

May 14, 2022

The Honorable Marcia L. Fudge  
Secretary  
U.S. Department of Housing and Urban Development  
451 7th Street SW, Room 10276  
Washington, DC 20410-0500

*RE: General Applicability Waiver of Build America, Buy America Provisions as Applied to Recipients of HUD Federal Financial Assistance (FR-6331-N-01)*

Dear Secretary Fudge:

On behalf of the Alliance for American Manufacturing (AAM), we appreciate the opportunity to provide comments on the Department of Housing and Urban Development's (HUD) proposed general applicability waiver for six months to the Build America, Buy America (BABA) requirements in the Infrastructure Investment and Jobs Act (IIJA) – also referred to as the Bipartisan Infrastructure Law (BIL). For the reasons outlined below, AAM urges that HUD immediately withdraw the proposed public interest waiver and narrow its scope to avoid unnecessary delays in BABA implementation – particularly for iron and steel products.

#### **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 HUD 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 narrow 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 is one of the primary reasons why Congress included BABA in the BIL.

### **HUD’s General Applicability Waiver Means \$15 Billion in FY22 Infrastructure Spending Will Occur Absent BABA Requirements**

In its proposed waiver, HUD notes that “[in] fiscal year 2022, HUD grantees will receive more than \$15 billion through the Department’s programs where infrastructure is an eligible activity,” subject to the Build America Buy America preference policy requirements. Coupled with the 180-day implementation period afforded by Congress in BABA § 70914, the additional six-month public interest waiver sought by HUD will ensure that none of that \$15 billion in federal assistance awarded by HUD will be subject to the Buy America preference policies in BABA.

- The HUD public interest waiver means that even iron and steel preferences that have been successfully implemented across various departments and agencies for decades will not take effect.
- For instance, as much as a third of the Community Development Block Grant (CDBG) Program dollars – over \$4 billion in FY22 – are utilized for public works infrastructure spending. Both EPA and USDA successfully administer an “American Iron and Steel”

(AIS) procurement preference for similar water infrastructure programs, raising questions as to why HUD is seeking a universal public interest waiver and why HUD has not made progress on BABA implementation for iron and steel products applied to water infrastructure spending during the 180-day implementation period afforded by Congress.

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 that 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.

### **HUD's General Applicability Public Interest Waiver Conflicts with Congressional Intent**

The general applicability public interest waiver sought by HUD 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. For instance:

- Congress 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
- Congress 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*

### **HUD's Waiver Request Misses the "Statutory Implementation Deadline"**

§ 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 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:

*"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." – U.S. Senator Tammy Baldwin, May 3, 2022*

Senator Brown's aforementioned, April 13, 2022, letter to OMB further 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

### **HUD's Waiver Request Timing Suggests a Predetermined Outcome**

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, HUD is only now, a mere two weeks before the conclusion of that 180-day period, proposing further delays to BABA. That HUD waited until the pendency of that 180 days to propose an additional six-month implementation delay - exactly 15 days prior to the effective implementation date of the BABA – demonstrates that the outcome of the proposed waiver was predetermined.

HUD's broad general applicability waiver 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, HUD points to the need to "complete the required public comment process pursuant to the Paperwork Reduction Act," which raises questions as to whether that process has begun, whether it could have begun sooner, and whether it intends to offer a specific timeline for its completion. For context, HUD is only providing a 15-day comment period for this proposed BABA public interest waiver.

HUD cites its need to gather data as its rationale for the public interest waiver. That the agency waited 180 days to commence this process and cites its inaction as the grounds for a public interest waiver stretches credulity. It is inarguably in the public interest that executive agencies adhere to the mandates imposed by Congress within the timeframes that Congress afforded. The Department is poised to establish a regrettable precedent here: that an agency's failure to comply may serve as the basis for any agency's waiver of its compliance with the law.

In defense of its predetermined waiver, the Department is quick to observe that its federal financial assistance has never been subject to Buy America laws. But that excuse belies the fact that the types of public infrastructure projects HUD supports are those that are routinely subject to Buy America laws when financed by other federal aid programs. Manufacturers, particularly iron and steel manufacturers, supplying these markets, currently comply with existing Buy America laws. Well established supply chains exist in the steel and iron sectors to supply Buy America compliant products and the United States has sufficient productive capacity to meet the demands of HUD's assistance spending. Although HUD says that it is unfamiliar with these requirements, private sector suppliers and contractors are certainly not.

### **Congress and OMB Directed a 30-Day Comment Period, Yet HUD 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, HUD 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 demonstrating a predetermined outcome.

**The Waiver Should be Narrowed and Full BABA Implementation Should be Accelerated**  
AAM urges that HUD immediately withdraw the proposed public interest waiver and narrow its scope to avoid unnecessary delays in BABA implementation. HUD’s proposed public interest waiver would, in effect, delay implementation of the BABA requirement beyond the 180 days already afforded by Congress. Billions of dollars in infrastructure spending will occur absent BABA requirements. HUD must accelerate its work to prioritize implementation of BABA and do so in a fully transparent manner with robust labor and industry stakeholder engagement.

Thank you for the opportunity share comments on this matter.

Sincerely,



Scott N. Paul  
President  
Alliance for American Manufacturing