

TESTIMONY OF

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REGARDING

**Implementation of Buy America Provisions:
Stakeholder Perspectives**

BEFORE THE

Subcommittee on Highways and Transit of the
Committee on Transportation and Infrastructure of the
United States House of Representatives

ON

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INTRODUCTION

Chair Crawford, Ranking Member Norton, and Members of the Subcommittee, thank you for the opportunity to appear today at this important hearing on implementation of the Build America, Buy America (BABA) requirements included in the Infrastructure Investment and Jobs Act (IIJA).

My name is Carlos Braceras, and I serve as Executive Director of the Utah Department of Transportation (UDOT) and on the Board of Directors of the American Association of State Highway and Transportation Officials (AASHTO), including as AASHTO President in 2018 through 2019. Today, it is my honor to testify on behalf of AASHTO, which represents the state departments of transportation (state DOTs) of all 50 states, the District of Columbia, and Puerto Rico.

I first joined UDOT with degrees in engineering and geology in 1986. Prior to my appointment as the Executive Director in May 2013, I served as the Deputy Director for twelve years with previous experience as a Region Director, Major Project Manager, Chief Geotechnical Engineer and Chief Value Engineer. In addition to serving as a past AASHTO President, I am also Chair of the AASHTO Agency Administration Managing Committee and Chair of the Technical Working Group of the AASHTO Center for Environmental Excellence. I am also the past Chair for the AASHTO Committee on Design.

I would like to extend AASHTO and UDOT's utmost gratitude to you and your colleagues on the House Transportation and Infrastructure Subcommittee on Highways and Transit (the Subcommittee) for your dedicated and tireless leadership on surface transportation policy that ultimately led to the enactment of the IIJA. Stable and long-term policy and funding provided through a robust multi-year federal surface transportation bill remains crucial to the work of every single state DOT to meet its goal of improving safety, mobility, and access for everyone, which is articulated in AASHTO's 2021-2026 [Strategic Plan](#). Our country depends on a well-functioning transportation system for the quality of life for all of our citizens and to remain economically competitive.

At UDOT, our mission is to enhance quality of life through transportation, and I would like to share several examples of how the IIJA is supporting that mission. I will start with the Bridge Formula Program, which has been one of the most valuable elements of IIJA for Utah. We have identified 90 bridges for improvements, which we prioritized with a goal to address as many locally-owned bridges as possible; of the 90 bridges prioritized, 76 are locally owned. Without the Bridge Formula Program, many of these bridges wouldn't be improved for quite some time; however, after implementation of the five-year program, all bridges that were in poor condition at the time of prioritization will be addressed. This translates to increased safety and accessibility in locations where needs are high and resources are short.

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Another formula fund program is supporting resilience in Utah. We are using funds from the Promoting Resilient Operations for Transformative, Efficient, and Cost-Saving Transportation (PROTECT) Formula Program to deliver projects that will mitigate wildfire and flooding risks, which are common in Utah. We also hope to implement another if we are able to obtain additional competitive grant funding through the PROTECT program.

Next, through the National Electric Vehicle Infrastructure (NEVI) Formula Program, we will be able to expand availability of electric vehicle charging infrastructure, especially to rural areas of our state where very few options exist for communities and visitors. We have awarded contracts for all Phase One sites in Utah, and we are now working with private sector partners who will build and maintain the sites.

Beyond formula funding programs, IIJA funding enables us to continue forward with delivering the largest transportation program in Utah's history. The IIJA's highway formula program was a crucial aspect of the last surface reauthorization, and coupled with an extremely robust state program in Utah, we are making a difference for all citizens in our state. And even though we have more than two and a half years before the IIJA funding expires, now is an ideal time to start thinking about the next reauthorization.

With those many benefits in mind, I again thank the Subcommittee for the opportunity to share input from the states. Today's hearing is an example of Congress' important oversight responsibility on IIJA implementation. By holding this hearing, the Subcommittee demonstrates its understanding of the impact of BABA on translating resources provided in the IIJA into programs, projects, and ultimately, tangible benefits for the public. As the owners and operators of transportation infrastructure in every corner of the country, state DOTs and AASHTO greatly appreciate the opportunity to offer our perspective on this vital issue.

STATE DOT'S SUPPORT FOR OVERALL INTENT OF BUILD AMERICA, BUY AMERICA

From the very beginning of our developing nation, we have valued investment in our transportation system—starting with rivers, harbors, and post roads. We recognize that a well-functioning and safe transportation system is the foundation of a strong economy and provides quality of life benefits such as access to employment, education, recreational, and health services opportunities. It is this interconnected multimodal national transportation system that has enabled the United States to become the most vibrant and powerful nation in history.

Thanks to Congress, we have been able to continue honoring our nation's commitment to transportation investment through the IIJA. State DOTs have recognized since Day 1 of the IIJA in November 2022 that delivery on this historic investment is paramount. AASHTO and the state DOTs have been partnering closely with the federal executive branch including the United States Department of Transportation (USDOT) in providing coordination, collaboration, and direct assistance to ensure that the benefits promised by the law are fully realized.

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As you know, a key policy priority included in the IIJA pertains to new BABA requirements. AASHTO and the state DOTs remain unwavering in our strong support of the goal to increase America's manufacturing capacity by creating new domestic jobs and encouraging economic growth; however, we also recognize this transformation can't occur overnight or with the flip of a switch. As such, we firmly believe that a deliberative and practitioner-informed process between government and industry should continue to guide implementation of BABA. This will ensure timely, cost-effective investments and successful delivery of critical transportation infrastructure projects funded through the IIJA.

IMPROVING EXECUTION OF BUILD AMERICA, BUY AMERICA TO REMOVE OBSTACLES TO PROJECT DELIVERY

For more than 40 years, Buy America statutes have required a domestic manufacturing process for iron, steel and certain manufactured products permanently incorporated into federal-aid highway and transit projects. The IIJA expanded Buy America coverage to five categories of construction materials: non-ferrous metals, plastic and polymer-based products, glass, lumber, and drywall.

With the 2024 transportation construction season on the horizon, there remains significant concern regarding the readiness of industry for the transition to recent and anticipated increases in BABA requirements. State transportation agencies are continuing to experience material and product delivery delays due to supply chain issues, material shortages, and worker shortages. Materials including aluminum, which is used in numerous products including light poles, mast arms, and sign panels; glass beads, which are used in retro-reflective pavement markings; fiber optic cable; epoxy; and plastic pipe/conduit have been in short supply around the country over the past two years—contributing to ongoing delivery delays for these critical items. While construction projects are accustomed to complex realities of utility relocation, we are seeing further delays as part of states' efforts to comply with BABA.

Specific examples of state DOTs experiencing delays are as follows:

- Utilities present particular challenges for many states. **Delaware** has experienced significant delays in design on several projects as some utility companies have been unwilling to sign project agreements with BABA requirements. In addition, there are several projects that the state DOT and utility companies have jointly decided to change from advance utility work to concurrent project utility work to address utility company BABA concerns. Their preference would have been for advance work. There is now a possibility that changing the process from advance utility work to concurrent work will delay the overall project once construction begins.

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- **Georgia** is experiencing delays primarily due to utilities failing to sign agreements because of BABA provisions. This is because utility companies would have to source materials outside of their regular operations and specifically for projects that have federal funding. This has contributed to project delays at award and during construction. Numerous questions persist on interpretation of BABA requirements and inconsistent application across jurisdictions and agencies.
- Project challenges related to BABA extend beyond utilities. **California** was unable to locate a domestic source for a key element of an emergency project. They procured a non-domestic source item for temporary use, while a domestic sourced item could be procured. As a result, they incurred the additional cost of the temporary nondomestic item, experienced an approximately four-month project delay in accepting the contract, and expended additional capital and support costs during the extended delay.

On a safety-related project, one of California's standard sole-source products was found to be non-domestically manufactured and subject to the polymer-based construction material requirements of Buy America. This issue was identified prior to advertisement, and they were able to specify a more expensive product that had been used in more critical safety zones, produced by the same manufacturer at one of their domestic facilities. As these safety-related items undergo pre-qualification testing for safety performance, finding domestic substitutes can create delays. Changing Buy America requirements requires an implementation period of 18 months to allow for alternative domestic materials and products to be identified, tested, and specified without producing significant project delays and associated costs.

- **Maine** has experienced challenges with procuring BABA-compliant glass beads and marine decking, leading to project delivery difficulties. With the removal of the manufactured product waiver, Maine will need to request relief on products such as composites (e.g., Glass Fiber Reinforced Plastic) from Canada, traffic signal equipment from Mexico, and geosynthetics from Asia. In addition, Maine relies on Canadian precast producers to meet the need for precast prestressed girders, precast culverts, and other transportation related precast products. The limited number of BABA-compliant precasters in the northeastern United States and the impracticality of trucking heavy precast elements long distances will increase costs and limit overall production.
- **Nebraska** has had difficulty securing silane sealers, as they are not currently produced in the United States. Silane sealers are vital in sealing and pausing the deteriorating effects on concrete caused by Alikli-Silica Reactions. In addition, Nebraska has very reactive aggregates used across the state on roadway concrete projects; the state has not been able to program older in-place concrete roadways that were constructed with inadequate amounts of supplementary cementitious materials like Class F fly ash, as no other viable Buy America product performs similarly.

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- **North Dakota** cannot procure submersible pumps for lift stations that are Buy America compliant. Submersible pumps for lift stations play a vital role in managing groundwater and stormwater in road construction projects.

With that said, AASHTO appreciates the actions taken to date by the Biden Administration since enactment of the IIJA to help with transitioning to the new BABA statutory provisions. We specifically recognize the following actions:

- January 2023: Waiver of the construction materials requirement for certain “grandfathered” projects in advanced stages of procurement.
- August 2023: Finalized and enacted a “de minimis” waiver from all Buy America requirements for the lesser of \$1,000,000 or 5 percent of certain covered components and materials on a project, or for entire projects that include less than \$500,000 in federal funding.
- October 2023: The White House Made in America Office (MIAO) updated “high-level coordinating guidance” for implementation of Buy America and similar programs that took effect on Oct. 23, 2023. This MIAO guidance included:
 - Reaffirmation that Buy America does not cover tools, equipment or supplies not “incorporated” into the project.
 - Adding three new standalone categories of covered construction materials to those specified by Congress – fiber optic cable (including drop cable), optical fiber, and engineered wood.
 - Confirmation of Congress’ intent that covered construction materials do not include “cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.” However, MIAO contends these materials can be covered if included in manufactured products, such as precast concrete.

Importance of Consistency in Federal Guidance

Congress intended the IIJA to spur expansion of America’s manufacturing capacity, promote the creation of jobs across the country, and encourage economic growth. To ensure timely and successful delivery of critical infrastructure projects enabled under IIJA, the White House MIAO, Office of Management and Budget (OMB), and USDOT should deploy a deliberative, practitioner- and industry-informed process for BABA implementation.

While AASHTO understands the complex nature of implementing the new BABA requirements across the entire federal government, it is important to recognize the disruption that occurs when OMB and USDOT frequently update and alter previously issued guidance. Every state DOT expends significant effort to change specification language, quality assurance language, and other documentation and to train state DOT employees on how to comply with any guidance.

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Consistency not only helps state DOTs but also our transportation industry partners. Therefore, it is important that any issued guidance not be a moving target. As state DOTs prepare, plan, and design projects for 2024 bid lettings, it is important to ensure that the transportation industry is prepared for and fully understands the new BABA requirements. Uncertainty related to BABA guidance due to frequent revisions to the process on how to comply with the law can impact the ability to adequately source and procure products, can increase costs, and lead to possible project delays.

In Utah, our teams are grappling with the distinction between general manufactured parts in contrast with project-incorporated manufactured parts. This uncertainty creates several difficulties. First, UDOT staff and our contractors are spending significant additional time researching and trying to make their own determinations about compliance. In cases where our teams are uncertain and need further guidance, they are unable to accurately estimate budgets and schedules without either clarification or waivers, or both. This causes delays for the projects in question, and it also has cascading effects on other projects. Programming projects is like a symphony, so major changes to one project can affect timing and resource allocation for other projects.

Additional uncertainty arises even when we are sure of BABA compliance with certain materials. Costs and availability of such products tend to be less stable, which can cause problematic variables and delays when developing and delivering a transportation program.

Need for a Transparent and Workable Waiver Process

It is important that the BABA waiver process at the White House and USDOT be timely and transparent, including clear indication of when the federal agency received the waiver request. States report that the waiver process and expectations of approval are not clear. States that have not submitted waiver requests report that the lack of a clear process remains a barrier in seeking approval in the first place. Specifically, there are three main factors contributing to this barrier:

- The time that it takes for the waiver to be processed exceeds the time limit on project deadlines;
- The level of effort and time required to submit a waiver may not be worth putting forth when the outcome and timing of the outcome are so uncertain, and;
- The required documentation and supporting evidence to be submitted is unclear.

Of the states who have used the waiver process and responded to AASHTO's inquiry, all of them would like to see improvements. The most critical area in which improvement is needed is clarity on the specific rules of when a waiver is required. A more transparent process for submitting a waiver request—including specific listings of required documentation—would provide greater support for states. Additionally, a set timeline for when to expect a decision on the waiver can help states plan more effectively.

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The challenges imposed by the waiver request process are also burdening states with additional workforce requirements necessary to carry out the documentation requirements necessary to comply with BABA. States have been facing challenges to maintain full-time staff just to process routine documentation associated with construction projects. Unfortunately, time-consuming administrative tasks related to BABA waiver requests add further strain to state DOT staff and reduce their capacity to support non-federally funded transportation projects and infrastructure that would otherwise complement and leverage investments driven by the IIJA.

Review and Potential Rescission of Manufactured Products Waiver

The IIJA requires federal agencies to review existing general applicability waivers of Buy America requirements. Using traditional waiver authority, FHWA issued a public interest waiver of general applicability of FHWA's Buy America requirement for manufactured products (Manufactured Products General Waiver) in 1983. Through this waiver, FHWA does not currently apply Buy America requirements to manufactured products except for predominantly steel and iron manufactured products, predominantly steel and iron components of manufactured products, and covered construction materials. Termination of this waiver would represent a major challenge and an additional administrative burden for state DOTs and manufacturers.

Given the wide range of products used in transportation and the global sourcing that has been established over the past several decades, this type of new requirement could lead to project cost increases and delays. Moreover, we believe the challenges from removing the current general applicability waiver for manufactured products will greatly outweigh any benefits to the domestic manufacturing capacity in this country.

In 2013, FHWA maintained its original finding from 1983 that the waiver of Buy America for manufactured products does not have any significant impact on American manufacturing since manufactured products comprise a small percent of the highway construction program. AASHTO believes the original justification for granting the general applicability waiver for manufactured products still applies.

State DOTs use a broad range of manufactured products on their projects supported by the Federal-aid Highway Program. Many of these products—or significant components of the products—are not readily available domestically. This includes products such as traffic signals, cameras, luminaires, controllers, cabinets, changeable message signs, and traffic management system components. Without the continuation of the current general applicability waiver of Buy America requirements for manufactured products, the ability of state DOTs to deliver the Federal-aid Highway Program will likely be impacted by project delays that could affect the safety of the traveling public and the operation of our road and highway system, which is a critical link in the delivery of our already strained supply chains.

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State DOTs also foresee significant challenges with tracking and documenting compliance with any new manufactured product requirements. As with the new requirements for construction materials, States have resource constraints that would make the administration of additional Buy America requirements even more difficult. This includes additional owner and contractor staff time needed to collect and evaluate documentation verifying the percentage of domestic content of numerous and widely varied manufactured products. In addition, from the manufacturing side, consistency in the implementation of requirements across such a broad cross-section of products will be challenging, creating additional burdens on the private sector manufacturers and suppliers of these products.

If FHWA decides to rescind or narrow the applicability of the current Buy America waiver for manufactured products, state DOTs and industry will need sufficient notice and time to allow for an orderly transition. Market conditions and supply chains for manufactured products used in Federal-aid construction projects have developed over several decades, and these processes would take multiple years to adapt to a new way of doing business.

AASHTO recommends USDOT and FHWA conduct market research and focus application of BABA on a limited number of manufactured product categories that will have the most significant impact on American manufacturing and expand this focus incrementally if tangible and positive impacts are realized. It would be unrealistic to immediately require American-made products in categories where a domestic industry is not currently in place or envisioned to develop in the near future. Furthermore, USDOT and FHWA should continue seeking ways to prevent project disruptions caused by difficulties in certifying commercially available off-the-shelf (COTS) components.

In Utah some of our contractors report that they are unwilling to bid on certain projects because of the impractical amount of time required to obtain and document manufactured products. In such cases, they report that the cost to track compliance and quantities is simply not worth their time, especially when the materials in question represent a small portion of the overall project cost. The unintended consequence is a decrease in competition and, in some cases, extreme difficulty being able to deliver certain projects because contractors cannot justify the business case.

Streamlining Certification with AASHTO Industry Document Repository

Absent the recommended improvements to BABA implementation requirements as noted above, individual states are relying on their own certification processes, with many states looking to self-certification by their contractors and suppliers. To assist with certification, AASHTO is looking to enable collaboration between state agencies, contractors, designers and suppliers on developing a centralized listing of domestically made construction materials complying with the new Buy America requirements.

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AASHTO's Product Evaluation and Audit Solutions (APEAS) technical service program released a new tool in May 2023 known as the [Industry Document Repository \(IDR\)](#). The IDR provides manufacturers and distributors with an interface to upload and manage documentation and associate each upload with an existing product previously evaluated by APEAS. Additionally, industry users can assign and manage tags to associate these uploads with specific states and agencies, while providing categorization for BABA purposes. Documents uploaded by industry are made available to state DOTs, which can greatly streamline the certification effort.

CONCLUSION

Thank you for allowing me to share AASHTO's and its state DOT membership perspectives—including those of Utah—on BABA implementation. As I noted, states strongly support the policy intent of BABA to strengthen domestic industry in delivering needed transportation programs and projects. At the same time, states continue to have significant concerns regarding the readiness of industry for this transition and the near-term negative impact on the delivery of needed transportation projects in communities around the country.

We believe that additional preparatory work—including robust market research into the availability of American-made goods in the broad cross-section of materials covered by the new BABA requirements—needs to be undertaken at the federal level to ensure a less disruptive transition to domestic products while providing the necessary time for adjustments in the sourcing of listed construction materials. Ultimately, critical infrastructure projects intended to improve safety, mobility, and access for everyone should not be disrupted while transportation agencies and their partners continue to make best-faith efforts to integrate the new BABA requirements into their program and project delivery processes.

Thank you for the opportunity to provide testimony at this hearing and I look forward to your questions.