

Morgan Lewis

MEMORANDUM

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TO: Dahua Technology USA Inc.
FROM: Morgan, Lewis & Bockius LLP
DATE: January 19, 2023
SUBJECT: RE: The FCC's Equipment Authorization Program

We, Morgan, Lewis & Bockius LLP, serve as outside counsel to Dahua Technology USA Inc. ("Dahua USA") in relation to the Federal Communications Commission's ("FCC" or the Commission) *Equipment Authorization Program*.¹ As Dahua USA's counsel, we have been closely studying and analyzing the *Report and Order*² issued by the FCC. At your request, this memorandum addresses particular uncertainties and issues relating to the *Report and Order*.

While there remains some ambiguity about how the Commission will choose to interpret certain points and define specific terms, such as "critical infrastructure" and "commercial facilities," we emphasize that (1) the *Report and Order* does not apply retroactively to existing authorizations issued to Dahua USA equipment prior to November 25, 2022; (2) the *Report and Order* provides Dahua with an opportunity to seek FCC approval for a compliance plan under which the company could obtain authorization for new products; and (3) the types of customers to which marketing is likely to be restricted under a compliance plan are already outside the scope of its current marketing efforts.

First, the *Report and Order* unequivocally states that the Commission did not "adopt any rules providing for the review or revocation of any currently existing equipment authorization granted prior to adoption of this order."³ As such, Dahua USA is not prohibited from importing, marketing, selling, or distributing previously authorized equipment. It remains legal to sell, market, use, and operate Dahua USA equipment that has previously obtained a valid FCC authorization in the United States, regardless of the date on which a particular unit of equipment was manufactured. This includes products that received authorization under the FCC rules in effect prior to November 25, 2022, even if they are first marketed in the United States after that date.

Second, the Commission clearly and intentionally provided a pathway for Dahua USA to secure future equipment authorizations. The *Report and Order* only prohibits "authorization to market and sell ... Dahua 'telecommunications equipment' and 'video surveillance equipment' (and that produced by their subsidiaries and affiliates) '[f]or the purpose of public safety, security of government facilities, physical security

¹ *Protecting Against National Security Threats to the Communications Supply Chain through the Equipment Authorization Program*, ET Docket No. 21-232; *Protecting Against National Security Threats to the Communications Supply Chain through the Competitive Bidding Program*, OEA Docket No. 21-233, Notice of Proposed Rulemaking and Notice of Inquiry, 36 FCC Rcd 10578 (2021) ("*Equipment Authorization Program*").

² *Equipment Authorization Program*, Report and Order, Order, and Further Notice of Proposed Rulemaking, FCC 22-84 (rel. November 25, 2022) ("*Report and Order*").

³ *Report and Order*, Para. 107.

surveillance of critical infrastructure, and other national security purposes.”⁴ It also prohibits Dahua USA from securing additional authorizations until such time as the Commission approves Dahua USA’s compliance plans and measures that will ensure that such equipment will not be marketed and sold for national security purposes.⁵ You have advised us that Dahua USA is committed to actively working with the Commission to develop well-articulated and appropriate measures to ensure Dahua USA’s equipment distributors, equipment dealers, and others in the supply and distribution chains associated with marketing or sale of such equipment are fully aware of the implications of the Commission’s restrictions and do not market or sell Dahua USA’s equipment for prohibited purposes. We understand that Dahua USA intends to submit a proposed compliance plan to the FCC as soon as practicable, and to pursue approval of that plan as expeditiously as possible.

Third, based on our interpretation of the *Report and Order* and the information provided by Dahua USA about its current marketing efforts the types of customers that Dahua USA will have to provide a compliance plan for avoiding in its marketing (*i.e.*, customers that would use Dahua USA equipment for national security purposes) are generally the same types of customers already subject to restrictions under the National Defense Authorization Act of 2019⁶ and the implementing rules such as the Federal Acquisition Regulation⁷ and Defense Federal Acquisition Regulation Supplement⁸. In other words, national security customers are already outside the scope of Dahua USA’s current marketing plans and efforts, as Dahua USA has made it clear that none of its equipment is intended for the prohibited uses in public safety, security of government facilities, physical security surveillance of critical infrastructure, or other national security purposes. While we cannot be certain how the Commission will interpret its *Report and Order*, we believe this is the most reasonable interpretation, and there is therefore a low risk of Dahua USA serving customers in a way that would trigger the restrictions.

Limitations and Qualifications

This memorandum has been prepared at the request of and provided on the understanding that it is for the sole use of Dahua USA, and has been prepared solely for the purposes of explaining the *Equipment Authorization Program*. As such, this memorandum has been prepared for informational purposes only and upon the express understanding that it will only be used for such purposes. Dahua USA may share this memorandum with and provide copies to other persons or entities subject to the provisions in this memorandum. Our firm does not have or accept a duty of care or any other legal responsibility in relation to this memorandum, or any related inquiries, advice or other work, to any person or entity other than Dahua USA. Any other person or entity who receives a draft or a copy of this memorandum (or any part of it) or discusses it (or any part of it) or any related matter with our firm, does so on the basis that such person or entity acknowledges and accepts that they may not rely, for any purpose, on this memorandum or any related information or advice given by our firm.

⁴ *Report and Order*, para. 177. For brevity, we refer to the restricted purposes as “national security purposes,” but this phrase is intended to encompass all categories of prohibited purposes stated in the quotation above.

⁵ *See Report and Order*, Para. 180.

⁶ National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 889 (2018).

⁷ *See* Federal Acquisition Circular (FAC) 2019-05, 84 FR 40216 (August 13, 2019); FAC 2020-03, 84 FR 68314 (December 13, 2019); FAC 2020-08, 85 FR 42664 (July 14, 2020); FAC 2020-09, 85 FR 53126 (August 27, 2020).

⁸ *See* DFARS Case 2018-D022, 86 FR 3832 (January 15, 2021).