SQUIRE PATTON BOGGS

Trump Puts "America First" With Executive Order

Following through on his promise to put "America first," President Donald Trump signed an Executive Order (EO) on April 18 titled "Buy American and Hire American," a two-part document addressing both US government procurement and immigration programs. As he announced the EO in Wisconsin – a state that helped him win the 2016 election – President Trump relied on many of the populist themes that drove his presidential campaign, pledging the EO would help end the "theft of American prosperity" and "protect workers and students."

The EO addresses "Buy American" policies, calling for an expansive review of existing federal procurement programs to increase government procurement of US-made products and materials and minimize the use of waivers. The EO's "Hire American" provisions focus on eliminating fraud and abuse in immigration, particularly the H-1B non-immigrant visa program for employment in specialty occupations.

President Trump and others in his administration lauded the EO, suggesting it will stimulate domestic job creation and create incentives to buy American-made products. Despite the publicity, a majority of the EO requests only investigation, reporting and strategy development on existing US policy, all of which may direct future policy-making.

Procurement Provisions

The EO's procurement provisions aim "to promote economic and national security and to help stimulate economic growth, create good jobs at decent wages, strengthen our middle class, and support the American manufacturing and defense industrial bases," establishing that US policy will be "to maximize… the use of goods, products, and materials produced in the United States."

Notably, the EO broadly defines "Buy American Laws" as "all statutes, regulations, rules, and Executive Orders relating to Federal procurement or Federal grants 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."

1. The EO directs federal agencies to "scrupulously monitor, enforce, and comply with Buy American Laws," minimizing the use of waivers. Within 150 days, the heads of all agencies must:
   - Assess the monitoring, enforcement and implementation of, and compliance with, Buy American laws within their departments.
   - Assess the use of waivers within their departments by type and by their impact on domestic jobs and manufacturing.
   - Develop and propose policies for their respective departments to ensure that "Federal financial assistance awards and Federal procurements maximize the use of materials produced in the United States, including manufactured products; components of manufactured products; and materials such as steel, iron, aluminum, and cement."

   Within 60 days, the Secretary of Commerce and the Director of the Office of Management and Budget (OMB), working with the heads of several other agencies, must issue guidance to agencies on how to develop these Buy American assessments and policies.
2. Within 150 days, the heads of all agencies must submit the findings of the above assessments to the Secretary of Commerce and the OMB Director.
3. Also within 150 days, the Secretary of Commerce and the US Trade Representative must assess the impacts of all US free trade agreements and the World Trade Organization Agreement on Government Procurement on the operation of Buy American laws, including their impacts on the implementation of domestic procurement preferences. A senior administration official called this "the [United States'] first ever review of worldwide procurement procedures."
4. Within 220 days, the Secretary of Commerce – working with the Secretary of State, the OMB Director and the US Trade Representative – must provide the President with a report that includes the findings of the three Buy American-related assessments aforedescribed. The report must include recommendations to strengthen implementation of Buy American laws, including domestic procurement preference policies and programs. Agency heads must also submit annual reports on implementation of Buy American laws to the Secretary of Commerce and the OMB Director for the next three years and later, as directed; the Secretary of Commerce must follow up with an annual report to the President on these submissions.
5. The EO directs federal agencies to be "judicious" in their use of public interest waivers, one of several waivers available under existing law. To the extent permissible under law:
   - Such waivers should be construed to ensure the maximum utilization of goods, products and materials produced in the US.
   - Determinations for such waivers must be made by the head of the agency with authority over the federal financial assistance award or federal procurement under consideration.
   - Before granting such waivers, agencies must consider "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," and integrate such findings into the waiver, as appropriate.

   The term "produced in the United States" is defined to mean that for iron and steel products "all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States."

Immigration Provisions

The EO's immigration provisions are based upon the following policy goals: "to create higher wages and employment rates for workers in the United States, and to protect their economic interests[.]" The term "Workers in the United States" includes US citizens, lawful permanent residents (green card holders), those awarded refugee or asylee status and other categories of immigrants authorized for employment, but does not include foreign national visa holders or other "nonimmigrants" only temporarily in the country. The EO calls on the executive branch to "rigorously enforce and administer the laws governing entry into the United States of workers from abroad."

The EO's policy section specifically references the Labor Certification process, which is used by employers to test the labor market when seeking green cards for employees in several Employment-Based categories, among the immigration programs to be rigorously enforced and administered, but does not provide additional detail or requirements.

In an effort to advance the EO's policy goals, the President directs the Secretary of State, the Attorney General, the Secretary of Labor and the Secretary of Homeland Security to propose new rules and issue new guidance "to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse." They are also directed to "suggest reforms" to the H-1B visa program to ensure these visas "are awarded to the most-skilled or highest-paid petition beneficiaries." This would likely include moving away from the current H-1B blind lottery system, by which petitions are randomly selected for adjudication, to a system favoring higher-skilled and higher-paid applicants. No hard deadlines are imposed in the EO's immigration provisions, with all requests to be carried out "as soon as practicable, and consistent with applicable law."

What It Means

In many ways, the EO's Buy American provisions are a natural extension of President Trump's trade policies going as far back as the start of his campaign. The Trump Administration, with the support of bipartisan Members of Congress, has committed to strong enforcement of existing US trade laws and pursuing investigations against allegations of illegally dumped and subsidized imports. However, the phrasing of the EO suggests any dumping/illegal subsidy determinations will be made by the agencies themselves and not necessarily as part of formal – and often highly complex – antidumping/countervailing duty investigations jointly conducted by the Department of Commerce and the International Trade Commission.

Similarly, the Trump Administration has expressed a willingness to review existing trade deals – starting with the expected renegotiation of the North American Free Trade Agreement (NAFTA) – to ensure they benefit American jobs and businesses. The EO's review of existing US free trade agreements formally ensures any reviews will extend to procurement provisions. However, the Trump Administration will not be able to pursue extensive revisions to any of the 14 existing US trade deals without launching formal renegotiations, and any changes risk triggering reciprocal responses targeting US companies competing abroad.

The EO's immigration provisions are long on rhetoric and short on concrete directives. It is a call to the President's own executive agencies to seek improvements in US immigration programs, which critics claim should be done through internal directives and memoranda, not an Executive Order. Industry groups have vowed to support the President's efforts to root out corruption and fraud, but hope the EO will not lead to increased regulations and procedures for securing visas they believe are essential to filling positions in fields with insufficient available US workers.

The EO's language echoes many of the President's campaign talking points on putting American workers first and slowing the hiring of foreign nationals. Although his past immigration statements have been mixed, for example, on the importance of H-1B visas for US employers and continuing President Obama's DACA program for individuals brought to the US as children, recent trends show President Trump moving toward a stronger pro-American, anti-visa stance.

The immediate impact of the EO's immigration provisions should be limited, with no likely legal effect on cases currently before the government, including the 85,000 new H-1B cases filed earlier this month under the annual H-1B quota. Substantial changes to most immigration programs would require congressional action or executive changes through the notice and comment rulemaking process. However, the EO reinforces a growing trend toward increased scrutiny in visa adjudications during the Trump presidency through internal guidance, such as recently introduced guidance on "extreme vetting" and more thorough screening for certain popular H-1B technology positions, and may result in a *de facto* increase in the difficulty of securing many employment visas.

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