

**Before the  
OFFICE OF MANAGEMENT AND BUDGET  
Washington, DC 20503**

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

NCTA – The Internet & Television Association (“NCTA”),<sup>1</sup> ACA Connects – America’s Communications Association (“ACA Connects”),<sup>2</sup> and INCOMPAS<sup>3</sup> (the “Associations”) submit these comments in response to the Office of Management and Budget’s (“OMB”) proposed revisions to its Guidance for Grants and Agreements<sup>4</sup> to implement the Build America,

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<sup>1</sup> NCTA is the principal trade association of the cable television industry in the United States, which is a leading provider of residential broadband service to U.S. households. Its members include owners and operators of cable television systems serving nearly 80 percent of the nation’s cable television customers, as well as more than 200 cable program networks. Cable service providers have invested more than \$290 billion over the last two decades to deploy and continually upgrade networks and other infrastructure—including building some of the nation’s largest Wi-Fi networks. NCTA’s members are leaders in the broadband industry, offering affordable, reliable, and scalable broadband across the country. NCTA members continue to work to expand the number of households served by investing their own private capital in rural expansion and by participating in federal support programs such as the FCC’s Rural Digital Opportunity Fund, as well as state-level broadband deployment initiatives and joint public-private partnerships. The base of all of these expansion efforts is the diverse workforce of 2.9 million direct and indirect jobs supported by the cable industry in the United States.

<sup>2</sup> ACA Connects is a trade association whose members include approximately 500 small- and medium-sized providers of broadband, video, and other communications services. ACA Connects’ members operate in all 50 states, largely in smaller markets and in rural areas. They offer service to more than one-quarter of rural households, and they have participated extensively in federal programs to support the deployment of broadband networks in unserved and underserved areas. Many members plan to file applications seeking funding from the Broadband Equity, Access, and Deployment Program and thus have a significant interest in the guidelines OMB is developing for BABA compliance.

<sup>3</sup> INCOMPAS, the internet and competitive networks association (formerly COMPTTEL), is the leading trade association advocating for competition policy across all networks. INCOMPAS represents internet, streaming, communications, and technology companies both large and small, advocating for laws and policies that promote competition, innovation, and economic development. INCOMPAS member companies offer a wide array of broadband voice, video, internet, and data offerings, using both wireline (copper/fiber) and wireless networks to reach their customers. Among the state-of-the-art solutions they deliver are managed services, cloud computing, data storage, over the top (“OTT”), content and streaming, and unique applications that are developed and deployed via broadband networks.

<sup>4</sup> Guidance for Grants and Agreements, 88 Fed. Reg. 8374 (Feb. 9, 2023).

Buy America Act (“BABA”) provisions of the Infrastructure Investment and Jobs Act (“IIJA”).<sup>5</sup> The Associations’ member companies plan to compete for awards granted through the Broadband Equity, Access, and Deployment (“BEAD”) Program, which would award funding for the deployment of broadband networks to expand connectivity throughout the United States. While the Associations support the Administration’s goals of (1) encouraging and supporting American industry and workers; and (2) closing the digital divide by connecting 100 percent of U.S. households with broadband, the reality is that many of the components and manufactured products necessary to build out broadband networks are simply either not currently available from U.S. sources, or only available at insufficient scale and/or unreasonable cost, and will not be onshored in time to “ensure timely deployment of broadband” and meet the 4-year timeline mandated by Congress.<sup>6</sup> The members of the Associations intend to obtain these components and products from domestic suppliers insofar as is reasonably possible, but the unduly rigid application of BABA risks undermining the BEAD Program and thwarting Congress’s and the Administration’s goal of connecting all Americans with high-speed broadband.

Faced with a similar situation in 2009, the Obama Administration waived the Buy America requirements of the American Recovery and Reinvestment Act in order to ensure the success of the broadband funding program established by that Act. The Associations therefore respectfully request that OMB make clear that it will apply the BABA waiver process, as established by the IIJA, in a reasonable manner that appropriately balances these goals and

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<sup>5</sup> Pub. L. No. 117-58, 135 Stat. 429 (2021).

<sup>6</sup> 47 U.S.C. §§ 1702(e)(3)(A)(i)(IV), (h)(4)(C); *see id.* § 1702(i) (granting NTIA authority to issue regulations “as may be necessary or appropriate to carry out the programs, projects or activities ... including to ensure that those programs, projects, or activities are completed in a *timely and effective* manner” (emphasis added)).

ensures that the BABA requirements do not have the effect of unduly delaying or escalating the cost of the construction of broadband networks as mandated by the IIA.

## I. BACKGROUND

Under the proposed BABA requirements, funds made available for a federal award for an infrastructure project may not be obligated unless all of the iron, steel, manufactured products, and construction materials used in the project are “produced in the United States.”<sup>7</sup> The proposed regulations define certain key terms, such as the meaning of “produced in the United States” for various products. The proposed regulations also include “[f]iber optic cable,” “[o]ptical fibers,” and “polymers used in fiber optic cables”—all of which are particularly relevant to broadband deployment—under the definition of “[c]onstruction materials” for which “all manufacturing processes” must occur in the United States. Additionally, the proposed revisions detail how awarding agencies can waive the application of the Buy America Preference.<sup>8</sup> This process includes providing a public comment period and submitting the waiver determination to OMB. This process differs substantially from the Buy American provisions and waivers employed in prior broadband buildouts.<sup>9</sup>

Entities awarded BEAD funding will have four years to deploy and construct broadband networks.<sup>10</sup> These networks contain dozens of network elements including, but not limited to: switching equipment; routing equipment; transport equipment; access equipment;

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<sup>7</sup> 88 Fed. Reg. at 8376-77.

<sup>8</sup> *Id.* at 8377-78.

<sup>9</sup> See, e.g., Nat’l Telecomms. & Info. Admin., *Fact Sheet: Broadband Technology Opportunities Program Buy American Requirement* (Mar. 1, 2012), [https://www2.ntia.doc.gov/files/BuyAmericanFactSheet\\_Final\\_010312.pdf](https://www2.ntia.doc.gov/files/BuyAmericanFactSheet_Final_010312.pdf).

<sup>10</sup> 47 U.S.C. § 1702(h)(4)(C); Nat’l Telecomms. & Info. Admin., *Notice of Funding Opportunity: Broadband Equity, Access, and Deployment Program* at 18 § II.B (May 2022), <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf>. A State may extend the four-year network deployment deadline for subgrantees by not more than one year if certain conditions are met. *Id.* § II.B.1.

billing/operations systems; and customers premises/end user equipment and devices. The devices used in each of these network elements, in turn, include hundreds of components, each with their own complex supply chains, which are sourced from around the world from trusted vendors and suppliers. For example, most network elements require advanced semiconductors that comprise over 50 percent of the network element costs and are not sourced in the United States. Even network elements that are assembled in the United States rely on foreign inputs from their global partners. There is currently no combination of network elements that could create a broadband network that meets the BABA requirements.

The Associations' members' real-world experience in deploying broadband networks has made clear that a strict American-made requirement for such networks is infeasible at this time and would deter rather than encourage the deployment of the facilities necessary for the nation to reach 100 percent broadband connectivity, particularly within the timeframe required by the IJJA. For example, routers, switches, ONUs, and gateways all have numerous components that are sourced almost exclusively from China or Taiwan. Even if manufacturers immediately start the process of shifting their operations to the United States, due to the number of components involved, the Associations estimate that it would take between 3 and 5 years to onshore these products. Fusion splicers and mechanical splicing tools have no known domestic source and, due to a limited market, onshoring may not be possible. And the onshoring of fiber optic taps, network access points, and terminals will take at least 3 years.

## II. DISCUSSION

Achieving the Administration’s goal of providing “access to broadband Internet in every region of the country—urban, suburban, and rural”<sup>11</sup>—requires a “whole-of-government and whole-of-nation approach.”<sup>12</sup> Secretary Raimondo summarized the Administration’s broadband goals stating, “We are going to ensure every American will have access to technologies that allow them to attend class, start a small business, visit with their doctor, and participate in the modern economy.”<sup>13</sup> Congress devoted an unprecedented \$65 billion to achieve universal access to broadband, and success will require flexibility and waivers of the BABA requirements to ensure projects can be deployed within four years.<sup>14</sup> The Associations’ members look forward to participating in the BEAD Program. But the very short timeline mandated by the IJA to realize the goal of extending broadband to unserved and underserved areas requires a careful assessment of how to ensure the availability of the equipment necessary to meet the Administration’s goal of connecting 100 percent of Americans.<sup>15</sup>

In connection with its proposed waiver of the BABA requirements for certain equipment necessary to build out middle mile broadband networks, NTIA’s initial industry assessment

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<sup>11</sup> President Joe Biden, *Remarks By President Biden on the Affordable Connectivity Program* (May 9, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/05/09/remarks-by-president-biden-on-the-affordable-connectivity-program>.

<sup>12</sup> Press Release, Nat’l Telecomms. & Info. Admin., *Biden-Harris Administration Launches \$45 Billion “Internet for All” Initiative to Bring Affordable, Reliable High-Speed Internet to Everyone in America* (May 13, 2022), <https://ntia.gov/press-release/2022/biden-harris-administration-launches-45-billion-internet-all-initiative-bring>.

<sup>13</sup> *Id.*

<sup>14</sup> *See supra* note 10.

<sup>15</sup> NTIA has previously recognized the challenges posed by imposing BABA requirements on broadband programs with short timeframes. Nat’l Telecomms. & Info. Admin., *Limited Applicability Nonavailability Waiver of the Buy America Domestic Content Procurement Preference as Applied to Recipients of Middle Mile Grant Program Awards* at 3-4 (Sept. 3, 2022), <https://www.commerce.gov/sites/default/files/2022-09/NTIA%20Middle%20Mile%20BABA%20Waiver.pdf> (“Middle Mile Nonavailability Waiver”).

made it clear that many of the manufactured products and some of the construction materials required for middle mile broadband infrastructure deployment—which are not dissimilar to those required for BEAD Program deployment—are not available in the quantity or quality needed for the Middle Mile Grant Program.<sup>16</sup> The proposed waiver emphasized that, for example, onshoring domestic manufacturing capacity for components, broadband routing, and broadband transport equipment will require, at minimum, 24-36 months.<sup>17</sup> And in 2009, NTIA, under the Obama Administration, found that “much of the finished products used to manage and operate broadband infrastructure and offer broadband service are manufactured outside of the United States” and waived the Buy America requirements of the American Recovery and Reinvestment Act to allow the purchase of non-U.S. switching, routing, transport and access, end-user, and billing and operations system equipment under the Broadband Technology Opportunities Program (“BTOP”).<sup>18</sup>

As under the Middle Mile Grant Program and BTOP, providers applying to participate in the BEAD Program cannot wait for a vast onshoring effort before planning their proposed buildouts. NTIA has stated that it expects to announce BEAD allocations by June 30, 2023, which will commence the six-month process for Eligible Entities to submit their Initial Proposals.<sup>19</sup> Although the timing among states will likely vary, some Eligible Entities could be requesting bids from providers as early as the fall of 2023. Waivers will therefore be necessary for a successful BEAD Program. Without waivers, providers may decide not to bid for BEAD

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<sup>16</sup> Middle Mile Nonavailability Waiver at 4-5.

<sup>17</sup> *Id.* at 5.

<sup>18</sup> Broadband Technology Opportunities Program, 74 Fed. Reg. 31410, 31410 (July 1, 2009).

<sup>19</sup> Press Release, Nat’l Telecomms. & Info. Admin., *Biden-Harris Administration Announces Timeline for National High-Speed Internet Deployment* (Nov. 10, 2022), <https://ntia.gov/press-release/2022/biden-harris-administration-announces-timeline-national-high-speed-internet>.

funding out of concern they may not be able to meet the BABA requirements and BEAD deployment milestones.

Further, for those who do apply for federal funding, supply chain issues that arose during the recent global pandemic, and which have not been fully resolved, will exacerbate the challenges of obtaining access to equipment necessary for broadband networks. These supply chain issues have put upward pressure on the costs of equipment and reduced the options for sourcing specific materials. Even prior to the pandemic, broadband providers faced supply chain constraints for certain equipment, including the electronics used in broadband networks, which forced many providers to anticipate need and order supplies years in advance. These constraints will likely be amplified due to the increased demand associated with the unprecedented levels of federal funding for broadband.

The availability of American-made materials may increase during the BEAD Program's buildout—due to onshoring efforts made during the Middle Mile Grant Program, outreach conducted during BEAD Program planning, and other factors. If and when equipment and components are available from U.S. sources, the Associations' members will seek to use them in their construction of BEAD-funded broadband networks. The IJJA's mandated deployment timeline does not give our members years to wait for possible onshoring, however, and it will force participating providers to seek out materials simultaneously, further stressing an already taxed supply chain.

As a result, prices for American materials may increase dramatically as demand far exceeds supply. Some providers may be unable to obtain the American materials they need, regardless of the cost. In addition to the prospect of BABA requirements deterring providers from bidding for BEAD funding, this combination of untenable equipment pricing and inadequate supply to meet BEAD deployment deadlines creates a risk of BEAD Program

defaults. Both scenarios delay realization of the goal of universal access to broadband. We therefore respectfully urge the Administration to recognize and allow for flexibility to address these issues and other unforeseen circumstances that may arise in sourcing needed materials through the reasonable grant of waivers of the BABA requirements, as contemplated by the IJJA and the proposed rules.

We note that BABA already appears to be playing a role in encouraging companies to move some manufacturing to the United States. For example, in August 2022, Corning announced its plans to build a new factory in Arizona to manufacture fiber optic cable.<sup>20</sup> Although that is a promising development, it is only one component of the hundreds needed to build a broadband network.

Finally, as noted above, funding recipients will be confronted with complex supply chain management for items subject to BABA requirements. To allow projects to move forward expeditiously, recipients should be permitted to obtain and rely upon certifications of BABA compliance from their suppliers. Congress and government agencies have recognized the necessity and prudence of such safe harbor provisions in the context of complex supply chain certifications, including in the recently enacted 2023 National Defense Authorization Act.<sup>21</sup> Here the Administration should adopt a safe harbor allowing funding recipients to rely on supplier certifications of BABA compliance.

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<sup>20</sup> Corning Inc., *Corning's Newest Optical Cable Manufacturing Facility Is Being Built in Gilbert, AZ*, <https://www.corning.com/optical-communications/worldwide/en/home/the-signal-network-blog/new-corning-cable-facility-being-built-in-arizona.html> (last accessed Mar. 1, 2023).

<sup>21</sup> See James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263 § 5949(h)(6), 136 Stat. 2395, 3490 (2022) (allowing that Federal bidders “may reasonably rely on the certifications of compliance from covered entities and subcontractors who supply electronic parts, products, or services” and “are not required to conduct independent third party audits or other formal reviews related to such certifications”); *Cf.* Limitation on Payments to Influence Certain Federal Transactions, 48 C.F.R. § 52.203-12 (providing that “Contractors may rely without liability on the representation made by their subcontractors in the certification and disclosure form”).



### III. CONCLUSION

For the foregoing reasons, it is vital to the success of the BEAD Program that NTIA have the flexibility to grant waivers of the BABA rules as needed to allow providers to formulate accurate bids for the numerous BEAD projects. The Associations support this Administration's commitment to expanding the reach of broadband networks to ensure that all Americans have access to high-speed broadband. That critical national imperative should not be hindered or delayed by an unduly restrictive BABA waiver framework. While the Associations' members will continue to strive towards the goals of BABA, broadband deployment on this scale requires material sourcing from around the globe.

Respectfully submitted,

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