

FAR clause has been implemented to create a single standard for all agencies subject to 10 U.S.C. 983 to comply with the statutory requirements.

DHS is not aware of any significant impact on the environment, or any change in environmental effect that will result from this final rule. DHS finds promulgation of the rule clearly fits within categorical exclusion A3, established in the Department's NEPA implementing procedures as removing and reserving HSAR clause 3052.209–71 and subpart 3009.4 is strictly administrative in nature.

This final rule is a standalone rule and is not part of any larger action. This final rule will not result in any major Federal action that will significantly affect the quality of the human environment. Furthermore, DHS has determined that no extraordinary circumstances exist that will create the potential for significant environmental effects. Therefore, this final rule is categorically excluded from further NEPA review and documentation.

#### List of Subjects in 48 CFR Parts 3009 and 3052

Government procurement.

For the reasons set forth in the preamble, DHS amends 48 CFR parts 3009 and 3052 as follows:

#### PART 3009—CONTRACTOR QUALIFICATIONS

- 1. The authority citation for part 3009 continues to read as follows:

**Authority:** 5 U.S.C. 301–302, 41 U.S.C. 1303, 41 U.S.C. 1707, 41 U.S.C. 1702, and 48 CFR subpart 1.3.

#### 3009.4 [Removed and Reserved]

- 2. Remove and reserve subpart 3009.4.

#### PART 3052—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 3. The authority citation for part 3052 continues to read as follows:

**Authority:** 5 U.S.C. 301–302, 41 U.S.C. 1707, 41 U.S.C. 1702, 41 U.S.C. 1303(a)(2), 48 CFR part 1, subpart 1.3, and DHS Delegation Number 0702.

#### 3052.209–71 [Removed and Reserved]

- 4. Remove and reserve section 3052.209–71.

**Paul Courtney,**

*Chief Procurement Officer, Department of Homeland Security.*

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## DEPARTMENT OF HOMELAND SECURITY

### 48 CFR Parts 3025 and 3052

[Docket No. DHS–2024–0022]

RIN 1601–AB13

#### Homeland Security Acquisition Regulation, Restrictions on Foreign Acquisition Update (HSAR Case 2024–002)

**AGENCY:** Office of the Chief Procurement Officer, Department of Homeland Security (DHS).

**ACTION:** Final rule.

**SUMMARY:** DHS is issuing a final rule to amend the Homeland Security Acquisition Regulation (HSAR) provisions that relate to the Kissell Amendment, a section of the American Recovery and Reinvestment Act of 2009, that deals with the acquisition of certain clothing, canvas or textile products and natural and synthetic fabrics. These changes are intended to reduce confusion and provide clarity to the requirements under the Kissell Amendment.

**DATES:** This final rule is effective December 26, 2024.

**FOR FURTHER INFORMATION CONTACT:** Nancy Harvey, Department of Homeland Security, Office of the Chief Procurement Officer, Acquisition Policy and Legislation, at (202) 282–8000 or email at [HSAR@hq.dhs.gov](mailto:HSAR@hq.dhs.gov). Include HSAR Case 2024–002 in the subject line.

#### SUPPLEMENTARY INFORMATION:

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#### I. Background

In a Notice of Proposed Rulemaking (NPRM), published in the **Federal Register** on July 24, 2024, DHS proposed to amend the Homeland Security Acquisition Regulation (HSAR) provisions that relate to the Kissell Amendment, a section of the American Recovery and Reinvestment Act of 2009 (Recovery Act), that deals with the acquisition of certain clothing, canvas or textile products and natural and synthetic fabrics.<sup>1</sup>

<sup>1</sup> See 89 FR 59877, Homeland Security Acquisition Regulation, Restrictions on Foreign

As explained in the NPRM, the Recovery Act was enacted in 2009.<sup>2</sup> Section 604 of the Recovery Act is also known as the Kissell Amendment.<sup>3</sup> The Kissell Amendment requires, with limited exceptions, that funds appropriated or otherwise available to DHS may not be used for the procurement of certain textiles, clothing and footwear, if that item is directly related to the national security interests of the United States, unless the item is grown, reprocessed, reused, or produced in the United States.<sup>4</sup> One of the exceptions is a De Minimis Exception, which allows the Secretary of Homeland Security to accept delivery of the aforementioned textiles, clothing and footwear “that contain 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.”<sup>5</sup>

The Kissell Amendment further requires DHS to apply it in a manner consistent with United States obligations under international agreements.<sup>6</sup> As DHS has explained in prior notices, this includes free trade agreements and the World Trade Organization Agreement on Government Procurement.<sup>7</sup> These requirements apply with respect to contracts entered into by DHS on or after August 16, 2009.<sup>8</sup>

As discussed in the NPRM, in 2009, DHS published an interim rule (“2009 Interim Rule”) amending the Homeland Security Acquisition Regulation (HSAR) at 48 CFR part 3025, Foreign Acquisitions, and part 3052, Solicitation Provisions and Contract Clauses, incorporating the Kissell Amendment requirements.<sup>9</sup> In 2010, DHS published a final rule (“2010 Final Rule”) adopting the 2009 Interim Rule as final without change.<sup>10</sup> The 2009 Interim Rule made amendments to the HSAR “to add solicitation provisions, contract clauses and related policy statements implementing these requirements and

Acquisition Update (HSAR Case 2024–002) (Jul. 24, 2024).

<sup>2</sup> See Public Law 111–5, 123 Stat. 115,165–166 (Feb. 17, 2009).

<sup>3</sup> Section 604 of the Recovery Act is codified at 6 U.S.C. 453b.

<sup>4</sup> See 6 U.S.C. 453b.

<sup>5</sup> See 6 U.S.C. 453b(d).

<sup>6</sup> See 6 U.S.C. 453b(k).

<sup>7</sup> See, e.g., 75 FR 32676, (June 9, 2010).

<sup>8</sup> See 6 U.S.C. 453b(l).

<sup>9</sup> See *Revision of Department of Homeland Security Acquisition Regulation; Restrictions on Foreign Acquisition* (HSAR Case 2009–004), 74 FR 41346 (Aug. 17, 2009).

<sup>10</sup> See *Revision of Department of Homeland Security Acquisition Regulation; Restrictions on Foreign Acquisition* (HSAR Case 2009–004), 75 FR 32676 (June 9, 2010).

exceptions for certain DHS contracts, option exercises and orders.”<sup>11</sup>

The regulations also provided an exception for “incidental amounts of cotton, other natural fibers, or wool incorporated in an end product, for which the estimated value of the cotton, other natural fibers, or wool is not more than 10 percent of the total price of the end product.”<sup>12</sup>

On March 5, 2013, DHS issued a deviation regarding the applicability of the Kissell Amendment (Deviation 13–01).<sup>13</sup> Under Deviation 13–01, DHS deviates from the language of 48 CFR 3025.7000 that restricted application of certain Kissell provisions to those actions with funds appropriated or otherwise provided on or before February 17, 2009.<sup>14</sup>

In addition, on March 14, 2013, DHS issued an amendment to Deviation 13–01 (“Deviation Amendment 1”).<sup>15</sup> Under Deviation Amendment 1, the De Minimis Exception described above was to be read as applying to “incidental amounts of 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 . . . .”<sup>16</sup> Deviation 13–01 and Deviation Amendment 1 were both effective immediately at the time of their publication in 2013 and are still in effect.<sup>17</sup>

<sup>11</sup> See 74 FR 41346 (Aug. 17, 2009).

<sup>12</sup> See 48 CFR 3052.225–70(d)(2).

<sup>13</sup> See HSAR class deviation, 13–01, *Applicability of the “Kissell Amendment” to Department of Homeland Security Acquisitions* (Mar. 5, 2013) (“Deviation 13–01”), available at: [https://www.dhs.gov/sites/default/files/publications/cpo-HSARclassdeviation13-01\\_0\\_0\\_0\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/cpo-HSARclassdeviation13-01_0_0_0_0.pdf) (last accessed May 31, 2024).

<sup>14</sup> “Effective immediately, the scope of the subpart 3025.70 shall apply as follows . . . . This subpart contains restrictions on the acquisition of certain foreign textile products imposed by the American Recovery and Reinvestment Act of 2009 on contracts, exercising of an option and orders entered into on or after August 16, 2009.”

See Deviation 13–01, available at: [https://www.dhs.gov/sites/default/files/publications/cpo-HSARclassdeviation13-01\\_0\\_0\\_0\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/cpo-HSARclassdeviation13-01_0_0_0_0.pdf) (last accessed May 31, 2024).

<sup>15</sup> See HSAR class deviation, 13–01, *Amendment 1, Homeland Security Acquisition Regulation 3052.225–70, Requirement for Use of Certain Domestic Commodities*, (March 14, 2013) (“Deviation Amendment 1”), available at: [https://www.dhs.gov/sites/default/files/publications/cpo-HSARclassdeviation13-01%E2%80%93amendment1\\_0\\_0\\_0\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/cpo-HSARclassdeviation13-01%E2%80%93amendment1_0_0_0_0.pdf) (last accessed May 31, 2024).

<sup>16</sup> The clause would not apply to “incidental amounts of cotton, other natural fibers, or wool incorporated in an end product, for which the estimated value of the cotton, other natural fibers, or wool is not more than 10 percent of the total price of the end product.”

<sup>17</sup> See Deviation 13–01, available at: [https://www.dhs.gov/sites/default/files/publications/cpo-HSARclassdeviation13-01\\_0\\_0\\_0\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/cpo-HSARclassdeviation13-01_0_0_0_0.pdf) (last accessed Apr. 23, 2024); see also Deviation Amendment available at: <https://www.dhs.gov/>

## II. Discussion of Comments and the Final Rule

Interested parties were given until September 23, 2024, to comment on the NPRM. DHS received two public comments, neither of which were substantive. DHS received one comment that was outside the scope of the rule, and another comment that supported the rule. This final rule amends the HSAR to better clarify how DHS complies with the Kissell Amendment including codifying certain requirements from Deviation 13–01 and Deviation Amendment 1.

Consistent with Deviation 13–01 this final rule, defines the term “end item” to mean “supplies delivered under a line item of a contract.” See 48 CFR 3025.7001(c). As “end item” is the term used in the Kissell Amendment, DHS believes that defining and using the statutory term “end item” in the HSAR provisions applicable to the Kissell Amendment will also provide clarity.

This final rule also amends 48 CFR 3025.7000 to explain that this provision applies to the Kissell Amendment, the subject of this subpart; as well as the description of the type of funds to which the Kissell Amendment applies consistent with current practice and Deviation 13–01. As explained in the NPRM, DHS issued Deviation 13–01 on March 5, 2013, and since then the Kissell Amendment has applied to “contracts, exercising of an option and orders entered into on or after August 16, 2009.”<sup>18</sup>

Consistent with Deviation 13–01 and current practice this final rule clarifies that the Kissell restrictions apply to all contracts, options and orders entered into on or after August 16, 2009. See 48 CFR 3025.7002–1. In addition, this final rule updates the provisions impacting the De Minimis Exception consistent with Deviation Amendment 1 to use the statutory term ‘end item’ where appropriate. See, e.g., 48 CFR 3025.7002–2 and 3052.225–70(d)(2).

Further, this final rule includes the Kissell amendment under the applicable legal authorities. It also fixes a typographical error to correctly reference 48 CFR 3025.7002–3 when mentioning the regulatory provision for specific application of trade agreements. See 48 CFR 3025.7002–2(h).

Accordingly, DHS adopts the NPRM as final, amending 48 CFR part 3025,

[sites/default/files/publications/cpo-HSARclassdeviation13-01%E2%80%93amendment1\\_0\\_0\\_0\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/cpo-HSARclassdeviation13-01%E2%80%93amendment1_0_0_0_0.pdf) (last accessed May 31, 2024).

<sup>18</sup> See Deviation 13–01, available at: [https://www.dhs.gov/sites/default/files/publications/cpo-HSARclassdeviation13-01\\_0\\_0\\_0\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/cpo-HSARclassdeviation13-01_0_0_0_0.pdf) (last accessed May 31, 2024).

Foreign Acquisitions, and 48 CFR part 3052, Solicitation Provisions and Contract Clauses.

## III. Regulatory Analyses

### A. Executive Orders 12866, 13563, and 14094

Executive Order 12866 (Regulatory Planning and Review), as amended by Executive Order 14094 (Modernizing Regulatory Review), and Executive Order 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866, as amended by Executive Order 14094. Accordingly, OMB has not reviewed this regulatory action.

### Need for the Rule

This final rule codifies the requirements as set forth in the Deviation 13–01 and Deviation Amendment 1, to provide clarity and consistency, and align the HSAR with existing DHS practice. DHS is not newly implementing the Kissell Amendment, but is, as described above, amending the existing regulation to clarify the type of funds to which the Kissell Amendment, including the De Minimis Exception, applies.

### Benefits and Costs of the Final Rule

The benefits and costs of a regulation are generally measured against a no-action baseline, which is a reasonable forecast of the way the world would look absent the regulatory action being assessed.<sup>19</sup> This final rule will not result in new costs since DHS has implemented the changes through Deviation 13–01 and Deviation Amendment 1, both issued in 2013. The changes to the HSAR will promote clarity and fuller understanding of the Kissell Amendment regulatory requirements by agency contracting officers as well as potential DHS vendors. This additional clarity will be a benefit to industry as improved

<sup>19</sup> See OMB Circular A–4, p. 11 (Nov. 9, 2023) (accessible at <https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf>).

contracting officer understanding of the regulatory requirements helps ensure that DHS applies standards similarly

across contracting actions, making it easier for industry to comply with DHS requirements. A summary of the costs

and benefits of the rule is shown below in Exhibit 1.

EXHIBIT 1—SUMMARY OF FINAL RULE CHANGES AND ECONOMIC IMPACTS OF THE FINAL RULE

Final CFR provision	Description of the change	Costs	Benefits
48 CFR 3025.7000 Scope of Subpart; and CFR 3025.7002–1 Restrictions.	Corrects language to clarify that Kissell Amendment applies to all contracts, options and orders entered into on or after August 16, 2009, and removes appropriation date from the scope criteria.	No new costs since DHS has already implemented the changes via Deviation 13–01 issued in March 2013.	Provides clarification on applicability and ensures consistency between the HSAR and existing DHS practice.
48 CFR 3025.7001 Definitions; 48 CFR 3025.7002–1 Restrictions; 48 CFR 3025.7002–2 Exceptions; 48 CFR 3052.225–70 Requirement for Use of Certain Domestic Commodities.	Changes terminology from “end product” to “end item” to consistently reflect Kissell Amendment applicability of 10% De Minimis Exception.	No new costs since DHS has already incorporated the “end item” definition through Deviation Amendment 1 issued in March 2013.	Provides clarity on terminology and ensures consistency between the HSAR and existing DHS practice.
48 CFR 3025.7002–2 Exceptions .....	Editorial correction to CFR reference relating to application of trade agreements.	No cost .....	Provides clarification.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, (Mar. 29, 1996), requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, or governmental jurisdictions with populations of less than 50,000. This final rule will provide clarity and consistency between the HSAR and existing DHS practice as set forth in Deviation 13–01 and Deviation Amendment 1; and does not directly mandate any actions or requirements that will result in burdens for small entities. Therefore, DHS certifies this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*

C. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501–35210).

D. National Environmental Policy Act

Section 102 of the National Environmental Policy Act of 1969 (NEPA), Public Law 91–190, 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 *et seq.*), as amended, requires Federal agencies to evaluate the impacts of major Federal actions that may significantly affect the human

environment, consider alternatives actions provide public notice and opportunity to comment, and properly document its analysis. DHS and its agency components analyzed the actions in this rule to determine whether NEPA applies to them and, if so, what level of documentation and analysis is required.

DHS Directive 023–01, Rev. 01 and DHS Instruction Manual 023–01–001–01, Rev. 01 (Instruction Manual) establish the policies and procedures DHS and its component agencies use to comply with NEPA and the Council on Environmental Quality regulations for implementing NEPA codified in 40 CFR parts 1500–1508. The CEQ regulations allow Federal agencies to establish, in their implementing procedures, with CEQ review and concurrence, categories of actions (“categorical exclusions”) that experience has shown do not, individually or in the aggregate, have a significant effect on the human environment and, therefore, do not require preparation of an environmental assessment or environmental impact statement. 40 CFR 1501.4, 1507.3(e)(2)(ii). Appendix A of the Instruction Manual lists the DHS categorical exclusions.

Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) the entire action clearly fits within one or more categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect.

This final rule amends the HSAR to better clarify how DHS complies with the Kissell Amendment. This includes codifying requirements as set forth in Deviation 13–01 and Deviation

Amendment 1 that are currently in effect.

DHS is not aware of any significant impact on the environment, or any change in environmental effect that will result from this final rule. DHS finds promulgation of the rule clearly fits within categorical exclusion A3, established in the Department’s NEPA implementing procedures.

This final rule is a standalone rule and is not part of any larger action, and will not result in any major Federal action that will significantly affect the quality of the human environment. Furthermore, DHS has determined that no extraordinary circumstances exist that will create the potential for significant environmental effects. Therefore, this final rule is categorically excluded from further NEPA review and documentation.

List of Subjects in 48 CFR Parts 3025 and 3052

Government procurement.

Accordingly, for the reasons set forth in the preamble, DHS amends 48 CFR parts 3025 and 3052 as follows:

PART 3025—FOREIGN ACQUISITION

■ 1. The authority citation for part 3025 is revised to read as follows:

**Authority:** 5 U.S.C. 301–302, 6 U.S.C. 453b, 41 U.S.C. 1303, 41 U.S.C. 1707, 41 U.S.C. 1702, and 48 CFR subpart 1.3.

■ 2. Revise section 3025.7000 to read as follows:

**3025.7000 Scope of subpart.**

This subpart implements section 604 of the American Recovery and Reinvestment Act of 2009, Public Law 111–5.

■ 3. In section 3025.7001, revise paragraphs (a) through (d) to read as follows:

**3025.7001 Definitions.**

\* \* \* \* \*

(a) "Commercial," as applied to an item described in (HSAR) 48 CFR 3025.7002-1, means an item of supply, whether an end item or component, that meets the definition of "commercial item" set forth in (FAR) 48 CFR 2.101.

(b) "Component" means any item supplied to the Government as part of an end item or of another component.

(c) "End item" means supplies delivered under a line item of a contract.

(d) "Non-commercial," as applied to an item described in (HSAR) 48 CFR 3025.7002-1, means an item of supply, whether an end item or component, that does not meet the definition of "commercial item" set forth in (FAR) 48 CFR 2.101.

\* \* \* \* \*

■ 4. In section 3025.7002-1, revise the introductory text to read as follows:

**3025.7002-1 Restrictions.**

The following restrictions implement section 604 of the American Recovery and Reinvestment Act of 2009, Public Law 111-5, and they apply to all contracts, options and orders entered into on or after August 16, 2009. Except as provided in (HSAR) 48 CFR 3025.7002-2, do not acquire, either as end items or components, any item listed in paragraph (a) or (b) of this section, if the item is directly related to the national security interests of the United States and the item has not been grown, reprocessed, reused, or produced in the United States:

\* \* \* \* \*

■ 5. In section 3025.7002-2, revise paragraphs (d), (g), and (h) to read as follows:

**3025.7002-2 Exceptions.**

\* \* \* \* \*

(d) Acquisitions of items listed in (FAR) 48 CFR 25.104.

\* \* \* \* \*

(g) The acquisition of covered items in 3052.7002-1(a) and (b) containing non-compliant fibers when the total value of the non-compliant fibers contained in the end item does not exceed 10 percent of the total purchase price of the end item.

(h) Acquisitions of items otherwise covered by (HSAR) 48 CFR 3025.7002-1(a) and (b) for which restricting a procurement of the items to those that have been grown, reprocessed, reused, or produced in the United States would be inconsistent with United States obligations under international agreements. Acquisitions of products that are eligible products per (FAR) 48 CFR subpart 25.4 are not covered by these restrictions; see (HSAR) 48 CFR 3025.7002-3 for specific application of trade agreements.

**PART 3052—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 6. The authority citation for part 3052 is revised to read as follows:

**Authority:** 5 U.S.C. 301-302, 6 U.S.C. 453b, 41 U.S.C. 1707, 41 U.S.C. 1702, 41 U.S.C. 1303(a)(2), 48 CFR part 1, subpart 1.3, and DHS Delegation Number 0702.

■ 7. In section 3052.225-70, revise the clause date and paragraphs (a)(1) through (4), (b) introductory text, (c) introductory text, and (d)(2) to read as follows:

**3052.225-70 Requirement for Use of Certain Domestic Commodities.**

\* \* \* \* \*

Requirement for Use of Certain Domestic Commodities NOV 2024

(a) \* \* \*

(1) "Commercial," as applied to an item described in paragraph(b) of this

clause, means an item of supply, whether an end item or component, that meets the definition of "commercial item" set forth in (FAR) 48 CFR 2.101.

(2) "Component" means any item supplied to the Government as part of an end item or of another component.

(3) "End item" means supplies delivered under a line item of this contract.

(4) "Non-commercial," as applied to an item described in paragraph (b) or (c) of this clause, means an item of supply, whether an end item or component, that does not meet the definition of "commercial item" set forth in (FAR) 48 CFR 2.101.

\* \* \* \* \*

(b) The Contractor shall deliver under this contract only such of the following commercial or non-commercial items, either as end items or components, that have been grown, reprocessed, reused, or produced in the United States:

\* \* \* \* \*

(c) The Contractor shall deliver under this contract only such of the following non-commercial items, either as end items or components, that have been grown, reprocessed, reused, or produced in the United States:

\* \* \* \* \*

(d) \* \* \*

(2) To the covered items in paragraphs (b) and (c) of this clause containing non-compliant fibers when the total value of the non-compliant fibers contained in the end item does not exceed 10 percent of the total purchase price of the end item; or

\* \* \* \* \*

**Paul Courtney,**

*Chief Procurement Officer, U.S. Department of Homeland Security.*

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