

Key Provisions in the Build America, Buy America Act Guidance:

On November 15, 2021, President Biden signed the Bipartisan Infrastructure Law (BIL) into law, which includes the Build America, Buy America Act (BABA).¹ BABA establishes a domestic content preference for Federal financial assistance obligated for infrastructure projects. The BABA preference applies to three separate product categories: (i) iron or steel products; (ii) manufactured products; and (iii) construction materials.²

In February, 2023, the Office of Management and Budget (OMB) issued proposed guidance to support implementation of the BABA provisions of the BIL. Today, OMB issues final guidance, to take effect 60 days after publication in the Federal Register.

The standards in the proposed guidance were developed based on listening sessions and a request for information published on April 21, 2022.³ The content of the final guidance is based on OMB's review and consideration of comments provided by public stakeholders through the notice and comment process for the final guidance. OMB also received feedback from Federal agencies.

The Guidance clarifies existing provisions related to domestic preferences and provides further guidance on implementing the statutory requirements to improve Federal financial assistance management and transparency.

As required by BABA, the guidance provides clear and consistent guidance to Federal agencies about how to apply the Buy America preference set forth in BABA to Federal awards for infrastructure projects.

For example, it includes definitions for key terms, including iron or steel products, manufactured products, construction materials, and materials such as aggregates and cement identified under section 70917(c) of BABA.

The guidance also offers standards that define "all manufacturing processes" in the case of construction materials, as required by statute.

The guidance also restates the circumstances defined in statute under which a waiver may be justified: (1) Public interest, (2) Unreasonable cost, and (3) Nonavailability. The guidance outlines the process that Federal agencies should implement to allow recipients to request waivers, including the process Federal agencies should follow in issuing proposed and final waivers.

What does the final guidance do?

The notice of final guidance will add a new section of Title 2 of the Code of Federal Regulations (CFR) to implement BABA provisions. Specifically, the final guidance implements the statutory

¹ Sections 70901 through 70927

² BABA 70912 and 70914

³ 87 FR 23888

requirements under the BIL for Buy America preferences for Federal financial assistance, including preferences for American-made steel and iron products, manufactured products, and construction materials. The final guidance includes a definition of the term “construction materials” and domestic manufacturing process standards for each construction material included in the definition. This final guidance builds on the Administration’s commitment to support American jobs and manufacturing through consistent and clear application of our domestic content laws for Federally-assisted infrastructure projects.

Do BABA preferences only apply to funding under BIL or do they apply to all Federal awards where there is construction for infrastructure?

Build America, Buy America Act requirements, enacted in the BIL, apply to all Federal financial assistance as defined in section 200.1 of title 2, Code of Federal Regulations – whether or not funded through BIL – where funds are appropriated or otherwise made available and used for a project for infrastructure.

What are the main differences between this final guidance and OMB’s interim guidance (M-22-11)?

There are multiple differences between the final guidance and OMB Memorandum M-22-11, or OMB’s “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure” issued on April 18, 2022. One key difference relates to the definition for of “all manufacturing processes” for construction materials. Under M-22-11, only the final and immediately preceding manufacturing processes are covered. The final guidance defines all manufacturing processes for a construction material, which must occur in the United States. Another key difference between M-22-11 and the final guidance is the specific method for distinguishing between the categories of products that Buy America preferences apply to: (1) steel and iron products; (2) manufactured products; and (3) construction materials; and (4) aggregates and cement, which are also referred to in the guidance as “section 70917(c) materials.” OMB provides revised definitions for the product categories at section 184.3 of the final guidance and a process for categorizing products based on their “status at the time [they are] ... brought to the work site” at section 184.4(e).

What is the Buy America requirement for a manufactured product?

Manufactured products must be manufactured in the United States and the cost of components of a manufactured product that are manufactured in the United States must exceed 55 percent of the cost of all components.

The final guidance further provides that “manufactured products” means articles, materials, or supplies that have been: “(i) Processed into a specific form and shape; or (ii) Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.” The final guidance also clarifies that construction materials and iron or steel products should not be considered manufactured products.

Do components need to be produced in the United States to allow the manufactured product to qualify?

The Build America, Buy America Act requires that more than 55 percent of the cost of components, for a manufactured product to be manufactured in the United States and the product itself must be manufactured in the United States. This does not require all components to be produced in the United States.

How is the cost of components of a manufactured product determined (i.e., how is it determined whether a product manufactured in the United States exceeds 55 percent of the cost of all components)?

In general, there are 4 steps in this determination:

1. Determine the components manufactured in the United States.
2. Determine the cost of those components manufactured in the United States.
3. Determine the cost of all components.
4. Divide the cost determined in step 2 by the cost determined in step 3.

If the fraction is more than 55 percent, the manufactured product complies with the Buy America requirements as long as the manufactured product is, itself, manufactured in the United States.

What does “predominantly” iron or steel mean in the definition of “iron or steel products”?

Under the final guidance, “predominantly” iron or steel means that the cost of iron or steel content of a product is more than 50 percent of the total cost of all its components. More specific information on how to make this calculation is provided in the guidance.

What is the Buy America requirement for iron and steel?

BABA states that, in the case of iron or steel products, all manufacturing processes, from the initial melting stage through the application of coatings, must occur in the United States.

What is considered a construction material in this guidance?

Under the final guidance, construction materials include:

- (i) Non-ferrous metals;
- (ii) Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
- (iii) Glass (including optic glass);
- (iv) Fiber optic cable (including drop cable);
- (v) Optical fiber;
- (vi) Lumber;
- (vii) Engineered wood; and
- (viii) Drywall.

What materials are included in Section 70917 (c) Materials?

Under the final guidance, section 70917(c) materials mean cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.

How are these materials treated under the final guidance?

Section 70917(c) of the BIL provides that “construction materials” shall not include cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.

The final guidance clarifies that:

- Section 70917(c) materials, on their own, are not manufactured products.
- Section 70917(c) materials should not be considered manufactured products when they are used at or combined proximate to the work site (for example, wet concrete or hot asphalt mix brought to the worksite)
- Section 70917(c) materials (such as stone, sand, and gravel) may be used to produce a manufactured product, such as the case with precast concrete.

When will this guidance be effective?

The effective date of this part is 60 days after publication in the Federal Register. However, the guidance provides for a transition period from the guidance in OMB Memorandum M-22-11 to the final guidance for ongoing or previously planned projects. Except in circumstances defined in the guidance, the final guidance applies to Federal awards obligated on or after its effective date. Awards obligated on or after May 14, 2022, the effective date of the Build America, Buy America Act, and before the effective date of the final guidance, are instead subject to OMB Memorandum M-22-11.

Is the guidance consistent with the United States’ international trade obligations?

The BABA provisions apply in a manner consistent with United States obligations under international agreements. Federal financial assistance awards are generally not subject to international trade agreements because these international obligations only apply to direct procurement activities by signatories to such agreements. In certain circumstances, however, a number of States have opted to obligate their procurement activities to the terms of one or more international trade agreements, and as such, are included in schedules to the international trade agreements.

The Made in America Office issued a [fact sheet](#) in 2022, which discusses how the TAA applies to both direct Federal procurement and Federal financial assistance. Waivers from the Buy America Preference remain available where consistent with applicable law. For additional information, consult the State in question or the agency providing the funds.

What happens if certain products are not available?

Waivers will promote investment in our manufacturing base by highlighting where there are gaps in domestic production and opportunities for new U.S.-based producers. Through industry engagement, complementary initiatives to boost our industrial base, and the use of transparent, targeted waivers, we are working to ensure that Build America, Buy America requirements are integrated with industrial strategies to increase opportunities for domestic producers and fill gaps in our supply chains.

A Federal awarding agency may waive the application of the Buy America Preference in any case in which it finds that:

- Applying the Buy America Preference would be inconsistent with the public interest (a “public interest waiver”);
- Types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality (a “nonavailability waiver”); or
- The inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall infrastructure project by more than 25 percent (an “unreasonable cost waiver”).

Federal financial assistance recipients may request waivers from a Federal awarding agency if the recipient reasonably believes a waiver is justified.