

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Protecting Against National Security	)	WC Docket No. 18-89
Threats to the Communications Supply	)	
Chain Through FCC Programs	)	
	)	

**COMMENTS OF HUAWEI TECHNOLOGIES CO., LTD., AND  
HUAWEI TECHNOLOGIES USA, INC.**

Huawei Technologies Co., Ltd., and Huawei Technologies USA, Inc. (collectively, “Huawei”), by their undersigned counsel, submit these comments regarding the Third Further Notice of Proposed Rulemaking (“Third FNPRM”)<sup>1</sup> in the above-captioned docket.

**I. INTRODUCTION**

The Commission proposes to expand the requirement adopted in the *Supply Chain Second Report and Order*<sup>2</sup> and in section 54.11 of the Commission’s rules<sup>3</sup> that certain carriers remove and replace equipment or services included on the Covered List. The Commission claims that the

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<sup>1</sup> See *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, Third Further Notice of Proposed Rulemaking, WC Docket No. 18-89, FCC 21-26 (“Third FNPRM”).

<sup>2</sup> See *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, Second Report and Order, 35 FCC Rcd 14284, 14290-308, ¶¶ 17-50 (2020) (“*Supply Chain Second Report and Order*”).

<sup>3</sup> See 47 C.F.R. § 54.11 (requiring eligible telecommunications carriers receiving Universal Service Fund support to certify prior to receiving a funding commitment or support that it does not use “any communications equipment or service that is on the Covered list found in § 1.50002” after the Commission begins accepting applications for Reimbursement Program funding and, for Reimbursement Program recipients, after the expiration of their removal, replacement, and disposal term). Huawei notes that this mandate has not taken effect and the Federal Register publication indicates that it is “delayed indefinitely.”

Consolidated Appropriations Act, 2021 (“CAA”)<sup>4</sup> “appears to modify the equipment and services eligible for reimbursement from those on the Covered List to those subject to the *Designation Orders*,” and “propose[s] to accordingly revise the equipment and services subject to removal to encompass all equipment and services produced or provided by Huawei and ZTE.”<sup>5</sup> The Commission asserts that such a change “would be consistent” with the Commission’s prior findings regarding “the potential vulnerabilities of all types of equipment.”<sup>6</sup>

The CAA does not support the proposal to *mandate* removal of any equipment. As explained further below, the CAA simply appropriated funds for the Commission to carry out the Secure and Trusted Communications Networks Act (the “Secure Networks Act”) and amended certain provisions of the Secure Networks Act to expand the size and type of providers, and the scope of equipment, *eligible for reimbursement* under Section 4 of that Act. The CAA also established a statutory prioritization scheme for circumstances in which demand for Reimbursement Program funding exceeds supply. The CAA did not, however, alter the scope of equipment that should be included on the Covered List required by the Secure Networks Act and developed pursuant to section 1.50002 of the Commission’s rules.<sup>7</sup>

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<sup>4</sup> Pub. L. 116-260, Division N-Additional Coronavirus Response and Relief, Title IX-Broadband Internet access Service, §§ 901, 906, 134 Stat. 1182 (2020) (“CAA”). All further references to the CAA refer to Division N, Title IX of the CAA.

<sup>5</sup> Third FNPRM, ¶ 16.

<sup>6</sup> *Id.*

<sup>7</sup> See 47 C.F.R. § 1.50002 (prescribing the procedures for the Public Safety and Homeland Security Bureau to publish the Covered List and the criteria for inclusion of communications equipment or services on the Covered List).

More importantly, the Commission has no authority under the Secure Networks Act, the CAA or any other provision of law to mandate that providers remove and/or replace covered equipment or services. Therefore, the Commission should not adopt its proposal to expand the scope of equipment and services subject to the removal-and-replacement mandate.

## **II. THE COMMISSION HAS NO AUTHORITY TO MANDATE THE REMOVAL AND REPLACEMENT OF COVERED EQUIPMENT.**

“The Commission, like other federal agencies, literally has no power to act unless and until Congress confers power upon it.”<sup>8</sup> As Huawei has previously explained, nothing in the Secure Networks Act purports to empower the Commission to mandate removal of covered equipment, whether by eligible telecommunications carriers (“ETCs”) or any other category of providers.<sup>9</sup> Section 4 of the Secure Networks Act establishes a purely *voluntary* Reimbursement Program for carriers that choose to participate. Moreover, Section 4 of the Secure Networks Act limits participation in the Reimbursement Program to providers of a certain size and type. No provision of the Secure Networks Act (including Section 4) mandates the removal and replacement of covered equipment outside of the context of a *voluntary* exchange of reimbursement funds for the removal of covered equipment or services.

And as Huawei has previously explained at length, no other statute—not sections 254 or 201 of the Communications Act, the Communications Assistance for Law Enforcement Act nor section 889 of the National Defense Authorization Act of 2019—provides authority for the Commission to mandate removal and replacement of covered equipment.<sup>10</sup> Because the Commission

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<sup>8</sup> *Mozilla Corp. v. FCC*, 940 F.3d 1, 74 (D.C. Cir. 2019).

<sup>9</sup> See Comments of Huawei Technologies Co., Ltd., and Huawei Technologies USA, Inc., WC Docket No. 18-89, at 22-27 (filed Aug. 31, 2020) (“Huawei Second FNPRM Comments”).

<sup>10</sup> See Huawei Section FNPRM Comments at 24-27. See also Comments of Huawei Technologies Co., Ltd., and Huawei Technologies USA, Inc., WC Docket No. 18-89, at 2-33 (filed Feb. 3, 2020); Reply

lacks statutory authority to impose a removal-and-replacement mandate in the first instance, the Commission has no authority to expand its already unlawful rule.

### **III. THE CAA DOES NOT AUTHORIZE THE COMMISSION TO MANDATE THE REMOVAL AND REPLACEMENT OF COVERED EQUIPMENT.**

The CAA only appropriated funds for, and expanded eligibility criteria for participation in, the voluntary Reimbursement Program established by Section 4 of the Secure Networks Act. It does not provide the Commission with statutory authority to adopt or expand any mandates regarding the removal-and-replacement of covered equipment.

Specifically, the CAA appropriated \$1.9 billion for the Commission to carry out the Secure Networks Act, of which \$1.895 billion shall be used to carry out the Reimbursement Program.<sup>11</sup> The CAA also amended the Secure Networks Act regarding other aspects of the voluntary Reimbursement Program by increasing the size,<sup>12</sup> and expanding the types,<sup>13</sup> of providers that may avail themselves of reimbursement funding under Section 4 of the Secure Networks Act. Moreover, the CAA revised the scope of equipment eligible for Reimbursement Program Funding by allowing reimbursement for equipment covered by the *Designation Orders*<sup>14</sup> and established a statutory scheme for prioritization of Reimbursement Program funding to the extent demand for such funding exceeds supply.<sup>15</sup>

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Comments of Huawei Technologies Co., Ltd., and Huawei Technologies USA, Inc., WC Docket No. 18-89, at 2-8 (filed Mar. 3, 2020); Comments of Huawei Technologies Co., Ltd., and Huawei Technologies USA, Inc., WC Docket No. 18-89, at 2 (filed May 20, 2020).

<sup>11</sup> See CAA, § 906.

<sup>12</sup> See CAA, § 901(1)(A) (increasing the size of provider eligible for Reimbursement Program funding to providers with fewer than 10 million customers).

<sup>13</sup> See CAA, § 901(2) (expanding the definition of “provider of advanced communications service” to include educational institutions that operate networks and provide services).

<sup>14</sup> See CAA, § 901(1)(B).

<sup>15</sup> See CAA, § 901(1)(C).

The CAA did not, however, alter the operative provisions of the Secure Networks Act that address use of Commission-administered subsidies for covered equipment or services. In particular, the CAA did not amend Section 2 of the Secure Networks Act regarding how the Covered List shall be developed.<sup>16</sup> Nor did it alter Section 3 of the Secure Networks Act, *i.e.*, the prohibition on use of Commission subsidies to purchase or otherwise obtain covered equipment or services.

Accordingly, the CAA had no effect on the Commission's authority (or lack thereof) under the Secure Networks Act to make national security determinations about which equipment or services should be "covered" under the Act and provides no authority for the Commission to mandate removal and replacement of any equipment or services outside of the limited context of the voluntary Reimbursement Program. The Commission cannot therefore rely on the CAA as grounds to expand its already unlawful removal-and-replacement mandate.

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<sup>16</sup> See Huawei Second FNPRM Comments at 3-14 (explaining the framework for adding equipment and services to the Covered List as prescribed by section 2 of the Secure Networks Act).

#### IV. CONCLUSION

For the reasons explained above, the CAA does not authorize the Commission to expand the removal-and-replacement mandate to reach all equipment produced or provided by designated companies. The Commission therefore should not adopt its proposal in Paragraph 16 of the Third FNPRM.

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