ALLIANCE FOR
american
manufacturing

October 28, 2021

Department of Defense
General Services Administration
National Aeronautics and Space Administration
via Regulations.gov

RE: FAR Case 2021-008, *Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements*

To Whom it May Concern:

The Alliance for American Manufacturing ("AAM" or "the Alliance") submits the following comments in response to the Department of Defense (DOD), General Services Administration, National Aeronautics and Space Administration (FAR Council, or "FARC") notice of proposed rulemaking (NPRM), *Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements* 86 Fed. Reg. 40980 (July 30, 2021).

The Alliance appreciates the opportunity to comment on the NPRM as it is a strong proponent of this nation's Buy American laws. These policies strengthen our manufacturing base, create jobs in the United States and encourage investments in the American economy.

The Alliance is a non-profit, non-partisan partnership formed in 2007 by some of America's leading manufacturers and the United Steelworkers. Our mission is to strengthen American manufacturing and create new private-sector jobs through smart public policies. We believe that an innovative and growing manufacturing base is vital to America's economic and national security, as well as to providing good jobs for future generations. AAM achieves its mission through research, public education, advocacy, strategic communications, and coalition building around the issues that matter most to America's manufacturers and workers.

At the outset it should be noted that amendments to the Federal Acquisition Regulations (FAR) Buy American Act (BAA) requirements were made in January of this year. That the NPRM follows so soon after the prior amendments is commendable, but also serves as a reminder that a public policy framework supporting the revitalization of our domestic industrial base is necessary after years of neglect. Until this year, the BAA's standards for domestic content and the price preference (or standard for determining unreasonable cost) had been unchanged since being established by President Eisenhower in an executive order issued in 1954.[1]

As the Administration considers further changes to the FAR's BAA requirements, it should also recognize that the regulatory changes promulgated in January require further attention from this administration. When the FAR Council issued its final rule amending the FAR's BAA requirements in January of this year, among other changes, it created a wholly new category of products (predominantly iron or steel or both) and a new origin standard for such products. The standards incorporated into the final rule for

[1] In 1954, President Dwight D. Eisenhower issued an executive order to (i) interpret the BAA's statutory requirement that domestic products must be manufactured "substantially all" from articles, materials, or supplies mined, produced, or manufactured in the United States via the establishment of a more than 50% domestic component content standard. E.O. 10582. *Prescribing Uniform Procedures for Certain Determinations under the Buy American Act* (Dec. 21, 1954).

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computation of foreign ferrous content and determinations of a products identity as "predominantly iron or steel or both" are anything but clear.

Moreover, the January rule change manifests an absurd result in contracts for construction materials subject to the TAA. In such cases, we are concerned that U.S. made materials that are predominantly iron or steel must satisfy the foreign ferrous content limitations and be processed in the U.S., while the origin standard for designated country materials continues to be the lesser "substantial transformation" standard. Remarkably in such situations, the U.S. is treating the materials of our trading partners more favorably than the construction materials produced by U.S. manufacturers.

AAM urges the Administration to expeditiously address the shortcomings of the January 2021 regulatory changes as it contemplates further changes to the FAR.

EO 14005 and the NPRM

On January 25, 2021, the President signed Executive Order (E.O.) 14005, Ensuring the Future Is Made in All of America by All of America's Workers (86 FR 7475, January 28, 2021).

The NPRM proposes new modifications to the FAR's BAA requirements to implement various directives included EO 14005.

Increase to the Domestic Content Threshold

Specifically, the NPRM proposes increases to the domestic content threshold necessary to demonstrate that a non-iron or non-steel end product or construction material qualifies as "domestic." The NPRM proposes to increase the domestic content threshold from 55 percent currently to 60 percent initially, to 65 percent in two years, and to 75 percent in five years. The NPRM also proposes a "fallback threshold," which would allow procuring entities to treat end products and construction materials as "domestic" if they meet the prior content threshold and no products or materials can meet the upwardly revised threshold. The FAR Councils propose that the fallback threshold apply until one year after the domestic content threshold is revised to 75 percent.

AAM supports these proposed changes to the regulations and clauses implementing the BAA.

Systemic Changes Are Needed or Domestic Content Increases are Illusory

The Administration deserves accolades for its commitment to making the BAA meaningful. But the improvements proposed in the NPRM will prove illusory without other systemic changes to the manner in which the BAA is applied by federal contracting officers.

For instance, the proposed increases to the domestic content standard may have little tangible impact on manufacturers of inputs to utility, communications, technology and other types of "systems."[2]

[2] *See, e.g., Data Transformation Corp.*, GSBCA 89082-P, 87-3 B.C.A. ¶20,017 (July 15, 1987) (automatic data processing system); *MRI Sys., Corp*., B-184785 (Nov. 19, 1976) (computer software system); *Thomas J. Valentino, Inc.*, B-156768 (August 17, 1965) (music background library). In certain cases, entire systems comprising many components were determined to be the end product subject of the procurement.

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The origin standards for "components" under the BAA is, generally, the component's place of manufacture. Except for recent changes to the FAR's BAA clauses for predominantly iron or steel products, the BAA imposes no domestic content element to the standard for a *component's* origin. The origin of subcomponents is not relevant to the BAA. The Comptroller General has clarified that the BAA "is applied to the end product itself and to the components directly incorporated into the end product *but is not applied to the supplies that are used in the manufacture of any such component.*"[3]

As noted above, contracting officers may treat entire systems as end products. Where a system is an end product, subassemblies comprising multiple actual products are treated as "components," origin for which is determined based upon the place of the combining of the products into the subassembly. As inputs to the component subassembly, finished end products are treated as subcomponents for which origin is irrelevant under the BAA.

The result of the NPRM's proposed domestic content increases to procurements where a system is an end product is that more subassemblies may be assembled in the United States but the proposed increase to the domestic content standards will do little to spur domestic manufacturing of the system inputs because, as subcomponents, their origin has no bearing on the BAA analysis.
This is just one example of the way in which contracting agencies' determinations eviscerate the value of the BAA requirements.

Contracting Officers Have Broad Discretion

Contracting officers' discretion over contract term and deliverables impacts that scope of the application of the BAA. For instance, the question of whether a particular item is an end product or a component of an end product is a fact-specific issue depending on the specifics of the particular contract under consideration.[4] The terms, as determined by the contracting officer, control the interpretation of the contract. This includes a contracting officer's determination of the "end product" to be delivered in a procurement. For example, in *Textron, Inc., Bell Helicopter Textron Division v. Adams*,[5] the court stated that the definition of an end product primarily rested on an exercise of procurement judgment by the procuring agency (and in the context of the subject procurement, the contract called for a system).[6]

Contracting officers effectively determine what products will meet the BAA's end product origin standard (manufacture + % domestic content), which products will be deemed "components" for which origin merely requires "manufacture in the United States," and which products will be deemed subcomponents, for which the origin is irrelevant.

The success of the Administration's proposed improvements to the BAA will turn in great part on the adherence to the letter of the law by federal contracting officers and the leadership of this Administration. AAM urges the Administration incorporate in its BAA policies initiatives training of contracting officers to aid compliance and avoid evasion of the BAA. Presidential memoranda or directives to agency contracting officers is also encouraged to aid adherence to the Administration's policies on the BAA.

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[3] To the Secretary of the Interior, 45 Comp. Gen. 658, B-158869 (1966). (Emphasis added).
[4] See U.S. v. Rule Industries, Inc., 878 F.2d 535, 11 Int'l Trade Re. (BNA) 1634, 35 Cont. Cas. Fed. (CCH) ¶75678 (1st Cir. 1989).
[5] 493 F. Supp. 824, 1 Int'l Trade Re. (BNA) 1861, 28 Cont. Cas. Fed. (CCH) ¶80806 (D.D.C. 1980).
[6] The court found that it was reasonable to conclude that the contract end product was a helicopter system, rather than merely the helicopters, and that more than 50% of the cost of the contract end product was derived from components of American manufacture.

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Enhanced Price Preference for Critical Products and Critical Materials

The NPRM also proposes a framework through which higher price preferences could be applied for end products and construction material deemed to be "critical" or made up of "critical components." The NPRM does not propose the list of items or their components deemed critical but would rely upon the critical supply chain review directed to be undertaken every four years by President Biden's Executive Order 14017 *America's Supply Chains (86 Fed. Reg. 11849).* The NPRM proposes that OMB would undertake a subsequent assessment of the quadrennial supply chain review to refine the list of products deemed critical for purposes of the enhanced price preference. The NPRM proposes that OMB would designate those products as critical if the Federal Government's procurement "is likely to make a meaningful difference toward strengthening U.S. supply chains." 86 Fed. Reg. 40982. The NPRM states that the "goal of the enhanced price preference for critical items and components is to provide a steady source of demand for domestically produced critical products." *Id* at 40984.

Separately, the NPRM proposes post-award reporting requirements that would require disclosure of specific domestic content of critical items and domestic end products and construction materials containing a critical component. The NPRM also asks for comments on the steps that the Federal Government can take, consistent with its trade agreement obligations, to acquire information about the content of goods procured pursuant to its agreement commitments.

AAM supports the proposed framework for an enhanced price preference for critical products and materials. As the FAR Councils rightly note at the outset of the NPRM, "[t]he Buy American statute does not prohibit the purchase of foreign end products or use of foreign construction material. Instead, it encourages the use of domestic end products and construction material by imposing a price preference for them." 86 Fed. Reg. 40981. It is critically important that the U.S. have domestic productive capabilities for inputs, products and materials that are critical to our national security, our national defense, and essential for protecting the public's health and wellbeing. The proposed enhanced price preference would serve as an important tool to incentive capital investments expanding domestic productive capabilities for critical goods, materials and inputs.

The Administration Should Ensure a Consistent Whole of Government Approach to Critical Materials

This administration and others before it have focused considerable resources toward galvanizing critical supply chains and to ensuring the United States has access to critical materials. These efforts include the President's Executive Order 14017, *America's Supply Chains* (Feb. 24, 2021), Executive Order 14001 *A Sustainable Public Health Supply Chain* (Jan. 21, 2021), the former president's Executive Order 13953, *Addressing the Threat to the Domestic Supply Chain From Reliance on Critical Minerals From Foreign Adversaries and Supporting the Domestic Mining and Processing Industries* (Sept. 30, 2020); and numerous agency reviews.

The Administration is correct to conclude it must "leverage" its "role as a purchaser and investor in critical goods."[7] AAM agrees that as "a significant customer and investor, the Federal Government has

[7] *FACT SHEET: Biden-Harris Administration Announces Supply Chain Disruptions Task Force to Address Short-Term Supply Chain Discontinuities*, available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/08/fact-sheet-biden-harris-administration-announces-supply-chain-disruptions-task-force-to-address-short-term-supply-chain-discontinuities/

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the capacity to shape the market for many critical products. The public sector can deploy this power in times of crisis, …or in normal times."[8] The Administration should leverage this role to strengthen supply chain resilience and support national priorities. The Federal Government purchasing power is an import tool to realize the Administration's aims with these initiatives. Yet, current procurement policies stymy these efforts through loose origin rules and blanket exceptions from domestic sourcing requirements. In EO 14005, the President directed a review and update of the list of domestically nonavaliable articles provided at §25.104(a) of the FAR. Remarkably, the list of items deemed nonavailable and for which the BAA has been waived categorically includes some of the very same items that are the focus of the initiatives to strengthen U.S. supply chains and sources of critical inputs and, in turn, the United States' national and economic security.

Consider that among the 35 critical minerals identified by the Secretary of the Interior and incorporated by reference in EO 13953, aluminum (bauxite), antimony, chromium, cobalt, graphite (natural), manganese, tantalum, and platinum group metals are all included on the FAR's list of items excepted from the BAA based upon non-availability. Many of these items are deemed essential for next generation capabilities, including renewable energy and advanced high-capacity batteries, key policy priorities for this administration.

Similarly, the FAR's domestically nonavailable articles list includes nickel and microprocessor chips, two items that figured prominently in the White House 100-day review undertaken pursuant to EO 14017.[9] In that report the White House concedes that U.S. productive capacity for semiconductor chips and other critical products is lacking. The enhanced price preference will undoubtedly spur domestic capital investments, expanding U.S. productive capabilities in sectors deemed critical. But the FAR Councils should take stock of current policies, like the categorical exclusions from BAA for items deemed domestically nonavailable, which undermine existing supply chain strengthening initiatives and will undermine new policies like the NPRM's proposed enhanced price preference if promulgated.

The United States Should Treat Critical Items Procurement as Excepted from Its Trade Agreement Obligations

The Federal Government should treat certain critical item procurements as exempt from its agreement obligations pursuant consistent with the agreements' textual exceptions and the United States' reservations from agreements' obligations. For example, Article III of the WTO's Revised GPA's includes limitations to the agreement's market access obligations. Specifically, Article III of the GPA, provides a textual limitation that permits parties to the agreement to deviate from the agreement's procurement market access obligations in order to implement domestic measures related to, among others, public health and national security.

Article III provides flexibility within the GPA's rules, affording parties to the agreement sufficient regulatory room to pursue national defense, public health and even socioeconomic or environmental policies through their government procurements. Article III of the Revised GPA provides:

1. Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same

[8] *Id*.

[9] The White House, *Building Resilient Supply Chains, Revitalizing American Manufacturing, And Fostering Broad-Based Growth 100-Day Reviews under Executive Order 14017* (June 2021).

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conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures:

a. *necessary to protect public morals, order or safety;*
b. *necessary to protect human, animal or plant life or health;*
c. necessary to protect intellectual property; or
d. relating to goods or services of persons with disabilities, philanthropic institutions or prison labor.

(Emphasis added).

The NPRM proposes that critical products, construction materials and product and materials containing critical components would be determined using the quadrennial critical supply chain review directed in EO 14017. That executive order directs supply chain assessments of "critical goods and materials" and "other essential goods and materials" the latter of which the EO defines as "goods and materials that are essential to national and economic security, [and] emergency preparedness…." By their very nature and characterization, critical items are essential to U.S. national security or its public health. Procurement policies related to such items should be viewed as excepted from procurement market access obligations in view of the limitations afforded by Article III of the GPA and comparable clauses in other agreements.

Unlike its Trading Partners, the United States Doesn't Appear to Have Clear Practices for Excluding Procurements from Agreement Obligations

Where other parties to the GPA and other agreements have developed internal, publicly available policies and processes for excluding particular procurements from agreement obligations based upon the *General Exceptions* to the GPA and other agreements, it is not apparent that the United States has ever done the same.[10] As the U.S. response to the COVID pandemic demonstrated, failure to safeguard essential domestic productive capabilities through preferential procurement policies will be perilous for the safety and wellbeing of the United States.

Content Calculations

Section 8(i) of the E.O. directed the FAR Council to consider replacing the "component test" in FAR Part 25 with a test under which domestic content is measured by a "value added" calculation. The NPRM requests comments on how such "value" could be calculated in order to promote U.S. based production or U.S. job-supporting economic activity.

Any Value-Added Metric Will Conflict with the Statute

First, it is not apparent that the President can direct such a change given the text of the underlying Buy American Act, which requires the Federal Government acquire for public use "[o]nly those manufactured articles materials and supplies *that have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured in the United States*," 41 USC § 8302 and for construction contracts "only ….manufactured articles, materials, and

[10] Canada, for instance, published guidance on its process for excluding a procurement from agreement obligations based upon national security or the other general exceptions included in these agreements. See https://buyandsell.gc.ca/policy-and-guidelines/supply-manual/section/3#section-3.105.

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supplies that have been manufactured in the United States substantially all from *articles, materials, or supplies* mined, produced, or manufactured in the United States. 41 USC § 8303.[11]

The BAA statute does not contemplate labor costs as an element of this "substantially all requirement." Should the FAR Council determine to jettison the BAA's component test and adopt a separate standard contemplating the value added from U.S. production, it will conflict with the BAA's express requirement that the origin of domestic end products turn on whether they were *manufactured substantially all from articles, materials and supplies mined produced or manufactured in the United States*.

The president's "authority to act via executive action 'must stem either from an act of Congress or from the Constitution itself.'" *Building and Const. Trades Dept. v. Allbaugh*, 295 F. 3d 28 (D.C. Cir. 2002). A "value-added" domestic content standard will plainly conflict with and contradict the text of the BAA, inviting legal challenges contesting whether the president has the authority to direct the replacement of the "component test" at all.

Labor costs are already included in the cost of a component.

In making "domestic end product" determinations, the costs of manufacturing or assembling *an end product* in the United States are excluded from the domestic component content cost analysis. Certain overhead elements of an end product including labor, freight, profit, overhead are not considered "components" of the end product and their costs are excluded from the content determinations. See *To S.F. Durst And Co., Inc.,* 46 Comp. Gen. 784, 1967 CPD ¶ 14, b B- 160627, 1967 WL 1640 (Comp. Gen. 1967).

The cost of labor is already contemplated in the value of any given component. Under the FAR, component value is:

> *For components purchased by the Contractor:* "the acquisition cost, including transportation costs to the place of its incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued);" or
>
> *For components manufactured by the Contractor*: "all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit.

The Comptroller General of the Government Accounting Office ("GAO") has ruled that the price paid for a component purchased in final form from another manufacturer includes the indirect costs of that manufacturer, an offeror that manufactures components in-house may properly include in the cost of those components its own costs for labor, plus overhead and general and administrative rates. See *Gen. Kinetics, Inc., Cryptek Secure Commc'ns Div*., 92-1 CPD ¶ 95, b- 243078, B 243078.2, 1992 WL 18533 (Comp. Gen. 1992).

[11] In 1954, President Dwight D. Eisenhower issued an executive order to (i) interpret the BAA's statutory requirement that domestic products must be manufactured "substantially all" from articles, materials, or supplies mined, produced, or manu-actured in the United States via the establishment of a more than 50% domestic component content standard. E.O. 10582. *Prescribing Uniform Procedures for Certain Determinations under the Buy American Act* (Dec. 21, 1954).

Labor Associated with End Product/Construction Material Are Already Contemplated Under BAA's

Labor associated with manufacture of end products and construction materials is already contemplated under BAA and the FAR provisions implementing it. To reiterate the obvious, a product's manufacture in the United States is one of the two requirements elements that must be met in order for an end product or construction material to be deemed "domestic" under the BAA and its implementing regulations.

Unless the component content element is waived on account of the COTS exception, the traditional two-part test for a "domestic end product" or "domestic construction material" under the BAA requires:

1. It is manufactured in the United States, and

2. The cost of its components mined, produced or manufactured in the United States exceeds fifty-five percent of the cost of all components.

This first prong requires the labor necessary to manufacture the final product to occur in the United States. This element of the BAA applies even where the second prong is waived on account of other laws, such as the COTS waiver.

In sum, any value added standard for determining domestic content would be impermissibly contrary to the authorizing statute and would double count domestic labor operations related to end product manufacture at the expense of domestic manufactures, as it would obviate the need to incorporate U.S. manufactured components into the end product.

Post-Award Reporting & Analysis: Data Issues Undermine the Accuracy and Legitimacy of BAA Compliance

The FAR Council proposes new reporting requirements related to critical items and domestic end products and construction materials containing a critical component. In order to gain insight into the actual domestic content of products sold under contract and thereby support the Administration's broader supply chain security initiatives, the rule would require contractors to provide the specific domestic content of critical items, domestic end products containing a critical component, and domestic construction material containing a critical component, that were awarded under a contract.

AAM supports any additional reporting regime that will improve the woefully inadequate data available to demonstrate the Federal Government's adherence to the BAA. The reporting requirement for items deemed critical or containing a critical component is commendable first start, yet regrettably narrow in scope.

Data quantifying market access concessions, demonstrating compliance with Buy American laws or even the Trade Agreements Act, which operates to waive the Buy American Act for certain procurements, is woefully inadequate.

For instance, in the context of market access granted by trade agreements, the U.S. Government Accountability Office (GAO) found major reporting deficiencies on the part of the largest World Trade

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Organization (WTO) Government Procurement Agreement (GPA) parties (including the United States) that complicate efforts to make detailed comparisons or to monitor compliance. As stated in its 2017 report, "These reporting deficiencies also reduce policymakers' ability to obtain an accurate understanding of the relative benefits of the GPA—that is, the extent to which they and other parties have opened procurement to one another's suppliers."

Data related to contractual adherence to Buy American laws is also lacking. A 2018 GAO report entitled, *Buy American Act: Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance* (GAO-19-17),[12] found major reporting deficiencies. The GAO determined:

> "The amount of foreign end products purchased could be greater than reported in FPDS-NG, however, *due to reporting errors and system limitations*. GAO found that 6 of the 38 contracts reviewed from the Departments of Defense (DOD), Health and Human Services (HHS), Homeland Security (DHS), and Veterans Affairs (VA) inaccurately recorded waiver or exception information. *FPDS-NG system limitations compound these errors because it does not fully capture Buy American Act data*. Among other things, the database does not always enable agencies to report the use of exceptions or waivers on contracts for both foreign and domestic products, reducing data accuracy."

That GAO report also suggests some of the data deficiencies related to market access and compliance with Buy American laws suggests some of the problems may be inherent to the data collection process itself. For instance, "the responsibility to certify the origins of products supplied to the federal government rests with the contractors…." Relying on contractors to validate compliance with the BAA ignores influences on the contractor that may impact the reliability of the data. Contractors face serious penalties for violations of a contract's requirements, including the BAA, which include nonpayment, contract termination, suspension and ultimately debarment.

Modification of COTS Policy

In 2009, the Administrator for Federal Procurement Policy waived the domestic content test (previously called the component test) for commercially available off-the-shelf (COTS) items based on a determination made pursuant to 41 U.S.C. 1907. See FAR Case 2000–305, January 15, 2009, 74 FR 2713. The COTS waiver was universally applied to "construction materials," based on a determination made pursuant to 41 U.S.C. 1907. See FAR Case 2000–305, January 15, 2009, 74 FR 2713 (defining "commercial available off-the-shelf (COTS) item" to include "construction material"). As a result of the COTS waiver, the BAA's domestic component content requirements, no longer applied to construction materials, such as steel and other construction materials, including those made of plastic and other polymers, nonferrous metals such as aluminum and copper, and materials like lumber or precast concrete.

Since 2009, these construction materials have been offered to the Government as "domestic" with minimal U.S. processing, and potentially with wholly foreign component content, because the origin of their inputs was irrelevant for purposes of the COTS waiver of the BAA. By shifting the origin consideration to the last stage of manufacture only, the COTS waiver of the BAA had a deleterious impact on upstream supply chains of common construction materials that are nonetheless critical to the nation's public and defense infrastructure.

[12] https://www.gao.gov/assets/gao-19-17.pdf.

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Other Construction Materials

The January 2021 Final Rule amending the FAR's BAA requirements partially restored the domestic content test for COTS items in so far as they are predominantly iron and steel.[13] Unfortunately the January 2021 Final Rule's repeal of the COTS waiver did not apply to and had no impact on the broad array and substantial quantities of *non-ferrous* construction material supplied in construction contracts. Thus, the NPRM proposes no modifications for a substantial universe of nonferrous construction materials, including those made of plastic and other polymers, nonferrous metals such as aluminum and copper, and materials like lumber or precast concrete. These construction materials could still be offered to the Government as "domestic" with minimal U.S. processing, and the origin of their inputs will continue to be irrelevant for purposes of the BAA.

AAM strongly supported the January 2021 final rule's repeal of the COTS exception to end products and construction materials predominantly of iron or steel. We urge further repeal of the COTS exception as applied to nonferrous products and construction materials.

Trade Agreement Origin Standard: Substantial Transformation Is Weak and Benefits Non-Agreement Countries

The NPRM observes that much of the Federal Government's purchases - acquisitions at and above $182,000 for supply contracts, and $7,008,000 for construction contracts- are subject to the Trade Agreements Act, which waives the BAA. Where the TAA applies to a procurement, a product or material is generally treated as U.S.-made if it is mined, produced, or *manufactured* in the United States *or substantially transformed* in the United States, even if it is made of 100 percent foreign component content.

In the NPRM, the FAR Council state "U.S. trade obligations are beyond the scope of this rulemaking," but that "the Made in America Office and the FAR Council seek to understand more about the impact of the substantial transformation test and potential lost opportunities for American workers." The FAR Council further asks "[i]s 'substantial transformation' a useful tool to promote good domestic jobs and domestic manufacturing? Why or why not?"

AAM demurs. The Administration's interpretation of the United States agreement obligations related to procurement market access is very much within the scope of this rulemaking. The United States' construction of the texts of these agreements has great bearing on its procurement practices. For example, the United States willingness to treat procurements of critical materials within the exceptions offered in GPA Article III, dictate whether it could impose an origin standard for critical materials that is more robust than the TAA substantial transformation standard. The Administration should be reviewing trade agreement obligations and it should contemplate policy frameworks that deviate from its general market access obligations, particularly for critical items essential to our national security and public health.

[13] Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) *Final Rule amending the Federal Acquisition Regulation (FAR) to implement an Executive order (E.O.) addressing domestic preferences in Government procurement,* 86 FR 6180, (Jan. 19, 2021).

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Moreover, the FAR Council's statement that the TAA imposes only the substantial transformation standard is not wholly correct. As noted in the NPRM, where the TAA applies to a procurement, a product or material is generally treated as U.S.-made if it is mined, produced, or *manufactured* in the United States *or substantially transformed* in the United States, even if it is made of 100 percent foreign component content.

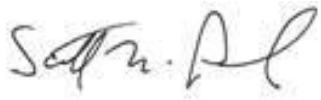
In fact, the FAR TAA clauses permit U.S.-made end products to be either "manufactured in the United States" *or* "substantially transformed in the United States." A 2020 federal court case determined that those standards are distinct. In *Acetris Health, LLC v. United States*, 949 F.3d 719 (Fed. Cir. Feb.10, 2020) the U.S. Court of Appeals for the Federal Circuit determined that the term "manufacture," as used in the FAR's TAA clauses, amounts to a standard *less than* "substantial transformation" affirming an origin standard that is both weaker than "substantial transformation" and results in the U.S. contravening its agreement obligation to afford foreign suppliers treatment in covered government procurement that is no less favorable than that afforded to domestic suppliers.

The *Acetris* decision is troubling. The "substantial transformation" standard is already weak and robs the U.S. of upstream economic impact. Moreover, because the origin of inputs is irrelevant in a substantial transformation analysis, products containing wholly foreign non-agreement country inputs provided they are "substantially transformed" in a designated country or the United States. As a result, countries that are not party to an agreement on procurement with the United States, such as China and Russia, still benefit from the expenditure of U.S. tax dollars, because the inputs they produce are transformed into a finished product in a trade agreement country or merely assembled into a finished product in the United States.

* * *

AAM commends the Biden Administration for its laudable commitment to improving Buy American requirements and appreciates the opportunity to comment in response to the NPRM.

Sincerely,



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