## OFFICE OF MANAGEMENT AND BUDGET

## 2 CFR Parts 184 and 200

## Guidance for Grants and Agreements

**AGENCY:** Office of Federal Financial Management, Office of Management and Budget.

**ACTION:** Final rule; notification of final guidance.

**SUMMARY:** The Office of Management and Budget is revising the OMB Guidance for Grants and Agreements. The revisions are limited in scope to support implementation of the Build America, Buy America Act provisions of the Infrastructure Investment and Jobs Act and to clarify existing provisions related to domestic preferences. These revisions provide further guidance on implementing the statutory requirements and improve Federal financial assistance management and transparency.

**DATES:** The effective date for the revised guidance is October 23, 2023.

**FOR FURTHER INFORMATION CONTACT:** Please contact Callie Conroy, Office of Management and Budget, via phone at 202–395–2747; via email at *MBX.OMB.Media@OMB.eop.gov.*

**SUPPLEMENTARY INFORMATION:**

### Executive Summary

The Office of Management and Budget (OMB) is revising its guidance in title 2 of the Code of Federal Regulations (2 CFR) to add a new part 184 and revise 2 CFR 200.322. The revisions implement the requirement for the Director of OMB to issue guidance to the head of each Federal agency to assist in the implementation of the requirements of the Build America, Buy America Act (BABA), Public Law 117–58, 135 Stat. 429, 70901–70927, Nov. 15, 2021.

As required by BABA, the new part 184 of 2 CFR provides clear and consistent guidance to Federal agencies about how to apply the domestic content procurement preference (Buy America or BABA preference) as set forth in BABA to Federal awards for infrastructure projects. *See* BABA 70915. For example, the new part 184 includes definitions for key terms, including iron or steel products, manufactured products, construction materials, and materials identified in section 70917(c) (section 70917(c) materials) of BABA. These definitions provide a common system for Federal agencies to distinguish between the product categories established under the statutory text in BABA. The new part also offers standards that define ''all manufacturing processes'' in the case of construction materials.

The new part 184 also includes guidance for determining the cost of components of manufactured products. The part 184 text uses a modified version of the ''cost of components'' test found in the Federal Acquisition Regulation (FAR) at 48 CFR 25.003, which is used for Federal procurement. Using this approach for determining the cost of components of manufactured products in the context of Federal financial assistance aims to provide a consistent approach for industry, with only minor modifications which are explained in this document.

The new part 184 also includes guidance on proposing and issuing Buy America waivers. For example, based on the statutory text of BABA, it restates the circumstances under which a waiver may be justified. The new part also includes guidance on the type of process that a Federal agency should implement to allow recipients to request waivers, including the process a Federal agency should follow in issuing proposed and final waivers.

The revised provision in 2 CFR part 200 specifies that Federal agencies providing Federal financial assistance for infrastructure projects must implement the Buy America preferences set forth in 2 CFR part 184, as required under section 70914(a) BABA, as of the effective date of the guidance, unless specified otherwise.

### Background

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (IIJA), Public Law 117–58, which includes BABA, at sections 70901 through 70927. BABA establishes a domestic content procurement preference for Federal financial assistance obligated for infrastructure projects. That preference is generally referred to in this document as the Buy America preference or BABA preference. The BABA preference applies to three separate product categories: (i) iron or steel products; (ii) manufactured products; and (iii) construction materials. *See* BABA 70912 and 70914.

BABA required that by May 14, 2022, the head of each covered Federal agency must ensure that ''none of the funds made available for a Federal financial assistance program for infrastructure may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States [(U.S.)].'' BABA 70914(a). BABA is consistent with this the Administration's policy in Executive Order 14005, Ensuring the Future Is Made in All of America by All of America's Workers (E.O. 14005), to ''use terms and conditions of Federal financial assistance awards . . . to maximize the use of goods, products, and materials produced in, and services offered in, the [U.S.].''

BABA requires OMB to issue guidance to the head of each Federal agency to ''assist in applying new domestic content procurement preferences.'' BABA 70915. BABA also allows OMB to amend 2 CFR, if necessary, to provide guidance to Federal agencies on imposing the Buy America preference through the terms and conditions of Federal awards. *Id.*

On April 18, 2022, OMB released M–22–11, entitled ''Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure'' (Memorandum M–22–11). Memorandum M–22–11 provided initial implementation guidance to Federal agencies on the application of the Buy America preference to Federal financial assistance programs for infrastructure, the Buy America waiver process, and other topics. Memorandum M–22–11 also provided ''preliminary and non-binding'' guidance on the definition of ''construction materials'' and associated standards for determining when all manufacturing processes of the construction material occur in the U.S. while OMB obtained stakeholder input to refine that definition and the associated standard for ''all manufacturing processes'' for each construction material.

On April 21, 2022, OMB issued a Notice of Listening Session(s) and Request for Information (RFI) in the **Federal Register**, which explained that OMB was beginning the process of seeking public input for its revised guidance and standards for construction materials. 87 FR 23888 (Apr. 21, 2022).

On February 9, 2023, OMB issued a Notification of Proposed Guidance in the **Federal Register**, which explained that OMB was proposing a new part 184 in 2 CFR chapter I to support implementation of BABA and clarify existing provisions in 2 CFR 200.322. 88 FR 8374 (Feb. 9, 2023).

In accordance with BABA, through this document, OMB is now amending 2 CFR, subtitle A, chapter I by adding a new part 184 to support implementation of BABA. OMB is also amending 2 CFR 200.322 to clarify existing provisions within part 200. The guidance in part 184 is intended to improve consistency in the implementation of BABA requirements across the Federal Government.

Prior to the effective date of the part 184 guidance, OMB will also issue an updated M-Memorandum to replace Memorandum M–22–11. The purpose of the update to Memorandum M–22–11 is to remove direct conflicts between Memorandum M–22–11 and the revised guidance in part 184. Parts and provisions of Memorandum M–22–11 that do not directly conflict with the revised guidance will generally be retained. OMB intends to issue the successor M-Memorandum before the effective date of the new part 184. OMB also intends the updated M-Memorandum to become effective concurrently with part 184. The updated M-Memorandum will continue to provide supplemental guidance to Federal agencies on implementation of BABA, which OMB did not believe was needed in the more succinct part 184 text. Sometimes, when OMB refers to Memorandum M–22–11 in this document, it refers to the initial guidance contained in Memorandum M–22–11, which OMB intends to carry over to the updated M-Memorandum except in cases of direct conflict.

OMB also notes, as explained in response to several commenters, that part 184 is not intended as comprehensive guidance on all topics related to the implementation of BABA. Instead, part 184 is intended to be high-level coordinating guidance for Federal agencies to use in their own direct implementation of BABA, as required under section 70914 of BABA. The guidance will help to ensure clear and consistent application of the key requirements under the statutory text. It is not possible for OMB to issue comprehensive guidance on every issue that may arise for different Federal agencies in the context of directly implementing their own unique Federal financial assistance programs, or on all topics raised by commenters, some of which are beyond the scope of what OMB intended to include in part 184.

BABA is a new and complex statute, which became effective in 2022. As such, establishing governmentwide guidance on these new statutory requirements has been an iterative process. OMB issued initial guidance in 2022 through Memorandum M–22–11. Following notice and comment, OMB is announcing revised guidance, which complements the initial guidance and, following the effective date, replaces it in cases of direct conflict. Federal agencies, in directly implementing BABA, may issue further guidance and provide further information to their recipients and other stakeholders on their own Federal financial assistance programs for infrastructure. OMB may also issue additional guidance in the future as it receives additional stakeholder feedback from Federal agencies, recipients of Federal awards, contractors, manufacturers, labor organizations, suppliers, industry associations, and others on this guidance. The revised guidance OMB announces in this document is an important next step in OMB's efforts to provide guidance to Federal agencies on implementing the statutory requirements in a coordinated way. The revised guidance is also an important step toward achieving this Administration's policy objectives set forth in E.O. 14005.

**Statutory Authority for Final Guidance**

OMB is required by section 70915(a) of BABA to issue guidance to the head of each Federal agency to assist in applying new Buy America preferences under section 70914 of BABA. Section 70915(a) of BABA also instructs OMB to, if necessary, amend subtitle A of title 2, Code of Federal Regulations (or successor regulations), to ensure that domestic content procurement preference requirements required under BABA or other Federal law are imposed through the terms and conditions of awards of Federal financial assistance.

OMB is also required by section 70915(b) of BABA to issue standards that define ''all manufacturing processes'' in the case of construction materials. While Memorandum M–22–11 provided ''preliminary and non-binding'' guidance on the definition of ''construction materials,'' the new part 184 includes OMB's standards for ''all manufacturing processes'' for the manufacture of construction materials. In issuing standards, BABA requires OMB to ensure that each manufacturing process required for the manufacture of the construction material and the inputs of the construction material occurs in the U.S. Section 70915(b) of BABA also requires OMB to take into consideration and seek to maximize the direct and indirect jobs benefited or created in the production of the construction material. The standards set forth in the revised guidance are based on industry feedback, agency consultation, and public comments received in response to the proposed guidance for each construction material as detailed further below.

**Need for This Final Guidance**

The new part 184 provides guidance to Federal agencies on how to implement the BABA requirements and standards in a consistent and coordinated way. In addition to providing clarity to Federal agencies and recipients of federally funded infrastructure project awards, this part will help to send clear market signals to the industries manufacturing products about what is needed to satisfy the BABA requirements.

The congressional findings at section 70911 of BABA (Findings) recognize several policy justifications for establishing Buy America preferences. The policy rationale in the Findings includes creating demand for domestically produced goods, helping to develop and sustain domestic manufacturing, and supporting millions of domestic manufacturing jobs. Congress also recognized that a robust domestic manufacturing sector is a vital component of the national security of the U.S. In addition, Congress recognized the importance of supporting domestic manufacturers that meet commitments of the U.S. to environmental, worker, and workplace safety protections; and in reinvesting tax dollars in companies and processes using the highest labor and environmental standards in the world. These justifications are consistent with the polices of this Administration set forth in E.O. 14005 to use terms and conditions of Federal awards to maximize the use of goods, products, and materials produced in, and services offered in, the U.S.

The revised guidance announced by OMB in this document adopts a unified scheme addressing how each covered Federal agency should apply the Buy America preference established by section 70914 of BABA to Federal awards for infrastructure. This includes providing key definitions and other provisions on how to classify products in the categories established under BABA. The revised guidance also includes other provisions providing manufacturing standards for each identified construction material. OMB is committed to ensuring strong and effective Buy America implementation consistent with BABA, other applicable law, and E.O. 14005.

**Summary of Comments**

On February 9, 2023, OMB solicited feedback from the public through proposed guidance published in the **Federal Register** on February 9, 2023. *See* 88 FR 8374 (Feb. 9, 2023). The period for public comments closed on March 13, 2023. Comments were received via *Regulations.gov* at Docket No. OMB–2023–0004. OMB received approximately 1,950 public comments from a broad range of interested stakeholders, such as States and State departments of transportation, local governments, manufacturers, labor

organizations, suppliers, construction contractors, industry associations, universities, foreign governments, and individuals.

**Section-by-Section Discussion**

OMB developed this revised guidance following review and consideration of comments received on the notification of proposed guidance. In this document, OMB summarizes significant comments received in response to its proposal and any substantive changes made to each section of the revised guidance. Minor changes to the language of the guidance are not addressed in all cases. These include minor plain language revisions, the addition of paragraph headings, and other minor editorial changes in the part 184 text. For sections where no substantive changes are discussed, the substantive proposal from the notification of proposed guidance was adopted.

**Summary of Significant Changes Made in This Final Guidance as Compared to the Proposed Guidance**

Section 184.1 was revised to clarify that the policy in the part 184 text applies to products ''incorporated into'' an infrastructure project. This is consistent with OMB Memorandum M–22–11 and other sections of the part 184 text. A similar change was also made to the definition of ''Buy America Preference'' in § 184.3.

Section 184.2 was revised to further clarify the non-applicability of part 184 to certain existing Buy America preferences. Section 184.2 was also revised to add an effective date for part 184, a modified effective date for certain projects, and a severability clause.

Section 184.3 was revised to modify certain definitions and add new ones.

The definition of ''construction materials'' at § 184.3 was revised to apply to ''only one'' of the listed materials. The list of construction materials was expanded to include engineered wood. Text was added to clarify that drop cable is included within the meaning of fiber optic cable. Language relating to minor additions was also added to the second paragraph of the definition.

The definition of ''manufactured products'' at § 184.3 was revised to provide an affirmative definition for the term instead of just explaining, in the negative, what the term does not include. The negative element of the definition was moved to the second paragraph of the definition. The second paragraph of the definition also includes clarifying language on items that may be considered components of a manufactured products.

Section 184.3 was also revised to add definitions for terms including component, manufacturer, predominantly of iron or steel or a combination of both, and section 70917(c) materials.

Section 184.4 was revised to provide additional guidance on the categorization of articles, materials, and supplies and how to apply of the Buy America preference by item category.

Section 184.5 includes minor changes in terminology but in substance remains similar to the proposed guidance.

Section 184.6 was revised to modify the manufacturing standard for certain construction materials including fiber optic cable. The standard for fiber optic cable was revised to clarify that it incorporates the standards for glass and optical fiber. The standard for plastic and polymer-based products was modified slightly to incorporate the proposed standard for composite building materials, which are a sub-category of plastic and polymer-based products. Because composite building materials are intended as a sub-category of plastic and polymer-based products, the standalone standard for composite building materials was eliminated. A new paragraph (b) was added to clarify that, except as specifically provided, only a single standard applies to a single construction material.

A few editorial changes were made to § 184.7 to provide clarity on the process for requesting and issuing waivers.

**Summary of Significant Changes Made in This Final Guidance as Compared to the Initial Guidance in Memorandum M–22–11**

Section 184.2 modifies existing guidance in Memorandum M–22–11 by providing an effective date for part 184.

Section 184.3 modifies existing guidance in Memorandum M–22–11 by modifying certain existing definitions and adding new ones.

The definition of ''construction materials'' at § 184.3 remains similar to Memorandum M–22–11 in applying to ''only one'' of the listed materials, but further clarifying language is now provided including the second paragraph on minor additions. The list of construction materials is expanded to include fiber optic cable (including drop cable), optical fiber, and engineered wood.

The definition of ''manufactured products'' at § 184.3 modifies existing guidance in Memorandum M–22–11 by providing an affirmative definition for the term as explained above in the summary of changes relative to the proposed guidance. Other clarifying language is also provided including on how to categorize products that could fall into multiple categories and on what items may be considered components of manufactured products.

Section 184.3 also modifies existing guidance in Memorandum M–22–11 by adding definitions for terms including ''component,'' ''manufacturer,'' ''predominantly of iron or steel or a combination of both,'' and ''section 70917(c) materials.''

Section 184.4 modifies existing guidance in Memorandum M–22–11 to provide additional guidance on the categorization of articles, materials, and supplies and how to apply the Buy America Preference by category.

Section 184.5 modifies existing guidance in Memorandum M–22–11 by offering more detail on how Federal agencies should implement the cost of components test.

Section 184.6 modifies existing guidance in Memorandum M–22–11 by providing revised manufacturing standards for each listed construction material, including materials that were not included in Memorandum M–22–11 such as fiber optic cable, optical fiber, and engineered wood.

A few editorial changes were made, but §§ 184.7 and 184.8 otherwise remain similar to existing guidance in Memorandum M–22–11.

**General Comments—Consistency and Uniformity for Buy America Requirements**

Many commenters emphasized the need for Federal agencies to apply and implement Buy America preferences in a consistent manner. For example, some commenters urged OMB to preserve the existing body of regulations, interpretations, and determinations related to Federal domestic content preferences as much as possible. Some commenters suggested using definitions already in use under the FAR in the procurement context or using existing Buy America standards implemented by specific Federal agencies with Buy America requirements that existed prior to passage of BABA in 2021. Other commenters suggested maintaining continuity with existing BABA guidance provided by OMB in Memorandum M–22–11.

Other commenters explained that further clarity was needed in the guidance on a variety of specific topics to ensure consistent application by Federal agencies. For example, some suggested establishing a unified certification process for Buy America compliance. Others suggested operational improvements to the Buy America waiver process, such as streamlining and expediting the waiver

process. Other commenters suggested creating a website or database of BABA approved materials or manufacturers. Some also suggested granting broad waivers for certain types of projects (for example, water projects), programs (for example, Broadband Equity, Access, and Deployment (BEAD)), or products (for example, commercial off the shelf (COTS) items).

*OMB Response:* In general, OMB agrees with commenters on the value of consistent implementation of Buy America requirements. OMB believes the guidance it issues in this document will help to achieve this. OMB will also continue to convene inter-agency workgroups on a recurring basis to ensure, to the extent possible, that Federal agencies implement BABA in a consistent, uniform, efficient, and transparent manner.

In the revised guidance, OMB has aimed to provide general consistency with certain provisions in the FAR. For example, see discussion below of the definition of ''predominantly of iron or steel or a combination of both'' in § 184.3, the ''brought to the work site'' language added in § 184.4, and the ''cost of components'' test used in § 184.5. However, the Buy America requirements established by Congress under BABA are not identical to the Buy American Act requirements implemented in the FAR. The FAR implements the Buy American Act (BAA) (41 U.S.C. 8301–8305). BAA applies to direct Federal procurement—what the Federal Government buys for its own use. By contrast, BABA applies to Federal financial assistance for infrastructure projects—or grants, cooperative agreements, and other Federal awards that Federal agencies provide to recipients constructing such projects. *See* 2 CFR 200.1. There are many substantive differences between the BAA, implemented in the FAR, and BABA. These differences include the applicable product categories that the domestic content preferences apply to and also the standards that apply to the categories. These differences do not allow for complete consistency on all topics between the FAR and the implementing guidance for BABA in part 184. However, OMB has aimed for a reasonable degree of consistency on certain specific provisions discussed below.

OMB also recognizes that certain Federal agencies, such as the Environmental Protection Agency (EPA) and operating administrations within the U.S. Department of Transportation (U.S. DOT), including the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA), already had Buy America requirements for Federal financial assistance that applied to Federal awards for infrastructure prior to passage of BABA in 2021. OMB also recognizes that section 70917(b) of BABA states that ''[n]othing in this part affects a [BABA preference] for a Federal financial assistance program for infrastructure that is in effect and that *meets* the requirements of section 70914'' (emphasis added). This topic is addressed specifically at § 184.2(a) of the guidance, and the discussion of that provision in this preamble. Section 184.2(a) generally allows Federal agencies to maintain Buy America preferences meeting or exceeding the requirements of BABA if the preferences existed before November 15, 2021. However, to the extent existing Buy America preferences did not meet or exceed the requirements for all of the product categories under BABA, these Federal agencies must supplement their existing requirements. For example, BABA established the Buy America preference for the ''construction materials'' category, which is addressed in several sections of the new part 184 and throughout this preamble. Because the construction material category was first established under BABA—and the term is used there in a novel way—provisions of OMB's guidance offering definitions and standards related to constructions materials will be used by all Federal agencies with Federal financial assistance programs for infrastructure in their own direct implementation of BABA. *See* BABA 70912(6)(C), 70914(a), 70915(b), and 70917(b).

Regarding other comments and suggestions for greater consistency on certification procedures, a database of approved products, and other topics, OMB notes that its revised guidance in part 184 is intended to be limited in scope. Some of these topics may possibly be the subject of future guidance for OMB or individual Federal agencies, but are not addressed in the current revised guidance issued in this document. Comments on the waiver process are addressed below.

**General Comments—Burden Reduction for Grant Recipients and Industry**

Many commenters raised concerns related to the implementation of BABA requirements and the burden these requirements may impose on industry and recipients of Federal financial assistance and their contractors. For example, some of these commenters maintained that OMB's guidance on Buy America requirements may impose a burden on companies involved in constructing or providing supplies for federally funded infrastructure projects, which may lead to project delays or increased project costs. Many commenters advocated for changes to the guidance that would reduce the burden for industry. For example, some commenters maintained that OMB should avoid creating new or different definitions that would modify existing guidance in Memorandum M–22–11. These commenters stated that, in some cases, modifying existing guidance might lead to confusion, project delays, or increased project costs.

Several State departments of transportation also explained that they have expended substantial effort and resources to implement OMB's initial guidance in Memorandum M–22–11. These commenters maintained that any significant changes to the Buy America preferences would create additional administrative burden for them. For example, they noted that significant changes in how to distinguish between product categories may result in voiding existing product categorization lists created by State departments of transportation based on OMB's preliminary guidance, or in making product categorization more difficult for them. These commenters urged OMB to maintain continuity with the preliminary guidance in Memorandum M–22–11 on how to distinguish between product categories.

*OMB Response:* Responses to comments regarding the effective date for the guidance are addressed separately under § 184.2(b) below. OMB must ensure that its revised guidance enables Federal agencies to implement the Buy America requirements in a way that is consistent with the text and statutory objectives of BABA and the policy of E.O. 14005. Memorandum M–22–11 provided initial implementation guidance to Federal agencies on the application of the Buy America preference to Federal financial assistance programs for infrastructure, the Buy America waiver process, and other topics. Memorandum M–22–11 also provided ''preliminary and non-binding'' guidance on the definition of ''construction materials'' and associated standards for manufacturing processes for an interim period.

BABA requires Federal agencies to ensure that all of the iron, steel, manufactured products, and construction materials used in federally funded infrastructure projects are produced in the U.S., and directs OMB to issue guidance to assist Federal agencies in achieving this objective. BABA 70914(a) and 70915(a). Congress explained its policy rationale for the

Buy America preference in its Findings at section 70911 of BABA, which includes ensuring that entities using taxpayer-financed Federal financial assistance should give a commonsense preference for the materials and products produced by companies and workers in the U.S. BABA 70911(4). The basic statutory requirements of BABA have been effective for all covered Federal agencies since May 14, 2022.

In issuing the revised guidance, OMB is fulfilling its obligations to assist Federal agencies in implementing BABA in a manner consistent with the statutory text and the polices of this Administration set forth in E.O. 14005. Implementing the statutory Buy America preference may impose a burden on some stakeholders in some circumstances; however, clear and consistent implementation of the BABA standards also provides significant opportunity for manufacturers across the U.S. On many topics OMB's discretion is limited, such as in the case of construction material standards, which must ''require that each manufacturing process required for the manufacture of the construction material and the inputs of the construction material'' occurs in the U.S. BABA 70915(b)(2)(A).

On certain topics, OMB recognized commenters' concerns regarding how its proposed guidance could have created confusion. For example, regarding OMB's product categorization system, which is based on OMB's definitions for the three top-level product categories established by Congress in BABA, OMB discusses below in this preamble how it has aimed to maintain continuity with Memorandum M–22–11 on a key element of the definition of ''construction materials'' that several commenters were specifically concerned about. Under the revised guidance, OMB returns to its approach under M–22–11 of classifying a combination of two separate construction materials as a manufactured product except in cases where the resulting product is specifically identified by OMB in the list of construction materials at § 184.3. Consistent with the preliminary guidance, this approach, for example, results in a plastic-framed sliding window being treated as a manufactured product, and it results in plate glass, on its own, being treated as a construction material. In this case, OMB recognized the concerns raised by commenters on the proposed guidance. OMB aimed to provide a definition of ''construction materials'' that would not create additional or excessive burden while also implementing BABA in a manner consistent with the statutory intent. While recipients may likely have to make some adjustments to ensure consistency with the revised guidance, the structure of the definition of ''construction materials'' should provide a reasonable degree of continuity for State agencies with product categorization lists based on Memorandum M–22–11.

OMB acknowledges that other elements of the product category definitions, and other provisions of the final guidance, which are explained below, will have some impacts on how products are categorized under BABA relative to Memorandum M–22–11. OMB's definitions for construction materials, iron or steel products, and manufactured products are discussed in more detail below, including OMB's supporting rationale for the final definitions and changes relative to the proposed guidance and Memorandum M–22–11.

OMB also acknowledges that is has provided further specification on certain items from Memorandum M–22–11. As Memorandum M–22–11 itself explained, OMB never intended to leave all provisions of that guidance in place permanently; rather, Memorandum M–22–11 provided initial implementation guidance to Federal agencies on the application of the Buy America preference to Federal financial assistance programs for infrastructure, the Buy America waiver process, and other topics. OMB has consistently explained in public notices on BABA that revised guidance and standards would follow the initial guidance. Memorandum M–22–11 identified itself as ''initial'' implementation guidance providing ''preliminary and non-binding guidance'' with regards to construction materials. Three days after the issuance of Memorandum M–22–11, OMB issued the RFI in the **Federal Register**, which explained that OMB was beginning the process of seeking public input for its revised guidance and standards for construction materials. 87 FR 23888 (Apr. 21, 2022). Through the Notification of Proposed Guidance issued by OMB in February 2023, OMB explained that it was seeking notice and comment for this revised guidance, which now modifies 2 CFR. 88 FR 8374 (Feb. 9, 2023). To the extent OMB has made material changes to its initial policy in Memorandum M–22–11, those changes are identified in this document along with OMB's reasons for making them.

OMB has also sought, where possible, to avoid being overly prescriptive; for example, this guidance leaves significant discretion to Federal agencies to apply the term ''minor additions'' for purposes of the definition of ''construction materials'' in the context of their own Federal financial assistance programs for infrastructure.

**Section 184.1: Purpose and Policy**

Section 184.1 of the revised guidance generally restates the purpose and policy from the statutory text of BABA with minimal modification. OMB received many comments, however, on the topic of whether products and supplies temporarily used on a work site, but not permanently incorporated into an infrastructure project, would be subject to the Buy America preference. Many commenters expressed concern that OMB may have intended to modify its policy in Memorandum M–22–11 on this topic, which stated that BABA only applies to products that are ''consumed in, incorporated into, or affixed to an infrastructure project.'' For example, one commenter observed that the proposed guidance did not include an equivalent provision and requested OMB to restate this clarifying language in the revised guidance in part 184.

*OMB Response:* OMB made a slight change in § 184.1(b) to replace the phrase ''used in the project'' with ''incorporated into the project.'' The intention of this change is to clarify that OMB's policy from Memorandum M–22–11 remains unchanged under the revised guidance in part 184 relative to the distinction between temporary use and permanent incorporation. As explained above, OMB has not rescinded Memorandum M–22–11. In cases of direct conflict, certain portions of Memorandum M–22–11 will be superseded by the revised guidance on the effective date of part 184—such as the preliminary standard for construction materials standards—but other parts and provisions of Memorandum M–22–11 that do not directly conflict with the revised guidance will remain in effect. OMB intends to issue an updated M-Memorandum to replace Memorandum M–22–11. The updated version of the memorandum will be revised to remove conflicts with the revised guidance in part 184.

On the issue of permanent incorporation, Memorandum M–22–11 explained that the Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the

infrastructure project. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project, but are not an integral part of the structure or permanently affixed to the infrastructure project. This policy is not modified by the revised guidance issued in this document in part 184.

**Section 184.2: Applicability, Effective Date, and Severability**

**Section 184.2(a)—Non-Applicability of This Part to Existing Buy America Preferences**

OMB received a variety of comments on the intended meaning of this section, such as how it would apply to specific Federal agencies. For example, some commenters asked how the revised guidance would apply to agencies like FTA and FHWA with preexisting and long-standing Buy America requirements. Other commenters were confused by the purpose of this provision as it appeared in the proposed guidance.

*OMB Response:* The purpose of this provision is to identify Buy America preferences to which the revised guidance does not apply. Certain Federal agencies, such as the EPA and operating administrations within the U.S. DOT, such as FHWA and FTA, have Buy America preferences that existed prior to passage of BABA. Section 70917(b) of BABA states that ''[n]othing in this part affects a [BABA preference] for a Federal financial assistance program for infrastructure that is in effect and that *meets* the requirements of section 70914'' (emphasis added). OMB notes that BABA's savings provision specifies that existing programs must meet the requirements of section 70914 of BABA. Hence, part 184 does not apply to a Buy America preference implemented by those agencies that either meets or exceeds the requirements of section 70914 of BABA if the preference was applied to Federal awards for infrastructure projects before November 15, 2021. Other provisions of part 184, however, should be used by agencies with existing requirements if they do not have comparable standards. For example, the construction material category—with specific materials identified by OMB in this guidance—is newly created under BABA. This category should be used by agencies that continue to apply their own existing regulations and implementing guidance for other categories. Other procedural elements of the revised guidance, such as those addressing the waiver process, will also apply to all Federal agencies. Individual Federal agencies are best positioned to provide more specific information on how BABA, part 184, and their existing requirements apply to specific infrastructure projects or Federal financial assistance programs that they oversee and implement.

**Section 184.2(b) and (c)—Effective Date of This Part and Modified Effective Date for Certain Infrastructure Projects**

OMB received many comments on the effective date for the guidance. Many commenters requested OMB to provide additional time before the guidance becomes effective. For example, some of these commenters indicated that supply chains needed more time to adjust to the guidance. Other commenters indicated that they needed more time to educate and train their staff on how to comply with the guidance. Other commenters indicated that Federal agencies responsible for implementing the guidance needed additional time to update their policies and practices and that recipients and subrecipients of Federal financial assistance subject to the Federal agency policies will then need time to apply those policies and practices. Still other commenters suggested that Federal agencies needed additional time to implement changes to their waiver processes to make it more transparent and efficient before the guidance goes into effect. OMB received many other comments on similar themes asking OMB to provide a delayed effective date for all or some provisions the guidance to allow affected or potentially affected entities more time to prepare for implementation, oversight, and compliance.

Many commenters recommended that OMB adopt a phased or incremental approach that would phase-in the guidance over time. Several commenters suggested delaying implementation until the next construction season in 2024. Some commenters specifically noted concerns related to projects started prior to the effective date of BABA.

Regarding the new standards for construction materials in particular, several commenters also requested phasing-in the standards over a longer period of time or only applying them after confirming that a sufficient domestic supply is available for all Federal infrastructure projects. Again, some commenters also noted concerns about applying requirements for construction materials on projects that began prior to passage of BABA or the effective date of the statutory BABA requirements.

A number of commenters also questioned the advisability of applying the revised guidance on projects that were already in planning, design, or later implementation phases prior to its issuance, or that had received prior Federal awards either before passage of BABA or under OMB's initial guidance in Memorandum M–22–11. Some commenters questioned whether this approach would be feasible. Others stated that additional guidance was needed to reduce uncertainty for such projects. Other commenters supported rapid implementation of the BABA standards.

*OMB Response:* By statute, the Buy America preferences under BABA became effective more than a year ago on May 14, 2022. BABA 70914(a); *see also* Memorandum M–22–11. OMB explained in Memorandum M–22–11 that it was issuing ''initial'' implementation guidance, including ''preliminary'' standards, to be followed by issuance of this revised guidance. The Buy America preferences under BABA, including the preliminary and non-binding standards for construction materials under Memorandum M–22–11, have now applied to Federal financial assistance for infrastructure for over a year.

Based on guidance in Memorandum M–22–11, many Federal agencies took the opportunity to propose and issue adjustment period waivers, and waivers for previously planned projects, finding that an adjustment or phase-in period was in the public interest after the BABA requirements initially became effective on May 14, 2022. Memorandum M–22–11 provided that ''agencies should consider whether brief, time limited waivers to allow recipients and agencies to transition to new rules and processes may be in the public interest.'' These waivers provided additional time beyond the statutory effective date of May 14, 2022 for Federal agencies to implement the statutorily-required Buy America preference. For one example of such an adjustment period waiver, see the ''Temporary Waiver of Buy America Requirements for Construction Materials'' issued by the U.S. DOT in May 2022. 87 FR 31931. For agencies that took the opportunity to propose and issue adjustment period waivers, the phase-in period provided recipients of Federal financial assistance and their suppliers additional time to adjust to, and plan to comply with, the new Buy America preference established by Congress at section 70914(a) of BABA as implemented by the relevant agency.

Since May 2022, many Federal agencies have also proposed and issued other types of general applicability waivers based on OMB's guidance in M–22–11, which also eased the transition to the new statutory requirements. Consistent with examples provided in Memorandum M–22–11, these other general applicability waivers included *de minimis,* small grant, and minor component waivers that individual Federal agencies and the Made in America Office at OMB found to be in the public interest and consistent with policy following the public comment period required under BABA.

In addition to its guidance on waivers, other sections of Memorandum M–22–11 also functioned as an on-ramp for phasing-in BABA requirements. For example, Memorandum M–22–11 provided preliminary and non-binding standards for the new category of construction materials, including a preliminary definition for that term. The preliminary standards in M–22–11 were less stringent than the standards now provided in the revised guidance. Specifically, the preliminary construction material standards in Memorandum M–22–11 only covered ''the final manufacturing process and the immediately preceding manufacturing stage for the [identified] . . . material[s].'' Memorandum M–22–11 explained that, following additional stakeholder input, OMB would issue further guidance on the meaning of the term construction materials and revised manufacturing standards for each identified material consistent with section 70915(b) of BABA.

OMB has now received stakeholder input through issuance of the RFI in April 2022 and the proposed guidance in February 2023. Based on consideration of that stakeholder input and the statutory requirements under BABA, the standards provided in the revised guidance now provide specific manufacturing standards for agencies to apply to each listed construction material. Consistent with BABA, the standards now enumerate the list of ''all manufacturing processes'' to occur in the U.S. BABA 70915(b). This includes ''each manufacturing process required for the manufacture of the construction material and the inputs of the construction material.'' *Id.* A period with less stringent standards for construction materials was already provided by Memorandum M–22–11.

OMB acknowledges that it added three construction materials to its list in the revised guidance in part 184. OMB identified all three materials in the proposed guidance issued in February 2023, with fiber optic cable and optical fiber identified in the proposed part 184 text and engineered wood identified in the preamble as a material that OMB was considering for its final list. To the extent that supply chain concerns arise due to the addition of these materials, or due to the clarification of the applicability of BABA to other construction materials, a Federal agency may use the waiver process described at section 70914(a) of BABA, and in § 184.7 of the guidance, to provide additional relief on the construction materials standards set forth in the revised guidance.

In addition to providing guidance on waivers and preliminary guidance on construction materials, Memorandum M–22–11 also provided initial implementation guidance on many other topics including iron or steel products, manufactured products, the applicability of BABA, the meaning of infrastructure and infrastructure projects, and exemptions to BABA. As discussed in this preamble, OMB acknowledges that the revised guidance makes changes and adjustments on several topics relative to the initial guidance. In many cases, however, OMB believes these changes are modest or limited in scope. The revised guidance remains consistent with the statutory framework provided by Congress in November 2021 and generally consistent with the framework provided by OMB through Memorandum M–22–11 over a year ago in April 2022. Thus, the revised guidance does not represent a wholesale change or replacement of the initial guidance, but only a refinement and revision of certain elements in responses to comments that OMB received related to both the RFI and the proposed guidance. As explained above, OMB is not rescinding the guidance in Memorandum M–22–11, but it is superseded in cases of direct conflict. OMB intends to issue an updated M-Memorandum to eliminate conflicts between the two sources of guidance.

From before the May 2022 effective date of BABA through the present, OMB has actively engaged with a wide array of stakeholders including Federal agencies, manufacturers, labor organizations, suppliers, nonprofits, State and local governments, and other entities and individuals that may be affected by Federal agencies' implementation of OMB's guidance. Engagement activities included public listening sessions, public comment periods, inter-agency coordination with the Federal Government, meetings with industry, and other public engagements. OMB has carefully considered public comments received in response to the proposed guidance in developing the revised guidance in this document. OMB intends to continue active engagement with stakeholders, but does not believe that an additional phase-in period is needed beyond the phase-in period provided by Memorandum M–22–11 and the adjustment period and other waivers issued by Federal agencies. Accordingly, OMB has decided on an effective date of 60 days after publication for the revised guidance.

OMB acknowledges commenters' concerns about applying the revised guidance on projects that had received prior Federal awards under OMB's initial guidance in Memorandum M–22–11. For infrastructure projects that received prior Federal awards on or after May 14, 2022, but before the effective date of the revised guidance, OMB adds language clarifying that Federal agencies should allow a project that receives a subsequent Federal award within one year of the effective date to be subject to Memorandum M–22–11 instead of the revised guidance. In this case, the project would remain subject to the original version of Memorandum M–22–11 published on April 18, 2022, not the updated or successor version that will remove direct conflicts with part 184. The purpose of this language is to provide additional flexibility for certain projects in the implementation phase.

OMB also includes clarifying language related to projects in the category described in the preceding paragraph that make significant design or planning changes after the effective of the revised guidance. If significant design or planning changes are made to the infrastructure project, the Federal awarding agency may apply the revised guidance to the additional Federal award instead of Memorandum M–22–11. This provision recognizes that, depending on their scope or nature, design or planning changes may warrant application of the revised guidance, such as in cases where the changes introduce novel project elements that were never evaluated under Memorandum M–22–11. However, the provision leaves discretion to the agency to consider the fact-specific circumstances of the project and which guidance should be applied.

OMB also includes language to clarify that even in the case of projects that qualify to continue applying Memorandum M–22–11 to obligations within one year of the effective date, Federal agencies eventually should apply the revised guidance if the projects receive additional Federal awards after the one-year period.

OMB also acknowledges commenters' concerns about applying the revised guidance on other projects that were in the planning, design, of other phases of implementation before the effective date of the revised guidance, but which had not received prior Federal awards. OMB finds that the waiver process is generally the appropriate mechanism for additional relief on these projects. If the Federal agency finds that a waiver is justified under the circumstances—and follows the processes set forth in § 184.7 of the revised guidance—a waiver may be available. The waiver process may also be the appropriate mechanism where the revised guidance may be considered excessively disruptive and contrary to the public interest. OMB will continue working with Federal agencies to identify any additional flexibilities that agencies can deploy to address the concerns raised in the comments about timelines.

**Section 184.2(d)—Severability**

BABA requires OMB to issue coordinating guidance and standards to Federal agencies on how to apply the statutorily required Buy America preferences. BABA 70915. For the reasons discussed in the preamble, OMB believes that its decisions on all provisions and elements of the revised guidance are well-supported by its authority under BABA and should be upheld in any legal challenge. OMB also believes that its exercise of its authority in the revised guidance reflects sound policy.

In the revised guidance, OMB adopts a unified scheme addressing how each covered Federal agency will apply a Buy America preference to Federal awards for infrastructure. While the unified scheme best serves the statutory objectives of BABA if left intact as adopted by OMB, the benefits of the revised guidance related to coordination across the Federal Government do not hinge on any single element or provision of the guidance. Accordingly, OMB considers individual elements and provisions adopted in the revised guidance to be separate and severable from one another. In the event of a stay or invalidation of any element or provision of the guidance, or any element or provision as it applies to a particular person or circumstance, OMB's intent is to otherwise preserve the revised guidance to the fullest possible extent. The elements that remained in effect would continue to provide vital guidance to Federal agencies to ensure coordinated implementation of the Buy America preference set forth in BABA.

Specifically, in the event that any element or provision of the revised guidance is held to be invalid or unenforceable as applied to a particular person or circumstance, the part 184 text explains that the provision should be construed so as to continue to give the maximum effect permitted by law as applied to other persons not similarly situated or to dissimilar circumstances. If any provision is determined to be wholly invalid and unenforceable, it should be severed from the remaining provisions of the revised guidance, which should remain in effect.

Regarding its coordinating function, the product categorization system provided by the definitions of key terms in § 184.3 and other provisions in § 184.4 ensure that Federal agencies will apply the Buy America preference in consistent, uniform, efficient, and transparent manner. The revised guidance, along with Federal agencies' coordinated efforts to directly implement the guidance, will send an important signal to recipients of Federal awards, contractors, industry, and suppliers on how to comply with BABA. Congress expressly recognizes the need for coordinating guidance and standards from OMB in section 70915 of BABA.

The guidance OMB issues in this document will continue to provide necessary coordinating information to Federal agencies and stakeholders even if individual elements or provisions were stayed or invalidated. For example, although OMB believes that the final list of construction materials in § 184.3 is well-supported and sound policy, if a reviewing court issued a stay or invalidation of OMB's inclusion of any individual item on the list, Federal agencies could still continue to implement the remainder of the revised guidance. This approach would allow Federal agencies to continue to implement statutory requirements under BABA, based on OMB's coordinating guidance, pending further decisions by the court or action by OMB on the stayed or invalidated provisions. The same would also be true if a reviewing court issued a stay or invalidation of OMB's inclusion of any specific types of products or components of products under the definition of ''manufactured products.''

Similarly, the construction material standards under § 184.6 each provide important coordinating information to Federal agencies, recipients and subrecipients of Federal awards, contractors, manufacturers, suppliers, and other stakeholders in the relevant industries. If any one of the construction material standards were stayed or invalidated by a reviewing court, the remaining standards should remain in effect. For any stayed or invalidated standard, as an interim measure, for that standard only, a reviewing court could revert to the preliminary and less stringent standard for construction materials that applied under Memorandum M–22–11. In that circumstance, Federal agencies could continue to implement the remaining standards for other construction materials without interruption and meet the statutory requirements under BABA.

Many commenters also expressed concerns on the topic of whether materials identified in section 70917(c) of BABA—referred to collectively in this document as the section 70917(c) materials—should be included in the category of manufactured products. In the revised guidance, as discussed below, OMB defines the circumstances in which section 70917(c) materials may be considered components of manufactured products under the Buy America preference at section 70914(a) of BABA. In the event that a reviewing court stayed or invalidated elements of OMB's guidance as applied to section 70917(c) materials, as an interim measure those materials could be excluded from BABA coverage without impacting the remainder of the guidance. This approach would allow Federal agencies to continue to fully implement remaining provisions of the OMB guidance pending further decisions by the reviewing court or action by OMB on treatment of section 70917(c) materials.

OMB believes that it is in the interest of Federal agencies, recipients and subrecipients of Federal awards, contractors, manufacturers, suppliers, other stakeholders, and the nation as a whole to leave the final coordinating guidance in place to the fullest extent possible and permitted by law. In addition to more fully implementing the statutory requirements of BABA, the revised guidance provides common guidelines, to be implemented by Federal agencies, for all stakeholders. It also provides important market signals to industry—many of which are making significant investments in American manufacturing and production in response to these standards—which will best allow the Federal Government to achieve the statutory objectives provided by Congress under BABA.

**Section 184.3: Definitions**

**Section 184.3—Definition of Component**

OMB received many suggestions on how to define the term component, which is used in the cost of components

test in § 184.5. Many commenters believed that OMB should use the definition of component in FAR 25.003. OMB also received suggestions to provide a definition for the related term ''end product,'' in which components are incorporated. Commenters indicated that it was important to be able to distinguish between end products and their components.

*OMB Response:* OMB defines component to mean an article, material, or supply, whether manufactured or unmanufactured, incorporated directly into: (i) a manufactured product; or, where applicable, (ii) an iron or steel product. This definition is a modified form of the definition used at FAR 25.003. The definition recognizes that the term component is used in the revised guidance in the context of both manufactured products and iron or steel products. Although the revised guidance does not directly use the term end product, the process for identifying end products—as distinguished from components—is generally addressed at § 184.4, at paragraphs (e) and (f), and in the associated preamble text in this document.

**Section 184.3—Definition of Construction Materials—General**

OMB received many comments on its proposed definition of ''construction materials.'' Some commenters stated that OMB should include only materials specifically listed in the Findings in section 70911(5) of BABA. Some of these commenters maintained that OMB did not have statutory authority to expand the list beyond the specific items mentioned in the Findings.

Other commenters urged OMB to more closely adhere to the definition of construction materials provided in Memorandum M–22–11. For example, one commenter expressed concern that the newly proposed definition would expand the scope of covered construction materials far beyond the initial guidance. This commenter observed that the proposed definition would include combinations of listed materials that would better be categorized as manufactured products. The commenter explained that this change would lead to significant confusion among contractors, suppliers, and recipients of Federal awards. The commenter also explained that State departments of transportation developed approved products lists and material vendor lists based on Memorandum M–22–11. The commenter feared that OMB's proposed revision would void months of work put in by State departments of transportation to implement the original non-binding implementation guidance. For related reasons, many commenters were opposed to OMB adding an ''other construction materials'' category because it would be too open-ended and create too much uncertainty for both Federal agencies and Federal award recipients.

A few commenters suggested that OMB should consider using the FAR's definition of construction materials at FAR 25.003. These commenters believed that using a similar definition to the FAR would reduce administrative burden and increase consistency across the Federal Government. However, another commenter observed that the FAR's definition of construction materials does not match the specific way the term is used in the statutory text of BABA. This commenter suggested that using the FAR definition would be confusing to administer because the more general definition under the FAR would not allow for distinguishing between construction materials and other product categories such as manufactured products. This commenter preferred the structure of a specific list of materials provided by OMB in Memorandum M–22–11.

Other comments suggested that OMB should modify the list of construction materials based on studies on the availability and costs of specific materials. These commenters also maintained that further market research should be completed to verify that any additional construction materials added to the list are produced in the U.S. in the quantities necessary to implement Federal financial assistance programs for infrastructure under the IIJA and other laws.

OMB also received many comments on specific construction materials. These comments are discussed further below.

*OMB Response:* In reaching its final list of construction materials for the guidance, OMB used the list provided by Congress in its Findings at section 70911(5) of BABA for guidance. Congress identified non-ferrous metals, plastic and polymer-based products, glass, lumber, and drywall. OMB acknowledges that the congressional findings do not constitute a statutory definition of the term. However, because no statutory definition is provided under BABA at section 70912, the congressional findings were helpful indicators of specific types of materials and items that Congress considers to be ''common construction materials used in public works infrastructure projects'' that ''are not adequately covered by a domestic content procurement preference.'' *See* BABA 70911(5).

The final list of construction materials is generally consistent with the list of items in the Findings in section 70911(5) of BABA and that were previously identified by OMB in Memorandum M–22–11. The list continues to include non-ferrous metals, plastic and polymer-based products, glass, lumber, and drywall.

OMB acknowledges the concerns raised over adding additional construction materials to its final list. However, OMB determined that certain items that represent a clear-cut logical extension of materials specifically mentioned in the Findings at section 70911(5) of BABA should also be treated as construction materials. Each new item added to the list in the proposed or revised guidance—fiber optic cable, optical fiber, and engineered wood—represents an extension of items already listed in the Findings and identified in Memorandum M–22–11. For example, the congressional list of ''common construction materials'' includes ''polymers used in fiber optic cables'' as an example of ''plastic and polymer-based products.'' The congressional list also includes ''optic glass'' as an example of ''glass.'' These two are the primary constituent elements of fiber optic cable, which are not, in general, incorporated on their own into an infrastructure project related to fiber optic cable. The congressional list also includes both lumber and plastic, which are constituent elements of engineered wood. Accordingly, OMB added these items to its final list.

Based on the structure of the final definition of ''construction materials,'' which is discussed further below, if these three items were not added they would instead be treated as manufactured products because they consist of inputs of more than one listed item. Fiber optic cable includes inputs of at least plastics and polymers, glass, and non-ferrous metals. Optical fiber includes inputs of at least plastics and polymers and glass. Engineered wood includes inputs of at least lumber and plastics and polymers. Treating these items as manufactured products instead of construction materials would result in a different and less-stringent domestic content preference applying to them. *See* BABA 70912(6).

OMB believes its decision to set forth in this guidance that Federal agencies should add these three items to its list of construction materials is well-supported by its authority under BABA and reflects sound policy. All three items are direct extensions of common construction materials identified by Congress in its Findings in section 70911(5) of BABA. By treating these

items as construction materials, OMB can define manufacturing standards for each item in § 184.6 of the guidance and seek to maximize the impact of taxpayer-funded Federal awards to enhance supply chains for their production in the U.S. This approach is consistent with the statutory framework in BABA. It will also support key statutory objectives including incentivizing domestic manufacturing of these items.

OMB also believes that adding these three items to its list provides needed clarity on its intent. For example, based on the definition proposed in February 2023, many commenters indicated that further guidance was needed on how to apply BABA to hybrid or composite items—consisting of inputs of more than one construction material—like engineered wood or fiber optic cable. OMB provides further discussion of each of these items below. Except for items specially included in the list, other hybrid or composite products, which combine listed construction materials to make a new product, will be treated as manufactured products. This topic is also discussed below. Further analysis is provided on the inclusion of fiber optic cable, optical fiber, and engineered wood under the topic headings for those items below under both §§ 184.3 and 184.6.

OMB also acknowledges that the congressional list of ''common construction materials'' in section 70911(5) of BABA includes three items that are not included in OMB's list of construction materials. These items are steel, iron, and manufactured products. It is clear, however, from sections 70912(2), 70912(6), and 70914(a) of BABA that Congress did not intend iron or steel products or manufactured products to be included in the construction material product category. For example, section 70912(6) of BABA establishes three separate product categories with different domestic manufacturing standards applicable to each one of them.

Based on review of public comments, OMB finds that including additional items to the list of construction materials—such as coatings, paint, or bricks—is not warranted at this time. This decision is discussed further below. In future revisions of part 184, OMB may consider adding new items to its list of construction materials or revising the definition in other ways consistent with BABA.

Another topic related to this definition that received many public comments was OMB's proposal to change its approach for how to apply the list in distinguishing between construction materials and manufactured products. Memorandum M–22–11 provided that a construction material is an item that ''is or consists primarily of'' only one of the listed materials. By contrast, the proposed guidance provided that a construction material is an item consisting ''of only one *or more* of'' the listed materials. 88 FR 8374 (emphasis added). Commenters were often confused by this change and observed that it would result in the key example of a manufactured product in Memorandum M–22–11—a plastic-framed sliding window made of glass and plastic—being reclassified as a construction material. Commenters also observed that, based on this proposed change, the construction material category would expand far beyond its current scope to include many item that industry currently considers manufactured products.

OMB acknowledges commenters' concerns on this topic and has returned to an approach that is more consistent with Memorandum M–22–11. In the revised guidance OMB defines construction materials to mean, ''articles, materials, or supplies that consist of only one of'' the listed materials. OMB also identifies certain specific exceptions to this provision in the including listed items that contain inputs of other listed items. Another exception to the general rule for distinguishing between construction materials and manufactured products in the revised guidance is in the case of minor additions of other materials to construction materials, which are discussed in paragraph (2) of the definition of ''construction materials.'' This topic is also discussed further below.

Consistent with the preliminary guidance, the approach in the revised guidance results in the example of a plastic-framed sliding window being treated as a manufactured product. As under Memorandum M–22–11, OMB intends that categorization as a manufactured product should generally be clear if a single item incorporated into an infrastructure project is not specifically identified on the list of construction materials and contains significant inputs of multiple listed or non-listed materials. Maintaining general consistency with Memorandum M–22–11 on this particular topic should prevent imposing unnecessary administrative burden on contractors, suppliers, and recipients, which commenters indicated was of significant concern.

OMB also recognized commenters' concerns that, under the approach in the proposed guidance, hybrid construction materials could have many standards applicable to them, which would create many implementation questions and complexities. For example, under the approach in the proposed guidance in February 2023, a product made of glass, plastic and polymer-based products, and copper could have been subject to three or more applicable standards. By contrast, under the approach in the revised guidance, the definition at § 184.3 and the standards at § 184.6 clarify that only a single standard applies to a single item, which is defined at § 184.6 in the case of each item. This approach should reduce administrative burden and ease the implementation of both the ''construction materials'' definition and associated standards.

To clarify how OMB intends agencies to implement the final definition in practice, following completion of all manufacturing processes for an item listed in paragraph (1) of the definition, if the finished item is combined together with another item listed in paragraph (1), or with a material that is not listed in paragraph (1), before it is brought to the work site, then except as provided in paragraph (2) of the definition regarding minor additions, the resulting article, material, or supply should be classified as a manufactured product, rather than as a construction material. However, the definition also explains that to the extent one of the items listed in paragraph (1), such as fiber optic cable, contains as inputs other items listed in paragraph (1), such as glass or plastics in the case of fiber optic cable, it is nonetheless a construction material. Minor additions to construction materials are addressed in paragraph (2) of the definition. This topic is discussed in further detail below.

Consistent with the example from Memorandum M–22–11, a plastic framed sliding window should be treated as a manufactured product while plate glass should be treated as a construction material. For another example, engineered wood, as a standalone product, should be classified as a construction material. However, if before the engineered wood is brought to the work site, it is combined together through a manufacturing process with glass or other items or materials to produce a new product, which is not listed in paragraph (1), such as a sliding window, the new product should be classified as a manufactured product.

OMB also observes that the manufacturing process standards in § 184.6 for some construction materials include the application of ''coatings.'' Coatings frequently constitute different materials than the construction material

itself and may or may not be considered minor additions under paragraph (2) of OMB's definition of ''construction materials.'' To clarify OMB's intent, other additions, such as coatings, do not change the categorization of a construction material if they are added through a manufacturing process specifically described in the standard for that construction material at § 184.6. For example, adding a coating to aluminum, even if not considered a minor addition, would not convert the aluminum ''construction material'' to a ''manufactured product'' because coatings are specifically identified in the manufacturing processes for non-ferrous metals. However, the coatings themselves do not require domestic sourcing in this scenario if comprised of different materials. In other words, it is not OMB's intent to require domestic sourcing directly for the coating itself. See also discussion at § 184.4(f).

OMB believes the definition provided in the revised guidance on the meaning of construction materials will provide clarity to stakeholders. OMB also believes its approach in the revised guidance will provide continuity with certain key elements of its initial guidance in Memorandum M–22–11.

**Section 184.3—Definition of Construction Materials—Inclusion of Non-Ferrous Metals**

OMB received several comments on whether and how to include non-ferrous metals in its list of construction materials. Some commenters concurred with OMB's inclusion of non-ferrous metals while others questioned this choice. Other commenters indicated that additional information was needed to help differentiate between a construction material and a manufactured product, including specifically in the case of non-ferrous metals. The commenter maintained the non-ferrous metal category includes complex products that should be considered manufactured products.

Regarding aluminum, one commenter urged OMB to make explicit in its final guidance that primary aluminum is a ''construction material.'' Another commenter asked OMB to specifically define ''construction materials'' to include aluminum extrusions. Some commenters suggested that the domestic supply of aluminum is inadequate and that it should be excluded on that basis. One commenter requested clarity on whether copper or aluminum wire with a protective coating or sheathing made of plastic should be treated under the new regulations as a construction material or manufactured product.

*OMB Response:* In reaching its final list of construction materials for the revised guidance, OMB started with the list provided by Congress in its Findings in section 70911(5) of BABA for guidance. More detailed discussion on that approach is provided above. Non-ferrous metals are included on that list and OMB includes that term in the revised guidance without modification.

OMB does not believe it is necessary to further define or provide specific examples of non-ferrous metals in the part 184 text. OMB understands a non-ferrous metal to be a metal not containing, including, or relating to iron or steel. As discussed by commenters, examples include aluminum and copper. OMB addresses how to distinguish between construction materials and manufactured products in other sections of the guidance and associated areas of this preamble. Further discussion of the manufacturing standard for non-ferrous metals is provided in § 184.6. If stakeholders believe that waivers are justified under section 70914(b) of BABA and § 184.8 of the revised guidance in relation to non-ferrous metals, the waiver process would be the appropriate mechanism to address concerns such as non-availability.

**Section 184.3—Definition of Construction Materials—Inclusion of Plastic and Polymer-Based Products**

OMB received several comments on whether and how to include plastic and polymer-based products in its list of construction materials. Many of these commenters requested further clarity on how differentiate between a construction material and manufactured product, including specifically in the case of plastic and polymer-based products. The commenter maintained the plastic and polymer-based products category includes complex products that should be considered manufactured products. Commenters stated that further clarity was needed on this topic to understand what manufacturing standards would apply to specific items. As an example, one commenter noted that ''epoxies and adhesives'' can be treated differently by different organizations, which would create uncertainty for manufacturers. Another commenter noted that epoxies, which are used in infrastructure projects, should be specifically addressed, such as by including them in the definition of ''plastic and polymer-based products''.

Another commenter suggested that providing a definition of ''plastic and resin'' would be sufficient. This commenter argued that as long as the composite material is made up of all plastic or resin, then creating a separate category for ''composite building materials'' was not needed. This commenter added that the term ''composite material'' is vague and could be interpreted differently by stakeholders.

See also discussion of comments on the topic of composite building materials below.

*OMB Response:* In reaching its final list of construction materials for the revised guidance, OMB used the list provided by Congress in its Findings in section 70911(5) of BABA for guidance. More detailed discussion on that approach is provided above. Plastic and polymer-based products are included on that list and OMB includes that term in the revised guidance. By a plastic and polymer-based product, OMB refers to a product comprised primarily of inputs of plastics and polymers, but which may also include some minor additions of other materials. OMB discusses how to distinguish between construction materials and manufactured products—including its understanding of the term ''minor additions''—in other sections of the guidance and associated areas of this preamble. Further discussion of the manufacturing standard for plastic and polymer-based products is provided in § 184.6.

**Section 184.3—Definition of Construction Materials—Modified Inclusion of Composite Building Materials as a Plastic and Polymer-Based Products**

Many commenters observed that composite building materials are more appropriately categorized as a subset of plastic and polymer-based products. The commenters raised concerns that if composite building materials were included in a standalone category, it could encompass far more materials than was intended by the use of that term in section 70911(5) of BABA. For example, one commenter stated that composite building materials may include a multitude of materials, such as concrete, reinforced plastics, cement, steel, reinforced concrete, and composite wooden beams. Similarly, some commenters pointed to language in Memorandum M–22–11, which included composite building materials as a subset of plastic and polymer-based products.

One commenter suggested that if a separate category were maintained for composite building materials, the term could be defined as ''products made with combinations of polymer and reinforcing fiber, where the polymer and fiber remain as distinct components but

the combination results in properties not found in the individual materials, such as high strength combined with low weight.'' Alternatively, some commenters noted that if composite building materials remained a standalone category of construction material, the definition should simply be clarified to ensure that it only includes materials made of plastic and polymers. Some commenters suggested that epoxies should be included in the definition of composite building materials.

*OMB Response:* After considering public comments on the issue, as well as the language in BABA and Memorandum M–22–11, OMB has adjusted the revised guidance to remove the standalone category for composite building materials. Plastic and polymer-based composite building materials should instead be evaluated under the category of plastic and polymer-based products, described above.

**Section 184.3—Definition of Construction Materials—Inclusion of Glass**

OMB received many comments on whether and how to include glass products in its list of construction materials. Again, many of these commenters requested further clarity on how to differentiate between a construction material and manufactured product.

Several commenters agreed that OMB should classify glass (including optic glass) as a type of construction material. Other commenters opposed including glass as a construction material. For example, one commenter suggested that OMB's inclusion of glass in the definition of ''construction materials'' could threaten safety, reduce competition, and impact costs for Federal recipients because certain glass ceramics are processed and produced internationally. This commenter suggested that OMB should revise its definition of ''construction materials'' to eliminate glass entirely or, alternatively, provide an exception for all glass used to support safety and chemical protection.

Other commenters requested clarification on the inclusion of ''optic glass'' in the ''glass'' category of construction materials. One commenter was unsure if the term should include glass in telecommunications cables, corrective eyewear, or lenses like in a lighthouse. One commenter urged OMB to not create new subsets of definitions for materials such a ''optic glass.'' Another commenter suggested that optic glass should be included in the manufacturing standard for optical fiber. Other commenters requested clarification on the application of the guidance to recycled glass. Several commenters had specific questions about optic glass in the context of the broadband industry, with one commenter suggesting that OMB does not need to define ''optic glass'' as part of the glass construction material because OMB had added ''optical fiber'' as a separate item to the list of construction materials in § 184.3. Other commenters thought that OMB provided sufficient guidance in the preliminary guidance.

Multiple commenters sought guidance on what types of glass should be considered a construction material versus a manufactured product. Several examples provided by commenters included glass utilized in plate glass, traffic line painting, glass insulator, fiber optic communications, windows, doors, and skylights. One commenter suggested that the distinction could be based on whether glass is: (i) delivered in panes to an infrastructure project; (ii) not treated with coating; (iii) optical or structural glass; or (iv) not used in complex applications or meeting advanced specifications, such as is used in certain types of U.S. DOT and FHWA road-marking projects.

Commenters also had specific questions about these classifications within the context of specific glass products. For example, several commenters requested clarification on the issue of glass beads used for retro-reflective pavement markings. Commenters indicated that there is uncertainty on how to classify these products under Memorandum M–22–11. For example, approaches may differ based on what materials the glass beads are combined with and when. The manufacturing process also includes steps such as selecting a specific formula of glass inputs, blending to customer specifications, formulaic combination using a blending auger machine, and application of complex, multi-purpose coatings. As a result, high-performance glass beads are of a wholly different type of glass than that used for typical construction material purposes, such as windows, doors, insulation, and external glazing. Consequently, one commenter suggested that glass beads should be considered manufactured products. However, another commenter urged OMB to clarify that glass used for retro-reflective pavement markings is a construction material. That commenter noted that those glass beads are never used by themselves. The commenter was concerned that State departments of transportation had reached inconsistent determinations on this topic based on M–22–11.

*OMB Response:* In reaching its final list of construction materials for the revised guidance, OMB used the list provided by Congress in its Findings in section 70911(5) of BABA for guidance. OMB notes that Congress specifically identified ''glass'' in section 70911, ''Findings,'' as one of several ''common construction materials.'' While OMB believes that this list is not exhaustive, OMB includes all items in the Findings section as listed construction materials. Thus, OMB has included glass in the revised guidance as a construction material. More detailed discussion on that approach is provided above.

OMB has not included a separate category for optic glass in the revised guidance. The general principles that apply throughout the revised guidance should be used to determine how to treat glass products such as recycled glass and glass beads. Federal agencies may decide to provide additional guidance on those topics for products that are used on infrastructure projects they provide funding for. If stakeholders believe that waivers are justified in the public interest or for other reasons in relation to glass, the waiver process would be the appropriate mechanism to address concerns related to this topic. However, OMB has included a separate category for ''optical fiber.'' As described in further detail below, OMB believes that given the unique features of the broadband industry, it is appropriate to provide more specific guidance.

OMB discusses how to distinguish between construction materials and manufactured products in other sections of the guidance and associated areas of this preamble. Further discussion of the manufacturing standard for glass is provided in § 184.6. OMB believes that this discussion will provide commenters with the guidance that they need to classify the glass-based products identified above, including glass beads.

**Section 184.3—Definition of Construction Materials—Inclusion of Fiber Optic Cable and Optical Fiber**

Many commenters—including industry, State and local governments, trade groups, and potential grant recipients—sought additional clarity and guidance from OMB on the treatment of fiber optic cable and optical fiber under BABA. Multiple commenters noted that BABA could have a significant impact on service providers' ability to participate in the Broadband Equity, Access, and Deployment (''BEAD'') program, which is administered by the National

Telecommunications and Information Administration (''NTIA''), and other Federal broadband programs.

Several commenters, including certain State departments of transportation, supported the OMB's classification of ''fiber optic cable'' and ''optical fiber'' as construction materials in § 184.3. One commenter requested a definition of what counts as ''optical fiber'' to better implement the requirements under BABA. Several commenters supported the classification but suggested amending § 184.6, which specifies the standards required for a construction material to be considered ''produced in the United States.''

Other commenters opposed including either fiber optic cable or optical fiber as new standalone categories of construction materials. Some commenters based their opposition on the statutory text of BABA. Others questioned OMB's rationale for distinguishing between construction materials and manufactured products. Some also questioned the capacity of domestic supply chains to produce optic fiber and fiber optic cables meeting the Buy America preference for construction materials.

Commenters opposing the classification based on the statutory text of BABA offered a variety of suggestions on interpreting the statutory text. Some commenters believed that Congress enumerated only five items as ''common construction materials'' in its Findings in section 70911(5) that ''are not adequately covered by a domestic content procurement preference.'' These commenters noted that while the Findings explicitly identify ''polymers used in fiber optic cables'' and ''optic glass,'' they do not explicitly identify fiber optic cable itself as a construction material or any other elements of fiber optic cable. They suggested that Congress, by including only polymers and glass, was excluding fiber optic cable and other inputs of fiber optic cable as ''common construction materials'' by omission.

One commenter suggested that the inclusion of ''fiber optic cable'' and ''optical fiber'' as construction materials would exceed section 70915(b)(2) by reaching back many stages into the manufacturing process. According to that commenter, OMB's proposed guidance would require a manufactured product, fiber optic cable, to effectively satisfy a compliance test that is more stringent than the 55 percent standard provided by Congress under section 70912(6)(B) by layering construction material manufacturing standards on the principal components of fiber optic cable.

This group of commenters generally suggested that the inclusion of ''fiber optic cable'' and ''optical fiber'' as construction materials would run contrary to the intent of BABA. They suggested that OMB instead should consider only components of fiber optic cables and optical fibers, that Congress specifically enumerated, as construction materials.

One commenter suggested that OMB could set the ''manufacturing process'' standards for these two construction materials in a manner that would create uniform standards for all fiber optic cabling. Another commenter suggested that classifying only optic glass and polymers as construction materials was preferable because it would reduce compliance costs and avoid confusion.

Several commenters also questioned the logical coherence of including ''optical fiber'' and ''fiber optic cable'' as construction materials. For ''optical fiber,'' some commenters sought clarity on how to distinguish between optical fiber and optic glass. These commenters questioned whether OMB intended ''optical fiber'' to represent ''optic glass'' or if it was an additional, separate material. One commenter noted that these two terms can be used colloquially in imprecise ways. For instance, a State department of transportation suggested that OMB did not need to make a standalone category for ''optic fiber'' because OMB had already defined ''optic glass'' as a construction material in § 184.3. Some manufacturers also stated that a separate definition is not necessary.

However, other commenters warned that the definitions and manufacturing processes of polymers and optic glass in other industries and products may not be appropriate in the context of fiber optic cables. Thus, one commenter suggested that OMB's guidance should provide separate definitions of ''optical fiber, ''optic glass,'' and ''polymers'' that apply to these other construction materials and industries. The commenter suggested that separate definitions of these items in § 184.3 would allow OMB provide a comprehensive standard uniquely applicable to fiber optic cable in § 184.6. The commenter cautioned against layering other standards on top of the fiber optic cable standard. A State department of transportation also suggested that providing specific guidance for each different construction material would avoid misinterpretation.

On comments suggesting that ''fiber optic cables'' should be classified as a ''manufactured product,'' commenters provided a variety of rationales. Some noted that while ''optic glass'' is listed as a subset of glass products, fiber optic cables are a distinct product. To create a fiber optic cable, these commenters noted that a manufacturer needs to combine several of the listed construction materials, including optic glass and polymers, through multiple, complex, and capital-intensive processes. For example, fiber optic cables are fabricated using optical fiber encased in a sheathing made from various materials by the different manufacturers. Several commenters stated that an end product, such as fiber optic cable, should not be classified as a construction material. Some commenters suggested the appropriate test should be whether you could walk into a store and buy it. For instance, one could buy a roll of fiber optic cable, which would make it an end product, rather than an input into an end product. One commenter suggested that OMB be consistent with other domestic preference regimes—noting that it was unaware of any other domestic preference regime where Congress or any agency had classified a construction material to be made up of other construction materials.

Other commenters focused on Memorandum M–22–11. Under their understanding of OMB's initial guidance, a fiber optic cable would have been categorized as a manufactured product, unlike the proposed guidance, which would have treated it as a construction material. Several commenters wanted to better understand OMB's rationale for the classification. Relatedly, several commenters stated that the proposed classification runs counter to congressional intent and the logical meaning of manufactured product. They suggested that OMB should revert to the list of construction materials published in Memorandum M–22–11, which did not include either ''fiber optic cable'' or ''optical fiber'' as standalone construction materials.

Relatedly, several commenters suggested that OMB use a single category—instead of spelling out ''optical fiber'' and ''fiber optic cable.'' One commenter noted that a broadband grant recipient will only purchase fiber optic cable. Because optical fibers are a construction material for fiber optic cable, rather than an independent final product, every material in optical fibers will already be included in fiber optic cables. Another commenter noted that optical fiber and fiber optic cable ultimately serve a singular, similar purpose.

Several commenters also suggested that OMB consider the capacity of domestic supply chains before

categorizing either ''optical fiber'' or ''fiber optic cable'' as construction materials. For example, some commenters emphasized the unique nature of the broadband manufacturing sector, differentiating it from some sectors, like steel, cement, or wallboard, in which the U.S. has established industrial capacity. These commenters believed that other industrial sectors could grow more easily to meet the demand occasioned by the IIJA programs and other Federal funding for infrastructure.

Alternatively, other commenters noted that substantial domestic manufacturing capacity already exists for fiber optic cables and that this capacity can be expanded to meet the demands of Federal programs such as BEAD. According to one commenter, more than 100 businesses currently manufacture fiber optic cables in the U.S., representing annual aggregate revenues of approximately $4 billion utilizing approximately 7,000 total employees. Commenters identified several existing manufacturing companies, including AFL, CommScope, Corning, OFS, and Prysmian. One commenter indicated that the domestic industry for optical cable has grown by 22 percent since 2020 and is expected to continue to grow as these firms and others have announced substantial investments to enhance domestic capacity. While this commenter acknowledged that supply chain constraints have increased delivery intervals for fiber optic cable, the commenter still believed that it was viable to treat fiber optic cable as a construction material. However, the commenter proposed some modifications to ''all manufacturing processes,'' as detailed below under § 184.6. Other commenters, focusing on the treatment of the electronics that go into a broadband network, stated that industry would have an easier time complying with BABA for fiber optic cables. Others noted the fact that a waiver of Buy America requirements for broadband under the American Recovery and Reinvestment Act (''ARRA'') of 2009 excluded fiber optic cable.

However, several other commenters stated that they believed the U.S. lacks sufficient domestic production capacity. Commenters indicated that there has been a shortage of fiber optic cables and optical fiber for several years due to global supply chain issues—which they predicted will continue for several more years. According to these commenters, infrastructure developers rely on imports or assembly work from other countries, such as Mexico and Korea. One commenter specifically noted that—even with the doubling of its domestic optical fiber capacity—it would still need to supplement its optical fiber production from Japan and Denmark, its preform inputs from Germany and Japan, and its fiber optic cable and optical connectivity from Mexico. Its domestic facilities rely on a complex web of U.S.-based and international facilities. Commenters also noted that the BEAD program would also greatly increase the demand for fiber, increasing supply chain issues. Consequently, they maintained that excluding foreign sources may make significantly less fiber available for BEAD deployments, leading to an increase in prices and schedule delays. These commenters feared that higher prices and delays would translate into reduced quantity of high-speed broadband mileage built through Federal programs and may also lead to price polarization—as the private market may turn to imported products—which could negatively impact smaller U.S.-based companies in the private market sector. A State department of transportation expressed that this may be a particular issue for utility owners and requested that OMB investigate this issue further.

Given the above concerns, several commenters sought a delay of BABA compliance until 2024 for fiber optic cables, optical fiber, and other materials now listed as construction materials that were not listed in M–22–11. Some of these commenters noted that States have already worked hard to develop contract specifications based on materials listed in Memorandum M–22–11 and requested stability.

Separately, several commenters noted that the actual composition of fiber optic cables may vary greatly, whether in the number of strands of glass and other specifications. For instance, cable designed for residential use may have a limited number of strands, while a transport fiber may have hundreds of strands, and cable designed for underground use may have additional armoring to reduce the chance of the cable being cut. Cable for aerial use may have minimal armor to reduce the weight the poles must bear.

Some commenters requested additional specifications on, or carve outs for, ''specialty cables,'' which they argued possess substantively distinct characteristics, manufacturing processes, and supply chains. These include drop cables and submarine cables, which have distinct supply chains that commenters claim would not be sufficient for BABA compliance as construction materials. For example, drop cables are typically classified together with connectivity products as they are cut to very short lengths and are utilized for the last hundred feet from a network to a home, business, or other end user (versus outside plant cables which can span multiple miles and have high fiber count). This leads to a different manufacturing process.

*OMB Response:* After careful review of the comments, OMB has decided to categorize ''optical fiber'' and ''fiber optic cable'' as separate, standalone construction materials in § 184.3. OMB notes that this categorization is consistent with the proposed guidance, although it differs from Memorandum M–22–11, which did not explicitly address the classification of either material. OMB believes that classifying these items as construction materials is consistent with BABA, has a logical basis, and furthers BABA's goals of enhancing domestic supply chains.

On comments regarding the statutory text, OMB believes that the classification of ''fiber optic cable'' and ''optical fiber'' is consistent with BABA. OMB recognizes that Congress identified in its Findings in section 70911(5) several ''common construction materials,'' including non-ferrous metals, plastic and polymer-based products (including polymers in fiber optic cables), glass (including optic glass), lumber, and drywall. This list also included steel, iron, and manufactured products, which Congress explicitly treated differently in the subsequent parts of BABA. For the reasons set forth above, OMB decided that items that represent a clear logical extension of materials specifically mentioned in the list should be treated as construction materials. This includes fiber optic cable and optical fiber.

OMB notes that Congress had the opportunity to define the term ''construction materials'' in section 70912, ''Definitions.'' While section 70912 defines several terms, including ''Domestic Content Procurement Preference,'' and ''Produced in the United States,'' which specifically use the term ''construction materials,'' it does not define ''construction materials'' itself. OMB also recognizes that the statute intentionally defines ''infrastructure'' to include ''broadband infrastructure,'' of which one of the main construction inputs is fiber optic cables. OMB also notes that section 70915 of BABA, ''OMB Guidance and Standards,'' explicitly requires OMB to ''issue guidance . . . to assist in applying new domestic content procurement preferences under section 70914,'' which implies that OMB has flexibility to determine what constitutes

a ''construction material'' as long as it is consistent with the statute.

Because OMB has defined fiber optic cable as a ''construction material,'' OMB believes it has avoided the issue of ''reaching back many stages into the manufacturing process'' that one commenter had flagged. In fact, by identifying fiber optic cable and optical fiber as separate, singular construction materials and applying specific standards to each in § 184.6, OMB believes that it will reduce confusion and compliance costs. For example, commenters specifically noted the confusion and compliance costs that may have resulted from attempting to separately apply every construction material standard that applied to different components of fiber optic cable, such as the standard for plastic and polymer-based products.

On OMB's rationale for the classification of these items as construction materials, OMB believes that the classification of ''fiber optic cable'' and ''optical fiber'' is logically consistent with BABA. A fiber optic cable primarily consists of optical fiber, aluminum (in the buffer tube) and plastic and polymer-based products (in the casing or jacketing that surrounds the optical fiber and buffer tube). An optical fiber primarily consists of glass, or plastic, or both. Consequently, OMB does not view the proposed guidance as necessarily adding additional items to the list of construction materials, but rather clarifying the standards for ''optic glass'' and ''polymers used in fiber optic cables'' in the context of broadband, creating a coherent and straightforward definition and standard, rather than shoehorning everything into those two definitions.

OMB recognizes, as several commenters noted, that the fiber optic manufacturing sector is unique, relative to other glass or plastic products. Even within the fiber optic manufacturing industry, fiber optic cables can be produced with similar, yet distinct, manufacturing processes, such as is the case for drop cable. Because of these nuances, OMB believes that it would be confusing to industry if it tried to capture these items in the definition and manufacturing process standards for ''optic glass'' and ''polymers used in fiber optic cables.'' As a result, OMB believes it is important to separately define ''fiber optic cable'' and ''optic fiber.'' Because optic fiber is an input into a fiber optic cable, it is important that the processes of producing optic fiber are captured in the manufacturing process for fiber optic cable. However, per industry guidance in the public comments, they are seen as two separate items. By spelling out both, OMB believes that its guidance is in line with industry standards, minimizing confusion and compliance costs.

In terms of the capacity of supply chains to produce fiber optic cables, OMB notes that several commenters identified both existing capacity and new investment in domestic fiber optic cable manufacturing. Per the statute, OMB recognizes that key elements of fiber optic cable are ''not adequately covered by a domestic content procurement preference'' and that Congress has specifically applied the Buy America preference to ''broadband infrastructure.'' IIJA 70911(5) and 70912(5)(J). To the extent justified under section 70914 of BABA, § 184.7 of the revised guidance, and E.O. 14005, relevant Federal agencies retain the flexibility to propose waivers on this topic. Related to concerns about supply chain availability and increased costs, the waiver process recognizes both as potential rationales for the head of a Federal agency to propose a waiver. OMB notes that a waiver was recently issued on April 19, 2023, applicable to certain Federal awards under NTIA's Middle Mile Grant program for broadband infrastructure.

In addition, OMB has clarified in the revised guidance that ''fiber optic cable'' includes ''drop cable,'' a frequently used sub-type of fiber optic cable. Based on public comments, OMB recognizes that the industry sometimes views drop cable as a separate product. However, because the process for creating drop cables is considered less complex than that of a standard fiber optic cable, OMB believes that the standards that apply to fiber optic cables generally—as outlined in § 184.6—are appropriate to also apply to drop cables. In terms of additional variation with fiber optic cables, Federal agencies may, as necessary, provide clarifying guidance to recipients and stakeholders to avoid any additional ambiguity or confusion. Because this guidance influences all Federal awards for infrastructure programs generally, OMB does not want to offer overly prescriptive, granular definitions that may constrain innovation or variability in industry practice. Such variations may be more appropriately recognized and addressed by the awarding Federal agency.

**Section 184.3—Definition of Construction Materials—Inclusion of Lumber**

Several commenters proposed removing lumber from the list of construction materials based on concerns about the limited supply of lumber. One commenter expressed concerns about including lumber and drywall on the list of construction materials due to existing supply constraints for each of these materials. This commenter observed that lumber is a key component in residential housing construction and domestic lumber production has never been high enough to fully meet demand at the national level. Accordingly, lumber has been imported from other countries to make up the shortfall. The commenter noted that Canada is one of the largest exporters of softwood lumber products to the U.S. The commenter indicated that including lumber on the list of construction materials would compound the challenges with already existing supply constraints and add significant challenges for the residential construction industry.

Another commenter suggested that to avoid disrupting the North American softwood lumber market for federally funded infrastructure projects, OMB should ensure that the process of obtaining a waiver for Canadian lumber is clear, expeditious, consistent with international obligations, and supportive of the American public interest. The Government of British Columbia urged OMB in the final guidance to: (1) exclude lumber and non-ferrous metals entirely from its definition of ''construction materials;'' or (2) specifically exempt lumber and non-ferrous metals from Canada from the definition of ''construction materials.''

Other commenters noted that lumber should include ''dimensional lumber only'' and not a combination of materials.

*OMB Response:* In reaching its final list of construction materials for the revised guidance, OMB used the list provided by Congress in its Findings in section 70911(5) of BABA for guidance. More detailed discussion on that approach is provided above. Lumber is included on that list and OMB includes it in the revised guidance. OMB understands a lumber product to be a product comprised primarily of lumber, but which may also include some minor additions of other materials (such as glue or other binding agents). Further discussion is provided on the newly listed material ''engineered wood'' below. If stakeholders believe that waivers are justified under section 70914(b) of BABA and § 184.8 of the revised guidance in relation to lumber, the waiver process would be the appropriate mechanism to address concerns related to this topic.

**Section 184.3—Definition of Construction Materials—Inclusion of Engineered Wood**

Several commenters supported including ''engineered wood'' as a separate construction material from lumber. Several commenters noted the unique manufacturing processes and complex supply chains for engineered wood products.

Some commenters suggested that the separate category should be titled ''other wood products'' to also include non-lumber manufactured wood products. They suggested the category be expanded to include plywood, oriented strand board, I-joists, glue laminated timber, cross-laminated timber, and structural composite lumber.

Other commenters agreed that engineered wood was a construction material but opposed the proposal to create a new stand-alone category for ''engineered wood'' items because they believed the ''lumber'' category already captured engineered wood. The commenters believed that a separate classification could create confusion, as some products could be considered both lumber and engineered wood. Another commenter noted that engineered wood is a laminar composite and already meets the requirements of lumber mixed with a binding agent, making a new category unnecessary.

Finally, other commenters thought that engineered wood should not be considered a construction material at all, and instead should be categorized as a ''manufactured product.'' Many commenters, as discussed prior, were generally opposed to including any new materials on the list of construction materials. Some commenters had specific concerns. For example, some commenters opposed classifying engineered wood products as a construction material because they consist of a mixture of multiple raw materials. Another commenter noted that engineered wood products are part of a system and that installation is not accomplished with simple binding agents. Several State departments of transportation noted that they already interpreted engineered wood to be a manufactured product and that labeling it as a construction material would be a significant change and require additional time to implement. Other commenters cautioned against including engineered wood products as a construction material based on domestic availability and supply chain concerns. One commenter noted engineered wood is highly price-sensitive to supply and demand. That commenter believed that applying the Buy America requirements to extremely price-sensitive materials would generate excessive requests for waivers due to project cost escalation, creating administrative backlog and project delays.

Separately, other commenters, who were neither explicitly supportive or opposed to the inclusion of engineered wood as a standalone category, sought further clarification from OMB. One commenter indicated that fiberboard and plywood are typical examples of engineered wood products and was uncertain how OMB would treat them. One of these commenters expressed a concern that a number of products could inappropriately be included under engineered wood, including hardwood plywood, hardwood veneer, and engineered wood floors. This commenter emphasized that particular parts of the manufacturing process for these products, such as splicing, currently occur in Canada and cannot be easily transitioned to the U.S. Another commenter noted that it interpreted lumber to be a narrowly defined construction material that does not generally include engineered wood products. Similarly, a separate commenter wrote that, as written in the preliminary guidance, it would treat the wood component as lumber and the adhesive as a manufactured product. One commenter suggested that OMB clarify the definition based on the domestic industry's ability to provide 100% of the required materials necessary for Federal projects.

*OMB Response:* After careful review of the comments, OMB has decided to categorize ''engineered wood'' as a separate, standalone construction material in § 184.3. Multiple commenters viewed engineered wood as an input into an infrastructure project. In addition, engineered wood can represent a logical extension of the categories of lumber, on the one hand, and plastic and polymer-based products, on the other, both of which are listed in the Findings in section 70911(5) of BABA and identified in Memorandum M–22–11. Both lumber and plastic and polymer-based products are constituent elements of engineered wood.

Engineered wood is also an input into an infrastructure project that is a substitute for traditional, non-engineered lumber. While manufacturers typically buy engineered wood in the specific forms that commenters identified, such as structural composite lumber and cross-laminated timber, they may then apply it to an infrastructure project in a similar manner as lumber. For example, a wood frame for roofing or flooring could be made out of either lumber or engineered wood. Manufacturers may choose one type over the other for a variety of reasons, including better quality, weight resistance, or appropriateness for the specific nature of an infrastructure project. Both products can serve identical functions in an infrastructure project and have similar manufacturing processes. Other similarities between engineered wood and lumber include the generally cohesive nature of standalone products and the lack of discrete components. Also like lumber, it is feasible, in most cases, to define a single manufacturing standard applicable to the engineered wood products that OMB intends to include in this category.

OMB also observes, however, that the manufacturing processes applicable to lumber and engineered wood, while similar in some ways, are not identical. Engineered wood involves additional material inputs that strengthen or modify it. Given the complementary nature of engineered wood with traditional lumber, and the fact that engineered wood consists of lumber, OMB did not want to artificially incentivize economic activity toward engineered wood over lumber simply because the former was categorized differently under OMB's guidance and thus subject to different domestic content preferences. Based on the structure of the final definition of ''construction materials,'' if engineered wood was not added to the list of construction materials, it would instead be treated as a manufactured product because it consists of inputs of more than one listed item. Because converting lumber into engineered wood only involves additions that would represent a small percentage of engineered wood's overall cost, OMB believes it would be possible for manufacturers to buy ''engineered wood'' subject to a different and less-stringent domestic content preference to avoid the domestic content preference for lumber. *See* BABA 70912(6). In doing so, it would defeat the purpose of including ''lumber'' as a specific construction material because it would disproportionately advantage engineered wood as an input into an infrastructure project.

To ensure that the construction material standard would apply to engineered wood, OMB added it to the list of construction materials in instances where an input is lumber. OMB notes that there may be cases where an engineered product is made up of non-lumber manufactured wood products. Such products do not fall under this category. However, if they are

made up of plastic and polymer-based products, they may be a construction material under the ''plastic and polymer-based products'' category. Further information on OMB's rationale for the products included under the category of construction materials is provided above, which was generally guided by the Findings in section 70911(5) of BABA.

OMB acknowledges the concerns raised by commenters on adding additional construction materials to its list. However, in the case of engineered wood, OMB found that this step was necessary to ensure treatment of this product as a construction material, and to allow stakeholders to distinguish between lumber, plastic and polymer-based products, and engineered wood when applying the standards at § 184.6.

While OMB believes that engineered wood could be seen as a subset of lumber, OMB recognized multiple commenters noted that engineered wood products have a unique production process that differs from lumber. Lumping both products in one general category could create confusion when applying the standard at § 184.6. OMB also notes that it has modified the standard in § 184.6 for engineered wood: ''All manufacturing processes from the initial combination of constituent materials until the wood product is in its final form, occurred in the United States.'' OMB believes that this will provide further clarity. Additional explanation on these changes can be found below.

**Section 184.3—Definition of Construction Materials—Exclusion of Additional Materials**

OMB received multiple comments about adding additional materials to the list of construction materials, such as paint, coatings, bricks, and geotextiles. Several commenters supported including paint and coatings as a construction material, and provided specific suggestions for defining the manufacturing processes for this item, which could range from mixing of the raw materials through packaging. Other commenters expressed opinions on whether coatings should, or should not, be considered construction materials, including both field-applied coatings and shop-applied coating. These commenters explained practical consequences that may result from this distinction.

For paint and coatings, some parties observed that requiring all manufacturing process to occur in the U.S.—from mixing of pigments, resin solvents and additives through final canning/packaging—could be difficult to monitor. For example, one commenter believed that it would be impossible to track where all components of coatings come from. Some commenters raised concerns that requiring the mixing of pigments in the U.S. could eliminate certain coatings that do not contain pigments.

Other commenters questioned whether paint and coatings should be included on the list at all. These commenters suggested that paint and coatings would more appropriately be categorized as a ''manufactured product'' because they consist of a disparate mixture of materials and chemicals. Other commenters suggested that paint and coatings are not construction materials, but instead should be treated as ''*de minimis*'' additions to construction materials that do not change the categorization of listed items. Another commenter suggested incorporating the application of coatings into the standards in § 184.6 of the guidance for items already listed, such as non-ferrous metals, rather than identifying coatings as a separate construction material. Other commenters observed that classifying paint and coatings as a type of construction material would represent a significant change from OMB's initial guidance in Memorandum M–22–11 that could impose an additional burden on stakeholders and take additional time to implement.

On bricks, some commenters noted that bricks should be considered a ''manufactured product'' because they are a mixture of multiple materials. Other commenters noted that bricks are a mixture of section 70917(c) materials. These commenters—beginning their analysis from the premise that combinations of section 70917(c) materials should not be treated as either construction materials or manufactured products—believed that OMB should not apply a Buy America to bricks under either category that reason. Some commenters did not express a strong preference, observing that bricks could reasonably be considered either a construction material or a manufactured product.

*OMB Response:* In reaching its final list of construction materials for the revised guidance, OMB used the list provided by Congress in its Findings in section 70911(5) of BABA for guidance. More detailed discussion on that approach is provided above. Paint, coatings, and bricks are not included on that list, nor does OMB consider these items to constitute a clear logical extension of items that are included on the list, at least as would warrant including them as separately listed construction materials. OMB aimed to generally adhere to the Findings in developing its final list for the guidance in part 184. Thus, at this time, OMB does not include these items in its list of construction materials in the definition in § 184.3.

In reaching this conclusion, OMB acknowledges the concerns and questions raised by several commenters about adding items such as paint and coatings to the list. Some commenters expressed concerns about complexity, confusion, and administrative burden that could be added to process of applying the Buy America preference if these items were included as listed construction materials. Consistent with guidance and principles explained elsewhere in part 184, paint, coatings, and brick incorporated into an infrastructure project will generally continue to be classified as manufactured products. This is generally consistent with the initial guidance provided in Memorandum M–22–11. OMB may consider adding additional items to the list of constructure materials in future iterations of its guidance through revisions to part 184. OMB will follow appropriate notice and comment procedures before adding additional items to the list.

Regarding comments maintaining that bricks are excluded as section 70917(c) materials, OMB explains its treatment of section 70917(c) materials below. Under the approach set forth in the revised guidance, bricks will generally be treated as manufactured products.

**Section 184.3—Definition of Construction Materials—Topic of Minor Additions and Binding Agents**

Many commenters recommended that OMB establish a reasonable standard for *de minimis* additions to construction materials, which would specify which minor additions of other materials would not change a construction material into a manufactured product.

Some commenters advocated for clear and specific metrics for determining what should be considered a *de minimis* addition. For example, one commenter requested OMB to provide a specific *de minimis* exception for construction materials to ensure that minor components or inputs—such as fillers, waxes, or similar materials—do not result in the exclusion of items such as structural engineered wood products from the construction material category.

Other commenters noted that trying to define and apply a single *de minimis* percentage or amount for all construction materials could be time-consuming, burdensome, and a

potentially a poor fit in some circumstances, such as for specific materials or agency programs.

OMB also received a mix of comments on binding agents, with some comments supporting OMB's proposal and others seeking further clarification. Many of the comments on binding agents came from the aggregate, paving, and cement industries. These comments are addressed separately below in the context of manufactured products.

There were also comments that expressed concerns over introducing ''new rules'' related to binding agents that have yet to be defined.

*OMB Response:* In the revised guidance, OMB adopts a simplified approach for the topic of both minor additions and binding agents. Instead of treating binding agents separately, the revised guidance provides that minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material. OMB elected to use the term ''minor additions'' instead of ''*de minimis*'' additions to reduce potential for confusion with *de minimis* waivers, which are described separately in Memorandum M–22–11 and have a different meaning and application.

OMB does not propose a specific definition of minor additions in this revised guidance, nor does OMB provide a specific percentage or amount that the term must correspond to in all cases for all Federal agencies. Instead, OMB emphasizes that Federal agencies should exercise reasonable discretion in applying this term within their respective Federal financial assistance programs for infrastructure. OMB has decided on this approach based on recognition of the wide diversity of infrastructure programs and projects funded by the Federal Government. For example, considering that the cost of construction materials may vary widely, a specific dollar amount threshold appropriate for the types of construction materials incorporated on smaller-scale projects funded by one agency may not be appropriate for much larger-scale projects funded by a different agency. Similarly, a single percentage threshold may not always be an equally good fit for all of the different the types of construction materials used on federally funded infrastructure projects. OMB will continue to engage with stakeholders to monitor and assess the implementation of the minor additions provision and may revisit this topic as necessary. Although not identical, OMB believes that this approach is generally consistent with the approach already in use by Federal agencies under Memorandum M–22–11 and BABA, and is also consistent with OMB's goals as outlined in the proposed guidance. OMB also believes that this approach—which leaves some flexibility—may also reduce burden on stakeholders.

For an example of OMB's intended application of this provision, wax added to engineered wood generally should not disqualify the engineered wood from being categorized as a construction material. However, if before the engineered wood is brought to the work site, it is combined with glass or other items or materials to produce a new product, which is not listed in paragraph (1) of the definition, such as a sliding window, the new product would be classified as a manufactured product, not a construction material.

To reduce complexity and potential for confusion, OMB has blended the provision in the proposed guidance related to binding agents into the new provision related to minor additions. This approach avoids the need for a new definition of the term binding agent in this context, which could potentially be confused with the alternative use of that term in the context of section 70917(c) materials. Instead, as with other additions or inputs, the relevant consideration is whether the binding agent added to a construction material is a minor addition.

OMB also explains above in this preamble that other additions, such as coatings, do not change the categorization of a construction material if they are added through a manufacturing process specifically described in the standard for that construction material at § 184.6 of the guidance. An example in the case of non-ferrous metals is provided above.

Federal agencies may consider issuing their own guidance on the topic of minor additions for their respective Federal funding programs for infrastructure. For example, agency guidance may provide additional qualitative or quantitative factors to consider in making a determination on whether an addition should be considered a minor addition. A relevant factor could be whether the addition will, or will not, constitute a significant portion of the total cost of the construction material.

**Section 184.3—Definition of Infrastructure Project**

Several commenters advocated for a more precise definition of ''infrastructure project'' and suggested possible changes to the definition to reduce confusion. For example, some comments suggested removing the phrase ''any activity related to,'' which they believe was unnecessary and could be confusing. Some commenters suggested using ''physical structures or facilities'' to define infrastructure. Another commenter suggested removing ''in the United States'' because this commenter believed that BABA applies to federally funded infrastructure without any limitations on where the infrastructure is built. Another commenter suggested adding ''using federal funds'' to the definition for additional clarity. Other commenters provided a range of other suggestions to further clarify, expand, or narrow the definition of this term.

A State agency observed that several independent infrastructure projects are often funded under one Federal award. Alternatively, in some cases only a portion of an infrastructure project, which is part of a larger project, may receive Federal funding. This State agency explained that it had received many questions regarding whether the term ''infrastructure project'' refers just to the federally funded parts of the project, an entire Federal award that may include other non-infrastructure components, the minimum amount of recipient funds required to receive a Federal award, or all matching recipient funds associated with a Federal award. The commenter recommended providing a clear definition of what the ''infrastructure project'' to resolve these questions and facilitate compliance with BABA requirements.

*OMB Response:* The definition of ''infrastructure project'' in § 184.3 is based on guidance already provided in Memorandum M–22–11, which was based on the definitions of ''infrastructure,'' ''project,'' and ''Federal financial assistance'' in section 70912 of BABA in addition to other statutory provisions. OMB added a ''see also'' signal to the definition to direct stakeholders to additional guidance provided in § 184.4 at paragraphs (c) and (d).

Regarding concerns about the phrase ''any activity related to,'' OMB notes that other effective guidance provides limiting principles related to the application of this term, such as the distinction between temporary use and permanent incorporation in Memorandum M–22–11, as discussed above, which remains effective. Although temporary items may fall under the broad scope of an infrastructure project, the Buy America preference does not apply to them if they are not permanently incorporated into the project. The initial guidance in Memorandum M–22–11, through the successor M-Memorandum, remains in effect except in cases of direct conflict

with part 184. OMB retains the phrase ''any activity related to'' for consistency with the guidance in § 184.4(d), which explains that Federal agencies should interpret the term ''infrastructure'' broadly. This broad interpretation, however, remains subject to other specific limiting principles in part 184, Memorandum M–22–11, or any successor M-Memorandum that OMB issues to replace Memorandum M–22–11. For similar reasons, OMB does not find it necessary to specifically limit the definition to ''physical structures or facilities.''

On the comment suggesting removing ''in the United States,'' OMB notes that the definition of ''infrastructure'' at section 70912(5) of BABA is limited to ''structures, facilities, and equipment . . . in the United States.'' Regarding the suggestion to add ''using federal funds,'' this topic is addressed elsewhere in the guidance such as §§ 184.1(b) and 184.4(b).

On the comment requesting more specificity on the scope of an infrastructure project, OMB first reminds stakeholders of its existing guidance in Memorandum M–22–11, which defines ''project'' as the construction, alteration, maintenance, or repair of infrastructure in the U.S. OMB explains in its initial guidance that the Buy America preference ''only applies to the iron and steel, manufactured products, and construction materials used for the infrastructure project under an award.'' OMB explains that if ''an agency has determined that no funds from a particular award under a covered program will be used for infrastructure, a Buy America preference does not apply to that award.'' Similarly, OMB explains that, ''for a covered program, a Buy America preference does not apply to non-infrastructure spending under an award that also includes a covered project.'' This should clarify the commenter's concern on application of BABA to other non-infrastructure components of an infrastructure project.

OMB also clarifies in Memorandum M–22–11 that a ''Buy America preference applies to *an entire infrastructure project,* even if it is funded by both Federal and non-Federal funds under one or more awards'' (emphasis in original). This guidance from Memorandum M–22–11 remains in effect. Federal agencies may consider providing further guidance on this topic to further address the risk of improper segmentation of infrastructure projects by funding source or in other ways in order to avoid BABA coverage. As Memorandum M–22–11 explains, the BABA preference should be applied to the entire infrastructure project. At this time OMB leaves Federal agencies with discretion on how best to ensure proper application of the Buy America preference to the entire infrastructure project receiving a Federal award.

On the definition of this term in general, considering the guidance already available on this topic from BABA itself, in Memorandum M–22–11, and in other provisions of the revised guidance in part 184, OMB did not find it necessary to make additional changes to the definition in the part 184 text beyond inserting the ''see also'' signal directing readers to further guidance in § 184.4 at paragraphs (c) and (d). Further discussion on those paragraphs is provided below in this preamble.

**Section 184.3—Definition of (1) Iron or Steel Products and (2) Predominantly of Iron or Steel or a Combination of Both**

Because the definition of ''iron or steel products'' is closely intertwined with the definition of ''predominantly of iron or steel or a combination of both,'' OMB discusses comments related to both definitions here. Many commenters supported providing a clear definition in the revised guidance for ''predominantly'' iron or steel items. Commenters generally agreed that using the definition at FAR 25.003 would provide the needed clarity. Some commenters also expressed support for including in that definition language from the FAR that would provide an exception for commercial off the shelf (COTS) fasteners. Other commenters recommended clarifying that the calculation could be defined by weight, volume, cost, or other measures. Some commenters also suggested increasing the threshold for ''predominantly iron or steel'' products above the 50 precent threshold used in the FAR.

Other commenters suggested adopting the definition of iron and steel from the American Iron and Steel (AIS) standard used by EPA. Some commenters also suggested using the word ''primarily'' as it is used in the AIS standard in place of the word ''predominantly.''

Some commenters observed that the word ''predominantly'' does not appear in the statute, and questioned whether it should be included in the revised guidance at all. Commenters also sought clarity on topics including what domestic content standard applies to components that are not made of iron or steel and when stakeholders should determine the cost of the iron or steel in the product.

*OMB Response:* In part 184, OMB adopts a definition for predominantly of iron or steel or a combination of both, which is generally consistent with the FAR definition. The definition adopted by OMB, however, does not incorporate FAR-specific waivers or exemptions, such as the language related to COTS fasteners. OMB also notes that when determining whether the product meets the applicable threshold, labor costs are not included.

OMB believes that a clear method is needed to distinguish between iron or steel products and other product categories to ensure that stakeholders will understand what domestic content standards to apply to individual items. OMB finds that using a definition based largely on the existing FAR definition will provide consistency and predictability for stakeholders, ensuring that similar principles are applied in the context of both Federal procurement and Federal financial assistance.

OMB also observes the similarity of its adopted standard to the AIS standard used by EPA. OMB acknowledges that the standards are not identical, but their use of a common 50 percent threshold should lead to similar results on product classification in many cases. OMB also clarifies that it does not modify the AIS standard used by EPA through this guidance. EPA is the best source of information on what Federal awards made by EPA are subject to its AIS standard based on section 70917 of BABA and § 184.2(a) of this guidance. OMB also observes that the term ''predominantly'' as used in the revised guidance is not identical to the term ''primarily'' used by EPA. Again, the terms both use a 50 percent threshold, but have other variations and will lead to different results on product classification in certain cases.

OMB addresses questions on what domestic content standard applies to components that are not made of iron or steel in other sections of the guidance and preamble.

**Section 184.3—Definition of Manufactured Products—General**

OMB received many comments on its proposed definition of ''manufactured products.'' For example, OMB received many comments requesting additional guidance on how to identify what constitutes a ''manufactured product'' relative to a construction material, an iron or steel product, or a section 70917(c) material (referred to as an ''excluded material'' in the preamble to the proposed guidance). Some commenters noted that the proposed guidance did not provide sufficient clarity on how to treat products that are a combination of multiple construction materials. Other commenters, including many State departments of transportation, questioned OMB's rationale for proposing to deviate from

the initial guidance in Memorandum M–22–11 on this topic, and potentially reclassifying many manufactured products as construction materials. These commenters explained various practical consequences of a deviation from the initial guidance on this topic, which are discussed above under the general comment summary for the definition of ''construction materials.''

Other commenters maintained that OMB's proposed definition of manufactured products was overly broad and should be narrowed and more tailored. For example, one commenter stressed the importance of providing an affirmative definition of the term, which would define what set of items OMB intends to be included in the category, rather than just explaining what items are not included. This commenter favored the affirmative language proposed in the preamble to OMB's proposed guidance, which would only classify an item as a manufactured product if it was either ''processed into a specific form and shape'' or consisted of a combination of raw materials ''to create a material that has different properties than the properties of the individual raw materials.''

Some commenters who favored narrowing the definition of ''manufactured products'' believed that the intent of BABA was only to include products that are commonly or frequently used in federally funded infrastructure projects. Some also suggested that a product should only be included if its use on federally funded infrastructure projects is broad or substantial enough to encourage or drive investment in American manufacturing based specifically on application of the Buy America preference. Commenters also expressed concerns that supply chains were already stressed and projects were already delayed prior to the enactment of BABA. These commenters suggested that an overly broad application of the Buy America preference for manufactured products could lead to further project delays and cost increases or overruns.

Some commenters supported the use of the FAR for supplemental definitions of the terms ''end product'' and ''component,'' which could be applied to the category of manufactured products. These commenters suggested that the supplemental definitions could provide further clarity for stakeholders. Other commenters questioned the appropriateness of using the FAR definitions in this context. Additionally, some commenters raised concerns about the burden of tracking a wide range of material components in an ''end product,'' which could encompass a range of different manufactured components brought to the site at different times.

Some commenters also requested that OMB clarify the treatment of ''kits'' or systems under the revised guidance. Specifically, one commenter requested confirmation that if a manufactured product is a kit or system consisting of multiple components that are required in order to implement the product solution at a site, the kit or system would be evaluated as a single manufactured product subject to the 55 percent cost component analysis, rather than viewing each of the items in the kit or system as a separate manufactured product each subject to its own separate analysis.

OMB also received one comment from a State department of transportation requesting clarification on classifications for topsoil, compost, and seed. Another commenter provided more detail on seeds, explaining that they are often used on infrastructure projects to prevent soil erosion, protect water quality, and comply with environmental requirements, such as those under the Clean Water Act.

*OMB Response:* OMB recognizes concerns expressed by commenters on the need to provide further clarity on the meaning and classification of manufactured products. To address these concerns, OMB has added an affirmative definition of the term ''manufactured products,'' which now comes before the limiting definition explaining what manufactured products are not. The affirmative definition is based largely on the elements for an affirmative definition proposed by OMB in the preamble to the proposed guidance. In the final guidance, the first paragraph of the definition of ''manufactured products'' defines the term to mean articles, materials, or supplies that have been: (i) processed into a specific form and shape; or (ii) combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.

Paragraph (1)(i) of the definition remains unchanged relative to the language included in the preamble of OMB's proposed guidance based on the definition of ''manufactured good'' at 2 CFR 176.140(a)(1). The second element of the affirmative definition of ''manufactured products'' in paragraph (1)(ii) was modified in the revised guidance relative to 2 CFR 176.140(a)(1). OMB dropped the reference to raw materials to clarify that a manufactured product may also be created by combining manufactured components, which are not raw materials. However, OMB retained the language specifying that the combination of materials would create a product with ''different properties'' than the individual articles, materials, or supplies. By retaining the language on ''different properties,'' OMB acknowledges that not just any combination of materials produces a manufactured product. For example, a mixture of raw materials in an unprocessed or minimally processed state, such as minimally-processed fill dirt, should not be classified as a manufactured product.

One important purpose of both elements of the affirmative definition of ''manufactured products'' in paragraph (1) is to recognize that some items, like certain raw materials, are not meaningfully ''manufactured'' before they are brought to the work site. Raw materials may include unprocessed or minimally-processed materials such as natural resources, which serve as the basic materials used in manufacturing processes for other finished products and components of finished products. OMB does not believe that Congress intended to apply the Buy America preference for manufactured products to non-manufactured or raw materials if they are brought to the work site in an unprocessed or minimally-processed state (such as topsoil, compost, and seed). Thus, OMB agreed with commenters that it was important to provide affirmative content and meaning for the definition to provide further clarity. If non-manufactured or raw materials are brought to the work site in an unprocessed or minimally processed state, Federal agencies should not classify these items as manufactured products in their implementation of BABA preferences.

OMB further clarifies that non-manufactured or raw materials mixed off-site with other non-manufactured or raw materials of similar types, or with similar but not identical properties, would not necessarily result in classifying the mixed material brought to the work site as a manufactured product if it remains in an unprocessed or minimally processed state. OMB recognizes that an overly strict application of the revised definition of ''manufactured products'' could potentially result in classifying certain technically composite or compound raw materials, such as fill dirt, as manufactured products, which is not OMB's intent. Even if there are some limited or marginal changes to the properties of the combined material, it may be reasonable to continue to classifying the combined material as a non-manufactured or raw material in at least the circumstances described above.

OMB also notes that certain waste or recycled materials, as discussed by some commenters, may also potentially be classified as non-manufactured raw materials if they remain in an unprocessed or minimally-processed state—or the equivalent of such a state for waste and recycled materials. OMB does not issue specific guidance to Federal agencies on the topic of waste or recycled materials through this document.

Paragraph (2) of OMB's revised definition of ''manufactured products'' again clarifies that if an item is classified as an iron or steel product, a construction material, or a section 70917(c) material, then it is not a manufactured product. OMB's responses to comments about treatment of combinations of different construction materials are addressed in the response to comments on the general construction material definition above. As explained under that section of the preamble, OMB has returned to an approach more consistent with Memorandum M–22–11 on that topic than was reflected in the proposed guidance. OMB returns to classifying items that consist of two or more of the construction materials listed in the definition at § 184.3, or that combine a listed construction material with non-minor additions of other non-listed items, as manufactured products, rather than as construction materials.

It was necessary to maintain what is now the first sentence of paragraph (2) of the definition of ''manufactured products'' to continue allow for distinguishing between product categories, which have different domestic content requirements applicable to each of them. Section 184.4(e) of the revised guidance explains that products only fall in a single category, but does not explain how to decide which category a product falls in. The definitions in § 184.3 provide that information. The first sentence of paragraph (2) of the ''manufactured products'' definition ensures that this definition does not conflict or overlap with other product category definitions in § 184.3. For example, many construction materials are also processed into a specific form and shape. Moreover, listed construction materials such as fiber optic cable and engineered wood are also produced by combining different materials through manufacturing processes. Paragraph (2) explains that the other definitions continue to take priority.

Paragraph (2) of OMB's revised definition also now clarifies that an item classified as a manufactured product may include components that are construction materials, iron or steel products, or section 70917(c) materials. In addition to the listed items, the components of a manufactured product may also include components that are non-listed raw materials or other types of articles, materials, or supplies.

Although not addressed directly in the part 184 text, OMB recognizes that some items may be acquired from a manufacturer or supplier as a kit intended for final assembly or installation on the work site. In such cases, the items comprising the kit should be treated the same with regard to the cost of components test. Even in the case of a kit, for the purposes of applying the cost of components test at § 184.5, the manufacturer should be considered the entity that manufactured the elements of the kit, not the recipient or contractor that acquires the kit or the contractor that assembles or installs the kit on the work site. The kit concept is discussed in further detail under § 184.4(e) below.

OMB believes the definition provided in the revised guidance on the meaning of manufactured products will provide needed clarity to stakeholders for the vast majority of product classifications. OMB also believes its approach in the revised guidance will provide continuity with certain key elements of its initial guidance in Memorandum M–22–11 on how to distinguish between manufactured products and construction materials. Where fringe or marginal cases arise, further guidance may be needed in the future.

**Section 184.3—Definition of Manufactured Product—Relationship to Section 70917(c) Materials**

Numerous commenters maintained that the revised guidance should clarify that section 70917(c) materials are entirely excluded from coverage under BABA. In the preamble to the proposed guidance, at question 9 labeled ''Aggregates,'' OMB indicated that section 70917(c) materials were only excluded by statute under the category of ''construction materials'' and sought comments on how they should be treated under the category of ''manufactured products'' in the revised guidance. The section 70917(c) materials include: (i) cement and cementitious materials; (ii) aggregates such as stone, sand, or gravel; and (iii) aggregate binding agents or additives. Section 70917(c)(1) of BABA states that ''the term 'construction materials' shall not include'' the section 70917(c) materials. Section 70917(c)(2) of BABA states the ''standards developed under section 70915(b)(1) shall not include'' the section 70917(c) materials as ''inputs of the construction material.'' These materials were referred to as ''excluded materials'' in the preamble to the proposed guidance based on their exclusion from the ''construction materials'' category.

Commenters offered many arguments and reasons why the section 70917(c) materials should be entirely excluded from all categories under BABA, including manufactured products. Some commenters noted that the adoption of the proposed guidance would have a negative impact on industry, such as narrowing the sources for aggregates that could be used in infrastructure projects. Some commenters also noted that local aggregates may not meet quality standards, which could limit the life of projects. Further, some commenters noted that alternative sources for aggregates are often more costly than current (foreign) sources. One commenter also noted that the domestic supply of aggregates is limited by environmental and land use regulations (many of them localized in scope), and subject to week-to-week fluctuations in availability. This commenter explained that supplies are not flexible in times of rising demand.

Some commenters believed that OMB failed to consider the provision at section 70917(c)(2), which prohibits the section 70917(c) materials from being considered inputs of a construction material under the standards called for under 70915(b)(1). These commenters argued that section 70917(c) materials, such as aggregates, should be fully excluded from BABA domestic content preferences, whether as standalone materials or as components in other materials such as precast concrete. These commenters also noted the close link between cement and concrete, observing that concrete cannot be produced without cement and that cement has no function other than to produce concrete. Some commenters maintained that Congress established the exclusion at section 70917(c) to acknowledge fluctuations in the availability of section 70917(c) materials, particularly cement. Some commenters also suggested that that if a Buy America preference were applied to section 70917(c) materials, the cost of the materials may significantly increase. Thus, these commenters argued that both cement and concrete products should be entirely exempt from BABA coverage.

Some commenters also stressed the importance of excluding asphaltic concrete from Buy America coverage for similar reasons to the comments stressing the importance of excluding

Portland cement concrete. These commenters explained that asphaltic concrete is made of aggregates and aggregate binding agents and additives (including asphalt), which are all section 70917(c) materials. Some comments also focused specifically on Portland cement concrete, which is made of aggregates, Portland cement (a form of cement and aggregate binding agent), and other additives.

Other commenters questioned why a combination of section 70917(c) materials with other section 70917(c) materials would create a new form of product that is not excluded. They observed that there is nothing in the statute to suggest that OMB should treat a product made of a combination of section 70917(c) materials differently than it treats the individual materials. One commenter noted that the listing of the section 70917(c) in a single list indicates that Congress intended to exclude not just single materials from BABA coverage, but also combinations of the listed materials when they are bound together. This commenter maintained that, under the statute, combinations of the section 70197(c) materials are excluded from BABA requirements in the same way as any individual material.

Many commenters questioned OMB's statement in the preamble to the proposed guidance that section 70917(c) materials could be treated as ''manufactured products'' subject to the Buy America preference at section 70914(a) of BABA. Some commenters indicated that only a combination of non-excluded construction materials can properly constitute a manufactured product under the statutory framework.

A few commenters also noted their agreement with OMB's observation that BABA did not specifically exclude section 70917(c) materials from the category of manufactured products. These commenters agreed that section 70917(c) should be subject to the relevant domestic content requirements for the category of manufactured products but not for the category of construction materials. For example, one commenter indicated that items made with inputs of section 70917(c) materials, such as precast concrete shapes and reinforced precast concrete structures, should be subject to the domestic content requirements for the manufactured product category established under BABA.

*OMB Response:* After careful consideration of the comments received on this topic and the statutory text of BABA, OMB clarifies that section 70917(c) materials, on their own, are not manufactured products. Further, section 70917(c) materials should not be considered manufactured products when they are used at or combined proximate to the work site—such as is the case with wet concrete or hot mix asphalt brought to the work site for incorporation. However, certain section 70917(c) materials (such as stone, sand, and gravel) may be used to produce a manufactured product, such as is precast concrete. Precast concrete is made of components, is processed into a specific shape or form, and is in such state when brought to the work site.

The revised guidance clarifies the circumstances under which the section 70917(c) materials should be treated as components of a manufactured product. That determination will be made based on consideration of: (i) the revised definition of the ''manufactured products'' at § 184.3; (ii) a new definition of ''section 70917(c) materials'' at § 184.3; (iii) new instructions at § 184.4(e) on how and when to categorize articles, materials, and supplies; (iv) new instructions at § 184.4(f) on how to apply the Buy America preference by category; and (v) additional discussion in this preamble clarifying that wet concrete should not be considered a manufactured product if not dried or set prior to reaching the work site.

Based on these provisions, the revised guidance clarifies that a manufactured product may include components that are section 70917(c) materials, construction materials, iron or steel products, manufactured products, raw materials, or any other articles, materials, or supplies.

As explained below, an item should be distinguished from its components for the purposes of BABA categorization based on the status of the product when brought to the work site. When brought to the work site, an article, material, or supply should only be classified into one of the following categories: (1) iron or steel products; (2) manufactured products; (3) construction materials; or (4) section 70917(c) materials. *See* 2 CFR 184.4(e) (as revised). Examples of how the revised provisions should be applied in practice to section 70917(c) materials are provided below.

Before discussing specific examples applying the revised provisions, OMB first explains its analysis of the statutory text on which the revised provisions are based. OMB agrees with commenters that the category of construction materials must not include section 70917(c) materials. The statute clearly excludes the section 70917(c) materials from categorization as construction materials and as components or inputs in the associated standards for these materials. The revised guidance recognizes these limitations. It does not include section 70917(c) materials in the list of construction materials at § 184.3 or in the standards at § 184.6. However, as explained in the preamble to the proposed guidance, the statutory text does not explain how section 70917(c) materials should be treated relative to the manufactured product category.

The section of BABA addressing the section 70917(c) materials applies only to the category of construction materials, not manufactured products. Section 70917(c) provides that ''the term *construction materials* shall not include cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.'' BABA 70917(c)(1) (emphasis added). The same section also provides that ''the standards developed under section 70915(b)(1)''—entitled ''standards for *construction materials*''—shall not include ''cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives as inputs of the construction material.'' BABA 70915(b)(1) (emphasis added) and 70917(c)(2). Notably, the standards developed under section 70915(b)(1) apply only to construction materials and not iron or steel or manufactured products.

The separate categories for ''construction materials,'' ''iron or steel'' products, and ''manufactured products'' are required by the plain text of BABA sections 70912(2), 70912(6), and 70914(a)—and were also applied under OMB's initial guidance in Memorandum M–22–11. Under the definition at section 70912(2), the statute recognizes that Federal agencies should apply three separate ''domestic content procurement preference[s]'' for: (i) iron and steel products; (ii) manufactured products; and (iii) construction materials. Under the definition for ''produced in the [U.S.]'' at section 70912(6), the statute also recognizes these categories. The three top-level categories mandated by Congress are again reiterated at section 70914.

Relative to the ''manufactured products'' category, a more stringent standard applies to the ''construction materials'' category, for which ''all manufacturing processes'' are required to occur in the U.S. *See* section 70912(6)(C) of BABA, with standards to define ''all manufacturing processes'' to be developed by OMB under section 70915(b)(1). Based on these provisions, the section 70917(c) materials should be excluded under the more stringent standard for ''construction materials.''

No exclusion, however, is provided under the category for ''manufactured products'' on which BABA is silent relative to these materials.

OMB's revised guidance in part 184 is consistent with the statutory framework of BABA, establishing three separate categories for Buy America preferences. Consistent with section 70917(c), OMB does not include the section 70917(c) materials under its proposed definition for ''construction materials'' at § 184.3, or as inputs for ''construction materials'' in the manufacturing standards at § 184.6.

OMB also properly recognized that the statute did not exclude the section 70917(c) materials from the ''manufactured products'' category, to which an alternative domestic content standard applies. BABA only excluded the section 70917(c) materials from the more stringent domestic content preference for ''construction materials,'' which requires ''all manufacturing processes'' for the material to occur in the U.S., but not from the alternative domestic content preference for manufactured products, which requires application of the 55 percent ''cost of components'' test.

The preamble to the proposed OMB guidance sought public comment on how the section 70917(c) materials should be treated in the context of the ''manufactured products'' Buy America preference category. OMB now provides guidance on that topic in part 184. In doing so, OMB aims for a harmonious interpretation of section 70917(c) of BABA, which bars classification of section 70917(c) materials as construction materials, and other sections of BABA, including sections 70912 and 70914, which require Federal agencies to apply a Buy America preference for manufactured products. Based on thorough review and consideration of all comments received, and careful consideration of congressional intent reflected in the statutory text, OMB's guidance gives effect to all of these provisions and renders them compatible.

OMB agreed with commenters that it should not apply the ''manufactured products'' Buy America preference to standalone section 70917(c) materials if they have not been combined with different section 70917(c) materials, or other materials, to create a manufactured product. An item can be classified as only one of the following: an iron or steel product, a construction material, a manufactured product, a section 70917(c) material, or none of the above. Thus, no individual item on the list of section 70917(c) materials should be treated, in isolation, as 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.

OMB's approach for distinguishing a single section 70917(c) material from a manufactured product is functionally similar—but not identical—to its approach for distinguishing a single construction material from a manufactured product. First, like the construction material definition, ''articles, materials, or supplies that consist of *only one* of the items listed'' in the definition of ''section 70917(c) materials'' should be classified as section 70917(c) materials. 2 CFR 184.3 (as revised) (emphasis added). Just like a plastic item by itself cannot be a manufactured product, stone by itself also cannot be a manufactured product. Second, to the extent one of the listed section 70917(c) materials contains, as inputs, other items listed in the definition—such as cement that requires aggregate binding agents as inputs—the listed item is still considered a section 70917(c) material. Third, when two or more section 70917(c) materials are combined together at or proximate to the work site to make an item that is not specifically listed—such as asphaltic or Portland cement concrete—agencies should rely on how such items were classified at the time they reached the work site.

In the case of section 70917(c) materials, OMB clarifies in this preamble that, to the extent the section 70917(c) materials were only combined as an unsettled mixture without final form when reaching the work site, such as in the case of wet concrete or hot mix asphalt, the unsettled mixture should not be considered a manufactured product to which a Buy America preference applies. Wet concrete is not yet ''processed into a specific shape or form.'' Although it may have ''different properties'' than individual section 70917(c) materials, OMB finds that it is more consistent with the intent of BABA to only treat section 70917(c) materials that have set or dried into a particular shape or form prior to reaching the work site, such as precast concrete, as manufactured products. OMB recognizes that certain section 70917(c) materials (such as stone, sand and gravel) may be used to produce a manufactured product such as is the case with precast concrete. Precast concrete consists of components processed into a specific shape or form and is in such state when brought to the work site, making it a manufactured product.

A key difference between the categories of construction material and section 70917(c) materials is that, unlike construction materials, no Buy America preference is applied directly to individual section 70917(c) materials. The parallels or similarities above relate only to how materials are classified as falling within one of those categories.

To illustrate this approach, if an individual item included in the list of section 70917(c) materials is brought to the work site for incorporation into an infrastructure project, then that item is still a section 70917(c) material and not a manufactured product. Agencies should not apply the Buy America preference under BABA to an individual section 70917(c) material that is not a component of a manufactured product.

There may be circumstances, however, when section 70917(c) materials will be treated as components of manufactured products to which a Buy America preference will apply. If the individual section 70917(c) material is combined with other section 70917(c) 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 section 70917(c) materials should be treated as components in the circumstances described in this preamble. For the reasons explained above, including the value of section 70917(c) materials in the 55 percent cost of components requirement is consistent with BABA, which requires a Buy America preference to be applied to all manufactured products. Examples of minor additions that would not change the categorization of a section 70917(c) material are provided under the discussion of aggregates below.

Based on the revised guidance, products like precast concrete should be treated as manufactured products—or when applicable, iron and steel products—with components including but not limited to aggregates, cement, and aggregate binding agents, as well as, where applicable, reinforcing iron or steel. OMB recognizes that in some circumstances a precast concrete product may instead be classified as an iron or steel product, such as when the product is predominantly of iron or steel or a combination of both. OMB also recognizes that BABA's savings provision, which is discussed above in this preamble, may affect product

classification in some circumstances. Federal agencies are in the best position to provide specific guidance on the application of BABA's savings provision to their awards. Specific examples of how the provisions of the revised guidance should be applied to section 70917(c) materials are provided below.

Aggregates should be classified as a section 70917(c) materials. The fact that an aggregate is processed into a specific form or shape—for example, to meet certain construction specifications—would not affect its classification. The aggregate would still be classified as a section 70917(c) material. Similarly, aggregates combined with minor additions of other materials that do not impact the commonsense identification of the material as an aggregate—for example, gravel combined with additives to increase traction or resilience or for some other purpose—would also not impact the classification of the aggregate as a section 70917(c) material. In addition, aggregates mixed only with other aggregates—such as sand mixed with gravel—remain aggregates and section 70917(c) materials.

In classifying aggregates this way, OMB recognizes that many aggregates are not ''manufactured'' in the ordinary sense of the term. For example, rocks and stone are not manufactured. Even in cases in which an aggregate is processed or altered in some way—for example, to meet construction specifications—provided that the product brought to the work site remains best classified as an aggregate, its categorization as a section 70917(c) material would not change.

As commenters observed, OMB acknowledges that cement is an input of concrete. Thus, in some cases, as specified in this preamble, a Buy America preference will apply to cement and cementitious materials as components of precast concrete. A precast concrete product, which contains cement as an input, should be classified as a manufactured product, not a section 70917(c) material. Circumstances when a Buy America preference does not apply include when cement and cementitious materials are brought to the work site as standalone products (to be mixed on site) or in combination with other section 70917(c) materials, such as in the case of wet concrete mix, which has not yet settled into a specific form or shape before reaching the work site. As with cement, in some cases, aggregate binding agents and additives will ultimately be treated as components of a manufactured product. The circumstances are similar to those described for cement and are therefore not repeated here.

**Section 184.3—Definition of Manufacturer**

OMB added this definition in the revised guidance to address comments received on the cost of component test for manufactured products at § 184.5. OMB addresses those comments under § 184.5. In the revised guidance, manufacturer is defined to mean the entity that performs the final manufacturing process that produces a manufactured product.

**Section 184.3—Definition of Produced in the U.S.**

OMB received a range of comments on its definition of produced in the U.S. As this definition is closely related to the manufacturing standards for construction materials at § 184.6, and the cost of components test for manufactured products, many of the comments are addressed under those sections.

Regarding the definition of ''produced in the [U.S.]'' for iron and steel products, some commenters suggested adding language to clarify that the standard does not require that other non-iron or -steel components must be produced in the U.S. One commenter suggested relocating § 184.6 of the revised guidance to the definition of ''produced in the [U.S.]'' in § 184.3. One commenter suggested moving language about ''binding agents'' into the definition of ''construction materials'' to the definition of ''produced in the [U.S.].'' Another commenter suggested revising the definition of ''produced in the U.S.'' for manufactured products to clearly differentiate between products that have all components manufactured in the U.S. and those with components manufactured in other countries.

*OMB Response:* OMB has adhered closely to the statutory definition for this term at BABA section 70912(6). OMB made minor clarifying edits, such as adding ''see also'' signals to other sections of the guidance with relevant information, such as a reference to § 184.5 in the case of manufactured products and § 184.6 in the case of construction materials.

On the definition applicable to iron or steel products, § 184.4(e) clarifies than an article, material, or supply incorporated into an infrastructure project must meet the Buy America preference for only the single category in which it is classified. Thus, in the case of iron or steel products, the Buy America preference does not apply directly to non-iron or -steel components. In addition, consistent with existing practice, the requirement for iron or steel does not restrict the origin of the raw materials used in production of the iron or steel, but requires that all manufacturing processes of the iron or steel product occurred in the U.S.

Comments on the definition as applied to manufactured products are addressed under § 184.5. Comments on the definition as applied to construction materials are addressed under § 184.6.

**Section 184.3—Definition of Section 70917(c) Materials**

OMB has summarized comments related to section 70917(c) materials under its discussion of the relationship of section 70917(c) materials to manufactured products.

*OMB Response:* OMB has defined section 70917(c) materials to mean only one of the following categories of items: (i) cement and cementitious materials; (ii) aggregates such as stone, sand, or gravel; or (iii) aggregate binding agents or additives. As discussed above on the relationship of section 70917(c) materials to manufactured products, OMB has incorporated a definition of ''section 70917(c) materials'' based on the materials listed in that section of BABA. OMB also added clarifying language to the definition, which is consistent with the policy explained above, which OMB uses to distinguish between section 70917(c) materials and manufactured products. OMB interprets section 70917(c) of BABA harmoniously with the Buy America preference for manufactured products, giving effect to both provisions.

OMB agrees with commenters that section 70917(c) materials are excluded from the category of construction materials and from being considered inputs to listed construction materials. OMB also agrees with commenters that the Buy America preference for manufactured products should not apply directly to section 70917(c) materials, such as aggregates, which are not meaningfully manufactured in the ordinary sense. In its discussion above, however, OMB also recognizes the statutory mandate to apply a Buy America preference to manufactured products, and explains the circumstances under which section 70917(c) materials should be considered components of manufactured products.

OMB notes that the statutory text of BABA is generally silent on the interaction between the two categories. OMB defines that relationship in this revised guidance in a way that is consistent with the statute reflected in both section 70917(c) of BABA, which excludes section 70917(c) materials from the category of construction materials, and sections 70912 and

70914(a) of BABA, which require application of a Buy America preference to manufactured products. The text of BABA does not indicate that Congress intended to exclude section 70917(c) materials from the latter category. OMB's revised approach interprets the statutory provisions on section 70917(c) materials and manufactured products in a way that renders the provisions compatible. Based on thorough review and consideration of all comments received, and careful consideration of congressional intent reflected in the statutory text, the policy of the Made in America Office in OMB on defining the interrelationship of the categories is set forth above in this preamble and in the part 184 text.

**Section 184.4: Applying the Buy America Preference to a Federal Award**

**Section 184.4(a) and (b)—Applicability of Buy America Preference to Infrastructure Projects and Including the Buy America Preference in Federal Awards**

Some commenters questioned the earlier guidance in Memorandum M–22–11, which only applied BABA to non-Federal entities as defined at 2 CFR 200.1. These commenters questioned the rationale for the non-applicability of BABA to for-profit entities and explained certain practical consequences of this policy. For example, non-Federal entities, such as nonprofit organizations, may compete against for-profit entities in applying for discretionary grants for infrastructure. Thus, they feared this policy in Memorandum M–22–11 could create an unlevel playing field for grant applicants. These commenters asked OMB to clarify that for-profit entities are also subject to BABA.

One commenter maintained that the guidance exempting for-profit entities from BABA has already created confusion and added ambiguity into the grant application process. This commenter explained that not-for-profit electric cooperatives are put on unequal footing with for-profit entities when applying for competitive Federal grant programs and faced with a barrier to entry in pursuing Federal funding opportunities. The commenter believed that it was not congressional intent to see America's nonprofit organizations be disadvantaged as the Federal Government makes generational investments in infrastructure such as broadband.

Alternatively, another commenter urged OMB to add language directly in part 184 expressly stating that the BABA preference does not apply to for-profit entities.

*OMB Response:* Except for minor editorial changes, OMB did not change the text of these provisions in § 184.4. Paragraph (a) explains that BABA applies to Federal awards where funds are appropriated or otherwise made available for infrastructure projects in the U.S., regardless of whether infrastructure is the primary purpose of the Federal award. Paragraph (b) provides information on including the Buy America preference in Federal awards.

The guidance in Memorandum M–22–11 was based on the definition of Federal financial assistance at section 70912(4)(A) of BABA, providing that the term Federal financial assistance has the meaning given the term in ''section 200.1 of title 2, Code of Federal Regulations (or successor regulations).'' Memorandum M–22–11 explained that Federal financial assistance means ''assistance that non-Federal entities receive or administer in the form of grants, cooperative agreements, non-cash contributions or donations of property, direct assistance, loans, loan guarantees, and other types of financial assistance.'' Section 70912(4)(B) of BABA also explains that the term Federal financial assistance includes all expenditures ''by a Federal agency to a non-Federal entity for an infrastructure project.''

In OMB Guidance for Grants and Agreements at 2 CFR 200.1, Federal financial assistance means assistance that non-Federal entities receive or administer in the form of grants, cooperative agreements, and several other forms of assistance. Memorandum M–22–11 clarified how the term should be applied to BABA. OMB does not modify that guidance through this document. In the same section of part 200, non-Federal entity means ''a State, local government, Indian tribe, Institution of Higher Education (IHE), or nonprofit organization that carries out a Federal award as a recipient or subrecipient.'' In § 184.4, OMB uses the term Federal awards, the meaning of which includes ''Federal financial assistance that a recipient receives directly from a Federal awarding agency or indirectly from a pass-through entity.'' 2 CFR 200.1.

Based on the direction in the statute and the definitions at 2 CFR 200.1, Memorandum M–22–11 explained that for-profit organizations are not considered non-Federal entities. However, Memorandum M–22–11 also explained that the initial guidance it contained did not alter independent statutory authorities that agencies may have to include domestic content requirements in awards of Federal financial assistance issued to for-profit organizations.

In response to comments on applicability of BABA to for-profits, OMB further clarifies that 2 CFR 200.101(a)(2) allows Federal agencies to apply subparts A through E of the OMB Guidance for Grants and Agreements in 2 CFR part 200 to for-profit entities. Thus—although OMB does not require them to do so—Federal agencies are allowed, under the existing structure of part 200, to apply part 200, including the domestic preferences at § 200.322, to for-profit entities. Federal agencies may consider applying the revised guidance in this way, at their discretion, to create a level-playing field, with respect to application of BABA, for discretionary grant programs or other reasons. OMB also notes that, through a separate process, OMB will be proposing revisions later in 2023 to the OMB Guidance for Grants and Agreements in 2 CFR part 200, and other parts of 2 CFR. *See* 88 FR 8480 (Feb. 9, 2023).

**Section 184.4(c) and (d)—Infrastructure in General and Interpretation of Infrastructure**

OMB received several comments on the meaning and interpretation of infrastructure. Many of these comments are discussed above under the definition of ''infrastructure project'' in § 184.3. Other comments are addressed here.

Some commenters asked OMB to clarify that infrastructure built solely to support affordable housing should not be covered by BABA. One commenter asked OMB to clarify that ''buildings and real property'' do not include single family and multifamily residential properties. This commenter believed that paragraph (d) and language in Memorandum M–22–11 supported its request. The commenter was particularly interested in privately-owed multifamily housing assisted by the U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of Agriculture (USDA). The commenter requested a broad exemption for Federal financial assistance used to construct or rehabilitate single-family and multifamily residential housing projects. Another commenter noted a major bottleneck in housing deliveries and that applying BABA to building and real property could be a major headwind into efforts to close the minority homeownership gap.

Another commenter observed that because the proposal references ''public transportation'' broadly, it is not entirely clear whether OMB intends to

include rolling stock such as buses, subway cars, and commuter rail cars, in the definition of ''infrastructure project.'' This commenter believed that because rolling stock was not specifically listed in § 184.4 of the proposed guidance, OMB did not consider rolling stock to be an infrastructure project, and FTA's rolling stock regulation at 49 CFR 661.11 would continue to stand. The commenter asked OMB or U.S. DOT to clarify. The commenter believed that FTA's current regulation pertaining to rolling stock (49 CFR 661.11, discussed above) should continue to survive. The commenter noted that certain FTA rolling stock provisions may conflict with part 184.

*OMB Response:* Except for minor editorial changes, OMB did not change the text of these provisions in the revised guidance. OMB reminds commenters that additional guidance on the interpretation of infrastructure is available in Memorandum M–22–11. Given the guidance already provided on this topic in Memorandum M–22–11, and in other provisions of the revised guidance in part 184, OMB did not find it necessary to make additional changes to these provisions.

On the comments regarding infrastructure built to support affordable housing, OMB notes that Memorandum M–22–11 instructed Federal agencies to consider whether the project will serve a public function, including whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public. Projects with the former qualities have greater indicia of infrastructure, while projects with the latter quality have fewer. Projects consisting solely of the purchase, construction, or improvement of a private home for personal use, for example, would not constitute an infrastructure project. Federal agencies will have more specific information on how BABA applies to their specific programs. OMB also notes that HUD and USDA have issued certain general applicability waivers, which may apply to some of the relevant housing projects. Recipients may consider requesting waivers from Federal agencies for evaluation by the relevant Federal agency under the waiver process in § 184.7 of the guidance.

On comments and questions related to FTA regulations and rolling stock, FTA and U.S. DOT are in the best position to provide specific responses on how FTA's regulations apply today and interact with BABA and part 184. OMB notes that § 184.2(a) allows a Buy America Preference meeting or exceeding the requirements of section 70914 of BABA to remain in effect if applied by the agency to Federal awards before November 15, 2021.

**Section 184.4(e)—Categorization of Articles, Materials, and Supplies**

OMB received many comments related to the categorization of articles, materials, and supplies. For example, some commenters observed that Memorandum M–22–11 provided that an ''article, material, or supply should only be classified into one of the following categories: (1) iron or steel; (2) a manufactured product; or (3) a construction material.'' Other commenters noted that the proposed guidance did not provide sufficient clarity on how to treat products that are a combination of multiple construction materials. Many of these commenters strongly felt that OMB should not deviate from the initial guidance found in Memorandum M–22–11. Specifically, Memorandum M–22–11 explained that for ''ease of administration, an article, material, or supply should not be considered to fall into multiple categories.'' These commenters questioned why this guidance was not carried over into part 184 and wondered about practical consequences of a product falling into multiple categories.

In the proposed guidance, OMB also asked if it should use the definition of the term ''end product'' at FAR 25.003, which prompted many comments on how to identify and differentiate the end products to which the Buy America preference applies, which would be separated by category. ''End product'' is defined in the FAR to mean ''those articles, materials, and supplies to be acquired for public use.'' FAR 25.003.

Some commenters supported using the FAR definition of ''end product'' to provide further clarity for stakeholders. Other commenters questioned the usefulness, suitability, or both, of using the FAR definition in the revised guidance. For example, some commenters raised concerns over the reasonableness and burden of tracking the material components in a vaguely defined ''end product.'' Many commenters sought clarity on how to specifically identify the end products to which the Buy America preference applies and how to distinguish the end product from its components. In other words, some comments sought clarity, or noted confusion, on how to distinguish between: (i) categorized end products to which the Buy America preference directly applies; and (ii) the components of categorized end products.

To the extent an item may be classified as a manufactured product, but also includes components made of iron, steel, or construction materials, where to draw the line around the end product relative to its components makes a significant difference on how to apply the Buy America preference. This is one reason why this topic was of special concern to commenters. A broad end product with many disparate components may be subject to only the 55 percent cost of components test for a manufactured product. Alternatively, if each component of that product were identified as a separate end product, they could each be subject to the more stringent domestic content preferences applicable to iron, steel, and construction materials. Many commenters sought further clarity on this topic.

*OMB Response:* In the revised guidance, OMB agreed with commenters that it should further clarify that items should only be classified as falling into a single category or bucket. The revised guidance explains that an article, material, or supply should only be classified into one of the following categories: (1) iron or steel products; (2) manufactured products; (3) construction materials; or (4) section 70917(c) materials. The fourth category was added in the revised guidance for consistency with OMB's approach on distinguishing between manufactured products and section 70917(c) materials discussed above. The revised guidance further explains that an ''article, material, or supply should not be considered to fall into multiple categories.'' The guidance also notes that, in ''some cases, an article, material, or supply may not fall under any of the categories listed in paragraph (e)(1).'' For example, see the discussion above on temporary items brough to a work site, which are not permanently incorporated into an infrastructure project, and on non-manufactured raw materials that do not meet the newly added affirmative definition of ''manufactured products.''

The revised guidance also explains that the ''classification of an article, material, or supply as falling into one of the categories listed in paragraph (e)(1) must be made based on its status at the time it is brought to the work site for incorporation into an infrastructure project.'' Although OMB did not choose to define the term ''end product'' in the revised guidance, through this sentence OMB has aimed to provide clarity for stakeholders on how to identify the articles, materials, and supplies to which the Buy America preference applies. The part 184 text now explains

that items are generally categorized when they are ''brought to the work site.''

The sentence is based in part on language from part 25 of the FAR, which defines a construction material, in relevant part, as ''an article, material, or supply brought to the construction site by a contractor or subcontractor for incorporation into the building or work.'' FAR 25.003. Although the term construction material under the FAR has a different meaning, OMB found this language useful to identify the time at which articles, materials, and supplies are classified as falling into one category or another. OMB does not incorporate the language in the FAR definition on ''emergency life safety systems'' but separately addresses the concept of a ''kit'' below.

By using the term ''work site,'' OMB generally refers to the location of the infrastructure project at which the iron, steel, manufactured products, and construction materials will be incorporated. Federal agencies should use reasonable discretion on how to apply this term. For example, for projects in environmentally sensitive areas, products may not initially be delivered directly to the location at which they will be incorporated. In other scenarios, components may be assembled at off-site locations and delivered to the work site after assembly. Not knowing all the potential variations on this topic, OMB leaves Federal agencies with a reasonable degree of flexibility on how the term should be applied. Federal agencies may consider providing guidance to their recipients on the meaning or scope of the work site. OMB may also consider providing further guidance on this topic in the future.

OMB cautions stakeholders that the ''brought to the work site'' language does not mean that Federal agencies will now require the Buy America preference to be applied directly at the time a product is brought to a work site. OMB has not changed its initial guidance in Memorandum M–22–11 that a Buy America preference ''only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project.'' Thus, this new language does not mean that Federal agencies will require compliance checks for all products brought to the work site, which may include temporary items that will never be incorporated into the project, excess supplies, or incorrect deliveries. The purpose of the language is to clarify when *categorization* occurs—not when Buy America compliance is required. If a product is brought to the work site but never incorporated into the infrastructure project, the BABA preference would never apply to it. BABA applies only to products ''incorporated into an infrastructure project.'' *See* 2 CFR 184.1(b) and the definition of ''Buy America Preference'' at § 184.3 (as revised). The language also does not necessarily require actual classification to occur at the time that products are brought to the work site, but only that, in general, classification is based on the ''status'' of a product at the time it was brought to the work site.

If categorization occurred instead at the time of ''incorporation'' into the project, after products are further combined through various assembly and manufacturing processes on the work site, the resulting ''end products'' and their ''components'' would often look very different and lead to different outcomes on product classification and the applicable domestic content preference. The same would be true if categorization occurred based on assessment of the status of products in a finished infrastructure project. Categorization at the time of ''incorporation'' or project completion could result in wide-ranging systems assembled on the site, which include many different products from different manufacturers, being categorized as a one large manufactured product. The resulting system could include many separate iron or steel products or construction materials from different manufacturers and suppliers. Shifting the level of analysis in this way could result in only applying the domestic content preference for manufactured products to the system as a whole. In the absence of any guidance on this topic, it is conceivable that some recipients or contractors may even seek to classify an entire infrastructure project as one manufactured product. OMB's revised guidance avoids these results by specifying that classification occurs based on the status of products brought to the work site.

Another consequence of classifying at the time of ''incorporation'' or project completion could be eliminating almost all circumstances in which the affirmative standard in paragraph (1) of the definition of ''manufactured products'' would not apply to an article, material, or supply. While certain unmanufactured or raw materials brought to a work site may not meet the definition, following ''incorporation'' or project completion, the permanently incorporated materials would generally have a specific form or shape, or have been combined with other materials through manufacturing processes. Classifying materials based on their status at the time they are brought to the work site is more likely to result in at least some articles, materials, or supplies not falling under any of the listed categories, which OMB recognizes as a possibility.

OMB also clarifies here in the preamble that in certain cases a manufactured product purchased from a single manufacturer or supplier as a ''kit'' may be classified as a manufactured product even if its components are brought to the site separately or at different times. OMB does not define the term kit in the text of the revised guidance, but leaves Federal agencies with reasonable discretion on how this concept should be applied in practice when classifying products under § 184.4(e).

In general, by the term kit OMB means a product that is acquired for incorporation into an infrastructure project from a single manufacturer or supplier that is manufactured or assembled from constituent components on the work site by a contractor. A kit may be treated and evaluated as a single and distinct manufactured product regardless of when or how its individual components are brought to the work site. In contrast to a kit, other manufactured products are manufactured or preassembled before they are brought to a work site. When determining if products brought to a work site constitute a kit or separate end products, Federal agencies should generally interpret the term kit as limited to discrete products, machines, or devices performing a unified function. A more wide-ranging system of interconnected products, machines, or devices (such as a heating, ventilation, and air conditioning system for an entire building) should not be considered a kit. OMB also instructs agencies that a kit should not include an entire infrastructure project.

On kits, OMB also clarifies that for the purposes of applying the cost of components test at § 184.5, the manufacturer should be considered the entity that performs the final manufacturing process that produces the kit, not the contractor that manufactures or assembles it on the work site. Thus, transportation costs to the work site should not be considered. In this context, the place of incorporation does not mean the place of incorporation into the infrastructure project, but the place at which the manufacturer established the elements of the kit to be acquired for the infrastructure project.

**Section 184.4(f)—Application of the Buy America Preference by Category**

Some commenters urged OMB to apply the standard for iron and steel products to the components and subcomponents of other product categories. For example, one commenter suggested that the iron and steel standard should be applied directly to components and subcomponents of manufactured products and construction materials. The commenter noted that BABA explicitly states, under one of the prongs for the term ''domestic content procurement preference,'' that no Federal financial assistance may be obligated for a project unless ''all iron and steel used in the project are produced in the United States.'' Based on this language, the commenter believed that BABA requirements should apply directly to iron and steel components and subcomponents of other product categories.

Some commenters also had questions and comments regarding what domestic content preference should apply to coatings. Some of these commenters observed that if galvanized coatings were to require domestic sources of zinc ingots, there could be substantial problems with sourcing.

*OMB Response:* In § 184.4(f), OMB explains that an article, material, or supply incorporated into an infrastructure project must meet the Buy America Preference for only the single category in which it is classified. This provision was added to address concerns from commenters that it was unclear which standard, if any, should be applied to components of items that do not match the product category that the item is classified in.

For example, in the case of iron and steel products, there is no restriction on the place of production or manufacture of components or subcomponents that do not consist of iron or steel. In the case of construction materials, there is no restriction on the place of production or manufacture of minor additions, or the materials used for additions specifically described in the standards at § 184.6, such as coatings for non-ferrous metals.

An additional example could be a steel guardrail consisting predominantly of steel, but coated with aluminum. In this case, the steel must be produced in the U.S., consistent with the requirements of BABA, but there would be no restrictions on the other components of the guardrail.

**Section 184.5: Determining the Cost of Components for Manufactured Products**

Many commenters provided opinions on the definition of ''cost of components'' in § 184.5. Some commenters suggested continuing to use the definition as provided under the FAR. Some of those commenters indicated that the definition should include a statement that the costs are based on a good faith estimate of the cost, as provided in the FAR in the context of ''predominantly iron and steel'' products.

Many commenters recommended adjusting the FAR definition, but removing the term ''contractor'' and replacing it with the term ''manufacturer.'' They noted that, in the case of Federal financial assistance, it is generally the manufacturer that would be in the best position to certify whether a product is manufactured in the U.S. One commenter explained that contractors are the entities that build the infrastructure facilities in the field with materials and products that have been manufactured or produced elsewhere. Even with job-produced materials such as Portland cement concrete, this commenter indicated that there are most often separate material producers. This commenter recommended using the term manufacturer with a definition that includes material producers.

Some commenters also expressed support for retaining use of the term ''contractor.'' For example, one commenter explained that many products are altered from their manufactured state before installation on an infrastructure project. Using an alternate subject like ''manufacturer'' could require additional definitions on what separates field alterations like cutting to size or drilling holes from more extensive modifications that would fall into the category of being manufactured.

At least one commenter recommend that OMB use both ''contractor or manufacturer'' as the appropriate subject. This commenter explained that circumstances exist in which equipment arrives to the work site as one piece and does not involve any work by the contractor other than installation. Other times, equipment may arrive in pieces that require assembly by the contractor. This commenter also recommended that the labor and overhead required for a contractor to assemble the equipment or system on the site be considered a part of the calculation of ''cost of components.''

Other commenters suggested replacing the term ''contractor'' with the term ''assistance recipient'' or ''vendor.'' In addition, some commenters suggested simply removing the term ''by the contractor'' from the definition.

Other commenters advocated for various other revisions to the ''cost of components'' test to include other costs, such as those associated with the manufacture or assembly (including machining and tooling) of the end product, research and development, intellectual property, freight and overhead, acquisition costs, and labor. Other commenters suggested that OMB should more clearly define the term ''overhead'' to avoid ambiguity.

Some commenters also suggested further adjustments to the definition in the proposed guidance. For example, some advocated removing the term ''construction materials'' from the definition. Other commenters objected to removing this term.

Some commenters also recommended that OMB incorporate the definitions for ''end product,'' ''component,'' and ''system'' from the FTA's Buy America regulations at 49 CFR 661.3. Alternatively, some commenters suggested that incorporating those definitions, and particularly the definition for ''end product,'' could cause further confusion for stakeholders.

Some commenters also question whether OMB should use the FAR definition at all. These commenters suggested considering other standards for the cost of components test, such as the standard used for ARRA implementation. Finally, some commenters requested that OMB clarify the treatment of ''kits'' or similar concepts under the revised guidance.

*OMB Response:* OMB agrees with commenters who recommended using the term ''manufacturer'' in this context. OMB separately defines that term in § 184.3 of the guidance to mean the entity that completes the final manufacturing process that produces a manufactured product. As products are classified based on their status when brought to the work site, this refers to the final manufacturing process that occurred before that point in time. How this term should be applied in the case of ''kits'' is described above under § 184.4(e).

With the exception of replacing the term ''contractor'' with ''manufacturer'' and the term ''end product'' with ''manufactured product,'' OMB adheres closely to the FAR definition. OMB believes this choice will promote uniformity and predictability for stakeholders and ensure that similar provisions are applied for both Federal procurement contracts under the FAR and Federal financial assistance under part 184.

OMB also notes that labor costs associated with the manufacturing of the manufactured product are not included in the costs of components

test, which is consistent with the approach under the FAR. For components manufactured by the contractor, the FAR standard specifically excludes ''any costs associated with the manufacture of the end product.'' OMB follows this approach in the case of components manufactured by the ''manufacturer.''

**Section 184.6: Construction Material Standards**

**Section 184.6(a)(1)—Standard for Non-Ferrous Metals**

Several commenters emphasized that OMB should not modify the definition of ''produced in the United States'' that OMB provided in § 184.6 of the preliminary guidance for non-ferrous metals. One commenter emphasized that ''all manufacturing processes'' for non-ferrous metals, in the context of aluminum, should capture the smelting and casting process. Several other commenters emphasized that OMB should consider ''final assembly'' to be a part of the manufacturing process as manufacturers add ''real-world value'' at that stage of production.

However, several other commenters suggested revisions to the proposed standard. Some commenters sought more clarity without providing specific feedback or suggestions. Other commenters focused on specific parts of the production process. One commenter noted that the phrase ''initial smelting or melting'' could cause confusion if not explained further. In particular, that commenter sought feedback on whether this provision covered the rolling process. Another commenter suggested that OMB replace the ''initial smelting'' requirement with a ''last melting'' requirement.

One commenter suggested that OMB adopt a completely different framework for determining the ''manufacturing process.'' That commenter suggested that OMB determine the manufacturing process based on the existing United States-Mexico-Canada Agreement (USMCA) Rules of Origin criteria of ''substantial transformation'' for assessing qualification for domestic preference procurement. According to this commenter, OMB should consider a non-ferrous metal to be ''produced in the United States'' if the process that causes a corresponding shift in a material's 4-digit Harmonized Tariff Schedule (HTS) code classification occurs in the U.S.

Several commenters suggested that the definition of ''produced in the United States'' for non-ferrous metals should be expanded to include any manufacturing processes that occur ''in the United States and/or Canada.'' To justify this decision, one commenter cited the statutory language in the 1950 U.S. Defense Production Act, which considers both the U.S. and Canada to be a ''domestic source.'' This commenter noted that Canada and the U.S. share a highly integrated aluminum market. Domestic aluminum producers rely on a mix of domestic, Canadian, and globally sourced primary aluminum, of which 75 percent represents U.S. imports. Another commenter cited logistical concerns, noting that many companies that supply non-ferrous metals to the U.S. operate on both sides of the border between the U.S. and Canada. This commenter warned that manufacturers may have a hard time accounting for where the production has occurred and flagged that manufacturers often comingle inventory, making it difficult to trace the origin of specific products.

Some commenters noted that ''non-ferrous metals'' is a broad category. Consequently, as written, it may capture non-ferrous metals whose components are not produced domestically, such as zinc. OMB did not receive specific significant comments on other types of non-ferrous metals, such as nickel, tin, or titanium.

*OMB Response:* OMB notes that it has not made any revisions to § 184.6 for ''non-ferrous metals'' compared to the preliminary guidance. The definition of ''produced in the United States'' for non-ferrous metals is: ''All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States.''

OMB believes that this standard accurately reflects the discrete manufacturing processes used in the production of non-ferrous metals. In general, commenters agreed that ''melting,'' where the ore of a non-ferrous metal is converted into a liquid, and ''smelting,'' where the ore is converted into its purest form, are the beginning of the manufacturing process. Similarly, commenters who addressed it agreed that ''assembly'' represented the end point of the manufacturing process. However, OMB has chosen to not offer additional granularity. As one commenter noted, non-ferrous metals is a broad category. Non-ferrous metals can be produced in many forms across residential, commercial, and industrial applications, ranging from wires to piping to roofing.

As written, § 184.6(a)(1) already covers any manufacturing processes involved in the manufacturing of non-ferrous metals that occur between the initial smelting or melting and final assembly. OMB believes that this would logically cover rolling—the process in which a non-ferrous metal is passed through one or more pairs of rolls to reduce the thickness or to achieve uniform thickness. OMB is concerned that expressing more specific processes would imply that those not provided are by default excluded from the manufacturing process, and thus the requirement to be ''produced in the United States.''

In terms of where the manufacturing process begins and ends, OMB notes that the statutory text of section 70912(6)(C) states that ''in the case of construction materials, that *all* manufacturing processes for the construction material occurred in the United States'' (emphasis added). While OMB recognizes that several commenters had noted separate stages of the process where the ''manufacturing process'' could begin or end, OMB believes it does not have flexibility to distinguish between ''initial'' and ''final'' stages of the same process, as with melting/smelting. Given the explicit statutory requirement that all manufacturing processes occur in the U.S., OMB believes that it must include all processes that industry has recognized.

One commenter expressed a concern that a lack of existing domestic capacity would make it difficult to produce certain types of non-ferrous metals, such as zinc, in the United States. In reaching its final list of construction materials for the revised guidance, OMB used the list provided by Congress in its Findings in section 70911(5) of BABA for guidance. More detailed discussion on that approach is provided above. Non-ferrous metals are included on that list and OMB includes that term in the revised guidance without modification. However, OMB also notes that Congress also provided an established waiver process to address concerns, including those related to supply chain availability.

**Section 184.6(a)(2)—Standard for Plastic and Polymer-Based Products**

One commenter suggested modifications to the definition of ''plastic and polymer-based products.'' Specifically, the commenter suggested adjusting the definition to include all manufacturing processes, including a reference to ''plastic or polymer-based fibers or filaments.'' Another commenter argued that the definition of ''plastic and resin'' is sufficient, noting that as long as the composite material is made up of all plastic or resin, then creating a separate category for ''composite building materials'' was not needed.

This commenter added that the term ''composite material'' is vague and could be interpreted differently by stakeholders. Further comments on the standard for the proposed category of composite building materials, which is eliminated in the final guidance, are addressed below.

*OMB Response:* OMB notes that it has made minor revisions to the standard in § 184.6(a)(2) for ''plastic and polymer-based products.'' The definition of ''produced in the United States'' for plastic and polymer-based products is: ''All manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form, occurred in the United States.'' OMB believes that this standard accurately reflects the discrete manufacturing processes used in the production of plastic.

The statute requires ''all manufacturing processes'' to occur in the U.S. and directs OMB to define all manufacturing processes. OMB requested comment on the definition in its proposed guidance, which aimed to ensure all manufacturing processes were captured in a manner consistent with the statute and that would be administrable and well understood by manufacturers and industry participants. Based on review of comments, OMB believes the standard laid out in the final guidance follows this statutory requirement.

OMB recognizes that many commenters were confused by the reference to ''composite building materials.'' As discussed below, that category of construction material has now been reintegrated into the broader category of plastic and polymer-based products. Although the broader plastic and polymer category incorporates an element of the standard for composite building materials—referring to ''constituent composite materials''—into the standard for plastic and polymer-based products, OMB notes that the category itself remains limited to plastic and polymer-based products. As discussed in § 184.3 above, the standard should only be applied to a product comprised primarily of inputs of plastics and polymers, although such a product may also include minor additions of other materials.

**Section 184.6(a)—Standard for Composite Building Materials (Eliminated as Standalone Material)**

Many commenters indicated that additional guidance was needed on ''composite building materials'' and how OMB intended to distinguish them from ''plastic and polymer-based products'' in general. Some commenters suggested that providing examples of composite building materials would also be useful. One commenter noted that these terms do not have standard industry meanings and vary between manufacturers and States. Several commenters recommended that OMB treat composite building materials as a subset of plastic and polymer-based products rather than defining it separately and providing a separate manufacturing standard. If treated as its own stand-alone category, commenters feared that the term could inadvertently incorporate a wider range of products than what was intended by law.

Other commenters supported the definition of composite building materials, as provided in the proposed guidance. These commenters believed that the production process for such products includes the combination of raw material inputs and the molding of the composite product, which is analogous to the ''all manufacturing processes'' origin standard applied to iron and steel under certain existing Buy America laws.

*OMB Response:* OMB has deleted the standard for composite building materials from the revised guidance. As recommended by numerous commenters, plastic or polymer-based composite building materials are instead treated as a subset of plastic or polymer-based products. OMB recognizes that without further guidance it may have been difficult to distinguish between these items. Thus, the standard in § 184.6 for plastic or polymer-based products applies to plastic or polymer-based composite building materials under the revised guidance.

**Section 184.6(a)(3)—Standard for Glass**

In general, most commenters did not suggest any revisions to OMB's proposed definition of ''produced in the United States'' for glass. However, one commenter warned that it believed that domestic industry for glass beads could not currently meet the proposed definition of ''produced in the United States'' for glass. In particular, that commenter focused on the fact that the process, as proposed, would include ''the batching and melting of raw materials.'' This commenter noted that existing firms cannot quickly move their entire manufacturing process to the U.S. Because the production process involves proprietary and unique manufacturing processes—which no domestic firm currently conducts in the U.S.—this commenter warned that the proposed standards would hamper the production process for certain glass products. Another commenter noted that all glass ceramics, which it considered to be a superior material compared to tempered glass for certain types of products like fire exits, doors, and windows, are processed and produced internationally.

*OMB Response:* OMB notes that it has not made any revisions to § 184.6 for ''glass.'' The definition of ''produced in the United States'' for glass is: ''All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.'' OMB believes that these standards accurately reflect the discrete manufacturing processes used in the production of glass.

One commenter expressed a concern that a lack of existing domestic capacity would make it difficult to produce certain types of glass products, such as glass beads, in the U.S. In reaching its final list of construction materials for the revised guidance, OMB used the list provided by Congress in its Findings in section 70911(5) of BABA for guidance. More detailed discussion on that approach is provided above. Glass is included on that list and OMB includes that term in the revised guidance without modification. However, OMB also notes that Congress also provided an established waiver process to address any concerns, including those related to supply chain availability. Specifically, in the event that a Federal agency believes that (i) applying the domestic content procurement preference would be inconsistent with the public interest, (ii) construction materials are not produced in the U.S. in sufficient and reasonably available quantities or of a satisfactory quality, or (iii) the inclusion of construction materials produced in the U.S. will increase the cost of the overall project by more than 25 percent, OMB notes that the head of that agency, under section 70914, can waive the BABA preference requirements.

**Section 184.6(a)(4) and (5)—Construction Material Standards—Fiber Optic Cable and Optical Fiber**

Commenters requested OMB to clarify the proposed standards for determining whether optical fiber and fiber optic cable are ''produced in the United States.'' In particular, commenters suggested that the standards should more accurately reflect industry standards and terminology. Other commenters noted that the OMB's ultimate standards must meet the statutory directives pertaining to the ''all manufacturing processes'' requirement, including that OMB provide ''clear and consistent market

requirements.'' Commenters thought it was important for OMB to eliminate ambiguity, where possible, so OMB could communicate clear signals to the market and to grantees in a way that supports investment in U.S. jobs and effective implementation of broadband infrastructure programs.

To better facilitate that process, several commenters detailed their understanding of the various steps of the production process for optical fiber and fiber optic cable that reflect industry standards and terminology. For the optical fiber, these steps include: (1) the making of the ''core'' or core rods, (2) the preform to provide various optical properties, and (3) the draw where the preform is heated, cooled, and then pulled through a draw tower to create a single strand of optical fiber. For fiber optic cable, these steps include: (1) the application of the buffer tube, (2) the stranding to reinforce and protect the cable, and (3) the jacketing to encase the stranded buffer tubes with a protective sheath or jacketing material.

Some commenters requested that OMB provide specific definitions of each step in the process to the extent that OMB updated its definitions in § 184.6 to reflect them.

Several commenters discussed in detail which steps of the manufactured process they thought should be included in § 184.6. In general, all commenters who proposed amendments to § 184.6 agreed that the manufacturing process for optical fiber should be through the ''completion of the draw,'' rather than ''stranding,'' which is a process that occurs later in the creation of the fiber optic cable. One commenter additionally suggested that OMB clarify that the drawing process involved soaking the fiber ''in deuterium gas.'' Separately, another commenter suggested defining the preform fabrication stage as fiber preform to reduce confusion and assist with the category determination of the construction material. While commenters were thus in general agreement about the manufacturing steps for optical fiber, commenters expressed different views on the appropriate manufacturing process for fiber optic cable.

At least two commenters generally agreed with OMB's proposed standards for fiber optic cable but recommended also including the making of the ''core.'' Other commenters noted that all the manufacturing processes for both optical fiber and fiber optic cable are currently performed in the U.S. Consequently, they argued that OMB must define ''all manufacturing processes'' to include each step because any narrower definition would deviate from the clear statutory requirement of BABA. Another commenter expressed a similar perspective, stating that the use of the word ''all'' to establish a 100 percent domestic content requirement at the outset of statutory implementation removes any discretion except through the waiver process.

In contrast, another commenter suggested that OMB revise the definition to include ''from and between the buffer tube extrusion to outer jacketing.'' This commenter noted that the manufacturing of optical preform, optical fiber (*e.g.,* draw), and optical cable are distinct, separate, and generally unrelated manufacturing processes. Each process generally occurs at different facilities and at different times. As such, optical preform and optical fiber manufacturing are each an input to the optical cable manufacturing process.

In addition, this commenter noted that—it believes—the industry as a whole would be unable to meet the Buy America preference and provide fiber optical cable to federally funded infrastructure projects based on the standards proposed in the preliminary guidance.

Two commenters suggested that OMB revise the definition for fiber optic cable to be based on the drawing of the optical fiber from the preform through jacketing. With this adjustment, the 2 CFR definition would specify that the manufacturing process, in which the polymer-based jacket is combined with binder yarns and other materials to form the cabled core, occur in the U.S., but the production of the polymers or yarns would not. In addition, the manufacturing process for the outer jacketing would occur in the U.S., but the production of other inputs, such as the aramid yarns, polymer-based tapes, and ripcords, would not.

Another commenter emphasized that no domestic manufacturer will be able to manufacture all the inputs at the more granular levels domestically based on OMB's proposed guidance. In addition, this commenter thought that competent and experienced broadband providers would be less likely to participate in Federal funding programs under the preliminary guidance, which will lead to more expensive builds with infrastructure that may be less capable and reliable. Another commenter also expressed concern that no manufacturer would likely invest the significant amount of capital over the course of several years to build complete preform making facilities because they would not produce fiber in time to supply fiber optic cable meeting the proposed guidance.

Another commenter that manufactures fused silica cylinders (or tubes) for fiber optic cables noted that it provides glass core rods to fabricate fiber optic ''preforms'' in the U.S. This commenter noted that the manufacture of fused silica cylinders, which is an input into optical fiber, should not be considered part of the ''manufacturing process'' under § 184.6.

Related to the above suggestions about existing domestic capacity, several commenters raised potential antitrust issues—which they argued would undermine Congress' goals of expansive broadband connectivity and job growth. One commenter stated that only a few companies can produce optical fibers and preforms in the U.S. and only a single manufacturer currently vertically integrates the cable production with complete preform fabrication in the U.S. that produces the type of optical fiber used in broadband and other infrastructure projects. According to this commenter, this would lead to increased prices due to this firm's market power and create a single point of failure—where disruptions could impede broadband installations.

Several commenters also asked for clarification on how the various manufacturing processes for construction materials interacted with each other.

A State department of transportation suggested that the manufacturing processes for optical fiber should reflect the reference to ''optic glass'' in section 70911(5). This commenter noted that only one set of manufacturing standards should apply to a particular product. For instance, standards applied to fiber optic cable and optical fiber should be separate from the standards applied to plastic and polymer-based products.

Another commenter stated that there is a fundamental disconnect between the rigid qualifying product definitions applying to ''glass,'' ''fiber optic cable,'' and ''optical fiber'' and the current realities of the marketplace for these critical broadband infrastructure inputs.

Another State department of transportation suggested that § 184.3 be revised to remove optical fiber as a separate construction material because the standards that OMB proposed for fiber optic cables in § 184.6 contained all the standards that OMB proposed for optical fiber in § 184.6.

Another commenter requested that OMB revise § 184.6 to clarify that the reference to ''all manufacturing processes'' in each construction material standard is intended to encompass only the manufacturing and assembly

processes to produce the relevant construction material and not any processes related to the production of, for example, constituent inputs or raw materials that may be used in the manufacturing and assembly of that construction material.

Another commenter expressed concern that BABA compliance could be prohibitively difficult and expensive to implement because some construction materials, such as fiber optic cable, may be comprised of multiple sub-components, each with its own distinct manufacturing and production processes, which could entail multiple supply chain layers.

A municipality suggested that the ''manufacturing processes'' standards should be consistent across polymer-based and glass components to avoid increased compliance costs and potential confusion. This commenter suggested that compliance will be easier if all ''fiber optic cabling'' is covered by a single rule.

Several commenters noted that the standards in § 184.6 for ''all manufacturing processes'' should not include simple assembly operations performed after the jacketing stage, including the process of cutting U.S.-made fiber optic cable to length and attaching *de minimis* parts such as connectors, which do not add significant value. One commenter pointed out that not including such operations would be consistent with customs rulings regarding fiber optic cable, which recognize that U.S.-made optical fibers are the ''essence'' of a fiber optic cable, and that ''simple assembly'' operations such as cutting fibers to length and adding connectors does not result in the substantial transformation of U.S.-made fiber optic cables.

*OMB Response:* After reviewing the record, OMB has refined the standards by which optical fiber and fiber optic cable will be considered ''produced in the United States'' under § 184.6. OMB has updated the definitions for both items. The definition of ''produced in the United States'' for fiber optic cable (including drop cable) is: ''All manufacturing processes, from the ribboning (if applicable), through buffering, fiber stranding and jacketing, occurred in the U.S. All manufacturing processes also include the standards for glass and optical fiber, but not for non-ferrous metals, plastic and polymer-based products, or any others.'' The definition of ''produced in the United States'' for optical fiber is: ''All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, occurred in the U.S.''

Based on careful consideration of comments, OMB believes that the revised standards more accurately reflect the discrete manufacturing processes used in the production of (a) optical fiber and (b) fiber optic cable, which uses finished optical fiber as an input. OMB has also defined fiber optic cable in a manner that avoids repeating the same steps involved in optical fiber, changing the beginning of the process from ''the initial preform fabrication stage'' to ''ribboning (if applicable).'' By modifying the standards to be consistent with current industry practice, OMB seeks to reduce confusion for stakeholders moving forward. For ''fiber optic cable'' in § 184.6(a)(4), OMB has not substantively modified the standard from the preliminary guidance. The text of the standard, however, now incorporates ''the standards for glass and optical fiber'' instead of trying to fit each individual standard into ''fiber optic cable.'' Based on industry feedback, OMB believes that the range of processes listed in the preliminary guidance is consistent with industry practice. However, for ''optical fiber'' in § 184.6(a)(5), OMB has replaced ''fiber stranding'' with ''the completion of the draw'' in the revised guidance to conform with industry understanding of the relevant manufacturing processes.

In terms of offering specific definitions for each specific step within § 184.6(a)(4) and (5), OMB defers to the awarding Federal agency if it believes that additional clarification is more appropriate. However, based on public comments that OMB received, OMB believes that there is a consistent, straightforward understanding among the industry of the definitions of the relevant terms that does not require further clarification by OMB.

OMB notes that the statutory text of section 70912(6)(C) states that ''in the case of construction materials, that *all* manufacturing processes for the construction material occurred in the United States'' (emphasis added). While OMB recognizes that several commenters had noted separate stages of the process where the ''manufacturing process'' could begin or end, OMB believes it does not have flexibility to set these terms. Given the explicit statutory requirement that *all* manufacturing processes occur in the U.S. and rough industry consensus from several of the largest domestic manufacturers on what those processes are, OMB believes that it must include all processes that industry has recognized, from the manufacturing process for ''glass'' and ''initial preform'' through ''stranding and jacketing.''

Where relevant, OMB notes that a Federal agency also has the waiver process to address concerns, including with respect to product availability.

To provide further guidance on which standards in § 184.6 apply to a particular material, OMB has added the following language as paragraph (b), which is discussed further below: ''Except as specifically provided, only a single standard under paragraph (a) of this section should be applied to a single construction material.'' OMB notes that, in its articulation of ''all manufacturing processes'' for fiber optic cable that it has also included ''the standards for glass and optical fiber, but not for non-ferrous metals, plastic and polymer-based products, or any others.'' OMB believes that the additional language provides the level of clarity requested by the relevant commenters.

In terms of minor additions, OMB notes that it has amended the definition of ''construction material'' in § 184.3 to read: ''Minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material.'' OMB discusses this provision in the preamble above. Federal agencies may also provide further guidance on this topic. This may afford Federal agencies the opportunity to address at least some of the specific concerns raised above, such as regarding simple assembly operations that may be seen as being outside of the ''manufacturing process'' because they are considered minor additions.

**Section 184.6(a)(6)—Standard for Lumber**

One commenter noted that the lumber referenced in part 184 should include dimensional lumber only and not a combination of materials. The commenter requested additional clarification on this topic and to better define the originally-proposed construction material groupings. Similarly, another commenter suggested that instead of creating a separate category for engineered wood products, OMB may consider defining within the lumber definition or standard what materials are intended to be included.

Other commenters requested additional clarity on what is meant by ''lumber.'' For example, one commenter noted that lumber is a narrowly defined construction material and does not generally include engineered wood products, such as plywood, glulam, trusses, composite beams, and other engineered products, which some could interpret to be ''manufactured products,'' and not construction materials. Other commenters noted that

lumber should include ''dimensional lumber only'' and not a combination of materials.

*OMB Response:* OMB notes that it has not made revisions to the standard in § 184.6 for ''lumber.'' The definition of ''produced in the United States'' for lumber is: ''All manufacturing processes, from initial debarking through treatment and planing, occurred in the United States.'' Based on review of comments received, OMB continues to believe that this standard accurately reflects the discrete manufacturing processes used in the production of lumber. OMB notes that lumber is narrowly interpreted and does not generally include engineered wood products, such as plywood, glulam, trusses, or composite beams.

The statute requires ''all manufacturing processes'' to occur in the U.S. and directs OMB to define all manufacturing processes. OMB requested comment on the definition in its proposed guidance, which aimed to ensure all manufacturing processes were captured in a manner consistent with the statute and that would be administrable and well understood by manufacturers and industry participants. Based on review of comments, OMB believes the standard laid out in the final guidance follows this statutory requirement.

The approach taken is similar to the standard applied to the ''melted and poured'' manufacturing standard applied to iron or steel products. The standard recognizes the distinction between the original raw material input—such as ore or logs, which may be mined, grown or extracted elsewhere—and the beginning of a manufacturing process, which initiates the beginning of the process where constituent components are combined to produce the lumber brought to the work site and used on the infrastructure product.

**Section 184.6(a)(7)—Standard for Drywall**

One commenter expressed concerns about including lumber and drywall on the list of construction materials due to existing supply constraints for each of these materials. This commenter observed that drywall is a key component in residential construction. The commenter indicated that including drywall on the list could have deleterious effects on builders, contractors, housing providers, and others. The commenter suggested that the unintended consequences of adding products like drywall to the list were not well thought out. The commenter suggested that the implications could be far-reaching and negatively affect the housing industry. The commenter suggested that OMB should strongly encourage Federal agencies to propose BABA waivers for drywall.

Another commenter noted that drywall combines multiple materials into a final product, and thus could be considered a manufactured product.

*OMB Response:* OMB notes that it has not made revisions to the standard in § 184.6 for ''drywall.'' The definition of ''produced in the United States'' for drywall is: ''All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels, occurred in the United States.''

BABA requires ''all manufacturing processes'' to occur in the U.S. and directs OMB to define all manufacturing processes. OMB requested comment on the definition in its proposed guidance, which aimed to ensure all manufacturing processes were captured in a manner consistent with the statute and that would be administrable and well understood by manufacturers and industry participants. Based on review of comments, OMB believes the standard laid out in the final guidance follows this statutory requirement.

**Section 184.6(a)(8)—Standard for Engineered Wood**

Several commenters, including several State and municipal entities agreed with OMB's proposed guidance that the standard for ''engineered wood products'' should be defined as: ''All manufacturing processes, from initial debarking through pressing, trimming, and sanding of glued sheets or boards, occurred in the United States.'' These commenters thought that no additional changes were needed.

However, two manufacturers in the industry sought more specific definitions for the manufacturing process of this category. To clarify this point, one of these commenters provided a summary description of the manufacturing of various engineered wood products including: (1) plywood, which is manufactured from sheets of cross-laminated veneer and bonded under heat and pressure with durable, moisture-resistant adhesives; (2) Oriented Strand Board, or OSB, which is manufactured from rectangular-shaped strands of wood that are oriented lengthwise and then arranged in layers at right angles to one another, laid up into mats, and bonded together with moisture-resistant, heat-cured adhesives; (3) I-joists, which is manufactured using sawn (wood that has been produced either by sawing lengthways or by a profile chipping process) or structural composite lumber flanges (laminated veneer lumber) and OSB webs, bonded together with exterior-type adhesives; (4) glued laminated timber, or glulam, which is composed of individual wood laminations, specifically selected and positioned in the timber based on performance characteristics and bonded together with durable, moisture-resistant adhesives; (5) cross-laminated timber, which is a panel consisting of several layers of lumber or structural composite lumber stacked in alternating directions, bonded with structural adhesives, and pressed to form a solid, straight, rectangular panel and may be sanded or prefinished before shipping; and (6) structural composite lumber, which is created by bonding layers of dried and graded wood veneers or strands with moisture-resistant adhesive into blocks of material known as billets that are cured in a heated press and comes in many varieties.

Based on these descriptions, they argued that the proposed standard does not adequately address the manufacturing processes specific to structural engineered wood. These two commenters suggested that standard could instead be: ''All manufacturing processes that take place in facilities designated as SIC 2436 (Softwood Veneer and Plywood), SIC 2439 (Structural Wood Members, Not Elsewhere Classified), and/or SIC 2493 (Reconstituted Wood Products), from the initial combination of constituent materials until the wood product is in a form in which it is delivered to the work site and incorporated into the project, occurred in the United States.''

These commenters thought that the established Standard Industrial Classification (SIC) codes for these distinct subcategories of construction materials would ensure uniformity and consistency in the implementation of the Buy America preference. Additionally, one of the commenters thought that this definition would allow relevant combinatory processes for engineered wood including structural engineered wood to occur domestically, while also acknowledging that constituent materials such as fillers, adhesives, foil, laminates, web, and glues could be sourced, as needed, from outside the U.S.

*OMB Response:* OMB notes that it has added a new standard in § 184.6 for ''engineered wood.'' It has modified the standard based on provided feedback to address some of concerns raised by commenters. In the preamble of the proposed guidance, OMB proposed to define ''produced in the United States''

for engineered wood products as: ''All manufacturing processes, from initial debarking through pressing, trimming, and sanding of glued sheets or boards, occurred in the United States.'' In the revised guidance in § 184.6, OMB offers a new, and now modified, definition of ''produced in the United States'' for engineered wood to be: ''All manufacturing processes from the initial combination of constituent materials until the wood product is in its final form, occurred in the United States.''

OMB believes that this revised standard accurately reflects the discrete manufacturing processes used in the production of engineered wood. This definition was adjusted based on industry feedback, provided in public comments, and is derived from industry definitions (from SIC codes), which will help eliminate confusion and create consistency for stakeholders. However, OMB emphasizes that, because OMB added engineered wood as a logical extension of lumber, it only applies the construction material classification—and the requirement for the associated manufacturing processes to occur in the U.S.—on products that have lumber as an input. OMB also did not want to tie the definition to external metrics, such as SIC codes, which may change over time and require updated guidance from OMB.

Further, the revised standard is consistent with the statute, which requires ''all manufacturing processes be conducted in the United States'' and directs OMB to define all manufacturing processes. The final definition will ensure all manufacturing processes are captured in a manner consistent with the statute as well as in a manner that would be administrable and well understood by manufacturers and industry participants. The approach taken is similar to the ''melted and poured'' manufacturing standard applied to iron or steel products. The standard recognizes the distinction between the original raw material input—such as ore or logs, which may be mined, grown or extracted elsewhere—and the beginning of a manufacturing process, which initiates the beginning of the process where constituent components are combined to produce the end product brought to the work site and used on the infrastructure product.

**Section 184.6(b)—Application of Standards by Listed Material**

Some commenters raised concerns that BABA compliance could be prohibitively difficult and expensive to implement as some construction materials may comprise multiple sub-components, each with its own distinct manufacturing and production processes, which could entail multiple supply chain layers. These commenters suggested revising § 184.6 to clarify that the reference to ''all manufacturing processes'' in each construction material standard is intended to encompass only the manufacturing and/or assembly processes to produce the relevant construction material and not any processes related to the production of, for example, constituent inputs or raw materials that may be used in the manufacturing and/or assembly of that construction material.

*OMB Response:* In the revised guidance, § 184.6(b) explains that, except ''as specifically provided, only a single standard under paragraph (a) of this section should be applied to a single construction material.'' Without this language it could be unclear in some cases what standard, or how many standards, could apply to a single item.

To provide clarity and reduce burden for stakeholders, OMB believed it was important to explain through this paragraph specifically which of the eight standards listed in paragraph (a), or how many standards, may apply to a single construction material. The answer provided by this paragraph is that only one standard should apply, which best fits the item under consideration.

By adding this paragraph, OMB sought to avoid a situation in which it would be unclear which standards, or how many standards, apply to a single item with multiple construction materials as inputs. Composite items on the list—with inputs of other items—include at least fiber optic cable, optical fiber, engineered wood, and drywall. A logical way was needed to identify what standard applies to a single item. For cases in which more than one standard may apply to a single construction material, only the standard from the list in paragraph (a) that best fits the relevant article, material, or supply should be applied.

For example, in the case of fiber optic cable, the standards for non-ferrous metals, plastic and polymer-based products, glass, fiber optic cable, and optical fiber could all apply to a single item. Instead, under this approach, OMB now clarifies that, in the case of fiber optic cable, the standards for glass and optical fiber also apply, but not the standards for non-ferrous metals, plastic and polymer-based products, or any others. Fiber optic cable is the only standard that incorporates other standards.

Engineered wood is another example. Without this paragraph, the standards for plastic and polymer-based products, lumber, and engineered wood could all simultaneously apply to a single item. Paragraph (b) clarifies that only the single standard for engineered wood applies to a product falling in that category.

**Section 184.7: Federal Awarding Agency's Issuance of a Buy America Preference Waiver—Waiver Process in General**

Many commenters advocated for changes that would reduce the burden on industry to comply with BABA requirements, particularly for small and medium sized businesses. For example, some commenters noted that OMB should avoid creating new or different definitions that might create confusion, project delays, and increase project costs. Some commenters urged OMB to provide clarity in the guidance to ensure consistency among agencies in applying rules and implementing the guidance, particularly with regard to certifying the origin of certain products as well as the waiver process—including, for example streamlining and expediting the waiver process. Other commenters had more specific suggestions in this area, such as creating a website or database of BABA approved materials or manufacturers, as well as the granting of broad waivers for certain types of projects (for example, water projects), programs (for example, the BEAD program), or products (for example, COTS items).

Alternatively, several responses stated that the best way to reduce the burden on the industry is to preserve the existing body of regulations, interpretations, and determinations as much as possible, such as by using definitions already in use under the FAR or existing standards under Buy America.

*OMB Response:* OMB made some editorial changes, but has not otherwise made material changes to § 184.7. In § 184.7(d)(3), OMB notes that it revised the legal authorities it references to only include E.O. 14005 and section 70923(b) of BABA, which OMB considered sufficient for the purposes of this provision. OMB provides additional guidance on the waiver process in Memorandum M–22–11. OMB may consider offering additional guidance on this topic in the future. OMB also notes that Federal agencies have direct statutory authority to propose and issue waivers under section 70914(b) of BABA. Federal agencies may also offer further guidance on this topic in the future for their specific programs. Section 184.7(b) continues to instruct Federal agencies to provide waiver request submission instructions and

guidance on the format, contents, and supporting materials required for waiver requests from recipients.

**Section 184.7(e)—Waivers of General Applicability**

With regard to general applicability public interest waivers, one commenter supported the language in the guidance that provides the flexibility for agencies, such as NTIA, to waive BABA restrictions for projects of less than $250,000.

Other commenters raised concerns about the breadth and frequency of public interest waivers issued by various agencies since BABA took effect, noting that these waivers are unnecessary and inconsistent with the objectives of Congress and the Administration for BABA implementation. These commenters noted that these types of waivers should only be issued sparingly.

*OMB Response:* OMB agrees that, under certain circumstances, general applicability waivers may be found by Federal agencies to be in the public interest. For example, they may create efficiencies or ease burdens for recipients. The purpose of this paragraph of part 184 is to recognize the longer comment period set forth at section 70914(d) for review of waivers of general applicability. OMB has not made any changes to this section of the guidance, which continues to remind Federal agencies of the need to provide a comment period of not less than 30 days on a proposal to modify or renew a waiver of general applicability.

**Section 184.8: Exemptions to the Buy America Preference**

Some commenters suggested including an exemption in § 184.8 for commercially available off-the-shelf (COTS) products. One commenter suggested that the exemption could cover COTS items costing in the aggregate up to 5 percent of total project costs used under the Federal award.

Another commenter suggested that § 184.5 or § 184.8 should include an exemption for materials, tools, or other items that are not permanently incorporated into the infrastructure project.

Other commenters suggested adding a new paragraph to § 184.8 stating that section 70917(c) materials, and any combination of these materials, such as concrete or asphalt mix, are excluded from BABA coverage.

Another commenter urged OMB to include a new paragraph in § 184.8 stating that the Buy America Preference does not apply to for-profit organizations as defined in 2 CFR 25.425.

*OMB Response:* OMB has retained the proposed language in § 184.8.

Regarding the comment requesting a COTS exemption, OMB notes that the waiver process, not part 184, would be the appropriate mechanism to address concerns on this topic. OMB observes that Federal agencies have not previously found such a waiver to be in the public interest, but COTS items may potentially fall under other public interest waivers that agencies have issued, such as *de minimis* or minor component waivers as described in Memorandum M–22–11.

Regarding the distinction between temporary use and permanent incorporation, OMB has addressed that topic in other sections of the preamble. OMB's existing guidance on that topic is available in Memorandum M–22–11. OMB also addresses the topic of the application of BABA to for-profit entities above in this preamble.

**Section 200.322: Domestic Preferences for Procurements**

One commenter indicated that 2 CFR 200.322 should be updated to reflect uniform language across the government referring to all efforts as Buy America or Buy American. The commenter suggested that even the terms Buy American or Buy America should be uniform. The commenter preferred the term Buy America because of its use in BABA. Therefore, the commenter stated that 2 CFR 200.322 should be retitled as ''Buy America Preference.''

Another commenter stated that the **Federal Register** document dated March 9, 2023 (88 FR 14514), correcting the **ACTION** line or caption of the proposed guidance to clarify its nature as ''guidance,'' calls into question the validity of the proposed addition of 2 CFR 200.322(c). The commenter observed that use of the term ''must'' as part of a 2 CFR part 200 indicates this is a rule, particularly in light of the fact that 2 CFR part 200 has been adopted as a rule by the individual Federal agencies. The commenter noted that U.S. DOT has adopted 2 CFR part 200 in 2 CFR part 1201. On the theory that this is a rule, the commenter stated that the revision of 2 CFR 200.322(c) failed to meet procedural requirements for notice and comment before adoption.

*OMB Response:* OMB has explained the distinction between the BAA and BABA in this document above. OMB does not believe that additional revisions to 2 CFR 200.322 are needed on this topic.

Regardless of the label provided in the **ACTION** line by the Office of the Federal Register, the OMB guidance ''published in subtitle A [of 2 CFR],'' which OMB modifies here, ''is guidance and not regulation.'' 2 CFR 1.105(b). ''Publication of the OMB guidance in the CFR does not change its nature—it is guidance and not regulation.'' *Id.* This is consistent in this instance with the text of BABA, which instructs OMB to issue guidance and standards, which may include amending ''subtitle A of title 2, Code of Federal Regulations (or successor regulations).'' BABA 70915(a)(2). In addition, OMB notes that the rulemaking requirements at 5 U.S.C. 553 do not apply to guidance on grants. *See* 5 U.S.C. 553(a)(2). In all events, OMB has followed notice and comment procedures with respect to this guidance that are consistent with the procedures that would be required were this a rule subject to 5 U.S.C. 553.

OMB notes that the revised text in 2 CFR 200.322 includes a revision from the proposed version. Instead of stating that ''Federal agencies providing Federal financial assistance for infrastructure projects must comply with the Buy America preferences set forth in 2 CFR part 184,'' the revised text now states that Federal agencies must ''implement'' such provisions.

**Other Comments—Waivers or Exemptions for International Trade Obligations**

Several commenters asked how the implementation of BABA would interact with the various trade obligations of the U.S. through the Trade Agreements Act (TAA), such as the World Trade Organization Agreement on Government Procurement (WTO–GPA). One commenter noted that BABA implementation should consider the international obligations of the U.S. and trade agreements and not undermine U.S. competitiveness in global markets. Several commenters noted the benefits of these international and trade obligations, including the governments of Korea and British Columbia. Several commenters raised concerns that the proposed guidance, as written, could lead to confusion and barriers to trade that would lead to delays and product shortages for American importers, including the United Kingdom of Great Britain and Northern Ireland (UK). These commenters also feared that any failure to comply with free trade agreements could initiate dispute settlement proceedings or other corresponding action to limit U.S. access to foreign government procurement. Several commenters inquired whether the proposed guidance differs from specific parts of the FAR, such as FAR 52.225–11, in

terms of requiring a cost component test, because the proposed guidance does not have comprehensive exemptions and flexibility. One commenter noted that agricultural products are subject to unique trade requirements.

Several commenters noted that certain components critical to infrastructure projects are still not produced in the U.S., but are available from suppliers in TAA countries. In particular, commenters noted that insufficient domestic labor supply may make it difficult to fill manufacturing jobs without relying on TAA countries.

Several commenters, including from the European Union (EU), UK, and the Government of Quebec, requested that the guidance explicitly state that BABA preferences will be ''applied in a manner consistent with United States obligations under international agreements,'' repeating the language found in section 70925 of BABA and Memorandum M–22–11. The Governments of the UK and Quebec, for example, suggested that lack of clarity may discourage foreign suppliers from bidding for opportunities in the U.S. without explicit reassurances.

These commenters noted several other areas where the U.S. has previously iterated its intentions to comply with international agreements. One commenter stated that, because Memorandum M–22–11 had reiterated this statutory directive, the proposed rules should do the same. The EU and UK Governments noted that the ARRA provision included similar language, citing 2 CFR 176.70 and 176.90 (''[ARRA] shall not be applied where the iron, steel, or manufactured goods used in the project are from a Party to an international agreement'').

Another commenter stated that the Office of the U.S. Trade Representative had, with respect to government procurement, waived Buy America requirements for eligible products from numerous designated countries where it would serve the interests of the U.S., including those from parties to the WTO–GPA, parties to most U.S. free trade agreements, certain least-developed countries, and certain Caribbean Basin countries. A separate commenter noted that the U.S. Department of Commerce's and the U.S. Department of Homeland Security's ''Assessment of the Critical Supply Chains Supporting the U.S. Information and Communications Technology Industry'' recommended that all Buy America programs be ''consistent with U.S. international trade obligations'' and include ''tolerances for assembly in allied or partner nations.'' Commenters from the broadband industry specifically cited that the Rural Utilities Service (RUS) ReConnect Program and other existing programs have included exceptions for U.S. global partners and allies. One commenter noted that its experience with prior Buy America clauses and preferences had also not been straightforward.

While some commenters wanted OMB to just add the ''applied in a manner consistent with U.S. obligations under international agreements'' language explicitly in BABA and M–22–11, other commenters thought that would be insufficient and wanted OMB to add additional language to address these concerns. Several commenters asked OMB to clarify that ''designated countries'' under the TAA are deemed to satisfy the BABA requirements and products manufactured in those countries would be treated as if they are manufactured in the U.S. The National Electrical Manufacturers Association (NEMA) suggested that this list include USMCA countries, EU member states, the UK, and Indo-Pacific Economic Framework partners. Alternative proposals included that OMB either (1) apply the existing USMCA Rules of Origin criteria for assessing qualification for domestic preference procurement or (2) treat Canada as a domestic source, similar to the Defense Production Act.

Other commenters alternatively advocated for granting waivers for components produced in such TAA countries. For instance, the Conseil de l'industrie forestière du Québec (CIFQ) and the Ontario Forest Industries Association (OFIA)—trade associations representing Canadian lumber mills in the provinces of Quebec and Ontario, respectively—argued that Canadian lumber should be subject to a ''public interest'' waiver because of several trade agreements between the U.S. and Canada, history, economic necessity for the availability of construction materials, and the broad public interest. The EU suggested that the final guidance clarify that BABA requirements do not apply to government procurement covered by the obligations of the U.S. under international agreements.

Several commenters noted that many states are members of the WTO–GPA and, as a result, have independent trade obligations, which may prohibit those states from discriminating against manufactured products and components from designated countries in conducting their own procurements. Some of these commenters suggested that OMB should require provision of a waiver for products from countries that have signed an international trade agreement with the U.S. Others noted that the waiver process is too onerous and requested that OMB should instead clarify in its final guidance that a recipient of Federal financial assistance can comply with domestic content requirements if they incorporate such products in an infrastructure project in accordance with the BABA without the need for a waiver.

Separately, some commenters noted that OMB has generated confusion because of the varying terms, acronyms, and common names that have been implemented across the Federal agencies and within funding agencies. For example, it listed that there is the ''Build America, Buy America Act'' (BABA), ''Buy America Act'' (BAA), ''Buy America Act with Trade Agreements Act (BAA/TAA), ''American Iron and Steel'' (AIS), and ''Buy America Requirements'' (BAR).

*OMB Response:* Several commenters expressed concern that OMB did not explicitly include in its part 184 guidance that the Buy America preference ''shall be applied in a manner consistent with United States obligations under international agreements.'' OMB notes that BABA provisions will be applied in a manner consistent with U.S. obligations under international agreements, as provided in section 70914(e) of BABA. OMB has not modified its existing guidance on this topic.

As explained above—and to avoid confusion and remove ambiguity on this topic—OMB reiterates that it is not rescinding its initial guidance to Federal agencies under Memorandum M–22–11. The provisions in OMB's initial guidance on this topic remain in effect. OMB explains in Memorandum M–22–11 that, pursuant ''to section 70914(e) of [BABA], [OMB's] guidance [on BABA] must be applied in a manner consistent with the obligations of the United States under international agreements.'' Memorandum M–22–11 also explains that if ''a recipient is a State that has assumed procurement obligations pursuant to the Government Procurement Agreement or any other trade agreement, a waiver of a Made in America condition to ensure compliance with such obligations may be in the public interest.'' Memorandum M–22–11 also explains that all proposed waivers citing the public interest as the statutory basis must include a detailed written statement, which shall address all appropriate factors, ''such as potential obligations under international agreements.''

By not including those provisions in part 184, OMB did not rescind its initial guidance to Federal agencies on this

topic. The language in Memorandum M–22–11 remains effective guidance from OMB to Federal agencies. The language does not conflict with the text of part 184, but supplements it, providing further context on waivers that Federal agencies may propose.

OMB intends to include similar language on this topic in the next iteration of Memorandum M–22–11, which will be issued to update other areas that directly conflict with part 184. Part 184 does not conflict with language in Memorandum M–22–11 on international agreements. As OMB also explains above, its guidance to Federal agencies in part 184 is not intended as comprehensive guidance on all topics, but high-level coordinating guidance to be used by Federal agencies in their own direct implementation of BABA. At this time, OMB has not included that language directly in part 184, but has not modified its initial policy.

The Made in America Office also issued a separate fact sheet within the last year that discusses how the TAA applies to both direct Federal procurement under the FAR and domestic content preferences for Federal financial assistance. *See* ''Fact Sheet on Buy American (BAA) or Buy America,'' Made in America Office (2022) (Fact Sheet).[1] The Fact Sheet recognizes that the ''BABA provisions apply in a manner consistent with United States obligations under international agreements.'' It further explains, however, that ''*Federal financial assistance* awards are generally not subject to international trade agreements because these international obligations only apply to direct federal *procurement* activities by signatories to such agreements'' (emphasis added). The FAR addresses how international trade agreements implemented by the TAA apply to direct Federal procurement activities of the U.S. at FAR subpart 25.4. *See also* FAR 25.1101, 25.1103, and 52.225–5. The Fact Sheet also provides general information on how the TAA applies to direct Federal procurement activities.

In the case of Federal financial assistance, the Fact Sheet also recognizes that ''a number of [U.S.] States have opted to obligate their procurement activities to the terms of one or more international trade agreements, and as such, are included in schedules to the international trade agreements.'' The Made in America Office explains in the Fact Sheet that Federal ''agencies may propose waivers in the public interest to allow State entities to comply with their international trade obligations.'' For additional information, the Fact Sheet also suggests consulting with ''the State in question or the [Federal] agency providing the funds.''

For States with international trade obligations, which are the recipients of Federal funds, OMB notes that the head of a Federal agency that applies a BABA preference to Federal awards may propose to waive BABA requirements by following the procedures in § 184.7 of the revised guidance in part 184. *See also* BABA 70914(b) (authorizing ''the head of a Federal agency that applies a domestic content procurement preference'' to issues waivers). The initial guidance in Memorandum M–22–11 provides additional information on this topic. Waivers may also be proposed in other circumstances, such as if items critical to infrastructure projects are not produced in the U.S. in sufficient and reasonably available quantities or of a satisfactory quality.

The IIJA recognizes that public interest waivers are an appropriate mechanism to allow Federal financial assistance recipients to meet obligations under international agreements. Section 70937(c)(2)(C) of IIJA recognizes that public interest waivers may be justified to allow recipients to satisfy ''potential obligations under international agreements.'' That section applies to ''a request to waive a Buy American law,'' which is defined broadly at section 70932(1) of IIJA to include ''any law . . . relating to Federal contracts, grants, or financial assistance that requires or provides a preference for the purchase or use of goods, products, or materials mined, produced, or manufactured in the United States,'' which includes the BABA preference.

OMB also observes that, in the case of Federal financial assistance under BABA, only Federal agencies that directly apply the BABA preference to Federal awards are authorized to issue waivers—not OMB directly on behalf of those agencies. BABA 70914(b). This waiver authority differs from the waiver authority under the TAA, which authorizes the ''President [to] waive, in whole or in part, . . . the application of any law, regulation, procedure, or practice regarding Government procurement.'' 19 U.S.C. 2511(a). The FAR explains that the President has delegated this waiver authority for direct Federal procurement activities to the U.S. Trade Representative, which has waived the BAA statute for eligible products. *See* FAR 25.402. By contrast, in the context of Federal financial assistance under BABA, it is the responsibility of the head of a Federal agency that directly applies the BABA preference to Federal awards to provide waivers. BABA 70914(b).

OMB may consider issuing further guidance on this topic in the future, but for now believes that the waiver process remains an appropriate mechanism—which is consistent with congressional intent in BABA and related sections of the IIJA—to allow recipients to satisfy international trade obligations, where applicable.

**Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and Executive Order 14094 (Modernizing Regulatory Review)**

Executive Orders (E.O.s) 12866, 13563, and 14094 direct agencies to assess all costs and benefits of available regulatory alternatives, and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The OMB Guidance for Grants and Agreements published in subtitle A of 2 CFR is guidance to Federal agencies and not regulation. 2 CFR 1.100(b). OMB has thus determined that the revision of 2 CFR is not a significant regulatory action under E.O. 12866, as amended.

**Regulatory Flexibility Act**

This revised guidance has been reviewed with regard to the requirements of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612) (RFA). The RFA only applies to a final rule promulgated under 5 U.S.C. 553, after being required by that section or any other law to publish a general notice of proposed rulemaking. The rulemaking requirements at 5 U.S.C. 553 do not apply to guidance on grants.

Even if this guidance were subject to the RFA, courts have explained that the requirement under the RFA to analyze effects on small entities only applies to direct effects. Small entities that may be impacted indirectly, but not directly, are not subject to analysis under the RFA. *See Nat'l Women, Infants, & Child. Grocers Ass'n* v. *Food & Nutrition Serv.,* 416 F. Supp. 2d 92, 109–10 (D.D.C. 2006). The revised guidance does not, in and of itself, directly impact small entities. Rather, as explained throughout this document, the new part 184 is directed toward Federal agencies, providing them with coordinating guidance on implementing BABA when obligating Federal awards for

[1] *https://www.madeinamerica.gov/media/documents/buy-american-vs-buy-america-fact-sheet.pdf.*

infrastructure. Under BABA, individual Federal agencies are directly responsible for implementing the statutory Buy America preference. *See* BABA 70914(a). Individual Federal agencies are also authorized to issues waivers of the Buy America preference. *See* BABA 70914(b). OMB does not have direct authority to do either under BABA. In this case, small entities that could be impacted by OMB's revised guidance will only be impacted indirectly by agency-specific implementation of the requirement under BABA 70914(a). Federal agencies retain considerable flexibility regarding the manner of implementing BABA section 70914(a), including the authority to issue public interest waivers under section 70914(b). Therefore, although this guidance is exempt from the requirements of the RFA, OMB certifies that it will not have a significant economic impact on a substantial number of small entities.

**Unfunded Mandates Reform Act of 1995**

This revised guidance would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48). This revised guidance would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $168 million or more in any one year (2 U.S.C. 1532). In addition, 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. Federal financial assistance programs for infrastructure generally permit this type of flexibility.

**Executive Order 13132 (Federalism Assessment)**

This revised guidance has been analyzed in accordance with the principles and criteria contained in E.O. 13132, ''Federalism,'' 64 FR 43255 (Aug. 10, 1999). OMB has determined that this revised guidance would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The Buy America preference established in BABA is inherently national in scope and significance. Regardless, in accordance with section 4(d) of E.O. 13132, OMB, through the Made in America Office, has, to the extent practicable, consulted with appropriate State and local officials that may be affected by Federal agencies' implementation of OMB's revised guidance. OMB weighed those interests carefully in finalizing its revisions to the guidance, which balance the State interests with the need to provide Federal agencies with consistent, uniform, efficient, and transparent guidance on the Buy America preference in BABA.

**Paperwork Reduction Act of 1995**

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. This guidance does not contain a requirement for information collection and thus the Paperwork Reduction Act does not apply.

**Executive Order 13175 (Tribal Consultation)**

OMB has analyzed this revised guidance in accordance with the principles and criteria contained in E.O. 13175, ''Consultation and Coordination with Indian Tribal Governments,'' 65 FR 67249 (Nov. 9, 2000). The new part 184 provides revised guidance to Federal agencies on applying the Buy America preference required under section 70914 of BABA to Federal awards for infrastructure. Through Memorandum M–22–11, OMB explained that, before applying a Buy America preference to a covered program that will affect Tribal communities, Federal agencies should follow the consultation policies established through E.O. 13175, and consistent with policies set forth in the Presidential Memorandum of January 26, 2021, on Tribal Consultation and Strengthening Nation-Nation Relationships. Several agencies have also proposed and issued Tribal adjustment period waivers to ease transition for Tribal communities to the new rules and processes under BABA when receiving Federal awards. To the extent that the Buy America preference established under section 70914 of BABA is determined to preempt Tribal law, the statutory preemption issue should have been a subject of the consultations required under Memorandum M–22–11. To the extent that any such consultations have not yet occurred, Federal agencies should commence consultations without delay. Federal agencies may again consider proposing brief, time limited waivers to allow Tribal communities to transition to the revised guidance reflected in the new part 184 provisions.

**Congressional Notification**

OMB has concluded that the final guidance is not a ''rule'' within the meaning of 5 U.S.C. 804(3). Nevertheless, out of an abundance of caution, OMB is submitting it to each House of the Congress and to the Comptroller General consistent with the procedures set forth in 5 U.S.C. 801(a).

**List of Subjects in 2 CFR Parts 184 and 200**

Administration of Federal financial assistance, Administrative practice and procedure, Federal financial assistance programs.

For the reasons stated in the preamble, the Office of Management and Budget amends 2 CFR subtitle A as follows:

■ 1. Add part 184, consisting of §§ 184.1 through 184.8, to read as follows:

## PART 184—BUY AMERICA PREFERENCES FOR INFRASTRUCTURE PROJECTS

Sec.



**Authority:** Pub. L. 117–58, 135 Stat. 429.

### § 184.1 Purpose and policy.

(a) *Purpose.* This part provides guidance to Federal awarding agencies on the implementation of the Buy America Preference applicable to Federal financial assistance set forth in part I of subtitle A, Buy America Sourcing Preferences, of the Build America, Buy America Act included in the Infrastructure Investment and Jobs Act (Pub. L. 117–58) at division G, title IX, subtitle A, part I, sections 70911 through 70917.

(b) *Policy.* The head of each Federal agency must ensure that none of the funds made available for a Federal award for an infrastructure project may be obligated unless all of the iron, steel, manufactured products, and construction materials incorporated into the project are produced in the United States. *See* section 70914(a) of the Build America Buy America Act.

### § 184.2 Applicability, effective date, and severability.

(a) *Non-applicability of this part to existing Buy America Preferences.* This part does not apply to a Buy America Preference meeting or exceeding the requirements of section 70914 of the

Build America, Buy America Act applied by a Federal Awarding Agency to Federal awards for infrastructure projects before November 15, 2021.

(b) *Effective date of this part.* The effective date of this part is October 23, 2023. Except as provided in paragraph (c) of this section, this part applies to Federal awards obligated on or after its effective date. Awards obligated on or after May 14, 2022, the effective date of the Build America, Buy America Act, and before the effective date of this part, are instead subject to OMB Memorandum M–22–11.

(c) *Modified effective date of this part for certain infrastructure projects.* If an infrastructure project that has previously received a Federal award obligated on or after May 14, 2022, but before the effective date of this part receives an additional Federal award obligated within one year of the effective date of this part, the additional Federal award is subject to OMB Memorandum M–22–11. However, if significant design or planning changes are made to the infrastructure project, the Federal awarding agency may apply this part to the additional Federal award. Federal awards for an infrastructure project obligated after one year from the effective date of this part are subject to this part, regardless of whether this part applied to previous awards for the project.

(d) *Severability.* The provisions of this part are separate and severable from one another. OMB intends that if a provision of this part is held to be invalid or unenforceable as applied to a particular person or circumstance, the provision should be construed so as to continue to give the maximum effect permitted by law as applied to other persons not similarly situated or to dissimilar circumstances. If any provision is determined to be wholly invalid and unenforceable, it should be severed from the remaining provisions of this part, which should remain in effect.

### § 184.3 Definitions.

Acronyms used in this part have the same meaning as provided in 2 CFR 200.0. Terms not defined in this part have the same meaning as provided in 2 CFR 200.1. As used in this part:

*Build America, Buy America Act* means division G, title IX, subtitle A, parts I–II, sections 70901 through 70927 of the Infrastructure Investment and Jobs Act (Pub. L. 117–58).

*Buy America Preference* means the ''domestic content procurement preference'' set forth in section 70914 of the Build America, Buy America Act, which requires the head of each Federal agency to ensure that none of the funds made available for a Federal award for an infrastructure project may be obligated unless all of the iron, steel, manufactured products, and construction materials incorporated into the project are produced in the United States.

*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.

*Construction materials* means articles, materials, or supplies that consist of only one of the items listed in paragraph (1) of this definition, except as provided in paragraph (2) of this definition. To the extent one of the items listed in paragraph (1) contains as inputs other items listed in paragraph (1), it is nonetheless a construction material.

(1) The listed items are:

(i) Non-ferrous metals;

(ii) Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);

(iii) Glass (including optic glass);

(iv) Fiber optic cable (including drop cable);

(v) Optical fiber;

(vi) Lumber;

(vii) Engineered wood; and

(viii) Drywall.

(2) Minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material.

*Infrastructure project* means any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States regardless of whether infrastructure is the primary purpose of the project. *See also* paragraphs (c) and (d) of § 184.4.

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

*Manufactured products* means:

(1) Articles, materials, or supplies that have been:

(i) Processed into a specific form and shape; or

(ii) Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.

(2) If an item is classified as an iron or steel product, a construction material, or a section 70917(c) material under § 184.4(e) and the definitions set forth in this section, then it is not a manufactured product. However, an article, material, or supply classified as a manufactured product under § 184.4(e) and paragraph (1) of this definition may include components that are construction materials, iron or steel products, or section 70917(c) materials.

*Manufacturer* means the entity that performs the final manufacturing process that produces a manufactured product.

*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.

*Produced in the United States* means:

(1) In the case of iron or steel products, all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

(2) In the case of manufactured products:

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

(ii) The cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 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. *See* § 184.2(a). The costs of components of a manufactured product are determined according to § 184.5.

(3) In the case of construction materials, all manufacturing processes for the construction material occurred in the United States. *See* § 184.6 for more information on the meaning of ''all manufacturing processes'' for specific construction materials.

*Section 70917(c) materials* means cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives. *See* section 70917(c) of the Build America, Buy America Act.

### § 184.4 Applying the Buy America Preference to a Federal award.

(a) *Applicability of Buy America Preference to infrastructure projects.* The Buy America Preference applies to Federal awards where funds are appropriated or otherwise made available for infrastructure projects in the United States, regardless of whether infrastructure is the primary purpose of the Federal award.

(b) *Including the Buy America Preference in Federal awards.* All Federal awards with infrastructure projects must include the Buy America Preference in the terms and conditions. The Buy America Preference must be included in all subawards, contracts, and purchase orders for the work performed, or products supplied under the Federal award. The terms and conditions of a Federal award flow down to subawards to subrecipients unless a particular section of the terms and conditions of the Federal award specifically indicate otherwise.

(c) *Infrastructure in general.* Infrastructure encompasses public infrastructure projects in the United States, which includes, at a minimum, the structures, facilities, and equipment for roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property; and structures, facilities, and equipment that generate, transport, and distribute energy including electric vehicle (EV) charging.

(d) *Interpretation of infrastructure.* The Federal awarding agency should interpret the term ''infrastructure'' broadly and consider the description provided in paragraph (c) of this section as illustrative and not exhaustive. When determining if a particular project of a type not listed in the description in paragraph (c) constitutes ''infrastructure,'' the Federal awarding agency should consider whether the project will serve a public function, including whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public.

(e) *Categorization of articles, materials, and supplies.* (1) An article, material, or supply should only be classified into one of the following categories:

(i) Iron or steel products;

(ii) Manufactured products;

(iii) Construction materials; or

(iv) Section 70917(c) materials.

(2) An article, material, or supply should not be considered to fall into multiple categories. In some cases, an article, material, or supply may not fall under any of the categories listed in paragraph (e)(1) of this section. The classification of an article, material, or supply as falling into one of the categories listed in paragraph (e)(1) 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, steel, manufactured products, and construction materials will be incorporated.

(f) *Application of the Buy America Preference by category.* An article, material, or supply incorporated into an infrastructure project must meet the Buy America Preference for only the single category in which it is classified.

### § 184.5 Determining the cost of components for manufactured products.

In determining whether the cost of components for manufactured products is greater than 55 percent of the total cost of all components, use the following instructions:

(a) 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

(b) 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.

### §184.6 Construction material standards.

(a) The Buy America Preference applies to the following construction materials incorporated into infrastructure projects. Each construction material is followed by a standard for the material to be considered ''produced in the United States.''

(1) *Non-ferrous metals.* All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States.

(2) *Plastic and polymer-based products.* All manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form, occurred in the United States.

(3) *Glass.* All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.

(4) *Fiber optic cable (including drop cable).* All manufacturing processes, from the initial ribboning (if applicable), through buffering, fiber stranding and jacketing, occurred in the United States. All manufacturing processes also include the standards for glass and optical fiber, but not for non-ferrous metals, plastic and polymer-based products, or any others.

(5) *Optical fiber.* All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, occurred in the United States.

(6) *Lumber.* All manufacturing processes, from initial debarking through treatment and planing, occurred in the United States.

(7) *Drywall.* All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels, occurred in the United States.

(8) *Engineered wood.* All manufacturing processes from the initial combination of constituent materials until the wood product is in its final form, occurred in the United States.

(b) Except as specifically provided, only a single standard under paragraph (a) of this section should be applied to a single construction material.

### §184.7 Federal awarding agency's issuance of a Buy America Preference waiver.

(a) *Justification of waivers.* A Federal awarding agency may waive the application of the Buy America Preference in any case in which it finds that:

(1) Applying the Buy America Preference would be inconsistent with the public interest (a ''public interest waiver'');

(2) Types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality (a ''nonavailability waiver''); or

(3) The inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall infrastructure project by more than 25 percent (an ''unreasonable cost waiver'').

(b) *Requesting a waiver.* Recipients may request waivers from a Federal awarding agency if the recipient reasonably believes a waiver is justified under paragraph (a) of this section. A request from a recipient to waive the application of the Buy America Preference must be provided to the Federal awarding agency in writing. Federal awarding agencies must provide waiver request submission instructions

and guidance on the format, contents, and supporting materials required for waiver requests from recipients.

(c) *Before issuing a proposed waiver.* Before issuing a proposed waiver, the Federal awarding agency must prepare a detailed written explanation for the proposed determination to issue the waiver based on a justification listed under paragraph (a) of this section, including for waivers requested by a recipient.

(d) *Before issuing a final waiver.* Before issuing a final waiver, the Federal awarding agency must:

(1) Make the proposed waiver and the detailed written explanation publicly available in an easily accessible location on a website designated by the Federal awarding agency and the Office of Management and Budget;

(2) Except as provided in paragraph (e) of this section, provide a period of not less than 15 calendar days for public comment on the proposed waiver; and

(3) Unless the Director of OMB provides otherwise, submit the waiver determination to the Made in America Office in OMB for final review pursuant to Executive Order 14005 and section 70923(b) of the Build America, Buy America Act.

(e) *Waivers of general applicability.* Waivers of general applicability mean waivers that apply generally across multiple Federal awards. A Federal agency must provide a period of not less than 30 days for public comment on a proposal to modify or renew a waiver of general applicability.

**§184.8 Exemptions to the Buy America Preference.**

(a) The Buy America Preference does not apply to expenditures for assistance authorized under section 402, 403, 404, 406, 408, or 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170a, 5170b, 16 5170c, 5172, 5174, or 5192) relating to a major disaster or emergency declared by the President under section 401 or 501, respectively, of such Act (42 U.S.C. 5170, 5191) or pre and post disaster or emergency response expenditures.

(b) ''Pre and post disaster or emergency response expenditures'' consist of expenditures for financial assistance that are:

(1) Authorized by statutes other than the Stafford Act, 42 U.S.C. 5121 *et seq.;* and

(2) Made in anticipation of or response to an event or events that qualify as an ''emergency'' or ''major disaster'' within the meaning of the Stafford Act, 42 U.S.C. 5122(1), (2).

## PART 200—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

■ 2. The authority citation for part 200 continues to read as follows:

**Authority:** 31 U.S.C. 503.

■ 3. Amend § 200.322 by adding paragraph (c) to read as follows:

**§ 200.322 Domestic preferences for procurements.**

* * * * *

(c) Federal agencies providing Federal financial assistance for infrastructure projects must implement the Buy America preferences set forth in 2 CFR part 184.

**Deidre A. Harrison,**

*Deputy Controller, performing the delegated duties of the Controller Office of Federal Financial Management.*

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