

**Before the
OFFICE OF MANAGEMENT AND BUDGET
EXECUTIVE OFFICE OF THE PRESIDENT**

Guidance for Grants and Agreements)	2 CFR Parts 184 and 200
Proposed Rule)	OMB-2023-0004
)	

**COMMENTS OF
NTCA–THE RURAL BROADBAND ASSOCIATION**

NTCA–The Rural Broadband Association (“NTCA”) appreciates the opportunity to provide comments to the Office of Management and Budget’s (“OMB”) proposed revisions to the Guidance for Grants and Agreements published in the Federal Register on February 9, 2023 (“Proposed Revisions”), regarding further guidance on implementing the Build America, Buy America Act (“BABAA”) provisions of the Infrastructure Investment and Jobs Act (“IIJA”). NTCA represents approximately 850 community-based companies and cooperatives that provide advanced communications services in rural America and more than 400 other firms that support or are themselves engaged in the provision of such services, and these members have a significant stake with respect to the implementation of BABAA as it could affect their ability to participate meaningfully and effectively in furthering the broadband-oriented objectives of the IIJA.

NTCA recognizes and fully supports the policy objectives that BABAA represents. By these comments, however, we ask OMB to consider important practical realities to ensure that BABAA does not become an obstacle to fulfillment of the IIJA’s call for the rapid deployment of desperately needed broadband facilities to many of the nation’s unserved and underserved areas. One issue of great import to our members is whether the Proposed Revisions to the Guidance for Grants and Agreements provide sufficient clarity regarding the BABAA requirements, thus exacerbating potential delays and ballooning costs that could result unless

BABAA requirements are clearly laid out and BABAA-eligible products are explicitly identified. NTCA members are small businesses with an average of approximately 30 employees; while firms of this size have a noteworthy track record of delivering broadband in some of the hardest-to-reach portions of the country, any processes for compliance must take into account their ability with limited staff to navigate potentially ambiguous BABAA processes and requirements and to demand the same of suppliers. It is also important that clear guidance is forthcoming soon from agencies with respect to the processes for compliance and obtaining necessary waivers, as preparations must begin soon for participation in the IJA's most significant broadband grant program – and broadband service providers need to know as soon as possible whether and to what degree (and at what cost and on what timeframes) they can reliably locate and procure compliant equipment.

Accordingly, we encourage all federal agencies responsible for implementing BABAA, including OMB, to: (a) ensure that recipients of federal broadband deployment funding are given sufficient notice of BABAA's application and provided adequate flexibility; and (b) make reasonable allowances with respect to BABAA compliance where questions arise due to a lack of specific guidance and despite acting in good faith to comply with BABAA's requirements. We detail below our specific concerns with the Proposed Revisions and our suggestions for how to help resolve these issues.

I. IT IS ESSENTIAL TO ADDRESS IN SHORT ORDER CONTINUING UNCERTAINTY SURROUNDING BABAA REQUIREMENTS.

The Proposed Revisions unfortunately do not fully address uncertainty surrounding the implementation and application of the BABAA requirements in the context of forthcoming federal broadband deployment funding. As one significant example, new part 184 in 2 CFR chapter I of the Proposed Revisions leaves open questions regarding the application of BABAA

to “manufactured products.” A BABAA-compliant manufactured product means that (i) the product was “manufactured” in the United States and (ii) the cost of the “components” of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55% of the total cost of all components of the manufactured product, “unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation.”

As an initial matter, recipients of federal broadband deployment funding grants or subgrants will not necessarily benefit from prior experience or precedent that can help define vague and ambiguous terms such as “manufactured” and “components,” as BABAA is a new requirement for most federally funded infrastructure projects. Domestic purchase preferences such as BABAA have been traditionally applied to federal procurement of goods and services through the implementation of the Buy American Act,¹ the Berry Amendment,² the Kissell Amendment,³ etc. (collectively, the “BAA”). There has been no overarching statute that applied BABAA-like provisions to all federal financial assistance programs, although there have been some statutes that incrementally applied similar restrictions to sector-specific infrastructure projects, such as those related to transportation (together with BAA, collectively, “Buy America Statutes”).⁴

¹ 41 U.S.C. §§ 8301-8303.

² 10 U.S.C. § 2533a.

³ 6 U.S.C. § 453b.

⁴ *See* Surface Transportation Assistance Act of 1978 (P.L. 95-599).

In addition, even if it were made clear that recipients could rely on prior experience with and precedent established in relation to the Buy America Statutes, such precedents may not offer adequate guidance to recipients in considering whether a piece of equipment at issue was “manufactured” in the United States. “Manufacture” is not defined in any of the Buy America Statutes, nor is specific definition provided within the executive orders implementing such statutes or in the Federal Acquisition Regulations (“FARs”) – even as determining whether particular activities constitute “manufacturing” has in the past proven complicated.⁵ Judicial and administrative tribunals have used different, and sometimes conflicting, standards in trying to answer this question, such as considering whether there were “substantial changes in physical character;”⁶ whether the product’s “ingredients [were] measured, weighed, mixed and compounded” in the United States;⁷ whether there were separate manufacturing stages involved or if the process was one continuous one;⁸ and whether the article is completed in the form required by the customer.⁹

Similarly, there has been considerable confusion regarding what constitutes a “component” as opposed to an end product or even a constituent material of a component. Tribunals have had competing views on whether certain equipment is an end product or a

⁵ See, e.g., *A. Hirsch, Inc.*, B-237466 (Feb. 28, 1990) (“The concept of what precisely constitutes ‘manufacturing’ for the purpose of the Act remains largely undefined; accordingly we have noted in our decisions in this area that each involves a peculiar factual situation and at best only provides conceptual guidance in determining whether a given set of operations constitutes manufacturing.”).

⁶ *Id. But see, A&D Machinery Co.*, B-242546; B-242547 (May 16, 1991) (stating that the test is not whether a foreign product has been significantly altered in the United States, but whether the item being procured is made suitable for its intended use, and its identity is established, in the United States).

⁷ See, e.g., *Acetris Health, LLC v United States*, 949 F.3d 719, 731 (Fed. Cir. 2020).

⁸ See, e.g., *Cincinnati Elec. Corp.*, B-185842 (Sept. 27, 1976).

⁹ See, e.g., *Valentec Wells, Inc.*, ASBCA 41659, 91-3 B.C.A. ¶24,168 (1991); *DynAmerica, Inc.*, B-248237 (Sept. 28, 1992).

component, such as in one procurement where the Government Accountability Office (“GAO”) and a federal district court reached different conclusions. The GAO viewed the item as its own end product as it was not directly incorporated into the “system” of which it was allegedly a part, whereas the federal court found that the item was a component of a system, in part because the contractor characterized it that way in its Buy American certificates.¹⁰ And, to add to the ambiguity, there have been disagreements over whether a component is actually a subcomponent or a constituent material of a component.¹¹

For these reasons, NTCA urges the release of further guidance that provides clarity as to the definitions of these key terms in the context of BABAA so that manufacturers, distributors, and the service providers that would ultimately seek to procure this equipment can more reliably discern whether any given product satisfies the BABAA requirements. It is particularly important as well that such guidance is forthcoming soon, given that IJJA broadband funding programs will be launched later this year and parties ranging from the state broadband offices designing those programs to those seeking funding need to account and scope for sufficient compliance with (or the need for waivers from) BABAA in their planning processes.

¹⁰ Textron, Inc., Bell Helicopter Textron Div. v. Adams, 493 F. Supp. 824 (D.D.C. 1980); Bell Helicopter Textron, B-195268 (Apr. 24, 1980).

¹¹ See Yohar Supply Co., B-225480 (Feb. 11, 1987) (stating that fabricated steel manufactured into lock sets was a foreign component even though the steel was produced in the United States and then processed in South Korea because the American-produced steel was a subcomponent of the Korean-fabricated steel.).

II. POTENTIAL IMPACTS ON BROADBAND DEPLOYMENT PROGRAM OBJECTIVES MUST BE CONSIDERED AND MITIGATED.

Service providers have faced and continue to confront significant challenges in the broadband supply chain in recent years.¹² Even if there is hope of supply chains improving, overly strict application of BABAA requirements or ambiguity in whether certain equipment complies with this framework could undermine the goals of the IJJA broadband programs – particularly as demand floods the marketplace all at once to meet aggressive timelines for broadband deployment under these initiatives.

Generally, the United States’ production capabilities related to information technology (“IT”) products, including broadband infrastructure equipment, have been on a downward trend for several decades.¹³ It is unclear whether and to what degree production capabilities could be brought onshore within the timeframes contemplated by the IJJA. Moreover, it is likely that costs for supplies – and thus ultimately costs of deployment – will increase because of such transitions to onshore production even if waivers are allowed on a case-by-case basis.¹⁴

In 2009, when the United States’ production capabilities in IT products were stronger than they are now,¹⁵ NTIA was able to provide a broad but reasonable waiver of Buy American

¹² See, e.g., Fiber Broadband Association, “Strategies to Mitigate Bottlenecks in the Current Fiber Broadband Supply Chain” (Sept. 28, 2022), available at: <https://www.fiberbroadband.org/li/?redir=p%2Fdo%2Fsd%2Fsid%3D3749%26fid%3D4496%26req%3Ddirect> (describing average supply chain lead times for fiber optic cable (52-60 weeks), fiber cabinets (10-20 weeks), fiber multipoint terminals (35-48 weeks), hand holes (22-26 weeks), etc.).

¹³ See R. Atkinson, “How Applying ‘Buy America’ Provisions to IT Undermines Infrastructure Goals” Information Technology & Innovation Foundation (May 9, 2022), available at: <https://itif.org/publications/2022/05/09/how-applying-buy-america-provisions-it-undermines-infrastructure-goals/> (observing that the United States’ share of global electronics output fell by 10.5% between 1999 and the present.).

¹⁴ See *id.*

¹⁵ See *id.* (the United States’ share of global electronics output between 2009 and the present has fallen by about 2.3%).

requirements under the Broadband Technology Opportunities Program (“BTOP”), citing the difficulty, if not impossibility, of BTOP applicants to “have certain knowledge of the manufacturing origins of each component of a broadband network.”¹⁶ NTIA recognized that requiring BTOP applicants to have such knowledge of each and every component required to deploy broadband infrastructure “would be so overwhelmingly burdensome as to deter participation in the program,” and processing waivers on a case-by-case basis would not only be an administrative burden on the applicant “as to discourage participation in the program,” but would also be a burden on “the agency’s time and costs.”¹⁷ These realities still exist today, and are indeed exacerbated by the United States’ relative decrease in IT production output.

In its proposed waiver for the Middle Mile Grant (“MMG”) Program,¹⁸ NTIA acknowledged supply chain challenges facing potential awardees of the program in meeting the BABAA requirements, which are expected to continue throughout the period of performance of MMG projects. Specifically, the agency pointed to a comprehensive industry assessment conducted by the Department of Commerce,¹⁹ which included the following findings:

¹⁶ Broadband Technology Opportunities Program, 74 Fed. Reg. 31,410 (July 1, 2009).

¹⁷ *Id.*

¹⁸ NTIA, “Limited Applicability Nonavailability Waiver of the Buy America Domestic Content Procurement Preference as Applied to Recipients of Middle Mile Grant Program Awards” (Sept. 19, 2022) (“NTIA MMG Waiver”), available at: <https://www.commerce.gov/sites/default/files/2022-09/NTIA%20Middle%20Mile%20BABA%20Waiver.pdf>.

¹⁹ See U.S. Department of Commerce, “Results from Semiconductor Supply Chain Request for Information” (Jan. 25, 2022), available at: <https://www.commerce.gov/news/blog/2022/01/results-semiconductor-supply-chain-request-information>.

1. Approximately two-thirds – 67% – of broadband network equipment is sourced exclusively from Asia;
2. Fiber optic cable assembly generally occurs in Mexico;
3. Only 12% of semiconductor production of any kind occurs in the United States, and domestic semiconductor production does not include the production of the most advanced chips at all; and
4. Domestic manufacturing cannot adequately supply critical network inputs made from oil-based polymers, such as hand holes, conduit, and splice enclosures.

NTIA added that onshoring production of these critical components of broadband networks could take up to five years if manufacturers commenced activities to onshore their production immediately.²⁰ By NTIA’s own assessment, the BABAA requirements place a substantial burden on recipients of federal funding to accomplish the objectives of the IJA broadband programs, and the circumstances that make strict compliance with BABAA impossible will continue to exist for the foreseeable future.

III. IN LIGHT OF THE CONTINUING UNCERTAINTY SURROUNDING BABAA IMPLEMENTATION AND THE POTENTIAL IMPACTS OF SUCH IMPLEMENTATION ON THE GOALS OF THE IJA, COMPLIANCE GUIDANCE SHOULD BE FORTHCOMING QUICKLY AND NTIA SHOULD BE EMPOWERED TO ACT FLEXIBLY AND IMPLEMENT WAIVER PROCESSES.

In light of the foregoing, NTCA first asks that OMB work with NTIA to offer detailed, specific guidance for categories of equipment that will be commonly used in federally funded broadband infrastructure projects. NTIA administers the largest federal broadband grant program (the \$42.45 billion Broadband Equity, Access, and Deployment, or “BEAD,”

²⁰ See NTIA MMG Waiver, pg. 5 (noting that new semiconductor fabrication facilities will take up to 5 years to build within the United States, with similar time periods for onshoring production capabilities of other relevant manufactured products and construction materials not currently produced in the United States in sufficient quantity or quality; domestic manufacturing capacity for broadband network equipment is estimated to require 3 years at a minimum).

program), and for this program to realize its full potential as contemplated by Congress and the Administration, guidance will be necessary for state program designers and potential funding recipients on matters such as what processes qualify as “manufacturing” and definitions of components for each category of such commonly used equipment.

Equally important and due to continuing ambiguity associated with key terms of the Buy American provisions, flexibility should be granted in the event of good-faith efforts to comply with the guidance provided by the federal government. In such cases, if NTIA is satisfied that the recipient procured equipment in good faith that it was BABAA-compliant, we ask that the OMB establish a process where the recipient receives an automatic waiver of a duration equal to as long as it takes the recipient to procure a BABAA-compliant replacement at reasonable cost. Good faith compliance with BABAA obligations should not result in grantees barred from reimbursement given the inherent ambiguities and complexities associated with interpreting the statute.

Finally, it is essential that NTIA have the flexibility to consider and grant waivers where needed to advance the goals of the BEAD program. NTCA supports the goals both of increasing domestic production of critical supplies *and* advancing broadband access for all Americans. NTIA is well-positioned to consider how best to strike a balance in pursuing and achieving both of these goals. Working with OMB, NTIA should be empowered to develop and articulate as soon as possible the processes and standards by which waivers will be granted and to issue such waivers as appropriate and necessary to accomplish the complete scope of objectives contemplated by the IIA.

IV. CONCLUSION

Thank you for your consideration of these comments and careful attention to the impact of the Proposed Revisions and the implementation of BABAA, as these issues are of crucial importance to our members. NTCA and its members support fully OMB's objective to strengthen the United States' industrial base and protect national security in implementing the BABAA requirements, and we believe that this goal can be achieved in a way that will at the same time further efforts to finally close the digital divide. Additional guidance, clearer definitions, carefully articulated processes, reasonable flexibility, and appropriately tailored waivers that reflect the current state of the broadband marketplace will be essential in the near future to realize each of these important objectives.

Respectfully submitted,

/s/ Michael R. Romano

Michael R. Romano

Executive Vice President

NTCA—The Rural Broadband Association

4121 Wilson Blvd, Suite 1000

Arlington, VA 22203

(703) 351-2000 (Tel)

mromano@ntca.org