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

Examining the Committee on Foreign Investment in the United States

Opening Remarks of The Honorable Kevin J. Wolf

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Chairman Crapo, Ranking Member Brown, and other distinguished members of the committee. Thank you for convening this hearing and for inviting me to testify on this important national security topic.

I was last before this committee in January 2010 for my confirmation hearing to be the Assistant Secretary of Commerce for Export Administration, a position I held until January 20, 2017. In that role, I worked closely with my colleagues within Commerce and many other agencies in shepherding the U.S. export control system. I was also a Commerce representative to the Committee on Foreign Investment in the United States.

Although I am now a partner with Akin Gump Strauss Hauer & Feld LLP, the views I express today are my own. I am not advocating for or against any potential changes to CFIUS or its legislation on behalf of another. Rather, I am here to answer your questions from the perspective of someone who has been both a government policymaker and a practitioner for nearly 25 years in these critical and complex national security areas. I am happy to help however you see fit.

My fellow panelists have already described well the content and scope of CFIUS, so I will get straight to my main point, which is that the CFIUS and export control systems complement each other. CFIUS has the authority to control the transfer of technology of national security concerns, but only if there is a covered transaction, however defined. The export control rules regulate the transfer of specific types of technology of national security concerns regardless of whether there is a covered transaction. This means that if concerns arise about specific or general types of technology -- whether as part of a CFIUS review or from any other source -- then the focus, I respectfully submit, should be on controlling the technology at issue to the destinations of concern.

The export control system is already well developed and flexible enough to address exactly this issue. Yes, it can be complex, but its national security functions are not limited by the need for a transaction. Moreover, the system is designed to constantly evolve as new threats are identified, new technologies of concern are discovered, and wide-spread commercialization makes existing controls unnecessary or impossible to implement.

The most effective export controls are those that are multilateral — those that our allies and other countries also impose for common objectives. Unilateral controls -- those that only one country imposes -- are generally counter-productive because they create incentives for non-US companies to develop the technology outside of US control. The imposition of unilateral controls, however, can be an effective short-term technique for regulating the export of technology -- at any stage of its development -- that is newly discovered to be sensitive in general or with respect to a specific destination.

The Export Administration Regulations, implemented by the Commerce Department's Bureau of Industry and Security, have the authority to impose such controls in coordination with other departments, primarily Defense and State. The descriptions of the technology can be as broad or narrow as the national security requires. The descriptions are generally connected to physical commodities, but do not need to be. The controls can be tailored to specific countries and to nationals of those countries. Law enforcement tools can be used with respect to domestic transactions when there is a foreign party using a U.S. company as a front. Using the export control process is also an excellent check on unintended consequences because it forces policymakers to describe clearly the information to be controlled. We can discuss the details of these tools and how they fit into the multilateral control regimes and the CFIUS process later as you like.

Although I cannot discuss specific cases, I can say that other types of national security issues created by foreign direct investment include primarily those that (i) have co-location issues (e.g., acquisitions next to military facilities); (ii) create espionage risks, (iii) could reduce the benefit of Defense Department technology investments; (iv) reveal personal identifying information of concern; (v) create security of supply issues for the Defense Department, or (vi) create potential exposure for critical infrastructure, such as with the telecommunications or power grids.

In my experience, the existing CFIUS structure, authorities, and internal procedures generally allowed for the resolution of these issues quite well. The Treasury Department was an excellent honest broker and well-facilitated consensus conclusions -- often after lengthy interagency discussion and always with the terrific support from the intelligence community. The agencies were always respectful of the need for a whole-of-government decision that took into account the particular equities and expertise of the other agencies. The career staff were and remain talented, dedicated public servants.

This last point is key. Given the increase in filings, and the increase in more complex cases, the staff was being stretched thin when I was there, and I expect they are even more stretched now. They need help. They need more resources, particularly with respect to those involved in monitoring mitigation agreements and studying transactions. I make this polite suggestion not only for their benefit but for the sake of our national security. I also make the suggestion for our economic security so that the

U.S. remains known as a country that welcomes foreign direct investment with the minimum necessary and quickest possible safe-harbor review burden.

Thus, when considering changes to CFIUS to address apparent gaps in national security controls associated with foreign direct investment, the questions I would ask are (i) whether the statutory authority already exists to address the issue through a regulatory or process change; (ii) whether another area of law, such as trade remedies or export controls, could address the issue more directly and without collateral consequences on other investments; or (iii) whether the solution lies in more resources to the agencies. If the answer to these questions is “no,” then that is the sweet spot for consideration of change to CFIUS legislation.

For each possible change in CFIUS’s scope, however, it is vital to weigh the costs. For example, if there is even a small expansion in the scope of CFIUS’s review authority, then some companies may be less willing to invest in the United States with the actual or perceived extra burden and time involved in closing a transaction, particularly if there is not a significant expansion in staff. With every expansion in scope, there will be a corresponding and exponential expansion in burdens and costs generally – more regulations lead to more words, lead to more analyses of those words in novel fact patterns, lead to more filings, lead to more reviews, lead to more mitigation agreements, and on and on. Also, if the legislation becomes too prescriptive, then it may limit the ability of the Administration and staff to resolve novel national security issues in a creative way. There were many such situations over the course of the last seven years that I suspect could not have been contemplated by the original drafters of the legislation and the regulations.

On export control and CFIUS topics, I have a three-minute, a thirty-minute, and a three-hour version. So, I will stop here with these general opening comments and look forward to answering your questions. Thank you again for spending the time to think through this complex and important national security issue.