary of Labor sits on CFIUS
2186 but is a nonvoting member and doesn't really look at these sort
2187 of workforce, wage, jobs issues. But it could easily be done and
2188 I think it would be value added to what CFIUS is already doing.

2189 Ms. Schakowsky. You know I would really like to talk to you
2190 about that. I think these are matters of national security. I
2191 would like to work with you and the AFL-CIO on that.

2192 Thank you.

2193 Ms. Drake. Thank you.

2194 Mr. Latta. Thank you. The gentlelady yields back.

2195 The chair recognizes the gentleman from Indiana for 5
2196 minutes.

2197 Mr. Bucshon. Thank you, Mr. Chairman.

2198 Mr. Lowery, when you were at Treasury, the CFIUS process was
2199 substantially revised. How did the process change and does it
2200 provide any insight into how policymakers should proceed under
2201 the current proposals?

2202 Mr. Lowery. Thank you, sir. So the way it mainly changed,
2203 it didn't change what CFIUS was looking at, which I think Mr.
2204 Tarbert talked about. What it did was it brought in -- it made

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2205 a much more formal review process by the intelligence community.

2206 So the intelligence community was always part of CFIUS but
2207 it just, it enhanced it. And then it also enhanced the level of
2208 our accountability from the U.S. Government. So it wasn't just
2209 signed off on by the career civil servants, not that they don't
2210 do a great job but, basically, the people that have to testify
2211 before Congress have to now sign off on all transactions.

2212 It also provided a lot more transparency between the
2213 executive branch and congressional branch which, frankly, did not
2214 exist before that.

2215 So all of those were a lot of process issues. The results
2216 of some updates on the types of issues we were looking at,
2217 especially on critical infrastructure and some homeland security
2218 issues, which was an update from a previous era.

2219 I would say probably the last thing is but it took a lot of
2220 time. So in 2007, we passed FINSA, through Congress. It took
2221 about a year and a half to do the regulatory process to get it
2222 back up into place. And then you had to make sure you had the
2223 right personnel because everybody has to have the right clearances
2224 and so forth to look at this. So it just takes a long time.

2225 Some of my criticism of the FIRRMA bill, and not all of the
2226 FIRRMA bill but parts of it, are that you would take this and

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2227 metastasize it. And that is the part that I worry about, that
2228 we literally wouldn't be able to implement it.

2229 Mr. Bucshon. Yes, understood.

2230 Mr. Wolf, in your testimony, you said, and this is
2231 interesting to me, that one side of the CFIUS debate are folks
2232 that believe transactions are more creative than the Government
2233 can understand. I am just curious if you thought that when you
2234 were at Commerce.

2235 Mr. Wolf. Yes, in fact, which is why I --

2236 Mr. Bucshon. That is a serious question but it is also kind
2237 of in jest because I --

2238 Mr. Wolf. No, technologies are evolving, transactions are
2239 evolving. The world is evolving quickly. And in any area of law
2240 and regulation, it is difficult for the Government regulations
2241 and statutes to keep up.

2242 And I acknowledge that as a serious debate.

2243 Mr. Bucshon. Let me just say I agree with you. I do think
2244 that you know bureaucracies can get behind pretty quickly.

2245 Mr. Wolf. Right.

2246 Mr. Bucshon. And I would just phrase it in a different way.
2247 It is not that the Government can't understand it, it is just that
2248 things are evolving so quickly because of the way, the inherent

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2249 nature of the way agencies and the Government do their business
2250 that it is pretty easy for them to quickly get behind.

2251 I am not saying I disagree. I just thought I would ask you
2252 whether you thought that when you were at Commerce.

2253 Mr. Wolf. But it is the key philosophical question in this
2254 FIRREA debate --

2255 Mr. Bucshon. Yes.

2256 Mr. Wolf. -- which is if, in light of that fact, should
2257 you have rather expansive authority with very broad general
2258 definitions on inbound and outbound investments, in order to be
2259 able to know it when you see it later, whether there is a
2260 transaction of concern.

2261 Mr. Bucshon. Yes.

2262 Mr. Wolf. And then the second question is if that expansive
2263 authority does more than good with respect to the open investment
2264 culture that every President before us has acknowledge. So I have
2265 got a longer version of that but that is the essential debate in
2266 this question.

2267 Mr. Bucshon. Yes, understood and I don't disagree. I think
2268 we need to balance our ability to accept foreign investment and
2269 to make sure that our economy is strong and not inappropriately
2270 burdensome on investment by overreaching. That is why we need

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2271 to strike a balance here.

2272 But that said, you know based on what people like me are
2273 currently hearing in the classified setting on a lot of issues,
2274 you know we have some really pretty serious national security
2275 issues to address and that is why getting this right is really
2276 important.

2277 So, I yield back, Mr. Chairman.

2278 Mr. Latta. Thank you very much. The gentleman yields back.

2279 The chair recognizes the gentleman from Kentucky for 5
2280 minutes.

2281 Mr. Guthrie. Thank you very much. And just finishing on
2282 that, and not my line of questioning, but that is one of the debates
2283 we have as the legislative branch. How much authority do we
2284 grant? Because it is quicker to react regulatory than
2285 legislatively and you get broad definitions, and broad
2286 authorities, and you hope that the things go down the way that
2287 Congress intended when you do that. But with the Chevron case,
2288 it gets to the point where both sides, both have -- and if you
2289 are in the executive branch, you probably want to do that anyway,
2290 taking a lot of liberty, I think, with what Congress intended.

2291 So, unfortunately, we are to the point that we have to be
2292 more prescriptive than that because you can't legislate for who

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2293 is in power now. You have got to legislate for who may be in power
2294 in the future.

2295 So, Mr. Wolf, this is the first question to you. One of the
2296 reasons cited for the current legislation is the need to deal with
2297 emergency situations, such as when a foreign purchaser is actively
2298 seeking to acquire U.S. technology.

2299 How long does it take for the export control process to work
2300 and is it suited for emergency situations?

2301 Mr. Wolf. And that is the follow-on to my previous point.
2302 And the key effort in this effort, in this debate, which I think
2303 is very well laid out in a process point in Section 109 of
2304 Congressman Royce's bill, is the need to identify the technologies
2305 of concern, the emerging technologies that are being sought by
2306 countries of concern, identify and regulate them, regardless of
2307 the nature of the transaction, whether it is a joint venture, or
2308 whether it is a voluntary sale, whether it is a telephone call.
2309 If technology is of concern, if it is being sought to be acquired
2310 by a foreign government to our detriment, it should be regulated
2311 and that is exactly what the export control system does.

2312 Now to the timing question. So I was so concerned about this
2313 when, during my time, we created a process that was referred to
2314 earlier, the OA521 process that allows the Commerce Department

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2315 to identify immediately and impose unilateral controls, that is
2316 without needing the permission or coordination of other countries
2317 over any technologies for any foreign policy or national security
2318 reason.

2319 So the legal answer to your question is it can be done as
2320 quickly as a reg can be written and published, in a day.

2321 The harder question, which is where the process point comes
2322 in from Secretary Royce -- or Congressman Royce's bill is to
2323 identify those technologies that, historically, we are not
2324 familiar with. And in this entire debate, artificial
2325 intelligence, robotics, driverless vehicle technology, a long
2326 list of other technologies are the target of acquisition.

2327 And so my primary advocacy is that the Government devote
2328 significantly more creative resources to identifying those
2329 technologies, listing them, and tagging their ability to be
2330 released to countries and end uses, and end-users of concern,
2331 regardless of whether it is an investment, passive or otherwise.

2332 So, it can be done quickly. So the law is there to do it
2333 quickly. The hard part is the brain power to think through what
2334 really is of concern and without doing it in such a broad way that
2335 you discourage investment in the U.S. or U.S. companies from
2336 developing this technology in the U.S.

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2337 Mr. Guthrie. So the law doesn't prevent you from acting
2338 quickly, the process, I mean doing the right thing correctly.

2339 Mr. Wolf. It is a function of will, and creativity, and
2340 intelligence, and collective efforts.

2341 Mr. Guthrie. Up to the point where everybody agrees this
2342 is right but we have got to wait so many days because of the law.
2343 The law actually allows you to --

2344 Mr. Wolf. The existing regulations with the broad authority
2345 that Congress has given the Commerce Department exist to tag and
2346 identify something immediately.

2347 One quick follow-on. However, that shouldn't be where it
2348 ends because the worst export controls are the ones that stay
2349 forever unilaterally, that is, only the U.S. imposes, because what
2350 that does is it drives that work, that technology, that
2351 development to our allies and then we lose that work because the
2352 U.S. is a more restrictive environment than our allies.

2353 And so what I have just described as a short-term unilateral
2354 fix but the regulation and also Congressman Royce's bill lays out
2355 a process to make it multi-lateral so that our allies are in the
2356 same boat with us, and achieving the common objectives, and
2357 leveling the playing field with respect to control of the
2358 technology of concern.

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2359 Mr. Guthrie. Okay, thanks.

2360 Mr. Lowery, is CFIUS equipped to review not only inbound
2361 foreign investment into the U.S. but also outbound transactions,
2362 such as the contribution of intellectual property to a joint
2363 venture with a foreign entity?

2364 Mr. Lowery. No, it is not. In the original FIRMA bill
2365 provided that authority and that is the biggest problem of the
2366 bill. It should not be doing that.

2367 That is, CFIUS should be about foreign investment into this
2368 country. And if it is a concern about what is happening that is
2369 being exported, whether it is in a joint venture or whether it
2370 is just a regular sale, that is when you turn to the authorities
2371 that Kevin Wolf just was talking about. That is what the export
2372 control system is all set up to do.

2373 That doesn't mean it doesn't need to be modernized, updated,
2374 and maybe sometimes having a fire under the you know whats from
2375 Congress. And I think that that is kind of what I saw from
2376 Congressman Royce and Congressman Engel's bill.

2377 Mr. Guthrie. Okay, thank you.

2378 And Dr. Scissors, can you please touch on the policy
2379 motivations for H.R. 4311 that stem from the Made in China 2025
2380 Plan?

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2381 Mr. Scissors. Sure. You know one difference in talking
2382 about how quickly to move is that you know China has a declared
2383 intent to acquire technology, to attain global technological
2384 leadership. It is not just to acquire technology to make its
2385 people better off. It is to be the leader, ahead of all of you,
2386 everyone else in various sectors. And in some of those sectors,
2387 we might think of okay, electrical cars. You know we don't want
2388 a lot of combustion engines on Chinese streets for 1.4 billion
2389 people. But other areas, like semiconductors, there is an
2390 obvious national security component to that, as well as strategic
2391 economic component.

2392 So Made in China 2025 is not the first time the Chinese have
2393 announced an industrial policy. It is the first time they have
2394 announced an industrial policy at the high end, where we are going
2395 to get technology at the high end. We are going to subsidize our
2396 companies at the high end.

2397 So the challenge to the United States has changed
2398 fundamentally because China is now competing with us in areas
2399 where we thought we were the undisputed global leader. And their
2400 intent is explicitly for that no longer to be true, that we will
2401 not be the undisputed global leader. Mr. Guthrie. Ms.
2402 Drake, you were shaking your head a couple of seconds ago. Do

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2403 you have a comment on that, then?

2404 Ms. Drake. Oh, I just, I agree with --

2405 Mr. Guthrie. You were agreeing, obviously.

2406 Ms. Drake. -- absolutely with those comments and think
2407 that we have to adjust what we are doing to respond to what China
2408 is doing, absolutely.

2409 Mr. Guthrie. Okay, thank you.

2410 And I yield back.

2411 Mr. Latta. Well, thank you very much.

2412 And seeing no other members here to ask questions, first I
2413 want to thank you all for being here. Your testimony has been
2414 very, very informative. It is an area that you know I think that
2415 this committee is delving into and we have got to do something.
2416 So I want to thank you for being here.

2417 And before I conclude today, I would also like to make sure
2418 that we submit for the record, by unanimous consent, a statement
2419 from FCC Commissioner Michael O'Rielly.

2420 [The information follows:]

2421

2422 *****COMMITTEE INSERT 8*****

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2423 Mr. Latta. And pursuant to committee rules, we remind
2424 members that they have 10 business days to submit additional
2425 questions for the record and I ask that witnesses submit their
2426 response within 10 business days upon receipt of those questions.

2427 And, without objection, the subcommittee will stand
2428 adjourned.

2429 [Whereupon, at 12:26 p.m., the subcommittee was adjourned.]