



General Services Administration

Summary of Findings and Feedback

**Section 889 Prohibition against Covered
Telecommunications Services and Equipment
Industry Engagement Meeting**

November 6, 2019

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Executive Summary

Summary of: GSA's 889 Industry Engagement Meeting	Date of Meeting: November 6, 2019
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Summary of Findings and Recommendations

Summary of Key Themes
<ol style="list-style-type: none">1. Many businesses with a small proportion of federal business will leave the market, making it less competitive and reducing innovation2. Increased compliance costs for both the private sector and federal parts of businesses will lead to higher prices to government buyers3. Section 889 will disproportionately impact small businesses and their ability to provide government services<ol style="list-style-type: none">4. There is a lack of clarity around key definitions in the statutory language.5. Analyzing exponentially large supply chains without precise definitions of covered equipment will prove very challenging for many businesses6. Businesses performing federal work in foreign countries with exclusively non-compliant equipment and/or services have no recourse7. Industry lacks awareness of the prohibition on covered telecommunications services and equipment
Summary of Key Recommendations to GSA
<ol style="list-style-type: none">1. Limit the application of Section 889 to the transmission of sensitive information2. Narrow the point at which businesses become responsible for data transmission3. Develop a “bill of materials” for software similar to that for a piece of equipment4. Use the NAICS codes as a basis for defining critical technology and consult regulations used to implement the Foreign Investment Risk Review Modernization Act pilot program as guidance5. Consider the Cybersecurity Maturity Model Certification as a good example of how to implement allowable costs for compliance6. Issue the overdue regulations re the Supply Chain Executive Order ASAP7. Provide a complete list of the affiliates of the named Chinese businesses8. Develop a list of equipment that potentially contains “substantial” components9. Provide “safe harbor” requirements10. Give industry adequate time to comply and adjust their supply chain and systems as necessary to do business with both the federal government and the private sector11. Consider delaying implementation to allow time for awareness, clarity and communication12. Exclude sales from the definition of the term “use”13. Rebrand the name/title “Section 889” to show the relevance of the prohibition to industry

Introduction

The National Defense Authorization Act (NDAA) for Fiscal Year 2019, Title VII, Section 889, Prohibition on certain telecommunications and video surveillance services or equipment, identifies sources of “covered telecommunications equipment or services”, and, in paragraph (a)(1)(B), states that, as of August 13, 2020, “[t]he head of an executive agency may not enter into a contract (or extend or renew a contract) with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.”

It became evident to GSA that its industry partners were not aware of the potential impact of this prohibition. As a result, GSA’s Office of the Procurement Ombudsman, of which fostering productive relationships between GSA and its industry partners is a primary function, sought to build industry awareness of this statutory language and hear different perspectives on the business impact on GSA and its supply chain by hosting an industry engagement meeting on November 6, 2019. This meeting was NOT part of the FAR Rule-Making process. Rather, it was specifically focused on GSA contractors and on the GSA mission. As such, GSA invited industry representatives, including representatives from the leasing, construction, IT, legal, small business and professional services communities, to share their thoughts. Over 200 people registered for this event and approximately 200 people attended this meeting in person.

GSA was particularly interested in industry responses to the following questions:

- *If (a)(1)(B) of Section 889 prohibits use by an entity of covered telecommunications equipment or services at any tier, including use that is unrelated to the performance of any GSA contract:*
 - *How would this impact your business, and therefore GSA’s mission?*
 - *What are some of the challenges involved in identifying covered equipment?*
 - *Would this impact your plans to do future business with the GSA?*
 - *What is your anticipated cost for compliance with this prohibition?*
 - *How long would it take to remove covered equipment from all levels of your supply chain on GSA contracts?*
- *How does GSA make industry more aware of the prohibition?*

Meeting Format

The meeting started with a Welcome by the GSA Procurement Ombudsman followed by an Introduction by the GSA Senior Procurement Executive who set the tone and laid out the purpose and framework for the meeting. One of GSA’s Senior Procurement Analysts then conducted a brief overview of the Section 889 prohibition and the threat it

is protecting against. This presentation was followed by a discussion by a panel comprised of industry experts and a GSA moderator addressing, among other things, the questions in the Introduction section above. The Panel comprised of the following:

Federal Moderator - Michael Thompson, Senior Procurement Analyst, GSA
Small Business Association Representative - Ann Sullivan, President, Madison Services Group

IT Industry Representative - Rob Arnold, CEO, Threat Sketch

Leasing Representative - Norman Dong, Managing Director, FD Stonetower

Construction Representative - Derek Hoffine, Operations Manager, Hensel Phelps

Legal Representative - Jonathan Aronie, Partner, SheppardMullin

Professional Services Representative - David Drabkin, Director, Dixon Hughes Goodman Government Contracting Advisory Services

Meeting attendees were provided the opportunity to ask questions, engage in discussion and provide comments and feedback after each question. This document summarizes the findings and feedback, key recommendations, and next steps resulting from this industry engagement meeting.

Key Prohibitions Discussed

Section 889 contains two prohibitions, Part A and Part B. The meeting focused largely on the impact of Part B on industry and GSA. The majority of the discussion centered on a broad interpretation of “**use**” as contained Part B. This broad interpretation assumes that the government interprets Part B to mean that the government cannot contract with any entity, including an international entity or an entity unrelated to the government contract that **uses** such equipment even if the use is unrelated to federal government contracting. For ease of reference, a summary of the language of both Parts A and B are below:

Part A: Effective August 13, 2019, the government is prohibited from procuring, obtaining, or extending or renewing a contract to procure or obtain covered telecommunications equipment or services as a substantial or essential component of any system or as a critical technology as part of any system.

Part B: Effective this coming August 13, 2020, a year from the first prohibition, the government is prohibited from entering into a contract, or extending or renewing a contract with an entity that uses covered telecommunications equipment or services as a substantial or essential component of any system or as a critical technology as part of any system.

Detailed Findings & Feedback

Thematic Elements	Detailed Findings & Feedback
<p>Impact on Federal Procurements in General</p>	<p>1. Potential for current vendors to drop out of the Federal Market.</p> <p>Section 889 introduces a very significant factor into the risk/benefit analysis for many businesses, especially those who only have a small percentage of their business with the government. Businesses will also not want to damage their reputations by somehow being identified as “non-compliant”. Businesses will not want to negatively burden their private sector businesses with Section 889 compliance. It follows that some will no longer participate in federal government contracting, reducing competition. For example, Oracle dropped out of the GSA Program in 2016 citing the increased burden of doing business with the government. One industry participant raised concern over whether the mere “sales, testing and configuration” of video surveillance equipment constituted “use”. If so, they suggested that many would drop out of the federal market. The application of the Part B prohibition to such ancillary services (including product distribution) raised concerns from the participants.</p> <p>2. Procurement costs will go up due to associated compliance costs and “padding” to account for the risk and uncertainty and additional costs incurred from “absolute” Section 889 compliance.</p> <p>The businesses that remain in the market will need to account for the costs associated with a comprehensive compliance process, the legal costs and risks of a broad interpretation leading to anticipated False Claims Act and fraud suits, replacements of prohibited products and the costs of identifying them, and revamping supply chains.</p> <p>3. Reduced access to innovative solutions from small businesses.</p> <p>The disproportionate impact on small businesses could significantly limit government access to smaller innovative businesses with novel solutions to pressing government issues. It follows that larger businesses could have a bigger influence on procurements, giving them more pricing power on government proposals. This disproportionate impact on small businesses could also prevent agencies from attaining small-business goals (SDB, veteran-owned, Women-owned, etc.) .</p>

<p>Global Impact</p>	<p>1. Businesses with federal contracts often perform work in foreign countries and need to procure covered services in those countries.</p> <p>The prohibition would impact even the most basic services such as phone service. Many countries do not have telecom services with non-prohibited network components. British Telecom was offered as an example. Naturally, the businesses that the contractor relies upon may have little incentive to revamp their services for one business. Data and hardware services are typically jurisdictionally bound. This will be an issue regardless of whether the government interprets the statute broadly or in a narrow fashion. Section 889 makes no exception for overseas work or an overseas business.</p> <p>2. The prohibition creates a group/committee, that can identify additional businesses and outlaw the use of those businesses by the government.</p> <p>This creates further risk for businesses that are trying to do business with the government because they have no idea in advance of what businesses might appear on the list. Threats and the global political climate change regularly. How can businesses predict which businesses will appear next on the list and how do they realistically prepare for an ongoing relationship with the government?</p>
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<p style="text-align: center;">Other Business and Legal Challenges</p>	<p>1. The Section 889 waiver program does not apply to businesses, only to government entities. Some confusion exists over the waiver program. It applies to the government agency, not the business. It simply allows for a delayed implementation for two years from the effective date of each Section 889 prohibition. Under the first prohibition, if a waiver is granted, the government may contract with a business that provides covered telecommunications equipment or services until August 13, 2021. Under the second prohibition, if a waiver is granted, the government may contract with a business that uses covered telecommunications equipment or services until August 13, 2022. For both waivers, at the end of the two years the waiver expires--there is no extension. Additionally, in support of each waiver, the business must maintain a full and complete laydown of the presence of covered telecommunications or video surveillance equipment or services in its supply chain and must provide a phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the system.</p> <p>2. Part B applies to all video surveillance equipment. The panelists interpreted Part B as applying to all video surveillance equipment.</p> <p>3. Manufacturers can only sell to distributors that do not distribute non-compliant products. This also means that distributors that sell to the government can only work with compliant manufacturers.</p> <p>4. A separate Government-only entity will not eliminate the Section 889 compliance requirement for the rest of the business. A business cannot simply set-up a separate entity that sells to the government only and have that entity be the only part of the business to assume the risk of Section 889 compliance because that separate entity would still fall within the larger business's supply chain.</p>
<p style="text-align: center;">Small Business-Specific Impact</p>	<p>1. Small businesses often lack the resources to comply with Section 889. Many small businesses rely on individual "1099s" and very small entities such as subcontractors to help manage costs for government work. The legal fees and compliance process alone could limit the ability of small businesses to remain in business.</p>

	<p>2. Larger businesses may seek to mitigate the risk of using non-compliant subcontractors by shying away from using smaller businesses on their projects altogether.</p> <p>Small businesses often perform as subcontractors and rely on business from larger businesses. Under a broad interpretation of Section 889, larger businesses may seek to mitigate the risk of using non-compliant subcontractors by shying away from using smaller businesses on their projects altogether. At best, the larger businesses will flow down the requirements to small businesses which may or may not be able to truly attest to compliance. Most small businesses may not have the financial resources to replace affected equipment. In addition, large private sector organizations will often develop intricate compliance processes that, in effect, act as barriers to entry for small businesses.</p> <p>3. Small businesses face the same supply chain risks as larger, much better resourced businesses, and thus have the same risk analysis burden depending on the depth of their supply chains.</p> <p>All affected businesses will need to sign the same “absolute” representation, regardless of how they manage their supply chain or the size of their business. The prohibition applies equally to small online portals and large distribution centers. Small businesses will have to make the same informed decisions and conduct the same deep due diligence as larger businesses.</p>
<p>Challenges with Compliance and in Identifying Covered Equipment</p>	<p>1. A broad interpretation of “use” in Part B makes identifying covered equipment very challenging.</p> <p>The impact of Part B is business-wide, affecting parts of the business that has nothing to do with its government operations. It also impacts a business’s entire supply chain. Even micro-purchases and purchases on eCommerce portals fall under the prohibition, yet micro-purchaseS do not have representations and certifications associated with them. With regard to credit card purchases on an eCommerce portal from a seller, GSA will need to figure out where the responsibility lies.</p> <p>2. No standard exists for what compliance looks like, driving up compliance costs.</p> <p>The provision is “absolute” in its application and no safe harbor exists to mitigate the significant legal risks to businesses. In the face of a potential increase in False Claims Act suits, businesses will have to spend heavily on</p>

their compliance programs and hire compliance consultants. Even if not enforced in an absolute fashion right away, strict enforcement could surface in response to lawsuits at a later date. The structure of the prohibitions seem to invite a wave of plaintiff lawsuits that will drive up costs for businesses and the government. Insurance companies will increase premiums for businesses, to cover this risk.

3. It will be nearly impossible for some businesses to identify covered equipment without a list of covered items and ultimately a list of compliant businesses.

Section 889 requires that businesses inventory the exhaustive list of items in their supply chain to ensure compliance. Businesses within contractors' supply chains will also have to undergo the same exercise right down to the bottom-most tier. A broad reading of the Section 889 (particularly, Part B) covers a large array of devices, even much less obvious ones such as thermostats, vehicle fleets, multifunction copying machines, and security cameras. For some businesses, this is a near impossible (from an operations and availability standpoint) and a cost-prohibitive task. Some businesses will also be reluctant to give up their proprietary parts lists to prevent the release of trade secrets. If businesses have the ability to come up with an exhaustive component list of all of the affected products throughout their supply chain, they then will have to replace the parts and require the businesses within their supply chain to do the same. Both may have to renegotiate and redo all associated contracts. Ultimately, businesses need a list of covered items and ultimately a list of compliant businesses.

4. Confusion exists on how to determine if a piece of covered equipment constitutes a “substantial or essential component or a critical technology of any system”.

GSA suggested that critical technology was defined in the FAR and that “substantial or essential component” means “critical to the use of that thing”. A few panelists and attendees suggested that the definition still needs further clarity. One person suggested that the government simply tie the “use” prohibition to contract performance and delivery because once you go two or three tiers into a supply chain the connection with federal service delivery tends to lessen significantly or disappear. On the other hand, the cyber threat tends to attack the lowest levels of the supply chain and work its way up.

	<p>5. Aside from the cyber security industry, most federal IT vendors will find Part B quite burdensome. IT businesses focused on innovation, hardware, and operational IT will find this very burdensome. The prohibition also impacts software. Most hardware runs on some sort of software. Developers rely on commercial and open source software libraries that span international boundaries. This can be problematic when you include the full software development supply chain.</p> <p>6. Section 889 affects many industries with potentially covered equipment. While telecom, the security industry, and some aspects of the IT industry seem obvious, hospitals, including the Veterans Health Administration’s medical devices (since DOD gets its medical devices through purchased care), the Food and Drug Administration, and the insurance industry inevitably use covered products and services. Many of these entities may not realize that prohibitions in Section 889 apply to them. However, many medical device manufacturers are now realizing that this applies to them.</p>
<p>How to Increase Industry Awareness of Section 889</p>	<p>1. GSA needs to conduct an awareness campaign in the regions and outside of the beltway to ensure understanding of the impact of Section 889. The government needs to explain how it will prioritize available funding and technical support to assist affected businesses, institutions, and organizations. In doing so, the government needs to also use the standard method for seeking public comment - the Federal Register. The government should reach out to non-traditional businesses with innovative services and offerings that government needs to do its business to see how this affects them and their ability to offer services to the government. Additionally, GSA needs to broaden its reach and use social media to communicate with industry.</p> <p>2. GSA needs to rebrand the nomenclature used to describe the statute. “Section 889” does little to show the relevance to industry of the content of the prohibitions and, as a result, many contractors are unaware of the prohibitions’ potential impact on them. The name should spark the interest of affected parties.</p> <p>3. Ensure communication is straightforward and</p>

	<p>understandable.</p> <p>One panelist expressed the hope that GSA will take the same care in communicating Part B as they did when they announced Part A. He found the Leasing Alert communication straightforward and understandable. He liked that the communication defined the extent of the prohibition and articulated that it did not extend to ancillary services.</p> <p>4. Ensure GSA customer understanding of Section 889. As the buying agency for the federal government, GSA needs to talk to the rest of its customers and make sure that they understand the significant impact this is going to have on how they do business. Agency customers should not wake up one morning and find out they cannot use GSA schedule contracts because the businesses on those contracts or the businesses they’ve been doing business with are no longer eligible or are incapable of making the proper representations and certifications.</p> <p>5. Small Business Advocacy. Small business advocacy can play a large role in helping Congress understand the impact of Section 889 on small businesses. Small businesses need to contact their supporting trade/lobby organizations to voice their concerns.</p>
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Summary of Recommendations to Make Section 889 Less Burdensome

Detailed Recommendations	
	<ol style="list-style-type: none"> 1. <i>Limit the application of Section 889 to the transmission of sensitive information.</i> 2. <i>Make businesses responsible only for data transmission once it reaches the business’s environment or some identified jurisdiction.</i> 3. <i>For software, GSA should consider the idea of having a “bill of materials” just as you would for a piece of equipment.</i> 4. <i>GSA could go to the regulations used to implement the Foreign Investment Risk Review Modernization Act (FIRRMA) pilot program and use the NAICS codes as a basis for defining critical technology. This effort could align with the Department of Commerce’s effort to define emerging and foundational technology. A coordinated government effort will help to inform the new FIRRMA regulations which should inform 889. Consistency will produce compliance.</i>

5. *The Cybersecurity Maturity Model Certification (CMMC) may serve as a good example of how to implement allowable costs for compliance. It also serves a model for setting levels of certification. It requires that every business that wants to do business with a particular business attain a certain level of certification. For a particular RFP, you need to certify at a certain level of compliance - go or no go. A similar approach would help businesses determine how low they need to go in their supply chain and will inform their mitigation plan. This potentially has its challenges, since disclosing such a certification may open businesses to being targeted by bad actors.*

6. *The Government should issue the regulations associated with the Supply Chain Executive Order, which are overdue, as soon as possible. If a business needs to replace equipment and the only options come from China, the business cannot act until they verify that the regulations allow continued purchases of such equipment from China. Delays make it difficult to comply with the first prohibition.*

7. *The Government needs to provide a complete list of the affiliates of the named Chinese businesses in the statute.*

8. *The Government would be best served providing a list of equipment that potentially contains “substantial” components.*

9. *The Government should provide “safe harbor” requirements that protect businesses from criminal liability.*

10. *The Government established Section 889 without providing sufficient clarity on the prohibition or adequate time to comply and adjust their supply chain and systems as necessary to do business with both the federal government and the private sector.*

11. *To ensure an effective implementation, the government might consider delaying implementation and executing a comprehensive awareness campaign at the regional level. It is clear that industry needs more time, better awareness and communication around definitions and applicability.*

12. *Sales should be excluded from the definition of the term “use” in Part B.*

13. *Rebrand the name used to describe the content of the statute as “Section 889” does little to show the relevance to industry of the content of the prohibitions and, as a result, many contractors are unaware of the prohibitions’ potential impact on them.*