

# Commerce publishes ANPRM seeking comment on the licensing process for ICTS transactions

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In an Advance Notice of Proposed Rulemaking<sup>1</sup> (ANPRM) published in the Federal Register on Monday, March 29, 2021, Commerce announced that it is soliciting public comment on a licensing process for companies seeking pre-clearance for information and communications technology and services (ICTS) transactions subject to Commerce's broad new authority to block or unwind such transactions, as implemented in the interim final rule, "Securing the Information and Communications Technology and Services Supply Chain."

That interim final rule, which was published on January 19, 2021, became effective on Monday, March 22, 2021, and broadly defines transactions to include acquisition, importation, transfer, installation, dealing in or use of ICTS. We previously discussed that interim final rule [here](#).<sup>2</sup>

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Commerce underscored in the ANPRM that it is only requesting comments on the licensing procedures, and is not re-opening the comment period for the Interim Final Rule nor is it extending the effective date of that rule.

While Commerce had initially announced in the interim final rule that it would establish a licensing or pre-clearance process by May 19, 2021, the agency stated that it found it necessary to solicit additional public comment and, accordingly, would not meet that deadline.

Commerce specifically requests comments on the following questions:

- Whether Commerce should model the ICTS licensing process on the notification process employed by the Committee on Foreign Investment in the United States (CFIUS) and/or the voluntary disclosure process that the Bureau of Industry and Security (BIS) uses to consider potential violations of export control laws;

- The advantages and disadvantages of varying approaches to the pre-clearance or licensing process, for example, a regime that would require authorization prior to engaging in an ICTS transaction, to one that allow entities to seek additional certainty from Commerce that a potential ICTS transaction would not be prohibited by the process under the interim final rule;
- Potential measures to protect the interests of small businesses in the licensing process;
- Whether there are categories of ICTS transactions that should or should not be considered for a license and whether any categories of transactions should be prioritized for licensing;
- Whether a license or pre-clearance should apply to more than a single ICTS transaction;
- The categories of information that should and should not be required in the licensing process (*e.g.* technical, security, operational information);
- Whether Commerce should issue decisions on a shorter timeframe if that could result in fewer licenses or pre-clearances being granted, versus a longer timeframe that may allow for a greater number of licenses or pre-clearances being issued;
- Considerations that Commerce should assess with respect to the potential for mitigation of an ICTS transaction in the licensing process;
- Considerations with respect to transactions that were subsequently modified after obtaining the license or other form of pre-approval;
- Whether holders of ICTS transaction licenses be required to re-apply for new licenses versus implementing a renewal process (and the structure for renewal if Commerce takes this approach).

The issuance of the ANPRM comes on the heels of subpoenas<sup>3</sup> served by Commerce on multiple Chinese-owned companies that provide ICTS services in the United States. Taken together, and

combined with the fact that Commerce allowed the Interim Final Rule to go into effect last week, these actions could signal that Commerce intends to move forward with a final ICTS rule even though it was issued pursuant to an Executive Order issued by the prior administration.

Many commenters to the November 2019 proposed rule and the Interim Final Rule, including the U.S. Chamber of Commerce<sup>4</sup> and the Information Technology Industry Council,<sup>5</sup> have emphasized the importance of licensing procedures to provide clarity to companies regarding whether they can move forward with ICTS transactions.

Companies who could be subject to reviews pursuant to the ICTS Interim Final Rule should consider submitting comments to the agency to help shape the licensing process. The comment period closed on April 28, 2021, which is 30 days after the date of publication of the ANPRM.

#### Notes

- <sup>1</sup> <https://bit.ly/3ehvNsj>
- <sup>2</sup> <https://bit.ly/3v71lc>
- <sup>3</sup> <https://bit.ly/3asm0hZ>
- <sup>4</sup> <https://bit.ly/3vaRMlv>
- <sup>5</sup> <https://bit.ly/3vcn6ql>

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