

Client Alert

International Trade & Litigation and Energy & Natural Resources Practice Groups

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President Trump Issues Memorandum On “Construction Of American Pipelines”

Prioritizes U.S.-Produced “Materials And Equipment”

On January 24, 2017, President Donald J. Trump signed a slate of executive orders and presidential memoranda focused on pipeline and other infrastructure projects. Along with memoranda that specifically concern the construction of the Keystone XL Pipeline and the Dakota Access Pipeline, which are receiving significant attention in the media, the President also issued a *Presidential Memorandum Regarding Construction of American Pipelines* (the “American Pipeline Memorandum”). The American Pipeline Memorandum is particularly notable because of the breadth of the President’s order, which directs the Secretary of Commerce to

develop a plan under which all new pipelines, as well as retrofitted, repaired, or expanded pipelines, inside the borders of the United States, including portions of pipelines, use materials and equipment produced in the United States, to the maximum extent possible and to the extent permitted by law.

The Secretary of Commerce also is directed to consult “with all relevant executive departments and agencies” in developing the plan, which must be submitted to President Trump within 180 days, or by July 24, 2017 (recognizing that July 23 falls on a Sunday).

At the time he signed the American Pipeline Memorandum in the Oval Office, President Trump explained, “I am very insistent that, if we’re going to build pipelines in the United States, the pipe should be made in the United States. So unless there’s difficulty with that—because companies are going to have to sort of gear up, much pipeline is bought from other countries—from now on, we’re going to start making pipeline in the United States. We build it in the United States. We build the pipelines. We want to build the pipe. [We’re] going to put a lot of workers—a lot of steelworkers—back to work.”

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Initial Guidance On The Meaning Of “Materials And Equipment Produced In The United States” And Early Questions About The Meaning Of “Inside The Borders Of The United States”

The American Pipeline Memorandum provides some interpretive guidance, while leaving other important terms unclear. The Memorandum goes into some detail regarding the meaning of “Produced in the United States” by stating that the term “shall mean”:

1. With regard to iron or steel products, that all manufacturing processes for such iron or steel products, from the initial melting stage through the application of coatings, occurred in the United States.
2. Steel or iron material or products manufactured abroad from semi-finished steel or iron from the United States are not “produced in the United States” for purposes of this memorandum.
3. Steel or iron material or products manufactured in the United States from semi-finished steel or iron of foreign origin are not “produced in the United States” for purposes of this memorandum.

The guidance focuses on “iron or steel products,” “steel or iron material or products manufactured abroad from semi-finished steel or iron from the United States,” and “steel or iron material or products manufactured in the United States from semi-finished steel or iron of foreign origin.” It is important to recognize that the memorandum, nevertheless, calls upon the Commerce Department to develop a plan associated with the more general term “materials and equipment produced in the United States.” Whether and how the Trump Administration determines the final contours of U.S.-origin “materials and equipment” remains an open question.

The American Pipeline Memorandum does not define the term “pipeline,” which raises the question whether it is intended to apply not only to facilities traditionally thought of as pipelines, but also to piping included within industrial facilities. Nor is it clear whether the term “pipeline” as used in the American Pipeline Memorandum is intended to refer solely to pipeline facilities intended to transport hydrocarbons (crude oil, natural gas, natural gas liquids and petroleum products), or whether it is intended to apply to any pipeline that transports any commodity or substance (such as, for example, industrial gases, petrochemical products, brine and even potable water and sewage).

Also undefined at present is the American Pipeline Memorandum’s reference to pipelines “inside the borders of the United States.” Does this mean only pipelines within the three-mile territorial waters of the United States (potentially excluding pipelines located on the Outer Continental Shelf (“OCS”))? What will be the impact on pipelines that cross both territorial waters and the OCS or those that cross international borders? We expect the Commerce Department to provide additional definitions with the proposed plan, among which there may be clarification as to whether the definition covers only-land-based segments of pipeline or is intended to cover projects that extend beyond the traditional three-mile territorial waters.

What Comes Next?

The American Pipeline Memorandum will be published by the Secretary of Commerce in the Federal Register, which is a daily publication of the Federal government that provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies (including Presidential Proclamations and Executive Orders). A request for public comment could accompany the notice of publication, but it is more likely that any such public comment request will accompany a preliminary or interim implementation rule, after the Commerce Department releases the plan required by the American Pipeline Memorandum.

We anticipate that the Commerce Department, working with other relevant executive departments and agencies (as charged by the President), will devote significant attention in the coming weeks to elaborating on the requirement that American pipeline projects “use materials and equipment produced in the United States, to the maximum extent possible and to the extent permitted by law.” A key focus of that effort is likely to include an assessment of the relationship between any plan and existing government procurement-related laws and regulations (*e.g.*, existing Buy America and Buy American requirements). Another likely area of focus will be determining how the requirements may be applied to the discrete project types, including “all new pipelines, as well as retrofitted, repaired, or expanded pipelines,” discussed in the Memorandum. Other more practical issues will also need to be addressed likely through transitional or other special rules, for example, to address existing contracts and manufacturing-in-process, “interconnection” challenges with pre-existing foreign equipment, and inventories/spares.

The drafters of the plan also will need to consider the extent to which any plan may be affected by international trade obligations, in particular the “national treatment” obligations that generally prohibit domestic content requirements under virtually every trade and investment agreement to which the United States is a party and other obligations applicable to government procurement, such as the World Trade Organization (“WTO”) Government Procurement Agreement. U.S. international trade obligations, however, are not self-executing under Federal law. Thus, the Trump Administration (and Congress) maintain the authority to implement a variety of policy measures that may violate U.S. obligations under any plan (*e.g.*, imposing a requirement to use U.S. domestic materials and equipment as a condition for the approval of permits for new pipelines or approval of retrofit or expansion projects). Whether such provisions will target private parties engaged in private transactions, whether such requirements are enforceable under U.S. law, whether the Trump Administration will care about WTO or other trade agreement violations, and whether the plan will account for critical availability and supply considerations will be key issues as this process moves forward. All of these considerations ultimately may need to be balanced against President Trump’s focus on protecting U.S. manufacturing and jobs—both during the campaign and in the early days of his Presidential Administration.

Traditionally, origin requirements are created as part of Federal funding programs, recognizing that funds are to be spent in accordance with defined parameters. Where project funding is supplied directly from the Federal Government, the “Buy American” (with an “n”) provisions of Federal law typically allow for the acquisition of materials substantially transformed in countries that have ensured, through reciprocal agreements, that they will include U.S.-origin products in their Federal acquisition programs. The language of the American Pipeline Memorandum, however, more closely aligns with the “Buy America” (without an “n”) provisions that are more commonly applicable to transportation infrastructure programs. Those infrastructure projects typically are excluded from international origin-reciprocity requirements, since Federal funds are more commonly provided as grants to state and local governments and agencies. It remains to be seen if Commerce’s plan will use grant programs to drive the basis for the origin requirements for public and private transactions, but that is potentially one option that could be explored.

Will The Plan Include Waiver Provisions?

President Trump’s remarks recognize that U.S. industry may need time to “gear up” in response to the American Pipeline Memorandum, raising the question as to whether any final plan will contain waiver provisions. One potential guidepost for resolving this issue could be what is referred to as the American Iron and Steel (“AIS”) provision, which requires Clean Water State Revolving Fund (“CWSRF”) and Drinking Water State Revolving Fund (“DWSRF”) assistance recipients to use iron and steel products that are produced in the United States. Enacted in 2014, the AIS requirement is administered by the U.S. Environmental Protection Agency (“EPA”). The AIS requirement is a permanent requirement for CWSRF projects, and it has been applied to DWSRF projects by Congress on an annual basis. The AIS requirement broadly applies to CWSRF and DWSRF projects for the construction, alteration, maintenance, or repair of a public water system or treatment works. Thus, it is analogous to the presumably wide

spectrum of new pipeline construction and repair projects that appear to be covered by the American Pipeline Memorandum.

Importantly, the AIS requirement may be waived in situations where the recipient demonstrates that: (1) use of U.S.-produced iron and steel products would be inconsistent with the public interest; (2) sufficient quantities of U.S.-produced iron and steel are not reasonably available or are of unsatisfactory quality; or (3) inclusion of U.S.-produced iron and steel products will increase the cost of the overall project by more than 25 percent. AIS waiver requests are filed with the EPA and subject to a public notice and comment period before the agency makes a final decision. The prospect of a waiver of any U.S.-origin “materials and equipment” requirement for U.S. pipeline construction likely is of particular interest to the private parties that may be concerned about potential cost and scheduling impacts.

Does Issuance Of The Direction Through A Presidential Memorandum, As Opposed To An Executive Order, Minimize Its Importance?

Early press reports regarding the American Pipeline Memorandum have generated potential confusion over differences between a Presidential Memorandum and the more familiar Executive Order. While there are some distinctions between the two expressions of executive branch authority, at least one Presidential scholar has characterized Presidential memoranda as “executive orders by another name, and yet unique.” Ultimately, the substance of the President’s direction is more important than the form in this instance, which directs that the Commerce Department develop a plan to provide for the use of materials and equipment produced in the United States for the construction, retrofitting, and repair of pipelines inside the borders of the United States. The content and implementation of the plan will ultimately determine the impact of the instructions provided under the Memorandum.

Could The Memorandum Portend A Paradigm Shift In U.S. Government Procurement?

At this time, of course, whether already-established origin standards (like the EPA’s AIS provision or the Department of Transportation’s Buy America programs) factor into the Trump Administration’s development of a plan for the construction of American pipelines is unclear. Nevertheless, the flip side is that there is the potential that the American Pipeline Memorandum, and any plan born out of it, could become a “blueprint” for changes to other government procurement policies in the future (including the AIS requirement, Buy America/Buy American requirements, or even the Veterans Administration Federal Supply Schedule program governing U.S.-made or other “designated country” end products). Thus, interested parties from all segments of industry should continue to monitor developments closely.

In sum, Tuesday’s announcement regarding a Presidential Memorandum Regarding Construction of American Pipelines underscores the Trump Administration’s focus on domestic manufacturing. Although many questions regarding the Memorandum and any future plan are yet to be answered, it is clear that domestic manufacturers should take the President’s actions very seriously as they consider the potential for increased U.S. sales and the concomitant investments in higher U.S.-based production capacity and jobs. Likewise, other segments of affected industries should take concrete steps to assess potential challenges and opportunities posed by this ongoing development, including how to engage constructively and creatively with the Administration and Congress to protect their interests in the context of President Trump’s priorities to promote U.S. manufacturing and its workers.

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