

DEPARTMENT OF COMMERCE ISSUES PROPOSED RULE ESTABLISHING NATIONAL SECURITY REVIEW FOR ACQUISITIONS OF INFORMATION AND COMMUNICATIONS TECHNOLOGY AND SERVICES

The U.S. Department of Commerce has issued a proposed rule that would empower the agency to review and restrict acquisitions of information and communications technology and services ("ICTS") in the interest of U.S. national security and without many procedural safeguards. The proposed rule implements Executive Order ("EO") 13873 of May 15, 2019, under which President Trump imposed restrictions on the "acquisition, importation, transfer, installation, dealing in, or use of any information and communications technology or service (transaction) by any person, or with respect to any property, subject to the jurisdiction of the United States," if the U.S. Government determined that the transaction poses an undue threat to U.S. national security.

Under the proposed rule, the Commerce Secretary will have the authority to prohibit any acquisition, importation, transfer, installation, dealing in, or use of any information and communications technology or service subject to U.S. jurisdiction. The proposed rule sets three conditions that must be met for the Commerce Secretary to exert this power:

1. The transaction must involve property in which a foreign country or national has an interest.
2. The transaction must include ICTS designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary.
3. The transaction must pose certain undue risks to critical infrastructure or the digital economy in the United States or certain unacceptable risk to U.S. national security or U.S. persons.

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The proposed rule's definition of a "foreign adversary" allows the Commerce Secretary to designate foreign governments or foreign non-government persons deemed to be adverse to the national security of the United States, either through "a long-term pattern or serious instances of conduct." Like EO 13873, the proposed rule does not name any particular countries or entities, but is most directly aimed at the acquisition of Chinese and Russian telecommunications equipment, and particularly equipment provided by ZTE and Huawei. For example, on November 22, 2019, the Federal Communications Commission ("FCC") passed a rule to forbid the use of the Universal Service Fund to buy Huawei and ZTE telecommunications equipment. Critically, the proposed rule also has some retroactive applicability – covering transactions that were initiated, are pending, or will be completed after May 15, 2019 (when EO 13873 was issued).

Comparison with the CFIUS and Team Telecom

The reviews under the proposed rule implicate a broader range of transactions than the Committee on Foreign Investment in the United States ("CFIUS") and Team Telecom processes. Under the CFIUS process, the U.S. Government is limited to 1) reviewing foreign investments that grant the foreign investor control over a U.S. business, or 2) reviewing noncontrolling investments by foreign investors in certain industries under the Critical Technology Pilot Program. The current CFIUS regulations do not cover other transactions that the U.S. Government believes may also provide foreign adversaries with access to U.S. ICT infrastructure. Team Telecom is only able to review transactions as part of the broader FCC process when FCC licenses enter the equation – and therefore during mergers and acquisitions. In contrast, the proposed rules have a far broader application that encompasses mergers and acquisitions, joint ventures, licensing agreements only involving intellectual property, and commercial purchases and sales, among other potential transactions.

Moreover, the proposed regulations have only the most basic procedural framework. They do not as yet provide any guidelines or meaningful constraints on Executive action, leaving a significant number of industries with little insight into how the proposed rule might be deployed to interfere with commercial transactions, what safeguards beyond the Administrative Procedures Act would be established to protect companies against inconsistent or arbitrary application, and what mechanisms would be provided to challenge actions administratively. For a proposal of this potential breadth, it is likely impacted sectors will be eager for clarification on these points. Depending on the form of the final regulations, the level of interference on commercial transactions could be significant – particularly for companies not currently affected by CFIUS or Team Telecom.

Comments open

Comments on the proposed rule are due by December 27, 2019. In particular, the Commerce Department has invited input on the definition of transaction, whether there are categories of transaction that should be excluded from the scope of the proposed rule, and whether there are any types of transaction that pose national security risks that could be mitigated, among other questions. Parties may also wish to request a 30-day extension to the comment period to reflect the importance of the matter and the intervening holiday period. A similar extension was granted in late 2018 when Commerce requested comments over the holiday

season on the Advanced Notice of Proposed Rulemaking ("ANPRM") for "emerging technologies". Comments may be submitted:

- By the Federal eRulemaking Portal: <http://www.regulations.gov> at docket number DOC-2019-0005.
- By email directly to: ICTsupplychain@doc.gov. Include "RIN 0605-AA51" in the subject line.
- By mail or hand delivery to: Henry Young, U.S. Department of Commerce, ATTN: RIN 0605-AA51, 1401 Constitution Avenue NW, Washington, DC 20230.

Please contact your Clifford Chance Partner if you wish to know more about this subject or support in submitting comments on the proposed rule before the December 27, 2019 deadline.

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