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¶ 241 FEATURE COMMENT: OMB Issues Final Build America, Buy America (BABA) Guidance Which May Trigger Compliance, Enforcement And Trade Issues—And Bid Protests

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The Biden administration's Office of Management and Budget (OMB) has issued final guidance implementing the "Build America, Buy America" (BABA) provisions in the Infrastructure Investment and Jobs Act (IIJA), which President Joseph Biden signed in November 2021. The final guidance is intended, as President Biden said in his 2023 State of the Union address, to ensure that when hundreds of billions of dollars of federally funded infrastructure projects are built with federal grant funding, "we're going to Buy American." But because of its extraordinary complexity and the conflicts it creates with other domestic-preference laws, in practice the new OMB guidance may impose heavy compliance burdens on contractors and suppliers, disrupt existing supply chains, and trigger disputes (through bid protests or otherwise) over states' prior commitments to open their procurement markets under international trade agreements.

The BABA Legislation—Under the "Build America, Buy America" provisions, which are in Title IX of the IIJA, Public Law 117-58 (Nov. 15, 2021), a new domestic preference is to apply generally to federal financial assistance (grants) for public infrastructure projects. Under BABA, "all iron, steel, manufactured products, and construction materials used in infrastructure projects funded at least partly by Federal financial assistance must be produced in the United States." 87 Fed. Reg. 45396, 45396 (July 28, 2022). This preference applies beyond infrastructure projects funded by the IIJA, to reach potentially all infrastructure projects supported with federal financial assistance. See, e.g., Arnold, Hoang & Bakies, Feature Comment, "No Such Thing As A Free Lunch (Or Infrastructure Project): Infrastructure Bill Brings Compliance With Federal Grant Obligations Into The Spotlight," 65 GC ¶ 39 (2023); Christopher Yukins, *Implementation Issues Under the BABA Act* (Jan. 2022), https://publicprocurementinternational.com/implementation-issues-under-the-baba.

The Act defines "infrastructure" broadly to include, "at a minimum, the structures, facilities, and equipment for" U.S. roads, highways, and bridges, public transportation, dams, ports, harbors, and other maritime facilities, intercity passenger and freight railroads, airports, water and wastewater systems, electrical transmission systems,

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utilities, broadband infrastructure, and buildings and real property. In one of its first steps implementing the Act, OMB urged federal agencies, when assessing what might qualify as infrastructure under the Act, to "err on the side of inclusiveness." OMB Memorandum M-22-08, at 2 (Dec. 20, 2021).

The Challenges of Reconciling Old and New "Buy America(n)" Laws—In implementing the new Act, regulators had several different approaches they could take, including those developed in Federal Acquisition Regulation (FAR) Part 25 under the Buy American Act of 1933 and the 2009 American Recovery and Reinvestment Act (ARRA). When regulators implemented the ARRA, in many cases they adopted the approaches earlier developed under the Buy American Act. But the BABA Act raised more difficult issues, in part because it often explicitly conflicted with other domestic-preference provisions.

One example of this conflict between new and old laws arose in the infrastructure legislation's definition of "construction materials." In traditional federal procurement, the implementing clauses for the Buy American Act, see, e.g., FAR 52.225-9, defined "construction materials" as "an article, material, or supply brought to the construction site by the Contractor or subcontractor for incorporation into the building or work," or "an item brought to the site preassembled from articles, materials, or supplies." This could be called the "truck bed" rule—"construction materials" under the older Buy American Act would be those items brought to a construction site on a truck bed. As the discussion below explains, however, OMB's final BABA guidance defined "construction materials" much more narrowly—though with more stringent requirements, which raises compliance challenges for contractors and suppliers that serve diverse federal, state and local markets.

While the Buy American Act and the BABA Act take similar approaches to the component-cost rule (the cost percentage of an item's components which must be of U.S. origin), the new law did not include the FAR's exceptions from the "cost of components" test for commercial off-the-shelf (COTS) items. See FAR 25.101(a)(2). When the FAR drafters carved a COTS exception from the Buy American Act requirements, they pointed to the costs and potential adverse economic impacts of applying the domestic component-cost requirement to COTS items being traded through a vast commercial marketplace. 74 Fed. Reg. 2713, 2715 (Jan. 15, 2009). OMB's final BABA guidance does not, however, create a similar COTS exception in the grants context.

Before turning to the OMB guidance, it is important to stress that although § 70915 of the Act called for OMB to issue guidance, and OMB has issued that guidance including through creation of a new 2 CFR Part 184, that guidance still must be implemented into the regulations of the grants-making agencies (such as the U.S. Department of Energy). In practice, for compliance purposes (as is discussed below) this will mean that contractors and suppliers need to ascertain which grants-making agency's regulations apply to any given purchase. Additionally, while the OMB guidance provides useful backdrop, it arguably lacks the legal force of the federal agency regulations. See 2 CFR § 1.105(b) ("Publication of the OMB guidance in the [Code of Federal Regulations] does not change its nature—it is guidance and not regulation.").

The OMB Guidance—The OMB guidance is extraordinarily long and complex, spanning the equivalent of over 170 double-spaced pages. The over 1,900 comments received on the proposed guidance are available at *regulations.gov*; a number of those comments are discussed below. The discussion below reviews the history and key aspects of the guidance, and then turns to the compliance, enforcement and international trade (and protest) issues raised by the OMB guidance.

Development of the Guidance: A few months after the infrastructure legislation became law in November 2021, OMB issued initial implementing guidance on April 18, 2022, OMB Memorandum M-22-11, *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure.* That initial guidance pointed out that, under the BABA Act, no later than May 14, 2022—180 days after the enactment of the infrastructure legislation—the head of each covered federal

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agency had to ensure that "none of the funds made available for a Federal financial assistance program for infrastructure … may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States." This meant in practice that federal agencies were working separately to issue their own BABA guidance and regulations. (Links to federal agency regulations are included at the White House's "Made in America" office website, https://www.whitehouse.gov/omb/management/made-in-america/build-america-buy-america-act-federal-financial-assistance/.) As the initial guidance stressed, the BABA domestic-content requirements were a logical extension of President Biden's Executive Order 14005, *Ensuring the Future Is Made in All of America by All of America's Workers* (2021), issued shortly after President Biden took office, which reflected his administration's priority to "use terms and conditions of Federal financial assistance awards to maximize the use of goods, products, and materials produced in, and services offered in, the United States."

Almost a year after the initial BABA guidance, OMB published proposed guidance in February 2023, 88 Fed. Reg. 8374 (Feb. 9, 2023); see 65 GC ¶ 36 (Feb. 15, 2023). That proposed guidance made clear that the contradictions buried in the BABA legislation—the conflicts between existing and new "Buy America(n)" requirements—could raise issues in any final implementing guidance. See, e.g., Jonathan D. Shaffer & Daniel H. Ramish, *OMB Proposed Guidance to Implement the BABA Act in the Uniform Guidance*, Federal Grant Practice § 53:6 (Thomson Reuters, 2023 ed.).

On April 21, 2022, OMB issued a Notice of Listening Session(s) and Request for Information (RFI) in the *Federal Register*, which explained that OMB was beginning the process of seeking public input for its revised guidance and standards for construction materials. 87 Fed. Reg. 23888 (Apr. 21, 2022). In the comments submitted in response and on OMB's subsequent proposed guidance, commentators noted:

- **Tangle of Requirements**: The American Public Transportation Association (APTA) pointed out that in order "to level the playing field for all bidders/contractors, it is imperative for OMB to coordinate with Federal recipients and construction industry primes/general contractors." Because of potential conflicts between the BABA requirements and preexisting "Buy America" requirements for federally funded transportation projects, APTA asked "OMB to ensure that whatever definition it settles on for construction materials be clear and consistent and consider how it will impact other, more mature Buy America requirements, especially those administered by [the Department of Transportation]." Comment ID OMB-2022-0007-0017 (June 6, 2023).

- **Waivers Slow and Insufficient**: The National Association of Counties (NACo) reported that critical projects (such as internet infrastructure investments in the western parts of the nation) could be delayed because domestically produced items are simply unavailable. The "federal government," NACo argued, must first make "certain that covered materials and processes are domestically available." Comment ID OMB-2022-0007-0015 (June 6, 2023). In its comments, the Associated Builders and Contractors (ABC) similarly noted that several agencies had imposed blanket waivers of BABA, citing "the lack of available information to immediately implement these [BABA] requirements." ABC asked that OMB delay implementation of the BABA requirements because the "U.S. construction industry currently faces significant headwinds in the form of supply chain disruptions, unprecedented materials cost inflation and declining investment," and cautioned "that immediate implementation of Buy America requirements could exacerbate these disruptions and further increase costs for contractors and taxpayers." Comment ID OMB-2022-0007-0008 (June 6, 2023).

- **Other Domestic Preferences Further Hurting Supply Chains**: The American Concrete Pipe Association reported that its "member companies are currently experiencing material shortages on a scale not previously seen in most lifetimes," and as a result producers "cannot currently promise delivery dates of pipe or bridges because they

> are unsure if or when steel reinforcing products will arrive. This is delaying the start date and completion date of infrastructure projects." The association blamed the Trump administration's "imposition of tariffs on foreign steel that triggered this crisis." Comment ID OMB-2022-0007-0009 (June 6, 2023).

The final OMB guidance was announced on August 14, 2023, see David Shepardson, *White House finalizes guidance to boost use of U.S.-made goods in infrastructure*, Reuters, Aug. 14, 2023, and published in the *Federal Register* on August 23, 2023, 88 Fed. Reg. 57750. The final guidance is to take effect on October 23, 2023.

Unresolved Issues in the Final Guidance: As noted, the guidance stretches over 170 pages; our focus here will be on key points in the guidance, many of which remain unresolved, which may trigger serious issues regarding compliance, enforcement and/or litigation, discussed in more detail in the following sections.

"Buy America(n)" Requirements Vary from Law to Law: While OMB acknowledged the need for consistency between different domestic-content requirements, OMB emphasized that "the Buy America requirements established by Congress under BABA are not identical to the Buy American Act requirements implemented in the FAR," and OMB said that existing "Buy America" requirements for infrastructure (for transportation projects, for example) which *meet or exceed* BABA's requirements will remain in place despite the new BABA guidance. 88 Fed. Reg. at 57753. Although (as OMB acknowledged) commentators (both industry and grantees) had pointed out that implementation of the disparate BABA requirements could create "confusion, project delays, or increased project costs," OMB insisted that the language of BABA required these new standards. 88 Fed. Reg. at 57753–54.

New Categories of Construction Materials: The OMB guidance, like the BABA statute, generally sorts items into three relevant categories: "manufactured products," "construction materials" and "iron or steel products." "Construction materials" were newly redefined under the OMB final guidance, in a narrower but more strictly regulated category. As noted, the FAR defines "construction materials" under the Buy American Act to include all the materials brought to a construction project, and the BABA statute itself does not define the term, see, e.g., 88 Fed. Reg. at 57763; in principle, therefore, the OMB guidance could simply have appropriated the traditional FAR definition of construction materials. Instead, OMB's final BABA guidance borrowed from the congressional findings in § 70911(5) of the Act to confine "construction materials" to narrow categories of products—(i) Non-ferrous metals; (ii) Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables); (iii) Glass (including optic glass); (iv) Fiber optic cable (including drop cable); (v) Optical fiber; (vi) Lumber; (vii) Engineered wood; and (viii) Drywall. 2 CFR § 184.3; 88 Fed. Reg. at 57758.

New Categories Yield Confusing Complexity: There was no statutory mandate for OMB to carve these specific categories of "construction materials" out of the broader category of "manufactured products"—only an illustrative list in the statutory findings. Because there is no ready *physical* difference between most "construction materials" and "manufactured products," and yet the BABA *legal* requirements for "construction materials" vary from those for "manufactured products" (discussed below), and "construction materials" can even be combined with "manufactured products" to create "manufactured products," the OMB guidance creates a regulatory scheme of Byzantine complexity, as the following example from the guidance illustrates:

> [A] plastic framed sliding window should be treated as a manufactured product while plate glass should be treated as a construction material. For another example, engineered wood, as a standalone product, should be classified as a construction material. However, if before the engineered wood is brought to the work site, it is combined together through a manufacturing process with glass or other items or materials to produce a new product, which is not [a listed "construction material"], such as a sliding window, the new product should be classified as a manufactured product.

88 Fed. Reg. at 57758. Notably, as described above,

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the same truckload of materials, if delivered to a construction site, might *all* qualify as "construction materials" under the traditional Buy American Act analysis. As the example suggests, the confusing complexity is not only in the tension between "construction materials" and "manufactured products" under the BABA guidance: another layer of complexity lies in *where* the item is modified (before or after it reaches the work site) (discussed below).

Complexity and Conflicts: Compliance Challenges—The IIJA, because of its sheer scope and complexity across billions of dollars in federal infrastructure funding, raised a wide array of compliance issues. See, e.g., Arnold, Hoang & Bakies, supra. Our focus here will be on those that relate to the Act's "Buy America" requirements under the OMB guidance.

As the discussion above showed, because domestic-preference requirements can differ between old and new laws, and even between implementing federal agencies—and the OMB final guidance did not erase those conflicts—contractors and suppliers may need detailed information, passed through the supply chain, to identify and comply with the new BABA requirements. A vendor (a manufacturer or supplier, for example, or a prime contractor), when asked to confirm BABA compliance (a common sort of request in the commercial marketplace), may need to know:

- **Federally Funded "Infrastructure"**: The vendor may need to know whether the purchase involves federally funded "infrastructure," which as noted is very broadly defined by the new legislation, and in implementation can be defined differently by different grants-making agencies. See 88 Fed. Reg. 57767–68 (discussing breadth of "infrastructure" term).

- **"Buy American" or "Buy America" or "BABA"—or Otherwise**: The supplier or contractor may need to know which statute governs the purchase, as the recent infrastructure legislation imposes very different requirements than, for example, the Buy American Act, which in turn can differ from "Buy America" requirements under federal transportation funding, or procurement funded by the 2009 ARRA. See, e.g., Kate M. Manuel et al., *Domestic Content Restrictions: The Buy American Act and Complementary Provisions of Federal Law* (Cong. Res. Serv. 2016); Christopher R. Yukins & Allen Green, *International Trade Agreements and U.S. Procurement Law*, in *The Contractor's Guide to International Procurement* (American Bar Association 2018) (Erin Loraine Felix & Marques Peterson, eds.), https://ssrn.com/abstract=3443244.

- **What Category Will the Item Fall Within—And Thus What Standard Applies**: If the purchase is subject to BABA, the category (or "bucket") in which an item falls is critical. See, e.g., 88 Fed. Reg. at 57775. An item being incorporated into an infrastructure project, OMB explained, "must meet the Buy America preference for only the single category in which it is classified." 88 Fed. Reg. at 57773. Thus, for example, "in the case of iron or steel products, the Buy America preference does not apply directly to non-iron or -steel components" included with those products. Id. To determine the correct category for an item, a vendor will need to know into which of the three primary categories the item falls. (A fourth category, under § 70917(c) of the BABA Act, covers concrete aggregates and similar materials. 4 CFR § 184.4.) The three main categories or "buckets" are:

  - **Manufactured Products**: A "manufactured product" under the final guidance, 2 CFR § 184.3, includes "articles, materials, or supplies that have been: (i) processed into a specific form and shape; or (ii) combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies." See 88 Fed. Reg. 57769. To qualify as "produced in the United States" as required by the BABA guidance, the manufactured product must be (i) "manufactured in the United States;" and (ii) the "cost of components that are mined, produced, or manufactured in the United States" must be

greater than 55 percent of the total cost of all components of the manufactured product. 2 CFR § 184.3. The calculation for the cost of components differs based on whether the components are self-produced by the manufacturer or are purchased by the manufacturer. 2 CFR § 184.5. As is discussed below, because the OMB guidance for "manufactured products" focuses on the manufacturing step just before the product is delivered to the work site, the test for manufacturing of "manufactured products" is arguably less demanding than that for construction materials and iron and steel products, for which *all* manufacturing processes must occur in the United States.

- **Construction Material**: As noted, "construction materials" under the OMB guidance, 2 CFR § 184.3, are those items that fall within narrow categories specially defined by OMB (e.g., glass and engineered wood). If an item is a construction material, "all manufacturing processes for the construction material [must have] occurred in the United States." Indeed, the OMB guidance sets forth precise requirements for manufacturing specific construction materials; for glass, for example, all "manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, [must have] occurred in the United States." 2 CFR § 184.6.

- **Iron or Steel Products**: The OMB final guidance addresses "iron or steel" items (or items "predominantly of iron or steel") under 2 CFR § 184.2—a definition which is close but not identical to the definition of iron and steel products under the Buy American Act, see, e.g., FAR 52.225-1; 88 Fed. Reg. at 57768. Section 70912 of the BABA Act defines "produced in the United States" to mean, for iron and steel products, "that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States."

- **Which Federal Agency Is Providing Financial Assistance to the Project**: Although the OMB guidance was intended to provide *uniformity* across federal agencies, the guidance itself acknowledges that different federal funding agencies may take very divergent approaches—and thus may issue regulations or guidance that apply BABA's Buy America requirements very differently. For example, while the OMB guidance says that the BABA requirements do not, on their face, apply to *for-profit* entities receiving federal financial assistance (as they do not qualify as "non-federal entities" covered by the OMB guidance), individual federal agencies may decide to extend the BABA requirements to for-profit firms, as well. 88 Fed. Reg. at 57774. As a practical matter, these and other differences in agencies' implementations (including agency-specific waivers, discussed below) may mean that vendors checking for BABA compliance need to know which federal agency is providing the financial assistance (a grant, for example) to support the infrastructure project.

- **How Will the Item Be Changed in the Supply Chain, and Delivered to the Work Site**: As noted, the OMB guidance imposes different tests for different categories of items. In practice, it may be very difficult (or even impossible) for vendors lower in the supply chain to determine the correct category or "bucket" in which a given item ultimately may fall—construction material, manufactured product, or iron or steel product—because that critical category is to be determined much later in the supply chain, as of the time the item is "brought to the work site," 88 Fed. Reg. at 57775–76. Since (as OMB acknowledges) the definition of a "work site" can vary, and different federal agencies may define "work site" differently, id. at 57776, to categorize products accurately it may be necessary for vendors to know exactly which agency is funding a project, and exactly how the work site is configured—a remarkably difficult compliance task in any extended supply chain. Even then, the analysis will be hard. Take, for example, what is likely to be

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the most common category of item, "manufactured products," which as noted (1) must be "manufactured" in the United States, and (2) must have domestic components exceeding 55 percent of costs. Because the OMB guidance focuses on the item as it is delivered to the work site, the OMB guidance suggests that only the last stage of "manufacture" matters, as a "manufacturer" is defined as the "entity that performs the final manufacturing process that produces a manufactured product." 4 CFR § 184; see also 88 Fed. Reg. at 57777 ("OMB … separately defines ["manufacturer"] … in § 184.3 of the guidance to mean the entity that completes the final manufacturing process that produces a manufactured product. As products are classified based on their status when brought to the work site, this refers to the final manufacturing process that occurred before that point in time."). What this seems to mean is that a supplier, asked whether an item that *appears* to be a "manufactured product" (because it's not predominantly made of iron or steel, and does not fall within the narrow categories of "construction materials") is BABA-compliant, would need to foresee whether that item would be further transformed by a "manufacturer"—the last in the supply chain, working on the product just before it is delivered to the work site (however that was defined). If so, the test for BABA compliance would have to rest not with the supplier, but the ultimate manufacturer. The "manufacturer," for its part, might need to be able to reach back into the supply chain for information on the costs of the item's various components, to meet the 55-percent cost-of-components test. Taken in sum, these are compliance requirements—really, information-gathering requirements—of potentially enormous difficulty, in part because (as federal regulators themselves noted, when they created a COTS exception from the Buy American Act's requirements) supply chains typically are built efficiently to add value, not to accumulate information that does not necessarily add value but may be needed for a domestic-content analysis. See 74 Fed. Reg. at 2715.

- **Has a Funding Agency Issued a Waiver**: A vendor assessing BABA compliance also may need to know whether a waiver from BABA's domestic-content requirements has been granted. Waiver authority remains with the funding agencies, and waivers will need to be submitted to OMB for review. 2 CFR § 184.7. Suppliers, contractors and grantees will need to sift through potentially scores or even hundreds of waivers—the BABA requirements for federally funded infrastructure are permanent, and the waivers are likely to accumulate over time—to determine if their funding agency has waived relevant requirements, or another agency has granted a parallel waiver for the same products that might be cited as an example. This will be an especially onerous process for foreign vendors whose products are covered by free trade agreements—essentially, they will be seeking a waiver for a right of access they already have in other circumstances—as is discussed below.

In practice, it may prove very difficult for suppliers low in the supply chain to gather all the information needed on final use to speak to BABA compliance. But without information from the suppliers at the "bottom" of the supply chain (on the materials used, for example, or the cost of components) it could be nearly impossible for purchasers at the "top" of the supply chain—the prime contractors and federal grantees that may be held accountable, for example—to confirm BABA compliance. Besides disrupting well-established supply chains, these complexities could make compliance practically unworkable, and thus—coming full circle—undermine Government enforcement efforts under the BABA Act.

Enforcement Challenges—Federal grantees (local governments, for example) that run afoul of the BABA requirements risk having their funding disallowed. See 2 CFR § 200.339. Contractors and their suppliers face arguably even more serious enforcement risks, potentially including (and depending on the circumstances) default termination, contractual damages, and disqualification or debarment. Perhaps most seriously, contractors and suppliers may face fraud challenges under the federal False Claims Act (or its state analogues). See,

e.g., Tom Ichniowski, *New White House Buy America Guidance Draws Scrutiny*, Eng. News Rec., Aug. 20, 2023. But liability under the False Claims Act may be triggered if a private firm acts "recklessly," a term that the Supreme Court recently confirmed means that the defendant was "conscious of a substantial and unjustifiable risk that their claims are false." *United States ex rel. Schutte v. SuperValu Inc.*, 143 S. Ct. 1391, 1401, 216 L. Ed. 2d 1 (2023); 65 GC ¶ 156. Given the complexities in BABA compliance under the OMB guidance, enforcement authorities may have difficulty showing that private firms, caught in a web of confusing BABA requirements, were indeed "reckless" under the False Claims Act.

International Trade Issues—and Potential Bid Protests—Although § 70925 of the BABA said that the Act is to be "applied in a manner consistent with United States obligations under international agreements," and a similar requirement under the ARRA was carried into OMB guidance, 2 CFR § 176.90, the final OMB BABA guidance did *not* exempt state procurements that are covered by trade agreements from BABA's sweeping new "Buy America" requirements. This could create serious tensions with states' obligations under standing trade agreements.

Thirty-seven states open some or all of their procurements to other members of the World Trade Organization (WTO) Agreement on Government Procurement (GPA), and other bilateral and regional trade agreements similarly bind signatory states to open their procurement (at least in part) to vendors from the member nations. See, e.g., Jean Heilman Grier, *The International Procurement System* 146-57 (Dalston 2022). Despite these international agreements to open state markets to vendors from signatory countries, the OMB guidance (per the accompanying Memorandum M-22-11) says those receiving federal assistance on infrastructure projects must seek a "public interest waiver" from the funding federal agency before allowing foreign items from those nations to bypass the BABA Act's new barriers to trade. See OMB Memorandum M-22-11, at 11 (noting that international trade agreements may be grounds for a public interest waiver); 88 Fed. Reg. at 57785 (discussing public interest waiver under OMB Memorandum M-22-11); 2 CFR § 184.7.

OMB's failure to carve out an exception for existing trade agreements with the states was sharply criticized by trading partners and members of the international trade community. See, e.g., Comments by the European Union, Comment ID OMB-2023-0004-1804 (Mar. 13, 2023). Jean Heilman Grier, former negotiator for the Office of the U.S. Trade Representative on procurement matters, argued that the Biden administration's failure to make an exception for items from signatory nations "may effectively nullify US commitments to treat foreign products the same as US-made products in procurement covered by the WTO [GPA], free trade agreements, and a 1995 bilateral arrangement with the European Union." Jean Heilman Grier, *Trade Agreements Ignored in New 'Buy America' Rules* (Feb. 13, 2023), https://trade.djaghe.com/?p=7604. Commenting on the "public interest" waivers required for foreign items which were previously guaranteed access to covered state markets, she noted that the "waiver process … provides no certainty that a public interest waiver will be issued for goods covered by an agreement." Jean Heilman Grier, *Final Infrastructure Guidance: No Trade Agreement Provisions* (Aug. 21, 2023), https://trade.djaghe.com/?p=7831.

As OMB acknowledged in its prefatory comments to the final guidance, several commenters on the final guidance "feared that any failure to comply with free trade agreements could initiate dispute settlement proceedings or other corresponding action to limit U.S. access to foreign government procurement." 88 Fed. Reg. at 57784; see, e.g., *Comments of Telecommunications Industry Ass'n,* at 6, Comment ID OMB-2023-0004-1812 (Mar. 13, 2023) (noting potential retaliatory actions). Those challenges could come at a government-to-government level through the WTO disputes process. See, e.g., WTO GPA, Article XX; Jean Heilman Grier, *The International Procurement System*, supra, at 65–66. Trading partners also might deploy other retaliatory trade measures. The European Union, for example, recently put into place its "International Procurement Instrument," EU Regulation 2022/1031; see European Union, *The EU's International Procurement Instrument – IPI*, https://eur-lex.europa.e

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u/EN/legal-content/summary/the-eu-s-international-procurement-instrument-ipi.html, which, in response to the new BABA restrictions, might be raised as a possible basis for retaliatory trade restrictions against U.S. vendors seeking access to EU member state markets. See generally *Webinar: New Protectionism in Public Procurement* (Sept. 7, 2022), https://publicprocurementinternational.com/new-protectionism-webinar/ (assembled resources); European Commission, *Study on the measurement of cross-border penetration in the EU public procurement market* (2021) (reviewing access of U.S. firms and others to EU member states' public procurement markets).

OMB also did not address the risk that the new BABA restrictions may be challenged through bid protests. Trade agreements regularly provide that vendors may challenge discriminatory actions through a bid challenge. See, e.g., WTO GPA, Art. XVIII ("Each Party shall provide a timely, effective, transparent and non-discriminatory administrative or judicial review procedure through which a supplier may challenge: (a) a breach of the Agreement; or (b) where the supplier does not have a right to challenge directly a breach of the Agreement under the domestic law of a Party, a failure to comply with a Party's measures implementing this Agreement."). Foreign vendors from signatory nations may seek to bring bid protest actions, see *Guide to State Procurement: A 50-State Primer on Purchasing Laws, Processes and Procedures* (American Bar Association, 3d ed. 2022, Melissa Javon Copeland, ed.) (includes state-by-state review of bid protest procedures), in those states where the OMB BABA guidance has now closed previously open public procurement markets. See generally Scott Sheffler, *A Balancing Act: State Participation in Free Trade Agreements with "Sub-Central" Procurement Obligations*, 44 Pub. Cont. L.J. 713 (2015); National Association of State Procurement Officials, *NASPO Guide to International Trade Agreements*, https://www.naspo.org/ita; cf. 19 USCA § 3512(b) (statutory limitation to challenges to state laws in violation of trade agreements).

Conclusion—To make sense of the BABA standards, one can look back to President Biden's State of the Union address in early 2023. Referring to the projects funded by the infrastructure legislation, he said that "when we do these projects, we're going to Buy American." "Buy American," President Biden declared, "has been the law of the land since 1933. But for too long, past administrations have found ways to get around it. Not anymore." Turning to specifics—the standards that OMB has now finalized—President Biden said: "Tonight, I'm also announcing new standards to require all construction materials used in federal infrastructure projects to be made in America. American-made lumber, glass, drywall, fiber optic cables." More generally, he said, "on my watch, American roads, American bridges, and American highways will be made with American products."

President's Biden's words help explain OMB's complex BABA guidance. President Biden's address, like the OMB guidance, focused on *construction materials*, which OMB has said means a few, narrow categories of items, such as glass and optical fiber. That BABA definition of "construction materials" covers fewer products than the preexisting Buy American Act, but the BABA guidance imposes more requirements (e.g., as to how and where manufacture occurs) than the Buy American Act. That contradiction—one legal term, "construction materials," meaning two things in the same regulatory space—is at the center of a complex web of conflicting requirements.

Despite warnings that regulatory complexity could slow projects and raise costs, OMB has issued Byzantine guidance that may make compliance very difficult, and may trigger serious disputes. Projects may be stalled as grantees and contractors wrestle with how to understand and comply with the new requirements. Suppliers may struggle to confirm that their products are "Buy America" compliant because the meaning of that term has become so complex, requiring far more information on domestic content, transformation and ultimate use than an item normally carries through the supply chain—as federal regulators have themselves acknowledged in past rulemakings. As a result, enforcement officials may find it difficult to use traditional tools (such as fraud statutes) to enforce BABA's new requirements. At the same time, because the new guidance overrides trade agreements which open state procurement markets (BABA requires a public interest

waiver to access those markets), the OMB guidance may trigger government-to-government challenges by trading partners, or state-level bid protests by foreign suppliers that may be locked out of state markets for federally funded infrastructure projects.

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