

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 )

**REPLY COMMENTS OF  
THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

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

**INTRODUCTION AND SUMMARY**

Even as concerns regarding specific suppliers are dominating the headlines,<sup>3</sup> the record in this proceeding makes the Commission’s path clear. The opening comments demonstrate that Section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (“2019 NDAA”)<sup>4</sup> applies to the Commission’s universal service fund (“USF”) programs, and

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<sup>1</sup> 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 NPRM Comments](#)”).

<sup>2</sup> [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”).

<sup>3</sup> See, e.g., Daisuke Wakabayashi and Alan Rappoport, *Huawei C.F.O. Is Arrested in Canada for Extradition to the U.S.*, N.Y. TIMES, Dec. 5, 2018, <https://www.nytimes.com/2018/12/05/business/huawei-cfo-arrest-canada-extradition.html>

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

that the Commission must therefore account for the statute as it moves forward. A number of commenters point out that Section 889's design is consistent with the whole-of-government approach to supply chain security that TIA has consistently promoted throughout this proceeding – especially in connection with specific suppliers of concern. While opposing commenters seek to manufacture a USF carve-out in the new statute, none of their arguments withstand scrutiny, as explained below.

Regarding the scope of the Commission's eventual rule, several commenters agree with TIA that certain provisions of Section 889 should be construed carefully to avoid problems of overbreadth. However, and contrary to the claims of some opposing commenters, nothing about Section 889 *limits* the Commission's pre-existing authority to adopt its proposed rule or one like it. Indeed, the Commission should move forward aggressively, and it is equipped to do so even without relying on Section 889. It need not and should not wait for DoD or others to move ahead first in implementing Section 889, even as the agency should continue reaching out to facilitate collaborative work on these issues across the government. While TIA endorses some of the mitigation-related measures proposed by other commenters pursuant to Section 889(b)(2), those efforts should proceed in parallel with the implementation of the actual prohibition on covered equipment, and with mindfulness of the statutory deadline.

Finally, the procedural objections raised by some opposing commenters to the Commission proceeding based on Section 889 are unavailing. Some of these arguments have merely been recycled from the earlier comment cycle on the original NPRM but with the same defects. Others maintain that the Commission may not rely upon the statute at all simply because the final version of it was not yet enacted when the original NPRM was issued. As

explained below, these procedural obstacles are either non-existent or can be easily and swiftly overcome.

## DISCUSSION

### I. THE COMMISSION MAY NOT INJECT A USF EXCEPTION INTO SECTION 889.

Multiple commenters agree with TIA that Section 889 applies to the USF programs. For example, USTelecom notes that Congress clearly intended the statute “to have a broad application across the federal government,” which would logically include the Commission.<sup>5</sup> Importantly, not only would this interpretation accurately reflect the statutory text, it would also best effectuate a coordinated, whole-of-government approach to supply chain security, as both NCTA and USTelecom point out.<sup>6</sup> Even WTA – which suggests briefly in passing that “strict statutory construction” might possibly exclude USF – readily concedes that “there appears to be Congressional intent” to comprehensively ban the use of Huawei and ZTE equipment.<sup>7</sup> Moreover, TIA agrees with USTelecom that a “whole of government approach” is particularly necessary in the context of supply chain risk management,<sup>8</sup> and that by affirming USF is covered within the scope of the 2019 NDAA, the Commission will harmonize its programs and actions with other Executive Branch agencies.<sup>9</sup>

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<sup>5</sup> Comments of USTelecom – The Broadband Association, filed Nov. 16, 2018 in WC Docket No. 18-89, at 2 (“[USTelecom Comments](#)”).

<sup>6</sup> Letter from Rick Chessen, NCTA, to Marlene H. Dortch, filed Nov. 16, 2018 in WC Docket No. 18-89, at 4 (“[NCTA Comments](#)”); USTelecom Comments at 2-3.

<sup>7</sup> Comments of WTA – Advocates for Rural Broadband, filed Nov. 16, 2018 in WC Docket No. 18-89, at 2 (“[WTA Comments](#)”).

<sup>8</sup> USTelecom Comments at 3.

<sup>9</sup> *Id.* at 4.

Opposing commenters offer various theories for why the statute should be read differently, which are occasionally creative but in all instances flawed. These include the notion that the intermediary role of the Universal Service Administrative Company (“USAC”) somehow exempts the USF programs from Section 889’s reach, that exempting USF actually “makes sense as a practical matter,”<sup>10</sup> that the text of the statute necessarily excludes USF despite a specific directive to the Commission (by name) to “implement” the prohibition, and that the statute was only intended to apply to federal procurements. As we explain below, none of these arguments withstand scrutiny. Moreover, even to the extent that the statute is actually ambiguous, the Commission’s decision to interpret the statute in a manner that avoids creating a USF exception would benefit from *Chevron* deference, notwithstanding claims to the contrary.

**A. The Role of USAC Does Not Place USF Beyond the Reach of Section 889.**

As a preliminary matter, TIA has explained why the Commission is an “executive agency” for purposes of Section 889(b)(1).<sup>11</sup> No commenter appears to seriously challenge this conclusion. However, the Rural Wireless Broadband Coalition (“RWBC”) argues that because only USAC obligates or expends USF support – and because USAC is not an “executive agency” – that the USF programs are therefore beyond Section 889’s reach.<sup>12</sup> This argument fails because Section 889(b)(1) unquestionably and explicitly applies to the *Commission*, and it is the agency – not USAC – that bears the responsibility of ensuring that USF programs comport with

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<sup>10</sup> Comments of Huawei Technologies Co., Ltd. and Huawei Technologies USA, Inc., filed Nov. 16, 2018 in WC Docket No. 18-89, at 4 (“[Huawei Comments](#)”).

<sup>11</sup> Comments of the Telecommunications Industry Association, filed Nov. 16, 2018 in WC Docket No. 18-89, at 5-7 (“[TIA Comments](#)”).

<sup>12</sup> Comments of Rural Wireless Broadband Coalition, filed Nov. 16, 2018 in WC Docket No. 18-89, at 5 & n. 13 (“[RWBC Comments](#)”); *see also* Comments of NTCA – The Rural Broadband Association, filed Nov. 16, 2018 in WC Docket No. 18-89, at 3-4 (“[NTCA Comments](#)”).

all applicable legal requirements. Indeed, the Commission’s rules make very clear that USAC “may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission’s rules are unclear, or do not address a particular situation, [USAC] shall seek guidance from the Commission.”<sup>13</sup>

The cases on which RWBC relies for its contrary position are readily distinguishable. For instance, in *United States ex rel. Shupe v. Cisco Sys, Inc.*, 759 F.3d 379 (5<sup>th</sup> Cir. 2014),<sup>14</sup> the court held that the False Claims Act (“FCA”) does not apply to USAC since it is not a government entity, but it relied heavily on the principle that “the [FCA] is only intended to cover instances of fraud ‘that might result in financial loss to the Government.’”<sup>15</sup> Likewise, in *In re Incomnet, Inc.*, 463 Fed. 1064 (9<sup>th</sup> Cir. 2006), the court held that for purposes of federal bankruptcy law, USAC had “dominion” over the USF programs because it held legal title to the funds, but this too is distinguishable because it addressed the recovery of funds rather than program implementation. Indeed, the *Incomnet* court readily acknowledged that “[t]he FCC has responsibility for *implementing* and regulating the collection and distribution of the USF.”<sup>16</sup> In Section 889, Congress clearly assigned to the Commission – not USAC – the responsibility for “*implementing* the prohibition in paragraph [b](1).”<sup>17</sup>

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<sup>13</sup> 47 C.F.R. § 52.702(c).

<sup>14</sup> RWBC Comments at n. 13.

<sup>15</sup> 759 F.3d at 385 (citation omitted).

<sup>16</sup> 463 F.3d at 1072 (emphasis added).

<sup>17</sup> Sec. 889(b)(2) (emphasis added). It also bears noting that Section 889(b)(1) is technically directed to the “head” of the relevant agencies, and that every member of the USAC board must be personally approved by the Chairman of the Commission, 47 C.F.R. § 54.703(c)(3). While the “head” usage is somewhat awkward when applied to agencies such as the Commission that typically make policy collectively through voting, *see* n.21 below, the usage seems quite apposite in this particular context.



Legalities aside, in practical terms USAC is also wholly dependent on the Commission to determine what types of products and services it may fund. For example, the Eligible Services List for the USF Schools and Libraries program (“E-Rate”) is adopted by the Wireline Competition Bureau each year, and the list explicitly specifies the types of communications equipment that may be funded.<sup>18</sup> Construing Section 889 to exempt USF on the grounds that authority for such determinations is vested in USAC even though USAC expressly disclaims such authority and is dependent upon the Commission for all such determinations would be a Catch-22 that would open a giant security loophole that Congress could not have intended.

**B. Subsidies are a Form of Grants.**

The plain text of the statute establishes that its purpose is to promote national security comprehensively across all federal funding programs. As an initial matter, no opposing commenter can explain away the first clause of paragraph (b)(2), which states that “[i]n implementing the prohibition in paragraph (1) ... the head[] of the Federal Communications Commission shall prioritize available funding and technical support ...” Paragraph (b)(2) thus clearly contemplates that the Commission has a role in *implementing* the ban in paragraph (b)(1), not merely mitigating its effects. But if the USF (and TRS) programs were excluded from the prohibition’s reach, there would be nothing else for the Commission to implement – at the least, certainly nothing significant enough to justify putting the Commission at the very top of the list.

Opposing commenters cast aside that language and logic, predictably hanging their hat instead on the fact that the word “subsidy” appears in the mitigation paragraph that was added in

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<sup>18</sup> See, e.g., [Order](#), *Modernizing the E-Rate Program for Schools and Libraries*, DA 18-1173, WC Docket No. 13-184 (rel. Nov. 16, 2018), at 10 (listing eligible components including communications hardware product categories).

the final stages by the conference committee, but not in the broader grant-and-loan prohibition language that was added earlier on the House floor.<sup>19</sup> But as TIA has explained, dictionary definitions of the word consistently equate a “subsidy” with a “grant.”<sup>20</sup> To the extent any ambiguity is perceived, the Commission is permitted to resolve it using other standard tools in its interpretive toolkit, including by examining the surrounding context of the statute as a whole, its purpose, and the legislative history – all of which point to the conclusion that USF subsidies are subject to Section 889’s prohibition.

If the text of Section 889 had been closely scrutinized by the House or Senate Communications Subcommittees – in which the specialized usages of communications law and the occasional characterization of USF as a “subsidy” program would likely be more familiar – then opponents *might* have a more plausible argument. However, Section 889 emerged from the House and Senate Armed Services Committees, was reconciled in a conference committee that included representatives from each of those committees, and was clearly intended to have a very wide scope reaching across the entire federal government – despite reflecting less familiarity with the details of how some agencies such as the Commission actually function.<sup>21</sup> In this

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<sup>19</sup> Comments of Competitive Carriers Association, filed Nov. 16, 2018 in WC Docket No. 18-89, at 3 (“[CCA Comments](#)”); ITTA Comments at 4-7; Huawei Comments at 3-8; NTCA Comments at 4-5; RWBC Comments at 5-6; Comments of the Wireless Internet Service Providers Association, filed Nov. 16, 2018 in WC Docket No. 18-89, at 2-3 (“[WISPA Comments](#)”); WTA Comments at 3-4.

<sup>20</sup> TIA Comments at 8-9.

<sup>21</sup> For example, paragraph (b)(2) refers to the “head[] of the Federal Communications Commission.” Technically, that formulation is incorrect, since as the Commission well knows, the agency’s work is officially directed by a five-member body acting as a collective whole. Although the Chairman oversees some day-to-day operations, that authority almost certainly would not extend to overturning all established practices and acting unilaterally to implement Section 889, despite the presence of language that includes the “head” of the Commission as part of a list of multiple agencies.

context, there is no basis for Congress or the Commission to *exclude* the USF programs on the theory that the word “subsidy” is a term of art with special meaning in the communications law context.

Importantly, none of this requires blue-penciling in a word to Paragraph (b)(1) or redlining a word out of Paragraph (b)(2), as Huawei claims.<sup>22</sup> To be sure, “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act ... it is generally *presumed* that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (emphasis added). However, “[t]he *Russello* presumption ... is only a presumption, and a rebuttable one at that.”<sup>23</sup>

The presumption is easily rebutted here. As we have explained, the legislative history of Section 889 shows that the two paragraphs, while undeniably related, were added to the bill at different times, by different bodies, likely with somewhat different yet overlapping concerns in mind, and almost certainly with little awareness of the interpretive fracas that would result in this docket.<sup>24</sup> Under these circumstances, the fact that the conference committee used one *additional* word in paragraph (b)(2) need not and should not be read to carve out an exemption for USF from paragraph (b)(1) – particularly when another reading is available that is fully consistent with the plain meaning of “subsidy” and with congressional intent to promote national security across all federal funding programs for communications equipment.

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<sup>22</sup> Huawei Comments at 4.

<sup>23</sup> *Hope v. Acorn Fin., Inc.*, 731 F.3d 1189, 1193 (11<sup>th</sup> Cir. 2013) (citing *Tarrant Regional Water District v. Hermann*, 569 U.S. 614, 629-30 (2013) in which the Supreme Court declined to apply the presumption because it “fail[ed] to account for other sections of [an interstate compact] that cut against its reading” and “produced anomalous results.”).

<sup>24</sup> TIA Comments at 13-14. The grant-and-loan prohibition that became paragraph (b)(1) was added as a House floor amendment. See [CONG. REC. daily ed.](#) (115<sup>th</sup> Cong.), May 23, 2018, at H4610 (text of amendment 18).

### **C. Creating a USF Exception in Section 889 Would Undermine Congressional Intent to Promote National Security.**

In their efforts to read a USF exception into Section 889, opposing commenters appear to be arguing the following. First, concerned about national security, Congress prevented nearly all federal funding for communications equipment – including programs managed by the Rural Utilities Service (“RUS”) but specifically *not* USF – from being spent on covered equipment. Next, Congress explicitly required various agencies that manage equipment funding programs, including the Commission by name, to prioritize all available funding – now *including* USF – to mitigate the impact of the preceding prohibition. That is, Congress required that USF dollars which were intentionally kept free from national security constraints would help backfill the impact of removing other funding that certainly will be subject to those constraints.

Huawei insists that this strange outcome “makes sense as a practical matter” but fails to explain why that is so.<sup>25</sup> Rather, given that the self-evident purpose of Section 889 was to address national security concerns, this outcome makes *no sense at all*. Having set out to improve national security, why would Congress stop only certain grant and loan programs from spending on covered equipment, and in the next breath direct a program *excluded* from security restrictions to help fill the funding gap it had just created? Neither Huawei nor any other commenter provides any answer. Statutory construction is a “holistic endeavor,”<sup>26</sup> and the bar should be very high before adopting a construction of a statute that would yield results that are absurd and manifestly contrary to the nation’s security interests.

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<sup>25</sup> Huawei Comments at 4; *see also* Comments of ITTA – The Voice of America’s Broadband Providers, filed Nov. 16, 2018 in WC Docket No. 18-89, at 6 (“[ITTA Comments](#)”).

<sup>26</sup> *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988).

#### **D. Section 889 Is Not Limited to Federal Procurement.**

CCA and RWBC rely heavily on paragraph (b)(1)'s use of the terms "procure or obtain" to conclude that Congress intended the ban to apply only to agencies' procurement processes and not to USF programs.<sup>27</sup> However, Congress clearly intended Section 889 to apply beyond the scope of an agency's procurement for its own use. While paragraph (b)(1) does apply to an agency's procurement of covered equipment and services for its own use, it also explicitly bars an agency from expending loan or grants funds on covered equipment.

When an agency provides loans or grants to businesses for those firms to purchase communications equipment and services, it does not "procure or obtain" such services itself – rather, the business procures or obtains them. To be sure, paragraph (b)(1) does not say that the agency "may not obligate or expend loan or grant funds *to enable businesses, institutions and organizations* to procure or obtain, extend or renew a contract to procure or obtain" covered equipment – phrasing that is found in paragraph (b)(2). Yet Congress clearly intended the scope of the ban to extend to those purchases. Similarly, to read a requirement that the purchases covered by Section 889 must emanate from a contract would also undermine congressional intent. Paragraph (b)(1) explicitly states an agency "may not obligate or expend loan or grant funds" to purchase covered equipment or services, listing entering into a contract as one among several ways that agencies obligate or expend federal dollars. When the Commission promulgates rules regarding which entities or transactions are eligible for USF reimbursement, it very clearly obligates USF funds for those purchases.

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<sup>27</sup> CCA Comments at 2; RWBC Comments at 4.

Indeed, reading paragraph (b)(1) to apply to expenditure of all federal grants, loans, and subsidies makes most sense within the context of Section 889 as a whole. As TIA and others have noted, statutory interpretation is a “holistic endeavor”<sup>28</sup> with ambiguous statutes being interpreted in a manner to best carry out their purpose, and statutes should not be interpreted in a way that is inconsistent with their structure. Here, Section 889(a) already addresses agencies’ procurement practices. Specifically, Section 889(a)(1)(A) requires that “[t]he head of an executive agency may not ... procure or obtain or extend or renew a contract to procure or obtain any equipment, system or service that uses covered telecommunications equipment or services,” while Section 889(a)(1)(B) applies the same prohibition to contracts “with an entity that uses any equipment, system or service that uses covered telecommunications equipment or services[.]” Subsection (a) is thus the “procurement bar” – it explicitly prevents agencies from procuring covered equipment directly for their own use, or indirectly by contracting with another entity that uses such equipment or services.

Subsection (b) must then have another purpose. Otherwise it would be wholly superfluous, and under traditional canons of statutory construction, statutes should be read in a manner that avoids rendering any provision to serve no purpose. The principal distinction between the two provisions is that the latter section restricts the use of agency “loan or grant funds.” Read together with subsection (a), subsection (b) is best interpreted as applying to an agency’s financing of a third party’s purchase of covered equipment or services. It thus applies, for example, to RUS loans to rural service providers to purchase covered equipment and services as well as to subsidy programs like the Commission’s USF and TRS programs. Furthermore,

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<sup>28</sup> *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988); *see also* TIA Comments at 7 & n. 20 (“holistic endeavor”); USTelecom Comments at 3 (same).

this reading best supports the purpose of Section 889, which as TIA elaborated on in previous comments is to protect U.S. networks by preventing federal dollars from supporting equipment and services that pose a threat to national security.

Finally, NTCA attempts to go much further, claiming that because the overall stated purpose of the NDAA is to “authorize appropriations for ... military activities of the Department of Defense ... and for defense activities of the Department of Energy,” that *all* of its provisions including Section 889 therefore “apply *only* to government procurement processes, including companies that support DoD and Energy via federal contracts.”<sup>29</sup> In a similar vein, RWBC argues that Section 889’s placement in the NDAA means it should be construed as appropriations language solely related to direct federal spending and therefore not to USF.<sup>30</sup> These arguments are plainly incorrect. Although connected to the annual appropriations process, the NDAA is clearly an *authorization* measure, not an appropriations measure. “An authorizing measure can establish, continue, or modify an agency, program, or activity for a fixed or indefinite period of time. It also may set forth the duties and functions of an agency or program, its organizational structure, and the responsibilities of agency or program officials.”<sup>31</sup> While the House and Senate both have rules that “prohibit the inclusion of legislative language ... in an *appropriations* measure,”<sup>32</sup> Congress frequently enacts significant policy changes – including

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<sup>29</sup> NTCA Comments at 3.

<sup>30</sup> RWBC Comments at 3.

<sup>31</sup> Congressional Research Service, *Overview of the Authorization-Appropriations Process*, Nov. 26, 2012, at 1, <https://www.senate.gov/CRSPubs/d2b1dc6f-4ed2-46ae-83ae-1e13b3e24150.pdf> (visited Dec. 4, 2018)

<sup>32</sup> *Id.* at 2 (citing House Rule XXI, cl. 2 and Senate Rule XVI ¶¶ 2, 4).

some with permanent effect – through legislative language in annual authorization bills.<sup>33</sup> The same is true here. Indeed, even if Section 889 had been included in an *appropriations* measure, the Commission would still be fully bound by it:

According to its own rules, Congress is not supposed to use appropriations measures as vehicles for the amendment of general laws.... Where Congress chooses to do so, however, we are bound to follow Congress's last word on the matter even in an appropriations law.<sup>34</sup>

**E. The Commission’s Decision to Avoid Creating a USF Exception Would be Entitled to *Chevron* Deference.**

To the extent the statute is deemed ambiguous, the Commission’s interpretation will be entitled to deference under *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This deference is predicated on the fact that “the agency [has] received congressional authority to determine the particular matter at issue in the particular manner adopted.”<sup>35</sup> RWBC claims that the latter condition has not been satisfied because “Congress has not ‘unambiguously’ vested the Commission with the general authority to administer the 2019 NDAA ‘through rulemaking and adjudication.’”<sup>36</sup> But RWBC’s reliance on *City of Arlington v.*

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<sup>33</sup> See, e.g., Eric Katz, *Major Changes to Federal Separation Pay and Hiring Tucked Into Senate Defense Bill*, GOVERNMENT EXECUTIVE, June 7, 2018, <https://www.govexec.com/pay-benefits/2018/06/major-governmentwide-changes-federal-hiring-separation-pay-tucked-defense-bill/148820/>; Jonathan Weisman & Jeremy W. Peters, *Congress Gives Final Approval to Aid Rebels in Fight With ISIS*, N.Y. TIMES, Sept. 8, 2014, <https://www.nytimes.com/2014/09/19/world/middleeast/senate-approves-isis-bill-avoiding-bigger-war-debate.html> (provision included in government funding bill); Rebekah L. Sanders, *Controversial Mine Legislation Slipped Into Defense Bill*, ARIZONA REPUBLIC, Dec. 3, 2014, <https://www.pressconnects.com/story/news/arizona/politics/2014/12/03/congress-buries-arizona-mine-legislation-defense-bill/19845441/>.

<sup>34</sup> *City of Los Angeles v. Adams*, 556 F.2d 40, 48-49 (D.C. Cir., 1977) (citing *United States v. Dickerson*, 310 U.S. 554, 555 (1940)).

<sup>35</sup> *City of Arlington v. FCC*, 569 U.S. 290, 306 (2013) (citing *United States v. Mead Corp.*, 533 U.S. 218 (2001)).

<sup>36</sup> RWBC Comments at 6-7 n.15 (quoting *City of Arlington*, 569 U.S. at 307).



*FCC*, 569 U.S. 290 (2013), is fundamentally misplaced. In that case, the “unambiguous” nature of the delegation was not *required*, but simply noted as a means to allow the Court to move past the question of delegated authority.<sup>37</sup> More fundamentally, in the very case where the delegated authority requirement was firmly established – *United States v. Mead*, 533 U.S. 218 (2001) – the Court emphatically reaffirmed the validity of *implicit* delegation:

This Court in *Chevron* recognized that Congress not only engages in express delegation of specific interpretive authority, but that “[s]ometimes the legislative delegation to an agency on a particular question is implicit.” Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency’s generally conferred authority and *other statutory circumstances* that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which “Congress did not actually have an intent” as to a particular result. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency’s exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency’s chosen resolution seems unwise, but is obliged to accept the agency’s position if Congress has not previously spoken to the point at issue and the agency’s interpretation is reasonable.<sup>38</sup>

The circumstances here make clear that the Commission has been delegated sufficient statutory authority to interpret Section 889(b)(1). Indeed, paragraph (b)(2) explicitly contemplates that the Commission – by name – shall “implement” paragraph (b)(1), and even provides high-level direction on how the agency should do so, i.e., “prioritiz[ing] available funding and technical support.” This is precisely the type of “other statutory circumstance” contemplated by *Mead* that makes apparent that “Congress would expect the agency to be able to speak with the force or law when it addresses ambiguity in the statute or fills a space in the enacted law.”

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<sup>37</sup> 569 U.S. at 307.

<sup>38</sup> *U.S. v Mead Corporation*, 533 U.S. 218, 229 (2001) (emphasis added) (internal citations to *Chevron* omitted).

In addition to Section 889 itself, the Commission’s ancillary authority under Section 4(i) of the Communications Act allows it to promulgate regulations implementing Section 889.<sup>39</sup> The exercise of that authority requires two conditions to be met: “(1) the Commission's general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.”<sup>40</sup> Both conditions are clearly met here. First, the protection of networks and security of networked devices from specific suppliers of concern clearly falls within the Commission’s general jurisdiction over “interstate and foreign communication by wire and radio.”<sup>41</sup> Second, such regulations would obviously be directly ancillary to the Commission’s statutorily mandated responsibilities under Section 889 itself. In summary, whether under Section 889 alone or in conjunction with its ancillary authority, the Commission clearly has authority to promulgate rules interpreting the statute, and those rules would therefore benefit from *Chevron* deference.

Finally, “[t]hough the application of *Chevron* deference alone is sufficient to uphold the regulations, it should also be noted that the regulations at issue here [would be] entitled to an even greater measure of deference because they relate to the exercise of the Executive’s authority in the realm of foreign affairs.”<sup>42</sup> The judicial standard of review “in an area at the intersection of national security, foreign policy, and administrative law” – such as determining the proper

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<sup>39</sup> 47 U.S.C. § 154(i).

<sup>40</sup> *Verizon v. FCC*, 740 F.3d 623, 632 (D.C. Cir. 2014) (quoting *American Library Ass’n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005)).

<sup>41</sup> 47 U.S.C. § 152(a).

<sup>42</sup> *Emergency Coalition v. U.S. Dept. of Treasury*, 498 F.Supp.2d 150, 166 n.10 (D.D.C. 2007) (citations omitted).

scope of Section 889 – “is extremely deferential.”<sup>43</sup> Here, the Commission’s decision to avoid creating a USF exception would indeed promote national security, and TIA has previously explained at length why this proceeding implicates various foreign policy considerations as well.<sup>44</sup> In the end, while the Commission should proceed cautiously in crafting its final rules for substantive reasons, it should be confident that it has the requisite legal authority to do so.

## **II. THE COMMISSION’S RULE SHOULD BE NARROWLY TAILORED BUT IS NOT LIMITED BY SECTION 889.**

TIA has previously urged the Commission to adopt a narrowly-tailored rule,<sup>45</sup> and in our opening comments TIA explained why the Commission should adopt certain limiting constructions to avoid overbreadth.<sup>46</sup> As described below, all other commenters who addressed those specific issues agree. However, nothing about Section 889 *limits* the Commission’s pre-existing authority to adopt its proposed rule, contrary to the claims of some opposing commenters.

### **A. Commenters Agree that the Commission Should Construe Section 889 to Avoid Problems of Overbreadth.**

Commenters agree with TIA that the Commission should carefully construe Section 889’s scope in a manner that avoids unintended consequences. For example, TIA agrees with CCIA that “if the provider has covered telecommunications equipment in a portion of its network, but that portion of the network would not be used in the provision of services to the

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<sup>43</sup> *Islamic-American Relief Agency v. Gonzales*, 477 F.3d 728, 734 (D.C. Cir. 2007).

<sup>44</sup> TIA NPRM Comments at 40-47.

<sup>45</sup> *Id.* at 28-53 (discussing generally the need for a narrowly-tailored rule).

<sup>46</sup> TIA Comments at 22-25.

executive agency, then the prohibitions in Sec. 889 would not apply.”<sup>47</sup> TIA also agrees that “in relation to this USF proceeding, Sec. 889 should not be read to bar entities that have used ‘covered equipment’ in other, non-USF settings.”<sup>48</sup> Regarding the third-party facilities exemption in Section 889(b)(3)(A), we agree with USTelecom that the Commission should confirm the statute’s finding that carriers are not responsible for the equipment of third party carriers with which they interconnect to complete a communication.<sup>49</sup>

CCIA and USTelecom also identify the geographic-scope issue regarding Section 889 that TIA also raised in our opening comments.<sup>50</sup> Specifically, CCIA describes the “difficulties that U.S. executive agencies and their personnel would face in obtaining connectivity and communications capabilities in African, Asian, European, and/or Latin American countries where the NDAA’s ‘covered equipment’ are far more prevalent.”<sup>51</sup> Partly for that reason, we agree with USTelecom that “[c]onfirming that the 2019 NDAA’s prohibition is limited to U.S. Eligible Telecommunications Carriers and does not include foreign affiliates, will also help limit the scope of the equipment at issue for replacement and/or mitigation.”<sup>52</sup>

Finally, TIA agrees with USTelecom that “a strand of fiber ... has no independent capability to route or redirect traffic that would impact national security.”<sup>53</sup> Consistent with

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<sup>47</sup> Comments of the Computer & Communications Industry Association (CCIA), filed Nov. 16, 2018 in WC Docket No. 18-89, at 2 (“[CCIA Comments](#)”).

<sup>48</sup> CCIA Comments at 2-3.

<sup>49</sup> USTelecom Comments at 7.

<sup>50</sup> TIA Comments at 26; *see also id.* at 22-25.

<sup>51</sup> CCIA Comments at 4.

<sup>52</sup> USTelecom Comments at 6.

<sup>53</sup> *Id.*

Section 889(b)(3)(B), the Commission should therefore ensure that its rule extends only to logic-enabled components, as TIA has explained.<sup>54</sup>

**B. Section 889 Does Not *Limit* the Commission’s Pre-Existing Authority Under the Communications Act.**

Some commenters point out differences between the text of Section 889 and the potential scope of the Commission’s proposed rule,<sup>55</sup> but their comparisons are imprecise and irrelevant. For example, Huawei argues that the statute’s restrictions are “substantially different and oftentimes narrower” than the restrictions proposed in the NPRM.<sup>56</sup> This is certainly true to an extent – for example, Section 889 only applies to Chinese entities while the Commission’s proposed rule seems designed to encompass companies such as Kaspersky Lab from Russia. But it is not true in other respects – in fact, Section 889 is in some ways *broader* than the Commission’s original proposal, as it applies to every agency and to specific companies not even mentioned in the NPRM, such as Dahua, Hytera, and Hikvision.<sup>57</sup>

Regardless, nothing about these differences requires that the Commission somehow limit its proposed rule to the boundaries of Section 889. For example, NCTA argues that “the scope, details, and timetables of any rules developed by the Commission ... should be coterminous with the requirements of Section 889.”<sup>58</sup> But as TIA has explained, the Commission had pre-existing authority under the Communications Act to take the action it has proposed, and nothing about Section 889 suggests that it cannot or should not proceed as planned. As just one example,

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<sup>54</sup> TIA Comments at 19-21; TIA NPRM Comments at 51-53.

<sup>55</sup> *See, e.g.*, RWBC Comments at 8-9.

<sup>56</sup> Huawei Comments at 11.

<sup>57</sup> *See* Sec. 889(f)(3)(B).

<sup>58</sup> NCTA Comments at 2.

addressing potential threats from companies other than those specifically designated in Section 889 – such as Kaspersky Lab, which is the subject of a DHS directive – is important to promoting national security objectives. Section 889 is a valuable source of *additional* statutory authority, but it need not and should not be the *only* such source of authority.

Huawei goes even further by claiming that Section 889 “confirms that the previously enacted Communications Act does not authorize the Commission to adopt universal-service policies on the basis of supposed national security concerns.”<sup>59</sup> To justify this remarkable conclusion, Huawei appears to suggest that because Section 889 assigns certain national security functions to other federal agencies, the Commission is therefore deprived of power to act.<sup>60</sup> Of course, that is simply incorrect – paragraph (b)(1) applies to every executive agency, and paragraph (b)(2) confirms that this is explicitly true with regard to the Commission, as it must “implement[]” paragraph (b)(1).

If anything, Huawei is correct that the statute vests authority to make determinations regarding *specific suppliers* with DoD.<sup>61</sup> This may suggest that the Commission *should* defer determinations regarding specific suppliers to others. As TIA has explained, this approach is fully consistent with our proposed rule, in which the Commission would be entirely reliant upon determinations made by Congress or by specific agencies with national security expertise.<sup>62</sup> But regardless of what the Commission *should* do, Huawei has not explained how the enactment of a new statute limits what the Commission *can* do using its pre-existing authority under the Communications Act.

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<sup>59</sup> Huawei Comments at 14.

<sup>60</sup> *Id.*

<sup>61</sup> *See* Sec. 889(f)(3)(D).

<sup>62</sup> TIA NPRM Comments at 25-27, 55-58.

### **III. THE COMMISSION SHOULD ADOPT A FINAL RULE PROMPTLY TO PROVIDE CERTAINTY TO THE MARKETPLACE.**

As TIA explained in our opening comments, Section 889 imposes an affirmative obligation on the Commission to take prompt action to adopt a final rule in this proceeding, whether the Commission chooses to rely on the NDAA as a source of authority for that rule or not.<sup>63</sup> We further noted the need for clarity to provide stakeholders with ample time to comply before the statutory deadline takes effect.<sup>64</sup> Despite suggestions that the Commission should wait to act until DoD or other agencies have concluded their own implementation proceedings, the Commission should not wait to provide necessary clarity on issues where it has the unique authority to do so.

To the contrary, by coordinating with other agencies, the Commission can do its part to ensure that loan and grant funds do not reimburse prohibited suppliers while ensuring that its rules remain consistent with government-wide implementation efforts. As the race to 5G continues, the need for clarity remains urgent. Meanwhile, although TIA supports pragmatic steps by the Commission to mitigate transition costs imposed by a ban, perhaps including undertaking an effort to provide time and cost projections, those efforts must occur in tandem with the implementation of the prohibition itself and cannot violate the statutory deadlines imposed by Section 889.

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<sup>63</sup> TIA Comments at 15-16.

<sup>64</sup> *Id.* at 16.

**A. The Commission Need Not and Should Not Wait for Actions by the Department of Defense or Other Federal Agencies.**

TIA fully agrees with commenters that a “cohesive, whole-of-government application will be critical” to proper implementation of Section 889.<sup>65</sup> However, the provision’s placement in the NDAA does not render it inapplicable to agencies like the Commission, as some commenters incorrectly suggest, *see* section I-D above. Nor does it absolve the Commission of the need to act swiftly to implement this ban where the Commission itself is uniquely authorized to do so. Some commenters suggest that the agency should wait for the Department of Defense to act first by implementing the statute in a Federal Rule of Acquisition (“FAR”).<sup>66</sup> However, as the race to 5G continues to mount, uncertainty regarding the implementation of Section 889 will cause critical delays in infrastructure investment and hinder consumer access to these technologies. Indeed, even those who disagree about the implications of Section 889 agree that the ecosystem needs clarity.<sup>67</sup>

Huawei specifically argues that it would be improper for the Commission to implement Section 889 before DoD, GSA, and NASA have finished updating the FAR because otherwise the agency “cannot ensure that its interpretation of Section 889 is valid.”<sup>68</sup> This argument assumes that the Commission would be implementing the same aspects of Section 889 as those other agencies. To the contrary, issues within the scope of DoD’s process regarding Section 889 – namely, updating the FAR – will differ significantly from the issues the Commission needs to

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<sup>65</sup> NCTA Comments at 3.

<sup>66</sup> NCTA Comments at 3-4; Huawei Comments at 15 (it would be inappropriate to rely on Sec. 889 before its interpretation by GSA, DoD, and NASA).

<sup>67</sup> *See, e.g.*, WTA Comments at 2 (“the NDAA adds more uncertainty to the rural telecommunications industry.”).

<sup>68</sup> Huawei Comments at 16.



address, such as ensuring that loans and grants do not fund covered equipment and prioritizing available funding and technical support for mitigation purposes. While certainly relevant to the Commission in its own procurement practices, DoD's work to implement Section 889 is expected to focus primarily on the federal procurement ban in Section 889(a), not the ban on loans and grants. Congress specifically tasked executive agencies with carrying out the loans and grants prohibition, which makes sense given the agencies' individual expertise and authority to manage their own programs.

As TIA explained in our opening comments, the Commission can and should work in parallel with DoD and other agencies to ensure coordinated implementation across the federal government.<sup>69</sup> Such coordination should provide consistency, for example, regarding exactly which (if any) suppliers in addition to those explicitly named in Section 889(f) may be implicated by the prohibition. However, the Commission cannot and should not wait for the FAR to be updated before taking steps to ensure that the USF and other Commission programs comply with Section 889's ban in time to meet the statutory deadline.

**B. Mitigation Efforts Should Occur in Parallel with the Transition and Cannot Violate Statutory Deadlines.**

In keeping with Section 889 and as TIA has consistently reiterated, the Commission should take remedial steps to assist effected entities, but these steps must not undermine the legitimacy or effectiveness of the rule itself.<sup>70</sup> TIA tentatively supports WTA's suggestion that the Commission use its expertise to ascertain the projected costs and time it will take for affected

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<sup>69</sup> TIA Comments at 25-27.

<sup>70</sup> Reply Comments of the Telecommunications Industry Association, filed July 2, 2018 in WC Docket No. 18-89, at 41-42 ("[TIA NPRM Reply Comments](#)"); TIA Comments at 21-22.

rural carriers to transition.<sup>71</sup> However, the statute establishes a two-year timetable for transition, so any assessment of costs should be conducted in parallel with active planning for the prohibition to take effect. It does not mean, as some commenters suggest, that the Commission “should not take any action to implement Section 889(b)(1) without a clear plan to reimburse affected carriers and ensure that customers do not face any adverse impact to their service.”<sup>72</sup> Instead, TIA agrees with USTelecom that “the more notice carriers have that the Commission is implementing the restrictions imposed by the 2019 NDAA on covered equipment, the less reliance they should have on covered equipment when the NDAA’s prohibitions go into effect in August 2020.”<sup>73</sup>

The Commission should also be cognizant of what it can and cannot achieve through the mitigation process. Paragraph (b)(2) requires the agency to “prioritize *available* funding and technical support” to assist affected entities.<sup>74</sup> It is not a statutory obligation “to *ensure* that small carriers ... are not harmed by this process,” as NTCA suggests.<sup>75</sup> Nor does it mean that small providers should be afforded a ten-year transition period,<sup>76</sup> when the statute clearly establishes an August 2020 deadline.<sup>77</sup> As TIA explained in our opening comments, by requiring agencies like the Commission to provide mitigation assistance, Congress has acknowledged that this prohibition may pose hardships on some entities and resolved that such a prohibition is

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<sup>71</sup> WTA Comments at 8.

<sup>72</sup> CCA Comments at 3-4.

<sup>73</sup> USTelecom Comments at 5-6.

<sup>74</sup> Sec. 889(b)(2) (emphasis added).

<sup>75</sup> NTCA Comments at 9 (emphasis added).

<sup>76</sup> *Id.* at 10.

<sup>77</sup> *See* Sec. 889(c) (establishing effective dates).

necessary nonetheless.<sup>78</sup> When considering what mitigation assistance it can provide, the Commission must likewise prioritize achieving compliance with the prohibition itself.

#### **IV. ANY ALLEGED PROCEDURAL DEFECTS ARE EITHER NON-EXISTENT OR CAN BE RESOLVED EXPEDITIOUSLY.**

Several commenters raise procedural objections to the Commission’s potential reliance upon Section 889 in issuing a final rule, or potentially to issuing any rule at all.<sup>79</sup> Some of these arguments, including that specific suppliers are entitled to a hearing before being subjected to a potential rule, are variants of arguments made in response to the NPRM<sup>80</sup> – and TIA has already rebutted them.<sup>81</sup> Others argue that the Commission may not rely upon Section 889 because the new law was not mentioned in its final form in the original NPRM, which predated the statute’s enactment. As we explain below, all of these arguments are without merit.

##### **A. The Commission May Permissibly Adopt a Rule That Relies Upon Designations of Specific Suppliers Made by Congress in Section 889.**

Huawei argues that because Congress did not make an express finding in Section 889 that the company poses a threat, the Commission cannot use the statute as a basis for subjecting the

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<sup>78</sup> TIA Comments at 21.

<sup>79</sup> *See, e.g.*, Huawei Comments at 15-17 (no reliance upon Section 889); *id.* at 14 (no rule at all); RWBC Comments at 10 (FNPRM required); WTA Comments at 5-7 (same).

<sup>80</sup> *Compare* Huawei Comments at 18-19 (arguing that treating an existing statute as a substitute for a hearing would deny due process) *with* Comments of Huawei Technologies Co., Ltd and Huawei Technologies USA, Inc., filed June 1, 2018 in WC Docket No. 18-89, at 59-83 (arguing that the Commission must provide companies with a meaningful hearing) (“[Huawei NPRM Comments](#)”).

<sup>81</sup> TIA NPRM Reply Comments at 81-85 (Commission may permissibly derive its list from determinations made by Congress or other agencies); *id.* at 91-96 (the Due Process Clause does not require an individualized hearing before Commission adopts a rule of general applicability whose implementation is guided by determinations made elsewhere).

company to a prohibition under its proposed rule.<sup>82</sup> Contrary to Huawei’s suggestion, the Commission is entirely free to draw the obvious conclusion regarding Congress’ intent and purpose from the actual enacted text of the statute as a whole. Section 889 bans spending on covered equipment from Huawei, ZTE, and three other Chinese companies, makes specific reference to public safety and critical infrastructure, vests additional determinations in the DoD in consultation with the FBI, and was enacted as part of the annual defense authorization bill.<sup>83</sup> To suggest that Congress enacted Section 889 – already a highly unusual statute in designating specific companies by name – for any reason other than that it was very concerned about national security in general and about the specific threat posed by the named companies, strains credulity.<sup>84</sup>

Further evidence about congressional intent is readily available from the legislative history of Section 889. Earlier versions of what originated as the “Defending U.S. Government Communications Act” contained precisely the explicit findings about Huawei (and ZTE) that Huawei now argues are lacking.<sup>85</sup> Moreover, the House floor debate made clear that three additional companies – Hytera, Hikvision, and Dahua – were added due to concerns that “[v]ideo surveillance and security equipment ... exposes the U.S. Government to significant vulnerabilities due to built-in backdoors baked right into their products.”<sup>86</sup> The fact that the

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<sup>82</sup> Huawei Comments at 19.

<sup>83</sup> See Sec. 889(f)(3).

<sup>84</sup> The D.C. Circuit recently endorsed this logic in a similar context in [Kaspersky Lab, Inc. v. Dep’t of Homeland Security](#), No. 18-5176, Nov. 30, 2018.

<sup>85</sup> See [S. 2391](#) § 2, 115<sup>th</sup> Cong. (making explicit findings regarding national security threats posed by Chinese companies generally and by Huawei and ZTE specifically); [H.R. 4747](#) § 2, 115<sup>th</sup> Cong. (same).

<sup>86</sup> Statement of Rep. Hartzler, CONG. REC. daily ed. (115<sup>th</sup> Cong.), May 23, 2018, at H4656.

legislative findings were omitted from the final bill text when it was incorporated into a larger bill – a very common practice as bills move through the legislative process – does not mean Congress was any less concerned.

As TIA has explained, Huawei’s argument that it is entitled to a hearing is misplaced, especially if the Commission does not make its own designations of specific suppliers but instead relies upon those made by Congress or by agencies with appropriate national security expertise.<sup>87</sup> The Due Process Clause simply does not require every federal agency to stick its head in the sand and ignore a potential national security threat *after* Congress has already made the requisite threat determination itself. Huawei’s appeal to the Commission is simply directed to the wrong place – now that Section 889 has been enacted, every agency must draw the obvious conclusion about the named companies, even as Huawei’s appeal must be to Congress itself.

**B. The Commission May Rely Upon Section 889 Without Providing Further Notice.**

The Administrative Procedure Act (“APA”) requires that “[g]eneral notice of proposed rule making shall be published in the Federal Register,” and that the notice “shall include ... reference to the legal authority under which the rule is proposed....”<sup>88</sup> Huawei, RWBC, and WTA argue that the Commission may not rely upon Section 889 as a source of statutory authority in its final rule since the statute was enacted after the NPRM and therefore not mentioned in the NPRM.<sup>89</sup> As an initial matter, TIA believes the Commission has, and continues to have, the authority to impose its proposed rule under the Communications Act without regard

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<sup>87</sup> TIA NPRM Reply Comments at 91-96.

<sup>88</sup> 5 U.S.C. § 553(b)(2).

<sup>89</sup> Huawei Comments at 16-17 (rule would violate APA’s legal authority requirement and the logical outgrowth doctrine); RWBC Comments at 10 (Commission must issue an FNPRM); WTA Comments at 5-7 (same).

to Section 889. But the Commission can rely upon Section 889 as an additional source of authority, and it has multiple procedural paths for concluding that it has provided adequate notice that it may do so, as described below.

**1. A Declaratory Ruling That Section 889 Applies to USF Would Be an Interpretive Rule Exempt from the APA’s Notice Requirement.**

The APA’s notice requirement does not apply to “interpretative rules.”<sup>90</sup> As explained below, if the Commission issues a Declaratory Ruling or a Memorandum Opinion and Order that Section 889(b)(1) applies to the USF programs and/or other Commission programs, that conclusion would be an interpretive rule, not a substantive rule. It would therefore be exempt from the APA’s notice-and-comment requirement and could thus be adopted without any further procedural steps.

In general, “the critical feature of interpretive rules is that they are ‘issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.’”<sup>91</sup> The question of whether a particular agency action is a substantive rule or an interpretive rule is a “common one,” and the D.C. Circuit’s analysis in *Central Texas Telephone Co-Op, Inc. v. FCC*, 402 F.2d 205, 210 (2005) is particularly instructive here. In *Central Texas*, the Commission acted in response to a Petition for Rulemaking invoking Commission Rule 1.2(a), which states that “[t]he Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a

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<sup>90</sup> 5 U.S.C. §553(b)(A).

<sup>91</sup> *Perez v. Mortgage Bankers Ass’n.*, 135 S. Ct. 1199, 1203 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)). To the extent there is any question whether the Commission has been delegated sufficient authority to “administer” Section 889(b)(1), it is easily resolved by paragraph (b)(2) which explicitly contemplates that the Commission will “implement[]” the prohibition. *See also* section I-E above.

controversy or removing uncertainty.”<sup>92</sup> The Commission issued a Memorandum Opinion and Order interpreting its number portability rules, concluding that they applied more broadly than some carriers had been construing them.<sup>93</sup> Upon review, the court described what qualifies as an interpretive rule:

To fall within that category, the rule must be interpreting something. It must “derive a proposition from an existing document whose meaning compels or logically justifies the proposition. The substance of the derived proposition must flow fairly from the substance of the existing document.”<sup>94</sup>

Applying that principle, the court held that the agency was simply interpreting its existing regulation and that the APA’s procedures were therefore not required.<sup>95</sup> The court’s rationale in *Central Texas* would apply even more clearly to a rule construing Section 889, as the question of whether Section 889 applies to USF is a matter of statutory *interpretation*, not an exercise of legislative rulemaking authority.

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<sup>92</sup> 47 C.F.R. § 1.2(a). The rule also specifies that where a petition for declaratory ruling closely relates to a pending rulemaking, the relevant bureau should docket the petition in that proceeding and issue a public notice seeking comment. *Id.* § 1.2(b). Although not acting in response to a petition, the Commission has followed that procedure here.

<sup>93</sup> See *Central Texas*, 402 F.2d at 208.

<sup>94</sup> *Id.* at 212 (quoting Robert A. Anthony, “Interpretive” Rules, “Legislative” Rules, and “Spurious” Rules: Lifting the Smog, 8 ADMIN. L. REV. 1, 6 n. 21 (1994)). The D.C. Circuit has previously observed that “if a second rule repudiates or is irreconcilable with a prior legislative rule, the second rule must be an amendment of the first, and, of course, an amendment to a legislative rule must itself be legislative,” *National Family & Reproductive Health Ass’n v. Sullivan*, 979 F.3d 227, 235 (D.C. Cir. 1992) (internal quotations omitted). But this doctrine is on questionable ground at best since *Perez*, 135 S. Ct. 1199, and in any event there is no suggestion here that a rule implementing Section 889 would in any way “repudiate” or be “irreconcilable” with any prior Commission rule.

<sup>95</sup> *Id.* at 210-214. Although eventually accepting the characterization of both parties that the Commission had adopted a rule, the court also strongly suggested that it viewed the Commission’s action as an adjudication rather than rulemaking, and that the agency’s action could also have been upheld on that basis had the Commission preserved the argument. *Id.* at 210. This path would likely also be available to the Commission to defend any decision regarding the scope of Section 889, if properly preserved.

Importantly, an interpretive rule may extend beyond a mere declaration that Section 889 applies to USF. For example, the *Central Texas* court held that “an agency may use an interpretive rule to transform ‘a vague statutory duty or right into a sharply delineated duty or right.’”<sup>96</sup> Moreover, “an interpretive rule does not have to parrot statutory or regulatory language but may have ‘the effect of creating new duties.’”<sup>97</sup> Thus, the Commission could potentially adopt at least portions of TIA’s more detailed proposed rule, such as its definition of logic-enabled components, as “interpretive” on the grounds that those provisions merely interpret statutory language. Alternatively, to the extent that the Commission issues more detailed rules addressing implementation matters that go beyond the text of Section 889 itself, the question of notice may be moot since the agency has already provided adequate notice of those issues by raising the appropriate questions in the original NPRM, as TIA has previously explained.<sup>98</sup>

## **2. The October Public Notice and the Original NPRM Jointly Satisfy the APA Notice Requirement.**

On October 26, 2018, the Commission issued a Public Notice that sought comment on the applicability of Section 889 to its pending rulemaking, and the Public Notice was docketed accordingly.<sup>99</sup> Even substantive rules can be upheld under the APA despite the lack of a proposing document that was formally styled as a Notice of Proposed Rulemaking. For example, the D.C. Circuit suggested in a 2005 case that the FCC may have satisfied its APA obligations by seeking comments on a Petition for Declaratory Ruling rather than a Notice of Proposed

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<sup>96</sup> *Central Texas*, 402 F.3d at 214 (quoting *Health Ins. Ass’n of Am. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994)).

<sup>97</sup> *Id.* (quoting *Fertilizer Inst. v. United States EPA*, 935 F.2d 1303, 1308 (D.C. Cir. 1991)).

<sup>98</sup> See TIA NPRM Reply Comments at 88-91 (explaining that all elements of TIA’s proposed rule would pass muster under the “logical outgrowth” doctrine).

<sup>99</sup> Public Notice (posted Oct. 26, 2018 in WC Docket No. 18-89).



Rulemaking, observing that “[t]he label . . . is not fatal.”<sup>100</sup> Moreover, while Huawei claims that the Public Notice “does not actually make a proposal to use this rulemaking to implement the 2019 NDAA,”<sup>101</sup> that misunderstands what is required. Rather, the Commission has *already* provided notice of its proposed rule change in the NPRM; the Public Notice simply provides notice of additional legal authority.

At the very least, the Public Notice means that any violation of the APA’s “legal authority” requirement, even if it exists, would be technical only. Courts have upheld regulations despite challenges under the APA’s “legal authority” provision where petitioners have failed to demonstrate actual prejudice.<sup>102</sup> Here, the Commission has provided a fair chance to comment on the applicability of Section 889 and there is clearly no prejudice to any stakeholder, particularly given the record of initial comments in response to the Public Notice. Quite unlike the situation in *Nat’l Tour Brokers Ass’n v. United States*, 591 F.2d 896 (D.C. Cir. 1975), cited by opposing commenters, the Commission has afforded an opportunity to provide comment on Section 889 *before* adopting its final rule.<sup>103</sup> Moreover, “defects in an original

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<sup>100</sup> *U.S. Telecom Ass’n v. FCC*, 400 F.3d 29, 40 (D.C. Cir. 2005). One salient difference, however, is that the Commission’s request for comment on the Petition for Declaratory Ruling in that case was published in the Federal Register, unlike the Public Notice here. That said, all opposing commenters clearly had actual notice of the Public Notice, as evidenced by their comments filed in response to it.

<sup>101</sup> Huawei Comments at 18.

<sup>102</sup> *Trans-Pacific Freight Conference of Japan/Korea v. Federal Maritime Commission*, 650 F.2d 1235, 1259 (D.C. Cir. 1977); *United States v. Stevenson*, 676 F.3d 557, 565 (6<sup>th</sup> Cir. 2012).

<sup>103</sup> 591 F.2d at 902 (“Of even greater importance, though, is the purpose behind the requirement that the parties be able to comment on the rule while it is still in the formative or ‘proposed’ stage. The purpose is both (1) to allow the agency to benefit from the expertise and input of the parties who file comments with regard to the proposed rule, and (2) to see to it that the agency maintains a flexible and open-minded attitude towards its own rules, which might be lost if the agency had already put its credibility on the line in the form of ‘final’ rules.”)

notice may be cured by an adequate later notice,” and an earlier notice may “remain[] in effect even though modified by the later notice[].”<sup>104</sup> If anything, the October Public Notice has modified the original NPRM by asking commenters to address “with particularity” the implications of Section 889 on the pending rulemaking.<sup>105</sup>

### **3. The NPRM’s Mention of Pending Legislation That Would Soon Be Enacted as Section 889 Satisfies the APA Notice Requirement.**

The APA requires only “that a proposed rule provide some notice of the legal authority for that rule – it does not prescribe the form that notice must take.”<sup>106</sup> In the original NPRM, all relevant stakeholders were provided notice by the Commission regarding what would eventually become Section 889:

Reflecting its continued concern about this issue, Congress is also considering pending legislation that would, if adopted, build upon these targeted prohibitions and block all federal agencies, *including the Commission*, from contracting with any entity that uses “telecommunications equipment or services . . . produced by Huawei Technologies Company or ZTE Corporation” as “a substantial or essential component . . . or as critical technology as part of any system.”<sup>107</sup>

The legislation discussed above – the Defending U.S. Government Communications Act – would eventually be incorporated, in modified form, into the 2019 NDAA as Section 889. Indeed, the

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<sup>104</sup> *Advocates for Highway Safety v. Federal Highway Admin.*, 28 F.3d 1288, 1291-92 (D.C. Cir. 1994) (citations omitted).

<sup>105</sup> *Global Van Lines, Inc. v. ICC*, 714 F.2d 1290, 1298 (5<sup>th</sup> Cir. 1983) (quoting H.R. REP. NO. 1980, 79<sup>th</sup> Cong., 2d Sess. 24 (1946)).

<sup>106</sup> *United States v. Lott*, 750 F.3d 214, 218 (2d Cir. 2014); *see also United States v. Stevenson*, 676 F.3d 557, 563 (6<sup>th</sup> Cir. 2012) (“The APA does not require that the proposed rule cite the relevant legal authority in a certain location, but rather requires just that notice must be given for any proposed rule.”).

<sup>107</sup> [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, at ¶ 6 (emphasis added) (citing Defending U.S. Government Communications Act, H.R. 4747 & S. 2391, 115<sup>th</sup> Cong.) (“NPRM”).

language from the original House and Senate bills quoted by the Commission above appears in nearly identical form in Section 889 as enacted.

At a minimum, then, the NPRM provided actual notice that Congress was actively considering enacting a bill that would require the Commission to take action, and the Public Notice provided further notice regarding the actually-enacted legislation in its final form. Although atypical in form, it is clear that all interested parties have been provided more than sufficient notice of Section 889's potential status as a source of legal authority in this proceeding to satisfy the requirements of the APA. To insist upon the issuance of an Further Notice of Proposed Rulemaking simply to add Section 889 to the original NPRM's citation of authority statement under these specific circumstances – especially when it is obvious that the most interested parties have suffered no prejudice – would be to exalt form over substance in a manner that accomplishes no useful purpose.

#### **4. A Rule Implementing Section 889 Is a Logical Outgrowth of the NPRM.**

The APA requires that the notice of a proposed rule include “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”<sup>108</sup> A final rule complies with this requirement only if it is a “logical outgrowth” of the proposed rule.<sup>109</sup> Huawei argues that a rule implementing Section 889 would violate the “logical-outgrowth” doctrine,<sup>110</sup> but does not explain why such a rule would actually be inconsistent with the original notice provided in the NPRM. The test is not whether parties could have contemplated that the

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<sup>108</sup> 5 U.S.C. § 553(b)(1).

<sup>109</sup> *CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076, 1080 (D.C. Cir. 2009).

<sup>110</sup> Huawei Comments at 17.

Commission would cite Section 889 as an additional source of legal authority, in addition to its existing authority under the Communications Act. Rather, a final rule “fails the logical outgrowth test” only if “interested parties would have had to divine the agency’s unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.”<sup>111</sup> But as TIA explained in our opening comments, Section 889 is not “distant” from the original NPRM; rather, it is fully consistent with the rule TIA has previously proposed that the Commission adopt in this proceeding<sup>112</sup> – a proposal that was made *prior* to Section 889’s enactment.

Clearly then, no “divination” of the agency’s unspoken thoughts is required here. Indeed, there may not be any parts of Section 889(b) that were not already contemplated by the Notice – in fact, some commenters concede that the Notice goes even further than the statute<sup>113</sup> – and even minor statutory matters like the effective date (specified by Section 889 as two years) were already well within the Commission’s grasp in the NPRM. To the extent there are any such discrete issues requiring construction of Section 889 itself, those matters can be resolved by the Commission through statutory interpretation without providing further notice, *see* section IV-B-1 above.

**C. If the Commission Decides to Issue A Further Notice, It Should Do So Promptly.**

To the extent the Commission identifies any procedural defect that it believes might prevent it from moving forward lawfully, the Commission would be justified in issuing a Further

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<sup>111</sup> *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir., 2017) (quoting *CSX Transportation*, 584 F.3d at 1080).

<sup>112</sup> TIA Comments at 14-21 (explaining that TIA’s proposed rule would appropriately implement Section 889(b)).

<sup>113</sup> *See, e.g.*, Huawei Comments at 12 (noting that the proposed rule applies to more equipment than Section 889(b)(1)).

Notice of Proposed Rulemaking that explicitly cites Section 889 as one of several sources of legal authority. Depending on the procedural path the agency follows with regard to notice, *see* section IV-B above, this approach could have some benefits. For example, reviewing courts might be less likely to extend *Chevron* deference to an interpretive rule that has not been adopted through APA-compliant notice-and-comment rulemaking.<sup>114</sup>

If the agency chooses to go down this path, however, it should do so quickly given the continuing uncertainty in the marketplace and the statutory implementation deadline. The Commission teed up several important questions in the NPRM, and TIA has proposed rule text that could easily form the basis for either an FNPRM or a final rule.<sup>115</sup>

## CONCLUSION

After eight months, two Notices, two full rounds of comment, and the enactment of a new statute that reaffirms the Commission’s basic plan while also establishing deadlines to guide its process, the time for action is unquestionably here. With 5G deployments beginning in earnest, the Commission should move forward by adopting a rule that promotes national security and provides certainty for the marketplace. As TIA has explained at length, the Commission currently has the authority to adopt a narrowly-tailored rule focused on specific suppliers of

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<sup>114</sup> *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1204 (2015) (“The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules. But that convenience comes at a price: Interpretive rules ‘do not have the force and effect of law and are not accorded that weight in the adjudicatory process.’”) (quoting *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 99 (1995)). *But see, e.g., Gonzales v. Oregon*, 546 U.S. 243 (2006) (contemplating that interpretive rules validly promulgated would receive *Chevron* deference); *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring) (“Agencies may now use these rules not just to advise the public, but also to bind them. After all, if an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law.”).

<sup>115</sup> TIA NPRM Comments at 88-89 (proposed rule text).

concern. The enactment of Section 889, if anything, provides more authority and a sense of urgency. No opposing commenter persuasively shows otherwise.

TIA continues to appreciate the Commission's efforts in this important proceeding, and we look forward to continuing our work with the agency in the months ahead.

Respectfully submitted,

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