The Daily Dish

The China Syndrome

DOUGLAS HOLTZ-EAKIN | MARCH 28, 2022

To be clear, China is a global rival, a strategic threat, and a beacon for those with anti-democratic impulses and little regard for human rights. Unfortunately, the desire to meet the China challenge often results in an overreach that has the potential to do more damage than good. A recent example is contained in the America Creating Opportunities for Manufacturing, Pre-Eminence in Technology, and Economic Strength Act of 2022, also known as the COMPETES Act. The act creates the Committee on National Critical Capabilities (CNCC), a new governing body that will screen outbound investments. (The CNCC is also contained in the Senate-passed version of the legislation.)

Recall that concern over China led to modernizing the Committee on Foreign Investment in the U.S. (CFIUS) in the Foreign Investment Risk Review Modernization Act (FIRRMA), which expanded the jurisdiction of CFIUS, and created mandatory CFIUS notification requirements for certain investments involving critical technologies and some personal data. It took a sustained bipartisan effort to bring FIRRMA to an appropriate scope.

The proposed CNCC is a parallel screening for the transfer of critical assets overseas. As with CFIUS process, parties to a covered transaction would be required to submit the transaction to the new committee for approval or potential blocking by the president. The CNCC, like CFIUS, is an interagency committee that would be chaired by the Office of the U.S. Trade Representative (USTR) and would have an overwhelmingly broad scope. A covered transaction would be:

> "(i) Any transaction by a United States business that–(I) shifts or relocates to a country of concern, or transfers to an entity of concern, the design, development, production, manufacture, fabrication, supply, servicing, testing, management, operation, investment, ownership, or any other essential elements involving one or more national critical capabilities identified under subparagraph (B)(ii); or (II) could result in an unacceptable risk to a national critical capability.
>
> (ii) Any other transaction, transfer, agreement, or arrangement, the structure of which is designed or intended to evade or circumvent the application of this title, subject to regulations prescribed by the Committee."

Notice that there may be far from an immediate consensus on what, exactly, constitutes "a country of concern" or an "entity of concern," opening a real can of worms regarding which transactions need to be approved. Similarly, the list of "national critical capabilities" is itemized as:

> "(A) means systems and assets, whether physical or virtual, so vital to the United States that the inability to develop such systems and assets or the incapacity or destruction of such systems or assets would have a debilitating impact on national security or crisis preparedness; and (B) includes the following: (i) The production, in sufficient quantities, of any of the following articles: (I) Medical supplies, medicines, and personal protective equipment. (II) Articles essential to the operation, manufacture, supply, service, or maintenance of critical infrastructure. (III) Articles critical to infrastructure construction after a natural or manmade disaster. (IV) Articles that are

components of systems critical to the operation of weapons systems, intelligence collection systems, or items critical to the conduct of military or intelligence operations. (V) Any other articles identified in regulations prescribed under section 1007.

(ii) Supply chains for the production of articles described in clause (i).

(iii) Essential supply chains for the Department of Defense.

(iv) Any other supply chains identified in regulations prescribed under section 1007.

(v) Services critical to the production of articles described in clause (i) or a supply chain described in clause (ii), (iii), or (iv).

(vi) Medical services.

(vii) Services critical to the maintenance of critical infrastructure.

(viii) Services critical to infrastructure construction after a natural or manmade disaster.

(ix) Any other services identified in regulations prescribed under section 1007."

The legislation speaks for itself. In the name of competing with China, the proposed CNCC is a massive intrusion into private investment flows. It may sweep in not only new mergers and acquisitions, but follow-on support agreements for old investments. For those areas subject to review and approval, U.S. firms will be disadvantaged in competition with other countries.

These considerations are sufficiently large that it makes no sense to jump into a full-scale adoption of the CNCC. Perhaps Congress could first establish a pilot program at USTR to work out the feasibility of the concept.