
President Trump Signs Buy American and Hire American Executive Order

APRIL 19, 2017

On April 18, 2017, President Trump signed an important executive order promoting “Buy American” and “Hire American” policies. In light of the Order, clients should be aware of:

- stricter standards for waivers of Buy American rules, particularly public interest waivers
- a proposal to strengthen Buy American rules to be drafted by the Department of Commerce;
- potentially heightened audit risks under the H-1B and other nonimmigrant visa programs; and
- proposals for H-1B reform to be drafted by the Departments of Homeland Security, Justice, Labor, and State.

Buy American

The Order calls on the executive agencies to conduct a systematic review of the United States' Buy American rules, and in particular to develop proposals to maximize US content in federal procurements and reduce the use of waivers, as well as to reexamine exemptions granted to foreign bidders.

Buy American rules impose domestic preference requirements on federal government procurements and certain federal funding of state and local procurements. The Order specifically mentions those “Buy American Laws” 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.” The Order announces that, as a matter of policy, the executive branch will maximize the use of US-made products through the terms and conditions of federal funding awards and federal procurements. To further this goal, the Order directs agencies to scrupulously monitor, enforce, and comply with Buy American rules and to minimize the use of waivers.

Buy American rules are generally mandated by statute but allow agencies some discretion in granting waivers for certain purposes, such as where application of the rules would be contrary to

public interest or result in unreasonable cost or where US-made products are unavailable. The Office of the US Trade Representative (USTR) has also granted waivers from the primary Buy American rules for all foreign countries that are party to the World Trade Organization (WTO) Agreement on Government Procurement (GPA), as well as for the United States' partners in free trade agreements (FTAs) that include commitments related to government procurement. While eliminating the availability of these waivers would require legislative changes, the Administration could revoke existing waivers, or reform the criteria for future waivers, solely by executive action.

The Buy American section of the Order has two main components. First, the Order calls on all agencies to review their Buy American rules, including monitoring of enforcement and compliance as well as the use of waivers, and to develop and propose policies to maximize the use of US-made products in federal procurements. Department of Commerce Secretary Wilbur Ross and Office of Management and Budget Director Mick Mulvaney will coordinate this review, in consultation with the Secretaries of State and Labor, as well as the Federal Acquisition Regulatory Council.

The Order also calls on Secretary Ross and the USTR to assess the impact of the WTO GPA and the nation's FTAs on the operation of Buy American rules. The Administration has stated that waivers provided under FTAs “may be a poster child of unfair and not reciprocal trade in the \$4.4 trillion government procurement market.” If Secretary Ross and the USTR find that the United States' trading partners are not meeting their commitments, the Administration could use those findings as grounds to renegotiate or revoke the waivers currently available under FTAs.

Once the agency review process is complete, Secretary Ross is directed to present a report to President Trump within 220 days, providing specific recommendations on how to strengthen Buy American rules. According to a press briefing, this report will serve as a blueprint for additional executive and regulatory actions, as well as a possible guide for legislative proposals.

Second, the Order directs agencies to strictly construe public interest waivers in order to maximize US content in federal procurements and grants. The Order provides that determinations to issue public interest waivers should be made by the head of the relevant agency, to the extent permitted by law, which is a significant departure from current practice for some agencies. The Order also directs agencies to take “appropriate account of whether a significant portion of the cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured goods or the use of injuriously subsidized steel, iron, or manufactured goods.” Although this unprecedented requirement poses significant administrative hurdles for agencies considering such waivers, the practical impact will likely be limited by the fact that public interest waivers represent a relatively small share of overall Buy American waivers.

Separately, the Order affirms the “melted and poured” standard for steel. This standard requires that, in order for a steel product to be considered US-made for purposes of Buy American rules, all manufacturing processes from the initial melting stage through the application of coatings occur in the United States. This standard is particularly relevant for the Buy American rules that apply to Department of Transportation-funded programs, some of which mandate up to 100% U.S. content for iron and steel products.

The Order follows a February Government Accountability Office report, which concluded the United States has opened a greater percentage of its government procurement to foreign competitors than its trading partners, and a March letter from Senators Tammy Baldwin and Jeff Merkley calling on President Trump to temporarily suspend the government procurement chapters in the United States' FTAs until they are renegotiated.

As the Department of Commerce and USTR draft their reports, clients with interests in reciprocal access to government procurement should prepare to articulate their concerns to the Administration. Clients should also be prepared for government procurement to be a contentious issue in the anticipated renegotiation of the North American Free Trade Agreement.

Hire American

The Order calls on the Departments of Homeland Security, Justice, Labor, and State to propose new rules “to protect the interests of United States workers in the administration of our immigration system” and, in particular, to propose reforms to the H-1B visa program with the goal of prioritizing visas for the highest skilled and highest paid applicants. Although major structural changes to nonimmigrant visa programs, such as ending the H-1B lottery system, will require legislation, there are a number of reforms that the Administration has telegraphed will be implemented administratively, such as increasing visa fees. The Order was described in a press briefing as “a transitional step to get towards a more skills-based and merit-based immigration system” and leaves considerable room for the four Departments to craft their own approaches to visa reform.

The Order follows a number of more specific legislative proposals in the House and Senate including, most prominently, the bipartisan H-1B and L-1 Visa Reform Act introduced by Senators Charles Grassley and Dick Durbin in January and by Congressmen Bill Pascrell, Jr., Dave Brat, Ro Khanna, and Paul Gosar in March. That legislation would significantly alter nonimmigrant visa programs by, among other things, establishing a visa allocation system for H-1B applicants with priority given to STEM graduates of US universities, higher-paid H-1B workers, and petitions from employers meeting criteria of “good corporate citizenship.”

As the Departments draft their proposals for visa reform, and the House and Senate consider current and future legislative proposals, clients with interests in the nonimmigrant visa programs should marshal ideas for improvements to the programs, both in terms of criteria for issuance of such visas and the administration of the programs. It is crucial for clients to convey to both the Administration and Congress how the nonimmigrant visa programs can effectively supplement the American workforce and how any reforms can be implemented to increase the competitiveness of American industry.

In terms of enforcement, the Order also calls for the “rigorous[] enforce[ment] and administ[r]ation of] the laws governing entry into the United States of workers from abroad.” Clients who utilize the nonimmigrant visa programs should take care to strictly adhere to program requirements and should prepare for an increased number (and increased breadth) of onsite audits.

Authors



**Ambassador
Charlene
Barshefsky**
RETIRED PARTNER

☎ +1 202 663 6000



**Stephanie
Hartmann**
COUNSEL

✉ stephanie.hartmann@wilmerhale.com

☎ +1 202 663 6564



Stephen A. Jonas
RETIRED PARTNER

☎ +1 617 526 6000