

Calendar No. 667

117TH CONGRESS }
2d Session }

SENATE

{ REPORT
{ 117-268

BUILD AMERICA, BUY AMERICA ACT

R E P O R T

OF THE

**COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE**

TO ACCOMPANY

S. 1303

**TO ENSURE THAT CERTAIN FEDERAL INFRASTRUCTURE
PROGRAMS REQUIRE THE USE OF MATERIALS
PRODUCED IN THE UNITED STATES, AND FOR OTHER PURPOSES**



DECEMBER 19, 2022.—Ordered to be printed

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DECEMBER 19, 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. 1303]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 1303) to ensure that certain Federal infrastructure programs require the use of materials produced in the United States, 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. 1303, the *Build America, Buy America Act*, updates the Buy America and Buy American statutes.¹ The bill extends Buy America regulations to all federally-assisted infrastructure projects, and expands the definition of infrastructure for the purposes of these regulations. The bill also instructs the Office of Management and Budget (OMB) to promulgate clarifying guidelines to strengthen Buy American requirements, closes certain loopholes in the waiver processes for both statutes, and creates a new “Made in America Office” within OMB.

¹49 U.S.C. 5323(j) (commonly referred to as Buy America); 41 U.S.C. 8301 (commonly referred to as the “Buy American Act”).

II. BACKGROUND AND NEED FOR THE LEGISLATION

The Build America, Buy America Act (S.1303) will help to ensure that taxpayer dollars are used to buy domestically-manufactured products and materials, thereby strengthening domestic supply chains and reducing the need to spend taxpayer dollars on foreign-made goods.

Every year, federal agencies spend billions to procure goods and supplies to support agency missions and on materials and assistance for infrastructure projects. Buy American and Buy America regulations establish a domestic preference for use of these taxpayer funds. Buy America preferences apply to federally-funded public works and infrastructure projects, such as the construction of highways, railways, and rapid transit systems. The Buy American Act of 1933 gives a preference for federal agencies to directly procure domestically produced goods.² Over time, however, loopholes, waivers, and outright non-compliance by federal agencies have weakened the effectiveness of these provisions.

The first title of the bill (Title I) works to broaden the impact of Buy America preferences. First, this title expands the definition of infrastructure for the purposes of these preferences. Buy America requirements have traditionally extended to public works transportation and water-related infrastructure. This bill extends Buy America coverage to other infrastructure projects including transmission facilities, structures and equipment of electric utilities, broadband infrastructure, and real property and buildings.

Title I also adds materials within these infrastructure projects to which the Buy America requirements apply. Previously, Buy America preferences applied only to iron, steel, and certain manufactured goods. This bill expands these requirements to include non-ferrous metals, such as copper used in electric wiring; plastic- and polymer-based products; glass, including optical fiber; and certain other construction materials, such as lumber and drywall.

In addition, this bill adds guardrails to agencies' granting of Buy America waivers by requiring agencies to publish written explanations for the waiver on a publicly available and easily accessible website designated by OMB, and to provide for at least 15 days for public comment.

Finally, Title I codifies President Biden's mandate in his Executive Order "Ensuring the Future is Made in All of America by All of America's Workers,"³ which directed agencies to partner with the Hollings Manufacturing Extension Partnership (MEP). This partnership will ensure that small- and medium-sized manufacturers within the MEP's national network are given a meaningful opportunity to provide products for federally-funded transportation projects.

The second title of this bill (Title II) focuses on the Buy American Act. This title requires OMB to promulgate rules to strengthen the Buy American Act by standardizing, simplifying, and clarifying how federal agencies comply with, report on, and enforce the requirements of the Act. These new rules and guidelines are meant to limit the use of waivers across federal agencies. For example, OMB must clarify the circumstances in which agencies may receive

²41 U.S.C. § 8302.

³Exec. Order No. 14005, 86 Fed. Reg. 7475 (Jan. 25, 2021).

waivers, such as when acquisition of certain items would be “inconsistent with the public interest,” as the original law provides, and the appropriate considerations for determinations of non-availability. OMB must also provide uniform procedures for what information agencies must make public about their waivers and where they must post this information.

Finally, to further monitor the waiver process, Title II creates a “Made in America Office” within the OMB with authority to review agency use of waivers. The purpose of this office is to maximize and enforce compliance with domestic preference statutes and ensure that any waivers are applied clearly, consistently, and transparently across federal agencies.

III. LEGISLATIVE HISTORY

Senator Sherrod Brown (D–OH) introduced S. 1303, the Build America, Buy America Act, on April 22, 2021, with Ranking Member Portman (R–OH), Chairman Peters (D–MI), and Senator Braun (R–IN) as co-sponsors. The bill was referred to the Senate Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 1303 at a business meeting on May 12, 2021. During the business meeting, a substitute amendment was offered by Chairman Peters and Ranking Member Portman and adopted by unanimous consent as modified. The modification was also adopted by unanimous consent. Senators present were Peters, Carper, Hassan, Sinema, Rosen, Padilla, Ossoff, Portman, Johnson, Paul, Lankford, Romney, Scott, and Hawley.

The substitute amendment adopted for S. 1303 merged the Build America, Buy America Act with Senator Baldwin’s Made in America Act (S. 1094) and Senator Stabenow’s Make It In America Act (S. 363). The merged text is divided into two sections: Title I, which tightens loopholes in Buy America, and Title II, which incorporates the bulk of Senator Stabenow’s bill updating Buy American Act waiver rules and domestic content requirements, and creating a Made in America office.

Amendment 1 to S. 1303 was offered by Senator Johnson (R–WI), which was not adopted by a roll call vote of 7 yeas to 7 nays. The amendment would have prohibited the cancellation of border wall construction and also would have prohibited the use of funds to pay for cancellation penalties. Senators in favor were Portman, Johnson, Paul, Lankford, Romney, Scott, and Hawley. Senators not in favor were Peters, Carper, Hassan, Sinema, Rosen, Padilla, and Ossoff.

The Committee ordered the bill reported favorably by voice vote as amended by the Peters-Portman Substitute Amendment as modified. Senators Paul and Romney were recorded “No.” Senators present for the vote were Peters, Carper, Hassan, Sinema, Rosen, Padilla, Ossoff, Portman, Johnson, Paul, Lankford, Romney, Scott, and Hawley.

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

Section 1. Short title; table of contents

This section provides that the bill may be cited as the “Build America, Buy America Act,” and provides a table of contents for Titles I and II of the Act.

*Title I—Build America, Buy America**Section 101. Findings*

Section 101 provides findings by Congress related to the determination that when the federal government makes investments in United States infrastructure, the iron, steel, manufactured products, and construction materials used in federally assisted infrastructure projects should be produced in the United States by American workers.

Section 102. Definitions

Section 102 provides definitions of terms used in the Act, including terms that inform the scope and application of domestic content procurement preferences to all infrastructure projects that receive federal financial assistance, commonly known as “Buy America” requirements. The definition of “infrastructure” is broadened to include broadband and certain other categories that have not previously been covered. The definition of “produced in the United States” establishes standards for manufactured products, ensuring that Buy America coverage for manufactured products is not weaker than current regulations. Terms defined are “deficient program,” “domestic content procurement preference,” “federal agency,” “federal financial assistance,” “infrastructure,” “produced in the United States,” and “project.”

Section 103. Identification of deficient programs

Section 103 requires the head of each federal agency to submit to OMB and to Congress within 60 days of enactment a report that identifies each program that provides financial assistance for infrastructure administered by the federal agency. The head of each federal agency must include in the report a list of deficient programs for which Buy America requirements specified in the Act do not apply or are subject to blanket waivers. This report must also be published in the Federal Register.

Section 104. Application of buy America preference

Section 104 establishes a governmentwide requirement, effective 180 days after the date of enactment of the Act, whereby no federal financial assistance for infrastructure may be used for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States. The governmentwide requirement is applied to all federal infrastructure programs, including programs identified as deficient under Section 103.

This section also establishes a waiver process in which domestic procurement preferences may be waived if the head of a federal agency determines that (1) applying the domestic content procurement preference would be inconsistent with the public interest, (2) the applicable products are not made in the United States in sufficient and reasonably available quantities or are not of satisfactory quality, or (3) applying the domestic preference would increase the cost of the overall project by more than 25 percent. Before issuing a waiver, the head of a federal agency must make a detailed explanation for the waiver publicly available, and provide at least 15 days for public comment.

This section also instates a two-year automatic sunset on waivers of general applicability. An agency head may reissue a general applicability waiver only after publishing two notices in the Federal Register: one prior to and one in response to a 30-day period of public comment.

Section 105. OMB guidance and standards

Section 105 requires OMB to issue guidance to assist federal agencies in complying with the Act and, if necessary, to update federal regulations related to the terms and conditions of awards of federal financial assistance with regard to Buy America requirements under this Act.

The section also directs the Director of OMB to issue standards within 180 days of enactment for determining whether a product is manufactured domestically in the case of construction materials.

Section 106. Technical assistance partnership and consultation supporting Department of Transportation Buy America requirements

Section 106 requires the establishment of a technical assistance partnership and consultation process regarding waivers between the Secretary of Transportation and the Secretary of Commerce, acting through the Director of the National Institute of Standards and Technology, within 90 days of enactment. Before granting a written waiver under a Buy American law, the Transportation Secretary is directed to consult with the Director of the Hollings Manufacturing Extension Partnership regarding whether there is a domestic entity that can provide the iron, steel, manufactured product, or construction material that is the subject of the proposed waiver. This section also requires the Secretary to submit an annual report to relevant congressional committees on the consultation process, waivers requested and granted, and an update on the challenges and gaps in the domestic supply base.

Section 107. Application

Section 107 clarifies that the requirements established under Title I of this Act apply to a federal program only to the extent that current Buy America requirements do not already apply or are deficient, as specified in this Act. If present Buy America requirements for an infrastructure program meet the standards of section 104 of this Act, this Title should not impact those requirements.

Title II—Make it in America

Section 201. Regulations relating to Buy American Act

Section 201 mandates that, within one year of enactment, OMB, in consultation with the Federal Acquisition Regulatory Council (FAR Council), shall standardize and simplify how federal agencies comply with and report on procurements subject to the Buy American Act (chapter 83 of title 41, U.S.C., “BAA”). The process shall include the following:

- Guidelines to determine public interest exceptions.
- Guidelines to ensure non-availability waivers are tied to appropriate considerations, including anticipated project delays

and lack of substitutable articles, materials, and supplies mined, produced, or manufactured in the United States.

- Uniform procedures for each federal agency to post on their website each BAA waiver issued by the head of the agency (with justifications) within 30 days of the waiver’s issuance.
- Guidelines to ensure a project is not disaggregated for purposes of avoiding the applicability of the requirements under the BAA.
 - An increase to the price preference for domestic offers.
 - Amending the definition of “domestic end products” and “domestic construction material” to ensure that iron and steel products purchased by the federal government maximize domestic components.

This section also establishes guidelines that will minimize the use of the “public interest waiver” to the BAA if the waiver will result in a decrease in domestic employment or prevent a boost in domestic employment. Furthermore, before issuing a public interest waiver to purchase a foreign sourced product, federal agencies must assess whether the cost advantage between a foreign offer and a domestic offer is due to dumped steel, iron, or manufactured products.

The section includes a Sense of Congress provision that calls on the FAR Council to raise domestic content requirements for products purchased for federal use and for construction materials used in federal public works projects. This provision calls for increasing domestic content requirements to 75 percent, or to 60 percent if there are no qualifying offers.

Finally, this section directs the FAR Council to amend Part 25 of the Federal Acquisition Regulation to define “end product manufactured in the United States,” including guidelines to ensure that manufacturing processes involved in production of the end product occur domestically.

Section 202. Amendments relating to Buy American Act

Section 202 adds language to sections 8302 and 8303 of the BAA to stipulate that manufactured articles, materials, and supplies of iron and steel are deemed manufactured in the United States only if all manufacturing processes involved in the production occurs in the United States.

This section also adds an annual report to section 8302 of the BAA. The OMB Director must submit a report to the listed congressional committees within 180 days of the end of the fiscal year during which the Act is enacted. The report must provide the total amount of acquisitions made by federal agencies in the relevant fiscal year of articles, materials, or supplies acquired that were mined, produced, or manufactured outside the United States. An exception is provided for the intelligence community.

This section also adds a definition for “federal agency” to the BAA, and provides for a number of conforming amendments.

Finally, this section excludes the acquisition-related dollar thresholds in the BAA from the Title 41 inflation adjustment requirement.

Section 203. Made in America Office

Section 203 establishes a “Made in America Office” within OMB. This office is charged with overseeing and enforcing compliance with domestic preference statutes, which include the Buy American Act, Buy America requirements in federal transportation programs, the Berry Amendment, and other domestic preference statutes (as defined in the text). This section outlines numerous duties for the Made in America Office Director, including bolstering the use of the Hollings Manufacturing Extension Partnership network for federal procurement purposes, reviewing the Defense Department’s use of reciprocal defense procurement agreements, and issuing annual reports on federal procurement spending in the context of this Act’s requirements. Not later than 90 days after enactment of this Act, the Director must also submit to the relevant congressional committees a summary of each report on the use of Made in America laws received by the Director pursuant to section 11 of Executive Order 14005.

Section 204. Hollings Manufacturing Extension Partnership activities

Section 204 directs the head of each federal agency to ensure that businesses participating in the Manufacturing Extension Partnership network are made aware of federal contracting opportunities. This section also calls for businesses participating in the Partnership network to be automatically enrolled in “GSA Advantage!”

Section 205. United States obligations under international agreements

Section 205 calls for all amendments and directives in this title to be applied in a manner consistent with U.S. international trade agreements.

Section 206. Definitions

Section 206 provides definitions for the terms “Berry Amendment,” “Buy American Act,” “federal agency,” “relevant congressional committees,” and “waiver.”

Section 207. Prospective amendments to internal cross-references

Section 207 provides instructions for amendments to cross-references in the Act that are to take effect on January 21, 2022.

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. The Committee agrees with the Congressional Budget Office’s statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

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

The changes in law set forth in this bill were included in the Infrastructure Investment and Jobs Act of 2021 (Pub. L. 117–58, Title IX), which became law before this bill was reported out of committee. These changes in law are now moot and therefore are not reflected in this section.

