



September 15, 2009

Jeremy Olson
Department of Homeland Security
Office of the Chief Procurement Officer, Acquisition Policy and Legislation Branch
245 Murray DR
BLDG 410 (RDS)
Washington, DC 20528

Re: HSAR Case 2009-004, Docket No. DHS-2009-0081

Dear Office of the Chief Procurement Officer:

The American Manufacturing Trade Action Coalition (AMTAC), National Council of Textile Organizations (NCTO), National Textile Association (NTA), U.S. Industrial Fabrics Institute (USIFI), American Fiber Manufacturers Association (AFMA), Leather Industries of America (LIA), Narrow Fabrics Institute (NFI), Domestic Sock Makers Coalition (DSMC), SEAMS, American Sheep Industry Association (ASI), and the labor union Workers United are jointly submitting comments with respect to the interim rule for the Requirements for Implementing Section 604 (the Kissell Amendment) of the American Recovery and Reinvestment Act of 2009. See Federal Register Vol. 74, No. 157, page 41346 from Monday, August 17, 2009.

This testimony is broken down into the following sections:

- I. Background on U.S. Textile and Apparel Industry and Its Relationship to the Department of Homeland Security
- II. Rationale for Including the Kissell Amendment in the American Recovery and Reinvestment Act of 2009 Was to Create Jobs
- III. The Interim Rule Fails to Implement the Kissell Amendment by Unnecessarily Defining and Improperly Regulating “Item Directly Related to National Security Interests”

- IV. The Interim Rule Contains Language that Identifies Mexico, Canada, and Chile Unnecessarily
- V. The Interim Rule's De Minimis Exception in Sec. 604(d) Should Be Interpreted as a *Post-Procurement* Authority
- VI. Conclusion

I. Background on U.S. Textile and Apparel Industry and Its Relationship to the Department of Homeland Security

The U.S. textile industry and its textile and apparel workers are commenting on the Department of Homeland Security's (DHS) interim rule to implement the Kissell Amendment offered by Congressman Larry Kissell because millions of square meters of textile and apparel products manufactured domestically are annually used by DHS.

As of August 2009, 528,975 Americans work in the U.S. fiber, textile, and apparel sectors including 122,100 in textile mills, 125,600 in textile product mills, and 165,000 in apparel manufacturing with an additional 116,275 people employed in the cotton industry.

AMTAC, NCTO, NTA, USIFI, AFMA, LIA, NFI, DSMC, SEAMS, ASI and Workers United represent substantially all of the U.S. supply chain from fiber production to the final assembly of textile and apparel products indispensable to the functioning of DHS. Textile and apparel production stages include fiber production, yarn and thread spinning or extruding, fabric weaving, knitting, or non-woven manufacturing, dyeing and finishing, cutting, and final assembly. Textile production is a high-tech, highly capital intensive manufacturing sector.

Products manufactured by the U.S. fiber, textile, and apparel sectors and used by DHS and the U.S. Department of Defense (DoD) include, but are not limited to:

Apparel, Uniforms, and Gear (including outerwear, socks, footwear, and headwear) / Combat Ensembles: extreme weather gear, parkas, coveralls, gloves, caps, boots, shoes, socks, rainwear, flyers/flight suits, fire-resistant clothing, tactical vests, quilted poncho liners, physical fitness uniforms, badges

Protective Gear and Armor: ballistic fabrics for hard armor (vehicles, panels, etc), ballistic vests, ballistic helmets, knee and elbow pads, headgear, body armor, fabrics to protect ceramic bullet proof plates

Pocketing and Lining: dress jacket linings, pocket lining

Fabrics: utility camouflage patterns, camouflage canvas ribbon fabric, fire retardant fabrics, fabric for load bearing and cushioning applications in parachutes straps and duffle bags, hot works fabrics, welding fabrics, parachute fabric, vehicle fabrics such as tire cord and interior fabrics, etc.

Yarn and Thread: sewing thread, embroidery thread, yarns for sonar cables

Sleep Systems: mattresses, mattress ticking and covers, mattress padding, sleeping bags, litter/cot fabric

Tents/ Tarpaulins: tent systems, tarpaulins, tent screening, fabrics for tent floor cushioning, portable structures, field tarp

Covers: equipment covers, protective covers

Load-Bearing Equipment: packs, bags (duffle bags, body bags), bandoliers, pouches, rucksacks, netting and netting systems, webbing, parachutes

Belts: v-belts, conveyor belts

Maritime Equipment: inflatable boats, life vests / personal flotation devices, flotation fabric, sonar cable

Geosynthetics: geotextiles, geomembranes, roofing membranes, sandbags

Medical: medical bandages

Markers: flags, banners, signs, panel markers

Flooring: carpet

II. Rationale for Including the Kissell Amendment in the American Recovery and Reinvestment Act of 2009 Was to Create Jobs

The express intent for enacting the American Recovery and Reinvestment Act of 2009 and its Kissell Amendment was to stimulate the U.S. economy by creating jobs and encouraging investment. This should be self-evident considering the fact that, as of this July, the United States suffered from its first 10-year actual decline in both industrial and manufacturing output since the 1929-1939 timeframe. U.S. textile mill, textile product mill, and apparel output has fared even worse, dropping by 55, 40, and 61 percent respectively.

Moreover, since 2001, the United States has run a cumulative trade deficit in excess of \$3.8 trillion in manufactured goods and a current account deficit in excess of \$5 trillion. Our foreign trading partners then stashed much of these surpluses in the U.S. financial system, helping to fuel the credit bubble that burst and crippled the U.S. economy by weighing it down with debt unprecedented in the history of the United States.

The trade deficits and loss of output are key reasons why total U.S. nonfarm, private sector, and manufacturing employment are lower as of August 2009 than they were in March 2000, July 1999, and June 1941, respectively, according to the U.S. Bureau of Labor Statistics. Since 2001, the United States has lost a staggering 5,343,000 manufacturing jobs, including 634,500 jobs textile and apparel manufacturing sectors.

Facts like these are why Congressman Kissell said,¹

“Mr. Chairman, the Berry Amendment has been in effect for over 60 years and has allowed the Department of Defense to purchase uniforms and other textile apparels as needed for our military to be made and manufactured here in the United States.

We know that textiles has brought forth the industrial revolution to the United States from its very beginnings, but not any industry has been hurt any more than textile has in the last few years in terms of lost employment.

Over 60,000 jobs have been lost throughout the Nation in the last year; over 8,000 of those jobs in my home State of North Carolina, over 44 factories have closed. We have thousands of Americans that are ready, willing and able to work, and we're being asked to consider a recovery and reinvestment program to put Americans to work.

This amendment would simply extend the Berry Act to be able to have Homeland Security to purchase uniforms for the TSA to be made in the United States. It would accomplish what we're looking for in the Recovery and Reinvestment Act, it would put Americans to work, and furthermore, it would keep Americans working.

We know that we have lost so many jobs in this area. We have the people that are ready, willing and able to work. I worked in textiles for 27 years. I watched the jobs leave and good people be left wondering where their meals are coming from and how they're going to take care of their families. This is an opportunity to put Americans to work and keep them at work. And what could be better than using our money, our taxpayers' money for that purpose and to put uniforms on the people that serve us?”

Speaker of the U.S. House of Representatives Nancy Pelosi echoed similar thoughts in her remarks in support of the stimulus by saying,

“After all of the debate, this legislation can be summed up in one word, “jobs” – new jobs for the 3.6 million Americans who were put out of work since the recession began in December 2007, new jobs and an economy transformed by this legislation's new investments in health, education, science, innovation, and in clean, efficient American energy, new jobs created through modernizing America's roads, bridges, transit systems, and waterways. It is the first such large-scale effort in half a century since the creation of the Interstate Highway System under President Eisenhower. The jobs that the American people care about most – their own – will be dramatically safer the day that President Obama signs this into law.”²

It is also why after signing the stimulus package into law, President Obama said,

“Now, what makes this recovery plan so important is not just that it will create or save 3.5 million jobs over the next two years, including 60,000-plus here in Colorado. It's that

¹ See Page H723 of the *Congressional Record* from January 28, 2009.

² Remarks by U.S. House Speaker Nancy Pelosi from the *Congressional Record*, page 1565, on February 13, 2009.

we're putting Americans to work doing the work that America needs done in critical areas that have been neglected for too long; work that will bring real and lasting change for generations to come.”³

In light of the job creation data will provide and the comments made by the Speaker, the President, and Congressman Kissell, it is deeply disconcerting that the interim rule written by DHS to fails to comport with legislative and executive intent by including loopholes that allow for imported goods and decreased domestic content that will destroy U.S. textile and apparel jobs and hinder investment.

III. The Interim Rule Fails to Implement the Kissell Amendment by Unnecessarily Defining and Improperly Regulating “Item Directly Related to National Security Interests”

Noting that the express purpose of passing the American Recovery and Reinvestment Act of 2009 and its Kissell Amendment was to create jobs, all signatories to this comment are agreed that, subject to the language of their respective statutes, the rule implementing the Kissell Amendment should mirror the rule that governs the Berry Amendment and cover as many textile and apparel products as possible. Such an approach would not only create the most jobs, it also would set as little new regulatory precedent as possible, simplifying implementation of the new interim rule.

Any rule allowing for unnecessary use of non-domestic manufactured textiles and apparel, and especially their component parts, will substantially undermine the job creating capability of the Kissell Amendment provisions in the stimulus. With respect to the textile mill and textile product mill sectors, an estimated 8,300 jobs are created for each \$1 billion in new output. Furthermore, each new job created by the federal government’s procurement of textile products supports production capacity that saves an estimated one additional job in the industry. Lastly, each manufacturing job created generates a minimum of 1.5 new jobs outside the manufacturing sector. Based on these assumptions, we estimate that $(8,300 + 8,300 + 12,450)$ 29,050 jobs would be created or saved for each \$1 billion (2,905 jobs for every \$100 million) in new spending on manufactured textile products.

As discussed by Congressman Kissell, Congressman David Price, Chairman of the DHS Subcommittee on Appropriations, and Congressman Bennie Thompson, Chairman of the Committee on Homeland Security, in the U.S. House of Representatives debate on the Kissell Amendment, the need to create jobs is a key reason why Congress wrote and clearly intended the Kissell Amendment to mirror the existing Berry Amendment that has covered DoD procurement of textiles and apparel since 1941. In particular, Chairman Thompson said (**bold** added for emphasis):⁴

³ Remarks by the President and Vice President at Signing of the American Recovery and Reinvestment Act, Denver Museum of Nature and Science in Denver, Colorado on February 17, 2009.

⁴ See Page H723 of the *Congressional Record* from January 28, 2009.

Mr. Chairman, first, I want to thank the Representative from North Carolina, Mr. Kissell for his amendment. The original Berry amendment covering procurement for the United States Military has ensured that U.S. troops wore military uniforms made from U.S. textiles and manufactured by U.S. factories since the beginning of World War II.

*As we know, things have changed dramatically since 1941. Since 2003, the Department of Homeland Security has also been working hard to provide our citizens with added security both at home and abroad. With over 100,000 uniformed employees, I believe that it is imperative that Berry amendment be extended **to include uniform and textile purchases** at the Department of Homeland Security and offer my overwhelming support for this amendment.*

Thus, the Kissell Amendment’s legislative language was drafted with the full knowledge that DHS purchases a wide array of textile and apparel products and that the 68 years worth of regulations, guidance, and precedents implementing the Berry Amendment are (or should be) well understood by contractors and government procurement officers. As such, we are deeply concerned with the interim rule unnecessarily plowing new ground with its confusing justification for the need to define “Item directly related to national security interests” in Subpart 3025.7001(e)⁵ and the inclusion of that term as an exception in Subpart 3025.7002-2(b).⁶ This language will greatly complicate the ability of contractors and government procurement officers to implement and comply with the new rule due to the uncertainty of the meaning of and the lack of precedent in administering the language at issue. It also may allow for foreign-made products to be purchased by DHS outside of congressional intent, undercutting the job-creation aspect of the stimulus.

In fact, in reading the background discussion proffered by DHS as justification for its Subpart 3025.7001(e) and Subpart 3025.7002-2(b) language, we are surprised and concerned that no mention is made of the DoD’s regulations in 48 CFR Part 225, Subpart 225.7002.2(m) and (n) that address this issue.

The regulations contained in 48 CFR Part 225, Subpart 225.7002.2(m) and (n)⁷ and its concomitant guidance and precedents already are a *de facto* solution to the “Item directly related to national security interests” issue.

⁵ This reads, “(e) ‘Item directly related to national security interests’ means an item intended for use in a Department of Homeland Security action protecting the nation from internal or external threats, including protecting the nation’s borders, transportation system, maritime domain or critical infrastructure, as determined by the contracting officer.”

⁶ This reads, “Acquisitions in the following categories are not subject to the restrictions in (HSAR) 48 CFR 3025.7002-1: ... (b) Acquisition of items not directly related to national security interests of the United States.”

⁷ These read, “(m) Acquisitions of fibers and yarns that are for use in synthetic fabric or coated synthetic fabric (but not the purchase of the synthetic or coated synthetic fabric itself), if –

- (1) The fabric is to be used as a component of an end product that is not a textile product. Examples of textile products, made in whole or in part of fabric, include –
 - (i) Draperies, floor coverings, furnishings, and bedding (Federal Supply Group 72, Household and Commercial Furnishings and Appliances);
 - (ii) Items made in whole or in part of fabric in Federal Supply Group 83, Textile/leather/furs/apparel/findings/tents/flags, or Federal Supply Group 84, Clothing, Individual Equipment and Insignia;

RECOMMENDATION: A simpler and more reasonable approach would be for DHS to eliminate Subpart 3025.7001(e) and to replace Subpart 3025.7002-2(b) by adopting the regulation contained in 48 CFR Part 225, Subpart 225.7002.2(m) and (n) and adhering to its accompanying guidance and precedents as clearly permitted by the language of the Kissell Amendment.

By taking this course of action, DHS procurement officers also would better be able to fulfill the training requirement contained in Title VI, Section 604(j) of the Recovery Act because they would be able to undergo the same training as has been done at DoD and they would have the ability to consult well-versed DoD procurement officers for advice should questions of coverage arise.

IV. The Interim Rule Contains Language that Identifies Mexico, Canada, and Chile Unnecessarily

Noting that the Office of the U.S. Trade Representative (USTR) is actively seeking to make technical corrections to the North American Free Trade Agreement (NAFTA) and the U.S.-Chile Free Trade Agreement with respect to the coverage of the government procurement provisions of those agreements to Transportation Security Administration (TSA), we object to the language of Subpart 3025.7002-3(a)(3)⁸ affecting TSA as drafted.

Specifically, we object to the inclusion of the following language,

“...except those from Mexico, Canada or Chile because TSA is listed as a covered governmental entity in the North American Free Trade Agreement (NAFTA) and the U.S.-Chile Free Trade Agreement...”

If those agreements are modified to where TSA procurement is not covered by those agreements, as USTR is actively seeking and as we support, then the regulation would need to be rewritten. That process could take months. Such a delay would allow for the use of foreign product for an unnecessary length of time, contradicting the express purpose of enacting the Kissell Amendment and the stimulus in case of a successful modification. That possibility is unacceptable and could easily be forestalled with proper drafting.

-
- (iii) Upholstered seats (whether for household, office, or other use); and
 - (iv) Parachutes (Federal Supply Class 1670); or

(2) The fibers and yarns are para-aramid fibers and yarns manufactured in a qualifying country.

(n) Acquisitions of chemical warfare protective clothing when the acquisition furthers an agreement with a qualifying country. (See 225.872 and the requirement in 205.301 for synopsis within 7 days after contract award when using this exception.)”

⁸ This reads, “(3) For solicitations, orders, exercising of an option and contracts issued by TSA in which any covered items will be procured with a value exceeding the simplified acquisition threshold, (HSAR) 48 CFR 3025.7002 applies to all covered items except those from Mexico, Canada or Chile because TSA is listed as a covered governmental entity in the North American Free Trade Agreement (NAFTA) and the U.S.-Chile Free Trade Agreement but TSA is excluded from all other trade agreements.”

RECOMMENDATION: To forestall the possibility of having to rewrite the rule in case of a successful modification, it would be better to write (a)(3) without mentioning Mexico, Canada, and Chile while still conveying the same meaning.

As an alternative, we suggest in **bold**,

“(3) For solicitations, orders, exercising of an option and contracts issued by TSA in which any covered items will be procured with a value exceeding the simplified acquisition threshold, (HSAR) 48 CFR 3025.7002 applies to all covered items except those from ~~Mexico, Canada or Chile because TSA is listed as a covered governmental entity in the North American Free Trade Agreement (NAFTA) and the U.S.-Chile Free Trade Agreement but TSA is excluded from all other trade agreements countries with whom the United States has a trade agreement where TSA is listed as covered governmental entity.~~”

If still applicable, Mexico, Canada, and Chile could then be listed in individual contract solicitations as countries with whom the United States has a trade agreement where TSA is listed as covered governmental entity and thus (HSAR) 48 CFR 3025.7002 will not apply.

V. The Interim Rule’s De Minimis Exception in Sec. 604 (d) Should Be Interpreted as a Post-Procurement Authority

As detailed below, the terms, construction, and context of Sec 604(d) support its interpretation as a “post-procurement authority” that gives the Secretary latitude to override Sec. 604’s fiber sourcing requirement when non-compliant fibers have been incorporated in an otherwise compliant, completed procurement.

A. The "Kissell Amendment" Text: (partial excerpt, H.R.1: *American Recovery and Reinvestment Act of 2009*: Title VI: Department of Homeland Security):

SEC. 604.

(a) REQUIREMENT- Except as provided in subsections (c) through (g), funds appropriated or otherwise available to the Department of Homeland Security may not be used for the procurement of an item described in subsection (b) if the item is not grown, reprocessed, reused, or produced in the United States.

(b) COVERED ITEMS- An item referred to in subsection (a) is any of the following, if the item is directly related to the national security interests of the United States:

(1) An article or item of—

(A) clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing (and the materials and components thereof);

(B) tents, tarpaulins, covers, textile belts, bags, protective equipment (including but not limited to body armor), sleep systems, load carrying equipment (including but not limited to fieldpacks), textile marine equipment, parachutes, or bandages;

(C) cotton and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric (including all textile fibers and yarns that are for use in such fabrics), canvas products, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles); or

(D) any item of individual equipment manufactured from or containing such fibers, yarns, fabrics, or materials.

(c) AVAILABILITY EXCEPTION- Subsection (a) does not apply to the extent that the Secretary of Homeland Security determines that satisfactory quality and sufficient quantity of any such article or item described in subsection (b)(1) grown, reprocessed, reused, or produced in the United States cannot be procured as and when needed at United States market prices. This section is not applicable to covered items that are, or include, materials determined to be non-available in accordance with Federal Acquisition Regulation 25.104 Nonavailable Articles.

*(d) DE MINIMIS EXCEPTION- Notwithstanding subsection (a), the Secretary of Homeland Security **may accept delivery** of an item covered by subsection (b) that contains **non-compliant fibers** if the total value of **non-compliant fibers** contained in the end item does not exceed 10 percent of the total purchase price of the end item.*

B. The Sec. 604 (d) De Minimis Exception: General Considerations

No committee reports, colloquies, or other materials exist on Congressional intent for the Sec. 604 (d) De Minimis Exception. Thus, the section's interpretation for regulatory implementation lies in its specific language and construction, taken in the context of the full enactment within which it exists.

C. Sec. 604 (c) Availability Exception: The Statute's "Pre-Procurement" Authority

Subsection (c) contains the statute's broad "pre-procurement" exceptions. The Secretary of Homeland Security is given authority to suspend the legislation's mandated U.S domestic sourcing criteria when supported by determinations on *satisfactory quality and sufficient availability . . . as and when needed at U.S. market prices*. These "pre-procurement" criteria for end items clearly apply to fiber used in their production.

D. Sec. 604 (d) De Minimis Exception: The Statute's "Post-Procurement" Authority

Subsection (d) contains the statute's authority for limited "post-procurement" exceptions to its mandate for use of U.S.-produced fiber.

The wording employed in subsection (d) specifies the authority provided as “post-procurement”. It states: “... **the Secretary of Homeland Security may accept delivery of an item...**” At delivery, the production phase in procurement of an item is complete and the authority provided in subsection (d) now activates.

Further to the validity of this interpretation, subsection 604 (d) subsequently twice refers to “non-compliant fibers”. These are look-backs to fiber-procurement compliance standards set for, but not met in, proffered deliveries. Procurement standards for the items in these deliveries, by definition under Section 604’s requirements, would have stipulated use of U.S.-produced fiber - - now displaced by fiber deemed “non-compliant”. Absent this interpretation, there is no basis to denote a delivered item’s fibers as “non-compliant”.

E. SUMMARY: The Kissell Amendment’s Section 604 (d) is a *post-procurement authority*.

It provides the Secretary of Homeland Security the option to accept delivery of an item produced with fiber out of compliance with the Act’s U.S. domestic procurement mandate, in instances where the non-compliant fiber in question does not exceed 10% of the value of the delivered product. As such, the signatories to these comments recommend that this interpretation be incorporated in the implementing regulations for Section 604 (d).

VI. Conclusion

Adopting the recommendations included in these comments will enable DHS to implement the Kissell Amendment fully and faithfully to create and save the most U.S. jobs possible. Thank you for your consideration. If you have any questions, please contact us.

CONTACTS:

American Manufacturing Trade Action Coalition (AMTAC)
Lloyd Wood
(202) 452-0866 or lwood@amtacdc.org

National Council of Textile Organizations (NCTO)
Mike Hubbard
(704) 215-4540 or mhubbard@ncto.org

National Textile Association (NTA)
David Trumbull
(617) 542-8220 or dtrumbull@nationaltextile.org

U.S. Industrial Fabrics Institute (USIFI)
Ruth Stephens
(651) 225-6920 or rastephens@ifai.com

American Fiber Manufacturers Association (AFMA)

Paul T. O'Day, President & Counsel
(703) 875 0432 or oday@afma.org

Leather Industries of America (LIA)
Laurence Lasoff
(202) 342-8497 or LLasoff@KelleyDrye.com

Narrow Fabrics Institute (NFI)
Ruth Stephens
(651) 225-6920 or rastephens@ifai.com

Domestic Sock Makers Coalition (DSMC)
Jim Schollaert
(703) 524-7197 or jim.schollaert@verizon.net

SEAMS (The National Association for the Sewn Products Industry)
Sarah Friedman
(803) 772-5861 or sarah@seams.org

American Sheep Industry Association (ASI)
Peter Orwick
(303) 771-3500 or porwick@sheepusa.org

Workers United
Mark Levinson
(917) 209-1767 or mark.levinson@workersunitedunion.org