



May 22, 2023

Filed Electronically: [regulations.gov](https://www.regulations.gov)
Docket ID: FHWA-2022-0027

The Honorable Shailen P. Bhatt
Administrator
Federal Highway Administration
U.S. Department of Transportation
Washington, D.C. 20590

RE: Notice and Request for Comment on Federal Highway Administration's Review of its General Applicability Waiver of Buy America Requirements for Manufactured Products (FHWA-2022-0027).

Dear Administrator Bhatt:

I write to you on behalf of the United Steelworkers Union (USW or Steelworkers). Our union is the largest industrial union in North America, representing workers in steel, aluminum, and other metals; paper; rubber; glass; cement; chemicals; refining; other industrial sectors; and service. We appreciate the opportunity to respond to the Department of Transportation's (DOT) Federal Highway Administration's (FHWA) request for comments regarding its existing general applicability waiver for manufactured products under its Buy America waiver authorities. USW strongly argues for the discontinuation of FHWA's outdated 1983 general waiver of manufactured products, and also responds to FHWA's intent to "consider other actions related to the implementation of Buy America requirements for manufactured products".

General Considerations

1. Does the justification that was used by FHWA in granting the General Waiver in 1983 still apply? Specifically, is FHWA's approach to the application of Buy America requirements to manufactured products still appropriate, considering the enactment of the BABA, and standards established therein?

USW urges FHWA to discontinue its general applicability waiver of Buy America for manufactured products. This waiver has been in effect for 40 years, despite explicit statutory language – found in Section 165 of the 1982 Surface Transportation Assistance Act (STAA) and again in the 2021 Bipartisan Infrastructure Law (BIL) – directing FHWA to apply a domestic content preference to manufactured products. It is inarguably in the public interest that FHWA adheres to the requirements imposed by Congress. After all, FHWA's Buy America statute and its full implementation of BABA is aligned with key priorities of the Biden-Harris administration, such as Executive Order 14005, *Ensuring the Future is Made in All of America by All of America's Workers*.

The purchasing power of the U.S. federal government, and the federal assistance that it delivers for infrastructure and other purposes, has the potential to grow domestic job creation and U.S. manufacturing capabilities. Full Buy America implementation would improve our domestic supply chains and establish robust, comprehensive domestic content preferences across all federal aid infrastructure spending.

However, FHWA's 40-year-old general waiver of Buy America for manufactured products represents a missed opportunity to maximize the return on taxpayer infrastructure investments with stronger domestic supply chains and more jobs. With each passing year, tens of billions of federal assistance dollars across thousands of infrastructure projects are being spent absent major elements of existing Buy America laws, as well as the Build America, Buy America Act (BABA) in the BIL. The continued existence of the general waiver eliminates any incentive for future domestic investment for the manufacture of a vast array of products.

USW urges that any waivers be time-limited and transparent. DOT should avoid broad and enduring general waivers, such as the 1983 manufactured products waiver, which has only discouraged capital investments in U.S. manufacturing capabilities and capacity.

2. What systems or processes do funding recipients, contractors, and manufacturers have to manage compliance with Buy America requirements?

USW supports the use of step certification, which creates a paper trail throughout the manufacturing process with each handler certifying that their individual "step" complied with the Buy America requirements. This compliance mechanism has been used by DOT, and other agencies, for decades to maximize Buy America

adherence.^{1 2 3} Manufacturers who want to supply these markets will willingly provide a certification attesting to the domestic manufacture of its product. This process is a mature and highly-successful method to ensure that the intent of both Congress and the Administration is met, and that the benefits of Buy America accrue to domestic producers and workers.

With step certification, there are a variety of enforcement mechanisms, both pre-award and post-award. Pre-award enforcement mechanisms could be disqualification from the current round of funding. Post-award enforcement mechanisms range from active replacement of the materials, if necessary, to termination of future work. Enforcement is possible through a variety of avenues including bid protests, whistleblowers, and audits. Additionally, USW would highlight that step certification has worked well due to the risk of criminal prosecution for falsifying certification paper work.

5. Are there specific types of manufactured products that are widely used on Federal-aid highway projects for which a large portion of the components are known to not be produced in the United States or not produced in sufficient quantities? If so, what are those components, what manufacturer produces them, and where are they primarily produced? What are the obstacles to having those components produced in the United States? Please provide data to support your comment.

As the largest industrial union in United States, our members truly “Supply America” from making the pigment that goes into yellow paint for roads to the steel that support bridges. We must build up our long-neglected domestic supply chains by ensuring that our tax dollars are spent on American products manufactured and supplied by American workers. Strong domestic content standards will send demand signals for companies to invest in their workers and their production, while also creating long-term economic resiliency for generations to come.

While we highlight our members’ hard work, we understand that we do have short-term vulnerabilities in our nation’s supply chain. That is why our union strongly supports robust Buy America standards coupled with a transparent, narrow waiver process to overcome short-term market limitations and supply gaps. The BIL codified the establishment of a central and publicly available website related to Buy America and Buy American waivers. Timely and transparent reporting by federal departments

¹ [U.S. Federal Highway Administration](#), “FHWA’s Buy America Q and A for Federal-aid Program”, Updated March 20, 2023.

² [U.S. Environmental Protection Agency](#), “Memorandum: Implementation of American Iron and Steel provisions of P.L. 113-76, Consolidated Appropriations Act, 2014”, March 20, 2014.

³ [U.S. Electronic Code of Federal Regulations](#), “Part 661 – Buy America Requirements”, Accessed May 22, 2023.

and agencies of this waiver clearinghouse will support domestic manufacturing. The clearinghouse will allow existing suppliers to access potential opportunities to manufacture and supply materials and products needed for infrastructure projects. Additionally, the clearinghouse will provide valuable information on the frequency, value, and nature of purchases that are not being supplied by domestic producers, which would enable domestic manufacturers to make informed investment decisions that will fill gaps in our production capabilities.

For example, when Buy America preferences were first applied to water infrastructure programs administered by Environmental Protection Agency (EPA) in 2014, the agency did not wait until it understood every possible iron and steel product that might be used in a water infrastructure project, nor did it conduct an exhaustive study of every possible supplier prior to implementation and application of the preference. Instead, it used waivers to keep projects moving, while sending market signals to domestic manufacturers. In 2018, it noted:

The EPA has seen a steady rise in domestically produced iron and steel products... Manufacturers have constructed new foundries and continue to invest in their domestic manufacturing capabilities. As a result, products the EPA had previously approved waivers for due to lack of domestic availability are now being readily manufactured in the United States.⁴

However, it must be explicitly noted that when departments or agencies are permitted to issue blanket waivers for entire categories of products, it undermines the effectiveness of the waiver clearinghouse, disincentivizing capital investments in the United States, while continuing to reward offshore production. Any misuse of waivers and regulatory carve-outs demonstrates a blatant disregard for domestic manufacturers and American workers in the supply chain who produce Buy America compliant products. The issuance of broad, categorical, or general applicability waivers discourages planned investments in U.S. production by those seeking to supply these markets and removes any incentive for future domestic investment.

Further, USW encourages DOT to increase its cooperation with the Manufacturing Extension Partnership (MEP) Supplier Scouting program, as directed by Congress, to strengthen its waiver protocols. With decades of experience working with small- and medium-sized manufacturers, the MEP stands poised to identify domestic manufacturers ready to supply the goods necessary for U.S. infrastructure investment. Relying on MEP's supplier scouting network will also maximize the impact of these investments for workers.

⁴ [U.S. Environmental Protection Agency](#), "Drinking Water State Revolving Fund American Iron and Steel Requirement: 2018 Annual Report Addendum", July 2019.

Compliance Standards for Manufactured Products

6. Should FHWA consider defining the term “produced in the United States” for manufactured products via rulemaking? If so, should it consider adopting the definition for the same term that is used in Section 70912(6)(B) of BABA, as described above? Or should it consider adopting some other definition? Should the definition vary by product or product type? Should FHWA adopt the approach for determining “cost of components” of a manufactured product described by the Office of Federal Financial Management in the Office of Management and Budget in the notification of proposed guidance published on February 9, 2023 ((Feb. 8, 2023)), which is the same as is used in the FAR (48 CFR 25.003)?

In response to OMB’s proposed guidance, USW provided the following comment pertaining to the definition of “cost of components” for determining the cost of manufactured products:

We support the OMB’s proposal to interpret “cost of components” consistent with the definition for that term in the Federal Acquisition Regulation (FAR). The standard benefits from established interpretive precedent, and ensures that components costs are evaluated on a fair basis. Importantly, the definition also ensures that end product assembly is not treated as a component input for purposes of the domestic component content requirement. Such an interpretation would diminish or eviscerate the value of the preference regime to U.S. upstream component manufacturers.

By including robust origin standards in BABA, Congress has made it abundantly clear that it is both an economic and national security imperative that the inputs for America’s transportation infrastructure be produced in the United States. The benefits of Buy America laws are maximized when robust standards are set for determining a product’s origin. When these laws apply to upstream inputs, they ensure that the economic benefits of government spending are accrued by an entire supply chain, not merely at the final stage of manufacturing. Weak Buy America origin standards, on the other hand, eviscerate the multiplier effect of taxpayer-financed spending, resulting in lost opportunity and forsaken economic return and fewer jobs for American workers.

BABA requires that the cost of the components that are “mined, produced, or manufactured in the United States” be greater than 55 percent of the total cost of all components of the manufactured product. Thus, Congress is clear that components

do not include unquantifiable, indirect, or so-called “value-added” considerations such as labor costs or community impact. While these are noble considerations, the focus of Congress in meeting this threshold is on production and domestic supply chains.

8. If FHWA were to adopt a definition for manufactured products produced in the U.S., should it consider also defining what it means for a manufactured product to be manufactured in the U.S.? If so, what manufacturing processes or assembly steps should be required to occur domestically? Should the requirement vary by product or product type?

USW urges FHWA to adopt a clear and robust standard for the term *manufacture*. We also urge FHWA to reject weak origin standards, such as mere *assembly*, which are nothing short of a pathway for affording foreign sourced end products the benefits of the Buy America procurement preferences and taxpayer investments in public infrastructure.

DOT should be emphasizing the importance of maximizing domestic production of “manufactured products”, including their components and material inputs. Assembly operations that are insubstantial or minor will not encourage the domestic manufacture of critical inputs to our infrastructure, and will stymie future compliance with the statutorily directed BABA origin standard for manufactured products. Additionally, processes involving product refurbishment, simple alterations, minor assembly, packaging, painting, testing, and others that do not create a basically new material or substantially change the physical character of the original inputs should not be treated as “manufacturing” for purposes of FHWA’s analysis.

We encourage FHWA to follow the example set by decades of construction guided by the federal Buy American Act (BAA). The U.S. Comptroller General has adopted different standards as to what constitutes “manufacturing” under the BAA. The basic test appears to be whether the materials or components subject to the “manufacturing” have undergone a process fundamentally changing their character. “If the operations performed on the foreign item create a basically new material or result in a substantial change in physical character, the item becomes ... manufactured in the United States.”^{5 6}

9. Federal financial assistance from FHWA may support the procurement of “rolling stock.” For example, States and local governments may seek to purchase certain electric vehicles under the Congestion Mitigation and Air Quality Program.[7] Should FHWA establish any special provisions for applying

⁵ See *A. Hirsh, Inc. v. U.S.A.* 1991 WL 102984 (E.D. Pa. 1991).

⁶ See *United States v. Rule Indus., Inc.*, 878 F.2d 535 (1st Cir. 1989).

Buy America requirements for manufactured products to “rolling stock” such as vehicles or wheeled equipment? If so, should FHWA consider applying requirements to rolling stock similar to those used by other Operating Administrations of the Department of Transportation, such as the Federal Transit Administration [8] or the Federal Railroad Administration? [9]

USW recognizes the utility of FHWA establishing clear guidance on the application of the statutory manufactured products standard to “rolling stock”, such as vehicles or wheeled equipment. USW urges FHWA to avoid replicating other departmental agency’s Buy America policies applied to rolling stock that do little to encourage capital investments in U.S. manufacturing capacity and capabilities, particularly for critical emerging industrial sectors like electric vehicle energy storage and distribution technologies.

Manufactured Products with Steel and Iron Components

10. Are there specific issues that should be considered for manufactured products that include steel or iron components?

As FHWA reviews its 1983 general waiver and concurrently implements BABA, it should be reminded that Congress codified the strongest origin standards for iron and steel products. Thus, under no circumstances should FHWA seek to reclassify such iron and steel products into new categories of products that have a weaker origin standard. Congress clearly had no intention of introducing additional foreign content into an iron or steel product. If DOT opts to apply a permissive origin standard to products (or components) that should be subject to an “all manufacturing processes” standard, it will be in clear violation of the law.

Through agency guidance issued subsequent to the 1983 final rule, FHWA has applied the Buy America requirements to components and subcomponents, as well as to other steel and iron material regardless of size and form. For example, FHWA has made the following statements in various guidance documents over the years:

- “All foreign steel and iron materials and products are covered by Buy America regardless of the percentage they comprise in a manufactured product or the form they take;”⁷
- “While FHWA does not apply Buy America requirements to ‘manufactured products,’ we do apply the requirements to specific components within those

⁷ [U.S. Federal Highway Administration](#), “Contract Administration Core Curriculum Manual”, October 2, 2014.

products. Case in point, if a bridge bearing was considered only as a manufactured product, it would be exempt from the Buy America requirements. However, FHWA policy has been that the steel components of a predominately steel product must be of domestic manufacture unless the value of the components is less than the minimal use threshold for the project;”⁸

- “Buy America requirements apply to any steel or iron component of a manufactured product regardless of the overall composition of the manufactured product;”⁹
- “[A]ll steel and iron materials are covered by Buy America regardless of the percentage they comprise in a manufactured product or form they take;”¹⁰
- “Your contractor should identify steel or iron components of any pre-assembled, manufactured product. When this is the case, the company who completed the assembly should provide the appropriate certification statement of conformance with the Buy America regulation;”¹¹ and
- “The Buy America provisions require that iron and steel components in pre-assembled manufactured products must also conform to the regulation.”¹²

Additionally, Congress included a “savings provision” in the BABA law to make sure that existing Buy America laws and policies would not be weakened during BABA implementation. This statutory savings provision does not merely “allow” departments and agencies to preserve existing Buy America policies and provisions, but, in fact, explicitly preserves such domestic content procurement preferences. The savings provision is critical to FHWA’s implementation of BABA, as Congress clearly sought to maintain the requirements of Section 165 in the 1982 STAA. DOT’s implementing regulations and forty years of administrative policy should be used as a minimum starting point for enhancements.

11. Should FHWA define the meaning of a “predominantly” steel and iron product? Why or why not? For example, could this help to distinguish between manufactured products and steel and iron products, for the purpose of applying Buy America requirements?

⁸ Donald P. Steinke, “Buy America Policy Response,” Contr. No. HCC-97-070 (Dec. 22, 1997), at 2 (AR013) (hereafter, “1997 Memo”).

⁹ [U.S. Federal Highway Administration](#), “FHWA’s Buy America Q and A for Federal-aid Program”, Updated March 20, 2023.

¹⁰ [U.S. Federal Highway Administration](#), “Buy America: Application to Federal-aid Highway Construction Projects”, July 9, 2002.

¹¹ [U.S. Federal Highway Administration](#), “Project Construction and Contract Administration: Buy America Field Compliance”, August 2012.

¹² [U.S. Federal Highway Administration](#), “Project Development Contract Specifications: Buy America Contract Requirements”, August 2012.

In response to a similar question posed by OMB, USW recently provided the following comment on the definition for “predominantly” iron or steel items:

We encourage OMB to follow established precedent, which is clear and well-understood. OMB should ensure that any threshold standard used to determine a product’s categorization as “iron or steel” is aligned with similar standards used to define iron and steel products in domestic procurement preference requirements applied to federal aid infrastructure spending, like BABA. Such examples include the EPA’s interpretation of the term “primarily iron or steel” in its American Iron and Steel laws. The EPA defined that term to mean that a product is “made of greater than 50 percent iron or steel, measured by cost. The cost [is] based upon the material costs.”¹³

OMB asks whether it “should adopt a definition of the term ‘predominantly’ similar to the definition for the term ‘predominantly iron or steel or a combination of both’ in the FAR...” While that definition, added to the FAR in 2021, is somewhat consistent with various agency’s definitions for “primarily iron or steel”, it is not wholly consistent, and permits foreign ferrous content. It also lacks the established interpretive precedent of other definitions found in the FAR. For these reasons, we encourage OMB to adopt a standard for predominantly iron or steel that is consistent with the definitions for “primarily iron or steel” in various existing federal-aid infrastructure program’s domestic procurement preference laws.

12. If FHWA adopts a definition for manufactured products produced in the U.S. similar to that used in Section 70912(6)(B) of BABA how should that definition be applied to predominantly iron or steel components of manufactured products?

See USW’s answer above.

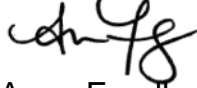
Conclusion

USW appreciates the opportunity to provide this information and the continued engagement of the Administration in ensuring that investment in American infrastructure be a generator of good, family-supporting jobs for American workers. **Our union strongly urges FHWA to discontinue the 1983 general waiver for**

¹³ [U.S. Environmental Protection Agency](#), “Memorandum: Implementation of American Iron and Steel provisions of P.L. 113-76, Consolidated Appropriations Act, 2014”, March 20, 2014.

manufactured products. We look forward to continuing to work with this Administration in its goals to create jobs and rebuild America.

Sincerely,



Anna Fendley

Director of Regulatory and State Policy