



Jack L. White
Partner

1751 Pinnacle Drive, Suite 1000
Tysons, VA 22102
(703) 590-1234
(703) 590-0366
jwhite@fhhfirm.com

Guidance on Compliance With DoD Sourcing Requirements For Sensitive Materials

Introduction

The Department of Defense (DoD) depends on powerful permanent magnets, including those made with rare earth elements such as neodymium-iron-boron (NdFeB) or specialty metals, for the functioning of critical weapon systems and essential technologies. As such, DoD requires a stable, secure, supply of rare earth elements such as NdFeB and has placed restrictions on where defense suppliers can source this material. In order to capture and retain contracts with DoD, NdFeB suppliers and, perhaps more importantly, systems integrators and suppliers of finished products farther down the value chain, must ensure that they can maintain compliance with these sourcing requirements. However, many suppliers and other contractors lack a functional appreciation of the full scope of applicable restrictions.

Part I provides an overview of the laws and regulations governing the procurement requirements for rare earth elements. Part II provides an overview of some notable exceptions to the rules. While this document is designed to dispel some of the misconceptions and confusion surrounding DoD rules, it does not comprehensively address the full array of potential circumstances. We encourage readers with specific questions and issues to contact an attorney.

Part I – Laws and Regulations Governing Procurement of Sensitive Materials

The National Defense Authorization Act (NDAA) for Fiscal Year 2019 amended Title 10 of the U. S. Code, imposing additional restrictions on the DoD’s acquisition and sale of certain sensitive materials that are manufactured in non-allied countries.¹ Subject to limited exceptions, this statute prohibits the procurement of the following materials, when those materials are melted or produced in any “covered nations:”

- 1) samarium-cobalt magnets,
- 2) NdFeB magnets,
- 3) tungsten metal powder,
- 4) tungsten heavy alloy or any finished or semi-finished component containing tungsten heavy alloy, and
- 5) tantalum metals and alloys.

The “covered nations” specified under the law are (i) the Democratic People’s Republic of North Korea, (ii) the People’s Republic of China, (iii) the Russian Federation, and (iv) the Islamic Republic of Iran. Importantly, the statute *also* prohibits the DoD from procuring any *end item* that contains one of the materials above, when that end item is manufactured in any

¹ 10 U.S.C. §2533c.



Jack L. White
Partner

1751 Pinnacle Drive, Suite 1000
Tysons, VA 22102
(703) 590-1234
(703) 590-0366
jwhite@fhhfirm.com

covered nation. Although the law may seem straightforward on its face, determining what constitutes an end item that is “manufactured” in one of these covered nations can be extremely difficult in light of increasingly globalized and complex modern supply chains.

Helpfully, the DoD has also issued regulations to implement this statute, which add additional color to what contractors may and may not do. Specifically, the Defense Federal Acquisition Regulation Supplement (DFARS) Part 225.7018 contains additional guidance on these procurement restrictions.

For example, these regulations clarify that the melting and manufacturing of NdFeB includes melting neodymium with iron and boron to produce the neodymium-iron-boron alloy. Additionally, the regulations clarify that the prohibition applies to all subsequent phases of magnet production, including powder formation, pressing, sintering or bonding, and magnetization. Generally, if the conditions specified in the regulations are unmet, a supplier cannot sell its product to the DoD or a customer on a DoD contract.

Part II – Exceptions to the Prohibitions on Procuring Covered Materials

Notably, the regulations provide some exceptions to the sourcing prohibition. For example, if the material in question is included in certain electronic device or commercial off the shelf end items, the restrictions may not apply. In addition, if the contract value is at or below the U. S. government’s Simplified Acquisition Threshold (SAT) (currently capped at \$250,000 per contract), then the restrictions will not apply. Importantly, NdFeB suppliers are advised that the SAT applies to the total dollar amount of the contract, not to the value of each individual magnet supplied within the contract. NdFeB suppliers are also advised that it is not possible to circumvent the DFARS requirements by “splitting” contracts below the SAT. This practice is prohibited by the DoD under other regulations.²

Other exemptions to the sourcing restriction include (a) DoD acquisitions of items outside the U. S. for use outside the U. S., and (b) acquisitions of recycled NdFeB magnets if the milling and sintering of the recycled magnet occur within the U. S. Additionally, the regulations also permit DoD to waive sourcing requirements if the covered materials cannot be purchased “as and when needed at a reasonable price.” Known as “nonavailability determinations,” these waivers require analysis, written certification, and in some instances public disclosure of the rationale. As such, DoD’s use of these waivers is uncommon and suppliers should not rely on them to provide regulatory relief.

Conclusion

The laws and regulations described above are meant to provide a clearer overview of the legal framework surrounding DoD’s procurement of sensitive materials. Suppliers of the covered materials identified here, and end products made with those materials, should ensure they

² See, Federal Acquisition Regulation (FAR) 13.003(c)(2).



Jack L. White
Partner

1751 Pinnacle Drive, Suite 1000
Tysons, VA 22102
☎ (703) 590-1234
📠 (703) 590-0366
jwhite@fhhfirm.com

analyze their supply chains to confirm that they remain in compliance with the procurement restrictions. Because of the scarcity of these products, suppliers may be surprised at how few suppliers remain in compliance with these conditions. Further, suppliers should also be aware that DoD has other restrictions in place for similarly sensitive products, particularly other specialty metals.

While complex, the regulations related to DoD's procurement of sensitive materials are navigable. Suppliers are encouraged to review the laws and regulations referenced herein, to ensure they remain in compliance and can maintain a continuity of business with DoD and its customers. Suppliers of covered materials are encouraged to seek legal counsel to help navigate DoD's sourcing requirements and guarantee compliance under the law.

FH+H's [International Trade + Transactions team](#) advises domestic, foreign, and multinational clients – including individuals, small businesses, and conglomerates – through global transactions. Focusing primarily on the defense, security, and intelligence sectors, Partner [Jack White](#) and Associate [Megan Paster](#) position U. S. businesses for overseas growth by ensuring full compliance with federal, state, and international rules to minimize risk and maximize profitability. Mr. White and Ms. Paster develop sustainable corporate and contracting structures that are tailored to specific transactions, industries, nations, and operating environments.