

July 15, 2022

Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410-0500

RE: 87 FR 33193, Request for Information Relating to the Implementation of the Build America, Buy America Act

The Council of State Community Development Agencies (COSCDA) is a national association dedicated to state actions on community development, housing, homelessness, and disaster recovery. COSCDA members administer U.S. Housing and Urban Development – Office of Community Planning and Development programs (HUD-CPD) to accommodate local-based projects and services. States primarily serve low-to-moderate income persons in small and rural communities. Frequently-supported activities include infrastructure development, housing preservation and expansion, and business assistance. To carry out this important work, COSCDA members partner with varying public and private entities which includes contractors engaged in construction and related industries.

COSCDA recognizes the *Build America, Buy America Act* was included in Public Law 117-58, the *Infrastructure Investment and Jobs Act* (IIJA) enacted on November 15, 2021. HUD’s Request for Information (RFI) considers the Buy America provision on domestic content procurement preference.¹ HUD has previously identified which federal financial assistance programs would need to adhere to this directive; programs include the Community Development Block Grant (CDBG), HOME Investment Partnerships (HOME), Housing Trust Fund (HTF), Housing Opportunities for Persons with AIDS (HOPWA), and Emergency Solutions Grants (ESG) programs. COSCDA members administer these programs in their respective states ensuring federal funds benefit distressed and underperforming communities as well as vulnerable and underserved populations.

Buy America’s domestic content procurement preference is well-intended to maximize federal financing for U.S.-based materials and to respective producers of these materials. Opportunities should certainly be pursued to engage American material production for federally-financed infrastructure development. The Buy America Preference (BAP) to “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,

¹ Federal Register. Request for Information Relating to the Implementation of the Build America, Buy America Act. Published June 1, 2022: <https://www.federalregister.gov/documents/2022/06/01/2022-11729/request-for-information-relating-to-the-implementation-of-the-build-america-buy-america-act>.

*manufactured products, and construction materials used in the project are produced in the United States*² will require extensive effort and costs though from all parties involved - HUD, grantees, contractors, and related project stakeholders.

As HUD assesses BAP implementation, COSCDA urges the agency to waive HUD-CPD programs from this requirement. Per the statute, Section 70914(b), HUD may waive BAP's application if the agency identifies one of the following:

- 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.*³

Each criteria reasonably applies to HUD-CPD programs. The nation faces immense deficiencies in its infrastructure and housing. As HUD-CPD programs primarily serve low-income populations, ensuring that project development can be adequately facilitated proves critical to assisting beneficiaries in a timely manner. BAP adherence of CPD-supported initiatives would significantly slow or altogether cancel projects correlating to improved economic and social outcomes to these populations. Aside from current challenges, supply chains remain incapable of supporting construction through domestically-generated materials alone. Each state and locality relies on the availability of products from various markets which may be accessible by location; for instance, between Canada or Mexico and bordering jurisdictions. Restricting application of construction materials would result in higher costs on projects likely exceeding the 25 percent threshold cited above. Overall, based on HUD's intent to assist disadvantaged populations through housing, infrastructure, and related built facilities, COSCDA believes that BAP would unnecessarily burden or obstruct project completion in support of program goals.

In the case of HUD's decision to comply with BAP, we suggest HUD enhance its outreach and engagement with stakeholders to ensure proper study on predicted BAP's effects. Any opportunity to receive direct feedback from a host of parties operating through CPD investments would be worthwhile and contribute to better implementation of the policy.

COSCD A would also urge consideration to install reasonable thresholds for materials used in project development. A requirement on domestic material application should only extend as far as U.S. producers can accommodate items in a consistent and accessible manner. For instance, a select list of materials by type and quantity used on specific projects as well as by size and scope would be a practical approach to consider incorporating on any determined compliance standard.

Timing will also be key to ensuring parties involved in carrying out CPD-invested projects can meet the new directive. COSCDA recommends HUD extend its current waiver to allow for both additional information collection and to accommodate federal, state, and local administrators and project associates with sufficient guidance and tools for BAP implementation.

Lastly, if a process is determined by HUD for BAP adherence, CPD program administrators should retain the ability to apply the policy only when practical to meet project timelines and objectives. Project quality and

² Public Law 117-58. Infrastructure Investment and Jobs Act. Section 70914(a): <https://www.govinfo.gov/content/pkg/PLAW-117publ58/pdf/PLAW-117publ58.pdf>.

³ Ibid. Section 10714(b).

timeliness should not be compromised in favor of ensuring BAP in project development. Certain authorities and discretions may be assigned to program administrators affording due response to adequately complete projects.

COSCSA offers the following responses to the listed questions in the RFI:

1. What HUD Federal Financial Assistance is used to fund infrastructure as defined under the Build America, Buy America Act? Specifically, HUD is seeking input from recipients on what forms of HUD's Federal Financial Assistance are used to fund infrastructure projects in those programs identified in HUD's report to Congress and OMB on January 19, 2022 (87 FR 2894) or in any other program through which HUD's Federal Financial Assistance may be used to fund infrastructure projects.

COSCSA recognizes and agrees with the programs cited in 87 FR 2894 under non-discretionary programs for the Office of Community Development:

- Community Development Block Grants/Entitlement Grants
- Community Development Block Grants/State's program and Non-Entitlement Grants in Hawaii
- Emergency Solutions Grant Program
- Home Investment Partnerships Program
- Housing Opportunities for Persons with AIDS
- Housing Trust Fund

2. How can HUD document what projects serve a "public function," thus qualifying as infrastructure under OMB's guidance and falling within the scope of the Act? When determining if a program has infrastructure expenditures, OMB guidance indicates that Federal agencies should interpret the term "infrastructure" broadly and consider the definition provided as illustrative and not exhaustive. Agencies are advised to consider whether the project will serve a public function, including whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public. Projects with the former qualities have greater indicia of infrastructure, while projects with the latter quality have fewer. How should HUD consider infrastructure projects more broadly? How can HUD determine if the ultimate recipient of the funding is a covered non-Federal entity?

We recommend further consideration to the use of the project and access to the broader public. A focus on categorizing each project by benefit to either the larger community or individual households may inform whether projects serve a "public function" and be considered qualifying infrastructure. Regarding determination of a covered non-federal entity, assignments by organization type, stated mission or development goals, and activities facilitated would contribute to identifying its status. In both infrastructure and entity classifications, COSCSA encourages direct engagement with project stakeholders such as housing developers, construction firms, and program administrations (both grantees and sub-recipients).

3. Are the entities utilizing Federal Financial Assistance to fund infrastructure doing so independently or in partnership with other entities? If used in partnership with other entities, how often are these private entities or other individuals that would not be covered by the definition of non-federal entities under 2 CFR 200.1?

Federal Financial Assistance through HUD CPD programs frequently partner with other entities to fund infrastructure. Partners are primarily considered non-federal entities under 2 CFR 200.1.

4. What activities are undertaken by recipients of HUD Federal Financial Assistance that fall within the Act's BAP? To the extent that these infrastructure projects are disaster-related, can the projects be clearly defined as undertaken in response to either (1) non-imminent future emergency or disaster mitigation/preparedness or (2) disaster or emergency response/imminent threats? How often would projects be designed to address both long term and imminent threats? How often would projects be designed to address current recovery needs along with future long term mitigation needs? What portions of infrastructure projects involve the use of iron, steel, manufactured products, or construction materials? How do recipients currently differentiate between infrastructure spending and non-infrastructure spending, such as administrative costs? What types of mitigation activities are conducted utilizing HUD Federal Financial Assistance that are not related to an imminent threat of a future emergency or disaster? How, if at all, will activities be limited such as funding fewer projects?

State CPD administrators direct HUD Federal Financial Assistance generally to housing; public facilities including roads, utilities, and public buildings; economic development; and public services. All except public services would be considered applicable to the Act's BAP.

Depending on the specific project, disaster-related investments may be considered responsive to both non-imminent and emergency response/imminent threats. Determination of defining individual projects by design to one purpose or the other may not be tenable since many projects meet both long-term and imminent needs; a similar rationale can be applied to projects designed for recovery needs as well as future long term mitigation. Disaster-related project investments supported by HUD CPD programs certainly meet one purpose or the other.

A certain portion of CPD-funded infrastructure projects involve considerable use of iron, steel, manufactured products, and construction materials; COSCDA is not prepared to offer a specific percentage at this time either from state-administered CPD programs or overall CPD program investments.

Funding recipients determine use of funds through annual planning and assign funding amounts to core activities which may include infrastructure and activities considered non-infrastructure. In the case of administrative expenses, current caps limit the amounts which can be applied from grants for this purpose. Other eligible program activities may also follow certain restrictions per program rules.

No other mitigation activity funded by HUD CPD programs are related to an imminent threat of a future emergency or disaster.

BAP will influence activities supported by HUD CPD investments in several ways. Fewer projects will be funded as a result of certain qualifications being necessary for policy compliance including access to domestic materials and contracting exclusively with entities which can obtain these materials. Locations of projects may be impacted as well since domestically-produced materials need to be distributed and available for use at specific sites. Access to materials may be limited depending on the location. Additionally, eligible activities determined by grantees may be restricted due to the processes involved in meeting BAP. It may be untenable to support certain activities if materials used in these developments cannot be sufficiently procured from domestic sources. State programs would likely determine how to both manage the BAP requirement and also ensure projects can be completed on time and within budget.

5. How do recipients currently determine sourcing for materials? Are there existing mechanisms to locate American made iron, steel, manufactured products, or construction materials? Furthermore, how do recipients currently track contractor sourcing? How often are materials recycled from other products such that the origin of such materials may be unknown?

Recipients rely extensively on sub-recipients and contractors for material sourcing. Contractors including construction firms and housing developers may have identified suppliers with information on American made products. Information sources and availability varies but may exist with the contractor or supplier via online postings.

8. What are contractor's administrative costs associated with complying with BABA? What forms of maintenance and guarantee costs will be necessary to confirm compliance? Will there be any construction timeline delays associated with BABA compliance? Is there a need for standard contractual provisions to deal with potential delays arising from BABA compliance? If there is a need for a product specific waiver, when would contractors know about the need?

Specific costs and time delays associated with BABA compliance cannot be adequately determined at this time. Standard contractual provisions would aid in accommodating project timelines and avoiding delays. Specific product waivers would depend upon the project and materials required therein. The determination on when a waiver is needed therefore would likely fall between the contractor's project design and material placement order ahead of construction.

9. What, if any, are the specific concerns, either from recipients or contractors, about a potential waiver process? Considering agency requirements associated with waiver processing, what would be the ideal and realistic timeline for waiver processing that would minimize impact on affected projects? What documentation is currently available, either from contractors or recipients, to demonstrate the need for a waiver in line with the requirements in section 70914 of the Act?

Significant concerns exist from recipients about a potential waiver process. Much of this is due to several unknowns in BAP adoption by HUD and the level of compliance expected thereafter. Any initial waivers which can be granted by HUD at the earliest possible date would be tremendously helpful to HUD-CPD program administrators, sub-grantees, sub-recipients, and other affected parties. Along with the availability of waivers on certain programs at the onset of HUD's implementation of BAP, supporting guidance would also be beneficial including extensive details to identify project types eligible for waivers and processes in securing these exemptions. Documentation which demonstrates the need for a waiver may be available from sources engaged on construction and supply chain issues. COSCDA can provide additional response on this point in the near future.

10. Where applicable, how will BABA requirements affect relocation plans, transfer procedures, and/or reasonable accommodation or modifications procedures for existing occupants? What if any changes are required for your agency's Administrative Plan or Admissions and Continued Occupancy Plan? Are there any other potential impacts on current residents of projects supported by HUD Federal Financial Assistance?

While specifics are not determined at this time, it is expected that BABA will impact reasonable accommodation and modifications procedures for existing occupants. Due to the procurement requirements, BABA will delay projects affecting residents of CPD-subsidized housing and increase project costs. Both added time and costs will reduce the number of projects which can be accommodated by available federal funds.

Further, due to these delays and fewer projects supported, health and safety risks posed by this policy should be considered for persons in need of quality and immediate housing.

11. What situations would require expedited or general waivers? How can HUD develop its waiver criteria in a way that identifies these expedited or general waivers? Are there situations where the cost of the materials would always meet the standards for waivers established under Section 70914 of the Act, whether a cost, public interest, or nonavailability waiver?

Considering populations served by HUD-CPD programs and ongoing deficiencies in housing and related assets for health, safety, and quality of life, COSCDA reaffirms its belief that waivers should extend to all HUD-CPD programs as these sources of federal financing assistance reasonably meets the statutory criteria for this accommodation. Aside from this level of waiver, each CPD program should be thoroughly assessed with both macro- and micro-level information communicated on how federal financing impacts communities and households. Outcomes of this study would inform the waiver criteria and processes for both expedited and general waivers. Several factors will likely be central to this development including program, project type, beneficiaries served, expected materials involved, and desired outcomes in response to community or household needs.

There are situations where the costs of the materials would meet the standards for waivers under Section 70914 of the Act. The public interest waiver can be met due to the populations and communities served by CPD programs which are predominantly low-income individuals and families. Additionally, both cost and nonavailability waivers may be applied due to ongoing supply chain issues impacting construction and project costs throughout the country.

12. How, if at all, would the Act's BAP affect contractor's willingness to accept infrastructure contracts subject to BABA's requirements? How would contractors need to build in additional costs when bidding for infrastructure contracts?

The Act's BAP will affect contractor willingness to accept infrastructure contracts if BABA requirements prove too cumbersome and burdensome. Due to several program rules already in place including federal labor standards contractors already show resistance to CPD-financed projects. The situation is especially apparent in small and rural communities which have fewer contractors readily available to accommodate developments. States consistently report limited bids on projects in smaller communities and response from contractors indicates lacking response is due to the myriad of existing requirements attached to the CPD funding. By adding the BABA requirement, contractors will either be even more reluctant to bid on projects, or increase costs to accommodate the added time and staffing needed to meet the BAP. It is too early to understand how contractors will build in additional costs for bids however the extent of requirements to address the BAP will significantly affect the pricing.

Thank you for the opportunity to provide comments on the Build America Buy America Act as it applies to HUD's Federal Financial Assistance. We welcome future engagement on how HUD policies and procedures can be implemented responsive to modern project needs. COSCDA looks forward to partnering with HUD to improve program outcomes and address ongoing challenges in housing, community development, homelessness, and disaster recovery.

Sincerely,

A handwritten signature in black ink, appearing to read "Dianne E. Taylor". The signature is written in a cursive style with a large initial "D" and "T".

Dianne E. Taylor
Executive Director