

How to “Build Back Better” with Buy American Policies

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I. Introduction

U.S. Government procurement represents 10-15 percent of America’s gross domestic product (GDP).² So when our political leaders propose to strengthen “Buy American” federal procurement policies that give preference to domestically sourced goods and services, it evokes an expectation that such measures will enhance U.S. manufacturing and employment in dramatic ways. In practice, however, recent “Buy American” initiatives announced by Presidents Trump and Biden portend limited real-world impact.

As discussed below, the lion’s share of federal procurement is concentrated around defense and transportation spending, where domestic preferences are already quite robust and the exceptions are limited. And for federal procurement involving other sectors of the economy, the exceptions to “Buy American” policies can often swallow the rule. Most notably, under the Trade Agreements Act (TAA), the U.S. Trade Representative (USTR) routinely waives the Buy American Act (BAA) requirements in order to afford non-discriminatory treatment to 128 of America’s trading partners.³

There are myriad reasons why America needs to develop effective trade and procurement policies that support U.S. manufacturing and jobs. And without question, the current focus on reforming the Federal Acquisition Regulations (FAR), which implement the BAA, represents an important first step in that process. But the need for additional improvements is manifest.

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These comments reflect the personal observations of the authors. They do not constitute legal advice and do not represent the views of Cassidy Levy Kent or its clients.

² See *Government Procurement*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/government-procurement>.

³ See Federal Acquisition Regulations (FAR) 25.003, 25.400 (2021).

In working to identify measures to “Build Back Better,” the current Administration should consider a broader range of policy options that may be even more impactful in supporting preferences for American-made goods and services. These include: (1) working to ensure that any new infrastructure spending contains enhanced “Buy American” policies similar to those used in the 2009 Recovery Act;⁴ and (2) endorsing a law that empowers everyday consumers to identify American-made goods when making online purchases.

II. The Existing Framework for Federal Procurement

The federal procurement system includes detailed regulations that delineate circumstances where domestically sourced goods and services are preferred, as well as numerous exceptions to these rules. Notably, there are important differences in the rules governing (1) defense spending; (2) transportation spending; and (3) other civilian procurement.

Defense Spending

In the area of defense spending, various laws operate to prohibit the use of non-domestic products. For example, the Department of Defense (DOD) may not purchase items relating to aircraft, missiles, space systems, ships, tanks and other vehicles, weapons systems, or ammunition unless all specialty metals within the item are melted or produced in the United States.⁵ Similarly, under the so-called “Berry Amendment,” DOD is generally required to purchase other U.S. origin items — including food, clothing, and textiles — where the prime contract amount exceeds \$250,000.⁶

Such domestic preferences are robust, as they apply to both prime contractors and subcontractors, and cover both the finished goods and constituent components. Limited exceptions apply in cases where domestic items are unavailable in sufficient quantities, where the quality of the domestic product is unsatisfactory, or where the price difference between the

⁴ See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, 123 Stat. 115 (2009).

⁵ See 10 U.S.C. § 2533b(a).

⁶ See 10 U.S.C. §§ 2533a(h), 2304(g)(1); see also 41 U.S.C. § 134. Congress has also extended the Berry Amendment requirements to govern procurement for the Transportation Safety Agency (TSA) of the Department of Homeland Security (DHS). See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, § 604, 123 Stat. 115, 165-6 (2009) (codified at 6 U.S.C. § 453b); see also MICHAELA D. PLATZER, CONG. RES. SERV., DEFENSE PRIMER: THE BERRY AND KISSELL AMENDMENTS 1 (2021).

domestic and foreign offering is more than 50 percent. And while “public interest” waivers are also available,⁷ given national security concerns, DOD limits U.S. market access to strategic allies that have signed Procurement Memoranda of Understanding (PMOUs) with the U.S. Government.⁸

Transportation Spending — “Buy America”

In the area of transportation spending — which includes aviation, highway, railroad, and other transit — “Buy America” (not to be confused with “Buy American”) is a condition placed on Department of Transportation (DOT) grants to state and local governments and applies to procurements made by state and local governments above the relevant value threshold (e.g., \$150,000). Since almost all large U.S. transportation projects are at least partially funded by the DOT, nearly all U.S. transportation projects are today subject to Buy America requirements.⁹

Under the Buy America provision, nearly all iron, steel, and other manufactured products are required to contain 100% U.S. content and to be 100% U.S.-manufactured.¹⁰ Components of “rolling stock” — such as trains, buses, ferries, and trolley cars — are required to contain at least 70 percent U.S. content with final assembly occurring in the United States.¹¹ “Public interest” waivers are available in limited circumstances, including insufficient quantity or quality, or where the cost of the domestic material would increase the overall project cost by more than 25

⁷ See FAR 25.103(a), 25.202(a)(1) (2021).

⁸ See ALLEN B. GREEN, INTERNATIONAL GOVERNMENT CONTRACT LAW at Chapter 2, § 2:13 (November 2020) (accessed through Westlaw).

⁹ Prior to 2012, Buy America allowed for the “segmentation” of projects. For example, following the 1989 earthquake, the California Department of Transportation (CalTrans) went out of its way to ensure that the eastern span of the San Francisco Bay Bridge would be rebuilt without federal funds so that it could use cheap Chinese steel for that particular segment of the bridge. See MICHAELA D. PLATZER & WILLIAM J. MALLET, CONG. RES. SERV., EFFECTS OF BUY AMERICA ON TRANSPORTATION INFRASTRUCTURE AND U.S. MANUFACTURING 5 (2019). The Moving Ahead for Progress in the 21st Century Act (MAP-21) closed this loophole. See Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112–141, 126 Stat. 405 (2012).

¹⁰ See, e.g., 49 U.S.C. § 5323(j)(1); 23 U.S.C. § 313(a); 49 U.S.C. § 22905(a)(1).

¹¹ See Fixing America’s Surface Transportation Act, Pub. L. No. 114-94, § 3011, 129 Stat. 1312, 1474 (2015). Battery electric buses are subject to Buy America, but the current law does not govern imports of lithium batteries insofar as they are “subcomponents” rather than “components.” See PLATZER & MALLET, *supra* note 9, at 2-3, 15-16 (citing 49 C.F.R. § 661.5).

percent.¹² Notably, because federal transportation spending generally flows through state or local governments, U.S. market access commitments under the World Trade Organization (WTO) Global Procurement Agreement (GPA) and other Free Trade Agreements (FTAs) often do not apply.¹³

Buy American Act (BAA) & Trade Agreements Act (TAA)

With respect to other civilian procurement by the federal government, the BAA generally applies. The law was first developed during the Great Depression to support U.S. manufacturing and labor. The view at the time was that it would be acceptable to award a federal contract to a foreign manufacturer if the difference between the domestic and foreign producer was large, but if the price difference was small, it would be “outrageous” to deprive the domestic producer of the business.¹⁴ The same logic still exists today, though the outrage may not, given the many exceptions that currently apply.

In its current form, the BAA contains a general rule that the federal government should apply a pricing preference for *unmanufactured* articles that have been “mined or produced in the United States” and *manufactured* articles that have been made in the United States from “substantially all” domestic components.^{15,16} The evaluation factor is currently 20 percent, if the lowest domestic offer is from a large business, and 30 percent if the lowest domestic offer is

¹² See, e.g., 49 U.S.C. § 5323(j)(2); 23 U.S.C. § 313(b); 49 U.S.C. § 22905(a)(2).

¹³ See PLATZER & MALLETT, *supra* note 9, at 3-4 (noting that, in the transportation sector, the United States has generally carved out subnational procurement from its international commitments).

¹⁴ See 76 CONG. REC. 3175 (1933) (statement of Sen. Johnson).

¹⁵ For a manufactured “end product” to be considered domestic, it: (1) must have been manufactured in the United States; and (2) more than 55 percent of the cost of its components must have been mined, produced, or manufactured in the United States. See FAR 25.003 (2021). To qualify under the BAA, commodity off-the-shelf (COTS) items are only subject to the first criterion.

¹⁶ Separate provisions similarly govern supplies and construction materials. For supplies, the BAA generally applies to those which are acquired for use in the United States, including supplies acquired under contracts set aside for small business concerns, if: (1) the supply contract exceeds the micro-purchase threshold; or (2) the supply portion of a contract for services that involves the furnishing of supplies (e.g., lease) exceeds the micro-purchase threshold. Absent an exception, the BAA restricts the purchase of supplies that are not domestic end products. See FAR 25.100(b) (2021). The BAA also applies to contracts for the construction, alteration, or repair of any public building or public work in the United States. Absent an exception, it requires the use of domestic construction material in construction contracts performed in the United States. For certain construction projects, the BAA also requires up to 95 percent domestic iron/steel. See *id.* at 25.201(b)(2)(ii) (2021).

from a small business.¹⁷ Thus, for example, if the foreign offering is only 15 percent cheaper than the domestic offering, the domestic offering is generally preferred.

Several exceptions apply to the BAA, including micro-purchases (*i.e.*, less than \$10,000)¹⁸ and IT products (*e.g.*, computers, printers, hardware, software).¹⁹ BAA waivers can also apply upon a finding that the product is not domestically available in sufficient quantities.²⁰ And perhaps most importantly, the exception provided in the TAA has, in practice, often swallowed the general rule.

The Trade Agreements Act was enacted to “foster the growth and maintenance of an open world trading system” and authorizes the President to waive the BAA requirements “for eligible products from countries that have signed an international trade agreement with the United States, or that meet certain criteria, such as being a least developed country.”²¹ This authority has been delegated to the USTR, who consistently waives the BAA in order to honor international commitments under the Global Procurement Agreement (GPA) of the World Trade Organization (WTO), as well as numerous bilateral and plurilateral trade agreements, such as the U.S.-Mexico-Canada Agreement (USMCA).²²

Despite recent calls to suspend such TAA waivers,²³ there is no indication that the Biden Administration plans to deviate from the established practice of past administrations to routinely waive the BAA pursuant to the TAA. Accordingly, the practical effect is that the U.S.

¹⁷ Prior to January 2021, the applicable price differentials were 6 percent (for large businesses) and 12 percent for small businesses. As he was leaving office, President Trump increased those levels to 20 percent and 30 percent, respectively. *See* Federal Acquisition Regulation: Maximizing Use of American-Made Goods, Products, and Materials, 86 Fed. Reg. 6,180 (Jan. 19, 2021).

¹⁸ *See* FAR 25.100(b) (2021); *see also* 41 U.S.C. § 8303(b)(1)(C); *see also* 41 U.S.C § 1902(a)(1).

¹⁹ *See* FAR 25.103(e), 25.202(a)(4) (2021).

²⁰ This exception has come under some criticism, as agencies can make a finding of insufficient availability where domestic manufacturers do not produce enough to meet at least 50 percent of all nationwide demand. As manufacturing firms produce less in the face of increasing import competition, they will be increasingly unable to meet this standard, and thus unable to benefit from a law intended to support them.

²¹ 19 U.S.C. § 2502; FAR 25.402(a)(1) (2021); *see also* FAR 25.001(b) (2021).

²² *See* FAR 25.402(a)(1) (2021).

²³ *See* Doug Palmer, *BALDWIN, BROWN WANT TO PROD BIDEN ON BUY AMERICA*, POLITICO PRO MORNING TRADE (Mar. 4, 2021); *see also* Letter from Sens. Baldwin, Brown, et al., to the President of the United States (Mar. 15, 2021), <https://www.brown.senate.gov/imo/media/doc/Brown-Baldwin%20Letter%20on%20Buy%20American%20TAA%20Waiver.pdf>.

Government treats foreign offers above a certain dollar threshold²⁴ from 128 countries the same as if they were domestic offers.²⁵

In practice, the BAA's application is limited to (1) non-TAA countries such as China, and (2) smaller procurements below the applicable thresholds. Given the broad applicability of the TAA and apparent reluctance to narrow the scope of this exception, the likely impact of further efforts to strengthen the BAA will, therefore, be limited.

III. Recently Announced “Buy American” Reforms

On January 25, 2021, President Joe Biden signed the “Executive Order on Ensuring the Future Is Made in All of America by All of America’s Workers.”²⁶ The order applies to federal contracts and federally funded grant and loan programs under the BAA. Several provisions are worth highlighting here.

First, the order creates a new “Made in America” Office at the Office of Management and Budget (OMB), which aims to centralize the waiver process and requires publication of all waiver requests and related actions. The executive order gives the new Made in America Director the authority to make decisions regarding waivers while allowing agency heads to be able to challenge such decisions.²⁷ These new waiver procedures apply broadly to all statutes or regulations that require or provide a domestic preference, which includes federal financial assistance, grant and loan programs administered by the DOT, and the EPA water infrastructure loans.

²⁴ TAA thresholds vary by country, agreement type, and category of procurement. Under the WTO GPA, for covered products, applicable thresholds are \$182,000 under supply contracts and \$7.008 million under construction contracts. *See* FAR 25.402(b) (2021). Under the USMCA, the applicable thresholds are \$80,317 and \$10.441 million, respectively. *See* Determination Regarding Waiver of Discriminatory Purchasing Requirements With Respect to Goods and Services Covered by Chapter Thirteen of the USMCA, 85 Fed. Reg. 39,037 (June 29, 2020); *see also* United States-Mexico-Canada Agreement (USMCA) at Annex 13-A 13-A-1 (entered into force July 1, 2020), https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/13_Government_Procurement.pdf.

²⁵ *See* FAR 25.003, 25.400 (2021). A few dozen countries do not qualify for TAA waivers, including Brazil, China, Russia, India, Turkey, Thailand, and Vietnam.

²⁶ Exec. Order No. 14005, Ensuring the Future Is Made in All of America by All of America’s Workers, 86 Fed. Reg. 7,475 (Jan. 28, 2021).

²⁷ *See id.* at 86 Fed. Reg. 7,476 (Section 4(c)(ii)).

Second, the order also directs the FAR Council — which coordinates changes to the FAR — to consider additional changes, including replacing the “component test” in Part 25 of the FAR,²⁸ increasing the domestic content requirements for end products and construction materials, and increasing the price preferences for domestic end products and domestic construction materials.²⁹ The FAR Council is required to make any proposed rule changes subject to public notice and comment before implementing any final rule.

Third, the order calls for federal agencies to partner with the Hollings Manufacturing Extension Partnership (MEP), a program at the National Institute of Standards and Technology (NIST) that consists of a network of centers that provide custom services to small and medium-sized manufacturers in order to improve production processes, upgrade technological capabilities, and facilitate product innovation.³⁰

In addition to these three provisions, the order also calls for the review of existing constraints on the extension of Buy American provisions to IT products and requires a biannual report from each federal agency that analyzes the agency’s spending as a result of waivers issued pursuant to the TAA.

Each of these initiatives are noteworthy in terms of their effort to foster greater transparency and good governance in the administration and enforcement of the BAA. However, as noted above, the BAA applies in only limited contexts given the broad use of waivers under the TAA. Accordingly, these measures alone are unlikely to dramatically strengthen the position of U.S. manufacturers and workers.

IV. Other Opportunities to Support American Manufacturing

There are other important opportunities to afford greater economic prospects for U.S. manufacturers and workers in connection with future purchases in the U.S. market. These opportunities exist in the areas of both government procurement and private sector consumer spending.

²⁸ See *supra* note 15 (discussing “component test”).

²⁹ See Exec. Order No. 14005, Ensuring the Future Is Made in All of America by All of America’s Workers, 86 Fed. Reg. 7,475, 7,477 (Jan. 28, 2021) (Section 8(a)).

³⁰ *Id.* at 86 Fed. Reg. 7,477 (Section 7).

A. New Infrastructure Spending

In March of this year, President Biden announced his American Jobs Plan, which seeks up to \$2 trillion in new infrastructure spending.³¹ While the scope and extent of the legislation still remains under development in Congress, it is clear that the magnitude of such infrastructure spending — if implemented — is likely to rival the \$789.5 billion in federal stimulus spending under the American Recovery and Reinvestment Act of 2009 (Recovery Act). Important lessons can be drawn from the unique “Buy American” policies established under the Recovery Act.

Under section 1605 of the Recovery Act, a domestic content requirement was attached to all appropriations — not only for federal agencies, but also for other sub-federal entities using those funds. Specifically, section 1605 of the Recovery Act provided that none of the appropriated funds could 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.³² Thus, in contrast to the BAA framework (which created a price preference for U.S.-origin product), the Recovery Act more closely mirrored the “Buy America” regime insofar as it delineated a general requirement that the funds be used to “Buy American.”

To be sure, section 1605 also contained waiver authorities to address situations where buying domestic would harm the “public interest,” where domestic articles were unavailable in sufficient quantity or quality, or where preferring domestic goods would run afoul of “United States obligations under international agreements.”³³ But in practice, the administration and enforcement of the Recovery Act resulted in robust preferences for goods made from American manufacturing and labor.

Importantly, much of the Recovery Act funds were used in sub-federal projects. For such state and local projects, the federal government first awards a grant — not a contract — to the state or local government. The state or local entity then awards a contract to a contractor using the grant funds. Under this scenario, the United States has considered such “financial assistance”

³¹ See *FACT SHEET: The American Jobs Plan*, THE WHITE HOUSE (Mar. 31, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/>.

³² See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, § 1605, 123 Stat. 115, 303 (2009).

³³ *Id.*

to be exempt from its international commitments relating to *federal procurement*.

At the sub-federal level, roughly 3/4 of states are technically bound under the WTO GPA, while even fewer states are bound under FTAs.³⁴ And at the sub-state level, local authorities are often unaware that their state may technically be bound under these agreements. Moreover, many of the individual projects at the state and local level fall below the relevant thresholds for triggering FTA or GPA commitments. In practice, while TAA waivers have always been the norm under the BAA, section 1605 waivers under the Recovery Act became the exception to the rule. Put another way, foreign access to Recovery Act funds was extremely limited, and U.S. taxpayer dollars accrued largely to the benefit of American manufacturers and workers. The notable outlier was Canada.

After extensive negotiations, the United States made an exception for Canada in a 2010 bilateral procurement agreement. Under that agreement, in exchange for Canada's commitment to cover its provinces and territories under the WTO GPA for the first time, the United States agreed to waive the Recovery Act's Buy American requirements for certain programs.³⁵ As a result, Canada was successful in winning approximately 5 percent of contracts by 2015.³⁶ But the ability of Canada to win similar U.S. market access in the future remains uncertain. While the North American Free Trade Agreement (NAFTA) generally entitled Canada to "national treatment" in public sector procurement contracts, the successor USMCA agreement removed Canada from the procurement chapter. Canada does not, therefore, have FTA rights that it can seek to enforce at this time.

³⁴ For example, just 22 states agreed to commitments under the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) and eight states made commitments under the U.S.-Colombia TPA. See Dominican Republic-Central America Free Trade Agreement (FTA) at Annex 9.1.2(b)(i)-24-29, Aug. 5, 2004, https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file977_3927.pdf; see also U.S. – Colombia Trade Promotion Agreement (TPA) at Annex 9.1 9-28-29 (entered into force May 15, 2012), https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file275_10139.pdf.

³⁵ See *Canada-U.S. Agreement on Government Procurement*, GOVERNMENT OF CANADA (Mar. 2, 2021), <https://www.tradecommissioner.gc.ca/sell2usgov-vendreaugouvusa/procurement-marches/agreement-accord.aspx?lang=eng>; see also *U.S.-Canada Agreement on Government Procurement*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/issue-areas/government-procurement/us-canada-agreement-government-procurement> (last visited Apr. 25, 2021).

³⁶ See Inu Manak & Colin Grabow, *The Canada-U.S. Relationship Is All Smiles. For Now.*, CATO INST. (Feb. 25, 2021, 6:21 PM), <https://www.cato.org/blog/canada-us-trade-relationship-all-smiles-now>.

Furthermore, countries should not be under the illusion that the WTO GPA will be enforceable against the United States any time soon. In December 2019, the WTO’s Appellate Body imploded after years of criticism for its activist approach to dispute settlement.³⁷ Any appeal filed at the WTO now would effectively be made to a Panel for an initial decision, but subsequently appealed “into the void,” and could not result in an enforceable remedy against the United States. Absent a new deal in Geneva, the WTO dispute settlement process does not provide a viable avenue for the enforcement of international procurement rules against the United States.

Given the success of the Recovery Act in affording meaningful economic opportunity to domestic manufacturers and workers through its Buy American provision, and given the limited need for waivers to address international commitments in the current environment, there is good reason for any new infrastructure spending to emulate the Recovery Act’s approach — both in law and in practice. Such an approach promises to be more robust and economically meaningful than the default framework contained in the BAA.

B. Empowering Consumers to Buy American

Separate and apart from “Buy American” preferences in the context of government procurement, it is important to note that many consumers in the private sector have a stated preference for the purchase of American-made goods.³⁸ On this point, the scientific literature acknowledges that “{a} product’s country-of-origin ... play a large role in consumer habits,”³⁹ with one market analyst estimating that “70% of Americans consider it significant to buy American products.”⁴⁰ Yet when making online retail purchases, Americans are generally

³⁷ See *WTO Reform: Making Global Rules Work for Global Challenges: Hearing Before the U.S. S. Comm. On Finance*, 116th Cong. (2020) (statement of Thomas R. Graham, Partner, Cassidy Levy Kent), <https://www.finance.senate.gov/imo/media/doc/TG.opening.SFCtestimony.v2docx1.pdf>.

³⁸ See Gabriel Evans & Rosemary Coates, *Survey Says: Americans Prefer “Made in USA,”* RESHORING INST. (2020), <https://reshoringinstitute.org/wp-content/uploads/2020/09/made-in-usa-survey.pdf>; see also *Made in America: Most Americans love the idea of buying a U.S.-made product instead of an import. But sometimes it’s hard to tell what’s real and what’s not.*, CONSUMER REP. (May 21, 2015), <https://www.consumerreports.org/cro/magazine/2015/05/made-in-america/index.htm>.

³⁹ Melissa Liu, *The Role of Nationalism in the United States Economy*, at 7 (June 2019) (unpublished B.S. thesis, University of Oregon) (on file with University of Oregon).

⁴⁰ *United States: Reaching the Consumer*, SANTANDER TRADE MARKETS (Jan. 2021), <https://santandertrade.com/en/portal/analyse-markets/united-states/reaching-the-consumers>; see also Deborah Weinswig, *Consumer Trends Support Demand For ‘Made In America,’ But Will Shoppers Pay Up?*, FORBES (Apr. 27, 2018), <https://www.forbes.com/sites/deborahweinswig/2018/04/27/consumer-trends-support-demand-for-made->

unable to discern the country of origin and, therefore, unable to exercise their stated preference to “Buy American.” This situation is fixable and should be fixed.

By way of background, imported articles have been subject to country-of-origin labeling (COOL) requirements going back to the Tariff Act of 1890.⁴¹ The current law generally provides that “every article of foreign origin ... imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article.”⁴²

What is clear from the law is the legislative intent that, at the time of purchase, consumers should be able to readily discern whether or not the item they are purchasing was imported or made in the United States.⁴³ Consumers may also wish to use this information to identify the specific country of origin of an article so that they can exercise a preference for goods imported from one foreign country versus another foreign country. For example, a consumer may disfavor Chinese-origin goods for reasons relating to perceived quality differences or a general disagreement with Chinese Government policies, including poor

in-america-but-will-shoppers-pay-up/?sh=5eb9dd4d5cfl (noting that, according to a 2016 survey by the Associated Press and GfK, roughly one-third of consumers said they would purchase an \$85 pair of U.S.-made jeans versus a \$50 pair of imported jeans).

⁴¹ See Tariff Act of 1890, ch. 1244, § 2504, 26 Stat. 567, 613 (1891).

⁴² 19 U.S.C. § 1304; *see also* 19 C.F.R. Part 134 (delineating customs marking rules and exceptions).

⁴³ See, e.g., Jayson L. Lusk et al., *Consumer Behavior Public Policy, and Country-of-Origin Labeling*, 28 REV. OF AG. ECON. 284, 285 (2006), https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1467-9353.2006.00288.x?casa_token=f-nQb5KQYrMAAAAA:I2WY_o4YdwN3_zZU3MtepREHj-C2r0hQYtlh_VU3fkS7ZysKmJbb6JbHdcFDwCmn9WzVAz3bjI_UJRkfS.

environmental stewardship,⁴⁴ intellectual property theft,⁴⁵ and human rights abuses.⁴⁶

When a consumer enters a brick-and-mortar retail establishment, he or she can readily discern the country of origin for a good, just as Congress intended. But with rare exceptions, consumers are today unable to identify the country of origin for items they buy online. It is not until after they make the purchase, and take physical custody of the merchandise, that a country-of-origin marking can be identified on the article (or on its container).

While this loophole always existed with regard to catalog sales, the outsized importance of e-commerce further cemented due to COVID-19 makes this a policy priority today. Last year, e-commerce sales totaled approximately \$791.7 billion, or nearly 4 percent of GDP, and the current rate of growth for online sales is 32.4 percent per annum.⁴⁷ It should be apparent that, if consumers are empowered to Buy American when making online retail purchases, it could result in a significant boon to U.S. manufacturers and workers.

Recognizing the need for reform, Senator Rick Scott (R-FL) has introduced legislation intended to address the problem. The Promoting Responsibility in Markets and E-Retailers Act (PRIME Act) would require online retailers to disclose country-of-origin information and charge the Federal Trade Commission (FTC) with enforcing this requirement. The FTC is well suited to administer such a law, as it already has ample experience addressing online “Made in USA”

⁴⁴ See *China’s Environmental Abuses*, U.S. DEPARTMENT OF STATE (2017-2021), <https://2017-2021.state.gov/chinas-environmental-abuses/index.html>; see also Eleanor Albert & Beina Xu, *China’s Environmental Crisis*, COUNCIL ON FOREIGN REL. (Jan. 18, 2016), <https://www.cfr.org/backgroundunder/chinas-environmental-crisis>.

⁴⁵ See *Findings of the Investigation Into China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974 Executive Summary*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, at i, xi-xii (Mar. 22, 2018), <https://ustr.gov/sites/default/files/enforcement/301Investigations/301%20Draft%20Exec%20Summary%203.22.ustrfinal.pdf> (finding evidence of extensive cyber-enabled theft and cyber intrusions into U.S. commercial networks that provided the Chinese government with “unauthorized access to IP, trade secrets, or confidential business information, including, but not limited to, technical data, negotiating positions, and sensitive and proprietary internal business communications”).

⁴⁶ See United States Trade Representative, *2021 Trade Policy Agenda and 2020 Annual Report of the President of the United States on the Trade Agreements Program*, at 4 (March 2021), <https://ustr.gov/sites/default/files/files/reports/2021/2021%20Trade%20Agenda/Online%20PDF%202021%20Trade%20Policy%20Agenda%20and%202020%20Annual%20Report.pdf> (discussing the need to hold China accountable for human rights abuses perpetrated by its forced labor program that targets the Uyghur minority).

⁴⁷ U.S. Department of Commerce, *Quarterly Retail E-Commerce Sales 4th Quarter 2020*, U.S. CENSUS BUREAU NEWS, at 1 (Feb. 19, 2021), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

claims, which can sometimes mislead consumers when U.S.-origin goods are being made from imported components.⁴⁸

Some retailers are already anticipating the need for reform. Amazon — which alone accounts for roughly half of online retail sales⁴⁹ — is already requiring its suppliers to disclose to Amazon the country-of-origin for each product running through its system.⁵⁰ Notably, however, Amazon has not taken the essential step of placing such information on its website and making it available to consumers. It would appear that, absent government regulation, Amazon is in no rush to supply this information to its customers.

Assuming the PRIME Act or something like it were to become law, it is clear that some consumers will use the available information to Buy American and, in the process, support U.S. manufacturers and workers who are striving to emerge from the COVID recession. This should be a “no brainer” for Congress. What remains to be determined is the full extent of the macroeconomic impact. But in any event, empowering consumers with better information is the right thing to do, and is necessary to ensure that American-made products get the recognition they deserve when competing for online retail sales opportunities in the future.

⁴⁸ See *Made in the USA An FTC Workshop: Staff Report of the Bureau of Consumer Protection*, FEDERAL TRADE COMMISSION, at 2 (June 19, 2020), https://www.ftc.gov/system/files/documents/reports/made-usa-ftc-workshop/p074204_-_musa_workshop_report_-_final.pdf (citing 15 U.S.C. § 45(a)).

⁴⁹ See Tugba Sabanoglu, *Projected retail e-commerce GMV share of Amazon in the United States from 2016 to 2021*, STATISTICA (Dec. 1, 2020), [https://www.statista.com/statistics/788109/amazon-retail-market-share-usa/#:~:text=In%202017%2C%20Amazon's%20market%20share,gross%20merchandise%20volume%20\(GMV\).](https://www.statista.com/statistics/788109/amazon-retail-market-share-usa/#:~:text=In%202017%2C%20Amazon's%20market%20share,gross%20merchandise%20volume%20(GMV).)

⁵⁰ See Tracy, *Amazon now requiring sellers to divulge a product's country of origin*, POC NETWORK // TECH (Dec. 21, 2020, updated Jan. 8, 2021), <https://www.pocnetwork.net/internet-news/amazon-now-requiring-sellers-to-divulge-a-products-country-of-origin/>.

V. Conclusion

President Biden’s commitment to “Build Back Better” has multiple elements and strengthening “Buy American” policies are clearly one such priority. His recent executive order is an important step in the right direction, but more can — and should — be done. As the Administration works with the Congress toward a major infrastructure spending package, it should take care to emulate the “Buy American” approach from the 2009 Recovery Act. Expanding beyond government procurement, there is also an opportunity to empower consumers in the private sector to “Buy American” when making online retail purchase decisions. Through a combination of such measures, the American economy can indeed “Build Back Better” and emerge from the COVID recession in a manner that fully supports the competitiveness of U.S. manufacturing and workers.