

## New Proposed Grant Restrictions on Use of Certain Chinese Products and Services: OMB Proposes Guidance Implementing Grant Provisions of Section 889(b) of 2019 NDAA

January 28, 2020

### Key Points

- On January 22, 2020, the Office of Management and Budget (OMB) proposed changes to its grants and agreements regulations (2 CFR Part 200) to implement § 889 of the National Defense Authorization Act (NDAA) for 2019, which prohibits the procurement and use of certain “covered telecommunications equipment and services” produced by Chinese companies—Huawei, ZTE, Dahua, Hikvision and Hytera (and any affiliate or subsidiary thereof).
- OMB’s proposed regulations would create 2 CFR 200.216, providing that “Grant, cooperative agreement, and loan recipients are prohibited from using government funds to enter into contracts (or extend or renew contracts) with entities that use covered technology.” According to OMB, the prohibition “applies even if the contract is not intended to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services.”
- The guidance reflects a broad interpretation of § 889’s grant and loan-related statutory prohibition, and it may signal the Trump administration’s intention to pursue a similarly broad approach in its forthcoming rulemaking implementing procurement regulations under § 889(a)(1)(B), which will also become effective August 13, 2020.
- If implemented as written, the prohibition could have significant ramifications for recipients of federal grants, cooperative agreements and loans, as well as their sub-recipients and suppliers. Companies and institutions with potential exposure to § 889 should consider filing comments with OMB by March 23, 2020.

### Background on Procurement, Use and Loan/Grant Restrictions

As we have described in earlier articles ([here](#) and [here](#)), § 889 of the National Defense Authorization Act of 2019 (“2019 NDAA”) generally prohibits federal agencies, federal contractors and grant or loan recipients from procuring or using—without a waiver or exemption—any equipment, system or service that uses certain “covered

### Contact Information

If you have any questions concerning this alert, § 889 or its implementing regulations, please contact:

#### Robert Huffman

Partner  
[rhuffman@akingump.com](mailto:rhuffman@akingump.com)  
Washington, D.C.  
+1 202.887.4530

#### Angela Styles

Partner  
[astyles@akingump.com](mailto:astyles@akingump.com)  
Washington, D.C.  
+1 202.887.4050

#### Scott Heimberg

Partner  
[sheimberg@akingump.com](mailto:sheimberg@akingump.com)  
Washington, D.C.  
+1 202.887.4085

#### Chris Chamberlain

Associate  
[cchamberlain@akingump.com](mailto:cchamberlain@akingump.com)  
Washington, D.C.  
+ 1 202.887.4308

telecommunications equipment or services” as a “substantial or essential component of any system, or as critical technology as part of any system.”

“Covered telecommunications equipment and services” generally include those produced by (or provided using equipment or services produced by) Huawei Technologies Company and ZTE Corporation and, with respect to certain public safety or surveillance applications, Dahua Technology Company, Hangzhou Hikvision Digital Technology Company and Hytera Communications Corporation, or any subsidiary or affiliate thereof. It may also include equipment or services produced by any entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Federal Bureau of Investigation, “reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of” a “covered foreign country” (currently defined as the “People’s Republic of China”).

Section 889 contains two sets of prohibitions: Subparagraphs § 889(a)(1)(A) and (a)(1)(B) set forth § 889’s “Prohibition on Use or Procurement,” while § 889(b) describes § 889’s “Prohibition on Loan and Grant Funds” (i.e., the “Loan/Grant Restriction”).

Subsection 889(a)(1)(A), which addresses procurements under the Federal Acquisition Regulations (FAR), became effective August 13, 2019. Section 889(a)(1)(A) states that the head of an “executive agency” may not “**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.” This provision was implemented through two interim rules issued by the Federal Acquisition Regulatory Council (FAR Council) in **August** and **December** of 2019 that amended the FAR.

The second of the prohibitions addressing procurements under subsection § 889(a) becomes effective August 13, 2020. This provision, § 889(a)(1)(B), states that the head of an “executive agency” may not “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.” This provision will be implemented in a forthcoming rulemaking (see **FAR Case 2019-009**).

In addition to the prohibitions under § 889(a), § 889(b)(1) (effective August 13, 2020), i.e., the Loan/Grant Restriction, states:

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 [§ 889](a).

By contrast to § 889(a), § 889(b)—the Loan/Grant Restriction—does not expressly include a corollary prohibition on the obligation or expenditure of loan or grant funds to those who themselves use, or contract with entities that use, any equipment, system or service that “uses covered telecommunications equipment or services . . . .” However, the Trump administration **has in the past indicated** that it interprets § 889(b)(1) to include such a prohibition, and it has now formally proposed regulations reflecting that position.

## Proposed OMB Guidance Implementing § 889(b)'s Loan/Grant Restriction and Expanding to Cooperative Agreements

In 2014, the OMB consolidated various sources of grant-related guidance into Title 2, Part 200, Subtitle A of the Code of Federal Regulations (CFR), also known as the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (“Uniform Guidance”). OMB’s *Uniform Guidance* is broadly followed by Executive Branch agencies and largely adopted as written through binding, agency-specific regulations in Subtitle B of 2 CFR Part 200. Indeed, OMB requires that Federal agencies adopt OMB’s guidance in their own agency-specific regulations, “unless different provisions are required by Federal statute or are approved by OMB.” See 2 CFR § 200.106 Agency implementation.

Against this backdrop, on January 22, 2020, OMB proposed new guidance (85 Fed. Reg. 3766) to align federal grant administration regulations with § 889 of the 2019 NDAA. Specifically, OMB proposes to create 2 CFR § 200.216, “Prohibition on certain telecommunication and video surveillance services or equipment,” which would provide that:

**Grant, cooperative agreement, and loan recipients are prohibited from using government funds to enter into contracts** (or extend or renew contracts) with **entities that use covered technology**. See Section 889 of Public Law 115-232 (National Defense Authorization Act 2019).

OMB does not define “covered technology,” but based on the context, it appears to use the term to refer to “covered telecommunications equipment and services” as described in § 889. OMB also does not define the term “use,” and the term is not defined in § 889 or other implementing regulations issued to date. However, OMB states that the prohibition “**applies even if the contract is not intended to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services.**” Further, OMB’s proposal appears to prohibit the mere “use [of] covered technology,” whereas the statutory prohibitions describe “covered telecommunications equipment or services [used] *as a substantial or essential component* of any system, or *as critical technology* as part of any system.”

### Discussion

Many in the federal contracting community are anxiously awaiting the arrival of regulations implementing § 889(a)(1)(B)’s prohibition on contracting with an entity that “uses” items and services described in § 889. OMB’s proposed implementation of the Loan/Grant Restriction is not specifically related to those anticipated regulations, but its prohibition on federal awardees’ contractual relationships with other entities that use “covered technology” suggests the Trump administration intends to broadly interpret the term “uses” in § 889(a)(1)(B). Also evidence of the administration’s willingness to broadly interpret § 889, OMB’s proposal extends the Loan/Grant Restriction to “cooperative agreements,” a category of agreements not addressed in the statute.

More importantly for federal grant, cooperative agreement and loan recipients, OMB’s proposed regulation could, if adopted as written, create serious and onerous due diligence obligations for recipients, sub-recipients and suppliers. It could also require significant investments in alternatives to the equipment and services described in § 889.

## Conclusions and Recommendations

Entities that receive federal grants, cooperative agreements or loans, and those who contract with such entities, should undertake an assessment of their exposure to § 889 and the potential consequences of OMB's proposed rule on their existing and future federal awards. Affected entities should consider filing comments with OMB, as this feedback will be of critical importance not only in generating guidance on as-yet undefined terms and requirements in the final regulation(s), but also potentially with respect to any forthcoming amendments to the FAR implementing § 889(a)(1)(B). Indeed, OMB states in the preamble to the proposed restriction that:

OMB has limited data on the impact of this prohibition on Federal award recipients and contractors who use covered technology and seeks feedback on the feasibility, burden, programmatic impact, and cost associated with implementing this requirement. Commenters are encouraged to provide relevant data on the impacts of this proposed change and suggestions on how to support implementation of this prohibition.

Comments must be filed by March 23, 2020.

Looking ahead to August 13, 2020, all entities with potential exposure to § 889's prohibitions—whether through contracts or grants or loans—should prepare to identify and potentially describe in submissions to the U.S. government any equipment, system or service that uses “covered telecommunications” equipment, as described in § 889.

Specifically, these preparations may include the following:

- Conduct or review IT inventories to identify potentially covered equipment.
- Review supplier agreements and vendor contracts to identify potentially covered services.
- Analyze, identify and prepare to defend any uses of covered equipment or services that may fall outside the scope of the forthcoming prohibitions, such as uses excluded by § 889's two exceptions, or uses that do not involve covered equipment or services used as a “substantial or essential component” or as “critical technology.”
- Understand and develop procedures for satisfying ongoing supply chain-related obligations, such as reporting and risk management activities.

[akingump.com](http://akingump.com)