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Domestic Preference Statutes: The Berry Amendment and the Kissell Amendment

Two laws—commonly referred to as the Berry and Kissell Amendments—require that certain products purchased by the Department of Defense (DOD) and the Department of Homeland Security (DHS) be produced within the United States. These domestic preference statutes relate to congressional interests in the manufacturing sector and national security. These laws are part of a broader framework of domestic preference statutes enacted by Congress. This In Focus discusses domestic preference statutes, the Berry and Kissell Amendments, some of their potential impacts, and issues for Congress.

Domestic Preference Statutes

The Berry and Kissell Amendments exist in broader domestic preference and trade policy frameworks that affect how they are implemented. In 2021, Congress sought to coalesce the various domestic preference laws and affect compliance with them. Section 70923 of the Infrastructure Investment and Jobs Act of 2021 (IIJA; P.L. 117-58) defined the term *domestic preference statutes* and created a Made in America Office within the Office of Management and Budget to “maximize and enforce compliance with domestic preference statutes.” The two amendments, which both predate the IIJA, are among several laws in the IIJA definition of domestic preference statutes. While the IIJA and Made in America Office represent some degree of centralized oversight of domestic preference policies, these statutes are largely implemented independently.

Trade Agreements

The implementation of the Berry and Kissell Amendments, as well as the other domestic preference statutes, may be affected by various trade agreements and statutes. For example, the Trade Agreement Act of 1979, the World Trade Organization Agreement on Government Procurement, and others affect the scope of domestic preference statute requirements. These trade policies generally allow a wide range of countries to supply goods to U.S. government purchasers without violating some domestic preference statutes. The Kissell Amendment explicitly requires compliance with the terms of trade agreements across all of its covered products, which may result in negating its domestic preference requirements.

The Berry Amendment

Congress established “a preference for American products” for DOD in the Fifth Supplemental National Defense Appropriations Act of 1941 (P.L. 77-29). The Berry Amendment was codified in the FY2002 National Defense Authorization Act (NDAA) (P.L. 107-107, §2533a; 10 U.S.C. §4862) and is implemented through the DOD-administered Defense Federal Acquisition Regulation Supplement.

The Berry Amendment requires certain items purchased by DOD to be completely domestic in origin. In general, the entire production process of the covered product must be performed in the United States, including the raw material sourcing, component manufacturing, and final assembly.

The items covered under the Berry Amendment have varied over the years. Currently, the Berry Amendment applies to DOD purchases of textiles; clothing; tents and tarps; footwear; food, hand, or measuring tools; and U.S. flags.

The Berry Amendment mandates a higher level of domestic content than the Buy American Act (BAA) of 1933 (41 U.S.C. §§8301–8303), which applies to most procurement at other federal agencies. Under BAA, the product must be mined, produced, or manufactured in the United States. For more information on BAA, see CRS Report R46748, *The Buy American Act and Other Federal Procurement Domestic Content Restrictions*.

Berry Amendment Exceptions

Berry includes exceptions for procurements when

- products are unavailable from U.S. manufacturers at satisfactory quality and sufficient quantity at U.S. market prices;
- “unusual and compelling urgency of need” for food or measuring items from non-domestic sources exist;
- items are to be used in support of combat or contingency operations or vessels in foreign waters;
- emergency purchases or products are intended for resale at retail stores such as military commissaries or post exchanges;
- there are certain purchases of textiles and chemical warfare protective gear from “qualifying countries” or a country with which the United States has a reciprocal defense procurement memorandum of understanding or other international agreement; and
- purchases are part of a contract with value at or below \$150,000.

The Kissell Amendment

The American Recovery and Reinvestment Act of 2009 (P.L. 111-5), Section 604—commonly referred to as the Kissell Amendment and codified at 6 U.S.C. §453b—imposes certain domestic preference requirements for textile products procured by DHS. The DHS Office of the

Chief Procurement Officer leads DHS implementation of the Kissell Amendment.

When procuring items directly related to national security interests, DHS is required to buy clothing, footwear, and other textile products from domestic sources. Food, hand, or measuring tools and flatware and dinnerware are not covered by the amendment. The Kissell Amendment contains language stating it shall be implemented consistent with trade agreement commitments. Thus, DHS may purchase textiles and textile products from a wide range of countries pursuant to trade agreements.

Kissell Amendment Exceptions

Kissell has exceptions for procurements when

- the Secretary of DHS determines that products are unavailable from American manufacturers at satisfactory quality and sufficient quantity at U.S. market prices;
- an item's noncompliant textile fibers do not constitute more than 10% of the item's purchase price;
- the item is procured outside the United States by vessels in foreign waters or in an emergency; or
- the total value of the procurement is less than a certain dollar amount.

Manufacturing and the Berry Amendment

Food

The Berry Amendment requires DOD to purchase most food from sources that grow, process, or manufacture food in the United States. Berry-related implementing regulations can be restrictive. As an example, DOD may purchase fish, shellfish, and other seafood taken from the sea only in U.S.-flag vessels or taken in U.S. waters and processed in the United States or on a U.S.-flag vessel.

Textiles, Apparel, and Footwear

The Berry Amendment requires that every step in the textile and apparel production process for most DOD clothing purchases, including military uniforms, originates from U.S. firms, including non-textile components such as zippers and buttons. In the FY2017 NDAA (P.L. 114-328, §817), Congress expanded the Berry Amendment by requiring DOD to provide 100% U.S.-made athletic shoes for recruits upon initial entry into the armed forces. This requirement remains in effect. Previously, DOD provided vouchers to recruits to purchase athletic footwear, which did not have to be domestic in origin. In 2019, the Defense Logistics Agency estimated potential demand for as many as 250,000 pairs of running shoes for recruits annually.

Flatware

The FY2007 NDAA (P.L. 109-364) removed a decades-long mandate that DOD purchase American-made flatware. The FY2020 NDAA (P.L. 116-92) and the FY2025 NDAA (P.L. 118-159) reinstated and continued, respectively, the domestic sourcing requirement for stainless steel flatware.

Manufacturing and the Kissell Amendment

The Kissell Amendment is more limited than Berry, as it generally applies only to textiles and apparel. Additionally, trade agreements limit the scope of the requirements. For example, a 2017 U.S. Government Accountability Office report found that most of DHS's textile products were imported. The U.S.-Mexico-Canada Agreement, entered into force in 2020, ended policies that had permitted manufacturers in Mexico to qualify as U.S. sources.

Issues for Congress

Areas of potential congressional interest include procurement and the economy; domestic nonavailability determinations (DNADs); and trade agreements.

Procurement and the Economy

Congress may consider the extent to which the Berry and Kissell Amendments affect U.S. national security interests and the U.S. industrial base. There may be trade-offs between acquisition costs and support of domestic industries. One potential issue of debate is the extent to which demographic or economic factors should be considered in procurement. Some policymakers contend procurement should be designed to impact economies in the United States, while others assert the sole consideration should be supplying the government. Procurement policy's role in industrial policy might relate to broader considerations about the government's role in the economy.

Berry Amendment and the Domestic Nonavailability Determination Process

Congress may consider the circumstances under which DOD may restrict the issuance of DNADs. DNADs waive Berry Amendment requirements, such as in the case of the United States not producing a solely domestic item or if U.S. manufacturers are at maximum production capacity.

Congress may consider whether or not DOD can improve the process it uses to research and issue DNADs. Currently, DOD procuring agencies conduct research for and issue DNADs. This includes an analysis of potential alternatives and affirmation that any domestically available alternative does not meet DOD requirements. According to DOD, market research (i.e., the process through which contracting officials gather data on potential acquisition programs) is a "general DNAD [issue]." Congress could require more insight from DOD on its DNAD process. Alternatively, Congress could take no action.

Trade Agreements

Congress may consider compliance with trade agreements. For example, Congress may identify countries it prefers to be excluded from eligibility for waivers or exceptions. Fewer waivers or exceptions might increase procurement costs for government agencies but also may change the degree to which procurement impacts domestic industries. Alternatively, Congress could take no action.

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