



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

June 29, 2022

SUMMARY AND RESPONSE TO PUBLIC COMMENTS ON THE GENERAL APPLICABILITY PUBLIC INTEREST ADJUSTMENT PERIOD WAIVER FROM APPLICATION OF THE BUILD AMERICA, BUY AMERICA PROVISIONS FOR RECIPIENTS OF TREASURY RESTORE ACT, DIRECT COMPONENT GRANTS

Summary of public comments:

Treasury’s Office of Gulf Coast Restoration (“the Office”) received seven comments from the public. Four comments were submitted by Gulf Coast states specified in the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act (“RESTORE Act”) RESTORE Act as eligible to receive grants under the Direct Component; two comments were submitted on behalf of industry groups; and a single comment was provided by an individual from the general public. All but one commenter is in support of Treasury issuing an adjustment period waiver to waive the application of the Buy America Preference requirements for iron, steel, manufactured products, and construction materials for infrastructure projects funded by Direct Component grants, to allow Treasury and their recipients and subrecipients sufficient time to prepare to implement the requirements for the long-term. Below is a summary of specific items that were identified in the comments submitted by the public, and Treasury’s response.

Specific comments:

- Two commenters from Direct Component eligible entities 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.
- Commenters also referenced the Agency’s authority to review and approve waivers and one commenter questioned the role of Office of Management and Budget in approving waivers.

- Two commenters from Direct Component eligible entities requested that Treasury consider a 12-month adjustment period waiver to provide Treasury and the Direct Component recipients and subrecipients sufficient time to prepare to implement and comply with the new requirements of the Act.
- All commenters reinforced the need for Treasury to provide adequate guidance to prepare grant recipients and subrecipients for implementing the new requirements and for putting in place the necessary controls for compliance.
- An industry group commented that sweeping waivers that delay implementation of the Act were not envisioned by Congress, are not in the public interest, and are a missed opportunity for the investment of millions in infrastructure projects.

Treasury's Response:

1. Applicability of the Build America, Buy America Act to Grants Awarded under the RESTORE Act Direct Component: RESTORE Act programs were not previously required to have their recipients comply with domestic content procurement preference requirements. Therefore, Treasury assessed the applicability of the Act to investments made from the Trust Fund and consulted extensively with OMB's Office of General Counsel (OGC) and OMB's Made in America Office (MIAO). OMB concluded that the Buy America Preference requirements of the Act apply to the Direct Component. In the discussions between Treasury and OMB, Treasury raised the following considerations, which mirrored those raised by two commenters on the draft waiver:

- a. Do funds obligated under the Treasury RESTORE Act Direct Component fall into the category of "post disaster or emergency response expenditures" financial assistance programs and are therefore exempt from the Buy America Preference requirements of the Act?**

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).” Although the RESTORE Act Direct Component meets the first condition, in that it is authorized by the RESTORE Act, a statute other than the Stafford Act, Treasury’s RESTORE Act Direct Component did not meet the second condition necessary to qualify for this exemption. The RESTORE Act was authorized in response to a disaster caused by the 2010 explosion on the Deepwater Horizon oil rig drilling in the Gulf of Mexico that caused the largest offshore oil spill in the United States. The oil spill exacerbated the effects of previous natural disasters, caused substantial environmental damage to the Gulf Coast region, and led to significant economic impacts on the commercial and recreational fisheries in the region. The Secretary of U.S. Department of Commerce declared the event a fisheries disaster pursuant to section 312(a) of the Magnuson-Stevens Fishery Conservation and Management Act, however 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. Therefore, OMB-OGC determined that the RESTORE Act Direct Component does not qualify for the “post disaster” exemption under the Act. In response to the comments received, Treasury will continue to work with OMB during the six-month adjustment period to determine if and how Buy America Preference (BAP) applies to awards made under the Treasury RESTORE Act Direct Component.

b. Are the funds made available under the Treasury RESTORE Act Direct Component for infrastructure projects exempt from the Buy America Preference requirements because they are obligations from a Trust Fund and not investments of taxpayer dollars?

Although the RESTORE Act Direct Component Program is not a taxpayer-financed program, it is a federal financial assistance program as defined in 2 CFR § 200.1. Further, the RESTORE Act specifies the activities, programs, and projects that are eligible for grants awarded under the Direct Component, including awards for infrastructure projects. As such, those RESTORE Act Direct Component grants that fund infrastructure as defined in section 70912(5) of the Act are subject to the BAP requirements. Although 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, section 70912(4)(A) clarifies that the BAP requirements apply to all federal financial assistance as defined in 2 CFR § 200.1 for infrastructure unless exempt under section 70912(4)(B). OMB Memorandum M-22-11 further reiterates the point stated in section 70912(4)(A) of the Act that the BAP requirements “applies to all Federal financial assistance as defined in section 200.1 of title 2, Code of Federal Regulations—whether or not funded through IJJA—where funds are appropriated or otherwise made available and used for a project for infrastructure” (see page 3 under the section titled “Applicability to Federal Financial Assistance Programs”). The Gulf Coast Restoration Trust Fund falls under funds “otherwise made available.”

- 2. Treasury’s Authority and Consultations with MIAO:** Treasury concurs with commenters that the Agency has the final approval authority for waivers granted under section 70914 of the Act for *specific* infrastructure projects funded by a RESTORE Act Direct Component grant; such a waiver may only be granted after Treasury determines that waiving BAP is appropriate because of nonavailability or unreasonable cost of covered materials, or because such a project-specific waiver would be in the public interest. In accordance with section 70914(b) and OMB memo M-22-11 (page 7), “Federal agencies must consult with MIAO for proposed waivers with broader applicability (such as a general applicability waiver) before posting them for public comment...MIAO will review the proposed waiver to determine if it is consistent with applicable law and policy, and will notify the Federal agency of its determination.” The purpose of the consultation with MIAO is to identify any opportunities to structure the waiver in order to maximize the use of goods, products, and materials produced in the U.S. to the greatest extent possible consistent with law. MIAO leads efforts to coordinate compliance with these requirements across the federal government. However, agencies are responsible for approving and rejecting waivers consistent with the Act and considers MIAO’s determinations on proposed waivers in doing so.
- 3. Length of Proposed Adjustment Period:** Two comments submitted by Direct Component eligible entities requested Treasury consider implementing a 12-month adjustment period waiver because they found six months is insufficient to stand up new policies and procedures,

hire staff, and continue to deliver on the Office's core mission. Treasury's initial determination was to have a 12-month waiver, but after consultation with the MIAO it was determined that a six-month waiver with the possibility of an extension would be more consistent with the objectives of the waiver policy as specified in the Build America, Buy America Act and OMB Memorandum M-22-11. Treasury understands the public's concerns and therefore plans to maximize efficiency by standing up policies and procedures that follow examples provided by other federal agencies that have long applied domestic content procurement preference requirements to iron and steel. Treasury will also use the adjustment period to identify and develop other general applicability waivers so that at the end of the six-month adjustment period there will continue to be coverage for certain activities. Finally, Treasury understands that full implementation of BAP will require the RESTORE Act, Direct Component recipients and subrecipients to develop their own policies and procedures and that the 2022 hurricane season, June through November, may impact the capacity of entities in the Gulf Coast Region to prepare to implement in the proposed timeline. The National Oceanic and Atmospheric Administration has predicted that the [2022 Atlantic hurricane season will be above-normal](#). Therefore, in response to public comments noting concern about having sufficient time to prepare, Treasury has added an action item to the adjustment period schedule described in the waiver. After conclusion of the 2022 Atlantic hurricane season, the Office will engage through Treasury's RESTORE Act Buy America Implementation Working Group to assess the capacity and preparedness of Direct Component eligible entities to implement the new requirements by the end of the proposed six-month adjustment period. If the Office learns that significant recipient and subrecipient staff time and resources are being used for post-disaster recovery efforts, Treasury will evaluate whether it is in the public interest to extend the adjustment period waiver for all Direct Component eligible entities in the Gulf Coast Region or approve additional, targeted waivers for impacted entities.

- 4. Guidance for Treasury RESTORE Act Direct Component Eligible Entities:** Treasury agrees with the commenters that the Office needs to provide adequate guidance to RESTORE Act Direct Component recipients and subrecipients. Treasury is proposing to use the waiver time to leverage the lessons learned, templates, guidance, and policies and procedures developed by the Environmental Protection Agency (EPA) and other federal agencies that have long applied domestic content procurement preference requirements to iron and steel;

the Office has already met with EPA and started this process. Treasury is in the process of preparing the first iteration of Frequently Asked Questions (FAQ's) to provide some certainty regarding Treasury's interpretation of the guidance provided by OMB and its application to RESTORE Act, Direct Component awards. In June 2022, the Office initiated regular meetings of the RESTORE Act Buy America Implementation Working Group comprised of RESTORE Act, Direct Component recipients and subrecipients and through engagement with this group will identify, scope, and develop guidance and trainings regarding how to include the BAP requirements in bid packages; develop, submit, and obtain requests for project-specific waivers; conduct and document market research; monitor contractors for compliance; and other activities necessary for successful implementation.

- 5. Waiver Scope and Intent:** Treasury appreciates the commenter's concern that the Office has misused their waiver authority to narrow the application of Buy America law. In accordance with the Act, Treasury has found that this general applicability adjustment period waiver is in the public interest to allow Treasury, Direct Component recipients, and subrecipients sufficient time to prepare to implement the requirements of the Act for the long-term while continuing to keep projects moving and preventing immediate delays to critically important projects to revive and sustain the ecosystems and economy of the Gulf Coast Region, including activities to support disaster preparedness and manage climate risk by building resilience and promoting sustainable economic development. Treasury is proposing this waiver not an *alternative* to increasing domestic production, but as an important *tool* to fill our knowledge gaps and implement the Buy America Preference provisions in the most efficient manner in order to promote investment in our domestic manufacturing base, strengthen critical supply chains, and position U.S. workers and businesses to compete and lead globally in the 21st century. Treasury understands that advancing the Made in America objectives is a long game and Treasury plans to move forward with sufficient information to implement the new requirements in a way that maximizes coordination and collaboration to support long-term investments in domestic production. The waiver period will provide Treasury sufficient time to work collaboratively with other federal agencies and learn from existing processes established for domestic content procurement preference requirements for iron and steel. Treasury will use the information gained from close engagement with other federal agencies, its financial

assistance recipients, and OMB to determine the appropriate scope of additional targeted waivers that may be necessary to ensure projects stay on time, on task, and on budget.