

8 Common Questions About U.S. Domestic Preference Laws for Electronics

Diving into U.S. domestic preference rules? Benchmark has compiled the following list of questions we hear most often from our customers on this topic. The responses to these FAQs are summary in nature and should not be the sole basis for your company's decision-making. We recommend reviewing "The Unofficial Guide to U.S. Domestic-Preference Laws for Electronics," also produced by Benchmark, for a more detailed discussion of the relevant issues.

1. Which rules apply to my product? Buy American Act, Buy America Laws, or Trade Agreements Act?

The applicable rules depend on various factors, including the purchasing entity, type of funding, nature of the acquisition (e.g., supplies, services, construction), contract value, place of performance, and whether any exceptions or waivers apply. Generally, the Buy American Act or Trade Agreements Act will apply in direct procurements administered by federal agencies. In contrast, the Buy America rules typically apply to federally-funded programs managed by state or local government entities (e.g., under federal grants).

2. What upcoming changes will be most disruptive to my market?

For some companies in the electronics product market, the steady increase in the minimum threshold for U.S. domestic content under the Buy American Act— from 55 percent to 60 percent as of October 2022 and ultimately to 75 percent by 2029— could prove challenging because it may require material adjustments to their established manufacturing and sourcing strategies. Further, the current administration has signaled an interest in potentially narrowing or even eliminating the Buy American Act's longstanding

exception for commercial IT products and partial waiver for commercial off-the-shelf (COTS) items. Though it is unclear if this interest will translate into policy, limiting the commercial IT exception or COTS waiver almost certainly would have a profound impact on the electronics market.

3. What if I pursue meeting one set of rules now and changes later result in additional rules I need to meet?

Your company will have to comply with all applicable rules as of the date they are effective. Because many of the relevant rules are evolving, companies will be most successful if they adopt a flexible compliance model to achieve short-term and long-term regulatory goals over time. An effective compliance model will largely be defined by the types of federal opportunities your company intends to pursue now and in the future. For example, suppose your company wants to compete for direct federal procurements valued below the applicable Trade Agreements Act threshold. In that case, you should consider focusing on the evolving Buy American Act regulations, which require manufactured end products to be manufactured in the U.S. and to contain a steadily increasing quantity of domestic content (from 55 percent to 60 percent in October 2022, 65 percent by 2024, and 75 percent by 2029). On the other hand, if your business goals include competing for work under federally-funded grant programs, you will also have to consider the many nuanced Buy America rules that could apply. Bottom line-- while it can be challenging to structure a compliance model in a world of moving targets, it is achievable. It can give your company a significant competitive advantage when pursuing U.S.-funded opportunities.

4. The electronics component supply chain is so global. Is it possible to reach the minimum U.S.-made content requirements for electronics?

Generally yes, though it ultimately depends on the specific product and applicable requirements in the federal opportunities your company wants to pursue. There has certainly been a focus on the scale and capabilities of the U.S.-based electronics manufacturing industry over the past few years. We believe this momentum will continue, in part, because of the clear trend towards strengthening U.S. domestic preference rules in publicly-funded projects.

5. Is the percent U.S. content requirement based on the cost of parts or the number of parts?

Under the regulations implementing the Buy American Act, the domestic content requirement is measured based on the cost of a product's components. The current regulations define "component" as an article, material, or supply incorporated directly into an end product. A product's "cost of components" is determined as follows:

- (a) For components purchased by the contractor, the acquisition cost, including transportation costs to the place of 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
- (b) 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. Cost of components does not include any costs associated with the manufacture of the end product.

6. What if the costs of the parts change?

Generally, under the Buy American Act, the applicable cost of a product's domestic components is measured as of the date an offer or representation that its product is Buy American compliant (e.g., under FAR 52.225-2 (Buy American Certificate)). If a change in the cost of a product's domestic components causes the product to fall below the applicable threshold, you should consult with an attorney to determine if your company has any disclosure obligations.

7. Is there a Buy America or Buy American certification we need to apply for? Can Benchmark help U.S. prepare the documentation?

Typically, yes—in federal procurements covered by the Buy American Act or Trade Agreements Act, your company will be required to complete a certification when submitting a proposal, such as FAR 52.225-2 (Buy American Certificate) or FAR 52.225-6 (Trade Agreements Act Certificate). Similar certifications are required under certain federally-funded grant programs, such as the certifications required by 49 CFR § 661.6 and 49 CFR § 661.12. Benchmark helps our customers collect the documentation (country of origin of components, etc.) needed to complete these certifications.

8. What aspects of meeting Buy America or Buy American can Benchmark help U.S. with? What should we do ourselves? When should we consult a lawyer or consultant?

Benchmark can help your company develop and execute a manufacturing and sourcing strategy geared towards compliance with U.S. domestic preference laws. Many of Benchmark's customers also consult with a qualified attorney or consultant to determine their compliance obligations and ensure they select a strategy that will satisfy those obligations.

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