

Takeaways from DoD's Proposed Changes to Certain Sourcing Restrictions

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Pursuant to Sections 817 and 881(b) of the [FY 2017 National Defense Authorization Act](#) ("NDAA"), the Department of Defense ("DoD") recently issued a [proposed rule](#) to amend certain sourcing restrictions found in [DFARS subpart 225.70](#) and related clauses. Specifically the proposed rule would amend the DFARS to:

- extend the [Berry Amendment's](#) domestic sourcing restrictions to the acquisition of certain athletic footwear for members of the Armed Forces, when the procurement is valued at or below the simplified acquisition threshold [Section 817], and
- recognize that Australia and the United Kingdom of Great Britain and Northern Ireland (the "UK") are now members of the National Technology Industrial Base ("NTIB"), thereby permitting the United States to acquire certain items (that are subject to the sourcing restrictions in [10 U.S.C. 2534](#)) if they are manufactured in the UK, Australia, Canada or the United States [Section 881(b)].

We provide our takeaways below.

The Power of Congressional Engagement

Notably, Section 817 of the FY 2017 NDAA – which amended [37 U.S.C. § 418](#) to extend the Berry Amendment restrictions to certain athletic shoe purchases – was added because of the *bipartisan* efforts of [Senator Angus King \(I-ME\)](#), [Senator Susan Collins \(R-ME\)](#) and [Representative Bruce Poliquin \(R-ME-02\)](#) and [Representative Niki Tsongas \(D-MA-03\)](#). For example, in a [joint press statement](#) issued on November 13, 2016, Sens. King and Collins and Rep. Poliquin explained that Section 817 was a "*significant victory for American jobs and respected American manufacturers* like New Balance [with sites located in Maine and Massachusetts] who will now be able to compete for contracts to provide domestically produced athletic footwear to military recruits. *For far too long, the Department of Defense has failed to apply the Berry Amendment to athletic footwear, and American manufacturers have paid the price.*" (Emphasis added). This type of action demonstrates the power of congressional engagement.

The Significance of the NTIB

The proposed rule would formally recognize that Australia and the UK are members of the NTIB, and permit the United States to acquire multipassenger motor vehicles (*i.e.*, buses) [[DFARS 225.7004](#)] and air circuit breakers for naval vessels [[DFARS 225.7006](#)] if those items are manufactured in Australia, the UK, Canada or the United States.^[1] This may provide more opportunities for companies with manufacturing sites located in Australia or the UK.^[2]

In part, the proposed amendments to the DFARS rule is “regulatory clean-up” that clarifies the extension of the rule’s provisions to the newer members of the NTIB. More broadly, however, it reflects DoD’s ongoing effort “to reduce the barriers to the seamless integration between the persons and organizations that comprise the national technology and industrial base.” Those efforts were directed by the same provision of the FY 2017 NDAA that expanded the membership of the NTIB. The important role of the NTIB also has been discussed in a recent [DoD-led Interagency Task Force report](#) about the strengthening and assessing US manufacturing and the defense industrial base.^[3]

The (Continued) Delay Associated with Regulatory Implementation

The FY 2017 NDAA was signed in December 2016, but the proposed rule wasn’t issued until August 2018. Although comments were due on October 23, 2018, no specific timetable has been provided for issuing the final rule.

This timeline demonstrates that it often takes (too) much time to implement statutory changes through the regulations. As reflected in the [HASC Report to the FY 2019 NDAA](#), “there has been a significant delay between statutory enactment and issuance of regulations in the Defense Federal Acquisition Regulation Supplement (DFARS).” Importantly, Congress now recognizes that these types of delays often place “the acquisition and contracting communities within and outside the Federal Government are unable to take full advantage of recent reforms and improvements to acquisition and contracting procedures.”

Further Tweaks to Athletic Footwear Procurements

As noted above, pursuant to Section 817 of the FY 2017 NDAA, the proposed rule seeks to amend [DFARS 225.7002](#) to require DoD to satisfy the Berry Amendment’s domestic sourcing restrictions when acquiring athletic footwear for members of the Armed Forces upon their initial entry into the Armed Forces when the acquisition is at or below the [simplified acquisition threshold](#). (The Berry Amendment’s domestic sourcing restrictions currently do not apply to these smaller value acquisitions.)

However, there is more to the story: [Section 633 of the FY 2018 NDAA](#) further amended Section 817 of the FY 2017 NDAA. Section 633 provides that the sourcing requirements enacted through Section 817 do not apply if the Secretary of Defense determines that complying with the requirements “would result in a sole source contract for procurement of athletic footwear . . . because there would be only a sole certified source of supply for such footwear.”^[4] Section 633 also requires DoD to use firm fixed price contracts for these athletic footwear procurements.

[1] The proposed rule also seeks to amend DFARS 225.7005 regarding the sourcing restrictions related to the purchase of certain chemical weapons antidotes. However, DFARS 225.7005 [was](#)

[deleted](#) as of October 1, 2018 to implement Section 813(a) of the FY 2018 NDAA.

[2] DoD previously waived, on an annual basis, the sourcing restrictions for these items if they were manufactured in the UK. See [DFARS 225.7008](#).

[3] This report was commissioned by President Trump through [Executive Order 13806](#).

[4] Notably, the proposed rule comments that this limited extension of the Berry Amendment, pursuant to Section 817, “may benefit small entities that can provide athletic footwear that is compliant with the Berry Amendment, because they may be more able to compete for smaller acquisitions.”

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