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Biden Issues Executive Order with New Stronger Buy American Provisions, Causing Doubt as To Potential Trade Liberalization

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In our last Client Alert, we discussed the future of Section 301 duties on Chinese imports that have affected the auto industry and the possibility of the repeal of these tariffs under the Biden Administration. We indicated that despite some hope of a return to a free trade agenda, due to strong labor union involvement in the Democratic party and elections, that this was not likely to happen in the short run. President Biden confirmed this on January 25th with his issuance of an executive order and proclamation affirming and expanding Buy American protocols for U.S. government procurement. Such action was praised by organized labor.

The AFL-CIO federation of trade unions welcomed Biden's order.

"This order is a good first step in revitalizing U.S. manufacturing, which Trump's policies failed to do over the past four years," AFL-CIO President Richard Trumka said.

While Buy American laws can be compliant with World Trade Organization (WTO) rules pursuant to the Agreement on Government Procurement the concept of buy-national campaigns is the antithesis of free trade. Actions such as this generally lead to retaliatory actions by foreign trading partners who are affected. This was seen in the Section 301 "trade war" with China where each tranche of 301 tariffs we imposed resulted in similar tariffs by the Chinese on U.S. imports. This affected many U.S. groups particularly exporters of agricultural products like soybeans. President Trump was criticized for his remarks about "trade wars are easy to win" and for withdrawing from the Transpacific Partnership (TPP) in his first days of office, so it is surprising to see President Biden starting off his first week in office with a Buy American Proclamation." It appears that President Biden is committed to some of the Trump administration trade policies, particularly of protecting U.S. steel manufacturers. For example, it is noted in Section 5:

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Sec. 5. Accounting for Sources of Cost Advantage. To the extent permitted by law, before granting a waiver in the public interest, the relevant granting agency shall assess whether a significant portion of the cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured goods or the use of injuriously subsidized steel, iron, or manufactured goods (emphasis added).

The Buy American laws only apply to government procurement. However, the auto industry sells many cars to the government. The General Services Administration has established a mandatory federal program for this. The GSA Fleet Purchasing Guide provides that:

“GSA Fleet is the *mandatory* source for the procurement of all new non-tactical motor vehicles purchased for the Department of Defense, federal executive agencies, and other eligible users in accordance with 41 CFR 101-26.501-1. Executive agencies are required to submit orders to...Vehicle Purchasing for new non-tactical motor vehicles procured or with a contracting action originating, in the 50 states, the District of Columbia, and all territories and insular territories or possessions..... as defined under Title 48 of the U.S. Code”.

The current list includes both US and foreign nameplates. However, this could change in the future. This could possibly affect both non-US nameplates made abroad, and US nameplates produced in Mexico and Canada where a number of U.S original equipment manufacturers have plants. The percentage of foreign components in U.S nameplate vehicles might also be affected

New powers are granted to the Office of Management Budget (OMB) to reform the system, with the creation of a Buy American Office and a director of such office within OMB.

The first priority is described below:

“Sec. 8. Promoting Enforcement of the Buy American Act of 1933. (a) Within 180 days of the date of this order, the Federal Acquisition Regulatory Council (FAR Council) shall consider proposing for notice and public comment amendments to the applicable provisions in the Federal Acquisition Regulation (FAR), title 48, Code of Federal Regulations, consistent with applicable law, that would:(i) 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 under which domestic content is measured by the value that is added to the product through U.S.-based production or U.S. job-supporting economic activity

(ii) Increase the numerical threshold for domestic content requirements for end products and construction materials; and

(iii) Increase the price preferences for domestic end products and domestic construction materials.”

Publication and a period for comment are provided. Readers should be watching for this notice and submitting comments that might protect their market shares of the U.S. government market. The OMB will have the power to grant waivers from the new rules which will require close scrutiny by the

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automotive industry and their suppliers that may wish to participate in the process.

Butzel Long attorneys are available to assist our clients in this endeavor.

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