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## Focus

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### FEATURE COMMENT: Les Misérables—Contractors And Agencies Struggle To Navigate Build America, Buy America Requirements One Year Later

As you may know, the end of this year—2022—marks the 10-year anniversary of the long-awaited film adaptation of *Les Misérables*. It took more than three decades to commit the beloved musical to the screen and, although the result received mixed reviews, the movie delighted many longtime fans of the musical, and attracted new fans (many of whom were pleasantly surprised to discover that Wolverine from X-Men could sing).

The end of 2022 also marks the one-year anniversary to the Infrastructure Investment and Jobs Act (IIJA), signed by President Biden on Nov. 15, 2021. The IIJA was also long-awaited and the subject of mixed reviews, but it is one of the Biden administration's signature legislative achievements to date. The IIJA provides \$1.2 trillion in funding for initiatives such as:

- Provision of clean water (to include investment in water infrastructure and elimination of lead service pipes)
- Access to reliable high-speed internet
- Repair and rebuild roads and bridges (focusing on climate change mitigation, resilience, equity, and safety for all users)
- Improvement and expansion of public transportation options
- Upgrades to airports and ports

- Investment in passenger rail
- Build a national network of electric vehicle (EV) chargers
- Upgrades to power infrastructure to deliver clean, reliable energy
- Make infrastructure resilient against the impacts of climate change, cyber-attacks, and extreme weather events
- Tackle legacy pollution by cleaning up Superfund and brownfield sites, reclaiming abandoned mines, and capping orphaned oil and gas wells

See White House Fact Sheet: The Bipartisan Infrastructure Deal, available at [www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/](http://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/).

The breadth of these initiatives means that a wide variety of Executive Branch agencies will be involved in undertaking these massive infrastructure projects. In addition to the challenges involved in the planning and execution of these projects, these agencies are now faced with the challenge of implementing new compliance requirements baked into the IIJA. While the IIJA is, of course, a deeply complex piece of legislation with a myriad of requirements, one section of the legislation has proven to be a particularly daunting hurdle standing between agencies and the contractors who stand ready and willing to undertake the work to achieve these goals: the Build America, Buy America (BABA) Act, incorporated into the IIJA at §§ 70901–27. The BABA requirements have sent shockwaves through the federal contracting community, and, over the course of the last year, contractors have scrambled to find clarity regarding how these requirements will be imposed on the wide variety of infrastructure projects to be administered by these diverse agencies. One year after the passage of the IIJA and the BABA, contractors remain

somewhat misérable as they attempt to prepare for the huge influx of infrastructure dollars to come as a result of the IIJA, and manage ongoing projects that are now suddenly subject to new, onerous domestic preference requirements that have yet to be fully understood by agencies. Agencies have taken a broad array of approaches to implementing and waiving these requirements and, while there is still a lot of dust that has yet to settle, in this Feature Comment we will look at BABA, one year later, and provide a snapshot of the requirements and certain agencies' attempts to implement (or not) these requirements.

**Now, Prisoner 24601, Your Time Is Up and Your Parole's Begun ...**—After 19 years of imprisonment and toil, Jean Valjean finally found himself free of the Bagne of Toulon—however, his parole was not quite the freedom he had dreamed of those 19 years, hampered as it was by the restrictions of that parole. Contractors have toiled for years under a variety of agency statutes and regulations applicable to infrastructure projects, the requirements of which vary widely depending on the agency administering the funds. This diversity has long caused boundless confusion for contractors trying in good faith to comply with agency requirements across different projects. In theory, the BABA requirements could help to alleviate this confusion by applying a consistent set of domestic preference restrictions to all federal financial assistance infrastructure projects—not just those funded by the IIJA—and thus give contractors freedom from the confusion that has long imprisoned them. The reality of contractors' "parole" from this confusion, however, is more complicated.

Subtitle A of the BABA Act contains two key parts: Buy America Sourcing Requirements (for federal financial assistance programs for infrastructure), IIJA §§ 70911–70917, and Make It In America, IIJA §§ 70921–70927, which strengthens Buy American Act restrictions and codifies many of the directives in Executive Order 14005 of Jan. 25, 2021 (Ensuring the Future is Made in All of America by All of America's Workers). In this Feature Comment, we focus on the Buy America Sourcing Requirements and how agencies that administer federal financial assistance awards for infrastructure are applying those requirements.

**I Dreamed a Dream in Time Gone By ...**—Fantine sang of happier times in the midst of her

tragic descent, questioning how her life had taken such a dark turn. While certainly less dramatic, contractors who are used to performing under federal financial assistance awards with familiar domestic preference requirements—or, better yet, awards with no such requirements—may now find themselves wistfully dreaming of such times as agencies scramble to implement the new BABA requirements.

To understand the scope of the BABA requirements, the statutory definitions are crucial. "Federal financial assistance" is defined for BABA purposes as follows:

(A) **IN GENERAL.**—The term "Federal financial assistance" has the meaning given the term in section 200.1 of title 2, Code of Federal Regulations (or successor regulations).

(B) **INCLUSION.**—The term "Federal financial assistance" includes all expenditures by a Federal agency to a non-Federal entity for an infrastructure project, except that it does not include expenditures for assistance authorized under section 402, 403, 404, 406, 408, or 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170a, 5170b, 5170c, 5172, 5174, or 5192) relating to a major disaster or emergency declared by the President under section 401 or 501, respectively, of such Act (42 U.S.C. 5170, 5191) or pre and post disaster or emergency response expenditures.

IIJA § 70912(4). This definition is significant in that it clearly applies the BABA requirements to almost all infrastructure projects, not just those funded by the IIJA. This means that these new requirements are here to stay, and are intended to remain in force even after the IIJA funds are exhausted.

"Infrastructure" is defined for BABA purposes as follows:

The term "infrastructure" includes, at a minimum, the structures, facilities, and equipment for, in the United States—

- (A) roads, highways, and bridges;
- (B) public transportation;
- (C) dams, ports, harbors, and other maritime facilities;
- (D) intercity passenger and freight railroads;
- (E) freight and intermodal facilities;
- (F) airports;
- (G) water systems, including drinking water and wastewater systems;

- (H) electrical transmission facilities and systems;
- (I) utilities;
- (J) broadband infrastructure; and
- (K) buildings and real property.

IIJA § 70912(5). Again, this definition casts a wide net over a variety of projects, including projects for construction of buildings and real property. This has given many contractors cause for concern, given the new BABA requirements related to construction materials (discussed below), as many contracts under federal financial assistance awards for infrastructure have not previously required contractors to account for the country of origin of construction materials.

The core BABA requirement relating to such federal financial assistance awards for infrastructure is found at IIJA § 70914, Application of Buy America Preference, which provides at subsection (a):

Not later than 180 days after the date of enactment of this Act, the head of each Federal agency 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.

IIJA § 70914(a).

In theory, then, by May 14, 2022, the BABA requirements were meant to be fully in force for all covered federal financial assistance programs for infrastructure. In practice, however, many agencies have been forced to issue a variety of waivers from the requirements to accommodate the reality that (a) compliance structures are not yet in place to implement these requirements, (b) many iron, steel, manufactured products, and construction materials are not “produced in the United States” such that they are available for use in all covered infrastructure projects, and (c) in some cases, the goal of increasing domestic content in these projects is outweighed by the administrative burden of implementation and enforcement.

Again, the definitions of the terms embedded in § 70914 are critical to understanding exactly what is now required of infrastructure contractors. In the BABA, “produced in the United States” is defined

differently based on the type of item at issue:

PRODUCED IN THE UNITED STATES.—The

term “produced in the United States” means—

(A) in the case of iron or steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;

(B) in the case of manufactured products, that—

(i) the manufactured product was manufactured in the United States; and

(ii) the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States 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 of the manufactured product has been established under applicable law or regulation; and

(C) in the case of construction materials, that all manufacturing processes for the construction material occurred in the United States.

IIJA § 70912(6).

These requirements should not be entirely unfamiliar to contractors—many agencies have had restrictions on the acquisition and use of non-domestic iron and steel for decades, and the definition of manufactured products “produced in the United States” closely resembles the Buy American two-part test for supplies in Federal Acquisition Regulation 52.225-1 (however, to add to contractors’ confusion, the FAR Buy American clause has recently been amended to require 60 percent of the cost of all components to be of domestic origin for a manufactured end product to be considered “domestic”). However, the requirement that “all manufacturing processes for the construction material [occur] in the United States” raised a few immediate questions that required answers before contractors could begin to attempt to comply with the requirement (or, for that matter, before agencies could begin to enforce it)—namely, what is a “construction material” and what are the “manufacturing processes” associated with a construction material? These questions were left unanswered in the BABA Act, which left it up to the Office of Management and Budget to issue “standards that define the term ‘all manufacturing processes’ in the case of construction materials.” IIJA § 70915(b)(1).

**On My Own, No Agency Standards to Guide Me ...**—Like the doomed Eponine longing for the handsome Marius, following passage of the BABA Act contractors were left on their own to try and prepare for the imminent effective date of these requirements without agency guidance as to what, exactly, would be required. Finally, on April 18, 2022, OMB issued a memorandum that contained “guidance to Federal agencies on the application of: (1) a ‘Buy America’ preference to Federal financial assistance programs for infrastructure; and (2) a transparent process to waive such preference, when necessary.” OMB Memorandum M-22-11, Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, April 18, 2022 at 2, available at [www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf](http://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf). This guidance was a welcome first step, but OMB could only take agencies part of the way—agencies are still required to “determine how this guidance is best applied to their infrastructure programs and processes, and consult with OMB, as needed, on establishing criteria, processes, and procedures for applying a Buy America preference and issuing waivers.” *Id.* Thus, to some degree, agencies were also left pining for clarity as to how to implement the guidance in a way that fit their particular agency needs.

However, the OMB memo did provide some critical clarity in terms of (1) how agencies may want to use the waiver power granted to them by § 70914(b) of the BABA Act, and (2) how to apply the BABA requirements to construction materials.

*Waivers:* With respect to agencies’ power to waive BABA requirements, § 70914(b) of the BABA Act provides:

- WAIVER.—The head of a Federal agency that applies a domestic content procurement preference under this section may waive the application of that preference in any case in which the head of the Federal agency finds that—
- (1) applying the domestic content procurement preference would be inconsistent with the public interest;
  - (2) 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; or
  - (3) the 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.

IIJA § 70914(b).

The OMB memo provided detail regarding the steps an agency must take before issuing a waiver, i.e., that agencies must make publicly available on an agency’s website a detailed written explanation for the proposed waiver, and provide a period for public comment. The OMB memo also provided information concerning the support that agencies must provide to the OMB Made in America Office (MIAO) in support of a proposed waiver. Specifically, agencies must include “a detailed justification for the use of goods, products, or materials mined, produced, or manufactured outside the United States and a certification that there was a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with potential suppliers.” OMB memo 22-11 at 7. The OMB memo also establishes a framework for future agency exceptions to the BABA requirements, and provides list of information that agencies must provide to the MIAO “at a minimum and to the greatest extent practicable” with each proposed waiver:

- Waiver type (nonavailability, unreasonable cost, or public interest)
- Recipient name and Unique Entity Identifier (UEI)
- Federal awarding agency organizational information (e.g., Common Governmentwide Accounting Classification (CGAC) Agency Code)
- Financial assistance listing name and number
- Federal financial assistance program name
- Federal Award Identification Number (FAIN) (if available)
- Federal financial assistance funding amount
- Total cost of infrastructure expenditures, including all Federal and non-Federal funds (to the extent known)
- Infrastructure project description and location (to the extent known)
- List of iron or steel item(s), manufactured products, and construction material(s) proposed to be excepted from Buy America requirements, including name, cost, country(ies)



of origin (if known), and relevant PSC and NAICS code for each.

- A certification that the Federal official or assistance recipient made a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with the prime contractor.
- A statement of waiver justification, including a description of efforts made (e.g., market research, industry outreach), by the Federal awarding agency and, in the case of a project or award specific waiver, by the recipient, in an attempt to avoid the need for a waiver. Such a justification may cite, if applicable, the absence of any Buy America-compliant bids received in response to a solicitation.
- Anticipated impact if no waiver is issued.
- Any relevant comments received through the public comment period.

Id. at 7–8.

The OMB memo also offered some important guidance for agencies concerning issuance of “a limited number of general applicability public interest waivers in the interest of efficiency and to ease burdens for recipients.” Id. at 10. These suggested general applicability public interest waivers include:

- **De minimis:** These waivers would promote efficiency for both recipients and federal agencies, especially where the cost of submitting and processing individualized waivers would “risk exceeding the value of the items waived.” OMB posited that agencies “may consider adopting an agency-wide public interest waiver that sets a de minimis threshold, for example, of 5 percent of project costs up to a maximum of \$1,000,000.”
- **Small Grants:** Agencies may also consider whether the Buy America preference could be waived for awards below the Simplified Acquisition Threshold (currently \$250,000). OMB noted that such a waiver “may be particularly relevant in the initial years after enactment of IIJA, and may be phased out over time as agencies develop efficient waiver review capabilities.”
- **Minor Components:** Agencies may also use their public interest waiver power to allow “minor deviations for miscellaneous minor

components within iron and steel products”—for example, such a waiver might allow a small percentage (e.g., five percent) of the total material cost of an otherwise domestic iron or steel end product to be used.

- **Adjustment Period:** OMB advised agencies to consider “whether brief, time limited waivers to allow recipients and agencies to transition to new rules and processes may be in the public interest.”
- **International Trade Obligations:** To the extent a recipient is a state that has assumed procurement obligations pursuant to a trade agreement, OMB advised that waiver from the Made in America requirements to ensure compliance with those obligations may be in the public interest.
- **Other Considerations:** OMB advised that agencies have discretion to issue waivers in the public interest, and acknowledged that waivers in the public interest may be appropriate in some circumstances, but not others. An agency should consider “the nature and amount of resources available to the recipient, the value of the items, good, or materials in question, the potential domestic job impacts, and other policy considerations, including sustainability, equity, accessibility, performance standards, and the domestic content (if any) of and conditions under which the non-qualifying good was produced.”

Id. at 11.

*BABA Construction Materials:* The OMB memo also provided helpful “preliminary and non-binding guidance to assist agencies in determining which materials are construction materials so that agencies can begin applying Buy America requirements to those materials.” OMB memo at 13. Per the OMB memo, the IIJA provided that the term “construction materials” includes

an article, material, or supply—other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives—that is or consists primarily of:

- non-ferrous metals;
- plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic

cables);

- glass (including optic glass);
- lumber; or
- drywall.

Id. at 13–14; IIJA §§ 70917(c)(1), 70911(5).

In the interest of providing clarity to contractors and item manufacturers and processors, OMB stated that “items that consist of two or more of the listed materials that have been combined together through a manufacturing process, and items that include at least one of the listed materials combined with a material that is not listed through a manufacturing process, should be treated as manufactured products, rather than as construction materials.” OMB memo at 14. OMB also clarified that, while it still intends to issue final standards on construction materials, in the interest of providing preliminary guidance to stakeholders, “agencies should consider ‘all manufacturing processes’ for construction materials to include at least the final manufacturing process and the immediately preceding manufacturing stage for the construction material.” Id. With this preliminary OMB guidance, agencies and contractors could feel a bit less “on their own” in understanding and applying BABA requirements.

**Do You Hear the People Sing? Singing the Songs of Contractors Who Will Not Be Left in the Dark Again ...**—One of the most recognizable songs from *Les Misérables* is a rousing call to revolution, sung by a chorus of enthusiastic students in the face of ongoing hardship. In light of the OMB memo and the looming May 14, 2022 deadline for the applicability of the BABA requirements and the hardship faced by contractors scrambling to comply, agencies rapidly issued a chorus of waivers of the BABA requirements to federal financial assistance programs for infrastructure. Although each affected agency has taken a slightly different approach, there are some common refrains that have been sung in unison by agencies: (1) adjustment period general applicability public interest waivers; and (2) public interest waivers in the categories suggested by the OMB memo. However, not all agencies have issued waivers, and some have presumably already taken the position that the requirements are “live” and applicable to federal financial assistance awards for infrastructure administered by those agencies—yet as the chorus grows louder and louder, such agencies may come to realize that

they, too, need to issue public interest waivers that are either generally applicable to certain categories of projects or that are project-specific in light of the ongoing uncertainty surrounding the implementation and enforcement of the BABA requirements.

In particular, the Department of Transportation (DOT) will have a pivotal role in implementing the initiatives in the IIJA, and, as such, contractors have eagerly awaited clear guidance from DOT regarding the BABA requirements. Prior to passage of the IIJA, DOT was no stranger to domestic preference requirements, and accordingly it has had the institutional knowledge and experience with domestic preference requirements necessary to rapidly respond to the BABA requirements. DOT agencies already have many statutes, colloquially known as the “Buy America” statutes, that specifically require awardees to ensure domestic materials are used in DOT-agency funded projects. See, e.g., 49 USCA § 5323(j) (Federal Transit Administration), 23 USCA § 313 (Federal Highway Administration), 49 USCA § 24405(a) (Federal Railroad Administration High Speed Rail Program), 49 USCA § 50101 (Federal Aviation Administration), 49 USCA § 24305 (AMTRAK). While these statutes vary in terms of their domestic preference requirements and the availability of waivers from those requirements, generally speaking the statutes require steel, iron, and manufactured goods used in DOT-agency projects to be of U.S. origin. However, prior to BABA, DOT agencies did not specifically address the origin of “construction materials,” other than to the extent that those materials would be considered iron, steel, or manufactured products—a gap in BABA compliance that DOT was required to fill under the IIJA.

Accordingly, on May 19, 2022, DOT issued a temporary public interest waiver for construction materials for a period of 180 days beginning on May 14, 2022 and expiring on Nov. 10, 2022. Department of Transportation, Temporary Waiver of Buy America Requirements for Construction Materials, May 19, 2022, available at [www.transportation.gov/regulations/temporary-waiver-buy-america-requirements-construction-materials](http://www.transportation.gov/regulations/temporary-waiver-buy-america-requirements-construction-materials). DOT characterized this waiver as a “transitional waiver to prepare for compliance with the new Made in America standards for construction materials” and stated its expectation that, during this time period, States, industry, and other partner would start “developing procedures to document compliance.” Id at 1.

True to its word, on Nov. 4, 2022, DOT published two notices advising that DOT was taking three concurrent actions: (1) DOT declined to extend its temporary waiver for construction materials, making that requirement applicable effective Nov. 10, 2022; (2) DOT proposed a narrow waiver for de minimis costs, small grants, and minor components; and (3) DOT took action to help transition to the new construction materials standard by proposing to (a) waive the construction materials requirements for any contracts entered into before Nov. 10, 2022, and (b) waive the construction material requirements for any contracts entered into before March 10, 2023 that result from solicitations published before May 14, 2022. See Notice that the Build America, Buy America Requirement for Construction Materials Applies Effective November 10, 2022, and Notice of Proposed Waiver of Buy America Requirements for *De Minimis* Costs, Small Grants, and Minor Components, Nov. 4, 2022, available at [www.transportation.gov/sites/dot.gov/files/2022-11/DOT%20Notice%20of%20Proposed%20Waiver%20for%20De%20Minimis%20Costs%20Small%20Grants%20and%20Minor%20Components%202022.11.04.pdf](http://www.transportation.gov/sites/dot.gov/files/2022-11/DOT%20Notice%20of%20Proposed%20Waiver%20for%20De%20Minimis%20Costs%20Small%20Grants%20and%20Minor%20Components%202022.11.04.pdf) (DOT de minimis waiver); Notice That the Build America, Buy America Requirement for Construction Materials Applies Effective November 10, 2022, and Notice of Proposed Waiver of That Requirement for a Narrow Category of Contracts and Subcontracts, Nov. 4, 2022, available at [www.transportation.gov/sites/dot.gov/files/2022-11/DOT%20Notice%20of%20Proposed%20Buy%20America%20Waiver%20for%20Certain%20Contracts%20and%20Solicitations%202022.11.04.pdf](http://www.transportation.gov/sites/dot.gov/files/2022-11/DOT%20Notice%20of%20Proposed%20Buy%20America%20Waiver%20for%20Certain%20Contracts%20and%20Solicitations%202022.11.04.pdf) (DOT narrow category waiver).

The proposed DOT de minimis waiver notes that certain DOT agency domestic preference requirements already exempt de minimis purchased or project costs under their existing statutory requirements (e.g., the Federal Transit Administration exempts purchases of \$150,000 or less by statute, see 49 USCA § 5323(j)(13)), while others do not have a similar exception (e.g., the Federal Railroad Administration). In the proposed DOT de minimis waiver, DOT proposes to use its waiver authority under IIJA § 70914(b)(1) to “waive the Act’s Buy America preferences for iron and steel, manufactured products, and construction materials used in infrastructure projects funded under

DOT-administered financial assistance programs,” as follows:

- The total value of the non-compliant products is no more than the lesser of \$1,000,000 or 5% of total allowable costs under the Federal financial assistance award;
- The size of the Federal financial assistance award is below \$500,000; or
- The non-domestically produced miscellaneous minor components comprise no more than 5 percent of the total material cost of an otherwise domestically produced iron or steel product.

DOT de minimis waiver at 6.

DOT also makes clear that the proposed DOT de minimis waiver would apply to other DOT-administered financial assistance programs that are subject to program-specific domestic preference requirements, specifying that the waiver is an exercise of DOT’s authority to issue public interest waivers under 23 USCA § 313(b)(1), 49 USCA § 5323(j), 46 USCA § 54101(d)(2)(B)(i)(I), 49 USCA § 22905(a)(2), 49 USCA § 50101(b)(1), and 41 USCA Chapter 83. Id. at 7. Thus, for DOT agencies at least, pending issuance of the final DOT de minimis waiver, contractors may be able to look forward to some consistency across agencies as a result of the DOT action to address the BABA requirements.

In the DOT narrow category waiver issued Nov. 4, 2022, DOT recognized that requiring compliance with the BABA domestic preference for construction materials would be “unduly burdensome for projects that have already executed construction contracts, because they already have received DOT financial assistance, are exercising DOT-approved pre-award authority, or will receive DOT credit assistance for activities already in progress.” DOT narrow category waiver at 10. Quite rightly, DOT recognized that “application of the construction materials requirement to these categories of projects would result in unacceptable delay, increased project costs, and potential loss of jobs while project construction is paused.” Id. Accordingly, DOT proposed a general public interest waiver of BABA’s domestic preference for construction materials for (1) any contract entered into before Nov. 10, 2022, and (2) any contract entered into before March 10, 2023, if the contract results from a solicitation published prior to May 14, 2022. Id. at 11. However, the proposed DOT narrow category waiver warns that if

a project sponsor’s solicitation does not result in an award by March 10, 2023, the full BABA construction materials requirement would apply. *Id.* Thus, while this proposed DOT narrow category waiver gives another brief reprieve to project sponsors and contractors scrambling to adjust to the BABA construction materials requirement, March 2023 will mark the end of such reprieve.

At the time of this writing, both waivers were still pending, following expiration of the comment period on Nov. 20, 2022. While DOT may make some changes to these proposed waivers—specifically surrounding the proposed percentage and dollar thresholds for the DOT *de minimis* waiver, given the OMB guidance and the likely support from grantee state and local governments and affected contractors, we expect to see these waivers finalized in some form.

DOT agencies have also proposed transitional waivers from the BABA requirements for electric vehicle (EV) chargers and for the Strengthening Mobility and Revolutionizing Transportation (SMART) Grants Program. See Notice of Proposed Waiver of Buy America Requirements for Electric Vehicle Chargers, 87 Fed. Reg. 53539 (Aug. 31, 2022), available at [www.govinfo.gov/content/pkg/FR-2022-08-31/pdf/2022-18831.pdf](http://www.govinfo.gov/content/pkg/FR-2022-08-31/pdf/2022-18831.pdf) (EV charger waiver); Notice of Proposed Temporary Waiver of Buy America Requirements for the Strengthening Mobility and Revolutionizing Transportation (SMART) Grants Program, 87 Fed. Reg. 61143 (Oct. 7, 2022), available at [www.govinfo.gov/content/pkg/FR-2022-10-07/pdf/2022-21848.pdf](http://www.govinfo.gov/content/pkg/FR-2022-10-07/pdf/2022-21848.pdf) (waiving BABA requirements for SMART projects’ Stage 1 planning and prototyping activities awarded pursuant to the FY 2022 Notice of Funding Opportunity for the program). The EV charger waiver is particularly noteworthy in that it is an attempt to balance the Biden administration’s focus on both sustainable energy and the goal of strengthening domestic manufacturing and strengthening the U.S. supply chain through the BABA requirements. The proposed EV charger waiver, issued by the Federal Highway Administration (FHWA), would modify the existing FHWA general applicability waiver for manufactured products (which may itself be a subject of scrutiny following the implementation of BABA requirements) and would waive existing Buy America requirements under FHWA regulations and the BABA requirements for the steel, iron, manufactured products,

and construction materials in EV chargers “in a manner that, over a deliberate transitional period, reduces the scope of that waiver.” EV charger waiver at 87 Fed. Reg. 53539. The EV charger waiver would “initially waive all Buy America requirements for EV chargers and all components of EV chargers that are installed in a project and then phase-out the waiver with two changes during calendar year 2023 and one change in January 2024.” *Id.* Specifically:

- Beginning on January 1, 2023, FHWA proposes to remove from the waiver EV chargers whose final assembly process does not occur in the United States. On and after that date, for EV chargers that are installed in a project FHWA proposes the waiver would be applicable only if final assembly occurs in the U.S.
- Beginning on July 1, 2023, FHWA proposes to also remove from the waiver EV chargers for which the cost of components manufactured in the United States does not exceed 25 percent of the cost of all components. On and after that date, for EV chargers that are installed in a project through December 31, 2023, FHWA proposes the waiver would be applicable only if: (i) final assembly occurs in the U.S.; and (ii) the cost of components manufactured in the United States exceeds 25 percent of the cost of all components.
- Beginning on January 1, 2024, and thereafter, FHWA proposes to also remove from the waiver EV chargers for which the cost of components manufactured in the United States does not exceed 55 percent of the cost of all components. On and after that date, FHWA proposes the waiver would be applicable only if: (i) final assembly occurs in the U.S.; and (ii) the cost of components manufactured in the United States exceeds 55 percent of the cost of all components.

EV charger waiver at 87 Fed. Reg. 53545.

While, again, the EV charger waiver is still pending as of the date of writing, through this proposed waiver FHWA has signaled its intent to proactively address the complexities associated with the implementation of domestic preference requirements as they apply to particular items that are of paramount importance in furthering the goals of the IIJA. While we may yet see changes in the final version of this waiver, this is likely a key example of how the administration must bal-



ance the competing objectives of project execution and sustainability with the interest in spurring American industry through domestic preference requirements.

**One Day More ... We Will Know What They Know**—Like the epic game of cat and mouse between Valjean and Javert, agencies and contractors continue to circle one another, awaiting their ultimate, intertwined fate with respect to the BABA requirements. We have examined above some examples of agency efforts to come to grips with the BABA requirements over the past year; however, many additional agencies have issued waivers for “another day, another destiny” on this never-ending road to full BABA-compliance. See, e.g., USDA Rural Development Build America, Buy America Public Interest Waiver, Aug. 4, 2022 (approving a six-month adjustment period waiver to “implement the new requirements and shepherd its customers through a transition to BABA”) available at [www.usda.gov/sites/default/files/documents/usda-rd-adjustment-period-waiver-approved-aug-4-22-with-comment.pdf](http://www.usda.gov/sites/default/files/documents/usda-rd-adjustment-period-waiver-approved-aug-4-22-with-comment.pdf); USDA Departmentwide Public Interest Waivers: De Minimis, Small Grants and Minor Components of Build America, Buy America Provisions as Applied to Recipients of USDA Federal Financial Assistance, Sept. 13, 2022, available at [www.usda.gov/sites/default/files/documents/usda-departmentwide-de-minimis-small-grants-minor-components-waiver-final-approved-09132022.pdf](http://www.usda.gov/sites/default/files/documents/usda-departmentwide-de-minimis-small-grants-minor-components-waiver-final-approved-09132022.pdf) (issuing departmentwide public interest waivers from application of the Buy America Domestic Content Procurement Preference provisions as applied to the iron, steel, manufactured products, and construction materials requirement of the BABA for de minimis items, small grants, and minor components) available at [www.usda.gov/sites/default/files/documents/usda-departmentwide-de-minimis-small-grants-minor-components-waiver-final-approved-09132022.pdf](http://www.usda.gov/sites/default/files/documents/usda-departmentwide-de-minimis-small-grants-minor-components-waiver-final-approved-09132022.pdf); Public Interest De Minimis and Small Grants Waiver of Build

America, Buy America Provisions as Applied to Recipients of HUD Federal Financial Assistance, Nov. 23, 2022, available at [www.hud.gov/sites/dfiles/GC/documents/6331-N-08%20De%20Minimis%20and%20Small%20Dollar%20Threshold.pdf](http://www.hud.gov/sites/dfiles/GC/documents/6331-N-08%20De%20Minimis%20and%20Small%20Dollar%20Threshold.pdf); Public Interest Waiver of Build America, Buy America Provisions for Exigent Circumstances as Applied to Certain Recipients of HUD Federal Financial Assistance, Nov. 23, 2022, available at [www.hud.gov/sites/dfiles/GC/documents/6331-N-05%20BABA%20Exigent%20Circumstances.pdf](http://www.hud.gov/sites/dfiles/GC/documents/6331-N-05%20BABA%20Exigent%20Circumstances.pdf); Public Interest Phased Implementation Waiver of Build America, Buy America Provisions as Applied to Recipients of HUD Federal Financial Assistance, Nov. 23, 2022, available at [www.hud.gov/sites/dfiles/GC/documents/6331-N-06%20Phased%20Implementation%20Waiver.pdf](http://www.hud.gov/sites/dfiles/GC/documents/6331-N-06%20Phased%20Implementation%20Waiver.pdf); see generally Made in America Office Buy America Waivers for Federal Financial Assistance, available at [www.madeinamerica.gov/waivers/financial-assistance/](http://www.madeinamerica.gov/waivers/financial-assistance/). While contractors may well be in the mood for revolution as they navigate these agency responses to the BABA requirements, one year following the passage of the IIJA we have already begun to see some tangible movement toward unified domestic preference requirements applicable to federal financial assistance awards for infrastructure. While we hope that contractors will not have to wait 19 long years like Jean Valjean to find the clarity they seek, it will likely take several “days” more before agencies, project sponsors, and contractors find their ultimate freedom from BABA confusion.



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