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# February 2023 Newsletter

National Security Investment Reviews

## Issue 1: National Security Creep in Corporate Transactions

Source: <https://corpgov.law.harvard.edu/2023/01/03/national-security-creep-in-corporate-transactions/>

### Considerations:

A new paper, National Security Creep in Corporate Transactions, forthcoming in the Columbia Law Review, explores how the fusion of economic and national security is playing out in the context of cross-border investment. In particular, it describes the phenomenon of “national security creep,” which is defined as “the recent expansion of national security-related review and regulation of cross-border investments to allow government intervention in more transactions than ever before.” This “national security creep” has impacts for contract design, deal volume, and judicial review in national security-related matters.

The paper focuses on several drivers of national security creep, including the newly expanded jurisdiction of the Committee on Foreign Investment in the United States (CFIUS), the global diffusion of CFIUS-like processes to U.S. allies, and a new focus on restricting outbound investment.

### Implications of national security creep

**Reduction in deal volume due to uncertainty:** While all regulatory review comes with a level of uncertainty, uncertainty is particularly high in the national security area. In part, this is because national security review is often sensitive. CFIUS conducts reviews confidentially and does not reveal which deals it reviews, mitigation measures it orders, or even the nature of national security concerns at issue in particular transactions. Recent changes to the regulatory landscape—where even parties with nominal U.S. ties might end up caught up in CFIUS review—also contribute to the uncertainty. Moreover, CFIUS review, unlike many other types of regulatory review, can be—and often is—retroactive.

**Impacts on deal transparency and securities disclosure:** Another question is whether deal parties will change their disclosure practices in light of national security review’s long arm. As the paper discusses in more detail, deal parties have, in the past, shunted sensitive information into undisclosed side letters. This occurs against the backdrop of the much more predictable antitrust review process, where there is ample precedent about what kinds of transactions will be flagged for antitrust review, and how antitrust authorities will order mitigations and divestitures. Because of national security review’s relative secrecy, there is little precedent (at least outside the government and a cadre of elite law firms) about how and why regulators review deals and issue mitigation or divestiture orders—perhaps creating an environment where companies report less in securities disclosures.

The paper explores several other potential impacts of national security creep. For example, will the diffusion of CFIUS-like processes lead to blowback for U.S. investors investing in other countries? Will the executive’s expanding claims about the nature of national security concerns cause judges to rein in the high levels of deference they typically afford to the executive on national security issues?

## Issue 2: Building momentum: the positive outlook for a US outbound investment review regime

Source: <https://www.financierworldwide.com/building-momentum-the-positive-outlook-for-a-us-outbound-investment-review-regime#.Y9f2W3bMJD8>

### Considerations:

The Biden administration's National Security Strategy stands out from recent predecessors in its focus on a modern industrial strategy in which US technological leadership is a key national security priority – one that promises perhaps unparalleled use of industrial and economic tools to meet the “pacing challenge” of China.

However, an increasing number of US policymakers view existing national security regulatory regimes as insufficient to address these concerns. In particular, there are growing calls for the review of outbound investments to ensure American capital does not flow to support strategic competitors' development of critical national security sectors. The strategy explicitly calls for the development of a new approach to screen outbound investment to “prevent strategic competitors from exploiting investments and expertise in ways that threaten our national security”. Colloquially referred to as “reverse CFIUS”, support for an outbound investment screening regime has steadily gained traction.

While the latest iteration of legislation that would have created an outbound investment review, the National Critical Capabilities Defense Act (NCCDA), was nixed from the CHIPS Act in the summer of 2022 and failed to make traction in other legislation, efforts persisted to make progress in the legislature and also came in the form of Congressional support for executive action. Significantly, the 2023 fiscal omnibus spending bill signed into law on 29 December 2022 includes provisions regarding an outbound investment review regime. The Senate explanations on the bill note that the Department of Treasury has 60 days to “submit a report describing such a program”, including the resources needed over the next three years to establish and implement such a programme.

The exact parameters of an outbound investment programme remain to be seen, though there are numerous ways such a programme can potentially come into existence. The NCCDA proposed the creation of a new agency, the Committee on National Critical Capabilities, that would be authorised to review and recommend presidential and congressional action on certain “covered transactions”. The original language of the NCCDA defined “covered transactions” to include those by US businesses that shift or relocate to a “country of concern”, or transfer 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 that “could result in an unacceptable risk to a national critical capability”.

## Issue 3: Senators Warner and Rubio on “Face the Nation” – National Security Investment Reviews

Source: <https://www.cbsnews.com/news/mark-warner-marco-rubio-face-the-nation-transcript-01-29-2023/>

### Considerations:

**SEN. RUBIO:** And so capitalism- so capitalism is going to give you the most efficient outcome. But sometimes, what do you do when the most efficient outcome is not in our national interest? Because it's more efficient to buy rare earth minerals from the Chinese, it's more efficient to have things built over there in many cases, but is it in our national interest to depend on them for 80-something percent of the active ingredients in our pharmaceuticals? I could argue it is not. And in those instances where the market efficient outcome is not in our national interest, it is my opinion that we default to the national interest because without our national interest or our national security, the other things won't matter. We are not a market, we're a nation. And the market exists to serve the nation, not the nation to serve the market. And so there are industries in which we will need to take a step because the U.S. has a vested national security interest in ensuring we have a domestic or allied capability. It's why we have an airplane industry in the United States. It's why we have a shipbuilding industry in the United States. I think that should extend to technology and agriculture in certain sectors.

**QUESTION:** But it sounds like you want to put more teeth into national security review commissions like CFIUS.

**SEN. WARNER:** No, I think national security is a very different framework. You know, ships and guns and tanks: traditional national security. Artificial intelligence, telecommunications network, food production, I think- and I think Marco would agree, we're seeing that in a national security context as well.

**SEN. RUBIO:** There's- the way I view it is the following. And that is that we need to identify what are the critical industries and capacities that our country needs to be able to have without being leveraged or, or having to go through the Chinese to get it? And then we need to figure out what government's role is. Now I want to make sure that we're not turning this into a lobbyist trough, where every industry comes here and gets money. And we have to make sure that we're going to invest in research, that that research is protected, that there's sufficient safeguards. Because what's the point of putting billions of dollars to innovate something they're going to steal anyway? We're just giving him billions of dollars more. But I do think, again, this is not about government running or owning these companies. But there are capacities that we need, you know, Boeing- half of Boeing's revenue comes from the government, because we made a decision wisely that, yeah, we're going to build F-35s in America. We're not going to rely on the Chinese or someone else to make it for us, because we will be denied that capability in a time of conflict. I just think that that needs to extend to areas of industrial capacity that we haven't traditionally identified as a national security issue, but are in the 21st century.

## Issue 4: CFIUS Determines It Has No Jurisdiction Over Fufeng Group's North Dakota Corn Mill Project

Source: <https://www.lexology.com/library/detail.aspx?g=159c2eec-7659-46ea-adb5-43ad5b82100b>

### Considerations:

Last December, the Committee on Foreign Investment in the United States (CFIUS) determined that it did not have jurisdiction to review Chinese company Fufeng Group Limited's ("Fufeng") proposed \$700 million corn milling project in North Dakota. The news came after CFIUS completed a three-month review and investigation of Fufeng's purchase from a private citizen of a 370-acre greenfield site in Grand Forks, North Dakota, to build a wet corn mill.

Under CFIUS regulations, CFIUS has jurisdiction to review foreign acquisitions of or investments in US businesses. However, the regulations provide an exception for "greenfield investments," which are truly start-up investments not involving existing US business entities or assets comprising a US business. For example, a "greenfield investment" involves only such activities as "incorporating a newly formed subsidiary" and "separately arranging for the financing of and the construction of a plant to make a new product, buying supplies and inputs, hiring personnel, and purchasing the necessary technology."<sup>1</sup> CFIUS could still have jurisdiction over such a transaction, however, under another part of its regulations, which addresses certain real estate transactions. Specifically, CFIUS has jurisdiction to review foreign acquisitions or investments in real estate in close proximity to designated US military installations, ports, and other sensitive facilities.

The 370 acres are located approximately 12 miles from Grand Forks Air Force Base, which is home to a US military drone facility and a new space networking center that is central to US military communications globally. A US Air Force officer stationed at the base issued a report raising concerns about the Government of China conducting covert surveillance through Fufeng. In addition, US lawmakers expressed concern with Fufeng's alleged ties to the Chinese government and the Chinese Communist Party. Senators John Hoeven and Kevin Cramer of North Dakota, as well as Senator Marco Rubio of Florida, submitted a formal request for CFIUS to conduct a review of the purchase. North Dakota Governor Doug Burgum submitted his own request for CFIUS review shortly thereafter. In response, the parties to the deal submitted the transaction to CFIUS for review.

**CFIUS ultimately determined that the transaction was not a "covered transaction" and thus not within CFIUS's authority to review. While CFIUS's letter to Fufeng does not explain why it came to this decision, CFIUS appears to have determined that the transaction is a greenfield investment and exempt from its jurisdiction over US businesses. Furthermore, despite concerns regarding the land's proximity to the Grand Forks Air Force Base, the base is not one of the military installations that has been designated as sensitive under the CFIUS regulations. As such, CFIUS likely could not rely on its jurisdiction over investments in real estate either, notwithstanding the many concerns expressed by members of the US Government.**

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