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## The Mandatory Investment Restriction Program: Past, Present and Future

A. Patrick Giles

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# THE MANDATORY INVESTMENT RESTRICTION PROGRAM: PAST, PRESENT AND FUTURE

A. PATRICK GILES\*

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## I. INTRODUCTION

By virtue of the authority vested in the President by Section 5(b) of the Act of October 6, 1917, as amended . . . and in view of the continued existence of the national emergency declared by Proclamation No. 2914 of December 16, 1950, and the importance of strengthening the balance of payments position of the United States during the national emergency, it is hereby ordered . . . .<sup>1</sup>

With these words, President Johnson, on January 1, 1968, announced the first mandatory restrictions on private investment abroad in the history of the United States.<sup>2</sup> The purpose of these restrictions was to reduce the United States balance of payments deficit, as derived from "direct investment" capital transactions in the International Monetary Fund reports, by one billion dollars in 1968.<sup>3</sup> The United States has had a balance of payments deficit in every year but two since 1946. These deficits are largely the result of military and foreign aid spending since the United States normally has a surplus in its balance of foreign trade account. However, in the sixties, military spending increased and the trade surplus decreased. Consequently, the United States balance of payments situation has significantly worsened.<sup>4</sup>

The mandatory direct investment restriction program was intended to replace the voluntary foreign investment restriction program that was proposed by the President in 1965. The voluntary program was generally

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\* J.D., 1968, University of Michigan. Mr. Giles is a member of the law firm of Gardner and Thomson, Miami, Florida.

1. Exec. Order No. 11387, 33 Fed. Reg. 47 (1968).

2. Morris, *The New Regulations Governing Direct Foreign Investment—An Early Appraisal*, 23 BUS. LAW. 701 (1968).

3. FOREIGN DIRECT INVESTMENT REGULATIONS, Practising Law Institute 9 (1968). [Hereinafter referred to as FDIR].

4. The balance of payments deficit for 1967 was 3.6 billion dollars. The President in his January 1, 1968 message announced the goal of reducing that deficit by three billion dollars in 1968. The mandatory direct investment restriction program was only a part of the total package and was intended to reduce the deficit by one billion dollars in 1968. Address by Don C. Cadle, Deputy Director of the Office of Foreign Direct Investments, First National Bank Building, Dallas, Texas, August 22, 1968, at 1.

considered to be successful but its application was limited to banks and to the 700 largest corporations in the United States.

This article will examine first, the statutory basis for the mandatory regulations; second, the general pattern of the regulations; third, the relationship of the regulations with U.S. tax law; and finally, a discussion of the constitutionality and future of the regulations.

## II. STATUTORY BASIS FOR THE REGULATIONS

Executive Order No. 11387 and the Foreign Direct Investment Regulations were enacted under the authority of section 5(b) of the Trading with the Enemy Act of 1917 and Presidential Proclamation No. 2914 of 1950. Section 5(b) was an amendment to the Trading with the Enemy Act and provided in its original form that the President could investigate, regulate or prohibit transactions in foreign exchange, coin exports, or property transfers between the United States and any foreign country or between residents of any foreign country and persons within the United States.<sup>5</sup> The Act, which was a wartime measure, was adopted to prevent the Axis powers from benefiting from the seizure of American property and to prohibit United States citizens from assisting the Axis powers by the transfer of property or foreign exchange.

Section 5(b) was amended in March, 1933, and provided that the President would have the same regulatory powers during "any other period of national emergency."<sup>6</sup> The 1933 amendment also provided for criminal penalties for willful violation of any provision of the section or any license, order, rule or regulation issued thereunder. The possible penalty was, and is, a maximum fine of ten thousand dollars or ten years in jail, or both.<sup>7</sup> The purpose of the 1933 amendment was to give the President added power during the banking crisis of March, 1933.<sup>8</sup>

Section 5(b) was again amended on May 7, 1940. This amendment provided that the President could regulate any transfer by any "banking institution . . . of, or dealing in, any evidences or indebtedness or . . . property in which any foreign state or a national or political subdivision thereof . . . has any interest . . ."<sup>9</sup> This amendment again added to the

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5. 40 Stat. 415 (1917).

6. 48 Stat. 1 (1933).

7. *Id.*

8. Beginning in mid-February, 1933, state after state had closed its banks to prevent runs by panic-stricken investors. In the eight days preceding March 3, 1933, 1.5 billion dollars in currency had been withdrawn from banks that were still open. On that date, the President had an emergency conference at the White House and issued a Proclamation closing all banks for four days on the basis of his power under section 5(b). At the same time, the President called the Congress into Emergency Session on March 9th. On that date the Congress passed the Administration's Emergency Banking Bill, which in its preamble, stated that the "actions . . . by the President of the United States or the Secretary of Treasury since March 4, 1933, pursuant to the authority conferred by subdivision (b) of Section 5 of the Act of October 6, 1917, as amended, are hereby approved and confirmed." (48 Stat. 1) 22 ENCYCLOPEDIA BRITANNICA 805 (1963).

9. 54 Stat. 179 (1940).

presidential powers in the area of "freezing foreign assets" and likewise sought to prevent the Axis powers from obtaining any benefit from the seizure of American property.

The last and final amendment to section 5(b) was on December 18, 1941. The amendment allowed the President to designate "any agency" to:

- (A) Investigate, regulate or prohibit, any transaction in foreign exchange, transfers of credit or payments between, by, through or to any banking institution . . . and
- (B) Investigate, regulate, direct or compel, nullify and void, prevent or prohibit, any acquisition holding, . . . transfer, withdrawal . . . or dealing in, or exercising any right, power, or privilege, with respect to, or transactions involving, *any property which any foreign country or national thereof has any interest.*<sup>10</sup>

Again the purpose of this amendment was to strengthen the President's power in controlling American owned foreign assets that could benefit the Axis powers and also to control transactions concerning any property in which any foreign national had any interest. The Act was not clear in its impact on property that was wholly owned by American citizens except that the designated agency, under the powers of subpart A, could regulate any transfer through any "banking institution."

Section 5(b) as amended, was first construed by the United States Supreme Court in *Propper v. Clark*.<sup>11</sup> The American Society of Composers, Authors and Publishers (ASCAP) owed a debt to a similar society in Austria (AKM). The debt was subject to a "freezing order" issued by the President on June 14, 1941 pursuant to section 5(b). A dispute arose between the Office of Alien Property Custodian and the receiver appointed in the New York Courts to handle the property of AKM. The Court held for the Office of Alien Property Custodian, finding that ASCAP was a "banking institution" within the definition of the Act, and that the Act should be broadly construed. The Court commented on the policy of the Act as follows:

Through the Trading with The Enemy Act in its various forms, the nation sought to deprive *enemies*, actual or potential, of the opportunity to secure advantages to themselves, or to perpetuate wrongs against the United States or its citizens through the use of assets that happened to be in this country. To do so has necessitated some inconvenience to our citizens and others who, as here, are not involved in any actions *adverse to the nation's interest*. That fact, however, cannot lead us to narrow the broad coverage of the executive order . . .<sup>12</sup>

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10. 55 Stat. 839 (1941). (Emphasis supplied.)

11. 337 U.S. 472 (1948).

12. *Id.* at 482. (Emphasis supplied.)

In addition to section 5(b), President Johnson used the Presidential Proclamation No. 2914 of December 19, 1950 to demonstrate the existence of a national emergency which enabled him to have the Commerce Department issue without hearings the Foreign Direct Investment Regulation. This Proclamation declared a national emergency because the "recent events in Korea . . . constitute a grave threat to the peace of the world."<sup>13</sup> President Truman justified his actions on the basis that the threat of Communist imperialism and aggression threatened the people of the United States with their right "to engage freely in their own business enterprises and the many other freedoms and rights which are part of our way of life . . ."<sup>14</sup>

Later we will examine more carefully and criticize the regulations and their statutory authority but, as we go through the description of the regulations and their tax impact, the following questions should be considered: 1) What is the relationship between the words and policy of the Trading with The Enemy Act and the FDIR? 2) What is the relationship between the Presidential Proclamation concerning Korea and the FDIR? and 3) Are any Congressional controls needed in the areas of Presidential powers during a national emergency, and the continuing periods of those emergencies?

### III. GENERAL PATTERN OF THE FOREIGN DIRECT INVESTMENT REGULATIONS (FDIR)

The FDIR provide:

1. Section 1000.201(a)(2): New direct investment outflows to continental Europe and certain developed countries (schedule C countries) are prohibited.
2. Section 1000.504(a)(2): New net investment in other developed countries (schedule B) is limited to 65% of the average of 1965-1966, investment in those countries.
3. Section 1000.504(a)(1): New net investment in the developing countries (schedule A) is limited to 110% of the average of the 1965-1966 investment in those countries.
4. Section 1000.305: A "direct investor" is defined as any person within the United States who directly or indirectly owns or acquires 10% or more of the total combined voting power of any affiliated foreign national.
5. Section 1000.304: An affiliated foreign national is very broadly defined to include any subject or citizen of, or any person domiciled or resident in, a foreign country or any branch, subsidiary, division, partnership, etc. of any United States person or corporation engaged in trade or business in a foreign country.

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13. 15 Fed. Reg. 9029 (1950).

14. *Id.*

6. Section 1000.503: Any "direct investor" may invest a maximum of \$200,000 per year in any or all scheduled countries.<sup>15</sup>
7. Section 1000.504(a)(3): In any schedule C country (generally Western Europe except United Kingdom) the direct investor may only reinvest his share of the earnings of an incorporated affiliated foreign national (AFN) which is the lesser of (a) 35% of the average of direct investment in 1965 and 1966 or (b) multiplying his share of the earnings by a fraction the numerator of which is the amount reinvested in the years 1964-1966 and the denominator of which is his share of the total earnings in 1964-1966.
8. Any direct investor, who (a) had no direct investments in any schedule C country during 1965-1966, or (b) did not reinvest any earnings during the years 1964-1966, may not reinvest any earnings from his share of an incorporated affiliated foreign national.

As a result of these regulations, direct investment in Western Europe is generally limited for any American person or corporation to \$200,000 per year. However, the regulation is not as severe an impediment to an American investor as it might be since foreign borrowings are exempt from direct investment. The large American investor can avoid the regulations by borrowing capital in Eurodollars overseas with the American investor or corporation as a guarantor of the loan.<sup>16</sup> In fact, it appears that the FDIR will have a stimulating effect on the European capital market as it forces American investors to raise capital for foreign expansion overseas. Don Cadle, Deputy Director of the Office of Foreign Direct Investments, has stated that in 1967, between 1.0 and 1.5 billion dollars of foreign debt was incurred by American business which otherwise might have been financed in the United States. He estimated that in 1968, United States business will raise or establish credit facilities abroad of between 4.5 and 5.0 billion dollars.<sup>17</sup> A large percentage of this growth, between 343% and 500%, can be attributed to the restrictions of the FDIR. Unfortunately, the expansion of the European capital market can only be a temporary solution to the American balance of payments problems because as the demand for foreign capital increases, interest rates will rise and widen the gap between American and foreign rates.<sup>18</sup>

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15. The de minimis limitation was originally \$100,000. It was raised to \$200,000 on August 14, 1968, and to \$300,000 for calendar year 1969. U.S. Dept. of Commerce News, Nov. 15, 1968.

16. Prior to the date of the borrowing, the American investor must get a certificate from the Office of Foreign Direct Investments. To obtain the certificate, the investor must in an affidavit allege that (a) the loan will be repaid without any positive direct investment or, (b) that the guaranty will not be met for at least seven years. FDIR § 1000.1002(a)(6), 33 Fed. Reg. 11268 (1968).

17. Address by Don C. Cadle, *supra* note 4, at 7.

18. At present, the American prime rate is 7%. The closest European equivalent to our prime rate is the Eurodollar rate which is a flexible rate set by trading in Eurodollars among European banks. At present, the Eurodollar rate is approximately 7¾%. London banks will lend Eurodollars at approximately 1% to 1½% above the Eurodollar rate. Therefore, the

Despite the fact that the regulations will help develop the European capital market, they can be justifiably criticized since they penalize those investors who attempted to follow the policies and procedures of the voluntary investment restriction program. Any investor who attempted to limit his foreign investments in 1965-1966, or who repatriated earnings during 1964-1966 in order to assist in the balance of payments deficit is in a poorer position than if he had invested as much as he could and had reinvested all earnings and repatriated nothing. This policy paradox is caused because the regulations measure what an investor can do now by what he did generally during the years 1964-1966. The more active he was in foreign investments during this period (and conversely the more he ignored the voluntary program) the higher is his base period, and, therefore, the higher is his possible investment or reinvestment or both without repatriation and taxation.

The regulations, in addition, penalize the small or new investor in the European market since he can only invest \$200,000 per year and he must repatriate and pay tax on *all* affiliated foreign earnings in schedule C countries.

#### IV. IMPACT OF FDIR ON TAX LAW AND TAX PLANNING

The major impact of the FDIR on tax law and tax planning is the restrictions on reinvestments with the effect that foreign earnings must be repatriated as dividends. These dividends when repatriated to a United States investor are fully taxable under the Internal Revenue Code. One of the major reasons for investing abroad was the opportunity to reinvest capital without United States taxation. That advantage, at least for schedule C countries, is now minimized to 35% of the foreign earnings and even that advantage is distorted since it arbitrarily depends on base period investments and dividend experience.<sup>19</sup>

The regulations specifically state that:

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European prime rate can be considered to be approximately  $8\frac{3}{4}\%$  to  $9\frac{1}{4}\%$ . Thus, the European prime rate is approximately 1% to  $1\frac{1}{2}\%$  higher than the American prime rate, but the European banks do not charge compensating balances. If an American investor borrows 2 million dollars from an American bank, he would probably have to maintain at least 15% compensating balances and, therefore, could only use 1.7 million dollars of his loan; however, since he must pay interest on the full 2.0 million dollars, his effective interest rate is 9.41%. With the additional factor of compensating balances, the American and European interest rates are approximately equal. However, this equality will not be maintained for long because 1) American interest rates will probably decline as the full impact of the income tax surcharge is measured, and 2) European interest rates will increase because of the heavy demand for Eurodollars. It should also be noted that at least some experts feel that the expansion of the Eurodollar market will have an *adverse* effect on the U.S. balance of payments problem. The theory is that foreign investors are buying Eurodollar bonds and convertibles with the proceeds of their sales of American securities. One Swiss banker has stated that "the recent Chrysler issues (Chrysler Overseas Capital Corp., 60 million dollars,  $4\frac{3}{4}\%$  Eurodollar convertibles, issued May, 1968) were in a large measure bought with money realized from the sales of Chrysler shares." Ball, *The Bond Americans Can't Buy*, FORTUNE Sept. 15, 1968, at 167.

19. FDIR § 1000.504(a)(3), 33 Fed. Reg. 8659 (1968).

A direct investor will not be authorized to reinvest *any* portion of its share of earnings . . . if the average of direct investment by the direct investor in all affiliated foreign nationals in schedule C countries during the years 1965 and 1966 was *zero* or a negative amount, or if the average of the direct investor's share in the reinvested earnings of incorporated affiliated foreign nationals . . . during the years 1964, 1965, and 1966 was zero or a negative amount.<sup>20</sup>

This regulation seems to unnecessarily penalize both the small investor who is just getting started in the European market and did not have any base period experience, and the American investor who suffered losses during the base period years. This is because both investors must repatriate *all* earnings in the form of dividends and pay American tax on those dividends. The regulation, furthermore, contradicts the congressional plan for certain minimum distributions of earnings by controlled foreign corporations under section 963 of the Internal Revenue Code.

A second impact of the forced dividends requirement is that some countries, such as Brazil and Taiwan, impose a higher income tax on distributed profits.<sup>21</sup> Further, because most countries put an additional withholding tax on dividends, it is possible that the American investor may not be able to use the full foreign tax credit because of the limitation contained in section 904 of the Internal Revenue Code.<sup>22</sup>

The regulations also have an effect on the subpart F of the Internal Revenue Code. Section 954(b)(3) exempts controlled foreign corporations from taxation under subpart F if the "foreign base company income" is less than 30% of gross income. It is possible that the 30% tainted income rule can be violated by mandatory repatriation and subject the American investor to having a pro rata share of such income included in his own gross income under section 951(a)(1).<sup>23</sup>

It is not known at this time what will be the position of the Internal Revenue Service as to the mandatory repatriation provisions of the FDIR. One can assume that they will treat as dividends those sums repatriated to the United States even if that repatriation is more than required by section 963 of the Code. It is known that the OFDI is not interested or

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20. FDIR § 1000.504(a)(3)(b), 33 Fed. Reg. 8659 (1968). (Emphasis supplied.)

21. BERENS, TAX PROBLEMS CREATED BY FOREIGN DIRECT INVESTMENT REGULATIONS, Practising Law Institute, at 86 (1968).

22. *Id.*

23. *Id.* at 88. As an example of how confusing the mixture of the foreign investment regulations and the tax law can become, assume that a direct investor transfers \$1,000,000 from his Dutch subsidiary to his English subsidiary for working capital needs. Since the transfer was across schedule countries, from C to B, the OFDI would treat the transfer as a repatriation of earnings by the Dutch subsidiary (affiliated foreign national) to the American parent (Direct Investor) and a direct investment from the American parent to the English subsidiary. It is unclear at this time whether the IRS will also treat the transfer as a dividend to the American parent and tax the \$1,000,000 even though none of the money ever was or was intended to be transferred to the United States. See FDIR § 1000.505(a), 33 Fed. Reg. 11706 (1968).

concerned with the tax impact of the regulations. Their position and policy is that they must reduce the balance of payments deficit by one billion dollars in 1968 and that the incidental tax consequences to their actions are really irrelevant to their basic policy goal.<sup>24</sup> It would seem that the goal of the OFDI could be achieved by having the affiliated foreign nationals either place their earnings in foreign branches of American banks or allow them to invest in American securities, without mandatory repatriation to the parent; yet, the regulations do not allow such alternatives. Even though our balance of payments problem is serious, it seems rather cavalier to ignore the tax consequences and foolish not to attempt to work out the policy conflicts between the OFDI and the IRS.

#### V. FUTURE OF THE REGULATIONS

The above discussion of some of the tax effects of the regulations should give the reader an idea of how the regulations have changed the application of the Internal Revenue Code to the area of international taxation. We now turn to an examination of whether such changes in the tax law are or should be valid because of regulations issued by the Commerce Department.

The first question is whether the regulations are constitutional. The issue is not whether the Congress has the power to regulate foreign investment for it clearly does under article 1, section 8.<sup>25</sup> Rather the proper inquiry is whether the President has the power to regulate such investments under the Trading with the Enemy Act and whether the regulations issued by a federal agency under that power can contradict the congressional tax scheme.

The Attorney General has stated in a letter to the Secretary of Commerce that he believes the regulations are constitutional:

My view is supported by four considerations: 1) the clear language of the statute, 2) the historical precedents of executive action under Section 5(b) over the past thirty-five years, together with the Acts of Congress and judicial decisions which have sustained the President's authority under the statute, 3) the continued existence of a national emergency declared by

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24. However, note that section 1000.203 of the FDIR which provides for the reduction and repatriation of liquid foreign balances states that the direct investor may submit a certificate to obtain a specific exemption if the regulation "would have created a substantial probability of material adverse United States or foreign tax consequences to the direct investor." FDIR § 1000.203(d)(2), 33 Fed. Reg. 8659 (1968).

25. The Supreme Court stated in *Norman v. Baltimore & O.R.R.*, 294 U.S. 240, 303 (1935) that:

[T]he broad and comprehensive national authority over the subjects of revenue, finance and currency is derived from the aggregate of the powers granted to Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several states, to coin money, and regulate the value thereof . . . and the added express power to make all laws which shall be necessary and proper for carrying into execution the other enumerated powers.

President Truman in Proclamation No. 2914 of December 16, 1950, and 4) the relation of the precedents under Section 5(b) to the present exercise of executive authority.<sup>26</sup>

Admittedly, the language of the statute is *broad*, but is not clear. The statute says in subpart A that the President or the designated agency "may investigate, regulate or prohibit . . . transfers of credit or payments between, by, or through, or to any banking institution . . ." <sup>27</sup> As previously noted, in *Propper v. Clark* the Supreme Court broadly construed the words "banking institution" and considered that ASCAP was such an institution.<sup>28</sup> It is unclear, however, whether the Supreme Court would consider all of the corporations and individuals in America who have more than a 10% interest in a foreign operation as "banking institutions." Clearly, the Supreme Court was willing to stretch the congressional language in order to arrive at a result consistent with the clear congressional intent of preserving American assets from its *enemies* under the freezing asset doctrine. It is not clear, however, that the Supreme Court would apply the same statutory construction when the impact of the regulations is most strongly against America's *allies* (schedule C countries) and when the freezing assets doctrine clearly does not apply.<sup>29</sup>

Subpart B of the statute states that the President or the designated agency may "investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding . . . transfer . . . or transaction involving any property *in which any foreign country or national thereof has any interest.*"<sup>30</sup> Again the congressional intent was the protection of the United States interests of foreign assets held in the United States under the freezing assets doctrine. Certainly one can question whether a "foreign country or national thereof has any interest" in a foreign subsidiary or branch which is owned 100% by an American investor and whose only interest or contact with the foreign country is its physical location or act of incorporation.

The Attorney General's position as to the constitutionality of the

26. Foreign Direct Investment—Rates of Application, 186 TAX MANAGEMENT PORTFOLIO A-1, Bureau of National Affairs (1968).

27. 55 Stat. 839 (1941).

28. It is interesting to note the definition of "banking institution" under the FDIR § 1000.311, 33 Fed. Reg. 49 (1968): "[T]he term banking institution shall include any person engaged primarily or incidentally in the business of banking, or granting or transferring credits, or of purchasing or selling foreign exchange or procuring purchasers and sellers thereof . . ." This regulation, however, was revoked in the reprint of the regulations published, August 31, 1968.

29. The Regulations make it clear that the freezing assets doctrine does not apply. FDIR § 1000.201(c), 33 Fed. Reg. 8659 (1968), states:

Nothing contained in this part shall be construed to limit the right of a person in the United States to make a bona fide transfer of capital or earnings in the ordinary course of business to a foreign national in respect to an interest in such person held by such foreign national.

Thus, under this regulation the prohibited transfer in *Propper v. Clark*, 337 U.S. 472 (1948), would be completely legal under the FDIR.

30. 55 Stat. 839 (1941). (Emphasis supplied.)

regulations was based upon the acts of Congress and judicial decisions over 35 years which have sustained the President's authority and the relation of those decisions to the present exercise of executive authority. We have already demonstrated that section 5(b) was enacted during the first World War and it was then amended during the banking crisis of 1933 and the beginning of World War II. In each instance, the President went to the Congress not to have his Act sustained, but rather to have his power broadened so that he could act and deal with the crisis. Constitutional inquiry of the FDIR does not relate to the balance of payments crisis; rather, it is asserted that the Executive should have followed its own historical precedent and approached Congress for the statutory authority to deal with the crisis.

The judicial precedents simply do not support the Attorney General's position. The cases either have to do with the "freezing assets doctrine"<sup>31</sup> which clearly does not apply to the impact and policy of the mandatory restrictions, or the illegal possession or sale of gold which is clearly irrelevant.<sup>32</sup>

The Attorney General's third argument in support of the constitutionality of the regulations is based on the continued existence of a national emergency as declared by President Truman on December 16, 1950. We have already discussed that the language of this proclamation, which dealt with the Korean War, does not apply to the mandatory restrictions. Clearly the Korean War is not the cause of our present balance of payments difficulties. One can argue that Communist imperialism and aggression in Vietnam is a cause of our problem, but the regulations are aimed not at that aggression or imperialism, but at our strongest allies. It seems attenuated to argue that a war in 1950 is justification for severe economic restraints in 1968. As the Court stated in *Bauer v. United States*:

It seems vital as a matter of national policy that emergency regulations and almost dictatorial powers granted or conceded in the turmoil of war, cold war, economic revolution and the struggle to preserve a balanced democratic way of life, should be discarded upon return to normal conditions, lest we grow used to them as the fittings of ordinary existence.<sup>33</sup>

The issue is more fundamental than the fact that the President should

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31. See *Propper v. Clark*, 337 U.S. 472 (1948); *Sardino v. Federal Reserve Bank*, 361 F.2d 106 (2d Cir. 1966); *Netherlands v. Federal Reserve Bank*, 99 F. Supp. 655 (S.D.N.Y. 1951).

32. See *Pike v. United States*, 340 F.2d 487 (9th Cir. 1965); *Bauer v. United States*, 244 F.2d 794 (9th Cir. 1957); *Ruffino v. United States*, 114 F.2d 696 (9th Cir. 1940).

33. 244 F.2d 794, 797 (9th Cir. 1957). It would be possible to set up some statutory procedure for the control of national emergency declarations. After the President has declared a national emergency, he could go to the Congress for approval, as President Roosevelt did in March, 1933. The Congress could then attach some specific time limitation to the emergency declaration so that the emergency powers would automatically expire unless the President went again to the Congress for an extension. Such a procedure is very similar to the procedure now used to set statutory ceilings on the national debt.

have declared a national emergency as to the problems in Vietnam. That fact would make the national emergency basis of the mandatory regulations more defensible, but it would not change the fundamental question of whether the Executive has the statutory authority to enact regulations restricting foreign investment.<sup>34</sup>

The discussion relating to the constitutionality of the regulations may be moot since there is no evidence at this time that the regulations will ever be tested in court. It is the position of the OFDI that no one can violate the regulations until January 1, 1969, as the restrictions on investment are viewed in terms of a calendar year. Thus, the investor who makes a direct investment in schedule C countries in excess of the de minimis limitation is within the scope of the regulations if he returns his investment to the United States before December 31, 1968.<sup>35</sup>

Don Cadle, Deputy Director of the OFDI, has stated that the OFDI "will have to tighten the application of the regulations wherever abuses appear."<sup>36</sup> He also said that the OFDI "will have to commence some compliance actions."<sup>37</sup> However, the commencement of the compliance actions does not mean that the regulations will be attacked in litigation. Although an attack on the constitutionality is an obvious defense, there is some possibility that there will be no defense at all. The reason for this paradox is that to the American businessman, the strength of the dollar is simply more important than noncompliance with the regulations. The risk of devaluation of the dollar and the possible resulting profit and investment loss is so great that it simply outweighs the inconvenience and policy conflicts in the regulations. American business is more concerned with the strengthening of the dollar through the reduction in our balance of payments deficit and then the abolishment of the OFDI.

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34. One must recognize, however, that the Supreme Court has construed the Executive's powers in foreign affairs very broadly. The Court stated in *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 320 (1936) that:

[i]f, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.

35. One questions whether the OFDI on reflection will really adopt this approach since it could lead to the abuse of "window dressing." The investor could invest 1 million dollars in Germany in 1968, and start construction on a plant with this capital; then he could either (1) mortgage the assets (the plant) at a foreign bank at 80% of value or, (2) make a short term loan with the foreign bank with the assets as security. The investor would then use the proceeds of the loan to return the capital to the United States on or before December 31, 1968. He leaves the capital in the United States for a couple of days thus fulfilling his obligations for that year under the FDIR. Then on January 2, 1969, he returns the money to Europe, pays off the loan, and starts to repeat the process. The regulations, however, provide that: anything in this part to the contrary notwithstanding any transaction for the purpose of, or which has the effect of, evading or avoiding any of the provisions set forth in this part may be disregarded in whole or in part for purposes of measuring compliance with the provisions of this part.

FDIR § 1000.204, 33 Fed. Reg. 49 (1968).

36. Address by Don C. Cadle, *supra* note 4, at 5.

37. *Id.*

We thus come to the final question: what is the future of the OFDI? Cadle has stated that "we will have to learn to live with the regulations or some effective substitute for *at least a few years*."<sup>38</sup> The regulations require that in order to obtain a certificate for foreign borrowings, the investor must allege under oath that he will not make "any transfers of capital in connection with the repayment of the borrowing *within seven years . . .*"<sup>39</sup> Certainly the war in Vietnam and other national and domestic events that affect our balance of payments will influence the life of the OFDI. However, the investor should probably be cautious and rather pessimistic since federal agencies in Washington tend to develop a life of their own and are rarely abolished.

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38. *Id.* (Emphasis supplied.)

39. FDIR § 1000.1002(b)(1), 33 Fed. Reg. 11268 (1968). (Emphasis supplied.)