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OF THE
UNITED STATES OF AMERICA

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April 28, 2021

The Honorable Gina Raimondo
Secretary
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Re: Securing the Information and Communications Technology and Services Supply Chain: Licensing Procedures, RIN 0605-AA60: ANPRM

Dear Secretary Raimondo:

The U.S. Chamber of Commerce (Chamber) submits these comments in response to the U.S. Department of Commerce's (Department) request for comment on the advanced notice of proposed rulemaking (ANPRM) to implement a licensing/pre-clearance (licensing) process for entities to reduce uncertainty for entities seeking to engage in an information and communication technology and services transaction.

We recognize this ANPRM is intended to solicit public comment in helping the Department develop a licensing mechanism associated with the interim final rule (IFR or Rule) implementing Executive Order 13873, Securing the Information and Communications Technology Services (ICTS) Supply Chain. However, we are not confident that a licensing mechanism will meaningfully alleviate the substantial, material flaws already well documented in the IFR by multiple stakeholders – including the Chamber[1] – as well as the Department's own regulatory impact analysis.[2] Indeed, the Department's recognition[3] of the complexity of developing a licensing mechanism for the IFR only validates the many stakeholder concerns that the Department should suspend this Rule pending the completion of the comprehensive information communications technology (ICT) supply chain review called for under Executive Order 14017, *America's Supply Chains*.[4] Absent this, the Department should at the very least suspend the IFR pending the completion and implementation of this licensing process.

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[1] https://www.uschamber.com/sites/default/files/210319_comments_ictssupplychain_commercedept.pdf
[2] U.S. Department of Commerce, *Securing the Information and Communications Technology and Services Supply Chain: Regulatory Impact Analysis & Final Regulatory Flexibility Analysis*. https://www.regulations.gov/document/DOC-2019-0005-0074
[3] "However, it has become apparent additional public input is needed, and the Department does not expect to have a licensing or other pre-clearance process in place by May 19, 2021…" 86 FR 16312.
[4] *America's Supply Chains,* Executive Order 14017 (February 24, 2021) 86 FR 11849

To be perfectly clear: this Rule is extremely broad in scope and unclear in defining what ICTS transactions constitute an unacceptable national security risk. Given the enormous number of transactions that could fall under a review by the Rule's authority, it is simply not administrable by the Department or the private sector. The Department itself acknowledges in its *Regulatory Impact Analysis & Final Regulatory Flexibility Analysis* that the Rule will cost U.S. industry billions of dollars to implement, will have a significant impact on the digital economy, and has no quantifiable benefits.

This licensing process simply injects more uncertainty and unreasonable burdens to the business community in pursuit of a national security goal that the federal government has yet to clearly articulate.

Should the Department continue to press ahead with this Rule – despite the clear justification to the contrary – we offer the following responses to the questions posed by the Department in the ANRPM. We strongly urge that any licensing process be voluntary, focus on high-risk transactions, not duplicate existing authorities, and allow parties the opportunity to agree on measures aimed at mitigating purported national security risks in an ICTS transaction under review.

Given the differences between the type of transactions subject to CFIUS jurisdiction, those governed by BIS's export control regime, and ICTS Transactions governed by the interim final rule, are the CFIUS and BIS processes useful models for an ICTS Transaction licensing or pre-clearance process? If so, are there specific factors or aspects of the CFIUS and BIS processes that Commerce should consider?

First and foremost, we do not agree with the premise that transactions subject to the Rule are "different" from those subject to the Bureau of Industry and Security (BIS) export control regime and Committee on Foreign Investment in the United States (CFIUS) processes. The Department appears to treat transactions subject to either review as reviewable under the IFR, creating significant overlap between the ICTS program and these other two programs. While the Department clarified in the IFR that covered transactions undergoing review or already reviewed by CFIUS are exempt from the scope of the Rule, it appears to cover low-risk transactions that are subject to CFIUS but have not been reviewed. Similarly, the Rule considers foreign adversaries to include persons that are nationals of a foreign adversary, no matter where they are located, overlapping with BIS's deemed export rule. Eliminating any overlap between these three programs would help the business community understand what constitutes an unacceptable national security risk for U.S. businesses that now are subject to seemingly duplicative U.S. government rules.

If the Department can make that clarification, then there are certain aspects of the CFIUS and BIS processes that could be helpful. For example, adopting the CFIUS and the BIS processes and establishing certain threshold criteria would help the business community understand what ICTS transactions are potentially subject to the Rule and thus potentially licensable. The BIS licensing regime identifies (i) a targeted group of products that pose a national security risk; and (ii) through its Entity List, specific entities that pose a national security concern. While not perfect, the criteria are useful. In contrast, the current ICTS rule is so broad that essentially any ICTS transaction involving a named foreign adversary is potentially reviewable under the Rule.

The Department should establish reasonable timeframes for departmental reviews and clarify that an ICTS transaction is "cleared" if the Department takes no action by the end of the

timeframe. For example, the CFIUS process allows a defined timeframe for CFIUS to initiate a review and offers protections for transactions where a review is not initiated. The Department should consider a similar approach here to give U.S. businesses seeking clarity through a voluntary licensing process more certainty regarding timing, and to provide the Department flexibility to make efficient decisions regarding low-risk transactions.

Finally, as part of a preclearance program, the Department should provide transparency and guidance about the types of high-risk transactions that would trigger Department intervention so that businesses have appropriate notice and can shape their internal compliance programs accordingly. This could include publishing advisory opinions of general interest, similar to what BIS does in the export control context.

Pre-clearance or licensing processes can take a range of forms from, for example, a regime that would require authorization prior to engaging in an ICTS Transaction, to one that allow entities to seek additional certainty from the Department that a potential ICTS Transaction would not be prohibited by the process under the interim final rule. What are the benefits and disadvantages of these various approaches? Which would be most appropriate given the nature of ICTS transactions? How can these approaches be implemented to ensure that national security is protected?

Any pre-clearance or licensing process under consideration should be voluntary and impose the least additional burden on businesses as possible. A regime that would require pre-authorization for an ICTS transaction would be extremely burdensome to business. At this stage, it is also unclear what would fall within the scope of ICTS transactions, creating additional uncertainty for businesses. Given the nature of ICTS transactions, the efficient directing of resources, and facilitation of business in a timely manner, any pre-clearance or license processes should cover batches of transactions (rather than individual transactions).

Additionally, the licensing process should provide a general exemption/safe harbor for low-risk transactions and provide specific licensing only for specifically identified high-risk transactions. Low-risk transactions could include, for example, intracompany transactions, and other transactions that meet certain objective security benchmarks, such as globally accepted cybersecurity standards. Reviewing countless licensing/preclearance requests for non-risky transactions will not further the Rule's objective in any meaningful way.

What considerations could be provided to small entities in the licensing or other pre-clearance process that would not impair the goal of protecting the national security?

The Department should strongly consider its own regulatory impact analysis that documents significant hardships that small businesses will face in complying with this Rule. As much as possible, the Department should provide safe harbors for transactions that involve small businesses to avoid the long-term risk to viability that the Department estimates this Rule will mean to the small business community.

Are there categories or types of ICTS Transactions described in 15 CFR 7.3 or within the interim final rule that should or should not be considered for a license or pre-clearance? Are there categories or types of ICTS Transactions described in 15 CFR 7.3 or within the interim final rule that the Department should prioritize for licensing or pre-clearance? Should the

licensing or pre-clearance process be structured differently for distinct categories or types of ICTS Transactions?

At this stage, the Department should provide additional guidance regarding what categories of transactions pose a real national security risk. Otherwise, transactions posing real national security risks may be overlooked due to the volume of transactions potentially in-scope for review. The Department should prioritize a review of such high-risk transactions. Transactions or types of transactions without a nexus to a significant national security concern could be considered pre-approved or pre-cleared. This would likely lessen the burden on the Department and allow a focusing of resources on transactions more closely tied to national security concerns. It would also serve the business community to utilize these criteria to identify appropriate transactions for potential licensing.

Should a license or pre-clearance apply to more than a single ICTS Transaction? For example, should the Department consider issuing a license that applies to multiple ICTS Transactions from a single entity that is engaged in a long-term contract for ICTS? If so, what factors should the Department evaluate in determining the appropriateness of such a license or series of licenses?

Yes. The license or pre-clearance process should be designed to impose the least burdensome requirements on businesses, including allowing multiple or batch ICTS transactions to be considered. ICTS transactions that are factually similar, or are part of a longer-term engagement or contract, should be considered as a batch and not on an individual basis. As part of this, the Department should include factors for making such a determination, such as whether the entity has no exhibited breaches, existing licenses ensuring security, etc. If a buyer of ICTS should pursue a license with the intent of acquiring a license that applies to multiple transactions from a single entity, requirements should be limited to what the buyer knows and is able to determine without breaching their own security and confidentiality.

What categories of information should the Department require or not require, e.g. technical, security, operational information?

The categories of information the Department should require should depend first on the type of entity seeking the license. For example, a manufacturer and a buyer of ICTS will likely have different levels of understanding of the transaction in question and it may be unreasonable to impose the same requirements on a buyer that might otherwise be placed on the manufacturer.

In addition, the information required by the Department as part of this process should be limited to factual information that can be acquired through reasonable effort by a party to assess the national security risk posed by the transaction. Technical information should be limited to what is strictly necessary to assess the national security risk, and business proprietary information should be restricted from potential disclosure to any third parties.

While the Department understands that business decisions must often be made within tight timeframes, the Department may not be able to determine whether a particular ICTS Transaction qualifies for a license or pre-clearance without detailed information and analysis. Considering this tension, should the Department issue decisions on a shorter timeframe if that could result in fewer licenses or pre-clearances being granted, or would the

inconvenience of a longer timeframe for review be outweighed by the potential for a greater number of licenses or pre-clearances being issued?

The Department raises a good question that highlights a significant tension in the implementation of this Rule. However, the question does more to demonstrate the inadequacy of the Rule and its long-term harm to the competitiveness of the U.S. business community. Based on the Department's expected staffing for the Rule, the Chamber contends this question offers a false choice – the Department will have neither the resources nor expertise to deliver decisions on a shorter timeframe for fewer transactions because the question assumes all transactions are the same. The Chamber contends that some transactions will be more complex than others and will therefore require more time to review than other - potentially more straightforward - transactions. The Department should consider a review of its human and financial resources to ensure that the Department will be in a position to discharge its responsibilities under the Rule – or narrowing the scope of reviewable transactions to achieve a similar goal.

How should the potential for mitigation of an ICTS Transaction be assessed in considering whether to grant a license or pre-clearance for that transaction?

The Department should consider a number of factors, including a company's risk management systems and procedures, how a company adheres to risk management standards or principles, and the company's history in regard to breaches and other security incidents, among other things. The Department should clearly outline how such mitigation processes would function before any licensing regime comes into effect.

If a license or pre-clearance request is approved, but the subject ICTS Transaction is subsequently modified, what process should be enacted to avoid invalidation of the license or other form of pre-clearance?

If the ICTS transaction is subsequently modified, the party should notify the Department and provide updated information on the nature of the modification, how it changes the transaction, and any additional pertinent information. Transaction modifications involving changes to the item that do not affect functionality should be acceptable under the existing pre-clearance/license approval. Further, the Department should establish clear criteria regarding whether a modification is material to the risk profile of the transaction and then provide expedited review for those modifications that are material.

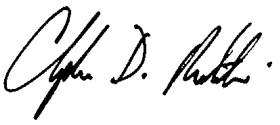
Should holders of an ICTS Transaction license or other form or pre-clearance have the opportunity to renew them rather than reapplying? If so, what factors should be considered in a renewal assessment? What would be the appropriate length of time between renewals? How should any renewal process be structured?

Yes, there should be an opportunity to renew. Renewal factors should include reliability, and low amount of anticipated risk over time. Further, the licensing process should be comprehensive in nature in the first place (e.g. to cover ongoing procurements, maintenance, etc.) so that renewals are not the "norm" but rather the exception where a licensed transaction did not include or foresee an extension or expansion at the time of applying for a license.

Conclusion

Thank you for the opportunity to comment on the Department's proposal. While our members share the Administration's priority to secure ICTS transactions, we continue to have significant concerns with this Rule and urge you to suspend this Rule pending the ICT supply chain review to be performed pursuant to the *America's Supply Chain* EO. The Rule's regulatory impact analysis illustrates, it will result in significant harm to the U.S. economy, businesses, and consumers without a demonstrated national security benefit exceeding its costs. We look forward to continuing to work with the Department—and other federal agencies—to help solve the critical challenges in securing the supply chain.

Sincerely,



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