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Identifying Risks in Your Foreign Supply Chain

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Introductions



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Overview of the Series

- Sep. 20, 2023: **New Rules and Restrictions in Foreign Supply Chains**
- Oct. 4, 2023: **Buy American Act Requirements**
- Oct. 18, 2023: **Trade Agreements Act**
- Nov. 1, 2023: **U.S. Export Control Laws and Tariffs**
- Nov. 8, 2023: **Corruption/Foreign Corrupt Practices Act (FCPA)**
- Nov. 15, 2023: **Supply Chain Cybersecurity**

Today's Agenda: Latest Rules & Restrictions



1. Supply Chain Risk Considerations
2. Executive Orders on America's Supply Chains
3. Section 889 and Implementing Regulations
4. Section 5949 Ban on Foreign Semiconductors
5. Federal Acquisition Supply Chain Security Act and the Federal Acquisition Security Council (FASC)

1. Supply Chain Risk Considerations

Supply Chain Management: Strict Liability?

- Today's supply chains are increasingly international
- Customer demands tend to be “strict liability”
 - “You are responsible for **everything**...”
- Risks
 - Warranty?
 - Remove & Replace = \$\$\$
 - Hardware failure = loss of life?
 - Software vulnerability = major cyber incident?
 - Damages?
 - Reputation



FROM



TO



Supply Chain Management

- Contractors face myriad issues relating to supply chain management:

- Counterfeit and Nonconforming Parts
- Cybersecurity controls
- Cloud computing requirements
- Prohibited sources (e.g., Section 889/ Chinese telecom; covered articles)
- Quality control standards, including Military standards
- Human Trafficking/Human rights/ Forced labor issues
- Corruption – Kickbacks/FCPA
- Required sources (AbilityOne/ UNICOR)
- Software sales
- Semiconductors
- Export controls (ITAR/EAR)
- Sanctions enforcement
- Tariffs/Duties
- Country of origin (including “Buy American” requirements)
- Trade Agreements Act
- Antitrust
- Conflict minerals regulations
- Intellectual property/data rights
- Trade Secrets
- End User/Licensing Agreements
- Tax
- Small business subcontracting
- Rated orders
- National Security and Classified materials
- Organizational Conflicts of Interest (OCI)
- Privacy
- California-specific requirements (Transparency in the Supply Chain Act; Prop 65)
- Product labeling
- IT Accessibility/disability access
- Contract labor standards
- Environmental considerations
- Fourth Party Logistics (4PL)
- Regulatory compliance with Department of Transportation (DOT)/ Federal Motor Carrier Safety Administration (FMCSA) regulations

- In this 6-part series, we will focus on major issues impacting the foreign supply chain

Supply Chain Risk – Prohibited Sources

- **2018 National Defense Authorization Act**

- Prohibition of Kaspersky software products and services
- Now part of the FAR (Subpart 4.20)



- **Federal Acquisition Supply Chain Security Act of 2018**

- FASC Interim Rule (2020) outlines processes and procedures for FASC to evaluate supply chain risk



- **2019 National Defense Authorization Act (NDAA), Section 889**

- Ban on procurements involving certain Chinese-origin telecommunications equipment
- FAR Subpart 4.21



- **2023 NDAA, Section 5949**

- Ban (beginning in late-2027) of Chinese-made semiconductors



- **More...???**



2. Executive Orders on America's Supply Chains

Executive
Order
14017

February 2021

Hardware &
Materials

Executive
Order
14028

May 2021

Software &
Cybersecurity

A. Executive Order on America's Supply Chains

- EO 14017 signed by President Biden on Feb. 24, 2021
- Required reviews of global supply chains that support key U.S. industries
- Two types of assessments:
 - 100-Day Supply Chain Review [Published June 2021]
 - Sectoral Supply Chain Assessments [Published Feb. 2022]
- Required coordination among:
 - Various executive agency heads
 - Assistant to the President for National Security Affairs (National Security Advisor)
 - Assistant to the President for Economic Policy
 - “Whole-of-government approach to assessing vulnerabilities”



“100-Day Report” on Supply Chain Security

Supply Chain Area	Responsible Agency
Semiconductor manufacturing	Dept. of Commerce
High-capacity batteries	Dept. of Energy
Rare earth metals	Dept. of Defense
Pharmaceuticals	Dept. of Health and Human Services

BUILDING RESILIENT SUPPLY CHAINS, REVITALIZING AMERICAN MANUFACTURING, AND FOSTERING BROAD-BASED GROWTH

100-Day Reviews under
Executive Order 14017

June 2021

A Report by
The White House

Including Reviews by
Department of Commerce
Department of Energy
Department of Defense
Department of Health and Human Services



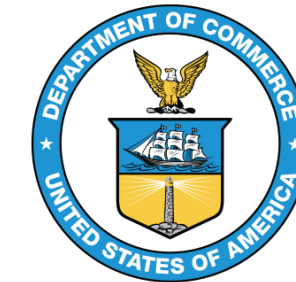
“100-Day Report” on Supply Chain Security (cont’d)

- Gov’t Policies + Investment = Improved Security (over time)

Supply Chain Area	Report Conclusion
Semiconductor manufacturing	Government continuing to coordinate with industry to identify improvements to supply chain.
High-capacity batteries	National Blueprint for Lithium Batteries published in June 2021 – policy incentives to support domestic manufacturing/jobs and investment; stimulate demand for domestic batteries.
Rare earth metals	DOD planning on investing in companies using the Defense Production Act to build out rare earth element mining and processing in the U.S. and E.U.
Pharmaceuticals	COVID-19 resulted in improved capacity for manufacturing vaccines; additional investment planned for other pharmaceuticals.
Cyber	In progress... <i>but new National Cybersecurity Strategy released in March 2023</i>

Sectoral Reports on America's Supply Chains

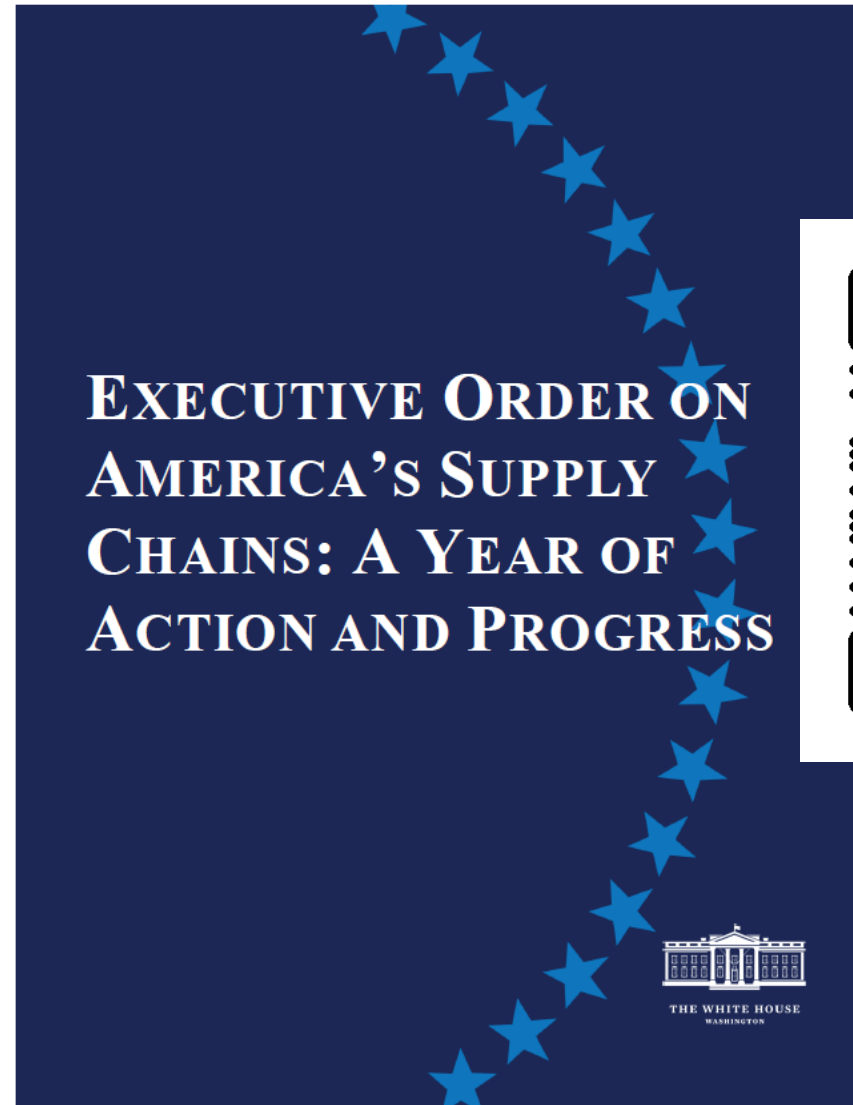
Supply Chain Area	Responsible Agency
Defense	Department of Defense
Public health and biological preparedness	Department of Health and Human Services
Information and communications technology	Department of Commerce / Department of Homeland Security
Energy	Department of Energy
Transportation	Department of Transportation
Agriculture and food production	Department of Agriculture



One-Year Capstone Report on Supply Chain Security

Capstone Report, Feb. 2022

- Updated on
 - Semiconductors
 - High-capacity batteries
 - Rare earth metals
 - Pharmaceuticals
 - Other 6 industrial base reviews
- Legislation supporting many of these priorities passed in August 2022 with the CHIPS and Science Act (Pub. L. 117-167)
 - \$280B for domestic research and manufacturing for semiconductors
 - Additional subsidies for domestic manufacturing
 - Tax credits for semiconductor manufacturing equipment
 - Incentives for domestic manufacturing for autos, consumer electronics, and defense systems
 - \$45B to improve supply chain security



Potential Impact of EO 14017 on Industry

- Agencies are continually seeking inputs from industry
- End-result likely to be tightened restrictions requiring:
 - More U.S.-sourced products (based on national security concerns)
 - Greater visibility into supply chain/Bill of Materials
- Higher costs (potentially) for sourcing these products/materials from within the U.S. and U.S. allies
- Continuing incentives for U.S.-based investment
- Assist Agencies (where possible) with a cost-benefit analysis when making supply chain recommendations
- But... **do not expect** the regulatory burden to be lightened

B. Executive Order on Improving the Nation's Cybersecurity

- EO 14028 signed by President Biden on May 12, 2021
- Focuses on:
 - Sharing threat information between industry/government
 - Standardizing cybersecurity requirements for contractors
 - Modernizing federal government cybersecurity
 - Including creation of a new federal [Cyber Safety Review Board](#)
 - Enhancing software supply chain security (“critical software” distinguished)

Software Supply Chain Security

- NIST tasked with development of resources/guidance
 - Definition of “critical software”
 - Preliminary and updated guidance on enhancing software supply chain security
 - Criteria for consumer labeling program for software and IoT
- **OMB Memo M-22-18 (Sept. 14, 2022)** – implements requirement for federal agencies to ensure software producers comply with the Secure Software Development Framework (SSDF) & NIST Software Supply Chain Guidance through self-attestations
- **OMB Memo M-23-16 (June 9, 2023)** – extends timeline for agencies to collect attestations from software producers
 - “Critical” software – three months after approval of CISA self-attestation form
 - All other software – six months after approval of CISA self-attestation form

EO 14028: Forthcoming FAR Regulations

- *Cyber Threat and Incident Reporting and Information Sharing* (FAR Case No. 2021-017) – implements Sections 2(b)-(c), 2(g)(i), 8(b) of EO 14028
 - Federal Register notice being prepared for proposed FAR rule (status as of Sept. 15, 2023)
- *Standardizing Cybersecurity Requirements for Unclassified Federal Information Systems* (FAR Case No. 2021-019) – implements Sections 2(i) and 8(b) of EO 14028
 - Federal Register notice being prepared for proposed FAR rule (status as of Sept. 15, 2023)
- *Supply Chain Software Security* (FAR Case No. 2023-002) – implements Section 4(n) of EO 14028 for secure software development and self-attestations
 - Draft proposed rule deadline extended many times; currently due September 20, 2023
- *Establishing FAR Part 40* (FAR Case No. 2022-010) – creates a new FAR Part 40 for cybersecurity supply chain requirements
 - Draft final FAR rule deadline extended many times; currently due October 4, 2023

3. Section 889 and Implementing Regulations

2019 NDAA: Section 889



- Part A

- Prohibits contractors from **selling** to the Government equipment and services that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system
- FAR rule took effect August 13, 2019

- Part B

- Prohibits agencies from working with contractors that are **using** covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, *even if that use is unrelated to the contractor's federal business*
- FAR rule effective August 13, 2020

- **Limited exceptions** and waivers



2019 NDAA: Section 889

- **“Covered telecommunications equipment or services”**
 - Equipment or services incorporating telecommunications technology produced by:
 - Huawei Technologies Company
 - ZTE Corporation
 - Any subsidiary or affiliate of either
 - Some equipment or services incorporating video surveillance and telecommunications technology produced by:
 - Hytera Communications Corporation
 - Hangzhou Hikvision Digital Technology Company
 - Dahua Technology Company
 - Any subsidiary or affiliate thereof

Section 889: Part A Overview

- Effective date August 13, 2019
- Interim Rule updates to the FAR
- Still waiting on final rule – draft final FAR rule currently due Sept. 27, 2023
- FAR 52.204-24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment
 - Required in all solicitations
- FAR 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment
 - Required in all solicitations and contracts
 - Report discoveries within one business day; follow-up in 10 business days
 - To be flowed down in all subcontracts

Section 889: Part A

- Part A Representation (FAR 52.204-24)

(d) **Representation.** The Offeror represents that it
 will, will not provide covered telecommunications equipment or services to the Government in the performance of any contract, subcontract or other contractual instrument resulting from this solicitation.

(e) **Disclosures.** If the Offeror has represented in paragraph (d) of this provision that it “will” provide covered telecommunications equipment or services”, the Offeror shall provide [additional information]...

Section 889: Part A

- Part A – Required Disclosures (FAR 52.204-24(e)(1))
 - 1) A description of all covered telecommunications equipment and services offered;
 - 2) Explanation of the proposed use of covered telecommunications equipment and services and any factors relevant to determining if such use would be permissible under the prohibition;
 - 3) For services, the entity providing the covered telecommunications services; and
 - 4) For equipment, the entity that produced the covered telecommunications equipment

Section 889: Part B Overview

- Effective date August 13, 2020
- Interim Rule updates to the FAR; draft final FAR rule due Sept. 27, 2023
- “Use” representation added to FAR 52.204-24
 - **Use limitation is incredibly broad**
 - Not limited to use “in performance of government contracts”
- “Reasonable inquiry” standard
- Prohibition and definitions added in FAR 52.204-25
- Limited to offeror entity
- No flow-down requirement
 - *But... it is still being flowed down by many vendors as a practical matter...*

Section 889: Part B

- Part B Prohibition
 - “[P]rohibits executive agencies from entering into, or extending or renewing, a contract *with an entity that uses*” banned technology.
 - As with Part A, Part B maintains the “as a substantial or essential component” limitation; but remember, that limitation does not impact a contractor’s initial disclosure obligations.
 - Part B applies to all federal contracts, regardless of size; but only applies to prime contractors.

Section 889: Part B

- Part B Representation (FAR 52.204-24)

(d)(2) After conducting a reasonable inquiry, for purposes of this representation, the Offeror represents that—

It does, does not use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services. The Offeror shall provide the additional disclosure information required at paragraph (e)(2) if the Offeror responds “does” in paragraph (d)(2).

(e)(2) **Disclosures.** [Similar to Part A]

Section 889: Part B

- “Reasonable Inquiry”
 - “In the entity’s possession”
 - “[P]rimarily documentation or other records”
 - “[N]eed not include an internal or third-party audit”
 - “This includes examining relationships with any subcontractor or supplier for which the prime contractor has a Federal contract and uses the supplier or subcontractor’s ‘covered telecommunications’ equipment or services as a substantial or essential component of a system. . . .”

Section 889: Part B

- 889 Part B Compliance Plan – Minimum Requirements:
 - Regulatory familiarization
 - Corporate enterprise tracking
 - Education
 - Cost of removal (if you identify and decide to remove existing telecommunication equipment or services)
 - Representation (to the Government)
 - Phase-out plan/waiver information (if you plan to request a waiver)

Section 889: Part B

- Supply Chain Obligations (Part B)
 - **DON'T** have to flow-down requirements to subcontractors/suppliers
 - **DO** have to conduct a “reasonable inquiry” into products/services owned or provided to you by subcontractors/suppliers you use
 - **DON'T** have to flow requirements to affiliates, parents and subsidiaries (for now)
- *Note: Part A requirements **DO** flow-down to subcontractors (FAR 52.204-25(e))

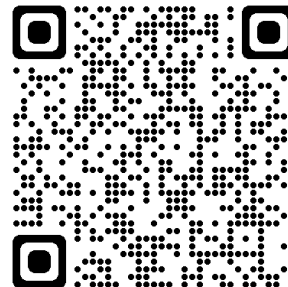
FAR Reporting Requirements

- Reporting obligation (FAR 52.204-25(d))
 - If covered equipment or services discovered during contract performance, must report within *1 business day*
 - Within *10 business days* of first report, must provide further information on prevention and mitigation actions
- These rules (Parts A&B) apply to *all* contractors
 - Commercial item and COTS procurements NOT exempt
 - Small businesses are not exempt

GSA – Section 889 Implementation



- Aug. 13, 2020 – refresh of the GSA Multiple Award Schedule (MAS) to include Part B
- Bilateral modification incorporating FAR 52.204-25 in all existing MAS contracts
 - Contractors had 90 days to accept the modification
 - Orders cannot be placed under the current contract until the contract is modified
 - GSA may initiate “contract ending action” for those who fail to accept the modification by the deadline
- Also released FAQs



DoD – Section 889 Implementation



- Directs COs not to issue contract or Task Order awards, or exercise option, on or after August 13, 2020 if contractor uses covered equipment or services, unless an exception or waiver applies
- COs must obtain contractor representation and applicable disclosures before making awards or executing a modification
 - For mods, CO should provide contractor adequate notice and time to comply
- Updated FAR clauses to be included in contracts and modifications
- Exceptions:
 - Not “substantial or essential component” or “critical technology”
 - FAR 4.2102(b)
- Limited opportunity for waivers; onerous vetting process
- DOD Waiver for low-risk items **expired September 30, 2022**

4. Section 5949 Ban on Foreign Semiconductors

Section 5949 Ban from 2023 NDAA

- Section 5949 of the 2023 NDAA (Pub. L. 117-263) included a **new ban on certain foreign-origin semiconductors**
- **Beginning December 23, 2027**, government may not “procure or obtain” any products or services including semiconductor products or services designed, produced, or provided by a prohibited source (including subs and affiliates):
 - Semiconductor Manufacturing International Corporation (SMIC)
 - ChangXin Memory Technologies (CXMT)
 - Yangtze Memory Technologies Corp. (YMTC)
 - Any other listed entities (esp. in China, Iran, North Korea, and Russia)
- Applies only to semiconductor products used in “critical systems”
 - **Includes** any telecommunication or information system operated by the government involving intelligence activities, national security, command and control of military forces, or that is an integral part of a weapons system
 - **Does not include** routine administrative and business applications like payroll, finance, logistics, and personnel management



Section 5949 Ban from 2023 NDAA (cont'd)

- Does **not** contemplate a “rip & replace” strategy – forward looking only
- Waivers may be available at the government’s discretion
- FAR clauses expected by December 2025
 - Will include **certification** of non-use (similar to Section 889)
 - Will require **timely notification** of any quality escapes
 - Will require **detection and avoidance** programs
 - Will force contractors to bear the **cost** of noncompliance/replacement
 - Will allow contractors to rely on **vendor certifications** without independent audits
- Through 2027, ongoing assessment of allied resources and emerging risks
- Government also working on implementing a “**Governmentwide Traceability and Diversification Initiative**” (by 2024) designed to coordinate analysis of and response to the government’s supply chain vulnerabilities
- FASC to make additional recommendations regarding supply chain security, including prohibited sources



5. Federal Acquisition Supply Chain Security Act and the Federal Acquisition Security Council (FASC)

Federal Acquisition Security Council (FASC)

- Required by the Federal Acquisition Supply Chain Security Act of 2018 (FASCSA)
 - Interim Rule issued September 1, 2020
 - [Final Rule](#) issued August 26, 2021, adding new 41 CFR Part 201-1
- Outlines processes and procedures for FASC to evaluate supply chain security risk
 - Facilitates collaboration among 12 agencies/offices
- Does not specifically name entities (“Sources”) or products (“Covered Articles”) that may pose risk

FASC Analysis

- Evaluation – rule includes 10 non-exclusive factors
- Recommendation – may be “Exclusion” or “Removal”
- Notice – Source has 30-day response period
- Order – to be issued by Secretary of Homeland Security, Secretary of Defense, or Director of National Intelligence
- Compliance – agencies may be granted waivers

FASC Open FAR Case

- *Implementation of FASC Exclusion Orders* (Case No. 2020-011)
 - Implements Section 1323 of the SECURE Technology Act (Pub. L. 115-390) (FY19), which created FASC and authorized DHS, DOD, and the DNI to issue exclusion and removal orders, upon the recommendation of the FASC
 - Orders are issued to protect national security by excluding certain covered products, services, or sources from the Federal supply chain
- Current status (as of Sept 15, 2023): Interim FAR rule is being prepared for release

Questions?



Next Session on October 4, 2023...

- **Buy American Act Requirements**