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Notice of Extension of Partial Buy America Waiver for Vans and Minivans

A Notice by the Federal Transit Administration on 11/18/2024

Comments on this document are being accepted at Regulations.gov.

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Department of Transportation
Federal Transit Administration
[Docket No. FTA-2024-0007]

AGENCY:

Federal Transit Administration (FTA), Department of Transportation (DOT).

ACTION:

Notice of extension of Buy America waiver.

SUMMARY:

Following consideration of comments, and because the Federal Transit Administration (FTA) has been unable to identify any manufacturer of non-Americans with Disabilities Act (ADA)-accessible vans and minivans that fully complies with Buy America, FTA is extending its partial, time-limited, general nonavailability waiver from the requirements of Buy America for a period of five years, or upon publication of a recission notice if FTA determines that a fully Buy America-compliant vehicle has become available, whichever occurs first. The waiver terms are described in this notice.

DATES:

The waiver extension is applicable on November 18, 2024.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

This notice grants an extension of FTA's October 25, 2022, partial general nonavailability waiver for mass-produced, unmodified vans and minivans (87 FR 64534 (/citation/87-FR-64534)). The waiver extension will expire after five years, or upon publication of a recission notice if FTA determines that a fully Buy America-compliant vehicle has become available, whichever occurs first.

Background

On November 15, 2021, President Biden signed into law the Build America, Buy America Act (BABA), enacted as title IX of the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117-58 (https://www.govinfo.gov/link/plaw/117/public/58), div. G, sections 70901-70927). BABA requires Federal agencies periodically to review existing general applicability waivers of Buy America requirements by publishing in the **Federal Register** a notice that: (i) describes the justification for a general applicability waiver and (ii) requests public comments for a period of not less than 30 days on the continued need for the general applicability waiver. BABA section 70914(d).

FTA is issuing this waiver extension following its review of comments received in response to its Notice of FTA's Review of Its Partial Waiver of Buy America Requirements for Vans and Minivans and Request for Comment, published in the **Federal Register** on August 22, 2024 (89 FR 68027 (/citation/89-FR-68027)).

Partial General Buy America Waiver for Vans and Minivans

Under FTA's Buy America statute (49 U.S.C. 5323(j) (https://www.govinfo.gov/link/uscode/49/5323)), FTA may obligate funds for a project to procure rolling stock only if the cost of components and subcomponents produced in the United States is more than 70 percent of the cost of all components of the rolling stock, and final assembly of the rolling (🗋 printed page 90825) stock occurs in the United States. 49 U.S.C. 5323(j)(2)(C) (https://www.govinfo.gov/link/uscode/49/5323). A manufacturer of rolling stock must submit to pre-award and post-delivery audits and independent inspections to verify its compliance with Buy America. 49 U.S.C. 5323(m) (https://www.govinfo.gov/link/uscode/49/5323).

On October 25, 2022, following multiple individual requests for a Buy America waiver for non-ADA-accessible vans or minivans that can be used in federally funded vanpool programs, FTA issued a partial, time-limited, general nonavailability waiver from the Buy America requirements for mass-produced, unmodified, non-ADA-accessible vans and minivans with seating capacity for at least six adults, not including the driver (87 FR 64534 (/citation/87-FR-64534)). FTA issued a partial waiver to maximize the use of materials produced in the United States, consistent with Executive Order 14005 (/executive-order/14005), Ensuring the Future Is Made in All of America by All of America's Workers (86 FR 7475 (/citation/86-FR-7475)). In lieu of applying the general Buy America standards for rolling stock, the 2022 waiver required the following:

(1) Final assembly must occur in the United States, as reported to the National Traffic Safety Administration (NHTSA) under the American Automobile Labeling Act (AALA); and

(2) The country of origin of the engine or motor must be the United States, as reported to NHTSA under the AALA. *See*49 U.S.C. 32304 (https://www.govinfo.gov/link/uscode/49/32304) and 49 CFR part 583 (https://www.ecfr.gov/current/title-49/part-583).

FTA also limited its 2022 waiver to expire automatically after two years.

In its August 22, 2024, notice, FTA requested comments from all interested parties regarding whether FTA should extend the waiver, modify the waiver, or allow it to lapse. FTA also asked six questions related to the waiver, and requested that commenters, in answering the questions, explain the likely impacts of the suggested course of action for FTA on administering and delivering FTA-funded projects and on supporting domestic manufacturing and jobs. The questions are reprinted below.

In accordance with subsection 70916(c) of the Build America, Buy America Act (BABA) (Title IX of the Infrastructure Investment and Jobs Act, Pub. L. 117-58 (https://www.govinfo.gov/link/plaw/117/public/58)), FTA consulted with the National Institute of Standards and Technology's Hollings Manufacturing Extension Partnership (MEP) concerning a possible waiver extension, which determined that no domestic entity currently manufactures the subject vans and minivans in compliance with Buy America requirements.

General Considerations

FTA's August 22, 2024, notice posed the following questions to the public concerning a possible waiver extension.

1. Are there any unmodified non-ADA-accessible vans or minivans with seating capacity for at least six adults, not including the driver, for which the cost of components and subcomponents produced in the United States is more than 70 percent of the cost of all components, and final assembly of the vehicle occurs in the United States?

a. If so, which vehicles?

b. If so, in what quantity are they available?

2. Do the market conditions that led to FTA's decision to issue the partial van and minivan waiver still exist and, if so, do they warrant continuing the waiver?

3. What actions could FTA take, if any, to promote the domestic production of Buy America-compliant vans and minivans?

4. Is there a publicly available source better suited than AALA reports (*https://www.nhtsa.gov/part-583-american-automobile-labeling-act-reports (https://www.nhtsa.gov/part-583-american-automobile-labeling-act-reports)*) to determine the domestic content and country of final assembly for vans and minivans? If so, please specify the data source and explain why it is preferred.

Considerations for Modifying the Waiver

5. If FTA were to modify the van and minivan waiver, what would be the likely impact on administering and delivering Federal transit projects? In what ways could modifications to the waiver promote or hinder the effective and efficient delivery of Federal transit projects across the United States? As examples, commenters may wish to consider the following modifications to the van and minivan waiver, specifying the likely impact of each and explaining why that impact is likely to occur:

a. In addition to engines and motors, require U.S.-manufactured transmissions as reported to NHTSA under the AALA.

b. Add a requirement that a vehicle contain some minimum percentage of “Content US/Canada,” as defined by and reported to NHTSA under the AALA.

6. FTA is also interested in any other proposals to modify the waiver not listed here that would meet the goals of promoting the efficient delivery of Federal transit projects and supporting domestic manufacturing and jobs. For each proposal, please explain how the waiver modification proposed achieves both goals and provide supporting information or documentation, where applicable.

Response to Comments

FTA received 51 comments from 56 different commenters, including transit operators, associations, state departments of transportation, metropolitan planning organizations, and the general public. All but one comment supported extending the waiver.

The comments in favor of an extension tended to be broadly supportive of the waiver and did not for the most part respond to specific questions FTA posed to the public. The supportive comments concurred that no known manufacturer currently meets all of FTA's Buy America requirements. Comments described the important role of vanpools to combat climate change, lower traffic congestion, and support commuters and equitable service, including service to the elderly, persons with disabilities that do not require ADA accessible vehicles, and rural communities for which full-sized buses are inappropriate. Comments from vanpool operators described their efforts to update or expand their aging fleets, and said they cannot succeed without an extension of the waiver. The supportive comments affirmed the necessity of extending the waiver to allow transit operators to continue purchasing vans and minivans using FTA grant funds.

Comment Opposed To Extending the Waiver

The single comment opposed to extending the waiver stated: “Buy America can rely on used van and minivan parts in junkyards across America that are being totally ignored”. The comment did not provide any further detail about the junkyard suggestion. While junk or salvage yards may be excellent sources for vehicle parts in some situations, FTA considers the junkyard option an impractical alternative for transit operators, who in almost all cases require new vehicles for their fleet purchases.

Requests To Lengthen the Waiver Period

When FTA approved the 2022 waiver, it set the waiver to expire automatically after two years. Twenty-eight comments requested extending the waiver for a period longer than two-years. Five comments suggested a five-year extension. One of these comments said five years is an appropriate length because the relatively small percentage of vans and minivans purchased using FTA funds means the availability of Buy America-compliant vans or minivans is unlikely to change in the foreseeable future, and because a five-year review (printed page 90826) period is what BABA specifies for general waivers. BABA § 70914(d)(1) ("An existing general applicability waiver or a general applicability waiver . . . shall be reviewed every 5 years after the date on which the waiver is issued"). One comment suggested that the waiver should be of indefinite duration, pending the availability of a Buy America-compliant product.

FTA agrees with the comments that suggested a five-year extension. An expiration after five years accords with BABA's requirement that general waivers be reviewed quinquennially, and the Made in America Office's national policy that general waivers have expiration dates. FTA also agrees that the availability of Buy America-compliant vans or minivans is unlikely to change in the foreseeable future. Therefore, a waiver of a shorter duration would add uncertainty and administrative burdens by requiring more frequent extensions, without generating any public benefit. FTA can rescind the waiver at any time if a Buy America-compliant van or minivan becomes available before the end of the five years.

Support for Extending the Domestic Requirements of the 2022 Partial Waiver

To maximize domestic content, the 2022 waiver required U.S. manufactured engines and final assembly. FTA sought comment from the public as to whether it should revise these requirements in a waiver extension.

Twenty-seven comments recommended extending the waiver with the same domestic manufacturing requirements as the 2022 waiver. Comments generally supported the current waiver as maximizing domestic content among van and minivan options while at the same time allowing transit operators to replace or expand their fleets using FTA funds.

Three comments asserted the requirements of the 2022 waiver are too restrictive. One of these comments said there is a shortage of vehicles that comply with the 2022 waiver, and this has led to difficulty expanding and updating vanpool fleets. However, this comment did not recommend any particular change to the waiver, and did not provide any specific data regarding how the requirements of the 2022 waiver have impaired the commenter's ability to replace or add vehicles.

One comment suggested relaxing the restrictions in the 2022 waiver to allow manufacturing and assembly anywhere in North America. This comment suggested doing so would make more hybrid and electric vehicles available, but it did not identify particular models to which it was referring.

Another comment requested that FTA eliminate the requirement that the vehicle's engine be manufactured in the United States. This comment stated the engine requirement excludes numerous vehicles that otherwise have high levels of domestic content according to the AALA reports.

In response to these comments that requested that FTA relax the requirements of the 2022 waiver, FTA notes the following: Notwithstanding that relaxation of the waiver's requirements would result in a greater selection of vehicles to purchase, none of the commenters said they were unable to comply with the 2022 waiver's requirements, or that they have been unable to obtain the type of vehicles they require under the 2022 waiver. With regard to the comment that the engine requirement of the 2022 waiver excludes vehicles with high domestic content reported under the AALA, the AALA reports show a value for combined U.S. and Canadian content, not U.S. content by itself. Absent more specific information about the U.S. content in these excluded vehicles, it is difficult for FTA to weigh the relative benefits to U.S. industry of eliminating the engine requirement, and so FTA declines to revise the waiver in response to this comment.

FTA agrees with the majority of comments that request maintaining the requirements of the 2022 waiver.

Other Comments

Some comments raised issues that were not germane to the pending waiver proposal. Two comments complained in general terms about the cost of complying with Buy America. One comment claimed Buy America causes $30,000 to $40,000 of "add-ons" to the Ram ProMaster in order for the vehicle to achieve 70% domestic content by cost, and that this is pushing vehicles beyond affordability. These comments are beyond the scope of the present action. FTA is not proposing revisions to Buy America requirements generally; it is only considering a limited, partial waiver of Buy America requirements to allow the purchase of certain vans and minivans.

Two comments complained that there exist vehicles with high domestic content, that are produced in the United States, but which the commenters cannot buy because of “foreign ownership” or “because they are Japanese or Korean owned companies”. These comments appear to indicate a misunderstanding of Buy America and the 2022 waiver. Buy America's standards for rolling stock require a minimum percentage of U.S. components and subcomponents by cost and U.S. final assembly. Neither Buy America nor the 2022 waiver excludes vehicles based on the countries where their global brands are headquartered or historically originated.[1]

Finding on Waiver

For the reasons stated in FTA's August 22, 2024, notice, and based on comments received from the public, FTA is extending the October 25, 2022, waiver for vans and minivans.

For mass-produced, unmodified non-ADA accessible vans and minivans with seating capacity for at least six adults not including the driver, in lieu of applying the Buy America standards for rolling stock, FTA will require:

(1) Final assembly must be in the United States, as reported to NHTSA under the AALA; and

(2) The country of origin of the engine (or electric vehicle motor) must be the United States, as reported to NHTSA under the AALA.

The waiver is available to all FTA grant recipients. FTA recipients do not need to submit individual applications for nonavailability waivers for these vehicles. The waiver applies to contracts recipients award during the waiver period. This waiver expires five years after the effective date of this notice as published in the **Federal Register** . FTA will review this waiver twice during the waiver period to assess whether it remains necessary. Based on the results of that review, FTA will take such action as deemed appropriate, including but not limited to rescinding, or narrowing the scope or duration of the waiver.

Veronica Vanterpool,

Deputy Administrator.

Footnotes

1. While this is true of Buy America requirements, there are other laws that restrict vehicle purchases based on the country where the vehicle manufacturer is headquartered or has corporate relations. See FTA's guidance regarding the National Defense Authorization Act of 2020: https://www.transit.dot.gov/funding/procurement/frequently-asked-questions-regarding-section-7613-national-defense (https://www.transit.dot.gov/funding/procurement/frequently-asked-questions-regarding-section-7613-national-defense).
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