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May 6, 2024

The Honorable Shailen Bhatt  
Administrator  
Federal Highway Administration  
1200 New Jersey Avenue SE  
Washington, DC 20503

**Subject: Federal Highway Administration Notice of Proposed Rulemaking – 23 CFR 635  
(Docket No. FHWA-2023-0037)**

Dear Administrator Bhatt:

The American Traffic Safety Services Association (ATSSA) is pleased to submit comments to the Federal Highway Administration (FHWA) in response to the Notice of Proposed Rulemaking (NPRM) on Buy America Requirements for Manufactured Products – 23 CFR 635 (Docket No. FHWA-2023-0037), published in the Federal Register on March 12, 2024. ATSSA members manufacture, distribute and install roadway safety infrastructure devices such as guardrail and cable barrier, traffic signs and signals, pavement markings, work zone safety and other devices that improve safety on this nation's surface transportation system.

**General Comments**

ATSSA members are generally in favor of increasing the capacity to procure and produce domestically sourced manufactured products for use on surface transportation projects. However, ATSSA members have advocated for the retention of the longstanding general interest waiver of Buy America requirements for manufactured products that has been in place since 1983 and are extremely concerned with the impacts that this NPRM could have on the timely and cost-effective delivery of much-needed roadway safety infrastructure improvements. Therefore, ATSSA again urges FHWA not to discontinue the Manufactured Products General Waiver.

With traffic fatalities continuing at unacceptable levels, we ask that FHWA recognize the difficulties that will be experienced by the roadway safety infrastructure industry across the country if the current Manufactured Products General Waiver is eliminated.

If the decision is made to discontinue the Manufactured Products General Waiver, FHWA needs to take all necessary steps – including the use of waivers or implementation transition periods to avoid the unintended consequence of hindering the delivery and increasing the costs of life-saving roadway construction and roadway safety projects across the country.

**Sourcing and Manufacturing Challenges for Safety Hardware and Devices**

The roadway safety infrastructure industry will face several serious challenges related to the elimination of the current general waiver of Buy America requirements for manufactured products

as proposed in the NPRM. ATSSA members do not believe there is currently an adequate domestic sourcing and manufacturing capability in existence today to domestically source materials for critically important roadway safety hardware and products.

As is stated in Section V of the NPRM:

*“While FHWA is proposing to discontinue the Manufactured Products General Waiver and impose Buy America requirements on manufactured products, FHWA does not desire to place contracting agencies, contractors, and manufacturers in a position where they are required to comply with Buy America requirements for manufactured products without having the systems in place to do so.”<sup>1</sup>*

ATSSA members do not believe that an adequate supply chain of domestically sourced products is currently in place to comply with an immediate application of Buy America requirements for manufactured products if the manufactured products waiver is discontinued as proposed in the NPRM. ATSSA has heard from its members that there are significant domestic shortages of materials and components for manufacturing critical roadway safety components and certain safety devices and products in the United States. For example, for some roadway safety infrastructure products, there is only one manufacturing option in the entire country that would satisfy Buy America requirements. This lack of competition and sourcing options will create the potential for material shortages and certainly will create significant price increases.

There are also certain roadway safety components, devices and products that include materials that currently have no domestic supply chain at all. It is not possible, despite the desire of policy makers, to create entirely new industries to domestically supply the roadway safety industry overnight. Creating new domestic supply chains takes time. Without allowing the time necessary to create these industries in the United States, projects will be delayed or cancelled.

Therefore, ATSSA strongly urges a delay in the discontinuation of the Buy America manufactured products waiver until there has been significant time to set up and expand manufacturing for the roadway safety industry. Failure to allow for the proper ramp up time could result in the halt of the manufacturing of vital life-saving devices and products that are required for deployment on our roadways – products and devices that keep the traveling public safe.

If delaying the discontinuation of the Buy America manufactured product waiver is not possible, ATSSA strongly urges FHWA to consider the use of targeted waivers for safety products and devices until domestic manufacturing capabilities reach a level that would allow for no slowdown of project delivery, significant project cost increases or the deployment of these critical products and devices.

### **Uniformity in Implementation**

ATSSA members have expressed concern with the lack of uniformity across the states in the implementation of the Buy America, Build America (BABA) provisions in the Infrastructure Investment and Jobs Act. In previous comments to the Federal Register, ATSSA has asked for additional guidance from the United States Department of Transportation (USDOT) and FHWA to

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<sup>1</sup> <https://www.federalregister.gov/d/2024-05182/p-84>

assist state departments of transportation (state DOTs), contractors, and manufacturers in further clarifying how the BABA requirements should be implemented.

It is also important that USDOT and FHWA provide additional guidance to state DOTs so that a uniform product certification process is utilized across the country. A uniform system would eliminate significant confusion and would ease the burden on construction and transportation industry stakeholders, along with state DOT partners. Without this additional guidance from USDOT and FHWA, there is the potential for inconsistent implementation of Buy America requirements across the country.

### **Federal Clearinghouse for Manufactured Products**

ATSSA members and state DOTs have greatly felt the burden of both compiling and providing materials and approving products for Buy America certification. The elimination of the manufactured products waiver will only exacerbate that burden. Many ATSSA member companies are nearing their limits in having the staff necessary to provide the product certification documentation for each federal-aid project where their products are included. This staff capacity issue is exacerbated for smaller companies that may simply be unable to keep up with the paperwork requirements – requirements that will increase with the discontinuation of the Buy America manufactured product waiver proposed in the NPRM.

ATSSA members that work across state lines have reported that state DOTs are requiring different forms of documentation for Buy America certification, thus further aggravating and expanding the growing burden of paperwork required. ATSSA strongly urges that FHWA adopt a federal clearinghouse for manufactured products that meet Buy America requirements – both for construction materials and manufactured products. Once a product is certified by one state DOT, all state DOTs could consult the clearinghouse to determine Buy America compliance for that product. Such a clearinghouse would remove the requirement that contractors and manufacturers must continuously certify the same product on a project-by-project basis. Streamlining the certification process through the creation of a clearinghouse will allow both state DOTs and ATSSA members to complete roadway safety projects in a more timely, efficient, and cost-effective manner.

### **Guidance Regarding Pavement Markings Classification**

ATSSA has heard significant concerns from its contractors and manufacturers in the pavement marking field regarding the classification and treatment of pavement markings in the implementation of the Buy America provisions of the IIJA.

Pavement markings are primarily constructed of two separate components: optic glass beads, which are used to illuminate the marking when met with a headlight, and a thermoplastic, paint, or epoxy used as the base, binder, and color of the marking.

The most common method of application being a process in which thermoplastic, paint, or epoxy is applied to the road, and then the glass beads are applied on top of that material to achieve the end pavement marking product.

In this case, under the Office and Management and Budget (OMB) Final Rule on Guidance for Grants and Agreements published in the Federal Register on August 23, 2023<sup>2</sup> (final guidance), the glass beads are classified as a construction material, and the marking material (thermoplastic, paint, and epoxy) is considered a separate manufactured product – even though this process results in the final product that is a pavement marking.

Another method to produce a pavement marking is using a preformed version, where the glass beads and marking material are combined offsite at the time of manufacturing (ahead of arrival to the job site), and then that product is applied to the roadway in a single process using heat. While the same manufactured products are applied to the roadway as the previously mentioned method (in the case of preformed, the glass beads and thermoplastic), only the preformed version is considered a whole manufactured product under the OMB final guidance. Additionally, this method is used sparingly, as it is a much less feasible option for most pavement marking applications than the field combined application, as it is significantly more time consuming and costly, and several types of roadways can't handle the groove cutting necessary to apply the final marking.

The OMB final guidance states in section 184.4(e):

*“If categorization occurred instead at the time of “incorporation” into the project, after products are further combined through various assembly and manufacturing processes on the work site, the resulting “end products” and their “components” would often look very different and lead to different outcomes on product classification and the applicable domestic content preference. The same would be true if categorization occurred based on assessment of the status of products in a finished infrastructure project. Categorization at the time of “incorporation” or project completion could result in wide-ranging systems assembled on the site, which include many different products from different manufacturers, being categorized as a one large manufactured product. The resulting system could include many separate iron or steel products or construction materials from different manufacturers and suppliers. Shifting the level of analysis in this way could result in only applying the domestic content preference for manufactured products to the system as a whole. In the absence of any guidance on this topic, it is conceivable that some recipients or contractors may even seek to classify an entire infrastructure project as one manufactured product. OMB's revised guidance avoids these results by specifying that classification occurs based on the status of products brought to the work site.”<sup>3</sup>*

Since the final product uses the same materials to produce the same pavement marking, it does not make sense to have two different sets of Buy America requirements apply to the pavement marking process. While it is understandable that OMB is aiming to avoid potential abuse of the Buy America requirements, pavement markings are a very specific product, with a two-part makeup.

ATSSA strongly urges FHWA to re-examine the categorization of the pavement markings. All pavement markings should be classified as total manufactured products – regardless of the

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<sup>2</sup> <https://www.federalregister.gov/d/2023-17724/p-283>

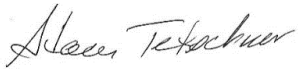
<sup>3</sup> <https://www.federalregister.gov/d/2023-17724/p-283>

process used to apply them - and therefore should fall under the Buy America requirements of the NPRM.

**Conclusion**

ATSSA members understand it is in the public's interest to improve roadway safety and urge FHWA to recognize this interest as well when finalizing the rules outlined in this NPRM. FHWA should acknowledge the real-world challenges and time needed to create domestically sourced products and understand the need for flexibility in any final guidance to avoid unnecessary project cost increases and transportation project impacts.

Sincerely,

A handwritten signature in cursive script that reads "Stacy Tetschner".

Stacy Tetschner

President and CEO