

January 10, 2020

U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, DC 20230

RE: Proposed Rule on Securing the ICTS Supply Chain, 15 CFR Part 7, RIN 0605-AA51

On behalf of the undersigned organizations, representing a diverse coalition of taxpayer and consumer advocacy groups, we write urging you to withdraw or significantly amend the proposed rule “Securing the Information and Communications Technology and Services Supply [ICTS] Chain” (RIN 0605-AA51).¹ The proposed rule would grant the Secretary of Commerce broad, significant, and undefined powers over small and large American businesses, and could have the unintended effect of harming domestic and global commerce as well as technological innovation.

We share the Department of Commerce’s view that America’s economic strength “is an essential element of our national security.” Like many others, we are concerned with media reports about the influence foreign governments may have on technological hardware and software developed by foreign companies.² However, we do not believe that these concerns justify granting federal regulators an unrestrained right to control or halt the activity of American businesses. Both the proposed rule and Executive Order 13873 take an expansive view of both the “transactions” the Commerce Department is permitted to evaluate and the Department’s determination of who is considered a “foreign adversary.”³

The definition of “transaction,” in both the Executive Order and in the proposed rule, includes the “acquisition, importation, transfer, installation, dealing in, or use of any information and communications technology or service.” As the Department itself acknowledges in its Request for Comment, the terms “dealing in” and “use of” are subject to interpretation. Taking a broad view of these terms, the Department could evaluate or regulate just about any business activity that involves the use of technology. In the 21st century, this plainly means any business activity.

It is also not difficult to imagine the Department developing a long list of foreign adversaries, either now or in the future. The Secretary of Commerce must consult with a number of federal department and agency heads in determining who is a “foreign adversary,” including the Secretaries of State, Defense, and Homeland Security, along with the Attorney General and the United States Trade Representative. Countries that are not considered adversaries in war or combat by the Secretary of State or Defense, for example, may be considered adversaries in international commerce by the United States Trade Representative. Would the Department exercise restraint in developing a list of adversaries, or seek the most expansive definition of “adversary” possible? We do not know the answer to this question, but the implications for domestic and international commerce are significant.

We are also concerned with the number of avenues that both public and private actors have to request the Secretary of Commerce evaluate a transaction. Not only does the Secretary have complete “discretion” to evaluate a transaction, but any federal department or agency head may request an evaluation. Even more concerning, the Secretary may begin an evaluation “[b]ased on information submitted to the Secretary by private parties that the Secretary determines to be credible.” The proposed rule does not define which private parties may submit information, nor how the Secretary may determine the information is “credible.” This could open the door to nefarious activity, from domestic and international competitors to American companies, that seeks to harm those companies for business reasons rather than genuine security concerns.

While the Department’s applications of their powers are unclear, the consequences for American companies caught up in this process are both more clear and quite severe. The proposed rule notes that the Secretary “may require measures to mitigate the transaction’s identified risks or may prohibit the transaction, including by requiring that the parties engaged in the transaction immediately cease the use of the ICTS that poses the undue or unacceptable risk.” The proposed rule, therefore, gives the Secretary broad powers to interfere with and even halt U.S. commerce.

The proposed rule is exempt from the requirements of Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs,” “because it involves a national security matter.” Other than this brief note, we have little to no sense of how much time, money, and manpower the Secretary’s “case-by-case, fact-specific approach” will cost taxpayers. We are also concerned that the Department itself acknowledges the proposed rule will impact “three broad groups of small entities,” since a “majority of entities today, large or small, utilize some manner of ICTS.” The Department’s list of affected entities includes all telecommunications service providers, internet service and software providers, and vendors and equipment manufacturers. This touches every part of America’s world-leading communications and information technology sectors.

These are not hypothetical concerns. Just last year, the Commerce Department suggested that U.S.-built cars manufactured in foreign-owned factories are a threat to American national security.⁴ This far-fetched allegation was contained in a Section 232

¹ Department of Commerce. (November 27, 2019). “Securing the Information and Communications Technology and Services Supply Chain.” (RIN 0605-AA51). Retrieved from: <https://www.regulations.gov/document?D=DOC-2019-0005-0001> (Accessed January 7, 2020.)

² Shepardson, David. “Huawei, ZTE ‘cannot be trusted’ and pose security threat: U.S. attorney general.” Reuters, November 14, 2019. Retrieved from: <https://www.reuters.com/article/us-usa-huawei-tech-zte/huawei-zte-cannot-be-trusted-and-pose-security-threat-u-s-attorney-general-idUSKBN1XO2UJ> (Accessed January 7, 2020.)

³ Executive Order 13873 of May 15, 2019, “Executive Order on Securing the Information and Communications Technology and Services Supply Chain.” Retrieved from: <https://www.whitehouse.gov/presidential-actions/executive-order-securing-information-communications-technology-services-supply-chain/> (Accessed January 7, 2020.)

⁴ “Adjusting Imports of Automobiles and Automobile Parts Into the United States.” The White House, May 17, 2019. Retrieved from: <https://www.whitehouse.gov/presidential-actions/adjusting-imports-automobiles-automobile-parts-united-states/> (Accessed January 7, 2020.)

investigation, the report for which has never been made public. The Commerce Department's goal should be to encourage commerce, not to impose sweeping regulations that would strangle it.

Based on all of the above concerns, we believe the best course of action for the Department is to withdraw this proposed rule. The proposal, if enacted, not only contains a number of alarming provisions at present, but could be expanded by future administrations intent on growing the size and scope of government.

Absent a withdrawal, the Department should, at a minimum, consider several changes to the proposed rule that would limit its impact on American commerce:

- Removing ambiguous terms from the definition of "transaction," especially "dealing in" and "use of" ICTS;
- Providing prudent guardrails for the Secretary in creating and updating the list of foreign adversaries, so that security allies such as (but not limited to) the UK, the EU, Japan, South Korea, Canada, Mexico, and other nations the U.S. has recently had trade disputes with are not deemed adversaries by the Secretary (or other federal agency heads);
- Clarifying the process by which a private party may submit information that triggers the Secretary's evaluation of a transaction, including (but not limited to) who may and may not submit information, how the information should be submitted, and how the Secretary will determine whether the information is "credible";
- Better estimations for taxpayers and stakeholders of the scope, scale, and cost of the Secretary's intended "case-by-case" approach to evaluating transactions;
- Establishing a clear and fair appeals process for American companies whose transactions become subject to the Secretary's review;
- Creating thoughtful safe harbors that reduce the regulatory costs and burdens particularly for small entities, while maintaining the proposed rule's stated focus on protecting national security interests.

We stand ready to assist on any and all of the above changes, and are eager to work with the Department should it withdraw the proposed rule. We appreciate your time and consideration.

Sincerely,



National Taxpayers Union



American Commitment



American Consumer Institute



ALEC



ALEC Action



Americans for Tax Reform



Center for a Free Economy



Center for Freedom and Prosperity



Center for Individual Freedom



Citizens Against Government Waste



Competitive Enterprise Institute



Digital Liberty



FreedomWorks



Hispanic Leadership Fund



Institute for Liberty



National Society of Professional Surveyors



Niskanen Center



R Street Institute



Secure America's Future Economy



Small Business & Entrepreneurship Council (SBE Council)



U.S. Geospatial Executives Organization