



February 15, 2024

Via Email, Shalanda.D.Young@omb.eop.gov

Hon. Shalanda D. Young, Director
Office of Management and Budget
The White House
725 17th Street, NW
Washington, DC 20503

RE: Petition for Rulemaking to issue amended Build America, Buy America Act implementation guidance under the Administrative Procedure Act and Request under the Paperwork Reduction Act review of 19 agencies' BABAA Waiver information collections.

Dear Director Young:

We are a coalition¹ of national trade associations that represent tens of thousands of government entities and businesses of all sizes, including minority-owned and disadvantaged businesses. Our members collectively employ millions of American workers in all 50 states, the District of Columbia, and Puerto Rico, and contribute hundreds of billions of dollars in business annually to America's economy. We are the government entities responsible for the safe and efficient public transportation that connect American communities and enable economic opportunities. We are the companies that build, maintain, repair, and represent all of our nation's infrastructure—highways, roads, rail, air, water, public transportation, housing, and more. Members of our coalition are working hard to “install, upgrade, or replace the public works

¹ [American Public Transportation Association](#) (“APTA”), [American Road & Transportation Builders Association](#) (“ARTBA”), [Associated General Contractors Association of America](#) (“AGC”), and [National Association of Home Builders](#) (“NAHB”), (collectively “Coalition Members”).

infrastructure of the United States”² and deliver on the \$1.2 trillion investment of the Infrastructure Investment and Jobs Act (“IIJA”) while complying with its Build America, Buy America Act (“BABAA”) requirements. We applaud the Biden’s administration’s leadership in rebuilding our nation’s infrastructure.

Our coalition supports BABAA’s laudable core purpose of strengthening domestic manufacturing. The global events that have contributed to continuing supply chain destabilization evidence the need for a more robust American manufacturing base. However, our members must currently rely on a construction materials market that is still adjusting to meet BABAA requirements, while seeking to deliver on the historic infrastructure investments authorized by the statute. Unfortunately, amidst these historic challenges, we have encountered significant difficulty in navigating an opaque and unbalanced implementation of BABAA by the White House Office of Management and Budget (“OMB”) and its Made In America Office (“MIAO”).

This type of regulatory uncertainty can result in pared down, delayed, and costlier infrastructure projects.³ It is also a disincentive for construction firms—including small and disadvantaged businesses—to bid on and otherwise participate in infrastructure-related Federal financial assistance programs (“FFA”), thereby undermining competition.

² Build America, Buy America Act, Pub. L. No. 117-58, div. G, Title 9, §§ 70,911(1), 135 Stat. 429 (Nov. 15, 2021) (included within the Infrastructure Investment and Jobs Act).

³ For example, a small municipality project to double drinking and wastewater treatment capacity received bids more than 32 percent (\$11 million) over estimate and experienced project delays as a result of rebidding, THE WEIRTON DAILY TIMES, *Costs creating delay in Weirton utility projects* (Dec. 15, 2023) <https://www.weirtondailytimes.com/news/local-news/2023/12/costs-creating-delay-in-weirton-utility-projects/>; and a tribal water supply infrastructure project experienced a \$2 million cost increase and project delay as a result of difficulties sourcing pipe fittings, water pumps, motors, electrical switches, and gears, Savannah Maher, *Federal “Buy American” rules could be stalling infrastructure projects*, MARKETPLACE (Oct. 26, 2023) <https://www.marketplace.org/2023/10/26/federal-buy-american-rules-could-be-stalling-infrastructure-projects/>.

Collectively, our associations and members have actively participated in numerous requests for information, calls for comment, and listening sessions conducted by OMB and individual agencies. However, at this time, there appear to be minimal demonstrable results for the expertise that we have shared. OMB needs to change course to foster a more deliberative, data driven BABAA implementation process that not only prioritizes domestic manufacturing but also provides adequate consideration for the timely and successful delivery of essential infrastructure projects. Failure to act will result in the IIA's inability to fulfill on its infrastructure promise to the American people.⁴

To this point, we respectfully write to invoke the Administrative Procedure Act ("APA") under 5 U.S.C. § 553(e) to petition OMB to issue amended BABAA implementation guidance and contemporaneously invoke the Paperwork Reduction Act ("PRA") under 44 U.S.C. § 3517(b) to request your review of certain information collections conducted by Federal agencies for BABAA waivers that fail to comply with the PRA as laid out below.

Since President Biden signed BABAA into law on November 15, 2021, OMB's guidance has not adequately accounted for historic cost spikes for key construction inputs, the Federal Reserve benchmark lending rate,⁵ continuing construction industry supply chain challenges,⁶ a

⁴ Remarks of President Joe Biden – State of the Union Address as Prepared for Delivery (Feb. 7, 2023) <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/07/remarks-of-president-joe-biden-state-of-the-union-address-as-prepared-for-delivery/> (“[We] came together to pass a one-in-a-generation infrastructure law;” “[W]e also need the best infrastructure in the world.,” “These projects will put hundreds of thousands of people to work rebuilding our highways, bridges, railroads, tunnels, ports and airports, clean water, and high-speed internet across America.”).

⁵ News Release, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (Dec. 13, 2023) <https://www.federalreserve.gov/newsevents/pressreleases/monetary20231213a.htm> (“Inflation has eased over the past year but remains elevated . . . The Committee seeks to achieve maximum employment and inflation at the rate of 2 percent over the longer run. In support of these goals, the Committee decided to maintain the target range for the federal funds rate at 5-1/4 to 5-1/2 percent.”)

⁶ The Hartford, *The Top 3 Trends That Will Impact the Construction Industry in 2024* (Oct. 25, 2023), <https://www.thehartford.com/insights/construction/2023-trends-shaping-the-future-construction-industry> (predicting continued substantial supply chain instability).

tight labor market,⁷ and an unsettled banking industry. A more informed and transparent timeline for Buy America preferences in FFAs for infrastructure is needed than what M-24-02 (Oct. 25, 2023)⁸ or M-22-11 (Apr. 18, 2022)⁹ provides and what OMB’s August 2023 guidance offers.¹⁰

OMB needs to establish new procedures, improve its existing procedures, exercise greater diligence in providing the public with notice of the particulars of BABAA implementation, genuinely consider comments that it receives, adjust its substantive interpretations of BABAA, establish a database of BABAA-compliant construction materials and manufactured products, and institute a robust, no-cost training regime for all stakeholders, among other improvements. We ask that you partner with us; we eagerly await your substantive response to this APA Petition and PRA Request by April 15, 2024.¹¹

⁷ See, e.g., News Release, U.S. BUREAU OF LABOR STATISTICS, *The Employment Situation – December 2023* (Jan. 5, 2024) <https://www.bls.gov/news.release/pdf/empsit.pdf> (announcing an unemployment rate of 3.7 percent); Economic News Release, U.S. BUREAU OF LABOR STATISTICS, *Job Openings and Labor Turnover Summary* (Jan. 3, 2023) <https://www.bls.gov/news.release/jolts.nr0.htm> (indicating 8.8 million job openings and 5.3 percent rate of job openings).

⁸ Mem. From Shalanda D. Young, Director, U.S. Office of Management and Budget to Heads of Executive Departments and Agencies, M-24-02: *Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure* (hereinafter “M-24-02”) (Oct. 25, 2023) (<https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf>) (superseding Mem. From Shalanda D. Young, Director, U.S. Office of Management and Budget to Heads of Executive Departments and Agencies, M-22-11: *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure* (Apr. 18, 2022) (<https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>)).

⁹ Mem. From Shalanda D. Young, Director, U.S. Office of Management and Budget to Heads of Executive Departments and Agencies, M-22-11: *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure* (Apr. 18, 2022) (<https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>).

¹⁰ OMB Guidance for Grants and Agreements, 88 Fed. Reg. 57,750, 57,789 (Aug. 23, 2023).

¹¹ 44 U.S.C. § 3517(b)(1) (requiring a response from the OMB Director to PRA Section 3517(b) requestors “within 60 days after receiving the request.”)

I. The OMB Director Should Favorably Adjudicate This Administrative Procedure Act Petition For Rulemaking To Issue Amended BABAA Implementation Guidance.

The stated purpose of the Administrative Procedure Act of 1946 (“APA”), as amended, is to serve as “a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government.”¹² The APA expressly requires “each agency” to “give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”¹³ OMB is an “agency” as defined by the APA.¹⁴ The coalition and its individual members qualify as “person[s]” under the APA.¹⁵ M-24-02, the August 2023 2 C.F.R. parts 184 and 200 guidance, and other BABAA guidance issued by OMB each qualify as a “rule” under the APA.¹⁶

The coalition respectfully submits that the policies laid out below to effectuate BABAA provisions of IJA¹⁷ should be favorably adjudicated by OMB and used to clarify M-24-02 guidance.

A. OMB should trust FFA implementing executive branch agencies with administering most of the details of BABAA policy through delegation.

Our members seek to build projects as safely, efficiently, and cost-effectively as possible. At the same time, each construction discipline is distinct, as are the types of projects funded by

¹² S. DOC. NO. 79-248, at 298 (1946) (emphasis added), cited in, e.g., *Diebold v. United States*, 947 F.2d 787, 795 (6th Cir. 1991); see also S. DOC. NO. 79-248 at 304 (“[The APA bill] is not a codification of administrative law. It represents, instead, an outline of minimum basic essentials, framed out of long consideration . . .”).

¹³ 5 U.S.C. § 553(e).

¹⁴ 5 U.S.C. § 551(1); *Citizens for Responsibility and Ethics in Washington v. Office of Admin.*, 566 F.3d 219, 224 (D.C. Cir. 2009) (internal citation omitted) (observing that the OMB is an “agency” under the APA and Freedom of Information Act).

¹⁵ 5 U.S.C. § 551(2) (“person” includes an individual, partnership, corporation, association, or public or private organization other than an agency”).

¹⁶ 5 U.S.C. § 551(4); see generally Gavoor and Platt, *Public Participation in Nonlegislative Rulemaking*, 61 VILLANOVA L. REV. 759 (2016).

¹⁷ Failure to timely adjudicate this petition would constitute an unreasonable delay under 5 U.S.C. § 706(1).

FFAs through the respective federal agencies. Logically, then, a one-size-fits-all blanket implementation of BABAA domestic preference requirements without meaningful delegation to agencies makes little sense. Project components—many of which now fall under BABAA—vary greatly among the different sectors as diverse as residential home building, public transit, highways and bridges. The reality of applying BABAA domestic contract procurement preferences to the construction of airports is distinct from applying those preferences to the construction of multi-family low-income housing structures or highway rest areas.

The agencies administering the various FFAs understand these distinctions. Yet, OMB has not exercised its BABAA implementing authority to fully leverage or realize these agencies' expertise to administer the statute. Instead, it has sought to develop BABAA-related policies and practices down to a granular level by fiat with the MIAO office. Regulating a subject-matter as rich and complex as government-wide domestic preference with an overburdened administrative staff investment causes errors and reductive regulatory shortcuts.¹⁸ For example, OMB originally characterized its February 9, 2023 “proposed guidance” as a “proposed rule,”¹⁹ only to attempt to cure the error with four days remaining in the comment period.²⁰ After the final guidance was issued,²¹ it was clear that a cost-benefit analysis was not performed, which in turn resulted in the issuance of an overly strict M-24-02 implementation document.

¹⁸ A May 2023 survey by ARTBA and AGC indicated 62 percent of transportation construction contractors described current Buy America policy in their state(s) as “somewhat” or “very” confusing.

¹⁹ OFFICE OF MANAGEMENT AND BUDGET, Proposed rule; notification of proposed guidance, OMB-2023-0004, 88 Fed. Reg. 8374 (Feb. 9, 2023) (<https://www.federalregister.gov/documents/2023/02/09/2023-02617/guidance-for-grants-and-agreements>).

²⁰ OFFICE OF MANAGEMENT AND BUDGET, Notification of proposed guidance; correction, OMB-2023-0004, 88 Fed. Reg. 14514 (Mar. 9, 2023) (<https://www.federalregister.gov/documents/2023/03/09/2023-04746/guidance-for-grants-and-agreements>) (“This document *corrects* the Action caption to a notification of proposed guidance published in the Federal Register of February 9, 2023 . . . The notification was *incorrectly categorized* in the Action caption as a proposed rule.” (emphasis added)).

²¹ OFFICE OF MANAGEMENT AND BUDGET, Guidance for Grants and Agreements, 88 Fed. Reg. 57,750, 57,789 (Aug. 23, 2023) (no economic analysis was performed).

Because each agency’s infrastructure construction stakeholders must account for unique inflationary, supply chain, and related dynamics, OMB should focus on implementing BABAA at a generalized level of policy and empower federal agencies with broad discretion to fill in the details. The policy objective of strengthening American manufacturing needs to be consistent. Government works best when agencies collaborate with their stakeholders to maximize investment while navigating distinct funding, design, procurement, and construction realities.

Some agencies, such as the U.S. Department of Transportation, bring decades of experience administering pre-BABAA domestic preference requirements. Congress anticipated this approach by expressly stating in BABAA that its provisions “shall apply to a Federal financial assistance program for infrastructure only to the extent that a domestic content procurement preference . . . does not already apply to iron, steel, manufactured products, and construction materials.”²² Yet OMB has chosen to preempt agency-level policy constructs and expertise in many cases.

Instead, OMB should ensure that key BABAA implementing agencies, like the U.S. Departments of Transportation and Housing and Urban Development, play the lead role in working with their grant recipients and stakeholders to implement BABAA. In so doing, it should establish expeditious, transparent, and statutorily-supported waiver policies, through which MIAO can play its designated role of reviewing waivers while incorporating substantial agency expertise. OMB should minimize its substantive role in adjudicating agency waiver decisions. Moreover, OMB should also meaningfully delegate to agencies the responsibility of crafting sensible BABAA policies that take their respective infrastructure sectors, programs, and expertise into account.

²² Build America, Buy America Act, Pub. L. No. 117-58, div. G, Title 9, § 70,917(a), 135 Stat. 429 (Nov. 15, 2021) (included within the Infrastructure Investment and Jobs Act).

B. OMB should promote agency-level BABAA databases at no cost to the regulated public to provide much-needed clarity and compliance aid to FFA infrastructure stakeholders, including State agencies.

The current state of BABAA implementation places the onus of compliance on State and local administrative agencies and, ultimately, construction contractors. Uncertainty and potential liability for these stakeholders translate to their assumption of regulatory risk for noncompliance with BABAA’s provisions. In reality, contractors “price” risk into their bids, resulting in higher project costs. A dysfunctional or elongated waiver process can result in project delays, which carry their own costs. Given a choice of projects to pursue, some contractors may choose to avoid FFA-funded projects, thereby reducing competition and potentially increasing costs for the American taxpayer yet again.²³

OMB could provide greater regulatory certainty by easing the BABAA certification process through agency-level databasing of BABAA-compliant “construction materials,²⁴ “manufactured products,”²⁵ iron, and steel. U.S. producers of construction materials and manufactured products as defined by the statute would presumably embrace such a policy improvement as a mechanism to increase and stabilize sales. Agencies could then exercise their discretion to coordinate with each other as circumstances merit. At present, some State and local agencies and trade associations are filling the gap by developing their own compilations, but the nationwide scope of BABAA policies as well as market dynamics for many construction materials makes it wiser for Federal executive branch agencies to step in and build compliance databases within their authority.

²³ The May 2023 ARTBA/AGC survey indicated 26 percent of transportation construction contractors were “less likely to bid federal-aid work” because of frustration with new Buy America regulations.

²⁴ Pub. L. No. 117-58, §§ 70,911(5), 70,912(2)(C), (6)(C), 70,917(a).

²⁵ Pub. L. No. 117-58, §§ 70,912(2)(B), (6)(B), 70,914(a), 70,917(a).

C. OMB should substantively implement BABAA to enable more consistent and competitive bidding on infrastructure projects at lower costs and with timelier project delivery.

An effective, balanced approach to BABAA implementation with genuine prioritization to deliver on the infrastructure investment of IJIA will require key clarifications to OMB’s approach in M-24-02 as follows.

i. OMB should revise M-24-02 to authorize agencies to issue BABAA waivers.

M-24-02 Part VI states that waivers may only be issued by the “head of the Federal agency” based on specific enumerated findings.²⁶ However, this is inconsistent with statutory authority. Though IJIA § 70,914(b) states “[t]he head of a Federal agency” in regards to applying BABAA waivers, IJIA § 70,935(a)—a provision titled “Judicious Use of Waivers” which is not cited in M-24-02—conditions in general terms that BABAA waivers may be “determined by an agency head or other relevant official.”²⁷ OMB’s own October 2023 BABAA guidance, 2 C.F.R. § 184.7, correctly states waivers may be applied by a “Federal awarding agency,” which authorizes a class of persons with authority to act in conformity with IJIA § 70,935(a) to issue BABAA waivers.²⁸ A feature of the modern administrative state is that agencies need to delegate decisional authority from the agency head to subordinate politically accountable officials in order to efficiently function.²⁹ BABAA waiver provisions should follow this paradigm.

²⁶ M-24-02 at 6 (citing “Section 70914(b) of BABA and 2 CFR 184.7” as authority for the proposition that “the head of a Federal agency may waive the application of a Buy America preference...”).

²⁷ Build America, Buy America Act, Pub. L. No. 117-58, div. G, Title 9, §§ 70,914(b), 70,935(a), 135 Stat. 429 (Nov. 15, 2021) (included within the Infrastructure Investment and Jobs Act).

²⁸ OMB Guidance for Grants and Agreements, 88 Fed. Reg. 57,750, 57,789 (Aug. 23, 2023).

²⁹ *See, e.g.*, 49 C.F.R. § 1.3 *et seq.* (laying out delegations of authority of the Secretary of Transportation to politically-accountable officials within their chain of command).

ii. OMB should allow accountable agency officials to administer BABAA waivers without multiple stages of substantive review.

M-24-02 commands that agencies “must consult with the MIAO for *proposed* waivers with broader applicability (such as a general applicability waiver) before posting them for comment” and submit to MIAO all draft waivers “for review after the public comment period has concluded.”³⁰ Such review appears to be *de novo* on account of the fact that MIAO will “review” each “draft waiver to determine if it is consistent with applicable law and policy.”³¹ MIAO will then “notify the Federal agency of its determination.”³² These procedures present a Gordian knot of regulatory choke points that have already resulted in delays of hundreds of days in some cases as laid out in Attachment A to this petition.³³ Continuing to require onerous waiver prerequisites will incentivize grant recipients and stakeholders to pursue material substitutions or other workarounds instead of engaging in the protracted waiver process. This heightens the likelihood that projects will employ substandard materials, thereby diminishing the quality, safety, and longevity of infrastructure projects.

A superior approach that will facilitate timely delivery of Federal infrastructure projects would be to narrowly tailor to the MIAO authorities set forth in IIA § 70,923 and E.O. 14,005 § 4(b)(1)(2)—a provision that authorizes waived review by the MIAO Director—in conformity with section E.O. 14,005 § 4(c), which M-24-02 references as the above-quoted provision that enunciates “applicable law and policy.”³⁴ Similarly, 2 C.F.R. § 184.7(d)(3)—OMB’s own 2 C.F.R. guidance regulation—provides the authority to waive pre-issuance proposed final waivers.

³⁰ M-24-02 at 7. (emphasis added).

³¹ *Id.* (citing Exec. Order 14,005, § 4(c)).

³² *Id.*

³³ Attachment A: Federal Agency BABAA Notable Waivers data

³⁴ M-24-02 at 7.

OMB should waive review of both proposed waivers for public comment and proposed final waivers as the *norm* and restrict pre-issuance proposed final waiver only to a narrow subset of general applicability waivers. Any substantive review of proposed agency waivers should be narrow and deferential.

As part of creating a norm of waiving its review of both proposed waivers for public comment and draft final waivers, OMB should explicitly create an expedited pathway for review. This would include waiving review³⁵ of both BABAA pre-issuance stages (proposed and final draft waivers) if they are non-controversial and meet predefined criteria to save time and resources. Doing so would provide the necessary flexibility that renders the BABAA waiver process administrable.

Lastly, OMB can readily satisfy its statutory mandate of continuing to “[m]aximize and enforce compliance with domestic preference statutes” by engaging in annual audits of agencies’ BABAA waiver practices and take remedial steps as needed by rebutting the norm of waiving review of pre-issuance BABA waivers on an agency-by-agency basis.³⁶

iii. OMB should authorize distinct streamlined waiver processes for small-scale and larger scale multi-phase projects.

Under the M-24-02 “Unreasonable Cost Waivers” provision, an unreasonable cost waiver is “available if 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.”³⁷ The 25 percent threshold and the data supporting it as laid out further in M-24-02 would benefit from a fast-track provision for small-scale projects that do not exceed \$35 million.³⁸ Fast-

³⁵ Exec. Order 14,005 § 4(b)(1)(2).

³⁶ IJA § 70,923(b)(1).

³⁷ M-24-02 at 10.

³⁸ Federal Acquisition Regulation § 22.502 defines a large-scale construction project as “a construction project where the total cost to the Federal Government is \$25 million or more.” Under Exec. Order No.

tracking these waivers will increase regulatory efficiency. This revision complies with IJA § 70,937(c)(2)(b). In particular, MIAO can implement IJA in this regard with a generalized cost comparison instead of a percentage cost increase approach. This will ensure more timely delivery of and greater competition for small-scale projects in which domestic producers of iron, steel, manufactured products, or construction materials will not be harmed. Moreover, the continued applicability of a 25 percent threshold for unreasonable cost waivers for regular and large-scale projects will promote the domestic preference requirement that is required by IJA.

In multi-phase infrastructure projects that take place over a period of years, OMB should implement processes to keep projects running and the delivery on infrastructure improvements consistent. OMB should therefore periodically reassess the cost criteria and offer streamlined procedures for unreasonable cost waivers to relieve pressure from strained or unreliable domestic supply chains. Such a policy would be especially useful where cost overruns are identified early. This would be especially valuable for key infrastructure programs that promote health and safety. For example, EPA proposed to replace nine million pipes across the country to remove lead-based neurotoxin from drinking water.³⁹ If M-24-02 remains in place without further clarification on these grounds, major projects like this one will languish even though Americans will continue to be exposed to serious, ongoing harm.

14,063, Use of Project Labor Agreements for Federal Construction Projects § 2(c), 87 Fed. Reg. 7363 (Feb. 4, 2022) (pub. Feb. 9, 2022), the President redefined the term to mean “a Federal construction project within the United States for which the total estimated cost of the construction contract to the Federal Government is \$35 million or more.”

³⁹ ENVIRONMENTAL PROTECTION AGENCY, Notice of Proposed Rule, National Primary Drinking Water Regulations for Lead and Copper: Improvements (LCRI), 88 Fed. Reg. 84,878 (Dec. 6, 2023); Coral Davenport, *Biden Administration to Require Replacing of Lead Pipes Within 10 Years*, N.Y. TIMES (Nov. 30, 2023) https://www.nytimes.com/2023/11/30/climate/epa-lead-drinking-water-pipes.html?te=1&nl=from-the-times&emc=edit_ufn_20231130 (news-media coverage of an Environmental Protection Agency lead rule that is “the strongest lead rule that the nation has ever seen”; concluding that \$15 billion of the \$30 billion cost of the rule “is available from the 2021 infrastructure law to help [utilities] pay for it.”).

II. The OMB Director Must Urgently Review Noncompliant BABAA Waiver Information Collections Being Administered By 19 Agencies.

We also invoke our right to request your review of agency information collections for BABAA waiver requests under Section 3517 of the Paperwork Reduction Act (“PRA”) to ensure, and if necessary, enforce agency compliance with the statute.⁴⁰ The PRA operates to “minimize the paperwork burden for individuals, small businesses, Federal contractors, State, local and tribal governments . . . resulting from the collection of information by or for the Federal Government”⁴¹ and to “ensure the greatest possible public benefit from and maximize the utility of information . . . collected by or for the Federal Government.”⁴²

M-24-02 builds on M-22-11 by requiring 18 unique types of information that are required for BABAA waivers—15 bulleted types of information and 3 types of information expressly required by IJA § 70937(c)(2)(A) and (D)—but there is no evidence that the OMB Director complied with the PRA in coordinating with agencies or advised agencies to meaningfully comply with the PRA in its issuance.⁴³ As of January 10, 2024 and as laid out in detail below, 19 of the 26 agencies listed on www.BuyAmerica.gov have not complied with the PRA’s strictures in regards to their BABAA waiver information collections.

⁴⁰ 44 U.S.C. § 3517(b).

⁴¹ 44 U.S.C. § 3501(1).

⁴² 44 U.S.C. § 3501(2).

⁴³ Mem. from Shalanda D. Young, Director, U.S. Office of Management and Budget to Heads of Executive Departments and Agencies, M-24-02: *Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure* (hereinafter “M-24-02”) (Oct. 25, 2023) (<https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf>) (superseding Mem. From Shalanda D. Young, Director, U.S. Office of Management and Budget to Heads of Executive Departments and Agencies, M-22-11: *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure* (Apr. 18, 2022) (<https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>)).

Contractors price their bids to account for all potential associated costs and risks, including excessive administrative obligations and ultra vires paperwork burdens that align with the increased overhead costs. The American taxpayer loses when contracting or grant recipient businesses of all sizes as well as State and local governments must pass on higher bids to government agencies to mitigate for the increased overhead costs associated with burdensome information collections. Small, minority-owned, and disadvantaged businesses are especially sensitive to burdensome information collection requirements and outsized compliance costs, which can threaten their viability or drive them away from participating in public projects. Similarly, State and local governments—and their taxpayers—will absorb the costs of inefficient and ultra vires information collections mandated by federal agencies.

A. The PRA applies to BABAA implementation and waiver collections.

The PRA regulates Federal agency third party or public information collections.⁴⁴ The statute governs information collections that obtain or solicit facts, opinions, or identical reporting or recordkeeping requirements imposed on ten or more persons. The PRA defines “persons” to include “State” and “local” governments,⁴⁵ and “Federal contractors, State, local and tribal governments” are all beneficiary classes for the PRA’s paperwork burden minimization mandate.⁴⁶

OMB’s PRA regulations define “collection of information” to include “contracts” and “requests for proposals or other procurement requirements.”⁴⁷ Consequently, information collections taken in furtherance of BABAA implementation and waivers in public procurement are covered by PRA.

⁴⁴ 44 U.S.C. § 3502.

⁴⁵ 44 U.S.C. § 3502(10).

⁴⁶ 44 U.S.C. § 3501(1).

⁴⁷ 5 C.F.R. § 1320.3(c)(1).

B. Most Federal agencies have failed to comply with the PRA in their BABAA waiver information collections.

The PRA imposes strong procedural and approval constraints on improper agency information collections. An agency “shall not conduct or sponsor the collection of information unless” the agency has conducted the review established by the PRA,⁴⁸ evaluated public comments received under the PRA,⁴⁹ submitted to the OMB Director a certification required under the PRA with various citations of authority,⁵⁰ published a notice stating the foregoing in the Federal Register, received approval from the OMB Director for the information collection, and obtained and displayed on the collection of information an unexpired OMB control number.⁵¹

As of January 10, 2024, only *two* agencies’ respective BABAA waiver information collections comply with the PRA.⁵² Three agencies publicly state that they do not offer Federal financial assistance on qualifying infrastructure programs.⁵³ Two agencies administer programs that are not governed by the BABAA domestic preference.⁵⁴ The remaining 19 agencies that have

⁴⁸ 44 U.S.C. § 3507(a)(1)(A).

⁴⁹ 44 U.S.C. § 3507(a)(1)(B).

⁵⁰ 44 U.S.C. § 3507(a)(1)(C).

⁵¹ 44 U.S.C. § 3507(a)(3).

⁵² U.S. DEP’T OF EDUCATION, *Build America, Buy America Act* (Jan. 10, 2024) (providing a “BABAA Waiver Request Form” with an unexpired OMB Control Number); U.S. DEP’T OF HOUSING AND URBAN DEVELOPMENT, *Build America, Buy America (BABA)* (Jan 10, 2024)

https://www.hud.gov/program_offices/general_counsel/build_america_buy_america (providing clear guidance and a PRA-compliant information collection “waiver application” with an unexpired OMB Control Number,

https://www.hud.gov/program_offices/general_counsel/build_america_buy_america/waiver).

⁵³ The U.S. Department of State, Office of Personnel Management, and U.S. Agency for International Development publicly state that they do not award Federal financial assistance or Federal financial assistance for covered infrastructure projects.

⁵⁴ GULF COAST ECOSYSTEM RESTORATION COUNCIL, *Build America, Buy America* (Jan. 10, 2024)

<https://www.restorethegulf.gov/build-america-buy-america> (“The Gulf Coast Ecosystem Restoration Council (Council) has determined that the domestic preference requirements of the Build America, Buy America Act (BABAA) do not apply to Council expenditures.”); THE NAT’L AERONAUTICS AND SPACE ADMIN., *Made in America* (Jan. 10, 2024) <https://www.nasa.gov/eo14005/> (“Because NASA grants and cooperative agreements are not governed by a requirement to procure equipment or supplies made or produced in America, NASA does not and cannot issue waivers.”).

links on the MIAO website have PRA non-compliant BABAA waiver information collection procedures, if any.

Coalition members do not make this claim lightly. By executive order and Federal law, each agency must post BABAA waiver information online. During the first week of his presidency, President Biden signed Executive Order 14,005, *Ensuring the Future Is Made in All of America by All America's Workers*, which requires the establishment of a website where agencies “shall” post “all proposed [BABAA] waivers and whether those waivers have been granted so that the regulated public can “easily identify proposed waivers and whether those waivers have been granted.”⁵⁵ The OMB Director’s implementing memorandum of E.O. 14,005 rolled out the Made in American Office (MIAO) and established the www.MadeinAmerica.gov⁵⁶ portal to house this information.⁵⁷ In November 2021, the enactment of IIJA placed statutory imprimatur to the E.O. 14,005 website under its BABAA provisions.⁵⁸

On the “Buy America Waivers for Federal Financial Assistance” page of www.MadeInAmerica.gov, approximately 25% of the listed agencies have achieved compliance with the PRA in regards to their BABAA implementation.

⁵⁵ Exec. Order No. 14,005, *Ensuring the Future is Made in All of America by All of America's Workers* § 6, 86 Fed. Reg. 7475, 7477 (Jan. 25, 2021) (pub. Jan. 28, 2021).

⁵⁶ Mem. From Shalanda D. Young, Director, U.S. Office of Management and Budget to Heads of Executive Departments and Agencies, M-21-26: *Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waivers from Made in America Laws, with implementing guidance, Improving the Transparency of Made in America Waivers* (Apr. 18, 2022) (<https://www.whitehouse.gov/wp-content/uploads/2021/06/M-21-26.pdf>); see also www.BuyAmerican.gov, which was established in IIJA, Pub. L. No. 117-58, § 70,936, automatically forwards visitors to www.MadeinAmerica.gov.

⁵⁷ Mem. From Shalanda D. Young, Director, U.S. Office of Management and Budget to Heads of Executive Departments and Agencies, M-21-26: *Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waivers from Made in America Laws, with implementing guidance, Improving the Transparency of Made in America Waivers* at 1-3 (Apr. 18, 2022) (<https://www.whitehouse.gov/wp-content/uploads/2021/06/M-21-26.pdf>).

⁵⁸ Pub. L. No. 117-58, § 70,936(a), (b).

Consequently, coalition members request that the OMB Director review⁵⁹ the PRA information collection practices of the following 19 agencies that do not have a publicly available BABAA waiver form with an unexpired OMB Control Number on their www.MadeInAmerica.gov-linked websites or have not otherwise disclaimed on such sites that they do not offer Federal financial assistance on qualifying infrastructure programs.⁶⁰

- U.S. Department of Agriculture⁶¹
- U.S. Department of Commerce⁶²
- U.S. Department of Defense⁶³
- Denali Commission (Alaska)⁶⁴
- U.S. Department of Energy⁶⁵
- Environmental Protection Agency⁶⁶
- General Services Administration⁶⁷
- U.S. Department of Health and Human Services⁶⁸
- U.S. Department of Homeland Security⁶⁹

⁵⁹ 44 U.S.C. § 3517(b).

⁶⁰ OFFICE OF MANAGEMENT AND BUDGET, MADE IN AMERICA OFFICE, *Buy America Waiver for Federal Financial Assistance* (Jan. 10, 2024) <https://www.madeinamerica.gov/waivers/financial-assistance/>.

⁶¹ U.S. DEP'T OF AGRICULTURE, *USDA Buy America Waivers for Federal Financial Assistance* (Jan. 10, 2024) <https://www.usda.gov/ocfo/federal-financial-assistance-policy/USDABuyAmericaWaiver> (utilizing August 2023-expired GSA waiver form, <https://www.gsa.gov/reference/forms/build-america-buy-america-waiver-request-data-collection>).

⁶² U.S. DEP'T OF COMMERCE, *Build America Buy America* (Jan. 10, 2024) <https://www.commerce.gov/oam/build-america-buy-america>.

⁶³ U.S. DEP'T OF DEFENSE, Under Secretary of Defense for Research and Engineering, *Key Links* (Jan. 10, 2024) <https://rt.cto.mil/ddre-rt/dd-rtl/grants/key-links/>.

⁶⁴ DENALI COMMISSION, *Grants* (Jan. 10, 2024) <https://www.denali.gov/grants/>.

⁶⁵ U.S. DEP'T OF ENERGY, *Guidance on Submission of a DOE Buy America Requirement Waiver Request* (Jan. 10, 2024) <https://www.energy.gov/sites/default/files/2022-11/Guidance%20on%20Submission%20of%20a%20DOE%20Buy%20America%20Requirement%20Waiver%20Request%2011-17.pdf> (accessible via a link on *Financial Assistance* page that links from MIAO, <https://www.energy.gov/management/financial-assistance>).

⁶⁶ U.S. ENVIRONMENTAL PROTECTION AGENCY, *Build America, Buy America (BABA) Approved Waivers* (Jan. 10, 2024) <https://www.epa.gov/cwsrf/build-america-buy-america-baba-approved-waivers>.

⁶⁷ U.S. GENERAL SERVS. ADMIN., *Acquisition policy library and resources* (Jan. 10, 2024) <https://www.gsa.gov/policy-regulations/policy/acquisition-policy/acquisition-policy-library-and-resources#tab--Resources> (August 2023-expired information collection form is not available on main page, <https://www.gsa.gov/reference/forms/build-america-buy-america-waiver-request-data-collection>).

⁶⁸ U.S. DEP'T OF HEALTH AND HUMAN SERVS., *HHS Build America, Buy America* (Jan. 10, 2024) <https://www.hhs.gov/grants-contracts/baba/index.html>.

⁶⁹ U.S. DEP'T OF HOMELAND SECURITY, "Buy America" Preference in FEMA Financial Assistance Programs for Infrastructure" (Jan. 10, 2024) <https://www.fema.gov/grants/policy-guidance/buy-america>.

- U.S. Department of the Interior⁷⁰
- U.S. Department of Justice⁷¹
- U.S. Department of Labor⁷²
- National Endowment for the Humanities⁷³
- National Science Foundation⁷⁴
- Social Security Administration⁷⁵
- U.S. Small Business Administration⁷⁶
- U.S. Department of Transportation⁷⁷
- U.S. Department of the Treasury⁷⁸
- U.S. Department of Veterans Affairs⁷⁹

⁷⁰ U.S. DEP’T OF THE INTERIOR, “Buy America” Domestic Sourcing Guidance and Waiver Process for DOI Financial Assistance Agreements (Jan. 10, 2024) <https://www.doi.gov/grants/buyamerica>.

⁷¹ U.S. DEP’T OF JUSTICE, *Grants* (Jan. 10, 2024) <https://www.justice.gov/grants>.

⁷² U.S. DEP’T OF LABOR, Office of the Assistant Secretary for Administration & Management, *Made in America: Buy America Waivers for Federal Financial Assistance Awards* (Jan. 10, 2024) <https://www.dol.gov/agencies/oasam/centers-offices/office-of-the-senior-procurement-executive/buy-america-waivers>.

⁷³ NAT’L ENDOWMENT FOR THE HUMANITIES, *Build America, Buy America Act and Waivers* (Jan. 10, 2024) <https://new.nsf.gov/funding/build-america-buy-america>.

⁷⁴ NAT’L SCIENCE FOUNDATION, *Build America Buy America Guidance on Submission of an NSF Waiver Request* (Jan 4, 2024) https://nsf.gov/resources.nsf.gov/2022-12/BABA_WaiverRequestSubmission_2022_Nov30_1.pdf?VersionId=nMi1CmpgPOMowx.yHJbVRGQs3zjjQBrG (accessed via a link from Build America, Buy America page, <https://new.nsf.gov/funding/build-america-buy-america>).

⁷⁵ SOCIAL SECURITY ADMIN., *Waivers for BABA Domestic Preference Requirements* (Jan. 10, 2024) <https://www.ssa.gov/oag/grants/waivers-baba-requirements.htm>.

⁷⁶ U.S. SMALL BUS. ADMIN., *Made in America waivers* (Jan. 10, 2024) <https://www.sba.gov/about-sba/open-government/made-america-waivers>.

⁷⁷ U.S. DEP’T OF TRANSPORTATION, *Made in America* (Jan. 10, 2024) <https://www.transportation.gov/office-policy/transportation-policy/made-in-america> (none of the six sub-agency “Buy America(n) Web Pages” that are linked on the Dep’t of Transportation’s page have PRA-compliant information collections, though the Federal Aviation Administration has multiple forms that expired in June 2023, <https://www.energy.gov/management/financial-assistance>; other sub-agencies provide varying degrees of guidance).

⁷⁸ U.S. DEP’T OF THE TREASURY, *RESTORE ACT – Buy America Preference* (Jan. 10, 2024) <https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/restore-act/restore-act-buy-america-preference> (providing guidance but no PRA-compliant information collection, https://home.treasury.gov/system/files/216/PRA_BABAA_Part%20I_to_be_completed_by_recipient_fina1_for_OIRA_12092022.pdf).

⁷⁹ U.S. DEP’T OF VETERANS AFFAIRS, *ACQUISITION, Logistics, and Construction* (Jan. 10, 2024) <https://department.va.gov/administrations-and-offices/acquisition-logistics-and-construction/build-america-buy-america-act-public-law-117-58/> (link intermittently loaded when accessed).

III. Conclusion

For the foregoing reasons, the OMB Director should favorably adjudicate this APA petition for rulemaking to issue amended BABAA implementation guidance under 5 U.S.C. § 553(e) and likewise review the BABAA waiver information collections described above under the PRA within 60 days under 44 U.S.C. § 3517(b), by April 15, 2024. Millions of Americans and thousands of American businesses are depending on OMB to act decisively to achieve the full promise of IIJA with a more deliberate and commonsense implementation of its BABAA provisions.

Sincerely,

_____/S/_____

Ward W. McCarragher
Vice President, Government Affairs and Advocacy
American Public Transportation Association

_____/S/_____

Richard A. Juliano
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ATTACHMENT A

Figure 1 – Notable Buy America Waivers That Have Been Approved or Withdrawn

| Agency | Waiver | Date of Request | Date of Approval / Withdrawal | Days to Determine |
|----------------|---|-----------------|-------------------------------|-------------------|
| FHWA and MARAD | Medium Voltage (MV) Cable Reel System | 9/8/2021 | 7/27/2022 | 322 |
| FHWA | California Golden Gate Bridge | 6/26/2020 | 2/8/2022 | 592 |
| FHWA | I-74 Bridge Recreational Trail | 3/20/2020 | 10/1/2021 | 560 |
| FHWA | Alaska Inter-Island Ferry | 9/1/2018 | 2/19/2020 | 536 |
| FHWA | Wyoming Avalanche Barrier | 3/9/2017 | 9/29/2021 | 1665 |

Figure 2 – Notable Buy America Waiver Requests That Have Not Yet Been Determined

| Agency | Waiver | Date of Request | Days Since Date of Request |
|--------|--|-----------------|----------------------------|
| FHWA | NJ/NY SeaStreak Ferry Vessels | 7/29/2016 | 2757 |
| FHWA | ILLDOT Submersible Pumps | 6/9/2021 | 981 |
| FHWA | Vermont Submersible Pumps | 7/25/2017 | 2396 |
| FHWA | Mount Vernon Library Commons Project | 6/5/2023 | 255 |
| DOE | LEDs for Berlin School District | 9/6/2023 | 162 |
| DOC | Broadband for BEAD Program | 8/1/2023 | 198 |