

**CLIENT ADVISORY: PRESIDENT TRUMP SIGNS EXECUTIVE ORDER TO STRENGTHEN “BUY AMERICAN” AND “HIRE AMERICAN” PROGRAMS**

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In an effort to fulfill one of his signature campaign promises, President Trump signed an [executive order](#) yesterday launching a government-wide review of federal procurement programs (“Buy American” programs) as well as programs through which workers enter the United States from abroad (“Hire American” programs). The executive order focuses heavily on reviewing the implementation and enforcement of domestic preference programs by federal agencies and sets forth numerous deadlines for assessing compliance with Buy American laws. Of particular note, the executive order calls for the “judicious use” of public interest waivers, as well as a comprehensive review of waivers available through pre-existing free trade agreements.

**I. Buy American Review**

The Buy American Act (the “BAA”) is the major domestic preference statute governing procurement by the federal government. The BAA<sup>1</sup>, in general, requires that manufacturers and distributors may only supply “domestic end products” to the federal government. A two-part test is applied to determine if an item qualifies as a domestic end product: 1) the product must be manufactured in the United States; and 2) the cost of domestic components must exceed 50 percent of the cost of all of the components used in the assembly.

There are five primary exceptions to the BAA. The BAA does not apply to procurements when its application would be inconsistent with the public interest<sup>2</sup> or unreasonable in cost.<sup>3</sup> The BAA does not apply to procurements of products for use outside of the United States or of products not produced or manufactured in the United States in sufficient and reasonably available commercial quantities and of satisfactory quality.<sup>4</sup> Lastly, the BAA does not apply to procurements under \$2,500.<sup>5</sup>

The restrictions of the BAA are also not applicable to end products and construction materials from certain countries pursuant to certain trade agreements.<sup>6</sup> Under the Trade Agreements Act, the President (through the U.S. Trade Representative) may waive the BAA for foreign end products or construction materials from countries that have signed an international trade

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<sup>1</sup> 41 U.S.C. §§ 10a-10d.

<sup>2</sup> 41 U.S.C. § 8302. Generally referred to as a “public interest” exception or waiver.

<sup>3</sup> *Id.* Generally referred to as an “unreasonable cost” exemption or waiver and is implemented through the use of price differentials.

<sup>4</sup> *Id.* Generally referred to as a “non-availability” exception or waiver.

<sup>5</sup> 41 U.S.C. §§ 10a(a), 428(f).

<sup>6</sup> 48 C.F.R. § 25.0001(b).

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agreement with the United States or that meet certain other criteria, such as being a least developed country. The U.S. Trade Representative has waived the BAA restrictions in acquisitions covered by the World Trade Organization Government Procurement Act, Free Trade Agreements, and the Israeli Trade Act.<sup>7</sup>

President Trump’s executive order calls on federal agencies to review and minimize the use of these exceptions and waivers. Specifically, the executive order stipulates that, before granting public interest waivers, agencies should review 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 good.”<sup>8</sup> Senior members of the Trump Administration have consistently raised concerns with the dumping of steel and other building and manufacturing inputs into the United States. The executive order also calls on public interest waivers to be construed to ensure “the maximum utilization of goods, products, and materials produced in the United States.”<sup>9</sup>

The executive order also takes aim at waivers available for trading partners who have signed free trade agreements with the United States, and specifically directs the Commerce Department and the Office of the U.S. Trade Representative to “comprehensively assess” the procurement provisions of trade agreements. According to a senior Trump Administration official discussing the executive order during a [White House briefing](#), if trade agreement-related waivers are deemed to have put the U.S. at a disadvantage following the mandated review, the trade agreements are likely to be renegotiated.

Under the executive order, Commerce Secretary Wilbur Ross will coordinate an effort across all federal government agencies to assess the monitoring of, enforcement of, implementation of, and compliance with Buy American laws. Based on the results of this review, and in consultation with the Secretary of State, the Director of the Office of Management and Budget, and the U.S. Trade Representative, Ross will submit a report to President Trump within 220 days providing recommendations on ways to strengthen the implementation of Buy American laws.

## **II. Hire American Review**

The “Hire American” portion of the executive order calls for a re-examination of all programs that govern the entry of foreign labor into the United States, with the goal of reforming current practices to grant visas to higher-skilled and higher-paid workers. It offers limited information on how this will be achieved, though does call for recommendations “as soon as practicable” from the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of

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<sup>7</sup> 48 C.F.R. § 25.402.

<sup>8</sup> THE WHITE HOUSE, Office of the Press Secretary, Presidential Executive Order on Buy American and Hire American (Apr. 18, 2017), <https://www.whitehouse.gov/the-press-office/2017/04/18/presidential-executive-order-buy-american-and-hire-american>.

<sup>9</sup> *Id.*

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Homeland Security on reforming the H-1B visa program in order to ensure that such visas are awarded to the “most-skilled or highest-paid petition beneficiaries.”<sup>10</sup>

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We will continue to monitor developments related to this executive order. For additional information on its implications, please contact **Kent Bressie** at +1 202 730 1337 or [kbressie@hwglaw.com](mailto:kbressie@hwglaw.com); **John Hodges** at +1 202 730 1326 or [jhodges@hwglaw.com](mailto:jhodges@hwglaw.com); or **William Leahy** at +1 202 730 1358 or [wleahy@hwglaw.com](mailto:wleahy@hwglaw.com).

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<sup>10</sup> *Id.*