

United States Senate

WASHINGTON, DC 20510

June 23, 2022

The Honorable Joseph R. Biden
President of the United States
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Dear President Biden:

As the Senate's strongest supporters of federal Build America, Buy America (BABA) policies, we write to express our opposition to the repeated use of blanket waivers by your Administration designed to avoid these domestic preference requirements. While Congress in recent years has taken significant steps to strengthen BABA, these blanket waivers threaten to undermine these protections, resulting in billions of dollars of infrastructure funds failing to reach American workers. To date, despite clear instructions in statute, the Environmental Protection Agency, the Department of Interior, the Federal Emergency Management Agency, the Department of Education, the Treasury Department, the Department of Housing and Urban Development, and the Department of Transportation have all proposed waivers of BABA requirements.

As you know, Title XI of the Infrastructure, Investment, and Jobs Act (IIJA)¹ made significant improvements to our Buy America laws. For example, the bill contained the *Make it in America Act*, which tightened procedures related to the use of public interest waivers and established the Made in America office to maximize compliance with BABA preference. The bill also included the *Build America, Buy America Act*, which requires agencies to complete an in-depth review of BABA applicability across all eligible programs, among other improvements to U.S. law.

While this legislation did provide standard flexibilities for implementation, Congress clearly intended for any blanket waiver authority to be used sparingly, only in the most targeted of instances. The IIJA provided six months for federal agencies to adjust policies and guidance to comply with these new requirements. Additionally, April 2022 guidance from the Office of Management and Budget generally followed this intent by providing waivers be time-limited, targeted, and conditional.

Yet on May 14, the Department of Transportation waived the requirements of this Act for construction materials for any funding obligated through November 10, 2022.² In its Federal Register Notice, the Department also notes that it is willing to consider further extensions based on the facts at the time.

At the same time, the Department of Housing and Urban Development (HUD) has delayed BABA implementation entirely, claiming in the formal public notice that the Department was not

¹ P.L. 117-58.

² 87 FR 31931

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prepared to implement the new BABA requirements and needed time to “complete the public comment process pursuant to the Paperwork Reduction Act.” HUD’s justification is particularly troubling given that Secretary Fudge contradicted her own agency’s notice of its proposed waiver. While testifying before Congress in May, Secretary Fudge claimed that the waiver request was necessary to address a lack of domestically produced materials instead of her own Department’s ability to implement the law. At the hearing, Secretary Fudge said that “in order to continue to do our work that we will need resources from outside of the United States.”

We remain skeptical of lengthy excuses claiming these provisions are too complicated to enforce. Other federal departments like the U.S. Department of Agriculture have been successfully administering Buy America preference requirements for water infrastructure projects for years. These departments incorporate the same products and materials as those used in many of the projects receiving HUD’s federal financial assistance.

Further, these waivers undermine the vast majority of funding made available through the IIJA. According to HUD’s published guidance, the agency estimates that it will distribute more than \$15 billion in fiscal year (FY) 2022 through programs “where infrastructure is an eligible activity” – because of the agency’s overly-broad waiver, none of that public infrastructure spending in FY2022 will be subject to IIJA’s strict BABA improvements.

A proliferation of public interest waivers without a thorough and accurate justification serves only to remove the incentive for manufacturers to invest in U.S. capacity. We understand that ongoing supply chain constraints will present implementation challenges, but that is precisely why Congress provided narrow waiver authority to overcome short-term market limitations and allow projects to proceed without delay.

Moreover, we supported the inclusion of BABA in the IIJA because it is clearly in the public interest to reduce our reliance on foreign supply chains by leveraging public investments to boost America’s industrial base and resilience. Each waiver that unnecessarily undermines or delays BABA implementation erodes the market signal Congress intended to send with the BABA and results in missed opportunities to create America jobs and strengthen our national security.

Full and timely implementation of BABA is critical to advancing in “Made in America” policies. We appreciate your attention to this critical matter.

Sincerely,



Mike Braun

United States Senator



Tammy Baldwin

United States Senator