



Buy America Requirements for Federally Funded Rail Projects

DETAILS

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Legal Research Digest 1

BUY AMERICA REQUIREMENTS FOR FEDERALLY FUNDED RAIL PROJECTS

This report was prepared under NCRRP Project 12-01, “Legal Aspects of Rail Programs,” for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Timothy R. Wyatt, Conner Gwyn Schenck PLLC.

Background

The nation’s freight, intercity passenger, and commuter rail operators need a comprehensive source of information that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to rail transportation. The complex interaction among operators, institutional entities at all levels of government, and private and public sectors creates a multi-level institutional configuration affecting rail system planning and operation.

To meet similar needs in the highway area, the Transportation Research Board of The National Academies inaugurated a legal research project in 1969 under the National Cooperative Highway Research Program. The highway legal project has been funded continuously since that time, eliciting strong support and approval from the constituency it serves. Similarly, a transit legal research project was implemented in 1992 under the Transit Cooperative Research Program and that project has continued since its inception. Finally, an airport legal research project was implemented in 2006 under the Airport Cooperative Research Program and continues today.

Each year, numerous attorneys nationwide are involved in rail-related work, yet there is no centralized repository of legal resources on which they can depend. In response, the National Cooperative Rail Research Program’s (NCRRP) *Legal Research Digest* series has been initiated to provide rail-related research on a wide variety of legal topics.

Applications

This *Legal Research Digest* evaluates and analyzes the requirements of four existing Buy America programs applicable to passenger and freight rail systems, each

of which present different regulatory and statutory requirements: FRA, FTA, FHWA, and Amtrak. The digest deals with this topic by addressing similarities and differences among the various programs and their applicability to freight and passenger rail environments. In this analysis, “passenger rail” encompasses high-speed, intercity passenger and commuter rail. The analysis also addresses recent agency changes and policy interpretations, including application of waivers. A critical concern involves those projects that are funded through multiple federal funding sources, potentially subject to different Buy America requirements. The digest presents strategies for resolving multiple, often confusing components.

Buy America provisions have been in existence since the 1933 Buy American Act (BAA), applicable to the procurement of goods by federal and state government agencies applying federal grants. FRA grant funds were not historically subject to significant domestic preferences or Buy America requirements; however, that dispensation changed in 2008 when Congress enacted a Buy America provision applicable to FRA grants under the High-Speed Intercity Passenger Rail (HSIPR) program. In addition, since 1978, FRA has also been responsible for administering the Amtrak Buy America provision applicable to procurements by Amtrak with funds from its capital grant.

To help clarify and understand the various applicable Buy America provisions, this digest discusses the legislative history pertaining to Buy America, the applicable federal regulations, and how these regulations have been applied to rail system improvements using federal grants. The author provides guidance that rail counsel will find useful as it pertains to rail-related construction and equipment purchases in conformance with applicable federal regulations.

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BUY AMERICA REQUIREMENTS FOR FEDERALLY FUNDED RAIL PROJECTS

By Timothy R. Wyatt, Conner Gwyn Schenck PLLC

I. INTRODUCTION

A. Purpose of This Digest

Federal grants for passenger and freight rail development typically have domestic preference conditions or “Buy America” requirements (sometimes also known as “Buy American” or “Buy National” requirements). Most recently, in 2008, Congress enacted a Buy America provision applicable to grants for the High-Speed Intercity Passenger Rail (HSIPR) program administered by the Federal Railroad Administration (FRA). However, since 1978, passenger and freight rail development funds administered by the National Railroad Passenger Corporation (Amtrak), Federal Transit Administration (FTA), and the Federal Highway Administration (FHWA) have been conditioned on Buy America compliance.

Although the various transportation grant Buy America provisions often appear similar on their face, there are significant differences in the way they are interpreted and administered by different federal grant-making agencies. This has led to confusion and concern in the railroad industry among manufacturers of rail cars and locomotives, railroad construction contractors, and rail development grant recipients (e.g., state departments of transportation (DOTs)) who procure rail construction and manufacturing services.

The purpose of this digest is to provide guidelines for complying with the various Buy America provisions, compiled into a single resource. The digest addresses the similarities and, most importantly, the differences among the various Buy America provisions. The digest also details the legislative and administrative history (and, in some cases, the judicial history) that helps explain most of the differences in the way the various Buy America provisions are administered. Keep in mind, however, that as of this publication, significant rulemakings are pending from FHWA and FRA.

B. History of Buy America Statutes

Most Federal Buy America statutes have their origins in times of national economic distress. The original Buy American Act (BAA), applicable to

direct federal procurements, was enacted by Congress in 1933 during the Great Depression.¹ The legislative history suggests that Congress intended to ensure that only domestic construction materials and manufactured products (typically machinery such as turbines and generators) were procured for use in public works projects such as the Hoover Dam.² As a general rule, the BAA forbids the purchase of all foreign goods by federal agencies,³ although a number of exceptions are set forth in the statute.⁴ Congress did not clearly define the exceptions, however, and BAA compliance standards have been established over the years by administrative regulations, executive orders, and court decisions. More than 80 years after its passage, the BAA is still federal law and still applies to most direct procurements by federal entities, including the U.S. Department of Transportation (USDOT) and its agencies.

However, most transportation development in the United States is procured not by federal entities but by state and local transportation agencies, albeit often using federal grant funds obtained from USDOT agencies. In February 1978, in the midst of another turbulent economic and foreign policy period, the Congressional Steel Caucus asked the U.S. General Accounting Office (GAO) to investigate the procurement of foreign goods by state and local governments using federal grant funds.⁵ In May 1978, the GAO responded “that contracts awarded by State and local authorities under Federal grant programs are not covered by the Buy American Act, unless the statute authorizing the Federal assistance to

¹ Lawrence Hughes, *Buy North America: A Revision to FTA Buy America Requirements*, 23 *TRANSP. L.J.* 207, 208 (1995).

² 76 *CONG. REC.* 1933, 3267 (1933); see also DANA FRANK, *BUY AMERICAN: THE UNTOLD STORY OF ECONOMIC NATIONALISM* 66 (1999).

³ 41 U.S.C. § 8302(a)(1) (2013).

⁴ 41 U.S.C. § 8302(a)(2) (2013).

⁵ FOREIGN-SOURCE PROCUREMENT FUNDED THROUGH FEDERAL PROGRAMS BY STATES AND ORGANIZATIONS 1, *COMP. GEN. REP'T NO. ID-79-1*, Docket Nos. B-162222, B-156489 (1978) (hereinafter *Foreign Procurement 1978 Report*).

State and local authorities explicitly provides for application of the Buy American Act.⁶ The GAO concluded that federal assistance programs administered by FRA, FHWA, and Amtrak “do not address the issue” of domestic preferences, and the grant program administered by FTA actually “prohibits domestic preference.”⁷

Shortly thereafter, Congress enacted Buy America provisions applicable to Amtrak,⁸ as well as FTA and FHWA,⁹ as amendments to transportation appropriations bills, with the intent to extend the BAA requirements to the transportation grant programs.¹⁰ The 1978 transportation grant Buy America provisions used almost identical statutory language to the BAA, with certain key terms and exception conditions left undefined. Beginning in 1982, however, the Buy America provisions applicable to FHWA and FTA were significantly revised by Congress¹¹ to include more specific, quantitative criteria for those agencies to determine whether an exception was triggered, or whether it was appropriate to grant waivers from the requirements. FHWA and FTA have also issued formal regulations and undertaken public rulemaking, often at the direction of Congress, to provide grant recipients with additional guidelines on Buy America compliance.¹² A number of Buy America waiver determinations made by FHWA and FTA are also publicly available to provide additional guidance, if not legal precedent, to assist grant recipients with understanding the waiver criteria.¹³ In response to FHWA and FTA rules, regulations, and waiver determinations, Congress has periodically refined the statutory

⁶ FEDERAL ASSISTANCE TO STATE AND LOCAL GOVERNMENTS AND OTHER ORGANIZATIONS FOR SELECTED PROGRAMS, Enclosure II, at 6, COMP GEN. REP’T NO. ID-78-40, Docket Nos. B-162222, B-156489 (1978) (hereinafter *Federal Assistance 1978 Report*).

⁷ *Foreign Procurement 1978 Report*, *supra* note 5, App. 1, at 13–14. At that time, FTA was known as the Urban Mass Transportation Administration (UMTA). To avoid confusion, both FTA and UMTA are referenced interchangeably herein as “FTA.”

⁸ *See infra* § II.B.2.

⁹ *See infra* § III.A.

¹⁰ Hughes, *supra* note 1, at 215 (“Rep. Robert W. Edgar (D-Pa.) explained that the [BAA] (enacted in 1933) applied only to direct federal procurements, and not to grants-in-aid. Rep. Edgar’s amendment would encompass grants-in-aid projects within the Buy America requirement.”).

¹¹ *See infra* § III.A.

¹² *See infra* §§ III.B.3, III.C.3.

¹³ *See infra* §§ III.B.4, III.C.4.

language applicable to FHWA and FTA, typically to close what it perceives to be “loopholes” used by grant recipients to purchase foreign goods.¹⁴

The national financial crisis of 2007–2008 was accompanied by a new wave of Buy America provisions applicable to transportation grants. In 2008, Congress enacted a Buy America provision applicable to FRA grants for HSIPR projects.¹⁵ In 2009, the American Recovery and Reinvestment Act (ARRA) stimulus bill, which provided substantial funding for FRA, FTA, FHWA, and Amtrak programs, included its own Buy America provision.¹⁶ ARRA also provided for expanded enforcement and monitoring of the Buy America provisions associated with ARRA-funded projects.¹⁷ The increased scrutiny of Buy America provisions associated with ARRA led to increased recognition of how apparently similar Buy America provisions are administered very differently by different federal agencies. There have subsequently been a number of efforts in Congress to both streamline and strengthen the various Buy America provisions,¹⁸ but as of this publication there remain sharp differences.

C. Buy America Statutory Issues

1. Coverage and Applicability

Applications of Buy America provisions in transportation grant programs for rail development can typically be divided into two categories: *construction materials* and *manufactured products* (including rolling stock). Even the original BAA, which on its face applies equally to all direct procurements of goods by the federal government, has been divided into administrative regulations outlining different procedures for construction materials¹⁹ and manufactured products (or “supplies”).²⁰ This section addresses considerations for grant recipients in determining which materials must be domestic on a federally funded project.

a. Construction Materials.—The 1933 BAA nominally prohibited federal agencies from purchasing any foreign construction materials of any kind, including steel, cement, wood, and even

¹⁴ *See infra* §§ III.B.2, III.C.2.

¹⁵ *See infra* § II.A.2.

¹⁶ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1605(c), 123 Stat. 115, 303 (2009).

¹⁷ *Id.* § 1524, 123 Stat. at 291.

¹⁸ *See, e.g., infra* § III.B.2.

¹⁹ 48 C.F.R. subpt. 25.2 (2013).

²⁰ 48 C.F.R. subpt. 25.1 (2013).

“mined” materials such as aggregate or sand.²¹ Likewise, the original Buy America provisions applicable to FTA, FHWA, and Amtrak nominally applied to all purchases of construction materials using funds appropriated for those agencies. Over time, however, most transportation grant Buy America provisions have increasingly focused on *steel*, with products such as cement and asphalt being expressly removed from coverage of most (but not all) such provisions. In recent years, most transportation grant Buy America provisions have expanded to also cover *iron*. Recipients of federal grants for construction projects, and their contractors, should consider whether the applicable Buy America provision is limited to steel and iron or whether all construction materials are covered. Note, however, that even if the applicable Buy America provision excludes construction materials other than steel and iron, mechanical systems such as heating, ventilation, and air conditioning (HVAC) incorporated into the construction project are typically covered by the applicable Buy America provision as “manufactured products.” Also, the grant recipient or its construction contractor should determine whether the constructed facility itself is considered a “manufactured product” under the applicable Buy America provision, in which case domestic content requirements may extend to all of its *components* (i.e., construction materials other than steel, iron, and mechanical systems).

b. Manufactured Products.—The 1933 BAA nominally required that federal agencies purchase only domestic manufactured products (those “that have been manufactured in the United States substantially all from” domestic components—i.e., from goods that were themselves “mined, produced, or manufactured in the United States”).²² The language of the BAA, its legislative history, and the rules implementing it suggest that Congress intended to establish domestic preferences for machinery—mechanical and electrical end products that result from assembly of mechanical and electrical components—to ensure that assembly processes take place in the United States and that the components come from domestic suppliers.²³ Over time, however, manufacturing processes have become more sophisticated than “mere assembly,” encompassing complex processes, including chemical and even biological processes.

Notably, FTA has adopted a sophisticated definition of manufacturing to refer to the “substantial transformation” of the constituent goods or materials.²⁴ This has the potential to extend coverage of the applicable Buy America provisions to “manufactured products” beyond machinery, e.g., to encompass construction materials (other than raw materials) such as cement that are not “assembled” but undergo some refinement, treatment, or other transformative processes. In the procurement of “rolling stock” (e.g., vehicles, locomotives, and rail cars) that result from the assembly of other manufactured products, the question also arises whether the applicable Buy America provision and its exceptions are to be evaluated at the level of the assembled rolling stock, or at the level of each individual manufactured component. The answer will vary depending on the applicable grant provision.

2. Exceptions, Exclusions, and Waivers

Most Buy America provisions have some form of the following five exceptions or waivers, all of which originated with the BAA. Although these exceptions appear similar on their face, this digest addresses the very significant differences that exist among the various transportation grant Buy America provisions with respect to how these exceptions (or waivers) are administered. Importantly, in most cases under the transportation grant Buy America provisions, the grant recipient must obtain a formal waiver from the federal grant agency, even if the criteria for an exception apply.

a. Domestic Content.—The 1933 BAA required federal agencies to purchase only those manufactured products that had been “manufactured in the United States *substantially all* from articles, materials, or supplies mined, produced, or manufactured in the United States.”²⁵ However, in a 1954 Executive Order, the phrase “substantially all” was interpreted to allow manufactured products to be considered domestic unless “the cost of the foreign products used in such materials constitutes fifty per centum or more of the cost of all the products used in such materials.”²⁶ Therefore, federal agencies could purchase manufactured products containing foreign components as long as domestic components constituted at least 50 percent of the end product (by cost), and the final as-

²¹ 41 U.S.C. § 8302(a)(1) (2013).

²² 41 U.S.C. §§ 8302(a)(1), 8303(a)(2) (2011).

²³ See 76 CONG. REC. 1933, 3267 (1933); see also FRANK, *supra* note 2, at 66.

²⁴ 49 C.F.R. § 661.3 (2013).

²⁵ 41 U.S.C. § 8302(a)(1) (2013) (emphasis added).

²⁶ Exec. Order No. 10,582, 19 Fed. Reg. 8,723 (Dec. 17, 1954).

sembly location for the end product was in the United States. This was not an exception per se, since manufactured products with at least 50 percent domestic content were deemed to be “substantially all” domestic. The original 1978 Buy America provisions applicable to FTA, FHWA, and Amtrak used this same “substantially all” language, perhaps implying that the same 50 percent domestic content standard applied to manufactured products purchased with those grant funds. However, subsequent legislation has tended to quantify domestic content requirements, rather than leave them open to executive or administrative interpretation, and the trend for Congress has been to impose stricter domestic content requirements than the BAA 50 percent rule. Grant recipients should also be aware that they may not be entitled to presume that a product automatically complies with the applicable Buy America provision just because the product satisfies the domestic content criteria in the legislation—grant recipients may still be required to request and receive a Domestic Content waiver from the federal grant agency.

b. Price Differential.—The 1933 BAA included an exception that permitted federal agencies to purchase foreign goods if the price of comparable domestic goods was “unreasonable.”²⁷ The 1954 Executive Order interpreted the cost of domestic goods to be “unreasonable” if it was higher than an adjusted bid to provide comparable foreign goods, where the adjusted foreign bid price is calculated by increasing the cost of the foreign goods in the bid by a minimum 6 percent “differential.”²⁸ This 6 percent Price Differential provision is still applicable in the BAA regulations governing direct federal procurements.²⁹ Because the BAA price differential is so low, and is applied only to the individual bid line items for foreign goods,³⁰ the BAA does not pose a significant barrier against purchases of foreign goods. Foreign goods need only be moderately cheaper than comparable domestic goods in order for the cost of domestic goods to be considered “unreasonable” and thus qualify for this 6 percent Price Differential exception. The original 1978 Buy America provisions applicable to FTA, FHWA, and Amtrak used this same “unreasonable” cost language, perhaps implying that the same 6 percent price differential

applied to allow the purchase of foreign goods with those grant funds. However, the trend in subsequent legislation has been for Congress to establish specific price differentials in the legislation, which tend to increase over time and are typically much larger than the BAA 6 percent price differential. Additionally, the trend in most (but not all) transportation grant Buy America legislation has been to apply the price differential to the *entire bid* that includes foreign goods, not just to the cost of foreign goods in that bid. As a result, it is very rare for a foreign bid to qualify for a Price Differential waiver from the transportation grant Buy America provisions.

c. Nonavailability.—The 1933 BAA permitted the purchase of foreign goods where comparable domestic goods “are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and are not of a satisfactory quality.”³¹ Although these terms were not clearly defined or quantified in the legislation, the Federal Acquisition Regulation (FAR) provides a list of classes of goods where it has been determined “that domestic sources can only meet 50 percent or less of total U.S. government and nongovernment demand.”³² Although federal agencies are required to perform some market research and specifically seek out domestic sources before purchasing goods on this list, federal agencies may purchase foreign goods on the list without a written waiver determination as long as their market research does not identify sources of comparable domestic goods.³³ Furthermore, if there are no domestic offers in response to an open solicitation, federal agencies are entitled to presume that domestic goods are not reasonably available, even if they are not on the FAR list.³⁴

Buy America provisions in transportation grant programs tend to use nearly identical language as the BAA to allow the purchase of foreign goods where comparable domestic goods are not reasonably available. However, for the most part, federal agencies have not adopted the FAR list of unavailable goods for their grant programs.³⁵ Some federal agencies have issued their own

²⁷ 41 U.S.C. § 8302(a)(1) (2013).

²⁸ Exec. Order No. 10,582, 19 Fed. Reg. 8,723 (Dec. 17, 1954).

²⁹ 48 C.F.R. § 25.105(b)(1) (2013).

³⁰ 48 C.F.R. § 25.501(a) (2013).

³¹ 41 U.S.C. §§ 8301(a)(2)(B), 8303(b)(1)(B) (2013).

³² 48 C.F.R. §§ 25.103(b)(1)(i), 25.104(a) (2013).

³³ 48 C.F.R. § 25.103(b)(1)(ii) (2013).

³⁴ 48 C.F.R. § 25.103(b)(3) (2013).

³⁵ FTA is an exception, as it has expressly adopted the FAR list of unavailable goods for a Nonavailability waiver under the FTA Buy America provision. 49 C.F.R. § 661.7, App. A(a) (2013).

“general” nationwide Nonavailability waivers, allowing grant recipients or their contractors to purchase certain foreign goods that the agency has determined are not reasonably available, without requiring the grant recipients to specifically request a Nonavailability waiver for those goods. However, unless the federal agency has issued a general waiver, the grant recipient typically must specifically request a Nonavailability waiver when it is unable to identify domestic goods in sufficient quantities or satisfactory quality, or, in some cases, when suitable domestic goods can not be made available within a reasonable time. The federal agency is typically under no obligation to grant a Nonavailability waiver for the purchase of foreign goods, even if comparable domestic goods are not actually available.

d. Public Interest.—The 1933 BAA included an exception that permitted federal agencies to purchase foreign goods if the acquisition of higher-priced domestic goods would “be inconsistent with the public interest.”³⁶ The FAR clarifies that the Public Interest exception to the BAA applies when the federal government “has an agreement with a foreign government that provides a blanket exception to the Buy American Act.”³⁷ Specifically, under the Trade Agreements Act, the BAA has been waived for transactions covered by the World Trade Organization (WTO) Agreement on Government Procurement or other free trade agreements (FTAs).³⁸ Most transportation grant Buy America provisions also include the possibility of the grant recipient obtaining a Public Interest waiver. However, the BAA standards for a Public Interest waiver for goods from foreign trading partners are largely inapplicable to the transportation grant Buy America provisions. The WTO Agreement on Government Procurement and most FTAs do not apply to transportation grant programs, because such agreements typically define “procurement” to exclude federal grant funds to states.³⁹ It is typically unclear what would qualify for a Public Interest waiver from the transportation grant Buy America provisions and, in most

programs, Public Interest waivers are almost non-existent. One notable exception is FHWA, where Public Interest waivers have had, and continue to have, a significant impact, allowing FHWA grant recipients to purchase foreign manufactured goods.⁴⁰

e. Small Purchase.—The BAA, like many federal procurement statutes, is inapplicable to purchases where the entire contract value is less than the federal “micro-purchase threshold,” which is currently \$3,000.⁴¹ Likewise, most transportation grant Buy America provisions have some threshold contract value below which the Buy America provisions do not apply. However, the cost thresholds vary widely, ranging from the \$2,500 FHWA “de minimis” purchase value to the Amtrak \$1 million contract price threshold. These variations in the Small Purchase cost threshold from agency to agency can have a significant impact on whether the grant recipient is able to purchase certain foreign goods—where the cost threshold is very high (as with Amtrak), most ordinary purchases (other than larger construction contracts or rolling stock procurements) are exempt from the Buy America provision. If a contract qualifies for the Small Purchase exception under the terms of a given transportation grant Buy America provision, the grant recipient generally does not need to request a waiver.

In addition to the differences in the way federal agencies interpret and apply the various Buy America waivers and exceptions, there are a number of other procedural issues related to the various transportation grant Buy America provisions where requirements and practices vary significantly from agency to agency. These issues are introduced briefly in the following text. In Sections II and III *infra*, the issues are specifically addressed in the context of each transportation grant Buy America provision.

3. Notice-and-Comment

Under the BAA, when federal agencies directly purchase foreign construction materials, they are generally required to make written findings justifying any purchase made under an exception to the BAA.⁴² Although there is no publication requirement, the federal agencies are required to make BAA waiver findings available for public

³⁶ 41 U.S.C. §§ 8302(a)(1), 8303(b)(3) (2013).

³⁷ 48 C.F.R. §§ 25.103(a), 25.202(a)(1) (2013).

³⁸ 48 C.F.R. § 25.402(a)(1) (2013); *see also* Trade Agreements Act of 1979, Pub. L. No. 96-39, §§ 301, 303, 93 Stat. 144 (1979).

³⁹ *See* World Trade Org., Agreement on Government Procurement, App. 1, United States, General Notes, WT/Let/672 (Mar. 22, 2005); North American Free Trade Agreement, Part IV: Government Procurement, ch. 10, § A, art. 1001.

⁴⁰ *See infra* §§ III.B.3, III.B.4.

⁴¹ 41 U.S.C. §§ 1902(a), 8302(a)(2)(C), 8303(b)(1)(C) (2013).

⁴² 48 C.F.R. § 25.202(b) (2013).

inspection.⁴³ Under the BAA, federal agencies are also generally required to submit an annual report to Congress detailing agency purchases of manufactured products with a foreign place of manufacture.⁴⁴ Note, however, that there is no requirement under the BAA to report foreign *components* of products manufactured in the United States. There is also generally no requirement under the BAA for federal agencies to publish their intent to purchase foreign goods (in the *Federal Register* or elsewhere) for public notice-and-comment.

The transportation grant Buy America provisions vary widely with respect to publication requirements for Buy America waivers. Federal grant-making agencies may or may not be required to publish waiver requests from their grant recipients (in the *Federal Register* or elsewhere) for public notice-and-comment. Likewise, the agencies may or may not be required to publish (in the *Federal Register* or elsewhere) their final determinations to grant or deny waivers for their grant recipients, and they may or may not be required to solicit public comments on their final determinations. The trend, however, is toward increased public scrutiny of transportation grant Buy America waivers. Before requesting a waiver, grant recipients must make themselves aware of the public notice-and-comment requirements under the applicable transportation grant Buy America provision. Furthermore, even where there is no publication requirement under the applicable Buy America provision, waiver requests from grant recipients, and waiver determinations by the federal agency, may be available to the public upon request under public records statutes such as the Freedom of Information Act (FOIA).⁴⁵ Transportation grant recipients should anticipate that their waiver requests will be made public, and that the waiver requests will be the subject of public opposition from organized labor and manufacturing trade associations.

4. Bid Certification and Potential Penalties

To a certain extent, transportation grant recipients must rely on their offerors (potential contractors or suppliers) to quantify the domestic content of their bids, or to identify foreign goods that they propose to deliver. However, Buy America enforcement provisions vary widely from one transportation grant program to the next. Some

transportation grant Buy America provisions expressly require bidders to certify Buy America compliance as a condition of bid responsiveness. In that case, grant recipients are obligated to reject a bid that fails to comply with the certification requirements of the transportation grant program, even if it is the lowest bid. Depending on the transportation grant provision, grant recipients may or may not be entitled to rely on the bidder's Buy America certification—in some cases, the grant recipients may be obligated to confirm compliance via post-award audits or otherwise. The grant recipient's failure to perform its own enforcement obligations under the applicable transportation grant Buy America provision could result in bid challenges from disappointed bidders and loss of federal grant funds.

Under direct federal procurements, a bidder's false certification of compliance with the BAA could potentially subject the bidder to liability under the False Claims Act (FCA).⁴⁶ Under the FCA, the contractor for a federal agency could be required to reimburse the government up to three times the government's actual damages (e.g., the amount paid for the foreign goods), plus additional monetary penalties.⁴⁷ Furthermore, there are criminal penalties for knowingly and willfully making a fraudulent BAA compliance certification, including possible imprisonment.⁴⁸

Under transportation grant programs, however, if the bidder is required to certify compliance with the applicable Buy America provision, such certification is made to the grant recipient, not the federal government. Therefore, there is probably no liability under the FCA for false certifications of compliance with transportation grant Buy America provisions. However, bidders should be mindful of state statutes similar to the FCA, which could impose similar liability for false Buy America compliance certifications made to grant recipients who are state and local transportation agencies. Furthermore, under some (but not all) transportation grant provisions, Congress has prescribed criminal penalties for false Buy America compliance certifications. Under most transportation grant Buy America provisions, contractors making false Buy America compliance certifications are subject to suspension or debarment (making them potentially ineligible to receive federal grant funds in the future), and the grant recipient faces the potential loss of federal

⁴³ *Id.*

⁴⁴ 41 U.S.C. § 8302(b) (2013).

⁴⁵ 5 U.S.C. § 552 (2013).

⁴⁶ 31 U.S.C. §§ 3729–3733 (2013).

⁴⁷ 31 U.S.C. § 3729(a)(1) (2013).

⁴⁸ 18 U.S.C. § 1001 (2013).

funding for the project. Grant recipients must be aware of the potential consequences of a false Buy America certification made by their contractors, and adjust their own enforcement activities accordingly to avoid loss of federal funds.

5. Multiple Funding Sources

Finally, grant recipients must be cognizant of situations in which multiple Buy America provisions apply to a project. For example, there may be transportation grant Buy America provisions that apply to all grants made by a federal agency and (as with ARRA) separate Buy America provisions in the legislation that authorized the grant funds. Often there are state and local Buy America provisions that apply to all contracts made by grant recipients such as state DOTs, and the transportation grant Buy America provisions typically allow the application of more stringent state and local Buy America provisions. Furthermore, when projects receive grant funds from multiple federal agencies, there may be multiple Buy America provisions that apply to a single project. As the previous discussion indicates, there are significant variations in the Buy America requirements from one federal grant program to the next, so a grant recipient can not assume that a project that complies with one Buy America provision complies with all other Buy America provisions that apply to the project. This potential problem is exacerbated by recent legislation that expands the definition of “project” in certain federal transportation grant contracts.⁴⁹ As will be discussed further herein, this recent legislation could apply the FHWA Buy America provision to contracts that are not funded by FHWA, including contracts funded by other transportation grant programs with their own Buy America provisions.

All the issues previously presented are discussed in depth in Sections II and III *infra*, in the context of each transportation grant Buy America provision applicable to passenger and freight rail development. The FRA and Amtrak Buy America provisions are discussed in Section II. The FHWA and FTA Buy America provisions are discussed in Section III. It is important to recognize, however, that Buy America provisions in federal law have been the subject of increased attention and scrutiny since 2008. A number of rulemaking actions related to the Buy America provisions discussed herein are still pending as of this digest’s publication. And in each new appropriations bill, Congress could strengthen the Buy America provi-

sions associated with any transportation grant program. It is the responsibility of grant recipients to monitor changes in the Buy America provisions to ensure that grant recipients remain in compliance.

II. BUY AMERICA PROVISIONS ADMINISTERED BY FRA

FRA grant funds were not historically subject to significant domestic preferences or Buy America requirements. In 2008, that changed when Congress enacted a Buy America provision (the FRA Buy America provision) applicable to FRA grants under the HSIPR program. However, since 1978, FRA has also been responsible for administering the Amtrak Buy America provision applicable to procurements made by Amtrak with funds from its capital grant. This section addresses the two distinct Buy America provisions administered by FRA.

A. FRA High-Speed Intercity Passenger Rail Buy America Provision

1. Statutory Language

a. Coverage and Applicability.—The FRA Buy America provision⁵⁰ was enacted by Congress in 2008. To date, FRA has not issued formal regulations implementing the statute. The statute requires, for all projects using FRA grant funds, that “all steel, iron, and manufactured goods used in the project are produced in the United States.”⁵¹ Therefore, unless an exception is applicable or a waiver is granted, no foreign steel or iron may be used in FRA-funded construction projects, and no foreign manufactured products (such as rolling stock) may be purchased with FRA grant funds. Note that the FRA Buy America provision requires manufactured products to be “produced in the United States”; not “manufactured in the United States substantially all from” domestic components (as in the BAA). Therefore, unless a given purchase qualifies for a waiver, manufactured products such as rolling stock purchased using FRA funds must be comprised of 100 percent domestic components.

b. Exceptions and Waivers.—

- Domestic Content

The FRA Buy America provision does not include an allowance, express or implied, to excuse

⁴⁹ See *infra* § III.B.2.

⁵⁰ 49 U.S.C. § 24405(a) (2013).

⁵¹ 49 U.S.C. § 24405(a)(1) (2013).

foreign content in a manufactured product (such as rolling stock) where the foreign content comprises less than half of the end product. As previously discussed, the word “substantially” in the BAA has been interpreted to require only 50 percent domestic content in manufactured products, but the word “substantially” does not appear in the FRA Buy America provision. Furthermore, unlike other transportation grant provisions that expressly provide for waivers when some specified percentage of the components of a manufactured product are domestic, there is no such express Domestic Content waiver in the FRA Buy America provision. The FRA Buy America provision, therefore, has been interpreted as strictly requiring 100 percent domestic content.⁵²

Note, however, that FRA has adopted FTA’s definition of a domestic end product as one where:

(1) All of the manufacturing processes for the end product...take place in the United States; and (2) All of the components of the end product [are] of U.S. origin. A component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents.⁵³

It is conceivable, then, that a component could be manufactured in the United States entirely of foreign subcomponents and that component would be considered 100 percent domestic, even if all of its subcomponents are foreign. When the components are assembled or manufactured into the final end product in the United States, that end product would satisfy the FRA Buy America provision because its final assembly location is in the United States and 100 percent of its components are “domestic,” even though its subcomponents may be substantially foreign. In that case, the foreign content is permitted under the FRA Buy America provision, and no waiver is required.

It is important to note that FRA does not make a significant distinction between rail rolling stock and other manufactured products. As noted above, FRA has adopted FTA’s method for evaluating the domestic content of manufactured products and

⁵² See, e.g., FRA, Buy America and FRA’s High-Speed Intercity Passenger Rail Program: Answers to Frequently Asked Questions, at 2 (Aug. 30, 2013), available at <https://www.fra.dot.gov/eLib/Details/L02740> [hereinafter *FRA Buy America FAQ*]:

FRA considers the need to grant waivers under these circumstances as strictly temporary because it expects that achieving domestic manufacture and 100% domestic component content can and will occur in the very near future. By encouraging grantees to use manufacturers or suppliers who maximize domestic content, FRA hopes to achieve its goal of 100% domestic content in the near future.

⁵³ *Id.* at 4; see also 49 C.F.R. § 661.5(d) (2013).

applies that same method to evaluate the domestic content of rolling stock.⁵⁴ FTA, on the other hand, has been required by Congress to adopt a separate method for evaluating the domestic content of rolling stock, to account for the origin of subcomponents.⁵⁵ Grant recipients should be mindful that rail rolling stock that satisfies the domestic content requirements of the FRA Buy America provision may not satisfy the domestic content requirements of the FTA Buy America provision and vice versa.

- Small Purchase

The FRA Buy America provision “shall only apply to projects for which the costs exceed \$100,000.”⁵⁶ For projects costing less than \$100,000, therefore, FRA grant recipients can purchase foreign goods using FRA grant funds without requesting a waiver. Furthermore, under the FRA Buy America provision, “in calculating the components’ costs, labor costs involved in final assembly shall not be included in the calculation.”⁵⁷ FRA has interpreted this to mean that labor costs involved in final assembly may be subtracted from the project cost before determining whether the \$100,000 Small Purchase cost threshold applies.⁵⁸ It is conceivable, therefore, that FRA grant funds can be spent on foreign goods where the project cost exceeds \$100,000, as long as the cost of goods after subtracting assembly labor is less than \$100,000.

Note, however, that the \$100,000 Small Purchase cost threshold applies to the *project*, not the individual contract. FRA has not issued regulations defining “project,” and in 2012, Congress rejected an attempt by some legislators to expand what constitutes a “project” for purposes of the FRA Buy America provision.⁵⁹ However, the FRA

⁵⁴ See generally *FRA Buy America FAQ*, *supra* note 52.

⁵⁵ 49 U.S.C. § 5323(j)(2)(C) (2013).

⁵⁶ 49 U.S.C. § 24405(a)(11) (2013).

⁵⁷ 49 U.S.C. § 24405(a)(3) (2013).

⁵⁸ *FRA Buy America FAQ*, *supra* note 52, at 6.

⁵⁹ See S. Amdt. 1766 to S. 1813, 112th Cong. (2012) (proposing to make the FRA Buy America provision applicable “to all contracts eligible for Federal funding for a project..., regardless of the funding source of such contracts, if at least 1 contract for the project is funded with amounts made available to carry out this title.”). This failed amendment, if enacted, would have imposed FRA Buy America requirements on contracts made by FRA grant recipients not using FRA grant funds, if the

Buy America provision still conceivably applies to contracts issued by FRA grant recipients with a value of less than \$100,000, if those contracts are part of an overall “project” for which the total project costs reach \$100,000. FRA grant recipients should not attempt to segment a project into a number of smaller contracts simply to avoid application of the FRA Buy America provision.⁶⁰

- Price Differential

The FRA grant recipient may request a waiver from the FRA Buy America provision if “including domestic material will increase the cost of the overall project by more than 25 percent.”⁶¹ Note that this is much stricter than the BAA “unreasonable cost” exception, which allows federal government agencies to purchase foreign goods if the lowest responsible bid is still less than the lowest purely domestic bid even after adjusting the low bid upward via a 6 percent price differential applied to the cost of foreign goods in the low bid. The FRA Buy America provision applies a much larger 25 percent price differential, and the price differential is applied to “the cost of the overall project,” not just the cost of foreign goods in the bid.⁶² The conditions justifying a Price Differential

contract was closely related to work that was funded by FRA.

⁶⁰ FRA has stated that the FRA Buy America provision applies even to purchases made with funds other than FRA grant funds, if the purchases are used in a “project” funded in part with FRA grant funds. FRA, Buy America and Related Requirements Webinar Presentation, at 9 (Aug. 29, 2013), *available at* <http://www.fra.dot.gov/eLib/details/L04747> [hereinafter *FRA Buy America Webinar*].

⁶¹ 49 U.S.C. § 24405(a)(2)(D) (2013).

⁶² *Id. But see* 49 U.S.C. § 24405(a)(3) (2013) (“[I]n calculating the components’ costs, labor costs involved in final assembly shall not be included in the calculation.”). This suggests that the 25 percent price differential is only to be applied to the cost of components in the end products, not the cost of labor to assemble components into end products. In some cases, it could be difficult, if not impossible, to separate out costs of labor from costs of goods for purposes of applying the Price Differential waiver. In most cases, applying the 25 percent price differential to the total bid price (including labor) will demonstrate that the low foreign bid does not qualify for a Price Differential waiver. In the rare circumstance where the lowest purely domestic bid is still larger than a foreign bid increased by 25 percent, FRA grant recipients should consider whether this would still be the case if final assembly labor costs are subtracted from both bids. Domestic labor will generally

waiver under the FRA Buy America provision are only available in rare circumstances.

- Nonavailability

Under the FRA Buy America provision, an FRA grant recipient may request a waiver to purchase foreign steel, iron, or manufactured products if comparable domestic goods “are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality.”⁶³ This language is nearly identical to the Nonavailability exception to the BAA. Note, however, that FRA has not implemented regulations or other guidance adopting the FAR list of goods that are presumed to be unavailable domestically under the BAA. Therefore, even if the FRA grant recipient wishes to purchase foreign goods that appear on the FAR list of unavailable domestic goods, the FRA grant recipient must request a Nonavailability waiver from FRA. Likewise, even if the FRA grant recipient does not obtain a domestic bid in response to an open solicitation, the FRA grant recipient must request a Nonavailability waiver from FRA. FRA has indicated that it will not presume domestic sources are not available, and that grant recipients should not expect that Nonavailability waiver requests will be granted.⁶⁴ FRA has entered into an interagency agreement with the National Institute of Technology and Standards, Manufacturing Extension Partnership (NIST-MEP) at the U.S. Department of Commerce to help it identify potential domestic manufacturing sources.⁶⁵ When confronted with a Nonavailability waiver request, FRA will seek out domestic sources itself or via NIST-MEP before granting the waiver.

The FRA Buy America provision includes a second potential justification for a Nonavailability waiver, which is only applicable to purchases of rolling stock and power train equipment. FRA may grant a waiver allowing the purchase of foreign rolling stock or power train equipment if comparable domestic products “cannot be bought and delivered in the United States within a rea-

cost more than foreign labor, so subtracting labor costs from the Price Differential evaluation will typically tip the balance even more in favor of the domestic bidder.

⁶³ 49 U.S.C. § 24405(a)(2)(B) (2013).

⁶⁴ *FRA Buy America Webinar*, *supra* note 60, at 23, 27.

⁶⁵ *Id.* at 25–26; *FRA Buy America FAQ*, *supra* note 52, at 2.

sonable time.”⁶⁶ This “unreasonable delivery time” Nonavailability waiver may apply where, in response to a solicitation for rolling stock or power train equipment, the FRA grant recipient receives a bid to provide domestic products but the bidder does not presently manufacture those products. Due to concerns about project delay, the FRA grant recipient might prefer to award the contract to a foreign bidder with the existing capability to manufacture the products, but doing so could provoke a bid challenge from the domestic bidder. In that situation, the FRA grant recipient could request a Nonavailability waiver on the grounds that the domestic bidder could not manufacture the products “within a reasonable time” to meet the FRA grant recipient’s project schedule.

- Public Interest

An FRA grant recipient may seek a waiver from the FRA Buy America provision where its application “would be inconsistent with the public interest.”⁶⁷ FRA has not issued regulations or guidance describing the circumstances or objective criteria that might justify a Public Interest waiver. Public Interest waivers for other Federal Buy America provisions have been the subject of criticism and scrutiny,⁶⁸ because what is in the “public interest” can be a subjective determination. Likewise, any Public Interest waiver from the FRA Buy America provision would likely receive public scrutiny from industry interests such as organized labor and manufacturing trade associations, as well as from Congress. FRA has indicated that its grant recipients should not expect that such waivers will be granted.⁶⁹

c. Notice-and-Comment.—If FRA decides to grant a waiver from the FRA Buy America provision, before the waiver takes effect, FRA must publish its determination in the *Federal Register*, along with “a detailed written justification as to why the waiver is needed.”⁷⁰ FRA must solicit and receive public comments on its proposed waiver “for a reasonable period of time not to exceed 15 days.”⁷¹ There is no statutory requirement for FRA to respond to the public comments or to publish any “final determination” after the 15-day

notice-and-comment period—the waiver is presumed to be effective after the 15-day notice-and-comment period has expired.

FRA is only required to publish its determination to *grant* a waiver—there is no statutory requirement for FRA to solicit public comments on waiver requests prior to making its determination.⁷² In the past, however, FRA has published some waiver requests in the *Federal Register* to solicit public comments (e.g., to determine whether there is a source of comparable domestic goods) before making its determination.⁷³ In recent years, FRA has informally published at least some of its open waiver requests on FRA’s Buy America Web site.⁷⁴ The public can post comments related to each open waiver request via a form on the Web site, and posted comments are publicly visible.⁷⁵ If FRA decides to grant a waiver after going through this informal notice-and-comment process, it is still obligated under the statute to publish its final determination in the *Federal Register* for an additional 15-day notice-and-comment period.

Even where FRA does not publish waiver requests, FRA considers waiver requests submitted by its grant recipients to be public records, “which are thus subject to the FOIA and to public release in response to individual FOIA requests.”⁷⁶ Furthermore, where grant recipients are state and local agencies, their waiver requests and related correspondence made to FRA, and any response received from FRA, may be subject to disclosure under state public records laws.

d. Certification and Enforcement.—For FRA grant recipients to evaluate bid compliance with the FRA Buy America provision, the grant recipients must often rely on domestic content representations or certifications made by the prospective contractors or suppliers. However, the FRA Buy America provision does not address compliance certification by FRA grant recipients, and FRA has not issued regulations establishing the legal requirements for bidder certifications. FRA

⁷² See 49 U.S.C. § 24405(a)(4) (2013).

⁷³ See *infra* notes 172–173, 182, 196, and accompanying text.

⁷⁴ FRA, Buy America, <https://www.fra.dot.gov/Page/P0185>.

⁷⁵ This is similar to the informal notice-and-comment procedure used by FHWA, which may be attributable to the fact that Congress required FHWA to assist FRA in developing a notice-and-comment procedure for its Web site. Pub. L. No. 110-432, Div. B, § 301(c) (2008).

⁷⁶ *FRA Buy America FAQ*, *supra* note 52, at 9–10.

⁶⁶ 49 U.S.C. § 24405(a)(2)(C) (2013).

⁶⁷ 49 U.S.C. § 24405(a)(2)(A) (2013).

⁶⁸ See *infra* §§ III.C.3.c, III.C.4.a.

⁶⁹ *FRA Buy America Webinar*, *supra* note 60, at 23, 27.

⁷⁰ 49 U.S.C. § 24405(a)(4)(A) (2013).

⁷¹ 49 U.S.C. § 24405(a)(4)(B) (2013).

has stated that its grant recipients “should require that the bidder or offeror submit with the bid or offer a completed Buy America certificate” as a condition of bid responsiveness.⁷⁷ If this requirement is specified in the solicitation, then the FRA grant recipient is obligated to reject bids that do not include either a completed Buy America compliance certificate or a “noncompliance” certificate indicating that the bidder qualifies for a waiver from the FRA Buy America provision. FRA has published “suggested” Buy America compliance certification forms.⁷⁸

The FRA Buy America provision allows for “a manufacturer or supplier of steel, iron, or manufactured goods to correct after bid opening any certification of noncompliance or failure to properly complete the certification (but not including failure to sign the certification)” only if “such manufacturer or supplier submitted an incorrect certification as a result of an inadvertent or clerical error.”⁷⁹ The authority to allow a bidder to correct its Buy America certification lies with the Secretary of Transportation (or his or her delegate, FRA) under the statute,⁸⁰ so an FRA grant recipient must ask FRA to permit the bidder to correct its certification.

Because any such Buy America compliance certification would be made to the FRA grant recipient and not to FRA, a false Buy America certification probably does not expose the bidder to liability under the FCA.⁸¹ When the FRA grant recipient is a state agency, however, there may be state statutes similar to the FCA under which the bidder could be liable for a false certification to the FRA grant recipient. The FRA Buy America provision does not expressly establish any criminal penalties for a false Buy America certification. However, a prospective contractor or supplier can become ineligible to receive FRA grant funds (either as a contractor in privity with an FRA grant recipient or as a subcontractor) if it represents that goods used in an FRA grant project are domestic when in fact they are not “produced in the

United States.”⁸² The prospective contractor or supplier becomes automatically ineligible to receive FRA grant funds after a court or federal agency determines that its false representation was *intentional*.⁸³

The FRA Buy America provision does not include any express requirements for enforcement by FRA grant recipients. However, FRA has published a list of actions that FRA grant recipients “need to do” to demonstrate compliance with the FRA Buy America provision.⁸⁴ These include:

- Provide notice in solicitations and requests for proposals (RFPs) that the project is subject to the FRA Buy America provision.
- Include “flow-down” requirements in contracts, requiring the contractor to put its own subcontractors and suppliers on notice that they must comply with the FRA Buy America provision.
- Maintain any Buy America compliance certifications received from contractors, manufacturers, and suppliers for all FRA grant-funded projects.
- Actively look for fraud and mistakes on the part of contractors, manufacturers, and suppliers.
- Audit rolling stock procurements.

e. Multiple Funding Sources.—The FRA Buy America provision recognizes that purchases made by FRA grant recipients may be subject to Buy America provisions in state law (e.g., where the grant recipient is a state agency or where the project is otherwise funded jointly by FRA and the state DOT).⁸⁵ Therefore, the FRA Buy America provision permits the application of “more stringent requirements...on the use of articles, materials, and supplies mined, produced, or manufactured in foreign countries in projects carried out with” FRA grant funds.⁸⁶ In other words, if the FRA grant recipient is subject to Buy America provisions in state law, then both the state Buy America provision and the FRA Buy America provision must be satisfied.

FRA takes the position that the FRA Buy America provision applies even to purchases made with funds other than FRA grant funds if the purchases are used in a “project” funded in part with

⁷⁷ *FRA Buy America FAQ*, *supra* note 52, at 6.

⁷⁸ *Id.* at 6–7; *see also FRA Buy America Webinar*, *supra* note 60, at 8. FRA’s “suggested” Buy America certification forms are similar to FTA’s mandatory Buy America certification forms. *See* 49 C.F.R. §§ 661.6, 661.12 (2013).

⁷⁹ 49 U.S.C. § 24405(a)(9) (2013).

⁸⁰ *Id.*

⁸¹ *See, e.g., United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 502 (D.C. Cir. 2004).

⁸² 49 U.S.C. § 24405(a)(7) (2013).

⁸³ *Id.*

⁸⁴ *FRA Buy America Webinar*, *supra* note 60, at 8.

⁸⁵ 49 U.S.C. § 24405(a)(8) (2013).

⁸⁶ *Id.*

FRA grant funds.⁸⁷ In other words, FRA grant recipients can not circumvent the FRA Buy America provision by using FRA grant funds for one “segment” of the project and state DOT funds or other federal grant funds for another “segment” of the project.

Multiple federal funding sources can lead to confusion because the FRA Buy America provision (and some other federal transportation grant Buy America provisions) apply to a “project,” not necessarily the *portion* of the project that is funded by the federal transportation grant program. One fairly common situation might be rolling stock procurement projects funded by multiple sources, including FRA grant funds and FTA grant funds. Based on a textual reading of both Buy America statutes, the entire procurement *project*, not just the individual contracts funded by either FRA grant funds or FTA grant funds, would have to comply with *both* the FRA Buy America provision and the FTA Buy America provision.⁸⁸ Some grant recipients advised this author that their policy is to ensure that the entire rolling stock procurement project conforms to the FRA Buy America provision, which is viewed as more stringent because it requires the rolling stock to be 100 percent domestic. Note, however, that under the FTA Buy America provision, rolling stock is evaluated down to the subcomponent level (rather than the component level).⁸⁹ Therefore, it is conceivable that certain rolling stock could satisfy the 100 percent domestic content requirement under the FRA Buy America provision but fail the 60 percent domestic content requirement under the FTA Buy America provision, as the FRA provision disregards the origin of rolling stock subcomponents.⁹⁰ An alternate practice could be to identify

all potentially applicable Buy America provisions and perform an independent evaluation of the compliance of the entire project with each provision.

2. Legislative History

To understand the legislative intent of the FRA Buy America provision, it is helpful to consider that it was enacted during the national financial crisis of 2007–2008, shortly before Congress appropriated ARRA stimulus funding for passenger rail development in early 2009. There is little recorded debate on the FRA Buy America provision in Congress.

Prior to 2008, Congress’s work on purchases of foreign goods with FRA funds is as follows. In 1978, the GAO reported to Congress that the FRA financial assistance programs did “not address the issue” of domestic preferences, “leaving such decision to the recipients’ discretion.”⁹¹ At that time, FRA financial assistance was available in the form of grants, stock purchases, and loan guarantees under the Railroad Rehabilitation and Improvement Financing (RRIF) program. In 1983, the GAO reported to Congress that probably less than 5 percent of FRA assistance funds were used to purchase foreign goods.⁹² In 1991, Congress passed an RRIF Buy America provision that would require high-speed rail facilities or equipment purchased with RRIF funds to have no more than 15 percent foreign content (with the possibility of waivers based on Nonavailability, Price Differential, and Public Interest).⁹³ However, Con-

tured in the United States, regardless of the origin of its subcomponents.”).

⁹¹ *Foreign Procurement 1978 Report*, *supra* note 5, App. 1, at 14.

⁹² The GAO reported that three grant recipients accounted for 71 percent of FRA’s \$634.2 million railroad assistance funding up to that point. Those three grant recipients identified \$23.4 million in foreign purchases, about 5 percent of the \$451.5 million in federal assistance they had received. FOREIGN SOURCE PROCUREMENT FUNDED THROUGH FEDERAL PROGRAMS BY STATES AND ORGANIZATIONS, REP’T NO. GAO/NSIAD-83-9, App. 2, at 23, Docket No. B-208826 (1983) (hereinafter *Foreign Procurement 1983 Report*). However, some of those purchases of foreign goods were made using nonfederal funds, so the actual percentage of federal funds spent on foreign goods by those grant recipients was somewhat less than 5 percent.

⁹³ Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1036(e) (1991) (to be codified at 45 U.S.C. § 831(g)(7)).

⁸⁷ *FRA Buy America Webinar*, *supra* note 60, at 9 (“Buy America requirements also apply to items purchased with non-grant funds if used in a grant-funded project.”).

⁸⁸ See 49 U.S.C. § 24405(a)(1) (2013) (“The Secretary of Transportation may obligate an amount that may be appropriated to carry out this chapter for a *project* only if the steel, iron, and manufactured goods used in the *project* are produced in the United States”) (emphasis added); 49 U.S.C. § 5323(j)(1) (2013) (“The Secretary may obligate an amount that may be appropriated to carry out this chapter for a *project* only if the steel, iron, and manufactured goods used in the *project* are produced in the United States.”) (emphasis added).

⁸⁹ 49 U.S.C. § 5323(j)(2)(C) (2013).

⁹⁰ *FRA Buy America FAQ*, *supra* note 52, at 4 (“A component is considered of U.S. origin if it is manufac-

gress repealed that earlier FRA Buy America provision in 1998.⁹⁴

Today's FRA Buy America provision originated with a Senate bill introduced in January 2007 called the Passenger Rail Investment and Improvement Act (PRIIA).⁹⁵ The Senate version of PRIIA would have established an FRA grant program to support intercity passenger rail service capital projects for state and regional transportation agencies.⁹⁶ The Senate version of PRIIA included a proposed FRA Buy America provision, with language very similar to the BAA and the existing Amtrak Buy America provision, which would apply to the proposed FRA intercity passenger rail grant program.⁹⁷ Like the BAA and the Amtrak Buy America provision, the Senate's proposed FRA Buy America provision nominally would have applied to *all products* (both "manufactured articles, materials, and supplies" and "unmanufactured articles, materials, and supplies") purchased by FRA grant recipients.⁹⁸ However, there were broad exceptions. Like the Amtrak Buy America provision, the Senate's proposed FRA Buy America provision would only apply to purchases greater than \$1 million. Also, like the BAA, it would require manufactured products to be manufactured only "substantially" from domestic components, and there would be an exception for "unreasonable" costs, but those terms were not defined or quantified in the Senate's proposed FRA Buy America provision.⁹⁹ There was very little recorded debate regarding the Senate's provision. The bill passed the Senate on October 30, 2007.¹⁰⁰

⁹⁴ Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 7203(a)(2) (1998). Despite the formal repeal of the RRIF Buy America provision, FRA announced in 2010 that its policy is to continue to impose domestic preference requirements, which are almost identical to the FRA Buy America provision, on RRIF funds. Notice Regarding Consideration and Processing of Applications for Financial Assistance Under the Railroad Rehabilitation and Improvement Financing (RRIF) Program, 75 Fed. Reg. 60,165, 60,166 (Sep. 29, 2010).

⁹⁵ Passenger Rail Investment and Improvement Act of 2007, S. 294, 110th Cong. (2007).

⁹⁶ *Id.* § 301(a).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ 153 CONG. REC. S13,551-64 (Oct. 30, 2007).

The House version of PRIIA was introduced by Representative James Oberstar on May 8, 2008.¹⁰¹ The House version of PRIIA would have established two FRA grant programs: one to support intercity passenger rail service capital projects for state and regional transportation agencies¹⁰² and one for high-speed rail corridor capital projects for state and regional transportation agencies.¹⁰³ Both of the proposed FRA grant programs in the House version of PRIIA would have been subject to the language of the Senate's proposed FRA Buy America provision, which (like the BAA) did not define or quantify what it meant to be manufactured "substantially" from domestic goods or what might constitute "unreasonable" cost of domestic goods.¹⁰⁴ In the House version of PRIIA (like the Senate version), the FRA Buy America provision would only have applied to purchases of \$1 million or more.¹⁰⁵ There was little recorded debate in the House regarding the proposed provision that passed the House on June 11, 2008.¹⁰⁶

Although both the House and Senate had passed the proposed FRA Buy America provision with language very similar to the BAA and Amtrak Buy America provision, neither the House bill nor the Senate bill ultimately became law, as the House and Senate failed to resolve other differences between their two bills.¹⁰⁷ With negotiations stalled on resolving differences in PRIIA, attention turned to another bill known as the

¹⁰¹ Passenger Rail Investment and Improvement Act of 2008, H.R. 6003, 110th Cong. (2008).

¹⁰² *Id.* § 301.

¹⁰³ *Id.* § 504.

¹⁰⁴ *Id.* §§ 301(a), 504(a).

¹⁰⁵ *Id.* Conversely, the House version of PRIIA also would have imposed new Buy America requirements on Amtrak for purchases as low as \$100,000. *Id.* § 221.

¹⁰⁶ 153 CONG. REC. H5,264 (June 11, 2008). On July 22, 2008, the House also took up the Senate version of PRIIA, voting to amend it by replacing it with the House version. 153 CONG. REC. H6,756-73 (July 22, 2008).

¹⁰⁷ At that time, the greatest point of contention between the House and the Senate with respect to PRIIA was not related to the FRA Buy America provisions, but rather the House's insistence that Buy America requirements should be imposed on Amtrak purchases as low as \$100,000. *See, e.g.*, 153 CONG. REC. H6,788-93 (July 22, 2008) (statement of Rep. Oberstar) (instructing the House conferees to insist on a \$100,000 "small purchase" threshold for Buy America requirements on Amtrak when resolving PRIIA differences in conference with the Senate).

Railroad Safety Improvement Act,¹⁰⁸ which had passed the House in October 2007 with no FRA Buy America provisions whatsoever. The Senate passed an amended version of the Railroad Safety Improvement Act on August 1, 2008,¹⁰⁹ and notified the House of the need to resolve differences between the two bills. The House responded on September 24, 2008, by passing a resolution (offered by Rep. Oberstar) to amend the Senate version by incorporating the entire text of the House version of PRIIA directly into the Railroad Safety Improvement Act.¹¹⁰ Like the version of PRIIA that had passed the House in June 2008, the amended Railroad Safety Improvement Act passed by the House in September 2008 would establish two FRA grant programs—intercity passenger rail and high-speed rail—subject to an FRA Buy America provision.¹¹¹

However, the FRA Buy America provision included in the House amendment was significantly different than the proposed FRA Buy America provision that had previously passed both the House and Senate. This new FRA Buy America provision required FRA grant recipients to purchase only domestic steel, iron, and manufactured products—other foreign goods were excluded from coverage.¹¹² There was no longer any allowance for manufactured products to be manufactured only “substantially” from domestic components—implying that 100 percent domestic content was required. Perhaps most significantly, the new FRA Buy America provision was not limited to purchases of at least \$1 million—the cost threshold was revised downward to \$100,000.¹¹³ Finally, the allowance for a waiver for “unreasonable” cost of domestic goods was replaced with a fixed 25 percent price differential that must be satisfied before cheaper foreign goods can be purchased in lieu of comparable domestic goods.¹¹⁴ There was no recorded debate in the House explaining why the FRA Buy America provision had changed so dramatically from the version that had already

passed both the House and Senate.¹¹⁵ The Senate adopted the House amendment on October 1, 2008, with no recorded debate on the changes that had been made to the FRA Buy America provision.¹¹⁶ The bill was signed into law on October 16, 2008,¹¹⁷ just 4 months before FRA grant funding would be made available via the ARRA stimulus bill.

3. Administrative History

There is no doubt that FRA has actively required its grant recipients to comply with the FRA Buy America provision ever since its enactment. However, as noted above, FRA has yet to issue regulations for administering the FRA Buy America provision. This is somewhat problematic from a legal perspective, in part because waivers of the FRA Buy America provision are discretionary. In 1980, less than 2 years after Congress first imposed a similar Buy America provision on FHWA grant funds, the U.S. District Court for the District of Columbia ruled that “there can be no doubt that regulations must be promulgated to implement the statutory mandate,” where Buy America waivers involve the exercise of agency discretion.¹¹⁸ The court in that 1980 case ordered FHWA “to issue valid regulations” within 30 days.¹¹⁹ FRA, on the other hand, has not issued regulations in the more than 5 years since the enactment of the FRA Buy America provision. However, as discussed herein, FRA has solicited public comments on application of the FRA Buy America provision and has made preliminary guidance publicly available.

a. Prerulemaking and Public Comments.—In December 2008, shortly after the enactment of PRIIA (including the FRA Buy America provision) in the *Federal Register*, FRA solicited public comments on its newly authorized HSIPR program, including whether there were additional legislative actions needed to facilitate the program and whether there were other considerations that might dissuade private sector involvement in the program.¹²⁰ In April 2010, FRA again solicited

¹⁰⁸ H.R. 2095, 110th Cong. (2007).

¹⁰⁹ 153 CONG. REC. S8,003 (Aug. 1, 2008).

¹¹⁰ H.R. Res. 1492, 110th Cong. (2008). Notably, this House amendment did not include any provision to strengthen Buy America requirements on Amtrak, which had become a point of contention between the House and the Senate.

¹¹¹ *Id.* Div. B, §§ 301(a), 501(a).

¹¹² *Id.* Div. B, § 301(a) (2008).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See 153 CONG. REC. H9,325–64 (Sep. 24, 2008).

¹¹⁶ See 153 CONG. REC. S10,283–90 (Oct. 1, 2008).

¹¹⁷ Rail Safety Improvement Act of 2008, Pub. L. No. 100-432, Div. B, § 301(a) (2008).

¹¹⁸ *Valiant Steel and Equipment, Inc. v. Goldschmidt*, 499 F. Supp. 410, 412 (D.D.C. 1980).

¹¹⁹ *Id.* at 414–15.

¹²⁰ Notice Requesting Expressions of Interest in Implementing a High-Speed Intercity Passenger Rail Corridor, 73 Fed. Reg. 76,443, 76,446 (Dec. 16, 2008).

public comment in the *Federal Register* on the national rail plan authorized by PRIIA.¹²¹ A number of the comments received in response to these solicitations, as well as comments received in response to various notices of available funding for these programs, have related to the FRA Buy America provision.

Potential FRA grant recipients and their potential suppliers expressed concerns about the FRA Buy America provision. In July 2009, the Nevada Central Railroad stated that FRA had no administrative procedures to register domestic manufacturers and publish a list of compliant manufacturers for FRA grant recipients.¹²² In September 2009, the California High-Speed Rail Authority stated that its foreign suppliers had expressed concerns related to the FRA Buy America provision.¹²³ In April 2010, the Oklahoma Passenger Rail Association proposed that the FRA Buy America provision “should be reasonably implemented, possibly utilizing a phased-approach. A product assembled and made up of 100% domestic components is laudable, but not practical at this time.”¹²⁴

On the other side of the spectrum, labor organizations and domestic manufacturing trade associations provided comments in favor of strict enforcement of the FRA Buy America provision. In July 2009, a joint response by numerous rail labor organizations expressed the opinion that no waivers of the FRA Buy America provision should be granted.¹²⁵ In May 2010, a number of labor organizations, including the Transportation Trades Division of the American Federation of Labor–Congress of Industrial Organizations (AFL-CIO) encouraged strict enforcement of the FRA Buy

America provision.¹²⁶ At that time, organizations such as the OneRail Coalition¹²⁷ and Apollo Alliance¹²⁸ cited AFL-CIO testimony to Congress in encouraging FRA to strictly enforce the FRA Buy America provision.

The differences of opinion between FRA grant recipients on the one hand and labor organizations and manufacturing trade associations on the other hand illustrate the difficulty FRA would face with any formal rulemaking to enact regulations. In September 2010, after receiving numerous comments and questions related to the FRA Buy America provision, FRA published a notice in the *Federal Register* indicating that it was making available on its Web site as interim guidance a list of answers to frequently asked questions concerning the FRA Buy America provision.¹²⁹ At that time, FRA stated that it was “beginning the process of implementing regulations to govern the application of the Buy America statute to all PRIIA-authorized spending as part of the HSIPR program.”¹³⁰ In December 2011, FRA announced that its Notice of Proposed Rulemaking (NPRM) for the FRA Buy America provision was on schedule to be published in early 2012.¹³¹ In April 2012, FRA announced that the NPRM had been upgraded from “insignificant” to “significant,” and that it was on schedule to be published in July 2012.¹³² However, in September 2012, FRA announced that the NPRM’s publication had been

¹²¹ National Rail Plan, 75 Fed. Reg. 17,203 (Apr. 5, 2010).

¹²² Comments, Nevada Central Railroad, Docket No. FRA-2009-0045 (July 20, 2009), *available at* <http://www.regulations.gov/#!documentDetail;D=FRA-2009-0045-0109>.

¹²³ Comments, California High Speed Rail Authority, Docket No. FRA-2009-0045 (Sep. 14, 2009), *available at* <http://www.regulations.gov/#!documentDetail;D=FRA-2009-0045-0111>.

¹²⁴ Comments, Oklahoma Passenger Rail Association, Docket No. FRA-2010-0020 (June 7, 2010), *available at* <http://www.regulations.gov/#!documentDetail;D=FRA-2010-0020-0060>.

¹²⁵ Comments, Rail Labor Organization, Docket No. FRA-2009-0045 (July 10, 2009), *available at* <http://www.regulations.gov/#!documentDetail;D=FRA-2009-0045-0089>.

¹²⁶ Comments, Transportation Trades Department, AFL-CIO, Docket No. FRA-2010-0020 (May 6, 2010), *available at* <http://www.regulations.gov/#!documentDetail;D=FRA-2010-0020-0020>.

¹²⁷ Comments, OneRail Coalition, Docket No. FRA-2010-0020 (May 6, 2010), *available at* <http://www.regulations.gov/#!documentDetail;D=FRA-2010-0020-0029>.

¹²⁸ Comments, Appollo Alliance, Docket No. FRA-2010-0020 (May 3, 2010), *available at* <http://www.regulations.gov/#!documentDetail;D=FRA-2010-0020-0005>.

¹²⁹ Notice of Availability of Answers to Frequently Asked Questions Regarding Buy America and FRA’s High-Speed Intercity Passenger Rail Program, 75 Fed. Reg. 59,322 (Sep. 27, 2010).

¹³⁰ *Id.* at 59,323.

¹³¹ FRA, Regulatory Activity Update to the 45th Railroad Safety Advisory Committee Meeting (Dec. 8, 2011).

¹³² FRA, Regulatory Activity Update to the 46th Railroad Safety Advisory Committee Meeting (Apr. 26, 2012).

delayed until February 2013.¹³³ Finally, in June 2013, FRA announced that the NPRM for the FRA Buy America provision was “on hold” pending discussions between FRA and the Office of Management and Budget.¹³⁴

b. Interim Guidance and Manufactured Products.—Shortly after putting its formal rulemaking for the FRA Buy America provision on hold, FRA made available on its Buy America Web site in August 2013 an updated list of its answers to frequently asked questions concerning the FRA Buy America provision.¹³⁵ At that time, FRA also made available a Webinar presentation explaining the FRA Buy America provision.¹³⁶ This interim guidance primarily impacts the way that manufactured products (including rolling stock) are evaluated under the FRA Buy America provision. These documents indicate that FRA has adopted certain FTA regulations as an “interim” measure.¹³⁷ Importantly, however, FRA has not adopted the FTA regulations regarding FTA’s Domestic Content waiver for rolling stock because Congress included that waiver in the FTA Buy America provision but did not include it in the FRA Buy America provision.¹³⁸

Under this interim guidance, FRA subjects all manufactured products (including rolling stock) to the two-part test used by FTA for manufactured products (excluding rolling stock): All components of the end product must be domestic, and all “manufacturing processes” of the end product must take place in the United States.¹³⁹ Where the components themselves are manufactured products, the components are considered domestic as long as the manufacturing process to produce the component takes place in the United States—the origin of its subcomponents is not considered.¹⁴⁰

For all manufactured products except rolling stock, FRA has adopted the FTA definition of “manufacturing processes” to be “substantial transformation”—the “form or function” of the components must have been altered via processes that transform the components and add value, so that the manufactured product is “functionally different from that which would result from mere assembly of the” components.¹⁴¹ Likewise, a component of a manufactured product is itself considered a domestic manufactured product as long as its “subcomponents have been substantially transformed or merged into a new and functionally different article” in the United States, regardless of the origin of its subcomponents.¹⁴² Therefore, a manufactured product (including rolling stock) could comply with the FRA Buy America provision even if its subcomponents are entirely of foreign origin, as long as there are sufficient manufacturing processes at both the component and end product levels.

On the other hand, if the FRA grant recipient is procuring a *system* that is the result of “mere assembly” of other manufactured goods (as opposed to “substantial transformation”), then FRA does not consider the assembled system to be a manufactured product for purposes of the FRA Buy America provision.¹⁴³ Instead, the FRA Buy America provision is evaluated at the next level down—each manufactured product that has been assembled into the system must comply with the FRA Buy America provision (i.e., manufactured in the United States from domestic components).¹⁴⁴ This is important because evaluation of domestic content is “cut off” at the component level—the origin of subcomponents is not considered under the FRA Buy America provision. A grant recipient might attempt to take advantage of this fact by “bundling” multiple manufactured products into a

¹³³ FRA, Regulatory Activity Update to the 47th Railroad Safety Advisory Committee Meeting (Sep. 27, 2012).

¹³⁴ FRA, Regulatory Activity Update to the 48th Railroad Safety Advisory Committee Meeting (June 14, 2013).

¹³⁵ *FRA Buy America FAQ*, *supra* note 52.

¹³⁶ *FRA Buy America Webinar*, *supra* note 60.

¹³⁷ *FRA Buy America FAQ*, *supra* note 52, at 3.

¹³⁸ *Id.* at 2; *FRA Buy America Webinar*, *supra* note 60, at 24.

¹³⁹ *FRA Buy America FAQ*, *supra* note 52, at 4; *see also* 49 C.F.R. § 661.5(d) (2013).

¹⁴⁰ *Id.* Note that this represents a departure from FRA’s testimony to Congress shortly after the passage of the FRA Buy America provision, in which FRA testi-

fied that it planned to require all subcomponents to be domestic. *High-Speed Rail in the United States: Opportunities and Challenges: Hearing Before the Subcomm. on Railroads, Pipelines, and Hazardous Materials of the H. Comm. on Transportation and Infrastructure*, 111th Cong. 36 (2009) (statement of Mark Yachmetz, FRA Associate Administrator for Railroad Policy and Development).

¹⁴¹ *FRA Buy America FAQ*, *supra* note 52, at 4; *see also* 49 C.F.R. § 661.3 (2013).

¹⁴² *FRA Buy America FAQ*, *supra* note 52, at 4; *see also* 49 C.F.R. § 661.11(e) (2013).

¹⁴³ *FRA Buy America FAQ*, *supra* note 52, at 4; *see also* 49 C.F.R. § 661.3 (2013).

¹⁴⁴ *See FRA Buy America Webinar*, *supra* note 60, at 13.

single procurement, with the products assembled together into a larger system (in an attempt to have the foreign components of the individual manufactured products treated as subcomponents of the delivered system). However, because FRA defines “manufacturing processes” to be more than “mere assembly,” a grant recipient or supplier of manufactured products containing foreign components can not circumvent the FRA Buy America provision in that manner. Under FRA’s interpretation, this “bundling” practice is ineffective because the FRA Buy America provision is evaluated at the manufactured product level, not at the level of a system resulting from “mere assembly” of other manufactured products.¹⁴⁵

However, there is a relaxed standard for procurement of rolling stock (as opposed to other manufactured products) under the FRA Buy America provision. Like FTA, FRA considers the applicable manufacturing process for rolling stock to be “final assembly” of the rolling stock components¹⁴⁶ (as opposed to “substantial transformation” of the components into an end product). Unlike FTA, however, FRA considers rolling stock to be domestic as long as it is manufactured (i.e., assembled) in the United States from domestic *components*. If the rolling stock component is a manufactured product, then it is considered domestic as long as it is manufactured in the United States, regardless of the origin of its subcomponents.¹⁴⁷ This is a key distinction from the FTA Buy America provision, which requires grant recipients to account for the origin of rolling stock subcomponents.¹⁴⁸ FRA has adopted the FTA definition of “component,” which is “any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location.”¹⁴⁹ Using this definition of “component” may make it easier to evaluate rolling stock under the FRA

Buy America provision, rather than under the FTA Buy America provision, and to achieve 100 percent domestic content.

However, unlike FTA, FRA considers rolling stock to consist of both components and “systems.”¹⁵⁰ FRA has provided examples of what it considers to be “systems” of rail cars: these include “trucks, car shells, main transformers, interior linings, HVAC.”¹⁵¹ FRA requires all components of rolling stock, as well as all components of its *systems*, to be domestic. FRA has provided a few examples of what it considers to be components of systems: e.g., wheels, axles, axle drivers, and shock absorbers are all considered components of truck systems.¹⁵² Under the FRA interim guidance, both the components of the rolling stock and the components of its systems must be domestic for the rolling stock end product to comply with the FRA Buy America provision.¹⁵³ FRA states that it “has developed various lists of items FRA considers to be components of rolling stock. ...Grantees should consult with FRA before issuing procurement notices for rolling stock.”¹⁵⁴ In part this is to obtain clarification on which items FRA will consider to be components (which must be domestic), subcomponents (which need not be domestic), or components of systems (which must be domestic).

Likewise, with manufactured products other than rolling stock, identifying the components of the manufactured product can be less than straightforward, owing in part to the subjective nature of the distinction between “substantial transformation” and “assembly.” FRA’s interim guidance provides one example where the manufactured product is a railroad turnout.¹⁵⁵ To comply with the FRA Buy America provision, the turnout must be manufactured in the United States from domestic components. FRA lists the

¹⁴⁵ Contrast this with FTA’s treatment of system procurements, where the FTA Buy America provision is evaluated at the system level, but FTA regulations define systems to be collections of *related* products, “which are intended to contribute together to a clearly defined function.” 49 C.F.R. § 661.3 (2013).

¹⁴⁶ *FRA Buy America FAQ*, *supra* note 52, at 4; *FRA Buy America Webinar*, *supra* note 60, at 11; *see also* 49 C.F.R. § 661.11 (2013).

¹⁴⁷ *FRA Buy America FAQ*, *supra* note 52, at 4; *FRA Buy America Webinar*, *supra* note 60, at 11.

¹⁴⁸ 49 U.S.C. § 5323(j)(2)(C) (2013); 49 C.F.R. § 661.11 (2013).

¹⁴⁹ *FRA Buy America FAQ*, *supra* note 52, at 5; *see also* 49 C.F.R. § 661.3 (2013).

¹⁵⁰ *FRA Buy America Webinar*, *supra* note 60, at 11, 16, 18.

¹⁵¹ *Id.* at 16. In the FTA Buy America provision, these same items are considered rolling stock components. 49 C.F.R. § 661.11, App. C (2013).

¹⁵² *FRA Buy America Webinar*, *supra* note 60, at 17. In the FTA Buy America provision, most of these same items would probably be considered *subcomponents* of the rolling stock, since FTA considers trucks to be *components* of rolling stock rather than systems. 49 C.F.R. § 661.11, App. C (2013).

¹⁵³ *FRA Buy America Webinar*, *supra* note 60, at 17–18.

¹⁵⁴ *FRA Buy America FAQ*, *supra* note 52, at 4.

¹⁵⁵ *FRA Buy America Webinar*, *supra* note 60, at 14.

components of the turnout, which include ties, switch rails, plates, clips, “frogs” (often manganese castings), and switches.¹⁵⁶ Therefore, FRA has determined that the process by which these components are combined to produce a turnout is “substantial transformation,” not “mere assembly.” Although “mere assembly” is insufficient to create a manufactured product for purposes of the FRA Buy America provision, assembly may account for most of the manufacturing process. “Substantial transformation” can be achieved by as little as “welding, soldering,” or “permanent adhesive joining” of components, or (in the case of electrical and mechanical equipment) the mere “collection, interconnection, and testing” of components.¹⁵⁷

Likewise, FRA says that the turnout *subcomponents* (e.g., the “vee point” subcomponent of the frog) “[n]eed not be of U.S. steel.”¹⁵⁸ This definition may diverge from the treatment of turnout components by FTA and FHWA, as shown by case studies herein.¹⁵⁹ In particular, the “frog” or manganese casting would typically be considered a “predominantly steel” product under the FHWA Buy America provision, which must be manufactured entirely from domestic steel.¹⁶⁰ The “vee point” might not qualify as a “miscellaneous steel” subcomponent (like washers or screws), which could be disregarded under the FHWA Buy America provision. Likewise, FTA has stated that its “requirements are clear: ‘all steel and iron manufacturing processes must take place in the United States,’ whether the item is an end product, a component, or a subcomponent.”¹⁶¹

In short, there are subtle but potentially critical distinctions between the FRA Buy America provision and other transportation grant Buy America provisions when it comes to railroad development projects and rolling stock procurements. In the absence of formal regulations or guidance covering a specific situation, FRA grant recipients should consult with FRA prior to issuing a solicitation, to confirm what is required to comply with the FRA Buy America provision. Some FRA waiver decisions are available on the agency’s Buy America Web site and may provide

illustrative guidance for a given situation. Some of the key FRA waiver decisions are discussed in the following section.

4. Waiver Case Studies

a. Steel Roof Tiles.—The first known request for a waiver from the FRA Buy America provision was made by the Oregon Department of Transportation (ODOT) to purchase foreign steel roof tiles. ODOT wanted to use a portion of the grant funds it received from FRA under the ARRA stimulus bill “to complete the rehabilitation of the historic Union Station roof in Portland, Oregon.”¹⁶² ODOT also obtained grant funds from FHWA under ARRA for the Union Station rehabilitation project.¹⁶³

ODOT reported a price of approximately \$1 million to purchase the tiles from a foreign manufacturer.¹⁶⁴ ODOT reported that it identified one domestic firm capable of manufacturing the tiles, but that firm had declined to bid on the work.¹⁶⁵ Further, ODOT estimated that it could have the tiles custom manufactured in the United States for \$1.5 million.¹⁶⁶ Although this was 50 percent greater than the cost of foreign tiles, it did not trigger the Price Differential waiver under either the FRA or FHWA Buy America provisions because it would not increase the cost of the total rehabilitation *project* by 25 percent to custom manufacture the tiles in the United States. Therefore, ODOT sought a Nonavailability waiver from both the FRA and FHWA Buy America provisions.¹⁶⁷

Pursuant to the FHWA Buy America provision, FHWA conducted its own investigation to search for domestic sources of the steel roof tiles and

¹⁵⁶ *Id.*

¹⁵⁷ *FRA Buy America FAQ*, *supra* note 52, at 4.

¹⁵⁸ *FRA Buy America Webinar*, *supra* note 60, at 15.

¹⁵⁹ *See infra* § III.B.4.a.

¹⁶⁰ 23 C.F.R. § 635.410(b)(1) (2013).

¹⁶¹ Buy America Requirements—End Product Analysis and Waiver Procedures, 71 Fed. Reg. 69,412, 69,419 (Nov. 30, 2006) (quoting 49 C.F.R. § 661.5(b)).

¹⁶² Notice of Buy America Waiver Request by Oregon Department of Transportation for Steel Roof Tiles To Be Used in Union Station Roof Rehabilitation, 75 Fed. Reg. 28,316 (May 20, 2010).

¹⁶³ Buy America Waiver Notification, 74 Fed. Reg. 63,816 (Dec. 4, 2009).

¹⁶⁴ Notice of Buy America Waiver Request by Oregon Department of Transportation for Steel Roof Tiles To Be Used in Union Station Roof Rehabilitation, 75 Fed. Reg. 28,316, 28,317 (May 20, 2010).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Because the tiles would be installed at the project site, for purposes of both Buy America provisions the individual tiles were evaluated as the end product, rather than as a component of a manufactured roof system.

found none.¹⁶⁸ Then, pursuant to the informal notice-and-comment requirements of the FHWA Buy America provision, on October 22, 2009, FHWA posted on its Web site a notice of intent to grant a waiver for the foreign steel roof tiles and provided 15 days for public comment.¹⁶⁹ FHWA stated that it “did not receive any substantive comments” indicating that the tiles were available domestically.¹⁷⁰ On December 4, 2009, FHWA published a notice in the *Federal Register* that it intended to grant ODOT’s Nonavailability waiver and invited public comment for 15 additional days.¹⁷¹

Five months after FHWA granted its waiver, on May 20, 2010, FRA published a notice in the *Federal Register* that ODOT had also requested a Nonavailability waiver from the FRA Buy America provision.¹⁷² FRA is not obligated under the Buy America provision to publish waiver requests in the *Federal Register* for public comment, but did so in this case “in order to completely understand the facts surrounding ODOT’s request.”¹⁷³ FRA received one comment in response to the notice, a joint response from railroad labor unions formally opposing the waiver request.¹⁷⁴ While the unions did not dispute that the particular steel roofing tiles were not available domestically, they argued that ODOT should not be allowed to circumvent the FRA Buy America provision based on an architectural design decision to specify roofing tiles that are available only from foreign manufacturers. Instead, the unions argued that ODOT

should be required to redesign the roof “to utilize the large variety of roofing materials that do comply with the funding restrictions.”¹⁷⁵

To date, FRA has not published a final determination on this waiver request. Under the FRA Buy America provision, in order to grant the waiver, FRA was required to publish such finding in the *Federal Register*, along with a “detailed written justification” for granting the waiver.¹⁷⁶ The failure to make such a determination was effectively a denial of ODOT’s waiver request, despite the fact that FHWA had already granted a waiver of the nearly identical FHWA Buy America requirement for the same steel roofing tiles. This means that for the project to comply with the FRA Buy America provision, ODOT would either have to change its design to use domestic roofing materials or elect not to use FRA grant funds in the project.

This illustrates that when a project is funded by multiple sources, each with its own Buy America provision, the grant recipient must take steps to comply with all applicable Buy America provisions, including obtaining waivers from multiple federal grant agencies if necessary. Even where the statutory waiver requirements appear similar (or identical), agencies differ in their procedures and standards, so a waiver from one agency is no guarantee that another agency will grant a waiver. FRA waivers are rare.

b. Steel Nuts.—In July 2010, FRA received a request from the Northern New England Passenger Rail Authority (NNEPRA) to waive the FRA Buy America provision to allow NNEPRA to purchase 3,340 square steel nuts with a nominal diameter of 1 1/8 in.¹⁷⁷ The nuts were to be used in combination with compatible track bolts and washers in a construction project to extend an Amtrak rail line to add service between Portland, Maine, and Brunswick, Maine.¹⁷⁸ The project received \$35 million in grant funds from FRA through ARRA, making the FRA Buy America provision applicable.

The nuts could be obtained from a foreign source at \$0.75 apiece.¹⁷⁹ The nuts were to be used

¹⁶⁸ Notice of Buy America Waiver Request by Oregon Department of Transportation for Steel Roof Tiles To Be Used in Union Station Roof Rehabilitation, 75 Fed. Reg. 28,316, 28,317 (May 20, 2010); Buy America Waiver Notification, 74 Fed. Reg. 63,816, 63,817 (Dec. 4, 2009).

¹⁶⁹ Buy America Waiver Notification, 74 Fed. Reg. 63,816, 63,817 (Dec. 4, 2009).

¹⁷⁰ Notice of Buy America Waiver Request by Oregon Department of Transportation for Steel Roof Tiles To Be Used in Union Station Roof Rehabilitation, 75 Fed. Reg. 28,316, 28,317 (May 20, 2010).

¹⁷¹ Buy America Waiver Notification, 74 Fed. Reg. 63,816, 63,817 (Dec. 4, 2009).

¹⁷² Notice of Buy America Waiver Request by Oregon Department of Transportation for Steel Roof Tiles To Be Used in Union Station Roof Rehabilitation, 75 Fed. Reg. 28,316, 28,317 (May 20, 2010).

¹⁷³ *Id.*

¹⁷⁴ Comments, United Transportation Union and Brotherhood of Locomotive Engineers and Trainmen, Docket No. FRA-2010-0085 (June 3, 2010), available at <http://www.regulations.gov#!documentDetail;D=FRA-2010-0085-0002>.

¹⁷⁵ *Id.*

¹⁷⁶ 49 U.S.C. § 24405(a)(4) (2013).

¹⁷⁷ Notice of Buy America Waiver Request by Northern New England Passenger Rail Authority To Purchase 3,340 AREMA Specified Carbon Steel Standard 1 1/8 Nominal Diameter Nuts, 75 Fed. Reg. 45,197 (Aug. 2, 2010).

¹⁷⁸ *Id.* at 45,198.

¹⁷⁹ *Id.*

in combination with 3,340 compatible track bolts and washers that were domestically manufactured. Furthermore, all but 80 of the 3,340 bolt-and-nut combinations were eventually to be removed and replaced with joint welds, so that the cost of foreign nuts in the final project was estimated to be only \$60.¹⁸⁰ However, under the FRA Buy America provision, there is no Small Purchase exception for a de minimis amount of foreign goods to be left in the project, so NNEPRA had to seek a waiver.¹⁸¹

Although not required by the FRA Buy America provision, FRA published the waiver request in the *Federal Register* in August 2010 to solicit public comment.¹⁸² Comments received were generally opposed to the request. A number of labor unions opposed the request on the basis that there were numerous domestic manufacturers of 1 1/8-in. diameter steel nuts compatible with the domestically manufactured track bolts.¹⁸³ One labor union suggested that the problem was with the project specifications, which required nuts that were only available from foreign suppliers but could have been written to permit domestic 1 1/8-in. diameter steel nuts.¹⁸⁴ A manufacturers trade

¹⁸⁰ *Id.*

¹⁸¹ Under the FHWA Buy America provision, for example, the nuts could have been disregarded as a “small purchase” costing less than 0.1 percent of the contract value. 23 C.F.R. § 635.410(b)(4) (2013). Alternately, under the FHWA Buy America provisions, the nuts might be considered “miscellaneous steel” products that need not be domestic. See *infra* notes 363, 447–448, and accompanying text. In this case, presumably, since the nuts were to be installed at the project site and not delivered to the site as a component or subcomponent of a manufactured product, the nuts themselves were treated as an end product that had to comply with the FRA Buy America provision.

¹⁸² Notice of Buy America Waiver Request by Northern New England Passenger Rail Authority To Purchase 3,340 AREMA Specified Carbon Steel Standard 1 1/8 Nominal Diameter Nuts, 75 Fed. Reg. 45,197 (Aug. 2, 2010).

¹⁸³ Comments, Brotherhood of Railroad Signalmen, Docket No. FRA-2010-0122 (Aug. 24, 2010), available at <http://www.regulations.gov/#!documentDetail;D=FRA-2010-0122-0004>; Comments, Brotherhood of Maintenance of Way Employees Division (BMWED) of the Teamster Rail Conference, Docket No. FRA-2010-0122 (Aug. 24, 2010), available at <http://www.regulations.gov/#!documentDetail;D=FRA-2010-0122-0003>.

¹⁸⁴ Comments, United Transportation Union and Brotherhood of Locomotive Engineers and Trainmen, Docket No. FRA-2010-0122 (Aug. 24, 2010), available at <http://www.regulations.gov/#!documentDetail;D=FRA->

association responded with a list of domestic manufacturers who could manufacture nuts satisfying the specifications.¹⁸⁵ Based on this information, FRA required NNEPRA to inquire of domestic manufacturers.¹⁸⁶ The investigation confirmed that existing nuts manufactured in the United States were incompatible with NNEPRA’s installation and maintenance equipment and thus did not satisfy the project specifications. Various domestic manufacturers indicated to NNEPRA that they could manufacture the square steel 1 1/8-in. diameter nuts satisfying the specifications. However, the estimated cost ranged from \$16,000 to \$60,000 (as opposed to the foreign bid of \$2,500), and the estimated time of delivery ranged from 10 to 18 weeks after award.¹⁸⁷ FRA determined that these domestic estimates did not indicate that the goods were available from domestic sources in sufficient quantities. FRA published a notice of intent to grant a Nonavailability waiver in November 2010¹⁸⁸ and granted the waiver in December 2010¹⁸⁹ (5 months after receiving the waiver request).

This illustrates FRA’s flexibility in granting Nonavailability waiver requests in the absence of any regulations implementing the FRA Buy America provision. First, although the lowest domestic offer for the nuts was 6.5 times the foreign bid, this purchase did not qualify for a Price Differential waiver because the purchase of domestic nuts would not increase the cost of the entire *project* by 25 percent. Under most transportation grant Buy America provisions, therefore, the higher price of domestic goods would have been irrelevant, at least for purposes of a Nonavailability waiver. However, FRA considered the increased cost as one factor that led it to conclude

2010-0122-0005 (“If the design of the track bolt requires foreign made nuts, then we suggest a design change.”).

¹⁸⁵ Comments, Alliance for American Manufacturing, Docket No. FRA-2010-0122 (Aug. 24, 2010), available at <http://www.regulations.gov/#!documentDetail;D=FRA-2010-0122-0006>.

¹⁸⁶ Notice of Intent To Grant Buy America Waiver to Northern New England Passenger Rail Authority To Purchase 3,340 AREMA Specified Carbon Steel Standard 1 1/8 Nominal Diameter Nuts, 75 Fed. Reg. 74,132, 74,133 (Nov. 30, 2010).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 74,134.

¹⁸⁹ Letter from Karen Rae, FRA Deputy Administrator, to Marina Douglass, NNEPRA, regarding Request for Waiver of Buy America Requirement (Dec. 16, 2010), available at <https://www.fra.dot.gov/eLib/Details/L04369>.

that domestic goods were not reasonably available.¹⁹⁰ Further, under the FRA Buy America provision, FRA has the statutory authority to grant a Nonavailability waiver based on unreasonable delivery time only for rolling stock, not for other manufactured products or construction materials. In this case, however, FRA considered the “unreasonable delivery time” to deliver domestic nuts as a second factor in favor of determining that domestic nuts were not reasonably available.¹⁹¹ As will be seen, FRA has continued to consider the additional cost and delivery time of domestic goods as the primary factors in favor of determining that domestic goods are not reasonably available.

c. Concrete Rail Ties.—In late 2011, the Washington State Department of Transportation (WSDOT) and Burlington Northern Santa Fe (BNSF) Railway approached FRA concerning their plan to use a concrete rail tie with foreign components in the Northwest Corridor project between Eugene, Oregon, and Vancouver, British Columbia.¹⁹² At that time, the plan was to fund the entire \$750 million project with ARRA grant funds and FRA HSIPR grant funds.¹⁹³ However, the plan to use these concrete ties originated in 2008 before any federal grant funds were available. Although the concrete ties were manufac-

tured in the United States by Vossloh, they included German-manufactured fasteners known as “tension clamps” (along with associated dowel inserts) that would hold the rail to the concrete tie. According to BNSF, the foreign components constituted only 11 percent of the cost of the Vossloh concrete tie and only 0.15 percent of the cost of the Northwest Corridor project.¹⁹⁴

In March 2012, BNSF submitted a formal request for a Nonavailability waiver from the FRA Buy America provision to allow the purchase of Vossloh concrete ties by state DOTs on a number of rail development projects that would improve property owned by BNSF, including WSDOT’s Northwest Corridor project.¹⁹⁵ BNSF said that there were no domestic manufacturers of the Vossloh ties’ foreign components, and that alternative concrete ties from other domestic manufacturers were incompatible with BNSF’s existing installation and maintenance equipment. In April 2012, FRA published notice of the waiver request in the *Federal Register* for public comment.¹⁹⁶ No comments were received. In June 2012, FRA granted the Nonavailability waiver, finding that comparable domestic products were “not produced in a sufficient and reasonably available amount.”¹⁹⁷ However, the waiver was not preconditional, applying only to the four state DOT rail improvement projects named in BNSF’s request.¹⁹⁸ It was “conditioned on BNSF’s good faith efforts” to work with FRA, Vossloh, and NIST-MEP “to explore the feasibility” of manufacturing the foreign components in the United States.¹⁹⁹ Future waiver requests for the products would not be granted without such a showing. Shortly thereafter, Vossloh signaled that it was “presently taking steps to meet all the Buy Amer-

¹⁹⁰ Notice of Intent To Grant Buy America Waiver to Northern New England Passenger Rail Authority To Purchase 3,340 AREMA Specified Carbon Steel Standard 1 1/8 Nominal Diameter Nuts, 75 Fed. Reg. 74,132, 74,133–34 (Nov. 30, 2010) (“NNEPRA concluded that...a cost of approximately \$14,000 more than the lowest foreign bidder...did not mean that domestic track nuts are ‘reasonably available’ and the waiver should still be granted.”).

¹⁹¹ *Id.* at 74,134 (“FRA agrees with NNEPRA in that custom made fabricated track nuts that cannot be delivered for 10–16 weeks are not ‘reasonably available’”).

¹⁹² Letter from Joseph C. Szabo, FRA Administrator, to David Smelzer, Washington State Department of Transportation (WSDOT), regarding Buy America Waiver Request Vossloh Ties Decision (June 19, 2012), available at <https://www.fra.dot.gov/eLib/Details/L04371>.

¹⁹³ Letter from Robert J. Boileau, Burlington Northern Santa Fe (BNSF) Railway, to Joseph C. Szabo, FRA Administrator, regarding BNSF Railway Company Request for Waiver from FRA’s Buy America Requirements for Vossloh 101-LV Concrete Ties (Mar. 19, 2012), available at <http://www.regulations.gov/#!documentDetail;D=FRA-2012-0037-0001>. WSDOT would be the FRA grant recipient. BNSF was involved because it owned the infrastructure on which the Northwest Corridor improvements would be made. *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Notice of the Buy America Waiver Request for Vossloh 101–LV Concrete Ties, 77 Fed. Reg. 21,620 (Apr. 10, 2012).

¹⁹⁷ Letter from Joseph C. Szabo, FRA Administrator, to David Smelzer, WSDOT, regarding Buy America Waiver Request Vossloh Ties Decision (June 19, 2012), available at <https://www.fra.dot.gov/eLib/Details/L04371>; see also Notice of Decision to Grant Buy America Waiver to Washington Department of Transportation to Purchase Vossloh 101–LV Concrete Rail Ties, 77 Fed. Reg. 38,388, 38,390 (June 27, 2012).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

ica requirements” and that it was getting “closer to meeting the Buy America requirements.”²⁰⁰

FRA’s processing of the Vossloh concrete tie waiver (roughly 2 months from formal waiver request to final decision) took less processing time than the NNEPRA request 2 years earlier. However, in testimony before the House Committee on Transportation and Infrastructure in December 2012, a WSDOT official said that “we have had some challenges in trying to get waivers for as much as 5 months on a clip for a rail tie that probably shouldn’t have taken that long.”²⁰¹ Further, “FRA’s inconsistent guidance on the approval process almost delayed construction for a year as we nearly missed the construction season window for BNSF to schedule the track laying equipment.”²⁰² In addition to the lack of formal published guidance from FRA, the WSDOT official said that the 100 percent domestic content criteria for manufactured products under the FRA Buy America provision and FRA’s “lack of Buy America waivers” are a hindrance to rail development.²⁰³

d. Incremental Train Control System.—In September 2012, the Illinois Department of Transportation (IDOT) requested a waiver from the FRA Buy America provision to allow IDOT to purchase an Incremental Train Control System (ITCS) for its FRA-funded project to implement high-speed rail from Chicago, Illinois, to St. Louis, Missouri.²⁰⁴ The ITCS would provide continuous automated communications between highway–rail

crossings and high-speed locomotives to activate crossings and ensure safe passage of trains. The ITCS was a *system* comprised of three “end products,” two of which contained foreign components.²⁰⁵ Under FRA’s treatment of system procurements, the FRA Buy America provision is evaluated independently for each end product in the system.²⁰⁶ One of the ITCS end products, the on-board locomotive equipment, included an Ethernet cable and antenna that were not manufactured domestically, representing about 2 percent of the cost of the on-board equipment.²⁰⁷ Another component, the “departure equipment” located at Union Station in St. Louis, which was used to upload new databases to the on-board equipment and download log files, contained a foreign-manufactured router comprising about 5 percent of the cost of the departure equipment.²⁰⁸ The equipment was already installed and undergoing testing at the time of IDOT’s waiver request.

Unlike its earlier waiver requests, FRA did not publish this request in the *Federal Register* for public notice-and-comment. Instead, in February 2013, 5 months after receiving the waiver request, FRA notified IDOT that it intended to grant the Nonavailability waiver request.²⁰⁹ As with the NNEPRA waiver request, FRA expressly considered the “costs in both time and money” as primary factors in determining that the foreign components were not “reasonably available.”²¹⁰ With respect to cost, IDOT estimated that only \$20,000 of the \$2.5 million ITCS cost was for foreign components.²¹¹ Further, the cost was negligible in comparison to the total \$1.142 billion FRA grant for the Chicago-to-St. Louis corridor improvements.²¹² The ITCS manufacturer estimated that

²⁰⁰ Jennifer Nunez, *Fascinating Fasteners for Keeping Track Tight: Small in Size, Fasteners Keep a Tight Grip on Track*, RAILWAY TRACK & STRUCTURES (July 2012), available at 2012 WLNR 16167327.

²⁰¹ *An Update on the High Speed and Intercity Passenger Rail Program: Mistakes Made and Lessons Learned: Hearing Before the H. Comm. on Transportation and Infrastructure*, 112th Cong. (2012), available at 2012 WLNR 25961956 (statement of Paula Hammond, WSDOT Secretary); see also *id.* (“[E]arlier this year we worked with BNSF to submit a Buy America waiver for two small parts used to attach rail to concrete ties at a cost of \$6 each.... Unfortunately the process to obtain the needed waiver took five months and required a justification of each individual part.”).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Letter from Joseph E. Shacter, IDOT, to Joseph C. Szabo, FRA Administrator, regarding the Illinois Department of Transportation’s Request for a Waiver from FRA’s Buy America Requirements (Sep. 26, 2012), available at <http://www.fra.dot.gov/Elib/Document/2594>.

²⁰⁵ *Id.*

²⁰⁶ See *supra* notes 143–144 and accompanying text. Contrast this with FTA’s approach, where FTA treats a train communication system as a typical rail rolling stock end product. 49 C.F.R. § 661.3, App. A(1) (2013). ITCS equipment treated as an end product by FRA might only be treated as a *component* of the ITCS system by FTA.

²⁰⁷ Letter from Joseph E. Shacter, *supra* note 204.

²⁰⁸ *Id.*

²⁰⁹ Letter from Joseph C. Szabo, FRA Administrator, to Joseph Shacter, IDOT, regarding Request for Waiver of Buy America Requirement (Feb. 12, 2013), available at <http://www.fra.dot.gov/eLib/details/L04519>.

²¹⁰ *Id.*

²¹¹ Letter from Joseph E. Shacter, *supra* note 204.

²¹² Letter from Joseph C. Szabo, *supra* note 209.

it would cost an additional \$1 million and 6 months to manufacture domestic components to replace the foreign components of the ITCS.²¹³ Although this would increase the cost of the ITCS by 40 percent, IDOT would not qualify for the 25 percent Price Differential waiver because the ITCS cost was a small part of the overall Chicago-to-St. Louis improvement *project*. Further, it is unclear whether the 6-month delay would qualify for the “unreasonable delivery time” Nonavailability waiver for rolling stock, since it is unclear whether the ITCS would qualify as rolling stock under the FRA Buy America provision.²¹⁴ Regardless, although it appeared that domestic components could have been made available, as with the NNEPRA waiver request, FRA considered the additional cost and delivery time to obtain domestic ITCS components as primary factors in determining that comparable domestic goods were not reasonably available, thus justifying granting a Nonavailability waiver.²¹⁵

As with the BNSF/WSDOT waiver for rail ties, FRA’s waiver for the ITCS was not precedential (applicable only to the Chicago-to-St. Louis project), and it was conditional. Future waivers for the ITCS would be conditioned on the manufacturer showing “significant good faith efforts to secure all domestic components for the ITCS.”²¹⁶ FRA encouraged the ITCS manufacturer to work with NIST-MEP (as Vossloh was doing with respect to the rail ties) to find ways to increase the domestic content of the ITCS.²¹⁷

In March 2013, FRA published a notice of its intent to grant the waiver request in the *Federal Register*²¹⁸ and on its Web site, soliciting public comment. Although the waiver had already been

²¹³ *Id.*

²¹⁴ FTA, on the other hand, has determined that “communication equipment” is a component of rail rolling stock for purposes of the FTA Buy America provision. 49 C.F.R. § 661.11, App. C (2013). However, the FTA Buy America provision does not include the “unreasonable delivery time” Nonavailability waiver for rolling stock.

²¹⁵ Letter from Joseph C. Szabo, *supra* note 209 (“The FRA believes that such costs in both time and money make the components not ‘reasonably available’ and, therefore, a waiver is appropriate.”).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Notice of Intent to Grant Buy America Waiver to Illinois Department of Transportation to Use Three Non-Domestic Component Parts, in the Incremental Train Control System, 78 Fed. Reg. 14,152 (Mar. 4, 2013).

granted, it could not become effective until publication in the *Federal Register*,²¹⁹ according to the statutory text of the FRA Buy America provision. This was a rare instance in which FRA did not provide any public notice-and-comment opportunity before making its waiver determination. With subsequent waiver requests, FRA has used its Web site (rather than the *Federal Register*) to provide an informal public notice-and-comment opportunity for the waiver requests, and then used the *Federal Register* only after deciding to grant the waiver request to satisfy its formal notice-and-comment requirement.

e. Amtrak Waiver Request—Turnout Component Parts.—In August 2012, FRA received a waiver request from Amtrak related to an FRA grant-funded project for Amtrak to improve the approach tracks at New York City’s Penn Station to support high-speed rail.²²⁰ Amtrak requested the waiver from the FRA Buy America provision to allow it to purchase turnouts manufactured by Nortrak in the United States that included foreign components. Specifically, Amtrak stated that the switch point rail was rolled in Austria, roller assemblies and associated plates were manufactured in Switzerland, and the vee points were forged and machined in Germany.²²¹ In September 2012, FRA published this waiver request on its Buy America Web site for a 15-day informal notice-and-comment period.

Although all the public comments appeared to oppose the waiver request, none identified sources of comparable domestic components.²²² FRA asked NIST-MEP to try to identify domestic sources. NIST-MEP identified domestic manufacturers of items similar to the Nortrak switch point rail, roller assemblies, and plates, but those domestic sources were not presently manufacturing items that matched Amtrak’s design specifications for the project.²²³ Although it appears the domestic

²¹⁹ 49 U.S.C. § 24405(a)(4) (2013).

²²⁰ Letter from Jeff Martin, Amtrak Chief Logistics Officer, to Joseph C. Szabo, FRA Administrator, regarding the National Railroad Passenger Corporation (“Amtrak”) Request for a Waiver from the FRA’s Buy America Requirements to Purchase Nortrak Turnouts (Aug. 8, 2012).

²²¹ *Id.*

²²² Letter from Joseph C. Szabo, FRA Administrator, to Jeff Martin, Amtrak Chief Logistics Officer, regarding Request for Waiver of Buy America Requirement (Apr. 23, 2013), available at <http://www.fra.dot.gov/eLib/details/L04520>.

²²³ *Id.*

sources could manufacture the products, it would be more expensive than purchasing the components from the foreign manufacturers and probably more time-consuming. For example, one potential domestic source said that it would take 6 months to 1 year to manufacture the switch point rail.²²⁴

In April 2013, more than 8 months after Amtrak's waiver request, FRA published in the *Federal Register* notice of its intent to grant Nonavailability waivers for the switch point rails, roller assemblies, and plates.²²⁵ (FRA noted that it considers the vee point to be a *subcomponent* of the frog, which is a component of the turnout, and that FRA does not require a waiver for subcomponents such as the vee point, as long as the frog itself is manufactured in the United States.²²⁶) FRA granted the Nonavailability waiver for the switch point rails, roller assemblies, and plates because, although domestic manufacturers might be able to provide them, "it would happen too late to meet the tight project deadline."²²⁷

This waiver case study illustrates a number of points. First, FRA's notice-and-comment waiver process has evolved to mirror the process used by FHWA, where waiver requests are published for informal notice-and-comment on the agency Web site rather than the *Federal Register*; then only the decision to grant a waiver is published in the *Federal Register* for an additional notice-and-comment period.²²⁸ Second, although Amtrak is subject to its own Buy America provision, it must comply with the FRA Buy America provision when it is working on an FRA grant-funded project.

Most importantly, FRA's Nonavailability waiver for Nortrak turnouts (like its similar Nonavailability waivers for the ITCS, Vossloh concrete ties, and NNEPRA steel nuts) illustrates the unique nature of the waiver. FRA considers the higher cost of domestic goods to be a primary factor in favor of granting a Nonavailability waiver—in most other transportation grant Buy America provisions, the cost of domestic goods is irrelevant for purposes of a Nonavailability

waiver. Also, although the FRA Buy America provision only includes the "unreasonable delivery time" justification for granting a Nonavailability waiver for *rolling stock*, FRA considers the additional time to deliver domestic manufactured products to be a primary factor in favor of granting a Nonavailability waiver for manufactured products other than rolling stock. This is true even when the delay caused by domestic manufacturing is on the same order of magnitude, or even shorter than, the time it takes FRA to make a decision on the waiver request. By allowing relatively moderate increases in price and delivery time for domestic goods to weigh strongly in favor of finding Nonavailability, FRA has adopted a Nonavailability standard different from other transportation grant programs (which often require a showing that the products are actually not available domestically).

On the other hand, these case studies demonstrate that FRA does not grant Nonavailability waiver requests lightly, regularly engaging NIST-MEP to seek out domestic sources. Furthermore, after spending several months determining that a Nonavailability waiver is warranted for a specific product, FRA does not make that waiver effective for future purchases of the same product. FRA's Nonavailability waivers are typically conditioned on efforts by the manufacturer to increase the domestic content of its product (such efforts to include working directly with NIST-MEP) in order for future waiver requests to be considered. This is a unique practice by FRA that is not typical of the other transportation grant agencies, which are addressed in Section III.

B. Amtrak Buy America Provision

1. Statutory Language—49 U.S.C. § 24305(f)

a. Coverage and Applicability.—Since 1978, Amtrak has been subject to a statutory domestic preference (the "Amtrak Buy America provision"),²²⁹ which applies to Amtrak's direct purchases using its federal funds. Under the Amtrak Buy America provision, Amtrak is allowed to purchase only:

²²⁴ Notice of Intent to Grant Buy America Waiver to Amtrak to Use Three Non-Domestic Component Parts in No. 32.75 136RE Special Turnouts Manufactured in the U.S. by voestalpine Nortrak, Inc., 78 Fed. Reg. 23,631, 23,633 (Apr. 19, 2013).

²²⁵ *Id.*

²²⁶ *Id.* at 23,632.

²²⁷ *Id.* at 23,633.

²²⁸ *See infra* § III.B.1.c.

²²⁹ 49 U.S.C. § 24305(f) (2013).

- Domestic *unmanufactured* or “raw” goods (those “mined or produced in the United States”),²³⁰ and
- Domestic *manufactured* goods (those “manufactured in the United States substantially from” other domestic goods).²³¹

Since Amtrak is not a federal government agency, it is not in a position to issue federal regulations governing the Amtrak Buy America provision. Amtrak shares responsibility with FRA for administering the Amtrak Buy America provision. FRA has recently explained, “Generally, Amtrak administers its own domestic buying preference program, except that interpretations of applicability are decided by FRA’s Chief Counsel and any waivers are decided by the FRA Administrator.”²³² As will be discussed further in this digest, FRA has interpreted the Amtrak Buy America provision to apply only “when Amtrak is spending funds from its own capital or operating grant”²³³—funds appropriated by Congress specifically for Amtrak. When Amtrak receives funds from other sources (e.g., where Amtrak receives HSIPR grant funds from FRA, either as the FRA grant recipient or as a contractor for the FRA grant recipient), then the Amtrak Buy America provision does not apply, but other Buy America provisions may apply.²³⁴

The Amtrak Buy America provision mirrors the language of the BAA, in that it establishes a domestic preference for *all* manufactured goods and unmanufactured goods. Therefore, it potentially has much broader coverage than the other Buy America provisions applicable to rail procurements (which are generally limited to steel, iron, and manufactured products). Under the Amtrak Buy America provision, all construction materials are potentially covered, including cement products, wood products, and even raw materials like sand and aggregate,²³⁵ not just steel.

²³⁰ 49 U.S.C. § 24305(f)(2)(A) (2013).

²³¹ 49 U.S.C. § 24305(f)(2)(B) (2013).

²³² *FRA Buy America FAQ*, *supra* note 52, at 11.

²³³ *Id.*; see also *FRA Buy America Webinar*, *supra* note 60, at 9 (stating that the Amtrak Buy America provision “[a]ppplies to Amtrak capital grants”).

²³⁴ *FRA Buy America FAQ*, *supra* note 52, at 10; see also *FRA Buy America Webinar*, *supra* note 60, at 9 (stating that the FRA Buy America provision “applies when Amtrak is operating under a PRIIA-authorized grant or performing a contract for another grantee”).

²³⁵ See 124 CONG. REC. H5,900 (June 21, 1978) (statement of Rep. Mikulski) (“It would mandate that

Likewise, the statutory exceptions to the Amtrak Buy America provision mirror those in the BAA, and are distinct from those in other transportation grant Buy America provisions (which tend to provide objective, quantitative criteria for determining whether a waiver is warranted). Therefore, even though the default coverage of the Amtrak Buy America provision is very broad, there may be more opportunities to obtain a waiver or exception from Buy America requirements in the case of direct procurements by Amtrak.

b. Exceptions and Waivers.—

• Small Purchase

The Amtrak Buy America provision applies only to Amtrak purchases costing at least \$1 million.²³⁶ Therefore, while the Amtrak Buy America provision applies to most significant construction projects or multivehicle rolling stock procurements, many large equipment procurements by Amtrak are exempt simply because the equipment costs less than \$1 million. The \$1 million threshold was established by Congress in 1978 because it was understood that Amtrak regularly purchased expensive equipment (“costing considerably more than \$100,000”) that was not manufactured domestically.²³⁷ When the procurement is less than \$1 million, the Amtrak Buy America provision does not apply, so no waiver is required. The \$1 million cost threshold in the Amtrak Buy America provision applies to the *purchase*, not necessarily the project.²³⁸ In situations where it is difficult or expensive to obtain comparable domestic goods, Amtrak might be tempted to segment a large procurement into related smaller purchases of foreign goods that are below the \$1 million threshold, in order to avoid application of the Amtrak Buy America provision. In 2012, the Senate

Amtrak must buy unmanufactured articles, such as stone, types of ore, mined or produced in the United States.”)

²³⁶ 49 U.S.C. § 24305(f)(3) (2013).

²³⁷ 124 CONG. REC. H10,131 (Sep. 19, 1978) (statement of Rep. Rooney). The version of the Amtrak Buy America provision that was originally passed by the House would have applied to any purchase of at least \$100,000. See H.R. REP. NO. 95-1182, at 5, 15, 17 (1978).

²³⁸ However, the version of the Amtrak Buy America provision that was originally passed by the Senate would have applied to any expenditure representing “any part” of a project as long as the total grant funds for the project exceeded \$1 million. See 124 CONG. REC. S7,253 (May 10, 1978).

passed a measure that would apply the Amtrak Buy America provision across multiple related contracts to prevent such segmentation.²³⁹ Although not enacted into law, Congress or FRA may nevertheless consider segmentation to violate the spirit, if not the text, of the Amtrak Buy America provision. When faced with the need to purchase foreign goods costing \$1 million or more, Amtrak may consider whether any of the other exceptions are applicable before segmenting the procurement into smaller purchases.

- Domestic Content

With respect to manufactured products, the Amtrak Buy America provision requires Amtrak to purchase only those that are “manufactured in the United States substantially from” domestic components.²⁴⁰ The statute does not define what it means to be “substantially” domestic, and there are no regulations implementing the statute. However, the statutory language closely tracks the BAA, which has been interpreted to require 50 percent domestic content (based on cost of components), plus final assembly of the end product in the United States.²⁴¹ The legislative history of the Amtrak Buy America provision indicates that Congress understood in 1978 that it was not establishing a specific numeric domestic content requirement (much less a strict 100 percent domestic content requirement) for Amtrak procurements.²⁴² Furthermore, in 1993, Congress rejected an attempt to establish an 80 percent domestic content “goal” for Amtrak, instead directing Amtrak to implement the Amtrak Buy America provision “consistent with the provisions

of the” BAA.²⁴³ FRA has confirmed that it applies the BAA test (final assembly in the United States and 50 percent domestic content, measured by cost of components) in its interpretation of what constitutes “substantially” domestic manufactured goods under the Amtrak Buy America provision.²⁴⁴ If these criteria are satisfied, then the manufactured product is considered “substantially” domestic and its purchase is not restricted by the Amtrak Buy America provision, so Amtrak is not required to obtain a waiver in that situation.²⁴⁵ Even if Amtrak determines that a waiver is not required, Amtrak may consider requesting and retaining documentation of domestic content from the manufacturer, to withstand any bid protests based on the Amtrak Buy America provision.

- Price Differential

Amtrak may obtain a waiver from the requirements of the Amtrak Buy America provision if “the cost of imposing those requirements is unreasonable.”²⁴⁶ The statute does not define “unreasonable” cost, and there are no regulations implementing the statute. However, the statutory language closely tracks the BAA, which has been interpreted to allow the purchase of foreign goods where comparable domestic goods are as little as 6 percent more expensive (determined by increasing the price of foreign goods by 6 percent for purposes of bid evaluation).²⁴⁷ This is substantially lower than the price differential specified by Congress for other transportation grant Buy America provisions. The legislative history suggests that Congress did not intend to prescribe any specific numeric price differential in evaluating whether the cost of domestic goods was “unreasonable,” instead leaving it to the discretion of the Secretary of Transportation (or the FRA as his or her delegate) to make the determination “after he takes into consideration the real and total costs to

²³⁹ S. 1813, 112th Cong. § 35210 (2012) (proposing to make the Amtrak Buy America provision applicable “to all contracts eligible for Federal funding for a project..., regardless of the funding source of such contracts, if at least 1 contract for the project is funded with amounts made available to carry out this chapter.”).

²⁴⁰ 49 U.S.C. § 24305(f)(2)(B) (2013).

²⁴¹ 48 C.F.R. § 25.003 (2013) (defining “domestic end product” to include “[a]n end product manufactured in the United States, if...[t]he cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components.”).

²⁴² 124 CONG. REC. H6,005 (June 23, 1978) (statement of Rep. Conte) (“[T]he only thing wrong with the language...is that it does not go far enough—it does not impose an absolute buy American requirement and it does not require the application of not less than a 50-percent differential.”).

²⁴³ H.R. REP. NO. 103-300 (1993), *available at* 1993 WL 414121, at *27.

²⁴⁴ Letter from Joseph Szabo, FRA Administrator, to Jeff Martin, Amtrak, regarding Request for a Buy American Exemption for Acela Power Car Central Block Assemblies (Mar. 7, 2012), *available at* <https://www.fra.dot.gov/eLib/Details/L04370>.

²⁴⁵ 49 U.S.C. § 24305(f)(2) (2013) (allowing Amtrak to purchase products “manufactured in the United States substantially from” domestic components without obtaining a waiver).

²⁴⁶ 49 U.S.C. § 24305(f)(4)(A)(ii) (2013).

²⁴⁷ 48 C.F.R. §§ 25.105(b), 25.204(b) (2013).

the taxpayer of the United States.”²⁴⁸ Furthermore, at the time the Amtrak Buy America provision was enacted in 1978, Amtrak did not typically use a price differential to evaluate foreign bids, and in the few instances where Amtrak purchased foreign goods based on cost, comparable domestic goods were 28 percent to 109 percent more expensive.²⁴⁹ If Amtrak considers the cost of domestic goods to be unreasonable with respect to comparable foreign goods, it must seek a waiver of the Amtrak Buy America provision from FRA.²⁵⁰ However, FRA recognizes that the “unreasonable cost” waiver under the Amtrak Buy America provision is “similar” to that in the BAA and “less stringent” than the 25 percent Price Differential waiver in the FRA Buy America provision.²⁵¹ Therefore, among the transportation grant programs, the Amtrak Buy America provision may offer the best possibility of obtaining a Price Differential or “unreasonable cost” waiver. However, there is no known instance of FRA ever granting such a waiver from the Amtrak Buy America provision.

- Nonavailability

As with the FRA Buy America provision, there are actually two distinct justifications for a Nonavailability waiver under the Amtrak Buy America provision. The first, which is applicable to all purchases, is that a waiver may be granted if the products (or their components) “are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and are not of a satisfactory quality.”²⁵² The statute does not define such key terms as “sufficient quantity” or “satisfactory quality,” although the statutory language closely tracks the BAA. Under the regulations implementing the BAA, this Nonavailability waiver may be easy to obtain. First, the FAR contains a list of goods that have been determined to be generally unavailable domestically,²⁵³ effectively creating general nationwide waivers from the BAA for entire classes of goods. Second, federal agencies under the BAA are entitled to presume that

domestic goods are not reasonably available if there are no domestic responses to a full and open solicitation.²⁵⁴ There are no such regulations implementing the nearly identical statutory language of the Amtrak Buy America provision. Under the Amtrak Buy America provision, FRA has announced that there are no “blanket” general nationwide waivers, and that all waivers must be granted on a project-specific, case-by-case basis.²⁵⁵ Therefore, Amtrak is probably not entitled to rely on the FAR list of unavailable goods. Further, even if Amtrak does not receive a bid for domestic goods in response to a solicitation, Amtrak must request and obtain a waiver from FRA in order to purchase foreign goods from the low bidder.²⁵⁶ Based on its recent history with Nonavailability waivers,²⁵⁷ FRA may require evidence from Amtrak that comparable domestic goods are not reasonably available and conduct its own independent investigation for domestic sources before granting such a waiver.

The second potential justification for a Nonavailability waiver under the Amtrak Buy America provision applies only to purchases of rolling stock or power train equipment. A waiver may be obtained if such equipment “cannot be bought and delivered in the United States within a reasonable time.”²⁵⁸ This additional waiver justification was added by Congress in 1979,²⁵⁹ 1 year after the Amtrak Buy America provision was originally enacted. There is very little recorded discussion of this amendment in the legislative history, so it is not clear why the amendment was made. However, the amendment aligned the statutory Amtrak Buy America provision with Amtrak’s preexisting internal Buy America policy, which permitted the purchase of foreign products where the products “will not be available in this country in time to meet schedule requirements.”²⁶⁰

²⁴⁸ 124 CONG. REC. S7,247 (May 10, 1978) (statement of Sen. Bayh).

²⁴⁹ *Foreign Procurement 1978 Report*, *supra* note 5, App. 1, at 43.

²⁵⁰ *FRA Buy America Webinar*, *supra* note 60, at 24.

²⁵¹ *Id.*

²⁵² 49 U.S.C. § 24305(f)(4)(A)(iii) (2013).

²⁵³ 48 C.F.R. §§ 25.103(b)(1)(i), 25.104 (2013).

²⁵⁴ 48 C.F.R. § 25.103(b)(2) (2013).

²⁵⁵ *FRA Buy America Webinar*, *supra* note 60, at 7, 23.

²⁵⁶ 49 U.S.C. § 24305(f)(4) (2013) (clarifying that the Secretary of Transportation, or FRA as his or her delegate, “may exempt Amtrak from” the Amtrak Buy America provision “[o]n application of Amtrak,” if the conditions are satisfied for a Public Interest, Price Differential, or Nonavailability waiver).

²⁵⁷ *See supra* § III.A.4.

²⁵⁸ 49 U.S.C. § 24305(f)(4)(B) (2013).

²⁵⁹ Amtrak Reorganization Act of 1979, Pub. L. No. 96-73, § 109 (1979).

²⁶⁰ *Foreign Procurement 1978 Report*, *supra* note 5, App. 1, at 43.

Presumably, the “unreasonable delivery time” justification for a Nonavailability waiver is useful to defend against a potential bid protest from a domestic manufacturer who does not presently manufacture the product sought, but who nevertheless argues that the product could be manufactured domestically given enough time. If seeking a Nonavailability waiver for rolling stock or power train equipment, Amtrak should try to make both arguments: that the products are not domestically available in sufficient quantity and satisfactory quality and also that such products can not be made available domestically in a reasonable time. When FRA grants a Nonavailability waiver, it may use both justifications to support its decision.²⁶¹ Amtrak should keep in mind, however, that the FRA waiver approval process is expected to take 6 months to 1 year for a given waiver request,²⁶² and this delay should be factored into what Amtrak considers to be a “reasonable time” for comparable domestic products to be delivered.

- Public Interest

Finally, Amtrak may obtain a waiver allowing the purchase of foreign goods when enforcement of the Amtrak Buy America provision would be “inconsistent with the public interest.”²⁶³ In part because there have been no regulations issued to implement the statute, it is unclear what would justify a Public Interest waiver. In the past, FRA has granted Public Interest waivers to Amtrak where the public interest has been expressed loosely to encompass “important public benefits associated with the development of improved high speed rail service across the country and the presence in the American market of competing equipment manufacturers.”²⁶⁴ Under that standard, of course, most purchases of foreign products by Amtrak could be justified. Since 2008, however, there has been enhanced scrutiny and enforcement of most transportation grant Buy America provisions, with special attention focused on Pub-

lic Interest waivers.²⁶⁵ Amtrak should anticipate that future Public Interest waivers will be rare.

c. Notice-and-Comment.—The Amtrak Buy America provision does not include any statutory requirement for publication or a public notice-and-comment opportunity for waivers. FRA has rarely, but occasionally, published waiver requests and waiver determinations related to the Amtrak Buy America provision in the *Federal Register* for public notice-and-comment. Amtrak is not a federal government agency, so its waiver requests to FRA, and FRA’s responses, are presumably public records subject to availability under FOIA. In general, however, the absence of a notice-and-comment requirement means that there has been little public scrutiny of the application of the Amtrak Buy America provision, and there are few case studies to illustrate its application.

d. Multiple Funding Sources.—According to the plain statutory text, the Amtrak Buy America provision applies to all direct purchases made by Amtrak, without regard to the source of funds.²⁶⁶ FRA has long taken the position, however, that the Amtrak Buy America provision does not apply to purchases made by Amtrak with funds other than its capital grant (i.e., its direct congressional appropriations), such as FRA grant funds.²⁶⁷ FRA has recently clarified that the Amtrak Buy America provision applies only “when Amtrak is spending funds from its own capital or operating grant.”²⁶⁸ The FRA Buy America provision rather than the Amtrak Buy America provision “applies when Amtrak is operating under a HSIPR program grant or performing a contract for another

²⁶⁵ See *infra* §§ III.C.3.c, III.C.4.a.

²⁶⁶ 49 U.S.C. § 24305(f)(2) (2013) (“Amtrak shall buy only – (A) unmanufactured articles, material, and supplies mined or produced in the United States; or (B) manufactured articles, material, and supplies manufactured in the United States substantially from articles, material, and supplies mined, produced, or manufactured in the United States.”).

²⁶⁷ See *Application of Washburn Wire Products, Inc.*, DOTCAB No. 85-804-13 (1981), available at 1981 WL 10234 (upholding FRA’s interpretation that a supplier to a construction contractor for Amtrak was not subject to Buy America requirements and was allowed to supply foreign steel for a Northeast Corridor improvement project, where the project was funded with FRA grant funds).

²⁶⁸ *FRA Buy America FAQ*, *supra* note 52, at 11; see also *FRA Buy America Webinar*, *supra* note 60, at 9 (stating that the Amtrak Buy America provision “[a]pplies to Amtrak capital grants”).

²⁶¹ See Letter from Jolene M. Molitoris, FRA Administrator, to George D. Warrington, Amtrak, regarding Grant of Exemption (Sep. 7, 2000), available at <http://www.regulations.gov/#!documentDetail;D=FRA-1999-6405-0004>.

²⁶² *FRA Buy America Webinar*, *supra* note 60, at 7.

²⁶³ 49 U.S.C. § 24305(f)(4)(A)(i) (2013).

²⁶⁴ See Letter from Jolene M. Molitoris, FRA Administrator, to George D. Warrington, Amtrak, regarding Grant of Exemption (Sep. 7, 2000), available at <http://www.regulations.gov/#!documentDetail;D=FRA-1999-6405-0004>.

HSIPR program grantee.”²⁶⁹ The key determination for which the Buy America provision (if any) applies is “the source of funds.”²⁷⁰ In a project jointly funded, for example, by FRA (with HSIPR grant funds) and Amtrak (with funds from its own capital grant), Amtrak should ensure compliance with both Buy America provisions.

2. Legislative History

The Amtrak Buy America provision was enacted in 1978 at a time when Congress was actively seeking to protect the domestic steel industry through enhanced Buy America provisions in federal grant programs. A May 1978 study performed by the GAO, at the request of the Congressional Steel Caucus, determined that the BAA applied only to direct federal procurements, not to federally assisted procurements by state and local governments or other organizations such as Amtrak, unless the statute authorizing federal assistance expressly provided for application of the BAA.²⁷¹ There were no such BAA requirements imposed by Congress on the Amtrak capital grant program up to that time.²⁷² However, Amtrak was operating on an internal policy that required the prior written approval of an Amtrak executive in order to make any procurement “from foreign sources.”²⁷³ Furthermore, under this policy:

No procurements from foreign sources are to be submitted for approval until it can be shown that the product or service is not available in this country or will not be available in this country in time to meet schedule requirements and, further, that all possible alternatives to foreign procurement, including specification changes and schedule relief, have been explored.²⁷⁴

The language of this policy was more stringent than any Buy America provision in federal law, because 1) it applied to all goods (and services), 2) it required written waivers for any deviation, 3) the only waiver was for Nonavailability (within a reasonable time), and 4) even if the product was

not available domestically, the policy required Amtrak to explore “all possible alternatives” to avoid foreign procurement.

At the time the Amtrak Buy America provision was enacted, Congress was aware that Amtrak was already operating under this stringent Buy America policy.²⁷⁵ Foreign goods constituted 3.7 percent of Amtrak’s total purchases in its existence from May 1971 through December 1977.²⁷⁶ There was some evidence that Amtrak’s foreign purchases were steadily decreasing over time, from 7.5 percent of Amtrak’s total purchases in 1974 down to 1.4 percent in 1977.²⁷⁷ At this time, Amtrak was lauded by legislators as a model grant recipient with respect to its internal Buy America requirement.²⁷⁸

With respect to steel, Congress was concerned about the ability of the domestic steel industry to withstand foreign competition, as foreign steel was believed to be cheaper in part due to foreign government subsidies.²⁷⁹ Likewise, with respect to

²⁷⁵ 124 CONG. REC. H5,899 (June 21, 1978) (statement of Rep. Mikulski) (“Amtrak itself has, by its own executive order, a very similar, or, in fact, even more stringent executive order already in place.”); *see also* 134 CONG. REC. H2,259 (Apr. 20, 1988) (statement of Rep. Carney) (“Amtrak has functioned well under a buy American policy which is very similar to the language included in this bill.”).

²⁷⁶ *Foreign Procurement 1983 Report*, *supra* note 92, at 24; *Foreign Procurement 1978 Report*, *supra* note 5, at 44; *see also* 124 CONG. REC. S7,247 (May 10, 1978) (statement of Sen. Long) (“They contend that about 96.3 percent of their purchases are American bought purchases the way it is now.”).

²⁷⁷ *Foreign Procurement 1978 Report*, *supra* note 5, at 44; *see also* 124 CONG. REC. S7,250 (May 10, 1978) (statement of Sen. Long) (“During the last year only 1.4 percent of their purchases were foreign purchases.”).

²⁷⁸ 134 CONG. REC. H2,259 (Apr. 20, 1988) (statement of Rep. Carney) (“On March 23, 1978, Amtrak officials testified as a ‘good example’ during ‘buy American’ hearings....”); 124 CONG. REC. S7,247 (May 10, 1978) (statement of Sen. Bayh) (“Amtrak does not solicit foreign bids to the extent which municipalities do under the grants made by” FTA.); 124 CONG. REC. S7,249 (May 10, 1978) (statement of Sen. Cannon) (“I think it is certainly clear they are trying to carry out a policy of ‘Buy American.’”); 124 CONG. REC. S7,250 (May 10, 1978) (statement of Sen. Long) (“Amtrak does have a good record on this. Their record is very good.”).

²⁷⁹ 124 CONG. REC. H6,004 (June 23, 1978) (statement of Rep. Rooney) (“This importation has a disastrous effect on American steel producers.”); 124 CONG. REC. S7,247 (May 10, 1978) (statement of Sen. Bayh) (“[T]he domestic steel industry was gravely threatened

²⁶⁹ *FRA Buy America FAQ*, *supra* note 52, at 10 ; *see also FRA Buy America Webinar*, *supra* note 60, at 9 (stating that the FRA Buy America provision “applies when Amtrak is operating under a PRIIA-authorized grant or performing a contract for another grantee”).

²⁷⁰ *FRA Buy America FAQ*, *supra* note 52, at 10; *see also FRA Buy America Webinar*, *supra* note 60, at 9 (“Check your grant for funding source.”).

²⁷¹ *Federal Assistance 1978 Report*, *supra* note 6, Enclosure II, at 6.

²⁷² *Foreign Procurement 1978 Report*, *supra* note 5, at 14.

²⁷³ *Id.* at 43.

²⁷⁴ *Id.*

rolling stock, there were suggestions that foreign governments were subsidizing their own rail car industries and then selling the rail cars in the United States below cost (i.e., “dumping”), making it difficult for domestic rail car manufacturers to compete.²⁸⁰ Congress responded to the perceived unfair foreign competition by imposing domestic preferences across multiple federal programs in 1978, including Amtrak, a significant consumer of both rail rolling stock²⁸¹ and steel.²⁸²

In fact, as passed by the Senate, the Amtrak Buy America provision would only have applied to purchases of “steel and rolling stock for fixed rail service,” where the total project cost (not just the cost of steel and rolling stock) was greater than \$1 million.²⁸³ Project expenditures for foreign goods other than steel and rolling stock were not prohibited under the Senate version. The House version, on the other hand, would have applied to *all* purchases (both manufactured and unmanufactured goods) of \$100,000 or more.²⁸⁴ A compromise reached in conference was to adopt the House’s broad application of Buy America requirements to all goods purchased by Amtrak (not just steel and rolling stock), while adopting the Senate limitation that the Buy America requirements would not apply to any purchase less than

\$1 million.²⁸⁵ This compromise version was enacted into law on October 5, 1978.²⁸⁶

Although the intent of the House version was to extend Buy America requirements to Amtrak’s purchases of all types of goods (not just steel and rolling stock), the compromise cost threshold of \$1 million effectively limited the Amtrak Buy America provision to larger construction projects and rolling stock procurements. Despite this limitation, purchases of foreign goods by Amtrak continued to decline, from 1.4 percent of all Amtrak purchases in 1977 (the year prior to enactment of the Amtrak Buy America provision) to 0.5 percent of all Amtrak purchases over the 5 years after its enactment.²⁸⁷

However, over the years, some in Congress have attempted to lower the \$1 million cost threshold of the Amtrak Buy America provision in order to reduce Amtrak purchases of foreign goods using federal assistance. By 2001, there was concern that most manufactured products being purchased by Amtrak were of foreign origin.²⁸⁸ Therefore, in the USDOT appropriations bill for fiscal year 2002, Congress expressly applied the BAA (rather than the Amtrak Buy America provision) to \$521,476,000 that was appropriated for the Amtrak capital grant.²⁸⁹ Since the language of the BAA is very similar to the Amtrak Buy America provision, the main effect of this was to temporarily remove the compromise \$1 million cost threshold and impose domestic preferences on Amtrak purchases as small as the BAA Small Purchase cost threshold (presently \$3,000). However, this change applied only to the \$521,476,000 that was appropriated for Amtrak in the 2001 legislation.

Subsequent efforts to permanently reduce the Small Purchase cost threshold for the Amtrak Buy America provision have failed. In 2008, the version of PRIIA passed by the House would have modified the Amtrak Buy America provision to ensure that the BAA applies to Amtrak purchases

last year in large part due to competition with foreign steel firms, often heavily subsidized by their own governments.”).

²⁸⁰ 124 CONG. REC. S7,247 (May 10, 1978) (statement of Sen. Bayh) (“I remember an Italian consortium that was involved in selling some railcars, with Italian Government subsidization.... The only way they got the sale was because they were able to dump in here and put our workers out of work.”).

²⁸¹ 124 CONG. REC. H5,884 (June 21, 1978) (statement of Rep. Rooney) (“[T]his so-called buy-American provision is essential for normal engine and car procurements, and also because of the magnitude of the procurement program for the Northeast Corridor improvement project. Congress has authorized \$1.75 billion for this project.”).

²⁸² 124 CONG. REC. H5,902 (June 21, 1978) (statement of Rep. Carney) (“In calendar year 1977, Amtrak purchased over 43,000 tons of steel—at a cost of over \$15 million. By the end of 1978, Amtrak plans to have purchased over 64,000 tons of steel for over \$25 million.”).

²⁸³ 124 CONG. REC. S7,253 (May 10, 1978).

²⁸⁴ H.R. REP. NO. 95-1182, at 4–5 (1978).

²⁸⁵ H.R. REP. NO. 95-1478, at 18 (1978).

²⁸⁶ Amtrak Improvement Act of 1978, Pub. L. No. 95-421, § 10 (1978),

²⁸⁷ *Foreign Procurement 1983 Report*, *supra* note 92, at 24.

²⁸⁸ 154 CONG. REC. H6,788 (July 22, 2008) (statement of Rep. Oberstar) (“[O]ur domestic rail transit, rail passenger transit systems were in decline. ...[M]anufacturers were drying up in America, and the new sourcing was coming from foreign manufacturers.”).

²⁸⁹ *Id.*; Pub. L. No. 107-87, § 326 (2001).

between \$100,000 and \$1 million.²⁹⁰ However, this change was not included in the version of PRIIA that was passed by the Senate and thus was never enacted.²⁹¹ In 2012, there was an effort in the Senate to prohibit “segmentation” of large procurements into smaller contracts to avoid application of the Amtrak Buy America provision. The version of the 2012 USDOT appropriations bill that passed the Senate would have applied the Amtrak Buy America provision to Amtrak contracts of less than \$1 million, where multiple contracts could be considered to constitute a single “project” and the combined value of the “project” contracts reached the cost threshold of \$1 million.²⁹² However, the compromise version that ultimately passed both houses of Congress prohibited “segmentation” of Buy America requirements only with respect to FHWA projects, not Amtrak projects.²⁹³

Amtrak should take note of these and other recent legislative efforts to ensure that the various transportation grant Buy America provisions are strictly and consistently applied. The Amtrak Buy America provision is notably distinct from other transportation grant Buy America provisions, both with respect to the very large Small Purchase threshold and to the lack of specific numeric criteria (e.g., for Domestic Content and Price Differential waivers). In the future, legislative efforts may be undertaken to address those differences and streamline requirements across federal programs.

3. Case Studies

a. Northeast Corridor.—

- Background

Several issues related to the Amtrak Buy America provision are best illustrated by Amtrak’s procurement of the Acela trainsets. In 1993, Congress appropriated funding for Amtrak to purchase high-speed trainsets for the Northeast Corridor.²⁹⁴ As originally passed by the Senate, the funds would have been subject to an enhanced

Buy America provision, including a specific 80 percent domestic content requirement.²⁹⁵ Ultimately, however, Congress decided to keep the funds subject to the existing Amtrak Buy America provision (which only required that products be manufactured in the United States “substantially from” domestic components), and asked Amtrak to establish a “general goal...to maximize the U.S. content of the new trainsets.”²⁹⁶ In consultation with FRA, Amtrak established a “goal” of 70 percent domestic content for the trainsets.²⁹⁷ The goal was to be implemented by considering domestic content commitments from manufacturers when evaluating proposals, with deductions for domestic content below 70 percent and bonus points for domestic content above 70 percent.²⁹⁸

In March 1996, Amtrak awarded the Acela manufacturing contract to a consortium of Bombardier Corporation, a Canadian manufacturer, and Alstom Transportation, Inc., the French manufacturer of the TGV “bullet train.”²⁹⁹ Bombardier would be primarily responsible for manufacturing the passenger rail cars, and Alstom would be primarily responsible for manufacturing the locomotives or “power cars.” To comply with both the Amtrak Buy America Provision and the FTA Buy America provision, Bombardier had already established a passenger rail car manufacturing facility in Plattsburgh, New York, and a transit rail car manufacturing facility in Barre, Vermont.³⁰⁰ For the Northeast Corridor project, final assembly of the passenger rail cars would take place at Bombardier’s Vermont facility, and final assembly of the power cars would

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ S. 2002, *The Amtrak Investment Act of 1994 and S. 1942, The Local Rail Freight Assistance Reauthorization Act of 1994: Hearing before the Subcomm. on Surface Transportation of the S. Comm. on Commerce, Science, and Transportation*, 103d Cong. 102 (1994) (statement of Jolene M. Molitoris, FRA Administrator).

²⁹⁸ *Amtrak Underscores Buy America Pledge*, RAILWAY AGE (Dec. 1994), available at 1994 WLNR 5347839.

²⁹⁹ *Bombardier Corp. v. Nat’l Railroad Passenger Corp.*, 298 F. Supp. 2d 1, 1 n.1 (D.D.C. 2002); see also Brian Hutchinson, *Train to Trouble: Teetering on the Edge of Insolvency, Amtrak is Being Sued by Bombardier over a Problem-Plagued US \$611M Project Funded by Canadian Taxpayers*, NAT’L POST (Sep. 21, 2002), available at 2002 WLNR 8208133.

³⁰⁰ Don Phillips, *Maker of High-Speed Train Sues Amtrak for \$200 Million*, WASH. POST, Nov. 9, 2001, available at 2001 WLNR 13167084.

²⁹⁰ H.R. 6003, § 221, 110th Cong. (2008). Under this proposal, the existing Amtrak Buy America provision would continue to apply to purchases of \$1 million or more.

²⁹¹ See *supra* notes 107, 110, and accompanying text.

²⁹² S. 1813, 112th Cong. § 35210 (2012).

²⁹³ See *infra* § III.B.2.

²⁹⁴ H.R. REP. NO. 103-300 (1993), available at 1993 WL 414121, at *27.

take place at Bombardier's New York facility, although significant manufacturing processes for components or subcomponents would take place outside the United States.³⁰¹

- Compliance Issues

Issues related to domestic manufacturing arose early in the performance of the contract. Amtrak stated that it originally anticipated having Bombardier and Alstom manufacture the trainsets using existing designs for trains in use in Europe, such as the Alstom TGV bullet train.³⁰² However, in 1999, FRA issued crashworthiness regulations requiring high-speed trains to be able to potentially withstand impacts with freight trains that would share the Northeast Corridor track.³⁰³ This was more stringent than the requirements for European trains, and it required Amtrak, Bombardier, and Alstom to come up with a customized, heavier design for the Acela trains.³⁰⁴ It has been suggested that the decision to forego the lighter European design in favor of a more traditional U.S. passenger train design was also motivated in part by Amtrak's goal to maximize domestic content, so that the Acela trains would incorporate more domestic parts.³⁰⁵ At any rate, a combination of heavier trains and "crucial differences between American and European rails" prevented the Bombardier and Alstom consortium from using wheels identical to those that Alstom traditionally used in its European trains, necessitating a redesign.³⁰⁶ The redesigned, heavier trains experienced problems, including excessive wheel wear, cracks in the suspension system, and cracks in the brakes. The manufacturer of the brakes blamed the problems on redesigns, approved by Amtrak and Bombardier in 1998, that

were required "partly to help satisfy so-called Buy America requirements set by Amtrak."³⁰⁷ Anthony Perl, a prominent transportation policy scholar, suggested that the design problems with Acela were due to a flaw in the Amtrak Buy America provision itself, which (like most Buy America provisions) requires domestic manufacturing but not domestic engineering: "What we have is design teams from France and Canada, and the trains are put together from kits in this country to satisfy Buy American rules. The labor is American, but the know-how is not."³⁰⁸

In 2000, when final delivery of the Acela trainsets was nearing completion, Amtrak announced that it intended to seek damages "in the dozens of millions of dollars" from Bombardier and Alstom due to the extensive delays and cost increases caused by the various redesigns.³⁰⁹ Bombardier preemptively filed suit against Amtrak in November 2001, seeking \$200 million in damages. Bombardier alleged that Amtrak interfered with its design by imposing more stringent specifications after the contract was executed, that Amtrak delayed in approving Bombardier's redesigns to address the stringent requirements, and that Amtrak failed to upgrade its own tracks to accommodate the initially planned foreign designs.³¹⁰ Bombardier alleged that, in part to satisfy Amtrak's domestic content goals, "large numbers of already completed components have had to be discarded or retrofitted."³¹¹ Amtrak conceded that the delays arose at least in part from making the new trainsets conform to the Amtrak Buy America provision, specifically citing the delays in redesigning the brakes.³¹² However, Amtrak contended that it properly rejected the components as

³⁰¹ *High-Speed Rail: Finally on Track*, RAILWAY AGE, Apr. 1998, available at 1998 WLNR 7707095.

³⁰² Janice D'Arcy, *Acela: Lessons Learned Too Late: Amtrak's High-Speed Rail Service Dogged by Design Disputes and Equipment Failures*, HARTFORD COURANT, Sep. 29, 2003, available at 2003 WLNR 15214802.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ Bryce Nesbitt, *Cracks in the "Buy American" Rules*, BOSTON GLOBE, Apr. 22, 2005, available at 2005 WLNR 6287723; Lin Garber, *Congress Forced Amtrak's Hand*, BOSTON GLOBE, Aug. 26, 2002, available at 2002 WLNR 2584884.

³⁰⁶ Raphael Lewis & Mac Daniel, *Acela Troubles Seen as Pattern for Amtrak: Missteps Tied to Need for New Identity, Revenue*, BOSTON GLOBE, Sep. 1, 2002, available at 2002 WLNR 2609833.

³⁰⁷ Daniel Machalba & Christopher J. Chipello, *Amtrak Brake Probe Scrutinizes Early Change in Spokes' Design*, WALL ST. J., June 27, 2005, available at 2005 WLNR 10139610.

³⁰⁸ Lewis & Daniel, *supra* note 306.

³⁰⁹ Francois Shalom, *Full Tilt Ahead: The First High-Speed Rail Link in North America is Set to Make its Debut*, MONTREAL GAZETTE, Oct. 7, 2000, available at 2000 WLNR 5498976.

³¹⁰ *Bombardier Corp. v. Nat'l Railroad Passenger Corp.*, 298 F. Supp. 2d 1, 2 (D.D.C. 2002).

³¹¹ Hutchinson, *supra* note 299.

³¹² *Bombardier Corp. v. Nat'l Railroad Passenger Corp.*, 298 F. Supp. 2d 1, 2 (D.D.C. 2002) ("Amtrak, in turn, argues that any delay is attributable to Bombardier as subcontractors that Bombardier selected were late in delivering brakes and other train components to Bombardier.").

nonconforming³¹³ and that responsibility for complying with the Amtrak Buy America provision rested solely with the Bombardier and Alstom consortium.³¹⁴ Amtrak filed a counterclaim against Bombardier in November 2002, seeking damages in part for Bombardier's alleged violation of the Amtrak Buy America provision that was incorporated into its contract.³¹⁵

Ultimately, the lawsuit was settled in March 2004 when Amtrak agreed to pay the Bombardier and Alstom consortium \$42.5 million out of \$70 million that Amtrak had previously withheld from the consortium's invoices, with neither party admitting liability.³¹⁶ While it will never be clear exactly the extent to which these extra costs can be attributed to strict application of the Amtrak Buy America provision, strict application of the FRA crashworthiness regulations, or other factors, one should expect Buy America enforcement to increase project costs. Further, in the Northeast Corridor, the failure to achieve a European-style high-speed rail system was attributed in part to strict application of domestic preferences. Although the trainsets were manufactured domestically using a large number of standard domestic parts, no true European-style high-speed rail manufacturing capability was developed in the United States as a result of the Acela procurement.

Also, as part of its settlement with Bombardier, Amtrak agreed to take on maintenance responsibilities for the Acela trainsets as early as 2006. Under the terms of the original contract, the consortium created the Northeast Corridor Management Service Corporation—a domestic corporation—to provide replacement components through 2013.³¹⁷ Often, a key selling point for rail Buy America provisions is the promise of long-term American jobs, by incentivizing foreign manufacturers to establish a domestic presence both for initial manufacturing and long-term maintenance. However, the Buy America provisions have

mixed results in establishing *new* domestic rail manufacturing capability, in part because they establish preferences for component parts that are presently manufactured in the United States. Amtrak may consider using waivers to introduce innovative foreign technology into the domestic rail system and incentivize domestic manufacturers to develop components compatible with the new technology. For the Amtrak Buy America provision, both the Nonavailability and Price Differential waivers could be realistic options for purchasing innovative foreign technologies, and they do not have the abuse concerns that accompany some of the other types of waivers.

- False Claims Act Applicability

While the Bombardier–Amtrak litigation was ongoing, Bombardier was also contending with lengthy *qui tam* litigation brought in 1998 by a former Amtrak employee, who claimed that Bombardier violated the FCA by submitting invoices to Amtrak for trainset parts that failed to comply with the contract specifications. In 2001, the U.S. District Court for the District of Columbia initially indicated that FCA liability might arise from the contractor's false certifications to a federal grant recipient like Amtrak,³¹⁸ but the court dismissed the relator's lawsuit for failure to make the claim with specificity. On appeal in 2002, the U.S. Court of Appeals for the D.C. Circuit reversed, allowing the relator to amend his complaint but withholding judgment as to whether a contractor's certifications made to a federal grant recipient could subject the contractor to FCA liability.³¹⁹ After the relator amended his complaint, the District Court again dismissed the lawsuit in 2003, and the D.C. Circuit affirmed in 2004, holding that a claim made by a contractor to a federal grant recipient like Amtrak is not a claim made to the federal government subject to the FCA, even if the claimant contractor is seeking to be paid with federal grant funds.³²⁰ This is

³¹³ *Id.* (“Amtrak maintains that the trainsets Bombardier delivered do not meet the Contract's specifications.”).

³¹⁴ Phillips, *supra* note 300.

³¹⁵ Barrie McKenna, *Amtrak Files Suit*, TORONTO GLOBE & MAIL, Nov. 22, 2002, available at 2002 WLNR 12085575.

³¹⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, INTERCITY PASSENGER RAIL: ISSUES ASSOCIATED WITH THE RECENT SETTLEMENT BETWEEN AMTRAK AND THE CONSORTIUM OF BOMBARDIER AND ALSTOM 1, 23 (2004).

³¹⁷ *Id.* at 26.

³¹⁸ United States *ex rel.* Totten v. Bombardier Corp., 139 F. Supp. 2d 50, 52 n.1 (D.D.C. 2001) (“Requesting payment for noncompliant products which satisfy neither their contracts nor Amtrak's regulations is not a violation of the False Claims Act. Only the false certification of compliance, where certification is a prerequisite to obtaining payment, would suffice.”).

³¹⁹ United States *ex rel.* Totten v. Bombardier Corp., 286 F.3d 542, 553 (D.C. Cir. 2002).

³²⁰ United States *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 502 (D.C. Cir. 2004) (“[C]laims were pre-

an important decision, illustrating that a contractor for a federal transportation grant recipient, who is required to certify compliance with a transportation grant Buy America provision, is probably not liable under the FCA for false Buy America certifications made to a grant recipient such as Amtrak, a state DOT, or a local transit agency.

- Waiver Request

In November 2011, Amtrak requested a waiver from the Amtrak Buy America provision to allow Amtrak to purchase two power car central block assemblies from Alstom for the Acela trainsets.³²¹ Each central block would cost more than \$1 million, so there was no question that the Amtrak Buy America provision applied. Although Alstom planned to assemble the central blocks in Hornell, New York, more than 50 percent of the components, by cost, would come from France.³²² The foreign components included power modules, logic controllers, and electronics controllers that were proprietary to Alstom, and thus not available from any domestic source. Therefore, in March 2012, FRA granted a Nonavailability waiver to Amtrak, allowing it to purchase the central block assemblies.³²³ However, FRA granted the waiver on the condition that Amtrak and Alstom collaborate with NIST-MEP to increase the domestic content of power car central blocks. FRA stated that future waivers for power car central blocks would not be granted unless Amtrak and Alstom documented their efforts to increase domestic content.³²⁴ FRA's standard approach with Nonavailability waivers in recent years, with respect to both the FRA Buy America provision and the Amtrak Buy America provision, has been to attach conditions to the waiver requiring the manufacturer to work with NIST-MEP to increase domestic content for future purchases.³²⁵

b. Northwest Corridor.—Amtrak's Northwest Corridor (between Eugene, Oregon, and Vancou-

mented only to Amtrak for payment or approval, and Amtrak is not the Government.”).

³²¹ Letter from Joseph Szabo, FRA Administrator, to Jeff Martin, Amtrak, regarding Request for a Buy American Exemption for Acela Power Car Central Block Assemblies (Mar. 7, 2012), *available at* <https://www.fra.dot.gov/eLib/Details/L04370>.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *See supra* § II.A.4.

ver, Washington), like the Northeast Corridor, was intended to provide high-speed rail service in the Northwest, but was developed at a smaller scale and much more incrementally than the Northeast Corridor project.³²⁶ Beginning in 1994, WSDOT leased two trainsets from Spanish manufacturer Talgo, to be operated by Amtrak.³²⁷ As a result of that experiment, the decision was made to purchase three trainsets from Talgo.³²⁸ At least one of the trainsets was to be purchased directly by Amtrak and was thus subject to the Amtrak Buy America provision.

To allay concerns about the Amtrak Buy America provision, as well as a comparable “Buy Washington” provision applicable to WSDOT, the trainsets were to be assembled in Washington.³²⁹ However, the Railway Progress Institute (a trade association for domestic rail industry suppliers) testified before Congress that the trainsets did not contain sufficient domestic content to satisfy the Amtrak Buy America provision.³³⁰ In July 1996, upon request from Amtrak, FRA granted a waiver from the Amtrak Buy America provision to permit the purchase. This appears to have been a Public Interest waiver, where the public interest justification was “the opportunity to further evaluate the potential of modern rail passenger equipment in the U.S.”³³¹

The further evaluation of Talgo trainsets was apparently successful, because in 1999, Amtrak petitioned FRA for waivers to allow it to purchase two additional Talgo trainsets for the Northwest Corridor.³³² Amtrak estimated that the new Talgo

³²⁶ *Amtrak Leads America into the Age of High Speed*, RAILWAY AGE, May 1996, *available at* 1996 WLNR 6215624.

³²⁷ Letter from George D. Warrington, Amtrak President and CEO, to Jolene M. Molitoris, FRA Administrator, regarding Request for Domestic Buying Preference Exemption (Aug. 23, 1999), *available at* <http://www.regulations.gov/#!documentDetail;D=FRA-1999-6405-0001>.

³²⁸ *Id.*

³²⁹ *Clinton Clouds the High Speed Picture*, RAILWAY AGE, Apr. 1997; *A Renfe Talgo Plant in the U.S.?*, RAILWAY AGE, Aug. 1996.

³³⁰ *Department of Transportation and Related Agencies Appropriations for 1998: Hearings before a Subcomm. of the H. Comm. on Appropriations*, 105th Cong. (1997) (statement of Dennis S. Sullivan).

³³¹ Letter from George D. Warrington, *supra* note 327.

³³² *Id.*; Petition for Buy American Exemption—National Railroad Passenger Corporation, 64 Fed. Reg. 59,230 (Nov. 2, 1999). At the same time, Amtrak peti-

trainsets would have about 30 percent domestic content.³³³ In 1999, unlike the 1996 waiver request, FRA decided to publish Amtrak's waiver request in the *Federal Register* for public notice-and-comment.³³⁴ The Railway Progress Institute again provided comment, stating that it would not oppose this waiver request but asked that Amtrak be required to strictly comply with the Amtrak Buy America provision in the future.³³⁵ In September 2000, 10 months after receiving the waiver request, FRA again granted Amtrak a Public Interest waiver to purchase the trainsets.³³⁶

The Northwest Corridor case study illustrates how FRA's flexibility in granting waivers from the Amtrak Buy America provision may have hastened the deployment of high-speed passenger rail in the Northwest. Operating at a much smaller scale, and with less public scrutiny, than the contemporary Northeast Corridor project, Amtrak was able to deploy European-style high-speed passenger trains almost immediately, to a favorable reception from the riding public. Although it is unlikely that Public Interest waivers would be so freely granted in today's political climate,³³⁷ this may also have been a situation where domestic manufacturers could not have realistically competed, so a Nonavailability waiver or Price Differential waiver may have been warranted.

The Talgo situation further illustrates, however, the mixed results of Buy America provisions in establishing new domestic rail manufacturing capability. The Seattle manufacturing plant that Talgo opened to assemble cars for the Northwest Corridor was initially converted into a long-term

tioned FRA for exemptions from the new FRA crashworthiness regulations that were necessitating a custom design for the Acela trains in the Northeast Corridor. Petition for Grandfathering of Non-Compliant Equipment—National Railroad Passenger Corporation, 64 Fed. Reg. 59,230 (Nov. 2, 1999).

³³³ Petition for Buy American Exemption—National Railroad Passenger Corporation, 64 Fed. Reg. 59,230 (Nov. 2, 1999).

³³⁴ *Id.*

³³⁵ Comments, Railway Progress Institute, Docket No. FRA-1999-6405 (Nov. 2, 1999), available at <http://www.regulations.gov/#!documentDetail;D=FRA-1999-6405-0003>.

³³⁶ Letter from Jolene M. Molitoris, FRA Administrator, to George D. Warrington, Amtrak President and CEO, regarding Grant of Exemption (Sep. 7, 2000), available at <http://www.regulations.gov/#!documentDetail;D=FRA-1999-6405-0004>.

³³⁷ See *infra* §§ III.C.3.c, III.C.4.a.

maintenance facility after the contract was completed.³³⁸ In 2009, in order to satisfy the new FRA Buy America provision that applied to HSIPR funds, Talgo also opened a manufacturing facility in Wisconsin.³³⁹ Upon completion of its manufacturing contracts for Wisconsin DOT and Oregon DOT, Talgo closed the facility when the State of Wisconsin elected not to retain Talgo for maintenance of the new trainsets.³⁴⁰

Although there are significant differences between the Amtrak Buy America provision applicable to Amtrak's capital grant and the FRA Buy America provision applicable to FRA grant funds such as the HSIPR program, certain patterns have developed in recent years. First, FRA administers a common notice-and-comment Web site for both Buy America provisions,³⁴¹ to solicit public comment on open waiver requests and post final waiver determinations. FRA waiver determinations under either Buy America provision generally take 6 months to 1 year from receipt of the waiver request, in large part because FRA performs significant investigations involving NIST-MEP for domestic sources. The most common waiver granted by FRA is a Nonavailability waiver, which can generally be obtained if both the cost and delivery time to obtain the item from a domestic source are moderately greater than the cost and delivery time to obtain the item from a foreign source. However, FRA typically conditions its Nonavailability waivers on the manufacturer increasing domestic content for future purchases. Section III addresses similar Buy America provisions that are applicable to rail programs but administered by other federal agencies—FHWA and FTA—and highlights the differences in the application of those Buy America provisions.

III. HIGHWAY AND TRANSIT BUY AMERICA PROVISIONS

A. Surface Transportation Assistance Legislative History

The Buy America requirements applicable to FHWA and FTA have similar origins as the

³³⁸ Paul Nussbaum, *Foreign Firms See Profit in U.S. High-Speed Rail*, PHILADELPHIA INQUIRER, Aug. 10, 2010, available at 2010 WLNR 15903717.

³³⁹ *Id.*

³⁴⁰ Paul Nussbaum, *"Higher-Speed" Trains to Precede True High-Speed Rail in U.S.*, PHILADELPHIA INQUIRER, July 13, 2012, available at 2012 WLNR 14623460.

³⁴¹ FRA, Buy America, <https://www.fra.dot.gov/Page/P0185>.

Amtrak Buy America provision but have evolved over the years into different requirements. Like the Amtrak Buy America provision, the FHWA and FTA Buy America provisions originated with 1978 legislation, specifically the Surface Transportation Assistance Act (STAA).³⁴² As with the Amtrak Buy America provision, the motivations behind the STAA Buy America provision were a recognition by Congress that the BAA did not apply to transportation grants (allowing significant amounts of federal funding to be spent with no domestic preferences),³⁴³ and a desire by Congress to protect the domestic steel industry and rolling stock manufacturing industry.³⁴⁴

Like the Amtrak Buy America provision of the same year, the 1978 STAA Buy America provision applied to *all* manufactured goods and unmanufactured goods purchased using federal highway and transit grant funds,³⁴⁵ not just steel and rolling stock, even though the legislative history evidences a congressional intent to specifically apply it to steel and rolling stock procurements. As with the BAA and the Amtrak Buy America provision, the 1978 STAA Buy America provision required manufactured products to be manufactured in the United States “substantially” from domestic components and included exceptions for nonavailability and “unreasonable” cost, without defining those terms.³⁴⁶

Also, as with the Amtrak Buy America provision, the original Senate version of the STAA Buy America provision would have applied domestic preferences only to highway and transit projects costing more than \$1 million. A compromise was reached in conference that the STAA Buy America provision would not apply to any purchase less than \$500,000.³⁴⁷ This compromise version was enacted into law on November 6, 1978. Although the language of the 1978 STAA Buy America provision extended Buy America requirements to all

purchases with federal highway or transit grants (not just steel and rolling stock), the compromise cost threshold of \$500,000 effectively limited the 1978 STAA Buy America provision to larger construction projects and equipment procurements (such as transit systems).

The 1978 STAA Buy America provision was revised by the 1982 STAA, which removed unmanufactured goods from coverage but specifically prohibited the purchase of foreign manufactured products, steel, and cement.³⁴⁸ (Cement was subsequently removed from the list of covered goods in 1984.³⁴⁹ Iron was added to the list of covered goods in 1991.³⁵⁰) The 1982 STAA Buy America provision also eliminated the \$500,000 cost threshold, so that domestic preferences now applied to *all* purchases of steel and manufactured products using FHWA or FTA grant funds.

The 1982 STAA Buy America provision also added specific numeric guidelines for objective application of the waivers. First, the “unreasonable cost” waiver was replaced with a Price Differential waiver, with a specific 25 percent Price Differential applicable to steel and most manufactured products and a less stringent 10 percent Price Differential applicable to rolling stock.³⁵¹ Second, the exception for foreign content in a “substantially” domestic manufactured product was replaced with a Domestic Content waiver for rolling stock, specifically allowing rolling stock (including train control, communication, and traction power equipment) to be purchased if it was assembled in the United States of at least 50 percent domestic components.³⁵² There was no Domestic Content waiver for other manufactured products, suggesting that manufactured products other than rolling stock must satisfy a 100 percent domestic content requirement. In 1987, Buy America waiver requirements for rolling stock were strengthened, as the Price Differential was

³⁴² Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, § 401 (1978). From the passage of the Surface Transportation Assistance Act (STAA) in 1978 until recodification in 1994, the statutory Buy America requirements applicable to both FHWA and FTA were identical, although each agency issued its own distinct regulations to implement the identical statute.

³⁴³ Hughes, *supra* note 1, at 215.

³⁴⁴ See 124 CONG. REC. H5,900-03 (June 21, 1978).

³⁴⁵ Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, § 401 (1978).

³⁴⁶ *Id.*

³⁴⁷ Hughes, *supra* note 1, at 215-16.

³⁴⁸ Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 165, 96 Stat. 2097, 2136-37 (1983).

³⁴⁹ Pub. L. No. 98-229, § 10 (1984).

³⁵⁰ Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1048 (1991); see also 58 Fed. Reg. 38,973 (July 21, 1993).

³⁵¹ Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 165(b)(4), 96 Stat. 2097, 2137 (1983). The 10 percent Price Differential for rolling stock means that FTA grant recipients could obtain a waiver to purchase foreign rolling stock if the price of the foreign rolling stock, multiplied by 1.1, was still less than the price of comparable domestic bids.

³⁵² *Id.* § 165(b)(3).

increased from 10 percent to 25 percent,³⁵³ the Domestic Content waiver requirement was increased from 50 percent to 60 percent,³⁵⁴ and grant recipients were required to evaluate domestic content of rolling stock by considering both components and subcomponents.³⁵⁵

In 1994, Congress formally recodified the STAA Buy America provision as two separate Buy America provisions,³⁵⁶ with one applicable to FHWA³⁵⁷ and one applicable to FTA.³⁵⁸ The following sections describe how the FHWA and FTA Buy America provisions are interpreted and administered today and issues that have arisen in recent years related to those statutes.

B. FHWA Provision

1. Statutory Language

a. Coverage and Applicability.—Under the FHWA Buy America provision, FHWA grant funds may only be used on a project if all “steel, iron, and manufactured products used in such project are produced in the United States.”³⁵⁹ The traditional use of FHWA grant funds has been for construction projects. Therefore, the primary application of the FHWA Buy America provision has been to prohibit the incorporation of foreign steel and iron construction materials into development projects funded with FHWA grants.

Unlike the BAA, the FHWA Buy America provision does not refer to products manufactured in the United States “substantially” from domestic components. Furthermore, there is no Domestic Content waiver for manufactured products in the FHWA Buy America provision. This suggests that Congress intended manufactured products purchased with FHWA grant funds to satisfy a 100

percent domestic content standard. However, as discussed in detail in Section III.B.3.b *infra*, FHWA has a longstanding general waiver for manufactured products. Therefore, at the present time, the FHWA Buy America provision effectively prohibits only the purchase of foreign steel and iron with FHWA grant funds.

The general waiver for manufactured products does not allow FHWA grant recipients to use FHWA grant funds to purchase manufactured products that are “predominantly” steel or iron,³⁶⁰ which FHWA has defined to mean those that contain 90 percent steel or iron by content.³⁶¹ When purchasing manufactured products that are predominantly steel or iron, “all manufacturing processes, including application of a coating, for these materials must occur in the United States.”³⁶² For other manufactured products that are not predominantly steel or iron, the general waiver applies, so there is no domestic content requirement for the “miscellaneous steel or iron components” such as washers and screws used in those products.³⁶³

In addition to the general waiver for manufactured products, there are a number of exceptions or waivers from the FHWA Buy America provision that may be available in a given situation. These are addressed as follows.

b. Waivers and Exceptions.—

- Price Differential

When Buy America requirements were first imposed on FHWA grants with passage of the STAA Buy America provision, the Price Differential exception (for “unreasonable” cost of domestic goods) was the most likely option for FHWA grant recipients to purchase foreign goods.³⁶⁴ In 1982,

³⁵³ Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 337(c), 101 Stat. 241 (1987).

³⁵⁴ *Id.* § 337(a).

³⁵⁵ *Id.* § 337(b).

³⁵⁶ Pub. L. No. 103-272, § 1(e) (1994) (formally codifying the FTA Buy America provision); *see also* Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 1903 (2005) (recodifying the FHWA Buy America provision). These legislative actions formally removed the waivers specifically for rolling stock from the FHWA Buy America provision, so that those waivers are currently only available to FTA grant recipients.

³⁵⁷ 23 U.S.C. § 313 (2013).

³⁵⁸ 49 U.S.C. § 5323(j) (2013).

³⁵⁹ 23 U.S.C. § 313(a) (2013).

³⁶⁰ Memo from Donald P. Steinke, FHWA Chief of Highway Operations, to Edward V.A. Kussy, Acting FHWA Chief Counsel, regarding Buy America Policy Response (Dec. 22, 1997), *available at* <http://www.fhwa.dot.gov/programadmin/contracts/122297.cfm>.

³⁶¹ Memo from John R. Baxter, FHWA Associate Administrator for Infrastructure, to FHWA Division Administrators et al. (Dec. 21, 2012), *available at* <http://www.fhwa.dot.gov/construction/contracts/121221.cfm>.

³⁶² 23 C.F.R. § 635.410(b)(1) (2013).

³⁶³ Memo from John R. Baxter, *supra* note 361.

³⁶⁴ *Valiant Steel and Equipment, Inc. v. Goldschmidt*, 499 F. Supp. 410, 413 (D.D.C. 1980) (FHWA’s “regulations incorporate only one of these exemptions, the cost differential provision, and they ignore entirely the exceptions Congress stipulated to al-

however, when Congress specified the Price Differential to be 25 percent, the Price Differential exception became much less of a realistic option. FHWA currently permits a grant recipient (e.g., a state DOT) to employ a Price Differential exception as long as the grant recipient states in its bid documents “that the contract will be awarded to the bidder who submits the lowest total bid based on furnishing domestic steel and iron materials unless such total bid exceeds the lowest total bid based on furnishing foreign steel and iron materials by more than 25 percent.”³⁶⁵ In other words, the 25 percent Price Differential is applied to the total bid price, not just the price of foreign steel and iron materials in the bid.³⁶⁶ If this condition is satisfied, FHWA regulations do not require the grant recipient to request a waiver. However, due to the large 25 percent Price Differential, this exception is rarely used.

- Nonavailability

The FHWA Buy America provision provides for a Nonavailability waiver to purchase predominantly steel or iron products if “such materials and products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.”³⁶⁷ Unlike the BAA (which allows federal agencies to purchase goods from the FAR list of goods that are considered unavailable without a project-specific waiver), FHWA has no general Nonavailability waivers for predominantly steel and iron products. This means that FHWA grant recipients must specifically request waivers on a project-specific, case-by-case basis for any predominantly steel or iron products that the grant recipient believes to be unavailable domestically. This appears to be the most common type of project-specific waiver granted by FHWA.

- Public Interest

FHWA grant recipients may request a waiver from the FHWA Buy America provision if its “application would be inconsistent with the public

low for domestic unavailability or other public interest considerations.”)

³⁶⁵ 23 C.F.R. § 635.410(b)(3) (2013).

³⁶⁶ 23 U.S.C. § 313(b)(3) (2013) (allowing a Price Differential exception if the use of domestic material will increase the cost of the *overall project* by 25 percent).

³⁶⁷ 23 U.S.C. § 313(b)(2) (2013); *see also* 23 C.F.R. § 635.410(c)(1)(ii) (2013).

interest.”³⁶⁸ Since 1983, FHWA has had a general Public Interest waiver in place for all manufactured products (except for predominantly steel and iron manufactured products).³⁶⁹ Therefore, the Public Interest waiver has probably been more widely used in conjunction with the FHWA Buy America provision than with any other transportation grant Buy America provision (where Public Interest waivers are typically subject to intense scrutiny). However, for products not covered by the general waiver for manufactured products, Public Interest waivers must be specifically requested from FHWA, and are rarely granted for predominantly steel and iron products. Note, however, that FHWA is still developing its regulations for rolling stock such as locomotives³⁷⁰—it is unclear whether rolling stock qualifies for FHWA’s general waiver for manufactured products. While FHWA rulemaking on rolling stock is pending, FHWA in recent years has granted a number of Public Interest waivers for various rolling stock procurements.³⁷¹

- Small Purchase

Although Congress did not provide a Small Purchase exception from the FHWA Buy America provision,³⁷² FHWA permits the purchase of predominantly steel or iron foreign products “if the cost of such materials used does not exceed one-tenth of one percent (0.1 percent) of the total contract cost or \$2,500, whichever is greater.”³⁷³ This Small Purchase exception was implemented by FHWA in a final rule issued in 1983 and was reiterated by memorandum in 1989.³⁷⁴ Under FHWA regulations, a grant recipient does not have to request a waiver if either of these “minimal use”

³⁶⁸ 23 U.S.C. § 313(b)(1) (2013); *see also* 23 C.F.R. § 635.410(c)(1)(i) (2013).

³⁶⁹ *See infra* § III.B.3.b.

³⁷⁰ Buy America Policy, 78 Fed. Reg. 41,492, 41,494 (July 10, 2013).

³⁷¹ *See infra* § III.B.4.b.

³⁷² The original STAA Buy America provision only applied to FHWA projects costing more than \$500,000. Pub. L. No. 95-599, § 401 (1978). However, Congress entirely removed this cost threshold in 1983. Pub. L. No. 97-424, § 165 (1983).

³⁷³ 23 C.F.R. § 635.410(b)(4) (2013).

³⁷⁴ Memo from William A. Weseman, FHWA Chief of Construction and Maintenance, to FHWA Regional Administrators et al. (July 6, 1989), *available at* <https://www.fhwa.dot.gov/programadmin/contracts/070689.cfm>.

criteria is satisfied.³⁷⁵ However, the grant recipient must “maintain a running list of non-domestic steel or iron components or subcomponents as a construction project proceeds,”³⁷⁶ to ensure that the minimal use criteria are not exceeded.

c. Notice-and-Comment.—FHWA is required to respond in writing to any request for a waiver from the FHWA Buy America provision, and any such written response from FHWA can be obtained by the public upon request.³⁷⁷ Prior to 2008, however, FHWA only published requests for “nationwide” general waivers in the *Federal Register* for public notice-and-comment.³⁷⁸

In the 2008 USDOT appropriations bill, Congress added a requirement for FHWA to provide “an informal public notice and comment opportunity,” such opportunity to last at least 15 days, to publish any waiver of the FHWA Buy America provision that FHWA intends to grant as well as FHWA’s rationale for doing so.³⁷⁹ In response, in April 2008,³⁸⁰ FHWA established a Buy America waiver Web site³⁸¹ on which it provides notice of waiver requests and solicits public comment for 15 days. FHWA is only obligated to post waiver requests that it intends to grant, along with its justification for doing so. However, in practice, the Web site states that “all waiver requests” will be posted there. Typically, FHWA posts the waiver request from its grant recipient without stating whether it intends to grant the request or offering any specific justification. On the Web site, the public can subscribe to receive an email notification of each new waiver request posted. The public can post comments pertinent to each waiver request informally via a form on the Web site, and posted comments are publicly visible.

Shortly after establishing the informal notice-and-comment requirement, Congress required FHWA to publish its “finding” on any waiver re-

quest in the *Federal Register*, along with “a detailed written justification as to the reasons that such finding is needed.”³⁸² Although FHWA is required to solicit public comment for 60 additional days following publication of the finding, the waiver may be effective as soon as FHWA makes its finding.³⁸³ Therefore, following the 15-day informal notice-and-comment period on its Web site, FHWA publishes its final decision to grant (or deny) a waiver request in the *Federal Register* for an additional 60-day comment period.

d. Certification and Enforcement.—There is no requirement in the FHWA Buy America provision for the contractor or supplier to certify its compliance with the FHWA Buy America provision to the FHWA grant recipient. However, FHWA grant recipients must rely on representations made by their contractors or suppliers as to the domestic content of goods delivered on FHWA grant-funded projects. If a court or federal agency determines that a contractor or supplier for an FHWA grant recipient “intentionally” represents that products are domestic when they are not, that contractor is ineligible to receive further FHWA grant funds, either as a direct contractor to an FHWA grant recipient or as a lower-tier subcontractor or supplier.³⁸⁴

Because the contractor, subcontractor, or supplier makes its representations to the FHWA grant recipient and not to FHWA, it may not be liable under the FCA for false representations of domestic content.³⁸⁵ There is also no express criminal penalty for violations of the FHWA Buy America provision. The only comparable penalties for intentional violations of the FHWA Buy America provision would thus have to arise under state law, but FHWA grant recipients (e.g., state DOTs) would have to ensure that their standard bid requirements or contract terms are sufficient to invoke the state law enforcement mechanisms. For example, the state DOT might have to develop a standard Buy America compliance certificate that is submitted as a condition of bid responsiveness in order to hold its contractor liable under state versions of the FCA for false representations of domestic content. FHWA regulations provide that a state’s standard “contract procedures may be

³⁷⁵ 23 C.F.R. § 635.410(b)(4) (2013).

³⁷⁶ Buy America Policy, 78 Fed. Reg. 41,492, 41,495 (July 10, 2013).

³⁷⁷ 23 C.F.R. § 635.410(c)(6) (2013).

³⁷⁸ *Id.*

³⁷⁹ Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, Div. K, § 130 (2007). This requirement has been repeated in subsequent appropriations bills. See Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, Div. A, § 123 (2009).

³⁸⁰ Buy America Waiver Notification System, 73 Fed. Reg. 19,927 (Apr. 11, 2008).

³⁸¹ FHWA, Notice of Buy America Waiver Request, <http://www.fhwa.dot.gov/construction/contracts/waivers.cfm>.

³⁸² SAFETEA-LU Technical Corrections Act of 2008, Pub. L. No. 110-244, § 117(a)(1)(A) (2008).

³⁸³ *Id.* at §§ 117(a)(1)(B), 117(b).

³⁸⁴ 23 U.S.C. § 313(e) (2013).

³⁸⁵ See, e.g., *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 502 (D.C. Cir. 2004).

used to assure compliance” with the FHWA Buy America provision.³⁸⁶

e. Multiple Funding Sources.—The FHWA Buy America provision requires FHWA to allow its grant recipients (e.g., state DOTs) to enact “more stringent requirements” on domestic content for products used in FHWA grant-funded projects.³⁸⁷ FHWA permits state DOTs to use “standard contract provisions that require the use of domestic materials and products, including steel and iron materials, to the same or greater extent as the” FHWA Buy America provision.³⁸⁸ For example, a 2012 decision by the U.S. Court of Appeals for the Third Circuit held that although the FHWA Buy America provision does not prohibit the use of “temporary bridges made of foreign steel,” a state DOT could still prohibit such foreign products under a state Buy America provision.³⁸⁹

Whether a state Buy America provision can be considered more stringent than the FHWA Buy America provision might not be a straightforward determination. While FHWA may have a stronger Domestic Content requirement for steel and iron, a comparable state Buy America provision might have stronger restrictions against foreign manufactured products. FHWA grant recipients must perform independent evaluations of a project’s compliance with both the FHWA Buy America provision and any potentially applicable state Buy America provision. The same principle generally applies to projects that receive grant funds from multiple federal agencies—the grant recipient should evaluate the project’s compliance with all potentially applicable Buy America provisions based on the funding source.³⁹⁰

2012 legislation by Congress could extend the FHWA Buy America provision even to contracts that are not funded by FHWA grants, including contracts funded by state DOTs or other federal agencies that are merely “eligible for assistance” from FHWA, as long as FHWA funds at least one contract in the overall project.³⁹¹ In that situation, state DOTs may now have to perform independent evaluations of each eligible contract under both the FHWA Buy America provision and any appli-

cable Buy America provision required by the funding source for that contract. FHWA has not issued final guidance or regulations implementing this legislation, which is discussed in more detail in the following section.

2. Legislative Revision (2012)

A revision to the FHWA Buy America provision was made by the 2012 USDOT appropriations bill known as the Moving Ahead for Progress in the 21st Century Act (MAP-21). Under this change, the FHWA Buy America provision applies “to all contracts eligible for assistance” from FHWA, regardless of the actual funding source of those contracts, as long as at least one contract on the “project” is funded with FHWA funds.³⁹²

For the purposes of this change, the “project” is defined to be any federal action that is subject to the National Environmental Policy Act (NEPA), i.e., any federal action “significantly affecting the quality of the human environment.”³⁹³ NEPA requires FHWA to account for environmental impacts of any such project, including the direct impacts, indirect or secondary impacts, and cumulative impacts.³⁹⁴ The cumulative impact of the federal action is “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”³⁹⁵ One purpose of the cumulative impact requirement is to prevent federal, state, and local government agencies from “segmenting” large projects into multiple smaller contracts, each of which (standing alone) may have an insignificant environmental impact, in order to circumvent NEPA environmental review for the overall project.³⁹⁶ The cumulative impact requirement extends the NEPA environmental review beyond a single federal contract, to all federal, state, and local government contracts that are reasonably related so as to comprise a single development project.³⁹⁷ With MAP-21, by applying the FHWA Buy America provision cumulatively to

³⁸⁶ 23 C.F.R. § 635.410(d) (2013).

³⁸⁷ 23 U.S.C. § 313(d) (2013).

³⁸⁸ 23 C.F.R. § 635.410(b)(2) (2013).

³⁸⁹ *Mabey Bridge & Shore, Inc. v. Schoch*, 666 F.3d 862, 871 (3d Cir. 2012).

³⁹⁰ *See, e.g., supra* § II.A.4.a.

³⁹¹ *Moving Ahead for Progress in the 21st Century Act*, Pub. L. No. 112–141, § 1518, 126 Stat. 405, 574 (2012) (to be codified at 23 U.S.C. § 313(g)).

³⁹² *Id.*

³⁹³ *Id.*; *see also* 42 U.S.C. § 4332(C) (2013).

³⁹⁴ 40 C.F.R. § 1508.8 (2013).

³⁹⁵ 40 C.F.R. § 1508.7 (2013).

³⁹⁶ *Coal. on Sensible Transp. Inc. v. Dole*, 642 F. Supp. 573, 591 (D.D.C. 1986), *aff’d*, 826 F.2d 60 (D.C. Cir. 1987 (“NEPA does not permit agencies to avoid review of cumulative effects by dividing projects into components.”)).

³⁹⁷ *See, e.g., Western N.C. Alliance v. N.C. Dep’t of Transp.*, 312 F. Supp. 2d 765, 772–73 (E.D.N.C. 2003).

all contracts on a single NEPA “project,” Congress similarly attempted to prevent the “segmenting” of highway projects to circumvent the FHWA Buy America provision.

a. Background.—The new MAP-21 requirement arose primarily out of controversy over the reconstruction of the Bay Bridge between San Francisco and Oakland. In 2000, the California Department of Transportation (Caltrans) accepted \$237 million in FHWA grant funds to help fund the project.³⁹⁸ By 2002, however, concerns arose that the resulting FHWA Buy America requirements would increase the reconstruction cost by \$200 million (due to higher prices of domestic steel).³⁹⁹ In 2003, in part to invoke the Price Differential exception, Caltrans announced bidding requirements that would factor “delay costs” for steel delivery into the bid price.⁴⁰⁰ In response to the bidding requirements, a number of domestic steel fabricators formed a unified consortium to invest in a new facility and pursue the steel delivery subcontract.⁴⁰¹ If prime contract bidders proposed to supply foreign steel, Caltrans required the bidders to also include an alternative price for the use of domestic steel.⁴⁰² Presumably the bidder would have to issue a subcontract to the domestic steel consortium if required to use domestic steel.

³⁹⁸ Greg Lucas & Lynda Gledhill, *Cost to Rebuild Bay Bridge Could Soar: Federal Rule Requires Use of Expensive Steel*, SAN FRANCISCO CHRON., July 7, 2002, available at 2002 WLNR 6856056.

³⁹⁹ *Id.* (“Department sources privately say the use of American steel will cause a \$200 million increase.”).

⁴⁰⁰ Lisa Vorderbrueggen, *Bay Bridge Work Delayed Again; Rising Costs Blamed: Caltrans, Citing a Weak U.S. Steel Market, Changes Bid Rules for Construction*, CONTRA COSTA TIMES, Oct. 22, 2003, available at 2003 WLNR 3089738. The design for the bridge called for very large girders, and there was the belief that no single domestic manufacturer had the existing facilities to manufacture the girders. Paul Rosta, *Caltrans Steels Up For Big Bid Changes: Rejecting a Sole Bid that Came in Too High, California Agency Makes Changes for Bay Crossing*, ENGINEERING NEWS-RECORD, Nov. 3, 2003, available at 2003 WLNR 3250864. By imposing a “delay cost” penalty on the domestic bids, the delay-adjusted domestic bids might be 25 percent higher than the bids using foreign steel, enabling the lower foreign bids to qualify for the Price Differential exception.

⁴⁰¹ Allan Brettman, *Steel Fabricators Join Hands for Bid*, PORTLAND OREGONIAN, Mar. 12, 2004, available at 2004 WLNR 20412567.

⁴⁰² *Id.*

In May 2004, Caltrans received just one bid for the eastern span. The bid was \$1.4 billion for the use of foreign steel, with an alternative bid of \$1.8 billion for the use of domestic steel.⁴⁰³ The domestic alternative was about 28 percent more expensive than the \$1.4 billion bid for foreign steel, appearing to justify the Price Differential exception. However, a challenge by the domestic steel manufacturers was likely, since they could argue that the bidder deliberately overstated the consortium’s costs to supply domestic steel (or that the bidder deliberately overstated the “delay costs” associated with supplying domestic steel). There was also controversy over whether the 25 percent Price Differential was satisfied—although the \$1.8 million domestic bid was 28 percent higher than the \$1.4 million foreign bid, calculated alternatively the \$1.4 million foreign bid was only 23 percent less than the \$1.8 million domestic bid.⁴⁰⁴

Caltrans had concerns that its acceptance of \$237 million in federal funds would now require it to pay an additional \$400 million for domestic steel.⁴⁰⁵ Caltrans began looking at “defederalizing” the eastern span by using no federal money for it.⁴⁰⁶ Congress responded in the 2005 USDOT appropriations bill known as the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) by stating the “Sense of Congress” that the FHWA Buy America provision “needs to be applied to an entire bridge project and not only to component parts of such project.”⁴⁰⁷ This legislation reiterated that domestic steel must be used “unless there is a finding that the inclusion of domestic materials will increase the cost of the overall pro-

⁴⁰³ Michael Cabanatuan, *Lone Bid for Bay Bridge Way Over Estimate: \$1.8 Billion Offer More than Double Caltrans’ Hope*, S.F. CHRONICLE, May 27, 2004, available at 2004 WLNR 7638950.

⁴⁰⁴ Michael Cabanatuan, *Sacramento: Caltrans May Be Able to Take Lower Bid for Bay Bridge: State Agency Says It Can Use Foreign Steel to Build Span, Although That’s Still Double the Original Construction Cost Estimate*, S.F. CHRON., May 28, 2004, available at 2004 WLNR 7640706.

⁴⁰⁵ Sean Holstege, *“Freeway on Stilts” Begets Costly Span*, OAKLAND TRIBUNE, May 28, 2004, available at 2004 WLNR 17168291.

⁴⁰⁶ Sean Holstege, *Questions May Delay Bay Bridge Call*, OAKLAND TRIBUNE, Dec. 6, 2004, available at 2004 WLNR 13146721.

⁴⁰⁷ Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 1928 (2005).

ject by more than 25 percent.”⁴⁰⁸ The legislation also stated that uncertainty over how to apply the Price Differential waiver “for major bridge projects threatens the domestic bridge industry.”⁴⁰⁹ SAFETEA-LU was enacted on August 10, 2005, just a couple of weeks after Caltrans approved a rebid package for the eastern span using no federal funds and no FHWA Buy America provision.⁴¹⁰ On October 5, 2005, FHWA published a memorandum reiterating that its practice was to apply the FHWA Buy America provision only to the individual contracts funded with FHWA funds.⁴¹¹

In 2006, Caltrans moved forward with its rebid procedures (including no FHWA Buy America provision and no domestic steel alternative bid price requirement),⁴¹² and in March 2006 it accepted a low bid of \$1.4 billion.⁴¹³ Although Caltrans was foregoing federal funds in order to avoid the FHWA Buy America provision, Caltrans argued that it could later apply to use the \$237 million in federal funds for other parts of the bridge construction.⁴¹⁴ Some in Congress viewed this as a deliberate attempt by FHWA and Caltrans to circumvent the FHWA Buy America provision.⁴¹⁵ In June 2006⁴¹⁶ and again in April 2007,⁴¹⁷ FHWA Administrator J. Richard Kapka testified before Congress that the FHWA Buy America provision applied only to federally funded contracts and that the provision was not violated on the Bay Bridge project.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ Sean Holstege, *Mood is Upbeat as Bridge Tower Cleared for Bids*, ALAMEDA TIMES-STAR, July 28, 2005, available at 2005 WLNR 24119473.

⁴¹¹ Holley Gilbert, *Cost, Law Figure in California Decision on Bridge Project*, PORTLAND OREGONIAN, Mar. 24, 2006, available at 2006 WLNR 4916576.

⁴¹² *Contractors Anticipate Rebidding of Signature Span*, ENGINEERING NEWS-RECORD, Jan. 23, 2006, available at 2006 WLNR 1650880.

⁴¹³ Gilbert, *supra* note 411.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*; J.T. Long, *This Time, Controversial Bay Area Span Brings in Two Bids*, ENGINEERING NEWS-RECORD, Apr. 3, 2006, available at 2006 WLNR 6027151.

⁴¹⁶ *Implementation of SAFETEA-LU: Hearing Before the Subcomm. on Highways, Transit and Pipelines of the H. Comm. on Transportation and Infrastructure*, 109th Cong. 11, 22–23 (June 7, 2006).

⁴¹⁷ *Buy America: Hearing Before the Subcomm. on Highways and Transit of the H. Comm. on Transportation and Infrastructure*, 110th Cong. 3–4 (Apr. 24, 2007).

The Bay Bridge controversy was renewed in late 2009, when delivery of steel from China was over 1 year late.⁴¹⁸ During the bidding process, a persistent factor in assessing the higher cost of domestic steel had been the perception that domestic steel manufacturers could not satisfy the delivery schedule demands of the Bay Bridge project, but the foreign steel suppliers could.⁴¹⁹ The steel shipments from China were finally completed in 2011, resulting in unfavorable publicity for Caltrans and its decision to forego federal funding to avoid the FHWA Buy America requirements.⁴²⁰ At a congressional hearing in December 2011, a number of Congressmen reiterated to Secretary of Transportation Ray LaHood that application of the Buy America provisions for transportation grants needed to be strengthened, pointing specifically to the Bay Bridge as an example of bad practices by grant recipients.⁴²¹

b. Legislative History.—The version of MAP-21 originally passed by the Senate in 2012 would have extended the antisegmentation requirement not just to FHWA, but also to FTA and Amtrak.⁴²² In other words, if FHWA grant funds, FTA grant funds, or Amtrak capital grant funds were used to fund any contract on a “project,” then all other contracts in that project would be subject to the respective Buy America provisions. This could have had major consequences for rail projects, where segmentation has long been an accepted practice for avoiding Buy America provisions. For example, shortly after passage of the STAA Buy America provision in the 1980s, the Sacramento regional transit authority received \$96 million in federal grant funds from FTA (then UMTA)

⁴¹⁸ Frank Haflich, *Bay Bridge Steel Delay Puts Completion Date in Question*, AMERICAN METAL MARKET, Nov. 2, 2009, available at 2009 WLNR 26488935.

⁴¹⁹ Frank Haflich, *Steel Fabricators Lash Out at Bay Bridge Suggestions*, AMERICAN METAL MARKET, Dec. 18, 2009, available at 2009 WLNR 26714047.

⁴²⁰ Donald L. Barlett & James B. Steele, *Big Boost for Chinese Steel*, PHILADELPHIA INQUIRER, Oct. 16, 2011, available at 2011 WLNR 21440404; David Barboza, *Bridge Comes to San Francisco With a Made-in-China Label*, N.Y. TIMES, June 26, 2011, available at 2011 WLNR 12698943.

⁴²¹ *The Federal Railroad Administration’s High-Speed and Intercity Passenger Rail Program: Mistakes and Lessons Learned: Hearing Before the H. Comm. on Transportation and Infrastructure*, 112th Cong. 17, 25 (Dec. 6, 2011).

⁴²² S. 1813, 112th Cong. §§ 1528, 20017, 35210 (2012).

toward its \$176 million light-rail project.⁴²³ Sacramento was permitted to segment the project by identifying 15 rail cars that would be built using nonfederal funds, and only the remaining 11 rail cars that would be built with federal funds would have to comply with the STAA Buy America provision.⁴²⁴ Likewise, a 1993 rail construction project by the Los Angeles county transportation authority was segmented into federally funded segments (which were required to comply with the FTA Buy America provision) and locally funded segments (which were not).⁴²⁵ Domestic industry representatives such as the Railway Progress Institute have repeatedly expressed concerns to Congress that this segmentation policy is used by FTA to circumvent the FTA Buy America provision.⁴²⁶ The version of MAP-21 passed by the Senate (with antiselementation provisions applicable to FTA and Amtrak, as well as FHWA) could have changed current practice for rail car and rail construction procurements.

There was significant support in Congress to apply the antiselementation provision to rail programs in 2012.⁴²⁷ Ultimately, however, Congress adopted the House version of the antiselementation provision, which was applicable only to FHWA.⁴²⁸ For its part, FRA has also adopted an internal antiselementation policy, so that the FRA

Buy America provision will also “apply to items purchased with non-grant funds if used in a grant-funded project.”⁴²⁹ This antiselementation trend is likely to result in legal disputes over what constitutes a “project” for purposes of extending the Buy America requirements to contracts not funded with federal grants. Also, for jointly funded projects (e.g., where both FHWA and FRA funds are used to fund separate contracts related to the same overall transportation development project), the situation could arise where the FHWA Buy America provision applies to FRA grant funds and the FRA Buy America provision applies to FHWA grant funds. In such joint funding situations, the grant recipient will need to confirm that both Buy America provisions are satisfied for the entire project.

3. Rulemaking History

a. Segmentation.—Despite Congress adopting the NEPA definition of “project” for purposes of evaluating the FHWA Buy America provision, in an NPRM issued jointly thereafter by FHWA, FRA, and FTA, the agencies stated that “in the highway context, ...issuance of Buy America waivers...are not considered to be environmental review responsibilities that can be assigned.”⁴³⁰ Thus, in a highway project with multiple federal funding sources (e.g., with portions funded by FHWA, FRA, or FTA), each agency retains authority over requests for waivers from its own Buy America provision. Even though the FHWA Buy America provision applies to the entire project (including segments or components funded by FRA or FTA), the other agencies do not assign to FHWA the authority to issue waivers from the FRA or FTA Buy America provisions. Project segments funded by FRA or FTA conceivably have to satisfy multiple Buy America provisions or obtain waivers from multiple agencies, including both the funding agency and FHWA.

As a result of MAP-21, the FHWA Buy America provision can extend to contracts that would otherwise not be subject to any Buy America provision. In December 2012, for example, FHWA determined that “utility work” on FHWA-funded projects (such as state-funded relocation of utilities out of the path of new highway development) is subject to the FHWA Buy America provision, even if the utility work is not reimbursed with

⁴²³ Dale Vargas & Ricardo Pimentel, *Light-Rail Deal Gets House Attention: Agreement on Violation of Buy America Regulations Triggers Probe*, SACRAMENTO BEE, Jan. 31, 1987, available at 1987 WLNR 1810794.

⁴²⁴ *Id.*

⁴²⁵ *Rail Project Bidding Altered: Foreign, Domestic Steelmakers Uncertain of Process*, AMERICAN METAL MARKET, Jan. 18, 1993, available at 1993 WLNR 5020589.

⁴²⁶ See 134 CONG. REC. S10,142 (July 27, 1988) (statement of Richard Griffin, General Signal Corp.) (“Congress should investigate the possibility of modifying the [FTA] authorizing legislation to preclude a transit property from ‘segmenting’ its funds, thereby avoiding compliance with all federal requirements. ...Congress should evaluate whether or not the entire operation of a transit agency should be subject to Buy America.”).

⁴²⁷ See 158 CONG. REC. H3,045 (May 17, 2012).

⁴²⁸ Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, § 1518 (2012); see also Tom Ichniowski, *MAP-21 Toughens ‘Buy America’ Requirements, U.S. Industry Says*, ENGINEERING NEWS-RECORD, Aug. 6, 2012, available at 2012 WLNR 17143377 (“[A] Senate-approved rail title that included ‘Buy America’ provisions...was dropped in the late rounds of negotiations on the final MAP-21 bill.”).

⁴²⁹ *FRA Buy America Webinar*, *supra* note 60, at 9.

⁴³⁰ Surface Transportation Project Delivery Program Application Requirements, 78 Fed. Reg. 53,712, 53,715 (Aug. 30, 2013).

FHWA funds.⁴³¹ This prompted concern from state DOTs and transportation industry associations that projects would be delayed while utility companies, who had not historically been subject to Buy America requirements, became compliant.⁴³² Therefore, on July 11, 2013, FHWA granted a temporary reprieve to utility companies, delaying application of the FHWA Buy America provision to state-funded utility relocations only through December 31, 2013.⁴³³

However, state DOTs and transportation industry associations continue to express concern about how the antisegmentation legislation will be applied. Despite the language of MAP-21, which would apply the FHWA Buy America provision to all contracts on a project, Caltrans has recommended that Buy America provisions should apply

on[]ly to those contracts that utilize federal funding. FHWA, FTA and FRA all apply [Buy America] provisions differently on those projects where they are the federal lead agency. Caltrans recognizes that utility companies are struggling to develop internal processes to identify materials that are subject to [Buy America] when the rules are applied differently from one project to another.⁴³⁴

The American Road and Transportation Builders Association has expressed concern that, as a result of MAP-21, FHWA will now have to “determine Buy America compliance on many utility and railroad contracts it would not [ordinarily] review through its customary oversight responsibilities.”⁴³⁵ As a result, “owners may delay con-

struction of a project if there is uncertainty about the Buy America compliance of the utility or railroad contract.” As of this publication, however, FHWA has not implemented any rules or regulations addressing the application of the FHWA Buy America provision to railroad contracts funded by non-FHWA sources.

b. Manufactured Products Waiver.—There is a longstanding general waiver from the FHWA Buy America provision for manufactured products other than steel or iron. Dating back to the original 1978 STAA Buy America provision (which nominally established domestic preferences for all manufactured goods and unmanufactured goods), FHWA issued regulations “temporarily” applying the domestic preference only to *structural* steel (defined as “shapes, plates, H-piling, and sheet piling”).⁴³⁶ This granted a waiver to all other manufactured products, including steel components of manufactured products. The purpose for this broad waiver was FHWA’s determination that “foreign structural steel is the only product having a significant nationwide effect on the cost of Federal-aid highway construction projects.”⁴³⁷ Removing coverage for manufactured products other than structural steel was justified in part based on the fact that the vast majority of highway grant funds were spent on steel, cement, asphalt, and aggregate materials (including sand)—mechanical and electrical equipment (such as traffic signals) accounted for only a small percentage of federal highway grant funds at the time.

With the 1982 STAA Buy America provision, Congress appeared to modify the domestic preference requirements for FHWA grants, applying domestic preferences specifically to steel and manufactured products. However, FHWA implemented an interim rule in January 1983 specifically retaining its general waiver for manufactured products and soliciting public comment.⁴³⁸ Several commenters, many apparently from state DOTs, told FHWA “that it is virtually impossible for a contracting agency to trace all components of some manufactured products incorporated into highway products; *e.g.*: signal controllers, glass for

⁴³¹ Letter from Victor M. Mendez, FHWA Administrator, to John Horsley, AASHTO Executive Director (Dec. 20, 2012), available at <https://www.fhwa.dot.gov/construction/contracts/121220.cfm>.

⁴³² Letter from AASHTO et al. to Ray LaHood, USDOT Secretary et al., regarding Application of Buy America Requirements to Utility Relocations (June 28, 2013), available at http://www.apta.com/gap/letters/2013/Pages/130628_LaHood_Foxx.aspx.

⁴³³ Memo from Gloria M. Shepherd, FHWA Associate Administrator for Infrastructure, to FHWA Division Administrators et al., regarding Application of Buy America to non FHWA-funded Utility Relocations (July 11, 2013), available at <https://www.fhwa.dot.gov/construction/contracts/130711.cfm>.

⁴³⁴ Comments, California Department of Transportation, Docket No. FHWA-2013-0041 (Sep. 9, 2013), available at <http://www.regulations.gov/#!documentDetail;D=FHWA-2013-0041-0062>.

⁴³⁵ Comments, American Road and Transportation Builders Association, Docket No. FHWA-2013-0041 (Sep. 9, 2013), available at <http://www.regulations.gov/#!documentDetail;D=FHWA-2013-0041-0048>.

⁴³⁶ 43 Fed. Reg. 53,717 (Nov. 17, 1978); see also 45 Fed. Reg. 77,455 (1980).

⁴³⁷ Letter from Elmer B. Staats, U.S. Comptroller General, to Hon. Adam Benjamin, Jr., Docket No. B-194859 (Aug. 3, 1979), available at <http://www.gao.gov/assets/130/127424.pdf>.

⁴³⁸ 48 Fed. Reg. 1,946 (Jan. 17, 1983); see also 48 Fed. Reg. 23,631 (May 26, 1983) (amending the Jan. 17, 1983, interim rule).

the signal heads, almost all electrical equipment,” etc.⁴³⁹ In November 1983, in its final rule, FHWA agreed “that it is very difficult to identify the various materials and then trace their origin. A manufactured product such as a traffic controller which has many components is particularly difficult to trace.”⁴⁴⁰ Furthermore, despite the fact that the 1982 STAA Buy America provision expressly applied to manufactured products, FHWA concluded that it “does not believe that all manufactured products must be covered,” because “FHWA has never covered all manufactured products under its Buy America regulation and Congress did not specifically direct a change in that policy.”⁴⁴¹ Therefore, FHWA granted a general Public Interest waiver for all “manufactured products other than steel and cement manufactured products.”⁴⁴² (Cement was removed from coverage by Congress in 1984.⁴⁴³) At the same time, however, FHWA expanded coverage of its Buy America requirements beyond structural steel “to include all steel products.”⁴⁴⁴ In 1997, FHWA clarified its policy to explain that, despite its Buy America waiver for manufactured products, “the steel components of a predominately steel product must be of domestic manufacture unless the value of the components is less than the minimal use threshold for the project.”⁴⁴⁵ Therefore, manufactured products that are predominantly steel or iron are not exempted by the Public Interest waiver for manufactured goods and must satisfy the FHWA Buy America requirement of 100 percent domestic steel or iron.

In light of FHWA’s waiver for manufactured products, questions have arisen over the years as to how to treat steel and iron components of manufactured products, where the manufactured products themselves are not predominantly steel or iron. In the past, FHWA has taken the position that all steel and iron components of manufac-

tured products must be domestic.⁴⁴⁶ However, FHWA clarified its position in 2012, in response to increased scrutiny of ARRA projects, explaining that its manufactured products waiver “was intended to encompass miscellaneous steel or iron components and subcomponents that are commonly available as off-the-shelf products such as faucets, door hardware, and light bulbs.”⁴⁴⁷ Under this 2012 clarification, for manufactured products that are not predominantly steel or iron, “miscellaneous steel or iron components” of those products (such as wires, hooks, brackets, hinges, nuts, bolts, washers, and screws) are exempted by FHWA’s manufactured products waiver and thus are not required to be domestic.⁴⁴⁸ Products “manufactured predominantly of steel or iron” are not subject to the waiver and must be domestic.⁴⁴⁹ But in its 2012 clarification, FHWA further stated that products “manufactured predominantly of steel or iron” are those that consist of “at least 90% steel or iron content when it is delivered to the job site for installation.”⁴⁵⁰ The 90 percent steel or iron requirement makes it clear that most steel incorporated into construction projects (including reinforcing steel) must be domestic, but most mechanical and electrical equipment (such as vehicles) are subject to the manufactured products waiver even if it contains a significant amount of steel or iron content.

⁴³⁹ Buy America Requirements, 48 Fed. Reg. 53,099 (Nov. 25, 1983).

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ Pub. L. No. 98-229, § 10 (1984).

⁴⁴⁴ Buy America Requirements, 48 Fed. Reg. 53,099 (Nov. 25, 1983).

⁴⁴⁵ Memo from Donald P. Steinke, FHWA Chief of Highway Operations, to Edward V.A. Kussy, FHWA Chief Counsel, regarding Buy America Policy Response (Dec. 22, 1997), available at <http://www.fhwa.dot.gov/programadmin/contracts/122297.cfm>.

⁴⁴⁶ FHWA, Buy America Q&A for Federal-aid Program (Dec. 12, 2013), http://www.fhwa.dot.gov/construction/contracts/buyam_qa.cfm (“Buy America requirements apply to any steel or iron component of a manufactured product regardless of the overall composition of the manufactured product....”); FHWA, CONTRACT ADMINISTRATION CORE CURRICULUM PARTICIPANT’S MANUAL AND REFERENCE GUIDE 23 (2006) (“All foreign steel and iron materials and products are covered by Buy America regardless of the percentage they comprise in a manufactured product or the form they take.”); FHWA, Buy America Application to Federal-aid Highway Construction Projects (July 29, 2002), <http://www.fhwa.dot.gov/programadmin/contracts/buyamgen.cfm> (“All steel and iron materials are covered by Buy America regardless of the percentage they comprise in a manufactured product or form they take.”).

⁴⁴⁷ Memo from John R. Baxter, FHWA Associate Administrator for Infrastructure, to FHWA Division Administrators et al. (Dec. 21, 2012), available at <http://www.fhwa.dot.gov/construction/contracts/121221.cfm>.

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

The 2012 clarification that FHWA considers its manufactured products waiver to apply to all but those comprised of 90 percent steel or iron “triggered opposition from various groups in the manufacturing industry,” as well as some Congressmen.⁴⁵¹ In particular, there was concern that FHWA grant funds were being used to purchase a significant amount of foreign vehicles, including construction equipment and even locomotives, since FHWA grant funds may be used to purchase such vehicles under the Congestion Mitigation and Air Quality Improvement (CMAQ) program.⁴⁵² Therefore, in July 2013, in the *Federal Register*, FHWA solicited public comments on whether “FHWA needs to reconsider its criteria for applying Buy America requirements to manufactured products.”⁴⁵³ All issues related to the FHWA manufactured products waiver were open for consideration, including whether there were specific categories of manufactured products that should or should not be subject to the waiver, how to define a “predominantly steel or iron product,” and whether vehicles should be subject to the waiver.⁴⁵⁴ Specifically, FHWA solicited comments on the following question:

What standard should apply to locomotives, rail cars, and locomotive parts that are purchased for locomotive retrofits? Should the FHWA require the application of the Federal Railroad Administration’s policy, which views locomotives and rail cars as “end products” that must be assembled in the United States and all components (including components purchased for retrofits) be manufactured in the United States?⁴⁵⁵

Representative comments received from domestic manufacturers included those from the Municipal Castings Association (MCA), which argued

⁴⁵¹ Buy America Policy, 78 Fed. Reg. 41,492, 41,493 (July 10, 2013). Additionally, domestic steel manufacturers and labor organizations filed a lawsuit against FHWA over its 2012 clarification, seeking a judicial declaration that the 2012 memorandum “amounts to an unlawfully promulgated legislative rule which is inconsistent with [FHWA]’s statutory authority and which has upset over thirty years of practice and precedent in [FHWA]’s administration of its duties under the Buy America statute, 23 U.S.C. § 313.” Complaint for Injunctive and Declaratory Relief at 2, *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union v. FHWA*, No. 13-1301 (D.D.C. Oct. 4, 2013). The litigation is ongoing at the time of this writing.

⁴⁵² Buy America Policy, 78 Fed. Reg. 41,492, 41,494 (July 10, 2013).

⁴⁵³ *Id.* at 41,495.

⁴⁵⁴ *Id.* at 41,495–96.

⁴⁵⁵ *Id.* at 41,496.

for streamlining the Buy America requirements for rolling stock across federal agencies:

The MCA sees little value in the adoption of a standard that departs from those Buy America standards applied to rolling stock by fellow Departmental agencies, the FTA and FRA (as discussed above). A consistent approach to the domestic content requirements of rolling stock should be applied Department-wide. The MCA urges the FHWA to apply the Title 23 Buy America requirements to procurements of rolling stock in a manner requiring no less domestic component content than that required under procurements of rolling stock for federal-aid transit projects.⁴⁵⁶

Likewise, Norfolk Southern Corporation urged FHWA to either adopt the FTA 60 percent domestic content requirement for rail rolling stock or else to grant a nationwide waiver from the FHWA Buy America provision for all locomotives.⁴⁵⁷

Similarly, several labor organizations recommended, at minimum, that FHWA adopt the FTA 60 percent domestic content requirement for rail rolling stock, increasing over time to the FRA 100 percent domestic content requirement for rail rolling stock.⁴⁵⁸ Likewise, CSX Corporation recommended that “for locomotives, FHWA maintain consistency with the policy of the Federal Railroad Administration under which locomotives and rail cars are considered ‘end products’ and all end products are assembled and all components are manufactured in the United States.”⁴⁵⁹ However, CSX also sought leeway on the domestic content requirement of locomotives:

[T]racking the source of steel for each of these components, especially the engines and electrical components, is overly burdensome and essentially impossible in a global economy. ...The application of the Buy America require-

⁴⁵⁶ Comments, Municipal Castings Association, Docket No. FHWA-2013-0041 (Sep. 8, 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=FHWA-2013-0041-0059>.

⁴⁵⁷ Comments, Norfolk Southern Corp., Docket No. FHWA-2013-0041 (Sep. 9, 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=FHWA-2013-0041-0072>.

⁴⁵⁸ Comments, United Steelworkers Association, Docket No. FHWA-2013-0041 (Sep. 9, 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=FHWA-2013-0041-0047>; Comments, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Docket No. FHWA-2013-0041 (Sep. 9, 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=FHWA-2013-0041-0063>.

⁴⁵⁹ Comments, CSX Corporation, Docket No. FHWA-2013-0041 (Sep. 3, 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=FHWA-2013-0041-0034>.

ment in this context is clearly inconsistent with the public interest. ...As a result, the option to request a waiver should remain in place.⁴⁶⁰

In January 2014, FHWA announced that, based on the public comments received, FHWA will probably issue new formal regulations, which may supersede the guidance in its 2012 memorandum.⁴⁶¹ As of the publication of this digest, FHWA has not issued a final rule regarding changes to its manufactured products waiver or applicability of the FHWA Buy America provision to rail rolling stock. However, a number of recent Public Interest waivers granted by FHWA for vehicles purchased under the CMAQ program⁴⁶² indicate some movement in the direction of applying the FHWA Buy America provision to rolling stock, suggesting that FHWA does not consider its general waiver for manufactured products to exempt such vehicles from the FHWA Buy America provision. FHWA has very recently stated that it prefers “to no longer process Buy America waivers for the purchase of transit vehicles.”⁴⁶³ In response, USDOT has expressed its preference for CMAQ funds for rolling stock to “be transferred [from FHWA] to FTA to be administered under applicable FTA requirements,” including the FTA Buy America provision.⁴⁶⁴ This may allow FHWA to avoid deciding how the FHWA Buy America provision is to be applied to rolling stock. It would also subject rolling stock purchased under the CMAQ program to FTA’s 60 percent domestic content requirement for rolling stock rather than FRA’s 100 percent domestic content requirement for rolling stock or FHWA’s 100 percent domestic content requirement for “predominantly steel or iron” manufactured products.

4. Waiver Case Studies

a. Railroad Turnouts.—In June 2008, on its relatively new Web site for informal notice-and-

⁴⁶⁰ *Id.*

⁴⁶¹ Motion for Stay of Proceedings to Allow Agency to Complete New Rulemaking or in the Alternative for Extension of Time at 2, United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Serv. Workers Int’l Union v. FHWA, No. 13-1301 (D.D.C. Jan. 28, 2014).

⁴⁶² See *infra* § III.B.4.b.

⁴⁶³ Memo from Fred R. Wagner, FHWA Chief Counsel, and Dorval R. Carter Jr., FTA Chief Counsel, to FHWA Administrators, regarding Transfer of Funds for Transit Projects (Dec. 11, 2013), available at <http://www.fhwa.dot.gov/construction/contracts/131211.cfm>.

⁴⁶⁴ *Id.*

comment, FHWA posted a notice soliciting comments on whether FHWA should grant a waiver of its Buy America provision to IDOT to purchase railroad turnout braces, manganese castings (“frogs”), guard rails, and weld kits.⁴⁶⁵ In July 2008, in the *Federal Register*, FHWA announced that because it received no comments within 15 days, it concluded “that there are no domestic manufacturers for these products” and a Nonavailability waiver was appropriate.⁴⁶⁶ The waiver (for \$206,000 worth of foreign turnout parts) was immediately effective, although FHWA invited additional comment on its Web site for a 15-day period.

The following year, in May 2009, FHWA again posted a notice on its Web site soliciting comments on whether FHWA should grant IDOT another waiver to purchase turnout braces, manganese castings, guard rails, and weld kits.⁴⁶⁷ Again, FHWA received no comments within 15 days, which suggested to FHWA that the turnout parts “may not be available domestically.”⁴⁶⁸ This time, during the 15-day comment period, “FHWA conducted an additional nationwide review to locate potential domestic manufacturers.”⁴⁶⁹ Finding no domestic manufacturers, in July 2009 FHWA again granted a Nonavailability waiver (this time for \$699,645 worth of foreign turnout parts), effective immediately.⁴⁷⁰ Again, FHWA invited additional comment on its Web site for a 15-day period after granting the waiver.

The IDOT turnout waivers illustrate a number of unique features of how FHWA administers the FHWA Buy America provision. First, it is unlikely that the notices provided on the Web site satisfied FHWA’s statutory informal notice-and-comment requirements, since they did not indicate that FHWA intended to grant the waivers, or offer any

⁴⁶⁵ FHWA, Request (June 5, 2008), available at <http://web.archive.org/web/20130606200547/http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=12> (seeking comments on IDOT’s Buy America waiver request for railroad turnout components).

⁴⁶⁶ Buy America Waiver Notification, 73 Fed. Reg. 42,894 (July 23, 2008).

⁴⁶⁷ FHWA, Request (May 20, 2009), available at <http://web.archive.org/web/20130606174129/http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=33> (seeking comments on IDOT’s Buy America waiver request for railroad turnout components).

⁴⁶⁸ Buy America Waiver Notification, 74 Fed. Reg. 32,219 (July 7, 2009).

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

justification for the waivers.⁴⁷¹ In fact, the notices may have been unclear—a typical reader may not have understood that the waiver sought was for railroad turnout parts. The notices contained very little product specification or manufacturers information to identify the parts, and there was no project description indicating that these were railroad projects.⁴⁷² In both cases, public comments were received only after the waiver notice appeared in the *Federal Register*. The public may have very little actual notice of waivers of the FHWA Buy America provision until the waivers are granted. Domestic suppliers of construction materials and manufactured products for highway and railroad projects must closely monitor FHWA's Web site in order to timely participate in the notice-and-comment process for potential waivers.

Second, the IDOT waivers illustrate what may be a lower standard for Nonavailability waivers under the FHWA Buy America provision than other transportation grant Buy America provisions. There is no indication that the grant recipient was required to show evidence that it was unable to obtain the turnout parts from domestic sources. In the 2008 waiver, FHWA based its waiver determination solely on the lack of public comments on its Web site in the 15-day period.⁴⁷³ Even in the 2009 waiver, when FHWA performed its own independent search for domestic sources, it did so within the 15-day online comment period.⁴⁷⁴ As a result, FHWA granted the Nonavailability waivers for railroad turnout parts very quickly, as opposed to FRA waivers in similar circumstances, which have involved months-long searches for domestic manufacturers working with NIST-MEP and concessions from manufacturers to increase domestic content in the future.⁴⁷⁵

Finally, these waivers may indicate a distinction between how railroad turnouts are treated for purposes of the FHWA and FRA Buy America provisions. Under the FRA Buy America provision, turnouts are considered manufactured products, and the parts for which IDOT sought waivers would be considered components or possibly subcomponents (in which case FRA would not re-

quire the subcomponents to be domestic).⁴⁷⁶ Under the FHWA Buy America provision, however, manufactured products are waived, unless they are composed of 90 percent steel or iron. FHWA may not have considered treating the turnout itself as a manufactured product subject to the waiver, instead treating the turnout parts (such as the frogs) as predominantly steel or iron construction materials that must be evaluated individually for compliance with the FHWA Buy America provision.

Shortly after the 2009 IDOT waiver, in November 2009, FHWA again posted a notice on its Web site soliciting comments on whether FHWA should grant ODOT a waiver to purchase turnout braces, manganese castings, guard rails, and weld kits.⁴⁷⁷ This time, FHWA received a number of comments, most indicating that the turnout braces and manganese castings were manufactured domestically by Nortrak but confirming that the guard rails were not rolled in the United States.⁴⁷⁸ FHWA's subsequent investigation was more detailed than it was for the IDOT request, as a final decision was not published in the *Federal Register* until June 2010. Although FHWA granted a Nonavailability waiver for the guard rail, it concluded that Nonavailability waivers were "not appropriate for Manganese turnout castings, LV braces, and Weld kits" (despite previously granting Nonavailability waivers to IDOT for those parts).⁴⁷⁹

b. Public Interest Waivers for Rolling Stock.—FHWA has not traditionally dealt with application of the FHWA Buy America provision to rolling stock.⁴⁸⁰ However, in November 2011, in the *Federal Register*, FHWA addressed waiver requests from Alameda County, California,⁴⁸¹ and San Francisco County, California,⁴⁸² to purchase

⁴⁷⁶ *FRA Buy America Webinar*, *supra* note 60, at 14.

⁴⁷⁷ FHWA, Request (Nov. 13, 2009), available at <http://web.archive.org/web/20130606190500/http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=41> (seeking comments on ODOT's Buy America waiver request for railroad turnout components).

⁴⁷⁸ Buy America Waiver Notification, 75 Fed. Reg. 37,875 (June 30, 2010).

⁴⁷⁹ *Id.*

⁴⁸⁰ Buy America Waiver Notification, 76 Fed. Reg. 72,027 (Nov. 2, 2011) ("Vehicles, however, are not the types of products that were initially envisioned as being purchased with Federal-aid highway funds when Buy America was first enacted.")

⁴⁸¹ *Id.*

⁴⁸² Buy America Waiver Notification, 76 Fed. Reg. 72,028 (Nov. 2, 2011).

⁴⁷¹ See *supra* notes 465, 467.

⁴⁷² *Id.*

⁴⁷³ Buy America Waiver Notification, 73 Fed. Reg. 42,894 (July 23, 2008).

⁴⁷⁴ Buy America Waiver Notification, 74 Fed. Reg. 32,219 (July 7, 2009).

⁴⁷⁵ See *supra* § II.A.4.e.

electric vehicles and hybrid vehicles using FHWA funds under the CMAQ program. In March 2012, FHWA addressed a similar request by Merced County, California.⁴⁸³ In all of these cases, FHWA granted a “partial” Public Interest waiver: the grant recipients could purchase the vehicles on the condition that “final assembly” took place in the United States, regardless of domestic content. In granting these “partial” waivers, FHWA did not address its existing Public Interest waiver for manufactured products, nor whether that waiver applied to vehicles. In fact, FHWA implied that a waiver was required for vehicle purchases because “FHWA has not located a vehicle that meets a 100 percent domestic iron and steel content requirement.”

In March 2012, around the time it was granting the Merced County waiver, FHWA published on its Web site a waiver request from the Vermont Agency of Transportation (VTrans) to purchase vehicles under the CMAQ program. FHWA received a number of comments, many questioning the “applicability” of the FHWA Buy America provision to vehicle procurements in light of FHWA’s waiver for manufactured projects. It took FHWA more than 1 year to address this waiver request. Finally, in June 2013, FHWA granted a “partial” Public Interest waiver request for the VTrans vehicles,⁴⁸⁴ as well as 74 other projects involving the purchase of “3,500 vehicles (including sedans, vans, pickups, SUVs, trucks, buses, and equipment, such as backhoes, street sweepers, and tractors).”⁴⁸⁵ This Public Interest waiver is not a general waiver for all vehicles, but rather a formal waiver of any domestic content requirement for *these specific projects*, conditioned on final assembly of the vehicles in the United States. At that time, FHWA stated that it was still trying to determine “what standards should apply to vehicles.” Shortly thereafter, FHWA issued its NPRM concerning whether vehicles should be subject to its general Public Interest waiver for all manufactured products.⁴⁸⁶ As of this publication, FHWA has not issued a final ruling, although in the interim it has continued to grant “partial” Public

Interest waivers for specific vehicle projects, conditioned on final assembly in the United States.⁴⁸⁷

These recent “partial” Public Interest waivers for vehicles, along with FHWA’s general Public Interest waiver for manufactured products, illustrate FHWA’s lower standard for Public Interest waivers than other transportation grant agencies, for which Public Interest waivers tend to be controversial. Although final guidance on vehicles is forthcoming, these recent waivers also suggest that FHWA is likely to impose a lower standard on domestic content for rolling stock than other transportation grant agencies (and lower than Congress originally imposed on FHWA with the 1982 STAA Buy America provision). FHWA has stated recently that it “does not believe that application of a domestic content standard should be applied to the purchase of vehicles.”⁴⁸⁸ The recent waivers suggest, however, that FHWA is leaning toward requiring final assembly of vehicles in the United States (which it has not traditionally required for other manufactured products).

While the controversy over how to handle vehicles has been ongoing, FHWA has also dealt with at least one waiver request for an apparent locomotive retrofit project under the CMAQ program. In August 2012, FHWA published a notice on its Web site to solicit public comment regarding a waiver request by Kentucky DOT for a diesel engine-generator set (“genset”) and air compressor.⁴⁸⁹ The notice provided very little detail (the products were not clearly identified by manufacturer or specifications, and the project was not clearly identified as a rail or locomotive project). Consequently, there were few comments and most were in favor of the waiver request, including comments apparently from the manufacturers of the products for which the waiver was sought. Stauffer Diesel, Inc. (doing business as Stadco Generators), commented that it had “7 years of experience building generator sets for ultra-low emissions locomotives,” and that its genset “is engineered and built in the U.S., using a diesel engine with less than 34% foreign content.”⁴⁹⁰ R.J.

⁴⁸³ Buy America Waiver Notification, 77 Fed. Reg. 19,410 (Mar. 30, 2012).

⁴⁸⁴ Buy America Waiver Notification, 78 Fed. Reg. 36,295 (June 17, 2013).

⁴⁸⁵ Buy America Waiver Notification, 78 Fed. Reg. 36,296 (June 17, 2013).

⁴⁸⁶ Buy America Policy, 78 Fed. Reg. 41,492, 41,495–96 (July 10, 2013).

⁴⁸⁷ Buy America Waiver Notification, 79 Fed. Reg. 33,633 (June 11, 2014); Buy America Waiver Notification, 78 Fed. Reg. 79,560 (Dec. 30, 2013).

⁴⁸⁸ Buy America Waiver Notification, 78 Fed. Reg. 70,395 (Nov. 25, 2013).

⁴⁸⁹ FHWA, Request (Aug. 22, 2012), <http://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=79> (seeking comments on Buy America waiver request for iron and steel components of genset and compressor).

⁴⁹⁰ *Id.*

Corman Railroad Group (doing business as Railpower Locomotives) commented that “all the final assembly of the Railpower GenSet locomotives and subsystems is performed in the United States,” and that it purchased components from other domestic vendors where possible. Although its genset was not 100 percent domestic, Railpower commented that its competitor’s products “also do not consist of 100% domestic steel (or iron).”⁴⁹¹

In March 2013, FHWA issued a Nonavailability waiver for the parts, concluding “that there are no domestic manufacturers of the iron and steel products in GenSet diesel engine and air compressor for CMAQ project in the Commonwealth of Kentucky.”⁴⁹² Once again, FHWA did not discuss the applicability of its general waiver for manufactured products to these components of rail rolling stock, perhaps because these were predominantly steel or iron products to which the general waiver does not apply. It is unclear why FHWA used the Nonavailability waiver for this locomotive project rather than the “partial” Public Interest waiver that it was using for vehicle projects, since the same criteria appear to be satisfied (final assembly in the United States but less than 100 percent domestic content). In its NPRM issued shortly thereafter, FHWA proposed to address the standard for locomotives and locomotive retrofits along with vehicles.⁴⁹³ However, as of this publication, FHWA has not issued its final guidance. USDOT recently expressed its preference for CMAQ funds for rolling stock to “be transferred [from FHWA] to FTA to be administered under applicable FTA requirements,” including the FTA Buy America provision.⁴⁹⁴ This may allow FHWA to avoid deciding how the FHWA Buy America provision is to be applied to rolling stock.

C. FTA Provision

1. Statutory Language

a. Coverage and Applicability.—The FTA Buy America provision requires all steel, iron, and manufactured products used in a project to be “produced in the United States” in order for FTA

grant funds to be used in the project.⁴⁹⁵ In part because FTA grant funds have long been applied both to major construction projects and rolling stock procurements, the FTA Buy America provision has been the subject of far more legislative and administrative attention than any of the other transportation grant provisions. The voluminous guidance from FTA applicable to railroad development and rail rolling stock procurement projects is synthesized herein.

• Construction Materials

FTA has interpreted the requirement for domestic steel and iron to apply to “all construction materials made primarily of steel or iron,” including “running rail and contact rail.”⁴⁹⁶ This is analogous to what FHWA considers to be “predominantly steel or iron products.”⁴⁹⁷ However, whereas FHWA considers predominantly steel or iron products to be those that are 90 percent steel or iron, “FTA believes that it is not appropriate to attach a percentage” of steel/iron content to its definition of construction materials made primarily of steel or iron.⁴⁹⁸ Under the FTA Buy America provision, for construction materials “made primarily of steel or iron” to be considered domestic, “[a]ll steel and iron manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives.”⁴⁹⁹

Although the FTA Buy America provision only applies to steel, iron, and manufactured products, FTA grant recipients should be aware that there are older FTA decisions that treat construction projects as manufactured products: “[T]he deliverable of the construction contract is considered as the end product and the construction materials used therein are considered components of the end product.”⁵⁰⁰ Since all components of manufactured products must be domestic under the FTA Buy America provision,⁵⁰¹ the implication is that all construction materials (not just primarily steel or iron construction materials) incorporated into

⁴⁹¹ *Id.*

⁴⁹² Buy America Waiver Notification, 78 Fed. Reg. 19,063 (Mar. 28, 2013).

⁴⁹³ Buy America Policy, 78 Fed. Reg. 41,492, 41,496 (July 10, 2013).

⁴⁹⁴ Memo from Fred R. Wagner and Dorval R. Carter, Jr., *supra* note 463.

⁴⁹⁵ 49 U.S.C. § 5323(j)(1) (2013); *see also* 49 C.F.R. § 661.5(a) (2013).

⁴⁹⁶ 49 C.F.R. § 661.5(c) (2013).

⁴⁹⁷ *See supra* notes 445–450 and accompanying text.

⁴⁹⁸ Buy America Requirements, 61 Fed. Reg. 6,300 (Feb. 16, 1996).

⁴⁹⁹ 49 C.F.R. § 661.5(b) (2013).

⁵⁰⁰ 46 Fed. Reg. 5,808 (Jan. 19, 1981).

⁵⁰¹ 49 C.F.R. § 661.5(d)(2) (2013) (“All of the components of the product must be of U.S. origin.”).

an FTA-funded construction project must be domestic. In 2007, FTA formally adopted a list of typical steel and iron end products, which includes “structures, bridges, and trackwork, including running rail, contact rail, and turnouts.”⁵⁰² At the same time, FTA formally adopted a list of typical “manufactured end products,” which includes “[i]nfrastructure projects not made primarily of steel or iron, including structures (terminals, depots, garages, and bus shelters).”⁵⁰³ Again, if these structures are considered manufactured products, the implication is that 100 percent of their components (i.e., all construction materials, not just steel and iron) must be domestic.⁵⁰⁴ There is very little guidance and no recent FTA waiver decisions applying the manufactured products standard to constructed facilities under the FTA Buy America provision, but grant recipients should be aware that there may be heightened domestic preferences for construction materials in addition to steel and iron in FTA-funded construction projects.

- **Manufactured Products**

For a manufactured product to be considered domestic under the FTA Buy America provision, “[a]ll of the manufacturing processes for the product must take place in the United States,” and “[a]ll of the components of the product must be of U.S. origin.”⁵⁰⁵ A component, however, is considered domestic as long as “it is manufactured in the United States,” but its subcomponents need not be domestic.⁵⁰⁶ In other words, under the FTA Buy America provision, foreign subcomponents can be combined via “manufacturing processes” to produce a component that is considered 100 percent domestic, as long as the manufacturing processes take place in the United States. FTA defines “manufacturing processes” to be those that “alter the form or function” of the manufactured product’s components, “transforming” the components into “a new end product,” which has “add[ed] value” greater than the mere sum of the value of the components.⁵⁰⁷ Manufacturing is not “mere assembly” of the components.⁵⁰⁸ In other words,

⁵⁰² 49 C.F.R. § 661.3, App. A(2) (2013).

⁵⁰³ 49 C.F.R. § 661.3, App. A(3) (2013).

⁵⁰⁴ 49 C.F.R. § 661.5(d)(2) (2013) (“All of the components of the product must be of U.S. origin.”).

⁵⁰⁵ 49 C.F.R. § 661.5(d) (2013).

⁵⁰⁶ 49 C.F.R. § 661.5(d)(2) (2013).

⁵⁰⁷ 49 C.F.R. § 661.3 (2013).

⁵⁰⁸ *Id.*

manufacturers can not skirt the FTA Buy America provision by importing foreign subcomponents that are merely “assembled” domestically into components that automatically become domestic by virtue of the final assembly location. The domestic manufacturing processes must be substantial, so that the foreign subcomponents are “transformed” domestically into a truly new component that has a higher function than the sum of its subcomponent parts.

As is the case with the other transportation grant Buy America provisions, there are a number of exceptions or opportunities to obtain a waiver from the strict domestic preferences of the general rule. Most importantly, rolling stock, although treated as a manufactured product, is subject to lower standards, both in terms of domestic content and what constitutes the manufacturing process for the end product. This and other waivers and exceptions are discussed in the following section.

- b. Exceptions and Waivers.—*

- **Domestic Content**

Unlike the BAA and the Amtrak Buy America provision, where manufactured products may be considered “substantially” domestic if 50 percent of the components are domestic and final assembly takes place in the United States, the FTA Buy America provision does not consider most manufactured products to be domestic unless 100 percent of the components are domestic.⁵⁰⁹ Further, for most manufactured products under the FTA Buy America provision, mere assembly of domestic components in the United States is insufficient to establish the end product as domestic. However, under the FTA Buy America provision, rolling stock will be considered domestic if it consists of 60 percent domestic content and final assembly takes place in the United States.⁵¹⁰ Under FTA’s regulations interpreting the statute, this is treated as an *exception* rather than a waiver, so that rolling stock satisfying both criteria is considered domestic, and no waiver is required.⁵¹¹ Note that this Domestic Content exception is not available for manufactured products other than rolling stock.

For purposes of the Domestic Content exception only, the FTA Buy America provision considers the origin of both the components *and subcompo-*

⁵⁰⁹ 49 C.F.R. § 661.5(d) (2013).

⁵¹⁰ 49 U.S.C. § 5323(j)(2)(C) (2013).

⁵¹¹ 49 C.F.R. § 661.11(a).

ments of the rolling stock.⁵¹² This exception, therefore, envisions that the components of the rolling stock may themselves be manufactured products that are assembled together to create the rolling stock end product.⁵¹³ If the component is a manufactured product that is manufactured domestically and domestic subcomponents comprise 60 percent of the cost of the component, then the component itself is considered a 100 percent domestic product.⁵¹⁴ In that case, the component's entire cost may be treated as domestic for purposes of determining whether the entire rolling stock end product qualifies for the Domestic Content exception, even if up to 40 percent of its subcomponents are foreign. However, FTA has recently stated that all steel and iron subcomponents must be manufactured domestically.⁵¹⁵ Subcomponents other than steel and iron are considered domestic as long as they are manufactured in the United States, regardless of the origin of their constituent materials.⁵¹⁶ Of all the Buy America provisions potentially applicable to rolling stock, only the Domestic Content exception in the FTA Buy America provision considers the origin of subcomponents.

- Public Interest

The FTA Buy America provision may be waived if its application “would be inconsistent with the public interest.”⁵¹⁷ There are no objective criteria established in the statute or regulations explaining what would qualify for a Public Interest waiver. When presented with a Public Interest waiver request, FTA “will consider all appropriate factors on a case-by-case basis, unless a general exception is specifically set out in” the FTA regulations.⁵¹⁸ As discussed further herein,⁵¹⁹ both gen-

eral and case-specific Public Interest waivers from the FTA Buy America provision have been the subject of controversy, leading Congress in the past to enact special notice-and-comment requirements and rulemaking obligations on FTA, which applied only to Public Interest waivers.⁵²⁰ Before requesting a Public Interest waiver, an FTA grant recipient should try to determine whether one of the other waivers or exceptions potentially applies.

- Nonavailability

The FTA Buy America provision may be waived if certain steel, iron, or manufactured products are not produced in the United States “in a sufficient and reasonably available amount or are not of a satisfactory quality.”⁵²¹ In accordance with this authority, FTA has expressly granted a general Nonavailability waiver⁵²² for all goods on the FAR list of unavailable goods.⁵²³ Therefore, FTA grant recipients need not seek a project-specific waiver to use those goods on an FTA grant-funded project.

If the FTA grant recipient receives at least one responsive and responsible bid in response to an open solicitation, and that bidder certifies compliance with the FTA Buy America provision, then the presumption is that those goods are available domestically and the Nonavailability waiver is not applicable.⁵²⁴ On the other hand, if the FTA grant recipient does not receive any bid to supply all domestic goods but instead receives only bids that include foreign goods (but are otherwise responsive and responsible), then FTA will presume that a Nonavailability waiver is warranted.⁵²⁵ There is no requirement in the statute or regulations for FTA grant recipients to perform an investigation to identify potential sources of comparable domestic goods when using the open solicitation process. However, if the FTA grant recipient seeks to pur-

⁵¹² 49 U.S.C. § 5323(j)(2)(C) (2013).

⁵¹³ 49 C.F.R. § 661.11(c),(d) (2013).

⁵¹⁴ 49 C.F.R. § 661.11(b),(g) (2013).

⁵¹⁵ Buy America Requirements—End Product Analysis and Waiver Procedures, 71 Fed. Reg. 69,412, 69,419 (Nov. 30, 2006) (The FTA Buy America “requirements are clear: ‘all steel and iron manufacturing processes must take place in the United States,’ whether the item is an end product, a component, or a subcomponent.” (quoting 49 C.F.R. § 661.5(b))). Contrast this with the FHWA Buy America provision, in which most steel and iron subcomponents may be considered “miscellaneous steel or iron” and need not be domestic. *See supra* notes 447–448 and accompanying text.

⁵¹⁶ 49 C.F.R. § 661.11(h) (2013).

⁵¹⁷ 49 U.S.C. § 5323(j)(2)(A) (2013).

⁵¹⁸ 49 C.F.R. § 661.7(b) (2013).

⁵¹⁹ *See infra* § III.C.3.c, III.C.4.a.

⁵²⁰ Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 3023 (2005).

⁵²¹ 49 U.S.C. § 5323(j)(2)(B) (2013).

⁵²² 49 C.F.R. § 661.7, App. A(a) (2013).

⁵²³ 48 C.F.R. § 25.104(a) (2013).

⁵²⁴ 49 C.F.R. § 661.15(a) (2013). However, in the case of rolling stock, the FTA grant recipient still has an obligation to perform its own investigation of the bidder's compliance with the FTA Buy America provision. *See infra* notes 554–556 and accompanying text.

⁵²⁵ 49 C.F.R. § 661.7(c)(1) (2013).

chase foreign goods via a sole-source procurement rather than an open solicitation, then FTA will require its grant recipient to provide evidence that comparable domestic products are truly unavailable in sufficient quantities before FTA will grant a Nonavailability waiver.⁵²⁶ Further, like FRA, FTA has recently entered into an inter-agency agreement with NIST-MEP to help it identify potential domestic manufacturing sources of rail rolling stock.⁵²⁷

In either open solicitations or sole-source procurements, if the FTA grant recipient's contractor or supplier certifies compliance with the FTA Buy America provision in the accepted bid but after award seeks to provide foreign materials, the bidder is bound by the Buy America compliance certification submitted with its bid.⁵²⁸ FTA will require its grant recipient to provide evidence that comparable domestic products are truly not available in the necessary quantities before FTA will grant a Nonavailability waiver in that situation.⁵²⁹

- Price Differential

The FTA Buy America provision may be waived if “including domestic material will increase the cost of the overall *project* by more than 25 percent.”⁵³⁰ FTA regulations implementing this provision clarify that the 25 percent Price Differential is applied to the individual *contract* between the FTA grant recipient and its presumptive contractor.⁵³¹ If the lowest bid in response to a solicitation by the FTA grant recipient proposes to include foreign goods, and the bid is otherwise responsible and responsive, then (for evaluation purposes only) the FTA grant recipient is to multiply the entire bid price (not just the cost of the foreign goods in the bid) by 1.25.⁵³² The FTA grant recipient must then compare this surcharged bid

price with the lowest responsible and responsive bid to provide only domestic goods. If the surcharged bid price that includes foreign goods is less than the actual bid price to provide only domestic goods, then the FTA grant recipient may request a Price Differential waiver from the FTA Buy America provision in order to contract with the low bidder.⁵³³

- Small Purchase

Although the FTA Buy America provision enacted by Congress did not include a Small Purchase exception, in 1991, FTA adopted a general Public Interest waiver⁵³⁴ for contracts defined as “small purchases” in USDOT’s “common grant rule.” USDOT defines small purchases as procurements that do not cost more than the “simplified acquisition threshold” for direct federal procurements⁵³⁵ (which is \$100,000 as of this publication⁵³⁶). FTA grant recipients can enter into contracts to purchase foreign goods where the total contract price is at or below this Small Purchase cost threshold, without seeking a project-specific waiver from FTA.⁵³⁷

c. Notice-and-Comment.—Before issuing any waivers of the FTA Buy America provision, FTA must publish its decision to grant a waiver both on its Web site and in the *Federal Register*.⁵³⁸ After publication, FTA must allow “a reasonable period of time for notice and comment” before granting the waiver.⁵³⁹ This is a relatively recent requirement, originating in MAP-21, which was enacted in July 2012. Prior to that, beginning with SAFETEA-LU in 2005, FTA was only required to publish its decision to grant Public Interest waivers.⁵⁴⁰

Note that the statutory publication requirement applies only to waivers that FTA has already decided to grant, not to all waiver requests received. However, FTA has interpreted its statu-

⁵²⁶ 49 C.F.R. § 661.7(c)(2) (2013).

⁵²⁷ Interagency Agreement Between U.S. Department of Transportation, Federal Transit Administration, and U.S. Department of Commerce, National Institute of Standards and Technology (2013), available at http://www.fta.dot.gov/documents/2013-9-24_IAA.pdf.

⁵²⁸ 49 C.F.R. § 661.13(c) (2013).

⁵²⁹ 49 C.F.R. § 661.7(c)(3) (2013).

⁵³⁰ 49 U.S.C. § 5323(j)(2)(D) (2013) (emphasis added).

⁵³¹ 49 C.F.R. § 661.7(d) (2013). This is similar to FHWA’s historic interpretation that Buy America provisions are to be evaluated at the individual contract level. See *supra* notes 411, 416–417, and accompanying text.

⁵³² 49 C.F.R. § 661.7(d) (2013).

⁵³³ *Id.*

⁵³⁴ 56 Fed. Reg. 932 (Jan. 9, 1991).

⁵³⁵ 49 C.F.R. § 18.36(d) (2013).

⁵³⁶ *Id.*; 41 U.S.C. § 134 (2013).

⁵³⁷ 49 C.F.R. § 661.7, App. A(c) (2013).

⁵³⁸ Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, § 20016 (2012).

⁵³⁹ *Id.*

⁵⁴⁰ 49 U.S.C. § 5323(j)(3) (2011); Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 3023 (2005).

tory notice-and-comment requirement to consist of a four-step process:⁵⁴¹

- FTA posts waiver requests on its Web site to solicit public comment.
- If FTA decides to grant the waiver (based on public comments, information provided by the FTA grant recipient, or FTA's own investigation), FTA prepares a written justification detailing the rationale for approving the waiver request.
- FTA publishes the written justification in the *Federal Register* for notice-and-comment within a "reasonable time."
- FTA posts on its Web site its final decision to either grant or deny the waiver.

This is similar to the informal notice-and-comment process that has been developed by FHWA and FRA in recent years.⁵⁴² FTA expects its "total processing time" for waiver requests to take about 30 days.⁵⁴³

d. Certification and Enforcement.—A contractor or supplier entering into a contract with an FTA grant recipient is required to execute a Buy America certificate, in which the contractor either certifies compliance with the FTA Buy America provision or indicates that the bid is believed to be eligible for a waiver from the provision.⁵⁴⁴ The certificate is to be incorporated into the contract with the FTA grant recipient. If a contractor has certified compliance with the FTA Buy America provision and later determines that it is unable to comply, the contractor is in breach of contract.⁵⁴⁵ At that point, the FTA grant recipient may pursue its contractual remedies against the contractor for breach of contract,⁵⁴⁶ which may include termination of the contractor or withholding funds pending the contractor either achieving compliance or obtaining a waiver. If the contractor establishes that its false certification was inadvertent, via sworn statement and such other evidence as may be required, FTA may allow the contractor to cor-

rect its certification and seek a waiver.⁵⁴⁷ The FTA grant recipient is not obligated to request a waiver on behalf of its contractor at that point, nor is FTA obligated to grant a waiver even if the conditions are satisfied that would justify granting a waiver.⁵⁴⁸

A contractor's "willful refusal" to comply with its Buy America certificate can subject the contractor to debarment or suspension.⁵⁴⁹ If FTA or a court determines that the contractor intentionally falsified the Buy America certificate, by falsely representing that goods were domestic when they were not, the contractor is ineligible to receive FTA grant funds.⁵⁵⁰ Furthermore, if the contractor's certification was "knowingly and willfully...false, fictitious, or fraudulent," the contractor or the individual who made the certification is subject to criminal fines and imprisonment of up to 5 years.⁵⁵¹ The FTA Buy America provision is unique among the transportation grant Buy America provisions by expressly providing for federal criminal liability. The statute does not expressly provide for liability under the FCA for false certifications of compliance with the FTA Buy America provision. However, some take the position that a false certification of compliance with the FTA Buy America provision can subject the contractor to liability under the FCA,⁵⁵² which would potentially subject the contractor to civil penalties, including treble damages.⁵⁵³

For purchases of rolling stock, the FTA grant recipient is not entitled to rely on its contractor's or supplier's certification of compliance with the FTA Buy America provision—the FTA grant recipient is required to conduct preaward and postdelivery audits of the manufacturer or contractor to ensure compliance.⁵⁵⁴ The preaward au-

⁵⁴¹ Buy America Requirements—End Product Analysis and Waiver Procedures, 71 Fed. Reg. 69,412, 69,413 (Nov. 30, 2006).

⁵⁴² See *supra* notes 74–75, 380–381, and accompanying text.

⁵⁴³ Buy America Requirements—End Product Analysis and Waiver Procedures, 71 Fed. Reg. 69,412, 69,413 (Nov. 30, 2006).

⁵⁴⁴ 49 C.F.R. §§ 661.6, 661.12 (2013).

⁵⁴⁵ 49 C.F.R. § 661.17 (2013).

⁵⁴⁶ 49 C.F.R. § 18.36(i) (2013).

⁵⁴⁷ 49 U.S.C. § 5323(j)(8) (2013).

⁵⁴⁸ 49 C.F.R. § 661.13(c) (2013).

⁵⁴⁹ 49 C.F.R. § 661.19 (2013).

⁵⁵⁰ 49 U.S.C. § 5323(j)(6) (2013).

⁵⁵¹ 18 U.S.C. § 1001 (2013); see also 49 U.S.C. § 5323(l) (2013) (making a certificate of compliance with the FTA Buy America provision subject to 18 U.S.C. § 1001).

⁵⁵² See *United States ex rel Sanders v. N. Am. Bus. Indus., Inc.*, 546 F.3d 288, 296 (4th Cir. 2008) (dismissing an FCA action as untimely based on the statute of limitations, and not reaching the question of whether a false certification of compliance with the FTA Buy America provision constitutes a false claim under the FCA).

⁵⁵³ 31 U.S.C. § 3729 (2013).

⁵⁵⁴ 49 U.S.C. § 5323(m) (2013).

dit includes an independent review (by the FTA grant recipient or someone independent of the manufacturer) of the manufacturer's documentation of proposed components and subcomponents, their cost, and their country of origin.⁵⁵⁵ Likewise, the postdelivery audit includes an independent review (by the FTA grant recipient or someone independent of the manufacturer) of the manufacturer's documentation of actual components and subcomponents, their cost, and their country of origin.⁵⁵⁶ These audit requirements are unique to the FTA Buy America provision.

e. Multiple Funding Sources.—The FTA Buy America provision expressly provides that states may impose “more stringent requirements” than the FTA Buy America provision “on the use of articles, materials, and supplies mined, produced, or manufactured in foreign countries in projects carried out with” FTA assistance.⁵⁵⁷ However, for state Buy America provisions to apply to FTA-funded projects, the state provisions must be “explicitly set out under State law,” not mere “administrative interpretations of non-specific State legislation.”⁵⁵⁸ Where enforceable state Buy America provisions exist, it may not be straightforward to determine whether the state Buy America provision is more or less stringent than the FTA Buy America provision. Where an FTA grant recipient is subject to a state Buy America provision, it should evaluate the compliance of the FTA grant-funded project according to both statutes.⁵⁵⁹

Where development projects are funded jointly, using FTA grant funds and funds from some other source, FTA requires “that the steel, iron, and manufactured goods used in the joint development project are produced in the United States, as described in” the FTA Buy America provision.⁵⁶⁰ Therefore, the FTA Buy America provision could conceivably apply to individual contracts or “seg-

ments” of a project not funded by FTA. Whether the FTA Buy America provision applies to a given contract may depend on the meaning of the word “project.”⁵⁶¹ In 2012, the Senate passed a measure that would adopt the very broad NEPA definition of a “project” for purposes of the FTA Buy America provision.⁵⁶² Although this measure was not ultimately enacted into law, as discussed in Section III.B.2 *supra*, the current trend in federal law is to extend Buy America provisions from one funding source to related contracts funded by another source, if the contracts are related parts of a single “project.”⁵⁶³

2. Legislative Revision (2005)

Congress initiated a significant update of the FTA Buy America provision with the 2005 USDOT appropriations bill known as SAFETEA-LU.⁵⁶⁴ This was the same legislation where Congress first addressed the potential use of segmentation to circumvent the FHWA Buy America provision.⁵⁶⁵ Likewise, many of the changes to the FTA Buy America provision in SAFETEA-LU appeared to be aimed at closing potential loopholes and abuses of the FTA Buy America provision. With respect to Public Interest waivers, Congress repealed some longstanding general waivers,⁵⁶⁶ required FTA to limit the applicability of others,⁵⁶⁷ and imposed heightened notice-and-comment requirements on future Public Interest waivers.⁵⁶⁸ With respect to manufactured products, Congress required FTA to formally define the term “end product,” to develop rules “to ensure that major system procurements are not used to circumvent the Buy America requirements,” and to provide a list of “representative items”

⁵⁵⁵ 49 C.F.R. § 663.25(b) (2013).

⁵⁵⁶ 49 C.F.R. § 663.35(b) (2013).

⁵⁵⁷ 49 U.S.C. § 5323(j)(7) (2013); *see also* 49 C.F.R. § 661.21(a) (2013).

⁵⁵⁸ 49 C.F.R. § 661.21(b)(2) (2013).

⁵⁵⁹ *See, e.g.,* Conti Enters., Inc. v. Se. Pa. Transp. Auth., No. Civ. A. 03–5345, 2003 WL 22594327, at *9 (E.D. Pa. Oct. 14, 2003) (requiring contractor to comply with both the FTA Buy America provision and a state Buy America provision, where a Public Interest waiver is potentially available under the FTA Buy America provision but not the state Buy America provision).

⁵⁶⁰ Notice of Final Agency Guidance on the Eligibility of Joint Development Improvements Under Federal Transit Law, 72 Fed. Reg. 5,788, 5,792 (Feb. 7, 2007).

⁵⁶¹ The FTA Buy America provision requires all “steel, iron, and manufactured goods used in the *project*” to be “produced in the United States.” 49 U.S.C. § 5323(j)(1) (2013) (emphasis added); *see also* 49 C.F.R. § 661.5(a) (2013). Historically, FTA has only applied the FTA Buy America provision to individual *contracts* that are funded by FTA grants, not to other contracts that are conceivably part of the same “project.” *See supra* note 531 and accompanying text.

⁵⁶² S. 1813, 112th Cong., § 20017 (2012).

⁵⁶³ *See supra* notes 427–429 and accompanying text.

⁵⁶⁴ Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 3023(i) (2005).

⁵⁶⁵ *Id.* § 1928.

⁵⁶⁶ *Id.* § 3023(i)(4).

⁵⁶⁷ *Id.* § 3023(i)(5)(A).

⁵⁶⁸ *Id.* § 3023(i)(1)(B).

such as end products or systems that FTA considers subject to the FTA Buy America provision.⁵⁶⁹ Finally, with respect to bid certification and enforcement, Congress required FTA to clarify how the FTA Buy America compliance certification requirement is to apply to negotiated procurements,⁵⁷⁰ required FTA to issue formal rules governing the process for granting waivers after the bidder has certified compliance,⁵⁷¹ and established potential criminal liability for false certifications.⁵⁷² Over the next several years, in response to SAFETEA-LU, FTA engaged in a lengthy rulemaking process that transformed the FTA Buy America provision. As a result, the FTA Buy America rules (particularly for evaluating domestic content) became more straightforward, conducive to more consistent application, and generally easier to satisfy. The following section addresses the FTA rulemaking with an emphasis on the changes made in response to SAFETEA-LU.

3. Rulemaking History

a. Compliance Certification Requirements.—It has long been established that, for sealed bids, completion of the Buy America certificate (certifying either that the bid complies with the FTA Buy America provision or that it does not comply but qualifies for a waiver) is a condition of bid responsiveness.⁵⁷³ In 1986, to eliminate confusion from potential bidders who worried that completing the Buy America certification as a sign of responsiveness exposed them to potential penalties, FTA established two separate certification forms.⁵⁷⁴ One certified compliance and one combined a noncompliance certification with a waiver request. These forms have persisted in essentially the same form for nearly 30 years.⁵⁷⁵

⁵⁶⁹ *Id.* § 3023(i)(5)(B).

⁵⁷⁰ *Id.* § 3023(i)(5)(D).

⁵⁷¹ *Id.* § 3023(i)(5)(C).

⁵⁷² *Id.* § 3023(j).

⁵⁷³ 49 C.F.R. § 661.13(b) (2013).

⁵⁷⁴ Buy America Requirements, 51 Fed. Reg. 22,285 (June 19, 1986).

⁵⁷⁵ In 1991, two separate sets of forms were established to correspond to the different domestic content standards for rolling stock and other manufactured products established by Congress that year. Buy America Requirements, 56 Fed. Reg. 926 (Jan. 2, 1991). In 2006, the forms were slightly modified to make it clear that an individual officer of the company is to make the certification, by requiring the individual's name and not just the company name on the certification form. Buy America Requirements—Amendments to Definitions, 71 Fed. Reg. 14,112, 14,117 (Mar. 21, 2006). This may al-

Because the certification forms are established by FTA regulations as conditions of bid responsiveness,⁵⁷⁶ FTA grant recipients must reject bids or proposals from prospective contractors who do not complete one Buy America certificate or the other. As the U.S. District Court for the Eastern District of Virginia explained in 1991:

[P]laintiff's failure to [complete] either certificate left it in a position to manipulate the bid to its advantage. For example, if plaintiff's bid was more than ten-percent below the next lowest bid, plaintiff could have increased its price ten percent simply by checking the foreign source certificate and still have received the contract. Similarly, if the bid were less than ten percent below the next lowest bidder, plaintiff could decide whether to [complete] the domestic source certificate and win the contract as the lowest bidder, or to [complete] the foreign source certificate and avoid winning the contract. A bidder might choose the latter course of action where it belatedly recognized that it would lose [sic] money if forced to perform at the bid price. This potential for manipulating the process by leaving the Buy American Certificate unsigned underscores the materiality of the requirement that the bidder properly complete the Buy American Certificate.⁵⁷⁷

Due to similar concerns about bid manipulation, in 1988 FTA clarified that each bid recipient “is bound by its original certification” and can not change its certification after bid opening to obtain a competitive advantage:

A bidder who certifies that it will meet the “Buy America” requirements is on notice that it cannot receive a waiver if it becomes apparent after bid opening that the grounds for a waiver exist. Conversely, a bidder who certifies that it cannot meet the applicable “Buy America” requirements is on notice that it cannot be awarded a contract unless the grounds for a waiver exist, and such bidder cannot, after bid opening, change its certification to one of compliance with the applicable requirements. ...To allow such a bidder to modify its certification, would give the bidder the best of both worlds—it could bid and then decide, based on the competing bids, whether it will supply a foreign or domestic “end product”.⁵⁷⁸

In 1999, Congress relaxed this requirement slightly, requiring FTA to allow the bidder an opportunity to correct certain incorrect Buy America certificates, including “any certification of non-compliance or failure to properly complete the certification (but not including failure to sign the cer-

low FTA or its grant recipients to hold the individual personally liable for false certifications.

⁵⁷⁶ 49 C.F.R. § 661.6 (2013).

⁵⁷⁷ *Seal and Co., Inc. v. Wash. Metro. Area Transit Auth.*, 768 F. Supp. 1150, 1158–59 (E.D. Va. 1991).

⁵⁷⁸ Buy America Requirements—Amendments, 53 Fed. Reg. 32,994 (Aug. 29, 1988).

tification).⁵⁷⁹ Because the statute only provided an opportunity to correct incorrect certifications of *noncompliance*, it was unclear whether bidders should also be allowed to correct inaccurate certificates of *compliance*. The concern in the latter situation was that it might permit a bidder who has certified Buy America compliance to change its certification to noncompliance in order to request a waiver after being awarded the contract. In 2003, after 4 years of deliberation, FTA decided to extend the opportunity to correct certifications both to bidders who incorrectly certified noncompliance and to those who incorrectly certified compliance with the FTA Buy America provision.⁵⁸⁰ To avoid the potential for bid manipulation, the bidder correcting its certification must certify under penalty of perjury that any such incorrect certification was “the result of an inadvertent or clerical error,” so the opportunity to correct may not be used simply to manipulate the bidding process.⁵⁸¹

In 2005, Congress addressed this in SAFETEA-LU by expressly providing that FTA may permit Nonavailability waivers after contract award, where the contractor made an initial certification of Buy America compliance “in good faith.”⁵⁸² In the same legislation, in recognition that FTA grant recipients are generally authorized under state laws to enter into procurements other than sealed bidding procedures, Congress required FTA to define the term “negotiated procurement” and to amend its Buy America certification requirements to support the negotiated procurement process.⁵⁸³

In November 2005, FTA proposed new rules and regulations to implement the requirements of SAFETEA-LU.⁵⁸⁴ First, recognizing that “the term ‘negotiated procurement’ is difficult to define” due to state and local variations in approved procurement processes, FTA proposed to define “negotiated procurement” broadly as any “contract

awarded using other than sealed bidding procedures.”⁵⁸⁵ In the case of a negotiated procurement, FTA recognized that during the negotiation process the contractor may make multiple proposals, with or without Buy America certifications, and the contractor may change its certification based on information learned during negotiations. However, the contractor would be required to submit one of the Buy America certification forms (either compliance or noncompliance) with its “best and final offer,” and FTA proposed that the contractor be contractually bound by the certification in its final offer the same way that a sealed-bid contractor is bound by the certification in its proposal.⁵⁸⁶ Any earlier certifications made during the negotiation process would be disregarded. This proposal was relatively uncontroversial (although some commenters wanted FTA to revise the definition of “negotiated procurement” more specifically to “reflect standard practices” adopted by particular states or industries).⁵⁸⁷ In March 2006, FTA implemented its original proposal to bind bidders to the Buy America certificate in their “best and final offer” in negotiated procurement situations (using FTA’s broad definition of “negotiated procurement” to include any procurement other than a sealed bid).⁵⁸⁸

FTA’s proposal regarding postaward waivers for bidders who certified Buy America compliance was more controversial. Although Congress indicated that FTA should permit Nonavailability waivers where the bidder originally certified compliance “in good faith,”⁵⁸⁹ in November 2005 FTA proposed requirements on bidders in that situation to guard against abuse and manipulation of the bidding process.⁵⁹⁰ For example, FTA proposed to grant such postaward waivers only where bidders produced evidence of domestic price estimates they received during bid preparation and evidence that it had since become impossible, or at least commercially impracticable, to obtain the domestic goods.⁵⁹¹ Further, FTA proposed to con-

⁵⁷⁹ Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 3020(b) (1999).

⁵⁸⁰ Buy America Requirements—Amendment to Certification Procedures, 68 Fed. Reg. 9,798 (Feb. 28, 2003).

⁵⁸¹ 49 C.F.R. § 661.13(b)(1) (2013).

⁵⁸² Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, §§ 3032(i)(5).

⁵⁸³ *Id.*

⁵⁸⁴ Buy America Requirements—Amendments to Definitions and Waiver Procedures, 70 Fed. Reg. 71,246 (Nov. 28, 2005).

⁵⁸⁵ *Id.* at 71,249.

⁵⁸⁶ *Id.* at 71,253.

⁵⁸⁷ Buy America Requirements—Amendments to Definitions, 71 Fed. Reg. 14,112, 14,113 (Mar. 21, 2006).

⁵⁸⁸ *Id.* at 14,117; 49 C.F.R. § 661.13(b)(2) (2013).

⁵⁸⁹ Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, §§ 3032(i)(5).

⁵⁹⁰ Buy America Requirements—Amendments to Definitions and Waiver Procedures, 70 Fed. Reg. 71,246, 71,253 (Nov. 28, 2005).

⁵⁹¹ *Id.*

sider the effect of any postaward waiver on other bidders, such as those who might have been awarded the contract if the low bidder had originally certified noncompliance.⁵⁹² Most commenters “felt that FTA’s proposal was unnecessarily complex or unduly restrictive.”⁵⁹³ Nevertheless, in November 2006, FTA implemented its original proposal with the tight restrictions largely unchanged.⁵⁹⁴ In fact, FTA indicated it would only offer postaward waivers over an initial Buy America certification of compliance when it would be “commercially impracticable” for the bidder to provide the domestic goods, expressly adopting federal case law standards for commercial impracticability to mean “when all means of performance are commercially senseless.”⁵⁹⁵ Thus, a bidder who has certified compliance with the FTA Buy America provision should not anticipate a Nonavailability waiver and should request one only if the bidder can demonstrate that its original bid was reasonable and based on real market prices, and that the prices of domestic goods have become excessive and unreasonable since bid time.

b. Manufactured Products.—A long-standing issue with the FTA Buy America provision has been how to identify the components of an end product under the provision, for purposes of determining whether manufactured products are domestic and also for determining whether rolling stock qualifies for a Domestic Content waiver. After Congress strengthened the Domestic Content waiver criteria for rolling stock in 1987, FTA issued an NPRM in 1988 to address such key terms as “final assembly” and “end product.”⁵⁹⁶ These terms were critical to the identification of components, because FTA has long defined a “component” to be an element incorporated into the “end product” at the “final assembly” location.⁵⁹⁷ In the eventual rule, which was not promulgated until 1991,⁵⁹⁸ FTA provided guidance that left many

terms open to interpretation, and there was continued confusion over its proper application. In 2005, as part of SAFETEA-LU, Congress required FTA to initiate rulemaking to define the term “end product” for purposes of the FTA Buy America provision, to develop a list of representative “end products” that are subject to the FTA Buy America provision, and to “address the procurement of systems under the definition [of end product] to ensure that major system procurements are not used to circumvent the Buy America requirements.”⁵⁹⁹

- Final Assembly

FTA’s concern about “final assembly” has long been whether sufficient manufacturing processes are actually taking place in the United States, or whether manufacturers are abusing the process by manufacturing up to 40 percent of the components elsewhere (or even a majority of the sub-components) and performing “mere assembly” of the components and subcomponents in the United States,⁶⁰⁰ so that the end product is effectively a foreign product. In its 1991 rulemaking, FTA declined to provide quantitative or objective criteria to define “final assembly” (rejecting a previous standard that final assembly must include activities constituting at least 10 percent of the cost of the product).⁶⁰¹ At that time, FTA adopted more subjective criteria for final assembly as “the creation of the end product...through the application of manufacturing processes.” These may include “installing” or “interconnecting,”⁶⁰² which could be used to describe almost any assembly process. However, FTA provided a concrete example of the significant amount of assembly activity required to constitute final assembly:

In the case of the manufacture of a new rail car, for instance, “final assembly” would include, as a minimum, the following operations: installation and interconnection of propulsion control equipment, propulsion cooling equipment, brake equipment, energy sources for auxiliaries and controls, heating and air conditioning, communi-

⁵⁹² *Id.*

⁵⁹³ Buy America Requirements—End Product Analysis and Waiver Procedures, 71 Fed. Reg. 69,412, 69,415 (Nov. 30, 2006).

⁵⁹⁴ *Id.*; 49 C.F.R. § 661.7(c)(3) (2013).

⁵⁹⁵ Buy America Requirements—End Product Analysis and Waiver Procedures, 71 Fed. Reg. 69,412, 69,415–16 (citing Jennie-O Foods, Inc. v. United States, 217 Ct. Cl. 314, 580 F.2d 400, 409 (1978)).

⁵⁹⁶ Buy America Requirements—Amendments, 53 Fed. Reg. 32,994 (Aug. 29, 1988).

⁵⁹⁷ 49 C.F.R. § 661.3 (2013).

⁵⁹⁸ Buy America Requirements, 56 Fed. Reg. 926 (Jan. 9, 1991).

⁵⁹⁹ Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 3023(i)(5)(B) (2005).

⁶⁰⁰ *See, e.g.*, 49 C.F.R. § 661.3 (2013) (defining “manufacturing process” to include the creation of “a new end product functionally different from that which would result from mere assembly of the elements or materials.”).

⁶⁰¹ Buy America Requirements, 56 Fed. Reg. 926 (Jan. 9, 1991).

⁶⁰² *Id.*

cations equipment, motors, wheels and axles, suspensions and frames; the inspection and verification of all installation and interconnection work; and, the testing in plant of the stationary product to verify all functions.⁶⁰³

Under the 1991 rule, the domestic content of all components that are incorporated into the end product at this “final assembly” location would have to be evaluated in order to evaluate the domestic content of the end product and determine whether rolling stock qualified for a Domestic Content waiver. In the late 1990s, FTA amended its regulations to specify a list of typical components of rail rolling stock.⁶⁰⁴ To a certain extent, providing the list of typical components obviates the need to specifically define “final assembly,” since manufacturers understand that even if the identified components (e.g., traction motor, propulsion gearbox, acceleration and breaking resistors, and propulsion controls) are packaged as a rail car subsystem (e.g., the propulsion control system) and delivered to the final assembly location as a package, the domestic content of the specifically identified components (rather than the assembled subsystem) is what matters for purposes of evaluating domestic content under the FTA Buy America provision.⁶⁰⁵

In 2005, in response to SAFETEA-LU, FTA proposed amending its regulations to formally adopt its 1991 example list of operations required to constitute final assembly (revised to include a number of additional elements that must be installed or interconnected into the end product, including car bodies or shells, pneumatic and electrical systems, door systems, and passenger seats, etc.).⁶⁰⁶ However, at least one commenter⁶⁰⁷ suggested there was a likelihood of confusion by FTA’s use of two distinct “typical” lists (one list of typical “components” of rail rolling stock⁶⁰⁸ and a separate list of typical elements of rolling stock that are installed or interconnected at the final assembly location⁶⁰⁹), especially considering the

fact that components are defined to be elements “directly incorporated into the end product at the final assembly location.”⁶¹⁰ The commenter suggested revising the list of typical operations required for final assembly of rail rolling stock to specifically include the “installation and interconnection” of all rail rolling stock components identified by FTA.⁶¹¹ Although this would significantly expand the list of operations required to achieve final assembly in the United States, the commenter proposed that FTA formally adopt a compliance review process that would allow FTA to find “final assembly” on a case-by-case basis, even if all “typical” components were not installed or interconnected at the final assembly location.⁶¹² In November 2006, FTA indicated that it agreed with the commenter’s suggested approach to make FTA’s list of typical rail rolling stock elements for “final assembly” consistent with its list of typical rail rolling stock “components.”⁶¹³ This proposal to effectively merge the two lists met substantial opposition, however, from rolling stock manufacturers and suppliers.⁶¹⁴ Therefore, in the final rule, FTA formally adopted the list of minimum elements that must be “installed and interconnected” for final assembly that FTA has been using since the 1990s (without incorporating its list of typical “components” into the “final assembly” list).⁶¹⁵ FTA regulations now include both the list of typical components of rail rolling stock⁶¹⁶ and the shorter list of elements that must be installed or interconnected at the final assembly location for purposes of determining whether final assembly of rail rolling stock takes place in the United States.⁶¹⁷ For FTA grant recipient purposes, the list of typical components is the primary reference for purposes of calculating domestic content. If multiple components are combined off site into a rolling stock subsystem and delivered as the subsystem to the final assembly

⁶⁰³ *Id.*

⁶⁰⁴ 62 Fed. Reg. 40,954 (July 31, 1997); 61 Fed. Reg. 6,302 (Feb. 16, 1996). For the current list of rail rolling stock components, see 49 C.F.R. § 661.11, App. C (2013).

⁶⁰⁵ Notice of Granted Buy America Waiver, 66 Fed. Reg. 32,412 (June 14, 2001).

⁶⁰⁶ Buy America Requirements—Amendments to Definitions and Waiver Procedures, 70 Fed. Reg. 71,246, 71,252 (Nov. 28, 2005).

⁶⁰⁷ Buy America Requirements—End Product Analysis and Waiver Procedures, 71 Fed. Reg. 69,412, 69,423 (Nov. 30, 2006).

⁶⁰⁸ 49 C.F.R. § 661.11, App. C (2013).

⁶⁰⁹ 49 C.F.R. § 661.11, App. D(a) (2013).

⁶¹⁰ 49 C.F.R. §§ 661.3, 661.11(c) (2013).

⁶¹¹ Buy America Requirements—End Product Analysis and Waiver Procedures, 71 Fed. Reg. 69,412, 69,423 (Nov. 30, 2006).

⁶¹² *Id.*

⁶¹³ *Id.*

⁶¹⁴ Buy America Requirements—End Product Analysis and Waiver Procedures, 72 Fed. Reg. 53,688, 53,694 (Sep. 20, 2007).

⁶¹⁵ Buy America Requirements—End Product Analysis and Waiver Procedures, 72 Fed. Reg. 55,102, 55,103 (Sep. 28, 2007).

⁶¹⁶ 49 C.F.R. § 661.11, App. C (2013).

⁶¹⁷ 49 C.F.R. § 661.11, App. D(a) (2013).

location for installation, the assembled subsystem does not rise to the level of a “component,” and the components do not become “subcomponents” for purposes of calculating domestic content. FTA also adopted the suggestion to provide for case-by-case review of “final assembly” compliance,⁶¹⁸ so that if a manufacturer does not install or interconnect all of the final assembly elements in the United States, or potentially if the manufacturer contests whether a part should be considered a component, FTA can consider the manufacturer’s request to deviate from these “typical” lists without necessitating a formal waiver.

- End Product

One of the most significant and complicated changes adopted via the SAFETEA-LU rulemaking was a change in how FTA identifies an “end product” for purposes of evaluating the FTA Buy America provision. As discussed herein, in 2007, FTA formally adopted what it calls a “non-shifting” approach to identify the end product, replacing its longstanding “shifting” approach. The difference is best illustrated by reviewing how FTA’s guidance has changed over the years.

In its 1991 rulemaking, FTA clarified that the end product was typically the subject of the procurement contract. This meant, for example, “if a grantee is procuring a new rail car, the car is the end product and the propulsion motor could be a component of the end product.”⁶¹⁹ In that case, the FTA Buy America provision would be evaluated for the rail car based on the domestic content of its components (e.g., the propulsion motor). “If that same grantee is procuring a replacement propulsion motor for an existing rail car, that propulsion motor would be the end product.”⁶²⁰ In the latter case, the FTA Buy America provision would be evaluated for the propulsion motor based on the domestic content of its components (which would have otherwise been subcomponents if the end product was the rail car). FTA has further explained that under the first scenario, when rail rolling stock was the end product, the 60 percent Domestic Content standard applied. However, when purchasing replacement parts, so that what was formerly a component became the end product, it was treated as a manufactured product (e.g., the propulsion motor) and the 100 percent

Domestic Content standard applied.⁶²¹ This “shifting approach” would generally result in higher domestic content for replacement parts, since the original rail car procurement would need to contain only 60 percent domestic content. Its original propulsion motor could have been entirely foreign (as long as the remaining rail car components were sufficiently domestic to constitute at least 60 percent of the rail rolling stock).⁶²² Alternatively, the original propulsion motor (as a component of the rolling stock end product) could have been considered 100 percent domestic under the rolling stock standard, as long as 60 percent of its subcomponents were domestic and the motor itself was manufactured in the United States.⁶²³ A replacement propulsion motor, on the other hand, as a manufactured end product, would have to contain 100 percent domestic content, so 100 percent of its components (which would have been subcomponents of the original rolling stock procurement) must be domestic.⁶²⁴

In 2005, in response to SAFETEA-LU, FTA proposed amending its regulations to abandon this longstanding shifting approach and instead adopt a list of “representative” end products that are always considered end products.⁶²⁵ “In other words, where a bus, rail car, or other major procurement items are always designated as end products—and their components are always designated as components, even if purchased as replacement parts.”⁶²⁶ The proposed list of typical end products would be consistent with FTA’s other list of typical rail rolling stock components, providing additional clarity and consistency regarding the calculation of domestic content. Under the former shifting approach, items on FTA’s list of typical rail rolling stock components⁶²⁷ would not have actually been considered components if purchased as replacement parts. Under

⁶²¹ Buy America Requirements—Amendments to Definitions and Waiver Procedures, 70 Fed. Reg. 71,246, 72,250 (Nov. 28, 2005).

⁶²² 49 C.F.R. § 661.11(a) (2013) (The FTA Buy America provision does not apply to rolling stock “if the cost of components produced in the United States is more than 60 percent of the cost of all components and final assembly takes place in the United States.”).

⁶²³ 49 C.F.R. § 661.11(g) (2013).

⁶²⁴ 49 C.F.R. § 661.5(d)(2) (2013).

⁶²⁵ Buy America Requirements—Amendments to Definitions and Waiver Procedures, 70 Fed. Reg. 71,246, 72,250 (Nov. 28, 2005).

⁶²⁶ *Id.*

⁶²⁷ 49 C.F.R. § 661.11, App. C (2013).

⁶¹⁸ 49 C.F.R. § 661.11, App. D(c) (2013).

⁶¹⁹ Buy America Requirements, 56 Fed. Reg. 926 (Jan. 9, 1991).

⁶²⁰ *Id.*

the proposed nonshifting standard, items on the list of typical rail rolling stock components would always be considered components.⁶²⁸ By specifying that the rolling stock standard (rather than the manufactured product standard) would now apply to purchases of rolling stock replacement parts, the suggestion was that replacement parts for rail rolling stock would now only need to contain 60 percent domestic content, which would appear to be a significant drop in domestic content from prior practice under the 1991 rule. Most of the opposition to the proposed new rule came from commenters concerned “that FTA would treat replacement parts under the rolling stock standard (*i.e.*, where sixty percent of the subcomponents of a component, by cost, must be domestic, but forty percent may be foreign sourced).”⁶²⁹

Therefore, in 2006, FTA proposed “to continue to treat rolling stock replacement parts under the manufactured products standard, which requires that 100% of components be of domestic manufacture.”⁶³⁰ However, because replacement parts would now be considered components rather than end products under FTA’s new nonshifting approach, a replacement part such as a new propulsion engine would now be “considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents.”⁶³¹ Under this new proposal, the subcomponents of the replacement engine, which had to be 100 percent domestic under prior practice, could now be 100 percent foreign as long as the final manufacturing process for the replacement engine takes place in the United States. Furthermore, the procurement of replacement rolling stock subcomponents (such as piston assemblies), which under prior practice were treated as end products that must be domestic, would now be treated as subcomponents with no domestic content requirement at all.⁶³²

⁶²⁸ For example, when “procuring a replacement propulsion motor for an existing rail car, [the] propulsion motor would still be a component of the rail car end product, and the rolling stock standard applicable to the rail car would apply to its component.” Buy America Requirements—Amendments to Definitions and Waiver Procedures, 70 Fed. Reg. 71,246, 71,251 (Nov. 28, 2005).

⁶²⁹ Buy America Requirements—End Product Analysis and Waiver Procedures, 71 Fed. Reg. 69,412, 69,418 (Nov. 30, 2006).

⁶³⁰ *Id.*

⁶³¹ 49 C.F.R. § 661.5(d)(2) (2013).

⁶³² Buy America Requirements—End Product Analysis and Waiver Procedures, 72 Fed. Reg. 53,688, 53,692 (Sep. 20, 2007).

This nonshifting approach was adopted in September 2007,⁶³³ although it is not plainly described in FTA regulations. Instead, FTA regulations were revised to include the new definition of “end product,” and the new list of representative end products.⁶³⁴ FTA’s list of representative end products provides clarity to FTA grant recipients that any component of the representative end products (including items on FTA’s list of typical rolling stock components⁶³⁵) can now be procured without being subject to any domestic content standard. Components procured directly by FTA grant recipients need only be manufactured in the United States, regardless of the origin of their subcomponents.⁶³⁶ This 2007 change reduced the domestic content requirements for replacement parts for rail rolling stock.

• Systems Procurement

In its 1991 rulemaking, FTA also addressed the procurement of “systems,” such as “an entire people-mover system.”⁶³⁷ In that case, even though the system was the “subject of the contract,” FTA stated that the system was not the “end product” for purposes of the FTA Buy America provision. Rather, each “sub-system” was to be treated as an end product, requiring the FTA Buy America provision to be evaluated for each subsystem. In the people-mover system example: “The six subsystems are: the guideway surfaces and equipment; the vehicles; the traction power system; the command and control system; the communications system; and the maintenance facility and equipment.”⁶³⁸ Therefore, for a people-mover system procurement, the FTA Buy America provision (requiring 100 percent domestic content for manufactured products) was to be evaluated independently for each of the six subsystems. This was years prior to FTA’s formal identification of representative end products, however, and FTA did not clearly define “system” in the 1991 rulemaking. Instead, it determined that for system procurements, “it is industry practice to have a contract broken down by sub-systems,”⁶³⁹ so end products could be identified by the contract breakdown of

⁶³³ *Id.*

⁶³⁴ 49 C.F.R. § 661.3 (2013).

⁶³⁵ 49 C.F.R. § 661.11, App. C (2013).

⁶³⁶ 49 C.F.R. § 661.5(d)(2) (2013).

⁶³⁷ Buy America Requirements, 56 Fed. Reg. 926 (Jan. 9, 1991).

⁶³⁸ *Id.*

⁶³⁹ *Id.*

subsystems. Under that approach, the distinction between procurement of a single end product and procurement of a system of end products would turn on whether the contract identified the procurement as a collection of subsystems or not.

In subsequent years, however, FTA began to take the position that a system is an end product itself. In decisions involving fare collection equipment in 1994, 1995, and 2002, FTA concluded that a “fare collection system” was an end product, so that each machine or device bundled into the system procurement was a component rather than an end product.⁶⁴⁰ As a component, each machine or device bundled into the fare collection system procurement would be considered domestic as long as it was manufactured in the United States, regardless of the origin of its subcomponents. This was controversial in part because the individual machines would be subject to lower domestic content standards as components of a system procurement than if the individual machines were purchased as end products.⁶⁴¹ In 2005, with SAFETEA-LU, Congress required FTA to address system procurements “to ensure that major system procurements are not used to circumvent the Buy America requirements.”⁶⁴²

In response to SAFETEA-LU, FTA proposed to continue to treat systems as end products for purposes of the FTA Buy America provision.⁶⁴³ To avoid abuses such as bundling of unrelated equipment into a single “system,” it proposed to define “system” to mean “a machine, product, or device, or combination of such equipment, ...which are intended to contribute together to a clearly defined function.”⁶⁴⁴ Furthermore, FTA proposed to identify typical systems, including fare collection systems, computer systems, and “information, security, and data processing” systems, in its new list of representative end products.⁶⁴⁵ Some commenters were concerned that

FTA’s formal designation of systems as end products “results in designation of critical equipment as components, thereby dramatically increasing the quantity of foreign-manufactured equipment that may be incorporated into a procured system.”⁶⁴⁶ Commenters were also concerned that FTA grant recipients or manufacturers may attempt to take advantage of the rule by bundling unrelated equipment into “super systems,”⁶⁴⁷ so that each “component” of the super system would qualify for the relaxed domestic content standard for components. To address the concerns, FTA proposed “to contain the potential for system abuse” by defining a system to be “the minimum set of components and interconnections needed to perform all of the functions specified by the grantee in its procurement.”⁶⁴⁸ FTA revised the proposed definition of system to include a number of objective factors to identify whether the individual components are truly integrated or simply independent end products.⁶⁴⁹

In 2007, FTA revised its regulations to formally specify that systems qualify as end products to formally adopt the expanded definition of “system,” and to include typical systems in its list of representative end products.⁶⁵⁰ This establishes that significant machinery and equipment items can be purchased without regard to their domestic content, as long as they are manufactured in the United States, where they are formally identified as components of end product “systems.” However, this also relieves the potential for certain abuses, such as bundling of unrelated equipment into “systems,” because all FTA grant recipients and all manufacturers of end product “systems” are subject to a common published standard. Primarily, the list of representative end products identifying typical systems⁶⁵¹ provides clarity for FTA grant recipients and manufacturers performing domestic content calculations.

⁶⁴⁰ Buy America Requirements; Amendments to Definitions and Waiver Procedures, 70 Fed. Reg. 71,246, 71,251 (Nov. 28, 2005).

⁶⁴¹ For more background on the fare collection system controversy, see the discussion of FTA’s microcomputer/software waiver in § III.C.3.d *infra*.

⁶⁴² Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 3023(i)(5)(B) (2005).

⁶⁴³ Buy America Requirements—Amendments to Definitions and Waiver Procedures, 70 Fed. Reg. 71,246, 71,251 (Nov. 28, 2005).

⁶⁴⁴ *Id.*

⁶⁴⁵ *Id.* at 71,252.

⁶⁴⁶ Buy America Requirements—End Product Analysis and Waiver Procedures, 71 Fed. Reg. 69,412, 69,419 (Nov. 30, 2006).

⁶⁴⁷ *Id.* at 69,420, 69,421.

⁶⁴⁸ *Id.* at 69,421.

⁶⁴⁹ Buy America Requirements—End Product Analysis and Waiver Procedures, 72 Fed. Reg. 53,688, 53,696 (Sep. 20, 2007).

⁶⁵⁰ 49 C.F.R. § 661.3 (2013).

⁶⁵¹ 49 C.F.R. § 661.3, App. A (2013) (listing “fare collection systems; computers; information systems; security systems; data processing systems” and “a communication or traction power system” as representative end products).

While the manufactured products rulemaking in response to SAFETEA-LU is lengthy and complex, the new lists implemented by FTA represent an improvement over prior practice in that grant recipients can have certainty about how to evaluate domestic content in most situations. If there is any question about what is the end product (for which domestic content and final assembly must be evaluated), grant recipients can refer to the list of representative end products.⁶⁵² If there is any question about what the components of the end product are, grant recipients can refer to the lists of typical components.⁶⁵³ And if there is any question whether final assembly has taken place in the United States, grant recipients can refer to the list of minimum final assembly operations.⁶⁵⁴

c. Public Interest Waivers for Chrysler Vehicles.—Although the FTA Buy America provision includes the opportunity to request a Public Interest waiver, such waivers have rarely been granted since SAFETEA-LU was enacted in 2005. Prior to that, Public Interest waivers were widely used by FTA grant recipients, e.g., to purchase vehicles manufactured by Chrysler outside of the United States.⁶⁵⁵ Examining the history of this waiver, its repeal by Congress, and FTA’s more recent approach to Public Interest waiver requests helps illustrate the change this creates for FTA grant recipients and their procurement practices.

In February 1984, FTA published a notice in the *Federal Register* soliciting public comment on a waiver request from Chrysler to allow FTA grant recipients to purchase 15-passenger Chrysler vans that were assembled in Canada.⁶⁵⁶ FTA received comments from 29 states supporting the request.⁶⁵⁷ FTA determined that the vans contained 74 percent domestic content,⁶⁵⁸ which would have qualified for the rolling stock Domestic Content exception but for the fact that the final assembly location was in Canada. FTA granted a Public Interest waiver for the vans, justified on the grounds that it would provide for

more competitive pricing in vehicle procurements by FTA grant recipients.⁶⁵⁹

Waiver requests almost always involve lower prices, so FTA grant recipients and suppliers (e.g., Chrysler) might often try to justify a waiver on the grounds of more competitive pricing. However, 4 years after granting a Public Interest waiver for Chrysler vans (and just 1 year after extending the waiver to Chrysler station wagons), FTA denied a similar Public Interest waiver request for Michelin tires manufactured in Europe.⁶⁶⁰ In that case, FTA stated that the Public Interest waiver was to “be utilized in extremely limited situations,”⁶⁶¹ and improving the competitive position of foreign products does not generally qualify:

The intent of the Buy America provision is to foster and encourage production of materials in the United States for use in federally funded mass transit projects. The granting of a general waiver to allow a foreign produced item to have equal competitive status with domestically produced items is contrary to the clear intent of the statutory provision.⁶⁶²

In 2003 and 2004, Chrysler requested similar Public Interest waivers (or Nonavailability waivers in the alternative) for the chassis and drive train of its smaller 8-to-10 passenger cargo vans, which were manufactured from German components.⁶⁶³ In 2004, FTA denied a general waiver for the Chrysler chassis on the grounds that a waiver for foreign products would “influence competition in these procurements.”⁶⁶⁴ However, the 1984 general waivers for 15-passenger Chrysler vehicles remained in FTA’s regulations.⁶⁶⁵ In 2005, as part of SAFETEA-LU, Congress formally repealed the Chrysler waivers.⁶⁶⁶

However, in 2009, FTA posted notice in the *Federal Register* seeking public comment on a

⁶⁵⁹ *Id.*

⁶⁶⁰ Determination Concerning Request for Public Interest Waiver of Buy America Requirements, 53 Fed. Reg. 22,418 (June 15, 1988).

⁶⁶¹ *Id.*

⁶⁶² *Id.*

⁶⁶³ Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to W. Alvin Jackson, DaimlerChrysler (Apr. 7, 2004), available at http://www.fta.dot.gov/legislation_law/legislation_law_664.html.

⁶⁶⁴ *Id.*

⁶⁶⁵ 49 C.F.R. § 661.7, App. A(b),(c) (2005).

⁶⁶⁶ Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 3023(i)(4) (2005). FTA removed the Chrysler waivers from its regulations in March 2006. Buy America Requirements—Amendments to Definitions, 71 Fed. Reg. 14,112, 14,113 (Mar. 21, 2006).

⁶⁵² 49 C.F.R. § 661.3, App. A (2013).

⁶⁵³ 49 C.F.R. § 661.11, App. B, C (2013).

⁶⁵⁴ 49 C.F.R. § 661.11, App. D (2013).

⁶⁵⁵ Exemption from Buy America Requirements, 49 Fed. Reg. 13,944 (Apr. 9, 1984).

⁶⁵⁶ 49 Fed. Reg. 4,062 (Feb. 1, 1984).

⁶⁵⁷ Exemption from Buy America Requirements, 49 Fed. Reg. 13,944 (Apr. 9, 1984).

⁶⁵⁸ *Id.*

Nonavailability waiver request for the Chrysler minivan chassis.⁶⁶⁷ The waiver request was from a domestic manufacturer, ElDorado National, which manufactured minivans using the Chrysler chassis. Although at that time FTA's public notice-and-comment requirements only applied to Public Interest waivers, FTA published this request out of "an abundance of caution because a nonavailability waiver would have a national impact."⁶⁶⁸ In 2010, Chrysler also requested a Public Interest waiver for both its chassis and its minivans,⁶⁶⁹ which FTA addressed along with the ElDorado request. In June 2010, FTA granted a general, nationwide Nonavailability waiver (rather than a Public Interest waiver) for all minivans and minivan chassis because no domestic source was identified by members of the public in the notice-and-comment process.⁶⁷⁰

In March 2012, a domestic manufacturer, Vehicle Production Group (VPG), informed FTA that it had developed a process to manufacture minivans and minivan chassis that conformed to the FTA Buy America provision and asked FTA to rescind the Nonavailability waiver.⁶⁷¹ FTA published VPG's rescission request in the *Federal Register* for public notice-and-comment,⁶⁷² and FTA rescinded the minivan and chassis waiver in December 2012.⁶⁷³ FTA received more than 800 comments in response to this request. Most of the comments opposing rescission of the waiver argued that the waiver results in more competitive pricing in minivan procurements by FTA grant recipients. FTA rejected the "competition" justification for either a Nonavailability waiver or a Public Interest waiver, saying that was the purpose of the Price Differential waiver:

⁶⁶⁷ Notice of Buy America Waiver Request by ElDorado National for Minivan Chassis, 74 Fed. Reg. 15,048 (Apr. 2, 2009).

⁶⁶⁸ Notice of Buy America Waiver for Minivans and Minivan Chassis, 75 Fed. Reg. 35,123, 35,124 (June 21, 2010).

⁶⁶⁹ *Id.* at 35,123.

⁶⁷⁰ *Id.* at 35,124.

⁶⁷¹ Letter from Seth Weinberg, VPG General Counsel, to Peter M. Rogoff, FTA Administrator (Mar. 29, 2012), available at <http://www.regulations.gov/documentDetail;D=FTA-2012-0029-0002>.

⁶⁷² Notice of Request to Rescind Buy America Waiver for Minivans and Minivan Chassis, 77 Fed. Reg. 46,556 (Aug. 3, 2012).

⁶⁷³ Decision To Rescind Buy America Waiver for Minivans and Minivan Chassis, 77 Fed. Reg. 71,673 (Dec. 3, 2012).

If limited competition results in a product ceasing to be available to FTA-funded transit agencies at a competitive price (measured by a greater than 25 percent differential between foreign-produced and Buy America-compliant vehicles), the appropriate action would be for the grantee to apply for a waiver based on price-differential.⁶⁷⁴

This is a change from 1984, when FTA originally granted the Chrysler minivan waiver for the express purpose of improving competitive pricing for its grant recipients.

As a result of FTA rescinding the general waiver for minivan chassis, other domestic manufacturers have modified their manufacturing practices to produce vans that satisfy the FTA Buy America provision. In July 2013, FTA notified El Dorado and Braun Corporation that it had determined that their manufacturing processes "to convert an incomplete Chrysler or Dodge minivan into" a domestic minivan "are sufficient to meet the Buy America final assembly requirements."⁶⁷⁵

The Chrysler van waiver history illustrates that general, nationwide waivers for rolling stock are no longer likely under the FTA Buy America provision. Although Nonavailability waivers may be available on a project-specific basis, general nationwide Nonavailability waivers are unlikely to be long-term. Domestic manufacturers will have a strong incentive under the FTA Buy America provision to increase domestic content or domestic manufacturing processes whenever FTA determines there are no other domestic sources, because a domestic supplier in that case would have an effective monopoly for future FTA grant projects. More importantly for FTA grant recipients, the Chrysler van waiver history demonstrates that Public Interest waivers are unlikely for the foreseeable future. With SAFETEA-LU, Congress indicated its disapproval of widespread Public Interest waivers. And in 2012, FTA sent a clear signal that the subjective concept of "more competitive pricing" that it used to justify Public Interest waivers for Chrysler vans in 1984 is no longer considered an appropriate justification for Public Interest waivers. In fact, it is unclear what would qualify for a Public Interest waiver, outside of the context of public safety.

⁶⁷⁴ *Id.* at 71,676.

⁶⁷⁵ Letter from Peter Rogoff, FTA Administrator, to Andrew Imanse, Thor Industries Group President (July 1, 2013), available at http://www.fta.dot.gov/documents/Imanse_re_Chrysler_Buy_America.pdf; Letter from Peter Rogoff, FTA Administrator, to Nick Gutwein, BraunAbility President (July 1, 2013), available at http://www.fta.dot.gov/documents/Gutwein_re_Chrysler_Buy_America.pdf.

d. Nonavailability Waiver for Computers and Software.—Compliance with the FTA Buy America provision is streamlined by FTA’s longstanding general waiver for much computer hardware and software. Beginning in January 1985, FTA published a notice in the *Federal Register* that it had received a request from the American Association of State Highway and Transportation Officials (AASHTO) for a general, nationwide Public Interest waiver to exempt “microcomputers” from the FTA Buy America provision.⁶⁷⁶ AASHTO’s justification for the request was that “[m]any smaller transit systems are now using microcomputers for their daily transit planning and daily programming needs,” and that the microcomputers did not satisfy the FTA Buy America provision “since their chips and some major components are not made in the United States.” In May 1985, based on comments received, FTA determined that a temporary Nonavailability waiver was appropriate,⁶⁷⁷ since it appeared that the components (primarily microchips) were not being manufactured in the United States in sufficient quantities of satisfactory quality. In October 1986, FTA made the microcomputer waiver permanent after determining, based on public comments,⁶⁷⁸ that the components (primarily microchips) were still not available domestically.⁶⁷⁹

One controversial aspect of FTA’s waiver for microcomputers has been its impact on software procurement, either as a standalone product or as a component of other manufactured products. In adopting the nationwide general waiver for microcomputers in 1985, FTA adopted a definition of a microcomputer to be a “computer system” that “includes a microprocessor, storage, and input/output facility, which may or may not be on one chip,” and recognized that a microcomputer includes “associated software” such as its operating system.⁶⁸⁰ FTA therefore interpreted the Nonavailability waiver for microcomputers to extend to software, permitting the purchase of foreign software as a standalone end product, with-

⁶⁷⁶ Exemption from Buy American Requirements, 50 Fed. Reg. 1,156 (Jan. 9, 1985).

⁶⁷⁷ Exemption from Buy America Requirements, 50 Fed. Reg. 18,760 (May 2, 1985).

⁶⁷⁸ FTA solicited public comments in May 1986 as to whether the domestic market for microcomputer products had improved. 51 Fed. Reg. 19,653 (May 30, 1986).

⁶⁷⁹ Buy American Requirements—Permanent Waiver, 51 Fed. Reg. 36,126 (Oct. 8, 1986).

⁶⁸⁰ Exemption from Buy America Requirements, 50 Fed. Reg. 18,760 (May 2, 1985).

out regard to whether it was actually incorporated into a microcomputer or resided on a microchip and without ever determining that software is not available domestically. While FTA’s logic was questionable (to grant a Nonavailability waiver for all software based primarily on a determination that microchips are not available domestically), the software waiver eliminated difficult questions related to FTA procurements, such as the need to identify the “components” of software and their respective costs and country of origin. Furthermore, under FTA’s approach for handling nonavailable goods, the cost of software incorporated into a manufactured end product may be considered domestic for purposes of evaluating overall domestic content of the end product.⁶⁸¹

The Nonavailability waiver for microcomputers (and software) remained in place, unchanged, as computer technology transformed dramatically in the 1990s. In 1999, FTA received a request to clarify the microcomputer waiver.⁶⁸² Specifically, the petitioner asked FTA to explain whether the waiver applied to any manufactured product containing a microprocessor or microchip (specifically referencing “fare collection equipment”), or whether the waiver should apply only to desktop computers (which were the focus of the 1985 waiver request). In October 1999, FTA published the waiver request in the *Federal Register* for public comment.⁶⁸³ FTA received only nine comments from the public, all in November and December 1999. However, FTA did not respond until February 2003, more than 3 years later, when FTA announced that it had determined, based on public comments, that microcomputer components (primarily microchips) were still not available domestically in sufficient quantities of satisfactory quality.⁶⁸⁴ Therefore, FTA did not revise the 1985 general waiver for microcomputers. FTA clarified, however, that it did not consider the general waiver to permit the purchase of all foreign manufactured products containing a microprocessor or microchip. If a manufactured product such as “a farecard system” contained a microcomputer, then the waiver only applied to the mi-

⁶⁸¹ 49 C.F.R. § 661.7(f) (2013) (“If a waiver is granted for a component or a subcomponent, that component or subcomponent will be considered to be of domestic origin.”).

⁶⁸² Buy America Requirements—Permanent Waiver for Microcomputers, 64 Fed. Reg. 54,855 (Oct. 8, 1999).

⁶⁸³ *Id.*

⁶⁸⁴ Buy America Requirements—Permanent Waiver for Microcomputers, 68 Fed. Reg. 9,801 (Feb. 28, 2003).

crocomputer; “the rest of the end product must be in compliance” with the FTA Buy America provision.⁶⁸⁵ At the same time, FTA reiterated that it would continue to consider the waiver to permit the purchase of foreign software.

FTA’s 2003 clarification of the microcomputer waiver came in the midst of a legal dispute over whether fare collection equipment purchased by the Massachusetts Bay Transportation Authority (MBTA) complied with the FTA Buy America provision.⁶⁸⁶ An unsuccessful bidder challenged MBTA’s purchase of an automated fare collection system. In November 2002, FTA notified MBTA that the fare collection system complied with the FTA Buy America provision, in part because it determined that one foreign-manufactured component (a “smart card reader”) was a microcomputer that qualified for the microcomputer waiver. The unsuccessful bidder filed a lawsuit in 2003 to challenge the application of the microcomputer waiver to this component of fare collection equipment.⁶⁸⁷

Shortly after FTA’s 2002 determination that MBTA’s smart card reader qualified for the microcomputer waiver, FTA received a request from CoinCard International, Inc., to interpret the microcomputer/software waiver to exempt CoinCard’s fare collection equipment. In May 2003, just 2 weeks after the lawsuit was filed challenging FTA’s determination on the MBTA fare collection equipment,⁶⁸⁸ FTA responded to CoinCard with its determination that CoinCard’s fare collection equipment did not comply with the FTA Buy America provision and was not exempted by the waiver.⁶⁸⁹ Individual components of CoinCard’s fare collection equipment were covered by the waiver, including the software and selected hardware components, such as command modules and transaction processors, which contained microprocessors, input and output slots, internal storage, operating systems, and memory.

⁶⁸⁵ *Id.*

⁶⁸⁶ *Cubic Transp. Sys., Inc. v. Mineta*, 357 F. Supp. 2d 261 (D.D.C. 2004).

⁶⁸⁷ The court ultimately dismissed the lawsuit based on the unsuccessful bidder’s lack of standing, without determining whether the microcomputer waiver was properly applied to the fare collection equipment. *Id.*

⁶⁸⁸ *Complaint, Cubit Transp. Sys., Inc. v. Mineta*, No. 03-CV-01023 (May 9, 2003).

⁶⁸⁹ Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to Denis Bernardi, CoinCard International, Inc. (May 23, 2003), *available at* http://www.fta.dot.gov/legislation_law/12316_621.html.

However, FTA determined that other hardware components, such as passenger counters, farecard printers, and bill and coin validators, “are not, themselves, microcomputers, although they may each contain embedded microprocessors.”⁶⁹⁰ All other subcomponents of these hardware components, as well as other components of the fare collection systems that were not microprocessors or software, had to be domestic in order for the fare collection equipment to comply with the FTA Buy America provision. Over the next 15 months, citing its CoinCard determination, FTA ruled that several other manufactured products (including automated passenger and customer information systems⁶⁹¹ and monitoring and diagnostic equipment)⁶⁹² were not themselves microcomputers eligible for the waiver, although certain components of these products were eligible microcomputers to the extent they were “capable of processing, storage, programming, and have input/output facilities.”

Despite the apparent consistency and relative clarity of these decisions, in 2005 (as part of SAFETEA-LU), Congress required FTA to issue a rule clarifying that the microcomputer waiver “applies only to a device used solely for the purpose of processing or storing data and does not extend to a product containing a microprocessor, computer, or microcomputer.”⁶⁹³ In November 2005, FTA issued an NPRM, which confirmed that the statutory language “actually reflects current FTA practice with respect to implementing the general waiver for microcomputer, microprocessor, and related equipment,”⁶⁹⁴ and solicited public comment on the need to clarify the waiver. Many of the public comments focused on whether

⁶⁹⁰ *Id.*

⁶⁹¹ Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to Martin B. Schnabel, MTA New York City Transit (Sep. 23, 2003), *available at* http://www.fta.dot.gov/legislation_law/12316_620.html; Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to Kevin Berry, Vansco Electronics Ltd. (Sep. 15, 2003), *available at* http://www.fta.dot.gov/legislation_law/12316_621.html.

⁶⁹² Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to Stephen McKay, Quester Tangent Corp. (Aug. 2, 2004), *available at* http://www.fta.dot.gov/legislation_law/12316_615.html.

⁶⁹³ *Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users*, Pub. L. No. 109-59, § 3023(i)(5)(A) (2005).

⁶⁹⁴ *Buy America Requirements—Amendments to Definitions and Waiver Procedures*, 70 Fed. Reg. 71,246 (Nov. 28, 2005).

FTA should allow its grant recipients to purchase foreign-origin software or input and output devices under this waiver,⁶⁹⁵ since the justification for the waiver has always been the nonavailability of *microchips*, and software and input and output devices are available domestically and can be procured independently of microchips. However, in November 2006,⁶⁹⁶ FTA clarified that the waiver will continue to apply to both microcomputers (which include “a microprocessor, storage, and input/output facility, which may or may not be on one chip”⁶⁹⁷) and software. FTA grant recipients can acquire software and input and output devices from foreign sources, regardless of whether a microprocessor or microchip is part of the purchase. Further, when purchasing manufactured products, any components of those products that may fairly be considered computers, microprocessors, storage, input and output devices, or software, may be treated as domestic when evaluating the domestic content of the manufactured product.⁶⁹⁸ However, no general waiver is available for the remainder of the manufactured product simply because some of its components may be classified as computer equipment or software—the remainder of the product still must be domestic to comply with the FTA Buy America provision.

4. Case Studies

a. Public Interest Waiver Request (MBTA).—In October 2008, FTA published a notice in the *Federal Register* soliciting comments on a Public Interest waiver request from MBTA to permit it to purchase two locomotives manufactured in Spain.⁶⁹⁹ MBTA had solicited bids for 28 new locomotives and entered into a negotiated procurement process with two bidders: MotivePower and Vossloh. MotivePower’s best and final offer of \$150.7 million included a Buy America compliance certification indicating that all 28 locomotives would qualify for the Domestic Content ex-

ception for rolling stock.⁷⁰⁰ Vossloh’s best and final offer of \$148.5 million included a Buy America *noncompliance* certification, indicating that it would manufacture the first two locomotives in Spain, in order to save costs and time by allowing its Spanish-based design team to be involved in the manufacturing process.⁷⁰¹ MBTA requested a Public Interest waiver for the two pilot locomotives, because it would enable Vossloh “to submit a competitive bid with respect to price and schedule.”⁷⁰²

The small difference in bid prices did not qualify for the 25 percent Price Differential waiver from the FTA Buy America provision. MBTA did not argue that this procurement qualified for the Nonavailability waiver from the FTA Buy America provision.⁷⁰³ Therefore, a Public Interest waiver was Vossloh’s only option.

FTA received more than 300 comments in response to this waiver request, including comments from a number of Congressmen opposing the waiver.⁷⁰⁴ In November 2008, FTA denied the waiver request because the justification offered by MBTA was the moderate cost savings associated with the Vossloh bid. FTA stated, “Public interest waivers are very difficult to obtain. FTA requires a clear nexus between the item requested and the beneficial impact on the public.”⁷⁰⁵ While FTA may grant Public Interest waivers for prototype vehicles, the waivers must be justified by Public Interest factors other than cost savings—such as schedule delays, safety issues, or the introduction of significant new technology. It was unclear from MBTA’s waiver request that

⁷⁰⁰ Noah Bierman, *MBTA Puts Off Buying 28 New Locomotives*, BOSTON GLOBE, Jan. 24, 2009.

⁷⁰¹ *Id.*

⁷⁰² Notice of Buy America Waiver Request by the Massachusetts Bay Transportation Authority for Final Assembly of Rail Rolling Stock, 73 Fed. Reg. 62,587, 62,588 (Oct. 21, 2008).

⁷⁰³ As illustrated in § II.A.4 *supra*, under the FRA Buy America provision, Nonavailability waivers have been granted by FRA even where there is a domestic bid, where the foreign goods only moderately improve the overall project cost and completion time. However, FTA has not adopted that relaxed standard for Nonavailability waivers.

⁷⁰⁴ Comments, Docket No. FTA-2089-0075 (Oct. 22–Nov. 21, 2008), available at <http://www.regulations.gov/#!docketBrowser;D=FTA-2008-0047>.

⁷⁰⁵ Letter from Sherry E. Little, FTA Deputy Administrator, to Daniel A. Grabauskas, MBTA (Nov. 14, 2008), available at http://www.fta.dot.gov/legislation_law/legislation_law_8894.html.

⁶⁹⁵ Buy America Requirements—End Product Analysis and Waiver Procedures, 71 Fed. Reg. 69,412, 69,414 (Nov. 30, 2006).

⁶⁹⁶ *Id.*

⁶⁹⁷ 50 Fed. Reg. 18,760 (May 2, 1985).

⁶⁹⁸ See *supra* notes 689–692 and accompanying text.

⁶⁹⁹ Notice of Buy America Waiver Request by the Massachusetts Bay Transportation Authority for Final Assembly of Rail Rolling Stock, 73 Fed. Reg. 62,587 (Oct. 21, 2008).

there would be any schedule delays or safety issues associated with the MotivePower bid, relative to the Vossloh bid, and “MBTA has not argued that this procurement involves the introduction of significant new technology.”⁷⁰⁶

After FTA denied the waiver request, MBTA cancelled its solicitation in January 2009, saying that it could not afford to purchase the 28 locomotives at the MotivePower bid price. MBTA was also concerned about a bid protest, “regardless of which company it chose.”⁷⁰⁷ Ultimately, in July 2010, MBTA entered into a contract with MotivePower to supply 20 new locomotives at a price of \$114.6 million.⁷⁰⁸

The MBTA waiver request illustrates the tougher standard for Public Interest waivers under the FTA Buy America provision since SAFETEA-LU, in comparison to the FHWA Buy America provision, where Public Interest waivers have been employed regularly.⁷⁰⁹ It also illustrates the tougher standard for Nonavailability waivers under the FTA Buy America provision, in comparison to the FRA Buy America provision (where domestic products may be deemed “not reasonably available” based on moderately higher prices and delivery times).⁷¹⁰ Under the FTA Buy America provision, unless there are no compliant domestic bids, a low bid that fails to satisfy the Domestic Content exception for rolling stock (60 percent domestic content and final assembly in the United States) can only be purchased if the lowest compliant domestic bid is 25 percent more expensive.

b. Final Assembly Determinations.—After the 2006–2008 “final assembly” rulemaking in response to SAFETEA-LU,⁷¹¹ FTA has published some of its recent waiver determinations that illustrate how the final assembly rules are applied in the context of rail rolling stock procurements.

In June 2010, the Washington Metropolitan Area Transit Authority (Metro) requested a Public Interest waiver to purchase eight rail cars manufactured in Japan by Kawasaki. However, FTA

explained that Public Interest waivers are now granted only “under the most extreme circumstances.”⁷¹² Thereafter, Kawasaki revised its proposal to Metro. Kawasaki now proposed to design the rail cars in Japan and manufacture four rail cars in Japan for “design qualification testing.”⁷¹³ The cars would be disassembled and only the four car shells would be shipped to the United States. Kawasaki would then reassemble the four rail cars in the United States, using “all new components”—aside from the car shells themselves, the parts used for design qualification testing would not be reused.⁷¹⁴ Specifically, all of the items on FTA’s published list of elements that must be installed or interconnected at the final assembly location⁷¹⁵ would be new, and then the reassembled rail cars would be retested to satisfy the FTA requirement for “in-plant testing of the stationary product.” In July 2010, FTA concluded that this constituted “final assembly” in the United States for purposes of the FTA Buy America provision.⁷¹⁶ Furthermore, Kawasaki calculated that the four reassembled rail cars (using the car shells manufactured in Japan) would have 61 percent domestic content, and the remainder of the rail cars manufactured to complete the order for Metro would have 69 percent domestic content.⁷¹⁷ Therefore, both requirements of the Domestic Content exception for rolling stock were satisfied by this approach.

In February 2011, FTA fielded a similar request from Miami-Dade Transit (MDT) to evaluate a proposal from Italian manufacturer AnsaldoBreda to supply heavy rail vehicles.⁷¹⁸ AnsaldoBreda proposed to perform manufacturing and in-plant testing of some of the components in Italy. However, all of the activities on FTA’s list of

⁷⁰⁶ *Id.*

⁷⁰⁷ Noah Bierman, *MBTA Getting Set to Buy Long-Needed Locomotives for Commuter Rail*, BOSTON GLOBE, Mar. 7, 2010.

⁷⁰⁸ *MBTA Orders MotivePower HSP46 Diesels*, RAILWAY GAZETTE, July 20, 2010; *Boise’s MotivePower Gets \$114 Million Contract*, IDAHO BUSINESS REVIEW, July 15, 2010.

⁷⁰⁹ See *supra* §§ III.B.3.b, III.B.4.b.

⁷¹⁰ See *supra* § II.A.4.

⁷¹¹ See *supra* notes 615–618 and accompanying text.

⁷¹² Letter from Dorval Carter, Jr., FTA Chief Counsel, to Carol B. O’Keefe, Metro General Counsel, regarding Determination of Buy America Compliance for the 7000 Series Railcar Procurement (July 23, 2010), available at http://www.fta.dot.gov/legislation_law/12316_11881.html.

⁷¹³ *Id.*

⁷¹⁴ *Id.*

⁷¹⁵ 49 C.F.R. § 661.11, App. D(a) (2013).

⁷¹⁶ Letter from Dorval Carter, Jr., *supra* note 712.

⁷¹⁷ *Id.*

⁷¹⁸ Letter from Dorval Carter, Jr., FTA Chief Counsel, to Ysela Llort, MDT Director, regarding Buy America Determination of Compliance (Apr. 2, 2012), available at http://www.fta.dot.gov/legislation_law/12316_15062.html.

minimum final assembly operations,⁷¹⁹ including all of the items on FTA’s list of elements that must be installed or interconnected at the final assembly location, as well as in-plant testing of the end product, would take place in the United States. In April 2012, FTA concluded that this satisfied its requirements for “final assembly” in the United States.⁷²⁰ FTA’s list of minimum final assembly operations do not require in-plant testing of *components* to take place in the United States, just in-plant testing of the *end product*. However, FTA cautioned MDT and AnsaldoBreda that final assembly in the United States is not sufficient to qualify for the Domestic Content exception for rolling stock.⁷²¹ The end product must also contain at least 60 percent domestic content, measured by the cost of components and subcomponents. FTA’s lists of representative rail rolling stock components⁷²² are set out separately from FTA’s list of minimum final assembly operations. Where in-plant testing of a component takes place overseas, it is unlikely that the component is domestically manufactured—and as more components are manufactured (and tested) overseas it becomes less likely that the end product will qualify for the Domestic Content exception for rolling stock.

Likewise, even if the end product contains 60 percent domestic content or more, final assembly of the components into the end product must take place in the United States to qualify for the Domestic Content waiver. In August 2002, FTA fielded a request from Alstom Transportation, Inc., to evaluate its proposal to conduct mid-life overhauls of rail vehicles for the Maryland Mass Transit Administration (MMTA).⁷²³ Alstom proposed to overhaul the truck assemblies in Canada, then reconnect the trucks to refurbished car bodies in the United States. The truck overhauls in Canada would include “removal and reinstallation of traction motors; wheel, axle and gear units; tread brake units; and cab signal antennas (communications equipment).”⁷²⁴ FTA’s list of minimum final assembly operations for rail rolling stock includes “installation and intercon-

nection of...brake equipment, ...communications equipment, motors, wheels, and axles.”⁷²⁵ Therefore, FTA concluded that regardless of the domestic content of the overhauled rail vehicles, they would not qualify for the Domestic Content exception for rolling stock if these items were removed and reinstalled in Canada.

These recent decisions illustrate the importance of FTA’s published lists of typical rail rolling stock components⁷²⁶ and minimum final assembly operations for rail cars⁷²⁷ in evaluating the Domestic Content exception for rail rolling stock. The list of components is used to verify that 60 percent of the cost of the end product is domestic; the list of final assembly operations is used to verify that 100 percent of the final assembly operations took place in the United States. Both criteria must be satisfied for the rail rolling stock to qualify for the Domestic Content rolling stock exception to the FTA Buy America provision.

c. Price Differential Waiver Requests (Metro North).—As opposed to the BAA, where Price Differential waivers are common, Price Differential waivers are rare under the transportation grant Buy America provisions because Congress established large price differentials (typically 25 percent) for the transportation grant programs. Unlike FRA, which applies the 25 percent price differential to the cost of the “overall project,”⁷²⁸ FTA has historically applied the 25 percent price differential only to “the cost of the contract between the grantee and its supplier of that item or material.”⁷²⁹ Therefore, the Price Differential waiver conditions have occasionally been satisfied under the FTA Buy America provision, particularly in narrowly focused supply contracts for a single item where there is little domestic competition or in construction contracts for a segment of an overall project. Application of the Price Differential waiver to rail projects is illustrated by a couple of waiver requests from Metro North Railroad in New York.

In April 2004, Metro North requested a Price Differential waiver for Phase III of its Harlem Valley Rail Trail construction project.⁷³⁰ This was

⁷¹⁹ 49 C.F.R. § 661.11, App. D(a) (2013).

⁷²⁰ Letter from Dorval Carter, Jr., *supra* note 718.

⁷²¹ *Id.*

⁷²² 49 C.F.R. § 661.11, App. C (2013).

⁷²³ Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to Peter Stahlmann, Alstom Corporate Counsel, *available at* http://www.fta.dot.gov/legislation_law/12316_609.html.

⁷²⁴ *Id.*

⁷²⁵ 49 C.F.R. § 661.11, App. D(a) (2013).

⁷²⁶ 49 C.F.R. § 661.11, App. C (2013).

⁷²⁷ 49 C.F.R. § 661.11, App. D(a) (2013).

⁷²⁸ *See supra* notes 60–61 and accompanying text.

⁷²⁹ 49 C.F.R. § 661.7(d) (2013).

⁷³⁰ Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to Thomas J. Larkin, Metro North Director of Procurement and Material Management (May 21, 2004), *available at* <http://www.fta.dot.gov/legislation>

a conversion of an abandoned rail bed into a paved trail that was being constructed in segments. The low bid included foreign construction materials, necessitating a waiver. After multiplying the entire low bid by 1.25, FTA concluded that the surcharged low bid was still lower than the lowest “domestic, compliant bid,” qualifying for the Price Differential waiver.⁷³¹ However, the Price Differential was applied to the entire low bid, not just the cost of foreign steel and iron construction materials in the bid.⁷³² Applying the Price Differential to the entire low bid, rather than solely to the cost of foreign construction materials as is done with the BAA, can make it harder to qualify for a Price Differential waiver. FTA, however, evaluated the Price Differential waiver only on the cost of the contract to construct this segment (Phase III) of the project, not for the overall Harlem Valley Rail Trail project. This is consistent with FTA’s regulations, which call for the Price Differential waiver to be applied to “the cost of the *contract* between the grantee and its supplier,”⁷³³ rather than to the overall *project* cost. This made it possible to obtain a Price Differential waiver—it would have been much harder, if not impossible, to demonstrate that selecting the lowest domestic bidder for the Phase III contract would increase the cost of the overall Harlem Valley Rail Trail project by 25 percent.

In recent years, FTA has indicated that for future Price Differential waiver requests, it will evaluate the FTA Buy America provision across all contracts that comprise an overall project, even to include contracts not funded by FTA. This revised approach is illustrated by a 2012 Price Differential waiver request from Metro North to purchase foreign steel frogs using its own funds.⁷³⁴

[_law/12316_618.html](#).

⁷³¹ *Id.*

⁷³² Note also that FTA has said that it evaluates construction projects as manufactured products, so that all “components”—i.e., all construction materials—must be domestic to comply with the FTA Buy America provision. 46 Fed. Reg. 5,808 (Jan. 19, 1981). Therefore, the low bid may have been noncompliant even if it contained no foreign steel or iron, based solely on a proposal to incorporate foreign paving materials.

⁷³³ 49 C.F.R. § 661.7(d) (2013) (emphasis added).

⁷³⁴ Letter from Michael L. Culotta, FTA Regional Counsel, to Anthony J. Bombace, Metro North Senior Director of Procurement and Material Management, regarding Buy America Waiver Request, Metro-North Railroad Bid Inquiry 1-11623, Frogs (July 5, 2013), available at http://www.fta.dot.gov/legislation_law/legislation_law_15608.html.

Metro North received a noncompliant low bid of \$219,950, and the lowest compliant bid was \$371,152. Multiplying the noncompliant low bid by 1.25, it was less than the lowest compliant bid, which would appear to satisfy the Price Differential requirements in FTA’s regulations.⁷³⁵ However, FTA denied the waiver request because Metro North failed to evaluate the impact on the cost of the overall development *project* on which the frogs would be used.⁷³⁶ The purpose of the supply contract was to stock Metro North’s inventory, so Metro North had not even identified any specific development projects on which the frogs would be used. Because FTA denied the waiver request, Metro North could only purchase the frogs from the low bidder using its own funds, and the frogs could only be used on projects not funded with FTA assistance.⁷³⁷ FTA grant recipients should be mindful that the trend is to apply transportation grant Buy America provisions across entire development projects, not just to federally funded contracts or individual segments of a project. This makes a Price Differential waiver unlikely.

IV. CONCLUSIONS

The transportation grant Buy America provisions potentially applicable to rail projects are deceptively similar and simple in appearance. The reality is that despite nearly identical statutory language, there are key differences in the way different federal grant-making agencies apply the provisions to their railroad construction projects and rail rolling stock procurements. There are even differences in the ways that individual federal agencies have applied the Buy America requirements over the years, as practices have evolved in response to perceived abuses and legislative mandates. With some federal agencies (like FRA), there are no regulations and little formal guidance for grant recipients. With other federal agencies (like FTA), the regulations and administrative history are so voluminous that research is often required to determine how to apply the various waivers to a given procurement. This digest combines into a single resource a comprehensive synthesis of each of the four transportation grant Buy America provisions applicable to rail programs. Grant recipients should first identify which transportation grant Buy America provi-

⁷³⁵ 49 C.F.R. § 661.7(d) (2013).

⁷³⁶ Letter from Michael L. Culotta, *supra* note 734.

⁷³⁷ *Id.*

sions potentially apply to their project, then review the materials herein related to the applicable Buy America provisions. Keep in mind, however, that as of this publication, significant rulemakings are pending from FHWA and FRA. The FTA discussion herein also illustrates that the Buy America provisions change over time, in some cases frequently, and the way that a grant-making agency applies its Buy America provision can change dramatically in response to direction from Congress. It is the responsibility of grant recipients to be informed of changes to the Buy America requirements applicable to their grants. There is no substitute for working closely with the federal grant-making agency for grant recipients to confirm their understanding of how a given Buy America provision applies to their projects.

V. APPENDIX

The following table summarizes the similarities and differences in the four Buy America provisions applicable to rail procurements, which are discussed in greater detail in this digest. The reader is cautioned that the table is a simplified presentation of a complex topic, as different federal agencies have different interpretations of what constitutes “manufacturing,” “components,” etc. The Buy America requirements are also fluid and subject to periodic revision by Congress or rulemaking and interpretation by federal agencies. Grant recipients should always consult with their attorney and the federal grant-making agency to determine whether a waiver or exception is applicable to a given situation on a grant-funded project.

Table 1.

	FRA Buy America Provision	Amtrak Buy America Provision	FHWA Buy America Provision	FTA Buy America Provision
APPLIES TO:	All steel, iron, and manufactured products used on a project funded by FRA	All manufactured products and unmanufactured goods purchased with Amtrak's capital grant funds	All steel and iron used on a project where at least one contract is funded by FHWA	All steel, iron, and manufactured products used on a project funded by FTA
EXCEPTIONS:				
Domestic Content:	No domestic content exception			Domestic content exception for rolling stock only
Manufactured Products	<p>Final assembly in the U.S. and 100% domestic components</p> <p>Components are domestic if manufactured in the U.S., regardless of origin of subcomponents</p>	<p>Must be "substantially" domestic:</p> <p>Final assembly in the U.S. and 50% domestic components</p> <p>Some specific procurements may have domestic content "goals" up to 70%</p>	<p>Nationwide general waiver for manufactured products</p> <p>Waiver does not apply to predominantly steel and iron manufactured products</p>	<p>100% domestic components and manufactured in the U.S.</p> <p>Components are domestic if manufactured in the U.S., regardless of origin of subcomponents.</p>
Rolling Stock	Same criteria as for manufactured products	Same criteria as for manufactured products	Project-specific waivers may be available where final assembly is in the U.S.	<p>Final assembly in the U.S. and 60% domestic components and subcomponents</p> <p>Subcomponents are domestic if manufactured in the U.S.</p>
Price Differential:	If domestic content will increase cost of overall project by more than 25%	<p>If cost of domestic goods is "unreasonable"</p> <p>No fixed price differential</p>	If domestic content will increase cost of overall project by more than 25%	If domestic content will increase cost of contract by more than 25%

	FRA Buy America Provision	Amtrak Buy America Provision	FHWA Buy America Provision	FTA Buy America Provision
Nonavailability:	<p>If domestic products are not available in sufficient quantities/satisfactory quality</p> <p>No nationwide waivers</p> <p>Higher cost and longer delivery time may qualify for a project-specific waiver</p> <p>For rolling stock only, if domestic rolling stock can not be bought and delivered in the U.S. in a reasonable time</p>	<p>If domestic products are not available in sufficient quantities of satisfactory quality</p> <p>No nationwide general waivers</p> <p>Higher cost and longer delivery time may qualify for a project-specific waiver</p> <p>For rolling stock only, if domestic rolling stock can not be bought and delivered in the U.S. in a reasonable time</p>	<p>If domestic products are not available in sufficient quantities of satisfactory quality</p> <p>No nationwide general waivers</p>	<p>If domestic products are not available in sufficient quantities/satisfactory quality</p> <p>Nationwide waiver for goods listed in 48 C.F.R. § 25.104(a)</p> <p>Nationwide general waiver for computers and software</p> <p>Project-specific waivers may be granted if no domestic bids</p>
Public Interest:	Rarely granted	Rarely granted	<p>Nationwide general waiver for most manufactured products</p> <p>Project-specific waivers available for rolling stock</p>	Rarely granted anymore
Small Purchase:	\$100,000	\$1,000,000	\$2,500 or 0.1% of the contract price, whichever is greater	\$100,000

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