

May 13, 2022

The Honorable Polly E. Trottenberg
Deputy Secretary
U.S. Department of Transportation
Washington, DC 20590

RE: Proposed Temporary Waiver of Buy America Requirements for Construction Materials (DOT-OST-2022-0047)

Dear Deputy Secretary Trottenberg:

On behalf of the Alliance for American Manufacturing (AAM), we appreciate the opportunity to provide comments on the Department of Transportation's (DOT) proposed temporary waiver of Buy America requirements for construction materials. For the reasons outlined below, AAM urges that DOT narrow the scope of the proposed public interest waiver and accelerate BABA implementation.

About AAM

AAM is a non-profit, non-partisan partnership formed in 2007 by some of America's leading manufacturers and the United Steelworkers. Our mission is to strengthen American manufacturing and create new private-sector jobs through smart public policies. We believe that an innovative and growing manufacturing base is vital to America's economic and national security, as well as to providing good jobs for future generations. AAM achieves its mission through research, public education, advocacy, strategic communications, and coalition building around the issues that matter most to America's manufacturers and workers.

AAM Supports the Build America, Buy America Act

AAM strongly supported enactment of the *Infrastructure Investment and Jobs Act* (IIJA) and the inclusion of the bipartisan *Build America, Buy America Act* (BABA), which will ensure that America's federally assisted infrastructure investments are completed with iron, steel, manufactured products, and construction materials that are produced in the United States. The United States has a once-in-a-generation opportunity to strengthen supply chains while rebuilding our infrastructure. Reinvesting tax dollars here at home creates American jobs, invests in goods produced under strong environmental and workplace safety standards, and protects our economic and national security. It is now the job of DOT and other federal departments and agencies to fully implement these Congressionally mandated comprehensive Buy America laws.

On April 18, 2022, the White House Office of Management and Budget (OMB) issued a memorandum to federal departments and agencies, which offers "Initial Implementation Guidance" as agencies work to implement BABA. In its memorandum OMB references the Biden administration's priority to "use terms and conditions of federal financial assistance awards to maximize the use of goods, products, and materials produced in, and services offered in, the United States" (*Executive Order 14005, Ensuring the Future Is Made in All of America by All of America's Workers*). The administration's efforts to rebuild our industrial base, create good

manufacturing jobs, and enhance supply chain security and resiliency are necessary and laudable.

AAM is Concerned with Potential Abuse of Public Interest Waivers

Seemingly aware of congressional frustration over the evasive use of public interest waivers and other federal agency mechanisms to undermine Buy America policies, the OMB guides agencies that public interest waivers “*be project-specific whenever possible*” and “*used judiciously and construed to ensure the maximum utilization of goods, products, and materials produced in the United States.*”

While AAM recognizes that limited, narrow use of waiver authority may be necessary to alleviate short-term market limitations or in instances of departments and agencies working to establish a Buy America policy for the first time, we are nonetheless deeply concerned with potential abuse of public interest waivers and potential Buy America evasion by federal departments and agencies.

This concern is shared in a [letter](#) from United States Senator Sherrod Brown (OH) – the sponsor of the *Build America, Buy America Act* – to OMB Director Shalanda Young on April 13, 2022, in which he wrote:

“Historically, federal agencies have often tried to narrow Buy America requirements. To do so now would be contrary to the spirit of the law and, more importantly, it would contradict the express congressional intent.” – U.S. Senator Sherrod Brown, April 13, 2022

Congress intended for there to be high bar of approval for public interest waivers, not for their use to be routine or frequent. After all, erosion of Buy America policies by departments and agencies – DOT included - is one of the primary reasons why Congress included BABA in the IIJA.

DOT has Proposed a 180-Day Public Interest Waiver for Construction Materials “To Prepare for Compliance”

DOT, which administers vast sums of infrastructure spending, is seeking to broadly waive substantial portions of BABA by applying an “adjustment period” public interest waiver in a manner that raises questions about whether meaningful steps have yet been taken to implement the BABA law during the 180-day period afforded by Congress for that very purpose. In its proposed waiver, DOT says it expects stakeholders to “begin the compliance process,” suggesting that the start of such activities may not have been prioritized during the 180-day implementation period afforded by Congress.

The “adjustment period” public interest waiver for construction materials sought by DOT will result in nearly a full year of federal infrastructure investments occurring absent major elements of the domestic procurement preference requirements mandated by Congress under BABA. Given DOT’s long history of public interest waivers, nationwide waivers, and other policies that have narrowed the scope of congressional intent on Buy America policy, AAM is concerned that this latest “adjustment period” public interest waiver is yet another milestone in DOT’s record of Buy America avoidance. After all, the DOT public interest waiver for “construction materials” is reminiscent of FHWA’s 1983 public interest waiver of “manufactured products” which has now

been in effect for roughly 40 years despite explicit statutory language directing the agency to apply the preference policy to this category of goods.

Such delays in Buy America implementation run counter to Congress's intent in enacting BABA, the sentiments of the substantial majority of the American public who believe U.S. tax dollars should be used to purchase American made materials for our public works infrastructure, and the president's directives to Executive Branch agencies in EO 14005.

BABA Author Shares AAM's Concern with DOT's "Perpetual" Waivers

DOT's history of waiver was raised by United States Senator Tammy Baldwin (WI) – one of the authors of BABA – at a May 3, 2022, hearing of the Senate Committee on Commerce, Science, and Transportation, at which Secretary Buttigieg appeared:

"The [manufactured products] waiver has been in place for over 40 years and that is despite the clear intention of Congress to require that federal dollars only buy American made manufactured goods... Given the history with perpetual waivers at DOT, I am concerned by this waiver and would like your assurance that DOT intends to fulfill its Buy America requirement promptly and fully." – U.S. Senator Tammy Baldwin, May 3, 2022

Congress Already Afforded 180 Days for BABA Implementation, Raising Serious Concerns About the Timing of the DOT Waivers Request

§ 70914 of the IIJA requires, within 180 days of the IIJA's enactment date, "the head of each Federal agency" to ensure that no federal financial assistance for infrastructure is obligated for a project "unless all of the *iron, steel, manufactured products, and construction materials* used in the project are produced in the United States." (Emphasis added).

The IIJA was enacted on November 15, 2021. The express terms of § 70914 require federal agencies to impose Buy America procurement preference requirements in the terms and conditions of federal financial assistance awards that are used for infrastructure construction by May 14, 2022.

The statutory implementation period was reaffirmed by Senator Baldwin at the aforementioned hearing:

"As you know, I pushed to include strong Buy America requirements in the Bipartisan Infrastructure Law. This gave agencies six months to put procedures in place for full implementation by May 14. However, last week the department announced that it intends to seek a waiver for Buy America requirements to purchase American made construction materials for 180 days." – U.S. Senator Tammy Baldwin, May 3, 2022

Senator Brown's aforementioned, April 13, 2022, letter to OMB identifies the 180-day period as a "statutory implementation deadline":

- *"Within 180 days of enactment of the Bipartisan Infrastructure Law, federal agencies are required to guarantee that federal infrastructure assistance funds only support projects that buy American... The May 14, 2022 **statutory implementation deadline** is fast approaching. I urge you to issue clear guidance to ensure that all federal agencies meet*

both the congressional intent and the spirit of the law.” (Emphasis added) – U.S. Senator Sherrod Brown, April 13, 2022

Yet even though Congress in § 70914 already afforded federal departments and agencies 180 days to prepare policies enabling the agencies to implement the procurement preference requirement, DOT is only now, a mere two weeks before the conclusion of that 180-day period, proposing further delays to BABA. That DOT waited until the pendency of that 180 days to propose an additional 180-day implementation delay – exactly 15 days prior to the effective implementation date of the BABA – demonstrates that the outcome of the proposed waiver was predetermined.

DOT’s Waiver Notice is Suspiciously Silent on “Manufactured Products”

Notably, and despite the substantial consideration Congress gave to the pernicious impact of perpetual general waivers, DOT completely ignores the BABA requirement as to manufactured products as well as the Section 70914 requirement to review general waivers at least 5 years from the date of their issuance. The FHWA general waiver for ‘manufactured products’ was issued in its 1983 final rule implementing Section 165 of the 1982 Surface Transportation Assistance Act. The 1983 waiver is of the 1982 law. It has no applicability to the BABA requirements mandated by Congress. Conversely, Subsection 70914(d) of the BIL *does*, in fact, apply to FHWA (and all of DOT). If FHWA intends to except manufactured products from the BABA, it must comply with the BIL’s requirements for such a general waiver. If FHWA intends the 1983 waiver to continue to waive the requirements of 23 USC 313 to “manufactured products” it should have issued a notice of its intent to do so, published in the Federal Register, affording the public 60 days to submit comments on the proposed continuation of the waiver. DOT has done neither. As such, AAM can only assume the Department is prepared to apply the BABA requirements to manufactured products by the statutory implementation deadline of May 14, 2022.

“Adjustment Period” Public Interest Waiver Conflicts with Congressional Intent

The “adjustment period” public interest waiver indicated in the OMB guidance that is now being sought by DOT to delay BABA implementation was *not* envisioned by Congress. To the contrary, Congress specifically sought to discourage the use of public interest waivers by classifying them as “deficient programs” and mandating periodic reviews to ensure their continued necessity.

Congress clearly contemplated DOT’s 1983 general applicability waiver for “manufactured products” when it:

- defined the term “deficient programs” in BIL § 70912 and 70913(c) to include those that have avoided Buy America with broad waivers of general applicability; and
- required agencies to review general applicability waivers at least every 5 years in BIL § 70914 (d).

Senator Brown’s aforementioned, April 13, 2022, letter to OMB outlines the reasoning for BABA enactment:

“As the author of this legislation, I crafted these provisions to apply Buy America requirements on a governmentwide basis and in so doing close loopholes in existing federal Buy America requirements.” – U.S. Senator Sherrod Brown, April 13, 2022

Congress and OMB Directed a 30-Day Comment Period, Yet DOT is Rushing the Process Against the Implementation Deadline

Section 70914(d)(2)(A)(ii) of BABA requires the head of a Federal agency to request public comment on general applicability waivers “for a period of not less than 30 days”; and, in its guidance memorandum (M-22-11) to Federal Agencies dated April 18, 2022, the OMB affirmed this statutory requirement:

*“General applicability waivers are subject to a minimum 30-day public comment period.”
See p. 6.*

Yet, despite the terms of § 70914 and OMB’s guidance, DOT has proposed a general applicability waiver of the BABA requirements and afforded only 15 days for public comment. As has been noted, the comment period coincides with the implementation deadline, leaving little opportunity for public comment and a seemingly predetermined outcome.

The Waiver Should be Narrowed and Full BABA Implementation Should be Accelerated

AAM urges that DOT narrow the scope of the proposed public interest waiver and accelerate BABA implementation. The proposed “adjustment period” public interest waiver would, in effect, delay implementation of the BABA requirement beyond the 180 days already afforded by Congress. OMB’s guidance directs that “adjustment period” waivers should be “brief” and “time limited.” Thus, DOT should accelerate its work to prioritize implementation of BABA and do so in a fully transparent manner with robust labor and industry stakeholder engagement.

Additional DOT Implementation Issues

Congress was Clear that BABA Implementation Shall Not Be Used by Agencies to Weaken Existing Application of Buy America Requirements

Congress made clear in BABA that any existing domestic content procurement preferences that are consistent with its robust requirements shall not be undermined in any way by BABA implementation.

- BIL § 70917 clarifies that BABA is to be applied to federal financial assistance programs used for infrastructure *“only to the extent that a domestic content procurement preference . . . does not already apply to iron, steel, manufactured products and construction materials.”*

Section 70917 doesn’t merely “allow” departments and agencies to preserve existing Buy America policies and provisions, but, in fact, explicitly preserves such domestic content procurement preferences. Section 70917 is critical to DOT’s implementation of BABA, as Congress clearly sought to maintain the requirements of Section 165 of the 1982 STAA, DOT’s implementing regulations, and forty years of administrative policy as a minimum starting point for enhancements.

- Currently, FHWA's Buy America requirements are based on §165 of the STAA of 1982 (Pub. L. 97-424). Section 165 was amended in 1983 to limit Buy America coverage to steel materials and products only and again in 1989 to expand coverage to iron materials and supplies.
- DOT's Buy America policy has long required iron and steel manufacturing processes to occur domestically, whether the iron and steel product is "ready for use as an item (e.g., fencing, posts, girders, pipe, manhole cover, etc.) or could be incorporated as a component of a more complex product through assembly." *Contract Administration Core Curriculum Manual* FHWA-NHI-134077 Federal Highway Administration HIPA-30, p. 88 (Oct. 2014).
- According to FHWA's *Contract Administration Core Curriculum Manual*, "Simply stated, Buy America requires the use of domestic steel and iron in Title 23 funded highway contracts." FHWA-NHI-134077 Federal Highway Administration HIPA-30, p. 87 (Oct. 2014).

As DOT implements BABA, it should be reminded that Congress codified the strongest origin standards for iron and steel products. Thus, under no circumstances should DOT or any other agencies seek to manipulate or reclassifying such iron and steel products into new categories of products, such as "manufactured products" with its weaker origin standard or "construction materials" with a new, weaker standard. Congress clearly had no intention of introducing additional foreign content into an iron or steel product.

- DOT's longest-standing Buy America law, Section 165 of the 1982 Surface Transportation Assistance Act, has been applied by the Department to steel and iron only since 1983. The Department determined to "waive the application of Buy America to manufactured products *that do not include steel and iron components.*" (Emphasis added). See [Q&A #12](#).
- But the Department has made clear in its 40 years of implementing § 165 of the 1982 STAA, that, "[h]owever, *Buy America requirements apply to any steel or iron component of a manufactured product regardless of the overall composition of the manufactured product* (e.g. Buy America applies to the steel wire mesh or steel reinforcing components of a precast reinforced concrete pipe)." (Emphasis added). *Id.*

DOT Must Respect Congressional Intent and Fully Implement BABA

Despite the fact that § 165 explicitly required the application of Buy America procurement preferences to "manufactured products" DOT's Federal Highway Administration (FHWA) "determined that Congress had not intended to cover all manufactured products; therefore, FHWA's regulations only cover manufactured products that are predominantly steel or iron products." *Contract Administration Core Curriculum Manual* FHWA-NHI-134077 Federal Highway Administration HIPA-30, (Oct. 2014).

Congress clearly had the Department's longstanding 1983 general waiver for manufactured products in mind when it included Section 70914 in the BIL, explicitly requiring the head of each Federal agency awarding federal financial assistance for public infrastructure to require as a condition of that federal assistance that the recipient apply a procurement preference for iron,

steel, manufactured products, *and* construction materials when expending those funds for an infrastructure project.

It is concerning that DOT indicates that it “will take appropriate steps to ensure the definition of ‘construction material’ suggested in the [OMB’s] Implementation Guidance” will be applied to its federal financial assistance despite characterizing OMB’s guidance as nonbinding.

If the Department opts to apply a permissive origin standard to products that should be subject to an “all manufacturing processes” standard, it will be in clear violation of the law. Such action would ensure that federal financial assistance will be used to purchase greater amounts of foreign content than Congress intended with the enactment of the BABA.

Thank you for the opportunity share comments on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott N. Paul". The signature is fluid and cursive, with a large initial "S" and a long, sweeping tail.

Scott N. Paul
President
Alliance for American Manufacturing