

# Foreign Trade Controls

## E-ALERT

August 17, 2009

### **FINAL RULE REQUIRES FEDERAL CONTRACTORS TO CERTIFY REGARDING CERTAIN BUSINESS ACTIVITIES IN SUDAN**

On August 11, 2009, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (“the Councils”) announced a [Final Rule](#) amending the Federal Acquisition Regulation (“FAR”), requiring U.S. federal contractors to certify that they do not conduct certain business activities in Sudan’s power production, mineral extraction, military equipment, or petroleum sectors. Significantly, the commentary accompanying the Final Rule indicates that (1) contractors will make the certification only on behalf of themselves, and not on behalf of their affiliates; (2) only prime contractors, and not subcontractors, will be required to make the certification; and (3) the certification will apply only to future contracts, and not to existing contracts.

#### **BACKGROUND**

The Sudan Accountability and Divestment Act (“SADA”), Pub. L. No. 110-174, signed into law in December 2007, requires a certification in each contract entered into by an executive agency that the contractor does not conduct business operations in Sudan’s power production, mineral extraction, military equipment, or petroleum sectors. SADA defines “business operations” quite broadly: “The term ‘business operations’ means engaging in commerce in any form in Sudan, including by acquiring, developing, maintaining, owning, selling, possessing, leasing, or operating equipment, facilities, personnel, products, services, personal property, real property, or any other apparatus of business or commerce.” Importantly, SADA specifically exempts business operations that (i) are conducted “directly and exclusively” with the regional government of southern Sudan, (ii) are conducted under a license from the Treasury Department’s Office of Foreign Assets Control, (iii) consist of supplying goods or services to peacekeeping forces, humanitarian organizations, or “marginalized populations of Sudan,” (iv) consist of providing goods or services that are used only to promote health or education, or (v) have been voluntarily suspended. (See our Trade Controls E-Alert of January 7, 2008 for more details about SADA.)

SADA required an amendment to the FAR to reflect this new federal contracting requirement. The Councils promulgated an interim rule amending the FAR in June 2008, and received diverse comments calling for both a broader and a narrower rule. The FAR will be amended to reflect the Final Rule’s requirements.

#### **CERTIFICATION LIMITED TO CONTRACTORS AND NOT TO AFFILIATES OR SUBCONTRACTORS**

In promulgating the Final Rule, the Councils confirmed that a contractor needs to certify only regarding its own business operations, and not those of its affiliates or subsidiaries. The Councils refused to require certification from a

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"person," which could include affiliates and subsidiaries, noting that SADA requires certification only from the "contractor." In rejecting the broader certification requirement, the Councils noted that "it is unlikely that most prospective Government contractors would be able to access the information needed to certify to the activities of their affiliates, parents, or parent-company subsidiaries."

Similarly, the Councils rejected a commenter's suggestion that the rule be applied to subcontractors, noting that SADA "does not require flow down of the certification provision to subcontractors but only addresses contracts entered into by executive agencies, *i.e.*, prime contracts." Therefore, prime contractors are not required to include the FAR certification clauses in their subcontract agreements.

### **CERTIFICATION APPLIES ONLY TO FUTURE CONTRACTS AND TO PRE-AWARD STATUS**

After weighing the comments received in response to the interim rule, the Councils concluded that the certification will apply only to future contracts and not to existing contracts, and the Final Rule includes normal effective date (prospective) language, as set forth in FAR 1.108(d). The Councils further decided that a new certification is not required upon exercise of a contractual option or issuance of a task or delivery order. Finally, the Final Rule also rejected suggestions that a contractor should be required to disclose whether it has future targeted business operations in Sudan and to certify that it will not engage in targeted business operations for the duration of the contract. The Councils noted that SADA includes no such requirements.

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Covington & Burling LLP has extensive experience with government contracting and with sanctions regimes. We have been closely monitoring federal, state, and U.N. measures targeting Sudan and other countries. We would be happy to assist our clients as they seek to navigate the intricacies of the legislative and regulatory regimes related to United States foreign trade controls.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our International Trade practice group:

Corinne Goldstein	202.662.5534	<a href="mailto:cgoldstein@cov.com">cgoldstein@cov.com</a>
Peter Flanagan	202.662.5163	<a href="mailto:pflanagan@cov.com">pflanagan@cov.com</a>
Jennifer Plitsch	202.662.5611	<a href="mailto:jplitsch@cov.com">jplitsch@cov.com</a>
Eric Carlson	86.10.5910.0503	<a href="mailto:ecarlson@cov.com">ecarlson@cov.com</a>

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