

ALERT

Deadline Approaching for Submitting Comments on FHWA's Review of Longstanding Buy America Waiver for "Manufactured Products"

May 5, 2023

WHAT: The period for submitting comments on the Federal Highway Administration's (FHWA) review of its longstanding waiver of Buy America requirements for "manufactured products," which was originally set to close on April 17, 2023, has been extended until May 22, 2023. Therefore, interested parties have additional time to weigh in on whether FHWA should continue with this longstanding waiver, or whether FHWA should instead require that all manufactured products used in FHWA projects be "produced in the United States," in accordance with the new Build America, Buy America (BABA) provisions of the Bipartisan Infrastructure Law.

WHEN: The comment period was previously set to close on April 17, 2023, but was extended until May 22, 2023.

WHAT DOES IT MEAN FOR INDUSTRY: FHWA's waiver of Buy America restrictions for manufactured products was first issued through an emergency rule issued in 1978 and was later memorialized in a final rule published in 1983. This waiver was issued as a "general waiver," meaning that it applies to all FHWA projects, and is not subject to a project-by-project determination. As a result, since 1978, manufactured products used in FHWA-funded projects have been exempt from the Buy America restrictions (except for iron and steel components of a manufactured product, which have been subject to Buy America restrictions).

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Practice Areas

Buy American and Trade Agreements Acts
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As discussed in prior alerts here and here, the BABA requires that all "iron and steel," "manufactured products," and "construction material" used in federally funded infrastructure projects must be produced in the United States. Although BABA allows agencies to waive the Buy America restrictions, BABA expresses a policy preference against "general applicability waivers" such as FHWA's Manufactured Products General Waiver, and requires agencies to review any existing general waivers to determine their continued necessity. See BABA at § 70913(c). Consistent with this requirement, FHWA is seeking "information and suggestions from the public and a broad array of stakeholders across public and private sectors regarding whether it should continue, discontinue, or modify, in whole or in part, the Manufactured Products General Waiver."

In particular, FHWA is seeking comment on the following issues as it considers whether to "continue, discontinue, or modify, in whole or in part," the longstanding Manufactured Products General Waiver:

- Does FHWA's original justification for granting the General Waiver in 1983 still apply?
- What systems or processes do funding recipients, contractors, and manufacturers use to manage compliance with Buy America requirements?
- What is the "volume" of domestic manufacturers of products procured using FHWA financial assistance?
- Do domestic manufacturers of products procured using FHWA financial assistance expect to expand domestic manufacturing based on the increase in demand created by recent Federal investments? If so, by how much and over what time period?
- Are there specific types of manufactured products that are widely used on FHWA 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?

In addition, FHWA is seeking comment on a number of issues regarding the application of the BABA requirements to manufactured products, including:

- What standard should FHWA use for determining the "cost of components" of a manufactured product for purposes of calculating whether the cost of the product's domestically produced components exceeds the 55% threshold called for under the BABA?
- How should the applicable standards for domestic content in manufactured products apply to "predominantly steel or iron components" of a manufactured product?
- How do funding recipients, contractors, and manufacturers manage compliance with Buy America requirements?
- 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 adopt standards used by other U.S. Department of Transportation (DOT) agencies, such as the Federal Transit Administration (FTA) or Federal Railroad Administration (FRA)?
- Should FHWA define the terms "produced" and "manufactured" in the United States for manufactured products, or should it adopt the definition for the same term as it is used in BABA § 70912(6)(B)?

- Should FHWA define the meaning of "predominantly" steel and iron products?

Interested parties are encouraged to submit comments on these topics and any other relevant issues relating to the FHWA's Manufactured Products General Waiver and application of Buy America requirements to manufactured products used in Federal-aid highway projects. Comments should be submitted to the Federal eRulemaking Portal at www.regulations.gov, Docket: FHWA-2022-0027.