

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

**COMMENTS OF
THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

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EXECUTIVE SUMMARY

In the months since the Commission received comments and reply comments in response to the Notice of Proposed Rulemaking in this proceeding, concerns regarding certain suppliers have continued to mount. Actions have been taken by Congress, other federal agencies, and several foreign governments. Of relevance here, by including Section 889 in the 2019 National Defense Authorization Act (“2019 NDAA”), Congress affirmed that federal dollars should not be spent on suppliers poised to undermine the security of our nation’s information and communications technology (“ICT”) networks. Whereas earlier this year the Commission *could* take action to make certain suppliers ineligible for receipt of universal service funds, due to Section 889 it is now *compelled* to prohibit a subset of those suppliers from participation in any of the Commission’s grant or loan programs.

Section 889(b) Applies to the Universal Service Fund.

First, the Commission is an “executive agency” within the context of Section 889 because it is an “independent establishment.” Next, the Commission’s subsidy programs including the Universal Service Fund (“USF”) qualify as “grants” subject to the procurement ban in Section 889(b)(1). While the statute does not explicitly define what constitutes a “grant,” the USF program has been repeatedly referred to as a “subsidy.” The plain meaning of the word “subsidy” indicates that the term is synonymous with “grant” for purposes of paragraph (b)(1).

This is especially true when read in context with the mitigation provision in paragraph (b)(2). The mitigation provision underscores Congress’ intention that the “loan or grant” ban applies to USF since it specifies the Commission by name as the primary agency responsible for mitigating the impact of the procurement ban. To construe the statute otherwise – that is, to prohibit non-federal entities from using federal dollars to buy covered equipment while exempting what is possibly the *largest* relevant federal funding program, and then simultaneously requiring that very same program to mitigate the prohibition’s effects – would be illogical and ultimately undermine the purpose of Section 889.

The statute’s purpose and legislative history further bolster this reading. Congress included Section 889 in the 2019 NDAA to protect U.S. networks by restricting federal support for equipment deemed to pose a national security threat. Reading the statute to exclude the USF program would significantly undermine that purpose. Moreover, to the extent Section 889(b)(1) is still ambiguous, any challenges in interpretation can be reconciled by understanding the legislative history, whereby paragraph (b)(2) was added in the final stages before passage and thus demonstrates congressional awareness that all of subsection (b) would implicate the Commission and USF. Finally, all other relevant Commission programs, including the Telecommunications Relay Service, are also subject to Section 889’s restrictions.

TIA’s Proposed Rule Would Appropriately Implement Section 889(b).

Section 889 now poses an affirmative obligation on the Commission to bar certain suppliers from participation in its grant and loan programs. For that reason, neither the procurement ban in paragraph (b)(1) nor the mitigation requirement in paragraph (b)(2) are self-

executing; rather, the Commission must provide guidance on how both will be implemented in practice. Fortunately, Section 889 is fully consistent with – and often strongly reinforces – TIA’s proposed approach, including the draft rule text that accompanied our previous comments. Like TIA’s proposal, Section 889 appropriately takes a narrowly-tailored approach by focusing on specific suppliers of concern rather than supply chain management more broadly. Section 889(b)(3)(B) also aligns with TIA’s suggestion to target the rule toward logic-enabled components from specific suppliers of concern.

Parts of Section 889 contemplate the need for an interagency process that leverages the appropriate national security expertise of other agencies to designate additional suppliers of concern. For that reason, the Commission’s rule should still derive its list of prohibited suppliers from multiple sources including – but not limited to – statutes such as Section 889. Meanwhile, now that Congress has acknowledged that the prohibition would potentially impose hardships on some entities by means of requiring the Commission to provide mitigation assistance, any argument that the Commission’s proposed rule would not be in the public interest due to cost has thus been acknowledged and resolved by statute.

Other Parts of Section 889 Neither Undercut Nor Expand its Core Purpose of Limiting Federal Procurement and the Use of Federal Dollars.

As the Commission moves forward in this proceeding, it should note that other parts of Section 889 neither undercut nor expand its core purpose of limiting federal procurement dollars from supporting suppliers of concern. This means the Commission should not read the rule of construction in Section 889(b)(3)(A) – *i.e.*, regarding backhaul, interconnection, and roaming with third parties – so broadly as to undermine the basic purpose of the statute. Nor should it read paragraph (b)(1) in concert with the indirect federal procurement ban in subsection (a) to vastly expand the statute’s reach to the use of non-federal dollars.

The Commission Should Continue Engaging With Other Federal Agencies on These Issues.

As the Commission moves ahead in this proceeding, it should continue to support and engage in other government and industry efforts. Even as the Commission works to implement Section 889(b), it should lend its expertise to the Department of Defense and other federal agencies that are actively working to interpret other ambiguities in the statute. The Commission should also continue to support public/private partnership work underway across the federal government, including but not limited to the recently-chartered DHS ICT Supply Chain Risk Management Task Force, NIST’s development of Special Publication 800-37, and the work of the Commission’s own Communications Security, Reliability and Interoperability Committee.

* * *

In summary, nothing in Section 889 should give the Commission any pause from moving ahead or following the approach TIA has proposed. Rather, the statute specifically requires and/or reinforces elements of TIA’s narrowly-tailored approach. We appreciate the Commission’s continuing work on this important issue, and we look forward to continued engagement with the agency as it moves forward.

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The Telecommunications Industry Association (“TIA”)¹ respectfully submits these comments in response to the Public Notice issued on October 26, 2018 in the above-captioned proceeding.²

INTRODUCTION

Since reply comments were filed four months ago in response to the Commission’s Notice of Proposed Rulemaking (“NPRM”) in this proceeding,³ government efforts to mitigate the threat posed by products from certain suppliers have continued at a rapid pace both at home and abroad. In the United States, Congress enacted Section 889 of the John S. McCain National

¹ TIA is the leading trade association for the information and communications technology (“ICT”) industry, representing companies that manufacture or supply the products and services used in global communications across all technology platforms. TIA represents its members on the full range of policy issues affecting the ICT industry and forges consensus on voluntary, industry-based standards. As with TIA’s prior advocacy in this proceeding, these comments represent the views of the TIA Public Policy Committee. See [Comments of the Telecommunications Industry Association](#), filed June 1, 2018 in WC Docket No. 18-89, at 1 n.3 (“TIA Comments”).

² Public Notice, *Wireline Competition Bureau Seeks Comment on Section 889 of John S. McCain National Defense Authorization Act for Fiscal Year 2019*, WC Docket No. 18-89, DA 18-1099 (rel. Oct. 26, 2018) (“Public Notice”).

³ [Notice of Proposed Rulemaking](#), *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, WC Docket No. 18-89, FCC 18-42 (rel. Apr. 18, 2018) (“NPRM”).

Defense Authorization Act for Fiscal Year 2019 (“2019 NDAA”)⁴ – the primary focus of these comments – and has also included relevant language in several FY19 appropriations bills.⁵ The Department of Homeland Security (“DHS”) has very recently formed and chartered an ICT Supply Chain Risk Management Task Force.⁶ On November 14, the U.S.-China Economic and Security Review Commission recommended that Congress direct the National Telecommunications and Information Administration (“NTIA”) and the Federal Communications Commission – to the extent Congress has not already done so – “to identify ... steps to ensure the rapid and secure deployment of a 5G network, with a particular focus on the threat posed by equipment and services designed or manufactured in China.”⁷ Other efforts

⁴ Pub. L. No. 115-232 § 889, 132 Stat. 1636, 1917 (Aug. 13, 2018).

⁵ [Legislative Branch Appropriations Act, 2019](#), Pub. L. No. 115-244, div. B, § 208 (Sept. 21, 2018) (prohibiting use of appropriated funds on telecommunications equipment from Huawei Technologies Company or ZTE Corporation unless the agency has reviewed the relevant supply chain risk against criteria developed by NIST and threat information from the Federal Bureau of Investigation (“FBI”), and conducted an assessment of the risk of cyber-espionage or sabotage associated with such systems); [Commerce, Justice, Science, and Related Agencies Appropriations Act, 2019](#), S. 3072, 115th Cong. (placed on calendar in the Senate), at § 514 (same); [Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2019](#), S. 3023, 115th Cong. (placed on calendar in the Senate), at § 420 (same); [Department of the Interior, Environment, and Related Agencies Appropriations Act, 2019](#), S. 3073, 115th Cong. (placed on calendar in the Senate), at § 432 (same); [Financial Services and General Government Appropriations Act, 2019](#), S. 3107, 115th Cong. (placed on calendar in the Senate), at § 632 (same).

⁶ DHS National Protection and Programs Directorate, *DHS and Private Sector Partners Establish Information and Communications Technology Supply Chain Risk Management Task Force* ([press release](#)), Oct. 30, 2018 (“DHS Task Force Press Release”).

⁷ U.S.-China Economic and Security Review Commission, 2018 Report to Congress, at 442-3 (Nov. 14, 2018), https://www.uscc.gov/sites/default/files/annual_reports/2018%20Annual%20Report%20to%20Congress.pdf.

relating to supply chain risk management and other security concerns are proceeding across the government.⁸

Momentum is increasing across the globe as well. In July, the United Kingdom pulled back on prior assurances regarding the security of Huawei equipment, releasing a report stating that the identification of shortcomings in Huawei's engineering processes has exposed new risks in UK networks and long-term challenges in mitigation and management.⁹ In August, Australia prohibited the use of Huawei equipment in their 5G networks,¹⁰ a decision that one official emphasized was "not taken lightly."¹¹ Intelligence reports given to Australian officials outlined a case in which Huawei personnel provided Chinese espionage services with access codes to

⁸ See, e.g., CSRIC Working Group 3, *Final Report – Report on Best Practices and Recommendations to Mitigate Security Risks to Emerging 5G Wireless Networks v14.0* (Sept. 2018), <https://www.fcc.gov/file/14500/download>; see also *infra* Section IV.B.

⁹ Huawei Cyber Security Evaluation Centre (HCSEC) Oversight Board, *Annual Report 2018, A report to the National Security Adviser of the United Kingdom*, July 17, 2018, at 4, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727415/20180717_HCSEC_Oversight_Board_Report_2018_-_FINAL.pdf.

¹⁰ Mitch Fifield, Minister for Communications and the Arts, and Scott Morrison, Acting Minister for Home Affairs, *Government Provides 5G Security Guidance to Australian Carriers* ([press release](#)), Aug. 23, 2018; Twitter, *Tweet by Huawei Australia*, <https://twitter.com/HuaweiOZ/status/1032411216184930304> (Aug. 22, 2018, 4:36 PM) ("We have been informed by the Govt that Huawei & ZTE have been banned from providing 5G technology to Australia. ***").

¹¹ Mike Burgess, Director-General ASD, *Speech to ASPI National Security Dinner* (Oct. 29, 2018), <https://asd.gov.au/speeches/20181029-aspi-national-security-dinner.htm>.

infiltrate a foreign network.¹² Germany is now also considering taking action to limit the use of Huawei equipment, with a senior German official noting that “there is serious concern.”¹³

In the face of these myriad developments, the Commission’s task is now clearer than ever. As we explain below, Section 889 applies to the Universal Service Fund, and affirmatively requires the Commission to act on many of the issues that were raised in the original NPRM. Importantly, various provisions of Section 889 are fully consistent with the implementation principles TIA proposed in our earlier comments and reply comments. While the Commission should continue to engage with other agencies across the government, the Commission itself must move forward swiftly to provide guidance and assistance to its own stakeholders, many of whom will now be affected by the statutory deadlines established in Section 889.

DISCUSSION

I. SECTION 889(b) APPLIES TO ALL GRANTS, LOANS, OR SUBSIDIES ADMINISTERED BY THE COMMISSION, INCLUDING THE UNIVERSAL SERVICE FUND.

Section 889(b) of the 2019 NDAA is the key provision at issue in the Public Notice and provides as follows:

- (1) The head of an executive agency may not obligate or expend 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 the equipment, services, or systems described in subsection (a).
- (2) In implementing the prohibition in paragraph (1), heads of executive agencies administering loan, grant, or subsidy programs, including the heads of the Federal Communications Commission, the Department of Agriculture, the Department of

¹² Paul Maley & David Uren, *China used Huawei to hack network, says secret report*, THE AUSTRALIAN (Nov. 3, 2018), <https://www.theaustralian.com.au/national-affairs/national-security/china-used-huawei-to-hack-network-says-secret-report/news-story/510d3b17c2791cbcac18f047c64ab9d8>.

¹³ Noah Barkin, *German officials sound China alarm as 5G auctions loom*, REUTERS (Nov. 13, 2018), <https://www.reuters.com/article/us-germany-china-5g-exclusive/german-officials-sound-china-alarm-as-5g-auctions-loom-idUSKCN1NI1WC>.

Homeland Security, the Small Business Administration, and the Department of Commerce, shall prioritize available funding and technical support to assist affected businesses, institutions and organizations as is reasonably necessary for those affected entities to transition from covered communications equipment and services, to procure replacement equipment and services, and to ensure that communications service to users and customers is sustained.

This subsection contains several undefined terms that may lend some ambiguity upon an initial reading. However, for the reasons described below, the statute clearly is best read to apply to all grant, loan, or subsidy programs administered by the Commission, including the Universal Service Fund.

A. The Commission Is An “Executive Agency.”

As a preliminary matter, the Commission is an “executive agency” for purposes of this statute because it is an “independent establishment.” Section 889(f)(4) incorporates the definition of “executive agency” in 41 U.S.C. § 133, which includes any “independent establishment as defined in section 104(1) of title 5.”¹⁴ In turn, title 5 defines an “independent establishment” to be “an establishment in the executive branch ... which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment.”¹⁵

First, the Commission itself has previously declared that it is an “independent establishment.” In a proceeding involving the regulation of towers to protect migratory birds, it stated (and restated) that it was not subject to certain bird conservation obligations imposed by

¹⁴ 41 U.S.C. § 133(3).

¹⁵ 5 U.S.C. § 104(1).

an Executive Order that excluded independent establishments within the executive branch.¹⁶ The Commission concluded, “the Executive Order does not apply to the Commission, which is an ‘independent establishment.’”

Next, aside from the Commission’s own self-assessment, courts have held that similarly situated agencies are “independent establishments.” Stressing the objectives of Congress to ensure that the agency remain independent of executive authority, with the exception of the appointment of Commissioners, a 1935 Supreme Court case involving the Federal Trade Commission (“FTC”) declared the FTC to be separate from executive authority due to Congress’s desire for the independent agency to be “free to exercise its judgment without the leave or hindrance of any other official or any department of the government.”¹⁷ No subsequent decision has overturned this case.¹⁸ Meanwhile, other federal courts have declared other

¹⁶ *Effects of Communications Towers on Migratory Birds*, Notice of Inquiry, 18 FCC Rcd 16938, 16942 ¶ 8 n.30 (2003) (citing 5 U.S.C. §§ 101, 104) (“[E]xecutive branch agencies are subject to Executive Order 13186. ... Section 2(g) of Exec. Order No. 13186 defines ‘Federal agency’ to mean ‘an executive department or agency, but does not include independent establishments as defined by 5 U.S.C. 104.’ The Executive Order does not apply to the Commission, which is an ‘independent establishment.’”) (internal citations omitted); *Effects of Communications Towers on Migratory Birds*, Notice of Proposed Rulemaking, 21 FCC Rcd 13241, 13246 ¶ 8 n.32 (2006) (same). See also *Regulatory Policies and International Telecommunications*, Notice of Inquiry and Proposed Rulemaking, 2 FCC Rcd 1022, 1032 ¶ 69 (1987) (citing 5 U.S.C. § 104) (“While this Commission does not fall within the definition of ‘executive department,’ it might be considered an independent establishment.”).

¹⁷ *Humphrey’s Executor v. United States*, 295 U.S. 602, 625-26 (1935). The Commission referenced this case in its 1987 Notice of Inquiry, *supra* n. 16, but not in its subsequent migratory bird proceeding.

¹⁸ In *Freytag v. Commissioner*, 501 U.S. 868, 920-21 (1991), a case involving a Tax Court and the Appointments Clause, Justice Scalia authored a concurring opinion that appears to offer a view that the Commission is an independent establishment, comparing the Tax Court to “some other independent establishments (notably, the so-called ‘independent regulatory agencies’ such as the FCC and the Federal Trade Commission).” However, the language was not endorsed by a majority of the Court and was offered in the context of the Appointments Clause, not the definition of independent establishment found at 5 U.S.C. § 104.

independent agencies, including the Atomic Energy Commission and the Equal Employment Opportunity Commission, to be “independent establishments.”¹⁹

Finally, other language in Section 889(b) strongly supports the conclusion that this statute applies to the Commission. Paragraph (b)(2), which provides additional direction to “executive agencies” for “implementing the prohibition of paragraph (1),” explicitly identifies and includes the Commission as an “executive agency.” This language would be in direct conflict with, and thus precludes, any interpretation of paragraph (b)(1) to mean that the Commission is not an executive agency. Applying the principle of statutory construction to read statutes as a whole thus strongly supports the conclusion that the Commission is subject to the restrictions in Section 889(b)(1).²⁰

B. Section 889(b)(1) Applies to the Universal Service Fund.

The next question under the statute –whether Section 889(b)(1)’s prohibition on loan and grant funds applies to the Universal Service Fund – should likewise be answered in the affirmative. As described below, this conclusion is compelled by the plain meaning of the text in paragraph (b)(1), additional context offered in paragraph (b)(2), the underlying purpose of Section 889 as a whole, and the legislative history of the 2019 NDAA.

1. Text

The plain meaning of the terms “subsidy” and “grant” make clear that USF programs qualify as a “grant” for purposes of the statutory ban in paragraph (b)(1). The USF program is a

¹⁹ *Nanfelt v. United States*, 1 Cl. Ct. 223, 224 (1982) (Atomic Energy Commission); *Trinh Huynh v. O’Neill*, Civil Action No. 3:01cv00445, 2002 U.S. Dist. LEXIS 3086, at *20 (E.D. Va. Feb. 11, 2002) (Equal Employment Opportunity Commission).

²⁰ See *Smith v. United States*, 508 U.S. 223, 233 (1993) (statutory interpretation is a “holistic endeavor”); *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)) (same); *United Sav. Ass’n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (same).

group of four programs that provide either direct grants such as the Low-Income (“Lifeline”) program, wherein the USF compensates eligible telecommunications carriers for discounted voice or broadband service, or reimburse entities for eligible telecommunications equipment and services purchases, as in the Schools and Libraries (“E-Rate”) Program. Thus, it should not be surprising that courts and the Commission itself have routinely referred to the USF program as a collection of “subsidies.”²¹

Moreover, the plain meaning of the term “subsidy” is synonymous with “grant” within the context of Section 889. The English Oxford dictionary defines subsidy as “a *grant* or contribution of money.”²² Similarly, the Merriam-Webster dictionary defines “subsidy” as “a *grant* or gift of money: such as ... a *grant* by a government to a private person or company to assist an enterprise deemed advantageous to the public.”²³ Likewise, Black’s Law Dictionary

²¹ See, e.g., *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 320 (5th Cir. 2001) (describing the establishment of “a transitional \$650 million Universal Service Fund to provide explicit *subsidies* for poor and rural customers”) (emphasis added). See also GAO, Testimony Before the Committee on Homeland Security and Governmental Affairs, U.S. Senate, “Opportunities to Reduce Fragmentation, Overlap, and Duplication and Achieve Other Financial Benefits,” at 3 (Apr. 27, 2016), <https://www.gao.gov/assets/680/676827.pdf> (“Greater coordination among the Federal Communications Commission’s *Universal Service Fund subsidy programs* and the U.S. Department of Agriculture’s Rural Utilities Service *grant programs* could result in more efficient and effective support of Internet access for tribal communities.”) (emphasis added); Remarks of Commissioner Ajit Pai, American Enterprise Institute, Washington, DC, *Connecting the American Classroom: A Student-Centered E-Rate Program*, at 6 (July 16, 2013), <https://docs.fcc.gov/public/attachments/DOC-322201A1.pdf>. (“So even if E-Rate did not *subsidize* these services, schools could spend their own money.... Puerto Rico received more than \$100 million in federal *subsidies* from 1998 through 2001 to wire 1,500 schools.”) (emphasis added).

²² *Subsidy*, ENGLISH OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/subsidy> (emphasis added) (last visited Nov. 15, 2018).

²³ *Subsidy*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/subsidy> (emphasis added) (last visited Nov. 15, 2018).

defines “subsidy” as a “*grant* of money made by government in aid of the promoters of any enterprise, work, or improvement in which the government desires to participate, or which is considered a proper subject for state aid, because likely to be of benefit to the public.”²⁴ Indeed, the Commission would find difficulty defining the USF subsidies it offers as anything other than a grant of money distributed through various mechanisms to promote the public interest in universal access to communications technologies.

Given the plain meaning of the terms “subsidy” and “grant,” the mere fact that the word “subsidy” was not used in paragraph (b)(1) but was used in paragraph (b)(2) does not change the meaning of the statute. Of course, it may be argued that the rule against surplusage, which calls for courts to “give effect, if possible to every clause and word” of a statute, means that the use of “subsidy” in paragraph (b)(2) in addition to “loans and grants” must endow it with a distinct meaning.²⁵ However, the D.C. Circuit has clarified that “where the text and history of [a] regulation make its meaning clear, the canon against surplusage cannot dictate a different interpretation.”²⁶ Furthermore, the Supreme Court has held that when a statute's text can be read in two ways – one in which the text is plain but certain language is mere surplusage, and another in which there is no surplusage but the text is ambiguous – “applying the rule against surplusage is, absent other indications, inappropriate.”²⁷ To read “subsidy” as anything other than a kind of

²⁴ *What is SUBSIDY?*, THE L. DICTIONARY, <https://thelawdictionary.org/subsidy/> (emphasis added) (last visited Nov. 15, 2018).

²⁵ *Great Lakes Comnet, Inc. v. FCC*, 823 F.3d 998 1003 (D.C. Cir. 2016) (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

²⁶ *Id.*

²⁷ *Lamie v. United States Tr.*, 540 U.S. 526, 536 (2004).

grant in the context of Section 889 would be to invite ambiguity where plain meaning allows none.

Similarly, reliance on the canon that *expressio unius est exclusion alterius* – “the expression of one thing is the exclusion of the other” – *i.e.*, that explicit inclusion of “subsidy” alongside “grants” and “loans” in (b)(2), and its absence in (b)(1), implies an intent to negate it in (b)(1), would be misplaced in reading Section 889.²⁸ As the D.C. Circuit has explained, this particular maxim has little force in the administrative setting, where courts defer to an agency’s interpretation of a statute unless Congress has directly spoken to the precise question at issue.²⁹ Indeed, the *expressio unius* canon is “a feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved.”³⁰

If anything, then, the surplusage and *expressio unius* arguments above – even if credited at all despite the statute’s plain meaning – would indicate an ambiguity that the Commission is then free to resolve by reading paragraph (b)(1) contextually within Section 889 as a whole, while also being guided by the underlying purpose of the statute. Both are addressed below.

2. Context

Consistent with the plain meaning of “grant and loans,” paragraph (b)(2) underscores that paragraph 889(b)(1) was intended to apply to the USF. By explicitly including the Federal Communications Commission in paragraph (b)(2), which elaborates on the implementation of

²⁸ *Clinchfield Coal Co. v. Fed. Mine Safety & Health Com.*, 895 F.2d 773, 779 (D.C. Cir. 1990).

²⁹ *Mobile Communs. Corp. of Am. v. FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996).

³⁰ *Cheney R. Co. v. ICC*, 902 F.2d 66, 68–69 (D.C. Cir. 1990) (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843–44 (1984)); *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 697 (D.C. Cir. 2014).

(b)(1), the second paragraph confirms that Congress intended to include Commission programs within the purview of Section 889's grant and loan prohibition.

Paragraph (b)(2) demonstrates Congress's understanding that the Commission's Universal Service Fund, with its dedicated funding and outlays of billions of dollars per year, is perhaps the largest and most well-known federal program that supports purchases of telecommunications equipment by non-federal entities. It is also by far the largest spending program of any kind that the Commission administers. For both reasons, the Federal Communications Commission is appropriately the *first* agency mentioned in paragraph (b)(2). It is then followed by other agencies that administer significant but smaller funding programs, including the Department of Agriculture, which oversees the Rural Utilities Service, and the Department of Commerce, which administers (among other things) the Broadband Technologies Opportunities Program (BTOP) that uses one-time funding appropriated in the 2009 American Reinvestment and Recovery Act.

To the extent it could be argued that the details in paragraph (b)(2) reflect nothing more than Congress's understanding about which agencies could best mitigate the effects of the prohibition in paragraph (b)(1), rather than the scope of the prohibition itself, that view should be rejected. Indeed, it would be highly illogical to construe the statute to prohibit non-federal entities from using federal dollars to buy covered equipment while *exempting* the largest relevant federal funding program from that prohibition and simultaneously requiring that same program to mitigate the effects of the prohibition just imposed. At the very least, such an absurd outcome would need to be more clearly directed by the statute's text, since "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent

with the legislative purpose are available.”³¹ There is no such indication here. Furthermore, such a reading would undermine the purpose of Section 889 as explained below.

3. Purpose

Congress included Section 889 in the 2019 NDAA to protect U.S. networks by preventing federal agencies and federal dollars from being used on equipment deemed to pose a threat to national security. As detailed at length in TIA’s comments and reply comments in this proceeding, the U.S. government and many allied governments have been responding to growing concerns about the presence of certain telecommunications suppliers in the ICT supply chain.³² Section 889 directly resulted from those concerns. Congress’s specific objective was to restrict the federal government’s reliance on and support for Huawei/ZTE equipment, either directly or through companies that use such equipment.

Excluding the Commission’s USF program – among if not atop the largest federal grant program for communications equipment – from the purview of Section 889’s ban, and allowing federal dollars to be spent on such equipment, would therefore clearly frustrate the fundamental purpose of the statute to promote national security. There is no indication that Congress intended this contradiction. There is also no indication in the limited legislative history that Congress intended Section 889 to apply only to certain federal agencies but not others.

Moreover, by adding paragraph (b)(2), Congress was clearly aware that its actions would potentially cause hardships and necessitate transitions to new equipment for some people,

³¹ *Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982) (citing *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 542-43 (1940)); *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940).

³² See TIA Comments at 6-14; [Reply Comments of the Telecommunications Industry Association](#), filed July 2, 2018 in WC Docket No. 18-89, at 44-69 (“TIA Reply Comments”).

including USF recipients. Indeed, as the House conference report emphasized, “conferees stress the importance of assisting rural communications service providers, anchor institutions, and public safety organizations in replacing covered equipment and associated support services contracts.”³³ Despite these acknowledged challenges, Congress affirmatively decided to adopt this course of action while ordering agencies to provide help to those affected. The Commission now has an obligation to implement Section 889 in all of its loan and grant programs to fulfill this purpose.

4. Legislative History

To the extent the statute is viewed as being ambiguous, the various challenges in interpreting it can be reconciled by understanding its legislative history. Paragraph (b)(2), which explicitly mentions the Commission and uses the word “subsidy,” was added by the conference committee at the final stages before passage. This later elaboration on the implementation of Section 889’s loan and grants prohibition makes clear that Congress specifically intended the ban on loans and grants to apply to subsidies like the Commission’s USF programs.

Some types of legislative history are “substantially more reliable than others,” and the report of a joint conference committee of both Houses of Congress is accorded “a good deal more weight” than even the remarks of the sponsor of a particular portion of a bill on the floor of the chamber.³⁴ Indeed, conference reports “are the gold standard when it comes to legislative history.”³⁵ Therefore, to the extent there was any actual difference in intent between the House

³³ H.R. REP. NO. 115-874, at 919 (2018) (Conf. Rep.), <https://www.gpo.gov/fdsys/pkg/CRPT-115hrpt874/pdf/CRPT-115hrpt874.pdf>.

³⁴ *Council for Urological Interests v. Burwell*, 790 F.3d 212, 231 (D.C. Cir. 2015) (citing *Simpson v. United States*, 435 U.S. 6, 17 (1978) (Rehnquist, J., dissenting on other grounds)).

³⁵ *Id.* (citations omitted).

and Senate – or even among the authors of the bill or this specific provision – about its scope, the clear intent of the conference committee in adding paragraph (b)(2), and as expressed in the conference report, should control when reading any otherwise-ambiguous language in paragraph (b)(1).

C. Section 889(b) Applies to All Other Commission Grant or Loan Programs Including the Telecommunications Relay Service Fund.

In the Public Notice, the Commission asks whether Section 889(b) applies to other programs it administers, including the Telecommunications Relay Service (“TRS”) Fund.³⁶ Per the plain meaning of the text, Section 889 does indeed apply to all grants or loans the agency administers, including the TRS Fund. While Congress did incorporate certain limiting constructions within the text of Section 889, such as the limitation in subparagraph (b)(3)(B) on what kinds of equipment are *not* covered by the ban, the text provides no exemption for any specific type of grant or loan program. Rather, consistent with Congress’s intention to prevent federal dollars from supporting suppliers that pose a threat to the nation’s ICT networks, Section 889 imposes a broad ban across all federal programs that provide money to purchase telecommunications equipment.

II. TIA’S PROPOSED RULE WOULD APPROPRIATELY IMPLEMENT SECTION 889(b).

Section 889 was enacted against the backdrop of the Commission’s proposed rule in this open proceeding, with TIA and others having previously provided extensive comments on how the Commission should move ahead. As described below, Section 889 is fully consistent with, and often strongly reinforces, the specific approach proposed by TIA in its previous comments. Nothing in Section 889 requires the Commission to re-think its own efforts or the proposals

³⁶ Public Notice ¶ 5.

made by TIA, nor does anything in the statute undercut the agency’s authority to impose a narrowly tailored rule. If anything, the statute provides greater impetus for the agency to move forward.

A. Section 889 Imposes an Affirmative Obligation on the Commission to Take Prompt Action in This Proceeding.

As TIA has explained, the Commission already has – and continues to have – the authority under Sections 201 and 254(b) of the Communications Act to adopt a narrowly tailored rule to restrict USF support for companies that pose a threat to national security.³⁷ However, we expressed concern that the Commission’s initial proposition that “the promotion of national security is consistent with the public interest” could be stretched too far without a limiting principle.³⁸ For that reason, we noted that national security provisions in the Communications Act and relevant precedents made clear that any specific actions must be based upon determinations made by expert security agencies or statutory requirements from Congress.³⁹

As an initial matter, Section 889 strongly reinforces and is fully consistent with the principles above. The new statute codifies a determination by Congress regarding five specific suppliers of concern,⁴⁰ while providing authority to the Department of Defense (“DoD”) to designate additional suppliers in consultation with other expert agencies.⁴¹ The statute makes clear that the role of the Commission and other executive agencies is to prevent the use of federal

³⁷ TIA Comments at 22-24.

³⁸ TIA Comments at 22 (quoting NPRM at ¶ 35).

³⁹ TIA Comments at 25-28.

⁴⁰ See 2019 NDAA § 889(f)(3)(A) (mentioning Huawei Technologies Company and ZTE Corporation); *id.* § 889(f)(3)(B) (mentioning Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, and Dahua Technology Company).

⁴¹ See *id.* § 889(f)(3)(D) (granting DoD authority to designate additional entities, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation).

funds under their control on equipment and services from suppliers of concern, but not to make independent national security determinations.

Where Section 889 goes further is that it now *requires* action by the Commission. Prior to the enactment of Section 889, the Commission's proposed actions in this proceeding were a matter of agency discretion – which the agency was wise to exercise – rather than legal compulsion. However, Section 889(b)(1) flatly prohibits the use of loan or grant funds – including, as explained above, any universal service funds – on equipment from suppliers of concern, and this prohibition will take effect on August 13, 2020.⁴² Paragraph (b)(2) also requires the Commission to assist affected businesses, institutions, and organizations by prioritizing available funding and technical support.

Against this backdrop, the Commission must provide clarity to USF recipients and other stakeholders by concluding this proceeding promptly. As TIA has explained in our comments and as demonstrated by our proposed rule text, there are a significant number of implementation issues to be addressed, including which suppliers are prohibited, which types of equipment and components are covered, and how compliance with the prohibition should be certified and/or verified.⁴³ To avoid unnecessary disruptions, USF recipients and other affected stakeholders (including other ICT vendors) must be given adequate time to respond to the Commission's directives on these issues long before the statutory deadline arrives. In that sense, neither paragraph (b)(1) nor (b)(2) can be considered self-executing; the Commission instead has an affirmative duty to provide not just mitigation assistance but also guidance on how the prohibition itself will be implemented in practice.

⁴² *See id.* § 889(c) (establishing effective dates).

⁴³ TIA Comments at 54-63.

B. Section 889 and TIA’s Proposed Rule Both Focus Appropriately on Specific Suppliers of Concern, Not Supply Chain Management Generally.

As TIA explained extensively in our comments, the Commission’s focus in this proceeding should be on specific suppliers of concern rather than supply chain management generally.⁴⁴ Supply chain security is a complex topic that appropriately involves public-private partnerships, and extensive work is taking place in industry and across the government, including the work of the Commission’s own Communications Security, Reliability, and Interoperability Committee (“CSRIC”) and the recent formation of an ICT Supply Chain Task Force by DHS.⁴⁵ As TIA explained, product testing is not a viable mechanism to address the concerns raised in the NPRM, and an overbroad rule or blanket country-of-origin ban could harm U.S. international trade interests without effectively improving security.⁴⁶

Again, Section 889 strongly reinforces and is fully consistent with the approach described above due to its focus on specific suppliers. More far-reaching legislative proposals remain under consideration in Congress, including the recently-proposed Federal Acquisition Supply Chain Security Act that would create a council to develop policies and procedures for agencies to use when purchasing information technology.⁴⁷ While the Commission can and should participate in collaborative efforts across the federal government to address supply chain security issues, *see* section IV below, its actions in this proceeding should remain focused on specific suppliers of concern.

⁴⁴ *See generally* TIA Comments at 28-47.

⁴⁵ TIA Comments at 28-35; DHS Task Force Press Release, *supra* n. 6.

⁴⁶ TIA Comments at 35-47.

⁴⁷ [S. 3058](#) (115th Congress); *see also* U.S. Senate Committee on Homeland Security and Governmental Affairs, *After Problems With Kaspersky, ZTE Products, McCaskill, Lankford Introduce Bipartisan Bill to Safeguard National Security from Supply Chain Security Threats* ([press release](#)), June 19, 2018.

C. The Commission Should Derive Its List of Prohibited Suppliers from Multiple Sources, Including But Not Limited to Statutes Such as Section 889.

In our initial comments, TIA proposed that the Commission further define the term “company posing a national security threat to the integrity of communications networks or the communications supply chain” to be any company that:

- (1) is prohibited by name in any federal statute from selling one or more covered communications technology products to one or more civilian federal agencies for national security reasons;
- (2) is prohibited by name in any publicly-released finding, directive, order, or similar action issued by the President, the Department of Homeland Security, or any other federal national security agency from selling one or more covered communications technology products to one or more civilian federal agencies for national security reasons;
- (3) is prohibited by name as the result of a federal interagency review process established either by statute or by executive order from selling one or more covered communications technology products to one or more civilian federal agencies for national security reasons; OR
- (4) is a subsidiary or affiliate of, or successor-in-interest to, any company mentioned above.

The Commission should adopt the comprehensive, yet specific approach proposed above, and nothing about Section 889 should cause it to deviate from that approach.

Importantly, while Section 889 itself would clearly result in certain companies qualifying under clause (1) above, it should not be the only means by which specific suppliers of concern are designated. For example, since Section 889 is currently limited to entities from China, it cannot cover Kaspersky Lab, although that company has been the subject of a DHS directive that would qualify under clause (2) above.⁴⁸ More generally, the enactment of Section 889 does not limit the agency’s ability to adapt to changing circumstances. New companies of potential

⁴⁸ 2019 NDAA § 889(f)(2) (“The term ‘covered foreign country’ means the People’s Republic of China.”).

concern in China or other countries may emerge in the future, or the companies named in Section 889 could be re-constituted under different names since the statute does not explicitly apply to subsidiaries or successors-in-interest of the named companies. Meanwhile, although Section 889 clearly provides an additional source of statutory authority for Commission action with regard to the named companies – in fact, it *compels* such action as described above – it is not the exclusive source of authority available since the Commission had the pre-existing, independent legal authority to act.

As explained in our comments, TIA continues to believe that designation of particular companies would best be accomplished through an interagency process that leverages the appropriate national security expertise of multiple agencies, even as Congress may continue to act on an ad-hoc basis with regard to particular companies as it has done here.⁴⁹ Parts of Section 889 reflect the beginnings of such an approach by centralizing certain determinations with regard to Chinese companies in DoD, even as more comprehensive mechanisms for an interagency process remain under discussion. For these reasons, the Commission’s interest in promoting national security would be served best by a rule that implements specific actions by Congress while also looking to other expert agencies that may be better-positioned to respond more quickly or based on greater expertise or access to intelligence information.

D. TIA’s Proposal to Target the Rule Towards Logic-Enabled Products and Components is Consistent with Section 889(b)(3)(B).

Section 889(b)(3)(B) limits the statute’s scope to telecommunications equipment that can “route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.” This effectively limits the prohibition to “smart” or

⁴⁹ TIA Comments at 80-86.

“logic-enabled” devices, while “dumb” devices are permitted even if purchased from covered companies. This prohibition is fully consistent with and reinforces the approach of TIA’s proposed rule, which focuses on logic-enabled products (and components) while exempting “dumb” components. As explained in TIA’s comments, a rule that focuses on “dumb” components would create unnecessary problems while providing no meaningful security benefit.⁵⁰

Regarding the specific definition, TIA proposed that a “covered communications technology product” should be defined as follows:

- (1) any software or firmware, regardless of whether its known functionality includes networking functions;
- (2) any equipment containing one or more logic-enabled components, as described in paragraph (3) below; OR
- (3) any logic-enabled component, which are those components containing or implementing logical functions and that are capable of generating or modifying the information content of digital data. [This includes, but is not necessarily limited to, network controller chips, CPUs, and functional circuit boards such as network or graphics cards, but does not include analog circuits or components such as op-amps, power supply regulators, cabling or antennas unless those components themselves contain a covered component.]⁵¹

In practical terms, the definition above is functionally similar to the language used in Section 889(b)(3)(B). However, the statutory definition appears to focus solely on end-products and not components. In addition, the TIA-proposed text would clearly cover all logic-enabled products from specific suppliers of concern even if not ostensibly designed or capable of communications functions. In contrast, the statutory text contains somewhat-vague functional terms – “cannot,” “user data,” “permit visibility,” “otherwise handles” – that could potentially create security

⁵⁰ TIA Comments at 49.

⁵¹ *Id.* at 88 (proposing 47 C.F.R. § 54.9(c)(3)).

loopholes and would be more difficult to implement by requiring more independent discretion on the part of suppliers, grantees, and loan recipients.

The Commission could therefore adopt the TIA-proposed rule text as a more-comprehensive variant of the statutory text, and/or could incorporate some elements of the statutory language into the rule text proposed above. In any event, TIA urges the Commission to carefully consider its final wording from a practical perspective. Including some examples in the rule text as proposed in the bracketed language above may be very helpful to engineers and procurement officers, including at USF recipient entities and within the ICT industry, in making these determinations without needing to resort to legal advice.

E. Section 889(b)(2) Provides a Framework to Address Implementation Concerns Previously Raised by Other Commenters.

Section 889(b)(2) explicitly requires the Commission to “prioritize available funding and technical support to assist affected businesses, institutions, and organizations as is reasonably necessary....” Significantly, this provision demonstrates full awareness by Congress that imposing restrictions on equipment from certain suppliers of concern would potentially cause some financial harm to some recipients of federal funds. Despite this awareness, Congress nevertheless directed the agencies to move forward. As a matter of law, all arguments that the Commission’s proposed rule would not be in the public interest due to the transition costs involved have therefore been acknowledged and resolved by this provision.

Meanwhile, the directive to prioritize available funding and technical support to affected entities is fully consistent with TIA’s reply comments in which we endorsed the Commission considering remedial steps to assist affected USF recipients.⁵² TIA has previously estimated and

⁵² TIA Reply Comments at 41-43.

calculated that the total transition costs involved may be far less than claimed,⁵³ and explained that USF recipients will continue to benefit from a competitive vendor market that includes many TIA member companies.⁵⁴ Those companies look forward to providing their products and services to affected entities, either directly or pursuant to any specific action the Commission may take in implementing paragraph (b)(2). Of course, any mitigation measures should not undermine the rule's legitimacy or effectiveness,⁵⁵ nor run afoul of the specific deadlines that have now been established in the statute.

III. OTHER PARTS OF SECTION 889 NEITHER UNDERCUT NOR EXPAND ITS CORE PURPOSE OF LIMITING FEDERAL PROCUREMENT AND THE USE OF FEDERAL DOLLARS.

The core purpose of Section 889 is to limit federal procurement and use of federal dollars on equipment, systems, and services from specific suppliers of concern. For that reason, the Commission should not read the rule of construction in Section 889(b)(3)(A) so broadly as to undercut the entire purpose of the statute. Nor should it read paragraph (b)(1) and subsection (a) together to vastly expand the statute's reach to address USF recipients' use of non-federal dollars, since doing so could yield problematic results.

A. Section 889(b)(3)(A) Is a Precautionary Rule of Construction That Does Not Prevent Any Action Being Contemplated by the Commission In This Proceeding.

In the Public Notice, the Commission seeks comment on the purpose of Section 889(b)(3)(A), which provides that “[n]othing in [subsection (b)] shall be construed to ... prohibit the head of an executive agency from procuring with an entity to provide a service that connects

⁵³ *Id.* at 28-31.

⁵⁴ *Id.* at 31-41.

⁵⁵ *Id.* at 42.

to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements....”⁵⁶ This provision was included to protect the ability of the U.S. government to continue procuring services from U.S. and other carriers who may have roaming agreements with Huawei or ZTE to assist their customers when traveling overseas, or who may interconnect with Huawei or ZTE equipment or services to peer traffic to allow the global Internet to function, or who may use Huawei or ZTE equipment or services to provide backhaul for their own wireless services in other countries.

As the Commission works to implement the Section 889(b)(1) prohibition within the context of its own programs, it should view subparagraph (b)(3)(A) as a rule of construction within the context of Section 889. This provision does not, however, limit the Commission’s preexisting authority to act.

B. Section 889(b)(1) Should Not Be Read Jointly with Section 889(a)(1)(B) to Restrict the Use of Non-Federal Dollars by Grantees.

The Commission should not construe Section 889(a)(1)(B) as imposing a ban on the broader commercial marketplace beyond the use of non-federal dollars by federal grantees or loan recipients. Section 889(b)(1) prohibits the use of grant or loan funds on “the equipment, services, or systems described in subsection (a).” Subsection (a) in turn prohibits the head of an executive agency from (A) directly procuring or obtaining any equipment, system, or service that uses covered telecommunications products, or (B) contracting with an entity that uses covered telecommunications products as a substantial or essential component or as critical technology of any system. The cross-reference in paragraph (b)(1) to subsection (a) arguably creates some ambiguity regarding what products are covered in the loans and grants ban, as it could potentially

⁵⁶ Public Notice at 2.

refer to “covered telecommunications equipment or services,” or to “any equipment, system, or service that uses covered telecommunications equipment or services....”⁵⁷

In TIA’s view, the first construction would appropriately limit the grant and loan prohibition only to the direct use of federal dollars on “covered telecommunications equipment or services.” This construction would avoid imposing administratively unworkable requirements on the private conduct of grant or loan recipients. For example, CAF recipients would be prohibited from using federal dollars to buy a covered router, but would not be prohibited from receiving CAF dollars simply because they already have a covered router somewhere in their system. Similarly, under the first construction, no Lifeline recipient could buy subsidized services directly from a covered company, but individuals would not be disqualified from obtaining a subsidy for broadband service simply because of their use of a covered phone.

While Congress is clearly concerned about reliance on the companies mentioned in the statute and may eventually place further restrictions on the sale, use, or even possession of covered products in the United States, Congress drafted Section 889 as a ban on federal procurement, not commercial possession. Various products from Huawei and ZTE, both for telecommunications infrastructure and for consumers, are currently in use in the United States, and the basic structure of Section 889 – as a ban on federal procurement – does not suggest that Congress intended to go that far. Indeed, the limiting construction in Section 889(b)(3)(A) indicates that Congress recognizes some interconnection with covered products will necessarily continue. Of course, even a restriction limited to USF dollars will potentially push affected carriers toward elimination of all covered gear from their networks, a likelihood Congress recognized by calling for mitigation assistance in paragraph (b)(2).

⁵⁷ 2019 NDAA § 889(a)(1)(B).

In the alternative, if the Commission finds that paragraph (b)(1) does prohibit spending federal loans and grants on any equipment, system, or service that uses covered telecommunications equipment or services, it should identify another limiting principle to avoid absurd or impracticable outcomes in its implementation of Section 889.

IV. THE COMMISSION SHOULD CONTINUE ENGAGING WITH OTHER FEDERAL AGENCIES ON THESE ISSUES.

Even as the Commission remains primarily focused here on implementation issues regarding Section 889(b), it should also be mindful of work elsewhere to implement other provisions of Section 889. The Commission should also continue engaging with broader supply chain risk management efforts taking place across the federal government.

A. The Commission Should Work Collaboratively with the Department of Defense and Other Agencies to Interpret Other Ambiguous Provisions of Section 889.

Section 889 is a far-reaching statute whose core purpose is to prohibit the procurement of certain equipment by every executive agency of the federal government. Putting aside paragraph (b), the statute contains several provisions that are currently undefined or ambiguous, and the eventual construction of those provisions could bear upon the Commission's implementation of Section 889 in this proceeding. Moreover, the Commission could potentially provide useful guidance as other agencies seek to implement the statute. For this reason, we urge the Commission to engage with DoD and other agencies as Section 889 is being implemented across the government.

DoD, which along with the General Services Administration ("GSA") and NASA shares responsibility for promulgating the Federal Acquisition Regulations ("FAR"), is currently in the process of implementing Section 889 by means of a new FAR rule. Specifically, the Defense Acquisition Regulations Council ("DARC") Director directed the Acquisition Technology &

Information Team to draft a proposed FAR rule that implements Section 889.⁵⁸ DoD is actively working on an internal pre-publication report,⁵⁹ with an interim final rule expected to be published for comment in February 2019 and comments due in April 2019.⁶⁰

Ideally, the FAR rule implementing Section 889 would provide greater clarity on various provisions in Section 889 that are currently undefined or ambiguous. For example, video surveillance and telecommunications equipment produced by three companies – Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, and Dahua Technology Company – is only prohibited from procurement if used for the purpose of “public safety, security of government facilities, physical security of critical infrastructure, and other national security purposes,”⁶¹ none of which are defined further by Section 889 itself. In addition, the indirect procurement ban of Section 889(a)(1)(B) could potentially be stretched to prohibit procurement from most large multinational ICT vendors, simply because they “use[] ... any system or service”⁶² that relies upon Huawei gear, even in a foreign country.

⁵⁸ Under Secretary of Defense for Acquisition, Technology and Logistics, *Open FAR Cases as of 11/9/2018*, at FAR Case No. 2018-017, Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment, <https://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf> (visited Nov. 16, 2018).

⁵⁹ *See id.* (showing that an internal pre-publication report on the Section 889 rule was due on November 14, 2018, following an extension from an earlier due date of October 24).

⁶⁰ DoD, GSA, & NASA, *Semiannual Regulatory Agenda*, at Sequence No. 424, 83 Fed. Reg. 58100, 58110 (Nov. 16, 2018), <https://www.gpo.gov/fdsys/pkg/FR-2018-11-16/pdf/2018-23933.pdf>; Office of Information and Regulatory Affairs, *Federal Acquisition Regulation (FAR); FAR Case 2018-017, Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment*, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=9000-AN83> (visited Nov. 16, 2018).

⁶¹ 2019 NDAA § 889(f)(3)(B).

⁶² *Id.* § 889(a)(1)(B).

TIA and two other stakeholders have provided early input to DoD on these and other issues that highlight some of the potential difficulties arising from Section 889. We incorporate by reference those comments into this proceeding as follows:

- Telecommunications Industry Association, *Comments to DARS on Section 889 of the FY19 National Defense Authorization Act*, filed Oct. 1, 2018, https://www.acq.osd.mil/dpap/dars/early_inputs/FY2019/TIA%20Input%20on%20FY19%20NDAA%20Implementation%20Sec%20889.pdf (visited Nov. 16, 2018).
- Security Industry Association, *Comments to DARS on Section 889 of the FY19 National Defense Authorization Act*, filed Oct. 19, 2018, https://www.acq.osd.mil/dpap/dars/early_inputs/FY2019/SIA%20Early%20Input%20FY19%20NDAA%20Sec%20889.pdf (visited Nov. 16, 2018).
- Letter from A.R. “Trey” Hodgkins, III, Senior Vice President, IT Alliance for Public Sector, to Ms. Linda Nielson, filed Oct. 18, 2018, https://www.acq.osd.mil/dpap/dars/early_inputs/FY2019/ITAPS%20FY19%20NDAA%20Early%20Engagement%20Letter%20on%20Secs%20881,%20889%20and%201654-55.pdf (visited Nov. 16, 2018).

We recommend that the Commission review these three sets of comments to understand various aspects of Section 889 that may have implications for the current USF-focused proceeding and beyond. The Commission may be able to constructively use these comments and its own expertise to help DoD ensure that the final FAR rule provides the guidance that Commission stakeholders need, while also enabling the Commission to avoid potential pitfalls as it seeks to implement Section 889 itself.

B. The Commission Should Continue Participating in Interagency Efforts to Address Supply Chain Risk Management Issues.

Since comments and reply comments were filed in this proceeding, other efforts to secure the ICT supply chain have been progressing across the federal government. Most notably, in late July DHS launched its National Risk Management Center (“NRMC”) to facilitate cross-sector government and industry collaboration to reduce cyber and systemic risk to national and economic security. Among the NRMC’s first initiatives, DHS has chartered the ICT Supply

Chain Risk Management Task Force to provide advice and actionable recommendations for assessing and mitigating risks associated with the ICT supply chain.⁶³ This task force will provide a valuable opportunity for government and industry to comprehensively assess and proactively address global ICT supply chain risks and the Commission will have an important role to play in engaging throughout that process.

Additionally, other agencies continue critical work developing guidance for federal supply chain security. For example, NIST recently received public comment on Special Publication 800-37 *Risk Management Framework for Information Systems and Organizations--A System Life Cycle Approach for Security and Privacy*. The publication, among other topics, addresses integration of “security-related, supply chain risk management concepts in the Risk Management Framework to address untrustworthy suppliers, insertion of counterfeits, tampering, unauthorized production, theft, insertion of malicious code, and poor manufacturing and development practices throughout the SDLC.”⁶⁴ As described in TIA’s earlier comments and reply comments in this proceeding, efforts like these continue to be vital in addressing supply chain risk management broadly, and the Commission should continue efforts to support these processes going forward.

CONCLUSION

Section 889 clearly applies to the Universal Service Fund and the Commission’s other grant and loan programs. Moreover, the statute imposes an affirmative obligation on the Commission to take action in this proceeding in order to provide both guidance and assistance to

⁶³ DHS Task Force Press Release, *supra* n. 6.

⁶⁴ NIST Computer Security Resource Center, *Risk Management Framework for Information Systems and Organizations: A System Life Cycle Approach for Security and Privacy (Final Public Draft)*, Oct. 2018, <https://csrc.nist.gov/publications/detail/sp/800-37/rev-2/draft> (visited Nov. 16, 2018).

affected stakeholders. Importantly, nothing in the statute should give the Commission any pause from following the approach TIA has proposed; in fact, the statute specifically reinforces elements of TIA's narrowly-tailored approach that focuses on specific suppliers of concern.

TIA appreciates the Commission's continuing work on this important issue, and we look forward to continued engagement with the Commission throughout this critical process and in connection with broader supply chain security efforts across the federal government.

Respectfully submitted,

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