

May 22, 2023

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

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

Dear Administrator Bhatt:

The Alliance for American Manufacturing (AAM) appreciates the opportunity to respond to the Federal Highway Administration's (FHWA) request for comments regarding its existing general applicability waiver for manufactured products under its Buy America waiver authorities. AAM strongly argues for the *discontinuation* of FHWA's outdated 1983 general waiver of manufactured products. AAM also responds to the FHWA's intent to "consider other actions related to the implementation of Buy America requirements for manufactured products." Detailed answers are provided in response to FHWA's questions.

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 strongly supported enactment of the Bipartisan Infrastructure Law (BIL) and the inclusion of the bipartisan *Build America, Buy America Act* (BABA), which ensures that America's federally assisted infrastructure investments are completed with iron, steel, manufactured products, and construction materials that are produced in the United States.

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?

AAM urges FHWA to *discontinue* its general waiver of Buy America for manufactured products, which has been in effect for 40 years despite explicit statutory language in Section 165 of the 1982 Surface Transportation Assistance Act (STAA) and again in the 2021 Bipartisan Infrastructure Law (BIL) directing the agency to apply a domestic content preference to manufactured products.

- Section 165 of the 1982 STAA explicitly required the application of Buy America procurement preferences to “manufactured products.” Yet, FHWA inexplicably “determined that Congress had not intended to cover all manufactured products.”¹
- With the enactment of BABA as part of the BIL, it is inappropriate and unreasonable for FHWA to continue applying this general waiver. In fact, Congress clearly had the FHWA’s longstanding 1983 general waiver for manufactured products in mind when it included BABA in the BIL, which explicitly requires 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 manufactured products, as well as iron, steel, and construction materials, when expending funds for an infrastructure project.
- Despite the clear requirement in BABA that existing general waivers be reviewed, FHWA waited nearly a year and a half to initiate this required review. Thus, AAM urges that FHWA expeditiously complete its review and *discontinue* the general waiver of manufactured products.

Congressional intent in the 2021 BABA is clear: discontinue the manufactured products general waiver. In general, Congress specifically sought to discourage the use of general waivers by classifying Buy America policy regimes weakened by such longstanding general waivers as “deficient programs” in BIL § 70912 and 70913(c) and mandating periodic reviews to ensure their continued necessity in § 70914 (d). In doing so, Congress clearly contemplated the 1983 general applicability waiver for manufactured products.

- Senator Sherrod Brown (Ohio), author and sponsor of the *Build America, Buy America Act*, wrote to the Office of Management and Budget (OMB) on April 13, 2022, stating the reasoning for its enactment as part of the BIL: “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.*” (*emphasis added*)
- Senator Tammy Baldwin (Wisconsin) – author of the *Made in America Act*, elements of which were incorporated into the final BABA provisions in the BIL – specifically raised the 1983 manufactured products general waiver with Secretary Pete Buttigieg at a May 3, 2022, hearing of the Senate Committee on Commerce, Science, and Transportation: “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.” When asked by Senator Baldwin to give an “assurance that DOT intends to fulfill its Buy America requirement promptly and fully,” Secretary Buttigieg responded that DOT is “committed to delivering on the intent of the Buy America provisions in the law.”

¹ *Contract Administration Core Curriculum Manual* FHWA-NHI-134077 Federal Highway Administration HIPA-30, (Oct. 2014)

- Representative John Garamendi (California) – the House sponsor of the *Made in America Act* and a BABA cosponsor – led a March 27, 2023, letter to Secretary Buttigieg in support of rescinding the Federal Highway Administration’s 1983 waiver for manufactured products. Representative Garamendi and his colleagues urged that FHWA “fully implement” the law, including its “requirements for manufactured products in federal-aid highway projects.”²

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 administration. Congress affirmed these points in its BABA Section 70911 *Findings*:

- *“by incentivizing domestic manufacturing, domestic content procurement preferences reinvest tax dollars in companies and processes using the highest labor and environmental standards in the world”*
- *“strong domestic content procurement preference policies act to prevent shifts in production to countries that rely on production practices that are significantly less energy efficient and far more polluting than those in the United States”*
- *“Buy America laws create demand for domestically produced goods, helping to sustain and grow domestic manufacturing and the millions of jobs domestic manufacturing supports throughout product supply chains”*
- *“a robust domestic manufacturing sector is a vital component of the national security of the United States”*

FHWA’s 40-year-old general waiver of Buy America for manufactured products represents a colossal missed opportunity to maximize the return on taxpayer infrastructure investments with stronger domestic supply chains and more jobs. After all, a national focus on bringing back lost industrial capabilities and strengthening what remains has never been more important, as our nation has become painfully aware of our broken supply chains.

- Reinvesting America’s tax dollars here at home benefits American workers by giving companies a powerful incentive to invest in U.S. operations. Yet, in the absence of strong Buy America policies, or due to general waivers that negate their existence entirely, taxpayer spending too often rewards companies that have moved their operations and jobs offshore.
- By promoting investment in domestic manufacturing, Buy America policies ensure that taxpayer-funded investments align with the highest labor and environmental standards in the world. Strong Buy America policies act to prevent shifts in production to countries that rely on practices that are significantly less energy efficient and far more polluting than here in the United States. When domestic content in infrastructure is maximized, the potential economic

² Link: <https://garamendi.house.gov/media/press-releases/garamendi-congressional-labor-caucus-call-secretary-buttigieg-fully-implement>

benefits are greatly multiplied, increasing U.S. manufacturing job gains by as much as 33 percent.³

- Buy America policies have always enjoyed bipartisan support – both in Congress and among voters. In fact, January 2023 polling conducted by Morning Consult identified that 83% of voters agree that “taxpayer dollars should go toward infrastructure projects that utilize American-made products like iron, steel, and other construction materials versus products that are imported from foreign countries.” Democrats (82%), Independents (80%), and Republicans (87%) all agree.⁴

Decades of FHWA’s general waiver of manufactured products being in place have denied opportunities to expand domestic supply chains and have discouraged investments in U.S. production by those seeking to supply these Buy America-covered markets. 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 2021 BABA law.

- FHWA must be guided by the fact that each waiver and each implementing policy that deviates from the terms of BABA or its precursor statutory Buy America obligations is a negative market signal that will have real and profound consequences on private sector capital investment decision making. The continued existence of the manufactured products general waiver eliminates any incentive for future domestic investment for the manufacture of a vast array of products.
- FHWA’s general waiver also negates the intended reward to companies making investments in response to the market signals created by the BABA law. Instead, these companies, and their workers, are denied the opportunity afforded under the Buy America requirement to supply the manufactured products needed to build our infrastructure and are instead forced to compete against dumped and subsidized imports, often from unreliable and potentially hostile sources.
- Companies that have already established domestic production should be rewarded for their investments and commitment to the U.S. market and American workers.

AAM urges that any waivers of manufactured products be targeted, time-limited, and transparent. DOT should avoid broad and enduring general waivers such as the 1983 manufactured products waiver, which only discourage 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?

³ *How Infrastructure Investments Support the U.S. Economy: Employment, Productivity and Growth*, UMass, Amherst. January 2009.

⁴ National Tracking Poll of 1,985 Registered Voters. Morning Consult. Conducted January 25-26, 2023. Link: https://www.americanmanufacturing.org/wp-content/uploads/2023/02/AAM_MC_U.S.-Trade-Relations-Support-for-Buy-American.pdf?eType=EmailBlastContent&eld=5fdc6c6f-d240-4fd7-a92c-3ad0f9ae43b8

AAM supports the use of “step certification” to manage compliance with Buy America requirements. Various government agencies administering Buy America laws have instituted “step certification” regimes to facilitate compliance. Agencies have also released certification templates in guidance and regulations implementing various Buy America laws. Manufacturers who want to supply these markets will willingly provide a certification attesting to the domestic manufacture of its product.

- According to FHWA, “A step certification is a process under which each handler (supplier, fabricator, manufacturer, processor, etc.) of the iron and steel products certifies that their step in the process was domestically performed.”⁵
- To document compliance with the “American Iron and Steel” laws, the Environmental Protection Agency (EPA) “...recommends the use of a step certification process, similar to one used by the Federal Highway Administration. The step certification process is a method to ensure that producers adhere to the AIS requirement and assistance recipients can verify that products comply with the AIS requirement. The process also establishes accountability and better enables States to take enforcement actions against violators. Step certification creates a paper trail which documents the location of the manufacturing process involved with the production of steel and iron materials. A step certification is a process under which each handler (supplier, fabricator, manufacturer, processor, etc.) of the iron and steel products certifies that their step in the process was domestically performed. Each time a step in the manufacturing process takes place, the manufacturer delivers its work along with a certification of its origin. A certification can be quite simple. Typically, it includes the name of the manufacturer, the location of the manufacturing facility where the product or process took place (not its headquarters), a description of the product or item being delivered, and a signature by a manufacturer’s responsible party...These certifications should be collected and maintained by assistance recipients.”⁶
- Federal Transit Administration (FTA) regulations at § 661.6 require certifications of compliance with its Buy America requirement and also provide sample certification language.

AAM supports the adoption of robust documentation mechanisms for substantiating Buy America compliance.

- The absence of such mechanisms invites malfeasance resulting in Buy America evasion or circumvention. To demonstrate compliance, robust recordkeeping and documentation procedures must be required. It would be an error to merely require a “good faith estimate” certification. AAM also recommends audits or review procedures for purposes of validating certifications.
- Moreover, there are many existing enforcement mechanisms that serve as adequate tools to encourage compliance and discourage malfeasance. Penalties for contractual breach, including

⁵ FHWA's Buy America Q and A for Federal-aid Program. Feb. 1, 2023. Link: https://www.fhwa.dot.gov/construction/contracts/buyam_qa.cfm

⁶ “Implementation of American Iron and Steel provisions of P.L. 113-76 Consolidated Appropriations Act” at #25 (Mar. 2014) available at <https://www.epa.gov/sites/default/files/2015-09/documents/ais-final-guidance-3-20-14.pdf>

nonpayment, failure to reimburse, contract termination, contractor suspension and contractor debarment are already contemplated by DOT agencies administering federal-aid infrastructure spending. Some are codified in agency regulations. Civil remedies are also available to the Federal Government (False Claims Act) and private sector competitors.

Meanwhile, with decades of experience working with small- and medium-sized manufacturers, the Manufacturing Extension Partnership (MEP) can identify domestic manufacturers ready to supply the manufactured products necessary for U.S. infrastructure investment.

- Congress gave specific instructions in BABA for DOT agencies – including FHWA – to collaborate with MEP to assist in implementation of the law.
- This is also precisely why President Biden’s Executive Order on *Ensuring the Future Is Made in All of America by All of America’s Workers* directed agencies to “partner with the Hollings Manufacturing Extension Partnership (MEP), discussed in the Manufacturing Extension Partnership Improvement Act (title V of Public Law 114-329), to conduct supplier scouting in order to identify American companies, including small- and medium-sized companies, that are able to produce goods, products, and materials in the United States that meet Federal procurement needs.”⁷
- Relying on MEP’s supplier scouting network will maximize the impact of federal-aid infrastructure investments for small businesses and their workers. Recognizing existing suppliers should only be a first step, though, and a concerted effort should also be made by all departments and agencies to work with MEP to identify manufacturers with interest in growing their operations to contribute to the domestic infrastructure supply chain.

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.

The FHWA should include the Buy America preference in bid solicitations and contract paperwork across all of its federally assisted infrastructure projects. Doing so will allow the traditional Buy America waiver process to provide valuable and precise market capacity information directly to FHWA and its stakeholders.

- If applied narrowly, manufacturers, contractors, and assistance recipients are best positioned to respond to availability, cost, and any other factors that may require the use of waivers.

⁷ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-ensuring-the-future-is-made-in-all-of-america-by-all-of-americas-workers/>

- This approach is undoubtedly the most effective, expedient, and transparent path to applying FHWA’s Buy America requirement. This approach also provides clear market signals necessary for investors and manufacturers confidently make significant capital investments in domestic productive capacity.

AAM also urges FHWA to adopt implementing policies with regard to the establishment of a central and publicly available website related to Buy America and Buy American waivers – as codified in the BIL. Timely reporting by federal departments and agencies and effective implementation of this waiver clearinghouse will support domestic manufacturing in two key respects:

- It will allow existing suppliers to access, in real time, potential opportunities to manufacture and supply materials and products needed for infrastructure projects; and
- This waiver database will provide valuable information on the frequency, value and nature of purchases that are not being supplied by domestic producers, enabling domestic manufacturers to make informed investment decisions that will fill gaps in our production capabilities.

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, AAM provided the following comment pertaining to the definition of “cost of components” for determining the cost of manufactured products:

“AAM supports the OMB’s proposal to interpret ‘cost of components’ consistent with the definition for that term in the Federal Acquisition Regulation. 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 entirely 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 strong standards are set for determining a product’s origin.

- Congress intends for Buy America to be applied to upstream components, subcomponents, and material inputs, ensuring 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?

AAM urges FHWA to adopt a clear and robust standard for the term “manufacture” and eschew 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.

- 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.
- Processes that do not in any way transform or alter the essential nature of products being procured, do not constitute manufacturing processes. See *In TRS Research*, 2000 CPD ¶128, b B-285514, 2000 WL 1099965 (Comp. Gen. 2000). They will not, therefore, enable a producer to comply with the BABA origin requirements for manufacture in the United States and will have discouraged, rather than encouraged, new domestic manufacturing capabilities necessary to meet the BABA’s domestic component content requirement.
- FHWA would be wise to follow decades of construction of the federal Buy American Act. 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.” See *A. Hirsh, Inc. v. U.S.A.* 1991 WL 102984 (E.D. Pa. 1991). See also *United States v. Rule Indus., Inc.*, 878 F.2d 535 (1st Cir. 1989).

- Processes involving product refurbishment, 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.

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 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]

AAM 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. AAM urges the FHWA to avoid replicating other departmental agencies’ 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 such as electric vehicle energy storage and distribution technologies.

The Federal Transit Administration’s (FTA) application of its Buy America requirements for EV rolling stock demonstrates the inadequacy of the agency’s implementing policies in the face of emerging technologies. Due to the outsized cost of the battery component versus a traditional propulsion system, OEMs can meet the FTA’s rolling stock Buy America statutory 70% domestic content threshold with fewer domestic non-battery components (frame, windows, braking systems, etc.). For instance, an audit recently conducted by FTA concluded that a Chinese manufacturer of EV buses was able to meet the statutory domestic content threshold with 53% of the total cost of materials attributed to its Power Battery System. FTA’s permissive approach to its Buy America law applied to rolling stock means that all other domestic-origin components – such as seats and the farebox – accounted for as little as 18 percent of the total cost of materials in that manufacturer’s electric bus. Federal policy must ensure that the outsized cost of a battery does not result in less non-battery domestic content.

The inadequacy of the FTA’s Buy America implementing policies is not limited to emerging technologies. Its longstanding Buy America loopholes have discouraged domestic production for some items absolutely critical to U.S. transportation systems, but also U.S. economic and national security.

To that end, AAM strongly urges FHWA to avoid loopholes related to applicable federal aid Buy America laws that improperly permit entire “systems” to be treated as a single “manufactured product.” In such instances, relevant Buy America laws are not applied to components and materials. Unfortunately, FTA’s “systems” as “end products” loophole is currently applied under its Buy America regulations, defined as:

“a machine, product, or device, or a combination of such equipment, consisting of individual components, whether separate or interconnected by piping, transmission devices, electrical

cables or circuitry, or by other devices, which are intended to contribute together to a clearly defined function.” 49 CFR § 661.3.

The FTA’s “systems” as “end products” loophole renders elements of those systems as either components or subcomponents. Because component origin is determined merely by the place of manufacture and subcomponent origin is irrelevant under FTA’s regulations for manufactured products, the FTA’s liberal construction of this element of its Buy America regulations creates a massive loophole that undermines the intent of its Buy America law.

- For items deemed *components*, they may be manufactured from inputs of any origin.
- For items deemed subcomponents, the items themselves may originate from any source including foreign sources.
- Examples of items deemed by the FTA to be “subcomponents” for which origin is irrelevant include such products as “pipe” and such complex products as “pumps.”

Additional examples of the FTA treating entire systems as the end product (permitting wholly foreign *subcomponent* content) include:⁸

- gas transmission system and valve lot system are each “manufactured end products,” Sacramento Regional Transit District (2014)
- security/surveillance system is still considered a “manufactured end product,” Security Industry Association (2016)
- water mist fire suppression systems are a “manufactured end product,” MTA (2015)
- fiberglass structural platform system is a “manufactured end product,” Delta Composites (2015)
- fire alarm, lighting, and power systems are each “manufactured end products,” Bob Hope Airport (2014)

If FHWA follows FTA’s misguided approach of treating entire systems as the end product, it will open yet another gaping loophole in the Buy America requirements, obviate the need for domestically produced inputs, and stymie any market signal to drive capital investments – and thus supply chain security and resiliency – in the United States.

The implications of permissive origin standards for an item essential to the nation’s critical infrastructure are seismic for the U.S. supply chains. For example, consider *electrical steel*, which is essential for transmission and distribution transformers for both traditional and renewable sources of energy, as well as infrastructure necessary for the Biden administration’s efforts to increase adoption of electric vehicles and other transportation infrastructure reliant on energy storage and electricity distribution. Domestic production of grain-oriented (GOES) and non-oriented (NOES) electrical steel has been under pressure from unfairly traded imports for decades, resulting in the loss of U.S. production. Today, there is just one remaining producer of GOES in the United States.

⁸ See <https://www.transit.dot.gov/regulations-and-guidance/buy-america/buy-america-guidance-letters>

It would be a grave mistake if the United States were to become dependent on potentially hostile foreign governments for its electrical steel needs given this material is critical to the production of power and distribution transformers and related applications in electric vehicle motors and other products. Implementing policies – including FHWA’s Buy America policy and BABA – that help to incentivize robust domestic production of electrical steel and the transformer supply chain is not only integral to the Administration’s goals of electrifying America’s vehicle fleet and modernizing the electric grid, it is imperative to the United States being able to independently respond to catastrophic damage to the nation’s electric grid infrastructure.

Following Superstorm Sandy in 2013, former Homeland Security Secretary Janet Napolitano raised concerns about our capacity to rapidly respond to natural disasters, calling attention to what the loss of domestic power transformer manufacturing capabilities meant for the United States’ ability to tackle that crisis effectively:

“I’ll give you a good example: transformers. You know, utilities use these big transformers to supply power. They are all made overseas. We have lost any domestic production whatsoever. And they’re big and they’re really expensive and they take a long time to move...After Sandy, we needed transformers and that whole process, I think, fed into some of the delay in getting the lights turned back on. That’s just one example that we run into...”⁹

Permissive origin standards, such as FTA’s “systems” as “end products” loophole, are a disincentive for U.S. production and investment, rather than the solution sought by Congress and the Biden administration to fill gaps and vulnerabilities in our supply chains and should not be adopted by FHWA.

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 manipulate or 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 the Department 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, the 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, the FHWA has made the following statements in various guidance documents over the years:

⁹ Alliance for American Manufacturing. (2013, March 4). “Getting the lights turned back on”—homeland security concerns from two DHS Chiefs. [Blog Post]. Retrieved from www.americanmanufacturing.org.

- “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;”¹⁰
- “While FHWA does not apply Buy America requirements to ‘manufactured products,’ we do apply the requirements to specific components within those 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;”¹¹
- “Buy America requirements apply to any steel or iron component of a manufactured product regardless of the overall composition of the manufactured product;”¹²
- “[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;”¹³
- “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;”¹⁴ and
- “The Buy America provisions require that iron and steel components in pre-assembled manufactured products must also conform to the regulation.”¹⁵

Congress made clear in BABA § 70917 that any existing domestic content procurement preferences that are consistent with its robust requirements shall not be undermined in any way by BABA implementation. 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.”*

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. Section 70917 is critical to FHWA’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.

¹⁰ FHWA, Contract Administration Core Curriculum Participant’s Manual and Reference Guide 2006 (“Contractor Core Curriculum”), at 23 (2006), available at <http://www.fhwa.dot.gov/programadmin/contracts/ccacc.pdf> (last visited May 28, 2014); (see also AR195 (“The normal Federal-aid contract requirements are set forth in the Contract Administration Core Curriculum Participant’s Manual and Reference Guide (CACC).”).

¹¹ Donald P. Steinke, “Buy America Policy Response,” Contr. No. HCC-97-070 (Dec. 22, 1997), at 2 (AR013) (hereafter, “1997 Memo”).

¹² FHWA’s Buy America Q&A for Federal-aid Program, Q&A No. 12, available at http://www.fhwa.dot.gov/construction/contracts/buyam_qa.cfm (last visited April 12, 2023).

¹³ July 9, 2002, FHWA Buy America Background and Talking Points, available at www.fhwa.dot.gov/programadmin/contracts/buyamgen.htm (last visited April 12, 2023).

¹⁴ FHWA, Project Construction and Contract Administration, Buy America Field Compliance, at 3 (August 2012), available at <https://www.fhwa.dot.gov/federal-aidessentials/companionresources/28buyamerica.pdf> (last visited April 12, 2023).

¹⁵ FHWA, Buy America Contract Requirements, Project Development Contract Specifications, at 2 (August 2012), available at <https://www.fhwa.dot.gov/federal-aidessentials/companionresources/27buyamerica.pdf> (last visited April 12, 2023).

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?

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

“AAM urges 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 the BABA. Such examples include the Environmental Protection Agency’s (EPA) 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% iron or steel measured by cost. The cost [is] based upon the material costs.’¹⁶ 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 agencies’ definitions for ‘primarily iron or steel,’ it is not wholly consistent and permits foreign ferrous content. It also lacks the established interpretative 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 AAM’s above comments.

Conclusion

AAM appreciates the opportunity to share information on this issue.

Alliance for American Manufacturing

711 D Street NW, 3rd Floor
Washington, DC 20004
Email: sboos@aamfg.org

¹⁶ <https://www.epa.gov/sites/default/files/2015-09/documents/ais-final-guidance-3-20-14.pdf>