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Buying American: The Berry and Kissell Amendments

Two U.S. laws—known as the Berry and Kissell Amendments—require that certain products purchased by the Department of Defense (DOD) and some agencies of the Department of Homeland Security (DHS) be manufactured and wholly produced within the United States. Congress typically debates the Berry Amendment in the context of annual National Defense Authorization Act (NDAA) legislation.

The laws are controversial. Supporters assert they help preserve the U.S. industrial base and sustain domestic manufacturing employment. Some lawmakers also assert that production of products such as government uniforms outside the United States raises national security concerns. Opponents contend the laws guarantee demand to certain companies and raise the government's procurement costs. They also claim these laws are inconsistent with modern supply chains that source components and raw materials from multiple countries.

The Berry Amendment

The Berry Amendment, named after its sponsor, Representative Ellis Yarnal Berry, first appeared in the Fifth Supplemental National Defense Appropriations Act of 1941 (P.L. 77-29). It became permanent law through the FY2002 NDAA (P.L. 107-107) and is codified at 10 U.S.C. §4862 and implemented through the Defense Federal Acquisition Regulation Supplement. The Berry Amendment requires certain items purchased by DOD to be 100% domestic in origin.

The items covered by the law have varied over the years; currently, the Berry Amendment applies to DOD purchases of textiles, clothing, footwear, food, hand or measuring tools, stainless steel flatware, and dinnerware. DOD purchases of these items must be entirely grown, reprocessed, reused, or produced in the United States. Unless exemptions in the law apply, the entire production process of covered products, from the production of raw materials, to the manufacture of all components, to final assembly, must be performed in the United States.

The Berry Amendment mandates a higher level of domestic content than the Buy American Act of 1933 (41 U.S.C. §§8301–8303), which applies to most direct procurement of other federal agencies. Under the Buy American Act, the procured product must be mined, produced, or manufactured in the United States. If manufactured, either at least 60% of the costs of its components must be manufactured in the United States, or the product must be a commercially available off-the-shelf item.

In FY2021, purchases by DOD of Berry-applicable products amounted to approximately $5.3 billion, according to figures from the Federal Procurement Data System-Next Generation (FPDS-NG), the primary source for federal procurement data, as reported through the System for Award Management (SAM.gov) database. DOD expenditures on Berry-related goods accounted for slightly more than 1% of the department's total spending on products and services in FY2021.

The Kissell Amendment

The Kissell Amendment, named after its sponsor, Representative Larry Kissell, was enacted as Section 604 of the American Recovery and Reinvestment Act of 2009 (P.L. 111-5) and is codified at 6 U.S.C. §453b. On March 5, 2013, amendments to the Homeland Security Acquisition Regulation implemented the Kissell Amendment requirements for DHS procurement. Kissell requirements are modeled on the Berry Amendment. Since August 2009, the Kissell Amendment has required DHS, when using appropriated funds directly related to national security interests, to buy textiles, clothing, and footwear from domestic sources. Excluded are food, hand or measuring tools, and flatware and dinnerware.

Although the Kissell Amendment as enacted applies to all agencies of DHS, in practice its restrictions apply only to the Transportation Security Administration (TSA). Prior to the Kissell Amendment's enactment, the United States had entered into commitments under the World Trade Organization Agreement on Government Procurement (WTO GPA), and under various free trade agreements, to open U.S. government procurement to imported goods. The Kissell Amendment applies only where it does not contravene those commitments.

Procurement by other DHS agencies, such as Customs and Border Protection or Immigration and Customs Enforcement, is subject to the Buy American Act. However, for these DHS agencies, the Buy American Act can, in certain circumstances, be waived pursuant to the Trade Agreements Act of 1979 (19 U.S.C. §§2501-2581). Thus, DHS agencies can purchase textile and apparel products from more than 100 countries provided certain conditions are met.

Berry and Kissell Exceptions

The Berry Amendment includes various exceptions. DOD, for example, can buy from non-U.S. sources when

- products are unavailable from American manufacturers at satisfactory quality and sufficient quantity at U.S. market prices;
- items are used in support of combat operations or contingency operations;
- products are intended for resale at retail stores such as military commissaries or post exchanges; and
- purchases are part of a contract whose value is at or below the Simplified Acquisition Threshold ($250,000). The FY2018 NDAA (P.L. 115-91) raised the threshold from $150,000; the FY2021 NDAA (P.L. 116-283) returned it to $150,000 for Berry-compliant purchases.

The Kissell Amendment has some similar exceptions.

Manufacturing Affected by Berry

DOD's annual purchases for Berry-applicable products are predominantly concentrated in food and apparel. In FY2021, FPDS-NG data indicate that food and apparel purchased by DOD comprised approximately 92% of the department's total Berry-specific contract obligations.

Food

The Berry Amendment requires DOD to purchase most food from sources that manufacture, grow, or process food in the United States. Over 95% of DOD's food purchases originated from the Defense Logistics Agency (DLA) as part of agency support to U.S. military personnel worldwide. DLA's leading food suppliers include Tyson Foods, Sara Lee, Kraft Heinz, Trident Seafoods, PepsiCo, and General Mills. The most restrictive Berry-related implementing regulation applies to seafood; it requires that DOD purchase only fish, shellfish, and seafood taken from the sea in U.S.-flagged vessels or caught in U.S. waters and processed in the United States or on a U.S.-flagged ship.

Rations known as meals ready-to-eat (MREs) represent an important component of DOD food sourced under the Berry Amendment. SoPakCo, AmeriQual, and Wornick are among the largest suppliers of MREs. The DOD market for Berry-compliant MREs was approximately $480 million in FY2021.

Textiles, Apparel, and Footwear

DOD's procurement of textile and apparel articles, including clothing and footwear, amounted to $2.3 billion in FY2021, representing 43% of the Department's total Berry-applicable purchases. Of these purchases, DOD expenditures specific to clothing amounted to $1.7 billion. Purchases subject to the Berry Amendment represented 5% of the $49 billion of textile and apparel shipments from U.S. mills in 2021.

One of the largest military-apparel contractors is the Federal Prison Industries (FPI), also known as UNICOR—a government-owned supplier—which provides prison-manufactured textile and apparel products. In FY2021, over 90% of FPI/UNICOR's textile and apparel sales, which amounted to approximately $99 million, went to DOD. Other contractors of military textiles and apparel are the National Industries for the Blind, Aurora Industries, M&M Manufacturing, and American Apparel.

In the FY2017 NDAA (P.L. 114-328), Congress extended the Berry Amendment by requiring DOD to provide 100% U.S.-made running shoes for recruits entering basic training. This requirement has been in effect since March 2017. Previously, DOD provided vouchers to recruits to purchase athletic footwear, which did not have to be domestic in origin. DLA estimates potential demand for as many as 250,000 pairs of running shoes annually.

DOD's direct purchases of footwear, such as combat boots and military dress shoes, amounted to $148 million in FY2021. Some manufacturers claim they have remained viable because they make millions of pairs of shoes annually for the military. While the United States is a major manufacturer of safety footwear, over 95% domestic demand was met through imports in 2021.

Hand or Measuring Tools

Hand or measuring tools make up a relatively small share of DOD's total Berry-applicable purchases, at roughly 2% or $108 million in FY2021. Leading contractors include Snap-On and Ideal Industries.

Flatware and Dinnerware

The FY2007 NDAA (P.L. 109-364) removed a decades-long mandate that DOD purchase American-made flatware. The FY2020 NDAA (P.L. 116-92) reinstated the domestic sourcing requirement for stainless-steel flatware. At present, Sherrill Manufacturing is the sole American producer of Berry-compliant flatware. In FY2021, flatware and dinnerware accounted for less than 1% of total DOD contract obligations. The restored Berry flatware requirement and the new requirement for dinnerware is set to expire September 30, 2023.

Manufacturing Affected by Kissell

The Kissell Amendment is more limited than Berry as it generally applies only to textiles and apparel, such as uniform items. In FY2021, TSA purchased approximately $55 million of Kissell-related items using appropriated funds. VF Imagewear is the leading contractor of TSA uniform items. The U.S.-Mexico-Canada Agreement, which entered into force on July 1, 2020, ended the exceptions that had permitted manufacturers from Mexico to qualify as "American" sources. In FY2020, clothing items from Mexico accounted for over 90% of TSA's Kissell-applicable purchases.

Congressional Debate

The Berry and Kissell Amendments raise several issues for potential congressional consideration. One issue of debate has been the extent to which socioeconomic factors should be considered in any procurement restrictions. For example, one prior proposal would have eliminated FPI/UNICOR's status as a mandatory source for some items covered by Berry and Kissell, in an effort to increase competition. Another issue has been associated monetary acquisition thresholds; some lawmakers have offered bills raising the Berry and Kissell acquisition thresholds to $500,000, seeking to make foreign suppliers eligible to bid on more DOD and DHS procurement contracts.

There also are macro considerations of potential interest to Congress. One is whether DOD or DHS should restrict the issuance of domestic non-availability determinations if the United States does not produce a solely domestic item, or if U.S. manufacturers are at maximum production capacity. A second consideration is the extent to which these two laws best reflect current U.S. national security interests and industrial base concerns.

Another issue is whether provisions related to procurement in the FY2023 NDAA (P.L. 117-263) might contravene preexisting commitments set forth under U.S. free trade agreements and the WTO GPA for certain DHS agencies other than TSA. The law requires several DHS agencies to purchase certain textile and apparel items related to national security from domestic sources. The provision further stipulates that one-third of obligated funds per fiscal year be awarded to entities that qualify as small businesses. In addition, the law requires DHS to submit a report to Congress, not later than 180 days after enactment, with recommendations on how DHS could procure additional items from domestic sources, as well as enhance domestic supply chains for such items related to national security.

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