

Calendar No. 586

117TH CONGRESS }
2d Session }

SENATE

{ REPORT
117-227 }

BUY AMERICAN.GOV ACT OF 2021

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 732

TO STRENGTHEN BUY AMERICAN REQUIREMENTS,
AND FOR OTHER PURPOSES



DECEMBER 5, 2022.—Ordered to be printed

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DECEMBER 5, 2022.—Ordered to be printed

Mr. PETERS, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 732]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 732) to strengthen Buy American requirements, and for other purposes, having considered the same, reports favorably thereon with an amendment, in the nature of a substitute, and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

S. 732, the BuyAmerican.gov Act of 2021, directs the General Services Administration (GSA) to establish a website, BuyAmerican.gov, that will be used to publish information about waivers and exceptions to domestic procurement preference measures, collectively referred to as “Buy American laws.”¹ Specifically,

¹This bill covers any law, regulation, Executive Order, or rule relating to federal contracts, grants, or financial assistance that requires or provides a preference for the purchase or use of goods, products, or materials mined, produced, or manufactured in the United States, including: *chapter 83* of title 41, United States Code (commonly referred to as the “Buy American Act”); section 5323(j) of title 49, United States Code; (C) section 313 of title 23, United States Code; section 50101 of title 49, United States Code; section 24405 of title 49, United States Code; section 608 of the Federal Water Pollution Control Act (33 U.S.C. 1388); section 1452(a)(4) of the Safe Drinking Water Act (42 U.S.C. 300j-12(a)(4)); section 5035 of the Water Resources Reform and Development Act of 2014 (33 U.S.C. 3914); section 2533a of title 10, United States

Continued

the website will collect information about waivers of Buy American laws that have been requested, are under consideration, or have been granted. The website will be designed to ensure manufacturers and other interested members of the public have an opportunity to learn of waiver requests early in the approval process. S. 732 also requires the Administrator of GSA to develop a centralized mechanism for collecting waiver requests.

II. BACKGROUND AND THE NEED FOR LEGISLATION

There are generally two categories of domestic content preferences in U.S. law and regulation. The first are Buy America preferences, which apply to federally funded public works and infrastructure projects, such as the construction of highways, railways, and rapid transit systems. The second is the preference for items procured directly by the federal government. This includes the Buy American Act of 1933, which gives a preference for federal agencies to procure domestically produced goods.² It also includes the Berry Amendment,³ a group of domestic sourcing restrictions passed by Congress in 1941 that applies to the Department of Defense.

Typically, Buy American requirements can be waived by an administering agency if applying the domestic content requirements would be (1) inconsistent with the public interest, (2) if the procured materials are not produced in sufficient quantities in the United States, or (3) if adhering to the Buy American requirements would increase the cost of the overall project by a certain percent.

From 2012 through 2016, federal agencies granted 388,953 Buy American waivers in order to source products manufactured outside the United States. The Department of Defense (DoD) granted over 230,000 waivers during that period, amounting to \$1.3 billion worth of products procured from non-domestic sources.⁴ Since these waivers are often granted with little oversight and transparency, the high number of approved waivers is a source of concern about compliance with Buy American laws.

A 2018 study by the Government Accountability Office (GAO) found a prevalence of data reporting errors by federal agencies, indicating that the full extent of the use of exceptions and waivers may not be fully known.⁵ The lack of a government-wide repository for information about waivers to domestic content preference is an additional concern.

On January 25, 2021, President Biden issued an Executive Order to update and centralize the Buy American waiver process.⁶ The order required the Administrator of GSA to develop a public website to publish information on all proposed, granted, and denied waivers.⁷ The order also called for greater oversight of the waiver

Code (commonly referred to as the “Berry Amendment”); section 2533b of title 10, United States Code; and, section 604 of the American Recovery and Reinvestment Act of 2009 (*6 U.S.C. 453b*).

² 41 U.S.C. § 8302.

³ 10 U.S.C. § 2533a.

⁴ Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, *Report to Congress on Department of Defense Fiscal Year 2016 Purchases from Foreign Entities*, (June 2017) (https://www.acq.osd.mil/dpap/cpic/docs/FY_16_Foreign_Entities_RTC_USA001870-17_signed_June_29_2017.pdf).

⁵ Government Accountability Office, *Buy American Act: Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance*, (GAO-19-17) (Dec. 2018) (<https://www.gao.gov/assets/gao-19-17.pdf>).

⁶ Exec. Order No. 14005, 86 Fed. Reg. 7475 (Jan. 25, 2021).

⁷ *Id.*

process by establishing a more centralized system of review.⁸ Prior to that, on April 21, 2017, President Trump issued an Executive Order aimed at bolstering Buy American laws and maximizing the Government’s use of goods, products, and materials produced in the United States.⁹ Notably, the order targeted the overuse of waivers and exceptions by requiring the heads of federal agencies to carefully consider the impact of “dumped” foreign steel, iron, or manufactured goods on the price of domestic goods.¹⁰

The solution to the opacity surrounding the approval of Buy American waiver requests is to improve transparency in the federal procurement process. This bill promotes transparency by requiring a public website for Buy American waiver requests. The domain, BuyAmerican.gov (already owned by GSA), will publish information about pending or granted Buy America waiver requests for public awareness and comment. The bill requires agencies to justify applications for Buy American waivers on the website, potentially reducing the incentive to utilize these waivers as “loopholes.” The existence of this website will give American businesses the opportunity to notify government agencies when they have the capability to fulfill a contract with domestic products.

III. LEGISLATIVE HISTORY

Ranking Member Rob Portman (R–OH) introduced S. 732, the BuyAmerican.gov Act of 2021, on March 11, 2021 with Senator Christopher Murphy (D–CT), Senator Lindsey Graham (R–SC), Senator Sherrrod Brown (D–OH), and Senator Debbie Stabenow (D–MI) as cosponsors. The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 732 at a business meeting on May 12, 2021. During the business meeting, a Substitute Amendment was introduced by Chairman Peters and Ranking Member Portman and was adopted by voice vote *en bloc*. An amendment was also offered by Senator Johnson and adopted by voice vote *en bloc*.

The bill, as amended, was ordered reported favorably by voice vote *en bloc* as amended with Senators Peters, Carper, Hassan, Sinema, Rosen, Padilla, Ossoff, Portman, Johnson, Paul, Lankford, Romney, Scott, and Hawley present.

The text of this bill was included in the Infrastructure Investment and Jobs Act (Pub. L. 117–58, Sec. 70931–70941), which became law before this bill was reported out of committee.

IV. SECTION BY SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title

This bill is named the BuyAmerican.gov Act.

Section 2. Definitions

This bill defines Buy American law broadly to include the Buy American Act (chapter 83 of title 41), Buy America requirements (section 5323(j) of title 49), the Berry Amendment (section 2533a of title 10), the specialty metal provisions in section 2533b of title

⁸*Id.*

⁹Exec. Order No. 13788, 82 Fed. Reg. 18837 (Apr. 21, 2017).

¹⁰*Id.*

10, and the Buy American rules in the American Recovery and Reinvestment Act (6 U.S.C. 453b).

Section 3. Sense of Congress on Buy American

This section expresses the sense of Congress that every agency should maximize federal awards and procurements for items made in the United States by American workers and businesses.

Section 4. Assessment of impact of free trade agreements

This section requires the Secretary of Commerce, the U.S. Trade Representative, and the Director of the Office of Management and Budget to assess the impacts of all United States free trade agreements and the World Trade Organization Agreement on Government Procurement on the operation of Buy American Laws, including their impacts on the implementation of domestic procurement preferences. It also requires an assessment of federal permitting processes on the operation of Buy American laws.

Section 5. Judicious use of waivers

This section requires public interest waivers to be construed to ensure maximum utilization of items produced in the United States and be approved by the head of the agency issuing the public interest waiver.

Section 6. Establishment of BuyAmerican.gov website

This section directs GSA to establish a website with the address BuyAmerican.gov. The website will include information on all waivers of Buy American laws that have been requested, are under consideration, or have been granted by executive agencies and be designed to enable manufacturers and other interested parties to easily identify waivers. GSA already owns the domain name BuyAmerican.gov.

Section 7. Waiver transparency and streamlining for contracts

This section requires that waivers to Buy American laws for federal grants be posted on BuyAmerican.gov. Specifically, it requires the Administration to develop a mechanism to collect information on requests to waive Buy American laws and other domestic content restrictions, utilizing existing reporting requirements whenever possible in order to make BuyAmerican.gov timely and effective.

Not less than 15 days prior to issuing a waiver, the head of an executive agency shall make available to the public, by posting on BuyAmerican.gov, a copy of the request to waive a Buy American law, and information available to the executive agency concerning the request. The agency will then allow informal public comment on the waiver request for at least 20 days prior to making a finding based on the request. A waiver may not be granted if the waiver request was not made available to the public, or there was no opportunity for public comment on the waiver request.

Section 8. Comptroller General report

This section requires the Comptroller General to produce a report not later than two years after enactment on the implementation of this bill.

Section 9. Rules of construction

This section future proofs the legislation by ensuring BuyAmerican.gov can be moved to a successor information system.

Section 10. Consistency with international agreements

This section ensures that the legislation is applied in a manner consistent with U.S. obligations under international agreements.

Section 11. Prospective amendments to internal cross-references

This section future-proofs the citation for the Berry Amendment in the U.S. Code.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. This legislation was enacted as part of the Infrastructure Investment and Jobs Act (Pub. L. 117-58, Sec. 70931-70941 (2021)) and was not assessed individually for intergovernmental or private sector mandates. The statements on these mandates regarding the enacted bill can be found under H.R. 3684 on CBO.gov.

VI. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

Because S. 732 would not repeal or amend any provision of current law, it would make no changes in existing law within the meaning of clauses (a) and (b) of paragraph 12 of rule XXVI of the Standing Rules of the Senate.