VIA ELECTRONIC TRANSMISSION

January 23, 2024
The Honorable Joseph R. Biden
President of the United States
The White House
1600 Pennsylvania Ave., NW
Washington, DC 20500

Dear President Biden:

On behalf of the National Venture Capital Association (NVCA), the venture capital firms we represent, and the tens of thousands of entrepreneurs across the country that our members serve, I write to express our absolute opposition to the initial drafting of the Department of Commerce's (DOC) National Institute of Standards and Technology (NIST) interagency guidance framework. We are deeply perplexed by the contradictory nature of this proposal at a time when the Biden Administration and Congress are actively seeking to partner with the investment community on research and innovation in areas ranging from computing to health care to national security and climate.[1][2]

As you are likely aware, venture capital (VC) funding is essential to maintaining innovation - America's lifeblood. VCs are our country's private financiers that assume the highest risk needed for research and development (R&D) to create higher-value companies, drive job creation, and catalyze innovation in frontier technologies. Despite this reality, the recent actions from this administration challenge the economic incentive of supporting American entrepreneurs.

In this letter, we aim to outline how the draft march-in framework and broader implementation of a patent-forfeiting ecosystem will stifle our nation's entrepreneurial economy, domestic venture investment, and private sector trust in the American patent system.

March-in will Destroy the Remaining VC Trust in the Patent System

To level-set, VCs are responsible for investing in entrepreneurs to generate profitable returns for their limited partners (LPs) – often institutional investors such as pension funds, endowments, and family offices. When evaluating the riskiness of potential investments, intellectual property (IP) and patents are valuable assets in generating a return on investment (ROI). According to a study

[1] National Venture Capital Association – NVCA, available at https://nvca.org/

[2] *Request for Information Regarding the Draft Interagency Guidance Framework for Considering the Exercise of March-In Rights*, Federal Register, available at https://www.federalregister.gov/documents/2023/12/08/2023-26930/request-for-information-regarding-the-draft-interagency-guidance-framework-for-considering-the

from the Ponemon Institute, 84% of the value of S&P 500 companies comes from intangible assets such as patents, trademarks, and proprietary information.[3]

Alarmingly, the decline in the effectiveness and reliability of the patent system has led to a decrease in entrepreneurial funding. Between 2004 and 2017, the share of venture capital funding received by the most patent-intensive businesses dropped by 22 percent. The NIST march-in framework, if implemented, will begin a slippery slope of which patents will be eligible to be seized by the government, thus only catalyzing VC distrust in the patent system and consequently deterring private investment in American entrepreneurs with patented inventions.

<u>March-in will make Public Funding Toxic for VCs – Nullifying the Administration's Previous Efforts</u>

Next, we do not agree with nor understand the intent behind the march-in framework and its applicability to all government innovation. This framework is counterintuitive to the recent economic stimulus programs intended to bolster America's public-private partnerships, competitiveness, and economic stability. NVCA celebrated and applauded this administration's commitment to supporting domestic technological innovation and increasing capital for startups in underrepresented regions and communities – unfortunately, the NIST framework now calls into question *all* venture capital paired with *any* of these initiatives. We are gravely concerned about the repercussions on our portfolio companies that have or are receiving federal funding - march-in has the potential to impact *any* patents licensed from the federal government to *any* company that is a product of federal research support.

Programs in this Administration's Marquee Legislation. Despite the framework being in "draft" form, we are already seeing the impact on the venture ecosystem – VCs are questioning their involvement and investment in programs produced from your marquee legislation:

- *American Rescue Plan Act* (ARPA), which provided $10 billion for the State Small Business Credit Initiative (SSBCI), $1 billion for the Build Back Better Regional Challenge, and $500 million for the Good Jobs Challenge.[4]
- *CHIPS and Science Act*, which provided $250 billion in semiconductor and scientific R&D and authorized the $10 billion Regional Tech Hub program and the $1 billion Recompete Program.[5]

NIST's current framework is counterintuitive to, and undermines, your administration's previous work bolstering economic development in these funding packages – we expect march-in to drive private funding away from these initiatives.

Federal Programs. Furthermore, despite NVCA's continued support of the reauthorization of the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs, the march-in framework will put the inventions made by small companies

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[3] *2019 Intangible Assets Financial Statement Impact Comparison Report,* Ponemon Institute LLC, available at https://www.aon.com/getmedia/60fbb49a-c7a5-4027-ba98-0553b29dc89f/Ponemon-Report-V24.aspx

[4] *H.R.1319 - American Rescue Plan Act of 2021,* Congress.gov, Library of Congress, available at https://www.congress.gov/bill/117th-congress/house-bill/1319

[5] *H.R.4346 - Chips and Science Act*, Congress.gov, Library of Congress, available at https://www.congress.gov/bill/117th-congress/house-bill/4346

utilizing these programs at risk, since they are covered by the Bayh-Dole Act of 1980, and make them less attractive candidates for private venture funding. Similarly, I expect this will lead to a decrease in VCs leveraging the existing Small Business Administration (SBA) Small Business Investment Company (SBIC) program or the new SBA and Department of Defense (DoD) Small Business Investment Company Critical Technologies (SBICCT) Initiative. The threat of march-in and broader implications of this framework will scare VCs from risking their return to engage with the government more broadly.

University Technology Transfer Offices (TTOs). The unreliability in the patent system will also extend to university TTOs, despite this being against the original intent of Bayh-Dole. Under the legislation, universities that receive federal grants can patent and license their inventions to US companies, which led to the creation of companies like Google (Stanford TTO), Genentech (University of California TTO), and Akamai Technologies (MIT TTO). The march-in framework would call into question inventions spun out of university TTOs leveraging federal dollars, thus limiting the innovation coming out of these commercializing arms.

Simply put, the draft framework sends a signal to VCs to divert funding away from any companies leveraging federal funding because we can no longer trust both patents for already commercialized inventions and future inventions. This concept seems counterintuitive to your administration's previous intent of building our innovative ecosystem.

<u>March-in Harms Small Businesses Competitiveness</u>

Another point of concern is that anyone can file a march-in petition. Many CEOs of our portfolio companies often work with small teams with limited capacity and workforce. This draft framework will allow large corporations to file countless march-in petitions against smaller companies, leaving them facing significant financial and administrative burdens they cannot handle.

For example, the framework highlights a 3D printing technology startup that has launched but has yet to offer a commercial product or service. In this example, the government is eligible to "March-In" when an "established construction company claims the startup is impermissibly shelving the subject invention by not launching a product or service."[6] We are alarmed that giant corporations or more "established companies" will continue to file march-in petitions against startups to protect against future competition, which will disproportionately impact small businesses in this situation.

<u>March-in will Hurt Development of Critical Industries</u>

Finally, we are concerned that the draft NIST framework will stifle R&D in emerging fields that rely on government-funded intellectual property, including renewable energy, telecommunications, agriculture, healthcare, and more. Your administration has dedicated its efforts to bolstering development in these sectors, yet "march-in" will slow and limit opportunities for entrepreneurs and development in these sectors.

We disagree with the administration's inclusion of pricing as a consideration in deciding whether the federal government can use its march-in authority. Nothing in the original Bayh-Dole Act

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[6] *Request for Information Regarding the Draft Interagency Guidance Framework for Considering the Exercise of March-In Rights*, Federal Register, available at *https://www.federalregister.gov/documents/2023/12/08/2023-26930/request-for-information-regarding-the-draft-interagency-guidance-framework-for-considering-the*

includes price as a factor when invoking march-in rights. This interpretation of the legislation misrepresents its original intent and will effectively curb investment in critical sectors like healthcare. The ambiguity of the draft framework, which also does not include a definition of what would constitute unreasonable prices, will lead to investors derisking their portfolios and limiting the development of vital cures and technologies.

In conclusion, I cannot understate the value of sustained VC funding for our nation's economy and competitiveness. VCs are critical to America's innovative ecosystem – VC backed companies account for 80% of America's private research and development (R&D) spending. VCs funnel capital into high-risk and emerging technologies, driving advancements in every industry, from defense to energy and health. Our members at NVCA collectively support tens of thousands of startup portfolio companies across all sectors, providing them with financial backing and offering support through strategic advice, board and personnel management, operational guidance, and other services to set them up for success.

We urge you to immediately withdraw the NIST march-in framework and abandon your administration's broader march-in strategy. I appreciate your consideration and welcome the opportunity for further discussion on this important topic.

Sincerely,

Bobby Franklin

Bobby Franklin

President and CEO
National Venture Capital Association

CC: The Honorable Gina Raimondo, Secretary, U.S. Department of Commerce