

ALERT

BEAD Program: NTIA Issues Limited Waiver of 'Build America, Buy America' Requirements

March 1, 2024

WHAT: On February 22, 2024, the National Telecommunications and Information Administration (NTIA) issued a final limited, general applicability, nonavailability waiver of the "Build America, Buy America" (BABA) domestic content requirement for the \$42.5B Broadband Equity, Access, and Deployment (BEAD) Program. Pursuant to the waiver, recipients and subrecipients receiving Federal financial assistance under the BEAD Program may utilize certain manufactured products and construction materials produced outside of the United States. This limited waiver also provides guidance regarding the manufacturing processes that must be performed in the U.S for certain categories of products used in BEAD deployments. The final waiver applies to all funds expended by BEAD Program award recipients for five years from the effective date of the waiver, February 22, 2024.

WHAT DOES IT MEAN FOR INDUSTRY: Under the BABA provisions of the Bipartisan Infrastructure Law, all iron and steel, manufactured products and construction materials used in federally funded infrastructure programs like BEAD must be "produced in the United States." After extensive input from various stakeholders, including more than 60 comments received on NTIA's proposed waiver, NTIA has decided to partially waive the BABA requirements for certain narrow categories of manufactured products and construction materials, based on NTIA's determination that the identified products and materials are not produced in the U.S. in sufficient and reasonably available quantities to meet the needs of the BEAD Program.

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NTIA's limited, general applicability, nonavailability waiver of the BABA requirements covers the following specific categories of materials and products used in the BEAD Program:

- Fiber Optic Cable. NTIA issued a limited waiver for "non-optic-glass inputs (e.g., an overclad cylinder)" used in fiber optic cable. NTIA also provided clarification that U.S.-made fiber optic cable may be "connectorized" outside of the U.S., and that "plastics and polymers" used in fiber optic cables are not subject to BABA. However, NTIA rejected calls to broaden the scope of the waiver to allow for the use of non-U.S. fiber, finding that broader waivers were not necessary to meet the expected demand for the BEAD Program.
- Electronics. NTIA issued a waiver for all "passive optical equipment" and "electronics" used in BEAD Program projects, except for four specific categories of electronics:
 - Optical line terminals and remote optical line terminals;
 - OLT line cards;
 - Optical pluggables;
 - Standalone Optical Network Terminals and Optical Network Units

For each of the four categories of electronics identified in the waiver, NTIA partially waived the BABA requirements, but identified specific manufacturing activities that must be performed in the U.S. (e.g., PCBA assembly, software integration, assembly, testing, quality assurance, packaging).

- Enclosures. NTIA also waived the BABA requirements for "enclosures" used to protect network equipment. In addition to providing definitions of enclosures (Cabinets, Vaults, Pedestals Closures and Terminals), NTIA also identified specific manufacturing activities that must be performed in the U.S. for each type of enclosure.

In addition to these waivers, NTIA confirmed its intent to publish a list of manufacturers that have certified (subject to fine or imprisonment for a false certification) that their products comply with BABA. NTIA also confirmed its intent to require recipients of BEAD funds to report their purchases of foreign items under the waiver. NTIA is expected to issue additional guidance on both the "self-certification" and reporting requirements.

NTIA's waiver provides important guidelines regarding the application of the relatively new BABA requirements to the BEAD Program. This guidance is in addition to the BABA rules issued by OMB in October 2023, which provide detailed standards for complying with the BABA requirements for various categories of products and materials used in infrastructure project (see our previous alert here). Recipients and subrecipients of BEAD funds, as well as suppliers of products and materials used on BEAD-funded projects, should be careful to review this guidance, as well as the terms of their specific agreements, to ensure that they understand the scope of their compliance obligations. Wiley is continuing to track developments in this complex and often-changing area, so look to this space for further updates as these changes continue to be

implemented.