



January 10, 2020

Henry Young
Senior Technology Policy Advisor
Office of the Secretary
United States Department of Commerce
1401 Constitution Ave NW
Washington, DC 20230

Re: Public Comments from the American Chemistry Council on ‘Proposed Rule for Securing the Information and Communications Technology and Services Supply Chain’ (84 FR 65316)

Dear Mr. Young:

The American Chemistry Council appreciates the opportunity to comment on the U.S. Department of Commerce’s proposed rule for “Securing the Information and Communications Technology and Services (ICTS) Supply Chain” (“Proposed Rule”), which would implement Executive Order 13873 issued on May 15, 2019.

ACC proactively engages on cybersecurity issues impacting U.S. chemical manufacturers. In 2001, the ACC created the Responsible Care® Security Code, a stringent, mandatory security program for ACC member companies. Since it was established, ACC member companies have invested more than \$23 billion to further enhance their site security, transportation security, and cybersecurity. The Security Code is the gold standard for the industry and serves as a model for regulatory programs around the world. With cybersecurity threats continuing to evolve in complexity and sophistication, our members fully recognize the importance of addressing this growing threat. Protecting the technology that helps run facilities and the valuable information regarding chemical formulas and customer databases from a potential cyber-attack are a primary focus for our industry.

We also note that ICTS is critical to seamless and reliable emergency response services in the chemical industry. ACC’s CHEMTREC emergency response service manages numerous process safety and transportation safety and security networks that absolutely depend on efficient, uninterrupted and reliable communications systems. CHEMTREC communications must operate without interruption or delay in the event of an emergency, as CHEMTREC acts as a 9-1-1 for the chemical industry for spills and releases. CHEMTREC networks act as safety brigades to bring in necessary reinforcements.

Given our strong support of stronger cybersecurity protections and critical emergency response capabilities in the U.S. chemical industry, we acknowledge the importance of addressing national security concerns related to ICTS. However, we are concerned that the Proposed Rule as drafted



would increase uncertainty in the U.S. and global business environments and could adversely impact U.S. chemical manufacturers. To summarize, we are concerned that the proposed rule:

- Does not provide sufficient notice to inform industry of its regulatory obligations in advance of a designation of foreign adversary and subsequently a preliminary determination of a prohibited transaction;
- Provides nearly unlimited authority for the Department of Commerce to intervene in virtually any commercial transaction between U.S. companies and their foreign counterparts that involves technology;
- Provides little to no due process, accountability, transparency, or coordination with other government programs that are also designed to protect national security;
- Places insufficient emphasis on voluntary mitigation measures by companies; and
- Threatens to cause substantial business damages to companies through government-imposed mitigation measures without resource to receive compensation.

We also recommend that the Administration:

- Narrow the scope of the Proposed Rule by focusing on problematic transactions that pose a demonstrated – as opposed to theoretical – national security risk and on direct uses of ICTS by U.S. companies;
- Clarify whether the Proposed Rule may also apply to transactions of wholly owned foreign subsidiaries of U.S.-headquartered companies;
- Amend the Proposed Rule in such a way so as to avoid unnecessarily broad actions that could undermine chemical manufacturing in the United States and the associated research and development and innovation;
- Ensure that Proposed Rule prioritizes risk mitigation by companies to a transaction over preliminary and final determinations of prohibited transactions;
- Draft a separate proposed rule that lays out that process for designating a foreign adversary and provide a public consultation (e.g., notice and comment and hearings) on that proposed rule;
- Amend the Proposed Rule by offering U.S. companies an opportunity for the Administration to pre-clear their transactions;
- Balance the authority of the Secretary of Commerce with strong roles for other important Cabinet officials in the ICTS, national security, and trade arenas;
- Establish an interagency committee regarding ICTS transactions, similar to the Committee on Foreign Investment in the United States (CFIUS);

- Require that the Secretary (or an interagency committee as we have recommended) consider outside information from stakeholders in making a determination of a prohibited transaction;
- Ensure that the Proposed Rule protects confidential business information (CBI) and outlines the processes underpinning that protection; and
- Redraft the Proposed Rule so that voluntary risk mitigation is the first step that companies could take on their own, before the government decides to make any preliminary or final determinations regarding prohibited transactions or mandatory mitigation measures.

Below, we outline the above concerns in greater detail, share our practical perspectives on possible impacts, and offer recommendations for improving the drafting of any final rule and associated rules, processes, and guidance.

U.S. Chemical Manufacturers Are Also ICTS Users

The U.S. chemical industry has a clear stake in Executive Order and the Proposed Rule, since it relies on ICTS to operate and compete. It is a \$553 billion dollar enterprise, supporting more than 25 percent of U.S. gross domestic product (GDP), and provides over 542,000 skilled, good-paying American jobs, with production in nearly every state. Thirty percent of these jobs are export dependent. And because over 96 percent of manufactured goods are touched in one way or another by chemistry, the chemicals industry is the foundation for American manufacturing. U.S. chemical manufacturers are digitizing their operations and will increasingly rely on digital technologies to enhance their competitiveness, including 5G wireless communications, the Internet of Things, artificial intelligence, and big data.

Since 2010, chemical manufacturers in the United States have announced approximately \$201 billion of investment in new chemicals and plastics production capacity. More than 60 percent of that capacity stems from foreign direct investment. Today, American chemical manufacturers produce 15 percent of the world's chemicals. They are one of the top exporting industries in the United States, accounting for 10 percent of all U.S. exports, which amounted to \$140 billion in 2018. The U.S. trade surplus in industrial chemicals was \$31 billion in 2018, and that surplus is estimated to grow to \$61 billion by 2024.

These investments and global trade in chemicals cannot happen without ICTS, which will underpin the strength and competitiveness of the U.S. chemical industry in the years to come.

The Breadth of the Proposed Rule Will Impact the Ability of U.S. Chemical Manufacturers to Compete, Invest, and Trade

The ability of U.S. chemical manufacturers to compete, invest, trade, and grow jobs in today's digitized world hinges on their access to supplies of world class ICTS. U.S. chemical manufacturers purchase ICTS not just from vendors in the United States but from around the

world. ICTS are essential to the competitiveness of U.S. chemical manufacturers, including with respect to research and development (R&D) and innovation.

The Proposed Rule as drafted is overly broad in scope and could potentially cover all ICTS purchased by U.S. chemical manufacturers and their foreign subsidiaries before and after May 15, 2019. Our understanding is that the Proposed Rule could apply to all ICTS transactions including those between 'foreign adversaries' and wholly owned foreign subsidiaries of U.S.-headquartered companies. As such, ACC is concerned that even the possibility of government scrutiny of transactions between U.S. chemical manufacturers and non-U.S. vendors of ICTS could lead to unintended consequences.

The final rule must specify that only transactions involving direct use of ICTS will be subject to reviews. Without this clarification, some or all U.S. chemical manufacturers might be forced to assume that all potential transactions involving ICTS are potentially prohibited. Industry-wide adoption of this perspective may result in a chill in R&D in the U.S. or lead to companies investing abroad to further their digitization strategies.

If a transaction is determined to be prohibited, the costs of unwinding the transaction or replacing ICTS already installed in U.S. chemical manufacturer facilities would be prohibitively high. In a low margin industry, unplanned, unexpected variable costs can make or break a company's profitability and competitiveness. Instead of spending their resources on R&D and innovation, companies would then be forced to reallocate their resources to establishing new businesses relationships with vendors and switching to entirely new ICTS systems.

ACC Recommendations: In light of these possible impacts, we urge Commerce to 1) narrow the scope of the Proposed Rule by focusing on problematic transactions that pose a demonstrated – as opposed to theoretical – national security risk and on direct uses of ICTS by U.S. companies; 2) clarify whether the Proposed Rule may also apply to transactions of wholly owned foreign subsidiaries of U.S.-headquartered companies; 3) amend the Proposed Rule in such a way so as to avoid unnecessarily broad actions that could undermine chemical manufacturing in the United States and the associated research and development and innovation; and 4) ensure that Proposed Rule prioritizes risk mitigation by companies to a transaction over preliminary and final determinations of prohibited transactions.

The Process for Designating a "Foreign Adversary" Must Provide Clarity and Certainty to Stakeholders (§ 7.2 Definitions)

As a starting point, it is not clear to us how the Secretary of Commerce and other U.S. government leaders will designate a 'foreign adversary'. The designation of a 'foreign adversary' governs the process for determining whether transactions are prohibited. U.S. chemical manufacturers seek clarity and certainty on how this process would work in practice.

We see three possible options for providing stakeholders the necessary clarity and certainty regarding designation of foreign adversaries: 1) the Administration could propose a separate rule on providing advanced notice of designation of foreign adversaries prior to any determination of prohibited transactions and seek public comment on those designations; 2) as a part of a separate

proposed rule, the Administration could propose an explicit list of foreign adversaries and ask stakeholders to provide public comments on that list; and 3) the Administration as a part of a revised proposed rule or a separate proposed rule, the Administration could draft a “white list” of allies, such as members of the North Atlantic Treaty Organization (NATO), that would be exempted from foreign adversary designations.

Both stakeholders and the Administration would benefit from a public consultation on proposed designations of foreign adversaries, a list of foreign adversaries, and/or a “white list” of allies. Stakeholders could provide the best available information from their perspectives. The Administration could take that information into account in designation decisions.

ACC Recommendations: Prior to any determinations of prohibited transactions, Commerce should draft a separate proposed rule that lays out that process for designating a foreign adversary and provide a public consultation (e.g., notice and comment and hearings) on that proposed rule. As a part of that proposed rule, we recommend that Commerce include a transparent methodology for identifying possible foreign adversaries and specific points of communication to interested persons on whether the designation of a foreign adversary may impact business transactions. As an interim measure until such time as the proposed rule can be completed following opportunity for notice and comment, Commerce should provide as much clarity as possible on which countries, companies, or non-state actors are ‘foreign adversaries’. For example, Commerce could significantly lessen the uncertainty of the Proposed Rule by establishing a ‘white list’ through the rule itself or a separate rule that specifies that all the North Atlantic Treaty Organization members or other treaty allies are not foreign adversaries.

U.S. Chemical Manufacturers Do Not Pose Undue or Unacceptable Risks to National Security or the U.S. Digital Economy

U.S. chemical manufacturers are focused on manufacturing and supplying chemicals to broad segments of the U.S. economy (e.g., agriculture, automotive, and building and construction). ICTS are essential for them to compete in a global business environment. They may purchase ICTS through vendors in the United States, but ultimately those goods and services may originate from outside the United States. As U.S. chemical manufacturers digitize their operations, they will require key components and services that come from abroad.

Scrutiny of their transactions by the Administration – which very well could be public in nature – could lead to brand denigration and negative pressures on valuations, thereby undermining the promise of the U.S. chemical industry, its export potential, and its investments in the United States. If U.S. chemical manufactures cannot purchase necessary ICTS in the United States due to the possibility of government scrutiny, they may choose to focus on digitization of operations abroad – to the detriment of their operations and competitiveness in the United States.

Furthermore, many U.S. chemical manufacturers are small and medium-sized enterprises, whose ICTS transactions may constitute a substantial portion of their innovation and R&D expenses. Government scrutiny of their transactions would force them to allocate more resources towards compliance and less towards innovation and R&D.

Taken as a whole, the ICTS transactions of U.S. chemical industry do not pose undue or unacceptable risks to national security or the U.S. digital economy. In fact, the greater risk to national security, the U.S. digital economy, and U.S. R&D and innovation would be if the Administration decides to prohibit significant numbers of ICTS transactions past and present – without giving companies opportunities to provide information on their transactions or mitigate any risks on their own without the force of government.

ACC Recommendations: We urge Commerce to narrow the scope of the proposed rule by limiting any reviews of transactions to demonstrated national security risks. We also urge the Secretary to amend the proposed rule by offering U.S. companies an opportunity to get their transactions pre-cleared by the U.S. government. The resulting data from these pre-clearances would better inform the U.S. government of the universe of transactions that could pose demonstrated risks to national security. These recommendations will result in more time and resource-efficient reviews that in fact address national security risks, as opposed to chasing possible national security risks. If Commerce takes on board these recommendations, they could make quicker decisions on whether to exclusion broad classes of economic actors in the U.S. economy, such as U.S. chemical manufacturers.

An Interagency Committee Would be Better Suited to Review ICTS Transactions

The Proposed Rule gives the Secretary of Commerce significant authority and discretion to "prohibit any acquisition, importation, transfer, installation, dealing in, or use of any information and communications technology or service (a "transaction") subject to United States jurisdiction", depending on the Secretary's designation of a 'foreign adversary'. The terms in this language are vague and in theory could encompass all ICTS transactions by U.S. companies. We recommend that the proposed rule or subsequent guidance define these terms clearly and offer examples of transactions that would necessitate a review.

Reviews of such transactions would attract significant political and public attention and could unnecessarily cause harm to the brands and valuations of U.S. chemical manufacturers. The Proposed Rule should avoid causing this harm and offer companies opportunities to learn about possible reviews and the earliest possible stages and provide the best available information and evidence regarding the specific circumstances of their respective transactions.

We also note that ongoing national security review that might also cover possible transactions, such as under the Committee on Foreign Investment in the United States. U.S. chemical manufacturers would experience less uncertainty in the implementation of any final rule if it deferred to ongoing reviews and explained why these reviews are insufficient before initiating reviews of possible prohibited transactions.

ACC Recommendations: To lessen possible political attention and harm, we would recommend balancing the authority of the Secretary with strong roles for other important Cabinet officials in the ICTS, national security, and trade arenas. Decisions regarding whether to prohibit transactions should not lie solely in the Office of the Secretary of Commerce.

Instead, we suggest that the rule establish an interagency committee, similar to the Committee on Foreign Investment in the United States (CFIUS). This committee would review transactions and make collective decisions about whether a transaction is prohibited. We recommend that it draft a clear and transparent methodology for assessing business and economic effects of prohibiting a transaction and subject that proposed methodology to a public consultation. We also recommend that the committee review whether and how mitigation measures should be imposed on companies that are party to prohibited transactions. This committee would be the first point of contact on a possible prohibited transactions, rather than the Office of the Secretary. If the Administration requires new authority from the Congress to establish such a committee, then we recommend that Commerce seek that authority from Congress.

Enhanced Transparency and Due Process Would Improve the Quality and Effectiveness of the Proposed Rule (*§ 7.100 Commencement of an evaluation of a transaction; § 7.102 Conduct of an evaluation; §7.103 Written determinations; adjustment of transactions; signature, data, and public availability*)

Opportunities for providing public input would give companies a greater stake in helping to implement the EO and the Proposed Rule. Irrespective of the source of information regarding the transaction, it would be useful for Commerce to offer the public an opportunity provide public comment on whether transactions should be prohibited, so as to arm the interagency with the best available information and facts regarding those transactions. A public consultation would be a more transparent first step compared to Commerce making a preliminary determination and then informing the company(ies) involved in the transactions.

U.S. chemical manufacturers would also benefit from opportunities to provide confidential businesses information (CBI) and assurances from Commerce that it will protect that CBI from disclosure to the public. The investments they make in ICTS may be tied to their research and development in new chemicals and therefore their trade secrets. CBI protection will enable U.S. chemical manufacturers to comply with any final rule and make it as effective as possible.

ACC Recommendations: ACC urges Commerce to require in the final rule that the Secretary (or an interagency committee as we have recommended) must consider outside information from stakeholders in making a determination of a prohibited transaction.

We encourage Commerce to enhance the transparency and due process elements of the Proposed Rule, including by providing notice and comment processes and opportunities to submit CBI wherever possible. We urge Commerce to commit in any final rule to protect CBI and outline the processes underpinning that protection.

Furthermore, we urge Commerce to publish final determinations and explanations for decisions in the Federal Register. Stakeholders would benefit from reviewing how the Administration evaluated the transaction and whether its determination is consistent with the EO and its associated implementing regulations. After making a preliminary determination, Commerce could then provide stakeholders with opportunities to the parties to the transaction to provide rebuttals and surrebuttals before making a final determination.

We urge Commerce to provide an appeals process – whether administratively or judicially – so that parties to a transaction have a formal avenue to disagree with.

Companies Should be Offered a Reasonable Opportunity to Make Voluntary Mitigation of Risks in Advance of Mandatory, Government-Imposed Mitigation Measures

To ensure that a final rule is effective and meets its objectives, companies will have to comply. If they understand that their ICTS transactions could pose a risk, they then would be in a better position to define and implement voluntary mitigation measures. Companies will want to avoid mandatory mitigation measures, which may be inefficient and impossible to implement.

ACC Recommendations: We urge Commerce to redraft the proposed rule so that voluntary risk mitigation is the first step that companies could take on their own, before the government decides to make any preliminary or final determinations regarding prohibited transactions or mandatory mitigation measures.

The Proposed Rule Must Include a Path for Companies to Recover Damages

U.S. companies that have invested in ICTS may experience substantial business damages if the Administration forces them to give up property as a part of a mandatory mitigation measure. Government takings of property is covered by federal eminent domain rules. The Proposed Rule as drafted does not contain a process by which affected businesses can request compensation for business damages. Alternatively, if Commerce issues a properly noticed “no buy” list in advance of businesses making a purchase, there would be no regulatory taking and the need to compensate businesses for their losses would not apply. Small businesses could be put out of business entirely through government-imposed mitigation measures and would have no remedy available to them. It is also questionable whether these losses are even insurable in private insurance markets (e.g., for government takings and business interruption).

ACC Recommendation: If Commerce cannot issue a properly noticed “no buy” list, we urge it to develop a process by which companies can request compensation for business damages.

Conclusion

The American Chemistry Council is committed to working with the Department of Commerce and the interagency in their efforts to craft a final rule on ICTS supply chain security that will benefit U.S. chemical manufacturers and support their world-class R&D and innovation in the United States. We look forward to serving as a resource to you during this process.

Best regards,



Ed Brzytwa
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American Chemistry Council