

## Panel III: Assessing Export Controls and Foreign Investment Review

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Vice Chairman Cleveland, Commissioner Glas, Chairman Bartholomew and distinguished Commissioners, thank you for the opportunity to share with you today my perspective regarding US export controls and the foreign investment review process. It is an honor to share the podium with my colleagues, David Hanke and Kevin Wolf, each of whom brings valued insights to the issues the Commission is reviewing.

As a practitioner for over 35 years, as well as a former US Naval Reserve Intelligence Officer, I have had the opportunity to engage with several Administrations on export control and foreign direct investment (“FDI”) issues before the Departments of Defense, State, Commerce, Energy, and Treasury, as well as the intelligence communities. I have participated in various export reform efforts through my appointments to a number of federal advisory committees and have seen first-hand the impact of reforms such as the DTSI initiatives under the Clinton Administration and the export control reform efforts under the Obama Administration on regulated parties. This engagement has provided me insight into practical and regulatory challenges that impact the Executive branch’s ability to meet national security objectives as well as the information gaps that affect Congressional legislative proposals. Nowhere are these gaps more evident than in the changing nature of export controls and FDI.

Before providing my remarks, I would like to state that I am testifying to you today in my capacity as a National Security Fellow at the George Mason University Antonin Scalia Law School, National Security Institute. The views expressed in my testimony are personal and do not reflect the views of any organization or individual other than myself. My views are also not designed to provide legal advice, but to identify areas where legal and regulatory gaps may exist which would benefit from further study by the Commission and/or additional legislation.

Based on my experience, I address two specific areas in my testimony:

- Current vulnerabilities and risks that remain in the US foreign investment review system; and
- Recommendations for Congress based on my assessment of these issues.

These broad and complex issues affect not only the US-China relationship, but all countries and parties that are subject to the requirements of these laws and regulations or that have developed regimes that mirror the objectives of the processes the US utilizes to manage both export control decisions and FDI resolutions. As such, although the observations discussed in my testimony apply to China, they also extend to other countries and parties that are similarly situated.

It is important to lay the foundation for how the export control and FDI laws were developed and function today. This baseline provides context for my observations as well as the recommendations proposed for further Commission study and potential legislative solutions.

My observations are underpinned by five structural concepts:

- National security is not a one-size-fits-all determination. Situations exist where analyses by two or three agencies under different laws will result in inconsistent decisions. But the open-ended nature of the term, national security, is essential to the US Government's ability to flexibly manage changed circumstances and pivot more seamlessly when needed. This concept is crucial to the understanding of how export and FDI laws align and vary.
- Current export controls and FDI laws are based on a "catch and release" philosophy that broadly identifies controlled items or activities and then establishes exceptions to those controls. Starting in the 1990s, the US Government shifted its export licensing approach from one designed to "deny and delay" foreign parties from receiving US technology and products to one premised on a "run faster" concept – in essence, the US could afford to allow exports of certain levels of technology or product because US industry would maintain a several generations lead in development. This shift accommodated the growing global research and development ("R&D") environment, the desire to access the Chinese market, and transfer of primary R&D efforts from the US government to industry.

At the same time, however, budgets for government R&D declined and industry research moved away from traditional areas of interest or relevance to US Government national security requirements. During this period, the Department of Commerce began expanding export opportunities by eliminating license requirements in favor of the use of license exceptions and changing the technical performance characteristics for items on the Commerce Control List ("CCL") to result in more technologies and products being classified in a basket category known as EAR99.

That process continues today as demonstrated by **Attachment 1**, which includes a chart of the published export classifications conducted by the Department of State ("State") between 2010 and December 2020<sup>1</sup>. Of the classifications published by State, approximately 84% resulted in Commerce controlled designations. Within that 84%, approximately 26% of the products and technology (including software) were classified as EAR99. To demonstrate the impact of this

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<sup>1</sup> These classifications represent only those that were submitted to State for review and determination. Companies complete thousands of self-classifications through internal processes which are not necessarily known to US Government policymakers. Thus, the percentages of EAR99 classifications reflected in State's database likely underrepresent the actual number of EAR99 classifications overall.

shift on the visibility the US Government and industry has into what is being transferred to foreign parties, the table below includes select examples that highlight the breadth of products that fall into this basket category.

**Table 1**

<b>ITEM</b>	<b>CLASSIFICATION</b>
Software that gathers information from a variety of sensors to provide situational awareness of moving objects such as manned aircraft, UAVs, birds and cars	EAR99
Master’s Thesis titled “A Distributed Avionics Software Platform for Liquid-Fueled Rocket”	EAR99
A tablet developed for use in a man-portable system for neutralizing chemical agents	EAR99
An inspection system that is designed for internal robotic infrastructure inspections	EAR99
A preloaded EPROM chip with software that monitors commercial APU’s operation and detects faults	EAR99
Middleware that allows customers to import and load OpenFlight 3D models and geospatial terrain databases into the Unity Game Engine	EAR99
A computer program that allows hobbyists to design a rocket and then simulate its flight	EAR99
Image generation system for civil and military aircraft simulator trainers and certain associated training and configuration-related services	EAR99
Software that provides a visual simulation of thermal infrared phenomena for aircraft operation training	EAR99
A 99.95% pure tantalum <sup>2</sup> plate	EAR99
Software tool designed to convert vulnerability scanner output files into a consolidated Excel workbook	EAR99

<sup>2</sup> Tantalum is currently listed on the US Critical Minerals List developed pursuant to Executive Order 13817 (“A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals”)(December 20 2017) and Secretarial Order No. 3359 (“Critical Mineral Independence and Security”) published on December 17, 2017 by the Department of the Interior. See CRS Report R45810, “Critical Minerals and U.S. Public Policy” by Marc Humphries (June 28, 2019), at pp. 2 and 40-43. Given this designation, tantalum provides an interesting example of how export national security determinations may conflict with other laws defining national security objectives. From an export control perspective, even with Department of Defense input into the classification, exporting agencies concluded that a tantalum product was properly categorized as EAR99 – a designation which qualifies for the least level of licensing under the EAR. At the same time, the Departments of the Interior and Defense identified tantalum and its supply as critical – both as a critical mineral and one which includes supply chain vulnerabilities. *Id.* The export laws place little limitation on the export of tantalum products, while at the same time other agencies (and even the same agency, as with Defense) view such minerals and products as crucial to various national security missions.

An EAR99 classification provides no details about a product's or technology's technical performance characteristics, its civil or military application or whether the item can be modified. Thus, even with succinct descriptions, such as those noted in Table 1, parties are not necessarily on notice regarding the potential impact to national security of the export or transfer of the item so classified.

In addition, the majority of EAR99 classified items are generally subject to license exceptions or may be exported under authorization, "No License Required," which means that there is no requirement to obtain any advanced, written permissions from the Department of Commerce. License exceptions in the Export Administration Regulations ("EAR"), which currently number 17<sup>3</sup>, are preauthorized approvals which permit an exporter or purchaser to determine whether its proposed transfer meets the requirements for use of the exception. This licensing determination does not require confirmation by any Government agency.

While records must be maintained of transfers that occur, absent an agency request, the transfers remain unknown to US Government regulators and policy makers. This is particularly true of technology or software transfers which do not traditionally pass through the standard US Customs process. This results in visibility gaps which can impact the manner in which export regulations are drafted and/or actual license decisions occur.

- These laws have been and remain reactive. Historically, Congress and the Executive branch have managed, updated and adjusted export and FDI laws/regulations to address specific situations. Export controls trace their roots to the founding of the United States and legislation from the 1950s and the 1970s, respectively, and form the primary foundation for the current Arms Export Control Act (AECA) and the Export Control Reform Act of 2018 (ECRA).

FDI reviews were first formalized in the Executive branch in 1975, through an Executive Order issued by then-President Gerald Ford. From 1975 to 1988, the Executive Order process functioned as expected until semiconductor production became a concern. In the late 1980s, Congress and the Executive branch noted that Japanese investors were purchasing semiconductor companies and assets to the point where supply chain and industrial base issues became pressing. This resulted in the 1988 passage of the Exon-Florio Amendments ("Exon-Florio") to the Defense Production Act ("DPA") and the beginning of the more formalized legislative underpinnings of the FDI process through the Committee on Foreign Investment in the United States ("CFIUS"). Additional revisions occurred in 1993, through the Byrd Amendment, when concerns arose over sovereign wealth fund and foreign government investments in the US.

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<sup>3</sup> See 15 CFR §§ 740.3-740.4, 740.6-740.7, and 740.9-740.21.

In 2006, we encountered the issue of critical infrastructure through Dubai Ports' investment in the management of several US ports that were already under the management of a British owner. This led to the Foreign Investment and National Security Act of 2007 ("FINSA"), which opened the door to a more intense appreciation by CFIUS for critical infrastructure and co-location issues. From 2007 through 2018, the CFIUS review process continued to function until activities related to semiconductors, supply chain and civil-military fusion (a form of dual-use policies) arose, this time with questions related to Chinese investments in the semiconductor industry. This resulted in the passage of the Foreign Investment Risk Review Modernization Act ("FIRRMA").

This brief historical overview places in context the fact that legislative and regulatory changes for both export controls and CFIUS most often occur when circumstances change. In these instances, Congress and the Executive branch conclude that new authorities are needed. While responsive to the issues at hand, this approach does not address the preventive or preemptive measures that may be needed to manage shifting priorities or concerns.

- Shifting geopolitical and geostrategic circumstances appear to dictate the flexibility needed within the legal and regulatory context. Understanding the certainty of uncertainty allows for some planning on how to manage change in the business and legal/regulatory world.<sup>4</sup> However, unanticipated factors or accelerated timelines can alter the landscape for operationalizing compliance. For example, while many in the 1960s predicted the advent and need for globalized supply chains and workforces, many had not yet anticipated that China would be a key player in that environment. Explosive global research and development and market opportunities contributed to a misalignment of objectives between businesses and governments. National security issues were not at the forefront of economic considerations.

This resulted in the reactive laws and regulations discussed above – a condition that made compliance and adjustments time consuming, expensive, and, in some circumstances, ineffective.

- History demonstrates that the more successful legislative and regulatory frameworks were grounded on three pillars:
  - Visibility
  - Accountability
  - Oversight

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<sup>4</sup> As Clausewitz stated: "Our knowledge of circumstances has increased, but our uncertainty, instead of having diminished, has only increased. The reason of this is, that we do not gain all of our experience at once, but by degrees; so our determinations continue to be assailed incessantly by fresh experience." Carl von Clausewitz, *On War*, page 36.

Unless legislators and regulators understand what is occurring, it is difficult to identify gaps, whether related to national security or economic security. Without visibility into what research is being conducted, by whom, under what conditions and for what applications, the US Government and Congress lack essential building blocks to assess what may be relevant and how what is relevant can be best managed. This can result in either overly broad or overly narrow laws and regulations since the Government and Congress are unable to divine where and how to draw lines.

Accountability is equally crucial. Accountability, however, does not mean simply knowing which agency is responsible for a decision, but understanding the more granular information related to the standards against which the decision was made, the person who made the decision and the recourse available to challenge the decision made. As Chief Judge Easterbrook of the Seventh Circuit stated in a seminal export controls criminal case, *Pulungan v. United States*: “A designation by an unnamed official, using unspecified criteria, that is put in a desk drawer, taken out only for use at a criminal trial, and immune from any evaluation by the judiciary, is the sort of tactic usually associated with totalitarian regimes.” 569 F.3d 326, 329 (7<sup>th</sup> Cir. 2009). Although included in a criminal case, the concept applies equally to the general need for accountability when dealing with export controls and FDI.

Tailored and structured accountability provides the regulated parties the explanations needed to understand the requirements. This is particularly important where the cloak of confidentiality is used to limit dissemination of relevant information to the public and to Congress.

Last, oversight provides the check and balance needed to keep the laws and regulations, as well as the related interpretations, within the bounds of Constitutional and administrative process<sup>5</sup>. Here, Congress plays a key role to ensure that legislation remains relevant, flexible and focused on the areas of concern. With that oversight comes a requirement for the Executive branch agencies responsible for export controls and FDI to provide Congress the visibility needed to understand how legislation impacts national and economic security.

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<sup>5</sup> The President has, at times, imposed some measure of self-discipline in the regulatory interpretation process, which helps alleviate degrees of uncertainty associated with industry decision-making. For example, Executive Orders (“EO”) 13891 (Promoting the Rule of Law Through Improved Agency Guidance Documents) (October 9, 2019) and 13892 (Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication) (October 9, 2019) limited the Executive branch’s ability to interpret regulations by fiat, rather than through established administrative or regulatory review processes. Both EOs required legal and regulatory interpretations as well as enforcement to be based on administrative processes that maximized and protected engagement with the US Government by those subject to regulation. This approach provided business and industries a higher degree of certainty when managing risk-based assessments related to unclear or inconsistent regulatory requirements. These EOs remained in place until January 20, 2021, when the Biden Administration revoked each one. See Executive Order 13992 (January 20, 2021), bringing the degree of uncertainty injected into the regulatory process back to pre-October 2019 times.

With this background, please find below my views on the two areas I explore in my testimony.

A. Current vulnerabilities and risks remaining in the US foreign investment review system

No legal framework is gap-free and unless laws prohibit or permit all activity, the gaps remain. Both FIRRMA and the CFIUS process made significant strides to manage the changing risks related to foreign direct investments. But any process can benefit from updates that include legislative improvements that minimize embedded vulnerabilities and risks. Even with the legislative modifications noted in the first bullet below, process vulnerabilities remain that limit some of FIRRMA's effectiveness and may be addressed through further legislative updates:

- FIRRMA confirmed existing CFIUS jurisdiction, clarified areas where jurisdiction existed but may not have been exercised frequently and expanded jurisdiction for certain minority investments.

The legislation included some significant changes in that it provided for mandatory filings for the first time since the Committee's establishment. The law also expanded the timelines for review and emphasized additional factors of concern from a national security perspective, such as supply chain vulnerabilities, key industries, personal data, and biotechnology developments. Also new, FIRRMA added a definition for critical technologies which included emerging and foundational technologies, a definition which was tied to ECRA.

But the underlying approach to national security reviews of FDI remained unchanged – the Committee reviews submissions to determine whether the transaction resulted in national security concerns that could not be mitigated. Treasury also continued as the CFIUS chair and coordinator of the CFIUS process as well as the sole drafter of the regulations. The overall modernization effort, however, did take cognizance of changed circumstances to address key policy objectives for both Congress and the Executive branch.

- Although individual cases may be approached differently, the Committee generally takes a static, slice-in-time analysis of FDI. This approach assesses the national security risks at the time of the review but absent a mitigation agreement, the Committee loses visibility into post-clearance activities.
- The Committee remains managed as a 'flat' organization – as noted above, Treasury chairs the Committee without additional leadership from other agencies, absent the designation of a co-lead agency. But under the regulations, Treasury also controls the designation of co-lead agencies, and thus the organization and leadership structure continue to remain 'flat.' Under § 800.230, Treasury expressly

reserves the right to designate co-lead agencies,<sup>6</sup> which effectively minimizes each member agency's ability to take a leading role in a transaction review, absent Treasury approval. This authority appears to have been drawn originally from the predecessor statute to FIRRMA, the Foreign Investment and National Security Act of 2007 (FINSAs), § 2170(k)(5), and continued in FIRRMA.

Further inquiry into the co-lead process would help inform Congress about the manner through which interagency engagements occur and national security equities are decided. This presents two areas for potential reform which may benefit the balancing of national and economic interests: 1) CFIUS member agencies should be able to self-determine whether to act as a co-lead with Treasury, rather than permitting Treasury to control that decision; and 2) once a co-lead agency is in place, the agency remains in that position unless it chooses to withdraw from that responsibility.

- US Government strategies<sup>7</sup>, reports<sup>8</sup> and think tank studies have highlighted the importance of emerging and foundational technology to US national security interests and the health of the US industrial base, as well as the risks associated with the acquisition or investment into companies developing these types of technologies.<sup>9</sup> In an effort to address these concerns, Congress tied the identification and control of emerging and foundational technologies to ECRA. This approach, however, suffers from at least four challenges:
  - ECRA is the underlying substantive statute for the Export Administration Regulations which means that emerging and foundational technologies are viewed as presumptively controlled under the EAR. While FIRRMA refers to ECRA § 1758 for an interagency process to take into account the views of the Departments of Defense, State, and Energy, as well as other agencies as needed, there is no published timeline or statutory processes for exigencies that may require more timely action. In addition, this process may not adequately take into account that a number of emerging and foundational technologies may more appropriately be subject to controls under other US export regimes – e.g., the regulations managed by the

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<sup>6</sup> **§ 800.230 Lead agency.** The term *lead agency* means the Department of the Treasury and any other agency designated by the Chairperson of the Committee to have primary responsibility, on behalf of the Committee, for the specific activity for which the Chairperson designates it as a lead agency, including all or a portion of an assessment, a review, an investigation, or the negotiation or monitoring of a mitigation agreement or condition.

<sup>7</sup> See, e.g., National Strategy for Critical and Emerging Technologies (October 2020), at p. 2.

<sup>8</sup> See, e.g., CRS Report R46458, “Emerging Military Technologies: Background and Issues for Congress” (Updated November 10, 2020).

<sup>9</sup> See, e.g., Twin Pillars: Upholding National Security and National Innovation in Emerging Technologies Governance (Center for Strategic and International Studies, January 2020).



Departments of State and Energy, the Food and Drug Administration and the Drug Enforcement Agency among others. Given the importance of emerging and foundational technologies to the US Government, the national security strategy and the intelligence strategy, the timeline and process for designation under the EAR may leave the US exposed to ongoing national security vulnerabilities and risks.

- Second, the EAR generally controls products and technology on the basis of multilateral regimes, such as the Wassenaar Arrangement, the Nuclear Suppliers Group and the Australia Group. Multilateral negotiations for the identification of products or technologies to be added to control lists take time and require extensive discussion. While these negotiations occur, the technologies or products at issue remain outside the purview of any export regime and are thus open to practically unlimited transfers, thereby perpetuating the national security risks that may exist.<sup>10</sup>

For example, in October 2020, the Department of Commerce published a final rule adding six emerging technologies to Commerce Control List (CCL). 85 Fed. Reg. 62583 (October 5, 2020). The Federal Register notice indicated that the additions arose from the December 2019 Wassenaar Plenary Session, an almost 10-month process from multilateral agreement to addition to the CCL. During that 10-month period, the designated technologies would not have been considered critical technologies for

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<sup>10</sup> Understanding the potential for gaps, Commerce established an Export Control Classification Number (“ECCN”) category, 0Y521, to use as an interim classification for products or products or technology that were either not yet subject to a specific ECCN (because none existed which could accommodate the technical or performance characteristics of the item) or did not warrant control (and thus could be classified as EAR99). See 77 Fed. Reg. 22191-22200 (April 13, 2012). Commerce specifically stated:

“The 0Y521 ECCN series will provide a mechanism for identifying and controlling items that warrant export controls, but that are not yet categorized on the CCL or USML, such as **emerging technologies**. It will provide a temporary control category for such items, while the U.S. Government works to adopt a control through the relevant multilateral regime(s); to determine appropriate longer-term control over the item; or determines that the item does not warrant control.”

77 Fed. Reg. at 22192. Placement in ECCN 0Y512 allowed Commerce the time to review the item to best determine the appropriate classification and subsequent licensing requirements. Detailed, publicly available information about this classification process, however, remain sparse. While the concept and general process for use of ECCN 0Y521 are included in 15 CFR § 742.6(a)(8)(iii), the regulations allows the classification to expire within one year unless the Department moves the item to another ECCN or requests an extension for one additional year. To assess whether this approach was, and remains, effective, especially for emerging technology, additional public information regarding the following questions would be helpful:

- Since the establishment of this ECCN, how many products and technologies have been placed in this category?
- How many of these products or technologies have been considered “emerging”?
- To which ECCNs were these products or technologies shifted?
- How many of these products and technologies were shifted to EAR99 classifications?

purposes of FIRRMA – a gap which meant that, absent other jurisdictional grounds for CFIUS review, investments by foreign parties involving these now critical technologies might not be subject to CFIUS review and/or would be outside of CFIUS’ mandatory purview.

- Third, the national security interests for export control purposes are not the same as that associated with acquisitions or investments. Exports tend to involve the provision of product, materials, equipment, software or technology in a one-time transaction or, at times, for ongoing transactions. But the entity making the sale of or transferring the products and technology retains ownership and control of the production, development, marketing and distribution processes. The national security equities, therefore, tend to examine whether the sale may advance the capabilities of the foreign purchaser or its government. An export of controlled technology to Country X may meet national security or foreign policy objectives without issue.

But the sale of the producer of that technology to a company from Country X now implicates not only the transfers of the technology, but the control over how the operation, design, developments, supply chain and sales occur. By tying the designation of emerging and foundational technologies as critical technologies for CFIUS review purposes to export controls, FIRRMA blurs the distinctions that underpin these analyses.

- Fourth, other authorities exist for agencies such as the Departments of Defense and Energy to identify and designate critical technologies, including emerging technology. For example, P.L. 115-232 (August 13, 2018), § 1049 (Critical Technologies List) authorized the Secretary of Defense to “establish and maintain a list of acquisition programs, technologies, manufacturing capabilities, and research areas that are critical for maintaining the national security technological advantage of the United States over foreign countries of special concern.” (§ 1049(a)). The Secretary is authorized to utilize the list to inform a number of decisions including but not limited to:

“any interagency determinations conducted pursuant to Federal law relating to technology protection, including export licensing, deemed exports, technology transfer, and foreign direct investment” (§1049(a)(1)) and;

“inform the Department’s activities of research investment strategies... and develop innovation centers and an emerging technology industrial base.” (§ 1049(a)(4))

The question for Congress may be whether the current FIRRMA-ECRA tie constrains agencies with national security equities from identifying and managing emerging technologies directly related to a national security

mission. This may be addressed, in part, by disentangling the FIRRMA-ECRA emerging and foundational technology process and allowing all agencies that are members of the Committee to identify those technologies of interest or concern. Disentanglement, however, does not mean that Commerce's authority to designate emerging and foundational would be eliminated or circumscribed. Rather, the process would be expanded to include other agencies with existing jurisdiction who could formally provide effective input to create jurisdiction for CFIUS to review cross-border transactions that may fall through the cracks based on the EAR designation process.

- FIRRMA expressly recognized the technology transfer gaps that existed in the bankruptcy processes. Sensitive technologies held by distressed parties or debtors in the bankruptcy process have been acquired by foreign parties in the past where those asset transfers did not benefit from CFIUS review. Assuming that the sensitive technologies were export controlled and the parties obtained export authorizations for the transfer of these sensitive technologies prior to the bankruptcy transfers, the Executive branch had no visibility into the potential implications to US national security interests. While FIRRMA recognized the gap, the statute did not address the process by which engagements could occur between the courts and CFIUS. As a result, the regulations do not outline how that engagement would occur.

The bankruptcy courts have taken a keen interest in this area as concerns exist that the court process may be used to circumvent or otherwise limit CFIUS review. Training sessions provided to the bankruptcy judges as part of their annual training has highlighted gaps in existing bankruptcy statutes that limit the courts' ability to engage directly and consistently with CFIUS through a formal process. These gaps can be remedied through amendments to the bankruptcy statutes that define the process for engagement with CFIUS.

## B. Recommendations for Congress

Based on the summary above, the Commission and Congress may wish to consider the following legislative proposals:

- Amendments to the bankruptcy statute<sup>11</sup> to accommodate the CFIUS review authorities included in FIRRMA.

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<sup>11</sup> These amendments can be incorporated into the bankruptcy rules, as well as other tools the court uses to manage its dockets. Currently, the Advisory Committee on Appellate, Bankruptcy, Civil, criminal and Evidence Rule has scheduled hearings on the Bankruptcy Rules for January 7 and 22, 2022. Public comments regarding proposed rule changes will be accepted between August 6, 2021 and February 16, 2022. Any legislative changes made to the courts' authorities may be able to be incorporated into the rule changes scheduled.

Amendments should authorize:

- The courts to consider national security when managing asset distributions or sales through the bankruptcy process
  - The creation of an ombudsman dedicated to identifying cases where national security issues may arise
  - The courts to engage directly with the Department of Defense on national security issues
- Congress should consider amending FIRRMA to disentangle FIRRMA from ECRA for the purpose of identifying emerging and critical technologies. The relatively slow pace of identifying these technologies may reflect the difficulty Commerce has encountered in striking the right balance between national security concerns and industry led innovation concerns. Disentangling FIRRMA from ECRA will open the aperture directly to more input from other agencies.

If, however, disentanglement is not possible, then FIRRMA should include provisions that authorize other CFIUS member agencies to designate emerging and foundational technologies that formally become part of cross-border transactions subject to CFIUS review. FIRRMA notes that Treasury may identify such technologies through its review of cross-border investments, but other agencies, such as the Departments of Defense and Energy have similar authorities and national security equities which would benefit their direct and independent input. The multilateral negotiation process and associated timelines to manage critical technologies under the EAR create potentially impactful delays that reduce FIRRMA's effectiveness.

- Congress should consider Senator Cotton's proposal to designate the Department of Defense as the permanent Deputy Chair of CFIUS. As the agency with primary responsibility for national security, DOD's input would help expand the resources from which national security equities can be identified. In his report entitled, "Beat China: Targeted Decoupling and the Economic Long War" (February 2021), Senator Cotton noted: "[S]uch a change [designating Defense as a permanent Deputy Chair] would ensure that Treasury will address national security concerns brought up by Defense and other organizations on the committee..." *Id.* at page 61. This may allow for a broader consideration of national security equities shared by other CFIUS members.
- Early drafts of FIRRMA included provisions that authorized members of the Committee to draft regulations for their agencies. Those regulations could inform the parties subject to CFIUS jurisdiction of the areas of interest for each member agency. Congress should consider including a similar provision in any updates to the statute.
- Confidentiality should be more clearly defined in the statute. In instances where parties issue public press releases, summaries in public filings such as Securities

and Exchange Commission notices or otherwise authorize the release of data, CFIUS should publish the non-confidential information relating to filings that have been made. The information should be included in the CFIUS annual reports to succinctly inform parties of the parties, types of transactions, industries and mitigation measures. Up until 2008, this type of information was included in CFIUS' Annual Report.

Additional issues, which extend beyond the scope of my direct testimony but which would benefit from additional study by the Commission and eventual legislative action, may be found at **Attachment 2**. Thank you for the opportunity to share my views with the Commission. I would be pleased to answer any questions.

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## ATTACHMENT 2

### Additional Questions the US-China Economic and Security Review Commission May Wish to Review and Propose Legislative Action

This attachment includes a list of questions and topics which may benefit from further study. The list is not provided in prioritized form and is designed solely to raise questions which the Commission may or may not choose to pursue.

1. Is there benefit to considering emerging and foundational technology in the same manner as the Atomic Energy Act considers “restricted data” – *i.e.*, certain nuclear-related data that is “born restricted” until such time as it is shifted to different controls?

2. Should foreign direct investment in companies that play key roles within the supply chain – at any tier – be part of the mandatory CFIUS review process? If so, should distinctions exist depending upon the country of origin of the party making the foreign direct investment?

3. Should the paradigm of “dual use” be changed or eliminated? The US Government has shifted to a more heavily focused reliance of commercial technologies for national security missions which may make the distinction of whether a technology is “dual use” less relevant when compared to where that technology is being shared across the globe.

4. Should the government contract regulations include specific provisions that address foreign investments, grants, gifts and/or contract awards to universities that participate in any type of contract or grant with the US Government, at any tier? Recent Inspectors General reports indicate that some universities that participate deeply on research and development projects or consortia for US Government missions are also those in receipt of the greatest number of foreign investments, grants, gifts and/or contracts.<sup>1</sup>

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<sup>1</sup> For example, as of December 2019, the last date for which the Department of Education published details regarding the parties, individuals and governments (collectively, “parties”) who donated or issued contracts (collectively, “funding”) to US universities and these parties’ countries of origin, the following universities received the most funding from foreign sources, while at the same time the greatest number of contracts, grants or subcontracts from US Government agencies (in no particular order):

- Columbia University in the City of New York
- Duke University
- Harvard University
- Johns Hopkins University
- Massachusetts Institute of Technology (MIT)
- Stanford University
- University of California, Berkeley
- University of California, San Diego
- University of Michigan, Ann Arbor
- Yale University

5. Several members of Congress proposed a CFIUS review of certain foreign gifts, contracts and investments in US universities. Those bills remain pending or have been incorporated into broader legislative drafts that remain under review. What benefits and risks may exist to expanding CFIUS' jurisdiction in this area? Are there other existing legislative authorities which may permit the US Government agencies with national security equities to review these financial engagements?

6. The Department of Commerce, Bureau of Economic Analysis ("BEA") collects information related to foreign direct investment in the US as well as outbound US investment in foreign jurisdictions. Currently, BEA regulations indicate that the information collected through these forms may not be shared in other contexts, which would appear to limit the use of this information for FDI purposes. Should Congress consider amending BEA's underlying statute, the International Investment and Trade in Services Survey Act (P.L. 94-472, 90 Stat. 2059, [22 U.S.C. 3101-3108](#), as amended), should be amended to authorize the use of BEA collected information on foreign direct investment in the US for CFIUS purposes. Currently the BEA website indicates that: "The Act specifies that the survey data may **only** be used for statistical and analytical purposes. BEA is prohibited from granting another agency access to the data for tax, investigative, or regulatory purposes." [Legal Authority and Confidentiality of International Survey Collections | U.S. Bureau of Economic Analysis \(BEA\)](#)

7. Currently the CFIUS regulations manage national security reviews of certain real estate transactions based, in part, on whether the transactions occur or will occur in 'urbanized areas.' This concept is defined by cross-referencing the Census Regulations which define, through various metrics, what constitutes an "urbanized area". Should Congress consider providing CFIUS greater flexibility to identify real estate transactions of interest outside of the scope of the Census definition of "urbanized areas."

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Of this group, Harvard, MIT and Yale received letters from the Department of Education inquiring into specific foreign parties funding efforts for university programs and activities. *See Institutional Compliance with Section 117 of the Higher Education Act of 1965* (October 2020)(Office of the General Counsel, Department of Education), at page 13. As Congress considers funding under the CHIPS Act and the national security agencies consider the breadth of parties who may qualify for further funding, understanding the interplay between foreign investments in US universities and the potential impact from additional US Government funding into critical areas of research appears relevant.