

D.C. District Court Invalidates Important FHWA Exemptions to “Buy America” Requirement

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On December 22, 2015, the U.S. District Court for the *District of Columbia* invalidated a **Federal Highway Administration (FHWA)** memorandum setting out the Agency’s position on the “**Buy America**” waiver for steel manufactured products. The decision creates uncertainty as to the proper administration of Buy America requirements, and will likely reduce demand for steel and iron imports used in federally-funded transportation projects.

The Buy America Requirement: Created by the Surface Transportation Assistance Act of 1978, the Buy America requirement currently provides that federal funds may not be used on any highway project “unless steel, iron, and manufactured products used in such project are produced in the United States.” 23 U.S.C. § 313(a). The FHWA has the authority to waive this requirement if its application “would be inconsistent with the public interest.” 23 U.S.C. § 313(b)(1). Pursuant to that authority, the Agency issued a [final rule](#) in 1983 that “waive[d] the application of Buy America to manufactured products other than steel . . . manufactured products.” A [1997 memorandum](#) later confirmed that the manufactured products waiver does not apply to products that “predominantly consist of steel. The Agency’s rationale for the waiver was that “Congress’ primary concern . . . was to protect the domestic steel industry.”

On [December 21, 2012](#), the FHWA issued a memorandum describing two categories of steel or iron products that the manufactured products waiver exempts from Buy America. First, the Agency noted that “the scope of the waiver was intended to encompass miscellaneous steel or iron components and subcomponents that are commonly available as off-the-shelf products.” Examples of this “Miscellaneous Products Exemption” to Buy America included “cabinets, covers, shelves, clamps, fittings, sleeves, washers, bolts, nuts, screws, tie wire, spacers, chairs, lifting hooks, faucets, door hinges, etc.”

The second exemption in the 2012 memorandum—the “90-Percent Threshold”—provided that a product was only considered “to be manufactured predominantly of steel or iron if the product consists of at least 90% steel or iron content.” Thus, under the “90-Percent Threshold” rule, Buy America applied only to products composed of at least 90 percent steel or iron, exempting anything

with lower steel or iron compositions.

The District Court's Decision: A steel and iron manufacturer association, several manufacturers, and a workers' union sued the FHWA, asserting that the 90-Percent Threshold and the Miscellaneous Products Exemption were not promulgated consistent with the requirements of the Administrative Procedure Act (APA). Specifically, the plaintiffs argued (1) that both exemptions were substantive rules subject to notice and comment rulemaking under Section 553 of the APA; (2) that the 90-Percent Threshold was arbitrary and capricious under Section 706 of the APA; and (3) that the FHWA failed to observe required procedure when it created the Miscellaneous Products Exemption, contrary to Section 706 of the APA.

The [district court agreed](#) on all counts with the plaintiffs. The lone exception upon which the Agency could rely was the one for interpretative rules. Although the court noted that the distinction between interpretative and substantive rules is "notoriously hazy," the district court observed that when agency rules are stated in numerical terms, these are more likely to fall within a legislative action rather than an interpretative action. Thus, the court rejected FHWA's argument that the 90-Percent Threshold was an interpretative rule exempt from the APA's notice and comment procedures. Noting the conclusory nature of the 2012 memorandum, the court further found the 90-Percent Threshold to be arbitrary and capricious.

Regarding the Miscellaneous Products Exemption, the district court first observed that in light of the final rule's expansion of Buy America to *all* steel products, the 2012 memorandum's exemption of steel items "commonly available as off-the-shelf products" constituted substantive rulemaking subject to the APA's notice and comment provisions. Because it deemed the Miscellaneous Products Exemption a new waiver, the court also concluded that the exemption was not promulgated in accordance with the SAFETEA-LU Technical Corrections Act of 2008, which requires new Buy America waivers to undergo notice and comment rulemaking. As the court noted, failure to comply with this statutory requirement was yet another ground for invalidating the exemption under the APA.

Relevance to Contractors: In the wake of the district court's decision, the FHWA withdrew the 2012 memorandum and [admonished entities](#) administering federally-funded projects to "use the existing statute [sic], regulation and implementing policy memos to administer the Buy America requirements . . . [u]ntil FHWA updates its regulatory policy." The FHWA may yet appeal the district court's decision or attempt to reinstate the Miscellaneous Products Exemption and 90-Percent Threshold via notice and comment rulemaking. Contractors will have to wait while the Agency determines its next steps.

In the interim, the district court's decision will likely have the practical effect of reducing demand for foreign steel and iron. Invalidation of the Miscellaneous Products Exemption will inevitably lead to increased demand for American steel and iron products. Additionally, rejection of the 90-Percent Threshold for determining whether a manufactured product "predominantly" consists of steel or iron may lead some program managers to reject imported products that are less than 90 percent composed of steel and iron, even though the use of such products was permitted under the 90-Percent Threshold. As the district court observed, the qualifier "predominantly" requires only that a product consist of more than 50 percent steel or iron before potentially becoming subject to the Buy America requirement. Until the FHWA updates its regulatory policy, contractors should be cautious when importing foreign manufactured products that are more than 50 percent steel or iron for use in federally-funded transportation projects.

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