

THE FOREIGN DIRECT INVESTMENT REGULATIONS, 1973: BALANCE OF PAYMENTS REMEDY OR REGULATION OF MULTINATIONAL CORPORATIONS?

The problems raised by the U.S. direct investment regulations are only one aspect of the greater problem of the multi-national corporation.¹

Since January 1, 1968, American corporations with foreign investment interests have been subject to mandatory restrictions on direct investment abroad. President Johnson created these restrictions, known as the Foreign Direct Investment Regulations, by Executive Order for the purpose of alleviating the worsening balance of payments deficit.² The order delegated authority to the Secretary of Commerce to administer the Foreign Direct Investment Regulations. He in turn created the Office of Foreign Direct Investment and subdelegated to it all the authority he had received under the Executive Order.³

The Constitution gives Congress the sole power to regulate "commerce with foreign nations."⁴ This foreign commerce power easily encompasses the regulation of foreign direct investment⁵ since the power comprehends "every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend."⁶ Thus, the President has no authority in

1. Reh binder, *The Foreign Direct Investment Regulations: A European Legal Point of View*, 34 LAW & CONTEMP. PROB. 95, 117 (1969) (Footnote omitted).

2. Exec. Order No. 11,387, 3 C.F.R. 200 (1973), 12 U.S.C. § 95a (Supp. V, 1970).

3. Dep't of Commerce Order 184-A, 33 Fed. Reg. 54 (1968).

4. U.S. CONST. art. I, § 8.

5. Foreign direct investment is mainly a movement of capital from one country to another. The movement is accompanied by varying degrees of control, technology, and management. See C. KINDLEBERGER, *AMERICAN BUSINESS ABROAD* (1969).

6. *Gibbons v. Ogden*, 22 U.S. 1, 85, 9 Wheat. 1, 193-94 (1824). The foreign commerce power is "exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified or impeded to any extent . . ." *Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 56-57 (1933).

this area except that delegated to him by Congress.⁷

Congress, in the Trading with the Enemy Act, delegated authority to the President to regulate some aspects of foreign commerce “[d]uring time of war or during any other period of national emergency declared by the President.”⁸ Relying on this delegation and the national emergency declared by President Truman in 1950 (which is still in effect),⁹ President Johnson issued the Foreign Direct Investment Regulations.¹⁰

The President in acting pursuant to this emergency power is constrained by its inherent limitations. Congress delegated the President this power so that he would have the ability to effectively respond to an emergency—not so he could regulate commerce in areas unrelated to the emergency.

The executive order identified the balance of payments crisis as one aspect of the declared emergency of 1950.¹¹ Whether in actuality it is such a part has been severely questioned.¹² However, granting that it is, the response-to-a-crisis rationale applies: the President is authorized to act only if he is responding to the balance of payments crisis. The necessity of such a response is the sole justification for the bypassing of Congress in adopting these Regulations. Likewise, the continuance of the Regulations is le-

7. The President's foreign relations powers do not give him authority to regulate foreign commerce although on occasion foreign commerce does affect foreign affairs. That the President was aware of the dichotomy is clearly shown by Paragraph (5) of the Executive Order which provides that the “Secretary of State shall advise the Secretary of Commerce . . . with respect to matters under this Order *involving foreign policy.*” Exec. Order No. 11,387, 3 C.F.R. 200, 201 (1973), 12 U.S.C. § 95a (Supp. V, 1970). (Emphasis added).

Further, the very act of delegating authority to the Secretary of Commerce as opposed to the Secretary of State implies that the President considered the Regulations to be a matter of foreign commerce—not foreign policy.

8. Section 5(b) of the Trading with the Enemy Act, originally enacted as the Act of October 6, 1917, ch. 106, § 5(b), 40 Stat. 415, has been amended several times and is now codified at both 12 U.S.C. § 95a (1970), and 50 U.S.C. App. § 5(b) (1970).

9. Proclamation No. 2914, Dec. 16, 1950, 50 U.S.C. App., notes preceding § 1 (1970).

10. Exec. Order No. 11,387, 3 C.F.R. 200 (1973), 12 U.S.C. § 95a (Supp. V, 1970). Although the reliance on the 1950 emergency is patently questionable, there has been no court challenge of the Regulations on this point, nor, for that matter, have there been any court decisions whatsoever on the Regulations.

11. *Id.*

12. See Garson & Miller, *The Foreign Direct Investment Regulations: Constitutional Questions and Operational Aspects Examined*, 11 B.C. IND. & COM. L. REV. 143 (1970); Comment, *The Foreign Direct Investment Controls*, 11 HARV. INT'L L.J. 490 (1970).

gitimate only so long as their essential purpose as a balance of payments remedy is maintained.

This paper proposes to examine the gradual changes that have occurred in the Regulations since their inception and to raise the question whether the original purpose of the Regulations has been forgotten. This writer suggests the possibility that the main purpose of the controls is no longer to remedy the balance of payments deficit, but to observe and regulate the large U.S. based multi-national corporations.

THE BALANCE OF PAYMENTS CRISIS

To understand the impact of the Regulations on the balance of payments, the essentials of the balance of payments must first be comprehended.

In the simplest terms, a nation incurs a balance of payments deficit whenever more units are paid out than are returned. Under the "liquidity" concept presently used by the United States Department of Commerce, the definition of "balance" is not, however, merely a matter of applying accounting techniques to all transactions involving foreigners. An analysis of the nature and purpose of the transaction must be made, and only those transactions that are "regular" are included in the balance computation. Within this definitional framework income from United States investments abroad, foreign investments in the United States, and returns on United States exports are the regular transactions that have a positive impact on the payments account, and governmental spending abroad, private foreign investment, and payments for foreign imports are the deficit transactions.¹³

Foreign direct investment is "an outflow of capital which gives foreigners the same purchasing power they would have if the money came from the sale of imports to the United States."¹⁴ Therefore, it is a debit item in computing the balance of payments.

To limit foreign direct investment is to reduce this negative increment in the balance of payments calculation. However, since U.S. corporations expect to repatriate more than they invest from profits (which have a positive impact) in the long run a limitation on investment may increase the deficit. Thus, by helping the bal-

13. Comment, *Governmental Regulation of Foreign Investment*, 47 TEXAS L. REV. 421, 421-22 (1969) (Footnote omitted).

14. *Id.* at 427.

ance of payments situation in the short-run, the Regulations may be hurting it over the long run.¹⁵

AN OVERVIEW OF THE FOREIGN DIRECT INVESTMENT REGULATIONS¹⁶

The Foreign Direct Investment Regulations apply only to "Direct Investors."¹⁷ A Direct Investor is any person (whether an individual or a business entity) within the United States that owns or controls a 10 percent or greater interest in any incorporated or unincorporated foreign entity.¹⁸ A foreign entity in which such interest is owned is designated an "Affiliated Foreign National."¹⁹

Direct Investors are prohibited from making any positive direct investment in Affiliated Foreign Nationals during any year, beginning with 1968, except as authorized under the "general allowances" provided in the Regulations or an amount specifically authorized by the Office of Foreign Direct Investment for a particular individual.²⁰

Direct investment by a Direct Investor is calculated on a calendar year basis by adding together the Direct Investor's net transfer of capital to Affiliated Foreign Nationals and the Direct Investor's share of earnings from its incorporated Affiliated Foreign Nationals that were reinvested abroad.²¹

"Net transfer of capital" is defined as (a) the aggregate trans-

15. See Fischer, *The Multinationals and the Crisis in United States Trade and Investment Policy*, 53 *BOS. U. L. REV.* 308, 331-32 (1973); Behrman, *Assessing the Foreign Investment Controls*, 34 *LAW & CONTEMP. PROB.* 84, 85-6 (1969).

16. 15 C.F.R. §§ 1000.101 *et. seq.* (1973). The Regulations are cited hereinafter as Section —, omitting from each section reference the prefix 1000. The summary is accurate up to August 15, 1973, and takes into account the recent amendments in 38 *Fed. Reg.* 16635 (June 25, 1973). Considerable reliance has been placed on the 1972 General Bulletin: Interpretative Explanation and Analysis of the Foreign Direct Investment Regulations [hereinafter cited as 1972 Bulletin] which provides a section by section analysis of the Regulations. Although superseded in some respects by the recent changes in the Regulations, the 1972 Bulletin has proved invaluable in deciphering the complex and intricate Regulations. The 1972 Bulletin has been published in 37 *Fed. Reg.* 18294 (September 9, 1972) and reprints are presently available from the Office of Foreign Direct Investment. However, since the Office has regularly issued revised and updated Bulletins to keep pace with changes in the Regulations, a new Bulletin can be expected shortly.

17. Section 201(a).

18. Section 305.

19. Section 304.

20. Section 201.

21. Section 306(a).

fers of capital by a Direct Investor to its incorporated Affiliated Foreign Nationals during the year, minus (b) the aggregate transfers of capital to the Direct Investor by its Affiliated Foreign Nationals during the same period, plus (c) the Direct Investor's share of net increase or decrease in the net assets of its Affiliated Foreign Nationals.²²

To compute the other component of direct investment, the Direct Investor's share of earnings from its incorporated Affiliated Foreign Nationals that were reinvested abroad, "reinvested earnings" must first be derived. This is calculated by taking (a) the total earnings of the Direct Investor's incorporated Affiliated Foreign Nationals, subtracting (b) the dividends paid by the incorporated Affiliated Foreign Nationals to the Direct Investor and certain other Affiliated Foreign Nationals, and then adding (c) dividends and remittances received by the incorporated Affiliated Foreign Nationals from certain other Affiliated Foreign Nationals.²³ The Direct Investor's share of the reinvested earnings is simply that proportion he would be entitled to were the earnings not reinvested.

Direct investment is not prohibited per se. The general prohibition on direct investment is addressed only to "positive direct investment," that is, direct investment during the year greater than zero.²⁴ Since, as defined above, direct investment measures the net effect of transactions, it is conceivable that in any given year direct investment can be negative, and the Direct Investor would therefore not come under the Regulations.

Subpart E contains the "general allowables" exception to the general prohibition against positive direct investment. At present, the Direct Investor must elect one of the three general allowables each year, and he is authorized to make positive direct investment for that year in accordance with the provisions of the elected allowable.²⁵

The "general allowables" are based on a "scheduled areas" design. For purposes of the Regulations, each of the countries of the

22. Section 313.

23. Section 306.

24. Section 201.

25. Section 502 as amended in 38 Fed. Reg. 16635 (June 25, 1973).

world is assigned to one of three "scheduled areas" (A, B, and C).²⁶ Schedule A generally comprises the least developed countries of the world; Schedule B, certain specified developed countries (although generally not the "highly developed countries") of the world; and Schedule C, the remaining countries (generally Western European countries—which also are generally very highly developed).²⁷ However, the scheduled areas do not include countries that are subject to Treasury or Commerce Department economic controls because of their dominance by "International Communism."²⁸ There are also a few areas under United States protection that are not subject to the Regulations.²⁹ Finally, although Canada is listed as a Schedule B country, Direct Investors are allowed to invest in Canadian Affiliated Foreign Nationals "without limitation as to amount."³⁰ This effectively removes Canada from the "general allowables" design and hence from the schedular framework.

The first of the three "general allowables" a Direct Investor may choose is the "worldwide minimum allowable." This allowable places a ceiling on the total amount of positive direct investment that a Direct Investor may make in all scheduled areas. Currently, the ceiling is \$6 million per year.³¹

The Direct Investor has a second choice of an historical allowable for each scheduled area based on the Direct Investor's direct investment in each such area during 1965-66.³² The Direct Investor is allowed to invest a percentage of the average amount of investment he made in each scheduled area in 1965-66. The percentage allowed varies with the scheduled area. Currently, the percentage allowed for Schedule A is 110%; Schedule B, 65%; and Schedule C, 35%.³³

The Direct Investor, as a final alternative, may elect an "earnings allowable" for each scheduled area based on the Direct Investor's share of Affiliated Foreign National earnings in each such area during the preceding year.³⁴ Positive direct investment is authorized in each area up to 40 percent of the Direct Investor's share of

26. Section 319 and I.R.C. (26 U.S.C.A.) § 4916(b). A list of the countries in each schedule can be found in DEP'T OF COMMERCE, 1972 FOREIGN DIRECT INVESTMENT PROGRAM, 21-2 (1972).

27. DEP'T OF COMMERCE, 1972 FOREIGN DIRECT INVESTMENT PROGRAM, 21-2 at pts. I, II, and III (1972).

28. *Id.* at pt. III.

29. *Id.* at pt. IV.

30. Section 1102.

31. Section 503 as amended in 38 Fed. Reg. 16635 (June 25, 1973).

32. Section 504(a) and (c).

33. Section 504(a).

34. Section 504(b).

Affiliated Foreign National earnings in the area during the preceding year.³⁵

In addition to the elected allowable, Direct Investors are eligible for a worldwide "incremental earnings" allowable. This supplemental allowable is based on the amount by which aggregate Affiliated Foreign National earnings in a calendar year exceed the average of such earnings during 1966-67.³⁶

Unused earnings and historical allowables in one schedule may be passed "downstream" (from C to B or A and from B to A) to other schedules.³⁷ The historical allowables may also be passed "upstream" up to the limit of the earnings allowable in the higher schedule.³⁸ Finally, if the historical earnings or incremental earnings allowables are not fully utilized during the calendar year, the excess can be carried forward to the next year.³⁹

Shifting away from the direct investment restrictions, two other fundamental requirements are imposed on all Direct Investors. First, the amount of assets that a Direct Investor may hold in liquid form in a foreign country (other than Canada) is restricted.⁴⁰ Such balances presently may not exceed the sum of (a) the amount of available proceeds of long-term foreign borrowing by the Direct Investor, and (b) the greater of \$100,000 or the average month-end liquid foreign balances held by the Direct Investor during 1965-66.⁴¹

Secondly, all Direct Investors must file reports reflecting the allowables and transactions pertinent to foreign direct investment.⁴² The Regulations authorize the Secretary of Commerce to require a report on information "reasonably related to direct investment or the purposes of Executive Order 11,387."⁴³ The Regulations further require the Direct Investor to keep a "full and ac-

35. *Id.*

36. Section 506, with an amendment in Section 506(a)(4), 38 Fed. Reg. 16635 (June 25, 1973).

37. Section 504(d).

38. Section 504(c).

39. Sections 504(d) and (e), and 506(d).

40. Section 203, with an amendment in Section 203(d)(2), 38 Fed. Reg. 16635 (June 25, 1973).

41. Section 203(c).

42. Sections 601-02.

43. Section 602(a).

curate record of each transaction engaged in by it which is subject to the provisions" of the Regulations.⁴⁴

There are four reports generally required of all Direct Investors: (1) The FDI-101 Base Period Report; (2) The FDI-102 Cumulative Quarterly Report; (3) The FDI-102F Annual Report (a short form of this report analogous to the Federal Income Tax short form is available to those Direct Investors who elected the worldwide minimum allowable); (4) The Form FDI-105 Report for Affiliated Foreign National Financial Structure and Related Data. Additionally, there are other reports required by the Office of Foreign Direct Investment applicable only to special types of Direct Investors.⁴⁵ However, there are certain exemptions from these reporting requirements that enable the small and medium-sized investors to avoid the reports. Thus, the reporting requirements fall primarily on the large investors.⁴⁶

Finally, it should be noted that the Office of Foreign Direct Investment, in extraordinary circumstances, will grant requests from Direct Investors for specific authorizations of positive direct investment that are not permitted under the general allowables.⁴⁷

THE MULTI-NATIONAL CORPORATION

There is no universally accepted definition of a multi-national corporation. This is due in part to the recent development of the multi-national corporation, and in part to the failure of economists and international business experts to agree on what comprises a multi-national corporation.⁴⁸ Some experts ascribe the same meaning to the terms "multi-national," "international," "transnational," and "worldwide" in describing corporate entities.⁴⁹ Other experts use each of these words to describe a different, though related, entity.⁵⁰ Nevertheless, there are certain characteristics generally attributed to the multi-national corporation which in the aggregate describe the creature sufficiently well for the purposes of this paper.

44. Section 601.

45. Section 602(b).

46. See Comment, *Foreign Direct Investment Controls*, 11 HARV. INT'L L.J. 490, 527 (1970).

47. Section 801.

48. See R. EELLS, *GLOBAL CORPORATIONS* 19-42 (1972).

49. See, e.g., L. TURNER, *INVISIBLE EMPIRES* 2-3 (1970); R. VERNON, *SOVEREIGNTY AT BAY* 3 (1971).

50. See, e.g., C. KINDLEBERGER, *AMERICAN BUSINESS ABROAD* 179-85 (1969); A. PHATAK, *EVOLUTION OF WORLD ENTERPRISES* 1-3 (1971).

The first essential of the multi-national corporation is that it own and manage business in two or more countries.⁵¹

Secondly, a multi-national corporation is "an agency of direct, as opposed to portfolio, investment in foreign countries, holding and managing the underlying physical assets rather than securities based upon these assets."⁵²

Corporate enormity is a third attribute of the multi-national corporation. Multi-national corporations, for the most part, are members of that select group of U.S. corporate giants: *Fortune's* list of 500 U.S. industrial firms.⁵³ One authority on the multi-national corporation has noted that an enterprise "with less than \$100 million in sales rarely merits much attention."⁵⁴ "Perhaps 200-300 large firms form the bulk of the multi-national corporation universe."⁵⁵

Power seems to be a main characteristic of the multi-national. One expert claims this is indeed an attribute of the multi-national, but only as a derivative of a less visible trait: the integrated decision process.⁵⁶ This trait begins when control over affiliates becomes centralized, usually in the parent, and is exercised to coordinate all activity in that enterprise toward a common objective.⁵⁷ As a worldwide enterprise grows more centralized, it becomes more multi-national in character.

While admittedly multi-nationals cannot be visualized in any concrete and specific manner, this paper is using the term to mean an entity with the following attributes: (1) an agency of direct rather than portfolio investment, (2) a corporation owning and managing in two or more countries, (3) an institution that is in some vague way enormous, and (4) a centralized enterprise with an integrated decision process.

51. Jacoby, *The Multi-national Corporation*, THE CENTER MAGAZINE, Vol. 3, No. 3, 38 (May 1970).

52. *Id.*

53. R. VERNON, SOVEREIGNTY AT BAY, 4-18 (1971).

54. *Id.* at 4.

55. SENATE COMM. ON FINANCE, 93D CONG., 1ST SESSION, MULTINATIONAL CORPORATIONS 44 (Comm. Print 1973).

56. J. Behrman, Some Patterns in the Rise of the Multi-national Enterprise, Research Paper 18, Grad. School of Bus., U. of N.C. at Chapel Hill (March 1969) as discussed by R. EELLS, GLOBAL CORPORATIONS 25-30 (1972).

57. *Id.*

THE RELATIONSHIP BETWEEN THE FOREIGN DIRECT INVESTMENT
REGULATIONS AND THE MULTI-NATIONAL CORPORATION

[T]he program falls heaviest on the multi-national enterprise and, in effect, represents a step, even though unilateral, toward their control.⁵⁸

The Direct Investor, as stated above, is defined in the Regulations as any U.S. person (whether an individual person or business entity) that owns or controls a ten percent or greater interest in any incorporated or unincorporated foreign entity. This paper is concerned with the restrictions placed on the Direct Investor who is a multi-national corporation compared to the restrictions placed on the Direct Investor who is not.

The essential part of the definition of Direct Investor relates to "ownership or control" in a foreign entity. One of the principal characteristics of the multi-national corporation, as discussed above, is that it is a "corporation owning and managing in two or more countries." The close identity here indicates the unavoidable impact that the Regulations have on the multi-national corporation.

The 10 percent ownership or control requirement can be viewed as an educated guess at where control over an Affiliated Foreign National begins.⁵⁹ Since control in each specific case may begin at a different percentage, the 10 percent figure is probably as useful as any other arbitrary figure. Further, although the figure is probably low (usually a higher percentage of equity ownership is thought to guarantee control), the Regulations provide that in some cases a person may qualify as a Direct Investor with a lower percentage of equity ownership.⁶⁰ Such a determination is made by the Office of Foreign Direct Investment where the U.S. person is found to actually participate in and exercise a controlling influence over the affairs of the foreign enterprise.⁶¹

Hence, the Regulations effectively assure that any U.S. person who controls a foreign enterprise qualifies as a Direct Investor. Multi-national corporations by definition so qualify. Obviously then, all U.S. multi-national corporations are subject to the Regulations.

Thus, the Regulations, implemented to remedy the balance of payment deficit, had the collateral effect of regulating the activities of the multi-national corporation. This writer suggests that

58. Comment, *Foreign Direct Investment Controls*, 11 HARV. INT'L L.J. 490, 563-64 (1970).

59. See C. KINDLEBERGER, *AMERICAN BUSINESS ABROAD* 3-4 (1969).

60. Section 304(b) (4).

61. See 1972 Bulletin § B305.

this unintentional side effect has become a major factor in the continuance of the controls while their efficacy as a balance of payments remedy has gradually been reduced. To show this we must analyze the changes in the Regulations since their inception—comparing the effect of the changes on the balance of payments to the continued regulation of the multi-national corporation.

THE SHIFTING EMPHASIS OF THE REGULATIONS

The Regulations, even at their inception, were not totally committed to reducing the balance of payments deficit. One particularly noticeable manifestation of this is the adoption of the schedular approach to investment. From the pure accounting aspect of the balance of payments, positive direct investment is equally detrimental whether occurring in Nigeria, Canada, Israel, Japan, or Denmark. However, by affording different treatment to investment in different areas, investment may be encouraged or discouraged according to political expediency.

In general, the United States has maintained a policy of aiding underdeveloped countries—this policy is continued under the Regulations by classifying such countries in Schedule A (which throughout the entire life of the controls has been the Schedule easiest to invest in).⁶²

Canada is not included under the controls, and investment can be made without limit there.⁶³ Israel is classed as a Schedule A country.⁶⁴ Japan is classed as a Schedule B country.⁶⁵ Obviously, preferential treatment is being conferred for political reasons. In short, policy considerations other than concern for the balance of payments entered into the Regulations.

The Regulations are structured so that all positive direct investment is prohibited except as authorized under the allowables. The allowables permit positive direct investment up to a certain limit depending on the choice of allowable made. This "maximum limit" design necessarily involves a size relationship between those who are restricted and those who are not. Since the multi-national cor-

62. Section 319.

63. Section 1102.

64. DEP'T OF COMMERCE, 1972 FOREIGN DIRECT INVESTMENT PROGRAM, 21-2 at pt. I (1972).

65. *Id.* at pt. II.

poration is a supergiant with large direct investment activities as part of its very nature, a high limit will not remove it from regulation. However, the higher the limit the fewer "normal" investors will be regulated.

When the controls were first instituted in 1968, the allowables were set very low—thus, almost all Direct Investors who were subject to the Regulations were in fact actually restricted in their investment. The 1968 program authorized an election between a \$200,000 worldwide allowable and a combination allowable that comprises an allowable similar to the present historical allowable for Schedules A and B, and a very limited allowable for Schedule C.⁶⁶ The combination allowable permitted a Direct Investor to make positive direct investment for 1968 in Schedule A up to an amount equal to 110% of the average annual investment in that schedule in 1965 and 1966. Similarly, positive direct investment in Schedule B was limited to 65% of the 1965-66 annual average investment. However, the amount of positive direct investment allowed in Schedule C was strictly limited: a Direct Investor could only reinvest earnings from his Schedule C Affiliated Foreign Nationals up to an amount equal to the lesser of (a) 35% of his average annual positive direct investment in the years 1965-66, or (b) a percentage of the Direct Investor's share of such annual total earnings equal to the percentage of the Direct Investor's share of the aggregate total earnings of his incorporated Schedule C Affiliated Foreign Nationals during 1964, 1965, and 1966.⁶⁷

The 1968 program thus imposed rather strict controls—especially for Direct Investors without substantial investment or earnings from previous investment in the years 1964-66. Criticism was leveled at the Regulations for giving the heavy investor in those years a better investment opportunity. Particularly upsetting to some investors was that those who had constrained themselves as requested under President Johnson's voluntary restraint program were penalized in favor of those who had ignored the program.⁶⁸

The Regulations were extensively liberalized in 1969 with respect to the allowables.⁶⁹

66. 15 C.F.R. § 1000.502 (1969); General Bulletin No. 1, Interpretative Analyses and Statements § B502, 33 Fed. Reg. 15158 (Oct. 10, 1968) [hereinafter cited as Gen. Bull. No. 1]. The worldwide allowable was originally set at \$100,000 for 1968, but was raised during the year to \$200,000. The \$200,000 limit is the figure used in Gen. Bull. No. 1, since it reflects the amount finally allowed for that year.

67. Gen. Bull. No. 1, §§ B503 and B504.

68. See Spuehler, *The New United States Foreign Direct Investment Program—Post-Mortem and Prognosis*, 43 L.A.B. BULL. 325, 348 (1968).

69. 15 C.F.R. §§ 1000.502-06 (1970); 1969 General Bulletin: Interpreta-

Subpart E (§§ 501-506) was changed, in the main, to its 1973 form in that the Direct Investor was allowed to elect one of three allowables: worldwide minimum, historical, or earnings.⁷⁰

The Direct Investor could, as in 1968, elect to be governed by the worldwide minimum allowable. However, the ceiling was raised to \$1 million from its 1968 ceiling of \$200,000.⁷¹ This huge increase meant that numerous Direct Investors who were affected in 1968 would not be affected in 1969.

The historical allowable remained as in effect in 1968.⁷²

In direct response to the criticisms that the 1968 Regulations penalized adherents of the voluntary restraint program, the Office of Foreign Direct Investment created the "earnings allowable." This allowable provided that in each scheduled area the Direct Investor could make positive direct investment in an amount up to thirty percent of the annual earnings of the Direct Investor's Affiliated Foreign National in the preceding year.⁷³ Other than changing the percentage to 40, the earnings allowable has remained unaltered.

The 1969 Bulletin also announced that beginning in 1970 another allowable would be available as a supplement to whichever of the three general allowables was elected. This allowable, known as the "incremental earnings allowable," authorized worldwide investment in an amount not to exceed the excess of (a) forty percent of the difference between the Direct Investor's share of total earnings of his Affiliated Foreign Nationals in the current year and the average annual earnings of such Affiliated Foreign Nationals in 1966-67, over (b) the Direct Investor's minimum allowable, earnings allowable, or historical allowables for the regulated year, whichever is highest.⁷⁴ "Generally, this additional allowable may benefit only Direct Investors who have Affiliated Foreign Nationals with an unusually high growth rate of earnings."⁷⁵

tive Explanation and Analysis of the Foreign Direct Investment Regulations, Introduction, and §§ B502-06, 34 Fed. Reg. 17806 (Nov. 5, 1969) [hereinafter cited as 1969 Bulletin].

70. *Id.*

71. 1969 Bulletin § B503.

72. 1969 Bulletin § B504.

73. *Id.*

74. 1969 Bulletin § B506.

75. 1969 Bulletin, Introduction.

The 1970 Program continued the liberalizing trend.⁷⁶ Another alternative allowable was authorized, giving the Direct Investor a choice of four different allowables from which to elect. This allowable, designated the "alternative minimum and Schedule A supplemental allowable" (also called simply the "§ 507 allowable"), provided that a Direct Investor could make \$1 million positive direct investment on a modified worldwide basis and an additional \$4 million in Schedule A. In effect, so long as the Direct Investor did not invest more than \$1 million in Schedules B and C combined, he could make up to \$5 million in positive direct investment per year.⁷⁷

The § 507 allowable was a major increase in the ceiling with respect to the balance of payments. Furthermore, the schedular preference reflected the overriding concern with the policy of helping the developing nations by encouraging U.S. investment in Schedule A.

The 1970 Regulations also streamlined the historical allowable for Schedule C. Schedule C assumed the same method of computation used in computing the Schedule A and B historical allowables. Thus, the Direct Investor was relieved of compliance with the strict and complex "reinvestment ratio" formula. A 35 percent limit, which is still the limit today, was adopted for Schedule C.⁷⁸

Prior to 1970, Direct Investors were required to disregard annual "aggregate losses" in computing their positive direct investment for compliance with the worldwide minimum allowable limit. This requirement was eliminated in 1970, thus permitting the Direct Investor who elected the worldwide minimum to subtract his annual "aggregate loss" from direct investment.⁷⁹ The effect was to raise the limit for all Direct Investors who had such losses.

The 1971 Regulations remained essentially the same with respect to the allowables. Nonetheless, the liberalizing trend continued in that the limit of the minimum worldwide allowable was raised to \$2 million per year,⁸⁰ the limit of the alternative minimum al-

76. 15 C.F.R. §§ 1000.502-06 (1971); 1970 General Bulletin: Interpretative Explanation and Analysis of the Foreign Direct Investment Regulations, Introduction, 35 Fed. Reg. 15671 (Oct. 7, 1970) [hereinafter cited as 1970 Bulletin].

77. 1970 Bulletin § B507.

78. 1970 Bulletin § B504.

79. 1970 Bulletin § B503.

80. 15 C.F.R. § 1000.503 (1972); Supplement No. 1 to the 1970 Bulletin, § B503, 36 Fed. Reg. 9502 (May 26, 1971) [hereinafter cited as Supp. No. 1].

lowable segment of the § 507 allowable was correspondingly increased to \$2 million,⁸¹ and finally the restriction on the earnings allowable was lifted to 40 percent.⁸²

The allowables provided under the Regulations for 1972 were the same as for 1971.⁸³

Recent changes in the allowables were adopted on June 25, 1973.⁸⁴ The worldwide minimum allowable was raised from \$2 million to \$6 million per year; the § 507 allowable was completely revoked; and the wording of the incremental allowable was changed so as not to be tied to the worldwide minimum allowable. Thus, a reduction in the amount of the incremental allowable, which would have normally followed from an increase in the worldwide minimum allowable, was avoided.⁸⁵

In summary, the general allowables have been substantially liberalized over the period of years since the Regulations went into effect. The worldwide minimum allowable has been elevated from \$100,000 to \$6 million—sixty times the original limit. The historical allowables for Schedule A and B have remained unchanged since the 1968 Bulletin, but the Schedule C historical allowable has been relieved of its previously strict limits so that it is now the same conceptually as the Schedule A and B allowables. Still the 35% limit is considerably stiffer than the 65% or 110% limits set for Schedules B and A respectively. The earnings allowable has been liberalized to 40% from the 30% restriction originally set in 1969. Finally, the supplemental incremental allowable has given an additional amount of authorized positive direct investment to the Direct Investors who have Affiliated Foreign Nationals with unusually high earnings growth rates.

The result of the liberalization obviously reduces the effect of the Regulations as a short term balance of payments remedy. The more positive direct investment that is allowed per year, the greater the debit in this segment of the balance of payments computation.

81. Supp. No. 1 § B507.

82. Supp. No. 1 § B504.

83. 15 C.F.R. § 1000.501-07 (1973); 1972 Bulletin §§ B501-07.

84. 38 Fed. Reg. 16635 (June 25, 1973). The amendments apply to all affected transactions entered into on or after January 1, 1973.

85. Sections 503, 506, 507 as amended in 38 Fed. Reg. 16635 (June 25, 1973). See Explanatory Paragraph (6), 38 Fed. Reg. 16636 (June 25, 1973).

However, while the liberalization of the allowables had a generally negative effect on the balance of payments, it did not uniformly affect all Direct Investors.

The changes eliminated many of the smaller Direct Investors from substantive regulation under the Regulations. Any Direct Investor whose normal positive direct investment falls between the original \$200,000 and the present \$6 million is no longer affected by the Regulations.

On the other hand, the multi-national corporation has been generally unaffected by the increase in the allowable limits. This paradox stems from the position of the multi-national corporation in direct investment in the years 1965-66. The multi-national corporation generally had investment in this period at such a level as to dictate the election of the historical allowables as the choice which would maximize its positive direct investment abroad. The multi-national corporation would similarly not be the user of the earnings allowable, but would be the beneficiary of the supplemental incremental earnings allowable if its Affiliated Foreign Nationals had unusual growth of earnings.

The situation of a multi-national corporation with regard to changes in the allowables can be illustrated as follows: multi-national corporation X had positive direct investment of \$10 million in Schedule C, \$8 million in Schedule B, and \$5 million in Schedule A in each of the years 1965 and 1966. Therefore, its annual average positive direct investment for the 1965-66 base period was \$10 million, \$8 million, and \$5 million respectively. Corporation X would have a Schedule B historical allowable of \$5.2 million per year, a Schedule A allowable of \$5.5 million per year, and, from 1970 on, a Schedule C allowable of \$3.5 million. Thus, corporation X would have an aggregate allowable of \$14.2 million which in practicality would preclude a selection of the worldwide minimum allowable at any time. It should be obvious that a multi-national corporation would not be affected by the huge increase in the worldwide minimum allowable. Substantial investment in the foreign arena during the base period 1965-66 virtually assures that the amount allowed will be greater under the historical allowables than the worldwide minimum.

With regard to the Schedule C allowable, the multi-national corporation received material benefit only whenever 35% of its annual average positive direct investment in the years 1965-66 exceeded its share of the annual total earnings (setting the multi-national corporation's share at the percentage it had in total earnings in 1964-66).

Finally, the change in the percentage of the earnings allowable will not generally affect the multi-national corporation because of its large base period investment. However, recent additions to the multi-national "club" will probably make use of the earnings allowable since they would have no historical base in 1965-66 from which to claim an historical allowable. However, a multi-national corporation may increase the annual earnings from its Affiliated Foreign Nationals to a level where the "earnings allowable" limitation would be less restrictive than the "historical allowable." In such a case, of course, the 10 percent gain in allowable positive direct investment does reflect a liberalizing of the restrictions on the multi-national corporation.

The second major restriction that the Regulations impose on the Direct Investor, the limitation on the amount of liquid assets a Direct Investor may hold during any given month in a foreign country, has also been relaxed. Originally, the 1968 program required a Direct Investor to limit the amount of "liquid foreign balances" to the greater of (a) \$25,000 or (b) the average end-of-month balances held by the Direct Investor during 1965-66.⁸⁶ The 1971 program elevated (a) to \$100,000.⁸⁷

The "liberalization" of the liquid foreign balance requirement again can be seen to affect the Direct Investor whose historical balances during 1965-66 were relatively low. For reasons similar to those discussed with regard to the allowables, the multi-national corporation would thus be unaffected by the "liberalization." The multi-national corporation would continue to use item (b), which has remained unchanged, since for the multi-national corporation item (b) would exceed item (a).

Although the original 1968 program imposed rather stringent reporting requirements on all Direct Investors, gradually over the past five years certain exemptions have been established that in effect relieve the small and medium-sized Direct Investor from the bulk of these requirements. The multi-national corporation, however, has not had its reporting requirements diminished, but actually has been required to submit more reports each year. Some of these reports bear a questionable relation to the controls, but

86. 15 C.F.R. § 1000.203 (1969); Gen. Bull. No. 1 § B203.

87. 15 C.F.R. § 1000.203 (1972); 1972 Bulletin § B203.

nonetheless are authorized pursuant to the "reasonable relationship of the information to direct investment" clause.⁸⁸

CONCLUSION

Since the Foreign Direct Investment Regulations were initiated by Presidential Order as an emergency measure aimed at alleviating the balance of payments crisis, they have undergone gradual changes that raise the question whether they are still aimed at that crisis. As shown above, the Regulations have been liberalized to a great extent. Limits on the positive direct investment have been raised. Limits on the liquid foreign balances have been elevated. Although undeniably the restriction of any positive investment at all works as a positive factor in the control of the balance of payments, restrictions that affect only some of the contributors to the deficit while allowing others to act without restraint lack the emergency element that is the justification for the Regulations' existence. Half-measures and partial solutions are simply not emergency measures. The liberalization of the controls indicate that the emergency has passed, and this alone points out that the maintenance of the controls is of doubtful validity. "[E]mergency delegation is not permanent, but is intended to cease when the emergency conditions disappear."⁸⁹

The further indications that the program in general has been liberalized with little of the liberalization passed on to the multi-national corporation suggests special emphasis on controlling the multi-national corporation. The multi-national corporation, in effect, is the only segment of the class that the Regulations were to control that is still being regulated.

Added together, the conclusion seems inescapable that the reason for the continuation of the Regulations is principally to regulate the multi-national corporation. As such, the Regulations seem mainly to be a method of channeling the activities of the multi-national corporation in a manner dictated by political preference. This idea is reinforced by the information gathering on the multi-national corporation that the Office of Foreign Direct Investment is presently conducting through its extensive reporting requirements.

88. Sections 601-02.

89. Garson & Miller, *Foreign Direct Investment Regulations: Constitutional Questions and Operational Aspects Examined*, 11 B.C. IND. & COM. L. REV. 143, 160 (1970).

The Regulations no longer represent a response to the balance of payments crisis. Therefore, the continuation of the Regulations cannot be justified as a valid exercise of the emergency powers. Since the President has authority to regulate foreign commerce only under these emergency powers, the continuation of these Regulations is a usurpation of Congressional authority.

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