



E.O. 14005: Bolstering Federal Government Purchase of American Products and Services

February 2, 2021

On January 25, 2021, President Joe Biden issued [Executive Order \(E.O.\) 14005](#) to advance the policy that the U.S. government should “use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced, and services offered in, the United States.” Although the E.O. has broad applicability, this Insight focuses exclusively on the [Buy American Act](#) (BAA) as applied to federal procurement and discusses selected provisions of the E.O.

As may occur during a presidential transition, E.O. 14005 [revoked two executive orders](#) and [superseded a third](#) that also promoted Buy American policies and were issued by President Biden’s immediate predecessor.

Implementing a Waiver Review Process

Under the E.O., a newly formed [Made in America Office](#), located in the Office of Management and Budget (OMB) and led by the Made in America director (appointed by the OMB director), will be responsible for reviewing agencies’ proposed waivers to the BAA and detailed justifications for procurement of products or materials not mined, produced, or manufactured in the United States. Presently, there is no centralized process or office for reviewing agencies’ waivers to the BAA.

Generally, the [review process](#) as described in Section 4 of E.O. 14005 is to include the following steps:

- The granting agency submits a proposed waiver and written justification for use of goods, products, or materials that have not been mined, produced, or manufactured in the United States to the Made in America Office.
- The Made in America Office reviews the proposed waiver and determines whether issuing it “would be consistent with applicable law and the policy set forth in section 1” of E.O. 14005. The Made in America director notifies the granting agency of his or her decision in writing.
- If the Made in American director determines that issuing the proposed waiver would not be consistent with applicable law and policy, the director is to return the proposed waiver for “further consideration.”

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- If the granting agency head disagrees with the determination, the agency is to notify the Made in America director in writing. Disagreements or conflicts between the director and agency head are to be resolved using procedures that “parallel” those found in Section 7 of E.O. 12866.

If a granting agency is “obligated by law to act more quickly than the review procedures” in E.O. 14005 allow, the agency head shall notify the Made in America Office and, “to the extent practicable, comply with the requirements” set forth in Section 4.

Identifying Cost Advantages of Certain Foreign Products

[Section 5](#) establishes a new requirement: Prior to “granting a waiver in the public interest, the relevant granting agency shall assess whether a significant portion of the cost advantage of a foreign-sourced product” resulted from the use of [dumped](#) or “injuriously subsidized” steel, iron, or manufactured goods. The agency may consult with the International Trade Administration and include its assessment in the agency’s waiver proposal.

Creating a Repository of Agencies’ Proposed Waivers

Neither the BAA nor the [Federal Acquisition Regulation](#) (FAR) requires agencies to draft written waivers or maintain them in a central location for public access. Under [Section 6](#), the Made in America director is to provide information regarding agencies’ proposed waivers and the accompanying justifications to the General Services Administration, which will post the information on a website it creates and maintains.

Amending Buy American Act Regulations

[Section 8](#) directs the [Federal Acquisition Regulatory Council](#) (FAR Council) to consider amending the FAR to effect the following changes:

- To be considered a [domestic end product](#) for the purposes of the BAA, the article must be manufactured in the United States, and the cost of domestic components must be greater than 55% of the cost of all components. For items wholly or predominantly made of iron or steel, the cost of foreign components must be less than 5% of the cost of all components. [Section 8\(a\)\(i\)](#) suggests replacing the component test with a test “under which domestic content is measured by the value that is added to the product through U.S.-based production or U.S. job-supporting activity.”
- [Section 8\(a\)\(ii\)](#) suggests increasing the thresholds discussed in the previous bullet statement.
- If a domestic offer is not the low offer, then the contracting officer is to increase the low offer by 20% (if a large business submitted the low offer) or 30% (if a small business submitted the low offer). [Section 8\(a\)\(iii\)](#) suggests increasing the percentages.

Review of List of Nonavailable Items

The BAA does not apply to articles, materials, or supplies that are [nonavailable](#), meaning they “are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.” [FAR 25.104](#) contains a list of nonavailable articles, which is to be published in the *Federal Register* for comment at least once every five years.

[Section 9](#) requires the administrator of the Office of Federal Procurement Policy, in consultation with the Secretary of Commerce and the Made in America director, to review any proposed amendment to the

FAR to update this list. The review, including market research and economic analyses of relevant markets, is to determine whether each article on the list meets the nonavailability criteria and shall be shared with the FAR Council.

Reporting on Information Technology Commercial Items

Information technology that is a [commercial item](#) is [not subject to the restrictions](#) on purchasing [foreign end products](#). [Section 10](#) requires the FAR Council to review “existing constraints on the extension of the requirements in Made in America Laws to information technology that is a commercial item” and develop recommendations for removing these constraints.

Additional Provisions in E.O. 14005

Other sections cover [policy](#), [definitions](#), [agency reviews](#), [supplier scouting](#), [reporting requirements](#), and [products offered to the general public on federal property](#), and [severability](#). The order also contains [general provisions](#) that are usually included in executive orders.

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