



COMMENTARY  
MAY 2017

# The Buy American and Hire American Executive Order: What It Means For Supply Chain Management

## IN SHORT

**The Situation:** President Donald Trump's Buy American and Hire American executive order increases enforcement of current laws relating to domestic preferences for government procurement.

**The Result:** Every federal agency is required to "scrupulously monitor, enforce, and comply with Buy American Laws," and to minimize the use of waivers of these laws.

**Looking Ahead:** Companies providing goods or service to the federal government, or to high-tier contractors, could experience significant impact to their supply chains.

In our December 2016 *Commentary* on the "[Government Contracts Ramifications of the Trump Election](#)" and our [January 2017 update](#), we predicted that the Trump Administration would seek to strengthen domestic preferences in procurement, possibly doing so via an executive order. On April 18, 2017, President Trump issued the [Buy American and Hire American executive order](#). The order does not create new law, but it increases enforcement of current laws relating to domestic preferences ("Buy American Laws") and calls for the Administration to explore new possibilities regarding domestic preferences.

Because domestic preferences in procurement are statutory, the impact of the Buy American and Hire American executive order is necessarily limited—achieving wholesale change of the statutory scheme would require congressional action. The executive order requires every agency to "scrupulously monitor, enforce, and comply with Buy American Laws," and to minimize the use of waivers of these laws. Agencies are also required to assess their compliance with Buy American Laws and the extent to which waivers are used, and to develop and propose policies to ensure that federal procurements maximize the use of materials produced in the United States.

The executive order specifically addresses the use of "public interest waivers." Under the Federal Acquisition Regulation ("FAR"), an agency may acquire a foreign end product without regard to the restrictions of the Buy American Act if it is in the public interest. The FAR provides that, to make a public interest waiver, the head of the agency must make a determination that a domestic preference would be inconsistent with the public interest. According to the FAR, this exception applies when an agency has an agreement with a foreign government that provides a blanket exception to the Buy American statute. FAR 25.103(a). The Buy American and Hire American executive order specifically addresses the use of public interest waivers, stating that they should be construed to ensure the maximum utilization of goods, products, and materials produced in the United States. Before granting a public interest waiver, the executive order instructs agencies to 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 to "integrate any findings into its waiver determination as appropriate."

The order also requires the Secretary of Commerce and the United States Trade Representative to assess the impacts of all United States free trade agreements and the World Trade Organization Agreement on Government Procurement to determine their impacts on domestic procurement preferences and the operation of Buy American Laws. This could have a significant impact on the current structure of the domestic preference scheme. Currently, the Trade Agreements Act implements free trade agreements by acting as an exception to the Buy American Act requirements. The recent executive order could signal a desire to move away from, or change, this structure. Finally, the order reaffirms that, with regard to iron and steel products, "produced in the United States" means that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

Although this executive order might not have a significant immediate impact, the heightened scrutiny required by the order will likely result in less use of current exceptions and waivers to domestic preference requirements. In addition, the executive order is likely to herald a new enthusiasm and prioritization of enforcement of these domestic preference requirements, which are already vigorously enforced through tools such as the False Claims Act. Further, once the reports required by the order have been submitted, there is the potential that the Administration could seek support to overhaul the current laws to require stronger domestic preferences, including by eliminating or limiting exceptions and waivers. As noted above, many of these actions would require congressional action. All of these developments could have a significant impact on the supply chains of companies who provide goods or services to the government or to higher tier contractors.



## THREE KEY TAKEAWAYS

1. The Buy American and Hire American order does not create new law; it increases enforcement of current law. A complete replacement of the statute would require an action of congress.
2. The executive order focuses on the use of "public interest waivers," stating that they should be construed to ensure the maximum utilization of goods, products, and materials produced in the United States.
3. The order will likely result in more limited use of public interest waivers, heightened enforcement of current procurement requirements, and perhaps also lead to new legislation requiring more restrictive domestic preferences.

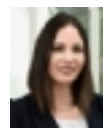
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