

October 28, 2021

General Services Administration
Regulatory Secretariat Division
Attn. Ms. Mahruba Uddowla
1800 F Street, NW
Washington, DC 20405

Ref: FAR Case 2021-008: Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements

Dear Ms. Uddowla:

The Information Technology Industry Council (ITI) is pleased to submit these comments on the proposed rule to implement changes to existing Buy American Act (BAA) requirements for federal contracts, as published in the July 30, 2021 *Federal Register*. ITI is the premier global advocate for technology, representing the world's most innovative companies. Founded in 1916, ITI is an international trade association with a team of professionals on four continents. We promote public policies and industry standards that advance competition and innovation worldwide. Our diverse membership and expert staff provide policymakers the broadest perspective and thought leadership from technology, hardware, software, services, and related industries.

As the Federal Acquisition Regulatory (FAR) Council considers revisions to BAA requirements, we encourage the FAR Council to 1) maintain the existing waiver of the component test for commercially available off-the-shelf (COTS) items; 2) respect the existing exception to BAA for commercial information technology (IT), consistent with statute; and 3) respect the United States' binding trade obligations, global business interests, and statutory obligations under the Trade Agreements Act (TAA).

In support of our position, ITI provides general comments on the proposed rule and specific responses to the FAR Council's request for feedback on other aspects of Executive Order 14005, beyond the Notice of Proposed Rulemaking (NPRM).

ITI's members—all of which are headquartered in, operate subsidiaries in, or otherwise have significant operations in the United States—are global leaders in the provision of information and communications technology (ICT) goods and services. Our companies are proud of the innovative and critical technologies they supply to the U.S. Government. The technology sector is also characterized by high-paying U.S. jobs—for example, high-tech sector workers make up a state-level average of nearly 10 percent of the total U.S. workforce. These jobs contribute disproportionately to U.S. exports, accounting for a state-level average of nearly 30 percent of U.S.

manufacturing exports and 12 percent of services exports.¹ These exports have enabled technology companies to lead all business sectors in terms of investing back into the United States. Indeed, technology firms make up 10 of the top 25 American investors based on domestic capital expenditures.² Beyond the immediate footprint of what can be classified as the “technology sector,” the gains afforded by ICT goods and services to the U.S. Government and companies of all sizes accrue across every sector of the economy.

General Comments Pertaining to the Proposed Rule

ITI appreciates the opportunity to submit comments to the proposed rule and to participate in the public hearing on August 26, 2021. We strongly encourage the FAR Council to continue conducting robust stakeholder engagement, and to establish sufficient procedural guardrails that will protect against potential politicization of the waiver review process. The global technology industry supports the U.S. Government’s goal of ensuring reliable access to the best technologies and products, and the comments and concerns expressed below are shared in that spirit.

First and foremost, ITI is concerned that the imposition of new U.S. federal government procurement requirements without the benefit of robust stakeholder engagement would undoubtedly harm the U.S. Government’s access to potentially the best available products, which may not be made in the United States at all. Such an impediment would have significant implications for the U.S. Government’s ability to ensure reliable access to these technologies and the ongoing success of U.S. digital transformation efforts.

For example, the rapid increase in content thresholds may present a challenge to offerors to federal procurements as supply chains may not be adjusted to meet new thresholds as quickly as the proposed rule suggests, particularly given the current supply chain challenges globally. Additionally, increased content thresholds place an immediate administrative burden on offerors in ensuring their products and products from lower-tier suppliers continue to meet growing content thresholds, which brings an added cost to the offerors and detracts from efforts to provide best available products to meet pressing government needs. Given these inevitable effects, ITI encourages the FAR Council to make the imposition of any new requirements measured, targeted, and gradual so U.S. interests are not inadvertently harmed.

ITI is also concerned that overly restrictive U.S. federal procurement requirements will undermine and limit the ability of companies to participate in the global commercial and foreign government procurement marketplaces. This impact will in turn disrupt the virtuous cycle of private-sector research and development (R&D) investments made possible by revenues from sales of U.S. products to a diverse customer base in overseas markets. U.S. national security depends on continued U.S. technological leadership on a global scale. This leadership in turn drives U.S. innovation, job creation, and economic growth. Remaining at the cutting edge of developing and

¹ Information Technology Industry Council (2020), “Powering Innovation, Driving Growth: The High-Tech Economy in Communities Across America”: <https://www.itic.org/policy/ITI-Powering-Innovation-Report-Final.pdf>.

² Mandel, Michael and Long, Elliott (2019), “Investment Heroes 2019: Boosting U.S. Growth,” Progressive Policy Institute: https://www.progressivepolicy.org/wp-content/uploads/2019/12/PPI_InvestmentHeroes2019_V4.pdf.

commercializing technologies will ensure they are available to the U.S. Government, private sector, and the defense industrial base. Given the desire of the Administration and Congress to ensure that U.S. companies remain among the most innovative and competitive in the world, a balanced and thorough review of these impacts is essential.

ITI has additional concerns and requests greater clarity regarding the scope of the post-award domestic content reporting requirements, in particular the role of the prime contractor with subcontractors throughout the greater supply chain. The reporting requirement, being wholly new, is not one that can be readily complied with today, and tracking domestic content beyond the established threshold for items yet to be identified will require establishing new internal processes and capabilities once those items are known. Mandatory reporting for domestic content beyond the thresholds could also be viewed as harmful to current trade obligations to the extent trading partners feel they are being disfavored. For these reasons, any reporting of domestic content of products procured, including in critical supply chains, should be voluntary. Mandatory reporting requirements will place an additional cost and burden on federal contractors already managing significant reporting requirements and risk the harms described.

Another area in which ITI has concerns and requests greater clarity is the treatment of items subject to the commercial IT exemption that may be considered as critical products or contain critical components. The U.S. Government's identification of a product or component as critical does not alleviate the circumstances that led Congress to legislate an exception to BAA rules for commercial IT and the Office of Federal Procurement Policy (OFPP) to waive the component test for COTS items. Indeed, it is very likely that, through the proposed rule's framework, agency action designating a product or component as critical would override express legislative intent and sound policy decisions without the benefit of the democratic process. Subsequent rulemaking to address the treatment of such items that meet either or both conditions should bear these circumstances and conclusions in mind. We urge the FAR Council to defer any further rulemaking directed to critical products and components until the quadrennial critical supply chain review has been completed and a more robust policy prescription can be formulated.

Finally, ITI is concerned that the introduction of more stringent rules will require federal procuring agencies and companies alike to make significant resource investments not presently understood. For instance, consider the immediate impacts that removing the commercial IT exemption would have on an agency's operations and a company's competitiveness. The scope and volume of U.S. Government purchases of commercial IT items are such that the burden on both procuring agencies and the Office of Management and Budget (OMB) to generate, pursue, and review waiver requests would be immense, were these products no longer subject to statutory exemption. At the same time, as companies' contracting departments work to keep pace with the changing landscape such a significant alteration would make, they will be increasingly devoting more and more of companies' limited resource pools to compliance, spending dollars and time that could be more constructively channeled towards advancing technological developments. The higher compliance costs and higher prices resulting from narrower supply chains will both come at the expense of increasing velocity to the U.S. Government end user and technological development in general. If companies were to do otherwise and sustain current levels of investment, it would reduce the

appeal for companies to participate in the federal market rather than absorb the increased costs of compliance; neither is a win-win scenario. Abrupt changes in the federal purchasing landscape, regardless of how well intended, should be avoided so other policies pursuing similar goals have time to take root and accomplish their varied aims. This is particularly critical now given the current supply chain challenges globally.

Responses to Questions for the Public

1. Commercial IT: To what extent does the original purpose of the exception, or other goals of the exception, remain relevant? Under what situations, if any, do current marketplace conditions support narrowing or lifting the statutory waiver?

First enacted in 2004, the BAA commercial IT exception not only remains relevant today but continues to be vital for ensuring the U.S. Government maintains access to cutting-edge, innovative, and secure technologies. Congress recognized nearly two decades ago that without an exception for commercial IT, the U.S. Government would be left behind in terms of accessing best-in-class, global technology. This reality remains true today.

Removing or limiting the current commercial IT exception would result in significant changes to how commercial IT is developed and sold to the U.S. Government, which could severely impact the U.S. Government's ability to procure advanced technologies. The NPRM envisions that companies would undertake the costly and lengthy reconfiguration of global supply chains and R&D networks that evolved over decades, without appropriate consideration of the feasibility, time, and investments required to create an appropriately robust U.S. electronics ecosystem to meet U.S.-specific content requirements. To be clear, the U.S. electronics ecosystem is not sufficient at this time to require U.S. manufacturers to alter existing supplier relationships in favor of wholly U.S.-based supply chains. Marketplace conditions do not support such changes.

Further, such changes would impact the ability of U.S. companies to make successful bids in foreign procurement processes, maintain significant shares in global markets, and remain competitive. The ICT supply chain is global, highly interdependent, and increasingly networked. Attempts to consolidate portions of that supply chain into a limited geographic space are unlikely to make it more secure, resilient, or affordable. Indeed, there could be a point at which the costs necessary to supply goods to the U.S. Government would make it unsustainable for those same products to compete globally. When the commercial and procurement opportunities outside of the United States outweigh the benefits of serving the U.S. Government, companies may respond accordingly. Alternatively, if U.S.-based advanced manufacturers are required to shift resources from developing high-tech end products to onshoring the development of basic, interchangeable commodities, the overall price of mission-critical technologies will exponentially increase while their capabilities stagnate. Both outcomes would hurt the U.S. Government's ability to ensure reliable access to these technologies.

Companies establish global supply chains built to support resiliency and serve the global market. They also leverage these supply chains to foster dynamic environments from which new and innovative products can emerge. For ITI member companies, the commercial IT exception remains particularly relevant because it facilitates the creation of these environments and leads to better, more secure ICT products. Take software as an example. Today's software technologies have evolved from largely on-premise, standalone systems to cloud-based systems enabled by software, computing, and networking capabilities. Because of the systemic nature of how these technologies work together and how they are developed, tested, and produced, it is virtually impossible to maintain these environments while isolating the "U.S. content" in them. Advances in software benefit from worldwide development and support, open-source software libraries, or software re-use, whether by the company or extracted from a C++ or Java library. They also benefit from cross-border evaluation and testing. By exploiting these opportunities, companies can offer more secure and innovative products to the U.S. Government, but they cannot also apply rigid content requirements to environments that have no manufacturing analog. Applying these requirements becomes even more challenging when attempting to ascribe value to products containing software and hardware components, the impossibility and impracticality of which underscores the value of continuing to exempt commercial IT.

Finally, by allowing companies to leverage existing global supply chains, the U.S. Government enables companies to invest resources in the R&D and advanced manufacturing programs needed to support innovation in the United States. ITI member companies continue to operate advanced IT manufacturing across the United States. However, attempting to move the entire supply chain to the U.S., including for low-level inputs and components, is counterproductive, will undermine U.S. global competitiveness, and raise costs for the U.S. Government. The COVID-19 crisis has brought about an important discussion of global supply chain vulnerabilities across all industry sectors. In response, ITI member companies are taking steps to diversify production and supply chains and limit critical supply constraints, especially in the event of disasters. The U.S. Government can do much to help these efforts succeed.

At this juncture, ensuring America remains a leader in advanced high-tech manufacturing should be the U.S. Government's primary focus and a core tenet of its trade, procurement, and innovation policies. To promote American leadership in high-tech manufacturing, ITI encourages the U.S. Government to make investing in the research, design, and manufacturing of critical technologies a national priority. In the case of semiconductors, for example, while the governments of our global competitors have invested heavily to attract new semiconductor manufacturing and research facilities, the absence of comparable U.S. incentives has made our country less competitive, and America's share of global semiconductor manufacturing has steadily declined as a result. To be competitive and strengthen the resilience of critical supply chains, we believe the U.S. Government should incentivize the construction of new and modernized manufacturing facilities and invest in

research capabilities. This calls for a comprehensive policy response that builds on prior sound and effective legislative decisions.

The commercial IT exemption remains relevant, promotes innovation and American competitiveness, and serves the U.S. Government's procurement needs as originally envisioned. Doing away with it will not solve the challenges emerging from COVID-19. ITI urges the FAR Council to reaffirm the exemption without change.

2. Commercially Available Off-The-Shelf (COTS) Items: To what extent does the original purpose of the partial waiver remain relevant?

The OFPP waiver of the domestic component test for COTS products was enacted in 2009 but drew upon commercial item policies previously embedded in the Federal Acquisition Streamlining Act of 1994 (P.L. 103-355) and the Clinger-Cohen Act of 1996 (P.L. 104-106). Collectively, these actions remain highly relevant as they are targeted at improving acquisition processes to 1) reduce red tape associated with doing business with the U.S. Government; 2) simplify the procedures for buying commercial items by allowing the U.S. Government to purchase based on the same terms and conditions available to commercial buyers; and 3) attract commercial suppliers to the federal marketplace, so that the U.S. Government has access to the most cutting-edge, innovative products and solutions. Improving acquisition processes in these ways is no less important today.

i. How has the application of the COTS waiver since 2009 been consistent or inconsistent with its stated purpose? For example, has the use of COTS expanded (or narrowed) since 2009 in ways that may not have been originally contemplated?

Since enactment of the partial waiver in 2009, we have seen increased opportunities for federal customers to leverage COTS technologies as essential and cost-effective solutions for maintaining modern government IT systems. For example, companies are constantly implementing critical cybersecurity measures to prevent, detect, and respond to increasingly sophisticated cyber-attacks. By leveraging COTS items, government agencies benefit from ongoing updates and fixes drawn from a broader population of consumers, as well as better access to repair part and services that may not be as readily available for an agency-specific build. This dynamic becomes even more important as many federal agencies are now embracing some degree of remote work as a standard operating procedure. These are just the kind of acquisition outcomes the U.S. Government should embrace and that the streamlined acquisition processes, which motivated the COTS waiver, were intended to obtain.

ii. Has the COTS waiver benefitted domestic firms and their employees? Why or why not?



The COTS waiver has benefited domestic firms and their employees. It also provides better technologies at lower costs to the U.S. Government and opens new opportunities for the American worker. With the waiver in place, companies can draw upon economies of scale, limit downstream supplier costs, and invest the bulk of their design and manufacturing dollars in high-tech processes that add substantial value to end products. Continued access to cutting-edge technologies would not be possible without the current BAA partial waiver for COTS ICT.

Maintaining the existing BAA partial waiver for COTS is critical for ensuring the U.S. technology sector's competitiveness. Our companies provide some of the most innovative products and services worldwide and would be best served by continuing to invest resources in the R&D programs that feed innovation and strengthen the American worker. After all, greater R&D investment leads to investments in human capital, improved productivity, and new opportunities that keep the U.S. technologically ahead. Also, emerging fields like data science, machine learning, and artificial intelligence are unlikely to thrive in the public sector if the COTS technologies on which they depend are not available to federal procuring agencies. Federal workers thus benefit from policies that enable the public sector to pursue the same opportunities as their private sector counterparts. The COTS waiver of the domestic component test makes pursuing these opportunities a reality to the benefit of the U.S. Government, its suppliers, and its employees.

iii. Under what situations, if any, do current marketplace conditions support narrowing or lifting the partial waiver?

We are not aware of any current marketplace conditions that support narrowing or lifting the partial waiver for COTS ICT. Further, we are skeptical that marketplace conditions should be the primary factor for motivating this decision. As described at the outset, better acquisition outcomes through simplified purchasing procedures should continue to be the overriding policy for purchasing items available to commercial buyers. The marketplace conditions surrounding the development and production of COTS ICT only underscore this point further. We strongly encourage the FAR Council to maintain the existing waiver of the BAA component test for COTS products in general, especially for COTS ICT based on the nature of existing global supply chains and global consumers for commercial products.

iv. Regardless of any other changes to the COTS partial waiver, should the Federal Government gather data on the domestic content of all COTS items, some COTS items, or categories of COTS items to inform future policy making? If so, what items or categories should be addressed? How might this be accomplished consistent with the intent of the COTS partial waiver to reduce administrative burdens?

We urge the U.S. Government to avoid applying domestic content data collection and reporting requirements to COTS items. Tracking COTS for reporting purposes places additional costs on those



COTS items, diluting the advantages derived from purchasing COTS and leveraging commercial scalability, especially at commercial firms where U.S. Government procurement is only a part of their business. Additionally, many COTS providers multi-source their components, which would make any tracking requirement even more burdensome.

As discussed above, exempting COTS products from the BAA component test is consistent with Congressional intent to streamline the U.S. Government's acquisition of commercial items in line with the Federal Acquisition Streamlining Act of 1994 (P.L. 103-355) and the Clinger-Cohen Act of 1996 (P.L. 104-106). By waiving government-specific acquisition requirements for COTS products, federal buyers can better attract commercial suppliers to the federal marketplace, which helps ensure the U.S. Government has access to best-in-class solutions in parity with commercial customers. By reimposing them, the U.S. Government will erect barriers to entry that many commercial suppliers may well choose to avoid. At the same time, charging agencies and suppliers alike to gather substantial amounts of information – the shelf life of which, given the constantly changing dynamics of the global marketplace, is increasingly short – will hardly provide a sound basis for future policymaking.

v. Please provide any recommendations to maintain and increase domestic production of COTS items (both manufacturing of the end product and its components) in critical industries.

To promote U.S. competitiveness in the high-tech and advanced manufacturing sectors, we encourage the Administration's efforts to review the resilience of U.S. critical ICT supply chains and recommend proactive policy measures to make the U.S. a more attractive manufacturing destination. Increasing domestic production would naturally follow from policies that make U.S. manufacturing more competitive globally. We strongly discourage the use of strict domestic content requirements as a policy tool, especially where sufficient manufacturing infrastructure does not currently exist on U.S. soil. This is very much the wrong tool for the wrong job.

As discussed above, many companies leverage well-established global supply chains as part of their manufacturing processes for COTS components and finished items. These global supply chains reflect the policy, trade, and industrial capabilities of a diverse trade and economic environment the U.S. has consistently led. Besides, supply chain resiliency depends on global supplier diversity—especially for critical products that may be subject to rapid demand increases based on societal factors. Imposing strict content requirements would limit the pool of available suppliers, increase costs to the U.S. Government, and ultimately impact the United States' access to critical products, without certainty that such measures would translate into increased domestic production. In contrast, allowing U.S. companies to leverage multiple suppliers in global markets promotes supply chain resiliency and the availability of both end products and their components in critical industries. As mentioned earlier in the comment, the U.S. electronics ecosystem is not sufficient at this time to require U.S. manufacturers to alter existing supplier relationships in favor of wholly

U.S.-based supply chains for COTS items. Increasing domestic production in this area will require comprehensive policy response once the quadrennial supply chain review is complete.

3. Services: How can the Federal Government promote the use of Made in America services? What standards or methodologies might be considered that could be easily adapted by commercial sellers? Are there critical services that should be accorded price preferences, and if so, why?

ITI does not see any circumstances which merit a consideration of expanding Made in America rules to services. Not only is services a very broad category, unlike a percentage content calculation associated with goods, a country-of-origin (COO) test for services would prove unworkable. For example, engineering services can be furnished through different tacking/charging mechanisms (e.g., fixed price, T&M, etc.), occur in different locations (e.g., on-site, off-site, CONUS, OCONUS, etc.), and employ engineers of differing nationalities and skill categories.

4. Trade Agreements: Because of the World Trade Organization—Government Procurement Agreement (WTO GPA) and the Trade Agreements Act (TAA), domestic content rules do not currently apply to most non-DoD goods acquisitions over \$182,000. Under the TAA, a purchase is treated as U.S.-made if it is mined, produced, or manufactured in the United States or substantially transformed in the United States. While U.S. trade obligations are beyond the scope of this rulemaking, the Made in America Office and the FAR Council seek to understand more about the impact of the substantial transformation test and opportunities for American workers.

We appreciate the continued consideration of the role of U.S. international trade commitments in promoting both U.S. public sector innovation and efficiency, as well as global competitiveness, jobs, and technological leadership in the U.S. ICT sector. In this regard, we continue to strongly encourage holistic consideration of the impact of this and any future rulemakings on existing U.S. international trade commitments and U.S. competitiveness. Close to 60 percent of the worldwide government procurement market for IT is outside of the United States,³ and the vast majority of the IT government procurement market in TAA-designated countries is accounted for by signatories of the World Trade Organization (WTO) Agreement on Government Procurement (GPA).

Based on WTO estimates of the size of government procurement markets, the GPA creates a market of \$4.0 to \$6.2 trillion across the 48 economies that have agreed to take on rules-based and market access commitments. This figure will grow as economies such as Brazil accede to the agreement, as benefits under the GPA are only conferred to governments that have enacted reciprocal access. Moreover, the United States' active participation as a signatory of the GPA enables the USG to set competitive terms for any country seeking to accede to the Agreement. Export opportunities for U.S. operations far outweigh any perceived "wins" from limiting

³ Information Technology Industry Council (2020), "Powering Innovation, Driving Growth: The High-Tech Economy in Communities Across America": <https://www.itic.org/policy/ITI-Powering-Innovation-Report-Final.pdf>.

competition in U.S. federal procurement processes.

ITI members across different verticals of the technology sector therefore depend on trade commitments—both in the GPA and U.S. preferential trade agreements—for the ability to compete for government contracts on non-discriminatory terms and continue to lead globally in selling goods and services to governments outside of the United States. These commitments ensure that leading technology firms with U.S. operations in sectors in which the U.S. has a clear global competitive advantage can do business with governments on competitive, non-discriminatory terms.

We also wish to respectfully underscore that the U.S. expansion of domestic procurement requirements may increase the likelihood that other governments—including key U.S. allies and trading partners, representing some of the largest procurement markets in the world—respond in kind, thereby restricting key opportunities for U.S. businesses of all sizes across economic sectors. As one example, the European Union is currently considering a legislative proposal for an “international procurement instrument” that would enable the European Commission to impose price preferences for its domestic firms where the Commission determines that those firms are not receiving reciprocal market access in other markets, like the United States.⁴

Beyond their immediate commercial impacts, these kinds of potential tit-for-tat restrictions on international procurement market access detract from U.S. leadership in the multilateral trading system, and place unnecessary pressure on diplomatic and commercial relationships with some of the United States’ closest allies. These concerns also extend to potential impacts on whether the United States’ allies can adequately prepare for conflict, which has implications for U.S. national security and military readiness.

We therefore urge the FAR Council to ensure that any actions taken fully adhere to the United States’ commitments and take into account the risk of potential international ramifications from domestic policy decisions.

ii. Is “substantial transformation” a useful tool to promote good domestic jobs and domestic manufacturing? Why or why not?

The “substantial transformation” test is not a tool – it is an outcome that confers origin. ITI fundamentally believes that federal procurement policy should be predominantly driven by ensuring U.S. Government has access to the best products. Instead, policies to promote good domestic jobs and domestic manufacturing should focus on fostering the conditions that drive innovation. For example, the Creating Helpful Incentives to Produce Semiconductors (CHIPS) for America Act incentivizes the domestic manufacturing, research, and design capacity needed to ensure resilient supply chains and sufficient chip supply to power the U.S. economy. Additional

⁴ European Parliament (June 24, 2021), “A New EU International Procurement Instrument” : [https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-international-procurement-instrument-\(ipi\)](https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-international-procurement-instrument-(ipi)).

supply chain resilience funding programs, such as the Critical Supply Chain Resiliency Program (CSCR) proposed in the Build Back Better plan and the \$2.4 billion provided for the Manufacturing Extension Partnership through the United States Innovation and Competition Act, will also promote good domestic jobs and domestic manufacturing.

With the above point in mind, we thought it may be helpful to provide context on the technology industry's relationship with "substantial transformation." The "substantial transformation" is measured in one of two ways: (1) using a tariff-shift approach (i.e., Part 102); or (2) via the evaluation of a complex set of processes that change numerous articles into a new item of commerce. The tariff-shift approach does not work well for many technology products because the origin of the components dictates the origin of the product, since most final technology products and their components are found in the same tariff heading. The case-by-case, process-based approach is a much better way to capture whether substantial transformation has occurred because it takes into account complex processes – including final assembly, as well as software download of the operating system and configuration data – that are better representations of the origin of the final product.

Substantial transformation, determined via complex processes, requires specialized skillsets to transform base articles into a new and different article of commerce with a character distinct from the articles from which it was transformed. For example, for one product developed by an ITI member companies, U.S.-based employees develop product firmware required by many ICT products and provide ongoing management for the firmware. Product firmware is what enables all of the differentiated product features and functionality of ICT products. In addition to the development and management of product firmware, U.S.-based employees also perform functionality tests for correct operation and authenticate, certify and record products as genuine and trusted. The work performed to test and authenticate adds an additional layer of security to ICT products.

In contrast to the domestic content requirement approach under BAA, one of the tremendous benefits of the "substantial transformation" test is it recognizes the reality that the value of end products is not necessarily in the manufacture of their underlying components and subcomponents. Rather, the innovation and skill that make those components/subcomponents into something functionally valuable.

5. Additional ideas: Global ICT Supply Chain and U.S. Competitiveness Concerns

As a final matter, we applaud the Biden Administration's efforts to address the resiliency of global supply chains, including the ICT supply chain. Companies in the United States lead the delivery of goods and services to markets worldwide, often innovating at home to serve the U.S. domestic market as well as the 95 percent of consumers that live outside the United States. Most of ITI's members serve the global market as well as customers across all levels of government via complex supply chains in which technology is developed, made, and assembled in multiple countries. These supply chains support a full range of global industry sectors, such as financial services, healthcare, and energy.



ITI therefore acutely understands the importance of ensuring the resiliency of global ICT supply chains as not only a global business imperative for companies and customers alike, but as critical to U.S. national security and economic strength. Our members devote significant resources, including expertise, initiative, and investment in cybersecurity and supply chain risk management efforts to create a more secure and resilient ICT ecosystem.⁵ We further recognize diversification of ICT supply chains as a necessary means of fostering resilience. Indeed, geographic diversification has become critical to the global competitiveness of firms in the United States, as it lowers costs, promotes efficiency and productivity, enables access to top global talent and growing customer bases, and mitigates supply chain risks.

While technology firms often source widely commoditized and non-IP-intensive components from firms in a range of U.S. trading partners, many ITI members retain the development and manufacture of high-end finished products in the United States. As discussed above, the components that firms use to support their U.S. manufacturing bases often do not represent high-value technology products. Rather, they are necessary inputs into U.S.-made systems. These inputs frequently are produced outside the United States, and their cost-effective acquisition—coupled with business decisions founded on long-standing U.S. domestic and international trade policy—serve as the basis for the United States’ leadership as a location for IP-intensive design, high-end manufacturing, and software development.

Buy American policies should therefore focus on ensuring that the United States remains a leader in advanced high-tech manufacturing and should operate in concert with other Biden Administration policies aimed at facilitating the political, economic, and social circumstances necessary to ensure continued U.S. leadership and job growth in high-end manufacturing. As recommended in the Administration’s 100-day supply chain review report, we encourage the U.S. to continue to work with partners and allies such as the European Union, Japan, Korea, Taiwan, and others in the Asia Pacific and Latin America to minimize damaging interruptions and ensure stability of global ICT supply chains.

Conversely, an approach that fails to consider the international realities of ICT supply chains and instead aims to re-shore the manufacturing of commodified goods risks diverting government resources away from necessary facets of U.S. competitiveness—including workforce development—in favor of domestic production of products and inputs that can be securely and reliably acquired from firms located in the territory of U.S. trading partners to support higher-end U.S. operations. Such an approach would substantially limit the ability of U.S. industries to compete in an open global marketplace, undermine U.S. technological leadership, and negatively impact the U.S. economy and job market. It would also bear significant implications on the ability of the U.S. Government to access cutting-edge technologies, implicating U.S. national security and military readiness. Given the desire of the Biden Administration and Congress to ensure that U.S.

⁵ See, e.g., “ITI Submission to the Risks in the Semiconductor Manufacturing and Advanced Packaging Supply Chain” (2021), <https://www.itic.org/documents/supply-chain/ITICommentsonSemiconductorSupplyChainRFCFinalSubmission4-5-21.pdf>.

companies remain among the most innovative and competitive in the world, a balanced and thorough review of these impacts is essential in this and any other rulemakings stemming from EO 14005.

ITI sincerely appreciates your consideration of our comments. We stand ready to engage with the FAR Council and the Made in America Office on this and any subsequent rulemakings. For any follow up questions or for more information, please contact Megan Petersen, Senior Director of Policy, Public Sector, at mpetersen@itic.org.

Sincerely,

Megan Petersen
Senior Director of Policy, Public Sector and Counsel
Information Technology Industry Council (ITI)