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Mr. William F. Clark
Director, Office of Government-wide Acquisition Policy
General Services Administration
1800 F Street, NW, Washington, DC 20405

Electronic Submission: <https://www.regulations.gov> Docket ID No. FAR-2023-0008

RE: Federal Acquisition Regulation: Prohibition on Certain Semiconductor Products and Services (FAR Case 2023-008)

As a 501(c)3 educational nonprofit, NDIA represents more than 1,700 corporate and over 65,000 individual members from small, medium, and large contractors. For more than 100 years, NDIA has provided a platform through which leaders in government, industry, and academia can collaborate and provide solutions to advance the national security and defense needs of the nation.

NDIA submits the following information for consideration by the Regulatory Secretariat Division in response to the request for comments regarding the consideration to amend the Federal Acquisition Regulation (FAR) to implement paragraphs (a), (b), and (h) in section 5949 of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023.

Section 5949 is a particularly complex statute that requires numerous government agencies' reviews, analyses, and reports. The analysis, assessment, and strategy developed by the Department of Commerce in accordance with Sec 5949(e) will be essential for successful implementation policy objectives underpinning Sec 5949. A pragmatic and meaningful implementation of the statute cannot be expected without this fundamental assessment being completed and available to federal contractors and subcontractors well prior to the effective date.

Furthermore, Sec 5949(g) requires the Federal Acquisition Security Council (FASC) to issue recommendations to mitigate supply chain risks relevant to the acquisition of semiconductor products and services based on the analysis, assessment, and strategy required by Sec 5949(e). The FASC recommendations are due no later than December 23, 2024, and require "engagement with the private sector and other non-governmental stakeholders."¹ Timely and meaningful engagement by the FASC with these key stakeholders is absolutely essential to the development of well-informed and effective recommendations related to supply chain risk management. While agency requests for information can be useful, it is only one element of engagement and is based on one-way communication. Truly meaningful engagement requires dialogue through meetings, conferences, summits, and outreach through associations and industry partners. Public meetings to discuss the ANPR, such as those put into practice by the Department of Defense through recent rulemakings related to intellectual property matters, have proven effective in fostering productive dialogue and are recommended as a meaningful way to engage with industry in the implementation of Sec. 5949.²

¹ Sec 5949(g).

² See DFARS Case 2019-D043 as one example of the use of public meetings in the rulemaking process:
<https://www.federalregister.gov/documents/2022/12/19/2022-27196/defense-federal-acquisition-regulation-supplement-small-business-innovation-research-data-rights>

Feedback Offered on Provided Questions:

(a) Do you have any recommendations for how DoD, GSA, and NASA can further clarify the scope of the prohibition?

1. In Section A, the prohibition scope of the proposed rule provides an example that does not align with the statute. Section 5949 (a)(2) states:

“Nothing in paragraph (1) shall be construed — (i) to require any covered semiconductor products or services resident in equipment, systems, or services as of the day before the applicable effective date; [or]

(ii) to prohibit or limit the utilization of such covered semiconductor products or services throughout the lifecycle of such existing equipment....”

The contradictory example provided in the proposed rule states:

“For example, section 5949(a)(1)(B) could restrict a Federal agency from acquiring a replacement control panel within a critical system that enables an Internet of Things (IoT) device that includes a covered semiconductor product or service and was purchased prior to the effective date of the prohibition.”

Recommendation: The regulation should make clear that the prohibition does not apply to the procurement, upgrade, modification, and sustainment of items if a solicitation for the item was published prior to the implementation date.

2. Section 5949(a)(1)(A)(Part A) prohibits “executive agencies from procuring or obtaining electronic products or services that include covered semiconductor products or electronic services.” Section 5949(a)(1)(B) (Part B) prohibits “executive agencies from procuring or obtaining electronic products or electronic services that *use* electronic products that include covered semiconductor products or services” for use in a critical system [*emphasis added*].

Recommendation: Additional clarity and illustrative examples of how the prohibition in Section 5959(a)(1)(A) and Section 5959(a)(1)(B) differ are needed to understand and enable implementation of the policy.

3. There is a lack of clarity on what will be considered a “critical system.”

Recommendation: The final rule should require the government to identify in the solicitation and contract whether the acquisition involves a “critical system.” This simple step will provide efficiency, consistency, and transparency and will enable industry and government acquisition professionals to understand to what extent the more restrictive prohibitions regarding covered semiconductor products and services with respect to “critical systems” are germane to the acquisition and any subsequent notification requirements regarding the use of covered semiconductor products and services in a critical system.

(b) Do you have any comments on the proposed definitions being considered for this rule, including the definition for reasonable inquiry?

1. The lack of clarity on when and what due diligence would be required is ambiguous and could slow down government acquisition activity if offerors cannot readily ascertain and implement the actions needed for compliance. Initially, the proposed rule gives the impression that it is using the same definition for “reasonable inquiry” currently used in other federal acquisition restrictions such as FAR 52.204-25 (implementing Sec. 889) and FAR 52.204-30 (FASCSA Orders) by stating that a “reasonable inquiry means an inquiry designed to uncover any information in the entity’s possession.” However, the proposed rule goes on to include the below requirements that appear to contradict the first part of the reasonable inquiry definition by requiring an offeror to go beyond the information in its possession. More specifically:
 - While an offeror may reasonably rely on certifications of compliance from subcontractors, “other mechanisms of due diligence” may be required “depending on the facts and circumstances,” and
 - “Diligence review shall be required with regard to entities that are established or operated in foreign countries of concern, even when they certify compliance with this rule.”

Recommendation: Because suppliers and subcontractors have already invested in “reasonable inquiry” protocols for purposes of compliance with the aforementioned provisions, this rule should be harmonized with those uses of “reasonable inquiry” to facilitate compliance and to avoid confusion and misalignment in these compliance efforts.

(c) Do you have any comments on DoD, GSA, and NASA’s plan for requiring a solicitation provision and contract clause?

1. In Item (5) of Section D (Contract Clause), the phrase “...*becomes aware or has reason to suspect*...” is vague and ambiguous, which will lead to inconsistent implementation.

Recommendation: Change the proposed notification requirement to apply to any Federal contractor, subcontractor, or covered entity who has “...*actual knowledge or reasonably believes*...” [that covered semiconductor products or services were used in a critical system], rather than “...*becomes aware or has reason to suspect*...”

(e) Are there any details regarding the waiver authority that would be helpful to clarify?

1. Clarify “critical national security interests” to mean “in the interest of National Security.”
2. In implementing the waiver authorities, consideration should be provided to limit the impact of the prohibition on the agency mission and timely delivery of products and services for essential agency needs. In this regard, the regulation should allow the relevant Secretary or agency head to delegate waiver authority to the program manager. The PM is the person most intimately familiar with the mission of a program, the industrial base supporting the program, and funding availability.

Recommendations: To minimize the impact on the agency mission and to ensure consistency in implementation and clarity in authorities provided, the rule should:

- a. Provide for the relevant Secretary or agency head to delegate waiver authority to the program manager;
- b. Clearly articulate factors/elements a program manager should or must consider in pursuing a waiver;
- c. Specifically describe processes and considerations a contracting officer should apply when assessing a contractor estimate to implement “rip/replace” versus pursuing a waiver; and
- d. Provide a process by which contracting officers can make domestic non-availability determinations.

(f) Do you have sufficient visibility into your supply chain to understand whether your supply chain uses any covered semiconductor products or services? What information is normally requested from subcontractors and suppliers about semiconductor provenance?

1. No. There are currently no requirements for a contractor to request information from its supply regarding the sourcing of its semiconductors.
2. Companies can readily identify their first-tier suppliers, determine whether any of their first-tier suppliers are a targeted entity, investigate such spending, and implement procurement blocks as needed.
3. Supplier procurement requirements and sourcing restrictions are communicated via contractual flow-downs. As needed, suppliers may be requested to provide a representation or certification of compliance during initial supplier screening, onboarding, and through annual supplier certifications.
4. In the normal course of business, the commercial market does not require companies to track, request, or report semiconductor provenance in electronic parts, products, or services. As a result, such information is generally not tracked or available. Imposing such requirements in commercial settings would negate the value and savings derived from using the commercial market as a source of supply and could create a denial of access to necessary goods or services related to covered semiconductors.

(g) What procedures do you anticipate using to conduct a reasonable inquiry into your supply chain to understand whether your supply chain uses any covered semiconductor products or services? How do you currently or how do you plan to detect the inclusion of covered semiconductor products and services in your supply chain?

1. We anticipate a periodic query of relevant internal electronic databases and systems that are readily searchable. For example, potential searches might include:
 - Searching a vendor master file for first-tier spending with targeted sources.

- If the rule results in the U.S. government publishing a list of electronic products with prohibited semiconductors, a supplier could use readily searchable, centralized databases of invoice-related data to search for in scope part numbers, part descriptions, or source names.
- 2. We anticipate adding the contractual clause to our standard terms and conditions of purchase for orders under applicable government contracts, and such clause requiring the offeror to (i) conduct a reasonable inquiry, (ii) provide a representation/certification of “no use,” (iii) customer notification requirement in the event the offeror determines it “uses” covered semiconductor products or services, and (iv) flow the clause to its subcontractors performing work under a government contract.

(h) If your organization does use covered semiconductor products or services, how much of an impact will this prohibition have on your organization

The prohibition will require every contractor and subcontractor to modify their supply chain and will add to the compliance burden and risk at all levels of the supply chain. The level of disruption and cost of compliance cannot yet be measured, but because it is not currently known where the covered semiconductors may be in use, a full review of every supply chain for all covered contracting actions would be necessary to “baseline” use, the anticipated costs and impacts should be expected to be substantial.

(j) Are there any categories of products or services you currently provide to the Government for which you anticipate needing a waiver when the prohibition is effective in December 2027? If so, which categories of products or services?

1. Use or requirement for waivers will significantly depend on whether the final rule makes clear that the prohibition does not apply to the upgrade, modification, or sustainment of products in which there was a solicitation published prior to the implementation data.
2. COTS items will be a category of items that will likely require a waiver.
3. Further, the requirement for waivers will depend on the willingness of suppliers to modify their supply chain, which will be contingent on ready access to non-prohibited semiconductors.

Recommendation: USG should align investments of CHIPS and Science Act funding to support the strategy developed in accordance with (e) and mitigate the risks identified by the FASC in accordance with (g). Investments in domestic and allied production capacity and/or stockpiling of Mature nodes/State of the Present (SOTP) devices are likely needed given the scope of Sec 5949 and the reliance on Mature nodes by the Aerospace and Defense sector, which is a highly regulated, long-cycle business.

(k) For categories of products or services for which a waiver may be necessary, how long do you anticipate it will take to find alternative semiconductors that are compliant?

As indicated above, a complete transition from prohibited semiconductors will depend on the willingness of suppliers to modify their supply chain, which will be contingent on ready access to non-prohibited semiconductors.

(m) What additional information or guidance do you view as necessary to effectively comply with a future rule to implement section 5949?

1. The rule should clarify under what facts and circumstances an offeror is required to conduct due diligence and the documentation required for proof of compliance.
2. To ensure consistency, the rule should clearly articulate what factors/elements a PCO should or must consider when determining whether, despite not being required to do so, to (1) request an offeror to “rip/replace” any products or services in equipment, systems, or services prior to the effective date of the prohibition or (2) prohibit or limit the utilization of covered semiconductor products or services during the lifecycle of existing equipment.

(n) What challenges do you anticipate facing in effectively complying with a future rule to implement section 5949.

In both purpose and structure, Section 5949 mirrors the Chinese telecom prohibitions in Section 889 of the FY2019 NDAA. Both laws seek to use the federal acquisition process to address economic and national security risks posed by Chinese technology in US networks and products; both laws consist of broad, largely ambiguous prohibitions which, on their face and if enforced as written, would require contractors to dramatically overhaul their technology supply chains as a condition of doing business with the federal government; and both laws include large gaps in time between enactment and effective date (two years for Sec 889, five years for Sec 5949), to allow sufficient time for the FAR Council to develop acquisition regulations and for industry to prepare for the compliance burden.

In the case of Part B of Section 889, which goes beyond a direct procurement ban to prohibit agencies from contracting with organizations that “*use*” covered telecom products, industry groups were unanimous that compliance with the law would be “infeasible” and “unworkable,” and DoD warned Congress that failing to narrow the scope of the prohibition could bring federal procurement to a halt. Many contractors put off discussions about a compliance strategy for months, in part because the idea of complying with the statutory text as written seemed implausible and in part because there seemed to be little sense in trying to define the key terms or answer the most pressing questions with regulatory guidance pending. The FAR Council took nearly two years to promulgate acquisition regulations to define and clarify the prohibition, finally issuing an interim final rule a month before the prohibition was to take effect. Nearly four years later, the FAR Council still has not issued a final rule.

The acquisition community faces a similar dilemma in preparing for Section 5949, particularly with respect to Part B, which, like its Section 889 counterpart, appears to go a step further than the direct ban in Part A by prohibiting the procurement of electronic parts and products that “*use*” other parts or products that include covered semiconductor products or services. This distinction seems to prohibit an agency from purchasing a part or product, even if it does not include covered semiconductor products or services, and instead uses another part or product that is otherwise prohibited by Part A. But as was the case with Section 889, “*use*” is not defined, and it remains unclear how closely the “*use*” of a covered part must be tied to, or incorporated in, a product or service being procured for it to fall within the scope of the prohibition.

In the case of this rule, the definition of “electronic products” appears overly broad in that it includes “products that include technology, parts or components that have electrical, digital, *magnetic*, wireless, *optical*, electromagnetic, or similar capabilities” (*italics emphasis added*). Under this definition, magnets

and lenses could technically be considered within scope despite not having an electrical system and not within the intent of applicability of Sec. 5949. Furthermore, when procuring commercial products and services, including COTS items, knowledge of subsequent tiers beyond tier one is often limited or non-existent. As currently drafted, the rule leaves ambiguity in the documentation required for proof of compliance at the sub-tier level. If all the relevant factors are taken into consideration, it is doubtful that the policy objectives underpinning Sec. 5949 will be achieved, and any progress made in reducing the presence of prohibited semiconductors in products and services acquired by the USG will take time, compliance structures will be costly, and deliveries will likely be slowed or stopped while cases of non-conformance are adjudicated.

(o) What would be the best method or process for identifying the provenance of the supply chain for the semiconductor components? Are you aware of existing guidelines or best practices for identifying and documenting the provenance of the supply chain for electronic products and electronic services? Do you have any suggestions for how and when the Government should validate supply chain provenance information and documentation?

1. Companies typically have the privity of contract with and, therefore, visibility into supply chains for only first-tier suppliers. As supply chains become more complex, tracking a vast number of suppliers to trace the origins of products, particularly the basic materials from upstream in the supply chain, remains a significant challenge.
 - a. Visibility is further challenged where data is proprietary, classified, unavailable (not tracked), or disclosure would reveal a competitive advantage.
 - b. During manufacturing processes, companies that source identical basic components from multiple vendors and co-mingle the storage of those materials will be unable to determine which component went into any given product.
2. Supply chain mapping would be costly and challenging given the lack of tools and processes to drill down into supply chain sub-tiers.
 - a. Market tools that rely on public information to map supply chain risk depend on outdated and inaccurate information, resulting in an inaccurate and incomplete map/analysis.
 - b. To manually map supply chains through various sub-tiers, industry would need to invest a substantial amount of labor and significantly invest in building out processes and tools.
3. To the extent the USG leads a supply chain mapping initiative, centralized, sensitive information would be an attractive target for cyber threats and would need to be appropriately secured.

(p) If the Department of Commerce establishes a public list that identifies electronic products with prohibited semiconductors, would this be helpful for implementing this prohibition?

1. Yes, such a list of electronic products with prohibited semiconductors would help raise awareness so companies may proactively implement internal procurement blocks, as needed, throughout the supply chain.

2. Such a list should identify for each electronic product at least: the name of the manufacturer, distributor, product name, model number, time period the electronic product was manufactured with the prohibited semiconductor(s), and if available, MAC or IP address.

q) Do you have any feedback regarding how DoD, GSA, and NASA should incorporate the requirements regarding certification, disclosure, notification of safe harbors, and allowable costs in paragraph (h) of section 5949?

1. The applicability and responsibilities of covered entities and covered contracts are particularly confusing and inconsistent.
 - a. Proposed contract clause (4) states that a contractor must disclose to a customer the inclusion of a covered semiconductor. This necessarily means that a contractor can utilize a covered semiconductor. If that is the case, please clarify the circumstances for a covered semiconductor.
 - b. Proposed contract clause (7) should make clear that any notifications made under paragraphs (4)-(6) that lead to rework or corrective actions shall be an allowable cost in accordance with Sec 5949.
 - c. Proposed contract clause (8) states that a contractor that fails to disclose a covered semiconductor product or service shall be responsible for rework or corrective action. The regulation should make clear that this is not applicable if the contractor reasonably relied upon the certification of compliance by its suppliers.
 - d. A clause should be added to make clear that requiring a contractor to “rip and replace” parts is an extraordinary mitigation step and should only be taken when the Secretary of the Department determines it is a critical national security interest.

Recommendation: The proposed Contract clauses should be clarified.

2. Clear accountability for the specific actors who have direct visibility to and control over procurements for a covered semiconductor product or service is needed. Phrased differently, federal contractors and subcontractors who are not a “covered entity” and provide a representation of “no use” after conducting their reasonable inquiry but subsequently learn of a “use” from their supply chain should be authorized to avail themselves of the Request for Equitable Adjustment (REA) process.

Recommendation: We respectfully request the rule clarify and confirm, for the avoidance of doubt, that the below paragraphs (h)(2 through 4) of Sec. 5949 apply only to a subset of federal contractors and subcontractors, specifically, those who are a “covered entity,”³ i.e., not the downstream federal contractors and subcontractors removed from the direct purchase of semiconductor products or services.

³ “Covered entity (section 5949(j)(2))” is defined as an entity that develops a design of a semiconductor that is the direct product of U.S. origin technology or software and purchases covered semiconductor products or services from an entity described in the first or third paragraph of the definition of “covered semiconductor product or services.”

*(2) require **covered entities** to disclose to direct customers the inclusion of a covered semiconductor product or service in electronic parts, products, or services included in electronic parts, products, or services subject to the contracting prohibition under subsection (a) as to whether such supplied parts, products, or services include covered semiconductors products or services;*

*(3) provide that a **covered entity** that fails to disclose the inclusion to direct customers of a covered semiconductor product or service in electronic parts, products, or services procured or obtained by an executive agency in contravention of subsection (a) shall be responsible for any rework or corrective action that may be required to remedy the use or inclusion of such covered semiconductor product or service;*

*(4) provide that the costs of covered semiconductor products or services, suspect semiconductor products, and any rework or corrective action that may be required to remedy the use or inclusion of such products **are not allowable costs** for Federal contracts;
(Emphasis added.)*

(r) What else should DoD, GSA, and NASA consider in drafting a proposed rule to implement the prohibitions outlined in section 5949?

1. **Recommendation:** For efficiency, consistency, and transparency, the rule must require the USG to publish and maintain a list of affiliates, subsidiaries, and successors of the targeted entities named in the definition of “covered semiconductor product or service.”
2. **Recommendation:** The rule should explicitly provide procedures for equitable adjustments as mitigation to any increased cost associated with complying with these requirements when an offeror complies with the reasonable inquiry requirement and subsequently learns that a sub-tier subcontractor uses covered semiconductor products or services prohibited by the rule.

NDIA and its membership appreciate the government’s desire to promote a strong, dynamic, and robust defense industrial base. If you have any questions related to these comments, please contact Chris Sax at csax@ndia.org.

Sincerely,

National Defense Industrial Association