

**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**23 CFR Part 635**

**[Docket No. FHWA-2023-0037]**

**RIN 2125-AG13**

**Buy America Requirements for Manufactured Products**

**AGENCY:** Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking (NPRM); request for comments.

**SUMMARY:** The FHWA is proposing to discontinue its general waiver of Buy America requirements for manufactured products and in doing so require FHWA recipients to start applying Buy America requirements to manufactured products. The FHWA is also proposing standards for applying Buy America to manufactured products should the waiver be discontinued. The proposed standards for applying Buy America to manufactured products are consistent with the Office of Management and Budget's (OMB) guidance implementing the Build America, Buy America Act (BABA) provisions of the Infrastructure Investment and Jobs Act (also known as the Bipartisan Infrastructure Law (BIL)).

**DATES:** Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** To ensure that you do not duplicate your docket submissions, please submit comments by only one of the following means:

- *Federal eRulemaking Portal:* Go to [www.regulations.gov](http://www.regulations.gov) and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366-9329.

All submissions should include the agency name and the docket number that appears in the heading of this document or the Regulation Identifier Number (RIN) for the rulemaking. All comments received will be posted without change to [www.regulations.gov](http://www.regulations.gov), including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** For questions about this notice, please contact Mr. Brian Hogge, Office of Infrastructure, (202) 366-1562, or via email at [brian.hogge@dot.gov](mailto:brian.hogge@dot.gov). For legal questions, please contact Mr. David Serody, Office of the Chief Counsel, (202) 366-4241, or via email at [david.serody@dot.gov](mailto:david.serody@dot.gov). Office hours are from 8:00 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access and Filing**

This document and all comments received may be viewed online through the Federal eRulemaking portal at [www.regulations.gov](http://www.regulations.gov) using the docket number listed above. Electronic retrieval help and guidelines are also available at [www.regulations.gov](http://www.regulations.gov). An electronic copy of this document may also be downloaded

from the Office of the Federal Register’s Website at [www.FederalRegister.gov](http://www.FederalRegister.gov) and the U.S. Government Publishing Office’s Website at [www.GovInfo.gov](http://www.GovInfo.gov).

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, FHWA will also continue to file relevant information in the docket as it becomes available after the comment period closing date and interested persons should continue to examine the docket for new material. A final rule may be published at any time after the close of the comment period and after FHWA has had the opportunity to review the comments submitted.

## **I. Executive Summary**

### **A. Purpose of the Regulatory Action**

The FHWA is required, by statute, to ensure that all FHWA-funded projects only use steel, iron, and manufactured products that are produced in the United States. 23 U.S.C. 313. The FHWA refers to these requirements as “Buy America” requirements. The Buy America requirement for manufactured products has existed in some form since the enactment of the 1978 Surface Transportation Assistance Act (1978 STAA), Public Law 95-599 (1978), with those requirements being modified by the 1983 Surface Transportation Assistance Act (1983 STAA), Public Law 97-424 (1983),<sup>1</sup> which provides the current Buy America requirement for manufactured products. In 1983, following the

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<sup>1</sup>For clarity, while this law was enacted as the Surface Transportation Assistance Act of 1982, because it was enacted on January 6, 1983, it will be referred to as the “1983 STAA.”

passage of the 1983 STAA, FHWA determined that it would be in the public interest to waive the Buy America requirements for manufactured products, creating the Manufactured Products General Waiver that continues to this day. *See* 48 FR 1946 (Jan. 17, 1983); 48 FR 53099 (Nov. 25, 1983). Due to the Manufactured Products General Waiver, manufactured products permanently incorporated into FHWA-funded projects do not need to be produced domestically, apart from predominantly iron or steel manufactured products and predominantly iron or steel components of manufactured products.

On November 15, 2021, the President signed BIL (Pub. L. 117-58) into law. The BIL includes the Buy America, Build America Act (BABA), which expands the coverage and application of Buy America requirements in Federal financial assistance programs for infrastructure. BIL, div. G §§ 70901-53. Among other requirements, BABA mandates that all iron, steel, manufactured products, and construction materials used in projects supported by funds made available for a Federal financial assistance program for infrastructure be produced in the United States. BABA § 70914. BABA provides that this mandate applies to such materials only to the extent that a domestic content procurement preference that meets the requirements of § 70914 does not already apply. BABA § 70917(a). As FHWA has an existing statutory Buy America requirement for steel, iron, and manufactured products at 23 U.S.C. 313, BABA's savings provision means that FHWA's existing Buy America requirements under 23 U.S.C. 313 apply to these products. The BABA's savings provision, however, requires that any domestic content procurement preference at least meets the requirements of § 70914. The requirements of § 70914 apply the definitions contained in § 70912, including the

definition of “produced in the United States.” Accordingly, while FHWA does not directly apply BABA’s manufactured products requirements, FHWA interprets BABA as requiring FHWA’s Buy America requirements to be generally consistent with the BABA requirements that are applicable to § 70914, including the BABA definition of “produced in the United States” for manufactured products at § 70912(6)(B).

BABA also expresses a general policy preference against general applicability waivers like the Manufactured Products General Waiver. Section 70914(d) of BABA requires Federal Agencies to review existing general applicability waivers of Buy America requirements by publishing in the Federal Register a notice that: (i) describes the justification for the general applicability waiver; and (ii) requests public comments for a period of not less than 30 days on the continued need for the general applicability waiver. As described in further detail below, FHWA has undergone that review.

Based on the contents of that review, and after considering the President’s policy, as embodied in Executive Order (E.O.) 14005, “Ensuring the Future Is Made in All of America by All of America's Workers,” to maximize the use of goods, products, and materials produced in the United States; the intent of Congress, as expressed in BABA’s preference against general applicability waivers; the purpose and goals of domestic content procurement preferences and waivers; and FHWA’s original rationale for issuing the Manufactured Products General Waiver compared to the current domestic manufacturing situation, FHWA is proposing the discontinuation of the Manufactured Products General Waiver. Simultaneously, FHWA is proposing to modify its current regulations implementing Buy America at 23 CFR 635.410 to set forth the standards for when a manufactured product will be considered to be “produced in the United States”

and therefore Buy America-compliant. For uniformity and consistency with BABA, FHWA is proposing that these standards mirror the standards OMB has established for BABA's domestic content procurement preference for manufactured products in its final guidance implementing BABA at 2 CFR part 184 ("Part 184").<sup>2</sup> 88 FR 57750.

#### B. Summary of the Major Provisions of the Regulatory Action in Question

The FHWA is proposing to set standards regarding its Buy America requirement for manufactured products, defining when a manufactured product is "produced in the United States" for the purposes of complying with 23 U.S.C. 313. Under this definition, which mirrors the definition at § 70912(6)(B) of BABA and in Part 184, to be produced in the United States, a manufactured product must be manufactured in the United States and have the cost of components of the product that are mined, produced, or manufactured in the United States be greater than 55 percent of the total cost of all components of the manufactured product. The FHWA is also proposing to mirror the standard in Part 184 for how to determine the cost of any component. To provide clarity in presenting these standards, FHWA is also proposing to define "component," "manufactured product," and "manufacturer," with these definitions again proposed to be substantially similar to those used in Part 184.

In addition, FHWA is not proposing to modify its current Buy America requirements for iron and steel.<sup>3</sup> To distinguish between iron and steel products, to which

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<sup>2</sup> Throughout this document, references to Part 184 refer to both the text in 2 CFR part 184 and the Preamble published in the Federal Register.

<sup>3</sup> The FHWA's longstanding Buy America requirements for iron and steel require that all manufacturing processes of permanently incorporated steel or iron materials, including application of a coating, must occur in the United States. 23 CFR 635.410(b)(1). BABA included domestic content procurement preferences for iron and steel at § 70912(2)(A), which require that all manufacturing processes, from the initial melting stage through the application of a coating, occur in the United States. Since FHWA's

FHWA's existing Buy America requirements will continue to apply, and manufactured products, FHWA is proposing to adopt the definitions of "iron or steel products" and "predominantly of iron or steel or a combination of both" found in Part 184.

In alignment with Part 184, FHWA is also establishing a separate classification for excluded materials, referred to as section 70917(c) materials in Part 184. These excluded materials are cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives. The FHWA is proposing to make clear that, standing alone, these excluded materials do not constitute a manufactured product for which a Buy America requirement applies. Under FHWA's proposed regulations, such excluded materials may constitute a component of a manufactured product when combined with other materials, including other excluded materials; however, FHWA is proposing to explicitly state that concrete and asphalt mixtures delivered to a job site without final form for incorporation into a project are not manufactured products.

In addition, for clarity, FHWA is proposing to make clear that a product must either be classified as an iron or steel product, a manufactured product, an excluded material, or another category specified by law or in 2 CFR part 184, such as construction materials. The FHWA believes that this, in concert with the new definitions, will make clear how recipients of FHWA financial assistance should differentiate between different materials and ensure that multiple standards do not apply to a single material, with exceptions for two specific manufactured products described below.

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requirements for iron and steel meet BABA's requirements for iron and steel, FHWA continues to apply its existing Buy America requirements unchanged. The FHWA notes, however, that its current Buy America requirements for iron and steel are substantially aligned with BABA's.

The FHWA proposes to deviate from the Part 184 by applying FHWA's existing Buy America requirements for iron and steel to two specific types of materials that may be used as components of manufactured products, with those manufactured products also required to conform with FHWA's proposed Buy America requirements for manufactured products.<sup>4</sup> First, with respect to precast concrete products that are classified as manufactured products, FHWA is proposing to require that any iron or steel products that are components of the precast concrete product must conform with FHWA's existing Buy America requirements for iron and steel. Second, with respect to intelligent transportation systems and other electronic hardware systems that are installed in the highway right-of-way or other real property and classified as manufactured products, FHWA is proposing to require that any iron or steel enclosures of such systems conform with FHWA's existing Buy America requirements for steel and iron. The FHWA is proposing these two deviations from Part 184 in order to continue FHWA's long-standing policy of requiring the iron or steel in these specified products to comply with the Buy America requirements for iron and steel, while also limiting the number of products that must comply with two different Buy America requirements. Along with these iron and steel requirements, under FHWA's proposed standards, precast concrete and such electronic hardware systems, when classified as manufactured products, would still need to meet FHWA's proposed standards for manufactured products; therefore, the cost of the iron and steel within the products shall count toward the 55 percent domestic content threshold.

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<sup>4</sup> Unlike these proposed regulations, under Part 184, materials should not be considered to fall into multiple categories, and only need to meet the domestic content procurement preference for only the single category in which it is classified. *See* 2 CFR 184.4(e), (f).



### C. Benefits and Costs

The preliminary regulatory impact analysis (RIA) prepared pursuant to Executive Order 12866, “Regulatory Planning and Review,” and available in the rulemaking docket, analyzes the costs and benefits associated with establishing Buy America requirements for manufactured products. The RIA discusses anticipated benefits of the rule qualitatively, as they could not be quantified. Expected benefits include protecting and expanding domestic manufacturing, increasing supply chain resiliency, and increasing consistency in applying domestic content procurement preferences for manufactured products between FHWA and other Federal Agencies that are subject to the requirements of BABA. Expected costs of the proposed rule relate to increased material costs for manufactured products used in highway construction projects, project delay, and the administrative costs to FHWA and recipients of FHWA financial assistance. At this time, FHWA is only able to quantify costs for the increased material costs and the administrative costs to FHWA. The FHWA estimates the increased material costs for manufactured products permanently incorporated into FHWA-funded projects to range from a high of roughly \$737 million per year to a low of \$45 million per year. The FHWA further estimates an additional \$167,000 per year in increased FHWA administrative costs. The other administrative costs to recipients of FHWA financial assistance and the costs associated with project delivery delay have not been quantified.

## **II. Background**

### A. History of FHWA’s Manufactured Products Domestic Content Procurement Preference and Manufactured Products General Waiver

The FHWA's Buy America requirements for the Federal-aid highway program were first established in 1978 by Section 401 of the 1978 STAA, which imposed a Buy America requirement to certain unmanufactured and manufactured articles, materials, and supplies. Following enactment of the 1978 STAA, FHWA issued an emergency rule to implement the Buy America requirement of Section 401. *See* 43 FR 53717 (Nov. 17, 1978). In that rule, FHWA determined that it was in the public interest to temporarily waive the provisions of Section 401 of the 1978 STAA to all products and materials other than structural steel. 43 FR at 53717. The FHWA based this determination on its belief that the implementation of the statutory text of Section 401 would have a major impact on the Federal-aid highway program and that foreign structural steel was the only foreign product with a significant nationwide effect on the cost of Federal-aid highway construction projects. *Id.*

In 1980, following this emergency rule, FHWA issued an NPRM to establish regulations implementing Section 401 of the 1978 STAA. 45 FR 77455 (Nov. 24, 1980). In that NPRM, FHWA proposed to extend the coverage of Buy America requirements to all steel construction materials used in highway construction projects, while excluding all other materials and products from coverage under Section 401. 45 FR at 77455. Again, FHWA stated that because foreign steel was identified as the only foreign commodity having a significant nationwide effect on the cost of Federal-aid highway construction projects, it was only necessary to implement Buy America requirements for steel products. *Id.* The FHWA acknowledged that natural materials, such as sand, stone, gravel, and earth materials; and petroleum and petroleum-based products, such as fuels, lubricants, and bituminous products, were two other commodities used in large amounts

for Federal-aid highway projects, but FHWA proposed not to apply Buy America requirements to such materials. *Id.* The FHWA found that there was limited foreign competition in natural materials because of the difficulty and high cost of transporting them due to their bulk and weight; as these materials were therefore usually domestically sourced, FHWA found it unnecessary to apply Buy America requirements to them. *Id.* For petroleum and petroleum-based products, FHWA determined that such products were not available from domestic sources in sufficient and reasonably available quantities, justifying their exemption from FHWA's proposed Buy America requirements. *Id.* For all other manufactured products covered by Section 401 of the 1978 STAA, FHWA determined that they were not used in sufficient quantity to have any appreciable effect on the overall cost of a project and did not require the protection of Buy America. The FHWA therefore proposed in the 1980 NPRM not to apply Buy America requirements to such products.

Prior to this rulemaking being finalized, Congress enacted the 1983 STAA, which repealed Section 401 of the 1978 STAA and instituted new Buy America requirements that are similar to those that exist today. Section 165(a) applied Buy America requirements to all steel, cement, and manufactured products used on FHWA-funded projects.<sup>5</sup> Subsection 165(b) provided that FHWA could waive the provisions of subsection 165(a) if their application would be inconsistent with the public interest; if such materials and products are not produced in the United States in sufficient and

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<sup>5</sup>The Buy America requirement for cement was eliminated by Congress in 1984. *See* Pub. L. 98-229. In addition, Congress added a Buy America requirement for iron in 1991. *See* Pub. L. 102-240. The FHWA's current Buy America requirements for steel, iron, and manufactured products were codified at 23 U.S.C. 313 by Section 1903 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) in 2005. Pub. L. 109-59.

reasonable quantities and of a satisfactory quality; or if the inclusion of domestic material(s) would increase the cost of the overall project by more than 25 percent.<sup>6</sup>

Shortly after the enactment of the 1983 STAA, FHWA issued an interim final rule implementing Section 165. 48 FR 1946 (Jan. 17, 1983). In this rule, FHWA again determined that it was in the public interest to temporarily waive the provisions of Section 165 of the 1983 STAA as they applied to all manufactured products other than cement. 48 FR at 1946. The FHWA based this decision “on the fact that sufficient information is not yet available in order to adequately assess the impacts of applying Buy America provisions to all manufactured products and to all projects regardless of project cost.” *Id.* The FHWA also noted that applying a Buy America requirement for all manufactured products would require tracing the origin of components used in petroleum-based products, which FHWA stated was extremely difficult to do. *Id.*

In late 1983, FHWA issued its final rule implementing Section 165 of the 1983 STAA, creating its current Buy America regulations at 23 CFR 635.410. 48 FR 53099 (Nov. 25, 1983). Once more, FHWA found that a waiver of Buy America requirements for manufactured products was in the public interest, thereby creating the Manufactured

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<sup>6</sup>Section 165(b)(3) of the 1983 STAA also allowed for a waiver of the provisions in subsection 165(a) in the case of the procurement of bus and other rolling stock under the Urban Mass Transportation Act of 1964 if the cost of components which are produced in the United States is more than 50 percent of the cost of all components of the vehicle or equipment; and final assembly of the vehicle or equipment has taken place in the United States. This use of components is referenced in subsection 165(c) of the 1983 STAA, which states that for the purposes of Section 165, in calculating components’ costs, labor costs involved in final assembly cannot be included. Subsection 165(c) was modified by Section 337 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 110-17), raising the threshold for the cost of components. In addition, Section 337(b) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 amended Section 165(b)(3) of the 1983 STAA to refer to the cost of all subcomponents, as well as components. Section 165(b)(3) was ultimately repealed by Section 4(r) of Public Law 103-272 in 1994; however, subsection 165(c) of the 1983 STAA remains codified at 23 U.S.C. 313(c).

Products General Waiver, which still remains in effect 40 years later.<sup>7</sup> 48 FR at 53102. The FHWA found that most responses from product manufacturers “recommended that manufactured products should be excluded from Buy America and/or expressed only a passing interest in the regulation.” 48 FR at 53101. For manufacturers that wanted Buy America requirements applied to manufactured products, FHWA stated that these manufacturers primarily expressed this opinion because they opposed unfair foreign trade practices, and that “protectionism in terms of a Buy America regulation on all manufactured products would not serve this purpose.” *Id.* Rather than apply Buy America requirements for manufactured products to remedy this concern, FHWA stated that unfair practices could be instead addressed through import laws. *Id.* at 53102. Further, FHWA determined that it was not the intent of Congress in enacting the 1983 STAA for FHWA to apply a Buy America requirement to manufactured products; FHWA noted that it had consistently waived manufactured products from coverage under Buy America laws and Congress did not specifically direct a change in that policy in enacting 1983 STAA, which FHWA interpreted to mean that not all manufactured products had to be covered by the requirements of Section 165. *Id.* at 53101-02. Finally, FHWA reiterated that materials and products other than steel, cement, asphalt, and natural materials comprised a small percent of the highway construction program; that other manufactured products were minimally used and there would be little economic effect to applying Buy America requirements to them; and that it would be difficult and

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<sup>7</sup>The FHWA’s regulations implementing Buy America have also remained consistent since 1983, apart from reacting to statutory changes by removing a reference to a Buy America requirement for cement (49 FR 18820 (May 3, 1984)) when Congress removed that Buy America requirement and adding a reference to a Buy America requirement for iron (58 FR 38973 (July 21, 1993)) after Congress added that requirement.

administratively burdensome to identify the various materials comprising manufactured products and trace their origin. *Id.* at 53102.

#### B. Current FHWA Buy America Requirements Under 23 U.S.C. 313

Currently, 23 U.S.C. 313(a) requires that all steel, iron, and manufactured products used in FHWA-funded projects be produced in the United States. Per 23 U.S.C. 313(h), these Buy America requirements apply to all contracts that are eligible for FHWA assistance regardless of the funding source if any contract within the scope of a determination under the National Environmental Policy Act (NEPA) involves an obligation of Federal funds. For purposes of § 70917 of BABA, FHWA considers 23 U.S.C. 313 to be a domestic content procurement preference in existence at the time of the enactment of BIL meeting the requirements of § 70914 with respect to iron, steel and manufactured products for all financial assistance that is administered under title 23, U.S.C.<sup>8</sup> However, as noted above in Section II.A, in 1983, FHWA issued a public interest waiver of general applicability of FHWA's Buy America requirement for manufactured products, known as the Manufactured Products General Waiver. Thus, were FHWA to discontinue this waiver, FHWA would need to establish standards for the application of Buy America to manufactured products that meet or exceed the requirements of § 70914. Accordingly, FHWA is publishing this NPRM to propose such standards.

#### C. Administration Priorities

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<sup>8</sup> Financial assistance made available for Federal Lands Management Agencies under the Federal Lands Transportation Program is subject to the Buy American Act provision (41 U.S.C. 8301-8303) under the Federal Acquisition Regulations. Throughout this document, FHWA refers to the projects subject to FHWA's Buy America requirements as "FHWA-funded projects."

In January 2021, President Biden issued E.O. 14005, titled “Ensuring the Future is Made in All of America by All of America’s Workers” (86 FR 7475, Jan. 28, 2021). The E.O. sets forth a policy that Federal Agencies should, consistent with applicable law, maximize the use of goods, products, and materials produced in, and services offered in, the United States. The E.O. helps promote private sector investment in the production of goods critical to our national security and economic stability. It is a policy of this Administration, exemplified by this E.O., to bolster domestic supply chains and, in doing so, create jobs, strengthen our manufacturing sector, and create economic opportunities for more of America’s small businesses. Indeed, President Biden emphasized the importance of using domestic products in American roads, bridges, and highways in his 2023 State of the Union Address.<sup>9</sup>

#### D. Build America, Buy America Act

On November 15, 2021, the President signed into law BIL, which includes BABA. The BABA requires that all iron, steel, manufactured products, and construction materials made available for a Federal financial assistance program for infrastructure be produced in the United States. BABA § 70914. The BABA, however, provides that the preferences under § 70914 apply only to the extent that a domestic content procurement preference as described in § 70914 does not already apply to iron, steel, manufactured products, and construction materials. BABA § 70917(a)-(b). As FHWA has existing Buy America domestic content preferences for steel, iron, and manufactured products at 23 U.S.C. 313, BABA’s preferences for those materials do not explicitly apply to FHWA.

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<sup>9</sup> As stated by President Biden: “And on my watch, American roads, bridges, and American highways are going to be made with American products as well.” See <https://www.whitehouse.gov/state-of-the-union-2023/>.

The FHWA does, however, apply BABA's domestic preference requirement for construction materials.<sup>10</sup>

Under BABA, all manufactured products must be “produced in the United States.” BABA § 70914. With respect to manufactured products, BABA defines “produced in the United States” to mean that (1) the manufactured product was manufactured in the United States and (2) the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent 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. BABA § 70912(6)(B).

In addition, BABA expresses a general policy preference against general applicability waivers, such as the Manufactured Products General Waiver. For example, § 70913(c) of BABA requires Federal Agencies to identify “deficient programs” for financial assistance, which includes programs that are “subject to a waiver of general applicability not limited to the use of specific products for use in a specific project.” BABA § 70913(c)(2). Section 70914(d) of BABA also requires Federal Agencies to review existing general applicability waivers of Buy America requirements by publishing in the Federal Register a notice that: (i) describes the justification for the general applicability waiver; and (ii) requests public comments for a period of not less than 30

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<sup>10</sup> Along with applying BABA's domestic preference requirement for construction materials, § 70916(c) of BABA requires FHWA to consult with the Director of the Hollings Manufacturing Extension Partnership regarding whether there is a domestic entity that could provide the iron, steel, manufactured product, or construction material that is the subject of the proposed waiver before FHWA grants a waiver under either its Buy America requirements for iron, steel, and manufactured products and under BABA's domestic preference requirement for construction materials.



days on the continued need for the general applicability waiver. Following the initial notice and review and consideration of comments received, BABA requires Federal agencies to publish in the Federal Register a determination on whether to continue or discontinue the general applicability waiver. BABA § 70914(d)(2)(B). On March 17, 2023, at 88 FR 16517, FHWA published the required notice to initiate its review of the Manufactured Products General Waiver in the Federal Register (“2023 RFC”). The FHWA discusses the comments received for the 2023 RFC in Section III.

#### E. OMB’s Guidance on BABA

The BABA further required OMB to issue guidance to assist in applying BABA’s requirements. BABA § 70915. On April 18, 2022, OMB issued memorandum M-22-11, “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure,”<sup>11</sup> which was rescinded and replaced by memorandum M-24-02, “Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure” on October 25, 2023 (“Implementation Guidance”).<sup>12</sup> Section VI of the Implementation Guidance warns against overly broad waivers, stating that they “undermine market signals designed to boost domestic supply chains, particularly for key articles, materials, and supplies in critical supply chains,” and that “[w]aivers that are overly broad will tend to undermine domestic preference policies.” Section VI also states that public interest waivers of domestic content procurement preferences “must be used judiciously and construed to ensure the maximum utilization of goods, products, and materials produced in the United

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<sup>11</sup><https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>.

<sup>12</sup><https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf>.

States.” The Implementation Guidance goes on to state that whether a waiver is in the public interest will depend upon numerous factors, such as the nature and amount of resources available to the recipient; the value of the items, goods, or materials in question; the potential domestic job impacts; and other policy considerations, including sustainability, equity, accessibility, performance standards, and the domestic content (if any) of and conditions under which the non-qualifying good was produced. In terms of general applicability waivers, Section VI of the Implementation Guidance states that Agencies “should align such waivers with complementary policies, such as work to boost supply chain resiliency and domestic employment” and that such waivers “should include appropriate expiration dates designed to ensure that, once available, Buy America qualifying products receive appropriate consideration.”

On August 23, 2023, at 88 FR 57750, OMB revised its guidance in title 2 of the CFR to add a new part 184 that provides additional guidance on implementing BABA. Part 184 includes definitions for key terms, including iron or steel products, predominantly of iron or steel or a combination of both, manufactured products, component, and manufacturer. 2 CFR 184.3. In line with § 70912(6)(B) of BABA, 2 CFR 184.3 states that a manufactured product is “produced in the United States” if the product was manufactured in the United States; and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard that meets or exceeds this standard has been established under applicable law or regulation for determining the minimum amount of domestic content of the manufactured product. Part 184 also provides guidance for determining the cost of

components of manufactured products. Pursuant to 2 CFR 184.5, in determining whether the cost of components for manufactured products is greater than 55 percent of the total cost of all components, there are two standards depending on the origin of the component. For components purchased by the manufacturer, the cost of the component is the acquisition cost, including transportation costs to the place of incorporation into the manufactured product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued). 2 CFR 184.5(a). For components manufactured by the manufacturer, the cost of the component is all costs associated with the manufacture of the component, including transportation costs described in 2 CFR 184.5(a), plus allocable overhead costs, but excluding profit and any costs associated with the manufacture of the manufactured product. 2 CFR 184.5(b).

Part 184 also states that an article, material, or supply should only be classified as either an iron or steel product, manufactured product, construction material, or section 70917(c) material,<sup>13</sup> that the classification must be made based on the status of the material at the time it is brought to the work site for incorporation into an infrastructure project, and that the material must meet the Buy America standards for only the single category in which it is classified. 2 CFR 184.4(e)-(f).

Again, Part 184 does not, by its own terms, apply to FHWA's Buy America requirements for steel, iron, and manufactured products; it only applies to FHWA's

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<sup>13</sup> Part 184 defines a section 70917(c) material as cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives. *See* 2 CFR 184.3. These materials are named section 70917(c) materials in Part 184 because they are referred to in § 70917(c) of BABA.

domestic content procurement preference for construction materials.<sup>14</sup> 2 CFR 184.2(a). Part 184 does, however, apply to all Federal financial assistance programs for infrastructure that are administered by Federal Agencies that did not have a domestic content procurement preference for steel, iron, and manufactured products meeting or exceeding BABA's requirements.

### **III. March 17, 2023, Request for Comments**

#### **A. Overview of Comments Received**

Pursuant to § 70914(d) of BABA, FHWA published the March 17, 2023, Request for Comments (RFC), seeking comments on whether to continue or discontinue the Manufactured Products General Waiver. 88 FR 16517. The FHWA received 9,496 comments; however, a vast majority of these comments received were “form” comments that were functionally identical to each other, with only occasional minor changes to the comments themselves under the names of different commenters. The majority of these form comments expressed support for discontinuing the Manufactured Products General Waiver, although there were also form comments that supported continuing the waiver. While FHWA believes that form comments might broadly indicate the level of support or opposition to the waiver, no form comment provided substantive analysis regarding the benefits or costs of continuing or discontinuing the Manufactured Products General Waiver.

Excluding the form comments, FHWA received 134 unique, substantive comments from State departments of transportation, manufacturers, State government

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<sup>14</sup>Since 23 U.S.C. 313 did not specifically apply to “construction materials”, FHWA did not have a domestic content procurement preference in effect for these products for purposes of § 70917 of BABA. Therefore, the provisions of BABA as interpreted by OMB apply to construction materials.

agencies, labor organizations, construction contractors, industry associations, members of Congress, and individuals. The FHWA briefly discusses the main topics brought up by commenters who supported and opposed the Manufactured Products General Waiver below.

#### B. Comments in Favor of Continuing the Manufactured Products General Waiver

Commenters who were in favor of continuing the Manufactured Products General Waiver generally presented similar points. Such commenters stated that removing the waiver (1) would likely increase project costs due to the increased cost of domestically produced products or due to the reduced size of the market for Buy America-compliant products; (2) would likely lead to project delays or cancellations due to the difficulty or inability to acquire Buy America-compliant products, partly due to a limited supply of such products; (3) may prevent the use of specific products because some products or their components not currently produced domestically and onshoring will take time, if it occurs at all, given the size of the market for Buy America-compliant products and components; and (4) would result in significant challenges if contracting agencies, contractors, and manufacturers were required to track the origin of a product's components, which commenters claimed would be worsened if these entities also had to track the cost of a product's components. Many commenters argued that these issues were particularly pronounced and any benefits of rescinding the Manufactured Products General Waiver would be limited given their assertions that the cost and amount of manufactured products used in highway construction projects are insignificant relative to the rest of the materials used in highway construction projects.

Commenters acknowledged that, were FHWA to rescind the Manufactured Products General Waiver and apply Buy America requirements for manufactured products, a waiver could be obtained for manufactured products that are not available from domestic sources; however, commenters argued that going through the waiver process would inevitably take time and therefore slow construction down, add administrative burden, and may result in duplicative waivers continually being requested for the same product that is included in multiple projects.

#### C. Comments in Favor of Discontinuing the Waiver

Comments in favor of discontinuing the waiver and applying Buy America requirements on manufactured products generally espoused the belief that doing so would restore America's manufacturing base, create and protect American jobs, and stimulate domestic economic growth. Commenters also noted that recent supply chain disruptions indicate the benefit of producing products in the United States and minimizing dependence on foreign sources, which these commenters argued also supports America's national security. Commenters who favored discontinuing the Manufactured Products General Waiver, in general, stated their belief that when taxpayer dollars are spent on federally financed infrastructure projects, those dollars should go to domestically produced products.

Commenters also argued that rescinding the Manufactured Products General Waiver would provide an incentive for companies to invest in U.S. manufacturing, which they argued the current Manufactured Products General Waiver disincentivizes. Commenters noted that switching from foreign-produced products to domestically produced products would reward companies that have moved production onshore, hired

American workers, and conducted their operations in compliance with strong U.S. environmental and worker safety regulations. As one commenter stated, each time FHWA employs the Manufactured Products General Waiver, it fails to account for whether a Buy America requirement for manufactured products was feasible, let alone probable. Another commenter stated that strong domestic content standards send demand signals for companies to invest in domestic production and workers. In a similar vein, commenters argued that the continued existence of the waiver eliminates any incentive for future domestic investment for manufactured products used on FHWA-funded projects. Commenters also pointed out that companies that wish to make manufactured products for FHWA-funded projects domestically do not receive any protection under the Manufactured Products General Waiver and must instead compete with foreign imports. Commenters further noted that the Manufactured Products General Waiver encourages the use of cheaper foreign-produced manufactured products on FHWA-funded projects and denies opportunities for U.S. manufacturing workers.

Despite these issues, some manufacturers and contracting agencies also indicated that they intend to increase domestic manufacturing capacity in response to the increased Federal transportation investments brought about by BIL, which indicates that there may be expansion capabilities for manufacturers who wish to produce Buy America-compliant manufactured products. Other manufacturers commented that they believed they were able to produce a Buy America-compliant product and therefore desired the rescission of the current waiver to take advantage of the market for Buy America-compliant products. These manufacturers stated that because of the Manufactured Products General Waiver, they must compete with foreign manufacturers who may seek to undermine their pricing,

have their products subsidized by foreign governments, or dump their products into the U.S. market.

In addition, commenters stated their belief that the Manufactured Products General Waiver was an inappropriate use of FHWA's waiver authority when it was issued in 1983, arguing that the 1983 STAA clearly directed and intended that FHWA require the use of U.S.-produced manufactured products in FHWA-funded projects.

Commenters also stated that the Manufactured Products General Waiver is inconsistent with the intent of Congress, as seen through the enactment of BIL. These commenters pointed to the fact that, where it applies, § 70914 of BIL requires the head of each Federal Agency to ensure that none of the funds available for a Federal financial assistance program for infrastructure may be obligated unless all of the manufactured products used in the project are produced in the United States; § 70913(c) of BIL defines programs for which a domestic content procurement preference requirement is subject to a waiver of general applicability not limited to the use of specific products for use in a specific project, like the Manufactured Products General Waiver, as "deficient programs;" and that § 70914(d) of BIL requires Federal Agencies to review existing waivers of general applicability and determine whether to continue or discontinue them.

#### **IV. Proposed Discontinuation of the Manufactured Products General Waiver**

The FHWA has carefully considered comments received on the 2023 RFC, the purpose of its Buy America requirements, the rationale provided by FHWA in issuing the Manufactured Products General Waiver in 1983, the priorities of the Administration, and the goal of Congress in enacting the domestic content procurement preferences in BABA, in determining whether the Manufactured Products General Waiver remains in the public



interest. After considering this information, FHWA has decided to propose to discontinue the manufactured products waiver.

First, both the intent of Congress, as expressed in §§ 70933 and 70935 of BABA, and the President's policy for the Federal Government, as expressed in Section 1 of E.O. 14005, is that Federal Agencies should use terms and conditions in Federal financial assistance awards to maximize the use of goods, products, and materials produced in the United States. Continuing the long-standing Manufactured Products General Waiver is not consistent with these policy goals.

Second, FHWA believes it is important to recognize the purpose of domestic content procurement preferences when considering whether a waiver is applicable and in the public interest. The Congressional findings in § 70911 of BABA are instructive regarding the purposes of domestic content procurement preferences. In general, the findings provide that taxpayers expect that publicly funded infrastructure will be produced in the United States by American workers, applying America's high environmental, worker, and workplace safety standards; that taxpayer dollars should not reward companies that have moved their operations and jobs to foreign countries; that publicly funded infrastructure projects should seek to prevent shifts in manufacturing to foreign countries, who may use less energy efficient and more polluting manufacturing methods, from the United States; that such projects should create a demand for domestically produced goods, helping to sustain and grow domestic manufacturing and the jobs domestic manufacturing supports throughout product supply chains; and that taxpayer funding should sustain a robust domestic manufacturing sector, which is a vital component of the national security of the United States. *See* BABA § 70911. Continuing

the long-standing Manufactured Products General Waiver continues to undermine the expressed purposes that domestic content procurement preferences, such as FHWA's Buy America requirement, are intended to serve.

Third, OMB's Implementation Guidance conveys a policy that waivers, including waivers of general applicability like the Manufactured Products General Waiver, should not be overly broad in order to ensure that any such waivers appropriately convey market signals on where the domestic supply chain can be bolstered for American manufacturers to take advantage of. The Implementation Guidance further provides that such waivers should also be time-limited to ensure that, once available, Buy America-compliant materials can receive appropriate consideration for inclusion in federally funded projects. The Manufactured Products General Waiver is inconsistent with these general principles.

Taking into account these above references, FHWA believes the Manufactured Products General Waiver is overly broad. The FHWA has considered comments stating that manufactured products that can be manufactured domestically are more likely to be ignored in favor of cheaper foreign products for use on FHWA-funded projects. The FHWA agrees with these commenters that the Manufactured Products General Waiver disincentivizes manufacturers from domestically producing products by covering all manufactured products without discretion, rather than specifically targeting those that would warrant a waiver under the waiver criteria in 23 U.S.C. 313(b). Further, FHWA believes the broadness of the Manufactured Products General Waiver can be seen in the fact that it applies to any newly created manufactured product without an analysis of whether coverage of that product is in the public interest.

The Manufactured Products General Waiver also fails to provide domestic manufacturers who wish to produce products for FHWA-funded projects with knowledge of the current gaps in the domestic manufacturing sector. By covering all manufactured products, the Manufactured Products General Waiver does not provide market signals that distinguish between manufactured products that are made domestically but not included in FHWA-funded projects because the products are more expensive than foreign products and manufactured products that are not produced domestically at all. This lack of clarity hinders manufacturers who wish to enter the market from understanding the competitive landscape, disincentivizing them from attempting to provide domestic manufactured products for FHWA-funded projects.

The FHWA believes it is important to compare its current understanding of the purpose and need for waivers with the fundamental underpinnings of the Manufactured Products General Waiver when it was issued in 1983. At that time, FHWA stated that a waiver was necessary because of the costs of applying a Buy America requirement to manufactured products – primarily the burden in identifying and tracing the origin of the components of manufactured products – while those products comprised only a small percent of the highway construction program. 48 FR at 53102. While FHWA recognized these costs, FHWA did not seemingly perceive any benefits of a Buy America requirement for manufactured products because it believed that manufacturers would not produce Buy America-compliant products due to the limited demand created by FHWA-funded projects; such nonexistent products would thus not require Buy America protection. In other words, when issuing the Manufactured Products General Waiver, FHWA presumed at the time that domestic manufacturers would not produce Buy

America-compliant products. The purpose of the waiver was thus to allow for the incorporation of products from foreign sources to fill what FHWA perceived would always be gaps in domestic manufacturing. It assumed that domestic manufacturing would not produce Buy America-compliant products and thus believed this assumption compelled the need for a broad waiver of general applicability.

The FHWA no longer agrees with this premise and is accordingly proposing to discontinue the Manufactured Products General Waiver. The FHWA notes that the Federal-aid highway program has grown considerably with the enactment of new funding programs that provide new eligibilities since the Manufactured Products General Waiver was established in 1983. As shown by commenters, domestic manufacturers are available to produce Buy America-compliant products used in Federal-aid highway funding programs. Keeping the Manufactured Products Waiver in place provides no incentive for new domestic manufacturers to enter the market or for existing domestic manufacturers to begin producing Buy America-compliant products. For nascent industries that produce manufactured products used in FHWA-funded projects, the Manufactured Products General Waiver also discourages companies from investing in domestic manufacturing that may be able to compete globally once the domestic manufacturers have built up expertise. Further, FHWA believes that due to the development of new kinds of manufactured products as well as the expansion of program eligibilities, such as the establishment of the Surface Transportation Block Grant Program and Congestion Mitigation and Air Quality Improvement Program, manufactured products as a category are used more often now than when the Manufactured Products General Waiver was issued and accordingly have a larger economic effect now. When

issuing the waiver in 1983, FHWA stated that materials and products other than steel, cement, asphalt, and natural materials comprised a small percentage of the highway construction program. Commenters on the 2023 RFC, however, referenced numerous other products that they believed would be affected by rescission of the Manufactured Products General Waiver, such as ITS hardware, traffic signals and controllers, and vehicle detection equipment.

Unlike the Manufactured Products General Waiver, FHWA instead believes, in line with OMB's Implementation Guidance, that waivers should aim to proactively encourage domestic manufacturing by providing clear market signals about which markets domestic manufacturers can enter with the reasonable expectation that their products could adequately compete for use on FHWA-funded projects. The FHWA acknowledges that waivers may be necessary in some circumstances but believes that waivers should seek to identify areas where domestic manufacturing can fill gaps and actively encourage such activity.

Accordingly, FHWA believes that the Manufactured Products General Waiver is overly broad, no longer in line with the purpose of domestic content procurement preferences and waivers, and therefore no longer serves the public interest. The FHWA is thus proposing to discontinue the Manufactured Products General Waiver. In doing so, FHWA seeks to encourage manufacturers to supply Buy America-compliant products to FHWA-funded projects and to encourage other manufacturers to shift their production to the United States to take advantage of this market.

The FHWA believes that rescinding the Manufactured Products General Waiver will also provide many benefits to the United States, such as protecting and increasing

domestic manufacturing and manufacturing jobs, providing an opportunity for manufacturing innovations to occur domestically, and creating a more resilient domestic supply chain and protecting national security. In addition, FHWA expects increases in domestic manufacturing to benefit related domestic industries, such as component manufacturers and material and product transporters.

At the same time, FHWA understands that discontinuing the Manufactured Products General Waiver and applying Buy America requirements on manufactured products may result in cost increases, project delays, and product unavailability if not done carefully. The FHWA acknowledges that there may be some products that are not currently produced in the United States and, for various reasons, might not be able to be produced in the United States in the near future. For such products, FHWA intends to consider whether it should propose any targeted waivers, with these waivers providing a timeline to encourage manufacturers to ramp up domestic production. To that end, FHWA is concurrently publishing a Request for Information (RFI), seeking specific and detailed information on what products are not and cannot be produced in the United States in the near future. Based on information received, FHWA intends to propose time-limited and targeted waivers covering such products, if it determines it would be appropriate to do so. The FHWA believes that issuing targeted waivers for certain manufactured products presents a better model than the current Manufactured Products General Waiver, which does not consider the availability of individually manufactured products and has no set ending in order to incentivize the onshoring of manufacturing.

With the FHWA RFI, FHWA seeks to mitigate the concerns posed by commenters that rescinding the waiver will cause cost increases and project delays by

ensuring the continued availability of necessary manufactured products. The FHWA would intend for such waivers to allow for the use of foreign manufactured products as domestic production ramps-up. Such waivers would be time-limited and could include an explicit schedule for phasing out a waiver over time, creating a glide-path toward full Buy America compliance for products, where possible. The FHWA's goal is that once these waivers expire, the domestic production of any covered product would be sufficient to ensure that Buy America-compliant products would be available for use in FHWA-funded projects. Such waivers could also take into account situations where economic realities, such as the size of the market, the cost of onshoring production, and geographic constraints (such as products made of materials that are not mined in the United States) may hinder domestic manufacturing growth even in the longer term, though such waivers would still be subject to periodic review.

By issuing waivers for products where necessary, FHWA intends to ensure that manufactured products needed for highway construction projects are available while also providing an advantage to domestic manufacturers who can provide manufactured products to FHWA-funded projects where a waiver is not needed. In addition, such targeted waivers afford manufacturers insight into market demand that can trigger capital investments in domestic manufacturing to fill current gaps in the Nation's supply chain, thereby decreasing the need for these waivers over the long-term. The FHWA will consider such waivers where they are deemed necessary to ensuring the availability of products at a reasonable price; however, where domestic production is currently feasible, FHWA believes in allowing Buy America requirements to operate as a useful incentive

for domestic manufacturers to contribute American-made manufactured products to highway construction projects.

In addition, DOT has issued a “Waiver of Buy America Requirements for De Minimis Costs and Small Grants” (“De Minimis and Small Grants Waiver”). 88 FR 55817 (Aug. 16, 2023). The De Minimis and Small Grants Waiver currently has no operative effect on manufactured products included in FHWA-funded projects, as such products are covered by the Manufactured Products General Waiver. Were the Manufactured Products General Waiver to be rescinded, however, the De Minimis and Small Grants Waiver would waive the application of FHWA’s Buy America requirements for manufactured products under a single financial assistance award for which (1) the total value of non-compliant products is no more than the lesser of \$1,000,000 or 5 percent of total applicable costs for the project; or (2) the total amount of Federal financial assistance applied to the project, through awards or subawards, is below \$500,000. 88 FR at 55820. For smaller projects and projects using limited amounts of manufactured products, where there is less of a benefit to discontinuing the Manufactured Products General Waiver, FHWA believes that the De Minimis and Small Grants waiver should prevent the rescission of the waiver from increasing project costs or causing project delays.

For all of the above reasons, FHWA is proposing to rescind the Manufactured Products General Waiver. The FHWA believes that the Manufactured Products General Waiver is no longer in the public interest. The FHWA seeks comment on whether this is the appropriate course of action. For proponents of rescission, as detailed more below, FHWA seeks comment on when the effective date of the rescission and the



implementation of Buy America requirements for manufactured products should be. For opponents of rescission, FHWA similarly seeks comment on when in the future, if ever, the waiver should be rescinded and what factors should FHWA consider before doing so.

## **V. FHWA Proposed Buy America Manufactured Product Standards**

As set out in 23 U.S.C. 313, FHWA must ensure that all manufactured products used in FHWA-funded projects are produced in the United States. The statutory text does not define when a product is “produced in the United States.” As FHWA is proposing to rescind the Manufactured Products General Waiver, FHWA believes it is required by BABA to adopt general standards that meet or exceed those under BABA, which FHWA proposes to do through this rulemaking.

Therefore, while commenters to the 2023 RFC proposed various standards they suggested FHWA should adopt for its application of Buy America requirement for manufactured products, FHWA is proposing to adopt the definition of when a manufactured product is “produced in the United States” as found in § 70912(6)(B) of BABA. This would require a manufactured product to be manufactured in the United States and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States to be greater than 55 percent of the total cost of all components of the manufactured product. While FHWA could legally adopt standards exceeding that found in BABA, such as by setting a higher domestic content threshold than 55 percent, FHWA recognizes the burden that any application of Buy America requirements may place on contracting agencies, contractors, and manufacturers. To minimize that burden to the greatest extent practicable while also maintaining the benefits of Buy America requirements, FHWA is proposing to align its

standard for when a manufactured product is “produced in the United States” for the purpose of 23 U.S.C. 313 to the one found in § 70912(6)(B) of BABA.

This standard would also provide consistency between FHWA’s standard for manufactured products and the standard used by other Federal Agencies that apply BABA. Beyond the requirements of § 70917 of BABA, FHWA believes there is a benefit of consistent application and interpretation between FHWA’s Buy America requirements and BABA’s domestic content procurement preferences. Consistency minimizes the burden on contracting agencies, contractors, and manufacturers, who can rely on existing systems and processes that they use to comply with BABA when working on FHWA-funded projects. It also allows manufactured products that provide BABA-compliant manufactured products for projects funded by other Federal Agencies to provide those same products on FHWA-funded projects. Consistent definitions further allow for better understanding of applicable requirements, as contracting agencies, contractors, and manufacturers do not have to navigate between multiple, disparate regimes.

The FHWA notes that were the Manufactured Products General Waiver to be rescinded, the requirements of 23 U.S.C. 313(h) would apply to manufactured products. This would mean that the proposed Buy America requirements for manufactured products would apply to all contracts eligible for FHWA financial assistance for a project carried out within the scope of the applicable finding, determination, or decision under NEPA, regardless of the funding source for such contracts, if at least one contract for the project is funded with amounts made available to carry out Title 23, U.S.C. In other words, any Buy America requirements for manufactured products could apply to

manufactured products purchased under contracts using only non-Federal funds if those contracts are within the scope of a determination under NEPA that involves an obligation of Title 23, U.S.C. funds.

The FHWA notes that it does not intend for these proposed standards to supplant current FHWA waivers that cover specific manufactured products. The FHWA further notes that its proposed standards are substantively similar to those in FHWA’s Electric Vehicle (EV) Charger Waiver,<sup>15</sup> which covers EV chargers, a type of manufactured product, and waives Buy America requirements for chargers under certain circumstances.<sup>16</sup> In particular, FHWA notes that under proposed § 635.410(c)(2)(ii), FHWA intends for a predominantly iron or steel enclosure of an EV charger that is installed in the highway right of way or other real property to be subject to FHWA’s existing Buy America requirements for iron or steel. The FHWA believes this aligns with FHWA’s EV Charger Waiver, which states that “[a]ll predominantly steel and iron housing components...must meet FHWA’s Buy America requirements for steel and iron” and that “[t]he cost of any such housing shall be included as a cost of an EV charger’s components when calculating whether the cost of components manufactured in the United States exceed 55 percent of the cost of all components.” *See* 88 FR 10619, 10634 (Feb. 21, 2023).

While FHWA is proposing to discontinue the Manufactured Products General Waiver and impose Buy America requirements on manufactured products, FHWA does not desire to place contracting agencies, contractors, and manufacturers in a position

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<sup>15</sup>Waiver of Buy America Requirements for EV Chargers, 88 FR 10619, February 21, 2023.

<sup>16</sup>More guidance on the EV Charger Waiver can be found at [https://www.fhwa.dot.gov/construction/contracts/buyam\\_qaev/](https://www.fhwa.dot.gov/construction/contracts/buyam_qaev/).

where they are required to comply with Buy America requirements for manufactured products without having the systems in place to do so. For example, when Part 184 was issued by OMB in August 2023, a 60-day period was provided before the revised standards for construction materials become effective. A longer transition or adjustment period was provided by DOT following the initiation of the new BABA requirements in May 2022. At that time, DOT issued an adjustment period waiver to allow time for stakeholders to transition to new rules and processes required by BABA related to construction materials. See “Temporary Waiver of Buy America Requirements for Construction Materials,” at 87 FR 31931. The FHWA seeks comment on whether a similar transition period is needed for its proposed standards for manufactured products to allow contracting agencies, contractors, and manufacturers time to create appropriate systems and processes, as well as train staff on compliance with the proposed standards. The FHWA specifically seeks comment on the minimum time required for these purposes and, accordingly, the effective date for the proposed Buy America requirements for manufactured products.

The FHWA also recognizes the complications that may arise if new requirements are imposed on ongoing projects, as well as projects that are in the planning, design, or later implementation phases. The FHWA intends any new requirements to only apply to Federal awards obligated or authorized after the effective date of a final rule, but FHWA requests comments on this point as well. For instance, FHWA requests comment on whether there should be a buffer period for certain projects that are in development that have not had Federal awards obligated or authorized but have relied on the Manufactured Products General Waiver such that those projects could continue to rely on the

Manufactured Products General Waiver, and under what conditions, if any, that buffer period would apply.<sup>17</sup>

The FHWA also recognizes that there are projects for highway construction that are subject to alternate project delivery methods, such as design-build, where contracts are awarded and work is authorized and obligated in phases. For example, where a project has not completed the environmental review process, Federal funds may be obligated for preliminary engineering and environmental document preparation but not physical construction. In these situations, FHWA believes that it may be appropriate to apply these proposed standards, if adopted, to physical construction since Federal funds have not been obligated or authorized for this work nor have there been any contractual commitments with respect to this work. The FHWA also requests comments on the appropriate buffer period, if any, for these types of projects.<sup>18</sup>

The FHWA also understands that tracking the origin and cost of components may be difficult, particularly for smaller manufacturers, contractors, and contracting agencies. To ease this burden, FHWA is not prescribing any specific method of compliance. The FHWA's intent and expectation is that recipients ensure that 55 percent of components, by cost, of a manufactured product are mined, produced, or manufactured in the United States. The FHWA requests comments on any specific provisions that FHWA should consider in easing the administrative burden in demonstrating compliance with this

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<sup>17</sup> See DOT's Waiver of Buy America Requirements for Construction Materials for Certain Contracts and Solicitations, issued on January 30, 2023, for a recent example of how the Department has handled similar situations for construction materials subject to the BABA requirements.

<https://www.transportation.gov/mission/office-secretary/office-policy/transportation-policy/waiver-buy-america-requirements-for-construction-materials>.

<sup>18</sup> Ibid.

proposed requirement.

## **VI. Section-by-Section Analysis**

### **§ 635.410(b), (c), and (d) – Reference to States**

The FHWA does not intend to substantively change its current Buy America regulations as they relate to FHWA’s Buy America requirement for iron and steel. The FHWA does, however, intend to make several, minor changes regarding these requirements to reflect the current scope of its Buy America requirements.

In § 635.410(b)(2), the introductory paragraph to § 635.410(b)(3), and § 635.410(d), FHWA is proposing to replace the mention of “State” with “recipient.” Along with the replacement of current § 635.410(c), described below, this would replace all mentions of “State” in the current regulation with “recipient.” The FHWA’s Buy America requirements apply to all recipients of Title 23, U.S.C. funds, which includes States but also may include other recipients like metropolitan planning organizations, local governments, and regional transportation authorities. As the Buy America requirements are the same between States and non-State entities, FHWA believes non-State entities should have the same abilities provided in regulation as States currently do.

### **§ 635.410(b) – Reference to Steel or Iron Materials**

Currently, 23 CFR 635.410(b) interchangeably refers to “steel or iron materials” and “steel and iron materials.” For consistency, FHWA is proposing to replace mentions of both terms with a single phrase: “iron or steel products,” which would be defined at proposed § 635.410(c)(1)(ii). The FHWA does not intend this change to affect its Buy America requirements for iron or steel materials. As noted in the discussion below with respect to proposed § 635.410(c)(1)(ii), (c)(1)(iv), and (c)(2), this change would make

clear when a manufactured product comprised of steel or iron would be considered an iron or steel product versus a manufactured product. Consistent with current FHWA requirements, predominantly iron or steel products would be subject to FHWA's existing Buy America requirements for iron and steel at § 635.410(b). Manufactured products that are not predominantly iron or steel would be subject to FHWA's proposed Buy America requirements for manufactured products at § 635.410(c).

### **§ 635.410(c) – Waiver Provisions**

The FHWA is proposing to replace current § 635.410(c) with new language detailing FHWA's Buy America requirements for manufactured products, as described in detail in Section V and below. The FHWA is thus proposing to remove the current regulatory text in 23 CFR 635.410(c), which discusses the process for requesting a Buy America waiver and the procedures FHWA will take to respond to that request. These provisions have remained substantively unchanged from 1983.<sup>19</sup> Since then, however, Congress has enacted several provisions structuring FHWA's process for issuing Buy America waivers.<sup>20</sup> These statutorily required processes are not covered by the current

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<sup>19</sup> The FHWA has made minor amendments to 23 CFR 635.410(c)(1)(ii) when Congress has modified the statutory coverage of its Buy America requirements. Originally, 23 CFR 635.410(c)(1) referenced a waiver of Buy America requirements being possible when steel and cement materials were not produced in the United States in sufficient and reasonably available quantity and of a satisfactory quality. *See* 48 FR at 53104. When Congress subsequently removed coverage for cement, FHWA modified that provision accordingly to remove reference to cement. *See* 49 FR at 18821. And when Congress added coverage for iron, FHWA modified the provision one last time to include mention of iron. 58 FR at 38975. None of these changes, the last of which occurred in 1993, substantially modified the process and procedures described in 23 CFR 635.410(c), however.

<sup>20</sup> The Consolidated Appropriations Act, 2010 (Pub. L. 111-117) required FHWA to make an informal public notice and comment period at least 15 days prior to issuing any Buy America waiver. The SAFETEA-LU Technical Corrections Bill (Pub. L. 110-244) states that if FHWA determines to issue a waiver, it must publish in the Federal Register a detailed written justification as to the reasons for the waiver and provide an additional comment period not to exceed 60 days, with that additional comment period not delaying the effectiveness of the waiver. Section 11513 of BIL affirmed that not less than 15 days before issuing a waiver, FHWA must provide notice of the proposed waiver, an opportunity to comment on the proposed waiver, and the reasons for the proposed waiver.

version of 23 CFR 635.410(c), and FHWA does not find it necessary to modify 23 CFR 635.410(c) to reiterate what is already stated in statute and FHWA guidance.<sup>21</sup>

### **§ 635.410(c) - Introductory Paragraph**

As stated above in Section V, FHWA is proposing to require that all manufactured products used and permanently incorporated in FHWA-funded construction<sup>22</sup> projects be produced in the United States. To promote consistency with FHWA's existing Buy America requirements for iron and steel, FHWA proposes to adopt language similar to the current regulatory language in § 635.410(b)(1).

In addition, FHWA is proposing to make clear that its Buy America requirement for manufactured products only applies to products that are permanently incorporated into FHWA-funded projects. The FHWA believes this aligns with FHWA's longstanding practice for iron and steel items and for the treatment of manufactured products covered by BABA. *See* Section IV of the Implementation Guidance.

### **§ 635.410(c)(1)(i) – Definition of Component**

The FHWA is proposing to adopt the definition of “component” used in Part 184. This would define what a component is for the purpose of FHWA's proposed Buy America requirements for manufactured products and for FHWA's proposed definition of an iron or steel product. To provide contracting agencies, contractors, and manufacturers with consistency, FHWA believes it is useful to have similar definitions between

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<sup>21</sup>The FHWA maintains guidance describing the information needed to submit a waiver request and the method to do so. *See* Questions #22-27 at [https://www.fhwa.dot.gov/construction/contracts/buyam\\_qageneral.cfm](https://www.fhwa.dot.gov/construction/contracts/buyam_qageneral.cfm), and Question #19 at [https://www.fhwa.dot.gov/construction/contracts/buyam\\_qa\\_baba.cfm](https://www.fhwa.dot.gov/construction/contracts/buyam_qa_baba.cfm).

<sup>22</sup>23 U.S.C. 101(a)(4) defines “construction” to include, in part, any project eligible for assistance under title 23, U.S.C.



FHWA's Buy America requirements and BABA's domestic content procurement preference where practicable.

**§ 635.410(c)(1)(ii), (c)(1)(vi) – Iron or Steel Products**

Pursuant to FHWA's current policy, predominantly iron or steel manufactured products must conform with FHWA's Buy America requirements for iron or steel.<sup>23</sup> The FHWA, however, does not currently define what threshold a product has to meet in order to be classified as a predominantly iron or steel product. In this proposed rulemaking, to provide clarity and consistency on this issue, FHWA is proposing to adopt the definitions of "iron or steel product" and "predominantly iron or steel or a combination of both" in Part 184.

With the proposed application of Buy America to both iron or steel products and manufactured products, FHWA believes that it is necessary to provide standards to determine whether a product should be classified as a manufactured product or an iron or steel product, as that determination is significant in understanding which standards apply to the product. While under FHWA's existing Buy America requirements for iron and steel, all manufacturing processes of the iron and steel must occur in the United States, FHWA's proposed standards for manufactured products allow for the inclusion of non-domestic components.

The FHWA proposes to use the definitions of "iron or steel products" and "predominantly of iron or steel or a combination of both" to classify a product for purposes of Buy America compliance. In adopting the definitions of "iron or steel products" and "predominantly of iron or steel or a combination of both" used in Part 184,

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<sup>23</sup>See Q&A #12 at [https://www.fhwa.dot.gov/construction/contracts/buyam\\_qageneral.cfm](https://www.fhwa.dot.gov/construction/contracts/buyam_qageneral.cfm).

FHWA hopes to utilize a single consistent definition to categorize products on a national level, both for all projects included in FHWA-funded projects and all projects subject to BABA. See the explanation below for proposed § 635.410(c)(2) for more information concerning the classification of materials.

**§ 635.410(c)(1)(iii) – Definition of Excluded Materials**

The FHWA proposes a definition of the term “excluded material” that cross-references the definition of the term “Section 70917(c) material” found in Part 184 at 2 CFR 184.3. Part 184 defines section 70917(c) materials as cement and cementitious materials; aggregates such as stone, sand, or gravel; and aggregate binding agents or additives. More information on the use of this category of materials in this proposed regulation can be found below in the discussion of proposed §§ 635.410(c)(1)(iv) and (c)(2).

**§ 635.410(c)(1)(iv) – Manufactured Products and Section 70917(c) Materials**

To ensure consistency with BABA, FHWA proposes to use substantively the same definition of “manufactured product” as used by OMB in Part 184, with slight changes with respect to references to “construction materials” and “section 70917(c) materials” in that definition which are described below. *See* 2 CFR 184.3.

The FHWA thus proposes to define a “manufactured product” using the same language found in paragraph (1) of the definition of the term in Part 184. For consistency, FHWA intends to apply this provision in the same way as applied by OMB in Part 184. For example, products brought to the work site in an unprocessed or minimally processed state, such as topsoil, compost, and seed, would not be considered manufactured products. *See* 88 FR at 57769. Similarly, non-manufactured or raw

materials mixed off of the work site with other non-manufactured or raw materials of similar types would not necessarily result in the mixed material brought to the work site being classified as a manufactured product if it remains in an unprocessed or minimally processed state, such as minimally-processed fill dirt. *See id.*

The FHWA notes that its proposal omits references to construction materials that are found in Part 184. The FHWA does not believe it necessary to refer to construction materials in this proposed rulemaking because 23 U.S.C. 313 does not cover construction materials. Since § 70915(b) of BABA directs OMB to issue the applicable standards with respect to determining when a construction material is produced in the United States for the purposes of BABA, FHWA and its recipients will follow the applicable OMB standards and guidance for construction materials.

The FHWA is also proposing to make clear that excluded materials, defined in proposed § 635.410(c)(1)(iii), are not, on their own, manufactured products. The FHWA would not consider excluded materials to be manufactured products and apply the proposed Buy America requirements for manufactured products if the excluded materials have not been combined with different excluded materials, or other materials, to create a manufactured product. *See* 88 FR 57772. This is also consistent with paragraph (2) of the definition of “manufactured product” in Part 184.

In terms of these excluded materials, FHWA received many comments in the 2023 RFC expressing confusion over the legal effect of § 70917(c) of BABA. By stating that excluded materials are not manufactured products, FHWA seeks to make clear that these materials—standing alone, as delivered to the job site—are not manufactured products. Likewise, FHWA recognizes and follows the OMB guidance specifying that

these materials, standing alone, as delivered to the job site are not construction materials either, as provided in § 70917(c) of BABA. *See* 88 FR 57771.

In alignment with Part 184, FHWA intends this rulemaking to mean that excluded materials, as defined in proposed § 635.410(c)(1)(iii), when combined together with other materials, including other excluded materials, could result in the creation of a manufactured product. *See id.* at 57772. If the individual excluded material is combined with other excluded materials and non-minor additions of other materials before it is brought to the work site, then the new product should be classified as a manufactured product and the excluded materials should be treated as components of the manufactured products. Therefore, like all other components of manufactured products, when excluded materials are components of a manufactured product, they would generally be included in the determination of whether a manufactured product is Buy America-compliant under FHWA's proposed standards.

For example, in alignment with Part 184, the combination of excluded materials and other materials into precast concrete would not render the precast concrete exempt from domestic content procurement preferences. *See id.* at 57771. For precast concrete, FHWA believes such an item would be a manufactured product or an iron or steel item depending on its amount of iron or steel, by cost. In either case, precast concrete used in FHWA-funded projects would be subject to the applicable Buy America requirement.<sup>24</sup>

To the extent that cement and cementitious material are components of that precast

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<sup>24</sup> If considered an iron or steel item, the precast concrete would be subject to FHWA's existing Buy America requirements for iron and steel. If considered a manufactured product, as described below, FHWA is proposing that the precast concrete be subject to the proposed Buy America requirements for manufactured products and that the iron and steel be subject to FHWA's existing Buy America requirements for iron and steel.

concrete, their origin and cost would have to be considered to determine whether the precast concrete would be Buy America-compliant.<sup>25</sup> Similarly, in some cases, aggregate binding agents and additives may be treated as components of manufactured products.

While FHWA is proposing that products with excluded materials as their components would generally be considered manufactured products, in alignment with Part 184, FHWA also proposes that such excluded materials combined as an unsettled mixture without final form when reaching the work site should not be considered a manufactured product, such as in the case of wet concrete or hot mix asphalt. *See id.* The OMB noted in Part 184 that while these products might fit the same definition of “manufactured products” FHWA is proposing to use, in the sense that the mixture would have “different properties” than would the individual materials, it is more consistent with the intent of BABA to treat only such materials that have set or dried into a particular shape or form prior to reaching the work site as manufactured products. *Id.* The FHWA agrees with OMB and further intends for these proposed regulations to have the same reach as Part 184.

In particular, consistent with Part 184, FHWA proposes to make clear that concrete and asphalt mixtures delivered to a job site without final form for incorporation into a project shall not be considered a manufactured product. As provided in Part 184:

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<sup>25</sup>The FHWA acknowledges that Congress eliminated a Buy America requirement regarding cement originally included in the 1983 STAA in 1984. *See* Public Law 98-229. The FHWA therefore believes it would be questionable to apply a domestic content procurement preference to cement. As noted above, FHWA does not intend to apply any domestic content procurement preference to cement standing alone, either as a manufactured product or as a construction material under BABA. The FHWA does not believe the removal of cement from the 1983 STAA, however, means that cement must be exempted from Buy America requirements even if included in a manufactured product. The FHWA believes the language of the 1983 STAA can be interpreted to refer to cement as a category of product. Its elimination therefore removes the ability of FHWA to apply a Buy America requirement to cement as a category of product. It says nothing about FHWA’s ability to consider it as a component of a manufactured product.

“OMB further clarifies in this preamble that wet concrete should not be considered a manufactured product if not dried or set prior to reaching the work site. The setting or drying of a combination of section 70917(c) materials into a finished product prior to reaching the work site is generally the circumstance in which a combination of only section 70917(c) materials would be considered a manufactured product.” *See id.* at 57772.

**§ 635.410(c)(1)(v) – Definition of “Manufacturer”**

For the purposes of defining the term “manufacturer” as it is used in § 635.410(c)(3), FHWA is proposing to use the definition found in Part 184 at 2 CFR 184.3. The FHWA believes this definition is simple and provides clarity on how to distinguish between the manufacturer of the finished manufactured product and the manufacturer of the components that go into that product.

**§ 635.410(c)(1)(vii) – Definition of “Produced in the United States”**

For the reasons stated in Section V, above, FHWA proposes to adopt the definition for “produced in the United States” for manufactured products found in § 70912(6)(B) of BABA, as implemented by OMB in Part 184 at 2 CFR 184.3.

**§ 635.410(c)(2) – Classification**

*Single Classification of Materials*

In § 635.410(c)(2), FHWA is proposing to make clear, consistent with Part 184, that an article, material, or supply should only be classified as either an iron or steel product, manufactured product, or another category specified by law or found in 2 CFR part 184. With two exceptions, discussed in more detail below, this means that an article, material, or supply cannot fall into multiple categories, i.e., be classified as both an iron

or steel product and a manufactured product. While this proposed regulation would only apply requirements to iron or steel materials and manufactured products, as those are the only materials covered under 23 U.S.C. 313, FHWA is proposing this provision to differentiate iron or steel materials, manufactured products, and other materials referred to in law or in Part 184, such as excluded materials, as defined in proposed § 635.410(c)(1)(iii) and known as section 70917(c) materials in Part 184, and construction materials, which may be subject to their own domestic content procurement preference. In alignment with Part 184, FHWA does not intend to subject a material to multiple Buy America requirements. Nor does FHWA intend to subject a material to a Buy America requirement and the requirement of another domestic content procurement preference, such as requirements for construction materials found in Part 184. The FHWA similarly does not intend materials to be subject to a Buy America requirement and the same domestic content procurement preference under BABA. For example, manufactured products would be subject only to FHWA's proposed standards, not both FHWA's proposed standards and the standards under BABA and Part 184. In general, FHWA agrees with Part 184 that applying multiple requirements to a single product is unnecessarily burdensome.

For instance, except as provided below, FHWA does not generally intend for a manufactured product with limited iron or steel content to be subject to both requirements for iron or steel products and manufactured products. Conversely, FHWA does not intend for a predominantly iron or steel manufactured product, when classified as an iron or steel product, to be subject to the proposed standards for manufactured products. Under FHWA's proposed § 635.410(c)(2), any products meeting the definition of a

manufactured product would need to comply with the proposed standards for manufactured products while products meeting the definition of an iron or steel product would continue to comply with FHWA's existing standards for iron or steel products found in 23 CFR 635.410(b).

Nor does FHWA intend for materials properly classified as construction materials under Part 184 to be subject to FHWA's Buy America requirements. The FHWA is not proposing to have this regulation cover the requirements applicable to construction materials. Instead, FHWA intends for properly classified construction materials to be solely subject to the requirements in BABA and Part 184. Iron or steel products and manufactured products that may contain construction materials, however, would still be subject to the applicable FHWA Buy America requirement. In such cases, FHWA does not intend for such components of the iron or steel product or manufactured product to be subject to BABA's construction material requirements.

Finally, FHWA intends this provision to make clear, as mentioned above in the discussion of proposed § 635.410(c)(1)(iv), that excluded materials, standing alone, would not be subject to FHWA's Buy America requirements for manufactured products. Excluded materials, known as section 70917(c) materials in Part 184, are a category of products specified in 2 CFR part 184. The proposed language would indicate that a material could only be classified as either an excluded material or manufactured product; an excluded material could therefore not be a manufactured product by itself.

However, for two particular kinds of manufactured products, FHWA is proposing additional requirements along with FHWA's proposed standards for manufactured products in order to continue FHWA's longstanding policy of requiring predominantly



iron or steel components of manufactured products to be Buy America-compliant with respect to those predominantly iron or steel components. In particular, FHWA believes this policy should be continued for (1) the iron or steel components of precast concrete; and (2) iron or steel enclosures of intelligent transportation systems and other electronic hardware systems installed in the highway right-of-way or other real property.<sup>26</sup> The FHWA believes that these products are regularly used in highway construction projects and manufacturers have formed longstanding supply chains to incorporate Buy America-compliant iron or steel components into them. Where these products are considered manufactured products, FHWA proposes that the product must meet the standard for a manufactured product. In addition, unlike all other manufactured products, FHWA is proposing to require the specified iron or steel components of these two products to be compliant with FHWA's existing Buy America requirements for iron and steel. However, to minimize any burden and give credit for using an American-made iron or steel product, FHWA proposes to include the cost of these iron or steel components in the determination of whether 55 percent of the product's components, by cost, are produced in the United States.

Besides the two exceptions noted above for precast concrete and iron or steel enclosures of intelligent transportation systems and other electronic hardware systems installed in the highway right-of-way or other real property, FHWA intends § 635.410(c) to possess the same meaning as 2 CFR 184.4(e). The FHWA also believes its proposed language makes clear that a material incorporated into an infrastructure project must meet

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<sup>26</sup>The FHWA notes that these requirements would only apply if the precast concrete or electronic hardware systems were classified as manufactured products. If they were classified as iron or steel products, such products would need to comply with FHWA's existing Buy America requirements for iron or steel.

the Buy America requirement only for the single category in which it is classified, as generally stated in 2 CFR 184.4(f). Materials would be classified as either (1) iron or steel materials and subject to FHWA's existing Buy America requirements for iron or steel found in 23 CFR 635.410(b); (2) manufactured products and subjects to the proposed Buy America requirements for manufactured products; or (3) manufactured products that are also either precast concrete or iron or steel enclosures of intelligent transportation systems and other electronic hardware systems installed in the highway right-of-way or other real property and subject to the proposed Buy America requirements for manufactured products and FHWA's existing Buy America requirements for specified iron or steel components of these two products.

*Categorization at the Work Site*

The FHWA proposes § 635.410(c)(2) to specify that the classification of an article, material, or supply as being either an iron or steel product or a manufactured product must be based on its status at the time it is brought to the work site for incorporation into an infrastructure project. The FHWA believes it is important to determine when the classification of materials occurs, as some manufactured products might include steel and iron. Depending on when a product is classified for the purpose of applying FHWA's Buy America requirements, the iron or steel component of a manufactured product could be classified as a separate material, and thus be subject to FHWA's Buy America requirements for iron and steel.

To provide consistency, FHWA is proposing this standard to align with the standard used by OMB in Part 184 at 2 CFR 184.4(e). The FHWA does not intend this language to mean that FHWA will conduct a compliance check to see if a product is Buy

America-compliant when it is brought to the work site; FHWA only intends this language to describe when a product will be categorized as either an iron or steel product or a manufactured product for the purpose of determining which Buy America requirement applies.

#### **§ 635.410(c)(3) – Cost of a Component**

The FHWA is proposing to adopt the standards, unchanged, used in Part 184 at 2 CFR 184.5 to determine the cost of a given component. The FHWA believes that this standard properly includes activities that directly connect to the goals of FHWA’s Buy America provision to increase domestic manufacturing. The FHWA also notes that 23 U.S.C. 313(c) specifically states that for the purposes of 23 U.S.C. 313, in calculating components’ costs, labor costs included in final assembly must not be included in the calculation.

#### **§ 635.410(c)(4) – Severability**

The FHWA is proposing to add a new § 635.410(c)(4) that contains a severability clause applicable to the proposed Buy America requirements for manufactured products made by this proposed rule in § 635.410(c). The FHWA believes that the proposed amendments to § 635.410(c) are capable of operating independently of one another. If one or more aspects of the proposed Buy America requirements for manufactured products are determined to be invalid, the remaining provisions should remain unaffected and in force.

### **VII. Rulemaking Analysis and Notices**

**Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures**

The OMB has determined that the proposed rule would be a significant regulatory action within the meaning of E.O. 12866, as amended by the E.O. 14094.

The preliminary regulatory impact analysis (PRIA) supports this proposed regulation and analyzes the costs and benefits associated with establishing Buy America requirements for manufactured products.

The expected benefits of the proposed rule relate to protecting and expanding domestic manufacturing, increasing supply chain resiliency, and increasing consistency in applying domestic content procurement preferences for manufactured products between FHWA and other Federal Agencies that are subject to the requirements of BABA. None of these benefits have been quantified.

The costs of the proposed rule relate to increased material costs for manufactured products used in highway construction projects, project delay, and the administrative costs to FHWA and recipients of FHWA financial assistance. At this time, FHWA is only able to quantify costs for the increased materials costs and the administrative costs to the FHWA. The FHWA's estimates of those increased material costs for manufactured products permanently incorporated into FHWA-funded projects range from a high of roughly \$737 million per year to a low of \$45 million. The wide range stems from the difficulty in estimating (1) the fraction of inputs to highway construction that are manufactured products; (2) the fraction of manufactured products that are currently domestically supplied but which fail to meet the proposed rule's requirement that 55

percent of the product's components, by cost, are mined, produced, or manufactured in the United States; and (3) the likely price premiums for purchasing manufactured products that would be compliant with the proposed rule compared to manufactured products currently used in FHWA-funded projects that would not be. The FHWA estimates an additional \$167,000 per year in increased FHWA administration costs to cover the salary and employer-provided benefits of an additional Federal employee to administer the Buy America program. The other administrative costs to recipients of FHWA financial assistance and the costs associated with project delivery delay have not been quantified.

The full regulatory impact analysis is available in the docket. The FHWA is seeking comment on assumptions that were developed as part of the PRIA, as well as information on other benefits or costs that would result from implementation of the rule.

This rule will not adversely affect in a material way the economy, any sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or Tribal governments or communities. These changes do not create a serious inconsistency with any other Agency's action or materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

### **Regulatory Flexibility Act**

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), FHWA has evaluated the effects of this proposed rule on small entities and has determined that it is not anticipated to have a significant economic impact on a substantial number of small entities. This proposed rule would impose Buy America requirements for manufactured products on recipients of FHWA financial assistance

including States, local governments, and other grant recipients. These recipients are primarily States, who are not included in the definition of small entity set forth in 5 U.S.C. 601. The FHWA believes the projected impact upon small entities that utilize FHWA funding would be negligible. To the extent the revisions require expenditures by State, local governments, and other grant recipients on Federal-aid projects, they are reimbursable. Small entities that may be impacted indirectly by a rulemaking are not subject to analysis under the Regulatory Flexibility Act, see *Mid-Tex Electric Cooperative, Inc. v. Federal Energy Regulatory Commission*, 773 F.2d 327 (D.C. Cir 1985). Therefore, FHWA certifies that the proposed action would not have a significant economic impact on a substantial number of small entities.

#### **Unfunded Mandates Reform Act of 1995**

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48). Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires Federal Agencies to prepare a written statement, which includes estimates of anticipated impacts, before proposing “any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year.” The current threshold after adjustment for inflation is \$177 million, using the most current (2022) Implicit Price Deflator for the Gross Domestic Product. The definition of “Federal mandate” in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal-

aid highway program permits this type of flexibility. Further, in compliance with the Unfunded Mandates Reform Act of 1995, FHWA will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, and Tribal governments, and the private sector.

### **Executive Order 13132 (Federalism)**

The E.O. 13132 requires Agencies to ensure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The FHWA has analyzed this proposed rule in accordance with the principles and criteria contained in E.O. 13132. The FHWA has determined that this proposed rule would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA has also determined that this proposed rule would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

### **Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), Federal Agencies must obtain approval from OMB for each collection of information they conduct, sponsor, or require through regulations. The FHWA has determined that the proposed rule does not contain collection of information requirements for the purposes of the PRA.

### **National Environmental Policy Act**

The FHWA has analyzed this proposed rule pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and has determined that it is categorically excluded under 23 CFR 771.117(c)(20), which applies to the promulgation of rules, regulations, and directives. Categorically excluded actions meet the criteria for categorical exclusions under the Council on Environmental Quality regulations and under 23 CFR 771.117(a) and normally do not require any further NEPA approvals by FHWA. This proposed rule would establish Buy America requirements for manufactured products. The FHWA does not anticipate any adverse environmental impacts from this proposed rule, and no unusual circumstances are present under 23 CFR 771.117(b).

**Executive Order 13175 (Tribal Consultation)**

The FHWA has analyzed this proposed rule in accordance with the principles and criteria contained in E.O. 13175, “Consultation and Coordination with Indian Tribal Governments.” The FHWA does not believe that the proposed rule would have substantial direct effects on one or more Indian Tribes; would not impose substantial direct compliance costs on Indian Tribal governments; and would not preempt Tribal laws. Therefore, a Tribal summary impact statement is not required.

**Executive Order 12898 (Environmental Justice)**

The E.O. 12898 requires that each Federal Agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations. The FHWA has determined that this proposed rule does not raise any environmental justice issues.



### **Regulation Identification Number**

A RIN is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in spring and fall of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

### **Rulemaking Summary, 5 U.S.C. 553(b)(4)**

As required by 5 U.S.C. 553(b)(4), a summary of this rule can be found in the Abstract section of the Department's Unified Agenda entry for this rulemaking at [<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=2125-AG13>].

### **List of Subjects in 23 CFR Part 635**

Grant programs – transportation, Highways and roads, Reporting and recordkeeping requirements

Issued on:

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Shailen P. Bhatt  
Administrator  
Federal Highway Administration

For the reasons stated in the preamble, FHWA proposes to amend 23 CFR part 635, as follows:

### **PART 635—CONSTRUCTION AND MAINTENANCE**

1. The authority citation for part 635 continues to read as follows:

**Authority:** Sections 1525 and 1303 of Pub. L. 112-141, Sec. 1503 of Pub. L. 109-59, 119 Stat. 1144; 23 U.S.C. 101 (note), 109, 112, 113, 114, 116, 119, 128, and 315; 31 U.S.C. 6505; 42 U.S.C. 3334, 4601 *et seq.*; Sec. 1041(a), Pub. L. 102-240, 105 Stat. 1914; 23 CFR 1.32; 49 CFR 1.85(a)(1).

**Subpart D – General Material Requirements**

2. Amend § 635.410 by:

a. removing the word “State” and adding, in its place, the word “recipient” in paragraphs (b)(2), (b)(3), and (d); and

b. removing the words “steel and iron materials” and “steel or iron materials” and adding, in their place, the words “iron or steel products” in paragraphs (b)(1)(i), (b)(1)(ii), (b)(2), (b)(3), (b)(3)(i), (b)(3)(ii), and (b)(4); and

c. revising paragraph (c) to read as follows:

**§ 635.410 Buy America requirements.**

\* \* \* \* \*

(c) No Federal-aid highway construction project is to be authorized for advertisement or otherwise authorized to proceed unless the manufactured products used and permanently incorporated in such project are produced in the United States. To meet this requirement, the manufactured product must meet the following:

(1) The following definitions apply to this section:

(i) *Component* means an article, material, or supply, whether manufactured or unmanufactured, incorporated directly into a manufactured product or, where applicable, an iron or steel product.

(ii) *Excluded materials* means *Section 70917(c) materials* as defined in 2 CFR 184.3.

(iii) *Iron or steel products* means articles, materials, or supplies that consist wholly or predominantly of iron or steel or a combination of both.

(iv) *Manufactured products* means articles, materials, or supplies that have been processed into a specific form and shape, or combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies. If an item is classified as an iron or steel product, an excluded material, or other product category as specified by law or in 2 CFR part 184, then it is not a manufactured product. However, an article, material, or supply classified as a manufactured product may include components that are iron or steel products, excluded materials, or other product categories as specified by law or in 2 CFR part 184. Mixtures of concrete or asphalt delivered to a job site without final form for incorporation into a project are not a manufactured product.

(v) *Manufacturer*, in the case of manufactured products, means the entity that performs the final manufacturing process that produces a manufactured product.

(vi) *Predominantly of iron or steel or a combination of both* means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings

utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components.

(vii) *Produced in the United States*, in the case of manufactured products, means:

(A) The product was manufactured in the United States; and

(B) The cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product.

(2) An article, material, or supply shall only be classified as an iron or steel product, a manufactured product, or other products as specified by law or in 2 CFR part 184. An iron or steel product must meet the requirements of paragraph (b). Except as otherwise provided in this paragraph, an article, material, or supply shall not be considered to fall into multiple categories. In some cases, an article, material, or supply may not fall under any of the above-listed categories. The classification of an article, material, or supply as falling into one of the categories listed in this paragraph must be made based on its status at the time it is brought to the work site for incorporation into an infrastructure project. In general, the work site is the location of the infrastructure project at which the iron or steel product or manufactured product will be incorporated.

(i) With respect to precast concrete products that are classified as manufactured products, components of precast concrete products that are manufactured predominantly of iron or steel or a combination of both shall meet the requirements of paragraph (b). The cost of such components shall be included

in the applicable calculation for purposes of determining whether the precast concrete product is produced in the United States.

(ii) With respect to intelligent transportation systems and other electronic hardware systems that are installed in the highway right of way or other real property and classified as manufactured products, the cabinets or other enclosures of such systems that are manufactured predominantly of iron or steel or a combination of both shall meet the requirements of paragraph (b). The cost of cabinets or other enclosures shall be included in the applicable calculation for purposes of determining whether systems referred to in the preceding sentence are produced in the United States.

(3) In determining whether the cost of components for manufactured products is greater than 55 percent of the total cost of all components, recipients shall determine the cost as follows:

(i) For components purchased by the manufacturer, the acquisition cost, including transportation costs to the place of incorporation into the manufactured product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(ii) For components manufactured by the manufacturer, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (a) of this section, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the manufactured product.

(4) The provisions of this § 635.410(c) are separate and severable from one another and from the other provisions of this section. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.

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