



June 30, 2017



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MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Wilbur Ross  
Secretary  
Department of Commerce

Mick Mulvaney  
Director  
Office of Management and Budget

SUBJECT: Assessment and Enforcement of Domestic Preferences In Accordance with Buy American Laws

On April 18, 2017, the President signed Executive Order 13788, Buy American and Hire American (the Order), to ensure that Federal procurement and Federal financial assistance awards maximize the use of goods, products, and materials produced in the United States, including iron, steel, and manufactured goods. Buy American Laws provide important benefits to the Nation. As defined in the Order, "Buy American Laws" means all statutes, regulations, rules, and Executive Orders relating to Federal procurement or Federal grants including those that refer to "Buy America" or "Buy American" that require, or provide a preference for, the purchase or acquisition of goods, products, or materials produced in the United States, including iron, steel, and manufactured goods.

As Section 2 of the Order explains, in order to "promote economic and national security and to help stimulate economic growth, create good jobs at decent wages, strengthen our middle class and support the American manufacturing and defense industrial bases," it shall be the policy of the executive branch to maximize, consistent with law, through terms and conditions of Federal procurement and Federal financial assistance awards, the use of goods, products, and materials produced in the United States. This memorandum provides guidance to agencies to help the Federal Government maximize, consistent with law, the policy and the statutory mandate to buy domestically manufactured products in its contracts and grants, and minimize use of exceptions and waivers, so that the Federal Government may optimize the positive impact of these laws for the betterment of United States citizens and taxpayers.

As discussed in greater detail in the Attachment, in Federal procurement, agencies are authorized to use five different exceptions from, and waivers of, the Buy American Act (BAA), such as when suitable products are not available domestically. Additionally, there are other situations where the BAA does not apply, including purchases for use outside the United States or purchases under the micropurchase threshold. Acquisitions made pursuant to these exceptions and waivers, which annually result in billions of Federal taxpayer dollars being spent for foreign-made products, must be carefully monitored. Separately, in Federal financial assistance, there is no primary law that imposes domestic sourcing requirements. Applicability of these requirements depends on whether the original authorizing or subsequent appropriations statute requires domestic sourcing requirements. There are an estimated 2,000 different Federal assistance authorizing statutes that require careful analysis to determine whether domestic sourcing requirements may be imposed.

To strengthen compliance with domestic preferences, Section 3 of the Order directs each agency to monitor, enforce, and comply with Buy American Laws, to the extent they apply, and minimize the use of waivers, consistent with applicable law. In particular, the heads of all agencies are directed to (i) assess their compliance with Buy American Laws, including use of exceptions and waivers, (ii) develop and propose policies to maximize use of material produced in the United States, and (iii) report to the Director of the Office of Management and Budget (OMB) and the Secretary of Commerce on their findings and recommendations.

To meet the requirements of Section 3, agencies are directed to conduct an analysis and prepare a report, following the outline provided in the Attachment. The “Section 3 report” shall be provided to the Department of Commerce (DOC) and OMB by September 15, 2017 (i.e., 150 days after issuance of the Order) at the following MAX Collect Page address: <https://community.max.gov/x/MAGIT>. The report should identify a point of contact for any necessary follow-up.

Thank you for your prompt attention to this matter. Questions regarding this memorandum may be sent to [fn-omb-ofpp@omb.eop.gov](mailto:fn-omb-ofpp@omb.eop.gov) with subject line “Buy American Law Compliance.”

Attachment

## **Assessment and Enforcement of Domestic Preferences in Accordance with Buy American Laws**

Section 3(b) of E.O. 13788 directs the heads of all agencies to perform the following tasks by September 15, 2017, to strengthen compliance with Buy American Laws:

- (i) Assess the monitoring of, enforcement of, implementation of, and compliance with Buy American Laws within their agencies;
- (ii) Assess the use of waivers within their agencies by type and impact on domestic jobs and manufacturing; and
- (iii) Develop and propose policies for their agencies to ensure that, to the extent permitted by law, Federal financial assistance awards and Federal procurements maximize the use of materials produced in the United States, including manufactured products; components of manufactured products; and materials such as steel, iron, aluminum, and cement.

To meet the requirements of Section 3(b), agencies shall conduct an analysis and submit a report of findings made pursuant to the assessments required by that section to DOC and OMB at the Max webpage and MAX Collect portal found here: <https://community.max.gov/x/MAGIT>. The agency's Section 3 report must include the following:

### **I. Federal Procurements**

#### **A. Oversight of Buy American Laws**

The Buy American Act (BAA) is the primary law in Federal acquisition providing a preference for domestic goods and manufactured products. The BAA provides a two-part test for determining if a product qualifies as a domestic end product: (i) the item must be manufactured in the United States and (ii) more than 50 percent of the cost of all the component parts is also manufactured in the United States. It provides for five exceptions and waivers: (1) domestic-non-availability, (2) unreasonable cost, (3) purchase of commercial IT, (4) resale, and (5) public interest determination. In addition, the BAA is not applicable to purchases at or below the micro purchase threshold (currently \$3,500) or to procurements for use outside of the United States. Further, the Trade Agreements Act (TAA) waives the BAA in certain circumstances, requiring procuring agencies to purchase goods only from domestic sources or from designated countries, including countries that are party to the World Trade Organization Agreement on Government Procurement (GPA), a U.S. Free Trade Agreement (FTA), or certain least developed countries. Both the BAA and the TAA contain waivers which allow for products under Department of Defense Reciprocal Agreements to be excepted from their respective requirements.

To address the requirements of section 3(b)(i) of the Order, agencies shall, at a minimum, evaluate and report on their oversight of the BAA and other Buy American Laws, including the Berry Amendment, if applicable to the agency, which imposes domestic source requirements on

certain agencies for the acquisition of textiles, food, and hand or measuring tools. The evaluation and report shall address the following:<sup>1</sup>

1. *Procedures and Guidance.* Provide links to, or copies of, any department level guidance in place to assist the workforce in meeting the requirements of Buy American Laws and the application of the TAA, including when the TAA takes precedence over the BAA and when the TAA is waived. In addition to memoranda, guidance would include, among other things (i) checklists or other tools, and (ii) instructions providing approval levels and mechanisms for the exercise of exemptions and waivers.
2. *Internal reviews.* Briefly describe reviews the agency, at the department level, has conducted or has directed bureaus to conduct in Fiscal Years 2015 and 2016 to evaluate compliance with Buy American Laws and the TAA, including (i) the nature of the analysis conducted and (ii) the results of the reviews.
3. *Marketing and Outreach.* Discuss steps your agency has taken to promote and enhance visibility for the acquisition workforce of products compliant with Buy American Laws, including BAA-compliant products (referred to as “domestic end products”) and to meet its obligations under the TAA, when applicable.
4. *Training.* Describe training tools or resources (other than that described in #1, above) that are used to ensure the acquisition workforce understands the parameters and technical mechanics of Buy American Laws and the TAA, including the applicability of the BAA and its exceptions and waivers.

#### **B. Enforcement of Buy American Laws and Waiver Usage**

As required by section 3(b)(i) and (ii) of the Order, agencies shall review the enforcement of the Buy American Laws, and the use of exemptions and waivers (as defined in section 1(d) of the E.O.). To assist the DOC and other agencies in evaluating the impact of agency spending for foreign items on domestic jobs and manufacturing, agencies should review the level of spending conducted under each exception, the most prevalent products that were subject to BAA exceptions and waivers, and, government-wide, the largest contracts subject to BAA exceptions and waivers, for each of the last three fiscal years.

In particular, agencies should take the following specific steps:

1. Agencies should report whether their contracting officers record exceptions and waivers in the Federal Procurement Data System (FPDS) (i) only for items that represent the predominant product on the contract, (ii) whenever an exception or waiver is used,

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<sup>1</sup> Pursuant to section 3(e) of the E.O., the Secretary of Commerce and the United States Trade Representative are required to assess the impacts of all U.S. free trade agreements and the World Trade Organization Agreement on Government Procurement on the operation of Buy American Laws. For this reason, several questions seek information which will be used by DOC and USTR to better understand how agencies are implementing international trade agreements and the impact on the implementation of domestic procurement preferences.

irrespective of whether it is for the predominant product, or (iii) in accordance with a different reporting structure (please explain).

2. Agencies should review the MAX webpage, found at <https://community.max.gov/x/MAGIT>, which contains information about the agency's use of exceptions and waivers – both by dollar amount and by type of product – that OMB has culled from FPDS. Agencies must confirm if this summary is accurate and provide any necessary refinements, revisions, or clarifications.
3. As a further step, on the MAX page, OMB has identified the 25 largest contracts under each exception, as well as spending subject to waivers in accordance with (i) the TAA and (ii) for use outside the United States. If one or more of your agency's contracts is listed, please review the contract files and report whether the exception or waiver was associated with the predominant North American Industry Classification System (NAICS) codes and product service codes (PSCs) reported in FPDS. If the waiver or exception was not tied to the predominant item, the agency should identify the NAICS/PSC for which the listed waiver was used.

### **C. Steps to strengthen implementation of Buy American Laws**

In accordance with section 3(b)(iii) of the Order, agencies should develop and propose policies for their agencies to ensure that Federal procurements maximize the use of materials produced in the United States, consistent with law. At a minimum, reports should address the following:

1. *Improved guidance.* Identify actions the agency intends to take to review and update relevant agency guidance, including areas of FAR Part 25 that your agency believes may benefit from further clarification to improve workforce understanding and compliance with domestic source restrictions.
2. *Improved reporting instructions.* Identify any instructions or workforce support associated with recording data in FPDS (*e.g.*, user manual, data dictionary, training modules on the BAA, FAR language, etc.) regarding the coding of BAA procurements and exceptions to Buy American Laws that may benefit from government-wide clarification (*e.g.*, clarifying the instructions to ensure all agencies, and components within agencies, are reporting on the commercial IT exception in the same manner; clarifying what to report if a BAA exception doesn't cover the predominant product in an acquisition for multiple products, etc.). Identify any instructions or workforce support regarding the coding of TAA eligible procurements and the country of origin reporting that may benefit from clarification, particularly to ensure that country of origin as required under the TAA is reported accurately (and reflects the determination made for TAA eligibility).
3. *Improved internal reviews.* Describe any plans for strengthened internal reviews, including the nature of the improvements. (*E.g.*, you might describe mechanisms in place

to ensure that the domestic non-availability waiver is not being used to support the procurement of a desired foreign product at the direction of a program office when a suitable domestic product would fulfill program requirements.) Such plans would include the development of guidance to the workforce to determine whether any obligations apply and whether any exceptions to these obligations are applicable.

4. *Improved marketing and outreach.* Identify steps that your agency intends to take, and recommendations to category managers, on how they might improve the visibility of domestic-end products in the marketplace.
5. *Improved training.* Describe any planned enhancements to internal training. Also describe topics where government-wide training offered by the Federal Acquisition Institute or the Defense Acquisition University might be enhanced, and the form of such training (e.g., classroom, online, etc.). This may include training to ensure contracting officers can accurately determine the applicability of the BAA, including for procurements over the TAA threshold where the BAA applies because the procurement is a small business set aside, and set asides are not subject to the TAA.
6. *Additional actions for strengthening Buy American Laws.* Provide your agency's ideas for strengthening Buy American Laws that may require statutory, executive, regulatory, or administrative action across the government.
7. *Additional steps for ensuring compliance with the TAA.* Provide your agency's ideas for ensuring compliance with the TAA to make certain that the benefits of the TAA go to designated countries, particularly countries that have provided appropriate reciprocal competitive government procurement opportunities to United States products and suppliers of such products.

## **II. Federal Grants**

### **A. Oversight of Buy American Laws**

For Federal financial assistance awards, there is no primary law that imposes the Buy American Laws as defined in E.O. 13788, and applicability varies by the authorizing and appropriation statutes imposed on specific Federal financial assistance programs. To address the requirements of section 3(b)(i) of the Order, agencies shall, at a minimum, evaluate and report on their oversight of Buy American Laws as follows:

1. *Inventory.* To better understand the scope of Buy American Laws as they apply to Federal financial assistance, agencies are required to provide an inventory of their existing Federal financial assistance authorities and information on the extent Buy American Laws apply to awards made under these authorities.
2. *Guidance.* As applicable, briefly describe guidance the agency has in place to assist Federal financial assistance recipients in complying with Buy American Laws. Provide

links to any publicly available guidance. Identify the last time the guidance was reviewed and/or updated. (Report any plans for updating guidance in section C.1 below.)

3. *Compliance reviews.* Briefly describe reviews the agency has conducted in the last two fiscal years, *i.e.* FY 2015 and 2016 (if any) to evaluate recipient compliance with Buy American Laws, including (i) the nature of the analysis conducted and (ii) the results of the reviews. (Report any planned reviews in section C.3 below.)

## **B. Waiver usage**

As required by section 3(b)(ii) of the Executive Order, agencies shall review the use of waivers. At a minimum, as part of the agencies' Section 3 report, agencies must describe their current waiver and exception process and actions they are taking to review and improve upon that process.

## **C. Steps to strengthen implementation**

In accordance with section 3(b)(iii) of the Executive Order, agencies should take action to maximize the use of materials produced in the United States. At a minimum, Section 3 reports should address the following:

1. *Improved guidance.* Identify actions the agency intends to take to review and update relevant agency guidance to recipients.
2. *Internal procedures.* Identify actions the agency intends to take to review and update relevant agency internal procedures to implement relevant Buy American Laws.
3. *Additional actions for strengthening the applicability of Buy American Laws to Federal financial assistance.* Provide your agency's ideas for strengthening and applying Buy American laws that may require statutory, executive, regulatory, or administrative action across the government.