SEC. ___. CODIFICATION OF PROHIBITION ON DEPARTMENT OF DEFENSE ENTERING INTO CERTAIN CONTRACTS WITH CONTRACTORS HAVING BINDING ARBITRATION AGREEMENTS APPLICABLE TO CERTAIN CLAIMS OF EMPLOYEES.

(a) IN GENERAL.—

(1) CODIFICATION OF PROHIBITION.—Chapter 141 of title 10, United States Code, is amended by inserting after section 2402 the following new section:

"§ 2403. Contracts: prohibition in the case of contractors having binding arbitration agreements applicable to certain claims of employees

"(a) LIMITATION ON CONTRACTING.—The Secretary of Defense may not enter into a covered contract unless the contractor—

"(1) agrees not to—

"(A) enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or

"(B) take any action to enforce any provision of an agreement existing as of when the contract is entered into with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any claim or tort described in paragraph (1); and

"(2) certifies that it requires each covered subcontractor to agree not to enter into, and not to take any action to enforce any provision of, any agreement as described in subparagraphs (A) and (B) of paragraph (1), with respect to any employee or independent contractor performing work related to the subcontract.

"(b) DEFINITIONS.— In this section:

"(1) COVERED CONTRACT.—The term 'covered contract' means a contract for an amount in excess of $1,000,000.

"(2) COVERED SUBCONTRACTOR.—The term 'covered subcontractor' means, with respect to a covered contract, an entity that has a subcontract under the contract for which the amount is in excess of $1,000,000.

"(c) EXCEPTION.—The prohibitions in subsection (a) do not apply with respect to an agreement of a contractor or subcontractor with an employee or independent contractor if no court in the United States has jurisdiction to enforce the agreement.

"(d) WAIVER AUTHORITY.—

"(1) STANDARDS FOR WAIVER.—The Secretary of Defense may waive the application of subsection (a) to a particular contractor or subcontractor for the purposes of a particular contract or subcontract if the Secretary or the Deputy Secretary personally determines—

"(A) that the waiver is necessary to avoid harm to national security interests of the United States; and

"(B) that the term of the contract or subcontract is not longer than necessary to avoid such harm.

"(2) REQUIRED DETERMINATION.—A determination under paragraph (1)—

"(A) shall set forth with specificity the grounds for the waiver and for the term selected for the contract or subcontract; and

"(B) shall state any alternatives considered in lieu of a waiver and the reasons each such alternative would not avoid harm to national security interests of the United States.

"(3) NOTICE-AND-WAIT.—The Secretary shall submit to Congress, and simultaneously make public, any determination under paragraph (1) not less than 15 business days before the contract or subcontract addressed in the determination may be awarded.".

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2402 the following new item:

"2403. Contracts: prohibition in the case of contractors having binding arbitration agreements applicable to certain claims of employees.".

(b) EFFECTIVE DATE.—Section 2403 of title 10, United States Code, as added by subsection (a), shall take effect on October 1, 2012.

Section-by-Section Analysis

This proposal would codify an appropriation limitation (referred to as the "Franken Amendment"), first enacted in the Fiscal Year 2010 Appropriations Act, Defense (section 8116) and continued in the FY 2011 Defense Appropriations Act (section 8102).

The Franken Amendment prohibits the Department of Defense from using appropriated funds to enter into certain contracts with contractors that have binding arbitration clauses in their agreements with employees or independent contractors that limit the employee or independent contractor's ability to bring a claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision or retention; or take any action to enforce a provision of an existing agreement.

This proposal would retain the Franken Amendment applicability to contracts and subcontracts over $1 million and its inapplicability to contracts and subcontracts for commercial items or commercial off-the-shelf items. This proposal also would retain the waiver authority of the Secretary of Defense when he determines that the waiver is necessary to avoid harm to national security interests of the United States and that the term of the contract or subcontract is not longer than necessary to avoid such harm.

The proposal includes an effective date of October 1, 2012. That delayed effective date is intended to work in tandem with the recurring general provision section expected to be included in the FY12 defense appropriations Act (sec. 8049 in the FY12 Budget submission). A one-year delayed effective date (to 10/1/12, the beginning of FY13) is suggested based on (1) the assumption that the Franken Amendment language will be carried in the FY12 Defense Appropriations Act, and (2) the notion that it is undesirable to have overlapping or duplicative provisions in effect at the same time.

This effective date would avoid overlapping authorities by assuming that for the period of FY12 the Franken prohibition will be covered by the recurring GP in the Defense Appropriations Act AND, if this permanent provision is enacted during the first session of the 112th Congress, that the recurring GP will be dropped from the FY13 budget submittal, with the permanent provision taking effect at the beginning of FY13 as the FY12 provision ceases to be in effect.

Budget Implications: This proposal will not result in any additional cost to the Department.

For Reference: Section 8049 from the Budget request for the Department of Defense for FY012 is as follows:

SEC. 8049. (a) None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract for an amount in excess of $1,000,000, unless the contractor agrees not to:

(1) enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or

(2) take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.

(b) None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract unless the contractor certifies that it requires each covered subcontractor to agree not to enter into, and not to take any action to enforce any provision of, any agreement as described in paragraphs (1) and (2) of subsection (a), with respect to any employee or independent contractor performing work related to such subcontract. For purposes

of this subsection, a "covered subcontractor" is an entity that has a subcontract in excess of $1,000,000 on a contract subject to subsection (a).

(c) The prohibitions in this section do not apply with respect to a contractor's or subcontractor's agreements with employees or independent contractors that may not be enforced in a court of the United States.

(d) The Secretary of Defense may waive the application of subsection (a) or (b) to a particular contractor or subcontractor for the purposes of a particular contract or subcontract if the Secretary or the Deputy Secretary personally determines that the waiver is necessary to avoid harm to national security interests of the United States, and that the term of the contract or subcontract is not longer than necessary to avoid such harm. The determination shall set forth with specificity the grounds for the waiver and for the contract or subcontract term selected, and shall state any alternatives considered in lieu of a waiver and the reasons each such alternative would not avoid harm to national security interests of the United States. The Secretary of Defense shall transmit to Congress, and simultaneously make public, any determination under this subsection not less than 15 business days before the contract or subcontract addressed in the determination may be awarded.