



U.S. Department of Transportation

# **DOT's Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act**

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## Introduction

One of the Biden-Harris Administration’s top policy priorities is to support American workers and businesses by rebuilding our Nation’s manufacturing base. On January 25, 2021, President Biden issued Executive Order 14005, *Ensuring the Future is Made in All of America by All of America’s Workers*, which states that “the United States Government should, consistent with applicable law, use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States.” As one of the leading Federal agencies in providing financial assistance for infrastructure development projects and applying domestic content preference requirements (i.e., Buy America(n) requirements), the Department of Transportation (DOT) is committed to helping the President achieve this important goal.

This report provides information on the Federal financial assistance programs for infrastructure and associated Buy America(n) requirements administered by DOT and its operating administrations, including the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), Federal Transit Administration (FTA), Maritime Administration (MARAD), (collectively referred to as the DOT Operating Administrations, or OAs), as well as the Office of the Secretary (OST).

DOT plays a broad and diverse role in applying domestic content preference laws. In FY 2020, the Department and its agencies issued \$700 million in direct purchases of products covered under the government-wide Buy American Act of 1933 (BAA)<sup>1</sup>, as well as other statutes. DOT plays a much larger and more significant role in Federal financial assistance to State and local governments, providing over \$70 billion in grants and loans for the development

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<sup>1</sup> 41 U.S.C. 8301-8305.

of transportation infrastructure improvements and purchases of equipment in FY 2020. Several of these financial assistance programs have their own specific Buy America(n) statutes that are applied by each OA and have some elements in common but also have features that are unique to each program.

This report was developed in accordance with the requirements found in section 70913 of the Build America, Buy America Act (BABA)<sup>2</sup>, part of the historic Bipartisan Infrastructure Law signed by President Biden on November 15, 2021. It provides a listing of the Federal financial assistance programs for infrastructure administered by DOT; a discussion of the domestic content preference laws and requirements that apply to those programs; and identifies those programs that are currently not fully consistent with the requirements of section 70914 of the BABA.

As the new statute was intended to expand the coverage and application of domestic preferences in Federal financial assistance programs, it is unsurprising that DOT's current programs are not fully aligned with those new, expanded requirements (and would thus be deemed "deficient programs" in the context of the BABA statute). However, given the Department's long history with applying Buy America requirements to its programs that are similar to those in the BABA, the degree of that inconsistency is relatively small, and (as is described in greater detail below) is largely based on the lack of specific domestic preference requirements for construction materials in DOT's programs and the existence of standing nationwide waivers for certain classes of products.

This report reflects the Department of Transportation's initial analysis of programs and associated Buy America requirements. This initial analysis errs on the side of over-

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<sup>2</sup> Infrastructure Investment and Jobs Act, Pub. L. 117-58, Division G, Title IX, Subtitle A (Nov. 15, 2021)

inclusiveness, based on the agency’s current understanding of information contained in the BABA and the imminent timing requirements for reporting. After OMB releases implementation guidance subject to section 70915 of the BABA, DOT will work closely with OMB to ensure that appropriate agency infrastructure programs are administered with proper requirements. **This initial analysis is subject to change upon further evaluation.**

## **DOT’s Financial Assistance Programs for Infrastructure**

DOT and its operating administrations currently administer 96 active Federal financial assistance programs. Of these programs, 26 include eligibility for transportation infrastructure projects and are currently obligating funds for new projects.<sup>3</sup> Appendix A provides a full list of these programs, including information on the DOT agency responsible for administering the program; the type of infrastructure projects<sup>4</sup> that receive funding under the program; and, for each of Fiscal Years 2019-2021, the number of entities participating in the program and the amount of Federal funding made available for financial assistance under the program.<sup>5,6</sup>

## **Applicable Domestic Content Procurement Requirements**

### **General**

Section 410 of the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2021<sup>7</sup> states that “no funds appropriated pursuant to this Act may be expended by an entity unless the entity agrees that in expending the assistance the entity will

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<sup>3</sup> This total is accurate as of Fiscal Year 2021. It does not include any new programs created under the Bipartisan Infrastructure Law (Pub. L. 117-58).

<sup>4</sup> As defined in section 70912(5) of the BABA.

<sup>5</sup> Funding totals presented in Appendix A are for all financial assistance (grants or loans) provided under each program and include funding for both infrastructure and non-infrastructure projects under those programs.

<sup>6</sup> For each program listed in Appendix A, DOT is currently reviewing whether and how the BABA would affect the application of Buy America(n) requirements to that program.

<sup>7</sup> Pub. L. 116-260, Division L

comply with sections 2 through 4 of the Act of March 3, 1933 (41 U.S.C. 8301-8305, popularly known as the “Buy American Act”).” This and similar provisions included in appropriations acts in prior fiscal years provide the basis for applying Buy American Act requirements to financial assistance programs administered by DOT. In addition to this general requirement, there are several specific statutes that apply particular Buy America(n) requirements to the Federal financial assistance programs administered by DOT’s OAs, including 49 U.S.C. § 50101 (FAA); 23 U.S.C. § 313 (FHWA); 49 U.S.C. § 22905(a) (FRA); 49 U.S.C. § 5323(j) (FTA); and 46 U.S.C. § 54101(d)(2) (MARAD). Each of these Buy America(n) statutes allows for waivers to be granted by DOT on the basis of: inconsistency with the public interest; non-availability of components or the goods are not manufactured in the United States; and the cost of compliance exceeding a specific threshold.

The following sections describe the current Buy America(n) implementation at each of the five OAs with assistance programs covered by those laws, as well as programs administered by OST.

## **FAA**

The Airport Improvement Program (AIP) is the FAA’s grant program for infrastructure projects. The FAA’s Buy American statute, **49 U.S.C. § 50101**, authorizes the Secretary of Transportation to obligate Federal funds for an AIP project only if all the steel and manufactured goods used in the project are produced in the United States. The statute provides for four types of waivers:

- (I) compliance with the statute is inconsistent with the public interest;
- (II) the steel and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality;

- (III) where (A) the cost of components and subcomponents produced in the United States is more than 60 percent of the cost of all components of the facility or equipment; and (B) final assembly of the facility or equipment has occurred in the United States; or
- (IV) where including domestic material will increase the cost of the overall project by more than 25 percent.

The FAA's Buy American Preference policy is included in FAA Order 5100.38D (the Airport Improvement Program Handbook), which also identifies eligible projects and their requirements. The FAA makes general information, policies, and procedures about the Buy American requirements available to the public via its website and dedicated Buy American Preference webpage.<sup>8</sup> The FAA has not promulgated regulations addressing its Buy American requirements.

The Buy American waiver allowances for Type I, II, and IV waivers in the FAA statute are similar to the waiver allowances provided in other DOT programs, in that they authorize waivers based on public interest, nonavailability, and domestic content increasing total project costs by more than 25%. However, Type III waivers are very different, and are better understood as a method of compliance with the Buy American statute, rather than as a waiver of those requirements in the traditional sense.

The FAA issues waivers with nationwide and project-specific scope, depending upon the type of waiver, the circumstances (i.e., the overall development objective) related to the airport development project or for a manufacturer's convenience. The Type I, II, and Type III waivers may be issued with nationwide scope. The FAA also issues certain Type III equipment waivers a nationwide scope, at the request of manufacturers of certain specified equipment such as runway

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<sup>8</sup> [https://www.faa.gov/airports/aip/buy\\_american/](https://www.faa.gov/airports/aip/buy_american/)

lighting and navigational aids used to meet thousands of airport design and/or operational standard projects at airports across the U.S. annually.

The FAA also issues waivers with project-specific scope, which can only be used on a single specific project and which expire at the close of the award. Project-specific waivers are limited to the overall development objective (as determined by FAA and the sponsor), which as a matter of airport and/or airfield circumstances may be best accommodated with more customized equipment, buildings, surface, and/or roads. Airport sponsors, contractors, or manufacturers may contact the FAA to request a Buy American waiver for a specific AIP-funded project. For projects that are competitive (low bid) equipment/building or construction projects involving airport and airfield surfaces such as runways, taxiways, and access roads, FAA contract terms included within sponsor procurements require that the apparent lowest bidder must request a waiver from the FAA within 15 days.

Non-availability waivers are received by the FAA independent of a competitive procurement. More frequently, non-availability waivers are requested for unique safety equipment such as foreign object debris detection equipment or in-pavement sensors whose projected use and useful life of previously acquired equipment creates a market opportunity for manufacturers of such products.

Interested manufacturers of goods or equipment proposed to be used in airport development projects also ordinarily participate in the airport sponsor's bid process. The FAA maintains a nationwide list of all goods and equipment that have an approved Buy American waiver.<sup>9</sup> A manufacturer may confirm a product's compliance with FAA Buy American

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<sup>9</sup> The latest list is available at [https://www.faa.gov/airports/aip/buy\\_american/media/nationwide-buy-american-waivers-issued.pdf](https://www.faa.gov/airports/aip/buy_american/media/nationwide-buy-american-waivers-issued.pdf).



requirements by checking the nationwide waiver list or by applying for an FAA Buy American waiver before or separately from immediate participation on an AIP-funded project.

The FAA limits the use of nationwide waivers to non-available products and those manufactured goods, such as specialized lighting equipment, necessary to meet specific operational standards or special interest projects. In contrast, the FAA offers project-specific waivers to manufactured products/projects accommodating unique specifications. The vast majority of nationwide waivers issued by the FAA are for lighting equipment, which are included in 85% of the projects awarded each fiscal year.

In 2019 and 2020, FAA issued just over 2,000 Buy American waivers, of which all but six were Type III waivers for construction projects or equipment/buildings. The other waivers included four Type II (non-availability) and two Type IV (cost) waivers; no Type I (public interest) waivers were issued in those years. Nationwide waivers accounted for 36 percent of the waivers issued in those years, while the remaining 64 percent were project-specific. More information on Buy American waivers issued by FAA may be found on the agency's Buy American web page at [https://www.faa.gov/airports/aip/buy\\_american/](https://www.faa.gov/airports/aip/buy_american/).

## **FHWA**

The FHWA's Buy America requirements for the Federal-aid highway program were first established in 1978 through section 401 of the Surface Transportation Assistance Act, Pub. L. 95-599 (1978). In 1982, these requirements were modified by section 165 of the Surface Transportation Assistance Act (STAA), Pub. L. 97-424 (1983), which provides the basic statutory language for FHWA's current Buy America requirements. The Moving Ahead for Progress in the 21st Century Act (MAP-21) codified this provision in **23 U.S.C. § 313**. The

provision prohibits the obligation of Federal-aid Highway funds for projects unless steel, iron, and manufactured products used in such projects are produced in the United States.<sup>10</sup>

FHWA regulations interpret and implement this mandate. Section 635.410 of Title 23, Code of Federal Regulations (CFR) requires that steel or iron materials that will be permanently incorporated in a Federal-aid project must be domestically manufactured. The requirement applies to the entire manufacturing process for steel and iron, including the application of any coatings. For FHWA, this means that all the processes that modify the chemical content, physical shape or size, or final finish of the material (from initial melting and mixing, continuing through the bending and coating) occur in the U.S.<sup>11</sup> FHWA Buy America requirements are applied to all project contracts eligible for title 23 assistance, regardless of whether Federal-aid funds actually will be used, that are within the scope of the NEPA document if at least one project contract is funded with title 23 funds.<sup>12</sup>

The FHWA statute and regulations create a process for granting waivers from the Buy America requirements when:

- (1) its application would be inconsistent with the public interest;
- (2) satisfactory quality domestic steel and iron products are not available in sufficient and reasonably available quantities; or
- (3) if the inclusion of the domestic material would increase the cost of the overall project contract by more than 25 percent.

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<sup>10</sup> Safety programs authorized in title 23 that are administered by the National Highway Traffic Safety Administration (NHTSA) are also subject to the Buy America requirements of section 313. However, those programs do not provide funding for infrastructure.

<sup>11</sup> Based on the “general waiver” discussed below, FHWA does not currently apply Buy America to manufactured products, except for steel and iron manufactured products.

<sup>12</sup> See 23 U.S.C. § 313(g). Prior to MAP-21, FHWA applied the Buy America requirements on a contract-by-contract basis; Buy America applied to the steel and iron products in the contracts that would use Federal highway-aid funds, but not on contracts for portions of a project funded using State-only or other non-title 23 funds.

Section 635.410(c) of Title 23 CFR also establishes the process for FHWA’s consideration of waivers. The agency has also issued additional guidance on the waiver process, such as FHWA’s Buy America Questions and Answers for Federal-aid Program (Questions #22 – 27), Revised Policy for the Approval of Buy America Waivers, and Contract Administration Core Curriculum Manual (pp. 89-90).

The majority of Buy America waivers issued by FHWA in recent years have been based on non-availability and have typically been “one-offs” involving specialty components for bridges and other types of infrastructure. Information on specific Buy America waivers issued by FHWA since 2001 may be found on the FHWA website at <https://www.fhwa.dot.gov/construction/cqit/buywaiver.cfm>.

## **FRA**

**49 U.S.C. § 22905(a)** requires that FRA obligate amounts for projects only if the steel, iron, and manufactured products used in such project are produced in the United States.<sup>13</sup> FRA does not have Buy America regulations, but it does provide guidance that is available on its website.<sup>14</sup> Except for the FTA rolling stock waiver provision, the general FTA and FRA Buy America provisions regarding the steel, iron, and manufactured goods used in its grant-funded projects are very similar. As a result, FRA has concluded that it is reasonable and appropriate to use applicable FTA rules for purposes of providing guidance to FRA’s grant recipients, specifically 49 CFR §§ 661.3, 661.5, and applicable parts of 661.11, and use them as guidance

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<sup>13</sup> Section 22905(a) applies to grants made under Chapter 229 of Title 49, including High-Speed Intercity Passenger Rail, Consolidated Rail Infrastructure and Safety Improvements, and Restoration and Enhancement grants, as well as the Federal-State Partnership for State of Good Repair grants authorized under Section 24911 of Title 49.

<sup>14</sup> See <https://railroads.dot.gov/legislation-regulations/buy-america/buy-america-fras-high-speed-intercity-passenger-rail-program> (Frequently Asked Questions) <https://railroads.dot.gov/legislation-regulations/buy-america/buy-america> (Buy America Overview and links to Waiver Requests).

for both FRA-funded manufactured goods procurement generally and rolling stock, where appropriate.

For manufactured goods, including rolling stock, to be considered as produced in the United States, (1) all the manufacturing processes for the end product must take place in the United States, and (2) all the components of the end product must be of U.S. origin. A component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents. (See FTA regulation: 49 C.F.R. § 661.5(d)). The statute creates a process for granting waivers from the Buy America requirements when:

- (1) its application would be inconsistent with the public interest;
- (2) satisfactory quantities or quality domestic steel, iron, and goods are not sufficiently available;
- (3) rolling stock and power train equipment cannot be delivered in the United States within a reasonable time; or
- (4) including domestic material will increase the cost of the overall project by more than 25 percent.

**49 U.S.C. 24305(f)** requires that Amtrak buy only unmanufactured articles, material, and supplies mined or produced in the United States or manufactured articles, material, and supplies manufactured in the United States substantially from articles, material, and supplies mined, produced, or manufactured in the United States, when the cost of those articles, material, or supplies bought is at least \$1,000,000. Under section 24305(f)(4), FRA may exempt Amtrak from that requirement for particular articles, material, or supplies. The information that Amtrak submits to FRA is similar to the information itemized above for requests under section 22905(a)(4), and as with requests under that section, FRA conducts its own due diligence and

analysis of the Amtrak’s assertions regarding non-availability before granting or denying the request for exemption.

Consistent with annual appropriations act provisions discussed above, the Buy American Act of 1933 is applied to certain FRA grant programs that do not fall under the requirements of Section 22905(a), and in some cases to commuter agencies who are exempted from 49 USC § 22905(a) pursuant to 49 U.S.C. § 22905(e)(1).

All Buy America waivers issued by FRA in recent years have been on the basis of non-availability or being “not available in a reasonable time.” A list of those waivers can be found on the FRA Buy America website at <https://railroads.dot.gov/legislation-regulations/buy-america/buy-america>.

## **FTA**

**49 U.S.C. § 5323(j)** authorizes FTA to obligate funds for a project only if the steel, iron, and manufactured goods used in the project are produced in the United States. FTA’s regulations at 49 CFR part 661 interpret and implement this statutory requirement.

Section 661.5 of Title 49 CFR requires that all iron, steel, and manufactured products used in the project are produced in the United States, except as provided in Sections 661.7 (Waivers) and 661.11 (Rolling Stock Procurements). For iron and steel to be considered as produced in the United States, all steel and iron manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. Additionally, FTA’s steel and iron requirements apply to “all construction materials made primarily of steel or iron and used in infrastructure projects such as transit or maintenance facilities, rail lines, and bridges. These items include, but are not limited to, structural steel or iron, steel or iron beams and columns, running rail and contact rail. These requirements do not

apply to steel or iron used as components or subcomponents of other manufactured products or rolling stock, or to bimetallic power rail incorporating steel or iron components.”

For manufactured products (except for rolling stock) to be considered produced in the United States, FTA has a two-part test: (1) all the manufacturing processes for the product must take place in the United States; and (2) all the components of the product must be of U.S. origin. A component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents. Section 5323(j)(2)(C) includes a statutory “waiver” for rolling stock (including train control, communication, traction power equipment, and rolling stock prototypes), which requires that the cost of components and subcomponents produced in the United States is more than 70 percent<sup>15</sup> of the cost of all components of the rolling stock and that final assembly of the rolling stock takes place in the United States.<sup>16</sup>

The FTA Administrator may issue waivers of the Buy America requirement in section 5323(j) if:

- (1) the application of Buy America is inconsistent with the public interest;
- (2) the steel, iron, and goods produced in the U.S. are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality; or
- (3) including domestic material will increase the cost of the overall project by more than 25 percent.

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<sup>15</sup> Prior to FY2020, the domestic content requirement was more than 65 percent for FY 2018 and FY 2019, and more than 60 percent for FY2015-2017. The phased increase in the minimum domestic content threshold was specified in changes made to section 5323(j) in the FAST Act.

<sup>16</sup> As implemented in 49 CFR § 661.11, this “waiver” does not require project-specific discretionary action by FTA, but the covered rolling stock is subject to pre-award and post-delivery Buy America reviews per 49 U.S.C. § 5323(m) and 49 CFR part 663.

Buy America waivers must be requested by a recipient of Federal funds unless the waiver is for a component or subcomponent of rolling stock or a specific item or material that is used in the production of a manufactured product, in which case, the manufacturer may request the waiver.

Per FTA regulations, “in the case of a sole source procurement, the Administrator will grant [a] non-availability waiver only if the grantee provides sufficient information which indicates that the item to be procured is only available from a single source or that the item to be procured is not produced in sufficient and reasonably available quantities of a satisfactory quality in the United States.” Non-availability waivers also “may be granted for a specific item or material that is used in the production of a manufactured product that is governed by the requirements of §661.5(d) of this part. If such a waiver is granted to such a specific item or material, that item or material will be treated as being of domestic origin.” This provision allows a manufacturer who makes a product in the United States of domestic and foreign components to seek a waiver for the non-domestic components. If the waiver is granted, the component is considered to be of domestic origin and the manufacturer may certify compliance with Buy America.

A unique provision of the FTA Buy America statute requires that, if the Secretary denies an application for a waiver based on non-availability, “the Secretary shall provide to the applicant a written certification that: (i) the steel, iron, or manufactured goods, as applicable, (referred to in this subparagraph as the ‘item’) is produced in the United States in a sufficient and reasonably available amount, (ii) the item produced in the United States is of a satisfactory quality, and (iii) includes a list of known manufacturers in the United States from which the item can be obtained.”

Most waivers granted by FTA in recent years have been on the basis of non-availability and have involved a variety of different specialty components and systems. More information on waivers granted by FTA may be found on the agency's Buy America website at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/waivers-granted>.

## MARAD

MARAD, unlike most other DOT operating agencies, does not have its own mode-specific Buy America(n) authority that it applies uniformly to all its grant programs. MARAD's Small Shipyard Grant program follows Buy America requirements that were recently enacted in statute at **46 U.S.C. § 54101** and are specific to that program. For MARAD's other grant programs, such as America's Marine Highways (AMH) and Port Infrastructure Development Program (PIDP),<sup>17</sup> MARAD currently applies **the Buy American Act (41 USC Chapter 83)** requirements, consistent with appropriations act provisions discussed above that apply to all appropriated DOT financial assistance programs.

The Buy American Act provides for exceptions based on:

- (1) non-availability if the articles, materials, or supplies are not mined, manufactured, or produced in the United States in sufficient and reasonably available commercial quantities and are not of a satisfactory quality;
- (2) application of the Buy American statute to the material would be impracticable or inconsistent with the public interest; or

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<sup>17</sup> MARAD also administers grants under programs administered by OST, including RAISE grants (formerly known as TIGER and then BUILD). MARAD has required compliance with domestic content requirements since the first round of TIGER discretionary grants in 2010. Beginning in 2014 with the TIGER VI round of grants, MARAD revised its Buy American requirements, basing them in large part on the Buy American Act implementing regulations found in the FAR subpart 25. The FAR subpart 25 applies to Federal procurement contracts, and while MARAD does not believe the FAR is controlling on its grants, it uses some relevant FAR provisions in its grant agreements.



(3) the cost of the domestic material is unreasonably expensive.

Determinations of exceptions are fact-based, and MARAD requires applicants/recipients to provide detailed information about the products, manufacturers, and each applicant's/recipient's efforts to comply with the Buy American Act when requesting an exception.

MARAD has not published regulations implementing the Buy American Act for its grant programs, and instead includes Buy American Act requirements in agreements MARAD enters into with financial assistance recipients.

As previously mentioned, 46 U.S.C. § 54101(d)(2) codifies specific Buy America requirements for MARAD's Small Shipyard Grant Program. These requirements prohibit the obligation of MARAD funds for Small Shipyard Grant projects unless each product or material purchased with the funds (including products and materials purchased by the grant recipient, and any commercially available off-the shelf item), is: (i) an unmanufactured article, material, or supply that has been mined or produced in the United States; or (ii) a manufactured article, material, or supply that has been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States. 46 U.S.C. § 54101(d)(2)(A). The statute grants the Maritime Administrator the authority to waive a Buy America requirement when:

- (1) the requirement would be inconsistent with the public interest;
- (2) the product or material is not available in the United States in sufficient and reasonably available quantities, of a satisfactory quality, or on a timely basis; or
- (3) the cost of compliance increases the cost of that product or material by more than 25 percent.

Buy America waiver determinations must also be published in the Federal Register.

MARAD granted three waivers of Buy American Act requirements between 2015 and 2017, one on the basis of unreasonable cost, and two on the basis of non-availability. All three of these waivers involved projects funded under the TIGER discretionary grants program. To date, MARAD has not issued a Buy America waiver under the Small Shipyard Grant Program.

## **OST**

The Office of the Secretary of Transportation (OST) is responsible for administering certain multimodal transportation financial assistance programs, including the RAISE<sup>18</sup> and INFRA<sup>19</sup> discretionary grants programs and the TIFIA<sup>20</sup> and RRIF<sup>21</sup> credit assistance programs. However, individual project grant agreements are administered by the relevant DOT Operating Administration, which apply their own Federal laws, rules and regulations to those projects, including Buy America requirements. The exception is the INFRA grant program, which is authorized in section 117 of title 23, and thus applies the requirements of 23 U.S.C. § 313, regardless of the agency administering the grant agreement.

## **Deficient Financial Assistance Programs**

Section 70913(c) of the BABA requires Federal agencies to identify Federal financial assistance programs that are currently inconsistent with the requirements of section 70914. An infrastructure program is considered inconsistent with section 70914 if: (1) it does not require that all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States; (2) it does not issue waivers and written justifications as specified in section 70914; or (3) it is subject to a waiver of general applicability.

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<sup>18</sup> Formally designated as National Infrastructure Investments in recent annual appropriations acts.

<sup>19</sup> Formally designated as the Nationally Significant Freight and Highway Projects program in statute.

<sup>20</sup> Transportation Infrastructure Finance and Innovation Act

<sup>21</sup> Railroad Rehabilitation and Improvement Financing

While each of DOT’s financial assistance programs currently applies domestic preference requirements (as described in the previous section of this report), none of those programs is currently fully consistent with the BABA requirements.

## **Iron, Steel, Manufactured Products, and Construction Materials**

Section 70914(a) of the BABA requires that “[n]ot later than 180 days after the date of enactment of this Act, the head of each Federal agency shall 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, manufactured products, and construction materials used in the project are produced in the United States.” The term “infrastructure” is defined in section 70912(5) to include, “at a minimum, the structures, facilities, and equipment for, in the United States

- (A) **roads, highways, and bridges;**
- (B) **public transportation;**
- (C) **dams, ports, harbors, and other maritime facilities;**
- (D) **intercity passenger and freight railroads;**
- (E) **freight and intermodal facilities;**
- (F) **airports;**
- (G) **water systems, including drinking water and wastewater systems;**
- (H) **electrical transmission facilities and systems;**
- (I) **utilities;**
- (J) **broadband infrastructure; and**
- (K) **buildings and real property.”**

Infrastructure types particularly applicable to DOT financial assistance programs are in **boldface** above.

The statute further clarifies in section 70912(6) that the term “produced in the United States” means:

A) in the case of iron or steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;

(B) in the case of manufactured products, that—

(i) the manufactured product was manufactured in the United States; and

(ii) the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States 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 of the manufactured product has been established under applicable law or regulation;

and

(C) in the case of construction materials, that all manufacturing processes for the construction material occurred in the United States.

The term “construction material” is not specifically defined in the BABA statute.

However, section 70917(c)(1) states that “the term “construction materials” shall not include cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.” In addition, the Congressional findings in section 70911(5) note that

“common construction materials used in public works infrastructure projects, including steel, iron, manufactured products, non-ferrous metals, plastic and polymer-based

products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables), glass (including optic glass), lumber, and drywall are not adequately covered by a domestic content procurement preference, thus limiting the impact of taxpayer purchases to enhance supply chains in the United States.”

As is described in the discussion of DOT’s domestic content procurement requirements above, 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) the 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. In contrast, where the Buy American Act is applied to DOT financial assistance programs not covered by a specific statute, such as with certain MARAD grants, the Buy American requirements apply to all construction material, which is defined in the terms of each grant as “an article, material, or supply brought to the construction site by the Recipient for incorporation into the building or work.” This definition is based off the similar definition in the FAR Subpart 25 and would cover steel, iron, manufactured products, and construction materials as defined in the BABA. Further, under MARAD’s requirements, a construction material is considered domestic if it is an unmanufactured construction material mined or produced in the US or if it’s manufactured in the US and the cost of its components mined, produced, or manufactured in the US exceeds 50% of the cost of all its components.

As discussed above, the FAA and FTA statutes allow for “waivers” for certain products, so long as they meet a defined threshold for domestic content. Specifically, there is an FTA statutory “waiver” for rolling stock, so long as it meets a 70 percent cost threshold, and FAA is permitted to grant so-called “Type III waivers” for products that meet a 60 percent threshold.

Both programs also require that final assembly occur in the United States. In the context of the BABA statute, however, these requirements may be better understood as representing minimum domestic content standards, rather than as waivers of Buy America(n) preferences. To the extent that products subject to those standards are considered manufactured products, the existing content standards in both programs is greater than the 55 percent threshold in BABA section 70912(6)(B) for determining whether a manufactured product is considered to be produced in the U.S. As a result, DOT believes that these programs are generally consistent with the BABA requirements regarding manufactured products.<sup>22,23</sup>

## Waivers

Section 70914(b) allows the head of an agency to waive the domestic content preference requirements of the BABA if the Secretary determines that:

- (1) applying the domestic content procurement preference would be inconsistent with the public interest;
- (2) types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality; or
- (3) the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent.

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<sup>22</sup> In its current practice, FAA applies its Type III authority on a project basis as well as on a facility or equipment item basis, but counts products covered by nationwide Type III equipment waivers as 100% domestic for purposes of meeting the 60% threshold.

<sup>23</sup> Under FTA's current practice, for a rolling stock component to be of domestic origin, more than 70% of the subcomponents, by cost, must be of domestic origin, and the manufacture of the component must take place in the U.S. If a component is of domestic origin, then 100% of its cost may be used in calculating the cost of domestic content of the rolling stock. 49 CFR § 661.11(g). A subcomponent is considered domestic if it is manufactured in the United States. *Id.* at § 661.11(h).

As is discussed in the previous section, the Buy America(n) statutes that are specific to programs administered by FAA, FHWA, FRA, FTA, and MARAD all have similar allowances (public interest, non-availability, and cost) for waivers of those provisions. Where the Buy American Act is applied, the types of waivers and exceptions available under that statute (and its implementing regulations in the Federal Acquisition Regulation) would also apply.<sup>24</sup>

## Written Justifications

Section 70914(c) of the BABA requires that, before issuing a waiver, each Federal agency provides a written justification for the proposed determination to issue the waiver on the agency's website, and that it allow for public comment on the proposed waiver for a period of at least 15 days. Each DOT agency currently allows for public comment on its proposed waivers, though that period is shorter than 15 days in some cases, as follows:

- **FAA.** Under Section 167 of the FAA Reauthorization Act of 2018, at least 10 days public notice and an opportunity for comment must be given before a waiver takes effect. The notice must be posted in an easily identifiable location on the Department or the agency's website and provide a detailed written explanation of the waiver determination.
- **FHWA.** Section 11513 of the recent Bipartisan Infrastructure Law (Pub. L. 117-58) codified a requirement in 23 U.S.C. § 313(g) (which had also been found in various recent annual appropriations acts)<sup>25</sup> that FHWA provide a public notice and comment opportunity on its intent to issue a waiver at least 15 days prior to issuing the waiver. In addition, Section 117 of the SAFETEA-LU Technical Corrections Act of 2008 requires FHWA to publish in the Federal Register its finding that a waiver is appropriate at least a

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<sup>24</sup> Such waivers and exceptions include those for information and communications technology; commercial off the shelf (COTS) items; cost share thresholds for determining domestic origin; and the "non-available" items list.

<sup>25</sup> *E.g.*, Consolidated Appropriations Act, 2021, Pub. L. 116-260, div. L § 122.

day before it takes effect, and to provide an opportunity for public comment on such finding.<sup>26</sup> The FHWA has a webpage where it posts requests for Buy America waivers prior to making findings on the requests or publishing the findings in the Federal Register.<sup>27</sup> Upon posting, over 8,5000 subscribers to this Web site receive an email notification regarding the proposed waiver. This allows the public to provide immediate feedback on the proposed waiver and identify potential domestic suppliers.

- **FRA**. After receiving a waiver request, FRA posts the request on its website for 15 days to accommodate public notice and comment. This allows the public to provide immediate feedback on the waiver request and identify potential domestic suppliers. FRA also conducts its own due diligence and analysis of the requester's assertions regarding non-availability. After consideration of the comments on the waiver request, FRA publishes in the Federal Register a final notice on its determination of the waiver request. The decision is effective 15 days after publication. All final waiver determinations also are posted on FRA's website.<sup>28</sup>
- **FTA**. Before FTA may grant a non-availability waiver, it must publish the waiver request and a detailed written explanation of FTA's waiver determination in the Federal Register and on FTA's website, and provide the public with a reasonable period of time for notice and comment. 49 U.S.C. § 5323(j)(3). After consideration of the comments on the proposed waiver, FTA publishes in the Federal Register a final notice on its

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<sup>26</sup> Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) Technical Corrections Bill, Pub. L. 110-244, § 117.

<sup>27</sup> <https://www.fhwa.dot.gov/construction/contracts/waivers.cfm>.

<sup>28</sup> <https://railroads.dot.gov/legislation-regulations/buy-america/buy-america>.



determination of the waiver application. All proposed and final waiver determinations also are posted on FTA's website.<sup>29</sup>

- **MARAD**. The Buy America statute for the Small Shipyards Grant program requires that any determinations made by the Maritime Administrator regarding exceptions to the Buy America provisions be published in the Federal Register, but does not set a time period to allow for public comment on those determinations. Because the Buy American Act doesn't include a public notice and comment requirement for public works, MARAD has not published its waivers of those requirements in recent years.

## General Applicability Waivers

Section 70913(c)(2) requires identifying programs “for which a domestic content procurement preference requirement . . . is subject to a waiver of general applicability not limited to the use of specific products for use in a specific project.” Most of DOT's financial assistance programs currently have general applicability waivers, as described in greater detail below. One key exception is the Federal Railroad Administration, which has not issued any general applicability waivers under its Buy America statutes.

### **FAA**

As discussed above, FAA issues both project-specific and nationwide waivers of its Buy American requirements. Nationwide non-availability waivers are issued for specific FAA-approved equipment or products and are limited to five years unless revoked based upon changes in the marketplace, such as the number of manufacturers making the same product within the

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<sup>29</sup> <https://www.transit.dot.gov/buyamerica>.

United States or policy. FAA currently has four nationwide Type II (nonavailability), and two Type IV waivers in place for specific products.

### **FHWA**

FHWA currently has four standing general applicability waivers of its Buy America requirements:

- 1) Nationwide waiver for manufactured products other than steel and iron products. This waiver was instituted in 1983 in conjunction with FHWA's final rule implementing its Buy America requirements.
- 2) Nationwide waiver for ferry boat equipment. In 1994, FHWA issued a nationwide waiver of the Buy America requirements for certain steel products used in the construction of ferry boats. The items included in the waiver are marine diesel engines, electrical switchboards and switchgear, electric motors, pumps, ventilation fans, boilers, electrical controls, and electronic equipment. Other steel and iron products used in the construction of ferry boats that are manufactured domestically are not waived, including steel and stainless-steel plate and shapes, sheet steel and stainless steel, steel and stainless-steel pipe and tubing, and galvanized steel products.
- 3) Nationwide waiver for pig iron and iron ore. In 1995, FHWA published a notice announcing a nationwide waiver of the Buy America requirements for certain components used in the manufacturing process for steel and iron products. The specific components include pig iron and processed, pelletized, and reduced iron ores.
- 4) Areawide waiver for power poles in Guam. In 2012, FHWA published a standing areawide waiver for non-domestic pre-stressed spun concrete transmission and distribution power poles in Guam.

FHWA also applies a regulatory minimal use threshold in administering its Buy America requirements. This provision was addressed in the 1983 final rule and was based on the public-interest waiver allowance in the underlying Buy America statute. This provision allows for a minimal amount of non-domestic steel to be incorporated if “the cost of such materials used does not exceed one-tenth of one percent (0.1 percent) of the total contract cost or \$2,500, whichever is greater.”<sup>30</sup> This provision requires the contracting agency to maintain a running list of non-domestic steel or iron components or subcomponents as a construction project proceeds. The threshold amounts have not been revised since the 1983 final rule.

In 2013, FHWA published a request for comments in the Federal Register<sup>31</sup> seeking comments regarding the continued need, in whole or in part, for the general waiver from Buy America for manufactured products, as well as the waivers for ferry boat equipment and pig iron and the minimal use threshold. Based on the comments received at that time, FHWA did not make any modifications to its standing waivers.

## **FTA**

There are three general, or nationwide, public interest waivers codified in FTA’s Buy America regulation at Appendix A to § 661.7:

- (1) Paragraph (a) applies the Buy American Act waivers published at 48 CFR § 25.104 (which establishes excepted articles, materials, and supplies under the Buy American Act of 1933) to FTA projects.
- (2) Paragraph (b) waives the requirement for microprocessors, computers, microcomputers, or software, or other such devices, which are used solely for the purpose of processing or storing data. The microprocessor waiver was first introduced in 1985 for a one-year

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<sup>30</sup> See 23 CFR 635.410(b)(4).

<sup>31</sup> 78 FR 41492.

period and was made permanent a year later. Later, FTA's microprocessor waiver was further limited in scope to items used solely for the processing and storing of data. The waiver for microprocessors applies only to a device used solely for the purpose of processing or storing data and does not extend to a product containing a microprocessor, computer, or microcomputer, such as a farebox.

(3) Paragraph (c) exempts small purchases of not more than \$150,000 from Buy America requirements. When FTA issued its Final Rule granting a public interest waiver for small purchases in 1995<sup>32</sup> it incorporated by reference the simplified acquisition threshold from the DOT's implementation of the governmentwide Common Grant Rule.<sup>33</sup> Section 3011 of the Fixing America's Surface Transportation (FAST) Act<sup>34</sup> effectively severed the relationship of the small purchase waiver to the Common Grant Rule and the Simplified Acquisition Threshold by setting the \$150,000 threshold in statute. Because it is a statutory waiver, FTA cannot eliminate the small purchase waiver or change the dollar threshold used for this waiver.

## **MARAD**

In applying the Buy American Act requirements to its programs, MARAD also allows for three general exceptions, based on the same exceptions granted in the Federal Acquisition Regulation (FAR) Subpart 25, and include:

(1) Commercially available off the shelf (COTS) items manufactured in the U.S. This exception is based on the same exception allowed for in the FAR subpart 25 as applied to

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<sup>32</sup> 60 FR 37930

<sup>33</sup> Then at 49 CFR § 18.36(d)

<sup>34</sup> Pub. Law 114-94, December 5, 2015

Federal procurements, which waives the component test for the acquisition of COTS items as long as an item is manufactured in the US. The FAR Council recently updated these regulations, choosing to keep the longstanding exception for COTS items manufactured in the U.S. except for items made wholly or predominantly of steel and/or iron.

- (2) Information technology that is a commercial item. This exception is based on the same exception in the FAR 25.202, which states that the restriction on purchasing foreign construction material does not apply to the acquisition of information technology that is a commercial item.
- (3) Foreign materials that are listed at 48 C.F.R. 25.104. These materials have been determined to be non-available from U.S. manufacturers, and the list of materials is published in the Federal Register at least once every five years. Suggestions for deletions from the list can be submitted to the Civilian Agency Acquisition Council or Defense Acquisition Regulations Council at any time.

## Appendix A

### DOT Financial Assistance Programs for Transportation Infrastructure

Agency	Financial Assistance Program (Assistance Listing Number)	Types of Infrastructure Projects	Number of Participants			Funding Level (\$ millions)		
			2019	2020	2021	2019	2020	2021
FAA	Airport Improvement Program (20.136)	<ul style="list-style-type: none"> <li>• Airports</li> <li>• Buildings and Real Property</li> </ul>	1183	1248	1228	\$3,583	\$4,303	\$3,543
FHWA	Highway Planning and Construction (20.205)	<ul style="list-style-type: none"> <li>• Roads, Highways, and Bridges</li> <li>• Public Transportation</li> <li>• Ports</li> <li>• Freight and Intermodal Facilities</li> <li>• Buildings and Real Property</li> </ul>	51	51	51	\$42,359	\$43,336	\$43,337
FHWA	Recreational Trails Program (20.219)	<ul style="list-style-type: none"> <li>• Roads, Highways, and Bridges</li> </ul>	50	50	49	\$83	\$83	\$82
OST	Transportation Infrastructure Finance and Innovation Act (TIFIA) Program (20.223)	<ul style="list-style-type: none"> <li>• Roads, Highways, and Bridges</li> <li>• Public Transportation</li> <li>• Ports</li> <li>• Freight and Intermodal Facilities</li> <li>• Buildings and Real Property</li> </ul>	4	6	11	\$1,535	\$2,263	\$8,960
FHWA	Federal Lands Access Program (20.224)	<ul style="list-style-type: none"> <li>• Roads, Highways, and Bridges</li> </ul>	52	52	52	\$227	\$232	\$231
OST	Railroad Rehabilitation and Improvement Financing Program (20.316)	<ul style="list-style-type: none"> <li>• Intercity Passenger and Freight Railroads</li> </ul>	2	1	1	\$914	\$851	\$908
FRA	National Railroad Passenger Corporation Grants (20.315)	<ul style="list-style-type: none"> <li>• Intercity Passenger Railroads</li> </ul>	1	1	1	\$1,925	\$3,001	\$4,679
FRA	Maglev Project Selection Program (20.318)	<ul style="list-style-type: none"> <li>• Intercity Passenger Railroads</li> </ul>	1	1	TBD	\$24	\$2	TBD
FRA	Consolidated Rail Infrastructure and Safety Improvements (20.325)	<ul style="list-style-type: none"> <li>• Intercity Passenger and Freight Railroads</li> </ul>	30	44	TBD	\$241	\$318	TBD
FRA	Federal-State Partnership for State of Good Repair (20.326)	<ul style="list-style-type: none"> <li>• Intercity Passenger Railroads</li> </ul>	12	11	TBD	\$300	\$291	TBD
FTA	Federal Transit Capital Investment Grants (20.500)	<ul style="list-style-type: none"> <li>• Public Transportation</li> <li>• Buildings and Real Property</li> </ul>	26	17	32	\$254	\$1,958	\$1,994
FTA	Federal Transit Formula Grants (20.507)	<ul style="list-style-type: none"> <li>• Public Transportation</li> <li>• Buildings and Real Property</li> </ul>	472	611	483	\$6,720	\$29,603	\$45,505
FTA	Formula Grants for Rural Areas and Tribal Transit Program (20.509)	<ul style="list-style-type: none"> <li>• Public Transportation</li> <li>• Buildings and Real Property</li> </ul>	131	159	138	\$769	\$2,995	\$1,850

FTA	Enhanced Mobility of Seniors and Individuals with Disabilities (20.513)	<ul style="list-style-type: none"> <li>Public Transportation</li> <li>Buildings and Real Property</li> </ul>	114	122	141	\$398	\$324	\$463
FTA	Public Transportation Research, Technical Assistance, and Training (20.514)	<ul style="list-style-type: none"> <li>Public Transportation</li> <li>Buildings and Real Property</li> </ul>	5	3	22	\$51	\$45	\$26
FTA	Projects for Washington Metropolitan Area Transit Authority (WMATA) (20.524)	<ul style="list-style-type: none"> <li>Public Transportation</li> <li>Buildings and Real Property</li> </ul>	1	1	1	\$149	\$149	\$15
FTA	State of Good Repair Grants Program (20.525)	<ul style="list-style-type: none"> <li>Public Transportation</li> <li>Buildings and Real Property</li> </ul>	56	70	58	\$2,872	\$2,657	\$2,633
FTA	Buses and Bus Facilities Formula, Competitive, and Low or No Emissions Programs (20.526)	<ul style="list-style-type: none"> <li>Public Transportation</li> <li>Buildings and Real Property</li> </ul>	309	314	291	\$1,119	\$1,212	\$1,182
FTA	Public Transportation Emergency Relief Program (20.527)	<ul style="list-style-type: none"> <li>Public Transportation</li> <li>Buildings and Real Property</li> </ul>	10	16	11	\$12	N/A	N/A
FTA	Public Transportation Innovation (20.530)	<ul style="list-style-type: none"> <li>Public Transportation</li> <li>Buildings and Real Property</li> </ul>	3	41	62	\$48	\$52	\$24
MARAD	Assistance to Small Shipyards (20.814)	<ul style="list-style-type: none"> <li>Other Maritime Facilities</li> </ul>	28	24	31	\$20	\$20	\$20
MARAD	America's Marine Highway Grants (20.816)	<ul style="list-style-type: none"> <li>Ports, Harbors, and Other Maritime Facilities</li> </ul>	9	8	9	\$7	\$10	\$11
MARAD	Port Infrastructure Development Program (20.823)	<ul style="list-style-type: none"> <li>Ports, Harbors, and Other Maritime Facilities</li> </ul>	15	17	25	\$287	\$205	\$241
OST	National Infrastructure Investments (20.933)	<ul style="list-style-type: none"> <li>Roads, Highways, and Bridges</li> <li>Public Transportation</li> <li>Intercity Passenger and Freight Railroads</li> <li>Ports</li> <li>Freight and Intermodal Facilities</li> <li>Buildings and Real Property</li> </ul>	55	70	90	\$884	\$1,000	\$983
OST	Nationally Significant Freight and Highway Projects (20.934)	<ul style="list-style-type: none"> <li>Roads, Highways, and Bridges</li> <li>Freight Railroads</li> <li>Ports</li> <li>Freight and Intermodal Facilities</li> <li>Buildings and Real Property</li> </ul>	20	20	25	\$856	\$906	\$905
OST	Transportation Demonstration Program (20.936)	<ul style="list-style-type: none"> <li>Airports</li> <li>Freight and Intermodal Facilities</li> </ul>	N/A	N/A	TBD	N/A	N/A	TBD