

## Client Alert: FCC Prohibits Equipment Authorizations for Covered Equipment November 30, 2022

On November 25, 2022, the FCC released a [Report and Order, Order, and Further Notice of Proposed Rulemaking](#) (“R&O” “Interim Freeze Order” and “FNPRM”) in its latest effort to protect the nation’s networks and supply chains from equipment and services that pose an unacceptable risk to national security or the safety of U.S. persons. The R&O amends the FCC’s equipment authorization rules to prohibit authorization of equipment that has been identified on the FCC’s [Covered List](#) as posing an unacceptable risk to national security of the United States or the security or safety of United States persons, and to prohibit the marketing and importation of such equipment in the United States. The Covered List currently includes certain telecommunications and/or video surveillance equipment produced by Huawei Technologies, ZTE Corporation, Hytera Communications, Hangzhou Hikvision Digital Technology, and Dahua Technology (and their subsidiaries and affiliates) that will be subject to this ban (discussed further below). The FNPRM seeks further comment on additional revisions to the rules and procedures associated with prohibiting the authorization of “covered” equipment in our equipment authorization program and on related revisions to the Commission’s competitive bidding program. A summary of the item is below.

The new rules will become effective upon announcement from the FCC in the Federal Register except for rules that impose information collection requirements, which will be subject to further review by OMB, and a later effective date. To avoid an influx of authorization requests during this pendency, the Interim Freeze Order adopts an interim freeze on further processing or grant of equipment authorization applications for equipment produced by any entity identified on the Covered List as producing “covered” equipment. The freeze is effective as of the release date of the Order (11/25/22) and will last until the FCC provides notice of the effective date of the Report and Order (unless otherwise modified or extended by OET).

### **Report and Order**

In November 2021, President Biden signed into law the [Secure Equipment Act of 2021](#) (Secure Equipment Act) which, among other things, required the FCC to establish rules stating that it will no longer review or approve any authorization application for equipment that is on the Covered List, and required the FCC to vote on an order within a year of the passage of the bill. The Report and Order responds to this directive by adopting such updates to the FCC equipment authorization rules as well as by addressing what constituted “covered” equipment for purposes of implementing the equipment authorization prohibition. Specific updates are as follows:

- [New General Prohibition of Authorizations for “Covered” Equipment](#): The FCC modifies its “General Provisions” in part 2, subpart J of its rules, to include a general prohibition of

authorization of “covered” equipment identified on the Covered List. Such equipment is ineligible for either of the two FCC authorization procedures: Certification or Supplier’s Declaration of Conformity (“SDoC”).

- Revised Equipment Certification Process: The FCC adopts the new attestation and U.S. service of process requirements for (1) applications for new equipment certification; (2) applications or requests to modify already certified equipment; and (3) notices of any change in the name, address, ownership, or control of the authorization grantee.
  - *Attestation:* Applicants will be required to submit a written and signed attestation certifying that: (1) the equipment is not prohibited from receiving an equipment authorization under the Commission’s rules; and (2) the applicant is not an entity identified on the Covered List with respect to “covered” equipment, either directly or as a subsidiary or affiliate of a directly-listed entity.
  - *U.S.-Based Agent for Service of Process:* Applicants will be required to designate and identify a contact in the United States to act as the applicant’s agent for service of process, regardless of whether the applicant is a domestic or foreign entity. U.S. applicants may designate themselves as the agent for service of process.
  - *Additional Grantee Prohibitions.* The FCC further prohibits the grantee of an equipment authorization from licensing or otherwise authorizing a second party to manufacture the equipment covered by the grant of the equipment authorization if such licensing or authorization would result in the equipment falling within the scope of “covered” equipment.
  
- Revised Supplier’s Declaration of Conformity (SDoC) Process: The FCC adopts a rule prohibiting the entities identified on the Covered List as producing “covered” equipment from using the SDoC process to authorize *any equipment* – not just “covered” equipment identified on the Covered List. Equipment that is eligible for authorization from these entities must be processed pursuant to the Certification process, regardless of any rule that may otherwise permit use of the SDoC process. Additionally, the FCC adopts the following new requirements for the SDoC process:
  - *Attestation:* Similar to the Certification process, here the responsible party is required to maintain a record of a written and signed certification that, as of the date of first importation or marketing, the equipment for which the responsible party maintains Supplier’s Declaration of Conformity is not produced by any entity that is identified on the Covered List as producing “covered” equipment.
  - *Enforcement:* the FCC notes it will exercise its existing authority to request that the responsible party provide information regarding any equipment that has been authorized through the SDoC procedures (e.g., equipment sample, representative data demonstrating compliance, and the compliance statement itself, including the attestation), and will take any available enforcement action as necessary.
  
- Impacts on Importation and Marketing Rules: The FCC confirms that revising the equipment authorization provisions as noted above also effectively prohibits the marketing and importation of “covered” equipment prohibited from authorization under the equipment authorization program, and therefore there is no need to adopt revisions to the importation or marketing rules at this time.

- Impacts on Exempt Equipment: The FCC recognizes that its rules currently exempt devices not likely to cause harmful interference to radio communications from equipment authorization requirements, which could potentially include “covered” equipment. Accordingly, the FCC will no longer exempt any equipment produced by any of the entities identified on the Covered List as producing “covered” equipment, and revises its rules to require that any equipment produced by these entities be subject to the Certification process.
- New Streamlined Process to Revoke Authorizations Based on False Representations: The R&O recognizes the FCC’s current authority to revoke authorizations if the Commission discovers, post-authorization, that the application (or in materials or responses submitted in connection therewith) contained false statements or representation. Relying on this authority, the FCC adopts a streamlined process to allow OET and PSHSB to review and revoke authorizations, granted after the adoption of the rules in the R&O, where the application for such authorization contained a false statement or representation regarding the “covered” status of such equipment.
- Revocation of Existing Covered Equipment Authorizations: The R&O recognizes that the FCC has the authority to review and revoke existing authorizations for equipment that is considered “covered” under the rules adopted in this R&O, however further states that the FCC is not making a decision at this time as to whether any particular equipment authorization should be revoked.
- Clarification on the Definition of Covered Equipment: The FCC provides several clarifications to the definition of Covered equipment pursuant to the Secure Networks Act and the Secure Equipment Act, which will be applicable to the new rules and the Covered List:
  - *Current Covered Equipment:* The R&O prohibits from equipment authorization all equipment produced by Huawei, ZTE, Hytera, Hikvision, and Dahua (including subsidiaries and affiliates) that is on the Covered List.
    - *Huawei and ZTE:* Such equipment includes telecommunications equipment and video surveillance equipment produced by these two entities (and their subsidiaries and affiliates).
    - *Hytera, Hikvision, and Dahua:* Such equipment includes telecommunications equipment and video surveillance equipment produced by Hytera, Hikvision, and Dahua (and their subsidiaries and affiliates) “for the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes.” The FCC notes that “for any equipment authorization application for video surveillance and telecommunications equipment produced by these entities, [it] will impose strict and appropriate conditions on any approved grant, consistent with the Commission’s equipment authorization rules.”
  - *Subsidiaries and Affiliates:* Each entity named on the Covered List that produces “covered” equipment will be required to provide the FCC with a list of their subsidiaries and affiliates that produce equipment that requires an equipment authorization, including under the new rules, within 30 days of the effective date of

the rules and must provide up-to-date information on any changes to the list with respect to any such entities.

- *Rebranding*: The FCC clarifies that it is precluding any equipment application by any other entity to the extent that the equipment for which authorization is sought had been produced by entities identified on the Covered List but has been re-branded or re-labeled with other names or associated with other companies.
- *Telecommunications Equipment Defined*: The FCC defines “telecommunications equipment” as “any equipment used in fixed or mobile networks that provides advanced communications service, provided the equipment includes or uses electronic components as defined [in the FCCs rules].” This includes “any equipment that can be used in such a fixed or mobile broadband network to enable users to originate and receive high quality voice, data, graphics, and video telecommunications using technology with connection speeds of at least 200 kbps in either direction.”
  - Notably, the FCC also concludes that not only the types of “telecommunications equipment” specifically identified in the Supply Chain Annual Reporting 2022 Filing Instructions are “covered” for the purposes of this proceeding, but also handsets designed for operation over fixed or mobile networks providing advanced communications services also are considered “covered.”
- *Video Surveillance Equipment*: The FCC defines “video surveillance equipment” as “any equipment that is used in fixed and mobile networks that provides advanced communications service in the form of a video surveillance service, provided the equipment includes or uses electronic components.” The FCC states that this definition is intended to “encompass all equipment that is designed and capable for use for purposes of enabling users to originate and receive high-quality video telecommunications service using any technology with connection speeds of at least 200 kbps in either direction.”

The R&O also addresses the FCC’s authority to make the above rule changes, the cost-effectiveness and economic impact of the new rules, several constitutional claims, and rejects arguments regarding treaty violations, and arguments that the Commission is acting in an arbitrary and capricious manner.

### **Further Notice of Proposed Rulemaking (“FNPRM”)**

In the FNPRM the FCC seeks comment on several additional issues, including:

- Further revisions to the equipment authorization program, such as whether to prohibit authorizations for equipment that utilize “component parts” that pose an unacceptable risk to national security also be prohibited from authorization.
- Whether certain existing authorizations should be revoked, and if so what procedures should govern that revocation.
- Whether prohibitions of particular “covered” equipment could have a deleterious effect on the public interest, particularly if it could result in supply chain issues.
- Whether to adopt a “U.S.-based responsible party requirement” for equipment authorizations.

- Other issues raised in the NPRM, not addressed in the R&O, such as review of authorizations post-grant, post-market surveillance, and the certification process for equipment prohibited from utilizing the SDoC process.
- Whether to prohibit entities listed on the Covered List from participating in Auctions at the FCC.