

2019 NATIONAL DEFENSE AUTHORIZATION ACT, SECTION 889 Q&A

Q. When does the rule kick in?

A. It's already kicked. The representation requirement (FAR 52.204-24) and the sale prohibition (FAR 52.204-25) went into effect in August 2019. The use prohibition goes into effect in August 2020. The FAR Council will issue a proposed rule for public comment on the use prohibition at some point in early 2020. That doesn't give us a lot of time to figure out whether we will be able to meet the representation requirement that almost certainly will come along with the new prohibition.

Q. How do I comply with Part A?

A. While compliance with Part A is not easy or inexpensive, it is doable. We need to attack it like we attack any of the Government's other supply chain regulations. Indeed, it's not unlike the TAA in that respect. OEMs need to secure representations from their component suppliers and develop a system to identify and evaluate covered components. Non-manufacturing primes need to secure representations from their OEMs/distributors. Service providers need to secure representations from their subcontractors. If you determine some of the products you sell incorporate covered technology, then you need to respond affirmatively to the 52.204-24 certification and provide the Government additional information. You also will have to make an assessment of whether the incorporated technology constitutes a "substantial or essential" part of the product.

Keep in mind, notwithstanding our reference to the TAA above, you CANNOT use your current TAA reps to satisfy your Part A obligations. A product can meet the Substantial Transformation test of the TAA, but still incorporate covered technology, and, thus, be prohibited under the new rule. You will need a targeted rep to cover your Part A obligations.

If you are a reseller of multiple products, some of which incorporate covered technology and some don't, then you will need to develop a process (as you probably already do for the TAA) that ensures the Government receives only compliant products.

One final word on this topic — be wary of companies who too quickly sign certs/reps. Many of us have had experiences with entities — often smaller entities — who pay no attention to the reps we request of them and express an irrational willingness to sign anything put in front of them. While, as discussed below, the law supports a company's ability to rely on the representations of its subcontractors and suppliers, that protection fades when such reliance is unreasonable.

Q. Does Part A prohibit the sale of products that incorporate any Huawei et al. technology, no matter how minor?

A. The prohibition speaks in terms of technology that comprises a “substantial or essential component of any system” or “critical technology as part of a system,” but we don’t view that language as providing a particularly meaningful limitation for two reasons.

- First, while the sales prohibition (FAR 52.204-25) incorporates this language, the representation provision (FAR 52.204.24) does not. The representation provision asks whether the contractor will provide any “covered telecommunications equipment or services to the Government in the performance of any contract, subcontract, or other contractual instrument” Notably, the representation is NOT limited to situations where the technology is “substantial or essential.” Instead, the representation captures any product that incorporates telecommunications equipment produced by Huawei et al.
- Second, we are not sure how it will be decided what Huawei et al. component is substantial or necessary — especially since the FAR definition of “substantial or necessary” is “any component necessary for the proper function of or performance of a piece of equipment, system, or service” — a definition that is quite broad and annoyingly circular.

Q. What if I’m a service provider? How does Part A apply to me?

A. The rule applies to services just as it applies to products. If you are a service provider, you need to ensure you are not providing covered technology in support of your services. For example, a company providing guard services needs to be sure it is not using surveillance cameras that incorporate covered technology. Similarly, a hospital providing medical services to veterans will have to be sure it is not using health monitors that incorporate covered technology. And if you are leasing property to the Government that includes telephone service, you need to determine whether the phones incorporate covered technology.

Q. Does the new rule apply to vendors or just subcontractors?

A. If only the FAR made such a distinction all our lives would be easier. But it does not. We almost had a useful distinction between “subcontractor” and “vendor” in last year’s NDAA, but the language was stripped from the bill before it was passed. Thus, we are left with the FAR’s very broad definition, and, thus, very broad flow-down obligations. But even if we could make such a distinction, we’re not sure it would matter. Remember, Part B, which goes into effect August 2020, applies to a company’s USE of covered technology. Thus, companies ultimately will want to flow down some sort of representation provision in most every agreement they enter into anyway.

Q. Didn’t GSA issue a FAR deviation to make life easier for Schedule contractors?

A. Yes and No. GSA did issue a FAR deviation. The resulting GSAR provision removes the order-level representation obligation for certain low-risk Schedules. But the deviation leaves in place the contract-level representation. Thus, the need for robust internal controls remains the same whether the deviation applies or not.

Q. How do I comply with the Part B USE provision?

A. That's not an easy question. While many contractors have built up robust compliance programs to identify and track various products and components throughout our supply chains, fewer have systems in place to identify the USE of covered technology outside a government contract. Indeed, we'd venture a guess that few know whether their copiers, laptops, thermostats, routers, phones, or cars incorporate covered technology. (And let's not even get into what the foreign offices are using, which also is covered by the plain language of the rule.) Nonetheless, unless Congress changes the law, we're going to have to find a practical way to figure all that out.

Unfortunately, the Government has not given us a list of products incorporating covered technology. (And they haven't given us a full list of Huawei and ZTE affiliates) We suppose it's possible the Government ultimately offers industry some help in this area once it receives comments on the forthcoming Interim Rule, but at this point, we're on our own. Accordingly, we propose a risk-based approach:

- First, categorize indirect purchases by risk (e.g., the purchase of a hammer is low risk; the purchase of a thermostat may be medium risk; the purchase of a router likely is high risk, etc.).
- Second, develop a standard, written, risk-based process for evaluating the content of the various products. Perhaps the policy calls for no steps with respect to low-risk items, a basic representation for medium risk items, and a representation coupled with additional due diligence for high risk items. Whatever the approach, it should be memorialized in writing and applied consistently.
- Third, engage your Purchasing Department to figure out the sources of the medium and high risk items. Prepare an inventory of indirect purchases similar to the process most of us already use for direct subcontract purchases.
- Fourth, solicit the necessary representation from the appropriate manufacturers. Ensure a process is in place to track the requests and the responses.

We'd probably also come up with a list of easy "no go" items and share that list not only with Purchasing, but with everyone in the Company with any purchasing authority.

We know this won't be easy, and the steps above really are just meant to serve as a starting point to get us all thinking about what an effective internal control system might look like.

Q. Is it enough just to flow down the applicable FAR and GSAR clauses and be done with it?

A. Probably not. While industry has some good case law on its side that reasonable reliance on an OEM's or distributor's certification can defeat the recklessness component of an FCA case (see [GovPlace](#)), those cases are limited to the contractor's "reasonable" reliance. Thus, securing representations from companies that you have some reason to believe are not putting the time in to ensure an accurate representation likely will not give you the protection you are hoping

for. On the other hand, representations from companies secured as part of a risk-based compliance program will be very valuable against an audit, investigation, or FCA law suit.

That all being said, you do need to flow-down the new FAR clauses as a minimum element of your compliance plan. The FAR 52.204-25 clause is a mandatory flow down clause now, and there is no exception for purchases below the simplified acquisition threshold, the micro-purchase threshold, commercial items, or COTS.

Q. How will Section 889 intersect with the forthcoming Section 846 online marketplace?

A. That is an open question at this point, but we think it will cause GSA significant problems. To date, GSA (and the primary supporters of the 846 online marketplaces) have taken the position that most rules do not apply to marketplace purchases because they all will be under the micro-purchase threshold. GSA also seems to be taking the position that the marketplace provider is not the prime contractor, and, thus, not responsible for compliance. GSA now will be faced with a new problem. The 889 rules clearly apply to COTS and clearly apply under the MPT. Thus, the marketplace provider will have to find a way to facilitate compliance with 889. (If you want more info on 846, you can check out our blogs on the subject [here](#) and [here](#).)

Moreover, GSA has a philosophical problem on its hands. Technology from Huawei et al. either presents a national security risk or it does not. We have no reason to doubt Congress's finding that it does. But if it does, then it makes no sense to carve out a federal contracting loophole for Section 846 purchases. This reality will pose a new risk for whatever company takes on the role of GSA's eCommerce platform provider.

Q. Does the 2020 Part B rule actually cover products I use wholly unrelated to my federal contracts?

A. The language of the statute itself makes it pretty clear that it does. And GSA certainly is reading it that way. Many questions from the attendees at the Industry Forum, however, suggest industry still has not come to grips with the scope of the forthcoming rule. Think about how many things in your office might contain covered components. Obviously, your computers, phones, printers, surveillance systems, and security systems might, but the list goes well beyond those items. As written, the rule could cover your thermostat, the cars in your fleet, your copiers. If you're in the health care field, what about the medical devices that share patient information with health care providers? If you're a hospital, what about the machines that alerts a nurse medication needs refilling, or that monitor the prescription cart in the hall outside the patient's room? If you're a construction company, what about the communication technology in your cranes? If you're a software OEM, what about the computers on which your people across the globe write their code? If you're a bank or credit card company, what about your ATMs and point of sale devices? The answer to all of these questions seems to be yes, Section Part B probably does cover those items, *whether or not you use them on a federal contract*.

Q. If I'm a distributor, does the rule preclude me from selling Huawei et al. equipment in the commercial marketplace?

A. Technically, no, but the regulations may make it harder to do so as a practical matter. As discussed, Section 889 prohibits the purchase of covered technology by the Government and (in 2020) prohibits the Government from contracting with a company that uses covered technology. But the rules do not cover the sale of covered technology in the commercial marketplace. So it seems you still can have covered products on your shelves to sell commercially so long as you don't sell it to the Government (directly or indirectly) or use it. (We suppose one could argue the sale of such products commercially is a "use," but we think that's a stretch and, if that's what Congress intended, it easily could have made that the rule.). That being said, we suspect many companies simply will decline to carry covered products to reduce the compliance burden of having to segregate covered products from acceptable products to ensure no errant delivery to a Government customer.

Q. Will the rule have an impact on small businesses?

A. Most likely. Several of the other panelists at the Industry Forum expressed concern over the impact of the rule (both Part A and Part B) on small businesses. A few members of the public expressed similar concerns. Frankly, we think they are right, but probably for different reasons. The primary concern expressed during the event was on the cost of compliance. But what we think actually will happen is that large businesses (OEMs, Systems Integrators, etc.) will be less likely to do business with untested entities because the risk is just too high. They simply will not trust their representations. Consequently, buyers will gravitate to the tried and true suppliers, distributors, and OEMs even where the cost is higher.

Q. What is the consequence of non-compliance?

A. As a strictly contractual matter, the failure to submit an accurate representation or the failure to provide acceptable products constitutes a breach of contract, that can lead to cancellation, termination, and a host of financial consequences. As with every other supply chain rule (like the TAA), however, the primary fear here is a False Claims Act allegation. And while the government may be inclined to give contractors an adjustment period before opening intrusive audits and investigations, plaintiffs lawyers will not be so generous. But even if such suits do not materialize at the outset, remember how the enforcement of the TAA evolved over time. Prior to 2003, GSA couldn't even spell TAA and paid no real attention to the COO rules. But then one small office products company brought a lawsuit against all the large office products companies. That lawsuit led to 200 subpoenas issued by the GSA OIG to companies in the office products and IT industries. That new focus generated significant attention from the qui tam bar, which resulted in multiple multi-defendant law suits (e.g., [Crennen](#) and [Sandager](#)).

Q. This whole thing is going to cost me a lot of money. Are my costs recoverable from the Government?

A. It depends. If you are performing cost reimbursement work for the Government, then your compliance costs likely are recoverable (in part) as part of your normal indirect cost recovery

process. If you are doing fixed-price work, on the other hand, then you do not have a means for cost recovery. To the extent the new obligations cause you to increase the price of your goods or services overall, you may be able to seek an EPA through the normal contracting channels. But remember, there are a number of constraints on EPAs, and contracting officers are not overly generous in granting them.

Q. What can I do to protect myself?

A. As noted above, we think about the Part A rule a little like we think about the TAA. OEMs need to secure meaningful representations from their suppliers. Distributors and resellers need to secure meaningful representations from their manufacturers and distributors. But remember, you soon will need a process that encompasses the things you buy for internal use. This suggests it makes sense to cast a wide net early on when identifying and reaching out to vendors. While you may not need to worry about the company that makes the stapler you use or resell, you very well might need to worry about the company that makes the thermostat, car, printer, copier, laptop, ATM, or medical device you use or resell.

We also suggest making sure you have a robust process for soliciting and securing updated certifications — at least annually. We've handled cases where the core of the plaintiff's argument was that the prime was reckless in not ensuring it had updated certifications from its OEMs.