

Calendar No. 807

108TH CONGRESS }
2d Session }

SENATE

{ REPORT
108-415 }

AMENDING THE OFFICE OF FEDERAL PROCUREMENT
POLICY ACT TO ESTABLISH A GOVERNMENTWIDE
POLICY REQUIRING COMPETITION IN CERTAIN EX-
ECUTIVE AGENCY PROCUREMENTS, AND FOR
OTHER PURPOSES

R E P O R T

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 346

AMENDING THE OFFICE OF FEDERAL PROCUREMENT POLICY ACT
TO ESTABLISH A GOVERNMENTWIDE POLICY REQUIRING COM-
PETITION IN CERTAIN EXECUTIVE AGENCY PROCUREMENTS,
AND FOR OTHER PURPOSES

together with
MINORITY VIEWS



NOVEMBER 18, 2004.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

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NOVEMBER 18, 2004.—Ordered to be printed

Ms. COLLINS, from the Committee on Governmental Affairs,
submitted the following

R E P O R T

[To accompany S. 346]

The Committee on Governmental Affairs, to whom was referred the bill (S. 346) to amend the Office of Federal Procurement Policy Act to establish a governmentwide policy requiring competition in certain executive agency procurements, and for other purposes, having considered the same reports favorably thereon with an amendment and recommends that the bill do pass.

I. SUMMARY AND PURPOSE

S. 346 would amend the Office of Federal Procurement Policy Act to require federal agencies to use competitive procedures in acquiring products offered for sale by Federal Prison Industries (FPI). By repealing the “mandatory source” authority in the 1934 legislation that created FPI, S. 346 would require FPI to compete for federal agency contracts, subject to limited exceptions. Private sector firms would be permitted to submit their own bids or proposals for such contracts. The contracting agency, rather than FPI, would be responsible for determining whether the product offered by FPI best meets its needs in terms of price, quality, and time of delivery.

As originally introduced, the bill’s third section would have expanded the federal statute prohibiting the sale of prison-made goods into interstate commerce (18 U.S.C. § 1761) to include both goods and services.¹ However, the Committee adopted an amend-

¹Over the past 20 years, several state Attorneys General, and more recently, in 1998, the Criminal Division of the Department of Justice, have issued opinions that the proscription of 18 U.S.C. § 1761 does not extend to services. Thus, state and federal prison industry programs evolved in which inmates perform certain services, such as call centers, data entry, packaging,

Continued

ment striking the third section. S. 346 thus preserves the status quo with respect to services. The amendment also authorizes FPI to sell or donate products or services to charitable entities; requires FPI to establish enhanced education and vocational training programs to prepare inmates for employment upon their release; and authorizes FPI to make products for the public sector that would otherwise be produced outside the United States.

Finally, S. 346 prohibits a contractor from being required to use FPI as a subcontractor or supplier of products or services under an agency contract. The bill also provides for the protection of classified and sensitive information under contracts between an executive agency and FPI.

II. BACKGROUND

Federal Prison Industries, Inc., which operates under the trade name UNICOR, is a self-supporting,² wholly-owned government corporation that employs federal prison inmates. In 1934, FPI was established by legislation and Executive Order to (1) provide prisoners opportunities to learn work skills that would assist them in integrating back into society after their release from prison; and (2) facilitate effective prison management. Studies indicate that inmates who are employed and receive vocational training are more likely to be employed and refrain from criminal behavior upon returning to society.

Under current law, all physically able inmates in federal prisons who are not a security risk are required to work.³ Inmates who are not employed by FPI have other labor assignments in the prison system, such as food service and maintenance. Federal law directs FPI to (provide employment for the greatest number of those inmates in the United States penal and correctional institutions who are eligible to work as is reasonably possible. 18 U.S.C. §4122(b)(1).

Inmates working in FPI earn between \$0.23 and \$1.15 per hour. FPI is not required to provide its inmate-employees with benefits or retirement accounts. Of approximately 174,000 inmates held in federal prisons in 2002, approximately 98,998 were considered eligible for prison employment and of these, 21,778 were employed by FPI. At the end of FY 2003, there were 20,274 inmates participating in FPI.

For several reasons, including the steady increase in the number of federal crimes, the federal inmate population has increased six-fold in the last two decades. That population is expected to reach 215,000 by 2010. The Bureau of Prisons plans to activate 17 additional prisons between 2004 and 2008. The challenge to manage and employ this burgeoning population grows accordingly.

FPI must “diversify, so far as practicable, prison industrial operations and so operate the prison shops that no single private indus-

and recycling activities for private companies. At the direction of its Board of Directors, FPI has concentrated its commercial service activity on performing work that would otherwise be performed by foreign workers outside the United States.

²No funds are appropriated for FPI operations, but it may borrow funds from the U.S. Treasury, as long as the total outstanding obligations do not exceed 25 percent of the net worth of the corporation. See 18 U.S.C. § 4129.

³See Pub. L. 101-647, Title XXIX, (2905(a)(1), Nov. 29, 1990, 104 Stat. 4914 (“It is the policy of the Federal Government that convicted inmates confined in Federal prisons, jails, and other detention facilities shall work.”).

try shall be forced to bear an undue burden of competition from the products of the prison workshops.” 18 U.S.C. § 4122(b)(1). FPI has more than 100 factories representing eight different industrial operations: clothing and textiles; graphics; electronics; fleet management and vehicular components; industrial products; office furniture; recycling activities; and services (including data entry and encoding). FPI produces only those products and services authorized by its Board of Directors. The quantity of each product is limited to a Board-determined “reasonable share” of the federal market. 18 U.S.C. § 4122(b)(2).

While FPI cannot sell its goods into the private sector, 18 U.S.C. § 1761, it has enjoyed a decisive advantage when doing business with the federal government. Specifically, “Federal departments and agencies and all other Government institutions of the United States shall purchase at not to exceed current market prices, such products of [FPI] as meet their requirements and may be available.” 18 U.S.C. § 4124(a).

Where FPI cannot, or declines to, meet the order of a federal agency, FPI may grant a waiver, which permits the agency to obtain products from the private sector. FPI has sole authority to determine whether its own price is reasonable. If FPI declines to grant a waiver, private businesses are not permitted to submit their own offers for contracts. See generally 48 C.F.R. § 8.604 (setting forth FPI’s waiver authority). FPI’s waiver history for the past ten years is reproduced below.

FY 2003 FPI Waiver Data

\$ Value of Waivers Requested	\$387,695,636	
\$ Value of Waivers Granted	354,205,046	91.4%
\$ Value of Waivers Denied	33,490,590	8.6%

FY 2002 FPI Waiver Data

\$ Value of Waivers Requested	\$241,608,164	
\$ Value of Waivers Granted	176,282,434	73.0%
\$ Value of Waivers Denied	65,325,730	27.0%

FY 2001 FPI Waiver Data

\$ Value of Waivers Requested	\$328,040,218	
\$ Value of Waivers Granted	260,746,219	79.5%
\$ Value of Waivers Denied	67,293,999	20.5%

FY 2000 FPI Waiver Data

\$ Value of Waivers Requested	\$513,469,597	
\$ Value of Waivers Granted	456,270,382	88.9%
\$ Value of Waivers Denied	57,199,215	11.1%

FY 1999 FPI Waiver Data

\$ Value of Waivers Requested	\$366,400,000	
\$ Value of Waivers Granted	294,700,000	80.4%
\$ Value of Waivers Denied	71,700,000	19.6%

FY 1998 FPI Waiver Data

\$ Value of Waivers Requested	\$396,174,000	
\$ Value of Waivers Granted	357,933,000	90.3%
\$ Value of Waivers Denied	38,241,000	9.7%

FY 1997 FPI Waiver Data

\$ Value of Waivers Requested	\$301,625,000	
\$ Value of Waivers Granted	266,656,000	88.4%
\$ Value of Waivers Denied	34,696,000	11.6%

FY 1996 FPI Waiver Data

\$ Value of Waivers Requested	\$442,000,000	
\$ Value of Waivers Granted	434,023,000	98.2%
\$ Value of Waivers Denied	7,977,000	1.8%

FY 1995 FPI Waiver Data

\$ Value of Waivers Requested	\$477,340,000	
\$ Value of Waivers Granted	404,363,000	84.7%
\$ Value of Waivers Denied	72,977,000	15.3%

FY 1994 FPI Waiver Data

\$ Value of Waivers Requested	\$391,419,000	
\$ Value of Waivers Granted	360,543,000	92.1%
\$ Value of Waivers Denied	30,876,000	7.9%

FPI relies on a large network of private-sector suppliers to carry out its operations. During FY 2003, FPI purchased \$550 million worth of raw materials, equipment, supplies, and services from private vendors. Of this amount, FPI bought more than 53 percent from small businesses.

In Fiscal Year 2003, FPI generated \$667 million in sales, making it the 32nd largest government contractor. The following table illustrates the substantial growth of FPI's sales over the past four decades.

[In millions of dollars]	
<i>Year</i>	<i>FPI sales</i>
1960	\$29
1980	117
1985	240
1990	339
1995	459
2000	546
2003	667

FPI's sales represent a small fraction of the total volume of government contracts; however, depending upon the definition of "market," these sales comprised a significant share of certain markets, such as office furniture, clothing and textiles. During the 1990s, FPI experienced a rapid growth in its share of the federal market in certain product lines, such as systems furniture and office seating.

Private firms report several instances in which they have worked with federal agencies to develop detailed proposals to meet agency needs, only to have FPI insist on taking the contract for itself.⁴ In some cases, FPI reportedly adopted the private firm's detailed proposal and insisted on performing the work itself. In other cases, important agency projects were delayed because FPI declined to grant waiver requests submitted by the agency.⁵ Private firms also report numerous instances in which FPI has insisted on selling its products to federal agencies at prices far exceeding contractor prices.⁶

In 1999, FPI and the Department of Defense completed a joint survey of DOD customers for FPI products. The survey provided DOD customers five categories in which to rate FPI products: excellent, good, average, fair, or poor.

According to the data reported jointly by DOD and FPI, more than a third of the DOD customers surveyed indicated that they have had a problem with an FPI product delivered in the previous 12 months. Moreover, a majority of DOD customers rated FPI as average, fair, or poor in price, delivery, and as an overall supplier.

In August 1998, GAO compared FPI prices for 20 representative products to private vendors' catalog prices for the same or comparable products and found that for 4 of these products, FPI's price was higher than the highest price offered by any private vendor. For five of the remaining products, FPI's price was at the "high end

⁴Hearing on S. 346 before the Senate Comm. on Governmental Affairs, 108th Cong., 2nd Sess. 44–46 (statement of Kurt Weiss, Senior Vice President and General Manager, U.S. Business Interiors).

⁵Hearing on S. 346 before the Senate Comm. on Governmental Affairs, 108th Cong., 2nd Sess. 73 (statement of Kurt Weiss, Senior Vice President and General Manager, U.S. Business Interiors).

⁶Hearing on S. 346 before the Senate Comm. on Governmental Affairs, 108th Cong., 2nd Sess. 89 (statement of Jack R. Williams, Jr., Assistant Regional Administrator, Federal Supply Service, Region 3, GSA.).

of the range” of prices offered by private vendors. FPI’s price exceeded the prices of over 70 percent of the commercial vendors for office furniture items reviewed by percentages that ranged from 18 percent to 24 percent. (Federal Prison Industries: Information on Product Pricing—GAO/GGD-98-15).

Similarly, in July 1998, GAO reviewed the timeliness of FPI deliveries and determined that roughly one-quarter of FPI products were shipped after the due date. FPI had no way of determining how many additional products may have been delivered after the due date, because it did not track the time of delivery of its products. Moreover, GAO found that more than half of FPI’s due dates were later than the time of delivery originally requested by the customer. (Federal Prison Industries: Delivery Performance Improving but Problems Remain—GAO/GGD-98-118).

In 2001, Congress eliminated FPI’s mandatory source status for Department of Defense contracts. Section 811 of the National Defense Authorization Act for FY 2002 required DOD procurement officials to conduct market research before purchasing a product from FPI, and to use competitive procedures for the procurement unless the FPI product was comparable to the best private sector products in terms of price, quality and time of delivery. This provision was reaffirmed and strengthened by section 819 of the National Defense Authorization Act for FY 2003.

Over the two years since Congress eliminated FPI’s mandatory source status for Department of Defense contracts, FPI’s sales to the Department dropped by less than one percent, from \$382 million in FY 2001 to \$379 million in FY 2003. FPI experienced more dramatic changes in individual product lines. From FY 2002 to FY 2003, for example, FPI lost 33 percent of its sales in office furniture. These losses were offset by sales increases of 15 percent in electronics and 32 percent in industrial products, which FPI attributes chiefly to the demand spike from the Afghanistan and Iraq military operations. From FY 2001 to FY 2003, the number of inmates employed by FPI declined from 22,560 to 20,274.⁷

During the last several years, FPI has taken significant steps to lessen its reliance on its traditional industries (such as textiles and office furniture). FPI’s growth plans now generally focus on those business areas that do not rely on mandatory source authority: services, fleet management, and recycling. FPI has also waived mandatory source for several of the products it manufactures, such as dormitory and quarters furniture, filters, fencing, and security doors. FPI’s efforts in this regard are consistent with the spirit and intent of S. 346.

S. 346 is intended to provide increased flexibility to federal agencies to acquire the best product at the best price for their needs; to increase business opportunities for private sector firms seeking to compete in product lines sold by FPI; and to provide basic fairness to these firms, which will be allowed to bid on contracts that are paid for with their own tax dollars. The enactment of S. 346 would be likely to have some adverse impact on FPI sales and inmate employment in the short term, but FPI’s track record since

⁷ A provision in the Consolidated Appropriations Act of 2004 required that federal agencies that purchase “a product or service offered” by FPI must make a determination “that such offered product or service provides the best value to the buying agency.” No data is yet available to measure the impact of this provision on FPI sales.

the enactment of section 811 indicates that any such adverse impact is likely to be manageable.

III. LEGISLATIVE HISTORY

S. 346 was introduced on February 11, 2003 by Senators Levin and Thomas. The bill has been cosponsored by Senators Shelby, Stabenow, Lugar, Grassley, Burns and Chambliss. Similar bills were introduced in previous Congresses, as follows:

107th Congress: S. 1295, sponsored by Senators Levin, Thomas, Inhofe and Stabenow;

106th Congress: S. 766, sponsored by Senators Levin, Abraham, Feingold, Helms and Robb;

105th Congress: S. 339, sponsored by Senators Levin, Abraham, Akaka, Burns, Helms and Robb;

104th Congress: S. 1797, sponsored by Senators Levin, Abraham, Akaka, Helms, McConnell and Robb.

S. 346 was referred to the Committee on Governmental Affairs, which in turn referred the bill to the Subcommittee on Financial Management, the Budget, and International Security.

The Subcommittee held a hearing on the bill on April 7, 2004, the content of which is summarized in the next section. The bill was pulled out of the Subcommittee on June 1, 2004. On June 2, 2004, the Committee on Governmental Affairs took up S. 346.

The Committee adopted an amendment offered by Senator Levin by voice vote. The Levin amendment deleted Section 3 of the bill, which would have prohibited the sale of inmate services in interstate commerce. The Levin amendment also added new sections to the bill that would: create new inmate job opportunities by authorizing FPI to sell or donate products or services to charitable entities; require FPI to establish enhanced educational and vocational training programs to prepare inmates for work opportunities as they approach the end of their terms; help repatriate jobs to the United States by encouraging FPI, to the maximum extent practicable, to produce new products or expand the production of existing products that would otherwise be produced outside the United States; and authorize priority placement in the Bureau of Prisons for any FPI employees who may be displaced in the event that FPI loses business after enactment of the bill.

The Committee rejected an amendment in the nature of a substitute offered by Senator Lautenberg by a vote of 11–5. The Lautenberg amendment, which was substantively identical to S. 2414, would have struck the text of S. 346 and replaced it with a Federal Inmate Work Opportunities Review Commission, which would have examined the status of FPI, including its impact on recidivism and the private sector. Within two years, the Commission would have been required to report its findings, conclusions and recommendations.

The Committee then favorably reported the bill, as amended, to the Senate by voice vote.

IV. SUBCOMMITTEE HEARING

On April 7, 2004, the Senate Governmental Affairs Subcommittee on Financial Management, the Budget, and International Security held a hearing on S. 346. At the hearing, the

Subcommittee heard testimony from Senator Thomas; Senator Stabenow; Harley G. Lappin, Director, Federal Bureau of Prisons; Jack R. Williams, Jr., Assistant Regional Administrator, Federal Supply Service, Region 3, General Services Administration; John M. Palatiello, President, Management Association for Private Photogrammetric Surveyors, on behalf of the U.S. Chamber of Commerce; Kurt Weiss, Senior Vice President and General Manager, U.S. Business Interiors, on behalf of the Office Furniture Dealers Alliance; Andrew S. Linder, President, Power Connector, Inc., on behalf of the Correctional Vendors' Association; and Philip W. Glover, President, Council of Prison Locals, American Federation of Government Employees, AFL-CIO.

Senators Thomas and Stabenow expressed support for S. 346, saying it would end FPI's monopoly on federal contracts. Senator Thomas indicated that the bill would inject competition into federal procurements, while limiting unfair government competition with the private sector. Senator Thomas praised the bill for restoring the authority for federal procurement preference for FPI. Senator Stabenow said the bill would also provide relief for private sector industries that have been hurt by FPI.

Director Lappin expressed neutrality on S. 346 in light of the Administration's neutral position on the bill. Director Lappin emphasized that FPI is the Bureau of Prisons' most important correctional management program. Given the continued increase in the federal inmate population, Director Lappin stressed the importance of the Attorney General's ability to maintain adequate work opportunities in federal prisons to reduce recidivism and counter the dangerous effects of inmate idleness. Director Lappin expressed willingness to eliminate FPI's mandatory source provided FPI has time to transition to a non-mandatory operating paradigm, and the Attorney General had adequate alternative work programs available to meet the Bureau of Prisons' inmate employment needs.

Mr. Williams expressed neutrality on S. 346, again in recognition of the Administration's neutral stance on the bill. Mr. Williams expressed his personal support for eliminating FPI's mandatory source saying such a move would improve FPI's operations in the same way the General Services Administration's operations were improved when its mandatory use provisions were eliminated.

Mr. Palatiello expressed support for S. 346 saying the bill would infuse competition in the federal procurement process. Mr. Palatiello praised the bill for prohibiting FPI from providing services to the commercial market.

Mr. Weiss expressed support for S. 346, citing, what in his view, is the flawed current system in which the government must buy products from FPI even if the buying agency can purchase a better product for less money from a private vendor. Mr. Weiss said S. 346 would provide greater procurement authority for federal contracting officers and allow private vendors greater access to federal business opportunities.

Mr. Linder expressed opposition to S. 346, saying that the bill would cause a reduction in FPI sales. Mr. Linder said such a reduction would result in an economic disruption for many of FPI's private sector suppliers. Mr. Linder noted that many of FPI's suppliers, such as his company, are small businesses and would have to eliminate jobs if FPI experienced significant sales losses.

Mr. Glover expressed opposition to S. 346 saying the bill would force FPI to eliminate inmate jobs. Mr. Glover said a reduction in FPI's inmate employment would result in increased inmate idleness within federal correctional facilities—which creates a more volatile and dangerous working atmosphere for BOP correctional staff.

V. SECTION-BY-SECTION ANALYSIS

Section 1 would add a new Section 40 to the Office of Federal Procurement Act, establishing a government-wide procurement policy on purchases from Federal Prison Industries (FPI).

Section 40(a) would establish the basic policy requiring FPI to compete for federal agency contracts.

Section 40(b) would require federal agencies to notify FPI of contracting opportunities and give fair consideration to FPI offers.

Section 40(c) would require federal agencies to ensure that they purchase FPI products only if they are comparable to those offered by the private sector in terms of price, quality and time of delivery.

Section 40(d) would authorize the Attorney General to exempt any federal agency contract from competition requirements if the award of the contract to FPI is necessary to maintain work opportunities and ensure safe and effective administration of a penal or correctional facility.

Section 40(e) would provide that FPI may not require contractors under federal agency contracts to use FPI as a subcontractor.

Section 40(f) would prohibit inmate workers from having access to classified and sensitive information under FPI contracts.

Section 2 contains conforming amendments. Subsection (a) would repeal provisions of current law applicable to Department of Defense purchases from FPI. Subsection (b) would repeal provisions of current law applicable to purchases from FPI by all federal agencies—including 18 U.S.C. § 4124(a), the current statutory source for FPI's mandatory source authority. Subsection (c) contains technical modifications to other statutes.

Section 3 would add a new section 4130 to title 18, United States Code, authorizing FPI to sell or donate products or services to charitable entities.

Section 4130(a) would authorize the sale or donation of products or services to charitable entities, and to low-income individuals who would otherwise have difficulty purchasing such products or services.

Section 4130(b) would require that the sale or donation of products to charitable entities be conducted pursuant to a work agreement, but only if: (a) the Attorney General determines in consultation with the Secretary of Labor and the Secretary of Commerce, that the product or services would not otherwise be available to the recipients; and (b) the chief executive officer of the charitable organization certifies in writing that no jobs or contractor work will be reduced or eliminated as a result of the sale or donation of inmate products or services.

Section 4 would add a new section 4049 to title 18, United States Code, establishing an Enhanced In-Prison Educational and Vocational Assessment and Training Program within the Federal Bureau of Prisons.

Section 5 would help repatriate jobs to the United States by encouraging FPI, to the maximum extent practicable, to produce new products or expand the production of existing products that would otherwise be produced outside the United States.

Section 6 would authorize priority placement in the Bureau of Prisons for any FPI employees who may be displaced if FPI loses business after enactment of the bill.

Section 7 contains the effective date for the bill.

VI. REGULATORY IMPACT

Paragraph 11(b)(1) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate the regulatory impact that would be incurred in carrying out the bill.

The enactment of this bill would not have any regulatory impact on the public because the bill is exclusively directed at the conduct of federal agencies.

VII. COST IMPACT

Section 11(a) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill include an estimate of the costs which would be incurred in carrying out such bill. The following estimate was provided by the Congressional Budget Office:

S. 346—A bill to amend the Office of Federal Procurement Policy Act to establish a governmentwide policy requiring competition in certain executive agency procurements, and for other purposes.

Summary: S. 346 would authorize the Attorney General to establish a Federal Enhanced In-Prison Vocational Assessment and Training Program in all federal institutions. Based on information from the Federal Bureau of Prisons, CBO estimates that implementing this enhanced program would cost nearly \$150 million over the 2005–2009 period to increase the number of inmates who participate in vocational training and to expand the services provided by the program.

The bill also would amend the laws governing the operations of the Federal Prison Industries (FPI), a government-owned corporation that produces goods and services for the federal government with prison labor. S. 346 would eliminate a requirement that federal agencies purchase products from FPI if products are available to meet the agencies' needs and the cost would not exceed current market prices. Such products include office furniture, textiles, vehicle tags, and fiber optics. CBO expects that the FPI's sales to the federal government would decrease under the bill and have a negligible effect on net spending by FPI because sales proceeds and operating costs of the FPI would both be lower under the bill.

S. 346 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of the amendment is shown in the following table. The cost of this legislation falls within budget function 750 (administration of justice).

	By fiscal year, in millions of dollars—				
	2005	2006	2007	2008	2009
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Spending on Enhanced Vocational Assessment and Training:					
Estimated Authorization Level	29	30	30	31	31
Estimated Outlays	26	29	30	31	31

Basis of estimate: CBO assumes that the bill will be enacted near the beginning of fiscal year 2005 and that the necessary amounts will be appropriated for each year. We estimate that implementing the Enhanced In-Prison Vocational Assessment and Training Program authorized in section 4 of S. 346 would cost nearly \$150 million over the 2005–2009 period. Depending on how much the operations of the FPI are reduced under the bill, implementing this legislation could increase the need for discretionary appropriations for security costs.

Enhanced in-prison vocational assessment and training

Section 10 would authorize the Attorney General to establish a Federal Enhanced In-Prison Vocational Assessment and Training Program in all federal institutions. Federal institutions currently participate in vocational assessment and training programs, and we assume that the program that would be authorized by the amendment would be an expanded version of the current program. Based on information from the Department of Justice (DOJ), CBO estimates that implementing the bill would cost about \$30 million each year over the 2005–2009 period to increase the number of inmates who participate in the training and to expand the services provided by the program.

Discretionary security costs and FPI spending

S. 346 would eliminate the requirement for federal agencies to purchase goods and services from FPI. Based on information from the DOJ and major federal customers of FPI, we expect that FPI's total sales to the federal government would decrease under the bill. Because of the reduction in federal sales, CBO expects there would be a corresponding reduction in the number of inmates employed by FPI.

Because CBO expects that the demand for FPI goods and services would decline under S. 346, FPI would provide security for fewer inmates during work hours. The costs of FPI operations, including security, are directly financed from the sale of its goods and services. No discretionary costs are incurred to provide security to prisoners participating in FPI programs during work hours. CBO expects that implementing S. 346 would increase the need for additional officers to provide security to inmates no longer working for FPI under the bill. The cost of additional security personnel would depend on the extent to which agencies no longer procure products and services from FPI, the size of the new FPI donation program that would be established under the bill, and the number of security personnel currently working for FPI that would eventually be hired by the Federal Bureau of Prisons. FPI estimates that the value of the security service it currently provides is about \$110 million a year.

The cost to FPI to produce products for the federal government is currently funded entirely by collections from the agencies that purchase FPI products. CBO estimates that the total amount collected by FPI would decrease over the 5-year period under the proposed legislation as agencies procure fewer FPI products. But that reduction in collections would be offset by a reduction in the cost to produce such products. Therefore, CBO estimates that enacting this legislation would result in no significant net change in FPI's spending for each year.

Estimated intergovernmental and private-sector impact: S. 346 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of State, local, or tribal governments.

Previous CBO cost estimate: On September 17, 2003, CBO transmitted a cost estimate for H.R. 1829, the Federal Prison Industries Competition in Contracting Act of 2003, as ordered reported by the House Committee on the Judiciary on July 25, 2003. That legislation would authorize the appropriation of specific amounts for an FPI donation program, an Enhanced Vocational Assessment and Training Program, and a Cognitive Abilities Assessment Demonstration Program. Under H.R. 1829, the requirement to purchase products from FPI would be reduced over the next several years, and the share of the federal market that FPI holds for the products and services it provides would be limited to 20 percent and 5 percent, respectively. CBO expects that, under H.R. 1829, there would be a corresponding reduction in the number of inmates employed by FPI and guarded by FPI security officers. CBO estimated that implementing H.R. 1829 would cost \$177 million over the 5-year period for salaries and benefits of security officers that would be paid from discretionary appropriations.

Estimated prepared by: Federal Costs: Lanette J. Walker; Impact on State, Local and Tribal Governments: Melissa Merrell; and Impact on the Private Sector: Paige Piper/Bach

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VIII. EFFECT ON CURRENT LAW

In compliance with paragraph 12 of the Standing Rules of the Senate, changes in existing law made by S. 346, as reported, are shown as follows: existing law proposed to be omitted is enclosed in black brackets, existing law in which no change is proposed is shown in roman:

TITLE 10. ARMED FORCES

Subtitle A. General Military Law

PART IV. SERVICE, SUPPLY, AND PROCUREMENT

CHAPTER 141. MISCELLANEOUS PROCUREMENT PROVISIONS

1.

[10 USC §2410n. Products of Federal Prison Industries: procedural requirements (a) Market research. Before purchasing a product listed in the latest edition of the Federal Prison Industries catalog under section 4124(d) of title 18, the Secretary of Defense shall conduct market research to determine whether the Federal Prison Industries product is comparable to products available from the private sector that best meet the Department's needs in terms of price, quality, and time of delivery. (b) Competition requirement. If the Secretary determines that a Federal Prison Industries product is not comparable in price, quality, or time of delivery to products available from the private sector that best meet the Department's needs in terms of price, quality, and time of delivery, the Secretary shall use competitive procedures for the procurement of the product or shall make an individual purchase under a multiple award contract. In conducting such a competition or making such a purchase, the Secretary shall consider a timely offer from Federal Prison Industries. (c) Implementation by Secretary of Defense. The Secretary of Defense shall ensure that—(1) the Department of Defense does not purchase a Federal Prison Industries product or service unless a contracting officer of the Department determines that the product or service is comparable to products or services available from the private sector that best meet the Department's needs in terms of price, quality, and time of delivery; and (2) Federal Prison Industries performs its contractual obligations to the same extent as any other contractor for the Department of Defense. (d) Market research determination not subject to review. A determination by a contracting officer regarding whether a product or service offered by Federal Prison Industries is comparable to products or services available from the private sector that best meet the Department's needs in terms of price, quality, and time of delivery shall not be subject to review pursuant to section 4124(b) of title 18. (e) Performance as a subcontractor. (1) A contractor or potential contractor of the Department of Defense may not be required to use Federal Prison Industries as a subcontractor or supplier of products or provider of services for the performance of a Department of Defense contract by any means, including means such as—(A) a contract solicitation provision requiring a contractor to offer to make use of products or services of Federal Prison Industries in the performance of the contract; (B) a contract specification requiring the contractor to use specific products or services (or classes of products or services) offered by Federal Prison Industries in the performance of the contract; or (C) any contract modification directing the use of products or services of Federal Prison Industries in the performance of the contract. (2) In this subsection, the term “contractor”, with respect to a contract, includes a subcontractor at any tier under the contract. (f) Protection of classified and sensitive information. The Secretary of Defense may not enter into any contract with Federal Prison Industries under which an inmate worker would have access to—(1) any data that is classified; (2) any geographic data regarding the location of—(A) surface and subsurface infrastructure providing communications or water or electrical power distribution; (B) pipelines for the distribution of natural gas, bulk petroleum products, or other commodities; or (C) other utilities; or (3) any personal or financial information about any individual private citizen, including information relating to such per-

son's real property however described, without the prior consent of the individual. (g) Definitions. In this section: (1) The term "competitive procedures" has the meaning given such term in section 2302(2) of this title. (2) The term "market research" means obtaining specific information about the price, quality, and time of delivery of products available in the private sector through a variety of means, which may include—(A) contacting knowledgeable individuals in government and industry; (B) interactive communication among industry, acquisition personnel, and customers; and (C) interchange meetings or pre-solicitation conferences with potential offerors.】

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10 U.S.C. CHAPTER 141—MISCELLANEOUS PROCUREMENT PROVISIONS

- Sec. 2381. Contracts: regulations for bids
- Sec. 2384. Supplies: identification of supplier and sources
- Sec. 2384a. Supplies: economic order quantities
- Sec. 2385. Arms and ammunition: immunity from taxation
- Sec. 2386. Copyrights, patents, designs, etc.; acquisition
- Sec. 2387. Procurement of table and kitchen equipment for officers' quarters: limitation on
- Sec. 2388. Liquid fuels and natural gas: contracts for storage, handling, or distribution
- Sec. 2389. Ensuring safety regarding insensitive munitions
- Sec. 2390. Prohibition on the sale of certain defense articles from the stocks of the Department of Defense
- Sec. 2391. Military base reuse studies and community planning assistance
- Sec. 2392. Prohibition on use of funds to relieve economic dislocations
- Sec. 2393. Prohibition against doing business with certain offerors or contractors
- Sec. 2394. Contracts for energy or fuel for military installations
- Sec. 2394a. Procurement of energy systems using renewable forms of energy
- Sec. 2395. Availability of appropriations for procurement of technical military equipment and supplies
- Sec. 2396. Advances for payments for compliance with foreign laws, rent in foreign countries, tuition, public utility services, and pay and supplies of armed forces of friendly foreign countries
- Sec. 2398. Procurement of gasohol as motor vehicle fuel
- Sec. 2399. Operational test and evaluation of defense acquisition programs
- Sec. 2400. Low-rate initial production of new systems
- Sec. 2401. Requirement for authorization by law of certain contracts relating to vessels and aircraft
- Sec. 2401a. Lease of vehicles, equipment, vessels, and aircraft
- Sec. 2402. Prohibition of contractors limiting subcontractor sales directly to the United States
- Sec. 2404. Acquisition of certain fuel sources: authority to waive contract procedures; acquisition by exchange; sales authority

- Sec. 2408. Prohibition on persons convicted of defense-contract related felonies and related criminal penalty on defense contractors
- Sec. 2409. Contractor employees: protection from reprisal for disclosure of certain information
- Sec. 2410. Requests for equitable adjustment or other relief: certification
- Sec. 2410a. Severable service contracts for periods crossing fiscal years
- Sec. 2410b. Contractor inventory accounting systems: standards
- Sec. 2410c. Preference for energy efficient electric equipment
- Sec. 2410d. Subcontracting plans: credit for certain purchases
- Sec. 2410f. Debarment of persons convicted of fraudulent use of "Made in America" labels
- Sec. 2410g. Advance notification of contract performance outside the United States
- Sec. 2410i. Prohibition on contracting with entities that comply with the secondary Arab boycott of Israel
- Sec. 2410j. Displaced contractor employees: assistance to obtain certification and employment as teachers or employment as teachers' aides
- Sec. 2410k. Defense contractors: listing of suitable employment openings with local employment service office
- Sec. 2410l. Contracts for advisory and assistance services: cost comparison studies
- Sec. 2410m. Retention of amounts collected from contractor during the pendency of contract dispute
- [Sec. 2410n. Products of Federal Prison Industries: procedural requirements]**
- Sec. 2410o. Multiyear procurement authority: purchase of dinitrogen tetroxide, hydrazine, and hydrazine-related products

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TITLE 15. COMMERCE AND TRADE

CHAPTER 14A. AID TO SMALL BUSINESS

§ 657a. HUBZone program (a) In general. There is established within the Administration a program to be carried out by the Administrator to provide for Federal contracting assistance to qualified HUBZone small business concerns in accordance with this section. (b) Eligible contracts.

* * * * *

(4) Relationship to other contracting preferences. A procurement may not be made from a source on the basis of a preference provided in paragraph (2) or (3), if the procurement would otherwise be made from [a different source under section 4124 or 4125 of title 18, United States Code, or the Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.)] a different source under the Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.) or Federal Prison Industries under section 40(d) of the Office of Federal Procurement Policy Act or section 4125 of title 18, United States Code.

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART III. PRISONS AND PRISONERS

CHAPTER 307. EMPLOYMENT

§4124. Purchase of prison-made products by Federal departments [(a) The several Federal departments and agencies and all other Government institutions of the United States shall purchase at not to exceed current market prices, such products of the industries authorized by this chapter as meet their requirements and may be available. (b) Disputes as to the price, quality, character, or suitability of such products shall be arbitrated by a board consisting of the Attorney General, the Administrator of General Services, and the President, or their representatives. Their decision shall be final and binding upon all parties.] [(c)](a) Each [Federal department, agency, and institution subject to the requirements of subsection (a)] Federal department or agency shall separately report acquisitions of products and services from Federal Prison Industries to the Federal Procurement Data System (as referred to in section 6(d)(4) of the Office of Federal Procurement Policy Act in the same manner as it reports other acquisitions. Each report published by the Federal Procurement Data System that contains the information collected by the System shall include a statement to accompany the information reported by the department, agency, or institution under the preceding sentence as follows: “Under current law, sales by Federal Prison Industries are considered intragovernmental transfers. The purpose of reporting sales by Federal Prison Industries is to provide a complete overview of acquisitions by the Federal Government during the reporting period.” [(d)] (b) Within 90 days after the date of the enactment of this subsection, Federal Prison Industries shall publish a catalog of all products and services which it offers for sale. This catalog shall be updated periodically to the extent necessary to ensure that the information in the catalog is complete and accurate.

* * * * *

TITLE 41. PUBLIC CONTRACTS

CHAPTER 1. GENERAL PROVISIONS

§ 48. Procurement requirements for the Government; nonapplication to prison-made products

If any entity of the Government intends to procure any commodity or service on the procurement list, that entity shall, in accordance with rules and regulations of the Committee, procure such commodity or service, at the price established by the Committee, from a qualified nonprofit agency for the blind or such an agency for other severely handicapped if the commodity or service is available within the period required by that Government entity; except that this section shall not apply with respect to the procurement of any commodity which is available for procurement from an industry established under chapter 307 of title 18, United States

Code, and **【which, under section 4124 of such title is required】**
which is required be law to be procured from such industry.

IX. MINORITY VIEWS OF SENATORS LAUTENBERG, VOINOVICH, DURBIN, CARPER AND PRYOR

A. INTRODUCTION

Since 1934, the mandatory source¹ authority of the U.S. Department of Justice's Bureau of Prisons (BOP) has been critical to the ability of Federal Prison Industries (FPI) to achieve important societal objectives: to manage, train and rehabilitate this nation's over 181,000 federal prison inmates, and to contribute to the safety and security of federal correctional personnel and facilities.

As the Committee acknowledged, the federal prison population has increased six-fold in the last two decades and it is expected to surpass 215,000 by 2010.² Notwithstanding this acknowledgment and the recognition that FPI's "challenge to manage and employ this burgeoning population grows accordingly," the Committee supports the elimination of FPI's mandatory source authority—one of FPI's most effective tools to help manage the federal prison population.³

S. 346 is premised upon the unsubstantiated claim that FPI's mandatory source status in the procurement of certain products by federal agencies is anti-competitive and places an undue burden on certain private business sectors. The record, however, shows that FPI's mandatory source authority does not confer an unfair competitive advantage; nor does it impose an undue burden or demonstrable harm on private businesses. to the contrary, the record demonstrates that "FPI is a true success story; a Government program that has exceeded the expectations of its creators, cost taxpayers almost nothing, and benefited millions of constituents."⁴

As U.S. Supreme Court Chief Justice Warren Burger remarked in 1981, "[w]hen society places a person behind walls and bars, it has an obligation—a moral obligation—to do whatever can reasonably be done to change that person before he or she goes back into the stream of society."⁵

¹ 18 U.S.C. § 4124 (2000).

² As of November 4, 2004, there were 181,063 prisoners in the custody of the Federal Bureau of Prisons. Two months earlier, September 4, 2004, there were 180,310 federal inmates: 167,964 (93.7%) males, 12,354 and (66.8%) females; 101,955 (56.5%) White, 72,433 (40.2%) Black; 2,890 (1.6%) Asian and 3,040 (1.7%) Native American; 57,863 (32.1%) ethnic Hispanic; and Average Inmate age, 38.

³ Before the Committee on Governmental Affairs, BOP Director Harley G. Lappin, testified: "The Bureau of Prisons is getting significantly greater numbers of federal inmates who are serving more time in prison, are unskilled, undereducated, criminally sophisticated, and physically violent. Virtually all of these inmates will be released back into our neighborhoods at some point and will need job skills (vocational training), work experience (the FPI program), and secondary education if they are to successfully reintegrate into society."

⁴ Steve Schwalb, *Factories with Fences: The History of Federal Prison Industries*, Foreword, Federal Prison Industries. The Myths, Successes, and Challenges of One of America's Most Successful Government Programs, pg. 5 (May 1996, published by Federal Prison Industries, Inc., Bureau of Prisons, U.S. Department of Justice).

⁵ Id. at Dedication, Warren Burger's Quest for "Factories with Fences," Warren I. Cikins, pg 2.

Accordingly, we oppose S. 346 as reported out of Committee because it has the real potential to erode the effectiveness and existence of federal correctional industries—the work programs in correctional facilities that provide real world work experience to inmates, teaching them transferable job skills and the work ethic necessary to help them prepare for post-release reentry and employment in their communities.

B. ARGUMENTS AGAINST S. 346

FPI's mandatory source authority has well-served this nation for the past 70 years because it does not provide FPI an unfair competitive advantage that would impose an undue burden on private enterprise. To ensure that the authority is exercised in a judicious fashion, Congress and the FPI Board have imposed a number of constraints that have over the years proven to be successful. Mandatory source authority has stood the test of time and has changed with the times.

While S. 346 purports to level the playing field in the federal procurement market, there are a host of unintended consequences that could potentially undermine any benefit that would be created from the enactment of this legislation. Indeed, the significant societal benefits derived from FPI's mandatory source authority should have compelled the Committee to adopt the Lautenberg Substitute Amendment, which would have created a Commission to conduct a comprehensive study of the costs and benefits associated with the FPI's program. The Commission's report would have better positioned this Committee to consider and approve legislation that remains committed to the important societal objectives of FPI.

1. *"Mandatory source" status does not provide FPI competitive advantage*

The stated purpose of S. 346 is to repeal FPI's mandatory source status and require federal agencies to use amorphous "competitive procedures" in acquiring products offered for sale by FPI. This legislation is based on the erroneous belief that FPI unfairly benefits from a "competitive advantage," which has harmed private businesses.

In 1999, Steve Schwalb, former Chief Operating Officer of FPI, aptly noted:

It is true that FPI pays its inmates less than a private sector worker would get paid for carrying out similar assignments. Yet any competitive advantage that accrues from this is more than offset by the lower average productivity of inmates and the security inefficiencies associated with employing inmates.

In addition, due to concerns expressed by both labor and private business at the time FPI was formed, Federal statute provides for significant constraints on FPI's activities, which further diminish any competitive advantage. * * *

In addition to these constraints, it should be noted that the average Federal inmate has an 8th grade education, is 37 years old, is serving a 10-year sentence for a drug related offense, and has never held a steady job. According

to a recent study by an independent firm, the overall productivity rate of an inmate with a background like this is approximately $\frac{1}{4}$ that of a civilian worker. Finally, the costs associated with civilian supervision of inmate workers and numerous measures necessary to maintain the security of the prison add substantially to the cost of production. It is hard to see how one could genuinely interpret the cumulative effect of these limitations as a “competitive advantage.”⁶

2. Constraints on mandatory source authority

One of the many significant constraints⁷ on FPI’s mandatory source authority is the law that prohibits FPI from selling any products in the commercial market. All FPI products must be sold to the federal government. Another constraint is that federal agencies desiring to purchase comparable FPI-products from private vendors are permitted to obtain waivers from FPI. In Fiscal Year (FY) 2003, for example, 91.4 percent of the total dollar value of waivers requested was granted by FPI. With additional reform measures adopted by the FPI Board, waivers will continue to be granted in almost all cases.

Some of the reform measures that have been implemented at FPI include:

- FPI’s Board eliminating the FPI program’s mandatory source for purchases up to \$2,500;
- FPI’s Board requiring the FPI program to approve requests for waivers in all cases where the private sector provides a lower price for a comparable product that the FPI program does not meet;
- FPI’s Board requiring the FPI program to waive mandatory source authority for products where the FPI program’s share of the federal market is 20 percent or more;
- FPI’s Board directing that any prison-made products sold by the FPI program must have at least 20 percent of its value contributed by inmate labor.

Another severe limitation on FPI’s mandatory source status is the blanket exemption for Department of Defense (DOD) contracts, pursuant to sections 811 and 819 of the National Defense Authorization Acts of 2002 and 2003, respectively. Section 637 of the consolidated Appropriations Act of 2004 recently extended Section 811 and Section 819 requirements to civilian agencies. The effect of these laws was to enhance private sector access to federal procurements and to increase the frequency of instances in which FPI must compete for a contract.

⁶Id. at Foreword, *Federal Prison Industries: The Myths, Successes, and Challenges of One of America’s Most Successful Government Programs*, pp. 5–6.

⁷Under Title 18 of the United States Code, FPI is specifically required by law to: (1) Employ as many inmates as reasonably possible; (2) Concentrate on manufacturing products that are labor intensive; (3) Provide the maximum opportunity for inmates to acquire marketable skills for use upon release; (4) Diversify production as much as possible to minimize competition with private industry and labor, and to reduce the burden on any one industry; (5) Avoid taking more than a reasonable share of the Federal market for any specific product; (6) Sell products only to the Federal Government, meeting the quality and delivery requirements of the Federal customer, and not exceeding current market prices; (7) Comply with Federal procurement regulations; and (8) Operate in an economically self-sustaining manner. See id.

According to the Government Accountability Office (GAO), as a direct result of these statutory and administrative constraints on FPI's mandatory source status, 13 prison factories were closed during FY 2003 and 1,683 inmate jobs have been eliminated. While an undetermined number of inmates may have been reassigned to other work within the prisons, such as food service, there has been an undisputed net loss of 1,683 inmate work opportunities.

The testimony of BOP Director Lappin confirmed GAO findings. Director Lappin testified that "the FPI program has had to close or downsize 13 factories, reduce operating costs, and reduce inmate participation by approximately 2,000 inmates, as well as FPI staffing by 97 positions." He further testified that statutory and administrative constraints on FPI's mandatory source status have resulted in "a reduction in the percentage of medically able, sentenced inmates in secure facilities working in the FPI program from 21 percent in FY 2002 to 19 percent in FY 2003."

3. *No undue burden to private businesses*

The loss of between 1,683 and 2,000 real inmate work opportunities has come at the expense of speculative claims that the FPI's mandatory source status has materially harmed private industry, specifically office furniture manufacturers.

In the 1934 Executive Order authorizing the creation of FPI, President Roosevelt required FPI to "diversify prison industrial operations that no single private industry shall be forced to bear an undue burden of competition with the products of the prison workshops." While it was well-understood that FPI would likely have a marginal impact on the businesses that would otherwise sell manufactured products to the federal agencies, part of FPI's mission was to diversify and not overburden one industry, "so far as practicable."⁸

In *Coalition for Government Procurement v. Federal Prison Industries, Inc.*,⁹ a coalition representing manufacturers of office furniture alleged that from 1991 through 1995, FPI repeatedly violated its statute by significantly expanding into the "competitive Federal government Office Furniture market," without authorization, resulting in private contractors losing \$450 million in sales.

The Sixth Circuit Court of Appeals affirmed the district court, finding that the Coalition had failed to establish that it lost \$450 million in sales as a result of UNICOR's increased production. Moreover, the circuit court found that the Coalition had failed to show that its interests prevailed over the legitimate interests of the federal government in employing federal inmates.

In its ruling, the court said the coalition also failed to show that FPI violated laws that assist FPI in determining where and by how much FPI could expand its federal market share of a certain product segment. The court further said the board of directors of FPI conducted lengthy, detailed evaluations of FPI's requests to expand and, in some cases, offset production increases at some prisons with decreases at others.

⁸ Executive Order No. 6917, The White House, December 11, 1934.

⁹ 365 F.3d 435 (6th Cir. 2004).

4. *Unintended consequences of S. 346*

As testimony submitted on behalf of National Correctional industries Association reflected, S. 346 would gut the only self-supporting reentry program that exists within our federal prisons, and have a long-term, direct, negative impact on the correctional industry programs in the states and localities as well.

It is important to remember that FPI is not a business; it should not be driven by market forces. Rather, FPI is and should remain a model correctional program with the central mission to manage, train and rehabilitate federal inmates. There are many ways in which the FPI program does not and should not operate as a business. For instance, FPI sells its products only to the federal government and does limited advertising and marketing. Moreover, it spreads its operations across multiple business areas to lessen its potential impact on each of the industries in which it operates. And, most significantly and as mentioned earlier, FPI is deliberately labor-intensive in order to train the largest possible number of inmates.

Requiring FPI to compete effectively with private business for a limited number of federal customers, at a time when FPI work opportunities are diminishing and the federal prison population is increasing, may lead to a host of unintended consequences—the least of which may be poor working conditions and questionable cost-cutting measures.

As BOP Director Harley G. Lappin testified before the committee:

If the FPI program is not able to maintain its viability as a correctional program or is not able to maintain adequate levels of inmate enrollment, there will be a negative ripple effect. First and foremost, if fewer inmates develop the social skills of the workplace, recidivism will likely increase, at substantial future cost to taxpayers and victims of crime. Second, there will be an economic disruption to the small businesses that currently depend on the FPI program for their continued business success. Third, opportunities to provide restitution to victims of crime will decrease. Fourth, the risk of dramatically increased inmate idleness will threaten the safe and orderly operations of our federal correctional institutions. Finally, if the FPI program is no longer available to provide training to inmates, we will need to further develop alternative programs.¹⁰

FPI is unique among inmate programs in that, by statute, it receives no appropriated funding for its operations. Earnings from FPI's industrial program are used for all operating costs of the program, including purchase of raw materials and equipment, staff salaries and benefits, and compensation to inmates performing in industrial work details. In addition, the FPI program pays for equipment and other startup costs associated with activating new

¹⁰Testimony of Harley G. Lappin, Director, Federal Bureau of Prison and CEO, Federal Prison Industries, before Senate Committee on Governmental Affairs (April 7, 2004).

prison factories. Any future shortfall will eventually be borne by the American taxpayer.

Also, it is important to remember that FPI supports local economies and many small businesses. In 2003, FPI purchased \$502 million in goods, services—and raw materials from the private sector and \$1.5 billion from 1997 through 2001—a figure representing 74 percent of FPI's gross sales revenues.

According to the Correctional Vendors' Association, as of September 5, 2003, small businesses in New Jersey that provide raw materials and component parts and services to FPI had outstanding long and short-term contracts totaling \$116 million. In Pennsylvania, total outstanding contracts as of the same date totaled \$138 million; in Ohio, \$52 million; in Illinois, \$50 million; and millions of dollars in purchases in these and many other states will be jeopardized by S. 346.

5. Societal benefits of FPI mandatory source authority

Although the FPI program produces products and performs services, the real output of the FPI program is inmates who are more likely to return to society as lawabiding taxpayers because of the job skills training and work experience they received in the FPI program.

Inmates who work in FPI are 24 percent less likely to commit crimes and 14 percent more likely to be employed for as long as 12 years after release, when compared to similar inmates who did not have FPI experience. Thirty-four percent of FPI participants belong to minority groups. Minorities are often at greater risk for recidivism but have a higher rate of improvement from participating in FPI programs than non-minorities.¹¹

Seventy-six percent of inmates working in the FPI program have been convicted of drug trafficking, weapons, and violent offenses. FPI provides a program of constructive industrial work, providing sound job skills and positive work habits to inmates. Even before they are released from prison, it is apparent to prison staff that inmates who work in the FPI program have made substantial adjustments in their thinking and their behavior. When compared to similar inmates without FPI experience, the FPI program inmates are substantially less likely to violate prison rules, despite the extensive and violent criminal histories that are so common to these individuals.

Another important benefit of the FPI program is its ability to provide inmates with wages that can be used to provide restitution to victims. The FPI program mandates that 50 percent of inmate wages be used to pay fines, victim restitution, and child support obligations, which helps those outside the prison system who were affected by inmates' conduct. In FY 2003, inmates working in the FPI program paid approximately \$3 million towards these obligations, with the vast majority going to victim restitution.

The FPI program also contributes significantly to reducing inmate idleness. Inmate idleness is problematic in a number of ways—it undermines other rehabilitation programs and increases

¹¹Larry D. Thompson, *Federal Prison industries: Fair to Business, Vital to Society*, Federal times (March 1, 2004).

the risk of violence, escapes, and other disruptions. Idle inmates require more staff to monitor, which increases the cost to taxpayers. Furthermore, as the amount of time inmates are idle increases, the rate of these problems does not increase in a linear fashion, but geometrically. Rapid growth of the inmate population has led to increased systemwide crowding, with the most significant crowding at medium and high security institutions. FPI data indicate a high correlation between increasing inmate-to-staff ratios and higher rates of assaults. Thus, the FPI program is particularly important at higher security level institutions.

C. LAUTENBERG SUBSTITUTE AMENDMENT

The Lautenberg Substitute Amendment to S. 346 was identical to S. 2414, the Federal Inmate Work Opportunities Review Commission of 2004, which was introduced on May 12, 2004 by Senators Graham (R-SC) and Dorgan (D-ND). The Amendment provided for the appointment to the Federal Inmate Work Opportunities Review Commission, a total of nine members, by the President, Speaker of the House, Minority Leader of the House of Representatives, and Majority and Minority Leaders of the Senate. The Amendment required those appointed to the Commission to be familiar with Prison Industries and to serve for the duration of the Commission.

The work of the Commission would consider the views of private industry, labor unions, correctional administrators, and others interested in prisoner reentry. The Commission would have examined the state of FPI, including its impact on recidivism and private and public sector markets. It would have examined the FPI in light of the amendments to the 2004 Omnibus appropriations requiring competitive bidding.

Within two years, the Commission would have distributed a report with findings and conclusions, and recommended reforms. The Substitute Amendment also authorized funds, as necessary, to carry out the mission of the Commission.

During the discussion on this Amendment in the Committee Mark-up, Senator Levin indicated that there are enough studies that have been done on FPI and thus, there is no need for the Review Commission proposed in S. 2414. However, an examination of the studies that have been undertaken, primarily by the GAO, reveals that none of the studies or reports have accomplished that which is proposed by S. 2414.

Previous studies have not considered the following:

- (1) The current state of Federal Prison Industries, including an examination of its impact on the Federal Bureau of Prison's correctional mission, including the reduction of recidivism and safe prison management, and its impact on both the private sector and private labor markets.
- (2) The market viability and number of inmates employed by Federal Prison Industries, including the potential impact of other legislative proposals pending before Congress.
- (3) Alternatives that can be employed by the Department of Justice to maximize inmate work opportunities while minimizing domestic private sector job displacement, including an

examination of State and foreign government inmate work programs.

(4) Other issues as the Commission may determine necessary to its mission.

The Commission shall consider the views of all relevant parties affected by the future of inmate work programs—another key element that has not been comprehensively undertaken by previous studies—including:

(1) Private sector businesses, both those that allege they are harmed by Federal Prison Industries and those who currently supply Federal Prison Industries;

(2) Labor unions;

(3) Corrections administrators; and

(4) Other organizations and persons with an interest in corrections and the reentry of offenders back into the community.

Without a Commission authorized to examine these issues fully, only two things are certain to occur:

First, there will be a net loss of available prison work caused by an abrupt decrease in federal contracts. Since Congress began limiting FPI's mandatory source authority on Defense Department contracts in 2002, more than 1,700 inmate jobs have disappeared.

Second, federal taxpayers will bear the expense of any increased costs. The Congressional Budget Office has estimated that legislation similar to S. 346 would cost taxpayers \$587 million over the next 5 years, including \$177 million just for the new prison guards needed to maintain order and supervise the inmates who would no longer be working once FPI is gone.

D. CONCLUSION

We believe that reducing the scope of and participation in the FPI program will make it much harder for inmates to acquire the work and social skills necessary for reentering society. Without such skills, they are more likely to become recidivists and harm the people in the communities they are attempting to rejoin.

Federal Prison Industries is unique among inmate programs in that, by statute, it receives no appropriated funding for its operations. Inmates who participate in FPI work programs develop job skills, become model inmates, and contribute to victim funds—an important act of contrition and rehabilitation.

Rather than destroy a good government program that has served an important role in prison safety for 70 years, the Committee should, at a minimum, create a commission to collect evidence, hold hearings, hear testimony, listen to all stakeholders, and develop a sensible consensus position that carefully weighs the costs and benefits of the FPI program.

There is great value to society in having federal prisoners occupy their time constructively, develop a work ethic, and acquire job skills that will ease their transition back into civil society upon their release. As Chief Justice Burger once said, "My position on this is the most conservative one you can imagine. If you can take an individual and train him so he can do something a little more useful than stamping license plates, he's a little less likely to go

back [into prison]. This isn't for the benefit of the criminal community. It's for the benefit of you and me."¹²

FRANK R. LAUTENBERG.

GEORGE V. VOINOVICH.

DICK DURBIN.

TOM CARPER.

MARK PRYOR.



¹² Warren I. Cikins, *Factories with Fences: The History of Federal Prison Industries*, Dedication, Warren Burger's Quest for "Factories with Fences," pg. 2.