

## SESSION 7

# FEDERAL CONTRACTING OVERSEAS

TUESDAY, JANUARY 26, 2021  
4:00 PM to 5:00 PM

# Agenda

- Overseas Compliance
- Section 889
- Contingency Operations
- Export Controls
- Foreign Investment and Ownership Considerations
- Avoidance of Human Trafficking
- COVID Impacts and Considerations
- Biden Administration
- International Standards: Challenges and Considerations



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# Overseas Compliance

- Turn-Key Solution
  - Standing engagements with vetted firms in 150+ countries
  - Can work with your preferred counsel
- Services
  - Business entity registration and maintenance
  - Filing local taxes and exemptions
  - Templated local employment agreements
  - Legal representations and power of attorney
  - Diligence on local agents and transactions
  - Status of Forces Agreements
  - Deployment guidance
  - Visas and customs
  - Arrests of contractor personnel working overseas
  - Lawsuits from local employees and vendors in foreign courts



## 889 Compliance



Section 889(a)(1) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year 2019 (Pub. L. No. 115-232) prohibits the Government from:

- ▶ (A) procure[ing] or obtain[ing] or extend[ing] or renew a contract to procure or obtain any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system; or
- ▶ (B) enter[ing] into a contract (or extend[ing] or renew[ing] a contract) with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.

Section 889(f)(3) defines “covered telecommunications equipment or services” as telecommunications or video surveillance equipment produced by certain Chinese companies and “[t]elecommunications or video surveillance services provided by such entities or using such equipment.”

# 889 Compliance

- Section 889 of the FY2019 National Defense Authorization Act
- Interim Rule: Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment
- FAR Subpart 4.21 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment
- FAR 52.204-24 Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment
- FAR 52.204-25 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment
- GSAR Class Deviation
- GSA Mass Modification
- DoD Memo: Implementation of the Section 889(a)(1)(B) Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment
- FAR and GSAR Class Deviation – Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment
- FAR Council – Information Collection; Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment

## 889 Compliance

- Does Section 889 prohibit implementer use of ISP, Telecom, electric utilities or similar service providers if those utilities or vendors use covered telecommunications equipment or services?
- Differing Agency Guidance
- How do companies comply?
  - Certification
  - Internal diligence
  - Vendor diligence?



# DOD Proposed Regulatory Update on Operational Contract Support

Proposed update to 32 CFR Part 158

Guidance on how DOD plans for and integrates contractor capabilities and personnel in support of operations outside the U.S.

Intended to "reduce the likelihood . . . of waste, fraud, and abuse" and ensure that DoD contractors "are fully prepared to meet the requirements necessary to support operations outside the United States."

Main Points:

- ▶ Clarifies government responsibility for planning for contractor support vs. directing contractor work.
- ▶ Broadens the range of operations that contractors can support.
- ▶ Clarifies the medical and dental requirements for contractor personnel.
- ▶ Outlines the support services that contractors are to provide for their personnel and which services the military may provide to contractors.
- ▶ Provides more detailed procedures for tracking and managing contractor personnel.







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# Export Controls

- Common export control triggers under USG contracts
  - Jurisdiction/classification changes to company's products based on modifications made for USG customer
  - Services provided to foreign persons (defense services)
  - Receiving controlled technical data/technology
  - Exporting controlled parts and components to third party
  - Employee travel (with export-controlled data on devices)
- Recent changes and updates
  - Exemption 126.4
  - Status of Hong Kong
  - Military End User (MEU) rule and MEU list

# Foreign Investment and Ownership Considerations

- FY21 NDAA beneficial ownership reporting requirements
  - Corporate Transparency Act (CTA)
  - Section 885
- CFIUS: recent changes implementing FIRRMA
  - Expanded scope of transactions subject to CFIUS review (to include certain non-controlling investments and real estate transactions)
  - Filings mandatory in certain circumstances
  - Imposition of filing fees (\$0-\$300,000, depending on value of transaction)
- Commerce review of ICTS transactions (Jan. 19, 2021 Interim Final Rule)
- FOCI mitigation for cleared companies
  - FY19 NDAA Section 842 waiving NID requirement for certain cleared companies under SSAs



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# Avoidance of Human Trafficking

- Remains significant area of enforcement and risk
  - New concerns arising from COVID
- Key developments
  - TIP as past performance evaluation factor
  - Emergence of expectations and best practices
    - Site monitoring and visits
    - Active engagement

# COVID Impacts and Considerations

- Wide variety of challenges
  - Scope and priority changes
  - Travel impact and impediments to operational movement
  - Local health restrictions and orders
  - Supply chain
- Increased costs
- Evolving guidance – allowable costs, progress payments, IT, PPE
- Anticipated audits and investigations
  - Steps that can be taken now



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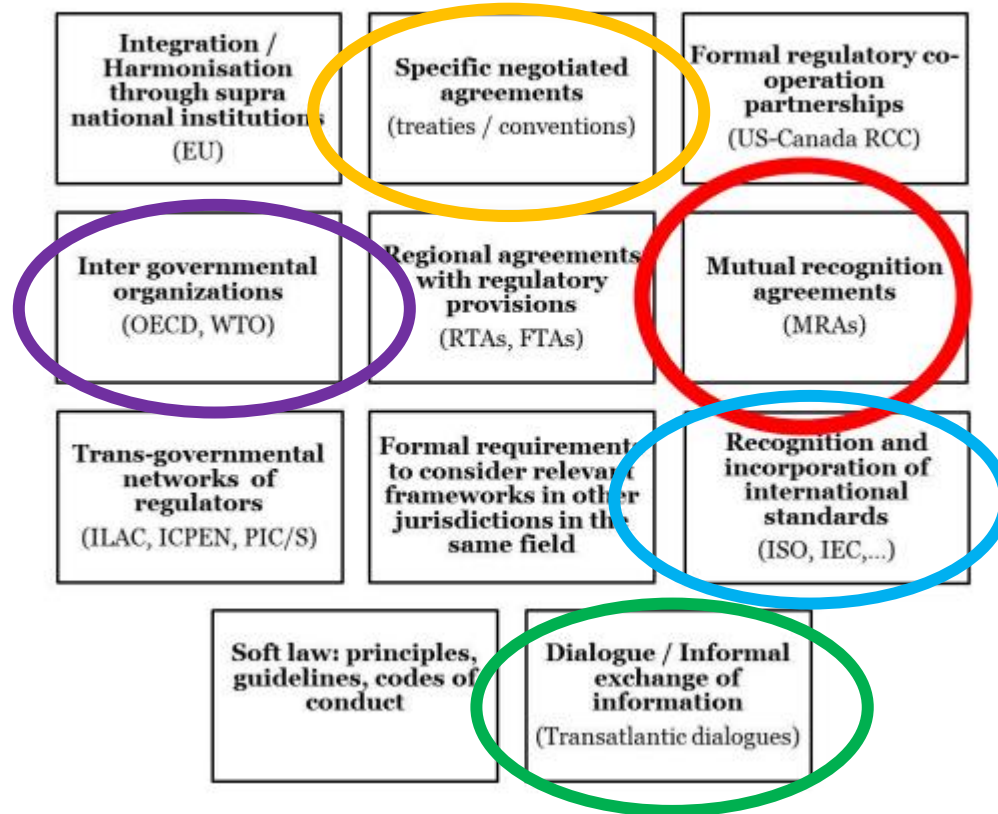
# International Trade - Procurement

- President Joe Biden
  - To nominate USTR Katherine Tai: “Trade as a Force of Good”
  - “Made in America” policy
- Challenges
  - “Huawei Ban” – Section 889 Interim Rule
  - Cybersecurity Maturity Model Certification (CMMC)
  - European Commission “White Paper” -- Foreign Government Subsidies
  - Addressing global warming -- FAR 23.103, GSA 2010 report
- Regulatory Cooperation – what process and standards?





Figure 1. MRA in the OECD typology of IRC mechanisms



From: Correia de Brito, A., C. Kauffmann & J. Pelkmans, *The Contribution of Mutual Recognition to International Regulatory Co-operation* (OECD 2016), <http://dx.doi.org/10.1787/5jm56fqsfxmx-en> (citing OECD, *International Regulatory Co-operation – Addressing Global Challenges* (2013), <http://dx.doi.org/10.1787/97892642004663-en>).

## Challenge Question



Submit your answer to [craig@pubklaw.com](mailto:craig@pubklaw.com)  
Subject line: Panel 7 Challenge Question

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