

DEPARTMENT OF TRANSPORTATION**Office of the Secretary****Docket No.: DOT-OST-2022-0047****Notice of Proposed Temporary Waiver of Buy America Requirements for Construction Materials****ACTION: Notice; Request for Comments.**

SUMMARY: As the Biden-Harris Administration implements the historic Bipartisan Infrastructure Law (BIL), we seek to maximize the use of American made products and materials in all Federally-funded projects while also successfully delivering a wide range of critical infrastructure projects for States, local communities, counties, Tribal nations and farms, factories and businesses across the U.S. In order to deliver projects and meaningful results while ensuring robust adoption of Buy America standards, DOT is proposing to establish a temporary public interest waiver for construction materials for a period expiring 180 days after May 14, 2022, and seeks comment. DOT proposes this transitional waiver to prepare for compliance with the new Made in America standards for construction materials. During this time period DOT expects states, industry, and other partners to begin the compliance process. DOT, using feedback from this proposed waiver and continued engagement through the waiver period, will work to ensure the creation of robust enforcement and compliance mechanisms. Suppliers and other stakeholders are encouraged to inform DOT of currently sufficient domestic availability of categories of construction materials to help DOT shorten the transitional waiver or narrow its applicability to rapidly encourage domestic sourcing.

DATES: Comments must be received by May 13, 2022.

ADDRESSES: Please submit your comments to the U.S. Government electronic docket site at <http://www.regulations.gov/>, Docket: **DOT-OST-2022-0047**.

Note: All submissions received, including any personal information therein, will be posted without change or alteration to <http://www.regulations.gov>. For more information, you may review DOT's complete Privacy Act Statement published in the Federal Register on April 11, 2000 (65 FR 19477).

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Darren Timothy, DOT Office of the Assistant Secretary for Transportation Policy, at darren.timothy@dot.gov or at 202-366-4051. For legal questions, please contact Michael A. Smith, DOT Office of the General Counsel, 202-366-2917, or via e-mail at michael.a.smith@dot.gov.

SUPPLEMENTARY INFORMATION:

Background

In January 2021, President Biden issued Executive Order (EO) 14005, titled “Ensuring the Future is Made in All of America by All of America’s Workers,” launching a whole-of-government initiative to strengthen Made in America standards.

The EO 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.” DOT is committed to ensuring strong and effective Buy America implementation consistent with EO 14005, and has a long track record of successfully applying

Made in America standards to support American workers and businesses through its more than \$70 billion in grant programs, and \$700 million in direct purchases in FY2020.

On November 15, 2021, President Biden signed the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, which includes the Build America, Buy America Act (“the Act”). Pub. L. No. 117-58, div. G §§ 70901-52. The BIL not only makes a historic investment in American transportation – from roads and bridges to rail to transit – but also greatly strengthens Made in America standards. Specifically, the Act expands the coverage and application of Buy America preferences in Federal financial assistance programs for infrastructure. The Act requires that no later than May 14, 2022—180 days after the date of enactment—the head of each covered Federal agency shall ensure that “none of the funds made available for a Federal financial assistance program for infrastructure ... 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.” BIL § 70914(a).

The Act provides that the preferences under Section 70914 apply only to the extent that a domestic content procurement preference as described in Section 70914 does not already apply to iron, steel, manufactured products, and construction materials. BIL § 70917(a)–(b). This provision allows Federal agencies to preserve existing Buy America policies and provisions that meet or exceed the standards required by the Act, such as FHWA’s existing requirements for iron and steel.

One of the new Buy America preferences included under Section 70914 of the Act is for construction materials. By May 14, 2022, each covered Federal agency must ensure that all manufacturing processes for construction materials used in Federally assisted infrastructure projects occur in the United States. None of the specific statutes that apply particular Buy

America¹ requirements to the Federal financial assistance programs administered by DOT's Operating Administrations (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), specifically cover construction materials, other than to the extent that such materials would already be considered iron, steel, or manufactured products. In addition to establishing Buy America preferences, the Act also provides certain statutory authorities for the Made in America Office ("MIAO") in the Office of Management and Budget ("OMB"). BIL §§ 70915(b) and 70923. MIAO was first established by Section 4 of EO 14005. MIAO's authorities under the BIL include issuing guidance to assist in applying the Act's requirements and issuing standards that define term "all manufacturing processes" in the case of construction materials. BIL § 70915.

On April 18, 2022, OMB issued memorandum M-22-11, "[Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure](#)" ("Implementation Guidance"). Under section VIII of the Implementation Guidance, "Preliminary Guidance for Construction Materials," "construction materials" includes:

an article, material, or supply—other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives—that is or consists primarily of:

- non-ferrous metals;
- plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
- glass (including optic glass);

¹ In this notice, references to "Buy America" include domestic preference laws called "Buy American" that apply to DOT financial assistance programs.

- lumber; or
- drywall.

Implementation Guidance at p. 13-14. The Implementation Guidance also states that “an article, material, or supply should only be classified into one of the following categories: (1) iron or steel; (2) a manufactured product; or (3) a construction material. For ease of administration, an article, material, or supply should not be considered to fall into multiple categories.” *Id.* at p. 6. The Implementation Guidance also explains that “items that consist of two or more of the listed materials that have been combined together through a manufacturing process, and items that include at least one of the listed materials combined with a material that is not listed through a manufacturing process, should be treated as manufactured products, rather than as construction materials.” *Id.* at p. 14. OMB characterizes its guidance on which materials are construction materials as “preliminary and non-binding guidance . . . so that agencies can begin applying Buy America requirements to those materials.” *Id.* at p. 13.

DOT will take appropriate steps to ensure the definition of “construction material” suggested in the Implementation Guidance applies to each award from a financial assistance program for infrastructure projects, including by incorporating that definition in terms and conditions incorporating a Buy America preference.

Section 70915(b) of the BIL requires OMB to issue standards that define “all manufacturing processes” for construction materials. Section VIII of the Implementation Guidance provides that, “[p]ending MIAO’s issuance of final standards on construction materials, and absent any existing applicable standard in law or regulation that meets or exceeds these preliminary standards, agencies should consider ‘all manufacturing processes’ for construction materials to mean the final manufacturing process and the immediately preceding

manufacturing stage for the construction material.” Implementation Guidance at p. 14. After considering information received through stakeholder and industry outreach, MIAO will issue further guidance that identifies initial manufacturing process for each type of construction material that should be considered as part of “all manufacturing processes.” *Id.* Agencies are also directed to “consult with MIAO, as needed, to ensure that any waiver issued for construction materials is explicitly targeted and time-limited, in order to send a clear market signal that additional standards for ‘all manufacturing processes’ in the case of construction materials will be forthcoming.” *Id.*

Proposed Waiver, Ramping Made in America Compliance, and Request for Comments

With the goal of advancing crucial infrastructure projects in a timely manner while implementing the new Buy America requirements, DOT is seeking comments on whether a temporary general waiver of the Buy America requirement for construction materials under the Build America, Buy America Act should be granted in the public interest, in order to provide sufficient time for DOT to (i) seek information and feedback from state, local, industry, and other partners and stakeholders on challenges and solutions; (ii) gather data on the sourcing of the full range of materials and products used in Federally funded transportation projects - and strategies for building up domestic capacity; and (iii) allow a reasonable adjustment period after OMB’s issuance of final standards for recipients of DOT financial assistance, including States, local communities, Tribal nations, transit agencies, railroads, airports and ports and their industrial vendors to develop and transition to new compliance and certification processes for construction materials.

During the proposed waiver period, DOT expects that implementing partners will take rapid action to prepare for compliance with the new requirements, as they currently do for iron and steel, for example, including:

1. Establishing certification processes by grantees to determine Buy America compliance for construction materials;
2. Working with industry to ensure that manufacturers are prepared to demonstrate that their products meet applicable Buy America standards;
3. Ensuring contractors and subcontractors are prepared to certify compliance with Buy America requirements for construction materials, and provide all relevant information, including contract provisions prescribing Buy America requirements;
4. Establishing appropriate diligence by State DOTs, contracting agencies, and other relevant agencies, including audits and reviews as appropriate;
5. Providing further data and information to DOT on the domestic availability of construction materials, in particular, comment by suppliers on construction materials that can be sourced in the U.S. currently.

During the proposed waiver period, DOT will also work to prepare for implementation of new Made in America requirements for construction materials by:

1. Assessing existing Made in America processes such as questions and requirements for grantees and contractors to ensure processes for reviewing construction materials are aligned with standards already in place, such as for iron and steel, as appropriate;
2. Building new Made in America requirements into forthcoming Notice of Funding Opportunities, loan programs, and other resources provided by the Department, as appropriate;

3. Reviewing DOT's enforcement processes, including stewardship and oversight agreements with states, risk-based reviews, and compliance assessment program reviews for non-compliance with Made in America standards to ensure the enforcement processes for construction materials are effective and consistent with processes for products such as iron and steel, as appropriate;

4. Reviewing data, information, and comments provided by states, industry, and other partners to further assess opportunities, challenges, and the availability of domestically-sourced construction materials. Stakeholders are encouraged to provide information to DOT in response to this notice, as well as to the OMB's [Listening Sessions and Request for Information](#) on the application of Made in America requirements to construction materials.

By the end of the waiver period, DOT expects state, industry, and other partners to establish an effective review process, as already in place for products such as iron and steel, as appropriate for construction materials, consistent with the BIL and interpreting guidance and standards. To the extent that suppliers can demonstrate through comments and information provided to the DOT that there is currently sufficient domestic availability of certain categories of construction materials, DOT will consider shortening the period of the waiver overall, or for certain categories of product, to rapidly encourage domestic sourcing. And, to the extent grantees, industry, or other partners seek future project-specific or broader waivers beyond this temporary waiver, they should be expected to provide rigorous justification of the lack of domestic availability – not only the difficulty of complying and the need for an adjustment period.

In bringing its Federal financial assistance programs for infrastructure into compliance with the Act's requirement for construction materials, DOT must also ensure that these important Federal programs for transportation infrastructure investment are able to obligate funds and complete infrastructure projects in a timely manner. For example, the new construction materials requirement will apply to capital projects funded by formula and discretionary programs of the Federal Transit Administration, including projects under the new All Stations Accessibility Program, which will upgrade the accessibility of fixed guideway public transportation systems for people with disabilities.

Because construction materials have not previously been subject to Made in America rules like iron and steel, there is a need to gather data on domestic sourcing capacity to inform stronger standards. For example, while the exact impact on highway project construction is unknown, the Department believes that it could be significant. According to the current National Bridge Inventory, there are more than 62,588 bridges with wood or timber elements (including 16,909 bridges whose main span have wood or timber elements), 2,281 bridges with non-ferrous metal elements, and 19,562 bridges with polymer-based products elements. Additionally, construction materials are used in a wide variety of other applications, such as culverts, glass for retro-reflectivity in pavement markings, glass in fiber optics involved in utility relocations, non-ferrous metals in sign sheeting, and dry wall used in rest areas and other vertical construction applications. These are just a few examples of construction materials that may be found in highway projects.

The Department has heard from stakeholders regarding concerns about the implementation of Buy America requirements to construction materials, specifically how recipients of Federal funds will need to require contractors to source Buy America compliant

construction materials and how industry will certify and demonstrate compliance. The Department recognizes both the importance of ensuring Buy America compliant construction materials and the need to implement the requirement in a way that is not overly burdensome. However, until we have more complete information on how construction materials are manufactured, and whether the manufacturing process complies with the OMB guidance, the Department is unable to ensure that transportation infrastructure projects continue to be obligated in compliance with these new requirements. Therefore, the Department is requesting comments on both sourcing and certification as well as other information relevant to applying Buy America to construction materials.

Content and timing of the proposed waiver. Specifically, DOT is requesting comment in consideration of applying its authority under Section 70914(b)(1) of the Act to provide a temporary waiver of the Buy America requirement for construction materials on DOT-assisted infrastructure projects, on the basis that applying the domestic content preference for these materials would be inconsistent with the public interest.² If issued, the waiver would be applicable to awards that are obligated on or after May 14, 2022. DOT is proposing to establish the temporary public interest waiver for construction materials for a period expiring 180 days after May 14, 2022. The Department requests comment on whether a longer or shorter effective period for the proposed waiver would be warranted.

DOT will consider all comments received in the 15-day comment period during its consideration of the proposed waiver, as required by section 70914(c)(2) of the Act. Comments

² Since the application of Buy America to construction materials is required under BIL § 70914, the authority for this waiver also based on BIL § 70914. Therefore, reference to, and reliance on, the waiver authority under specific Buy America provisions that are administered by the Department, such as 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), is unnecessary.

received after this period, but before any notice of a decision whether to grant a waiver is published in the Federal Register, will be considered to the extent practicable.

Consistency with Implementation Guidance. The Implementation Guidance notes that a “waiver in the public interest may be appropriate where an agency determines that other important policy goals cannot be achieved consistent with the Buy America requirements established by the Act.” Implementation Guidance at p. 10. The guidance also recognizes several instances in which Federal agencies may consider issuing a public interest waiver, and encourages agencies to consider an adjustment period where time limited waivers would allow recipients and agencies to transition to new Buy America preferences, rules, and processes. *Id.* at p. 11.

Issued in Washington, DC on: April 28, 2022.

Polly E. Trottenberg

Deputy Secretary