

The Latest Developments Under Section 889 Part B: New SAM Representation and DoD Waiver

Litigation Alert
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Yesterday, the Federal Acquisition Regulatory (FAR) Council issued a [second interim rule](#) to supplement the [initial interim rule](#) that implemented [Section 889\(a\)\(1\)\(B\) of the FY19 National Defense Authorization Act](#) (Section 889 Part B) and its prohibition on the use of certain Chinese telecommunications technology by government contractors. The second interim rule will allow offerors to make the representation regarding their compliance with Section 889 Part B on an annual basis through the System for Award Management (SAM), the government portal where offerors are required to submit certain representations to contract with the government. The initial interim rule had established an offer-by-offer representation requirement, but had anticipated the establishment of the SAM representation. We reported on the initial interim rule [here](#).

Under the second interim rule, offerors that determine they do not "provide covered telecommunications equipment or services to the Government in the performance of any contract" are only required to make the related representation at FAR 52.204-26(c) and FAR 52.212-3(v)(2)(i) in SAM annually rather than on an offer-by-offer basis. The reduced reporting is useful but does not do much to reduce the cost and compliance burden of the rule itself, or to resolve the uncertainty related to the term "use" or what amounts to a "reasonable inquiry."

In addition, on August 12, 2020, the Department of Defense (DoD) was able to secure a [short-term waiver](#) from compliance with Section 889 Part B for DoD contractors through September 30, 2020. The Director of National Intelligence (DNI) indicated that its "preliminary review" of DoD's waiver request appears to have a sufficient nexus to the United States' national security interests and allows the DoD "to continue its contracting activities that would otherwise be prohibited under section 889(a)(1)(B) and to provide additional information to the [Office of the DNI] to further assess your waiver request." The DNI also requested additional information demonstrating that the DoD understands the risks related to the prohibited equipment and technology, specific mitigation measures to address the risks, and a plan to seek alternatives to the prohibited equipment and services. If DoD is able to satisfy this further request, the DNI will conduct a more thorough review of the DoD's waiver request and determine whether extending the waiver beyond 30 September 2020 is in the national security interests of the United States.

For more information, please contact:

[Alex L. Sarria](#), asarria@milchev.com, 202-626-5822

[Jason N. Workmaster](#), jworkmaster@milchev.com, 202-626-5893

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