

Preparing For More Limber Federal Supply Chain Oversight

By **Amanda Robinson, Barron Avery and Sarah-Jane Lorenzo** (December 13, 2024, 6:03 PM EST)

On Nov. 20, the U.S. Senate Committee on Homeland Security and Governmental Affairs approved a bill that would enhance federal efforts to implement a new supply chain security enforcement initiative. The bipartisan bill seeks to strengthen the role and authority of the Federal Acquisition Security Council.

The FASC Improvement Act would permit FASC and the U.S. Congress to act quickly to investigate potential risks to federal acquisition security. If passed, it would give Congress a direct role in identifying companies of concern, and issuing orders to exclude and remove those companies from executive agency procurements.

FASC

FASC is an interagency council tasked with identifying companies, products and services that introduce risk to the information technology supply chain. After investigation, FASC may recommend their removal and exclusion from executive agency information systems and procurements.

FASC's recommendations to remove or exclude a company, its products or its services can be adopted and issued as orders by the secretaries of U.S. Department of Defense and the U.S. Department of Homeland Security, and by the Office of the Director of National Intelligence. Exclusion and removal orders issued by those agencies can be implemented by specific agencies or on a governmentwide basis.

FASC's actions can have devastating effects for companies with foreign ties, their investors and their customers. After exclusion and removal orders are issued, the government agencies to which they apply are prohibited from purchasing the company's products and services, and those products and services will be removed from the federal government supply chain.

Not only is the company excluded and removed from federal procurement and systems, but it is placed on a blacklist that prohibits downstream government contractors from doing business with it. The bottom line is that there are significant risks even to companies that do not work with the government directly.

Although FASC was established in 2018 by the Federal Acquisition Supply Chain Security Act, it only



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began issuing notices of its recommendations this year. FASC is actively investigating companies, but none of its recommendations have been adopted and issued as exclusion and removal orders yet. FASC's slow pace may be a motivating factor for this bill, which would streamline the process for designating, investigating and excluding sources of concern.

Changes on the Horizon

The FASC Improvement Act would expand FASC's authority beyond its current focus on supply chain risks by permitting FASC to take broader acquisition security enforcement actions.

The bill strengthens congressional oversight of FASC and permits FASC to directly issue binding removal and exclusion orders when directed to do so by Congress. The bill also permits Congress to designate sources of concern that FASC must investigate.

The bill also addresses the perceived concern over FASC's slow pace by mandating a 270-day time frame for action on designated sources of concern. Within this time frame, FASC must issue a designated order of exclusion and removal, or report to Congress and explain why such an order was not issued.

The bill would move FASC into the Executive Office of the President, and would elevate FASC's agency membership requirements. Those moves are intended to strengthen FASC's governing structure and improve its efficacy.

For example, under FASC's current governing statute, FASC's chairperson must be a senior-level official from the U.S. Office of Management and Budget. Under the new bill, the chairperson must be the national cyber director or someone else on FASC, designated by the national cyber director to be the chairperson

Finally, in order to incorporate best practices on due process considerations, national security exemptions, case-by-case waivers and second-order prohibitions, the bill makes subtle changes to FASC's process for assessing risk and issuing orders. These changes are intended to better insulate FASC's actions from legal challenges.

In testimony before the U.S. House of Representatives, one of the bill's sponsors, House Committee on Oversight and Accountability Chair James Comer, R-Ky., noted that the bill is intended to provide Congress with "a streamlined and standardized process for prohibiting federal agencies from buying or using a source of concern in the future," and allow the executive branch to act quickly to protect the federal supply chain from nefarious technology and hostile actors.

Potential Impacts

If passed, the bill could have significant implications for companies with foreign ownership, their investors and their customers. With more resources, FASC could increase its caseload. As a result, more companies with ties to foreign adversaries through ownership, control or even employment of foreign nationals could find themselves the targets of FASC investigations, recommendations and orders.

The bill's attempt to streamline and expedite FASC investigations may also mean FASC will be better equipped to move quickly when investigating companies and issuing orders. Companies that are targets of FASC investigations will need to act fast to respond to FASC's recommendations and implement

protective measures that address FASC's concerns.

To guard against the risk of being caught off guard by a FASC recommendation, companies with ties to foreign adversaries — and their investors — may wish to proactively assess whether those ties could subject them to foreign influence or control, or could otherwise create supply chain risk.

FASC takes an aggressive approach when identifying criteria deemed to be risky. Included among its concerns is any operational presence in a country of special concern or country that is considered to be a foreign adversary, as well as the scope of involvement by foreign nationals in operations more broadly.

Companies should consider taking proactive steps to assess their foreign touchpoints through the lens of the foreign country's reach and influence. There are likely ways to reduce the risk of government interest and concern, including through corporate governance changes, tightening of access controls, and guardrails around research and development.

To be clear, FASC's jurisdiction is broad, and even companies that lack ties to foreign adversaries may find their products subject to a FASC investigation based on the foreign ties of companies in their supply chains. Accordingly, federal contractors and subcontractors may wish to assess the foreign ties of the companies in their supply chains.

When evaluating products that may result in supply chain vulnerabilities, FASC considers factors including the product's functionality and features; the environment in which it is used or installed; the security, authenticity, and integrity of the product and any associated supply and compilation chains; and whether the product transmits information or data outside the United States.

Next Steps

The bill received majority support in the House, and in September was quickly marked up and reported favorably by the Senate Committee on Homeland Security and Governmental Affairs, after being introduced with bipartisan support from U.S. Sens. Gary Peters, D-Mich., and Mike Rounds, R-S.D.

The bill was sent to the Senate floor for consideration on Nov. 13, where it still needs approval before reaching the president's desk. Questions remain whether there will be floor time for the Senate to consider the bill individually. That said, the bill's bipartisan backing and smooth passage in the House and Senate committees highlights the broad bipartisan support for further action on supply chain security.

While the timing of the bill's passing is less clear, it may become law sooner rather than later. The bill now has bicameral support. Although it may be included in must-pass legislation later this month, if the bill is not included in legislation before year-end, then it may be passed to the next Congress, which will likely spend the first 100 days focused primarily on reconciliation and confirming President-elect Donald Trump's nominations in the Senate.

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