

# What Every Federal Contractor Needs To Know About NDAA Section 889 — The New Supply Chain Rule Regarding Selling and Using Chinese Products and Components

Presented to the Coalition For Government Procurement  
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Presenters  
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**SEC. 889. PROHIBITION ON CERTAIN TELECOMMUNICATIONS AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT.** 41 USC 3901 note prec.

(a) PROHIBITION ON USE OR PROCUREMENT.—(1) The head of an executive agency may not—

(A) procure or obtain or extend or renew a contract to procure or obtain any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system; or

(B) enter into a contract (or extend or renew a contract) with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.

(2) Nothing in paragraph (1) shall be construed to—

(A) prohibit the head of an executive agency from procuring with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or

(B) cover telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.

(b) PROHIBITION ON LOAN AND GRANT FUNDS.—(1) The head of an executive agency may not obligate or expend loan or grant funds to procure or obtain, extend or renew a contract to procure or obtain, or enter into a contract (or extend or renew a contract) to procure or obtain the equipment, services, or systems described in subsection (a).

(2) In implementing the prohibition in paragraph (1), heads of executive agencies administering loan, grant, or subsidy programs, including the heads of the Federal Communications Commission, the Department of Agriculture, the Department of Homeland Security, the Small Business Administration, and the Department of Commerce, shall prioritize available funding and technical support to assist affected businesses, institutions and organizations as is reasonably necessary for those affected entities to transition from covered communications equipment and services, to procure replacement equipment and services, and to ensure that communications service to users and customers is sustained.

(3) Nothing in this subsection shall be construed to—

(A) prohibit the head of an executive agency from procuring with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or

(B) cover telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.

(c) EFFECTIVE DATES.—The prohibition under subsection (a)(1)(A) shall take effect one year after the date of the enactment of this Act, and the prohibitions under subsections (a)(1)(B) and (b)(1) shall take effect two years after the date of the enactment of this Act.

(d) WAIVER AUTHORITY.—

# Section 889 Executive Summary

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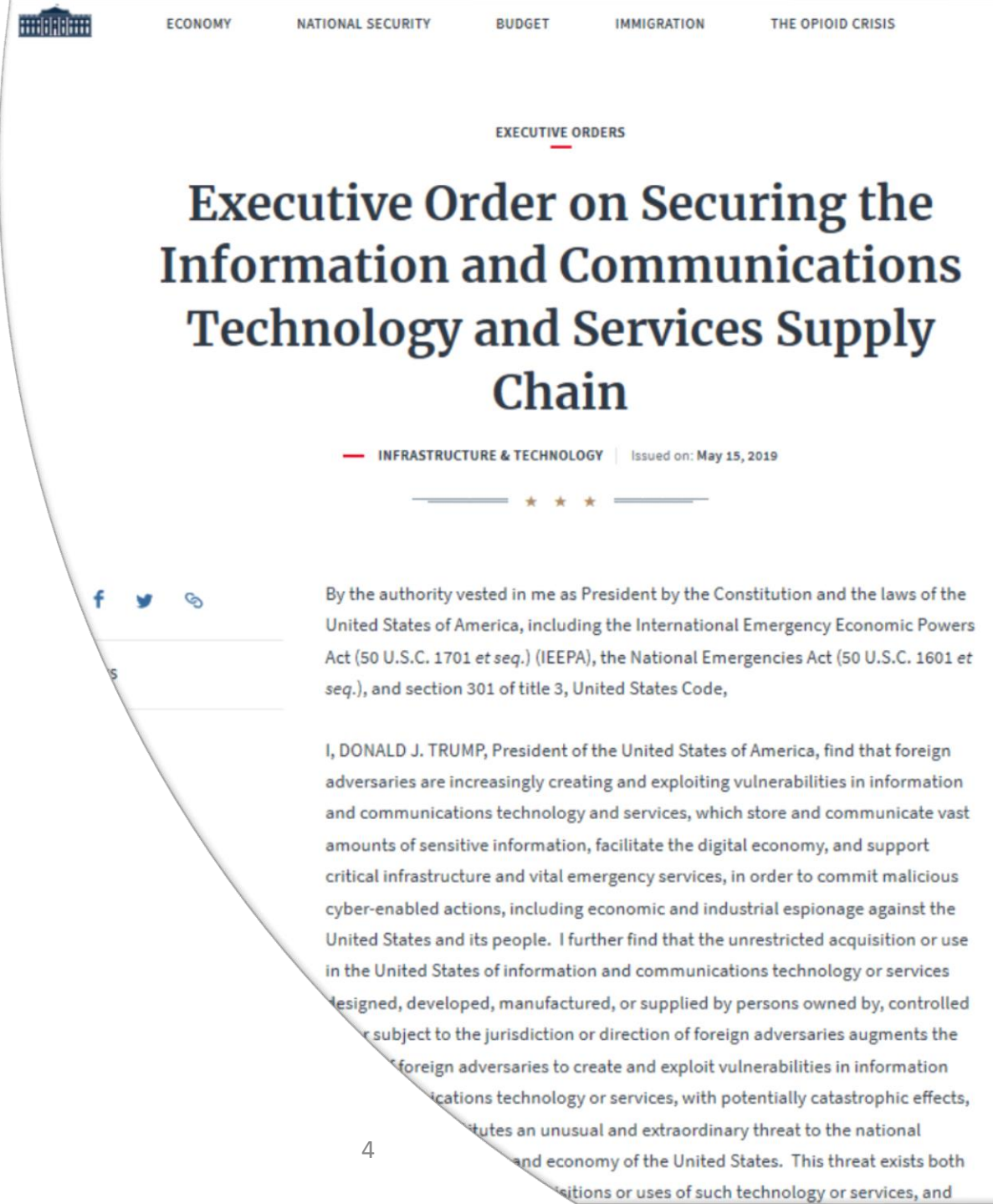
- Subsection A (effective Aug. 2019)
  - The Government cannot procure or obtain products that incorporate banned technology
  - The Government cannot procure or obtain services that use banned technology in the performance of the service
- Subsection B (effective Aug. 2020)
  - The Government cannot procure or obtain products or services from companies that USE banned technology whether or not the use relates to a federal contract

# Genesis of Section 889 (according to the USG)

- “Cyber threats from foreign adversaries, hackers, and criminals present significant and new risks to government and industry”
- “Foreign adversaries are increasingly creating and exploiting vulnerabilities in [communications technology] in order to commit malicious cyber-enabled actions, including economic and industrial espionage against the U.S.”
- “Constant, targeted, and well-funded attacks by malicious actors threaten government and industry by way of their contractors, subcontractors, and suppliers at all tiers of supply chain”

2/5/2020

Coalition For Government Procurement



The screenshot shows the official White House website for Executive Order 13866, titled "Executive Order on Securing the Information and Communications Technology and Services Supply Chain". The page is dated May 15, 2019, and is categorized under "INFRASTRUCTURE & TECHNOLOGY". The text of the order begins with "By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.), and section 301 of title 3, United States Code,". The order then states that President Donald J. Trump finds that foreign adversaries are increasingly creating and exploiting vulnerabilities in information and communications technology and services, which store and communicate vast amounts of sensitive information, facilitate the digital economy, and support critical infrastructure and vital emergency services. The order further finds that the unrestricted acquisition or use in the United States of information and communications technology or services designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries augments the threat to the United States posed by foreign adversaries to create and exploit vulnerabilities in information and communications technology or services, with potentially catastrophic effects. The order concludes that this constitutes an unusual and extraordinary threat to the national security, health, or interest of the United States and economy of the United States. This threat exists both in the acquisition or use of such technology or services, and in the design, development, manufacture, or supply of such technology or services.

ECONOMY NATIONAL SECURITY BUDGET IMMIGRATION THE OPIOID CRISIS

EXECUTIVE ORDERS

## Executive Order on Securing the Information and Communications Technology and Services Supply Chain

INFRASTRUCTURE & TECHNOLOGY | Issued on: May 15, 2019

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.), and section 301 of title 3, United States Code,

I, DONALD J. TRUMP, President of the United States of America, find that foreign adversaries are increasingly creating and exploiting vulnerabilities in information and communications technology and services, which store and communicate vast amounts of sensitive information, facilitate the digital economy, and support critical infrastructure and vital emergency services, in order to commit malicious cyber-enabled actions, including economic and industrial espionage against the United States and its people. I further find that the unrestricted acquisition or use in the United States of information and communications technology or services designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries augments the threat to the United States posed by foreign adversaries to create and exploit vulnerabilities in information and communications technology or services, with potentially catastrophic effects. This constitutes an unusual and extraordinary threat to the national security, health, or interest of the United States and economy of the United States. This threat exists both in the acquisition or use of such technology or services, and in the design, development, manufacture, or supply of such technology or services.

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# Definition of Banned Technology

- Equipment incorporating telecommunications technology produced by:
  - Huawei Technologies Company
  - ZTE Corporation
  - Or a subsidiary or affiliate of either
- Some equipment incorporating video surveillance and telecommunications technology produced by:
  - Hytera Communications Corporation
  - Hangzhou Hikvision Digital Technology Company
  - Dahua Technology Company
  - Or any subsidiary or affiliate thereof



# The Subsection A Prohibition (FAR 52.204-25)

- (b) **Prohibition.** Section 889. . . prohibits the head of an executive agency on or after August 13, 2019, from procuring or obtaining . . . any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. . . .

NAUTICS AND ADMINISTRATION 1 2019-0002, Sequence No. Acquisition Regulation; Acquisition Circular 2019-05; Prohibition Department of Defense (DoD), General Services Administration (GSA), ACTION: Summary presentation of an interim rule. SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rule agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2019-05. A companion document, the <i>Small Entity Compliance Guide</i> (SECG), follows this FAC. The FAC, including the SECG, is available via the internet at <a href="http://www.regulations.gov">http://www.regulations.gov</a> . RULE LISTED IN FAC 2019-05	FOR FURTHER INFORMATION CONTACT: <i>Farpolicy@gsa.gov</i> or call 202-969-4075. Please cite FAC 2019-05, FAR Case 2018-017. SUPPLEMENTARY INFORMATION: A summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR Case, refer to the specific subject set forth in the document following this item summary. FAC 2019-05 amends the FAR as follows:	
	Subject	FAR case Analyst
Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment .....	2018-017	Francis.
<b>Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment (FAR Case 2018-017)</b> This interim rule amends the FAR to implement section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232). Paragraph (a)(1)(A) of section 889 prohibits agencies from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunication equipment or services as a substantial or essential component of any system, or as a critical technology as part of any system on or after August 13, 2019, unless an exception applies or a waiver has been granted. Further prohibitions at paragraph (a)(1)(B) of section 889 go into effect August 13, 2020, and will be addressed through separate rulemaking. To implement paragraph (a)(1)(A) of section 889, this interim rule provides a prohibition on acquisition and contract modification at FAR 52.204-24 to determine whether covered telecommunications equipment or services are used as a substantial or essential component of any system, or as critical technology as part of any system. . . . The prohibition at FAR 52.204-24 is effective August 13, 2019 except for FAR Case 2018-017, which is effective August 13, 2019. Kim Herrington, Acting Principal Director, Defense Pricing and Contracting, Department of Defense. Jeffrey A. Kosos, Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration. William C. Roets, II, Acting Assistant Administrator, Office of Procurement, National Aeronautics and Space Administration. [FR Doc. 2019-17200 Filed 8-12-19; 8:45 am] BILLING CODE 6820-EP-P		
<b>DEPARTMENT OF DEFENSE</b> <b>GENERAL SERVICES</b> <b>ADMINISTRATION</b> <b>NATIONAL AERONAUTICS AND</b> <b>SPACE ADMINISTRATION</b> <b>48 CFR Parts 1, 4, 12, 13, 39, and 52</b> [FAC 2019-05; FAR Case 2018-017; Docket No. 2018-0017, Sequence No. 1] RIN 9000-AN83 <b>Federal Acquisition Regulation: Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment</b> AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA). ACTION: Interim rule.		



## The Subsection 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]

## FAR 52.204- 25(d)

- (d) Reporting requirement.
  - (1) In the event the Contractor identifies covered telecommunications equipment or services used as a substantial or essential component of any system, or as critical technology as part of any system, during contract performance, or the Contractor is notified of such by a subcontractor at any tier or by any other source, the Contractor shall report the information in paragraph (d)(2) of this clause to the Contracting Officer . . . .



# FAR 52.204-26 (Dec. 2019)

- (a) Definitions. . . .
- (b) Procedures. The Offeror shall review the list of excluded parties in the [SAM] for entities excluded from receiving federal awards for “covered telecommunications equipment or services”.
- (c) Representation. The Offeror represents that it ☐ does, ☐ does not provide covered telecommunications equipment or services as a part of its offered products or services to the Government in the performance of any contract, subcontract, or other contractual instrument.

# GSA's Subsection A Deviation

- Deviates from the requirement that offerors represent whether they will or will not provide banned technology
- Creates a new GSAR clause, requiring submission of annual representation to the Government (GSAR 552.204-70)
- Extends the FAR's and deviation's requirements to GSA's lease acquisitions and Commercial Solutions Opening procurements



# Subsection B

- Effective August 13, 2020, the Government is prohibited from entering into a contract, or extending or renewing a contract, with an entity that uses certain covered telecommunications equipment or services

H. R. 5515—282

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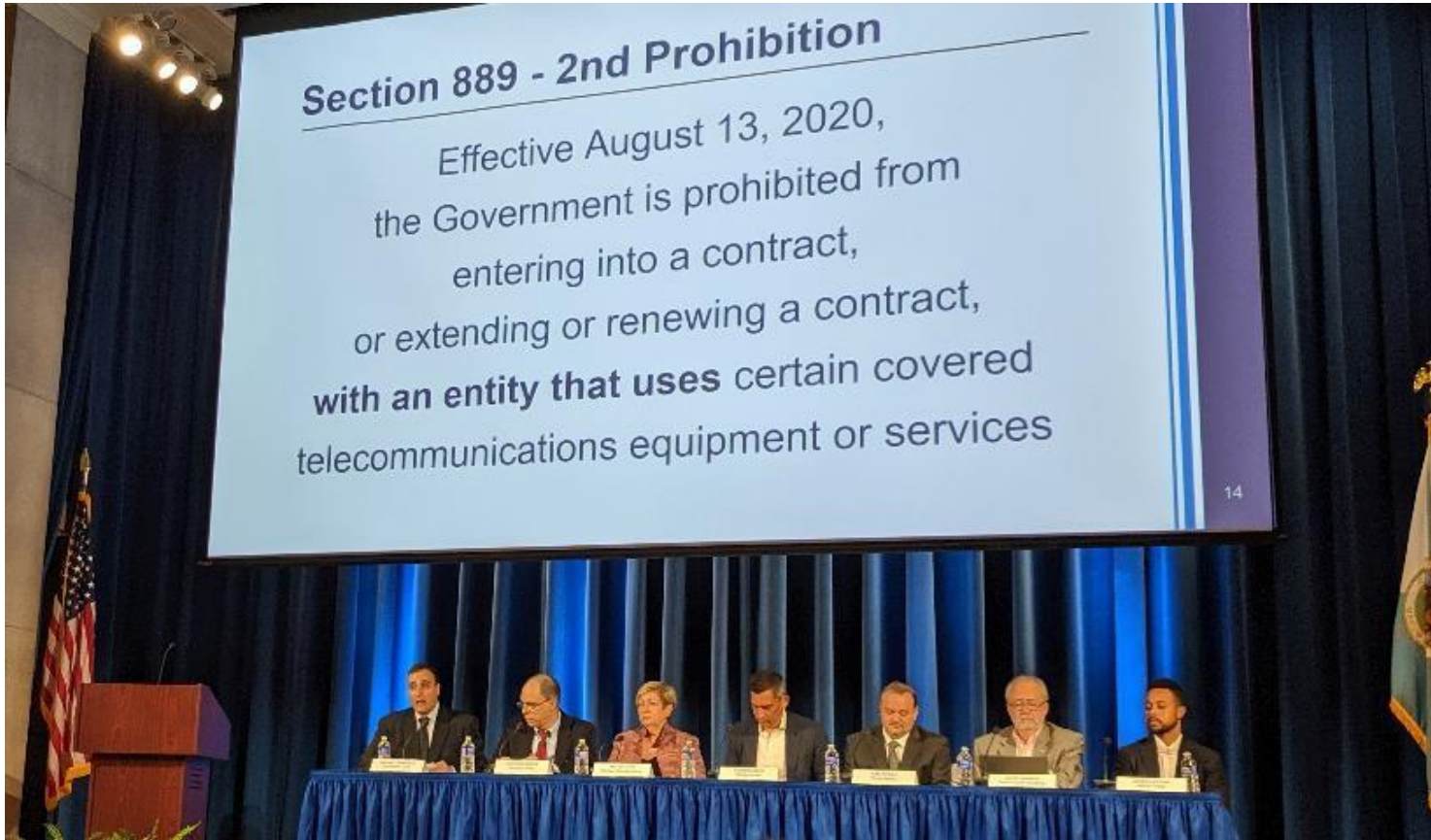
# Yes, Subsection B Is As Broad As It Sounds

- Subsection B of the ban applies to every sector: automotive, banking, building services, construction, general supplies and services, health care, higher education, information technology, leasing, nuclear power, OCONUS operations, professional services, travel and transportation, etc.
- There is very little recognition within industry (or, frankly, the Government) of the potential impact of Subsection B

# Illustration of Potential Scope







**Section 889 - 2nd Prohibition**

Effective August 13, 2020,  
the Government is prohibited from  
entering into a contract,  
or extending or renewing a contract,  
**with an entity that uses** certain covered  
telecommunications equipment or services

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## GSA's Subsection B Awareness Campaign

- Proposed rule is expected in March 2020
- In the meantime, GSA is undertaking a concerted effort to build industry awareness

# Suggested Internal Compliance Workstreams

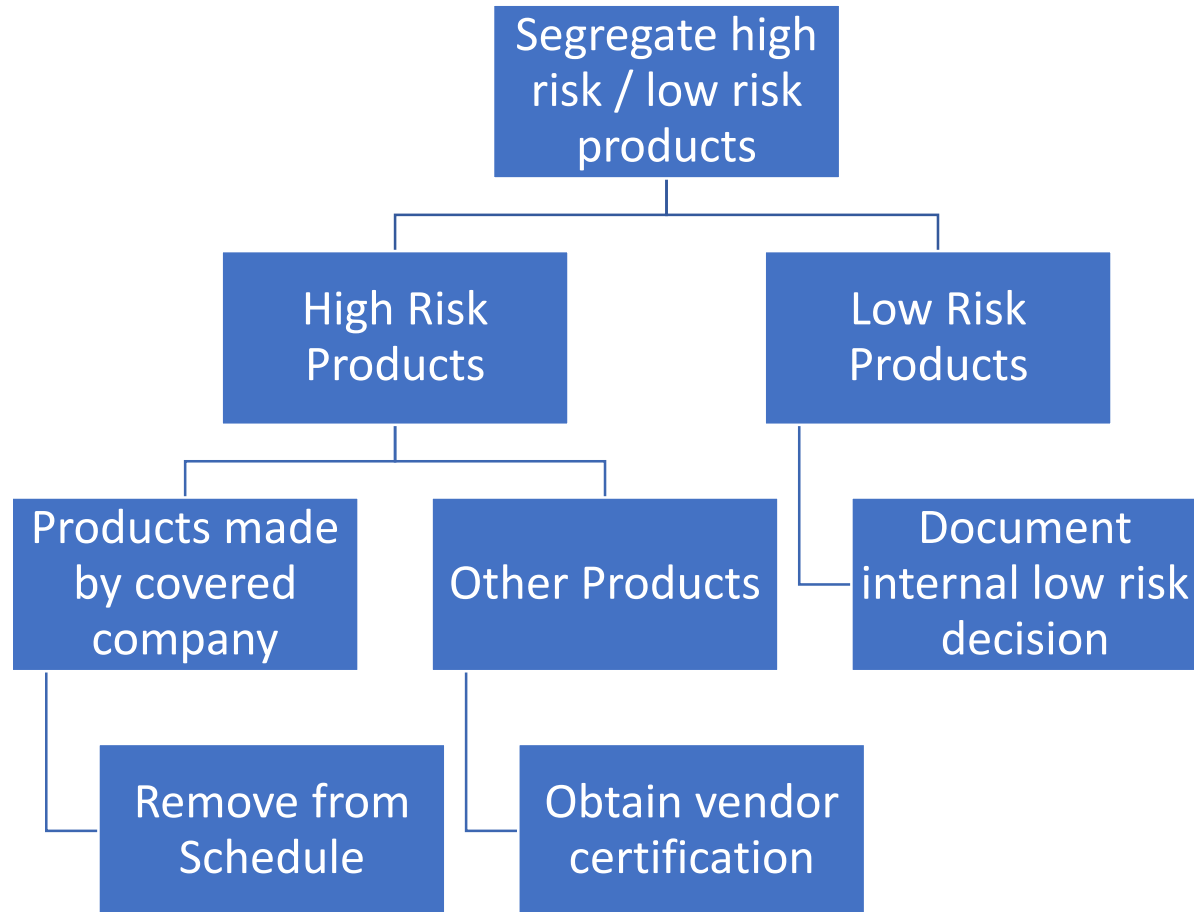
- Determine status of Company's current FAR representation
  - Has the company certified yet?
- Evaluate current compliance with Subsection A
  - Develop a reasonable risk-based approach
- Map out plan to evaluate compliance with Subsection B
  - Develop a reasonable risk-based approach
- Institute appropriate internal controls
  - Process for obtaining and updating vendor certifications
  - Process for certifying new products
  - Process for flowing down FAR obligations to subcontractors
  - Process to review customer requests for certification



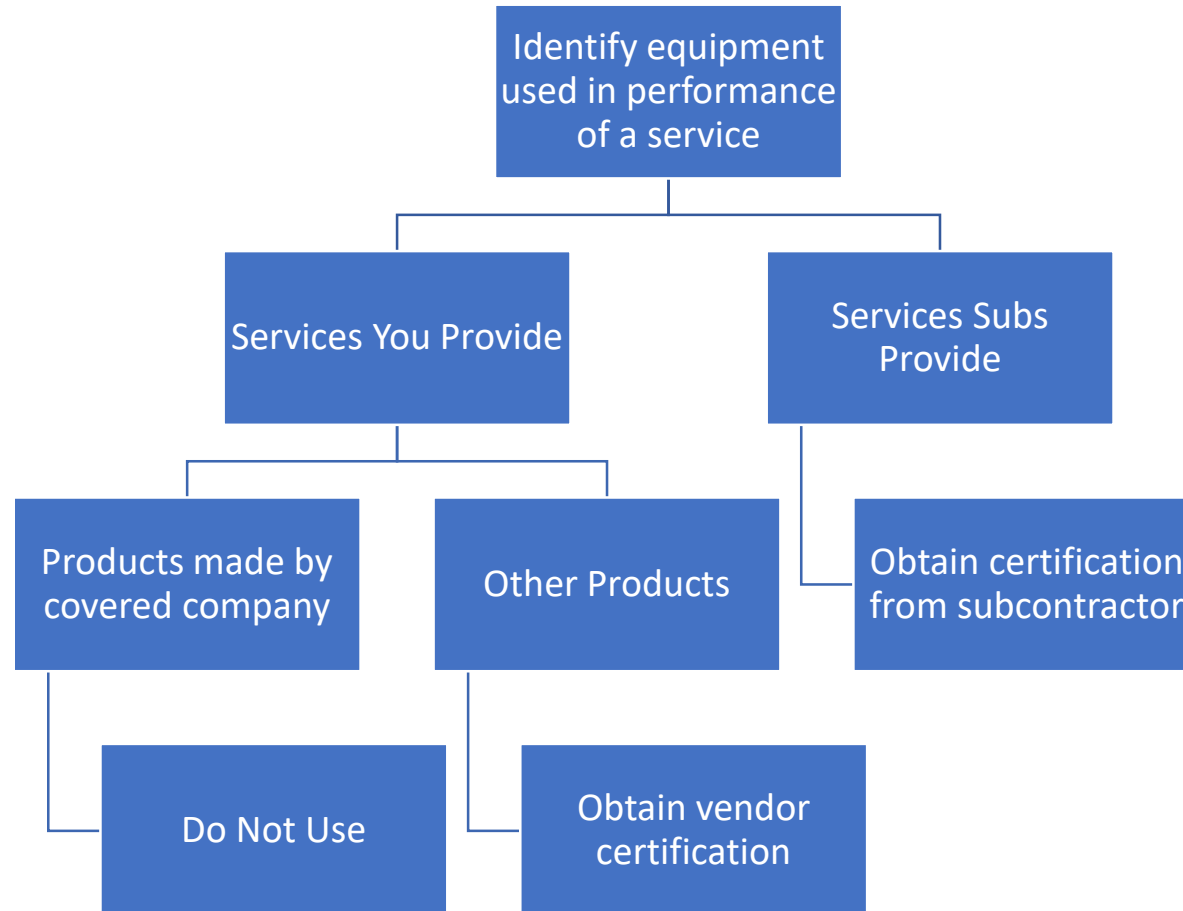
# Compliance Brainstorming

The following slides are intended to help companies begin thinking through how to establish a Section 889 workplan. The steps outlined are not endorsed by the Government. Neither will they necessarily ensure compliance with the new rules. They are offered here solely for the purpose of generating awareness and discussion.

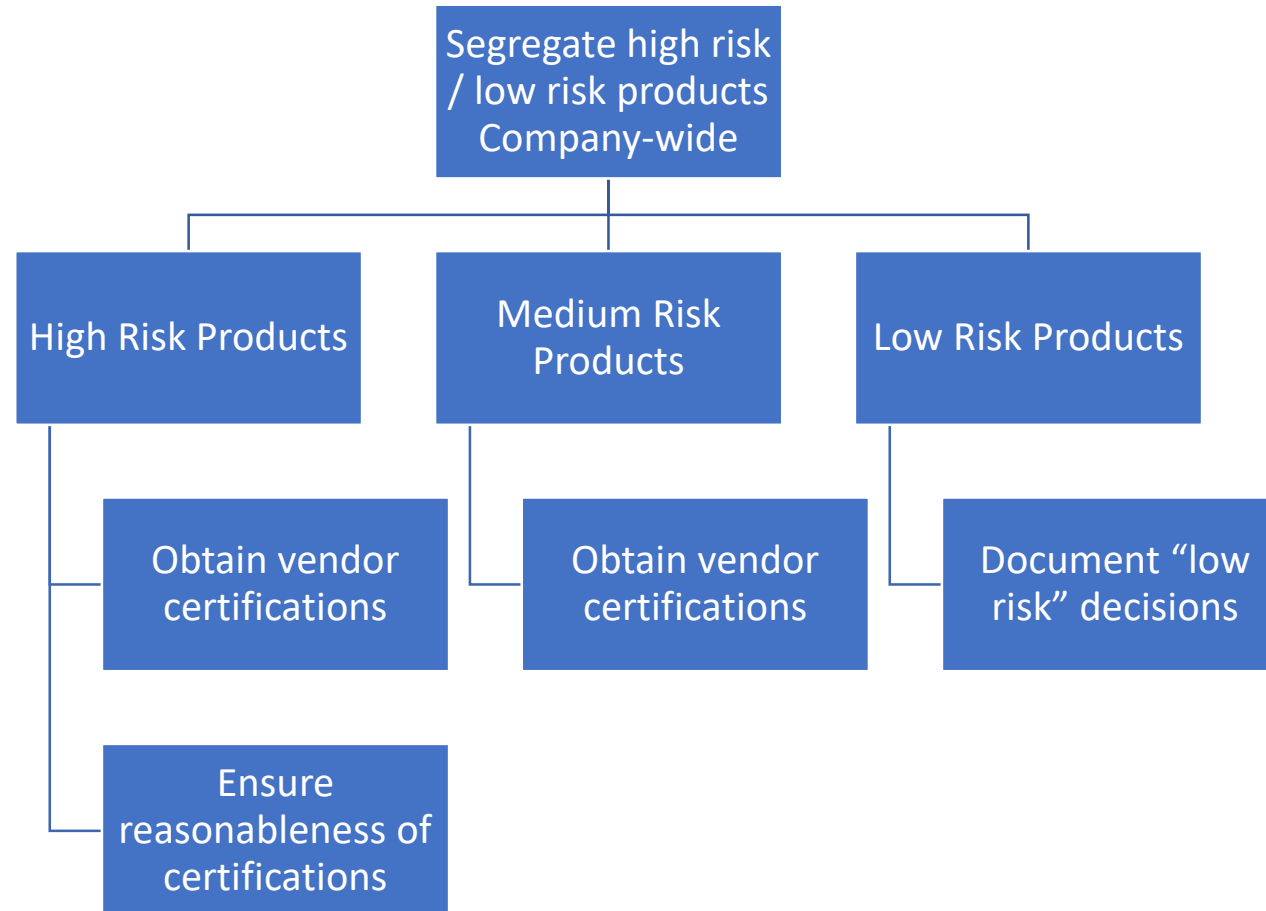
# Possible “Subsection A” Compliance Process for *Products*



# Possible “Subsection A” Compliance Process for *Services*



# Possible “Subsection B” Compliance Process



## Q&A

- Does Section 889 cover my affiliates? My subsidiaries? My parent?
- Does Section 889 cover my overseas locations?
- My staff works from home sometimes. Does it cover the equipment they use at home?
- Do I need to flow down the FAR clauses to my commercial items suppliers (e.g., the company I buy toilet paper from)?
- I develop software, which I then sell as a COTS product. Does Section 889 cover the computers I use in the development process?

## Q&A

- It will take me a long time to comply with Subsection B. Will the Government grant me a waiver?
- How does the Government plan to enforce compliance?
- I produce software. Does Section 889 apply to me?
- My staff often uses their personal cell phone for business. Are their phones covered?

# Thank you

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