

Building confidence in your organization's Section 889 Part B compliance program

Government Contract Services
February 2022

Now

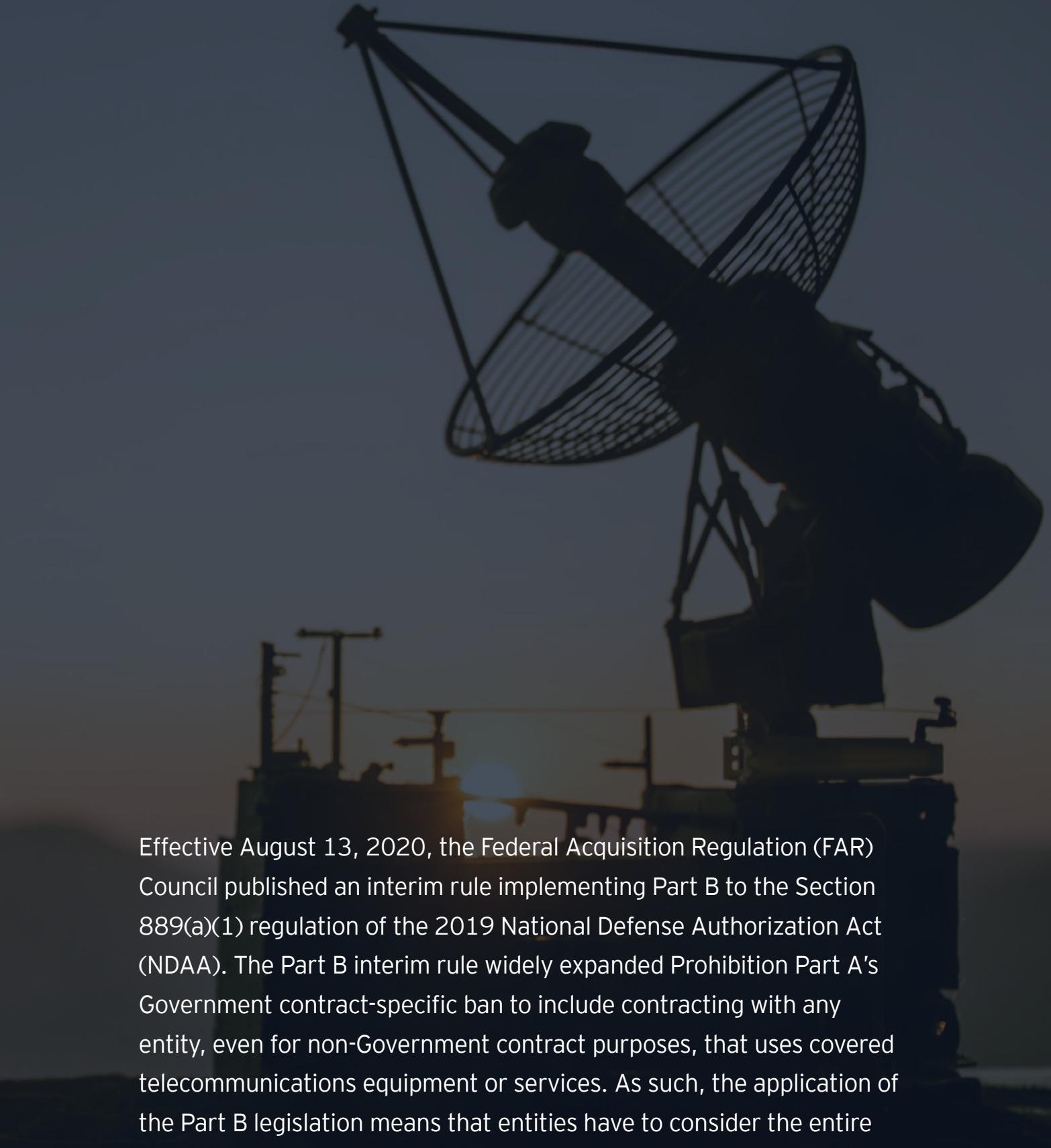
assess supply chain and contract compliance programs against applicable Section 889 regulatory requirements

Next

identify Section 889 compliance program gaps and achieve buy-in from the supply chain and contracts functional groups to drive organizational change enterprise-wide

Beyond

monitor regulatory updates to the Section 889 interim ruling and target compliance program maturity through industry benchmarking and internal/external assessments



Effective August 13, 2020, the Federal Acquisition Regulation (FAR) Council published an interim rule implementing Part B to the Section 889(a)(1) regulation of the 2019 National Defense Authorization Act (NDAA). The Part B interim rule widely expanded Prohibition Part A's Government contract-specific ban to include contracting with any entity, even for non-Government contract purposes, that uses covered telecommunications equipment or services. As such, the application of the Part B legislation means that entities have to consider the entire enterprise in eliminating Section 889 exposure, thereby broadening the implications and compliance oversight needs to include commercial elements of the business.

Section 889 Government contractor insights

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Interpreting Section 889 Part B

Notably, some entities that have advanced Section 889 maturity have had to invest in the engagement of their external and/or internal legal counsel to assist in interpretation of the concepts and terms mentioned in the Section 889 Part B interim ruling. The delayed Section 889 response from some entities therefore could be secondarily driven by pending investment decisions to engage internal or external counsel. Representative legal interpretation questions including the following:

Section 889 Part B considerations	Why relevant?
Definition of "entity"	August 2020 interim rule suggests that the "entity" is synonymous with the "offeror" who certifies compliance via FAR 52.204-24 (offer by offer representation) and/or FAR 52.204-26 (annual SAM.gov representation).
Definition of "use"	August 2020 interim rule does not scope out or explicitly place any limitation on the definition of "use" as it relates to the enterprise-wide prohibition, thereby making it likely applicable to both domestic and international locations.

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04

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Government contractor insights

Our Government Contractor Services team captured client insights from a cross-section of government contractors to understand the current state of Section 889 compliance among industry leaders. The participants represented both public and private nonprofit companies in aerospace and defense (A&D), technology-focused defense and intelligence, applied sciences, utilities, and professional services.

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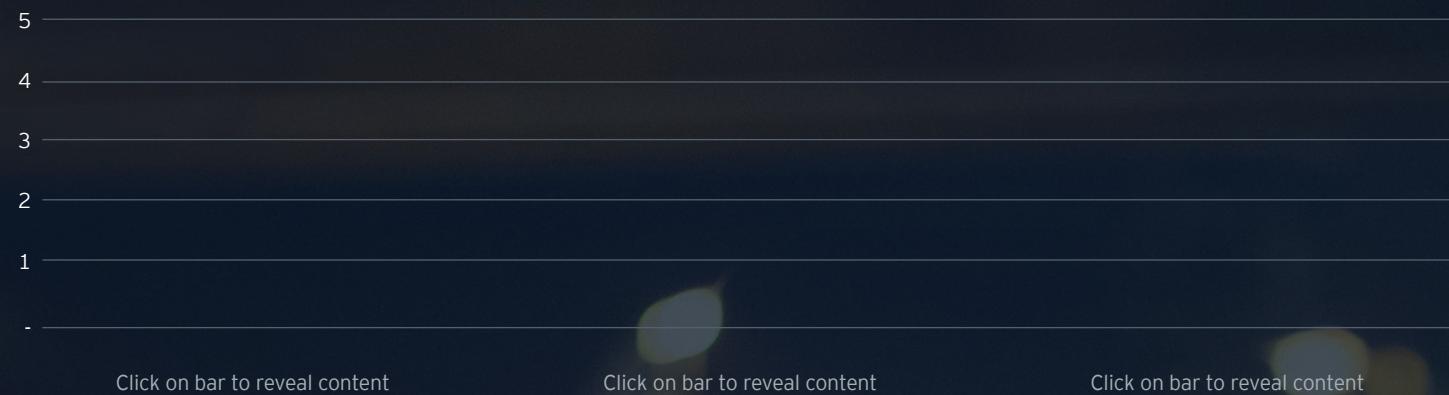
Questions	A&D entities	Non-A&D entities
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¹ Section 889 requirements defined by the FAR Council's Interim Rule implementing Section 889(a)(1)(B) of the 2019 National Defense Authorization Act (NDAA). Source: [Federal Register Volume 85, Number 135](#).

Risks of noncompliance

The following results were compiled during an A&D training for a company that included over 35 respondents representing at least eight business units. The respondents were asked to identify the ways in which their business units were addressing Section 889 regulatory requirements.

Section 889 government contractor insights



Note: Respondents from four of the eight represented subsidiaries or business units of the Company stated that they were unsure about the Company's Section 889 compliance.

Respondents demonstrated differing levels of Section 889 maturity. The varying levels of compliance maturity are primarily driven by two main factors: the requirement's company-wide impact and the requirement's interim, not final, status. For example:

- One entity did not have awareness of current state Section 889 compliance at the business unit level, while another entity had conducted compliance assessments of each domestic business unit.
- Some respondents were reluctant to prepare a Section 889 compliance plan and/or process updates to their existing Section 889 compliance plan due to the uncertainty of the requirement's interim ruling status.

A government contractor could be disqualified from bidding on a government contract if any part of its entity, even the commercial business, has prohibited telecommunications equipment as a substantial or essential component of any system, or as critical technology as part of any system. An entity's failure to submit an accurate [Prohibition Part A](#) or [Part B](#) representation to the US Government also constitutes a breach of contract that can lead to false claims act violations, cancellation, termination and financial consequences.

What critical activities should contractors undertake in establishing and maturing a Section 889 compliance program?

Actions to take now

- 1 Design and implement an entity-level policy and procedural document listing the steps to take to address Section 889 procurement monitoring and reporting requirements.
- 2 Verify subcontractor compliance through clause flowdowns, annual representations and certifications, and periodic subcontractor assessments of compliance.
- 3 Take a proactive approach to enhance requirement awareness enterprise-wide. This is achieved by receiving buy-in from key stakeholders, including upper management, legal, supply chain, contracts and information technology.
- 4 Implement a Section 889 steering committee that drives key compliance and business operation initiatives.
- 5 Prepare a compliance plan that achieves the reasonable inquiry standard on an annual basis.²

² Reasonable inquiry means an inquiry designed to uncover any information in the entity's possession about the identity of the producer or provider of covered telecommunications equipment or services used by the entity that excludes the need to include an internal or third-party audit.

Contacts



Sajeev D. Malaveetil

Partner

Government Contract Services Practice Leader

Ernst & Young LLP

McLean, VA

sajeev.malaveetil@ey.com

+1 703 747 1248



Courtney E. Black

Principal

Government Contract Services

Ernst & Young LLP

Dallas, TX

courtney.black@ey.com

+1 214 969 9604

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