Written testimony of

Ambassador Robert M. Kimmitt
Former Deputy Secretary and General Counsel of the U.S. Treasury

Before the Subcommittee on Monetary Policy and Trade
of the
Committee on Financial Services
United States House of Representatives

Foreign Direct Investment: Striking the Balance

December 14, 2017

Mr. Chairman, Ranking Member Moore, members of the Subcommittee,

Thank you for your invitation to discuss today's important topic. It is a particular pleasure to appear with my distinguished fellow panel members.

In my capacity as a former government official, I would like to offer perspective on the Committee on Foreign Investment in the United States (CFIUS). This is one of those rare instances where advancing age, which includes over three decades of work on CFIUS, has some benefits.

My experience with CFIUS began in 1985, when I served as Treasury Department General Counsel under President Ronald Reagan and Secretary James Baker. CFIUS was then governed by its founding Executive Order, signed in 1975 by President Ford because of concern about Saudi petrodollars being recycled to buy American assets.

Later during my service at Treasury, concern had shifted to Japanese purchases, which led to passage in 1988 of the Exon-Florio Amendment to the Defense Production Act, which gave CFIUS its first statutory basis. In 1992, concern about state-owned companies buying sensitive

US technology companies led to passage of the Byrd Amendment, subjecting state-owned acquirers to special scrutiny.

In 2005, I returned to Treasury as Deputy Secretary. After deals involving the Chinese National Overseas Oil Company (CNOOC) and Dubai Ports were blocked by congressional concerns, Congress passed the Foreign Investment and National Security Act of 2007 (FINSA), the governing legislation for today's operations of CFIUS.

Because of growing concern about Chinese investment in the United States, particularly by state-owned enterprises and especially, but not exclusively, in the technology sector, legislation has been proposed by a bipartisan group of legislators led by Senator Cornyn and Congressman Pittenger. While I am not appearing to discuss individual elements of the proposed legislation, I would like to offer some observations that may assist in your deliberations:

- Every public official has a solemn and primary obligation to safeguard US national security. Earlier this year, this Committee, in making the Secretary of the Treasury a statutory member of the National Security Council, recognized that our economic strength is tightly linked to our overall security.

- Any analysis of foreign direct investment (FDI) should begin by recognizing its important contribution to the US economy. My former boss, then Treasury Secretary Baker, described foreign investment as America's economic "ace in the hole," because such investment represented a foreign company's strong vote of confidence in the US market and American workers.

- Nancy McLernon will cover this point far better, but I would note that almost 7 million Americans will receive their paychecks this month from companies headquartered overseas. A full 40% of those workers are in manufacturing jobs, versus 13% in the overall economy. So an FDI job is three times more likely to be in manufacturing, and these jobs pay about 25% more than the economy-wide average. That is why a more open investment policy is integral to US economic success, and I urge President Trump

to join his predecessors, save one, in issuing the traditional US Open Investment Policy statement at the earliest opportunity.

- But in issuing that statement, and in considering the bill before you, it is important to make clear that the US Government must ensure foreign investment does not harm US national security interests. Chinese investment has an appropriately high priority for close scrutiny, because China seeks to compete strategically against the United States in multiple spheres – military, diplomatic, and economic – using all elements of the state, including state-owned enterprises, in that competition. We are also witnessing a greater complexity of proposed deals, specifically those involving companies in the technology sector.

- It is important to note that Exon-Florio provided, and FINSA provides, significant authority to identify and block troublesome Chinese acquisitions. The first acquisition unwound by a President was China National Aero-Technology's stake in Mamco Manufacturing in 1990 under George H.W. Bush. Huawei's acquisition of 3Com did not proceed under George W. Bush. Huawei's acquisition of 3Leaf; Ralls' acquisition of wind farms near a US naval base; and Fujian Grand Chip's attempted acquisition of Aixtron's US assets were blocked by President Obama. And President Trump recently blocked the acquisition of Lattice Semiconductor by a Chinese investment group.

- As you consider new legislation, therefore, I would be sure to address actual gaps in existing authority. There is particular concern that Chinese companies may be using creative legal structures to conclude deals short
  of ownership or control that could nonetheless impair US national security.
  I believe this is a very valid area for stricter scrutiny in the United States.
  I would be careful, however, about extending CFIUS's reach to transactions occurring outside the United States.

- This comment raises a very important point: CFIUS is intended to give the President an exceptional authority to protect the United States, without, however, superseding or

substituting for important authorities in other statutes. So, for example, if a joint venture abroad raises concerns about technology transfer or compromise, the export control regime and authority under the Export Administration Regulations (EAR) or International Traffic in Arms Regulations (ITAR) should be the first line of defense. Today, when others in the interagency community cannot resolve contentious issues under their authority, those issues are often adjudicated in CFIUS, counter to the law's admonition that CFIUS be an authority of exceptional rather than primary resort. Both Alan Estevez and Kevin Wolf, who have more relevant and more recent export control experience than I, will also have important perspectives on this point.

- This leads me to the view that the greatest problem facing CFIUS today is not a lack of authority, though additional authority is warranted, but rather a lack of resources. As cases filed before CFIUS climb to 250 this year, and with the prospect that CFIUS agencies led by Treasury could be involved next year in a time-consuming legislative and regulatory implementation exercise, I think the increase in workload may begin to delay jobs-producing investments that do not raise national security concerns. It will also leave less time for Treasury to engage in important pre-deal discussions with investors looking for guidance on how best to identify opportunities that do not raise security concerns. The draft bill recognizes this resource challenge, and I urge that matching requirements to resources be a central point in your further deliberations.

- Today's hearing and your future actions are also being watched closely overseas. Germany has already tightened its investment screening mechanism; Britain is considering doing the same; and, of concern, the European Commission (EC) in Brussels is establishing an investment review mechanism – even though under European law the Commission has no authority or jurisdiction on security matters. So the new EC review may become a political screening process that could create a new barrier to US investment into that important market of over 300 million consumers.

- These and similar developments around the world lead me today to be more concerned about investment protectionism than trade protectionism. If we want to continue to grow

well-paying FDI jobs in the United States, we must send a clear message that we are open to investment except in those instances where a CFIUS process focused squarely on national security determines an investment must be blocked. I know you will strive to strike that important balance.

Thank you for your kind attention. I look forward to your questions and my fellow panelists' presentations.