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TRUMP ISSUES “BUY AMERICAN AND HIRE AMERICAN” EXECUTIVE ORDER

President Trump has issued Executive Order 13788, Buy American and Hire American, “to promote economic and national security and to help stimulate economic growth, create good jobs at decent wages, strengthen our middle class, and support the American manufacturing and defense industrial bases...” To do that, the executive order states that “it shall be the policy of the executive branch to maximize, consistent with law, through terms and conditions of federal financial assistance awards and federal procurements, the use of goods, products, and materials produced in the United States...In order to create higher wages and employment rates for workers in the United States, and to protect their economic interests, it shall be the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad...”

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Regarding enforcement of the “Buy American” portion of the executive order, “every agency shall scrupulously monitor, enforce, and comply with Buy American laws, to the extent they apply, and minimize the use of waivers, consistent with applicable law.” (NOTE: The implementation of Title 41 of the U.S. Code, Public Contracts; Chapter 83, Buy American, is in Federal Acquisition Regulation (FAR) part 25, Foreign Acquisitions, which “provides policies and procedures for (1) acquisition of foreign supplies, services, and construction materials; and (2) contracts performed outside the United States.”)

The executive order goes on to emphasize that “to the extent permitted by law, public interest waivers from Buy American laws should be construed to ensure the maximum utilization of goods, products, and materials produced in the United States...; determination of public interest waivers shall be made by the head of the agency with the authority over the federal financial assistance award or federal procurement under consideration...[and]; before granting a public interest waiver, the relevant agency shall take appropriate account of 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, and it shall integrate any findings into its waiver determination as appropriate.”

Regarding the “Hire American” portion of the executive order, “the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, and consistent with applicable law, propose new rules and issue new guidance, to

supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse...In order to promote the proper functioning of the H-1B visa program, the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.” (NOTE: The Department of Labor describes the H-1B visa program as follows (<https://www.dol.gov/whd/immigration/h1b.htm>): “The H-1B program applies to employers seeking to hire nonimmigrant aliens as workers in specialty occupations or as fashion models of distinguished merit and ability. A specialty occupation is one that requires the application of a body of highly specialized knowledge and the attainment of at least a bachelor’s degree or its equivalent. The intent of the H-1B provisions is to help employers who cannot otherwise obtain needed business skills and abilities from the U.S. workforce by authorizing the temporary employment of qualified individuals who are not otherwise authorized to work in the United States. The law establishes certain standards in order to protect similarly employed U.S. workers from being adversely affected by the employment of the nonimmigrant workers, as well as to protect the H-1B nonimmigrant workers. Employers must attest to the Department of Labor that they will pay wages to the H-1B nonimmigrant workers that are at least equal to the actual wage paid by the employer to other workers with similar experience and qualifications for the job in question, or the prevailing wage for the occupation in the area of intended employment – whichever is greater.”)

RUBBER GLOVES NONMANUFACTURER WAIVER TERMINATED

The Small Business Administration (SBA) is terminating the class waiver to the nonmanufacturer rule for Rubber Gloves (*e.g.*, electrician’s, examination, household-type, surgeon’s) Manufacturing, under Product Service Code (PSC) 9320 (Rubber Fabricated Materials, and the North American Industry Classification System (NAICS) code 339113 (Surgical Appliance and Supplies Manufacturing).

Paragraph (h) of Section 303 of the Business Opportunity Development Reform Act of 1988 (Public Law 100-656), enacted November 15, 1988, requires those with federal contracts that are set-aside for small businesses (or for service-disabled veteran-owned small businesses, Historically Underutilized Business Zone [HUBZone] small businesses, or women-owned small businesses), or awarded through the 8(a) program to provide the product of a small business manufacturer or processor if the recipient is not the actual manufacturer or processor (see paragraph (f) of FAR 19.102, Size Standards). This is called the “nonmanufacturer rule.” However, SBA may waive this requirement if there are no small business manufacturers or processors for that product. SBA granted a waiver to the nonmanufacturer rule for rubber glove manufacturing on May 1, 2008 (see the June 2008 *Federal Contracts Perspective* article “Three

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Nonmanufacturer Rules Waived, One Proposed”).

However, on October 27, 2016, SBA received a request to terminate the current class waiver to the nonmanufacturer rule because, according to the request, there was a small business manufacturer available to participate in the federal market for this class of product. The requester provided evidence that this small business manufacturer has submitted offers on solicitations for government contracts within the last 24 months. (**EDITOR’S NOTE:** The small business size standard for businesses providing products under NAICS code 339113 is 750 employees.)

The SBA issued a notice of its intent to terminate the class waiver (see the April 2017 *Federal Contracts Perspective* article “SBA Intends to Terminate Rubber Gloves Nonmanufacturer Rule Waiver”) but SBA did not receive any comments on its intent to terminate the class waiver, so SBA is terminating the class waiver. With this termination, small businesses receiving contracts for covered rubber gloves through a set-aside (or the 8(a) program) will no longer be able to provide the product of any manufacturer regardless of the size of the business – the small business contractor must to provide rubber gloves manufactured by a small business.

SBA PROPOSES TO ADOPT NAICS 2017 FOR SIZE STANDARDS

The Small Business Administration (SBA) is proposing to incorporate the Office of Management and Budget’s (OMB) North American Industry Classification System (NAICS) revision for 2017 (NAICS 2017) into its table of small business size standards effective October 1, 2017, the beginning of the 2018 fiscal year.

NAICS 2017 created 21 new industries by reclassifying, combining, or splitting 29 existing industries under changes made to NAICS in 2012 (NAICS 2012) (see the September 2016 *Federal Contracts Perspective* article “OMB Issues 2017 Version of the NAICS”). Most of the changes involve industries in petroleum and natural gas extraction, mining, major household appliance manufacturing, electronic shopping and mail-order houses, and research and development in nanotechnology.

Of the 21 new industries, five were created by merging two or more of thirteen NAICS 2012 industries, while three were created by combining part of one industry with another industry. Three new industries were created by splitting two industries to two parts each with one part of each industry defined as a separate industry and other parts of the two industries combined to form a separate new industry. One new industry was formed by designating part of one industry as a separate industry. OMB also changed 6-digit NAICS codes for eight industries without changing their definitions and titles and amended the title of one industry without changing its 6-digit code. (Complete information on the relationship between NAICS 2012 and NAICS 2017 is available on the U.S. Bureau of the Census website at <http://www.census.gov/eos/www/naics/>.)

The following are the proposed size standards for the new industries created by NAICS 2017 (NAICS 2012 vs. NAICS 2017):

- 211111, Crude Petroleum and Natural Gas Extraction (1,250 employees), would be divided into 211120, Crude Petroleum Extraction (1,250 employees) and 211130, Natural Gas Extraction (1,250 employees)

- 211112, Natural Gas Liquid Extraction (750 employees), would become part of 211130, Natural Gas Extraction (1,250 employees)
- 212231, Lead Ore and Zinc Ore Mining (750 employees), and 212234, Copper Ore and Nickel Ore Mining (1,500), would be combined as 212230, Copper, Nickel, Lead, and Zinc Mining (750 employees)
- 333911, Pump and Pumping Equipment Manufacturing (750 employees), and 333913, Measuring and Dispensing Pump Manufacturing (750 employees), would be combined as 333914, Measuring, Dispensing, and Other Pumping Equipment Manufacturing (750 employees)
- 335221, Household Cooking Appliance Manufacturing (1,500 employees), 335222, Household Refrigerator and Home Freezer Manufacturing (1,250 employees), 335224, Household Laundry Equipment Manufacturing (1,250 employees), and 335228, Other Major Household Appliance Manufacturing (1,000 employees), would be combined as 335220, Major Household Appliance Manufacturing (1,500 employees)
- 452111, Department Stores (except Discount Department Stores) (\$32.5 million), and 452112, Discount Department Stores (with insignificant perishable grocery sales) (\$29.5 million), would be combined as 452210, Department Stores
- 452113, Discount Department Stores (with significant perishable grocery sales) (\$29.5 million), and 452910, Warehouse Clubs and Supercenters, would be combined as 452311, Warehouse Clubs and Supercenters
- 452990, All Other General Merchandise Stores (\$32.5 million) would be redesignated as 452319, All Other General Merchandise Stores (\$32.5 million)
- 454111, Electronic Shopping (\$32.5 million), 454112, Electronic Auctions (\$38.5 million), and 454113, Mail-Order Houses (\$38.5 million), would be combined as 454110, Electronic Shopping and Mail-Order Houses (\$38.5 million)
- 512210, Record Production (\$7.5 million), and 512220, Integrated Record Production/Distribution (1,250 employees), would be combined as 512250, Record Production and Distribution (250 employees)
- 517110, Wired Telecommunications Carriers (1,500 employees), would be redesignated as 517311, Wired Telecommunications Carriers (1,500 employees)
- 517210, Wired Telecommunications Carriers (except Satellite) (1,500 employees) would be redesignated as 517312, Wired Telecommunications Carriers (except Satellite) (1,500 employees)
- 532220, Formal Wear and Costume Rental (\$20.5 million), would be redesignated as 532281, Formal Wear and Costume Rental (\$20.5 million)

- 532230, Video Tape and Disc Rental (\$27.5 million), would be redesignated as 532282, Video Tape and Disc Rental (\$27.5 million)
- 532291, Home Health Equipment Rental (\$32.5 million), would be redesignated as 532283, Home Health Equipment Rental (\$32.5 million)
- 532292, Recreational Goods Rental (\$7.5 million), would be redesignated as 532284, Recreational Goods Rental (\$7.5 million)
- 532299, All Other Consumer Goods Rental (\$7.5 million), would be redesignated as 532289, All Other Consumer Goods Rental (\$7.5 million)
- 541711, Research and Development in Biotechnology; Nanobiotechnologies Research and Experimental Development Laboratories (1,000 employees), would be redesignated as part of 541713, Research and Development in Nanotechnology (1,000 employees)
- 541711, Research and Development in Biotechnology; except Nanobiotechnologies Research and Experimental Development Laboratories (1,000 employees), would be redesignated as 541714, Research and Development in Biotechnology (except Nanobiotechnology) (1,000 employees)
- 541712, Research and Development in the Physical, Engineering, and Life Sciences (Except Biotechnology); Nanotechnology Research and Experimental Development Laboratories (1,000 employees), would be redesignated as part of 541713, Research and Development in Nanotechnology (1,000 employees)
- 541712, Research and Development in the Physical, Engineering, and Life Sciences (Except Biotechnology); Except Nanotechnology Research and Experimental Development Laboratories (1,000 employees), would be redesignated as 541715, Research and Development in the Physical, Engineering, and Life Sciences (Except Nanotechnology and Biotechnology) (1,000 employees)
- 721310, Rooming and Boarding Houses (\$7.5 million) would be retitled 721310, Rooming and Boarding Houses, Dormitories, and Workers' Camps

Comments on this proposed rule must be submitted no later than June 19, 2017, identified with the Regulatory Information Number (RIN) 3245-AG84, by either of the following methods: (1) the Federal eRulemaking Portal: <http://www.regulations.gov>; or (2) or mail/hand-delivery/courier: Khem R. Sharma, Ph.D., Chief, Office of Size Standards, 409 Third Street SW, Mail Code 6530, Washington, DC 20416.

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