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## Trump Executive Order Calls For More Aggressive Use Of The Buy American Act—An Order Likely To Have More Political Than Practical Effect

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#### FEATURE COMMENT: Trump Executive Order Calls For More Aggressive Use Of The Buy American Act—An Order Likely To Have More Political Than Practical Effect

President Trump recently issued an executive order, EO 13881, 84 Fed. Reg. 34257 (July 15, 2019), calling for more aggressive application of the Buy American Act. The new order calls for the Federal Acquisition Regulatory Council to strengthen domestic preferences under the Act. The order was long predicted as another step in the Trump administration's advancing protectionism. Indeed, most of the Trump administration's protectionist initiatives have been foreseeable from the outset, for the Trump administration has consistently embraced those initiatives that provide maximum political benefit at minimum cost. But developments since Trump took office—including new data that show that the Buy American Act applies to a markedly small portion of federal procurement, and emerging electronic marketplaces that could swallow up much of that small market share—may mean the new executive order has far more impact politically (both in the U.S. and abroad) than it does practically.

**The Executive Order on Revamping the “Buy American” Regulations**—Trump's most recent executive order, see 61 GC ¶ 217, followed an April 2017 executive order (EO 13788), which called for executive agencies to “Buy American” when possible, 82 Fed. Reg. 18837 (Apr. 21, 2017); 59 GC ¶ 115, and a Jan. 31, 2019 order (EO 13858), which directed agencies to encourage grantees to purchase U.S.-made goods in federally funded initiatives, such

as infrastructure projects, 84 Fed. Reg. 2029 (Jan. 31, 2019). See Grier, “President's Buy American Order: Raise Domestic Content” (July 22, 2019), *trade.djaghe.com/?p=5921*.

On its face, the latest executive order seems to have more bite. The order notes that it “is the policy of the United States to buy American and to maximize ... the use of goods ... produced in the United States,” and that as a result the Trump administration “shall enforce the Buy American Act to the greatest extent permitted by law.”

To maximize the impact of the Buy American Act, the new order calls for the Federal Acquisition Regulatory Council to revamp the Buy American Act's implementing regulations. Those complex regulations are set forth at Federal Acquisition Regulation subpts. 25.1 (for supplies) and 25.2 (for construction materials), 48 CFR subpts. 25.1 & 25.2. The current regulations (summarized here for brevity) ask two questions to qualify an item as domestic: was the item manufactured in the U.S., and does it contain the requisite U.S. domestic content. E.g., FAR 25.001(c)(1). If the item is determined to be of foreign origin, the regulations apply a price preference (not a bar) to favor competing U.S.-origin items. See, e.g., Bashur, Stewart and Weinkam, “Current Challenges Facing Contractors Under Recent Changes to Domestic Preference Programs,” *Procurement Law*, Winter 2018, at 3, 4.

Trump's new order calls for regulators to expand the domestic content requirements under the Act, largely by rewriting the regulatory scheme launched by President Eisenhower's order that has, for over 60 years, guided enforcement under the Buy American Act, *Prescribing Uniform Procedures for Certain Determinations Under the Buy American Act*, EO 10582, 19 Fed. Reg. 8723 (Dec. 17, 1954). See generally Nibley, Conant and Bakkies, Feature Comment, “Real Steps Towards ‘Buy American’ Compliance—Part I: Unpacking FAR Pt. 25 and the Application of ‘Buy American’ Laws,” 60 GC ¶ 52.

Under that existing regulatory scheme for Buy American Act enforcement, covered goods,

even if manufactured in the U.S., must include at least 50 percent U.S. content. See, e.g., FAR 25.003 (“‘Domestic end product’ means ... [a]n end product manufactured in the United States, if ... [t]he cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components.”). The new order from President Trump would decrease the foreign content allowed to only five percent for iron and steel end products, and to 45 percent for all other end products. (The order also calls for senior trade officials to assess whether the 45-percent limit could, in time, be reduced to 25 percent.) Thus, for example, if an iron end product included foreign iron that constituted more than five percent of the cost of all the components used in the end product, that end product would be considered of foreign origin under the recent executive order.

| <b>Proposed Changes to Domestic Content Requirements—What Percent Content Makes an Item “Foreign” Under the Buy American Act</b> |                          |   |
|--|--------------------------|---|
|  | Iron and Steel Items     | Other Items                                 |
| Existing Law   | 50%                      | 50%   |
| Trump Proposal   | 5% foreign iron or steel | 45% foreign content (could decrease to 25%) |

If an item qualifies as “foreign” under the Buy American Act test, the next step is to assess the price preference. See Green, *International Government Contract Law* § 2.4 (Westlaw Nov. 2018). In simplified terms, a domestic item offered by a small business is afforded a 12-percent price preference, i.e., award may be made to the U.S. item even if it is up to 12 percent more expensive, FAR 25.105(b); domestic items offered by other businesses enjoy a six-percent preference, id.; and domestic items offered to the Defense Department enjoy a 50-percent preference, Defense FAR Supplement 252.225-7001. (The 50-percent preference for Defense Department items is almost never seen in practice, perhaps because so much defense materiel is covered by reciprocal defense procurement agreements between the U.S. and its allies, and those agreements remove most barriers to defense trade. See generally Miller, “Is It Time to Reform Reciprocal Defense Procurement Agreements?,” 39 Pub. Cont. L.J. 93 (2009).)

The new Trump order would radically expand these Buy American price preferences (though not the preference for Defense Department purchases). Under the regulations called for by the order, domestic items from small businesses would enjoy a 30-percent price preference, and those from other businesses would have a 20-percent price preference.

| <b>Price Preferences Applied Against Foreign Items Under Buy American Act</b> |                      |                      |
|---|----------------------|----------------------|
|   | Small Businesses     | Other Businesses     |
| Existing Law  | 12% price preference | 6% price preference  |
| Trump Proposal  | 30% price preference | 20% price preference |

**What the Order Does Not Address**—President Trump’s executive order calls for the Federal Acquisition Regulatory Council to publish a proposed rule for public comment. The order leaves unaddressed a number of exceptions and safe harbors under the Buy American Act, see, e.g., *Buy American Act: Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance* (GAO-19-17), at 4–9, [www.gao.gov/assets/700/696086.pdf](http://www.gao.gov/assets/700/696086.pdf), which may complicate the rulemaking and severely limit the impact of the new executive order. Those include:

- *The Buy American exception for commercially available off-the-shelf (COTS) items:* Under current regulations, COTS items manufactured in the United States need not contain a requisite level of domestic content. See 41 USCA § 1907 (exceptions for COTS items); FAR 25.001(c); see also Green, *supra*, § 2.8 (discussing legal test for “manufacture”). Nothing in the order suggests that this exception will be eliminated; leaving it in place, however, will limit the new order’s impact.

|   |   |
|---|---|
| <b>“Squeezing” the Buy American Act</b> | Acquisitions Above Trade Agreements Thresholds (typically \$180,000): Buy American Act Does Not Apply |
|   | Buy American Act Applies: Acquisitions from \$10,000 to the Trade Agreements Thresholds               |
|   | Micro-Purchases (Currently up to \$10,000): Buy American Act Does Not Apply                           |

- *The exception for procurements above the trade agreements thresholds:* What is often over-

looked is that the Buy American Act does not apply to procurements above the thresholds set in various international trade agreements; those thresholds for supplies range from \$25,000 (for Canada) to \$180,000 (under the most important agreement, the World Trade Organization (WTO) Agreement on Government Procurement (GPA)). See FAR 25.402. Procurements *above* those thresholds are exempt from the Buy American Act, pursuant to waiver authority vested in the president by the Trade Agreements Act. See, e.g., Grier, “Trade Agreements Act of 1979: Broad Authority, Narrow Application” (Apr. 21, 2014), *trade.djaghe.com/?p=559*; GAO-19-17, *supra* at 4. In effect, these trade agreements “squeeze down” on the Buy American Act, and limit its effect to smaller contracts below the trade agreements thresholds. Nothing in the new EO suggests that those trade agreements will be undone. In fact, as is discussed below, because of Canada’s unexpected refusal to join the procurement provisions in the U.S.–Mexico–Canada Agreement (USMCA), it will be even more difficult for the U.S. to abandon existing agreements. For now (at least), the latticework of international trade agreements opening procurement markets seems secure, and those agreements leave only a limited scope to the Buy American Act.

- *The safe harbor for goods sold through “catalogue” contracts:* The international trade agreements typically contain a provision, see, e.g., WTO GPA, II.6, echoed in the FAR, see FAR 25.403, which says that agencies should look to the total estimated value of the acquisition—not the value of an individual order—in assessing whether a procurement exceeds the trade agreements’ monetary thresholds and thus is covered by a trade agreement. In practice, this rule means that many catalogue contracts (known as “indefinite-delivery/indefinite-quantity” contracts in the U.S., and “framework” agreements internationally) are assumed to have total values larger than the trade agreements’ monetary thresholds and so are *not* covered by the Buy American Act.
- *The exception for acquisitions below the micro-purchase threshold—fueled by the*

*prospect of new commercial electronic marketplaces:* While international trade agreements “squeeze” the Buy American Act from above, micro-purchases erode it from below. Micro-purchases are exempt from the Buy American Act, see, e.g., Congressional Research Service, *Domestic Content Restrictions: The Buy American Act and Complementary Provisions of Federal Law* 7 (R43354, Sept. 12, 2016), [https://www.everycrsreport.com/files/20160912\\_R43354\\_80f139d4eb763ccd9a433cba33e81d5567f6f5d.pdf](https://www.everycrsreport.com/files/20160912_R43354_80f139d4eb763ccd9a433cba33e81d5567f6f5d.pdf). The scope of micro-purchases in the Federal Government may grow dramatically in the coming years, as users—ordinary federal employees, not contracting officials—are allowed to use online marketplaces (such as *Amazon.com* or *Walmart.com*) to purchase goods and services for the Federal Government. See generally Yukins and Ramish, Feature Comment, “Section 809 and ‘E-Portal’ Proposals, By Cutting Bid Protests in Federal Procurement, Could Breach International Agreements and Raise New Risks of Corruption,” 60 GC ¶ 138, [ssrn.com/abstract=3176223](http://ssrn.com/abstract=3176223). Under a mandate from Congress, the General Services Administration has endorsed the use of electronic marketplaces, see GSA, *Procurement Through Commercial E-Commerce Portals—Phase II Report: Market Research & Consultation* (April 2019), [interact.gsa.gov/document/gsa-and-omb-phase-2-deliverable-attached](http://interact.gsa.gov/document/gsa-and-omb-phase-2-deliverable-attached), and a draft solicitation No. 7QSCC19R0429 (available on [www.fbo.gov](http://www.fbo.gov)) for electronic marketplaces has been published for comment. That draft solicitation’s statement of objectives makes it clear that GSA’s pilot electronic marketplaces will be focused, at least at first, on sales below the micro-purchase threshold. Furthermore, while the limit on micro-purchases is generally \$10,000, see OMB Memorandum M-18-18 (June 20, 2018), GSA has urged Congress to increase the micro-purchase threshold to \$25,000 for purchases through GSA-approved electronic marketplaces, see GSA, *Procurement Through Commercial E-Commerce Portals*, *supra*, at 4. If the micro-purchase cap does rise to \$25,000, it will be even easier for federal buyers to use micro-purchases through commercial elec-



tronic marketplaces to avoid the impact of the Buy American Act.

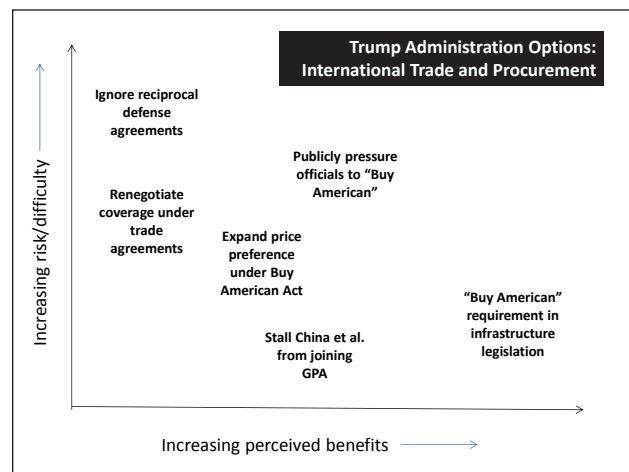
GAO found that foreign products subject to the Buy American Act came to under \$8 billion—less than two percent of annual federal procurement of roughly \$500 billion

In part because of these various exceptions and safe harbors, the Buy American Act in fact covers a relatively small portion of the approximately \$500 billion in annual federal procurement. A recent study by the Government Accountability Office found that foreign end products accounted for only \$7.8 billion of fiscal year 2017 obligations for products potentially subject to the Buy American Act. GAO-19-17, *supra*, at 11; *GAO Finds Inconsistent Buy American Guidance, Inaccurate Procurement Data*, 61 GC ¶ 2. That very small sliver of the federal procurement budget potentially touched by the Buy American Act—less than two percent of annual federal procurement spending of roughly \$500 billion—may shrink even further in the coming years, as firms work to take advantage of the various exceptions and safe harbors from an increasingly onerous Buy American Act.

These many variables will make it difficult for regulators to assess the potential costs and benefits of the proposed rule changes, including its impact on commercial markets. Cf. Yukins and Cora, Feature Comment, “Considering the Effects of Public Procurement Regulations on Competitive Markets,” 55 GC ¶ 64 (regulators should consider costs and benefits when assessing rules with significant economic impact). Beyond the coverage issues outlined above, it will be difficult to assess how stricter Buy American preferences may affect procurement outcomes. The price preferences put in place under the Buy American Act during the Eisenhower administration assumed that procurement awards would be based solely on price. That is no longer true in many federal procurements; statistically, the vast majority of federal procurement decisions are now based on “best value” competitive assessments which weigh both price and quality. See, e.g., Yukins, “The U.S. Federal Procurement System: An Introduction,” 2017 Upphandlingsrattslig Tidskrift (UrT) 69, 81–82, [ssrn.com/abstract=3063559](https://ssrn.com/abstract=3063559). In this new world of “best value” procurement, mere price preferences—even the large price preferences for domestic items contemplated by the most recent EO—may create a regulatory conundrum.

**Conclusion—The New Executive Order and the Trump Protectionist Agenda**—As the discussion above reflects, ultimately the new executive order may have relatively little practical effect in increasing federal purchases of U.S.-origin goods. Even if the order succeeded in sweeping all foreign competition from the small share of the federal market still potentially covered by the Buy American Act—roughly \$8 billion—that would have little, if any, real impact on the U.S. trade deficit, which rose to \$621 billion in 2018. The order’s purpose therefore seems largely political, and as such it was one of the predictable protectionist steps that the Trump administration was likely to take.

In a paper presented in February 2017 to the Thomson Reuters Government Contracts Year in Review Conference, the author suggested that, by assessing the various protectionist options open to the Trump administration, and weighing their perceived political benefits (in stirring the Trump political base) against potential risks and costs, it was possible to predict which protectionist measures the Trump administration would most likely press in procurement. The following chart which reflected those options in early 2017 has, for the most part, proven remarkably prescient:



See Yukins, “International Procurement Developments in 2016—Part I: The Trump Administration’s Policy Options in International Procurement,” 2017 Gov’t Contracts Year in Review Briefs 3 (Feb. 2017). As was explained above, the Trump administration has largely followed this predicted path:

- **Public Pressure to “Buy American”**: As expected, Trump did indeed pressure U.S. officials to “Buy American” in April 2017. See EO 13788.

- *“Buy American” in Infrastructure*: Trump’s prior EO 13858 called for executive agencies to encourage grantees to “Buy American” when using federal grants for infrastructure projects. Major infrastructure legislation—which President Trump has touted as a trillion-dollar initiative—is stalled politically, but likely would include a “Buy American” provision much like Section 1605 of the American Recovery and Reinvestment Act, which called for the use of U.S.-made iron, steel and manufactured items in projects funded by that act.
- *No Action Against Defense Procurement Agreements*: The Trump administration has not moved to curb the reciprocal defense procurement agreements which open defense markets with allies, perhaps because of the costs and risk of disrupting sales of military materiel abroad. Instead, the Trump administration has urged more aggressive foreign military sales. See, e.g., Cleary, “U.S. Arms Sales Overseas Skyrocketed 33% in 2018,” *Breaking Defense*, Oct. 9, 2018 (“The United States sold \$55.6 billion worth of weapons to allies in fiscal 2018, a massive 33 percent increase over 2017 as the Trump administration has given the Pentagon and State Department a green light to sell more, more quickly, overseas.”), available at [www.dsca.mil/news-media/news-archive/us-arms-sales-overseas-skyrocketed-33-2018](http://www.dsca.mil/news-media/news-archive/us-arms-sales-overseas-skyrocketed-33-2018).
- *China and the GPA*: Any talk of China joining the GPA seems to have been drowned out by the broader—and intense—trade battles between the United States and China.
- *Renegotiating Trade Agreements*: President Trump issued EO 13796, 82 Fed. Reg. 20819 (May 4, 2017), which called for a general review of trade agreements for fairness; the report on that review has never been published, however. The Trump administration also tried to reframe international procurement agreements by demanding dollar-for-dollar reciprocity in the USMCA negotiations (a startling departure from decades of U.S. trade practice), but was rebuffed. Findings from a recent GAO report suggested that it would be very difficult to administer dollar-for-dollar reciprocity (one dollar of access to the U.S. federal procurement market in return for one dollar of access to a trading partner’s market), in part because the data on international trade in procurement remains so uncertain. See *Foreign Sourcing in Government Procurement*, at 2 (GAO-19-414, May 2019) (“U.S. trade policy is being made and international procurement negotiations conducted with limited empirical data available about the country of origin of the goods and services purchased”), [www.gao.gov/assets/700/699393.pdf](http://www.gao.gov/assets/700/699393.pdf). Moreover, during the USMCA negotiations, the U.S. Chamber of Commerce pointed out that strict reciprocity under the USMCA could in practice cut existing U.S. access to Mexican public procurement markets because Mexican firms sell so little to U.S. agencies. Canada, which had publicly criticized the concept of strict reciprocity, simply refused to join the USMCA’s procurement chapter. See Yukins, “International Procurement Developments in 2018 – Part IV: The United States in International Procurement: Understanding a Pause in the Trump Administration’s Protectionism,” 2019 Gov’t Contracts Year in Review Briefs 6 (Feb. 2019) (citing authorities). By refusing to join, Canada may have “locked” the U.S. into the GPA, for if Canada does not open its public markets under the USMCA and the USMCA replaces the North American Free Trade Agreement as planned, the GPA—one of the most robust of the international agreements affecting procurement—will be the sole agreement guaranteeing U.S. exporters access to the Canadian markets. See generally *Government Procurement Agreements Contain Similar Provisions, but Market Access Commitments Vary* (GAO-16-727, Sept. 2016) (noting access afforded by GPA), [www.gao.gov/assets/690/680044.pdf](http://www.gao.gov/assets/690/680044.pdf).
- *Expanding Price Preferences Under the Buy American Act*: Finally, and as expected, Trump has now called for an expansion of price preferences under the Buy American Act. See, e.g., Choi, “‘Buy American and Hire American’: President Trump’s Options for Strengthening the Buy American Act,” 47 *Pub. Cont. L.J.* 79, 85 (2017). Because of the various curbs on the Buy American Act, discussed above, this latest order probably will have no material impact on the U.S. trade deficit, which in 2018 was \$621 billion—roughly 80 times larger than the federal market potentially subject to the Buy American Act. In sum, the practical impact

of the latest EO is likely to be very limited because the Buy American Act plays a very small role in the modern federal procurement market.

The political impact of the new EO is likely to be much larger, both here and abroad. In the U.S., Trump's political base probably will cheer this latest round of economic nationalism, although the new order can do little to restore the U.S. manufacturing base—the touchstone for the Trump administration's protectionist efforts. Abroad, those in Europe and beyond who favor heightened protectionism may well point to this latest “Buy American” initiative as an excuse for new trade barriers in procurement. Although the Buy American Act has grown far less

relevant since it was passed in 1933, for foreigners it is consistently a rallying point for protectionism—if the Americans have a strong Buy American Act, the argument goes, why shouldn't we? The Trump administration's latest protectionist measure will almost certainly encourage new barriers to international trade, and thus may cause new divisions in the community of nations.



*This Feature Comment was written for THE GOVERNMENT CONTRACTOR by Professor Christopher R. Yukins of the George Washington University Law School in Washington, D.C.*