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Focus

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FEATURE COMMENT: The FY 2023 National Defense Authorization Act's Impact On Federal Procurement Law—Part II

On Dec. 23, 2022, President Biden signed into law the James M. Inhofe National Defense Authorization Act (NDAA) for Fiscal Year 2023, P.L. 117-263. Because of the substantial volume of procurement law changes in the FY 2023 NDAA, this Feature Comment summarizes the more significant changes in two parts. Part I, which was published in the Jan. 18, 2023 issue of THE GOVERNMENT CONTRACTOR, 65 GC ¶ 7, addressed §§ 801–843 (plus § 525). Part II addresses §§ 846–884, plus sections in Titles I, III, IX, XII, XIV, XV and LIX.

Section 846, Report on Software Delivery Times—Not later than December 2023, the under secretary of defense for acquisition and sustainment, in consultation with the Department of Defense chief information and chief digital and artificial intelligence officers, must submit a report to the congressional defense committees that describes "covered software" delivered during the fiscal year "that is being developed using iterative development, including a description of the capabilities delivered for operational use." "Covered software" means software that is being developed that (A) was acquired using a "software acquisition pathway" established under FY 2020 NDAA § 800 ("Authority for Continuous Integration and Delivery of Software Applications and Upgrades to Embedded Systems"), see Schaengold, Prusock and Muenzfeld, Feature Comment, "The FY 2020 National Defense Authorization Act's Substantial Impact On Federal Procurement Law—Part I," 62 GC ¶ 6; "or (B) is a covered defense business system," as defined in 10 USCA § 2222(i). For covered software being developed using iterative development, the report must include "the frequency with which capabilities of such covered software were delivered," broken down by covered software for which capabilities were delivered in (i) less than three months; (ii) more than three months and less than six months; (iii) more than six months and less than nine months; (iv) more than nine months and less than twelve months. With respect to covered software using iterative development for which capabilities were not delivered in less than twelve months, the report must explain why such delivery did not occur. Additionally, for covered software that was not developed using iterative development, the report must explain why it was not used and describe the development method used.

For purposes of § 846, "iterative development" has the same meaning as "agile or iterative development" under FY 2018 NDAA § 891 (i.e., "acquisition pursuant to a method for delivering multiple, rapid, incremental capabilities to the user for operational use, evaluation, and feedback not exclusively linked to any single, proprietary method or process," and that involves "the incremental development and fielding of capabilities" and "continuous participation and collaboration by users, testers, and requirements authorities.").

A related provision, § 241, Costs Associated with Underperforming Software and Information Technology, requires DOD to submit annual reports to the congressional defense committees describing software delivered during the preceding year, to include whether software was developed iteratively

and the software delivery times. These reports are required to be submitted starting in December 2023 through Dec. 31, 2028.

Section 851, Modification to the National Technology and Industrial Base—This section adds New Zealand to the list of countries included in the national technology and industrial base (NTIB), which was previously limited to the U.S., Canada, United Kingdom, and Australia. See Schaengold, Schwartz, Prusock and Levin, Feature Comment, "The FY 2022 National Defense Authorization Act's Ramifications For Federal Procurement Law—Part II," 64 GC ¶ 22 (discussing FY 2022 NDAA §§ 854 & 1411).

Section 852, Modification to Miscellaneous Limitations on the Procurement of Non-U.S. Goods—Section 852 amends 10 USCA § 4864, which limits certain procurements (e.g., for buses, components for naval vessels and auxiliary ships, satellite components) to domestic or NTIB sources. See Schaengold, Schwartz, Prusock and Levin, Feature Comment, "The FY 2022 National Defense Authorization Act's Ramifications For Federal Procurement Law—Part II," 64 GC ¶ 22 (discussion of NTIB in FY 2022 NDAA §§ 854 & 1411); Schaengold, Schwartz, Prusock and Muenzfeld, Feature Comment, "The Significance Of The FY 2021 National Defense Authorization Act To Federal Procurement Law—Part II," 63 GC ¶ 24 (discussion of NTIB in FY 2021 NDAA §§ 846, 848, 849). Section 852 requires DOD to review the limitations on procuring specified items, and submit to the congressional defense committees a determination of whether such limitations should be continued, modified, or terminated. The determination should include the findings from the review and key justifications for the recommendation. The first review should be conducted by Nov. 1, 2024, and subsequently every five years. The review must include the criticality of the item reviewed to a military unit's mission accomplishment or other national security objectives, the extent to which such item is fielded in current programs of record, the number of such items to be procured by such current programs, and whether cost and pricing data for such item has been deemed fair and reasonable.

Section 855, Codification of Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region—Section 855 amends 10 USCA Chap. 363 and codifies much of FY 2022 NDAA § 848, see Schaengold, Schwartz, Prusock and Levin, Feature Comment, "The FY 2022 National Defense Authorization Act's Ramifications For Federal Procurement Law—Part II," 64 GC ¶ 22, making permanent the prohibition on DOD procuring certain items from the Xinjiang Uyghur Autonomous Region (XUAR). Specifically, "[n]one of the funds authorized to be appropriated by a [NDAA] or any other Act, or otherwise made available for any fiscal year for [DOD], may be obligated or expended to knowingly procure any products mined, produced, or manufactured wholly or in part by forced labor from XUAR or from an entity that has used labor from within or transferred from XUAR as part of a 'poverty alleviation' or 'pairing assistance' program." See CRS In Focus IF10281, *China Primer: Uyghurs* (Jan. 6, 2023).

FY 2022 NDAA § 848 required DOD to "issue rules to require a certification from offerors for [DOD] contracts … stating the offeror has made a good faith effort to determine that forced labor from XUAR … was not or will not be used in the performance of such contract." Section 855 removes the certification requirement, but retains the requirement that offerors must make a good faith effort to determine that forced labor from XUAR will not be used in contract performance. By June 2023, DOD shall issue a policy requiring offerors or awardees to "make a good faith effort to determine that forced labor from XUAR … will not be used in the performance of such contract."

A related provision, § 651, Prohibition of the Sale of Certain Goods from the Xinjiang Uyghur Autonomous Region in Commissaries and Exchanges, prohibits DOD from knowingly allowing commissaries or military exchanges to sell items that are mined, produced, or manufactured by forced labor from the XUAR region, or to sell items from entities that use certain types of labor (i.e., as part of a "poverty alleviation" or "pairing assistance" program) within the XUAR region.

Section 856, Codification of DOD Mentor-Protégé Program—This section makes permanent the defense mentor-protégé program, which was originally authorized as a pilot program in FY 1991 NDAA § 831 and has been extended multiple times. See Schaengold, Prusock and Muenzfeld, Feature Comment, "The FY 2020 National Defense Authorization Act's Substantial Impact On Federal Procurement Law—Part II," 62 GC ¶ 14 (discussing

FY 2020 NDAA § 872); Schaengold, Broitman and Prusock, Feature Comment, "The FY 2016 National Defense Authorization Act's Substantial Impact On Federal Procurement—Part II," 58 GC ¶ 28 (discussing FY 2016 NDAA § 861). The now permanent program will be codified at 10 USCA § 4092. The amendments to the DOD Mentor-Protégé program by § 856 do not apply to mentor-protégé agreements entered into before the FY 2023 NDAA's enactment.

Section 856 reduces the value of DOD contracts that a mentor firm must have during the fiscal year preceding the fiscal year in which the mentor firm enters into a mentor-protégé agreement from $100 million to $25 million. Section 856 also reinstates the three-year program participation term that was in place prior to the FY 2020 NDAA's enactment, which reduced it to two years. See Schaengold, Prusock and Muenzfeld, Feature Comment, "The FY 2020 National Defense Authorization Act's Substantial Impact On Federal Procurement Law—Part II," 62 GC ¶ 14 (discussing § 872).

Section 856 further requires that, no later than July 1, 2023, the DOD director of the Office of Small Business Programs "establish a pilot program under which a protege firm may receive up to 25 percent of the reimbursement for which the mentor firm of such protege firm is eligible under the Mentor-Protege Program for a covered activity." A "covered activity … is an engineering, software development, or manufacturing customization that the protege firm implements in order to ensure that a technology developed by the protege firm will be ready for integration with a" DOD program or system. The pilot program will terminate five years after it is established.

Section 857, Procurement Requirements Relating to Rare Earth Elements and Strategic and Critical Materials—Section 857 implements requirements relating to rare earth elements and strategic and critical materials. "Strategic and critical materials" are materials designated as such under § 3(a) of the Strategic and Critical Materials Stock Piling Act (50 USCA § 98b(a)) and include materials needed to supply U.S. military, industrial and essential civilian needs during a national emergency, and which are not found or produced in the U.S. in sufficient quantities to meet such need. See 50 USCA § 98h-3(1).

Section 857 directs the secretary of defense to require contractors to provide the origin of permanent magnets containing rare earths or strategic and critical minerals that are in systems delivered to DOD. Contractors must make a commercially reasonable inquiry and disclose where the materials were mined, refined into oxides, made into metals and alloys, and processed (i.e., sintered or bonded) and magnetized. If a contractor is unable to obtain that information, it has 180 days from delivery to DOD to institute a tracking system to make such disclosures "to the fullest extent possible," taking into account the possible refusal of foreign entities to provide information. This requirement comes into effect within 30 months of the NDAA's enactment and only after DOD certifies to the congressional armed services committees that collecting the data does not pose a national security risk.

The secretary may waive the requirements to disclose and institute a supply chain tracking system for not more than 180 days if the secretary certifies to the congressional armed services committees that the continued procurement of the system is necessary to meet the demands of a national emergency or that a contractor that cannot currently make the disclosure is "making significant efforts to comply" with the disclosure requirements. The waiver can be renewed with an updated certification to the armed services committees.

Section 857 expands the prohibition on procuring certain items from Communist Chinese military companies, found in FY 2006 NDAA § 1211, by adding rare earth elements, strategic and critical minerals or energetic materials for missiles and munitions to the prohibited items list. It also expands the covered entities to include those covered by Executive Order 13959 ("Addressing the Threat from Securities Investments That Finance Communist Chinese Military Companies"); FY 2021 NDAA § 1206H ("Reporting of Chinese Military Companies Operating in the US"); or other Chinese companies certified as covered entities by DOD. This provision will take effect 180 days after the secretary "certifies to the congressional defense committees that a sufficient number of commercially viable providers exist outside of" China "that collectively can provide [DOD] with satisfactory quality and sufficient quantity of such goods or services as and when needed at [U.S.] market prices."

Section 858, Analyses of Certain Activities for Action to Address Sourcing and Industrial Capacity—Section 858 requires the

under secretary for acquisition and sustainment to review items identified in the section and develop appropriate actions to ensure their secure domestic production and acquisition, consistent with the Defense Production Act. The items include solar components for satellites, satellite ground station service contracts, naval vessel shafts and propulsion system components, infrastructure or equipment for a passenger boarding bridge at military airports, U.S. flags, natural rubber for military applications, alternative proteins as sustainable and secure food sources, and carbon fiber. DOD is required to undertake an analysis for each item and develop recommendations, considering national security, economic, and treaty implications, as well as impacts on current and potential suppliers. By Jan. 15, 2024, DOD is required to submit to the congressional defense committees a summary of the findings, relevant recommendations, and descriptions of specific activities taken as a result of the analyses. The recommendations may include (1) restricting procurement to U.S. suppliers, suppliers in the NTIB, suppliers in other allied nations, or other suppliers; (2) increasing investment through use of research and development or procurement activities to expand production capacity, diversify sources of supply, or promote alternative approaches for addressing military requirements; or (3) prohibiting procurement from selected sources or nations.

Section 860, Risk Management for DOD Pharmaceutical Supply Chains—Section 860 implements reporting requirements for the under secretary for acquisition and sustainment and the Defense Health Agency (DHA) director. First, by December 2023, the under secretary is required to (1) develop and issue implementing guidance for risk management of DOD pharmaceutical supply chains; (2) identify, in conjunction with the Department of Health and Human Services, supply chain information gaps regarding DOD's reliance on foreign suppliers of drugs, including active pharmaceutical ingredients and final drug products; and (3) submit a report to the congressional armed services committees about the information available to assess DOD's reliance on high-risk foreign suppliers of drugs and vulnerabilities in the DOD drug supply chain. The report should also include any recommendations to address information gaps and risks related to DOD's reliance on foreign suppliers. Second, the DHA director, by one year after the actions taken by the under secretary, is required to develop and publish implementing guidance for risk management of the DOD pharmaceutical supply chain. The director should establish a working group to assess the risks to DOD's pharmaceutical supply chain, identify the pharmaceuticals most critical to beneficiary care at military treatment facilities, and establish policies for allocating DOD's scarce pharmaceutical resources if supply is disrupted.

Section 861, Strategy for Increasing Competitive Opportunities for Certain Critical Technologies—Section 861 requires DOD to submit by December 2023 to the congressional defense committees a "comprehensive strategy" to "(1) increase competitive opportunities available for appropriate United States companies to transition critical technologies into major weapon systems and other programs of record, and (2) enhance the integrity and diversity of the defense industrial base." "Appropriate United States Company" means a nontraditional defense contractor or "a prime contractor that has entered into a cooperative agreement with a nontraditional defense contractor … to pursue funding authorized by" 10 USCA §§ 4021–22 "in the development, testing, or prototyping of critical technologies." "Critical technology" means technology identified by the secretary as critical, including "(A) Biotechnology. (B) Quantum science technology. (C) Advanced materials. (D) Artificial intelligence and machine learning. (E) Microelectronics. (F) Space technology. (G) Advanced computing and software. (H) Hypersonics. (I) Integrated sensing and cybersecurity. (J) Autonomous systems. (K) Unmanned systems. (L) Advanced sensing systems. (M) Advanced communications systems."

The strategy must describe "methods to increase opportunities for appropriate United States companies to develop end items of critical technologies for major weapon systems, rapidly prototype such end items, and conduct activities that would support the transition of such end items into major weapon systems and programs of record."

Section 871, Codification of Small Business Administration Scorecard—This section codifies at 15 USCA § 644(y) the annual scorecard program for evaluating federal agency compliance with small business contracting goals. See www.sba.gov/document/support-small-business-procurement-scorecard-overview; www.sba.gov/agency-scorecards/.

Section 871 also requires additional information to be included on federal agency and Governmentwide scorecards with respect to prime contracts, including: the "number (expressed as a percentage) and total dollar amount of awards made to" women-owned small businesses, Historically Underutilized Business Zone small businesses, service-disabled veteran-owned small businesses, and 8(a) small businesses through sole-source contracts and competitions restricted to those categories of small businesses. The data for 8(a) small businesses must be "disaggregated by awards made to such concerns that are owned and controlled by individuals and awards made to such concerns that are owned and controlled by an entity."

Section 872, Modifications to the SBIR and STTR Programs—This section amends the SBIR and STTR Extension Act of 2022 (Extension Act), which President Biden signed into law on Sept. 30, 2022. Specifically, 15 USCA § 638 is amended in two places. First, as noted in Thomson Reuters Government Contracts Year in Review Conference Briefs Covering 2022, the Extension Act provided that each federal agency, which is "required to" have a Small Business Innovation Research (SBIR) or Small Business Technology Transfer (STTR) program, shall "require" each small business submitting a proposal "for a federally funded award to disclose," among other items, "whether the small business concern is wholly owned in [China] or another foreign country *of concern*." (Emphasis added.) Section 872 amends the above language by striking "of concern" (italicized above) from Subparagraph (D), which results in an assessment for that Subparagraph beyond "foreign country of concern"— defined as China, North Korea, Russia, Iran "or any other country determined to be a country of concern by the Secretary of State"—to include all "foreign countries."

Second, as also noted in the Thomson Reuters Government Contracts Year in Review Conference Briefs Covering 2022, pursuant to the Extension Act, each agency "required to" have an SBIR or STTR program "shall establish and implement a due diligence program *to assess security risks presented by small business concerns* ***seeking a federally funded award***." These due diligence programs must "assess": (a) "the cybersecurity practices, patent analysis, employee analysis, and *foreign ownership of a small business concern* ***seeking an award***, including the financial ties and obligations … of the small business concern and employees of the small business concern to a foreign country, foreign person, or foreign entity; and (b) "*awards* ***and proposals or applications*** … including through the use of open-source analysis and analytical tools, for the nondisclosures of information required under [15 USCA § 638(g)(13) concerning, e.g., various forms of foreign affiliation, including with China, Russia, North Korea and Iran]." (Emphasis added.) This statutory language requires a "due diligence program to assess security risks presented by small business concerns seeking" an award and involves the assessment of "awards and proposal or applications" by such small businesses.

Section 872 provides that "in carrying out" this "due diligence program" DOD "shall perform the assessments required" in the paragraph above: (A) "only with respect to small business concerns ***selected … as the presumptive recipient of an award***"; and (B) "prior to notifying the small business" that it has been selected for the award. (Emphasis added.) This limitation of the due diligence program to small business awardees or presumed awardees expires when the under secretary for research and engineering certifies to the" House and Senate Armed Services Committees "that an automated capability for performing the assessments required under the due diligence program" "with respect to all small business concerns seeking an award" "is operational."

Section 875, Demonstration of Commercial Due Diligence for Small Business Programs—Not later than Dec. 31, 2027, the secretary of defense must "establish a program to carry out a demonstration of commercial due diligence tools, techniques, and processes in order to support small businesses in identifying attempts by malicious foreign actors to gain undue access to, or foreign ownership, control, or influence over [(FOCI)]" a small business or any technology it is developing for DOD. The program must include (1) "identification of one or more entities to be responsible for the commercial due diligence tools, techniques, and processes" included in the demonstration and "a description of the interactions required between such entity, small businesses, and the government agencies that enforce such tools, techniques, and processes"; (2) "[a]n assessment of commercial due

diligence tools, techniques, and processes already in use by" DOD, the Army, Navy, and Air Force Offices of Small Business Programs; (3) "development of methods to analyze the commercial due diligence tools, techniques, and processes" to monitor and assess attempts by malicious foreign actors to gain undue access to, or FOCI over a small business or any technology it is developing for DOD, and "provide information on such attempts to applicable small businesses"; and (4) "development of training and resources for small businesses that can be shared directly with such businesses or through a procurement technical assistance program."

Not later than April 1, 2023, DOD must provide the congressional defense committees an interim briefing on the program and no later than March 1, 2028, DOD must submit to those committees a report on the program, including any identified attempts by malicious foreign actors, lessons learned, and recommendations for legislative actions.

Section 882, Security Clearance Bridge Pilot Program—This section requires the secretary of defense, in consultation with the director of national intelligence, to conduct a pilot program permitting the Defense Counterintelligence and Security Agency (DCSA) to sponsor personal security clearances of employees of "innovative technology companies" performing DOD contracts while the Government completes the adjudication of the companies' facility clearance applications. Section 882 defines "innovative technology company" as a nontraditional defense contractor that "provides goods or services related to" "(i) one or more of the 14 critical technology areas described in" the under secretary's Feb. 1, 2022 memorandum entitled "[Under secretary of defense for research and engineering] Technology Vision for an Era of Competition"; or "(ii) information technology, software, or hardware that is unavailable from any other entity that possesses a facility clearance." The pilot program is limited to 75 companies. Participants will be selected by the under secretary for research and engineering, in consultation with the under secretary for acquisition and sustainment and the cognizant service acquisition executive. If a participant is granted a facility clearance, DCSA will transfer the personal security clearances of its employees to the company within 30 days after the facility clearance is granted. If a participant is denied a facility clearance, DCSA will release (i.e., no longer sponsor) the personal security clearances of the participant's employees that are being held by DCSA. The pilot program terminates on Dec. 31, 2028.

Section 883, Existing Agreement Limits for Operation Warp Speed—Section 883 provides that the value of modifications to, or orders under, a contract or other agreement by DOD "on or after March 1, 2020, to address the COVID–19 pandemic through vaccines and other therapeutic measures" will not count towards "any limit established prior to March 1, 2020, on the total estimated amount of all projects to be issued under the contract or other agreement." The value of any such modification or order will still count towards meeting any guaranteed minimum value under the contract or agreement.

Section 884, Incorporation of Controlled Unclassified Information (CUI) Guidance into Program Classification Guides and Program Protection Plans—Section 884 requires the secretary of defense, acting through the under secretaries for intelligence and security, and for research and engineering, to ensure that all program classification guides for classified programs and program protection plans for unclassified programs include guidance for marking CUI. See www.dcsa.mil/mc/isd/cui/. The Joint Explanatory Statement (JES) to the FY 2023 NDAA acknowledges that DOD's "uneven application of CUI markings is particularly problematic for industry." In particular, Congress is concerned that ineffective training and oversight has led to "over-classification of entire documents and a lack of clear portion markings within documents." As a result, when programs reach their "next regularly scheduled update," guidance requiring the use of document portion markings and providing a process to ensure proper and consistent use of such markings should be added to the program classification guides and protection plans. All updates must be completed before Jan. 1, 2029. The above-referenced under secretaries must establish (1) a process to monitor progress that includes tracking all program classification guides and protection plans and the dates when updates are completed, (2) updated training for Government and contractor personnel to ensure consistent application of document portion marking guidance, and (3) a process to ensure that any identified gaps or lessons learned are incorporated into guidance and training instructions.

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Certain non-Title VIII FY 2023 NDAA provisions important to procurement law include the following:

Section 153, Digital Transformation Commercial Software Acquisition—This section authorizes the Air Force to contract for commercial digital engineering and software tools and requires the Air Force to include in the FY 2024 budget request a program element for procuring and managing commercial engineering software tools. The Air Force is also required to conduct a review of commercial digital engineering and software tools and identify any commercial products that have "the potential to expedite the progress of digital engineering initiatives across the weapons system enterprise." The section further requires the Air Force to provide a report to the congressional defense committees on digital engineering and software tools by March 1, 2023.

Section 161, Increasing Air Force and Navy Use of Used Commercial Dual-Use Parts in Certain Aircraft and Engines—Section 161 requires both the Air Force and the Navy to create a process, within 180 days of the FY 2023 NDAA's enactment (i.e., by June 2023), to use remanufactured or used commercial dual-use parts for certain aircraft and engines. When acquiring such parts, the military departments are required to use full and open competition among suppliers providing Federal Aviation Administration approved parts.

Section 351, Resources for Meeting Materiel Readiness Metrics for Major Defense Acquisition Programs—This section amends 10 USCA § 118 to require DOD's director of cost assessment and performance evaluation to provide the congressional defense committees, within five days of the secretary of defense's submission of materials in support of the president's annual budget request, an estimate of operation and maintenance budget requirements (at the subactivity group level) necessary to meet materiel readiness objectives across the "Future Years Defense Program." See Congressional Research Service In Focus IF10831, *Defense Primer: Future Years Defense Program (FYDP)* (Dec. 23, 2022), at 1. This requirement is to be phased in over the next two years, and fully implemented for all major weapon systems within five days of DOD providing Congress supporting materials for the FY 2026 budget request.

Section 1244, Temporary Authorizations Related to Ukraine and Other Matters—In this section, Congress gives DOD specific authorities that can be used for contracts, subcontracts, transactions, or modifications to provide support to Ukraine, support to allies providing support to Ukraine, or to build or replenish stocks. According to the JES, DOD "would benefit from temporary acquisition flexibilities to increase [DOD's] stocks of critical munitions, provide material and related services to allies and partners that have supported Ukraine, and provide material and services to Ukraine." These authorities include using the special emergency procurement authority in 41 USCA § 1903, waiving the provisions in 10 USCA § 3372(a) & (c) related to undefinitized contractual actions, and exempting (as appropriate) certified cost and pricing data requirements in 10 USCA § 3702. These authorities terminate Sept. 30, 2024.

Section 1244 also provides multiyear procurement authority for specified munitions and as additions to existing contracts. According to the JES,

> providing multi-year procurement authority for certain munitions programs is essential to increase [DOD's] stocks of such munitions, improve warfighting readiness, provide the defense industrial base with predictable production opportunities and firm contractual commitments, ensure consistent funding across the [DOD's] Future Years Defense Program, increase and expand defense industrial capacity, and coordinate the timing and funding for capital expenditures with defense contractors.

The JES requires the agency head (i.e., the secretary of defense or of a military department) to notify the congressional defense committees in writing within 30 days of using the procurement authorities in this section.

Notably, these authorities expire at the end of FY 2024 and do not seek to address the fundamental challenges to the industrial base or the acquisition process that hamper the ability to provide support or replenish stocks without extraordinary authorities. Nor are comprehensive or far-reaching efforts to address these challenges found elsewhere in the NDAA.

Section 1412, Modification to Authorities Under the Strategic and Critical Materials Stockpiling Act—Section 1412 amends the Strategic and Critical Materials Stockpiling Act,

see 50 USCA § 98d, by expanding the authority of the national defense stockpile manager to make purchases for the stockpile (including, in certain circumstances, where the "Stockpile Manager determines there is a shortfall of such materials in the stockpile"), and extending the obligation authority period from two years to "until expended." Section 1412 also amends 50 USCA § 98b by only requiring the president to notify Congress when planning to acquire materials *to increase* stockpile quantities (previously, notification was required for any quantity change) and shortening the required waiting period between notification to Congress and when the acquisition may occur (from 45 to 30 days).

Section 1414, Authority to Acquire Material for the National Defense Stockpile—This section authorizes the national defense stockpile manager to spend up to $1,003,500,000 of authorized appropriations through FY 2032 to procure strategic or critical materials that are identified in § 1414 or are identified in the most recent strategic and critical materials report submitted to Congress pursuant to 50 USCA § 98h-5. This section identifies the following as "strategic and critical materials required to meet the [U.S.] defense, industrial, and essential civilian needs": neodymium oxide, praseodymium oxide, and neodymium iron boron magnet black; titanium; energetic materials; isomolded graphite; grain-oriented electric steel; tire cord steel; and cadmium zinc telluride. The authority applies to purchases during FYs 2023 to 2032.

Section 5949, Prohibition on Certain Semiconductor Products and Services—Section 5949 prohibits federal agencies (i.e., Government-wide) from (i) acquiring or contracting for electronic parts, products, or services that include covered semiconductor products or services; or (ii) contracting with an entity to procure or obtain electronic parts or products that use any electronic parts or products that include covered semiconductor products or services. The second prohibition only applies to critical systems. Covered semiconductors are from Semiconductor Manufacturing International Corp. (SMIC); ChangXin Memory Technologies (CXMT); Yangtze Memory Technologies Corp. (YMTC); or other entities as determined by the secretaries of defense or commerce. Given how this section was written, it is not clear what some of the clauses or terms mean, leaving it up to the regulatory process to clarify.

This provision takes effect five years from enactment (i.e., in Dec. 2027), permits waivers to be granted under certain circumstances, and grandfathers in systems containing covered semiconductors on the day before the prohibition effective date. The Federal Acquisition Regulation is required to be revised within three years, and must include certain flow-down requirements and a certification of non-use by contractors. Contractors can rely on the certification of compliance from subcontractors and developers of semiconductor designs based on U.S. technology or software. There is a safe harbor stating that when a contractor makes the required notifications in good faith and in accordance with the applicable requirements, and where it is later discovered that prohibited items are contained in the items delivered to the Government, the contractor will not be subject to civil liability or a determination of not being a responsible contractor based solely on violation of this prohibition if the contractor has taken "comprehensive and documentable efforts to remove covered semiconductors from the Federal supply."

The JES notes that "in serving federal supply chains, federal contract recipients and their suppliers (including domestic and foreign subsidiaries, affiliates, distributors, and intermediaries) should not utilize companies connected to foreign countries of concern that threaten national security," such as SMIC, YMTC, and CXMT, "or any other company identified under this section (including any affiliate, subsidiary, successor, distributor, or intermediary thereof)." According to the JES, when contemplating issuing a waiver under this section "critical national security interests of the United States may include protecting the Nation's economic security and its technological competitiveness relative to strategic competitors."

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The FY 2023 NDAA included the following cybersecurity-related provisions of interest to the procurement community:

Section 901, Increase in Authorized Number of Assistant and Deputy Assistant Secretaries of Defense—This section establishes the office of the assistant secretary of defense for cyber policy.

Section 1553, Plan for Commercial Cloud Test and Evaluation—This section requires DOD, in consultation with industry, to implement a plan

for testing and evaluating the cybersecurity of the clouds of commercial cloud service companies providing DOD storage or computing of classified data (including penetration testing). The plan is required to include that new contracts with cloud providers grant DOD the right to conduct independent threat-realistic assessments of the commercial cloud infrastructure, to include "the storage, compute, and enabling elements" (including the control plane), and supporting systems used to fulfill the mission set forth in the contract. The plan is required to be implemented and submitted to the armed services committees within 180 days of the FY 2023 NDAA's enactment (i.e., by June 2023).

The section authorizes DOD to include in the policy and regulations a waiver of the testing requirements specifically listed in § 1553 if such waiver is approved by the DOD chief information officer and the operational test and evaluation director.

Section 5921, FedRAMP Authorization Act—This section codifies the Federal Risk and Authorization Management Program (FedRAMP) that is run by the General Services Administration. According to the JES, FedRAMP "provides a standardized, reusable approach to security assessment and authorization for cloud computing products and services that process unclassified information used by agencies." Codification of the program makes mandatory many of the goals the FedRAMP program sought to achieve, particularly after a 2019 Government Accountability Office report found that many agencies were not obtaining cloud services from FedRAMP authorized entities. This section makes several changes to the FedRAMP program, including establishing a board whose members must have certain technical qualifications; iterating a "presumption of adequacy" for cloud services that have achieved FedRAMP authorization; and requiring that third parties who advise on FedRAMP requirements or assessments disclose FOCI. The section establishes a Federal Security Cloud Advisory Committee to oversee agency adoption, use, authorization, monitoring, acquisition, and security of cloud computing products and services. This section also requires GSA, starting in December 2023, to submit to the appropriate congressional committees an annual report on FedRAMP.

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The FY 2024 NDAA—Based on current trends and how the provisions in the FY 2023 NDAA are written, the debate concerning the FY 2024 NDAA is likely to be dominated by the same general themes applicable to the FY 2023 NDAA, i.e., China, cybersecurity (focused on China), streamlining acquisition processes (to speed up procurement timelines and access to private industry technology), and the industrial base (with a focus on China and supply chains). Another potential theme may be International Traffic in Arms Regulations and Foreign Military Sales reform, born out of frustrations with the timelines to deliver weapon systems to allies in support of Ukraine and Taiwan. It is unlikely that the FY 2024 NDAA will contain many provisions seeking to use the procurement process to promote general public or socioeconomic policies.

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