

## CLIENT ALERT

### Clearing The Decks--FAR Council Finally Issues COTS Waivers Mandated By Clinger-Cohen Act of 1996

Jan.23.2009

Six years after the initial advance notice of proposed rulemaking, on January 15, 2009, the FAR Council issued its final rule identifying additional statutory requirements to be waived when the government purchases commercial, off-the-shelf equipment as narrowly defined in the Clinger-Cohen Act of 1996 (commercial items, sold in substantial quantities in the commercial marketplace, and offered to the government without modification), relieving COTS procurements from compliance with only one statute of significance--the Buy American Act, but significantly not the Trade Agreements Act (applicable to many of the GSA schedule and other contract vehicles under which the government buys COTS items)--and even then the new rule provides only a partial waiver: the item must still be "manufactured" (an undefined term) in the United States, but the origin of the components will no longer be relevant in determining the country of origin for COTS items. Neither this final FAR rule nor a separately published interim DFARS rule (that effectively provided a similar partial waiver) limits or revokes the existing waiver provided as a result of annual authorization act provisions wholly exempting from the Buy American Act information technology products that qualify under the broader definition for commercial items.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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