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OVERVIEW OF GOVERNMENT PROCUREMENT AFTER PRESIDENT OBAMA'S 2009 STIMULUS BILL

The American Recovery and Reinvestment Act of 2009 (the "Stimulus Bill"), signed into law by President Barack Obama on February 17, 2009, incorporates principles of the Buy American Act ("BAA") by establishing a preference for domestic goods and suppliers for public projects. However, the Buy American provisions included in the Stimulus Bill do not remove the United States' obligation to comply with the World Trade Organization ("WTO") Agreement on Government Procurement ("GPA") or certain international free trade agreements. Therefore, goods and suppliers from countries party to the GPA may be eligible for projects funded by the Stimulus Bill. However, suppliers of goods and materials that have their origin in a non-GPA country may be affected by the restrictive procurement guidelines set forth in the Stimulus Bill.

The GPA bridged the gap left by other multilateral trade agreements that did not address government procurement. The current version of the GPA was signed in 1994, and the U.S. has been a Party since it went into force on January 1, 1996. The basic principle of the GPA is to create equal opportunity for foreign and domestic goods, services, and suppliers in government procurement contracts. Parties ("Party" or "Parties") to the GPA agree: (i) not to favor domestic goods, services, and suppliers over foreign goods, services, and suppliers; (ii) to treat no less favorably the goods, services, and suppliers of one Party to the GPA over another Party to the GPA; (iii) to ensure that its entities do not favor one local supplier over another local supplier based on foreign affiliation or ownership; and (iv) to ensure that its entities do not discriminate against local suppliers based on the country where its goods or services are produced, when the country of production is a Party to the GPA.

The GPA does not apply to all government procurement. The annexes to the GPA set forth for each Party the government entities, utilities, goods, services, and construction services that are covered. Further, the procurement must exceed a threshold value, which is specified by each Party in an annex. The threshold values vary based on the government entity that procures the goods or services. For example, the U.S. Department of Defense has a threshold of \$176,000 for goods contracts and \$6,500,000 for construction contracts.

There are thirty-nine Parties to the GPA, including, but not limited to: members of the European Union, Canada, Hong Kong, and the United States. The WTO grants observer status to certain countries, which enables them to follow discussions on matters that may be of direct interest to them. Observers to the GPA include, but are not limited to: China, New Zealand, and Australia. Argentina, Chinese Taipei, and Georgia are a few observer countries that are currently negotiating accession to the GPA.

The Buy American Act ("BAA"), which predates the GPA, is a federal statute that codifies the United States' preference for domestic suppliers when acquiring goods to be used on government projects. The BAA was passed by Congress in 1933, signed by President Hoover, and has been substantively amended four times. The BAA requires the government to use "articles, materials, and supplies," whether unmanufactured or manufactured, that are produced or mined in the U.S. "in every contract for the construction, alteration, or repair of any public building or public work." Manufactured goods must be substantially produced in the U.S.; meaning, the cost of domestic components used must exceed fifty percent of the cost

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of all the components. However, there are some exceptions. Foreign products may be used for public works if: they are secured for use outside the U.S.; sufficient quantities of domestic goods are not available; the quantity required is less than or equal to a certain threshold value; the foreign purchase is consistent with the public interest; or the cost of the domestic goods is unreasonable.

The Trade Agreements Act of 1979 (the “TAA”), as amended (§19 U.S.C. 2511 *et seq.*), gives the president general authority to waive, in whole or in part, discriminatory purchasing requirements for domestic goods such as those set forth in the BAA or other purchasing laws, if application of the law would result in “treatment less favorable” than that given to domestic products and suppliers, or to “eligible products of another foreign country or instrumentality that is party to the [GPA] and suppliers of such products.”

The authority granted under § 19 U.S.C. 2511(b) also permits the president to designate non-GPA countries that may be eligible for a waiver of domestic purchasing requirements. The president may waive the requirements if a country is party to the North American Free Trade Agreement (“NAFTA”), and will “provide appropriate reciprocal competitive government procurement opportunities” to U.S. products and suppliers of U.S. products. The president may designate a country or instrumentality eligible for waiver if it is not a “major industrialized country” and “will assume the obligations of the [GPA] and provide such opportunities to such products and suppliers.” The president may also designate a “country or instrumentality, other than a major industrial country, which will provide such opportunities to such products and suppliers.” Finally, the president may designate any country that “is a least developed country.”

As mentioned, the Stimulus Bill includes provisions of the BAA. The Stimulus Bill requires that the “construction, alteration, maintenance, or repair of a public building or public work” receiving stimulus funds must use “American iron, steel, and manufactured goods” by its terms. However, the Stimulus Bill is not intended to set aside the United

States’ obligations under international agreements. Moreover, like the BAA, the Stimulus Bill includes exceptions. The provisions do not apply: to least developed countries; to any case or category of cases if it is not in the public interest; if there is an insufficient supply or quality of the goods; or if using the domestic goods will increase the overall cost of the project by twenty five percent or more. Any exceptions made to the Buy American requirements made under the Stimulus Bill must be published in the Federal Register.

The Buy American provisions included in the Stimulus Bill are to “be applied in a manner consistent with United States obligations under international trade agreements.” As such, the United States remains committed to the GPA, NAFTA, and other trade agreements in spite of the pressure to prefer domestic goods and services in the current U.S. economic climate. Thus, the Buy American provisions of the Stimulus Bill are not absolute, but qualified by existing trade agreements, most significantly, the GPA. ♦

For more information about Schnader’s Corporate and Government and Regulatory Affairs Practice Groups, or to request to speak with a member of the group at a particular Schnader office location, please contact:

*Glenn D. Fox, Chair, Corporate Practice Group
(215) 751-2211
gfox@schnader.com*

*James J. Eisenhower, Chair, Government & Regulatory Affairs Practice Group
(215) 751-2017
jeisenhower@schnader.com*

*Cynthia G. Fischer
(212) 973-8175
cfischer@schnader.com*

*Rachel E. Branson
(215) 751-2438
rbranson@schnader.com*

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