

## Statement of Richard Ashooh

U.S. Senate Committee on Banking, Housing and Urban Affairs

September 29, 2022

Chairman Brown, Ranking Member Toomey, and Members of the Committee:

Thank you for the opportunity to testify before you today. Today's hearing is a timely, relevant, and critical examination of the issues associated with U.S. originated investments to countries, companies, or causes which may pose a national security threat or otherwise threaten U.S. interests. Having served as Assistant Secretary of Commerce for Export Administration at the Bureau of Industry and Security (BIS) in the prior administration from 2017 until 2020, I had both the honor and challenge of weighing many of these very issues, especially with respect to concerns over unauthorized technology transfers as the primary purview of the Bureau. It is in that capacity that I am testifying here today. In short, I understand the difficulties the Committee and Congress face in the effort to implement effective policies and hope my participation today constructively contributes to that goal.

It should be stated at the outset that the concerns at the heart of this hearing are well-founded – from the moment of my swearing in at BIS, the challenges presented by the People's Republic of China were apparent, serious, and alarming. While great strides have been made in addressing these concerns, national security is never static and must be constantly addressed.

Much of what has been accomplished in recent years is the result of legislation this Committee championed in 2018 which led to the Export Control Reform Act and Foreign Investment Risk and Review Modernization Act, also known as ECRA and FIRRMA. That debate considered many of the issues captured by today's review of the need for enhanced scrutiny and action regarding outbound investments and has many lessons to offer policymakers. At this point, I would like to underscore my gratitude to the committee for the thoughtful approach it took at that time, which involved bi-partisan, bi-cameral, and multi-jurisdictional legislating to advance a long-overdue modernization of some very complex and powerful authorities. Any consideration of measures which could significantly alter U.S. capital flows merits, in my view, a similarly thoughtful and thorough approach.

While the issues associated with regulating financial behaviors to obtain a national interest objective are many, I will confine my comments today to three recommendations that are drawn from the lessons learned in the consideration and implementation of FIRRMA and ECRA.

1. **Clearly define the national security threat to be addressed.** While this objective appears obvious, the temptation to address a broad panoply of legitimate concerns which do not necessarily rise to the level of a national security threat is alluring. National security as currently understood in the United States is already very broad, taking into consideration factors such as infrastructure, supply chains, and data protection, in addition to the traditional concerns over kinetic threats. That said, a fundamental premise in national security is specificity – the concept that if everything is a threat, then nothing is. During the ECRA/FIRRMA debate, concerns over joint ventures with Chinese companies led to a robust discussion of whether to expand the scope of CFIUS to regulate this activity. Once the key issue was distilled to one of concerns over technology transfer, the purview of export controls, the appropriate tailoring of ECRA could occur – thanks to the concomitant updating of that law with FIRRMA.
2. **Regulate Horizontally.** National security threats are rarely stove-piped – solutions to address them should not be either. National security threats are commonly carried out by individuals or groups, funded by governments, with the help of – or in pursuit of – technology. Therefore, multiple agencies must collaborate – the Department of State regulates persons, Treasury the financing, and Commerce technology, with coordination from additional agencies including the Department of Defense. One of the most crucial updates to FIRRMA and ECRA – made possible by amending these statutes concurrently – was to dovetail their definitions and authorities. Establishing a unified definition of critical technologies, and grounding that definition in well-defined – and might I say well-refined – export control lists such as the Commerce Control List maintained within the Export Administration Regulations or EAR and the United States Munitions List maintained within the International Traffic in Arms Regulations or ITAR, created clear, specific, updatable tools for regulating. And since it categorizes countries and restricts them based on national security concerns, this obviated the need for Treasury to develop its own country criteria – another robustly debated

issue. This synchronization – further refined in regulation after FIRRMA and ECRA passed – is a model for enhancing the power and effectiveness of U.S government policy implementation.

**Recommendation: Outbound screening criteria should align with the criteria that is already the foundation of the export licensing and in-bound investment authorities.**

3. **Build on what works.** As mentioned, the passage of ECRA and FIRRMA made tremendous improvements to both regulatory regimes and in many ways streamlined their implementation. For all the progress made because of and since the passage of these important laws, gaps do exist in the financial space. For instance, it is currently possible that export-controlled technology could be the beneficiary of U.S. financing – intentionally or not. This disconnect is one which could be addressed through alterations to current authorities. Again, using the ECRA/FIRRMA example, the amendments allowed the two regimes to reinforce each other as complementary tools to protect national security. For example, as a member of the CFIUS committee, Commerce reviews cases through the national security lens prescribed by CFIUS, but also through the overall lens of the export control system, highlighting export control implications and defense industrial base issues previously undetected. Further, the review offers Commerce the chance to vet the applicants against other important national security authorities, such as compliance with the Defense Priorities and Allocations System, making for an even more comprehensive National Security review.

In addition, a recent enhancement to the Export Administration Regulations defines the term “support” by “U.S. persons” to include, among other things, financing. While further study must be conducted, this feature of the law creates a regulatory “hook” to limit financial activities already tied to restrictions based on export controls.

**Recommendation: Congress should consider whether existing authorities such as the export control system can be leveraged as a tool to obtain insights into financial transactions of concern, or even address gaps in the current system.**

As I said at the outset, these concerns are real and gaps in the system pertaining to financial transaction merit immediate attention. **As the**

**principles I have discussed here illustrate, it is my view that amendments to current authorities hold the potential to address the most pressing concerns regarding outbound investments, without the establishment of an additional, entirely new regime.**

One further lesson from prior deliberations bears repeating. These issues, which have the potential to staunch billions of dollars of investments, demand thorough, thoughtful review and must include public input. Input from impacted stakeholders is crucial to effective policymaking. Further, just as synchronization amongst relevant agencies and authorities is critical, some consideration must be given to alignment with partner nations. Since the passage of FIRRMA and ECRA, many like-minded countries have embarked on similar national security reviews of both foreign direct investment screening and export controls. This point merits emphasis – U.S. goals are far more impactful with a coordinated, global response. It is clear from the behavior of our allies that the U.S. has led in these areas, resulting in a more global – and therefore far more effective – approach. It should continue this leadership.

I am happy to take your questions.