DOMESTIC SOURCE RESTRICTIONS IN THE UNITED STATES

A PRACTICAL GUIDE FOR UK COMPANIES SELLING TO THE U.S. DEPARTMENT OF DEFENSE (DOD) AND TO U.S. COMPANIES UNDER CONTRACT TO THE DOD

Revised March 2022

Prepared for the British Defence Staff - US
by HOLLAND & KNIGHT LLP

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1. DOMESTIC SOURCE RESTRICTIONS IN THE UNITED STATES

This Guide provides an overview of the various sourcing restrictions that the United States places upon the procurement of goods and services by the U.S. Department of Defense ("DoD"), with an emphasis on how these restrictions apply to acquisitions from UK companies. This Guide attempts to provide explanations of these restrictions in layman's terms, and gives practical advice regarding issues that may arise.

Generally, when determining the regulations or provisions that apply to government contracts, the contract should specify the particular rule which is in place at the time of the granting of the contract (or before). This Guide uses several symbols to assist the reader:

🔔 *The bell denotes practice pointers and flags potential pitfalls.*

ⓘ *The "*i*" denotes background or informational material.*

http:// *The Guide includes hyperlinks to websites with additional information.*

A short introduction to the topic of this Guide is particularly difficult, as there is not a single source of law or regulation in the United States that can be consulted to obtain a definitive list of goods or services that must be domestically sourced. Likewise, there is not one standard test to be used to determine whether a good or service is a U.S. domestic product or service. Instead, "domestic source restrictions" or "domestic preferences" have been added to U.S. law in various places and at various times as political acts to assist U.S. industry, sometimes to benefit just a single U.S. company. While some are blatant (*e.g.*, The Buy American Act), others have titles that do not point to their meaning (*e.g.*, The Berry Amendment or the Specialty Metals Provisions), and others still, have no title at all; they just appear in the law, the result of a "middle of the night" insertion into a defense appropriations law.

Recently, the U.S. government has placed an increased emphasis on having government procurement funds go to products or materials "Made in America." This emphasis is reflected in recent changes to domestic procurement laws (as will be highlighted throughout this Guide) and in President Joe Biden's creation of a Made in America Office ("MIAO"). That being said, the MIAO website is being used as a place to collect and streamline access to domestic procurement waivers. We encourage UK companies to regularly visit the MIAO website, as it undergoes frequent updates and we expect more resources to be housed there going forward.

ⓘ *The Made in America Office website is: https://www.madeinamerica.gov/.*

Given that background, we have tried to gather together and briefly describe the domestic preferences currently existing, along with exemptions, exceptions, and waivers that apply

to UK companies. We note that the purpose of this Guide is to provide a brief overview. This Guide is not intended to be comprehensive, but rather should be used to assist UK company officials in spotting the relevant issues early in any proposed transaction. Due to the unique nature of each transaction, we urge readers to seek U.S. counsel with respect to particular transactions.

2. THE BUY AMERICAN ACT, THE TRADE AGREEMENTS ACT, AND THE US/UK MOU

A. The Buy American Act

The Buy American Act ("BAA"), 41 U.S.C. §§ 8301–8305, as amended, provides a procurement preference for supplies and construction materials produced or manufactured in the United States.

> ⓘ *The regulations implementing The Buy American Act are found at 48 C.F.R. Part 25. To examine the most up-to-date regulations implementing The Buy American Act, visit: https://www.ecfr.gov/current/title-48/chapter-1/subchapter-D/part-25.*

Through the application of price evaluation factors, the BAA restricts the U.S. Government's purchase of supplies that are not domestic end products for use within the United States.

In order to comply with the BAA, the end product being provided must qualify as a "domestic end product" under one of two tests.

For an end product or construction material not consisting wholly or predominantly of steel or iron, the product must be (A) an unmanufactured item mined or produced in the United States or (B) an item that is (1) manufactured in the United States and (2) consisting of components mined, produced, or manufactured in the United States, the cost of which exceed a certain percentage of the cost of all components.

> 🔔 *On March 7, 2022, an increase in the Buy American Act domestic content threshold was published in the Federal Register (the "BAA Rule"). 87 Fed. Reg. 12,780. The new domestic content threshold requirement, by date, is noted in the table below:*

Date	Domestic Content Threshold
Now – October 24, 2022	55%
October 25, 2022 – December 31, 2023	60%
January 1, 2024 – December 31, 2028	65%
January 1, 2029 and after.	75%

Under the BAA Rule, contractors generally will be required to comply with the threshold in effect in the year of delivery, even if the contract spans across different threshold years. However, the BAA Rule does permit agencies to allow contractors to apply the domestic content threshold in effect at the time of the contract award for the entire period

of performance, subject to approval by the agency's "senior procurement executive" in consultation with the MIAO.

The BAA Rule also creates a "fallback threshold," which allows an agency to use the old 55% threshold for end products or construction materials when (1) no end products or construction materials are available that meet the new domestic content threshold or (2) such products or materials are of an unreasonable cost. The fallback threshold does not apply to (a) items that consist wholly or predominantly of iron or steel and (b) commercially available off-the-shelf items. The fallback threshold is available only until calendar year 2030.

Separately, for an end product or construction material made wholly or predominantly of steel or iron, the product must be (1) manufactured in the United States and (2) the foreign iron and steel constitutes less than 5% of the cost of all components.

Absent an exception, the BAA applies to all federal contracts performed within the United States within a certain dollar value range. For supply contracts, the BAA does not apply to contracts below the "micro-purchase threshold," currently set at $10,000,[1] or to contracts above the Trade Agreements Act threshold, which is currently $183,000 for supply contracts.[2] Therefore, supply contracts valued between $10,001 and $182,999 are subject to the BAA, unless an exception otherwise applies.

The other particularly relevant exception is for commercially available off-the-shelf ("COTS") items. The BAA waives the domestic content requirement for COTS end products and construction materials (except an end product or construction material that consists wholly or predominantly of iron or steel or a combination of both, excluding COTS fasteners). COTS items *not* consisting wholly or predominantly of iron or steel only need to be manufactured in the United States.

B. The Trade Agreements Act

The Trade Agreements Act ("TAA"), 19 U.S.C. §§ 2501–2581, implements various trade agreements that the United States has signed with other countries, including the World Trade Organization Government Procurement Agreement ("WTO GPA"). The TAA waives the provisions of the BAA for "eligible products" from countries that have signed an international trade agreement with the United States, or that meet certain other criteria.

Under the TAA, products or construction materials from "designated countries" will receive the same price evaluation treatment as if they were domestic end products. Unlike the BAA, the TAA *prohibits* the U.S. Government from purchasing products or

[1] For up-to-date micro-purchase threshold information, check the definition of "micro-purchase threshold" at 48 C.F.R. § 2.101.

[2] For up-to-date Trade Agreements Act threshold information, check 48 C.F.R. § 25.402(b).

construction materials that are not from designated countries when the estimated value of the procurement exceeds the relevant TAA dollar thresholds.

The estimated dollar value of the acquisition determines whether the TAA applies ("the TAA threshold"). For supply contracts, the TAA threshold is currently set at $183,000.

ⓘ *For up-to-date TAA threshold information, check 48 C.F.R. § 25.402(b).*

There are three groups of countries that are eligible for "designated country" treatment for U.S. procurements. First are the WTO GPA countries and those countries with free trade agreements with the United States. Next are the "least developed" countries, and third are the Caribbean Basin countries. As a signatory to the WTO GPA, the United Kingdom is a "designated country" for purposes of TAA analysis.

To be considered compliant under the TAA, the product must have been mined, produced, or manufactured in the United States or in a designated country, or it must have been "substantially transformed" into a new and different article of commerce with a name, character, or use distinct from which it was transformed in the United States or in an eligible country.

The substantial transformation test is fact-specific. U.S. Customs and Border Protection ("CBP") is the U.S. Government agency that provides guidance on the substantial transformation test to determine if a product meets the TAA requirements. CBP has held that the determinative issue is "the extent of operations performed and whether the parts lose their identity and become an integral part of the new article." Assembly operations that are minimal or simple as opposed to complex or meaningful will generally not result in a substantial transformation.

> 🔔 *Under the TAA, "substantial transformation" is determined on a case-by-case basis, examining the totality of the circumstances. If a company is unsure whether the processing constitutes substantial transformation, it can submit a request for a Customs Ruling to CBP. In its letter rulings, CBP provides a definitive country of origin determination that companies can rely on for TAA purposes.*

Separately, under authority in the TAA, the U.S. Trade Representative has waived the BAA for civil aircraft and related items that meet the "substantial transformation" test of the TAA, from countries that are parties to the Agreement on Trade in Civil Aircraft. This includes the United Kingdom.

C. The US/UK Reciprocal Defense Procurement MOU

For purposes of sales to the DoD, UK companies can rely on authority outside of the BAA to satisfy domestic sourcing requirements, thereby dispensing of the BAA domestic

content requirements, if the UK company can show (often through satisfying the substantial transformation test), that its product is of UK origin.[3]

Under the public interest exception of the BAA, the head of a federal agency may make a determination that application of the BAA would be contrary to the public interest. Although usually applied on a contract-by-contract or product-by-product basis, this exception can apply when a U.S. Government agency undertakes an agreement with another government to mutually waive the application of each country's domestic preference restrictions. The U.S. Government has done just that with HMG regarding purchases by the DoD. This agreement takes the form of the MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF DEFENSE OF THE UNITED STATES AND THE SECRETARY OF STATE FOR DEFENCE OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND CONCERNING RECIPROCAL DEFENSE PROCUREMENT, or the so called U.S. DOD-UK MOD RECIPROCAL DEFENSE PROCUREMENT MOU. The MOU was first entered into in 1975, and was renewed most recently in 2017. Pursuant to this agreement (which is effective for ten years), the DoD has waived the applicability of the BAA to products produced or manufactured in the UK.

> *Under the provisions of the U.S. DOD-UK MOD RECIPROCAL DEFENSE PROCUREMENT MOU, procurements conducted by the Department of Defense (e.g. Air Force, Navy, Army, Defense Logistics Agency) treat offers for products manufactured in the United Kingdom the same as domestic products under the BAA.*

[3] We note again here that the exception under the MOU applies only to sales to the DoD. Sales to other U.S. Government agencies will need to meet the BAA/TAA requirements.

3. INFRASTRUCTURE INVESTMENT AND JOBS ACT

The Infrastructure Investment and Jobs Act ("Infrastructure Act") was signed into law by President Biden on November 15, 2021.

A. Buy American Act

With respect to the BAA under the Infrastructure Act, it is uncertain now if the initial step of determining whether a product is wholly or predominantly of steel and iron will continue. The Infrastructure Act specifies that, by November 15, 2022, regulations should be implemented that amend the definition of "domestic end product" and "domestic construction material" to ensure that iron and steel products are to the greatest extent possible made with domestic components and provide a definition for "end product manufactured in the United States." This suggests that, even if the wholly or predominantly of iron and steel evaluation remains in some form, it is likely to be altered.

Note that, under the Infrastructure Act, the COTS exception is no longer available for iron and steel articles, materials, and supplies. Under the previous rule, the COTS exception was not available for products made "predominantly of steel and iron," (except for fasteners, described below), which suggests that the Infrastructure Act may apply to all iron and steel incorporated in a product. The Infrastructure Act does not affect the COTS exception for other products, not made of iron and steel.

B. Trade Agreements Act

The Infrastructure Act does not have an immediate effect on the current TAA regulations. The Infrastructure Act calls for the Secretary of Commerce, the United States Trade Representative, and the Director of the Office of Management and Budget to conduct an assessment of the impact of the TAA on BAA. This report is required to be made public by April 14, 2022. Thus, it is not clear what impact the Infrastructure Act will have on the TAA. As such, it will need to be monitored.

C. Broader Infrastructure Projects

For infrastructure projects funded through the Infrastructure Act, these projects will be subject to *so-called* Buy America (not BAA) regulations. Whether updated requirements contained in the Infrastructure Act will apply depends upon the nature of the existing domestic content procurement preference.

For infrastructure projects funded by sources outside of the Infrastructure Act, these projects will be subject to Buy America regulations. Whether the updated requirements will apply depends upon the nature of the existing domestic content procurement preference.

It would not appear that users of this Guide would be pursuing infrastructure projects; however, if so, certain Buy America rules (not BAA) would apply.

ⓘ *The term "infrastructure" (see Section 70912 of the Infrastructure Act) includes (as examples), the structures, facilities, and equipment for, in the United States: roads, highways, and bridges; public transportation; and dams, ports, harbors, and other maritime facilities.*

4. BERRY AMENDMENT

One of the oldest domestic preferences laws in the United States is the Berry Amendment, 10 U.S.C. § 2533a, which requires the DoD to give preference to certain domestically grown, reprocessed, reused, or produced commodities, unless an exception applies. Note that the Berry Amendment applies only to procurements by the DoD.

A. What items does the Berry Amendment apply to?

The following items must be grown, reprocessed, reused, or produced in the United States: food, clothing (other than sensors, electronics, or other items added to, and not normally associated with clothing), tents, tarpaulins, covers, cotton and other natural fiber products, woven silk, spun silk for cartridge cloth, synthetic fibers (including all textile fibers and yarns that are for use in synthetic fabrics but not fabric that is to be used as a component of an end product that is not a textile product such as draperies, bedding, parachutes, upholstered seat), canvas, wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles), hand and measuring tools, stainless steel flatware, and dinnerware. Unless exemptions laid out in the law apply, the entire production process of affected products, from the production of raw materials to the manufacture of all components to final assembly, must be performed in the United States.

ⓘ *The Berry Amendment previously applied to the procurement of specialty metals and historical references will include specialty metals as being subject to the Berry Amendment. Specialty metals were separated into their own section of the law (discussed further below) and are no longer covered by the Berry Amendment.*

One way to determine whether the Berry Amendment provisions apply is if the following DFARS clause is included in the solicitation or contract:

252.225.7012 Preference for Certain Domestic Commodities.

252.225-7015 Restriction on Acquisition of Hand or Measuring Tools

B. Are there exceptions to the Berry Amendment?

Yes, there are several exceptions to the Berry Amendment, most important of which is the Domestic Nonavailability exception. Under this exception, the Secretary of Defense; Secretaries of the Army, Navy, or Air Force; a designated Under Secretary of Defense[4]; or Director of the Defense Logistics Agency may make a Domestic Nonavailability

[4] As of the date of this Guide, the Berry Amendment (48 C.F.R. § 225.7002-2 of the DFARS) lists the designated Under Secretary as the Under Secretary of Defense (Acquisition, Technology, and Logistics). However, that position was removed in 2018, replaced by two posts: the Under Secretary of Defense (Research and Engineering) and the Under Secretary of Defense (Acquisition and Sustainment).

Determination ("DNAD") when items covered by the Berry Amendment are not grown, reprocessed, reused, or produced in the United States in satisfactory quality or sufficient quantities.

> 🔔 *As part of the U.S. government's effort to bring transparency and consistency to the waiver process, the MIAO now collects and centrally posts all waivers from U.S. domestic preference laws. DNADs are a significant portion of those waivers, and are available here: https://www.madeinamerica.gov/waivers/.*
> ⓘ *Instructions and templates for submitting a DNAD are available here: https://www.acquisition.gov/nmcars/annex-3-domestic-nonavailability-determination.*

In addition, the following non-exhaustive list of exceptions applies:

Simplified Acquisition Threshold. Acquisitions below the simplified acquisition threshold, presently $250,000, are not subject to the Berry Amendment.

> ⓘ *A September 2021 proposed rule seeks to lower the simplified acquisition threshold to $150,000. As of the date of the Guide, the rule has not been implemented. See 86 Fed. Reg. 53,931.*

Combat Operations. Acquisitions made outside the United States in support of combat operation are not subject to the Berry Amendment.

Overseas Purchases. Acquisitions of perishable foods or emergency acquisitions by or for establishments located outside the United States for personnel of those establishments are not subject to the Berry Amendment.

At Sea Purchases. Procurements by vessels in foreign waters are not subject to the Berry Amendment.

Commissary Purchases. Acquisitions of items specifically for commissary resale are not subject to the Berry Amendment.

Cotton And Other Natural Fiber Exceptions. Non domestic cotton fibers may be acquired if the acquisition is for incidental amounts of cotton, other natural fibers, or wool incorporated in an end product, where the estimated value of the cotton, other natural fibers, or wool is less than 10 percent of the total price and is less than the simplified acquisition threshold. Non domestic cotton or wool fiber byproducts can also be purchased for use in the production of propellants and explosives.

Chemical Warfare Protective Clothing Produced in a Qualifying Country. Acquisitions of chemical warfare protective clothing are not subject to the Berry Amendment when the acquisition furthers an agreement with a qualifying country. The UK qualifies for this exception.

5. SPECIALTY METALS

The United States has implemented a domestic preference for specialty metals deemed critical to national security. 10 U.S.C. § 2533b. For direct DoD procurement of a specialty metal, the specialty metal must be melted or produced in the United States. For DoD procurements of specific items/articles (listed in the statute) that incorporate specialty metals, the specialty metals must be melted or produced in the United States or a "qualifying country" (or incorporated in an article manufactured in a qualifying country), unless specific exceptions apply.

> *The current regulations for specialty metals restrictions are located at DFARS:*
>
> *252.225-7008 Restriction on Acquisition of Specialty Metals,*
>
> *252.225-7009 Restriction on Acquisition of Certain Articles Containing Specialty Metals, and*
>
> *252.225-7010 Commercial Derivative Military Article--Specialty Metals Compliance Certificate.*

A. What are specialty metals?

Specialty metals include certain steel and metal alloys, titanium and titanium alloys, and zirconium and zirconium alloys. Alloys are defined as any metal consisting of a mixture of a basic metallic element and one or more metallic, or non-metallic, alloying elements. For alloys named by a single metallic element (*e.g.*, titanium alloy), it means that the alloy contains 50 percent or more of the named metal (by mass). If two metals are specified in the name (*e.g*., nickel-iron alloy), those metals are the two predominant elements in the alloy, and together they constitute 50 percent or more of the alloy (by mass).

Steel that is subject to the specialty metals restriction is any steel that contains more than 1.65 percent manganese, 0.60 percent silicon or copper, or 0.25 percent of aluminum, chromium, cobalt, molybdenum, nickel, niobium (columbium), titanium, tungsten, or vanadium.

Metal alloys that are subject to the specialty metals restrictions include (1) metal alloys that consist of nickel or iron-nickel alloys that contain alloying metals (other than nickel and iron) in excess of 10 percent; or (2) cobalt alloys that contain alloying metals (other than cobalt and iron) in excess of 10 percent.

B. What are the qualifying countries?

Qualifying countries, for purposes of the specialty metals restrictions, include those countries with which the United States has entered into a reciprocal defense procurement MOU or international agreement. These countries include: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece,

Israel, Italy, Japan, Latvia, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden, Switzerland, Turkey, and the UK.

> *Because the U.S and UK have entered into the U.S. DOD-UK MOD RECIPROCAL DEFENSE PROCUREMENT MOU, the specialty metals restrictions do not apply to DoD purchases of articles or alloys of specialty metals melted or produced in the UK.*

C. Are there any exceptions to the specialty metals restrictions?

Yes, there are several exceptions to the specialty metal acquisition restrictions, in addition to the exception for items manufactured in qualifying countries:

Electrical Components. The specialty metals restrictions do not apply to electronic components, which are defined as items that operate by controlling the flow of electrons or other electrically charged particles in circuits, using interconnections of electrical devices such as resistors, inductors, capacitors, diodes, switches, transistors, or integrated circuits.

Commercial Off-the-Shelf ("COTS") Items. Items that are deemed to be commercially available off-the-shelf are not subject to the specialty metals restrictions. This exception, however, does not apply to mill products, such as bar, billet, slab, wire, plate, or sheet, or to forgings or castings of specialty metals, unless the mill products, forging or castings were incorporated into commercially available off-the-shelf end items, subsystems or assemblies. The exception also does not apply to fasteners, which have their own special rules. (*See* section 5, below.)

Domestic Nonavailability. The specialty metals restrictions do not apply to certain items which the DoD has determined do not exist in sufficient quantity or satisfactory quality. The determinations can be made on a contract-by-contract or a class basis.

Combat Operations. The specialty metals restrictions do not apply to acquisitions outside of the United States in support of combat operations or contingency operations.

De minimis. There is now a de minimis exception that applies to what would otherwise be non-compliant items. The exception permits contractors to make a good faith estimate of the amount of specialty metals incorporated into the end item. If the total amount of noncompliant specialty metals incorporated into the item/article is less than 2 percent of the total weight of all specialty metals in the item, then the specialty metals restriction does not apply. This exception does not apply to high performance magnets containing specialty metals.

Commissary Purchases. Acquisitions of items specifically for commissary resale are not subject to the specialty metals restrictions.

Commercial Derivative Military Articles. The specialty metals restrictions do not apply to items which the contracting officer has determined to be a commercial derivative military article, provided that the contractor makes certain certifications about its purchase of domestic specialty metals. This exception allows a contractor to combine compliant and noncompliant specialty metals on the production line, if the contractor agrees to purchase a certain amount of domestically produced specialty metals for use in the article's production.

Commercial derivative military articles generally include military articles that are produced in the same production facilities as commercial products, and that use a common supply chain and the same or similar production process as the commercial products.

Contractors may use the commercial derivative military article exception if they certify that they (and their subcontractors) have entered into contractual agreements to purchase specialty metals melted or produced in the United States in an amount that is the greater of: (1) 120 percent of the amount of specialty metals required to produce the commercial derivative military article (including subcontracting efforts); or (2) 50 percent of the amount of specialty metals purchased by the contractor or its subcontractors during the commercial derivative military article's period of production. The foregoing is sometimes referred to as the "market basket" exception.

6. SPECIAL RULES FOR COMMERCIALLY AVAILABLE OFF-THE-SHELF FASTENERS

A. What are fasteners?

As mentioned above, special provisions of the specialty metals restrictions apply in the case of COTS fasteners. The FAR and DFARS do not contain a specific definition of fastener, and the term is construed broadly to include any sort of anchors, bolts, hardware, nails, nuts, pins, clips, rivets, rod, screws, etc.

B. Are there any exceptions to the fasteners restrictions?

The exception that otherwise applies to COTS items does NOT apply to COTS fasteners unless one of the following conditions is satisfied:

1. The fasteners are incorporated into an end item, subsystem, assembly, or component that, itself, qualifies as a COTS item.
2. The fasteners are commercial items and the manufacturer of the fasteners certifies that it will purchase, during the relevant calendar year, an amount of U.S. domestically produced specialty metals in the required form for use in production of fasteners for sale to the DoD and other customers, that is not less than 50 percent of the total amount of the specialty metals that it will purchase for production of such fasteners for all customers.

Because the U.S. and UK have entered into the U.S. DOD-UK MOD RECIPROCAL DEFENSE PROCUREMENT MOU, the specialty metals restrictions do not apply to DoD purchases of fasteners produced in the UK.

7. SECTION 2534 MISCELLANEOUS LIMITATIONS ON THE PROCUREMENT OF NON-U.S. GOODS

A. What items are on the list?

In addition to the Berry Amendment and the provisions regarding specialty metals, the United States has implemented limitations on the procurement of certain goods by the DoD. Unlike the Berry Amendment or specialty metals restrictions, the items listed in Section 2534 ("Miscellaneous Goods") (10 U.S.C. § 2534) were added in separate bills over a long period of time. For example, the first item added (buses) was contained in a 1982 bill that was mainly focused on NATO interoperability, veteran pay, and other miscellaneous defense matters. Other goods were added in the 1989, 1991, 1992, and 1993 National Defense Authorization Acts.

Manufacturers of Miscellaneous Goods must be part of the national technology and industrial base ("NTIB"). NTIB applies to "persons and organizations that are engaged in research, development, production, integration, services, or information technology activities conducted within the United States, the United Kingdom of Great Britain and Northern Ireland, Australia, and Canada." 10 U.S.C. § 2500(1). The Miscellaneous Goods provision also contains an exception that allows the Secretary of Defense to waive any restrictions if certain conditions are satisfied.

B. What items are covered in Miscellaneous Goods section?

Section 2534 applies to:

1. Multi-passenger motor vehicles (buses)
2. Large medium-speed diesel engines for auxiliary ships
3. Components for T-AO 205 class vessels
    a. Auxiliary equipment (including pumps)
    b. Propulsion system components (including engines, reduction gears, and propellers
    c. Shipboard cranes
    d. Spreaders for shipboard cranes
4. Components for naval vessels (to the extent they are unique to marine applications)
    A. Gyrocompasses
    B. Electronic navigation chart systems
    C. Steering controls
    D. Propulsion and machinery control systems
    E. Totally enclosed lifeboats
5. A star tracker used in a satellite weighing more than 400 pounds whose principle purpose is to support the national security, defense, or intelligence needs of the United States Government.

6. *Special rule for sonobuoys*. For sonobuoys, DoD may not procure a sonobuoy from a foreign country unless U.S. firms that produce sonobuoys compete on an equal basis with foreign firms in the foreign country.

C. What are the exceptions in Miscellaneous Goods?

Under Section 2534, the Secretary of Defense may waive restrictions under a number of different conditions, including: 1) the limitations would cause "unreasonable costs or delays"; 2) the U.S. producer of the item would not be harmed by competition from a foreign country; 3) the limitation would impede cooperative programs between the DoD and a foreign country or under reciprocal memorandums of understanding for defense items, provided that the country does not discriminate against defense goods produced in the U.S. to a greater degree than the U.S. discriminates against defense items produced in that country; 4) satisfactory quality items from NTIB producers are not available; 5) the limitation would result in only one NTIB source for the item; 6) the procurement is for less than the "simplified acquisition threshold"; 7) the limitation is not in the national security of the U.S.; and 8) the limitation would adversely affect a U.S. company. 10 U.S.C. § 2534(d).

The Secretary of Defense may waive the limitation in Miscellaneous Goods based upon conditions 2) or 3) of the paragraph above only if the waiver is made for a specific item and a specific country, and the waiver is published in the *Federal Register* at least 15 days before it takes effect. In addition, the Secretary of Defense must furnish notice to the congressional defense committees. Finally, the waiver may be in effect for no longer than one year.

D. Elimination of need for waiver for goods from the UK.

Previously, the Under Secretary of Defense (Acquisitions, Technology, and Logistics), invoked powers under 10 U.S.C. § 2534(d) to waive limitations on certain items in Miscellaneous Goods with respect to the UK. As of December 21, 2018, the United Kingdom was added to the definition of the NTIB in 10 U.S.C. § 2500(1), and such waivers are no longer necessary. 83 Fed. Reg. 65,560; 85 Fed. Reg. 34,533.

E. A note on ball and roller bearings.

Before 2021, ball and roller-bearings were included for a number of years in the Section 2534 list of Miscellaneous Goods. The 2021 NDAA removed ball and roller-bearings from the list, making them subject to a specific DFARS rule. Now, ball or roller-bearings must be (1) manufactured in the U.S. or Canada and (2) the cost of the bearing components manufactured in the U.S. or Canada must exceed 50% of the total cost of the components. 48 C.F.R. § 225.7009-2.

8. NATIONAL DEFENSE AUTHORIZATION ACTS ("NDAAS")

A. What are NDAAs?

An NDAA is an annual Congressional act that gives guidance on the policy for the coming year and funds defense agencies. Even though an NDAA is, by name, an authorization act for defense agencies, every year the NDAA contains sections that move beyond classic funding, to establish broader policies and rules that apply to every aspect of defense agencies.

Often, industry and members of Congress will use the annual NDAA to achieve specific policy goals or objectives. The practice of incorporating novel policies into an NDAA is both a significant burden *and* important opportunity. In the sections below, we highlight some of the significant changes that have been implemented through NDAAs in recent years.

B. Fiscal Year 2022 NDAA

As of the date of this Guide, the Fiscal Year ("FY") 2022 NDAA is the operative NDAA. More than anything, the theme of the FY 2022 NDAA is supply chain readiness and Made in America initiatives. This emphasis is not surprising, given the Biden Administration's focus on these issues, the impact on supply chain readiness awareness due to COVID-19, and an increased focused on eliminating forced labor.

In all likelihood, supply chain readiness and elimination of forced labor will remain important issues in the years to come. UK companies seeking to compete in the U.S. government contracting field are well-advised to pay attention to these issues and ensure they've conducted supply chain diligence to keep pace with changing requirements.

C. 2019 NDAA Section 889

Of particular importance to U.S. government contractors is Section 889 of the FY 2019 NDAA. Section 889 of the 2019 NDAA prohibits the federal government, government contractors, and grant and loan recipients from procuring or using certain "covered telecommunication equipment or services" that are produced by Huawei, ZTE, Hytera, Hikvision, and Dahua and their subsidiaries as a "substantial or essential component of any system, or as critical technology as part of any system." However, as explained below, there is slight deviation between the general Federal Acquisition Regulations ("FAR") and the Defense Federal Acquisition Regulations ("DFAR").

Federal Acquisition Regulations. The FAR directly implement Section 889 of the FY 2019 NDAA. In particular, it requires representations from government contractors about whether or not they use telecommunications equipment or services from the five names Chinese telecommunications companies. This a broad representation, typically understood to encompass any use whatsoever, even if unrelated to the work the contractor does for the U.S. Government. The most up-to-date FAR clauses are at:

52.204.-24 Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment

52.204-25 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment

52.204.26 Covered Telecommunications Equipment or Services - Representation

Department of Defense Federal Acquisition Regulations. However, in the DFAR, DoD currently only requires government contractors to represent that a more limited scope of telecommunications equipment (that of Huawei and ZTE) is not part of their offered products or services. At the same time, the DFAR are somewhat broader, because they provide for designation of Russian telecommunications companies as well. We expect the requirements to keep evolving as DoD determines the best way to ensure compliance with the telecommunications equipment requirements. For the most accurate information about the representation required by DoD, check the applicable DFAR clauses:

DFARs 252.204-7016 Covered Defense Telecommunications Equipment or Services-Representation

DFARs 252.204-7017 Prohibition on the Acquisition of Covered Defense Telecommunications Equipment of Services-Representation

DFARs 252.204-7018 Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Service

9. JONES ACT

The Merchant Marine Act of 1920 (46 U.S.C. § 55102), or so-called "Jones Act", regulates maritime trade in U.S. waters and between U.S. ports. The act regulates coastal shipping, and requires that all goods transported by water between U.S. ports be carried in U.S.-flag ships, constructed in the United States, owned by U.S. citizens, and crewed by U.S. citizens or U.S. permanent residents.

The Jones Act not only prevents UK vessels from carrying cargo and passengers from one port in the U.S. to another, but also restricts ownership of vessels in this trade to U.S. citizens or entities. However, there are a number of ways for non-U.S. persons to structure ownership within the parameters of the Jones Act restrictions.

Also under the Jones Act, the use of foreign parts and labor in ship construction and repair is heavily restricted. For example, the steel of foreign repair work on the hull and superstructure of a U.S.-flagged vessel is limited to 10 percent by weight.

> *We include this brief overview of the Jones Act in order to provide only the most basic introduction to the subject. The specifics of the Jones Act have a long history of legislation and adjudication in the United States, and a treatise on the many aspects of the act could run to several hundred pages.*

10. SMALL BUSINESS PREFERENCE PROGRAMS

A. What are Small Business Programs?

Pursuant to the Small Business Act, 15 U.S.C. § 631 *et seq*., the U.S. Government has a statutorily mandated goal of awarding 23 percent of all prime contracts to "small businesses."

Under the Small Business Act, a "small business concern" is one which satisfies the following criteria:

- Is organized for profit
- Has a place of business in the United States
- Operates primarily within the United States or makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor
- Is independently owned and operated
- Is not dominant in its field of operation
- Does not exceed size standards established, and updated periodically, by the SBA

Therefore, while a company does not need to be incorporated in the United States to fall under the definition of "small business," it must operate primarily within the United States or make a significant contribution to the U.S. economy. Given these limitations, we include this section to provide the basics on these programs, and to allow UK companies the opportunity to consider whether they meet the above criteria and, if not, how they might partner with U.S. small business to win a portion of the work that is mandated for small businesses.

Within the 23 percent goal, the U.S. Government requires various percentages to be awarded to certain "socioeconomic" classifications of businesses, such as socially disadvantaged-owned small businesses (including the so-called "8(a)" companies) (5 percent), service-disabled veteran-owned small businesses (3 percent), and woman-owned small businesses (5 percent)).

The U.S. Government agencies use a variety of methods to meet their small business prime contracting goals. These include:

- The most common method is restricting or "setting aside" competitive procurements so that only small or other classifications of businesses are eligible to compete. In some instances, agencies can avoid competition requirements altogether and award "sole source" contracts to certain of these types of businesses.

- Another method used to increase prime contract awards to small businesses is to provide an evaluation preference to such businesses in an otherwise unrestricted competitive procurement.

- Finally, the U.S. Government also awards contracts to small businesses pursuant to the Small Business Innovation Research ("SBIR") and the Small Business Technology Transfer programs, which are focused on research and development efforts by high technology small businesses.

Most state and local governments (including public universities) also have programs to set aside or encourage the award of prime contracts and subcontracts to small or other classifications of businesses. These programs vary widely from state to state, as does the terminology used to refer to such entities.

In short, a business that can legitimately claim status as a small or other socioeconomic classification of business often has a competitive advantage in the United States.

B. What size standards apply to small businesses?

Each procurement that is issued by the U.S. Government has a North American Industry Classification System ("NAICS") code associated with it. That code establishes the size standard, or size threshold, for the procurement. The Small Business Administration ("SBA") sets the size standards for each type of economic activity, or industry, generally under the NAICS codes. The size standards are either based on revenue or employee count, depending on the NAICS code.

ⓘ *13 C.F.R. § 121.201 provides a full table of small business size standards matched to the U.S. NAICS industry codes. A full table matching a size standard with each NAICS Industry or U.S. Industry code is also published annually by SBA in the* Federal Register.

A company qualifies as a small business if the company's average revenues or employee count is smaller than the size standard established for the procurement as of the date the company submits its proposal including price.

In determining the concern's size, SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign "affiliates," regardless of whether the affiliates are organized for profit. An entity will be deemed an affiliate if one controls or has the power to control the other, or a third party or parties controls or has the power to control them both. Control includes either affirmative or negative control, and it does not matter whether control is actually exercised. SBA considers factors such as common ownership, common management, corporate restrictions and bylaws, previous relationships with or ties to another concern, ongoing or unduly reliant contractual relationships, in determining whether affiliation exists.

🔔 *The affiliation rules are very complex and fact driven. Companies that misrepresent their size status could face suspension, debarment, or criminal and civil penalties.*

It is important to note that an affiliate means any company that meets the above criteria – it does not matter whether the company is engaged in the same line of businesses as the entity trying to qualify as a small business. A hotel could be deemed affiliated with a tool company if they are owned or controlled by the same people or entities.

C. How do I know whether a company is a small business?

A company is permitted to self-certify as a small business and this certification usually appears in the entity's System for Award Management ("SAM") database listing. Prime contractors may rely in good faith on the representations made by a small business subcontractor.

For certain categories of small businesses, namely the socioeconomic categories, the company must also apply for and receive approval from a certifying body in order to qualify as a small business within that category.

D. Can a foreign entity be considered a small business?

In addition to having revenues or employee count under the size status, in order to qualify as a small business, the entity must generally be located and operated for profit within the United States. For the SBIR program, the company must also be majority owned and controlled by a United States citizen or permanent resident alien, other small business concerns, an Indian tribe, or any combination thereof. Most foreign companies, even if they are smaller than the applicable size standard, will therefore not qualify as a small business based on these domestic restrictions.

E. Can a large (or foreign) business participate in small businesses contracts?

If a company is not qualified as a small business (*i.e.*, it is deemed a large business), it may not bid on a small business set-aside as the prime contractor or enter into a joint venture with a small business to bid as a prime contractor. However, the small business regulations typically permit the small business prime contractor to use large (or foreign) businesses as their subcontractors or suppliers. These relationships may be subject to certain restrictions, including restrictions on the percentage of work the subcontractor may perform, and what type of work the large business (or foreign) subcontractor may perform depending on the nature and amount of the prime contract.

Because the goal of these U.S. Government programs is to encourage meaningful participation by small businesses, the Government wants to ensure that the small business contractor is not a mere "front" or "pass-through" for a large business. There are significant enforcement risks for companies that fail to abide by the small business regulations and respect the boundaries established to ensure that small businesses are receiving the benefit of the contracts awarded to them.

Many U.S. Government agencies have established formal programs where a large business can act as a "mentor" to a small business "protégé" firm. These programs have several advantages. They permit the mentor and protégé to work together more closely than would otherwise be permissible, and, in some instances, permit the mentor and protégé to form a joint venture to bid for and receive contracts. These programs typically require the parties to enter into a formal, written mentor-protégé agreement that must meet certain requirements and be approved by the government.

In addition, the U.S. Government also requires large business prime contractors, as a condition of their prime contracts, to establish a Subcontracting Plan that includes goals for awarding subcontracts to small or other classifications of businesses and take steps to ensure that a certain percentage of the subcontracted work is awarded to small businesses. Failure to make a good faith effort to comply with the Subcontracting Plan could result in liquidated damages or enforcement risk in the event a government audit reveals that the large business cannot demonstrate good faith efforts to achieve its goals. Therefore, similar to U.S. Government purchasing officials, large prime contractors have strong incentives to use small businesses as their subcontractors and suppliers.

11. NOFORN RESTRICTIONS

The United States uses a system of restrictive markings that can be added to a document to enable the restriction to be identified at a glance. While these markings are not domestic preferences as described in the other sections of this Guide, there have been allegations that the marking, NOT RELEASABLE TO FOREIGN NATIONALS ("NOFORN" or "NF") has been used improperly to prevent UK companies from gaining access to DoD bid documents, and therefore that this improper use has been utilized to preclude UK companies from winning a DoD contract. We therefore include a description of the proper use of NOFORN.

> *Other marking restrictions may apply to documents that limit access with respect to UK companies. For a full listing of all Limited Dissemination Controls, visit https://www.archives.gov/cui/registry/limited-dissemination.*

A. Definition

The marking NOFORN is a limited dissemination intelligence control marking used to identify information which an originator has determined may not be provided in any form to foreign governments (including coalition partners), international organizations, foreign nationals, or immigrant aliens without the originator's approval.[5]

B. Authorized Use/Users

(i) **Within DoD**: In addition to marking on intelligence information, NOFORN is authorized for use on the following types of non-intelligence information (classified and unclassified):

- Naval Nuclear Propulsion Information ("NNPI");
- Unclassified Controlled Nuclear Information ("UCNI");
- National Disclosure Policy ("NDP-1"), under the NDP-1 "National Policy and Procedures for the Disclosure of Classified Military Information to Foreign Governments and International Organizations" (Oct. 2, 2000);[6]
- Cover and cover support information; and
- Unclassified information properly categorized as Controlled Unclassified Information ("CUI") having a licensing or export control requirement.

[5] Note: In order to use the NOFORN marking, the originator must have determined that the information it identifies meets the criteria of Intelligence Community Directive 710, "Classification and Control Marking System" (Sept. 11, 2009) and Intelligence Community Policy Guidance 403.1 (Mar. 13, 2013).

[6] The referenced policy and procedures are provided to designated disclosure authorities on a need-to-know basis from the Office of the Deputy Under Secretary of Defense (Policy Integration) and Chiefs of Staff.

(ii) **Other U.S. Government Agency Uses**:

- Department of State ("DoS") Sensitive But Unclassified ("SBU") Information. DoS SBU information is information originated within the DoS, which that agency believes warrants a degree of protection and administrative control, and meets the criteria for exemption from mandatory public disclosure in accordance with the provisions of the Freedom of Information Act ("FOIA"). DoS SBU information may carry the additional dissemination restriction NOFORN (*i.e.*, SBU NOFORN). This "handling caveat" marking is used only with unclassified information.

C. Contesting a NOFORN Designation

As a type of limited dissemination control, NOFORN designations are subject to decontrolling standards in 32 C.F.R. § 2002.16(b)(4). In general, only an "authorized holder" of information with a NOFORN marking may consult with the designating agency if it has significant doubt about whether it is appropriate to use the marking. Under the regulations, if after consulting the designating agency's policy the authorized holder still has significant doubts, the authorized holder should not apply the limited dissemination control.

D. Examples of NOFORN Marking

1. **DoD:**

TOP SECRET//NOFORN

(TS//NF) This is the marking for a portion that is classified TOP SECRET NOT RELEASABLE TO FOREIGN NATIONALS. Besides the exceptions listed above, NOFORN may be applied only to intelligence information.

Classified by: J. Jones, Mgr., ABC Dept.
Derived from: Memorandum XYZ, Dated 20071215
Declassify on: 20171231

TOP SECRET//NOFORN

2. **DoS:**

UNCLASSIFIED//SBU NOFORN

(U//SBU-NF) This is the marking for a portion that is SENSITIVE BUT UNCLASSIFIED NOFORN.

UNCLASSIFIED//SBU NOFORN