



**AMERICAN PUBLIC TRANSPORTATION ASSOCIATION**  
**FACT SHEET**  
**INFRASTRUCTURE INVESTMENT AND JOBS ACT**  
**BUILD AMERICA, BUY AMERICA TITLE**  
*October 1, 2022*

On November 15, 2021, President Joseph Biden signed the Infrastructure Investment and Jobs Act (IIJA) into law, which includes a title addressing Buy America requirements for infrastructure projects.<sup>1</sup> The IIJA’s Build America, Buy America (BABA) Title also encourages strengthening the Buy American Act regarding federal government procurement.<sup>2</sup> Under IIJA Buy America requirements, each federal agency must:

- within 60 days, submit to the Office of Management and Budget (OMB) a report that identifies each federal financial assistance program for infrastructure administered by the agency. The report must identify all domestic content procurement requirements applicable; assess the applicability of domestic content procurement preference requirements in current law; provide details on any applicable domestic content procurement preference requirements and any exceptions or waivers; and describe the types of infrastructure projects that receive funding under the program. In addition, the report must identify programs for which the domestic content procurement preference does not apply or is subject to a waiver.<sup>3</sup>
- within 180 days, “ensure that none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, may be obligated for a project unless all of the iron, steel, and manufactured products and construction materials used in the project are produced in the United States.”

In this Act, “produced in the United States” means:

- For iron or steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the U.S.;
- For manufactured products, that the product was manufactured in the U.S. and the cost of the product components mined, produced, or manufactured in the U.S. is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content applies; and
- For construction materials, that all manufacturing processes occurred in the U.S.

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<sup>1</sup> P.L. 117-58, Division G, Title IX. This Title builds on [Executive Order 14005, Ensuring the Future is Made in All of America by All of America’s Workers](#) (Order); signed by President Joseph Biden on January 25, 2021; *see also* APTA Fact Sheet, *Executive Order on Ensuring the Future is Made in All of America by All of America’s Workers* (Jan. 25, 2021).

<sup>2</sup> On March 7, 2022, the Administration issued a final rule on new Buy American requirements. Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements, 87 Fed. Reg. 12780 (Mar. 7, 2022).

<sup>3</sup> *See* OMB Memorandum M-22-08 (Dec. 20, 2021).

Please note that the IJIA excludes from the definition of construction materials: cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives. In addition, the Act limits the standards under § 70915 (OMB Guidance) from including cement and cementitious materials; aggregates such as stone, sand, or gravel, or aggregate binding agents or additives as inputs of the construction materials.

A federal agency may waive the application of the domestic content procurement preference where:

- applying the preference would be inconsistent with the public interest;
- the types of iron, steel, manufactured goods, or construction materials are not produced in sufficient and reasonably available quantities or satisfactory quality; or
- the inclusion of the materials produced in the United States will increase the cost of the project by more than 25 percent.

Before a federal agency may grant a waiver, it must make it publicly available and provide at least 15 days for public comment. Waivers issued after the date of enactment of this program will be reviewed every five years.<sup>4</sup>

The IJIA requires the Secretary of Transportation, before granting a waiver, to consult with the Director of the Hollings Manufacturing Extension Partnership regarding whether there is a domestic entity that can provide the material that is the subject of a waiver request.<sup>5</sup>

### **DOT Report on Infrastructure Programs Subject to BABA**

On February 7, 2022, the Department of Transportation (DOT) published its report on [DOT's Identification of Federal Assistance Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act](#).<sup>6</sup>

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<sup>4</sup> Please note that existing product-specific general applicability waivers issued more than 180 days prior to the date of enactment of this program are not subject to the review or public comment period for five years.

<sup>5</sup> In addition, the legislation requires the Secretary of Transportation to enter into a technical assistance partnership with the Secretary of Commerce to: ensure the development of a domestic supply base to support intermodal transportation in the United States (e.g., high-speed passenger rail and public transportation); ensure compliance with Buy America laws that apply to a project receiving assistance from a DOT modal program; encourage technologies developed with the support of and resources from the Secretary to be transitioned into commercial market and application; and establish procedures for consultation with the Hollings Manufacturing Extension Partnership.

<sup>6</sup> 87 Fed. Reg. 6943 (Feb. 7, 2022).

In its report, DOT finds that none of its programs, including public transit and passenger rail programs, is currently fully consistent with BABA requirements.<sup>7</sup> DOT states:

...the mode-specific Buy America(n) statutes applied by most DOT agencies cover iron, steel and manufactured products, in ways that are generally consistent (or that in some cases exceed) that standards found in the BABA. **However, none of those statutes specifically cover construction materials**, other than to the extent that such materials would already be considered iron, steel, or manufactured products.<sup>8</sup> (emphasis added)

### **OMB Initial Implementation Guidance**

The IIJA directs the OMB to issue guidance to assist in identifying deficient programs and applying new domestic content procurement standards, and to define the term “all manufacturing processes” in the case of construction materials (except for the exempt materials listed above).

On April 18, 2022, OMB issued a Memorandum providing Initial Implementation Guidance on applying Buy America preferences for infrastructure (“OMB Initial Implementation Guidance”).<sup>9</sup> The OMB Initial Implementation Guidance states that agencies must ensure that all applicable programs include Buy America requirements in each award for an infrastructure project.<sup>10</sup> It also outlines the process for issuing Buy America waivers.<sup>11</sup>

On April 21, OMB issued a Notice of Listening Sessions and Request for Information (RFI) seeking public comment on BABA implementation. The RFI contains specific questions regarding construction materials.<sup>12</sup> OMB subsequently extended the comment period to June 6, 2022.<sup>13</sup>

On June 6, [APTA filed comments](#) to OMB’s Buy America RFI seeking input on construction materials produced in the U.S.

### **DOT Temporary Waiver of Buy America Requirements for Construction Materials**

On April 28, 2022, DOT published a notice seeking comment on whether it should use its authority, in accordance with § 70914(b)(1) of BABA, to provide a temporary waiver of the Buy America requirement for construction materials on DOT-assisted infrastructure projects, on the

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<sup>7</sup> Id. at 19.

<sup>8</sup> Id. at 21.

<sup>9</sup> OMB, Memorandum-22-11, [Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure](#) (April 18, 2022).

<sup>10</sup> Id. at 2.

<sup>11</sup> Id. at 6-13.

<sup>12</sup> OMB, [Notice of Listening Sessions and Request for Information](#), 87 Fed. Reg. 23888 (April 21, 2022).

<sup>13</sup> OMB, [Construction Materials Used in Federal Financial Assistance Projects for Infrastructure and End Products Manufactured in the United States under the Build America, Buy America Act; Request for Information](#), 87 Fed. Reg. 32063 (May 26, 2022).

basis that applying the domestic content preference for these materials would be inconsistent with the public interest.

On May 13, [APTA filed comments](#) strongly supporting DOT's proposed temporary waiver of the Buy America requirements for construction materials. The request for a waiver acknowledges that the requirement will take time to implement in an already constrained supply chain that threatens to implode if further uncertainty is injected into the contracting process. APTA also recommends that neither the Federal Transit Administration (FTA) nor the Federal Railroad Administration (FRA) make any changes to the rigorous rolling stock and final assembly requirements under current law and regulation. In addition, options in rolling stock contracts should be subject to the same Buy America requirements as the base contract.

On May 19, DOT issued a [Temporary Waiver of Buy America Requirements for Construction Materials](#) for a period of 180 days beginning on May 14, 2022, and expiring on November 10, 2022.<sup>14</sup> DOT is establishing this transitional waiver to prepare for compliance with the new Buy America standards for construction materials. During this time, DOT expects states, industry, and other partners to begin developing procedures to document compliance.<sup>15</sup>

On June 21, APTA, together with Coalition partners, sent a [letter](#) to Mitch Landrieu, Senior Advisor to the President for Infrastructure Coordination, to request an extension of the 180-day temporary BABA waiver for construction materials. The letter states that before BABA requirements for construction material take effect, it is critical for DOT to conduct a thorough analysis of domestic manufacturing capabilities, provide sufficient opportunity for public comment on draft rules, and provide adequate time for public and private entities to adjust and comply with final rules. Rushing through this process could further drive inflation, result in significant delays to projects, and further constrain the supply chain.

### **DOT Request for Information on Construction Materials**

On July 28, 2022, DOT published a notice requesting information on construction materials used in federal financial assistance projects for transportation infrastructure in the U.S. under BABA.<sup>16</sup> On August 18, [APTA filed comments](#) to DOT's RFI on the construction materials requirement under BABA. APTA urged DOT to consider applying the Buy America requirement to construction materials that DOT has found to have sufficient domestic supply and require it only after OMB has issued its final guidance. APTA also urged the Federal government to take the lead in creating a list or database of domestically produced construction materials and certify that those listed are Buy America and BABA compliant.

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<sup>14</sup> 87 Fed. Reg. 31931 (May 25, 2022).

<sup>15</sup>The waiver is applicable to awards that are obligated on or after May 14, 2022, and before November 10, 2022. Unless extended, the waiver expires on November 10, 2022.

<sup>16</sup> DOT, [Construction Materials Used in Federal Assistance Projects for Transportation Infrastructure in the United States Under the Build America, Buy America: Request for Information](#), 87 Fed. Reg. 45396 (July 28, 2022).

## **DOT Notice of Proposed Waiver for Electric Vehicle Chargers**

On August 31, 2022, the Federal Highway Administration (FHWA) published a notice<sup>17</sup> seeking comments on a proposal under its Buy America waiver authorities<sup>18</sup> to: modify its existing general applicability waiver for manufactured products to remove electric vehicles (EV) chargers; and waive certain Buy America requirements under FHWA regulations and BABA for the steel, iron, manufactured products, and construction materials in EV chargers in a manner that, over a deliberate transitional period, reduces the scope of that waiver.

The proposed waiver would initially waive all Buy America requirements for EV chargers and all components of EV chargers and then phase-out the waiver in calendar years 2023 and 2024:

- Beginning on January 1, 2023, FHWA proposes to remove from the waiver EV chargers whose final assembly process does not occur in the U.S. FHWA also proposes to remove from the waiver EV chargers for which the cost of components manufactured in the U.S. does not exceed 25 percent of the cost of all components. Thus, in 2023, FHWA proposes the waiver would be applicable only if: (1) final assembly occurs in the U.S.; and (2) the cost of components manufactured in the U.S. exceeds 25 percent of the cost of all components.
- Beginning on January 1, 2024, and thereafter, FHWA proposes to remove from the waiver EV chargers for which the cost of components manufactured in the U.S. does not exceed 55 percent of the cost of all components. Thus, in 2024, and thereafter, FHWA proposes the waiver would be applicable only if: (1) final assembly occurs in the U.S.; and (2) the cost of components manufactured in the U.S. exceeds 55 percent of the cost of all components.<sup>19</sup>

On September 30, APTA, together with Coalition partners, sent a [letter](#) to FHWA in support of the proposed waiver of Buy America requirements for EV chargers. The letter states that the waiver will help provide adequate time for a proper ramp-up in domestic capacity for the long-term deployment of the EV charging network. The timeline provided in the notice allows U.S. companies to both fully utilize the first-to-market advantage while shifting manufacturing capacity to the U.S., creating good jobs domestically without stunting the growth of the industry by waiting for manufacturing capacity to grow before they can fully scale construction and deployment.

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<sup>17</sup> FHWA, [Notice of Proposed Waiver of Buy America Requirements for Electric Vehicle Chargers](#), 87 Fed. Reg. 53539 (August 31, 2022).

<sup>18</sup> 23 U.S.C. § 313(b)(1) and [23 CFR 635.410\(c\)](#).

<sup>19</sup> In accordance with Section 70914(d)(1) of BABA, FHWA would commence a review of the waiver not less than five years after the date on which the waiver is issued.

## **Recent Congressional Oversight on State-Owned Enterprise Compliance with Buy America**

On September 21, 2022, House Committee on Transportation and Infrastructure (T&I Committee) Republican Leaders sent a letter to the DOT Inspector General (IG) urging the IG to initiate a review into the Southeastern Pennsylvania Transportation Authority's (SEPTA) compliance with FTA Buy America requirements regarding a railcar procurement contract.<sup>20</sup> In 2017, SEPTA awarded a contract to the China Railway Rolling Stock MA Corporation (CRRC MA), a subsidiary of CRRC Corporation Limited. In the letter, Republican Leaders express concern about whether CRRC MA has met Buy America requirements over the course of the contract to date and whether CRRC MA will be able to meet these requirements as the contract progresses.

On September 28, T&I Committee Chair Peter A. DeFazio sent a letter to FTA requesting enhanced oversight of rolling stock procurements manufactured by State-Owned Enterprises (SOEs). He also urged FTA to help transit agencies improve their own oversight, more thoroughly track Buy America compliance, and verify whether the benefits of these rules are being realized under these procurements.<sup>21</sup> In addition, Chair DeFazio urged FTA to undertake enhanced Buy America compliance reviews for all such procurements from SOEs and thorough use of its enforcement and oversight authority to verify SOEs compliance with Buy America.

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<sup>20</sup> House Committee Republicans on Transportation and Infrastructure, [letter to the DOT IG on SEPTA compliance of the Buy America requirements](#) (September 21, 2022).

<sup>21</sup> House Committee on Transportation and Infrastructure, Chairman Peter A. DeFazio, [letter to the DOT Administrator on SOE-manufactured rolling stock compliance of Buy America requirements](#). (September 28, 2022).