

Before the
U.S. DEPARTMENT OF COMMERCE
Washington, DC 20230

In the Matter of)	
)	
Securing the Information and Communications)	
Technology and Services Supply Chain:)	Docket No. 210325-0068
Licensing Procedures)	RIN-0605-AA60

**COMMENTS OF THE
TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Telecommunications Industry Association (“TIA”)¹ welcomes this opportunity to provide comments to the Department of Commerce in response to the Advance Notice of Proposed Rulemaking (“ANPRM”) aimed at seeking further industry feedback on its ongoing efforts to secure the nation’s information and communications technology and services (“ICT” or “ICTS”) supply chain.² TIA represents the global manufacturers and vendors of trusted ICT equipment and services that empower communications networks worldwide. Our members work to leverage modern global supply chains that have been enabling operations across all segments of the global economy, and all share Commerce’s interest in preserving a trusted ICT network. TIA and its members all have a stake in the broad rules adopted by Commerce earlier this year, and to that end, TIA welcomes Commerce’s willingness to solicit additional input from industry on this critical issue.

¹ TIA is the leading trade association for the information and communications technology (“ICT”) industry, representing companies that manufacture or supply the products and services used in global communications across all technology platforms. TIA represents its members on the full range of policy issues affecting the ICT industry and forges consensus on voluntary, industry-based standards.

² *Securing the Information and Communications Technology and Services Supply Chain: Licensing Procedures*, Advance Notice of Proposed Rulemaking 86 FR 16312 (Mar. 29, 2021).

I. Commerce Should Suspended these ICTS Transaction Rules until a Licensing System has been put into Place.

TIA is no stranger to the national security concerns raised in this docket. As TIA has said numerous times, threats to the ICT supply chain, particularly when these threats come from state-sponsored bad actors, raise serious national security concerns.³ Commerce, and the entire U.S. government, have a critical role to play in mitigating threats to the ICT supply chain and there are times when government action is warranted, however, such action must always be undertaken with significant input from industry. TIA had hoped that the effective date for the Interim Final Rule (“IFR”)⁴ that is the foundation for the questions raised in the ANPRM would be delayed while Commerce and the administration engaged with industry on mitigating the almost universal concerns raised by industry stakeholders in response to the IFR.⁵ Unfortunately, the IFR went into effect last month, though there remains time for the administration to commit to halting any use of this rule until substantial changes have been made as a result of Commerce’s consultation with industry.

TIA was pleased to see the Biden administration’s Executive Order last month that correctly underscored the critical nature of the ICT supply chain and the importance of mitigating potential existing threats.⁶ This Executive Order kicked off a year-long, comprehensive review of the ICT industrial base supply chain by the Secretary of Commerce and the Secretary of Homeland Security.⁷ TIA supports the year-long effort on analyzing threats to the ICT supply chain and ongoing government responses, and we look forward to working with

³ Comments of the Telecommunications Industry Association, Docket No. 210113-0009 (filed Mar. 22, 2021) (TIA Comments).

⁴ Interim Final Rule, 86 Fed. Reg. 4909 (Jan. 19, 2021).

⁵ See eg. Comments of USTelecom, Docket No. 210113-0009 (filed Mar. 22, 2021); Comments of the Cellular Telecommunications Industry Association, Docket No. 210113-0009 (filed Mar. 22, 2021); Comments of the National Association of Manufacturers, Docket No. 210113-0009 (filed Mar. 22, 2021).

⁶ Exec. Order No. 14017, *Securing America’s Supply Chains*, 86 Fed. Reg. 11,849, Sec. 4(iii) (Mar. 1, 2021).

⁷ *Id.* At Sec. 3.

government stakeholders during this process. It is critical that the Secretaries and the administration work with industry in this consultation and that it leads to careful, deliberate government action that correctly balance the need for supply chain security with the burdens additional regulations would place on industry. To that end, TIA urges the administration and Commerce to not implement broad and overbearing regulations on the ICT industry that could adversely affect innovation in the name of supply chain security while undergoing this review.

As we have said in our prior comments, the IFR as written is extremely broad in its jurisdiction and adds substantial regulatory burdens and costs to the ICT industry without addressing an identifiable, concrete benefit to national security.⁸ While the administration reviews the best path forward to working with industry on securing the ICT supply chain, TIA again asks that the administration suspend the IFR as written, or at least commit to not utilizing its investigatory powers. Such a commitment should last until this year-long consultation on the ICT supply chain has concluded and Commerce is able to implement a licensing regime that would lessen the burden of these regulations on the ICTS industry. Halting any investigations under the IFR until the rules have been streamlined and a licensing regime put into place will allow Commerce to issue further guidance to industry on how these rules will be applied, thus limiting the transactions that fall under the IFR's jurisdiction and allowing valuable agency resources and staff time to be efficiently deployed on critical national security issues.

⁸ TIA Comments, section III (explaining how the IFR as written would not have mitigated an attack similar to the SolarWinds breach).

II. Commerce Must Create a Licensing System that Reduces Regulatory Uncertainty on ICTS Industry and the Burden on Commerce Staff.

TIA has supported the Department of Commerce's inclusion of a pre-licensing regime for the ICTS transaction rule since our first comments on this proposed rule.⁹ TIA agrees with the initial Supply Chain Executive Order and the past iterations of the rule in this docket that have underscored the necessity of a pre-licensing or safe harbor system of these rules.¹⁰ TIA thanks Commerce for soliciting further input from industry on how this voluntary licensing system should be structured, and welcomes this opportunity to offer input from TIA's members on how this system should operate. In order for Commerce to efficiently effectuate a potentially unwieldy application system and to provide the ICT industry with the necessary regulatory certainty that enables ICTS industry to continue deploying networks nationwide, TIA and our members support the following:

a. *A Mandated Pre-Clearance Licensing Regime Would Result in Additional Burdens to Commerce and Industry.*

In the ANPRM, Commerce debates the utility of requiring all ICT transactions to go through a licensing request. Specifically, the ANPRM asks for industry feedback on "a regime that would require authorization prior to engaging in an ICTS Transaction" versus a regime that allows entities to seek pre-clearance licenses voluntarily.¹¹ TIA and our members strongly oppose Commerce transforming this docket into a requirement placed on the global ICT industry to receive U.S. government clearance in advance of entering into any private ICTS transaction. A blanket requirement for all ICTS transactions to receive a pre-clearance license would

⁹ Comments of the Telecommunications Industry Association, Docket No. 191119-0084 (filed Jan. 10, 2020).

¹⁰ Executive Order on Securing the Information and Communications Technology and Services Supply Chain, (May 15, 2019).

¹¹ ANPRM at 16313.

represent an unprecedented expanse of government jurisdiction into private transactions without a clear public benefit.

As we have already discussed in this docket, the potential chilling effect due to the regulatory burden and scope of the IFR as written is of deep concern to industry and could impact 5G deployment nationwide.¹² Such a burden would be greatly increased should Commerce require a pre-clearance prior to engaging in a private ICTS transaction. These costs would not be solely felt by industry, however. A mandatory pre-licensing regime for every ICT transaction would drastically increase the burden on Commerce's staff and likely lead to an inundated Commerce staff, thus diverting critical government resources from confronting national security risks. Increasing the load on staff tasked with reviewing every pre-clearance application would additionally result in expanded review times for ICTS transactions and culminate in increased cost and deployment time for next-generation networks in the country.

b. *Commerce Must Implement Commercially Reasonable Timelines and a Presumption of Clearance.*

The ANPRM solicits feedback from industry on timelines for granting pre-clearance license requests, and how Commerce should balance industry's interests in prompt review with Commerce staff's ability to issue decisions quickly. Commerce is correct to seek input on timelines, as ICT business deals need to be executed efficiently in order not to delay deployment. As written, the IFR allows Commerce 120 days for Commerce to conduct an investigation into an ICTS transaction.¹³ As many commenters have already noted, this timeline is not commercially reasonable, and could severely disrupt production schedules.¹⁴ TIA supports other

¹² TIA Comments at 6-7.

¹³ Interim Final Rule, 86 Fed. Reg. 4909 (Jan. 19, 2021).

¹⁴ See eg. Comments of NAM at 4; Comments of USTelecom at 14.

industry associations' suggestion for a 30-day review period for ICTS investigations and would support a similar 30-day review period for pre-clearance requests.¹⁵

The ICT industry needs these commercially reasonable timeframes and certainty regarding their private transactions in order to continue efficiently building out the nation's high-speed networks. To streamline Commerce staff's role in this process, pre-clearance requests could be extended beyond the 30-day window to review through a notification from Commerce, which would also provide industry notice that there is a potential for the transaction to be reviewed. Should Commerce staff not respond within the 30-day window, there should be a presumption that the transaction at issue is cleared and the burden would be on Commerce to show that a delay and lack of a notification to the parties at issue was warranted.

c. Commerce Should Adopt a Trusted Vendor List that Excludes Low-Risk and Longstanding Trusted Vendors from Jurisdiction of these Rules.

An additional way to reduce the burden for a pre-clearance licensing system on Commerce's staff is to reduce the potential number of vendors who would be seeking pre-clearance. As we discussed in our prior comments, TIA supports the creation of a Trusted Vendor list that would remove ICT transactions from the IFR's jurisdiction altogether.¹⁶ This list or certification could take the form of a simplified application and approval process for lower-risk companies, as well as established trusted ICT companies that have been building secure networks in the U.S. for decades. This list would not need to be permanent and could require Trusted Vendors to re-apply to retain this status. TIA was not the only commenter to suggest this idea,¹⁷ and establishing a Trusted Vendor list and a simplified application and

¹⁵ *Id.*

¹⁶ TIA Comments at 7-8.

¹⁷ Comments of the US-China Business Council at 4-5, Docket No. 210113-0009 (filed Mar. 22, 2021).

approval process for these lower-risk and established ICT vendors could substantially reduce the number of pre-clearance applications that Commerce staff receive.

d. *Commerce Should Issue Guidance for the Scope of Transactions that Fall Under the IFR's Jurisdiction.*

To further reduce the burden on Commerce staff, TIA again urges Commerce to work with industry on establishing guidelines on what kinds of transactions would fall under the jurisdiction of the IFR, as these guidelines would reduce the number of transactions submitted to Commerce for pre-clearance.¹⁸ Such guidance should be made with consultation with industry and make it clear what kinds of transactions Commerce is expecting to review and that would be potentially subject to mitigation under the IFR. Commerce can decrease the burden on their staff by issuing guidance to identify transactions where businesses could potentially seek a license and the factors that staff will weigh when reviewing an application. Listing these factors will not only reduce the potential number of pre-clearance applications but will also assist the ICT industry in developing compliance programs and best practices for ICT transactions, thus further reducing regulatory uncertainty.

¹⁸ TIA comments at 6.

CONCLUSION

TIA again thanks the Department of Commerce for this opportunity to continue to provide feedback on these rules. TIA looks forward to continued consultation with industry and government stakeholders on how to enact these rules in a way that serves the critical national security interests at stake in the ICT supply chain, while refraining from imposing broad regulatory burdens on the ICT community that could slow down innovation and/or result in an unworkable process for the government. We share the government's goal in promoting the deployment of trusted and secure next-generation networks, a goal that our members strive towards every day as they produce and manufacture secure and reliable ICT products. We look forward to continuing this important consultation with Commerce and the administration on these issues as these rules continue to be implemented and the year-long review of the ICT supply chain is conducted.

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