

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**

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Appendix

This Appendix is intended to provide brief information explaining the different types of legislation, rules, and other legal authority by which the U.S. government implements domestic source restrictions. Like the primary guide, this Appendix is not intended to explain the entire lawmaking process, but should instead be used to provide context when working to understand the authorities included in the main Guide.

A. ACTS OF CONGRESS

1. Generally

RELEVANT DOMESTIC SOURCE RESTRICTIONS: Buy American Act, Trade Agreements Act, Infrastructure Investment and Jobs Act, Berry Amendment, Section 2534 Miscellaneous Goods, Jones Act, Specialty Metals Provision.

Nearly all domestic source restrictions in the United States stem from an Act of Congress. After Congress passes legislation, the restriction (or exceptions to the restriction) may be implemented through regulations, rules, or agency policy. A full explanation of the procedure and rules applicable to passing legislation is truly the subject of entire books. Important here is understanding that the timeline for passing legislation through Congress is often measured in months or years. Especially in today's political climate, new legislation faces hurdles at nearly every step of the process. And, even once legislation passes, there is often a lag before implementation or enforcement begins.

Specific acts of Congress can be tracked using this website: <https://www.congress.gov/>

2. NDAAs

RELEVANT DOMESTIC SOURCE RESTRICTION: NDAAs

Each year, usually in December, Congress passes a National Defense Authorization Act, which funds the Department of Defense for the year ahead and includes broader policies and directives for U.S. government agencies. The yearly NDAA is a unique act of Congress, as it operates on a more predictable legislative schedule. Often, the NDAA is an opportunity for interested members of the public to engage in the legislative process for specific end goals. That being said, advocating for a specific inclusion in an NDAA is a long and demanding process, often requiring engagement for much of the year. As previewed in the primary Guide, domestic source restrictions, including an emphasis on "Made in America" products and prohibitions on the use of certain Chinese tech, have featured heavily in recent NDAAs.

B. REGULATIONS

RELEVANT DOMESTIC SOURCE RESTRICTIONS: FAR, DFAR, Code of Federal Regulations

Regulations are the more detailed rules that U.S. government agencies publish to implement and explain the process behind acts of Congress. Sometimes, Congress will give the executive branch agency wide discretion by passing a law with general language, and the agency will have significant latitude in how it implements the act. Other times, Congress itself will decide the details of a program and those details will be included in the act.

As compared to acts of Congress, regulations are much more fluid and can undergo more frequent revisions. When agencies propose or issue new regulations, they are published in the Federal Register. Often, for new or modified rules, there is a comment period during

which members of the public can submit comments or suggestions with respect to the new regulation. The agency is then required to review each comment and consider it when drafting the final rule. Regulations also house the federal acquisition rules, including contract clauses, that DoD contractors will see in U.S. government contracts. The citations to specific FAR and DFAR clauses in the primary Guide correspond to specific sections in the Code of Federal Regulations.

C. AGENCY POLICY AND GUIDANCE

RELEVANT DOMESTIC SOURCE RESTRICTIONS: NOFORN designation, DoD programs.

U.S. government agencies also often publish policy statements or general guidance, which can help government contractors understand their obligations. To be clear, U.S. agency policy statements often do not have the force of law, but instead provide easy-to-understand information related to a specific law or regulation. Much of this information is available on U.S. government agency websites. For example, the Department of Defense, Defence Pricing and Contracting published a “Memorandum for the Defense Industrial Base,” which explains the steps a business needs to take to contract and do business with the DoD. (The memorandum is available here: <https://www.acq.osd.mil/dpap/policy/policyvault/USA000713-20-DPC.pdf>. As relates to the Guide, many of the U.S. government agency websites include information to help industry members understand domestic source restrictions and take advantage of exceptions or waivers. We encourage UK companies to visit the agency websites to learn more about the various legal references in this Guide.

D. U.S. DOD-UK MOD RECIPROCAL DEFENSE PROCUREMENT MOU

The U.S. DoD-UK MOD Reciprocal Defense Procurement MOU is an agreement entered into by the U.S. Department of Defense and UK Secretary of State for Defence. In the United States, there are currently twenty-nine (29) countries with which the DoD has similar reciprocal defense procurement (“RDP”) agreements. Though the text of the agreements are negotiated and agreed to between the governments, the Department of Defense often publishes a request for industry input in the Federal Register prior to entering into a RDP. For example, prior to renegotiating the current U.S. DoD-UK MOD RDP MOU, the DoD published such a request, available here: <https://www.federalregister.gov/documents/2017/10/20/2017-22714/negotiation-of-a-follow-on-reciprocal-defense-procurement-memorandum-of-understanding-with-the>.