



March 12, 2021

General Services Administration
Regulatory Secretariat Division
1800 F Street NW, 2nd Floor
Washington, DC 20405

RE: FAR Case 2019-009: Industry Questions on Section 889 Implementation

To Whom It May Concern:

The National Defense Industrial Association (NDIA) represents more than 1,600 corporate and over 60,000 individual members from small, medium, and large contractors dedicated to excellence in supplying and equipping America's warfighters. Policy changes have the potential to impact our members' effectiveness in supporting our national defense. As a result, our members are committed to active engagement with the Department of Defense by providing informed comment on relevant policies as they are developed and implemented. It is in this spirit that we provide the enclosed questions on the implementation of Section 889 of the FY 2019 National Defense Authorization Act.

NDIA fully supports the overarching policy objective behind Section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232). NDIA has worked hard with our member companies and other trade associations to assist in the development of a Final Rule that can be implemented, provides a reasonable amount of time for our member companies to understand how the Final Rule applies to their businesses, and provides enough time for our members to develop a compliance plan.

Attached, please find a list of industry questions that NDIA has gathered. As our previous engagements on this issue show, we would be happy to continue a dialogue on the implementation of Section 889. If you or your staff have any questions, please contact Nick Jones, Director of Regulatory Policy at njones@ndia.org or (703) 247-2562.

Respectfully submitted,

National Defense Industrial Association

NDIA Questions on the Implementation of Section 889 of the FY 2019 NDAA

I. General Administration

- a. Although waiver procedures exist, have any waivers been issued? Are the waivers publicly available?
- b. It would be helpful if a clear list of Huawei subsidiaries, and other entities covered by Section 889, were readily available. Does GSA, DoD, or NASA plan to release such a list?
 - i. Foreign suppliers or non-Government related suppliers often balk at the Section 889 requirements due to the lack of a clear list of banned entities and their inability to perform continual monitoring of the restricted entities (or any subsidiary or affiliate of any such entity) identified in the Entity List, Supplement No. 4 to part 744 of the Export Administration Regulations (EAR), that is maintained by the U.S. Department of Commerce's Bureau of Industry and Security (BIS).
- c. How will the Federal government inform industry regarding banned entities' subsidiaries and affiliates identified in Section 889 of the FY19 NDAA? In the absence of a definitive source, will the Federal government provide industry with a list of such subsidiaries and affiliates to ensure consistent application of the Section 889 prohibitions?

II. Contractor Obligations

- a. Section 889 requirements are extremely difficult to enforce with non-U.S. suppliers especially where there is no nexus with U.S. Government contracts. Example: Procuring network services from a supplier in Brazil to support a commercial global communications network.
 - i. Non-U.S. suppliers might potentially use covered telecommunications equipment/services within their companies, but they potentially may attest that the covered telecommunications equipment/services will not be provided to the customer or used to support the customer. Is a contractor required to disclose this type of situation? For example, would a contractor be required to disclose when a non-U.S. supplier sells bandwidth to a U.S. based company and the services do not affect any products or services sold by the U.S. based company to the U.S. Government (i.e., cannot route or redirect Government user data traffic or permit visibility into any Government user data or data packets)?
- b. What regulatory obligations are triggered for a prime or first-tier subcontractor when a lower-tier subcontractor indicates it violates Section 889 Part B by using, but not delivering, prohibited telecommunications equipment?

III. Backhaul Exception

- a. Section 889(a)(2)(A) allows the head of executive agency to procure with an entity “to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements.” Does the FAR Council concur that this exception is intended to extend to non-government entities, particularly those in the telecommunications industry?