

January 10, 2020

The Honorable Wilbur L. Ross, Jr.
Secretary
U.S. Department of Commerce
1401 Constitution Ave, NW
Washington, DC 20230

Dear Secretary Ross:

The undersigned associations respectfully submit this letter on behalf of our member companies regarding the U.S. Department of Commerce’s (“Department” or “Commerce”) proposed rule to implement Executive Order 13873, Securing the Information and Communications Technology and Services (“ICTS”) Supply Chain (“proposed rule” or “proposal”). As written, the proposed rule would provide the U.S. government with the authority to intervene in, block, and unwind certain ICTS transactions on national security grounds. As longtime partners in the U.S. government’s efforts to provide national security while strengthening our economy and technology leadership, we welcome the opportunity to share an overview of our members’ views on the proposed rule. We look forward to working with the Department to shape a rule that both addresses national security risk while simultaneously supporting U.S. innovation and promoting the growth of the U.S. economy.

Our members share the Administration’s commitment to ensuring that ICTS transactions do not pose undue risks to national security. However, we view the proposed rule as vague and highly problematic because as written, it would provide the Department with nearly unlimited authority to intervene in virtually any commercial transaction between U.S. companies and their foreign counterparts that involves technology, with little to no due process, accountability, transparency, or coordination with other government programs that are also designed to protect national security.

The proposed rule does not provide sufficient legal clarity to U.S. companies to identify transactions that could be in scope, and effectively grants Commerce the independent authority to prohibit an activity *after* it has occurred. This could create significant uncertainty in the business community, disrupt global supply chains, and make a range of trade and investment decisions very difficult. Although the preamble of the proposal describes a “case-by-case, fact-specific approach intended to avoid overly restricting entire classes of transactions,”¹ the proposal does not set boundary conditions, identify any examples of transactions that Commerce is intending to prevent, nor propose a process that gives meaningful notice or sufficient due process to potentially affected parties. As written, the proposal would force companies to operate in an environment where *all* ICTS transactions with foreign entities could be subject to review, making it more difficult to enter into such relationships out of fear that they could be suddenly and unexpectedly severed, eroding trust in U.S. companies, and marking them as unreliable.

Under the proposed rule, companies may also bear higher costs as they alter long-standing business relationships, search for new suppliers, and unwind transactions, which will harm U.S. competitiveness and technology leadership. We recommend that Commerce tailor the rule in a way

¹ 84 Fed. Reg. 65316, 65317 (Nov. 27, 2019).

that alleviates uncertainty, minimizes costs, and provides clear guidance to industry, thereby avoiding harming the competitiveness of U.S. companies.

Of course, it may sometimes be necessary to scrutinize certain transactions for national security purposes. However, the proposal's failure to incorporate other national security programs, like those administered by the Bureau of Industry and Security's Export Administration Regulations and the Committee on Foreign Investment in the United States, is highly problematic. National security programs must work in concert with one another to minimize economic damage to an impacted party and ensure consistent decisions in implementing mitigation measures where appropriate. Otherwise, they may inflict significant harm on U.S. businesses and consumers, all without a corresponding national security benefit. We recommend that the Commerce Department provide a more deliberate discussion of how this proposal would complement existing programs without creating redundancy and subjecting transactions to multiple national security reviews.

Given the above, we strongly encourage the Department to issue a supplemental notice of proposed rulemaking ("SNPRM") as the next step in developing this proposal. This SNPRM must: (1) clarify and narrow the scope of the proposal to identify which transactions are covered or excluded, and include a set of criteria to determine foreign adversaries prior to review; (2) ensure accountability and interagency collaboration; (3) establish meaningful and transparent procedures for government accountability; (4) provide necessary due process protections including notice to affected parties, pre-clearance mechanisms, rejection of information provided by third parties as a basis for commencement of an evaluation, and a mechanism for requesting advisory opinions; (5) ensure confidentiality of sensitive commercial information in the review process; and (6) define more robust procedures for waivers, appeals, and mitigation.

We greatly appreciate your attention to our concerns and recommendations and look forward to working with the Department to ensure that the government receives the best input possible to formulate its proposed rules.

Sincerely,

ACT | The App Association
Alliance for Automotive Innovation
American Chemistry Council
American Gas Association
American Trucking Associations
BSA | The Software Alliance
Coalition of Services Industries (CSI)
CompTIA
Computer & Communications Industry Association
CTIA
Edison Electric Institute
Here for America
Information Technology Industry Council (ITI)
Internet Association
IPC

Motor & Equipment Manufacturers Association
National Electrical Manufacturers Association (NEMA)
National Foreign Trade Council (NFTC)
National Restaurant Association
National Retail Federation
National Taxpayers Union
NCTA - The Internet & Television Association
NTCA - The Rural Broadband Association
Security Industry Association
SEMI
Semiconductor Industry Association
TechNet
The US-China Business Council
U.S. Chamber of Commerce
USTelecom—The Broadband Association
United States Council for International Business (USCIB)

cc:

Steven Mnuchin, Secretary, Treasury Department
Cordell Hull, Acting Deputy Under Secretary, Bureau of Industry and Security
Richard Ashooh, Assistant Secretary of Commerce for Export Administration, Bureau of Industry and Security
Douglas Kinkoph, Acting Assistant Secretary, National Telecommunications and Information Administration