

NFIB
The Voice of Small Business
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APR 10 2018

FCC Mailroom

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of:

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

April 5, 2018

TO: Secretary of the Commission
Office of the Secretary
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

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RE: Recommendations to Strengthen Draft Notice of Proposed Rulemaking on
"Protecting Against National Security Threats to the Communications Supply
Chain Through FCC Programs" (FCC-CIRC1804-01, March 27, 2018)
(ex parte communication)

1. The National Federation of Independent Business (NFIB) files this Recommendation in WC Docket No. 18-89 to provide recommendations on the circulated draft of a Notice of Proposed Rulemaking on "Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs" (FCC-CIRC1804-01, March 27, 2018) (hereafter "DRAFT NPRM"). The Fact Sheet accompanying the DRAFT NPRM noted that the DRAFT NPRM was released as part of a "permit-but-disclose" proceeding (see 47 CFR § 1.1206) and that anyone expressing to the Federal Communications Commission (FCC or Commission) views on the DRAFT NPRM must file them in WC Docket No. 18-89. The Commission is scheduled to address the DRAFT NPRM at its meeting on April 17, 2018.

2. This document recommends adjustment of the DRAFT NPRM so that it addresses and requests comments upon three additional subjects integral to the FCC's decisionmaking: small businesses with already-built networks, coordinated and timely FCC decisionmaking, and potential foreign country retaliation. For reader convenience, the NFIB recommendations are set forth below in bold typeface.

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3. NFIB is an incorporated nonprofit association with about 300,000 small and independent business members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty states hear the voice of small business as they formulate public policies. NFIB advances the interests of small and independent businesses, most if not all of which use telecommunications services in their businesses.

4. The DRAFT NPRM (at Appendix A) proposes a prohibition on use of universal service support "to purchase or obtain any equipment or services produced or provided by any company posing a national security threat to the integrity of communications networks or the communications supply chain." Hereafter this document refers to that prohibition on universal service support as "the Prohibition" and refers to the company mentioned in the Prohibition as a "Prohibited Source Company."

5. The Prohibition would have a substantial adverse economic impact on small businesses in the telecommunications industry if those businesses (a) depend upon Universal Service Fund support for a substantial portion of their activities and cannot replace that support with other funds, (b) have built their networks to date in substantial part with equipment from what would become a Prohibited Source Company, and (c) have obligated themselves by contract to use the maintenance services of that Prohibited Source Company with respect to those networks in the future. The substantial adverse economic impact to those small businesses may be aggravated if, as a matter of technological fact, their existing networks built from the Prohibited Source Company's equipment cannot interoperate with equipment which, after the Prohibition takes effect, must come from another company. Even if a Prohibited Source Company's network equipment could interoperate with another company's equipment, the small business would incur substantial adverse economic impact if it must, to comply with the Prohibition, breach a contractual obligation to use in the future the maintenance services of the Prohibited Source Company. If the small businesses had the foresight in drafting contracts with a foreign company to excuse themselves from compliance if U.S. government intervention prevents them from carrying out the contract, it would be useful for the FCC to know what action by the FCC could constitute the intervention necessary to release such small businesses from obligations to the Prohibited Source Companies. **NFIB recommends that the FCC insert into the Preamble of the DRAFT NPRM after paragraph 18 the following new paragraph:**

"[] *Small Businesses with Networks Already Built with Equipment from Companies of Concern.* Although the Commission contemplates making prospective-only the proposed prohibition on acquiring equipment or services from a company posing a national security threat to the integrity of communications networks or the communications supply chain, the prohibition may nevertheless pose special problems for small businesses in the telecommunications industry that have already built their networks on equipment from what would become a prohibited source company and have already entered into maintenance contracts for the future with the prohibited source company. The Commission seeks comment on (a) the extent to which

American small businesses in the telecommunications industry have already built their networks with equipment from a company that likely will become a prohibited company under the rule, (b) the extent to which such small businesses could in the future purchase equipment from non-prohibited companies that would interoperate with the existing equipment from the prohibited company, and (c) the extent to which, as a practical business matter, such small businesses could avoid the adverse impact of the prohibition by no longer accepting universal service support. Similarly, the Commission seeks comment on (a) the extent to which American small businesses in the telecommunications industry that have already built their networks with equipment from companies that likely will become a prohibited company have bound themselves by contract to use in the future the maintenance services of that prohibited company, and (b) the extent to which, and the means by which, an action by the Commission can trigger government-intervention contract clauses, in contracts that otherwise require use of what will become prohibited companies, that excuse such small businesses from using their services."

6. Paragraph 19 in the Preamble seeks comment on how to identify the companies that pose a national security threat to the integrity of communications networks or the communications supply chain for purpose of the Prohibition. Similar national security determinations made elsewhere in the government involve a broad range of agencies that have crucial expertise. Although their experience and advice improves the quality of decisions, coordinating and obtaining the multi-agency process can consume a great deal of time, which often disadvantages American businesses, and especially small businesses. **NFIB recommends that the Commission add at the end of Paragraph 19 in the Preamble the following:**

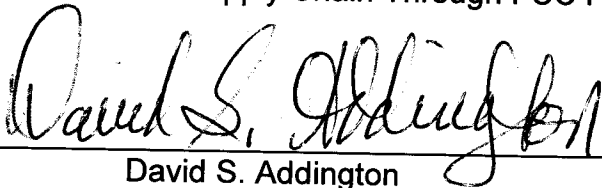
"The Commission also seeks comments on how it might best organize and operate to: (a) avail itself of the information and advice needed in identifying companies of concern and on related matters from the Departments of State, the Treasury (including the Office of Foreign Assets Control), Defense (including the National Security Agency and U.S. Cyber Command), Justice (including the FBI), and Homeland Security (including the National Protection and Programs Directorate), the Office of the Director of National Intelligence (including the Central Intelligence Agency), and the Office of Science and Technology Policy; and (b) ensure that the FCC can make timely decisions regarding companies of concern so as not to constitute an obstacle that disrupts or increases costs to American companies, and especially small businesses, in the telecommunications market."

7. The DRAFT NPRM (paras. 4 - 8) discusses, as possible examples of companies of concern, two companies from the People's Republic of China (Huawei Technologies Company and ZTE Corporation) and a company of the Russian Republic (Kaspersky Lab). In relations among nation-states, an action by one nation-state against the government or people of a second nation-state often results in reciprocation or retaliation by the second against the first. The DRAFT NPRM should acknowledge that potential occurrence and seek comment upon it. **NFIB recommends that the FCC**

insert into the Preamble of the DRAFT NPRM after paragraph 33 the following new paragraph:

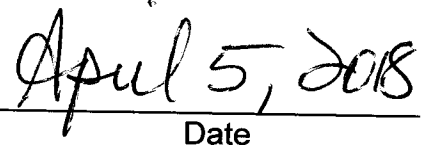
"[] In relations among nation-states, when the government of one country takes an action that a second country perceives as contrary to the interests of that second country or some of its people, the government of that second country may take action adverse to the interests of the first country or some of its people (often called reciprocation or retaliation). As stated in Appendix A to this Notice, the Commission proposes a rule to prohibit use of universal service support "to purchase or obtain any equipment or services produced or provide by any company posing a national security threat to the integrity of communications networks or the communications supply chain." If the FCC designates a foreign company as a prohibited source for purposes of this rule, the government of the foreign country in which the foreign company is organized or from which it operates may reciprocate or retaliate by barring a company organized in or operating from the United States from engaging in some communications-related activity in that foreign country. The Commission seeks comment on how it should assess the probability and impact of such adverse reciprocal action against American companies by foreign governments and what weight it should give to that risk of action against American companies in evaluating the proposed rule."

8. NFIB appreciates the Commission's commitment to the protection of the Nation and the opportunity to share advice with the FCC on how to strengthen its Draft Notice of Proposed Rulemaking on "Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs."



David S. Addington

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Date