

# Section 889 Part B Redux: What Are Contractors' Compliance Obligations in 2021?

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In July 2020, the Federal Acquisition Regulation (FAR) Council published the interim final rule implementing Section 889(a)(1)(B) (Section 889 Part B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232), which prohibits federal government agencies from doing business with entities that use any equipment, system, or service that uses (i) covered telecommunications equipment, or (ii) services from specific Chinese companies or their affiliates as a substantial or essential component of any system, or as critical technology as part of any system. We previously covered the interim rule and contractors' obligations under it [here](#) and [here](#).

The interim rule provided contractors just one month to comply with Section 889 Part B before its August 13, 2020 effective date. During that month, contractors scrambled to conduct the "reasonable inquiry" required by the interim rule to determine whether they used any covered equipment or services and whether that equipment was a substantial or essential component of or critical technology in any system. These inquiries generally required contractors to assemble cross-functional teams including representatives from legal, information technology, purchasing/supply chain, finance, and other organizations to canvas their technology and systems, analyze the results, and make judgment calls about numerous gray areas left unaddressed in the interim rule—like the absence of any definition of "use." In some cases, companies also quickly replaced covered equipment or services that they determined fell within the Section 889 Part B prohibition or created risk that a government official might conclude it did. All this effort culminated in representations to the Government about whether or not the companies used covered

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equipment or services and, in a few situations, requests to Contracting Officers for waivers under the interim rule.

As we approach the one-year anniversary of Section 889 Part B taking effect, it is important for contractors to keep in mind that compliance with the interim rule is not a one-time effort. The interim rule identified specific actions that the FAR Council expected contractors to incorporate into their compliance programs within the first year, and contractors would be wise to revisit their reasonable inquiries, follow-up activities, and representations to the Government to confirm that they have addressed each item on the FAR Council's list. The six continuing "actions needed for compliance" are:

1. **Regulatory Familiarization** – Contractors can likely check this item off the list as they likely read and analyzed the interim rule when it was issued and when they completed their reasonable inquiries ahead of making their initial representations to the Government.
2. **Corporate Enterprise Tracking** – In this action, the interim rule described the reasonable inquiry that contractors should make to determine whether they use covered equipment or services, including "examining relationships" with subcontractors and suppliers. Although contractors may have conducted a reasonable inquiry in 2020 before making their first Section 889 Part B representation to the Government, they should not consider that inquiry to be a one-time obligation. In the last year, most companies will have purchased new equipment and services and forged relationships with new suppliers and subcontractors. They also may have entered into new lines of business or undergone a merger or acquisition with another company. Any of those events creates the opportunity for new use of covered equipment or services that was not present when contractors conducted their initial reasonable inquiries. Contractors should consider whether any new equipment and services, supplier relationships, and lines of business have been scrutinized for Section 889 Part B compliance and whether they have sufficient processes in place to identify and review similar activities automatically going forward.
3. **Education** – The interim rule specifically anticipated that companies would provide training on Section 889 Part B compliance for purchasing/procurement and materials management professionals. Companies should confirm that they have provided training to those and other relevant organizations. They should also ensure that any new employees have received similar training and that the company has a plan for periodic refresher training for new and existing employees.
4. **Removal** – The interim rule anticipated that some contractors would elect to replace covered equipment and services identified in their reasonable inquiries. For contractors that decided to replace equipment and services, now is a good time to confirm those plans were implemented and that any replacement equipment or services are in fact compliant with Section 889 Part B.
5. **Representation** – By now, virtually all contractors have made a representation to the Government related to compliance with Section 889 Part B, likely in annual SAM.gov updates and possibly in individual contracts, task orders, and modifications. Again, circumstances change, and contractors should confirm that their representations remain accurate after any new information or analysis is identified.

6. **Develop a Phase-Out Plan and Submit Waiver Information** – The interim rule provided that any Section 889 Part B waivers would be effective only through August 13, 2022, at the latest, and that contractors should expect to phase-out any covered equipment or services by that time. Contractors that have obtained waivers should revisit their phase-out plans to make sure they remain on track and identify as soon as possible any areas that require revision to comply with the August 2022 expiration of waivers.

Finally, as contractors review their compliance programs and ensure that they are continuing to meet their obligations under the interim rule, the contracting community should keep in mind that the FAR Council is expected to issue a final rule this summer that addresses comments submitted on the interim rule. Contractors should be ready to re-constitute their Section 889 Part B working groups to efficiently review compliance programs and make any necessary revisions to address new or changing obligations in the final rule.