

wiley

2021 NATIONAL SECURITY SERIES

National Security Concerns in International Supply Chains: New Laws, Policies, and Funding

April 13, 2021

Hon. Nazak Nikakhtar

Megan L. Brown

Nova J. Daly



W

**ATTORNEY AFFIRMATION
NEW YORK CLE CREDIT FOR NONTRADITIONAL FORMAT COURSE**

I, _____, acknowledge receipt of the course materials for:

 (attorney name)
 National Security Concerns in International Supply Chains New Laws, Policies, and Funding

 (course title)

I certify that I have listened to and/or viewed the above course in its entirety. Therefore, I request that I be awarded the applicable number of New York CLE credits for this course.

Format (check one)

- Teleconference
- Webconference
- Videoconference
- Audiotape
- Videotape
- CD
- CD-ROM
- DVD
- Audio File
- Online
- Live Broadcast
- Other _____
 (Please Describe)

COURSE CODE: _____

During the course or program you will see and/or hear a CLE code. Please enter the code in the above field. If you do not include the code, you will not be awarded New York CLE credit. If there are multiple codes (for example, a separate code for each segment of a program) please enter here:

Code #2: _____ Code #3: _____
 Code #4: _____ Code #5: _____



Wiley Rein LLP
 Name of CLE Provider

Signature of Attorney _____ NY State Bar Registration # _____

4/13/2021
 Date of completion of CLE course
 (New York attorneys earn CLE credit as of the date they complete a CLE course)

- To obtain New York CLE credit, please complete and sign this form and then submit it to the CLE provider. Once your participation is verified by the provider, a New York CLE Certificate of Attendance will be issued to you by the provider.
- New York attorneys should retain a copy of this affirmation along with their New York CLE Certificate of Attendance.
- Experienced New York attorneys (attorneys who have been admitted to the New York Bar for more than two years) may earn CLE credit through nontraditional formats. Generally, newly admitted attorneys may not earn CLE credit through nontraditional formats.
- Please note that in New York, one hour of CLE credit consists of at least 50 minutes of instruction. Credit hours must be calculated in no less than 25-minute (.5-hour) increments.

- For those requesting NY CLE credit, please complete the attorney affirmation form that was emailed to you with the webinar access information. The form looks like this.

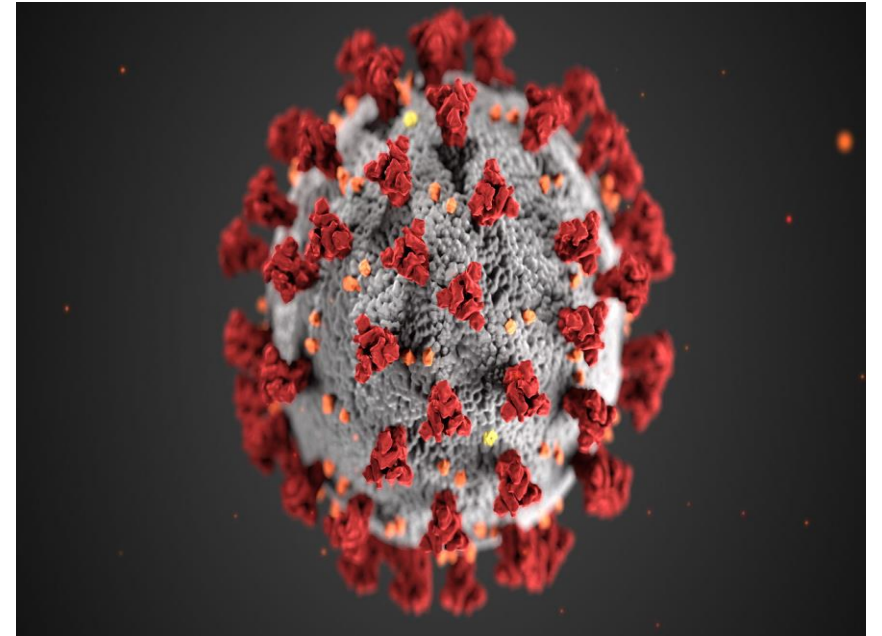
- During the program, we will mention a course code. This code will need to be provided on the form in the space designated – see yellow arrow.

- Email completed forms to pmcdonough@wiley.law



COVID Elevates Global Supply Chain Concerns

- The COVID-19 pandemic exposed vulnerabilities in U.S. supply chains
- One [survey](#) found that 98% of businesses had their supply chains disrupted by the pandemic
- Disruptions include shortages, changes in demand, and price swings
- 90% of businesses expect disruptions to have a long term impact
- Nearly half of companies said that regional or geographic concentration continued to be a supply chain risk, especially those that depend on China
- Members of Congress have introduced dozens of bills in response to the pandemic that aim to strengthen supply chains or “re-shore” U.S. manufacturing



China Concerns Have Been Driving Policy



- Global contest for power and influence
- Overcapacity and IP theft
- U.S. dependence on Chinese inputs and finished goods
- U.S.-China links in healthcare, biotech, critical minerals, and high-tech products
- Taiwan-China supply chain concerns
- But China is not the only source of concern for the United States

Cybersecurity Events Encourage ICT Supply Chain Scrutiny

- Solarwinds and other security events increase concerns about software assurance across ICT supply chains
- Existing workstreams receiving new attention
- Past Executive Orders (EO) and subpoenas responded to threats from certain companies or countries
- [MITRE Report March 2021](#)
- Executive Orders expected imminently



Government Work Impacting Supply Chains Abounds

White House

- [Executive Order 13873](#) ICTS Emergency
- Bulk-Energy [Supply Executive Order](#)
- [National Emergency](#) in U.S. Critical Mineral Supply Chain
- [Executive Orders](#) Regulate with Alipay, WeChat Pay, Tencent QQ
- [Executive Order](#) barring investment in CCMCs
- Trump [Buy America Rule](#)
- Biden Admin [Buy America Executive Order](#)
- [Supply Chain](#) Review EO
- Buy America Anticipated supply chain EOs

Congress

- Secure and Trusted Communications Networks Act
- Numerous committees of jurisdiction, caucuses, and task forces like the House Armed Services Defense Critical Supply Chain Task Force
- Past and future NDAA provisions, such as Section 889 of FY2019

Commerce

- [Interim Final Rule](#) on ICT Transactions with “Foreign Adversaries” and [APNRM](#) on licensing
- Export Controls
 - Military End User and U.S. Direct Product Rule
 - Emerging Technologies
- Entity Listings for Chinese telecoms, semiconductor, drone manufacturers
- Implementation of EOs on [WeChat, TikTok](#)
- NIST [supply chain best practices](#)
- NTIA [software bill of materials](#) work

Other Agencies

- FCC
 - limits on equipment and services
 - Team Telecom/ national security review
- DHS
 - Cybersecurity and Infrastructure Security Agency
 - National Risk Management Center
- [FAR Council](#) NDAA Section 889 Rule
- DoD lists of [Communist Chinese Military Companies](#)
- State Department “Clean Path” effort
- USTR
 - 232 Measures
 - [301 Measures](#)

Task Forces

- DHS [ICT Supply Chain Risk Management \(SCRM\) Task Force](#)
- Federal Acquisition Security Council (FASC) and interim final [rule](#)
- [Cyberspace Solarium Commission](#)



New Regimes, New Challenges

NDA Section 889 Rollout Offers Lessons Learned

- Section 889 prohibits agencies from contracting with companies that use certain equipment, but rule lacked clear definitions and ample notice, creating uncertainty for agencies, government contractors, and partners across the economy

CFIUS Activity Shows Government Priorities

- Congress and the Executive have regulated certain FDI to protect US industry and have used oversight to examine data flows, transfers of critical tech, foreign surveillance, supply chains, and high-risk real estate transactions

Export Control Changes Confirm Complexity for Organizations

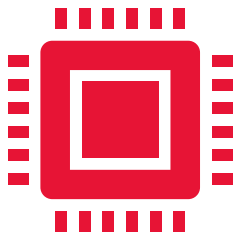
- Increased use of export controls pose challenges for U.S. organizations and show limits of attempts to keep technology out of competitors' hands

ICTS Supply Chain Rule is Broad and Requires Planning

- January 2021 rule implemented EO; set processes for Commerce to identify and address transactions involving ICTS designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of a “foreign adversary” that pose an undue or unacceptable risk to U.S. national security
- Identified foreign adversaries: China, Russia, Iran, North Korea, Cuba, and Venezuela’s Maduro regime
- Commerce missed its deadline to establish a preclearance/license regime but has put out an ANPRM seeking input
- Commerce has not issued guidance about how companies should comply
- Commerce has not announced any restrictions on ICTS transactions yet, despite issuing subpoenas
- Questions remain about authority and scope



Biden Supply Chain Efforts



- February 24 EO instituting a formal review of critical supply chains
- First Track: 100-day review of active pharmaceutical ingredients (APIs), critical minerals and rare earth elements, semiconductors, and large capacity batteries
- Second Track: One-year review on measuring health and resiliency of defense, public health, ICT, energy, transportation industrial bases as well as agricultural commodities and food production

Role of Export Controls and Import Restrictive Measures in Supply Chain Risk Solutions

- Responding to Chinese Industrial Policies, Military Civil Fusion Strategy, Made in China 2025, Data Transfer Requirements
 - Communist Chinese Military Companies (CCMC)
 - Military End Users
 - Entity Lists
- Combatting Chinese mandated forced technology transfer
- Challenges/Concerns
 - Foreign availability
 - Profitability of U.S. industry
 - Retaliation
 - Burdensome/uncertain regulations



What's Next for the Biden Administration?

- The Biden Administration has indicated it will continue national-security based restrictions against China
 - Continues to add Chinese tech companies to the Entity List
- President Biden recently requested a 28% increase in the Department of Commerce's budget to ensure adequate staffing on export controls and ICT supply chain security
- A multilateral approach?
 - President Biden has signaled that he wants to work with allies
 - The Biden Administration recently worked with the EU, UK, and Canada to target Russia



What's Next for Congress?

- Strengthening U.S. supply chains and addressing China generally has bipartisan support, though parties may differ on methods
- Potential legislative efforts
 - NDAA
 - Endless Frontiers Act
 - Strategic Competition Act
 - CHIPS Act Funding
 - Omnibus legislation
- Scrutiny of federal agency and private sector management of supply chains
 - GAO repeatedly finds deficiencies in federal agencies
 - Contractor obligations are expanding and will reach far deeper into economy
 - Companies' relationships can come under scrutiny as well, as noted in last year's Senate PSI report on Chinese telecoms



Policy Options and Political Challenges for the Biden Administration

- Buy America: Domestic preference programs, WTO GPA obligations?
- Defense Production Act: authorities and scope
- “Reshoring Efforts”: Biden tax & infrastructure plan
 - Tax credits, penalties for off-shoring and re-shoring
 - Restrictive measures (IEEPA, Section 232, Section 301, Section 201, and Title VII trade remedy measures)
- R&D: Endless Frontiers Act, other work to encourage investment
- CHIPS for America Act
- Future of ICT Supply Chain Rule, License Regime?
 - Will this be a blueprint for other executive action using IEEPA authority?

“This is about making sure the United States can meet every challenge we face...pandemics, but also in defense, cybersecurity, climate change, and so much more.”

*President Biden
February 24, 2021*



Infrastructure and Tax Plans Address Supply Chain

- President Biden’s \$2 trillion infrastructure plan aims to strengthen supply chains and spur domestic manufacturing growth. The plan:
 - Creates an office at the Department of Commerce dedicated to monitoring domestic industrial capacity and funding investments to support the manufacturing of critical goods
 - Allocates \$50 billion to semiconductor manufacturing and research; \$174 billion to invest in the EV market
 - Invests \$52 billion in existing capital access programs to modernize supply chains, including in the auto sector
 - Calls for a new financing program to support debt and equity investments for manufacturing to strengthen U.S. supply chains
- On the tax-side, President Biden’s “Made in America” tax plan would penalize companies for offshoring jobs and create incentives for onshoring
- Ball now in Congress’s court – Biden Admin. needs Congressional buy-in



Practical Considerations for Companies

- Country of origin and entity evaluation alone may not be durable constructs for third party risk management
- Organizations must understand risks of certain transactions, regional commitments, and supply chain dependencies
- Contract provisions should ensure that regulatory shocks can be managed
- Decision making and long term planning may be subject to government scrutiny and emerging recordkeeping obligations
- Supply chain inquiries will come from upstream and downstream partners
- Organizations need timely and helpful information about government actions and priorities, which can shift quickly
- Organizations should consider vulnerability to retaliation by other countries



Questions?

wiley

Contact Us



Hon. Nazak Nikakhtar

Partner and Co-Chair,
National Security
202.719.3380
nnikakhtar@wiley.law



Megan L. Brown

Partner, Privacy, Cyber &
Data Governance
202.719.7579
mbrown@wiley.law



Nova J. Daly

Senior Public Policy
Advisor, National Security
202.719.3282
ndaly@wiley.law

