

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

**Six-Month Adjustment Period Public Interest General Applicability Waiver, Excepting
Fiber Optic Glass and Fiber Optic Cable, of the Buy America Domestic Content
Procurement Preference for Recipients of Connecting Minority Communities Pilot
Program Awards**

ACTION: Notice

SUMMARY: Congress passed the Build America, Buy America Act (BABA or Act), which is included in the Infrastructure Investment and Jobs Act, Public Law Number 117-58, 135 Stat. 429 (IIJA), in November 2021. BABA provides for strong and permanent domestic sourcing requirements across all federal financial assistance programs. The U.S. Department of Commerce (the Department), in keeping with its mission to create the conditions for economic growth and opportunity for all communities, is ready to help lead on this important mission to assist with catalyzing domestic manufacturing, resilient supply chains, and job growth. The Department is eager to contribute to growing America’s domestic production capacity and will comply with BABA’s requirements as much as possible while balancing equity, practicality, and implementation costs. The transition for some existing programs or products may take time, so flexibility will be important as the Department implements the provisions of the BABA. The National Telecommunications and Information Administration (NTIA) is establishing a public interest general applicability waiver of Section 70914 (Buy America Preference) of BABA for all iron, steel, manufactured products, and construction materials, with the exception of fiber optic glass and fiber optic cables, used in infrastructure projects funded through Connecting Minority Communities Pilot Program (CMC or CMC Pilot Program) awards. This

waiver will be in effect for a six-month adjustment period beginning on the date of its issuance, November 3, 2022 through May 1, 2023, and will cover all CMC Pilot Program awards made during this period.

NTIA conducted an initial industry assessment by contacting a broad set of industry trade associations, network operators, and communications technology manufacturers to obtain input on the challenges they anticipate in meeting BABA requirements while deploying broadband infrastructure for the IJA grant programs. This initial assessment informed NTIA's analysis of the impact of BABA on items to be acquired for the CMC Pilot Program. NTIA will conduct further market research during the six-month adjustment period to identify items that can be domestically sourced, such as fiber optic glass and fiber optic cable. After the six-month adjustment period, the up-to-date list of items that meet BABA requirements will be available at the Department's Build America, Buy America website. The six-month adjustment period will also give CMC recipients the needed time to identify potential domestic sources for necessary components of their projects and assess the costs from such sources.

Based on its review of CMC recipients' budgets, NTIA expects that some of their purchases under the waiver will include manufactured products, e.g., broadband switching equipment, broadband routing equipment, and external broadband wireless equipment that contain iron and/or steel. Additional items that will be used in projects funded by CMC awards are: cabling; conduits; transceivers; antennas; power supplies; broadband customer premises equipment; storage units and enclosures; controllers; access points; radio units; distribution nodes; batteries; solar panels; hardware such as brackets, bolts, or screws; steel poles; monopole towers; and tower structural supports. Several of these products, such as broadband communications equipment and end-user devices, relate to critical supply chains in the Information and

Communications Technology (ICT) Industrial Base, as identified in Executive Order 14017. NTIA is requiring recipients of this waiver to report on their purchases of items from foreign sources. Recipients reporting foreign-sourced items will help with market research and with future NTIA grant programs and awards that also involve these items. NTIA will use this information to better understand the broadband products market and the availability of U.S. products in the ICT supply chain. This will inform its implementation of the CMC Pilot Program, as well as its other broadband infrastructure deployment programs.

The CMC Pilot Program aims to address the lack of broadband access, connectivity, adoption, and equity at our nation's Historically Black Colleges or Universities (HBCUs), Tribal Colleges or Universities (TCUs), and minority-serving institutions (MSIs). The CMC Pilot Program authorizes new federal funding for the NTIA Assistant Secretary to make grants to eligible HBCUs, TCUs, and MSIs in anchor communities: (i) for the purchase of broadband internet access service or any eligible equipment; or to hire and train information technology personnel; or to facilitate educational instruction and learning, including through remote instruction; (ii) to operate a minority business enterprise (MBE); or (iii) to operate a tax-exempt 501(c)(3) organization. The CMC Pilot Program is a non-recurring program in that NTIA does not expect to receive future appropriations for this program. It is not a grant program to construct broadband infrastructure. However, several projects under the category described by the above-discussed section (i) propose funding infrastructure-related components as part of their activities, such as classroom upgrades or improvements to broadband systems internal to campus networks. This waiver is in the public interest because it will alleviate the need for budgeting and planning revisions that the immediate imposition of the Buy America Preference would impose on HBCU, TCU, and MSI CMC recipients. Because the CMC Pilot Program Amended Notice of Funding

Opportunity (NOFO) was released before the enactment of the BABA, CMC recipients had no notice of the Buy America Preference when preparing their applications and would have to revise their budgets and project timelines to account for the BABA requirements. They will therefore benefit significantly from the six-month adjustment period provided by this waiver. This adjustment period will allow CMC recipients to receive their awards and begin implementing their project activities. Many of these activities also include important components unrelated to broadband infrastructure, e.g., hiring IT personnel or facilitating educational instruction and digital skills training, that will support students with the greatest unmet financial needs. The six-month adjustment period will also give CMC recipients the needed time to identify potential domestic sources for necessary components of their projects and assess the costs from such sources. This waiver is consistent with Executive Orders 14041 and 14049, which emphasize the need to strengthen the capacities of HBCUs and TCUs to participate in federal programs and funding opportunities. Given the planned CMC awards to multiple TCUs, this waiver will also satisfy the intent of Executive Order 13175 by providing increased flexibility for waivers involving Federal policies with Tribal implications.

PUBLIC COMMENTS: On September 19, 2022, the Department published its proposed public interest general applicability waiver for CMC recipients for a 15-day public comment period on its Build America, Buy America website. NTIA also informed potentially interested stakeholders about the opportunity to comment on the proposed waiver. The public comment period closed at 11:59 p.m. Eastern Time (ET) on October 3, 2022. The Department received no comments regarding the proposed waiver.

FOR FURTHER INFORMATION CONTACT: For questions about this waiver, please contact Jennifer Duane, Director, Grants Management, Administration, and Compliance, Office

of Internet Connectivity and Growth, National Telecommunication and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Room 4887, Washington, DC 20230, via telephone at (202) 482-2048 or by email at jduane@ntia.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The IIJA, which includes the BABA, was enacted on November 15, 2021. The Buy America Preference set forth in Section 70914 of the BABA requires that all iron, steel, manufactured products, and construction materials used for infrastructure projects with Federal financial assistance awards be produced in the United States. NTIA may waive the application of the Buy America Preference in any case in which it finds that: applying the domestic content procurement preference would be inconsistent with the public interest; types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality; or the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent. All waivers must have a written explanation for the proposed determination and provide a period of not less than 15 days for public comment on the proposed waiver. Agencies must submit proposed waivers to the Office of Management and Budget (OMB) Made in America Office (MIAO) for review to determine if the waiver is consistent with policy.

The IIJA and the Buy America Preference provide a unique opportunity to create domestic manufacturing jobs, strengthen critical supply chains, and help lower costs. Waivers of the Buy America Preference may sometimes be appropriate to meet ambitious goals and timelines, such as those associated with the efforts of the Biden-Harris Administration to ensure the availability

of broadband service for all Americans, including those served by HBCUs, TCUs, and MSIs. Federal agencies use waivers of the Buy America Preference as a tool to promote domestic investment and to prepare American workers and businesses for global competition and leadership.

Since the enactment of the BABA, the Department and NTIA have worked diligently to implement the Buy America Preference. Consistent with the requirements of Section 70913 of the BABA, the Department produced a report that identifies and evaluates each of its federal financial assistance programs with potentially eligible uses of funds that include infrastructure, as defined by the BABA, to determine which programs would be in compliance with the Buy America Preference and which would be considered inconsistent with Section 70914 of the BABA and thus “deficient” as defined by Section 70913(c) of the BABA. The Department submitted this report to Congress and OMB and also published it in the Federal Register within 60 days of the enactment of the BABA, on January 21, 2022. Specifically, the Department published the required report in a notice entitled “Department of Commerce’s Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act.” For more information on the Buy America Preference, please visit www.commerce.gov/oam/build-america-buy-america and www.madeinamerica.gov. Since issuing the report, the Department has held regular meetings with the MIAO and is an active participant in the MIAO Buy America Preference Working Group.

II. The CMC Pilot Program

The Biden-Harris Administration is committed to expanding internet access for vulnerable communities as part of its efforts to ensure the availability of high-speed internet service for all

Americans. The CMC Pilot Program was created because students and communities of color experience significant barriers to digital access, adoption, and connectivity, often causing them to forfeit important economic and educational opportunities. The COVID-19 pandemic has further exacerbated these digital inequities for students, faculty, and staff of HBCUs, TCUs, and MSIs. Through the CMC Pilot Program, NTIA will provide up to \$268 million in federal grants to eligible HBCUs, TCUs, and MSIs to purchase broadband service or equipment, hire IT personnel, operate an MBE or a tax-exempt 501(c)(3) organization, or facilitate educational instruction. The CMC Pilot Program is authorized by Section 902 of the Consolidated Appropriations Act, 2021, Division N, Title IX, Section 902, Public Law 116-260, 134 Stat. 1182 (CAA). It is a non-recurring program in that NTIA does not expect to receive future appropriations for this program.

On November 9, 2021, NTIA published an amended NOFO on Grants.gov, which amended the original CMC Pilot Program NOFO published on August 3, 2021, to describe the requirements under which it will award grants for the CMC Pilot Program. Because NTIA released the CMC Pilot Program NOFO before the enactment of the BABA, the NOFO did not include information about the Buy America Preference. The application window for the CMC Pilot Program closed on December 1, 2021. The applications received by NTIA did not account for the impacts of the Buy America Preference relative to project timelines and project budgets. NTIA received over 200 applications for CMC awards for a total funding request of over \$842 million. NTIA has completed its review of these applications and has submitted its recommendations for CMC awards to the NIST Grants Office. NTIA began making CMC awards on a rolling basis in July 2022.

III. Items Covered by This Waiver

This waiver will cover all iron, steel, manufactured products, and construction materials, with the exception of fiber optic glass and fiber optic cables, used in infrastructure projects funded through CMC Pilot Program awards. NTIA will conduct market research during the six-month adjustment period to identify items that can be domestically sourced, such as fiber optic glass and fiber optic cable. After the six-month adjustment period, the up-to-date list of items that meet BABA requirements will be available at the Department's Build America, Buy America website. The waiver will cover all CMC Pilot Program awards made during the six-month adjustment period, which will give CMC recipients the needed time to identify potential domestic sources for necessary components of their projects and assess the costs from such sources.

IV. Public Interest in a General Applicability Waiver Providing a Six-Month Adjustment Period for CMC Recipients, Strengthening HBCU and TCU Capacity to Participate in Federal Programs and Funding Opportunities, and Increasing Flexibility for Waivers Granted to Tribal College Recipients

NTIA anticipates that many CMC Pilot Program recipients will receive funding for projects without expenditures on broadband infrastructure components, such as the hiring of IT personnel, the operation of an MBE, or the facilitation of educational instruction and digital skills training. In the absence of this waiver of the Buy America Preference, CMC recipients with projects that do include infrastructure expenditures would be immediately subject to the Buy America Preference without any adjustment period. The NOFO provided no notice to CMC applicants of the future enactment of the BABA. CMC recipients therefore prepared their

project budgets and project implementation schedules without any notice that a requirement like the Buy America Preference would apply to the CMC Pilot Program.

The immediate imposition of the Buy America requirement on CMC awards for projects with infrastructure expenditures would cause CMC recipients to have to revise budgets and project timelines to account for the BABA requirements. This would increase administrative burdens and delay HBCUs, TCUs, and MSIs in implementing their awards. Many CMC projects, which also include important components unrelated to infrastructure that CMC recipients need (e.g., the hiring of IT personnel or the facilitation of educational instruction), might be delayed in their implementation as a result. NTIA has recommended awards to those CMC recipients that demonstrated that they have student populations with the greatest unmet financial needs, in accordance with the methodology in Section III.C.4 of the NOFO. The delays and additional burdens associated with the immediate imposition of the Buy America Preference would therefore harm some of our nation's neediest and most vulnerable students, as well as the institutions that serve them. NTIA has determined that this public interest waiver with its six-month adjustment period will provide an appropriate means to address these concerns while also promoting domestic manufacturing.

NTIA will require waiver recipients to report on their purchases of items from foreign sources. NTIA expects that many of the items purchased from foreign sources will be types of broadband equipment, such as switching equipment, routing equipment, and customer premise equipment, that are not widely available from domestic manufacturers. This waiver will therefore offer clear market signals to American businesses about the demand for such products. This will provide them with the opportunity to respond to this demand and reduce the need for future similar waivers. The use of waivers to promote domestic manufacturing in this manner is one of the

goals of the BABA waiver process. NTIA will also be able to use the reported information for market research, including to better understand the availability of U.S. products in the ICT supply chain, and for the management of future grant programs.

This waiver will be consistent with recent Executive Orders emphasizing the importance of HBCUs and TCUs. The pool of CMC award recipients affected by this waiver will include both HBCUs and TCUs. Section 1 of Executive Order 14041 states that it is the policy of the Biden-Harris Administration to use partnerships with HBCUs to promote educational equity, excellence, and economic opportunity. Section 2 of Executive Order 14041 specifically provides for efforts to strengthen “the capacity of HBCUs to participate in Federal programs, access Federal resources, including grants and procurement opportunities, and partner with Federal agencies.” It also addresses efforts to promote “campus modernization and infrastructure improvements,” as well as ones to “break down barriers and expand pathways for HBCUs to access federal funding and programs” in such areas as innovation and research and development. Executive Order 14049 emphasizes that TCUs are “integral and essential to Tribal communities.” In a manner similar to Executive Order 14041, Section 2 of Executive Order 14049 discusses “breaking down barriers that impede the access of higher education institutions that serve Native American students, such as TCUs, to federal funding and strengthening the capacity of those institutions to participate in Federal programs and partnerships.” The grant of this waiver will therefore be consistent with the policy goals of Executive Orders 14041 and 14049.

The pool of CMC recipients whose projects have broadband infrastructure components will also include multiple TCUs. This waiver will thus be consistent with established Executive Branch policy regarding consultation and coordination with Indian Tribal governments in the

development of Federal policies that have Tribal implications. Section 6 of Executive Order 13175 specifically concerns increasing flexibility for Indian Tribal waivers. It directs federal agencies to streamline the processes through which Indian Tribes apply for waivers of statutory and regulatory requirements. It further directs federal agencies to consider waiver requests from Tribal governments “with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian [T]ribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.” This waiver will be consistent with and further the intent underlying Executive Order 13175, as it will constitute the use of a flexible policy approach to advance the objective of making broadband internet service more readily available for Native communities. It will also minimize the burden of revising budgets already submitted and approved for the CMC Pilot Program.

When evaluating this waiver, NTIA carefully considered the benefits of the Buy America Preference. NTIA also examined such factors as the need for CMC recipients to revise project budgets and other plans to account for the Buy America Preference and Executive Orders concerning the institutions served by the CMC Pilot Program. NTIA has determined that a public interest waiver of the Buy America Preference, offering a six-month adjustment period for CMC recipients, will provide an appropriate means to balance the domestic manufacturing and other benefits offered by the Buy America Preference with the interests of CMC recipients in beginning their projects as soon as possible.

Moreover, this waiver will enable NTIA to fulfill its responsibilities under Executive Order 13175 to provide increased flexibility for waivers involving Federal policies with Tribal implications. In this connection, this waiver is consistent with the Buy America implementation guidance published by the Office of Management and Budget on April 18, 2022, as part of M-

22-11, Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure (M-22-11). It provides at page 10 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 established by the Act...” Additionally, M-22-11 provides that a Federal agency may wish to consider issuing a limited number of public interest waivers to promote efficiency and to ease burdens for recipients. Given these considerations, NTIA will grant a public interest waiver of the Buy America Preference for CMC Pilot Program recipients as described in this Notice.

V. Assessment of Cost Advantage of a Foreign-Sourced Product

M-22-11 states on page 12 that agencies are expected to assess, when it is appropriate to do so, “whether a significant portion of any cost advantage of a foreign-sourced product is the result of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products” before granting a public interest waiver. NTIA’s analysis has concluded that this assessment is not applicable to this waiver because it is not based on the cost of foreign-sourced products.

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