

**Testimony of the Honorable Clay Lowery  
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Subcommittee on Digital Commerce and Consumer Protection  
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**Perspectives on Reform of the CFIUS Review Process**

Chairman Latta, Ranking Member Schakowsky, and Members of the Committee, I thank you for the opportunity to testify on Reform of the CFIUS process and particularly the Foreign Investment Risk Review Modernization Act of 2017 (FIRRMA). My name is Clay Lowery, and I am currently Managing Director of Rock Creek Global Advisors, a consulting firm that advises companies on international economic and financial policy matters. Our clients have views regarding FIRRMA – both positive and negative – however, my testimony today reflects my own views.

My views are largely informed by my prior government experience as well as my own analysis of the FIRRMA bill. I served in the U.S. Government from 1994 to 2009, most of it at the Treasury Department but also at the National Security Council. During my final years in government, from 2005 to 2009, I was the Assistant Secretary of International Affairs for the Treasury Department, and one of my primary responsibilities was overseeing the Committee on Foreign Investment in the United States, or CFIUS, during the last CFIUS modernization effort.

In 2006, I inherited the consequences of one of the most controversial transactions in the history of CFIUS: the Dubai Port World case. This case put a spotlight on the shortcomings in the CFIUS process at that time and the need to modernize it. Over the next few years, I led a reorganization of Treasury to address these shortcomings and assisted with a reorganization of CFIUS across the federal government, including with the intelligence community. As part of this process, I worked with Congress to create the Foreign Investment and National Security Act of 2007 (“FINSAs”), worked with the White House to draft the 2008 Executive Order, oversaw the rule-making process that

developed the CFIUS regulations of 2008, and led the CFIUS review process, including the analysis and disposition of hundreds of transactions.

I am pleased to be testifying alongside Kevin Wolf and Derek Scissors, both of whom I respect and of whose views and expertise I think highly.

In my testimony, I will provide some background about CFIUS as well as discuss my general support for FIRRMA while pointing out what I consider to be several key shortcomings in the proposed November 2017 bill – particularly from the perspective of someone who has had to implement a major reform of CFIUS in the past.

I would like to highlight that I know there have been a number of informal updates to FIRRMA by the House Financial Services Committee, the Senate Banking Committee, and the Administration, as well as a companion piece of legislation addressing export controls in the House Foreign Affairs Committee. I think that these updates are addressing a number of the criticisms I have of the November bill, which are highlighted in my testimony today, and the reform agenda seems to be moving in what I consider to be a much more productive and implementable direction.

As an initial matter, I think the most important thing to keep in mind about CFIUS is its purpose: ensuring national security while promoting foreign investment. This mission statement comes directly from the legislation that created CFIUS and has guided it for the last 30 years.

Roughly 7 million American workers, or about 6 percent of total U.S. private-sector workers, are employed directly through foreign direct investment (FDI). These are good, high-paying jobs that provide average compensation per worker 24 percent higher than U.S. private-sector wages. These jobs are disproportionately in the manufacturing sector: 20 percent of all manufacturing employment is due to FDI. And, according to a recent Reuters analysis, two-thirds of the manufacturing jobs created from 2010 to 2014 can be attributed to foreign direct investment.

In short, FDI is in the national interest of the United States and we should not become complacent. While the U.S. remains the largest destination for FDI, our share of attracting such investment has fallen about 40 percent in the past 16 years.<sup>1</sup>

This dual mission – to ensure national security while continuing to encourage foreign investment into the United States – should be kept in mind when trying to reform CFIUS. In my remarks today, I will emphasize three main points, which I hope will contribute to your efforts to modernize CFIUS successfully.

1. The FIRRMA bill should be one element of a comprehensive strategy to protect U.S. technology, which should also include reforming and enhancing our export control system.
2. Key parts of the current FIRRMA bill are vague, duplicative and unnecessarily burdensome, and should be amended in order for this legislation to be effective.
3. CFIUS does not have adequate resources or expertise to deal with the massive number of cases that would result from the current draft of FIRRMA.

Before I discuss these issues, however, I wanted to say a few words about the CFIUS review process.

### **CFIUS Process**

CFIUS is an interagency committee that investigates transactions that could result in control of a U.S. business by a foreign person in order to determine the effect, if any, on U.S. national security. CFIUS is chaired by the Treasury Department and is comprised of the Departments of Commerce, Defense, Energy, Homeland Security, Justice, and State, as well as the Office of the U.S. Trade Representative and the Office of Science and Technology Policy. In addition, the Intelligence Community under the leadership of the DNI and the Department of Labor serve as non-voting members of CFIUS.<sup>2</sup>

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<sup>1</sup> United Nations Conference on Trade and Development (UNCTAD) World Investment Report 2017.

<sup>2</sup> Several offices in the executive office of the president also serve as observers of CFIUS.

Parties submit their transactions to CFIUS for review on a voluntary basis, although CFIUS has the authority to compel a filing if necessary. The statute prescribes strict timelines for CFIUS's review, but parties are encouraged to pre-file with CFIUS to provide the government with an opportunity to begin its analysis before the clock starts running.

CFIUS officials are obligated by law, and subject to the possibility of criminal or civil penalties, not to disclose information regarding transactions. The rationale behind this rule is to protect both proprietary and intelligence information.

Once a transaction has been filed, CFIUS first determines whether it has jurisdiction to review the transaction – that is, does it involve foreign control of a U.S. business in interstate commerce – and, if it does, CFIUS then undertakes a three-part evaluation:

1. Does the acquirer pose a threat to national security? This analysis is led by the Intelligence Community.
2. Is national security made more vulnerable by the acquisition of the U.S. assets? This analysis tends to be driven by the CFIUS agency with applicable subject-matter expertise.
3. Do the consequences of permitting a specific transaction that combines the identified threat and vulnerabilities risk impairing national security?

CFIUS investigates these questions in the first 30 days after it accepts the filing. At the end of those 30 days, CFIUS can undertake a second stage investigation that lasts up to an additional 45 days if it is not satisfied or in most transactions where the acquirer is state-controlled.

The process, the timelines, the composition of CFIUS, the protection of information, and the reforms of 2007/08 have all been designed by Congress and respective Administrations to protect national security and to do so while maintaining the United

States' long-standing policy of openness to investment. In addition, recognizing that some transactions may raise national security issues, Congress has expressly authorized CFIUS to enter into mitigation agreements with the transaction parties to address those concerns. There are many different methods of mitigating a transaction. Examples include establishing special security procedures at facilities that can be verified by the government, implementing certain passivity mechanisms, or even forcing a company to divest specific assets. In short, these mitigation agreements impose measures on the parties intended to address national security risks. These mitigation agreements are the pressure valve that enables CFIUS to find solutions to more difficult transactions in order to fulfill its mission of protecting national security while promoting foreign investment.

If at the end of that 75-day period, CFIUS cannot make a decision or recommends that a transaction should be prohibited, the matter is referred to the President who has 15 days to make a decision. Only the President is authorized to block a transaction.

### **China as the Rationale for Updating CFIUS**

Since CFIUS was reformed ten years ago, it has performed in an exceptionally professional and thoughtful manner. Congress and the American people should be proud of how well the group of individuals across the government have carried out their duties. Their scrutiny of cases is thorough, and they have protected national security while preserving the reputation of the United States as open to investment from around the world. CFIUS in many respects has been a model not only within our government but also for other countries: various nations are now considering how they can emulate the U.S. process.

That said, there is little question that the investment landscape has changed substantially in those ten years. By far, the most important change has been the rise of China as a direct investor in the United States. Ten years ago, CFIUS would review just one or two transactions a year that involved a Chinese acquirer – today, it is dozens and dozens of transactions every year.

As highlighted by the bill's sponsors, the rise of China and its growing threat is the key rationale behind this bill.

Derek will cover this in much more detail in his testimony, but in China, the State exerts much more control over the economy than does the U.S. Government or that of any other major economy. The Chinese government is directing a comprehensive strategy, much of it outlined in the Made-in-China 2025 Plan, to become dominant in emerging technologies not only through development of its own industries but also through acquisitions, including from U.S. companies. China's strategy incorporates government efforts to:

- Fuse the military and civilian sectors;
- Subsidize industries of the future and individual companies in these sectors;
- Support cyber espionage to serve commercial and national security objectives;
- Use restrictions on foreign investment and licensing to coerce technology transfers; and
- Impose domestic standards that favor Chinese companies and promote their adoption in other markets, pressuring U.S. manufacturers to conform to Chinese standards.

### **FIRRMA Bill as a Partial Response**

The United States must address this serious and growing challenge in a comprehensive manner that goes well beyond the scope of this hearing. Such a strategy should certainly include enhancing our military and cyber capabilities, upgrading our export control system, and modernizing CFIUS, among other elements.

The FIRRMA bill is one important step. I think this bill gets a number of things right. For example, the bill correctly:

- expands CFIUS' jurisdiction from only reviewing cross-border direct investments into the U.S. where the acquiring party gains control of the asset to reviewing

- foreign direct investment (i) into certain real estate transactions in the proximity of military facilities, and (ii) where the investor does not necessarily obtain a controlling stake in a national security asset;
- mandates that notice be filed for direct investments by entities with a significant foreign government interest;
  - expands the illustrative list of national security factors that CFIUS may consider in evaluating transactions; and
  - encourages the Administration to share information with our allies and to work with them on their foreign investment screening regimes to make them more consistent with the U.S. regime.

That said, Congress should review and revise the language in the bill to clarify its intent. For instance, the inbound investment provision should make clear that the concern about minority investments in critical technology or critical infrastructure companies is not about the companies *per se*, but about any critical technology associated with those companies. I also am concerned that the FIRRMA bill appears to exempt CFIUS from judicial review for even procedural matters – potentially limiting due process and review of the government’s actions.

Such issues can be rectified and clarified by small drafting amendments or by a sound and thorough “rule-making” process that allows for input from the private sector and other interested parties.

### **Vague, Duplicative, and Burdensome**

Addressing my other key concerns will take much more work. Among these are that the bill uses vague language, duplicates existing export control authority, and will be overly burdensome to implement for both the private sector and the government.

This results from the fact that the FIRRMA bill is only partially about foreign investment into the United States. Instead, there is a substantial part of this bill that transforms the Committee on Foreign Investment in the United States, CFIUS, into a technology control

regime in which there isn't a merger, there isn't an acquisition, and there isn't even a foreign investment into the United States.

My concerns about these issues stem from my experience in implementing the last CFIUS modernization legislation in 2007. This process took roughly a year and a half. It required a substantial effort by lawyers and policy makers across the government, and in that case, we were just updating the procedures and substance of a structure that was already in existence. The FIRRMA bill, by contrast, as the Administration and Congressional sponsors have highlighted, is much more far reaching and expansive.

FIRRMA will make for a much more complex rule-making process than the CFIUS modernization effort from 10 years ago. I am apprehensive not just because it will take much longer than a year and a half to promulgate these regulations, but because the legislation uses vague language and leaves too many terms to be defined and interpreted, such that there is a distinct possibility of unintended changes or unforeseen consequences resulting from the rule-making process.

Congress is all too familiar with what that can mean. In the 2010 Dodd-Frank bill, a provision was put in to create what is known as the "Volcker Rule." As a former U.S. Treasury Department official, there are few careers that I respect more than Paul Volcker's. However, the legislative rule named after him for what may have been a sound idea has led to an overly complex rule that is vague, burdensome and essentially a regulatory nightmare for both the regulators and for the financial institutions they regulate. I presume you have heard from your constituents about these consequences. Personally, I doubt that this was what was intended by Mr. Volcker's efforts. I worry that provisions in FIRRMA may, regardless of how well intended, suggest a failure to learn the lessons of the "Volcker Rule" and create substantial implementation problems.

Let me provide a simple example that highlights anomalous results from the FIRRMA bill as drafted that would treat similar transactions differently depending on the corporate form of the end user or licensee. A technology license and associated support provided



by a U.S. company to a wholly foreign-owned company is presumptively considered an “ordinary customer relationship” and is not subject to CFIUS review. Yet the bill appears to make that same transaction subject to CFIUS investigation if that licensee is a joint venture. Likewise, if that same technology license and associated support constituted part of the U.S. company’s contribution to a joint venture, an investigation would also be triggered. In the end, technology and associated support are being made available by the same U.S. party to a non-U.S. party, but some transactions would trigger an investigation by CFIUS and others would not. We should worry about creating a guessing game for U.S. companies that requires hours of legal analysis of complex transactions and structures – when their non-U.S. competitors are not burdened with anything even remotely similar.

The FIRRMA bill has left many terms undefined or ill defined. For example:

- What is a “critical technology company,” which relates to both the incoming investment provision (Section 3(a)(5)(B)(iii)) and outgoing transactions (Section 3(a)(5)(B)(v))?
- What does “intellectual property” mean?
- What is the definition of “associated support”?
- What is “any type of arrangement”?
- What is an “ordinary customer relationship”?
- What are “critical technologies”?
- What are “emerging technologies”?
- What are the sectors (of critical technologies and emerging technologies?), what are the subsectors – Do we need a list?

In fact, it is this last question that leads to my second concern with FIRRMA -- it duplicates our export control regime, which is better equipped than CFIUS to address the threat to national security posed by technology exports. Kevin has provided details on this in his testimony, but one of the concerns that critics of using export controls for emerging technologies have noted is that it is sometimes hard to define the technology

that is not already controlled. This bill seems to suggest that CFIUS – a group of roughly 100 people who don't have subject matter expertise – will be able to do that better than the roughly 500 people we have in Defense, Commerce, and State that are already working on these export control issues every day.

This leads to the final concern I would like to highlight, and that is that portions of the FIRRMA bill are overly burdensome. Many observers have expressed concerns that the proposed regime intrudes excessively into the business affairs of US companies and imposes undue burdens on them. While that may be the case, I want to focus more on the burden FIRRMA would impose on our government.

The U.S. Government is not always known for being efficient. CFIUS, even without any expansion of its jurisdiction, is especially prone to inefficiency because it is made up of numerous agencies that must come to a unanimous decision. Moreover, its mandate is focused on protecting national security. For a government employee, while such a mandate clearly “focuses the mind”, it also adds substantial pressure to “getting it right” each and every time – I promise you that this is not a recipe for efficiency.

Today, CFIUS reviews approximately 150 to 200 transactions a year. Over the preceding few months, I don't think there has been a single government witness, CFIUS practitioner witness, or CFIUS expert who has testified before Congress who has not said that significantly more resources are needed for CFIUS. Maybe just as importantly, many of them have also said that we need to develop greater subject matter expertise given the rise in complexity of the transactions under review.

With FIRRMA, however, the number of transactions under review will expand from 200 a year to several thousand. If this expansion is truly necessary for our national security and cost is the only issue, then by all means – let us find a way to pay for it. But this expansion is not driven by national security. Instead, it would be the needless result of a bill that is too vague and too duplicative, rendering it practically impossible for CFIUS to

accomplish the work it has been tasked to do and that is so vital to U.S. economic and national security.

Most CFIUS practitioners in Washington would tell you that over the last few years, CFIUS reviews have become very slow and the idea that transactions are being handled in a 30-day time period or 75-day time period as defined in legislation is a joke.

Let me be clear that this is not a criticism of the professionalism and efforts of the CFIUS team, who are some of the hardest working people in government, and who have demonstrated over a long period of time that they can be trusted to protect confidential and proprietary information.

Instead, it is an acknowledgement that the number of transactions CFIUS must review has risen and the nature of foreign direct investment has become more complex, making it difficult for the government to keep up. CFIUS members recognize that national security decisions should not be rushed or made lightly, but they also have competing responsibilities other than analyzing CFIUS transactions. And all these challenges exist under the current system, without a single change to the scope of CFIUS.

To conclude, let me reiterate that I am broadly supportive of the CFIUS modernization effort, but I think continued work on the informal updates I mentioned earlier in my testimony is needed to ensure that the outcome does not have the unintended consequence of chilling investment in the U.S. and harming our competitiveness around the world – both of which are important to our economic strength, which is the backbone of President Trump’s National Security Strategy. In addition, adding the implementation risk I’ve tried to identify in this testimony could destabilize the excellent and, so far, targeted work that CFIUS currently performs. In other words, I humbly suggest that without fixing this bill – we could harm our national security – not enhance it.

Thank you.