

Foreign Investment and National Security:

Executive Order 14083

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Introduction

On September 15, 2022, United States President Joe Biden issued Executive Order 14083, which directed the Committee on Foreign Investment in the United States (CFIUS) to take a closer examination of future foreign investment in the United States and how it may threaten United States national security.¹ The Executive Order more specifically directed CFIUS to consider foreign investment threats into areas of “critical technology or critical infrastructure that would affect United States leadership in areas related to national security.”² Though not stated directly, the consensus seems to be that this Executive Order was issued at China.³ The Executive Order notes some key markets such as biomanufacturing, the agricultural base, and advanced clean energy, but it is clear that the President is worried about future foreign investment into the United States supply chain as a whole and how that may have an impact on the country’s national security.⁴

This raises two important questions: 1) will this Executive Order deter future foreign investment in the United States and 2) how may this new direction affect existing cultural norms between the United States and countries around the world? This report will argue that the new

¹ Exec. Order No. 14083, 3 C.F.R 57369 (2022) [hereinafter Executive Order]

² *Id.*

³ Zeyi Yang, *China Report: What’s up with all of Biden’s Executive Orders on China?*, MIT TECHNOLOGY REVIEW, (Sept. 20, 2022) <https://www.technologyreview.com/2022/09/20/1059782/china-report-bidens-executive-orders/>

⁴ *Id.* at 5730-5731

criteria CFIUS must use will make it extremely difficult to encourage future foreign investment and that the national security aspect may not be impacted as described.

Background

It is no secret that the United States has encouraged foreign investment throughout the nation's history. The United States leads the world in foreign investment, registering over 506 billion dollars in foreign direct investment in 2021.⁵ China has been increasing its foreign investment in the United States almost every year, and began a wave of investment in technology and advanced manufacturing in the early 2010s. The United States has become increasingly more concerned about Chinese direct investment; for example, the country has been worried about the introduction of China's phone app TikTok and its cybersecurity concerns and threats to the nation's national security.⁶ The Executive Order hoped to address these issues by directing CFIUS to evaluate non-exhaustive potential factors in future foreign investment deals:

The effect on U.S. supply chains, including those unrelated to defense; the effect on U.S. leadership in advanced technologies; how the transaction is situated within industry

⁵ Jannick Damaard & Carlos Sanchez-Munoz, *United States is World's Top Destination for Foreign Direct Investment*, IMF Blog (Dec. 7, 2022)

⁶ Yang, *supra* note 3

investment trends; cybersecurity risks that could emerge from the transaction; and risks to the private data of people in the United States.⁷

In essence, the United States is concerned over national security risks through mediums in the private sector.⁸ While the Executive Order has been quite successful in deterring some Chinese investment, this new direction could and evaluation of factors could lead to more problems for the United States.⁹

Analysis

The Executive Order is going to put a large burden on CFIUS in the evaluation of future foreign investment deals.¹⁰ CFIUS already has a long process of reviewing foreign investment deals, which can take up to 6 months for the committee to evaluate and make a decision.¹¹ This Executive Order is going to significantly increase the amount of time CFIUS takes to examine a future deal, which could deter future investment all together. Some deals reviewed by CFIUS

⁷ Jonathan Masters, et. al., *What Happens When Foreign Investment Becomes a Security Risk?*, COUNCIL ON FOREIGN RELATIONS (Jan. 3, 2023)

<https://www.cfr.org/background/what-happens-when-foreign-investment-becomes-security-risk>

⁸ Executive Order, *supra* note 1

⁹ Masters, *supra* note 8 (explaining that Chinese investment fell by forty three percent since the issuance of the Executive Order)

¹⁰ Executive Order, *supra* note 1 (detailing all the responsibilities of CFIUS in it's new evaluation of future foreign investment)

¹¹ JAMES K. JACKSON, CONGR. RSCH. SERV., RL 33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 14 (2020)

may also become public knowledge, which could discourage investors who would like to be silent.¹² It is quite possible that foreign investment firms may spend additional resources in these transactions to avoid a CFIUS review. This avoidance behavior, though anecdotal, “ raise[s] concerns about the possible impact a CFIUS review may have on financial markets and the potential costs of redefining the concept of national security relative to foreign investment.”¹³ The United States has always encouraged foreign investment and these new evaluative factors may decrease it in the future.

A new issue with the Executive Order is that there are already restrictions in foreign direct investment in the United States. SelectUSA, a program created by the Department of International Commerce, has already published a list of limitations on foreign direct investment related to all areas of the market.¹⁴ The limitations include but are not limited to areas of transportation, atomic, energy, natural resources, and financial services.¹⁵ Including these new factors into an already complex limitation system of oversight creates a similar burden to the one already affecting CFIUS. The markets that the Executive Order details (e.g. technology) will continue to see growth regardless. Though Chinese firms are making significant investments that may have national security implications, there is already protections in place for the national security risk to be low.¹⁶

Though the Executive Order has detailed certain markets in which there is significant concern over national security, some of the new evaluative factors that CFIUS must examine are

¹² *Id.* at 15

¹³ *Id.* at 15-16

¹⁴ EDWARD S. RIVERA, DEP. OF. COMM., FDI RESTRICTIONS: LIMITATIONS ON FOREIGN INVESTMENT INTO THE UNITED STATES 1

¹⁵ *Id.* at 2-10

¹⁶ Yang, *supra* note 3

already described in federal statutes.¹⁷ A national security review is already done by CFIUS in a foreign investment transaction, so issuing an Executive Order may have been moot.¹⁸ The inference can be made that the Executive Order was targeted at China specifically, which would probably affect future foreign relations with the country. In an already tense relationship with China, these new limitations on future foreign investment may break down an important trade relationship and thus affect the United States investment market in the future.¹⁹ These possible increased tensions with China could have an adverse effect on national security, creating even more of a burden on the current administration to regulate investment markets and be more careful in maintaining this relationship.

The Executive Order is inconsistent with United States policy, which is even described in the issuance. According to the current administration “The United States commitment to open investment is a cornerstone of our economic policy and provides the United States with substantial economic benefits, including “the promotion of economic growth, productivity, competitiveness, and job creation, thereby enhancing national security.”²⁰ It seems completely unnecessary for the President to issue this Executive Order with stringent limitations if it goes against the cornerstone of economic policy. The President already has authority to block a transaction from happening, so if there is a national security threat there are already schemes in place to deter it.²¹

¹⁷ Executive Order, *supra* note 1, at 57370

¹⁸ JACKSON, *supra* note 12, at 17

¹⁹ Masters, *supra* note 8

²⁰ Executive Order, *supra* note 1 at 57369

²¹ Masters, *supra* note 8

Conclusion

The Executive Order issued by President creating foreign investment limitations will have further implications on the future of United States on foreign investment. The national security risk presented to CFIUS is actually more minimal than described. Foreign investment will continue to target these specified markets, whether it be by China or another country. These specified markets will all continue to see exorbitant investment growth in the future, so in theory it's better for that investment to be done in the United States where there are already protections in place. All this Executive Order does is making an indirect pass at another country, which is probably in poor taste and will have an adverse effect on whatever relationship is already built.
