

November 22, 2022

The Honorable Jack Reed
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable James Inhofe
Ranking Member
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Chairman Reed and Ranking Member Inhofe:

The undersigned organizations strongly believe that the American business community and government have a shared interest in safeguarding the supply chains of U.S. agencies and departments, such as the Department of Defense, and businesses from risks to U.S. economic and national security. Many of our organizations supported the CHIPS for America Act (P.L. 117-167) to strengthen U.S. economic competitiveness, address security threats, and improve the resilience of semiconductor supply chains.

However, we have several substantive and procedural concerns with a specific amendment to the Senate National Defense Authorization Act (NDAA) for Fiscal Year 2023 that would add certain semiconductor technologies to section 889 of the NDAA for Fiscal Year 2019 (P.L. 115-232), particularly a provision typically referred to as part B. As currently crafted, and despite industry attempts to provide feedback on very short notice, the amendment is not fixable in the limited time available to the Senate to consider the NDAA.

Left unaddressed, adding the covered semiconductors to part B of section 889 would harm federal agencies' ability to procure the essential goods and services they need to promote our nation's well-being, while putting added financial pressure on businesses that are operating in an inflationary economy. The remainder of this letter explains some of the key problems related to part B and offers a more workable approach to enhancing the U.S. government's supply chain security by leveraging the Federal Acquisition Security Council (FASC).

Problems With "Uses" in Part B Run Throughout the Amendment

Section 889 has two main provisions that are commonly referred to as part A and part B:

- Part A bars the government from buying or obtaining (e.g., through a contract) any covered telecommunications equipment or services produced by specific covered suppliers. Part A is not easy to comply with as it presents federal contractors with costly and complex compliance burdens. However, with sufficient time and resources, which are often limited, businesses can implement part A.¹

¹ It is critical to highlight that protections targeting certain foreign-made gear have been initiated to conform with part A, which went into effect in August 2019. Thus, protections have been initiated.

- Part B is much more challenging. It bans agencies from contracting with a provider that “uses”—a term that is not defined in law or regulation—any covered equipment or services in its supply chains even if the provider does not know that the covered technology is being used for governmental or commercial work. Although part B has been in effect for a few years, there is no corresponding final rule implementing part B in federal contracts because the requirements are complex and not straightforward.²

Semiconductors are small subcomponents found in every system with electronics—such as a toaster containing a couple of semiconductors to a vehicle containing hundreds of semiconductors. Including semiconductors in part B would make policy design and implementation unquestionably vague, overly inclusive, and not risk based. For example, under the amendment, a company with both federal and nonfederal customers would be barred from selling to the government because it “uses” a coffee service that “uses” the covered semiconductors.

To further emphasize the point, the reach of part B could feasibly extend to a company offering printer paper. Coffee services and printer paper are not threats to U.S. national security. Yet the incredibly broad and vague nature of “use” would have unintended, but real, consequences for federal agencies and the U.S. contracting community.

Covered Semiconductors Should Be Excluded From Part B to Avoid Federal Contracting Challenges

The federal government and U.S. industry have a joint interest in modifying the amendment to exclude covered semiconductors from part B of section 889. Given the complexity and interconnected nature of the trade and supply chains that include semiconductors, if the amendment is passed as written, many businesses with international and domestic operations would be forced to halt their work providing key products and/or services to U.S. agencies.

At the time of this writing, the “use” prohibition raises a number of compliance and implementation concerns that do not offer quick fixes. Here are some selected concerns:

- The part B prohibition applies regardless of whether “usage” is related to performing work under a federal contract. U.S. contractors would face many difficulties trying to determine if covered semiconductors are “used” in, or are a part of, systems or services that third parties provide them (e.g., payroll, accounting, logistics, and travel).
- The identity of a semiconductor producer is unlikely to be apparent and could require tracing throughout the entire supply chain. Interpreted broadly, expanding part B to cover semiconductors could require entities that do business with the U.S. government to trace their entire supply chain—perhaps down to the component level—regarding every item of equipment used anywhere in a contractor’s enterprise.

² Part B is still operating under an interim final rule issued in August 2020.

What's more, government contractors purchasing commercial equipment may be several tiers removed from the entity in the supply chain that produced the semiconductors incorporated into the covered equipment or service. The federal government would be faced with an untenable task of determining a compliance, certification, and enforcement process for every product or service with electronics that it uses or procures.

- Small and midsize businesses (SMBs) with mostly domestic footprints would be negatively affected by part B if their products contain electronics. Many SMBs do not directly procure semiconductors but rather rely on module makers which, in turn, use multiple sources of semiconductors.
- The rule of construction in draft section 875(b)(2) provides insufficient clarity to ensure that the amendment would not require the removal and replacement of covered semiconductor products or services acquired prior to the effective date of the amendment. Also, the amendment lacks adequate clarity that the presence of such covered semiconductor products or services would not trigger the prohibitions in section 889 insofar as they were acquired prior to the effective date of the legislation.
- If the amendment remains consistent with draft legislation that our associations have reviewed, government contractors and grant or loan recipients would face tremendous compliance burdens and an almost impossible task of identifying the source of components used in every electronic device throughout their enterprises. These devices and other commercial products are often purchased many years prior to bidding on contracts. It is difficult to see how contractors could make good-faith representations regarding their "use" of prohibited semiconductors.

The amendment's effective date of four years is intended to recognize that substantial time would be needed to develop additional domestic production capacity for semiconductors. However, four years is insufficient to address the many problems associated with part B. The difficulties with "uses" run through the entire amendment, which can only be remedied by excluding covered semiconductors from part B of section 889.

Policymakers Need to Use the FASC to Mitigate Risks From Foreign Semiconductors

Security threats, whether physical or cyber, are incredibly dynamic and must be countered by quick and effective responses, which often must be adjusted over time based on the threat. Rather than using the blunt, permanent prohibition that part B entails, Congress has purposefully created the FASC to improve executive branch coordination, foster supply chain information sharing, and initiate actions to address supply chain risks, including specific semiconductors. The FASC—composed of senior officials with expertise in supply chain risk management, acquisitions, or information and communications technology (ICT)—was established a few years ago to perform functions comparable to part B, including calling for the removal of "covered articles" (e.g., ICT) from agency information systems. Any new FASC legislation should be addressed separately from the amendment.

U.S. industry appreciates and shares the national and economic security goals underlying section 889, including limiting the presence of covered suppliers in the digital infrastructure of U.S. government networks and systems. For the reasons outlined here, part B is unworkable in its current form. The amendment should not add covered semiconductors to part B.

The undersigned associations believe that the American business community and U.S. policymakers have a shared goal in avoiding disruptions to federal agencies' contracting operations and programs. We also believe that Congress and industry can work together to better leverage the FASC to meet the objectives of part B in ways that are risk based, can be practically implemented, and enhance the security of our U.S. government supply chains.

Sincerely,

Aerospace Industries Association (AIA)
The Alliance for Digital Innovation (ADI)
Alliance for Automotive Innovation
Associated General Contractors of America (AGC)
The Center for Procurement Advocacy (CPA)
Competitive Carriers Association (CCA)
Computing Technology Industry Association (CompTIA)
CTIA
Information Technology Industry Council (ITI)
National Defense Industrial Association (NDIA)
National Foreign Trade Council (NFTC)
NCTA—The Internet & Television Association
NTCA—The Rural Broadband Association
Professional Services Council (PSC)
Security Industry Association (SIA)
Small Business & Entrepreneurship Council (SBE Council)
Telecommunications Industry Association (TIA)
U.S. Chamber of Commerce
U.S. Council for International Business (USCIB)
USTelecom—The Broadband Association

cc: Members of the Senate Committee on Armed Services
cc: Members of the Senate Committee on Commerce, Science, and Transportation
cc: Members of the Senate Committee on Homeland Security and Governmental Affairs
cc: Members of the House Committee on Armed Services
cc: Members of the House Committee on Energy and Commerce
cc: Members of the House Committee on Homeland Security
cc: Members of the House Committee on Oversight and Reform