

July 15, 2020

TO THE MEMBERS OF THE UNITED STATES CONGRESS:

Our organizations, which represent nearly every industry segment critical to America's economic recovery, urge lawmakers to include language in the COVID-19 phase 4 package that would defer the effective date of section 889(a)(1)(B) of the National Defense Authorization Act for Fiscal Year 2019 (P.L. 115-232) to August 13, 2021. The next COVID-19 aid legislation is expected to get signed into law before section 889(a)(1)(B), commonly known as part B, takes effect on August 13, 2020.

Policymakers and businesses have a mutual interest in modifying the starting date of part B to avoid a federal contracting crisis. Left unaddressed, part B would jeopardize the federal government's ability to procure the essential goods and services it needs to promote our nation's well-being, while simultaneously placing added financial pressure on many industries that are struggling to rebound economically and keep the pandemic in check.

We have previously written Congress about our ongoing concerns regarding the sweeping, unclear compliance language in part B. Our organizations have also undertaken considerable outreach to offices and committees on Capitol Hill and to the administration. We want to resolve the uncertainties in the requirements in collaboration with policymakers before the law goes into effect in just a few weeks. 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 service in its supply chains, even if the provider does not know the covered technology is being used for governmental or commercial work.

U.S. providers would be barred from supplying essentially any service or good, such as personal protective equipment needed to fight COVID-19, to agencies. Even small and midsize businesses with mostly domestic footprints would be negatively affected by part B owing to the interconnected nature of trade and supply chains.

Thus, the implementation date should be delayed for several reasons:

First, part B is expected to become effective on August 13, 2020. An early version of the interim rule to implement this complex law was released on July 10, 2020. Publication of the rulemaking is a step forward, yet it is unreasonable to expect industry to digest the rule's multiple mandates in a month, much less comply with them. Further, the interim rule raises as many questions as it answers, including the future scope of the program and definitions of certain words and phrases. Congress should continue to consider substantive changes to section 889.

It is critical to highlight that the regulation is estimated to cost government and industry tens of billions of dollars in compliance expenses. Such costs do not factor in contractors' establishment of policies and tracking tools to conform to the regulation, possible removal and replacement of banned equipment and services, and development of waiver requests. Our groups support the supply chain risk management goals of part B. However, at a time when the U.S. is facing a surge in new coronavirus cases, it is imprudent to add this regulatory headwind to a struggling economy.

Second, on June 10, 2020, the Department of Defense’s Under Secretary of Defense for Acquisition and Sustainment, Ellen Lord, testified before the House Armed Services Committee that the department and contractors need more time to administer the pending regulation. In June 2019, the Office of Management and Budget (OMB) pressed Congress to adjust the effective date of part B to August 13, 2022—a year later than our associations’ request. OMB officials argued that the additional time would help ensure the effective execution of section 889 “without compromising” policymakers’ security objectives. Moreover, given the complexity of global supply chains, even if regulatory guidance were to be issued in the coming days, U.S. providers would not have sufficient time to examine such guidance and conduct the due diligence necessary to comply with part B by August 13, 2020.

Third, practical changes to section 889 are required to make implementation workable and maintain consistency with lawmakers’ original aims. Our groups supported an amendment (2193) to the Senate FY 2021 NDAA (S. 4049) offered by Sen. Ron Johnson. This amendment, among other things, would clarify important contracting definitions in part B. In addition, our associations urge Congress to (1) make enhancements to the amendment, including codifying the Federal Acquisition Security Council’s (FASC’s) role in managing supply chain risks that are covered under section 889 and (2) attach it to the final defense bill. The FASC brings together senior officials from across government who have expertise in supply chain risk management activities and are well suited to help develop and guide section 889 prohibitions in partnership with the business community.

Fourth, protecting industry and agency supply chains from U.S. adversaries depends on a sound administration of part B. Our groups are encouraged by an amendment (445) offered by Rep. Virginia Foxx on July 13, 2020, to the House FY 2021 NDAA (H.R. 6395). It would extend the effective date of part B to January 1, 2022, to enable industry and policymakers to make necessary improvements to section 889. Foxx’s amendment would also push regulators to “provide the regulatory certainty” that industry needs to comply with part B. Similarly, on July 1, 2020, Rep. Vicky Hartzler successfully added an amendment to H.R. 6395 highlighting public- and private-sector worries that a hurried implementation of part B would put the federal government’s acquisition of vital goods and services at risk and increase supply chain vulnerabilities due to a rushed fulfillment of part B.

Both government and industry have a shared interest in adjusting the effective date of part B and making practical changes to section 889. We look forward to continuing our work with you to reduce risks to our nation’s supply chains and make the implementation of section 889 achievable.

Sincerely,

Aerospace Industries Association (AIA)
Airlines for America (A4A)
Alliance for Automotive Innovation (Auto Innovators)
American Automotive Policy Council (AAPC)
Alliance for Digital Innovation (ADI)
American Bankers Association (ABA)
American Council of Engineering Companies (ACEC)
American Fuel & Petrochemical Manufacturers (AFPM)
American Moving and Storage Association (AMSA)
American Trucking Associations (ATA)

Associated General Contractors of America (AGC)
Cargo Airline Association
The Center for Procurement Advocacy (CPA)
Computing Technology Industry Association (CompTIA)
Global Business Alliance (GBA)
Information Technology Industry Council (ITI)
International Association of Movers (IAM)
Motor & Equipment Manufacturers Association (MEMA)
National Air Carrier Association (NACA)
National Defense Industrial Association (NDIA)
National Electrical Manufacturers Association (NEMA)
National Motor Freight Traffic Association (NMFTA)
Professional Services Council (PSC)
Security Industry Association (SIA)
U.S. Chamber of Commerce