

# American Federation of Labor and Congress of Industrial Organizations



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March 4, 2009

The Honorable Peter R. Orszag  
Director, Office of Management and Budget  
Eisenhower Executive Office Building  
1650 Pennsylvania Avenue, N.W.  
Washington, D.C. 20503

Dear Director Orszag:

On behalf of the AFL-CIO, I am sending you a memorandum regarding implementation of the Buy America provisions of the American Recovery and Reinvestment Act of 2009. I urge you to take into consideration these views, which are representative of the concerns of our affiliated unions, as OMB issues regulations or guidance pertaining to the expenditure of funds under the American Recovery and Reinvestment Act.

Buy America laws have been on the books for decades and can be applied consistently with our international trade obligations. The Buy America requirements of the American Recovery and Reinvestment Act, if properly implemented, will help ensure that taxpayer funds are used to create and maintain good jobs for American workers and to stimulate the U.S. economy. The AFL-CIO believes these provisions are a critical component of our economic recovery.

Congress also clearly favors a strong domestic sourcing preference. The Senate overwhelmingly defeated an amendment to remove its Buy America preference by 65-31, and the House Committee on Appropriations voted 55-0-1 to retain its Buy America provision during consideration of the economic recovery bill.

Sincerely,

William Samuel, Director  
GOVERNMENT AFFAIRS DEPARTMENT

c Julia Wise, Office of Federal Procurement Policy  
Albert Matera, Office of the Chief Acquisition Officer, United States General Services Administration  
Linda Neilson, Defense Procurement and Acquisition Policy, United States Department of Defense

**Comments from the AFL-CIO Regarding the Implementation of the Buy America  
Provision for Iron, Steel and Manufactured Goods in the American Recovery and  
Reinvestment Act of 2009  
March 4, 2009**

**EXECUTIVE SUMMARY**

The Office of Management and Budget (OMB) will soon issue interim regulations to all federal agencies on the implementation of the American Recovery and Reinvestment Act of 2009 (2009 Act), including the Buy America requirement that involves the use of iron, steel and manufactured goods made in the United States.<sup>1</sup> OMB has an obligation to implement this provision fully and faithfully and should rely on existing federal law and well-established precedent,<sup>2</sup> discussed below, as Congress did in fashioning the provision, to fulfill that obligation.

First and foremost, OMB should ensure that the interim regulations effectively implement the 2009 Act's requirements fully covering all federal, state or local public buildings or public works projects which may be constructed, altered, maintained or repaired with monies provided under the 2009 Act. As reflected in the 2009 Act, coverage should also include all contracts and grants. In addition, OMB should adopt a strict application of the two-part test developed under the Buy American Act of 1933 for determining whether a "manufactured good" is made in the United States. It should rely on the long-standing definition of "iron and steel" developed by the Department of Transportation over many decades to determine if iron and steel are produced in the United States. While a more rigorous standard for "manufactured goods" may be appropriate, it is also important that interim regulations be put into place quickly. Strict adherence to these well-developed precedents will ensure predictability and prevent confusion, undue burden or delay in implementation of this much-needed stimulus.

Importantly, in issuing interim regulations OMB must provide greater transparency of the waiver process to avoid abuse. The waiver process has been shrouded in secrecy, and waivers have

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<sup>1</sup> Section 1605 of the 2009 Act requires that, with enumerated exceptions (which mirror the 1933 Buy American Act, except for the cost exception threshold), all stimulus funding for the construction, alteration, maintenance, or repair of a public building or public work use iron, steel and manufactured goods in the project that are produced in the United States.

<sup>2</sup> Domestic-sourcing laws have been in existence since 1933. After a seismic economic collapse led to the Great Depression, the Buy American Act was enacted in FDR's New Deal to stimulate the domestic economy and requires that materials and goods produced in the United States be used in federal procurements for public use. See: 41 U.S.C. § 10a et. seq. ("1933 Act"). From the outset, exceptions for unavailability, unreasonable cost, and the public interest were part of the 1933 Act. Beginning in the early 1980s, specific "Buy America" statutes were enacted to apply the preference to federal *grants* to state and local governments mainly for highway, mass transit, and rail and airport projects under the jurisdiction of the Department of Transportation.

been granted under suspect interpretations or have been deliberately misused.<sup>3</sup> Providing real-time transparency, which would be in keeping with the President's commitment to improve transparency and accountability in the spending of taxpayer dollars will help to curb some of this abuse. This could be accomplished by requiring that detailed *requests* for waivers from federal agencies and state and local governments (to the relevant federal agency) be posted on the website established to track stimulus spending at [www.recovery.gov](http://www.recovery.gov).

Finally, with regard to the effect of international trade agreements on the implementation of the Buy America provision, there has been much hyperbolic rhetoric from opponents of sensible national policy. It is entirely rational for governments to take steps to ensure that their own stimulus funding (undertaken in extraordinary times and incurring future debt) has the intended effect of stimulating national economic growth. Of course, the United States should implement this Buy America rule, as it always has in the past, in full compliance with its obligations under international trade agreements and subject to a strict interpretation of our obligations, including any derogations that have been taken.

OMB's interim regulations should make clear that no waivers are to be granted if there has been no reciprocal agreement under existing international trade agreements. Countries that have made no legal commitments have no legitimate expectation to preferential access to our procurement market. Giving them such access could encourage them to under-stimulate their own economies and "free-ride" on the United States, which is taking appropriate measures. Many countries that have refused to take on such reciprocal obligations have domestic-sourcing policies for their own stimulus spending.<sup>4</sup>

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<sup>3</sup> We note that stimulus-funded projects using U.S. made goods will not necessarily be more expensive, as generally there is competition among U.S. companies within industries, and anti-trust laws prohibit price-fixing and collusion. Likewise, there is also a cost cap in the 2009 Act's Buy America provision to prevent price gouging. The purpose of the stimulus of creating jobs and stimulating domestic demand is greatly enhanced by applying the Buy America preference and thus far outweighs some additional cost.

<sup>4</sup> For example, China has its own domestic-sourcing policies, which USTR repeatedly has described in the annual National Trade Estimate.

## OMB MUST ISSUE INTERIM REGULATIONS THAT FULLY IMPLEMENT THE INTENT OF CONGRESS

The Buy America provision for the use of iron, steel and manufactured goods in the 2009 Act requires, with exception, that:

“None of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a *public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.*” (Emphasis added).

Application to State and Local Procurement re: Funding Under the 2009 Act: By its own terms, the provision at issue broadly encompasses all funds appropriated by the Act, whether such monies are spent on direct federal procurement or whether monies are provided as *grants* or otherwise made available to state and local governments for public use projects. Likewise, by the broad and unqualified language, the terms “*public building*” and “*public work*” encompass any federal, state or local government building (like a school, courthouse or police station), and any federal, state or local public work project, either of which may be constructed, altered, maintained or repaired with monies provided under the 2009 Act to state and local governments (in addition to direct procurement like the construction or repair of federal buildings). Existing Buy America statutes, which require the application of domestic sourcing for highway and mass transit projects, confirm the fact that Congress intended federal *grants* to state and local governments to be covered under the 2009 Act’s Buy America provision.<sup>5</sup> Indeed, Congress modeled it in on these existing statutes.

OMB should state clearly in its interim regulations that the Buy America provision at issue applies to any federal, state or local public building or public work project which may be constructed, altered, maintained or repaired with monies provided under the 2009 Act.

Definition of Manufactured Goods: Congress’s inclusion of the term “manufactured goods” was deliberate and intended to require that the construction, alteration, maintenance, or repair of a public building or public work with monies spent under the 2009 Act use manufactured goods produced in the United States. Although there has been some confusion surrounding this term, that confusion is largely based on a lack of understanding of existing federal domestic-sourcing laws and well-developed and long-standing interpretations that have evolved under such laws.

The Buy American Act of 1933, 41 USC 10a et. seq. (“1933 Act”), which applies to certain procurements utilizing federal funds, has a well-established interpretation of the term “manufactured good” that has evolved over several decades. Under the 1933 Act, the focus is on the country of origin of the “end product” procured, and a two-part test is used to determine if

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<sup>5</sup> For example, the Buy America statutes relating to mass transit projects and highway projects state that *grants* provided to the states for mass transit and highways are to be used to purchase iron, steel and manufactured goods produced in the United States. 23 U.S.C. § 313; 49 U.S.C. § 5323(j).



the end product is a domestic end product.<sup>6</sup> The first part involves determining if the end product is “manufactured” in the United States. A substantial transformation test is used to determine if an end product is manufactured by examining if the end product results from a process that changes it substantially from the components or inputs that went into manufacturing that end product (e.g., log into lumber product). Under the second part of the test, the cost of domestic components must exceed 50 percent of the cost of all the components for the end product to be considered manufactured in the United States. Only tangible costs should be calculated in determining whether the domestic content exceeds 50 percent of the cost of all components, and inconsequential costs and intangible costs (like intellectual property) should not be used to manipulate the results so that a product is deemed to be made in the United States when a strict application of the test would show otherwise.

For monies spent under the 2009 Act, the 1933 Act is a well-grounded and workable precedent developed over several decades that provides predictability and will not result in confusion or delay. During Congressional consideration of the 2009 Act, it was clear that this was the intent of Congress in enacting this provision. OMB should adhere to it in issuing interim regulations for determining whether “manufactured goods” under the 2009 Act are produced in the United States.

Definition of Iron and Steel: The 2009 Act expressly includes “iron and steel” in the text of the Buy America provision. Congress’s intent also was deliberate and obvious – to require (with enumerated exceptions) that iron and steel produced in the United States be used in the construction, alteration, maintenance or repair of any public building or public work funded under the 2009 Act. The terms “iron” and “steel” have been defined and interpreted in existing Buy America statutes beginning in the early 1980s. Steel will be deemed to be produced in the United States if it is melted and poured in a blast or arc furnace in the United States. Under this definition steel sheet, for example, made from slab produced outside the United States would not be considered steel produced in the United States. More specifically, the Federal Highway Administration, which has been applying a Buy America provision since the 1980s, requires that “all manufacturing process of steel material (*i.e.*, smelting, and any subsequent process which alters the steel material’s physical form or shape or changes its chemical composition) must occur within the United States to be considered of domestic origin.”<sup>7</sup> Similarly, the Federal Transit Agency’s regulations provide that all steel and iron manufacturing processes, including melting and pouring, must take place in the United States (except metallurgical processes involving refinement of steel additives). 49 C.F.R. 661.5.

OMB should adhere to this well-established interpretation as developed by the Department of Transportation over several decades and rely on that body of law and precedent in issuing interim regulations for monies spent under the 2009 Act.

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<sup>6</sup> An “end product” refers to the product procured that will be used in constructing, altering, maintaining or repairing a public building or a public work project (e.g. construction-grade steel; concrete). See e.g., *S.J. Amoroso Const. Co., v. U.S.*, 12 F.3d 1072 (Fed. Cir. 1993).

<sup>7</sup> *Headquarters Memorandum Dated July 6, 1989*; Subject: Buy America Requirements provides guidance concerning Buy America  
<http://www.fhwa.dot.gov/programadmin/contracts/070689.cfm>.

Transparency for Waiver Requests: As noted above, exceptions are enumerated in the 2009 Act's Buy America provision that essentially mirror existing federal Buy America laws (e.g., product not reasonably available in the United States). Such exceptions permit federal agencies to waive the Buy America requirement and let the state or local government contract for materials and goods made overseas. However, the waiver process has not been adequately transparent and over the years (under existing law) has been subject to loose interpretations or misuse that have resulted in granting unjustified waivers to the detriment of our domestic workers and industries. OMB must ensure that no waivers are granted without adequate basis for stimulus monies provided under the 2009 Act, which would undermine the intention of the stimulus to create jobs in the United States to spur national economic growth.

A simple but effective way to accomplish this would be to create real-time transparency. This can be done by requiring in OMB's interim regulations that all requests for waivers by federal agencies and state and local governments be posted on the Internet website established to monitor spending under the 2009 Act (at [www.recovery.gov](http://www.recovery.gov)) by the relevant federal agency within five days of receipt of the waiver request. Such waiver requests must be in sufficient detail so that the public will know what precisely is being requested and why. This is in keeping with the Administration's strong commitment to the highest level of transparency and accountability so that the public can track how taxpayer dollars are spent to stimulate domestic demand and create jobs here in the United States. Requiring the posting of waiver requests in real-time would be the best means to ensure that the Buy America provision is administered fully and effectively, as intended by Congress.

Granting of Waivers re: Obligations Under Existing International Trade Agreements: Implementation of this Buy America rule in compliance with our obligations under international trade agreements should be subject to strict interpretation of our obligations under such trade agreements, including the numerous derogations that have been taken by the United States and other countries. These are reciprocal commitments and thus no unilateral concessions should be given with regard to the spending of taxpayer dollars under the 2009 Act.

OMB should enunciate in its interim regulations that iron, steel and manufactured goods from countries that do not share these obligations under existing international trade agreements should not be considered for any waivers.