Implementation of FY19 NDAA Section 889(a)(1)(B)

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Part I: Understanding the Problem

Text of FY19 NDAA Sec. 889(a)(1)(B)

- 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.

What Congress Was Worried About (Mostly)

- Federal agencies may not contract with entities, such as U.S. Internet Service Providers, that
- use any equipment, such as routers and base stations (made by acceptable vendors), that in turn:
- use covered telecommunications equipment (Huawei or ZTE products) as:
- a substantial or essential component of those routers or base stations.

What Congress Actually Did (Inadvertently)

- Federal agencies cannot contract with any entity, even a U.S. hardware or software company, whose
- overseas facilities *anywhere* (e.g. India / Africa / Europe) use any service, such as Internet service from a foreign ISP, to serve the local operations and markets, where:
- the foreign ISP uses covered telecommunications equipment (Huawei or ZTE products) as:
- a substantial or essential component (or critical technology) of that Internet service ("system").

Net Effects

- ***Impossible*** for a company to verify that every sales office around the world isn't connected by an ISP that, in turn, does not use Huawei / ZTE gear
- Typically no contractual relationship with an ISP, nor visibility into its network
  - Consider: who is your ISP at home? Do you know which brand of routers they use?
- Given the global reach of Huawei and ZTE, the opposite is more likely to be true

Net Effects (continued)

- Thus, Sec. 889(a)(1)(B) prevents federal agencies from buying products from ***any*** large company with overseas operations (!)
- If the (a)(1)(A) model is followed here, companies must self-certify their compliance
- Most companies will just ***stop selling to the gov't***
  - The need to keep sales and other offices online in overseas markets would significantly outweigh any desire (or ability) to make sure that no foreign ISP uses H/Z gear.

Small IT Resellers Are Also Affected

- If "use" includes commercial sales, then:
- Federal agencies cannot contract with an entity, such as a small IT reseller, that:
- commercially sells ("uses") to non-gov't customers:
- any products from a covered company
  - Cell phones, two-way radios, security cameras, routers or other IT equipment
- Small IT resellers may also abandon the gov't

The Problem Also Goes Well Beyond Tech & ISPs

- Federal agencies cannot contract with any entity, even a U.S. widget manufacturer, who
- uses any service, such as a foreign shipping service, to ship its products anywhere, if:
- the shipping service uses covered telecom equipment (Huawei or ZTE products) as:
- a substantial or essential component (or critical technology) of ANY "system" anywhere.

Part II: Possible Solutions

Limiting the Scope of the Statute

- Potentially multiple paths based on FAR definitions
  - Entity, Use
  - Equipment, Service, System
  - Substantial or Essential / Critical Technology
- Factors for consideration
  - Furthering congressional intent / avoiding bad results
  - Consistency with other parts of Sec. 889
  - Interplay between different terms as defined
  - Careful analysis with hypotheticals is essential

1. Limit "Use" to Federal Contracts

- Possible Definition for FAR:
  - "The term 'use' means use in the performance of federal contracts."
  - Thus, (a)(1)(B) would not apply to non-federal sales or use of covered equipment by a government contractor that is unrelated to federal work.
- To work properly, the limitation likely must apply to both instances of "use" in (a)(1)(B).
- Clarify what counts as performance. Indirect work like order processing / invoicing should not count.

2. Limit "Use" to United States

- Possible Definition for FAR:
  - "The term 'use' refers to use in the United States."
- Relatively few U.S. ISPs use H/Z gear
  - FCC is currently collecting data
  - Congress is moving "rip-and-replace" legislation
- Not a perfect solution given August 2020 deadline
  - Some U.S. ISPs will still be affected on that date
- Based on legal presumption against extraterritorial application of U.S. laws

Presumption Against Extraterritoriality

"Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.

"The question is not whether we think 'Congress would have wanted' a statute to apply to foreign conduct 'if it had thought of the situation before the court,' but whether Congress has affirmatively and unmistakably instructed that the statute will do so."

- *RJR Nabisco v. European Community*, 136 S. Ct. 2090, 2100 (2016) (internal citations omitted).

3. Limit "Use" to Directly Relevant Uses

- Possible Definition for FAR:
  - "The term 'use' refers to those uses that are directly related to the contract at issue."
- Scenario intended by Congress:
  - Example: Contracts with ISP
  - Purpose is to provide Internet services to gov't
  - Use of network gear is directly related to contract
- Unintended Scenario:
  - Vendor's use of a foreign ISP would be unrelated

4. Limit "System" to Relevant Systems

- Possible Definition for FAR:
  - "The term 'system' refers to any system through which data pertaining to the contract at issue may pass."
- Likely would have similar effects to #1, #3
  - Just another way to attack the problem
  - Again, may not be a perfect solution

5. Limit "Entity" to Exclude Subsidiaries & Affiliates

- Possible Definition for FAR:
  - "The term 'entity' refers to the legal entity that executes the contract and does not include subsidiaries or affiliates of that entity which are unrelated to performance of the contract."
- Likely would have similar effects to #1 (fed contracts)
  - Just another way to attack the problem
  - Again, may not be a perfect solution

Practicalities

- Each of these approaches may be partial fixes
- A well-considered combination will likely work best
- Some definitions may lead to legal challenges
  - But may still get the job done, at least for a while
  - Hopefully, few would be motivated to sue (!)
- Industry is trying to propose common-sense ways to interpret a problematically-worded statute
- Comment period on draft FAR will be **very** important

Part III: Other Issues

Consistency of Terms Across the Government

- EO 13873 prohibits “any acquisition, importation, transfer, installation, dealing in, or use of any ICT service” etc.
  - Commerce Dep’t currently reviewing comments on proposed draft rule
- “Critical technology” – used in FIRRMA, but definition may cross-reference Commerce process which leaves terms uncertain.

Ability of SecDef to Designate Covered Companies

- Section 889(f)(3)(D) allows the Secretary of Defense, in consultation with FBI and DNI, to designate additional entities that would be covered telecommunications equipment or services.
- Will the addition of more covered entities under sec. 889 be published in the Federal Register?
- Is such a list under consideration, and will it be released before Aug. 13, 2020?

Legislative Options

- If any changes to Sec. 889 are to be made:
  - Congress must hear from *the government* about specific problems that cannot be fixed with FARs
- Neither DoD, other agencies, nor industry should assume there will be any changes

Thank You!