# REVERSING CFIUS: ANALYZING THE INTERNATIONAL AND CONSTITUTIONAL IMPLICATIONS OF THE REVISED NATIONAL CRITICAL CAPABILITIES DEFENSE ACT

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*In 2022, congressional consideration of the Revised National Critical Capabilities Defense Act (Revised NCCDA), colloquially known as "Reverse CFIUS", caused a flurry of conversation amongst congressional committees, legal practitioners, and private companies. The bill proposed a broad outbound foreign investment review regime for industries implicating national critical capabilities. While Congress ultimately declined to pass the Revised NCCDA, a similar outbound review mechanism is soon likely to be promulgated by the Executive Branch or the Legislative Branch. This note discusses the legislative history resulting in the proposal of an outbound investment review mechanism. It criticizes the breadth and ambiguity of the most recently available version of the Revised NCCDA's proposal in comparison to current national security investment review mechanisms and export control statutes, such as FIRRMA and IEEPA. This note embarks on a constitutional and international law analysis of executive authority to review foreign and domestic investments abroad. Finally, this note recommends specific ways in which the Revised NCCDA should be reworked before any congressional or executive action is taken to best comply with international standards and constitutional limits on executive power. It concludes by proposing that outbound foreign investment review could be attached to an existing regulatory framework to expand gradually by sequential congressional and presidential authorizations, in a similar fashion to other national security review regimes. This process would sculpt a more workable and durable outbound investment review regime, placed on more stable legal footing.*



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# I. INTRODUCTION

The United States ("U.S.") holds itself open as a paragon of free, open, and international trade.[1] This freedom comes with an extensive regulatory framework meant to ensure American national security against economic manipulation by foreign adversaries through investments and the supply chain.[2] This framework includes government procurement regulations, export control regimes, and notably, the Committee on Foreign Investment in the United States ("CFIUS"). CFIUS regulates foreign direct investment into the United States, without regard for investments emanating from the U.S. into other countries.[3] CFIUS has broad jurisdiction over "any collection of assets in the United States that arguably constitute a going concern," including businesses with a foreign controlling equity interest or foreign investors with significant involvement in substantive decision-making within a company.[4] Although CFIUS wields powerful tools for regulating foreign direct investment into the U.S., its decisions are reactive against specific transactions that pose a national security threat to the U.S.[5] "CFIUS is a tool of last resort."[6] Because CFIUS is not meant to be a proactive tool, but rather a responsive tool, its power is limited. It is still tailored to specific investments, as discussed below, even in the context of expanding economic review regimes used as national security tools, as illustrated by President Biden's recent Executive Order increasing the range of CFIUS review.[7]

In this context, policymakers have raised the possibility of establishing an outbound investment review mechanism.[8] Outbound foreign investment

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1. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, TRADE AGREEMENTS, https://ustr.gov/trade-agreements.

2. Daniel Griswold, *Free Trade on Trial: Trade and National Security*, DISCOURSE MAGAZINE (Sept. 16, 2020), https://www.discoursemagazine.com/economics/2020/09/16/free-trade-on-trial-trade-and-national-security/.

3. STEPHEN P. MULLIGAN & CHRIS D. LINEBAUGH, CONG. RSCH. SERV., LSB10848, NATIONAL SECURITY REVIEW BODIES: LEGAL CONTEXT AND COMPARISON 1–3 (2022).

4. Jonathan Wakely & Andrew Indorf, *Managing National Security Risk in an Open Economy: Reforming the Committee on Foreign Investment in the United States*, 9 HARV. NAT'L SEC. J. *1, *7 (2018), https://harvardnsj.org/wp-content/uploads/sites/13/2018/06/WakelyIndorf_CFIUS_05.28.18.pdf.

5. Sarah Bauerle Danzman, Panel Discussion at Atlantic Council's Economic Statecraft Initiative (Friday, Jan. 14, 2022) *at* https://www.atlanticcouncil.org/news/transcripts/outbound-investments-may-spell-trouble-for-U.S.-national-security-can-screening-reduce-the-risk/.

6. *Id.*

7. Exec. Order No. 14,083, 87 Fed. Reg. 37635 (Sept. 15, 2022).

8. Press Release, Brian Fitzpatrick, U.S. Rep., Fitzpatrick, DeLauro, Spartz, Pascrell Introduce the National Critical Capabilities Defense Act (Dec. 28, 2021), https://fitzpatrick.house.gov/2021/12/fitzpatrick-delauro-spartz-pascrell-introduce-the-national-critical-capabilities-defense-act.

review could become a proactive tool, unilaterally regulating the actions of the U.S. and its allies that might lead to supply chain vulnerability for national critical capabilities.[9] During the last several years, as the U.S. has faced global supply chain crises exacerbated by its dependency on foreign actors for pharmaceuticals, semiconductors, and technology, a congressional proposal for initiating outbound investment review has been garnering more and more bipartisan support.[10] Such a mechanism, mirroring many of the processes involved in CFIUS review and known colloquially as "Reverse CFIUS," was proposed in 2022 in the Revised National Critical Capabilities Defense Act ("Revised NCCDA").[11]

Although not formally enacted, this outbound investment review proposal has garnered favor from powerful executive actors, such as the White House National Security Advisor,[12] and would logically intersect with the general trend of expansion in national security regulation. If Congress is unable to agree on a statutory mechanism to govern outbound foreign investment review in the coming months, the Executive Branch likely has the power to take action to implement such a review system.[13]

The proposed "Reverse CFIUS" process has a broad sweep, raising questions about the viability of a statutory outbound investment review process, its extraterritorial application, and its executive accountability. In this note, I review the proposal and make recommendations for strengthening a potential outbound investment review process. First, I trace the history and context of outbound foreign investment review. Next, I explore the mechanisms of the Revised NCCDA as compared to its predecessor, CFIUS, to demonstrate the ambiguities that make the Revised NCCDA particularly unworkable. Finally, I propose alternative solutions, based on an analysis of the international and domestic legal deficiencies posed by either congressional codification of the Revised NCCDA or executive action pursuant to the Revised NCCDA. Congress should reform the current version of the Revised NCCDA before it is formally enacted, drawing its recommendations for revision from other effective national-security-centric statutes that are grounded in congressional authorization and have executive

9. *See id.*

10. *See id.*

11. Discussion Draft of the National Critical Capabilities Defense Act of 2022, ROS22860 HKG, 117th Cong. § 1001 (10)(A), https://insidetrade.com/sites/insidetrade.com/files/documents/2022/jun/wto2022_0399a.pdf.

12. Jake Sullivan, Nat'l Sec. Advisor, Address at the National Security Commission on Artificial Intelligence Global Emerging Technology Summit (July 13, 2021).

13. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 33 (Oct. 12, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf.

accountability mechanisms, such as CFIUS and the International Emergency Economic Powers Act ("IEEPA"). Alternatively, outbound investment review, in limited form, could be attached to an existing regulatory framework to expand gradually by sequential congressional and presidential authorizations. I argue that such a solution could resolve the unworkability and difficulty of implementing an entirely new outbound investment review system.

## II. OUTBOUND INVESTMENT REVIEW IS NOT NEW.

Outbound investment review is not a new concept: the ability to regulate some outbound investments has been implicit within the power delegated to early manifestations of CFIUS, such as in the definition of "international investment" under the very first iterations of CFIUS review in the 1976 International Investment Survey Act.[14] That definition has been construed to capture both inbound foreign investments into the United States and also U.S. financial obligations abroad.[15] As Ben Joseloff, former CFIUS Lead Counsel, has noted, many often overlook the fact that "CFIUS already has the authority to screen certain types of outbound investment, specifically where a U.S. business is being contributed to a foreign-controlled joint venture and other similar transactions that include the contribution of a U.S. business to some type of foreign entity."[16]

The idea of adopting an explicit mechanism for outbound foreign investment review also arose in early drafts of CFIUS's governing statute, the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), for certain types of intellectual property.[17] Even so, it was rejected because CFIUS has historically been understood to directly regulate incoming foreign investments, not outbound U.S. investments into foreign commerce, since the power cited by Joseloff is not widely recognized.[18] The narrower scope of this interpretation is pursuant to the idea of "regulatory proportionality" in guidelines published by the Organization for Economic Cooperation and Development.[19] These guidelines assert that "[r]estrictions on investment, or conditions on transaction, should not be greater than needed to protect national security and they should be avoided when other

14. International Investment Survey Act, 22 U.S.C. § 3102 (1976).

15. *Id.*

16. Ben Joseloff, Panel Discussion at Atlantic Council's Economic Statecraft Initiative (Jan. 14, 2022) *at* https://www.atlanticcouncil.org/news/transcripts/outbound-investments-may-spell-trouble-for-U.S.-national-security-can-screening-reduce-the-risk/.

17. Wakely & Indorf, *supra* note 4, at 32.

18. MULLIGAN & LINEBAUGH, *supra* note 3, at 3.

19. Wakely & Indorf, *supra* note 4, at 30.

existing measures are adequate and appropriate to address a national security concern."[20] In reliance on these guidelines, critics of the incursion of CFIUS review into outbound investments insisted that an amendment to that effect could create four problems.[21] It could duplicate existing export control protocols, create unnecessary uncertainty for technology-focused businesses, limit foreign collaboration with the United States, or spark backlash from foreign countries which would then deny access to their market as a coercive method of control.[22] To fully realize its goals of regulating outbound investment, Congress began contemplating a separate protocol to manage the particular national security concerns posed by outbound investments and the international supply chain.[23]

## III. CONGRESSIONAL DEVELOPMENT OF OUTBOUND INVESTMENT REVIEW HAS BEGUN.

Proponents of establishing a separate outbound foreign investment review system aim "to ensure that the United States can quickly detect supply chain vulnerabilities."[24] As the Council on Foreign Relations has noted, "[t]he impetus behind this is to limit the transfer of technology to China through U.S. investments that could be used to bolster China's military and civilian surveillance capabilities."[25] An outbound investment review system, in some form, fits within the current administration's expansive view of national security protocols. Both the Trump and Biden administrations have linked economic security to national security,[26] striking many transactions down under CFIUS, encouraging other European Union ("EU") member states to impose similar screening mechanisms, and now endorsing an outbound investment review mechanism.[27] Jeffrey Fiedler, Commissioner

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20. ORG. FOR ECON. COOP. & DEV., OECD GUIDELINES FOR RECIPIENT COUNTRY INVESTMENT POLICIES RELATING TO NATIONAL SECURITY (2008), https://www.oecd.org/daf/inv/investment-policy/41807723.pdf.

21. Wakely & Indorf, *supra* note 4, at 34.

22. *Id.*

23. *See* Press Release, Brian Fitzpatrick, U.S. Rep., Fitzpatrick, DeLauro, Spartz, Pascrell Introduce the National Critical Capabilities Defense Act (Dec. 28, 2021), https://fitzpatrick.house.gov/2021/12/fitzpatrick-delauro-spartz-pascrell-introduce-the-national-critical-capabilities-defense-act.

24. *Id.*

25. Inu Manak, *Outbound Investment Screening Would be a Mistake*, COUNCIL ON FOREIGN RELS. (June 30, 2022, 10:07 AM), https://www.cfr.org/article/outbound-investment-screening-would-be-mistake.

26. Will Moreland, *FDI Like You're FDR: CFIUS Review Under the Biden Administration's Rooseveltian Conception of National Security*, 12 J. NAT'L SEC. L. & POL'Y 627, 645 (2022).

27. Kristen Eichensehr & Cathy Hwang, *National Security Creep in Corporate Transactions*, 123 COLUM. L. REV. (forthcoming 2023) (manuscript at 11, 22) (on file at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4211540#).

of the U.S. China Economic and Security Review Commission, summarized: "[o]utbound investment has rarely been regulated…and it was the third rail of free marketeers. And Trump started it with military-related companies. President Biden has rationalized that somewhat and continued it, and I think it's a fait accompli."[28]

A. Early Drafts of Codified Outbound Investment Review Have Resulted in the NCCDA.

In February of 2022, the House of Representatives voted to advance the America Creating Opportunities for Manufacturing, Pre-Eminence in Technology, and Economic Strength Act of 2022 ("America COMPETES"), which included the initial version of the NCCDA.[29] This House Bill was a counterpart to a July 2021 Senate Bill, titled the U.S. Innovation and Competition Act ("USICA"), which had already declined to incorporate a similar outbound investment review proposal.[30] The House's NCCDA provisions were later replaced in June 13, 2022 by the bipartisan, bicameral draft of the Revised NCCDA.[31] In July of 2022, after harmonizing the two bills and ultimately rejecting the outbound foreign investment review proposal, Congress passed a massively scaled down version of American COMPETES and USICA: the CHIPS and Science Act, which President Biden signed into law in August of 2022.[32]

Although Congress recently declined to codify the review process proposed under the Revised NCCDA, remaining bipartisan proponents of the Revised NCCDA will likely push their legislation through in coming sessions.[33] If Congress does not act to pass the Revised NCCDA, the

28. Jeffrey Fiedler, Panel Discussion at Atlantic Council's Economic Statecraft Initiative (Jan. 14, 2022) *at* https://www.atlanticcouncil.org/news/transcripts/outbound-investments-may-spell-trouble-for-U.S.-national-security-can-screening-reduce-the-risk/.

29. Renée Latour & Catrina Crittenden, *U.S. Lawmakers Seek to Establish Outbound Investment Review Regime*, CLIFFORD CHANCE (Aug. 30, 2022), https://www.cliffordchance.com/insights/resources/blogs/antitrust-fdi-insights/2022/08/us-lawmakers-seek-to-establish-outbound-investment-review-regime.html; National Critical Capabilities Defense Act of 2021, H.R. 6329, 117th Cong. §§ 1001–1013 (2021).

30. Latour & Crittenden, *supra* note 29.

31. *Id.*

32. Brian Mosley, *"Chips and Science" NSF Legislation, Formerly the USICA and COMPETES Acts, Heads Towards Passage Into Law*, COMPUTING RSCH. ASS'N (July 28, 2022), https://cra.org/govaffairs/blog/2022/07/chips-science-bill-passage/; Jenny Leonard & Jordan Fabian, *Biden Signs Chips Bill, Unleashing Funding for US Production*, BLOOMBERG NEWS (August 10, 2022, 3:26 AM), https://www.bloomberg.com/news/articles/2022-08-09/biden-set-to-sign-chips-bill-as-us-makers-unveil-new-investments#xj4y7vzkg.

33. *See* Justin A. Chiarodo & Anthony Rapa, *Congress May Tighten Scrutiny of U.S. Investment in Foreign Technologies*, C4ISRNET (Sept. 1, 2022), https://www.c4isrnet.com/opinion/2022/09/01/congress-may-tighten-scrutiny-of-us-investment-in-

Executive Branch is considering taking action to establish such a mechanism.[34] The Revised NCCDA, if enacted according to the most recent draft in Congress, would create outbound investment processes quite similar to the CFIUS review for inbound investment.

It is important to understand the development of the NCCDA over time to fully grasp the wide scope contemplated by the most recent draft. The first version of the NCCDA constructed the basic framework for regulating U.S. investments into "national critical capabilities" abroad.[35] The House proposal aimed to establish the Committee on National Critical Capabilities (CNCC), chaired by the United States Trade Representative who was mandated to consult with the Secretary of Defense, the Secretary of Commerce, and other federal agencies.[36] The initial NCCDA demanded mandatory review of any "covered transaction," defined as any transaction by a United States business that "shifts or relocates to a country of concern, or transfers to an entity of concern, the design, development, production, manufacture, fabrication, supply, servicing, testing, management, operation, investment, ownership, or any other essential elements involving one or more national critical capabilities," or results in a risk to a national critical capability.[37]

The bill introduced the term "national critical capability," in addition to drawing on many of the terms and mechanisms used in modern CFIUS review. Several terms used in this bill elaborate upon direct antecedents found in FIRRMA.[38] It is helpful to compare these different terms as they are defined by each statute.

First, "critical infrastructure'' under FIRRMA is defined as "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security."[39] FIRRMA's definition of "critical technologies" includes defense items, such as weapons, nuclear equipment, toxins, and emerging technologies.[40]

defense-technologies/.

34. *See id.*

35. National Critical Capabilities Defense Act of 2021, H.R. 6329, 117th Cong. §§ 1001–1013 (2021); THE WHITE HOUSE, NATIONAL SECURITY STRATEGY (Oct. 12, 2022) at 33, available at: https://www.whitehouse.gov/wp- content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf.

36. H.R. 6329 § 1001(11).

37. *Id.* § 1001(5)(i)-(iii).

38. Pub. L. No. 115-232, §§ 1703–1717(a), 1718, 1719(a), 1720, 1721(c), 1723–1725, 132 Stat. 1636, 2177–2183, (codified as amended at 50 U.S.C. § 4565 (2018)).

39. § 4565(a)(5).

40. § 4565(a)(6)(A)(i-iii).

The NCCDA used FIRRMA's definition of "critical infrastructure," but added more requirements: it purported to cover "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters."[41] "National critical capabilities," a new term expanding the definition of "critical infrastructure" even further, were defined as "systems and assets, whether physical or virtual, so vital to the United States that the inability to develop such systems and assets or the incapacity or destruction of such systems or assets would have a debilitating impact on national security or crisis preparedness."[42] By defining these terms in broad language, the NCCDA expanded a CFIUS-type review to the supply chain, and not simply to transactions involving defense items or implicating national security. It added a further rationale of crisis preparedness to the bill's scope, defined in terms of national preparedness for a public health emergency or a major disaster.[43]

B. Mechanisms of the NCCDA Mirror CFIUS Mechanisms.

In practice, the proposed NCCDA would function similarly to CFIUS, but the initial draft of the NCCDA would depart from FIRRMA's mechanisms in several significant ways.

1. Mandatory Review

First, a U.S. business that engaged in a covered transaction under the NCCDA would be required to report the transaction in written form to the CNCC.[44] The CNCC was authorized to unilaterally conduct review if the entity did not comply.[45] Alternatively, if a ranking member of an appropriate congressional committee and a chairperson on the CNCC requested a review of a proposed transaction, the Committee could initiate a review.[46]

This mandatory review process differed from the voluntary submission allowed for CFIUS review: under FIRRMA, a party can voluntarily submit their transaction for review,[47] unless it's a type of covered transaction with a substantial foreign government interest for which review is mandatory.[48]

41. H.R. 6329 § 1001(7).
42. *Id.* § 1001(11).
43. *Id.* § 1001(6).
44. *Id.* § 1003(a).
45. *Id.* § 1003(b)(2).
46. *Id.* § 1003(b)(3).
47. 50 U.S.C. § 4565(b)(1)(C)(i).
48. *Id.* § 4565(b)(1)(C)(v)(IV)(bb).

Similar to the CNCC, the President or CFIUS can generally initiate a review of any covered transaction.[49]

2. Review by the Committee

Under the NCCDA, the CNCC, within 60 days of notification, could review the transaction to determine if it implicates a national critical capability,[50] using factors such as:

> The long term strategic economic, national security, and crisis preparedness interests of the United States; the history of distortive or predatory trade practices in each country in which a foreign person that is a party to the transaction is domiciled; control and beneficial ownership . . . of each foreign person that is a party to the transaction; and impact on the domestic industry and resulting resiliency, including the domestic skills base, taking into consideration any pattern of foreign investment in the domestic industry.[51]

Again, the NCCDA departed from FIRRMA by extending the 45-day window of review to a 60-day window.[52] Under the NCCDA's review procedure, if the CNCC reviewed a proposed transaction and determined that the transaction posed a risk as explained in the factors above, it could mitigate that transaction or recommend "appropriate action" to the President under the NCCDA or other existing regulations that would address or mitigate the risk.[53] Alternatively, it could ply Congress for "the establishment or expansion of Federal programs to support the production or supply of articles and services" covered by the proposed outbound investment.[54]

In CFIUS review, the Committee can investigate a covered transaction and take any action necessary to protect the national security of the United States. Under FIRRMA, after each concluded review, supplemented by analysis by the Director of National Intelligence ("DNI"),[55] CFIUS must notify Congress and certify a written report on the result of the investigation.[56] The Committee itself has the ability to mitigate transactions by considering the transaction's effects on national security, including the "threat, vulnerabilities, and consequences to national security related to the transaction."[57]

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49. *Id.* § 4565(b)(1)(D).
50. H.R. 6329, 117th Cong. § 1003(b)(1)(A) (2021).
51. *Id.* § 1005(1–4) (numbers omitted).
52. 50 U.S.C. § 4565(b)(2)(C).
53. H.R. 6329 § 1003(b)(1)(B)(i).
54. *Id.* § 1003(b)(1)(B)(ii).
55. 50 U.S.C. § 4565(b)(4).
56. *Id.* § 4565(b)(2)(B).
57. *Id.* § 4565(l)(4)(A).

The factors that CFIUS considers in determining the national security risk of a transaction are much more explicitly connected to national security than those that would be considered by the CNCC. They include:

> The transaction *threatens to impair the national security* of the United States and the risk has not been mitigated during or prior to the review of a covered transaction . . . the transaction is a foreign government-controlled transaction; or the transaction would result in control of any critical infrastructure of or within the United States by or on behalf of any foreign person, if the Committee determines that the transaction *could impair national security*, and that such impairment to national security has not been mitigated by assurances provided or renewed with the approval of the Committee.[58]

3. Review by the President

If the transaction was referred to the President for review under the NCCDA, the President would have expansive mitigation power, including suspending or prohibiting the covered transaction. The President's action would be based on credible evidence that would lead the President to believe that the transaction posed "an unacceptable risk to one or more national critical capabilities" (using the same factors considered by the CNCC) and there were no other adequate authorities that would protect such capabilities.[59]

Likewise, under FIRRMA, in addition to notifying Congress or mitigating the transaction, CFIUS can refer the transaction to the President to determine "the effects of the transaction on the national security of the United States," considering the factors used in CFIUS review.[60] Similar to provisions under the NCCDA, if the President decides to suspend or prohibit a covered transaction, the President has to first find credible evidence indicating that a covered transaction would allow a foreign person to acquire an interest in a manner that impairs national security, and that other provisions of law, outside of CFIUS and IEEPA, do not provide the President with appropriate or adequate authority to protect national security as implicated by the specific transaction.[61]

There are many factors that the President may use to consider a transaction under FIRRMA.[62] These include domestic industrial concerns, effects of the transaction on military goods, technological concerns, energy concerns, whether the transaction is controlled by a foreign government, and

58. *Id.* § 4565(b)(2)(B) (emphasis added).
59. H.R. 6329, 117th Cong. § 1004(a-d) (2021).
60. 50 U.S.C. § 4565(b)(1)(A).
61. *Id.* § 4565(d)(4).
62. *Id.* § 4565(f)(9)(C).

domestic plans for resources.[63] The President also considers the compliance of the involved country with treaties, its cooperation with the U.S., and "the potential for transshipment or diversion of technologies with military applications, including an analysis of national export control laws and regulations."[64] Clearly, these factors, especially those that analyze the history and background of foreign countries in determining the risks of the transaction, are the genesis for factors considered by the CNCC under the NCCDA.

#### 4. Non-Review Capabilities

The NCCDA would allow the CNCC to determine supply chain sensitivities and identify additional national critical capabilities, reporting both findings to Congress.[65] The initial version of the proposal concluded with an assurance that "nothing in this title may be construed as prohibiting or limiting the free and fair flow of commerce outside of the United States that does not pose an unacceptable risk to a national critical capability."[66]

Similarly, CFIUS can collect trend information from the business sectors that have presented transactions for review, recommend critical technology strategies, initiate an evaluation of foreign espionage attempts, and identify new technologies for addition to the Export Control Reform Act.[67]

### C. Revisions to the NCCDA Have Expanded the Scope of Outbound Investment Review.

When the original NCCDA was proposed in the House within America COMPETES in January 2022, it faced backlash from businesses, federal agencies, and legal practitioners, due to its breadth, unworkability, and potentially harmful economic effects.[68] It was ultimately removed from America COMPETES and an alternative, the Revised NCCDA, was reportedly circulated in Congress in draft form.[69] No further action has been

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63. *Id.*

64. *Id.*

65. H.R. 6329, 117th Cong. §§ 1006–1008 (2021).

66. *Id.* § 1013.

67. 50 U.S.C. § 4565(m)(2–3).

68. *See National Security Update– The House of Representatives Proposes an Outbound Investment Review Regime as Part of the American COMPETES Act*, COVINGTON (Jan. 27, 2022), https://www.cov.com/en/news-and-insights/insights/2022/01/national-security-update-the-house-of-representatives-proposes-an-outbound-investment-review-regime-as-part-of-the-america-competes-act.

69. Discussion Draft of the National Critical Capabilities Defense Act of 2022, ROS22860 HKG, 117th Cong. § 1005 (5)(B), https://insidetrade.com/sites/insidetrade.com/files/documents/2022/jun/wto2022_0399a.pdf.

taken, but the Revised NCCDA is the most recent proposal that has developed the existing framework for outbound investment review. Instead of narrowing the scope of the review in response to widespread criticism, the draft legislation contemplates an expansion of the NCCDA's regulatory and jurisdictional scope.

1. Revised NCCDA Provisions

Minor revisions to the previous proposal by the Revised NCCDA include the removal of the U.S. Trade Representative as Chairperson, leaving discretion to the President to determine the chair; a decrease in review timeline from 60 days to 45 days; and more limiting language for covered activities.[70] The language of the draft legislation provides for mandatory notification and unilateral review, similar to its parent bill.[71] The CNCC has the same review and mitigation powers as in the previous bill, [72] and the President is still able to suspend or prohibit a transaction under existing authorities, such as the Export Control Reform Act of 2018,[73] IEEPA[74] or other sanctions orders, or the Defense Production Act of 1950.[75] If these fail to provide authority for the President's action, the President can suspend, prohibit, or mitigate a covered transaction.[76] In other words, the Revised NCCDA more closely mirrors CFIUS.

However, there are still marked ambiguities in the Revised NCCDA that pose interesting problems for the implementation of an effective outbound investment review process. The NCCDA expands the previous proposal in significant ways. For instance, its mandatory review requirement now not only applies to U.S. entities but also to foreign entities, foreign affiliates, or U.S. affiliates who are "subject to substantial influence from either the country of concern or an entity influenced by a country of concern," defined as the People's Republic of China, Russia, Iran, North Korea, Cuba, and Venezuela.[77] The term "substantial influence" is undefined in the recent draft,[78] which leaves this provision's scope arguably unlimited, since almost any entity could be influenced by a country of concern. This change might leverage investment review over businesses completely outside of the U.S. that have no nexus to the U.S. other than a level of

70. *Id.*
71. *Id.* § 1003(c)(1–2).
72. *Id.* § 1004.
73. 50 U.S.C. § 4801–4852.
74. 50 U.S.C. § 1701 *et seq.*
75. 50 U.S.C. § 4501 *et seq*.
76. *Id.*
77. 50 U.S.C. §§ 1001(1)(B), 1001(4).
78. *See* 50 U.S.C. § 1001(4) (with no definition included for "substantial influence.").

"influence" by a country of concern.

Perhaps most concerning is the application of the new proposal to not only continuing and proposed transactions, but also to activities overseas.[79] Covered activities under the proposal now encompass manufacturing and relocation of a national critical capability in a country of concern and open-source technology sharing that "supports, contributes to, or enables" a national critical capability in a country of concern. Also covered are investments into financial resources for a national critical capability, "any activity by a recipient or beneficiary of financial assistance" with respect to a country of concern, or any activity that benefits from a certain financial amount in goods or services by a U.S. national security agency with respect to a country of concern.[80] To reiterate, an entity of concern could be a country that is not a U.S. adversary, but simply a country that is characterized as being "influenced by a country of concern."[81] The review of a wide range of activities conducted by U.S. and non-U.S. actors alike could sweep in both advisory activities and financial investments. The proposal threatens to include such "mundane international activities such as hiring salespeople in some foreign markets."[82] One study estimates that the proposed screening review would cover around 43 percent of U.S. investments in China, which would likely discourage American investment abroad and create unpredictability for investors.[83]

In the current draft legislation, the phrase "national critical capabilities" has a more expansive definition than it did in the previous bill, but still is defined in reference to supply chain capabilities, like batteries, pharmaceuticals, semiconductors, artificial intelligence, bioeconomy, manufacturing for essential goods and materials within those supply chain items, and entire industries and sectors within the supply chain.[84] Now, the Revised NCCDA also carves out several exceptions from "covered activities," which include a still-undefined de minimis threshold, any prior transaction concluded at the time of enactment, ordinary business

79. *See* 50 U.S.C. § 1001(5).

80. 50 U.S.C. § 1001(5)(A).

81. 50 U.S.C. § 1001(7)(A).

82. Chamber of Com. of the U.S., U.S. Chamber Letter on the Bipartisan Innovation Act (Mar. 16, 2022), https://www.uschamber.com/international/u-s-chamber-letter-on-the-bipartisan-innovation-act.

83. Thilo Hanemann, et al., *An Outbound Investment Screening Regime for the United States?*, U.S.-CHINA INVESTMENT PROJECT, 7 (Jan. 2022), https://rhg.com/wp-content/uploads/2022/01/RHG_TWS_2022_US-Outbound-Investment.pdf.

84. Discussion Draft of the National Critical Capabilities Defense Act of 2022, ROS22860 HKG, 117th Cong. § 1001 (10)(A), https://insidetrade.com/sites/insidetrade.com/files/documents/2022/jun/wto2022_0399a.pdf.

transactions that would not result in any foreign intrusion, and licenses.[85] Even so, because of the massive scope of the proposed coverage of activities related to the manufacturing of national critical capabilities, the review could extend through the supply chain of all items used to manufacture anything that could be deemed a national critical capability. This might implicate "ordinary business transactions" that on their own would not result in a foreign intrusion. Coupling the broad definition of national critical capabilities with the vast scope of implicated activities, the Revised NCCDA might encroach upon private business, without a specific national security nexus.

The CNCC would still be granted power to conduct non-review activities, such as directing an interagency rulemaking process that adds more items to the list of national critical capabilities.[86] The Revised NCCDA also now calls for multilateral engagement with U.S. allies, even recommending "technical assistance" to be provided to partners of the U.S to develop comparable mechanisms.[87]

One source has indicated that the Revised NCCDA could be going through more changes before being formally re-proposed as a bill, but has not confirmed the congressional reaction to the newest screening mechanisms.[88] The newest proposal purportedly "focuses on transparency requirements for companies that receive funding from the bill, but removes the authority to block or modify transactions in the review process"—presumably on the part of the CNCC.[89] These revisions might limit the agency's power, but still would not cure the proposal's other ambiguities and overbroad scope, since the President would still have authority to achieve the same results pursuant to the CNCC's review under the Revised NCCDA.

2. Critical Reception of the Revised NCCDA

There has been widespread criticism of the Revised NCCDA, including concerns expressed in a Coalition letter from the U.S. Chamber of Commerce to Congress.[90] In the letter, the Chamber of Commerce calls the Revised NCCDA's proposal unworkable and unclear: "[t]he measure is overly broad in scope and would capture a wide range of transactions without

85. *Id.* § 1001(5)(B).
86. *Id.* § 1008.
87. *Id.* § 1009.
88. Manak, *supra* note 25.
89. *Id.*
90. Chamber of Com. of the U.S., *supra* note 82.

an obvious nexus with national security."[91] The Chamber of Commerce argues that the new process would suppress American innovation and technical progress, since it imposes such strict regulation on critical infrastructure needed for American weapons and technology, and it encourages Congress to focus on implementing such a review process through existing export control mechanisms or CFIUS review.[92] Although the Chamber of Commerce's criticism is well-founded, it should be noted that 75 percent of U.S. direct investment abroad occurs in high-income developed countries, rather than countries of concern, so this bill would likely cover a limited portion of U.S. investments overall.[93] Still, the Revised NCCDA has the potential to hamstring American innovation in important sectors that are sourced by or pass through countries of concern.

The most prevalent criticism of outbound investment review is that it is redundant. Some argue that foreign supply chain dominance could be addressed by an existing structure, such as export control mechanisms under the Export Control Reform Act.[94] Implementing a new system might pose concerns from a practical and financial standpoint. Inu Manak of the Council of Foreign Relations has asserted:

> The United States has a robust export control regime, and it is not clear that an outbound investment screening mechanism would capture any additional national security concerns that the export control regime cannot address. And if the current regime does not fill a particular gap, it would be worthwhile to first consider amendments to existing regimes than create an entirely new process.[95]

Although this criticism is certainly based in valid concerns, the Revised NCCDA still can provide needed regulation that current export control mechanisms do not. For instance, export control systems do not apply to companies' capital investments into foreign entities when the investment does not implicate a transfer of goods, services, or technology,[96] while the Revised NCCDA might presumably cover activities that relate to the supply chain for goods, services, and technologies, in addition to transactions. Unlike existing export control regimes that limit the export of U.S.-manufactured defense articles and services, nuclear equipment, and dual use items to countries of concern,[97] the Revised NCCDA would impose

91. *Id.*

92. *Id.*

93. Manak, *supra* note 25.

94. *Id.* (discussing ECRA, 50 U.S.C. § 4801–4852, but notably mislabeling it as the Export Control Review Act).

95. *Id.*

96. MULLIGAN & LINEBAUGH, *supra* note 3, at 2.

97. *Id.* at 1.

restriction on some U.S. investments into foreign companies that do not have a direct nexus with the defense sector or national security.

The Revised NCCDA would also provide a more efficient, forty-five-day adjudicatory system to navigate risky outbound investments, as compared to the current export control advisory system. Export control guidance often takes months to solidify as the Chamber of Commerce adds to the list of technologies that fall under export control jurisdiction.[98] Even so, Clay Lowery, the former chair of CFIUS, acknowledged that while firms have historically been frustrated by slow and complicated export control regimes, placing confidence in the mechanisms of the Revised NCCDA might have unintended consequences. He noted that export control regimes have been cautious in defining critical and emerging technologies and "we're now going to create a system in which we're basically going to have a [rapid] judgment on these regimes,"[99] which could cause instability.

The Revised NCCDA has faced further resistance because the CNCC's review is arguably country-specific. CNCC review would focus on all investments into foreign entities of concern, unlike traditional CFIUS review which typically covers individual inbound investments that pose a specific concern.[100] The Revised NCCDA's emphasis on "unacceptable risks" to national critical capabilities creates uncertainty for investors who might not know what will be deemed an unacceptable risk, since there is no guidance in the proposed bill.[101] Many investors might interpret the effect of the Revised NCCDA as a ban on transactions in all countries of concern.[102] Manak has asserted that the expansive and vague scope of "national critical capabilities" would threaten a "protectionist" approach to market regulation that could endanger trade relationships with other countries.[103] The U.S. has international commercial influence, so the "ripple effect of these actions would be global in scale and could make countries that adopt strict screening mechanisms less competitive sources of foreign investment in the future."[104]

98. Manak, *supra* note 25.

99. Clay Lowery, Panel Discussion at Atlantic Council's Economic Statecraft Initiative (Jan. 14, 2022), https://www.atlanticcouncil.org/news/transcripts/outbound-investments-may-spell-trouble-for-U.S.-national-security-can-screening-reduce-the-risk/.

100. Manak, *supra* note 25.

101. *See id.* ("It is possible that a party engaged in a transaction may not even be aware that it could result in an unacceptable risk. This could generate major uncertainty for investors.").

102. Sarah Bauerle-Danzman, Panel Discussion at Atlantic Council's Economic Statecraft Initiative (Jan. 14, 2022), https://www.atlanticcouncil.org/news/transcripts/outbound-investments-may-spell-trouble-for-U.S.-national-security-can-screening-reduce-the-risk/.

103. Manak, *supra* note 25.

104. *Id.*

## IV. LEGAL ANALYSIS OF THE REVISED NCCDA PROMPTS CONSIDERATION OF ALTERNATIVES

There has not been an academic analysis of the legality of the Revised NCCDA, as critics have mostly focused on its practical implementation. If the consequences of which critics are warning occur, passage of the Revised NCCDA might destabilize investors and the American economy, which would itself implicate national security. As scholar Will Moreland has contended, "[a]mid an international clash of systems, the weakening of the American middle class – and consequently public faith in the American model – becomes a national security issue. Domestic unease forces leaders to focus resources at home when international competitors are pressing forward abroad."[105] Conversely, if national security is compromised by foreign control of the supply chain for critical resources, the economy and American defense would be similarly destabilized.

Destabilization of national security in both scenarios implicates executive power, either exercised pursuant to statute by a congressional delegation[106] or pursuant to the Executive's own action.[107] Both paths appear treacherous. An analysis of the potential legal approaches to the extraterritorial application of the Revised NCCDA under international law and the Foreign Commerce Clause foresees potential international unrest that might result from implementation of the Revised NCCDA. And, although the Executive Branch does receive deference in actions motivated by national security and foreign affairs,[108] Congress will probably refuse to authorize the Revised NCCDA because of its expansive scope and minimal accountability procedures. Especially because the Revised NCCDA does not necessarily implicate foreign affairs or national security directly, as will be discussed,[109] it is potentially unconstitutional for the Executive Branch to implement it in full without congressional authorization. If the President does act alone to implement the Revised NCCDA as it exists now, pursuant to an executive order, the Executive Branch will likely be acting without congressional authorization and thus at its lowest ebb of authority.[110]

105. Moreland, *supra* note 26, at 645.

106. *See* Zivotofsky v. Kerry, 576 U.S. 1, 10 (2015) (analyzing the limits of the Executive in the face of congressional authorization, silence, or resistance).

107. *See* Abraham D. Sofaer, *Presidential Power and National Security*, 37 PRESIDENTIAL STUD. QUART. 101, 114 (2007), https://www.jstor.org/stable/20619297 (discussing at length the Executive's power to act alone).

108. *See Zivotofsky,* 576 U.S. at 15 (for example, the President "is also better positioned to take the decisive, unequivocal action necessary to recognize other states at international law.").

109. *See infra* pp. 308–310.

110. *See Zivotofsky,* 576 U.S. at 10 (noting that because the Revised NCCDA is not necessarily in the Executive's constitutional purview, and if Congress declines to enact it, the Executive will be acting

Modification of the Revised NCCDA to further limit its scope before executive or congressional actions, conducting a "pilot program" to test the efficacy of the review proceeding, or relying on an existing executive regulatory practice might resolve the issues that currently undermine the legality and workability of outbound investment review.

### A. The Revised NCCDA Implicates International Law Under Extraterritoriality Principles and Under the Foreign Commerce Clause.

Historically, courts have applied a presumption against extraterritorial application of congressional regulation.[111] Critics of the presumption highlight that Congress has become more globally focused and less territorial in recent years.[112] Even so, the Supreme Court has continually affirmed the presumption since Congress "is primarily concerned with domestic conditions."[113] In *Morrison v. Nat'l Austl. Bank Ltd.*, the Supreme Court required a clear indication of congressional intent, confirmed by statutory context, for a federal statute to apply extraterritorially.[114] International law principles are at play in questions of extraterritorial application of a federal statute.[115] Five principles govern the exercise of extraterritorial jurisdiction: territoriality (jurisdiction within a national border or over actions that have effects within that territory), nationality (jurisdiction over a nation's citizens wherever they are), the protective principle (jurisdiction over foreign conduct that threatens national security), passive personality (jurisdiction over foreign individuals who injure nationals abroad), and universality (jurisdiction over universally heinous crimes regardless of where they are committed).[116]

#### 1. The U.S. Might Face Resistance if It Attempts to Regulate Foreign Transactions Abroad.

In terms of the types of transactions which the Executive Branch has the power to regulate, "statutes underlying national security review frameworks generally require some nexus between the transaction under

at its lowest ebb of authority).

111. CURTIS A. BRADLEY, *Extraterritorial Application of U.S. Law*, *in* INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM, 179–80 (2d ed. 2015) (discussing American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) which held that application of antitrust regulations do not apply to a U.S. company abroad, as a federal statute should be presumed "to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power").

112. *Id.*

113. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (citing Foley Bros. Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

114. Morrison v. National Australia Bank, 561 U.S. 247, 248 (2010).

115. *See* Sofaer, *supra* note 107, at 114.

116. BRADLEY, *supra* note 111, at 186.

review and a U.S. person or property interest."[117] Some foreign countries have rejected economic regulations that apply extraterritorially to foreign corporations "owned or controlled by U.S. corporations," such as those associated with economic sanctions under IEEPA.[118] They allege that "these regulations violate international law, as neither being within the nationality category nor effects doctrine" in international law.[119]

Although CFIUS applies to investments into the U.S. and has clearly delegated authority to regulate transactions that impact national security within the U.S., the Revised NCCDA has a much more ambiguous and expansive jurisdiction abroad. Its existing regulations could extend to foreign affiliates of the U.S. in their dealings with other foreign entities,[120] attenuating the American nexus of the activity regulated and facing the same difficulty in enforcement abroad as have extraterritorial export control mechanisms.

Interestingly, under *United States v. Kassar*, the Second Circuit (citing other circuit holdings) delineated a potential legal principle that could justify such expansive outbound investment review.[121] It proposes that "for non-citizens acting entirely abroad, a jurisdictional nexus exists when the aim of that activity is to cause harm inside the United States or to U.S. citizens or interests."[122] It is unclear how far this nexus can extend – would a U.S. ally's investment in one link of the supply chain for a national critical capability actually constitute a "threat" to U.S. interests? Would investing in a component of a national critical capability abroad automatically demonstrate that entity's desire to cause harm to the United States? Based on this ambiguity, the Revised NCCDA might still face pushback from foreign nations whose companies might be arbitrarily implicated by such expansive regulation.

2. The Foreign Commerce Clause Does Not Justify the Revised NCCDA's Scope.

There is also a constitutional argument that might be raised in support of the extraterritorial application of the Revised NCCDA, but it will also

117. MULLIGAN & LINEBAUGH, *supra* note 3, at 5.

118. BRADLEY, *supra* note 111, at 190.

119. *Id.*

120. Discussion Draft of the National Critical Capabilities Defense Act of 2022, ROS22860 HKG, 117th Cong. § 1003(2), https://insidetrade.com/sites/insidetrade.com/files/documents/2022/jun/wto2022_0399a.pdf.

121. United States v. Kassar, 660 F.3d 108, 118 (2d Cir. 2011).

122. *Id.*; *See also* United States v. Peterson*,* 812 F.2d 486, 494 (9th Cir. 1987) ("Protective jurisdiction is proper if the activity threatens the security or government functions of the United States.").

likely fail. The Foreign Commerce Clause, an overlooked enumerated grant of commercial regulatory power within the Constitution, provides Congress the power to regulate commerce "with foreign nations."[123] If the Executive Branch acts on its own and codifies the mechanisms proposed by the Revised NCCDA, it would not be acting under the authority granted by the Foreign Commerce Clause, since Article I only explicitly grants that type of regulatory power to Congress.[124] However, since Congress might contemplate the delegation of extraterritorial regulatory authority to the Executive Branch by passing the Revised NCCDA, this analysis is implicated.

The Foreign Commerce Clause is unilateral in the sense that it does not require foreign consent for its authorization or implementation.[125] Legislation under the Foreign Commerce Clause applies to the use of channels of foreign commerce with the U.S., the instrumentalities, persons, or things in foreign commerce with the U.S., or activities having a substantial relation to foreign commerce with the U.S.[126] The commerce regulated must have a nexus with the U.S., based on the plain text of the Foreign Commerce Clause ("commerce with foreign nations").[127] Arguably, investments and activities related to the supply chain are activities that have a substantial relation to foreign commerce with the U.S. Looking at the text of the Foreign Commerce Clause, however, Congress will probably be unable to regulate entirely local conduct by foreign entities abroad under this power.[128] As Professor Anthony Colangelo has explained:

> A comprehensive global regulatory power over international markets among the nations of the world is not within the scope of the Clause. And thus, reaching purely local conduct inside foreign nations pursuant to that power is neither appropriate nor adapted to the end of regulating commerce only 'with,' not 'among,' those nations; indeed, it is inconsistent with the letter and spirit of that constitutional language.[129]

The Foreign Commerce Clause could be used to uphold regulation that operates entirely outside of the U.S if there is substantial effect within the U.S., which Colangelo has argued is derived from international law principles.[130] Ultimately, if the U.S. is able to regulate extraterritorial activity under international law by an "internationally agreed-upon comprehensive

123. U.S. CONST. art. I, § 8, cl. 3.
124. *See id*.
125. Anthony J. Colangelo, *The Foreign Commerce Clause,* 96 VA. L. REV. 949, 952 (2010).
126. *Id.* at 986.
127. *Id.*
128. BRADLEY, *supra* note 111, at 195.
129. Colangelo, *supra* note 125, at 1021.
130. *Id.*

regulatory scheme," the activity probably has a substantial effect on the U.S.[131] However, because the Revised NCCDA proposes a global regulatory power over presumably local conduct, its widest application will likely be inconsistent with the Foreign Commerce Clause. As mentioned above, since IEEPA and similar export control statutes that apply extraterritorially and contemplate similar provisions to the Revised NCCDA have faced resistance from international actors, Congress's action in creating the Revised NCCDA would probably be resisted by foreign governments, leading to a conclusion that it is not an "internationally agreed upon" regulatory scheme and thus perhaps unjustified under the Foreign Commerce Clause.

3. Multilateral Collaboration to Enact an Outbound Foreign Investment Review Might Provide a Solution.

Fortuitously, an internationally agreed-upon regulatory scheme may be in the making. In October 2022, the European Commission briefly announced its contemplation of an outbound investment review system, pursuant to a re-examination of the EU's export control regime,[132] seemingly in response to the U.S.'s announcement of its consideration of a similar mechanism.[133] Because some EU members want to continue an investment relationship with China, the U.S. and the EU should collaborate to minimize friction between the process contemplated by the Revised NCCDA and the EU's future protocols.[134] As Dr. Elmar Hellendoorn of the GeoEconomics Center and the Europe Center for the Atlantic Council argues:

> The multilateralization of outbound investment screening is logical merely from a technical perspective. American capital, knowledge, and sensitive technology may be tied up in European companies, which can still invest in China, independently from US regulators. US legislation, once extant, may even have extraterritorial reach, automatically affecting European investors in China.[135]

Multilateral collaboration might be difficult because of diverging European interests, a lack of European national security standards, and Europe's different strategic priorities.[136] However, if the EU and the U.S. can find a way to develop outbound investment review systems in harmony with each

131. *Id.* at 1038.

132. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, at 11, COM (2022) 548 final (Oct. 18, 2022).

133. Elmar Hellendoorn, *What US Outbound Investment Screening Means for Transatlantic Relations*, ATL. COUNCIL (Nov. 8, 2022), https://www.atlanticcouncil.org/blogs/econographics/what-us-outbound-investment-screening-means-for-transatlantic-relations/.

134. *Id.*

135. *Id.*

136. *Id.*

other, the review process could become an "internationally agreed upon" regulatory scheme that would allow extraterritorial implementation pursuant to international law principles and consistent with the Foreign Commerce Clause.

B. The Revised NCCDA Implicates Separation of Powers Concerns.

In its current form, Congress will probably refuse to authorize the mechanisms proposed by the Revised NCCDA without significant modifications to the draft legislation, and the Executive Branch should be cautious in acting without more guidance from Congress.

Judicial precedent demonstrates extreme deference to presidential action in foreign affairs and national security, often finding that when the Executive acts with "no contrary indication of legislative intent," Congress has implicitly authorized the executive action, subject to certain caveats.[137] In *Youngstown Sheet & Tube Co. v. Sawyer*,[138] Justice Jackson's concurrence laid out a framework that has since been adopted when considering executive action in relation to congressional authority.[139] When Congress has passed a statute authorizing the President's actions, the President is acting with the strongest presumption of authority.[140] Justice Jackson also explained that the President has some authority to act in the absence of legislative authority, when Congress is silent or has demonstrated implied consent to the President's action.[141] Even so, the "harder it is to ground a presidential act in specific legislative authorization, the harder it is to justify that act under the Constitution."[142]

1. National Security Deference Provides a Presumption of Legality.

As the national security environment has evolved since the 1950s, the President can often operate without consulting Congress because of a proliferation of broad, ex-ante congressional authorizations for presidential action motivated by national security concerns.[143] For instance, IEEPA establishes clear congressional authorization for the Executive Branch to

137. Dames & Moore v. Regan, 453 U.S. 645, 678–79 (1981).

138. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 535–38 (1952) (Jackson, J., concurring).

139. *See Zivotofsky,* 576 U.S. at 10 (adopting Jackson's concurrence explicitly).

140. *Youngstown*, 343 U.S. at 637. (Jackson, J., concurring).

141. *Id.* at 636–38.

142. Andrew Kent & Julian D. Mortenson, *Executive Power and National Security Power* 2 (Fordham L. Legal Studies Research Paper, Paper No. 2824416, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2824416# *reprinted in* THE CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION, (J. Compton & K. Orren, eds., 2018).

143. *Id.* at 29–30.

wield economic sanctions pursuant to a national emergency, indicated by the explicit language of the authorizing statute and the mechanisms for executive accountability within the statute.[144]

CFIUS, on the other hand, has congressional authorization to review domestic investments pursuant to its legislative history, but has been criticized for its lack of accountability within FIRRMA.[145] The Revised NCCDA, drawing its statutory language directly from FIRRMA, likely faces similar accountability problems.

2. The Revised NCCDA Lacks the Executive Authority Implicit Within Similar Regimes, such as CFIUS and IEEPA.

The CFIUS review process is the inspiration behind the Revised NCCDA, and so it is important to understand the legislative history that led to the codification of FIRRMA, which is grounded in a consistent interplay between Congress and the Executive Branch. Executive orders and congressional action complemented each other over time to gradually extend executive power in CFIUS review, implicitly authorizing CFIUS's current scope. The Revised NCCDA, proposing a fully developed new review process, will lack this gradual congressional approval. There will likely be difficulty in the immediate implementation of such a massively expansive review system without revision.

CFIUS originated as a fact-finding organization pursuant to a 1975 Executive Order.[146] The Committee contemplated by the Executive Order did not have the express authority to take action against specific foreign investments, only to collect data on foreign investments into the United States.[147] In response to criticism, Congress codified CFIUS by issuing the International Investment Survey Act of 1976 to authorize "the collection and use of information on international investments and … [provision of] analyses of such information to the Congress, the executive agencies, and the general public."[148]

In 1988, a weakening dollar, U.S. debt, and low stock prices created a perception of American commercial vulnerability.[149] In the midst of this national crisis, Congress acted again to expand CFIUS's scope with the

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144. 50 U.S.C. § 1701 (2018).

145. E. Maddy Berg, *A Tale of Two Statutes: Using IEEPA's Accountability Safeguards to Inspire CFIUS Reform,* 118 COLUM. L. REV. 1763, 1764 (2018).

146. Exec. Order No. 11,858, 40 Fed. Reg. 20263 (May 7, 1975).

147. Wakely, *supra* note 4.

148. 22 U.S.C. § 3101(b) (1976).

149. Moreland, *supra* note 26, at 632.

Exon-Florio amendment to the 1950 Defense Production Act.[150] This amendment codified the procedures used by the President to regulate specific covered transactions.[151] The same year, President Reagan used his executive order to delegate the authority to mitigate transactions to CFIUS itself.[152] This move effectively transformed CFIUS from a fact-finding body "with limited authority to review and analyze data on foreign investment to an important component of U.S. foreign investment policy with a broad mandate and significant authority to advise the President on foreign investment transactions."[153]

Congress again endorsed this transformation with the Byrd Amendment to the Exon-Florio statute in 1992.[154] Proponents of the amendment argued that a shift in language from a transaction that "threatens to impair national security" under the Exon-Florio amendment to a transaction that "could affect national security" under the Byrd Amendment effectively broadened executive authority to capture relevant transactions that would not directly cause national security risks but still implicate national security concerns.[155] Critics of the Byrd Amendment argued that it did not extend far enough because CFIUS was still reliant on voluntary notification by covered parties, which hindered executive control over dangerous investments that went unreported with little consequence.[156] In response to this debate, President Bush added an important administrative change to the CFIUS review process in 2006.[157] Effectively, the President delegated retroactive review authority to CFIUS if the parties materially failed to comply with the proffered terms post-review.[158]

After the attacks on September 11, 2001, there arose a need for clarification about how CFIUS could address homeland security, national security risks posed by emerging technology, particular countries' suspect affiliations, and new threats in the commercial realm.[159] In 2007, Congress

150. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425 (codified as amended at 50 U.S.C. §4565 (2022)).

151. *Id.*

152. Exec. Order No. 12,661, 54 Fed. Reg. 779 (Dec. 27, 1988).

153. JAMES JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENTS IN THE U.S. (CFIUS) 8 (2020).

154. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 837, 106 Stat. 2315, 2464 (1992) (prior to 2007 amendment).

155. *Id.*

156. Kristy Young, *The Committee on Foreign Investment in the United States and the Foreign Investment and National Securities Act of 2007: A Delicate Balancing Act that Needs Revision*, 15 U.C. DAVIS J. INT'L L. & POL'Y 43, 49 (2008).

157. JACKSON, *supra* note 153, at 9.

158. *Id.*

159. Moreland, *supra* note 26, at 636.

authorized FINSA, the Foreign Investment and National Security Act.[160] Its goals were to increase transparency and enable congressional oversight of CFIUS.[161] Importantly, it gave CFIUS statutory authority, modified and added to its membership criteria, and increased the factors the president could use in suspending or prohibiting a covered transaction.[162] In 2018, FIRRMA demonstrated congressional sanction of CFIUS's growth, in direct response to a growing Chinese presence in foreign investments into the U.S.[163] FIRRMA includes more covered transactions, such as mergers, acquisitions or takeovers by a foreign person that could result in foreign control of U.S. commerce and joint ventures.[164]

Most recently, in September of 2022, President Biden issued an Executive Order, the first order to address CFIUS directly regarding the risk factors it should consider when reviewing covered industries.[165] The Executive Order directs CFIUS to consider harm to U.S. technology, potential cybersecurity risks, third party ties, direct transactions' impacts on citizens' sensitive data, and the aggregate effect of investments within certain industries, even though CFIUS traditionally approaches its analysis case by case.[166] It also expands the focus of FIRRMA by underscoring the importance of regulating inbound foreign investment in broad industry and technology sectors, including digital and physical supply chains, rather than the defense industry alone.[167]

Each of these mechanisms reflect congressional support for the expansion of national security review and the link between national security and the economy. Under Justice Jackson's framework in *Youngstown*, the Executive is operating at the highest ebb of its power when there is congressional authorization for executive action.[168] Through a combination of legislation and executive orders, Presidential action under CFIUS has been consistently authorized by Congress.[169] Because CFIUS originated as a fact-finding body pursuant to an Executive Order, and then progressed

160. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246. President Bush implemented FINSA in 2008 by executive order. *See* Exec. Order No. 13,456, 3 C.F.R. § 171 (2009).

161. *See* JACKSON, *supra* note 153, at 10.

162. *Id.*

163. *Id.* at 11.

164. *Id.*

165. Exec. Order No. 14,083, 87 Fed. Reg. 57369 (Sept. 20, 2022).

166. *Id.*

167. *Id.*

168. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 535–38 (1952) (Jackson, J., concurring).

169. *See* MULLIGAN & LINEBAUGH, *supra* note 18, at 3.

incrementally through legislative and executive expansion to become the large reviewing committee it is today, CFIUS authority has still been cabined at important points throughout its development.[170] CFIUS has been limited by its mandate to only evaluate transactions that directly pose a threat to national security; Congress specifically ordered that it "should not consider issues of national interest absent a national security nexus."[171] Congress has delegated its regulatory power to CFIUS to review transactions to protect national security, not to regulate private businesses unrelated to any national security risk.

Based on its demonstrated support for CFIUS review, it would not be surprising for Congress to authorize executive regulation of outbound foreign investment review pursuant to a national security need. However, the Revised NCCDA contemplates a mechanism that is much larger in scope and power than CFIUS review. In stark contrast with the gradual progression and carefully limited scope of CFIUS, the CNCC is not originating as a fact-finding body: it is emerging as a fully-fledged regulatory committee that has immense mitigation power and mandatory review authority.[172] In addition, the Revised NCCDA lacks FIRRMA's focus on threats to national security, opting for more attenuated language about investments and activities that might implicate still-undefined national critical capabilities. As it stands now, the draft describes its statutory purpose to "require reviews of United States investment in foreign countries that *may* threaten national critical capabilities."[173] Currently, the transactions *and* activities covered by the Revised NCCDA extend up the entire supply chain for national critical capabilities and, taken individually, might implicate completely private and unrelated transactions by entirely foreign investors. Without incorporating a direct national security nexus for the items and activities regulated, which would also drastically limit the scope of the Revised NCCDA's proposal, Congress is unlikely to authorize the Executive to regulate these types of foreign investments abroad by passing a statute. The draft legislation should incorporate more clarity about the scope of reviewable transactions and tailor the review to respond to direct national security threats posed by outbound investments.

In the absence of congressional authorization, the Executive Branch

170. *See infra* pp. 312–314.

171. Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, § 1702(b)(9), 132 Stat. 2177 (2018) (codified as amended at 50 U.S.C. § 4565).

172. *See infra* pp. 297–300; 301–303.

173. Discussion Draft of the National Critical Capabilities Defense Act of 2022, ROS22860 HKG, 117th Cong. § 1001, https://insidetrade.com/sites/insidetrade.com/files/documents/2022/jun/wto2022_0399a.pdf.

might act to codify the Revised NCCDA pursuant to Executive Order. This would probably be an unconstitutional overstep of its authority, since the current proposals do not explicitly operate pursuant to a foreign affairs or national security justification and indeed, implicate activities outside of those realms. If the Executive Branch decides to act without congressional approval, it will be operating with at-best ambiguous constitutional authorization, since Congress would have refused to pass the Revised NCCDA and the Revised NCCDA does not propose a standard that can fit well under the President's foreign affairs or national security powers.

3. The Revised NCCDA Repeats the Mistakes of FIRRMA and Lacks the Executive Accountability Mechanisms Implicit Within IEEPA.

Although Congress has continually sanctioned its expansion, CFIUS review has still come under fire for evading accountability by Congress and the judiciary based on its ill-drafted governing statute.[174] It is likely that review under the Revised NCCDA would face the same concerns unless the mechanisms that have been passed down from FIRRMA are modified.

Other similar statutes, such as IEEPA, have more safeguards in place to ensure executive accountability and protect the separation of powers.[175] IEEPA, like FIRRMA and the Revised NCCDA, "has given presidents the authority to alter or even terminate an extraordinary range of property interests for reasons expressed in statutory terms that are simple, vague, and far-reaching."[176] However, under this authority, the President can only claim the power to block transactions relevant to a publicly declared "national emergency," as contemplated by the statute.[177] Importantly, Congress has the authority to terminate the national emergency by joint resolution;[178] these have rarely been introduced, and never in the context of IEEPA, which signals Congress's continued endorsement of the President's broad use of this power.

While there have been criticisms of the actual efficacy of the executive oversight mechanisms contemplated by IEEPA, such as the difficulty of a national emergency termination by Congress without a bipartisan majority,[179] Congress still has extensive oversight power over executive

174. Berg, *supra* note 145, at 1764.

175. P.L. 95-223 (October 28, 1977), 91 Stat. 1626 (codified as amended at 50 U.S.C. § 1701 *et seq.* (2018)).

176. Kent & Mortenson, *supra* note 142, at 30.

177. 50 U.S.C. § 1701 (2018).

178. 50 U.S.C. § 1622 (2018).

179. *See generally* Bailey Williams, *Xiaomi Corporation v. U.S. Department of Defense, Defending the International Emergency Economic Powers Act*, 17 DUKE J. OF CON. L. & PUB. POL'Y 333, 355–57 (2022).

action through the statutory scheme governing the Office of Foreign Assets Control ("OFAC").[180] Unlike CFIUS, OFAC's powers are authorized by specific regulations for each sanction's program pursuant to each national security emergency, rather than CFIUS's broadly delegated and constant regulatory power.[181] CFIUS can unilaterally initiate a review without notifying Congress,[182] whereas OFAC must act pursuant to a public declaration of a national emergency, providing a political check on executive action.[183] A national emergency declaration is the sole trigger for OFAC's action,[184] whereas CFIUS may consider a wide range of factors relating to national security before deciding to take action against an investment.[185] IEEPA also provides for congressional review of OFAC's action during the declared national emergency period,[186] whereas CFIUS must only report its actions to Congress after each review is concluded.[187]

Finally, IEEPA subjects OFAC's actions to judicial review, in tandem with the APA's scope of review provisions,[188] whereas CFIUS has a more limited judicial review provision, limiting judicial oversight over executive action.[189] Judicial review over the CFIUS process has been litigated before, specifically in *Ralls Corp. v. Comm. on Foreign Inv. in the United States.*[190] In *Ralls,* an American company owned by two foreign nationals filed a suit against a CFIUS order and a Presidential order that first restricted, and then prohibited, the company from acquiring four American companies.[191] Pursuant to FINSA (and FIRRMA), judicial review of CFIUS was statutorily barred for "the actions . . . and findings of the President."[192] The D.C. Circuit followed Supreme Court precedent to hold that "a statutory bar to judicial review precludes review of constitutional claims only if there is clear and convincing evidence that the Congress so intended."[193] The court construed the statute as barring judicial review of the "final action[s] the President takes 'to suspend or prohibit' any covered transaction that threatens to impair the

180. Berg, *supra* note 145, at 1780–86.
181. *Id.*
182. 50 U.S.C. § 4565(b)(3)(A).
183. 50 U.S.C. § 1701.
184. 50 U.S.C. § 1701(b).
185. 50 U.S.C. § 4565(f)(6).
186. 50 U.S.C. § 1703.
187. 50 U.S.C. § 4565(b)(3)(A).
188. 50 U.S.C. § 1702(c).
189. 50 U.S.C. § 4565(e).
190. Ralls Corp. v. Comm. on Foreign Inv. in the U.S., 758 F.3d 296, 301–02 (D.C. Cir. 2014).
191. *Id.*
192. 50 U.S.C. § 4565(e)(1) (2018).
193. *Ralls*, 758 F.3d at 308.

national security of the United States."[194] FINSA did not prohibit courts from reviewing the process provided by the Presidential Order or CFIUS's review, and the court held CFIUS must provide the parties with basic elements of procedural due process, such as being informed of the official action, being given access to the unclassified evidence on the official record, and being able to rebut that evidence.[195] The actions of CFIUS can be litigated on procedural grounds, but the Executive's final actions cannot, pursuant to FINSA and now FIRRMA.[196]

Because CFIUS itself has much less executive accountability than similar national security statutory regimes,[197] the Revised NCCDA, which closely tracks FIRRMA, will likely face the same criticisms while also lacking CFIUS's congressional authorization, setting it on even more uncertain footing.[198] In contrast to IEEPA's cabining of OFAC's action, the Revised NCCDA does not delegate authority to the CNCC based on a limited and specified national emergency; it would allow the CNCC to unilaterally initiate review and recommend suspension to the President, evading congressional interference.[199] It would only be required to issue a report to Congress annually, rather than after the conclusion of each review,[200] further isolating the powerful mitigation and suspension power held by the CNCC from congressional accountability.

Currently, there is no explicit judicial review provision in the Revised NCCDA.[201] Following in the steps of FIRRMA, the statute might specifically bar judicial review of final Presidential actions, and courts will treat judicial review of the President's final actions pursuant to the CNCC's recommendations as barred both under the Administrative Procedure Act ("APA") and the Revised NCCDA. If the Revised NCCDA bars judicial review of Presidential or agency action, such a provision would further insulate the operations of the CNCC from oversight. Conversely, if Congress explicitly allows for judicial review of the CNCC, it would be held somewhat accountable for its decisions. Rather than using the procedures within FIRRMA as a template for the Revised NCCDA, Congress should incorporate new accountability mechanisms into the Revised NCCDA to

194. *Id.* at 311.

195. *Id.*

196. *Id.*

197. *See generally* Berg, *supra* note 145.

198. Discussion Draft of the National Critical Capabilities Defense Act of 2022, ROS22860 HKG, 117th Cong. § 1007, https://insidetrade.com/sites/insidetrade.com/files/documents/2022/jun/wto2022_0399a.pdf.

199. *Id.* § 1003(2).

200. *Id.* § 1007.

201. *See id.* § 1003(c)(2).

increase executive transparency and provide more oversight into the CNCC's expansive review process.

### C. Alternative Proposals Are Needed to Best Implement an Effective Outbound Investment Review Mechanism.

In this Part, I predict that the unworkability and legal shortcomings of the current Revised NCCDA will probably result in either its complete overhaul by Congress or the cabining of the current proposal within an existing review mechanism to limit the scope of the outbound investment review. While both options would arguably solve the deficiencies in the current outbound investment review procedures under the Revised NCCDA, I propose that the latter would best curb the executive power contemplated by the Revised NCCDA while effectively addressing foreign threats to the supply chain. I recommend three alternative proposals for Congress or the Executive Branch to follow in promulgating a review system: revision of the Revised NCCDA, creating a pilot program, or gradual expansion by agency rulemaking. These solutions are outlined below.

First, Congress could improve the Revised NCCDA by adding several limiting provisions. The CNCC would be well served by limiting its jurisdiction to the *transactions* of specific U.S. actors who are investing in foreign capabilities abroad, as initially proposed, rather than extending regulation to the activities of U.S. allies and other foreign entities. In addition, the Revised NCCDA's scope would be clearer if the term "national critical capabilities" was explicitly defined, ideally with a connection to national security. These changes would closely tailor the proposed framework to the traditional Executive objective of protecting U.S. national security.

In addition, I argue that Congress could build in more oversight mechanisms within the Revised NCCDA review and reporting process; if it imported a joint resolution provision, Congress could have more review powers to encourage executive accountability. Importing IEEPA's requirement of a public declaration of national emergency that triggers agency action is impractical because of the confidential, sometimes classified nature of pending transactions. But the Revised NCCDA could open channels of communication to Congress and the courts by increasing the frequency of reporting to Congress and providing for judicial review of the CNCC's final actions.

A similar, more limited alternative could be the promulgation of a "pilot program." The Department of the Treasury has purportedly proposed another alternative very similar to the review mechanism under the Revised NCCDA, entitled under draft publication as the Sensitive Technologies

Supply Chain Risk Management Act of 2022.[202] The proposed review mechanism is framed as an 18-month "pilot program" that only applies to investments made by U.S. companies into foreign entities that design or manufacture "sensitive technologies" that pose a risk to the national security of the U.S., rather than undefined "national critical capabilities" introduced by the Revised NCCDA.[203] In contrast to the expansive suspension and mitigation power held by the proposed CNCC, the pilot program would create a Committee with a reporting function only, placing control in the hands of Congress rather than the Executive.[204] This proposal has gone largely unnoticed by lawmakers, but presents a narrower and more controllable program than that contemplated by the Revised NCCDA.[205]

I further propose another alternative to imposing a separate outbound investment procedure: simply relying on currently authorized procedures to enact review, such as rulemaking by an executive agency pursuant to an executive order. This proposal would align with the more gradual development of CFIUS review, slowing down the immense regulatory repercussions that an abruptly formed statutory review procedure might cause. If the Executive Branch does decide to form the CNCC as an executive committee in absence of congressional authorization, endorsement of a case-by-case rulemaking structure might also functionally limit the CNCC's review power.

It is helpful to look to similar instances of rule-making in cabining Executive power to illustrate this strategy's effectiveness. For instance, to implement Executive Order 13873, which declared foreign acquisition of sensitive technology to be a national security threat,[206] the Chamber of Commerce announced a rule to regulate information and communications technology and services (ICTS) transactions, which took effect in March of 2021.[207] Under this process, the Chamber of Commerce can review the national security and economic risks of transactions between any individual under U.S. jurisdiction, involving property in which a foreign adversary has an interest, and involving any ICTS[208] concerning "internet systems, wireless networks, cellular phones, computers, satellite systems, artificial

202. Manak, *supra* note 25.

203. *U.S. Policy-makers Consider Alternatives for Outbound Investment Review*, AKIN GUMP (May 5, 2022), https://www.akingump.com/en/news-insights/us-policymakers-consider-alternatives-for-outbound-investment-review.html.

204. *Id.*

205. Manak, *supra* note 25.

206. Exec. Order No. 13,873, 84 Fed. Reg. 22689 (May 15, 2019).

207. STEPHEN P. MULLIGAN, CONG. RSCH. SERV., IF11760, THE INFORMATION AND COMMUNICATIONS TECHNOLOGY AND SERVICES (ICTS) RULE AND REVIEW PROCESS (2022).

208. 15 C.F.R. 7.3(a) (2022).

intelligence, quantum computing, and cloud computing services"—much of the technology implicated by the covered transactions under the Revised NCCDA.[209] It can regulate transactions with a country deemed a foreign adversary, which is much more targeted than traditional CFIUS review or the procedure proposed under the Revised NCCDA, and it can review individual commercial sales:

> While CFIUS traditionally reviews major corporate restructurings and acquisitions, the ICTS Rule authorizes Commerce to review individual commercial sales. For example, whereas CFIUS might prevent a foreign entity from acquiring a stake in a U.S. semiconductor company, under the ICTS Rule, Commerce could block a U.S. company from buying individual semiconductors from a foreign company subject to the jurisdiction of a foreign adversary, such as China.[210]

Because the Chamber of Commerce's action is a rule pursuant to an executive order in the direct interest of national defense, I argue that many of the questions regarding congressional delegation of authority to the Executive pursuant to an expansive statute do not apply.[211] Under the commonly accepted view that the President has plenary removal authority, executive agencies are justified in following executive orders based on the Vesting and Take Care Clauses, since the President can remove executive agency heads at will and has the duty to oversee the functioning of the Executive Branch.[212]

Also, the Chamber of Commerce's ability to target individual transactions that pose a particular threat in a foreign adversary's jurisdiction would not implicate private transactions abroad, because each transaction implicates a certain ICTS item that is specified within the rule, in contrast with the Revised NCCDA's current vague regulatory power over "covered transactions and actions" that are expansively defined. Because the Chamber of Commerce is limited to reviewing transactions with foreign *adversaries*, its scope is cabined to a clearly specified list of foreign entities.[213] This stands in direct opposition to the Revised NCCDA's potential coverage of transactions and activities by U.S. actors, U.S. allies, and foreign adversaries

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209. MULLIGAN, *supra* note 207.

210. *Id.*

211. *See* U.S. CONST. art. II, § 1; U.S. CONST. art. II, § 3.

212. *See* U.S. CONST. art. II, § 1; U.S. CONST. art. II, § 3; Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S.Ct. 2183, 2197 (2020).

213. Securing the Information and Communications Technology and Services Supply Chain Interim Final Rule, 15 C.F.R. 7, 86 Fed. Reg. 4909 (proposed Jan. 19, 2021) (to be codified at 15 C.F.R. pt. 7) (listing the designated entities as, The People's Republic of China, including the Hong Kong Special Administrative Region (China); the Republic of Cuba (Cuba); the Islamic Republic of Iran (Iran); the Democratic People's Republic of Korea (North Korea); the Russian Federation (Russia); and Venezuelan politician Nicolas Maduro (Maduro Regime).)

at every stage of the supply chain.

I posit that a similar procedure that focuses on specific items in the manufacturing supply chain for national critical capabilities could be implemented in a targeted way by a single agency pursuant to an executive order, rather than by a complicated statutory scheme implemented by a massive conglomeration of departments and executive agencies. Such a procedure could also focus on individual transactions rather than activities, similar to the Chamber of Commerce's rule that reviews specific types of transactions between a U.S. individual and a foreign adversary. By isolating the authority to review outbound investments to an appropriate agency based on the nature of the transaction, the review of foreign investment would be much more tailored to the specific national security risk that threatens the U.S. through that transaction.

An agency rule pursuant to an executive order would still accomplish the goals of the Revised NCCDA, which would be the regulation of investment into critical capabilities abroad. However, it would limit the scope of the transactions and activities that are covered under the agency's authority and likely clarify the ambiguous validity of extraterritorial extension of a vague regulatory regime by establishing a tighter nexus to national security.

## V. CONCLUSION

The Revised NCCDA has been introduced at a time where national security is on the forefront of the American consciousness. Russia wages war with Ukraine, and China is a rising economic and security threat to the U.S. Americans have seen firsthand the ability of economic weapons, such as sanctions, to imperil Russian defense. The last year has prompted a more passionate call to use economic weapons within U.S. national security strategy and to diversify incoming supply chain sources to protect from the adversarial acquisition of sensitive technologies. Although reviewing outbound foreign investments may work to advance American national security, the proposal contemplated by the Revised NCCDA is ambiguous, overbroad, and impractical. Unless it is revised extensively before being passed by Congress or enforced by the Executive, the draft legislation's scope will implicate activities and transactions of foreign entities that have a negligible nexus to the United States, which places the Executive in a tenuous, arguably unconstitutional position.

A better solution would be to cabin the scope of the legislation and transform the outbound review mechanism into a smaller-scale, more limited review of transactions by a single agency pursuant to an Executive Order. This process is how CFIUS developed gradually and retained congressional authorization at each step of its expansion. Under its constitutional authority and existing congressional delegations, an existing executive agency could implement a scaled-down review of outbound investments related to singular transactions or items that implicate national security. If the independent review process proposed by the Revised NCCDA eventually becomes necessary, Congress can authorize the agency to expand its review powers as needed. This gradual development of outbound investment review would ultimately result in a measured approach to economic defense that is closely tailored to the Executive's constitutional national security power.