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# **Buying American: Protecting U.S. Manufacturing Through the Berry and Kissell Amendments**

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## Summary

The Berry and Kissell Amendments are two separate but closely related laws requiring that certain goods purchased by national security agencies be produced in the United States.

The Berry Amendment (10 U.S.C. §2533a) is the popular name for a law requiring textiles, clothing, food, and hand or measuring tools purchased by the Department of Defense (DOD) to be grown, reprocessed, reused, or produced wholly in the United States. Congress over the decades has varied the list of products covered by the law. Under the Kissell Amendment (6 U.S.C. §453b), textile, apparel, and footwear products purchased by certain Department of Homeland Security (DHS) agencies—namely, the Transportation Security Administration (TSA) and the U.S. Coast Guard—must be manufactured in the United States with 100% U.S. inputs.

The Berry and Kissell Amendments have created niche markets for domestic producers. DOD's Defense Logistics Agency purchased about \$2.4 billion of Berry-applicable products in FY2016. DOD's annual Berry Act purchases equal approximately 2% of domestic textile and apparel shipments and around 1% of domestic production of footwear, food, and hand or measuring tools. Annual purchases of textiles, clothing, and shoes by the TSA and the Coast Guard pursuant to the Kissell Amendment are approximately \$30 million.

Proponents of the Berry and Kissell Amendments assert the laws serve to keep certain U.S. production lines operating, provide jobs to American factory workers, and shield the U.S. military from dependence on foreign sources for critical items that could lead to supply problems during times of war or military mobilization. Critics of the amendments point out the laws may undercut free-market competition and can result in higher costs to DOD and DHS because they must pay more for protected products than the free market requires. They also argue the laws are inconsistent with modern practices in manufacturing, which often rely on supply chains that source components and raw materials from multiple countries. Another concern is that these requirements can potentially provoke retaliation and harm foreign sales.

In recent Congresses, legislative action has centered on the scope of the Berry and Kissell Amendments. For example, in the 2017 National Defense Authorization Act (NDAA), Congress extended the Berry Amendment to athletic footwear, ending a voucher program that had allowed new recruits to purchase foreign-made running shoes. Beginning on October 1, 2018, DOD is scheduled to provide 100% U.S.-made running shoes to recruits. In the 115<sup>th</sup> Congress, H.R. 1811 has been introduced to widen the scope of the Kissell Amendment to all DHS agencies.

A related issue for Congress is the use of prison labor to manufacture Berry-compliant apparel by DOD. A mandatory source provision in law gives an advantage to prison factories if they can provide the desired product within the required time frame at a competitive price. In the 114<sup>th</sup> Congress, the Federal Prison Industries Competition in Contracting Act of 2015 (H.R. 1699) would have eliminated Federal Prison Industries' no-bid contract status.

Requirements for obtaining waivers are another congressional concern. The Government Accountability Office (GAO) is currently auditing DHS's compliance with the Kissell Amendment. The audit is expected to be finished in summer 2017.

Congress is also considering the effectiveness of the laws. To address this issue, the Bureau of Industry and Security (BIS) at the U.S. Department of Commerce (DOC) is conducting an assessment of the defense industrial base for textiles, apparel, and footwear, which will include a review of the usefulness of the Berry and Kissell Amendments. That review is scheduled to be released in 2017.

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## Introduction

Congress has passed several laws requiring that goods purchased by federal agencies be produced in the United States. Among these are two separate but closely related laws applying to national security agencies. The Berry Amendment covers direct Department of Defense (DOD) purchases of textiles, apparel, footwear, food, and hand or measuring tools. The Kissell Amendment is more limited, applying to textiles, apparel, and footwear procured by certain Department of Homeland Security (DHS) agencies. Under these two laws, the purchased items must be 100% domestic in origin, unless exemptions laid out in the laws apply.

The two laws are controversial. Proponents argue the amendments are important to the U.S. economy by helping to preserve the U.S. industrial base and creating manufacturing jobs for American workers. They also claim domestic preference laws may lessen dependence on foreign sources for certain critical U.S. military and nonmilitary needs, and that these laws encourage some foreign manufacturers to invest within the United States so that their products can be sold to the U.S. government. On the other hand, opponents believe the laws give monopolies to certain companies, raise the government's procurement costs, and fail to fully utilize the international supply chains that many U.S. manufacturers rely on to meet their production needs.

## Berry Amendment

The Berry Amendment (10 U.S.C. §2533a) is the popular name of a 1941 statute enacted as part of the Fifth Supplemental National Defense Appropriations Act (P.L. 77-29). It has been amended numerous times.<sup>1</sup> It became a permanent part of the *U.S. Code* when it was codified by the FY2002 National Defense Authorization Act (P.L. 107-107).<sup>2</sup> Proposals to alter the Berry Amendment typically are advanced during consideration of defense appropriations acts and the National Defense Authorization Act. DOD implements the Berry Amendment through its Defense Federal Acquisition Regulation Supplement (DFARS).<sup>3</sup>

The Berry Amendment specifies that affected products purchased directly by DOD must be “entirely grown, reprocessed, reused, or produced in the United States.” Unless DOD grants a waiver because domestic firms do not make the product or because other exceptions in the law are met, the entire production process of an affected product, from the production of raw materials to the manufacture of all components to final assembly, must be performed in the United States. As an example, when DOD purchases a military uniform, it must be sewn in the United States using fabric, thread, buttons, and zippers made in the United States from raw materials of U.S. origin.

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 cost of its components, by value, must be

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<sup>1</sup> Originally, the Berry Amendment covered only troops' uniforms and food, with other items added or removed over time. In 2007, for example, specialty metals were removed from the Berry Amendment. The rules governing specialty metals are now codified as 10 U.S.C. §2533b.

<sup>2</sup> Some say the Berry Amendment was named for George Leonard Berry, a Democrat from Tennessee, although this is unconfirmed.

<sup>3</sup> DFARS, Part 225.7002, <http://www.acq.osd.mil/dpap/dars/dfars/html/current/252225.htm#252.225-7002>.

manufactured in the United States, or the end product must be a commercially available off-the-shelf item.

## International Obligations

The United States has made binding commitments related to the government procurement market under the World Trade Organization Agreement on Government Procurement (WTO GPA). Of the more than 45 countries that are parties to this arrangement, each has agreed to provide producers in other signatory countries access to its national government procurement markets. This can result in certain “foreign” products being treated as “domestic” ones in specific procurements. However, the agreement expressly does not apply to DOD procurements involving textiles, clothing, food, and hand or measuring tools.<sup>4</sup> This Berry Amendment restriction also applies to most U.S. free-trade agreements, including the North American Free Trade Agreement and the Dominican Republic-Central America Free Trade Agreement, as well as to bilateral free-trade agreements with Australia, Morocco, Peru, South Korea, and Colombia.<sup>5</sup>

## Kissell Amendment

A second law, sometimes referred to as the Kissell Amendment (6 U.S.C. §453b), is modeled on, but not identical to, the Berry Amendment.<sup>6</sup> The Kissell Amendment was enacted as Section 604 of the American Recovery and Reinvestment Act of 2009 (P.L. 111-5).<sup>7</sup> It applies to the Coast Guard and the Transportation Security Administration (TSA), both of which are within DHS. It is implemented through the Homeland Security Acquisition Regulation,<sup>8</sup> which imposes domestic content restrictions on certain clothing, textile, and footwear products acquired by particular DHS agencies when an item is directly related to national security.

In introducing the amendment, Representative Lawrence Kissell noted he was particularly interested in supporting the domestic textile industry.<sup>9</sup> Thus, the narrowly defined purpose of the Kissell Amendment is to ensure that DHS purchases of textile, apparel, and footwear products are wholly produced in the United States. The law covers clothing (including materials and components), canvas or textile products, natural and synthetic fabrics, individual equipment items, and footwear products. If these items are related to “the national security interests of the United States,” they must be “domestically grown, reprocessed, reused, or produced in the United

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<sup>4</sup> WTO GPA, United States Appendix I, Annex I, specifies that the WTO GPA does not apply to DOD purchases involving (1) Federal Supply Classification (FSC) 83 (textiles) (other than pins, needles, sewing kits, flagstaves, flagpoles, and flagstaff trucks); (2) FSC 84 (clothing and individual equipment, other than luggage); (3) FSC 89 (food) (other than tobacco products); and (4) FSC 51 and 52 (hand or measuring tools). See WTO, Appendices and Annexes to the GPA, [https://www.wto.org/english/tratop\\_e/gproc\\_e/appendices\\_e.htm#appendixI](https://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm#appendixI).

<sup>5</sup> Information is based on a May 2, 2017, email exchange between CRS and the Department of Commerce’s Office of Textiles and Apparel.

<sup>6</sup> 6 U.S.C. §453b, Requirements to buy certain items related to national security interests from American sources; exceptions, <http://uscode.house.gov/browse/prelim@title6/chapter1&edition=prelim>.

<sup>7</sup> Named for Rep. Lawrence Kissell, who from 2009 to 2013 represented North Carolina’s 8<sup>th</sup> congressional district. The Kissell provision was made permanent during the 111<sup>th</sup> Congress through the DHS authorization process.

<sup>8</sup> See parts 3025 and 3052 of the Revision of Department of Homeland Security Acquisition Regulation: Restrictions on Foreign Acquisition (HSAR Case 2009-004), <https://www.federalregister.gov/documents/2010/06/09/2010-13804/revision-of-department-of-homeland-security-acquisition-regulation-restrictions-on-foreign#p-12>.

<sup>9</sup> See *Congressional Record*, vol. 155, part 1 (January 28, 2009), pp. H723-H724.

States” to the greatest extent possible. Unlike the Berry Amendment, the Kissell Amendment does not apply to food or to hand or measuring tools.

## **International Obligations**

Although the Kissell Amendment as enacted applies to all agencies of DHS, in practice its restrictions apply only to the Coast Guard and TSA. The reason for this is that, prior to the Kissell Amendment’s passage, the United States had entered into commitments under various trade agreements to open U.S. government procurement to imported goods. However, the WTO GPA entitles the United States to exempt agencies critical to national security from its international procurement obligations. The United States has applied this exemption to those two agencies, so the Kissell Amendment governs their procurement.

Other DHS agencies, such as Customs and Border Protection, Immigration and Customs Enforcement, the Federal Emergency Management Agency, and the Secret Service are not covered by the exemption, and the Kissell Amendment therefore does not apply. Like many other agencies, these agencies’ procurement is subject to the less stringent Buy American Act. However, under the Trade Agreements Act of 1979, if a procurement is covered under a trade agreement, then Buy American Act restrictions are waived.<sup>10</sup> Thus, DHS can purchase textile and apparel products from more than 100 countries if certain conditions are met.

The United States has also entered into commitments under various free-trade agreements to open U.S. government procurement to imported goods. As a result of these trade agreements, manufacturers in Mexico, Canada, and Chile are treated as “American” sources under the Kissell Amendment.

## **Exceptions to the Berry and Kissell Requirements**

The Berry Amendment includes several exemptions, which may apply at the discretion of DOD. For example, DOD may buy covered items from non-U.S. sources when

- products are unavailable from American manufacturers at satisfactory quality and in sufficient quantity at market prices;<sup>11</sup>
- items are used in support of combat operations or contingency operations;
- products are purchased by vessels in foreign waters (e.g., a Navy ship is docked overseas and the crew needs to purchase textile, clothing, or footwear items);
- products contain noncompliant fibers, if the value of those fibers is not greater than 10% of the product’s total price;
- items are for emergency acquisitions;
- products are intended for resale at retail stores such as military commissaries or post exchanges;<sup>12</sup> or

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<sup>10</sup> Mary Lynn Landgraf, *New Approaches for Selling to the Military*, International Trade Administration, Office of Textiles and Apparel, October 6, 2015, p. 18, [http://otexa.trade.gov/Presentations\\_TradeEvents/New\\_Approaches\\_to\\_Selling\\_to\\_%20the\\_Military.pdf](http://otexa.trade.gov/Presentations_TradeEvents/New_Approaches_to_Selling_to_%20the_Military.pdf).

<sup>11</sup> The Under Secretary of Defense for Acquisition, Technology, and Logistics (AT&L) and the secretaries of the military services have the authority to determine that certain items under the Berry Amendment are not available domestically in quantities or qualities that meet military requirements. Such decisions are called domestic nonavailability determinations, or DNADs. On February 1, 2018, DOD will abolish the AT&L office, and Berry Amendment compliance will be overseen by a new office of acquisition and sustainment.

- the purchase is part of a contract whose value is below the Simplified Acquisition Threshold, generally \$150,000, beneath which certain federal procurement regulations do not apply.<sup>13</sup>

Kissell Amendment exemptions are often the same as those in the Berry Amendment, such as purchases beneath the Simplified Acquisition Threshold. But there are also some notable differences. For example, the Kissell Amendment has “national security” limiting language that is not included in the Berry Amendment. This restricts Kissell Amendment coverage to purchases intended for or used by DHS to protect against internal or external threats to the United States.<sup>14</sup> Thus, if an item, such as curtains for a DHS office, is not related to activities to protect the United States from internal or external national security threats, its procurement most likely would not be subject to the Kissell Amendment.

**Appendix A** shows the differences between the Berry Amendment, the Kissell Amendment, and the Buy American Act.

## The Berry and Kissell Amendments and Domestic Manufacturing

Sales to DOD in the four Berry-applicable product categories totaled \$2.4 billion in FY2016 (see **Figure 1**). DOD expenditures on Berry Amendment products accounted for roughly 1% of the department’s spending on products and services in FY2016, according to figures from the Federal Procurement Data System-Next Generation (FPDS-NG).<sup>15</sup>

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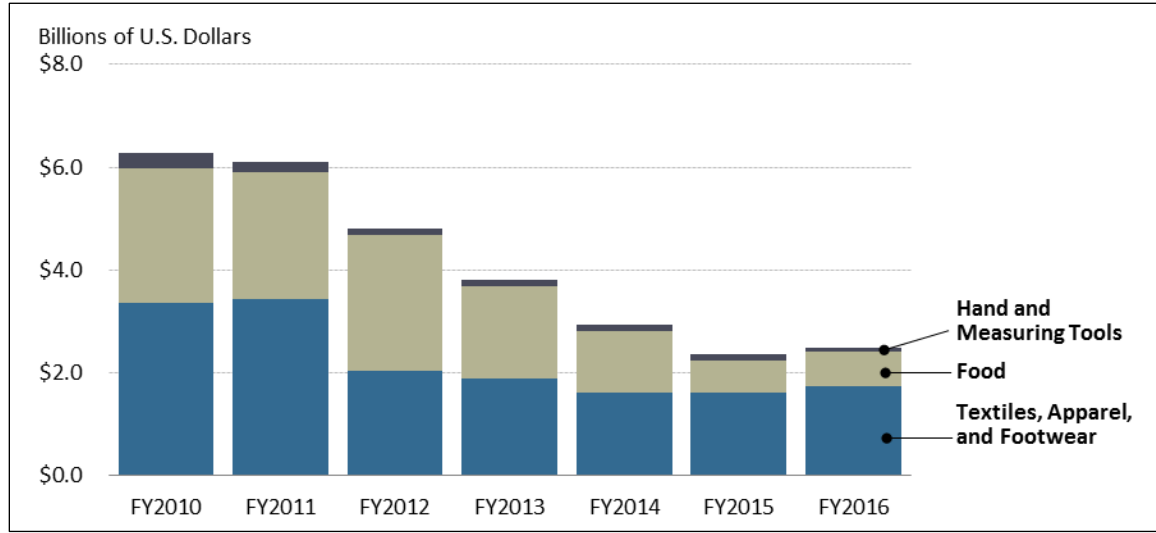
<sup>12</sup> The Berry Amendment grants a blanket exemption to the military resale systems (military commissaries and exchanges). These stores sell more than \$1 billion in apparel alone. Exchanges get more than 90% of their clothes from factories outside the United States, according to one industry estimate.

<sup>13</sup> The Simplified Acquisition Threshold is considered every fifth year (in years evenly divisible by five—2015, 2020, 2025, etc.), and sometimes it is raised. The threshold process is governed primarily by 41 U.S.C. §1908, which requires review and adjustment of certain statutory acquisition-related thresholds for inflation using the Consumer Price Index. The threshold is defined in Federal Acquisition Regulation §2.101 (48 C.F.R. §2.101).

<sup>14</sup> See HSAR 3025.7001(3), [https://www.dhs.gov/sites/default/files/publications/CPO\\_HSAR\\_1\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/CPO_HSAR_1_0.pdf).

<sup>15</sup> FPDS-Next Generation is the official source for federal procurement data. See General Services Administration, Federal Procurement Data System-Next Generation, <https://www.fpds.gov/fpdsng/cms/index.php/en/>.

**Figure 1. Berry Amendment Purchases**



**Source:** CRS, using data compiled from the Federal Procurement Data System-Next Generation.

**Note:** Five federal supply groups (FSGs) are used to provide a general picture of items covered by the Berry Amendment: hand tools (FSG 51); measuring tools (FSG 52); textiles (FSG 83); apparel, footwear, badges, individual equipment, and personal armor (FSG 84); and food (FSG 89).

One reason for the drop in spending on Berry-related products in recent years is the decrease in Armed Forces end strength. The number of active-duty personnel fell to 1.38 million in 2016 from 1.51 million in 2010, when the U.S. military was more actively engaged in Iraq and Afghanistan.<sup>16</sup> If there is a higher level of defense spending in coming years, this could result in increased DOD demand for Berry-applicable products.<sup>17</sup>

In FY2016, the Coast Guard and TSA combined accounted for more than \$30 million in procurement obligations for Kissell items. Most of this amount involves uniforms. TSA provides 14 different uniform items to new hires.<sup>18</sup>

## Textiles and Apparel

Under the Berry and Kissell Amendments, all covered textile and apparel items must be manufactured in the United States from domestic components. This has created niche markets for domestic producers.<sup>19</sup> **Figure 2** provides a graphic depiction of the textile and apparel production steps affected by these laws.

<sup>16</sup> Office of the Under Secretary of Defense, *National Defense Budget Estimates for FY2017*, March 2016, pp. 258-260, [http://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2017/FY17\\_Green\\_Book.pdf](http://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2017/FY17_Green_Book.pdf).

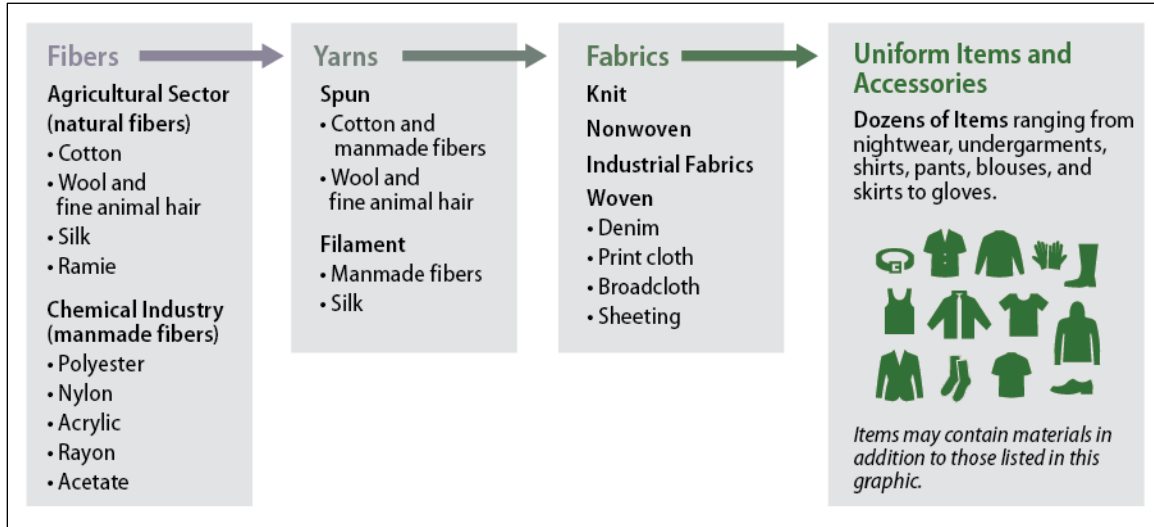
<sup>17</sup> Pat Host, “FY ‘17 Defense Spending Slams F-35 Program; Air Force, Navy Programs Get Boosts,” *Defense Daily*, March 2, 2017.

<sup>18</sup> TSA’s initial uniform issue consists of three long-sleeve shirts, three short-sleeve shirts, two pairs of trousers, two ties, and one belt, sweater, socks, and jacket. See also TSA, *Uniform Procurement: Compliance with the Buy American Act*, Fiscal Year 2015 Report to Congress, May 13, 2015, p. 2; *TSA Dress and Appearance Responsibilities*, February 3, 2010, p. 10, <https://www.afge.org/globalassets/documents/tsa/representation/dress-and-appearance—handbook.pdf>; and *Stronger Union, Safer Skies*, <https://www.afge.org/about-us/agencies/tsa/>.

<sup>19</sup> Clothing items include outerwear, headwear, underwear, nightwear, footwear, hosiery, headwear, belts, badges, and insignia. Textile products include cotton and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, coated synthetic fabric, including all textile fibers and yarns that are for use in such fabrics, (continued...)



**Figure 2. Textile and Apparel Production Steps**



**Source:** CRS, adapted from an illustration compiled by the U.S. International Trade Commission.

DOD spent approximately \$1.6 billion on Berry-compliant purchases of textiles and apparel in FY2016, and DHS purchases of apparel under the Kissell Amendment came to more than \$30 million. Purchases subject to the Berry and Kissell Amendments represented around 2% of the \$68 billion of textile and apparel shipments from U.S. factories in 2016.<sup>20</sup>

In FY2016, the top apparel products consumed by DOD were special-purpose clothing, personal armor, individual equipment, and footwear.<sup>21</sup> Among the large private contractors benefiting from the Berry Amendment market were American Apparel, a producer of military uniforms, in Alabama;<sup>22</sup> Ceradyne,<sup>23</sup> a major supplier of military body armor, in California; Campbellsville Apparel, a large supplier of undergarments to the military, in Kentucky; and contractors that sell textile fabrics to DOD, such as the International Textile Group’s Burlington Industries of North Carolina.

Outside the mainland United States, Puerto Rico is the largest source of military apparel items. Several large private suppliers operate Berry-compliant manufacturing facilities there, including

(...continued)

canvas products, wool, and any item of individual equipment manufactured from or containing fibers, yarns, fabrics, or materials listed here.

<sup>20</sup> Calculated by CRS, with data from the U.S. Census Bureau, *Manufacturers’ Shipments, Inventories, and Orders (M3) Survey*, for textile and apparel shipments, <https://www.census.gov/manufacturing/m3/>.

<sup>21</sup> Department of Defense Instruction 1338.18 prescribes the quantity and types of clothing to be furnished by the secretaries of the military departments (Army, Navy, Air Force, and Marine Corps) within their own organizations to enlisted personnel. Officers generally receive a one-time clothing allowance payment upon commissioning. Clothing items include everything from towels, socks, and underwear to helmets. DOD provides cash allowances for items not issued. See Department of Defense, *Armed Forces Clothing Monetary Allowance Procedures*, Number 1338.18, January 7, 1998. Members of the Armed Forces are responsible for maintaining and replacing uniforms, which may be replaced with uniform items that are not Berry-compliant because service members are using their own funds to make the purchases.

<sup>22</sup> American Apparel has no affiliation with the Los Angeles-based manufacturer of the same name. See American Apparel, The Company, [http://amappinc.com/the\\_company](http://amappinc.com/the_company).

<sup>23</sup> Ceradyne, a domestic supplier of body armor, is now part of the 3M Company’s Energy and Advanced Materials Division.

Propper International, M&M Manufacturing, and Bluewater Defense. Government supply sources, including those that operate under the AbilityOne program, such as the National Industries for the Blind, the Travis Association of the Blind, and Goodwill Industries, are also significant suppliers of apparel for the military market.<sup>24</sup>

Federal Prison Industries (FPI), also known as UNICOR,<sup>25</sup> delivers prison-manufactured apparel compliant with the Berry Act.<sup>26</sup> FPDS reports that action obligations of clothing from UNICOR to the Department of Defense totaled nearly \$100 million in FY2016. As of September 30, 2016, 18 U.S. penitentiaries and federal correctional institutions produced clothes and textiles, including facilities in Atlanta, GA; Beaumont, TX; Jesup, GA; Talladega, AL; and Butner, NC.<sup>27</sup> FPI/UNICOR buys raw materials and component parts from private industry.

DOD's awarding of clothing contracts to this government-owned supplier has proven controversial in both Congress and the apparel industry.<sup>28</sup> Critics have voiced concern that prison industrial programs hurt private industry and provide jobs for inmates rather than residents who are not incarcerated.<sup>29</sup> Among other issues, critics have challenged FPI/UNICOR's mandatory source provision, which requires DOD to purchase from FPI/UNICOR factories if they can provide the desired product within the required time frame and at a competitive price. The mandatory source requirement is waived when the prison share of federal purchases of a product rises above 5% of total DOD purchases of that product.<sup>30</sup> In FY2016, DOD accounted for more than 90% of FPI/UNICOR's textile and apparel sales. In that year, FPI/UNICOR also sold about \$250,000 in apparel to the U.S. Coast Guard.

Over the years, Congress has considered various bills to eliminate FPI's mandatory source clause and require FPI/UNICOR to compete for federal contracts. For example, in the 114<sup>th</sup> Congress,

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<sup>24</sup> These nonprofit government supply sources make various apparel items for DOD, including battle dress uniforms, cotton trouser belts, and Army Combat Uniform trousers. According to its website, the AbilityOne program, formerly known as the Javits-Wagner-O'Day (P.L. 92-28) program, is the largest source of employment in the United States for people who are blind or have significant disabilities. For more details, see The AbilityOne Program, *Expanding Opportunities*, [http://www.acq.osd.mil/dpap/cpic/cp/docs/2015\\_AbilityOne\\_DoD\\_Fact\\_Sheet.pdf](http://www.acq.osd.mil/dpap/cpic/cp/docs/2015_AbilityOne_DoD_Fact_Sheet.pdf).

<sup>25</sup> The FPI/UNICOR industrial manufacturing program, a wholly owned government corporation within the Department of Justice's Federal Bureau of Prisons (BOP), was established by President Franklin D. Roosevelt in 1934 by Executive Order 6917. FPI changed its name to UNICOR in 1977. By statute, FPI/UNICOR products must be purchased by federal agencies, and they are not available for sale in interstate commerce or to nonfederal entities.

<sup>26</sup> UNICOR, *Federal Prison Industries, Inc., Fiscal Year 2016 Annual Management Report*, November 15, 2016, pp. 1 and 8, [https://www.unicor.gov/publications/reports/FY2016\\_AnnualMgmtReport.pdf](https://www.unicor.gov/publications/reports/FY2016_AnnualMgmtReport.pdf).

<sup>27</sup> For a map and list of UNICOR's factory locations, see [https://www.bop.gov/inmates/custody\\_and\\_care/unicor\\_about.jsp](https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp).

<sup>28</sup> A 2013 audit of FPI's operations showed that 4,600 inmates nationwide worked in the voluntary prison clothing and textile factory program in June 2012, the most recent data available. For additional details, see U.S. Department of Justice, Office of the Inspector General Audit Division, *Audit of the Management of Federal Prison Industries and Efforts to Create Work Opportunities for Federal Inmates*, Audit Report 13-35, September 2013, p. 4. See also *FPI General Overview FAQs*, [https://www.unicor.gov/FAQ\\_General.aspx](https://www.unicor.gov/FAQ_General.aspx). Inmates' wages are based on seniority and rate of production of each inmate and range between \$0.23 and \$1.15 per hour. Participation in the FPI/UNICOR program is voluntary for inmates and is not available to all inmates.

<sup>29</sup> U.S. Congress, House Committee on Armed Services, *National Defense Authorization Act for Fiscal Year 2013*, H.R. 4310, 112<sup>th</sup> Cong., 2<sup>nd</sup> sess., May 11, 2012, 112-479, p. 284, <https://www.gpo.gov/fdsys/pkg/CRPT-112hrpt479/pdf/CRPT-112hrpt479.pdf>.

<sup>30</sup> See UNICOR, *Mandatory Source Purchasing Exceptions*, [https://www.unicor.gov/publications/corporate/CATC6500\\_FINAL\\_20160114.pdf](https://www.unicor.gov/publications/corporate/CATC6500_FINAL_20160114.pdf). This allowable exemption was passed under the National Defense Authorization Act for FY2008 (P.L. 110-181).

the Federal Prison Industries Competition in Contracting Act of 2015 (H.R. 1699) would have eliminated FPI's no-bid contract status.<sup>31</sup>

TSA's biggest supplier of apparel under the Kissell Amendment in FY2016 was VF Imagewear, a subsidiary of VF Corporation, and owner of brands such as Lee Brand and Wrangler Hero.<sup>32</sup> DHS accounts for around 10% of VF's sales. The company produces clothes in a number of U.S. locations.<sup>33</sup>

## Exemptions

Congress regularly considers exemptions to the Berry Amendment. For instance, over the years, lawmakers have passed legislation granting permanent waivers for flame-resistant rayon fabrics used in standard ground combat uniforms.<sup>34</sup> A 1999 waiver for para-aramid fibers and yarns used as a principal fiber in antiballistic body armor,<sup>35</sup> taking the form of a grant of authority to DOD to procure articles containing para-aramids from foreign sources, has since been implemented in the DFARS as a Berry Amendment exception.<sup>36</sup>

## Economic Effects

In the commercial market, apparel firms have been outsourcing the labor-intensive manufacturing process to low-wage countries for many years, often constructing elaborate supply chains that allow inputs from multiple countries to be combined into a single finished product. As shown in **Figure 3**, direct employment in apparel manufacturing dropped 85% from 1990 to 2016, from about 900,000 jobs to roughly 130,000 jobs. In the more highly automated textile manufacturing industry, employment fell from 700,000 in 1990 to about 230,000 in 2016.<sup>37</sup> Many of the remaining textile industry workers are involved in producing fabrics for industrial applications, such as conveyor belts and automotive floor coverings, rather than for apparel.

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<sup>31</sup> Other legislative changes to the FPI program are discussed in CRS Report RL32380, *Federal Prison Industries: Background, Debate, Legislative History, and Policy Options*, by (name redacted)

<sup>32</sup> "Spending \$50 Mil for TSA Uniforms Shows Washington's Lunacy," *Investor's Business Daily*, March 15, 2013, <http://www.investors.com/politics/perspective/just-when-you-think-washington-spending-can8217t-get-any-crazier-it-does/>.

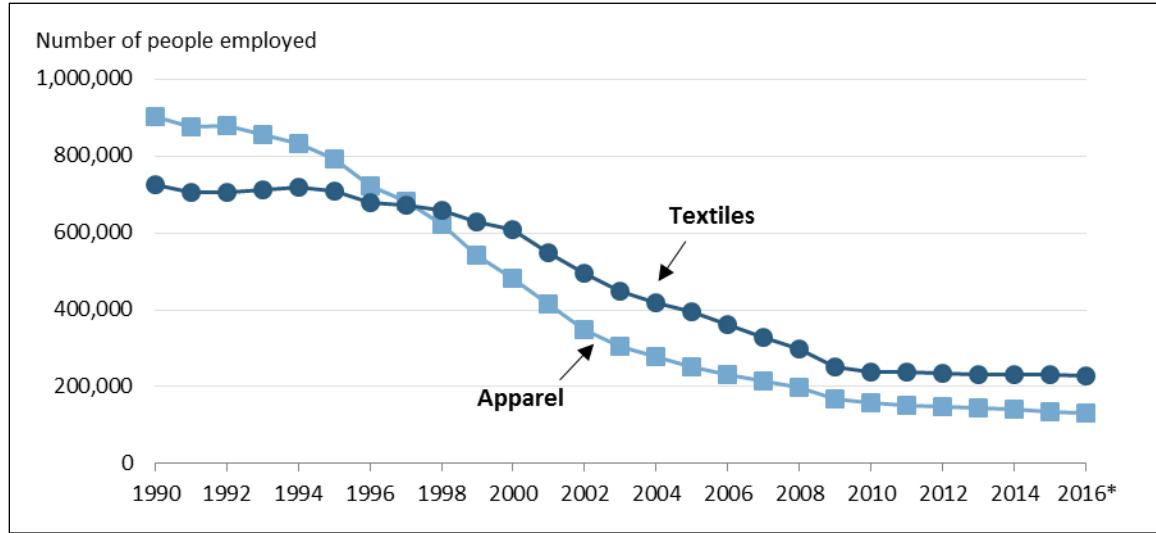
<sup>33</sup> See VF, *VF's Owned and Operated and Tier 1 Supplier Factory List, Active Factories During Q4, 2016*, [https://static1.squarespace.com/static/55649607e4b0576ead7365cd/t/589a2ef82994ca176615d4f5/1486499599728/VFs\\_Global\\_SupplierFactoryList\\_2016\\_Q4.pdf](https://static1.squarespace.com/static/55649607e4b0576ead7365cd/t/589a2ef82994ca176615d4f5/1486499599728/VFs_Global_SupplierFactoryList_2016_Q4.pdf).

<sup>34</sup> See National Defense Authorization Act for FY2012 (P.L. 112-81), §822.

<sup>35</sup> Kevlar is one of the best-known brand names for aramid fiber materials. Aramid is shorthand for the scientific name *aromatic polyamide*.

<sup>36</sup> Strom Thurmond National Defense Authorization Act for FY1999 (P.L. 105-261), §807. The DFARS exception is discussed in the U.S. Government Accountability Office report *Military Uniforms: Issues Related to the Supply of Flame Resistant Fibers for the Production of Military Uniforms*, June 30, 2011, <http://www.gao.gov/products/GAO-11-682R>.

<sup>37</sup> Employment data compiled by CRS from U.S. Bureau of Labor Statistics, *Current Employment Statistics (CES) Survey*, accessed April 2017. Apparel employment data cover NAICS code 315, and textile employment covers two NAICS codes, 313 and 314.

**Figure 3. U.S. Textile and Apparel Employment**

**Source:** CRS, based on analysis of data from the Bureau of Labor Statistics Current Employment Survey.

**Note:** 2016 data are preliminary.

The Berry and Kissell Amendments require apparel manufacturers to construct supply chains separate from those used in commercial apparel production, relying exclusively on domestic manufacturers of components such as buttons and zippers. Because these producers lack scale and face little competition in the market for 100% U.S.-made products, they may have cost structures that make it difficult to compete in the commercial apparel market.

Notwithstanding the protection offered by the Berry Amendment and, more recently, the Kissell Amendment, manufacturers have found it difficult to sustain domestic production of many types of textiles and apparel. For example, six years after opening a \$500 million factory, DuPont recently announced plans to shutter its South Carolina Kevlar para-aramid production plant, which manufactures a fiber used in bulletproof vests and combat helmets for the military. DuPont cited uncertainty over DOD orders for para-aramid fibers as one reason for the plant closure, along with a lack of commercial demand.<sup>38</sup>

The Bureau of Industry and Security at the Department of Commerce is updating its 2003 assessment of the U.S. textile, apparel, and footwear industries. The updated assessment, which the bureau expects to finish in summer 2017, is expected to address the effectiveness of the Berry and Kissell Amendments and other domestic-source laws.<sup>39</sup>

## Footwear

About 99% of all footwear sold in the United States is imported, according to the Footwear Distributors and Retailers of America, the main trade group representing solely the footwear industry.<sup>40</sup> The United States maintains a small number of firms manufacturing nonorthopedic

<sup>38</sup> “DuPont to Close Kevlar Plant, Putting 113 Out of Jobs,” Associated Press, March 4, 2017, <https://www.usnews.com/news/best-states/south-carolina/articles/2017-03-04/dupont-to-close-kevlar-plant-putting-113-out-of-jobs>.

<sup>39</sup> Bureau of Industry and Security (BIS), U.S. Department of Commerce, *Industrial Base Assessments*, <https://www.bis.doc.gov/index.php/other-areas/office-of-technology-evaluation-ote/industrial-base-assessments>.

<sup>40</sup> Footwear Distributors and Retailers of America (FDRA), “Footwear Customs,” [http://fdra.org/key-issues-and-\(continued...\)](http://fdra.org/key-issues-and-(continued...))

footwear, including boots and other types of footwear for the military.<sup>41</sup> These firms employed about 10,800 workers in 2015. DOD's direct purchases of footwear, such as combat boots and military dress shoes, totaled about \$157 million in FY2015. This is equivalent to roughly 9% of the sales of U.S. footwear manufacturers,<sup>42</sup> implying that the domestic-purchase requirement protected approximately 1,000 jobs. Leading DOD footwear contractors include McRae, Rocky Brands, and Wolverine.

In the 2017 National Defense Authorization Act, Congress extended the Berry Amendment to require the military services to provide recruits with 100% U.S.-made running shoes.<sup>43</sup> Previously, DOD provided vouchers to recruits to purchase athletic footwear, which did not have to be domestic in origin. The new requirement is to be implemented beginning on October 1, 2018, and may create a new market for athletic shoes manufactured domestically.

As with other types of footwear, assembling a running shoe may require more than a dozen parts (see **Figure 4**). New Balance, a maker of running shoes, reportedly manufactures about 25% of its domestically sold products in Massachusetts and Maine, but imports the majority of its inventory from China and Vietnam.<sup>44</sup> Currently, a "Made in the USA" New Balance sneaker can include up to 30% foreign content, which would not meet the 100% U.S.-made requirement of the Berry Amendment.<sup>45</sup> However, the company says it will be able to manufacture a wholly American-made athletic shoe for the military. Wolverine Worldwide, a Michigan-based footwear firm, manufactures some shoes in the United States, including combat boots and military dress shoes, and the rest in Asia. Nike, which sources virtually all of its footwear from independent manufacturers overseas, had opposed a strict American-made athletic shoe purchase policy for the military. Adidas, another major athletic shoe brand, has announced that it plans to open a factory in the United States in 2017 to produce U.S.-made running shoes.<sup>46</sup> Adidas's so-called "speedfactory" would be largely operated by robots.

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(...continued)

advocacy/footwear-customs/.

<sup>41</sup> Footwear assembly is as complicated as producing a garment. Making a shoe may require as many as 20 parts, including the upper (which covers the top and sides of the foot), the bottom part (which consists of the midsole and outsole), and other components (such as shoelaces, eyelets, and yarn for linings). As is the case with apparel production, shoemaking uses a variety of materials, including leather, rubber, and various types of fabric. See Textile Exchange, *Shoe Making—How Shoes are Made*, <http://www.teonline.com/knowledge-centre/shoe-making-how-shoes-made.html>.

<sup>42</sup> Domestic footwear manufacturers reported sales of \$1.784 billion in 2015; data for 2016 are not available. See U.S. Census Bureau, *2015 Annual Survey of Manufactures*, Footwear Manufacturing NAICS 3162, accessed April 28, 2017, <https://www.census.gov/data/tables/2015/econ/asm/2015-asm.html>.

<sup>43</sup> The footwear provision was enacted as Section 817 of P.L. 114-328.

<sup>44</sup> Alec Banks, "The Unexpected Connection Between the Military and New Balance," *Highsnobiety*, March 14, 2017, <http://www.highsnobiety.com/2017/03/13/new-balance-1978-shoe/>.

<sup>45</sup> New Balance, *Made in USA Sneakers*, <http://www.newbalance.com/made-in-us-and-uk/>.

<sup>46</sup> Adidas, "Adidas Will Open Atlanta-Based Facility to Make Shoes in America," press release, August 10, 2016.

**Figure 4. Example of Components Used in New Balance’s 950 Running Shoe**



**Source:** The New England Council, “Department of Defense to Procure ‘Made in America’ Running Shoes,” <https://newenglandcouncil.com/blog-post/department-of-defense-to-procure-made-in-america-running-shoes/>.

## Food

Military food items, also known as subsistence items, are purchased, with few exceptions, through the Defense Logistics Agency (DLA) Troop Support Subsistence Directorate in Philadelphia, PA, which serves as the operational manager for all food operations. Just as with textiles, apparel, and footwear, DLA must buy food items in accordance with the provisions of the Berry Amendment, generally requiring food served to U.S.-based troops be of wholly domestic origin, with certain allowable exemptions and waivers. The Kissell Amendment contains no provisions related to food products.

Food products were the second-largest share of DOD’s contract obligations subject to Berry Amendment requirements, at more than \$655 million in sales in FY2016.<sup>47</sup> These sales represented slightly more than 1% of overall domestic food, beverage, and tobacco manufacturing shipments that year.<sup>48</sup>

Most packaged, nonperishable food items are purchased through DLA’s subsistence prime vendor program. Current participants include about 50 commercial food distributors, ranging from large companies such as U.S. Foods, Sysco, and Labatt Food Service to much smaller companies.<sup>49</sup> DLA buys U.S.-origin food products from manufacturers such as Kraft Heinz, Nestle, General Mills, Tyson Foods, ConAgra, and Campbell Soup,<sup>50</sup> which then ship the purchases to a prime vendor for delivery to military dining facilities and other locations. DOD also buys some unique and perishable items directly from producers.

<sup>47</sup> Food products include meat, poultry, seafood, dairy, cereals, fruits and vegetables, snack foods, baked goods, beverages, and condiments and other items classified under federal supply group 89.

<sup>48</sup> CRS, with data from the Census Bureau, Manufacturers’ Shipments, Inventories, and Orders for food shipments.

<sup>49</sup> The subsistence prime vendor program uses a contractual arrangement with commercial vendors to supply a wide range of commercial off-the-shelf material directly to military customers on a just-in-time basis. The distributor of a commercial product line provides it to all of DLA’s customers in an assigned region within a specified period of time after an order is placed. A list of DLA Subsistence Prime Vendors can be accessed at <http://www.dla.mil/TroopSupport/Subsistence/FoodServices/pvlist.aspx>. The system relies on an electronic order and receipt system in place of DOD’s former system of maintaining inventories at supply depots.

<sup>50</sup> “Rankings of Leading Suppliers,” *Government Food Service*, September 2016, p. 18, [http://www.ebmpubs.com/GFS\\_pdfs/gfs0916\\_TopSuppliers.pdf](http://www.ebmpubs.com/GFS_pdfs/gfs0916_TopSuppliers.pdf).

Meals ready-to-eat (MREs) are a major share of food sourced for DOD under the Berry Amendment.<sup>51</sup> AmeriQual, SoPakCo, and Wornick are the three main companies that supply MREs to the military, with DOD sales of more than \$300 million in FY2016. Combined, the three companies employ more than 1,600 people.<sup>52</sup> For AmeriQual, sales of MREs to the U.S. military account for approximately 85% of revenue.<sup>53</sup>

Under Berry Amendment requirements, DOD, with certain exceptions, must purchase food and ration kits for the military services from sources that manufacture, grow, or process food in the United States. Meeting this standard is generally easier with food than other manufactured products because there is a large domestic agricultural sector that supplies the overwhelming majority of food purchased by U.S. consumers. The food industry's output contains a larger share of domestic content than the output of any other manufacturing industry.<sup>54</sup>

Affecting the purchase of food under the Berry Amendment are certain distinctions between food types and considerations of where the food was grown, caught, and/or harvested.<sup>55</sup> For example, DOD interprets the Berry Amendment to provide that if a food item is processed in the United States, it may contain food grown or harvested in other countries. Thus, DOD may buy corn canned in the United States even if the corn was grown abroad. The same logic applies to many other items, such as potato chips, boxed cereals, and juices; as long as these items are processed in the United States, they are deemed compliant with the Berry Amendment.

The Federal Acquisition Regulations provide exemptions for a list of items that are generally not available from U.S. growers, such as bananas, capers, cashew nuts, coffee, cocoa beans, olive oil, bulk spices and herbs, raw sugar, tea in bulk, and vanilla beans.<sup>56</sup> In addition, in 2008, the Under Secretary of Defense for Acquisitions, Technology, and Logistics issued a Domestic Non-Availability Determination affecting seasonal fresh fruits and vegetables, which allows DOD to purchase fruits and vegetables from foreign producers during off-season.<sup>57</sup> Previous Congresses have considered amending the Berry Amendment to permit the purchase of fresh fruits and vegetables from all sources.<sup>58</sup>

The most restrictive food-related provisions in the Berry Amendment pertain to fish, shellfish, and seafood. These food items must be taken from the sea in U.S.-flag vessels or caught in U.S. waters, and must be processed in the United States or on a U.S.-flag ship. The rule applies to both

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<sup>51</sup> MREs are the individual rations bought by the U.S. military for service members to use in the field, when conditions for full food service are not possible. Each MRE contains an entrée/starch, crackers with a spread, a dessert or snack and beverages, along with accessories and utensils. MREs are designed to provide sustenance in a convenient package, and there are dozens of MRE menus, including kosher and vegetarian options.

<sup>52</sup> PrivCo reports for AmeriQual, SoPakCo, and Wornick viewed on April 14, 2017. PrivCo provides financial data on major privately held companies.

<sup>53</sup> See PrivCo's report on AmeriQual Group, LLC.

<sup>54</sup> Ryan Noonan and Jane Callen, *Made in America: Food, Beverages, and Tobacco Products*, U.S. Department of Commerce Economics and Statistics Administration, 2013, p. 5, [http://www.esa.doc.gov/sites/default/files/foodbeveragetobaccoindustryprofile\\_1.pdf](http://www.esa.doc.gov/sites/default/files/foodbeveragetobaccoindustryprofile_1.pdf).

<sup>55</sup> Information is based on an April 10, 2017, email exchange between CRS and DOD's Office of Acquisition, Technology, and Logistics (AT&L).

<sup>56</sup> FAR, Part 25.104—nonavailable articles, [http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/far/25.htm#P243\\_24138](http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/far/25.htm#P243_24138).

<sup>57</sup> See DLA Amendment of Solicitation/Modification of Contract, <http://www.dla.mil/Portals/104/Documents/TroopSupport/Subsistence/Food%20Services/Regions/East/PV/04D3057-P23.pdf>.

<sup>58</sup> Seventh Package of Legislative Proposals Sent to Congress for Inclusion in the National Defense Authorization Act for FY2009, sent to Congress on May 28, 2008, <http://ogc.osd.mil/olc/docs/28May2008Package.pdf>.

fresh and frozen products whether sold whole, in parts, or as fillets.<sup>59</sup> American Samoa's tuna fishing and processing industry, which comprises the majority of private-sector employment in this unincorporated territory of the United States, has benefited from the domestic preference provisions for food items in the Berry Amendment.<sup>60</sup> In recent years, however, tuna companies, such as Chicken of the Sea, have eliminated or cut back operations in American Samoa, reportedly due to an increase in the minimum wage there.<sup>61</sup>

Food procurement for places such as Iraq and Afghanistan has been excluded from the Berry Amendment due to operational considerations,<sup>62</sup> but most nonperishable food is still acquired from U.S. manufacturers.<sup>63</sup> Food sold in military commissaries and post exchanges is explicitly excluded from the Berry Amendment requirements by law.<sup>64</sup>

## Hand or Measuring Tools

Hand or measuring tools such as chisels, files, hammers, pliers, screwdrivers, calipers, and micrometers are specifically indicated as products covered by the Berry Amendment. The amendment requires each individual tool or all the tools within tool sets or kits purchased by DOD be wholly produced in the United States, unless exemptions laid out in the law apply. A hand or measuring tool is defined as wholly U.S.-made if it is assembled in the United States out of components, or otherwise made from raw materials into the finished product. For example, DOD is generally prohibited from buying a wrench not forged in the United States.<sup>65</sup> The Kissell Amendment contains no provision related to hand or measuring tools.

Assuring compliance with the Berry mandate may be complicated, as some sets or kits may consist of thousands of tools. Domestic supply of certain hand or measuring tools may be very limited; according to one estimate, in 2016, imports of hand tools accounted for more than 40% of domestic demand.<sup>66</sup> Suppliers to DOD must provide assurance that all items in a tool or measuring set or kit are compliant with the Berry Amendment.

Hand or measuring tools account for a relatively small share of DOD's total Berry-applicable contract procurement obligations, worth about \$100 million in FY2016. Leading distributors and

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<sup>59</sup> See §8118 of the 2005 DOD Appropriations Act (P.L. 108-287).

<sup>60</sup> StarKist, owned by Del Monte Foods, operates a tuna cannery in American Samoa, qualifying its products as Berry Amendment-compliant. In 2016, Tri Marine, the only other tuna canning factory in the territory, announced it would indefinitely suspend its operations there. For more information about American Samoa's tuna industry, see Arielle Levine and Stewart Allen, *American Samoa as a Fishing Community*, National Oceanic and Atmospheric Administration, NMFS-PIFSC-19, July 2009, pp. 17-20, [https://www.pifsc.noaa.gov/tech/NOAA\\_Tech\\_Memo\\_PIFSC\\_19.pdf](https://www.pifsc.noaa.gov/tech/NOAA_Tech_Memo_PIFSC_19.pdf).

<sup>61</sup> "Tuna Cannery in American Samoa to Halt Production," *Honolulu Star Advertiser*, October 13, 2016.

<sup>62</sup> Exception is established in DFARS, 225.7002-2, [http://www.acq.osd.mil/dpap/dars/dfars/html/current/225\\_70.htm#225.7002-2](http://www.acq.osd.mil/dpap/dars/dfars/html/current/225_70.htm#225.7002-2).

<sup>63</sup> Madeleine Pullman and Zhaohui Wu, *Food Supply Chain Management: Economic, Social and Environmental Perspectives* (Routledge, 2012), p. 170.

<sup>64</sup> 10 U.S.C. §2533a(g) grants a blanket exemption to military commissaries, exchanges, and other nonappropriated fund instrumentalities operated by the Department of Defense.

<sup>65</sup> If a hand or measuring tool was assembled in a foreign country, then disassembled and reassembled in the United States, it does not qualify as U.S.-made. There are no explicit restrictions on the source of the components in the hand or measuring tools, unlike the restrictions on textile and apparel components or food inputs discussed previously.

<sup>66</sup> Rory Masterson, *Hand Tool Manufacturing in the U.S.*, IBISWorld, Industry Report OD5929, June 2016, p. 12.



manufacturers of hand or measuring tools and equipment to DOD are Federal Resources Supply,<sup>67</sup> Snap-On,<sup>68</sup> and Kipper Tool.<sup>69</sup>

Because commercial demand for hand or measuring tools far outweighs sales to DOD, the law seemingly does little to encourage manufacturers to produce or assemble tools in the United States, or to move the manufacture of tools produced in a foreign country to the United States. According to the federal government, cutlery and hand tool shipments totaled \$10.3 billion in 2015,<sup>70</sup> implying that sales to DOD under the Berry Amendment accounted for about 1% of shipments. Thus Berry Amendment purchases may be responsible for roughly 380 of the 38,000 jobs in cutlery and hand tool manufacturing.<sup>71</sup>

Allowable exceptions to the Berry Amendment include a nonavailability waiver if hand or measuring tools are not available domestically. This waiver became a requirement as part of the FY2011 Defense Authorization Act (P.L. 111-383).<sup>72</sup>

## Congressional Debate

Proponents of the Berry and Kissell Amendments assert that the laws serve to keep certain U.S. production lines operating. They argue that the U.S. military should not be dependent on foreign sources for critical items, including those covered by the Berry and Kissell Amendments, and that dependence on foreign sources for military and national security items could lead to supply problems during times of war or military mobilization.

Critics of the amendments point out that the laws may raise procurement costs and lengthen delivery times by requiring the purchase of domestic products when less expensive imports are available. They claim that the amendments are inconsistent with modern practices in manufacturing, which often involve supply chains that source components and raw materials from multiple countries, and that domestic purchase requirements may alienate foreign trading partners, thereby potentially provoking retaliation and harming foreign sales.

This controversy notwithstanding, Congress has not considered repeal of the Berry or Kissell Amendments. Legislative action has centered on the scope of the amendments, the requirements for obtaining waivers, and the use of audits to determine the laws' effectiveness.

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<sup>67</sup> Federal Resources Supply, a private company based in Maryland, is a distributor of sets, kits, and outfits of hand tools. See <http://www.federalresources.com/>.

<sup>68</sup> See Snap-On, *2016 Annual 10-K Report*, p. 20, for an overview of the company's worldwide manufacturing facilities, located in several U.S. states, including Alabama, Arkansas, Tennessee, and Wisconsin, as well as foreign manufacturing locations, including Argentina, Belarus, China, Hungary, and Sweden.

<sup>69</sup> Kipper Tool, a distributor of hand and measuring tool systems, sets, and kits, sells its products to the military, industry, and other customers. For more information about Kipper Tool, a privately held company headquartered in Georgia, see <http://www.kippertool.com/>.

<sup>70</sup> Shipments data from U.S. Census Bureau, *2015 Annual Survey of Manufacturers*, Cutlery and Hand Tools, NACIS 33221, accessed May 3, 2017, <https://www.census.gov/data/tables/2015/econ/asm/2015-asm.html>.

<sup>71</sup> Employment and wage data compiled from Bureau of Labor Statistics, *Quarterly Census of Employment and Wages*, accessed April 2017. Hand tool manufacturing data is included in NAICS code 33221.

<sup>72</sup> Department of Defense, "Defense Federal Acquisition Regulation Supplement; Nonavailability Exception for Procurement of Hand or Measuring Tools (DFARS Case 2011-D025)," *76 Federal Register* 52132-52133, August 19, 2011.

## Changes in Scope

There have been attempts over the years to reduce the scope of the Berry Amendment. For example, lawmakers have offered bills that would have eliminated FPI/UNICOR's federal contract mandate and made changes to the Simplified Acquisition Threshold, such as raising the Berry and Kissell thresholds to \$500,000. The higher limit would reduce the number of purchases covered by the Berry and Kissell Amendments, making foreign suppliers eligible to bid on more DOD and DHS procurement contracts. None of these proposals has passed.

In recent Congresses, lawmakers have introduced bills that would have widened the scope of these domestic preference laws. For instance, in the 115<sup>th</sup> Congress, the Homeland Production Security Act, H.R. 1811, would amend the American Recovery and Reinvestment Act of 2009 (P.L. 111-5) to prohibit the use of funds appropriated to DHS for the procurement of uniforms not manufactured in the United States. Such a change would expand the Kissell Amendment to the Customs and Border Patrol, the Secret Service, and Federal Emergency Management Agency (FEMA) of DHS.

## Waiver Requirements

According to DLA Troop Support, more than a dozen domestic nonavailability determinations were approved between 2005 and 2015 (see **Appendix B** for more information about selected determinations). These waivers of Berry Act requirements generally apply only for a specific time period. In some cases, waivers remain in force until a domestic source or a substitute material can be found.

On April 18, 2017, President Donald Trump issued an executive order directing executive branch agencies “to maximize, consistent with law ... the use of goods, products, and materials produced in the United States” and directing them to “minimize the use of waivers, consistent with applicable law.”<sup>73</sup> An explicit reference to the Berry Amendment was mentioned in a White House background briefing on the executive order.<sup>74</sup> It is unclear how the executive order will affect DOD and DHS interpretations of waiver requirements under the Berry and Kissell Amendments, respectively.

## Audits

Pursuant to the FY2014 National Defense Authorization Act (P.L. 113-66), Congress directed DOD's Office of Inspector General to conduct periodic audits to ensure compliance by the military services with the Berry Amendment and the Buy American Act.<sup>75</sup> Three recent audits found the Navy fully complied with the Berry law in 12 of 23 contracts, the Air Force in 15 of 21 contracts, and the Army in 29 of 33 contracts.<sup>76</sup> In addition, Senator Christopher Murphy has

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<sup>73</sup> “Presidential Executive Order on Buy American and Hire American,” April 18, 2017.

<sup>74</sup> The White House, “Background Briefing on Buy American, Hire American Executive Order,” press release, April 17, 2017, <https://www.whitehouse.gov/the-press-office/2017/04/17/background-briefing-buy-american-hire-american-executive-order>.

<sup>75</sup> Section 1601 of P.L. 113-66 calls for the Department of Defense Inspector General to periodically audit contracting practices and policies to determine whether the military services are complying with the Berry Amendment and the Buy American Act. See *Legislative Text and Joint Explanatory Statement to accompany H.R. 3304* (Committee Print), Title XVI, Industrial Base Matters, Subtitle A, p. 698.

<sup>76</sup> DOD Office of Inspector General, *Army Personnel Complied with the Berry Amendment But Can Improved Compliance with the Buy American Act*, DODIG-2015-206, November 11, 2014. See also DODIG-2015-161 for the (continued...)

requested the Government Accountability Office (GAO) to investigate U.S. government compliance with the Berry Amendment and the Buy American Act.<sup>77</sup> The committee report on the Senate-reported 2016 DHS appropriations bill (S. 1619) requested that GAO audit DHS's compliance with the Kissell Amendment.<sup>78</sup> This legislation was incorporated in the Consolidated Appropriations Act, 2016 (P.L. 114-113).<sup>79</sup> GAO expects to complete its study in 2017.<sup>80</sup>

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Department of Navy's compliance record, August 12, 2015, and DODIG-2016-051 for compliance by the Air Force, February 24, 2016. All three reports can be found at <http://www.dodig.mil/pubs/index.cfm>.

<sup>77</sup> Sen. Christopher Murphy, "Murphy Calls on GAO to Investigate U.S. Government Compliance with 'Buy American' Laws," press release, March 31, 2017, <https://www.murphy.senate.gov/newsroom/press-releases/murphy-calls-on-gao-to-investigate-us-government-compliance-with-buy-american-laws>.

<sup>78</sup> U.S. Congress, Senate Committee on Appropriations, Subcommittee on Department of Homeland Security, *Department of Homeland Security Appropriations Bill, 2016*, committee print, 114<sup>th</sup> Cong., 1<sup>st</sup> sess., June 18, 2015, 114-68, pp. 16-17.

<sup>79</sup> Division F of P.L. 114-68 was the Department of Homeland Security Appropriations Act, 2016.

<sup>80</sup> Information based on a March 16, 2017 email exchange with GAO.

## Appendix A. Comparison of Berry Amendment, Kissell Amendment, and Buy American Act

	Berry Amendment <sup>a</sup>	Kissell Amendment <sup>a</sup>	Buy American Act
Where It Applies	DOD	DHS <sup>b</sup>	Government-wide
Covered Items	Primarily Federal Supply Groups (FSG) 51, 52, 83, 84, and 89 <sup>c</sup>	FSG 83 and 84	Specified in amendment
Thresholds	Greater than the simplified acquisition threshold (\$150,000)	Greater than the simplified acquisition threshold (\$150,000)	Greater than micro-purchase threshold (\$3,000)
Domestic Content	100%	100%	Must exceed 50%
Applicable Defense Federal Acquisition Regulations Supplement (DFARS) or Department of Homeland Security Acquisition Regulation (HSAR)	DFARS 252.225-7012, 252.225-7015	HSAR 3025 and 3052	Policy outlined in Federal Acquisition Regulations (FAR); certain exceptions are outlined in DFARS 252.225-7001, 252.225-7002, 252.225-7035 (Part 25.102)
Place of Manufacture	United States	United States <sup>d</sup>	United States <sup>e</sup>
Where Item Will Be Used	Anywhere	Anywhere	United States <sup>f</sup>
Contractor Certification	No	No	Yes

**Source:** CRS, adapted from DOD Office of Inspector General, *Army Personnel Complied with the Berry Amendment But Can Improve Compliance with the Buy American Act*, Report No. DODIG-2-15-026, November 2, 2014, p. 2.

- a. The Berry and Kissell Amendments apply to end items and components. Components are articles, materials, or supplies incorporated directly into an end item.
- b. Applies only to the Transportation Security Administration and the Coast Guard.
- c. Federal Supply Groups (FSG): 51-hand tools; 52-measuring tools; 83-textiles, leather, furs, apparel and shoe findings, tents and flags; 84-clothing, individual equipment, and insignia; and 89-subsistence (food).
- d. Because of various free-trade agreements, manufacturers in Mexico, Canada, and Chile are treated as American sources.
- e. The Buy American Act applies unless a waiver is granted or an exception applies.
- f. The Buy American Act does not apply to the purchase of items whose intended use is outside of the United States.

## Appendix B. Selected Berry Amendment Domestic Nonavailability Waivers (DNAD) Since 2005

DNAD	Date Approved	Effective Period	Status
Steel toe caps End item: Navy safety boot	4/17/2006	Effective until conditions stated within the DNAD are met (i.e., a domestic source or substitute material can be found).	No longer in effect. As of 2007, a domestic source became available.
Ethyl vinyl acetate for midsoles and nonmarking solid rubber for outsoles End Item: Air Force running shoes	7/16/2006	Effective until conditions stated within the DNAD are met (i.e., a domestic source or substitute material can be found).	No longer in effect. DNAD cancelled on April 24, 2011, when Defense Logistics Agency determined that the Air Force no longer demanded running shoes containing this component.
Fresh fruits and vegetables	5/16/2008	Effective until domestic products of satisfactory quality and sufficient quantity can be procured as needed at U.S. market prices.	Active DNAD
Acrylic staple fiber End item: Acrylic fiber sandbags	10/30/2008	Effective until conditions stated within the DNAD are met (i.e., a domestic source or substitute material can be found).	Active DNAD
Snap fastener End item: Marine Corps men's dress green coat belt	12/3/2008	Effective until conditions stated within the DNAD are met (i.e., a domestic source or substitute material can be found).	Active DNAD
Chemical and oil protective nitrile gloves	12/8/2008	Effective until conditions stated within the DNAD are met (i.e., a domestic source or substitute material can be found).	Active DNAD
70 filament/68 denier (70/68 FD) nylon partially oriented yarn (POY) End item: U.S. Air Force All Purpose Environmental Clothing System Parka and Trousers under contract SPM1C1-08-D-1041	7/10/2010	One-time retroactive DNAD applicable to yarn produced by Invista from September 2008 to April 2009, used in Air Force products delivered or in process under contract SPM1C1-08-D-1041 only.	No longer in effect.

DNAD	Date Approved	Effective Period	Status
70 filament/68 denier (70/68 FD) nylon partially oriented yarn (POY) End item: U.S. Marine Corps All Purpose Environmental Clothing System Parka and Trousers under contract SP0100-06-D-4062	11/9/2011	One-time retroactive DNAD applicable to yarn produced by Invista from September 2008 to April 2009, used in Marine Corps products delivered or in process under contract SPMICI-06-D-4062 only.	No longer in effect.
CR/CR2 8TZ zipper components End item: Anti-exposure coveralls	12/22/2011	Effective until conditions stated within the DNAD are met (i.e., a domestic source or substitute material can be found).	Active DNAD
Personal protective equipment impermeable aprons	11/24/2014	DNAD remains in effect for a period not to exceed one year after the date of approval.	No longer in effect.
Chest piece material components (padding and haircloth) End item: U.S. Army men's and women's dress coats	12/22/2014	Retroactive approval for the chest piece padding and haircloth components already delivered under contracts and orders supplying the Army dress coats during the periods from October 2007 to January 2008 for the padding material and October 2007 to September 2009 for the haircloth material.	No longer in effect.

**Source:** DLA provided DNAD waiver list to CRS by email on April 19, 2017.

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