



## **DEPARTMENT OF TRANSPORTATION**

### **Federal Transit Administration**

**[Docket No. FTA-2012-0029]**

### **Decision to Rescind Buy America Waiver for Minivans and Minivan Chassis**

**AGENCY:** Federal Transit Administration, DOT.

**ACTION:** Decision on request to rescind Buy America waiver.

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**SUMMARY:** On June 21, 2010, the Federal Transit Administration waived its Buy America final assembly requirement for minivans and minivan chassis after confirming that no manufacturer was willing and able to supply minivans or minivan chassis that were assembled in the United States. Now, FTA rescinds the waiver after confirming that the Vehicle Production Group has started producing a substantially similar vehicle, the MV-1, in the United States.

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### **SUPPLEMENTARY INFORMATION:**

#### **I. Background**

The Vehicle Production Group (VPG) petitioned the Federal Transit Administration (FTA) to rescind the non-availability waiver it issued on June 21, 2010 (75 FR 35123). The waiver exempted minivans and minivan chassis from the Buy America final assembly requirement outlined at 49 CFR part 661, stating that it would remain in effect until such a time as a domestic source became available.

With few exceptions, FTA's Buy America requirements prevent FTA from obligating an amount that may be appropriated to carry out its programs for a project unless "the steel, iron, and manufactured goods used in the project are produced in the United States." 49 U.S.C. 5323(j)(1). For FTA-funded rolling stock procurements, the Buy America requirements are two-fold: (1) at least 60 percent of the components, by dollar value, must be produced in the United States; and (2) final assembly must occur in the United States. 49 U.S.C. 5323(j).

An exception to, or waiver of, the Buy America rules is allowed if "the steel, iron, and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality." 49 U.S.C. 5323(j)(2)(B).

On June 21, 2010, in response to formal requests from Eldorado National, Kansas (Eldorado) and the Chrysler Group LLC (Chrysler), and after ascertaining through notice and comment that no manufacturer of minivans or minivan chassis performed final assembly in the United States, FTA waived its Buy America final assembly requirement for minivans and minivan chassis. 75 FR 35123.

When FTA waived the final assembly requirement for minivans, it declined to define the term "minivan." FTA's reluctance to define the term stemmed from its understanding that (1) among the various classifications used by Federal regulatory agencies, minivans like the Chrysler Town and Country, and Dodge Caravan were not uniformly placed in the same class of vehicles<sup>1</sup>; and (2) interested parties understood the

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<sup>1</sup> There is no uniform definition or classification for minivans. The closest things to a definition of a vehicle type, like "minivan," are the classifications used by the National Highway Traffic Safety Administration (NHTSA) and the Environmental Protection Agency (EPA) to regulate safety and control emissions. However, NHTSA's classifications do not uniformly group vehicles from one regulation to the next. For example, under NHTSA's Corporate Average Fuel Economy (CAFE) standards, most "minivans," like Chrysler's Town and Country, fall under the class of "light trucks." However, when regulating safety, the same vehicle is classified as a "multipurpose passenger vehicle," which includes

waiver would apply to the type of vehicle produced by the parties that petitioned FTA—Chrysler and EIDorado.<sup>2</sup> Because there is no uniform definition or classification for “minivan,” and FTA grantees understood that the waiver would apply to vehicles similar to those produced by Chrysler and EIDorado, FTA declined to create a new definition or classification.

Recently, an original equipment manufacturer called the Vehicle Production Group (VPG) started producing a six-passenger vehicle called the Mobility Vehicle 1 (MV-1). The MV-1 is a purpose-built, wheelchair-accessible vehicle that is substantially similar to a minivan. According to VPG sales materials, the MV-1 seats up to six adults, with one full-size wheelchair. Wheelchairs enter the MV-1 via a ramp that stows under the vehicle and deploys to the passenger side. It is available with a Ford Modular 4.6 liter V8 engine and can be purchased with an engine that runs on gasoline or compressed natural gas (CNG). AM General LLC (AM General) assembles the MV-1 at its plant in Mishawaka, Indiana. VPG certifies that the MV-1 complies with Buy America requirements for both domestic content and final assembly. Moreover, VPG maintains that it manufactures the MV-1 in sufficient quantity to meet the current and future demand on FTA-funded projects.

Based on the fact that it produces the MV-1 in the United States, VPG petitioned FTA to rescind the Buy America final assembly waiver it issued on June 21, 2010, for minivans and minivan chassis.

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vehicles built on a truck chassis (or with special features for occasional off-road operation) that carry ten persons or less. See 49 CFR 571.3. These distinct classification systems highlight the differences in vehicles based upon various factors, such as fuel economy or passenger capacity, but each classification system uses different factors.

<sup>2</sup> Chrysler is the Original Equipment Manufacturer (OEM) of specific model minivans. EIDorado modifies these same Chrysler model minivans into wheelchair-accessible vehicles.

Pursuant to VPG's request, FTA published a notice in the Federal Register on August 3, 2012, calling for comments on VPG's request to rescind the 2010 Buy America waiver for minivans and minivan chassis. 75 FR 35124. FTA sought comment from all interested parties regarding the availability of domestically manufactured minivans and minivan chassis in order to fully determine whether a waiver remained necessary.

The August 3, 2012 notice established a deadline of September 4, 2012, for interested parties to submit comments. Following a request from Chrysler, FTA published a second notice on August 28, 2012, extending the comment deadline by one week, from September 4 to September 11, 2012. 77 FR 52134.

## **II. Response to Public Comments**

FTA received approximately 836 comments in response to its notice. Of the 836 comments, three comments were posted to the docket in error, and 88 comments were filed after the September 11, 2012 deadline. FTA considered all comments submitted to the docket on or before September 19, 2012.

The commenters represent a broad spectrum of stakeholders from throughout the United States and include elected officials, state and local governments, transit and other local government agencies, transportation providers, trade associations, vehicle manufacturers, suppliers and retailers, a labor union, members of the disability community, and numerous persons in their individual capacity.

The following is FTA's response to the substantive comments. FTA responds to public comments in the following topical order: (A) General Comments; (B) Definition of a "Minivan"; (C) Minivan Use for Paratransit Transportation Services; (D) Minivan Use for Vanpool Services; (E) Competition and Price Concerns; (F) U.S. Employment;

(G) Safety Concerns; and (H) Miscellaneous Comments. Several commenters raised issues that are outside the scope of FTA's request for comments. FTA declines to address those concerns in this Decision.

#### A. General Comments

Many commenters expressed support for Buy America and its purposes, including its intent to support U.S. manufacturing and employment. Most commenters generally stated that these are difficult economic times and highlighted FTA's role in assisting U.S. manufacturers.

Hundreds of employees from VPG, AM General, the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW), Amalgamated UAW Local 5, the Ford Motor Company, and many other VPG suppliers submitted comments in favor of rescinding the waiver. FTA also received favorable comments from retailers and consumers, elected officials, and other interested persons.

Many other vehicle manufacturers, suppliers and retailers, including Chrysler, ElDorado National-Kansas, Thor Industries, Inc. (Thor Industries), the Braun Corporation (Braun), state government agencies (including Alabama, Florida, Indiana, Illinois, Montana, Nebraska, South Dakota, Virginia, and Wyoming Departments of Transportation), transit agencies or other local transportation providers, trade associations, an elected official, persons employed in the transit industry, and other interested parties or persons opposed or raised significant concerns about VPG's request to rescind the waiver.

## B. The Definition of “Minivan”

The commenters opposing rescission of the waiver argued that the MV-1 is not a “minivan,” and thus, minivans remain unavailable from a U.S. source. These commenters asserted that minivans and the MV-1 differ in several respects—size, sliding side doors, passenger capacity, wheelchair capacity, rear entry vs. side entry for wheelchairs, seating arrangements, rear- vs. front-wheel drive, and fuel economy. Chrysler, for example, stated that its customers “will not consider the MV-1 to be a suitable replacement for our minivans[, which] . . . are front-wheel drive vehicles with a 6-cylinder engine.” According to Chrysler, “[t]he MV-1 is a rear-wheel drive vehicle with an 8-cylinder engine, which is more like an SUV than a minivan.” Chrysler further stated that:

As a paratransit vehicle, the MV-1 falls short of traditional minivans.

- Chrysler minivans converted for paratransit use have more seating capacity than the MV-1. The Chrysler wheelchair accessible minivan is typically configured to carry 4 ambulatory passengers and 2 wheelchair passengers. The MV-1 configuration that provides 2 wheelchair positions only have space for one ambulatory person—the driver.

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EIDorado also commented that the MV-1 is “not a minivan” but a “Mobility Vehicle,” the first of its kind. EIDorado reasoned that the MV-1 cannot be a minivan, as most minivans do not come equipped with a standard wheelchair ramp.

Thor Industries, the parent company to EIDorado, made a similar comment and also stated that the MV-1 is not a minivan, but “the first ‘Mobility Vehicle’ of its kind.” Moreover, according to Thor Industries, the MV-1 has significantly different features from a “typical EIDorado minivan.” It provided a table to illustrate the differences it

perceived between ElDorado's Amerivan Minivan (built on a Grand Dodge Caravan and Chrysler Town and Country chassis) and the MV-1. Thor Industries claimed the Amerivan Minivan has the following features that are lacking on the MV-1: one-touch automatic operation for the door and ramp, sliding power ramp door, kneeling rear suspension, removable driver seating for the wheelchair driver, a removable "co-pilot" seat, driver/passenger transfer seat option, three wheelchair securement locations, bus-tested at the Altoona Bus Research and Testing Center (Altoona), seven airbags, integrated lap/shoulder seat belts for the wheelchair user, driver/front passenger advanced head restraints, front wheel drive, the "lowest ground to floor height in the industry," and "dependable structure as proven by Altoona and in-service record," a spare tire, various convenience or comfort options, rear heat and air conditioning, a 6-cylinder engine (compared to the MV-1's 8-cylinder engine), a fuel economy of 17 city miles per gallon (mpg) (compared to the MV-1's 13 city mpg), 25 highway miles per gallon (compared to the MV-1's 18 highway mpg), and a range of 500 miles (compared to the MV-1's range of 350 miles).

Another commenter that claimed the MV-1 is not a minivan, Braun, noted the following differences:

[The MV-1 is] limited to 5 ambulatory passengers with 1 wheelchair, or a driver and 2 wheelchair passengers" while "the commercial Braun wheelchair accessible minivan is typically configured to carry 4 ambulatory passengers and 2 wheelchair passengers, and may also be reconfigured to carry 5 ambulatory and 1 wheelchair passengers. The unconverted Chrysler vehicle covered by the waiver is a 7 passenger commuter vehicle configuration.

Other differences identified by Braun include the fact that the MV-1 has no fixed front passenger seat nor an airbag for this seat, is rear-wheel drive, utilizes a swing door

for wheelchairs, “which limits access through the front passenger door,” has a V-8 engine while Chrysler minivans use a V-6 engine, and the MV-1 does not offer a rear-entry option for wheelchairs.

VPG rebutted these claims in its comments, stating that FTA classified the MV-1 as a minivan when FTA exempted the MV-1 from its bus testing requirements at 49 C.F.R. part 665, and “[w]hatever it [the MV-1] may be called in other contexts, for purposes of Buy America, it has been indisputably established by FTA under due authority that the MV-1 is qualified as a minivan.”

Regarding comments about the MV-1’s seating capacity, VPG responded that the MV-1 seats six (including the driver and 1 wheelchair) and stated that Braun’s installation of a 2 passenger flip seat to seat seven passengers “prevents wheelchair passengers from utilizing the vehicle for its intended purpose, specifically, providing wheelchair accessible transportation.” In response to the MV-1’s lack of a fixed front seat, VPG commented that:

[The MV-1 was designed] without a fixed front seat in order to permit the wheelchair passenger the opportunity to ride in proximity to the driver, which our research informed us was the preferred position of the wheelchair passenger, despite the fact that “converted” vehicles never allowed that freedom of choice and perspective to a wheelchair-using passenger. We note, however, that the MV-1 has multiple tracks for the restraint system, so that a wheelchair passenger, when desired or required, can be separated from the driver.

Braun responded to VPG’s comments by stating that the MV-1 does not have “substantially similar attributes to” a minivan based upon fuel economy because:

... [I]t is evident that the VPG MV-1 has a [Gross Vehicle Weight Rating or] GVWR rating of 6,600 lbs, falling between the 2005 Ford Econoline full size van and F-150 pickup truck. Since these two vehicles were the only Ford trucks using this powertrain [4.6L V8 RWD 4-speed] in Model 2005 and the only Ford vehicles with “substantially similar attributes” as

required under [the U.S. Department of Energy's (DOE) Advanced Technology Vehicle Manufacturing or] ATVM program rules, it can only be concluded that these vehicles were used as the basis upon which DOE granted the loan to VPG. Ford did not manufacture a minivan in 2005 that employed the powertrain featured in VPG's loan application and in the current production MV-1.

It can only be concluded based on the above comparison that the VPG's loan was based on a comparison to a full size van and a pickup truck, and never to a minivan. We maintain that the "vehicles with substantially similar attributes" found in the ATVM technical documentation were full size vans and/or pickup trucks, and not minivans.

Braun also alleged that the MV-1 does not meet the National Highway Traffic Safety Administration's (NHTSA) definition of a minivan. Braun cited NHTSA's Final Rule for average fuel economy standards for light trucks model years 2008-2011 (49 CFR part 523) published in 71 FR 17566 on April 6, 2006. Braun commented that:

NHTSA's 2008-2011 final rule tightened the minivan definition [under 49 CFR 523.5(a)(5)(ii)] . . . .

The reason NHTSA created the new minivan definition was clearly explained in the final rule:

"Specifically, unlike the smaller passenger cars, all minivans feature three rows of seats, thus offering greater passenger carrying capability"  
[footnote omitted.]"

In addition to furthering our goal of subjecting all minivans to the CAFE standard for light trucks, the provision adopted today limits the number of vehicles that will be reclassified as light trucks." [Footnote omitted.]

The practical effect of NHTSA's rule change was to make certain that vehicles with only two rows of seating as standard equipment would no longer be classified as minivans and no longer be able to compete under the non-passenger vehicle, or truck, CAFE standards.

Braun further stated that:

A careful examination of the MV-1 vehicle provides the following information:

1. The MV-1 does not have three rows of seats that are standard equipment,
2. Even if NHTSA were to determine that a single seating position in the front of a vehicle (as provided in the MV-1) constitutes a “row” and that a single rear-facing jump seat in the middle constitutes a “row,” the middle jump seat is not standard equipment on the MV-1.
3. The MV-1 does not have the ability to remove or stow seats to create a flat-leveled surface for cargo-carrying purposes. The aft seating of the MV-1 is fixed, and not removable or stowable.
4. Whereas all minivans produced and sold in the U.S. today feature front-wheel drive unibody construction, the MV-1 is a rear-wheel drive vehicle body-on-frame vehicle. Because of this, the propeller shaft mates to the rear-drive differential at the rear axle and the floor p[l]an rises under the aft vehicle seating to accommodate this component. The MV-1 has a two-tier floor p[l]an for both gasoline and CNG versions, it therefore is impossible to create a flat, leveled surface to the rear of the automobile as clearly specified under NHTSA’s minivan definition.

Braun also cited [www.fueleconomy.gov](http://www.fueleconomy.gov), which is maintained by DOE using EPA fuel economy data, to show that the MV-1 is classified as a “Special Purpose Vehicle 2WD” and not as a minivan.

Finally, Braun supplemented its comments with a response that FTA classified the MV-1 as an “unmodified mass-produced van,” and not a minivan.

FTA Response: Neither FTA’s authorizing legislation nor its implementing regulations define the term “minivan.” NHTSA does classify vehicles for purposes of regulating emissions and safety, but these classifications do not uniformly group vehicles from one regulation to the next. This is why, for purposes of various Federal regulations, a minivan like Chrysler’s Town and Country is not always in the same class. For example, under NHTSA’s CAFE standard, most “minivans” fall under the class of “light trucks.” The MV-1 is in a different class under the CAFE standard because it does not have three rows of removable seats or seats that stow away into a flat or level surface.

See 49 CFR 523.5(a)(5). When regulating safety, however, both the MV-1 and

traditional “minivans” fall under the class of “multipurpose passenger vehicles,” which includes all vehicles that carry ten persons or less and are constructed on a truck chassis (or with special features for occasional off-road operation). See 49 CFR 571.3. These distinct classification systems highlight the differences in vehicles based upon various factors, such as fuel economy or passenger capacity, but each classification system uses different factors. There is no uniform categorization.

Braun also cites DOE and EPA categories based upon fuel economy to show that the MV-1 is a “special purpose vehicle” rather than a “minivan.” These categories and their corresponding data are listed at [www.fueleconomy.gov](http://www.fueleconomy.gov), which DOE maintains with data from EPA. EPA’s website, however, specifically states that “[t]hese categories are used for labeling and consumer information purposes and do not serve any other regulatory purpose.”<sup>3</sup> Accordingly, the fact that the MV-1 may not fall under the “minivan” category for purposes of EPA’s comparisons of vehicles based upon fuel economy is immaterial to Buy America.

Thus, to avoid the confusion that may result from creating a new vehicle classification system, FTA will not differentiate or define a “minivan” for purposes of Buy America. In applying or waiving Buy America rules, FTA will make decisions based upon the performance or functional specifications used by FTA grantees in actual procurements in conformance with Federal requirements and guidance, including the “Common Grant Rule” (49 CFR parts 18 and 19) and the most recent edition of FTA Circular 4220.1 “Third Party Contracting Guidance.”

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<sup>3</sup> <http://www.epa.gov/carlabel/gaslabelreadmore.htm>. While EPA has its own classification system for purposes of regulating vehicle emissions (40 CFR part 86), this further shows that classifications systems differ based upon specifications and features. See 49 CFR 86.1803-01.

### C. Minivan Use for Paratransit Transportation Services

Several commenters pointed out the differences between the MV-1's accessibility features and the accessibility features of traditional minivans. The comments noted performance problems (such as binding as a result of ice and gravel collection) with under-floor ramps like those equipped on the MV-1. They also questioned whether the MV-1 could, in fact, accommodate more than one wheelchair at a time. Other commenters stated that the MV-1 has smaller overall passenger capacity compared to traditional minivans. One local transit agency responsible for providing paratransit services commented that its fleet includes both the MV-1 and the Dodge Caravan and, while both are useful in providing paratransit services, they are very different vehicles and the MV-1's rear facing seat is not useable for many of the services it provides.

FTA Response: As stated above, under FTA's Buy America law, a non-availability waiver may be granted only if "the steel, iron, and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality." 49 U.S.C. 5323(j)(2)(B). Therefore, as long as there is a domestic manufacturer for a product, FTA cannot grant a non-availability waiver or permit a non-availability waiver to stand. FTA finds here that there is a U.S.-made vehicle—the MV-1—that can sufficiently meet the needs for which the minivan non-availability waiver was issued. Procurement decisions must be made based on performance or functional needs defined in conformance with Federal regulations and guidance, including the "Common Grant Rule" and the most recent edition of FTA Circular 4220.1 "Third Party Contracting Guidance." If the need arises for a non-compliant vehicle under Buy America, recipients of FTA financial assistance may

petition FTA for waivers on a case-by-case basis. In reviewing any waiver request, FTA only will consider waiving Buy America if the petitioner can articulate and has included in its procurement a performance or functional specification in conformance with Federal requirements and guidance that failed to yield a compliant bid or offer for a U.S.-produced vehicle.

#### D. Minivan Use for Vanpool Services

A significant number of commenters claim the MV-1 is solely a paratransit vehicle and does not qualify for FTA funding for vanpool services. The comments cite the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, § 20016 (to be codified at 49 U.S.C. 5323(i)). MAP-21 changed the definition of “vanpool vehicle” to mean a vehicle that has a “. . . seating capacity of which is at least 6 adults (not including the driver) . . . .” According to the comments, the MAP-21 definition excludes the MV-1 (with a seating capacity of only 6, including the driver) and includes Chrysler minivans (with a slightly higher seating capacity). Therefore, these commenters stated that, while the MV-1 may be acceptable for paratransit service, the MV-1 would not qualify for FTA-funded vanpool service.

FTA Response: While the definition of “vanpool,” now codified at 49 U.S.C. 5323(i)(2)(C)(ii), applies to certain FTA-funded vanpool projects, FTA prefers to consider waiver requests for limited circumstances and on a procurement-by-procurement basis rather than waiving the Buy America requirements for an entire class of vehicles in all circumstances. If an FTA recipient requests a waiver for a vanpool purchase, FTA will review the procurement based upon established requirements and guidance for third

party procurements, including the Common Grant Rule and the most recent edition of FTA Circular 4220.1 “Third Party Contracting Guidance.

#### E. Competition and Price Concerns

Most of the comments opposing rescission of the waiver stated that such a rescission would eliminate competition of vehicle manufacturers and suppliers and result in *de facto* sole-source procurements. According to Chrysler, ElDorado, Braun, and other vehicle manufacturers and suppliers, rescission of the waiver would create a public transportation monopoly in favor of VPG and indicated their prediction that prices would rise from the lack of competition. State DOTs, local transit agencies, and other transit providers made similar comments.

FTA Response: This argument is similar to one presented by a manufacturer of motor coaches in 2010 when it sought a public interest waiver from FTA. As was the case with that request, by arguing that a single Buy America-compliant manufacturer has cornered the market and can thus control prices, the commenters ignore the FTA waiver that is intended to address this concern. If limited competition results in a product ceasing to be available to FTA-funded transit agencies at a competitive price (measured by a greater than 25 percent differential between foreign-produced and Buy America-compliant vehicles), the appropriate action would be for the grantee to apply for a waiver based on price-differential.

Claims about price inflation, however, appear to be unfounded. Those in favor of rescinding the waiver stated that the price of the MV-1 is similar to competing vehicles.

## F. U.S. Employment

Commenters in support of rescinding the waiver stated that a rescission would result in more U.S. jobs. Commenters opposing the rescission of the waiver stated that a rescission would benefit only VPG and AM General employees, and would negatively impact other vehicle manufacturers and suppliers, including their U.S. employees. Thor Industries, the parent company of EIDorado, commented that since the waiver, EIDorado has been able to create new jobs, both directly and indirectly through its distribution network. Thor Industries further stated that a rescission of the waiver would result in a 39 percent decrease in EIDorado's employment.

FTA Response: Buy America is the mechanism used by FTA to protect and encourage U.S. manufacturing and U.S. jobs. The regulations do not prohibit Chrysler, EIDorado and other manufacturers from adjusting their business practices to perform final assembly in the United States. If they took such action, they also would be able to certify compliance with Buy America and offer their products to FTA's grantees.

## G. Safety Concerns

Braun, among other commenters, raised safety concerns about the MV-1, including whether the MV-1 meets the Federal Motor Vehicle Safety Standards (FMVSS), and the number of airbags and seatbelts in the MV-1 compared to Chrysler minivans. Many commenters opposed to the rescission also noted that the MV-1 has not undergone testing per FTA's bus testing requirements at 49 CFR part 665.

VPG certified that the MV-1 has met all applicable FMVSS requirements and received an exemption from FTA from the bus testing requirements of 49 CFR part 665 because of its status as an unmodified, mass-produced van.

FTA Response: All vehicles purchased with FTA funds must meet all applicable safety requirements, which generally include certifying compliance with FMVSS and FTA's bus testing regulations. The MV-1 has satisfied these requirements.

#### H. Miscellaneous Comments

A number of parties submitted miscellaneous comments. These include commenters that expressed concern that the MV-1 is rear wheel drive, which typically does not perform as well as front-wheel drive in extreme weather conditions such as snow or ice; not produced in sufficient quantity; has an 8-cylinder engine, which consumes more fuel than the Chrysler minivan and other similar vehicles with 6-cylinder engines; and that there are too few MV-1 retailers. One commenter requested information about the potential number of vehicles and the amount of FTA funding that this request affects. Other commenters stated that FTA should not make a decision that will only benefit one U.S. company or "artificially protect" a company from competition.

FTA Response: FTA responds to the foregoing miscellaneous comments with a general statement about Buy America waivers.

The purpose of Buy America is for the taxpayer resources used on FTA-funded projects to preserve and encourage U.S. manufacturing jobs. FTA advances this purpose by strictly enforcing Buy America rules that require all steel, iron, and manufactured products on FTA-funded projects to be produced in the United States. Thus, when considering whether to grant (or rescind) a waiver, FTA seeks to grant the most narrowly construed waiver possible. In this instance, the current waiver is broadly construed; it applies to all minivans and minivan chassis purchased with FTA funds. A more narrow approach is to rescind the existing waiver and then consider waivers on a case-by-case

basis only. This approach will ensure that waivers are granted only when absolutely necessary, and only when construed as narrowly as possible.

Under FTA's Buy America law, a non-availability waiver may be granted only if "the steel, iron, and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality." 49 U.S.C. 5323(j)(2)(B). Therefore, as long as there is a manufacturer of the product in question that fully complies with Buy America, FTA cannot grant a non-availability waiver or permit a non-availability waiver to stand. FTA finds here that there is a fully Buy America-compliant vehicle that meets the needs for which the original minivan waiver was granted.

To the extent FTA is willing to consider waiver requests, they will be limited to procurements that include specifications based on performance or functional needs that cannot be met by a Buy America compliant product. Specifications may not be exclusionary and must conform to Federal requirements and guidance, including the Common Grant Rule and the most recent edition of FTA Circular 4220.1 "Third Party Contracting Guidance."

Thus, the prohibition against exclusionary and discriminatory specifications notwithstanding, if the need arises for a non-compliant vehicle, recipients may petition FTA for waivers on a case-by-case basis. FTA will only consider waiving Buy America if the petitioner can articulate and has included in its procurement a performance or functional specifications in conformance with Federal requirements and guidance that failed to yield a compliant bid or offer for a U.S.-produced vehicle.

VPG, AM General, and Ford Motor Company responded to the commenters that expressed concern about adequacy of VPG's supply and network. They assert that the MV-1 can be produced in sufficient quantity. VPG and Ford commented that there are sufficient dealerships throughout the United States, including well-established automobile, bus, and mobility dealers, in addition to VPG's retail outlets, that can offer needed service and warranty. According to VPG, the high percentage of U.S.-manufactured parts (approximately 75 percent U.S. content), including a Ford engine, in its vehicles means these parts are readily available in the United States.

FTA does not collect data specifically on "minivans" as FTA does not define the term "minivan." Rather, it measures the number of FTA-funded purchases of "vans," which includes minivan purchases, but also includes other vehicle purchases falling within the "van" category. In Fiscal Year (FY) 2011, FTA awarded \$ 133,298,132 for 3,279 vans.

Regarding comments from Chrysler and others that FTA should avoid decisions that benefit a single entity, FTA notes that the current waiver has served to the near-exclusive benefit of Chrysler since 2010. Additionally, if Chrysler, ElDorado, or other manufacturers adjusted current business practices to perform final assembly in the United States, their vehicles also would be Buy America compliant.

### **III. Conclusion**

FTA has determined that a Buy America waiver for minivans and minivan chassis is no longer necessary because the Vehicle Production Group now produces a substantially similar vehicle in the United States, in accordance with FTA's Buy America rules. Therefore, FTA hereby rescinds the waiver it issued on June 21, 2010.

Issued this 27th day of November, 2012.

Peter Rogoff,

Administrator.

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