



February 11, 2020

The Honorable Paul Ray
Office of Information and Regulatory Affairs (OIRA)
Office of Management and Budget (OMB)
Eisenhower Executive Office Building
Washington, D.C. 20503

Dear Administrator Ray:

On behalf of National Taxpayers Union, I write urging you to review a Proposed Rule from the Department of Commerce, “Securing the Information and Communications Technology and Services Supply Chain” (RIN 0605-AA51), as a regulatory action that is extremely likely to be significant if allowed to take effect as written.¹ Additionally, we request an opportunity to meet with you to discuss this matter of great importance to American taxpayers.

As you well know, the Office of Information and Regulatory Affairs (OIRA) has the authority under Executive Order 12866 to review “significant regulatory actions” in both the proposed and final rule stages.² A “significant” rule is defined as one that may:

- “(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.”³

We believe the Proposed Rule from the Department of Commerce meets the first condition outlined above, which also makes it an “economically significant” regulatory action.⁴ Though OIRA concluded its EO 12866 Regulatory Review of the Proposed Rule on November 19, 2019, and determined the Proposed Rule was not

¹ Department of Commerce. (2019). “Securing the Information and Communications Technology and Services Supply Chain.” RIN 0605-AA51, DOC-2019-0005-0001. Retrieved from: <https://www.regulations.gov/document?D=DOC-2019-0005-0001> (Accessed February 5, 2020.)

² E.O. 12866 of September 30, 1993, “Regulatory Planning and Review.” Retrieved from: <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf> (Accessed February 5, 2020.)

³ Ibid., 2.

⁴ Carey, Maeve P. “Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the Federal Register.” Congressional Research Service, Updated September 3, 2019. Retrieved from: <https://crsreports.congress.gov/product/pdf/R/R43056> (Accessed February 5, 2020.)

economically significant,⁵ EO 12866 indicates OIRA may only waive further review during the Final Rule stage if “there has been no material change in the facts and circumstances upon which the regulatory action is based.”

⁶ We believe that the significant response to the Proposed Rule from stakeholders represents a material change in the facts and circumstances upon which the regulatory action is based, and therefore the Proposed Rule merits a closer examination from OIRA before reaching the Final Rule stage.

National Taxpayers Union and 20 other taxpayer and consumer advocacy groups submitted comments on the Proposed Rule to the Commerce Department on January 10, 2020, expressing our deep concerns with the proposal. We wrote:

“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.”⁷

National Taxpayers Union believes that the expansive definitions of “transaction” and “foreign adversary” in the Proposed Rule, along with the lack of due process for affected entities, would adversely affect productivity, competition, and jobs across many different sectors of the economy.

Some of America’s broadest trade associations, representing businesses large and small across the country, clearly agree. The U.S. Chamber of Commerce wrote in its comments on the Proposed Rule:

“While our members share the Administration’s priority to secure ICTS transactions, this rulemaking proposes to provide the Secretary with significant authority to intervene in, block, and unwind essentially any ICTS transaction, with little to no accountability, transparency, or coordination with other government programs. This could result in significant harm to the U.S. economy, businesses, and consumers without a corresponding national security benefit.”⁸

And the Internet Association wrote in its comments:

“It is critical the U.S. government avoid promoting policies that adversely impact internet companies and their substantial contributions to the U.S. economy. IA has concerns that, as drafted, the proposed rule lacks important procedural and substantive safeguards that are essential to a fair, transparent, and effective regulatory regime. As a result, it could create significant adverse consequences for U.S. businesses and U.S. digital leadership without a corresponding benefit to U.S. national security.”⁹

⁵ OIRA. (2019). “OIRA Conclusion of EO 12866 Regulatory Review.” Retrieved from: <https://www.reginfo.gov/public/do/eoDetails?rrid=129511> (Accessed February 5, 2020.)

⁶ E.O. 12866 of September 30, 1993, “Regulatory Planning and Review.” Retrieved from: <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf> (Accessed February 5, 2020.)

⁷ Lautz, Andrew. “Coalition of 21 Organizations Urges Significant Changes to Proposed Commerce Rule.” National Taxpayers Union, January 10, 2020. Retrieved from: <https://www.ntu.org/publications/detail/coalition-of-21-organizations-urges-significant-changes-to-proposed-commerce-rule> (Accessed February 5, 2020.)

⁸ “U.S. Chamber of Commerce ICTS Supply Chain Comments.” U.S. Chamber of Commerce, January 10, 2020. Retrieved from: <https://www.uschamber.com/comment/us-chamber-of-commerce-icts-supply-chain-comments> (Accessed February 5, 2020.)

⁹ “IA Filing on Proposed Rule Securing ICTS Supply Chain.” Internet Association, January 13, 2020. Retrieved from: https://internetassociation.org/files/ia_filing-on-proposed-rule-securing-icts-supply-chain_jan-2020_trade/ (Accessed February 5, 2020.)

Clearly, the trades and businesses most affected by the Proposed Rule share our concerns that it will adversely affect in a material way the economy, many different sectors of the economy, productivity, competition, and jobs.

We believe that the comments of 21 taxpayer and consumer advocates, along with numerous companies and trade associations that will be directly impacted by the Proposed Rule, constitute material changes in the facts and circumstances upon which the regulatory action is based. On this basis alone, we encourage you to review the Proposed Rule as economically significant.

We appreciate the critical role OIRA plays in the regulatory process, and we share the goals you laid out before the Senate Homeland Security and Governmental Affairs Committee in December: “Promoting cost-benefit analysis; making the regulatory process more democratic; facilitating interagency review; responsibly updating federal statistical and information policy; vindicating Congress’s right to review regulations; and leaving OIRA an even better place to work than I found it[.]”¹⁰ We stand ready to assist in your review of this Proposed Rule, and we thank you in advance for your time and consideration.

Sincerely,

Andrew Lautz
Policy and Government Affairs Associate

¹⁰ “Opening Statement of Paul J. Ray.” Senate Committee on Homeland Security and Governmental Affairs, December 4, 2019. Retrieved from: <https://www.hsgac.senate.gov/imo/media/doc/Prepared%20Statement-Ray-2019-12-04.pdf> (Accessed February 5, 2020.)