



U.S. Chamber of Commerce

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Via Electronic Submission

Ms. Deidre A. Harrison
Deputy Controller, Office of Federal Financial Management
Office of Management and Budget
Washington, DC 20503

**Re: Proposed Rule, and Notification of Proposed Guidance (“NPRM”);
Guidance for Grants and Agreements (88 Fed. Reg. 8374, February 9, 2023)**

Dear Ms. Harrison:

The U.S. Chamber of Commerce (“the Chamber”) appreciates the opportunity to submit comments on the Office of Management and Budget (“OMB”) Notice of Proposed Rulemaking in the above referenced NPRM as part of the OMB implementation of Build America, Buy America Act (“BABA”) statute contained in the Infrastructure Investment and Jobs Act (“IIJA”).

The IIJA imposed these novel BABA requirements on a wide range of infrastructure projects and programs across a range of sectors, including broadband, water, energy, and transportation infrastructure. Last April, OMB released M-22-11 *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure* (OMB Guidance), which provides direction to Federal agencies on the application of BABA requirements to Federal financial assistance programs for infrastructure. The OMB Guidance also set forth a process to waive these requirements under certain circumstances. The NPRM proposes to revise this Guidance.

As our topline recommendations, the Chamber urges OMB to (1) ensure that BABA requirements are implemented in a manner taking into account supply chain realities and congressional intent; (2) guarantee the consistency of these BABA requirements with U.S. international obligations; (3) provide greater transparency to industry and other stakeholders on the implementation of BABA requirements; (4) consider labor costs associated with the manufacture of end products; (5) drive cross-agency improvements in permitting processes to facilitate domestic building; and (6) avoid the imposition of domestic sourcing requirements on construction materials beyond the scope of the law’s requirements.

OMB Must Balance BABA Requirements With Supply Chain Realities and the Need to Modernize America's Infrastructure

Maintaining and enhancing domestic manufacturing capacity is a laudable goal. With well-established global supply chains in many sectors, the implementation of BABA requirements should not be applied in a manner that will greatly increase costs or halt or otherwise delay needed infrastructure projects.

The Chamber is concerned that the broad application of BABA requirements under the IIJA, without sufficient waivers, risks impairing access to essential, smart, modern, resilient services and infrastructure. In enacting the IIJA, Congress recognized that the primary purpose of the legislation was to upgrade America's infrastructure. Absent sufficient flexibilities, BABA requirements could easily become an obstacle to that objective by increasing costs and limiting access to hard-to-find materials.¹ BABA included a waiver process to account for this dynamic with the understanding that BABA requirements must be appropriately balanced with the goal of robust infrastructure investment.

Similarly, the implementation of BABA requirements must account for supply chain realities. The broad-based application of Buy America requirements has the strong potential to disadvantage many sectors for which many components are only available from overseas suppliers. For example, information technology components are particularly impacted by domestic content requirements given the global nature of supply chains in this sector, where products are assembled from parts made in dozens of countries. Additionally, we encourage OMB to consider intangible sources of value such as R&D and intellectual property in determining component costs for manufactured products. Other sectors such as transportation infrastructure are similarly affected and would benefit from such an approach.²

Given these considerations, the Chamber welcomes this NPRM as a first step towards much-needed clarifications to the initial OMB Guidance, but more must be done by individual federal agencies to implement BABA requirements in a manner reflecting supply chain realities and congressional intent to modernize America's infrastructure. This undertaking is insufficient to ensure a sound and smooth implementation of BABA for all industry stakeholders as DOT and its modal agencies need to issue more specific guidance for particular industry sectors.

¹ <https://www.vox.com/policy-and-politics/2022/10/26/23375613/buy-america-biden-infrastructure>

² <https://www.washingtonpost.com/us-policy/2023/02/18/biden-buy-america-roads-bridges/>

OMB Must Implement BABA in a Manner Consistent With International Obligations

Ensuring that BABA rules are consistent with U.S. international trade obligations is critical to acknowledge the importance of international trade to the U.S. economy, to avoid trade retaliation, and to provide American businesses the certainty they need to invest, build, and hire. The initial OMB Guidance recognizes that “[p]ursuant to section 70914(e) of the Act [the IIJA], this guidance must be applied in a manner consistent with the obligations of the United States under international agreements.” This statement principally refers to the World Trade Organization (WTO) Government Procurement Agreement (GPA) and the government procurement obligations in U.S. free-trade agreements (FTAs).

That statement made sense for many reasons. Complying with these international obligations allows government procurement expenditures to secure better value for limited taxpayer dollars. It also affords access to products that may not be available in sufficient quantity or quality from domestic sources, and it lets U.S. workers and companies access lucrative foreign government procurement opportunities in exchange for access to U.S. procurement.

However, the initial OMB Guidance approached this matter in a circuitous and confusing manner that may well give officials at the federal, state, and local levels the mistaken impression that compliance with these obligations is not mandatory. It conveyed that compliance with these international obligations may be a basis for a discretionary public interest waiver. However, Section 70914(a) of the IIJA mandates compliance with U.S. international obligations in respect of infrastructure-related procurement. Setting up a scenario where such public interest waivers may — or may not — be issued is inconsistent with the IIJA, and such an approach opens the door to costly noncompliance with international obligations. Further, given the Administration’s stated aim of minimizing the issuance of waivers, this approach is very likely to result in frequent violation of U.S. international obligations.

Unfortunately, OMB’s proposed revised Guidance for Grants and Agreements, published on February 9, 2023, adds to the confusion regarding the treatment of international obligations by its silence on the IIJA’s requirement that BABA must be applied consistent with U.S. international obligations. The recipients of IIJA financial assistance include many state government agencies and other sub-federal entities whose procurement is bound by U.S. commitments under the GPA and U.S. FTAs. Applying BABA rules to their government procurements is a clear conflict with these international trade agreement obligations.

U.S. government violation of international obligations it has undertaken with regard to government procurement would potentially be devastating to valuable commercial relationships and alliances. It would invite trading partners to bring trade

disputes against the United States — which experts advise they will win. Lawless behavior by the U.S. government would invite lawless behavior in return, and this would in turn result in a crumbling of the trade rules that U.S. businesses depend on to sustain high-paying U.S. jobs.

Procurement-related rule violation is particularly likely to give rise to retaliation against industries that export to government procurement markets abroad. For example, foreign government procurement markets generate many tens of billions of dollars in sales for U.S. producers of medical goods. The losses to American workers and companies from this retaliation would be substantial. The Biden/Harris Administration recognized this dynamic in 2021 when it wisely abandoned an effort to withdraw certain U.S. medical products from the GPA and FTAs, perceiving accurately that the U.S. had more to lose than to gain from such a move.

OMB can and should follow the precedent the Obama/Biden Administration set on this issue in 2009. When OMB implemented Section 1605 of the 2009 American Recovery and Reinvestment Act (“Recovery Act”), OMB constructed its Guidance carefully to provide a clear and integrated approach to this issue. The Recovery Act, just like the IIJA, required that its ‘Buy America’ requirement be applied in a manner consistent with U.S. international obligations. OMB added a provision to address this issue³ which is still in the Code of Federal Regulations. OMB should apply that approach to the IIJA and incorporate it into the OMB Guidance.

Leaving state and local government officials to deal with the confusing state of play laid out in the initial OMB Guidance will produce a range of unproductive outcomes that delay projects, add needlessly to costs, and result in the waste of taxpayer dollars. Even though purchasing a foreign product will often be the sole option, states and local governments are highly unlikely to challenge the OMB Guidance to procure a foreign product subject to a trade agreement. State and local officials are frequently unaware of the reach of the GPA and U.S. FTAs and the countries and products covered by these agreements.

OMB Must Address Informational Challenges for Industry and Eligible Entities

While domestic preferences have been part of U.S. law for many years, the application of BABA requirements to a wide range of new programs, sectors, and entities will constitute a long-term challenge. The initial OMB Guidance and subsequent information provided through the Made in America website and other platforms has thus far failed to provide impacted stakeholders with sufficient information regarding several important aspects of BABA implementation. In June

³ 2 CFR §176.160: Award term—Required Use of American Iron, Steel, and Manufactured Goods (covered under International Agreements) —Section 1605 of the American Recovery and Reinvestment Act of 2009.

2022, the Chamber and several other organizations sent a letter to OMB outlining 46 questions regarding BABA implementation in light of the IJJA's expanded application of these requirements, followed by a second letter in November 2022.

To date, OMB has not answered these questions, which is particularly concerning because BABA is now in effect. Through this rulemaking and other means, OMB must provide industry and other impacted stakeholders a clearer understanding of BABA requirements and processes to enable effective compliance with statutory requirements and the capability to efficiently modernize America's infrastructure. We specifically outline two of these concerns below pertaining to the scope of covered infrastructure programs and the transparency of the waiver process.

First, the IJJA's BABA requirements apply to all federal financial assistance for infrastructure programs, yet the full scope of the covered programs is unclear. However, while the statute outlines the types of infrastructure programs to be included (e.g., water, broadband), the text also allows other types of infrastructure programs to be included within BABA's purview. A single list of all covered infrastructure programs is currently not available, which makes it challenging for the private sector and state and local governments to have a comprehensive understanding of which federal infrastructure programs are subject to BABA requirements and which are exempt. The Chamber recommends OMB publish a complete list of all federal infrastructure programs on a single website to provide clarity for all potentially impacted stakeholders.

Contributing to this ambiguity is the directive within the OMB Guidance to "interpret the term 'infrastructure' broadly," which in effect requires agencies to use creative interpretations that could cover numerous programs and industries not contemplated by Congress. Future guidance should exclude this unbounded requirement and instead only encompass the specific categories of infrastructure enumerated by the IJJA.

Second, the IJJA established a waiver process to prevent the application of BABA requirements in certain circumstances. Given that many of the materials covered under BABA requirements are produced domestically in insufficient quantities or not produced at all, a robust waiver process is imperative. However, the ongoing implementation of the waiver process has raised many questions that require attention and resolution in this proceeding. In particular, some concerns have been raised about including useful and sufficient information contained on the Made in America website on waivers, including the status of proposed waivers, and concerns that not all waivers have been included on the website.

OMB Must Drive Cross-Agency Improvements in the Permitting Process to Make it Easier to Build Domestically

Making improvements to the Federal environmental review and permitting process will help support more domestic sourcing of products and services and deliver value for taxpayers. Reducing permitting delays in decision-making will enhance project planning, and delivery and is paramount to realizing our shared goals of a strong American economy and continued environmental protections.

Since the beginning of the National Environmental Policy Act (NEPA) implementation in the 1970s, the time it takes to complete environmental reviews has increased significantly, unnecessarily delaying investment and environmental stewardship. According to the Council on Environmental Quality, the average completion time for the environmental review process is now four and a half years, slowing down transportation, forestry, manufacturing and clean energy projects as well as other federal authorizations. These long reviews delay investment in modern, efficient infrastructure and job creation, including potential reductions to congestion-related emissions, enhanced climate resiliency, and all forms of energy, including solar and wind projects.

In addition to NEPA, various other Federal permitting processes create a complicated set of permitting steps that increase investor uncertainty and sometimes block projects altogether. Improvements are needed to make these processes clearer and federal decision-making more efficient. Adopting permit streamlining policies in conjunction with any BABA policies will help reduce delays and improve the predictability of the Federal permitting process. It will allow businesses to plan and invest with confidence while enhancing economic productivity and environmental stewardship.

OMB Should Consider Labor Costs Associated with the Manufacture of End Products in Implementing BABA

The Chamber shares the Administration's goal of supporting and uplifting the American workforce, but labor shortages and rising labor costs pose challenges to the expansion of some domestic manufacturing sectors. As manufacturers expand operations in the United States, they are increasing the number of high-wage manufacturing jobs. In fact, U.S. manufacturing employment has reached 13 million, a level not seen since before the Great Recession. However, job openings in manufacturing continue to outpace job seekers by a two-to-one margin, and demographic realities suggest this "new normal" for the labor market will persist for the foreseeable future.

Consequently, the Chamber urges OMB to allow manufacturers to take into account labor costs associated with the manufacture of end products in their BABA

compliance determinations. Currently, these labor costs are not included when calculating the cost of domestic components for purposes of compliance.

OMB Must Avoid Imposing Domestic Sourcing Requirements on Construction Materials Beyond the Language of the IIJA

To expeditiously execute on the promise of the IIJA to improve U.S. infrastructure, it is imperative that federal and state partners responsible for distributing federal investments respect the exclusion of certain construction materials from BABA—as the law clearly affirms—and avoid imposing any domestic sourcing requirements on aggregates, cement, and related materials.

Section 70917(c)(1) established an important limitation to the term “construction materials.” The limitation prohibits the term “construction materials” used in BABA from including “cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.”

Section 70917(c)(2) prohibits the same construction materials from being included as “inputs” in “all manufacturing processes” that produce “construction materials.” OMB is required to issue standards that define the term “all manufacturing processes” for construction materials to which BABA applies a domestic content procurement preference.

Neither of these sections establishes that the listed items are not construction materials, just that they are excluded from the “construction materials” for which BABA establishes a domestic content procurement preference. BABA does not provide authority for the listed materials to be considered manufactured products.

Congress considered cement and cementitious materials, aggregates such as stone, sand, or gravel, and aggregate binders and additives to be construction materials for which they were not creating a domestic content procurement requirement because the limitation was drafted to the term “construction materials” as that term is used under BABA. If the items in the limitation were not construction materials, there is no purpose, reason or cognizable consequence to affirmatively removing them from that term as it is used under BABA.

Congress understood that the construction materials they were excluding from the term “construction materials” are, when combined, concrete and asphalt mix construction materials. Congress included Section 70917(c)(2) to ensure that the combination of construction materials in Section 70917(c)(1) into concrete and asphalt mix construction materials did not create a domestic content procurement preference for concrete or asphalt mixes. Congress’ intent to not establish a domestic content procurement preference for their combination as concrete or asphalt mix is clear.

In a similar vein, we seek clarification on whether exemptions identified under the current Consolidated Appropriations Act of 2014 including AIS P.L. 113-76, Section 436 will also apply to BABA. This section specifically exempts a specific range of industrial water technology equipment including pumps, blowers, MBR, clarifiers, presses, grinders, rakes and conveyors.

Conclusion

The Chamber thanks OMB for considering our views on this NPRM, and we look forward to continuing to engage on BABA implementation moving forward. If you have any questions, please reach out to Matt Furlow, Policy Director at the Chamber Technology Engagement Center (C_TEC)(mfurlow@uschamber.com) and John Murphy, Senior Vice President for International Policy (jmurphy@uschamber.com).

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil L. Bradley", with a large, stylized flourish at the end.

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and Head of Strategic Advocacy