



# Build America, Buy America (BABA) Act Implementation Webinar

April 2022

# AGENDA

- Domestic Preference History
- Build America, Buy America Act
- BABA Covered Items
- BABA Waivers
- EPA Next Steps
- Questions and Answers



# Domestic Preference History

2009 Buy  
American  
requirement  
for SRF

June 2014 AIS  
permanent for  
CWSRF and  
WIFIA

Jan 2014 AIS  
requirement  
introduced  
for SRF

Nov 2021 AIS  
permanent for  
DWSRF

# BABA

Build America, Buy America Act

# The Bipartisan Infrastructure Law (BIL)

*Public Law No. 117-58*

*BIL is also referred to as:*



Significant new appropriations for supplemental DWSRF and CWSRF funds for 5 years

Amendments to SDWA 1452 and CWA Title VI

*(the SDWA DWSRF and CWA CWSRF authorizing sections)*

Build America,  
Buy America (BABA)  
Act



# BUILD AMERICA, BUY AMERICA (BABA) ACT

- Included in the Infrastructure Investment and Jobs Act
  - Public Law Number 117-58
  - Title IX, Subtitle A, Part I – Buy America Sourcing Requirements
  - Sections 70911-70917
- Signed November 15, 2021
- Effective date 180 days after enactment: May 14, 2022
- <https://www.congress.gov/117/plaws/publ58/PLAW-117publ58.pdf>

# MADE IN AMERICA OFFICE (MIAO)

- BIL codifies the MIAO and centralized waiver review process required by Executive Order 14005
- MIAO aims to increase reliance on domestic supply chains
  - Gather government-wide data to support decision-making to make U.S. supply chains more resilient
  - Bring increased transparency to waivers in order to send clear demand signals to domestic producers
- MIAO waiver website:
  - <https://www.madeinamerica.gov/waivers/>



# OMB BABA GUIDANCE

- Released April 18, 2022
- “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure”
- <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

April 18, 2022

M-22-11

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Shalanda D. Young  
Director

SUBJECT: Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (“IIJA”), Pub. L. No. 117-58, which includes the Build America, Buy America Act (“the Act”). Pub. L. No. 117-58, §§ 70901-52. The Act strengthens Made in America Laws<sup>1</sup> and will bolster America’s industrial base, protect national security, and support high-paying jobs. The Act requires that no later than May 14, 2022—180 days after the enactment of the IIJA—the head of each covered Federal agency<sup>2</sup> shall ensure that “none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.”<sup>3</sup>

The Act affirms, consistent with Executive Order 14005, *Ensuring the Future Is Made in All of America by All of America’s Workers* (“the Executive Order”), this Administration’s priority to “use terms and conditions of Federal financial assistance awards to maximize the use of goods, products, and materials produced in, and services offered in, the United States.”<sup>4</sup>

The Act provides statutory authorities for the Made in America Office (“MIAO”) in the Office of Management and Budget (“OMB”) to maximize and enforce compliance with Made in

<sup>1</sup> “Made in America Laws” means all statutes, regulations, rules, and Executive Orders relating to Federal financial assistance awards or Federal procurement, including those that refer to “Buy America” or “Buy American,” that require, or provide a preference for, the purchase or acquisition of goods, products, or materials produced in the United States, including iron, steel, and manufactured products offered in the United States. Made in America Laws include laws requiring domestic preference for maritime transport, including the Merchant Marine Act of 1920 (Pub. L. No. 66-261), also known as the Jones Act. Exec. Order No. 14,005, 86 Fed. Reg. 7475, § 2(b) (Jan. 28, 2021), available at <https://www.federalregister.gov/documents/2021/01/28/2021-02038/ensuring-the-future-is-made-in-all-of-america-by-all-of-american-workers>. Made in America Laws also include laws that give preference to Indian-owned and -controlled businesses, such as the Buy Indian Act (25 U.S.C. 47), that produce items in the United States.

<sup>2</sup> For the purposes of this guidance, the terms “Federal agency” and “agency” mean any authority of the United States that is an “agency” (as defined in section 3502 of title 44, United States Code), other than an independent regulatory agency (as defined in that section). IIJA, § 70912(3).

<sup>3</sup> IIJA, § 70914(a).

<sup>4</sup> Exec. Order No. 14,005 (see footnote 1).

# WHAT IS BABA?

- “[N]one of the funds made available for a Federal financial assistance program for infrastructure...may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.”
- “Project” means:
  - Any activity related to the construction, alteration, maintenance, or repair of infrastructure in the U.S.

# COVERED PROGRAMS

- State Revolving Fund (SRF) and Water Infrastructure Finance and Innovation Act (WIFIA) programs
  - Not just for BIL-funded projects
  - Expands existing American Iron and Steel (AIS) domestic preference requirements
  - For typical SRF and WIFIA projects, the vast majority of purchased items will now be covered, including many products that have not been in the past

# COVERED PROGRAMS (cont.)

- Adds new requirements to other EPA infrastructure programs
  - Tribes, Territories, and District of Columbia
  - Section 319 Nonpoint Source Implementation Grant Program
  - National Estuary Program
  - Water Infrastructure Improvements for the Nation (WIIN) Grant Program
  - Sewer Overflow and Stormwater Reuse Municipal Grants (OSG)
  - Alaska Native Village (ANV) Grant Program
  - United States – Mexico Border Infrastructure Program
  - America's Water Infrastructure Act (AWIA) Resiliency Grant Program
  - Congressionally Directed Spending/Community Project Funding

# BABA Covered Items

# BABA COVERED ITEMS

- Iron and steel + manufactured products + construction materials
- Items should only be classified into ONE of the three categories
- Applies to items consumed in, incorporated into or affixed to an infrastructure project (aka permanently incorporated)
  - Does not apply to items brought to and removed from the construction site prior to the completion of the infrastructure project (e.g., temporary scaffolding)
  - Does not apply to equipment and furnishings that are used at or within the finished infrastructure project (e.g., movable chairs, desks, portable computer equipment)



# IRON AND STEEL

- Items that are predominantly iron or steel, unless another standard applies under law or regulation
- All manufacturing processes, from the initial melting stage through the application of coatings, must occur in the U.S.



# MANUFACTURED PRODUCTS

- Manufactured in the U.S.
- Cost of components that are mined, produced, or manufactured in the U.S. is greater than 55 percent of the total cost of all components of the manufactured product
  - Unless another standard for determining the minimum amount of domestic content has been established under applicable law or regulation



# CONSTRUCTION MATERIALS

- Includes:

- Non-ferrous metals
- Plastic and polymer-based products (including PVC, composite building materials, and polymers used in fiber optic cables)
- Glass (including optic glass)
- Lumber
- Drywall

- Excludes:

- Items made primarily of iron or steel
- Manufactured products
- Cement and cementitious materials
- Aggregates such as stone, sand, or gravel
- Aggregate binding agents/additives

# RFI FOR CONSTRUCTION MATERIALS



The screenshot shows the Federal Register website. At the top, it says "FEDERAL REGISTER" and "The Daily Journal of the United States Government". Below this, there is a blue bar with the text "Notice". The main heading is "Notice of Listening Sessions and Request for Information". Below this, it says "A Notice by the Management and Budget Office on 04/21/2022". There is a green button that says "SUBMIT A FORMAL COMMENT". The document is titled "PUBLISHED DOCUMENT". The "AGENCY:" is "Office of Management and Budget." The "ACTION:" is "Notice of listening session(s) and request for information." The "SUMMARY:" is "The Build America, Buy America Act ('the Act'), enacted as part of the Infrastructure Investment and Jobs Act (IIJA) on November 15, 2021, provides for the application of domestic preference requirements to infrastructure projects funded by Federal financial assistance and also includes requirements to standardize and simplify application of the Buy American Act in government contracts. The Act directs the Office of Management and Budget (OMB) to issue". The "DOCUMENT DETAILS" section includes "Printed version: PDF", "Publication Date: 04/21/2022", "Agency: Office of Management and Budget", "Dates: Written submissions must be received on or before 11:59 p.m. May 23, 2022.", "Document Type: Notice", and "Document Citation: 87 FR 23888".

- All manufacturing processes for construction materials must occur in the U.S.
- OMB has issued a Request for Information on the definition of “end product manufactured in the United States” specific to construction materials
  - <https://www.federalregister.gov/documents/2022/04/21/2022-08491/notice-of-listening-sessions-and-request-for-information>

# BABA Waivers

# BABA WAIVER AUTHORITY

- Pursuant to Section 70914(c) of BABA, EPA may waive Buy America preference where EPA finds that:
  - Applying the domestic content procurement preference would be inconsistent with the public interest (a “*public interest waiver*”);
  - Types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality (a “*nonavailability waiver*”); or
  - Inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent (an “*unreasonable cost waiver*”)

# BABA WAIVER TYPES

- Project-Specific Waivers
  - MIAO requests review subsequent to 15-day public comment period
- General Applicability (aka National) Waivers
  - MIAO requests review before the public comment period
  - Must be reviewed every 5 years

# BABA WAIVER PRINCIPLES

- Time-limited
  - Agencies should identify a short, definite time frame (e.g., no more than 1-2 years)
  - Ensure domestic producers have prompt access to market
- Targeted
  - Waivers that are overly broad will tend to undermine domestic preference policies
  - Broader waivers will receive greater scrutiny from MIAO
- Conditional
  - Agencies are encouraged to issue waivers with specific conditions that support the policies of BABA



# EPA Next Steps

# EPA NEXT STEPS

- Develop EPA program-specific implementation procedures memo
  - EPA will assess unanswered questions from MIAO guidance
  - Holding listening sessions to help identify these questions and solicit initial public input from all stakeholders
  - Timeline not yet established; will include solicitation of public comment
  - Need to balance the desire for expedient publication with meaningful procedures

# ANTICIPATED PROPOSED WAIVERS


- “Adjustment period” public interest waiver
  - For SRF: could be similar to AIS “Plans and Specs” waiver
  - For WIFIA: likely to post for public comment soon
  - For Other OW programs: under consideration
- De minimis public interest waiver
  - Could be similar to AIS; all OW programs considering
  - All projects may use a small amount (~5%) non-domestic products

# OTHER POTENTIAL PROPOSED WAIVERS

- MIAO BABA guidance lists other public interest waivers for consideration, in the interest of efficiency and to ease burdens for recipients:
  - Minor Components Waiver – similar to existing AIS manufacturer waiver
  - Small Project/Award Threshold – projects under certain \$ threshold
  - Program Priority Waivers – EPA may examine other program-level waivers
- Short-term product specific waivers
  - For products not currently manufactured in the U.S.

# BABA WEBSITE AND CONTACT INFO

- Website for EPA Office of Water infrastructure programs
  - [www.epa.gov/cwsrf/build-america-buy-america-baba](http://www.epa.gov/cwsrf/build-america-buy-america-baba)
- Email inbox for inquiries and comments: **BABA-OW@epa.gov**
- Implementation Procedures
- Waivers for public comment, requests, approvals
- Link to OMB waiver website
- Training and resources



BABA inquiries and comments:

[BABA-OW@epa.gov](mailto:BABA-OW@epa.gov)