



July 14, 2022

Joseph Carlile
Senior Advisor, Office of the Secretary
Department of Housing and Urban Development
451 Seventh Street SW, Room 10226
Washington, DC 20410

RE: Docket No. FR-6331-N-03, Request for Information Relating to the Implementation of the Build America, Buy America Act

Dear Mr. Carlile,

Thank you for the opportunity to provide feedback to HUD on the Build America, Buy America Act, which establishes a new Buy America Preference (BAP) for federally-funded infrastructure projects, including buildings and real property. As the leading voice for aging, we value our ongoing partnership with HUD to preserve and expand affordable, service-enriched housing options for older adults with low incomes, and we value HUD's thoughtful approach to implementing the BAP as it relates to HUD-assisted housing.

LeadingAge views the partnership between HUD and private housing providers as key to the successful preservation and expansion of America's affordable housing stock. With scarce federal resources and major supply chain disruptions, we urge HUD to consider the strategies outlined below to avoid additional barriers to constructing and rehabbing affordable rental housing in America.

About LeadingAge

LeadingAge represents more than 5,000 aging services providers, including non-profit owners and managers of federally-subsidized senior housing properties. Alongside our members and 38 state partners, we use applied research, advocacy, education, and community-building to make America a better place to grow old. Our membership encompasses the continuum of services for people as they age, including those with disabilities. We bring together the most inventive minds in the field to lead and innovate solutions that support older adults wherever they call home.

Build America, Buy America

The Build America Buy America Act establishes a new domestic procurement requirement for construction and manufacturing products, as well as all iron and steel products, used in the construction, alteration, maintenance, and repair of infrastructure in America.

Like HUD, we support public-private partnerships to guide expansion of affordable housing options across the country. However, applying the new BAP to the Section 202 capital advance, HUD-held housing loans, HOME and CDBG funds, and other much-needed affordable senior housing programs could effectively halt new HUD-funded senior housing and stall the recapitalization of the existing affordable housing stock. All in all, applying the requirement to HUD programs could jeopardize affordable housing options even as housing cost burdens skyrocket.

In short, while the goals of BABA are important, implementing such requirements may exacerbate the massive and nationwide affordable housing shortage and ultimately have an overall negative impact on the country's affordable housing goals.

LeadingAge therefore urgently requests that HUD interpret BABA applicability as narrowly as possible as it relates to the construction and repair of privately-owned, federally-assisted rental housing, and implement the broadest waivers possible under the Office of Management and Budget's (OMB) guidance for the implementation of BABA.¹

BABA Applicability

In HUD's June 1 Request for Information, the agency asks how HUD can document what projects serve a "public function," thus qualifying as infrastructure under OMB's guidance and falling within the scope of the Act (HUD RFI Question #2).

OMB guidance on Build America, Buy America applicability clearly exempts from the term "infrastructure project" any "projects consisting solely for the purchase, construction, or improvement of private homes for personal use." HUD should not implement BABA because the funds in many HUD programs are used to construct privately-leased, individual homes.

In addition, the Infrastructure Investment and Jobs Act, which carried the BABA to enactment, did not treat all infrastructure equally; while the IIJA provided significant funding boosts to certain infrastructure sectors, new housing was decisively left out of the new funding allotments. This not only indicated congressional intention of the scope of "infrastructure" implicated within IIJA and BABA, but also left affordable housing without the additional resources needed to carry out the BABA requirements.

For these reasons we strongly urge HUD to reconsider the scope and applicability of HUD funds under BABA implementation to exclude HUD-assisted housing programs.

General Applicability Waivers

Even without a Buy America Preference, current awardees of HUD's Section 202 Capital Advance funding to create housing for older adults connected to services and supports have experienced significant increases in construction costs and project delays resulting from product unavailability. While some of the awardees' cost increases fall below what OMB describes as "unreasonable cost" increases (25% or more of the project's entire budget), the cost increases still threaten to entirely derail already-approved for housing developments.

With two out of every three eligible older adult renter households remaining housing-unassisted,² the country cannot afford to lose a single new or existing unit of affordable housing. In addition, the BAP requirement will be new for HUD as well as for housing providers, meaning that the agency will not yet have established efficient waiver review processes for product- or project-specific waivers. The resulting

¹ OMB M-22-11 "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure"

² Department of Housing and Urban Development (HUD) custom tabulations of the 2019 American Housing Survey and CBPP tabulations of 2018 HUD administrative data, <https://www.cbpp.org/research/housing/three-out-of-four-low-income-at-risk-renters-do-not-receive-federal-rental-assistance>

confusion, inconsistency, and delays will foster infeasibility and create a clear disincentive for housing providers to participate in federal funding programs for affordable housing.

We therefore urgently request that HUD implement a variety of general applicability waivers outlined in OMB M-22-11. According to the memo, a general applicability exemption refers to a waiver that applies generally across multiple awards and can be “non-product-specific” (applying to all manufactured products, for example). The OMB guidance further states that an agency might issue a general waiver in situations for which there are well-documented sourcing challenges, and that the agency shall review such waivers within five years of the date on which they were issued.

We strongly support HUD’s use of general applicability waivers across multiple HUD awards. For example, construction products have increased in cost nearly 20% in the last year alone, with lumber 17% over its 25-year cost average.³ Applying a five-year general waiver for all construction products will allow affordable housing construction and rehab anticipated, planned, or already underway to continue despite the new BAP, will allow supply chains time to transition to a heightened domestic procurement focus, and will allow federal affordable housing resources to reflect the additional cost of the BAP.

Public Interest Waivers

In addition to the general applicability waiver options discussed above, there is a clear need and appropriateness for several “public interest waivers” (as defined in OMB M-22-11) for HUD-assisted housing programs.

The OMB guidance states that a waiver in the public interest may be appropriate where an agency determines that other important policy goals cannot be achieved consistent with the Buy America requirements; this clearly encompasses the Administration’s goals to address the country’s severe shortage of affordable housing stock and to prevent and end homelessness.⁴

According to the White House announcement, “President Biden believes the best thing we can do to ease the burden of housing costs is to boost the supply of quality housing.” In order to meet the Administration’s goals, HUD should consider the following public interest waivers:

- **Adjustment Period:** A time-limited waiver to allow recipients to transition to new rules and processes is essential to allowing affordable housing construction to continue. An adjustment period of no less than two years is needed to allow already penciled-out projects to advance and budgeted developments and awards to continue without additional disruption.
- **Other Considerations:** OMB guidance states that a waiver may be in the public interest related to sustainability, equity, and accessibility. Seeing as HUD-assisted housing has an overrepresentation of minority groups (including minority health groups) compared to market-rate housing,⁵ HUD should consider implementing a broad BAP public interest waiver for HUD programs so that HUD can continue to advance racial equity, climate resilience, and disability empowerment through housing programs across the country.

³ <https://www.nahb.org/blog/2022/02/lumber-prices-in-2020-and-2021-set-record-highs-even-when-adjusted-for-inflation>; <https://www.census.gov/construction/c30/pdf/release.pdf>

⁴ <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/16/president-biden-announces-new-actions-to-ease-the-burden-of-housing-costs/>;
<https://www.usich.gov/goals/#:~:text=Ending%20Family%20Homelessness,our%20country%20as%20a%20whole>

⁵ <https://www.huduser.gov/portal/sites/default/files/pdf/2019-Characteristics-Report.pdf>

- **Small Grants and De Minimis:** To avoid significant burden for both recipients and agencies, it is in the public's interest for HUD to waive application of the BAP for grants or funding awards under a certain threshold, as well as for infrastructure project purchases below a de minimus threshold.
- **Infeasibility:** In HUD's June 1 RFI, Question #5 asks: "How do recipients currently determine sourcing for materials? Are there existing mechanisms to locate American made iron, steel, manufactured products, or construction materials? Furthermore, how do recipients currently track contractor sourcing?"
Currently, housing providers report not being aware, and not currently tracking, the sourcing of materials used in construction and rehab. While not included as a waiver example from OMB, we urge HUD to consider an "infeasibility" waiver based on the fact that housing providers are unlikely to know, or have the ability to verify and document, the source or processing location of materials utilized in projects.
- **Disaster Mitigation:** In question #4, HUD's RFI asks: "What types of mitigation activities are conducted utilizing HUD Federal Financial Assistance that are not related to an imminent threat of a future emergency or disaster? How, if at all, will activities be limited such as funding fewer projects?"
Many projects undertaken by the HUD-assisted portfolio to preserve and improve the housing stock are, in a broad sense, mitigation activities that will better position housing communities and residents in the event of a future disaster. Because of the demographics of HUD-assisted housing, efforts to maintain quality housing are in and of themselves acts of resilience for the country's most disaster-impacted households, whether or not they are in response to a disaster or related to an imminent threat of a future emergency. In fact, much of HUD-assisted coastal stock is threatened by sea level rise, which inextricably links general rehab and project preservation activities with the country's disaster resilience efforts. HUD should therefore broadly interpret HUD programs as disaster-related and exempt from BAP requirements that would result in limited funding or fewer projects.
- **Location:** HUD's RFI also asks: "Are recipients currently subjected to Buy American requirements from other Federal, state, local, or Tribal entities?...What is the burden and impact, either based in prior experience or as an estimate based on OMB's suggested language, associated with inserting Buy American language into contracts for infrastructure projects?" (Question #6)
HUD-assisted housing providers report not being currently subject to other BAP requirements. Therefore, the burden and impact will be significant and, as stated above, will effectively stall the development of new affordable housing, especially in areas that are already high cost and difficult to develop. While again not suggested by OMB, HUD could consider a location-based waiver that would apply in all federally-determined "Difficult Development Areas."
- **Construction Contractors and Bidding:** Question #12 of HUD's RFI asks about the BAP's impact on contractors' willingness to accept infrastructure contracts subject to BABA's requirements. Contractor willingness to partner with HUD-assisted housing communities for rehab, and with non-profit developers for new construction, is already under strain. For example, many projects are too small or too complex to garner interest from contractors, making it difficult to secure the three bids necessary for HUD's procurement thresholds. A new BAP requirement will only exacerbate these issues and could result in overall higher costs for HUD-assisted housing projects compared to market-rate housing; these higher costs would need to be absorbed by rents and would overall lead to less incentive to participate in HUD-assisted housing and create more pressure on the affordable rental market.

Project-Specific Waivers

Question #9 in HUD's RFI asks about specific concerns about a potential waiver process. As stated above, the newness of the BAP requirement means that the agency will not yet have established efficient review processes for product- or project-specific waivers. We therefore urge HUD to emphasize blanket waivers that have the lowest barriers and highest efficiency to avoid major delays for individual projects.

In instances where HUD-assisted infrastructure projects are in fact subject to the BAP, we urge HUD to make timely information available, and provide for timely processing, for recipients to request project-specific waivers based on the nonavailability of domestically-sourced products or based on unreasonable costs associated with the BAP.

Again, thank you for your review and consideration of these comments. Preserving and expanding the affordable housing stock is critical to the Administration's goal of addressing housing unaffordability, and critical to allowing older adults to age in community; we urge HUD to implement BABA in the least restrictive way so as to maintain housing construction and rehabilitation options across the country.

We look forward to working together to advance affordable, service-enriched housing options for older adults. Please address any questions to Juliana Bilowich (jbilowich@leadingage.org).

Sincerely,

Juliana Bilowich
Director, Housing Operations and Policy