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Government Matters

For more information,
contact:

Steve Cave
Northern Virginia
+1 703 245 1017
scave@kslaw.com

Thomas J. Spulak
Washington, D.C.
+1 202 661 7948
tspulak@kslaw.com

J. Michael Taylor
Washington, D.C.
+1 202 626 2385
jmtaylor@kslaw.com

Patrick J. Togni
Washington, D.C.
+1 202 626 2958
ptogni@kslaw.com

Mark Wasden
Washington, D.C.
+1 202 626 5529
mwasden@kslaw.com

President Biden Signs Made-In-America Executive Order

Articulates Administration Policy And Creates New Made In America Office To Review Proposed Waivers Of “Made In America Laws”

On January 25, 2021, President Joseph R. Biden Jr. signed an Executive Order on Ensuring the Future Is Made in All of America by All of America’s Workers (the “Made-in-America E.O.”). According to the White House, the Made-in-America E.O. “directs a process for updating domestic preferences to fit the current realities of the American economy” and is designed to ensure “that when the federal government spends taxpayer dollars, they are spent on American made goods by American workers and with American-made component parts.” In remarks at the signing ceremony, President Biden stated that the Executive Order is designed to “get to the core issue with a centralized, coordinated effort.”

Administration Policy

The Made-in-America E.O. begins by providing the following policy statement:

The United States Government should, consistent with applicable law, use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States. The United States Government should, whenever possible, procure goods, products, materials, and services from sources that will help American businesses compete in strategic industries and help America’s workers thrive. Additionally, to promote an accountable and transparent procurement policy, each agency should vest waiver issuance authority in senior agency leadership, where appropriate and consistent with applicable law.

In and of itself, this policy pronouncement is not unexpected, but it is important because it now serves as the guidepost for harmonizing the various “Made in America Laws” and decisions that will be made in

connection with future requests for waivers from the requirements of those laws.

What Laws Are Covered By The Made-in-America E.O.?

The Made-in-America E.O. broadly covers all “Made in America Laws” so as to include “all statutes, regulations, rules and Executive Orders relating to Federal financial assistance awards of Federal procurement, including those that refer to ‘Buy America’ or ‘Buy American,’ that require, or provide a preference for, the purchase or acquisition of goods, products, or materials produced in the United States, including iron, steel, and manufactured goods offered in the United States.”

The Made-in-America E.O. also covers “laws requiring domestic preference for maritime transport, including the Merchant Marine Act of 1920”, which is also known as the Jones Act.

Proposed Waivers Of “Made in America Laws” Will Be Subject To Review By A New “Made In America Office”, Unless That Review Is Waived

The Made-in-America E.O. is particularly important for instructing the Director of the Office of Management and Budget (“OMB”) to create a new Made in America Office and to appoint the Director of that office. The Made in America Office Director, moreover, has been charged with reviewing proposed waivers by Federal agencies of any Made in America Laws. Prior to granting waivers, Federal agencies will be required to provide the Made in America Director with details, including “a description of its proposed waiver and a detailed justification for the use of goods, products, or materials that have not been mined, produced, or manufactured in the United States.”

In an apparent effort to harmonize the provision of waivers across all Federal Agencies, the OMB Director will now take action on the proposed waivers through the Made in America Director. Specifically, OMB may determine “that issuing the proposed waiver would be consistent with applicable law and” Administration policy. In the alternative, OMB may determine “that issuing the proposed waiver would not be consistent with applicable law or” with Administration policy. In such cases, the proposed waiver will be returned “to the head of the agency for further consideration” along with “a written explanation for the determination.”

The Federal agency must provide written notice to the Made in America Office if it “disagrees with some or all of the bases for the determination and return” of the proposed waiver. There will be a process for resolving disagreements between the Federal agency and the Made in America Office Director under “procedures that parallel” section 7 of Executive Order [12866](#) (Sept. 30, 1993) (Regulatory Planning and Review).

OMB may decide to forego review of proposed waivers. Likewise, the Made-in-America E.O. allows Federal agencies to take action on waivers of Made in America Laws without OMB review in situations where “a granting agency is obligated by law to act more quickly than the review procedures” would allow.

In sum, the new Made in America Office Director position appears to attempt to create a new focal point for the Administration’s review of proposed waivers of Federal domestic procurement preference laws. This could diminish the potential for inconsistent approaches to waivers across Federal agencies in the future.

Public Website

The Made-in-America E.O. orders the creation of a public website with “information on all proposed waivers and whether those waivers have been granted”, among other information. Publication of information on waivers is permissible only “to the extent permitted by law and consistent with national security and executive branch confidentiality interests.”

Accounting For Sources Of Cost Advantage

Before granting a waiver under the context of “public interest,” the relevant granting agency also is now directed to “assess whether a significant portion of the cost advantage of a foreign-sourced product” results from the use of dumped or subsidized imports. Such determination can be made in consultation with the U.S. Department of Commerce International Trade Administration (which determines the extent of dumping or countervailable subsidies under the U.S. Trade Remedy laws). In other words, agencies now are charged with looking behind the cost advantage to understand if the product benefits from unfairly priced inputs.

Supplier Scouting

The Made-in-America E.O. instructs Federal agencies to partner with the Hollings Manufacturing Extension Partnership (“MEP”) “to conduct supplier scouting in order to identify American companies, including small- and medium-sized companies, that are able to produce goods, products, and materials in the United States that meet Federal procurement needs,” to the extent appropriate and consistent with applicable law.

Potential Notice Of Proposed Rulemaking

The Made-in-America E.O. instructs the Federal Acquisition Regulatory Council (“FAR Council”) to “consider proposing for notice and public comment amendments to the applicable” Federal Acquisition Regulations within 180 days (or by July 25, 2021) that, consistent with applicable law, would:

- “Replace the ‘component test’ in Part 25 of the FAR that is used to identify domestic end products and domestic construction materials with a test under which domestic content is measured by the value that is added to the product through U.S.-based production or U.S. job-supporting economic activity;”
- “Increase the numerical threshold for domestic content requirements for end products and construction materials;” and
- “Increase the price preferences for domestic end products and domestic construction materials.”

Although specific details remain to be provided over the next six months, the Made-in-America E.O. lays the foundation to modify the “component test” so that it could incorporate U.S. economic impact (beyond the cost of U.S.-origin components) into the origin analysis. Interested parties will be able to provide comments and analysis as part of the rulemaking process.

Updates To The List Of Nonavailable Articles

The Made-in-America E.O. requires that the FAR Council consult with the Secretary of Commerce and the Made in America Office Director before making any amendments to the list of domestically nonavailable articles in FAR 25.104(a), “paying particular attention to economic analyses of relevant markets and available market research, to determine whether there is a reasonable basis to conclude that the article, material, or supply is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.”

Report On Information Technology That Is A Commercial Item

The Made-in-America E.O. instructs the FAR Council to “promptly review existing constraints on” the application of the Made in America Laws “to information technology that is a commercial item” and requires the development of “recommendations for lifting these constraints”, where doing so would be consistent with applicable law and Administration policy. “Information technology” is defined by FAR 2.101 as “any equipment, or interconnected system(s) or subsystem(s) of equipment, that is used in the automatic acquisition, storage, analysis, evaluation,

manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by” an agency.

Reports On Made In America Laws

The Made-in-America E.O. requires relevant Federal agencies to submit a report to the Made in America Office Director within 180 days (July 25, 2021) regarding implementation and compliance with Made in America Laws. The report also must discuss “the agency’s ongoing use of any longstanding or nationwide waivers of any Made in America Laws,” among other information. After the submission of the inaugural report, relevant Federal agencies must submit biannual reports on similar topics. The biannual reports also must provide “the agency’s analysis of spending” due to “waivers issued pursuant to the Trade Agreements Act of 1979” that are “separated by country of origin.”

Implementation Of Administration Policy On Federal Government Property

The Made-in-America E.O. requires the General Services Administration to make recommendations to the Made in America Office Director within 180 days (July 25, 2021) on how to ensure “that products offered to the general public on Federal property are procured in accordance with” Administration policy.

Revocation And Supersession Of Certain Presidential And Regulatory Actions

The Made-in-America E.O. revokes all or part of three Executive Orders that were issued by President Donald J. Trump, including: (1) Executive Order [13788](#) (Apr. 18, 2017) (Buy American and Hire American); (2) section 5 of Executive Order [13858](#) (Jan. 31, 2019) (Strengthening Buy-American Preferences for Infrastructure Projects); and (3) Executive Order [13975](#) (Jan. 14, 2021) (Encouraging Buy American Policies for the United States Postal Service).

The Made-in-America E.O. supersedes the following Executive Orders “to the extent that they are inconsistent with this order”: (1) Executive Order [10582](#) (Dec. 17, 1954) (Prescribing Uniform Procedures for Certain Determinations Under the Buy-America Act); and (2) Executive Order [13881](#) (July 15, 2019) (Maximizing Use of American-Made Goods, Products, and Materials).

Although not certain at this time, it appears that this action means that proposed amendments to the FAR regarding procurement by the Department of Defense, General Services Administration, and the National Aeronautics and Space Administration may not be implemented as recently published in final form. *See Federal Acquisition Regulation: Maximizing Use of American-Made Goods, Products, and Materials*, [86 Fed. Reg. 6180](#) (Jan. 19, 2021) (stated to apply to solicitations issued on or after February 22, 2021 and resultant contracts).

In sum, although many details have yet to be announced, the Executive Order on Ensuring the Future Is Made in All of America by All of America’s Workers articulates the Biden Administration’s early focus on this topic.



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