

115TH CONGRESS  
1ST SESSION

# S. 908

To amend chapter 83 of title 41, United States Code, to increase the requirement for American-made content, to strengthen the waiver provisions, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

APRIL 7, 2017

Ms. STABENOW (for herself, Mr. PETERS, and Ms. BALDWIN) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

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## A BILL

To amend chapter 83 of title 41, United States Code, to increase the requirement for American-made content, to strengthen the waiver provisions, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the  
5 “Make it in America Act”.

6 (b) **TABLE OF CONTENTS.**—The table of contents for  
7 this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Regulations relating to Buy American Act.

Sec. 3. Amendments relating to Buy American Act.

Sec. 4. United States obligations under international agreements.

Sec. 5. Definitions.

1 **SEC. 2. REGULATIONS RELATING TO BUY AMERICAN ACT.**

2 (a) IN GENERAL.—Not later than 1 year after the  
3 date of the enactment of this Act, the Administrator for  
4 Federal Procurement Policy, in consultation with the Fed-  
5 eral Acquisition Regulatory Council, shall promulgate final  
6 regulations to standardize and simplify how Federal agen-  
7 cies comply with, report on, and enforce chapter 83 of title  
8 41, United States Code (commonly known as the “Buy  
9 American Act”). The regulations shall include, at a min-  
10 imum, the following:

11 (1) Guidelines for Federal agencies to deter-  
12 mine, for the purposes of applying sections 8302(a)  
13 and 8303(b)(3) of such title, the circumstances  
14 under which the acquisition of articles, materials, or  
15 supplies mined, produced, or manufactured in the  
16 United States is inconsistent with the public inter-  
17 est.

18 (2) Uniform procedures for each Federal agen-  
19 cy to make publicly available, in an easily identifi-  
20 able location on the website of the agency, and with-  
21 in the following time periods, the following informa-  
22 tion:

1 (A) A description of the circumstances in  
2 which the head of the agency may waive the re-  
3 quirements of chapter 83 of such title.

4 (B) Each waiver made by the head of the  
5 agency within 30 days after making such waiv-  
6 er, including a detailed justification for the  
7 waiver.

8 (3) Rules for Federal agencies to ensure that a  
9 project is not disaggregated for purposes of avoiding  
10 the applicability of the requirements under chapter  
11 83 of such title.

12 (4) Procedures to investigate occurrences when  
13 the head of a Federal agency improperly waives the  
14 requirements of chapter 83 of such title.

15 (5) Rules for the Administrator to evaluate the  
16 percentage of domestic content in a manufactured  
17 end product, including providing a definition for the  
18 term “manufactured end product”.

19 (b) GUIDELINES RELATING TO INCONSISTENCY  
20 WITH PUBLIC INTEREST.—With respect to the guidelines  
21 developed under subsection (a)(1), the Administrator shall  
22 seek to minimize waivers related to contract awards that  
23 result in a decrease in employment in the United States,  
24 which shall be considered to be inconsistent with the public  
25 interest.

1 (c) RULES RELATING TO DOMESTIC CONTENT.—

2 With respect to the rules developed under subsection

3 (a)(5), the Administrator may not treat components of

4 foreign origin of the same class or kind as those that are

5 not mined, produced, or manufactured in the United

6 States in sufficient and reasonably available commercial

7 quantities of a satisfactory quality as domestic content.

8 With respect to providing a definition for the term “manu-

9 factured end product”, the Administrator shall defer to

10 previous judicial rulings on the question of—

11 (1) whether the product is completed in the

12 final form required for use by the Federal Govern-

13 ment; and

14 (2) whether separate manufacturing stages or

15 continuous processes constitute “manufacturing”.

16 **SEC. 3. AMENDMENTS RELATING TO BUY AMERICAN ACT.**

17 (a) SPECIAL RULES RELATING TO AMERICAN MATE-

18 RIALS REQUIRED FOR PUBLIC USE.—Section 8302 of title

19 41, United States Code, is amended by adding at the end

20 the following:

21 “(c) SPECIAL RULES.—The following rules apply in

22 carrying out the provisions of subsection (a):

23 “(1) CALCULATION OF DOMESTIC AND NON-DO-

24 MESTIC OFFERS.—

1           “(A) EXCLUSION OF START-UP COSTS IN  
2           CALCULATING COST OF OFFER.—When com-  
3           paring offers between domestic entities and  
4           non-domestic entities, costs related to the start-  
5           up of a contract shall be excluded from the do-  
6           mestic offer.

7           “(B) UNREASONABLE COST DETERMINA-  
8           TION.—

9           “(i) IN GENERAL.—The head of a  
10           Federal agency may not determine the cost  
11           of acquiring articles, materials, or supplies  
12           mined, produced, or manufactured in the  
13           United States to be unreasonable under  
14           subsection (a)(1) unless the acquisition of  
15           such articles, materials, or supplies would  
16           increase the cost of the overall acquisition  
17           by more than 25 percent.

18           “(ii) RULE OF CONSTRUCTION WITH  
19           RESPECT TO DEFENSE CONTRACTS.—With  
20           respect to the percentage increase required  
21           for a determination of unreasonable cost  
22           applicable to projects under Department of  
23           Defense contracts as of the date of the en-  
24           actment of the Make it in America Act,  
25           nothing in this subparagraph may be con-

1           strued as reducing such percentage in-  
2           crease.

3           “(2) USE OUTSIDE THE UNITED STATES.—

4           “(A) IN GENERAL.—Notwithstanding the  
5           exception described in subsection (a)(2)(A),  
6           subsection (a)(1) shall apply to articles, mate-  
7           rials, or supplies for use outside the United  
8           States if such articles, materials, or supplies are  
9           not needed on an urgent basis or are acquired  
10          on a regular basis.

11          “(B) COST ANALYSIS.—In any case in  
12          which articles, materials, or supplies are to be  
13          acquired for use outside the United States and  
14          are not needed on an urgent basis or are ac-  
15          quired on a regular basis, before entering into  
16          a contract, an analysis shall be made of the dif-  
17          ference in the cost of acquiring such articles,  
18          materials, or supplies from a company mining,  
19          producing, or manufacturing the articles, mate-  
20          rials, or supplies in the United States (exclud-  
21          ing the cost of shipping) and the cost of acquir-  
22          ing such articles, materials, or supplies from a  
23          company mining, producing, or manufacturing  
24          the articles, materials, or supplies outside the  
25          United States (including the cost of shipping).

1           “(3) DOMESTIC AVAILABILITY.—The head of a  
2 Federal agency may not determine that an article,  
3 material, or supply is not mined, produced, or manu-  
4 factured in the United States in sufficient and rea-  
5 sonably available commercial quantities and of a sat-  
6 isfactory quality under subsection (a)(1) unless the  
7 head of the agency first determines that—

8           “(A) domestic production cannot be initi-  
9 ated without significantly delaying the project  
10 for which the article, material, or supply is to  
11 be acquired; and

12           “(B) a substitutable article, material, or  
13 supply is not mined, produced, or manufactured  
14 in the United States in sufficient and reason-  
15 ably available commercial quantities and of a  
16 satisfactory quality.”.

17 (b) REPORTS.—

18           (1) ANNUAL REPORT.—Subsection (b) of sec-  
19 tion 8302 of title 41, United States Code, is amend-  
20 ed to read as follows:

21           “(b) REPORTS.—

22           “(1) IN GENERAL.—Not later than 180 days  
23 after the end of each of fiscal years 2018 through  
24 2022, the Director of the Office of Management and  
25 Budget, in consultation with the Administrator of

1 General Services, shall submit to the Committee on  
2 Oversight and Government Reform of the House of  
3 Representatives and the Committee on Homeland  
4 Security and Governmental Affairs of the Senate a  
5 report on the total amount of acquisitions made by  
6 Federal agencies in the relevant fiscal year of arti-  
7 cles, materials, or supplies acquired from entities  
8 that mine, produce, or manufacture the articles, ma-  
9 terials, or supplies outside the United States.

10 “(2) ADDITIONAL CONTENT.—Each report re-  
11 quired under paragraph (1) shall separately include,  
12 for the fiscal year covered by the report—

13 “(A) the dollar value of any articles, mate-  
14 rials, or supplies that were mined, produced, or  
15 manufactured outside the United States, in the  
16 aggregate and by country;

17 “(B) an itemized list of all waivers made  
18 under this chapter with respect to articles, ma-  
19 terials, or supplies and the country where such  
20 articles, materials, or supplies were mined, pro-  
21 duced, or manufactured;

22 “(C) if any articles, materials, or supplies  
23 were acquired from entities that mine, produce,  
24 or manufacture such articles, materials, or sup-  
25 plies outside the United States due to an excep-



1           tion (that is not the micro-purchase threshold  
2           exception described under subsection (a)(2)(C)),  
3           the specific exception that was used to purchase  
4           such articles, materials, or supplies;

5           “(D) if any articles, materials, or supplies  
6           were acquired from entities that mine, produce,  
7           or manufacture such articles, materials, or sup-  
8           plies outside the United States pursuant to a  
9           reciprocal defense procurement memorandum of  
10          understanding (as described in section 8304),  
11          or a trade agreement or least developed country  
12          designation described in subpart 25.400 of the  
13          Federal Acquisition Regulation, a citation to  
14          such memorandum of understanding, trade  
15          agreement, or designation; and

16          “(E) a summary of—

17                  “(i) the total procurement funds ex-  
18                  pended on articles, materials, and supplies  
19                  mined, produced, or manufactured inside  
20                  the United States;

21                  “(ii) the total procurement funds ex-  
22                  pended on articles, materials, and supplies  
23                  mined, produced, or manufactured outside  
24                  the United States; and

1           “(iii) the total procurement funds ex-  
2           pended on articles, materials, and supplies  
3           mined, produced, or manufactured outside  
4           the United States per country that mined,  
5           produced, or manufactured such articles,  
6           materials, and supplies.

7           “(3) PUBLIC AVAILABILITY.—Not later than  
8           180 days after the end of each relevant fiscal year,  
9           the Director of the Office of Management and Budg-  
10          et shall make the relevant report required under  
11          paragraph (1) publicly available on a website.

12          “(4) EXCEPTION FOR INTELLIGENCE COMMU-  
13          NITY.—This subsection does not apply to acquisi-  
14          tions made by an agency, or component of an agen-  
15          cy, that is an element of the intelligence community  
16          as specified in, or designated under, section 3 of the  
17          National Security Act of 1947 (50 U.S.C. 3003).”.

18          “(2) COMPTROLLER GENERAL REPORT.—Not  
19          later than 1 year after the date of the enactment of  
20          this Act, the Comptroller General of the United  
21          States shall report to Congress on the extent to  
22          which, in each of fiscal years 2011, 2012, 2013,  
23          2014, and 2015, articles, materials, or supplies ac-  
24          quired by the Federal Government were mined, pro-  
25          duced, or manufactured outside the United States.

1 Such report shall include for each Federal agency  
2 the following:

3 (A) A summary of total procurement funds  
4 expended on articles, materials, and supplies  
5 mined, produced, or manufactured—

6 (i) inside the United States;

7 (ii) outside the United States; and

8 (iii) outside the United States—

9 (I) under each category of waiver  
10 under chapter 83 of title 41, United  
11 States Code;

12 (II) under each category of ex-  
13 ception under such chapter; and

14 (III) for each country that  
15 mined, produced, or manufactured  
16 such articles, materials, and supplies.

17 (B) For each fiscal year covered by the re-  
18 port—

19 (i) the dollar value of any articles,  
20 materials, or supplies that were mined,  
21 produced, or manufactured outside the  
22 United States, in the aggregate and by  
23 country;

24 (ii) an itemized list of all waivers  
25 made under this chapter with respect to

1 articles, materials, or supplies and the  
2 country where such articles, materials, or  
3 supplies were mined, produced, or manu-  
4 factured;

5 (iii) if any articles, materials, or sup-  
6 plies were acquired from entities that  
7 mine, produce, or manufacture such arti-  
8 cles, materials, or supplies outside the  
9 United States due to an exception (that is  
10 not the micro-purchase threshold exception  
11 described under section 8302(a)(2)(C) of  
12 title 41, United States Code), the specific  
13 exception that was used to purchase such  
14 articles, materials, or supplies;

15 (iv) if any articles, materials, or sup-  
16 plies were acquired from entities that  
17 mine, produce, or manufacture such arti-  
18 cles, materials, or supplies outside the  
19 United States pursuant to a reciprocal de-  
20 fense procurement memorandum of under-  
21 standing (as described in section 8304 of  
22 title 41, United States Code), or a trade  
23 agreement or least developed country des-  
24 ignation described in subpart 25.400 of the  
25 Federal Acquisition Regulation, a citation

1 to such memorandum of understanding,  
2 trade agreement, or designation; and

3 (v) a summary of—

4 (I) the total procurement funds  
5 expended on articles, materials, and  
6 supplies mined, produced, or manufac-  
7 tured inside the United States;

8 (II) the total procurement funds  
9 expended on articles, materials, and  
10 supplies mined, produced, or manufac-  
11 tured outside the United States; and

12 (III) the total procurement funds  
13 expended on articles, materials, and  
14 supplies mined, produced, or manufac-  
15 tured outside the United States per  
16 country that mined, produced, or  
17 manufactured such articles, materials,  
18 and supplies.

19 (C) A description of the methods used by  
20 each Federal agency to calculate the percentage  
21 domestic content of articles, materials, and sup-  
22 plies mined, produced, or manufactured in the  
23 United States.

24 (3) ANALYSIS OF DOMESTIC INFORMATION  
25 TECHNOLOGY AND SEMICONDUCTOR MANUFAC-

1 TURING CAPABILITIES.—Not later than 1 year after  
2 the date of the enactment of this Act, the Inter-  
3 national Trade Commission shall submit to Congress  
4 an industry analysis of the capabilities of the domes-  
5 tic information technology and semiconductor indus-  
6 try to supply the Federal Government with domesti-  
7 cally manufactured information technology systems.

8 (c) DEFINITIONS.—Section 8301 of title 41, United  
9 States Code, is amended by adding at the end the fol-  
10 lowing new paragraphs:

11 “(3) FEDERAL AGENCY.—The term ‘Federal  
12 agency’ has the meaning given the term ‘executive  
13 agency’ in section 133 of title 41, United States  
14 Code.

15 “(4) SUBSTANTIALLY ALL.—The term ‘substan-  
16 tially all’, with respect to articles, materials, or sup-  
17 plies mined, produced, or manufactured in the  
18 United States, means that—

19 “(A) the cost of the domestic components  
20 of such articles, materials, or supplies exceeds  
21 75 percent of the total cost of all components  
22 of such articles, materials, or supplies; or

23 “(B) in the event that a Federal agency  
24 does not receive an offer on a contract that  
25 meets such threshold, the cost of the domestic

1 components of such articles, materials, or sup-  
2 plies exceeds 60 percent of the total cost of all  
3 components of such articles, materials, or sup-  
4 plies.

5 “(5) WAIVER.—The term ‘waiver’, with respect  
6 to the acquisition of an article, material, or supply  
7 for public use, means the inapplicability of this  
8 chapter to the acquisition by reason of any of the  
9 following determinations under section 8302(a)(1) or  
10 8303(b)(3) of this title:

11 “(A) A determination by the head of the  
12 Federal agency concerned that the acquisition  
13 is inconsistent with the public interest.

14 “(B) A determination by the head of the  
15 Federal agency concerned that the cost of the  
16 acquisition is unreasonable.

17 “(C) A determination by the head of the  
18 Federal agency concerned that the article, ma-  
19 terial, or supply is not mined, produced, or  
20 manufactured in the United States in sufficient  
21 and reasonably available commercial quantities  
22 of a satisfactory quality.”.

23 (d) CONFORMING AMENDMENTS.—Title 41, United  
24 States Code, is amended—

25 (1) in section 8302—

1 (A) in paragraph (1) of subsection (a)—

2 (i) by striking “department or inde-  
3 pendent establishment” and inserting  
4 “Federal agency”; and

5 (ii) by striking “their acquisition to be  
6 inconsistent with the public interest or  
7 their cost to be unreasonable” and insert-  
8 ing “their acquisition to be inconsistent  
9 with the public interest, their cost to be  
10 unreasonable, or that the articles, mate-  
11 rials, or supplies of the class or kind to be  
12 used, or the articles, materials, or supplies  
13 from which they are manufactured, are not  
14 mined, produced, or manufactured in the  
15 United States in sufficient and reasonably  
16 available commercial quantities and of a  
17 satisfactory quality”; and

18 (B) in paragraph (2) of subsection (a)—

19 (i) in subparagraph (A), by inserting  
20 “subject to subsection (c)(2)(A),” before  
21 “to articles, materials, or supplies”; and

22 (ii) by amending subparagraph (B) to  
23 read as follows:

24 “(B) to any articles, materials, or supplies  
25 procured pursuant to a reciprocal defense pro-



1           curement memorandum of understanding (as  
2           described in section 8304), or a trade agree-  
3           ment or least developed country designation de-  
4           scribed in subpart 25.400 of the Federal Acqui-  
5           sition Regulation; and”;

6           (2) in section 8303—

7                 (A) in subsection (b)—

8                         (i) by striking “department or inde-  
9                         pendent establishment” each place it ap-  
10                         pears and inserting “Federal agency”;

11                        (ii) by amending subparagraph (B) of  
12                        paragraph (1) to read as follows:

13                                 “(B) to any articles, materials, or supplies  
14                                 procured pursuant to a reciprocal defense pro-  
15                                 curement memorandum of understanding (as  
16                                 described in section 8304), or a trade agree-  
17                                 ment or least developed country designation de-  
18                                 scribed in subpart 25.400 of the Federal Acqui-  
19                                 sition Regulation; and”;

20                         (iii) in paragraph (3)—

21                                 (I) in the heading, by striking  
22                                 “INCONSISTENT WITH PUBLIC INTER-  
23                                 EST” and inserting “WAIVER AU-  
24                                 THORITY”; and

1 (II) by striking “their purchase  
2 to be inconsistent with the public in-  
3 terest or their cost to be unreason-  
4 able” and inserting “their acquisition  
5 to be inconsistent with the public in-  
6 terest, their cost to be unreasonable,  
7 or that the articles, materials, or sup-  
8 plies of the class or kind to be used,  
9 or the articles, materials, or supplies  
10 from which they are manufactured,  
11 are not mined, produced, or manufac-  
12 tured in the United States in suffi-  
13 cient and reasonably available com-  
14 mercial quantities and of a satisfac-  
15 tory quality”; and

16 (B) in subsection (c), by striking “depart-  
17 ment, bureau, agency, or independent establish-  
18 ment” each place it appears and inserting  
19 “Federal agency”.

20 (e) EXCLUSION FROM INFLATION ADJUSTMENT OF  
21 ACQUISITION-RELATED DOLLAR THRESHOLDS.—Sub-  
22 paragraph (A) of section 1908(b)(2) of title 41, United  
23 States Code, is amended by striking “chapter 67” and in-  
24 serting “chapters 67 and 83”.

1 **SEC. 4. UNITED STATES OBLIGATIONS UNDER INTER-**  
2 **NATIONAL AGREEMENTS.**

3 This Act, and the amendments made by this Act,  
4 shall be applied in a manner consistent with United States  
5 obligations under international agreements.

6 **SEC. 5. DEFINITIONS.**

7 In this Act:

8 (1) **FEDERAL AGENCY.**—The term “Federal  
9 agency” has the meaning given the term “executive  
10 agency” in section 133 of title 41, United States  
11 Code.

12 (2) **WAIVER.**—The term “waiver”, with respect  
13 to the acquisition of an article, material, or supply  
14 for public use, means the inapplicability of chapter  
15 83 of title 41, United States Code, to the acquisition  
16 by reason of any of the following determinations  
17 under section 8302(a)(1) or 8303(b)(3) of such title:

18 (A) A determination by the head of the  
19 Federal agency concerned that the acquisition  
20 is inconsistent with the public interest.

21 (B) A determination by the head of the  
22 Federal agency concerned that the cost of the  
23 acquisition is unreasonable.

24 (C) A determination by the head of the  
25 Federal agency concerned that the article, ma-  
26 terial, or supply is not mined, produced, or

1 manufactured in the United States in sufficient  
2 and reasonably available commercial quantities  
3 of a satisfactory quality.

○