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Congress Expands Buy America Requirements in the Infrastructure Investment and Jobs Act (P.L. 117-58)

Domestic content preference laws, which require that certain goods purchased with federal funds be manufactured primarily in the United States, have received increased attention from both Congress and the executive branch in recent years. The Infrastructure Investment and Jobs Act (IIJA; P.L. 117-58), enacted in November 2021, made changes to “Buy America” requirements for federally funded infrastructure projects.

Buy America

“Buy America” refers to several statutes and regulations that apply to federal financial assistance used to support infrastructure-related projects, principally those involving highways, public transportation, airports, aviation, and intercity passenger rail, including Amtrak. Buy America requirements also apply to certain federally funded water-related infrastructure projects and, in these cases, are administered by the Environmental Protection Agency (EPA). Buy America requirements as they relate to transportation date to the Surface Transportation Assistance Act of 1978 (P.L. 95-599) and are distinct from requirements under the Buy American Act of 1933, which is specific to direct procurement by the federal government.

Statutes containing differing Buy America requirements applicable to each transportation mode are administered by various Department of Transportation (DOT) agencies. Each agency subject to the law maintains its own regulations and monitors grantees’ performance. The Federal Transit Administration, for example, addresses different issues in its Buy America requirements from other DOT agencies, such as the Federal Highway Administration. EPA has separate requirements, and implementing the IIJA will require agencies in certain other federal departments, such as the Department of Energy and the Department of Commerce, to develop Buy America regulations of their own.

Compliance is the responsibility of recipients of federal grants covered by Buy America statutes, such as a state government seeking to use federal funds to cover part of the cost of rebuilding a highway bridge or local governments using federal funds to replace water pipes and sewage systems. Grantees may obtain waivers of requirements to use domestic products in certain circumstances.

Expanded Requirements

Buy America requirements traditionally extend to public-works transportation and water-related infrastructure. The IIJA expands Buy America coverage to other infrastructure projects funded by federal grants, including transmission facilities; structures and equipment of electric utilities;

broadband infrastructure; and real property and buildings. Other projects may be covered; for example, the IIJA authorizes federal funding for an expanded clean school bus program. Although the program authorized in the IIJA to fund purchases of electric school buses by local school districts contains no explicit Buy America references, EPA may determine that Buy America requirements will extend to these items as well.

Buy America requirements previously applied to iron, steel, and certain manufactured goods. The IIJA broadens coverage to include nonferrous 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. Congress did not include cement and aggregates—comprising sand, gravel, and crushed stone—in the IIJA’s list of construction materials subject to Buy America. Industry groups asserted that transporting these extremely heavy materials from distant U.S. producers rather than closer Canadian or Mexican producers would be costly and might have other adverse effects including more damage to roads and highways. Imported cement and aggregates accounted for approximately 16% of total U.S. consumption in 2020; however, this figure is not representative of the materials use in federally funded projects.

To be considered “produced in the United States” under the IIJA, manufactured goods must contain greater than 55% domestic content and be manufactured in the United States. In the case of construction materials all manufacturing processes must occur in the United States. The law directs the Office of Management and Budget (OMB) to define the relevant manufacturing processes as they relate to construction materials within 180 days of enactment. The IIJA instructs OMB to ensure that construction materials and associated inputs originate in the United States, as well as to “seek to maximize the direct and indirect jobs benefited or created in the production of the construction material.”

Executive Order 14005 and the IIJA

The IIJA and Executive Order 14005 (E.O.) each contain similar language that addresses domestic content requirements. E.O. 14005, signed by President Biden in January 2021, established a Made in America Office within OMB with several responsibilities, including increased enforcement of and compliance with domestic preference statutes. The statute establishes a centralized system in which OMB is to serve as the final authority in reviewing waiver requests for all projects using federal funds; previously, the various agencies that administer Buy

America requirements have been responsible for considering waiver requests from their grantees.

The IIJA directs the Secretary of Transportation to enter into an agreement with the Secretary of Commerce and to consult with the Director of the Hollings Manufacturing Extension Partnership to determine whether a domestic entity could supply the iron, steel, manufactured product, or construction material needed for an infrastructure project prior to granting a Buy America waiver. In addition, both the IIJA and E.O. 14005 instruct all federal agencies to work with the Director of the Hollings Manufacturing Extension Partnership to identify American firms that can supply goods and materials that meet Buy America requirements, as well as develop and sustain a domestic supply base of such goods and materials.

Waivers allowed under prior Buy America laws are also authorized under the IIJA, including where Buy America requirements would be inconsistent with public interest; products and materials are not domestically available in sufficient quantities and/or of satisfactory quality; and if the domestic products/materials raise the cost of the project by a specified threshold. Prior to a waiver being granted, the issuing agency must make the proposed waiver publicly available on a website designated by OMB and must afford the public a specified amount of time to comment. General applicability waivers must be reviewed every five years to determine whether or not a waiver should be continued. Additionally, prior to granting a waiver, both the IIJA and E.O. 14005 direct federal agencies to assess whether the cost advantage of a foreign product is the result of unfair trade practices, such as dumping or subsidization.

Effects on Manufacturing and Employment

Buy America has several objectives that range from shielding U.S. manufacturing and employment from import competition to maintaining a domestic industrial base of critical goods and materials. Assessing how well Buy America has accomplished these purposes is difficult—as is measuring the economic costs and benefits of Buy America restrictions.

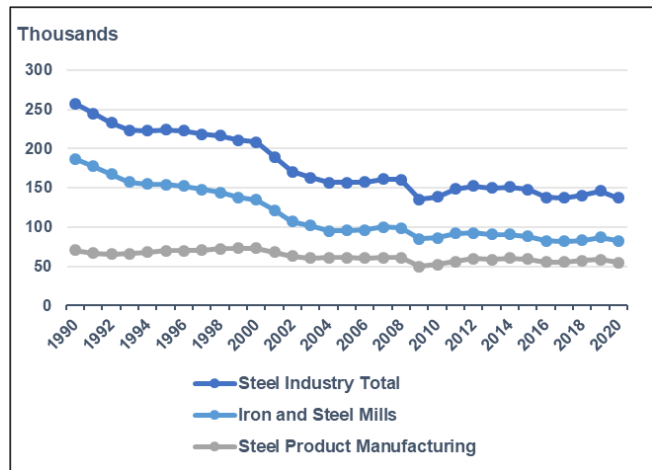
Steel has been a particular focus of Buy America laws. Data on the quantity of steel used each year in projects subject to Buy America requirements are not available, so it is not possible to calculate accurately the share of domestic steel production covered by the laws.

Employment in steel manufacturing has declined 47% between 1990 and 2020; however, it has remained moderately stable since 2009 (**Figure 1**). Domestic producers' share of the U.S. steel market has fluctuated between 2000 and 2020, ranging from approximately 70% to 90%, and experienced the market's highest levels of import competition during 2014–2015. Steel produced in Canada and Mexico is entitled to duty-free access to the U.S. market under the United States-Mexico-Canada trade agreement. Some manufacturers contend that Buy America requirements hinder the integration of the three economies that the agreement is intended to promote.

One of the primary manufacturing industries affected by Buy America is rolling stock, and has likely resulted in

greater domestic production of rail cars and transit buses than would occur without the requirements. These industries are relatively small, and the majority of sales are to private railroads not covered by Buy America.

Figure 1. U.S. Steel Manufacturing Employment



Source: CRS analysis of Bureau of Labor Statistics, Current Employment Statistics.

Potential Effects and Issues

The broadening of Buy America coverage under the IIJA may impact supply chains across multiple industries, including among suppliers to the construction industry. Some firms that manufacture certain construction materials contend that they rely on imported components or other inputs, and assert that broadening Buy America coverage may adversely affect their domestic manufacturing activities. Barring import competition for a broader range of procurement funded by federal grants also has the potential to increase the market power of domestic producers in industries that are already highly concentrated, possibly leading to higher project costs.

Oversight of expanded Buy America requirements mandated in the IIJA is likely to prove complicated due to other provisions in the law. The IIJA increases the amount of federal infrastructure funding provided directly to local entities, such as counties or municipal bus systems, rather than passing through state governments or metropolitan planning organizations. This may also extend to nontransportation infrastructure projects, such as tribal broadband deployments, where eligible entities include tribal governments, tribal colleges or universities, or native corporations not previously engaged in overseeing Buy America requirements. Some jurisdictions and nongovernmental organizations may lack the staff and legal expertise to comply with the Buy America regulations of various federal agencies. This may complicate enforcement, as specific procurement contracts often require complex determinations of whether a bidder has adhered to federal law and can lead to protracted legal challenges.

Christopher D. Watson, Analyst in Industrial Organization and Business

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