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Prohibitions on Use of Chinese Telecommunications Equipment and Services: Complying with the NDAA

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Cy counsels clients on a broad range of government contracting matters before government agencies and federal courts, which includes overall regulatory compliance with the Small Business Administration’s (SBA) small business programs. He represents small and mid-sized government contractors looking to structure compliant teaming, joint venture, and mentor-protégé agreements. Cy also handles the prosecution and defense of small-business size and status protests; appeals before the SBA and the Office of Hearings and Appeals; as well as bid protests before the Government Accountability Office, the Court of Federal Claims, and the U.S. Court of Appeals for the Federal Circuit.

Cy’s work for federal contractors includes the preparation, negotiation, and prosecution of Contract Dispute Act claims, requests for equitable adjustment, termination for convenience settlements, and defense of suspensions and debarments. He also works with clients on the preparation of Organizational Conflict of Interest (OCI) mitigation plans and related OCI concerns, as well as intellectual property licensing, copyright, trademark, and data rights issues under the Federal Acquisition Regulation and Defense Federal Acquisition Regulation Supplement.

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Assisting clients in a variety of government contracting matters, Anna guides commercial businesses through bid protests at all levels, size and status protests, requests for equitable adjustment, claims, and appeals. Her work encompasses small business procurement matters, particularly on issues related to eligibility, participation in the federal small business set-aside programs, and maintaining regulatory compliance. Anna also works closely with PilieroMazza's False Claims Act (FCA) Group and addresses other issues arising under the Federal Acquisition Regulation (FAR) and the Contract Disputes Act (CDA).

A member of the Firm's Cybersecurity & Data Privacy team, Anna works actively to help clients come into compliance with cybersecurity and data privacy laws. In particular, she assists government contracts working with the Department of Defense (DOD) to assess and meet their compliance obligations for the Cybersecurity Maturity Model Certification (CMMC), which impacts a contractor's ability to bid for and maintain a contract with the DOD.

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We deliver results for our clients by implementing legal and business solutions that take the client's best interests into consideration. Moreover, PilieroMazza's efficient operational structure and lean approach to staffing matters translates into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

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- Business & Corporate
- Cybersecurity & Data Privacy
- False Claims Act
- Government Contracts
- Intellectual Property & Technology Rights
- Labor & Employment
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Overview

- Rule background
- Applicability
- Banned entities, products, and services
- Key terms
- Flowdown realities
- Waivers
- Open issues

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Section 889 Background

- "Section 889" refers to Section 889 of the 2019 NDAA
- Implemented in the Federal Acquisition Regulation ("FAR") as of August 13, 2020, via an interim rule
- Multiple attempts to delay implementation, given ubiquity of banned products and cost of compliance with ban
- (a)(1)(A) piece of ban came into effect last year; (a)(1)(B) piece is now in focus

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Part A Applicability

- In effect since August 13, 2019 – FAR 52.204-25
- Prohibits Executive Agencies from procuring/obtaining telecommunications equipment/services from the prohibited Chinese companies
- Only applies if the prohibited equipment/services is the deliverable or if it is a “substantial or essential component” or “critical technology” of any deliverable

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Part A Applicability

- Within ONE BUSINESS DAY: Requires reporting of any discovered prohibited technology or services
- Within TEN BUSINESS DAYS: Requires additional reporting of steps taking to mitigate the impact of the discovery and steps you took before discovery to prevent the provision of the prohibited equipment or services
- Applies to all EXECUTIVE Agencies
- No limit to the types of size of contracts to which it applies (including COTS and micro-purchases)
- Must be flowed down to Subcontractors

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Part B Applicability

- NDAA applies to all executive agencies, so the ban will also apply outside the FAR
  - Remains to be seen how other agencies implement the ban, however, as the interim rule only applies to the FAR
- Unless a waiver exists, applies to ALL prime contractors performing any FAR-covered contracts
  - Applies to prime contractors only, and also to their affiliates
    - Likely will not apply to foreign affiliates—not clear until final rule is released (also, it may still apply indirectly due to the domestic firm's "use" of foreign equipment or services)
  - But, some intricacies will likely require information from some subcontractors or vendors
- No exception for commercial item contracts, small businesses, simplified acquisitions, or micro-purchases.
- Likely that non-executive agencies will implement the same requirements

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Part B Applicability

- This is a material solicitation requirement for all solicitations after August 13th (unless a waiver is granted to the Agency)
- Failure to certify that you are not using the covered equipment or services will be a valid basis for rejecting an offer (arguably agencies are required to reject offers)
- Does not currently apply to affiliates, parents, subsidiaries… BUT… FAR Council said they may make it apply to such entities
- Final Rule expected in August 2021

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Part A&B Reporting

- Reporting is ongoing throughout contract performance, every contract. If you identify the use of covered equipment you MUST:
  - Report it within one business day
    - the contract number; the order number(s), if applicable; supplier name; supplier unique entity identifier (if known); supplier Commercial and Government Entity (CAGE) code (if known); brand; model number (original equipment manufacturer number, manufacturer part number, or wholesaler number); item description; and any readily available information about mitigation actions undertaken or recommended.
  - Follow-up within 10 business days giving
    - any further available information about mitigation actions undertaken or recommended. In addition, the Contractor shall describe the efforts it undertook to prevent use or submission of covered telecommunications equipment or services, and any additional efforts that will be incorporated to prevent future use or submission of covered telecommunications equipment or services.

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Banned Entities

- Huawei Technologies Company, ZTE Corporation, Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, Dahua Technology Company, and any and all of their subsidiaries or affiliates
- Any company the Secretary of Defense “reasonably believes” is owned or controlled by or otherwise connected in some way to the government of the People’s Republic of China

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Banned Products and Services

- Telecom equipment produced by Huawei or ZTE
  - For example: phones, routers
- Telecom equipment and video equipment produced by Hytera, Hangzhou, or Dahua
  - For example: thermal cameras used for fever, and thus COVID, detection
- Telecom or video surveillance services that “use” any of the above equipment
  - We have spoken with clients who use covered video cameras in warehouses in China to monitor inventory
  - Another client uses Chinese security for local warehouses in China and those security services use the covered equipment

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Key Terms

- Definitions of terms used in the prohibition are in FAR 4.2101
- However, several of the major terms are vaguely defined or are simply not defined at all

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Key Terms

- *Covered telecommunications equipment or services*
  - "Equipment" means both telecom equipment produced by Huawei Technologies Company or STE Corporation or any of their subsidiaries or affiliates, and telecom and video surveillance equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Tecnology Company or any of their subsidiaries or affiliates
  - "Services" means telecom or video surveillance services "provided by such entities or using such equipment"
  - Also applies to products or services offered by an entity the Secretary of Defense "reasonably believes" is owned, controlled, or otherwise connected to the Chinese government

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Key Terms

- *Reasonable Inquiry*
  - "an inquiry designed to uncover any information in the entity's possession about the identity of the producer or provider of covered telecommunications equipment or services used by the entity that excludes the need to include an internal or third-party audit"
  - "Entity" presumably means contractor here
- *Substantial or Essential Component*
  - "any component necessary for the proper function or performance of a piece of equipment, system, or service"
  - NOT a piece of equipment that is essential to your business, necessarily—rather, a component that is a critical part of any equipment/services you use

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Reasonable Inquiry: Practical Application

- How do you know what's in your possession?
- Be broad! Make sure you are diligent
- Check with 3rd party IT providers and any vendors/subcontractors/suppliers/etc. to verify what they use
  - The ban, as such, does not flow down but you still need to do your due diligence
  - If you, as a prime, fail to inquire, DOJ or IGs could consider this reckless disregard for the truth and thus FCA territory
- Ask employees and anyone who connects to your WiFi/other networks what products they use
  - If employees use, for example, Huawei phones, they cannot use those phones for any work-related functions or to connect to your networks in any fashion

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Dealing with Banned Equipment

- Get rid of it ASAP!
- Other options available?
  - Disconnect devices until you find a way to deal with the banned items
  - Turn off devices?
  - Disconnect from internet/network?
- Do you have to inquire as to the use of such covered equipment by your vendors? Service providers?

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Flowdown Realities

- FAR 52.204-24 is NOT a “Required” flowdown to subcontractors
- Thus, Subcontractors can continue to use the prohibited items/services, generally, in the running of their business
- HOWEVER, Subcontractors cannot use the prohibited items/services directly in performance of a covered federal government subcontract
- Same issues/questions with “use” as the prime contractor.

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Flowdown Realities

- FAR 52.204-25 IS a “Required” flown down to subcontractors
- Thus, Subcontractors must report, within ONE BUSINESS DAY, to the prime any time, during contract performance, where they identify prohibited equipment or services in use.
  - the contract number; the order number(s), if applicable; supplier name; supplier unique entity identifier (if known); supplier Commercial and Government Entity (CAGE) code (if known); brand; model number (original equipment manufacturer number, manufacturer part number, or wholesaler number); item description; and any readily available information about mitigation actions undertaken or recommended.

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Exceptions

- **Blanket Exception**: equipment cannot route or redirect user data traffic or cannot permit visibility into any user data or packets that such equipment transmits or otherwise handles.
  - This applies to both the government and contractors (so Part A and Part B of the rule)
- **Government Exception**: connections to third-party facilities, e.g., backhaul, roaming, or interconnection arrangements
  - This DOES NOT apply to contractors "use" under Part B.

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Waivers

- Agency heads can grant one-time waivers to a Government entity (e.g., contracting office) if the entity requests such a waiver
  - But, entity must include a "compelling justification" as to why it needs the waiver, as well as a "full and complete laydown or description" of the equipment or services, and a phase-out plan to eliminate the equipment or services
  - Agency head can also grant a waiver in the case of a national emergency
  - Must notify ODNI and FASC in either event
  - Within 30 days a full description of the contract and use of each piece of prohibited technology/services must be submitted to Congress as well as an attestation that the waiver does NOT risk national security and how the Agency came to that conclusion

Waivers

- Director of National Intelligence may provide waivers if s/he "determines the waiver is in the national security interests of the United States"
- ALL waivers for (a)(1)(B) provisions expire on August 13, 2022 at the latest
  - Currently, DoD's waiver expires September 30, 2020

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Waivers

- If an offer is submitted that does NOT comply with the rule, the KO has to make a determination as to whether to go through the onerous process of seeking a waiver
  - Likely HIGHLY discretionary – not a basis for protest
- If a contract is ongoing and the contractor cannot comply
  - KO may seek a waiver (again very difficult and at the discretion of the KO)
  - KO may terminate the contract
  - No option years are allowed
- Only two waiver types… so these KO waivers have to go through one of those two processes… DIFFICULT!!

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Comments to the FAR

- Due Sept. 14, 2020
- FAR Council seeking wide ranging comments and answers to specific questions:
  - To what extent do you currently use any equipment or service?
  - How much would it cost to comply with the rule?
  - Do you have insight into existing equipment or components?
  - What is the best way to identify the existence of covered technology or services?
  - To what extent do you have control over existing equipment vs forced use (i.e., landlord requires it)?
  - Are there foreign locations or specific use cases in the supply chain that make compliance impossible?
  - What additional guidance is necessary for compliance?

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Impacts of Telecom Ban

- FAR Council recognized 74% of companies impacted are small businesses
- FAR council recognized that there will be a “significant” impact on contractors and the government – increased costs, reduced competition, and inability to meet mission needs.
- Far council recognized that companies will leave the federal marketplace
- Cost impacts – possibility of claims
  - And costs of replacing products and services…
- Time for inventorying your products and services
  - Stops short of an internal (or external) audit, but you still need to be aware of what you have and use
  - Remember, ban applies to whole products as well as components
  - What does “reasonable inquiry” practically look like?

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Impacts of Telecom Ban

- "Using" the banned products or services applies to all parts of your company, not just the government contracts performance side
  - But what about contracts you perform solely OCONUS? What if subcontractors or vendors use the banned products or services and contract with you?
- What if you have locations in China or elsewhere that use the covered equipment or service and NO OTHER OPTION is available?
- What if China passes a "tit-for-tat" law REQUIRING the use of covered equipment for all activities in China?
- Keeping track of agency waivers
  - Not all agencies will necessarily have a waiver

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Impacts of Telecom Ban

- Options for Current Bids:
  - Part B only prohibits the Offeror from using the covered equipment or services
  - Thus, make a reasonable inquiry of your company, only
  - Then, purge your company of all offending equipment or services and don't ask your proposed subcontractors… yet
  - Upon award of the Subcontract, ensure there is language in the subcontract requiring them to not "use" the prohibited equipment or services
  - If the subcontractor cannot certify to such non-use, do not award the subcontract
  - This way you secure the prime contract, make a valid certification, but do not have to worry about subcontractors… yet… assuming you can perform the work

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Impacts of Telecom Ban

- False Claims Act implications:
  - Weak "reasonable inquiry"
    - Difficult case for DOJ because the definitions are so vague (need knowing falsity or reckless disregard for the truth)
    - BUT… there is a line where the inquiry is "unreasonable" or where the Qui Tam relators may claim you didn't do "enough"
  - Knowingly limiting the "reasonable inquiry" to avoid "getting the answer you don't want"
  - Knowingly ignoring red flags or likely signs of covered equipment or services
  - Limiting employee ability to inspect or report use of covered equipment or services

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Questions

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