

Wide Nets, Heavy Burdens: Unpacking Executive Order 14105's Final Rule

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Executive Order 14105 “Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern” was enacted to protect U.S. national security interests in light of China’s military technological growth. This Executive Order creates an outbound investment review program that restricts investments by a U.S. person into companies in specified countries operating in certain technology sectors. This Note will discuss the background of geopolitical tensions between the United States and China, review E.O. 14105, and argue that the program it creates results in burdensome unintended consequences to the U.S. economy. These unintended circumstances include: (1) high regulatory compliance costs, (2) trade wars, (3) a decrease in U.S. competitiveness, and (4) retaliatory policies from China. Along the way, this Note will propose methods and considerations to alleviate some of these burdens.

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INTRODUCTION

With advancement in emerging technologies like artificial intelligence (“AI”) and automated systems comes questions of its impact on national security. In particular, China has experienced rapid technological innovation¹ as a result of decades of unprecedented economic growth.² As China has grown from a regional to a global power, its government has recognized the need for more advanced military technology and intelligence.³ Since the 1970s, foreign direct investment (“FDI”) into China has increased due to relaxed regulations and open trade policies,⁴ granting Chinese companies increased access to resources, capital, funding, and intelligence to develop key military technologies.⁵ China’s efforts to produce and create advanced technologies, paired with the current geopolitical tensions between the United States and China, has caused the United States to recognize a new national security threat.

The United States has adopted several legal responses to address the perceived national security threats. Under the Export Administration Act of 1979 (“EAA”), the Export Administration Regulations (“EAR”), the Commerce Control List (“CCL”), and the Export Control Reform Act (“ECRA”), Congress has prohibited certain transactions and mandated licensing requirements for specific sensitive military technologies.⁶ For example, the CCL requires licensing to export discharge type arms, non-lethal or less-lethal grenades and projectiles, and components of such projectiles⁷ to any country other than Canada.⁸ In a similar vein, the United States has also implemented controls over inbound investment flows to curb the transfer of sensitive technological information between companies in both countries. As an extension of the Defense Production Act (“DPA”), Congress created the Committee on Foreign Investment in the United States (“CFIUS”) to review transactions where

1. See TAI MING CHEUNG, INNOVATE TO DOMINATE: THE RISE OF THE CHINESE TECHNO-SECURITY STATE 2 (Cornell Univ. Press, 2022).

2. WANG GUNGWU & JOHN WONG, INTERPRETING CHINA’S DEVELOPMENT 84 (World Sci. Publ’g Co., 2007).

3. CHEUNG, *supra* note 1, at 1.

4. See Yang Liang, Mary E. Lovely & Hongsheng Zhang, *Preferential Liberalization: China’s Foreign Investment Regulation Reform and its Post-WTO-Accession Export Surge* 6 (Ctr. for Health, Econ. & Pol’y Stud., Working Paper No. 2023404, 2023).

5. EMILY S. WEINSTEIN & NGOR LUONG, U.S. OUTBOUND INVESTMENT INTO CHINESE AI COMPANIES 1 (2023).

6. Export Administration Act of 1979, 50 U.S.C. § 4601 (1979) (repealed 2018); Export Administration Regulations: Revisions to Space-Related Export Controls, 15 Fed. Reg. 84770, 84771 (Oct. 23, 2024) (to be codified at 15 C.F.R. pts. 734, 740, 744, 746, 774); Commerce Control List, U.S. DEP’T OF COMMERCE, <https://www.bis.doc.gov/index.php/regulations/commerce-control-list-ccl> (last visited June 15, 2025); 50 U.S.C. § 4801, 4811–26.

7. Examples provided include stun guns, shock batons, electric cattle prods, and immobilization guns. Commerce Control List, 15 C.F.R. § 774.1 (2025).

8. *Id.*

companies in other countries invest in U.S. companies.⁹ Then, in 2023, former President Joe Biden sought to further counter the transfer of U.S. technological know-how by restricting investments of a U.S. person into Chinese companies in Executive Order 14105: Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern (“E.O. 14105”).

The authority underpinning E.O. 14105 arises from the National Emergencies Act (“NEA”) and the International Emergency Economic Powers Act (“IEEPA”), which grant the president power to declare national emergencies in the event of an extraordinary threat and the ability to block or restrict transactions with a country.¹⁰ The national emergency declared in E.O. 14105 is China’s technological advancement in military technology.¹¹ E.O. 14105 creates an outbound investment program that requires notifications for or prohibitions on certain transactions involving specified technology and with countries of concern.¹² Although E.O. 14105 directs the U.S. Department of the Treasury (the “Treasury”) to specify the categories of technologies and transactions that would be subject to E.O. 14105,¹³ the focus is on technology such as semiconductors, microelectronics, quantum information, and AI that are critical in military, intelligence, surveillance, or cyber-enabled capability sectors.¹⁴ In the Treasury Department’s Advanced Notice of Proposed Rulemaking (“ANPRM”) and Notice of Proposed Rulemaking (“NPRM”), it attempted to define these technologies and transactions.¹⁵ The Treasury published its Final Rule (the “Final Rule”) on November 15, 2024, delineating the specifics of E.O. 14105.¹⁶ This outbound investment regulatory scheme is the first of its kind, raising many questions about what its scope and anticipated effects will be.¹⁷

There is some merit to the arguments underlying concern over a national security threat and the need for an outbound investment program. This Note, however, will examine the background and scope of E.O. 14105 and argue that the unintended economic impacts outweigh national security concerns, creating

9. 3 C.F.R. § 1971–1975 (1975).

10. National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (codified as amended at 50 U.S.C. §§ 1601–51); International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626 (codified as amended at 50 U.S.C. §§ 1701–10).

11. Exec. Order No. 14105, 88 Fed. Reg. 54867 (Aug. 9, 2023).

12. *Id.*

13. *Id.*

14. *Id.*

15. Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 89 Fed. Reg. 90398 (Nov. 15, 2024) (to be codified at 31 C.F.R. pt. 850).

16. *Id.*

17. Note that President Trump’s America First Trade Policy memo tasked the Treasury with reviewing Exec. Order No. 14105 and whether it should be modified or rescinded. *America First Trade Policy*, THE WHITE HOUSE (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/america-first-trade-policy/>.

more harm than it ameliorates. Part I will place E.O. 14105 in the context of China's recent economic developments, shifts in power, and the rising tensions between the United States and China. Part II will discuss other legislative efforts to counter the rising tensions with China, review the legal foundations underpinning E.O. 14105, and explain E.O. 14105 and its resulting regulations. Part III will argue that the Final Rule's current framework does not make up for its many negative impacts, such as high costs compliance, impediments on free trade, decreased U.S. competitiveness, and retaliatory actions from China. It will also present a few ideas for how to resolve these consequential aspects of E.O. 14105. This Note concludes with a summary of the argument and identifies potential avenues for future research.

II. BACKGROUND ON E.O. 14105

China is now a world power that rivals the United States across critical domains of economy, technology, and military.¹⁸ Since 1978, China has been the largest economy¹⁹ in terms of purchasing power parity, which is defined as the rates of currency conversion that equalize the purchasing power of currencies between countries.²⁰ China has also been the largest destination for total accumulated FDI, which is defined as cross-border investment of an investor in one economy into another economy.²¹ Due to China's economic, military, and technological expansion, trade wars, and geopolitical conflict, some scholars have suggested that the tensions between the United States and China amount to a "new Cold War."²² They argue that China's position has ultimately pushed the United States to take strong measures in the name of national security.²³ Parts I.A. and I.B. will respectively discuss the government-led industrialization efforts and foreign direct investments that contributed to China's economic growth and the mounting threat it presents to the United States.

A. CHINA'S RAPID ECONOMIC GROWTH

China's economy has grown at a rapid rate in the post-World War II economy. Prior to World War II, China was a geographically dispersed

18. GRAHAM ALLISON, NATHALIE KIERSZNOWSKI & CHARLOTTE FITZEK, THE GREAT ECONOMIC RIVALRY: CHINA VS THE U.S. 1 (2022); Pui Sun Tam, *Global Impacts of China-US Trade Tensions*, 29 J. INT'L TRADE & ECON. DEV. 510, 510 (2020).

19. Tam, *supra* note 18.

20. *Purchasing Power Parities-Frequently Asked Questions (FAQs)*, OECD (June 1, 2024), https://www.oecd-ilibrary.org/finance-and-investment/foreign-direct-investment-fdi/indicator-group/english_9a523b18-en.

21. Shayerah I. Akhtar & Cathleen D. Cimino-Isaacs, *Foreign Direct Investment: Background and Issues* CRS (Feb. 19, 2025), <https://www.congress.gov/crs-product/IF10636>.

22. SETH SCHINDLER & JESSICA DICARLO, THE RISE OF THE INFRASTRUCTURE STATE: HOW U.S.-CHINA RIVALRY SHAPES POLITICS AND PLACE WORLDWIDE 1 (Bristol Univ. Press 2022).

23. *Id.* at 3.

agricultural country.²⁴ In 1953, China began large-scale industrialization projects to implement a unified purchasing and selling system via the circulation of the renminbi currency.²⁵ By 1978, former Chairman of the Central Military Commission of China Deng Xiaoping enacted economic reforms and open-door foreign policies,²⁶ resulting in an average gross domestic product (“GDP”) growth of 9.6 percent per year up until 2005.²⁷ These economic reforms employed an industrialization strategy that focused on modernizing the agricultural sector and mobilizing a massive labor input into underdeveloped regions.²⁸ The Jiang-Zhu Administration in 1997 turned towards reforms that created a market economy and utilized state-owned enterprises to foster a bustling public sector.²⁹ China’s accession into the World Trade Organization (“WTO”) in 2001 led to an economic surge due to globalization of domestic markets and economic sectors.³⁰

Another reason for China’s economic growth is its ability to attract high levels of foreign direct investment. China is a top FDI destination in the world due to the relaxed regulatory environment and the existence of programs incentivizing investments.³¹ For example, investors became attracted to development zones in China because the development zones were offered tax and regulatory exemptions.³² Local and provincial areas encouraged FDI through incentive packages that made it easier and cheaper to manufacture in China.³³ These incentives still continue today. For example, in 2023, China’s Ministry of Commerce and other similar departments announced further policy measures to encourage foreign investment in technology sectors.³⁴ These policy measures include expediting the approval process for access to the market, issuing bonds with funds directed towards technology, and easing visa requirements.³⁵

24. WEN TIEJUN, TEN CRISES: THE POLITICAL ECONOMY OF CHINA’S DEVELOPMENT (1949–2020) 7 (Glob. Univ. for Sustainability Book Series 2020).

25. *Id.* at 54.

26. GUNGWU & WONG, *supra* note 2, at 83.

27. Carsten A. Holz, China’s Economic Growth 1978–2025: What We Know Today About China’s Economic Growth Tomorrow 32 (Dec. 26, 2006) (unpublished manuscript) (on file with author).

28. TIEJUN, *supra* note 24, at 155–59.

29. GUNGWU & WONG, *supra* note 2, at 4.

30. *Id.* at 6.

31. U.S. DEPT. OF STATE, 2023 *Investment Climate Statements: China* (2023), <https://www.state.gov/reports/2023-investment-climate-statements/china/>.

32. LIANG ET AL., *supra* note 4, at 6.

33. *Id.* at 9.

34. Giulia Interesse, *China’s New Measures to Support Foreign Investment in Sci-tech Firms*, CHINA BRIEFING (May 1, 2024), <https://www.china-briefing.com/news/china-sci-tech-investment-facilitation-new-policy-measures-mofcom/>.

35. *Id.*

China is also an attractive FDI location because of its large market. The Chinese market is highly sought after by competing foreign companies because it is easier for an entity to have a monopoly,³⁶ thus generating more revenue.³⁷ Due to the attractiveness of China's market, U.S. FDI into China amounted to \$7.5 billion in 2019, making China the third largest market for U.S.-affiliated firms overseas.³⁸ Most of these investments are in sectors like business services, analytics, life sciences, and biometrics.³⁹ While investments have slowed down since 2019 due to growing protectionist policies in the U.S. and trade tensions, large deals between U.S. and Chinese companies still exist.⁴⁰

While Chinese investors are the dominant investors in Chinese AI companies, seventeen percent of the total investors in that sector are from the U.S.⁴¹ One paper from the Center for Security and Emerging Technologies found that between 2015 and 2021, U.S. investors accounted for thirty-seven percent of the \$110 billion raised by Chinese companies working in AI.⁴² This has led to a booming AI ecosystem and economy in China, with national security implications to the U.S. For example, at least one company receiving funding from U.S. investors is actively involved with developing military and public safety AI.⁴³ A Select Committee investigation also found that GCV Capital, a U.S. corporation, invested in Megvii, a Chinese AI company that actively supports China's efforts to profile and track down Uyghurs.⁴⁴ It also discovered that CSR Ventures, another U.S. corporation, financed the development of technology directly contrary to U.S. interests and risked transferring business and technological know-hows to China.⁴⁵ These examples illustrate the prevalence of U.S. investments in technology companies that support China's economic growth and research development, while also demonstrating that U.S.

36. Chinese sectors are dominated by state-owned enterprises, which essentially make up monopolies. Peijun Duan & Tony Saich, *Reforming China's Monopolies* 5 (Harv. Kennedy Sch., Ash Ctr. for Democratic Governance & Innovation, Working Paper No. RWP14-023, 2014). This suggests that a foreign private company has less competition with other domestic Chinese companies in a certain sector.

37. Tao Liu & Wing Thye Woo, *Understanding the U.S.-China Trade War*, 11 CHINA ECON. J. 319, 334–35 (2018). China still has anti-monopoly laws to prevent mergers that may reduce competition. Meirong Jin & Qian Li, *China's Anti-Monopoly Merger Control and National Security: Interactions with Foreign Investment Law and Beyond*, 13(3) J. NAT. SEC. L. & POL. 471, 485 (2023).

38. CONG. RSCH. SERV., IF11283, U.S.-CHINA INVESTMENT TIES: OVERVIEW 2 (2021).

39. *Id.*

40. Tesla invested \$5 billion into a factory near Shanghai. *Id.*

41. WEINSTEIN & LUONG, *supra* note 5.

42. Emily S. Weinstein & Ngor Luong, *Summary of "U.S. Outbound Investment into Chinese AI Companies,"* CTR. FOR SEC. & EMERGING TECH. (Feb. 2023), <https://cset.georgetown.edu/publication/u-s-outbound-investment-into-chinese-ai-companies>.

43. WEINSTEIN & LUONG, *supra* note 5, at 19.

44. Press Release, Select Committee on the CCP, Committee Launches Investigations into U.S. Venture Capital Firms Funding Problematic PRC Companies (July 19, 2023), <https://selectcommitteeontheccp.house.gov/media/press-releases/select-committee-launches-investigations-us-venture-capital-firms-funding>.

45. *Id.*

dollars may be funding development of technology that could have national security implications.

In addition to its economic growth, there are several other reasons for China's gradual rise to power. First, China has been able to expand its influence across Asia through so-called "debt diplomacy," where China offers billions of dollars in infrastructure loans to emerging countries.⁴⁶ Because some of the countries cannot afford payments on the debt, countries are forced to open ports to Chinese military and trade, strengthening China's overall position in the Pacific.⁴⁷ Second, scholars argue that another reason for the shift in world power is because the U.S. has been consistently operating at a trade deficit,⁴⁸ while China has been operating at a trade surplus.⁴⁹ In fact, between the U.S. and China, the bilateral trade deficit has grown from 16 percent in 1993-1994, to forty-six percent in 2016-2017.⁵⁰ This indicates the growing strength of China's comparative advantages.⁵¹ Having China as a world power, matched with the trade deficits that the U.S. has experienced, demonstrates the shifting power dynamics in the Pacific.

As a result, scholars have noted that the U.S. has been knocked down from its post-Cold War leadership in the Pacific and now seems to be operating at a disadvantage.⁵² Although the U.S. has been a dominant actor in shaping international relations in Asia since Japan's defeat in World War II,⁵³ China has threatened this pre-existing world order by expressing dissatisfaction with the U.S.' involvement in the Pacific.⁵⁴ And as China's substantial interests have grown, so has its power to protect them.⁵⁵

46. Mike Pence, Vice President, Remarks by Vice President Pence on the Administration's Policy Toward China 7 (Oct. 4, 2018) (transcript available at <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-vice-president-pence-administrations-policy-toward-china/>).

47. *Id.*; see also Vali Kafeji, *China's Debt-Trap Diplomacy in Central Asia*, CENTRAL ASIA-CAUCASUS ANALYST (Oct. 13, 2024), <https://www.cacianalyst.org/publications/analytical-articles/item/13823-chinas-debt-trap-diplomacy-in-central-asia.html>.

48. A trade deficit is "a situation in which a country buys more from other countries than it sells to other countries." *Trade Deficit*, MERRIAM-WEBSTER (2024).

49. Tam, *supra* note 18, at 511 (stating that the trade deficit rose from \$74.880 billion to \$351.937 billion between 1998 and 2000); see also *Trade Surplus*, MERRIAM-WEBSTER (2024) (defining trade surplus as "a situation in which a country sells more to other countries than it buys from other countries").

50. Liu & Woo, *supra* note 37, at 322 (citing Peter Navarro, former policy advisor to President Trump).

51. *What a Trade Deficit Means*, COUNCIL ON FOREIGN RELS. (June 17, 2021), <https://education.cfr.org/learn/reading/what-trade-deficit-means#:~:text=Bilateral%20trade%20deficits%20between%20two,countries%20have%20certain%20comparative%20advantages>.

52. Jonathan D. Pollack, *Competing Visions: China, America and the Asia-Pacific Security Order*, in CHINA'S GLOBAL ENGAGEMENT: COOPERATION, COMPETITION, AND INFLUENCE IN THE 21ST CENTURY 155, 156-57 (Brookings Inst. Press 2017).

53. *Id.* at 156.

54. *Id.*

55. *Id.* at 170.

B. UNITED STATES-CHINA GEOPOLITICAL TENSIONS

As China's economy has grown, tensions between the U.S. and China have also increased. While some of the tensions are attributed to shifting world powers, trade wars between the countries, China's anti-democratic policies, and China's growth in military technology have also aggravated the relationship between the two countries.

1. *Tensions Stemming from Trade Wars and Anti-democratic Practices*

The trade wars between the U.S. and China have had a negative impact on the relationship between the two countries. The U.S. imposes tariffs and trade barriers, to which China retaliates with its own tariffs and trade barriers.⁵⁶ These bilateral trade tensions impact both economies negatively, such as causing a substantial reduction in employment across both countries.⁵⁷ However, the U.S. faces higher losses than China because U.S. industries have more extensive supply chain linkages in China.⁵⁸ For example, in 2011, a study predicted that if the U.S. enacted measures against Chinese imports, there would be a 0.79 percent drop in GDP in its own economy,⁵⁹ compared to the lesser GDP drop in China's economy.⁶⁰ Similar results occurred in 2018 when the U.S. implemented a twenty-five percent tariff on Chinese steel and aluminum, to which China responded with its own twenty-five percent tariffs across multiple sectors.⁶¹ These retaliatory tariffs resulted in a \$27 billion decrease in U.S. agricultural exports,⁶² requiring the U.S. government to provide a \$12 billion subsidy to the agriculture industry.⁶³ Despite being strategic competitors, the two countries continue to rely on each other for the trade of goods and services and remain deeply interconnected.⁶⁴

This is why both countries have engaged in talks to re-open trade, though unsuccessfully.⁶⁵ Efforts to maintain good relations have been consistently

56. Tam, *supra* note 18, at 513.

57. *Id.*

58. Ka Zeng, Rob Wells, Jingping Gu & Austin Wilkins, *Bilateral Tensions, the Trade War, and US–China Trade Relations*, 24 BUS. & POL'Y 399, 420 (2022).

59. Tam, *supra* note 18, at 520.

60. *Id.* at 526.

61. Liu & Woo, *supra* note 37, at 322.

62. Alex Durante, *How Tariffs and the Trade War Hurt U.S. Agriculture*, TAX FOUND. (July 25, 2022), <https://taxfoundation.org/blog/tariffs-trade-war-agriculture-food-prices/>.

63. *Id.*

64. Vani Archana, *Who Will Win from the Trade War? Analysis of the US-China Trade War from a Micro Perspective*, 13 CHINA ECON. J. 376, 376 (2020). Many projects have been the result of collaboration of the two countries, including the development of China's first passenger jet, where three-fifths of the supply chain for the components were from the United States. SCHINDLER & DiCARLO, *supra* note 22.

65. See Weihuan Zhou & Henry Gao, *US–China Trade War: A Way Out?*, 19 WORLD TRADE REV. 605, 605 (2020).

disrupted by what U.S. politicians consider concerning Chinese trade and governmental practices.⁶⁶ U.S. politicians allege that China has engaged in unfair trade practices, such as illegal subsidies to domestic companies, discriminatory regulation, and currency manipulation.⁶⁷ Former Vice President Mike Pence noted that the Chinese Communist Party (“CCP”), the leading political party in China, has utilized policies inconsistent with free and fair trade, such as currency manipulation, industrial subsidies to incentivize foreign investment, and tariffs.⁶⁸ Furthermore, the Committee of Foreign Affairs alleged that China engages in intellectual-property theft by forcing companies to transfer foreign technology as a condition of access to the Chinese market.⁶⁹ U.S. companies have been willing to trade their technology and IP for access to the Chinese market,⁷⁰ leading to the inevitable transfer of know-how into China.

On the governance front, Pence discussed concerns regarding coercive domestic policies that have undermined the push for world-wide democracy.⁷¹ For example, China has implemented measures such as the Great Firewall of China,⁷² the Social Credit Score System,⁷³ and persecuted individuals based on their faith.⁷⁴ Such concerns have been echoed by human rights advocates. For example, Amnesty International launched a new campaign and report about how Chinese authorities have “created a dystopian hellscape on a staggering scale” against Uyghurs, Kazakhs, and other Muslim minorities “in the Xinjiang Uyghur Autonomous Region.”⁷⁵ Researchers also point to China’s crackdown on the Internet, media, and civil society as an example of authoritarian measures.⁷⁶

66. See, e.g., Pence, *supra* note 46.

67. *Id.*

68. *Id.*

69. See, e.g., *Unfair Trading Practices Against the U.S.: Intellectual Property Rights Infringement, Property Expropriation, and Other Barriers*, Hearings Before the Comm. on Foreign Affairs, 112th Cong. 2–5 (2012) (including examples like pirated copies of U.S. movies sold on the streets of Beijing or stealing, copying, and marketing American software and music).

70. Liu & Woo, *supra* note 37, at 334–35.

71. See Pence, *supra* note 46.

72. The Great Firewall of China, formally known as the Golden Shield Project, censors media and blocks website access in China. Emily Quan, *Censorship Sensing: The Capabilities and Implications of China’s Great Firewall Under Xi Jinping*, 39 SIGMA: J. POL. INT’L STUD. 19, 20–21 (2022).

73. The Social Credit System began in 2014, where the system was to reward actions that build trust in society and penalize actions that are against society. Zeyi Yang, *China Just Announced a New Social Credit Law. Here’s What it Means.*, MIT TECH. REV. (Nov. 22, 2022), <https://www.technologyreview.com/2022/11/22/1063605/china-announced-a-new-social-credit-law-what-does-it-mean/>.

74. See Pence, *supra* note 46.

75. AMNESTY INT’L, *China: Draconian Repression of Muslims in Xinjiang Amounts to Crimes Against Humanity* (June 10, 2021), <https://www.amnesty.org/en/latest/news/2021/06/china-draconian-repression-of-muslims-in-xinjiang-amounts-to-crimes-against-humanity/>.

76. For example, authorities took the “country’s most outspoken critics and forcibly ‘disappear[ed]’ many of them for months, without any legal procedure, subjecting them to forced sleep deprivation, abusive

Furthermore, in 2018, China approved the removal of the two-term limit on the presidency, further consolidating current Chinese President Xi Jinping's power.⁷⁷ The perceived unfair trade practices and illiberal changes have fueled the growing tensions between the two countries.

2. *Growth in Military Technologies*

Tensions between the U.S. and China have also grown as a result of China strengthening its military technology in the so-called "arms race."⁷⁸ On the missile and nuclear defense front, China views U.S. missile defense as a fundamental threat to its nuclear weapons.⁷⁹ As the U.S. develops and matures its military framework, Chinese nuclear experts lose confidence in their own offensive capabilities and their nuclear warhead's ability to penetrate U.S. defenses.⁸⁰ Experts and analysts in China suggest nuclear expansion and improvements, such as developing missiles with multiple warheads that can overwhelm the U.S. missile system.⁸¹ The Obama administration acknowledged the national security implications of China's nuclear expansion and employed policies for nuclear deterrence.⁸² The strategic arms control relieved tensions on the nuclear front,⁸³ but now there are additional security concerns with other military technology.

The new battle front is in information and automated technology. China expressed its goals of expanding its sphere of influence in the Pacific through technology and military intelligence.⁸⁴ Since the CCP took power in 1949, it has sought to pursue what scholars call authoritarian expansionism.⁸⁵ In 2017, President Xi Jinping set the goal for China to take the center stage in military power and innovation by 2050.⁸⁶ China adopted a three-step transformation

interrogations and threats." Yaqiu Wang, *In China, the 'Great Firewall' is Changing a Generation*, HUM. RTS. WATCH (Sept. 1, 2020), <https://www.hrw.org/news/2020/09/01/china-great-firewall-changing-generation>.

77. *China's Xi Allowed to Remain 'President for Life' as Term Limits Removed*, BBC (Mar. 11, 2018), <https://www.bbc.com/news/world-asia-china-43361276>.

78. See 31 C.F.R. pt. 850 (2025).

79. Baohui Zhang, *U.S. Missile Defence and China's Nuclear Posture: Changing Dynamics of an Offence-Defence Arms Race*, 87 INT'L. AFF. 555, 559 (May 2011).

80. *Id.* at 560.

81. *Id.* at 561.

82. *Id.* at 566.

83. *Id.* at 568–69.

84. This includes the Belt and Road Initiative and the Digital Silk Road. Cameron F. Kerry, Mary E. Lovely, Pavneet Singh, Liza Tobin, Ryan Hass, Patricia M. Kim & Emilie Kimball, *Is U.S. Security Dependent on Limiting China's Economic Growth?*, BROOKINGS (Oct. 3, 2023), <https://www.brookings.edu/articles/is-us-security-dependent-on-limiting-chinas-economic-growth/>.

85. See CHRIS OGDEN, THE AUTHORITARIAN CENTURY: CHINA'S RISE AND THE DEMISE OF THE LIBERAL INTERNATIONAL ORDER 1 (Bristol Univ. Press 2022); YA-WEN LEI, THE CONTENTIOUS PUBLIC SPHERE: LAW, MEDIA, AND AUTHORITARIAN RULE IN CHINA 171–202 (Princeton Univ. Press 2018).

86. CHEUNG, *supra* note 1, at 1.

program: (1) achieve mechanization by developing information and strategic capabilities, (2) state security defense modernization, and (3) support technological growth.⁸⁷ As a part of the transformation, China focuses on mission-oriented tasks, such as basic manufacturing technology for aircrafts and medical technology,⁸⁸ and innovation-oriented tasks that allow for scientific discovery.⁸⁹ Parallel to this is China's five-year economic plan, where China noted that AI technology would be its first priority.⁹⁰ China has recognized that to protect its economic interests, its military should be equipped for information warfare.⁹¹

Also noted in the economic plan is China's goal for self-sufficiency in technology, defined as local production of at least seventy percent of the materials and parts used in high-technology products.⁹² This is exemplified in the "Made in China 2025" plan, where the CCP seeks to control ninety percent of the most advanced industries like AI and biotechnology.⁹³ The plan focuses on control over the entire manufacturing process and promoting traditional industries.⁹⁴ Based on these programs, China is evidently focused on the importance of technology leadership, allowing the country to increase research and development, mobilize academia and business, and expand grand-scale technological innovations.⁹⁵ Its efforts have paid off, as Chinese companies have created new QR code systems,⁹⁶ become a world leader in mobile payments,⁹⁷ and can now produce the seven-nanometer chip used for military systems and AI.⁹⁸

87. *Id.* at 185.

88. *Id.* at 26–27.

89. *Id.* at 27–28.

90. Gregory C. Allen, *China's Pursuit of Defense Technologies: Implications for U.S. and Multilateral Export Control and Investment Screening Regimes*, CSIS (Apr. 13, 2023), <https://www.csis.org/analysis/chinas-pursuit-defense-technologies-implications-us-and-multilateral-export-control-and>.

91. Information warfare includes technology that reduces battlefield uncertainty, cognitive control operations, automatic weapons, and precision-guided munitions. *Id.*

92. Liu & Woo, *supra* note 37, at 332.

93. Pence, *supra* note 46.

94. Scott Kennedy, *Made in China 2025*, CSIS (June 1, 2015), <https://www.csis.org/analysis/made-china-2025>.

95. Kerry et al., *supra* note 84.

96. Ryan Hass, Patricia M. Kim, Emilie Kimball, Jessica Brandt, David Dollar, Cameron F. Kerry, Aaron Klien, Joshua P. Meltzer, Chris Meserole, Amy J. Nelson, Pavneet Singh, Melanie W. Sisson & Thomas Wright, *U.S.-China Technology Competition*, BROOKINGS (Dec. 23, 2021), <https://www.brookings.edu/articles/u-s-china-technology-competition/>.

97. Dagny Dukach, *Understanding the Rise of Tech in China*, HARV. BUS. REV. (Sept./Oct. 2022), <https://hbr.org/2022/09/understanding-the-rise-of-tech-in-china>.

98. Matthew Schleich & William Alan Reinsch, *Contextualizing the National Security Concerns over China's Domestically Produced High-End Chip*, CSIS (Sept. 26, 2023), <https://www.csis.org/analysis/contextualizing-national-security-concerns-over-chinas-domestically-produced-high-end-chip>.

One specific military technology causing tension with the U.S. is mass-surveillance tools used for crowd monitoring and personal identification.⁹⁹ China is the market leader for such tools, with domestic technology giants like Dahua, Huawei, and ZTE.¹⁰⁰ The Chinese government's use of these technologies creates what scholars call a "Surveillance State," which has human rights implications.¹⁰¹ For example, there are ethical concerns regarding the use of biometric data as part of surveillance technology used in the repression of the Uyghur community in the Xinjiang region of China.¹⁰² Further, surveillance systems allow China to easily track locations, which is a new method of social pressure that could threaten the democratic and anti-authoritarian ideals that the U.S. stands for.¹⁰³ The U.S. government and companies stand at complicated crossroads, in both wanting to punish China's human rights violations while also creating advanced technology to decrease China's hold on the market.¹⁰⁴

Other critical military technologies are the semiconductors and microchips used to create AI. AI is a transformative technology in military settings, allowing for automated warfare through automated intelligence, surveillance, facial recognition, and unmanned vehicles.¹⁰⁵ China does not yet have the capability to manufacture advanced semiconductors for AI technology, so it has focused on Taiwan's concentration of semiconductor manufacturing capacity.¹⁰⁶ Because the science behind the semiconductor manufacturing process is not easily replicable, the U.S. has also struggled to manufacture this technology.¹⁰⁷ As a result, both countries are in a race to obtain and manufacture semiconductors, and Taiwan, as the key to semiconductor manufacturing, is at the heart of the struggle.¹⁰⁸

To conclude, China has experienced unprecedented economic growth through domestic policies and reforms, foreign direct investment, and certain

99. Maria Bega, *The New Arms Race Between China and the U.S.: A Comparative Analysis of AI-Powered Military and Economic Pursuits*, 17 EUROPOLITY: CONTINUITY AND CHANGE IN EUR. GOVERNANCE 75, 93–95 (2023).

100. *Id.* at 94.

101. Megan Gates, *The Rise of the Surveillance State*, ASIS INT'L. (June 1, 2021), <https://www.asisonline.org/security-management-magazine/monthly-issues/security-technology/archive/2021/june/The-Rise-of-The-Surveillance-State/>.

102. Bega, *supra* note 99, at 95.

103. See Gates, *supra* note 101.

104. *Id.*

105. *Id.* at 80.

106. Hass et al., *supra* note 96.

107. Brennan Gallagher, Book Review, 111 JOINT FORCE Q. 141, 141–42 (2023) (reviewing CHRIS MILLER, CHIP WAR: THE FIGHT FOR THE WORLD'S MOST CRITICAL TECHNOLOGY (2022)); see also Bega, *supra* note 99, at 89 (noting that U.S. company NVIDIA manufactures microchips and semiconductors through Taiwan Semiconductor Manufacturing Company Limited).

108. See generally SHENG LIJUN, CHINA'S DILEMMA: THE TAIWAN ISSUE (ISEAS-Yusof Ishak Inst., 1st ed. 2001) (discussing China's displeasure with Taiwan and Taiwan's importance to China).

trading practices. From China's increased economic power, resulting trade wars, authoritarian-leaning policies, and increased development of and focus on critical military technologies, geopolitical tensions between the U.S. and China have exacerbated. In light of these growing geopolitical tensions, President Biden aimed to dampen China's ability to produce key military technology through E.O. 14105.

III. INTRODUCTION AND EXPLANATION OF E.O. 14105

E.O. 14105 is the first outbound investment program in the U.S. But is not the first step that the U.S. has taken to counter China's national security threats. This Part will go over previous legislative efforts in export controls and inbound investment reviews, contextualize the legal underpinnings of E.O. 14105, discuss how E.O. 14105 came to be, and provide an in-depth review of the contents of E.O. 14105.

A. LEGISLATIVE EFFORTS BY THE UNITED STATES

E.O. 14105 is a result of a cumulation of policies focused on curbing national security threats through investments. The United States has previously dealt with national security threats accompanying investments through restrictions on exports and inbound investments. In 1979, the United States implemented an export control regime through the EAA of 1979, where a Council was formed to advise the U.S. on its exports.¹⁰⁹ The Council was created to identify and examine specific problems in business, agricultural, and industrial practices to encourage those industries to enter into foreign markets.¹¹⁰ The EAR were passed in tandem with the EAA, designed to help with implementation.¹¹¹ Under the EAR, the export of certain items requires licensing, as determined by the Commerce Control List.¹¹² While low-technology consumer goods typically do not require licensing, exporting listed goods to an "embargoed country, an end-user of concern, or in support of a prohibited end-use" would require licensing.¹¹³

In 2018, due to concerns of China's pursuit towards military leadership, additional restrictions were placed on the export of emerging and foundational

109. Export Administration Act of 1979, 50 U.S.C. § 4601 (1979) (repealed 2018).

110. *Id.*

111. *Id.*; Implementation of Additional Export Controls, 89 Fed. Reg. 23876 (Apr. 4, 2024) (to be codified at 15 C.F.R. pts. 732, 734, 736, 740, 742, 744, 746, 748, 770, 772, 774).

112. The Commerce Control List, 15 C.F.R. § 774.1 (2025).

113. *Dual Use Export Licenses*, BUREAU OF INDUS. & SEC., U.S. DEPT. OF COM., <https://www.bis.doc.gov/index.php/all-articles/2-uncategorized/91-dual-use-export-licenses> (last visited Sept. 17, 2025).

technology.¹¹⁴ In response to China's call for technological and military superiority, the U.S. passed the ECRA that re-established the President's non-emergency authority to control exports for national security reasons.¹¹⁵ Specifically, the ECRA restricts the export of items that significantly contribute to the military potential of other countries that would be detrimental to domestic national security.¹¹⁶ The ECRA reiterated that in order to protect the U.S., it was necessary to maintain leadership in the science, manufacturing, and technology sectors, which requires robust capabilities in the investigation, intelligence, and monitoring of exports in such sectors.¹¹⁷ From ECRA, the President derives the authority to oversee exports of specific nuclear explosive devices, missiles, chemical and biological weapons, and intelligence services.¹¹⁸

On the inbound investment side, the Exon-Florio Amendment to the DPA grants authority to the CFIUS to review certain transactions involving FDI into the U.S.¹¹⁹ The CFIUS was established by former President Gerald Ford in Executive Order 11858,¹²⁰ and is meant to evaluate national security implications of proposed investments by foreign entities into U.S. companies.¹²¹ To do so, the CFIUS evaluates various factors concerning the transaction's implications on national security and technology growth.¹²² Some factors include the effect of the proposed acquisition on the United States' production capacity in areas of national security, potential effects of the transaction on U.S. technological leadership in areas affecting national security, and the state of relations between the company's country and the United States.¹²³ CFIUS continuously balances the benefits of foreign investment and national security.¹²⁴ The Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA") further expanded CFIUS to allow scrutiny into transactions

114. BJÖRN FÄGERSTEN, ULLA LOVCALIC, ANNA LUNDBORG REGNÉR & SWAPNIL VASHISHTHA, CONTROLLING CRITICAL TECHNOLOGY IN AN AGE OF GEOECONOMICS: ACTORS, TOOLS, AND SCENARIOS 16 (Swedish Inst. of Int'l Affs. 2023).

115. *Id.*; 50 U.S.C. §§ 4811(1)(A), (B).

116. *Id.*

117. *Id.* § 4811(3).

118. *Id.* § 4812(a).

119. *CFIUS Laws and Guidance*, U.S. DEPT. OF TREAS., <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-laws-and-guidance> (last visited May 13, 2023).

120. Exec. Order No. 11858, 40 Fed. Reg. 20263 (May 7, 1975); Patrick Griffin, *CFIUS in the Age of Chinese Investment*, 85 FORDHAM L. REV. 1757, 1760–61 (2017).

121. Griffin, *supra* note 120, at 1761.

122. *Id.*

123. *Id.* at 1765.

124. *Id.*

involving non-controlling foreign investments into U.S. businesses and discrimination of transactions based on countries of origin.¹²⁵

Efforts turned to regulating outbound investments in 2023, when the Outbound Investment Transparency Act (“OITA”) was passed as an amendment to the DPA.¹²⁶ The DPA grants the president the authority to review international mergers and acquisitions by U.S. companies, along with other similar transactions.¹²⁷ OITA regulates “[c]overed activities” by a U.S. person through reporting and notification requirements.¹²⁸ Covered activities are defined as any activity engaged by a U.S. person related to a “covered sector[]”¹²⁹ that involves an acquisition of a foreign establishment.¹³⁰ OITA is a similar framework to the one that E.O. 14105 proposes, but only goes as far as requiring notifications of transactions. OITA was eventually paired with the National Defense Authorization Act of 2024, which directed the U.S. military to focus on countering China.¹³¹ The combination of OITA’s notification requirements and the increased emphasis on countering China ultimately spurred President Biden to develop a strong unilateral executive action.

B. LEGAL FOUNDATIONS FOR E.O. 14105

The two key authorities underpinning E.O. 14105 are the NEA and the IEEPA. The NEA grants the president authority to declare national emergencies and requires the president to notify Congress, who can terminate the emergency upon resolution.¹³² The IEEPA empowers the president to impose controls over transactions that are based either entirely or substantially outside of the U.S. in the event of unusual or extraordinary threats.¹³³ The president may also prescribe

125. Foreign Investment Risk Review Modernization Act of 2018, H.R. 5841, 115th Cong. (2018); BJORN ET AL., *supra* note 114, at 24.

126. Outbound Investment Transparency Act, S. 2678, 118th Cong. (2023); Bob Casey & John Cornyn, *Cornyn, Casey Outbound Investment Amendment Passes Senate* (July 26, 2023), https://www.legistorm.com/stormfeed/view_rss/2271332/member/813/title/casey-cornyn-bill-to-screen-us-investment-in-china-overwhelmingly-passes-senate.html.

127. Defense Production Act § 2, 50 U.S.C. § 4501.

128. S. 2678.

129. *Id.*; Covered sectors include: advance semiconductors and microelectronics, artificial intelligence, hypersonics, networked laser scaling systems, satellite-based communications, and quantum informatics. Thibault Denamiel, Eric Meyers & William Alan Reinsch, *Insight Into the Senate’s Outbound Investment Mechanism*, CSIS (Aug. 2, 2023), <https://www.csis.org/analysis/insight-senates-outbound-investment-mechanism>.

130. S. 2678.

131. U.S. SENATE COMM. ARMED SERVS., SUMMARY OF THE FISCAL YEAR 2024 NATIONAL DEFENSE AUTHORIZATION ACT 1 (2024).

132. National Emergencies Act, 50 U.S.C. § 1621; Rachel Jessica Wolff, *Whose Constitutional Authority is it Anyway? Nondelegation, the National Emergencies Act, and the International Emergency Economic Powers Act*, 21 GEO. J.L. & PUB. POL’Y 615, 624 (2023).

133. International Emergency Economic Powers Act, 50 U.S.C. § 1701; *see also* 31 C.F.R. § 800.101 (noting that President Biden derived authority from the IEEPA, NEA, and 3 U.S.C. § 301).

the means to investigate, regulate, or prohibit any transactions in foreign exchanges.¹³⁴ The IEEPA grants extremely broad authority to the president to block any transaction or freeze assets.¹³⁵

The IEEPA has been invoked sixty-nine times since its passage,¹³⁶ and can only be used in areas of extraordinary threat.¹³⁷ “National emergency” and “unusual and extraordinary” threats are undefined terms, but they are generally understood as instances of “true” emergencies.¹³⁸ Previous instances of national emergencies include harboring alleged terrorists in Afghanistan after 9/11,¹³⁹ civil unrest and political repression of civilians in Burundi,¹⁴⁰ and Russia’s annexation of Crimea.¹⁴¹ Executive orders that invoke the IEEPA generally limit the national emergency to a specific government or territory and state a precise motivation for declaring the national emergency.¹⁴² However, recent national emergencies lack explicit geographical limitations¹⁴³ and contain broader and vaguer motivations, citing to general human and civil rights abuses or political corruption.¹⁴⁴ The IEEPA is still used as a tool for economic sanctions against specific countries but now is also used to target groups and individuals regardless of their geographic locations.¹⁴⁵

C. THE ROAD TO E.O. 14105

Following a similar structure to other executive orders invoking the IEEPA, E.O. 14105 was signed by President Biden on August 9, 2023.¹⁴⁶ E.O. 14105 was intended as a protectionist measure to curb outbound investments in key technology sectors.¹⁴⁷ E.O. 14105 found the “advancement

134. 50 U.S.C. § 1702.

135. Andrew Boyle & Tim Lau, *The President’s Extraordinary Sanctions Powers*, BRENNAN CTR. FOR JUST. (July 20, 2021), <https://www.brennancenter.org/our-work/research-reports/presidents-extraordinary-sanctions-powers>.

136. CHRISTOPHER A. CASEY, DIANNE E. RENNACK & JENNIFER K. ELSEA, CONG. RSCH. SERV., THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 15 (2024).

137. See *Dames & Moore v. Regan*, 453 U.S. 654, 654 (1981) (invoking IEEPA for the Iranian hostage crisis).

138. CASEY ET AL., *supra* note 136, at 51.

139. YU OUYANG & MICHAEL A. MORGAN, TALKING TOUGH IN U.S. FOREIGN POLICY: EXECUTIVE ACTIONS, NATIONAL EMERGENCIES, AND ECONOMIC SANCTIONS 33–38 (Springer Int’l. Publ’g 2023).

140. *Id.* at 96.

141. *Id.* at 69–70.

142. *Id.* at 18–21.

143. Geographically nonspecific emergencies include the spread of chemical and biological weapons, transnational criminal organizations and cyber-enabled malicious activities, and foreign adversaries exploiting information and communication vulnerabilities in technology. *Id.* at 19.

144. *Id.* at 21.

145. For example, Executive Order 13219 targets a broad range of persons who threaten international stabilization in the Western Balkans, omitting the word “foreign.” *Id.* at 22.

146. Exec. Order No. 14105, 88 Fed. Reg. 54867 (2023).

147. *Id.*

by countries of concern in sensitive technologies and products critical for the military, intelligence, surveillance, or cyber-enabled capabilities of such countries” to be an “unusual and extraordinary threat to the national security of the U.S.”¹⁴⁸ In the paragraphs leading up to the order, President Biden expressed his concerns with countries that engage in comprehensive, long-term strategies advancing sensitive technologies and products critical to military intelligence.¹⁴⁹ To prevent other countries from acquiring cutting-edge technologies and achieving military dominance through U.S. FDI, E.O. 14105 was enacted to restrict outbound investments in those technologies.¹⁵⁰

E.O. 14105 was highly anticipated, as leaders in Congress had been expressing the need for limiting investments into Chinese companies.¹⁵¹ Following talks of legislation on investment prohibitions, policymakers advocated for additional measures for investments in sensitive technology sectors and critical supply chains.¹⁵² In 2023, the U.S.-China Economic and Security Review Commission was mandated to monitor, investigate, and report on the national security implications of the economic relationship between the United States and China.¹⁵³ The report noted that if Chinese technology surpassed the United States’ in areas of warfare, “the balance of power in Asia and worldwide could be dramatically altered.”¹⁵⁴ The report found that China’s military-civil fusion program has made rapid progress in AI for defense applications and are able to produce quality modern weapons systems that could threaten the U.S. homeland.¹⁵⁵ Despite current export controls by the United States, the report noted the significant obstacles in enforcement due to the development of dual-use technologies.¹⁵⁶ The report opined that the current investment restrictions are insufficient to halt the flow of U.S. expertise, capital, and technology into China.¹⁵⁷ The report specifically recommended that Congress evaluate the effectiveness of semiconductor export control regulations to prevent China from acquiring sensitive information.¹⁵⁸ These protectionist ideas are reflected in the Treasury Department’s ANPRM that followed E.O.

148. *Id.*

149. *Id.*

150. *Id.*

151. See, e.g., Pence, *supra* note 46.

152. *Id.*

153. 2023 REPORT TO CONGRESS: EXECUTIVE SUMMARY AND RECOMMENDATIONS, U.S.-CHINA ECON. & REV. COMM’N 6 (2023).

154. *Id.*

155. *Id.* at 29.

156. *Id.*; Alexandra Van Cleef, *The Battle Between Open Markets and National Security: How Limiting Investments into Foreign Technology Might be Hurting National Security Goals*, 33 CATH. U. J.L. & TECH. 53, 78–79 (2024).

157. U.S.-CHINA ECON. & REV. COMM’N, *supra* note 153, at 29.

158. *Id.*

14105.¹⁵⁹ The ANPRM stated that U.S. investments typically include intangible benefits such as managerial assistance, access to investment and talent networks, additional financing capabilities, and market access.¹⁶⁰

In 2023, Mike Gallagher, then Chairman of the House Select Committee on the CCP, also wrote to President Biden expressing national security concerns.¹⁶¹ Chairman Gallagher stated that in one of the estimates, over \$200 billion of U.S. capital is invested in Chinese companies through private markets, which directly finances technology companies connected to the Chinese military and human right abuses.¹⁶² He encouraged President Biden to restrict investments into sectors relevant to national security, while safeguarding shareholder rights and protecting investors.¹⁶³ The road to E.O. 14105 was characterized by growing concerns over China's use of certain military technologies, echoed by the political sentiment of national security protectionism.

D. CONTENTS OF E.O. 14105

In order to address ambiguities in the outbound investment program, E.O. 14105 directs the Treasury Department to provide regulations identifying categories of transactions and technologies that would either require notification or be prohibited altogether.¹⁶⁴ To ensure that the regulations are effective, the Treasury must consult other executive agencies and public commenters, and then perform its own investigations prior to the Final Rule.¹⁶⁵ In August 2023, the Treasury provided an ANPRM that sought comments on a preliminary draft rule.¹⁶⁶ In July 2024, the Treasury provided an updated Notice of Proposed Rulemaking, implementing many of the comments it received and seeking additional commentary.¹⁶⁷ After incorporating more of the comments, the Final Rule was completed in November 2024 and went into effect January 2025.¹⁶⁸ The Final Rule creates an outbound investment program where a U.S. person

159. Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 89 Fed. Reg. 90398 (Nov. 15, 2024) (to be codified at 31 C.F.R. pt. 850).

160. *Id.*

161. *Letter to President Biden on Restrictions on U.S. Investments to China*, SELECT COMM. ON CCP (Aug. 3, 2023), <https://selectcommitteontheccp.house.gov/media/letters/letter-president-biden-restrictions-us-investments-china>.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 89 Fed. Reg. 90398 (Nov. 15, 2024) (to be codified at 31 C.F.R. pt. 850).

167. *Id.*

168. *Id.*

with knowledge of specific covered transactions with a country of concern must either notify the Treasury or prevent such transaction.¹⁶⁹

1. *Parties Involved*

E.O. 14105 focuses its geographic scope on “countries of concern,” defined in the Final Rule as a country or territory that has been identified as engaging in “comprehensive, long-term strategies that direct, facilitate, or otherwise support advancements in sensitive technologies and products that are critical to such countries’ military, intelligence, surveillance, and cyber-enabled capabilities,” that counter U.S. capabilities.¹⁷⁰ These territories are the People’s Republic of China, Hong Kong, and Macau.¹⁷¹

The Final Rule is concerned with transactions between “United States persons” and “covered foreign persons.”¹⁷² A U.S. person is defined as “any United States citizen or lawful permanent resident, as well as any entity organized under the laws of the United States.”¹⁷³ A covered foreign person is defined in the NPRM as:

“A person of a country of concern that engages in a covered activity (§ 850.209(a)(1));

Any person that has a particular relationship with a person of a country of concern that engages in a covered activity—i.e., where (1) the person holds a specific interest in such person of a country of concern, such as a voting interest, board seat, equity interest, or the power to direct or cause the direction of the management or policies of the person of a country of concern through contractual arrangement(s) (including, for the avoidance of doubt, any contractual arrangement with respect to a variable interest entity); and if there is such an interest, (2) more than 50 percent of the first person’s revenue, net income, capital expenditure, or operating expenses is attributable to such person of a country of concern, individually or in the aggregate (§ 850.209(a)(2)); or

A person of a country of concern that participates in a joint venture with a U.S. person if such joint venture engages or intends to engage in a covered activity (§ 850.209(a)(3)).”¹⁷⁴

Commenters argued that these definitions are too broad, allowing for loopholes for companies that have wholly owned subsidiaries or international

169. *Id.*

170. Exec. Order No. 14105, 88 Fed. Reg. 54867 (2023).

171. *Id.*

172. 31 C.F.R. § 850.101 (2025).

173. Exec. Order No. 14105, 88 Fed. Reg. 54867 (2023).

174. 31 C.F.R. § 850.209 (2025).

branches.¹⁷⁵ However, the Final Rule does capture subsidiaries,¹⁷⁶ and includes a “foreign branch” as part of the definition of a U.S. person.¹⁷⁷

2. *Transactions Involved*

E.O. 14105 focuses on “covered transactions,” which are transactions that could convey intangible benefits.¹⁷⁸ These transactions include: an acquisition of an equity interest or contingent equity interest; provision of a loan or similar debt financing arrangement where the debt financing will afford the U.S. person an interest in profits; the right to appoint members of the board, or other comparable financial and governance rights; conversion of a contingent equity interest; acquisition, leasing, or other development of operations, land, property, and assets that will result in the establishment of a covered foreign person or engagement of a person with a country of concern; joint venture in a covered activity; and acquisition of a limited partner or equivalent interest in a fund.¹⁷⁹

Despite the numerous involved transactions, there are exceptions where transactions with ancillary services or those that do not provide the same direct U.S. know-how are exempt from notification or prohibition. These transactions include: an investment of a U.S. person into a publicly traded security (as defined by the Securities Exchange Act) or a security issued by an investment company (as defined by the Investment Company Act); investments of a limited partner below a certain size into a pooled investment fund or where there is contractual assurance that fund capital will not be used in prohibited or notifiable transactions; a full buyout of all interests of a person of a country of concern if the entity is not a covered foreign person; an intracompany transaction between a parent company and its subsidiaries; fulfillment of a binding capital commitment entered prior to the Final Rule; an acquisition of a voting interest in a covered foreign person upon default or loan condition where the U.S. person is a passive syndicate; and certain other transactions.¹⁸⁰

During the commentary period for both the ANPRM and NPRM, commenters supported a narrow definition of covered transactions. Commenters to the ANPRM advocated for delineated exceptions, such as insurance,

175. 31 C.F.R. §§ 850.201–229 (2025); Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 89 Fed. Reg. 90398 (Nov. 15, 2024) (to be codified at 31 C.F.R. pt. 850).

176. 31 C.F.R. § 850.206 (2025).

177. *Id.*

178. Press Release, U.S. Dept. of the Treasury, Off. of Pub. Affs., Fact Sheet: President Biden Issues Executive Order Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern; Treasury Department Issues Advance Notice of Proposed Rulemaking to Enhance Transparency and Clarity and Solicit Comments on Scope of New Program 4 (Aug. 9, 2023), <https://home.treasury.gov/system/files/206/Outbound-Fact-Sheet.pdf>.

179. 31 C.F.R. § 850.210 (2025).

180. *Id.*

reinsurance, consulting, or like services.¹⁸¹ They argued that these services should be exceptions because they are secondary and intermediary services focused on financial protection, risk management, and advisory assistance to businesses and individuals where there is a weaker link to national security concerns.¹⁸² For passive investments, commenters supported the exceptions for index funds, mutual funds, exchange-traded funds, and publicly traded securities because limited partners investing in private funds do not provide the same intangible benefits or have the same direct communication as general partnerships may have.¹⁸³ The NPRM, and the Final Rule, took the comments into account and have kept certain limited partnership investments as exceptions, but broadened the definition of covered transactions to include new categories like joint ventures and brownfield investments.¹⁸⁴ However, these exemptions can be exploited by companies wanting to make certain investments, creating potential loopholes.¹⁸⁵

3. Knowledge Standard

E.O. 14105 requires a U.S. person with knowledge of a transaction to either prohibit the transaction or notify the Treasury of the transaction.¹⁸⁶ Knowledge is defined in the Final Rule as actual knowledge, an awareness of a high probability, or reason to know that a fact or circumstance exists or is substantially likely to occur.¹⁸⁷ Generally, this standard is met if a U.S. person engages in a reasonable and diligent inquiry at the time of the given transaction.¹⁸⁸ The Final Rule provides guidelines for what a “reasonable and diligent inquiry” includes.¹⁸⁹ Among other considerations, the Treasury will look at whether the U.S. person obtained contractual warranties, if they undertook efforts to obtain available non-public information relevant to

181. Council Ins. Agents & Brokers, Comment Letter on Proposed Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern (Sept. 28, 2023), <https://www.regulations.gov/comment/TREAS-DO-2023-0009-0025>; *see also* Consumer Tech. Ass'n., Comment Letter on Proposed Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern (Sept. 28, 2023), <https://www.regulations.gov/comment/TREAS-DO-2023-0009-0058> (requesting for exceptions such as consumer usage of connected devices).

182. Council Ins. Agents & Brokers, *supra* note 181.

183. Inst. Ltd. Partners Assoc., Comment Letter on Proposed Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern (Sept. 28, 2023), <https://www.regulations.gov/comment/TREAS-DO-2023-0009-0055>.

184. 31 C.F.R. §§ 850.101–904 (2025).

185. Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 89 Fed. Reg. 90398 (Nov. 15, 2024) (to be codified at 31 C.F.R. pt. 850).

186. 31 C.F.R. § 850.104 (2025).

187. 31 C.F.R. § 850.216 (2025).

188. 31 C.F.R. § 850.104 (2025).

189. *Id.*

determining the transaction's status as a covered transaction, or whether they purposefully avoided learning or seeking relevant information.¹⁹⁰

Commenters after the ANPRM and NPRM requested more specific guidance on what relevant due diligence steps would look like, and other red flags that a U.S. person should keep an eye out for.¹⁹¹ For example, some commenters wanted a specific checklist of what a reasonable and diligent inquiry includes, while others proposed a safe harbor from enforcement if the U.S. person took specific due diligence steps.¹⁹² However, the Treasury declined to include any specific steps or safe harbors in the Final Rule, and instead included the aforementioned factors that the Treasury will consider.¹⁹³ As a result, U.S. investors bear the burden of determining whether a transaction falls under the purview of E.O. 14105.

4. Technologies Involved

E.O. 14105 is concerned with transactions relating to “covered national security technologies and products,” including sensitive technologies in AI, semiconductors, microelectronics, and quantum information technologies that are critical in military, intelligence, surveillance, or cyber-enabled capabilities.¹⁹⁴

The ANPRM initially provided preliminary definitions for each type of technology involved and sought commentary from experts within each technology sector to refine the definitions.¹⁹⁵ For example, AI systems were defined by the ANPRM as a “machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments.”¹⁹⁶ If the U.S. were to prohibit transactions involving AI technology, the ANPRM notes that the approach could be to focus on transactions “designed to be *exclusively used* for...any military, government intelligence, or mass-surveillance end use[s].”¹⁹⁷ Based on the comments, the NPRM and the Final Rule then specifically defined AI systems as a machine-based system that can “make predictions, recommendations, or decisions influencing real or virtual environments” or any “data system,

190. *Id.*

191. *See, e.g.*, Akin Gump Strauss Hauer & Feld LLP, Comment Letter on Proposed Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern (Sept. 28, 2023), <https://www.regulations.gov/comment/TREAS-DO-2023-0009-0045>.

192. 31 C.F.R. §§ 850.104–904 (2025).

193. 31 C.F.R. § 850.104 (2025).

194. Exec. Order No. 14105, 88 Fed. Reg. 54867, 54868 (Aug. 9, 2023).

195. Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 89 Fed. Reg. 90398 (Nov. 15, 2024) (to be codified at 31 C.F.R. pt. 850).

196. *Id.* at 90464.

197. *Id.* (emphasis added).

software, hardware, application, tool, or utility that operates in whole or in part using a system described [above].”¹⁹⁸

Similarly, semiconductors and microelectronics include electronic design automation software, certain fabrication and advanced packaging tools, advanced integrated circuits, and supercomputers.¹⁹⁹ Quantum information technologies include the development and production of quantum computers, quantum sensing platforms, and quantum networking and communications systems.²⁰⁰ The final definitions help clarify the technologies implicated by E.O. 14105, and leaves room for the Treasury to adjust definitions as technology evolves.

5. *Notifiable vs. Prohibited Transactions*

E.O. 14105 also provides a distinction between transactions that must be notified versus transactions that are prohibited. The obligations imposed by the Final Rule depend on the type of technologies involved.²⁰¹ The Final Rule set forth which technology fits under which requirement, as briefly summarized in the chart below.

| Notifiable transactions are ventures that: ²⁰² | Prohibited Transactions are ventures that: ²⁰³ |
|--|--|
| <ul style="list-style-type: none"> • design, fabricate, or package any integrated circuit not prohibited; or • develop an AI system designed for a military end use, combat system logistics, government intelligence or mass surveillance, or intended by the covered foreign person to be used for cybersecurity, digital forensics, penetration | <ul style="list-style-type: none"> • develop or produce any electronic design automation software for the design of integrated circuits or advanced packaging; • develop or produce any front-end semiconductor fabrication equipment, equipment for performing volume advanced packaging, or materials or technology designed |

198. 31 C.F.R. § 850.202 (2025).

199. 31 C.F.R. § 850.204 (2025).

200. 31 C.F.R. § 850.224 (2025).

201. Exec. Order No. 14105, 88 Fed. Reg. 54867, 54868 (Aug. 9, 2023).

202. 31 C.F.R. § 850.217 (2025). Note that these are non-exhaustive summaries of the actual rule and not the specific technology.

203. 31 C.F.R. § 850.224 (2025). Note that these are non-exhaustive summaries of the actual rule and not the specific technology.

| | |
|--|--|
| <p>testing, control of robotic systems, or trained using a quantity of computing power greater than 10^{23} computation operations.</p> | <p>exclusively for use in or with extreme ultraviolet lithography fabrication equipment;</p> <ul style="list-style-type: none"> • design any integrated circuit that exceeds performance parameters in Export Control Classification Number 3A090.a; or • fabricate certain integrated circuits, supercomputers, quantum computers, quantum sensing platforms, quantum networks or communication systems, and AI systems trained with computing power greater than 10^{24} or 10^{25}. |
|--|--|

To undertake a notifiable transaction, a U.S. person must file a notification form in compliance with the Final Rule.²⁰⁴ Some information required in the notification form includes the content of the transaction, such as a description of the parties involved and the commercial rationale for the transaction,²⁰⁵ or the timing of the transaction, which is no later than thirty calendar days following the acquisition of information.²⁰⁶

Alternatively, a U.S. person involved in, or with knowledge of, a prohibited transaction must refuse to engage in the transaction unless an exemption applies.²⁰⁷ A U.S. person is also charged with the responsibility to take “all reasonable steps to prohibit and prevent any transaction by its controlled foreign entity that would be a prohibited transaction if engaged in by a U.S. person.”²⁰⁸

204. 31 C.F.R. §§ 850.401–406 (2025).

205. 31 C.F.R. § 850.405 (2025).

206. 31 C.F.R. § 850.404(e) (2025).

207. 31 C.F.R. § 850.301 (2025).

208. 31 C.F.R. § 850.302(a) (2025).

6. *Penalties*

Lastly, the Final Rule outlines the consequences of violating E.O. 14105. The NPRM proposed civil and criminal penalties up to the maximum amounts allowed in IEEPA section 206,²⁰⁹ and permitted the Treasury to take action to nullify a transaction or require divestment.²¹⁰ In response, some commenters requested an appeals process for the penalties.²¹¹ However, the Final Rule echoes the NPRM,²¹² as the Treasury declined to establish an appeals process because the penalty will only be imposed based on the facts and circumstances.²¹³

IV. UNINTENDED CONSEQUENCES OF E.O. 14105

E.O. 14105 is a step in the right direction in protecting national security interests. However, there are unintended consequences that decrease the overall effectiveness of the program and prevent the program from expanding into other sectors. These unintended effects include the high costs of compliance, global trade tensions, a decrease in U.S. competitiveness, and retaliatory actions that impact U.S. industries.

Some U.S. politicians argue that broadening the law would resolve many of these negative effects. For example, U.S. Secretary of State Marco Rubio calls the proposal “almost laughable” because it is too narrowly tailored, riddled with loopholes, and ignores important technologies that have a dual-use in military technology.²¹⁴ Similarly, Michael McCaul, then House Foreign Affairs Committee Chairman, issued a statement expressing that E.O. 14105 did not account for existing technological investments (as E.O. 14105 is not retroactive) and failed to include key sectors like energy and biotechnology.²¹⁵ Representative McCaul emphasized that the need to stop the flow of American dollars and know-how into China’s military requires more than “half measures that [take] too long to develop and go into effect.”²¹⁶ This sentiment was echoed

209. The penalty for violating, conspiring the violate, or causing a violation shall not exceed the greater of \$250,000 or the amount that is twice the amount of the violating transaction. The penalty for someone who willfully commits, attempts to commit, conspires or aids and abets the commission of violation is fined up to \$1,000,000 or is imprisoned for up to twenty years. 31 C.F.R. § 850.701 (2025).

210. Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 89 Fed. Reg. 90398 (Nov. 15, 2024) (to be codified at 31 C.F.R. pt. 850).

211. 31 C.F.R. §§ 850.101–904 (2025).

212. 31 C.F.R. §§ 850.701–704 (2025).

213. 31 C.F.R. §§ 850.101–904 (2025).

214. *Biden’s China Investment Ban: Who’s Targeted and What Does It Mean for the 2024 US Election?*, GUARDIAN (Aug. 9, 2023), <https://www.theguardian.com/world/2023/aug/10/joe-biden-us-china-investment-ban-who-is-targeted-what-does-it-mean-for-2024-usa-election>.

215. Press Release, Foreign Affs. Comm., McCaul on Executive Order Curbing U.S. Tech Investment in China (Aug. 9, 2023), <https://foreignaffairs.house.gov/press-release/mccaul-on-executive-order-curbing-us-tech-investment-in-china/>.

216. *Id.*

in former Chairman Gallagher's statement, explaining that while E.O. 14105 is a small step in the right direction, there are too many loopholes.²¹⁷ Former Chairman Gallagher argues that E.O. 14105 does not address the passive flows of U.S. money into Chinese-affiliated companies that are necessary to prevent a techno-totalitarian surveillance state, military buildup, and human rights abuses.²¹⁸ Many other politicians support E.O. 14105 itself, but agree that the targeted approach is inadequate, encouraging Congress to take stronger action such as increased sanctions and export control regimes.²¹⁹ There is merit to these policymakers' arguments, as having a broader E.O. 14105 could prevent any U.S. dollars from aiding China's technological development.

However, this Note argues that having such a broad approach would actually exacerbate the negative impacts of E.O. 14105. The policymakers developing this law saw value in drafting a narrow rule, as the Final Rule explicitly states that E.O. 14105 is "narrowly scoped to focus on a limited subset of investment activity and to avoid unintended impacts in broader sectors of the U.S. or global economies."²²⁰ Even if the law were to be broadened to include more transactions and technologies, E.O. 14105 would still be hampered with the following consequences: (a) direct economic costs of compliance, (b) economic impacts of freezing global trade, (c) a decrease in U.S. competitiveness from a lack of ally support, and (d) retaliatory consequences from China.

A. UNTENABLE COST OF COMPLIANCE AND IMPACTS ON INNOVATION AND JOB GROWTH

The first consequence of E.O. 14105 is its heavy burden on companies to run due diligence or report transactions.²²¹ Investors and businesses have been gearing up to prepare for the Final Rule since E.O. 14105 was first issued.²²² Large law firms have suggested that the best way to remain ahead of the Final

217. Press Release, House Select Comm. on the Chinese Communist Party, Gallagher Issues Statement on President Biden's Executive Order to Curb U.S. Investment in China (Aug. 10, 2023), <https://selectcommittecontheccp.house.gov/media/press-releases/gallagher-issues-statement-president-bidens-executive-order-curb-us-investment>.

218. *Id.*

219. *Washington Update*, WILLIAMS & JENSEN (Aug. 18, 2023), <https://www.ncpers.org/files/washupdate/W&JWashingtonUpdate08-18-23.pdf> (quoting House Financial Services Chairman McHenry and Subcommittee Chairman Luetkemeyer's thoughts on the executive order).

220. Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 89 Fed. Reg. 90401 (Nov. 15, 2024) (to be codified at 31 C.F.R. pt. 850); *see also* CONG. RSCH SERV., REGULATION OF U.S. OUTBOUND INVESTMENT TO CHINA 2 (Dec. 10, 2024).

221. Exec. Order No. 14105, 88 Fed. Reg. 54867 (Aug. 9, 2023).

222. Alice Tchernookova, *Law Firms Prep Market for US Outbound Investment Regime*, INT'L FIN. L. REV. (Sept. 6, 2023), <https://www.iflr.com/article/2c5mexx2idpckw4tkopog/law-firms-prep-market-for-us-outbound-investment-regime>.

Rule is for businesses to gather intelligence within their own companies and to begin due diligence.²²³ Companies are recommended to take extensive steps to understand the company's investments in China, flag sensitive transactions,²²⁴ investigate diligence processes and contractual representations that could inform these questions,²²⁵ and establish compliance procedures.²²⁶

However, these compliance steps and methods come at a cost. According to a Thomson Reuters Regulatory Intelligence study, compliance procedures have been costly to companies,²²⁷ and these costs are expected to rise with the implementation of E.O. 14105. For example, sixty-six percent of U.S. survey respondents expected their costs to increase in 2023.²²⁸ These anticipated compliance costs include the need to grow compliance teams and compliance staff, while company budgets remain tight.²²⁹ Similarly, a study performed in 2023 by the National Association of Manufacturers found that federal regulations cost an estimated \$12,800 per employee per year in 2022.²³⁰ Within the \$12,800 per employee figure, economic regulations account for \$7,700, environmental regulations account for \$2,800, tax compliance accounts for \$1,300, and others account for \$900.²³¹ These studies demonstrate that costs of compliance are high and weigh against company and job growth. With the complexity of E.O. 14105, reporting businesses may have to invest in outsourced expert advice and technology at an additional cost.²³²

The high cost of complying with E.O. 14105 chills growth in investment, job creation, and wages.²³³ In the same National Association of Manufacturers

223. *Id.*

224. *With Biden Executive Order, a U.S. Outbound Investment Control Regime Takes an Important Step Forward—Focused on China, but Significant Steps Remain Before Implementation*, GIBSON DUNN 16 (Aug. 14, 2023), <https://www.gibsondunn.com/wp-content/uploads/2023/08/with-biden-executive-order-us-outbound-investment-control-regime-takes-important-step-forward-focused-on-china.pdf>.

225. *U.S. Launches Outbound Investment Screening Targeting China with Further Developments Forthcoming*, COVINGTON & BURLING (Aug. 11, 2023), <https://www.cov.com/en/news-and-insights/insights/2023/08/us-launches-outbound-investment-screening-targeting-china-with-further-developments-forthcoming>.

226. James H. Barker, Les P. Carnegie & Damara Chambers et al., *White House Issues Outbound Investment Executive Order and Treasury Department Solicits Comments on This New Regulatory Program: 5 Key Takeaways*, LATHAM & WATKINS 7 (Aug. 14, 2023), <https://www.lw.com/admin/upload/SiteAttachments/White-House-Outbound-Investment-Executive-Order-Treasury-Department-5-Key-Takeaways.pdf>.

227. THOMSON REUTERS REGULATORY INTELLIGENCE, 2023 COST OF COMPLIANCE: REGULATORY BURDEN POSES OPERATIONAL CHALLENGES FOR COMPLIANCE 2 (2023).

228. *Id.* at 12.

229. *Id.* at 2, 10.

230. NICOLE V. CRAIN & W. MARK CRAIN, NAT'L ASSOC. OF MFRS., THE COST OF FEDERAL REGULATION TO THE U.S. ECONOMY, MANUFACTURING AND SMALL BUSINESS 4 (2023).

231. *Id.*

232. *The Real Cost of Compliance: Regulatory Expenses*, GREEN GROWTH CPAs, <https://greengrowthcpas.com/compliance-costs-of-regulatory-expenses/> (last visited Jun. 21, 2025).

233. CRAIN & CRAIN, *supra* note 230, at 7.

study, when asked about the alternative uses of funds currently allocated for compliance, fifty percent of companies stated that funds could be used for investments, while thirty-six percent stated that it could use the funds for employee initiatives.²³⁴ Additionally, costs of compliance may result in relocations of employees overseas, where employment may be cheaper.²³⁵

The Final Rule will especially burden startups or small companies innovating new technologies, who may not have the resources to perform thorough due diligence.²³⁶ As a result, the smaller companies will be either unable to reinvest as much as they would like back into the company, or will not engage with technologies or organizations subject to regulation, chilling innovation. For example, the U.S. Bureau of Industry and Security has a list of foreign organizations and businesses subject to strict licensing requirements for exports.²³⁷ Small and medium sized enterprises who “lack the scale or sophistication to steer through complex export regulations” are less likely to collaborate with scholars associated with companies on that list,²³⁸ which is detrimental to overall research and development.

Federal departments and agencies will also be impacted by regulation costs. In 2017, economic enforcement costs incurred by federal agencies and departments totaled \$12.6 billion.²³⁹ This number will only continue to increase.²⁴⁰ Broadening E.O. 14105 is not a viable solution to this problem, as that would actually increase compliance costs for both companies and the government.

Without further direction, examples, or a safe harbor in the Final Rule, a lot of businesses will have to perform their own diligence at great costs. E.O. 14105 covers a broad range of businesses, including businesses that have significant direct or indirect Chinese ownership, or businesses with material

234. *Id.* at 18.

235. RICHARD WILLIAMS, THE IMPACT OF REGULATION ON INVESTMENT AND THE U.S. ECONOMY 2–3 (2011).

236. Vescen Tech., Inc., Comment Letter on Proposed Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern (Sept. 28, 2023), <https://www.regulations.gov/comment/TREAS-DO-2023-0009-0008>.

237. 15 C.F.R. § 744.16 (2024).

238. Hideki Tomoshige, *The Unintended Impacts of the U.S. Export Control Regime on U.S. Innovation*, CSIS (July 25, 2022), <https://www.csis.org/blogs/perspectives-innovation/unintended-impacts-us-export-control-regime-us-innovation>.

239. CLYDE WAYNE CREWS, JR., COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 23 (2015).

240. Ian Allen, *U.S. Outbound Investment Program Could Signal Spread of Similar Efforts*, JUST SEC. (Nov. 20, 2023), <https://www.justsecurity.org/90191/u-s-outbound-investment-program-could-signal-spread-of-similar-efforts/> (stating that the projection for starting the implementation of E.O. 14105 is at \$10 million dollars, not including other high administrative costs).

investments in China,²⁴¹ and implicates many AI technologies that are likely developed and deployed by a wide range of companies.²⁴²

One solution to limit these costs is presented in comments to the ANPRM, which argued that having specific guidelines would allow investors and businesses to have more confidence in their transactions, and potentially limit overhead costs for compliance.²⁴³ One example where specific guidance helped companies comply with regulations at a low cost is when CFIUS was first enacted. The National Venture Capital Association created market-standard representations of diligence requirements for investments into the United States, which CFIUS adopted.²⁴⁴ As a result of the requirements, there was simplified and amplified diligence and compliance among companies.²⁴⁵ The Final Rule could have included a sample checklist or questionnaire that a company could refer to when determining if its transactions would fall within the scope of E.O. 14105. There also could have been a voluntary advisory opinion process, where the Treasury could evaluate proposed transactions to determine whether the transaction is prohibited, notifiable, or neither,²⁴⁶ similar to Securities and Exchange Commission or Internal Revenue Service opinion letters. However, the Final Rule does not offer such clarity, making it harder for companies to clearly determine whether a transaction falls within the scope of E.O. 14105 and requiring increased diligence.

From the high costs of staffing and training compliance teams and implementation of risk measures, funds are misallocated to compliance instead of being used productively elsewhere in the business. The Treasury can alleviate compliance costs by providing further regulations or guidance clarifying the compliance measures, with examples or a sample checklist, or by allowing for an opinion process. Furthermore, the Treasury can conduct studies to evaluate the costs of complying with E.O. 14105 specifically, and adjust future regulations accordingly.

241. Alyza Sebenius, Joshua F. Gruenspecht & Stephen R. Heifetz, *The New National Security Rules for Investing U.S. Capital*, WILSON SONSINI (Nov. 13, 2024), <https://www.wsgr.com/en/insights/the-new-national-security-rules-for-investing-us-capital.html>.

242. *Id.*

243. Nat'l Venture Cap. Assoc., Comment Letter on Proposed Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern (Sept. 28, 2023), <https://www.regulations.gov/comment/TREAS-DO-2023-0009-0054>.

244. *Id.*

245. *Id.*

246. Letter from Ken Monahan, Vice President, Nat'l Assoc. of Mfrs., to Meena R. Sharma, Acting Dir., Off. of Inv. Sec. Pol'y & Int'l Rel. (Sept. 28, 2023), <https://www.regulations.gov/comment/TREAS-DO-2023-0009-0021>.

B. NEGATIVE ECONOMIC IMPACT ON FREE TRADE

A second consequence of E.O. 14105 is its negative impacts on free trade, as the restrictions on investments into China come at a time when investments are already declining.²⁴⁷ China will view E.O. 14105 as a trade barrier, which will chill global free trade. In turn, the perceived trade barrier will have negative impacts on the United States, because having an open and predictable rules-based investment environment provides a net positive impact on global trade.

One positive impact of global trade is the sharing of talent between countries, as many U.S. scientists and workers in the technology industry come from abroad.²⁴⁸ Having broad regulations could harm the United States' ability to attract international talent for technological innovation.²⁴⁹ For example, thirty percent of the talent pool in the quantum information technology industry in the United States is from China.²⁵⁰ From a company standpoint, E.O. 14105 would disincentivize international companies from working with U.S. companies due to the costs and time associated with compliance.²⁵¹ International companies will not want to hire U.S. citizens because the companies would be subject to and need to adhere with U.S. regulations.²⁵² This would be detrimental to employees in the United States that are affiliated with foreign companies, as many may lose their jobs and the job opportunities for future employees of foreign firms will inevitably dry out. Also, investment abroad has been beneficial to U.S. consumers because it creates significant new market opportunities for U.S. companies,²⁵³ allowing them to expand operations into an international market.²⁵⁴ The automotive industry, for example, has rapidly increased trade and production of car components due to increased efficiency.²⁵⁵

Further, there is a correlation between both increased trade and higher costs on everyday goods.²⁵⁶ Having trade barriers, such as tariffs and quotas (and in

247. Reva Goujon, Charlie Vest & Thilo Hanemann, *Big Strides in a Small Yard: The New US Outbound Investment Screening Regime*, RHODIUM GRP. (Aug. 11, 2023), <https://rhg.com/research/big-strides-in-a-small-yard-the-new-us-outbound-investment-screening-regime/>.

248. Nat'l Venture Cap. Assoc. Comment Letter, *supra* note 243.

249. National Security Advisor Jake Sullivan stated that in 2021, about nine out of ten AI PhD students from overseas take a job in the U.S. after graduating. *Id.*

250. Vescnt Tech., Inc., *supra* note 236.

251. See, e.g., British Priv. Equity & Venture Cap. Assoc., Comment Letter on Proposed Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern (Sept. 27, 2023), <https://www.regulations.gov/comment/TREAS-DO-2023-0009-0034> (mentioning that these create barriers of entry for North American limited partners who invest into U.K. funds because they have to comply with these regulations).

252. *Id.*

253. Consumer Tech. Ass'n., *supra* note 181.

254. James Langenfeld & James Nieberding, *The Benefits of Free Trade to U.S. Consumers: Quantitative Confirmation of the Theoretical Expectation*, 40 BUS. ECON. 41, 44 (2005).

255. DOUGLAS A. IRWIN, *FREE TRADE UNDER FIRE* 21 (Princeton Univ. Press, 5th ed. 2020).

256. Langenfeld & Nieberding, *supra* note 254, at 45.

this case an outbound investment restriction) are often costly,²⁵⁷ making protectionism an unfavorable policy. Negative impacts such as these can be seen in the 1974 Multi-Fiber Arrangement policy that placed quotas on imports of foreign textiles and apparels.²⁵⁸ As a result of these trade restrictions, U.S. consumers paid significantly higher prices,²⁵⁹ which could be parallel to the effects of restrictions on outbound investments into technology.

The negative implications of trade barriers can also be seen in President Donald Trump's 2025 tariffs on goods from Mexico, Canada, and China.²⁶⁰ While the tariffs were intended for the national security purpose of stanching the flow of illegal drugs into the United States, the retaliatory tariffs and trade tensions were immediate.²⁶¹ Canadian Prime Minister Justin Trudeau enacted a twenty-five percent retaliatory tariff against \$106 billion worth of U.S. goods.²⁶² The impact of the tariffs are broad, impacting items like beer, fruit juices, and household appliances.²⁶³ Similarly, Mexico's President Claudia Sheinbaum Pardo "slammed Trump's tariffs and . . . instructed the secretary of the economy to 'implement . . . tariff and non-tariff measures in defense of Mexico's interests.'"²⁶⁴ China has taken another stance, claiming that they would file a lawsuit with the WTO and to take other "necessary countermeasures."²⁶⁵ The European Union ("EU"), who is not affected by the tariffs, even stated that they would "respond firmly" if Trump imposed tariffs on the EU.²⁶⁶ From one set of tariffs, the world has already responded in a way that heavily impacts the prices of goods, demonstrating how destructive global trade wars can be.

Perhaps national security concerns should take priority over free trade. However, free trade actually encourages a cooperative global environment that helps protect against national security threats. For example, in 2000, the United States was faced with a choice: deny China's entry into the WTO, thus causing hostility, or allow accession into the WTO, thus creating a prosperous trade

257. IRWIN, *supra* note 255, at 88–89.

258. *Id.* at 91–92.

259. *Id.*

260. Andrea Shalal, Jarrett Renshaw & David Lawder, *Trump Launches Trade War with Tariffs on Mexico, Canada and China*, REUTERS (Feb. 1, 2025), [https://www.reuters.com/business/trump-readies-order-steep-tariffs-goods-mexico-canada-china-2025-02-01/#:~:text=Feb%201%20\(Reuters\)%20%2D%20U.S.,dent%20global%20growth%20and%20reignite](https://www.reuters.com/business/trump-readies-order-steep-tariffs-goods-mexico-canada-china-2025-02-01/#:~:text=Feb%201%20(Reuters)%20%2D%20U.S.,dent%20global%20growth%20and%20reignite).

261. *Id.*

262. Megan Lebowitz, *Canada, Mexico and China Slam Trump's Tariffs*, NBC NEWS (Feb. 1, 2025), <https://www.nbcnews.com/politics/donald-trump/trudeau-retaliatory-tariffs-canada-us-trump-rcna190314>.

263. *Id.*

264. Katrina Bishop, *'It doesn't have to be this way': Canada, Mexico, China, and the EU respond to Trump's tariffs*, CNBC (Feb. 2, 2025), <https://www.cnbc.com/2025/02/02/it-doesnt-have-to-be-this-way-canada-mexico-and-china-respond-to-trumps-tariffs.html>.

265. *Id.*

266. *Id.*

relationship between the two countries.²⁶⁷ The United States agreed to accession, resulting in China's further economic growth.²⁶⁸ Accordingly, both countries have grown to rely on one another,²⁶⁹ fostering a collaborative global environment. Political science and economic studies have found a positive link between trade and peace, where free trade can even push for democratic institutions and policies that benefit the United States.²⁷⁰ Therefore, despite national security concerns, the benefit of global free trade generally helps prevent conflict, and having broad restrictions that sour trade relationships would undermine the current global harmony.

Policymakers should construct and apply E.O. 14105 in such a way that allows room for renegotiation with China. After President Trump's aforementioned tariffs against Mexico and Canada, Mexico and Canada have agreed to work with President Trump to appease the underlying reasons for the tariffs.²⁷¹ This demonstrates that while trade wars may occur, the risk of stagnant economic growth incentivizes countries to work together in coming up with solutions to the larger issue. Here, the United States and China may have the opportunity to examine each country's concerns and come to an understanding in a way that would prevent restrictions on trade. In the meantime, E.O. 14105 should be construed narrowly in its application so that only transactions implicating military technologies are restricted.

C. A POTENTIAL DECREASE OF U.S. COMPETITIVENESS FROM LACK OF ALLY SUPPORT

Another consequential impact of E.O. 14105 is a decrease of U.S. competitiveness in innovation and technology, where China can obtain intelligence and funding from companies in other countries that have yet to implement a similar outbound investment program. Without U.S. obtaining ally support, China would be able to get investment opportunities from other international companies, essentially having access to the same information for key technologies.²⁷²

The United States is taking the lead in sculpting an outbound investment regime, and it appears that other allies will eventually follow. However, as of

267. Samuel Gregg, *A Free, Prosperous and Secure America: How Trade Liberalization Strengthens US National Security, and Economic Nationalism Undermines It*, 2 AM. INST. FOR ECON. RSCH. 1, 13 (2024).

268. *Id.*

269. *Id.* at 13–14.

270. IRWIN, *supra* note 255, at 66–69.

271. Josh Boak, Fabiola Sánchez & Rob Gillies, *Trump Agrees to Pause Tariffs on Canada and Mexico After They Pledge to Boost Border Enforcement*, AP NEWS (Feb. 3, 2025, 7:14 PM PDT), <https://apnews.com/article/trump-tariffs-canada-mexico-china-sheinbaum-trudeau-017efa8c3343b8d2a9444f7e65356ae9>.

272. Denamiel et al., *supra* note 129.

now, without concrete ally support, China may be able to gain technological intelligence and investments through other countries, thus decreasing U.S. competitiveness and backfiring on national security concerns. This is because the Final Rule limits market and investment opportunities for U.S. companies and opens the doors for foreign suppliers to satisfy the demand instead.²⁷³ For example, if the United States placed caps on exports of AI Graphics Processing Units, Chinese AI chipmakers—like Biren Technology (which is a Chinese semiconductor design company that is competitive in the AI chip field)—would be able to “swoop in and take the market share.”²⁷⁴

Similarly, if the United States is unwilling to invest in cutting-edge Chinese companies, there will be other foreign companies that will fill in the gap, putting U.S. companies at a disadvantage by reducing their overall innovation and competitiveness. This is the view that the public commentary on the ANRPM takes, as many commenters emphasized the need for multilateral support.²⁷⁵ Without other key countries implementing similar outbound investment mechanisms, China may fill the investment and innovation gap by turning to other countries.

There are indications of U.S. allies enacting similar outbound investment frameworks, which would alleviate some of the competitiveness issues. East Asian economies already have some form of outbound investment restrictions that are similar to E.O. 14105. Some examples include Japan’s requirement for prior notification of outward investment in weapons and manufacturing, South Korea’s Industrial Technology Protection Committee’s authorization to block transactions that could transfer technology on the National Core Technology List, and Taiwan’s restrictions on outbound investments under \$50 million USD.²⁷⁶ There are also various proposals floating around Europe, such as in

273. Stephen Ezell, *Export Controls on AI Chips: Biden’s Overreach Risks U.S. Leadership in Tech*, INFO. TECH. & INNOVATION FOUND. (Jan. 7, 2025), <https://itif.org/publications/2025/01/07/export-controls-on-ai-chips-bidens-overreach-risks-us-leadership-in-tech/>.

274. *Id.*

275. Coal. Serv. Indus., Comment Letter on Proposed Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern (Sept. 28, 2023), <https://www.regulations.gov/comment/TREAS-DO-2023-0009-0041>; Nat'l Foreign Trade Council, Comment Letter on Proposed Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern (Sept. 27, 2023), <https://www.regulations.gov/comment/TREAS-DO-2023-0009-0014>; Transatlantic Bus. Initiative, Comment Letter on Proposed Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern (Sept. 2023), <https://www.regulations.gov/comment/TREAS-DO-2023-0009-0010>; SRI Int'l, Comment Letter on Proposed Provisions Pertaining to U.S. Investments in Certain National Security Technologies and Products in Countries of Concern (Sept. 28, 2023), <https://www.regulations.gov/comment/TREAS-DO-2023-0009-0057>.

276. Gisela Grieger, *US Approach to Outbound Investment Screening*, EUR. PARLIAMENTARY RSCH. SERV. 2 (2023), [https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/751470/EPRS_ATA\(2023\)751470_E_N.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/751470/EPRS_ATA(2023)751470_E_N.pdf).

Germany and the United Kingdom.²⁷⁷ The countries acknowledge the national security threat, but it is unclear how far they will go in replicating the outbound investment screening approach.²⁷⁸

The EU is also considering a corresponding parallel initiative to E.O. 14105²⁷⁹ as increasing U.S.-China competition forces other countries to reevaluate their positioning in global affairs.²⁸⁰ After Russia's invasion of Ukraine, the EU's relationship with China has become strained.²⁸¹ This was exacerbated by China's position on Taiwan, where the EU has taken measures to curb Chinese military aggression.²⁸² Faced with these new military threats and aggression and in light of new military risks in the quantum information, advanced semiconductors, and AI industries, the European Commission (the "Commission") met and discussed the need to utilize FDI screening and export controls.²⁸³ The recommendation was for member states to review outbound investments of technologies relating to military and intelligence capabilities into non-EU countries.²⁸⁴ The Commission also implemented a pilot program that allows for voluntary disclosures and requires other mandatory disclosures on transactions.²⁸⁵ This program is set to have additional progress reports in 2025, with a final implementation recommendation on June 30, 2026.²⁸⁶ In sum, U.S. allies have taken steps towards implementing a similar regime to E.O. 14105, which will increase the overall effectiveness of E.O. 14105.

277. *Biden Administration Moves to Restrict Outbound Investment to China*, ALLEN & OVERY SHEARMAN (Aug. 10, 2023), <https://www.allenavery.com/en-gb/global/news-and-insights/publications/biden-administration-moves-to-restrict-outbound-investment-to-china>. For example, the United Kingdom is considering updating their National Security and Investment Act of 2021 following a 2024 Report. *UK National Security and Investment Act Update: Streamlining Security, Supporting Investment*, KATTEN (Sept. 11, 2025), https://katten.com/files/2159721_uk_national_security_and_investment_act_update_streamlining_security_supporting_investment.pdf.

278. *United States Establishes New "Outbound Investment Program" Targeting Certain Investment Activities in China*, DEBEVOISE & PLIMPTON (Aug. 11, 2023), https://www.debevoise.com/-/media/files/insights/publications/2023/08/11_united-states-establishes-new-outbound-invest.pdf?rev=ddcbc2d6a9ea4f7588a79d7e3908e772&hash=D55CD50CE082E614717B87F6435B2A35.

279. Roland Stein & Leonard von Rummel, *The New U.S. Outbound Investment Screening: A Model for the EU?*, BLOMSTEIN (Sept. 26, 2023), <https://www.blomstein.com/en/news/the-new-us-outbound-investment-screening-a-model-for-the-eu>; Ian Allen, *U.S. Outbound Investment Program Could Signal Spread of Similar Efforts*, JUST SEC. (Nov. 20, 2023), <https://www.justsecurity.org/90191/u-s-outbound-investment-program-could-signal-spread-of-similar-efforts/>.

280. CHINA-U.S. COMPETITION: IMPACT ON SMALL AND MIDDLE POWERS' STRATEGIC CHOICES 11 (Simona A. Grano & David Wei Fang Huang eds., Palgrave MacMillan 2023).

281. *Id.* at 14.

282. *Id.*

283. *Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security Strategy"*, at 2-3, COM (2023) 20 final (June 20, 2023).

284. Commission Recommendation (EU) of 15 January 2025 on Reviewing Outbound Investments in Technology Areas Critical for the Economic Security of the Union, 2025 O.J. (L 63) 1-2.

285. *Id.* at 4.

286. *Id.* at 6.

In the meantime, the United States could provide incentives to increase U.S. competitiveness. One example of such incentives is providing the infrastructure for U.S. AI technology that can compete with its Chinese counterparts. In 2025, President Trump announced the Stargate Initiative, which is a \$500 billion private sector deal to expand AI intelligence infrastructure in the United States.²⁸⁷ The first phase focuses on constructing data centers so that there is less U.S. reliance on foreign AI infrastructure.²⁸⁸ Another example would be to invest in other international companies that provide infrastructure for emerging technologies. Taiwan Semiconductor Manufacturing Company Limited, a Taiwan semiconductor company, has worked with President Trump to build new fabrication facilities in the United States, allowing for a direct supply of semiconductors to technology companies.²⁸⁹ By building infrastructure and partnering with companies that shape technological innovation, the United States would be able to continue to expand its technological capabilities in such a way that prevents a decrease in U.S. competitiveness.

D. CHINA'S RETALIATION AGAINST THE UNITED STATES

Finally, E.O. 14105 has spurred retaliation from China, further deteriorating the relationship between the two countries and decreasing U.S. competitiveness. The Chinese Foreign Ministry called E.O. 14105 "blatant economic coercion and technological bullying" and an attempt to "politicize and weaponize trade."²⁹⁰ The Chinese ambassador in Washington D.C. warned that China will respond with retaliation if there are further technology restrictions.²⁹¹ In fact, China has already implemented countermeasures, such as banning chip sales for critical infrastructure vendors and imposing restrictions on minerals

287. Garth Friesen, *Trump's AI Push: Understanding The \$500 Billion Stargate Initiative*, FORBES (Jan. 23, 2025), <https://www.forbes.com/sites/garthfriesen/2025/01/23/trumps-ai-push-understanding-the-500-billion-stargate-initiative/>.

288. *Id.*

289. Samantha Subin, *Trump Announces \$100 Billion Investment in U.S. from TSMC, Calls it 'Most Powerful Company' in the World*, CNBC (Mar. 3, 2025, 1:05 PM EST), <https://www.cnbc.com/2025/03/03/tsmc-to-announce-100-billion-investment-in-us-chip-plants.html>.

290. Foreign Ministry Spokesperson's Remarks on President Biden's Signing of Executive Order on Restricting Investments in China, Ministry of Foreign Affs. People's Republic of China (Aug. 10, 2023), https://www.fmprc.gov.cn/eng/xw/fyrbt/202405/t20240530_11349802.html; Clement Tan, *'Blatant Economic Coercion': China Slams Biden's Order Limiting U.S. Overseas Tech Investment*, CNBC (Aug. 9, 2023, 9:54 PM EDT), <https://www.cnbc.com/2023/08/10/china-slams-biden-order-limiting-us-overseas-technology-investment.html>; Paul Haenle, *How Biden's New Outbound Investment Executive Order will Impact U.S.-China Relations*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Aug. 15, 2023), <https://carnegieendowment.org/2023/08/15/how-biden-s-new-outbound-investment-executive-order-will-impact-u.s.-china-relations-pub-90378#:~:text=Rhetorically%2C%20the%20Foreign%20Ministry%20has,community%20in%20the%20U.S.%20business>.

291. Denamiel et al., *supra* note 129.

used in semiconductors.²⁹² Without imports of critical minerals used in semiconductors, the United States is unable to produce the required amount of semiconductors to fuel critical technologies. This would risk national security and technological growth.

China may also implement a similar outbound investment regime that could prevent investments into the United States or refuse to provide critical information to the United States regarding its military and technological advancements, which would defeat the purpose of E.O. 14105. China has not backed down from trade wars in the past,²⁹³ and likely will not back down from new restrictions. For example, when the United States implemented semiconductor export restrictions in 2023, China retaliated by restricting exports of certain minerals critical to semiconductor manufacturing.²⁹⁴ This included gallium, where China exports eighty percent of the United States' supply, and germanium, where China exports sixty percent of the United States' supply.²⁹⁵ Similarly now, China could respond with other restrictions harming U.S. companies, or enact a similar law to prevent investments into the United States.

E.O. 14105 could also work in President Xi Jinping's favor, as he has moved towards restricting American influences and investment in Chinese companies,²⁹⁶ while having a detrimental impact on U.S. manufacturing and intelligence. In 2023, sales for Nvidia's GPU and Intel's Gaudi 2 chip were blocked in China, pushing Chinese companies to accelerate chip development on their own.²⁹⁷ Similarly, by limiting flows of investment into China, China could create monetary incentives that push companies to expedite research and development in critical technologies, or to collaborate with other foreign companies. This would backfire on E.O. 14105's main goal of preventing China's access to the creation of such technology.

One current example of this is seen in the recent development of DeepSeek, which has impacted U.S. companies economically and threatened U.S. competitiveness.²⁹⁸ Though not directly a retaliatory measure from China, the release of DeepSeek demonstrates China's ability to generate AI technology

292. Haenle, *supra* note 290.

293. IRWIN, *supra* note 255, at 290 (stating that China has not backed down from the trade war with the U.S.—every time U.S. raised its tariffs, China responded with similar tariffs).

294. Alice Cheng, *The Price of U.S. Semiconductor Export Restrictions*, BROWN POL. REV. (Dec. 8, 2024), <https://brownpoliticalreview.org/us-semiconductor-export-restrictions/>.

295. *Id.*

296. Press Release, U.S. House Comm. Fin. Serv., McHenry Statement on Treasury's Outbound Investment Final Rule (Oct. 28, 2024), <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=409401>.

297. Cheng, *supra* note 294.

298. Eduardo Baptista, *What is DeepSeek and Why is it Disrupting the AI Sector*, REUTERS (Jan. 28, 2025, 9:13 AM PST), <https://www.reuters.com/technology/artificial-intelligence/what-is-deepseek-why-is-it-disrupting-ai-sector-2025-01-27/>.

without U.S. resources or help and shows that E.O. 14105 may not be able to stop China's innovation in key military technologies. DeepSeek is a Chinese AI startup company that created an AI model rivaling ChatGPT, the top-rated AI platform developed in the United States.²⁹⁹ The features of both ChatGPT and DeepSeek are comparable. Comparisons have noted that ChatGPT provides engaging conversational content for writing, and can break down complex topics well, while DeepSeek takes a more technical approach to writing, and uses more precision and conciseness in its research.³⁰⁰ However, DeepSeek cost less than \$6 million USD to train its model, while OpenAI, the company that developed ChatGPT, cost over \$100 USD to train ChatGPT.³⁰¹ Not only did development and training cost less, but the technology behind DeepSeek is more environmentally friendly, with early estimates suggesting ninety percent lower energy consumption and smaller AI facilities than its U.S. counterparts.³⁰²

DeepSeek's impacts on the U.S. economy were instant. One week after DeepSeek launched, U.S. stocks suffered a \$1 trillion USD wipeout,³⁰³ with Nvidia's, a key semiconductor chip company, stocks dropping twelve percent.³⁰⁴ The economic impacts on AI technology and innovation will be lasting. DeepSeek uses an open-source model,³⁰⁵ which grants the public the ability to use, modify, or create derivative works from a source code without requiring a negotiated license to use the work.³⁰⁶ U.S. AI platforms, like ChatGPT and Llama, are currently closed models that allow for companies to charge customers for certain uses and licenses.³⁰⁷ The open-source model threatens the ability for these companies to charge for derivative works, as the public can easily access DeepSeek's technology and code.³⁰⁸ As a result, large

299. *Id.*

300. Vinod Chugani, *DeepSeek v. ChatGPT: How do They Compare?*, DATAACAMP (Jan. 30, 2025), <https://www.datacamp.com/blog/deepseek-vs-chatgpt>.

301. Bailey Schulz, *What is DeepSeek? How a Small Chinese Startup Shook up the AI Sector*, USA TODAY (Jan. 27, 2025, 2:41 PM ET), <https://www.usatoday.com/story/money/2025/01/27/what-is-deepseek-ai/77969863007/>.

302. Thibaut Legrand, *DeepSeek v. ChatGPT: The Comprehensive 2025 Comparison Shaking up the AI Industry*, DIGIDOP (Jan. 28, 2025), <https://www.digidop.com/blog/deepseek-vs-chatgpt>.

303. Joseph Adinolfi, *Stock Market's \$1 Trillion Wipeout Is a Taste of What Can Happen When AI Bets Unspool*, MARKETWATCH (Jan. 28, 2025, 4:50 PM EST), <https://www.marketwatch.com/story/stock-markets-1-trillion-wipeout-is-a-taste-of-what-can-happen-when-ai-bets-unspool-d7dd9c01>.

304. Derek Saul & Mary Whitfill Roeloffs, *DeepSeek Panic Live Updates: Nvidia Stock Drops 4%—As Trump Reportedly Mulls China Chip Sale Restrictions*, FORBES (Jan. 29, 2025, 4:07 PM EST), <https://www.forbes.com/sites/derekssaul/2025/01/29/deepseek-panic-live-updates-nvidia-stock-drops-4-as-trump-reportedly-mulls-china-chip-sale-restrictions/>.

305. See DEEPSEEK, <https://www.deepseek.com/> (last visited on June 22, 2025).

306. AMANDA BROCK ET AL., OPEN SOURCE LAW, POLICY AND PRACTICE 21–22 (Amanda Brock ed., Oxford Univ. Press 2nd ed. 2022).

307. Michael Nolan, *Llama and ChatGPT Are Not Open Source: few ostensibly open-source LLMs live up to the openness claim*, IEEE SPECTRUM (July 27, 2023), <https://spectrum.ieee.org/open-source-llm-not-open>.

308. BROCK, *supra* note 306, at 299–301.

corporations in the United States may be unable to generate as much revenue in developing AI, hampering the U.S. economy and technological innovation, and ultimately furthering the need to protect national security interests.

Another troubling aspect of DeepSeek is that CEO of Scale AI, another prominent AI company, made a statement that DeepSeek used 50,000 Nvidia chips that were supposedly banned in an export control.³⁰⁹ Even with U.S. export controls in place, Chinese companies have allegedly been able to access key technology that may be used in military applications. This raises doubts about whether export controls are effective, and whether E.O. 14105 would be effective in stemming China's access to the development of key sensitive technologies. DeepSeek's arrival at the top of the Apple App Store charts shook the belief that the United States would continue as an unchallenged global superpower of AI in a time where technological superiority is crucial in national security and technological advancement.³¹⁰

One viable method of alleviating the impacts of China's retaliation is to increase U.S. competitiveness, as mentioned in Part IV.C. By increasing the ability for companies to compete with China, the United States does not have the disadvantage of worse quality or more expensive technology. Another potential of alleviation is the change in presidency, where current President Trump can potentially renegotiate with China. In fact, in President Trump's America First Trade Policy, the Treasury is instructed to review E.O. 14105 to determine whether the order "should be modified or rescinded and replaced" and "shall make recommendations based upon the findings of [the] review," including potential "modifications to these procedures."³¹¹ This would allow the Treasury to study some of the impacts of E.O. 14105 and address the unintended consequences that may follow.

E.O. 14105 protects national security at the expense of the U.S. economy. Companies will bear the high burden of compliance, trade tensions will increase, U.S. competitiveness will decrease, and China may retaliate. Without clarifying modifications, incentives to U.S. companies to continue pushing the boundaries of AI, further ally support, or a reevaluation of the outbound investment program, these unintended consequences render E.O. 14105 a solution that does more harm than good.

309. *Is DeepSeek Lying? CEO of Scale AI Alexandre Wang Says the Chinese Startup Is Using 50,000 Nvidia H100 Chips but Workers Can't Talk About It*, MSN (Jan. 28, 2025), <https://www.msn.com/en-in/money/news/is-deepseek-lying-ceo-of-scale-ai-alexandr-wang-says-the-chinese-startup-is-using-50-000-nvidia-h100-chips-but-workers-can-t-talk-about-it/ar-AA1y13aL?ocid=finance-verthp-feeds&apiversion=v2&noservercache=1&domshim=1&renderwebcomponents=1&wcseo=1&batchserverlemetry=1&noservertelemetry=1>.

310. Marc Cieslak, *DeepSeek Shows AI's Centre of Power Could Shift Away from U.S.*, BBC (Jan. 28, 2025), <https://www.bbc.com/news/articles/c9w5d9new0yo>.

311. *America First Trade Policy*, *supra* note 17.

CONCLUSION

Because of rising tensions between the United States and China, which stem from concerns over economic and information flow through U.S. investments into Chinese companies developing critical military technologies, former President Biden took a strong step in passing E.O. 14105 to create an outbound investment program. Currently, the program is intended to be narrow, with some requirements for notification on certain transactions and prohibitions on other transactions. This Note demonstrates that E.O. 14105 and the Final Rule have negative impacts that ultimately burden U.S. companies, with respect to compliance costs, worsening international trade relations leading to trade wars, U.S. competitiveness, and the U.S.' already deteriorating relationship with China. Without further clarifications, compliance costs will remain high, and trade tensions will deepen.

And in the meantime, China has the ability to outsource much of the investment dollars and intelligence elsewhere, or develop it themselves. China can also enact retaliatory actions, undermining E.O. 14105 and its primary objective of ensuring U.S. national security. To counter these impacts, the Treasury should: (1) provide clearer guidance and examples, or even a safe harbor, (2) stop restricting international trade, (3) consult with allies to enact similar regimes and promote small business technological innovation, and (4) engage in open trade talks or negotiations with China.

E.O. 14105 is the first unilateral decision on U.S. national security regarding outbound investments and has the power to change the landscape of U.S. investments. There is a lot more to be discussed, and this Note is limited to critiquing the Final Rule and highlighting some economic impacts of E.O. 14105. Potential further avenues of research include how E.O. 14105 alters international relations, whether other countries have followed the United States lead in creating outbound investment programs, whether E.O. 14105 has achieved national security goals, or further exploration of legislation that complements E.O. 14105.

As is, E.O. 14105 not only opens the door for more restrictions on trade with China in the future, but also chills international trade relationships across the world at a time where global order is critical. All in all, the global outbound investment regime is the beginning of a new era where technology, the economy, and national security are inextricably linked.