

DECISION MEMORANDUM

SUBJECT: Public Interest: Minor (Ferrous) Components of Iron and Steel Products General Applicability Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for U.S. Environmental Protection Agency Financial Assistance Awards

FROM: Michael S. Regan

The U.S. Environmental Protection Agency (EPA) is seeking comment on a proposed Public Interest Minor Components Waiver from the Build America, Buy America Act requirements in section 70914 of the Infrastructure Investment and Jobs Act. This waiver is critical to ensure that agency infrastructure projects conducted by state, tribal, local, and financial assistance recipients sustain progress in communities across the country. This public interest waiver would allow manufacturers to utilize a small amount of non-domestic iron and steel components within otherwise domestically manufactured iron and steel products.

Introduction

In November 2021, Congress passed, and the President signed, the Infrastructure Investment and Jobs Act, which included the Build America, Buy America Act. This is a transformational opportunity to build a resilient supply chain and manufacturing base for critical products here in the United States that will catalyze new and long-term investment in good-paying American manufacturing jobs and businesses. Consistent with the policy direction of Executive Order 14005: Ensuring the Future is Made in All of America by All of America's Workers, section 70914 of Infrastructure Investment and Jobs Act establishes government-wide Buy America conditions on all federally funded infrastructure projects funded after May 14, 2022.

The EPA remains committed to implementing Build America, Buy America to cultivate the domestic manufacturing base for a range of products. This proposed waiver would allow the EPA's state, local, tribal, and non-profit recipients to manage their federally funded activities more efficiently. For the purposes of this proposed general applicability waiver, for only the Iron and Steel products covered by BABA, the EPA would allow up to five percent of the total material cost to include non-domestically produced miscellaneous minor iron or steel components without further need for a product-specific waiver.

This waiver for manufacturers differs from EPA's *De Minimis* waiver¹, which may allow assistance recipients to waive entire products that in total are no more than a total of five percent of a total project cost to reduce the administrative burden for assistance recipients. This Minor (Ferrous) Components of Iron and Steel Products waiver will reduce administrative burden on manufacturers that seek to ensure that their iron and steel products comply with Build America, Buy America, but may have small iron or steel components within their product that are non-domestic or of unknown origin.

¹ <https://www.epa.gov/system/files/documents/2022-10/EPA%20BABA%20De%20Minimis%20Waiver%20Final%20Oct%202022.pdf>

Minor Components Waiver

The Office of Management and Budget's April 18, 2022, memorandum, "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure" (M-22-11) encourages agencies to consider whether it is in the public interest to waive application of a Buy America preference to minor components within iron and steel products.

This waiver advances Build America, Buy America objectives by focusing needs for domestic manufacturing on higher value items while minimizing the administrative burden on manufacturers that must account for the sourcing of minor components in an iron and steel product. The waiver expedites the process for manufacturers seeking to deem their products compliant with Build America, Buy America, which then benefits assistance recipients seeking Build America, Buy America-compliant products for their federally funded projects. This waiver supports those manufacturers making extensive efforts to produce domestic iron and steel products and signals to them to prioritize high-value domestic iron and steel products. In addition, this waiver is consistent with the EPA's existing American Iron and Steel Minor Components waiver.

The waiver only applies to iron and steel products subject to the Build America, Buy America Act requirements and only concerns the iron and steel (ferrous) components of an otherwise domestically manufactured iron and steel good. The Build America, Buy America Act requires that the iron and steel used in a product is melted and/or poured in the United States and all subsequent operations occur domestically. This waiver would allow manufacturers of iron and steel products to utilize a small portion (up to five percent by product material cost) of non-domestic or unknown origin iron and steel minor components within their otherwise domestically manufactured iron and steel products.

Anticipated Program Impacts Absent a Waiver

Build America, Buy America impacts more than 60 EPA programs. The Agency is committed to robust implementation of the Act's Buy America Preference in an efficient and effective manner. Absent this waiver, manufacturers will face considerable challenges determining that their iron and steel products, which may contain trivial components of foreign or unknown origin, are compliant with Build America, Buy America. Such uncertainty could lead to a significant increase in product nonavailability waiver requests for these iron and steel products from assistance recipients.

Failure to grant such a waiver creates significant administrative burden for the EPA and recipients as both sides must negotiate their iron and steel products on a project-by-project basis, which will increase the cost to the taxpayer, delay the award of assistance agreements and extend projects. More broadly, absent a waiver, recipients might inefficiently expend resources for critical public health protection and environmental infrastructure projects and fail to meet project goals.

Further, EPA only anticipates using this waiver for a subset of iron and steel products where product manufacturers would greatly benefit from this waiver. The cost of items would tend to

be less than \$100 per product and, rarely, would apply to more than \$500 of minor components of an extremely large Iron and Steel product. Without the waiver, small, miscellaneous iron and steel components (typically less than \$100 per product) would prevent a manufacturer from providing critical infrastructure products that otherwise could be made with more than \$1,000 worth of domestic iron and steel. As a result, not having this waiver prevents a manufacturer from having a BABA-compliant product and could force a recipient to request a waiver for an altogether non-domestically sourced product.

Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB Memorandum M-22-11, 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. The EPA’s analysis has concluded that this assessment is not applicable to this waiver, as this waiver is not based on the cost of foreign-sourced products. The EPA will perform additional market research as it implements the Build America, Buy America requirements to better understand the market and to limit the use of waivers caused by dumping of foreign-sourced products.

Public Comment

The EPA is particularly interested in public comments on the five percent threshold of the total material cost of an otherwise domestically produced iron and steel product and whether commenters think the EPA should increase or decrease the percent threshold.

Proposed Waiver Decision

Section 70914(b)(1) of the Infrastructure Investment and Jobs Act authorizes the Administrator to waive the requirements of Build America, Buy America if implementation would be inconsistent with the public interest. Due to the critical need to reduce the administrative burden for recipients and agencies to ensure recipients can effectively carry out the EPA-funded activity in a timely manner thus, reducing risks to human health and the environment, the EPA proposes that it is in the public interest to waive Build America, Buy America requirements for minor (ferrous) components of iron and steel products. The EPA will review this waiver every five years, or more often as necessary, after the date on which the waiver is issued.

If you have any questions concerning the contents of this memorandum or would like to submit comments during the public comment period, please contact Dan Coogan at EPA_BABA_Waiver@epa.gov.