

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**[Docket No. FR-6331-N-01]****General Applicability Waiver of Build America, Buy America Provisions as Applied to Recipients of HUD Federal Financial Assistance**

AGENCY: Office of the Secretary, U.S. Department of Housing and Urban Development (HUD).

ACTION: Notice.

SUMMARY: In accordance with the Build America, Buy America Act (the Act) this notice advises that HUD is proposing a general applicability waiver for six months to the Buy America Domestic Content Procurement Preference (“Buy America Preference,” or “BAP”) to provide the agency with sufficient time to solicit information from the public relating to the agency’s potential information collection needs and the associated burdens that would be placed on recipients arising from compliance and monitoring with the BAP in connection with Federal Financial Assistance awards made by HUD. In accordance with the Act, HUD has found that this proposed general applicability waiver is in the public interest as HUD must complete the required public comment process pursuant to the Paperwork Reduction Act to establish an approved collection for the information identified as necessary to establish compliance with the BAP.

DATES: Comments on the proposed waiver set out in this document are due on or before May 14, 2022. This proposed waiver is effective for six months after May 14, 2022, unless, after reviewing any comments, HUD publishes a subsequent notice in the Federal Register explaining any changes to its determination to issue the waiver.

ADDRESSES: Interested persons are invited to submit comments on this proposed general applicability waiver. Copies of all comments submitted are available for inspection and downloading at www.regulations.gov. To receive consideration as public comments, comments must be submitted through one of two methods, specified below. All submissions must refer to the above docket number and title.

1. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the www.regulations.gov website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

2. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410-0500.

No Facsimile Comments. Facsimile (FAX) comments will not be accepted.

Public Inspection of Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8:00 a.m. and 5:00 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the submissions must be scheduled by calling the Regulations Division at (202) 708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information

Relay Service at (800) 877-8339 (this is a toll-free number). Copies of all submissions are available for inspection and downloading at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Joseph Carlile, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 10226, Washington, DC 20410-5000, at (202) 402-7082. HUD encourages submission of questions about this document be sent to BuildAmericaBuyAmerica@hud.gov.

SUPPLEMENTARY INFORMATION:

I. Build America, Buy America

The Build America, Buy America Act (the Act) was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA). Pub. L. 117-58. The Act establishes a domestic content procurement preference, the BAP, for Federal infrastructure programs. Section 70914(a) of the Act establishes that no later than 180 days after the date of enactment, HUD must ensure that none of the funds made available for infrastructure projects may be obligated by the Department unless it has taken steps to ensure that the iron, steel, manufactured products, and construction materials used in a project are produced in the United States. In Section 70912, the Act further defines a project to include “the construction, alteration, maintenance, or repair of infrastructure in the United States” and includes within the definition of infrastructure those items traditionally included along with buildings and real property.

II. HUD’s Progress in Implementation of the Act

Since the enactment of the Act, HUD has worked diligently to implement the BAP. Consistent with the requirements of section 70913 of the Act, HUD has produced a report that identifies and evaluates all of HUD’s Federal Financial Assistance programs with potentially eligible uses of funds that include infrastructure as defined by the Act to determine which

programs would be in compliance with the BAP and which would be considered inconsistent with section 70914 of the Act and thus “deficient” as defined by section 70913(c) of the Act. The report was submitted to Congress and the Office of Management and Budget (OMB) and published in the Federal Register within 60 days after the date of enactment of the Act, on January 19, 2022. Specifically, HUD published the required report in a notice entitled “Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act” in compliance with Section 70913. 87 FR 2894. In the report, HUD erred on the side of over-inclusiveness in accordance with OMB guidance,¹ finding that none of HUD’s discretionary funding programs reviewed to date fully meet the BAP requirements outlined in section 70914 of the Act and are considered “deficient” under the definition in section 70913(c). Since issuing the report, HUD has held regular meetings with Departmental offices and consulted administrative and economic data to plan to implement the Act.

III. Waivers

Under Section 70914(b), HUD has authority to waive the application of a domestic content procurement preference when (1) application of the preference would be contrary to the public interest, (2) the materials and products subject to the preference are not produced in the United States at a sufficient and reasonably available quantity or satisfactory quality, or (3) inclusion of domestically produced materials and products would increase the cost of the overall project by more than 25 percent. Section 70914(c) provides that a waiver under 70914(b) must

¹ See OMB Memorandum M-22-08, Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act, <https://www.whitehouse.gov/wp-content/uploads/2021/12/M-22-08.pdf>.

be published by the agency with a detailed written explanation for the proposed determination and provide a public comment period of not less than 15 days.

Information on this waiver may be found at the webpage at this link:

https://www.hud.gov/program_offices/general_counsel/BABA.

IV. Public Interest in a General Applicability Waiver of Buy America Provisions

In this notice, HUD is seeking comment on a proposed general applicability waiver of the BAP to HUD's Federal Financial Assistance awards to provide the Department with sufficient time to properly determine what information collections will be necessary for it to ensure compliance with the BAP as required by the Act, including completion of the processes for solicitation of public comment pursuant to the Paperwork Reduction Act (PRA) and receipt of approval for the information collection from OMB. In fiscal year 2022, HUD grantees will receive more than \$15 billion through the Department's programs where infrastructure is an eligible activity, and may be subject to the BAP. HUD believes that full compliance with the BAP will create ongoing demand for domestically produced products and deepen domestic supply chains. HUD anticipates that in order to ensure full compliance with the BAP, it will need to impose additional information collection requirements on recipients of Federal financial assistance from HUD. Specifically, HUD expects such recipients to face additional paperwork burdens in complying with the BAP and in submitting requests for product or project specific waivers of the BAP.

As HUD's previous Federal Register Notice advised, many of the Department's programs may be subject to the BAP and have previously not required compliance with similar Buy American preferences. Because the potential application of BAP mandated by the Act is new to the majority of HUD's programs and Federal Financial Assistance, HUD does not have a full

understanding of the impact on HUD's programs and Federal Financial Assistance that will be subject to the Act's provisions, nor does it have adequate information concerning the types of information necessary to demonstrate compliance with the BAP or to seek product- or project-specific waivers under the Act to readily provide the public with an opportunity to evaluate the burdens associated with the information to be collected. As a result, the Department is not yet equipped to provide recipients of Federal Financial Assistance from HUD with the opportunity to fully evaluate and comment on the proposed information to be collected as would be required under the PRA.

Because of the significance and wide scope of the new paperwork burdens expected to be placed upon the public as a result of the implementation of the BAP, HUD would like to take time to first solicit and then fully consider information from the public about the types of information that could be necessary to either request a waiver or demonstrate compliance with the BAP before beginning the process of soliciting and considering public comment in accordance with the PRA. HUD believes that the participation of the public in this important process is key to the successful implementation of the BAP across its Federal Financial Assistance programs funding infrastructure projects. Therefore, HUD has determined that it would be contrary to the public's interest to apply the BAP to Federal Financial Assistance obligated by HUD prior to completion of these processes. HUD is hereby proposing to waive the application of the BAP to its Federal Financial Assistance funds obligated for the duration of this waiver to allow for the completion of the processes as described and the receipt of approval from OMB for the appropriate information collections.

During the proposed waiver period, HUD expects that implementing partners will take rapid action to prepare for compliance with the new requirements, including, for example:

1. Establishing certification processes for grantees and sub-grantees to determine Buy America compliance;
2. Ensuring contractors, subcontractors, and suppliers are prepared to certify compliance with Buy America requirements, and provide all relevant information, including contract provisions prescribing Buy America requirements;
3. Establishing appropriate diligence by grantees and other relevant agencies, including audits and reviews as appropriate;
4. Providing further data and information to HUD on the domestic availability of covered materials, including the extent to which compliant and non-compliant goods are used during the waiver period, which can be used to help provide market insights.

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

1. Assessing existing Federal financial assistance processes to see where Made in America processes can be most efficiently added and aligned;
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 existing enforcement processes, including stewardship and oversight agreements with grantees, risk-based reviews, and compliance assessment program reviews to ensure we are ready to enforce Made in America standards.
4. Reviewing data, information, and comments provided by grantees, industry, and other partners to further assess opportunities, challenges, and the availability of domestically-sourced construction materials.
5. Training HUD staff and adopting best practices based on interagency work.

By the end of the proposed waiver period, the Department expects grantees, industry, and other partners to be ready to implement Made in America standards, consistent with the Act and interpreting guidance and standards. To the extent appropriate based on information gathered during the proposed waiver period, the Department will consider shortening the period of the waiver overall, or for certain categories of products, 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.

V. Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB Memorandum M-22-11, “Memorandum for Heads of Executive Departments and Agencies,” published on April 18, 2022, agencies are expected to assess “whether a significant portion of any cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products” as appropriate before granting a public interest waiver. HUD’s analysis has concluded that this assessment is not applicable to this waiver, as this waiver is not based in the cost of foreign-sourced products. HUD will perform additional market research during the duration of the waiver to better understand the market to limit the use of waivers caused by dumping of foreign-sourced products.

VI. Limited Duration of the Waiver

HUD remains committed to the successful implementation of the important BAP across its programs providing covered Federal Financial Assistance for infrastructure projects and will move swiftly towards completion of the processes outlined in this notice. This waiver is effective

as of May 14, 2022, and will remain in effect for all Federal Financial Assistance for infrastructure projects for six months, or until HUD publishes a notice extending the waiver or a final notice confirming the completion of the PRA process described.

VII. Solicitation of Comments on the Waiver

As required under Section 70914 of the Act, HUD is soliciting comment from the public on the waiver. In particular, HUD invites comments on the length, purpose, and scope of the waiver to allow HUD to make an informed final determination on this waiver. Please refer to the “**DATES**” and “**ADDRESSES**” sections of this notice for information on submission of comments.

Dated: _____

4/28/2022

X Marcia L. Fudge

Marcia L. Fudge
Secretary
Signed by: MARCIA FUDGE

[Billing Code: 4210-67]