



January 25, 2021

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

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

On behalf of National Taxpayers Union (NTU), the nation's oldest taxpayer advocacy organization, I write in strong opposition to the interim final rule (IFR) issued by the U.S. Department of Commerce on January 19, "Securing the Information and Communications Technology and Services Supply Chain." The IFR would grant sweeping regulatory powers to the Secretary of Commerce, including the ability to halt or unwind business transactions by American companies, with little or no recourse available to the affected businesses. The rule represents significant regulatory overreach by the prior administration, and we are asking this Administration and Commerce Department to expeditiously withdraw the IFR.

Last January, NTU led a coalition of taxpayer and consumer advocacy organizations in registering objections to the Department's Proposed Rule concerning the ICTS supply chain.<sup>1</sup> Among the coalition's many objections, we wrote that:

- **The Department could take a broad view of how to define an ICTS "transaction"** subject to the Department's review under the Proposed Rule, including how to interpret the terms "dealing in" ICTS or "use of" ICTS. In its IFR, the Department offers little clarity as to how broadly these terms could be interpreted, and NTU remains concerned that Commerce will broadly interpret its ability to interfere with business transactions.
- **The Department could develop a long list of foreign adversaries under the Proposed Rule**, thereby subjecting almost any ICTS transaction in those countries to Commerce review and oversight. While the IFR defines a narrower list of six adversaries, it allows the Secretary to add to or amend the list of foreign adversaries at any time.

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<sup>1</sup> 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>

- **The Department’s definition of entities impacted by the Proposed Rule encompassed “every part of America’s world-leading communications and information technology sectors.”** This is confirmed by the IFR’s estimate that more than 4.5 million firms could be significantly impacted at a cost to the U.S. economy of up to \$20.2 billion.

Unfortunately, the IFR has not eased any of NTU’s concerns with last year’s Proposed Rule. Instead, we must register a number of new concerns based on the IFR:

- The Department’s attempts to more clearly define certain terms only underscore that Commerce believes its regulatory powers have no limits when it comes to ICTS transactions between private parties.
- The IFR will lead to tremendous amounts of business uncertainty, given the Department refuses to provide clarity on its processes or procedures in many parts of the rule.
- The Department itself admits that the IFR could cost firms a significant amount of money, and that firms will need to either pass these costs on to customers, or absorb the costs and suffer losses. The Department offers a proverbial shrug to these concerns, stating that this rule’s uncalculated benefits to national security are worth the aforementioned costs to millions of businesses.

For all of the above reasons and more, we ask that the Department halt its implementation of this IFR and withdraw the rule.

### *Commerce Appears to See No Limits on Its Authority Under the IFR*

At several points throughout the IFR, the Department attempts to clarify definitions that commenters considered vague in the Proposed Rule. Unfortunately, many of the Department’s proposed definitions raise a whole new host of concerns for the businesses affected by the IFR and for free market advocates like NTU.

Take, for example, the IFR’s proposed definition of a “person owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary.” The extraordinarily broad definition (emphases ours) includes qualifiers that could loop not only millions of firms but millions of individuals into Commerce-initiated investigations under the rule:

“...*any person, wherever located, who acts as an agent, representative, or employee, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign adversary or of a person whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in majority part by a foreign adversary; any person, wherever located, who is a citizen or resident of a*

*nation-state controlled by a foreign adversary; any corporation, partnership, association, or other organization organized under the laws of a nation-state controlled by a foreign adversary; and any corporation, partnership, association, or other organization, wherever organized or doing business, that is owned or controlled by a foreign adversary.”*

This definition, while sweeping and broad, will contribute to significant confusion and uncertainty for businesses as well. How will the Department define whether a person is “indirectly supervised, directed, controlled, financed, or subsidized” by a foreign adversary? Will the participation of a citizen of, say, China or Hong Kong, or even a U.S. citizen who resides in China or Hong Kong, make them a “person owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary” under the IFR? Given the amount of business activity some American companies have in China, the vague, expansive definition above is deeply concerning.

The Department writes that the Secretary will weigh the following factors in determining whether a transaction is subject to influence from a foreign adversary:

“[w]hether the party or its component suppliers have headquarters, research, development, manufacturing, test, distribution, or service facilities or other operations in a foreign country, including one controlled by a foreign adversary” ... “[whether there are] personal and professional ties between the party—including its officers, directors or similar officials, employees, consultants, or contractors—and any foreign adversary,” ... “[and] any other criteria that the Secretary deems appropriate.”

Would any American business with a facility in one of the six listed foreign adversaries be subject to Commerce’s far-reaching authority under the IFR? Would an employee or official from a company who has a relative living in a nation-state controlled by one of the foreign adversaries be considered to have “personal” ties to a foreign adversary? The sweeping language in the IFR suggests the answer to both questions is ‘yes.’

Describing risks to U.S. telecommunications infrastructure early in the IFR, Commerce includes as an example the “interconnection via the internet of computing devices embedded in everyday objects” and “applications (‘apps’), which may be downloaded from app stores or web browsers by a user to a mobile device.” Does Commerce intend to halt, unwind, or otherwise interfere with Internet of things (IoT) devices or applications that are used by millions or even tens of millions of Americans every day? Does Commerce see *any* hardware or software connected to the internet as under its purview for purposes of the IFR? The Department’s language suggests the answer to both questions is ‘yes,’ and, if so, this IFR could have a chilling effect on consumers and producers throughout the country.

Lastly we note -- as above -- that the Department has deemed the Secretary has the *sole* authority to “add to, subtract from, supplement, or otherwise amend the list” at any time. While the IFR’s list is limited to six foreign adversaries, a future Secretary effectively has a blank page to add to this list, and create further disruption and uncertainty to American business operations overseas.

### *The IFR Will Contribute to Tremendous Business Uncertainty*

While some of the definitional clarifications above raise new concerns for NTU that we did not have under the Proposed Rule, we are also troubled by the Department’s *lack* of detail or clarity at several points in the IFR. We believe that the Department’s ambiguity will contribute to significant confusion, worry, and compliance costs for potentially millions of U.S. businesses.

The Department acknowledges that commenters “argued that the Proposed Rule was overly broad” in addressing the scope of covered ICTS transactions. Their response is to wave off these concerns, writing that:

“The Department concludes that categorical exemptions of specific industries or geographic locations are unwarranted at this time...”

The Department also refuses to commit to working with industry partners who may be affected by the IFR:

“The Department has declined to add specific provisions relating to collaborating with industry on ICTS Transaction determinations.”

Besides a generally dismissive approach to the businesses that may be negatively impacted by the IFR’s expansive and disruptive components, the Department also makes clear that it believes it can investigate *any* affected business’s information at *any* time. The Department writes that when making an initial determination on an ICTS transaction the Secretary may review “any available information,” and may require information from parties to an ICTS transaction under oath “either before, during, or after an ICTS transaction under review.”

If these due process concerns were not enough, the Department does not guarantee the affected parties’ right to a meeting with Commerce on their affected transactions, only writing that the Secretary “may” grant a meeting at their own discretion. The Department also declines to set up any kind of clear and consistent standards for reviewing ICTS transactions, instead declaring that it will review *all* transactions on a “case-by-case basis.”

All of the above will contribute to significant uncertainty for *any* American business, large or small, involved in *any* stage of the ICTS supply chain.

### *The IFR Could Pose Significant Costs and Burdens on Millions of Firms*

We are glad the Department acknowledges that the IFR would be economically significant, given the White House Office of Information and Regulatory Affairs (OIRA) previously determined that the Proposed Rule was *not* economically significant.<sup>2</sup> Indeed, as it turns out, even the *lower bound* of the IFR's estimated economic impact easily exceeds the \$100-million threshold for rules to be deemed "economically significant."<sup>3</sup>

The Department estimates between 267,000 and 4.5 *million* firms will be affected by the IFR, for a total economic impact of between \$235 million and \$20.2 *billion*. A significant portion of the IFR's economic impact will fall on small entities, up to \$10.9 billion.

Commerce admits that:

"...firms will have to absorb those costs and/or pass them along to their consumers in the form of higher prices. Either action will reduce the profits of firms. Due to their lack of market power, and their lower profit margins, *small firms may find it difficult to pursue either or both of those responses while remaining viable.*"

The Department's response is to proverbially shrug its shoulders, insisting that the "primary direct benefit" of *theoretical*, impossible-to-measure improvements to national security outweigh the direct, measurable potential costs for up to millions of businesses large and small. This justification sets a dangerous precedent, paving the road for regulators to expand their power without end in the name of vaguely-defined "national security." As advocates of limited government and a 'light touch' approach to federal regulatory policy, we are significantly concerned by this language from the Department.

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<sup>2</sup> OIRA. (2019). "OIRA Conclusion of EO 12866 Regulatory Review." Retrieved from: <https://www.reginfo.gov/public/do/eoDetails?rrid=129511> (Accessed January 21, 2021.)

<sup>3</sup> For more, see: Lautz, Andrew. "Administration Should Halt Rule that Gives Government 'Significant and Undefined Powers.'" National Taxpayers Union, February 11, 2020. Retrieved from: <https://www.ntu.org/publications/detail/administration-should-halt-rule-that-gives-government-significant-and-undefined-powers>

All of the above leads us to the conclusion that the only appropriate recourse is for the Department to halt implementation of the IFR and withdraw the rule. Should you have any questions for NTU or if you would like to discuss this further, I am at your disposal.

Sincerely,

Andrew Lautz, Policy and Government Affairs Manager