

ALERT

FHWA Rescinds Longstanding Buy America Waiver for “Manufactured Products”

January 27, 2025

WHAT: On January 14, 2025, less than a week before President Biden left office, the U.S. Department of Transportation’s Federal Highway Administration (FHWA) published a final rule updating its Buy America rules to rescind FHWA’s long-standing waiver of Buy America restrictions for “manufactured products” used in federal-aid highway projects.

The rule now faces uncertainty under President Trump, who took office on January 20, 2025, and issued a “regulatory freeze” for rules published by the Biden Administration that have not yet taken effect. While the Trump Administration has indicated it might strengthen Buy America requirements, it remains to be seen whether it will modify or delay the final FHWA rule.

FHWA’s decision, which resulted from a review of Buy America waivers mandated by the Build America, Buy America (BABA) Act, aims to close “a significant loophole in Buy America” and maximize the use of domestically produced manufactured products in federal-aid highway and bridge projects.

The final rule rescinding the Manufactured Products General Waiver is scheduled to be implemented in two phases. During the first phase of the rule, which applies to federally funded highway projects obligated on or after October 1, 2025, all manufactured projects permanently incorporated into the project must be assembled in the U.S. During the second phase, which applies to federally funded highway projects obligated on or after October 1, 2026, all manufactured projects must be assembled in the U.S. and the cost of components of products that are mined, produced, or manufactured in the U.S. must be greater than 55% of the total cost of all

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components of the manufactured product, consistent with BABA. Consistent with OMB's rules and guidance for complying with BABA, FHWA's revised rules rescinding the Manufactured Products General Waiver instruct that an item should generally be placed into only one of the following three categories, and should only be subject to one set of Buy America standards for that category: (i) "iron or steel" products, (ii) "manufactured products," or (iii) "construction material."

Notwithstanding this general rule, FHWA identified two specific types of products used in federally funded highway projects that may be subject to two different Buy America standards: "precast concrete products" and "enclosures" for intelligent transportation systems (ITS) and other electronics that contain significant iron or steel components. According to FHWA, "precast concrete products" and "enclosures" represent a unique situation that requires application of two different Buy America standards. First, precast concrete products and enclosures *as a whole* must satisfy the Buy America standard for manufactured products (i.e., they must be manufactured in the U.S. and contain at least 55% U.S. components, including iron or steel components). Second, the components of precast concrete products and enclosures that "consist wholly or predominantly of iron or steel or a combination of both" must *separately* comply with the Buy America standards for iron or steel (i.e., "all manufacturing processes" for the components, including application of a coating, must occur in the U.S.). All other iron and steel components or subcomponents of a manufactured product will now be subject to the standard for manufactured products instead of the "all manufacturing processes" standard for iron and steel – a reversal of more than 40 years of agency practice.

Finally, FHWA noted that a number of commenters expressed particular concern over the domestic availability of certain products used in federally funded highway projects – including, for example, electronics, video imaging systems, lighting systems, ITS technologies and electrical systems, as well as "various other information communication technologies and network communication devices." While FHWA acknowledged these concerns, it nevertheless concluded that such concerns did not justify continuation of the Manufactured Products General Waiver. Instead, FHWA suggested that it would work with manufacturers and recipients of FHWA funds to identify specific products that are not in fact domestically manufactured in sufficient amounts, and if necessary issue Buy America waivers for those products. In addition, FHWA suggested that the risk that certain products might not be domestically available would be mitigated by FHWA's phased approach to imposing the Buy America restrictions to manufactured products used in FHWA-funded projects.

WHEN: The final rule, which was published in the *Federal Register* on January 14, was originally scheduled to take effect on March 17, 2025, with implementation to proceed in two phases: The first phase requiring final assembly of manufactured products in the U.S. is scheduled to take effect for FHWA-funded projects obligated on or after October 1, 2025, while the second phase requiring full compliance with Buy America is scheduled to take effect for FHWA-funded projects obligated on or after October 1, 2026.

However, the "regulatory freeze" issued by President Trump on his first day in office requires agencies to "consider postponing" implementation of any rules that were published in the *Federal Register* but have not yet taken effect, for a period of 60 days, "for the purpose of reviewing any questions of fact, law, and policy that the rules may raise." Although the new Administration has signaled an intent to strengthen Buy America requirements, we will need to wait and see whether the new Administration delays implementation of or

makes changes to the final rule.

WHAT IT MEANS FOR INDUSTRY: Through the final rule, the FHWA removed the Manufactured Products General Waiver that had been in place since 1983, marking a significant change to FHWA's application of Buy America requirements to federal-aid highway projects. Although these requirements will not take full effect right away, based on FHWA's phased approach, recipients and manufacturers should nevertheless begin reviewing their supply chains to assess whether their products currently comply with the Buy America requirements, whether they need to make changes to sources of supply or manufacturing processes to come into compliance, or whether they need to seek waivers for specific categories of products that cannot be domestically sourced.

Wiley's Government Contracts and International Trade practices routinely advise clients on issues related to Buy America and other domestic source requirements, and are continuing to track developments in this complex and often-changing area. Look to this space for further updates as these changes continue to be implemented.