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Homeland Security

Illusory Progress: The Apparent Expansion of the Berry Amendment to DHS

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The phrase “trade war” and the specter of the Hawley-Smoot Tariff Act¹ have been bantered about recently due to the inclusion of the “Buy American” clause in the American Recovery and Reinvestment Act of 2009 (the Act).² The fervor died down somewhat after the Senate amended the Buy American clause by requiring that it be applied in a manner that respects international treaties. With all the focus on the Buy American clause, the apparent expansion of the Berry Amendment’s³ textile and clothing restrictions to the Department of Homeland Security, contained in Section 604 of the Act, was mostly ignored.⁴ The Section 604 restriction, although included in the Act, does not merely apply to funds appropriated under the Act, but is intended to apply to all funds appropriated to DHS.⁵

At first blush, it would appear as though Section 604 of the Act expanded the clothing and textile restrictions of the Berry Amendment, which had applied only to the Department of Defense, to DHS. Unfortunately, it is not that straightforward. The expansion created new issues that were not present under the Berry Amendment. These issues were created because the “Berry Amendment expansion” is not really a true expansion, but rather the implementation of a new source restriction that is similar to the Berry Amendment. In most instances, a contractor that is currently in compliance with the requirements of the Berry Amendment for DoD procurements will also be in compliance with the Section 604 restriction for covered DHS procurements. However, there are some differences in coverage, e.g., parachutes and protective equipment, that will raise new compliance issues. Given the fact that DHS has yet to implement the Section 604 restrictions, depending on the approach to implementation it takes, additional compliance issues could arise.

The Berry Amendment and Section 604

Essentially, the Berry Amendment limits the procurement powers of DoD by restricting the purchase of certain commodities, including clothing and certain textiles, to domestic sources. The requirements of the Berry Amendment will differ greatly depending on the article being procured by DoD, e.g., *compare* natural

statement indicates that the Section 604 restriction might not be an ongoing restriction.

¹ See 71 P.L. 361, June 17, 1930; 19 U.S.C. § 1654.

² 111 P.L. 5, February 17, 2009.

³ 10 U.S.C. § 2533a.

⁴ This language was introduced by Congressman Larry Kissell (D-N.C.).

⁵ It is clear that it was the intent of Congress that Section 604 would be an ongoing restriction and would not merely apply to fiscal year 2009 funds. However, Congressman Bennie Thompson (D-Miss.) noted when Section 604 was introduced that the restriction “should . . . be ultimately made permanent during the 111th Congress through the DHS Authorization process.” H.R. Conf. Rep. 111-724 (January 28, 2009). This

fabric, which must be wholly manufactured (every step of manufacturing)⁶ in the United States, with synthetic fabric, which must only be wholly manufactured⁷ in the United States if the fabric is utilized in a textile product. That said, by and large, the Berry Amendment requires domestic production of covered articles or components, unless an exception applies. The Section 604 restriction, on the other hand, covers slightly different products and is not as restrictive as the Berry Amendment in some respects and more restrictive in other respects.

The Section 604 restriction has several features that distinguish it from the Berry Amendment. For example, it only applies to the procurement of an item that is “directly related to the national security interests of the United States,” a phrase not defined in Section 604, as opposed to all DHS procurements. Furthermore, protective equipment (including but not limited to body armor)⁸ and parachutes⁹ are specifically covered¹⁰ under the Section 604 restriction, while both items are not fully, specifically, covered under the Berry Amendment.¹¹ Another significant difference is that Section 604 does not limit DHS’s procurement of the covered textile and clothing items to domestic sources. This is because Section 604(k) states that “[t]his section shall be applied in a manner consistent with United States obligations under international agreements.” What this means in layman’s terms is that DHS may, depending on how DHS implements the Section 604 restriction and in non-small business set-aside procurements,¹² purchase the covered textile and clothing items from other than domestic sources.

Implementation of Section 604(k)

A. Trade Agreements Act Approach

There are several ways in which DHS could implement the Section 604 restriction to take into account section k of the restriction. The simplest way to implement Section 604 (k) would be to start with the premise that for procurements greater than the threshold set

forth in Federal Acquisition Regulation 25.402, the Trade Agreements Act (TAA)¹³ applies. The TAA is the means in which the trade agreements negotiated under the Trade Act of 1974 are approved/implemented,¹⁴ and provides the authority to modify discriminatory purchasing requirements in federal procurements.¹⁵ Under the TAA, as implemented by the FAR, procurements “indispensable for national security” are exempt from the requirements of the TAA.¹⁶ Accordingly, because the Section 604 restriction only applies to procurements “directly related to the national security interests of the United States” DHS could apply the Section 604 restriction only to those procurements of covered articles where the “national security” exception to the TAA applies. Consequently, under this TAA approach, only domestic products would be compliant with the Section 604 restriction, absent the application of an exception. This approach does have some significant weaknesses.

Its greatest weakness, which is grounded in the very language of Section 604, is that it is not clear exactly how a Transportation Security Administration uniform is “directly related to the national security interests of the United States” or “indispensable for national security.” It is unambiguous that Congressman Kissell intended for Section 604 to apply to TSA’s purchases of uniforms¹⁷, but the nexus between national security and a TSA uniform is not clear. In fact, U.S. Customs and Border Protection uniforms are more closely tied to national security, but Congress indicated that the “Obama administration [would have to act for Section 604] to cover the Federal Emergency Management Agency, U.S. Customs, Border Protection, and U.S. Immigration Service [procurements][.]”¹⁸ Congress’ position that the Obama administration would have to act for these DHS agencies to be covered under Section 604 is misplaced because if the “TAA approach” is followed, these agencies would be covered. In addition, even under the Free Trade Agreement (FTA) approach outlined below, Section 604 would apply; it just would not limit procurements to U.S. manufactured products. It is also apparent that the “national security interests” language and the intersect between Section 604 and the TAA were not fully considered.¹⁹

Another weakness of the TAA approach is that Section 604 does not have a qualifying country exception for chemical warfare protective clothing like the Berry

⁶ See *National Graphics*, B-168791, 49 Comp. Gen. 606 (1970).

⁷ DFARS 225.7002-2(o).

⁸ Defense Federal Acquisition Regulation Supplement Procedures, Guidance, and Information (PGI) 225.7002-1, provides a non-exhaustive list of Federal Supply Classes (FSC) that are considered items of clothing for purposes of DoD’s Berry Amendment. Included in this list is FSC 8415-Clothing Special Purpose, which covers safety and protective clothing. Safety and protective clothing likely would be considered protective equipment.

⁹ Small arms protective inserts, which is protective equipment, are not individually covered under the Berry Amendment. H.R. Conf. Rep. 109-360 (December 18, 2005); PGI 225.7002-1(E).

¹⁰ 73 Fed. Reg. 11354 (March 3, 2008) (stating that the Berry Amendment would have to be amended in order for parachutes to be individually covered under the Berry Amendment).

¹¹ To the extent the term “protective equipment” covers protective clothing, the Berry Amendment restriction is greater as all material and components normally associated with clothing are covered under the Berry Amendment and only the end item “protective equipment” is covered under Section 604.

¹² Generally, small business set-aside procurements are exempt from the application of FTAs. See, e.g., NAFTA, Annex 1001.2b, Schedule of the United States, paragraph 1; WTO GPA, Appendix 1, General Notes, paragraph 1; Australia FTA, Section 7, Schedule of the United States, paragraph 1.

¹³ See Pub. L. 96-39, July 26, 1979, 19 USC § 2501 *et. seq.*; implemented by FAR Subpart 25.4.

¹⁴ 19 U.S.C. § 2502(a)(1).

¹⁵ 19 U.S.C. § 2511. This authority includes the authority to designate those countries with free trade agreements with the United States or that meets one of the requirements set forth in 19 U.S.C. § 2511(b)(1)-(4) as eligible countries, and thus qualify for non-discriminatory treatment.

¹⁶ FAR 25.401(a)(2).

¹⁷ H.R. Conf. Rep. 111-723 (January 28, 2009).

¹⁸ H.R. Conf. Rep. 111-724 (January 28, 2009).

¹⁹ It is likely that Congress believes that the Obama administration would have to act because FEMA, U.S. Customs, Border Protection, and U.S. Immigration Service are not exempt from the World Trade Organization Government Procurement Agreement, like TSA and the U.S. Coast Guard. However, this position ignores the fact that TSA procurements are not exempt from the North American Free Trade Agreement, and thus the Obama administration would also have to act to exempt TSA procurements from the North American Free Trade Agreement.

Amendment.²⁰ As a result, DHS, absent the use of the availability exception,²¹ would not be able to purchase the same chemical warfare protective clothing that is purchased by DoD. Therefore, it might not have access to the same crucial technology as DoD. Lastly, applying the “indispensable for national security” exception of the TAA in order to implement Section 604, which is a discriminatory preference law prohibited under the FTAs,²² when there is a process for amending the FTAs to exempt DHS procurements might be considered a less than good faith application of the U.S. FTAs.

B. Free Trade Agreement/Qualifying Country Approach

Even with its faults, the TAA approach has certain administrative benefits; however, it also does not take into account possible confusion caused by the language contained in the United States’ FTAs. For example, there is seemingly no issue with the World Trade Organization Government Procurement Agreement (WTO GPA),²³ which exempts the procurement of a variety of items by the U.S. Coast Guard (for national security reasons)²⁴ and all TSA procurements, and also contains a broad exception for national security related procurements.²⁵ Similarly, the Australia FTA, like the WTO GPA, does not cover procurements by the TSA. But with respect to U.S. Coast Guard procurements, because of “essential security” interests, it does not apply to the procurement of certain items that are covered under the Section 604 restriction.²⁶ In addition, the North American Free Trade Agreement exempts procurements made by the U.S. Coast Guard (for national security reasons), but not those made by any other DHS agency such as TSA.²⁷ Both the Australia FTA and NAFTA, like the WTO GPA, contain an exception for procurements related to national security,²⁸ which would appear to allow for the exemption of purchases covered under Section 604 and would be consistent with the TAA approach outlined above.

However, because the WTO GPA, Australia FTA, and NAFTA already have a “carve-out” for U.S. Coast Guard procurements that relate to national security (or in the case of the Australia FTA, the exception is related to the essential security interest of the U.S.), manufacturers from signatory countries of these FTAs could argue that the national security exception does not apply to procurements covered by Section 604 because the national security exception was already taken into account when establishing the Coast Guard “carve out.” The overarching argument for these manufacturers (and any other manufacturers from a country with an FTA with the United States that has similar language) is that if DHS is to be treated like DoD, exempting the application of the FTA when DHS procures the FSCs covered under Section 604 for national security pur-

poses, then the United States must amend the “Schedule of the United States” provided in the FTAs, which list applicable U.S. agencies and FSCs covered under the FTAs.

DHS could choose to address the national security issue by establishing a “qualifying country” list similar to the one at Defense Federal Acquisition Regulation Supplement 225.872-1 and allow DHS agencies to procure Section 604 covered articles from these qualifying countries. If DHS took this approach, it would have to determine if it wanted to account for the differences in DHS coverage in the FTAs. As noted above, the Australia FTA coverage of Coast Guard procurements is different than either the WTO GPA or NAFTA. Therefore, if these differences were taken into account, for example, a Canadian article of clothing would not meet the requirements of Section 604 if it were procured by the U.S. Coast Guard. However, if under the same procurement the article of clothing were manufactured in Australia, it would meet the requirements of Section 604, so long as the procurement was not a small business set-aside.

If an FTA approach were taken, a thorough review of U.S. FTAs would be needed to determine what countries’ products and what FSCs would qualify for non-discriminatory treatment when procured by the various DHS agencies. Another related issue that would need to be resolved if an FTA approach is taken would be to determine whether the Section 604(k) language will be implemented: (1) so certain countries’ products will be eligible only if the procurement in question is greater than the threshold set forth in FAR 25.402 (given the fact that the U.S.’s FTAs set forth procurement value thresholds, adjusted for inflation, above which the FTAs are applicable)²⁹ or, (2) like the Berry Amendment’s chemical warfare protective clothing exception, which specifically exempts from coverage those items produced in identified qualifying countries.

Under the FTA approach, there would also be some concern that Section 604(k) would be implemented in a manner similar to the qualifying country exception of the specialty metal restriction found at DFARS 252.225-7014 (June 2005) and Alternate 1 (April 2003). Under this exception, the specialty metal restriction does not apply if the specialty metal is “[m]elted in a qualifying country or incorporated in an article manufactured in a qualifying country.” This exception has been criticized by U.S. specialty metal manufacturers because it allows qualifying country manufacturers to have a less difficult time complying with the specialty metal restriction than U.S. manufacturers. DFARS 252.225-7014’s qualifying country exception does not apply to U.S. manufacturers, thus a U.S. manufacturer would not comply with the specialty metal restriction if it merely incorporated the specialty metal in an article manufactured in the United States.

A “DFARS 252.225-7014 qualifying country type exception” could be implemented with respect to Section 604 in two ways. The restriction on fabrics, fibers and yarns (Section 604(b)(1)(C)) could be implemented so that an FTA country manufacturer would be in compliance if the covered fabric (including yarns and fibers) was manufactured in an FTA country or incorporated

²⁰ DFARS 225.7002-2(p).

²¹ 111 P.L. 5, Sec. 604(c), February 17, 2009.

²² See, e.g., NAFTA, Article 1003; Australia FTA Article 15.2, paragraph 1, and WTO GPA, Article III.

²³ WTO GPA, Annex 1.

²⁴ The Washington Report, Volume XLIII, Number 6 (February 9, 2009) states that DHS already applies the Berry Amendment to the procurement of Coast Guard uniforms.

²⁵ WTO GPA, Article XXIII.

²⁶ Australia FTA, Annex 15-A.

²⁷ NAFTA, Annex 1001.1a-1, Schedule of the United States, paragraph 53.

²⁸ Australia FTA, Article 22.2; NAFTA, Article 1018.

²⁹ See, e.g., NAFTA, Article 1001, paragraph 1(c); Australia FTA Article 15.1, paragraph 2(b), and WTO GPA, Article I, paragraph 4.

into an article manufactured in an FTA country. However, as noted below, given the fact that the Section 604 fabric restriction does not apply to commercial items, the impact of such language would be minimal. The second way would be simply based on the country-of-origin of the end product. This approach would lead to the bigger issue of what test will be used to determine the country of origin of a product under Section 604. If the Berry Amendment's "every step of the process used to manufacture the covered article" test is applied only to domestic end items, and the U.S. Customs and Border Protection's textile country-of-origin test³⁰ is used for FTA country end products (the test these products as well as U.S. products were subject to prior to the passage of Section 604), the country of a good would be: (1) the country where the good is wholly obtained or produced; (2) the country where a specified applicable change in tariff classification occurred; (3) the country in which the good was knitted to shape; (4) the country in which the good was wholly assembled; (5) the country in which the most important assembly or manufacturing process occurred; or (6) the last country in which an important assembly or manufacturing process occurred.³¹ This would, like the DFARS 252.225-7014 qualifying country exception, favor FTA country manufacturers over U.S. manufacturers because they could more easily comply with the Section 604 restrictions.

There is little doubt that the TAA approach outlined above is administratively less burdensome and would meet the requirements of Section 604(k), because it takes into account the FTAs by applying them to DHS procurements in a manner consistent with how other federal agencies currently implement these FTAs. However, though fraught with administrative "pot-holes" from a free trade standpoint, the FTA approach is likely more palatable as it is a less-protectionist approach. Furthermore, the supporters of the FTA approach have some support for their position in the language of the various FTAs. That being said, the FTA approach does have the drawback that DHS would likely apply the same COO test to FTA country products that is currently being applied, but would apply a stricter COO test to U.S. products than is currently applied. Although this is not the only issue that DHS will have to resolve, it is an issue that it will have to address immediately as it provides the foundation for the application of Section 604.

³⁰ 73 Fed. Reg. 55860 (September 26, 2008) (the restrictions that are set forth in 19 U.S.C. § 3592, as implemented in 19 C.F.R. § 102.21, apply when determining the country of origin of a textile product for purposes of the Trade Agreements Act).

³¹ Under 19 C.F.R. § 102.21, the country of origin for a textile product is: (1) the country, territory, or insular possession in which the good was wholly obtained or produced; or (2) the country, territory, or insular possession in which each of the foreign materials incorporated in that good underwent an applicable change in tariff classification. 19 C.F.R. § 102.21(c)(1)-(2). If neither of these rules applies, then the country-of-origin of a textile product will be: (1) the country in which the good was knitted to shape; (2) if the good was not knitted to shape, the country in which the good was wholly assembled; (3) if the product was not knitted to shape or wholly assembled in one country, the country in which the most important assembly or manufacturing process occurred; or (4) if the product was not knitted to shape, wholly assembled in one country, nor was there one important assembly, then the last country in which an important assembly or manufacturing process occurred. 19 C.F.R. § 102.21(c)(3)-(5).

Other Exceptions

Section 604 also contains several other exceptions not found in the Berry Amendment. Unlike the Berry Amendment, Section 604 includes a de minimis exception for non-compliant fabrics/fibers, which will likely have a limited impact because commercial fabrics (including fibers and yarns) are generally exempt from the Section 604 restriction. The de minimis exception might have some impact if an article of clothing happened to only incidentally contain natural or synthetic fibers, because the commercial item exception³² for fabric would likely not apply to an article of clothing, the components of which are independently covered to the extent they are the type normally associated with an article of clothing, such as fabric. Furthermore, DHS purchases of an "item of individual equipment" manufactured from or containing fibers, yarns, fabrics, or materials are also exempt if they are a commercial item.³³ The commercial item exceptions are a departure from the Berry Amendment, which covers the procurement of commercial items.³⁴ Like the Berry Amendment, however, the Section 604 restriction, outside of the clothing restriction, does not specifically address if the restriction applies at the component level or whether the restriction applies if the covered article is a component and not an end item being procured. The Berry Amendment has been applied to covered articles that are merely components of an end item. Under the Berry Amendment, for example, parachutes are not covered individually, but the fabric used to manufacture a parachute is covered.³⁵ It is likely that the Section 604 restriction will be implemented like the Berry Amendment, and thus will apply, absent an exception (such as the commercial item exception), at the component level.

Additional Issues to Consider

Obviously, for the reasons stated above, the application of the Section 604 restrictions will lead to a very different result than if the Berry Amendment applied.³⁶

³² It is interesting to note that neither the Berry Amendment nor Section 604 states that it applies to commercially available off-the-shelf (COTS) items "notwithstanding Section 35" of the Office of Federal Procurement Policy Act (41 U.S.C. § 431(b)(2)). See 10 U.S.C.A. § 2533a(i); 111 P.L. 5, Sec. 604(g), February 17, 2009. Therefore, an argument can be made that neither the Berry Amendment nor Section 604 applies to the procurement of COTS items.

³³ There is some overlap between the items covered under Section 604(b)(1)(B) and (b)(1)(D); therefore, a determination will have to be made if the commercial item exception supersedes the (b)(1)(B) restriction. Given the fact that the (b)(1)(B) restriction is more specific it will likely supersede the commercial item exception applicable to the overlapped items covered under (b)(1)(D).

³⁴ 10 U.S.C. § 2533a(i).

³⁵ 73 Fed. Reg. 11354 (March 3, 2008) (stating that the Berry Amendment would have to be amended in order for parachutes to be individually covered under the Berry Amendment).

³⁶ For example, under the Berry Amendment small arms protective inserts, commonly referred to as SAPI plates, are not individually covered, but are likely covered under Section 604(b)(1)(B). Therefore, when DoD procures SAPI plates it merely requires that fabrics (but not the fibers or yarns) used in the SAPI plates be domestic. However, if TSA purchased SAPI plates, on a non-small business set-aside basis, the end item would have to be manufactured in the United States, or a

In addition to the implementation of Section 604(k), there are several other unresolved issues that will have to be addressed prior to August 16, 2009, which is the effective date of Section 604. One of the biggest remaining issues is the overlapping coverage of Section 604(b)(1)(A)-(B), most notably for protective equipment. DHS will have to determine if protective clothing is included in protective equipment. On January 22, 2007, the Defense Acquisition Regulatory Council issued the DFARS PGI 225.7002-1, which provided a non-exhaustive list of FSCs that DoD considers items of clothing. Among the items provided is FSC 8415-Clothing Special Purpose, which covers safety and protective clothing. If DHS follows this approach, it would mean that protective clothing, including all material and components thereof (which are normally associated with an article of clothing) would be covered under the Section 604 restriction, but when purchasing protective equipment, other than clothing, only the end item would be covered. The other approach would be to treat protective clothing and protective equipment identically and thus only the end item, protective clothing, would be covered.

Other broader issues that will have to be addressed by DHS include determining:

- when an item will be considered directly related to the national security interests of the United States;
- whether the terms “reprocessed and reused” which are historically tied to the Wool Products Labeling Act of 1939³⁷ under the Berry Amendment will be tied to the Labeling Act under Section 604;

“qualifying country” depending on how Section 604(k) is implemented, but the components, the ceramic plate and synthetic fabric (which, let us assume, is a commercial item) would not be covered. This is but one example of where the application of Section 604 will lead to significantly different results than the application of the Berry Amendment.

³⁷ 15 U.S.C. § 68.

- how to apply, if at all, existing case law relating to the application of the Berry Amendment to Section 604, e.g., generally, as noted above, if an item is covered under the Berry Amendment then every step of the process used to manufacture the item must occur in the United States;³⁸
- whether Section 604 applies to grant funds provided to states from DHS for the procurement of covered articles *directly related to the national security interests of the United States*;³⁹ and
- whether DHS should work with DoD in implementing Section 604 so that in those areas where the restrictions are identical they are applied in the same manner.⁴⁰

Given the complexity of these issues, DHS should attempt to issue implementing regulations quickly so that industry can provide its input on the issues addressed above.

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³⁸ See *National Graphics*, B-168791, 49 Comp. Gen. 606 (1970) (generally, when a fabric and its fibers are covered under the Berry Amendment, the fabric will only be considered compliant if the fibers and the spinning and weaving of the fabric occur in the United States).

³⁹ Arguably, this restriction would apply to any grant funds provided to states from DHS for the procurement of covered articles directly related to the national security interests of the United States because those funds would be funds appropriated or made available to DHS and there is no requirement that DHS must conduct the procurement.

⁴⁰ Consistent application of the Berry Amendment has been a problem within DoD, e.g., some DoD agencies read “the materials and components” of clothing language broadly while other read it narrowly, therefore, a concerted DoD/ DHS effort could lead to clearer more consistent implementation and greater contractor compliance.