



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**Buy America Waiver Notification**

**AGENCY:** Federal Highway Administration (FHWA), Department of Transportation (DOT).

**ACTION:** Notice.

**SUMMARY:** This notice provides information regarding FHWA's issuance of a Buy America waiver for the obligation of Federal-aid funds for 151 State projects involving the acquisition of vehicles and equipment on the condition that they be assembled in the U.S.

**DATES:** The waiver is issued as of [INSERT DATE ONE DAY AFTER DATE OF PUBLICATION IN FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** For questions about this notice, please contact Mr. Gerald Yakowenko, FHWA Office of Program Administration, 202-366-1562, or via e-mail at [Gerald.Yakowenko@dot.gov](mailto:Gerald.Yakowenko@dot.gov). For legal questions, please contact Mr. Jomar Maldonado, FHWA Office of the Chief Counsel, 202-366-1373, or via e-mail at [jomar.maldonado@dot.gov](mailto:jomar.maldonado@dot.gov). Office hours for the FHWA are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

An electronic copy of this document may be downloaded from the Federal Register's home page at <http://www.archives.gov> and the Government Publishing Office's database at <http://www.access.gpo.gov/nara>.

## **Background**

This notice provides information regarding FHWA's decision to issue a Buy America waiver for the obligation of Federal-aid funds for 151 State projects involving the acquisition of vehicles (including sedans, vans, pickups, trucks, buses, and street sweepers) and equipment (such as trail grooming equipment) on the condition that they be assembled in the United States. The waiver would apply to approximately 955 vehicle and equipment acquisitions. The requests for vehicle-related waivers received between April 2016 and December 2016 are incorporated by reference into this notice. These requests are available on FHWA's Buy America website at the following locations:

- April to June, 2016:  
<https://www.fhwa.dot.gov/construction/contracts/cmaq161207.cfm>;
- July to September, 2016:  
<https://www.fhwa.dot.gov/construction/contracts/cmaq170321.cfm>; and
- October to December, 2016:  
<https://www.fhwa.dot.gov/construction/contracts/cmaq170725.cfm>.

These projects are being undertaken to implement air quality improvement, safety, and mobility goals under FHWA's Congestion Mitigation and Air Quality Improvement Program and the Recreational Trails Program.

Title 23, Code of Federal Regulations (CFR), § 635.410 requires that steel or iron materials (including protective coatings) that will be permanently incorporated in a

Federal-aid project must be domestically manufactured. For FHWA, this means that all the processes that modified the chemical content, physical shape or size, or final finish of the material (from initial melting and mixing, continuing through the bending and coating) occurred in the United States. The statute and regulations create a process for granting waivers from the Buy America requirements when its application would be inconsistent with the public interest or when satisfactory quality domestic steel and iron products are not sufficiently available. In 1983, FHWA determined that it was both in the public interest and consistent with the legislative intent to waive Buy America for manufactured products other than steel manufactured products. The FHWA's national waiver for manufactured products does not apply to the requests in this notice because these involve predominately steel and iron manufactured products. The FHWA's Buy America requirements do not have special provisions for applying Buy America to "rolling stock" such as vehicles or equipment (see 49 U.S.C. 5323(j)(2)(C), 49 CFR 661.11, and 49 U.S.C. 24405(a)(2)(C) for examples of Buy America rolling stock provisions for other DOT agencies).

On April 18, 2017, the President issued Executive Order (E.O.) 13788—Buy American and Hire American. Section 2(a) of the E.O. 13788 establishes as a policy of the executive branch to "maximize, consistent with law...the use of goods, products, and materials produced in the United States." Section 3(b)(i) requires every agency to "assess the...implementation of, and compliance with Buy American Laws" within their jurisdictions. Section 3(b)(ii) requires agencies to assess the use of waivers within their agencies by type and impact on domestic jobs and manufacturing. Section 3(b)(iii) requires agencies to develop and propose policies to ensure that, to the extent permitted

by law, Federal financial assistance awards maximize the use of materials produced in the United States.

In response to these E.O. 13788 requirements, the FHWA is evaluating how to revise its Buy America policies and procedures, including the process and manner in which it decides whether to grant waivers for vehicles and equipment. This evaluation may result in delays in decisions on whether to grant Buy America waivers in the future.

Although FHWA has not found manufacturers that produce vehicles and equipment in such a way that all their steel and iron elements are manufactured domestically, the Agency is evaluating the process and manner in which it considers these waivers to ensure that it is consistent with the intent and purpose of E.O. 13788. The FHWA is aware that in today's global industry, vehicles are assembled with iron and steel components manufactured all over the world. The Agency also understands the difficulty of identifying vehicles that have 100% components made in the U.S. For example, the Chevrolet Volt, which was identified by many commenters in a November 21, 2011, Federal Register Notice (76 FR 72027) as a car that is made in the United States, is comprised of only 45 percent of United States and Canadian content according to the National Highway Traffic Safety Administration's part 583 American Automobile Labeling Act Report Web page.<sup>1</sup> There is no indication of how much of this 45 percent content is U.S. manufactured (from initial melting and mixing) iron and steel content.

However, the policy behind E.O. 13788 is to help stimulate economic growth, create good jobs at decent wages, strengthen our middle class, and support the American

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<sup>1</sup>[http://www.nhtsa.gov/Laws+&+Regulations/Part+583+American+Automobile+Labeling+Act+\(AALA\)+Reports](http://www.nhtsa.gov/Laws+&+Regulations/Part+583+American+Automobile+Labeling+Act+(AALA)+Reports).

manufacturing and defense industrial bases. Sec. 2(a), E.O. 13788. This means that FHWA Buy America policies should be interpreted and applied in a manner that fosters innovative approaches that would increase the manufacture of compliant domestic steel and iron products and consistent with 23 U.S.C. 313. Unlike other waiver requests, the requests for vehicle and equipment waivers have been for recurrent products. The products waived in the past have been of similar type and kind, yet there have been no changes in the manufacturing process to produce Buy America compliant products or products maximizing Buy America compliant content. The FHWA's practice of approving waiver requests for these recurrent project types could be setting the expectation that FHWA will always grant waivers for these projects, discouraging innovative approaches and job creation in the domestic steel and iron industry for this sector.

The FHWA is re-evaluating the process and manner in which it decides whether to grant waivers for vehicles and vehicle-related equipment. This change will not affect the approval of a waiver for vehicles and equipment received during April to December, 2016 timeframe. The projects in these lists were submitted prior to the issuance of the E.O. and have been published for informal comment consistent with the Consolidated Appropriations Act of 2017 (Pub. L. 115-31) (see publications for December 7, 2016,<sup>2</sup> March 21, 2017,<sup>3</sup> and July 25, 2017<sup>4</sup>). The FHWA received no comments in response to these publications. Because FHWA has not found domestic manufacturers that can produce the vehicles and equipment identified in this notice in such a way that all their

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<sup>2</sup> <https://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=139>.

<sup>3</sup> <https://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=147>.

<sup>4</sup> <https://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=153>.

steel and iron materials are manufactured domestically, FHWA finds that a waiver of FHWA's Buy America requirements is appropriate under the non-availability criteria (23 U.S.C. 313(b)(2) and 23 CFR 635.410(c)(2)(ii)). However, FHWA believes that it is consistent with the Buy America requirements to impose the condition that the vehicles and the vehicle components be assembled in the United States. Requiring final assembly to be performed in the United States is consistent with past guidance to FHWA Division Offices on manufactured products (see Memorandum on Buy America Policy Response, Dec. 22, 1997).<sup>5</sup> Moreover, in today's economic environment, the Buy America requirement is especially significant in that it will ensure that Federal-aid funds are used to support and create domestic jobs. Thus, so long as the final assembly of the 151 State projects occurs in the United States, applicants to this waiver request may proceed to purchase these vehicles and equipment.

In accordance with the provisions of section 117 of the "Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Technical Corrections Act of 2008" (Pub. L. 110-244), FHWA is providing this notice of its finding that a non-availability waiver of Buy America requirements is appropriate on the condition that the vehicles and equipment identified in the notice are assembled domestically. The FHWA invites public comment on this finding for an additional 15 days following the issued date of the finding. Comments may be submitted to FHWA's Web site via the link provided to the waiver page noted above.

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<sup>5</sup> <http://www.fhwa.dot.gov/programadmin/contracts/122297.cfm>.

(Authority: 23 U.S.C. 313; Pub. L. 110-161, 23 CFR 635.410)

Issued on: April 11, 2018.

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Brandy L. Hendrickson,  
Acting Administrator,  
Federal Highway Administration.

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