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Defense Primer: The Berry and Kissell Amendments

Two U.S. laws require the Department of Defense (DOD) and some agencies of the Department of Homeland Security (DHS) to purchase only domestic products for certain military and nonmilitary purposes. These laws are known as the Berry Amendment and the Kissell Amendment. Congress typically debates the Berry Amendment in the context of the annual National Defense Authorization Act.

The laws are controversial. Supporters argue they help preserve the U.S. industrial base and create domestic manufacturing jobs. Some lawmakers also assert that production of government uniforms outside the United States raises national security concerns. Opponents believe the laws give monopolies 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 (10 U.S.C. §2533a) is the popular name of a 1941 law enacted as part of the Fifth Supplemental National Defense Appropriations Act (P.L. 77-29). It became a permanent part of the *U.S. Code* when it was codified by the FY2002 National Defense Authorization Act (NDAA; P.L. 107-107).

The Berry Amendment requires certain items purchased by DOD to be 100% domestic in origin. The requirement generally extends to inputs into the purchased items. The items covered by the law have varied over the years. The law affects DOD purchases of textiles, clothing, footwear, food, and hand or measuring tools. Recently, Congress reinstated stainless-steel flatware and added dinnerware as additional covered items. 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 affected 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 much higher level of domestic content than the Buy American Act of 1933, which generally governs the procurements of other federal agencies. Under the Buy American Act, the final product must be mined, produced, or manufactured in the United States, and if manufactured, either at least 50% of the costs of its components must be manufactured in the United States, or the end product must be a commercially available off-the-shelf item.

Total sales to DOD in the five Berry-applicable product categories came to around \$4.0 billion in FY2020. DOD expenditures on Berry Amendment products accounted for around 1% of the department's spending on products and services in FY2020, according to figures from the Federal Procurement Data System-Next Generation, the primary source for federal procurement data, as reported through the System for Award Management (beta.SAM.gov) database.

The Kissell Amendment

The Kissell Amendment (6 U.S.C. §453b) was enacted as Section 604 of the American Recovery and Reinvestment Act of 2009 (P.L. 111-5) and, through the Homeland Security Acquisition Regulation, made permanent on March 5, 2013. 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). This is because, prior to the Kissell Amendment's passage, the United States had entered into commitments under the World Trade Organization Agreement on Government Procurement, 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, including the Secret Service, Immigration and Customs Enforcement, and Customs and Border Protection, is subject to the less-stringent Buy American Act. For these DHS agencies, the Buy American Act is also waived pursuant to the Trade Agreements Act (P.L. 96-39). Thus, they can purchase textile and apparel products from more than 100 countries if certain conditions are met. Over half of DHS's uniform items came from foreign sources in FY2019, according to a 2020 report by the Department of Homeland Security.

Berry and Kissell Exceptions

The Berry Amendment includes various exceptions. For example, DOD 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, generally \$250,000, in which case the item can be sourced overseas. (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

A majority of DOD's procurement contract obligations for Berry-applicable items are related to food and apparel,

according to data from the FPDS-NG. Of all DOD's reported contracts for Berry-related items, about \$1.8 billion in FY2020 was below the Simplified Acquisition Threshold and therefore not subject to Berry requirements.

Food

The Berry Amendment requires DOD to purchase most food for military services from sources that manufacture, grow, or process food in the United States. The Defense Logistics Agency (DLA) reported nearly \$700 million in contract obligations in FY2020 to feed U.S. troops worldwide. DLA's leading food suppliers include Tyson Foods, Sara Lee, Kraft Heinz, Trident Seafoods, PepsiCo, and General Mills. The most restrictive Berry-related provision 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.

Meals ready-to-eat (MREs) form a major part of DOD food sourced under the Berry Amendment. SoPakCo, AmeriQual, and Wornick are among the largest suppliers of MREs. The DOD market for Berry-applicable MREs was over \$500 million in FY2020.

Textiles, Apparel, and Footwear

At nearly \$1.6 billion in FY2020, DOD's procurement of clothing, textiles, and footwear made up approximately two-thirds of DOD's contract obligations subject to the Berry Amendment in the last fiscal year.

One of the largest military-apparel contractors is the Federal Prison Industries (FPI), also known as UNICOR, which supplies prison-manufactured apparel. This government-owned supplier has proven controversial in both Congress and the apparel industry. Critics have voiced concern that prison industrial programs pose a threat to private enterprise and to the jobs of residents who are not incarcerated. Among other issues, critics have challenged FPI/UNICOR's mandatory source provision, which could require DOD to purchase from FPI/UNICOR factories if they can provide the desired product, within the required time frame, and at a competitive price. In FY2020, DOD accounted for over 90% of FPI/UNICOR's textile and apparel sales.

Other large contractors of military apparel are the National Industries for the Blind, Aurora Industries, M&M Manufacturing, and American Apparel. Another Berry requirement is the manufacture of DOD apparel in the United States, including Puerto Rico and other U.S. territories.

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. 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. Since the new requirement took effect in March 2017, DLA has awarded three contracts for athletic footwear to San Antonio Shoes, Propper International, and New Balance.

DOD's direct purchases of footwear, such as combat boots and military dress shoes, in FY2020 totaled about \$130 million. 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, about 99% of shoes sold domestically are imported.

Hand or Measuring Tools

Hand or measuring tools make up a relatively small share of DOD's total Berry-applicable contract procurement obligations, at over \$66 million in FY2020. 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 reinstated the domestic sourcing requirement for stainless-steel flatware. DOD buys about 500,000 knives, forks, and spoons a year. Sherrill Manufacturing is currently the only Berry-compliant flatware manufacturer in the United States. Congress also stipulated DOD purchase dinnerware only from domestic producers such as Homer Laughlin China Company.

The restored Berry flatware requirement and the new requirement for dinnerware is effective from after December 20, 2020, and is set to expire before September 30, 2023. Congress also required a report from the Secretary of Defense that includes a recommendation on whether DOD purchases of dinnerware and stainless-steel flatware should be limited to sources in the United States.

Manufacturing Affected by Kissell

The Kissell Amendment is more limited than Berry because it generally applies only to uniform items and body armor. In FY2020, TSA purchased approximately \$34 million of Kissell-related items using appropriated funds. VF Imagewear is the leading contractor of TSA uniform items. The U.S.-Mexico-Canada Agreement (USMCA), which entered into force on July 1, 2020, ended the exceptions that had permitted manufacturers from Mexico to qualify as "American" sources. Mexico accounted for around one-fifth of the TSA's total annual expenditures for the purchase of uniform items. One bill in the 116th Congress would have required, among other things, more purchases from small businesses and considered raising the uniform allowances for items covered by the law.

Congressional Debate

The Berry and Kissell Amendments raise several issues: If the United States does not produce a solely domestic item, or if U.S. manufacturers are at maximum production capability, should DOD or DHS restrict procurement from foreign sources? And do U.S. national security interests and industrial base concerns justify these laws?

Over the years, changes have been proposed to the Berry and Kissell Amendments, such as adding new items covered by these laws. One past proposal would have eliminated FPI/UNICOR's federal contract mandate. Other lawmakers have offered bills raising the Berry and Kissell acquisition thresholds to \$500,000, making foreign suppliers eligible to bid on more DOD and DHS procurement contracts. Congress returned the contracting threshold for Berry-compliant purchases to \$150,000 in the FY2021 NDAA, subject to future inflation adjustments.

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