

Citing National Security, FCC Begins Proceeding to Bar the Use of Universal Service Monies for Equipment from Certain Countries

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Echoing concerns raised by other parts of the federal government over the past several years, the FCC, at its open meeting on April 17, 2018, adopted a [Notice of Proposed Rulemaking](#) (“NPRM”) to consider a rule which would prohibit Universal Service Fund (“USF”) support from being used “to purchase or obtain any equipment or services produced or provided by a company posing a national security threat to the integrity of communications networks or the communications supply chain.” The NPRM seeks comment on issues such as how such a rule can be implemented and enforced, what types of equipment and services should be covered, and how manufacturers covered by the rule are to be identified and made known to USF recipients. Although this is only the start of the proceeding, the FCC’s action could have a broad-reaching impact for some communications equipment manufacturers and create potential liabilities for entities participating in any of the federal USF programs. All companies purchasing equipment from certain countries – principally China and Russia – may be affected, even if they don’t receive federal USF money.

Recently Congress has expressed concerns about foreign state influence in U.S. communications networks resulting from the use of equipment and/or services by certain foreign entities, particularly from China and Russia. For a number of years, many mitigation arrangements imposed by Team Telecom on certain Section 214 authorization holders and submarine cable landing licensees have required the affected carriers and cable operators to obtain government consent to use principal equipment suppliers, as part of the Team Telecom’s ongoing review of these carriers and operators to ensure equipment used in cable systems or carrier infrastructure does not come from certain companies that raise national security issues. To reinforce existing measures that address these concerns, the FCC proposes the above-stated bright line rule and seeks comment on scope, implementation, and enforcement.

Scope of the Prohibition

One key issue in the NPRM is how to identify companies that pose a national security threat to communications networks or the communications supply chain. Several potential approaches are discussed. First, it asks whether the Commission should “establish the criteria for identifying a covered company,” and if so, how it should determine such criteria. Second, the NPRM suggests that the Commission could “rely on existing statutes listing companies barred from providing certain equipment or services to federal agencies for national security reasons.” Third, another federal

agency could “maintain a list of communications equipment or service providers that raise national security concerns regarding the integrity of communications networks or the communications supply chain.” A related definitional issue is whether the prohibition would also apply to a covered company’s subsidiaries, parents, and/or affiliates, and how these entities should be defined.

Implementation Issues

The Commission also has requested input on various implementation issues related to the proposed rule, such as:

- Whether the prohibition should apply to all equipment and services from companies that have been identified as raising national security risks, or whether the rule should be more narrowly tailored to certain types of equipment and services more prone to supply chain vulnerabilities. One approach would be to “limit the scope of the proposed rule to equipment and services that relate to the management of a network, data about the management of a network, or any system the compromise or failure of which could disrupt the confidentiality, availability, or integrity of a network.” This approach would seem to exclude end user equipment. Another approach could “prohibit the use of any USF funds on any project where equipment or services produced or provided by a company posing a national security threat to the integrity of communications networks or the communications supply chain is being purchased or obtained.” This approach might apply to indirect purchases of services from covered companies as well as direct purchases. This approach potentially could cover end user equipment whether directly or indirectly purchased with USF funds.
- Whether and how the rule should apply to contractors and subcontractors of USF recipients.
- Whether the Commission should adopt “rules on a program-specific basis across the four separate USF programs.”
- The proposed rule would be prospective only, but the item seeks comment on how much time USF recipients would need to come into compliance with the rule, and whether there should be staggered compliance deadlines for certain recipients (e.g., schools and libraries, smaller USF recipients). The Commission tentatively concludes that the proposed rule would extend to upgrades of existing equipment or services.
- The potential impact of the rule on existing contracts between USF recipients and parties identified as posing a supply chain risk.
- How to ensure that USF recipients are able to and do comply with the rule (e.g., requiring certifications from USF applicants or recipients).
- How to enforce the rule, particularly in the E-Rate program, when USF support may be distributed to a school or library rather than a service provider.
- Whether USF recipients should be permitted to seek a waiver of the rule.
- The costs and benefits of the rule.
- The FCC’s legal authority to adopt the proposed rule, which the FCC tentatively concludes from its statutory authority to administer the universal service fund, the absence of statutory limits to place conditions on how such funds are used, and its general rulemaking authority to carry out the provisions of the Communications Act.

Beyond the Federal USF

Finally, and with potentially much farther reaching impact than the proposed rule, the NPRM asks more generally whether the Commission should “consider actions targeted not only at the USF-funded equipment of [covered] companies, but also non-USF funded equipment or services produced or provided by those companies that might pose the same or similar national security threats to the nation’s communications networks.”

Next Steps

This proceeding is at its early stage, and affected parties will have an opportunity to respond to the FCC’s proposal. Already, some smaller rural carriers have raised concerns with the proposal, citing costs and the potential impact on broadband deployment in rural areas. Both direct and indirect recipients of federal USF disbursements should examine the proposal carefully to determine its impact on the company’s operations. Initial comments on the NPRM will be due 30 days after the item is published in the Federal Register, and reply comments will be due 60 days after publication.