

ALERT

Biden Administration Early Executive Actions: Update for Government Contractors

January 22, 2021

On January 20, 2021, the first day of the Biden Administration, the President took several executive actions that affect government contractors. The President is expected to sign an additional Executive Order (EO) today that addresses several federal worker issues.

First, the President rescinded several Executive Orders (EOs) issued by the prior administration that either directly affected contractors or the regulatory process as a whole.

- Section 10 of the Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government rescinds Executive Order 13950, Combating Race and Sex Stereotyping. EO 13950 had prohibited certain types of training programs by contractors and federal grantees and imposed serious sanctions for contractors or grantees who ran afoul of the EOs limitations. Section 10 also instructs agencies to consider actions to suspend agency actions arising from EO 13950. As we previously wrote, even before the administration change, some agencies had suspended implementation of EO 13950 in response to a nationwide injunction. This EO generally advances a policy of a comprehensive approach to advancing equity (broadly defined in the EO) across Government agencies and programs for people of color and others who have been historically underserved or marginalized by poverty and inequality. Section 7 of this EO, among other things, expresses the policy of promoting government contracting and procurement opportunities on an equal basis to all eligible providers of goods and services and instructs agency heads to consult with the Assistant to the President for Domestic Policy (APDP) and the Director for the Office of Management and

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Government Contracts

Budget (OMB) to produce a plan that addresses any barriers to full and equal participation in agency procurement and contracting opportunities that underserved communities and individuals may face. Our colleagues in the Employment & Labor Practice have also issued an alert on several employment focused Executive Orders.

- Section 2 of the Executive Order on Revocation of Certain Executive Orders Concerning Federal Regulation revokes several EOs from the prior administration directed at the regulatory process. In particular, Section 2 revokes EO 13771, Reducing Regulation and Controlling Regulatory Costs, issued January 30, 2017. EO 13771 notably had required agencies to identify two regulations for elimination for every new regulation proposed. Section 2 also revokes EO 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents, issued October 9, 2019, which imposed controls on use of agency guidance documents (as opposed to promulgated regulations). And, this EO revokes EO 13892, Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, issued October 9, 2019. EO 13892 had restricted agency reliance on guidance documents as grounds for finding a violation of a statute or regulation. The rescission of these EOs will affect rulemakings going forward that affect government contractors as well as the issuance of agency guidance documents in the future.

Second, and related to the rescission of prior regulatory process EOs, the President signed a Memorandum to the Heads of Executive Departments and Agencies on Modernizing the Regulatory Review Process. This memorandum instructed the Director of OMB to begin a review process for modernizing the regulatory review process, typically handed by the Office of Information and Regulatory Affairs (OIRA) within OMB.

Recommendations from OMB should (i) identify ways to modernize the regulatory review process to ensure that the review promotes policies that reflect new scientific developments and economic understandings, account fully for regulatory benefits that are difficult to quantify, and do not have harmful deregulatory effects; (ii) propose procedures to analyze regulatory initiatives to ensure that they appropriately benefit and do not inappropriately burden disadvantaged, vulnerable or marginalized communities; (iii) consider ways OIRA can proactively engage with agencies to promote initiatives likely to yield significant benefits; and (iv) identify reforms to promote transparency in the regulatory review process as well as an “appropriate approach with respect to the review of guidance documents.”

Third, and unsurprisingly, the Assistant to the President and Chief of Staff, Ronald A. Klain, issued a Regulatory Freeze Pending Review Memorandum to pause the rulemaking process. In particular, the memorandum asks agencies not to propose or issue any rules until a department or agency head appointed or designated by President Biden reviews and approves the rule, with limited exceptions for emergency situations or other urgent circumstances as determined by OMB. Rules that have been sent already to the Office of the Federal Register (OFR) but not yet published should be immediately withdrawn and subject to the review process described above. And, for rules that have been published or otherwise issued, agencies should consider postponing the effective date for 60 days to review any questions of fact, law, or policy relating to the rules. In addition, agencies should consider opening a 30-day comment period on such regulations, and extending the

60-day hold, as necessary.

After the 60-day hold, rules that do not raise a substantial question of fact, law or policy, require no further action. For rules that do raise such questions, agencies should notify OMB and consult with the Director on further action. Lastly, the memorandum states: "Should actions be identified that were undertaken before noon on January 20, 2021, to frustrate the purpose underlying this memorandum, I may modify or extend this memorandum, pursuant to direction of the President, to request that agency heads consider taking steps to address those actions." This memorandum potentially halts the effective date of the Buy American Act final rule, set to go into effect on January 21, 2021 and be included in solicitations issued as of February 22, 2021, about which Wiley recently wrote.

Fourth, some of the Biden Executive Orders directed at larger policy issues have a tangential effect on at least some federal contractors. For example, the Executive Order on Protecting the Federal Workforce and Requiring Mask-Wearing urges federal contractor employees on site in federal buildings to wear masks and maintain social distancing and instructs agency heads to take action to require compliance with Centers for Disease Control and Prevention (CDC) guidelines on wearing masks, maintaining physical distance, and other public health measures by on-site federal contractors. The Executive Order on Ethics Commitments by Executive Branch Personnel requires Executive Branch employees to agree to a "revolving door ban" that prohibits them from participating personally and substantially in any particular matter involving specific parties that is directly and substantially related to the appointee's former government work, including regulations and contracts. For contractors who hire former Biden Administration appointees, this pledge could limit their work activities going forward. Our colleagues in Wiley's Election Law and Government Ethics Practice Group analyze this EO here. Finally, the Executive Order on Termination of the Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction aims to pause, and ultimately stop, construction of the southern border wall based on the policy that "no more American taxpayer dollars be diverted to construct a border wall." Of course, this pause would affect those contractors involved in construction of that wall.

Finally, President Biden signed an EO that will revoke four EOs directed at the federal workforce, including the October 2020 EO that established "Schedule F" for employees who served in policy positions and allowed for easier and more expeditious termination of these employees. The EO also directs the Office of Personnel Management to recommend ways for the Government to pay its own employees a minimum of \$15 per hour. Further, the President announced that he has directed preparations for an EO, to be issued within the first 100 days, that increases the contractor minimum wage to \$15 per hour.

Taken as a whole, the Day 1 Biden Administration executive actions primarily serve to halt implementation of certain EOs from the prior administration, such as EO 13950, and otherwise halt the implementation of pending regulations from that administration. In the near term, it should be relatively quiet on the new Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS) front as this regulatory pause and review takes place. The forthcoming EO will also reverse actions of the prior administration while advancing some of the policy objectives of the Biden Administration.

Because Wiley is “Wired into Washington,” we are uniquely situated to help contractors anticipate and respond to the far-reaching priorities of this new Biden Administration. Wiley’s Government Contracts Practice will monitor all new guidance and developments as the Administration moves forward with its policy priorities.