

The Biden Administration's 'Made in America' Executive Order: A Move to Strengthen U.S. Preferences in Federal Spending

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On Jan. 25, 2021, President Biden issued an Executive Order (E.O.) entitled “Ensuring the Future is Made in All of America by All of America’s Workers.”¹ This E.O. seeks to bolster American industry by strengthening policies and practices related to financial federal assistance awards and federal procurements that require or provide a preference for the purchase or acquisition of goods, products, or materials produced in the United States. While this E.O. has limited immediate impact, agency implementation of the E.O. over the coming months may have a significant effect on some federal procurements and federal financial assistance awards.

Administration Policy

The E.O. expresses the Biden administration’s policy to “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” and that the U.S. 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.” The E.O. focuses on “Made in America Laws,” which are “all statutes, regulations, rules, and Executive Orders relating to Federal financial assistance awards or 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” and laws requiring domestic preference for maritime transport, including the Jones Act.

Key Content of the E.O.

- Section 3: Requires each agency to review and consider suspending, revising, or rescinding agency actions that are inconsistent with Biden administration policy, as well as to consider proposing any additional agency actions necessary to enforce or advance the administration policy.

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- Section 4: Establishes a “Made in America Office” within the Office of Management and Budget (OMB), and updates and centralizes the Made in America waiver process in this office. Prior to granting a waiver, the granting agency will be required to provide the director of the Made in America Office with: (1) a description of its proposed waiver and (2) the justification for the agency’s use of goods, products, or materials that have not been mined, produced, or manufactured in the United States. The Made in America director will publish this information (to the extent permitted by law and consistent with national security and confidentiality interests) to the public website established by the order. The E.O. establishes a review process by which the Made in America director will determine whether the proposed waiver is consistent or inconsistent with applicable law and administration policy. The director will establish a deadline (not to exceed 15 business days) by which s/he will notify the agency that OMB has opted not to review the matter or notify the agency head in writing of the result of the review.
 - Section 5: Agencies must now assess prior to granting a waiver whether a significant portion of the foreign product’s cost advantage is due to dumped steel, iron, or manufactured goods or the use of injuriously subsidized steel, iron, or manufactured goods. Any findings from this assessment must be included in the waiver determination as appropriate.
 - Section 6: Increases transparency by requiring that the General Services Administration (GSA) develop a public website to publicize all proposed waivers, whether those waivers have been granted, and the contact information for each granting agency.
 - Section 7: Seeks to connect new businesses to federal contracting opportunities by requiring agencies to partner with the Hollings Manufacturing Extension Partnership (see, Pub.L. 114-329) to scout for “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.”
 - Section 8: Requires the Federal Acquisition Regulatory Council (FAR Council), within 180 days of the E.O., to consider proposing, through notice-and-comment rulemaking, amendments to the Federal Acquisition Regulation (FAR) that 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 that measures domestic content “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.
 - Section 9: Establishes a process by which the Office of Federal Procurement Policy, the secretary of commerce, and the Made in America director review any potential updates to the list of nonavailable items in the FAR prior to the FAR Council’s issuance of any proposed amendment to the same.
 - Section 10: Requires the FAR Council to “promptly review” the existing constraints on

extending Made in America law requirements to commercial item information technology and to develop recommendations for lifting the same to further promote the administration policy.

- Section 11: Requires agencies within 180 days of the E.O. to report on the agency's implementation of and compliance with Made in America laws and the agency's ongoing use of any longstanding or nationwide Made in America law waivers and to provide recommendations on how to further effectuate the administration policy.
- Section 12: Requires agencies after submitting the report required by the previous section to bi-annually submit a report on their: (1) ongoing implementation and compliance with Made in America laws; (2) analysis of goods, products, and materials that are not subject to Made in America laws or where the requirements of these laws have been waived; (3) spending as a result of waivers issued pursuant to the Trade Agreements Act of 1979, separated by country of origin; and (4) recommendations for how to further effectuate the administration policy.
- Section 13: Requires the GSA within 180 days of the E.O. to make recommendations to the Made in America director for ensuring that products offered to the general public on federal property are procured in accordance with the E.O.'s policy.
- Section 14: Revokes E.O. 13788 of April 18, 2017 (Buy American and Hire American); Section 5 of E.O. 13858 of Jan. 31, 2019 (Strengthening Buy-American Preferences for Infrastructure Projects), and E.O. 13975 of Jan. 14, 2021 (Encouraging Buy American Policies for the United States Postal Service) and supersedes the following to the extent that they are inconsistent with this E.O.: Executive Order 10582 of Dec. 17, 1954 (Prescribing Uniform Procedures for Certain Determinations Under the Buy-American Act) and Executive Order 13881 of July 15, 2019 (Maximizing Use of American-Made Goods, Products, and Materials).

Key Takeaway

The "Made in America" E.O. directs a broad review and strengthening of policies and practices related to federal financial assistance awards and federal procurements that require or provide a preference for the acquisition of goods, products, or materials produced in the United States. While the E.O. has limited immediate impact, agency implementation over the coming months may have a significant effect on some federal procurements and federal financial assistance awards. Contractors and grant recipients subject to Buy America, Buy American, or similar U.S. source requirements and preferences should closely monitor agency implementation of the E.O., and evaluate whether adjustments in manufacturing processes and suppliers are necessary to ensure compliance with increased U.S. source requirements and preferences.

¹ [Click here to view the Fact Sheet, which the White House released in advance of the E.O.](#)

