

# CRS Report for Congress

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## Federal Prison Industries: UNICOR

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### Summary

UNICOR, the trade name for Federal Prison Industries, Inc. (FPI), is the government corporation that employs offenders incarcerated in federal prisons.<sup>1</sup> Established in 1934, UNICOR provides job training opportunities to federal inmates by producing goods and services for federal agencies. By statute, UNICOR products and services must be purchased by federal agencies (a requirement often referred to as “superpreference,” “mandatory source,” or “sole source”) and are not available for sale in interstate commerce or to non-federal entities. Federal agencies can obtain products from the private sector through a waiver issued by UNICOR if the corporation is unable to make the needed product or provide the required service.

The debate on UNICOR’s impact on the free market has been affected by tensions between competing interests that represent two social goods — the employment and rehabilitation of offenders and the need to protect jobs of law abiding citizens. FPI legislation introduced in the 108<sup>th</sup> Congress with provision on these issues include: S. 346 (Levin), H.R. 1829 (Hoekstra), H. R. 1982 (Maloney), and H.R. 2417 (Goss). On December 28, 2001, the President signed the National Defense Authorization Act for FY2002 (P.L. 107-107) which contains a provision requiring FPI to compete for work projects for the Department of Defense (DOD) if their products are not comparable in price, quality, and time of delivery as the private sector. H.R. 1982 and S. 346 were introduced in the 108<sup>th</sup> Congress to establish similar policy on competing for government-wide procurement. Updates on this report will be made as legislative action occurs.

### Most Recent Developments

Federal Prison Industries (FPI) has continued to receive attention in the 108<sup>th</sup> Congress. Like legislation introduced in the previous Congress, H.R. 1829 proposes to gradually eliminate a requirement for federal agencies to purchase products and services obtained from FPI. At the end of first session of the 107<sup>th</sup> Congress, the enactment of the

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National Defense Authorization Act for 2002 (P.L. 107-107) made provision for the DOD to conduct research and market analysis prior to the purchase of FPI products to determine whether FPI products are comparable in price, quality, and time of delivery as the private sector. If it is determined that FPI is not comparable in the areas stated above, FPI must compete with other entities for procurement of the product. Similar provision is made in H.R. 1982 and S. 346, introduced in the 108<sup>th</sup> Congress to provide governmentwide policy requiring competition for the procurement of products. H.R. 2417 includes similar provisions as it pertains to product procurement for the Central Intelligence Agency.

## History of UNICOR

UNICOR, the trade name for Federal Prison Industries, Inc. (FPI), is the government corporation that employs offenders incarcerated in federal prisons.<sup>2</sup> As the federal prison system was established in the first decades of the 20th century, factories were constructed within the prisons to manufacture products needed by the federal government. Congress approved legislation in 1930 giving general authority for “employment for all physically fit inmates in the United States penal and correctional institutions.” The legislation specified, however, that the work of prisoners should not compete with that of the private sector.<sup>3</sup>

Labor organizations had been making arguments against prison industries since the late 1800s. The depression of the 1930s and the resulting high levels of unemployment crystallized the debate. Congress and President Franklin Roosevelt responded by establishing UNICOR. The purpose was to consolidate the operations of all federal prison industries in order to provide training opportunities for inmates and “diversify the production of prison shops so that no individual industry would be substantially affected.”<sup>4</sup> Originally authorized in 1934 through P.L. 73-461 and Executive Order 6917, the current statutory authority for UNICOR was first codified in the 1948 revision of the “Crimes and Criminal Procedure” statutes. The only amendments to the statute since the 1948 codification were relatively recent provisions added in 1988, 1990, and 1992.<sup>5</sup>

The absence of legislative action on this issue for the half century from 1934 to 1988 is notable. Developments in recent decades that have increased congressional interest in prison industries include:

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<sup>3</sup> 46 Stat. 391, P.L. 71-271.

<sup>4</sup> Franklin Delano Roosevelt. *The Public Papers and Addresses of Franklin D. Roosevelt*. New York, Random House, 1938. Vol. Three, p. 497.

<sup>5</sup> The 1988 Anti-Drug Abuse Act (P.L. 100-690) authorized UNICOR to borrow from and invest in the U.S. Treasury (18 U.S.C. 4129), added the “reasonable share” language regarding market capture (18 U.S.C. 4122), and made other changes to the law. The 1990 Crime Control Act (P.L. 101-647) required federal agencies to report information on the purchase of UNICOR products and services (18 U.S.C. 4124(c) and (d)). The Small Business Research and Development Enhancement Act of 1992 (P.L. 102-564) modified the reporting requirements so that federal agencies provide separate reports of UNICOR purchases to the Federal Procurement Data System (18 U.S.C. 4124(c)).

- the erosion of the nation’s manufacturing sector over the past 10 or 20 years, resulting in higher levels of unemployment among members of the workforce with marginal skills;
- the rapid and dramatic increase in the federal inmate population (from roughly 30,000 in the early 1980s to three times that amount today) at the same time that the federal government was downsizing, resulting in a reduction of UNICOR’s federal market; and,
- the need to develop more aggressive inmate management techniques in federal prisons as the profile of the federal offender population changed from primarily non-violent offenders to those convicted of violent crimes and drug trafficking.

## Authority and Activities

Federal Prison Industries, Inc., is administered by a six-person board of directors appointed by the President.<sup>6</sup> Its enabling act requires that representatives of agricultural producers, labor, and retailers serve as board members. The board’s decisions regarding products to be manufactured and areas of expansion are driven by a goal of employing the greatest possible number of inmates. UNICOR is required to diversify its product line and operate so that “no single private industry” bears “an undue burden;” it is also charged with reducing “to a minimum competition with private industry or free labor.”<sup>7</sup>

Of the roughly 125,000 inmates held in federal prisons, about 17,000 (18%) are employed by UNICOR in 100 factories scattered in half of the states. Goods and services provided by inmates employed by UNICOR include: metal products (lockers, storage cabinets, shelving), clothing and textile products (draperies, canvas goods, military clothing), graphics and services (data entry, text editing, road signs), plastics, and electronics (cable assemblies, connectors, power distribution systems), and furniture products and accessories.

UNICOR is a self-supporting government corporation that may borrow funds from the U.S. Treasury<sup>8</sup> and use the proceeds to purchase equipment, pay wages to inmates and staff (over 1,600 staffers who are not inmates are employed), and invest in expansion of facilities. No funds are appropriated for UNICOR operations. Inmates earn from \$.25 per hour up to a maximum of \$1.15 per hour, rates considerably below the minimum wage.

## Issues of Debate

Since UNICOR’s establishment in 1934, business and labor interests have argued that UNICOR undercuts the free enterprise system. Due to the sole source requirement, corporations that wish to do business with the federal government are restricted in the areas in which they can submit bids. Citizens who have not committed crimes may lose their jobs in free society because their employers are not allowed to compete for federal contracts. Also, it is argued that UNICOR is expanding into new business fields that will result in further job losses, particularly in the manufacturing industries that must struggle to survive.

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<sup>6</sup> 18 U.S.C. 4121

<sup>7</sup> 18 U.S.C. 4122

<sup>8</sup> 18 U.S.C. 4129

UNICOR advocates argue that prison labor projects help offenders learn discipline and work skills and are effective rehabilitation tools that lessen the likelihood that offenders will return to crime upon release. Prison administrators view the prison work programs as indispensable inmate management tools. Also, UNICOR often purchases raw materials and services from small businesses; in 1994, 57% of UNICOR's procurement expenditures were awarded to small businesses.<sup>9</sup> In summary, all federal prison inmates are required to work; those not employed by UNICOR have institutional labor assignments (to the extent that they are physically able to work or are not security risks).<sup>10</sup>

The growth of the federal inmate population has raised congressional awareness of the significant policy issues involved. Should the sole source requirement be maintained or stricken? How can UNICOR expand product and service lines to keep an increasing number of inmates busy without adversely affecting the private sector? Do the benefits of rehabilitation for offenders balance the economic hardship imposed on law abiding workers who may lose job opportunities because they cannot compete for federal contracts? Which employment opportunities pose the minimum security risk?

## UNICOR and Private Competitors

The current statutory authority for Federal Prison Industries, Inc., stipulates that its products may only be sold to the federal government and not to the public "in competition with private enterprise."<sup>11</sup> The UNICOR board of directors must take steps to ensure that the private sector has access to the federal market.<sup>12</sup>

In addition to these longstanding limitations, the 1988 Anti-Drug Abuse Act (P.L. 100-690) required that UNICOR meet specific requirements to ease the impact of its activities upon the private sector. Before approving the expansion of an existing product or the creation of a new product, UNICOR must:

- prepare a "detailed written analysis" of the likely impact of the expansion upon industry and free labor. The analysis must identify the number of vendors currently providing the product to the federal government, the proportion of the federal market met by small businesses, small disadvantaged businesses, or businesses operating in labor surplus areas, the size of the federal and non-federal markets, projected growth of federal demand, and a projection of the strength of the market for both UNICOR and private vendors;

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<sup>9</sup> U.S. Congress. House. Committee on Small Business. Small Business Competition for Federal Contracts: The Impact of Federal Prison Industries. Hearing, June 27, 1996, 104<sup>th</sup> Congress, 2<sup>nd</sup> Session. 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 1996. 296 p. (Hereafter cited as Small Business Committee hearing.)

<sup>10</sup> The 1990 Omnibus Crime Control Act (P.L. 101-647, 104 Stat. 4914, 18 U.S.C. 4121 Notes) required that all offenders in federal prisons and other detention facilities must work, with consideration given to security and health limitations.

<sup>11</sup> 18 U.S.C. 4122(a). In addition to the statutory preference for material or services from UNICOR, federal regulations require that contracting officers next investigate whether an item is available from a non-profit agency serving the blind and severely handicapped before other businesses may bid on the contract. See: 488 CFR 508.705-70 (Oct. 1, 1995 edition).

<sup>12</sup> See 18 U.S.C. 4122(b)(1) and (2).

- announce in an appropriate publication (*Commerce Business Daily* is used) the plans for expansion and invite comments on the plans;
- advise affected trade associations of the plans and invite comments;
- provide all of the above information to the UNICOR board of directors prior to the board's decision on expansion;
- through the board of directors, provide opportunity to affected trade associations or relevant business representatives to comment to the board on the proposal; and
- publish the final decision of the board of directors.<sup>13</sup>

In addition to the requirements above, a list of sales made by UNICOR is generally made available to interested parties semi-annually.

## Congressional Actions on the Expansion of UNICOR

The question of whether UNICOR is unfairly competing with private businesses, particularly small businesses, in the federal market has been and continues to be an issue of debate. In the summer of 1989 the Senate considered a proposal to provide the private sector with greater opportunity to compete for Department of Defense contracts. Introduced as an amendment to the National Defense Authorization Act of 1990-1991 (S. 1352), the proposal would have curtailed, according to the sponsor, "the preference that FPI currently enjoys over small and small disadvantaged business concerns, and make certain that FPI sell its products to the Defense Department at a 'fair market price,' the standard demanded of all who furnish supplies or services to the Government." The Senate adopted the amendment, but the conference committee deleted the provision.<sup>14</sup>

Also in the 101st Congress, an amendment was approved by the House during floor debate on the Comprehensive Crime Control Act of 1990 (H.R. 5269). The amendment would have prohibited UNICOR from expanding production in the footwear, apparel, textile, or furniture industries until a report was submitted to Congress.<sup>15</sup> Instead of restricting UNICOR activities, conferees agreed to require that federal agencies report on products and services purchased from UNICOR.<sup>16</sup> Finally, the 101st Congress mandated that UNICOR contract out for an independent study to make recommendations regarding the impact of UNICOR on the private sector (see "Issues of Debate," above).<sup>17</sup>

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<sup>13</sup> These procedures are set forth at 18 U.S.C. 4122(b)(3)-(6); they are carried out in accordance with the document "Final Procedures for Soliciting and Evaluating Comments on Proposals to Produce a New Product or to Significantly Expand Production of an Existing Product," available from the UNICOR Market Research Division (202-508-8554).

<sup>14</sup> Dixon, Alan J. Remarks in the Senate. *Congressional Record*, daily edition, v. 135, July 31, 1989. P. S16895. A statement in opposition to the amendment appears at: Thurmond, Strom. Remarks in the Senate. *Congressional Record*, daily edition, v. 135, Sept. 18, 1989. P. S20658-59. See also Dixon, Alan J. Remarks in the Senate. (Statement in the consideration of Conference Rept. 101-331), *Congressional Record*, daily edition, v. 135, Nov. 15, 1989. P. S29112-29143.

<sup>15</sup> Consideration of Amendment # 16 to H.R. 5269 in the House. *Congressional Record*, daily edition, v. 135, Oct. 4, 1990. P. H8882-H8886.

<sup>16</sup> 18 U.S.C. 4124(c) and (d).

<sup>17</sup> Appropriations for fiscal year 1991 for the Department of Justice and other agencies, P.L. 101-515, 104 Stat. 2115. See: Deloitte & Touche, Executive Summary, p. 2.

Little discussion of UNICOR and prison industries took place in the 102nd Congress. During the 103rd Congress, legislation was considered in the Senate regarding the payment of minimum wages to prisoners.<sup>18</sup> Of some significance, the National Performance Review recommended in September 1993 that the mandatory source provision be eliminated and that UNICOR be exempt from the Federal Acquisition Regulation in order to better compete with the private sector in terms of delivery schedules and costs.<sup>19</sup>

More significant activity on this issue took place in the 104th Congress. In the first session, the Senate-passed version of the fiscal year 1997 appropriations legislation for the Department of Justice (H.R. 2076) would have excluded UNICOR from the general prohibition in interstate commerce of prison-made goods and services.<sup>20</sup> Also, in the first session of the 104th Congress, the chairman of the House Subcommittee on Crime introduced legislation (H.R. 2360) authorizing federal prisoners to engage in community service projects; another bill (H.R. 2553) would have established pilot programs for federal prisoners to produce for sale items that currently are produced solely by foreign labor.

Perhaps the most far-reaching legislation was introduced in the second session of the 104th Congress. H.R. 3206, introduced March 29, 1996, would have removed the standing penalty for U.S. government officials who contract for the hire of any prisoners (18 U.S.C. 436) and would have deleted the prohibition in interstate commerce of prison-made goods (18 U.S.C. Chapter 85). By the close of the 104th Congress, none of the legislative proposals had advanced. Legislation on FPI was reintroduced but not passed in the 105th Congress (S. 339, H.R. 2758, H.R. 4100) to revise the requirements for procurement of products of FPI, and to minimize unfair competition for federal contracting opportunities.

In the 106<sup>th</sup> and the 107<sup>th</sup> Congresses, bills were introduced and hearings were held on FPI reform bills to continue the debate to eliminate the sole source requirement for the procurement of FPI products by federal agencies.

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<sup>18</sup> U.S. Congress. Senate. Committee on Labor and Human Resources. Prison Labor. Hearing on S. 1115, 103<sup>rd</sup> Congress, 1<sup>st</sup> Session, Oct. 28, 1993. Washington, U.S. Govt. Print. Off., 1993. And U.S. Congress. House. Committee on Education and Labor. Subcommittee on Labor Standards. Fair Labor Standards Act Amendment. Hearing on H.R. 3705, 103<sup>rd</sup> Congress, 2<sup>nd</sup> session, July 14, 1994. Washington, U.S. Govt. Print. Off., 1994. The issue of paying minimum wages to inmates was raised by one U.S. court of appeals ruling (*Hale v. Arizona*, 990 F. 2d 131) that was subsequently overturned (*Hale v. Arizona*, 993 F. 2d 1387, 9<sup>th</sup> Cir. 1993, en banc).

<sup>19</sup> Office of the Vice President. Report of the National Performance Review. Reinventing Support Services. Washington, U.S. Govt. Print. Off., 1993. P. 21-23.

<sup>20</sup> Section 117, H.R. 2076, Oct. 10, 1995 version. This provision was deleted in the conference agreement. The President vetoed H.R. 2076.