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"Made in America" Executive Order Likely to Motivate FDI by Overseas Vendors

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EXECUTIVE SUMMARY

On January 25, 2021, President Biden issued his "Executive Order on Ensuring the Future is made in all of America by All of America's Workers" (the "Executive Order"). It declares that it is the policy of the Executive Branch that the U.S. Government "should… use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in… the United States." This new Executive Order is likely to be impetus for increased FDI by overseas vendors selling to or seeking financial assistance from the U.S. Government.

Section 3 of the Executive Order mandates that all U.S. Government Agencies immediately: review and consider reversing or rescinding all Agency actions which are inconsistent with a Made in America policy; and, consider proposing new Agency actions to promote and enforce a Made in America policy.

The Executive Order in its Section 4 establishes a new Made in America Office within the Office of Management and Budget. This Office shall systematize and coordinate waivers to the various U.S. Made in America laws that are sought from U.S. Government Agencies. The sense of this Section is that waivers by U.S. Government Agencies of the requirements of Made in America Laws will become more transparent, uniform and perhaps, difficult to obtain.

One factor relevant to the issuance of the waivers of U.S. Made in America requirements – cost advantage, will now pursuant to Section 5 of the Executive Order, be looked at differently. Under the Executive Order, the cost advantage of a foreign sourced products must be analyzed to determine whether any cost advantage is significantly attributable to "the use of dumped steel, iron, or manufactured goods or the use of injuriously subsidized steel, iron or manufactured goods."

As to the promotion of transparency in the Agency waiver of Made in America requirements process, Section 6 of the Executive Order establishes a public website where all information relative to a requested waiver will be posted. This public disclosure process seems intended to facilitate public objections to the granting of a

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requested waiver by domestic producers/manufacturers and other interested parties. In addition, to better enable domestic suppliers to challenge waivers of Made in America Laws, the Executive Order supports the scouring of American companies that produce goods, products and materials that meet the Federal procurement needs. (See Section 7 of the Executive Order).

The Executive Order seeks to promote enforcement of the U.S. Buy American Act of 1933 by proposing for consideration by the Federal Acquisition Regulatory Council ("FAR Council") amendments to applicable regulations which would replace the domestic content component test with a value added test, increase the numeric threshold for domestic content requirements and increase the price preferences for domestic end products and construction materials. (See Section 8 of the Executive Order).

The Executive Order lastly directs the FAR Council to develop recommendations for lifting constraints on the extension of Made in America Laws to information technology that is a commercial item.

The Executive Order seeks reports from all U.S. Government Agencies within 180 days from issuance and thereafter bi-annually on how the agencies will further and promote the Made in America policy.

The issuance of this Executive Order by the current administration demonstrates that it intends to continue and expand/accelerate the policies of the previous administration in regard to Made in America requirements and policies. Given the current and likely continuing trends in the U.S. of rapidly rising construction costs, growing demand for industrial properties and increasing site selection, due diligence and project acquisition timelines, astute and forward thinking foreign sellers, manufacturers and producers seeking to maintain or grow U.S. Government subsidized sales or direct U.S. procurement sales would be well advised to begin now to plan expanded production and supply chains in the U.S. For further information, please contact Keith W. Groebe.

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