

FHWA Proposes Rescinding Buy America Waiver for 'Manufactured Products,' Seeks Industry Input

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WHAT: The U.S. Department of Transportation's Federal Highway Administration (FHWA) announced a Notice of Proposed Rulemaking (NPRM) which would end the long-standing general waiver of Buy America requirements for manufactured products used in federal-aid highway projects (the Manufactured Products General Waiver). For four decades, contractors working on these projects could source certain manufactured products from outside the United States. The proposed rule would largely reverse that. It would also largely reverse FHWA's long-standing practice of requiring that all manufacturing processes for iron and steel components and subcomponents of manufactured products occur in the United States, though it would maintain this requirement for products deemed to be predominantly iron or steel. FHWA's proposal also clarifies that "excluded materials" – defined as cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives – are not considered manufactured products that would be subject to Buy America requirements.

The FHWA, in proposing to discontinue the Manufactured Products General Waiver, seeks to "bolster American manufacturing while creating good-paying jobs." The rescission intends to comport with the 2021 Build America, Buy America (BABA) Act, which "expands the coverage and application of Buy America requirements in Federal financial assistance programs for infrastructure" by "mandat[ing] that all iron, steel, manufactured products, and construction materials used in projects supported by funds made available for a Federal financial assistance program for infrastructure be produced in the

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United States." FHWA's proposed rescission of the waiver comes in response to BABA's mandate for federal agencies to review existing general applicability waivers in light of the Administration's preference against general waivers, such as the FHWA's long-standing Manufactured Products General Waiver.

In addition to discontinuing the waiver, the FHWA is also proposing to update its standards for what it means for manufactured products used in FHWA projects to be "produced in the United States." The proposed standard, which mirrors the BABA standards established by OMB in 2 CFR Part 184 (see our prior alert [here](#)), requires that:

- The product be manufactured in the United States; and
- The cost of the product's components that are mined, produced, or manufactured in the United States must be greater than 55% of the total cost of all components of the manufactured product.

The FHWA is also proposing to update its standards for determining the "cost of components" – as well as the definitions of "component," "manufactured product," "manufacturer," "iron or steel products," and "predominately of iron or steel or a combination of both" – to also mirror the standards established by OMB to implement the BABA requirements.

Finally, FHWA has proposed to reverse its long-standing practice of applying the iron and steel requirements (i.e., all manufacturing processes must occur in the United States) to iron and steel components and subcomponents of manufactured products, with the following two exceptions:

- First, for precast concrete products, any iron or steel components must comply with FHWA's existing Buy America requirements for iron and steel (i.e., "all manufacturing processes, including application of a coating" for the iron and steel components must occur in the U.S.); and
- Second, for "intelligent transportation systems" and other electronic hardware systems installed in the highway right-of-way or other real property, any iron or steel enclosures must comply with FHWA's existing Buy America requirements for iron and steel.

WHEN: Comments on the proposed rule, as well as an accompanying Request for Information (RFI) seeking information on the availability of specific manufactured products, are due within 60 days after the date of publication in the Federal Register.

WHO: If the general waiver is discontinued, Recipients, Subrecipients and Contractors – large or small – supporting a federal-aid highway project will need to ensure that all manufactured products incorporated into a FHWA-funded project are "produced in the United States" absent a waiver.

WHAT DOES IT MEAN FOR INDUSTRY: If approved as written, the proposed rule would mark a dramatic shift in the application of Buy America requirements to federally funded highway projects. The Manufactured Products General Waiver has been in effect since Congress passed the 1983 Surface Transportation Assistance Act, when FHWA determined that it was in the public interest to waive the Buy America requirements for manufactured products used in federally funded highway projects. Therefore, for more than

40 years, manufactured products incorporated into FHWA-funded projects did not need to be produced domestically (apart from “predominantly iron or steel manufactured products and predominately iron or steel components of manufactured products”).

In explaining its decision to rescind this long-standing waiver, FHWA indicated that the existing waiver was “overly broad,” and inconsistent with congressional intent as well as Administration priorities to encourage U.S. manufacturing. As a result of this decision, Recipients, Subrecipients and Contractors will now need to identify domestic sources for these materials.

The extent of the impact of FHWA’s change is unclear. Although FHWA was unable to quantify the costs of rescinding its long-standing waiver, the Agency did recognize that requiring only U.S.-made manufactured products may result in “cost increases, project delays, and product unavailability if not done carefully.” FHWA also acknowledged that some manufactured products may not currently be produced in the United States. As a result, FHWA indicated that it intends to consider whether to issue “targeted waivers” for specific products. Toward that end, FHWA issued an accompanying RFI requesting information on whether certain manufactured products are not and cannot be produced in the United States, to allow FHWA to determine whether targeted waivers for those products are warranted.

Interested parties are encouraged to submit comments on these topics and any other relevant issues relating to the FHWA’s proposed rescission of the Manufactured Products General Waiver. Comments should be submitted to the Federal eRulemaking Portal at www.regulations.gov once the NPRM is posted on the Federal Register.