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# Transportation Spending and “Buy America” Requirements

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## Summary

The Buy America Act is the popular name for a group of domestic content restrictions that have been attached to funds administered by the Department of Transportation (DOT). These funds are used to make grants to states, localities, and other non-federal government entities for various transportation projects. Specific sources of funding administered by the Federal Highway Administration (FHWA), the Federal Aviation Administration (FAA), the Federal Transit Administration (FTA), the Federal Railroad Administration (FRA), and the National Railroad Passenger Corporation (Amtrak) are covered under various Buy America provisions. Generally, these statutes require applicable agency grant programs and spending to be used to fund projects that only include steel, iron, and/or manufactured products produced in the United States. Each provision includes a series of circumstances under which the agency may issue a nationwide or project-specific waiver to these domestic content requirements. Such exemptions may be based upon a finding that application of the domestic content requirement is not in the public interest, the needed materials are not produced in sufficient quantity and/or quality in the United States, or the cost of using domestic materials is unreasonable, among others.

The Buy American Act, another statute requiring domestic content preferences in federal government procurement, does not apply to DOT-administered grant funds because, while the source of the money is federal, purchases are not made directly by the federal government. For more information on the Buy American Act and other domestic preference requirements, see CRS Report R43354, *Domestic Content Restrictions: The Buy American Act and Complementary Provisions of Federal Law*, by (name redacted) et al.

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## Introduction

The Buy America Act is the popular name for a group of domestic content restrictions that have been attached to funds administered by the Department of Transportation (DOT). These funds are used to make grants to states, localities, and other non-federal government entities for various transportation projects. The Buy American Act, another statute requiring domestic content preferences in federal government procurement, does not apply to these funds because, while the source of the money is federal, purchases are not made directly by the federal government.<sup>1</sup>

Generally, these statutes require applicable agency grant programs and spending to be used to fund projects that only include steel, iron, and/or manufactured products produced in the United States. Each provision includes a series of circumstances under which the agency may issue a nationwide or project-specific waiver to these domestic content requirements. Such exemptions could be based upon a finding that application of the domestic content requirement is not in the public interest, the needed materials are not produced in sufficient quantity and/or quality in the United States, or the cost of using domestic materials is unreasonable, among others.

## Federal Highway Administration

### Requirements and Applicability

Section 313 of Title 23 of the U.S. Code prohibits the obligation of funds appropriated under Title 23 and administered by the DOT, through the Federal Highway Administration (FHWA), “unless the steel, iron, and manufactured products used in such project are produced in the United States.”<sup>2</sup> Raw materials used in the manufacturing processes may be imported.<sup>3</sup> The FHWA considers a “manufactured product” to be “any item that must undergo one or more manufacturing processes before the item can be used in a highway project ... [and] may be usable as a stand-alone product, or as a component within a more complex assembly which would also be considered a manufactured product.”<sup>4</sup> Section 313’s restriction on use of foreign products only applies to manufactured products that consist predominantly of steel or iron, not all manufactured products, as discussed in detail below.<sup>5</sup>

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<sup>1</sup> For more information about the Buy American Act and similar domestic content restrictions, see CRS Report R43354, *Domestic Content Restrictions: The Buy American Act and Complementary Provisions of Federal Law*, by (name redacted) et al.

<sup>2</sup> 23 U.S.C. §313(a).

<sup>3</sup> 48 *Federal Register* 53103 (November 25, 1983).

<sup>4</sup> Memorandum from Donald P. Steinke, Chief, Highway Operations Division to Edward V.A. Kussy Acting Chief Counsel, “Buy America Policy Response,” December 22, 1997, available at <http://www.fhwa.dot.gov/programadmin/contracts/122297.cfm> (hereinafter 1997 Buy America Memorandum). “Some typical stand-alone products used in highway projects are steel in the form of rebar and structural steel; asphaltic cement; portland cement; and aggregates. Typical composite products include bridge bearings, signal heads, both asphaltic and portland cement concrete; and precast concrete items.” *Id.*

<sup>5</sup> See, *infra*, “FHWA General Waivers.”

Regulations promulgated by FHWA further clarify the Buy America requirements, which must be satisfied in order for a Title 23 project to be authorized for advertisement or otherwise proceed.<sup>6</sup> The requirements are satisfied if the project meets at least one of the following four criteria.<sup>7</sup> First, the project qualifies if it has no permanently incorporated steel or iron materials, or if steel or iron is used in the project, it is manufactured in the United States. Manufacturing processes include the “application of a coating,” where a coating is any process that protects or enhances the value of the underlying material.<sup>8</sup> Second, the state can include standard contract provisions requiring the use of domestic materials and products.<sup>9</sup> Third, the state can include alternate bid provisions for foreign and domestic steel and iron materials. The alternate bid procedure must be acceptable to the Division Administrator and require all bidders to submit bids based on domestic materials. The contract must also clearly state that the contract will be awarded to the bidder with the lowest total bid on domestic materials unless that bid exceeds the lowest total bid on foreign materials by more than 25%.<sup>10</sup> Fourth, the project may use a minimal amount of foreign steel or iron, such that the cost of the materials does not exceed 0.1% of the total contract cost or \$2,500, whichever is greater.<sup>11</sup>

These requirements apply to “projects” receiving funds under Title 23 and administered by the DOT. “Project” is defined as “any undertaking eligible for assistance under this title.”<sup>12</sup> Additionally, the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21) added a new subsection to section 313, which states,

The requirements under this section shall apply to all contracts eligible for assistance under this chapter for a project carried out within the scope of the applicable finding, determination, or decision under the National Environmental Policy Act of 1969 [NEPA] (42 U.S.C. 4321 et seq.), regardless of the funding source of such contracts, if at least 1 contract for the project is funded with amounts made available to carry out this title.<sup>13</sup>

Under this new provision, if one contract within the scope of a NEPA document is funded through Title 23, the Buy America requirements will apply to all contracts within that NEPA document that would be eligible for assistance, even if the other contracts are ultimately funded through non-federal sources.<sup>14</sup> This provision applies to contracts awarded on or after October 1, 2012.

<sup>6</sup> 23 C.F.R. §635.410.

<sup>7</sup> *Id.* at §635.410(b).

<sup>8</sup> *Id.* at §635.410(b)(1).

<sup>9</sup> *Id.* at §635.410(b)(2).

<sup>10</sup> *Id.* at §635.410(b)(3). *See also* 23 U.S.C. §313(b)(3).

<sup>11</sup> 23 C.F.R. §635.410(b)(4). Furthermore, the cost of the materials is “the cost that is shown to be the value of the steel and iron products as they are delivered to the project.” *Id.* The FHWA issued a Notice and Request for Comments in July 2013 seeking comment on the continuing need for this provision. *See* 78 *Federal Register* 41492, July 10, 2013.

<sup>12</sup> 23 U.S.C. §101(a)(18). The definition of “project” was amended by the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21), arguably broadening the scope of the term. The previous text defined “project” as “an undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion of a highway so constructed or any other undertaking eligible for assistance under this title.” *See* P.L. 112-141, 125 Stat. 405 (2012); 23 U.S.C. §101(a)(21) (2006).

<sup>13</sup> P.L. 112-141, §1518 *codified at* 23 U.S.C. §313(g).

<sup>14</sup> For example, under this MAP-21 provision, the expanded Buy America coverage would reach contracts for non-federally funded utility relocation where one other contract within the scope of a shared NEPA document is federal funded. *See* Letter from Gloria M. Shepherd, Acting Associate Administrator for Infrastructure to Division Administrators, “Application of Buy America to non FHWA-funded Utility Relocations,” FHWA, July 11, 2013, *available at* <http://www.fhwa.dot.gov/construction/contracts/130711.cfm>.

The FHWA has stated its intent to publish a Notice of Proposed Rulemaking for this new provision in 2013.<sup>15</sup>

Finally, the FHWA is prohibited from imposing funding restrictions that would prevent a state from imposing stricter requirements on the “use of articles, materials, and supplies mined, produced, or manufactured in foreign countries in projects carried out with” Title 23 funds.<sup>16</sup>

## FHWA General Waivers

The FHWA may issue waivers to the Buy America requirements and based on this authority has issued three general, nationwide waivers to the requirements. First, in 1983 the FHWA determined that it was in the public interest to waive application of Buy America to manufactured products other than steel and iron manufactured products.<sup>17</sup> The FHWA further clarified this general waiver in memoranda issued in 1997<sup>18</sup> and 2012,<sup>19</sup> concluding that

in order for a manufactured product to be considered subject to Buy America, the product must be manufactured predominantly of steel or iron. The FHWA deems a product to be manufactured predominantly of steel or iron if the product consists of at least 90% steel or iron content when it is delivered to the job site for installation.<sup>20</sup>

The “miscellaneous steel or iron components, subcomponents, and hardware” needed to assemble and construct either manufactured products consisting predominantly of steel or iron or other manufactured products are not subject to the Buy America provisions.<sup>21</sup>

This waiver was motivated by a belief that applying the Buy America requirements to these products would not fulfill Congress’s intent to protect the domestic manufacturing industry.<sup>22</sup> The FHWA determined that “foreign competition in natural materials was not significant due to their high cost in transportation and that petroleum-based products were not available from domestic sources in sufficient and reasonable quantities.”<sup>23</sup> Furthermore, it can be difficult to trace the origin of various materials that make up manufactured products. In 2013, the FHWA stated that it “has applied, and intends to continue to apply, Buy America to predominantly steel and iron products delivered to a project site for permanent incorporation in that project.”<sup>24</sup>

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<sup>15</sup> See FHWA “MAP-21—Moving Ahead for Progress in the 21<sup>st</sup> Century: Buy America Questions & Answers,” available at <http://www.fhwa.dot.gov/map21/qandas/qabuyamerica.cfm>.

<sup>16</sup> 23 U.S.C. §313(d).

<sup>17</sup> 48 *Federal Register* 1946 (Interim Final Rule, January 17, 1983); 48 *Federal Register* 53099 (Final Rule, November 25, 1983).

<sup>18</sup> 1997 Buy America Memorandum, *supra* note 4.

<sup>19</sup> Memorandum from John R. Baxter, Associate Administrator for Infrastructure to Division Administrators, Directors of Field Services, “Action: Clarification of Manufactured Products under Buy America,” December 21, 2012, available at <http://www.fhwa.dot.gov/construction/contracts/121221.cfm> (hereinafter 2012 Buy America Memorandum).

<sup>20</sup> *Id.* For examples of manufactured products that are subject to Buy America, *see id.*

<sup>21</sup> *Id.*

<sup>22</sup> See 48 *Federal Register* 53099.

<sup>23</sup> 78 *Federal Register* 41493.

<sup>24</sup> 78 *Federal Register* 41494.

Second, a nationwide waiver for certain steel items used in the construction of ferryboats was issued in 1994.<sup>25</sup> This waiver covers “marine diesel engines, electrical switchboards and switchgear, electric motors, pumps, ventilation fans, boilers, electrical controls, and electronic equipment.”<sup>26</sup> FHWA determined that these items were not manufactured in sufficient and reasonably available quantities in the United States “to avoid an enormous administrative burden on the State, contractor, and suppliers.”<sup>27</sup> However, other steel or iron products that are used in the construction of ferryboats are readily available in the United States, and, therefore, are not covered by this waiver and are still subject to Buy America.<sup>28</sup>

Third, the FHWA granted a nationwide waiver for pig iron and processed, pelletized, and reduced iron ore.<sup>29</sup> Pig iron is a crude iron made from molten iron that got its name from the pig-shaped molds it is often poured into when it comes out of a blast furnace. Processed, pelletized, and reduced iron ore are the result of “methods by which raw iron ore is improved to produce enriched ore.”<sup>30</sup> The FHWA concluded that these materials are not produced in the United States in sufficient and reasonably available quantities of a satisfactory quality. Therefore, “imposing Buy America requirements on these materials is not in the public interest.”<sup>31</sup>

Each of these general waivers remains in force. However, in July 2013, the FHWA issued a Notice and Request for Comment on the continued need for the general waivers to Buy America and if necessary, what limits should be placed on the waivers.<sup>32</sup> Additionally, at least one bill introduced in the 113<sup>th</sup> Congress would require the Secretary to review each standing nationwide waiver, through a notice and public comment process, every five years to determine if the waiver is still necessary.<sup>33</sup>

## FHWA Specific Waivers

In addition to these general, nationwide waivers, a state may request a waiver of the provisions if (1) the application of the provisions would be inconsistent with the public interest or (2) steel and iron materials and products are not produced in the U.S. in sufficient and reasonably available quantities of satisfactory quality.<sup>34</sup> The waiver may be requested for a specific project, for certain materials or products in a specific geographic area, or both.<sup>35</sup> The requests are first submitted to the Regional Federal Highway Administrator and a denial of a request may be appealed to the

<sup>25</sup> 59 *Federal Register* 6080. This waiver was based on 23 C.F.R. §635.410(c)(5)-(6). *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> 60 *Federal Register* 15478.

<sup>30</sup> 60 *Federal Register* 15479.

<sup>31</sup> *Id.*

<sup>32</sup> 78 *Federal Register* 41492.

<sup>33</sup> Invest in American Jobs Act of 2013, H.R. 949, 113<sup>th</sup> Cong., §101 (2013).

<sup>34</sup> 23 U.S.C. §313(b); 23 C.F.R. §635.410(c)(1). Section 313 also states that the Buy America requirements “shall not apply where the Secretary finds—... (3) that inclusion of domestic material will increase the cost of the overall project contract by more than 25 percent.” 23 U.S.C. §313(b)(3). This exception is embodied in the regulations allowing for an alternate bid procedure, where a bid for use of foreign materials can be accepted if the total lowest bid for domestic materials exceeds the total lowest bid for foreign materials by more than 25 percent. *See* 23 C.F.R. §635.410(b)(3).

<sup>35</sup> 23 C.F.R. §635.410(c)(3).

FHWA.<sup>36</sup> In evaluating a request, the FHWA may consider such factors as cost, administrative burden, and potential delays that may occur if the provisions are not waived.<sup>37</sup> Additionally, not less than 15 days before issuing a waiver, the FHWA must give public notice and an opportunity to comment on the issuance of such a waiver.<sup>38</sup> The FHWA is prohibited from issuing waivers for foreign products that come from a country that has an agreement with the United States, under which the Buy America requirements have been waived, if the country has violated the agreement in specific ways. Determining the applicability of this prohibition is done in concert with the United States Trade Representative.<sup>39</sup>

## Federal Aviation Administration

### Requirements and Applicability

Section 50101 of Title 49 of the U.S. Code prohibits the obligation of funds appropriated under certain provisions administered by the Federal Aviation Administration (FAA) for a project unless “steel and manufactured goods used in the project are produced in the United States.”<sup>40</sup> This requirement applies to projects receiving funding appropriated to carry out the following provisions:<sup>41</sup>

- FAA salaries, operations, and maintenance (49 U.S.C. §106(k));
- site preparation work associated with acquiring, establishing, or improving an air navigation facility (49 U.S.C. §44502(a)(2));
- demonstration projects for certain research and development activities (49 U.S.C. §44509);
- the Airport Improvement Program (AIP) (49 U.S.C. Chapter 471, Subchapter I), with specific exceptions;<sup>42</sup>
- the Airport and Airways Trust Fund (49 U.S.C. Chapter 481), with specific exceptions.<sup>43</sup>

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<sup>36</sup> 23 C.F.R. §635.410(c)(2), (4).

<sup>37</sup> 23 C.F.R. §635.410(c)(7).

<sup>38</sup> See P.L. 112-55, §122 (applicable to FY2013 through P.L. 112-175, §101(a)(12) and P.L. 113-6, §1101(a)(7) and FY2014 through P.L. 113-46, §101(a)(6)).

<sup>39</sup> 23 U.S.C. §313(f).

<sup>40</sup> 49 U.S.C. §50101(a).

<sup>41</sup> *Id.*

<sup>42</sup> The Buy America provision does not apply to 49 U.S.C. §47127 (ground transportation demonstration projects to improve ground access to air carrier airport terminals). 49 U.S.C. §50101(a).

<sup>43</sup> The Buy America provision does not apply to 49 U.S.C. §§48102(e) (air traffic controller performance research grants), 48106 (airway science curriculum grants), 48107 (civil aviation security research and development), 48110 (facilities for advanced training of maintenance technicians for air carrier aircraft). 49 U.S.C. §50101(a).



## FAA Waivers

The FAA Buy America requirements may be waived if the FAA finds that (1) applying the restriction is inconsistent with the public interest;<sup>44</sup> (2) the steel and manufactured goods produced in the United States are “not produced in a sufficient and reasonably available amount or are not of a satisfactory quality”;<sup>45</sup> or (3) using domestic materials will increase the overall project cost by more than 25%.<sup>46</sup> Additionally, except for funds available under 49 U.S.C. Section 106(k) (for salaries, expenses, and operating costs of the FAA), the FAA may grant a waiver when funds are used to procure a facility or equipment if (1) the cost of components and subcomponents produced in the United States is more than 60% of the cost of all components; and (2) the final assembly of the facility or equipment occurs in the United States.<sup>47</sup>

The FAA has also issued nationwide waivers for certain commonly used products from specific manufacturers that often qualify for a waiver under the 60% domestic content provision.<sup>48</sup> These nationwide waivers allow a product to be used in projects “without having to receive separate project waivers.”<sup>49</sup>

## Federal Transit Administration

### Requirements and Applicability

Funding under Chapter 53 of Title 49 of the U.S. Code, administered by the Federal Transit Administration (FTA) for public transportation projects, may be obligated for a grantee project if the “steel, iron, and manufactured goods used in the project are produced in the United States.”<sup>50</sup> Regulations promulgated by the FTA further clarify this requirement.<sup>51</sup> “The steel and iron requirements apply to all construction materials made *primarily* of steel or iron and used in infrastructure projects such as transit or maintenance facilities, rail lines, and bridges.”<sup>52</sup> However, the steel or iron requirements “do not apply to steel or iron used as components or subcomponents of other manufactured products or rolling stock, or to bimetallic power rail incorporating steel or iron components.”<sup>53</sup> The FTA has declined to attach a percentage at which a material becomes “made primarily of steel or iron.” Instead, it has noted that “the definition [of made primarily of steel or iron] refers to construction or building materials made either

<sup>44</sup> 49 U.S.C. §50101(b)(1).

<sup>45</sup> 49 U.S.C. §50101(b)(2).

<sup>46</sup> 49 U.S.C. §50101(b)(4).

<sup>47</sup> 49 U.S.C. §50101(b)(3).

<sup>48</sup> See *id.*; see, e.g., “Notice of Decision To Issue Buy American Waivers for Foreign Object Debris (FOD) Detection Equipment,” 75 *Federal Register* 81708 (Dec. 28, 2010); “Notice of Waivers To Buy American Under the American Reinvestment and Recovery Act for Grants-in-Aid for Airports,” 74 *Federal Register* 62388 (November 27, 2009).

<sup>49</sup> 74 *Federal Register* 62388 (November 27, 2009).

<sup>50</sup> 49 U.S.C. §5323(j).

<sup>51</sup> 49 C.F.R. Part 661.

<sup>52</sup> 49 C.F.R. §661.5(c) (emphasis added).

<sup>53</sup> *Id.*

principally or entirely from either steel or iron. All other manufactured products, even though they may contain some steel or iron elements, would not be covered.”<sup>54</sup>

In order for a manufactured product to satisfy the “produced in the United States” requirement, all of the manufacturing processes must take place in the United States. Additionally, all of the product’s components must be of American origin, meaning they must be manufactured in the United States; the origin of the component’s subcomponents does not matter.<sup>55</sup>

If steel, iron, or manufactured products are being included in a Chapter 53 project, the bidder must certify that it will comply with the statutory and regulatory Buy America provisions.<sup>56</sup> The FTA may not create any funding limitations that restrict a state from imposing “more stringent” requirements on the “use of articles, materials, and supplies mined, produced, or manufactured in foreign countries....”<sup>57</sup> However, the FTA will not participate in contracts governed by state or local Buy America provisions that are not explicitly established under state law or state and local Buy Local provisions.<sup>58</sup>

## FTA Waivers

The Buy America requirements may be waived for any Chapter 53 spending if the FTA finds one of three circumstances to be true. First, a waiver may be granted if applying the requirements would be inconsistent with the public interest.<sup>59</sup> For individual requests for a public interest waiver, the FTA must “consider all appropriate factors on a case-by-case basis.”<sup>60</sup> The FTA has also issued several general public interest waivers from the Buy America requirements. These waivers apply to “microprocessors, computers, microcomputers, or software, or other such devices, which are used solely for the purpose of processing or storing data....” and FTA grantees making “small purchases”<sup>61</sup> with capital, planning, or operating assistance.<sup>62</sup> Individual applications are not required to take advantage of these general waivers.<sup>63</sup>

Second, a waiver may be issued if the materials needed are not produced in the United States in a sufficient and reasonably available amount or are not of satisfactory quality.<sup>64</sup> “It will be presumed that the conditions exist to grant this non-availability waiver if no responsive and responsible bid is received offering an item produced in the United States.”<sup>65</sup>

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<sup>54</sup> 74 *Federal Register* 6300 (February 16, 1996).

<sup>55</sup> 49 C.F.R. §661.5(d).

<sup>56</sup> 49 C.F.R. §661.6.

<sup>57</sup> 49 U.S.C. §5323(j)(7).

<sup>58</sup> 49 C.F.R. §661.21(b).

<sup>59</sup> 49 U.S.C. §5323(j)(2)(A).

<sup>60</sup> 49 C.F.R. §661.7(b).

<sup>61</sup> “Small purchase” is defined in the “common grant rule” and includes “services, supplies, or other property that do not cost more than the simplified acquisition threshold ... currently set at \$100,000....” 49 C.F.R. §18.36(d).

<sup>62</sup> 49 C.F.R. §661.7, Appendix A(b).

<sup>63</sup> *See* 49 C.F.R. §661.9.

<sup>64</sup> 49 U.S.C. §5323(j)(2)(B).

<sup>65</sup> 49 C.F.R. §661.7(c).

Third, if including domestic materials will increase the cost of the overall project by more than 25%, a waiver may be issued.<sup>66</sup> According to FTA regulations, this waiver will be granted if the amount of the lowest responsive and responsible foreign materials bid multiplied by 1.25 is less than the amount of the lowest responsive and responsible domestic materials bid.<sup>67</sup>

The FTA has additional authority to waive the requirements when funds are used to purchase rolling stock, which is defined as “transit vehicles such as buses, vans, cars, railcars, locomotives, trolley cars and buses, and ferry boats, as well as vehicles used for support services.”<sup>68</sup> A waiver for rolling stock may be issued if the FTA finds that (1) the cost of the components and subcomponents produced in the United States<sup>69</sup> is more than 60% of the cost of all components of the rolling stock; and (2) final assembly of the rolling stock occurs in the United States.<sup>70</sup> Similar to the public interest waiver discussed above, the FTA has issued a general waiver to the Buy America requirements when “foreign sourced spare parts for buses and other rolling stock ... whose total cost is 10 percent or less of the overall project contract cost are being procured as part of the same contract for the major capital item.”<sup>71</sup>

In all cases, proposed waivers to the FTA Buy America requirements must be published in the *Federal Register* and must provide the public with notice and a reasonable comment period.<sup>72</sup> The FTA will issue a written determination in response to waiver applications, explaining the reasons for granting or denying the request.<sup>73</sup> However, the FTA is prohibited from issuing waivers for goods produced in a foreign country if that country has an agreement with the United States, under which the Buy America requirements have been waived, and has violated that agreement in specific ways. Determining the applicability of this prohibition is done in concert with the United States Trade Representative.<sup>74</sup>

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<sup>66</sup> 49 U.S.C. §5323(j)(2)(D).

<sup>67</sup> 49 C.F.R. §661.7(d).

<sup>68</sup> 49 C.F.R. §661.3.

<sup>69</sup> “For a component to be of domestic origin, more than 60 percent of the subcomponents of that component, by cost, must be of domestic origin, and the manufacture of the component must take place in the United States.” 49 C.F.R. §661.11(g).

<sup>70</sup> 49 U.S.C. §5323(j)(2)(C). A component is “any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into an end product at the final assembly location.” 49 C.F.R. §661.11(c).

<sup>71</sup> 49 C.F.R. §661.11, Appendix A(a).

<sup>72</sup> 49 U.S.C. §5323(j)(3).

<sup>73</sup> 49 C.F.R. §661.9(e).

<sup>74</sup> 49 U.S.C. §5323(j)(5).

# Rail Funding Provisions

## Federal Railroad Administration Intercity and High-Speed Passenger Rail

### Requirements and Applicability

In 2008, the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) was enacted, authorizing appropriations to establish several new grant programs supporting intercity passenger rail and high-speed rail services.<sup>75</sup> Spending authorized under PRIIA is subject to Buy America requirements stated in 49 U.S.C. Section 24405(a). The statute requires that appropriations enacted to carry out Chapter 244, created in PRIIA, may be obligated “only if the steel, iron, and manufactured goods used in the project are produced in the United States.”<sup>76</sup> However, this requirement only applies to “projects for which the costs exceed \$100,000.”<sup>77</sup>

The FRA has not yet promulgated regulations implementing these Buy America requirements but has stated its intent to do so. It has published a Frequently Asked Questions document in the *Federal Register* that addresses the applicability and requirements of section 24405(a).<sup>78</sup> This document notes that until the FRA publishes its own regulations it will reference certain sections of the FTA’s regulations at 49 C.F.R. Part 661, discussed above, for the purpose of providing guidance to the FRA’s grantees.<sup>79</sup> Many provisions of the FTA’s Buy America statute are identical to section 24405(a). Specifically, the FRA will use the FTA’s definition regarding when manufactured goods are considered “produced in the United States.” This definition requires the manufacturing processes for an end product to take place in the United States and all of the end product’s components to be of domestic origin. The origin of a component’s subcomponents is not relevant to this determination.<sup>80</sup>

The FRA is prohibited from creating funding limitations that restrict a state from imposing “more stringent” requirements on the “use of articles, materials, and supplies mined, produced, or manufactured in foreign countries....”<sup>81</sup>

<sup>75</sup> P.L. 110-432, Div. B.

<sup>76</sup> 49 U.S.C. §24405(a)(1).

<sup>77</sup> 49 U.S.C. §24405(a)(11). “For the purposes of [subsection (a)], in calculating the components’ costs, labor costs involved in final assembly shall not be included in the calculations.” 49 U.S.C. §24405(a)(3).

<sup>78</sup> “Notice of Availability of Answers to Frequently Asked Questions Regarding Buy America & FRA’s High-Speed Intercity Passenger Rail Program,” 75 *Federal Register* 59322 (September 27, 2010); see also Federal Rail Administration, “Buy America Frequently Asked Questions,” available at <https://www.fra.dot.gov/eLib/Details/L02740> (hereinafter FRA FAQs).

<sup>79</sup> FRA FAQs, *supra* note 78, at 3.

<sup>80</sup> *Id.* at 4; see 49 C.F.R. §661.5(d).

<sup>81</sup> 49 U.S.C. §24405(a)(8).

## FRA Waivers

Waivers may be issued if the FRA finds that (1) applying the Buy America requirements is inconsistent with the public interest; (2) domestically produced steel, iron, and manufactured goods are not produced in sufficient and reasonably available amounts or are not of satisfactory quality; (3) “rolling stock or power train equipment cannot be bought and delivered in the United States within a reasonable time”; or (4) using domestic materials will increase the cost of the overall project by more than 25%.<sup>82</sup> Unlike the statutory provisions governing FTA funding, the FRA statute does not authorize a waiver when procuring rolling stock if the cost of the domestic components is more than 60% of the cost of all of the components.<sup>83</sup>

Proposed waivers must be published in the *Federal Register* and provide public notice and a reasonable period of time for public comment. Completed waiver requests may also be viewed on the FRA’s website.<sup>84</sup> Just like the FTA, the FRA is prohibited from issuing waivers for goods produced in a foreign country if that country has an agreement with the United States, under which the Buy America requirements have been waived, and has violated that agreement in specific ways.<sup>85</sup> Additionally, the FRA has stated that it

will apply the statutory Buy America provision strictly and will issue a waiver only when the bidder/offeror has demonstrated by clear evidence that it has met the requirements for a waiver. Moreover, FRA considers the need to grant waivers under these circumstances as strictly temporary because it expects that achieving domestic manufacture and 100% domestic component content can and will occur in the very near future.<sup>86</sup>

## Amtrak

### Requirements and Applicability

Amtrak was established in statute as a for-profit corporation and “not a department, agency, or instrumentality of the United States Government.”<sup>87</sup> Therefore, the Buy American requirements that apply to direct purchases of the federal government do not restrict Amtrak spending. However, Amtrak has its own Buy America requirements at 49 U.S.C. Section 24305(f). When the cost of articles, material, or supplies bought is at least \$1,000,000,<sup>88</sup> Amtrak may only buy

(A) unmanufactured articles, material, and supplies mined or produced in the United States;  
or

<sup>82</sup> 49 U.S.C. §24405(a)(2).

<sup>83</sup> See 49 U.S.C. §24405(a); see also FRA FAQs at 2 (explaining that the FRA does not have statutory authority to issue a waiver based on the 60% cost threshold for rolling stock domestic components).

<sup>84</sup> Federal Rail Administration, “Buy America,” available at <https://www.fra.dot.gov/Page/P0185>.

<sup>85</sup> 49 U.S.C. §24405(a)(6).

<sup>86</sup> FRA FAQs, *supra* note 78, at 2.

<sup>87</sup> 49 U.S.C. §24301(a).

<sup>88</sup> 49 U.S.C. §24305(f)(3).

(B) manufactured articles, material, and supplies, manufactured in the United States substantially from articles, material, and supplies mined, produced, or manufactured in the United States.<sup>89</sup>

The FRA<sup>90</sup> has interpreted the “substantially from articles, material, and supplies mined, produced or manufactured in the United States” requirement to mean that the manufactured goods must have domestic component content greater than 50%, by cost.<sup>91</sup> This interpretation borrows from the definition of “domestic end product” from Buy American regulations.<sup>92</sup>

Amtrak may also be subject to the Buy America requirements in 49 U.S.C. Section 24405, discussed above, if it is operating under funds subject to those restrictions.

### Amtrak Exemptions

Amtrak may be exempted from the section 24305(f) requirement as it relates to particular articles, material, or supplies if the FRA determines that one of the following is true: imposing the requirement is inconsistent with the public interest; the cost of imposing the requirement is unreasonable; or the necessary goods are not “mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and are not of a satisfactory quality.”<sup>93</sup>

Additionally, Amtrak may receive an exemption from the Buy America requirements for rolling stock or power train equipment when those items “cannot be bought and delivered in the United States within a reasonable time.”<sup>94</sup>

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<sup>89</sup> 49 U.S.C. §24305(f)(2).

<sup>90</sup> The FRA has been delegated authority from the Secretary of Transportation to issue exemptions from these requirements to Amtrak upon request. *See* FRA FAQs, *supra* note 78, at 11.

<sup>91</sup> *See* Letter from Joseph Szabo, Administrator of the Federal Rail Administration, to Jeff Martin, Chief Logistics Officers, Amtrak, “Re: Request for a Buy American Exemption for Acela Power Car Central Block Assemblies,” March 7, 2012, *available at* <https://www.fra.dot.gov/eLib/Details/L04370>.

Amtrak’s domestic buying preference statute requires Amtrak to purchase manufactured articles with a value exceeding \$1 million dollars that are manufactured in the United States substantially from articles, material, and supplies mined, produced, or manufactured in the United States. “Substantially” has been interpreted by Amtrak and Federal Railroad Administration (FRA) to mean that the manufactured articles in Amtrak’s purchases must have domestic component content greater than fifty percent (by cost). *See* 48 C.F.R. § 25.003 (domestic end product means- “An end product manufactured in the United States, if- (i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components.”)

*Id.*

<sup>92</sup> *See* 48 C.F.R. §25.003.

<sup>93</sup> 49 U.S.C. §24305(f)(4)(A).

<sup>94</sup> 49 U.S.C. §24305(f)(4)(B).

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