September 14, 2020

Dr. Michael E. Wooten
Administrator
Office of Federal Procurement Policy
Office of Management and Budget
Washington, DC 20503

Subject: Interim Rule—Federal Acquisition Regulation: Prohibition on Contracting With Entities Using Certain Telecommunications and Video Surveillance Services or Equipment (FAR Case 2019-009)

Dear Administrator Wooten:

The U.S. Chamber of Commerce welcomes the opportunity to comment on the joint Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) interim rule (IR or the rule), which amends the Federal Acquisition Regulation (FAR) to implement section 889(a)(1)(B), commonly referred to as part B, of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (P.L. 115-232).[1]

The IR, which applies to all contracts, is creating significant uncertainty and regulatory hurdles for American businesses across multiple sectors due to the part B prohibition and the ambiguities in the NDAA and the IR. The Chamber wants to partner with DoD, GSA, NASA, and other executive agencies to strengthen the rule to ensure U.S. security and the competitiveness of American industry in international markets. At the same time, agencies need to collaborate among themselves, with the business community, and with lawmakers to write a rule that responsibly reflects today's practical commercial and security realities. Policymakers are urged to develop a flexible and an appropriately scoped rule alongside industry to mitigate the unprecedented costs that it is expected to impose on federal contractors.

The Chamber does not attempt to address each question in the rulemaking, which seems targeted to individual contractors. Instead, we offer input on key themes and specific issues that tend to be emphasized by several business organizations.

Key Points

- U.S. industry shares policymakers' national and economic security goals underlying section 889, including taking costly actions to limit the presence of covered suppliers in its digital infrastructure.

- The incredibly expansive and complex IR, which was published on July 14, 2020, leaves many issues unresolved, particularly the future breadth of the program and the definitions of certain words and phrases.

- American businesses could soon face unrealistic compliance burdens, undermining their ability to successfully compete against foreign companies and/or pushing them to choose between doing business abroad and doing business with the U.S. government. Policymakers need to scope the rule in a manner that responsibly reflects today's business and security realities.

- The Chamber urges the administration and Congress to add language to the COVID-19 phase 4 package or the FY 2021 NDAA that suspends the implementation of part B until August 13, 2021. Part B went into effect on August 13, 2020.

- Agencies need to exercise their authority in ways that provide *flexible guidance* to contractors without instituting check-box approaches to compliance that needlessly burden industry. Congress may need to work with industry on substantive improvements to section 889.

- If fully implemented, part B and the resulting IR could harm federal agencies' ability to procure the essential goods and services they need to promote our nation's well-being, while putting added financial pressure on businesses that are struggling to rebound economically and keep the coronavirus pandemic in check.

1. PART B AND THE IR: SEVERAL CHALLENGES NEED TO BE ADDRESSED BY GOVERNMENT AND INDUSTRY

The IR raises many questions and policy issues that need to be worked through thoughtfully between agencies and industry.[2]

Industry groups need more time to review and comply with the rule. The FAR Council acknowledges in the IR that it lacked sufficient time to publish the IR within 60 days before August 13, 2020, including completing a full public comment period prior to the rule becoming effective. It can take businesses several months to work with their suppliers to rip and replace equipment or services—and at great cost.[3] The FAR Council also recognizes that the "expansiveness and complexity" of part B required substantial up-front analysis. To be fair and achieve constructive long-term outcomes, the business community deserves equal consideration on timing. Industry opposes the rulemaking being issued in interim form. Business groups have pressed the administration for many months to issue the part B mandate as a proposed rule.

The term "offeror" needs to be narrowly defined. According to the IR, "The term offeror will continue to refer to *only the entity that executes the contract*" [italics added], which is constructive.[4] Section 889 does not refer to an offeror; it refers to an "entity," albeit undefined. The IR does not define an "offeror." Still, "offeror" is helpful to industry because it focuses the inquiry on the prime contractor and excludes affiliates, parents, and/or subsidiaries, which tracks with industry's requested definition of "entity." (See the appendix regarding definitions.)

It's concerning to the Chamber that the FAR Council is considering expanding the scope of the part B prohibition to apply to the "offeror and any affiliates, parents, and subsidiaries of the offeror that are domestic concerns. …"[5] We believe that Congress should amend section 889 to define "entity" to "not include any parent, subsidiary or affiliate of such entity." Equally important, the Chamber contends that the FAR Council should not expand the rule to affiliates, etc. Such an expansion would dramatically increase industry's compliance burdens, broadening the scope of a procurement law that is focused on the use of covered equipment or services by prime contractors. An expanded rule would adversely affect contractors' nongovernmental work and encompass countless additional business organizations, many of which have no connection to the federal government or its networks and information systems beyond their connection to an offeror. The Chamber strongly contends that term "offeror" should continue to refer to the entity that executes the contract.

The rule needs to say that the part B procurement prohibition will not flow down, including to affiliates, parents, and/or subsidiaries. The IR says that the part B procurement prohibition "*will not flow down* because the prime contractor is the only 'entity' that the agency 'enters into a contract' with, and an agency does not directly 'enter into a contract' with any subcontractors, at any tier" [italics added].[6] Part B does not apply to subcontractors; the rule for part A already contains a flow-down clause governing all subcontractors. But, to a certain extent, the IR suggests a flow-down requirement because of the double-uses problem in statute that could apply to a prime contractor. The rule needs to clearly say that the part B procurement prohibition "will not flow down, including to affiliates, parents, and/or subsidiaries, because the prime contractor is the only 'entity' that the agency 'enters into a contract' with, and an agency does not directly 'enter into a contract' with any subcontractors, at any tier."

Also, the incorporation of part A and part B in FAR provisions 52.204-24 and 52.204-25, including eventually in 52.204-26 via the System for Award Management (SAM),[7] dramatically increases industry's regulatory burdens and uncertainty. Since the 52.204-25 prohibition under part A flows down to all subcontractors, considerable time is being spent by entities to push requirements to subcontractors and clarify requests from prime contractors. It is the Chamber's understanding that many companies are attempting to simply flow down the entirety of 52.204-25 without exclusions, which is spurring pushback and increasing negotiation time. Moreover, businesses are reportedly certifying compliance in one contracting area but not in others, creating rough-hewn responses that are difficult to manage as rapidly as the rule mandates. Hence, the IR's merger of parts A and B is causing much confusion throughout business supply chains as professionals respond to the rule's representations, certifications, and/or flow-down requirements. The rule would also be more effective if parts A and B of section 889 were implemented through separate FAR numbers.

"**Reasonable inquiry" needs to be defined to exclude the need for offerors to conduct an internal or third-party audit.** To implement part B, the IR requires "submission of a representation with each offer that will require all offerors to represent, after conducting a reasonable inquiry, whether covered telecommunications equipment or services are used by the offeror." The IR defines "reasonable inquiry" to mean an "inquiry designed to uncover any information in the entity's possession about the identity of the producer or provider of covered telecommunications equipment or services used by the entity that excludes the need to include an internal or third-party audit." The Chamber believes that the definition of "reasonable inquiry" should be bounded to *specifically exclude* the need for offerors to conduct an internal or third-party audit.

The "information in the entity's possession" provision is sweeping and needs to be narrowly tailored. The IR says, "An entity may represent that it does not use covered telecommunications equipment or services … if a reasonable inquiry by the entity does not reveal or identify any such use. A reasonable inquiry is an inquiry designed to uncover any "information in the entity's possession" about the identity of the producer or provider of covered telecommunications equipment or services used by the entity. A reasonable inquiry need not include an internal or third-party audit."[8] The Chamber maintains that the rule would be stronger and more useful to both agency and business stakeholders if it says that a reasonable inquiry *does not require* an internal or third-party audit.

Agencies need to reasonably interpret section 889, including in ways that do not conflict with other laws. Agencies need to create reasonable interpretations of section 889 so that industry compliance is not overly burdensome. What's more, it is critical that the IR does not conflict with other laws, such as ones governing the communications sector.

For example, the IR interprets section 889 prohibition in ways that could effectively put U.S. carriers at risk of being found in violation of the rule because they are following other U.S. laws and regulations. In particular, the exception in 889(a)(2)(A) allows the head of an 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." Congress included this exception out of practical necessity to enable the section 889 prohibition to exist alongside the routine traffic exchanges and interconnection arrangements that are necessary for global communications to function. U.S. telecommunications providers that enter these agreements have limited visibility into the use of covered products in peer networks. They also have no choice in the matter. American carriers are legally obligated to interconnect with (47 U.S.C. § 251) and offer voice and data roaming to (47 CFR § 20.12) other domestic providers that may have covered equipment or services in their networks or facilities. Also, U.S. providers must interconnect with foreign providers to facilitate the free-flow of international communications traffic and enable roaming to permit U.S. customers to use their wireless services when overseas.

Nevertheless, the FAR Council erroneously concludes in the IR that the rule of construction in 889(a)(2)(A) applies only in circumstances where the government is buying telecommunications services. In reaching this conclusion, the council assumes that Congress limited the backhaul exception to the government, which is not the case.

Section 889(a)(2) provides that "[n]othing" in section 889(a)(1) "shall be construed to … prohibit the head of an executive agency from procuring with an entity to provide a service that connects to the facilities of a third-party." Given that section 889(a)(1) includes both part A *and* part B, this statutory text and the overall structure of the FY 2019 NDAA make clear that Congress intended to permit heads of government agencies and service providers alike to interconnect and exchange telecommunications carriers with third parties without being deemed to "use" any covered products in such third-party networks.

At a minimum, section 889(a)(2)(A) is ambiguous whether it applies to contractors and should be interpreted through that lens. The council should revise its interpretation of this section of the statute with these considerations in mind.

Sec. 889(a)(2) of FY 2019 NDAA

(2) Nothing in paragraph (1) shall be construed to—

(A) prohibit the head of an executive agency from procuring with an entity to provide a *service* that connects to the facilities of a third-party, such as backhaul, *roaming*, or *interconnection arrangements*; or

(B) cover telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles [italics added].

***

52.204-25(c) Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment

(c) *Exceptions.* This clause does not prohibit contractors from providing—

(1) A service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or

(2) Telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.[9]

The rule also adopts a narrow reading of the term "service" in the rule of construction. The IR interprets service to mean the specific service that is being provided to agencies, as opposed to the general service (e.g., broadband and phone service) the entity (prime contractor) could provide to both agencies and private entities. The IR's interpretation of section 889 renders the exemption for carriers effectively moot, as well as contrary to communications law, due to the obligation of carriers to interconnect and roam with carriers that may have covered equipment or services. Thus, the rule puts nearly every U.S. carrier at risk of violating part B, absent a more rationale interpretation of the rule of construction or some limiting interpretation

of the term "use." Therefore, the Chamber urges agency officials to better align the section 889 prohibition and rule of construction with telecommunications carriers' legal and regulatory obligations.

Agency waivers are appreciated by industry, but they paper over substantial difficulties with the underlying law and rule. The IR provides a lengthy description of the agency waiver process. Any exercise of the authority is subject to significant statutory constraints, including—

- Granting entities a waiver on a one-time basis for a period of not more than two years.

- Mandating that an entity seeking a waiver must provide a "compelling justification" (which is not defined in statute and the IR).

- Requiring an entity to provide a "full and complete laydown" of the presence of covered equipment or services in the entity's "supply chain." ("Supply chain" is undefined in the IR and section 889 and could be construed by regulators to include practically anything. Indeed, "supply chain" implies that the "information in the entity's possession" standard for conducting a reasonable inquiry is abandoned in the context of a waiver request. Instead of providing a laydown of covered equipment in the entity's possession, the waiver requires information about the entity's supply chain, which entails pulling in third-party suppliers/subcontractors. It is important to note that the Chamber does not agree with the IR's apparently broad, extraterritorial reading of section 889.)

- Exercising waiver authority by the head of an executive agency rather than governmentwide.

The IR gives businesses insights into securing a waiver, but the waiver process is neither swift nor or easy for both applicants and regulators. The IR delineates between what the head of an agency is empowered to do regarding waivers and what options the Director of National Intelligence (DNI) has. The rule notes that DNI can grant waivers without time limits, and that this authority is "separate and distinct from that granted to an agency head."[10] The IR does not suggest that the DNI would leverage his or her authority to grant blanket waivers, which could make for a more effective agency waiver process. Notwithstanding DoD's targeted, temporary waiver, which was granted by the DNI until September 30, 2020,[11] the IR still applies to other executive agencies and much of industry. Most firms that do business with the government have little to no certainty about how to comply with the regulation owing to a hurried process.

As a practical matter, getting a waiver will be an extremely arduous process for small, midsize, and even large prime contractors. Many will likely be unable to meet the waiver requirements on the IR's prescribed timelines. Potential revisions to the regulation's waiver requirements could feature (1) the entity representing that it meets the section 889(a)(1)(A) requirements, (2) the secretary of Defense determining that the entity will not harm national security, and (3) the waiver is being issued in the interest of U.S. competitiveness.

The rule should identify a single federal source listing subsidiaries or affiliates of covered entities. FAR 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, defines covered equipment or services in keeping with section 889.[12] However, neither the FAR provision nor the IR provides contractors with a ready source that identifies the subsidiaries or affiliates of covered entities. There are a number of sources that list affiliates or subsidiaries of the covered entities, such as the Department of Commerce (DOC), but none appear both definitive and comprehensive. At the time of this writing, a cursory check of the SAM Excluded Parties List suggests that many of the covered companies are not listed. The Chamber thinks that it would be beneficial to all stakeholders if the rule was amended to identify a single U.S. government source for subsidiaries or affiliates. A logical candidate is the DOC. In turn, subsidiaries or affiliates should be included in the SAM Excluded Parties List.

Contractors welcome consistent, nonprescriptive multiagency guidance regarding compliance scenarios. The Chamber urges regulators to clarify their intentions regarding various compliance scenarios. For instance, how would agencies interpret "use" if a contractor is located in a multitenant facility, but the contractor does not control the use of covered equipment or services in common areas? Contractors need coordinated guidance from agencies that signals officials' compliance expectations without such guidance becoming rigid and/or prescriptive. It serves the objectives of both public and private stakeholders when conformity to a rule is as frictionless as possible.

To further emphasize the point, policymakers may not appreciate the limited ability of contractors to avoid using covered equipment or services when they don't own or control the facilities in which they operate. It is impractical to expect a contractor to compel a facility owner/manager to remove all covered equipment or services if that owner/manager is not (1) subject to the rule, (2) a U.S. contractor, and/or (3) a domestic concern. As much as contractors want to comply with the rule, it is not realistic for agency officials to expect them to purchase commercial real estate in a foreign country with the stipulation that the facility not contain or use any covered equipment or services.

Testing commercial products and services on covered equipment or services should not necessarily be considered "use." The IR does not directly address the testing of commercial devices and services against covered equipment or services. The Chamber holds that such testing should be considered outside the scope of the rule, particularly when such testing would not route or redirect user data. For instance, company ABC is a manufacturer of electronic consumer devices that use cellular networks around the globe. The company, similar to many of its peers, tests the devices' operational and software compatibility in a U.S. laboratory on a closed telecommunications network that does not route, redirect, or store customer data. The closed network uses covered equipment or services, but such use seems outside the intended letter and/or spirit of section 889. The Chamber believes that company ABC's testing activity should not in and of itself be covered and thus should be included in the IR's list of exceptions to the part B prohibition.

2. THE ADMINISTRATION AND CONGRESS NEED TO SUSPEND THE EFFECTIVE DATE OF PART B

Industry organizations urge the administration and Congress to add language to the COVID-19 phase 4 package or the FY 2021 NDAA that suspends the implementation of part B until August 13, 2021, which is consistent with the Office of Management and Budget's (OMB's) June 2019 recommendation to Congress to adjust the effective date of part B to August 13, 2022—a year later than the Chamber's request.[13] OMB officials argued that the additional time would help ensure the effective execution of section 889 "without compromising" policymakers' security objectives.

The U.S. contracting community shares policymakers' national and economic security goals underlying section 889 and is already taking costly actions to limit the presence of covered suppliers in its digital infrastructure. It is critical to highlight that protections targeting certain foreign-made gear have been initiated to conform with section 889(a)(1)(A), or part A, which went into effect on August 13, 2019. Part A bars agencies from procuring any equipment, system, or services that use covered telecommunications equipment or services as a substantial or essential component of any system—thus protections targeting certain foreign-made gear have been initiated.[14]

3. THE IR UNDERESTIMATES THE REGULATION'S EXTRAORDINARY COSTS

The rulemaking to implement part B was released on July 14, 2020—23 months after the enactment of the FY 2019 NDAA and 1 month prior to its effective date. The Chamber believes that it is unreasonable to expect industry to digest the rule's multiple mandates in a month, much less comply with them. The IR acknowledges that during the first year that part B is in effect, contractors and subcontractors will need to learn about the provision and its requirements as well as develop a compliance plan.[15] Some 60 words in legislation resulted in an 86-page regulation that is estimated to cost government and industry *tens of billions of dollars* in compliance expenses.[16] The IR is likely to be one of the most expensive acquisition/supply chain regulations ever enacted.[17]

Estimated Cost of Rule to Contractors Is High and Likely to Increase[18]		
	FAR Council estimate[19]	**Real-world cost**
Total cost of the rule in year 1	$12 billion	TBD
Total cost of the rule in year 2 and each subsequent year	$2.4 billion	TBD

The FAR Council estimates that the rule will cost contractors $12 billion in the first year of implementation and $2.4 billion in each subsequent year. These conservative cost projections are incredibly large on their own. The Chamber's experience suggests that these numbers may substantially underestimate of the real costs that agencies and businesses will grapple with in the coming years, absent significant improvements to the IR and section 889. Critically, the $12 billion and $2.4 billion costs do not factor in a substantial portion of contractors' requirements under the rule, which will be the most time-consuming elements of implementation.

Agencies recommend that contractors' compliance plans feature six parts—and yet half of their costs are not accounted for, which should be unacceptable to policymakers.

- Review and understand the rule, including compliance actions.
- Establish corporate policies and tracking tools to conform to the rule **(unaccounted for)**.
- Complete companywide education compliance training.
- Remove and replace equipment or services to be eligible for a federal contract **(unaccounted for)**.
- Complete the representation to the government whether the offeror uses covered equipment or services, including alerting the government during contract performance.
- Develop a "full and complete laydown" to support waiver requests **(unaccounted for)**.

The Chamber believes that the IR's cost estimates are inadequate, especially in relation to the sprawling aims of section 889. The parts of the IR's compliance plan that are the most expensive and significant to organizations are incomplete and shouldn't be neglected simply to finalize the rule. The administration should hold the comment period open, including suspending the IR's effective date, to receive public data on the compliance regime, which deserves thoughtful scrutiny by public and private stakeholders.

4. FEDERAL CONTRACTING CHALLENGES ARE AVOIDABLE

Government and industry have a mutual interest in resetting the effective date of part B to avoid a potential federal contracting crisis, which would disadvantage communities across the U.S. The part B prohibition applies to every sector and every dollar amount. All contracts will be impacted by part B.[20] Left unaddressed, part B could harm federal agencies' ability to procure the essential goods and services they need to promote our nation's well-being—such as autos, health care, civil and military defense systems, information technology (IT) and communications, financial services, and transportation—while putting added financial pressure on businesses that are struggling to rebound economically and keep COVID-19 in check.

American businesses could soon face unrealistic compliance burdens, undermining their ability to successfully compete against foreign companies and/or pushing them to choose between doing business abroad and doing business with the U.S. government. Policymakers need

to scope the rule in a manner that responsibly reflects today's business and security realities. The Chamber believes that the administration needs to work with lawmakers to suspend implementing part B to safeguard supply chains and prevent possible contracting challenges.

5. THE DOUBLE-'USES' PROBLEM MAY REQUIRE CHANGES TO THE LAW

Congress may need to work with industry on substantive changes to section 889 that cannot necessarily be rectified through the rulemaking process. Part B bans agencies from contracting with a provider that "uses"—a term that is not defined in law or regulation—any covered equipment or services in its supply chains, even if the provider does not know the covered technology is being used for governmental or commercial work. Difficulties with "uses" run through the entire rule, which can only be remedied through congressional action unless regulators can consistently foster a flexible regulatory environment.[21]

The Double-"Uses" Problem

Sec. 889. Prohibition on certain telecommunications and video surveillance services or equipment. (excerpts)

Prohibition on Use or Procurement. (1) The head of an executive agency may not—

> (A) procure or obtain or extend or renew a contract to procure or obtain 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; or
>
> (B) 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 [italics added].

6. CONGRESSIONAL FUNDING IS NEEDED FOR RIP AND REPLACE PROGRAMS

The Chamber urges the administration to work with Congress to fully fund the Secure and Trusted Communications Networks Reimbursement Program to advance core objectives of section 889 and the IR. The program, which is administered by the Federal Communications Commission (FCC), is expected to assist U.S. firms in removing vulnerable equipment and replace it with more secure and trusted alternatives. It is noteworthy that the program is authorized at $1 billion under the bipartisan Secure and Trusted Communications Networks Act of 2019 (P.L. 116-124), yet the FCC announced on September 4, 2020 that the reimbursements could cost double this amount. An FCC statement says, in part—

> Based on data Commission staff collected through the information collection, all filers report it could cost an estimated $1.837 billion to remove and replace Huawei and ZTE equipment in their networks. Of that total, filers that appear to initially qualify for reimbursement under the Secure and Trusted Communications Networks Act of 2019 report it could require approximately $1.618 billion to remove and replace such

equipment. Other providers of advanced communications service may not have participated in the information collection and yet still be eligible for reimbursement under the terms of that Act.[22]

The administration and Congress should plan to fund this reimbursement program in line with the expected requirements imposed on industry. Similarly, Congress should enact and fully fund the Public Wireless Supply Chain Innovation (R&D) Fund and the Multilateral Telecommunications Security (MTS) Fund. The Chamber applauds the inclusion of the R&D Fund and the MTS Fund in section 1092 of the Senate FY 2021 NDAA (S. 4049). These funds would promote U.S. leadership, competitiveness, and supply chain security in 5G, a critical backbone for future economic growth. The R&D Fund would provide grants to companies to develop and deploy Open RAN—or open radio access networks—technologies, while the MTS Fund would support the global development and deployment of secure and trusted telecommunications in consultation with America's foreign partners.

The Chamber urges lawmakers to adopt the R&D Fund and the MTS Fund authorization levels (i.e., $750 million per fund) that were included in section 501 of the reported version of S. 3905, the Intelligence Authorization Act for FY 2021, in the final FY 2021 NDAA.[23] These spending levels would provide a critical starting point to ensure U.S. leadership in 5G. However, these funds should be replenished over time to address the long-term needs of the telecommunications industry in leveling the playing field for trusted and secure equipment worldwide. At the time of this writing, Congress has not passed legislation funding the program.[24]

***

The Chamber appreciates the opportunity to provide DoD, GSA, and NASA substantive feedback on the IR. If you have any questions or need more information, please do not hesitate to contact Christopher Roberti (croberti@uschamber.com, 202-463-3100) or Matthew Eggers (meggers@uschamber.com, 202-463-5619).

Sincerely,

Christopher D. Roberti
Chief of Staff
Senior Vice President, Cyber, Intelligence, and Security

Matthew J. Eggers
Vice President, Cybersecurity Policy

Cc: Kim Herrington[25]
Acting Principal Director, Defense Pricing and Contracting
Department of Defense

Washington, DC 20301
kim.herrington2.civ@mail.mil

Monica Y. Manning
Assistant Administrator for Procurement
NASA Headquarters
Washington, DC 20546
monica.y.manning@nasa.gov

Jeffrey A. Koses
Senior Procurement Executive
General Services Administration
Washington, DC 20503
Jeffrey.Koses@gsa.gov

***

Appendix: Recommended Definitions

The proposed definitions below are taken from an industry paper[26] and redlines to section 889 of the FY 2019 NDAA[27] that the Chamber and several business groups briefed the OMB and other agencies on June 2, 2020.

Entity

"The term 'entity' does not include any parent, subsidiary or affiliate of such entity."

Use

"The term 'use' means use that is—
(i) by an entity;
(ii) in the United States; and
(iii) in fulfillment of the contract."

System

"The term 'system' means a system used in fulfillment of the contract."

Fulfillment of the contract

The wording "fulfillment of the contract" refers to "[E]quipment, services, or systems are used 'in fulfillment of the contract' if they are required for the performance of services under the contract or the furnishing of a product under the contract."

Substantial or essential component

"Substantial or essential component refers to any component used in the fulfillment of the contract that is necessary for the proper function or performance of a piece of equipment, system, or service."

The Chamber notes that FAR 52.204-25 defines "substantial or essential component" to mean "any component necessary for the proper function or performance of a piece of equipment, system, or service." Numerous industry organizations have a BYOD—bring your own device—policy that allows employees to use personal smartphones and tablets to conduct business. It is not clear from the FAR definition of "substantial or essential component" whether these devices meet the definition. The Chamber recommends that the clause be revised to *explicitly exclude* personal or BYOD devices, including smartphones, tablets, home routers, as part of "substantial or an essential component." It is impractical for companies to determine with a high degree of certainty whether personal devices are manufactured by or contain components from covered entities.

Endnotes

[1] Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) interim rule (IR), "Federal Acquisition Regulation: Prohibition on Contracting With Entities Using Certain Telecommunications and Video Surveillance Services or Equipment," *Federal Register* (FR) 42655–42679 July 14, 2020. https://www.federalregister.gov/documents/2020/07/14/2020-15293/federal-acquisition-regulation-prohibition-on-contracting-with-entities-using-certain

https://www.congress.gov/bill/115th-congress/house-bill/5515

[2] See the industry paper (version 2) briefed to administration officials on June 2, 2020. The document recommends ways to clarify and strengthen the rulemaking, including certain definitions and concepts. https://www.reginfo.gov/public/do/eo/eomeetingrequest?id=wy-7_qN8uVaB2FCYOFGB0snKUiJ-4qYHggDLMg15udIoMkrK-b7vmQkH5deKsfH3rYn0Q15GmjMIxsV89RRx4Glk6ArRm6Q3ZzVopac

https://www.uschamber.com/sites/default/files/johnson_amdt_to_s_4049.pdf

[3] FR 42666–42670.

[4] FR 42666.

[5] Ibid.

[6] Ibid.

[7] DoD, GSA, NASA IR (part 2), "Federal Acquisition Regulation: Prohibition on Contracting With Entities Using Certain Telecommunications and Video Surveillance Services or Equipment," FR 53126–53134, August 27, 2020.

https://www.federalregister.gov/documents/2020/08/27/2020-18772/federal-acquisition-regulation-prohibition-on-contracting-with-entities-using-certain

[8] FR 42667.

[9] https://www.acquisition.gov/far/part-52#FAR_52_204_25

[10] FR 42688.

[11] "Pentagon wins brief waiver from government's Huawei ban," *Defense News*, August 14, 2020. https://www.defensenews.com/congress/2020/08/14/pentagon-wins-brief-waiver-from-governments-huawei-ban

Section 889(d)(2) provides the Director of National Intelligence (DNI) with authority to grant a waiver to the head of an agency regarding the prohibition contained in section 889 if the waiver is in the national security interest of the U.S. The DNI's waiver authority is distinct from the authority of an agency head to provide a waiver under section 889(d)(l) and can be exercised at the DNI's sole discretion.

[12] https://www.acquisition.gov/far/part-52#FAR_52_204_25

[13] https://www.uschamber.com/sites/default/files/200715_coalition_sec.889delay_congress.pdf
https://www.whitehouse.gov/wp-content/uploads/2019/06/Pence-Proposal.pdf

https://www.uschamber.com/sites/default/files/8-21-20_selected_cyber_priorities_conferees_fy21_ndaa_working_final.pdf

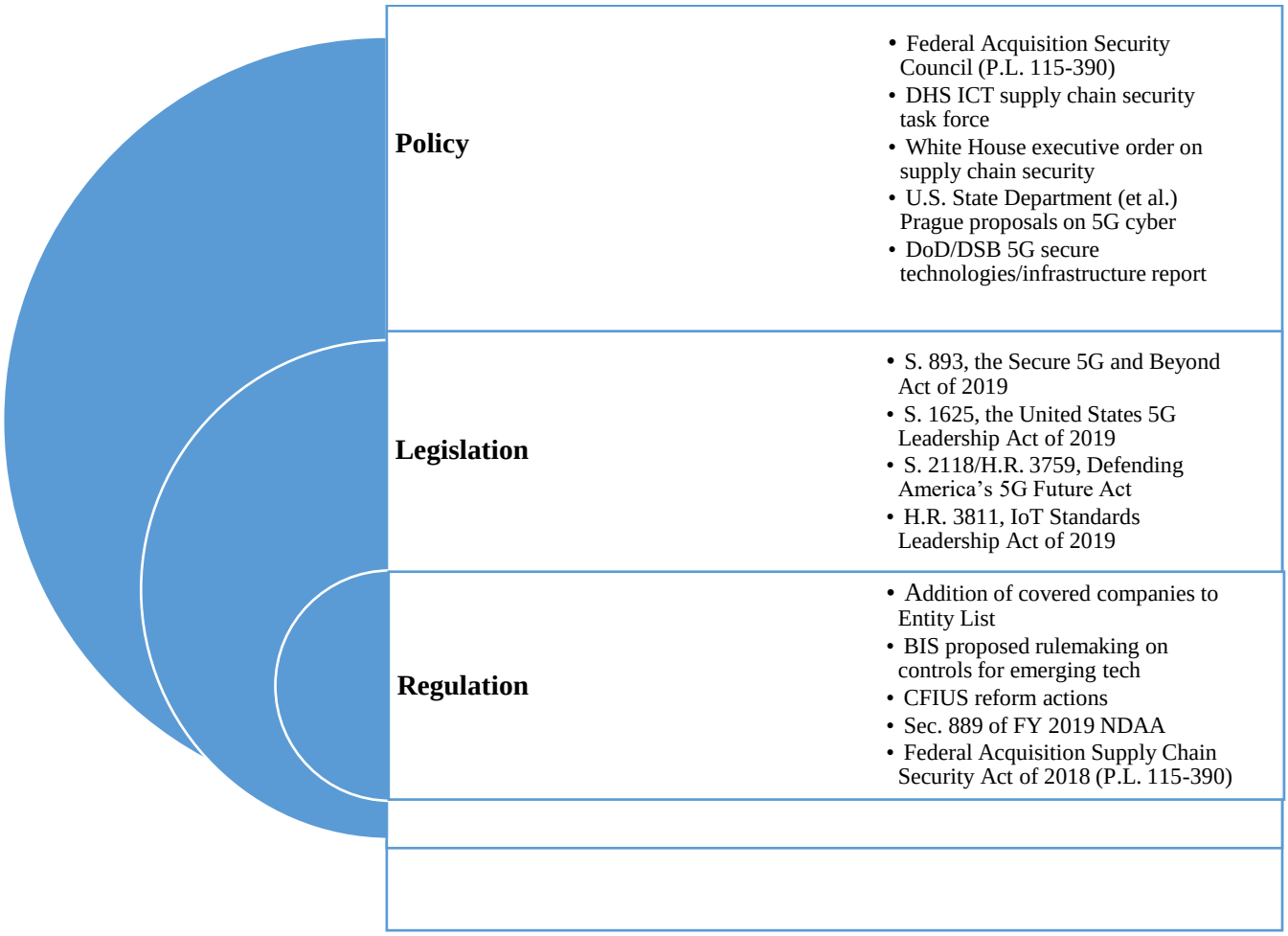
"McConnell Announces Senate Will Vote on Targeted COVID-19 Relief," September 8, 2020. https://www.republicanleader.senate.gov/newsroom/press-releases/mcconnell-announces-senate-will-vote-on-targeted-covid-19-relief

[14] Section 889, part B, of the FY 2019 NDAA, covers certain telecommunications equipment or services produced or provided by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of these entities) and certain video surveillance products or telecommunications equipment or services produced or provided by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of these entities).

[15] FR 42669.

[16] https://acquisition.gov/FAR-Case-2019-009/889_Part_B

[17] The IR doesn't factor in the dozens of policy, legislative, and regulatory security issues that relate to or overlap with supply chain security matters that are beyond the scope of this letter. A sampling is provided in the Chamber's August 2019 letter to the Bureau of Industry and Security regarding the agency's May 2019 rule that applied the Temporary General License to certain categories of transactions between U.S. businesses and the covered companies/entities.
https://www.uschamber.com/sites/default/files/190816_comments_tglextension_bis_final_v1.0.pdf



[18] FR 42672.

[19] The IR refers to DoD, GSA, and NASA as the "signatory agencies" that developed the estimated the rule's costs, FR 42670.

[20] https://content.govdelivery.com/attachments/USGSA/2020/07/15/file_attachments/1496370/Industry%20Focused%20Section%20889%20Flyer.pdf

[21] The employment of "uses" twice in part B has created major issues concerning the interpretation and scope of part B. The provision bans federal agencies from contracting with any entity that uses any equipment, system, or service that uses covered equipment or services as a substantial or essential component. This arrangement could have the following consequences as shown in these hypothetical examples:

- Company A is an IT company with a sales office in the U.K. The company uses a shipping vendor, such as the Royal Mail, to ship its products. The Royal Mail notionally uses covered equipment in its enterprise networks. Company A could be barred from selling to the U.S. government.

- Company B is a manufacturer of personal protective equipment (PPE) with operations in the U.S. and Southeast Asia. The overseas division obtains network service for its Asian plant from a local provider that uses covered gear. Company B could be banned from selling to the U.S. government.

- Company C is a pharmaceutical company with a drug manufacturing plant in India. The company provides its Indian employees with cell phone service through an Indian internet service provider such as Bharti Airtel. Bharti Airtel uses covered equipment. Company C could be prohibited from selling to the U.S. government.

[22] Federal Communications Commission (FCC), "FCC Releases Results of Supply Chain Data Request: Identifies Carriers with Huawei and ZTE Equipment and Services in Their Networks," September 4, 2020.
https://docs.fcc.gov/public/attachments/DOC-366702A1.pdf

[23] Section 501 of S. 3905 refers to the Public Wireless Supply Chain Innovation Fund in S. 4049 as the Communications Technology Security and Innovation Fund.
https://www.congress.gov/bill/116th-congress/senate-bill/3905

https://www.congress.gov/116/crpt/srpt233/CRPT-116srpt233.pdf, p. 8.

Also see H.R. 6624. the USA Telecommunications Act.
https://www.congress.gov/bill/116th-congress/house-bill/6624

[24] https://www.commerce.senate.gov/2020/3/president-signs-rip-and-replace-bill-into-law

See the Chamber's June 25, 2020, letter to the National Telecommunications and Information Administration on the *National Strategy to Secure 5G*, especially p. 7.
https://www.uschamber.com/sites/default/files/200625_comments_nationalstrategytosecure5g_commercedept1.pdf

[25] Federal Acquisition Regulatory (FAR) Council members.
https://www.acquisition.gov/far-council-members

[26] https://www.reginfo.gov/public/do/eo/eomeetingrequest?id=wy-7_qN8uVaB2FCYOFGB0snKUiJ-4qYHggDLMg15udIoMkrK-b7vmQkH5deKsfH3rYn0Q15GmjMIxsV89RRx4Glk6ArRm6Q3ZzVopac

[27] https://www.uschamber.com/sites/default/files/industry_889_redline_6-3-2020.pdf