



Office of Gulf Coast Restoration
U.S Department of the Treasury

February 17, 2023

SUMMARY AND RESPONSE TO PUBLIC COMMENTS ON THE PROPOSED PUBLIC INTEREST GENERAL APPLICABILITY WAIVER FROM APPLICATION OF SECTION 70914(a) OF THE BUILD AMERICA, BUY AMERICA ACT TO THE RESTORE ACT, DIRECT COMPONENT INFRASTRUCTURE PROJECTS THAT WERE IN THE FUNDING PIPELINE BY MAY 14, 2022

Summary of public comments:

Treasury’s Office of Gulf Coast Restoration (“the Office”) received seven comments from the public on the proposed waiver: *Public Interest General Applicability Waiver from Application of Section 70914(a) of the Build America, Buy America Act to the RESTORE Act, Direct Component Infrastructure Projects That Were in the Funding Pipeline by May 14, 2022*. One comment was submitted on behalf of a Gulf Coast state entity and five comments were submitted from Florida counties specified in the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act (“RESTORE Act”), as eligible to receive grants under the Direct Component program. All comments from RESTORE Act, Direct Component eligible entities were in support of Treasury issuing the waiver to waive the application of the Buy America Preference requirements for iron, steel, manufactured products, and construction materials for infrastructure projects selected through public engagement and in the Direct Component funding pipeline by May 14, 2022, the effective date of the Build America, Buy America Act (“the Act”). The Office received one submission from a corporation that is not in support of the proposed waiver. Below is a summary of specific items that were identified in the comments submitted by the public, and Treasury’s response.

Specific comments:

1. Five commenters described their entity’s extensive Multiyear Implementation Plan (MIP) development process that includes project cost estimation and coordination with diverse stakeholders to conduct the rigorous public input process required by Treasury’s implementing regulations at 31 CFR §§ 34.303(b)(8) and (b)(9). These comments did not request any changes be made to the waiver, but rather reinforced their agreement with Treasury’s basis for making the determination that a waiver is required for projects in the Direct Component funding pipeline.

2. One commenter recommended modifying the waiver scope to clarify that Treasury should not require additional demonstration of prior public engagement for an activity that is already included in an accepted MIP as prior public engagement should be presumed for any project already included in a MIP.
3. One commenter raised questions about the applicability of the Build America, Buy America Act (“Act”) enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA) to Direct Component grants authorized under the RESTORE Act and suggested the Direct Component should be excluded on the basis of the grants being funded from a Trust Fund and for the purposes of “post disaster...expenditures”.
4. One commenter requested that Treasury extend waiver coverage for any projects awarded between January 13, 2023, the day Treasury’s adjustment period waiver expires, and the effective date of this waiver.
5. One commenter referenced the Agency’s authority to approve waivers and questioned the role of Office of Management and Budget in approving waivers.
6. One commenter expressed concern regarding the five-year length of the proposed waiver period that would delay the expenditure of taxpayer dollars on American steel in federally funded infrastructure projects.

Treasury’s Response:

Comment Summary: Requested clarification of the documentation required to demonstrate a project is covered by the waiver.

Response: The Office agrees with the comment submitted regarding the documentation required to demonstrate that public engagement has occurred and has revised the language in paragraph one of the *Waiver Scope* to read as follows:

“This waiver will apply to RESTORE Act, Direct Component projects which were already in the funding pipeline by May 14, 2022 (the effective date of the Buy America Preference requirements), as evidenced by (a) submittal of the project to Treasury in a MIP prior to May 14, 2022 (subject to subsequent Treasury acceptance of the MIP), or (b) documentation indicating that substantial regulatory-required public engagement for the eligible entity’s selection and approval of that particular infrastructure project for inclusion in the entity’s MIP had already occurred on or before May 14, 2022.”

Comment Summary: Disagreement on the applicability of the Build America, Buy America Act to grants awarded under the RESTORE Act Direct Component.

Response: The Office has previously provided a thorough [public response](#) on the determination that the provisions of the Act apply to expenditures made under Treasury’s RESTORE Act, Direct Component program. Briefly, we summarize these arguments below.

- a. Pursuant to section 70912(4)(B) of the Act and section II of OMB Memorandum M-22-11, the Buy America Preference does not apply to certain expenditures of assistance including “pre and post disaster or emergency response expenditures,”

that “consist of expenditures for financial assistance that are (1) authorized by statutes other than the Stafford Act, 42 U.S.C. §§ 5121 et seq., and (2) made in anticipation of or response to an event or events that qualify as an “emergency” or “major disaster” within the meaning of the Stafford Act, id. §5122(1), (2).” In summary, although the Direct Component program was authorized by the RESTORE Act in response to a disaster, the largest offshore oil spill in the United States caused by the Deepwater Horizon Oil rig, this event was not declared a “major disaster” within the meaning of the term under the Stafford Act, 42 USC § 5122 and as determined by the President.

- b. Section 70911 of the Act specifically states that entities receiving taxpayer-financed federal assistance should give procurement preference to U.S.-made materials and goods as one of the reasons for promulgating the Buy America sourcing requirements. Although Treasury’s RESTORE Act, Direct Component is not a taxpayer-financed program, it is a federal financial assistance program as defined in 2 CFR § 200.1 and includes expenditures for infrastructure as defined by the Act. Section 70912(4)(A) of the Act clarifies that the Buy America Preference requirements apply to all federal financial assistance as defined in 2 CFR § 200.1 for infrastructure unless exempt under section 70912(4)(B) (which is addressed above).

Comment Summary: Request to retroactivity apply the provisions of the waiver.

Response: Treasury agrees that the language of the funding pipeline waiver creates a gap between January 13, 2023, the expiration date of the adjustment period waiver, and the effective date of this proposed waiver. However, OMB’s Office of General Counsel advised Treasury that it is not permissible for proposed waivers to apply retroactively, and therefore Treasury will not make this waiver retroactive. Treasury did not obligate any funds under its Direct Component program between January 13, 2023, and the effective date of this waiver, February 17, 2023.

Comment Summary: Treasury has the authority to issue waivers without Office of Management and Budget (OMB) approval.

Response: Treasury has previously provided a thorough [public response](#) regarding the role of the Agency and OMB in granting waivers, including project-level waivers.

The commenter is accurate in stating that Treasury has the authority to waive the application of the Buy America preference requirements when the proposed waiver meets the requirements of section 70914(b) of the Act. In addition, section VII. of OMB memorandum M-22-11 dated April 18, 2022, and titled, “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure” reiterates that “Federal agencies are responsible for processing and approving all waivers including waivers requested by recipients and on behalf of subrecipients.” OMB-Made in America Office’s (MIAO) role is to review the proposed waivers to ensure they are consistent with applicable law and policy (see section 4.(c)(i) of [Executive Order 14005](#) and section VII. of the OMB memorandum M-22-11). Pursuant to section VII. of OMB memorandum M-22-11, Federal agencies must “consult with

MIAO for proposed waivers with broader applicability (such as a general applicability waiver) before posting them for public comment.” This consultation is to identify any opportunities to structure the waiver in order to maximize the use of goods, products, and materials produced in the United States to the greatest extent possible consistent with law.

Section 4.(c)(ii)(2) of [Executive Order 14005](#) provides that when there is a disagreement or conflict between the head of an agency and the Director of the MIAO on a proposed waiver, such matter will “be resolved in accordance with procedures that parallel those set forth in section 7 of Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review) with respect to the Director of the Office of Information and Regulatory Affairs within OMB.” Treasury participates in MIAO-led interagency working groups to stay informed on policy updates, and all waivers undergo internal legal review to ensure the waiver meets the requirements of Section 70914(b) of the Act.

Comment Summary: Treasury’s proposed five-year general applicability waiver is not in the public interest and could result in taxpayer dollars being spent on imported products.

Response: First, Treasury acknowledges that the proposed waiver will be effective for five years and is consistent with section 70914(d)(1) of the Act and the guidance in OMB memorandum M-22-11 that general applicability waivers issued by agencies “shall be reviewed every five years after the date on which the waiver is issued.” We have revised this language in two sections to clarify that the agency will evaluate the applicability of the waiver on a shorter timeframe, as appropriate. It is important to note that while the waiver may be in place for up to five years, it does **not** encompass all Direct Component infrastructure projects during the next five years. It is limited to those obligations for awards or monetary amendments to Direct Component-funded infrastructure projects for which substantial regulatory-required public engagement occurred prior to May 14, 2022. Treasury states in the proposed waiver (page 10) that the Office anticipates that most infrastructure projects previously selected through the substantial regulatory-required public engagement process and currently in the funding pipeline will be awarded a grant within three years. Therefore, in years 4 and 5 of this waiver, Treasury expects the majority of Direct Component obligations for infrastructure projects will apply the Buy America Preference requirements for iron, steel, manufactured products, and construction materials.

To the second point regarding the expenditures of taxpayer funding, Treasury finds that this is not applicable to Treasury’s expenditure of funds for Direct Component grants, which are funded through the Gulf Coast Restoration Trust Fund that is funded by the administrative and civil penalties paid by the parties responsible for the Deepwater Horizon Oil Spill. By granting this waiver, Treasury is ensuring that the Gulf Coast states, counties, and parishes impacted by the largest offshore oil spill in U.S. history will be able to expend their funding as previously chosen by the communities of the Gulf Coast. Treasury finds it is in the public interest to grant this waiver that reduces the risk of further delays or increased costs that may result from implementation of the new Buy America Preference requirements that were not law at the time when these projects were selected or scoped through the substantial regulatory-required public engagement process described in sections 3 and 5 of this waiver. This waiver only covers

projects that were included on a Multiyear Implementation Plan or selected through the substantial regulatory-required public engagement process by May 14, 2022, the effective date of the Act. Infrastructure projects selected after May 14, 2022, will be subject to the Buy America Preference requirements, unless a different applicable waiver is in effect at that time. Currently, only \$914M or roughly one-half of the annual deposits have been made to the Trust Fund and, of these, over \$450M of the Direct Component allocation is available for future projects that could include expenditures for infrastructure. Future projects not currently in the funding pipeline, will be subject to the Buy America Preference requirements, if an applicable waiver is not in effect at that time and, as the commenter, advocates these funds could result in a potentially significant investment in American iron, steel, manufactured products, and construction materials.