

Before the
Federal Communications Commission
Washington, D.C. 20554

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

SECOND REPORT AND ORDER

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By the Commission: Chairman Pai and Commissioners O’Rielly, Carr, Rosenworcel, and Starks issuing
separate statements.

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## I. INTRODUCTION

1. The Commission plays an important role in protecting America’s communications networks and, today, we take further steps toward securing our communications networks by implementing the Secure and Trusted Communications Networks Act of 2019 (Secure Networks Act). We first adopt a rule that requires Eligible Telecommunications Carriers (ETCs) to remove and replace covered equipment from their networks. Second, we establish the Secure and Trusted Communications Networks Reimbursement Program to subsidize smaller carriers to remove and replace covered equipment, once Congress appropriates at least \$1.6 billion that Commission staff estimate will be needed to reimburse providers eligible under current law. Third, we establish the procedures and criteria for publishing a list of covered communications equipment or services that pose an unacceptable risk to the national security of the United States or the security and safety of United States persons and prohibit USF support from being used for such covered equipment or services. Last, we adopt a reporting requirement to ensure we are informed about the ongoing presence of covered equipment in communications networks.

## II. BACKGROUND

2. As the importance of broadband to Americans has grown, the United States government has moved to protect the security of the networks that provide these services. Congress and the Executive Branch have prioritized the importance of identifying and eliminating potential security vulnerabilities in communications networks and their supply chains.<sup>1</sup> The Commission, which was created by Congress in part “for the purpose of the national defense [and] for the purpose of promoting safety of life and property through the use of wire and radio communication . . . ,”<sup>2</sup> in turn has helped to identify and address these vulnerabilities by using its resources to protect the integrity of communications networks and the communications supply chain.

3. *Congressional and Executive Branch Action.* In 2017, responding to continuing concerns over the purchase and use of communications equipment from certain foreign entities, Congress passed,

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<sup>1</sup> In 2012, the House Permanent Select Committee on Intelligence released a bipartisan report assessing the counterintelligence and security threat posed by Chinese telecommunications companies operating in or providing equipment to customers in the United States. Permanent Select Committee on Intelligence, U.S. House of Representatives, Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE at iv (Oct. 8, 2012), [https://republicans-intelligence.house.gov/sites/intelligence.house.gov/files/documents/huaweizte%20investigative%20report%20\(final\).pdf](https://republicans-intelligence.house.gov/sites/intelligence.house.gov/files/documents/huaweizte%20investigative%20report%20(final).pdf). In 2017, the White House released Executive Order 13800, which directed the Secretary of Homeland Security, in coordination with the Secretary of Defense, the Attorney General, the Director of National Intelligence, the Director of the Federal Bureau of Investigation, and all other appropriate agency heads, to identify authorities and capabilities that agencies could employ to support the cybersecurity efforts of critical infrastructure entities, and to determine how best to support cybersecurity risk management efforts. Exec. Order No. 13800 § 2(b), 82 Fed. Reg. 22391, 22393, Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure (May 11, 2017). In November 2018, the Department of Homeland Security convened the Information and Communications Technology Supply Chain Risk Management Task Force, a public-private partnership formed to examine and develop consensus recommendations to identify and manage risk to the global information and communications supply chain. Press Release, Department of Homeland Security, DHS Announces ICT Supply Chain Risk Management Task Force Members (Nov. 15, 2018), <https://www.dhs.gov/news/2018/11/15/dhs-announces-ict-supply-chain-riskmanagement-task-force-members>. In 2020, the Department of Defense explained its strategic objective for supply chain security is to “[r]educe threats to key U.S. supply chains to prevent foreign attempts to compromise the integrity, trustworthiness, and authenticity of products and services purchased and integrated into the operations of the U.S. Government, the Defense Industrial Base, and the private sector.” The National Counterintelligence and Security Center, Supply Chain Risk Management: Reducing Threats to Key U.S. Supply Chains (Sept. 25, 2020) <https://www.dni.gov/files/NCSC/documents/supplychain/20200925-NCSC-Supply-Chain-Risk-Management-trifold.pdf>.

<sup>2</sup> 47 U.S.C. § 151.

and the President signed into law, the National Defense Authorization Act for Fiscal Year 2018 (2018 NDAA). The 2018 NDAA, among other things, bars the Department of Defense from using “[t]elecommunications equipment [or] services produced . . . [or] provided by Huawei Technologies Company or ZTE Corporation” for certain critical programs, including ballistic missile defense and nuclear command, control, and communications.<sup>3</sup>

4. In 2018, Congress passed, and the President signed into law, the National Defense Authorization Act for Fiscal Year 2019 (2019 NDAA).<sup>4</sup> Section 889(b)(1) of the 2019 NDAA prohibits the head of an executive agency from using federal funds to procure or obtain equipment, services, or systems that use “covered telecommunications equipment or services” as a substantial or essential component of any system, or as critical technology as part of any system.<sup>5</sup> Section 889(f)(3) of the 2019 NDAA subsequently and generally defines “covered telecommunications equipment or services” as (1) telecommunications equipment produced by Huawei or ZTE or any subsidiary or affiliate of such entities; (2) for certain safety and security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation (Hytera), Hangzhou Hikvision Digital Technology Company (Hikvision), or Dahua Technology Company (Dahua) or any subsidiary or affiliate of such entities; (3) telecommunications or video surveillance equipment services provided by such entities or using such equipment; or (4) telecommunications or video surveillance equipment or services produced by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country, where “covered foreign country” is defined as the People’s Republic of China.<sup>6</sup>

5. Like Congress, the President and the Executive Branch have undertaken numerous efforts to secure our country’s communications supply chain. For example, in December 2018, the Federal Acquisition Security Council, which includes seven Executive Branch agencies, was established pursuant to the SECURE Technology Act.<sup>7</sup> The Council is charged with developing a government-wide strategy to address communications supply chain risks and may recommend that other agencies remove insecure communications services or equipment.<sup>8</sup> On September 1, 2020, the Council issued an interim final rule to “standardize processes and procedures for submission and dissemination of supply chain information” and “facilitate the operations of a Supply Chain Risk Management Task Force under the [Council].”<sup>9</sup> It also provided the “criteria and procedures by which the [Council] will evaluate supply chain risk.”<sup>10</sup> In May 2019, the President signed Executive Order 13873, declaring a national emergency with respect to the security, integrity, and reliability of information and communications technology and services, and granting the Secretary of Commerce the authority to prohibit transactions of information and communications technology or services when, among other things, the transaction would pose undue risks

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<sup>3</sup> See Pub. L. 115-91, 131 Stat. 1283, 1762, § 1656.

<sup>4</sup> See Pub. L. 115-232, 132 Stat. 1636.

<sup>5</sup> *Id.* at 1917, § 889(a)-(b)(1).

<sup>6</sup> *Id.* at 1918, § 889(f)(2)-(3).

<sup>7</sup> See Pub. L. 115-390, 132 Stat. 5173.

<sup>8</sup> See *id.*

<sup>9</sup> Office of Management and Budget, Federal Acquisition Supply Chain Security Act, 85 Fed. Reg. 54263 (Sept. 1, 2020).

<sup>10</sup> *Id.*

to U.S. critical infrastructure or national security.<sup>11</sup> In November 2019, the Department of Commerce began a rulemaking to implement Executive Order 13873.<sup>12</sup>

6. *Commission Action.* In April 2018, the Commission released the *2018 Supply Chain Notice*, which proposed to prohibit the use of USF support to purchase or obtain equipment or services from any communications equipment or service provider identified as posing a national security risk to communications networks or the communications supply chain.<sup>13</sup>

7. In November 2019, we adopted the *2019 Supply Chain Order*, which adopted a rule prohibiting the use of “universal service support . . . to purchase or obtain any equipment or services produced or provided by a covered company posing a national security threat to the integrity of communications networks or the communications supply chain.”<sup>14</sup> We adopted this rule based on our conclusion that it is critical to the provision of “quality service”<sup>15</sup> that USF support be spent on secure networks and not on equipment and services from companies that threaten national security. Pursuant to this rule, which is codified at 47 CFR § 54.9, USF support may not be used to purchase, maintain, improve, modify, operate, manage, or otherwise support any equipment or services produced or provided by a covered company.

8. In the *2019 Supply Chain Order*, we also initially designated two Chinese companies, Huawei and ZTE, and their subsidiaries, parents, or affiliates, as companies that pose a national security threat to the integrity of communications networks and the communications supply chain, and we established a process for future designations of other companies posing such a risk.<sup>16</sup> Consistent with that process,<sup>17</sup> the Commission’s Public Safety and Homeland Security Bureau issued final designations of Huawei and ZTE on June 30, 2020.<sup>18</sup> Accordingly, as of that date, USF support may not be used to

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<sup>11</sup> See Exec. Order No. 13873, 84 Fed. Reg. 11578, Executive Order on Securing the Information and Communications Technology and Services Supply Chain (May 15, 2019), <https://www.whitehouse.gov/presidential-actions/executive-order-securing-information-communications-technology-services-supply-chain/> (Executive Order 13873). On May 14, 2020, the President issued an order extending the emergency declaration for another year. See Continuation of the National Emergency With Respect to Securing the Information and Communications Technology and Services Supply Chain, 85 Fed. Reg. 29321 (May 14, 2020).

<sup>12</sup> U.S. Department of Commerce, Securing the Information and Communications Technology and Services Supply Chain, 84 Fed. Reg. 65316 (Nov. 27, 2019).

<sup>13</sup> See *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89, Notice of Proposed Rulemaking, 33 FCC Rcd 4058, 4058, para. 2 (2018) (*2018 Supply Chain Notice*).

<sup>14</sup> *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89, Report and Order, Further Notice of Proposed Rulemaking, and Order, 34 FCC Rcd 11423, 11433, para. 26 (2019) (*2019 Supply Chain Order and Further Notice*), *appeal pending in Huawei Technologies USA v. FCC*, No. 19-60896 (5th Cir.).

<sup>15</sup> 47 U.S.C. § 254(b)(1).

<sup>16</sup> See *2019 Supply Chain Order*, 34 FCC Rcd at 11438-48, paras. 43-63.

<sup>17</sup> See *2019 Supply Chain Order*, 34 FCC Rcd at 11438, para. 40; *id.* at 11449, para. 64; *id.* at 11486, para. 185 (directing the Public Safety and Homeland Security Bureau to determine whether to finalize the initial designations within 120 days of the *Order*’s publication in the Federal Register, and holding that the Bureau may extend the 120-day deadline for good cause); *Public Safety and Homeland Security Bureau Extends Timeframe For Determining Whether to Finalize Designations of Huawei and ZTE Pursuant to 47 C.F.R. § 54.9*, PS Docket Nos. 19-351 and 19-352, Public Notice, DA 20-471 (PSHSB May 1, 2020) (finding good cause to extend the timeframe for determining whether to finalize the initial designations of Huawei and ZTE to June 30, 2020).

<sup>18</sup> See generally *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs – Huawei Designation*, PS Docket No. 19-351, Order, 35 FCC Rcd 6604 (PSHSB 2020) (*Huawei Designation Order*); *Protecting Against National Security Threats to the Communications Supply Chain Through*

(continued....)

purchase, maintain, improve, modify, operate, manage, or otherwise support any equipment or services produced or provided by Huawei or ZTE or their subsidiaries, parents, and affiliates.

9. In the *2019 Supply Chain Further Notice*, which accompanied the *2019 Supply Chain Order*, we sought comment on a proposal to “require, as a condition on the receipt of any USF support that [ETCs] not use or agree not to use within a designated period of time, communications equipment or services from covered companies.”<sup>19</sup> We also proposed to establish a program to reimburse costs incurred by ETCs required to remove and replace covered equipment and services.<sup>20</sup> To better inform our consideration of a reimbursement program and the presence of Huawei and ZTE equipment in U.S. networks, we also enacted the *2019 Information Collection Order*, which required ETCs to report whether they use or own Huawei or ZTE equipment or services in their networks, or the networks of their affiliates and subsidiaries, and to report the cost of removing and replacing such equipment and services.<sup>21</sup> We released the results of that information collection in September 2020.<sup>22</sup>

10. We have also taken action to block access to our communications networks through our section 214 authority to providers posing a substantial and serious security threat to U.S. communications networks.<sup>23</sup> In 2019, we declined to grant China Mobile’s application for international 214 authority because the carrier who applied for the license was “vulnerable to exploitation, influence, and control by the Chinese government.”<sup>24</sup> Relying on the expertise of appropriate Executive Branch agencies, we concluded that there existed “a significant risk that the Chinese government would use the grant of such authority to [the carrier] to conduct activities that would seriously jeopardize the national security and law enforcement interests of the United States.”<sup>25</sup> Earlier this year, we directed China Telecom (Americas) Corporation to respond to a series of questions about its ownership, management, operations, facilities, customers, and the extent to which it is subject to exploitation, influence, and control by the Chinese government.<sup>26</sup> The response must demonstrate why we should not commence a proceeding to revoke China Telecom (Americas) Corporation’s 214 authorization as well.<sup>27</sup>

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*FCC Programs – ZTE Designation*, PS Docket No. 19-352, Order, 35 FCC Rcd 6633 (PSHSB 2020) (*ZTE Designation Order*).

<sup>19</sup> *2019 Supply Chain Order*, 34 FCC Rcd at 11470–71, para. 122.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 11481–82, paras. 162–63.

<sup>22</sup> See *Wireline Competition Bureau and Office of Economics and Analytics Release Results from Supply Chain Security Information Collection*, WC Docket No. 18-89, Public Notice, DA 20-1037 (WCB Sep. 4, 2020) (*Information Collection Results PN*).

<sup>23</sup> 47 U.S.C. § 214(a) (“No carrier shall undertake the construction of a new line or an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extend line . . . .”); see also *China Mobile International (USA) Inc.*; Application for Global Facilities-Based and Global Resale International Telecommunications Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, File No. ITC-214-20110901-00289; *China Mobile International (USA) Inc.*, Memorandum Opinion and Order, 34 FCC Rcd 3361, 3365-66, para. 8 (2019) (*China Mobile USA Order*); *China Telecom (Americas) Corporation*, GN Docket No. 20-109, et al., Order to Show Cause, 35 FCC Rcd 3713 (IB, WCB, EB 2020) (*China Telecom Order to Show Cause*).

<sup>24</sup> *China Mobile USA Order*, 34 FCC Rcd at 3365-66, para. 8.

<sup>25</sup> *Id.*

<sup>26</sup> *China Telecom Order to Show Cause*, 35 FCC Rcd at 3718-19, paras. 11-12.

<sup>27</sup> *Id.*

11. *Secure and Trusted Communications Networks Act of 2019.* On March 12, 2020, the President signed into law the Secure and Trusted Communications Networks Act of 2019 (the Secure Networks Act), which passed both Houses of Congress by voice vote.<sup>28</sup> The Secure Networks Act intersects with several key provisions of the Commission’s Supply Chain proceeding and, among other measures, prohibits the use of USF support to purchase covered communications equipment or services and directs the Commission to establish a reimbursement program substantially similar to the one proposed in the *2019 Supply Chain Further Notice*.

12. Section 2 of the Secure Networks Act mandates that the Commission publish on its website a list of “covered” communications equipment. To be “covered,” the Secure Networks Act provides that such equipment must meet two criteria. *First*, the communications equipment or service must, based exclusively on determinations made by Congress, certain government agencies, or interagency bodies, “pose[ ] an unacceptable risk to the national security of the United States or the security and safety of United States persons[.]”<sup>29</sup> *Second*, the equipment or services must be “capable of—(A) routing or redirecting user data traffic or permitting visibility into any user data or packets that such equipment or service transmits or otherwise handles; (B) causing the network of a provider of advanced communications service to be disrupted remotely; or (C) otherwise posing an unacceptable risk to the national security of the United States or the security and safety of United States persons.”<sup>30</sup>

13. Section 3 of the Secure Networks Act prohibits the use of “a Federal subsidy that is made available through a program administered by the Commission and that provides funds to be used for the capital expenditures necessary for the provision of advanced communications service” to purchase, rent, or otherwise obtain any covered communications equipment or services published on the list established pursuant to section 2.<sup>31</sup> Consistent with our proposals in the *2019 Supply Chain Further Notice*, section 4 of the Secure Networks Act establishes the Secure and Trusted Communications Networks Reimbursement Program (Reimbursement Program) to facilitate the removal, replacement, and disposal of covered communications equipment and services, complete with reporting and certification requirements.<sup>32</sup> The Secure Networks Act did not appropriate funds for the Reimbursement Program, and proposals to fund the Reimbursement Program remain pending in Congress. Section 5 requires all providers of “advanced communications services” to submit annual reports to the Commission “regarding whether such provider has purchased, rented, leased, or otherwise obtained any covered communications equipment or service . . . .”<sup>33</sup> Section 7 tasks the Commission with enforcing the Secure Networks Act, and adds penalties beyond those in the Communications Act and our rules for violations of section 4.

14. In April 2020, the Wireline Competition Bureau released a Public Notice seeking comment on how the Secure Networks Act’s reimbursement program differed, if at all, from the one the Commission proposed in the *2019 Supply Chain Order*.<sup>34</sup>

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<sup>28</sup> Secure and Trusted Communications Networks Act of 2019, Pub. L. No. 116-124, 133 Stat. 158 (2020) (codified as amended at 47 U.S.C. §§ 1601–1609) (Secure Networks Act).

<sup>29</sup> Secure Networks Act § 2(b)(1).

<sup>30</sup> *See id.* § 2(a).

<sup>31</sup> *See id.* § 3(a)(1)(A)-(B).

<sup>32</sup> *See id.* § 4(a).

<sup>33</sup> *See id.* § 5(a). This reporting requirement is limited to equipment or services purchased after August 14, 2018. *See id.*

<sup>34</sup> *See Wireline Competition Bureau Seeks Comment on the Applicability of Section 4 of the Secure and Trusted Communications Networks Act of 2019 to the Commission’s Rulemaking on Protecting Against National Security Threats to the Communications Supply Chain*, WC Docket No. 18-89, Public Notice, 35 FCC Red 3494 (WCB 2020) (*Section 4 Public Notice*).

15. In July 2020, the Commission released the *2020 Supply Chain Declaratory Ruling and Second Further Notice*, which found that the Commission’s prohibition, codified at 47 CFR § 54.9, “is consistent with and substantially implements subsection 3(a) of the Secure Networks Act, which prohibits the use of federal funds on certain communications equipment and services.”<sup>35</sup> In the *2020 Supply Chain Second Further Notice*, the Commission sought comment on how other sections of the Secure Networks Act interact with the Commission’s ongoing efforts to secure the communications supply chain.<sup>36</sup>

### III. REPORT AND ORDER

16. In the *2019 Supply Chain Further Notice*, the Commission sought comment on the establishment of a reimbursement program to “offset reasonable costs” for ETCs to remove and replace covered communications equipment and services from their networks.<sup>37</sup> In the *2020 Supply Chain Second Further Notice*, the Commission sought comment on how to implement the various provisions of the Secure Networks Act into our ongoing Supply Chain proceeding. Based on our review of the record created in response, we adopt several rules to protect the security of our communications networks and implement the Secure Networks Act.

#### A. Requirement to Remove and Replace Covered Equipment and Services

17. In the *2019 Supply Chain Further Notice*, we proposed to require ETCs receiving USF support to remove and replace covered equipment and services from their network operations, contingent on the availability of a funded reimbursement program.<sup>38</sup> We based the scope of the proposed requirement on our view that sections 201(b) and 254 of the Communications Act provide us the legal authority to condition receipt of USF support to advance universal service principles grounded in the provision of “[q]uality services . . . at just, reasonable, and affordable rates,” while furthering the public interest and the promotion of nationwide access to advanced telecommunications and information services, and sought comment on that rationale.<sup>39</sup> Following the passage of the Secure Networks Act, which, among other provisions, established a reimbursement program for the removal, replacement, and disposal of covered equipment and services, we modified our proposal and sought further comment on implementation of the Secure Networks Act and, specifically, whether it provided us independent authority to require ETCs or other providers to remove and replace equipment on the Covered List.<sup>40</sup>

18. Consistent with our proposal in the *2019 Supply Chain Further Notice* and the directives of the Secure Networks Act, we require recipients of reimbursement funds under the Reimbursement Program and ETCs receiving USF support to remove and replace from their network and operations environments equipment and services included on the covered list required by section 2 of the Secure Networks Act (Covered List). We condition this obligation to remove and replace covered equipment and services upon a congressional appropriation to fund the Reimbursement Program. We also adopt

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<sup>35</sup> *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, 35 FCC Rcd 7821, 7826-27, para. 20 (2020) (*2020 Supply Chain Declaratory Ruling and Second Further Notice*).

<sup>36</sup> *See id.* at 7828-39, paras. 23-60.

<sup>37</sup> *2019 Supply Chain Further Notice*, 34 FCC Rcd at 11470-71, para. 122. The Wireline Competition Bureau separately sought comment on section 4 of the Secure Networks Act, which created the Secure and Trusted Communications Networks Reimbursement Program. *See Section 4 Public Notice*, 35 FCC Rcd at 3494.

<sup>38</sup> *2019 Supply Chain Further Notice*, 34 FCC Rcd at 11470-71, para. 122; *see also id.* at 11472-75, paras. 128-36 (seeking comment on the scope of entities and equipment required to remove and replace).

<sup>39</sup> 47 U.S.C. §§ 201(b), 254(b); *see also 2019 Supply Chain Further Notice*, 34 FCC Rcd at 11471, paras. 123-24. We also sought comment on whether there were other sources of legal authority, including the 2019 NDAA and CALEA. *Id.* at 11471-75, paras. 125-26, 129-32, 134, 136.

<sup>40</sup> *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7836-37, para. 51; *see also Section 4 Public Notice*, 35 FCC Rcd 3494.

deadlines consistent with those for reimbursement funding recipients. This requirement, and the steps we take towards its implementation, will further the Commission's goal of protecting our communications networks and supply chains from communications equipment and services that pose a national security threat while facilitating the transition to safer and more secure alternatives.

### 1. Entities Required to Remove and Replace Covered Equipment and Services

19. The obligation to remove and replace covered equipment and services on the Covered List applies to recipients of reimbursement funds from the Reimbursement Program and ETCs receiving universal service support. Our authority to require these entities to remove and replace covered equipment and services arises from both the Secure Networks Act and sections 201(b) and 254(b) of the Communications Act.<sup>41</sup> By limiting the requirement to these recipients, we protect the nation's networks from a substantial amount of equipment and services that pose a threat to the security of our communications networks while minimizing the financial and logistical challenges of removal and replacement on providers.

#### a. Entities Receiving Funds from the Reimbursement Program

20. The Secure Networks Act requires any recipient of Reimbursement Program funding to remove all existing covered equipment or services in their networks as a condition of receiving reimbursement funds.<sup>42</sup> The Secure Networks Act prohibits recipients of reimbursement funds from purchasing, renting, leasing, or otherwise obtaining covered equipment or services with reimbursement funds or any other funding, including private funds.<sup>43</sup> Recipients must also certify that they will permanently remove, replace, and dispose of all covered equipment or services that are in the recipient's

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<sup>41</sup> Secure Networks Act § 4(c)(2)(B) ("A recipient of a reimbursement under the Program may not . . . purchase, rent, lease, or otherwise obtain any covered communications equipment or service, using reimbursement funds or any other funds (including funds derived from private sources)."); § 4(d)(4)(B)(i) ("An applicant for reimbursement under the Program shall, in the application of the applicant, certify to the Commission that . . . beginning on the date of the approval of the application, the applicant . . . will not purchase, rent, lease, or otherwise obtain covered communications equipment or services, using reimbursement funds or any other funds (including funds derived from private sources) . . ."); § 4(d)(6)(A) (stating that except where the statute allows for extensions, "the permanent removal, replacement, and disposal of any covered communications equipment or services identified under paragraph (4)(A)(i) shall be completed not later than 1 year after the date on which the Commission distributes reimbursement funds to the recipient"); § 4(e)(4)(A)(iii) ("The Commission shall require a recipient of reimbursement under the Program to submit to the Commission, in a form and at an appropriate time to be determined by the Commission, a certificate stating that the recipient . . . has permanently removed from the communications network of the recipient, replaced, and disposed of (or is in the process of permanently removing, replacing, and disposing of) all covered communications equipment or services that were in the network of the recipient as of the date of the submission of the application of the recipient for the reimbursement . . ."); 47 U.S.C. § 201(b) ("All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable . . . . The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."); § 254(b) ("The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles: (1) Quality services should be available at just, reasonable, and affordable rates; (2) Access to advanced telecommunications and information services should be provided in all regions of the Nation; . . . (7) Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.").

<sup>42</sup> Secure Networks Act § 4(d)(6)(A) (except where the statute provides exceptions, requiring the permanent removal, replacement, and disposal of any covered communications equipment or services to be completed no later than one year after the date on which the Commission distributes reimbursement funds to the recipient).

<sup>43</sup> *Id.* § 4(c)(2)(B) (prohibiting recipients of reimbursement funds from purchasing, renting, leasing, or otherwise obtaining covered communications equipment or services with reimbursement funds or any other funding, including private funds).



network as of the date of submission of the application for reimbursement.<sup>44</sup> These provisions indicate congressional intent that recipients of Reimbursement Program funds are to be included within the scope of the Commission's remove-and-replace rule and must remove covered equipment.<sup>45</sup> Additionally, commenters support a broad application of our remove-and-replace requirement to entities that meet the definitions contained in the Secure Networks Act.<sup>46</sup> Because section 4 of the Secure Networks Act requires the removal and replacement of covered equipment and services from recipients' networks, we find sufficient support both in the language of the statute and the record to include recipients of reimbursement funding from the Reimbursement Program in the Commission's remove-and-replace requirement.<sup>47</sup>

**b. Eligible Telecommunications Carriers Receiving Universal Service Funding**

21. To ensure that USF funds are not supporting covered equipment and services, and that our rule effectively and broadly removes covered equipment and services from recipients' networks to the extent permissible under our legal authority, we obligate ETCs receiving USF support to remove covered equipment and services throughout their entire network, not just in jurisdictions where they operate as an ETC, and irrespective of whether they receive reimbursement under the Reimbursement Program.<sup>48</sup> This broad approach to removal greatly mitigates the identified risks to national security underlying both our rules and recognized by Congress. Our decision to require ETCs that receive USF support to remove covered equipment and services is also consistent with the scope of removal under the Reimbursement Program recipient obligations in the Secure Networks Act, which similarly requires recipients to permanently remove covered communications equipment or services contained on the Covered List from

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<sup>44</sup> *Id.* § 4(d)(4)(B)(i) (requiring applicants for reimbursement funds to certify compliance with a prohibition from purchasing, renting, leasing, or otherwise obtaining covered equipment or services with reimbursement funds or any other funding, including private funds, beginning on the date of approval of its application for reimbursement); *see also id.* § 4(e)(4)(A)(iii) (requiring a similar final certification from reimbursement recipients). Recipients must also certify that they have fully complied, or are in the process of complying, with all terms and conditions of the Reimbursement Program, all commitments made in the application, and the timeline submitted with the application. *Id.* § 4(e)(4)(A)(i), (ii), (iv).

<sup>45</sup> *See* H.R. Rep. No. 116-352, at 14 (2019) ("Any applicant receiving reimbursement funds under the Program is required to complete the permanent removal, replacement, and disposal of covered equipment and services from their networks not later than one year after the date on which the Commission distributes funds to the applicant.").

<sup>46</sup> *See* NTCA Sec. 4 PN Comments at 2-3 (noting that the Secure Networks Act "expressly makes eligible for 'rip and replace' funding any 'provider of advanced communications services,' without reference to ETC status, that has 2 million or fewer customers and that makes certain certifications"); RWA Further Notice Reply at 9 (arguing that the "better solution" is to require all covered equipment operators and carriers, including non-ETCs that meet the congressional definition contained in the Secure Networks Act, to remove and replace, and be eligible for reimbursement of, covered equipment and services).

<sup>47</sup> No commenters in the record oppose this conclusion. While Huawei argues that the Secure Networks Act does not grant the Commission authority to mandate removal and replacement as proposed in the *2019 Supply Chain Further Notice*, it does not dispute that recipients of funding through the Reimbursement Program, who volunteer to participate in the Program, are required to remove covered equipment and services as a condition of receiving funding. *See* Huawei Sec. 4 PN Comments at 2.

<sup>48</sup> *See* JAB Wireless Further Notice Comments at 10 ("In order to maximize the efficacy of the equipment replacement program, the Commission should strive to eliminate all covered equipment in use by ETCs generally."). The scope of the rule does not extend to affiliates and subsidiaries of ETCs. *See* CCA Further Notice Comments at 7-8 (encouraging the Commission to consider whether any funding mechanism affiliated with the replacement mandate "address[es] the costs of full compliance with the requirements, including equipment or services of affiliates and partners to the extent that the equipment or services are relevant to compliance with the new rules").

their networks.<sup>49</sup> By aligning the scope of the Commission’s removal requirement with the obligations under section 4 of the Secure Networks Act, our rules will best effectuate the congressional intent to “mitigat[e] threats posed by vulnerable communications equipment and services” throughout U.S. networks.<sup>50</sup>

22. We condition the implementation of our remove-and-replace rule on the appropriation of funding by Congress for the Reimbursement Program, to ensure sufficient funding is available to pay for the removal and replacement of covered equipment. Several commenters support this proposal and encourage the Commission to wait until Congress has appropriated funding,<sup>51</sup> and others express concern that any obligation to remove and replace covered equipment and services without reimbursement amounts to an unfunded mandate.<sup>52</sup>

23. Pursuant to the Secure Networks Act, only providers with two million or fewer broadband customers<sup>53</sup> are eligible for the Reimbursement Program, but we find no reason to accordingly limit the applicability of our remove-and-replace rule to only those ETCs which are eligible for the Reimbursement Program.<sup>54</sup> Although the data show the vast majority of ETCs will be eligible to receive funding under the Reimbursement Program, in line with the intended scope of eligible entities as set forth by Congress under the Secure Networks Act,<sup>55</sup> some large ETCs receiving USF support may not be

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<sup>49</sup> See *infra* Section III.E.1; Secure Networks Act § 4(c)(1)(A) (recipients of reimbursement funding shall use funds solely for the purpose of permanently removing covered communications equipment or services). Applicants for reimbursement must also certify to the Commission that the applicant has developed a plan for permanent removal of all covered equipment and services from their networks. *Id.* § 4(d)(4)(A)(i)(I).

<sup>50</sup> H.R. Rep. No. 116-352, at 9 (2019).

<sup>51</sup> See, e.g., CCA Further Notice Comments at 2-3; LATAM Further Notice Comments at 9; RWBC Further Notice Comments at 6-7; NTCA Sec. 4 PN Comments at 2-3; PRTC Sec. 4 PN Reply at 5; see also CCA Second Further Notice Comments at 6 (urging the Commission to “proceed with a reasonable perspective” when implementing the section 3 prohibition on Federal subsidies while the Secure Networks Act remains unfunded); NTCA Second Further Notice Comments at 4 (to provide sufficient time to transition under the prohibition on spending Federal subsidies under section 3 of the Secure Networks Act, the Commission should allow providers of advanced communications services to continue receiving USF support until federal funding is available to reimburse providers for replacement equipment and services, or allow such products to be replaced in the normal course of business); Letter from Mike Saperstein, Vice President, Strategic Initiatives & Partnerships, USTelecom, to Marlene Dortch, Secretary, FCC, WC Docket No. 18-89, at 1 (filed Dec. 4, 2020) (USTelecom Dec. 4 *Ex Parte*) (stating that “it is appropriate that . . . obligations are triggered only if Congress appropriates the funding required for removal and replacement”).

<sup>52</sup> NTCA Sec. 4 PN Comments at 3 (“There should be no requirement to ‘rip’ before there is definitive funding to ‘replace.’”); USTelecom Sec. 4 PN Comments at 4 (“In no case should there be an unfunded mandate to ‘rip and replace’ . . . .”); PRTC Sec. 4 PN Reply at 5 (“PRTC also encourages the Commission not to require the removal and replacement of existing equipment and services until and unless Congress has appropriated funds for the reimbursement program.”); see also USTelecom Second Further Notice Comments at 5 (“[T]he Commission should either reconsider the scope of its prior rule in section 54.9 to match the definition required by the Secure Networks Act, or it should clarify that any equipment subject to the rules in section 54.9 of its rules is also eligible for the funded removal and replacement program under the Secure Networks Act.”).

<sup>53</sup> See *infra* Section III.E.1.

<sup>54</sup> See Secure Networks Act § 4(b)(1).

<sup>55</sup> See *infra* Section III.E.1. ETCs are providers of “advanced communications services” and, as such, are subject to the provisions of the Secure Networks Act, including prohibitions on Federal subsidy spending in section 3 and reimbursement in section 4 of the Secure Networks Act, where eligible. Secure Networks Act § 9(10) (defining “provider of advanced communications service” as a person who provides advanced communications service to United States customers); § 9(1), (8) (defining “advanced communications service” and “person”); see also *id.* § 4(b) (limiting eligibility for reimbursement under the Reimbursement Program to providers of advanced communications services that (1) have 2,000,000 or fewer customers; and (2) make all certifications required by

(continued....)

eligible for reimbursement under the Reimbursement Program due to the size of their broadband customer base. The House Report suggests that Congress intended to focus on providing reimbursement for small providers, noting that larger communications companies “generally have avoided installing and using Huawei and other suspect foreign equipment in their networks,” while smaller providers with limited resources may have purchased such equipment because it was less expensive or they were unaware of the security risks, or both.<sup>56</sup> Based on the data submitted pursuant to the Information Collection and subscription data from FCC Form 477, only two ETCs using suspect foreign equipment appear to fall outside the scope of reimbursement eligibility due to the number of broadband customers.<sup>57</sup> Larger ETCs are also more likely to have resources to pay for removal, replacement, and disposal of covered communications equipment and services themselves, and not need taxpayer money to accomplish the objectives of our remove-and-replace requirement.<sup>58</sup> Furthermore, nothing in the Secure Networks Act prevents us from requiring removal from entities beyond those who receive reimbursement funding. Because of the serious risks that untrusted participants in our supply chain pose to our communications networks, the benefits to our national security of removing covered equipment and services from our communications networks far outweigh the burdens that compliance with the requirement may impose on a small number of large ETCs.

24. We further clarify that, consistent with the requirements for participation in the Reimbursement Program under the Secure Networks Act, we require all ETCs receiving USF support to dispose of the removed covered equipment and services rather than resell, donate, or trade them.<sup>59</sup> Similar to other applications of the rule, such as the certification requirement,<sup>60</sup> this requirement synchronizes the disposal requirements for ETC recipients of USF support with those applicable to other reimbursement recipients and minimizes any burdens that may result from the administration of disparate regimes. Furthermore, allowing ETCs that receive USF support to resell covered equipment and services removed from their networks undermines the effectiveness of the rule and fails to effectively eliminate those products that pose national security risks from our communications networks and supply chain.<sup>61</sup>

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subsection (d)(4)); § 4(d)(4) (requiring applicants for reimbursement to certify to the Commission that the applicant has developed a plan for permanent removal and replacement of covered equipment or services that are in the applicant’s communications network as of such date, has developed a plan for disposal of such equipment and services, and has developed a specific timeline for the permanent removal, replacement, and disposal of such equipment and services, and furthermore will not purchase, rent, lease, or otherwise obtain covered equipment or services using reimbursement funding or any other funding, including private funds).

<sup>56</sup> H.R. Rep. No. 116-352, at 9 (2019).

<sup>57</sup> Staff calculations based on Form 477 data; see *Wireline Competition Bureau and Office of Economics and Analytics Release Results from Supply Chain Security Information Collection*, WC Docket No. 18-89, Public Notice, 35 FCC Rcd 9471, 9473 (WCB and OEA 2020).

<sup>58</sup> We clarify that ETCs receiving USF support that do not receive funding through the Reimbursement Program are required to remove covered communications equipment and services from their networks, but whether they replace such equipment and services with alternatives from the Replacement List is within their discretion.

<sup>59</sup> See Secure Networks Act § 4(c)(1)(C) (limiting recipient’s use of funds to disposal of covered communications equipment or services); § 4(d)(4)(A)(i)(II) (requiring recipient to certify that, as of the date of application, recipient has developed a plan for disposal of equipment or services removed from their communications networks).

<sup>60</sup> See *infra* Section III.A.4.

<sup>61</sup> Consistent with the Secure Networks Act, ETCs receiving USF support that dispose of covered communications equipment and services in compliance with the remove-and-replace requirement are not permitted to resell or transfer such equipment or services to foreign providers. See *infra* Section III.E.3.h; Secure Networks Act § 4(c)(1)(C); see also PRTC Sec. 4 PN Reply at 2 (urging the Commission to “clarify that providers may properly dispose of covered equipment and services by transferring or selling them to non-U.S. providers”).

25. The application of our remove-and-replace requirement to both ETCs receiving USF support and recipients of reimbursement under the Reimbursement Program appropriately considers the benefits to our national security of a broader approach against the burdens to remove and replace covered communications equipment and services from networks.<sup>62</sup> We recognize that the presence of products in communications networks that pose risks to our national security is not limited to ETCs<sup>63</sup> and believe that the application of our remove-and-replace requirement to recipients of reimbursement funding in addition to ETCs receiving USF support encompasses a wide range of entities whose networks may contain covered equipment or services. Furthermore, while some commenters support an expansive application of the remove-and-replace rule to require all entities to replace covered equipment or services, rather than just the recipients described above,<sup>64</sup> we find that the slightly more limited scope of our rule not only covers entities with flawed equipment and services, it also best captures the broadest application while staying within the bounds of our legal authority.<sup>65</sup> Some commenters representing non-ETC USF recipients such as schools, libraries, and rural healthcare providers favor expanding the remove-and-replace requirement to non-ETC USF recipients because of the cyberthreats such recipients face when compromised equipment and services remain in their networks.<sup>66</sup> While we recognize that the continued existence of such untrusted products in our communications networks and supply chains does introduce risks, we must, as USTelecom posits, consider the “large administrative burdens” that inclusion of non-

<sup>62</sup> See PRTC Further Notice Comments at 4 (arguing that the proposed scope of the remove-and-replace mandate as extending to all covered equipment from covered companies, including finished products and certain component parts, “should be more narrowly tailored to mitigate security risks”).

<sup>63</sup> CCA Further Notice Comments at 3 (because national security risks to the supply chain extend beyond USF participants, Congress should address issues holistically); NTCH Further Notice Comments at 5 (“The threat posed by the use of covered equipment obviously applies with equal force to the many carriers . . . who have chosen not to take ETC status . . . .”); RWA Further Notice Comments at 4 (“Any FCC effort to protect America’s national security needs to focus on all covered equipment deployed throughout the country.”); RWA Sec. 4 PN Comments at 5 (“Long term success maintaining America’s national security can only be measured by ‘the 100% elimination of covered company equipment’ from within the jurisdiction of the U.S. . . . .”); Triangle Further Notice Comments at 3 (“All the equipment that is a threat to national security should be removed by all carriers, not just Universal Service funded networks.”); RWA Further Notice Reply at 8 (“National security threats posed by covered company equipment either exist or do not exist. There is no middle ground.”). *But see* USTelecom Further Notice Comments at 17 (“[N]on-ETCs are not a national security priority to this replacement requirement, and should not be subject to replacement requirements.”).

<sup>64</sup> RWA Further Notice Comments at 4 (“So long as Congress ties sufficient appropriations to a replace-and-remove mandate, it should not matter whether a company or organization is or is not an ETC, nor should it matter whether that company or organization is a USF recipient.”); RWA Sec. 4 PN Comments at 5 (“Any replace-and-remove mandate should be applied broadly, regardless of who operates the covered company equipment or their eventual end users.”); RWA Further Notice Reply at 2 (“RWA and other commenters recognize that the public interest is best served if the proposed replacement and removal provision applies not just to ETCs receiving USF support, but to any service provider or public entity using equipment manufactured or serviced by a covered company.”); PRTC Sec. 4 PN Reply at 7 (“The Commission should not attempt to narrow the scope of eligible entities based on their ETC status, whether they receive USF support, or whether they provide service directly to end-users or serve as intermediate providers.”); *see also* PTA-FLA Sec. 4 PN Comments at 2 (limiting the Commission’s proposals to ETCs would contravene the directive of the Secure Networks Act and unnecessarily limit the scope and effectiveness of the program).

<sup>65</sup> *See, e.g.*, CompTIA Further Notice Comments at 2; CTIA Further Notice Comments at 13-14; USTelecom Further Notice Comments at 13-14; WTA Further Notice Comments at 9 (supporting limiting the remove-and-replace requirement to ETCs); *see also* USTelecom Dec. 4 *Ex Parte* at 1 (discussing “its position that the Draft Order correctly defines the scope of obligations and responsibilities in that they apply only to [ETCs] and reimbursement participants”).

<sup>66</sup> *See* CHIME Further Notice Comments at 2-3 (supporting expanding the requirement to health care providers); *see also* SECA Further Notice Comments at 3-4; E-mpa Further Notice Reply at 2 (supporting voluntary participation in removal and replacement by E-Rate recipients).

ETC USF recipients would impose against the proportionate impact on national security.<sup>67</sup> We find that limiting the requirement to recipients of the Reimbursement Program and ETC recipients of USF support, rather than all USF recipients, reduces the administrative burdens of removing and replacing covered equipment and services on non-ETC USF recipients while reducing national security threats to our communications supply chain. Eligible non-ETC USF recipients may voluntarily participate in the Reimbursement Program, which would subject them to the remove-and-replace requirement but also allow them to receive reimbursement for removal, replacement, and disposal of covered equipment and services; otherwise, non-ETC USF recipients are under no obligation to remove or replace covered equipment or services from their networks. We draw this important distinction to avoid imposing an unfunded mandate on non-ETC USF recipients were we to require the removal and replacement of covered equipment when such recipients are not eligible to participate in the Reimbursement Program. Nevertheless, because the record indicates very little covered equipment outside the USF programs requiring an ETC designation,<sup>68</sup> we will closely monitor future developments, including through the information collection adopted pursuant to section 5 of the Secure Networks Act,<sup>69</sup> to determine whether addressing non-ETC USF recipients is necessary and appropriate.

26. *Legal Authority.* A variety of separate and independent statutory provisions provide the Commission with the appropriate authority and ability to impose a remove-and-replace requirement. Section 4 of the Secure Networks Act expressly requires recipients of Reimbursement Program funding to “permanently remove[]” and replace “all covered communications equipment or services” in their networks as a condition of receiving reimbursement funds.<sup>70</sup> The Secure Networks Act requires applicants to certify that they will permanently remove, replace, and dispose of covered equipment or services in the recipient’s network as of the date of submission of the application for reimbursement and further requires recipients to submit a final certification to the Commission that they have permanently removed, replaced, and disposed of, or are in the process of doing so, all covered communications equipment or services from their networks.<sup>71</sup> Relatedly, the Secure Networks Act prohibits recipients of reimbursement funds from purchasing, renting, leasing, or otherwise obtaining covered equipment or services with reimbursement funds or any other funding, including private funds, indicating congressional intent to have covered equipment and services eliminated from recipients’ networks as a condition of

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<sup>67</sup> See USTelecom Further Notice Comments at 13-14 (“[I]nclusion of other USF recipients, like rural health care providers and libraries, could put large administrative burdens on the reimbursement fund without proportional benefit to national security.”).

<sup>68</sup> See *id.* at 13 (supporting limiting removal and replacement to ETCs because “ETCs are most likely to have covered equipment”).

<sup>69</sup> See *infra* Section III.F. This information collection applies to all providers of advanced communications service, unlike our previous information collection adopted in the *2019 Supply Chain Information Collection Order*, which applied only to ETCs, thus providing a more expanded and comprehensive awareness of covered communications equipment and services in networks. See *2019 Supply Chain Information Collection Order*, 34 FCC Rcd at 11481-82, paras. 162-66.

<sup>70</sup> Secure Networks Act § 4(d)(6)(A) (except where the statute allows for extensions, “the permanent removal, replacement, and disposal of any covered communications equipment or services identified under paragraph (4)(A)(i) shall be completed not later than 1 year after the date on which the Commission distributes reimbursement funds to the recipient”); § 4(e)(4)(A)(iii) (recipients of reimbursement fund must submit a certification to the Commission “stating that the recipient . . . has permanently removed from the communications network of the recipient, replaced, and disposed of (or is in the process of permanently removing, replacing, and disposing of) all covered communications equipment or services that were in the network of the recipient as of the date of the submission of the application of the recipient for the reimbursement . . .”).

<sup>71</sup> *Id.* § 4(d)(4)(B)(i), (e)(4)(A)(iii); see RWA Sec. 4 PN Comments at 7 (agreeing with the Commission’s proposal to “require an applicant to certify its replace-and-remove plans and timeline”); *id.* at 8 (“[R]eimbursement recipients are to use reimbursement funds solely for ‘permanently removing’ covered equipment, ‘replacing’ covered equipment, and ‘disposing’ of covered equipment.”).

receiving funding.<sup>72</sup>

27. The requirement adopted today is similarly consistent with the 2019 NDAA, which directs the Commission to “prioritize funding and technical support to assist affected . . . entities to transition from covered communications equipment [as defined by the statute], and to ensure that communications service to users and customers is sustained.”<sup>73</sup> While one commenter indicated that we could rely on the 2019 NDAA to obligate removal and replacement of covered equipment and services,<sup>74</sup> we find that the provisions of the Secure Networks Act, discussed above, build upon the goals of the 2019 NDAA and provide us with express authority to require removal and replacement.<sup>75</sup>

28. In addition, the Communications Act provides legal authority for the application of our rule to ETCs that receive USF support. As the U.S. Court of Appeals for the Tenth Circuit has held, section 254(e) is reasonably interpreted as allowing the Commission “to specify what a USF recipient may or must do with the funds,” consistent with the policy principles outlined in section 254(b).<sup>76</sup> Section 254(b) requires the Commission to base its universal service policies on the principles of providing “[q]uality services . . . at just, reasonable, and affordable rates,” as well as promoting “[a]ccess to advanced telecommunications and information services . . . in all regions of the Nation.”<sup>77</sup> Section 201(b) authorizes the Commission to “prescribe such rules as may be necessary in the public interest to carry out

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<sup>72</sup> Secure Networks Act § 4(c)(2)(B) (prohibiting recipients of reimbursement funds from purchasing, renting, leasing, or otherwise obtaining covered communications equipment or services with reimbursement funds or any other funding, including private funds).

<sup>73</sup> 2019 NDAA § 889(b)(2).

<sup>74</sup> See Letter from Jamie Susskind, Vice President, Policy and Regulatory Affairs, Consumer Technology Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-89, at 3 (filed Mar. 3, 2020) (CTA March 3, 2020 *Ex Parte*) (urging the Commission to rely on statutory sources of authority, such as section 889(b) of the 2019 NDAA, in this proceeding). Compare Letter from Michael J. Jacobs, Vice President, Regulatory Affairs, ITTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-89, at 1 (filed Oct. 9, 2019) (ITTA Oct. 9, 2019 *Ex Parte*) (in referencing the potential of a remove-and-replace requirement although one had not yet been proposed in the proceeding, arguing that the Commission’s proposed remove-and-replace requirement “is beyond the Commission’s statutory authority under Section 254 of the Communications Act of 1934 . . . as well as Section 889 of the 2019 NDAA”).

<sup>75</sup> As we find we have sufficient authority under sections 201(b) and 254 of the Communications Act and various provisions of the Secure Networks Act, we need not consider whether CALEA or sections 316 or 214 of the Communications Act provide a legal basis for regulation. See CompTIA Further Notice Comments at 3 (“[CALEA] would not provide a good basis for the Commission to go beyond the USF context.”); CTIA Further Notice Comments at 14-18 (CALEA is not a legal basis for supply chain regulation); Huawei Further Notice Comments at 19 (“CALEA does not grant the Commission authority to enact the ban on covered equipment and services for USF recipients—let alone a ban that would extend to all communications companies.”); LATAM Further Notice Comments at 5-7 (CALEA cannot serve as a source of authority for the Commission’s supply chain regulations); NCTA Further Notice Comments at 8-9 (CALEA does not provide a source of authority for the Commission to regulate beyond the USF context); USTelecom Further Notice Comments at 15-16 (“CALEA does not and was never intended to provide the Commission authority to regulate the telecommunications supply chain.”); Huawei Second Further Notice Comments at 26-27 (“The Commission cannot rely on [CALEA] as a source of authority to require ETCs or any other category of carriers to remove and replace covered equipment.”); CTA March 3, 2020 *Ex Parte* at 3 (“[W]e agree with other commenters in this docket who have argued that [CALEA] is not a source of authority for the FCC to regulate the ICTS supply chain.”). Compare RWA Further Notice Comments at 7-8; RWA Further Notice Reply at 13 (arguing broad authority under CALEA). See also Huawei Further Notice Reply at 5-8 (refuting arguments in the record that the Commission can rely on sections 214 or 316 of the Communications Act to mandate removal and replacement). Compare RWA Further Notice Comments at 5-7 (arguing authority under sections 316 and 214 of the Communications Act).

<sup>76</sup> *In re FCC 11-161*, 753 F.3d 1015, 1046 (10th Cir. 2014).

<sup>77</sup> 47 U.S.C. § 254(b).

the provisions of the [Communications] Act.”<sup>78</sup> By requiring ETCs that receive USF support to remove covered equipment and services, we further advance the provision of quality services nationwide, and ensure the safety, reliability, and security of the nation’s communications networks, which is necessary in the public interest in fulfillment of the purpose of the Communications Act.<sup>79</sup>

29. The record also supports our determination that the Communications Act provides the Commission broad legal authority to require removal of covered equipment and services by ETCs that receive USF support.<sup>80</sup> TIA states that the Commission is “properly acting within its assigned responsibilities by promulgating rules that place conditions and restrictions on use of USF support.”<sup>81</sup> WTA and NCTA both note that the Commission has clear and well-established authority to impose public interest conditions on the use of USF.<sup>82</sup> Furthermore, the provisions of the Communications Act tied to our administration of universal service programs provide well-established authority for imposing remove-and-replace requirements on ETCs receiving universal service funds.<sup>83</sup>

30. We reject arguments that the Commission lacks the authority to mandate removal and replacement of covered equipment and services.<sup>84</sup> Huawei asserts that neither the Secure Networks Act nor any other statute provides the requisite authority to impose a remove-and-replace requirement.<sup>85</sup> According to Huawei, nothing in the Secure Networks Act requires removal and replacement, nor does

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<sup>78</sup> *Id.* § 201(b).

<sup>79</sup> See WTA Further Notice Comments at 5 (while agreeing that “safety, reliability, and security” of U.S. communications networks is critical, acknowledges that “other Universal Service principles clearly stated in Section 254 of the [Communications] Act must not be sacrificed in their entirety in the name of security” when contemplating a successful transition to ensure continuation of service for affected customers); CTA March 3, 2020 *Ex Parte* at 3 (urging the Commission “to rely on other statutory sources of authority in this proceeding, such as Section 254 of the Communications Act”).

<sup>80</sup> See ASRPIO Further Notice Reply at 17 (“[T]he Commission has a suite of diverse regulatory powers from both Title II and III to not only conduct a wide-ranging inquiry better grasping network security threats and challenges, but to also implement effective and meaningful solutions.”); see also USTelecom Further Notice Comments at 13-14 (supporting limiting the removal and replacement fund to ETCs).

<sup>81</sup> TIA Further Notice Comments at 5.

<sup>82</sup> NCTA Further Notice Comments at 7 (“[T]he Commission has well-established authority to place reasonable public interest conditions on the use of USF funds.”); WTA Further Notice Comments at 9 (“[T]he administration of Universal Service is where the Commission has the clearest authority in this matter.”); see also CTIA Further Notice Comments at 12 (“CTIA believes that the FCC’s actions should be targeted to its unique role in overseeing and administering federal USF funds.”).

<sup>83</sup> See CompTIA Further Notice Comments at 2 (“Expanding beyond the USF context to prohibit private transactions would take the Commission into significant uncharted territory and may invite major legal challenges.”); CTIA Further Notice Comments at 13 (“[T]he Commission’s legal authority beyond placing conditions on USF support is unclear at best.”).

<sup>84</sup> See LATAM Further Notice Comments at 5 (stating that “the Commission’s authority to require the removal and replacement of existing equipment is questionable,” specifically arguing against using CALEA as a source of authority); see also E-mpa Further Notice Reply at 2 (supporting voluntary removal and replacement but opposing required remove-and-replace).

<sup>85</sup> See Huawei Further Notice Comments at 2-13 (arguing that sections 201(b) and 254(b) of the Communications Act do not grant the Commission authority to require remove-and-replace); *id.* at 13-18 (the 2019 NDAA does not provide legal authority); *id.* at 18-29 (the Commission cannot rely on CALEA for legal authority); Huawei Second Further Notice Comments at 22-24 (discussion of Secure Networks Act); *id.* at 24-26 (discussion of Communications Act provisions); *id.* at 26 (discussion of 2019 NDAA); *id.* at 26-27 (discussion of CALEA); see also Huawei Further Notice Reply at 5-8 (refuting arguments in the record that the Commission can rely on sections 214 or 316 of the Communications Act to mandate removal and replacement).

the Reimbursement Program, which is voluntary, mandate removal.<sup>86</sup> We disagree. The Secure Networks Act conditions receipt of reimbursement funds on removal and disposal of all covered equipment from the recipient's network; put differently, section 4 obligates recipients of reimbursement funds to certify to the removal of all covered equipment and services from their network, then provides a means by which to replace such equipment and services through reimbursement.<sup>87</sup> While providers' participation in the Reimbursement Program is not mandatory, the Secure Networks Act requires us to mandate removal of covered equipment and services by any provider who does choose to participate.<sup>88</sup>

31. We also reject ITTA and Huawei's arguments that the Communications Act does not provide us legal authority to adopt our remove-and-replace rule. ITTA argues that the proposed requirement is beyond the Commission's authority under section 254 of the Communications Act.<sup>89</sup> Huawei argues that the section 254(b) principles upon which the Commission must "base policies for the preservation and advancement of universal service" do not include the promotion of national security or equipment regulation applied to a subset of USF recipients.<sup>90</sup> Conditioning the receipt of USF support on removal of covered equipment and services, however, ensures against the substantial security risks associated with such equipment and services and thereby promotes access to "quality" advanced telecommunications and information services.<sup>91</sup> Moreover, while Huawei contends that section 201(b) alone does not empower the Commission to enact rules in the absence of other authority under the Communications Act,<sup>92</sup> we find that the combination of these Communications Act provisions grants us the authority to adopt a remove-and-replace requirement for ETCs receiving USF support.

## 2. Equipment and Services Requiring Removal and Replacement

32. We limit the scope of the remove-and-replace requirement to equipment and services on the Covered List. This approach aligns with the scope of equipment and services that Congress intended to restrict under the statute,<sup>93</sup> as both the section 3 prohibition and the section 4 reimbursement eligibility apply to equipment and services added to the Covered List.<sup>94</sup> Our rules on publication of the Covered List also incorporate notice for updates to the covered equipment or services listed, and entities will

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<sup>86</sup> Huawei Sec. 4 PN Comments at 2; Huawei Second Further Notice Comments at 22-23.

<sup>87</sup> Secure Networks Act § 4(d)(4)(A)(i) (applicants for reimbursement must certify that they have developed a plan to remove and dispose of all covered equipment and services from their networks).

<sup>88</sup> *Id.* § 4(d)(6)(A) (except where the statute allows for extensions, "the permanent removal, replacement, and disposal of any covered communications equipment or services identified under paragraph (4)(A)(i) shall be completed not later than 1 year after the date on which the Commission distributes reimbursement funds to the recipient"); § 4(e)(4)(A)(iii) (recipients of reimbursement fund must submit a certification to the Commission "stating that the recipient . . . has permanently removed from the communications network of the recipient, replaced, and disposed of (or is in the process of permanently removing, replacing, and disposing of) all covered communications equipment or services that were in the network of the recipient as of the date of the submission of the application of the recipient for the reimbursement . . .").

<sup>89</sup> See ITTA Oct. 9, 2019 *Ex Parte* at 1 (referencing the potential of a remove and replace requirement although one had not yet been proposed in the proceeding).

<sup>90</sup> Huawei Second Further Notice Comments at 24; see also Huawei Further Notice Comments at 2-12; Huawei Further Notice Reply at 2.

<sup>91</sup> 47 U.S.C. § 254(b).

<sup>92</sup> Huawei Further Notice Comments at 12-13; Huawei Second Further Notice Comments at 25-26.

<sup>93</sup> See also CTIA Sec. 4 PN Comments at 2 ("In implementing these mandates, the Commission should hew closely to Congress's instructions [in the Secure Networks Act].").

<sup>94</sup> See Secure Networks Act §§ 2, 3(a), 4(a)-(c); see also *id.* § 9(5) (defining "covered communications equipment or service" as equipment or service that is on the Covered List published by the Commission pursuant to section 2(a) of the Secure Networks Act).



therefore have notice with regard to the scope of equipment or services they are subsequently required to remove and replace.<sup>95</sup> We find that using the Covered List better aligns compliance with removal and replacement obligations to the administration of the Reimbursement Program and creates a bright-line determination for ETCs receiving USF support and reimbursement recipients to easily identify equipment and services to remove and replace from their networks. Furthermore, we tie administration of the remove-and-replace requirement to the administration of the Reimbursement Program; therefore, we find it will not be overly burdensome for entities, including smaller carriers, to identify, remove, replace, and discard covered equipment and services from their networks.<sup>96</sup>

33. Consistent with the provisions of the 2019 NDAA and Secure Networks Act,<sup>97</sup> this rule represents a reasoned modification of our proposal in the *2019 Supply Chain Further Notice*. There, we proposed to require the removal of all equipment and services from covered companies.<sup>98</sup> To synchronize the requirement we adopt today with the scope of covered equipment and services under the Secure Networks Act, however, we slightly modify our rule from our original proposal. We conclude upon review of the record in this proceeding and after considering the Secure Networks Act that our proposal risks being too broad and excessively burdensome.<sup>99</sup> Our slightly modified and more narrowly tailored rule instead supports a risk-based assessment of problematic equipment and services within a network, consistent with the approach taken in section 889 of the 2019 NDAA<sup>100</sup> and ultimately incorporated into section 2 of the Secure Networks Act,<sup>101</sup> rather than the proposed blanket prohibition to all equipment and services produced by a manufacturer.<sup>102</sup> The Covered List is limited to such equipment and services that the federal government, including the U.S. intelligence community, has identified as national security threats and that are placed at the most vulnerable spots in our communications infrastructure.<sup>103</sup>

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<sup>95</sup> See *infra* Section III.C.2; III.C.4.

<sup>96</sup> Cf. LATAM Further Notice Comments at 3; PRTC Further Notice Comments at 5 (raising concerns that the requirement will be overly burdensome for smaller carriers); see also PRTC Further Notice Comments at 3 (arguing remove-and-replace has a disproportionate impact on smaller entities).

<sup>97</sup> 2019 NDAA § 889; Secure Networks Act § 2(c)(3).

<sup>98</sup> *2019 Supply Chain Further Notice*, 34 FCC Rcd at 11474-75, paras. 133-36.

<sup>99</sup> Compare, e.g., PRTC Further Notice Comments at 4 (requiring removal and replacement of all covered equipment from covered companies is “broader than necessary to secure communications networks and supply chains from national security threats”) with RWA Further Notice Reply at 4 (“[A]ny federal government effort to eliminate national security risks posed by covered company equipment or services needs to be holistic and not leave behind any lingering threats.”).

<sup>100</sup> CompTIA Further Notice Comments at 4 (encouraging the Commission to narrow its approach to align with the framework taken by section 889 of the 2019 NDAA); NCTA Further Notice Comments at 10 (the Commission should refrain from imposing a blanket ban that goes farther than what Congress intended in section 889); PRTC Further Notice Comments at 6-9 (advocating for a scope consistent with the one established by Congress in the 2019 NDAA); RWBC Further Notice Comments at 15 (“Alternatively, [the Commission] could match up the scope of its removal and replacement requirement with the scope of equipment covered by the 2019 NDAA.”); WTA Further Notice Comments at 10 (supporting “a narrow position on what equipment should be removed” similar to language adopted in the 2019 NDAA).

<sup>101</sup> Secure Networks Act § 2(c)(3).

<sup>102</sup> Huawei Further Notice Comments at 47 (“[I]mposing a categorical removal and replacement requirement without regard to whether specific equipment actually poses a risk to the integrity of communications networks would be arbitrary and capricious.”); LATAM Further Notice Comments at 3 (should the Commission mandate removal of covered equipment, “it must do so in a risk-based manner”); PRTC Further Notice Comments at 4 (the remove-and-replace requirement “should be more narrowly tailored to mitigate security risks”); see also TIA Further Notice Comments at 10 (encouraging prioritization of equipment that poses a threat).

<sup>103</sup> Equipment and services on the Covered List are also limited to certain operational functions such as routing or redirecting user data traffic, causing an advanced communications service provider’s network to be remotely

(continued....)

Therefore, we believe limiting the remove-and-replace requirement to equipment and services on the Covered List advances our goals of protecting our communications networks and supply chains from those products that pose a risk to our national security while minimizing the financial, administrative, and logistical efforts entities may face in compliance.<sup>104</sup>

34. USTelecom posits that our proposal to implement section 3 of the Secure Networks Act “stands to create a significant gap in the scope of equipment that could be subject to replacement funding” vis-à-vis the scope of covered equipment under the two prohibitions.<sup>105</sup> According to USTelecom, the Commission should either reconsider the scope of section 54.9 of the Commission’s rules to match the definition of “covered communications equipment or service” required by the Secure Networks Act, or it should clarify that equipment subject to section 54.9 is also eligible for funded removal and reimbursement under the Reimbursement Program; otherwise, USTelecom argues, failure to do either creates a *de facto* unfunded mandate.<sup>106</sup>

35. We disagree with USTelecom that the interplay of section 54.9 and Reimbursement Program eligibility amounts to an unfunded mandate. First, section 3 of the Secure Networks Act does not, in itself, require the removal and replacement of covered equipment or services; it merely prohibits prospective use of certain Federal subsidies to purchase, rent, lease, or otherwise obtain any covered communications equipment or service, or maintain any covered communications equipment or service previously purchased, rented, leased, or otherwise obtained on the Covered List.<sup>107</sup> Second, the requirement to remove and replace, like the prohibition under section 54.10 and the equipment and services eligible for reimbursement under the Reimbursement Program, only applies to the products and

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disrupted, or otherwise posing an unacceptable risk to United States national security. Secure Networks Act § 2(b)(2)(A)-(C). As such, concerns raised in the record regarding inclusion of Lifeline end-user equipment are moot because they are outside the scope of the Secure Networks Act. *See* CTIA Further Notice Comments at 24 (any removal and replacement requirements should not extend to end-user devices to minimize network disruptions); NCTA Further Notice Comments at 12 (raising concerns about “significant repercussions” associated with inclusion of specific pieces of equipment within the scope of equipment covered by any removal obligation); RWA Further Notice Comments at 8 (because lingering threats to the supply chain can exist in a wide variety of network components, including mobile devices provided to a Lifeline subscriber, entities must remove all covered equipment and services from their networks); RWBC Further Notice Comments at 13-16; Letter from Douglas W. Kinkoph, Associate Administrator, Office of Telecommunications and Information Applications, NTIA, to the Honorable Ajit Pai, Chairman, FCC, WC Docket No. 18-89, PS Docket Nos. 19-351 and 19-352, at 10-11, n.55 (filed June 9, 2020) (noting if the Commission is concerned about the security risk through continue use of suspect handsets, it has ample authority to alter wireless providers’ radio licenses to prevent the use of such devices on their networks).

<sup>104</sup> We clarify that, while there is nothing in section 54.9 of the Commission’s rules that restricts the use of private funds to purchase, obtain, maintain, improve, modify, or otherwise support any equipment or services produced or provided by any company posing a national security threat to the integrity of communications networks or the communications supply chain, nor is there anything in section 54.10 of the Commission’s rules that restricts the use of private funds to purchase, rent, lease, or otherwise obtain any covered communications equipment or service, or maintain any covered communications equipment or service previously purchased, rented, leased, or otherwise obtained, as identified and published on the Covered List, compliance with the remove-and-replace mandate requires ETCs receiving USF support and recipients of Reimbursement Program funding to remove all covered equipment and services from their network operations and to certify compliance. To the extent there are equipment or services not on the Covered List but fall within the scope of section 54.9, entities may continue to use private funds to purchase, obtain, maintain, improve, modify, or otherwise support such equipment or services. 47 CFR §§ 54.9, 54.10.

<sup>105</sup> USTelecom Second Further Notice Comments at 4.

<sup>106</sup> *Id.* at 4-5.

<sup>107</sup> Secure Networks Act § 3(a)(1).

services contained on the Covered List.<sup>108</sup> To the extent there is equipment or service that is prohibited under section 54.9 but is not on the Covered List, it is not subject to the remove-and-replace requirement, and thus that rule does not constitute an unfunded mandate.<sup>109</sup>

### 3. Constitutional Considerations

36. We disagree with arguments raised by commenters that mandating removal and replacement is impermissibly retroactive or amounts to a regulatory taking.<sup>110</sup> We address these two concerns raised in the record in turn.

37. Pursuant to the Administrative Procedure Act (APA), in the absence of express statutory authority to promulgate retroactive rules,<sup>111</sup> the Commission may only adopt legislative rules that apply prospectively.<sup>112</sup> A rule may be found to be impermissible as primarily retroactive “if it impairs rights a party possessed when he acted, increases a party’s liability for past conduct, or imposes new duties with respect to transactions already completed.”<sup>113</sup> Additionally, a rule may be impermissible for secondary retroactivity, in which rules affect the future legal consequence of past or ongoing actions.<sup>114</sup> Where a rule has secondary retroactive effect, it is permissible unless such effect is unreasonable.<sup>115</sup> And the Takings Clause of the Fifth Amendment prohibits the government from taking “private property ... for public use, without just compensation.”<sup>116</sup> Notably, and relevant to any takings arguments, Commission and judicial precedent have established that carriers have no vested property interest in USF support.<sup>117</sup>

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<sup>108</sup> See *infra* Section III.C.

<sup>109</sup> We do, however, acknowledge that the creation of two prohibitions will establish different parameters for designation of covered equipment or services.

<sup>110</sup> See Huawei Further Notice Comments at 29-31; LATAM Further Notice Comments at 3-5; PRTC Further Notice Comments at 3; Huawei Further Notice Reply at 2-3; Huawei Second Further Notice Comments at 28-30.

<sup>111</sup> We note that the Secure Networks Act requires the Commission to publish a list of any covered communications equipment or service produced by an entity that poses an unacceptable risk to national security or the security and safety of United States persons and to establish a reimbursement program for removal of such equipment purchased, rented, leased, or otherwise obtained before August 14, 2018. Secure Networks Act §§ 2(a)-(b), 4(a). The Secure Networks Act requires the Commission to publish the list of covered communications equipment or services to its website and to complete a rulemaking to implement the reimbursement program by March 12, 2021. *Id.* §§ 2(a), 4(g)(2). To the extent the rules adopted in this Order serve to implement the rulemaking requirement of the Secure Networks Act, this APA limitation is inapplicable.

<sup>112</sup> *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

<sup>113</sup> See *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

<sup>114</sup> See *Landgraf*, 511 U.S. at 269 & n.24 (a law does not act retrospectively merely because it is applied in a case arising from conduct antedating its enactment or upsets expectations based in prior law; rather, the issue is whether the new provision attaches new legal consequences to events completed before its enactment).

<sup>115</sup> See *DIRECTV*, 110 F.3d at 826 (“A rule that upsets expectations, as we held in *Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996), may be sustained ‘if it is reasonable,’ i.e., if it is not ‘arbitrary’ or ‘capricious.’ A change in policy is not arbitrary or capricious merely because it alters the current state of affairs. The Commission ‘is entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest,’ *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 411 (D.C. Cir. 1983), if it gives a reasoned explanation for the revision.”).

<sup>116</sup> U.S. Const. amend. V.

<sup>117</sup> See *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17770, para. 293 (2011) (*USF/ICC Transformation Order*); see also *In re FCC 11-161*, 753 F.3d 1015, 1070 (10th Cir. 2014) (upholding the Commission's determination that companies have no “vested right to continued receipt of support at current levels” or “entitlement to ongoing USF support”); *id.* at 1082 (holding that “the FCC

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38. *Retroactivity Claims.* Huawei argues that the Commission’s proposal to mandate replacement of covered equipment and services would impose primary retroactivity and therefore be invalid under the APA and, further, would impose secondary retroactivity by adversely and unreasonably altering future legal consequences of past actions.<sup>118</sup> According to Huawei, requiring removal of equipment and services installed before the adoption of section 54.9 of the Commission’s rules would “constitute a sanction on Huawei’s past conduct” and restrict its ability to supply equipment and services to telecommunications carriers.<sup>119</sup> LATAM argues that a remove-and-replace requirement raises concerns about the retroactive impact of regulatory actions on private investment.<sup>120</sup> PRTC states that the requirement raises the same prospective application concerns that the Commission found would not be impacted in the *2019 Supply Chain Order* when adopting section 54.9 of the Commission’s rules, thus contradicting the Commission’s arguments in that *Order* that the rule would only be applied prospectively and not require carriers to remove or stop using existing equipment or services.<sup>121</sup>

39. We disagree with commenters that the remove-and-replace requirement constitutes impermissible primary retroactivity. Huawei claims that the rule attaches a “new disability” or “new burdens” to past conduct.<sup>122</sup> In support of its argument, Huawei cites *National Mining Association*, where the D.C. Circuit found that a Department of Interior rule was invalid because it imposed a “new disability,” namely permit ineligibility, based upon “pre-rule violations by mine operators over whom permit operators acquired control before the rule’s effective date.”<sup>123</sup> It also cites *Rock of Ages Corp.*, where the Second Circuit found a new regulation from the Department of Labor to be impermissibly retroactive because it required on-going inspections at blasting sites beginning a year before the effective date of the regulation that imposed the inspection requirement, thus impermissibly imposing new duties

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reasonably interpreted § 214(e)(2) as not requiring it to offer USF support to all ETCs in a particular area”); *id.* at 1070 (upholding the Commission’s determination that companies have no “vested right to continued receipt of support at current levels” or “entitlement to ongoing USF support”); *id.* at 1055, 1082 (noting that the Commission has the discretion to balance competing universal service principles); *Members of the Peanut Quota Holders Assoc. v. United States*, 421 F.3d 1323, 1335 (Fed. Cir. 2005) (“The government is free to create programs that convey benefits in the form of property, but, unless the statute itself or surrounding circumstances indicate that such conveyances are intended to be irrevocable, the government does not forfeit its right to withdraw those benefits or qualify them as it chooses.”); *Adak Eagle Enterprises, LLC & Windy City Cellular, LLC*, Order on Reconsideration and Memorandum Opinion and Order, 30 FCC Rcd 5080, 5089 para. 22 (2015) (“[C]ompanies do not have a vested right to continued receipt of support at current levels, and the Commission has the discretion to balance competing universal service principles.”); *Connect America Fund*, Order and Order on Review, 31 FCC Rcd 8454, 8466, para. 32 (2016) (“In fact, ‘there is no statutory provision or Commission rule that provides companies with a vested right to continued receipt of support at current levels, and [the Commission is] not aware of any other, independent source of law that gives particular companies an entitlement to ongoing USF support.’”) (quoting *USF/ICC Transformation Order*, 26 FCC Rcd at 17771, para. 293).

<sup>118</sup> Huawei Further Notice Comments at 29-31; Huawei Second Further Notice Comments at 28-30.

<sup>119</sup> Huawei Further Notice Comments at 30 (responding to the original proposed application of the removal and replacement requirement to equipment and services produced or provided by a company posing a national security threat to the integrity of communications networks or the communications supply chain); *see 2019 Supply Chain Further Notice*, 34 FCC Rcd at 11474, para. 133.

<sup>120</sup> LATAM Further Notice Comments at 3-4; *see also* Huawei Further Notice Reply at 3 (supporting LATAM’s concerns).

<sup>121</sup> *2019 Supply Chain Order*, 34 FCC Rcd at 11456, 11458, paras. 85, 93; PRTC Further Notice Comments at 2-3; *see also* Huawei Further Notice Reply at 2-3 (supporting PRTC’s assertions).

<sup>122</sup> Huawei Further Notice Comments at 30-31; Huawei Second Further Notice Comments at 29.

<sup>123</sup> Huawei Further Notice Comments at 30-31 (citing *Nat’l Mining Ass’n v. Dep’t of Interior*, 177 F.3d 1, 8 (D.C. Cir. 1999)) (internal quotations omitted).

on already completed transactions.<sup>124</sup> Huawei also cites *AMC Entertainment, Inc.*, where the Ninth Circuit invalidated an agency's interpretation of a rule which would have required retrofitting movie theaters before the agency announced its interpretation.<sup>125</sup> We find that Huawei's interpretation of these cases is incorrect as applied to the requirement at hand. The standard for primary retroactivity assesses whether a rule has changed the past legal consequences of past actions.<sup>126</sup> Unlike the factual circumstances in the cases cited by Huawei, the remove-and-replace requirement does not attach a "new disability" before the rule goes into effect. Carriers will not be penalized for having covered equipment or services in their networks before the removal and replacement rule is effective, nor do they have to take action prior to the rule taking effect; therefore, the rule has no primary retroactive effect. Thus, while it "changes the legal landscape," it has not "rendered past actions illegal or otherwise sanctionable,"<sup>127</sup> even as to the carriers themselves—much less those from whom the carriers purchase equipment not governed by such rules, such as Huawei.<sup>128</sup>

40. While the effect of the removal and replacement rule may alter the future legal consequence to certain carriers of having certain equipment or services in a network by making what was once permissible equipment and services to operate now impermissible to retain going forward, "[i]t is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes."<sup>129</sup> Such action "has never been thought to constitute retroactive lawmaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect."<sup>130</sup>

41. We similarly find Huawei's arguments regarding secondary retroactivity unpersuasive. Huawei argues that to compel equipment replacement would impose unreasonable secondary retroactivity on carriers and suppliers "because such a requirement would adversely and unreasonably alter the future legal consequences of past actions" and render covered equipment "essentially useless."<sup>131</sup> However, "secondary activity—which occurs if an agency's rule affects a regulated entity's investment made in reliance on the regulatory status quo before the rule's promulgation—will be upheld if it is reasonable."<sup>132</sup> First, we disagree with Huawei that this rule constitutes secondary retroactivity. The remove-and-replace requirement imposes a future obligation, albeit on existing property, by mandating removal, *as well as* replacement, of covered equipment and services; replacement can only occur once removal—a future action—occurs. As such, this requirement imposes a legal consequence on an action to occur at a future date, i.e., should a reimbursement recipient or an ETC receiving USF support retain covered equipment or

<sup>124</sup> *Id.* at 31 (citing *Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 158-59 (2d Cir. 1999)).

<sup>125</sup> *Id.* (citing *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 770 (9th Cir. 2008)).

<sup>126</sup> *Bowen*, 488 U.S. at 217-220 (Scalia, J., concurring).

<sup>127</sup> *Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009) (*NCTA*) (upholding new rules made applicable to existing agreements).

<sup>128</sup> As to Huawei, the new rules have no application at all. They apply only to carriers, requiring them to replace Huawei equipment only if and after reimbursement to the carriers for doing so becomes available. While collateral effects on its contracts with such carriers would not be cognizable as primary retroactivity under *NCTA*, in any event Huawei makes no claim that the Commission's action could result in any carrier claims against Huawei, much less any damages in support of any such claims notwithstanding the reimbursement program.

<sup>129</sup> *Mobile Relay Assoc. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006) (quoting *Bowen*, 488 U.S. at 219 (Scalia, J., concurring)).

<sup>130</sup> *Id.* at 11; *see also NCTA*, 567 F.3d at 670 (holding that barring rules because they may "frustrat[e] . . . expectations" that are "legitimate" or "impair the future value of past bargains" would "spell the end of informal rulemaking").

<sup>131</sup> Huawei Further Notice Comments at 31.

<sup>132</sup> *Mobile Relay Assoc.*, 457 F.3d at 11.

services in its networks past the certification requirement deadline for the rule. And the Commission, in creating the Reimbursement Program, has sought to mitigate any harm that the future effect of the rule may incur.

42. Second, even assuming *arguendo* that the removal-and-replacement requirement amounts to secondary retroactivity, it is reasonable and therefore permissible.<sup>133</sup> The threat that the presence of covered equipment and services in our communications networks poses to our national security necessitates the prompt removal and replacement of such equipment, thereby supporting that this requirement is not arbitrary and capricious. Courts have held that the Commission “is entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest, though it must give a sufficient explanation of that change.”<sup>134</sup> The rule we adopt today facilitates the transition away from such identified equipment and services that threaten our nation’s security to ensure entities are able to offer secure, reliable, and quality service over their networks. To that end, our rule is no different than other regulatory requirements which require regulated entities to upgrade their networks for the improved provision of services. For example, the Commission may require a common carrier subject to section 214 of the Communications Act to “provide itself with adequate facilities for the expeditious and efficient performance of its service” which, for some carriers, could require an upgrade of their equipment.<sup>135</sup> Similarly, the remove-and-replace rule requires recipients of reimbursement funding and ETCs receiving USF support—which are, in fact, common carriers—to effectively upgrade their networks by removing compromised products and services and thus improve the provision of quality services at just, reasonable, and affordable rates, in accordance with section 254 of the Communications Act.<sup>136</sup>

43. Third, providers may choose alternatives to removal and replacement of covered equipment and services to avoid compliance or avoid any perceived impact on private investment. Participation in the Reimbursement Program is voluntary; providers are under no obligation to accept reimbursement funding and the conditions associated with such support. Designation as an ETC, and the opportunity therefore to participate in USF programs, or acceptance of USF funds through those programs, is likewise voluntary, and providers that are currently designated as ETCs or that accept universal service funding may decline to participate in USF programs. To allow providers so inclined a reasonable opportunity to relinquish their ETC status<sup>137</sup> or secure alternative funding to USF support, ETCs choosing this option must do so within one year after the Wireline Competition Bureau issues a Public Notice announcing the acceptance of applications filed during the initial filing window to participate in the Reimbursement Program. This time period is consistent with the amount of time that carriers participating in the Reimbursement Program and for ETCs receiving USF support that retain their designation or continue to accept universal service funding have to comply with the remove-and-replace requirement.<sup>138</sup> Finally, we reiterate that the applicability of this rule is within the bounds of our legal

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<sup>133</sup> See *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997) (“A rule that upsets expectations, as we held in *Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996), may be sustained ‘if it is reasonable,’ i.e., if it is not ‘arbitrary’ or ‘capricious.’ A change in policy is not arbitrary or capricious merely because it alters the current state of affairs. The Commission ‘is entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest,’ *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 411 (D.C. Cir. 1983), if it gives a reasoned explanation for the revision.”).

<sup>134</sup> *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 411 (D.C. Cir. 1983).

<sup>135</sup> 47 U.S.C. § 214(d).

<sup>136</sup> 47 U.S.C. § 254(b).

<sup>137</sup> A state commission, or the Commission in the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a state commission, shall permit an ETC to relinquish its designation as such in any area served by more than one ETC. *Id.* § 214(e)(4).

<sup>138</sup> See *infra* Section III.A.4.

authority and, as such, only extends to recipients of reimbursement funds and ETCs receiving USF support; beyond this, our rule imposes no restriction on Huawei's ability to supply equipment and services to telecommunications carriers and other providers who are not subject to this requirement. ETCs that choose to forego their ETC designation or disclaim USF support may avoid any impact that this rule may have on future legal consequences of past actions. While the rule no doubt may frustrate a business that undertook a course of conduct based on current law, only to have its expectations frustrated, when the law changes, "this has never been thought to constitute retroactive lawmaking."<sup>139</sup>

44. Furthermore, we disagree with PRTC's assertion that the rule we adopt today raises the same concerns regarding prospective application that the Commission addressed when adopting section 54.9 in the *2019 Supply Chain Order*.<sup>140</sup> In that *Order*, we found that because the rule restricting use of USF support was prospective in effect, it therefore did "not prohibit the use of existing services or equipment already deployed or in use."<sup>141</sup> That finding is not contradicted here. The prohibition contained in section 54.9 of the Commission's rules prospectively limits the use of future USF support,<sup>142</sup> whereas the requirement to remove and replace obligates recipients of reimbursement funding and ETCs receiving USF support to take action to remove covered equipment and services from their networks. Not only do the regulations impose different obligations, but, as stated above, the future receipt of USF support is not mandatory. Therefore, under both rules, affected entities may decline to accept USF support and avoid compliance with either rule.

45. *Unconstitutional Taking*. LATAM argues that the Commission's remove-and-replace requirement raises regulatory takings concerns.<sup>143</sup> PRTC contends that this requirement raises the same regulatory takings arguments that the Commission addressed in the *2019 Supply Chain Order*.<sup>144</sup> Huawei also argues that mandating removal and replacement would violate the Takings Clause and due process "because carriers have vested property interests in already-purchased equipment, and mandating its removal would deny all economically beneficial or productive use or all economically viable use of the equipment."<sup>145</sup>

46. We find the arguments from LATAM, PRTC, and Huawei unpersuasive. As explained in the *2019 Supply Chain Order*, universal service support recipients do not have a property interest in maintaining particular levels of support notwithstanding changes in the program rules.<sup>146</sup> Nor are we persuaded that the effects on carriers' existing equipment represents a regulatory taking under the *Penn Central* framework.<sup>147</sup> First, the economic impact on carriers is minimal, especially for reimbursement recipients who are eligible to receive reimbursement for reasonable costs incurred to remove, replace, and

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<sup>139</sup> *Mobile Relay Assoc. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006).

<sup>140</sup> *2019 Supply Chain Order*, 34 FCC Rcd at 11456, 11458, paras. 85, 93; PRTC Further Notice Comments at 2-3.

<sup>141</sup> *2019 Supply Chain Order*, 34 FCC Rcd at 11456, para. 85.

<sup>142</sup> 47 CFR § 54.9.

<sup>143</sup> LATAM Further Notice Comments at 4-5; *see also* Huawei Further Notice Reply at 3 (supporting LATAM's concerns).

<sup>144</sup> *2019 Supply Chain Order*, 34 FCC Rcd at 11463-64, para. 105; PRTC Further Notice Comments at 4-5; *see also* Huawei Further Notice Reply at 2-3 (supporting PRTC's assertions).

<sup>145</sup> Huawei Second Further Notice Comments at 28 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-16 (1992) (internal quotations omitted)).

<sup>146</sup> *2019 Supply Chain Order*, 34 FCC Rcd at 11463-64, para. 105.

<sup>147</sup> *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 124 (1978). In assessing whether such a taking has occurred, courts consider: (1) the economic impact of the regulation on the regulated party; (2) the extent to which the regulation interferes with the regulated party's reasonable investment-backed expectations; and (3) the "character" of the government action. *Id.*

dispose of covered equipment through the Reimbursement Program. For those ETCs receiving USF support that do not receive reimbursement funding, the impact to replace covered equipment and services should not be severe because larger entities, who would otherwise be ineligible for reimbursement, are less likely to have covered equipment or services in their networks and otherwise have more opportunity to bear the cost of any such replacement due to their size.<sup>148</sup> Second, the rule should not upend reasonable investment-backed expectations, as providers have been aware of the designation of certain products and manufacturers as covered equipment or services since the passage of the 2019 NDAA in 2018. And over the last decade, Congress and the Executive Branch have repeatedly stressed the importance of identifying and eliminating potential security vulnerabilities in communications networks and their supply chains.<sup>149</sup> Third and finally, the requirement does not amount to a physical invasion of the property, especially when there is recourse for entities to relinquish their ETC designation or forego receiving future USF support in order to avoid any consequence of the rule upon physical property.

47. As an alternative basis for our conclusion, we are not persuaded that the regulatory takings precedent represents the appropriate manner of analyzing our action here. In particular, the restriction applies only as a condition on a provider's continued participation in the federal universal service program, including receipt of compensation from the federal universal service support mechanisms.<sup>150</sup> Even assuming *arguendo* that the restriction resulted in some effect on providers'

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<sup>148</sup> H.R. Rep. No. 116-352, at 9 (2019) (“Large communications companies with sophisticated network security operations and significant capital generally have avoided installing and using Huawei and other suspect foreign equipment in their networks.”).

<sup>149</sup> See, e.g., Letter from Senator Jon Kyl et al. to Hon. Julius Genachowski, Chairman, FCC, Oct. 19, 2010 (letter from bipartisan group of lawmakers expressing concern to the FCC about ensuring the security of U.S. telecommunications networks in light of potential deals between U.S. telecommunications carriers and two Chinese telecommunications equipment manufacturers, Huawei and ZTE); Letter from Representative Anna Eshoo to Hon. Julius Genachowski, Chairman, FCC, Nov. 2, 2010 (expressing “grave concerns about the implications of foreign-controlled telecommunications infrastructure companies providing equipment to the U.S. market” and particular concern that “Huawei and ZTE, Chinese telecommunications infrastructure manufacturers are looking to increase their presence in the U.S.”); Permanent Select Committee on Intelligence, U.S. House of Representatives, Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE at iv (Oct. 8, 2012), [https://republicans-intelligence.house.gov/sites/intelligence.house.gov/files/documents/huawei-zte%20investigative%20report%20\(final\).pdf](https://republicans-intelligence.house.gov/sites/intelligence.house.gov/files/documents/huawei-zte%20investigative%20report%20(final).pdf) (bipartisan report assessing the counterintelligence and security threat posed by Chinese telecommunications companies, specifically Huawei and ZTE, operating in or providing equipment to customers in the United States); Presidential Policy Directive 21, Critical Infrastructure Security and Resilience (Feb. 12, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-criticalinfrastructure-security-and-resil> (directing federal agencies to exercise their authority and expertise to partner with other agencies to identify vulnerabilities in communications infrastructure and to work “to increase the security and resilience of critical infrastructure within the communications sector”); Executive Order 13800 § 2(b), 82 Fed. Reg. 22391, 22393, Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure (May 11, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-executiveorder-strengthening-cybersecurity-federal-networks-critical-infrastructure/> (directing heads of federal agencies to identify authorities and capabilities that agencies could employ to support the cybersecurity efforts of critical infrastructure entities, and to determine how best to support cybersecurity risk management efforts); 2018 NDAA § 1656 (barring the Department of Defense from using “[t]elecommunications equipment [or] services produced . . . [or] provided by Huawei Technologies Company or ZTE Corporation” for certain critical programs, including ballistic missile defense and nuclear command, control, and communications).

<sup>150</sup> See, e.g., *2019 Supply Chain Order*, 34 FCC Rcd at 11452, para. 72 (noting that section 54.9 of the Commission’s rules “does not prohibit USF recipients from using their own funds to purchase or obtain equipment or services from covered companies, but USF recipients must be able to clearly demonstrate that no USF funds were used to purchase, obtain, maintain, improve, modify, or otherwise support any equipment or services produced or provided by a covered entity”). However, recipients of Reimbursement Program funding are prohibited from using funding, including private funds to purchase, rent, lease, or otherwise obtain any covered communications equipment or service. See Secure Networks Act § 4(c)(2)(B).



property interest in their existing equipment, there is a sufficient nexus and proportionality between the restriction and the providers' participation in the USF programs.<sup>151</sup> The restriction on use of universal service support for equipment and services that pose an ongoing security risk has a clear nexus to the Commission's legitimate concerns, as explained in the *2019 Supply Chain Order*.<sup>152</sup> By targeting the providers' actions only insofar as they would be using federal universal service support in a manner that perpetuates a security risk, the restriction is appropriately proportional to address that harm.

48. Separately, we observe that these arguments only focus on the removal of the equipment and disregard the support provided for the replacement of the equipment and the availability of "just compensation" through reimbursement appropriations. Eligibility for providers of advanced communications service to participate in the Reimbursement Program is expansive, and the vast majority of affected entities required to remove and replace covered equipment and services under our rule by virtue of their continued receipt of universal service support will be eligible to receive reimbursement.<sup>153</sup> Where recipients of reimbursement funding do have a property interest in the covered equipment we require them to remove, the Reimbursement Program offers just compensation.

#### 4. Certification Requirement and Timing

49. In the *2019 Supply Chain Further Notice*, we proposed making the remove-and-replace requirement contingent on the creation of a reimbursement program that would help "mitigate the impact on affected entities, and in particular small, rural entities."<sup>154</sup> Commenters supported this approach.<sup>155</sup> Accordingly, we will proceed as proposed and make compliance with the removal obligation coincide with the implementation of the Reimbursement Program, which we separately establish below. Specifically, we will require ETC recipients of USF support to certify that they have complied with our new rule requiring the removal of equipment and services on the Covered List. The first certification will be required one year after the Wireline Competition Bureau issues a Public Notice announcing the acceptance of applications filed during the initial filing window to participate in the Reimbursement Program. Once the one-year period has expired, ETCs receiving USF support will then need to certify going forward that they are not using equipment or services identified on the Covered List before receiving USF support each funding year.<sup>156</sup>

50. We find that adopting a uniform certification requirement and transition period will promote equitable compliance deadlines for all entities subject to the remove-and-replace requirement, regardless of their participation in the Reimbursement Program. Additionally, as the threat to our national security is immediate, it better advances our goals to require entities to remove and replace covered equipment and services consistent with the transition periods for reimbursement in the Reimbursement Program, rather than permitting them to wait until such products are at end-of-life or replaced in the ordinary course of business.

#### B. General Matters on Secure Networks Act Implementation

<sup>151</sup> See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605-606 (2013) (discussing the analytical framework established by *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994)).

<sup>152</sup> *2019 Supply Chain Order*, 34 FCC Rcd at 11433-38, 11449-54, paras. 28-38, 66-78.

<sup>153</sup> See *supra* para. 23, n.57 (determining that only two ETCs using suspect foreign equipment appear to fall outside the scope of reimbursement eligibility due to the number of broadband customers, based on the 2019 Information Collection and FCC Form 477 data).

<sup>154</sup> *2019 Supply Chain Further Notice*, 34 FCC Rcd at 11470, para. 122.

<sup>155</sup> See, e.g., CCA Further Notice Comments at 2-3; LATAM Further Notice Comments at 9; RWBC Further Notice Comments at 6-7; see also NTCA Sec. 4 PN Comments at 2-3; PRTC Sec. 4 PN Reply at 5.

<sup>156</sup> Participants in the Reimbursement Program will not need to certify compliance with the remove-and-replace rule until after the expiration of their removal, replacement, and disposal term.

51. The Secure Networks Act’s requirements apply to “communications equipment or service” and to providers of “advanced communications service.” Although the Secure Networks Act defines “communications equipment or service” as “any equipment or service that is essential to the provision of advanced communications service,”<sup>157</sup> it does not define which factors make equipment or service “essential.” Similarly, the Secure Networks Act defines “advanced communications service” as the “advanced telecommunications capability” described in section 706 of the Telecommunications Act of 1996, which encompasses “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology,”<sup>158</sup> but does not define how the Commission should determine what constitutes “high-speed, switched, broadband telecommunications capability.”<sup>159</sup> In the *2020 Supply Chain Second Further Notice*, the Commission sought comment on how to interpret these two terms employed throughout the Secure Networks Act.

52. *Interpretations of “communications equipment or service”*. Consistent with our proposal in the *2020 Supply Chain Second Further Notice*,<sup>160</sup> we interpret “communications equipment and service” as defined in section 9(4) to include all equipment or services used in fixed and mobile broadband networks, provided they include or use electronic components.<sup>161</sup> We believe that all equipment or services that include or use electronic components can be reasonably considered essential to broadband networks, and we further believe that our definition will provide a bright-line rule that will ease regulatory compliance and administrability. Our proposed definition received support from several commenters in the record, who agreed that it provides regulatory certainty and as one commenter explained, “would make it universally clear for compliance purposes.”<sup>162</sup> RWA also supports the definition because it “provides the FCC with the flexibility it needs as technology evolves so that regulations do not lag behind technological developments.”<sup>163</sup>

53. We reject arguments that we should interpret “communications equipment or service” more broadly or narrowly. Although we agree with CCA that we “need not adopt a cramped interpretation in order to implement the [Reimbursement] Program,”<sup>164</sup> the definition is appropriately tailored because it provides clear and simple guidance to regulated parties while still covering any equipment and service that could potentially pose a threat to national security.<sup>165</sup> Our decision to include in the definition of communications equipment or services any equipment or service that includes or uses

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<sup>157</sup> Secure Networks Act § 9(4).

<sup>158</sup> *Id.* § 9(1).

<sup>159</sup> *See id.*

<sup>160</sup> *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7829, para. 26.

<sup>161</sup> Included in the definition of “communications services” is software and firmware used in broadband networks. This interpretation is consistent with Commission precedent regarding software’s potential security risk. *Cf. 2019 Supply Chain Order*, 34 FCC Rcd at 11449, para. 66 (“The rule we adopt in this Report and Order shall apply to any and all equipment or services, including software, produced or provided by a covered company.”). Also included in this definition is any optical switching equipment or services that include or use electronic components. Letter from W. Scott Schelle, A. Richard Burke, and Gary Monetti, Secure Networks Coalition, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-89, at 1 (filed Dec. 2, 2020) (SNC Dec. 2, 2020 *Ex Parte*).

<sup>162</sup> Dell Second Further Notice Comments at 1.

<sup>163</sup> RWA Second Further Notice Reply at 2.

<sup>164</sup> CCA Second Further Notice Comments at 3.

<sup>165</sup> *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7829, para. 26; Dell Further Notice Comments at 1.

electronic components does not alter or modify the statutory language, but instead interprets it in a way so as to “most accurately reflect[] the broad participant pool Congress intended for the program.”<sup>166</sup>

54. Alternatively, CTIA’s argument that our definition is “unduly broad” conflates our interpretation of “communications equipment or service” with the separate inquiry in section 2(b)(2) of the Secure Networks Act.<sup>167</sup> Section 2(b)(2) provides that, relying solely on determinations made by a list of enumerated sources, the Commission shall publish on the Covered List communications equipment or service that meet specific criteria. CTIA would read out the difference between “communications equipment or service” in section 9(4) of the Secure Networks Act and section 2(b)(2), which limits the Covered List, to communications equipment and services that possess certain capabilities.<sup>168</sup> CTIA proposes to “narrow the scope of the ‘communications equipment or service’” because “not all equipment subcomponents are essential,” and asks us to “develop a risk-based analysis relevant to the core layer, distribution layer, and access layer.”<sup>169</sup> We disagree because the Secure Networks Act already provides a definition for the subset of communications equipment and services that have been subjected to the section 2(b)(2) review. Section 9(5) defines “covered communications equipment or service” as “any communications equipment or service that is on the [Covered List] . . . ,” and, thus, subject to the section 2(b)(2) criteria.<sup>170</sup> These factors, which determine which pieces of equipment or service should be considered “covered communications equipment and services,” and thus must be published on the Covered List, do not apply to the definition of “communications equipment and services.”

55. *Definition of “advanced communications service.”* Consistent with our proposal in the 2020 *Second Further Notice*,<sup>171</sup> we interpret “advanced communications service” for the purposes of the Secure Networks Act to include services with any connection of at least 200 kbps in either direction.<sup>172</sup> This interpretation had unanimous support in the record and is consistent with the Commission’s historic interpretation of section 706 of the Telecommunications Act.<sup>173</sup> We acknowledge that the Commission has encouraged providers of advanced communications service to offer broadband service at greater speeds and adjusted over time its definition of advanced telecommunications capability in its annual Broadband Deployment Reports.<sup>174</sup> However, our interpretation in this proceeding covers a broader array

<sup>166</sup> CCA Second Further Notice Comments at 4.

<sup>167</sup> CTIA Second Further Notice Comments at 9.

<sup>168</sup> *See id.* at 9-10 (contending that the proposed interpretation is inconsistent with the “risk-based approach to telecom equipment and services taken in Section 889 of the 2019 NDAA,” which “reflects Congress’s view that some equipment poses less risk to U.S. telecom networks . . . .” than others).

<sup>169</sup> *Id.*

<sup>170</sup> Secure Networks Act § 9(5).

<sup>171</sup> 2020 *Supply Chain Second Further Notice*, 35 FCC Rcd at 7829, para. 27.

<sup>172</sup> No commenter opposed this definition.

<sup>173</sup> 47 CFR § 1.7001(b).

<sup>174</sup> *See Inquiry Concerning Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2406, para. 20 (1999) (stating, in relevant part, that “broadband” and “advanced telecommunications capability” “hav[e] the capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) directions, a speed . . . in excess of 200 [kbps] in the last mile”); *Inquiry Concerning Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 14-126, 2015 Broadband Deployment Report, 30 FCC Rcd 1375, 1393-94, para. 26 (2015); *see also Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans In a Reasonable and Timely Fashion*, GN Docket No. 19-285, 2020 Broadband Deployment Report, 35 FCC Rcd 8986, 8991-92, para. 13 (2020).

of equipment and services, consistent with congressional intent to identify and remove insecure equipment and, therefore, we believe establishing a standard that captures this broader number of providers is appropriate. Using the standard will maximize program participation to include providers with older, legacy technology.<sup>175</sup>

56. We agree with Dell that our interpretation “would ensure that insecure equipment is not left in our nation’s interconnected broadband networks.”<sup>176</sup> The 200 kbps threshold is a familiar benchmark to current providers of advanced communications services, as it matches the definition of “broadband services” the Commission uses to determine which facilities-based broadband providers must file the Commission’s FCC Form 477 and which helps determine the availability of advanced communications services throughout the country.<sup>177</sup> Using this standard will also allow the Commission to leverage available information on FCC Form 477 filers to verify applicant eligibility.

### C. Section 2 of the Secure Networks Act – Creation and Maintenance of the Covered List

57. Section 2(a) of the Secure Networks Act directs the Commission to publish, no later than March 12, 2021,<sup>178</sup> a list of covered communications equipment and services (Covered List).<sup>179</sup> The Covered List, which will be publicly available, will serve as a reference for interested parties to indicate the communications equipment and services that certain providers must remove from their networks, as well as the equipment and services to which the section 3(a) prohibition applies, the communications equipment and services eligible for reimbursement pursuant to section 4, and the equipment and services that form the basis for the reporting requirements in section 5.

#### 1. Sources for and Reliance on Determinations

58. Consistent with the clear direction in the Secure Networks Act and our proposal in the *2020 Supply Chain Second Further Notice*,<sup>180</sup> we will publish on our website the Covered List of communications equipment or services determined to pose an unacceptable risk to the national security of the United States or the security and safety of United States persons. Section 2(c) of the Secure Networks Act states that the “Commission shall place” on the Covered List “any communications equipment or service that poses an unacceptable risk to the national security of the United States or the security and safety of United States persons based solely on one or more of the following determinations,” and then lists four sources for such determinations:

- “A specific determination made by any executive branch interagency body with appropriate national security expertise, including the Federal Acquisition Security Council”;
- “A specific determination made by the Department of Commerce pursuant to Executive Order No. 13873 . . . relating to securing the information and communications technology and services supply chain”;
- “The communications equipment or service being covered telecommunications equipment or services, as defined in section 889(f)(3)” of the 2019 NDAA; or

<sup>175</sup> See CCA Second Further Notice Comments at 2-4 (“[T] the Commission should adopt rules that interpret the statutory language as it most accurately reflects the broad participant pool Congress intended for the program.”); Dell Technologies Second Further Notice Comments at 1.

<sup>176</sup> Dell Second Further Notice Comments at 1.

<sup>177</sup> We do not modify the definition of “advanced communications service” for any other purposes other than interpreting the Secure Networks Act.

<sup>178</sup> Secure Networks Act § 2(a).

<sup>179</sup> Secure Networks Act § 2(a).

<sup>180</sup> *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7830, para. 30.

- “A specific determination made by an appropriate national security agency.”<sup>181</sup>

59. *Requirement to accept determinations.* Consistent with the *2020 Supply Chain Second Further Notice*, the Commission interprets Congress’s use of the words “shall place” to mean we have no discretion to disregard determinations from these enumerated sources.<sup>182</sup> The record supports our interpretation. For example, USTelecom contends that “once one of the federal agencies, either enumerated or implied, make a granular determination about ‘covered equipment’, the Commission is bound to accept it.”<sup>183</sup> Similarly, NCTA explains that “[the] Secure Networks Act did not grant the Commission plenary authority to regulate the communications network supply chain based upon its own assessment of national security risks posed by covered equipment and services.”<sup>184</sup> Thus, where there is a determination from one of these sources, we must take action to publish or update the Covered List to incorporate communications equipment or services covered by that determination.<sup>185</sup>

60. *No deviation from enumerated sources.* Consistent with our proposal in the *2020 Supply Chain Second Further Notice* and the record, we interpret Congress’ use of the word “solely” in section 2(c) to mean we can accept determinations only from these four categories of sources.<sup>186</sup> This interpretation is shared by multiple commenters, including USTelecom, NCTA, NTCA, CTIA, and Huawei.<sup>187</sup>

61. *Determinations from any executive branch interagency body with appropriate national security expertise.* The Secure Networks Act directs the Commission to rely on “a specific determination made by any executive branch interagency body with appropriate national security expertise, including the Federal Acquisition Security Council” to accept determinations.<sup>188</sup> We include in this definition two cross-government groups: Team Telecom and the Committee on Foreign Investment in the United States (CFIUS), as these executive branch interagency bodies routinely provide expert advice to the Commission

<sup>181</sup> Secure Networks Act § 2(c). The Act defines “appropriate national security agency” to include the Department of Homeland Security, the Department of Defense, the Office of the Director of National Intelligence, the National Security Agency, and the Federal Bureau of Investigation. *Id.* § 9(2).

<sup>182</sup> *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7830, para. 30. Huawei agrees, and stated in its comments that “the Secure Networks Act’s use of the term ‘shall’ provides the Commission no discretion” when evaluating determinations for inclusion on the Covered List. Huawei Second Further Notice Comments at 6.

<sup>183</sup> USTelecom Second Further Notice Comments at 2-3.

<sup>184</sup> NCTA Second Further Notice Comments at 5.

<sup>185</sup> While it is difficult for the Commission to calculate the national security benefits derived from removing covered communications equipment and services, the Secure Networks Act requires the Commission to rely on the judgment and expertise of those enumerated sources tasked with making this assessment. Secure Networks Act § 2(c)(1)-(4).

<sup>186</sup> “In taking action under subsection (b)(1), the Commission shall place on the list any communications equipment or service that poses an unacceptable risk to the national security of the United States or the security and safety of United States persons based *solely* on one or more of the following determinations . . . .” (emphasis added). Secure Networks Act § 2(c).

<sup>187</sup> See CCA Further Notice Comments at 4-5 (arguing that the Commission should rely on “the judgment of national security agencies for the Covered List”); CTIA Second Further Notice Comments at 6 (contending that “while the Commission has a role to play in [supply chain] security, it must rely on relevant expert agencies”); Huawei Second Further Notice Comments at 5 (stating that the Commission “has no choice but to rely ‘solely’ and ‘exclusively’ on one or more of four ‘specific [national security] determinations’ delineated in section 2(c) of the Secure Networks Act”); NCTA Second Further Notice Comments at 4-6 (arguing that “Congress envisioned that only a defined set of Federal agencies and inter-agency Executive branch bodies with recognized national security expertise would make threshold national security risk determinations”); USTelecom Second Further Notice Comments at 2-3 (agreeing that the use of “solely . . . eliminates the Commission’s discretion to determine the equipment that poses a threat to national security on its own”).

<sup>188</sup> Secure Networks Act § 2(c)(1).

on national security-related questions.<sup>189</sup> The Executive Order establishing Team Telecom explained that Team Telecom was created to “assist the FCC in its public interest review of national security and law enforcement concerns that may be raised by foreign participation in the United States telecommunications services sector.”<sup>190</sup> The Executive Order creating CFIUS authorized it to conduct inquiries “with respect to the potential national security risk posed by a transaction.”<sup>191</sup>

62. We have no discretion to ignore determinations from CFIUS and Team Telecom because they are plainly “executive branch interagency bodies with appropriate national security expertise.”<sup>192</sup> For example, Team Telecom and the economic agencies (Department of Commerce, U.S. Trade Representative, and Department of State), recently recommended in 2018 that the Commission deny China Mobile USA’s section 214 application, finding that allowing China Mobile USA to “offer telecommunications services as a common carrier between the United States and international countries . . . would pose substantial and unacceptable national security and law enforcement risks” because China Mobile USA is “subject to exploitation, influence, and control by the Chinese Government.”<sup>193</sup> And we recently adopted rules streamlining the process by which the Commission “coordinates with [Team Telecom] for assessment of any national security, law enforcement, foreign policy, or trade policy issues regarding certain applications filed with the Commission.”<sup>194</sup>

63. We therefore disagree with CTIA and NTCA that findings from Team Telecom or CFIUS “are not structured to make determinations of general supply chain risk,”<sup>195</sup> because regardless of their structure, we must incorporate any determinations they make into the Covered List. Huawei argues that relying on Team Telecom and CFIUS is unnecessary “given the involvement of the agencies that

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<sup>189</sup> The members of Team Telecom are the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, and the head of any other executive department or agency, or any Assistant to the President, as the President determines appropriate. Exec. Order No. 13913 of April 4, 2020, 85 Fed. Reg. 19643, Executive Order on Establishing the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector (Apr. 4, 2020), <https://www.federalregister.gov/documents/2020/04/08/2020-07530/establishing-the-committee-for-the-assessment-of-foreign-participation-in-the-united-states> (Apr. 8, 2020) (Team Telecom Executive Order). The members of CFIUS are the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the Secretary of Commerce, the United States Trade Representative, the Chairperson of the Council of Economic Advisers, the Attorney General, and the Director of the Office of Management and Budget. Exec. Order No. 11858 of May 7, 1975, 40 Fed. Reg. 20263, Foreign Investment in the United States (May 7, 1975) <https://www.archives.gov/federal-register/codification/executive-order/11858.html> (May 9, 2008) (CFIUS Executive Order).

<sup>190</sup> Team Telecom Executive Order.

<sup>191</sup> CFIUS Executive Order.

<sup>192</sup> See Team Telecom Executive Order (“There is hereby established [Team Telecom,] the primary objective of which shall be to assist the FCC in its public interest review of national security and law enforcement concerns that may be raised by foreign participation in the United States telecommunications services sector.”); see also CFIUS Executive Order (“The Committee shall undertake an investigation of a transaction in any case . . . in which following a review a member of the Committee advises the chairperson that the member believes that the transaction threatens to impair the national security of the United States and that the threat has not been mitigated.”).

<sup>193</sup> Executive Branch Recommendation to the Federal Communications Commission to Deny China Mobile International (USA) Inc.’s Application for an International Section 214 Authorization, File No. ITC-214-20110901-00289 at 4-7 (filed July 2, 2018), <https://go.usa.gov/xEhZ7>; The Commission assessed this recommendation as part of its public interest analysis of the pending application and concluded that “significant national security and law enforcement harms would arise from granting China Mobile USA an international section 214 authorization” and decided determined that a “grant of the application would result in substantial and serious national security and law enforcement risks.” *China Mobile USA Order*, 34 FCC Rcd at 3377, para. 33.

<sup>194</sup> *Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, Report and Order, IB Docket No. 16-155, FCC 20-133, at 1 (2020).

<sup>195</sup> CTIA Second Further Notice Comments at 14; NTCA Second Further Notice Comments at 9-10.

comprise CFIUS and Team Telecom in other relevant bodies identified in the Secure Networks Act.”<sup>196</sup> But that argument fails to recognize that section 2(c)(1) of the Secure Networks Act specifically includes executive branch interagency bodies with appropriate national security expertise.<sup>197</sup> We also disagree with CTIA’s claim that determinations made by the [Federal Acquisition Security Council] should not “result in automatic listing of items on the Covered List” because the “FASC does not operate in a public fashion.”<sup>198</sup> The Secure Networks Act specifically lists the Council as an executive branch interagency body with national security expertise,<sup>199</sup> and we have no authority to disregard Congress’s clear direction. Moreover, any additions the Commission makes to the Covered List will be made public.<sup>200</sup>

64. *Determinations from the Department of Commerce.* The Secure Networks Act directs the Commission to rely on determinations made by the Department of Commerce.<sup>201</sup> Executive Order No. 13873 grants the Secretary of Commerce the authority to prohibit any transaction of any information and communications technology or service where the Secretary, in consultation with other relevant agency heads, determines that the transaction: (i) involves property in which foreign country or national has an interest; (ii) includes information and communications technology or services designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary; and (iii) poses certain undue risks to the critical infrastructure or the digital economy in the United States or certain unacceptable risks to U.S. national security or U.S. persons.<sup>202</sup> In November 2019, the Department of Commerce commenced a rulemaking to implement Executive Order No. 13873.<sup>203</sup> The proposed rule would authorize the Secretary to make a preliminary determination to prohibit or mitigate certain transactions, subject to a notice period before the Secretary issues a final determination.<sup>204</sup>

65. Pursuant to this statutory requirement, we will incorporate any final determinations from the Department of Commerce and add them to the Covered List once they are published in the Federal Register. Although CTIA contends that “Commerce’s implementation of the 2019 Supply Chain EO is replete with concerns about breadth and unpredictability,” the Secure Networks Act does not permit us the discretion to alter or ignore Department of Commerce determinations.<sup>205</sup> Furthermore, administrative and judicial remedies are available should there be any disagreement with the Department of Commerce’s implementation of its authority under the Secure Networks Act to make determinations, and those have no

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<sup>196</sup> Huawei Second Further Notice Reply at 4-5.

<sup>197</sup> Secure Networks Act § 2(c)(1).

<sup>198</sup> CTIA Second Further Notice Comments at 16-17; The National Counterintelligence and Security Center, Supply Chain Risk Management: Reducing Threats to Key U.S. Supply Chains (2020) <https://www.dni.gov/files/NCSC/documents/supplychain/20200925-NCSC-Supply-Chain-Risk-Management-trifold.pdf>.

<sup>199</sup> Secure Networks Act § 2(c)(1).

<sup>200</sup> *See infra* Section III.C.2.

<sup>201</sup> Secure Networks Act § 2(c)(2).

<sup>202</sup> *See* Exec. Order No. 13873, 84 Fed. Reg. 11578, Executive Order on Securing the Information and Communications Technology and Services Supply Chain (May 15, 2019), <https://www.whitehouse.gov/presidentialactions/executive-order-securing-information-communications-technology-services-supply-chain/>.

<sup>203</sup> U.S. Department of Commerce, Securing the Information and Communications Technology and Services Supply Chain, 84 Fed. Reg. 65316 (Nov. 27, 2019). On May 14, 2020, the President issued an order extending the emergency declaration for another year. *See* Continuation of the National Emergency With Respect to Securing the Information and Communications Technology and Services Supply Chain, 85 Fed. Reg. 29321 (May 14, 2020).

<sup>204</sup> *Id.*

<sup>205</sup> CTIA Second Further Notice Comments at 16-17.

bearing here. We will, therefore, comply with the Commission's statutory obligation to incorporate determinations from the Department of Commerce's proceeding into the Covered List.

66. *Determinations from the 2019 NDAA.* The third enumerated source for determinations is found in section 889(f)(3) of the 2019 NDAA. Each subpart of section 889(f)(3) contains determinations. Section 889(f)(3) of the 2019 NDAA defines "covered telecommunications equipment or services" to include "(A) telecommunications equipment produced or provided by Huawei or ZTE; (B) for the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation (Hytera), Hangzhou Hikvision Digital Technology Company (Hikvision), or Dahua Technology Company (Dahua); [and] (C) telecommunications or video surveillance services provided by such entities or using such equipment."<sup>206</sup> Additionally, section 889(f)(3)(D) provides that covered telecommunications equipment or services includes "[t]elecommunications or video surveillance equipment or services produced or provided by an entity that the Department of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the governments of [the People's Republic of China]."<sup>207</sup>

67. As we explained in the *2020 Supply Chain Second Further Notice*, the 2019 NDAA establishes four sources of determinations.<sup>208</sup> The first is telecommunications equipment produced or provided by Huawei or ZTE capable of the functions outlined in sections 2(b)(2)(A)-(C) of the Secure Networks Act.<sup>209</sup> We disagree with NCTA and Huawei, which argue that we must limit the scope of our designation because section 889(a)(2)(b) of the 2019 NDAA limits the restriction on the procurement of "covered telecommunications equipment or services" to equipment and services that can "route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles."<sup>210</sup> This restriction to only certain types of equipment and services, however, applies only to section 889(a)(1) and does not extend to the definition section in section 889(f)(3).<sup>211</sup> Congress explicitly limited the scope of its procurement restrictions to Huawei and ZTE equipment in subsections (a) and (b) of the 2019 NDAA to equipment capable of routing or permitting network visibility, but did not include such a limitation in paragraph 889(f)(3), which governs the determination we must incorporate onto the Covered List. To limit the NDAA determination to equipment capable of routing or permitting network visibility would both ignore the plain text of the NDAA and read section 2(b)(2)(C) out of the Secure Networks Act, which lists the capabilities of communications equipment or service that

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<sup>206</sup> Pub. L. 115-232, 132 Stat. 1636, 1918, § 889(f)(3)(A)-(C).

<sup>207</sup> *Id.* § 889(f)(3)(D).

<sup>208</sup> See *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7832, para. 35. As required by the Secure Networks Act, all of these national security determinations are further limited to "communications equipment and services." See Secure Networks Act § 2(a).

<sup>209</sup> The Commission "shall place" on the Covered List "any communications equipment or service" "if, based exclusively on the determinations" under section 2(c), such equipment or service poses an unacceptable risk to the national security of the United States and the security and safety of United States persons" and is "capable" of "(A) routing or redirecting user data traffic or permitting visibility into any user data or packets that such equipment or service transmits or otherwise handles; (B) causing the network of a provider of advanced communications service to be disrupted remotely; or (C) otherwise posing an unacceptable risk to the national security of the United States or the security and safety of United States persons." Secure Networks Act § 2(b)(2)(A)-(C).

<sup>210</sup> Huawei Second Further Notice Reply at 6-7; NCTA Second Further Notice Comments at 6-7.

<sup>211</sup> Nor does the restriction in section 889(b)(3)(B), which limits the scope of the prohibition on federal agency spending to equipment capable of routing or permitting network visibility, support NCTA or Huawei's argument. That restriction specifically applies only to subsection (b), not section 889(f). 2019 NDAA at § 889(b)(3)(B).



warrant inclusion on the Covered List. We will thus place on the Covered List the determination found in section 889(f)(3)(A), that is, “telecommunications equipment produced or provided by Huawei or ZTE” capable of the functions outlined in sections 2(b)(2)(A), (B), or (C) of the Secure Networks Act.<sup>212</sup>

68. The second determination we will incorporate from the 2019 NDAA is video surveillance and telecommunications equipment produced by Hytera, Hikvision, and Dahua capable of the functions outlined in section 2(b)(2)(A)-(C) of the Secure Networks Act.<sup>213</sup> Consistent with our proposal from the *2020 Supply Chain Second Further Notice*, we will incorporate onto the Covered List such equipment from Hytera, Hikvision, and Dahua, “to the extent it is used for public safety or security,” capable of the functions outlined in sections 2(b)(2)(A), (B), or (C) of the Secure Networks Act.<sup>214</sup>

69. The third determination we incorporate from the 2019 NDAA is “[o]ther telecommunications or video surveillance services produced or provided by Huawei, ZTE, Hytera, Hikvision, and Dahua or using such equipment” that are capable of the functions outlined in section 2(b)(2)(A)-(C) of the Secure Networks Act.<sup>215</sup> Finally, we will also include on the Covered List “telecommunications or video surveillance equipment” that the Department of Defense “reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of” China, but we are unaware of any such determination by the Department of Defense at this time.<sup>216</sup>

70. *Determinations from appropriate national security agencies.* Consistent with our proposal in the *2020 Supply Chain Second Further Notice*, because we are required to incorporate a specific determination made by an appropriate national security agency, we will include in the definition of “an appropriate national security agency”<sup>217</sup> any sub-agencies of the enumerated agencies provided in section 9(2) of the Secure Networks Act.<sup>218</sup>

71. *Form of determinations.* The Secure Networks Act grants the Commission no discretion to disregard determinations from any of these four enumerated sources. Although we recognize that each source may follow a different procedure to arrive at the conclusion that equipment or services, or classes of equipment or services, pose an unacceptable security risk, we nevertheless must incorporate their decisions into the Covered List. Accordingly, we reject CTIA’s argument that the transparency of the originating source should control what kind of deference we give to a national security determination,<sup>219</sup> and Huawei’s argument that a determination should only be incorporated if it identifies “particular pieces or categories of equipment.”<sup>220</sup> Congress granted us no authority to dictate to other agencies how to arrive at their determinations, and granted us no discretion to disregard or modify these determinations.

## 2. Publishing the Covered List

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<sup>212</sup> Huawei Second Further Notice Comments at 14-15; NTCA Second Further Notice Comments at 7; Huawei Second Further Notice Reply at 6-7.

<sup>213</sup> 2019 NDAA § 889(f)(3)(B).

<sup>214</sup> *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7832, para. 35; *see* NCTA Second Further Notice Comments at 7 (arguing that “the Commission can treat such cameras as covered equipment *only* insofar as they are used in one of the ways enumerated in Section 889”).

<sup>215</sup> 2019 NDAA § 889(f)(3)(C); *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7832, para. 35.

<sup>216</sup> 2019 NDAA § 889(f)(3)(D); *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7832, para. 36.

<sup>217</sup> Secure Networks Act § 2(c)(4).

<sup>218</sup> The only party that commented on this subject, USTelecom, agrees that “sub-agencies of enumerated ‘appropriate national security agenc[ies]’ should qualify [to make determinations under section 2(c)].” USTelecom Second Further Notice Comments at 2.

<sup>219</sup> CTIA Second Further Notice Comments at 13.

<sup>220</sup> Huawei Second Further Notice Comments at 6.

72. Consistent with our proposal from the *2020 Supply Chain Second Further Notice* and the text of the Secure Networks Act, we will publish, update, or modify the Covered List without providing notice or opportunity to comment.<sup>221</sup> Section 2(a) of the Secure Networks Act states the Commission “shall publish on its website [the Covered List]”<sup>222</sup> and section 2(d) states the Commission “shall periodically update the [Covered List.]”<sup>223</sup> As we stated in the *2020 Supply Chain Second Further Notice*, we read this language “to be mandatory—precluding us from altering the list beyond the specific updates (all tied to changes in section 2(c) determinations) required by its terms.”<sup>224</sup> Because the Commission is statutorily obligated to update the Covered List in light of new or modified determinations, we need not provide notice *before* updating the Covered List to reflect new or modified determinations.<sup>225</sup> Accordingly, when one of the enumerated sources makes a new or modified determination, the Commission will update the Covered List without first providing notice or seeking comment on these changes. To provide clear guidance for affected providers, however, the Public Safety and Homeland Security Bureau will issue a Public Notice each time the Covered List is updated.<sup>226</sup> The Secure Networks Act’s section 3(a)(1) prohibition and section 5 reporting requirement will then apply to the communications equipment and services added to the Covered List 60 days after publication of the updated Covered List.<sup>227</sup>

73. Because this notice process is based on the clear language of the Secure Networks Act, we disagree with commenters who argue this process to update the Covered List fails to provide proper notice for affected parties.<sup>228</sup> Section 2(a) of the Secure Networks Act tasks the agency with publishing the Covered List no later than March 13, 2021.<sup>229</sup> In taking action to publish this list, Congress clearly directs the agency to rely “solely” on the determinations from external sources. The Act then requires the Commission to enforce the provisions of the Act, including section 3(a)’s prohibition that applies to items on the Covered List 60 days after their inclusion.<sup>230</sup> The text of the Secure Networks Act indicates Congress intended for an expedited regulatory process by establishing procedures “so clearly different from those required by the APA that is must have intended to displace them.”<sup>231</sup>

74. We also disagree with commenters who advocate for a notice period in addition to the one already provided by the Secure Networks Act to “ensure that the Commission has an accurate factual

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<sup>221</sup> *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7835, para. 46.

<sup>222</sup> Secure Networks Act § 2(a).

<sup>223</sup> Secure Networks Act § 2(d).

<sup>224</sup> *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7835, para. 45.

<sup>225</sup> *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7833, 7835, paras. 38, 46 (“Consistent with the Secure Networks Act, which establishes no notice period before the publication of the Covered List, we propose to publish the Covered List without first seeking public comment on the contents. We note that section 2(d) uses mandatory language and thus does not appear to give the Commission discretion not to update the Covered List based on changes in determinations, and hence it would be unclear what purpose a notice period would serve”).

<sup>226</sup> See RWA Second Further Notice Comments at 2 (supporting the Commission publicly announcing each update to the Covered List to notify “rural carriers [who] do not have sufficient resources to monitor actions taken by a multitude of governmental bodies and federal agencies”).

<sup>227</sup> Secure Networks Act §§ 3(a)(1), 5.

<sup>228</sup> See, e.g., CTIA Second Further Notice Comments, NTCA Second Further Notice Comments, Huawei Second Further Notice Comments, NCTA Second Further Notice Comments, RWA Second Further Notice Comments.

<sup>229</sup> Secure Networks Act § 2(a).

<sup>230</sup> Secure Networks Act § 3(a).

<sup>231</sup> *Asiana Airlines v. F.A.A.*, 134 F.3d 393, 397 (D.C. Cir. 1998).

basis upon which to make the technical determination required by the Act.”<sup>232</sup> For example, Huawei argues the notice period is crucial to “ensure that appropriate due process protections are provided and that companies have the opportunity to respond to allegations and provide information relevant to the analyses required by the Secure Networks Act before the Commission places any equipment or services on the Covered List.”<sup>233</sup> Huawei contends that notice and comment “from relevant stakeholders regarding the technical capabilities of equipment is a critical step for the Commission to conduct the analyses section 2(b)(2)(A) and (B) require.”<sup>234</sup> But under the Secure Networks Act, we merely accept the determination from the enumerated source and then add to the Covered List all communications equipment or service from that determination that is capable of the functions outlined in section 2(b)(2)(A)-(C). We do not conduct our own analysis of the national security threat the equipment or services identified by these enumerated sources pose to the communications supply chain; the Secure Network Act requires us to be deferential to the source agency providing the determination. In addition, there is no need to solicit public comment when the Commission performs no technical analysis prior to including equipment or services on the Covered List.

75. To the extent necessary, we also find good cause to deviate from the standard rulemaking or formal adjudication process when publishing or updating the Covered List in response to determinations. As we tentatively found in the *2020 Supply Chain Second Further Notice*, “the Commission’s placement of the equipment or service on the Covered List . . . is a non-discretionary, ministerial act.”<sup>235</sup> Because the Secure Networks Act provides the Commission no discretion when incorporating determinations onto the Covered List, our action is not subject to the notice and comment provisions of the APA.<sup>236</sup> While we expect that the source of the determination will either provide some opportunity for notice and comment prior to making the determination<sup>237</sup> or have a justifiable reason, such as valid national security concerns, for deviating from this process,<sup>238</sup> regardless of the process provided by the source of the determination, we have no discretion to deviate from our role to publish and update the Covered List. When an enumerated source makes a determination that communications equipment or services pose an unacceptable risk to the national security of the United States or the security and safety of United States persons, we will include it on the Covered List without seeking comment.

76. When the Commission publishes or updates the Covered List, it will do so in response to

<sup>232</sup> Huawei Second Further Notice Comments at 6.

<sup>233</sup> Huawei Second Further Notice Comments at 18.

<sup>234</sup> Huawei Second Further Notice Comments at 21.

<sup>235</sup> *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7833-34, para. 41; *Metzenbaum v. Federal Energy Regulatory Commission*, 675 F.2d 1282, 1291 (D.C. Cir. 1982) (agency order, issued pursuant to congressional waiver of certain provisions of federal law that otherwise would have governed construction and operation of Alaskan natural gas pipeline, was appropriately issued without notice and comment under the APA’s “good cause” exception as a nondiscretionary ministerial action).

<sup>236</sup> See 5 U.S.C. § 551(4); see also *Metzenbaum*, 675 F.2d at 1291 (“The three orders issued that day were, in fact, nondiscretionary acts required by the waiver . . . As such, notice and comment was unnecessary.”); see also *Pennsylvania Federation of Sportsmen’s Clubs v. Norton*, 413 F.Supp. 2d 358 (M.D. Pa. 2006) (holding that agency did not need to comply with APA notice and comment requirements where it released a document describing actions taken by other agencies, as well as plans to address additional issues, but did nothing to actually implement any action).

<sup>237</sup> See, e.g., Office of Management and Budget, Federal Acquisition Supply Chain Security Act, 85 Fed. Reg. 54263, 54264 (Sept. 1, 2020) (FASC Interim Rule)) (“The FASC or its designee will provide notice of the recommendation . . . to any source named in the recommendation. This due process procedure is intended to provide the named source(s) with the information needed for the source(s) to respond to the recommendation.”).

<sup>238</sup> See 5 U.S.C. § 553(a)(1) (exempting “a military or foreign affairs function of the United States” from the APA’s general rulemaking procedural requirements); § 554(a)(4) (exempting “the conduct of military or foreign affairs functions” from the APA’s adjudication procedural requirements).

a new or modified determination from an agency specifically enumerated by the Secure Networks Act.<sup>239</sup> The Commission itself changes or creates no new rule when doing so. Whether the determination originated from a process where the opportunity for notice and comment was present is irrelevant to the ministerial function the Commission performs by updating the Covered List.<sup>240</sup> We therefore reject arguments to the contrary, as inconsistent with and undermining the statutory process.<sup>241</sup>

77. Moreover, inclusion on the Covered List does not mean providers are immediately prohibited from using the communications equipment—the Act’s prohibition applies 60 days after the equipment or services are included on the Covered List.<sup>242</sup> Similarly, such communications equipment or service must be reported pursuant to the reporting requirement in section 5 of the Secure Networks Act 60 days after the communications equipment or service has been placed on the Covered List.<sup>243</sup> When updated, the Public Safety and Homeland Security Bureau will issue a public notice indicating that the Covered List has been updated. Providers, manufacturers, and other interested parties will then have 60 days’ notice before the prohibition and reporting requirement take effect and may in that time period seek whatever relief they believe is appropriate.

78. We also disagree with commenters who believe the Commission should implement a notice period to allow time for industry to provide feedback to the Commission regarding potential effects of adding communications equipment and services to the Covered List. For example, NCTA believes the Commission should implement a “notice and interim transition period prior to placement of new equipment or services on the list.”<sup>244</sup> Under this program, the Commission would allow industry to “appraise the Commission of any potential impacts of its proposed updates or seek clarification regarding models of equipment or components that would be covered by the update.”<sup>245</sup> Dell argues that the Commission should seek “confidential industry advice from trusted domestic technology companies . . .” in order to “establish the level of specificity that is required to determine the threat posed by equipment or service[s].”<sup>246</sup> Because the prohibition on the use of federal subsidies will not take effect until 60 days after the equipment or service’s inclusion on the Covered List, the Act already provides a time period for industry to review and take appropriate action. Moreover, any interim period proposal ignores the plain language of the Secure Networks Act. If a designated government agency determines that communications equipment or services pose a threat to national security of the safety and security of United States persons, the Commission has no discretion and must add this equipment or service to the Covered List.<sup>247</sup>

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<sup>239</sup> Secure Networks Act § 2(b).

<sup>240</sup> We accordingly reject NTCA’s suggestion that we should use our designation process under § 54.9 of our rules in the Secure Networks Act designation process, as that view is untethered from the statutory requirements. NTCA Second Further Notice Comments at 3.

<sup>241</sup> See CTIA Second Further Notice Comments at 16-17 (arguing that other agencies’ “determination may not have benefited from public input or may have processes that are less accessible to or understood by all entities that will be impacted.”); RWA Second Further Notice Comments at 2; Huawei Second Further Notice Reply at 8.

<sup>242</sup> Secure Networks Act § 3(a)(1).

<sup>243</sup> See *infra* Section III.F.

<sup>244</sup> NCTA Second Further Notice Comments at 11 (arguing that the “marketplace would benefit from maximum disclosure of the national security risk determinations provided to the FCC by the relevant agencies . . . in order to maintain the stability of their supply chain and minimize disruptions to network operations.”)

<sup>245</sup> NCTA Second Further Notice Comments at 12.

<sup>246</sup> Dell Second Further Notice Comments at 2.

<sup>247</sup> See Secure Networks Act § 2(b). We reject Huawei’s arguments to the contrary, as they assume a degree of discretion we simply lack under the statute. See Huawei Second Further Notice Comments at 7-8 (arguing for a “meaningful opportunity to respond to the other agency’s proposed determination before the Commission can place  
(continued....)

### 3. Incorporating Determinations onto the Covered List

79. Section 2(b) of the Secure Networks Act states that the Commission “shall place” on the Covered List “any communications equipment or service” that (1) “is produced or provided by any entity” “if, based exclusively on the determinations” from section 2(c), “such equipment or service poses an unacceptable risk to the national security of the United States and the security and safety of United States persons”<sup>248</sup> and (2) is “capable” of “(A) routing or redirecting user data traffic or permitting visibility into any user data or packets that such equipment or service transmits or otherwise handles; (B) causing the network or a provider of advanced communications service to be disrupted remotely; or (C) otherwise posing an unacceptable risk to the national security of the United States or the security and safety of United States persons.”<sup>249</sup> We anticipate that some determinations will list specific communications equipment or services that “pose[] an unacceptable risk to the national security of the United States and the security and safety of United States persons” and others will list general categories or classes of equipment that pose such a risk. In the case of the former, we will incorporate these national security determinations onto the Covered List automatically. With the latter, we will incorporate these determinations onto the Covered List to the extent the class or category of equipment or service identified is “capable” of the 2(b)(2)(A)-(C) criteria.

80. *Specific determinations based on the section 2(b)(2)(C) criteria.* If a determination indicates that a specific piece of equipment or service poses an unacceptable risk to the national security of the United States and the security and safety of United States persons, the Commission will automatically include this determination on the Covered List. We take this approach because of the plain language in section 2(b)(2)(C) which lists, among other equipment or service capabilities mandating inclusion on the Covered List, whether the equipment or service poses an unacceptable risk to the national security of the United States or the security and safety of United States persons. If an enumerated source has already performed this analysis as part of its determination, the only action we need take is to incorporate this determination onto the Covered List. We note that USTelecom agrees with this simple process because, when a national security determination makes a “granular determination about ‘covered equipment’ the Commission is bound to accept it.”<sup>250</sup> The Commission’s role is limited to serving as “the custodian of such determinations.”<sup>251</sup>

81. We reject Huawei’s arguments that section 2(b)(2)(C) should be interpreted more narrowly.<sup>252</sup> These arguments center around Huawei’s contention that, by incorporating onto the Covered List specific determinations of particular pieces of equipment or services, we are disregarding sections

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equipment or services on the Covered List, and [] an opportunity to seek judicial review directly of the external agency’s determination.”).

<sup>248</sup> Secure Networks Act § 2(b)(1).

<sup>249</sup> Secure Networks Act § 2(b)(2)(A)-(C).

<sup>250</sup> USTelecom Second Further Notice Comments at 2-3; *see also* Huawei Second Further Notice Comments at 7 (“Accordingly, the specified agencies must identify *particular* pieces or categories of equipment that, in their view, ‘pose[] an unacceptable risk.’”).

<sup>251</sup> USTelecom Second Further Notice Comments at 2-3.

<sup>252</sup> Huawei argues the canon of surplusage dictates that, should the Commission automatically include equipment or services that have been explicitly deemed a national security threat by an enumerated source, we would read out of the statute the technical analysis found in sections 2(c)(2)(A) and (B). Huawei Second Further Notice Comments at 11. But it is Huawei’s reading that gives no meaning to section 2(b)(2)(C), which requires inclusion on the list of any communications equipment or services subject to a national security determination if it “otherwise posing an unacceptable risk to the national security of the United States or the security and safety of United States persons.” Huawei then claims a different canon, *eiusdem generis*, requires us to use section 2(b)(2)(C) only to modify equipment subject to sections 2(b)(2)(A) and (B), but that would again would essentially read section 2(b)(2)(C) out of the statute. *Id.* at 13.

2(b)(2)(A) and (B) because we would neglect to conduct a required analysis of the capabilities of equipment and service we include on the Covered List. Those sections play an important role in determining which specific pieces of equipment or services belong on the Covered List when we receive a more general determination. But when a determination covers a specific piece of equipment or service and the agency has indicated that such equipment or service poses a national security risk, we are obligated to include it on the Covered List, particularly because one of the three capabilities that warrant inclusion on the list is whether the equipment or service is capable of “otherwise posing an unacceptable risk to the national security of the United States or the security and safety of United States persons.”<sup>253</sup> Our actions in this scenario are non-discretionary and ministerial. If the determination is specified to a particular piece of communications equipment or service, we have no discretion to exclude that determination from the Covered List.

82. *Determinations identifying broader classes or categories of equipment or services.* In the *2020 Supply Chain Second Further Notice*, the Commission sought comment on how best to incorporate determinations that are made at “different levels of granularity.”<sup>254</sup> Because the Commission will rely on determinations from other government agencies and sources, not every determination will be conveyed with the same level of specificity. When the Commission identifies a broader determination from a section 2(c) source that a class or category of communications equipment or service poses an unacceptable national security risk, the Commission will publish it on the Covered List to the extent the equipment or service identified is capable of the section 2(b)(2)(A)-(C) criteria. We believe this procedure is best viewed through the lens of the determination the Commission received from section 889(f)(3)(A) of the 2019 NDAA. Congress provided the Commission with the determination that all “telecommunications equipment produced or provided by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities)” poses a threat.<sup>255</sup> This broader determination refers a class of equipment or service—telecommunications equipment produced or provided by Huawei or ZTE—but did not specify which specific pieces of communications equipment or services to add to the Covered List. In this case, and likewise when the Commission receives similarly broad determinations in the future, we will include on the Covered List “telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation that is capable of (A) routing or redirecting user data traffic or permitting visibility into any user data or packets that such equipment or service transmits or otherwise handles, (B) causing the networks of a provider of advanced communications service to be disrupted remotely, or (C) otherwise posing an unacceptable risk to the national security of the United States or the security and safety of United States persons.”<sup>256</sup>

83. This method for incorporating broader classes of equipment and services into the Covered List relies on the expertise and determinations of enumerated sources, and is supported by CTIA and USTelecom, which argue for a “whole-of-government approach, led by DHS and supported by Commerce.”<sup>257</sup> By adopting this approach and continuing to be deferential to the enumerated sources making the determination, the Commission will “continue to work closely with Executive Branch entities with expertise and responsibilities concerning telecommunications security, including supply chain security.”<sup>258</sup>

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<sup>253</sup> Secure Networks Act § 2(b)(2)(C). We therefore reject Huawei’s argument that we claim the Secure Networks Act gives us a “broad, roving license” to make national security decisions. Huawei Second Further Notice Comments at 13-14. Section 2(b)(2)(C) provides that ability to other agencies or Congress.

<sup>254</sup> *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7833, para. 41.

<sup>255</sup> 2019 NDAA § 889(f)(3)(A).

<sup>256</sup> See Secure Networks Act §§ 2(b)(1); 2(b)(2)(A)-(C).

<sup>257</sup> CTIA Second Further Notice Comments at 6; USTelecom Second Further Notice Comments at 2.

<sup>258</sup> CTIA Second Further Notice Comments at 6-7.

84. We disagree with commenters who argue that more general determinations should not trigger inclusion on the Covered List. Huawei commented that “the specified agencies must identify *particular* pieces or categories of equipment that, in their view, ‘pose[] an unacceptable risk.’”<sup>259</sup> Huawei believes that because the Secure Networks Act does not define “specific,” the Commission must use the ordinary meaning of the word, which is understood as “constituting or falling into a specifiable category, restricted to a particular individual, situation, relation, or effect; free from ambiguity.”<sup>260</sup> Thus, Huawei asserts that the references to “specific determinations” in section 2(c) mean that only determinations as to individual types of equipment or services trigger the Commission’s obligations to include such equipment or services on the Covered List.<sup>261</sup> Huawei argues that “[g]eneral guidance or mere expressions of concern regarding particular manufacturers or types of equipment does not constitute a ‘specific determination’ upon which the Commission can rely.”<sup>262</sup> We disagree. We interpret the Secure Networks Act to require “specific determinations” to have a level of specificity sufficient to allow the Commission to incorporate the determination onto the Covered List. Should the Commission identify a determination, for example, that failed to indicate the source or type of communications equipment or service that the originating source found potentially insecure, we would be unable to incorporate this generic determination onto the Covered List. If, however, the originating source identifies a class or category of communications equipment or service, even at a broad level, such a determination provides the Commission enough information to include it on the Covered List. Furthermore, with more general determinations, we do not place on the Covered List, for example, “all Huawei equipment or services.” Instead, we limit inclusion on the Covered List to a specifiable category of Huawei equipment or services capable of the functions outlined in 2(b)(2)(A)-(B) or that otherwise poses an unacceptable risk to the national security of the United States or the security and safety of United States persons. When the Commission identifies a determination, the Covered List will include the determination, subject to the 2(b)(2)(A)-(C) criteria.

85. The Secure Networks Act does not require the Commission to conduct a technical analysis of the communications equipment or service prior to including it on the Covered List. Section 2(b) merely states that, upon receipt of a determination from an enumerated source, the Commission “shall place” on the Covered List only the communications equipment and service from that determination that is capable of the functions outlined in section 2(b)(2)(A)-(C). That is precisely what we will do. Accordingly, we reject the arguments of commenters that contend we should conduct various technical analyses.<sup>263</sup>

86. *Definition of “capable” for incorporation on the Covered List.* Section 2(b) requires us to place on the Covered List communications equipment or service if, among other requirements, it is “capable” of the functions or impacts set forth in section 2(b)(2)(A)-(C). Consistent with our proposal in

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<sup>259</sup> Huawei Second Further Notice Comments at 7.

<sup>260</sup> Huawei Second Further Notice Comments at 7.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *See, e.g.*, CTIA Second Further Notice Comments at 14-15 (arguing the Commission should “develop its own record to establish specific findings on each component or service” prior to publishing the Covered List and should use a “criticality assessment . . . when determining covered equipment in order to maximize the benefit to the security of our nation’s networks.”); Huawei Second Further Notice Comments at 8-9 (arguing that the Secure Networks Act requires the Commission to “conduct further analysis as to whether specific pieces of identified equipment or services are presently ‘capable of’ meeting the requirements of sections 2(b)(2)(A)-(C) before equipment or service is placed on the Covered List.”); Huawei Second Further Notice Comments at 14 (“Congress intended for the Commission to consider technical matters within its expertise, just like those set out in Sections 2(b)(2)(A) and (B).”). The Covered List, as NTCA requests, will serve as a “single source for covered [] equipment and service.” NTCA Second Further Notice Comments at 2-3. To the extent NTCA argues for additional specificity, it is not required by the text of the Secure Networks Act.

the *2020 Supply Chain Second Further Notice*,<sup>264</sup> we interpret “capable” for the purposes of fulfilling section 2(b)(2)(A)-(C), to include equipment or service that can possibly perform these functions, even if the subject equipment or service is not ordinarily used to perform the functions in section 2(b)(2)(A)-(C). We take this approach because we are unwilling to risk the deployment of unsecure equipment or services that would occur if we defined “capable” too narrowly. The term “capable” as presented in the Secure Networks Act is ambiguous and we interpret it in light of the goals of the statute.

87. Although we disagree with Huawei that our decision to define “capable” broadly is “misguided,” we agree that a piece of equipment or service’s capabilities “refers to the *present* functionality of equipment or a service” as that is the ordinary interpretation of that word.<sup>265</sup> For the purposes of including communications equipment and services on the Covered List, we define “capable” to include the current possible uses of equipment or service. Our approach does not extend this definition to the functionalities of communications equipment or services should they be modified in the future. Our broad definition of “capable” in this context alone does not, as Huawei suggests, unreasonably extend the definition to equipment or services “*potentially* having such attributes after modification.”<sup>266</sup> We merely decline to narrow the scope of communications equipment or service’s capability to the equipment or service’s marketed use.<sup>267</sup> To do otherwise would allow potentially insecure equipment or service to remain in communications networks.

88. *Clarifying inclusion on the Covered List.* The Commission also sought comment in the *2020 Supply Chain Second Further Notice* on a process to allow interested parties to clarify whether a specific piece of communications equipment or a specific service is included on the Covered List.<sup>268</sup> Some commenters argue that we should consider mechanisms to provide transparency on which specific pieces of communications equipment and service are included on the Covered List.<sup>269</sup> As with any Commission proceeding, providers of advanced communications service and other interested parties may seek a declaratory ruling to “terminat[e] a controversy” or “remov[e] uncertainty.”<sup>270</sup> To the extent a party is uncertain whether a specific piece of equipment is subject to a determination under section 2(c) of

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<sup>264</sup> *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7834, para. 42.

<sup>265</sup> Huawei Second Further Notice Comments at 9. Our interpretation of “capable” tracks the word’s definition in the Merriam-Webster Dictionary—“having traits conducive to or features permitting something” *Capable*, merriam-webster.com, <https://www.merriam-webster.com/dictionary/capable> (last visited Sept. 24, 2020). See also *Stokeling v. U.S.*, 139 S.Ct. 544 (2019) (“‘Capable’ means ‘susceptible’ or ‘having attributes . . . required for performance or accomplishment’ or ‘having traits conducive to or features permitting.’”) (citing Webster’s Ninth New Collegiate Dictionary and Oxford American Dictionary and Thesaurus). In patent law, where “a claim [] recites capability and not actual operation, an accused device ‘need only be capable of operating’ in the described mode.” *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1204 (Fed. Cir. 2020). “The meaning of ‘capable of’ is explained as . . . ‘the ability to perform.’” *E.I. Dupont de Nemours and Company v. Unifrax I LLC*, 2017 WL 1833224, \*2 (D. Del. May 5, 2017). See also *U.S. v. Mike*, 655 F.3d 167, 178 (3d Cir. 2011) (Fuentes, J., concurring in part) (explaining that a firearm is “‘capable’” of discharging ammunition, . . . if it has *the potential* to fire ammunition, or the “‘capacity for’” discharging ammunition, but cannot do so at the relevant time.”) (emphasis added and citation omitted).

<sup>266</sup> Huawei Second Further Notice Comments at 9.

<sup>267</sup> *Id.*

<sup>268</sup> *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7834-35, para. 44.

<sup>269</sup> See CTIA Second Further Notice Comments at 18; NCTA Second Further Notice Comments at 11 (requesting that the Commission “ensure that providers understand clearly what specific equipment and services are prohibited.”); RWA Second Further Notice Comments at 3 (arguing that the Commission should create an FCC-administered portal where “entities can easily and expeditiously engage with FCC staff on any questions they may have” to determine whether specific equipment or services is included on the Covered List).

<sup>270</sup> 47 CFR § 1.2. See *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7834-35, para. 44.



the Secure Networks Act, the party may seek a declaratory ruling. That said, we lack discretion to modify a determination under section 2(c), and we are skeptical that any equipment that an enumerated source has determined “poses an unacceptable risk to the national security of the United States or the security and safety of United States persons” would not also, at a minimum, “pos[e] an unacceptable risk to the national security of the United States or the security and safety of United States persons.”<sup>271</sup>

89. Once the Commission publishes the Covered List, the Public Safety and Homeland Security Bureau will issue a public notice indicating that the Covered List has been revised and that the section 3(a) prohibition and section 5(a) reporting requirement will take effect for communications equipment and service on the Covered List 60 days later. Pursuant to the Secure Networks Act, the Commission “shall periodically update the [Covered List] to reflect changes in the determinations described [in section 2(c)].”<sup>272</sup> If one of the sources for determinations changes or modifies a determination, the Commission will update the Covered List accordingly. We note, however, that we have no discretion to reverse or modify determinations from other sources as the statute requires us to accept and incorporate the determinations as provided.<sup>273</sup> Should interested parties seek to reverse or modify the scope of one of these determinations, the party should petition the source of the determination.

#### 4. Updating and Modifying the Covered List

90. Section 2(d) of the Secure Networks Act concerns how the Covered List should be updated to reflect new or revised determinations of covered communications equipment or services.<sup>274</sup> Congress directed the Commission to “periodically update the [Covered List] to reflect changes in the determinations described [in section 2(c)].”<sup>275</sup> In addition, the Commission “shall monitor the making or reversing of the determinations” from the enumerated sources in order to “place additional communications equipment or services on the [Covered List] or to remove communications equipment and services from such list.”<sup>276</sup> If any of these determinations are reversed, the Commission “shall remove such equipment or service from the list . . . ,” unless the equipment or service’s inclusion on the Covered List is based on a determination received from another enumerated source.<sup>277</sup> Finally, the Commission must notify the public for every twelve-month period during which the Commission does not update the Covered List.<sup>278</sup> The Commission must indicate that “no updates were necessary during such period to protect national security or to address changes in the determinations . . . .”<sup>279</sup>

91. *No updates to Covered List unless Commission receives new or modified determination.* In the *2020 Supply Chain Second Further Notice*, we sought comment on “the process to update and publish the Covered List and solicit ideas and best practices for ways to maintain the Covered List and keep it current and readily available.”<sup>280</sup> We interpreted the Secure Networks Act to not give the Commission discretion to make any updates to the Covered List outside of determinations made by the

<sup>271</sup> Compare Secure Networks Act § 2(b)(1) with Secure Networks Act § 2(b)(2)(C). See also *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7833-34, paras. 40-43.

<sup>272</sup> Secure Networks Act § 2(d).

<sup>273</sup> See *supra* Section III.C.1.

<sup>274</sup> Secure Networks Act § 2(d).

<sup>275</sup> Secure Networks Act § 2(d)(1).

<sup>276</sup> Secure Networks Act § 2(d)(2).

<sup>277</sup> *Id.* Section 4(f) of the Secure Networks Act, discussed *infra* Section III.E, provides options for when communications equipment or services are removed from the Covered List following an update or revocation of any determination. Secure Networks Act § 4(f).

<sup>278</sup> Secure Networks Act § 2(d)(3).

<sup>279</sup> *Id.*

<sup>280</sup> See *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7835, para. 45.

sources enumerated in section 2(c).<sup>281</sup> We noted that the text of section 2(d) “does not appear to give the Commission discretion not to update the Covered List based on changes in determinations, and hence it would be unclear what purpose a notice period would serve.”<sup>282</sup>

92. We believe the best interpretation of the Secure Networks Act is that it does not grant the Commission authority to update the Covered List outside of these national security determinations, and thus, we will make no changes or modifications to the Covered List unless we identify a new or modified determination of covered communications equipment or services from any of the sources identified in section 2(c) of the Act.<sup>283</sup> If one of the sources issues a new or modified determination, the Commission will update the Covered List to reflect this change. Once the Commission updates the Covered List, the Public Safety and Homeland Security Bureau, in conjunction with the Wireline Competition Bureau, will issue a Public Notice declaring that the Covered List has been updated to reflect a new or modified determination. This approach is consistent with NCTA’s desire for the Commission to “provide clear and prominent notice of decisions to remove vendors of equipment items from the Covered List.”<sup>284</sup> If we identify no updates or modifications in any twelve-month period, the Public Safety and Homeland Security Bureau shall issue a Public Notice indicating that “no updates were necessary during such period to protect national security or to address changes in the determinations . . . .”<sup>285</sup>

#### **D. Ban on Federal Subsidies for Equipment on the Covered List**

93. Section 3 of the Secure Networks Act prohibits funding from Federal programs made available to subsidize capital expenditures necessary for the provision of advanced communications service from being used to purchase, rent, lease, or otherwise obtain any covered communications equipment or service, or maintain any covered equipment or service previously purchased, rented, leased, or otherwise obtained.<sup>286</sup> Currently, section 54.9 of the Commission’s rules imposes a similar prohibition on the spending of USF support, yet broadly applies to equipment and services produced or provided by entities designated as posing a national security threat to the integrity of communications networks or the communications supply chain.<sup>287</sup> In the *2020 Supply Chain Declaratory Ruling and Second Further Notice*, we found that section 54.9 substantially implements the prohibition under section 3 of the Secure Networks Act, but we nonetheless proposed a new rule, independent of section 54.9, to align the Commission’s rules with the scope of the prohibition found in the Secure Networks Act.<sup>288</sup> We sought comment on that proposal and an effective period of 60 days after communications equipment or services are placed on the Covered List. We also sought comment on the impact of the proposed rule on multiyear contracts or contracts with voluntary extensions between USF recipients and companies producing or providing communications equipment or services posing a supply chain security risk, if any such contracts exist.<sup>289</sup>

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<sup>281</sup> *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7835, para. 45.

<sup>282</sup> *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7835, para. 46.

<sup>283</sup> We received no comments in response to this proposal.

<sup>284</sup> NCTA Second Further Notice Comments at 11.

<sup>285</sup> Secure Networks Act § 2(d)(3).

<sup>286</sup> *Id.* § 3(a)(1).

<sup>287</sup> 47 CFR § 54.9.

<sup>288</sup> *2020 Supply Chain Declaratory Ruling*, 35 FCC Rcd at 7827-28, para. 21; *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7835-37, paras. 47-51.

<sup>289</sup> *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7835-37, paras. 48-51.

94. Consistent with our proposal in the *2020 Supply Chain Second Further Notice*,<sup>290</sup> we adopt a rule to enact section 3 of the Secure Networks Act by prohibiting the use of Federal subsidies made available through a program administered by the Commission and that provide funds to be used for the capital expenditures necessary for the provision of advanced communications service to purchase, rent, lease, or otherwise obtain any communications equipment or service, or maintain any covered communications equipment or service previously purchased, rented, leased, or otherwise obtained, and identified and published on the Covered List.<sup>291</sup>

95. The new rule we adopt today, codified at section 54.10, prohibits the use of a Federal subsidy made available through a program administered by the Commission that provides funds for the capital expenditures necessary for the provision of advanced communications service to purchase, rent, lease, or otherwise obtain any covered communications equipment or service identified and published on the Covered List, or maintain any such covered communications equipment or service previously purchased, rented, leased, or otherwise obtained. The Commission has interpreted section 3 of the Secure Networks Act as intending to apply to all universal service programs but not other Federal subsidy programs to the extent those programs may tangentially or indirectly involve expenditures related to the provision of advanced communications service.<sup>292</sup> We acknowledge that there will be two processes to designate equipment or services as prohibited from federal funding—one for the designation of an entity as posing a national security threat to the integrity of communications networks or the communications supply chain,<sup>293</sup> and one for the designation of specific equipment and services through the Covered List process outlined in section 2 of the Secure Networks Act.<sup>294</sup> Certain equipment or services may be subject to either or both the prohibition under section 54.9 of the Commission’s rules and the new section 54.10 prohibition enacting section 3 of the Secure Networks Act.<sup>295</sup>

96. We find that the prohibitions in sections 54.9 and 54.10 of the Commission’s rules are consistent with, and fully implement, section 3(a) of the Secure Networks Act.<sup>296</sup> The new prohibition encompasses covered equipment and services found on or added to the Covered List, while the existing prohibition in section 54.9 applies to a somewhat overlapping group of products or services from companies designated as posing a threat to national security. As we stated in the *2020 Supply Chain Second Further Notice*, the addition of section 54.10 will grant the Commission two different designation processes, “one for the designation of an entity, as currently provided by [section 54.9 of] the Commission’s rules, and another, more targeted process, for the designation of specific communications equipment and services per section 2 of the Secure Networks Act.”<sup>297</sup> The new prohibition further applies

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<sup>290</sup> See *id.* at 7835-36, para. 48.

<sup>291</sup> See CTIA Second Further Notice Comments at 2 (supporting the Commission’s proposal to prohibit use of Federal funds for equipment and services that are published on the Covered List); Dell Second Further Notice Comments at 3 (“Dell Technologies supports the Commission’s proposal to adopt a new rule that prohibits FCC-administered federal subsidies from being used to purchase or maintain items on the Covered List . . .”).

<sup>292</sup> *2020 Supply Chain Declaratory Ruling*, 35 FCC Rcd at 7826-27, para. 20; see also *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7836, para. 49.

<sup>293</sup> See 47 CFR § 54.9.

<sup>294</sup> See Secure Networks Act §§ 2, 3.

<sup>295</sup> Parties subject to these requirements are responsible for complying with both prohibitions, as applicable, and in accordance with any applicable effective dates.

<sup>296</sup> In the *2020 Supply Chain Declaratory Ruling*, we found that we satisfied the requirement to implement the section 3(a) prohibition within 180 days of enactment of the Secure Networks Act through our action in the *2019 Supply Chain Order*; therefore, our action today has no bearing on section 3(b)’s implementation deadline. *2020 Supply Chain Declaratory Ruling*, 35 FCC Rcd at 7826-28, paras. 18-22.

<sup>297</sup> *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7835, para. 48.

to any funding programs administered by the Commission made available to subsidize capital expenditures for the provision of advanced communications service, including any future USF programs, whereas section 54.9 is limited to USF support.<sup>298</sup> We believe that this approach will comprehensively encapsulate the universe of products and services that pose a risk to our nation's communications systems and prohibit spending of public funds consistent with congressional intent.

97. The two rules are intended to complement each other, and compliance should not impose additional burdens on providers of advanced communications service. CTIA raises concerns about the overlap of the two prohibitions, specifically that parties subject to both requirements are responsible for compliance with both prohibitions, and urges the Commission to “promote consistency, pursue transparency, and work with agencies that have expertise on supply chain and national security.”<sup>299</sup> Although there is some overlap between the two prohibitions, we believe that the rules are straightforward and transparent in their applicability to entities, funding, and equipment or services such that providers are able to comply. For example, the equipment and services designated under each rule will be published in accordance with the respective requirements (i.e., the Commission's website for section 54.9, or the Covered List for section 54.10) such that entities can identify which equipment or services are subject to each prohibition.

98. CTIA urges the Commission to limit the new prohibition to subsidies under the USF programs, rather than expanding to include “other programs administered by the Commission that primarily support the provision of advanced communications services” and requests that the rule explicitly state the limitation to USF.<sup>300</sup> We find additional limitation would be misplaced given our previously stated interpretation of the statute and its applicability. Furthermore, we are compelled by the clear and direct language of the statute to make the language of section 54.10 potentially broader than USF programs. Section 3 of the Secure Networks Act applies only to Federal subsidies administered by the Commission used for capital expenditures necessary for the provision of advanced communications services which, as stated in the *2020 Supply Chain Declaratory Ruling*, we interpret to encompass universal service programs.<sup>301</sup> Consistent with the *2020 Supply Chain Declaratory Ruling*, we reiterate that the prohibition does not apply to the Interstate Telecommunications Relay Service (TRS) Fund, as the TRS Fund does not subsidize capital expenditures necessary for the provision of advanced communications services.<sup>302</sup> However, to the extent Congress creates additional programs in the future that provide a Federal subsidy administered by the Commission that provides funds to be used for capital expenditures necessary for the provision of advanced communications services, they would appear to fall under the prohibition in section 3 of the Secure Networks Act, and we would expect that section 54.10 would apply to those programs as well.

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<sup>298</sup> RWA recommends that we apply the prohibition to both “USF programs that fund capital expenditures and to USF programs that fund operational expenditures” to encompass the broadest range of risky or compromised equipment. See RWA Second Further Notice Comments at 4. We clarify that, through both prohibitions under sections 54.9 and 54.10 of the Commission's rules, the rules apply, respectively, to both USF funds and to Federal subsidies administered by the Commission that provide funds for capital expenditures used for the provision of advanced communications services, which we have interpreted to mean universal service programs. Both prohibitions apply to all universal service funding from all current USF programs.

<sup>299</sup> CTIA Second Further Notice Comments at 7.

<sup>300</sup> CTIA Second Further Notice Comments at 8-9 (quoting *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7836, para. 49).

<sup>301</sup> *2020 Supply Chain Declaratory Ruling*, 35 FCC Rcd at 7826-27, para. 20.

<sup>302</sup> *Id.*

99. Consistent with our decision not to grandfather existing contracts under section 54.9 in the *2019 Supply Chain Order*,<sup>303</sup> we also decline to grandfather existing contracts for equipment or services on the Covered List under section 54.10 of the Commission's rules. Exempting or excluding covered equipment or services purchased under existing multiyear contracts would negate the purpose behind our rule in contravention of the clear and direct language in section 3 of the Secure Networks Act.<sup>304</sup> Dell "urge[s] the Commission to prioritize risk factors before contractual obligations,"<sup>305</sup> and we believe our decision advances that directive. Furthermore, although NCTA supports grandfathering existing equipment acquired pursuant to multiyear contracts except in instances where the authorized Federal body making the risk determination cites compelling evidence of an ongoing threat to national security,<sup>306</sup> we find that, given the process by which the referring agencies or entities make such determinations that trigger inclusion of equipment and services on the Covered List,<sup>307</sup> we find that there is compelling evidence that equipment and services on the Covered List do pose such a threat, and grandfathering is not warranted.

100. NCTA urges the Commission to avoid an "unfair retroactive effect" by grandfathering existing equipment acquired pursuant to multiyear contracts in certain circumstances.<sup>308</sup> We disagree with NCTA's assessment of the rule's effect. Section 3 of the Secure Networks Act does not, in itself, require a future action that generates a retroactive effect; it merely prohibits prospective use of certain Federal subsidies to purchase, rent, lease, or otherwise obtain any covered communications equipment or service, or maintain any covered communications equipment or service previously purchased, rented, leased, or otherwise obtained on the Covered List.<sup>309</sup> As such, there can be no primary retroactivity in restricting the use of future Federal subsidies for covered equipment or services provided pursuant to existing contracts.<sup>310</sup> Furthermore, we rely on the presumption that, in passing the Secure Networks Act, Congress intended to apply section 3 to existing contracts absent manifest injustice.<sup>311</sup> We determine that the record

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<sup>303</sup> *2019 Supply Chain Order*, 34 FCC Rcd at 11457, para. 87 ("[e]xempting existing multiyear contracts would negate the purpose behind our rule and allow federal funds to be used to perpetuate existing security risks to communications networks and the communications supply chain"); see also *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7836, para. 50 (seeking comment on the impact of the section 54.10 prohibition proposal on multiyear contracts or contracts with voluntary extensions, and whether the Secure Networks Act permits us to grandfather any such equipment or services).

<sup>304</sup> See Blue Danube Second Further Notice Reply at 5 ("[M]ultiyear contracts and contracts with voluntary extensions should be terminated. It is an effort that we believe must be approached with urgency.").

<sup>305</sup> Dell Second Further Notice Comments at 3.

<sup>306</sup> NCTA Second Further Notice Comments at 13-14 (recommending limiting grandfathering to the equipment's reasonable end-of-life or the remaining duration of the multiyear contract, whichever is shorter).

<sup>307</sup> See Secure Networks Act § 2(c).

<sup>308</sup> NCTA Second Further Notice Comments at 13-14 (arguing that grandfathering should be permitted "unless the authorized Federal body making a new risk determination that adds a new vendor or equipment to the Covered List cites compelling evidence of an ongoing threat to national security from specific items of already-deployed equipment from newly banned vendors").

<sup>309</sup> Secure Networks Act § 3(a)(1).

<sup>310</sup> See *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (a rule can be impermissible as primarily retroactive "if it impairs rights a party possessed when he acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed") (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

<sup>311</sup> See *Amgen Inc. v. Horgan*, 285 F.Supp.3d 351, 381 (D.C. Cir. 2018) (the manifest injustice standard, whereby courts may set aside new interpretations of existing law adopted in agency adjudications only if retroactive application of the new interpretation would constitute a manifest injustice, is satisfied only if the affected party has "detrimentally relied on the established legal regime") (citing *Consol. Edison Co. of N.Y. v. FERC*, 315 F.3d 316,

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does not support a finding of manifest injustice. Therefore, absent such a showing, we decline to adopt a grandfathering exception to section 54.10.

101. Some commenters favor grandfathering existing equipment contracts in order to promote predictability and minimize network disruptions, and propose alternatives to allow for grandfathering in certain situations.<sup>312</sup> For instance, CTIA suggests that rather than attempting to define *ex ante* what kinds of arrangements qualify for grandfathering, the Commission should “exercise its discretion and work with the regulated community to build in permissible grandfathering that is consistent with fair process and sensible regulatory practice.”<sup>313</sup> NCTA further asks that the Commission clarify that “where a provider has already been selected to provide services that receive USF support, the support will not end 60 days after equipment or services are added to the Covered List.”<sup>314</sup>

102. We decline to adopt these alternative proposals. We find that the urgency of the threat that allowing covered equipment and services to remain in our communications networks poses to our national security outweighs the potential burdens associated with failure to grandfather or exempt certain contracts. Because such exemptions would create security loopholes to the effectiveness of the prohibition, we reject commenters’ proposals to grandfather existing equipment contracts for covered equipment or services.

103. *Effective date.* The prohibition on the use of Federal subsidies under section 54.10 of the Commission’s rules that we adopt today takes effect 60 days after any particular communications equipment or services are placed on the Covered List, consistent with the Secure Networks Act.<sup>315</sup> Furthermore, adopting a 60-day period between placement on the Covered List and the effectiveness of the prohibition on funds appropriately balances the consideration of the compelling national security interests to promptly remove insecure equipment and services from our networks against the burdens on advanced communications service providers to identify covered equipment and services and make any adjustments to alternative funding to effectuate the prohibition. We will require recipients of universal service support from each of the four USF programs to certify that they have complied with our new rule prohibiting the use of Federal subsidies for equipment and services on the Covered List.<sup>316</sup>

104. Some commenters raise concerns about the 60-day period between when items are placed on the Covered List and when the prohibition under section 54.10 takes effect,<sup>317</sup> and many propose

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323 (D.C. Cir. 2003); *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987); *Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981)).

<sup>312</sup> See CTIA Second Further Notice Comments at 18-19 (encouraging the Commission to use its discretion to grandfather existing contracts “to promote predictability in business planning and to minimize disruptions from additions to the Covered List”); NCTA Second Further Notice Comments at 13-14 (declining to grandfather equipment could disrupt service by forcing premature retirement of equipment and cause increased network costs, adversely affected service provisioning and quality, or expose providers to cyber and other threats as software and firmware updates become available).

<sup>313</sup> CTIA Second Further Notice Comments at 19.

<sup>314</sup> NCTA Second Further Notice Comments at 14.

<sup>315</sup> Secure Networks Act § 3(a)(2).

<sup>316</sup> See *2019 Supply Chain Order*, 34 FCC Rcd at 11454, para. 79 (requiring similar certification of compliance with section 54.9 of our rules).

<sup>317</sup> See CCA Second Further Notice Comments at 5-6 (urging the Commission to “proceed with a reasonable perspective on the expected timeline” in light of the real-life implications of loss of funding for rural providers and the lack of appropriated funding for replacements); CTIA Second Further Notice Comments at 17 (requiring notice for publication of the Covered List is critical because, without such notice and when combined with the 60-day effective date for the section 3 prohibition, “the Commission would be able to limit unfair surprise to the regulated community and disruption in federal USF programs and compliance”); RWA Second Further Notice Reply at 4

(continued....)

alternatives. NTCA suggests that providers continue receiving USF support until federal funding is available to reimburse for the cost of replacement or the provider replaces the equipment in the normal course of business.<sup>318</sup> CCA urges the Commission to be mindful of the strains the current public health crisis has placed on small and rural wireless carriers and advocates for a transition timeline that allows carriers to demonstrate progress through milestones.<sup>319</sup> NCTA proposes the creation of a safe harbor “for providers that are making a reasonable, good-faith effort to transition away from newly-banned equipment but cannot meet the 60-day removal timetable without significant disruptions to network operations or service delivery.”<sup>320</sup>

105. We disagree with these commenters’ assessments of the impact of the 60-day effective date of the section 54.10 prohibition and therefore decline to adopt their alternative proposals. First, setting the effective date of the prohibition at 60 days after covered equipment is placed on the Covered List is statutory,<sup>321</sup> and the rule we adopt today codifies an effective date consistent with the statute. Second, the rule prohibits the use of Federal subsidies to purchase, rent, lease, or otherwise obtain covered communications equipment or service, or maintain covered communications equipment or service previously purchased, rented, leased, or otherwise obtained on the Covered List; it does not directly speak to a deadline to remove or replace that equipment.<sup>322</sup> To the extent providers request a transition period to secure alternative funding, similar to our decision in the *2019 Supply Chain Order*, we find that there is a compelling interest in protecting our national security, which necessitates prompt implementation of the prohibition.<sup>323</sup> Therefore, we find that 60 days is sufficient notice to prohibit spending of Federal subsidy funding on equipment and services added to the Covered List.

**E. Sections 4 and 7 of the Secure Networks Act – Establishment of Secure and Trusted Communications Networks Reimbursement Program**

106. The Commission in the *2019 Supply Chain Further Notice* proposed a program to reimburse ETCs for reasonable transition costs associated with the removal and replacement of equipment and services produced or provided by entities posing a national security threat as designated by the process outlined in section 54.9 of the Commission’s rules.<sup>324</sup> Subsequently, the President signed into law

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(noting that “[t]he proposed 60-day grace period is insufficient as many rural carriers do not have the resources to make such potentially drastic modifications to their networks in such a short period of time,” especially if given no prior notice).

<sup>318</sup> NTCA Second Further Notice Comments at 4-5; *see also* NTCA Second Further Notice Reply at 3 (the Commission should not “simply add designations to the Covered List and ban the use of universal service funds without a proper notice and comment process”).

<sup>319</sup> CCA Second Further Notice Comments at 5-6 (urging the Commission to implement section 3 “in a way that allows carriers to demonstrate they are making progress and meeting milestones to receive the necessary time to transition away from funding or new equipment installation while preserving connectivity for their customers”); *see also* RWA Second Further Notice Reply at 4 (supporting CCA’s milestone-based proposal).

<sup>320</sup> NCTA Second Further Notice Comments at 13; *see also* RWA Second Further Notice Reply at 4 (supporting NCTA’s safe harbor approach).

<sup>321</sup> *See* Secure Networks Act § 3(a)(2).

<sup>322</sup> We address issues regarding the transition periods for removal and replacement of covered equipment and services under the Reimbursement Program in this Order. *See supra* Section III.A.4; *infra* Section III.E.3.

<sup>323</sup> *See 2019 Supply Chain Order*, 34 FCC Rcd at 11455, para. 83. Section 54.9 of the Commission’s rules took effect immediately upon publication in the Federal Register because of the national security interests in moving expeditiously. *Id.* We are not granted the discretion to waive a statutory mandate; however, we believe 60 days is sufficient based on our experience with the effective date of section 54.9.

<sup>324</sup> *2019 Supply Chain Further Notice*, 34 FCC Rcd at 11470-71, 11474, paras. 122, 133; 47 CFR § 54.9(b).

the Secure Networks Act requiring the Commission to establish the Reimbursement Program.<sup>325</sup> The Wireline Competition Bureau then released a public notice seeking comment on the applicability of the Secure Networks Act on the Commission's proposed reimbursement mechanism.<sup>326</sup>

107. The reimbursement program required by the Secure Networks Act largely mirrors the Commission's original proposal in purpose and process. Both are focused on reimbursing entities for the removal and replacement of equipment and services posing a national security risk.<sup>327</sup> Both envision a reimbursement process focused on initial cost estimates and including procedures to protect against waste, fraud, and abuse.<sup>328</sup> But there are also noticeable differences. For example, the Commission initially proposed limiting eligibility to ETCs, while the Secure Networks Act expands eligibility beyond ETCs to include all providers of advanced communications service with two million or fewer customers.<sup>329</sup> The process for designating covered equipment and services also differs, which could change the scope of reimbursable expenses for the removal, replacement, and disposal of such equipment and services under the Commission's proposal versus the program required by Congress.<sup>330</sup> We conclude the Reimbursement Program effectively supersedes the Commission's original proposal, and we conform it to the requirements set forth in the Secure Networks Act.

108. We now establish, as directed by the Secure Networks Act, the Reimbursement Program to reimburse the costs reasonably incurred by providers of advanced communication services with two million or fewer customers to permanently remove, replace, and dispose of covered communications equipment and services from their networks.<sup>331</sup> We will allow eligible providers to obtain reimbursement to remove and replace older covered communications equipment with upgraded technology and will reimburse providers for certain transition expenses incurred prior to the creation of this program. We require program participants to submit estimated costs to receive funding allocations. Recipients can then obtain funding disbursements on a rolling basis upon a showing of actual expenses incurred.

109. If aggregate demand exceeds available funding, we will prioritize funding for ETCs and expenses for transitioning core networks over non-ETCs and non-core network transition expenses. Program recipients will have one year from the initial funding disbursement to complete the permanent removal, replacement, and disposal of covered communications equipment. The Commission may grant a single, general six-month extension for all recipients and/or individual extensions of time if circumstances warrant. We also adopt a number of measures as directed by the Secure Networks Act to combat waste, fraud, and abuse, including the filing of status updates, spending reports, and a final certification, requiring documentation retention, audits, reviews and field inspections, and seeking the repayment of disbursed funds for violations of the Secure Networks Act and the Reimbursement Program rules in addition to taking other possible enforcement actions.<sup>332</sup>

## 1. Reimbursement Program Eligibility

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<sup>325</sup> Secure Networks Act § 4.

<sup>326</sup> *Section 4 Public Notice*, 35 FCC Rcd at 3494.

<sup>327</sup> *Compare 2019 Supply Chain Further Notice*, 34 FCC Rcd at 11471, para. 127 with Secure Networks Act § 4(b).

<sup>328</sup> *Compare 2019 Supply Chain Further Notice*, 34 FCC Rcd at 11478-79, paras. 147-152 with Secure Networks Act § 4(d)-(e).

<sup>329</sup> *Compare 2019 Supply Chain Further Notice*, 34 FCC Rcd at 11472-73, paras. 128-130 with Secure Networks Act § 4(a).

<sup>330</sup> *Compare 2019 Supply Chain Further Notice*, 34 FCC Rcd at 11474-75, paras. 133-136 with Secure Networks Act §§ 2(b), 4(b).

<sup>331</sup> *See* Appx. A, § 1.50004.

<sup>332</sup> *See id.* A, §§ 1.50004(k)-(n), 1.50005.



110. *Eligible Providers.* As directed by section 4 of the Secure Networks Act, we limit eligibility for the Reimbursement Program to providers of advanced communication service with two million or fewer customers.<sup>333</sup> The Secure Networks Act identifies advanced communication service providers as providers of advanced telecommunications capability as defined in section 706 of the Telecommunications Act of 1996 (Telecommunications Act).<sup>334</sup> Advanced telecommunications capability is defined in section 706 of the Telecommunications Act “without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”<sup>335</sup> As Blue Danube correctly notes, the advanced communications service term in the statute is “straight forward.”<sup>336</sup>

111. The Commission has historically interpreted providers of advanced telecommunications capability, and thus providers of advanced communications services, to mean facilities-based providers, whether fixed or mobile, with a broadband connection to end users with at least 200 kbps in one direction.<sup>337</sup> This standard is used by the Commission to identify providers required to report broadband deployment using the FCC Form 477.<sup>338</sup> The few commenters addressing this issue generally support the use of this same speed threshold to determine providers of advanced communications service.<sup>339</sup> Using this standard will maximize the pool of eligible applicants and help assist with the removal of insecure equipment that is older and slower than newer, more technologically up-to-date equipment from our Nation’s interconnected networks.<sup>340</sup>

112. Separately, for purposes of the Reimbursement Program, a school, library or health care provider, or consortium thereof, may also qualify as a provider of advanced communications service, and therefore be eligible to participate in the Reimbursement Program, if it provisions facilities-based broadband connections of at least 200 kbps in one direction to end users, which could include students, patrons, patients, or member institutions in the context of cooperative infrastructure sharing arrangements.<sup>341</sup> This clarification addresses the concerns raised by Northern Michigan University as it

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<sup>333</sup> Secure Networks Act § 4(a)-(b). If Congress were to pass additional legislation defining eligibility for the reimbursement program, the Commission would modify its eligibility requirements. *See* USTelecom Dec. 4 *Ex Parte* at 1.

<sup>334</sup> Secure Networks Act § 9(1).

<sup>335</sup> 47 U.S.C. § 1302(d)(1).

<sup>336</sup> *See* Blue Danube Second Further Notice Reply at 4.

<sup>337</sup> *See Inquiry Concerning Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2406, para. 20 (1999) (stating, in relevant part, that “broadband” and “advanced telecommunications capability” “hav[e] the capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) directions, a speed . . . in excess of 200 [kbps] in the last mile”).

<sup>338</sup> 47 CFR § 1.7001.

<sup>339</sup> *See* Dell Technologies Second Further Notice Comments at 1; RWA Second Further Notice Reply at 2.

<sup>340</sup> *See* CCA Second Further Notice Comments at 3-4 (“[T]he Commission should adopt rules that interpret the statutory language as it most accurately reflects the broad participant pool Congress intended for the program.”); Dell Technologies Second Further Notice Comments at 1 (“This broader definition of advanced communications service would ensure that insecure equipment is not left in our nation’s interconnected broadband networks.”).

<sup>341</sup> However, a school, library, or health care provider that merely purchases advanced telecommunications or information services and is not a facilities-based network provider of services is not considered a provider of advanced communications services for purposes of the Reimbursement Program. Accordingly, we disagree with RWA’s suggestion to interpret the statute to allow reimbursement eligibility for entities that only purchase but do not provide advanced communications services. *See* RWA Sec. 4 PN Comments at 4.

seeks to remove and replace covered equipment from its LTE network that serves “over 15,000 NMU students, K-12 families, and community members.”<sup>342</sup>

113. We also take this opportunity to clarify the demarcation point between eligible and non-eligible advanced communications service providers, i.e., those with fewer than two million customers.<sup>343</sup> The Secure Networks Act defines “customers” to mean “with respect to a provider of advanced communications service—(A) the customers of such provider” as well as the “customers of any affiliate . . . of such provider.”<sup>344</sup> The statute references the definition of “affiliate” contained in section 3 of the Communications Act, which reads “a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person.”<sup>345</sup>

114. We read the phrase “customers of such provider” and “customers of any affiliate” as having more than one possible interpretation. The language could refer only to those customers purchasing advanced communications service or could refer to any customer of the provider or affiliate regardless of the service or product purchased. The accompanying House Report states “[s]ection 4 requires the FCC . . . to reimburse providers of advanced communications service with 2 million or fewer subscribers.”<sup>346</sup> This language suggests an intention to focus on the subscribers of the provider that purchase advanced communications service in determining eligibility. The House Report also states the Reimbursement Program is established “to assist small communications providers with the costs of removing prohibited equipment and services from their networks.”<sup>347</sup> By limiting the meaning of “customer” to those purchasing advanced communications service, potentially a large company with a small number of advanced communications service customers could qualify for the Reimbursement Program. Given the overall intent of the program to assist with the removal of equipment and services posing a national security risk and the language in the House Report, we choose to interpret customer narrowly, which in turn will increase the pool of eligibility for the program. Accordingly, we interpret “customers of such provider” and “customers of any affiliate” to mean those customers taking advanced communications service from the provider and its affiliates. A provider seeking to participate in the Reimbursement Program must have two million or fewer customers, as of the date its application is filed.<sup>348</sup>

115. To identify customers of advanced communications service, providers must count those customers purchasing a service that includes a broadband connection with a speed of at least 200 kbps in one direction. The Secure Networks Act states an advanced communications service has the meaning given the term advanced telecommunications capability.<sup>349</sup> The Commission has historically interpreted “advanced telecommunications service” to mean a service with a broadband connection of at least 200 kbps in one direction.<sup>350</sup> Accordingly, we direct providers to count customers of broadband service

<sup>342</sup> NMU Sec. 4 PN Comments at 1.

<sup>343</sup> Secure Networks Act § 4(b)(1).

<sup>344</sup> *Id.* § 9(6).

<sup>345</sup> *Id.* § 9(6)(B); 47 U.S.C. § 153(2). The definition of affiliate further states “[f]or purposes of this paragraph, the term ‘own’ means to own an equity interest (or the equivalent thereof) of more than 10 percent.” 47 U.S.C. § 153(2).

<sup>346</sup> H.R. Rep. No. 116-352, at 12.

<sup>347</sup> *Id.* at 8.

<sup>348</sup> If the provider’s number of customers increases above two million after its application is filed, they will not lose their eligibility to participate in the Reimbursement Program by virtue of the customer increase.

<sup>349</sup> Secure Networks Act § 9(1).

<sup>350</sup> See *Inquiry Concerning Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2406, para. 20 (1999).

meeting or exceeding this speed threshold for purposes of program eligibility. A subscriber merely purchasing traditional plain old telephone service would therefore not count as a subscriber of advanced communications service.

116. Lastly, to be eligible, the Secure Networks Act requires providers filing applications to make specific certifications per section 4(d)(4).<sup>351</sup> Applicants must certify that “as of the date of the submission of the application, the applicant— (i) has developed a plan for— (I) the permanent removal and replacement of any covered communications equipment or service that are in the communications network of the applicant as of such date; and (II) the disposal of the equipment or services removed . . . and has developed a specific timeline . . . for the permanent removal, replacement, and disposal of the covered communications equipment or services identified . . . , which timeline shall be submitted to the Commission as part of the application.”<sup>352</sup> The applicant must also certify on the date of its application’s approval that it “will not purchase, rent, lease, or otherwise obtain covered communications equipment or services, using reimbursement funds or any other funds (including funds derived from private sources); and . . . will consult and consider the standards, guidelines, and best practices set forth in the cybersecurity framework developed by the National Institute of Standards and Technology . . . in developing and tailoring the risk management practices of the applicant.”<sup>353</sup> We direct the Wireline Competition Bureau to incorporate these certifications as part of the application submission process to ensure applicants are eligible for the Reimbursement Program.

117. *Covered Communications Equipment or Services.* The Secure Networks Act allows eligible providers to seek reimbursement for expenses associated solely with the permanent removal, replacement, and disposal of “covered communications equipment or services” as designated per section 2(a) of the Secure Networks Act.<sup>354</sup> Specifically, eligible providers may seek reimbursement funds to remove, replace, and dispose of “covered communications equipment or services purchased, rented, leased or otherwise obtained” before August 14, 2018 if on the initial list published by the Commission, or no later than 60 days after the Commission adds further equipment and services to the initial list.<sup>355</sup> Recipients are prohibited from using reimbursement funds to remove, replace, or dispose of covered communications equipment or service purchased, rented, or leased or otherwise obtained after these statutory cutoff dates.<sup>356</sup> The Commission has no discretion to deviate from the scope of covered communications equipment or services provided under the Secure Networks Act. Accordingly, to the extent the Commission’s original proposal in the *2019 Supply Chain Further Notice* suggested limiting eligibility to a broader or narrower category of equipment and services, we now instead follow the requirements contained in the Secure Networks Act.<sup>357</sup>

## 2. Costs Reasonably Incurred

118. As proposed in the *2019 Supply Chain Further Notice*, the Reimbursement Program will reimburse costs reasonably incurred for the removal, replacement, and disposal of covered equipment and

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<sup>351</sup> Secure Networks Act § 4(b) (“The Commission may not make a reimbursement under the Program to a provider of advanced communications service unless the provider . . . makes all of the certifications required by subsection (d)(4)”).

<sup>352</sup> *Id.* § 4(d)(4)(A).

<sup>353</sup> *Id.* § 4(d)(4)(B).

<sup>354</sup> *Id.* § 2(a).

<sup>355</sup> *Id.* § 4(c).

<sup>356</sup> *Id.* § 4(c)(2).

<sup>357</sup> *2019 Supply Chain Further Notice*, 34 FCC Rcd at 11474-75, paras. 133-36.

services in accordance with the Secure Networks Act.<sup>358</sup> The reasonableness standard we adopt is consistent with the standard applicable to the broadcast incentive auction reimbursement mechanism.<sup>359</sup> This standard is also consistent with approach taken in the *Emerging Technologies* framework when assisting existing operators with relocation costs in transitioning to new facilities.<sup>360</sup> A standard of reasonableness will provide the Commission with a sensible approach for evaluating reimbursement costs to help combat waste, fraud and abuse through the exclusion of excessive and otherwise unreasonable costs from the Reimbursement Program.

119. The Secure Networks Act does not expressly establish a standard for evaluating costs for reimbursement. The statute simply requires the Commission to reimburse providers for the permanent removal, replacement, and disposal of covered communications equipment and services.<sup>361</sup> We therefore proposed to apply a standard of reasonableness when evaluating requests for reimbursement.<sup>362</sup> One commenter, the Rural Wireless Broadband Coalition, urged the Commission to “follow the principle” of reimbursing any reasonable cost.<sup>363</sup> Other commenters, while not engaging directly with the proposed reasonableness standard, implicitly supported this approach by commenting on the need for certainty in knowing upfront what expenses are reimbursable, advocating for the inclusion of various expenses as reasonable, and supporting use of the same standard as used in the broadcast incentive auction reimbursement mechanism.<sup>364</sup>

120. We see no reason to deviate from using a standard of reasonableness, as proposed, for purposes of the Reimbursement Program. First, using a standard of reasonableness will help guide objective determinations of whether to include or deny costs for reimbursement and ensure that excessive, unreasonable costs do not jeopardize the available funding needed by all participating providers to transition away from networks posing a national security risk.<sup>365</sup> Second, by using an existing standard,

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<sup>358</sup> *Id.* at 11475-76, para. 140. We note that the Reimbursement Program does not modify rules that govern how universal service funds may be used in the various universal service programs. ETCs will still be required to certify, for example, that federal high-cost support was used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. See Letter from Carri Bennet, General Counsel, RWA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-89, at 2-3 (filed Nov. 27, 2020) (RWA Nov. 27, 2020 *Ex Parte*).

<sup>359</sup> See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567, 6822, para. 623 (2014) (*Incentive Auction Order*).

<sup>360</sup> See also *Expanding Flexible Use in the 3.7-4.2 GHz Band*, GN Docket No. 18-122, Report and Order, Order Proposing Modification, 35 FCC Rcd 2343, 2391 para. 111 (2020) (“That transition of [incumbent] operations relies on the Commission’s *Emerging Technologies* framework, a framework the Commission has relied on since the early 1990s to facilitate the swift transition of spectrum from one use to another.”) (*C-Band Report and Order*) (citing *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, ET Docket No. 92-9, First Report and Order and Third Notice of Proposed Rulemaking, 7 FCC Rcd 6886 (1992) (*Emerging Technologies Order*), clarified by Third Report and Order, 8 FCC Rcd 6589 (1993), modified on reconsideration, Memorandum Report and Order, 9 FCC Rcd 1943 (1994)).

<sup>361</sup> Secure Networks Act § 4(a)-(c).

<sup>362</sup> *2019 Supply Chain Further Notice*, 34 FCC Rcd at 11475-76, para. 140.

<sup>363</sup> RWBC Further Notice Comments at 21.

<sup>364</sup> See RWA Further Notice Comments at 14 (“Funding should closely mirror the structure used for the Broadcast Incentive Auction.”); RWA Sec. 4 PN Comments at 14 (“RWA urges the Commission to follow a path similar to that used by the FCC for the post-auction migration of broadcasters after the 600 MHz auction.”); CCA Further Notice Comments at 7; JAB Further Notice Comments at 11-12; PRTC Further Comments at 5, 15-16.

<sup>365</sup> See, e.g., *Incentive Auction Order*, 29 FCC Rcd at 6820, para. 620 (“In order to implement the Spectrum Act’s reimbursement provisions, we must determine which expenses will be eligible for reimbursement from the Reimbursement Fund and how to qualify those expenses.”); CCA Further Notice Comments at 7 (responding to question as to what replacement costs are reasonable by answering “[t]here are no simple answers to these questions.”).

we can leverage our prior experience with the broadcast incentive auction reimbursement mechanism standard and the *Emerging Technologies* framework to benefit the Reimbursement Program.<sup>366</sup> While the equipment and services replaced may differ, the same basic steps apply here, as in planning and implementing a network transition while attempting to minimize disruptions for customers/users. Lastly, using the existing standard provides regulatory consistency between similarly situated program participants of both the broadcast incentive auction, other wireless proceedings involving the relocation of existing operators, and the instant Reimbursement Program.<sup>367</sup>

121. We will thus consider eligible for reimbursement costs reasonably incurred for the timely removal, replacement, and disposal of covered equipment and services obtained prior to the statutory cutoff dates. The Commission interpreted “costs reasonably incurred” in the broadcast incentive auction reimbursement mechanism context as requiring the reimbursement of “costs that are reasonable to provide facilities comparable to those . . . reasonably replaced.”<sup>368</sup> The Commission has further interpreted “[t]hese costs [to] include both ‘hard’ expenses, such as new equipment and tower rigging, and ‘soft’ expenses, including legal and engineering services.”<sup>369</sup> We see no reason to deviate from this model and will apply it to the instant Reimbursement Program. Although we cannot forecast all types of reasonable expenses, we do provide guidance to help participants with their transition planning. The appropriate scope of “costs reasonably incurred” will necessarily be decided on a case-by-case basis, and we delegate authority to the Wireline Competition Bureau to make reimbursement determinations and to finalize a catalog to help participants estimate their reimbursable costs.

**a. Comparable Facilities and Technology Upgrades**

122. We consider as reasonable replacement facilities comparable to the facilities in use by the provider prior to the removal, replacement, and disposal of covered communications equipment or service. We recognize, however, when replacing older technology that a certain level of technological upgrade is inevitable. Accordingly, we will permit Reimbursement Program participants to obtain reimbursement for reasonable costs incurred for replacing older mobile wireless networks with fourth generation Long Term Evolution (4G LTE) equipment or service that are 5G ready.<sup>370</sup>

123. The reimbursement program is intended “to assist small communications providers with the costs of removing prohibited equipment and services from their networks and replacing prohibited equipment with more secure communications equipment and services.”<sup>371</sup> Language from the House Report demonstrates that Congress “expects the Commission, when implementing regulations . . . to preclude network upgrades that go beyond the replacement of covered communications equipment or services from eligibility; however, [Congress] expects there to be a transition from 3G to 4G or even 5G-ready equipment in instances where equipment being replaced was initially deployed several years

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<sup>366</sup> See RWA Further Notice Comments at 14; RWA Sec. 4 PN Comments at 14. There already exists in the incentive auction context a Catalog of Expenses, identifying categories of expenses considered reasonable for purposes of reimbursement. See *Media Bureau Finalizes Reimbursement Form for Submission to OMB and Adopts Catalog of Expenses*, GN Docket No. 12-268, Public Notice, 30 FCC Rcd 11701 (MB 2015). We can look to these efforts to assist our determinations and help identify the types of expenses considered reasonable during a transition process in implementing the Reimbursement Program.

<sup>367</sup> A fundamental precept of administrative law is to treat similarly situated entities in a similar manner. See *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

<sup>368</sup> *Incentive Auction Order*, 29 FCC Rcd at 6821, para. 623.

<sup>369</sup> *Id.* at 6822, para. 623.

<sup>370</sup> See Letter from Michael McMenamin, Counsel, Blue Danube Strategies, to Marlene H. Dortch, Secretary, FCC, WC Docket 18-89, at 2 (filed Dec. 3, 2020).

<sup>371</sup> H.R. Rep. No. 116-352, at 8.

ago.”<sup>372</sup>

124. We sought comment in the *2019 Supply Chain Further Notice* on whether we should use the same “comparability standard” used in the broadcast incentive auction reimbursement mechanism.<sup>373</sup> In the broadcast proceeding, the Commission said that reasonable reimbursement costs include “costs that are reasonable to provide facilities comparable those that [an existing operator] had prior to the auction.”<sup>374</sup> The Commission further stated that it did “not anticipate providing reimbursement for optional features beyond those already present” but recognized when replacing older equipment that the new “equipment necessarily may include improved functionality.”<sup>375</sup> The Commission uses a similar comparable facilities standard when relocating incumbent operators under the *Emerging Technologies* framework.<sup>376</sup> One commenter, the Rural Wireless Association, urged the Commission to “closely mirror the structure used for the Broadcast Incentive Auction.”<sup>377</sup> Another commenter, Rise Broadband, said a comparability standard for replacement costs is essential.<sup>378</sup> Otherwise, commenters generally favored allowing some level of technological upgrade, especially when replacing older technology that is unlikely to have a comparable replacement.<sup>379</sup>

125. Consistent with approach taken on equipment upgrades for the broadcast incentive auction, we expect, as a general matter, eligible providers to “obtain the lowest-cost equipment that most closely replaces their existing equipment.”<sup>380</sup> That said, we recognize the replacement of older legacy technology will inevitably require the use of newer equipment and services that have additional capabilities.<sup>381</sup> Accordingly, consistent with the intent of Congress, we will allow, and indeed encourage,

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<sup>372</sup> *Id.* at 13.

<sup>373</sup> See *2019 Supply Chain Further Notice*, 34 FCC Rcd 11475-56, para. 140.

<sup>374</sup> *Incentive Auction Order*, 29 FCC Rcd at 6822, para. 623.

<sup>375</sup> *Id.* at 6822, para. 624.

<sup>376</sup> See *C-Band Report and Order*, 35 FCC Rcd at 2422-23, paras. 193-95; *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of Advanced Wireless Services, including Third Generation Wireless Systems*, ET Docket No. 00-258, *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, WT Docket No. 02-353, Ninth Report and Order, 21 FCC Rcd 4473 (2006) (“[U]nder our *Emerging Technologies* policy, new entrants were required to provide incumbents with comparable replacement facilities that would allow them to maintain the same service in terms of three factors: throughput, reliability, and operating costs”) (citing *Emerging Technologies Third R&O*, 8 FCC Rcd at 6591 & 6603, paras. 5, 36); *Teledesic LLC v. FCC*, 275 F.3d 75, 86 (D.C. Cir. 2001) (“‘Comparable facilities,’ however, does not mean that terrestrial users will be able to insist on top-of-the-line replacement facilities. Rather, satellite operators will have to ensure that the replacement facilities are equivalent to the existing FS facilities with respect to throughput, reliability, and operating costs . . .”).

<sup>377</sup> See RWA Further Notice Comments at 14; see also RWA Sec. 4 PN Comments at 14 (“RWA urges the Commission to follow a path similar to that used by the FCC for the post-auction migration of broadcasters after the 600 MHz auction.”).

<sup>378</sup> JAB d/b/a Rise Broadband Further Notice Comments at 11-12.

<sup>379</sup> CCA Further Notice Comments at 7; CompTIA Further Notice Comments at 6; JAB Further Notice Comments at 11-12; NCTA Further Notice Reply at 6-7; Nokia Further Notice Comments at 7-8; PRTC Further Comments at 5, 15-16; RWBC Further Notice Comments at 16-17.

<sup>380</sup> *Incentive Auction Order*, 29 FCC Rcd at 6822, para. 624.

<sup>381</sup> See CompTIA Further Notice Comments at 6 (“Virtually all of the gear being replaced would likely have no current equivalent on the marketplace, and some degree of upgrading through the new . . . funded program will be inevitable. Moreover, as a policy matter it makes little sense to use funding from a federally-administered program to pay for equipment that would be outdated on the day it was installed.”); Nokia Further Notice Comments at 7-8 (“The Commission should support purchases of 5G-ready equipment.”); NTCA Further Notice Comments at 6 (encouraging “Commission to adopt rules that would allow [providers] to obtain reimbursement for current releases

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eligible providers replacing third generation and older equipment to obtain reimbursement for the cost of 4G LTE replacement equipment that is 5G-ready.<sup>382</sup>

126. The record indicates new equipment supporting older, second- and third generation wireless technology services<sup>383</sup> is unavailable, and even acquiring such equipment and services on the secondary market is proving increasingly difficult and in some instances impossible.<sup>384</sup> And from a policy perspective, investing money on outdated and soon-to-be decommissioned equipment and service is of little benefit and an inefficient and wasteful use of Federal support.<sup>385</sup> We will therefore allow providers replacing older technology to obtain reimbursement for the cost of new replacement equipment that is 4G LTE compatible and is capable of subsequently being upgraded to provide 5G service. However, operators that elect “to purchase optional equipment capability or make other upgrades” beyond those reasonably needed to replace existing equipment must do so using their own funds, consistent with the approach we took in the broadcast incentive auction proceeding and the recent C-Band auction proceeding.<sup>386</sup>

127. By taking this approach on comparable facilities and technology upgrades, we reject alternative proposals for determining reimbursement amounts based on the value of the equipment being replaced.<sup>387</sup> For example, NTCH and NTCA suggested that to avoid the “impossibility” of evaluating

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of equipment available at the time of replacement that most closely resemble the functionality of the equipment being replaced—but that is also capable of meeting reasonable projections of future demand”); NTCA Further Notice Reply at 6-7; RWA Further Notice Reply at 14 (“The Commission needs to recognize the simple fact that technology is constantly evolving and newly-manufactured equipment will naturally be upgraded from what was originally manufactured and deployed in prior years.”); *see also Incentive Auction Order*, 29 FCC Rcd at 6822, para. 624 (“[W]e also expect that some [operators] will not be able to replace older, legacy equipment that is comparable in terms of functionality and cost because of advances in technology and because manufacturers often cease supporting older equipment when newer products become available.”).

<sup>382</sup> *See* Blue Danube Sec. 4 PN Comments at 7-8 (“[A]ll installed replacements should be the newest available equipment, and . . . all gear should be LTE-compatible, and at a minimum, be upgradable to 5G.”); RWA Sec. 4 PN Reply at 8 (“It is imperative that participants are fully reimbursed for the costs of replacing their equipment and services, even if such replacement is accomplished via upgrades that include components that support 5G services.”).

<sup>383</sup> The reimbursement program is not limited to replacing covered equipment and services in wireless networks, but we recognize the initial focus is on the equipment and services provided by Huawei and ZTE, which is most often found with the provision of wireless services. Accordingly, while much of this discussion is focused on replacing wireless technology, the underlying rationale applies equally in the non-wireless context.

<sup>384</sup> *See* CCA Further Notice Comments at 7 (“[W]hen it comes to much legacy equipment—particularly 3G equipment—that may be subject to a replacement mandate, there simply are no substitutes on the market.”); CompTIA Further Notice Comments at 6; NTCA Further Notice Reply at 6-7.

<sup>385</sup> *See* CompTIA Sec. 4 PN Comments at 12-13 (“Forcing carriers to replace networks with legacy components would be wasteful in the long term and would countermand universal service goals.”).

<sup>386</sup> *See Incentive Auction Order*, 29 FCC Rcd at 6822, para. 624 (“Eligible [operators] may elect to purchase optional equipment capability or make other upgrades at their own cost, but on the cost of the equipment without optional upgrades is a reimbursable expense.”); *C-Band Report and Order*, 35 FCC Rcd at 2422-23, para. 194 (“In contrast, we do not anticipate allowing reimbursement for equipment upgrades beyond what is necessary to clear the band. For example, if an incumbent builds additional functionalities into replacement equipment that are not needed to facilitate the swift transition of the band, it must reasonably allocate the incremental costs of such additional functionalities to itself and only seek reimbursement for the costs reasonably allocated to the needed relocation”); *see also* USTelecom Sec. 4 PN Comment at 8.

<sup>387</sup> If, however, eligible providers are simply removing and disposing of covered equipment and service without replacement, e.g., simply shutting down an older network, then the Commission would consider reimbursing the provider for the cost of the depreciated value of the decommissioned equipment. *See* PTA Sec. 4 PN Comments at 3

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what constitute appropriate replacements, the Commission should simply reimburse the original cost of the covered equipment and services plus an additional 25%.<sup>388</sup> This approach, however, may not result in providing sufficient reimbursement funding for providers if the cost of the replacement equipment exceeds the reimbursement support allocated to the recipient. In addition, we find PRTC's proposal to reimburse both the present-day value of the replaced equipment and the cost of the replacement equipment unreasonable, giving the provider a windfall and an unfair competitive advantage over other providers.<sup>389</sup>

**b. Catalog of Eligible Expenses and Estimated Costs**

128. We next delegate to the Wireline Competition Bureau the responsibility to develop and finalize a Catalog of Eligible Expenses and Estimated Costs (Catalog of Eligible Expenses) to inform the Reimbursement Program. The Secure Networks Act requires the Commission to “develop a list of suggested replacements” for covered equipment and services and for applicants to submit “initial reimbursement cost estimate[s] at the time of application.”<sup>390</sup> The Commission is also required to “take reasonable steps to mitigate the administrative burdens and costs associated with the application process, while taking into account the need to avoid waste, fraud, and abuse.”<sup>391</sup> In the broadcast incentive auction reimbursement mechanism, the use of a catalog to estimate relocation costs played a critical role in the successful processing of reimbursement applications.<sup>392</sup> We seek to duplicate that success here by using a Catalog of Eligible Expenses as suggested in the record.<sup>393</sup> The catalog will identify reimbursable costs with as much specificity as possible, provide guidance to entities seeking reimbursement, streamline the reimbursement process, and increase accountability. Listing in the catalog, however, is not a guarantee of reimbursement for any individual expense, and all claimed expenses are subject to review by the Commission staff to ensure each expense and request for reimbursement is reasonable.

129. The Catalog of Eligible Expenses will also help the Commission and applicants satisfy the Secure Networks Act's requirements not only by helping applicants with transition planning and estimating costs for application submissions, but also with identifying potential replacement equipment and services and expediting the Commission's reimbursement request review process. As CCA points out, the removal, replacement and disposal of covered equipment and services in a mobile wireless network is a complex, multi-step process that is likely to encompass a range of expenses, including: drive testing to determine baseline coverage; evaluating spectrum and backhaul capabilities; ordering new equipment; installing new network core and RAN equipment; potentially leasing space on or building new towers and obtaining any associated permits and approvals; testing and optimizing the network; and

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(“While replacement of the covered equipment is certainly envisioned by the statute, it is not required. The statute does not require all three costs to be reimbursed.”).

<sup>388</sup> See NTCH Further Notice Comments at 7-9; NTCA Further Notice Reply at 7.

<sup>389</sup> See PRTC Further Notice Comments at 15.

<sup>390</sup> Secure Networks Act § 4(d)(1)-(2)(B).

<sup>391</sup> *Id.* § 4(d)(2)(C).

<sup>392</sup> See *Incentive Auction Order*, 29 FCC Rcd at 6821, para. 622; *Media Bureau Finalizes Reimbursement Form for Submission to OMB and Adopts Catalog of Expenses*, GN Docket No. 12-268, Public Notice, 30 FCC Rcd 11701 (MB 2015). The Commission has similarly used a catalog to estimate relocation costs in the C-band auction proceeding. See *WTB Releases Final Cost Category Schedule for 3.7-4.2 GHz Band Relocation Expenses and Announces Process and Deadlines for Lump Sum Elections*, GN Docket No. 18-122, IB Docket No. 20-205, Public Notice, 35 FCC Rcd 7967 (WTB 2020).

<sup>393</sup> See *Incentive Auction Order*, 29 FCC Rcd at 6821, para. 622; RWA Further Notice Comments at 3 (stating a “reimbursement policy needs to be clearly spelled-out via a pre-approved Catalog of Eligible Reimbursement Expenses that is similar to what was used in the Television Broadcast Incentive Auction”).



migrating traffic and decommissioning covered equipment and services.<sup>394</sup> Because there will likely be a range of expenses that could vary among providers, the Catalog of Eligible Expenses will be used to provide helpful guidance regarding the kinds and amounts of expenses that will be reimbursed. Accordingly, the Catalog of Eligible Expenses will not be a definitive list of all reimbursable expenses but a means to facilitate the reimbursement process. Given the importance of the Catalog of Eligible Expenses to the Reimbursement Program, Commission staff have already begun work to develop it, and we expect to release it as soon as possible.<sup>395</sup>

**c. Timing of Costs Incurred**

130. We next turn to the acceptable timing of costs incurred by providers to comply with the Commission's requirement. Some providers have already started the process to remove and replace problematic equipment from Huawei and ZTE from their networks.<sup>396</sup> We applaud these providers for proactively taking steps to increase the security of their networks notwithstanding the uncertainty of Federal government assistance. As such, we will allow providers to obtain reimbursement for costs reasonably incurred prior to the creation and funding of the Reimbursement Program, for the removal, replacement, and disposal of covered equipment and services.

131. The Secure Networks Act expressly limits reimbursement support to the removal, replacement, and disposal of covered equipment and services obtained before certain dates. For covered equipment and services placed by the Commission on the initial Covered List required by section 2(a) of the Secure Networks Act, the cutoff date is August 14, 2018,<sup>397</sup> which is the day after the 2019 NDAA was signed into law.<sup>398</sup> For equipment and services subsequently added to the Covered List required by section 2(a), the provider must have obtained the equipment or service no later than 60 days after being placed on the Covered List to obtain reimbursement for costs associated with its removal, replacement, and disposal.<sup>399</sup> The cutoff deadlines are explicit in the statute, and we lack discretion to use different cutoff dates for the purchase of covered communications equipment or service that is eligible for the reimbursement of removal, replacement, and disposal costs.<sup>400</sup>

132. The 2019 NDAA prohibits the head of an executive agency from obligating or expending “loan or grant funds to procure or obtain, extend or renew a contract to procure or obtain, or enter into a contract (or extend or renew a contract) to procure or obtain” telecommunications and video surveillance

<sup>394</sup> CCA Sec. 4 PN Comments at 5.

<sup>395</sup> Chairman Pallone-Ranking Member Walden Letter at 2. Indeed, the Commission has engaged a contractor to prepare the Catalog of Eligible Expenses. See Supply Chain Reimbursement Program Catalog of Eligible Expenses, Contract Award Number 273FCC21C0001, [https://beta.sam.gov/opp/ba18962b90254b9c9af7da547d3361ae/view?keywords=%22federal%20communications%20commission%22&sort=-modifiedDate&index=&is\\_active=true&page=1&organization\\_id=100076366](https://beta.sam.gov/opp/ba18962b90254b9c9af7da547d3361ae/view?keywords=%22federal%20communications%20commission%22&sort=-modifiedDate&index=&is_active=true&page=1&organization_id=100076366) (awarding contract to Widelity, Inc.).

<sup>396</sup> See, e.g., Letter from Alexi Maltas, Senior V.P. and General Counsel, CCA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-89, at 1 (filed Aug. 3, 2020) (CCA Aug. 3, 2020 *Ex Parte*) (stating “affected carrier members are already working diligently to discuss options with network vendors and develop network transition plans to remove covered equipment”).

<sup>397</sup> Secure Networks Act § 4(c)(1)(A).

<sup>398</sup> John S. McCain National Defense Authorization Act for Fiscal Year 2019, H.R. 5515, 115<sup>th</sup> Cong., PL 115-232, 132 Stat. 1636 (2018) (2019 NDAA); Press Release, Department of Defense, President Signs Fiscal 2019 Defense Authorization Act at Fort Drum Ceremony (Aug. 13, 2018), <https://dod.defense.gov/News/Article/Article/1601016/president-signs-fiscal-2019-defense-authorization-act-at-fort-drum-ceremony/>.

<sup>399</sup> Secure Networks Act § 4(c)(1)(B).

<sup>400</sup> Because of the statutory cutoff date, we lack discretion to consider an alternative cutoff date. See, e.g., NTCA Further Notice Comments at 7 (urging the Commission to set November 26, 2019 as the cutoff date).

equipment produced by entities reasonably believed to be owned or controlled by a foreign country.<sup>401</sup> The 2019 NDAA specifically identified Huawei and ZTE as producers of covered equipment,<sup>402</sup> putting the general public on official notice that the Federal government considered the equipment and services produced by these entities to pose a potential national security risk.

133. Following the 2019 NDAA's enactment and as the instant rulemaking proceeding progressed, providers increasingly began planning and taking steps to proactively remove, replace, and dispose of covered equipment and services from their networks. Providers urged the Commission to reimburse costs associated with these efforts even if incurred prior to the creation of any reimbursement program.<sup>403</sup> We will not penalize these providers for taking decisive, proactive steps to secure their networks before the reimbursement program is created and funded. Indeed, in order to protect the nation's communications networks, we encourage providers to remove and replace covered equipment and services before the Reimbursement Program begins.<sup>404</sup> Accordingly, for covered equipment and services placed on the initial list required by section 2(a) of the Secure Networks Act, we will reimburse reasonable costs associated with the removal, replacement, and disposal of covered equipment that were incurred on or after April 17, 2018, the date the Commission adopted the *2018 Supply Chain Notice* commencing this proceeding.<sup>405</sup> Costs incurred before that date are ineligible for reimbursement. For equipment and services subsequently added to the initial list, the provider must incur the costs of removal, replacement, and disposal on or after the date the equipment or services are placed on the list for the reasonably incurred cost to qualify for reimbursement.<sup>406</sup>

134. We recognize the removal, replacement, and disposal of covered equipment may, in the case of mobile wireless networks, entail setting up parallel network core and RAN components and then migrating existing customers to the new network.<sup>407</sup> We expect providers will endeavor to mitigate service disruptions to effectuate a seamless transition for customers. Consistent with our proposal in the *2019 Supply Chain Further Notice*, to the extent providers experience a reduction in revenues as a result of a temporary loss in service, reduced coverage, or otherwise as a result of the transition, we will not reimburse providers for the lost revenues in the Reimbursement Program.<sup>408</sup>

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<sup>401</sup> 2019 NDAA § 889(b)(1).

<sup>402</sup> *Id.* § 889(f)(3).

<sup>403</sup> Letter from Jeff Kohler, Co-Founder and Chief Development Officer, JAB Wireless, Inc. d/b/a Rise Broadband), Counsel to NetNumber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-89, at 1 (filed Aug. 26, 2020); Letter from Carri Bennet, General Counsel, and Stephen Sharbaugh, Legislative and Policy Analyst, RWA, Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-89, at 1 (filed July 2, 2020).

<sup>404</sup> See Letter from Rep. Frank Pallone, Jr., Chairman, House of Representatives Committee on Energy and Commerce, and Rep. Greg Walden, Ranking Member, House of Representatives Committee on Energy and Commerce, to Hon. Ajit Pai, Chairman, FCC (Nov. 23, 2020), at 1-2, <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/FCC%20Bipartisan%20Letter%20re%20Secure%20and%20Trusted%20Comms.pdf> (Chairman Pallone-Ranking Member Walden Letter). For any expenses incurred before the commencement of the Reimbursement Program providers may not be reimbursed for unreasonable expenses. We will apply the same standard, i.e., costs reasonably incurred, to determine whether an expense is eligible for reimbursement.

<sup>405</sup> See *2018 Supply Chain Notice*, 33 FCC Red 4058. The adoption date of the *2018 Supply Chain Notice* was the first clear indication that the Commission was considering taking action to remove covered equipment from U.S. networks.

<sup>406</sup> See Secure Networks Act § 4(c)(1)(ii) (discussing limits on use of funds).

<sup>407</sup> See, e.g., CCA Sec. 4 PN Comments at 5 (stating the transition process will involve “erecting new network cores in parallel with existing cores” and then require the migration of traffic to the new network).

<sup>408</sup> *2019 Supply Chain Further Notice*, 34 FCC Red at 11476, para. 141 (“We propose to make lost revenues ineligible for reimbursement due to the difficulty in administration . . .”).

135. Allowing reimbursement for lost revenues would increase the costs of the Reimbursement Program substantially, and risk exhausting funding prematurely without reimbursing many eligible providers.<sup>409</sup> We are also concerned that evaluating the reasonableness of requests for reimbursement for lost revenues is challenging and speculative and may result in over-reimbursement. We believe scarce program funding is better spent by assisting as many eligible providers as possible with the replacement costs directly related to the transition instead of trying to ensure providers are also reimbursed for lost revenues. Moreover, we expect program participants will strive to minimize service disruptions for customers during the transition process to mitigate revenue loss. Accordingly, we disagree with Mark Twain Communications Company and deem lost revenues an unreasonable and ineligible expense for purposes of the reimbursement program.<sup>410</sup>

**d. Limitations on Use of Funds**

136. The Secure Networks Act limits funding use to the removal, replacement, and disposal of covered communications equipment and services.<sup>411</sup> Even with covered communications equipment and services, to use funds for the removal, replacement, and disposal, the Secure Networks Act requires the recipient to have obtained the equipment or service before a certain statutorily specified cutoff date.<sup>412</sup> Specifically, for covered communications equipment or services published on the Commission's initial Covered List, the recipient must have obtained the equipment or service before August 14, 2018.<sup>413</sup> For communications equipment or service subsequently added to the Covered List, the recipient must have obtained the equipment or service no later than 60 days after being added to the Covered List.<sup>414</sup> Separately, the Secure Networks Act prohibits recipients from using funds to "purchase, rent, lease, or otherwise obtain any covered communications equipment or service."<sup>415</sup> Requests for the reimbursement of expenses falling within the scope of these statutory prohibitions are considered unreasonable per se and thus ineligible.

137. Rural Wireless Broadband Coalition asks whether the statutory limit on funding use prohibits recipients from operating and maintaining covered communications equipment or service in their networks during the removal, replacement, and disposal process.<sup>416</sup> The transition process will likely involve standing up a replacement network before migrating traffic to the replacement network and decommissioning the covered communications equipment or service in the old network.<sup>417</sup> Recipients would thus need to continue operating and therefore maintain the old network containing covered communications equipment or service during the transition process to mitigate service disruptions for existing customers. According to the Rural Wireless Broadband Coalition, keeping the old network operational may involve replacing defective equipment that is covered, and because such equipment is typically proprietary, it would likely require, for purposes of interoperability, a replacement that is also

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<sup>409</sup> See *infra* Section III.E.3.d.

<sup>410</sup> See MTTTC Further Notice Comments at 5 ("The reimbursement program should also include lost revenues, if any, associated with such replacement . . .").

<sup>411</sup> See Secure Networks Act § 4(c)(1); Appx. A, § 1.50004(i) (limiting use of funds consistent with the Secure Networks Act).

<sup>412</sup> Secure Networks Act § 4(c)(2)(A).

<sup>413</sup> Secure Networks Act § 4(c)(2)(A)(i).

<sup>414</sup> *Id.* § 4(c)(2)(A)(ii).

<sup>415</sup> *Id.* § 4(c)(2)(B). Recipients are also not allowed to use "other funds (including funds derived from private sources)" to "purchase, rent, lease, or otherwise obtain any covered communications equipment or service." *Id.* § 4(c)(2)(B).

<sup>416</sup> See RWBC Sec. 4 PN Comments at 15-16.

<sup>417</sup> See *id.* at 15 n.39.

supplied by the same supplier and covered.<sup>418</sup>

138. We read the statute as clearly prohibiting the use of funds by recipients to obtain equipment or service that is on the Covered List even if such equipment is needed to maintain operations during a transition process. Notwithstanding this limitation, a provider possessing covered communications equipment spares obtained before becoming a Reimbursement Program recipient could use funds to install and maintain that covered communications equipment during the transition process.<sup>419</sup> The provider, however, must remove and dispose of all covered communications equipment by the time of the final certification.<sup>420</sup>

### 3. Reimbursement Process

139. The Commission in the *2019 Supply Chain Further Notice* proposed a “detailed reimbursement application process” like the reimbursement mechanism used in the broadcast incentive auction proceeding “to confirm that funding is being used only to replace covered equipment and services, rather than to deploy services to new areas or replace aging equipment or services that are not covered.”<sup>421</sup> Applicants would “provide details of the covered equipment and services being replaced, the replacement equipment and services, and the estimated costs of replacement.”<sup>422</sup> To help guide applicants, we sought comments on “efficient ways” to develop replacement cost estimates.<sup>423</sup> We separately sought comment on whether to “prioritize payments for the replacement of certain equipment and services that are identified as posing the greatest risk to the security of networks, and what categories of equipment and services should that prioritization include.”<sup>424</sup> Comments were also sought on measures to prevent waste, fraud, and abuse, including applicant certifications, deadlines for completing removal and replacement, periodic compliance audits, investigations, and enforcement penalties.<sup>425</sup>

140. The Secure Networks Act establishes specific requirements applicable to the application process for the reimbursement program.<sup>426</sup> Specifically, “[t]he Commission shall require an applicant to provide an initial reimbursement cost estimate at the time of application, with supporting materials substantiating the costs.”<sup>427</sup> The Commission is required to act on applications within 90 days after the date of submission.<sup>428</sup> If there is an excessive number of applications, the Commission can extend this

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<sup>418</sup> *Id.* at 15.

<sup>419</sup> If, however, the recipient receives Universal Service support, then there may be other applicable rules that prohibit the use of funding to install and maintain covered communications equipment or service. *See* 47 CFR § 54.9; *supra* Section III.D.

<sup>420</sup> *See* Secure Networks Act § 4(e)(4)(A)(iii) (recipients of reimbursement fund must submit a certification to the Commission “stating that the recipient ... has permanently removed from the communications network of the recipient, replace, and disposed of (or is in the process of permanently removing, replacing, and disposing of) all covered communications equipment or services that were in the network of the recipient as of the date of the submission of the application of the recipient for the reimbursement....”); *supra* Section III.A.

<sup>421</sup> *2019 Supply Chain Further Notice*, 34 FCC Rcd at 11478, para. 149.

<sup>422</sup> *Id.* at 11478, para. 149.

<sup>423</sup> *Id.* at 11475-76, para. 140.

<sup>424</sup> *Id.* at 11475, 11477-78, paras. 137, 146.

<sup>425</sup> *Id.* at 11479, para. 152.

<sup>426</sup> Secure Networks Act § 4(d); *Section 4 Public Notice*, 35 FCC Rcd at 3494-95 (seeking comment on the impact of section 4 on the Commission’s proposed reimbursement program).

<sup>427</sup> Secure Networks Act § 4(d)(2)(B)(i).

<sup>428</sup> *Id.* § 4(d)(3)(A)(i).

deadline by no more than 45 days.<sup>429</sup> The Commission must also give applicants a 15-day period to cure a material deficiency in the application as determined by the Commission “(including by lacking an adequate cost estimate or adequate supporting materials) . . . before denying the application.”<sup>430</sup> The Secure Networks Act also includes provisions for the removal, replacement, and disposal term and extensions thereof, status updates, measures to avoid waste, fraud, and abuse, and education efforts.<sup>431</sup> The statute also addresses enforcement actions and additional penalties relevant to the reimbursement program.<sup>432</sup>

141. We now adopt a reimbursement process like the one used in the broadcast incentive auction reimbursement mechanism that provides allocations to eligible providers based on their estimated costs. Program recipients can then obtain funding disbursements upon showing of actual expenses incurred. If aggregate demand exceeds available funding, we will prioritize funding requests from ETCs subject to a remove and replace requirement before funding the requests of non-ETCs. Among non-ETCs, we will further prioritize funding to those that voluntarily provided the Commission with cost estimate data in response to the Supply Chain Security Information Collection over those that did not.<sup>433</sup> Additionally, if we are unable to fully fund either all ETCs or all non-ETCs, we will prioritize funding for transitioning core networks over funding non-core network expenses. Program recipients will have one year from the initial disbursement to complete the permanent removal, replacement, and disposal of covered communications equipment or services with the potential for a general and individual extensions of time.

142. Our goals in developing a reimbursement process are threefold. First, we strive to create a simple and straightforward process, providing certainty to participants while minimizing the costs associated with reimbursement and the administrative burden on both affected parties and the Commission. Second, the reimbursement mechanism should facilitate the prompt and efficient distribution of funds for the expeditious removal, replacement, and disposal of covered communications equipment and services posing a national security risk from the networks of participating providers. Third, the program should fairly cover the eligible costs reasonably incurred for reimbursement and include measures to prevent waste, fraud, and abuse. As the Secure Networks Act instructs the Commission, “[i]n developing the application process . . . , the Commission shall take reasonable steps to mitigate the administrative burden and costs associated with the application process, while taking into account the need to avoid waste, fraud, and abuse in the Program.”<sup>434</sup>

**a. Funding Allocation with Rolling Reimbursement Process**

143. The Reimbursement Program will allocate funds on the applicant’s behalf to the U.S. Treasury for draw down by applicants on a rolling basis upon the showing of expenses actually incurred. This approach is consistent with the one used in the broadcast incentive auction reimbursement mechanism which has proven successful in the efficient and expeditious disbursement of funds for

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<sup>429</sup> *Id.* § 4(d)(3)(A)(ii).

<sup>430</sup> *Id.* § 4(d)(3)(B). The statute states that “[i]f such period would extend beyond the deadline . . . for approving or denying the application, such deadline shall be extended through the end of such period.” *Id.*

<sup>431</sup> *Id.* § 4(d)(6)-(8), (e), (i).

<sup>432</sup> *Id.* § 7. The Commission sought comment on the impact of section 7 in the *2020 Supply Chain Second Further Notice*. 35 FCC Rcd at 7838-89, paras. 57-59.

<sup>433</sup> See Supply Chain Security Information Collection, <https://www.fcc.gov/supplychain> (last visited Dec. 1, 2020); Notice of Office of Management and Budget Action for Control No. 3060-1270 (Feb. 12, 2020), [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201912-3060-014#](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201912-3060-014#); see also RWA Nov. 27, 2020 *Ex Parte* at 1.

<sup>434</sup> Secure Networks Act § 4(d)(2)(C).

transitioning networks.<sup>435</sup>

144. The Secure Networks Act states “[n]othing in this section shall be construed to prohibit the Commission from making a reimbursement under the Program to a provider of advanced communications service before the provider incurs the cost of the permanent removal, replacement, and disposal of the covered communications equipment or service for which the application of the provider has been approved . . . .”<sup>436</sup> This language permits us to make funding disbursements in advance of costs actually incurred but does not require any such advance payments. We have concerns, however, about providing advanced funding because once disbursed, the Commission’s ability to ensure the applicant spends the money as intended to avoid waste, fraud, and abuse is greatly diminished. If the Commission later finds the applicant has not used the money as intended and in compliance with the Secure Networks Act and the Commission’s rules, then reclaiming the money from the applicant following advance disbursement can prove challenging. Accordingly, rather than disbursing large amounts upfront to program participants, we will use an initial funding allocation process based on cost estimates, and then allow rolling disbursements based on showings of actual costs incurred. This approach provides recipients with the upfront knowledge of available funds for purposes of planning and engaging lenders and vendors. We find that this methodology best achieves Congress’s goal of mitigating the administrative burden and costs of the program while taking steps to avoid waste, fraud, and abuse.<sup>437</sup>

145. Some commenters urge the Commission to “establish a payment schedule and clear milestones for payments so that carriers know when they will be able to obtain payments to facilitate a transition.”<sup>438</sup> They argue that given the scope and scale of expenses, waiting for reimbursement until the transition is complete is unworkable. As NetNumber states, “the Commission should provide for milestone payments to ensure service providers receive sufficient funding at every stage of the network transition process.”<sup>439</sup> We surmise the milestone process suggested is akin to draws on a construction loan whereby a lender releases a certain percentage of the total loan amount upon satisfaction of certain construction milestones, e.g., obtaining the necessary permits, pouring the foundation, completing the close-in inspection, and so forth.

146. We find milestones would add an unnecessary level of complexity to the reimbursement mechanism. For such a system to work, we would need to determine the appropriate deployment milestones, the percentage of funding to disburse at each stage, the documentation needed to demonstrate milestone completion, and some inspection verification process to ensure the milestones are indeed satisfied prior to disbursing funds. By instead having a rolling system of disbursements throughout the transition project based on the submission of documentation of eligible expenses incurred, we successfully address any concerns some providers may have of delayed payments until the network transition is complete. Accordingly, we decline to use a transition funding disbursement mechanism based on milestones. While we decline to impose milestone-based disbursements, we delegate the task of determining the specific timing of disbursements to the Wireline Competition Bureau as part of its

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<sup>435</sup> See *Incentive Auction Order*, 29 FCC Rcd at 6815-16, para. 607.

<sup>436</sup> Secure Networks Act § 4(h).

<sup>437</sup> *Id.* § 4(d)(2)(C). By adopting a rolling reimbursement process, we decline to provide funding upfront before costs are actually incurred as suggested by the Secure Networks Coalition. SNC Second Further Notice Reply at 8-9. We expect the reimbursement process, as shown in the broadcast incentive auction context, will sufficiently meet the financial needs of providers, including smaller providers, in a timely manner while ensuring appropriate agency oversight over the disbursement and use of funds for their intended purpose.

<sup>438</sup> See CCA Aug. 3, 2020 *Ex Parte* at 2; Letter from Steven Augustino, Counsel to NetNumber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-89, at 3 (filed Aug. 17, 2020) (NetNumber *Ex Parte*); Letter from Alexi Maltas, Senior V.P. and General Counsel, CCA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-89, at 2 (filed July 29, 2020); CCA Sec. 4 PN Comments at 5; COMSovereign Sec. 4 PN Comments at 9.

<sup>439</sup> NetNumber *Ex Parte* at 3.

implementation of the Reimbursement Program with the goal of efficiently and expeditiously disbursing funds to recipients.

147. Lastly, we decline to provide “bonuses” for completing the removal, replacement, and removal process ahead of the applicable deadline as suggested by Blue Danube.<sup>440</sup> The Secure Networks Act already provides an aggressive one-year deadline for completing the transition process.<sup>441</sup> This provides ample incentives for Reimbursement Program recipients to act quickly to complete the process. Accordingly, we find additional incentive payments unnecessary.

**b. Submission of Cost Estimates**

148. The Secure Networks Act directs the Commission to “develop an application process” that “require[s] an applicant to provide an initial reimbursement cost estimate at the time of application, with supporting materials substantiating the costs.”<sup>442</sup> Consistent with the statute, to participate in the Reimbursement Program, eligible providers are required to submit initial estimates of the costs to be reasonably incurred for the removal, replacement, and disposal of covered communications equipment or services to participate in the reimbursement program.<sup>443</sup> We direct the Wireline Competition Bureau to establish an initial 30-day filing window for the submission of cost estimates and to establish subsequent filing windows as necessary should support remain, or additional support become available to fund additional requests. Participants are also statutorily required to submit, in addition to cost estimates, “supporting materials substantiating the costs,” a “specific timeline . . . for the permanent removal, replacement and disposal of the covered communications equipment or services,” and the certifications required by section 4(d)(4) as to the development of a transition plan and the use of funds if approved and in developing and tailoring risk management practices.<sup>444</sup>

149. We have separately tasked the Wireline Competition Bureau with developing and finalizing a Catalog of Eligible Expenses to identify reimbursable costs with as much specificity as possible to help entities in preparing initial cost estimates.<sup>445</sup> Applicants can reference the final Catalog of Eligible Expenses, which will contain a list of many, but not necessarily all, of the relevant expenses in lieu of providing additional supporting documentation to justify the specific cost estimate. If an applicant believes the predetermined estimate does not fully account for its specific circumstances or a predetermined cost estimate is not provided in the Catalog of Eligible Expenses for the cost identified by the applicant, the applicant can provide its own individualized cost estimate. Applicants providing such individualized cost estimates will be required to submit supporting documentation and to certify the estimate is made in good faith.

150. Regardless of whether they are claiming predetermined cost estimates or their own individualized estimated costs, each applicant will be required to certify under penalty of perjury, inter alia, that: (1) it believes in good faith that it will reasonably incur all of the estimated costs that it claims as eligible for reimbursement; (2) it will use all money received from the Reimbursement Program only for expenses it believes are eligible for reimbursement; (3) it will comply with all policies and procedures relating to allocations, draw downs, payments, obligations, and expenditures of money from the Reimbursement Program; (4) it will maintain for 10 years detailed records, including receipts, of all costs eligible for reimbursement actually incurred; and (5) it will file all required documentation for its

<sup>440</sup> See Blue Danube Second Further Notice Reply at 6.

<sup>441</sup> Secure Networks Act § 4(d)(6)(A).

<sup>442</sup> *Id.* § 4(d)(2)(A)-(B).

<sup>443</sup> *Id.* § 4(d)(2)(B).

<sup>444</sup> *Id.* § 4(d)(2)(B), (d)(4).

<sup>445</sup> See *supra* Section III.E.2.b; NetNumber Sec. 4 PN Comments at 9-10 (“The Commission should consider issuing a cost catalog with preapproved reimbursement amounts, allowing service providers to better scale replacements based on network size and account for network design their replacement projects.”).

expenses.<sup>446</sup> We will also require applicants to provide detailed information on the covered communications equipment or services they are removing, replacing, and disposing to assist the Commission in evaluating whether the estimated costs reported are reasonably incurred.

151. For entities that choose to provide their own cost estimate, i.e., either a cost estimate higher than the predetermined cost estimate or an individualized cost estimate for an expense for which the Commission does not provide a predetermined cost estimate, the Wireline Competition Bureau will review the required justification for the estimate and may accept it or substitute a different amount for purposes of calculating the initial allocation.<sup>447</sup> The Wireline Competition Bureau may ultimately determine, based on its reasonableness review, that an applicant should receive a different allocation from that claimed on the application.

### c. Funding Allocation Stage

152. After an applicant submits estimated cost forms, the Wireline Competition Bureau will review them to determine completeness, the applicant's eligibility for reimbursement, and the reasonableness of the cost estimates provided, and will allocate funding accordingly for draw down by applicants. The funding amount allocated represents the maximum amount eligible for draw down by an eligible provider unless a subsequent funding allocation is made. This approach is consistent with the suggestion of NetNumber to "cap reimbursement for service providers at their estimated replacement costs for covered equipment and services in their networks."<sup>448</sup>

153. Per the Secure Networks Act, the Wireline Competition Bureau must act on applications within 90 days of submission.<sup>449</sup> If there is an excessive number of applications, the Wireline Competition Bureau can extend this deadline by no more than 45 days.<sup>450</sup> Applicants are allowed a 15-day period to cure a material deficiency in the application as determined by the Wireline Competition Bureau "(including by lacking an adequate cost estimate or adequate supporting materials) . . . before

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<sup>446</sup> Similar certifications were required by the Commission with the broadcast incentive auction reimbursement mechanism. *Incentive Auction Order*, 29 FCC Rcd at 6818, para. 612. In addition, a 10-year record retention requirement is consistent with the record keeping required for the broadcast incentive auction reimbursement program. *Id.* at 6825, para. 634.

<sup>447</sup> The Commission is statutorily authorized to require applicants to update initial cost estimates and/or submit additional supporting cost estimate materials. Secure Networks Act § 4(d)(2)(B)(ii). If the applicant has already incurred costs eligible for reimbursement, e.g., the applicant already started transitioning its network prior to the acceptance of applications, then it should report its actual expenses with supporting documentation and indicate which costs are actual and not estimated in its submission. Doing so will allow the Wireline Competition Bureau to factor in the actual costs when determining the funding allocation.

<sup>448</sup> The funding amount allocated represents the maximum amount eligible for draw down by an eligible provider unless a subsequent funding allocation is made. This approach is consistent with the suggestion of NetNumber to "cap reimbursement for service providers at their estimated replacement costs for covered equipment and services in their networks." NetNumber Sec. 4 PN Comments at 9.

<sup>449</sup> Secure Networks Act § 4(d)(3)(A)(i). For purposes of calculating the 90-day deadline, we will consider the date of submission as the date on which the filing window closes for accepting reimbursement requests. This approach is consistent with our historical treatment of applications submitted during a filing window as all being filed on the last day of the filing window. See, e.g., *Incentive Auction Task Force and Media Bureau Announce Procedures for the Post-Incentive Auction Broadcast Transition*, MB Docket No. 16-306 et al., Public Notice, 32 FCC Rcd 858, para. 36 (IATF/MB 2017) ("Applications filed during either the first priority window or second window will be treated as filed on the last day of that window for purposes of determining mutual exclusivity."). A filing window also allows the Wireline Competition Bureau to efficiently review and act on applications in batch and not in piecemeal fashion, and is necessary to manage demand for funding.

<sup>450</sup> Secure Networks Act § 4(d)(3)(A)(ii). After the initial filing window closes, we expect the Wireline Competition Bureau to release a public notice announcing the applications accepted for filing and indicate whether an extension of time of up to 45 days to review applications is justified.



denying the application.<sup>451</sup> The Wireline Competition Bureau will notify Applicants of material deficiencies via Public Notice. If the 15-day cure period, “would extend beyond the deadline . . . for approving or denying the application, such deadline shall be extended through the end of such period.”<sup>452</sup> If the Wireline Competition Bureau denies the application, the filer will be allowed to resubmit its application or submit a new filing at a later date.<sup>453</sup> Once the Wireline Competition Bureau completes its review, it will issue an allocation from the Program to the provider, which will be available to the provider to draw down as expenses are incurred.

**d. Prioritization if Demand Exceeds Supply**

154. The Commission has requested Congress to appropriate \$2,000,000,000 to fund the Reimbursement Program.<sup>454</sup> To date, Congress has not yet appropriated any funds. Even if the eventual appropriation is substantial, the potential exists for the costs reasonably incurred for the removal, replacement, and disposal of covered communications equipment or services to exceed the funding appropriated. ETCs with two million or fewer customers reported in the Commission’s Supply Chain Security Information Collection that it would cost \$1.62 billion to remove and replace Huawei and ZTE equipment in their networks.<sup>455</sup> And this figure does not account for other providers of advanced communications service that would be eligible to participate in the reimbursement program.

155. In the *2019 Supply Chain Further Notice*, the Commission sought comment on whether “[t]o best target available funds,” the Commission should “prioritize[] payments for the replacement of certain equipment and services that are identified as posing the greatest risk to the security of networks, and what categories of equipment and services should that prioritization include.”<sup>456</sup> The Commission also sought comment on whether to “cap the amount eligible for each individual funding request.”<sup>457</sup> In the subsequently enacted Secure Networks Act, Congress did not provide for, or expressly prohibit, any funding prioritization scheme. The statute does instruct the Commission to “make reasonable efforts to ensure that reimbursement funds are distributed equitably among all applicants . . . according to the needs of the applicants, as identified by the applications of the applicant.”<sup>458</sup> The Commission is also required to notify Congress on the need for additional funding should anticipated demand exceed \$1 billion.<sup>459</sup> The Wireline Competition Bureau sought further comment on the impact of the Secure Networks Act on the proposed reimbursement program in April 2020.<sup>460</sup> Only three parties commented on this issue with

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<sup>451</sup> *Id.* § 4(d)(3)(B). The statute states that “[i]f such period would extend beyond the deadline . . . for approving or denying the application, such deadline shall be extended through the end of such period.” *Id.*

<sup>452</sup> *Id.* § 4(d)(3)(B).

<sup>453</sup> *See id.* § 4(d)(3)(C). Resubmitted applications previously denied or new applications from filers of previously denied applications will be subjected to a subsequent filing window if there is available funding. If we were to process such filings as part of the applications submitted in the initial filing window, it would delay the award of funding allocations as the Commission must ensure aggregate demand does not exceed the available funds before issuing all allocations for requests filed in the initial filing window.

<sup>454</sup> *See* FCC Chairman Ajit Pai, Testimony to U.S. Senate Committee on Appropriations, Subcommittee on Financial Services and General Government, Oversight of the Federal Communications Commission Spectrum Auctions Program, Fiscal Year 2021 (June 16, 2020) (FCC Chairman Pai Written Testimony), <https://docs.fcc.gov/public/attachments/DOC-364949A1.pdf>.

<sup>455</sup> *Supply Chain Information Collection Results*, WC Docket No. 18-89, Public Notice, 35 FCC Rcd 9471, 9472 (OEA/WCB rel. Sept. 4, 2020).

<sup>456</sup> *2019 Supply Chain Further Notice*, 34 FCC Rcd at 11475, para. 137.

<sup>457</sup> *Id.* at 11477-78, para. 146.

<sup>458</sup> Secure Networks Act § 4(d)(5).

<sup>459</sup> *Id.* § 4(d)(5)(B).

<sup>460</sup> *See Section 4 Public Notice*, 35 FCC Rcd at 3494-95.

WTA generally supporting the prioritization of ETCs receiving USF support over other providers, NetNumber suggesting we use funding caps based on the type of service provider and the nature of the project, and RWA asking us to prorate reimbursement where each recipient gets a set percentage of the appropriated funding.<sup>461</sup>

156. We decide to establish a prioritization paradigm in the event the estimated costs for replacement submitted by the providers during the initial or any subsequent filing window in the aggregate exceed the total amount of funding available as appropriated by Congress for reimbursement requests. We find prioritization preferable to the alternatives suggested by NetNumber and RWA. Capping fund amounts depending on the nature of the removal, replacement, and disposal project and service provider type presents added complexity to the allocation process and fails to ensure demand will not exceed the total amount of available funding as the number of requests are unlimited.<sup>462</sup> We also find that prorating support equally among all participants based on a set percentage of available funding, as the only means of allocating support, fails to account for the individual needs of the applicants and runs counter to the directive in the Secure Networks Act.<sup>463</sup>

157. Under the prioritization scheme we adopt, we will first allocate funding to eligible providers that are ETCs subject to a remove-and-replace requirement under the Commission's rules.<sup>464</sup> If funding is insufficient to meet the total demand from this subcategory of eligible providers, then we will prioritize funding for transitioning the core networks of these eligible providers before allocating funds to non-core network related expenses, including reasonable costs incurred for removing, replacing, and disposing of a provider's radio access network.<sup>465</sup> If after allocating support to ETCs for both core and non-core network expenses funding is still available, we will then allocate funding to non-ETC eligible provider applicants, prioritizing those non-ETCs that provided cost estimate data in response to the Commission Supply Chain Security Information Collection over other non-ETCs. We will further prioritize funding for core network transition costs over non-core network transition costs within each non-ETC category. If available funding is insufficient to satisfy all requests in a certain prioritization category, then we will prorate the available funding equally across all requests falling in that category.

<b>Funding Prioritization Categories</b>	
<b>Priority 1</b> Advanced communications service providers with 2 million or fewer customers that are Eligible Telecommunications Carriers subject to section [54.11] (new removal and replacement requirement).	<b>Priority 1a*</b> Costs reasonably incurred for transitioning core network(s).
	<b>Priority 1b*</b> Costs reasonably incurred for non-core network transition.

<sup>461</sup> See NetNumber Sec. 4 PN Comments at 9; RWA Sec. 4 PN Comments at 7; RWA Sec. 4 PN Reply at 5-6; WTA Further Notice Comments at 8-10.

<sup>462</sup> NetNumber suggests we use funding caps but ensure "fair compensation for the full deployment cost for replacement equipment." NetNumber Sec. 4 PN Comments at 9. If there is no limit on the number of requests filed, then NetNumber's approach could lead to a funding deficit as the total demand, even when using a capped funding approach, could exceed the total amount of available funding.

<sup>463</sup> See Secure Networks Act § 4(d)(5)(A).

<sup>464</sup> See *supra* Section III.A.1.

<sup>465</sup> The Catalog of Eligible Expenses cost catalog will include additional detail as to what are considered core and non-core network related expenses.

<b>Funding Prioritization Categories</b>	
<b>Priority 2</b> Non-ETC providers of advanced communications service with 2 million or fewer customers that participated in the Supply Chain Security Information Collection, OMB Control No. 3060-1270.	<b>Priority 2a*</b> Costs reasonably incurred for transitioning core network(s).
	<b>Priority 2b*</b> Costs reasonably incurred for non-core network transition.
<b>Priority 3</b> Other non-ETC providers of advanced communications service with 2 million or fewer customers.	<b>Priority 3a*</b> Costs reasonably incurred for transitioning core network(s).
	<b>Priority 3b*</b> Costs reasonably incurred for non-core network transition.

\*If available funding is insufficient to satisfy all requests in this prioritization subcategory, then prorate the funding available equally among all requests in subcategory.

158. In considering prioritization of funding, we interpret the Secure Networks Act as requiring the Commission to make reasonable efforts to treat all applicants on a just and fair basis while accounting for the applicants' individual circumstances.<sup>466</sup> Accordingly, the Commission may find some applicants have a greater and more urgent need for funding than other applicants. We thus do not interpret the statute as requiring equal funding or treatment but instead requiring the Commission to make reasonable efforts to treat similarly situated applicants fairly.

159. While the presence of covered communications equipment or services threatens network security for all eligible providers equally, we find ETCs who are receiving USF support stand in a different position vis-à-vis other providers. Congress and the Commission have undertaken significant efforts over the twenty-plus years to subsidize the costs of ETCs to provide service in high-cost, hard-to-serve areas to facilitate universal access to essential telecommunications and broadband services to all Americans.<sup>467</sup> And these efforts have borne fruit, resulting in the affordable availability of essential communications services for hard-to-reach Americans. ETCs in many instances represent the only provider of such services in the most rural areas of our country.<sup>468</sup> Accordingly, we find the protection of ETC networks—networks which are funded through USF and serve on the front lines of providing

<sup>466</sup> *Equitable*, Black's Law Dictionary (11th ed. 2019) (defining "equitable" as "[j]ust; consistent with principles of justice and right").

<sup>467</sup> See 2019 Universal Service Monitoring Report, at 21, Table 1.10 (Feb. 4, 2020) (detailing the billions of dollars distributed each year from 2001-2018 for the various USF programs), <https://docs.fcc.gov/public/attachments/DOC-362272A1.pdf>.

<sup>468</sup> See, e.g., *Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 5949, 5968, 5999, paras. 51, 141 (2016) (limiting Phase II auction support eligibility to ETCs in census block areas not served with voice and broadband of at least 10/1 Mbps by any provider).

universal service—from national security threats to be of the utmost importance.<sup>469</sup>

160. Perhaps most significantly, in this Order we require ETCs receiving universal service support to remove covered equipment and services from their networks.<sup>470</sup> Failure to comply will result in the loss of future universal service funding. ETCs, which often provide service in areas where providers are less likely to be able to recover their costs from subscribers, are more sensitive to the possibility that they could lose universal service funding. ETCs thus face greater consequences than non-ETC providers if the transition does not occur in a timely manner. The potential for enforcement liability or reduced universal service funding further distinguishes ETCs from the circumstances of other applicants.<sup>471</sup> Based on these factors, we find there is a greater urgency to expeditiously accommodate the transition of ETC networks over other applicants. Accordingly, if initial funding is insufficient to satisfy reimbursement requests, we will first prioritize funding to ETCs over non-ETC applicants.<sup>472</sup>

161. Among non-ETC applicants, we will further prioritize funding, as recently suggested by RWA, to first allocate funding to those non-ETCs that voluntarily provided cost estimate data in response to the Supply Chain Security Information Collection over other non-ETC applicants.<sup>473</sup> The estimated cost to remove and replace covered equipment as reported by the Supply Chain Security Information Collection participants with two million or fewer customers totaled \$1.62 billion with costs reported by all filers totaling \$1.84 billion.<sup>474</sup> This number includes data reported not only by ETCs required to report but also non-ETCs that were encouraged to report on a voluntary basis.<sup>475</sup> The Commission asked Congress to appropriate \$2 billion in funding for the Reimbursement Program, taking into account the cost data collected in the Supply Chain Security Information Collection.<sup>476</sup> If Reimbursement Program demand were to substantially exceed \$2 billion in appropriated funding due to the emergence of providers not participating in the Supply Chain Security Information Collection, then those non-ETCs that

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<sup>469</sup> See WTA Further Notice Comments at 8-9 (“The Commission should also implement an approach that not only improves network security but also advances the principles of Universal Service. It is critical that the Commission preserve and whenever possible increase recent gains in rural coverage while replacing covered equipment.”). PTA-FL does not expressly advocate an alternative prioritization approach but notes, without citing any statistics, that some non-ETCs are also sole source providers. Letter from Donald Evans, Counsel for PTA-FL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-89, at 2 (filed Dec. 1, 2020). PTA-FL also states non-ETCs have a greater need for reimbursement support than ETCs because their covered equipment was acquired without using USF support. *Id.* Notwithstanding these assertions, the Commission has made a substantial investment to help ETCs provide service in areas where the economics often do not support viable service offerings. Facing the possibility of service disruptions absent continued support due to the remove-and-replace prohibition we adopt today, we find, notwithstanding PTA-FL’s recent filing, that ETCs stand in a different position than non-ETCs, justifying a prioritization in the allocation of reimbursement support.

<sup>470</sup> See *supra* Section III.A.

<sup>471</sup> See WTA Further Notice Comments at 10 (“[T]he Commission should place a priority on assisting carriers that will be immediately impacted by its USF prohibition and will need to remove the equipment in order to continue receiving USF throughout the rest of their network . . .”).

<sup>472</sup> By adopting a prioritization scheme, we decline to follow the suggestions of RWA to grant an equitable percentage of funding to all applicants “proportionate to need . . . if there is an insufficient amount of funds initially appropriated.” RWA Sec. 4 PN Comments at 7; RWA Sec. 4 PN Reply at 5-6. We will, however, pro rate funding within a prioritization subcategory if insufficient funds remain for all requests in the subcategory.

<sup>473</sup> See RWA Nov. 27, 2020 *Ex Parte* at 1; Notice of Office of Management and Budget Action for Control No. 3060-1270 (Feb. 12, 2020) (approving supply chain information collection), [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201912-3060-014#](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201912-3060-014#).

<sup>474</sup> *Supply Chain Information Collection Results*, 35 FCC Rcd at 9472.

<sup>475</sup> See *2019 Supply Chain Order*, 34 FCC Rcd at 11482, para. 166.

<sup>476</sup> See FCC Chairman Pai Written Testimony, <https://docs.fcc.gov/public/attachments/DOC-364949A1.pdf>.

participated voluntarily in the collection could go without or with reduced funding simply because the costs of non-participating non-ETCs were not reported, and thus not considered. We find this result inequitable. Accordingly, we will prioritize funding for participating non-ETCs over other non-ETCs.

162. If funding proves insufficient to meet the estimated reimbursement costs reasonably incurred for ETCs or non-ETCs, we will further prioritize funding for expenses to transition the core networks of providers over non-core network expenses.<sup>477</sup> Commenters indicate replacing the core network is the logical first step in a network transition and may have the greatest impact on eliminating a national security risk from the network. For example, CCA states “[t]he core is where the routing functions and ‘intelligence’ resides in today’s networks, so starting with the core is a natural step both in transitioning networks and prioritizing any national security risks.”<sup>478</sup> WTA also notes that “limiting removal and replacement to core equipment could save the transition time and money as the equipment that is least likely to be a threat is on the edge of the network.”<sup>479</sup> While we believe having covered communications equipment and service in any portion of the network poses a national security risk, we agree that prioritizing funding for core network transition expenses makes sense logically from a network migration standpoint and will greatly mitigate risks in the network.<sup>480</sup> Accordingly, we instruct the Wireline Competition Bureau to further prioritize the allocation of funding among applicants.

163. If available funding is insufficient to satisfy all funding requests in a prioritization subcategory, we will prorate funding among all requests in the subcategory to ensure that total funding allocated does not exceed the funding available. Specifically, the Wireline Competition Bureau will reduce each applicant’s funding allocation request by an equal percentage to bring down the total funding allocation within the available support limit. This process will thus result in the equitable distribution of funding among applicants within the prioritization subcategory, consistent with the statute, while still allocating more funding to those applicants with higher transition costs.<sup>481</sup> The Wireline Competition Bureau will determine a pro-rata factor by dividing the total amount of available funding by the total amount of funding requested. The Wireline Competition Bureau will then multiply the pro-rata factor by the total amount of support requested by each applicant and will allocate funds to each eligible applicant in the prioritization subcategory consistent with this calculation. The net result is each eligible applicant in that subcategory will receive less support than requested by the same pro-rata factor to bring the overall support amount committed within the applicable limit.

164. Following the acceptance of applications submitted during the relevant filing window, the Wireline Competition Bureau will assess the aggregate demand of the applications filed during the applicable filing window to determine whether demand exceeds available funding, thereby triggering the

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<sup>477</sup> See “Core Network Layer: Explained,” Carritech Telecommunications, <https://www.carritech.com/news/core-networks/> (“Typically, in telecommunication networks, the term ‘core’ is used by service providers and refers to the high capacity communication facilities that connect primary nodes. A core/backbone network provides paths for the exchange of information between different sub-networks.”) (last visited Nov. 2, 2020). To demarcate core network transition and non-core network transition expenses, applicant will need to report estimated costs for such activities separately in their submission.

<sup>478</sup> Letter from Alexi Maltas, Senior V.P. and General Counsel, CCA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-89, at 1 (filed Aug. 27, 2020).

<sup>479</sup> WTA Sec. 4 PN Comments at 4-5.

<sup>480</sup> SNC states that replacing the core without also replacing the radio access network may raise interoperability issues but such concerns do not dissuade us from finding that funding is best prioritized to most efficiently address national security risks by first assisting with the replacement of the core network over a provider’s radio access network when demand exceeds available funding. SNC Dec. 2, 2020 *Ex Parte* at 2.

<sup>481</sup> Secure Networks Act § 4(d)(5).

need for funding prioritization.<sup>482</sup> The Wireline Competition Bureau will need to account for the administrative cost of operating the reimbursement program when assessing aggregate demand to the extent such costs are funded by a congressional appropriation and do not count towards funding available for reimbursement requests.

**e. Funding Disbursement Stage**

165. Following the allocation of funds to eligible providers and after eligible providers incur actual costs, they will need to file reimbursement claims along with any required supporting invoices and other cost documentation, as directed by the Wireline Competition Bureau, to obtain reimbursement funds from their allocation. Entities may, and likely will, submit multiple reimbursement requests as they incur expenses throughout the reimbursement period. The Wireline Competition Bureau will review reimbursement claims to ensure that disbursements are made only for costs reasonably incurred.

166. If an actual cost exceeds the estimated cost for a particular line item, the program participant will need to note the nature of the variation in the reimbursement claim filing, e.g., the recipient had to change equipment vendors resulting in higher replacement costs than estimated. We understand the difficulty in accurately estimating costs and expect some degree of variation between estimated and actual costs. Ultimately, while we will exercise some degree of flexibility with such variations, the Reimbursement Program participant cannot draw down more than the total funding amount allocated to it and can only receive reimbursement for reasonable costs incurred. If a recipient's costs exceed the funding allocation, then the recipient will need to seek an additional allocation of funding, if funding remains available.

167. To ensure the timely use of allocated funds as intended, we will require recipients to submit all applicable reimbursement claims by a set date following the expiration of the term for completing the removal, replacement, and disposal of covered communications equipment and services.<sup>483</sup> Without a deadline, outstanding funding would have to remain allocated indefinitely to satisfy possible future reimbursement claims filed for actual expenses incurred even if the recipient had no intention of filing any future claims. The effect would be to essentially strand funding and prevent the reallocation of unused funds to other Reimbursement Program participants. Imposing a deadline for the filing of reimbursement claims will address these concerns.

168. The Commission recently imposed a deadline on the filing of invoices to receive committed funds in the Rural Health Care Program to address similar concerns.<sup>484</sup> In that proceeding, the Commission found an invoicing deadline of 120 days following the expiration of the one-year service delivery deadline, with the possibility of a one-time 120 day extension, sufficient to give program participants time to submit claims for expenses incurred while still providing the certainty needed for the efficient de-obligation of funding for use by future program participants.<sup>485</sup> For the same reasons, we will

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<sup>482</sup> In conducting this assessment, the Wireline Competition Bureau should make a cursory review of the applications to determine if any requests are clearly ineligible for funding, e.g., equipment to be removed is not on the Covered List ineligible or there appears to be a duplicate request from an applicant, and should not be included in the aggregate demand assessment. Per the Secure Networks Act, the Commission must give applicants a 15-day period to cure any material defect in the application before denying the application. Secure Networks Act § 4(d)(3)(B). This cursory review to eliminate clearly ineligible or erroneous applications will help to ensure a more accurate assessment of aggregate demand to determine whether to apply funding prioritization.

<sup>483</sup> See Appx. A, § 1.50004(g)(2).

<sup>484</sup> See *Promoting Telehealth in Rural America*, WC Docket No. 17-310, Report and Order, 34 FCC Rcd 7335, 7422-23, paras. 188-91 (2019). The Commission similarly adopted an invoicing deadline for the E-Rate Program. See *id.* at 7423, para. 189 (“The Commission previously found in the E-Rate context that a uniform . . . invoice deadline provides the right balance between the need for efficient administration of the program and the need to ensure applicants and service providers have sufficient time to finish their own invoicing processes.”).

<sup>485</sup> 47 CFR § 54.627(a)-(b); *Promoting Telehealth in Rural America*, 34 FCC Rcd at 7423, paras. 189-90.

apply the approach used in the Rural Health Care Program to the Reimbursement Program. Recipients are required to file all reimburse claims within 120 days following the expiration of the removal, replacement, and disposal term. Prior to the expiration of the 120-day deadline, recipients can request and receive a 120-day extension of the reimbursement claim deadline, if timely requested. After the expiration of the reimbursement claim deadline, any allocated but as-yet unclaimed funds will revert automatically to the Reimbursement Program for reallocation to other participants pursuant to a future filing window.<sup>486</sup>

**f. Removal, Replacement, and Disposal Term**

169. The Secure Networks Act requires, unless there is an extension provided for by the statute, Reimbursement Program recipients to complete the removal, replacement, and disposal of covered communications equipment or service “not later than 1 year after the date on which the Commission distributes reimbursement funds to the recipient.”<sup>487</sup> We conclude the one year window for project completion commences when the applicant makes the initial draw down disbursement of funding during the funding distribution stage. Thus, the one-year deadline will vary among recipients depending on when each recipient chooses to accept its initial draw down disbursement. We find this approach most accurately complies with a straight-forward reading of the statute and that it provides applicants a substantial amount of control over when the one-year window opens since the applicant chooses when to accept the initial draw-down.

170. We recognize there is concern among providers that the network transition process will likely take more than a year to complete.<sup>488</sup> Congress has made clear its intent, however, and we lack discretion to deviate from what the statute requires. By tying the completion term to the actual initial disbursement of funds, we adhere to the statutory requirement but also provide some flexibility to applicants.<sup>489</sup> At the same time, we acknowledge applicants may defer taking their initial disbursement to further delay commencement of the one-year deadline. Such actions, in turn, may delay the network transitions to remove, replace, and dispose of equipment and service posing a national security risk. To ensure the efficient and expeditious use of funding to facilitate network transitions, we will require recipients to file to receive their initial disbursement within [one year] of receiving the funding allocation approval. Failure to file for an initial disbursement within one year of receipt of funding allocation approval will result in the automatic reversion of the funding allocation to the program fund for reallocation to other or future program participants.

171. *Term Extensions.* The Secure Networks Act authorizes the Commission to grant extensions of time to complete the removal, replacement and disposal of covered communications

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<sup>486</sup> If a petition for an extension of the removal, replacement, and disposal term is pending when the term expires, then automatic reversion of the unallocated funds is stayed until, and if, the extension request is denied. Additional details on the removal, replacement, and disposal term, and extensions thereof, are provide in the subsequent section.

<sup>487</sup> Secure Networks Act § 4(d)(6).

<sup>488</sup> See, e.g., NetNumber Sec. 4 PN Comments at 10 (“Core network infrastructure projects typically run from 6-8 months to as long as 12-18 months.”); RWA Sec. 4 PN Comments at 11 (“There exists a litany of reasons as to why compliance with a 12-month timeframe to project starting when providers initially receive funding is difficult to achieve for carriers in many rural areas.”); RWBC Sec. 4 PN Comments at 3-4 (“Meeting the one-year deadline for the removal, replacement, and disposal of covered equipment will present numerous and insurmountable challenges for small wireless carriers.”).

<sup>489</sup> Because the Commission has declined to use a milestone-based phased funding approach, the suggestion to commence the one-year project deadline to the final disbursement is unworkable. See NetNumber Sec. 4 PN Comments at 10 (“[T]he Reimbursement Program should allow for phased milestones and corresponding reimbursements to better manage larger-scale replacement projects while adhering to Section 4’s timeline requirements.”).

equipment and service.<sup>490</sup> The Commission may grant a “general” six-month extension “to all recipients of reimbursements . . . if the Commission: (i) finds that the supply of replacement communications equipment or services needed by the recipients to achieve the purposes of the Program is inadequate to meet the needs of the recipients; and (ii) provides notice and a detailed justification for granting the extension to” Congress.<sup>491</sup> The Commission is also authorized to grant “individual” extensions on a case-by-case basis to program recipients pursuant to petition for a period of time of up to six months.<sup>492</sup> To grant an individual extension, the Commission must find that, “due to no fault of such recipient, such recipient is unable to complete the permanent removal, replacement, and disposal.”<sup>493</sup> According to the legislative history, “[t]he Committee expects the Commission to not find it the fault of a recipient of the program if such recipient has a shortage of qualified workers, either employees or contracted third-parties, to complete the removal of covered equipment and replacement of new equipment under the timeframe established.”<sup>494</sup>

172. The general extension provision authorizes the Commission to issue *sua sponte* a one-time six-month extension to all program recipients.<sup>495</sup> Following the funding allocation stage, we direct the Wireline Competition Bureau to assess the supply of replacement equipment in the marketplace. We expect the Wireline Competition Bureau, in making this assessment, to account for the information reported by program recipients in the status updates filed as required by the Secure Networks Act.<sup>496</sup> The Wireline Competition Bureau shall inform the Commission of its assessment in a timely manner so as to give the Commission sufficient time to provide notice and justification to Congress and to issue a general extension of time before the initial one-year deadline expires for program recipients.

173. In reading the statutory provision on individual extensions, we agree with commenters who assert that the provision allows the Commission to grant more than one extension to a recipient. The Secure Networks Act states that the Commission may grant a petition for an extension, but does not provide any direct limit as to the number of extensions that may be granted.<sup>497</sup> Instead, the only limit to granting an extension is whether the Commission finds that, “due to no fault of such recipient, such recipient is unable to complete the permanent removal, replacement, and disposal.”<sup>498</sup> We interpret this language to mean that we may grant more than one individual extension as factors beyond the control of an applicant may exist for more than six months, an interpretation endorsed by all commenters.<sup>499</sup> We also agree with commenters that the Commission may not issue a single, across-the-board extension that

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<sup>490</sup> Secure Networks Act § 4(d)(6)(B)-(C).

<sup>491</sup> *Id.* § 4(d)(6)(B).

<sup>492</sup> *Id.* § 4(d)(6)(C).

<sup>493</sup> *Id.* § 4(d)(6)(C)(ii).

<sup>494</sup> House Rep. No. 116-352, at 14.

<sup>495</sup> Interpreting this provision to allow for more multiple general six month extensions for all participants without regard to the circumstances of each individual applicant would seem to run counter to the intent of Congress of having a one-year term deadline and would seem to moot, or at least significantly diminish, the need for, or relevance of allowing, individual extensions.

<sup>496</sup> *See* Secure Networks Act § 4(d)(8).

<sup>497</sup> *Id.* § 4(d)(6)(C).

<sup>498</sup> *Id.* § 4(d)(6)(C)(ii).

<sup>499</sup> CCA Sec. 4 PN Comments at 7; PRTC Sec. 4 PN Comments 8; RWA Sec. 4 PN Comments at 12; RWBC Sec. 4 PN Comments 9-10; WTA Sec. 4 PN Comments at 6. We also agree with commenters that the statute specifically allows the Commission to grant both a general and individual extensions if the circumstances warrant. *See* CCA Sec. 4 PN Comments at 7; Secure Networks Act § 4(d)(6)(c)(ii).



exceeds six months.<sup>500</sup> We believe this is an important safety valve for recipients to complete their network transitions. We direct the Wireline Competition Bureau to address petitions for extensions in the first instance consistent with the following principles. In order to ensure prompt replacement in accordance with the goals of the Act, petitions for extension will only be granted where the program recipient demonstrates the delay is due to factors beyond its control. In making this determination, we direct the Wireline Competition Bureau to be guided by the Commission's precedent in dealing with similar requests involving wireless facilities under section 1.946 of the Commission's rules.<sup>501</sup> We encourage the Wireline Competition Bureau to provide guidance as necessary to program recipients to help them in seeking an extension of time.<sup>502</sup>

174. *Applicability of USF Support Certification Requirement.* The new remove-and-replace rule that we adopt today requires ETCs to certify prior to receiving USF support that they do not use equipment or services identified on the Covered List.<sup>503</sup> The Commission recognizes Reimbursement Program recipients will likely need to utilize their existing covered communications equipment or service on a temporary basis during the transition process to mitigate service disruptions for existing customers.<sup>504</sup> Accordingly, Reimbursement Program recipients are not subject to the new certification requirement until after the expiration of their removal, replacement, and disposal term.<sup>505</sup> However, once the term has expired, the provider will be subject to the certification requirement going forward when seeking to obtain USF support.

175. *Effect of Removal from the Covered List.* The Secure Networks Act provides a process for addressing situations when communications equipment or service is removed from the Covered List following the filing of an application for reimbursement.<sup>506</sup> If this situation occurs, then according to the Secure Networks Act, an applicant may either: (1) return the reimbursement funds received and be released from any further removal, replacement, and disposal requirements; or (2) retain the reimbursement funds received and remain subject to the applicable removal, replacement, and disposal requirements.<sup>507</sup> For purposes of the Reimbursement Program established today, we interpret this statutory provision to mean that if the Covered List removal occurs after an application is filed and approved, then we will give the applicant the option to either proceed with or withdraw from the Reimbursement Program altogether. If withdrawing, then the applicant would need to notify the

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<sup>500</sup> CCA Sec. 4 PN Comments at 7; RWBC Sec. 4 PN Comments 9-10; RWA Sec. 4 PN Comments at 12; WTA Sec. 4 PN Comments at 6; PRTC Sec. 4 PN Comments 8.

<sup>501</sup> Section 1.946(e) allows for extensions of time "if the licensee shows that failure to meet the construction or coverage deadline is due to involuntary loss of site or other causes beyond its control." 47 CFR § 1.946(e)(1). The rule further provides that "[e]xtension requests will not be granted for failure to meet a construction or coverage deadline due to delays caused by a failure to obtain financing, to obtain an antenna site, or to order equipment in a timely manner. If the licensee orders equipment within 90 days of its initial license grant, a presumption of diligence is established." 47 CFR § 1.946(e)(2). The rule further provides that "[e]xtension requests will not be granted for failure to meet a construction or coverage deadline because the licensee undergoes a transfer of control or because the licensee intends to assign the authorization. The Commission will not grant extension requests solely to allow a transferee or assignee to complete facilities that the transferor or assignor failed to construct." 47 CFR § 1.946(e)(2).

<sup>502</sup> This addresses the request of CCA, asking the Commission to provide clear guidance on how it will implement the provision on individual extensions and what will be expected from applicants to satisfy an extension request. See CCA Aug. 3, 2020 *Ex Parte* at 3.

<sup>503</sup> See *supra* Section III.A.4.

<sup>504</sup> See CCA Sec. 4 PN Comments at 5; RWA Sec. 4 PN Comments at 10; WTA Sec. 4 PN Comments at 4, 6.

<sup>505</sup> See Appx. A, § 54.11(d).

<sup>506</sup> Secure Networks Act § 4(f).

<sup>507</sup> *Id.* § 4(f)(1).

Commission as such and return any reimbursement funds previously disbursed to the Commission where applicable.<sup>508</sup> If continuing with the Reimbursement Program, then the applicant must continue to comply with all applicable program requirements and obligations. Per the Secure Networks Act, if a program recipient needs an “assurance” as to whether the reimbursement funds have been returned, then “the assurance may be satisfied [by the recipient] making an assurance that such funds have been returned.”<sup>509</sup>

**g. Pre-Approval of Network Transition Plans**

176. We decline to implement a preapproval process for transition plans. Both CCA and NetNumber urge the Commission to provide a mechanism by which providers can obtain an upfront approval or at least additional guidance for their network transition plans.<sup>510</sup> These commenters note the complexity of transitioning a network and explain how upfront approval and guidance would mitigate wasted time and resources on a plan the Commission ultimately does not support. The upfront approval mechanism would apparently need to precede the filing window for submitting reimbursement cost estimates.

177. Although we see the benefits of having a preapproval process, we are concerned the addition of another procedural layer will unnecessarily delay the allocation of funding for the removal, replacement, and disposal of covered communications equipment and service from the networks of eligible providers. Because of the national security implications of continuing to have insecure equipment in our communications networks, we are striving to receive applications within twelve months of the adoption of this Report and Order. Adding a processing layer to pre-approve transition plans would require building in further time for implementation and the redirection of resources to reviewing and approving transition plans, instead of immediately implementing a system to receive applications. Moreover, we will separately be providing participants with guidance on replacement equipment and cost estimates. We find the additional guidance will sufficiently help applicants in formulating their network transition plans and should alleviate the concerns the commenters express. Accordingly, we decline at this time to establish a preapproval process for transition plans as suggested by CCA and NetNumber.<sup>511</sup>

**h. Requirements on the Disposal of Covered Equipment and Services**

178. The Secure Networks Act directs the Commission to adopt regulations requiring the “disposal” of covered communications equipment and services by Reimbursement Program recipients to prevent the use of such equipment or services in the networks of advanced communications service providers.<sup>512</sup> While the act of disposing typically means to get rid of or to transfer control of something to another, we read “disposal” in connection with the statutory language “to prevent such equipment or services from being used in the networks of providers” as requiring the destruction of the equipment or service by the recipient so as to make the equipment or service inoperable and incapable of use.<sup>513</sup> We adopt a regulation consistent with our interpretation and will require recipients to dispose of covered

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<sup>508</sup> If withdrawing, any funding allocated but not yet disbursed to the applicant would automatically revert to the Commission for potential reallocation to other applicants pursuant to a subsequently established filing window.

<sup>509</sup> Secure Networks Act § 4(f)(2). That said, the Commission will provide recipients with confirmation of reimbursement funds returned.

<sup>510</sup> CCA Aug. 3, 2020 *Ex Parte* at 2; NetNumber *Ex Parte* at 2.

<sup>511</sup> For the same reasons, we decline a similar suggestion by SNC, to the extent SNC’s proposals differs from the process we adopt today, to have two separate application rounds upfront to obtain a funding allocation, *i.e.*, one to request funds for planning and another for replacement and implementation. SNC Dec. 2, 2020 *Ex Parte* at 2.

<sup>512</sup> Secure Networks Act § 4(d)(7).

<sup>513</sup> Disposal is defined as the act of disposing. Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/disposal> (defining noun “disposal”). To dispose of something means “to get rid of,” “to deal with conclusively,” “to transfer to the control of another.” Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/dispose> (defining verb “dispose”).

communications equipment and service in a manner to prevent the use of the equipment or service in the networks of other providers.<sup>514</sup>

179. We disagree with PRTC that the statute would allow the Commission to permit the transfer of covered communications equipment or service to non-U.S. providers in an operable state that would allow for use of the equipment or service in another provider's network, whether foreign or domestic.<sup>515</sup> At the same time, we agree with CCA and will allow providers to satisfy our disposal requirements "by documenting their transfer of removed equipment to third parties tasked with destruction or other disposal of the equipment."<sup>516</sup> Regardless of the method of disposal or destruction, we require participants to retain detailed documentation to verify compliance with this requirement. We expect the Wireline Competition Bureau to provide participants with additional guidance to help participants with the disposal and verification process.<sup>517</sup>

**i. Forms, Reimbursement Fund Administrator, & Education Efforts**

180. The Commission directs the Wireline Competition Bureau to create one or more forms to be used by entities to claim reimbursement from the Reimbursement Program, to report on their use of money disbursed and the status of their construction efforts, and for any other Reimbursement Program-related purposes. We also direct the Wireline Competition Bureau to establish the timing and calculate the amount of the allocations to eligible entities from the Reimbursement Program, develop a final Catalog of Eligible Expenses with the assistance of a contractor, and make other determinations regarding eligible costs and the reimbursement process. We further direct the Wireline Competition Bureau to adopt the necessary policies and procedures relating to allocations, draw downs, payments, obligations, and expenditures of money from the Reimbursement Program to protect against waste, fraud, and abuse and to protect Reimbursement Program funds in the event of bankruptcy of a support recipient.<sup>518</sup>

181. The Wireline Competition Bureau will consult with the Office of General Counsel and the Office of the Managing Director in carrying out these tasks. We also encourage the Wireline Competition Bureau to work, as necessary, with other appropriate Bureaus and Offices in implementing and maintaining the Reimbursement Program. We authorize the Wireline Competition Bureau to engage contractors to assist in the reimbursement process and the administration of the Reimbursement Program. Lastly, as required by the Secure Networks Act, we direct the Wireline Competition Bureau with the assistance of the Consumer and Governmental Affairs Bureau to "engage in education efforts with providers of advanced communications service" to encourage participation in the Reimbursement Program and to assist such providers in submitting applications.<sup>519</sup>

**4. Preventing Waste, Fraud, and Abuse**

182. The Secure Networks Act requires us to take "all necessary steps" to combat waste,

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<sup>514</sup> See Appx. A, §1. 50004(j).

<sup>515</sup> See PRTC Sec. 4 PN Reply at 9-10.

<sup>516</sup> CCA Sec. 4 PN Comments at 10; *see also* COMSovereign Sec. 4 PN Comments at 10 ("To ensure proper equipment disposal, the Commission should require carriers to utilize certified electronic recyclers and should mandate reporting and verification requirements that facilitate supply chain auditing . . .").

<sup>517</sup> See SNC Second Further Notice Reply at 10 ("The Commission must establish clear direction to the operators of how and where to dispose of the affected equipment, and, depending on the level of complexity of the process, may have to take a significant role in determining the procedures and companies involved in collecting, destroying, or otherwise disposing of the equipment.").

<sup>518</sup> We expect the Wireline Competition Bureau through the implementation process will address many of the procedural details highlighted by the Secure Networks Coalition with input as needed from the public. SNC Second Further Notice Reply at 6-7, 9-10.

<sup>519</sup> See Secure Networks Act § 4(i).

fraud, and abuse in the Reimbursement Program.<sup>520</sup> The Secure Networks Act and the associated House Report specified that these steps shall include, but are not limited to, requiring recipients to submit status updates, detailed spending reports and documentation of invoices, and conducting routine audits and random field investigations of recipients to ensure compliance with Program requirements and this Act.<sup>521</sup> We sought comment in the *Section 4 Public Notice* and the *2019 Supply Chain Second Further Notice* on these statutory obligations.<sup>522</sup> We now adopt rules to protect against the waste, fraud, and abuse of taxpayer money consistent with the Secure Networks Act.<sup>523</sup>

183. *Status Updates.* While we did not receive any comments on how to implement this statutory provision, we will proceed as directed by the Secure Networks Act and require program recipients to file a status update “once every 90 days beginning on the date on which the Commission approves an application for a reimbursement.”<sup>524</sup> Recipients must file the first report within 90 days of receiving their funding allocation. Although the statute allows us to require more frequently filed updates, we find an update every 90 days sufficient to keep the Commission informed of ongoing developments while not unduly burdening program recipients and diverting limited administrative resources away from the network transition process. These updates will help the Commission monitor the overall pace of the removal, replacement, and disposal process and whether recipients are acting consistently with the timelines provided to the Commission or whether unexpected challenges are causing delay.

184. In the update, the recipients shall report on the efforts undertaken, and challenges encountered, in permanently removing, replacing, and disposing its covered communications equipment or services. Recipients shall also report in detail on the availability of replacement equipment in the marketplace so the Commission can assess whether a general, six-month extension permitted by the statute is appropriate. The report must include a certification that affirms the information in the status report is accurate.<sup>525</sup> After the program recipient has notified the Commission of the completion of the permanent removal, replacement, and disposal of the covered communications equipment or service pursuant to a final certification, updates are no longer required.<sup>526</sup>

185. We direct the Wireline Competition Bureau to provide additional details on the filing requirements and contents for such status updates. Per the statute, we direct the Wireline Competition Bureau to publicly post on the Commission’s website the status update filings within 30 days of submission.<sup>527</sup> We further direct the Wireline Competition Bureau to prepare a report for Congress within every 180 days following the funding allocation stage. The report shall provide an update on the Commission’s implementation efforts and “the work by recipients of reimbursements . . . to permanently remove, replace, and dispose of covered communications equipment or services.”<sup>528</sup>

186. *Spending Reports.* The Secure Networks Act directs the Commission to require Reimbursement Program recipients to submit “reports regarding how reimbursement funds have been

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<sup>520</sup> See *id.* § 4(e).

<sup>521</sup> *Id.*; H.R. Rep. No. 116-352.

<sup>522</sup> *2019 Supply Chain Further Notice*, 34 FCC Rcd at 11454-55, para. 80; *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7837-38, para. 55; see also *Section 4 Public Notice*, 35 FCC Rcd 3496.

<sup>523</sup> See Appx. A, §§ 1.50004, 1.50005.

<sup>524</sup> Secure Networks Act § 4(d)(8)(A).

<sup>525</sup> See *id.* § 4(e)(4)(B).

<sup>526</sup> See *id.* § 4(e)(4) (discussing final certification).

<sup>527</sup> *Id.* § 4(d)(8)(B).

<sup>528</sup> *Id.* § 4(d)(8)(C).

spent, including detailed accounting of the covered communications equipment or services permanently removed and disposed of, and the replacement equipment or services purchased, rented, leased or otherwise obtained, using reimbursement funds.<sup>529</sup> Like status updates, spending reports help mitigate waste, fraud, and abuse by allowing the Commission to monitor the recipient's funding use to help make sure funds are spent as intended. The statute requires the filing of spending reports on a regular basis but does not otherwise indicate the filing frequency.<sup>530</sup>

187. We sought and received limited comment on the implementation of this statutory provision.<sup>531</sup> The lone commenter, the Rural Wireless Broadband Coalition, understands the benefits of having recipients file such reports but encourages the Commission to limit the filing frequency to a semi-annual basis.<sup>532</sup> According to Rural Wireless Broadband Coalition, [p]roducing these detailed accountings will be a burdensome, time-consuming exercise for small wireless carriers, requiring them to dedicate scarce resources to track, record, assemble, review, and report extensive data related to the removal, replacement, and disposal of covered equipment.<sup>533</sup>

188. We are sensitive to the reporting burden highlighted by Rural Wireless Broadband Coalition. While the removal, replacement, and disposal term is for a one-year period with possible extensions of time for up to six-months, we find that requiring filings twice a year will provide information with sufficient frequency to allow the Commission to monitor against waste, fraud, and abuse while mitigating the reporting burden on recipients. Accordingly, we will require Reimbursement Program recipients to file semiannually. Spending reports will be due within 10 calendar days after the end of January and July, starting with the recipient's initial draw down of disbursement funds and terminating once the recipient has filed a final spending report showing the expenditure of all funds received as compared to the estimated costs submitted. A final spending report will be due following the filing of a final certification by the recipient.

189. We direct the Wireline Competition Bureau to provide Reimbursement Program recipients with additional details on the filing of and information contained in the spending reports. We also direct Wireline Competition Bureau to make filed spending reports available to the public via a portal on the Commission's website. We will consider detailed accounting information on the covered communications equipment or services permanently removed and disposed of, and the replacement equipment or services purchased, rented, leased, or otherwise obtained, using reimbursement funds presumptively confidential and will withhold such disaggregated information from routine public inspection.<sup>534</sup>

190. *Final Certification.* The Secure Networks Act directs the Commission to require Reimbursement Program recipients to file a final certification "in a form and at an appropriate time to be determined by the Commission."<sup>535</sup> In the final certification, the Reimbursement Program recipient must indicate whether it has fully complied with (or is in the process of complying with) all terms and conditions of the Program and the commitments made in the application of the recipient for the

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<sup>529</sup> *Id.* § 4(e)(2).

<sup>530</sup> *Id.* § 4(e)(2).

<sup>531</sup> *Section 4 Public Notice*, 35 FCC Rcd at 3496.

<sup>532</sup> *See* RWBC Sec. 4 PN Comments at 16-17.

<sup>533</sup> *Id.*

<sup>534</sup> *See* 5 U.S.C. § 552(b)(4) (exempting from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential"); 47 CFR § 0.457(d)(2) ("In the absence of a request for non-disclosure, the Commission may . . . determine on its own motion that the materials should not be routinely available for public inspection.").

<sup>535</sup> Secure Networks Act § 4(e)(4)(A).

reimbursement; has permanently removed from the communications network of the recipient, replaced, and disposed of (or is in the process of permanently removing, replacing, and disposing of) all covered communications equipment or services that were in the network of the recipient as of the date of the submission of the application of the recipient for the reimbursement; and has fully complied with (or is in the process of complying with) the timeline submitted by the recipient.<sup>536</sup> The statute also requires the filing of an updated certification if at the time the final certification is filed, the recipient has not fully complied with and completed its obligations under the Reimbursement Program.<sup>537</sup>

191. No comments were filed addressing the final certification required by the Secure Networks Act. As we lack discretion to deviate from clear statutory requirements, we adopt a rule requiring recipients to file a final certification and updates as necessary per the statute.<sup>538</sup> We will require recipients to file the final certification within 10 calendar days of the expiration of the removal, replacement and disposal term because the final certification relates to the completion of the removal, replacement, and disposal process. The final certification will relate to the state of compliance and project completion as of the end of the removal, replacement and disposal term.<sup>539</sup> Notwithstanding the statutory allowance for a final certification update, the failure to complete the removal, replacement, and disposal process in accordance with the Reimbursement Program's requirements by the end of the removal, replacement and disposal term, as evidenced in the filing of the final certification as initially filed, may result in the assessment of fines, forfeitures, and/or other enforcement actions against the recipient. We direct the Wireline Competition Bureau to provide additional details on the filing requirements and contents for the final certification and associated updates.

192. *Documentation Retention Requirement.* Reimbursement Program recipients are required to provide documentation, including relevant invoices and receipts, to support requests for the disbursement of reimbursement funds for reasonable expenses actually incurred during the removal, replacement, and disposal process. This documentation helps the Commission assess whether funding is being used as intended for reasonable costs, helps the Commission compare actual costs to submitted estimated costs, and helps to ensure disbursements for actual costs do not exceed the recipients funding allocation. While commenters did not address document retention, we find it prudent in our effort to combat waste, fraud, and abuse to require program recipients to retain all documentation related to their requests for funding reimbursement for actual expenses incurred.<sup>540</sup> Recipients must retain the documentation for a period of 10 years after the date the final disbursement payment is received from the Reimbursement Program.<sup>541</sup> The retained documentation will assist the Commission with any subsequent investigations should an issue of waste, fraud, and abuse arise following the completion of the removal, replacement, and disposal process. A 10-year period of time for retaining documentation is consistent with the Commission's retention requirement for both the E-Rate program and the broadcast incentive auction reimbursement program and coincides with the 10-year statute of limitations under the False Claims Act.<sup>542</sup>

193. *Audits, Reviews, and Field Investigations.* In the *Further Notice* we proposed subjecting program recipients to periodic compliance audits and other inquiries, including investigations as

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<sup>536</sup> See *id.* § 4(e)(4)(A).

<sup>537</sup> See *id.* § 4(e)(4)(A)-(B).

<sup>538</sup> See Appx. A, § 1.50004(m).

<sup>539</sup> Subsequently filed final certification updates will relate to the state of compliance and project completion as of the date the update is filed.

<sup>540</sup> See Appx. A, § 1.50004(n).

<sup>541</sup> *Id.*

<sup>542</sup> See 31 U.S.C. §§ 3729-33; 47 CFR § 54.516(a); *Incentive Auction Order*, 29 FCC Rcd at 6825-26, para. 634.

appropriate, to ensure compliance with the Commission's rules and orders.<sup>543</sup> We did not receive any comments on this issue. We now direct the Office of the Managing Director, or a third-party identified by the Office of the Managing Director, to prepare a system to audit Reimbursement Program recipients to ensure compliance with our rules. Consistent with our experience regarding the Universal Service Fund, we find that audits are the most effective way to determine compliance with our rule requirements.<sup>544</sup> To facilitate audits and field investigations, we require Reimbursement Program recipients to provide consent to allow vendors or contractors used by the recipient to release confidential information to the auditor, reviewer, or other representative.<sup>545</sup> Recipients must also allow any representative appointed by the Commission to enter the premises of the recipient to conduct compliance inspections.

194. *Enforcement.* In the *Second Further Notice*, we sought comment on implementing the enforcement measures contained in section 7 of the Secure Networks Act.<sup>546</sup> We received only one comment, from CCA, on the issue. As provided for in the statute, a violation of the Secure Networks Act or a regulation adopted pursuant to this statute shall constitute a violation of the Communications Act.<sup>547</sup> In addition, as directed by the Secure Networks Act and consistent with our proposal in the *Second Further Notice* and the Secure Networks Act, we require Reimbursement Program recipients found in violation of our rules or the "commitments made by the recipient in the application for the reimbursement" to repay funds disbursed via the Reimbursement Program.<sup>548</sup> Prior to requiring repayment, the Wireline Competition Bureau will send notice<sup>549</sup> of the violation to the alleged violator<sup>550</sup> and give the alleged violator 180 days to cure the violation as required by the Secure Networks Act.<sup>551</sup> The cure period will provide alleged violators with ample time to resolve issues of non-compliance before the Commission proceeds with taking further enforcement action.<sup>552</sup>

195. Section 7(c) of the Secure Networks Act requires the Commission to take immediate action to recover all reimbursement funds awarded to a recipient if the recipient is required to repay

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<sup>543</sup> See, e.g., 47 CFR § 54.320(a); see also *2019 Supply Chain Further Notice*, 34 FCC Rcd at 11454-55, para. 80; see also *Section 4 Public Notice*, 35 FCC Rcd 3496.

<sup>544</sup> See Secure Networks Act § 4(e)(3)(A); *2019 Supply Chain Further Notice*, 34 FCC Rcd at 11454, para. 80.

<sup>545</sup> See Appx. A, § 1.50004(o).

<sup>546</sup> Secure Networks Act § 7; *Supply Chain Second Further Notice*, 35 FCC Rcd at 7838-39, para. 57-59.

<sup>547</sup> Secure Networks Act § 7(a). As such, the Commission's authority to impose fines and forfeitures pursuant to section 503 of the Communications Act and section 1.80 of the Commission's rules, 47 CFR § 1.80, will apply equally to violations of the Secure Networks Act and Commission regulation adopted pursuant to the Secure Networks Act. Potential violators are not limited to Reimbursement Program recipients but could also include consultants, vendors and contractors that assist entities participating in Reimbursement Program.

<sup>548</sup> See Secure Networks Act § 7(b)(1); *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7838-39, para. 58; Appx. A, §§ 1.50004 (providing final rule for the Reimbursement Program) and 1.50005 (providing final rule on related enforcement actions).

<sup>549</sup> See CCA Second Further Notice Comments at 8 (arguing that the foundation of enforcement regulations must be predicated on the Commission's clear guidance); see also *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7838-39, para. 58.

<sup>550</sup> See Secure Networks Act § 7(b)(2)(A); see also *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7838-39, para. 58; Appx. A, § 1.50005(b).

<sup>551</sup> See Secure Networks Act § 7(b)(2)(B). In addition to taking steps necessary to address a non-compliant situation, curing a violation may simply involve a response showing that a violation has been cured.

<sup>552</sup> See NCTA Second Further Notice Comments 11-13, 14; Dell Second Further Notice Comments at 3-4 (supports a secure information reporting and enforcement regime to facilitate industry feedback and manage cyber and other related threats to the U.S. communications supply chain); CCA Second Further Notice Comments at 8 (include in the Commission's enforcement procedures a reasonable opportunity for carriers to cure before repayment or other penalty action is triggered).

funding due to a violation.<sup>553</sup> CCA urged the Commission “to include in its enforcement procedures a reasonable opportunity for carriers to cure before repayment or other penalty action is triggered.”<sup>554</sup> The statute already provides program participants a 180-day period to cure violations prior to initiating repayment actions, and so we find going beyond what is already required unnecessary. Accordingly, consistent with our proposals in the *Second Further Notice*, we will initiate a repayment action by sending a request for repayment to the recipient immediately following the expiration of the opportunity to cure if the recipient fails to respond to the notice of violation, indicating the violation is cured.<sup>555</sup> If the alleged violator does respond to the notice but is ultimately determined by the Commission not to have cured the violation, the Commission will then request repayment following that determination.<sup>556</sup>

196. We direct the Enforcement Bureau to take all steps necessary to initiate enforcement actions against Reimbursement Program violators and to recover any outstanding repayment amounts once a violation of the Reimbursement Program is referred by the Wireline Competition Bureau to the Enforcement Bureau. Participants found to violate our rules will also be referred to “all appropriate law enforcement agencies or officials for further action under applicable criminal and civil laws.”<sup>557</sup> Any person or entity that violates the Reimbursement Program rules will also be banned from further participation in the section 4 reimbursement program, and the person or entity may also be barred from participating in other Commission programs, including Universal Service support programs.<sup>558</sup>

#### 5. Section 4(d)(1) of the Secure Networks Act – Establishment of the Replacement List

197. Section 4(d)(1) of the Secure Networks Act requires the Commission to develop a list of suggested replacements (Replacement List) for the equipment and services being removed, replaced, and destroyed.<sup>559</sup> Specifically, Congress directed the Replacement List to include “both physical and virtual communications equipment, application and management software, and services or categories of replacements of both physical and virtual communications equipment, application and management software.”<sup>560</sup> The list of suggested replacements must also be technology neutral and may not advantage the use of reimbursement funds for capital expenditures over operational expenditures.<sup>561</sup> We sought comment on how to develop the Replacement List in April 2020.<sup>562</sup>

198. Consistent with our statutory obligation, we establish, and will publish on our website, a Replacement List that will identify the categories of suggested replacements of real and virtual<sup>563</sup>

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<sup>553</sup> *Id.* § 7(c).

<sup>554</sup> CAA Second Further Notice Comments at 8.

<sup>555</sup> See Appx. A, § 1. 50(005(c); *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7839, para. 59.

<sup>556</sup> *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7839, para. 59.

<sup>557</sup> Secure Networks Act § 7(b)(1)(C).

<sup>558</sup> *Id.* § 7(b)(1)(B), (D).

<sup>559</sup> *Id.* § 4(d)(1)(A).

<sup>560</sup> *Id.* See SNC Dec. 2, 2020 *Ex Parte* at 2 (requesting that Commission include network management software on the Replacement List).

<sup>561</sup> *Id.* at § 4(d)(1)(B)

<sup>562</sup> See *Section 4 Public Notice*, 35 FCC Rcd at 3496-97.

<sup>563</sup> COMSovereign Sec. 4 PN Comments at 3 (arguing that the replacement list for communications equipment should include virtual equipment and services); see CCA Sec. 4 PN Comments at 8 (contending that virtual network equipment and services, including Open RAN and Virtual RAN, warrant further exploration, and encouraging the Commission to implement this process on a technology-neutral basis); RWA Sec. 4 PN Comments at 17 (The Commission must absolutely consider “virtual network equipment and services.” Software defined networks (SDNs) and open RAN (O-RAN) interfaces and virtualized network architecture are becoming more prevalent);

(continued....)



hardware and software equipment and services to guide of providers removing covered communications equipment from their networks.<sup>564</sup> We agree with commenters that the Secure Networks Act provides the Commission with the flexibility to choose either to create a list of suggested replacements or categories of replacements.<sup>565</sup> We also agree that the Replacement List should include categories of replacements rather than try to identify suggested replacements,<sup>566</sup> because, as commenters assert, creating a list of suggested replacements would have negative consequences, such as the Commission being seen as picking favored equipment and manufacturers and imposing *de facto* mandates of specific equipment.<sup>567</sup> We agree with commenters that we should provide carriers with the flexibility to select the equipment or services that fit their needs from categories of equipment and services.<sup>568</sup> We are wary of actions that could harm our communications networks, or result in mandatory purchases of specific equipment included on the Replacement List. We therefore will list categories of suggested replacements on the Reimbursement List.

199. Further, were we to try to identify specific equipment and services, we would risk inadvertently overlooking some equipment or manufacturers because “the number and diversity of telecommunications equipment is enormous, with varying model numbers, releases, and configurations.”<sup>569</sup> There is no available resource with such information in the record. We believe the better approach in developing the Replacement List is to identify categories of replacement equipment

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Ericsson Sec. 4 PN Comments at 8 (“Virtualized networking will allow for unprecedented specialization in security.”); ORAN Coalition Sec. 4 PN Comments at 10-11 (“[T]he list should include suppliers of Open RAN solutions and virtual network equipment and services. There is an ongoing move towards Software Defined Networking (SDN) and Network Function Virtualization (NFV) which take advantage of open and standardized interfaces); USTelecom Sec. 4 PN Reply at 3 (To the extent the Commission provides more detail around categories or types of equipment, it should include and emphasize Open RAN equipment as options that allow “networks [to] be deployed with a more modular design without being dependent upon a single supplier.”); Metaswitch Sec. 4 PN Comments at 5 (“strongly agree[ing] [that] the replacement list should include suppliers of virtual network equipment and services”).

<sup>564</sup> Secure Networks Act § 4(d)(1); *see also* COMSovereign Sec. 4 PN Comments at 4 (Before generating a list of acceptable replacement equipment and services, the Commission should clearly define criteria for inclusion for both vendors and equipment); US Telecom Sec. 4 PN Reply at 3 (arguing that the Commission should do no more than create “categories of suggested replacements” rather than detailing specific vendors or replacements); RWA Sec. 4 PN Reply at 2 (“The Secure Networks Act mandates that the Commission create either a list of suggested replacements of equipment and services or a list of categories of replacement equipment and services. Such a ‘safe list’ is mandatory”); CTIA Sec. 4 PN Comments at 7-8 (asking the Commission to make clear that the List of Suggested Replacements is a set of non-binding suggestions—not a list of required replacements or a *de facto* white list, which could unintentionally harm competition by picking winners and losers); Ericsson Sec. 4 PN Comments at 8-9 (arguing that the Commission should refrain from developing a list of specific “suggested” suppliers and that it should also not list precise pieces of equipment or names of equipment and services.); NetNumber, Inc. Sec. 4 PN Comments at 3; ORAN Sec. 4 PN Comments at 9; CompTIA Sec. 4 PN Comments at 2 (“The Commission should elect to create a list of “categories of replacements” because a list of suggested “replacements” would be counterproductive).

<sup>565</sup> *See* CompTIA Sec. 4 PN Comments at 2; RWA Sec. 4 PN Comments at 2; *see also* ORAN Sec. 4 PN Comments at 9; Letter from W. Scott Schelle, President, Tasman Technologies, LLC, Secure Networks Coalition to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-98, at 2 (filed Sept. 29, 2020) (SNC Sept. 29, 2020 *Ex Parte*).

<sup>566</sup> *See* CompTIA Sec. 4 PN Comments at 2; RWA Sec. 4 PN Reply at 2; USTelecom Sec. 4 Reply at 3; CTIA Sec. 4 PN Comments at 7-8; ORAN Sec. 4 PN Comments at 9; NetNumber Sec. 4 PN Comments at 3.

<sup>567</sup> *See* CTIA Sec. 4 PN Comments at 7-8.

<sup>568</sup> *See* ORAN Sec. 4 PN Comments at 9; RWA Sec. 4 PN Reply at 2; CTIA Sec. 4 PN Comments at 7-8.

<sup>569</sup> *See* CTIA Sec. 4 PN Comments at 6 (“The number and diversity of telecommunications equipment is enormous, with varying model numbers, releases, and configurations. The same will be true for service offerings, which the Commission has not thus far regulated or attempted to catalog on the same granular level as equipment.”).

and services that providers of advanced communications service could then look to as they determine the proper equipment and services for their networks.<sup>570</sup>

200. Others suggest that rather than creating a list of permissible hardware and software equipment and services, the Commission should make a list of manufacturers from whom the products and services might be purchased.<sup>571</sup> The Secure Networks Act specifically requires the Commission to produce a list of “Suggested Replacements.” Identifying manufacturers would give the imprimatur of government approval and create a government approved list of manufacturers.<sup>572</sup> An approved government listing could influence purchases and appear to convey that the Commission believes certain equipment meets quality and security metrics, which would require intensive review of products to ensure that the Replacement List was accurate and up-to-date. It could also lead to security threats as companies rely on the Commission’s “seal of approval” in lieu of conducting their own research into the security of certain equipment. Further, entities seeking to enter the market may be dissuaded if their customers are only able to purchase equipment from manufacturers approved by the Commission, harming competition and innovation right as the move to Open Radio Access Networks (O-RAN) and virtualized networks opens up markets to new competitors.<sup>573</sup> For these reasons, we decline to name specific manufacturers and instead find that a Replacement List with categories of suggested equipment and services to guide providers of advanced communications service is the better interpretation of our obligation.

201. In compiling this Replacement List, we will use the categories of equipment and services in our recently completed information collection as guidance for specific categories on the Replacement List.<sup>574</sup> Additionally, the Catalog of Expenses adopted as part of the Reimbursement Program will inform the Replacement List by helping to target the type of equipment that will be removed and replaced. The Commission may also review efforts from other Federal partners, such as the Federal Acquisition

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<sup>570</sup> See Blue Danube Sec. 4 PN Comments at 5 (suppliers of parts of the network, including small suppliers, should have the opportunity to participate in the equipment replacement); Ericsson Sec. 4 PN Comments at 8-9; CTIA Sec. 4 PN Comments at 7 (“The Bureau was thus right to emphasize that the Replacement List will be comprised of “suggestions.”).

<sup>571</sup> Metaswitch Sec. 4 PN Reply at 4 (“The Commission is required to make a list” and “service providers are most likely to select equipment from a supplier on the list” and “the aim is to replace the equipment as quickly as possible.”).

<sup>572</sup> CompTIA Sec. 4 PN Comments at 3; USTelecom Sec. 4 PN Comments at 6; USTelecom Sec. 4 PN Reply at 3; (there is no need to create a separate list of “allowable” equipment in the supply chain—any equipment that is not derived from a manufacturer designated as a national security threat should be “allowed.”); Ericsson Sec. 4 PN Comments at 8-9 (“The “categories of replacements” “allows the Commission to facilitate operators’ replacement decisions among the broad and diverse choices the market supplies for investment in secure equipment. It allows the Commission to avoid picking specific winners in the market.”); ORAN Sec. 4 PN Comments at 9 (“By describing categories of replacement services and equipment rather than specifying individual pieces of equipment or select services, the Commission will facilitate operators’ navigation of the wide variety of choices they have available to them through this replacement program); Blue Danube Sec. 4 PN Comments at 5 (“The association can provide advice on the specific unsecured equipment and services that are in operation in the U.S. Precise names of equipment and services are not required, and the specific details should be chosen by the operators replacing the unsecured equipment.”).

<sup>573</sup> Letter from Diane Rinaldo, Executive Director, Open RAN Policy Coalition to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-98, at 1 (filed Oct. 1, 2020) (O-RAN Oct. 1, 2020 *Ex Parte*).

<sup>574</sup> See Wireline Competition Bureau and Office of Economics and Analytics Open Reporting Portal for Supply Chain Security Information Collection, Public Notice, 35 FCC Red 1440 (WCB, OEA 2020). Specifically, in the 2019 Supply Chain Order, the Commission directed OEA and WCB to conduct an information collection to determine whether ETCs own equipment or services from Huawei and ZTE; what that equipment is and services are; the costs associated with purchasing and/or installing such equipment and services; and the costs associated with removing and replacing such equipment and services. See 2019 Supply Chain Order at 11482, para. 165.

Security Council,<sup>575</sup> or the Department of Homeland Security’s Information and Communications Technology Supply Chain Risk Management Task Force,<sup>576</sup> if those efforts are relevant to the Replacement List.

202. We agree with commenters that the Replacement List should include equipment and services equipped, or upgradable to, be used in O-RAN, or in virtualized networks.<sup>577</sup> Including O-RAN equipment and services, which “could transform 5G network architecture, costs, and security,”<sup>578</sup> is consistent with the Secure Networks Act’s requirement that the Replacement List be technologically neutral. The Secure Networks Act allows for the inclusion of services such as O-RAN and virtualized network equipment “to the extent that the Commission determines that communications services can serve as an adequate substitute for the installation of communications equipment.”<sup>579</sup> The record shows that these communications services can serve as an adequate substitute for communications equipment.<sup>580</sup> We make such a finding here. We encourage providers participating in the Reimbursement Program to consider this promising technology, along with all other available technologies as they make their procurement decisions.<sup>581</sup>

203. One commenter asserts that we should use a software overlay to allow companies with covered communications equipment and services to keep the equipment in their networks until obsolescence, potentially enabling reimbursement funding to cover more networks.<sup>582</sup> They argue the software overlay will make the replacement of the risky of covered equipment more efficient “with

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<sup>575</sup> The Federal Acquisition Security Council was established pursuant to the SECURE Technology Act. *See* P.L. 115-390, 132 Stat. 5173, <https://www.congress.gov/115/bills/hr7327/BILLS-115hr7327enr.pdf>.

<sup>576</sup> The Information and Communications Technology Supply Chain Risk Management Task Force is a public-private supply chain risk management partnership established in to identify and develop consensus strategies that enhance supply chain security. *See* <https://www.cisa.gov/ict-scrm-task-force>.

<sup>577</sup> *See* O-RAN Oct. 1, 2020 *Ex Parte* at 2; COMSovereign Sec. 4 PN Comments at 4 (arguing that the list should include suppliers of Open RAN solutions and virtual network equipment and services); CCA Sec. 4 PN Comments at 8; RWA Sec. 4 PN Comments at 17 (“[T]he Commission must absolutely consider ‘virtual network equipment and services.’ Software defined networks (SDNs) and open RAN (O-RAN) interfaces and virtualized network architecture are becoming more prevalent. SDNs and O-RAN networks lower a carrier’s deployment costs while also helping a carrier to future-proof its network investments”); PTA Sec. 4 PN Comments at 5 (“The statute expressly envisions and permits equipment to be replaced by “services” rather than replacement “equipment.”); Metaswitch Sec. 4 PN Comments at 5.

<sup>578</sup> *See* FCC Chairman Ajit Pai, Remarks, FCC Forum on 5G Open Radio Access Networks (Sept. 14, 2020), <https://docs.fcc.gov/public/attachments/DOC-366866A1.pdf>.

<sup>579</sup> *See* Secure Networks Act § 4(d)(1)(b).

<sup>580</sup> *See* O-RAN Oct. 1, 2020 *Ex Parte* at 2; COMSovereign Sec. 4 PN Comments at 4; PTA Sec. 4 PN Comments at 5; NetNumber Sec. 4 PN Comments 6 (“Including virtual solutions on the list comports with market realities” and “a variety of architectures support core network functions.”); Ericsson Sec. 4 PN Comments at 8 (“Virtualized networking will allow for unprecedented specialization in security.”).

<sup>581</sup> *See* Letter from Melissa Newman, Vice President, Government Affairs, Telecommunications Industry Association, to Marlene Dortch, Secretary, FCC, WC Docket No. 18-89 (Nov. 25, 2020) (arguing that “the Commission [should] treat new technologies and existing technologies that have been creating trusted ICT networks in the U.S. for decades equally”); Chairman Pallone-Ranking Member Walden Letter; O-RAN Oct. 1, 2020 *Ex Parte*.

<sup>582</sup> *See* Quinn Sec. 4 PN Comments at 2 (“The cost saving of this two part approach (software overlay immediately, followed by rip and replace on obsolescence schedule) would enable the limited reimbursement funding authorized under the statute to cover more networks and on a much shorter timeline resulting in greater levels of broadband network security for the nation.”); CompTIA Sec. 4 PN Comments at 2 (arguing that software overlay solutions can provide greater broadband network security at lower cost than the removal and replacement of covered equipment and on much shorter time scales.).

proven and fully tested technology (tested by [the U.S. government]), that installs as software on 3rd party communications equipment and mitigates the covered equipment manufacturers' ability to remotely access, manipulate traffic, access private and proprietary data and make configuration changes."<sup>583</sup> They further suggest that these software technologies provide the ability to defend the United States communications and data infrastructure, regardless of the location and source of manufacturing allowing time for "rip and replace" actions to be accelerated at lower cost.<sup>584</sup>

204. Were we to adopt this proposal, covered, potentially harmful equipment could remain in our networks for years, increasing the risks to our networks. We believe the better approach given the language in the Secure Networks Act is take every measure possible to immediately reduce and eliminate the risk by removing the equipment promptly. Additionally, the Reimbursement Program requires that reimbursement funds be used solely for the purposes of "permanent removal of covered communications equipment and services . . . ." The public interest and our statutory goals would be best served by the approach we have adopted.

205. We also decline at this time to rely solely on a third party to create a list of suggested categories or the list of replacement equipment and services, as advocated by one commenter.<sup>585</sup> First, the Secure Networks Act requires the Replacement List to be technologically neutral.<sup>586</sup> Trade associations or membership organizations may be inherently biased toward the interests of their membership. Rather than risk the impression of self-dealing, we believe it is more prudent to maintain control of the Replacement List. Second, although we recognize the challenges inherent in creating the Replacement List, the Secure Networks Act is clear that the Commission "shall" develop the Replacement List. Outsourcing the task to a third-party trade association or similar organization could be an unlawful subdelegation and risk the appearance of abdicating the Commission's responsibility.<sup>587</sup>

206. *Maintenance of the List.* We agree with commenters that the list of suggested equipment and service should be transparent and current.<sup>588</sup> We will update the list of suggested equipment and services, and program recipients and interested third parties may also provide information about suggested equipment and services to assist us in keeping the list current and reflective of changes in the market. We find that the list should be updated at least annually to ensure that it stays current with new technologies and innovations while also providing access to evolving next-generation communications capabilities to all consumers.<sup>589</sup> Updating the Replacement List annually is consistent with the minimum schedule that Congress set for the Commission to update the list of covered communications equipment and services.<sup>590</sup> We believe updating our list of equipment and services that pose a threat to national security risks and our Replacement Lists together will provide consistency and clarity for providers seeking to comply with our rules.

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<sup>583</sup> See Quinn Sec. 4 PN Comments at 2; CompTIA Sec. 4 PN Comments at 2.

<sup>584</sup> See Quinn Sec. 4 PN Comments at 2.

<sup>585</sup> See CTIA Sec. 4 PN Comments at 8-9 (suggesting that the Commission consider creating categories of suggested replacements designated by company or membership in a third-party organization to reduce the Commission's administrative burden).

<sup>586</sup> See Secure Networks Act § 4(d)(1)(b).

<sup>587</sup> See Secure Networks Act § 4(d)(1)(a) ("the Commission shall . . ."). See also *USTelecom v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004) ("[W]hile federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so.").

<sup>588</sup> CTIA Sec. 4 PN Comments at 9; Metaswitch Sec. 4 PN Comments at 5.

<sup>589</sup> See Secure Networks Act § 4(d); RWA Sec. 4 PN Comments at 18.

<sup>590</sup> See Secure Networks Act § 2(d)(3) ("For each 12-month period during which the list published under subsection (a) is not updated, the Commission shall notify the public . . .").

207. We decline to update the list quarterly, as some commenters argue.<sup>591</sup> By adopting a Replacement List featuring categories of equipment and services, we are expressly declining to attempt to evaluate every piece of equipment or software released. We find that the relevant categories of equipment and services are unlikely to change quarterly, and that an annual review is sufficient to keep the list current and foster a competitive marketplace. An annual update will be much more comprehensive and avoid the need for providers to constantly check the Commission’s website prior to investing in their networks. For these same reasons, we decline to update the list at even shorter intervals, such as monthly.<sup>592</sup> We do, however, note that the list may be updated at a shorter interval if the Commission deems it necessary.

208. We direct the Wireline Competition Bureau to issue a Public Notice at least annually announcing the updates to the Replacement List.

#### **F. Section 5 of the Secure Networks Act – Reporting Requirement**

209. In the *2019 Supply Chain Order*, the Commission sought to understand the scope of potentially prohibited equipment or services in the communications supply chain to help inform its rulemaking.<sup>593</sup> As a result, it adopted the *2019 Information Collection Order*, which required ETCs, and their non-ETC affiliates and subsidiaries, to report on the existence, or lack thereof, of any of their equipment and services obtained from Huawei and ZTE.<sup>594</sup> ETCs had to submit information on the type of equipment or service obtained from these covered companies; the cost to purchase and/or install such equipment and services; and the cost to remove and replace such equipment and services.<sup>595</sup> All submissions were required to be certified.<sup>596</sup> The Office of Economics and Analysis and WCB collected and compiled this data, and the results were published in September 2020.<sup>597</sup>

210. Section 5 of the Secure Networks Act requires that “providers of advanced communications service” report annually if they have “purchased, rented, leased, or otherwise obtained any covered communications equipment or service, “on or after” August 14, 2018 or 60 days after an equipment or service has been placed on the Covered List.<sup>598</sup> In other words, any equipment or service on the Covered List based on one of these two specifications must be reported.<sup>599</sup> Section 5 also requires that providers of advanced communications service who have indicated in the information collection that their network contains covered equipment or services, based on the above specifications, submit a “detailed justification” for obtaining such equipment or services, as well as information indicating whether the covered equipment or services has subsequently been removed and replaced and information about plans to continue the purchase, rent, lease, installation, or use of such covered equipment or services.<sup>600</sup> Any providers that certify to the Commission that they do not have any equipment or services are not required to submit annual reports unless they acquire covered equipment or services after their last certification.<sup>601</sup>

<sup>591</sup> See COMSovereign Sec. 4 PN Comments at 3 (arguing for quarterly updates); USTelecom Sec. 4 PN Reply at 2 (same).

<sup>592</sup> See COMSovereign Sec. 4 PN Comments at 3.

<sup>593</sup> *2019 Supply Chain Order*, 34 FCC Rcd at 11481, para. 162.

<sup>594</sup> *Id.* at 11482, para. 164.

<sup>595</sup> *Id.*

<sup>596</sup> *Id.*

<sup>597</sup> See *Information Collection Results PN*.

<sup>598</sup> Secure Networks Act § 5.

<sup>599</sup> *Id.*

<sup>600</sup> Secure Networks Act § 5(c)(1), (2).

<sup>601</sup> *Id.* at § 5(b).

211. In the *2020 Supply Chain Second Further Notice*, we proposed to require that advanced communications service providers report the type, location, date obtained, and any removal and replacement plans of covered equipment and services in their networks.<sup>602</sup> We also sought comment on the appropriate information needed to satisfy the “detailed justification” requirement of the Secure Networks Act.<sup>603</sup>

212. Consistent with the Secure Networks Act and our proposal in the *2020 Supply Chain Second Further Notice*, we implement a new data collection requirement applying to all providers of advanced communications service. We require that providers of advanced communications service annually report on covered communications equipment or services in their networks. Specifically, with respect to equipment or services on the initial Covered List acquired on or after August 14, 2018, or equipment or services added to the Covered List that were purchased 60 days or more after the Covered List is subsequently updated, providers must report the type of covered communications equipment or service purchased, rented or leased; location of the equipment or service; date the equipment or service was procured; removal or replacement plans for the equipment or service, including cost to replace; amount paid for the equipment or service;<sup>604</sup> the supplier for the equipment or service;<sup>605</sup> and a detailed justification for obtaining such covered equipment and service.<sup>606</sup>

213. The detailed justification must thoroughly explain the provider’s reasons for obtaining the covered equipment and/or services, including why the provider chose to obtain covered equipment and services rather than equipment and services not on the Covered List.<sup>607</sup> Providers must also indicate whether the equipment and services were published on the Covered List at the time of purchase, and whether the covered equipment and services supports any other covered equipment and services that do not need to be reported, because, for example, the equipment or services were obtained before August 14, 2018. This information is not only required pursuant to the Secure Networks Act but will inform future Commission action to address security issues in communications networks.

214. We will release to the public a list of providers that have reported covered equipment or services in their networks, consistent with the *2019 Information Collection Order*.<sup>608</sup> We believe that the public interest in knowing whether providers have covered equipment and services in their networks outweighs any interest the carrier may have in keeping such information confidential. We reject NCTA’s argument to the contrary.<sup>609</sup> Other information, such as location of the equipment and services; removal

<sup>602</sup> *2020 Supply Chain Second Further Notice*, 35 FCC Rcd 7821, 7834, para. 54.

<sup>603</sup> *Id.*

<sup>604</sup> See Secure Networks Act § 4(d)(2)(B); see also Dell Technologies Second Further Notice Comments at 3-4.

<sup>605</sup> Dell Technologies Second Further Notice Comments at 3-4.

<sup>606</sup> See Secure Networks Act § 5(c).

<sup>607</sup> These reasons can include technical or compatibility issues or the source of the vendor was not known by the provider. See CCA Second Further Notice Comments at 7.

<sup>608</sup> *2019 Supply Chain Order*, 34 FCC Rcd at 11481-82, para. 166.

<sup>609</sup> NCTA Second Further Notice Comments at 15-16. NCTA argues that because the Secure Networks Act directed that status updates under the reimbursement program would be made public under section 4(d)(8) while remaining silent on whether the section 5 results should be made public, Congress intended that section 5 results remain confidential. We disagree. Instead, Congress provided us with significant discretion as to the “form” and manner of these reports, see Secure Networks Act § 5(a), (d), and we believe the public interest in knowing whether covered communications equipment and services acquired after August 14, 2018 are in providers of advanced communications service networks outweigh any countervailing interest of the provider in keeping such information confidential. Moreover, at the time it passed the Secure Networks Act, Congress was aware of our intention to publish a list of ETCs with Huawei and ZTE equipment in their networks based on the *2019 Information Collection Order*, and we believe Congress’s silence as to whether the section 5 results should be made public is better interpreted as endorsing a similar approach to the *2019 Information Collection Order* rather than NCTA’s reading.

or replacement plans that include sensitive information; the specific type of equipment or service; and any other provider specific information will be presumptively confidential.<sup>610</sup>

215. We direct the Office of Economics and Analytics to administer the collection, which includes creating a form for submission through an online portal. The form will require that all providers certify that the information provided is true and accurate subject to federal regulations.<sup>611</sup> The form will have the option for providers to certify that they do not have any covered equipment and services. Those providers that certify that they do not have any covered equipment and services will not need to refile annually unless circumstances change, and they acquire any of these covered equipment and services or if equipment they currently use is subsequently added to the Covered List.<sup>612</sup> However, a provider of advanced communications service that certifies that its network does have covered equipment or services will need to continue to file an annual report, including the justification, until the provider can certify that its network no longer contains covered equipment or services.<sup>613</sup>

216. We reiterate that this information collection requirement does not have any effect on the *2019 Information Collection Order* and its subsequent results. The *2019 Information Collection Order* has closed, and we have publicly reported its results.<sup>614</sup> The results of the *2019 Information Collection Order* helped inform us of the extent of Huawei and ZTE equipment in our communications networks and provided information about the cost of replacing such equipment.<sup>615</sup> USTelecom argues that the Secure Networks Act's information collection should supersede the *2019 Information Collection Order*,<sup>616</sup> but that argument has been mooted by the release of results from the *2019 Information Collection Order*. Moreover, the *2019 Information Collection Order* and the new information collection are distinct. The new information collection, as required by Congress in the Secure Networks Act, will inform the Commission and public about advanced communications service provider action regarding covered communications equipment or services on or after August 14, 2018.<sup>617</sup> As we explained in the *2020 Supply Chain Second Further Notice*, the *2019 Information Collection Order* only covered ETCs.<sup>618</sup> ETCs were required to report any Huawei and ZTE equipment and services in their networks, or their subsidiaries or affiliates, regardless of when they were obtained.<sup>619</sup>

217. *Effective Date.* For the first annual filing, certified responses to this information collection from providers of advanced communication service will be due through the portal no later than 90 days after the Office of Economics and Analytics issues a public notice announcing the availability of

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<sup>610</sup> See CCA Second Further Notice Comments at 7; Blue Danube Second Further Notice Reply at 6 (“Commercial communications operators are in a highly competitive market. The design of their networks and their supply contracts should be viewed as “presumptively confidential.”); see also 47 CFR § 0.457. We believe that this information would likely qualify as trade secrets under FOIA. See 5 U.S.C. § 552(b)(4).

<sup>611</sup> Secure Networks Act § 5(b).

<sup>612</sup> *Id.*

<sup>613</sup> The Secure Networks Act only allows entities that respond to the information collection with a negative response to cease filing unless their subsequently purchase, rent, lease, or obtain covered communications equipment and services. Secure Networks Act § 5(b).

<sup>614</sup> See *Information Collection Results PN*.

<sup>615</sup> See *id.*

<sup>616</sup> USTelecom Second Further Notice Comments at 7.

<sup>617</sup> See Secure Networks Act § 5(a)(1).

<sup>618</sup> *2020 Supply Chain Second Further Notice* at 7837, para. 54; *2019 Information Collection Order* at 11482, para. 163.

<sup>619</sup> *2019 Information Collection Order* at 11482, para. 164.

the new reporting portal.<sup>620</sup> Thereafter, all providers of advanced communications service required to comply with this information collection must submit their certified response through the portal no later than March 31 for the previous year.

### G. Cost-Benefit Summary

218. Based on presently available information obtained through our Information Collection, we estimate the cost of requiring the removal and replacement of covered equipment and services within the next two years to be \$1.8 billion for all ETCs.<sup>621</sup> Not all of that amount, however, is subject to reimbursement. The ETCs that appear to initially qualify for reimbursement under the Secure Networks Act report it would require approximately \$1.6 billion to replace their equipment.<sup>622</sup> Yet, as we concluded in the *2019 Supply Chain Order*, we find that the affected equipment has a 10-year life and that this Order will impact investment decisions starting in 2021.<sup>623</sup> We therefore expect to see some replacements, like those normally occurring under attrition at the end of both 2020 and 2021, covering two years and including up to 20% of the original equipment.<sup>624</sup> Hence, we expect the required replacement costs for the Huawei or ZTE asset base occurring at the end of the period for all ETCs may be as low as \$1.5 billion (i.e., about 80% of \$1.8 billion) and the reimbursement amount for qualifying ETCs may be as low as \$1.3 billion (i.e., 80% of \$1.6 billion).

219. We nonetheless conclude that, even if total replacement cost is as high as \$1.8 billion reported by all ETCs, that cost will be far exceeded by the benefits obtained by addressing the important national security concerns raised by the enumerated sources who make national security determinations.<sup>625</sup> As we explained in the *2019 Supply Chain Order*, the benefits of removing covered equipment and services “extend to [hard] to quantify matters, such as preventing untrustworthy elements in the communications network from impacting our nation’s defense, public safety, and homeland security operations, our military readiness, and our critical infrastructure, let alone the collateral damage such as loss of life that may occur with any mass disruption to our nation’s communications networks.”<sup>626</sup>

220. The other rules enacted in this Order are mandated by the Secure Networks Act and we

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<sup>620</sup> Although we proposed a six-month window in the proposed rules appendix of the *2020 Supply Chain Second Further Notice*, 35 FCC Rcd at 7845, a 90-day period would provide the Commission and the public with quicker notification of potential security risks to U.S. communications networks. We find that a 90-day period is sufficient time for providers to complete the first annual report for two reasons. First, it will likely take the Office of Economics and Analytics time to prepare the portal for the annual submissions. We expect providers of advanced communications service to begin work for the certification and reporting requirement before the Office of Economics and Analytics issues the Public Notice, providing sufficient time for providers to gather the information when added to the 90 days after the Public Notice is published. Second, 90 days is roughly consistent with the amount of time the Commission gave ETCs, their subsidiaries, and affiliates, to comply with the first information collection, including an extension of time to respond. See *Wireline Competition Bureau and Office of Economics and Analytics Open Reporting Portal for Supply Chain Security Information Collection*, WC Docket No. 18-89, Public Notice, 35 FCC Rcd 1440 (WCB and OEA 2020); see also *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89, Order, 35 FCC Rcd 2998 (WCB and OEA 2020) (extending time to comply with information collection to 86 days).

<sup>621</sup> See *Wireline Competition Bureau and Office of Economics and Analytics Release Results from Supply Chain Security Information Collection*, WC Docket No. 18-89, Public Notice, DA 20-1037 (WCB and OEA Sept. 4, 2020). In the *2019 Supply Chain Order*, we preliminarily estimated the total cost to be between \$600 million and \$2 billion dollars. 34 FCC Rcd at 11481, para. 161.

<sup>622</sup> *Id.*

<sup>623</sup> *2019 Supply Chain Order*, 34 FCC Rcd at 11466, para. 110.

<sup>624</sup> See *id.* at 11466, paras. 110-11.

<sup>625</sup> See *supra* Section III.C.

<sup>626</sup> See *2019 Supply Chain Order*, 34 FCC Rcd at 11466, para. 110.



have no discretion to diverge from statutory direction. We estimate the reporting costs of complying with the new reporting requirement, mandated by section 5 of the Secure Networks Act, to be approximately \$600,000, being the product the per provider cost of \$167 and our estimate of reporting providers of advanced communications services of approximately 3,500 ( $\$167 * 3,500 = \$584,500$ , which we round to \$600,000 recognizing our calculations are only approximations).<sup>627</sup> This reporting cost estimate is higher than the cost of the data collection of the *2019 Information Collection* because the universe of respondents includes all providers of advanced communications service, not just ETCs.<sup>628</sup> We anticipate that the new prohibition on Federal subsidy programs administered by the Commission will not have incremental net costs beyond those already imposed by section 54.9 of the Commission's rules.<sup>629</sup> We accordingly find that our requirements will achieve the stated objectives of Congress's mandated rules in the most cost-effective manner.<sup>630</sup>

#### IV. PROCEDURAL MATTERS

221. *Paperwork Reduction Act of 1995 Analysis.* This document contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

222. *Final Regulatory Flexibility Analysis.* The Regulatory Flexibility Act of 1980 (RFA) requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." Accordingly, we have prepared a FRFA concerning the possible impact of the rule changes contained in the Report and Order on small entities. The FRFA is set forth in Appendix B.

223. *Congressional Review Act.* The Commission has determined, and the Administrator of

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<sup>627</sup> We estimate that complying would take 3 hours for each ETC subject to that collection, at a cost of about \$167 per carrier, as the reporting requirements for the new collection are similar to those in the *2019 Information Collection*. *See* [https://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=202004-3060-049](https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202004-3060-049). We estimate there are approximately 3,500 providers of advanced communications service, i.e., providers that would have to report under the present collection, as follows. There are 3,822 current 477 filings. Some of these are from filers that affiliated with each other. We associated affiliated 477 filers with a unique "parent" filer, dropping the affiliates from our count. Of the remaining 477 filers, we dropped filers who only engage in fixed line resale and do not supply mobile service. This left 3,579 filers, which, recognizing our process involves approximation, we round to 3,500.

<sup>628</sup> *See supra* Section III.F.

<sup>629</sup> *See supra* Section III.D.

<sup>630</sup> *See supra* Section III. Huawei argues that the "significant upfront costs as well as ongoing expenditures . . . will make it extremely difficult to comply with a removal and replacement mandate." Huawei Second Further Notice Comments at 30. Huawei believes a cost benefit analysis "likely would result in inequitable disbursement or reimbursement funds because some carriers may have spent more on covered company equipment than other carriers" and, for non-ETCs, "the magnitude of equipment replacements costs is not something they can afford." *Id.* at 31. We disagree. For non-ETCs, the requirement to remove and replace equipment applies only to those providers which voluntarily choose to participate in the Reimbursement Program. And we received no comments from ETCs who would be ineligible to participate in the Reimbursement Program stating the requirement to remove and replace covered equipment or services is not feasible. Finally, the design of the Reimbursement Program, including section 4 of the Secure Networks Act and the rules we adopt today, will ensure an equitable allocation of funds to replace covered equipment and services. *See supra* Section III.E.

the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs that this rule is major under the Congressional Review Act, 5 U.S.C. § 804(2). The Commission will send a copy of this Second Report and Order to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

224. *Contact Person.* For further information about this proceeding, please contact Brian Cruikshank, FCC Wireline Competition Bureau, 45 L Street, N.E., Washington, D.C. 20554, at (202) 418-3623 or [brian.cruikshank@fcc.gov](mailto:brian.cruikshank@fcc.gov).

## V. ORDERING CLAUSES

225. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-4, 201(b), 214, 229, 254, 303(r), 403, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201(b), 214, 229, 254, 303(r), 403, 503, sections 2, 3, 4, 5, and 7 of the Secure Networks Act, 47 U.S.C. §§ 1601, 1602, 1603, 1604, and 1606, section 889 of the 2019 NDAA, Public Law No. 115-232, and sections 1.1 and 1.412 of the Commission's rules and 47 CFR §§ 1.1, this Report and Order IS ADOPTED.

226. IT IS FURTHER ORDERED that Parts 1 and 54 of the Commission's rules ARE AMENDED as set forth in Appendix A.

227. IT IS FURTHER ORDERED that, pursuant to sections 1.4(b)(1) and 1.103(a) of the Commission's rules, 47 CFR §§ 1.4(b)(1), 1.103(a), this Report and Order SHALL BE EFFECTIVE 60 days after publication of this Report and Order in the Federal Register, with the exception of sections 1.50004(c), (d)(1), (g), (h)(2), (j)-(n), 1.50007, and 54.11, which contain new or modified information collection requirements that require review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. The Commission will announce the effective date of those sections in the Federal Register after receiving OMB approval.

228. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this Report and Order to Congress and to the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

229. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## Final Rules

## Part 1 – Practice and Procedure

The authority citation for part 1 continues to read as follows:

Authority: 47 U.S.C. chs. 2, 5, 9, 13; 28 U.S.C. 2461 note, unless otherwise noted.

2. Add the following new subpart DD:

Subpart DD – Secure and Trusted Communications Networks

Authority: 47 U.S.C. chs. 5, 15.

**§ 1.50000 Purpose**

The purpose of this subpart is to implement the Secure and Trusted Communications Networks Act of 2019, Pub. L. 116-124, 133 Stat. 158.

**§ 1.50001 Definitions**

For purposes of this subpart:

(a) *Advanced communications service*. The term “advanced communications service” means high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology with connection speeds of at least 200 kbps in either direction.

(b) *Appropriate national security agency*. The term “appropriate national security agency” means:

- (1) The Department of Homeland Security;
- (2) The Department of Defense;
- (3) The Office of the Director of National Intelligence;
- (4) The National Security Agency; and
- (5) The Federal Bureau of Investigation.

(c) *Communications equipment or service*. The term “communications equipment or service” means any equipment or service used in fixed and mobile networks that provides advanced communication service, provided the equipment or service includes or uses electronic components.

(d) *Covered communications equipment or service*. The term “covered communications equipment or service” means any communications equipment or service that is included on the Covered List developed pursuant to section 1.50002.

(e) *Determinations*. The term “determination” means any determination from sources identified in section 1.50002(b)(1)(i)-(iv) that communications equipment or service pose an unacceptable risk to the national security of the United States or the security and safety of United States persons.

(f) *Covered List*. The Covered List is a regularly updated list of covered communications equipment and services.

(g) *Reimbursement Program*. The Reimbursement Program means the program established by section 4 of the Secure and Trusted Communications Networks Act of 2019, Pub. L. 116-124, 133 Stat. 158, codified at 47 U.S.C. § 1603, as implemented by the Commission in section 1.50004.

(h) *Reimbursement Program recipient (or recipient)*. The term “Reimbursement Program recipient” or “recipient” means an eligible advanced communications service provider that has requested via application and been approved for funding in the Reimbursement Program, regardless of whether the provider has received reimbursement funds.

(i) *Replacement List*. The Replacement List is a list of categories of suggested replacements for covered communications equipment or service.

### **§ 1.50002 Covered List**

(a) *Publication of the Covered List*. The Public Safety and Homeland Security Bureau shall publish the Covered List on the Commission’s website and shall maintain and update the Covered List in accordance with section 1.50003.

(b) *Inclusion on the Covered List*. The Public Safety and Homeland Security Bureau shall place on the Covered List any communications equipment or service that:

(1) is produced or provided by any entity if, based exclusively on the following determinations, such equipment or service poses an unacceptable risk to the national security of the United States or the security and safety of United States persons:

(i) A specific determination made by any executive branch interagency body with appropriate national security expertise, including the Federal Acquisition Security Council established under section 1222(a) of title 41, United States Code;

(ii) A specific determination made by the Department of Commerce pursuant to Executive Order No. 13873 (84 Fed. Reg. 22689; relating to securing the information and communications technology and services supply chain);

(iii) Equipment or service being covered telecommunications equipment or services, as defined in section 889(f)(3) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law 115-232; 132 Stat. 1918); or

(iv) A specific determination made by an appropriate national security agency;

(2) and is capable of:

(i) Routing or redirecting user data traffic or permitting visibility into any user data or packets that such equipment or service transmits or otherwise handles;

(ii) Causing the networks of a provider of advanced communications services to be disrupted remotely; or

(iii) Otherwise posing an unacceptable risk to the national security of the United States or the security and safety of United States persons.

### **§ 1.50003 Updates to the Covered List**

(a) *Consultation with Sources*. The Public Safety and Homeland Security Bureau shall monitor the status of determinations in order to update the Covered List.

(b) If a determination regarding covered communications equipment or service on the Covered List is reversed or modified, the Public Safety and Homeland Security Bureau shall remove from or modify the entry of such equipment or service on the Covered List, except the Public Safety and Homeland Security Bureau may not remove such equipment or service from the Covered List if any other of the sources identified in section 1.50002(b)(1)(i)-(iv) maintains a determination supporting inclusion on the Covered List of such equipment or service.

(c) After each 12-month period during which the Covered List is not updated, the Public Safety and Homeland Security Bureau will issue a Public Notice indicating that no updates were necessary during such period.

#### **§ 1.50004 Secure and Trusted Communications Networks Reimbursement Program**

(a) *Eligibility.* Providers of advanced communications service with two million or fewer customers are eligible to participate in the Reimbursement Program to reimburse such providers for costs reasonably incurred for the replacement, removal, and disposal of covered communications equipment or services if:

(1) the covered communications equipment or service to be removed, replaced, or disposed of was purchased, rented, leased or otherwise obtained before August 14, 2018 and on the initial Covered List published per section 1.50002; or

(2) the covered communications equipment or service was added to the Covered List per section 1.50003, then no later than 60 days after the date of addition to the Covered List;

(3) the provider certifies:

(i) as of the date of the submission of the application, the provider has developed:

(A) a plan for the permanent removal and replacement of any covered communications equipment or service that is in the communications network of the provider as of such date; and the disposal of the equipment or services removed; and

(B) a specific timeline for the permanent removal, replacement, and disposal of the covered communications equipment or service, which timeline shall be submitted to the Commission as part of the application per subsection 1.50004(c)(1)(iv); and

(ii) beginning on the date of the approval of the application, the provider:

(A) will not purchase, rent, lease, or otherwise obtain covered communications equipment or service, using reimbursement funds or any other funds (including funds derived from private sources); and

(B) in developing and tailoring the risk management practices of the applicant, will consult and consider the standards, guidelines, and best practices set forth in the cybersecurity framework developed by the National Institute of Standards and Technology.

(b) *Filing Window.* The Wireline Competition Bureau shall announce the opening of an initial application filing window for eligible providers seeking to participate in the Reimbursement Program for the reimbursement of costs reasonably incurred for the removal, replacement, and disposal of covered communications equipment and services. The Wireline Competition Bureau may implement additional filing windows as necessary and shall provide notice before opening any additional filing window, and include in that notice the amount of funding available. The Wireline Competition Bureau shall treat all eligible providers filing an application within any filing window as if their applications were simultaneously received. Funding requests submitted outside of a filing window will not be accepted.

(c) *Application Requests for Funding.* During a filing window, eligible providers may request a funding allocation from the Reimbursement Program for the reimbursement of costs reasonably incurred for the permanent removal, replacement, and disposal of covered communications equipment or service.

(1) Requests for funding allocations must include:

(i) An estimate of costs reasonably incurred for the permanent removal, replacement, and disposal of covered communications equipment or service from the eligible provider's network. Eligible providers may rely upon the predetermined estimated costs identified in the Catalog of Expenses Eligible for Reimbursement made available by the Wireline Competition Bureau. Eligible providers that submit their own cost estimates must submit supporting documentation and certify that the estimate is made in good faith.

(ii) Detailed information on the covered communications equipment or service being removed, replaced and disposed of;

(iii) The certifications set forth in paragraph (a)(3);

(iv) A specific timeline for the permanent removal, replacement, and disposal of the covered communications equipment or services; and

(v) The eligible provider certifies in good faith :

(A) it will reasonably incur the estimated costs claimed as eligible for reimbursement;

(B) it will use all money received from the Reimbursement Program only for expenses eligible for reimbursement;

(C) it will comply with all policies and procedures relating to allocations, draw downs, payments, obligations, and expenditures of money from the Reimbursement Program;

(D) it will maintain detailed records, including receipts, of all costs eligible for reimbursement actually incurred for a period of 10 years; and

(E) it will file all required documentation for its expenses.

(d) *Application Review Process.* The Wireline Competition Bureau will review applications to determine whether the application is complete, whether the applicant is eligible for the Reimbursement Program, and to assess the reasonableness of the cost estimates provided by the applicant. The Wireline Competition Bureau shall approve or deny applications to receive a funding allocation from the Reimbursement Program within 90 days after the close of the applicable filing window. The Wireline Competition Bureau may extend the deadline for granting or denying applications for up to an additional 45 days if it determines that an excessive number of applications have been filed during the window and additional time is needed to review the applications.

(1) *Opportunity to Cure Deficiency.* If the Wireline Competition Bureau determines that an application is materially deficient (including by lacking an adequate cost estimate or adequate supporting materials), the Wireline Competition Bureau shall provide the applicant a 15-day period to cure the defect before denying the application. If the cure period would extend beyond the deadline under paragraph (d) for approving or denying the application, such deadline shall be extended through the end of the cure period.

(2) Denial of an application shall not preclude the applicant from submitting a new application for reimbursement in a subsequent filing window.

(e) *Funding Allocation.* Once an application is approved, the Wireline Competition Bureau will allocate funding on the applicant’s behalf to the United States Treasury for draw down by the Reimbursement Program recipient as expenses are incurred pursuant to the funding disbursement process provided for in paragraph (g).

(f) *Prioritization of Support.* The Wireline Competition Bureau shall issue funding allocations in accordance with this section after the close of a filing window. After a filing window closes, the Wireline Competition Bureau shall calculate the total demand for Reimbursement Program support submitted by all eligible providers during the filing window period. If the total demand received during the filing window exceeds the total funds available, then the Wireline Competition Bureau shall allocate the available funds consistent with the following priority schedule:

<b>Table 1 to Paragraph (f)–Prioritization Schedule</b>	
<b>Priority 1</b> Advanced communication service providers with 2 million or fewer customers that are Eligible Telecommunication Carriers subject to section [54.11] (new removal and replacement requirement).	<b>Priority 1a</b> Costs reasonably incurred for transitioning core network(s).
	<b>Priority 1b</b> Costs reasonably incurred for non-core network transition.
<b>Priority 2</b> Non-ETC providers of advanced communications service with 2 million or fewer customers that participated in the Supply Chain Security Information Collection, OMB Control No. 3060-1270.	<b>Priority 2a*</b> Costs reasonably incurred for transitioning core network(s).
	<b>Priority 2b*</b> Costs reasonably incurred for non-core network transition.
<b>Priority 3</b> Other non-Eligible Telecommunication Carriers that are providers of advanced communication service with 2 million or fewer customers.	<b>Priority 3a</b> Costs reasonably incurred for transitioning core network(s).
	<b>Priority 3b</b> Costs reasonably incurred for non-core network transition.

(1) *Application of prioritization schedule.* The Wireline Competition Bureau shall issue full funding allocations for all eligible providers in the Priority 1 prioritization category before issuing funding allocations in any subsequent prioritization categories. The Wireline Competition Bureau shall continue to review all funding requests and issue funding allocations by prioritization category until there are no available funds remaining. If there is insufficient funding to fully fund all requests in a particular prioritization category, then the Wireline Competition Bureau will pro-rate the available funding among all eligible providers in that prioritization category. Requests for funds in subsequent prioritization categories will be denied for lack of available funding.

(2) *Pro-rata reductions.* When pro-rata reductions are required per paragraph (f)(1), the Wireline Competition Bureau shall:

- (i) divide the total remaining funds available by the demand within the specific prioritization category to produce a pro-rata factor;
- (ii) multiply the pro-rata factor by the total dollar amount requested by each recipient in the prioritization category; and
- (iii) allocate funds to each recipient consistent with this calculation.

(g) *Funding Disbursements.* Following the approval and issuance by the Wireline Competition Bureau of a funding allocation, a Reimbursement Program recipient may file a reimbursement claim request for the draw down disbursement of funds from the recipient's funding allocation. The recipient must show in the reimbursement claim actual expenses reasonably incurred for the removal, replacement, and disposal of covered communications equipment or service. The Wireline Competition Bureau will review and grant or deny reimbursement claims for actual costs reasonably incurred.

(1) *Initial Reimbursement Claim.* Within one year of the approval of its Reimbursement Program application, a recipient must file at least one reimbursement claim. Failure to file a reimbursement claim within the one-year period will result in the reclamation of all allocated funding from the Reimbursement Program recipient and revert to the Reimbursement Program fund for potential allocation to other Reimbursement Program participants.

(2) *Reimbursement Claim Deadline.* All reimbursement claims must be filed by the Reimbursement Program recipient within 120 days of expiration of the removal, replacement and disposal term. Following the expiration of the reimbursement claim deadline, any remaining and unclaimed funding allocated to the Reimbursement Program recipient will automatically be reclaimed and revert to the Reimbursement Program fund for potential allocation to other Reimbursement Program participants.

(3) *Extension of Reimbursement Claim Deadline.* A Reimbursement Program recipient may request a single extension of the reimbursement claim deadline by no later than the deadline discussed in paragraph (g)(2). The Wireline Competition Bureau shall grant any timely filed extension request of the reimbursement claim filing deadline for no more than 120 days.

(h) *Removal, Replacement, and Disposal Term.* Reimbursement Program recipients must complete the permanent removal, replacement, and disposal of covered communications equipment or service within one year of receiving the initial draw down disbursement from their funding allocation.

(1) *General Extension.* The Commission may extend by a period of six months the removal, replacement, and disposal term to all Reimbursement Program recipients if the Commission:

- (i) finds that the supply of replacement communications equipment or services needed by the recipients to achieve the purposes of the Reimbursement Program is inadequate to meet the needs of the recipients; and
- (ii) provides notice and detailed justification for granting the extension to:
  - (A) the Committee on Energy and Commerce of the House of Representatives; and
  - (B) the Committee on Commerce, Science, and Transportation of the Senate.

(2) *Individual Extensions.* Prior to the expiration of the removal, replacement and disposal term, a Reimbursement Program recipient may petition the Wireline Competition Bureau for an extension of the



term. The Wireline Competition Bureau may grant an extension for up to six months after finding, that due to no fault of such recipient, such recipient is unable to complete the permanent removal, replacement, and disposal by the end of the term. The Wireline Competition Bureau may grant more than one extension request to a recipient if circumstances warrant.

(i) *Limitations on Funding Use.* A Reimbursement Program recipient may not:

(1) use reimbursement funds to remove, replace or dispose of any covered communications equipment or service purchased, rented, leased, or otherwise obtained:

(i) on or after August 14, 2018 if on the initial Covered List published per section 1.50002; or

(ii) on or after 60 days after the date of addition to the Covered List if the communications equipment or services were subsequently added to the Covered List per section 1.50003; or

(2) purchase, rent, lease, or otherwise obtain any covered communications equipment or service, using reimbursement funds or any other funds (including funds derived from private sources).

(j) *Disposal Requirements.* Reimbursement Program recipients must dispose of the covered communications equipment or service in a manner to prevent the equipment or service from being used in the networks of other providers of advanced communications service. The disposal must result in the destruction of the covered communications equipment or service, making the covered communications equipment or service inoperable permanently. Reimbursement Program recipients must retain documentation demonstrating compliance with this requirement.

(k) *Status Updates.* Reimbursement Program recipients must file a status update with the Commission once every 90 days beginning on the date on which the Wireline Competition Bureau approves the recipient's application for reimbursement and until the recipient has filed the final certification.

(1) Status updates must include:

(i) efforts undertaken, and challenges encountered, in permanently removing, replacing, and disposing of the covered communications equipment or service;

(ii) the availability of replacement equipment in the marketplace;

(iii) whether the recipient has fully complied with (or is in the process of complying with) all requirements of the Reimbursement Program;

(iv) whether the recipient has fully complied with (or is in the process of complying with) the commitments made in the recipient's application;

(v) whether the recipient has permanently removed from its communications network, replaced, and disposed of (or is in the process of permanently removing, replacing, and disposing of) all covered communications equipment or services that were in the recipient's network as of the date of the submission of the recipient's application; and

(vi) whether the recipient has fully complied with (or is in the process of complying with) the timeline submitted by the recipient as required by paragraph (c)(iv).

(2) The Wireline Competition Bureau will publicly post on the Commission's website the status update filings within 30 days of submission.

(3) Within 180 days of completing the funding allocation stage provided for in paragraph (e), the Wireline Competition Bureau shall prepare a report for Congress providing an update on the Commission's implementation efforts and the work by recipients to permanently remove, replace, and dispose of covered communications equipment and service from their networks.

(l) *Spending Reports.* Within 10 days after the end of January and July, Reimbursement Program recipients must file reports with the Commission regarding how reimbursement funds have been spent, including detailed accounting of the covered communications equipment or service permanently removed and disposed of, and the replacement equipment or service purchased, rented, leased, or otherwise obtained, using reimbursement funds.

(1) This requirement applies starting with the recipient's initial receipt of disbursement funds per paragraph (g) and terminates once the recipient has filed a final spending report certification.

(2) Following the filing of its final certification per paragraph (m), certifying that the recipient has completed the removal, replacement, and disposal process, the recipient must file a final spending report showing the expenditure of all funds received as compared to estimated costs identified in its application for funding.

(3) The Wireline Competition Bureau will make versions of the spending reports available on the Commission's website subject to confidentiality concerns consistent with the Commission's rules.

(m) *Final Certification.* Within 10 days following the expiration of the removal, replacement, and disposal term, Reimbursement Program recipient shall file a final certification with the Commission.

(1) The final certification shall indicate whether the recipient has fully complied with (or is in the process of complying with) all terms and conditions of the Reimbursement Program, the commitments made in the application of the recipient for the reimbursement, and the timeline submitted by the recipient as required by paragraph (c). In addition, the final certification shall indicate whether the recipient has permanently removed from its communications network, replaced, and disposed of (or is in the process of permanently removing, replacing, and disposing of) all covered communications equipment or services that were in the network of the recipient as of the date of the submission of the application by the recipient for the reimbursement.

(2) *Updates.* If a recipient submits a certification under this paragraph stating the recipient has not fully complied with the obligations detailed in paragraph (m)(1), then the recipient must file an updated certification when the recipient has fully complied.

(n) *Documentation Retention Requirement.* Each Reimbursement Program recipient is required to retain all relevant documents, including invoices and receipts, pertaining to all costs eligible for reimbursement actually incurred for the removal, replacement, and disposal of covered communications equipment or services for a period ending not less than 10 years after the date on which it receives final disbursement from the Reimbursement Program.

(o) *Audits, Reviews, and Field Investigations.* Recipients shall be subject to audits and other investigations to evaluate their compliance with the statutory and regulatory requirements for the Reimbursement Program. Recipients must provide consent to allow vendors or contractors used by the recipient in connection with the Reimbursement Program to release confidential information to the auditor, reviewer, or other representative. Recipients shall permit any representative (including any auditor) appointed by the Commission to enter their premises to conduct compliance inspections.

(p) *Delegation of authority.* The Commission delegates authority to the Wireline Competition Bureau, to adopt the necessary policies and procedures relating to allocations, draw downs, payments, obligations,

and expenditures of money from the Reimbursement Program to protect against waste, fraud, and abuse and in the event of bankruptcy, to establish a Catalog of Expenses Eligible for Reimbursement and predetermined cost estimates, review the estimated cost forms, issue funding allocations for costs reasonably incurred, set filing deadlines and review information and documentation regarding progress reports, allocations, and final accountings.

#### **§ 1.50005 Enforcement**

(a) In addition to the penalties provided under the Communications Act of 1934, as amended, and section 1.80 of this chapter, if a Reimbursement Program recipient violates the Secure and Trusted Communications Networks Act of 2019, Pub. L. 116-124, 133 Stat. 158, the Commission's rules implementing the statute, or the commitments made by the recipient in the application for reimbursement, the recipient:

- (1) Shall repay to the Commission all reimbursement funds provided to the recipient under the Reimbursement Program;
- (2) Shall be barred from further participation in the Reimbursement Program;
- (3) Shall be referred to all appropriate law enforcement agencies or officials for further action under applicable criminal and civil law; and
- (4) May be barred by the Commission from participation in other programs of the Commission, including the Federal universal service support programs established under section 254 of the Communications Act of 1934, as amended.

(b) *Notice and Opportunity to Cure.* The penalties described in paragraph (a) shall not apply to a recipient unless:

- (1) the Commission, the Wireline Competition Bureau, or the Enforcement Bureau provides the recipient with notice of the violation; and
- (2) the recipient fails to cure the violation within 180 days after such notice.

(c) *Recovery of Funds.* The Commission will immediately take action to recover all reimbursement funds awarded to a recipient under the Program in any case in which such recipient is required to repay reimbursement funds under paragraph (a).

#### **§ 1.50006 Replacement List**

(a) *Development of List.* The Commission shall develop a list of categories of suggested replacements of physical and virtual communications equipment, application and management software, and services for the covered communications equipment or services listed on the Covered List pursuant to sections 1.50002 and 1.50003 of this chapter.

- (1) In compiling the Replacement List, the Commission may review efforts from, or overseen by, other Federal partners to inform the Replacement List.
- (2) The Replacement List shall include categories of physical and virtual communications equipment, application and management software, and services that allows carriers the flexibility to select the equipment or services that fit their needs from categories of equipment and services.
- (3) The Wireline Competition Bureau shall publish the Replacement List on the Commission's website.

(b) *Maintenance of the List.* The Wireline Competition Bureau shall issue a Public Notice announcing any updates to the Replacement List. If there are no updates to the Replacement List in a calendar year, the Wireline Competition Bureau shall issue a Public Notice announcing that no updates that have been made to the Replacement List.

(c) *Neutrality.* The Replacement List must be technology neutral and may not advantage the use of reimbursement funds for capital expenditures over operational expenditures.

#### **§ 1.50007 Reports on Covered Communications Equipment or Services**

(a) *Contents of Report.* Each provider of advanced communications service must submit an annual report to the Commission that:

(1) identifies any covered communications equipment or service that was purchased, rented, leased or otherwise obtained on or after (i) August 14, 2018, in the case of any covered communications equipment or service on the initial list published pursuant to section 1.50002 of this chapter; or (ii) within 60 days after the date on which the Commission places such equipment or service on the list required by section 1.50003 of this chapter;

(2) provides details on the covered communications equipment or services in its network subject to reporting pursuant to section 1.50007(a)(1) of this chapter, including the type, location, date purchased, rented, leased or otherwise obtained, and any removal and replacement plans;

(3) provides a detailed justification as to why the facilities-based provider of broadband service purchased, rented, leased or otherwise obtained the covered communications equipment or service;

(4) provides information about whether any such covered communications equipment or service has subsequently been removed and replaced pursuant to Commission's reimbursement program contained in section 1.50004 of this chapter;

(5) provides information about whether such provider plans to continue to purchase, rent, lease, or otherwise obtain, or install or use, such covered communications equipment or service and, if so, why; and

(6) includes a certification as to the accuracy of the information reported by an appropriate official of the filer, along with the title of the certifying official.

(b) *Reporting Deadline.* Providers of advanced communications service shall file initial reports within 90 days after the Office of Economics and Analytics issues a public notice announcing the availability of the new reporting platform. Thereafter, filers must submit reports once per year on or before March 31st, reporting information as of December 31st of the previous year.

(c) *Reporting Exception.* If a provider of advanced communications service certifies to the Commission that such provider does not have any covered communications equipment or service in the network of such provider, such provider is not required to submit a report under this section after making such certification, unless such provider later purchases, rents, leases or otherwise obtains any covered communications equipment or service.

(d) *Authority to Update.* The Office of Economics and Analytics may, consistent with these rules, implement any technical improvements, changes to the format and type of data submitted, or other clarifications to the report and its instructions.

**Part 54 — Universal Service**

3. The authority citation for part 54 is revised to read as follows:

Authority: 47 U.S.C. 151, 154(i), 155, 201, 205, 214, 219, 220, 229, 254, 303(r), 403, 1004, 1302, and 1601-1609, unless otherwise noted.

4. Insert the following new section 54.10:

**§ 54.10 Prohibition on Use of Certain Federal Subsidies**

(a) A Federal subsidy made available through a program administered by the Commission that provides funds to be used for the capital expenditures necessary for the provision of advanced communications service may not be used to:

- (1) purchase, rent, lease, or otherwise obtain any covered communications equipment or service; or
- (2) maintain any covered communications equipment or service previously purchased, rented, leased, or otherwise obtained.

(b) The term “covered communications equipment or service” is defined in section 1.50001.

(c) The prohibition in paragraph (a) of this section applies to any covered communications equipment or service beginning on the date that is 60 days after the date on which such equipment or service is placed on a published list pursuant to section 1.50003 of this chapter. In the case of any covered communications equipment or service that is on the initial list published pursuant to section 1.50002 of this chapter, such equipment or service shall be treated as being placed on the list on the date which such list is published.

5. Insert the following new section 54.11:

**§ 54.11 Requirement to Remove and Replace**

(a) Each Eligible Telecommunications Carrier receiving Universal Service Fund support must certify prior to receiving a funding commitment or support that it does not use covered communications equipment or services.

(b) For purposes of paragraph (a), covered communications equipment or services means any communications equipment or service that is on the Covered list found in section 1.50002.

(c) The certification required in subsection (a) is not applicable until one year after the date the Commission releases a Public Notice announcing the acceptance of applications for filing during the initial filing window of the Reimbursement Program per section 1.50004(b).

(d) Reimbursement Program recipients, as defined in section 1.50001(h), are not subject to subsection (a) until after the expiration of their applicable removal, replacement, and disposal term per section 1.50004(h).

## APPENDIX B

## Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Further Notice of Proposed Rulemaking (*2019 Supply Chain Further Notice*) and the Second Further Notice of Proposed Rulemaking (*2020 Supply Chain Second Further Notice*) in this proceeding.<sup>1</sup> The Commission sought written comment on the proposals in the *2019 Supply Chain Further Notice* and *2020 Supply Chain Second Further Notice*, including comment on the accompanying IRFAs. The present Final Regulatory Flexibility Analysis (FRFA) addresses comments received on the IRFAs and conforms to the RFA.<sup>2</sup>

**A. Need for, and Objectives of, the Rules**

2. Consistent with our obligation to be responsible stewards of the public funds used in Universal Service Fund (USF) programs and increasing concern about ensuring communications supply chain integrity, and as directed by the Secure and Trusted Communications Networks Act of 2019<sup>3</sup> (Secure Networks Act), the Second Report and Order (Order) adopts rules to implement sections 2, 3, 4, 5, and 7 of the Secure Networks Act and to require recipients of reimbursement funds under the Secure and Trusted Communications Networks Reimbursement Program (Reimbursement Program) and Eligible Telecommunications Carriers (ETCs) receiving USF support to remove and replace from their network operations communications equipment and services included on the covered list required by section 2 of the Secure Networks Act (Covered List).

3. Specifically, in addition to the requirement to remove-and-replace, the Commission adopts several rules to implement provisions of the Secure Networks Act. The Commission implements section 2 of the Secure Networks Act by publishing on its website the Covered List of communications equipment or services determined to pose a risk to national security, pursuant to the sources of determinations identified in section 2(c) of the Secure Networks Act. The Commission adopts a rule to prohibit the use of Federal subsidies made available through a program administered by the Commission to purchase, rent, lease, or otherwise obtain any covered communications equipment or service, or maintain any covered communications equipment or service previously purchased, rented, leased, or otherwise obtained, and identified and published on the Covered List. The Commission establishes, as directed by section 4 of the Secure Networks Act, the Reimbursement Program to reimburse costs reasonably incurred by providers of advanced communications service with two million or fewer customers to permanently remove, replace, and dispose of covered communications equipment and services from their networks. To further administer the Reimbursement Program, the Commission establishes, and will publish on its website, a list of suggested replacements (Replacement List) for the equipment and services being removed, replaced, and destroyed, and establishes a reporting requirement and new information collection to require providers of advanced communications service to report covered communications equipment and service in their networks.

**B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA**

4. No comments were filed in response to the IRFAs. However, parties did file comments addressing the impact of some proposals on small entities.

5. LATAM and PRTC raise concerns that the proposal to require recipients of funding through the Reimbursement Program and ETCs receiving USF support to remove and replace covered communications equipment and services on the Covered List will be overly burdensome for entities,

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See 5 U.S.C. § 604.

<sup>3</sup> Pub. L. 116-124, 133 Stat. 158 (2020).

including smaller carriers, when identifying, removing, replacing, and discarding covered equipment and services from their networks.<sup>4</sup> PRTC also argues that the requirement for remove-and-replace will have a disproportionate impact on smaller entities.<sup>5</sup> Lastly, NTCA argues that small providers should be required to remove and replace covered equipment and services “simultaneously once congressional funding is provided to do so,”<sup>6</sup> and CCA similarly urges the Commission to only mandate removal-and-replacement once the requirement is fully funded, or else risk diverting scarce resources away for small and rural carriers.<sup>7</sup> As set forth in the Order, we note that the requirement to remove and replace covered equipment and services is contingent upon appropriation from Congress; this will reduce the burdens imposed upon smaller providers by ensuring that funds are available to cover reimbursable expenses through the Reimbursement Program.<sup>8</sup> Furthermore, we tie the administration of the remove-and-replace requirement to the administration of the Reimbursement Program, including limiting the scope of the requirement to equipment and services on the Covered List. This will allow providers to easily identify equipment and services to remove and replace from their networks; therefore, we find it will not be overly burdensome for entities, including smaller carriers, to identify, remove, replace, and discard covered equipment and services from their networks.

6. In response to the Commission’s proposal that the prohibition on the use of Federal subsidies under section 54.10 of the Commission’s rules, which implements section 3 of the Secure Networks Act, take effect 60 days after any particular communications equipment or services are placed on the Covered List, CCA urges the Commission to be mindful of the strains the current public health crisis has placed on small and rural wireless carriers and advocates for a transition timeline that allows carriers to demonstrate progress through milestones.<sup>9</sup> As set forth in the Order, we disagree with CCA’s assessment of the impact of the 60-day effective date of the section 54.10 prohibition.<sup>10</sup> First, setting the effective date of the prohibition at 60 days after covered equipment is placed on the Covered List is statutory,<sup>11</sup> and the rule we adopt codifies an effective date consistent with the statute. Second, the rule is to prohibit use of Federal subsidies to purchase, rent, lease, or otherwise obtain covered communications equipment or services, or maintain covered communications equipment or services previously purchased, rented, leased, or otherwise obtained on the Covered List; it does not directly speak to a deadline to remove or replace that equipment. To the extent providers request a transition period to secure alternative funding, similar to our decision in the *2019 Supply Chain Order*, we find that there is a compelling interest in protecting our national security, which necessitates prompt implementation of the prohibition.<sup>12</sup> Therefore, we find that 60 days is sufficient notice for small entities to prohibit spending of Federal subsidy funding on equipment and services added to the Covered List.<sup>13</sup>

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<sup>4</sup> LATAM Further Notice Comments at 3; PRTC Further Notice Comments at 5 (raising concerns that the requirement will be overly burdensome for smaller carriers).

<sup>5</sup> PRTC Further Notice Comments at 3.

<sup>6</sup> NTCA Sec. 4 PN Comments at 3.

<sup>7</sup> CCA Further Notice Comments at 4. *See also* NTCA Sec. 4 PN Comments at 2-3; PRTC Sec. 4 PN Reply at 5; CCA Second Further Notice Comments at 6; NTCA Second Further Notice Comments at 4.

<sup>8</sup> *See supra Second Report and Order* at Section III.A.4.

<sup>9</sup> CCA Second Further Notice Comments at 5-6. *See also* RWA Second Further Notice Reply at 4 (supporting CCA’s milestone-based proposal).

<sup>10</sup> *See supra Second Report and Order* at Section III.D.

<sup>11</sup> *See* Secure Networks Act § 3(a)(2).

<sup>12</sup> *See supra Second Report and Order* at Section III.D.

<sup>13</sup> *See id.*

7. NTCA requests that the Commission's rules specify the "use" restrictions on equipment or services pending their removal and replacement under the Commission's proposed rule and in combination with the prohibition against use of USF funds, which creates a "significant challenge" for smaller providers who are reliant upon USF funds.<sup>14</sup> As noted in the Order, the prohibition in section 3 of the Secure Networks Act, which superseded the Commission's earlier proposal, specifies that Federal subsidies made available through a program administered by the Commission cannot be used to purchase, rent, lease, or otherwise obtain any communications equipment or service, or maintain any covered communications equipment or service previously purchased, rented, leased, or otherwise obtained, and identified and published on the Covered List.<sup>15</sup> Additionally, the Commission clarifies in the Order that the requirement that recipients of Reimbursement Program funding and ETCs receiving USF support remove and replace covered equipment and services is contingent upon congressional appropriation; thus, entities required to comply with the remove-and-replace rule, including smaller providers, will not be required to remove covered equipment or services until there is funding available to reimburse them for the removal, replacement, and disposal of such equipment or services.<sup>16</sup>

8. The Secure Networks Coalition urges the Commission to release reimbursement funding upfront in order to offer financial security for affected operators representing small rural carriers, which often operate on lower margins than larger national carriers.<sup>17</sup> In the Order, we determine that the Reimbursement Program will allocate funds on a rolling basis upon showing of expenses actually incurred.<sup>18</sup> This provides recipients with the upfront knowledge of available funds for purposes of planning and engaging lenders and vendors. We find that this methodology best achieves Congress's goal of mitigating the administrative burden and costs of the program while taking steps to avoid waste, fraud, and abuse. We expect the reimbursement process, as shown in the broadcast incentive auction context, will sufficiently meet the financial needs of providers, including smaller providers, in a timely manner while ensuring appropriate agency oversight over the disbursement and use of funds for their intended purpose.

9. COMSovereign proposes that the Commission update its approved replacement vendor and equipment list frequently "to keep pace with new technologies and innovations," which will help guarantee that advanced products and services are available to small and rural providers required to remove and replace covered equipment and services.<sup>19</sup> As noted in the Order, we agree with commenters that the list of suggested equipment and service should be transparent and current.<sup>20</sup> We will update the list of suggested equipment and services, and program recipients and interested third-parties may also provide information about suggested equipment and services to assist us in keeping the list current and informed based upon changes in the market. We find that the list should be updated at least annually to ensure that the list stays current with new technologies and innovations while also providing access to evolving next-generation communications capabilities to all consumers.<sup>21</sup> We find that the categories of

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<sup>14</sup> NTCA Further Notice Reply at 11; NTCA Further Notice Comments at 4.

<sup>15</sup> See *supra* Second Report and Order at Section III.D.

<sup>16</sup> See *supra* Second Report and Order at Section III.A.1.

<sup>17</sup> SNC Second Further Notice Reply at 8-9. See also CCA *Ex Parte* Aug. 3, 2020 at 2; NetNumber *Ex Parte* Aug. 17, 2020 at 3; CCA *Ex Parte* July 29, 2020 at 2; CCA Sec. 4 PN Comments at 5; COMSovereign Sec. 4 PN Comments at 9 (urging the Commission to establish a payment schedule and clear milestones for payments to inform carriers when they will be able to obtain payments to facilitate a transition).

<sup>18</sup> See *supra* Second Report and Order at Section III.E.3.a.

<sup>19</sup> COMSovereign Sec. 4 PN Comments at 6.

<sup>20</sup> See *supra* Second Report and Order at Section III.E.5. See also CTIA Sec. 4 PN Comments at 9; Metaswitch Sec. 4 PN Comments at 5.

<sup>21</sup> See *supra* Second Report and Order at Section III.E.5.



equipment and services are unlikely to change quarterly, and that an annual review is sufficient to foster a competitive marketplace. An annual update will be much more comprehensive and avoid the need for providers to constantly check the Commission's website prior to investing in their networks.<sup>22</sup> Additionally, updating the Replacement List annually is consistent with the schedule that Congress set for the Commission to update the list of covered communications equipment and services.<sup>23</sup> We believe updating our list of equipment and services that pose a threat to national security risks and our Replacement Lists together will provide consistency and clarity for providers seeking to comply with our rules.

**C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration**

10. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.<sup>24</sup>

11. The Chief Counsel did not file any comments in response to this proceeding.

**D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply**

12. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted pursuant to the Order.<sup>25</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>26</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>27</sup> A "small business concern" is one which (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>28</sup>

13. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein.<sup>29</sup> First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the Small Business Administration's (SBA) Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.<sup>30</sup> These types of

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<sup>22</sup> See *id.*

<sup>23</sup> See Secure Networks Act § 2(d)(3) ("For each 12-month period during which the list published under subsection (a) is not updated, the Commission shall notify the public . . .")

<sup>24</sup> 5 U.S.C. § 604 (a)(3).

<sup>25</sup> *Id.* § 604(a)(3).

<sup>26</sup> *Id.* § 601(6).

<sup>27</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" set forth in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

<sup>28</sup> 15 U.S.C. § 632.

<sup>29</sup> See 5 U.S.C. § 601(3)-(6).

<sup>30</sup> See SBA, Office of Advocacy, "What's New With Small Business?", <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/09/23172859/Whats-New-With-Small-Business-2019.pdf> (Sept 2019).

small businesses represent 99.9% of all businesses in the United States, which translates to 30.7 million businesses.<sup>31</sup>

14. Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”<sup>32</sup> The Internal Revenue Service (IRS) uses a revenue benchmark of \$50,000 or less to delineate its annual electronic filing requirements for small exempt organizations.<sup>33</sup> Nationwide, for tax year 2018, there were approximately 571,709 small exempt organizations in the U.S. reporting revenues of \$50,000 or less according to the registration and tax data for exempt organizations available from the IRS.<sup>34</sup>

15. Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”<sup>35</sup> U.S. Census Bureau data from the 2017 Census of Governments<sup>36</sup> indicate that there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.<sup>37</sup> Of this number there were 36,931 general purpose governments (county<sup>38</sup>, municipal and town or township<sup>39</sup>) with populations of

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<sup>31</sup> *Id.*

<sup>32</sup> 5 U.S.C. § 601(4).

<sup>33</sup> The IRS benchmark is similar to the population of less than 50,000 benchmark in 5 U.S.C § 601(5) that is used to define a small governmental jurisdiction. Therefore, the IRS benchmark has been used to estimate the number small organizations in this small entity description. *See* Annual Electronic Filing Requirement for Small Exempt Organizations — Form 990-N (e-Postcard), “Who must file,”

<https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard>. We note that the IRS data does not provide information on whether a small exempt organization is independently owned and operated or dominant in its field.

<sup>34</sup> *See* Exempt Organizations Business Master File Extract (EO BMF), “CSV Files by Region,” <https://www.irs.gov/charities-non-profits/exempt-organizations-business-master-file-extract-eo-bmf>. The IRS Exempt Organization Business Master File (EO BMF) Extract provides information on all registered tax-exempt/non-profit organizations. The data utilized for purposes of this description was extracted from the IRS EO BMF data for Region 1-Northeast Area (76,886), Region 2-Mid-Atlantic and Great Lakes Areas (221,121), and Region 3-Gulf Coast and Pacific Coast Areas (273,702) which includes the continental U.S., Alaska, and Hawaii. This data does not include information for Puerto Rico.

<sup>35</sup> 5 U.S.C. § 601(5).

<sup>36</sup> *See* 13 U.S.C. § 161. The Census of Governments survey is conducted every five (5) years compiling data for years ending with “2” and “7”. *See also* Census of Governments, <https://www.census.gov/programs-surveys/cog/about.html>.

<sup>37</sup> *See* U.S. Census Bureau, 2017 Census of Governments – Organization Table 2. Local Governments by Type and State: 2017 [CG1700ORG02]. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. Local governmental jurisdictions are made up of general purpose governments (county, municipal and town or township) and special purpose governments (special districts and independent school districts). *See also* Table 2. CG1700ORG02 Table Notes\_Local Governments by Type and State\_2017.

<sup>38</sup> *See id.* at Table 5. County Governments by Population-Size Group and State: 2017 [CG1700ORG05]. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 2,105 county governments with populations less than 50,000. This category does not include subcounty (municipal and township) governments.

<sup>39</sup> *See id.* at Table 6. Subcounty General-Purpose Governments by Population-Size Group and State: 2017 [CG1700ORG06]. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 18,729 municipal and 16,097 town and township governments with populations less than 50,000.

less than 50,000 and 12,040 special purpose governments - independent school districts<sup>40</sup> with enrollment populations of less than 50,000.<sup>41</sup> Accordingly, based on the 2017 U.S. Census of Governments data, we estimate that at least 48,971 entities fall into the category of “small governmental jurisdictions.”<sup>42</sup>

16. Small entities potentially affected by the rules herein include eligible schools and libraries, eligible rural non-profit and public health care providers, and the eligible service providers offering them services, including telecommunications service providers, Internet Service Providers (ISPs), and vendors of the services and equipment used for telecommunications and broadband networks.

### 1. Schools and Libraries

17. As noted, “small entity” includes non-profit and small government entities. Under the schools and libraries universal service support mechanism, which provides support for elementary and secondary schools and libraries, an elementary school is generally “a non-profit institutional day or residential school, that provides elementary education, as determined under state law.”<sup>43</sup> A secondary school is generally defined as “a non-profit institutional day or residential school, that provides secondary education, as determined under state law,” and not offering education beyond grade 12.<sup>44</sup> A library includes “(1) a public library, (2) a public elementary school or secondary school library, (3) an academic library, (4) a research library . . . , and (5) a private library, but only if the state in which such private library is located determines that the library should be considered a library for the purposes of this definition.”<sup>45</sup> For-profit schools and libraries, and schools and libraries with endowments in excess of \$50,000,000, are not eligible to receive discounts under the program, nor are libraries whose budgets are not completely separate from any schools.<sup>46</sup> Certain other statutory definitions apply as well.<sup>47</sup> The SBA has defined for-profit, elementary and secondary schools having \$12 million or less in annual receipts, and libraries having \$16.5 million or less in annual receipts, as small entities.<sup>48</sup> In funding year 2007, approximately 105,500 schools and 10,950 libraries received funding under the schools and libraries universal service mechanism. Although we are unable to estimate with precision the number of these entities that would qualify as small entities under SBA’s size standard, we estimate that fewer than 105,500 schools and 10,950 libraries might be affected annually by our action, under current operation of the program.

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<sup>40</sup> See *id.* at Table 10. Elementary and Secondary School Systems by Enrollment-Size Group and State: 2017 [CG1700ORG10]. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 12,040 independent school districts with enrollment populations less than 50,000. See also Table 4. Special-Purpose Local Governments by State Census Years 1942 to 2017 [CG1700ORG04], CG1700ORG04 Table Notes\_Special Purpose Local Governments by State\_Census Years 1942 to 2017.

<sup>41</sup> While the special purpose governments category also includes local special district governments, the 2017 Census of Governments data does not provide data aggregated based on population size for the special purpose governments category. Therefore, only data from independent school districts is included in the special purpose governments category.

<sup>42</sup> This total is derived from the sum of the number of general purpose governments (county, municipal and town or township) with populations of less than 50,000 (36,931) and the number of special purpose governments - independent school districts with enrollment populations of less than 50,000 (12,040), from the 2017 Census of Governments - Organizations Tables 5, 6, and 10.

<sup>43</sup> 47 CFR § 54.500.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 47 CFR § 54.501(a), (b).

<sup>47</sup> *Id.*

<sup>48</sup> 13 CFR § 121.201; NAICS codes 611110 and 519120 (NAICS code 519120 was previously 514120).

## 2. Healthcare Providers

18. *Offices of Physicians (except Mental Health Specialists)*. This U.S. industry comprises establishments of health practitioners having the degree of M.D. (Doctor of Medicine) or D.O. (Doctor of Osteopathy) primarily engaged in the independent practice of general or specialized medicine (except psychiatry or psychoanalysis) or surgery. These practitioners operate private or group practices in their own offices (e.g., centers, clinics) or in the facilities of others, such as hospitals or HMO medical centers.<sup>49</sup> The SBA has created a size standard for this industry, which is annual receipts of \$12 million or less.<sup>50</sup> According to 2012 U.S. Economic Census, 152,468 firms operated throughout the entire year in this industry.<sup>51</sup> Of that number, 147,718 had annual receipts of less than \$10 million, while 3,108 firms had annual receipts between \$10 million and \$24,999,999.<sup>52</sup> Based on this data, we conclude that a majority of firms operating in this industry are small under the applicable size standard.

19. *Offices of Physicians, Mental Health Specialists*. This U.S. industry comprises establishments of health practitioners having the degree of M.D. (Doctor of Medicine) or D.O. (Doctor of Osteopathy) primarily engaged in the independent practice of psychiatry or psychoanalysis. These practitioners operate private or group practices in their own offices (e.g., centers, clinics) or in the facilities of others, such as hospitals or HMO medical centers.<sup>53</sup> The SBA has established a size standard for businesses in this industry, which is annual receipts of \$12 million dollars or less.<sup>54</sup> The 2012 U.S. Economic Census indicates that 8,809 firms operated throughout the entire year in this industry.<sup>55</sup> Of that number 8,791 had annual receipts of less than \$10 million, while 13 firms had annual receipts between \$10 million and \$24,999,999.<sup>56</sup> Based on this data, we conclude that a majority of firms in this industry are small under the applicable standard.

20. *Offices of Dentists*. This U.S. industry comprises establishments of health practitioners having the degree of D.M.D. (Doctor of Dental Medicine), D.D.S. (Doctor of Dental Surgery), or D.D.Sc. (Doctor of Dental Science) primarily engaged in the independent practice of general or specialized dentistry or dental surgery. These practitioners operate private or group practices in their own offices (e.g., centers, clinics) or in the facilities of others, such as hospitals or HMO medical centers. They can provide either comprehensive preventive, cosmetic, or emergency care, or specialize in a single field of

<sup>49</sup> See U.S. Census Bureau, *2017 NAICS Definition, "621111 Offices of Physicians (except Mental Health Specialists)"* <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621111&search=2017+NAICS+Search&search=2017>.

<sup>50</sup> See 13 CFR § 121.201, NAICS Code 621111.

<sup>51</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621111, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=621111&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false>.

<sup>52</sup> *Id.* The available U.S. Census data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$12 million or less.

<sup>53</sup> See U.S. Census Bureau, *2017 NAICS Definition, "621112 Offices of Physicians, Mental Health Specialists"*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621112&search=2017+NAICS+Search&search=2017>.

<sup>54</sup> See 13 CFR § 121.201, NAICS Code 621112.

<sup>55</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621112, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=621112&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false>.

<sup>56</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$12 million or less.

dentistry.<sup>57</sup> The SBA has established a size standard for that industry of annual receipts of \$8 million or less.<sup>58</sup> The 2012 U.S. Economic Census indicates that 115,268 firms operated in the dental industry throughout the entire year.<sup>59</sup> Of that number 114,417 had annual receipts of less than \$5 million, while 651 firms had annual receipts between \$5 million and \$9,999,999.<sup>60</sup> Based on this data, we conclude that a majority of business in the dental industry are small under the applicable standard.

21. *Offices of Chiropractors.* This U.S. industry comprises establishments of health practitioners having the degree of D.C. (Doctor of Chiropractic) primarily engaged in the independent practice of chiropractic. These practitioners provide diagnostic and therapeutic treatment of neuromusculoskeletal and related disorders through the manipulation and adjustment of the spinal column and extremities, and operate private or group practices in their own offices (e.g., centers, clinics) or in the facilities of others, such as hospitals or HMO medical centers.<sup>61</sup> The SBA has established a size standard for this industry, which is annual receipts of \$8 million or less.<sup>62</sup> The 2012 U.S. Economic Census statistics show that in 2012, 33,940 firms operated throughout the entire year.<sup>63</sup> Of that number 33,910 operated with annual receipts of less than \$5 million per year, while 26 firms had annual receipts between \$5 million and \$9,999,999.<sup>64</sup> Based on this data, we conclude that a majority of chiropractors are small.

22. *Offices of Optometrists.* This U.S. industry comprises establishments of health practitioners having the degree of O.D. (Doctor of Optometry) primarily engaged in the independent practice of optometry. These practitioners examine, diagnose, treat, and manage diseases and disorders of the visual system, the eye and associated structures as well as diagnose related systemic conditions. Offices of optometrists prescribe and/or provide eyeglasses, contact lenses, low vision aids, and vision therapy. They operate private or group practices in their own offices (e.g., centers, clinics) or in the facilities of others, such as hospitals or HMO medical centers, and may also provide the same services as opticians, such as selling and fitting prescription eyeglasses and contact lenses.<sup>65</sup> The SBA has established a size standard for businesses operating in this industry, which is annual receipts of \$8 million or less.<sup>66</sup>

<sup>57</sup> See U.S. Census Bureau, 2017 NAICS Definition, “621210 Offices of Dentists”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621210&search=2017+NAICS+Search&search=2017>.

<sup>58</sup> See 13 CFR § 121.201, NAICS Code 621210.

<sup>59</sup> See U.S. Census Bureau, 2012 Economic Census of the United States, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621210, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=621210&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false>.

<sup>60</sup> *Id.* The available U.S. Census data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$8 million or less.

<sup>61</sup> See U.S. Census Bureau, 2017 NAICS Definition, “621310 “Offices of Chiropractors””, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621310&search=2017+NAICS+Search&search=2017>.

<sup>62</sup> See 13 CFR § 121.201, NAICS Code 621310.

<sup>63</sup> See U.S. Census Bureau, 2012 Economic Census of the United States, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621310, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=621310&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false&vintage=2012>.

<sup>64</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$8 million or less.

<sup>65</sup> See U.S. Census Bureau, 2017 NAICS Definition “621320 Offices of Optometrists”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621320&search=2017+NAICS+Search&search=2017>.

<sup>66</sup> See 13 CFR § 121.201, NAICS Code 621320.

The 2012 Economic Census indicates that 18,050 firms operated the entire year.<sup>67</sup> Of that number, 17,951 had annual receipts of less than \$5 million, while 70 firms had annual receipts between \$5 million and \$9,999,999.<sup>68</sup> Based on this data, we conclude that a majority of optometrists in this industry are small.

23. *Offices of Mental Health Practitioners (except Physicians)*. This U.S. industry comprises establishments of independent mental health practitioners (except physicians) primarily engaged in (1) the diagnosis and treatment of mental, emotional, and behavioral disorders and/or (2) the diagnosis and treatment of individual or group social dysfunction brought about by such causes as mental illness, alcohol and substance abuse, physical and emotional trauma, or stress. These practitioners operate private or group practices in their own offices (e.g., centers, clinics) or in the facilities of others, such as hospitals or HMO medical centers.<sup>69</sup> The SBA has created a size standard for this industry, which is annual receipts of \$8 million or less.<sup>70</sup> The 2012 U.S. Economic Census indicates that 16,058 firms operated throughout the entire year.<sup>71</sup> Of that number, 15,894 firms received annual receipts of less than \$5 million, while 111 firms had annual receipts between \$5 million and \$9,999,999.<sup>72</sup> Based on this data, we conclude that a majority of mental health practitioners who do not employ physicians are small.

24. *Offices of Physical, Occupational and Speech Therapists and Audiologists*. This U.S. industry comprises establishments of independent health practitioners primarily engaged in one of the following: (1) providing physical therapy services to patients who have impairments, functional limitations, disabilities, or changes in physical functions and health status resulting from injury, disease or other causes, or who require prevention, wellness or fitness services; (2) planning and administering educational, recreational, and social activities designed to help patients or individuals with disabilities, regain physical or mental functioning or to adapt to their disabilities; and (3) diagnosing and treating speech, language, or hearing problems. These practitioners operate private or group practices in their own offices (e.g., centers, clinics) or in the facilities of others, such as hospitals or HMO medical centers.<sup>73</sup> The SBA has established a size standard for this industry, which is annual receipts of \$8 million or less.<sup>74</sup> The 2012 U.S. Economic Census indicates that 20,567 firms in this industry operated throughout the

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<sup>67</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621320, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=621320&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false>.

<sup>68</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$8 million or less.

<sup>69</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “621330 Offices of Mental Health Practitioners (except Physicians)”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621330&search=2017+NAICS+Search&search=2017>.

<sup>70</sup> See 13 CFR § 121.201, NAICS Code 621330.

<sup>71</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621330, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false>.

<sup>72</sup> *Id.* The available U.S. Census data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$8 million or less.

<sup>73</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “621340 Offices of Physical, Occupational and Speech Therapists and Audiologists”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621340&search=2017+NAICS+Search&search=2017>.

<sup>74</sup> See 13 CFR § 121.201, NAICS Code 621340.

entire year.<sup>75</sup> Of this number, 20,047 had annual receipts of less than \$5 million, while 270 firms had annual receipts between \$5 million and \$9,999,999.<sup>76</sup> Based on this data, we conclude that a majority of businesses in this industry are small.

25. *Offices of Podiatrists.* This U.S. industry comprises establishments of health practitioners having the degree of D.P.M. (Doctor of Podiatric Medicine) primarily engaged in the independent practice of podiatry. These practitioners diagnose and treat diseases and deformities of the foot and operate private or group practices in their own offices (e.g., centers, clinics) or in the facilities of others, such as hospitals or HMO medical centers.<sup>77</sup> The SBA has established a size standard for businesses in this industry, which is annual receipts of \$8 million or less.<sup>78</sup> The 2012 U.S. Economic Census indicates that 7,569 podiatry firms operated throughout the entire year.<sup>79</sup> Of that number, 7,545 firms had annual receipts of less than \$5 million, while 22 firms had annual receipts between \$5 million and \$9,999,999.<sup>80</sup> Based on this data, we conclude that a majority of firms in this industry are small.

26. *Offices of All Other Miscellaneous Health Practitioners.* This U.S. industry comprises establishments of independent health practitioners (except physicians; dentists; chiropractors; optometrists; mental health specialists; physical, occupational, and speech therapists; audiologists; and podiatrists). These practitioners operate private or group practices in their own offices (e.g., centers, clinics) or in the facilities of others, such as hospitals or HMO medical centers.<sup>81</sup> The SBA has established a size standard for this industry, which is annual receipts of \$8 million or less.<sup>82</sup> The 2012 U.S. Economic Census indicates that 11,460 firms operated throughout the entire year.<sup>83</sup> Of that number, 11,374 firms had annual receipts of less than \$5 million, while 48 firms had annual receipts between \$5

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<sup>75</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621340,

<https://data.census.gov/cedsci/table?text=EC1262SSSZ4&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false>.

<sup>76</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$8 million or less.

<sup>77</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “621391 Offices of Podiatrists”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621391&search=2017+NAICS+Search&search=2017>.

<sup>78</sup> See 13 CFR § 121.201, NAICS Code 621391.

<sup>79</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621391,

<https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=621391&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false&vintage=2012>.

<sup>80</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$8 million or less.

<sup>81</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “621399 Offices of All Other Miscellaneous Health Practitioners”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621399&search=2017+NAICS+Search&search=2017>.

<sup>82</sup> See 13 CFR § 121.201, NAICS Code 621399.

<sup>83</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621399,

<https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=621399&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false>.

million and \$9,999,999.<sup>84</sup> Based on this data, we conclude the majority of firms in this industry are small.

27. *Family Planning Centers.* This U.S. industry comprises establishments with medical staff primarily engaged in providing a range of family planning services on an outpatient basis, such as contraceptive services, genetic and prenatal counseling, voluntary sterilization, and therapeutic and medically induced termination of pregnancy.<sup>85</sup> The SBA has established a size standard for this industry, which is annual receipts of \$12 million or less.<sup>86</sup> The 2012 Economic Census indicates that 1,286 firms in this industry operated throughout the entire year.<sup>87</sup> Of that number 1,237 had annual receipts of less than \$10 million, while 36 firms had annual receipts between \$10 million and \$24,999,999.<sup>88</sup> Based on this data, we conclude that the majority of firms in this industry is small.

28. *Outpatient Mental Health and Substance Abuse Centers.* This U.S. industry comprises establishments with medical staff primarily engaged in providing outpatient services related to the diagnosis and treatment of mental health disorders and alcohol and other substance abuse. These establishments generally treat patients who do not require inpatient treatment. They may provide a counseling staff and information regarding a wide range of mental health and substance abuse issues and/or refer patients to more extensive treatment programs, if necessary.<sup>89</sup> The SBA has established a size standard for this industry, which is \$16.5 million or less in annual receipts.<sup>90</sup> The 2012 U.S. Economic Census indicates that 4,446 firms operated throughout the entire year.<sup>91</sup> Of that number, 4,069 had annual receipts of less than \$10 million while 286 firms had annual receipts between \$10 million and \$24,999,999.<sup>92</sup> Based on this data, we conclude that a majority of firms in this industry are small.

29. *HMO Medical Centers.* This U.S. industry comprises establishments with physicians and other medical staff primarily engaged in providing a range of outpatient medical services to the health maintenance organization (HMO) subscribers with a focus generally on primary health care. These establishments are owned by the HMO. Included in this industry are HMO establishments that both

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<sup>84</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$8 million or less.

<sup>85</sup> See U.S. Census Bureau, *2017 NAICS Definition, "621410 Family Planning Centers"*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621410&search=2017+NAICS+Search&search=2017>.

<sup>86</sup> See 13 CFR § 121.201, NAICS Code 621410.

<sup>87</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621410, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=621410&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false>.

<sup>88</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$12 million or less.

<sup>89</sup> See U.S. Census Bureau, *2017 NAICS Definition, "621420 Outpatient Mental Health and Substance Abuse Centers"*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621420&search=2017+NAICS+Search&search=2017>.

<sup>90</sup> See 13 CFR § 121.201, NAICS Code 621420.

<sup>91</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621420, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=621420&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false>.

<sup>92</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$16.5 million or less.



provide health care services and underwrite health and medical insurance policies.<sup>93</sup> The SBA has established a size standard for this industry, which is \$35 million or less in annual receipts.<sup>94</sup> The 2012 U.S. Economic Census indicates that 14 firms in this industry operated throughout the entire year.<sup>95</sup> Of that number, 5 firms had annual receipts of less than \$25 million, while 1 firm had annual receipts between \$25 million and \$99,999,999.<sup>96</sup> Based on this data, we conclude that approximately one-third of the firms in this industry are small.

30. *Freestanding Ambulatory Surgical and Emergency Centers.* This U.S. industry comprises establishments with physicians and other medical staff primarily engaged in (1) providing surgical services (e.g., orthoscopic and cataract surgery) on an outpatient basis or (2) providing emergency care services (e.g., setting broken bones, treating lacerations, or tending to patients suffering injuries as a result of accidents, trauma, or medical conditions necessitating immediate medical care) on an outpatient basis. Outpatient surgical establishments have specialized facilities, such as operating and recovery rooms, and specialized equipment, such as anesthetic or X-ray equipment.<sup>97</sup> The SBA has established a size standard for this industry, which is annual receipts of \$16.5 million or less.<sup>98</sup> The 2012 U.S. Economic Census indicates that 3,595 firms in this industry operated throughout the entire year.<sup>99</sup> Of that number, 3,222 firms had annual receipts of less than \$10 million, while 289 firms had annual receipts between \$10 million and \$24,999,999.<sup>100</sup> Based on this data, we conclude that a majority of firms in this industry are small.

31. *All Other Outpatient Care Centers.* This U.S. industry comprises establishments with medical staff primarily engaged in providing general or specialized outpatient care (except family planning centers, outpatient mental health and substance abuse centers, HMO medical centers, kidney dialysis centers, and freestanding ambulatory surgical and emergency centers). Centers or clinics of health practitioners with different degrees from more than one industry practicing within the same establishment (i.e., Doctor of Medicine and Doctor of Dental Medicine) are included in this industry.<sup>101</sup> The SBA has established a size standard for this industry, which is annual receipts of \$22 million or

<sup>93</sup> See U.S. Census Bureau, *2017 NAICS Definition, "621491 HMO Medical Centers"*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621491&search=2017+NAICS+Search&search=2017>.

<sup>94</sup> See 13 CFR § 121.201, NAICS Code 621491.

<sup>95</sup> See U.S. Census Bureau, *2012 Economic Census of the United States, Table ID: EC1262SSSZ4, Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621491, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=621491&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false>.

<sup>96</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$35 million or less.

<sup>97</sup> See U.S. Census Bureau, *2017 NAICS Definition, "621493 Freestanding Ambulatory Surgical and Emergency Centers"*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621493&search=2017+NAICS+Search&search=2017>.

<sup>98</sup> See 13 CFR § 121.201, NAICS Code 621493.

<sup>99</sup> See U.S. Census Bureau, *2012 Economic Census of the United States, Table ID: EC1262SSSZ4, Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621493, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=621493&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false>.

<sup>100</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$16.5 million or less.

<sup>101</sup> See U.S. Census Bureau, *2017 NAICS Definition, "621498 All Other Outpatient Care Centers"*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621498&search=2017+NAICS+Search&search=2017>.

less.<sup>102</sup> The 2012 U.S. Economic Census indicates that 4,903 firms operated in this industry throughout the entire year.<sup>103</sup> Of this number, 4,269 firms had annual receipts of less than \$10 million, while 389 firms had annual receipts between \$10 million and \$24,999,999.<sup>104</sup> Based on this data, we conclude that a majority of firms in this industry are small.

32. *Blood and Organ Banks.* This U.S. industry comprises establishments primarily engaged in collecting, storing, and distributing blood and blood products and storing and distributing body organs.<sup>105</sup> The SBA has established a size standard for this industry, which is annual receipts of \$35 million or less.<sup>106</sup> The 2012 U.S. Economic Census indicates that 314 firms operated in this industry throughout the entire year.<sup>107</sup> Of that number, 235 operated with annual receipts of less than \$25 million, while 41 firms had annual receipts between \$25 million and \$49,999,999.<sup>108</sup> Based on this data, we conclude that approximately three-quarters of firms that operate in this industry are small.

33. *All Other Miscellaneous Ambulatory Health Care Services.* This U.S. industry comprises establishments primarily engaged in providing ambulatory health care services (except offices of physicians, dentists, and other health practitioners; outpatient care centers; medical and diagnostic laboratories; home health care providers; ambulances; and blood and organ banks).<sup>109</sup> The SBA has established a size standard for this industry, which is annual receipts of \$16.5 million or less.<sup>110</sup> The 2012 U.S. Economic Census indicates that 2,429 firms operated in this industry throughout the entire year.<sup>111</sup> Of that number, 2,318 had annual receipts of less than \$10 million, while 56 firms had annual receipts

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<sup>102</sup> See 13 CFR § 121.201, NAICS Code 621498.

<sup>103</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621498, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=621498&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false>.

<sup>104</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$22 million or less.

<sup>105</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “621991 Blood and Organ Banks”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621991&search=2017+NAICS+Search&search=2017>.

<sup>106</sup> See 13 CFR § 121.201, NAICS Code 621991.

<sup>107</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621991, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=621991&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false>.

<sup>108</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$35 million or less.

<sup>109</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “621999 All Other Miscellaneous Ambulatory Health Care Services”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621999&search=2017+NAICS+Search&search=2017>.

<sup>110</sup> See 13 CFR § 121.201, NAICS Code 621999.

<sup>111</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621999, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=621999&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false>.

between \$10 million and \$24,999,999.<sup>112</sup> Based on this data, we conclude that a majority of the firms in this industry is small.

34. *Medical Laboratories.* This U.S. industry comprises establishments known as medical laboratories primarily engaged in providing analytic or diagnostic services, including body fluid analysis, generally to the medical profession or to the patient on referral from a health practitioner.<sup>113</sup> The SBA has established a size standard for this industry, which is annual receipts of \$35 million or less.<sup>114</sup> The 2012 U.S. Economic Census indicates that 2,599 firms operated in this industry throughout the entire year.<sup>115</sup> Of this number, 2,465 had annual receipts of less than \$25 million, while 60 firms had annual receipts between \$25 million and \$49,999,999.<sup>116</sup> Based on this data, we conclude that a majority of firms that operate in this industry are small.

35. *Diagnostic Imaging Centers.* This U.S. industry comprises establishments known as diagnostic imaging centers primarily engaged in producing images of the patient generally on referral from a health practitioner.<sup>117</sup> The SBA has established size standard for this industry, which is annual receipts of \$16.5 million or less.<sup>118</sup> The 2012 U.S. Economic Census indicates that 4,209 firms operated in this industry throughout the entire year.<sup>119</sup> Of that number, 3,876 firms had annual receipts of less than \$10 million, while 228 firms had annual receipts between \$10 million and \$24,999,999.<sup>120</sup> Based on this data, we conclude that a majority of firms that operate in this industry are small.

36. *Home Health Care Services.* This U.S. industry comprises establishments primarily engaged in providing skilled nursing services in the home, along with a range of the following: personal care services; homemaker and companion services; physical therapy; medical social services; medications; medical equipment and supplies; counseling; 24-hour home care; occupation and vocational therapy; dietary and nutritional services; speech therapy; audiology; and high-tech care, such as intravenous therapy.<sup>121</sup> The SBA has established a size standard for this industry, which is annual receipts

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<sup>112</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$16.5 million or less.

<sup>113</sup> See U.S. Census Bureau, 2017 NAICS Definition, “621511 Medical Laboratories”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621511&search=2017+NAICS+Search&search=2017>.

<sup>114</sup> See 13 CFR § 121.201, NAICS Code 621511.

<sup>115</sup> See U.S. Census Bureau, 2012 Economic Census of the United States, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621511, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=621511&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false&vintage=2012>.

<sup>116</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$35 million or less.

<sup>117</sup> See U.S. Census Bureau, 2017 NAICS Definition, “621512 Diagnostic Imaging Centers”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621512&search=2017+NAICS+Search&search=2017>.

<sup>118</sup> See 13 CFR § 121.201, NAICS Code 621512.

<sup>119</sup> See U.S. Census Bureau, 2012 Economic Census of the United States, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621512, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=621512&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false>.

<sup>120</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$16.5 million or less.

<sup>121</sup> See U.S. Census Bureau, 2017 NAICS Definition, “621610 Home Health Care Services”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621610&search=2017+NAICS+Search&search=2017>.

of \$16.5 million or less.<sup>122</sup> The 2012 U.S. Economic Census indicates that 17,770 firms operated in this industry throughout the entire year.<sup>123</sup> Of that number, 16,822 had annual receipts of less than \$10 million, while 590 firms had annual receipts between \$10 million and \$24,999,999.<sup>124</sup> Based on this data, we conclude that a majority of firms that operate in this industry are small.

37. *Ambulance Services.* This U.S. industry comprises establishments primarily engaged in providing transportation of patients by ground or air, along with medical care. These services are often provided during a medical emergency but are not restricted to emergencies. The vehicles are equipped with lifesaving equipment operated by medically trained personnel.<sup>125</sup> The SBA has established a size standard for this industry, which is annual receipts of \$16.5 million or less.<sup>126</sup> The 2012 U.S. Economic Census indicates that 2,984 firms operated in this industry throughout the entire year.<sup>127</sup> Of that number, 2,926 had annual receipts of less than \$15 million, while 133 firms had annual receipts between \$10 million and \$24,999,999.<sup>128</sup> Based on this data, we conclude that a majority of firms in this industry is small.

38. *Kidney Dialysis Centers.* This U.S. industry comprises establishments with medical staff primarily engaged in providing outpatient kidney or renal dialysis services.<sup>129</sup> The SBA has established a size standard for this industry, which is annual receipts of \$41.5 million or less.<sup>130</sup> The 2012 U.S. Economic Census indicates that 396 firms operated in this industry throughout the entire year.<sup>131</sup> Of that number, 379 had annual receipts of less than \$25 million, while 7 firms had annual receipts between \$25 million and \$49,999,999.<sup>132</sup> Based on this data, we conclude that a majority of firms in this industry are small.

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<sup>122</sup> See 13 CFR § 121.201, NAICS Code 621610.

<sup>123</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621610, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=621610&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false>.

<sup>124</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$16.5 million or less.

<sup>125</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “621910 Ambulance Services”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621910&search=2017+NAICS+Search&search=2017>.

<sup>126</sup> See 13 CFR § 121.201, NAICS Code 621910.

<sup>127</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621910, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=621910&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false>.

<sup>128</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$16.5 million or less.

<sup>129</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “621492 Kidney Dialysis Centers”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=621492&search=2017+NAICS+Search&search=2017>.

<sup>130</sup> See 13 CFR § 121.201, NAICS Code 621492.

<sup>131</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 621492, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=621492&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false&vintage=2012>.

<sup>132</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$41 million or less.

39. *General Medical and Surgical Hospitals.* This U.S. industry comprises establishments known and licensed as general medical and surgical hospitals primarily engaged in providing diagnostic and medical treatment (both surgical and nonsurgical) to inpatients with any of a wide variety of medical conditions. These establishments maintain inpatient beds and provide patients with food services that meet their nutritional requirements. These hospitals have an organized staff of physicians and other medical staff to provide patient care services. These establishments usually provide other services, such as outpatient services, anatomical pathology services, diagnostic X-ray services, clinical laboratory services, operating room services for a variety of procedures, and pharmacy services.<sup>133</sup> The SBA has established a size standard for this industry, which is annual receipts of \$41.5 million or less.<sup>134</sup> The 2012 U.S. Economic Census indicates that 2,800 firms operated in this industry throughout the entire year.<sup>135</sup> Of that number, 877 has annual receipts of less than \$25 million, while 400 firms had annual receipts between \$25 million and \$49,999,999.<sup>136</sup> Based on this data, we conclude that approximately one-quarter of firms in this industry are small.

40. *Psychiatric and Substance Abuse Hospitals.* This U.S. industry comprises establishments known and licensed as psychiatric and substance abuse hospitals primarily engaged in providing diagnostic, medical treatment, and monitoring services for inpatients who suffer from mental illness or substance abuse disorders. The treatment often requires an extended stay in the hospital. These establishments maintain inpatient beds and provide patients with food services that meet their nutritional requirements. They have an organized staff of physicians and other medical staff to provide patient care services. Psychiatric, psychological, and social work services are available at the facility. These hospitals usually provide other services, such as outpatient services, clinical laboratory services, diagnostic X-ray services, and electroencephalograph services.<sup>137</sup> The SBA has established a size standard for this industry, which is annual receipts of \$41.5 million or less.<sup>138</sup> The 2012 U.S. Economic Census indicates that 404 firms operated in this industry throughout the entire year.<sup>139</sup> Of that number, 185 had annual receipts of less than \$25 million, while 107 firms had annual receipts between \$25 million and \$49,999,999.<sup>140</sup> Based on this data, we conclude that more than one-half of the firms in this industry are small.

41. *Specialty (Except Psychiatric and Substance Abuse) Hospitals.* This U.S. industry

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<sup>133</sup> See U.S. Census Bureau, 2017 NAICS Definition, “622110 General Medical and Surgical Hospitals”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=622110&search=2017+NAICS+Search&search=2017>.

<sup>134</sup> See 13 CFR § 121.201, NAICS Code 622110.

<sup>135</sup> See U.S. Census Bureau, 2012 Economic Census of the United States, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 622110, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=622110&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false&vintage=2012>.

<sup>136</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$41.5 million or less.

<sup>137</sup> See U.S. Census Bureau, 2017 NAICS Definition, “622210 Psychiatric and Substance Abuse Hospitals”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=622210&search=2017+NAICS+Search&search=2017>.

<sup>138</sup> See 13 CFR § 121.201, NAICS Code 622210.

<sup>139</sup> See U.S. Census Bureau, 2012 Economic Census of the United States, Table ID: EC1262SSSZ4, *Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 622210, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=622210&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false>.

<sup>140</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$41.5 million or less.

consists of establishments known and licensed as specialty hospitals primarily engaged in providing diagnostic, and medical treatment to inpatients with a specific type of disease or medical condition (except psychiatric or substance abuse). Hospitals providing long-term care for the chronically ill and hospitals providing rehabilitation, restorative, and adjustive services to physically challenged or disabled people are included in this industry. These establishments maintain inpatient beds and provide patients with food services that meet their nutritional requirements. They have an organized staff of physicians and other medical staff to provide patient care services. These hospitals may provide other services, such as outpatient services, diagnostic X-ray services, clinical laboratory services, operating room services, physical therapy services, educational and vocational services, and psychological and social work services.<sup>141</sup> The SBA has established a size standard for this industry, which is annual receipts of \$41.5 million or less.<sup>142</sup> The 2012 U.S. Economic Census indicates that 346 firms operated in this industry throughout the entire year.<sup>143</sup> Of that number, 146 firms had annual receipts of less than \$25 million, while 79 firms had annual receipts between \$25 million and \$49,999,999.<sup>144</sup> Based on this data, we conclude that more than one-half of the firms in this industry are small.

42. *Emergency and Other Relief Services.* This industry comprises establishments primarily engaged in providing food, shelter, clothing, medical relief, resettlement, and counseling to victims of domestic or international disasters or conflicts (e.g., wars).<sup>145</sup> The SBA has established a size standard for this industry which is annual receipts of \$35 million or less.<sup>146</sup> The 2012 U.S. Economic Census indicates that 541 firms operated in this industry throughout the entire year.<sup>147</sup> Of that number, 509 had annual receipts of less than \$25 million, while 7 firms had annual receipts between \$25 million and \$49,999,999.<sup>148</sup> Based on this data, we conclude that a majority of firms in this industry are small.

### 3. Providers of Telecommunications and Other Services

#### a. Telecommunications Service Providers

43. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The closest

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<sup>141</sup> See U.S. Census Bureau, *2017 NAICS Definition, "622310 Specialty (Except Psychiatric and Substance Abuse) Hospitals"*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=622310&search=2017+NAICS+Search&search=2017>.

<sup>142</sup> See 13 CFR § 121.201 NAICS Code 622310.

<sup>143</sup> See U.S. Census Bureau, *2012 Economic Census of the United States, Table ID: EC1262SSSZ4, Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 622310, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=622310&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false&vintage=2012>.

<sup>144</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$41.5 million or less.

<sup>145</sup> See U.S. Census Bureau, *2017 NAICS Definition, "624230 Emergency and Other Relief Services"*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=624230&search=2017+NAICS+Search&search=2017>.

<sup>146</sup> See 13 CFR § 121.201, NAICS Code 624230.

<sup>147</sup> See U.S. Census Bureau, *2012 Economic Census of the United States, Table ID: EC1262SSSZ4, Healthcare and Social Assistance: Subject Series - Estab and Firm Size: Receipts/Revenue Size of Firms for the U.S.: 2012*, NAICS Code 624230, <https://data.census.gov/cedsci/table?text=EC1262SSSZ4&n=624230&tid=ECNSIZE2012.EC1262SSSZ4&hidePreview=false>.

<sup>148</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of \$35 million or less.

applicable NAICS Code category is Wired Telecommunications Carriers.<sup>149</sup> Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees.<sup>150</sup> U.S. Census Bureau data for 2012 indicate that 3,117 firms operated the entire year.<sup>151</sup> Of this total, 3,083 operated with fewer than 1,000 employees.<sup>152</sup> Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our actions. According to Commission data, one thousand three hundred and seven (1,307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers.<sup>153</sup> Of this total, an estimated 1,006 have 1,500 or fewer employees.<sup>154</sup> Thus, using the SBA's size standard the majority of incumbent LECs can be considered small entities.

44. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers<sup>155</sup> and under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>156</sup> U.S. Census Bureau data for 2012 indicate that 3,117 firms operated during that year.<sup>157</sup> Of that number, 3,083 operated with fewer than 1,000 employees.<sup>158</sup> Based on these data, the Commission concludes that the majority of Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers, are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.<sup>159</sup> Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees.<sup>160</sup> In addition, 17 carriers have reported that they are

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<sup>149</sup> See, U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers"*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017>.

<sup>150</sup> See 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

<sup>151</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false>.

<sup>152</sup> *Id.* The largest category provided by U.S. Census Bureau data is "1000 employees or more" and a more precise estimate for firms with fewer than 1,500 employees is not provided.

<sup>153</sup> See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

<sup>154</sup> *Id.*

<sup>155</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers"*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017>.

<sup>156</sup> See 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

<sup>157</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false>.

<sup>158</sup> *Id.* The largest category provided by U.S. Census Bureau data is "1000 employees or more" and a more precise estimate for firms with fewer than 1,500 employees is not provided.

<sup>159</sup> See Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service* at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-301823A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf).

<sup>160</sup> *Id.*

Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.<sup>161</sup> Also, 72 carriers have reported that they are Other Local Service Providers.<sup>162</sup> Of this total, 70 have 1,500 or fewer employees.<sup>163</sup> Consequently, based on internally researched FCC data, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities.

45. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for Interexchange Carriers. The closest applicable NAICS Code category is Wired Telecommunications Carriers.<sup>164</sup> The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.<sup>165</sup> U.S. Census Bureau data for 2012 indicate that 3,117 firms operated for the entire year.<sup>166</sup> Of that number, 3,083 operated with fewer than 1,000 employees.<sup>167</sup> According to internally developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.<sup>168</sup> Of this total, an estimated 317 have 1,500 or fewer employees.<sup>169</sup> Consequently, the Commission estimates that the majority of interexchange service providers are small entities.

46. *Operator Service Providers (OSPs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The closest applicable size standard under SBA rules is for the category Wired Telecommunications Carriers.<sup>170</sup> Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>171</sup> U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year.<sup>172</sup> Of this total, 3,083 operated with fewer than 1,000 employees.<sup>173</sup> Thus under this size standard, the Commission estimates that the majority of firms in this industry are small entities. According to Commission data, 33 carriers have reported that they are

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers"*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017>.

<sup>165</sup> See 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

<sup>166</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false>.

<sup>167</sup> *Id.* The largest category provided by the census data is "1000 employees or more" and a more precise estimate for firms with fewer than 1,500 employees is not provided.

<sup>168</sup> See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*). [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-301823A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf).

<sup>169</sup> *Id.*

<sup>170</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers"*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017>.

<sup>171</sup> See 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

<sup>172</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false>.

<sup>173</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.



engaged in the provision of operator services.<sup>174</sup> Of these, an estimated 31 have 1,500 or fewer employees and 2 have more than 1,500 employees.<sup>175</sup> Consequently, the Commission estimates that the majority of operator service providers are small entities.

47. *Local Resellers.* The SBA has not developed a small business size standard specifically for Local Resellers. The SBA category of Telecommunications Resellers is the closest NAICS code category for local resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry.<sup>176</sup> Under the SBA's size standard, such a business is small if it has 1,500 or fewer employees.<sup>177</sup> U.S. Census Bureau data from 2012 show that 1,341 firms provided resale services during that year.<sup>178</sup> Of that number, all operated with fewer than 1,000 employees.<sup>179</sup> Thus, under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.<sup>180</sup> Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.<sup>181</sup> Consequently, the Commission estimates that the majority of local resellers are small entities.

48. *Toll Resellers.* The Commission has not developed a definition for Toll Resellers. The closest NAICS Code Category is Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. MVNOs are included in this industry.<sup>182</sup> The SBA has developed a small business size standard for the category of Telecommunications Resellers.<sup>183</sup> Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>184</sup> 2012 U.S. Census Bureau data show that 1,341 firms provided resale services during

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<sup>174</sup> See Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

<sup>175</sup> *Id.*

<sup>176</sup> See U.S. Census Bureau, 2017 NAICS Definition, "517911 Telecommunications Resellers", <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517911&search=2017%20NAICS%20Search>.

<sup>177</sup> See 13 CFR § 121.201, NAICS Code 517911.

<sup>178</sup> See U.S. Census Bureau, 2012 Economic Census of the United States, Table ID: EC1251SSSZ5, Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012, NAICS Code 517911, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517911&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false>.

<sup>179</sup> *Id.* Available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees. The largest category provided is for firms with "1000 employees or more."

<sup>180</sup> See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

<sup>181</sup> See *id.*

<sup>182</sup> See U.S. Census Bureau, 2017 NAICS Definition, "517911 Telecommunications Resellers", <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517911&search=2017%20NAICS%20Search>.

<sup>183</sup> See 13 CFR § 121.201, NAICS Code 517911.

<sup>184</sup> *Id.*

that year.<sup>185</sup> Of that number, 1,341 operated with fewer than 1,000 employees.<sup>186</sup> Thus, under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services.<sup>187</sup> Of this total, an estimated 857 have 1,500 or fewer employees.<sup>188</sup> Consequently, the Commission estimates that the majority of toll resellers are small entities.

49. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as “establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including voice over Internet protocol (VoIP) services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”<sup>189</sup> The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.<sup>190</sup> U.S. Census data for 2012 show that there were 3,117 firms that operated that year.<sup>191</sup> Of this total, 3,083 operated with fewer than 1,000 employees.<sup>192</sup> Thus, under this size standard, the majority of firms in this industry can be considered small.

50. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services.<sup>193</sup> The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.<sup>194</sup> For this industry, U.S. Census Bureau data for 2012 show that there

<sup>185</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517911, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517911&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false>.

<sup>186</sup> *Id.* Available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees. The largest category provided is for firms with “1000 employees or more.”

<sup>187</sup> See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

<sup>188</sup> See *id.*

<sup>189</sup> See 13 CFR § 120.201. The Wired Telecommunications Carrier category formerly used the NAICS code of 517110. As of 2017 the U.S. Census Bureau definition shows the NAICS code as 517311 for Wired Telecommunications Carriers. See, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017>.

<sup>190</sup> *Id.*

<sup>191</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012* (517110 Wired Telecommunications Carriers). <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false>.

<sup>192</sup> *Id.*

<sup>193</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517312 Wireless Telecommunications Carriers (except Satellite)”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517312&search=2017+NAICS+Search&search=2017>.

were 967 firms that operated for the entire year.<sup>195</sup> Of this total, 955 firms employed fewer than 1,000 employees and 12 firms employed 1000 employees or more.<sup>196</sup> Thus under this category and the associated size standard, the Commission estimates that the majority of Wireless Telecommunications Carriers (except Satellite) are small entities.

51. The Commission's own data—available in its Universal Licensing System—indicate that, as of August 31, 2018, there are 265 Cellular licensees that will be affected by our actions.<sup>197</sup> The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.<sup>198</sup> Of this total, an estimated 261 have 1,500 or fewer employees, and 152 have more than 1,500 employees.<sup>199</sup> Thus, using available data, we estimate that the majority of wireless firms can be considered small.

52. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite).<sup>200</sup> Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.<sup>201</sup> For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year.<sup>202</sup> Of this total, 955 firms had fewer than 1,000 employees and 12 firms had 1000 employees or more.<sup>203</sup> Thus under this category and the associated size standard, the Commission estimates that a majority of these entities can be considered small. According to Commission data, 413 carriers reported that they were engaged in wireless

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<sup>194</sup> See 13 CFR § 121.201, NAICS Code 517312 (previously 517210).

<sup>195</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517210, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false&vintage=2012>.

<sup>196</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>197</sup> See Federal Communications Commission, *Universal Licensing System*, <http://wireless.fcc.gov/uls>. For the purposes of this FRFA, consistent with Commission practice for wireless services, the Commission estimates the number of licensees based on the number of unique FCC Registration Numbers.

<sup>198</sup> See Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-301823A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf).

<sup>199</sup> See *id.*

<sup>200</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “517210 Wireless Telecommunications Carriers (except Satellite)”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517312&search=2017%20NAICS%20Search>.

<sup>201</sup> See 13 CFR § 121.201, NAICS Code 517312 (previously 517210).

<sup>202</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517210, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false&vintage=2012>.

<sup>203</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

telephony.<sup>204</sup> Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.<sup>205</sup> Therefore, more than half of these entities can be considered small.

53. *Satellite Telecommunications.* This category comprises firms “primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”<sup>206</sup> Satellite telecommunications service providers include satellite and earth station operators. The category has a small business size standard of \$35 million or less in average annual receipts, under SBA rules.<sup>207</sup> For this category, U.S. Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year.<sup>208</sup> Of this total, 299 firms had annual receipts of less than \$25 million.<sup>209</sup> Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

54. *All Other Telecommunications.* The “All Other Telecommunications” category is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation.<sup>210</sup> This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems.<sup>211</sup> Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.<sup>212</sup> The SBA has developed a small business size standard for “All Other Telecommunications”, which consists of all such firms with annual receipts of \$35 million or less.<sup>213</sup> For this category, U.S. Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year.<sup>214</sup> Of those firms, a total of 1,400 had annual receipts less than \$25 million and 15 firms had annual receipts of \$25 million to \$49, 999,999.<sup>215</sup> Thus, the Commission estimates that the majority of

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<sup>204</sup> See Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-301823A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf).

<sup>205</sup> *Id.*

<sup>206</sup> See U.S. Census Bureau, 2017 NAICS Definition, “517410 Satellite Telecommunications”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517410&search=2017+NAICS+Search&search=2017>.

<sup>207</sup> See 13 CFR § 121.201, NAICS Code 517410.

<sup>208</sup> See U.S. Census Bureau, 2012 Economic Census of the United States, Table ID: EC1251SSSZ4, Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the U.S.: 2012, NAICS Code 517410, <https://data.census.gov/cedsci/table?text=EC1251SSSZ4&n=517410&tid=ECNSIZE2012.EC1251SSSZ4&hidePreview=false&vintage=2012>.

<sup>209</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>210</sup> See U.S. Census Bureau, 2017 NAICS Definition, “517919 All Other Telecommunications”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517919&search=2017+NAICS+Search&search=2017>.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> See 13 CFR § 121.201, NAICS Code 517919.

<sup>214</sup> See U.S. Census Bureau, 2012 Economic Census of the United States, Table ID: EC1251SSSZ4, Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the U.S.: 2012, NAICS Code 517919, <https://data.census.gov/cedsci/table?text=EC1251SSSZ4&n=517919&tid=ECNSIZE2012.EC1251SSSZ4&hidePreview=false>.

<sup>215</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

“All Other Telecommunications” firms potentially affected by our action can be considered small.

**b. Internet Service Providers**

55. *Internet Service Providers (Broadband)*. Broadband Internet service providers include wired (e.g., cable, DSL) and VoIP service providers using their own operated wired telecommunications infrastructure fall in the category of Wired Telecommunication Carriers.<sup>216</sup> Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.<sup>217</sup> The SBA size standard for this category classifies a business as small if it has 1,500 or fewer employees.<sup>218</sup> U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year.<sup>219</sup> Of this total, 3,083 operated with fewer than 1,000 employees.<sup>220</sup> Consequently, under this size standard the majority of firms in this industry can be considered small.

56. *Internet Service Providers (Non-Broadband)*. Internet access service providers such as Dial-up Internet service providers, VoIP service providers using client-supplied telecommunications connections and Internet service providers using client-supplied telecommunications connections (e.g., dial-up ISPs) fall in the category of All Other Telecommunications.<sup>221</sup> The SBA has developed a small business size standard for All Other Telecommunications which consists of all such firms with gross annual receipts of \$35 million or less.<sup>222</sup> For this category, U.S. Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year.<sup>223</sup> Of these firms, a total of 1,400 had gross annual receipts of less than \$25 million.<sup>224</sup> Consequently, under this size standard a majority of firms in this industry can be considered small.

**c. Vendors and Equipment Manufacturers**

57. *Vendors of Infrastructure Development or “Network Buildout.”* The Commission has not developed a small business size standard specifically directed toward manufacturers of network facilities. There are two applicable SBA categories in which manufacturers of network facilities could fall and each have different size standards under the SBA rules. The SBA categories are “Radio and

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<sup>216</sup> See U.S. Census Bureau, *2017 NAICS Definition, “517311 Wired Telecommunications Carriers”*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017>.

<sup>217</sup> *Id.*

<sup>218</sup> See 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

<sup>219</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false>.

<sup>220</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>221</sup> See U.S. Census Bureau, *2017 NAICS Definition, “517919 All Other Telecommunications”*, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517919&search=2017+NAICS+Search&search=2017>.

<sup>222</sup> See 13 CFR § 121.201, NAICS Code 517919.

<sup>223</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the U.S.: 2012*, NAICS Code 517919, <https://data.census.gov/cedsci/table?text=EC1251SSSZ4&n=517919&tid=ECNSIZE2012.EC1251SSSZ4&hidePreview=false>.

<sup>224</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

Television Broadcasting and Wireless Communications Equipment” with a size standard of 1,250 employees or less<sup>225</sup> and “Other Communications Equipment Manufacturing” with a size standard of 750 employees or less.”<sup>226</sup> U.S. Census Bureau data for 2012 shows that for Radio and Television Broadcasting and Wireless Communications Equipment firms 841 establishments operated for the entire year.<sup>227</sup> Of that number, 828 establishments operated with fewer than 1,000 employees, and 7 establishments operated with between 1,000 and 2,499 employees.<sup>228</sup> For Other Communications Equipment Manufacturing, U.S. Census Bureau data for 2012, show that 383 establishments operated for the year.<sup>229</sup> Of that number 379 operated with fewer than 500 employees and 4 had 500 to 999 employees.<sup>230</sup> Based on this data, we conclude that the majority of Vendors of Infrastructure Development or “Network Buildout” are small.

58. *Telephone Apparatus Manufacturing.* This industry comprises establishments primarily engaged in manufacturing wire telephone and data communications equipment.<sup>231</sup> These products may be stand-alone or board-level components of a larger system. Examples of products made by these establishments are central office switching equipment, cordless and wire telephones (except cellular), PBX equipment, telephone answering machines, LAN modems, multi-user modems, and other data

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<sup>225</sup> See 13 CFR § 121.201, NAICS Code 334220. See also U.S. Census Bureau, *2017 NAICS Definition*, “334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=334220&search=2017+NAICS+Search&search=2017>.

<sup>226</sup> See 13 CFR § 121.201, NAICS Code 334290. See also U.S. Census Bureau, *2017 NAICS Definition*, NAICS Code “334290 Other Communications Equipment Manufacturing”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=334290&search=2017+NAICS+Search&search=2017>.

<sup>227</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1231SG2, *Manufacturing: Summary Series: General Summary: Industry Statistics for Subsectors and Industries by Employment Size: 2012*, NAICS Code 334220, <https://data.census.gov/cedsci/table?tid=ECNSIZE2012.EC1231SG2&y=2012&n=334220&vintage=2012&hidePreview=false>.

<sup>228</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of establishments that meet the SBA size standard of employment of 1,250 or fewer employees. The number of “establishments” is a less helpful indicator of small business prevalence in this context than would be the number of “firms” or “companies.” An establishment is a single physical location at which business is conducted and/or services are provided. It is not necessarily identical with a single firm, company or enterprise, which may consist of one or more establishments. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the number of small businesses. U.S. Census Bureau data does not provide information on the number of firms for this industry.

<sup>229</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1231SG2, *Manufacturing: Summary Series: General Summary: Industry Statistics for Subsectors and Industries by Employment Size: 2012*, NAICS Code 334290, <https://data.census.gov/cedsci/table?tid=ECNSIZE2012.EC1231SG2&y=2012&n=334290&vintage=2012&hidePreview=false>.

<sup>230</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of establishments that meet the SBA size standard of employment of 750 or fewer employees. The number of “establishments” is a less helpful indicator of small business prevalence in this context than would be the number of “firms” or “companies.” An establishment is a single physical location at which business is conducted and/or services are provided. It is not necessarily identical with a single firm, company or enterprise, which may consist of one or more establishments. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the number of small businesses. U.S. Census Bureau data does not provide information on the number of firms for this industry.

<sup>231</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “334210 Telephone Apparatus Manufacturing,” <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=334210&search=2017%20NAICS%20Search>.

communications equipment, such as bridges, routers, and gateways.<sup>232</sup> The SBA has developed a small business size standard for Telephone Apparatus Manufacturing, which consists of all such companies having 1,250 or fewer employees.<sup>233</sup> U.S. Census Bureau data for 2012 show that there were 266 establishments that operated that year.<sup>234</sup> Of this total, 262 operated with fewer than 1,000 employees.<sup>235</sup> Thus, under this size standard, the majority of firms in this industry can be considered small.

59. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment.<sup>236</sup> Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.<sup>237</sup> The SBA has established a small business size standard for this industry of 1,250 or fewer employees.<sup>238</sup> U.S. Census Bureau data for 2012 show that 841 establishments operated in this industry in that year.<sup>239</sup> Of that number, 828 establishments operated with fewer than 1,000 employees, 7 establishments operated with between 1,000 and 2,499 employees and 6 establishments operated with 2,500 or more employees.<sup>240</sup> Based on this data, we conclude that a majority of manufacturers in this industry are small.

60. *Other Communications Equipment Manufacturing.* This industry comprises establishments primarily engaged in manufacturing communications equipment (except telephone apparatus, and radio and television broadcast, and wireless communications equipment).<sup>241</sup> Examples of such manufacturing include fire detection and alarm systems manufacturing, Intercom systems and

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<sup>232</sup> *Id.*

<sup>233</sup> See 13 CFR § 121.201, NAICS Code 334210.

<sup>234</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1231SG2, *Manufacturing: Summary Series: General Summary: Industry Statistics for Subsectors and Industries by Employment Size: 2012*, NAICS Code 334210, <https://data.census.gov/cedsci/table?n=334210&tid=ECNSIZE2012.EC1231SG2&hidePreview=false&vintage=2012>. The number of “establishments” is a less helpful indicator of small business prevalence in this context than would be the number of “firms” or “companies.” An establishment is a single physical location at which business is conducted and/or services are provided. It is not necessarily identical with a single firm, company or enterprise, which may consist of one or more establishments. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the number of small businesses. U.S. Census Bureau data does not provide information on the number of firms for this industry.

<sup>235</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of establishments that meet the SBA size standard of employment of 1,250 or fewer employees.

<sup>236</sup> See U.S. Census Bureau, *2017 NAICS Definitions*, “334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=334220&search=2017>.

<sup>237</sup> *Id.*

<sup>238</sup> See 13 CFR § 121.201, NAICS Code 334220.

<sup>239</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1231SG2, *Manufacturing: Summary Series: General Summary: Industry Statistics for Subsectors and Industries by Employment Size: 2012*, NAICS Code 334220, <https://data.census.gov/cedsci/table?text=EC1231SG2&n=334220&tid=ECNSIZE2012.EC1231SG2&hidePreview=false>.

<sup>240</sup> *Id.* Available census data does not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

<sup>241</sup> See U.S. Census Bureau, *2017 NAICS Definition*, “334290 Other Communications Equipment Manufacturing”, <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=334290&search=2017+NAICS+Search&search=2017>.

equipment manufacturing, and signals (e.g., highway, pedestrian, railway, traffic) manufacturing.<sup>242</sup> The SBA has established a size standard for this industry as all such firms having 750 or fewer employees.<sup>243</sup> U.S. Census Bureau data for 2012 shows that 383 establishments operated in that year.<sup>244</sup> Of that number, 379 operated with fewer than 500 employees and 4 had 500 to 999 employees.<sup>245</sup> Based on this data, we conclude that the majority of Other Communications Equipment Manufacturers are small.

**E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities**

61. *Requirement to Remove and Replace Covered Equipment and Services.* The Order requires recipients of reimbursement funds under the Reimbursement Program and ETCs receiving USF support to remove and replace from their network operations covered equipment and services included on the Covered List.<sup>246</sup> The Order conditions this obligation to remove and replace covered equipment and services upon a congressional appropriation to fund the Reimbursement Program.<sup>247</sup> The Order limits the scope of the remove-and-replace requirement to equipment and services on the Covered List.<sup>248</sup> Applicants for funds through the Reimbursement Program shall satisfy compliance with the remove-and-replace obligation in accordance with the deadlines and transition periods associated with the Reimbursement Program.<sup>249</sup> Entities required to comply that are not recipients of funding through the Reimbursement Program must remove covered equipment and services within one year after the Wireline Competition Bureau issues a Public Notice announcing the acceptance of applications filed during the initial filing window to participate in the Reimbursement Program. ETC recipients of USF support must certify that they have complied with our new rule requiring the removal of equipment and services on the Covered List.

62. *Covered List.* Consistent with the Secure Networks Act, no later than March 12, 2021, the Commission will publish on its website the Covered List of communications equipment or services determined to pose an unacceptable risk to the national security of the United States or the security and safety of United States persons.<sup>250</sup> The Order establishes that the Commission will publish, update, or modify the Covered List without providing notice or opportunity to comment; however, the Public Safety and Homeland Security Bureau will issue a Public Notice every time the Covered List is updated.<sup>251</sup> As directed by the Secure Networks Act, the Order states that the Commission may only accept determinations from the four sources enumerated in the Secure Networks Act, and will incorporate national security determinations into the Covered List automatically, when identifying specific communications equipment or services that “pose[] an unacceptable risk to the national security of the

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<sup>242</sup> *Id.*

<sup>243</sup> See 13 CFR 121.201, NAICS Code 334290.

<sup>244</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1231SG2, *Manufacturing: Summary Series: General Summary: Industry Statistics for Subsectors and Industries by Employment Size: 2012*, NAICS Code 334290, <https://data.census.gov/cedsci/table?text=EC1231SG2&n=334290&tid=ECNSIZE2012.EC1231SG2&hidePreview=false&vintage=2012>.

<sup>245</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>246</sup> See *supra* Section III.A.

<sup>247</sup> See *supra* Section III.A.1.

<sup>248</sup> See *supra* Section III.A.2.

<sup>249</sup> See *supra* Section III.A.4.

<sup>250</sup> See Secure Networks Act § 2.

<sup>251</sup> See *supra* Section III.C.2.



United States and the security and safety of United States persons,” or to the extent the class or category of equipment or service identified is “capable” of the 2(b)(2)(A)-(C) criteria, when listed in general categories or classes of equipment that pose such a risk.<sup>252</sup> The Commission will periodically update or modify the Covered List to reflect changes in determinations and will notify the public for every twelve-month period during which the Commission does not update the Covered List.<sup>253</sup>

63. *Restriction on Use of Federal Subsidies.* Pursuant to section 3 of the Secure Networks Act, the Order adopts a rule that no Federal subsidy made available through a program administered by the Commission for capital expenditures necessary for the provision of advanced communications service shall be used to purchase, rent, lease, or otherwise obtain any covered communications equipment or service, or maintain any covered communications equipment or service previously purchased, rented, leased, or otherwise obtained, as identified and published on the Covered List.<sup>254</sup> The Commission has interpreted section 3 of the Secure Networks Act as intending to apply to all universal service programs but not other Federal subsidy programs to the extent those programs may tangentially or indirectly involve expenditures related to the provision of advanced communications service.<sup>255</sup> In the Order, the Commission declines to grandfather existing contracts for equipment or services on the Covered List under section 54.10 of the Commission’s rules.<sup>256</sup> The prohibition on the use of Federal subsidies takes effect 60 days after any particular communications equipment or services are placed on the Covered List, consistent with the Secure Networks Act.<sup>257</sup> The Order requires recipients of universal service support from each of the four USF programs to certify that they have complied with the new rule prohibiting the use of Federal subsidies for equipment and services on the Covered List.<sup>258</sup>

64. *Reimbursement Program.* The Order establishes, as directed by the Secure Networks Act, the Secure and Trusted Communications Reimbursement Program (Reimbursement Program) to reimburse the costs reasonably incurred by providers of advanced communication services with two million or fewer customers to permanently remove, replace, and dispose of covered communications equipment and services from their networks.<sup>259</sup> In the Order, the Commission allows eligible providers to obtain reimbursement to remove and replace older covered communications equipment with upgraded technology and will reimburse providers for certain transition expenses incurred prior to the creation of this program.<sup>260</sup> Program participants are required to submit estimated costs to receive funding allocations, and recipients can then obtain funding disbursements on a rolling basis upon a showing of actual expenses incurred.<sup>261</sup> If aggregate demand exceeds available funding, the Order prioritizes funding for ETCs and expenses for transitioning core networks over non-ETCs and non-core network transition expenses.<sup>262</sup> Program recipients will have one year from the initial funding disbursement to complete the permanent removal, replacement, and disposal of covered communications equipment, and the Commission may grant a single, general six-month extension for all recipients and/or individual

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<sup>252</sup> See *supra* Sections III.C.1, III.C.3; Secure Networks Act § 2(b).

<sup>253</sup> See *supra* Section III.C.4; Secure Networks Act § 2(d).

<sup>254</sup> See *supra* Section III.D.

<sup>255</sup> See *id.*

<sup>256</sup> See *id.*

<sup>257</sup> See *id.*; Secure Networks Act § 3(a)(2).

<sup>258</sup> See *supra* Section III.D.

<sup>259</sup> See Secure Networks Act § 4.

<sup>260</sup> See *supra* Section III.E.2.

<sup>261</sup> See *supra* Section III.E.3.

<sup>262</sup> See *supra* Section III.E.3.d.

extensions of time if circumstances warrant.<sup>263</sup>

65. *Status Updates.* As directed by the Secure Networks Act, the Order requires program recipients to file a status update “once every 90 days beginning on the date on which the Commission approves an application for a reimbursement.”<sup>264</sup> Recipients should file the first report within 90 days of receiving their allocation.<sup>265</sup> In the update, the recipients shall report on the efforts undertaken, and challenges encountered, in permanently removing, replacing, and disposing its covered communications equipment or services.<sup>266</sup> Recipients shall also report in detail on the availability of replacement equipment in the marketplace so the Commission can assess whether a general, six-month extension permitted by the statute is appropriate. The report must also include information that the entity has fully complied with (or is in the process of complying with) all terms and conditions of the Program; has fully complied with (or is in the process of complying with) the commitments made in the application of the recipient for the reimbursement; has permanently removed from the communications network of the recipient, replaced, and disposed of (or is in the process of permanently removing, replacing, and disposing of) all covered communications equipment or services that were in the network of the recipient as of the date of the submission of the application of the recipient for the reimbursement; and has fully complied with (or is in the process of complying with) the timeline submitted by the recipient.<sup>267</sup> The report must include a certification that affirms the information in the status report is accurate.<sup>268</sup> After the program recipient has notified the Commission of the completion of the permanent removal, replacement, and disposal of the covered communications equipment or service pursuant to a final certification, updates are no longer required.

66. *Steps to Mitigate Waste, Fraud, and Abuse.* The Order directs the Office of the Managing Director, or a third-party identified by the Office of the Managing Director, to prepare a system to audit Reimbursement Program recipients to ensure compliance with our rules.<sup>269</sup> The Order requires recipients found in violation of the Commission’s rules or the “commitments made by the recipient in the application for the reimbursement” to repay funds disbursed via the Reimbursement Program.<sup>270</sup> Prior to requiring repayment, the Commission will provide notice of the violation, and will give the violator 180 days to cure the violation.<sup>271</sup> The Commission initiates such action by sending a request for repayment to the recipient immediately following the expiration of the opportunity to cure if the recipient does not respond to the notice of violation. If the alleged violator does not respond to the notice or does not repay the amounts due, the Commission will demand repayment. Participants that are found to violate our rules will also be referred to “all appropriate law enforcement agencies or officials for further action under applicable criminal and civil laws.”<sup>272</sup> Any person or entity that violates the Reimbursement Program rules will also be banned from further participation in the section 4 Reimbursement Program, and the person or entity may also be barred from participating in other Commission programs, including

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<sup>263</sup> See *supra* Section III.E.3.

<sup>264</sup> See Secure Networks Act § 4(d)(8)(A).

<sup>265</sup> See *supra* Section III.E.4.

<sup>266</sup> See *id.*

<sup>267</sup> See Secure Networks Act § 4(e)(4)(A)-(B).

<sup>268</sup> See Secure Networks Act § 4(e)(4)(B).

<sup>269</sup> See *supra* Section III.E.4.

<sup>270</sup> See *supra* *Second Report and Order* at para. 95; Secure Networks Act § 7(b)(1).

<sup>271</sup> See Secure Networks Act § 7(b)(2)(B).

<sup>272</sup> See Secure Networks Act § 7(b)(1)(C).

Universal Service support programs.<sup>273</sup>

67. *Replacement List.* The Order establishes, and the Commission will publish on its website, a Replacement List that will identify the categories of suggested replacements of real and virtual hardware and software equipment and services to guide of providers removing covered communications equipment from their networks.<sup>274</sup> The Replacement List of suggested equipment and services will be updated at least annually, and program recipients and interested third-parties may also provide information about suggested equipment and services to assist in keeping the list current and informed based upon changes in the market.<sup>275</sup>

68. *Reporting Requirement.* The Order requires that providers of advanced communications service annually report the type of covered communications equipment or service purchased, rented or leased; location of the equipment or service; date the equipment or service was procured; removal or replacement plans for the equipment or service, including cost to replace; amount paid for the equipment or service; the supplier for the equipment or service; and a detailed justification for obtaining such covered equipment and service.<sup>276</sup> All covered communications equipment or services on the initial Covered List published under section 2(a) of the Secure Networks Act that was purchased, leased, or otherwise obtained by a provider on or after August 14, 2018 must be reported. Additional covered equipment or services added to the list must be reported in the next annual report that is at least 60 days after the list is updated. Those providers needing to submit a detailed justification must thoroughly explain their reasons for obtaining the covered equipment and/or services. The Commission will release to the public a list of providers that have reported covered equipment or services in their networks, consistent with the *2019 Information Collection Order*.<sup>277</sup> For the first annual filing, certified responses to this information collection from providers of advanced communication service will be due through the portal no later than 90 days after the Office of Economics and Analytics issues a public notice announcing the availability of the new reporting portal.<sup>278</sup>

**F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

69. The RFA requires an agency to describe the steps the agency has taken to minimize the significant economic impact on small entities of the final rule, consistent with the stated objectives of the applicable statutes, including a statement of the factual, policy, and legal reasons in support of the final rule, and why any significant alternatives to the rule considered by the agency and which affect the impact on small entities were rejected.<sup>279</sup>

70. Several of the rules in the Order are adopted pursuant to statutory obligation under the Secure Networks Act. However, where the Commission has discretion in its interpretation or implementation of the Secure Networks Act provisions, or adopts rules pursuant to alternative statutory authority, the scope of the rules is narrowly tailored so as to lessen the impact on small entities. The rules adopted in the Order appropriately consider the burdens on smaller providers against the Commission's goal of protecting our communications networks and communications supply chain from communications equipment and services that pose a national security threat, while facilitating the transition to safer and more secure alternatives.

<sup>273</sup> See Section III.E.4; Secure Networks Act § 7(b)(1)(B), (D).

<sup>274</sup> See *supra* Section III.E.5.; Secure Networks Act § 4(d)(1).

<sup>275</sup> See *id.*

<sup>276</sup> See *supra* Section III.F; Secure Networks Act § 5(c).

<sup>277</sup> See *supra* Section III.F.

<sup>278</sup> See *id.*

<sup>279</sup> See 5 U.S.C. § 604(a)(6).

71. Consistent with our proposal in the *2019 Supply Chain Further Notice*, the requirement to remove and replace covered equipment and services is contingent upon appropriation from Congress, rather than making the requirement effective before funding is secured or based upon funding obtained through alternative measures, such as USF.<sup>280</sup> Waiting until appropriated funding is available will reduce the burdens imposed upon smaller providers by ensuring that funds are available to cover reimbursable expenses through the Reimbursement Program.<sup>281</sup> Additionally, the Order ties the administration of the remove-and-replace requirement to the administration of the Reimbursement Program, including limiting the scope of the requirement to equipment and services on the Covered List, which will allow providers to easily identify equipment and services to remove and replace from their networks.<sup>282</sup> Using the Covered List to determine the scope of equipment and services applicable to the remove-and-replace requirement, as well as the prohibition on the use of Federal subsidies in section 54.10 of the Commission's rules and the Reimbursement Program, will enable small providers to easily identify equipment and services for compliance with these rules.

72. Consistent with the statutory mandates in the Secure Networks Act, the Order establishes a program to reimburse eligible providers of advanced communications service for costs reasonably incurred to remove, replace, and dispose of covered equipment and services on the Covered List.<sup>283</sup> As a general matter, when obtaining replacement products for reimbursement, we expect eligible providers to "obtain the lowest-cost equipment that most closely replaces their existing equipment" yet will allow, and indeed encourage, eligible providers replacing third generation and older equipment to obtain reimbursement for the cost of fourth generation Long Term Evolution (4G LTE) replacement equipment that is 5G-ready.<sup>284</sup> This will put recipients, including smaller providers, on equal footing to their prior position before incurring the costs of removing and replacing the covered equipment and services and, ultimately, end up placing recipients in a slightly better position than they were before having to replace the covered equipment and services.

73. Although one commenter advocated that the Commission release reimbursement funding upfront to provide financial security for smaller providers, the Order determines that the Reimbursement Program will allocate funds on a rolling basis, similar to the administration of the broadcast incentive auction.<sup>285</sup> This methodology, which sufficiently met the financial needs of providers, including smaller providers, in the broadcast incentive auction context, best achieves Congress's goal of mitigating the administrative burden and costs of the program while taking steps to avoid waste, fraud, and abuse. Consistent with the Secure Networks Act, the Order further sets a term of one year from the date upon which funding is received for recipients to remove, replace, and dispose of covered equipment or services, though the Secure Networks Act authorizes the Commission to grant six-month extensions of time, either on a general or case-by-case basis, for compliance.<sup>286</sup>

74. Lastly, we will update the list of suggested equipment and services contained on the Replacement List at least annually to ensure that the list stays current and transparent, which will help small and rural providers required to remove and replace covered equipment and services access advanced products and services when transitioning away from covered equipment and services in their

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<sup>280</sup> See *supra* Section III.A.

<sup>281</sup> See *id.*

<sup>282</sup> See *supra* Section III.2.

<sup>283</sup> See *supra* Section III.E.

<sup>284</sup> See *supra* *Second Report and Order* at para. 125.

<sup>285</sup> See *supra* Section III.E.3.a.

<sup>286</sup> See *supra* Section III.E.3.

networks.<sup>287</sup>

75. Pursuant to section 1.3 of the Commission's rules, any provision of the Commission's rules may be waived by the Commission on its own motion or on petition "if good cause therefor is shown."<sup>288</sup> The Order permits entities to seek a waiver of the requirements if permitted by statute. In these ways, the Order seeks to minimize the economic burden of these rules on small entities.

**G. Report to Congress**

76. The Commission will send a copy of the Second Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.<sup>289</sup> In addition, the Commission will send a copy of the Second Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Second Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register.<sup>290</sup>

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<sup>287</sup> See *supra* Section III.E.5.

<sup>288</sup> 47 CFR § 1.3.

<sup>289</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>290</sup> See 5 U.S.C. § 604(b).

**STATEMENT OF  
CHAIRMAN AJIT PAI**

Re: *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89.

When I became Chairman in January 2017, the FCC and the Executive Branch had no strategy for countering the threats to the security of our nation's communications networks posed by certain foreign equipment providers, particularly those with close ties to the Chinese Communist Party. Indeed, the prior Administration didn't even seem to believe there was a threat. Its position was that "We welcome China's rise," and "China's rise is potentially good for the world."<sup>1</sup> Consistent with this view, on the previous FCC's watch, Chinese-manufactured equipment was incorporated into our communications networks with nary an eyebrow raised by agency leadership.

Things have changed, and how. Working closely together, this Administration and this FCC have tackled this problem head on and have implemented a comprehensive effort, both at home and abroad, to confront this challenge. And we've been getting results.

On the international front, we've seen a sea change on this issue, following close collaboration with our allies. For example, in 2019, I was a part of the US delegation to the Czech Republic to help form what ultimately became the Prague Proposals—a risk-based framework for understanding supply chain security to which 32 countries ultimately agreed. And I have personally traveled everywhere from Germany to Bahrain to Malaysia, and have held bilateral talks with counterparts in numerous countries, from Brazil to South Korea, on the importance of cooperation on this issue. We're now seeing the fruits of engagements like these. The United Kingdom announced in July that it will remove insecure equipment from its 5G networks. This followed the decisions of countries across Europe, like the Czech Republic, Poland, Romania, Denmark, Estonia, Latvia, Sweden, and Greece. We have also seen telecommunications operators taking actions to make their networks secure. From Reliance Jio in India to Telefonica in Spain, from Orange in France to Telstra in Australia, from SK and KT in South Korea to NTT in Japan, operators increasingly are making the decision to only use trusted vendors in their 5G deployments. This momentum is no accident. It is due in large part to the hard work done over the past four years, including the extensive and often behind-the-scenes efforts by the FCC, to establish a common, risk-based framework for securing the supply chain.

And on the domestic front, we've made real progress in securing our communications networks and supply chains. In 2019, for example, the FCC prohibited money from our Universal Service Fund from being used to purchase equipment and services from companies that are designated as national security threats. We issued initial designations of two companies, Huawei and ZTE, as national security threats. And Commission staff in the Public Safety and Homeland Security Bureau subsequently finalized those designations. We also proposed to require certain carriers, known as eligible telecommunications carriers, or ETCs, to remove covered equipment from their USF-funded networks and replace it with equipment from trusted vendors. We further proposed to establish a reimbursement program to help small, rural carriers shoulder the costs associated with removing and replacing that equipment. And we have also explored the potential of Open Radio Access Networks, or Open RANs, to transform 5G network architecture, costs, and security.

Now, a little more than a year later, having cut off the flow of insecure equipment and services into federally-funded communications networks, we turn our attention to finalizing the process for removing equipment already in place that poses a continued threat to our national security, a process memorably termed "rip and replace." In the time since we first proposed to create a reimbursement

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<sup>1</sup> The White House, Press Conference with President Obama and President Hu of the People's Republic of China, <https://obamawhitehouse.archives.gov/the-press-office/2011/01/19/press-conference-president-obama-and-president-hu-peoples-republic-china> (Jan. 19, 2011).

program to help carriers remove covered equipment and services from their networks, Congress passed and the President signed the Secure and Trusted Communications Networks Act of 2019. This law prohibits the use of the Universal Service Fund to purchase covered equipment and services and requires the Commission to create a reimbursement program similar to what we had proposed. The Secure and Trusted Communications Networks Act also expanded our legal authority to reimburse certain other providers of advanced communications services, and not just ETCs, for removing and replacing covered equipment and services in their networks.

So today, we establish “rip and replace” rules and largely adopt our prior proposals for creating a reimbursement program to remove and replace insecure equipment and services in our nation’s networks, with certain modifications as required by the 2019 Act. Specifically, we require all ETCs to remove covered equipment and services from their networks. We create a reimbursement program to subsidize smaller carriers and other providers of advanced communications services to remove and replace those services and equipment. We adopt procedures for publishing a list of covered equipment. And we adopt reporting requirements so that we are informed about the continued presence of covered equipment in the nation’s communications networks.

This is critically important work, but there’s still more to be done. We are taking steps within our power to implement the reimbursement program, such as adopting rules for the program and beginning the work of developing a cost catalog to help streamline the process of determining eligible removal and replacement costs. But we can’t actually implement the reimbursement program unless and until Congress appropriates the necessary funding. Based on information collected by Commission staff from providers of advanced communications services, the reported cost of removing and replacing covered equipment for providers eligible under current law is nearly \$1.6 billion, and it is possible that the actual number will turn out to be greater. As Senator Wicker, Chairman of the Senate Committee on Commerce, Science, and Transportation recently wrote about the reimbursement program: “This is a national security imperative. Fully funding this program is essential to protecting the integrity of communications infrastructure and protecting the future viability of the digital economy at large.” I entirely agree, and have said so for some time. The FCC stands ready to fully implement the reimbursement program once Congress provides this funding.

My gratitude goes out to the many Commission staff on the front lines of the fight to protect the security of our nation’s communications networks, including: Pam Arluk, Rhonda Campbell, Brian Cruikshank, Elizabeth Cuttner, Kate Dumouchel Justin Faulb, Charlene Goldfield, Jesse Goodwin, Janice Gorin, Trent Harkrader, Billy Layton, Alex Minard, Kris Monteith, Ramesh Nagarajan, Rachel Nixon, Ryan Palmer, and Jaina Patel of the Wireline Competition Bureau; Aaron Garza of the Consumer and Governmental Affairs Bureau; Steven Carpenter, Lisa Fowlkes, Jeffery Goldthorp, Jennifer Holtz, Kathleen Hom, Kurian Jacob, Debra Jordan, Nicole McGinnis, Saswat Misra, Austin Randazzo, and Avery Roselle of the Public Safety and Homeland Security Bureau; Octavian Carare, Alex Espinoza, Tanner Hinkel, Kenneth Lynch, Chuck Needy, Eric Ralph, Michelle Schaefer, Emily Talaga, and Geoff Waldau of the Office of Economics and Analytics; Denise Coca, Kathleen Collins, Nese Guendelsberger, Kathryn O’Brien, Thomas Sullivan, Troy Tanner, and Michele Wu-Bailey of the International Bureau; Charles Mathias and Wesley Platt of the Wireless Telecommunications Bureau; Rizwan Chowdhry, Pamela Gallant, Jeff Gee, Kalun Lee, Shannon Lipp, Keith Morgan, Adam Suppes, Raphael Sznajder, and Ashley Tyson of the Enforcement Bureau; Maureen McGowan and Sanford Williams of the Office of Communications Business Opportunities; Regina Brown, Daniel Daly, Mindy Ginsburg, Francisco Salguero, Jae Seong, Deena Shetler, and Mark Stephens of the Office of Managing Director; and Malena Barzilai, Michael Carlson, Matthew Dunne, Thomas Johnson, Douglas Klein, Marcus Maher, Rick Mallen, Linda Oliver, and Bill Richardson of the Office of General Counsel.

**STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

Re: *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89.

It is not irrational to say that communications infrastructure is a bigger part of our daily lives than at any other point in our nation's history. As I stated in 2019, when we adopted the first order in this proceeding, Americans not only use these incredible networks to communicate with loved ones, but also to make financial transactions and engage in commerce. Little did we know that – just over a year later – these networks would be a standing foundation, allowing us to stay in touch during pandemic lockdowns, talk to our doctors, order groceries and take out, do our jobs, facilitate our children's education, and so much more. The need to keep these networks secure and operational, protected from those who would do us harm, has never been so apparent.

Over the years, I have been outspoken about the threat our networks face from foreign governments and their state-controlled businesses, which operate according to ideologies that are not consistent with capitalism or freedom. At the same time, I recognize the gravity of this undertaking, and I have tried to approach these difficult decisions with humility and caution, seeking to avoid boisterous commentary. The Commission, on the advice of the Administration's security experts, is effectively closing our market to certain companies and reimbursing providers that purchased certain equipment in the interests of preserving our nation's national security. It is a sobering action, and our rhetoric should match the gravity of the moment and its long-term importance. While we should be incredibly mindful our actions may have global repercussions, we must do so notwithstanding, because the record and evidence presented demonstrate that it is the right thing to do. In the end, I support this order setting forth the framework for recipients of reimbursement funds to remove covered equipment from certain networks, along with the two national security matters to be voted on subsequently.

It is my hope that, as these matters proceed, everyone acknowledges that many providers, especially small businesses and those in rural America, did not do anything wrong by incorporating the problematic equipment into their networks. Ultimately, the equipment allowed them to offer service to many Americans, and, in some areas, they may be the only broadband offering available. As we talk about "rip and replace" or "remove and destroy," we must be aware that, in large part, this will look more like "duplicate and dismantle." Americans that rely on these networks must continue to receive services during the time it takes to carry out what is effectively a mandated equipment replacement process, carried out via the cutoff of USF subsidies. While many want this equipment out of our networks tomorrow, and there will likely be pressure to make that a reality, as the regulator, the Commission also needs to make sure this is done correctly and in an orderly manner, without abruptly cutting off service to consumers. It may take time for all the necessary congressional, Commission, and federal agency components to be finalized.

Further, the Secure and Trusted Communications Networks Act of 2019 (Secure Networks Act) requires the Commission to develop a list of suggested replacements for equipment and services to be replaced. In doing so, the Commission must be careful not to tip the scales towards certain technologies or companies or take advantage of this serious matter to pick winners and losers. I am pleased that the order recognizes the need to tread carefully here. While some may turn to O-RAN, which I can see may have benefits, others are likely to turn to more traditional technologies. Each company should be allowed to select the system that works best for them, without being influenced, pressured, or required by the Commission or any other governmental entity to make certain technology choices.

Ultimately, today's item is a good faith effort to implement congressional intent as adopted in the Secure Networks Act and other national security laws. I approve.



**STATEMENT OF  
COMMISSIONER BRENDAN CARR**

Re: *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89.

We launched this proceeding nearly three years ago with a simple and important goal in mind—to protect America’s communications networks and in turn our national security. After all, if our communications networks are threatened, everything we value is threatened.

Before we voted on the Notice of Proposed Rulemaking back in April 2018, I asked my colleagues to broaden the scope of our proceeding and put additional options on the table. In addition to prohibiting carriers from using USF funds to purchase insecure equipment on a going forward basis, I suggested that we seek comment on removing any insecure gear that may already be in our communications networks.

Flash forward to today and the national security threats posed by allowing this type of covered equipment to remain in our networks has only grown. Indeed, I can think of no greater threat to our security than the one now posed by Communist China and those that would do its bidding.

The record on this is clear: The Chinese government intends to surveil persons within our borders, for government security and spying advantage, as well as for intellectual property and an industrial or business edge. The New York Times has reported that hackers working for the Chinese government stole some of our government’s most important cybersecurity tools and repurposed them to attack Western allies and businesses. The Chinese reportedly targeted one of our ally’s telecom networks, and when the tools were later transferred to North Korea and Russia, those governments crippled British hospitals and shipping companies. They even shut down a Ukrainian airport, its postal service, gas stations, and ATMs. There is little doubt that the Chinese government would value additional direct access to our telecom networks for reasons contrary to our security interests.

Under Chairman Pai’s leadership, the FCC has shown the strength and resolve to meet this threat. We have issued Show Cause Orders to companies that are owned and controlled by the People’s Republic of China. We have blocked one such company from connecting to our networks. We have prohibited companies that have been barred from bidding on federal contracts for national security reasons from participating in our spectrum auctions. And we have established CSRIC as an advisory council charged with providing recommendations to ensure the security of our communications networks, among other actions.

America has turned the page on the weak and timid approach to Communist China of the past. Any backsliding or softening of our approach would be a monumental mistake.

So today, with new authority from Congress, we implement the process for removing insecure equipment that is already installed in networks throughout the country. There will be plenty of difficult work ahead to fully implement and fund the replacement efforts, and Congress has already begun to work on the funding challenge with the Ensuring Network Security Act, which, if passed would help us ensure America has the most secure 5G networks in the world.

And it is imperative that we build on our actions today. Just last month, the Executive Branch submitted filings detailing their review of China Unicom and Pacific Networks—two entities that hold Section 214 authorizations and that are ultimately owned by the PRC. The Executive Branch’s public filings detail a nefarious pattern of economic espionage and trade secrets theft. They cover charges demonstrating “at a granular level how the PRC uses all available levers to steal sensitive U.S. person data, trade secrets, and other commercially valuable information.” And they outline the steps some of these entities have been taking to extend their operations in the U.S.

So our work at the FCC must continue. The FCC should build on the leadership we have shown and take immediate and appropriate action on the China Unicom and Pacific Networks authorizations.

Thank you to the staff of the Wireline Competition Bureau and the Public Safety and Homeland Security Bureau for their hard work on this and the many other important national security items that they have worked on. This decision has my support.

**STATEMENT OF  
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89.

Our 5G future is about connecting everything. It is about moving to a new networked world that will open up possibilities for communications that we cannot even fully imagine today. By exponentially increasing the connections between people and things around us, this technology could become an input in everything we do—improving agriculture, education, healthcare, energy, transportation, and more. The data we derive from all of these connections is powerful. It will inform machine learning, artificial intelligence, and the next generation of innovation across the economy.

This is exciting. But these opportunities also bring big security challenges. That's because they create a broader attack surface for cyber events, with more devices and a huge increase in traffic load. So we need networks that are trustworthy, resilient, and secure—and we need them right now. And we will not have secure networks in the United States if we do not first have a secure communications supply chain.

That is why what the Federal Communications Commission does today is important. We take another step in our multi-year effort to secure the communications supply chain. Specifically, we put in place a system to replace insecure equipment from the Chinese companies Huawei and ZTE, to the extent that it is present in our networks today. This is critical because we know that there are vulnerabilities that come with this equipment—and those vulnerabilities could provide foreign interests with access to our networks and jeopardize the security of communications in the United States. But while we authorize this effort today, to implement it in full requires an appropriation from Congress, consistent with the Secure and Trusted Communications Networks Act. As this decision demonstrates, we are ready.

But we can't stop here. This is only the beginning. Because we have so much more work to do to ensure that our communications future is secure. China is playing the long game. By using state-sponsored technological development to extend its economic reach, it could put itself in a position to gather intelligence, steal intellectual property, and bring down regional communications in times of crisis. And despite our efforts here, the Chinese government is still actively consolidating its global 5G authority. It has been funding and building infrastructure across Africa, Latin America, and Central and Southeast Asia. It is a central player in writing international standards and securing patents for emerging 5G technologies. It is developing trade alliances like the Regional Comprehensive Economic Partnership that could sustain its advantages in international supply chains and create more opportunities for Huawei and ZTE to produce and sell within the region.

What does this mean? It means what we do here—banning two vendors and removing their equipment from our nation's networks—is a start, but it is not enough. The United States needs a more comprehensive approach to secure 5G—both at home and abroad.

First, we need a coordinated national strategy for 5G security. Just two months ago the Government Accountability Office warned that there are serious deficiencies in our present national security plan developed pursuant to the Secure 5G and Beyond Act. We need to do better. When we do, it should include a robust plan for research and development, incentives for carriers to bring next-generation connections to rural and underserved communities so we do not deepen our digital divide, and across-the-board efforts to boost competition. In other words, rather than trying to match the tactics and scale of industrial policy in China, the United States should play to its strengths to help expand the market for secure communications equipment.

Second, we need to stimulate this new market for communications equipment by supporting the development of open radio access network technology here on our shores. Today, most carriers rely on just a few European or Chinese equipment makers to build out their networks—and that market is shrinking. But we can open this ecosystem to new providers by supporting the development of open

RAN, which has the potential to increase diversity and competition in communications equipment. In this new market we can make security a priority and not an afterthought. And we may be able to do so at lower cost, making this virtualized equipment more competitive with state-subsidized equipment from Huawei and ZTE. On top of that, it pushes the equipment market to where the United States is strongest—in semiconductors and software. The FCC should help this effort by establishing open RAN testbeds that bring together operators, vendors, vertical interests, and government agencies.

Third and finally, we need to address the security challenges posed by Chinese equipment by building a consistent and united front with our allies and not alienating them. The United States represents roughly a quarter of global gross domestic product. When we lock arms with other like-minded nations, we are stronger. So let's not go at this alone. Let's build on multilateral efforts like the Prague Principles and use our collective leverage to shape how communications networks develop and ensure that new technologies honor democratic principles and human rights.

We have our work cut out for us. As this proceeding clearly demonstrates, network security and national security go hand-in-hand. Together, they provide a foundation for 5G innovation and economic security. If we do this right, we will multiply the opportunities we have to support American values in the deployment of next generation communications both at home and abroad. And that is how we engage China from a position of strength—and grow American leadership in digital technology.

**STATEMENT OF  
COMMISSIONER GEOFFREY STARKS**

Re: *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89.

Today's decision represents another important step in confronting the threat of insecure equipment in our nation's communications networks. Building on bipartisan agreement and widespread industry commitment to improving our security, today we establish comprehensive requirements for the reimbursement program required by the Secure and Trusted Communications Networks Act of 2019 and take other steps to implement that statute. Our decision moves the rip-and-replace process forward by setting clear expectations for Eligible Telecommunications Carriers and participants in the reimbursement program so that they can make informed decisions about how to eliminate untrustworthy equipment from their networks.

I recognize, however, that the lack of a congressional appropriation for the replacement program leaves many of those providers in an unfortunate bind. For small and rural carriers, just like small businesses around the country, 2020 has been an incredibly challenging year. In our conversations around these issues, small carriers have repeatedly told me about their need for help to replace equipment that they bought legally and in good faith. Some of these same carriers have experienced substantial losses as a result of honoring the Keep Americans Connected Pledge, further weakening their ability to replace this equipment on their own. While finalizing the Commission's designations of Huawei and ZTE as national security threats was an undoubtedly important step, the gap between those designations—which limited the ability of many providers to upgrade and maintain their existing networks—and funding for replacements is beginning to cause a strain. Those providers need certainty about replacement funding as soon as possible, and I will continue to urge Congress to prioritize appropriating funding for replacement.

Given the seriousness and urgency of the threats to our networks, I am glad that we have decided to move forward with today's Order, even as we await an appropriation. And I am pleased that the Chairman worked with me to make changes to today's Order that will further reduce the national security impact of the funding lag. The version we now adopt will effectuate the recommendations by Chairman Frank Pallone and Ranking Member Greg Walden and make clear that the Commission intends to develop and release the Catalogue of Eligible Expenses as soon as possible, so that it can be a resource to providers who wish to begin the replacement process before reimbursement funding becomes available. It also encourages companies to proceed with the replacement process before the reimbursement program is funded with confidence that doing so will not jeopardize their eligibility. These steps should encourage providers to make these critical security improvements now.

I thank the Chairman for also working with me to add language to this item encouraging ETCs and recipients of reimbursement funds to consider O-RAN equipment and services. While achieving its primary goal of improving security, the replacement process outlined in this Order also represents an opportunity to make changes in U.S. networks that will promote innovation, reduce costs, and kickstart a new generation of American technological leadership. I'm optimistic that O-RAN can support all three of those goals. I would have preferred, however, that the Commission go a step further and require carriers that receive replacement money to certify that they considered O-RAN solutions. If American tax-payer dollars are going to rebuild these networks, Americans should get the best value and the most benefit. It's not unfair, then, to ask companies to consider alternatives that could save money while promoting American innovation. To be clear, I would not have proposed a requirement that any provider adopt O-RAN, but I believe mandating that they consider it would have better promoted both innovation and efficient spending of reimbursement funds. But even without that requirement, I am hopeful that today's decision will help educate smaller carriers about the benefits of O-RAN and give them the confidence to make the leap if O-RAN make sense for their businesses.

Going forward, the Commission must take a proactive role in promoting the security of our networks. Our adversaries are creative and agile, and the Commission must both work to prevent future vulnerabilities like the ones we address today and stand ready to quickly respond when new threats emerge. That means building a well-functioning task force across the many bureaus and offices in the Commission that confront security issues and supporting a unified effort across the federal government. Network security is national security, and there is no time to waste.

Thank you to the staff of the Wireline Competition Bureau for their work on this item.