

February 4, 2021

Ms. Wynn Coggins
Acting Agency Head
U.S. Department of Commerce
1401 Constitution Ave NW
Washington, DC 20230

Dear Acting Agency Head Coggins:

The undersigned urge the Administration to include the Department of Commerce (Department) interim final rule “*Securing the Information and Communications Technology and Services (ICTS) Supply Chain*” (86 FR 4909) under the review pursuant to the Regulatory Freeze Pending Review memorandum issued by White House chief of staff Ronald A. Klain on January 20, 2021.

The interim final rule (IFR) implements Executive Order 13873, “*Securing the Information and Communications Technology and Services Supply Chain*,” which allows the Secretary of Commerce (“the Secretary”) to intervene in substantially all ICTS transactions between U.S. companies and foreign parties in any time period that the Secretary determines that “pose an undue risk to the U.S.’s critical infrastructure, digital economy, national security, or the safety of U.S. persons.” While the Department performed a thoughtful examination of the record and worked to address some of the concerns of industry, significant and serious issues remain. Therefore, we request that the Administration use the time afforded by the freeze of the IFR to reevaluate the efficacy of the policy articulated in the underlying EO 13873, and develop a coordinated strategy for managing legitimate national security risks related to ICTS.

Our members are committed partners of the federal government in seeking to achieve our common goal of safeguarding national security while strengthening the nation’s economy and technological leadership. We also share a commitment to ensuring that ICTS transactions do not pose undue risks to national security. However, we believe that the IFR in its current form will not provide the level of security intended and may, in fact, undercut U.S. competitiveness abroad. The IFR is too broadly constructed, it provides almost unfettered authority to the Secretary to block or unwind transactions, affected parties have no mechanism to appeal or challenge a determination by the Secretary, and it is duplicative and/or overlaps with existing regimes designed to protect against malicious actors from exploiting the ICTS supply chain.

We are not alone in this position. The comments filed on the initial ICTS Supply Chain notice of proposed rulemaking demonstrate significant public concern with the rule.¹ Broadly, these comments raise multiple concerns with the rule, including: (i) a lack of sufficient legal clarity to U.S. companies to identify transactions that could fall within its scope; and (ii) the effective grant to the Secretary of Commerce the authority to prohibit an activity or transaction *after* it has been completed. Although Commerce provided additional clarity on this and other areas in the IFR, the scope remains incredibly broad such that almost all ICTS transactions with

¹ Rulemaking docket, “Securing the Information and Communications Technology and Services Supply Chain,” Department of Commerce, DOC-2019-0005. <https://beta.regulations.gov/docket/DOC-2019-0005>

named foreign adversaries will be subject to review. Implementing the IFR “as is” could create significant uncertainty in the business community; disrupt global supply chains; and make a range of trade and investment decisions unnecessarily difficult. It will likely also serve to erode trust in U.S. companies, marking them as unreliable business partners. The net impact of these negative consequences could undermine the much-needed economic recovery from the pandemic that is a priority of the Administration and a central feature of the *Biden-Harris American Rescue Plan*.²

We recognize that it may sometimes be necessary to scrutinize certain transactions for national security purposes. The IFR fails to work in concert with other national security programs in a way that ensures consistent decisions in implementing mitigation measures and minimizes economic damage to an impacted party. Otherwise, they may inflict significant harm on U.S. businesses and consumers, all without a corresponding national security benefit. While the Department did include changes to better incorporate the Department of Treasury’s Committee on Foreign Investment in the United States (CFIUS), the Department should provide a more deliberate discussion of how the IFR would complement other federal programs without creating redundancy and subjecting transactions to multiple national security reviews.

For the reasons outlined above, the Administration should indefinitely suspend Executive Order 13873 and freeze implementation of the IFR in order to perform a careful review, as it is doing for Executive Order 13920, “*Securing the United States Bulk-Power System*”.³ Indeed, both EO 13920 and EO 13873 are based on the same statutory authority, contain several common features, and have caused significant concern for their substantial regulatory overreach. Further, the Biden Administration could use this time to develop a coordinated strategy for managing legitimate national security risks associated with supply chains, as called for by industry and other key stakeholders – including the U.S. Cyberspace Solarium Commission.⁴ At a minimum, Commerce should halt this IFR and begin again with a notice of proposed rulemaking that seeks public comment to address the numerous substantive concerns with this IFR.

Thank you for your consideration. We look forward to working with you on this important issue.

Sincerely,

Alliance for Automotive Innovation
American Association of Exporters and Importers (AAEI)
American Automotive Policy Council

² “President Biden Announces American Rescue Plan,” The White House, January 20, 2021. <https://www.whitehouse.gov/briefing-room/legislation/2021/01/20/president-biden-announces-american-rescue-plan/>

³ Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (January 20, 2021) (Sec. 7(c)). <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/>

⁴ *Cyberspace Solarium Commission White Paper #4: Building a Trusted ICT Supply Chain*, U.S. Cyberspace Solarium Commission, October 2020, <https://www.solarium.gov/public-communications/supply-chain-white-paper>.

American Gas Association
American Trucking Associations
ACT | The App Association
Autos Drive America
BSA | The Software Alliance
The Center for Procurement Advocacy (CPA)
Coalition of Services Industries (CSI)
CompTIA
Computer & Communications Industry Association
Consumer Technology Association
CTIA
Edison Electric Institute (EEI)
Global Business Alliance
Information Technology Industry Council
Internet Association
IPC
Motor & Equipment Manufacturers Association
National Electrical Manufacturers Association (NEMA)
National Foreign Trade Council (NFTC)
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
United States Council for International Business (USCIB)
USTelecom–The Broadband Association

cc:

Mr. Ron Klain, White House Chief of Staff
Mr. Rob Fairweather, Acting Director, Office of Management and Budget
Mr. Brian Deese, Director, National Economic Council
Hon. Cedric Richmond, Senior Advisor to the President
Ms. Anne Neuberger, Deputy National Security Advisor for Cyber and Emerging Technology
Mr. Peter Harrell, Senior Director, National Security Council
Mr. Mike Harney, Chief of Staff, Department of Commerce
Mr. Quentin Palfrey, Deputy General Counsel, Department of Commerce
Mr. Henry Young, Senior Counsel and Senior Policy Advisor, Department of Commerce