



Hogan
Lovells

Aerospace & Defense Insights

Domestic sourcing guidance issued
to help American businesses compete

Michael Mason, Stacy Hadeka, Joy Sturm, and Rebecca Umhofer

Through Aerospace & Defense Insights, we share with you the top legal and political issues affecting the aerospace and defense (A&D) industry. Our A&D industry team monitors the latest developments to help our clients stay in front of issues before they become problems, and seize opportunities in a timely manner.

Recently, the White House Office of Management and Budget issued guidance to federal agencies implementing a January executive order that aimed to strengthen American industry through changes to federal contract law that more strongly favor domestic products. The new guidance instructs agencies to take numerous actions to support the EO's goal of increasing government purchase of American goods.

Recently, the White House Office of Management and Budget (OMB) issued guidance to federal agencies further implementing a January executive order. The 25 January 2021 Executive Order (EO), which we previously [reported on](#), aims to strengthen American industry through changes to federal procurement law that more strongly favor domestic products. It was meant to implement Biden's "Made in All of America" plan, which was central to his campaign.

The Made in America EO tightens requirements that federal agencies purchase domestic products by increasing domestic content requirements, limiting waivers of domestic purchase restrictions, and encouraging accountability and transparency. The EO also established a Made in America Office (MIAO) within OMB to lead the government's Buy American policy and tasks it with overseeing a new centralized process for reviewing waivers to "Buy American" requirements. The EO also calls for Federal Acquisition Regulation (FAR) rulemaking to implement this new approach.

The OMB issued [guidance](#) to federal agencies on 11 June 2021 addresses how the MIAO will implement the EO. As a preliminary matter, the guidance identifies numerous statutes, regulations, and rules that are identified as "Made in America Laws." These

include the Buy American Act (BAA), the Berry Amendment, the Kissell Amendment, the Jones Act, the Cargo Preference Acts of 1904 and 1954, and others. Exceptions to these "Made in America Laws" are collectively referred to in the guidance as "waivers." One such example is where application of the Trade Agreements Act effectively waives the BAA.

The guidance requires agencies to take a number of actions to "strengthen internal agency waiver review processes, prepare for and support a centralized strategic waiver review process at the MIAO, and increase reliance on domestic manufacturers. Among other things, agencies will be required to do the following:

- **Designate a Senior Accountable Officer:** Each agency is required to designate a Senior Accountable Officer (SAO) for domestic sourcing by 30 June 2021. The SAO will be responsible for identifying opportunities to increase the agency's reliance on U.S. products, materials and services and will file the required reports on the agencies use of Made in America statutes, rules, regulations and orders.
- **Agency reports:** The guidance requires that each agency report on its use of Made in America Laws by 24 July 2021. The guidance identifies specific elements for these report and instructs that "to the extent practicable, the report should focus on proactive steps the agency is or will be taking to strengthen and diversify existing domestic supplier bases and create new opportunities where there are gaps . . ." Updated reports will be required semi-annually beginning 23 January 2022.
- **Agency-OMB waiver review process:** The guidance notes that it "contemplates a phased implementation approach to allow the MIAO to build capacity and to give agencies time to adjust to new processes." The phased approach will provide leeway for "transactional reviews" to be conducted by the MIAO. The guidance explains that a "transactional review" is review of a waiver covering a specific business transaction such as a federal procurement of a product or materials. It further explains that the initial phase of "transactional reviews" will include only Jones Act waivers and "non-availability" waivers that

are proposed by one of the 24 agencies subject to the Chief Financial Officers Act pursuant to the Buy America Act. The guidance identifies specific information that agencies must include in proposing these types of waivers and notes that additional types of waivers and waivers proposed by all other federal agencies will be reviewed beginning in the first quarter of fiscal year 2022.

- **Waiver transparency:** The guidance notes that once the SAOs have been designated, the MIAO will work with them to develop additional processes for posting descriptions of proposed waivers and justifications on a public website that has been established by the General Services Administration (GSA) pursuant to the EO.

Key takeaways

- This guidance confirms that waivers will come under increased scrutiny, which may serve to decrease use of these waivers over time.
- As waivers become publicly available on GSA's website, information about evolving bases for waivers will be available to contractors.
- Additional developments stemming from the Administration's Made in America EO are expected, and these may impact whether and how Buy American restrictions will apply to specific procurements.
- This guidance is one piece of a developing web of rules and initiatives that relate to the Biden Administration's focus on building resilient supply chains, revitalizing American manufacturing, and fostering broad-based growth as emphasized in EO 14017, "America's Supply Chains." Contractors seeking to benefit from domestic preferences will be well-served to keep up with the evolving landscape in this area.



Alicante
Amsterdam
Baltimore
Beijing
Birmingham
Boston
Brussels
Budapest*
Colorado Springs
Denver
Dubai
Dublin
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jakarta*
Johannesburg
London
Los Angeles
Louisville
Luxembourg
Madrid
Mexico City
Miami
Milan
Minneapolis
Monterrey
Moscow
Munich
New York
Northern Virginia
Paris
Perth
Philadelphia
Riyadh*
Rome
San Francisco
São Paulo
Shanghai
Shanghai FTZ*
Silicon Valley
Singapore
Sydney
Tokyo
Ulaanbaatar*
Warsaw
Washington, D.C.

*Our associated offices
Legal Services Center: Berlin



Michael Mason

Partner | Washington, D.C.
T: +1 202 637 5499
E: michael.mason@hoganlovells.com



Stacy Hadeka

Senior Associate | Washington, D.C.
T: +1 202 637 3678
E: stacy.hadeka@hoganlovells.com



Joy Sturm

Partner | Washington, D.C.
T: +1 202 637 5990
E: joy.sturm@hoganlovells.com



Rebecca Umhofer

Senior Knowledge Lawyer | Washington, D.C.
T: +1 202 637 6939
E: rebecca.umhofer@hoganlovells.com

www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

© Hogan Lovells 2021. All rights reserved. CT-REQ-158