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Domestic Content Restrictions: The Buy American Act and Complementary Provisions of Federal Law

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Summary

Broadly understood, *domestic content restrictions* are provisions which require that items purchased using specific funds appropriated or otherwise made available by Congress be produced or manufactured in the United States. Federal law contains a number of such restrictions, each of which applies to different entities and supplies, and imposes somewhat different requirements. Some of these restrictions have, however, been waived pursuant to the Trade Agreements Act (TAA).

The Buy American Act of 1933 is the earliest and arguably the best known of the major domestic content restrictions. It generally requires federal agencies to purchase "domestic end products" and use "domestic construction materials" on contracts exceeding the micro-purchase threshold (typically $3,500) performed in the United States. *Unmanufactured* end products or construction materials qualify as "domestic" if they are mined or produced in the United States. *Manufactured* ones are treated as "domestic" if they are manufactured in the United States, and either (1) the cost of components mined, produced, or manufactured in the United States exceeds 50% of the cost of all components, or (2) the items are commercially available off-the-shelf items. Agencies may, however, purchase "foreign" supplies in exceptional circumstances (purchase of domestic goods or use of domestic construction materials would be "impracticable").

The TAA permits the President to waive the application of domestic content restrictions that would discriminate against "eligible" products or suppliers from countries that have trade agreements with the United States or meet certain other criteria. The Buy American Act is one restriction that has been so waived. This means that certain federal agencies must generally treat end products or construction materials that have been wholly grown, produced, or manufactured in designated countries, or that have been "substantially transformed" into new and different articles within designated countries using materials from other countries, the same as domestic ones when acquiring goods or services whose value exceeds certain monetary thresholds.

The Berry Amendment, as currently codified in 10 U.S.C. §2533a, requires that food, clothing, tents, certain textile fabrics and fibers, and hand or measuring tools purchased by the Department of Defense (DOD) using appropriated or other funds be *entirely* grown, reprocessed, reused, or produced within the United States, with certain exceptions (e.g., procurements by vessels in foreign waters). Until 2006, the Berry Amendment also required that any "specialty metals" (certain types of steel and metal alloys) contained in aircrafts, missile and space systems, ships, tank and automotive items, weapon systems, ammunition, or any components thereof, purchased by DOD be melted or produced in the United States, with certain exceptions. However, that prohibition has since been codified in 10 U.S.C. §2533b.

The Buy America Act is the name commonly given to domestic content restrictions imposed on states, localities, and other nonfederal entities as a condition of receiving specific grant funds administered by the Department of Transportation (DOT) and certain other federal agencies. The nature of the restrictions can vary depending upon the funds involved. However, by way of example, 23 U.S.C. §313 generally requires recipients of Title 23 funding to use in funded projects steel and iron produced in the United States, as well as manufactured products consisting "predominantly" of steel and iron that were produced in the United States, with certain exceptions (e.g., materials needed are not produced in the United States in sufficient and reasonably available quantities of satisfactory quality).

There are also a number of other domestic content restrictions that apply in specific contexts and, in many cases, are intended to address perceived "gaps" left by the four major domestic content regimes noted above.

Contents

The Buy American Act: Restrictions on the Procurements of Federal Agencies 3
Purchases of Supplies 4
Purchases of Construction Materials 6
Exceptions to the Buy American Act 6
Waiver of Buy American Requirements Pursuant to the TAA 7
Trade Agreements Act: Agencies Treating Certain Eligible Foreign Offers Like Domestic Offers 7
International Trade Obligations 8
Waiver of Domestic Preference Content Requirements for Eligible Products from Designated Countries 9
The Substantial Transformation Test 11
Prohibition on Procurement from Nondesignated Countries 11
Exceptions to the TAA 11
The Berry Amendment: Requiring That Certain DOD Purchases Include Only Domestic Content 12
Specialty Metals Restriction (currently codified in 10 U.S.C. §2533b) 14
Buy America Act: Restrictions on Purchases Using Grant Funds 16
Grant Programs Administered by the Department of Transportation 16
Federal Highway Administration 17
Federal Aviation Administration 18
Federal Transit Administration 18
Federal Railroad Administration: Intercity and High-Speed Passenger Rail 20
Clean Water State Revolving Fund and Drinking Water State Revolving Fund 20
Tabular Comparison of Major Requirements 22
Other Provisions 23

Tables

Table 1. Tabular Comparison of the Major Domestic Content Regimes 22

Contacts

Author Information 28

Broadly understood, *domestic content restrictions* are provisions which require that items purchased using specific funds appropriated by Congress be produced or manufactured in the United States.[1] Over the years, Congress has enacted a number of such restrictions, pursuant to its broad power over federal spending,[2] in order to protect U.S. businesses and labor by generally barring the use of federal funds to purchase "foreign" products.[3] However, these restrictions are potentially less stringent than they might at first appear, since Congress has permitted the President to waive them so that the United States may comply with its obligations under various international trade agreements and accomplish certain other goals,[4] or expressly provided for supplies produced or manufactured in countries with which the United States has trade agreements to be treated the same as supplies produced or manufactured domestically.[5] Such promotion of trade has also been seen as generally benefitting U.S. firms and labor by facilitating the export of supplies and services in whose production the United States enjoys competitive advantages.[6]

Federal law currently has four major domestic content regimes, which apply in different contexts and impose different requirements upon the use of federal procurement, grant, and other funds:

1. The **Buy American Act of 1933**, as amended, generally requires federal agencies to purchase "domestic end products" and use "domestic construction materials" on contracts exceeding the micro-purchase threshold (typically $3,500) performed in the United States.
2. The **Trade Agreements Act of 1979**, as amended, permits the waiver of the Buy American Act and has resulted in "eligible products" from "designated countries" receiving equal consideration with domestic offers when certain federal agencies procure certain goods or services whose value exceeds certain monetary thresholds.
3. The **Berry Amendment** (10 U.S.C. §2533a) and its former **"specialty metals" provision**, now codified at 10 U.S.C. §2533b, require that food, clothing, tents, certain textile fabrics and fibers, and hand or measuring tools purchased by the Department of Defense (DOD) be entirely grown, reprocessed, reused, or produced in the United States; and that any "specialty metals" contained in any aircraft, missile and space system, ship, tank and automotive item, weapon

[1] In a few cases, these restrictions also apply to other funds available to federal agencies. *See, e.g.*, 10 U.S.C. §2533a (generally prohibiting the use of funds appropriated or otherwise available to the Department of Defense (DOD) for the procurement of certain items unless the item is grown, reprocessed, reused, or produced in the United States).

[2] U.S. CONST., art. 1, §8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."). Other powers may also be implicated in specific cases.

[3] *See generally* Dana Frank, *Buy American: The Untold Story of Economic Nationalism* 56-57 (1998).

[4] *See* 19 U.S.C. §2511(a) (authorizing the President to waive "the application of any law, regulation, procedure, or practice regarding Government procurement" that would discriminate against eligible products and suppliers from designated countries).

[5] *See, e.g.*, American Recovery and Reinvestment Act, P.L. 111-5, §1605(d), 123 Stat. 303 (February 17, 2009) (providing that certain domestic content restrictions imposed by the act are to be "applied in a manner consistent with United States obligations under international agreements").

[6] *Cf.* CRS Report RL33944, *U.S. Trade Concepts, Performance, and Policy: Frequently Asked Questions*, by Wayne M. Morrison et al. ("Economic theory indicates that trade occurs because it is mutually enriching.... By allowing each participant to specialize in producing what it is relatively more efficient at and trading for what it is relatively less efficient at, trade can increase economic well-being above what would be possible without trade.").

system, ammunition, or any components thereof, purchased by DOD be melted or produced in the United States.

4. The **Buy America Act**—which is the popular name for a group of domestic content restrictions that have been attached to specific grant funds administered by the Department of Transportation (DOT) and certain other federal agencies—generally requires that steel, iron, and manufactured products made primarily of steel or iron and used in infrastructure projects be produced or manufactured in the United States.

However, there are also a number of other domestic content restrictions that apply in specific contexts and, in many cases, are intended to address perceived "gaps" left by the four major domestic content regimes noted above.[7]

This report provides an overview of the Buy American Act, Trade Agreements Act, Berry Amendment (including its former specialty metals provision), and Buy America Act, specifically highlighting the commonalities and differences among them. The report also lists other federal domestic content restrictions codified in the *U.S. Code*. It does not address state or local "Buy American" provisions;[8] nor does it address use of the "Made in America" label.[9]

It is also important to note that existing domestic content restrictions generally pertain to the place of production or manufacture of supplies.[10] They generally do not address the place of performance of services, or, with certain exceptions, the nationality of the vendor.[11]

[7] *See infra* "Other Provisions."

[8] *See, e.g.*, CAL. GOV'T CODE §4304 (2016) ("Every contract for the construction, alteration or repair of public works or for the purchase of materials for public use shall contain a provision that only unmanufactured materials produced in the United States, and only manufactured materials manufactured in the United States, substantially all from materials produced in the United States shall be used in the performance of the contract."). Some states and localities also have measures that promote the purchase of state or local products.

[9] The Federal Trade Commission (FTC) regulates use of the "Made in the USA" designation. *See* FTC, Bureau of Consumer Protection, Made in USA, *available at* http://www.business.ftc.gov/advertising-and-marketing/made-usa. Federal law does not require the purchase of supplies bearing the "Made in the USA" designation, *per se*, although it may require the purchase of supplies that are produced or manufactured in the United States, and entities found to have intentionally affixed a "Made in America" or similar designation on an ineligible product that was sold in or shipped to the United States may be debarred from certain federal contracts. *See, e.g.*, 15 U.S.C. §1536 (debarment from Department of Commerce contracts).

[10] *Cf.* Military Optics, Inc., B-245010.3; B-245010.4 (January 16, 1992) ("The fact that the manufacturer of a domestically manufactured end product may be foreign owned is not a factor to be considered in determining whether to apply the Buy American Act differential.").

[11] *See, e.g.*, 10 U.S.C. §2534 (requiring DOD, with certain exceptions, to purchase buses, chemical weapons antidotes, certain components for naval vessels, certain valves and machine tools, and certain ball and roller bearings from manufacturers that are part of the U.S. technology and industrial base); 10 U.S.C. §2536 (prohibiting the award of DOD or Department of Energy contracts under a national security program to entities controlled by foreign governments if that entity would need to be given access to information in a proscribed category of information in order to perform the contract); 22 U.S.C. §4864(c) (requiring the Secretary of State to ensure that U.S. diplomatic and consular posts assist U.S. firms in obtaining local licenses and permits to perform certain local guard contracts for foreign service buildings); 42 U.S.C. §1870a (requiring that the National Science Foundation, "to the maximum extent practicable and consistent with current law," award to "domestic firms" any contracts for the purchase of goods or services intended for direct use by the Foundation); 49 U.S.C. §50103 (contract preference for domestic firms).

The Buy American Act: Restrictions on the Procurements of Federal Agencies

The Buy American Act is the earliest and arguably the best known of the major domestic content restrictions.[12] On its face, the Buy American Act appears to prohibit federal agencies from acquiring[13] "foreign" goods by providing that "[o]nly unmanufactured articles, materials, and supplies that have been mined or produced in the United States, and only manufactured articles, materials, and supplies that have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States, shall be purchased for public use."[14]

As implemented, however, the act is better understood as generally establishing a price preference for domestic end products and construction materials.[15] Specifically, the provisions of the Federal Acquisition Regulation (FAR) implementing the Buy American Act require that, when a domestic offer (i.e., an offer of a domestic end product) is not the low offer, the procuring agency must add a certain percentage of the low offer's price (inclusive of duty) to that offer before determining which offer is the lowest priced, or provides "best value" for the government.[16] This percentage typically ranges from 6%, in cases where the lowest domestic offer is from a large business;[17] to 12%, when the lowest domestic offer is from a small business;[18] to 50%, for Department of Defense procurements,[19] although agencies may adopt higher percentages by regulation.[20] If the

[12] Act of March 3, 1933, 47 Stat. 1520 (codified, as amended, at 41 U.S.C. §§8301-8305). For a more detailed discussion of the Buy American Act, *see* CRS Report R43140, *The Buy American Act—Preferences for "Domestic" Supplies: In Brief*.

[13] Although the Buy American Act uses the word "purchase" in certain places, it has been found to apply to leases of supplies on the basis that "it would be unreasonable to presume that Congress intended to narrow the protection afforded to American manufacturers by allowing the lease of foreign-made products where the purchase of such products is prohibited." Postmaster General, B-156082 (July 20, 1966).

[14] 41 U.S.C. §8302(a)(1). *See also* 41 U.S.C. §8303(a)(1)-(2) ("Every contract for the construction, alteration, or repair of any public building or public work in the United States shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers shall use only (1) unmanufactured articles, materials, and supplies that have been mined or produced in the United States....").

[15] Exec. Order No. 10582, implementing the Buy American Act, authorizes agencies to reject foreign offers that would have an "adverse effect" on the public interest. *See, e.g.*, Prescribing Uniform Procedures for Certain Determinations Under the Buy-American Act, 19 Fed. Reg. 8723 (December 21, 1954) ("Nothing in this order shall affect the authority or responsibility of an executive agency ... [t]o reject any bid or offer for reasons of the national interest not described or referred to in this order."). However, other than as authorized by this order, agencies generally cannot reject what would otherwise be the low offer on the grounds that it is foreign. *See* Viking Supply Corp., B-150091 (January 17, 1963).

[16] 48 C.F.R. §25.105 (supplies); 48 C.F.R. §25.204 (construction materials). Which offer represents the "best value" for the government is determined based on various factors established by the government and incorporated into the solicitation for the contract. *See* 48 C.F.R. §15.101 (best value); 48 C.F.R. §15.304 (evaluation factors). Cost or price must be among these factors, but it need not be the primary factor or carry any specific weight in the overall award. 48 C.F.R. §15.304(c)(1). Other factors may include contractors' compliance with the solicitation requirements, technical excellence, management capability, personnel qualifications, prior experience, and small-business status. 48 C.F.R. §15.304(c)(2).

[17] 48 C.F.R. §25.105(b)(1) (supplies); 48 C.F.R. §25.204(b) (construction materials).

[18] 48 C.F.R. §25.105(b)(2) (supplies only; there is no comparable provision as to construction materials). *But see* Puget Sound Pipe & Supply Co., B-164396 (August 5, 1968) (finding that, although the lowest domestic offer was from a small business, the 6% factor applied because the small business did not offer the products of a small business).

[19] 48 C.F.R. §225.105 ("Use an evaluation factor of 50 percent instead of the factors specified in FAR 25.105(b).").

[20] 48 C.F.R. §25.105(a)(1) (supplies); 48 C.F.R. §25.204(b) (construction materials). *See also* Concrete Tech., Inc., B-

domestic offer is the lowest, or tied for lowest, after the application of this price preference, the agency must generally award the contract to the domestic offeror. However, if the foreign offer still has the lowest price, the agency may generally award the contract to the foreign offeror pursuant to provisions of the Buy American Act permitting the purchase of foreign end products, and the use of foreign construction materials, when the costs of domestic ones are "unreasonable."[21]

The Buy American Act makes separate provisions for federal agencies' purchase of supplies and their construction of "public works," as discussed below. It also incorporates several exceptions that permit the use of foreign end products and construction materials even if the cost of domestic ones is not "unreasonable." In addition, the application of the Buy American Act has been waived in certain procurements pursuant to the Trade Agreements Act (TAA).

Purchases of Supplies

As implemented by the FAR, the Buy American Act generally requires that federal agencies acquiring supplies for use in the United States under a contract valued in excess of the micro-purchase threshold (typically $3,500) purchase "domestic end products."[22] Whether an *end product* (i.e., an article, material, or supply to be acquired for public use)[23] is "domestic" depends, in part, upon whether it is unmanufactured or manufactured. *Unmanufactured* end products must be mined or produced in the United States in order to qualify as "domestic" for purposes of the Buy American Act.[24] *Manufactured* end products, in contrast, qualify as domestic if they are manufactured in the United States, and either (1) the cost of the components mined, produced, or manufactured in the United States exceeds 50% of the cost of all components, or (2) the end product is a commercially available off-the-shelf (COTS) item.[25]

The meaning of "manufacture" is not defined by the Buy American Act, executive orders implementing the act,[26] or the FAR, and determining whether particular activities constitute "manufacturing"—such that a product can be said to be manufactured in the United States—can be complicated.[27] In answering this question, judicial and other tribunals have, at various times,

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202407 (October 27, 1981) (agencies may adopt higher percentages by regulation); General Elec. Co., B-152470 (February 14, 1964) (same).

[21] *See, e.g.*, Yohar Supply Co., B-225480 (February 11, 1987) ("[T]he Buy American Act ... does not prohibit the purchase of foreign source end items."); Paulsen-Webber Cordage Corp., B-140904 (December 11, 1959) (upholding the purchase of foreign end products where the price of the domestic products was 36% higher than the price of the foreign ones).

[22] 41 U.S.C. §8302(a)(1)(C); 48 C.F.R. §25.100(b)(1). The Buy American Act itself refers to items "manufactured in the United States *substantially all* from articles, materials, or supplies mined, produced, or manufactured in the United States." *See* 41 U.S.C. §8302(a)(1) (emphasis added). However, the executive branch has long construed "substantially all" to mean at least 50%, and this interpretation has been upheld as within the executive branch's discretion. *See, e.g.*, Allis-Chalmers Mfg. Co., B-147210 (November 27, 1961).

[23] 48 C.F.R. §25.003 (definition of *end product*).

[24] *Id*. (definition of *domestic end product*).

[25] *Id*. For purposes of the FAR, *COTS items* generally include any items of supply (including construction material) that are (1) "commercial items"; (2) sold in substantial quantities in the commercial marketplace; and (3) offered to the government without modification, in the same form in which they are sold in the commercial marketplace. 48 C.F.R. §2.101. *Commercial items* are items of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes that have been sold, leased, or licensed to the general public, or offered for sale, lease, or license to the general public. *Id*.

[26] *See especially* Exec. Order No. 10582, 19 Fed. Reg. 8723 (December 21, 1954).

[27] *See, e.g.*, United States *ex rel.* Kress v. Masonry Sols. Int'l, Inc., No. 12-2380, 2015 U.S. Dist. LEXIS 73807, at *11

considered whether there were "substantial changes in physical character";[28] whether separate manufacturing stages were involved, or whether there was one continuous process;[29] and whether the article is completed in the form required by the government.[30] Operations performed after the item has been completed (e.g., packaging, testing) generally are not viewed as manufacturing.[31]

The cost of components, in turn, is generally determined based upon certain costs incurred by the contractor in purchasing or manufacturing the components. Specifically,

- for components *purchased* by the contractor, the cost of components includes the acquisition costs (including transportation costs to the place of incorporation into the end product), and any applicable duty (regardless of whether a duty-free certificate of entry is issued);[32] and
- for components *manufactured* by the contractor, the cost of components includes all costs associated with the manufacture of the component (including transportation costs), and allocable overhead costs,[33] but excludes profits and any costs associated with the manufacture of the end product.[34]

Specific components generally need not be manufactured in the United States, so long as at least 50% of the costs of *all* components are mined, produced, or manufactured in the United States, or the end product is a COTS item. In general, anything that is not itself acquired as an end product is seen as a component, even if the agency could theoretically have purchased it as an end product.[35]

(E.D. La. June 8, 2015) ("[O]ver the years, the Comptroller General has adopted different, and sometimes conflicting, standards as to what constitutes 'manufacturing' under the Buy American Act.") (quoting A. Hirsh, Inc. v. United States, No. CIV. A. 90-2179, 1991 U.S. Dist. LEXIS 7964, at *6 (E.D. Pa. June 11, 1991)); A. Hirsch, Inc., B-237466 (February 28, 1990) ("The concept of what precisely constitutes 'manufacturing' for the purpose of the Act remains largely undefined; accordingly we have noted in our decisions in this area that each involves a peculiar factual situation and at best only provides conceptual guidance in determining whether a given set of operations constitutes manufacturing.").

[28] A. Hirsch, Inc., B-237466 (February 28, 1990). *But see* A D Machinery Co., B-242546; B-242547 (May 16, 1991) (stating that the test is not whether a foreign product has been significantly altered in the United States, but whether the item being procured is made suitable for its intended use, and its identity is established, in the United States).

[29] *See, e.g.*, Cincinnati Elec. Corp., B-185842 (September 27, 1976).

[30] *See, e.g.*, Valentec Wells, Inc., ASBCA 41659, 91-3 B.C.A. ¶ 24,168 (July 11, 1991); DynAmerica, Inc., B-248237 (September 28, 1992).

[31] *See, e.g.*, Marbex, Inc., B-225799 (May 4, 1987).

[32] 48 C.F.R. §25.003 (definition of *cost of components*).

[33] Costs are generally *allocable* to a government contract if they (1) are incurred specifically for the contract; (2) benefit both the contract and other work, and can be distributed to each in reasonable proportion to the benefits; or (3) are necessary to the overall operation of the business, even if a direct relationship to any particular cost objective cannot be shown. *See generally* 48 C.F.R. §31.201-4.

[34] 48 C.F.R. §25.003.

[35] *See id*. (defining *component* as any "article, material, or supply incorporated directly into an end product or construction material"). In practice, determining whether an item is an end product, or a component of an end product, can be complicated, particularly when the agency seeks to acquire some sort of "system." *See, e.g.*, Data Transformation Corp., GSBCA 89082-P, 87-3 B.C.A. ¶20,017 (July 15, 1987) (automatic data processing system); MRI Sys., Corp., B-184785 (November 19, 1976) (computer software system); Thomas J. Valentino, Inc., B-156768 (August 17, 1965) (music background library). However, judicial and other tribunals often look to the purpose and structure of the procurement in making such determinations. *See, e.g.*, Ampex Corp., B-203021 (February 24, 1982) (finding that two videotape recorder/reproducer systems were not end products because the solicitation for each system contained 15 line items, each of which could be viewed as an end product).

Purchases of Construction Materials

The Buy American Act also generally requires that domestic materials be used in federal agencies' construction projects by prohibiting them from "allow[ing] the contractor to acquire foreign construction materials."[36] *Construction material* generally includes any "article, material, or supply brought to the construction site by a contractor or subcontractor for incorporation into [a] building or work," including items brought to the site preassembled from articles, materials, or supplies.[37] However, materials purchased directly by the government are treated as supplies, not construction materials.[38]

Domestic construction material includes unmanufactured construction material mined or produced in the United States, as well as construction material manufactured in the United States, provided that (1) the cost of the components mined, produced, or manufactured in the United States exceeds 50% of the cost of all components, or (2) the material is a COTS item.[39] *Manufacture* is determined in the same way as for end products, and the costs of construction materials are also generally calculated in the same way as the costs of end products.[40]

Exceptions to the Buy American Act

The FAR lists five "exceptions" to the Buy American Act, or five circumstances in which an agency may purchase foreign end products, or permit the use of foreign construction materials, without violating the act. These exceptions apply when

1. the procurement of domestic goods or the use of domestic construction materials would be "impracticable" or "inconsistent with the public interest";[41]
2. domestic end products or construction materials are unavailable "in sufficient and reasonably available commercial quantities and of a satisfactory quality";[42]
3. the contracting officer determines that the cost of domestic end products or construction materials would be "unreasonable";[43]

[36] 41 U.S.C. §8303(a)(1)-(2); 48 C.F.R. §25.202(a).

[37] 48 C.F.R. §25.003 (definition of *construction material*). However, "emergency life safety systems" (e.g., emergency lighting, fire alarms) that are discrete systems which are incorporated into a public building or work and are produced as complete systems, are evaluated as single and discrete construction material regardless of when or how the individual parts or components are delivered to the construction site. *Id*.

[38] *Id*.

[39] *Id*.

[40] *See supra* notes 26-34 and accompanying text.

[41] 41 U.S.C. §8302(a)(1) (supplies); 41 U.S.C. §8303(b)(3) (construction); 48 C.F.R. §25.103(a) (supplies); 48 C.F.R. §25.202(a)(1) (construction materials). The "public interest" prong of this exception encompasses agency agreements with foreign governments that provide for the purchase of foreign end products or construction materials, as well as *ad hoc* determinations that application of the act's restrictions would not be in the public interest. *See also* 10 U.S.C. §2533 (prescribing that defense agencies take certain factors into account when determining whether application of the Buy American Act is inconsistent with the public interest).

[42] 48 C.F.R. §25.103(b) (supplies); 48 C.F.R. §25.202(a)(2) (construction materials). *See also* 41 U.S.C. §8302(a)(2)(B) (supplies); 41 U.S.C. §8303(b)(1)(B) (construction). In some cases, the government has made a determination that particular classes of products are nonavailable. *See generally* 48 C.F.R. §25.104(a). In other cases, the head of the contracting agency determines that goods which are not subject to class determinations are nonavailable. 48 C.F.R. §25.103(b)(2).

[43] 48 C.F.R. §25.103(c) (supplies); 48 C.F.R. §25.202(a)(3) (construction materials).

4. the goods are acquired specifically for commissary resale;[44] or
5. the agency procures information technology that is a commercial item.[45]

However, some commentators also treat procurements whose value is at or below the micro-purchase threshold (generally $3,500), and procurements for use outside the United States, as exceptions to the act.[46]

The procuring agency may determine, on its own initiative, whether one of these exceptions applies. Alternatively, particularly in the case of construction contracts, vendors may request that the contracting officer make a determination regarding the applicability of an exception prior to or after contract award.[47]

Waiver of Buy American Requirements Pursuant to the TAA

In practice, the applicability of the Buy American Act is significantly limited by its waiver pursuant to the Trade Agreements Act, as discussed below. Its requirements generally only apply when (1) the anticipated value of the procurement is below the relevant monetary thresholds prescribed by U.S. trade agreements;[48] (2) the acquisition involves agencies, supplies, or services excluded from the coverage of particular trade agreements;[49] or (3) the circumstances of the acquisition are otherwise such that the acquisition is exempt from the TAA's waiver of the Buy American Act (e.g., acquisitions set aside for small businesses).[50]

Trade Agreements Act: Agencies Treating Certain Eligible Foreign Offers Like Domestic Offers

The Trade Agreements Act (TAA) allows the President to waive "the application of any law, regulation, procedure, or practice regarding Government procurement" that would discriminate against eligible products or suppliers from "designated countries" so that the United States may comply with its obligations under various international trade agreements and accomplish certain other goals.[51] Laws subject to waiver include the Buy American Act and similar domestic content

[44] 48 C.F.R. §25.103(d) (supplies only; there is no similar provision as to construction materials).

[45] 48 C.F.R. §25.103(e) (supplies); 48 C.F.R. §25.202(a)(4) (construction materials). *See supra* note 25 for the definition of *commercial item*.

[46] *See, e.g.*, 9-50 *Gov't Conts.: Law, Admin. & Proc.* §50.60[1] (listing "products ... to be used outside the United States" and "goods ... procured under an award with a value less than the 'micro-purchase threshold'" as exceptions to the Buy American Act). The micro-purchase threshold may be lower, or higher, than $3,500, depending upon the circumstances of the procurement. *See* 48 C.F.R. §2.101.

[47] 48 C.F.R. §§25.203, 25.205. Contractors are, however, generally not legally entitled to a determination that an exception applies. *See, e.g.*, Two State Constr. Co., DOTCAB 78-31, 81-1 B.C.A. ¶ 15,149 (May 29, 1981).

[48] *See* 48 C.F.R. §25.402(b).

[49] *See* 48 C.F.R. §25.401(b). For example, supplies or services may be excluded from the coverage of particular trade agreements if the federal agency purchasing the supplies or services is not a covered entity under the agreement. *See* 19 U.S.C. §2518(4)(A); *e.g.*, WTO GPA, United States Appendix I, Annex 1; *id.* at Annex 4; U.S.-Panama Trade Promotion Agreement, Chapter 9, Annex 9.1.

[50] *See* 48 C.F.R. §25.401(a). These exceptions are discussed further, *infra*, notes 90-93 and accompanying text.

[51] 19 U.S.C. §2511(a); 48 C.F.R. §25.404 (stating that least developed country end products, construction materials, and services must be treated as eligible products for acquisitions subject to the WTO GPA); 48 C.F.R. §25.405 (providing that Caribbean Basin country end products, construction material, and services must be treated as eligible products for acquisitions subject to the WTO GPA); *see also, e.g.*, Revised WTO GPA, art. IV; U.S.-Oman Free Trade

restrictions. Under the TAA and its implementation in the FAR, offers of "eligible products"[52] from certain countries with which the United States has trade agreements, or which it otherwise treats as designated countries,[53] are generally entitled to "receive equal consideration with domestic offers" whenever the value of the acquisition exceeds certain monetary thresholds.[54]

The TAA also prohibits procurement of products of nondesignated countries, with certain exceptions and waivers, in acquisitions covered by the World Trade Organization (WTO) Government Procurement Agreement (GPA) whose value exceeds the relevant monetary thresholds, in order to encourage additional countries to join this agreement and provide reciprocal competitive government procurement opportunities to U.S. products and suppliers.[55] The FAR implements this prohibition by requiring federal agencies to acquire only "U.S.-made or designated country end products or U.S. or designated country services" in acquisitions covered by the WTO GPA, subject to certain exceptions.[56]

A "substantial transformation" test is used to determine whether an end product originates in a particular country for purposes of the TAA when the product consists at least in part of materials from another country.[57]

International Trade Obligations

Congress passed the TAA in part to implement the Government Procurement Code resulting from the Tokyo Round of international trade negotiations.[58] The code contained nondiscrimination obligations with respect to government procurement similar to those now contained in the plurilateral[59] WTO GPA.[60]

Currently, the WTO GPA generally requires that, whenever the value of an acquisition exceeds certain monetary thresholds, the United States grant a party's covered products, services, and

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Agreement, art. 9.2. There are other statutory provisions that also permit waiver of the Buy American Act or domestic preferences. *See, e.g.*, 10 U.S.C. §2350b (permitting waiver in the context of the acquisition of defense equipment for cooperative projects under the Arms Export Control Act); 10 U.S.C. §2457(e) (authorizing the Secretary of Defense to waive, as inconsistent with the public interest, the requirements of the Buy American Act if it is determined that the procurement of equipment manufactured outside the United States is necessary to carry out the standardization of equipment with North Atlantic Treaty Organization members); 22 U.S.C. §2603 (authorizing waivers of the Buy American Act in the context of migration and refugee assistance).

[52] An *eligible product* is "a foreign end product, construction material, or service that, due to applicability of a trade agreement to a particular acquisition, is not subject to discriminatory treatment." 48 C.F.R. §25.003.

[53] Some of the designated countries that are "Caribbean Basin countries" or "least developed countries" have not entered into trade agreements with the United States. *See* 48 C.F.R. §25.003 (listing these least developed and Caribbean Basin countries under the definition of *designated country*).

[54] 19 U.S.C. §2511; 48 C.F.R. §25.402(a)(1), (b).

[55] 19 U.S.C. §2512(a), (b); 48 C.F.R. §25.403(c).

[56] 48 C.F.R. §25.403(c)

[57] 19 U.S.C. §2518(4)(B); 48 C.F.R. §25.001(c).

[58] 19 U.S.C. §§2511-18; Tokyo Round Government Procurement Code, *available at* http://www.worldtradelaw.net/tokyoround/procurementcode.pdf.

[59] In this context, a "plurilateral" agreement is one to which not all WTO Members are bound.

[60] Revised WTO GPA, art. IV, *available at* http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm. On March 30, 2012, the parties to the WTO GPA adopted a new version of the agreement intended to bring it into conformity with current procurement practices and update the list of procurements covered by the agreement. The Revised WTO GPA entered into force for the United States on April 6, 2014. Revised WTO Agreement on Government Procurement Enters into Force, *available at* https://www.wto.org/english/news_e/news14_e/gpro_07apr14_e.htm.

suppliers national treatment—that is, treat them no less favorably than domestic goods, services, and suppliers—with respect to all laws, regulations, procedures, and practices regarding government procurement covered by the agreement.[61] The WTO GPA also contains a most-favored-nation (MFN) treatment provision that requires the United States to treat a party's covered products, services, and suppliers no less favorably than the products, services, and suppliers of any other party to the agreement with respect to all laws, regulations, procedures, and practices covered by the agreement.[62] Most U.S. free trade agreements also contain some form of nondiscrimination obligation pertaining to government procurement.[63] Annexes to these free trade agreements include monetary thresholds that determine when the obligations in the agreements apply to an acquisition of covered products or services by a covered entity.[64]

If a WTO Member or country party to a U.S. free trade agreement considered a U.S. government procurement measure to violate the agreement, it could potentially challenge the measure in a dispute settlement proceeding.[65] If an adverse decision were ultimately rendered, the United States would be expected to remove the offending measure or face the possibility of paying compensation to the complaining foreign country or being subject to trade retaliation.[66] Such sanctions might include the suspension by the retaliating foreign country of nondiscriminatory treatment accorded to U.S. products, services, and suppliers in that country's procurements.[67]

Waiver of Domestic Preference Content Requirements for Eligible Products from Designated Countries

So that the United States may comply with its obligations under these trade agreements, the Office of the United States Trade Representative (USTR)[68] has waived the Buy American Act for eligible products from designated countries, making these products in a sense "subject to" the TAA rather than the Buy American Act.[69] Part 25 of the FAR contains a list of countries designated by the USTR. This list includes (1) parties to the WTO GPA; (2) parties to most U.S.

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[61] Revised WTO GPA, art. IV. The agreement contains general exceptions for (1) measures necessary for certain national security or defense purposes; (2) measures necessary to protect public morals, order, or safety; (3) measures necessary to protect human, animal, or plant life or health; (4) measures necessary to protect intellectual property; or (5) measures "relating to goods or services of persons with disabilities, philanthropic institutions or prison labour." *Id.* art. III. In addition, the General Notes to parties' procurement annexes may contain additional exceptions that apply to procurement by entities of a particular party. *E.g.*, Revised WTO GPA, United States Appendix I, Annex 7.

[62] *Id.*

[63] *See, e.g.*, U.S.-Oman Free Trade Agreement, art. 9.2. Some U.S. free trade agreements, such as the North American Free Trade Agreement (NAFTA), contain both national treatment and MFN provisions. NAFTA art. 1003.

[64] *See, e.g.*, U.S.-Peru Trade Promotion Agreement, Annex 9.1.

[65] *E.g.*, WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, arts. 21-22; U.S.-Korea Free Trade Agreement arts. 22.12-22.14.

[66] *See* sources cited *supra* note 65.

[67] *Id.*

[68] The President has delegated the authority to designate countries and make the required determinations under section 301 of the TAA to the USTR. Exec. Order No. 12260, at §1-201, 46 Fed. Reg. 1653 (December 31, 1980). The USTR makes each designation, and, if necessary, the required determinations, and publishes them in the Federal Register. *See, e.g.*, USTR, Determination Regarding Waiver of Discriminatory Purchasing Requirements with Respect to Goods and Services Covered by Chapter Nine of the United States-Panama Trade Promotion Agreement, 77 Fed. Reg. 65603 (October 29, 2012).

[69] 48 C.F.R. §25.402(a)(1). None of the relevant exceptions contained in the FAR, discussed below, must apply to the acquisition. *See* "Exceptions to the TAA" (discussing certain exceptions, such as acquisitions set aside for small businesses, provided for in 48 C.F.R. §25.401(a)).

free trade agreements; (3) certain least developed countries;[70] and (4) certain Caribbean Basin countries.[71]

Not all products and services from particular designated countries are eligible products for purposes of the TAA, however.[72] Rather, only products and services covered for procurement by specified agencies of the United States under certain trade agreements are eligible.[73] Annexes to the WTO GPA and U.S. free trade agreements indicate which products and services of a particular country are covered for procurement by the United States, often by including certain products and services within the coverage of the agreement or excluding them from coverage under the agreement.[74] In addition, the international obligations contained in these agreements extend only to procurements by particular entities, such as certain federal agencies, that are listed in a country's annexes.[75] Thus, it appears that products and services acquired by entities not listed in the relevant annexes to free trade agreements would not be eligible products under the TAA.[76]

An acquisition is subject to a TAA waiver or purchase restriction only when its value equals or exceeds certain monetary thresholds.[77] These thresholds are initially established in annexes to particular trade agreements.[78] However, the USTR revises the thresholds every two years and has currently set the threshold for supply contracts under the WTO GPA at $191,000 ($7.36 million for construction contracts).[79] The FAR lists the monetary thresholds for each relevant trade agreement.[80] It also contains instructions for calculating the estimated acquisition value.[81] These instructions correspond to the rules for valuation of contracts contained in the WTO GPA.[82]

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[70] The term *least developed countries* includes "any country on the United Nations (UN) General Assembly list of least developed countries." 19 U.S.C. §2518(6). For more on how the UN applies this designation, see UN Dev. Policy and Analysis Division, LDC Criteria, *available at* http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_criteria.shtml.

[71] 48 C.F.R. §25.003 (defining *designated country*). The USTR has waived the Buy American Act for eligible products from "least developed countries" and Caribbean Basin countries to accomplish certain other goals. 48 C.F.R. §§25.402(a)(1), 25.404, 25.405. For example, the Caribbean Basin Initiative "provides beneficiary countries with duty-free access to the U.S. market for most goods" to help with the development of their economies. USTR, Caribbean Basin Initiative, *available at* https://ustr.gov/issue-areas/trade-development/preference-programs/caribbean-basin-initiative-cbi.

[72] 19 U.S.C. §2518(4)(A) (defining *eligible product*). Certain end products, construction material, and services from "least developed" or "Caribbean Basin" countries are eligible products under the TAA for acquisitions covered by the WTO GPA. 48 C.F.R. §§25.404, 25.405.

[73] 19 U.S.C. §2518(4)(A) (defining *eligible product*); 48 C.F.R. §25.003 (same).

[74] *See, e.g.*, Revised WTO GPA, United States Appendix I, Annex 1; *id.* at Annex 4; U.S.-Panama Trade Promotion Agreement, Chapter 9, Annex 9.1.

[75] *See, e.g.*, Revised WTO GPA, United States Appendix I, Annex 1; *id.* at Annex 5; U.S.-Panama Trade Promotion Agreement, Chapter 9, Annex 9.1.

[76] *See* 19 U.S.C. §2518(4)(A).

[77] 48 C.F.R. §§25.402(b), 25.403(c). For designated countries that are least developed countries or Caribbean Basin countries, the relevant monetary threshold is provided in the WTO GPA. 48 C.F.R. §§25.404, 25.405.

[78] *See, e.g.*, Revised WTO GPA, United States Appendix I, Annex 1 (establishing monetary thresholds for procurements of supplies and construction services).

[79] 48 C.F.R. §25.402(b).

[80] *Id.*

[81] 48 C.F.R. §25.403(b).

[82] Revised WTO GPA, art. II.

The Substantial Transformation Test

The TAA sets forth the test for determining whether an article originates in a particular country. Under this test,

> An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.[83]

Thus, for a product made at least in part from materials manufactured in another country to undergo "substantial transformation," it must acquire a new name, character, or use.[84]

Prohibition on Procurement from Nondesignated Countries

To encourage additional countries to join the WTO GPA and to provide reciprocal competitive government procurement opportunities to U.S. products and suppliers, the TAA requires the President, with regard to acquisitions covered by the WTO GPA, to prohibit procurement of the products of nondesignated countries, subject to certain exceptions and waivers.[85] When the value of the acquisition exceeds the relevant monetary threshold in the WTO GPA, the TAA's purchasing restriction applies.[86] The purchasing restriction, as implemented in the FAR, requires federal agencies to acquire only "U.S.-made or designated country end products or U.S. or designated country services" in acquisitions covered by the WTO GPA, "unless offers for such end products or services are either not received or are insufficient to fulfill the requirements."[87]

Generally, a U.S.-made end product is a product "that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed."[88] Essentially, designated country end products are products grown, produced, manufactured, or substantially transformed in a country that is party to the WTO GPA; party to a U.S. free trade agreement that contains procurement obligations; one of certain least developed countries; or one of certain Caribbean Basin countries.[89]

Exceptions to the TAA

Pursuant to Subpart 25.4 of the FAR, the TAA does not apply to certain acquisitions, including[90]

1. acquisitions set aside for small businesses;[91]

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[83] 19 U.S.C. §2518(4)(B).

[84] 48 C.F.R. §25.001(c); CSK Int'l, Inc., B-278111.2 (December 30, 1997) (attachment of a pulaski tool head together with its wooden handle did not result in a substantial transformation).

[85] 19 U.S.C. §2512.

[86] 48 C.F.R. §25.403(c).

[87] *Id*.

[88] 48 C.F.R. §25.003 (defining *U.S.-made end product*).

[89] *Id*. (defining *designated country end product*).

[90] 48 C.F.R. §25.401(a).

[91] A set-aside is an acquisition in which only small businesses may compete. See generally CRS Report R42391, *Legal*

2. acquisitions of arms, ammunition, or war materials, or purchases indispensable for national security or national defense purposes;
3. acquisition of end products for resale;
4. acquisitions from Federal Prison Industries, Inc., under Subpart 8.6 of the FAR, or from nonprofit agencies employing persons who are "blind or severely disabled" (commonly known as AbilityOne), under Subpart 8.7 of the FAR; or
5. other acquisitions not using full and open competition, authorized under Subparts 6.2 or 6.3 of the FAR, when the limitation of competition would preclude the use of the procedures of Subpart 25.4; or sole-source acquisitions justified in accordance with Subpart 13.501.[92]

When an acquisition is not subject to the TAA due to one of these exceptions, the Buy American Act or another domestic preference law may apply.[93]

The Berry Amendment: Requiring That Certain DOD Purchases Include Only Domestic Content

The Berry Amendment has existed since the beginning of World War II and, historically, was included in yearly defense appropriations acts. However, it became permanent law in 1993,[94] and was ultimately codified at 10 U.S.C. §2533a in 2002.[95] Over the years, the scope of the amendment has changed,[96] though its core purposes have remained constant: safeguarding the United States' national security interests and protecting the U.S. industrial base to enable it to meet defense requirements during times of need.[97]

Pursuant to the Berry Amendment, DOD cannot use appropriated or otherwise available funds to purchase a covered item unless that item is *entirely* grown, reprocessed, reused, or produced within the United States.[98] In other words, the Berry Amendment requires a higher level of domestic content than is required under the Buy American Act, which permits manufactured items to qualify as "domestic" so long they are manufactured in the United States, and (1) the cost of components mined, produced, or manufactured in the United States exceeds 50% of the cost of

Authorities Governing Federal Contracting and Subcontracting with Small Businesses.

[92] 48 C.F.R. §25.401(a). Subparts 6.2 and 6.3 of the FAR, respectively, discuss (1) full and open competition after the exclusion of sources, and (2) other than full and open competition. Section 13.501 discusses the special documentation requirements pertaining to the use of "special simplified procedures" for certain commercial items. *See also* 48 C.F.R. §13.500(a) ("This subpart authorizes the use of simplified procedures for the acquisition of supplies and services in amounts greater than the simplified acquisition threshold but not exceeding $7 million ($13 million for acquisitions as described in 13.500(c)), including options, if the contracting officer reasonably expects, based on the nature of the supplies or services sought, and on market research, that offers will include only commercial items.").

[93] *See* Puerto Rico Marine Mgmt., Inc., B-247975.5 (October 23, 1992).

[94] Department of Defense Appropriations Act, 1994, P.L. 103-139, §8005, 107 Stat. 1488 (November 11, 1993). The Berry Amendment was initially codified at 10 U.S.C. §2241 note. *Id.*

[95] National Defense Authorization Act for FY2002, P.L. 107-107, §832, 115 Stat. 1189 (December 28, 2001).

[96] In its original incarnation, the Berry Amendment ensured only that troops' uniforms were wholly manufactured in the United States and that their food was wholly grown and produced in the United States. *See* Fifth Supplemental National Defense Appropriations Act, P.L. 77-29, 55 Stat. 125 (April 5, 1941). Over time, other items were added.

[97] *See* U.S. Gov't Accountability Office, Defense Acquisition: Rationale for Imposing Domestic Source Restrictions, GAO/NSIAD-98-191, at p. 1 (1998).

[98] 10 U.S.C. §2533a(a).

all components, or (2) the items are COTS items. For purposes of the Berry Amendment, covered items include food,[99] clothing,[100] tents,[101] certain textile fabrics and fibers,[102] and hand or measuring tools.[103] Until 2006, the Berry Amendment also included provisions addressing specialty metals, but this language has since been codified in 10 U.S.C. §2533b,[104] discussed below.

There are a number of exceptions within the Berry Amendment, permitting DOD to acquire covered items that are not entirely grown, reprocessed, reused, or produced within the United States when

1. the Secretary of Defense, or the secretary of a military department, determines that items of satisfactory quality or sufficient quantity cannot be acquired "as and when needed at United States market prices";[105]
2. the value of the purchase is below the simplified acquisition threshold (generally $150,000);[106]
3. procuring items outside the United States in support of combat operations; or procuring food, or hand or measuring tools, outside the United States in support of contingency operations;[107]
4. procuring food or hand or measuring tools in circumstances in which the unusual and compelling urgency of the need does not permit the use of competitive procedures;[108]
5. vessels procure items in foreign waters;[109]
6. conducting "emergency procurements," or establishments located outside the United States procure perishable foods for the personnel attached to that establishment;[110]

[99] 10 U.S.C. §2533a(b)(1)(A).

[100] 10 U.S.C. §2533a(b)(1)(B). *Clothing* includes any materials or components of clothing, excluding sensors, electronics, or other items that are added to, but not normally associated with, clothing. *Id.*

[101] 10 U.S.C. §2533a(b)(1)(C). *Tents* include any structural components of tents, along with tarpaulins and covers. *Id.*

[102] 10 U.S.C. §2533a(b)(1)(D). Covered textile fabrics and fibers include cotton and other natural fiber products, woven silk or silk blends, spun silk yarn for cartridge cloth, synthetic fabrics, coated synthetic fabrics, canvas products, and wool. *Id.* Items of individual equipment manufactured from or containing such fibers, yarns, fabrics, or materials are also expressly included. 10 U.S.C. §2533a(b)(1)(E).

[103] 10 U.S.C. §2533a(b)(2).

[104] The domestic source requirements applicable to specialty metals were relocated by the John Warner National Defense Authorization Act for FY2007. P.L. 109-364, §842, 120 Stat. 2335 (October 17, 2006).

[105] 10 U.S.C. §2533a(c). Under the Defense Federal Acquisition Regulation Supplement, other officials authorized to make nonavailability determinations include the Under Secretary of Defense and the Director of the Defense Logistics Agency. 48 C.F.R. §225.7002-2(b)(1). Any nonavailability determination must be supported by documentation that analyzes alternatives that would not require a domestic nonavailability determination and certifies, in writing and with specificity, why such alternatives are unacceptable. 48 C.F.R. §225.7002-2(b)(2)(i),(ii).

[106] 10 U.S.C. §2533a(h). *See* 48 C.F.R. §2.101 (simplified acquisition threshold may exceed $150,000 in certain circumstances, e.g., acquisitions of supplies or services to be used to support contingency operations or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack).

[107] 10 U.S.C. §2533a(d)(1).

[108] 10 U.S.C. §2533a(d)(4).

[109] 10 U.S.C. §2533a(d)(2).

[110] 10 U.S.C. §2533a(d)(3).

7. acquiring items for commissary resale;[111]
8. procuring food products (other than fish, shellfish, or seafood)[112] processed or manufactured in the United States;[113]
9. acquiring waste and byproducts of cotton and wool fiber for use in the production of propellants and explosives;[114] or
10. procuring "chemical warfare protective clothing" produced outside the United States is necessary to comply with certain U.S. agreements with foreign governments.[115]

Even if an acquisition is exempt from the requirements of the Berry Amendment, it is potentially subject to the Buy American Act.[116] However, if the Berry Amendment applies to an acquisition, the Buy American Act does not.[117]

Neither the Berry Amendment nor the specialty metals restriction, discussed below, have been waived pursuant to the TAA, and certain trade agreements of the United States expressly provide that they do not apply to procurements involving textiles, clothing, food, and "specialty metals."[118]

Specialty Metals Restriction (currently codified in 10 U.S.C. §2533b)

The specialty metals restriction first appeared in 1972,[119] when it was added to the Berry Amendment during the Vietnam War.[120] It remained part of the Berry Amendment until 2006, when the National Defense Authorization Act for FY2007 took effect, and moved the specialty metals restriction from the codification of the Berry Amendment in 10 U.S.C. §2533a to a separate section of the *U.S. Code*, 10 U.S.C. §2533b.[121]

Pursuant to the specialty metals restriction, DOD cannot buy any aircraft, missile and space system, ship, tank and automotive item, weapon system, ammunition, or any components thereof, containing a specialty metal that was not melted or produced in the United States.[122] Further, DOD is prohibited from purchasing, either directly or through a contractor, any specialty metal not melted or produced in the United States.[123]

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[111] 10 U.S.C. §2533a(g).

[112] 10 U.S.C. §2533a note.

[113] 10 U.S.C. §2533a(f)(1).

[114] 10 U.S.C. §2533a(f)(2).

[115] 10 U.S.C. §2533a(e).

[116] 10 U.S.C. §225.7000(b) ("Nothing in this subpart affects the applicability of the Buy American statute.").

[117] *See id.*

[118] *See, e.g.*, Revised WTO GPA, United States Appendix I, Annex 1 (specifying that the WTO GPA does not apply to purchases of the Department of Defense involving (1) Federal Supply Classification (FSC) 83 (textiles) (other than pins, needles, sewing kits, flagstaffs, flagpoles, and flagstaff trucks); (2) FSC 84 (clothing and individual equipment) (other than luggage); (3) FSC 89 (food) (other than tobacco products); and (4) "specialty metals," among other things).

[119] Department of Defense Appropriations Act, 1973, P.L. 92-570, §742, 86 Stat. 1200 (October 26, 1972).

[120] See CRS Report RL33751, *The Specialty Metal Clause: Oversight Issues and Options for Congress*, by Valerie Bailey Grasso, at p. 1.

[121] P.L. 109-364, §842(a).

[122] 10 U.S.C. §2533b(a)(1).

[123] 10 U.S.C. §2533b(a)(2).

Specialty metals include certain types of steel;[124] certain metal alloys made of nickel, iron-nickel, and cobalt;[125] titanium and titanium alloys;[126] and zirconium and zirconium alloys.[127]

The specialty metals restriction contains a number of exceptions identical to those that apply to the Berry Amendment, including for purchases below the simplified acquisition threshold;[128] items deemed to be "non-available";[129] acquisitions conducted outside of the United States in support of combat or contingency operations;[130] acquisitions made on a noncompetitive basis due to compelling urgency;[131] and items purchased for commissary resale.[132] However, there are also certain exceptions that are unique to the specialty metals restriction, and permit DOD to purchase specialty metals, or specified items containing (or whose components contain) such metals, that were not melted or produced in the United States. These exceptions apply when

1. acceptance of an end item containing noncompliant materials is "necessary" to the national security interests of the United States;[133]
2. acquiring electronic components (unless the Secretary of Defense determines, based on the recommendation of the Strategic Materials Protection Board, that domestic availability of a particular electronic component is critical to national security);[134]
3. acquiring certain COTS items, or fasteners that are commercial items purchased under a contract or subcontract with a manufacturer of such items, provided certain conditions are met;[135]
4. purchasing items wherein the total weight of noncompliant specialty metals is less than 2% of the total weight of the item's specialty metals;[136]
5. the acquisition is necessary to comply with or further certain agreements with foreign governments;[137]
6. the Secretary of Defense, or the secretary of a military department, determines that items acquired under a prime contract are "commercial derivative military articles," and the contractor certifies that it and its subcontractors have entered

[124] 10 U.S.C. §2533b(*l*)(1). The specialty metals restriction applies to steel "with a maximum alloy content exceeding one or more of the following limits: manganese, 1.65 percent; silicon, 0.60 percent; or copper, 0.60 percent" or "containing more than 0.25 percent of any of the following elements: aluminum, chromium, cobalt, columbium, molybdenum, nickel, titanium, tungsten, or vanadium." *Id.*

[125] 10 U.S.C. §2533b(*l*)(2). The specialty metals restriction applies to nickel, iron-nickel, and cobalt base metal alloys only if they contain "a total of other alloying metals (except iron) in excess of 10 percent." *Id.*

[126] 10 U.S.C. §2533b(*l*)(3).

[127] 10 U.S.C. §2533b(*l*)(4).

[128] 10 U.S.C. §2533b(f).

[129] 10 U.S.C. §2533b(b).

[130] 10 U.S.C. §2533b(c)(1).

[131] 10 U.S.C. §2533b(c)(2).

[132] 10 U.S.C. §2533b(e).

[133] 10 U.S.C. §2533b(k)(1).

[134] 10 U.S.C. §2533b(g).

[135] 10 U.S.C. §2533b(h)(2)-(3). Acquisitions of certain COTS items are, however, excluded from this exception, meaning that they must comply with the specialty metals restrictions. *See* 10 U.S.C. §2533b(h)(2)(A)-(D).

[136] 10 U.S.C. §2533b(*i*)(1). This exception does not apply to high performance magnets. 10 U.S.C. §2533b(*i*)(2).

[137] 10 U.S.C. §2533b(d)(1), (2).

into agreements for the purchase of specified amounts of domestically melted specialty metal;[138] and

7. acquiring items produced, manufactured, or assembled in the United States prior to October 17, 2006, that contain noncompliant specialty metals, provided that (a) the contractor or subcontractor plans to comply with the specialty metals restriction in the future, (b) removing the noncompliant specialty metals would be impractical, and (c) the noncompliance was inadvertent.[139]

As with the Berry Amendment, acquisitions that are exempt from the specialty metals restrictions could potentially be subject to the Buy American Act; and the Buy American Act does not apply if the specialty metals restriction applies.[140]

Buy America Act: Restrictions on Purchases Using Grant Funds

The Buy America Act is the popular name for a group of domestic content restrictions that have been attached to specific funds administered by the Department of Transportation (DOT) and certain other federal agencies. These funds are used to make grants to states, localities, and other nonfederal government entities for various purposes, including transportation projects or for water-related infrastructure systems. The Buy American Act does not apply to these funds because, while the source of the money is federal, purchases are not made directly by the federal government.[141] In other words, these purchases are not federal procurements for purposes of the Buy American Act.

The various Buy America requirements have not been waived pursuant to the TAA, and certain U.S. trade agreements expressly exclude "non-contractual agreements or ... any form of [government] assistance," such as grants, from their coverage.[142]

Grant Programs Administered by the Department of Transportation

Many domestic content restrictions related to the use of grant funds are placed on projects administered through agencies in DOT.[143] This section describes some of these Buy America requirements, which differ among agencies.

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[138] 10 U.S.C. §2533b(j).

[139] 10 U.S.C. §2533b note.

[140] *See* 48 C.F.R. §225.7000(b).

[141] *See generally* 31 U.S.C. §§6303-6305 (distinguishing between procurement contracts, grants, and cooperative agreements based, in part, on whether the "principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government," or whether it is "to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States").

[142] *See, e.g.*, Revised WTO GPA, art. II(3)("Except where provided otherwise in a Party's annexes to Appendix I, this Agreement does not apply to ... non-contractual agreements or any form of assistance that a Party provides, including cooperative agreements, grants, loans, equity infusions, guarantees and fiscal incentives.").

[143] Amtrak is also subject to statutory domestic preference requirements. For more information on these requirements, *see* archived CRS Report R43388, *Transportation Spending and "Buy America" Requirements*.

Federal Highway Administration

Section 313 of Title 23 of the *U.S. Code* prohibits the obligation of funds appropriated under Title 23 and administered by the DOT for a project "unless the steel, iron, and manufactured products used in such project are produced in the United States."[144] Section 313's restriction on the use of foreign manufactured products only applies to manufactured products that consist predominantly of steel or iron, not all manufactured products.[145] Raw materials used in the manufacturing processes may be imported.[146]

States expending Federal Highway Administration (FHWA) funds can satisfy the Buy America requirements by using only steel or iron produced in the United States, or including standard contract provisions that require domestic materials. Otherwise, the state may use alternate bid provisions, requiring each bidder to submit bids based on domestic materials and stating that the contract will be awarded to the bidder with the lowest total bid on domestic materials unless that bid exceeds the lowest total bid on foreign materials by more than 25%.[147] Additionally, if the project includes steel and iron materials, the Buy America requirements do not prevent the minimal use of foreign steel and iron materials, not exceeding .1% of the total contract cost, or $2,500, whichever is greater.[148] The FHWA is prohibited from creating funding restrictions that would prevent a state from imposing stricter Buy America requirements on projects carried out with Title 23 funds.[149]

The FHWA has issued nationwide waivers to the Buy America requirements for manufactured products other than steel or iron manufactured products;[150] certain steel and iron materials used in

[144] 23 U.S.C. §313(a). The Federal Highway Administration (FHWA) considers a "manufactured product" to be "any item that must undergo one or more manufacturing processes before the item can be used in a highway project ... [and] may be usable as a stand-alone product, or as a component within a more complex assembly which would also be considered a manufactured product." Memorandum from Donald P. Steinke, Chief, Highway Operations Division to Edward V.A. Kussy Acting Chief Counsel, "Buy America Policy Response," December 22, 1997, *available at* http://www.fhwa.dot.gov/programadmin/contracts/122297.cfm [hereinafter 1997 Buy America Memorandum].

[145] Contract Procedures; Buy America Requirements, 48 Fed. Reg. 1946 (Interim Final Rule) (January 17, 1983); Buy America Requirements, 48 Fed. Reg. 53,099 (Final Rule) (November 25, 1983); 1997 Buy America Memorandum, *supra* note 144 ("FHWA policy has been that the steel components of a predominately steel product must be of domestic manufacture unless the value of the components is less than the minimal use threshold for the project."). The FHWA issued a memorandum in 2012 that defined the meaning of a manufactured product made predominately of steel or iron. Memorandum from John R. Baxter, Associate Administrator for Infrastructure to Division Administrators, Directors of Field Services, "Action: Clarification of Manufactured Products under Buy America," December 21, 2012, *available at* http://www.fhwa.dot.gov/construction/contracts/121221.cfm. However, this memorandum was struck down by the U.S. District Court for the District of Columbia as a violation of several provisions of the Administrative Procedure Act (APA). United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. and Serv. Workers Int'l Union v. Fed. Highway Admin., 151 F. Supp. 3d 76, 80 (D.D.C. 2015). Notably, the district court ruled that the guidance document could not qualify as an interpretive rule and should have been issued as a substantive rule subject to the notice and comment requirements in 5 U.S.C. §553. *Id.* at 86-89. After the court's ruling was released, FHWA formally withdrew the 2012 memorandum and instructed grantees to "use the existing statute, regulation and implementing policy memos to administer the Buy America requirements." FHWA, US District Court for the District of Columbia Decision Related to Buy America Requirements, *available at* http://www.fhwa.dot.gov/construction/contracts/160106.cfm.

[146] 48 *Fed. Reg*. at 53,103.

[147] 23 C.F.R. §635.410(b)(3). *See also* 23 U.S.C. §313(b)(3).

[148] 23 C.F.R. §635.410(b)(4).

[149] 23 U.S.C. §313(d).

[150] 48 Fed. Reg. at 1946; 48 Fed. Reg. at 53099; *see also* 1997 Buy America Memorandum, *supra* note 144.

ferryboat construction;[151] and pig iron and processed, pelletized, and reduced iron ore.[152] States may also be granted project- or material-specific waivers if the FHWA determines that applying the Buy America requirements is against public interest, or that the steel and iron materials and products needed are not produced in the United States in sufficient and reasonably available quantities of satisfactory quality.[153] However, the FHWA is prohibited from issuing waivers for foreign products that come from a country that has an agreement with the United States, under which the Buy America requirements have been waived, if that country has violated the agreement in specified ways.[154]

Federal Aviation Administration

Section 50101 of Title 49 of the *U.S. Code* prohibits the obligation of funds appropriated under certain provisions administered by the Federal Aviation Administration (FAA) for a project unless the "steel and manufactured goods used in the project are produced in the United States."[155] This requirement may be waived if the FAA finds that applying the restriction is against the public interest; the necessary materials are not produced domestically in sufficient and reasonably available amounts or are not of satisfactory quality; or the use of domestic materials increases the overall project cost by more than 25%.[156] Additionally, a waiver may be granted if funds available under certain provisions are used to procure a facility or equipment where the cost of components and subcomponents produced in the United States is more than 60% of the cost of all components, and the final assembly of the facility or equipment occurs in the United States.[157] The FAA has issued nationwide waivers for certain commonly used products from specific manufacturers that often qualify for a waiver under the 60% domestic content provision.[158] These nationwide waivers allow a product to be used in projects "without having to receive separate project waivers."[159] Section 50101 does not include a prohibition on the issuance of waivers for foreign products from a country that has violated a trade agreement with the United States, as stated in other transportation-related Buy America provisions.

Federal Transit Administration

Funding under Chapter 53 of Title 49 of the *U.S. Code*, administered by the Federal Transit Administration (FTA) for public transportation projects, may be obligated for a grantee project

[151] General Material Requirements; Buy America Requirements, 59 Fed. Reg. 6080 (February 9, 1994).

[152] General Material Requirements; Buy America Requirements, 60 Fed. Reg. 15478 (March 24, 1995).

[153] 23 U.S.C. §313(b); 23 C.F.R. §635.410(c)(1).

[154] 23 U.S.C. §313(f). Determining the applicability of this prohibition is done in concert with the USTR. *Id.*

[155] 49 U.S.C. §50101(a). These requirements apply when funds are appropriated under the following provisions of Title 49 of the *U.S. Code*: §106(k) (salaries, operations, and maintenance of the FAA); §44502(a)(2) (site preparation work associated with acquiring, establishing, or improving an air navigation facility); §44509 (demonstration projects for certain research and development activities); Chapter 471, Subchapter I (excluding §47127) (the Airport Improvement Program); Chapter 481 (excluding §§48102(e), 48107, 48110) (the Airport and Airways Trust Fund).

[156] 49 U.S.C. §50101(b).

[157] 49 U.S.C. §50101(b)(3). This waiver is available for funds expended under 49 U.S.C. §§44502(a)(2), 44509; 49 U.S.C. Chapter 471 Subchapter I (excluding §47127); and Chapter 481 (excluding §§48102(e), 48107, 48110). *Id.*

[158] *See* 49 U.S.C. §50101(b)(3); *see, e.g.*, Notice of Decision To Issue Buy American Waivers for Foreign Object Debris (FOD) Detection Equipment, 75 Fed. Reg. 81,708 (December 28, 2010); Notice of Waivers To Buy American Under the American Reinvestment and Recovery Act for Grants-in-Aid for Airports, 74 Fed. Reg. 62,388 (November 27, 2009).

[159] *Id.*

only if the "steel, iron, and manufactured goods used in the project are produced in the United States."[160] This requirement applies to all construction materials made primarily of steel or iron and used in infrastructure projects, but does not apply to steel or iron used as components or subcomponents of other manufactured products or rolling stock.[161] The FTA has not specifically defined "made primarily of steel or iron."[162] In order for a manufactured product to satisfy the "produced in the United States" requirement, all of the manufacturing processes must take place in the United States. Additionally, all of the product's components must be of American origin, meaning that they must be manufactured in the United States; the origin of the component's subcomponents does not matter.[163] The FTA may not impose any funding limitations that restrict a state from imposing "more stringent" Buy America requirements.[164]

The Buy America requirements may be waived for any Chapter 53 spending if the FTA finds that applying the restriction is inconsistent with the public interest; the materials needed are not produced domestically in sufficient and reasonably available amounts or are not of satisfactory quality; or using domestic materials will increase the cost of the overall project by more than 25%.[165] Additionally, a waiver may be granted when funds are used to procure rolling stock[166] if the cost of the components and subcomponents produced domestically[167] represents a certain percentage of the cost of all components and subcomponents of the rolling stock, and final assembly of the rolling stock occurs in the United States.[168] In 2015, Congress increased the threshold cost requirement for future fiscal years.[169] For FY2016 and FY2017 funds, the cost of domestically produced components must be more than 60% of the cost of all components.[170] In FY2018 and FY2019, the requirement increases to 65%, and in FY2020 and beyond the requirement increases to 70%.[171] However, the FTA is prohibited from issuing waivers for foreign goods if the foreign country has a trade agreement with the United States that waives Buy America requirements and has violated that agreement in specified ways.[172]

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[160] 49 U.S.C. §5323(j).

[161] 49 C.F.R. §661.5(c).

[162] *See* Buy America Requirements, 61 Fed. Reg. 6300 (February 16, 1996). The FTA has noted that "the definition [of made primarily of steel or iron] refers to construction or building materials made either principally or entirely from either steel or iron. All other manufactured products, even though they may contain some steel or iron elements, would not be covered." *Id*.

[163] 49 C.F.R. §661.5(d).

[164] 49 U.S.C. §5323(j)(7). However, the FTA will not participate in contracts governed by state or local "Buy America" provisions that are not explicitly established under state law, or state and local "Buy Local" provisions. 49 C.F.R. §661.21(b).

[165] 49 U.S.C. §5323(j)(2).

[166] *Rolling stock* is defined as "transit vehicles such as buses, vans, cars, railcars, locomotives, trolley cars and buses, and ferry boats, as well as vehicles used for support services." 49 C.F.R. §661.3.

[167] *See* 49 C.F.R. §661.11(g) ("For a component to be of domestic origin, more than 60 percent of the subcomponents of that component, by cost, must be of domestic origin, and the manufacture of the component must take place in the United States.").

[168] 49 U.S.C. §5323(j)(2)(C).

[169] P.L. 114-94, §3011, 129 Stat. 1474 (December 4, 2015).

[170] 49 U.S.C. §5323(j)(2)(C)(i).

[171] *Id*. FTA has issued guidance to assist grantees in complying with this new requirement. *See* Notice of Policy on the Implementation of the Phased Increase in Domestic Content Under the Buy America Waiver for Rolling Stock and Notice of Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurement in Limited Circumstances, 81 Fed. Reg. 60,278 (September 1, 2016).

[172] 49 U.S.C. §5323(j)(5). Determining the applicability of this prohibition is done in concert with the USTR. *Id*.

Federal Railroad Administration: Intercity and High-Speed Passenger Rail

Projects funded through spending authorized under the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) are subject to Buy America requirements stated in 49 U.S.C. §24405(a) if project costs exceed $100,000.[173] The statute states that funds may be obligated from appropriations enacted to carry out Chapter 244 "only if the steel, iron, and manufactured goods used in the project are produced in the United States."[174] Manufactured goods are considered "produced in the United States" when the manufacturing processes for the end product take place in the United States, and all of the end product's components are of domestic origin.[175] The origin of a component's subcomponents is not relevant to this determination.[176] The Federal Railroad Administration (FRA) may not create any funding limitations that restrict a state from imposing "more stringent" Buy America requirements on projects funded under PRIIA.[177]

A waiver of the Buy America requirements may be granted if applying the restrictions is inconsistent with the public interest; domestically produced steel, iron, and manufactured goods are not produced in sufficient and reasonably available amounts or are not of satisfactory quality; domestic rolling stock or power train equipment cannot be purchased and delivered within a reasonable time; or the use of domestic materials increases the cost of the overall project by more than 25%.[178] The FRA is prohibited from issuing waivers for goods produced in a foreign country if that country has an agreement with the United States, under which the Buy America requirements have been waived, and has violated that agreement in specified ways.[179]

Clean Water State Revolving Fund and Drinking Water State Revolving Fund

In addition to the Buy America restrictions attached to funds administered by DOT, certain grant funding used for water-related infrastructure projects is subject to domestic content restrictions. Projects that receive funding through state water pollution control revolving funds, commonly known as the Clean Water State Revolving Fund (CWSRF)[180] and the Drinking Water State Revolving Fund (DWSRF),[181] are also subject to domestic content restrictions that require the use

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[173] 49 U.S.C. §24405(a)(11). "For the purposes of [subsection (a)], in calculating the components' costs, labor costs involved in final assembly shall not be included in the calculations." 49 U.S.C. §24405(a)(3).

[174] 49 U.S.C. §24405(a)(1).

[175] Notice of Availability of Answers to Frequently Asked Questions Regarding Buy America & FRA's High-Speed Intercity Passenger Rail Program, 75 Fed. Reg. 59,322 (September 27, 2010); *see also* Federal Rail Administration, "Buy America Frequently Asked Questions," *available at* https://www.fra.dot.gov/eLib/Details/L02740 [hereinafter FRA FAQs]. FRA has not yet promulgated regulations implementing these requirements but has stated its intent to do so. Until then, FRA has published a "Frequently Asked Questions" document to guide grantees. 75 *Fed. Reg.* at 59,322.

[176] FRA FAQs, *supra* note 175; *see* 49 C.F.R. §661.5(d).

[177] 49 U.S.C. §24405(a)(8).

[178] 49 U.S.C. §24405(a)(2).

[179] 49 U.S.C. §24405(a)(6).

[180] *See* 33 U.S.C. §1383; *see also* ENVTL. PROT. AGENCY, *Learn About the Clean Water State Revolving Fund (CWSRF), available at* https://www.epa.gov/cwsrf/learn-about-clean-water-state-revolving-fund-cwsrf [hereinafter, "*Learn About the CWSRF*"]. The Clean Water State Revolving Fund was established by the 1987 amendments to the Clean Water Act. *See* Water Quality Act of 1987, P.L. 100-4, §212, 101 Stat. 21 (1987).

[181] *See* 42 U.S.C. §300j-12; *see also see also* ENVTL. PROT. AGENCY, *How the Drinking Water State Revolving Fund Works, available at* https://www.epa.gov/drinkingwatersrf/how-drinking-water-state-revolving-fund-works#tab-1 [hereinafter, "*How the DWSRF Works*"]. The Drinking Water State Revolving Fund was established by the 1996 amendments to the Safe Drinking Water Act. *See* Safe Drinking Water Act Amendments of 1996, P.L. 104-182, §130,

in the project of U.S.-produced iron and steel products.[182] The CWSRF and DWSRF provide low-interest financing for water quality and public water system interest projects through loan programs administered by the states.[183] At the federal level, these revolving funds are administered by the Environmental Protection Agency (EPA).[184]

Financing made available through the CWSRF or DWSRF may not be used for a project for the construction, alteration, maintenance, or repair of "treatment works"[185] unless "all of the iron and steel products used in the project are produced in the United States."[186] For projects funded through the DWSRF, this restriction also applies to financing for the construction, alteration, maintenance or repair of a "public water system."[187]

To be considered "produced in the United States," all manufacturing processes, with the exception of metallurgical processes involving refinement of steel additives, must take place in the United States.[188] "[I]ron and steel products" are defined as the following items: lined or unlined pipes and fittings; manhole covers and other municipal castings; hydrants; tanks; flanges; pipe clamps and restraints; valves; structural steel; reinforced precast concrete; and construction materials—provided that these products are "made primarily of iron or steel[.]"[189] Under EPA guidance, a product is made "primarily" of iron or steel if the cost of iron and steel constitutes more than 50% of the materials cost for the product.[190]

EPA may waive the domestic content restrictions if applying the restrictions would be inconsistent with the public interest; iron and steel products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or inclusion of

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110 Stat. 1662 (1996).

[182] *See* 33 U.S.C. §1388(a) (placing restrictions on funds made available through the CWSRF); Consolidated Appropriations Act, 2016, P.L. 114-113, tit. IV, §424, 129 Stat. 2579 (2015) (placing restrictions on funds available through the DWSRF).

[183] *See* 33 U.S.C. §1383(c) (identifying projects eligible for assistance under the CWSRF); 42 U.S.C. §300j-12(a)(2) (limiting the use of funds for DWSRF to certain projects that will "facilitate compliance with national primary drinking water regulations ... or otherwise significantly further the health protection objectives of [the Safe Drinking Water Act]"); *see also Learn About the CWSRF*, *supra* note 180 (describing the CWSRF program); *How the DWSRF Works*, *supra* note 181 (describing the DWSRF program).

[184] *See* 33 U.S.C. §1388(f); P.L. 114-113, tit. IV, §424(e).

[185] Treatment works include certain sewers, sewage collection systems, pumping and power equipment, and other items defined in more detail in 33 U.S.C. §1292(2)(A); *see also* P.L. 114-113, §425 (incorporating the Clean Water Act's definition of "treatment works" for DWSRF projects).

[186] *See* 33 U.S.C. §1388(a); Consolidated Appropriations Act, 2016, P.L. 114-113, tit. IV, §424.

[187] *Id.* The term "public water system" is defined as a "system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals." 42 U.S.C. §300f(4).

[188] EPA, IMPLEMENTATION OF AMERICAN IRON AND STEEL PROVISIONS OF P.L. 113-76, CONSOLIDATED APPROPRIATIONS ACT, 2014, at 6, 9 (2014) [hereinafter, "EPA GUIDANCE"], *available at* https://www.epa.gov/sites/production/files/2015-09/documents/ais-final-guidance-3-20-14.pdf.

[189] *See* 33 U.S.C. §1388(b) (definition "iron and steel products" for CWSRF projects); P.L. 114-113, tit. IV, §424(a)(2) (identical definition for DWSRF projects).

[190] *See* EPA GUIDANCE, *supra* note 188, at 6. EPA continues to apply the guidance issued under the Consolidated Appropriations Act of 2014 for CWSRF and DWSRF projects. *See* EPA, *State Revolving Fund American Iron and Steel (AIS) Requirement*, *available at* https://www.epa.gov/cwsrf/state-revolving-fund-american-iron-and-steel-ais-requirement ("[A]ll guidances adopted for FY 2014 apply for the permanent AIS requirements for the CWSRF."); EPA, APPLICATION OF AMERICAN IRON AND STEEL REQUIREMENTS TO FISCAL YEAR 2016 DRINKING WATER STATE REVOLVING FUNDS UNDER THE CONSOLIDATED APPROPRIATIONS ACT, 2016, at 1 (2016), *available at* https://www.epa.gov/sites/production/files/2016-02/documents/fy2016_dwsrf_ais_continuation_memo_508.pdf ("All [American Iron and Steel] guidance issued for FY 2015 and FY 2015 will continue to be applicable....").

domestic iron and steel products would increase the cost of the overall project by more than 25%.[191]

The domestic content restrictions for CWSRF and DWSRF projects originated in the Consolidated Appropriations Act of 2014, which placed restrictions on the use of appropriated funds through the end of FY2014.[192] For CWSRF projects, the restriction was made permanent through the Water Resources Reform and Development Act of 2014,[193] and is now codified in the *U.S. Code*.[194] The restriction has not been made permanent for DWSRF projects, but it was extended in FY2015 and FY2016 through appropriations legislation.[195]

Tabular Comparison of Major Requirements

Table 1, below, summarizes key aspects of the four major domestic content regimes in federal law, in order to better highlight the similarities and differences among them.

Table 1. Tabular Comparison of the Major Domestic Content Regimes

Regime	Agencies & Items Covered	Basic Requirements	Exceptions
Buy American Act	Federal agencies; procurements of supplies and construction materials whose value exceeds the micro-purchase threshold (generally $3,500) conducted in the U.S., unless TAA applies	Unmanufactured items must be mined or produced in the U.S. Manufactured items must be manufactured in the U.S., but qualify as such if they are manufactured in the U.S., and (1) at least 50% of the cost of components is mined, produced, or manufactured in the U.S., or (2) the item is a COTS item	Procuring domestic items is impracticable or inconsistent with the public interest; domestic items are of insufficient quantity or quality; domestic items are unreasonable in cost; the agency acquires items for commissary resale; the agency acquires IT that is a commercial item
TAA	Specified federal agencies; procurements of specified supplies, construction materials, or services valued in excess of certain monetary thresholds (e.g., $191,000 for supplies subject to the WTO GPA)	Offers of eligible products from designated countries must be treated the same as domestic offers When the value of the acquisition exceeds the relevant threshold in the WTO GPA, products from nondesignated countries cannot be procured, with certain exceptions and waivers	Acquisitions set aside for small businesses; acquisitions of arms, ammunition, war materials, or items indispensable for national security or defense; acquisitions of end products for resale; acquisitions from Federal Prison Industries or AbilityOne; certain noncompetitive acquisitions
Berry Amendment & specialty	Defense agencies; procurements of "covered items" or "specialty metals" valued in excess of the	Food, clothing, tents, certain textile fabrics and fibers, and hand and measuring tools must	Required items are not available in sufficient quantity/quality; certain noncompetitive acquisitions; acquisitions in

[191] *See* 33 U.S.C. §1388(c); P.L. 114-113, tit. IV, §424(b).

[192] P.L. 113-76, tit. IV, §436, 128 Stat. 346 (2014).

[193] P.L. 113-121, §5004, 128 Stat. 1326 (2014).

[194] 33 U.S.C. §1388.

[195] Consolidated and Further Continuing Appropriations Act, 2015, P.L. 113-235, tit. IV, §424, 128 Stat. 2449 (2014); P.L. 114-113, tit. IV, §424. The current versions of the Department of the Interior, Environment, and Related Agencies Appropriations Act for FY2017 in the House and Senate would, if enacted, continue these domestic content restrictions for DWSRF projects for the next fiscal year. *See* H.R. 5538, 114th Cong. §435 (2016) (as engrossed in the House); S. 3068, 114th Cong. §427 (2016) (as introduced in the Senate).

Regime	Agencies & Items Covered	Basic Requirements	Exceptions
metals restriction	simplified acquisition threshold (generally $150,000), with some exceptions for purchases outside the U.S.	be entirely grown, reprocessed, reused, or produced in U.S. Any specialty metals used in aircrafts, missile and space systems, ships, tanks and automotive items, weapon systems, and ammunition, or components thereof, must be melted or produced in the U.S.	support of combat operations or, in certain cases, contingency operations; acquisitions by vessels in foreign waters; emergency procurements and, in certain cases, procurements by establishments outside U.S. for their personnel; acquisitions of certain items for use in the production of propellants and explosives; certain acquisitions of chemical warfare protective clothing; other circumstances, particularly in the case of specialty metals
Buy America	States, localities, other nonfederal government entities; procurements of iron (in certain cases), steel, or manufactured products using specified DOT grant funding, Clean Water State Revolving Funds, Drinking Water State Revolving Funds, or other appropriated funds with domestic content restrictions.	Depending upon the restriction in question, funds may not be obligated for a funded project unless that project uses only iron, steel, and manufactured products consisting predominantly of iron and steel produced in the U.S.	Procuring domestic items is impracticable or inconsistent with the public interest; domestic items are of insufficient quantity or quality; use of domestic materials would increase the cost of projects by specified amounts (e.g., 25% or more); the end product is assembled in the U.S. and a specified percentage (e.g., 60%) of the cost of its components are made in U.S.

Source: Congressional Research Service, based on various sources cited in this report.

Other Provisions

In addition to the four major domestic preference regimes previously discussed, there are also numerous other domestic content restrictions that apply in specific contexts and are intended to address perceived "gaps" left by the Buy American Act, in particular. In some cases, as with the Berry Amendment, these provisions require a higher level of domestic content than is required under the Buy American Act,[196] which permits manufactured items to qualify as "domestic" so long as they are manufactured in the United States, and (1) the cost of components mined, produced, or manufactured in the United States exceeds 50% of the cost of all components, or (2) the items are COTS items.[197] In other cases, as with the Buy America Act, these provisions apply to federal grants or other funds that are spent by entities that are not federal agencies, and thus not subject to the Buy American Act and other federal procurement laws.[198] In yet other cases, the provision seeks to "encourage" procurement of domestic content by federal agencies or other entities without strictly mandating it.

Listed below are the domestic content restrictions that have been codified, including in notes, in the *U.S. Code*. This listing is intended to be comprehensive. However, it is important to note that

[196] *See supra* "The Berry Amendment: Requiring That Certain DOD Purchases Include Only Domestic Content."

[197] *See supra* "The Buy American Act: Restrictions on the Procurements of Federal Agencies."

[198] *See supra* "Buy America Act: Restrictions on Purchases Using Grant Funds."

un-codified provisions—such as might appear in annual appropriations measures—are not included.[199] Provisions are given in numerical order by the Title of the *U.S. Code* in which they appear.

3 U.S.C. §110: Directs that all furniture purchased for the use of the Executive Residence at the White House be, "as far as practicable," of domestic manufacture.

6 U.S.C. §453b: Prohibits the Department of Homeland Security from using funds appropriated or otherwise available to it to procure covered items unless the item was grown, reprocessed, reused, or produced in the United States, with certain exceptions. Covered items include (1) articles and items of clothing, and the materials and components thereof, other than sensors, electronics, or other items added to and not normally associated with clothing; (2) tents, tarpaulins, covers, textile belts, bags, protective equipment, sleep systems, load carrying equipment, textile marine equipment, parachutes, and bandages; (3) cotton and other natural fiber products, woven silk or silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, canvas products, and wool, and (4) any item of individual equipment manufactured from or containing such fibers, yarns, fabrics, or materials.[200]

7 U.S.C. §612c note: Requires that Community Distribution Programs receiving certain federal funds purchase, "whenever possible," only "food products that are produced in the United States," with certain exceptions.

7 U.S.C. §903 note: Mandates that, as a condition of certain loans made for purposes of rural electrification, "to the extent practicable and the cost of which is not unreasonable," borrowers agree to use, in connection with the expenditure of borrowed funds, only (1) unmanufactured articles, materials, and supplies that have been mined or produced in the United States or an "eligible country" (i.e., a country with which the United States has certain trade agreements), or (2) manufactured articles that have been manufactured in the United States or an eligible country from articles, materials, or supplies mined, produced, or manufactured in the United States or an eligible country.

7 U.S.C. §1506(p): Expresses the sense of Congress that, "to the greatest extent practicable," all equipment and products purchased by the Federal Crop Insurance Corporation using funds available to the Corporation should be "American-made"; and that, in providing financial assistance to, or entering contracts with, entities for the purchase of equipment and products to carry out this subchapter, the Corporation, "to the greatest extent practicable," shall notify the entity of this policy.

7 U.S.C. §7012: Expresses the sense of Congress that, "to the greatest extent practicable," all equipment and products purchased using funds made available pursuant to Chapter 98 of Title 7—which addresses the Consolidated Farm Service Agency, the Rural Utilities Service, the Rural Business and Cooperative Development Service, and the Rural Development Disaster Assistance Fund—should be "American-made"; and that, in providing financial assistance to, or entering contracts with, entities for the purchase of equipment and products to carry out this subchapter, the Secretary of Agriculture, "to the greatest extent practicable," shall notify the entity of this policy.

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[199] *See, e.g.*, P.L. 111-5, §1605 (prohibiting the use of funds appropriated or otherwise made available by the Recovery Act for a project for the construction, alteration, maintenance, or repair of a public building or work unless "all of the iron, steel, and manufactured goods used in the project are produced in the United States," with certain exceptions).

[200] This provision is like the Berry Amendment, discussed previously, but applies to purchases by the Department of Homeland Security, not DOD.

10 U.S.C. §2302 note: Requires the Secretary of Defense to "encourag[e] increased domestic breeding," while ensuring that military working dogs are procured as efficiently as possible and at best value to the government.

10 U.S.C. §2436: Directs the Secretary of Defense to plan and establish an "incentive program" for contractors to purchase capital assets manufactured in the United States, in part with funds made available to DOD.

10 U.S.C. §2534: Prohibits DOD from procuring sonobuoys manufactured in a foreign country if U.S. firms that manufacture sonobuoys are not permitted to compete on an equal basis with foreign manufacturing firms for the sale of sonobuoys in that country, with certain exceptions.

10 U.S.C. §2534 note: Mandates that DOD incorporate clauses into any of its contracts that provide for photovoltaic devices to be (1) installed on DOD property or in a facility owned by DOD, or (2) reserved for the exclusive use of DOD in the United States for their full economic life, to require that any photovoltaic devices installed under the contract "be manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States."

10 U.S.C. §7291 note: Requires that any vessels constructed or converted under a program for the construction and conversion of cargo vessels incorporating features "essential for military use" incorporate (1) propulsion systems whose "main components (that is, the engines, reduction gears, and propellers)" are manufactured in the United States; and (2) bridge, machinery control systems, and interior communications equipment that are manufactured in the United States and have more than 50% of their value, in terms of cost, added in the United States, with certain exceptions.

12 U.S.C. §1735e-1: Directs the Secretary of Housing and Urban Development to encourage the use of materials and products mined and produced in the United States in the administration of housing programs.

14 U.S.C. §97: Prohibits the Coast Guard from procuring buoy chain that is not manufactured in the United States, or substantially all the components of which are not produced or manufactured in the United States, unless the price of buoy chain manufactured in the United States is "unreasonable" or emergency circumstances exist.

15 U.S.C. §631 note; 15 U.S.C. §661: Requires the Administrator of Small Business, when providing financial assistance with amounts appropriated pursuant to certain amendments made to the Small Business Act in 1992, "when practicable," to give preference to small businesses which use or purchase equipment and supplies produced in the United States, and to encourage small businesses receiving assistance to purchase such equipment and supplies.

15 U.S.C. §2221(*l*): Requires that the recipients of arson prevention grants under Chapter 49 (Fire Prevention and Control) of Title 15 purchase, when available and cost-effective, American-made equipment and products when expending grant funds.

20 U.S.C. §6067: Expresses the sense of Congress that no funds appropriated pursuant to Chapter 68 (National Education Reform) of Title 20 are to be expended by an entity unless the entity agrees to comply with the Buy American Act in expending the funds, and to purchase only "American-made equipment and products" in the case of any equipment or products that may be authorized to be purchased with financial assistance provided under Chapter 68.

22 U.S.C. §2354: Imposes a number of restrictions on procurements made outside the United States involving foreign assistance funds. Among other things, (1) funds may not be used to purchase, in bulk, any commodities at prices higher than the market price prevailing in the United

States at the time of purchase (adjusted for differences in the cost of transportation to destination, quality, and terms of payment); (2) agricultural commodities or products available for distribution under the Food for Peace Act shall, "insofar as practicable," be procured within the United States unless such items are not available in the United States in sufficient quantities to supply emergency requirements of recipients; (3) commodities procured must generally be insured in the United States against marine risk with companies authorized to do a marine insurance business in any State of the United States; (4) funds made available under Chapter 32 of Title 22 may not be used to procure any agricultural commodity, or product thereof, outside the United States when the domestic price of such commodity is less than parity, with certain exceptions; and (5) funds may not be used to procure construction or engineering services from "advanced developing countries" which have attained a "competitive capability" in international markets for construction services or engineering services.

24 U.S.C. §225h: Requires the District of Columbia to comply with the Buy American Act in all procurements made under Subchapter III (Mental Health Service for the District of Columbia) of Chapter 4 of Title 24; and prohibits the award of contracts or subcontracts made with funds authorized under this Subchapter for the procurement of articles, materials, or supplies produced in countries whose government unfairly maintains in government procurement a "significant and persistent pattern or practice of discrimination" against U.S. products and services that results in identifiable harm to U.S. businesses.[201]

25 U.S.C. §1638b: Requires that all procurements conducted with funds made available to carry out Subchapter III (Health Facilities) of Chapter 18 (Indian Health Care) of Title 25 comply with the Buy American Act.

31 U.S.C. §5111: Requires that the Secretary of the Treasury, in order to protect the national security through domestic control of the coinage process, acquire only articles, materials, supplies, and services for the production of coins that have been produced or manufactured in the United States, unless the Secretary (1) determines that doing so would be inconsistent with the public interest, or the cost is unreasonable, and (2) publishes a written notice stating the basis for this determination in the Federal Register.

31 U.S.C. §5114: Requires that articles, materials, and supplies procured for use in the production of currency, postage stamps, and other security documents for foreign governments be treated "in the same manner" as articles, materials, and supplies procured for public use within the United States under the Buy American Act.

31 U.S.C. §5114 note: Provides that none of the funds made available by the Treasury, Postal Service, and General Government Appropriations Act, 1989 (P.L. 100-440), or any other act with respect to any fiscal year, may be used to contract for the manufacture of "distinctive paper" for U.S. currency and securities pursuant to 31 U.S.C. §5114 outside the United States or its possessions, with certain exceptions.

33 U.S.C. §1295: Prohibits the award of grants for the construction of water treatment works under Subchapter II (Grants for the Construction of Treatment Works) of Chapter 26 (Water Pollution Prevention and Control) of Title 33 unless only (1) unmanufactured articles, materials, supplies that have been mined or produced in the United States, and (2) manufactured articles, materials and supplies that have been manufactured in the United States "substantially all" from

[201] The Buy American Act of 1988, enacted as part of the Omnibus Trade and Competitiveness Act of 1988, imposed similar restrictions upon the procurements of federal agencies. *See generally* P.L. 100-418, §7004, 102 Stat. 1551-52 (August 23, 1988). However, these restrictions were temporary and expired on April 30, 1996.

articles, materials, or supplies mined, produced, or manufactured in the United States, are used, with certain exceptions.

33 U.S.C. §2201 note: Expresses the sense of Congress that, "to the extent practicable," all equipment and products purchased with certain funds made available for water resources development be "American made."

38 U.S.C. §2301(h): Prohibits the Department of Veterans Affairs from procuring any burial flags that are not "wholly produced in the United States," unless the Secretary determines this requirement cannot reasonably be met, or that compliance with the requirement would not be in the national interest of the United States.

40 U.S.C. §3313: Requires that procurements carried out pursuant to this section (i.e., procurements promoting the use of energy-efficient lighting fixtures and bulbs in public buildings) comply with the Buy American Act.

42 U.S.C. §1760: Requires, with certain exceptions, that school food authorities participating in the National School Lunch Program purchase, "to the maximum extent practicable," "domestic commodities or products" (i.e., agricultural commodities produced in the United States, and food products processed in the United States "substantially using" agricultural commodities that are produced in the United States).

42 U.S.C. §5206: Prohibits the expenditure of funds appropriated under the Disaster Mitigation Act of 2000, or any amendment made by the act, by any entity unless that entity complies with the Buy American Act in expending the funds.

42 U.S.C. §6374: Requires that "preference" be given to vehicles that operate on alternative fuels derived from domestic sources when considering which types of alternative fuel vehicles to acquire in implementing the statutory requirement that "the maximum number practicable" of vehicles acquired annually for use by the federal government be alternative fueled vehicles.

42 U.S.C. §6705: Prohibits the award of grants under Chapter 80 (Local Public Works Employment) of Title 42 for local public works projects unless the project uses only (1) unmanufactured articles, materials, or supplies mined or produced in the United States, and (2) manufactured articles, materials, and supplies manufactured in the United States "substantially all" from articles, materials, and supplies mined, produced, or manufactured in the United States, with certain exceptions.

42 U.S.C. §13316: Requires that the U.S. Agency for International Development (USAID), in selecting projects for the renewable energy technology transfer program, consider, among other things, the degree to which the equipment to be included in the project is designed and manufactured in the United States; and ensure that, in carrying out projects, the "maximum percentage"—but in no case less than 50%—of the cost of any equipment furnished in connection with the project shall be attributable to the manufactured U.S. components of such equipment, as well as the "maximum participation" of U.S. firms.

42 U.S.C. §13362: Requires that USAID, in selecting projects for the innovative clean coal technology transfer program, consider, among other things, the degree to which the equipment to be included in the project is designed and manufactured in the United States; and ensure that, in carrying out projects, the "maximum percentage"—but in no case less than 50%—of the cost of any equipment furnished in connection with the project shall be attributable to the manufactured U.S. components of such equipment, as well as the "maximum participation" of U.S. firms.

42 U.S.C. §13387: Requires that USAID, in selecting projects for the innovative environmental technology transfer program, consider, among other things, the degree to which the equipment to

be included in the project is designed and manufactured in the United States; and ensure that, in carrying out projects, the "maximum percentage"—but in no case less than 50%—of the cost of any equipment furnished in connection with the project shall be attributable to the manufactured U.S. components of such equipment, as well as the "maximum participation" of U.S. firms.

42 U.S.C. §16312: Requires that any agreement for U.S. participation in the International Thermonuclear Experimental Reactor (ITER) shall, at a minimum, ensure that the share of high-technology components of the ITER manufactured in the United States is "at least proportionate" to the U.S. financial contribution to the ITER, among other things.

42 U.S.C. §17353: Requires that International Clean Energy Foundation promote the use of American-made clean and energy efficient technologies, process, and services by giving preference to entities incorporated in the United States, or whose technology will be "substantially manufactured" in the United States, when making grants to promote projects outside the United States.

49 U.S.C. §24305: Requires Amtrak to buy unmanufactured articles, material, and supplies that are mined or produced in the United States, and manufactured articles, material, and supplies manufactured in the United States substantially from articles, material, and supplies that are mined, produced, or manufactured in the United States when the cost of articles, material, or supplies bought is at least $1 million.

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