

April 15, 2024



Honorable Michael S. Regan  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave NW  
Washington, DC 20460  
Submitted via Email at [BABA-OTAQ@epa.gov](mailto:BABA-OTAQ@epa.gov)

*RE: Proposed General Applicability Public Interest Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for U.S. Environmental Protection Agency Financial Assistance Awards under the Clean Ports Program*

Dear Administrator Regan:

The Alliance for American Manufacturing (AAM) appreciates the opportunity to respond to the Environmental Protection Agency's (EPA) request for comment on a proposed public interest waiver for certain zero emission (battery electric and hydrogen fuel cell) mobile port equipment to be funded in the \$3 billion Clean Ports Program from the Build America, Buy America (BABA) requirements in Section 70914 of the Infrastructure Investment and Jobs Act (IIJA).

The Alliance for American Manufacturing (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 Urges Significant Revisions to EPA's Proposed Buy America Waiver of the \$3 Billion Clean Ports Program**

AAM is deeply concerned by EPA's proposed general applicability public interest waiver covering port equipment funded by the \$3 billion Clean Ports Program. It is inconsistent with both the letter and spirit of the BABA. As drafted, EPA's proposed waiver creates few, if any, incentives for companies to make meaningful investments in U.S. manufacturing capacity or hire workers, overlooks the domestic supply chain for component content, and creates new Buy America loopholes. If EPA believes that use of waiver authority is necessary, AAM urges that it rescind its current proposal and advance a new strategy that incorporates the necessary adjustments outlined below.

Absent significant modifications, EPA's proposed waiver is a missed opportunity to advance the stated goals of the Biden administration to accelerate emissions reductions while concurrently incentivizing domestic manufacturing. As a result, countries like the People's Republic of China (PRC), whose companies are backed by massive state subsidies and are often connected to its military, will stand to benefit from the U.S. taxpayer-funded purchase of zero emission vehicles, cargo handling equipment, locomotives, and vessels – including ocean going vessels and harbor craft.

EPA's sweeping waiver proposal undermines the utility of Buy America to domestic port equipment supply chains because it renders immaterial for BABA compliance all stages of production of port equipment and component content.

1. EPA proposes that only U.S. "final assembly" will be required for port equipment. Yet, it does not define this term and includes no safeguards to ensure such a standard is not satisfied with only minor activity in the United States. Foreign companies will exploit this policy by conducting the bare minimum amount of "final assembly" in the United States, requiring the involvement of few workers.
2. In doing so, EPA proposes to fully eliminate both the BABA's manufactured product origin standard requirement of (1) domestic "manufacture" and (2) the statutory 55 percent domestic content requirement for components of a manufactured product, meaning that 100 percent of the component content may be sourced from foreign producers.
3. EPA already and regrettably relies on a legally unsupported *de minimis* waiver policy based on a calculation of *overall project costs* rather than *materials costs* – which conflicts with Federal Government-wide Final Guidance issued in 2023 by the Office of Management and Budget (OMB) stating that "applicable project costs are defined as material costs subject to the Buy America preference." In the context of the Clean Ports Program, this policy effectively allows recipients to allocate up to 5 percent of the *entire* project cost for non-BABA-compliant purchases of BABA-covered products.
4. In addition to the existing Agency-wide *de minimis* policy, EPA now proposes an additional "supplemental *de minimis*" waiver, which allows for an *additional* 10 percent of purchases of port equipment to be made absent *any* Buy America requirements – including even the minimal "final assembly" requirement. This is a regrettable, new Buy America loophole, one that has never before been issued by any department or agency and certainly should not be advanced by EPA.
5. EPA indicates that additional, project-specific waivers will be available *in addition to* the already lenient policy being proposed should it "prove inadequate."

Taken together, these sweeping waiver policies vastly undermine the BABA requirements applicable to this program – meaning the \$3 billion in funding will largely be used for the purchase of equipment with foreign-produced content without improving U.S. manufacturing capacity for such equipment.

If EPA believes a waiver is necessary, it should rescind its current waiver and propose a new one that prioritizes eliminating loopholes, is short in duration, and is narrow in scope. EPA's approach must recognize the unique supply chain challenges and opportunities of the vastly different equipment considered eligible technologies under the Clean Ports Program. Critically, EPA must also broaden its application of restrictions on countries of concern to ensure that the Peoples Republic of China (PRC) does not strengthen its dominance in these sectors with the backing of the U.S. taxpayer.

These comments provide details on the issues that require adjustment.

### ***EPA's \$3 Billion in Funding Will Be Spent Long Before the Waiver Expires***

EPA's proposed waiver lasts until the end of June 2028, presumably long after the \$3 billion in Clean Port Program funding has been distributed and port equipment deliveries have been completed. Specifically, EPA proposes a four-year duration of its Buy America waiver, expiring December 31, 2027, with an additional 6-month grace period for deliveries made after the waiver expiration. Thus, the waiver will remain in existence until the end of June 2028.

This timeline is inconsistent with EPA's stated intent of providing time for U.S. manufacturing to meet demand for BABA-compliant components. In our view, a four-year waiver effectively ensures that U.S. manufacturing and its workers will have no opportunity to supply any of the component content associated with equipment purchased with Clean Ports Program funding.

AAM urges EPA to shorten its proposed waiver timeline and consider conducting periodic requests for information (RFI) to inform market capabilities and any necessary waiver policies, with a focus on expanding U.S. productive capabilities for component content necessary for the covered port equipment.

### ***EPA's Comment Period Ends Just Weeks Before the Application Deadline***

These concerns are intensified by the timeline under which EPA has proposed this waiver. EPA has established a May 28, 2024, deadline for applications for funding – just six weeks after the comment deadline for this proposed Buy America waiver. That EPA's *deadline* for submission of "optional" informal notices of intent to apply was March 28, 2024 – just days after EPA's proposed Buy America waiver was issued on March 25, 2024 – raises concerns that this proposed waiver was issued with a predetermined outcome, leaving little to no time for EPA to consider well-intentioned public comments or make necessary adjustments sought by labor and industry stakeholders.

AAM notes that EPA began conducting "Listening Sessions" in late-2022 and in October 2023 established an "anticipated timeline" for funding opportunities. In contrast, BABA was enacted in November 2021 as part of the IIJA.

AAM urges EPA to make any necessary adjustments to its "anticipated timeline" for funding opportunities in order to fully review public comments and make necessary revisions to its proposed Buy America waiver.

### ***EPA Overlooks that Applying Buy America is in the "Public Interest"***

It is clearly in the public interest to address both emissions reductions and expanding U.S. manufacturing, yet EPA's waiver vastly diminishes the importance of the latter. AAM is concerned that EPA is seeking its sweeping Buy America waiver, which lasts for the entire duration of the program's funding, so that it may quickly distribute federal assistance under the \$3 billion Clean Ports Program.

Congress enacted BABA because it is clearly in the public interest that America's federally assisted infrastructure investments are completed with iron, steel, manufactured products, and

construction materials that are produced in the United States. In doing so, Congress flatly discouraged waivers of general applicability such as the one EPA is proposing because they dampen investment in new U.S. manufacturing capacities, encourage reliance on foreign sources for those products, and undermine the nation's economic and national security.

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).

Congress also outlined specific *Findings* in Section 70911 of BABA:

- *"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"*

Meeting these objectives is wholly dependent upon federal agencies' policies to implement the law. Given the Biden administration's repeated emphasis on growing and sustaining the U.S. manufacturing sector, its supply chain, and good jobs for America's workers, it is discouraging that EPA is seeking to issue a general applicability public interest waiver that will vastly undermine the Buy America requirements that Congress clearly stated are in the public interest.

General waivers undermine Buy America's market signals crucial for stimulating investments in U.S. factories. Rather than seeking a general waiver, EPA should rely on product-specific, time-limited waivers. A targeted approach to waivers, accompanied by full transparency for the public, offers clear market signals essential for investors and manufacturers to confidently make substantial capital investments in domestic productive capacity.

Moreover, seeking a general waiver effectively denies the public and policymakers of any understanding of the current state of supply chains for producing port equipment in the United States. EPA should pursue narrow waivers and ensure full transparency by posting detailed information on the centralized [MadeinAmerica.gov](https://www.madeinamerica.gov) website, which is aimed at informing the public about pending and current Buy America waivers.

Greater transparency in the application of Buy America waivers will bolster domestic manufacturing by enabling existing suppliers to promptly access potential opportunities to manufacture materials and products needed for infrastructure projects. Additionally, this waiver database will furnish valuable insights into the frequency, value, and nature of purchases that

are not sourced from domestic producers, which empowers domestic manufacturers to make informed investment decisions aimed at bridging gaps in our production capabilities.

Moreover, with experience collaborating with small- and medium-sized manufacturers, the Manufacturing Extension Partnership (MEP) is well-equipped to identify domestic manufacturers prepared to supply the materials and manufactured products essential for port infrastructure equipment.

### ***China Will Be a Massive Beneficiary of the \$3 Billion Clean Ports Program***

The various types of mobile port equipment covered by EPA's waiver represent important industrial capabilities for U.S. economic and national security, and it would be regrettable if this \$3 billion round of Clean Ports Program funding were to further expand the PRC's efforts to dominate these sectors using hard-earned tax dollars.

As outlined in a recent petition filed by the United Steelworkers and other unions, under Section 301 of the Trade Act of 1974 (19 U.S.C. §2411), the PRC has for decades carried out a comprehensive strategy to dominate global transportation and logistics networks. USW's petition identifies a broad range of unreasonable and discriminatory acts, policies, and practices, which have contributed to the devastation of the U.S. shipbuilding and maritime logistics sectors, as well as the domestic supply chain of manufacturers and America's workers who serve this vital sector. The Section 301 petition recommends actions to address the injury caused by the alleged unfair practices and to ensure the viability of the domestic producers and workers that have been harmed. This includes adopting strong domestic content requirements attached to federal assistance and other federal programs to mitigate and eliminate the use of Chinese-produced and -affiliated port infrastructure equipment in the United States.

AAM strongly urges that EPA consult with the United States Trade Representative and other administration officials currently reviewing the USW's Section 301 petition to ensure that its proposed BABA implementation policies for the Clean Ports Program are aligned with the overall approach of the Biden administration to this critical sector. After all, EPA's proposed waiver of BABA covers maritime logistics equipment which is directly related to the pending Section 301 petition, including drayage trucks, yard trucks, other cargo handling equipment, locomotives, and vessels. Tugboats, push boats, pull boats, and ferries are listed as eligible vessels in EPA's Notice. AAM does not believe that proceeding with the proposed waiver, as currently structured, would be in the "public interest" based on the significant evidence provided in the Section 301 petition.

### **Recommendations to Improve EPA's Clean Ports Program Buy America Waiver**

#### **1. EPA Should Abandon its "One-Size-Fits-All" Approach**

AAM appreciates that EPA has sought industry input and interagency research to determine U.S. productive capacity for the various categories of port equipment that are considered eligible technologies under the Clean Ports Program. But it should not come as a surprise that existing domestic production capabilities "do not meet the BABA requirements for manufactured products." After all, the U.S. manufacturing sector has endured decades of

flawed policies that have incentivized offshore production. Reversing the negative impacts of decades of neglect in our nation's manufacturing base does not happen overnight. But with sustained commitment and strategic investment, we can rebuild domestic industries, foster innovation, and secure long-term economic prosperity for all Americans.

The current lack of domestic capacity is an inadequate justification for a sweeping "one-size-fits-all" waiver that removes any incentive for companies to make future investments in U.S. production. EPA has the authority to issue project- and product-specific waivers or, as an alternative, EPA could have pursued a limited public interest waiver that overcomes existing market limitations specific to "domestic battery module or fuel cell component manufacturing."

Critical to this effort is adopting a Buy America waiver framework that addresses the unique challenges and opportunities of each equipment category. EPA's waiver justification – which is focused specifically on a lack of capacity for "domestic battery module or fuel cell component manufacturing" – is misaligned with the issuance of its sweeping general applicability public interest waiver that vastly undermines Buy America application for all component content until the middle of 2028.

EPA's "one-size-fits-all" justification specific to battery and fuel cell content serves as the basis for its proposed Buy America waiver for a number of vastly different equipment categories. Among the eligible technologies covered by the waiver are zero emission cranes, zero emission class 3-8 vehicles, zero emission cargo handling equipment, zero emission locomotives, and zero emission vessels – including ocean going vessels and harbor craft. Given that each equipment category has its own unique supply chain constraints and opportunities, AAM questions EPA's application of an identical Buy America waiver policy across each equipment category that fails to acknowledge their many other components.

EPA should abandon its "one-size-fits-all" general applicability public interest waiver and allow recipients to request project- and product-specific waivers. Doing so would adhere to the clear intent of Congress that Buy America waivers be applied narrowly and in a manner that creates powerful incentives for market participants to invest in U.S. production and workers – for each individual category of port equipment covered by the program. EPA should work with labor and industry stakeholders to issue narrow, time-limited, and transparent non-availability waivers where there is a demonstrated need.

AAM also urges EPA to make its market research available to the public. Public commenters should be afforded this information and given an opportunity to review and respond to it as part of their comments.

## **2. *Finite Waiver Periods and Transparent Waiver Processes Will Encourage Investments in U.S. Manufacturing and the Supporting Supply Chain***

To overcome any short-term market limitations that may arise, Congress granted flexibility in the form of waivers of the BABA's general preference requirement to ensure that infrastructure projects may proceed efficiently. This flexibility is not without limitations, however, as Congress was rightly concerned that federal departments and agencies have

historically misused their waiver authority to undermine and narrow the scope and application of Buy America laws.

Congress clearly recognized that limited, narrow use of waiver authority would be necessary to alleviate short-term market limitations while also maintaining transparent market signals that induce capital investments in domestic manufacturing productive capabilities. But because EPA relies on a general waiver that is broadly applied and last for a long period, its approach lacks transparency and does not create incentives for U.S. capital investments. EPA's approach also does not allow for adjustments based on market conditions during the life of the \$3 billion program.

The IIJA codifies the establishment of a central and publicly available website related to Buy America and Buy American waivers. Timely reporting by federal departments and agencies and effective implementation of this waiver clearinghouse will support domestic manufacturing in two key respects: 1) it will allow existing suppliers to access, in real time, potential opportunities to manufacture and supply materials and products needed for broadband infrastructure; and 2) this waiver database will provide valuable information on the frequency, value and nature of purchases that are not being supplied by domestic suppliers, enabling domestic manufacturers to make informed investment decisions that will fill gaps in the nation's production capabilities.

To realize the investment stimulating potential of the BABA, it is imperative that the EPA administers any general waivers of the BABA in a time-limited manner, as required by law. See § 70914(d) of the IIJA. As the EPA has clearly learned from its experience administering the American Iron and Steel (AIS) laws, the existence – at all – of a product-specific general waiver will discourage capital investments in U.S. productive capacity for the subject product. Conversely, terminating a general waiver signals immediate demand for U.S. produced products and materials, thereby encouraging capital investments.

It begs reiterating that Congress specifically sought to discourage the use of general waivers by classifying Buy America policy regimes weakened by such longstanding and broadly applicable general waivers as “deficient programs” in BABA § 70912 and 70913(c) and mandating periodic reviews to ensure their continued necessity, BABA § 70914(d).

### **3. EPA Should Apply Buy America to Component Content**

Because EPA's proposed public interest waiver applies to all component content, this broad waiver bypasses domestic producers and their workers who produce Buy America-compliant components and materials in the United States.

AAM questions why EPA did not propose a limited non-availability waiver with narrower scope to alleviate short-term market limitations associated with battery and fuel cell components and content. Yet, by issuing a general applicability public interest waiver on the basis that a single component is unavailable, EPA overlooks all other component content for which there is domestic capacity and for which a waiver is not necessary. EPA's determination to waive the BABA requirements based upon its analysis of a single component's availability domestically is arbitrary. Moreover, by short-circuiting the traditional waiver process whereby funding recipients request waivers on an as-needed basis, EPA will

continue to be entirely unaware of existing and future market capabilities for all components in addition to battery and fuel cell components and content.

EPA is reminded that the BABA content threshold for manufactured products is a mere 55 percent, meaning that BABA-compliant manufactured products may contain 45 percent foreign content – in fact, even more with the *de minimis* waiver applied. While it is right that battery and fuel cell component content accounts for an outsized share of the total cost of a manufactured product in this context, there are many other inputs that could be used to approach or even exceed the threshold. Rather than waive the 55 percent content requirement entirely, EPA should consider using its authorities to establish tiered thresholds for component content that increase over time until market participants can meet the 55 percent statutory threshold.

AAM notes that this approach has been proposed at other departments and agencies, including at the Department of Transportation where a tiered phase-in of BABA requirements was proposed for electrical vehicle (EV) chargers funded with federal assistance provided by the Federal Highway Administration (FHWA). The administration's reforms of the Buy American Act (BAA) have also relied on gradual increases to content thresholds over time that give manufacturers time to adjust supply chains and create powerful incentives to encourage market participants to achieve first-move status by exceeding content thresholds.

#### **4. Iron and Steel Components Should Be Required to Be Melted in the United States**

With respect to equipment purchases under the Clean Ports Program, there are significant components produced using large amounts of iron and steel – including shells, chassis, and frames.

AAM appreciates that EPA specifically requested comment on “whether it would be appropriate to add a requirement to use domestic iron and steel components in addition to requiring domestic assembly.” Indeed, EPA should require that iron and steel components of mobile port equipment adhere to the “all manufacturing processes” requirement codified in BABA. AAM notes that the Federal Highway Administration (FHWA) requires U.S.-melted iron and steel for the enclosures and housing of electric vehicle (EV) chargers – also classified as a manufactured product.

There is significant idled and underutilized U.S. production capacity for iron and steel. According to the American Iron and Steel Institute (AISI), 2024 year-to-date capacity utilization for domestic raw steel production is just 76.4 percent.

#### **5. “Final Assembly” Should Not Be Easily Satisfied with Minor Activities**

The BABA law clearly requires that all manufactured products be manufactured in the United States. Thus, AAM is puzzled that EPA is seeking to apply a “final assembly” requirement that is not derived from the law itself nor on any guidance from OMB. Furthermore, EPA fails to define the term “final assembly” to ensure it is not easily met with quintessentially insignificant processes. EPA merely proposes that “final assembly for zero



emission mobile port equipment funded under the Clean Ports Program must occur in the United States.”

AAM urges EPA to adhere to the more substantial standard of “manufacture” mandated by BABA and eschew weak origin standards, such as “final assembly,” which will afford a pathway for affording foreign sourced end products the benefits of the Buy America procurement preferences and taxpayer investments in port infrastructure.

An assembly origin standard that requires merely insubstantial or minor processes 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.

EPA should 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 EPA’s analysis.

## 6. ***Foreign Countries of Concern Restrictions Should Apply to All Equipment***

As structured, this waiver will effectively incentivize Chinese state-owned and state-subsidized companies to establish very minor assembly facilities in the U.S. that will rely entirely on imported Chinese content. Their presence will crowd out U.S. firms and even foreign direct investment (FDI) from legitimate entities subject to market forces. This has already occurred in U.S. transit markets for electric buses and railcars, necessitating Congressional enactment of Sec. 7613 of the FY 2020 National Defense Authorization Act, which prohibited the use of U.S. federal assistance for transit projects to purchase vehicles from such entities (including BYD and CRRC) that also manufacture port equipment that may be permissively acquired with U.S. taxpayer monies if EPA proceeds with the Clean Ports Program BABA waiver as drafted.

EPA imposes a “foreign country of concern” restriction applied only to cranes but does not similarly apply this limitation to drayage trucks, yard trucks, other cargo handling equipment, locomotives, vessels, and other equipment covered by the waiver.

AAM appreciates that EPA’s Notice of Funding Opportunity states that it “may exclude additional types of equipment beyond cranes, as warranted by national security matters.”

Accordingly, AAM urges that EPA update its Notice of Funding Opportunity to similarly stipulate that recipients may not use any program funds to purchase any equipment manufactured by entities owned by, controlled by, or subject to the direction of a government of a foreign country of concern, or to entities that are headquartered in a foreign country of concern.

U.S. tax dollars should not be used to purchase port equipment from companies under the influence of China, Iran, North Korea, and Russia. AAM again notes that the Biden administration is currently reviewing a Section 301 petition filed by USW regarding the PRC’s strategy to dominate global maritime logistics networks and commercial shipbuilding sectors. Failing to expand this “foreign countries of concern” limitation to all equipment purchases would imperil U.S. economic and national security.

#### **7. EPA Must Harmonize its BABA De Minimis Policy with Its Own AIS Laws and Office of Management and Budget Final Guidance**

AAM is troubled that EPA continues to adhere to a BABA *de minimis* waiver policy calculated as a percentage of total project costs rather than as a percentage of a project’s *materials costs*. EPA’s BABA *de minimis* waiver is the outlier.

The EPA’s BABA *de minimis* waiver waives the preference requirement for materials up to 5 percent of total project costs. Meanwhile, the OMB’s Final Guidance for BABA clearly states that “applicable project costs are defined as material costs subject to the Buy America preference.”

This point is seemingly irrelevant to the general waiver proposed for the Clean Ports Program, given that EPA is proposing to waive the entire requirement of any domestic component content. However, we understand that this *de minimis* waiver may still be applied to even the lenient policy that would result if EPA proceeds with its waiver.

Nevertheless, it is alarming that EPA continues to adhere to a *de minimis* general waiver policy that is calculated as a percentage of total project costs rather than materials costs. Other departments – including both the Department of Transportation and the Department of Commerce – have revised this policy to ensure that the *de minimis* allowance is not inflated by irrelevant project costs.

Although AAM does not oppose a reasonable and responsibly administered *de minimis* exception in cases where Buy America component content calculations are required, it continues to urge the Agency to reconsider its approach. First, by tying the *de minimis* waiver to a project’s total costs, it will be excepting an excessive and disproportionate share of U.S.-produced materials from a project. The BABA law applies to iron, steel,

manufactured products and construction materials. In other words, it applies to tangible materials and not to services, including construction labor, profit and overhead. A *de minimis* waiver of BABA should not factor in these project costs.

EPA, under its own American Iron and Steel (AIS) law applied to water projects, has prudently applied *de minimis* exceptions to applicable domestic preference laws and have ensured that such exceptions / waivers are based upon “the total cost of the materials used in and incorporated into a project...”<sup>1</sup>

It is, thus, concerning that EPA continues to adhere to a BABA *de minimis* policy that is both inconsistent with its own AIS policy and with the OMB Final Guidance.

### **8. EPA Must Abandon its Creation of a New “Supplemental De Minimis” Loophole**

AAM is strongly opposed to EPA’s establishment of a new “supplemental *de minimis*” waiver, which appears to be nothing short of a glaring Buy America loophole that effectively increases the size of an already lenient *de minimis* allowance for non-compliant content and further exacerbates the sweeping waiver being proposed. AAM urges EPA to revise its existing BABA *de minimis* policy and withdraw its proposed “supplemental *de minimis*” waiver proposal.

The “supplemental *de minimis*” waiver allows for an additional 10 percent of purchases of port equipment (with the exception of cranes) to be made absent any Buy America requirements. AAM understands that this 10 percent supplemental *de minimis* waiver will be added to the existing 5 percent *de minimis* waiver to effectively create a 15 percent *de minimis* waiver that can be applied in a manner that fully eliminates any Buy America application for a full 15 percent of applicant funding spent on covered port equipment. In other words, recipients will be permitted to use up to 15 percent of funding to purchase equipment for which both “final assembly” and all component content is not compliant with BABA.

AAM observes that this is a new Buy America loophole that has never before been proposed by any department or agency. AAM strongly urges EPA to abandon the creation of this new loophole.

### **Conclusion**

Thank you for your attention to these comments and we stand ready to work with EPA to make all necessary changes to its proposed waiver.

### **Alliance for American Manufacturing**

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<sup>1</sup> <https://www.epa.gov/sites/default/files/2015-09/documents/deminimis-waiver-04-15-14.pdf>.