



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”).

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 ó 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>

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

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

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

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 IIIA § 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.

tracking these waivers will increase regulatory efficiency. This revision complies with IJA
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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 . .

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

- 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, *õDmƒ "Co gtkecö 'F qo gwke 'Uqwt ekpi 'T wƒ cpeg'cpf 'Y ckxgt 'Rt qegui'htq "* 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,

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 |
| | California Golden Gate Bridge | 6/26/2020 | 2/8/2022 | 592 |