

Over 4 Million Firms Import ‘Significant Amount’ of Goods, Services Affected by Foreign Adversary Rule

In a cost analysis of a [rule](#) that would provide for Commerce review of transactions for a wide variety of products in the telecommunications and information and communications technology and services (ICTS) supply chains, the Commerce Department estimated that 4.5 million firms import “significant amounts of goods and services” that could be subject to review, with nearly all of those small and mid-sized firms.

The rule allows Commerce to step in to review any proposed, ongoing or pending ICTS goods or services transaction, including imports of goods, involving China, Cuba, Iran, North Korea, Russia or Venezuela’s Nicolas Maduro regime, and potentially prohibited it or require mitigation. It could cost affected firms up to \$20 billion, the Commerce Department said in the rule released Jan. 14 (see [ITT 01/14/2021](#)). The rule provides for an optional “licensing” process whereby companies can request a review of their transaction and, if approved, get safe harbor. Procedures for the licenses will be published by Commerce in 60 days, the rule said.

The areas covered by the rule are:

- Information or communications technology that will be used in a critical infrastructure sector
- Software, hardware and services integral to wireless local area networks, mobile networks, satellite payloads, satellite operations and control, cable access points, wireline access points, core networking systems, or long- and short-haul systems
- Software or hardware that uses or retains sensitive personal data with more than 1 million U.S. customers
- Certain information technology products that have sold more than 1 million units in the last year to U.S. persons
- Software designed for communicating via the Internet in use by more than 1 million U.S. customers

- Products integral to artificial intelligence and machine learning, quantum key distribution, quantum computing, drones, autonomous systems or advanced robotics.

Businesses and trade groups that commented on the interim rule asked Commerce to limit the definition of “foreign adversary” to specific companies, or entities that are owned by the country on the target list. Instead, it went with the broad “under the jurisdiction of” that country.

Businesses and trade groups asked what the department will consider when determining whether a transaction “poses an undue or unacceptable risk.” There will be 10 criteria, the notice said. “Along with other factors, when determining if an ICTS Transaction poses an undue or unacceptable risk, the Secretary will consider the nature of the information and communications technology or services at issue in the ICTS Transaction, including technical capabilities, applications, and market share considerations; the nature and degree of the direction or jurisdiction exercised by the foreign adversary over the design, development, manufacture, or supply at issue in the ICTS Transaction; and the statements and actions of the foreign adversary at issue in the ICTS Transaction. Other considerations include whether the ICTS Transaction poses a discrete or persistent threat and the nature of the vulnerability implicated by the ICTS Transaction.”

Some asked that Commerce provide technical assistance for parties that are going to be forced to alter their wireless networks. It refused. “The parties to the transaction will bear the responsibility and cost of complying with any prohibition or mitigation measure,” the notice said. — *Mara Lee*

Commerce Releases Interim Final Rule on Licensing Imports for Telecom, IT Industries

The Commerce Department [released](#) an [interim final rule](#) that would require government assent for inputs into certain products if those imports are from Iran, China, Russia, Cuba, Venezuela or North Korea. Several of those countries are already sanctioned; as a practical matter, this rule will

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target Chinese goods. Commerce proposed the rule in 2019 (see [ITT 01/13/2020](#)).

During a call with reporters, a senior official said that although it would be up to the next administration to promulgate regulations to put the rule into practice, he said “they didn’t want any more time to elapse” so they are getting this out just before the change in presidents. The department has 120 days to set up a licensing process from the time the interim final rule is published.

He said it would affect imports of several categories of goods involved in information and communications technology and services. The government is asking companies to collaborate by asking if their goods are covered by the rule, and the Commerce Department secretary will have 180 days to decide whether the import would be prohibited, allowed or allowed with “mitigating measures.”

“We do not intend this to be a heavy-handed regulation, we intend this to be an opportunity for the United States government and private sector to work together to make sure that the United States information and communication supply chain is as secure as possible,” the official said. — *Mara Lee*

Grassley Says Changes to GSP Will Have to Happen to Get Both GSP, MTB Renewed

In a week, Sen. Chuck Grassley, R-Iowa, will become the top Republican on the Judiciary Committee, but he will retain a seat on the Finance Committee, and he said he'll still be working on trade issues in 2021. Grassley said that it would “be a lot easier” to pass legislation renewing the Miscellaneous Tariff Bill than to renew the Generalized System of Preferences benefits program, since Democrats have proposed numerous changes to GSP that would make eligibility more difficult for developing countries. “But I believe because the Democrats have tied them together, we won’t get it done until we get some compromise done with them on Generalized [System of] Preferences,” he told *International Trade Today* during a conference call with reporters Jan. 14.

Grassley was also asked about the possibility of legislation to give Congress more of a say on Section 232. He said, “I thought it was going to be real easy to get a bipartisan solu-

tion” on 232 reform in 2019, but then faced division among Republicans and reluctance to negotiate from Democrats on the Finance Committee. He said he hopes the U.S. Chamber of Commerce’s interest in getting reforms will give the idea a boost. “I’ll be working closely with all those people who want to take a leadership role on it,” he said. Sens. Pat Toomey of Pennsylvania and Rob Portman of Ohio, both Republicans, were leaders on the legislation in the previous Congress, with Sen. John Warner, D-Va., co-sponsoring Toomey’s bill and Sen. Kyrsten Sinema, D-Ariz., co-sponsoring Portman’s. — *Mara Lee*

Politics Seen as Preventing Biden From Reversing Section 301 Tariffs

National Foreign Trade Council [panelists](#) addressing the future of U.S.-China relations agreed that the political climate won’t allow President Joe Biden to reverse the Section 301 tariffs on China, even though they think those tariffs haven’t been effective in achieving their goal of changing the competitive playing field with Chinese firms.

Rep. Stephanie Murphy, D-Fla., who introduced a [bill](#) during the previous Congress that would have allowed Section 301 and Section 232 tariffs to last only 120 days without an affirmative vote in Congress, believes the 301 tariffs imposed more damage on U.S. firms, farmers and workers than they did on China. But Murphy, a House Ways and Means Committee member, was not able to get any Republicans to sign on to the bill, and two of the six moderate Democrats who co-sponsored it lost their elections in November.

She said both in the country and in Congress, sentiment on China makes removing the tariffs very difficult. “Biden won in areas that are reflexively anti-trade, who have not yet had a compelling argument made to them as to why trade is anything but negative to their communities,” she said. Biden won Pennsylvania, Michigan and Wisconsin, rebuilding the “blue wall” that Trump dismantled in the 2016 election.

Murphy, who is starting her third term representing central Florida, said during the Jan. 12 webinar that Republicans are creating “a little bit of a ‘Red Scare’” in their campaign ads. “You either think China is the big bad boogeyman or you’re a socialist,” she said, describing what she called their

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narrative. “There is no room for a nuanced approach to China,” she said. “That is too simplistic for the relationship that the U.S. has with China. That completely eliminates any room for nuance, any room for rational, reasonable, strong strategy.”

Dave Hanke, a former Republican Senate staffer and now an Arent Fox partner, agreed that the China tariffs weren’t “particularly strategic or thoughtful,” and that the political dynamic is not there for negotiating concessions to secure their removal.

Murphy did express hope that Biden might undo the Section 232 tariffs on Europe and Japan, which she said angered allies “that should be working with us to form a united front on China.” She said using Section 232 tariffs for questionable national security claims is bad policy, even aside from that concern. “Because when we do that, it opens the door for others to follow suit and claim a national security rationale when one doesn’t really exist,” she said. Hanke called the Section 232 tariffs “huge unforced errors by the U.S. We needed teammates, not adversaries,” he said.

Murphy said she was heartened by Biden’s trade and national security appointments, and said she’s “hopeful that team will be able to lead us out of this convoluted place the Trump administration landed us.”

Webinar moderator David Lynch, an economics reporter for the *Washington Post*, asked Hanke if decoupling from China is inevitable now.

Hanke said that “there is decoupling happening. You might call it selective decoupling or surgical decoupling.” But he said when you block sales of U.S.-designed semiconductors to Chinese users, you have to help them financially. He said “we can’t have policies that kneecap” firms that are crucial to U.S. economic innovation and strength. He said Congress is acting to bolster firms that have lost business due to export controls through the USA Telecommunications Act and HIPS for America Act. “These things would have never even been considered three or four years ago,” Hanke said. “You might say these are industrial policy-lite.”

He said the government will spend billions of dollars in the semiconductor field “so we can stay in the game.” He said

there will be decoupling in semiconductors, 5G, personal protective gear and pharmaceuticals.

Panelist Monica He, director of international trade policy for biotech firm Amgen, cautioned that requiring the strategic stockpile or other government purchasers to buy U.S.-manufactured drugs could have “tremendous adverse economic impacts” if other countries follow suit and require domestic pharmaceuticals for their government purchases. She said the new administration should be asking itself: “What are the international implications for ‘Buy American’? Could that have implications for U.S. companies doing business abroad?” Companies that make biologics are mostly located in the U.S. and Europe, as many of the older-style prescription drugs are manufactured in India and China.

Hanke also cautioned that the political rhetoric about making goods in America doesn’t make economic sense. “People need to do a reality check on that,” he said. But he said policymakers could encourage companies to shift production to democracies with free markets, such as India and Mexico. “The North American value chain can come into play to replace some of those value chains running through China,” he said. — *Mara Lee*

Import Enforcement Efforts Likely Here to Stay Under Biden, Lawyer Says

Ramped up import enforcement efforts are likely here to stay under President Joe Biden, Sidley Austin’s Ted Murphy said in an email. The multi-agency effort to crack down on import violations is expected to continue unencumbered and Murphy views these efforts as not administration-specific, particularly dealing with questions of forced labor, Section 301 tariff evasion and USMCA compliance.

This past year has seen a flurry of increased import enforcement action, particularly from CBP. For instance, the agency detained cargo worth \$55.5 million due to forced labor-related withhold release orders during fiscal year 2020, up from \$1.2 million in FY19 (see [ITT 12/02/2020](#)). CBP also conducted more audits and issued more penalties and notices of liquidated damages than ever before, completing 466 audits and collecting \$44.6 million in additional duties from those audits in FY20. [These numbers](#) are 75 and \$3.5 million more in audits and duties collected, respectively, than were completed in FY19.

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Murphy said he expects these increased audit and duty-collection rates will continue based on what his firm is seeing with its clients. Beyond CBP's administrative actions, increased trade enforcement can be expected through whistleblower cases and Department of Justice prosecutions of customs-related violations, he said.

False Claims Act lawsuits with large settlements and payouts to the individual whistleblower are also likely to continue, Murphy said. In September, a Germany-based multinational engineering company paid more than \$22.2 million to resolve allegations it violated the FCA by misrepresenting the valuation of its imported merchandise. The whistleblower received \$3.7 million of that settlement (see [ITT 09/28/2020](#)). More recently, a whistleblower received 20% of a \$160,933 settlement over a claim that a roofing materials importer avoided its Chinese country of origin labels (see [ITT 01/21/2021](#)). All of these actions, plus greater trade enforcement action by other government agencies, such as the Federal Trade Commission (see [ITT 12/28/2020](#)), will continue, Murphy said.

CBP Detained 90 Shipments Over Forced Labor in Last 2 Months of 2020

CBP detained 90 shipments due to the possible use of forced labor on the goods from Oct. 1 to Dec. 31 of last year, the agency said in newly posted forced labor [statistics](#). That seems to show a continuing trend of increased CBP forced labor actions (see [ITT 12/02/2020](#)). For fiscal year 2021 as of Jan. 28, CBP has issued four withhold release orders, made one finding (see [ITT 10/19/2020](#)) and revoked one WRO (see [ITT 12/08/2020](#)). CBP hasn't issued any penalties so far in the fiscal year, it said. When asked about the dearth of penalties issued in recent years and whether more should be expected, a CBP spokesperson said: "CBP is committed to enforcing U.S. trade laws and maintaining a level playing field for U.S. domestic industry. We will continue to use all of our available authorities, including civil penalties, to prevent goods made by forced labor from entering U.S. commerce." CBP collected its first penalty in August last year (see [ITT 08/14/2020](#)).

Commerce Delays, Reopens Comments on Aluminum Licensing Rule

The Commerce Department will put new aluminum import licensing regulations on hold and seek more comments on

the program, it said in a [notice](#) released Jan. 25. "This delay in effective date is necessary to allow the incoming Administration time to review the Final Rule and consider any additional comments before implementation," Commerce said. Comments on the final rule are now due Feb. 26. "Parties are invited to comment on all aspects of the Final Rule and" the Aluminum Import Monitoring and Analysis System, it said.

As announced by final rule in December (see [ITT 12/22/2020](#)), the AIM system had been set to take effect Jan. 25. It requires importers of aluminum or their customs brokers to submit information in an online portal to obtain an automatically issued license, then to submit the license number with entry summary documentation. A similar program for steel imports has been in effect since 2005.

Now, unless "otherwise announced, the majority of the final rule will be effective on March 29, 2021," Commerce said. Provisions allowing importers to say "unknown" for certain required data elements will continue to be in place until Dec. 24, 2021, "as originally stated in the final rule." President Joe Biden, on his first day in office, announced a freeze on regulations that were published under his predecessor but that have not yet taken effect (see [ITT 01/21/2021](#)).

EU Director General Hopes for Mutual Tariff Suspension in Airbus/Boeing During Negotiations

European Union Director General for Trade Sabine Weyand told an audience Jan. 15 that resolving punitive tariffs are "a prerequisite for creating a good atmosphere" so that the EU and the U.S. can coordinate on confronting China's trade abuses and creating a carbon border adjustment.

Weyand, responding to a question during a Center for Strategic and International Studies [webinar](#), said that removing the tariffs that are connected to the Airbus/Boeing dispute is probably more complex than removing Section 232 tariffs on European steel and aluminum. "We thought we were on the road to at least a partial solution" with the U.S., and at least a partial suspension of tariffs, and a set of ground rules on subsidy disciplines in the civil aircraft sector. Weyand called the recent addition of products by the Office of the U.S. Trade Representative "massive," and a New Year's Eve surprise.

Weyand said that a lot of businesses that have nothing to do with aerospace have been hurt by the tariffs. "We said,

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OK, it's three weeks to the new administration," and so the EU decided to hold its fire. Once Joe Biden takes office, she said, "both sides hopefully will agree to suspend the sanctions on both sides and then create space for this negotiation. Maybe not in the first 100 days, but the first six months, we should be able to settle this issue."

Weyand also addressed the crisis at the World Trade Organization, where there is no director-general and no binding dispute settlement system, and where the only multilateral negotiation underway, on overfishing, blew its end of year deadline. "Joining the consensus in Geneva around the [director general] candidate would create a lot of good will," she said, and would be a signal of the new administration's commitment to multilateral organizations.

She said she hopes the trilateral dialogue between the U.S., Japan and the EU on how to update WTO rules to manage China's distorting business practices will be revived, and that they would have a proposal ready for the next ministerial conference, which is expected late this year.

One of the listeners asked if talks toward a U.S.-EU trade agreement could be reopened, and Weyand said no. The Transatlantic Trade and Investment Partnership "was an instrument of a different time and a different era," she said. "An EU-U.S. TTIP-type agreement would do nothing to address the challenges the world trading system faces at the moment," she said, such as Chinese overcapacity in steel making. — *Mara Lee*

FDA Clarifies High-Risk Foods List for Traceability Proposal, Releases FAQs

FDA updated for clarity its list of high-risk foods subject to its proposed traceability rule, it said in a [constituent update](#) Jan. 12. While no foods were added or removed from the list, FDA modified current listings, including adding the word "fresh" to fruit and vegetable commodities and re-

vised the description for "cheeses, other than hard cheeses" to "clarify which cheeses are part of this designation, and to include examples of such cheeses." FDA describes each of the specific edits in a [memo](#) also dated Jan. 12. The agency also released answers to [frequently asked questions](#) it has received on the proposed rule, including during public outreach. FDA's proposed traceability rule sets record-keeping requirements for entities at key points in supply chains for listed high-risk foods (see [ITT 09/22/2020](#)). Comments on the proposal are currently due Feb. 22 (see [ITT 12/17/2020](#)).

FDA Sets Uniform Compliance for Food Labeling Regs Issued in 2021-22

FDA will on Jan. 6 publish a [final rule](#) to establish Jan. 1, 2024, as the uniform compliance date for food labeling regulations issued Jan. 1, 2021, through Dec. 31, 2022. The FDA periodically announces uniform compliance dates for new food labeling requirements to minimize the economic impact of labeling changes, it said.

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