

## New Executive Order Seeks to Expand Buy American Requirements Imposed on Federally Funded Infrastructure Projects

February 4, 2019

### Key Points

- On January 31, 2019, President Trump signed an executive order that directs federal departments and agencies to take steps to encourage recipients of federal financial assistance for a broad range of infrastructure projects to use goods, products and materials in those projects that, to the greatest extent practicable, are produced in the United States.
- The executive order requires federal department and agency heads to take the following actions: (1) within 90 days, encourage grant recipients to use, to the greatest extent practicable, U.S.-produced goods, products and materials in every contract, subcontract, purchase order or subaward chargeable against the federal financial assistance for the infrastructure project; and (2) within 120 days, submit a report to the President identifying approaches that have been, or could be, used, consistent with law, to maximize the use of U.S.-produced goods, products and materials in federally funded infrastructure projects and addressing whether requirements to use U.S.-produced goods, products and materials could be imposed on new federal financial assistance awards.
- The executive order applies Buy American requirements to iron and aluminum as well as steel, cement and other manufactured products.
- The executive order does not change existing law, but directs federal departments and agencies to expand or impose Buy American requirements where they can do so consistent with law and international treaties.

On January 31, 2019, President Donald Trump signed an [executive order](#)<sup>1</sup> building on his promise to “[revitalize American manufacturing](#)” by seeking to expand the types of infrastructure projects subject to Buy American requirements and the goods, products

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<sup>1</sup> The executive order uses the term “Buy American” to refer to the purchase of U.S.-manufactured products. This would encompass the requirements in federally funded transportation projects that are typically referred to as “Buy America” restrictions.

and materials that must be produced in the United States. The executive order builds on [Executive Order 13788](#), which President Trump signed on April 18, 2017. Executive Order 13788, among other things, directed federal agencies to report to the President on proposed policies to ensure that, to the extent permitted by law, federal financial assistance awards and federal procurements maximize the use of materials produced in the United States.

This latest executive order directs federal agencies to “encourage” “recipients of new federal financial assistance awards under a “covered program” to use, to the greatest extent practicable, domestic iron, aluminum, steel, cement and other manufactured products produced in the United States in every contract, subcontract, purchase order or subaward that is chargeable against such federal financial assistance award. The executive order also requires federal agencies to report to the President on any “tools, techniques or conditions” that have been, or could be, used, consistent with law, and in furtherance of the policy set forth in the executive order to maximize the use of U.S.-produced goods, products and materials in infrastructure projects that receive federal financial assistance.

The executive order defines “covered program” as a program that provides federal financial assistance to develop “infrastructure projects.” The executive order defines “infrastructure project” to include surface transportation (e.g., roadways, bridges, railroads and transit); aviation; ports; water resources; energy production, generation and storage; electricity transmission; electric, oil, natural gas and propane distribution systems; broadband Internet; pipelines; stormwater and sewer; drinking water infrastructure; cybersecurity; and any other sector designated by the Federal Permitting Improvement Steering Council. The executive order defines “manufactured products” as “items and construction materials composed in whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.”

Keeping in mind that the executive order must be interpreted consistent with current law, it raises several issues worthy of note:

## **Increasing the types of projects covered by Buy American requirements**

Some of the infrastructure projects listed in the executive order do not typically receive federal grants or loans, including pipelines, energy production and distribution, broadband Internet and cybersecurity. In the event that the President’s proposal to provide federal grants or loans to these types of projects comes to fruition, either Congress could impose Buy American requirements in law or the agencies, pursuant to this new executive order, could seek to impose requirements to the extent that they can do so under their legal authority. It is worthy of note that the 2009 America Recovery and Reinvestment Act, known as the “Recovery Act” (Section 1605 of Pub. L. 111-5), which provided federal grants and loans for a broad range of infrastructure projects, required that all iron, steel and manufactured goods used in projects funded by the Recovery Act for the construction, alteration, maintenance or repair of a public building or public work be produced in the United States, with some exceptions.

## **Increasing restrictions on projects already covered by Buy American restrictions**

Buy American requirements already apply in some respects to transportation-related infrastructure projects, including roads and bridges, public transportation, airport and rail, and to Environmental Protection Agency-administered water infrastructure loans. The programs vary in terms of the goods, products and materials subject to the Buy American requirement and, if manufactured products must be produced in the United States, what elements of the product must be made in the U.S. and what manufacturing or assembly must occur in the United States.

The executive order requires federal departments and agencies to broaden the types of goods, products and materials that must be produced in the United States. For example, the Federal Highway Administration (FHWA) previously determined through rulemaking that its statutory obligation to ensure that steel, iron and manufactured products used in federally funded projects are produced in the U.S. should, in the public interest, not apply to manufactured products. In response to the executive order, FHWA could decide that the public interest now requires it to apply Buy American requirements to all manufactured products, driving up the cost of highway construction projects. This presumably could be done within the agency's discretion. In contrast, the Federal Transit Administration's (FTA) statute allows recipients of federal funds to buy rolling stock that includes some percentage of foreign-made components and other manufactured products that include only foreign-made subcomponents. FTA could apply its tests to determine compliance with these requirements more strictly. FHWA and other agencies may go through the rulemaking process to expand Buy American requirements recognizing that certain changes may require a change in law. As a new tool, technique or condition, federal agencies may, rather than impose absolute requirements for U.S.-produced products, elect to make the use of U.S.-produced goods, products and materials a selection factor in awarding discretionary grants, also driving up project costs and forcing project sponsors to decide whether securing federal funds is worth the added project cost.

## **Impetus for new legislation**

Given the recent focus on prioritizing domestic manufacturing, this latest executive order could serve as an impetus for Congress to impose enhanced or new Buy American requirements in law. Recipients of federal financial assistance should be aware of these evolving Buy American requirements as should producers and manufacturers of goods, products and materials that are used in infrastructure projects, since it will be critical to understand the types of goods, products and materials that are subject to Buy American requirements; the rules around determining whether a manufactured product is considered U.S.-manufactured; and the rules around waivers of Buy American requirements.