

DEPARTMENT OF COMMERCE

Limited General Applicability Nonavailability Waiver of the Buy America Domestic Content Procurement Preference as Applied to Recipients of Broadband Equity, Access, and Deployment Program

ACTION: Notice; Request for Comments

SUMMARY: Congress passed the Build America, Buy America Act (BABA or Act), which includes strong and permanent domestic sourcing requirements across Federal financial assistance programs for infrastructure. The Department of Commerce (DOC), in keeping with its mission to create the conditions for economic growth and opportunity for all communities, is ready to lead on this important mission to catalyze domestic manufacturing, resilient supply chains, and job growth. DOC will also help grow America's domestic production capacity while advancing BABA's requirements to strengthen the resiliency of domestic supply chains and support America's communities, workers, and firms.

In accordance with BABA, this notice advises that DOC is proposing to issue a limited, general applicability, nonavailability waiver of the Buy America Domestic Content Procurement Preference (Buy America Preference) under BABA to recipients of Federal financial assistance under the National Telecommunications and Information Administration's (NTIA) Broadband Equity, Access, and Deployment Program (BEAD Program), which will flow down to subrecipients. The waiver: (1) incentivizes the domestic production of specific manufactured products based on strategic prioritization criteria, including network and data security, which will directly expand American job opportunities; (2) promotes broad participation in the BEAD Program; (3) ensures that BEAD Program subrecipients will have access to the manufactured products necessary to fulfill their obligations under the program; (4) allows funding recipients to continue to provide economic opportunity through timely deployment of broadband infrastructure, which is recognized to expand job opportunities; and (5) supports the timely development of critical domestic infrastructure that delivers broadband internet services to all Americans. Recipients to whom the waiver applies must report on their purchases of items from foreign sources as set forth below in this proposed waiver. Through this Notice, NTIA seeks public comment on the proposed waiver.

DATES: The comment period for this waiver will be 30 days from the publication date of this notice. Comments must be received by September 21st, 2023. DOC will determine whether to modify or finalize the proposed waiver after the comment period. The proposed waiver will, if granted, be effective for BEAD Program awards obligated after the effective date of the final waiver for a period of five years. DOC will review this waiver no less than annually to assess whether it remains necessary to the fulfillment of DOC's missions and goals and consistent with applicable legal authorities, such as the Infrastructure Investment and Jobs Act; [Executive Order 14005](#), *Ensuring the Future Is Made in All of America by All of America's Workers*; and the Office of Management and Budget (OMB) Memorandum [M-22-11](#), *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure* (OMB M-22-11) (or any successor M-Memorandum or guidance).

ADDRESSES: Interested persons are invited to submit comments on this proposed BEAD Program nonavailability waiver. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by DOC, and enables DOC to make comments immediately available to the public. Please submit comments to

BABA@ntia.gov with the subject “*BEAD Program Nonavailability Waiver.*”

Note that all submissions received, including any personal information therein, may be publicly posted without change or alteration. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Will Arbuckle, Policy Advisor, Office of Internet Connectivity and Growth (OICG), National Telecommunications 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 BABA@ntia.gov.

SUPPLEMENTARY INFORMATION:

I. Infrastructure Investment and Jobs Act (IIJA) and Build America, Buy America Act (BABA)

BABA was enacted on November 15, 2021, as part of IIJA, Pub. L. 117-58, 135 Stat. 429, 70901-70927, and established domestic content procurement preference requirements for federal financial assistance projects for infrastructure. The Buy America domestic content procurement preference (Buy America Preference) under BABA applies to all iron or steel products, manufactured products, and construction materials used for infrastructure projects under an award.¹

Under IIJA Section 70914(b), DOC has the authority to waive the application of the Buy America Preference when (1) the application of that preference would be inconsistent with the public interest, (2) the materials and products subject to that preference are not produced in the United States at a sufficient and reasonably available quantity or satisfactory quality, or (3) the inclusion of domestically produced materials and products subject to that preference would increase the cost of the overall project by more than 25 percent. Section 70914(c) provides that a waiver under 70914(b) must be published by the agency with a detailed written explanation for the proposed determination to issue a waiver and provide a public comment period of not less than 15 days.

II. DOC’s Progress in Implementation of BABA

Since the enactment of BABA, DOC has worked diligently to implement the Buy America Preference. Consistent with the requirements of Section 70913 of the Act, DOC has produced a report that identifies and evaluates all of DOC’s Federal financial assistance programs with potentially eligible uses of funds that include infrastructure as defined by BABA² to determine which programs would be in compliance with the Buy America Preference and which would be considered inconsistent with Section 70914 of the Act and thus “deficient” as defined by Section 70913(c).

The report was submitted to Congress and OMB and published in the Federal Register within 60 days after the date of enactment of the Act on January 21, 2022. Specifically, DOC published the required report 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](#)” in compliance with Section 70913. On May 6, 2022, DOC issued Financial Assistance Memorandum (FAM) 2022-01, *Interim procedures for*

¹ See IIJA § 70912(2).

² See IIJA § 70912(5).

addressing the applicability of Build America, Buy America Act requirements in Federal Financial Assistance Programs for Infrastructure.

In support of the 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,”³ DOC issued a specific award condition (SAC) that, if determined to be applicable per the guidance provided by FAM 2022-01, is included in new awards, renewal awards, amendments obligating additional funds to existing awards that are executed on or after May 14, 2022, and Notice of Funding Opportunities (NOFOs) effective immediately.

III. The Broadband Equity, Access, and Deployment (BEAD) Program

This Notice applies only to the application of the Buy America Preference to the BEAD Program, as detailed further below.

A. BEAD Program Description

The IJA charged NTIA with establishing the \$42.45 billion BEAD Program.⁴ The BEAD Program’s principal focus is deploying broadband service to unserved locations (those without any broadband service at all or with broadband service offering speeds below 25 megabits per second (Mbps) downstream/3 Mbps upstream) and underserved locations (those with broadband service offering speeds between 25 Mbps downstream/3 Mbps upstream and 100 Mbps downstream/20 Mbps upstream). Once Eligible Entities (*i.e.*, the States, the District of Columbia, Puerto Rico, American Samoa, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands) demonstrate they will be able to ensure service to all unserved and underserved locations, they may propose plans that use remaining funds in a wide variety of ways. IJA also underscores that Eligible Entities should ensure deployment of gigabit connections to community anchor institutions, such as libraries and community centers that lack such connectivity.

With respect to the deployment of last-mile broadband infrastructure, the BEAD Program prioritizes projects designed to provide fiber connectivity directly to the end user. It also requires all projects to provide a low-cost option to eligible subscribers, requires all states to have plans to address middle-class affordability, and further prioritizes proposals that improve affordability to ensure that networks built using taxpayer dollars are accessible to all Americans.⁵

B. Restrictions on Use of Items Manufactured in China

Independent of BABA, section 60102(g)(1) of the IJA prohibits the expenditure of BEAD Program funds to purchase or support any covered communications equipment or service, as defined in section 9 of the Secure and Trusted Communications Networks Act of 2019 ([47 U.S.C. 1608](#)).⁶ Further, BEAD Program funds may not be used to purchase or support “fiber optic cable and optical transmission equipment manufactured in the People’s Republic of China, except that the Assistant Secretary may waive the application of this clause with respect to a project if the eligible entity that awards a subgrant for the project shows that such application

³ Executive Order 14005 § 1.

⁴ IJA § 60102(b)(1).

⁵ See Broadband Equity, Access and Deployment Program Notice of Funding Opportunity, NTIA-BEAD-2022, <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf> (BEAD NOFO).

⁶ IJA § 60102(g)(1)(D)(i).

would unreasonably increase the cost of the project.”⁷ The Assistant Secretary does not expect to issue such waivers.

IV. BEAD Program Proposed Limited, General Applicability, Nonavailability Waiver

Given the importance of BABA and its potential to impact the BEAD Program and other NTIA-administered grant programs,⁸ NTIA and DOC initiated an assessment of the domestic supply chain for relevant manufactured products, construction materials, and iron or steel products during the lead-up to the publication of the [BEAD NOFO](#) on May 13, 2022, and continuing to the present. During the course of this assessment, several items necessitated by the BEAD Program were identified as not produced in the United States in sufficiently and reasonably available quantities, or a satisfactory quality, to meet expected demand. In light of these findings, DOC is proposing a limited, general applicability, nonavailability waiver that would provide recipients and subrecipients of Federal financial assistance under NTIA’s BEAD Program a limited exemption from application of the Buy America Preference. DOC proposes to find in its final waiver that certain items discussed below are not produced in the United States in sufficient and reasonably available quantities or a satisfactory quality that can fully comply with all requirements of the Buy America Preference under BABA. Consistent with OMB M-22-11, DOC proposes below to make this waiver time-limited; targeted to specified items, products, materials, and categories; and conditional on certain conditions for manufacturing processes.

A. Findings of Industry Assessment

In order to obtain a clear view of the broadband supply chain, DOC staff have held hundreds of meetings with large and small equipment manufacturers, Internet service providers (ISPs), telecom companies, and many of the associations that represent these entities, among others.

DOC’s initial industry assessment made clear that some construction materials and manufactured products required for broadband infrastructure deployments, as detailed further below, are presently not available in the quantity or quality needed for the BEAD Program to achieve the timeframes established by the IJA.

1. Construction Materials

a. Optical Fiber and Fiber Optic Cable

Optical fiber and fiber optic cable are likely to see the highest levels of expenditures compared to any other category of equipment used in BEAD fiber broadband deployments. While there is broad agreement across industry stakeholders that domestic production of optical fiber and fiber optic cable exists today, there is concern that there will not be sufficient supply, especially for small- to medium-sized ISPs, during peak demand for construction materials during the rollout of the BEAD Program.

DOC therefore proposes, as discussed in section IV.B.1.a below, to waive the Buy America Preference for non-optic-glass inputs (*e.g.*, an overclad cylinder) which are used as an input to the preform manufacturing process of optical fiber, a construction material that will be used in BEAD Program projects.

⁷ IJA § 60102(g)(1)(D)(ii).

⁸ See generally DOC Office of Acquisition Management, Build America Buy America page, <https://www.commerce.gov/oam/build-america-buy-america>.

b. Other Construction Materials

NTIA's research indicates that there is no need for a waiver of the Buy American Preference for other construction materials.

2. Manufactured Products

a. Electronics

Electronics are likely to be the second largest segment of equipment used in BEAD fiber broadband deployments. Such electronics include, but are not limited to, Optical Network Terminals and Optical Network Units (ONTs/ONUs), Optical Line Terminals (OLTs) and remote Optical Line Terminals (rOLTs), OLT line cards, optic pluggables, routers, switches, optical amplifiers, and power systems. These electronics – and comparable electronics used in fixed wireless and other types of broadband network deployments, as well as antenna and antenna arrays – are almost uniformly manufactured in Southeast Asia. As part of its supply chain research, DOC explored with manufacturers the possibility of moving the manufacturing of certain electronics to the United States to facilitate implementation of the Buy America Preference. During DOC's industry assessment, two key factors became apparent:

- Semiconductors, also referred to as integrated circuits, including systems on a chip, memory, central processing units, and others are key components of essentially all electronics that are used to build broadband networks. Semiconductors represent the majority of the value of the components that make up such products – often in excess of 70 percent. Almost all of these chips are currently manufactured outside the United States. While the historic CHIPS and Science Act, Pub. L. 117-167, 136 Stat. 1366, is expected to spur a major investment in domestic semiconductor manufacturing, the construction timeline and type of semiconductor fabrication plants mean that the impact of that investment is unlikely to be realized during the time period needed for the BEAD Program.⁹
- There are some classes and categories of electronics that are currently manufactured outside of the United States, but for which *there is* an economic case for onshoring final assembly.

DOC therefore proposes, as discussed in section IV.B.1.b.ii below, to waive the Buy America Preference for all electronics in BEAD Program projects, with the exception of four categories of electronics. For the four categories of electronics listed in section IV.B.1.b, NTIA proposes to waive only the 55 percent cost of components test and to provide specific guidance regarding the manufacturing processes that must occur in the United States for the waiver to be applicable.

b. Enclosures

Enclosures are a manufactured product used at a location where a network function (*e.g.*, active electronics, fiber split or splice) is housed, and include pedestals, terminals, and fiber distribution frames. NTIA's research indicates that, while there is domestic production capacity for enclosures, domestic producers frequently rely on inputs that are not currently produced in sufficient quantities in the United States and are unlikely to be so in the near to mid-term.

DOC therefore proposes, as discussed in section IV.B.1.b.ii below, a limited waiver of the 55% cost of

⁹ CHIPS Incentives Program, authorized by Title XCIX—Creating Helpful Incentives to Produce Semiconductors for America of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116-283, referred to as the CHIPS Act or Act), as amended by the CHIPS Act of 2022 (Division A of Pub. L. 117-167).

components requirement for enclosures used in BEAD Program projects in order to ensure that there are sufficient and reasonably available quantities of enclosures manufactured in the United States and to provide specific guidance regarding the manufacturing processes that must occur in the United States for the waiver to be applicable.

c. Other Network Equipment

Other network equipment that is not electronics (*e.g.*, splitter modules, and ancillaries like vaults, conduit, lashing wire, mounting brackets, attenuators and patch panels) makes up a small percentage of network expenditures. NTIA’s research indicates that there is some domestic production capacity for other network equipment, and that expenditures on this category of equipment as a percentage of total network spend is low. To the extent that there are classes or categories of other network equipment used in broadband network deployments that are not domestically available, NTIA expects that the Department’s public interest waiver of the Buy America Preference for *de minimis* infrastructure project purchases will be sufficient for most projects.¹⁰

3. Iron or Steel Products

The highest value products used in broadband network infrastructure projects made primarily from iron or steel are the radio towers used in terrestrial fixed wireless deployments. NTIA’s research indicates that there is no need for a waiver of the Buy American Preference for iron or steel products.

B. Proposed Waiver

In light of the foregoing, DOC proposes to adopt a limited, general applicability, nonavailability waiver of the Buy America Preference for the BEAD Program.

1. Scope of Waiver

a. Construction Materials

DOC proposes to waive the Buy America Preference for non-optic-glass inputs (*e.g.*, an overclad cylinder) to preforms used to manufacture optical fiber and fiber optic cable in BEAD Program projects. For the purposes of the waiver, we propose that all optic glass used in the manufacturing of optical fiber and fiber optic cable must meet the following standard for glass: “All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.” For the purposes of this waiver, we also propose that all fiber optic cable and optical fiber must otherwise meet the following standards for those materials:

- Fiber optic cable (including drop cable): All manufacturing processes, from the initial ribboning (if applicable), through buffering, fiber stranding and jacketing, occurred in the United States. All manufacturing processes also include the standards for glass and optical fiber, but not for non-ferrous metals, plastic and polymer-based products, or any others.
- Optical fiber: All manufacturing processes, from the initial preform fabrication stage through

¹⁰ See Department of Commerce, Department-wide Public Interest Waivers for De Minimis Infrastructure Project Purchases, Small Grants, and Minor Components within Iron and Steel Products, Notice of Final Waiver (May 17, 2023), <https://www.commerce.gov/sites/default/files/2023-05/De%20Minimis%20Waiver.pdf> (DOC De Minimis Waiver).

the completion of the draw, occurred in the United States.

b. Manufactured Products

i. Electronics

DOC proposes to waive the Buy America Preference for all electronics in BEAD Program projects, with the exception of the four categories of electronics identified in this section. For these four categories of electronics, NTIA proposes to waive the 55 percent cost of components test and to provide specific guidance regarding manufacturing processes that must occur in the United States for these categories to be BABA compliant.

- **Optical Line Terminals and Remote Optical Line Terminals**

Optical Line Terminals (OLTs) and Remote Optical Line Terminals (rOLTs) are optical network electronic components in ISP network hubs used to send and receive signals. NTIA proposes that OLTs and rOLTs covered by this waiver include, but not be limited to, OLTs and rOLTs that support EPON, GPON, XGS-PON, 25GS-PON, Point-to-Point Ethernet, and G.fast technologies, as well as future PON technologies.

In order for an OLT or rOLT to be considered “produced in the United States,” the following manufacturing processes, at a minimum, must be conducted entirely within in the United States:

- Printed circuit board (PCB) assembly is required for any PCB in the OLT that contains line card (subscriber-facing) functionality;
- Software integration (including firmware integration, installation of licensed software, and customer specific configuration);
- Chassis assembly;
- Testing and quality assurance; and
- Packaging and shipping.

- **OLT Line Cards**

OLT line cards are a type of fiber-optic card that can be installed in OLTs and rOLTs to provide network interface ports. In order for OLT line cards, whether sold independently or installed in an OLT or rOLT, to be considered “produced in the United States,” the following manufacturing processes, at a minimum, must be conducted entirely within the United States:

- Printed circuit board (PCB) assembly;
- Line card assembly;
- Software integration (including firmware integration, installation of licensed software, and customer specific configuration);
- Chassis assembly;
- Testing and quality assurance; and
- Packaging and shipping.

- **Optic Pluggables**

Optic pluggables are optical transceivers that can be installed in (“plugged into”) OLTs, rOLTs, and equipment that has the characteristics of OLTs (*e.g.*, switches, routers, virtual OLTs). In order for optic pluggables, whether sold independently or installed in an OLT or rOLT or equipment that has the characteristics of OLTs or rOLTs, to be considered “produced in the United States,” the following manufacturing processes, at a minimum, must be conducted entirely within the United States:

- Optical sub-assembly installation;
- Enclosure assembly;
- Software integration (including firmware integration, installation of licensed software, and customer specific configuration);
- Testing and quality assurance; and
- Packaging and shipping.

- **Optical Network Terminals and Optical Network Units**

Optical Network Terminals and Optical Network Units (ONTs/ONUs) are optical network electronic components installed at the customer endpoint of a network and are used to send and receive signals. In order for an ONT/ONU to be considered “produced in the United States,” the following manufacturing processes, at a minimum, must be conducted entirely within in the United States:

- Printed Circuit board (PCB) assembly;
- Software integration (including firmware integration, installation of licensed software, and customer specific configuration);
- Chassis assembly;
- Testing and quality assurance; and
- Packaging and shipping.

ii. Enclosures

Enclosures are manufactured products used at a location where a network function (*e.g.*, active electronics, fiber split or splice) is housed, and include pedestals, terminals, and fiber distribution frames. NTIA proposes to waive the 55 percent cost of components test for enclosures and to provide specific guidance regarding the manufacturing processes that must occur in the United States for enclosures to be BABA compliant:

In order for an enclosure to be considered “produced in the United States,” the following manufacturing processes, at a minimum, must be conducted entirely within the United States:

- Manufacturing of the metal or plastic parts (*e.g.*, by machining or injection molding); and
- Assembly of the parts of the final manufactured product.

2. Additional Proposed Requirements

a. DOC *de minimis* Waiver

In order to ensure that optical fiber, fiber optic cable, and the five categories of manufactured products discussed in section IV.B.1.b above are produced in the United States, NTIA proposes that the DOC *de minimis* waiver, published on May 17th, 2023, would not apply to those products.¹¹

b. Buy America Self Certification

Manufacturers that have expressed a willingness to onshore manufacturing of key electronics are concerned that they will be undercut by companies falsely claiming BABA compliance. In order to address such concerns, NTIA proposes to publish and maintain on the NTIA website a list of manufacturers and that manufacturer’s individual products that an officer of the company has certified, subject to fine or imprisonment under Title 18 of the United States Code, 18 U.S.C. 1001, are

¹¹ *See id.*

compliant with the Buy America Preference.¹² Such certifications would be required annually.

c. Reporting Requirements

BEAD Program recipients are responsible for compliance with BABA reporting requirements under this waiver. In addition, consistent with the approach taken in the Middle Mile Grant Program BABA Waiver, DOC proposes to have BEAD Program recipients to whom the proposed waiver would apply report on their purchases of items from foreign sources.¹³ Recipients reporting foreign-sourced items will help with future DOC grant programs and awards that also use those items and support market research. DOC will use this information to better understand the market and availability of U.S. products in this supply chain to inform its implementation of the BEAD Program as well as its other broadband infrastructure deployment programs. DOC will publish additional BABA reporting and compliance requirements in separate guidance.

V. Anticipated Program and Project Impacts Absent Limited Non-Availability Waiver

DOC conducted an extensive effort to engage with a wide-ranging set of stakeholders across the broadband ecosystem. This includes, but is not limited to, Internet Service Providers (ISPs), telecom companies, large and small manufacturers, multinational equipment providers, and many of the associations that represent these entities. Based on this extensive engagement, it is clear that, absent the proposed waiver, potential subrecipients that may wish to participate in the BEAD Program will be unable to source BABA-compliant electronics or BABA-compliant optical fiber and fiber optic cable in sufficient and reasonably available quantities or of a satisfactory quality. This would create a material, and avoidable, risk to the overall success of the BEAD Program.

VI. Effective Date and Duration of the Waiver

The proposed waiver, if granted, would be effective for BEAD Program awards obligated after the effective date of the final waiver for a period of five years. DOC will review this waiver no less than annually to assess whether it remains necessary to the fulfillment of NTIA's missions and goals and consistent with applicable legal authorities, such as the IIJA, Executive Order 14005, and proposed 2 CFR Part 184. DOC may, based on the results of that review, terminate or narrow the scope or duration of the proposed waiver, or take such other action as it deems appropriate.

VII. Solicitation of Comments on the Proposed Waiver

As required under Section 70914 of BABA, DOC is soliciting comment from the public on this proposed waiver, including on the availability of relevant iron or steel products, manufactured products, and construction materials and on the strategies that could allow for the scope of the waiver to be limited, immediately or over time. Comments that contain references to studies, research, and other empirical data that are not widely available should include copies of the referenced materials along with the submitted comments. Organizational commenters may wish to identify a point of contact for the comments, which will facilitate DOC follow up for clarifications as necessary. Commenters are advised not to incorporate information that concerns business trade secrets or other confidential commercial or financial information as part of the comment. Please do not include any information you would not like to be made publicly available.

Please refer to the "DATES" and "ADDRESSES" sections of this notice for information on

¹² 18 U.S.C. § 1001.

¹³ Department of Commerce, Limited Applicability Nonavailability Waiver of the Buy America Domestic Content Procurement Preference as Applied to Recipients of Middle Mile Grant Program Awards, Notice of Final Waiver (Apr. 19, 2023), <https://www.commerce.gov/sites/default/files/2023-04/NTIA%20Middle%20Mile%20Final%20Waiver.pdf>.

submission of comments.

Paperwork Reduction Act

This notice does not contain collection-of-information requirements subject to the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 *et seq.*). Notwithstanding any other provisions of law, no person is required to, nor shall a person be subject to penalty for failure to comply with, a collection of information subject to the requirements of PRA unless that collection of information displays a currently valid OMB control number.