

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration Limited General Applicability Nonavailability Waiver of the Buy America Domestic Content Procurement Preference as Applied Solely to Recipients of Tribal Broadband Connectivity Program Grant Awards Made Pursuant to the July 27, 2023, Tribal Broadband Connectivity Program Notice of Funding Opportunity.

ACTION: Notice; Request for Comments

SUMMARY: Congress passed the Build America, Buy America Act (BABA or Act) on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA), Pub. L. 117-58, 135 Stat. 429, 70901-70927. BABA establishes 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 a program for Federal financial assistance.¹ 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.

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.

Based upon a formal consultation process with Tribal government leaders and NTIA and DOC's assessment of the domestic supply chain for relevant manufactured products, construction materials, and iron or steel products, DOC concluded that certain manufactured products and construction materials are not produced in the United States in sufficient and reasonably available quantities to meet the needs of the Tribal Broadband Connectivity Program (TBCP), administered by the National Telecommunications and Information Administration (NTIA). DOC and NTIA are therefore proposing a limited, general applicability, nonavailability waiver of the Buy America

¹ See IIJA § 70912(2).

Preference requirements for certain construction materials² and certain manufactured products³ that would apply only to those recipients of Federal financial assistance awarded pursuant to the second TBCP Notice of Funding Opportunity, released on July 27, 2023 (Second TBCP NOFO).⁴ The proposed waiver would flow down to subrecipients of the recipients of Second TBCP NOFO awards. Consistent with the Office of Management and Budget (OMB) Memorandum M-24-02, this proposed waiver is time-limited; targeted to specific items, products, materials, and categories; and conditional on the requirement that certain manufacturing processes must occur in the United States.⁵ This proposed waiver would: (1) incentivize 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) promote broad participation in the TBCP; (3) ensure that TBCP recipients and subrecipients will have access to the manufactured products necessary to fulfill their obligations under the program; (4) allow funding recipients to continue to provide economic opportunity through timely deployment of broadband infrastructure, which is recognized to expand job opportunities; (5) support the timely development of critical domestic public infrastructure that makes available broadband Internet services to all Americans; and (6) reflect established Executive Branch policy favoring flexibility for Indian Tribal waivers. NTIA proposes to have recipients and subrecipients to whom the proposed waiver would apply report on their purchases of items from foreign sources, as set forth below. Through this Notice, NTIA seeks public comment on the proposed waiver.

DATES: The comment period for this proposed BABA waiver will be 30 days from the publication date of this notice. Comments are due on or before October 15, 2024 at 11:59 p.m. Eastern Time. The proposed waiver would, if granted, be effective for five years from its effective date. See Section III below for more details. DOC would review this proposed 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 IIJA; Executive Order 14005, *Ensuring the Future Is Made in All of America by All of America's Workers*; and OMB M-24-02 (or any successor M-Memorandum or guidance).

ADDRESSES: Interested persons are invited to submit comments on this proposed waiver. Electronic submission of comments will allow commenters the maximum amount of time to

² Specifically, for non-optic-glass inputs (e.g., an overclad cylinder) to preforms used to manufacture optical fiber and fiber optic cable in TBCP projects and for unrepeated submarine fiber optic cable used solely for TBCP projects located in the State of Alaska.

³ Specifically, for passive optical equipment and for all electronics in TBCP projects, except for: 1) optical line terminals (OLTs) and remote optical line terminals (rOLTs); 2) OLT line cards; 3) optic pluggables; and 4) Standalone optical network terminals and optical network units. For these four categories of products, DOC waives the 55 percent cost of components requirement and provides specific guidance regarding manufacturing processes that must occur in the United States.

⁴ Notice of Funding Opportunity, Tribal Broadband Connectivity Program, National Telecommunications and Information Administration (July 27, 2023), available at https://www.ntia.gov/sites/default/files/2024-03/ntia_tribal_broadband_connectivity_program_round_2_nofo_amendment_03_2024.pdf.

⁵ Memorandum for the Heads of Executive Departments and Agencies, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, Office of Management and Budget, M-24-02 (Oct. 25, 2023) (OMB M-24-02), at 9.

prepare and submit comments, ensure timely receipt of filed comments by DOC, and enable DOC to make filed comments available to the public on a timely basis. Commenters should send submissions via electronic mail to Tbcpnofo2@ntia.gov, with the subject “DOC Waivers: TBCP.”

Note that any submissions received, and any personal information therein, may be publicly posted without change or alteration. Accordingly, commenters should not include in their filed comments any confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, 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 AND BACKGROUND INFORMATION:

I. Build America, Buy America

As previously noted, the U.S. Congress enacted BABA on November 15, 2021, as part of the IIJA. Under the IIJA, Federal financial assistance projects for infrastructure must comply with domestic content procurement preference requirements established in the “Build America, Buy America Act,” set out at IIJA Sections 70901-70952. BABA’s domestic content procurement preference applies to all iron and steel, manufactured products, and construction materials used for infrastructure projects under an award. These procurement preference requirements took effect on May 14, 2022.

II. Waivers

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

III. TBCP: Expanding Broadband Internet Access for Native Communities

This Notice applies only to the application of the Buy America Preference to recipients and subrecipients of TBCP awards made under the second round of TBCP funding under the following

circumstances. For those TBCP awards under the second round of funding obligated on or after the effective date of this waiver, [XX], 2024, through [XX], 2029 (i.e., five years from the effective date), the waiver will apply to funds expended by award recipients and subrecipients during the entire period of performance of the award. For TBCP awards under the second round of funding obligated prior to the effective date of this waiver, the waiver only applies to funds expended by award recipients and subrecipients after the effective date and for the remainder of the period of performance of the award.

A. TBCP Description

Many Native American, Alaska Native, and Native Hawaiian communities have insufficient access to broadband Internet and the educational and economic opportunities that it offers. The Biden-Harris Administration is committed to expanding broadband Internet access for these communities, as part of its efforts to ensure the availability of broadband Internet service for all Americans. These efforts include the TBCP, which authorizes grants to eligible Native American, Alaska Native, and Native Hawaiian entities for broadband infrastructure deployment, digital inclusion, workforce development, telehealth, and distance learning. The TBCP received \$1 billion in appropriated funding pursuant to the Consolidated Appropriations Act, 2021, Public Law 116-260, 134 Stat. 1182. The IIJA appropriated an additional \$2 billion in funding for grants under the TBCP and allowed TBCP recipients up to four years to expend the grants funds awarded under this program. NTIA, which is the Executive Branch agency principally responsible by law for advising the President on telecommunications and information policy issues, is the administrator of the TBCP. NTIA does not expect to receive future TBCP appropriations.

On June 3, 2021, NTIA published a NOFO on Grants.gov to describe the requirements under which it would make awards for a first round of TBCP funding (First TBCP NOFO).⁶ NTIA has made approximately \$1.86 billion in TBCP awards to 226 Tribal entities pursuant to the First TBCP NOFO.

Because NTIA released the First TBCP NOFO five months before the enactment of the IIJA, the First TBCP NOFO did not include information about the Buy America Preference set forth in the Act. NTIA also made several TBCP awards for broadband infrastructure deployment prior to the May 14, 2022 effective date of the Buy America Preference. However, most recipients of broadband infrastructure deployment awards under the First TBCP NOFO did not receive these awards until after the May 14, 2022 effective date. Concerns about the consistent and equitable treatment of TBCP award recipients led NTIA to grant a limited general applicability public interest waiver of the Buy America Preference for those recipients that had submitted applications for TBCP funding by the September 1, 2021 deadline established by the First TBCP NOFO. This waiver grant also reflected established Executive Branch policies that favor increased flexibility for Indian Tribal waivers and emphasize the importance of consultation with Tribal governments.

⁶ Notice of Funding Opportunity, Tribal Broadband Connectivity Program, National Telecommunications and Information Administration (June 3, 2021), available at <https://broadbandusa.ntia.gov/sites/default/files/2021-06/NTIA.Tribal%20Broadband%20Connectivity%20Program.Final.OMB%20Cleared.pdf>.

During the 2022 calendar year, NTIA conducted formal Tribal Consultations concerning questions about the second round of TBCP funding.⁷ This consultation process included multiple online consultation sessions with Tribal leaders from across the United States. These sessions took place in January and September of 2022. The sessions specifically addressed, among other topics, the issue of whether recipients of the second round of TBCP funding awards should be subject to the Buy America Preference. The Tribal leaders who participated in these consultation sessions consistently expressed strong support for a waiver of the Buy America Preference for the second TBCP funding round. In doing so, they emphasized the importance of factors like the urgent need of Tribal communities for broadband services, the difficulties posed by the remote nature of many such communities for infrastructure deployment projects, the limited financial and other resources of Tribal governments, and concerns about significant delays in equipment procurement caused by supply chain problems.⁸ Furthermore, consultation participants discussed issues like the possibility of NTIA providing an “authorized list of resources or activities” that would offer BABA guidance for Native communities, including information about specific vendors and/or manufacturers that are BABA-compliant.⁹

DOC also participated in a separate joint Tribal Consultation process regarding BABA in September of 2022.¹⁰ The White House Council on Native American Affairs (WHCNA) led this joint process, which involved seven other Federal government agencies.¹¹ During the WHCNA Tribal Consultation, Native leaders emphasized that Tribal waivers of the Buy America Preference allow ample opportunity for ongoing consultations while also building the capacity of Tribes to

⁷ Letter to Tribal Leaders from Adam Geisler, Division Chief, Tribal Broadband Connectivity and Nation-to-Nation Coordination Division, and Douglas W. Kinkoph, Associate Administrator, Office of Internet Connectivity and Growth, regarding Tribal Broadband Connectivity Program Tribal Consultation, National Telecommunications and Information Administration (Aug. 18, 2022). *See also, e.g.*, Letter to Tribal Leaders from Douglas W. Kinkoph, Associate Administrator, Office of Internet Connectivity and Growth, regarding Tribal Broadband Connectivity Program Tribal Consultation, National Telecommunications and Information Administration (Dec. 28, 2021); NTIA Tribal Consultation Summary Report, National Telecommunications and Information Administration (January 2022) (January 2022 Tribal Consultation Summary Report).

⁸ *See, e.g.*, Summer 2022 Virtual Tribal Consultation Number 1 Transcript, Moderator Adam Geisler, Division Chief, Tribal Broadband Connectivity and Nation-to-Nation Coordination Division, National Telecommunications and Information Administration (Sep. 12, 2022) (Tribal Consultation Number 1 Transcript), at 25-27; *see also* Summer 2022 Virtual Tribal Consultation Number 2 Transcript, Moderator Adam Geisler, Division Chief, Tribal Broadband Connectivity and Nation-to-Nation Coordination Division, National Telecommunications and Information Administration (Sep. 14, 2022) (Tribal Consultation Number 2 Transcript), at 23-26; Summer 2022 Virtual Tribal Consultation Number 3 Transcript, Moderator Adam Geisler, Division Chief, Tribal Broadband Connectivity and Nation-to-Nation Coordination Division, National Telecommunications and Information Administration (Sep. 16, 2022) (Tribal Consultation Number 3 Transcript), at 36-37.

⁹ Tribal Consultation Number 2 Transcript at 23-24.

¹⁰ Letter to Tribal Leaders from Anthony Morgan Rodman, Executive Director, White House Council on Native American Affairs (Aug. 18, 2022).

¹¹ The other Federal agency participants were: the U.S. Department of Agriculture; the U.S. Department of Energy; the U.S. Department of Health and Human Services, Administration for Native Americans; the U.S. Department of Housing and Urban Development; the U.S. Department of the Interior; the U.S. Small Business Administration; and the U.S. Department of Transportation. *Id.* at 2.

work towards eliminating the need for future waivers.¹² Such waivers therefore both serve as a tool to promote investment in our domestic manufacturing base and promote equity and justice for Native communities.¹³

On July 27, 2023, NTIA published the Second TBCP NOFO on Grants.gov to make available up to approximately \$980 million for a second round of TBCP grant awards. In this second funding round, NTIA expects to make awards of between \$1 million and \$50 million for broadband infrastructure deployment projects as well as awards of between \$100,000 and \$2.5 million for broadband adoption and use projects. The requirements established by the Second TBCP NOFO for the second round of awards incorporate the Buy America Preference and the other provisions of the BABA. The waiver proposed in this notice would be limited to recipients and subrecipients of awards made pursuant to the Second TBCP NOFO.

On May 5, 2024, DOC released the DOC Public Interest Tribal Consultation Waiver. Generally speaking, this waiver applies to expenditures by Tribal awardees under any DOC financial assistance agreement incurred on or after its effective date. However, the DOC Tribal Financial Assistance Agreements Waiver specifically states that it “does not apply to awards made under the DOC's National Telecommunications and Information Administration's (NTIA) Broadband Equity, Access, and Deployment (BEAD) or Tribal Broadband Connectivity Program (TBCP).”¹⁴ The waiver proposed in this notice is specifically for recipients of awards made under the Second TBCP NOFO. The DOC Tribal Financial Assistance Agreements Waiver does not apply to or otherwise affect any award funding made under the Second TBCP NOFO.

B. Restrictions on Use of Items Manufactured in China

Independent of BABA, section 60102(g)(1)(D)(i) of the IIJA prohibits the expenditure of TBCP 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).¹⁵ Further, TBCP 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 [of Commerce for Communications and Information] 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 would unreasonably increase the cost of the project.”¹⁶

IV. TBCP: Proposed Limited General Applicability Nonavailability Waiver

¹² See, e.g., Public Interest Waiver for Financial Assistance Agreements to Indian Tribes, Notice of Final Waiver, U.S. Department of Commerce (May 8, 2024) (DOC Tribal Financial Assistance Agreements Waiver), at 2. See also www.commerce.gov/oam/build-america-buy-america.

¹³ See, e.g., DOC Tribal Financial Assistance Agreements Waiver at 2.

¹⁴ Id. at 1.

¹⁵ See also 2 CFR § 200.216 (“Prohibition on certain telecommunications and video surveillance services or equipment.”).

¹⁶ IIJA § 60102(g)(1)(D)(ii).

A. Findings of DOC Industry Assessment: Non-Availability of Certain Manufactured Products and Construction Materials

Given the importance of BABA and its potential to impact the TBCP and other NTIA-administered grant programs,¹⁷ NTIA and DOC conducted an assessment of the domestic supply chain for relevant manufactured products, construction materials, and iron or steel products. NTIA also engaged in tribal consultation as described above. Since then, DOC has held numerous additional meetings with Tribal governments, representatives of Native communities, large and small equipment manufacturers, Internet service providers (ISPs), telecommunications companies, and many of the associations that represent these entities, among others.

Based on its extensive industry engagement, research, and assessment, DOC has determined that some construction materials and manufactured products required for broadband infrastructure deployments, as detailed further below, are not presently available in the quantity or quality needed for the TBCP to achieve the timeframes established by the IIJA.¹⁸ In light of these findings, DOC is proposing this limited, general applicability, nonavailability waiver to provide recipients and subrecipients of Federal financial assistance under the Second TBCP NOFO a limited exemption from application of the Buy America Preference. Consistent with OMB M-24-02, this proposed waiver is time-limited; targeted to specified items, products, materials, and categories; and conditional on the requirement that certain manufacturing processes must occur in the United States.¹⁹

1. Construction Materials, Including Inputs to Optical Fiber and Fiber Optic Cable

DOC's market research indicates that there is no need for a waiver of the Buy America Preference for a majority of construction materials, including for optical fiber and fiber optic cable. DOC seeks comment on two potential exceptions below.

DOC's analysis shows that optical fiber and fiber optic cable will see the highest levels of expenditures compared to any other category of equipment used in TBCP fiber broadband deployments. As a result, DOC proposes waiving the Buy America Preference for non-optic-glass inputs (e.g., an overclad cylinder) to the preform manufacturing process of optical fiber. This narrow and targeted waiver applies to an input that is a minor element of the overall cost of a finished fiber optic cable, and will ensure the availability of a secure, competitive, and redundant supply of BABA-compliant optical fiber and fiber optic cable for the duration of the TBCP Program.

Under the terms of the proposed waiver, fiber optic cable connectors would not need to be manufactured in or attached to fiber optic cable in the United States. Furthermore, the proposed

¹⁷ See generally DOC Office of Acquisition Management, Build America Buy America page (www.commerce.gov/oam/build-america-buy-america).

¹⁸ See IIJA § 70914(b)(2) (authorizing waiver of the domestic content procurement preference where relevant items "are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality").

¹⁹ OMB M-24-02 at 9.

waiver would apply the manufacturing process standard OMB adopted for fiber optic cable, without the addition of a domestic manufacturing requirement for plastics and polymer-based products.²⁰

NTIA also proposes to waive the Buy America Preference for unrepeated submarine fiber optic cable. This proposal reflects NTIA's supply chain research, which shows there is no domestic source for this specific type of submarine fiber optic cable that NTIA expects to be used in certain tribal deployments. NTIA specifically seeks comment on this proposal from relevant stakeholders.

2. Manufactured Products

a. Electronics

DOC's industry assessment has shown that electronics are likely to be the second largest segment of equipment used in TBCP fiber broadband deployments. Such electronics include, but are not limited to, Optical Line Terminals (OLTs) and remote Optical Line Terminals (rOLTs), OLT line cards, optic pluggables, Optical Network Terminals and Optical Network Units (ONTs/ONUs), routers, switches, optical amplifiers, and power systems. These electronics, and comparable electronics used in fixed wireless and other types of broadband network deployments (e.g., radios, power management systems, antennas and antenna arrays, and radiofrequency conditioning and connectivity devices), are almost all manufactured overseas. 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 TBCP.²¹
- 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.

²⁰ See 2 CFR § 184.6(a)(4); see also Office of Management and Budget, Guidance for Grants and Agreements, 88 Fed. Reg. 57,750 (Aug. 23, 2023). The effective date for this guidance was October 23, 2023. See 2 CFR § 184.2(b).

²¹ 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).

NTIA therefore proposes, as discussed below, to waive the Buy America Preference requirements for manufactured products for all electronics in TBCP projects, with the exception of four categories of electronics. These categories are: (1) Optical line terminals and remote optical line terminals (OLTs/ rOLTs); (2) OLT line cards; (3) Optic pluggables; and (4) Standalone optical network terminals and optical network units (ONTs/ONUs). For these four categories of electronics, NTIA proposes to waive only the 55 percent cost of components requirement for manufactured products and to provide specific guidance regarding the manufacturing processes that must occur in the United States for those categories of electronics to be considered “produced in the United States.”²²

In the context of the proposals contained herein, DOC clarifies that any OLT line card that performs the functions of an OLT would be subject to the Buy America Preference, as discussed below, regardless of where the line card is installed, what it is called, or what additional capabilities the line card might possess. DOC further clarifies that the waiver requirements would capture only subscriber-facing optic pluggables, which DOC's market research indicates typically make up the bulk of optic pluggables used in an OLT. In addition, DOC clarifies that standalone ONTs/ONUs would need to be manufactured in the United States, whereas application of the Buy America Preference to combined ONTs/ONUs would be waived. The specific manufacturing processes required for standalone ONTs/ONUs to be considered “produced in the United States” and therefore compliant with the Buy America Preference are set forth below.

b. Enclosures

For purposes of this proposed waiver, DOC considers enclosures to be manufactured products used to protect and house a network function, *e.g.*, active electronics, fiber split or splice, or other connection points. DOC further considers enclosures as generally falling into one of four categories, which are: cabinets; vaults and other below-ground housings (Vaults); pedestals and other above-ground housings (Pedestals); and closures and terminals. It is the assessment of DOC that closures (including aerial closures) and terminals are likely to be the most utilized enclosure types in TBCP projects, and that closures and terminals are mostly manufactured and assembled outside of the United States. DOC's assessment further indicates, however, that (a) many closures and terminals manufactured outside of the United States incorporate a significant percentage of domestic components, and (b) manufacturers have the incentive and ability to invest in domestic capacity to manufacture the molded outer shells of closures and terminals to meet TBCP demand.

Given this assessment and as discussed below, DOC therefore does not propose to waive the 55 percent cost of components requirement for cabinets, Vaults, Pedestals, and closures and terminals. DOC does propose that enclosures should be evaluated for compliance with the Buy America Preference on a standalone basis. DOC further proposes that construction materials and

²² For the purposes of this proposed waiver, the “55 percent cost of components requirement” refers to subsection (2)(ii) of the definition of “produced in the United States” set forth in 2 CFR § 184.3.

manufactured products bundled or packaged with an enclosure should themselves be evaluated for compliance with the Buy America Preference.²³

c. Passive Optical Equipment

DOC's assessment indicates that "passive optical equipment" is a category of manufactured products separate from electronics that is made up of devices that split, combine, or facilitate the passage of optical signals in a fiber optic communication system without use of power. Examples of passive optical equipment include splitters, multiplexers, demultiplexers, taps, directional couplers, connectors, optical filters, attenuators, and wave division multiplexers that require no power for operation.²⁴ DOC's independent market research indicates that passive optical equipment is almost exclusively manufactured overseas and will generally make up a small percent of overall network spend, meaning there is little economic incentive for manufacturers to invest in domestic production. As discussed below, DOC therefore proposes to waive the application of the Buy America Preference for passive optical equipment

d. Other Network Equipment

Other network equipment that is not electronics (*e.g.*, conduit, mounting brackets, patch panels) makes up a small percentage of network expenditures. DOC's research indicates that there is some domestic production capacity for other network equipment that is not electronics, and that expenditures on this category of equipment as a percentage of total network spend are 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 DOC's public interest waiver of the Buy America Preference for *de minimis* infrastructure project purchases will be sufficient for most projects.²⁵

With regard to minor hardware items, DOC believes that the value of such items will not exceed *de minimis* thresholds under its existing waiver. Second TBCP NOFO recipients and subrecipients would be expected to make a good faith effort to measure the quantity and value of minor hardware items utilized in the project and report accordingly.

B. Proposed Waiver

In light of the foregoing, NTIA proposes to adopt a limited, five-year, general applicability, nonavailability waiver of the Buy America Preference requirements for certain construction

²³ By way of example, if a TBCP subrecipient purchases a cabinet that comes packaged with a length of fiber optic cable, the TBCP subrecipient must ensure that the cabinet meets the standards set forth in this waiver for cabinets, and that the fiber optic cable meets the standards set forth in this waiver for fiber optic cable.

²⁴ Taps are sometimes referred to as fiber terminals. For the sake of clarity, passive optical fiber terminals are not the "terminals" discussed in the electronics or enclosures sections below.

²⁵ 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) (DOC *de minimis* Waiver) (www.commerce.gov/sites/default/files/2023-05/De%20Minimis%20Waiver.pdf).

materials and certain manufactured products under the circumstances described below and solely for recipients and subrecipients of funding awards made pursuant to the Second TBCP NOFO. Because this proposed waiver would be limited to awards made in the second round of TBCP funding, it would not interact with or otherwise affect either the above-described DOC Tribal Financial Assistance Agreements Waiver or the separate and previous waiver of the Buy America Preference for recipients of funding under the First TBCP NOFO.

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 TBCP projects. DOC also proposes to waive the Buy America Preference for unrepeated submarine fiber optic cable. However, under the proposed waiver, all optic glass used in the manufacturing of optical fiber and fiber optic cable (including “core rods”) must meet the standard for glass set forth in 2 CFR § 184.6(a)(3): “All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.”²⁶ The proposed waiver would also require that all fiber optic cable and optical fiber must otherwise meet the standards for those materials set forth in 2 CFR § 184.6(a)(4) and (a)(5).²⁷

DOC clarifies that it considers connectors to be minor additions to fiber optic cable that occur after the construction material has been produced in the United States.²⁸ Under the proposed waiver, connectors would not, therefore, need to be manufactured in nor attached to fiber optic cable in the United States.

In addition, in order to ensure that optical fiber and fiber optic cable are produced in the United States, the proposed waiver would not permit the DOC *de minimis* Waiver to be applied to recipient or subrecipient purchases of optical fiber and fiber optic cable.

b. Manufactured Products

i. Electronics

DOC proposes to waive the Buy America Preference for all electronics in TBCP projects, with the exception of the four categories of electronics identified in this section: 1) Optical line terminals and remote optical line terminals, 2) OLT line cards, 3) optic pluggables, and 4) Standalone optical network terminals and optical network units. For these four categories of electronics, DOC

²⁶ 2 CFR § 184.6(a)(3).

²⁷ 2 CFR § 184.6(a)(4), (a)(5).

²⁸ See 2 CFR § 184.6(a)(4) (standard for fiber optic cable is silent with respect to connectorization, which occurs after jacketing); see also 2 CFR § 184.3 (definition of “construction materials” stating that “[m]inor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material.”).

proposes to waive the 55 percent cost of components requirement and to provide specific guidance regarding manufacturing processes that must occur in the United States for these categories to be considered “produced in the United States.”²⁹

In addition, in order to ensure that the four categories of electronics identified in this section are produced in the United States, DOC proposes that the DOC *de minimis* Waiver could not be applied to recipient or subrecipient purchases of the four categories of electronics identified in this section.

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

Optical Line Terminals (OLTs) and Remote Optical Line Terminals (rOLTs) are optical network electronic components typically found in ISP network hubs or distributed deeper into the network (e.g., in cabinets or other enclosures between a network hub and a customer premises) and are used to send and receive signals. OLTs and rOLTs covered by this proposed waiver would include, but would not be limited to, OLTs and rOLTs that support EPON, GPON, NGPON2, XGS-PON, 25GS-PON, Point-to-Point Ethernet, and G.fast technologies, as well as future PON technologies.

Under the proposed waiver, 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 the United States:

- Printed Circuit Board (PCB) Assembly is required for any PCB in the OLT that contains line card (subscriber-facing) functionality;³⁰
- 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 performs the functions of an OLT including, among other things, the physical and data link layer functions of the PON. OLT line cards can be installed in OLTs, rOLTs, and equipment that has the characteristics of OLTs (e.g., switches, routers, virtual OLTs, etc.) to provide network interface ports. Under the proposed waiver, an OLT line card is subject to the Buy America Preference regardless of where the line card is installed, what it is called, or what additional capabilities the line card might possess.

Under the proposed waiver, in order for OLT line cards, whether sold independently or installed in an OLT, rOLT, or equipment that has the characteristics of OLTs, to be considered “produced in

²⁹ 2 CFR § 184.3 (definitions of “manufactured product” and “produced in the United States.”).

³⁰ For the purposes of this proposed waiver, “PCB Assembly” means the complete process of transforming a bare printed circuit board into a functional unit by mounting and soldering components creating a functional board for inclusion in a finished product.

the United States,” the following manufacturing processes, at a minimum, must be conducted entirely within the United States:

- PCB assembly;³¹
- 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 subscriber (or customer)-facing 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). Under the proposed waiver, 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;
- Housing assembly;
- Software integration (including firmware integration, installation of licensed software, and customer specific configuration);
- Testing and quality assurance; and
- Packaging and shipping.

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

Standalone Optical Network Terminals (ONTs), Optical Network Units (ONUs), and standalone devices that perform the functions of an ONT or ONU (together, standalone ONT/ONUs) are installed in PON/FTTH networks at the customer endpoint to serve as a demarcation between a service provider network and the consumer in-home network. Standalone ONTs/ONUs contain active electronics to convert optical signals to and from electrical signals. Under the proposed waiver, in order for a standalone 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:

- PCB Assembly;³²
- Software integration (including firmware integration, installation of licensed software, and customer specific configuration);
- Chassis assembly;

³¹See *supra* note 22.

³²See *supra* note 22.

- Testing and quality assurance; and
- Packaging and shipping.

Under the proposed waiver, recipients and subrecipients may not avoid application of the Buy America Preference by deploying combined ONTs that function only as a standalone ONT/ONU (*e.g.*, a combined ONT/router with the routing functionality disabled).

ii. **Enclosures**

Enclosures are manufactured products used to protect and house a network function (*e.g.*, active electronics, fiber split or splice, or other connection points). Enclosures can generally be viewed as falling into one of four categories:

- **Cabinets**

Cabinets fall into two general categories: passive and active. Passive cabinets offer a housing and management system to split fiber-optic cables from the central office to customer premises. They include a splitter module, responsible for dividing the signal from the feeder cable into individual drop cables, and a chassis that accommodates the ports where fiber-optic cables can be connected. Passive cabinets include optical hub cabinets, optical broadband cabinets, fiber distribution hubs, and primary flex points. Active cabinets are engineered with integrated power and climate control systems.

- **Vaults and Other Below Ground Housings (Vaults)**

Vaults and other below-ground housings also fall into two general categories: passive and active. Passive vaults and handholes are underground enclosures that provide access to fiber optic cable for splicing and repairs, and include pull boxes or splice boxes. Active vaults, sometimes referred to as controlled environment vaults, are underground vaults that are engineered with integrated power and climate control systems in which electronics, among other things, can be installed.

- **Pedestals and Other Above-Ground Housings (Pedestals)**

Pedestals house splitters and splicers which connect the central office to customer premises. Other above-ground housings are, like pedestals, protective units (housing) for splices, taps, splitters, combiners, or other passive optical components.

- **Closures and Terminals**

Closures also fall into two general categories: passive and active. Passive closures are a connection part that connects two or more fiber optical cables together and for housing terminals, splices, splitters/combiners, and taps. They include spliced closures, network interface device (NID) enclosure, and other wall-mount, pole-mount, or aerial closures. Active closures, sometimes

referred to as OSP active housing, are closures that are manufactured with an integrated power component.

Terminals are devices used as a connection point for fiber cabling and cable management specifically for splicing, splitting, and distribution. They also provide sealed environmental protection and control for network line deployment (*i.e.*, splices, splitters/combiners, and taps).

- **Proposed Application of the Buy America Preference to Enclosures**

DOC proposes not to waive the 55 percent cost of components requirement for cabinets, Vaults, Pedestals, and closures and terminals.³³

Under the proposed waiver, in order for cabinets, Vaults, or Pedestals to be considered “produced in the United States,” in addition to complying with the cost of components requirement, the following manufacturing processes, at a minimum, must be conducted entirely within the United States:

1. Integrate subassemblies;
2. Install internal components, hardware, and wiring;
3. Seal and waterproof; and
4. Test, label, and document.

Under the proposed waiver, in order for closures and terminals to be considered “produced in the United States,” in addition to complying with the cost of components requirement, the following manufacturing process, at a minimum, must be conducted entirely within the United States:

1. Manufacturing of the molded outer shell (*e.g.*, by injection molding).

Under the proposed waiver, enclosures should be evaluated for compliance with the Buy America Preference on a standalone basis.³⁴ Likewise, construction materials and manufactured products bundled or packaged with an enclosure must themselves be evaluated for compliance with the Buy America Preference.

In addition, under the proposed waiver, in order to ensure that enclosures are produced in the United States, the DOC *de minimis* Waiver may not be applied to recipient or subrecipient purchases of enclosures.

iii. Passive Optical Equipment

³³ As discussed above, DOC's industry assessment indicated that (a) many closures and terminals manufactured outside the United States incorporate a significant percentage of domestic components, and (b) manufacturers have the incentive and ability to invest in domestic capacity to manufacture the molded outer shells of closures and terminals to meet TBCP demand.

³⁴ By way of example, if a TBCP subrecipient purchases a cabinet that comes packaged with a length of fiber optic cable, the TBCP subrecipient must ensure that the cabinet meets the standards set forth in this waiver for cabinets, and that the fiber optic cable meets the standards set forth in this waiver for fiber optic cable.

Passive optical equipment is a category of manufactured products that is made up of devices that split, combine, or facilitate the passage of optical signals in a fiber optic communication system without use of power.³⁵ Examples of passive optical equipment include splitters, multiplexers, demultiplexers, taps, directional couplers, connectors, optical filters, attenuators, and wave division multiplexers that require no power for operation. DOC proposes to waive the Buy America Preference for passive optical equipment.

iv. Other Network Equipment

Other network equipment that is not electronics (*e.g.*, conduit, mounting brackets, patch panels, *etc.*) makes up a small percentage of network expenditures. This proposed waiver does not apply to these types of other network equipment. To the extent that there are classes or categories of other network equipment used in broadband network deployments that are not domestically available, DOC expects that the DOC *de minimis* Waiver will be sufficient for most projects.³⁶

C. Iron or Steel Products

DOC does not propose to waive the Buy America Preference for any other iron or steel products used for TBCP-funded broadband infrastructure projects, including radio towers used in terrestrial fixed wireless deployments. To the extent that there are products or categories of iron or steel products used in broadband network deployments that are not domestically available, DOC expects the DOC *de minimis* Waiver will be sufficient for most projects.³⁷

D. Reporting Requirements

Second TBCP NOFO recipients would be responsible for compliance with BABA reporting requirements under this proposed waiver. In addition, consistent with the approach taken in the Middle Mile Grant Program BABA Waiver and the BEAD BABA waiver, TBCP recipients to whom the proposed waiver would apply would need to report on their purchases of items from foreign sources.³⁸ 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 TBCP. NTIA has published guidance on BABA compliance

³⁵ For the sake of clarity, neither optical fiber nor fiber optic cable are "passive optical equipment" as defined in or for purposes of this proposed waiver.

³⁶ See DOC *de minimis* Waiver.

³⁷ See *id.*

³⁸ 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, U.S. Department of Commerce (Apr. 19, 2023) (www.commerce.gov/sites/default/files/2023-04/NTIA%20Middle%20Mile%20Final%20Waiver.pdf); see also Limited General Applicability Nonavailability Waiver of the Buy America Domestic Content Procurement Preference as Applied to Recipients of Broadband Equity, Access, and Deployment Program, Notice of Final Waiver, U.S. Department of Commerce (Feb. 22, 2024) (www.commerce.gov/sites/default/files/2024-02/BABA%20Waiver%20Signed.pdf).

and anticipates applying the reporting requirements associated with BEAD to recipients of awards under the Second TBCP NOFO.³⁹

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

DOC conducted an extensive effort to engage with a wide-ranging set of stakeholders across the broadband ecosystem. These stakeholders have included, but were not limited to, Tribal governments, which were invited to formal Tribal Consultations, other representatives of Native communities, ISPs, telecom companies, large and small manufacturers, multinational equipment providers, and many of the associations that represent these entities. Based on this extensive engagement, DOC finds that, absent the proposed waiver, potential recipients and subrecipients that may wish to participate in the second round of TBCP funding would 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. These findings reflect the conclusions reached in the Tribal Consultation processes concerning BABA and the TBCP. Particularly relevant are those conclusions regarding the harms to Native communities that would result from the lack of a Buy America Preference waiver, *e.g.*, significant delays in achieving broadband availability.⁴⁰ Given these conclusions, NTIA has found that such harms would create a material, and avoidable, risk to the overall success of the TBCP.

VI. Established Executive Branch Policy and Results of Tribal Consultation Favor Increased Flexibility for Tribal Waivers; Comment Sought on Specific Measures to Further Promote Increased Flexibility

A. Proposed Waiver Consistent with Executive Branch Policy and Results of Tribal Consultation Processes

The proposed waiver would 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 5 of Executive Order 14112 addresses Federal agency actions to increase the accessibility, equity, flexibility, and utility of Federal funding and support programs for Tribal nations. It indicates that agencies should, among other things, provide waivers for Federal funding programs for Tribal nations to achieve such objectives as: (i) taking into account the unique needs, limited capacity, or significant barriers faced by Tribal nations by providing reasonable and appropriate exceptions or accommodations where necessary; and (ii) increasing the flexibility of funding for Tribal nations by removing, where feasible, unnecessary limitations on Tribal spending.

³⁹ See BABA compliance and reporting requirements available on the BroadbandUSA website at https://broadbandusa.ntia.gov/technical-assistance/BABA_Compliance_and_Self_Certification

⁴⁰ See, *e.g.*, Tribal Consultation Number 1 Transcript at 25-27; *see also, e.g.*, Tribal Consultation Number 2 Transcript at 23-26; Tribal Consultation Number 3 Transcript at 36-37.

A waiver of the Buy America Preference solely for Second TBCP NOFO award recipients, as described in this Notice, would be consistent with and further the intent underlying Executive Order 14112. In particular, it would take into account the significant barriers faced by Native communities seeking to obtain broadband access. The above-described BABA-related Tribal Consultation processes documented these barriers, which include geographic remoteness, the limited financial and other resources of many Tribal governments, and supply chain difficulties.⁴¹ Given the importance of utilizing flexible policy approaches at the Tribal level, NTIA also seeks comment on other potential measures through which the proposed waiver could foster such flexibility.

VII. Request for Comments on the Proposed Waiver

As required under Section 70914 of BABA, NTIA is requesting comment from the public on this proposed waiver, including on the availability of relevant iron or steel products, manufactured products, and construction materials, as well as on the strategies that could allow for the scope of the waiver to be limited, either immediately or over time. As discussed above, NTIA also seeks comment on the provision of special technical assistance services to Native communities, as well as on the use of a list of BABA-compliant items similar to the BEAD Program BABA Self-Certification List. In addition, NTIA seeks comment on its proposal to waive the Buy America Preference for unrepeated submarine fiber optic cable.

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 NTIA 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 their comments. 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 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.

⁴¹ See, e.g., Tribal Consultation Number 1 Transcript at 25-27; see also, e.g., Tribal Consultation Number 2 Transcript at 23-26; Tribal Consultation Number 3 Transcript at 36-37.