

“Made in America” Follow-Through: OMB Guidance on Steps to Strengthen U.S. Supply Chains, Reduce Domestic Content Waivers

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WHAT: In our January 2021 alert, we reported on President Biden’s Executive Order (EO) “Ensuring the Future is Made in All of America by All of America’s Workers,” which seeks to strengthen enforcement of Made in America Laws and maximize the Federal Government’s use of U.S. goods and services. Among other things, the EO required the Office of Management and Budget (OMB) to create a new “Made in America Office” (MIAO) to centralize, standardize, and make more transparent reviews of nearly all waivers of “Made in America Laws.” On June 11, 2021, the OMB published Memorandum M-21-26, “Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waivers from Made in America Laws,” outlining the initial steps being taken by the MIAO to implement the Made In America EO.

In particular, the memorandum outlines the following initial actions being taken by the MIAO in an effort to “increase reliance on domestic supply chains” and “reduce the need for waivers” of Made in America Laws:

- *Accountability.* Each agency is required to designate a “Senior Accountable Official” (SAO) who is responsible for coordinating directly with the MIAO Director to “implement a holistic approach” to meeting the goals of the EO. Among other responsibilities, the SAOs will be responsible for “identifying opportunities to increase the agency’s reliance on U.S. products, materials, and services.”

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- *Standardized Waiver Review Process:* In an effort to standardize the process for granting waivers of Made in America Laws, the memorandum published a list of standard information required for MIAO review and approval of waiver requests based on “non-availability.” In addition, the MIAO announced its goal of issuing waiver decisions within “3-7 business days and in not more than 15 days from submission to OMB.”
- *Transparency:* The MIAO will establish a website, with a go-live goal of “early FY 2022,” to publish information on all waivers and OMB decisions regarding waivers.
- *Data Gathering:* Finally, each agency is required to provide initial and semi-annual reports regarding the agency’s implementation of, and compliance with, Made in America laws—including steps taken by the agency to “strengthen and diversify existing domestic supplier bases” as well as any waivers of Made in America Laws granted by the agency.

In addition to these initial actions, the MIAO also identifies a number of additional planned actions that the MIAO intends to take to further strengthen the enforcement of Made in America Laws. Of particular note for government contractors, these planned actions include reviewing and potentially eliminating or restricting existing waivers of Made in America Laws based on “unreasonable cost,” as well as waivers for “COTS” and “Commercial Item IT.”

WHEN: The Acting OMB Director issued the memorandum on June 11, 2021; the effort to implement change, with MIAO/SAO collaboration, will begin during the summer of 2021.

WHAT IT MEANS FOR INDUSTRY: OMB’s relatively speedy initial guidance and action plan for implementing the January EO is a sign of the new Administration’s commitment to continue strengthening enforcement of Made in America Laws. While there are many open questions about what this will mean in practice, the bottom line is that it is likely going to be more difficult for agencies to waive Made in America laws. Here are some key considerations for industry as this initiative moves ahead.

First, study up on what we know now. The memorandum provides a helpful overview of the extant MIA laws – including the various tests for determining domestic status as well as bases for waivers. Suppliers of goods and services to the Federal Government should make sure they understand these complex rules, and their potential impacts on manufacturing and supply chain, particularly now that agencies will likely feel more pressure to enforce existing MIA restrictions, and less likely to pursue waivers.

Second, monitor the MIAO website for waiver decisions for further guidance on the Administration’s approach to enforcing Made In America Laws. While it is not clear what precedential effect will be given to the MIAO’s waiver decisions—which are likely to be very fact-specific—the existence of a centralized database of decisions may nevertheless serve as a useful source of guidance for determining compliance with Made in America laws. In addition, these decisions could give rise to potential protest issues—for example, if a waiver appears to be poorly-reasoned or run contrary to the facts—so companies should closely monitor the site since any potential bid protest would likely need to be filed on a very short timeline, typically from the date of publication.

Third, carefully review the MIAO’s list of specific standardized information required for MIA waivers. By understanding what information an agency will need to obtain a waiver, sellers who offer non-domestic items can craft their proposals to serve up “on a silver platter” the necessary information – adding detail and clarity the agency program and contracting shops can use to enhance waiver requests. Conversely, domestic sellers, knowing what is required to support a waiver, might be able to leverage that knowledge in any challenge to a waiver (e.g., in a bid protest or by direct advocacy with the agency or MIAO).

Fourth, don’t wait until the last minute to engage with the Government. Where feasible based on agency receptivity, use the regulatory authority under Federal Acquisition Regulation (FAR) Part 15, see FAR 15.201(c) (4) (encouraging one-on-one meetings/exchanges with industry partner regarding contractor capabilities) to provide early information bearing on MIA law applicability or, as necessary, to make the case for waiver – or against it, depending on the facts. Consider engagement from the working level all the way up to the SAOs, who are specifically charged with leading agency’s efforts related to domestic sourcing.

Finally, be on the lookout for additional efforts to strengthen Made in America Laws—including potential elimination or restriction on existing waivers of the Buy American Act based on unreasonable cost, as well as existing waivers for “Commercial Item IT” and for “COTS” products.

The EO, and now the OMB memorandum, are clear signs that the current Administration is committed to continuing the recent trend towards strengthening Made in America Laws and encouraging the Federal Government’s procurement of domestic goods and services. Sellers on both sides of the MIA border should closely follow developments, adjust accordingly, and communicate effectively with agency officials. This is a rapidly changing and complex area of law – don’t wait to plan and evolve to adapt to the new domestic sourcing regime.