



April 14, 2023

Via www.regulations.gov

TO: The Honorable Shailen Bhatt, Administrator
Federal Highway Administration (FHWA)

FROM: Andrew Stasiowski, President and CEO,
American Highway Users Alliance *Andrew Stasiowski*

RE: Notice and Request for Comment on FHWA's Review of its General Applicability
Waiver of Buy America Requirements for Manufactured Products;
Docket No. FHWA-2022-0027

The American Highway Users Alliance (the "Highway Users" or "we" or "our") respectfully submits these comments on the Notice and Request for Comment in this docket published at 88 Fed. Reg. 16517 (March 17, 2023) ("Notice"). The docket concerns the Federal Highway Administration's (FHWA's) review of its General Applicability Waiver of Buy America requirements for manufactured products. That review is required by the Build America, Buy America Act (BABA) provisions included in the Infrastructure Investment and Jobs Act, Public Law No. 117-58 (IIJA), signed into law by the President on November 15, 2021.¹

Overview of Comments

The Highway Users considers that there is sound justification for the longstanding FHWA waiver of Buy America requirements for manufactured products and recommends that the waiver be continued without an expiration date.²

We support American manufacturing and the goal of Buy America programs. However, we foresee adverse consequences from reducing the scope of this waiver. Any such change would lead to difficulty and delay in the ability of the construction industry to procure products needed to deliver FHWA-funded projects. Further, States would face difficulty knowing whether products needed for a project are either covered by a waiver or available from U.S. manufacturing sources, or available from U.S. sources at reasonable cost. So, the process of putting contracts out for bid (including development of material and product specifications) could slow down. Slower progress by States and contractors would represent a disappointment in the implementation of the IIJA. After all, the public wants prompt delivery of needed highway investments, not delayed or missed opportunity with lost construction jobs, reduction in economic growth, and missed opportunities to promptly complete projects that would improve safety and mobility for people and business.

¹ Build America, Buy America Act set forth at sections 70901-52 of IIJA.

² By statute, such a waiver is to be reviewed every 5 years. See IIJA section 70914(d).

We appreciate that FHWA appears to acknowledge that there are bases for such concerns:

FHWA will also consider how to ensure that that manufactured products are widely available in the immediate future for FHWA-funded projects in the United States.

Notice at 16518.

However, notwithstanding our support for the current waiver, we recognize that the Administration appears likely to at least consider a less extensive waiver as part of the required review.³ Accordingly, we offer these comments in support of our position, beginning with a statement of interest by the Highway Users.

Overview: The Highway Users and its Interest in this Docket

The Highway Users is the united voice of the motoring public, promoting safe, uncongested highways and enhanced mobility and related benefits for people and business.

We support prompt and efficient use of Federal highway funds to achieve the benefits of a highway system that has adequate capacity, is safe and is in good or better condition. That will enhance the economy and quality of life in this country.

The Highway Users, a 300-member coalition, includes companies, trade associations, safety advocacy groups, and motoring clubs. Our members represent or support millions of road users from the truck, bus, auto, RV, and motorcycling modes. Such users pay the bulk of the fees deposited into the Federal Highway Trust Fund, fees which the public wants to see turned into highway, bridge, and highway safety investments that help grow the economy, improve supply chains, enhance safety, and improve the quality of life.

Our membership includes companies (and associations of companies that, in turn, include many member companies) that not only use the roads, but comprise large portions of the economy. They manufacture and/or sell cars, trucks, automotive equipment, fuel, asphalt, concrete, aggregates, safety equipment, signage, and other products that improve highway safety and mobility for people and business.

We support the goal of buying made in America iron and steel, manufactured products and construction materials for use in Federally assisted highway projects. However, in implementing Build America, Buy America Act provisions, FHWA must take care to allow State DOTs and others sufficient time (including as appropriate through waivers) to implement new requirements without delaying, or increasing the cost of, FHWA-funded highway projects, projects sorely needed in the public interest.

³ FHWA states that “through this notice, [it] is soliciting information and suggestions ... regarding whether it should continue, discontinue, or modify, in whole or in part, the Manufactured Products General Waiver.” Notice at 16519.

The Current Manufactured Products General Waiver Remains Well Justified

In 1983, in adopting today's waiver from Buy America requirements for manufactured products, FHWA noted that such products represented "a small percent of the highway construction program" and that "it is very difficult to identify the various materials and then trace their origin." 48 Fed. Reg. 53099, 53102 (November 25, 1983).

Those reasons are at least as applicable today. With increased world trade and technological advances, manufactured products are more complex and more likely than ever to include materials or components not made in the U.S. Tracing the origin of components of manufactured products would be a daunting task.

And the regulatory costs of a program that would involve such tracing could well be considerable. For example, states implementing the Federal-aid Highway Program would face increased work in putting out to bid contracts with more restrictive sources of supply, and time and effort would be needed for bidders to find qualifying materials. Costs may well go up due to: reduced sources of supply (at least until U.S. sources become more available); delayed access to needed products; or cost-differentials between U.S. and foreign sources.

Higher costs and delays mean that a given amount of funding will yield fewer and/or smaller investments in improving the highway system, as well as lost economic and other benefits. Those lost or delayed benefits include highway safety (roads in good or excellent condition are safer than those which are not) and improved mobility for people and business. Delay and higher material costs in construction, within a fixed budget, means fewer construction jobs and reduced economic growth. For example, business investment in factories, stores, warehouses and other commercial facilities along a highway could well be delayed when business learns that public investment to improve the highway will be delayed.

We are concerned over the potential for delay of projects when American made products are unavailable, very hard to obtain, or hard to obtain on time or at reasonable cost. These considerations are recognized as bases for waivers, including public interest waivers. See section 70914(b) of IJA and 23 CFR 635.410; see also OMB Memo M-22-11 (April 18, 2022) regarding implementation of Buy America laws. We consider these types of cost and delay impacts to be foreseeable and, as noted, having a downward impact on U.S. construction jobs. So, continuation of the current waiver for manufacturing products will help avert delay in the completion of projects and expedite, rather than delay, the many and various benefits to people and business that are expected from those projects. Those benefits include jobs during construction and the benefits of transportation infrastructure improvements, including safety, mobility for people and business and economic growth.

There Are Additional Well-Justified Buy America Waiver Concepts for Manufactured Products

We consider it possible that FHWA or USDOT may determine to modify the Buy America waiver for some manufactured products (or classes of manufactured products) even while maintaining a broad waiver for all other manufactured products. This was done with respect to

electric vehicle chargers, which are now governed by their own temporary Buy America waiver rules, even as the current, broad waiver remains in place for other manufactured products. See 88 Fed. Reg. 10619 (February 21, 2023).

Without in any way retreating from our support for continuation of the current manufactured products waiver, we note here several circumstances where there is additional, particular merit for applying a Buy America waiver to manufactured products. We do not suggest that this list is comprehensive.

Products in Small Quantities

A waiver from BABA requirements for de minimis costs, small grants, and minor components (herein, “small quantities”) has been proposed by USDOT but not yet adopted. See 87 Fed. Reg. 68576 (November 15, 2022). Specifically, the proposal would waive BABA preferences for iron and steel, manufactured products, and construction materials used in infrastructure projects funded under USDOT-administered financial assistance programs under a single financial assistance award for which:

- The total value of the non-compliant products is no more than the lesser of \$1,000,000 or 5% of total allowable costs under the Federal financial assistance award;
- The size of the Federal financial assistance award is below \$500,000; or
- The non-domestically produced miscellaneous minor components comprise no more than 5 percent of the total material cost of an otherwise domestically produced iron or steel product.

Id. at 68577. In support of the proposed waiver, USDOT indicated that there were burdens in tracing low volume products and that it wanted to focus efforts to develop U.S. manufacturing on higher volume products. Id.

As FHWA knows, its current waiver for manufactured products is pursuant to a different statute, and, thus, not directly affected by this proposal for a waiver pursuant to BABA. See Notice at 16517.

However, to the extent there is any change in the current Buy America waiver for manufactured products, the waiver certainly should be preserved for acquisitions of those products in small quantities and dollar amounts (and we would include in such an exclusion somewhat larger quantities and dollar amounts than USDOT proposed in that still pending docket).

Products Assembled in the U.S.

To the extent there is any doubt on the point, FHWA should clearly treat final assembly as part of the manufacturing process. In a recent docket, CFR text proposed by OMB, proposed 2 CFR 184.6(a), 88 Fed. Reg. 8378 (February 9, 2023), described “all manufacturing processes” for non-ferrous metals as including “assembly.”

The place of final assembly is easier to ascertain than the origin of various components of a manufactured product, which could include many components.

Accordingly, to the extent there is any change in the current Buy America waiver for a particular manufactured product, the waiver certainly should be preserved for that manufactured product if final assembly took place in the U.S.

Safety Cases

We are advised by some of our members, though do not have direct knowledge, that significant equipment used in construction is not made in the U.S, or not generally made in the U.S., including orange traffic safety cones. In its Implementation Guidance Memo, OMB was clear that

A Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project ...it does not apply to tools, equipment and supplies, such as temporary scaffolding, brought to the construction site and removed at or before completion of the infrastructure project.

OMB Memo M-22-11 (April 18, 2022), 5-6.

So, we consider it clear that safety cones and similar articles used at a site but which do not become part of the completed infrastructure project, are not subject to a Buy America preference.

Moreover, safety is universally considered a top transportation policy objective. Accordingly, to the extent that, contrary to OMB's clear guidance, and contrary to our recommendation that the Buy America waiver for manufactured products be continued, consideration is given to change in the current Buy America waiver for manufactured products, the waiver certainly should be preserved for products with a strong and clear safety purpose, including but not limited to orange traffic safety cones.

Definition of Manufactured Products Cannot Reach Excluded Construction Materials

Whatever FHWA may consider in its review of the current manufactured product waiver (and we strongly recommend continuing the current waiver for manufactured products), we emphasize that FHWA must recognize and honor the legal limitation in IIJA Section 70917(c). This limitation removes listed materials from the term "construction materials," as that term is used in IIJA to establish domestic content procurement preferences. Section 70917 lists cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives; those listed excluded materials and the combination of those excluded materials as cement or asphalt mix are not subject to Buy America preference. Section 70917(c) makes clear that the excluded materials listed in that section are construction materials, but construction materials for which no BABA domestic content procurement preference exists under BABA. Accordingly, neither FHWA, USDOT, OMB nor any other agency has legal authority to include any of the construction materials listed in that section, or their combination as cement or asphalt mix, as manufactured products.

Adequate Transition Must be Provided Before any Changes in the Current Waiver Take Effect

To the extent that, contrary to our recommendation, FHWA decides to modify the current broad Buy America waiver for manufactured products, it is essential that the modification also provide for a significant and fair transition period before new requirements take effect. For example, the current waiver should apply to any projects put out to bid within one year – or preferably an even longer period – of final agency action changing the current waiver. That would allow states to use the current rule for projects that are nearly through the pre-bid processes.

In the Event of a Proposed Change in the Current Waiver, An Opportunity to Comment Must Be Provided

To the extent that, contrary to our recommendation, FHWA decides to change the current broad Buy America waiver for manufactured products, an opportunity to comment on the specific proposed change must be provided.

We appreciate that FHWA is providing an opportunity to comment at this stage, where it is undertaking a review of its current waiver, but there is no substitute for the opportunity to comment on a specific proposal.

Questions Posed by FHWA

In the Notice, FHWA poses a number of questions. Many of the questions seek specific information that is commercial in nature. See 88 Fed. Reg. 16519-20. The Highway Users is a broad-based coalition. To the extent FHWA's questions ask for specific information of a commercial nature, we are not in a position to provide it; nor do we have a position on the issues in all of the questions. Below we provide responses to questions 1, 2, 6, and 8.

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?

Yes. The General Waiver for Manufactured Products continues to be well justified.

FHWA specifically asks that responses to questions indicate impacts on “administering and delivering Federal-aid highway projects and on supporting domestic manufacturing and jobs.” Notice at 16519.

We consider that continuing the current waiver will continue to responsibly ease and expedite program administration and project delivery and reduce costs for States and contractors, thereby placing downward pressure on bid prices. As a result, more projects could be delivered, with more construction jobs – and more quickly -- within a given budget. And there would be

additional benefits, including: highway safety; economic growth; and improved mobility for people and business.

The extent to which giving up those benefits would stimulate U.S. manufacturing and manufacturing jobs would depend on specifics. For example: How limited is the supply of U.S. manufacturers for a product? How long would it take to make capital investments to enable increased U.S. production?

On the other hand, we consider that any significant curtailment of the current waiver would complicate program administration and project delivery, would drive up project costs, and result in fewer projects being delivered within a given budget, meaning fewer construction jobs.

These points are amplified by the first five paragraphs on page 3 of these comments, above, which are hereby incorporated by reference into the response to this question.

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

We, as a coalition, do not have such information. However, we emphasize that, as evidenced by this docket and other recent dockets by USDOT and OMB, as well as by FHWA, what USDOT and FHWA will require as to Buy America does appear to be under active review and the situation is widely viewed as not fixed. Without indicating agreement to any change other than as may be supported in these comments, the Highway Users does emphasize that, to the extent that changes are made in requirements regarding the Buy America waiver for manufactured products, it is important that FHWA provide a reasonable and substantial transition period (years, not months) before new requirements take effect. We also discuss the need for a reasonable transition if changes are made at page 5, above.

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, 88 Fed. Reg. 8374, which is the same as is used in the FAR (48 CFR 25.003)?

The language used by OMB to define “cost of components” is in accord with language in the Federal Acquisition Regulation (FAR) but, importantly, and correctly, the actual text proposed by OMB for inclusion in the CFR does not refer to the FAR or incorporate it by reference. The transportation community would want to have the opportunity to work with FHWA on the implementation of Buy America issues as applied to FHWA programs. To the extent a rule is adopted that states in the rule (or even in the preamble of the rule) that a definition, intended to be used with respect to an FHWA program, is incorporated by reference from the FAR, FHWA may be binding itself to how the

definition, and even individual words used in the definition, are interpreted and applied in administering the FAR. Should FHWA make use of the words in OMB’s proposal for defining “cost of components” of a manufactured product, FHWA should make clear that it is promulgating a definition, that it is not incorporating a definition from the FAR by reference, and that FHWA will interpret and apply the provision.

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?

We note that in its recent docket on proposed guidance on Buy America issues, OMB asked whether combinations of materials listed as excluded from the definition of “construction materials” in section 70917(c) of the IJA (e.g., aggregates, cement, additives and binders) could be considered “manufactured products.” See 88 Fed. Reg. 8374, 8376 (February 9, 2023). We strongly opposed this possibility in detailed docket comments to OMB and consider such interpretation to be contrary to statute. FHWA should not consider adopting any such interpretation. To the same effect is our discussion above, that the definition of a manufactured product cannot include statutorily excluded construction materials. Supra, 5.

Conclusion

The Highway Users thanks FHWA for its consideration and recommends that any further action in this docket or on the issues addressed in this docket be in accord with these comments.
