

## BUY AMERICAN

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Enacted amid controversy, the “Buy American” clause of the United States government’s stimulus plan, Section 1605 of the American Recovery and Reinvestment Act of 2009 (ARRA), has attracted attention throughout the international trade community. President Barack Obama stated prior to signing the ARRA that he was against sending a protectionist message and expressed concern for world trade. Though altered by the United States Congress following President Obama’s statement on a national news television program on February 3, 2009, the Buy American clause still made it into the ARRA.

The Buy American clause requires that all of the “iron, steel, and manufactured goods used in [a] project” funded by the ARRA involving a “public building” or “public work” be “produced in the United States.” The Buy American clause does, however, afford opportunities for waiver of the requirement, and takes into consideration international trade agreements the United States currently maintains with its international trading partners.

The Buy American clause provides for a waiver in three circumstances, as detailed below. In each case, the waiver would be determined by the “head of the [United States] Federal department or agency involved,” and would require that justification for the waiver be published in the United States Federal Register. First, a waiver can be obtained if application of the restriction imposed by the Buy American clause would be inconsistent with public interest. What might qualify as circumstances inconsistent with the public interest is left undefined. Accordingly, time will be the best measure of how the various governmental departments and agencies determine what is necessary for the public interest.

The second justification for a waiver is if the “iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and

reasonably available quantities and of satisfactory quality.” The Buy American clause provides no quantitative standards or other guidance as to how this waiver would be applied. *(However, the Interim Rule discussed below, sets forth a list of “nonavailable articles” that United States federal agencies have determined are not available in the United States in sufficient quality or quantities for government contracting purposes.)*

The third way a waiver could be obtained is if the “inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.” While this basis for a waiver enjoys a certain (albeit limited) mathematical certainty, the waiver could be difficult for certain suppliers to obtain in larger projects. As the increased cost is measured by its effect on the “overall” cost of the project, a waiver is less likely if the good in question is a relatively inexpensive portion of the overall cost for the project. Based on the language of the Buy American clause, it does not appear to matter that the subject may be far more expensive if purchased from a United States manufacturer—what matters is the effect on the cost of purchasing the United States product in relationship to the overall cost of the project.

While not in an earlier draft version of the clause, the final Buy American clause provides it will “be applied in a manner consistent with United States obligations under international [free trade] agreements.” At the urging of the White House, this provision was added to the ARRA and has the effect of exempting companies from Mexico and Canada (as NAFTA member countries) and signatories to the World Trade Organization’s Agreement on Government Procurement for those construction projects with a value of \$7.4 million or more.

Notably, companies based in China, Brazil, and India, current major trade partners of the United

States, would be prohibited from receiving stimulus money absent a waiver. Also, commentators have noted the clause appears inconsistent with the G-20's commitment last year to avoid new trade barriers.

An interim final rule addressing procurements made directly by the United States government under the Federal Acquisition Regulation became effective March 31, 2009 (the Interim Rule). The Interim Rule provides component parts of a finished product are not counted for purposes of applying the Buy American clause and further provides for a scaling down of the words "used for a project" to only mean those materials incorporated into the building or work (and not, for example, the tools the workers bring to the construction site). Finally, the Interim Rule provides that, absent defined exceptions, "manufactured construction material" may have components of a foreign origin so long "as the manufacture of the construction material occurs in the United States."

On April 3, 2009, the United States Office of Management and Budget (OMB) released interim final guidance implementing the Buy American clause (the Interim Guidance). The Interim Guidance applies to ARRA grants, loans, and cooperative agreements made by federal agencies to state and local governments. The Interim Guidance sets forth a stricter definition of "manufactured" with regard to component parts than does the FAR Interim Rule. Under the Interim Guidance, a manufactured good containing materials of foreign origin must be, to be considered domestic, "substantially transformed in the United States into a new and different manufactured good distinct from the materials from which it was transformed." Unmanufactured goods utilized in ARRA funded projects are not subject to the Buy American clause. And, because certain states have exemption from compliance with international trade agreements as not all recipients of federal financial assistance are required to comply with these agreements.

Commentators have voiced concern that legislation such as the Buy American clause could trigger legislative reactions from other countries, making it more challenging for United States' businesses to

compete for opportunities abroad. Accordingly, in evaluating whether the goal of the Buy American clause (having American stimulus dollars go toward the purchase of American-made products manufactured by American workers) is achieved, consideration should also be given to any negative economic consequences resulting from retaliatory action by key United States trading partner countries. The actual application of the Buy American clause, in particular the waiver provisions, will also be an important factor in determining how the Buy American clause is received by the international community and the ultimate success of this portion of the American stimulus package.

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