



DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA-2022-0013]

Notice of Partial Buy America Waiver for Vans and Minivans

AGENCY: Federal Transit Administration, Department of Transportation (DOT).

ACTION: Notice of Buy America Waiver.

SUMMARY: In response to multiple individual requests for a Buy America nonavailability waiver for non-ADA-accessible vans or minivans that can be used in federally funded vanpool programs, and because the Federal Transit Administration (FTA) has been unable to identify any manufacturer of non-ADA-accessible vans or minivans that fully comply with Buy America, FTA is issuing a partial, time-limited, general nonavailability waiver from the requirements of Buy America as described in this notice.

DATES: This waiver is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] and expires two years from this date, or upon publication of a rescission notice if FTA determines that a fully Buy America-compliant vehicle has become available, whichever occurs first.

FOR FURTHER INFORMATION CONTACT: Jason Luebbbers, FTA Attorney-Advisor, at (202) 366-8864 or Jason.Luebbbers@dot.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Under FTA's Buy America statute, FTA may obligate funds for a project to procure rolling stock only if the cost of components and subcomponents produced in the United States is more than 70 percent of the cost of all components of the rolling stock, and if final assembly of the rolling stock occurs in the United States. 49 U.S.C. 5323(j)(2)(C). A manufacturer of rolling

stock must submit to pre-award and post-delivery audits and independent inspections to verify its compliance with Buy America on a per-procurement basis. *Id.* Section 5323(m).

FTA may waive Buy America requirements for a product if, among other reasons, a compliant version of the product is not produced in a sufficient and reasonably available amount or is not of a satisfactory quality. *Id.* Section 5323(j)(2)(B). If FTA denies a request for a nonavailability waiver, FTA must provide the waiver applicant with a written certification that: the item is produced in the United States in a sufficient and reasonably available amount; the item produced in the United States is of a satisfactory quality; and includes a list of known manufacturers in the United States from which the item can be obtained. *Id.* Section 5323(j)(6).

On October 20, 2016, FTA granted a general public interest waiver for mass-produced, unmodified non-ADA-accessible vans and minivans, only from its domestic content requirement, for three years or until a compliant manufacturer came forward, whichever came first. (81 FR 72667). At that time FTA had identified some models of van or minivan for which final assembly occurred in the United States but could not identify a van or minivan that also satisfied the domestic content requirement. The waiver expired on September 30, 2019. Since expiration, FTA has received requests to reissue the 2016 waiver from grant recipients, the American Public Transportation Association (APTA), and turnkey vanpool service provider Enterprise.

In 2021, FTA received three applications for waivers of the domestic content requirement, but not the final assembly requirement, for non-ADA-accessible vans and minivans to be used in vanpool service, based on the nonavailability of compliant vehicles. A vanpool vehicle is a vehicle with seating capacity for at least six adults not including the driver. 49 U.S.C. 5323(i)(2)(C)(ii)(I). The three applicants are Coast Transit Authority of Biloxi, Mississippi; the Metropolitan Transportation Commission of San Francisco, California; and the Ann Arbor Area Transportation Authority in Michigan. All three applications are to support procurements of service contracts with “Commute with Enterprise” to carry out vanpool programs of between 40 and 250 vehicles.

Today, final assembly for some mass-produced, unmodified non-ADA-accessible van and minivan models occurs in the United States. However, these models either do not comply with FTA's domestic content requirement or FTA recipients cannot verify the domestic content because their manufacturers are unwilling to sign the required Buy America certification regarding minimum domestic content or submit to FTA's pre-award and post-delivery audit requirements.

On July 19, 2022, FTA published a notice (87 FR 43101) proposing a nonavailability waiver for non-ADA accessible vans and minivans and seeking public comment. FTA proposed that, in lieu of applying Buy America's domestic content standard for rolling stock, FTA instead would require non-ADA-accessible vans and minivans to have U.S.-manufactured engines or motors and U.S. final assembly, as reported to the National Highway Traffic Safety Administration (NHTSA) under the American Automobile Labelling Act (AALA). *See* 49 U.S.C. 32304 and 49 CFR part 583. FTA requested comments from all interested parties regarding the proposed waiver and whether it should be modified from FTA's proposal, and why.

RESPONSE TO COMMENTS

FTA received submissions from 126 discrete commenters in Docket FTA-2022-0013, including comments from a variety of transit agencies, national associations, vanpool operators, state Departments of Transportation, and the general public. Comments were almost entirely supportive of the waiver, concurring that no known manufacturers currently meet all of FTA's Buy America requirements. Most commenters requested that FTA expand the waiver, either in scope, duration, or both. Only one commenter opposed the waiver.

Commenters supportive of the waiver noted the following benefits: support for U.S. jobs by requiring U.S. final assembly and U.S.-manufactured engines or motors; climate benefits and decreased congestion through reducing the number of vehicles on the road; expansion or maintenance of vanpool service and vanpool fleets; increased mobility for communities; and

greater ability to hire drivers for the relatively smaller class of vehicle compared to buses. Commenters noted the roles vans and minivans play in providing mobility access in large urban, small urban, and rural communities, for a variety of social service programs, and for elderly passengers and riders with disabilities who do not need an ADA-accessible van. Below is a summary of the categories of comments received and FTA's responses.

Requests to Expand or Clarify the Scope of Waiver

FTA received a number of comments seeking to expand or clarify the scope of the waiver. A number of commenters advocated for expanding the definition of vanpool or expanding the waiver to cover other classes of vehicle. One commenter noted that carpooling does not require six passenger seats and advocated for waiver eligibility for passenger vehicles with fewer seats. Several commenters advocated for waiver eligibility for larger classes of vehicles, such as cutaways. Finally, three commenters noted that several models of sport utility vehicle (SUV) meet the statutory definition of a vanpool vehicle, but not the common meaning of van or minivan, and requested that the waiver scope be revised to include SUVs.

FTA declines to expand the waiver beyond the scope of the waiver requests it received: that is, to unmodified non-ADA-accessible vans and minivans that meet the statutory definition of a vanpool vehicle. For purposes of FTA funding programs, a vanpool vehicle must have seating capacity for at least six adults, not including the driver. 49 U.S.C. 5323(i)(2)(C)(ii)(I). The vanpool vehicle definition is statutory, and the waiver requests FTA received were for vanpool vehicles. Vehicles with fewer seats do not meet the statutory definition of vanpool vehicles and therefore are beyond the scope of this waiver action. FTA has not received any request to waive requirements for larger vehicles like cutaway vans and buses, which also are beyond the scope of this action. FTA agrees with the comment that an SUV that meets the statutory definition of a "vanpool vehicle" would be covered by this waiver. FTA finds it unnecessary, however, to change the terminology of the waiver based on this comment.

FTA received several comments related to ADA-accessible vehicles and their exclusion from the proposed waiver. One commenter stated that no ADA-accessible vans or minivans are Buy America compliant and requested that the waiver also apply to those vehicles. Another commenter stated concern that the waiver promoted non-ADA-compliant vehicles at the expense of ADA-compliant ones.

ADA-accessible vans and minivans typically are created by converting a “standard model” van or minivan by applying aftermarket manufacturing steps and adding or replacing vehicle components, such as a wheelchair lift. Because of these further manufacturing steps and component changes, ADA-accessible vans and minivans have different characteristics from the unmodified vehicles. FTA has not received any requests to waive Buy America requirements for ADA-accessible vehicles. For these reasons, ADA-accessible vans and minivans are beyond the scope of this action.

One commenter requested FTA clarify the meaning of “unmodified” and asked whether the installation of advanced driver-assistance systems (ADAS) disqualified otherwise eligible vehicles from waiver eligibility.

FTA uses the term unmodified to mean the mass-produced models of vans and minivans produced by automotive manufacturers that have not undergone aftermarket manufacturing. For purposes of this waiver, FTA uses the term primarily to distinguish from ADA-accessible vans and minivans that are created by converting base vehicles to make them wheelchair-accessible through aftermarket manufacturing processes. The installation of hardware and components necessary for ADAS, such as lidar, radar, computing and data storage, cameras, and other integrations, does not disqualify an otherwise eligible van or minivan from eligibility under this waiver. However, the addition of ADAS equipment may raise entirely separate issues related to technology standards or safety standards depending on the level of autonomy achieved and the components involved. FTA recommends consulting with the appropriate FTA regional office before using FTA funds to acquire and install ADAS in vehicles.

One commenter asked whether zero-emission vehicles such as electric vehicles would be eligible under the waiver. Zero emission vehicles, including electric vehicles, are eligible if they otherwise satisfy the conditions of the waiver.

Requests to Remove the Requirement that Engines or Motors be U.S.-Manufactured

Ten commenters disfavored the waiver requirement that engines or motors be produced in the United States as reported under the AALA. Many of those commenters cited supply chain difficulties and long lead times for commercial vans and minivans as a rationale for removing the country-of-origin requirement for engines and motors. One commenter stated that FTA should remove the country-of-origin requirement for motors to promote the adoption of electric vehicles. Several commenters noted that some vehicles currently used in vanpool fleets would not be eligible under this requirement, and that requiring U.S.-manufactured engines and motors would impact fleet usage.

FTA's intent in granting this waiver is to strike a balance between making vanpool-capable vehicles available to public transportation providers, and at the same time maximizing U.S. manufacturing activity in accordance with Executive Order 14005, *Ensuring the Future Is Made in All of America by All of America's Workers*. FTA understands that requiring U.S.-manufactured engines and motors will limit vehicle selection for recipients and may impact turnkey service contractors with existing fleets, compared to if FTA did not require domestic manufacturing at all. However, there are a number of van and minivan models currently available that meet FTA's waiver requirements. The requirement that engines or motors are of U.S. origin strikes a balance between availability and supporting U.S. manufacturing, and therefore, FTA declines to revise it.

Requests to Lengthen the Waiver Period or Perform an Availability Analysis Before Allowing the Waiver to Expire

Sixty-nine commenters—many of them citing COVID-19 supply chain issues and reduced dealership inventory—requested that FTA extend the waiver beyond the proposed two-

year period. Many commenters pointed out that FTA's 2016 waiver for vans and minivans lasted for three years. Forty-nine commenters requested that the proposed waiver continue indefinitely until such time as a fully Buy America compliant vehicle becomes available.

FTA's two-year waiver is time-limited, consistent with the waiver principles and criteria contained in the Office of Management and Budget's (OMB) Initial Implementation Guidance, M-22-11. Furthermore, FTA notes that this waiver applies to contracts entered into during the two-year period, independent of the delivery date of vehicles. For these reasons, FTA declines to extend the waiver period.

Objection to Proposed Waiver

One commenter objected to the proposed waiver, noting that manufacturers had three years under the 2016 waiver to produce a compliant vehicle, and FTA providing another waiver would send the wrong message to industry. The commenter also stated that transit agencies do not conduct adequate market research for their procurements and overall do not do a reasonable job of buying rolling stock.

By law, if FTA denies a request for a nonavailability waiver, FTA must certify a list of known manufacturers from which the required item can be obtained. 49 U.S.C. 5323(j)(6). FTA is presently unable to make that certification because FTA cannot identify a Buy America compliant, unmodified, non-ADA-accessible van or minivan produced in the United States. No bidder or offeror certified compliance with Buy America requirements in response to the procurements conducted by the three waiver applicants. Additionally, FTA conducted outreach to manufacturers with the highest levels of U.S. or Canadian¹ content and U.S. final assembly, and those manufacturers expressed disinterest in participating in FTA-funded procurements due to domestic content and auditing requirements.

¹ Reporting under the AALA distinguishes between the United States and Canada for the location of final assembly and the country of origin of engines and transmissions, but it does not distinguish between the United States and Canada for content levels. 49 U.S.C. 32304(b)(A); 49 CFR 583.5.

FTA's waiver is intended to maximize the domestic content of the vans and minivans procured with Federal assistance, consistent with U.S. Department of Transportation policy goals. FTA will rescind the two-year waiver if, during the waiver period, the FTA determines that a Buy America compliant van or minivan is available.

FINDING ON WAIVER

In accordance with subsection 70916(c) of the Build America, Buy America Act (Title IX of the Infrastructure Investment and Jobs Act, Pub. L. 117-58), FTA consulted with the National Institute of Standards and Technology's Hollings Manufacturing Extension Partnership (MEP), which determined that no domestic entity currently manufactures the subject vans and minivans in compliance with Buy America requirements, and that supplier scouting by MEP is not warranted.

Therefore, for the reasons stated in FTA's July 19, 2022, notice of proposed nonavailability waiver and based on comments received from the public, FTA is granting the waiver as proposed.

For mass-produced, unmodified non-ADA accessible vans and minivans with seating capacity for at least six adults not including the driver, in lieu of applying the Buy America standards for rolling stock, FTA will require:

- (1) Final assembly must be in the United States, as reported to NHTSA under the AALA;
- (2) The country of origin of the engine or (in the case of electric vehicles), motor must be the United States, as reported to NHTSA under the AALA;
- (3) The waiver is available to all FTA grant recipients;
- (4) The waiver expires two years from the date this notice is published in the *Federal Register*, or upon FTA's publication of a *Federal Register* notice rescinding the waiver after determining that a fully Buy America-compliant vehicle has become available, whichever occurs first.

For the duration of this partial general nonavailability waiver, FTA recipients do not need to submit individual applications for nonavailability waivers for these vehicles.

Nuria I. Fernandez,

Administrator.

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