



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

June 11, 2021

M-21-26

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Shalanda D. Young  
Acting Director

A handwritten signature in black ink that reads "Shalanda D. Young".

SUBJECT: Increasing Opportunities for Domestic Sourcing and Reducing the Need  
for Waivers from Made in America Laws

On January 25, 2021, the President signed Executive Order 14005, *Ensuring the Future is Made in All of America by All of America's Workers* (the Executive Order). This Executive Order aims to help American businesses compete in strategic industries and ensure America's workers thrive. It contemplates a series of actions to enable the United States Government to maximize its use of goods, products, and materials produced in, and services offered in, the United States. These actions include, among other things, requiring the Office of Management and Budget (OMB) to establish the Made in America Office (MIAO). The MIAO will provide greater oversight of waivers from Made in America Laws,<sup>1</sup> thus increasing consistency and public transparency of such waivers. The Executive Order also directs the Federal Acquisition Regulatory Council (FAR Council) to consider strengthening applicable Made in America provisions in the Federal Acquisition Regulation (FAR).

The MIAO aims to increase reliance on domestic supply chains and reduce the need for waivers through a strategic process aimed at: achieving consistency across agencies; gathering data to support decision-making to make U.S. supply chains more resilient;<sup>2</sup> bringing increased transparency to waivers in order to send clear demand signals to domestic producers; and

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<sup>1</sup> The Executive Order defines "waiver" to include exceptions and waivers under applicable Made in America Laws. This memorandum often uses the term "waiver" generally to include both exceptions to the Buy American Act, waivers under the Jones Act, and other determinations under Made in America Laws unless noted otherwise.

<sup>2</sup> Data gathering will be informed, in part, by the results of supply chain reviews conducted pursuant to Executive Order 14017, *America's Supply Chains* (Feb. 24, 2021). In addition, as explained in this guidance, the MIAO seeks to gather data using a variety of approaches to support policy decisions to maximize the use of goods, products, and materials produced in, and services offered in, the United States – including product class reviews, agency analyses of waiver activity, discussions with SAOs, and reviews covering specific transactions (e.g., a direct Federal procurement for products or construction materials subject to the BAA).

concentrating efforts on changes that will have the greatest impact. Together, these four principles will, over time, increase U.S.-made content and limit the use and impact of waivers.

Consistent with these principles, this memorandum provides initial guidance to covered agencies<sup>3</sup> (agencies) regarding the MIAO's implementation of the Executive Order. This memorandum contemplates a phased implementation approach to allow the MIAO to build capacity and to give agencies time to adjust to new processes. The areas of implementation addressed in this guidance include:

(1) Senior Accountable Officials. To facilitate implementation of these and other actions contemplated by the Executive Order, this memorandum requires agencies to designate a Senior Accountable Official (SAO) for domestic sourcing. The SAO will coordinate with the Made in America Director to implement a holistic approach to advance the policy set forth in Section 1 of the Executive Order, including by working to increase opportunities for U.S. manufacturing and reduce waivers.

(2) Agency reports. This memorandum describes the required elements of the initial and semi-annual reports on use of Made in America Laws that agencies are required to submit pursuant to Sections 11 and 12 of the Executive Order.

(3) Agency-OMB waiver review process. Pursuant to Section 4 of the Executive Order, this memorandum publishes a list of information that agencies must include when submitting proposed waivers to the Made in America Director for review and a deadline by which the Director of OMB, through the Made in America Director, will waive each review or notify the head of the agency of the result of the review.

(4) Waiver transparency. Pursuant to Section 6 of the Executive Order, this memorandum outlines initial steps toward development of a public website that shall include information on all proposed waivers to Made in America Laws and whether those waivers have been granted.

Greater management attention to strategies that incentivize domestic manufacturing investment and centralized management of waivers will send a strong demand signal to industry, thereby incentivizing enhanced domestic production activity and investment in domestic supply chains. As stated above, agencies should take a holistic approach to implementing the Executive Order, including by addressing how they will minimize waivers to all Made in America Laws. As soon as SAOs are identified, the MIAO will begin meeting with them to discuss management strategies to avoid and limit the need for waivers and to review the results of actions taken since issuance of the Executive Order.

During the summer of 2021, the MIAO will begin working with SAOs to develop and refine the process and scope for transactional<sup>4</sup> reviews that meet the principles described above

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<sup>3</sup> A covered agency for purposes of this memorandum is an "agency" as defined in section 3502(1) of title 44, United States Code that is not an "independent regulatory agency" as defined in section 3505(5) of title 44, United States Code.

<sup>4</sup> A "transactional review," for purposes of this memorandum, is a review of a waiver covering specific a business transaction (e.g., a direct federal procurement for products or construction materials subject to the Buy American Act). As explained in this memorandum, the MIAO intends to gather a variety of data to support decision-making to

without unduly delaying agency decisions. The waiver process will be phased-in, beginning with an initial phase of transactional reviews. The initial phase of transactional reviews includes Jones Act waivers and non-availability procurement waivers proposed by the 24 agencies subject to the Chief Financial Officers Act<sup>5</sup> (CFO Act) pursuant to the Buy American Act (BAA). As it conducts these initial transactional reviews, the MIAO will work with SAOs to develop and refine a process to review additional waivers that are not part of the initial phase of transactional reviews (e.g., additional types of waivers, waivers proposed by non-CFO Act agencies) in the first quarter of fiscal year (FY) 2022, as well as to maximize opportunities to promote domestic sourcing.

The MIAO will also confer with the General Services Administration to develop the public website required by Section 6 of the Executive Order. The public website is expected to be functioning by early FY 2022 and will include the results of initial waiver reviews completed before website construction is completed. Transparent reporting of waivers from Made in America Laws will not only build confidence that these laws are operating as intended, but also provide data to inform policy development and strategic decision-making.

Taking agency input into account, the MIAO will provide further details to agencies prior to implementation of expansions or revisions of the waiver review process, including the processes for waiver transparency. Additional information is provided in the Attachment.

Questions regarding this Memorandum should be sent to the MIAO at [MadeInAmerica@omb.eop.gov](mailto:MadeInAmerica@omb.eop.gov).

Attachment

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make U.S. supply chains more resilient, including product class reviews, agency analyses of their waiver activity, discussions with SAOs, and transactional reviews.

<sup>5</sup> 31 U.S.C. § 901.

## Reducing the Need for Waivers from Made in America Laws

Section 4 of the Executive Order requires the Made in America Office (MIAO) to update and centralize the Made in America waiver process. Sections 11 and 12 of the Executive Order require agencies to report to the MIAO on their compliance with Made in America Laws and suggestions for maximizing use of U.S.-made products and construction materials. Section 6 of the Executive Order requires prompt publication of proposed waivers.

The MIAO will take a strategic approach to increasing reliance on domestic supply chains and reducing the need for waivers over time. This approach will include the phase-in of a waiver review process, with an initial focus on Jones Act waivers and non-availability procurement waivers pursuant to the Buy American Act under Federal procurements.

This renewed emphasis on Made in America Laws is to serve as a key facet in a broader economic strategy to increase U.S. productivity and global competitiveness, as well as the resiliency of our manufacturing base to market volatility and manipulation. Moreover, it recognizes that foreign near-peer competitors are increasingly creating and exploiting economic vulnerabilities in gaining undue influence over the global transportation system, which provides the access to worldwide supply chains that supports our national defense, vital emergency services, critical infrastructure, economy, and way of life.

### **Background**

As defined in section 2(b) of the Executive Order, “Made in America Laws” include all statutes, regulations, rules, and Executive Orders relating to Federal procurement or Federal financial assistance, including those that refer to “Buy American” or “Buy America” that require, or provide a preference for, the purchase or acquisition of goods, products, or materials produced in the United States, including iron, steel, and manufactured goods offered in the United States. Made in America Laws include laws requiring domestic preference for maritime transport, including the Merchant Marine Act of 1920 (Pub. L. No. 66-261), also known as the Jones Act, and the Cargo Preference Acts of 1904 and 1954.

A number of key Made in America Laws are described below.

*Buy American Act (BAA)* – The BAA<sup>6</sup> is the primary law in Federal procurement providing a preference for domestic goods and manufactured products. The BAA and implementing regulations in the FAR provide a two-part test for determining if a product qualifies as a domestic end product: (i) the item must be manufactured in the United States, and (ii) more than 55 percent of the cost of all the component parts is also manufactured in the United States.<sup>7</sup> The FAR provides various waivers and exceptions to the BAA:

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<sup>6</sup> 41 U.S.C. §§ 8301-8303.

<sup>7</sup> The 55 percent content threshold applies to items that do not consist wholly or predominantly of iron or steel or a combination of both. For items that do consist wholly or predominantly of iron or steel or a combination of both, the component test requires that the cost of foreign iron and steel constitutes less than 5 percent of the cost of all the components used.

- (1) Inconsistent with the public interest – domestic preference conflicts with the public interest; this exception applies in circumstances where an agency has an agreement with a foreign government that provides a blanket exception to the Buy American Act.<sup>8</sup> The Department of Defense (DOD) uses this authority, in part, to waive the BAA for reciprocal agreements that promote rationalization, harmonization, and standardization of defense equipment with allied forces and with allied and friendly governments.<sup>9</sup>
- (2) Domestic non-availability – articles, materials, or supplies are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities and of a satisfactory quality.<sup>10</sup> There are two types of non-availability determinations: class determinations (for specified articles listed in FAR 25.104)<sup>11</sup> and individual determinations.<sup>12</sup>
- (3) Unreasonable cost – the price of the domestic end product is higher than the price of a foreign end product by 30 percent if offered by small business or 20 percent if offered by other than a small business in a civilian agency acquisition, or 50 percent in a Defense Department acquisition.<sup>13</sup>
- (4) Resale by Commissary – the acquisition is specifically for commissary resale.<sup>14</sup>
- (5) Information technology (IT) that is a commercial item – acquisitions for commercial IT are statutorily exempt from requirements of the BAA.<sup>15</sup>
- (6) Application of the Trade Agreements Act (TAA) – for certain goods, services, and construction contracts that exceed certain thresholds,<sup>16</sup> procuring agencies must treat products and suppliers from designated countries, including countries that are party to the World Trade Organization Agreement on Government Procurement (GPA), a U.S. Free Trade Agreement (FTA), or certain least developed countries,<sup>17</sup> the same as they would treat a U.S. product or supplier (i.e., waive Made in America preferences).

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<sup>8</sup> Federal Acquisition Regulation (FAR), 48 C.F.R. § 25.103(a).

<sup>9</sup> See Defense FAR Supplement (DFARS), 48 C.F.R. § 225.872.

<sup>10</sup> FAR § 25.103(b).

<sup>11</sup> FAR § 25.103(b)(1).

<sup>12</sup> FAR § 25.103(b)(2).

<sup>13</sup> FAR § 25.103(c); contracting officers have discretion to impose the use of higher factors upon written determination that use of a higher factor is appropriate to the circumstances. See FAR 25.105(a)(1).

<sup>14</sup> FAR § 25.103(d).

<sup>15</sup> FAR § 25.103(e).

<sup>16</sup> As of May 24, 2021, the threshold is \$182,000 for goods or services procured by the Federal Government in the Government Procurement Agreement (GPA). Different thresholds may apply to obligations under other trade agreements; construction contracts; and procurement by other entities (e.g., the Tennessee Valley Authority). The thresholds are subject to change, depending on formulas expressed in each agreement. Covered products and entities may vary by agreement. See FAR § 25.401 for services not subject to the TAA. More information on GPA obligations can be found at the World Trade Organization's Integrated Government Procurement Market Access Information (e-GPA) Portal. World Trade Organization, <https://e-gpa.wto.org/en/Appendix/Details?Agreement=GPA113&Party=UnitedStates> (last visited June 9, 2021).

<sup>17</sup> FAR § 25.402(a)(1).

In addition, the component content test of the BAA is waived for some commercial off-the-shelf (COTS) products.<sup>18</sup> The BAA is not applicable to purchases at or below the micro-purchase threshold (currently \$10,000 for most acquisitions, but see FAR § 2.101) or to procurements for use outside of the United States.

*Berry Amendment* – The Berry Amendment<sup>19</sup> requires the DOD to purchase food, clothing, fabric, hand or measuring tools, flags and stainless-steel flatware and dinnerware that are grown, reprocessed, reused, or produced in the United States. The statute contains several exceptions to the prohibition, including: the domestic non-availability of products, purchases below the simplified acquisition threshold, and procurement of food and tools outside of the United States in support of contingency operations. Additional exceptions are provided for items purchased for resale in commissaries; chemical warfare protective clothing as part of an agreement with foreign countries; procurements by vessels in foreign waters; and emergency procurements by, or for, an establishment located outside the United States for the personnel attached to such establishment.

*Kissell Amendment* – The Kissell Amendment,<sup>20</sup> passed as part of the American Recovery and Reinvestment Act, applies many of the same restrictions of the Berry Amendment to goods directly related to the national security interest purchased by the Department of Homeland Security (DHS). The Amendment generally restricts the DHS from procuring certain textiles and fabrics that are not grown, reprocessed, reused, or produced in the United States. The statute contains several exceptions to the prohibition, including the domestic non-availability of products, purchases below the simplified acquisition threshold, procurement by vessels in foreign waters, and emergency procurements.

*Jones Act* – The Merchant Marine Act of 1920,<sup>21</sup> generally provides that no merchandise may be transported between points in the United States to which coastwise laws apply, either directly or via a foreign port, in any vessel unless it is U.S.-built, U.S.-owned, and documented with a coastwise endorsement by the U.S. Coast Guard.<sup>22</sup> A Jones Act waiver is available in limited circumstances where the waiver is in the interests of national defense.<sup>23</sup> The Secretary of Defense may request that DHS issue a waiver only to “the extent the Secretary considers necessary in the interest of national defense to address an immediate adverse effect on military operations.”<sup>24</sup> The Secretary of Homeland security may also approve a waiver if the Secretary considers it “necessary in the interest of national defense” and following a determination by the Maritime Administrator of the non-availability of coastwise-qualified vessels.<sup>25</sup> However, a waiver initiated by the Secretary of Homeland Security only lasts for 10 days and extensions may only occur in increments of 10 days, with an aggregate duration not to exceed 45 days.<sup>26</sup>

*Cargo Preference Acts of 1904 and 1954* – Under the Cargo Preference Acts, 100 percent

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<sup>18</sup> FAR § 25.101(a)(2)(i).

<sup>19</sup> 10 U.S.C. § 2533a.

<sup>20</sup> 6 U.S.C. § 453b.

<sup>21</sup> 46 U.S.C. § 50101

<sup>22</sup> 46 U.S.C. § 55102.

<sup>23</sup> 46 U.S.C. § 501.

<sup>24</sup> 46 U.S.C. § 501(a).

<sup>25</sup> 46 U.S.C. § 501(b)(1).

<sup>26</sup> 46 U.S.C. § 501(b)(2).

of all supplies bought for the DOD,<sup>27</sup> and at least 50 percent of all equipment, materials, or commodities purchased or financed by non-DoD entities<sup>28</sup> with Federal funds, must be carried on privately-owned, U.S.-flag commercial vessels when transported to and from international destinations. This reservation of cargo opportunities is necessary for the U.S. to encourage and aid the development and maintenance of an American merchant fleet (and mariner base) sufficient to carry our waterborne domestic commerce and a substantial part of our international trade at all times, and to serve as a naval and military auxiliary in time of war or national emergency.<sup>29</sup> Vessels suitable for carriage of cargoes under these acts must be U.S.-flag, -crewed, and -owned, although they need not be constructed in the U.S.

*Buy America Laws applicable to Federal Financial Assistance* – There is no overarching statute that applies Buy American provisions government-wide for Federal financial assistance; however, there are a number of statutes that expressly require preference for the purchase or acquisition of goods, products, or materials produced in the United States. These requirements differ in law and regulation according to the specific authorizing and appropriation statutes. For example, the Department of Transportation’s Federal Transit Administration’s grant-making authority requires that the steel, iron, and manufactured goods used in the project are produced in the United States.<sup>30</sup>

### **Initial actions**

Agencies must take the actions described below to strengthen internal agency waiver review processes, prepare for and support a centralized strategic waiver review process at the MIAO, and increase reliance on domestic manufacturers and domestic vessels.

A. Designate a senior accountable official (SAO) for domestic sourcing. By June 30, 2021, each agency must designate an SAO for domestic sourcing who is at a sufficiently senior level, such as Assistant Secretary for Management, to direct the agency’s management activities regarding the implementation of Made in America Laws, as defined in the Executive Order. SAOs may assign or delegate operational responsibilities to a position that is appropriate to the agency’s organizational structure. The SAO will be responsible for identifying opportunities to increase the agency’s reliance on U.S. products, materials, and services as appropriate (e.g., through Federal procurement, Federal assistance, coastwise trade laws). These actions include conducting supplier scouting with the Department of Commerce’s Manufacturing Extension Partnership (MEP) to identify U.S.-based companies that produce U.S.-made goods, participating in inter-agency product level reviews to explore new domestic sourcing opportunities, strengthening agency waiver processes, managing a waiver reduction strategy, and meeting regularly with the Made in America Director to discuss progress on limiting the need for waivers and to share ideas for strengthening Made in America policies and practices. The name, title, and contact information for the SAO must be sent to the MIAO at [MadeInAmerica@omb.eop.gov](mailto:MadeInAmerica@omb.eop.gov).

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<sup>27</sup> 10 U.S.C. § 2631(a)

<sup>28</sup> 46 U.S.C. § 55305(b); includes foreign military sales financed and managed by DOD.

<sup>29</sup> 46 U.S.C. § 50101

<sup>30</sup> 49 U.S.C. § 22905(a)(1).

B. Support product category reviews for Federal procurement. The MIAO and the OMB Office of Federal Procurement Policy will convene agencies to explore market conditions for product categories where non-availability determinations are most prevalent. The product reviews will leverage category management, where agencies share market intelligence to surface common challenges and coordinate potential procurement strategies for going to market together as an organized entity and stimulating industry interest in domestic sourcing.

C. Standardize waiver information. The SAO and MIAO's ability to identify successful strategies for meeting requirements through domestic channels requires a clear understanding of why the agency requires the waivers. As such, agencies must include the following information in proposed non-availability and Jones Act waivers. As discussed above, only waivers from CFO Act agencies will be included in the initial phase, but all types of waivers from all covered agencies will be included when the review process is fully implemented. Further guidance will be developed with input from agencies and published by OMB as the phased-in implementation progresses.

1. Information for proposed non-availability waivers. The following information should be reflected in proposed non-availability waivers:
  - a. *Identification of agency and contracting activity.* Identify the agency, contracting activity, and program (requirements) office.
  - b. *Nature and/or description of end item or construction material being acquired.* Identify the item(s) being procured, including:
    - i. a description of the item(s);
    - ii. the impact to the mission if the agency is not able to acquire the item(s);
    - iii. country(ies) of origin and U.S. content (if any), of foreign end item intended for purchase, if known;
    - iv. if the waiver is to be issued pre-award,<sup>31</sup> whether the supplier of the item(s) intended for purchase is a small or disadvantaged business; and
    - v. the estimated value of the procurement (or portion of the procurement) covered by the waiver.
  - c. *Market research and outreach conducted* – describe the market research activities and methods used to identify domestically manufactured items capable of satisfying the requirement, including the timing of the research and conclusions reached on the availability of sources (e.g., sources are available but cannot offer sufficient quantity; sources are available but cannot offer sufficient quality; no

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<sup>31</sup> Requests for waivers are likely to be prepared at one of two points during the procurement process: pre-solicitation and pre-award.



sources can be identified).

- Such analysis might include a review of information on category management dashboards on the acquisition gateway, consultation with category managers, supplier scouting with supply chain experts who study domestic capabilities and market trends, such as the MEP, chambers of commerce, industry and trade associations that represent domestic suppliers, and relevant labor unions or worker organizations.
  - d. *Use of competition* – if the waiver is to be issued pre-solicitation, describe whether competition is anticipated; if the waiver is to be issued pre-award, describe whether competition was conducted and, if so, how long the solicitation was open; if domestic sources were identified during market research but did not compete, describe potential reason(s), if known.
  - e. *Expectation of price preference* – identify whether the solicitation will or did include the provision announcing the agency’s intention to provide a price preference for domestic end products and construction material.
  - f. *Exclusion of source offering a U.S.-made end product* – if a waiver is to be issued pre-award, explain if a U.S.-made end product was offered but would be rejected for reasons other than price.
  - g. *Identification of approving authority* – non-availability determinations above \$25,000 generally should be reviewed and approved at a level no lower than the head of the contracting activity.
2. Information in Jones Act Section 501 waivers requested by CFO Act agencies. CFO agencies requesting a waiver of the Jones Act from the DHS Secretary shall provide the following information to DHS in any such request, and DHS shall share this information with the Made in America Director.
- a. *Nature and/or description of the transportation required by the CFO agency.*
  - b. *Why the CFO agency cannot acquire the transportation on a Jones Act qualified vessel.*
  - c. *An explanation of why it is in the interest of national defense for the Secretary of DHS to waive the Jones act for the requested transportation, including impacts if the waiver is not granted.*
  - d. *Any additional information necessary to clarify the need for the waiver or to comply with Section 501.*

3. Information in Jones Act Section 501(b) waivers other than those requested by CFO Act agencies. Where an entity other than a CFO Act agency requests that the DHS Secretary waive the Jones Act, DHS will share the following information with the Director, MIAO:
  - a. *The request for waiver submitted by the entity.*
  - b. *The determination by the Maritime Administrator regarding the availability or non-availability of qualified United States flag capacity to meet national defense requirements, pursuant to 46 U.S.C. § 501(b)(1), (3).*
  - c. *Any actions identified by the Maritime Administrator pursuant to 46 U.S.C. § 501(b)(3)(A) that could be taken to enable United States flag capacity to meet national defense requirements.*
  - d. *Any recommendations or information provided to the Secretary by other Departments and Agencies regarding the waiver request.*
  - e. *Any notices that DHS may have made to Congress, pursuant to 46 U.S.C. §501(b)(3), prior to granting or denying a request.*
  - f. *Any additional information necessary to understand why the waiver is necessary and consistent with law.*

SAOs and agency senior procurement executives for CFO agencies shall take immediate action to ensure justifications for non-availability and Jones Act waivers reflect the content outlined above. Routinely addressing the information above will promote greater consistency across agencies in the quality of waiver determinations, improve domestic industry insight, and help the MIAO meet its goal of completing timely reviews.

Once SAOs have been designated, the MIAO will work with agencies on requirements and scope for transactional waiver reviews by the MIAO and processes for posting descriptions of proposed waivers and justifications on the public website established by the General Services Administration pursuant to section 6 of the Executive Order, consistent with national security and executive branch confidentiality interests. This website, and the transparency of decisions to waive Made in America Laws, will provide the opportunity to increase domestic sourcing as well as to promote accountability and public trust. The website will be designed to help manufacturers, resellers, and other interested parties, including potential domestic manufacturers who are not currently selling to Federal agencies, easily identify opportunities to do business in the Federal marketplace. Increased waiver transparency, supplier scouting, and data-informed decision-making will support increased access by small, disadvantaged, veteran-owned, and women-owned businesses.

The MIAO is planning for a phased implementation of its receipt and review of agency waivers. It will work with SAOs to conduct initial transactional reviews ahead of an expanded review process to proceed early in the first quarter of FY 2022. For transactional waiver reviews, the MIAO plans to complete its reviews of the majority of waivers within 3-7 business days and in not more than 15 days from submission to OMB.<sup>32</sup> The MIAO will work with agencies to develop a process and scope for waiver reviews that achieves the objectives of the Executive Order without unduly delaying agency decisions.

D. Report on Use of Made in America Laws.<sup>33</sup> By July 24, 2021, the head of each covered agency, through its SAO, must report on its use of Made in America laws, pursuant to Section 11 of the Executive Order. To the extent practicable, the report should focus on proactive steps the agency is or will be taking to strengthen and diversify existing domestic supplier bases and create new opportunities where there are gaps, consistent with the purpose and policy of the Executive Order. The report must include the following elements:

(1) The agency's implementation of, and compliance with, Made in America Laws. This part of the report should cover the management of waivers and address all types of waivers from Made in America Laws that are relevant to the agency. For example, if an agency conducts direct procurement, awards grants covered by Buy America requirements, and is involved in approving maritime transport waivers, the report should address each. The report should include the following, as appropriate:

- a. *Internal management controls* – Describe the processes used by the agency to maximize the use of domestic sources and review waivers granted by the agency, including (i) the level of official who approves waivers, (ii) workforce training (including in-service refresher training), and (iii) management reviews. For financial assistance waivers, explain the processes used by the agency to maximize compliance by recipients with applicable Made in America Laws. Describe the assistance the agency provides, if any, to identify Made in America compliant alternatives that would obviate the need for a waiver.
- b. *Conformance with waiver content requirements* – Describe the extent to which agency procurement waivers already reflect the elements outlined in paragraph C, above. For agencies that also handle financial assistance waivers, please describe the elements included in the waiver justification, if any, for grant programs with Buy America requirements. For agencies that administer Jones Act and related maritime shipping laws, please describe the elements considered in waiver justifications.

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<sup>32</sup> Section 4(b)(i)(2) of the Executive Order requires the MIAO to establish deadlines for waiver reviews at the same time that content requirements for waivers are identified. These dates may be revised after processes are developed and/or based on experience.

<sup>33</sup> Section 11 of the Executive Order requires agencies to report on compliance with Made in America Laws. The MIAO office will work with non-CFO agencies covered by the Executive Order to adjust the reporting requirements as appropriate, if necessary.

- c. *Baseline of waiver activity* –Provide a profile of the agency’s waivers reported in the Federal Procurement Data System (FPDS) in FY 2020. For agencies that also handle waivers unrelated to procurement, provide (if available) a list of such waivers granted in 2020. This section should include a brief explanation of whether and why 2020 provides a good baseline year, or suggest an alternative baseline. Explain whether non-procurement waivers are published and, if so, where they can be found.
- d. *Agency’s analysis of non-availability waivers used (if any)* – Provide a summary of the types of products and/or construction materials for which non-availability waivers are used most frequently, and, for each such category identified: (i) the agency’s analysis of the programs most affected; (ii) the cause(s) of these waivers; and (iii) the steps taken or planned to identify domestic capability for requirements, including partial fulfillment of requirements, consideration of domestically manufactured substitutes, use of supplier scouting to identify alternative sources and supply chains, and coordination with technical assistance centers that might help small and disadvantaged businesses and new entrants develop capabilities.

(2) Longstanding or Nationwide Waivers. Describe the agency’s ongoing use of any longstanding or nationwide waivers<sup>34</sup> of Made in America Laws (if any) and provide a written description of the consistency of such waivers with the policy set forth in section 1 of the Executive Order; analyze whether and how such waivers effectuate the policies enumerated in section 1 of the Executive Order and the mission of the agency; explain the plan for periodically reviewing and renewing these waivers and whether any are ripe for withdrawal.

(3) Recommendations for how to further effectuate the policy set forth in section 1 of the Executive Order, which may include, as appropriate:

- a. *Strategic planning activities* – Actions taken or planned by the agency to identify untapped domestic manufacturing potential or strategies to close gaps through consultation with category managers and supply chain experts who study domestic capabilities and market trends such as the MEP, chambers of commerce, industry and trade associations that represent domestic suppliers, and relevant labor unions or worker organizations;
- b. *Critical requirements* – Actions taken or planned to identify manufacturing gaps for critical products and procurement and or financial assistance strategies for closing them;
- c. *Interagency and inter-governmental activities* – Sponsorship or participation in government-wide, interagency, multi-agency, or inter-governmental efforts to

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<sup>34</sup> Such as the 1983 Federal Highway Administration (FHWA) waiver exempting manufactured products other than steel and cement from Buy America requirements, 48 FR 53099. Congress later modified the Buy America statute to repeal coverage of cement (Pub. L. 98-229, Section 10 (1984)) and add coverage for iron (Pub. L. 102-240, Section 1048(a) (1991)).

share market intelligence, surface common challenges, collaborate on potential procurement strategies for stimulating industry interest in domestic sourcing and going to market as organized entities;

- d. *Building U.S. manufacturing competitiveness using financial assistance* – Actions to leverage financial assistance programs to strengthen U.S. manufacturing capabilities and capacity, such as through the administration of grants for apprenticeships or economic development initiatives, or by increasing focus on domestic sourcing through updated Notices of Funding Opportunities or award terms and conditions;
- e. *Recommendations for purchase card buys* – Actions that might increase Federal buys of U.S.-made products on the open market; and
- f. *Other recommendations to strengthen application of Made in America laws* – Information and ideas to help inform ongoing efforts to make Made in America Laws more impactful to helping American businesses compete in strategic industries and helping America's workers thrive.

(4) The status and outcome of the agency's review pursuant to section 3 of the Executive Order, including:

- a. Whether the head of the agency has proposed to suspend, revise, or rescind any agency actions inconsistent with the policy set forth in section 1 of the Executive Order; and
- b. Whether the head of the agency has proposed any additional agency actions to enforce the policy set forth in section 1 of the Executive Order.

Reports shall be submitted to the following [MAX Collect Page](#) no later than July 24, 2021. Prior to this date, SAOs will be invited to meet with the Made in America Director to discuss their agency's progress.

E. Updated Reports on Made in America Laws. Semi-annually, beginning January 23, 2022, agencies must update their reports to address ongoing efforts to grow U.S. manufacturing and comply with Made in America Laws. The update must address any changes to the information in the initial report, including by describing new or revised processes and plans, as well as:

- (1) The agency's ongoing implementation of, and compliance with, Made in America Laws – including progress in limiting the use of waivers, and specific actions taken to reduce non-availability waivers (and for the first semi-annual report submitted in a fiscal year, a specific analysis of results against prior year's activity);

- (2) The agency's analysis of goods, products, materials, and services not subject to Made in America Laws (e.g., procurements for use outside the U.S.) or where requirements of the Made in America Laws have been waived;
- (3) The agency's analysis of spending as a result of waivers issued pursuant to the Trade Agreements Act of 1979, as amended, 19 U.S.C. 2511, separated by country of origin, where information is available; and
- (4) Recommendations for how to further effectuate the policy set forth in section 1 of the Executive Order, including planned agency actions and initiatives.

Report updates, which are required to be submitted to the [MAX Collect Page](#), must satisfy the requirements of section 12 of the Executive Order. Required contents of report updates, with adequate notice, may be revised by the MIAO.

F. Promoting Transparency in Federal Procurement. The Director of OMB, through the Made in America Director, will work with the Administrator of the General Services Administration on the development of a public website that will include information on all proposed waivers and whether those waivers have been granted, with an aim to have the website fully functional in early FY 2022.

#### **Additional planned actions related to waivers**

A. Waivers for unreasonable cost. The MIAO seeks to better understand the relative competitiveness of domestic sources in Federal competitions where foreign end-products and construction materials were acquired. This insight may help to inform a more strategic application of price preferences in the future. The MIAO will work with agencies on a process to share information regarding the differential between the price paid and the price offered by the domestic source that was most competitive.

B. Waivers for commercial information technology. As explained above, acquisitions of commercial IT are exempt by statute from the requirements of the BAA. Section 10 of the Executive Order requires a review of the impact of this exception, which has been in effect for more than 15 years. As part of this review, the MIAO will collaborate with the FAR Council, agency IT experts, including the category manager for IT, SBA, the Federal Acquisition Security Council (FASC),<sup>35</sup> and interested stakeholders to understand the extent to which the original purpose of the exception, or other goals of the exception, remain relevant, the impact of narrowing or lifting the exception, and the extent to which current conditions may support such narrowing or lifting to further promote Made in America policies with appropriate strategies in place to strengthen domestic IT supply chains.

C. Partial waiver for COTS. In 2009, the Administrator for Federal Procurement Policy, using authorities provided by Congress to reduce administrative burdens imposed by government-

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<sup>35</sup> The Federal Acquisition Supply Chain Security Act of 2018, Title II of Pub. L. No. 115-390, was signed into law on December 21, 2018 and established the Federal Acquisition Security Council (FASC).

unique requirements, waived the component test of the BAA for acquisition of COTS. In making the decision, the Administrator concluded, in part, that manufacturers' component purchasing decisions are based on factors such as cost, quality, availability and maintaining the state of the art, not the country of origin, making it difficult for a manufacturer to guarantee the source of its components over the term of a contract. The Administrator further concluded that continued application of the content requirement created a barrier to entry which may limit the Government's ability to purchase products already in the commercial distribution systems. The MIAO, in collaboration with the Administrator for Federal Procurement Policy, other members of the FAR Council, SBA, and interested stakeholders, will review the findings and conclusions of the 2009 determination to understand the extent to which the basis of the partial waiver remains relevant, the impact of rescinding the partial waiver, and the extent to which current conditions may support rescission of the partial waiver to further promote Made in America policies with appropriate strategies in place to strengthen domestic commercial supply chains.

D. Sales on Federal Property. Section 13 of the Executive Order requires GSA to submit to the MIAO recommendations for ensuring that products offered to the general public on Federal property are procured in accordance with the policies set forth in section 1 of the Executive Order. The MIAO will confer with GSA upon receipt of the recommendations to address appropriate follow-on actions.

E. Compliance with Cargo Preference Laws. The MIAO will work with relevant agencies to review how best to ensure agency compliance with cargo preference requirements to maximize the utilization of U.S.-flag vessels, in excess of any applicable statutory minimum, to the greatest extent practicable. This review will include a consideration of steps for SAO notification of the MIAO and the Administrator of the Maritime Administration of the ongoing and prospective activities of the agency that are, or may be considered to be, within the scope of 46 USC § 55305(b), as well as the process to be used for making determinations of non-availability.