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¶ 11 FEATURE COMMENT: The Significance Of The Fiscal Year 2025 National Defense Authorization Act To Federal Procurement Law—Part I

On Dec. 23, 2024, nearly three months after the Oct. 1, 2024 start of Fiscal Year 2025, President Biden signed into law the "Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025" (FY 2025 NDAA), P.L. 118-159, becoming the 64th consecutive fiscal year that a NDAA has been enacted. Unfortunately, signing the NDAA in December is not unusual, with seven of the last nine NDAAs becoming law in December and the FY 2021 NDAA becoming law even later—on Jan. 1, 2021. In the last 49 fiscal years, the NDAA has been enacted on average 44 days after the fiscal year began, and the FY 2025 NDAA (enacted 84 days after the beginning of FY 2025) increased the average delay.

The NDAA is primarily a policy bill and does not provide budget authority for the Department of Defense to spend, but it does authorize the appropriation of budget authority. The amounts authorized by the NDAA are not binding on the appropriations process but can influence appropriations and serve as "a reliable indicator of congressional sentiment on funding for particular items." Congressional Research Service Report R46714 (March 28, 2021), *FY2021 National Defense Authorization Act: Context & Selected Issues for Congress*. The FY 2025 NDAA adhered to the Biden administration's budget request, rejecting the Senate Armed Services Committee's (SASC) effort (through S. 4638) that "would have authorized approximately $25.1 billion more than [the president's] requested" amount of $883.67 billion for national security. The SASC's effort to increase defense spending, however, has gained momentum, including as a result of the recent elections and the use of reconciliation to adjust appropriations.

For the FY 2025 NDAA, the House passed its version of the NDAA, but the Senate was unable to pass the bill that was reported out favorably by the SASC. As a result, there was no formal conference, and the committees held an "informal conference," with the basis of negotiations being the House-passed bill, the Senate bill as reported out of the SASC and filed Senate amendments agreed to by the SASC's Chair and Ranking Member. This departure from regular procedures has increased in recent years; over the last four years, only the FY 2024 NDAA followed the process of both the House and Senate passing their respective versions of the bill and the holding of a conference (albeit truncated) to reconcile the two bills.

The FY 2025 NDAA's procurement-related reforms and changes are primarily located (as usual) in the Act's "Title VIII—Acquisition Policy, Acquisition Management, and Related Matters," see CRS Insight IN12225 (Aug. 17, 2023), *FY2024 NDAA: Department of Defense Acquisition Policy*, at 1, which includes 72 provisions addressing procurement matters. This is an increase over the past four NDAAs—the FY 2024, 2023, 2022, and 2021 NDAAs contained 47, 55, 57, and 63 Title VIII provisions, respectively—but not an unusually high number. For example, the 2020, 2019 and 2018 NDAAs contained, respectively, 78, 71 and 73 Title VIII provisions. The impact and importance of a NDAA on federal procurement law, however, should not be measured simply on the total number of procurement provisions. Moreover, certain provisions in other titles of the FY 2025 NDAA are also very important to procurement law. See CRS Insight IN12225 (Aug. 17, 2023), *FY2024 NDAA: Department of Defense Acquisition Policy*, at 1 ("Congress may incorporate provisions related to the defense acquisition process or individual acquisition programs in multiple titles in an NDAA.").

Some of the FY 2025 NDAA's provisions will not become effective until the Federal Acquisition Regulation or Defense FAR Supplement (and possibly other (e.g., Small Business Administration) regulations) are amended or new provisions are promulgated, which can sometimes take two to four years or more. Certain other provisions include delayed effective dates.

The incoming Trump Administration has stated that it intends to dramatically slash the number of federal regulations, see, e.g., E. Musk & V. Ramaswamy, "The DOGE Plan to Reform Government," The Wall Street Journal (Nov. 20, 2024) ("the use of executive orders to roll back regulations that wrongly bypassed Congress is legitimate and necessary to comply with the Supreme Court's recent mandates"), which could potentially delay or effectively eliminate the implementation of certain NDAA implementing regulations (at least under the incoming Trump Administration). It also could potentially lead to the Trump Administration's issuance of executive orders to attempt to make certain favored regulations, rules, or laws effective immediately (or in very short time periods), while "repealing" or nullifying others, without compliance with notice and comment periods or other traditional administrative rulemaking requirements. See, e.g., 41 USCA § 1707; FAR subpt. 1.5; FAR 1.301(b). For example, during the first Trump Administration, on Sept. 22, 2020, the president issued Executive Order 13950, "Combating Race and Sex Stereotyping," which, among other actions, prohibited federal contractors and subcontractors from providing certain workplace diversity, equity and inclusion training and programs. This EO was "*effective immediately*, except that the requirements of section 4 ["Requirements for Government Contractors"] of this order *shall apply to [federal] contracts entered into 60 days after the date of this order*," which meant that federal contractors were required to comply in 60 days, whether or not regulations had been issued. See 85 Fed. Reg. 60683 (emphasis added). Notably, the EO did not require or reference standard FAR Council rulemaking, which did not occur, to implement it or receive public comment.

On the other hand, the Supreme Court's overruling of *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), arguably could make it harder for Trump Administration agencies to advance substantially different interpretations of the same statutory language, particularly if a previous administration's existing regulatory interpretations track the statute. Because agency leadership ordinarily changes with turnover in the party holding the presidency, *Chevron* created a situation where successive administrations from different parties (and occasionally from the same party) sometimes advanced significantly different constructions of the same statute, which created uncertainty, i.e., "regulatory whiplash," for regulated parties. See *Loper Bright Enters. v. Raimondo,* 603 U.S. 369, 411 (2024) ("But statutory ambiguity … is not a reliable indicator of actual delegation of discretionary authority to agencies. *Chevron* thus allows agencies to change course even when Congress has given them no power to do so. By its sheer breadth, *Chevron* fosters unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty."). Under *Loper*, the courts, rather than administrative agencies, have the ultimate authority for statutory interpretation, poten-

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tially limiting the possibility of changing statutory interpretations. However, it will likely take a long time to resolve these issues because litigation will be required with inevitable delays, including appeals and the possibility of varying interpretations in different district and circuit courts.

Major themes of the FY 2025 NDAA are China, the Defense Industrial Base, supply chains, readiness, and technology (including advanced manufacturing, cybersecurity, and artificial intelligence (AI)). It also takes steps to streamline the acquisition process (including commercial buying) and rationalize the location and structure of the acquisition statutes in Title 10 of the U.S. Code. These themes are in various procurement-related provisions and are a continuation of themes in recent NDAAs, which are driven in part by the bipartisan and bicameral focus on China. This focus is about more than security. It is about decoupling, and it is driving policy from industrial base and supply chain to cybersecurity and software acquisition.

Industrial base and supply chain are among the most prominent themes, with provisions focused on expanding sources of production (§§ 857, 865 & 882), strengthening investments in the industrial base (§ 905), contested logistics and supply chains (§§ 162, 218, 356, 821, 841, 849 & 883), and prohibiting purchases from and/or certain interactions with entities in China, Russia, North Korea, and/or Iran (§§ 162, 164, 839, 851, 853, 1078, 1082, 1346 & 1709).

Within the industrial base focused sections, this year's NDAA slightly strengthened "Buy-American" or "Buy Allies" policies (§§ 845, 846 & 848) and strengthened stockpiles (§§ 1411 & 1412). A number of provisions focused on certified cost and pricing data or commercial acquisition processes (§§ 161, 814, 815, 834, 863 & 864). Cybersecurity (§§ 1501, 1502, 1522 & 1612) and AI (§§ 237, 1087 & 1533) are also areas of focus, but some of the more aggressive provisions were dropped from the final bill.

In his signing statement, President Biden took issue with several provisions in the FY 2025 NDAA that he believes raise "concerns," including "constitutional" concerns. See www.whitehouse.gov/briefing-room/statements-releases/2024/12/23/statement-from-president-joe-biden-on-h-r-5009-servicemember-quality-of-life-improvement-and-national-defense-authorization-act-for-fiscal-year-2025/. None of these provisions, which concern (among other issues) limitations on the transfer of Guantánamo Bay detainees, possible disclosure of classified and other highly confidential information (for which the Biden Administration "presume[s]" preventive measures were incorporated into the NDAA), and possible interference with the exercise of the president's "constitutional authority to articulate the positions of the United States in international negotiations or fora," is likely to have a significant impact on procurement law or policy. Notably, the president signed the NDAA into law even though his "Administration strongly opposes … section 708 of the Act," which as passed will prevent the military health system (i.e., TRICARE) "from covering 'medical interventions for the treatment of gender dysphoria that could result in sterilization' for beneficiaries under 18 years of age." CRS Insight IN12401 (Jan. 10, 2025), *FY2025 NDAA: TRICARE Coverage of Gender-Affirming Care*, at 3.

Because of the substantial volume of procurement law changes in the FY 2025 NDAA, this Feature Comment summarizes the more significant changes in two parts. Part I addresses §§ 803–853, below. Part II, which will be published on Jan. 29, 2025, addresses §§ 854–888, plus sections in Titles I, II, III, IX, XIII, XIV, XV, XVI, XVII and LII. For an outstanding online review of the FY 2025 NDAA, see Christopher Yukins, "National Defense Authorization Act for Fiscal Year 2025—Procurement Summary," *http://publicprocurementinternational.com/ndaa-fy2025-summary/*.

We look to the Joint Explanatory Statement (JES), which accompanies the NDAA as "legislative history," to help "explain[] the various elements of the [House and Senate] conferees' agreement" that led to the enacted FY 2025 NDAA. CRS In Focus IF10516, *Defense Primer: Navigating the NDAA* (Dec. 2021), at 2; CRS Rept. 98-382, *Conference Reports and Joint Explanatory Statements* (June 11, 2015), at 1, 2. However, unlike in most years (except for the FY 2022 and 2023

NDAAs), "the House and Senate did not establish a conference committee to resolve differences between the two [i.e., House and Senate] versions of the bill. Instead, [House Armed Services Committee] and SASC leaders negotiated a bicameral agreement based on the two versions." CRS Insight IN12405 (Jan. 8, 2025), *FY2025 NDAA: Status of Legislative Activity*, at 2. Nevertheless, FY 2025 NDAA § 5 provides that "[t]he joint explanatory statement regarding this [NDAA] … shall have the same effect with respect to the implementation of this [NDAA] as if it were a joint explanatory statement of a committee of conference."

Section 803, Treatment of Unilateral Definitization of a Contract as a Final Decision—Section 803 amends 10 USCA § 3372(b) to provide that a unilateral price definitization by a contracting officer is a final decision under the Contract Disputes Act that can be appealed to the Court of Federal Claims or the Armed Services Board of Contract Appeals. This section effectively overrules the Federal Circuit's decision to the contrary in *Lockheed Martin Aeronautics Co. v. Sec'y of the Air Force*, 66 F.4th 1329 (Fed. Cir. 2023); 65 GC ¶ 121. Notably, this amendment does not apply to civilian (i.e., non-DOD) procurements.

Section 804, Middle Tier of Acquisition for Rapid Prototyping & Rapid Fielding—This section codifies and revises the expedited and streamlined "middle tier" of acquisition for programs or projects intended to be completed within two to five years, which was established by FY 2016 NDAA § 804. See Schaengold, Broitman and Prusock, Feature Comment, "The FY 2016 National Defense Authorization Act's Substantial Impact On Federal Procurement–Part I," 58 GC ¶ 20. The "middle tier" includes two acquisition pathways: (1) "rapid prototyping," which uses "innovative technologies to rapidly develop fieldable prototypes to demonstrate new capabilities and meet emerging military needs"; and (2) "rapid fielding," which uses "proven technologies to field production quantities of new or upgraded systems with minimal development required." The objective of acquisition programs under the rapid prototyping pathway is "to field a prototype that can be demonstrated in an operational environment and provide for a residual operational capability within five years of the development of an approved requirement." For acquisitions under the rapid fielding pathway, the objective is "to begin production within six months and complete fielding within five years of the development of an approved requirement." Section 804 provides that a program manager for "middle tier" acquisitions "may seek an expedited waiver from any regulatory requirement, or in the case of a statutory requirement, a waiver from Congress, that the program manager determines adds cost, schedule, or performance delays with little or no value to the management of such program or project."

Section 814, Modifications to Commercial Product & Commercial Service Determinations—10 USCA § 3456 provides that a contract for a product or service acquired using FAR pt. 12 commercial acquisition procedures serves as a prior commercial product or service determination with respect to such product or service. Section 814 amends this provision to provide that a subcontract for a product or service acquired under FAR pt. 12 also serves as a commercial product or service determination. It also amends this section to provide that a prior acquisition of "a product without a part number or a product with a prior part number that has the same functionality as the product had with the prior part number" under FAR pt. 12 serves as prior commercial product or service determination. Section 814 further provides that a product or service can be deemed to have a prior commercial product or service determination, even if the product or service was subject to minor modifications. However, section 814 amends 10 USCA § 3456 to provide that a contract or subcontract issued under FAR pt. 12 will *not* be considered a prior commercial product or service determination if the prior determination was not issued or approved by a DOD contracting officer.

Section 815, Application of Recent Price History to Cost or Pricing Data Requirements—Section 815 amends 10 USCA § 3702 ("Required Cost or Pricing Data and Certification"), which requires that "[a]n offeror for a subcontract (at any tier) of a contract" must "submit cost or pricing data before the award of the subcontract if the prime contractor and each higher-tier subcontractor have been required to make available cost or pricing data [under the Truthful Cost or

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Pricing Data Act] and the price of the subcontract is expected to exceed $2,000,000." Section 815 creates an exception to this requirement for nontraditional defense contractors by permitting them to submit prices paid for the goods and services they would provide under the subcontract if "the prices to be submitted are prices that were paid for the same goods and services" and "the price of such subcontract is not expected to exceed $5,000,000." The "[s]ubmission of prices paid … shall be deemed to be the submission of cost or pricing data … if a [DOD] contracting officer … determines that the prices submitted … are fair and reasonable based on supported cost or pricing data within the last 12 months." The exception to the requirement to submit cost or pricing data will provide some flexibility for nontraditional defense contractors, but its value is relatively limited because (i) the exception only applies to relatively small dollar value subcontracts; (ii) to the extent acquisitions from nontraditional defense contractors are for commercial products and services, they are already exempt from providing cost or pricing data; and (iii) it overlaps with the FY 2016 NDAA § 873 pilot program, which was extended to 2029 by FY 2025 NDAA § 863 and is discussed in Part II of this article.

Section 816, Modifications to Authority to Carry Out Certain Prototype Projects Using Other Transaction Authority—This section amends 10 USCA § 4022 to change the approval authority for use of other transaction authority for certain prototype projects. For prototype projects with an expected cost of between $100 million and $500 million, the approval authority is changed from the agency's senior procurement executive to the head of the contracting activity. For prototype projects with an expected cost in excess of $500 million, the approval authority is changed from the under secretary of defense for research and engineering or the under secretary for acquisition and sustainment to the agency's "senior procurement executive … or, for the Defense Advanced Research Projects Agency, the Defense Innovation Unit, or the Missile Defense Agency," the agency director. This approval authority cannot be delegated.

Section 817, Clarification of Other Transaction Authority for Follow on Production—10 USCA § 4022 provides that other transaction agreements for prototype projects "may provide for the award of a follow-on production contract or transaction to the participants in the transaction." Section 817 defines "follow-on production contract or transaction" as "a contract or transaction to produce, sustain, or otherwise implement the results of a successfully completed prototype project for continued or expanded use by" DOD. It also clarifies that "[a] follow-on production award may be provided for in a transaction entered into under this section for a prototype project, awarded with respect to such a transaction as one or more separate awards, or a combination thereof."

Section 818, Clarification of Other Transaction Authority for Facility Repair—10 USCA § 4022(i) authorizes the establishment of a pilot program for carrying out "prototype projects that are directly relevant to enhancing the ability of [DOD] to prototype the design, development, or demonstration of new construction techniques or technologies to improve military installations or facilities[.]" The authorization for the pilot program provides that (i) "not more than two prototype projects may begin to be carried out per fiscal year under such pilot program"; and (ii) "the aggregate value of all transactions entered into under such pilot program may not exceed $300,000,000." Section 818 clarifies that these limitations do not apply to "projects carried out for the purpose of repairing a facility." It also extends the authority for the pilot program to September 2030.

Section 821, Inclusion of Japan & South Korea in Contested Logistics Demonstration & Prototyping Program—Section 821 adds Japan and South Korea to the Contested Logistics Demonstration & Prototyping Program. The secretary of defense (secretary) was directed to establish this program by FY 2024 NDAA § 842 "to identify, develop, demonstrate, and field capabilities for product support in order to reduce or mitigate the risks associated with operations in a contested logistics environment." See Prusock, Schwartz, Ross, and Schaengold, Feature Comment, "The Significance Of The FY 2024 NDAA To Federal Procurement Law—Part II," 66 GC ¶ 13. The program requirements included assessment of effective approaches to meet the product support requirements of

the U.S. and covered nations (Australia, Canada, New Zealand, and the UK). Section 821 adds Japan and South Korea to the list of covered nations.

Section 824, Modification and Extension of Temporary Authority to Modify Certain Contracts and Options Based on the Impacts of Inflation—FY 2023 NDAA § 822 amended 50 USCA § 1431 (which is part of P.L. 85-804, see FAR subpt. 50.1, "Extraordinary Contractual Actions") to provide that the secretary, "acting pursuant to a Presidential authorization": (1) "may make an amendment or modification to an eligible [i.e., DOD] contract when, due solely to economic inflation, the cost to a prime contractor of performing such eligible contract is greater than the price of such eligible contract," and (2) "may not request consideration from such prime contractor for such amendment or modification." Section 822 provides for similar "economic inflation" relief for DOD subcontractors.

FY 2024 § 824 further amended 50 USCA § 1431 to extend this authority for an additional year, i.e., to Dec. 31, 2024. In addition, FY 2023 NDAA § 822 states that "[o]nly amounts specifically provided by an appropriations Act for" these purposes can be used to fund such economic inflation adjustments, amendments, or modifications. FY 2024 § 824 added that "[i]f any such amounts are so specifically provided, the Secretary may use them for such purposes." See Prusock, Schwartz, Ross and Schaengold, Feature Comment: "The FY 2023 National Defense Authorization Act's Impact On Federal Procurement Law—Part I," 65 GC ¶ 7. FY 2025 § 824 again amends 50 USCA § 1431 to extend this authority for an additional year, i.e., to Dec. 31, 2025.

Section 834, Performance Incentives Related to Commercial Product & Service Determinations—Section 834 provides that agency heads, to the maximum extent practicable, shall "establish criteria in performance evaluations for appropriate personnel to reward risk-informed decisions that maximize the acquisition of commercial products, commercial services, or non-developmental items other than commercial products." The JES provides that this provision clarifies that DOD officials should "adhere to the commercial item preference, where possible."

Section 837, Modifications to Contractor Employee Protections from Reprisal for Disclosure of Certain Information—This section amends the whistleblower protections in 10 USCA § 4701, which provide that "an employee of a contractor, subcontractor, grantee, or subgrantee or personal services contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing" to certain persons and entities information that the employee reasonably believes is evidence of (i) gross mismanagement of a DOD or NASA contract or grant, (ii) gross waste of NASA or DOD funds, (iii) an abuse of authority related to a DOD or NASA contract or grant, (iv) a violation of law, rule, or regulation related to a DOD or NASA contract or grant, or (v) a substantial and specific danger to public health or safety. Individuals who believe they have been subjected to a prohibited reprisal may submit complaints to the NASA or DOD Office of Inspector General (OIG) (as applicable). Unless the OIG determines that the complaint is frivolous, fails to allege a violation, or has already been addressed, the OIG must investigate the complaint and submit a report of its findings to the complainant, the entity alleged to be responsible for the prohibited reprisal, and the agency head.

Section 837 enhances these protections for whistleblowers by ensuring that whistleblowers are informed of the disposition of their complaint. Specifically, it requires that, no later than 30 days after receiving the OIG's report on the investigation, the agency head must notify the complainant and the OIG in writing of either the actions ordered to address the reprisal or the decision to deny relief. If the agency head changes the actions ordered or decision to deny relief after making this notification, the agency head must provide written notification to the complainant and the OIG within 30 days after the change.

Section 839, Employment Transparency Regarding Individuals Who Perform Work in, for, or Are Subject to the Laws or Control of People's Republic of China—Section 839 amends FY 2022 NDAA § 855, which provides that DOD "shall require each covered entity to disclose … if the entity employs one or more individuals who will perform work in the People's Republic of China [PRC] on" certain DOD

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contracts or subcontracts. See Schaengold, Schwartz, Prusock, and Levin, Feature Comment, "The FY 2022 National Defense Authorization Act's Substantial Impact On Federal Procurement—Part II," 64 GC ¶ 22 (discussion of § 855). Section 839 amends this provision to require disclosure to DOD if the entity employs one or more individuals who will perform work in, "for, or are subject to the laws or control of" the PRC. Section 839 also amends the definition of a "covered contract" to cover "any [DOD] contract or subcontract for, or including, any information and communications technology, including contracts for commercial products or services."

A covered entity must "disclose" if it "employs any individuals who will perform work in, for, or are subject to the laws or control of" the PRC on a covered contract. The disclosure must identify the number of individuals performing such work, provide a description of the physical presence in the PRC where work will be performed, and state "whether an agency or instrumentality of the [PRC] or any other covered entity has requested access to data or otherwise acquired data from the covered entity required to make a disclosure" pursuant to PRC law. If a covered entity is performing a covered contract for services dealing with commercial or noncommercial computer software and must make a disclosure, that disclosure must "describe the process for disclosing a cybersecurity vulnerability, if such covered entity is also required to disclose" such vulnerability to the PRC "Ministry of Industry and Information Technology or any other [PRC] agency or instrumentality" and "provide any information related to how a United States affiliate is notified of a vulnerability" required to be disclosed to a PRC instrumentality.

A "covered entity" is "any corporation, company, limited liability company, limited partnership, business trust, business association, or other similar entity, including any subsidiary thereof, performing work on a covered contract in, for, or subject to the laws or control of the [PRC], including by leasing or owning real property used in the performance of the covered contract in the [PRC]."

DOD is required to amend the DFARS not later than June 2025 to require an individual or entity performing work on a covered contract in the PRC to "notify the covered entity within 48 hours of such individual or entity reporting any software vulnerability related to such covered contract to the [PRC] Ministry of Industry and Information Technology or any other [PRC] agency or instrumentality." The covered entity will be required to "retain and furnish to [DOD] information regarding any cybersecurity vulnerability reported to" any PRC instrumentality or agency.

Section 845, Amendment to Requirement to Buy Strategic Materials Critical to National Security from American Sources—This section amends 10 USCA § 4863, which prohibits DOD from acquiring certain specialty metals or end items containing certain specialty metals not melted or produced in the U.S. There is an exception to the prohibition for agreements with foreign governments where the acquisition is necessary to comply with: (1) offset agreements, or (2) agreements with foreign governments in which both governments agree to remove barriers to purchases of supplies, and where the agreement with the foreign government complies, where applicable, with the requirements of the Arms Export Control Act and 10 USCA § 2457. Section 845 modifies this provision to clarify that the exemption applies where the acquisition is necessary "in furtherance of agreements with qualifying foreign governments[.]" It also adds a new definition for "qualifying foreign government" which means "the government of a country with which the [U.S.] has … a reciprocal defense procurement agreement or memorandum of understanding[.]"

Section 848, Domestic Nonavailability Determinations List—Not later than June 2025, this section requires the under secretary for acquisition and sustainment (under secretary) to "develop and maintain a list of all domestic nonavailability determinations," which refers to the availability exception provided under the Berry Amendment for determinations by the secretary of defense or of a military department that "satisfactory quality and sufficient quantity" of any article or item "cannot be procured as and when needed at [U.S.] market prices." After the under secretary establishes the required list, DOD has 30 days to submit it to Congress and develop a plan for sharing the list with

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industry partners. Each year, the under secretary must "submit to Congress a list of all domestic nonavailability determinations made during the" prior year.

Section 849, Supply Chain Illumination Incentives—Not later than April 1, 2026, this section requires the secretary to "develop and implement policies, procedures, and tools to incentivize each [DOD] contractor … to assess and monitor the entire supply chain of goods and services provided to [DOD] by such contractor to identify potential vulnerabilities and noncompliance risks." By Sept. 30, 2025, the secretary "shall provide" to the congressional armed services committees "a briefing on the development and implementation of" such "policies, procedures, and tools."

Section 850, Report & Updated Guidance on Continued Risk Management for DOD Pharmaceutical Supply Chains—This section follows up on FY 2023 NDAA § 860, which required the under secretary and the director of the Defense Health Agency (DHA) to develop and issue implementing guidance for DOD pharmaceutical supply chain risk management; identify supply chain information gaps regarding DOD's reliance on foreign drug suppliers; and submit a report to the congressional armed services committees identifying DOD's reliance on high-risk foreign suppliers of drugs and vulnerabilities in DOD's pharmaceutical supply chain. See Prusock, Schwartz, Ross, and Schaengold, Feature Comment, "The FY 2023 National Defense Authorization Act's Impact On Federal Procurement Law—Part II," 65 GC ¶ 12 (discussion of § 860). Based on this report, which DOD published in November 2023, see www.warren.senate.gov/imo/media/doc/FY23%20NDAA%20sec%20860%20Risk%20management%20for%20DoD%20Pharmceuticals1.pdf, the DHA director was required to develop and publish implementing guidance for risk management of the DOD pharmaceutical supply chain.

Section 850 now requires the under secretary to submit a report to the congressional armed services committees by December 2026 on "existing information streams within the Federal Government, if any, for excipients and key starting materials for final drug products that may be used to assess the reliance by [DOD] on high-risk foreign suppliers" and "active pharmaceutical ingredients, final drug products, and respective excipients and key starting materials … that are manufactured in a high-risk foreign country." The report must identify any limitations on the secretary's ability to obtain and analyze such information; to monitor the temperature of active pharmaceutical ingredients, final drug products, and respective excipients and key starting materials throughout DOD's supply chain; and to use data analytics to monitor vulnerabilities in DOD's pharmaceutical supply chain.

Section 851, Prohibition on Contracting with Covered Entities that Contract with Lobbyists for Chinese Military Companies—This section adds 10 USCA § 4663, which prohibits DOD from entering into "a contract with an entity," or its parent or a subsidiary, that "is a party to a contract with a covered lobbyist." The term "covered lobbyist" means "an entity that engages in lobbying activities for any entity determined to be a Chinese military company" identified by DOD pursuant to FY 2021 NDAA § 2060H. The term "lobbying activities" means "lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others." The prohibition, which takes effect on June 30, 2026, may be waived by the secretary upon notification to Congress. The JES directs the Government Accountability Office "to submit a report to the congressional defense committees, not later than [December 2025], on the national security risks posed by consulting firms who simultaneously contract with [DOD] and the Chinese government or its proxies or affiliates."

Section 853, Prohibition on Procurement of Covered Semiconductor Products & Services from Companies Providing Them to Huawei—No later than Sept. 2025, this section prohibits DOD from entering into or renewing "a contract for the procurement of any covered semiconductor products and services for [DOD] with any entity that knowingly provides covered semiconductor products and services to Huawei." The term "covered semiconductor products and services" means "semiconductors; equipment for manufacturing semiconductors; and tools for design-

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ing semiconductors." The term "Huawei" includes a subsidiary, owner, beneficial owner, affiliate, or successor of Huawei Technologies Company, as well as "any entity that is directly or indirectly controlled by" that company. By the prohibition's effective date, the secretary must "develop and implement a process requiring each entity seeking to provide covered semiconductor products and services to [DOD] to certify … that [it] is not an entity covered by such prohibition." The prohibition may be waived by the secretary "on a case-by-case basis as may be necessary in the interest of national security" if the covered semiconductor products and services are (1) "only available from an entity otherwise covered by such prohibition," and (2) "required for [DOD] national security systems or priority missions."

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