

FCC Bars Imports of Telecommunications Equipment or Technology from Certain Chinese Producers

by Lawrence Ward, Dave Townsend, and T. Augustine Lo

On November 25, 2022, the Federal Communications Commission (“FCC”) adopted new rules to block the importation of telecommunications equipment considered unacceptably hazardous to U.S. national security. These new FCC rules block the importation or sale in the United States of equipment made by several leading Chinese telecommunications equipment producers. This FCC action carries out the Secure Equipment Act of 2021, which President Biden signed into law in November 2021 and which required the agency to take such steps.

FCC chair Jessica Roseworcel announced these new requirements approved on a unanimous and bipartisan basis by all of the FCC commissioners, saying, “The FCC is committed to protecting our national security by ensuring that untrustworthy communications equipment is not authorized for use within our borders, and we are continuing that work here. These new rules are an important part of our ongoing actions to protect the American people from national security threats involving telecommunications.”

The FCC action was taken by its Public Safety and Homeland Security Bureau (“PSHS Bureau”) under broad authorities created by the Secure and Trusted Communications Networks Act of 2019 (“Secure Networks Act”). This November 25 FCC Report and Order will block all future FCC authorizations of telecommunications equipment noted on the “Covered List” that the PSHS Bureau had previously published in March 2021 to highlight equipment it had identified under Section 2 of the Secure Networks Act. The PSHS Bureau’s Covered List specifies foreign-origin equipment or services that it considers to pose an unacceptable risk to U.S. national security or the security and safety of U.S. persons, based on criteria established by the Secure Networks Act.

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By way of context, all radio frequency (“RF”) devices must be examined and authorized by the FCC’s Office of Equipment and Technology under Part 2 (“Part 2”) of Title 47 in the Code of Federal Regulations (“CFR”) before being marketed in or imported into the United States. The FCC’s telecommunications equipment authorization program under Part 2 is designed to assure that all RF devices operated in the United States will do so without RF interference that would disrupt other devices and will comply with other FCC rules. The U.S. Customs and Border Protection (“CBP”) within the U.S. Department of Homeland Security routinely examines inbound shipments of foreign-made electronics to confirm they have been duly reviewed and authorized by the FCC under its Part 2 program. Under the November 25 Order, the FCC will now refuse to do any Part 2 examinations or approvals of certain categories of telecommunications equipment made by companies on the Covered List, including network servers and routers, consumer products such as smartphones and other products such surveillance and security cameras.

Since March 2021, the Covered List (which lists both equipment and services) had included communications equipment produced by Huawei Technologies, ZTE Corporation, Hytera Communications, Hangzhou Hikvision Digital Technology, and Dahua Technology (and their subsidiaries and affiliates), all leading equipment manufacturers in China.

This latest FCC action against these firms follows several other FCC moves in regard to Chinese telecommunications equipment and service providers. The FCC had earlier barred anyone in the United States from using any federal funds to buy any equipment or services on the PSHS Bureau Covered List and had launched its Secure and Trusted Communications Networks Reimbursement Program (known colloquially as its “Rip and Replace Program”) to allow American telecommunications carriers to remove equipment named on the Covered List that had already been installed in their networks before being so listed. In addition, the FCC had cancelled any operating authority in the United States of such Chinese state-owned telecommunications providers as China Telecom and China Unicom.

FCC commissioner Brendan Carr has also indicated that the FCC is continuing to explore further measures that would block the future U.S. sale or use of equipment that contain any parts, components or software supplied by companies on the Covered List, arguing that the November 25 Order by itself only bars finished goods bearing those Chinese brand names. Commissioner Carr contends that risky parts, components or software supplied by these same Chinese companies might still be used inside products made by other firms and thus could still be brought within the American

telecommunications system and so additional safeguards may be required.

The Biden Administration had announced in October 2022 in its National Security Strategy (“NSS”) that it viewed China as the preeminent security and economic challenge to the United States and essentially pledged a new “whole of government” approach to confront that challenge. Just as the Administration has already worked to strengthen scrutiny on in-bound direct investment from China into the United States through the Committee of Foreign Investment in the United States (“CFIUS”) and to expand and stiffen export controls of advanced technologies such as supercomputers and semiconductors to China, now the Government is seeking to limit importation of specific goods and services that are deemed risks to national security and American data privacy. Congress may well continue to expand such import restrictions against key categories of Chinese-origin goods or services, such as precluding the use of Chinese-made parts or components in equipment or machinery furnished to the Department of Defense or other federal agencies or banning the operation in the United States of the popular video hosting platform TikTok that is owned by the Chinese company ByteDance or at least barring the installation of that app on any mobile device owned or used by federal agencies.

In further late-breaking legal developments, BIS also transferred Yangtze Memory Technologies, another leading Chinese semiconductor company, and 35 other Chinese entities from its Unverified List (“UVL”) to the much more restrictive BIS Entity List, barring access by those Chinese entities to much advanced U.S. technology unless licensed by BIS. BIS also invoked its new “foreign direct product” rule against 21 Chinese entities, again imposing new export license requirements. BIS typically names foreign companies to its UVL if BIS is unable to confirm, through in-person inspections or other such diligence measures, that those companies will adhere to U.S. export control requirements in regard to their receipt of American technology exports. BIS had placed 31 Chinese companies on the UVL in October 2022 as one element of its expanded export control program vis-à-vis China. However, in a move that may still offer some reassurance to both U.S. and Chinese firms trying to cope with these new and stiffer export control restrictions, BIS also removed 25 Chinese entities from the UVL under that agency’s formal process that allows UVL-listed companies to petition BIS for such removal and to demonstrate their commitment to compliance with U.S. export controls.