



## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

[Docket No.: DOT-OST-2023-0120]

### Notice of Proposed Waiver of Buy America Requirements for the Pacific Island Territories and the Freely Associated States

**ACTION:** Notice; request for comments.

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**SUMMARY:** The Department of Transportation (DOT) is seeking comments on a proposed temporary general applicability public interest waiver of the requirements of section 70914(a) of the Build America, Buy America Act (BABA) included in the Infrastructure Investment and Jobs Act (IIJA) and related domestic preference statutes administered by DOT and its Operating Administrations (OAs) for federal financial assistance awarded for infrastructure projects located in the Commonwealth of Northern Mariana Islands (CNMI), Guam, and American Samoa, collectively referred to as the Pacific Island territories. The proposed waiver would also apply to financial assistance that is subject to a DOT domestic preference statute and provided by DOT to the Freely Associated States in the Pacific (the Republic of Palau, Republic of the Marshall Islands, and Federated States of Micronesia). BABA only applies to the United States and its territories. The waiver would provide time for the Department to collect and analyze evidence to determine if a more targeted waiver of these requirements is in the public interest. The waiver would also allow time for the Department and its OAs to offer technical assistance to potential assistance recipients in the remote communities in the Pacific Island territories and Freely Associated States. The waiver will remain in effect for 18 months after the effective date of the final waiver and will be reviewed as often as necessary.

**DATES:** Comments must be received by **[INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Please submit your comments to the U.S. Government electronic docket site at <http://www.regulations.gov>, Docket: DOT-OST-2023-0120.

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](mailto:darren.timothy@dot.gov) or at 202-366-4051. For legal questions, please contact Jennifer Kirby-McLemore, DOT Office of the General Counsel, 405-446-6883, or via e-mail at [jennifer.mclemore@dot.gov](mailto:jennifer.mclemore@dot.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

The Buy America preferences set forth in Section 70914(a) of BABA included in the IIJA require that all iron, steel, manufactured products, and construction materials used for infrastructure projects in the United States under federal financial assistance awards be produced in the United States.

Under Section 70914(b) and in accordance with the Office of Management and Budget (OMB)'s Guidance Memorandum M-22-11, Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, DOT may waive the BABA application in any case in which it finds that: (i) applying the domestic content procurement preference would be inconsistent with the public interest; (ii) types of iron, steel, manufactured products, or construction materials are not produced in the U.S. in sufficient and reasonably available quantities or of a satisfactory quality; or (iii) the inclusion of iron, steel,

manufactured products, or construction materials produced in the U.S. will increase the cost of the overall project by more than 25 percent. All waivers must have a written explanation for the proposed determination; provide a period of not less than fifteen (15) calendar days for public comment on the proposed waiver; and submit the proposed waiver to the OMB Made in America Office (MIAO) for review to determine if the waiver is consistent with policy.

BABA also 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. IIJA section 70917(a)–(b). Federal financial assistance programs administered by DOT’s Operating Administrations (OAs)<sup>1</sup> are subject to a variety of mode-specific statutes that apply particular Buy America<sup>2</sup> requirements to iron, steel, and manufactured products, including 49 U.S.C. 50101 (FAA); 23 U.S.C. 313 (FHWA); 49 U.S.C. 5323(j) (FTA); and 46 U.S.C. 54101(d)(2) (MARAD). Recent annual appropriations acts have also required DOT to apply the Buy American Act (41 U.S.C. chapter 83) to funds appropriated under those acts,<sup>3</sup> where a mode-specific statute is not in place. These statutes also allow for waivers of the Buy America requirements to be issued when the Department determines that doing so is in the public interest.

DOT and its OAs provide financial assistance to the three Pacific Island territories of Guam, American Samoa, and CNMI through both discretionary grants and allocated programs, including assistance programs for highways and bridges, public transportation, airports, and port facilities. The Freely Associated States (the Republic of Palau, Republic of the Marshall Islands,

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<sup>1</sup> DOT OAs that provide or administer financial assistance covered under this proposed waiver include the Federal Aviation Administration (FAA); Federal Highway Administration (FHWA); Federal Transit Administration (FTA); and the Maritime Administration (MARAD).

<sup>2</sup> In this notice, references to “Buy America” include domestic preference laws called “Buy American” that apply to DOT financial assistance programs.

<sup>3</sup> For example, section 409 of the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2022 states that “no funds appropriated pursuant to this Act may be expended by an entity unless the entity agrees that in expending the assistance the entity will comply with sections 2 through 4 of the Act of March 3, 1933 (41 U.S.C. 8301-8305, popularly known as the “Buy American Act”).”

and Federated States of Micronesia) in the Pacific region are also eligible recipients of discretionary grants under FAA's Airport Improvement Program (AIP).

Over five years from FY 2018 to FY 2022, DOT OAs provided over \$340 million in financial assistance for 160 capital projects in the Pacific Island territories under various programs where infrastructure is an eligible activity and may be subject to BABA or other existing DOT Buy America requirements. FAA also provided \$88 million in AIP discretionary grants to the Freely Associated States in the Pacific region for 20 projects over that same time period.

Economies in the Pacific Islands are over 5,000 miles from the mainland United States and must import products via air or sea. These economies have few local heavy manufacturers and largely rely on established regional supply chains from east Asia, Australia, and New Zealand. Most goods, equipment, materials, and supplies are imported and rely on shipping with associated timelines and unpredictable shipping fuel costs fluctuations. Moreover, materials sourced from the United States lead to additional shipping fees and longer lead times, thus significantly extending construction activity schedules. Lastly, ongoing gaps in supply chain availability impact lead times for materials, increasing project timelines. For these reasons, DOT is concerned that complying with Buy America requirements may increase already elevated project time and costs—particularly in the short run—and seeks time to better understand the local manufacturing footprint and the balance of equities for residents of the Pacific Island territories. DOT is aware that substantial changes to shipping and supply chains to incorporate domestic sourcing requirements in the Pacific Island territories could take multiple years to establish.

In considering this waiver, DOT consulted with the relevant Federal assistance programs in the respective OAs, including the regional offices in those agencies that directly administer DOT funding programs in the Pacific Island territories and Freely Associated States. DOT also relied on other communications that it has received from stakeholders in those territories. For

example, CNMI and Guam have cited their isolated location in the Western Pacific and reliance on ocean freight as the only mode of transporting commodities to the island as creating significant challenges in obtaining materials from domestic sources, with impacts on both project costs and delivery schedules. The two territories have also indicated that shipping construction materials from the continental United States raises shipping costs by approximately 30 percent above the cost to ship directly to the islands from Asia.

Other Federal agencies have also conducted outreach efforts to the Pacific Island territories and received similar feedback. For example, representatives from American Samoa have indicated to the Federal Emergency Management Agency that “As a containerized community, our territories depend on goods, equipment, materials, and supplies to be imported.” They further stated that “we can purchase equipment from foreign countries closer to American Samoa and with reasonable prices and shorter shipping time.” American Samoa representatives also noted that availability of materials from nearby foreign countries such as New Zealand and Australia would result in a significant cost savings to the grantors.

### **Proposed Waiver and Request for Comments**

DOT is proposing to use its authority under Section 70914(b)(1) to waive the Act’s Buy America preferences for iron and steel, manufactured products, and construction materials used in infrastructure projects located within the Pacific Island territories of CNMI, Guam, or American Samoa and funded under DOT-administered financial assistance programs. The proposed waiver would apply to all awards obligated after the effective date and, in the case of awards obligated prior to the effective date, all expenditures for non-domestic iron, steel, manufactured products, and construction materials incurred after the effective date.

Because many DOT-administered financial assistance programs are also subject to program-specific domestic preference requirements, the waiver proposed in this notice would also apply to those requirements. Specifically, the waiver would also be an exercise of DOT’s authority to issue public interest waivers under 23 U.S.C. 313(b)(1), 49 U.S.C. 5323(j); 46

U.S.C. 54101(d)(2)(B)(i)(I), 49 U.S.C. 50101(b)(1), and 41 U.S.C. chapter 83. Under those DOT authorities, the proposed waiver would also apply to projects in the Freely Associated States (the Republic of Palau, Republic of the Marshall Islands, and Federated States of Micronesia).<sup>4</sup>

The proposed duration of the waiver is 18 months after the effective date of the final waiver. The Department will review this waiver in 12 months to assess whether it remains necessary to the fulfillment of DOT's missions and goals and consistent with applicable legal authorities, such as the IIA, Executive Order 14005, and OMB M-22-11. The Department may, based on the results of that review, terminate the waiver, or take action to develop a new waiver in consultation with the MIAO.

Without the waiver, DOT-assisted infrastructure projects located within the Pacific Island territories and Freely Associated States will continue to experience challenges with product delivery, availability, reliability, and project scheduling. Infrastructure project schedules rely on readily available products delivered within reasonable timeframes. Due to the extreme distances that manufacturers for products produced in the mainland United States would have to ship products to the Pacific Island territories and Freely Associated States and due to the lack of existing local product supply networks for these products, manufacturers may not be able to assure on-time delivery of compliant products and associated projects in the Pacific Island territories and Freely Associated States could potentially face unreasonable scheduling uncertainty.

On the other hand, the proposed waiver will likely help grant recipients establish rules and procedures to manage Buy America requirements. Furthermore, the waiver will provide recipients more options to efficiently complete projects.

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<sup>4</sup> The proposed waiver under section 70914(b)(1) of the Act excludes projects in the Freely Associated States because the requirements under section 70914(a) are applicable only to infrastructure projects "in the United States" and, therefore, the BABA requirements do not apply to projects in the Freely Associated States. However, airports located in the Freely Associated States are eligible recipients under FAA's Airport Improvement Program, and the Buy American requirements specific to that program would thus also apply to the Freely Associated States.

Uncertainties regarding capacity, shipping, and supply networks make domestic sourcing in the Pacific Island territories and Freely Associated States challenging for assistance recipients, shippers, and DOT staff in the short run. DOT is engaging to understand opportunities to leverage existing shipping and transportation processes to make domestic sourcing feasible over the longer term.

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. DOT’s analysis has concluded that this assessment is not applicable to this waiver.

DOT will consider all comments received in the initial 15-day comment period during our consideration of the proposed waiver, as required by Section 70914(c)(2) of the BIL. Comments received after this period, but before notice of our finding is published in the Federal Register, will be considered to the extent practicable. Pursuant to Section 117 of the SAFETEA-LU Technical Corrections Act of 2008 (Pub. L. 110-244, 122 Stat. 1572), if FHWA makes a finding that a waiver is appropriate under 23 U.S.C. 313(b), FHWA will also invite public comment on this finding for an additional 5 days following the date of publication of the finding. Comments received during that period will be reviewed, but the finding will continue to remain valid. Those comments may influence DOT/FHWA's decision to terminate or modify a finding.

Issued in Washington, DC on: August 3, 2023.

**Carlos Monje, Jr.,**

*Under Secretary of Transportation for Policy.*