



Promoting Innovation Worldwide

May 2, 2022

The Honorable Ron Wyden  
Chairman, Senate Finance Committee  
Washington, D.C. 20515

The Honorable Richard Neal  
Chairman, Committee on Ways and Means  
Washington, D.C. 20510

The Honorable Mike Crapo  
Ranking Member, Senate Finance Committee  
Washington, D.C. 20515

The Honorable Kevin Brady  
Ranking Member, Committee on Ways and Means  
Washington, D.C. 20510

The Honorable John Cornyn  
United States Senate  
Washington, D.C. 20515

The Honorable Bob Casey  
United States Senate  
Washington, D.C. 20515

Dear Interested Members of the House and Senate,

On behalf of the members of the Information Technology Industry Council (ITI), I write to express our strong concerns with the current approach taken in the National Critical Capabilities Defense Act (NCCDA); as well as to offer several principles that we believe should guide consideration of whether and how to further regulate outbound transactions, investments, and transfers.

ITI is the premier global advocate for technology, representing the world's most innovative companies. We promote public policies and industry standards that advance competition and innovation worldwide. Most of ITI's members service the global market via complex supply chains in which technology is developed, made, and assembled in multiple countries, and service customers across all levels of government and the full range of global industry sectors, such as financial services, healthcare, and energy.

We take seriously Congress's and the Administration's concerns that business transactions, investments, and transfers align with U.S. objectives for resiliency and security in critical supply chains. As ITI's members service the global market we acutely understand the importance of securing global information communications and technology supply chains as not only a global business imperative for companies and customers alike, but as critical to our collective security.

Our industry has strong concerns about the impacts that overlapping Federal authorities will have on American global competitiveness and technological leadership. The potential for ambiguity in federal authorities and conflicting determinations from federal agencies may ultimately undermine the goal of policymakers to enhance U.S. economic competitiveness and national security. As currently drafted, the NCCDA implicates a vast array of daily transactions that may already be subject to review under existing export control and supply chain review authorities. We maintain that it is premature to include the NCCDA in any Conference Committee Report for the Bipartisan Innovation Act.

If Congress, or the Executive Branch, believes there is a gap in existing national security authorities it would be helpful for policymakers to identify those gaps to facilitate a robust public debate with stakeholders to develop an effective and efficient mechanism to review uncovered transactions,

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investments, or transfers. As Congress and the Executive Branch continue to consider the NCCDA or similar proposals, we offer below several suggestions for principles that should guide policymakers.

### **Focus on Identifying and Addressing Clear Gaps in Current Authorities**

The approach to “Covered Transactions” in the NCCDA is expansive. However, the Executive Branch currently has several mechanisms in place to conduct national security reviews of transactions and transfers involving information and communications technologies systems (ICTS). For example, the NCCDA would almost certainly result in oversight duplicative of the regime governing “emerging” and “foundational” technologies under the purview of the Bureau of Industry and Security (BIS) under the Export Control Reform Act of 2018 (ECRA), which were in part codified with the motive of addressing technology transfers through outbound and inbound investments.<sup>1</sup>

The Secretary of Commerce also has extensive authorities to review ICTS transactions under *Executive Order 13873 on Securing the Information and Communications Technologies and Services Supply Chain* (ICTS EO). The ICTS EO grants the Secretary the authority to prohibit any acquisition, importation, transfer, installation, dealing in, or use of ICTS subject to U.S. jurisdiction that involves any property in which a foreign country or national has an interest and poses a risk to U.S. national security.<sup>2</sup> The Interim Final Rule (ICTS IFR) implementing the EO captures a broad swath of ICTS transactions and clearly overlaps with the supply chain and outbound investment reviews envisioned by the NCCDA.<sup>3</sup> The breadth of authorities envisioned in the NCCDA, coupled with the broad discretion granted to the Department of Commerce, will continue to cast uncertainty over nearly all ICTS transactions and could undermine the national security objectives these measures purport to address, while also severely hindering U.S. competitiveness and hurting U.S. businesses.

As such, in considering any approach to outbound investment review, it is imperative that policymakers carefully examine existing authorities, identify clear gaps in those authorities that correspond to core national security concerns, and craft any new authorities in a manner that is sufficiently narrow and targeted to avoid capturing transactions already subject to existing regimes. Creating overlapping regimes in the U.S. that do not exist in other nations undermines U.S. competitiveness and technological leadership by making our allies and adversaries potentially more attractive destinations for market investment.

### **Articulate the Use and Implementation of Existing Supply Chain Review Authorities**

The administration has not articulated a vision for using these new authorities under the ICTS EO and IFR. Given the scope and breadth of this rule as it relates to reviews of ICTS transactions, it is

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<sup>1</sup> Testimony of Kevin J. Wolf, Partner Akin Gump Strauss Hauer & Feld, before the U.S. House Committee on Energy and Commerce, Subcommittee on Digital Commerce and Consumer Protection (Apr. 26, 2018). Available at <https://docs.house.gov/meetings/IF/IF17/20180426/108216/HHRG-115-IF17-Wstate-WolfK-20180426.pdf>.

<sup>2</sup> Securing the Information and Communications Technology and Services Supply Chain, Executive Order 13873 (issued on May 15, 2019) here: <https://www.federalregister.gov/documents/2019/05/17/2019-10538/securing-the-information-and-communications-technology-and-services-supply-chain>

<sup>3</sup> Securing the Information and Communications Technology and Services Supply Chain, Interim Final Rule; 86 FR 4909, Section 7.3 (effective date Mar. 22, 2021) available here: <https://www.federalregister.gov/documents/2021/01/19/2021-01234/securing-the-information-and-communications-technology-and-services-supply-chain>

vital that the uncertainty surrounding its use be resolved prior to establishing a new interagency group with overlapping jurisdiction. This is especially true given that the NCCDA envisions a broad regulatory approach that covers not just outbound investments, but other activities commonplace in the global supply chain. ITI has outlined concerns to the Department of Commerce over the breadth of scope of the ICTS Supply Chain IFR<sup>4</sup>. We are concerned that similarly vague and expansive reviews of U.S. supply chain activities can further undermine U.S. competitiveness.

### **Tie Actions to Specific Threats to U.S. National Security**

Any approach taken in legislation or by executive action should be tied to narrow and specific national security threats. If a transaction does not implicate a specific, identifiable threat or vulnerability to U.S. supply chains or national security equities, it should not be the subject of additional regulatory reviews. Clarity in regulatory liability and security exposure is a critical element of a competitive global supply chain and helping stakeholders understand risks and threats is essential to that calculation. As an initial matter, Congress should commission a report to evaluate the impacts of additional outbound transaction, investment, and transfer screenings on U.S. national security. This report should include recommendations to Congress to address the scope of jurisdiction and structure of any agency or interagency reviews.

### **Designate an Appropriate Executive Branch Lead**

Even though the NCCDA's purview would be limited to "countries of concern," such reviews would be resource-intensive and, similar to the ICTS EO, implicate an unknown number of existing and future transactions. It is essential that whichever federal agency, or collection of agencies, undertakes these reviews is appropriately resourced and staffed to ensure it is capable of performing the volume of reviews under their jurisdiction on a timely and consistent basis. The U.S. Trade Representative would be the wrong agency to take on this complex and resource-intensive mission. Notably, the recommendation of the U.S. China Economic and Security Review Commission, which serves as the inspiration for the NCCDA, does not place this new responsibility at USTR.<sup>5</sup> Relatedly, the NCCDA would provide twelve Congressional committees with the ability to request investment screenings, opening the door to disjointed reviews of a broad spectrum of transactions, investments, and transfers; any Congressional involvement in directing screenings should be more targeted.

### **Pursue Robust Opportunities for Discussion and Consultation**

Given the implication that capital flows and early-stage investments may be a concern, it is essential that legislators conduct public hearings to ensure policymakers have a complete understanding of existing authorities and the impacts of a new regime on U.S. global supply chains, R&D investments, and overall economic competitiveness. It is also critically important that new regulatory mechanisms be coordinated with U.S. allies and partners to ensure any proposed

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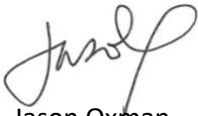
<sup>4</sup> ITI Comments Responding to Commerce Department Interim Final Rule on *Securing the Information and Communications Technology and Services Supply Chain* (RIN 0605-AA51; DOC-2019-0005) available at [https://www.itic.org/documents/supply-chain/ITICommentsonICTSSupplyChainIFRFINAL\\_2021-03-22.pdf](https://www.itic.org/documents/supply-chain/ITICommentsonICTSSupplyChainIFRFINAL_2021-03-22.pdf).

<sup>5</sup> U.S.-China Economic and Security Review Commission, 2021 Report to Congress (Nov. 2021) available at [https://www.uscc.gov/sites/default/files/2021-11/2021\\_Annual\\_Report\\_to\\_Congress.pdf](https://www.uscc.gov/sites/default/files/2021-11/2021_Annual_Report_to_Congress.pdf) (p. 168)

reforms minimize the likelihood that unilateral U.S. actions will undermine the ability of U.S. companies to compete globally.

Thank you for your consideration of our industry's views and we offer our assistance as you continue to evaluate any legislation or executive action on this important issue.

Sincerely,



Jason Oxman  
President and Chief Executive Officer  
Information Technology Industry Council (ITI)

Cc: The Honorable Nancy Pelosi  
The Honorable Kevin McCarthy  
The Honorable Charles E. Schumer  
The Honorable Mitch McConnell  
The Honorable Janet Yellen, Secretary of Treasury  
The Honorable Gina Raimondo, Secretary of Commerce  
Jake Sullivan, Assistant to the President for National Security Affairs  
Brian Deese, Director of the National Economic Council