1310 L Street, NW, 7th Floor
Washington, DC 20005
cei.org

202 331 1010 main
202 331 0640 fax

January 10, 2020

VIA REGULATIONS.GOV

Secretary Wilbur Ross
Department of Commerce
1401 Constitution Ave., NW
Washington, DC 20230

Re: Comments on Proposed Rule Securing the Information and Communications Technology and Services Supply Chain (84 FR 65316, November 27, 2019, Docket No. DOC-2019-0005, RIN 0605-AA51).

Dear Mr. Ross:

On behalf of the Competitive Enterprise Institute ("CEI"), we are pleased to provide the following comments on the Department of Commerce's proposed regulation concerning the information technology supply chain. Founded in 1984, CEI is a non-profit research and advocacy organization that is dedicated to advancing the principles of limited government, free enterprise, and individual liberty.

For the administration to exercise the authority under the International Emergency Economic Powers Act, 50 U.S.C. § 1701, the statute requires a threat to national security that is unusual and extraordinary.[1]

The threat that is claimed in Executive Order 13873, upon which these regulations are based, is that of the acquisition or use in the United States of any "information and communications technology or services designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries."

Who are these foreign adversaries which so threaten us as to constitute a national emergency? Neither the executive order nor the regulations specify. One would expect if such a threat exists it could at least be named.

There is no doubt that specific instances could constitute a threat to national security and that threat might be unusual and extraordinary. For instance, if the United States learned that a company was purposefully introducing vulnerabilities that could be used to harm it, this might constitute an unusual and extraordinary threat.

But as a category, acquisition or use in the United States of information technology by companies which do business in and are therefore subject to the jurisdiction of, for instance,

[1] 50 U.S.C. § 1701(a).

China is common and occurs every day. Almost every major American technology company has offices in China and is therefore subject to its jurisdiction. For instance, Microsoft entered the Chinese market in 1992. Google entered the Chinese market in 2006. Almost all major American technology companies produce their products, at least partially, in China. In 2014 and 2015, China exported 90.6% of all computers and 70.6% of all smartphones made worldwide.[2] It is impossible for the acquisition or use of such products to be considered unusual and extraordinary.

Furthermore, the statute requires that "Any exercise of such authorities to deal with any new threat shall be based on a *new* declaration of national emergency which must be with respect to such threat." 50 U.S.C. § 1701(b). Each time a new unusual and extraordinary threat occurs, the President must issue a new declaration of national emergency to deal with that threat.

As the Report of the House Committee on International Relations, which drafted the final IEEPA, stated:

> [G]iven the breadth of the authorities, and their availability at the President's discretion upon a declaration of a national emergency, their exercise should be subject to various substantive restrictions. The main one stems from a recognition that emergencies are by their nature rare and brief, and are not to be equated with normal ongoing problems. A national emergency should be declared and emergency authorities employed only with respect to a specific set of circumstances which constitute a real emergency, and for no other purpose. The emergency should be terminated in a timely manner when the factual state of emergency is over and not continued in effect for use in other circumstances. A state of national emergency should not be a normal state of affairs.[3]

The threat specified by the executive order is incredibly broad, vague, and unbounded. And the proposed regulation uses this single declaration of national emergency to attempt to deal with all future threats on this topic. It is hard to imagine any set of future facts would lead to the termination of this emergency; it would be the future normal state of affairs. The statute prohibits such actions.

Lastly, the statute only allows the administration to block the transfer or use of property owned at least partially by foreign governments and their citizens. It does not apply to those merely "subject to the jurisdiction" of a foreign government. Nor does the statute allow the government to prohibit the use in the United States of property wholly owned by American citizens even if it had previously been "designed, developed, manufactured, or supplied by" a foreign national or foreign adversarial government.

We urge the administration to follow the law as passed by Congress and signed by the President. Should the administration learn of any specific unusual and extraordinary threat,

---

[2] Intrepid Sourcing, Consumer Electronics Industry Report, https://intrepidsourcing.com/industry-reports/consumer-electronics-industry-report/.

[3] U.S. Congress, House, Trading with the Enemy Act Reform Legislation, Report of the Committee on International Relations on H.R. 7738, 95th Cong., 1st sess., H.Rept. 95-459 (Washington, DC: GPO, 1977), p. 11.

1310 L Street, NW, 7th Floor Washington, DC 20005 202 331 1010 cei.org

nothing prevents the President from issuing a declaration of national emergency to deal with that threat and prohibit the acquisition of any specific harmful product. But Congress required a new declaration of national emergency for each new threat, not some unbounded and unending declaration for all future threats. The proposed regulation bypasses the authority of Congress to regulate commerce with foreign nations and should be withdrawn.

Sincerely,

Devin Watkins, Attorney
devin.watkins@cei.org
Sam Kazman, General Counsel
sam.kazman@cei.org
Competitive Enterprise Institute
1310 L Street NW, 7th Floor
Washington, DC 20005
(202) 331-1010