

# The Buy American Act and Other Federal Procurement Domestic Content Restrictions

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## The Buy American Act and Other Federal Procurement Domestic Content Restrictions

Federal law imposes a number of restrictions requiring federal agencies to acquire items that are produced or manufactured in the United States. The Buy American Act of 1933 (BAA) is the earliest and arguably best known of the major domestic content restriction laws. It generally requires federal agencies to apply a price preference for “domestic end products” and/or use “domestic construction materials” for contracts performed in the United States. Whether an end product (i.e., an article, material, or supply to be acquired for public use) is considered domestic for BAA purposes depends, in part, upon whether it is unmanufactured or manufactured. Unmanufactured end products and construction materials qualify as domestic if they are mined or produced in the United States. Generally, manufactured end products and construction materials 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 55% of the cost of all components, or (2) they are commercially available off-the-shelf (COTS) items. An agency may, however, purchase foreign products or materials if the domestic cost of such supplies would be unreasonable (that is, if the cost of domestic products exceed the relevant price preference) or in exceptional circumstances, such as if the purchase of domestic goods or use of domestic construction materials would be impracticable.

In addition, some of the restrictions imposed by the BAA may be waived pursuant to the Trade Agreements Act of 1979 (TAA). 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. This means that covered end products or construction materials imported from a designated country will be generally treated as domestic end products or materials for purposes of the BAA when they have been wholly grown, produced, or manufactured in a designated country, or have been “substantially transformed” into new and different articles within a designated country using materials from foreign nondesignated countries.

Another domestic content restriction provision is the Berry Amendment, which generally requires that the Department of Defense (DOD) purchase certain items that have been entirely grown, reprocessed, reused, or produced within the United States, with certain exceptions (e.g., procurements by vessels in foreign waters). The Berry Amendment also includes a specialty metals restriction, which requires that 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.

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 major domestic content restrictions noted above.

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Over the years, pursuant to its broad power over federal spending, Congress has enacted a number of federal funding restrictions on the purchase of “foreign” products.<sup>1</sup> These domestic content restrictions generally require federal agencies to purchase items that are produced or manufactured in the United States, subject to various exceptions and exemptions.

The three major domestic content regimes, which apply in different contexts and impose different requirements upon the use of federal procurement funds, are the following:

1. The **Buy American Act of 1933 (BAA)** (41 U.S.C. §§ 8301–8305), as amended, generally requires federal agencies to purchase “domestic end products” and use “domestic construction materials” on contracts above certain monetary thresholds (typically \$10,000) performed in the United States.
2. The **Trade Agreements Act of 1979 (TAA)** (19 U.S.C. §§ 2501–2581), as amended, permits the waiver of the BAA and has resulted in “eligible products” from “designated countries” receiving equal consideration with domestic offers for certain federal acquisitions exceeding specified monetary thresholds.
3. The **Berry Amendment** encompasses two domestic content restrictions applicable only to the Department of Defense (DOD). The first generally requires that food, clothing, tents, certain textile fabrics and fibers, hand or measuring tools, stainless steel flatware, and dinnerware purchased by DOD be entirely grown, reprocessed, reused, or produced in the United States (10 U.S.C. § 2533a). The second “specialty metals restriction” generally requires that any “specialty metals” contained in any aircraft, missile and space system, ship, tank and automotive item, weapon system, ammunition, or any components thereof, purchased by DOD be melted or produced in the United States (10 U.S.C. § 2533b).

In addition, there are 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 three major domestic content regimes noted above.<sup>2</sup> This report provides an overview of the BAA, TAA, as well as the Berry Amendment. The report also lists other federal procurement domestic content restrictions codified in the U.S. Code. In addition to procurement-related restrictions, federal law imposes domestic content restrictions on certain grant programs; however, these “Buy America” grant restrictions are outside the scope of this report.<sup>3</sup> This report also does not address state or local “Buy American” provisions<sup>4</sup> or the use of “Made in USA” and similar designations.<sup>5</sup>

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<sup>1</sup> See, e.g., 10 U.S.C. §§ 2533a–2533b; 41 U.S.C. §§ 8301–8305. See generally DANA FRANK, *BUY AMERICAN: THE UNTOLD STORY OF ECONOMIC NATIONALISM* 56-57 (1998).

<sup>2</sup> See *infra* “Other Statutory Provisions.”

<sup>3</sup> For information on Buy America grant provisions, see CRS In Focus IF10628, *Buy America, Transportation Infrastructure, and American Manufacturing*, by Michaela D. Platzer and William J. Mallett and CRS Report R44266, *Effects of Buy America on Transportation Infrastructure and U.S. Manufacturing*, by Michaela D. Platzer and William J. Mallett.

<sup>4</sup> 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.

<sup>5</sup> The Federal Trade Commission (FTC) regulates use of the “Made in USA” and similar designations. See FTC, Bureau of Consumer Protection, *Made in USA*, <http://www.business.ftc.gov/advertising-and-marketing/made-usa>. Federal law does not require the purchase of supplies bearing the “Made in USA” designation, *per se*, although it may

Existing domestic content restrictions generally pertain to the place of production or manufacture of supplies.<sup>6</sup> They generally do not address the place of *performance of services*, or, with certain exceptions, the *nationality of the contractor*.<sup>7</sup>

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

The BAA is the earliest and arguably the best known of the major domestic content restrictions.<sup>8</sup> The BAA generally prohibits federal agencies from purchasing<sup>9</sup> “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 acquired for public use<sup>10</sup> unless . . . their acquisition [would] be “inconsistent with the public interest or their cost to be unreasonable.”<sup>11</sup>

As discussed below, the BAA generally applies to the purchase of supplies (i.e., domestic end products) and construction materials, and agencies apply varying price preferences to domestic offers to assess whether their costs are unreasonable. Moreover, the BAA incorporates several exceptions, discussed below, that permit the use of foreign end products and construction

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require the purchase of supplies that are produced or manufactured in the United States, and entities found to have intentionally affixed a “Made in USA” 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).

<sup>6</sup> *Cf.* Military Optics, Inc., B-245010.3; B-245010.4 (Jan. 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.”).

<sup>7</sup> *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).

<sup>8</sup> 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.

<sup>9</sup> 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).

<sup>10</sup> 41 U.S.C. § 8301(1) (“The terms ‘public building’, ‘public use’, and ‘public work’ mean a public building of, use by, and a public work of, the Federal Government, the District of Columbia, Puerto Rico, American Samoa, and the Virgin Islands.”).

<sup>11</sup> 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....”).

materials even if the cost of domestic products or materials is not above the applicable domestic price preference. In addition, the application of the BAA is waived in certain procurements pursuant to the TAA.

## **Purchases of Domestic End Products**

The BAA generally encourages federal agencies acquiring supplies for use in the United States under a contract valued in excess of a monetary threshold—called the “micro-purchase threshold” (typically \$10,000)<sup>12</sup>—to purchase domestic end products instead of foreign products.<sup>13</sup> Whether an end product (i.e., an article, material, or supply to be acquired for public use)<sup>14</sup> 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 BAA.<sup>15</sup> Manufactured end products,<sup>16</sup> 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 55% of the cost of all components,<sup>17</sup> or (2) the end product is a commercially available off-the-shelf (COTS) item.<sup>18</sup>

The term “manufacture” is not expressly defined by either the BAA, the executive orders implementing the act,<sup>19</sup> or the Federal Acquisition Regulation (FAR). Determining whether particular activities constitute manufacturing—such that a product can be said to be “manufactured in the United States” and, thus, qualify as a domestic end product for purpose of

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<sup>12</sup> 41 U.S.C. § 1902. *See also* Federal Acquisition Regulation: Increased Micro-Purchase and Simplified Acquisition Thresholds, 85 Fed. Reg. 40064 (July 2, 2020). The micro-purchase threshold can be higher than \$10,000 for institutions of higher education, related nonprofits, and certain other entities under certain circumstances. *Id.*

<sup>13</sup> 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 (Nov. 27, 1961).

<sup>14</sup> 48 C.F.R. § 25.003 (definition of “end product”).

<sup>15</sup> *Id.* (definition of “domestic end product”).

<sup>16</sup> “For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all the components used in the end product.” *Id.*

<sup>17</sup> President Trump issued several executive orders seeking to strengthen Buy American requirements for federal agency procurements and assistance programs and limit the use of waivers from such requirements. One of these orders, Executive Order 13881—and a related federal agency rulemaking—increased the domestic content requirements for certain products. For more on the Trump Administration orders, *see* CRS Legal Sidebar LSB10256, *President Encourages Agencies to Buy American-Produced Goods & Materials*, by David H. Carpenter. *See also* FAR Council, Final Rule, Maximizing Use of American-Made Goods, Products, and Materials, 86 Fed. Reg. 6180, 6187 (Jan. 19, 2021). President Biden also issued an executive order seeking to further strengthen Buy American requirements in federal procurement. Exec. Order No. 14005, *Ensuring the Future Is Made in All of America by All of America’s Workers* (Jan. 25, 2021).

<sup>18</sup> 48 C.F.R. § 25.003. 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.*

<sup>19</sup> *See especially* Exec. Order No. 10582, *Prescribing Uniform Procedures for Certain Determinations under the Buy-American Act* (Dec. 21, 1954).

the BAA—is a fact-specific question.<sup>20</sup> In answering this question, agency boards of contract appeals and courts<sup>21</sup> have applied fact-specific and sometimes conflicting standards to consider whether: the product underwent “substantial changes in physical character” in the United States,<sup>22</sup> the product’s “ingredients [were] measured, weighed, mixed and compounded” in the United States,<sup>23</sup> or the product was completed in the form required for use by the government in the United States.<sup>24</sup> Operations performed after the item has been completed (e.g., packaging, testing) generally are not viewed as manufacturing.<sup>25</sup>

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);<sup>26</sup> 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,<sup>27</sup> but excludes profits and any costs associated with the manufacture of the end product.<sup>28</sup>

Specific components generally are considered to be manufactured in the United States if the cost of components mined, produced, or manufactured in the United States accounts for at least 55% of the cost of all components, or the end product is a COTS item.<sup>29</sup> 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.<sup>30</sup>

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<sup>20</sup> 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 (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 (Feb. 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.”).

<sup>21</sup> 41 U.S.C. § 7105 (establishing agency boards of contract appeals, including the Armed Services Board of Contract Appeals and the Civilian Board of Contract Appeals, to hear government contract disputes). Decisions of a agency boards of appeals are generally appealable to the U.S. Court of Appeals for the Federal Circuit. *Id.* § 7107(a).

<sup>22</sup> *A. Hirsch, Inc.*, B-237466 (Feb. 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).

<sup>23</sup> See, e.g., *Acetris Health, LLC v United States*, 949 F.3d 719, 731 (Fed. Cir. 2020).

<sup>24</sup> *Marbex, Inc.*, B-225799 (May 4, 1987). See also *Valentec Wells, Inc.*, ASBCA 41659, 91-3 B.C.A. ¶ 24,168 (July 11, 1991); *DynAmerica, Inc.*, B-248237 (Sept. 28, 1992).

<sup>25</sup> See, e.g., *Marbex, Inc.*, B-225799 (May 4, 1987).

<sup>26</sup> 48 C.F.R. § 25.003 (definition of “cost of components”).

<sup>27</sup> 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.

<sup>28</sup> 48 C.F.R. § 25.003.

<sup>29</sup> *Id.*

<sup>30</sup> 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,



## Purchases of Construction Materials

The BAA also generally requires that every construction contract for any public building or public work include a provision that the contractor acquire domestic construction materials.<sup>31</sup> 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.<sup>32</sup> However, materials purchased directly by the government are treated as supplies, not construction materials.<sup>33</sup>

Construction materials are considered domestic for the purposes of the BAA in the same way as end products. “Domestic construction materials”<sup>34</sup> include unmanufactured construction materials 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 55% of the cost of all components, or (2) the material is a COTS item.<sup>35</sup> Whether construction materials are manufactured in the United States 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.<sup>36</sup>

## Price Preference

As mentioned above, the BAA generally only requires federal agencies to purchase domestic end products and constructions material if their cost is not “unreasonable.” The unreasonable cost component of the BAA has been implemented through the establishment of price preferences for domestic end products and construction materials.<sup>37</sup> Specifically, the provisions of the FAR implementing the BAA require that, when a domestic offer 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

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can be complicated, particularly when the agency seeks to acquire some sort of “system.” *See, e.g.*, Data Transformation Corp., GSBGA 89082-P, 87-3 B.C.A. ¶20,017 (July 15, 1987) (automatic data processing system); MRI Sys., Corp., B-184785 (Nov. 19, 1976) (computer software system); Thomas J. Valentino, Inc., B-156768 (Aug. 17, 1965) (music background library). However, the agency boards and judiciary often look to the purpose and structure of the procurement in making such determinations. *See, e.g.*, Ampex Corp., B-203021 (Feb. 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).

<sup>31</sup> 41 U.S.C. § 8303(a)(1)-(2); 48 C.F.R. § 25.202(a).

<sup>32</sup> 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.*

<sup>33</sup> *Id.*

<sup>34</sup> “For construction material that consists wholly or predominantly of iron or steel or a combination of both, a construction material manufactured in the United States if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all the components used in such construction material.” *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *See supra* notes 29-37 and accompanying text.

<sup>37</sup> *See, e.g.*, Exec. Order No. 10582, Prescribing Uniform Procedures for Certain Determinations Under the Buy-American Act, (Dec. 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 (Jan. 17, 1963).



government.<sup>38</sup> This percentage ranges from 20%, in cases where the lowest domestic offer is from a large business;<sup>39</sup> to 30%, when the lowest domestic offer is from a small business;<sup>40</sup> to 50%, for DOD procurements,<sup>41</sup> although agencies may issue regulations setting higher percentages.<sup>42</sup> If the 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 generally may award the contract to the foreign offeror at the initially proposed price.<sup>43</sup>

## Exceptions to the Buy American Act

Federal law establishes a number of other “exceptions” or circumstances in which an agency may purchase foreign end products, or permit the use of foreign construction materials, without violating the BAA. These exceptions apply when

- the procurement of domestic goods or the use of domestic construction materials would be “impracticable” or “inconsistent with the public interest”;<sup>44</sup>
- domestic end products or construction materials are unavailable “in sufficient and reasonably available commercial quantities and of a satisfactory quality”;<sup>45</sup>
- the contracting officer determines that the cost of domestic end products or construction materials would be “unreasonable”;<sup>46</sup>

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<sup>38</sup> 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).

<sup>39</sup> 48 C.F.R. § 25.105(b)(1) (supplies); 48 C.F.R. § 25.204(b) (construction materials).

<sup>40</sup> 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 (Aug. 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).

<sup>41</sup> 48 C.F.R. § 225.105 (“Use an evaluation factor of 50 percent instead of the factors specified in FAR 25.105(b).”).

<sup>42</sup> 48 C.F.R. § 25.105(a)(1)(supplies); 48 C.F.R. § 25.204(b) (construction materials). *See also* Concrete Tech., Inc., B-202407 (Oct. 27, 1981) (agencies may adopt higher percentages by regulation); General Elec. Co., B-152470 (Feb. 14, 1964) (same).

<sup>43</sup> *See, e.g.*, Yohar Supply Co., B-225480 (Feb. 11, 1987) (“[W]hile the Buy American Act . . . does not prohibit the purchase of foreign source end items, it does establish a price preferences for acquiring domestic end products over foreign end products.”); Paulsen-Webber Cordage Corp., B-140904 (Dec. 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).

<sup>44</sup> 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).

<sup>45</sup> 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).

<sup>46</sup> 48 C.F.R. § 25.103(c) (supplies); 48 C.F.R. § 25.202(a)(3) (construction materials).

- the goods are acquired specifically for commissary resale;<sup>47</sup>
- the agency procures information technology that is a commercial item;<sup>48</sup>
- the value of the procurements is at or below the micro-purchase threshold (generally \$10,000);<sup>49</sup> or
- the items are procured for use outside the United States.<sup>50</sup>

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.<sup>51</sup>

## Trade Agreements Act: Agencies May Treat Certain Eligible Foreign Offers Like Domestic Offers

The TAA<sup>52</sup> 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.<sup>53</sup> This authority has been exercised to waive the BAA and similar domestic content restrictions.

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<sup>47</sup> 48 C.F.R. § 25.103(d) (supplies only; there is no similar provision as to construction materials).

<sup>48</sup> 48 C.F.R. § 25.103(e) (supplies); 48 C.F.R. § 25.202(a)(4) (construction materials). *See supra* note 28 for the definition of *commercial item*.

<sup>49</sup> 41 U.S.C. § 8302(a)(2)(C). The micro-purchase threshold may be lower, or higher, than \$10,000, depending upon the circumstances of the procurement. *See* 48 C.F.R. § 2.101.

<sup>50</sup> *Id.* § 8302(a)(2)(A).

<sup>51</sup> 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).

<sup>52</sup> Congress passed the TAA in part to implement the General Agreement on Tariffs and Trade (GATT)’s 1979 Code on Government Procurement resulting from the Tokyo Round of international trade negotiations. *See* CRS In Focus IF11651, *WTO Agreement on Government Procurement (GPA)*, by Andres B. Schwarzenberg. The GATT 1979 Code contained nondiscrimination obligations with respect to government procurement similar to those now contained in the plurilateral WTO GPA. Revised WTO GPA, art. IV, [https://www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm#articleIV](https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm#articleIV). 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 procurement activities 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, [https://www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm).

<sup>53</sup> 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 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).

Under the TAA and its implementing regulations, offers of “eligible products”<sup>54</sup> from certain “designated countries,” which include countries with which the United States has trade agreements and parties to the World Trade Organization Government Procurement Agreement (WTO GPA),<sup>55</sup> are generally entitled to “receive equal consideration with domestic offers” whenever the value of the acquisition exceeds certain monetary thresholds.<sup>56</sup> The TAA also generally<sup>57</sup> prohibits procurement of products from nondesignated countries in acquisitions covered by WTO GPA whose value exceeds relevant monetary thresholds. These measures are intended to encourage additional countries to join this agreement and to provide reciprocal competitive government procurement opportunities to U.S. products and suppliers.<sup>58</sup>

## International Trade Obligations

The WTO GPA generally requires that, whenever the value of an acquisition exceeds certain monetary thresholds, certain U.S. federal agencies<sup>59</sup> may grant a member party’s covered products, services, and 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.<sup>60</sup> 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.<sup>61</sup> Most U.S. free trade agreements also contain some form of nondiscrimination obligation pertaining to government procurement.<sup>62</sup> 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.<sup>63</sup>

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<sup>54</sup> 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.

<sup>55</sup> 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”).

<sup>56</sup> 19 U.S.C. § 2511; 48 C.F.R. § 25.402(a)(1), (b).

<sup>57</sup> 19 U.S.C. § 2512(a)(2) (establishing exceptions); 19 U.S.C. § 2512(b) (establishing standards to waive and defer).

<sup>58</sup> 19 U.S.C. § 2512(a), (b); 48 C.F.R. § 25.403(c).

<sup>59</sup> Some states require state agencies to comply with domestic content restrictions. These State “Buy American” provisions are outside of the scope of this report. This report also does not address the voluntary commitments that some states made under the WTO GPA with respect to some state entities.

<sup>60</sup> 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 App’x I, Annex 7.

<sup>61</sup> *Id.*

<sup>62</sup> *See, e.g.*, U.S.-Oman Free Trade Agreement, art. 9.2. Notably, Chapter 13 of the United States-Mexico-Canada Agreement (USMCA) sets forth nondiscrimination obligations with respect to government procurement between the United States and Mexico—but not Canada. *See* USMCA Chapter 13, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>. The U.S.-Jordan Free Trade Agreement lacks a procurement chapter. *See* U.S.-Jordan Free Trade Agreement, <https://ustr.gov/trade-agreements/free-trade-agreements/jordan-fta/final-text>.

<sup>63</sup> *See, e.g.*, U.S.-Peru Trade Promotion Agreement, Annex 9.1.

If a WTO Member party to the GPA or a country party to a U.S. free trade agreement believes a U.S. government procurement measure violates the agreement, it could potentially challenge the measure in a dispute settlement proceeding.<sup>64</sup> If an adverse decision were ultimately rendered, the United States would be expected to remove the offending measure or compensate the complaining foreign country to avoid being subject to trade retaliation.<sup>65</sup> Such retaliation might include the suspension of foreign country nondiscriminatory treatment to U.S. products, services, and suppliers in that country's procurements.<sup>66</sup>

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

To comply with U.S. trade agreements obligations, the Office of the United States Trade Representative (USTR)<sup>67</sup> has waived the BAA for eligible products from designated countries.<sup>68</sup> 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. free trade agreements; (3) certain least developed countries;<sup>69</sup> and (4) certain Caribbean Basin countries.<sup>70</sup>

Not all products and services from designated countries are eligible products for purposes of the TAA.<sup>71</sup> Rather, only products and services covered for procurement by specified agencies of the United States under certain trade agreements are eligible.<sup>72</sup> 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 either including or excluding certain products and services under the terms of the agreement.<sup>73</sup> In addition, the international obligations contained in

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<sup>64</sup> *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.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> 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, Agreement on Government Procurement (Dec. 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 (Oct. 29, 2012).

<sup>68</sup> 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)).

<sup>69</sup> 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, [http://www.un.org/en/development/desa/policy/cdp/ldc/ldc\\_criteria.shtml](http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_criteria.shtml).

<sup>70</sup> 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, <https://ustr.gov/issue-areas/trade-development/preference-programs/caribbean-basin-initiative-cbi>.

<sup>71</sup> 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.

<sup>72</sup> 19 U.S.C. § 2518(4)(A) (defining "eligible product"); 48 C.F.R. § 25.003 (same).

<sup>73</sup> *See, e.g.*, Revised WTO GPA, United States App'x I, Annex 1; *id.* at Annex 4; U.S.-Panama Trade Promotion Agreement, Chapter 9, Annex 9.1.

these agreements extend only to procurements by particular entities, such as certain federal agencies, that are listed in a country's annexes.<sup>74</sup> 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.<sup>75</sup>

An acquisition is subject to a TAA waiver or purchase restriction only when its value equals or exceeds certain monetary thresholds.<sup>76</sup> These thresholds are initially established in annexes to particular trade agreements.<sup>77</sup> However, the USTR revises the thresholds every two years and has currently set the threshold for supply contracts under the WTO GPA at \$182,000 (about \$7 million for construction contracts).<sup>78</sup> The FAR lists the monetary thresholds for each relevant trade agreement.<sup>79</sup> It also contains instructions for calculating the estimated acquisition value.<sup>80</sup> These instructions correspond to the rules for valuation of contracts contained in the WTO GPA.<sup>81</sup>

## Harmonization of the TAA and Buy American Act

As noted, the TAA provides that the President shall prohibit procurement of "products of a foreign country or instrumentality" from nondesignated foreign countries.<sup>82</sup> The TAA sets forth the test for determining whether an article originated in a particular country. Under this test,

[a]n 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.<sup>83</sup>

In order to implement the TAA, the FAR's Trade Agreements Clause provides that a "Contractor shall deliver under this contract only U.S.-made or designated country end products."<sup>84</sup> Thus, rather than explicitly adopting the TAA's country-of-origin test, the FAR defines a "U.S.-made end product" as "an article 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

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<sup>74</sup> See, e.g., Revised WTO GPA, United States App'x I, Annex 1; *id.* at Annex 5; U.S.-Panama Trade Promotion Agreement, Chapter 9, Annex 9.1.

<sup>75</sup> See 19 U.S.C. § 2518(4)(A).

<sup>76</sup> 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.

<sup>77</sup> See, e.g., Revised WTO GPA, United States App'x I, Annex 1 (establishing monetary thresholds for procurements of supplies and construction services).

<sup>78</sup> 48 C.F.R. § 25.402(b).

<sup>79</sup> *Id.*

<sup>80</sup> 48 C.F.R. § 25.403(b).

<sup>81</sup> Revised WTO GPA, art. II.

<sup>82</sup> 19 U.S.C. § 2512(a)(1).

<sup>83</sup> 19 U.S.C. § 2518(4)(B). For a product made at least in part from materials manufactured in another country to undergo a "substantial transformation," it must acquire a new name, character, or use. 48 C.F.R. § 25.001(c); CSK Int'l, Inc., B-278111.2 (Dec. 30, 1997) (attachment of a pulaski tool head together with its wooden handle did not result in a substantial transformation).

<sup>84</sup> *Acetris Health, LLC v. United States*, 949 F.3d 719, 724 (Fed. Cir. 2020) (quoting 48 C.F.R. § 52.225-5).

name, character, or use distinct from that of the article or articles from which it was transformed.”<sup>85</sup>

The U.S. Court of Appeals for the Federal Circuit examined the interplay between the TAA, FAR, and BAA in the 2020 decision *Acetris Health, LLC v United States*.<sup>86</sup> The case involved a government contract bid protest challenging the U.S. Department of Veterans Affairs (VA) determination that the BAA and TAA barred the VA from acquiring certain pharmaceutical products from Acetris Health.<sup>87</sup> The products in question i.e., pills, were comprised of active pharmaceutical ingredients that were manufactured in India, a nondesignated country, and then “measured, weighed, mixed and compounded in . . . a facility in Dayton, New Jersey.”<sup>88</sup>

The court held “that the VA’s interpretation of the TAA and the FAR was erroneous.”<sup>89</sup> Looking first at the country-of-origin test, the court determined that the “product of a country” for the purposes of the TAA country-of-origin test “is the final product that is procured.”<sup>90</sup> In this case, the final product was not the drug’s active ingredients as the VA had determined, but was instead the finalized pills, comprised of both active and inactive ingredients, that were actually delivered to the VA.<sup>91</sup> The court explained that “Acetris’ tablets do not meet prong (i) of the TAA’s country-of-origin test for India because the tablets are not ‘wholly the . . . manufacture’ of India . . . [and] do not meet prong (ii) because the tablets’ components are not ‘substantially transformed’ into tablets in India.”<sup>92</sup> Consequently, the TAA did not prohibit the VA from acquiring Acetris’ pills.<sup>93</sup>

The court then turned to the FAR’s Trade Agreements Clause, “which harmonizes and implements the BAA and TAA in contracts covered by the WTO Agreement” and provides that Acetris “shall deliver under this contract only U.S.-made . . . end products.”<sup>94</sup> In the court’s view, “[t]he regulatory history of the term ‘U.S.-made end product’ makes clear that the source of the components (here, the API [active pharmaceutical ingredients]) is irrelevant in determining where a product is ‘manufactured.’”<sup>95</sup> Rather, the court determined that a U.S.-made end product is one that is either substantially transformed or manufactured in the United States, regardless of whether they are comprised of foreign-sourced components.<sup>96</sup> Because the Acetris pills were “measured, weighed, mixed and compounded” in New Jersey, they were manufactured in the United States.<sup>97</sup> The court concluded, “[t]herefore, on the plain meaning of the FAR, Acetris’

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<sup>85</sup> 48 C.F.R. § 25.003. 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. *Id.* (defining “designated country end product”).

<sup>86</sup> 949 F.3d 719 (Fed. Cir. 2020).

<sup>87</sup> *Id.* at 722.

<sup>88</sup> *Id.* at 731.

<sup>89</sup> *Id.* at 730.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 730-31.

<sup>96</sup> *Id.* at 731.

<sup>97</sup> *Id.*



products are ‘U.S.-made end products.’” As a result, the court held that the Acetris pills were both TAA- and BAA-compliant.<sup>98</sup>

## Exceptions to the TAA

In addition to exceptions stipulated in the WTO GPA and free trade agreements, FAR Section 25.402 provides that the TAA does not apply to the following acquisitions:<sup>99</sup>

- acquisitions set aside for small businesses;<sup>100</sup>
- acquisitions of arms, ammunition, or war materials, or purchases indispensable for national security or national defense purposes;
- acquisition of end products for resale;
- acquisitions from Federal Prison Industries, Inc. [also known as UNICOR], under [FAR] Subpart 8.6, and acquisitions under [FAR] Subpart 8.7, Acquisition from Nonprofit Agencies Employing People Who Are Blind or Severely Disabled [commonly known as AbilityOne]; and
- other acquisitions not using full and open competition, if authorized by [FAR] Subpart 6.2 or 6.3, when the limitation of competition would preclude use of the procedures of this subpart; or sole source acquisitions justified in accordance with 13.501(a).<sup>101</sup>

When an acquisition is not subject to the TAA due to one of these exceptions, the BAA or another domestic preference law may apply.<sup>102</sup>

## 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,<sup>103</sup> and was ultimately codified at 10 U.S.C. § 2533a and § 2533b.<sup>104</sup> Over the years, the scope of the

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<sup>98</sup> *Id.* For more on the policy implications of ambiguity in the TAA and other federal procurement laws, see CRS In Focus IF11580, *U.S. Government Procurement and International Trade*, by Andres B. Schwarzenberg.

<sup>99</sup> 48 C.F.R. § 25.401(a).

<sup>100</sup> A set-aside is an acquisition in which only small businesses may compete. See generally CRS Report R42391, *Legal Authorities Governing Federal Contracting and Subcontracting with Small Businesses* (available to congressional clients upon request).

<sup>101</sup> 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.”).

<sup>102</sup> See *Puerto Rico Marine Mgmt., Inc.*, B-247975.5 (Oct. 23, 1992).

<sup>103</sup> Department of Defense Appropriations Act, 1994, P.L. 103-139, § 8005, 107 STAT. 1488 (Nov. 11, 1993). The Berry Amendment was initially codified at 10 U.S.C. § 2241 note. *Id.*

<sup>104</sup> National Defense Authorization Act for FY2002, P.L. 107-107, § 832, 115 STAT. 1189 (Dec. 28, 2001); John Warner National Defense Authorization Act for FY2007, P.L. 109-364, § 842; 120 STAT. 2335 (Oct. 17, 2006).



amendment has changed,<sup>105</sup> 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.<sup>106</sup>

Pursuant to the Berry Amendment,<sup>107</sup> 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.<sup>108</sup> The Berry Amendment covered items include food,<sup>109</sup> clothing,<sup>110</sup> tents,<sup>111</sup> certain textile fabrics and fibers,<sup>112</sup> hand or measuring tools, stainless steel flatware, and dinnerware.<sup>113</sup> Until 2006, Section 2533a also included domestic content restrictions on specialty metals, but the specialty metals provisions, which are discussed below, have since been codified at 10 U.S.C. § 2533b.<sup>114</sup>

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

- "the Secretary of Defense or the Secretary of the military department concerned determines that satisfactory quality and sufficient quantity of any [covered item] grown, reprocessed, reused, or produced in the United States cannot be procured as and when needed at United States market prices";<sup>115</sup>
- the value of the purchase is below the simplified acquisition threshold (generally \$150,000 for Berry Amendment purposes);<sup>116</sup>

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<sup>105</sup> 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 (Apr. 5, 1941). Over time, other items were added.

<sup>106</sup> *See* U.S. Gov't Accountability Office, Defense Acquisition: Rationale for Imposing Domestic Source Restrictions, GAO/NSIAD-98-191, at p. 1 (1998).

<sup>107</sup> For more information, *see* CRS Report R44850, *Buying American: Protecting U.S. Manufacturing Through the Berry and Kissell Amendments*, by Michaela D. Platzer.

<sup>108</sup> 10 U.S.C. § 2533a(a).

<sup>109</sup> 10 U.S.C. § 2533a(b)(1)(A).

<sup>110</sup> 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.*

<sup>111</sup> 10 U.S.C. § 2533a(b)(1)(C). Tents include any structural components of tents, along with tarpaulins and covers. *Id.*

<sup>112</sup> 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).

<sup>113</sup> 10 U.S.C. § 2533a(b)(2)-(4).

<sup>114</sup> 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 (Oct. 17, 2006). *See generally* *The Berry Amendment's Specialty Metals Restrictions Do Not Apply To Commercial Off-The-Shelf Items*, VENABLE GOVERNMENT CONTRACTS UPDATE, 2007-14 (Nov. 2007) ("The Berry Amendment, codified at 10 U.S.C. § 2533a and 2533b, restricts DOD's ability to acquire certain non-domestic goods, including food, clothing, cotton and specialty metals not grown, reprocessed, reused, melted, or produced in the United States. Because of the unique issues surrounding the procurement of 'specialty metals,' last year's National Defense Authorization Act for Fiscal Year 2007 . . . created a new section 2533b under Title 10 to address the restrictions related to them.").

<sup>115</sup> 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).

<sup>116</sup> 10 U.S.C. § 2533a(h). In 2020, the FAR Council increased the simplified acquisition threshold for most

- procuring items outside the United States in support of combat operations;<sup>117</sup>
- procuring food or hand or measuring tools, outside the United States in support of contingency operations;<sup>118</sup>
- 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;<sup>119</sup>
- vessels acquire items in foreign waters;<sup>120</sup>
- conducting “[e]mergency procurements or procurements of perishable foods by, or for, an establishment located outside the United States for the personnel attached to such establishment”;<sup>121</sup>
- acquiring items for commissary resale;<sup>122</sup>
- procuring food products (other than fish, shellfish, or seafood)<sup>123</sup> processed or manufactured in the United States;<sup>124</sup>
- acquiring “[w]aste and byproducts of cotton and wool fiber for use in the production of propellants and explosives”;<sup>125</sup> or
- procuring “chemical warfare protective clothing” produced outside the United States necessary to comply with certain U.S. agreements with foreign governments.<sup>126</sup>

Even if an acquisition is exempt from the requirements of the Berry Amendment, it is potentially subject to the BAA.<sup>127</sup> However, if the Berry Amendment applies to an acquisition, the BAA does not.<sup>128</sup>

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

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procurements to \$250,000. Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA), Final Rule, Federal Acquisition Regulation: Increased Micro-Purchase and Simplified Acquisition Thresholds, 85 Fed. Reg. 40064, 40067 (July 2, 2020). However, the FY2021 National Defense Authorization Act (NDAA) lowered the threshold to \$150,000 for the Berry Amendment, which will no longer be tied to the government-wide threshold. FY2021 NDAA § 817, P.L. 116-283 (Dec. 15, 2020). *See also* 48 C.F.R. § 2.101 (simplified acquisition threshold may exceed \$250,000 in certain circumstances, such as 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).

<sup>117</sup> 10 U.S.C. § 2533a(d)(1).

<sup>118</sup> 10 U.S.C. § 2533a(d)(1).

<sup>119</sup> 10 U.S.C. § 2533a(d)(4).

<sup>120</sup> 10 U.S.C. § 2533a(d)(2).

<sup>121</sup> 10 U.S.C. § 2533a(d)(3).

<sup>122</sup> 10 U.S.C. § 2533a(g).

<sup>123</sup> 10 U.S.C. § 2533a note.

<sup>124</sup> 10 U.S.C. § 2533a(f)(1).

<sup>125</sup> 10 U.S.C. § 2533a(f)(2).

<sup>126</sup> 10 U.S.C. § 2533a(e).

<sup>127</sup> 10 U.S.C. § 225.7000(b) (“Nothing in this subpart affects the applicability of the Buy American statute.”).

<sup>128</sup> *See* 10 U.S.C. § 225.7000(b).

that they do not apply to procurements involving textiles, clothing, food, and “specialty metals.”<sup>129</sup>

## Specialty Metals Restriction (10 U.S.C. § 2533b)

The specialty metals restriction first appeared in 1972,<sup>130</sup> when it was added to the Berry Amendment during the Vietnam War.<sup>131</sup> It remained part of 10 U.S.C. § 2533a until 2006, when the National Defense Authorization Act for FY2007 took effect, and moved the specialty metals restriction to a separate section of the U.S. Code, 10 U.S.C. § 2533b.<sup>132</sup>

Under the specialty metals restrictions, DOD generally may not acquire certain military platforms or weapon systems—or components of these platforms and systems—that contain any amount of a specialty metal that was not melted or produced in the United States.<sup>133</sup> The restriction applies to aircraft; missile and space systems; ships; tank and automotive items; weapon systems; and ammunition.<sup>134</sup> Consistent with the overall requirement, DOD and its prime contractors are also prohibited from directly acquiring any specialty metal (e.g., metal sheets, rods, plates) if the metal was not melted or produced in the United States.<sup>135</sup>

DOD uses the foundry location where the final melting or similar production of a specialty metal takes place to determine its origin.<sup>136</sup> For example, titanium sponge—unwrought titanium that has not been melted—that has been manufactured in Kazakhstan, shipped to the United States, and melted into ingots at a foundry in Ohio would be considered compliant with the specialty metals domestic sourcing mandate.

The specialty metals domestic sourcing restrictions apply to all DOD prime contracts and subcontracts.<sup>137</sup> For the purposes of the restriction, 10 U.S.C. § 2533b defines a “specialty metal” as any of the following metals or metal alloys:

- Steel with a maximum alloy content exceeding one or more of the following limits: manganese, 1.65%; silicon, 0.60%; copper, 0.60%; or containing more

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<sup>129</sup> See, e.g., Revised WTO GPA, United States App’x 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, flagstuffs, 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). The Kissell Amendment, originally enacted as Section 604 of the American Recovery and Reinvestment Act of 2009 (P.L. 111-5), has required the Department of Homeland Security (DHS) when using appropriated funds directly related to national security interests, to buy textiles, clothing, and footwear, from domestic sources. Because of U.S. trade commitments, in practice the Kissell Amendment applies only to the Transportation Security Administration (TSA). For more on the Kissell Amendment, see CRS In Focus IF10605, *Buying American: The Berry and Kissell Amendments*, by Michaela D. Platzer.

<sup>130</sup> Department of Defense Appropriations Act, 1973, P.L. 92-570, § 742, 86 STAT. 1200 (Oct. 26, 1972).

<sup>131</sup> See CRS In Focus IF11226, *Defense Primer: Acquiring Specialty Metals and Sensitive Materials*, by Heidi M. Peters.

<sup>132</sup> P.L. 109-364, § 842(a).

<sup>133</sup> 10 U.S.C. § 2533b(a).

<sup>134</sup> 10 U.S.C. § 2533b(a)(1).

<sup>135</sup> 10 U.S.C. § 2533b(a)(2).

<sup>136</sup> See *Defense Pricing and Contracting, Frequently Asked Questions Regarding the Specialty Metals Restriction under 10 U.S.C. 2533b*, at 8 (July 29, 2009), [https://www.acq.osd.mil/dpap/cpic/ic/docs/Updated\\_Frequently\\_Asked\\_Questions\\_Specialty\\_Metals\\_07-26-13.pdf](https://www.acq.osd.mil/dpap/cpic/ic/docs/Updated_Frequently_Asked_Questions_Specialty_Metals_07-26-13.pdf).

<sup>137</sup> See Restrictions on Acquisition of Certain Articles Containing Specialty Metals, Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7009.

than 0.25% of any of the following elements: aluminum, chromium, cobalt, niobium (columbium), molybdenum, nickel, titanium, tungsten, or vanadium.

- Metal alloys consisting of nickel, iron-nickel, and cobalt base alloys containing a total of other alloying metals (except iron) in excess of 10%.
- Titanium and titanium alloys.
- Zirconium and zirconium base alloys.<sup>138</sup>

The specialty metals restriction contains a number of exceptions identical to those found in 10 U.S.C. § 2533a, including purchases below the simplified acquisition threshold;<sup>139</sup> when a determination is made that “compliant specialty metal of satisfactory quality and sufficient quantity, and in the required form, cannot be procured as and when needed”;<sup>140</sup> acquisitions conducted outside of the United States in support of combat or contingency operations;<sup>141</sup> acquisitions made on a noncompetitive basis due to unusual and compelling urgency;<sup>142</sup> and items purchased for commissary resale.<sup>143</sup> Moreover, 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

- acceptance of an end item containing noncompliant materials is “necessary” to the national security interests of the United States;<sup>144</sup>
- 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;<sup>145</sup>
- acquiring certain COTS items (with certain limitations), or fasteners that are commercial items purchased under a contract or subcontract with a manufacturer of such items, if the manufacturer can certify that it has purchased at least 50% of the specialty metals used in the production of these items from domestic sources;<sup>146</sup>
- purchasing items wherein the total amount of noncompliant specialty metals is less than 2% of the total weight of the item’s specialty metals;<sup>147</sup>
- the acquisition is necessary to comply with or further certain agreements with foreign governments;<sup>148</sup>

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<sup>138</sup> 10 U.S.C. § 2533b(l).

<sup>139</sup> 10 U.S.C. § 2533b(f).

<sup>140</sup> 10 U.S.C. § 2533b(b).

<sup>141</sup> 10 U.S.C. § 2533b(c)(1).

<sup>142</sup> 10 U.S.C. § 2533b(c)(2).

<sup>143</sup> 10 U.S.C. § 2533b(e).

<sup>144</sup> 10 U.S.C. § 2533b(k)(1).

<sup>145</sup> 10 U.S.C. § 2533b(g).

<sup>146</sup> 10 U.S.C. § 2533b(h)(2)-(3). Acquisitions of commercial 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).

<sup>147</sup> 10 U.S.C. § 2533b(i)(1). This exception does not apply to high performance magnets. 10 U.S.C. § 2533b(i)(2).

<sup>148</sup> 10 U.S.C. § 2533b(d)(1), (2).

- 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 into agreements for the purchase of specified amounts of domestically melted specialty metal;<sup>149</sup> and
- 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.<sup>150</sup>

As with the Berry Amendment, acquisitions that are exempt from the specialty metals restrictions could potentially be subject to the BAA; however, the BAA does not apply if the specialty metals restriction applies.<sup>151</sup>

## Tabular Comparison of Major Requirements

**Table 1**, below, summarizes key aspects of the three major domestic content procurement 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 \$10,000) conducted in the United States, unless TAA applies	Unmanufactured items must be mined or produced in the United States  Manufactured items must be manufactured in the United States, but qualify as such if they are manufactured in the United States, and (1) at least 55% of the cost of components is mined, produced, or manufactured in the United States, 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., \$182,000 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 (UNICOR) or AbilityOne; certain noncompetitive acquisitions

<sup>149</sup> 10 U.S.C. § 2533b(j).

<sup>150</sup> 10 U.S.C. § 2533b note, as enacted by P.L. 109-364, § 842(b), 120 STAT. 2337 (Oct. 17, 2006).

<sup>151</sup> See 48 C.F.R. § 225.7000(b).

Regime	Agencies & Items Covered	Basic Requirements	Exceptions
Berry Amendment	Defense agencies; procurements of “covered items” or “specialty metals” valued in excess of the simplified acquisition threshold (generally \$150,000), with some exceptions for purchases outside the United States	Food, clothing, tents, certain textile fabrics and fibers, hand and measuring tools, stainless steel flatware, and dinnerware must be entirely grown, reprocessed, reused, or produced in the United States  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 United States	Required items are not available in sufficient quantity/quality; certain noncompetitive acquisitions; acquisitions in 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

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

## Other Statutory Provisions and Executive Orders

In addition to the major domestic preference regimes previously discussed, there are also numerous other domestic content restrictions that seek to address situations that the BAA does not cover. These provisions, listed in the **Appendix** below, have been codified in the U.S. Code and the notes. In some cases, as with the Berry Amendment, these provisions require a higher level of domestic content than is required under the BAA.<sup>152</sup> In other cases, these domestic content restrictions apply to federal grants or other funds that are spent by entities that are not federal agencies, and thus not subject to the BAA and other federal procurement laws. In other instances, the provision seeks to incentivize procurement of domestic content by federal agencies or other entities without strictly mandating it. The **Appendix** does not include un-codified provisions, such as those included in annual appropriations measures.<sup>153</sup> Provisions are listed in numerical order by the Title of the U.S. Code in which they appear.

Executive actions also may affect domestic content requirements.<sup>154</sup> For example, President Trump issued several executive orders seeking to strengthen requirements for federal agency procurements and assistance programs to purchase domestic goods, materials, and products, and to limit the use of waivers from such requirements. One of these orders, Executive Order 13881, called for, and a subsequent federal agency rule implemented, an increase in domestic content

<sup>152</sup> See *supra* “The Berry Amendment: Requiring That Certain DOD Purchases Include Only Domestic Content.”

<sup>153</sup> 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).

<sup>154</sup> Exec. Order No. 13881, Maximizing Use of American-Made Goods, Products, and Materials (July 15, 2019) (superseded in part by Exec. Order No. 14005, Ensuring the Future Is Made in All of America by All of America’s Workers, (Jan. 25, 2021). For a general information on executive orders, see CRS Insight IN11540, *Presidential Transitions: Executive Orders*, by Ben Wilhelm.



requirements for certain products.<sup>155</sup> In January 2021, President Biden issued Executive Order 14005 to strengthen domestic content restrictions in federal procurement and supersede conflicting aspects of E.O. 13881.<sup>156</sup> Among other things, E.O. 14005: (1) creates a position of “Made in America Director” within the Office of Management and Budget to review federal agencies’ use of waivers from domestic content restrictions; (2) directs the FAR Council to consider strengthening the domestic content requirements for end products and construction materials; and (3) directs the FAR Council to consider “replac[ing] the ‘component test’ . . . that is used to identify domestic end products and domestic construction materials with a test under which domestic content is measured by the value that is added to the product through U.S.-based production or U.S. job-supporting economic activity.”<sup>157</sup>

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<sup>155</sup> For more on the Trump Administration orders, see CRS Legal Sidebar LSB10256, *President Encourages Agencies to Buy American-Produced Goods & Materials*, by David H. Carpenter. See also FAR Council, Final Rule, Maximizing Use of American-Made Goods, Products, and Materials, 86 Fed. Reg. 6180, 6187 (Jan. 19, 2021).

<sup>156</sup> Exec. Order No. 14005, Ensuring the Future Is Made in All of America by All of America’s Workers, (Jan. 25, 2021).

<sup>157</sup> *Id.* Federal statutes reference several other executive orders that pertain to domestic content restrictions. See, e.g., Exec. Order No. 13797, Establishment of Office of Trade and Manufacturing Policy (April 29, 2017) (establishing an office to “help improve the performance of the executive branch’s domestic procurement and hiring policies,” among other things); Exec. Order No. 13817, A Federal Strategy To Ensure Secure and Reliable Supplies of Critical Minerals (Dec. 20, 2017) (seeking to reduce the United States’ dependency on foreign sources of critical minerals); Exec. Order No. 13858, Strengthening Buy-American Preferences for Infrastructure Projects (Jan. 31, 2019) (seeking to maximize “the use of goods, products, and materials produced in the United States, in Federal procurements and through the terms and conditions of Federal financial assistance awards”); Exec. Order No. 13944, Combating Public Health Emergencies and Strengthening National Security by Ensuring Essential Medicines, Medical Countermeasures, and Critical Inputs Are Made in the United States (Aug. 6, 2020) (seeking to maximize the procurement and use of essential medicines and “medical countermeasures” made in the United States); Exec. Order No. 14005. President Biden revoked Section 5 of Executive Order 13858, which expanded President Trump’s earlier executive order on federal procurement practices to the provision of federal financial assistance generally (i.e., not only grants), in Biden’s January 25, 2021 executive order on federal procurement. See Exec. Order No. 14005, Ensuring the Future Is Made in All of America by All of America’s Workers (Jan. 25, 2021).



## Appendix. Other Statutory Provisions

**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.<sup>158</sup>

**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. § 2208 notes:** States Congress’s findings that: (1) federal law “requires that commodities and products purchased with Federal funds be, to the extent practicable, of domestic origin”; (2) domestic content restrictions “seek to ensure that purchases made with Federal funds benefit domestic producers”; and (3) the “Richard B. Russell National School Lunch Act (42 U.S.C. 1751 et seq.) requires the use of domestic food products for all meals served under the program, including food products purchased with local funds.” Directs the Department of Agriculture to train personnel on the enforcement of various domestic content restrictions.

Further provides that none of the funds made available in the Department of Agriculture’s 1998 appropriations law “may be expended by an entity unless the entity agrees that in expending the funds the entity will comply with sections 2 through 4” of the BAA. Expresses the sense of Congress that entities receiving financial assistance to purchase “any equipment or product that may be authorized to be purchased with financial assistance provided using funds made available

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<sup>158</sup> This provision is like the Berry Amendment, discussed previously, but applies to purchases by the Department of Homeland Security, not DOD.

in this Act . . . should, in expending the assistance, purchase only American-made equipment and products.”

**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.

**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. § 2350b:** Permits the Secretary of Defense to waive domestic content restrictions for certain contracts involving cooperative projects under the Arms Export Control Act.

**10 U.S.C. § 2424:** Provides that certain limitations on the Department of Defense’s authority to acquire supplies and services from exchange stores outside the United States for use by the U.S. armed forces do not apply “to contracts for the procurement of soft drinks that are manufactured in the United States.”

**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. § 2533c:** Prohibits DOD from procuring “sensitive materials” from four specific countries: the Democratic People’s Republic of Korea, the People’s Republic of China, the Russian Federation, or the Islamic Republic of Iran. Covered materials include

- samarium-cobalt magnets;
- neodymium-iron-boron magnets;
- tungsten metal powder;
- tungsten heavy alloy or any finished or semi-finished component containing tungsten heavy alloy; and
- tantalum metals and alloys.

Under these sourcing prohibitions, DOD generally may not directly acquire sensitive materials that were mined, refined, separated, or melted in the four specified countries, or military platforms or weapon systems containing sensitive materials melted or produced in the four specified countries. The prohibitions apply to aircraft; missile and space systems; ships; tank and automotive items; weapon systems; and ammunition. Limited exceptions are specified.

**10 U.S.C. § 2534:** Provides that the Secretary of Defense may acquire buses, chemical weapons antidotes, certain naval vessel components, and certain other items only if “the manufacturer is part of the national technology and industrial base,” with some exceptions.

Also 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. § 8661 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. § 1152:** Authorizes the Commandant of the Coast Guard to enter into contracts or place orders for certain supplies or services prior to entering into a contract for the construction of a Coast Guard vessel funded by Congress and provides that, in conducting such advance acquisitions, “the Commandant may give priority to persons that manufacture materials, parts, and components in the United States.”

**14 U.S.C. § 1154:** 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. § 638:** Provides that when making an award of a funding agreement to a small business under the Small Business Innovation Research (SBIR) program, a covered federal agency “shall give consideration to whether the technology to be supported by the award is likely to be manufactured in the United States.”

**15 U.S.C. § 638 note:** Expresses the sense of Congress that “an entity that is awarded a funding agreement under the SBIR program of a Federal agency under section 9 of the Small Business Act [15 U.S.C. 638] should, when purchasing any equipment or a product with funds provided through the funding agreement, purchase only American-made equipment and products, to the extent possible in keeping with the overall purposes of that program.”

**15 U.S.C. § 2221(I):** 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 BAA 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.

**22 U.S.C. § 2396:** Provides that none of the funds made available to carry out the Foreign Assistance Act “shall be used to finance the purchase, sale, long-term lease, exchange, or guaranty of a sale of motor vehicles unless such motor vehicles are manufactured in the United States.” Allows the President to waive the domestic content restrictions “where special circumstances exist.”

**24 U.S.C. § 225h:** Requires the District of Columbia to comply with the BAA 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.<sup>159</sup>

**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 BAA.

**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 BAA.

**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

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<sup>159</sup> 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 (Aug. 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 BAA.

**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 BAA in expending the funds.

**42 U.S.C. § 5581:** Expresses Congress’s policy to “stimulate the purchase by private buyers of at least 90 per centum of all solar photovoltaic energy systems produced in the United States during fiscal year 1988.”

**42 U.S.C. § 6276:** Directs an interagency working group to conduct studies of: (1) foreign export promotion practices for renewable energy and energy efficiency technologies and products; and (2) foreign barriers to trade of such products produced in the United States.

**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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