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Supply Chain Modernization and Security: Seizing Opportunities and Mitigating Risks

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Setting The Stage



COVID-19 started during the most transformative time in international trade in over a generation

Focus on U.S. manufacturing, technology, and innovation as national security and domestic employment priorities

Unilateral action, especially tariffs

Supply chains: uncertainty but also re-shoring opportunities

Environmental, Social and Governance (ESG) considerations and key to current and future supply chain planning

ESG Laws and Regulations - Overview

North America	Europe	Asia-Pacific
In Force		
California Transparency in Supply Chains Act 2010	European Union Non-financial Reporting Directive	Australian Modern Slavery Act 2018
U.S. Dodd-Frank Act Section 1502 (Conflict Minerals Rule)	European Union Conflict Minerals Regulation	Hong Kong Stock Exchange ESG Reporting Requirements
US Federal Acquisition Regulation: Ending Trafficking in Persons	French Corporate Duty of Vigilance Law	Singapore Prevention of Human Trafficking Act
U.S. SEC Guidance Regarding Disclosure Related to Climate Change	UK Equality Act 2010	
	UK Modern Slavery Act 2015	
Proposed or Not Yet Effective		
Canadian Modern Slavery Act and Amendment to Customs Tariff	Dutch Child Labour Due Diligence Act 2019	Hong Kong Modern Slavery Bill 2017
Updated SEC Guidance Regarding Disclosure Related to Climate Change	European Union Amended Non-financial Reporting Directive (Corporate Sustainability Reporting Directive)	New South Wales Modern Slavery Act 2018
	German Legislation on Corporate Due Diligence in Supply Chains	New Zealand Climate Risk Reporting
	Swiss Responsible Business Initiative	
	UK Climate-Related Financial Disclosures	

Executive Branch and Congressional Developments



Executive Order On Ensuring the Future Is Made in All of America by All of America's Workers



E.O. 14005, issued January 25, 2021

Articulates the Biden Administration's intent to develop a harmonized approach to the various "Made in America Laws" and decisions that will be made in connection with future requests for waivers from the requirements of those laws.

Creates a new "Made in America" office within the Office of Management and Budget that will serve as a clearinghouse for waivers across all Federal Agencies

Celeste Drake named Director of Made in America Office on April 27

Potential Notice of Proposed Rulemaking by July 25, 2021?

Executive Order On Ensuring the Future Is Made in All of America by All of America's Workers (Cont'd)



Key Takeaways

- **There's less daylight between Trump and Biden on government procurement than you might think.**
- A new “whole of government approach” to trade-facing and government procurement topics? (*E.g.*, New requirement for public interest waivers – the granting agency must “assess whether a significant portion of the cost advantage of a foreign-sourced product” results from the use of dumped or subsidized imports.)
- *Managing compliance risks* – the first question still should be “what does the contract / bidding document say?”

Executive Order On Ensuring the Future Is Made in All of America by All of America's Workers (Cont'd)



Federal Register / Vol. 86, No. 36 / Thursday, February 25, 2021 / Notices

11589

making a judgment about the applicant's integrity, business ethics, and record of performance under Federal awards when completing the review of risk posed by applicants.

F. Federal Award Administration Information

1. Federal Award Notices

Following the evaluation outlined in Section E, the Secretary will announce awarded projects by posting a list of selected projects at <https://www.transportation.gov/buildamerica/INFRAgrants>. Following the announcement, the Department will contact the point of contact listed in the SF 424 to initiate negotiation of a project-specific agreement.

2. Administrative and National Policy Requirements

a. Safety Requirements

The Department will require INFRA projects to meet two general requirements related to safety. First, INFRA projects must be part of a thoughtful, data-driven approach to safety. Each State maintains a strategic highway safety plan.¹¹ INFRA projects will be required to incorporate appropriate elements that respond to priority areas identified in that plan and are likely to yield safety benefits. Second, INFRA projects will incorporate appropriate safety-related activities that the Federal Highway Administration (FHWA) has identified as "proven safety countermeasures" due to their history of demonstrated effectiveness.¹²

After selecting INFRA recipients, the Department will work with those recipients on a project-by-project basis to determine the specific safety requirements that are appropriate for each award.

b. Other Administrative and Policy Requirements

All INFRA awards will be administered pursuant to the Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards found in 2 CFR part 200, as adopted by USDOT at 2 CFR part 1201. A project carried out under the INFRA program will be treated as if the project is located on a Federal-aid highway. Additionally, applicable Federal laws, rules and regulations of the relevant operating administration administering the project will apply to

the projects that receive INFRA grants, including planning requirements, Stakeholder Agreements, and other requirements under the Department's other highway, transit, rail, and port grant programs. For an illustrative list of the applicable laws, rules, regulations, executive orders, policies, guidelines, and requirements as they relate to an INFRA grant, please see http://www.ops.fhwa.dot.gov/Freight/infrastructure/nshp/fy2016_gr_exhibit_c/index.htm.

As expressed in Executive Order 14005, *Ensuring the Future Is Made in All of America by All of America's Workers* (86 FR 7475), it is the policy of the executive branch to maximize, consistent with law, the use of goods, products, and materials produced in, and services offered in, the United States. All INFRA projects are subject to the Buy America requirement at 23 U.S.C. 313. The Department expects all INFRA applicants to comply with that requirement without needing a waiver. To obtain a waiver, a recipient must be prepared to demonstrate how they will maximize the use of domestic goods, products, and materials in constructing their project.

The applicability of Federal requirements to a project may be affected by the scope of the NEPA reviews for that project. For example, under 23 U.S.C. 313(g), Buy America requirements apply to all contracts that are eligible for assistance under title 23, United States Code, and are carried out within the scope of the NEPA finding, determination, or decision regardless of the funding source of such contracts if at least one contract is funded with Title 23 funds.

In connection with any program or activity conducted with or benefiting from funds awarded under this notice, recipients of funds must comply with all applicable requirements of Federal law, including, without limitation, the Constitution of the United States; the conditions of performance, nondiscrimination requirements, and other assurances made applicable to the award of funds in accordance with regulations of the Department of Transportation; and applicable Federal financial assistance and contracting principles promulgated by the Office of Management and Budget. In complying with these requirements, recipients, in particular, must ensure that no concession agreements are denied or

Department may terminate the award of funds and disallow previously incurred costs, requiring the recipient to reimburse any expended award funds.

INFRA projects involving vehicle acquisition must involve only vehicles that comply with applicable Federal Motor Vehicle Safety Standards and Federal Motor Vehicle Safety Regulations, or vehicles that are exempt from Federal Motor Carrier Safety Standards or Federal Motor Carrier Safety Regulations in a manner that allows for the legal acquisition and deployment of the vehicle or vehicles.

3. Reporting

a. Progress Reporting on Grant Activity

Each applicant selected for an INFRA grant must submit the Federal Financial Report (SF-425) on the financial condition of the project and the project's progress, as well as an Annual Budget Review and Program Plan to monitor the use of Federal funds and ensure accountability and financial transparency in the INFRA program.

b. Reporting of Matters Related to Integrity and Performance

If the total value of a selected applicant's currently active grants, cooperative agreements, and procurement contracts from all Federal awarding agencies exceeds \$10,000,000 for any period of time during the period of performance of this Federal award, then the applicant during that period of time must maintain the currency of information reported to the System for Award Management (SAM) that is made available in the designated integrity and performance system (currently the Federal Awardee Performance and Integrity Information System (PAPIIS)) about civil, criminal, or administrative proceedings described in paragraph 2 of this award term and condition. This is a statutory requirement under section 872 of Public Law 110-417, as amended (41 U.S.C. 2313). As required by section 3010 of Public Law 111-212, all information posted in the designated integrity and performance system on or after April 15, 2011, except past performance reviews required for Federal procurement contracts, will be publicly available.

G. Federal Awarding Agency Contacts

For further information concerning this notice, please contact the Office of

DOT Notice of Funding Opportunity, 86
Fed. Reg. 11572 (Feb. 25, 2021)



Executive Order on America's Supply Chains

E.O. 14017, issued February 24, 2021

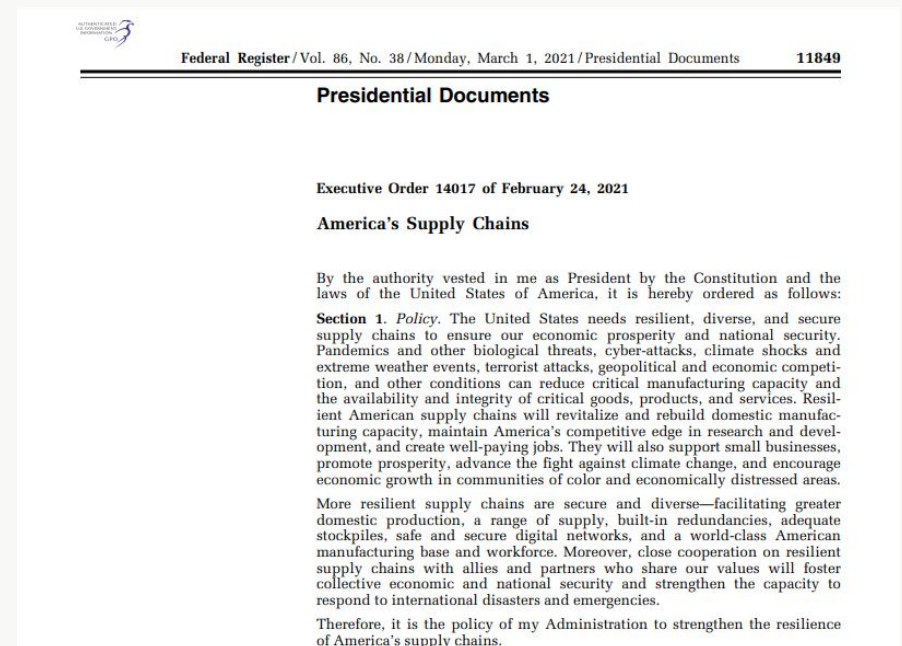


“The United States needs resilient, diverse, and secure supply chains to ensure our economic prosperity and national security. Pandemics and other biological threats, cyber-attacks, climate shocks and extreme weather events, terrorist attacks, geopolitical and economic competition, and other conditions can reduce critical manufacturing capacity and the availability and integrity of supply of critical goods, products, and services.”

— President Joseph R. Biden Jr., Executive Order 14017 (Feb. 24, 2021)

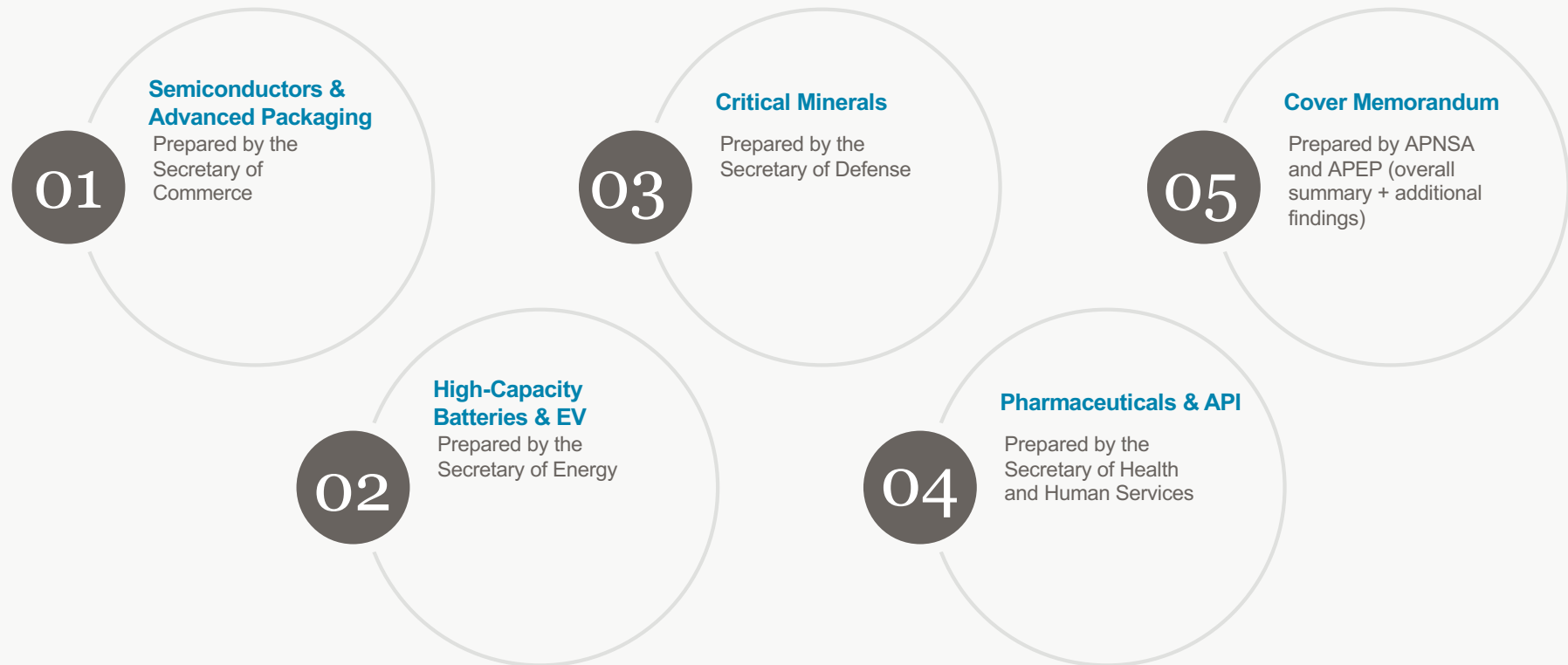
Statement Of Policy (Cont'd)

“[C]lose cooperation on resilient supply chains with allies and partners who share our values will foster collective economic and national security and strengthen the capacity to respond to international disasters and emergencies.”



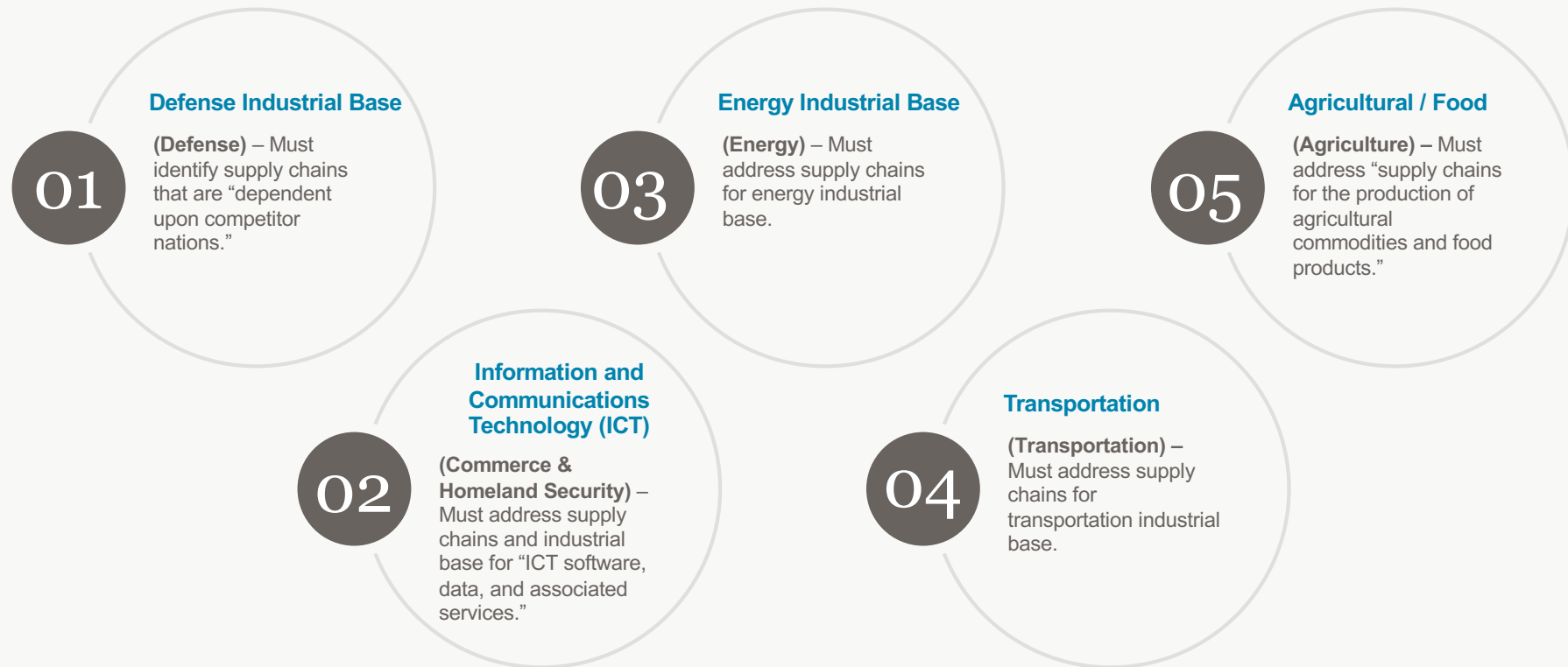


100-Day Supply Chain Review (due June 4)





1-Year Sectoral Supply Chain Assessments





American Jobs Plan

The American Jobs Plan proposal targets the following areas for \$2.2 trillion in new government spending: (1) manufacturing, research and development (“R&D”), and supply chain infrastructure, (2) transportation infrastructure, and (3) utility infrastructure

The Plan also would incentivize domestic production of semiconductors, computer chips, battery technology, clean energy technology, and biotechnology, among other critical product supply chains



Supply Chain Legislation

The *Endless Frontier Act* would create a Supply Chain Resiliency and Crisis Response Program at the Department of Commerce

The *National Manufacturing Guard Act of 2021* would create an Office of Supply Chain Preparedness in the Department of Commerce

The *Strategic Competition Act* would create a Technology Partnerships Office at the State Department that would provide funding and strategic advising services for US businesses seeking to diversify their supply chains away from dependence upon China



Broader Context – Supply Chains And U.S. Trade Policy



*“I think that . . . a lot of the assumptions that we have based our trade programs on has maximized efficiency without regard to the requirement for resilience . . . **trade policy itself needs to be rethought and reformed with resilience and strategy in mind.**”*

— Katherine Tai, President Biden’s Nominee for the United States Trade Representative (Senate Finance Committee 2/25/21)

Broader Context – Supply Chains and U.S. Trade Policy



There are no definitive plans for a new exclusion process from the Section 301 China tariffs

Business continuity planning for the Section 301 China tariffs should coordinate with Legal and Compliance

Practical Perspectives: Supply Chain Management



Information and Communications Technology and Services (ICTS)



- Starting **March 22, 2021** Commerce can review, restrict, or prohibit “ICTS Transactions”
- **ICTS Transactions:** Any acquisition, importation, transfer, installation, dealing in, or use of any ICTS, *including ongoing activities*, that –
 - involve a person or property subject to US jurisdiction;
 - involve property in which a foreign country or national has an interest;
 - are initiated, pending, or completed on or after January 14, 2021; and
 - involve one of six key types of ICTS

ICTS Transactions

- **ICTS:** Hardware, software, products, or services *primarily* intended to fulfill or enable the function of information or data processing, storage, retrieval, or communication by electronic means, including transmission, storage, or display
 - ICTS to be used in a critical infrastructure sector
 - ICTS integral to wireless LAN, mobile, core, long- and short-haul networks; satellite payloads, operations and control; cable and wireline access points
 - ICTS integral to data hosting or computing services
 - Internet-enabled sensors, webcams, surveillance, routers, modems, and drones;
 - Software designed primarily for connecting with/communicating via Internet; and
 - ICTS integral to AI, machine learning, quantum computing, drones, and robotics
- **Foreign adversary:** Persons owned, owned, controlled, or subject to the jurisdiction of a foreign adversary (e.g., China, Russia)

Xinjiang Uyghur Autonomous Region

- *Economic Sanctions*: Treasury Department prohibitions on dealings with Chinese individuals, companies, and government agencies
- *Export Controls*: Prohibition on transferring items subject to US export jurisdiction to Chinese companies on the Entity List
- *Imports/Customs*: Withhold Release Orders for all cotton and tomato products from Xinjiang and their downstream products
- *Regulatory Guidance*: Joint Xinjiang Supply Chain Business Advisory
- *Congressional Action*: Uyghur Forced Labor Prevention Act
- *Multilateral Cooperation*: Australia, UK, and Canada trade restrictions





Semiconductors: Technology Supply Chain Case Study



“We will confront unfair and illegal trade practices, cyber theft, and coercive economic practices that hurt American workers, undercut our advanced and emerging technologies, and seek to erode our strategic advantage and national competitiveness. We will ensure that our supply chains for critical national security technologies . . . are secure.”

— Biden Administration’s Interim National Security Strategic Guidance



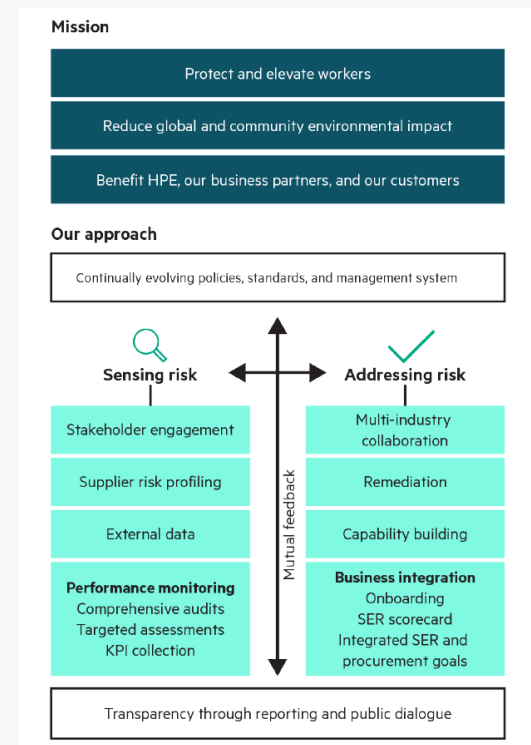
Semiconductors: Technology Supply Chain Case Study

- *ICTS Interim Final Rule*: Identifies risk of “foreign adversary” chips
- *FY 2019 NDAA § 889*: Restricts government contractors and their subsidiaries from using Huawei, ZTE, Dahua, Hikvision, and Hytera telecommunications and video surveillance equipment and services
- *USTR*: Section 301 Report on unfair trade practices, including trade secret theft and anti-competitive behavior
- *Onshoring/Reshoring*: Incentive-based programs to diversify semiconductor manufacturing supply chains
- *Entity List*: Fujian Jinhua Integrated Circuit Co. listing

HPE's Approach To Supply Chain Responsibility

The HPE Supply Chain Responsibility Program

“We share a responsibility with our suppliers to protect workers, communities, and the environment in our supply chain. Our extensive Supply Chain Responsibility (SCR) program guides our approach to assessing risks, monitoring and improving performance, and working collaboratively with suppliers, peers, and other stakeholders to share knowledge on key issues.”



ESG And Small And Medium-Sized Enterprises

SMEs Face Unique Challenges

ESG due diligence by SMEs may be affected by a lack of resources and market influence

OECD Guidance – collaborative efforts to pool leverage (industry associations or cross-sectoral initiatives)



Questions?



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Appendix A: Biden Administration's Executive Order on America's Supply Chains



Executive Order on America's Supply Chains

E.O. 14017, issued February 24, 2021

<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/24/executive-order-on-americas-supply-chains/>

America's Supply Chains E.O. Reports - Industrial Sectors

The definitions are not set in stone.

“Digital networks, services, assets, and data” (“digital products”) are likely to be addressed.

Goods, services, and materials may be relevant “within more than one defined industrial base.”

Assessments may be added “for goods and materials not included in” the initial industrial base sectors.





America's Supply Chains E.O. Reports - Required Contents

What are the **critical or essential goods and materials** in the supply chain?

What capabilities are required to produce these materials?

What risks and contingencies “may disrupt, strain, compromise, or eliminate the supply chain”?

Where are the “key manufacturing and production assets”, and what risks do they face?

America's Supply Chains E.O. Reports - Required Contents (Cont'd)



Do “unfriendly or unstable” nations hold an “exclusive or dominant supply” of critical or essential goods and materials in this supply chain?

Are substitutes or alternative sources available?

What education/skills are required to meet the future workforce needs of the sector?

What research and development needs must be met “to sustain leadership” in the sector?

America's Supply Chains E.O. Reports - Required Contents (Cont'd)



How do transportation systems support existing supply chains and what risks are posed by transportation?

How does **climate change** pose risks “to the availability, production, or transportation” of critical or essential goods or materials in this supply chain?

America's Supply Chains E.O. Reports - Required Contents (Cont'd)



“Possible avenues for engagement” on “allied and partner actions.”

Have “United States allies and partners” taken steps to identify and prioritize relevant critical or essential goods and materials?

What are policy recommendations “for ensuring a resilient supply chain for the sector” may include “cooperating with allies and partners to identify alternative supply chains?”



America's Supply Chains E.O. - Stakeholder Consultations

The Supply Chains E.O. calls for stakeholder consultations, “as appropriate.”

Industry

Academia

Non-governmental organizations

Communities

Labor unions

Government entities



America's Supply Chains E.O. - Future Reports

Follow-up reports must be provided to President Biden to review “actions taken over the previous year and making recommendations” on several topics.

The reports must address “diplomatic, economic, security, trade policy, informational, and other actions that can successfully engage allies and partners to strengthen supply chains jointly or in coordination[.]”

Final point – this is one part of a broader effort (e.g., Executive Order 104001 (1/21/21) (Sustainable Public Health Supply Chain).

Appendix B: Biden Administration's Executive Order on Ensuring the Future Is Made in All of America by All of America's Workers



Executive Order on Ensuring the Future Is Made in All of America by All of America's Workers

E.O. 14005, issued January 25, 2021

<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-ensuring-the-future-is-made-in-all-of-america-by-all-of-americas-workers/>