§ 250.16 Format of compliance plan for transportation services and affiliate transactions.

* * * * *

(e) * * *

(1) Any person who transports gas for others pursuant to subpart B or G of part 284 of this chapter and who knowingly violates the requirements of §§ 358.4 and 358.5 of this chapter, this section, or § 284.13 of this chapter will be subject, pursuant to sections 311(c), 501, and 504(b)(6) of the Natural Gas Policy Act of 1978, to a civil penalty, which the Commission may assess, of not more than $1,584,648 for any one violation.

* * * * *

PART 385—RULES OF PRACTICE AND PROCEDURE

■ 3. The authority citation for part 385 continues to read as follows:

Authority: 5 U.S.C. 551–557; 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 791a–825v, 2601–2645; 28 U.S.C. 2461; 31 U.S.C 3701, 9701; 42 U.S.C. 7101–7352, 16441, 16451–16463; 49 U.S.C. 60502; 49 App. U.S.C. 1–85 (1988); 28 U.S.C. 2461 note (1990); 28 U.S.C. 2461 note (2015).

■ 4. Revise § 385.1504(a) to read as follows:

§ 385.1504 Maximum civil penalty (Rule 1504).

(a) Except as provided in paragraph (b) of this section, the Commission may assess a civil penalty of up to $28,618 for each day that the violation continues.

* * * * *

■ 5. Revise § 385.1602 to read as follows:

§ 385.1602 Civil penalties, as adjusted (Rule 1602).

The current inflation-adjusted civil monetary penalties provided by law within the jurisdiction of the Commission are:

(a) 15 U.S.C. 3414(b)(6)(A)(i), Natural Gas Policy Act of 1978: $1,584,648 per violation, per day.

(b) 16 U.S.C. 823b(c), Federal Power Act: $28,618 per violation, per day.

(c) 16 U.S.C. 825n(a), Federal Power Act: $3,738 per violation.

(d) 16 U.S.C. 825o–1(b), Federal Power Act: $1,584,648 per violation, per day.

(e) 15 U.S.C. 717t–1, Natural Gas Act: $1,584,648 per violation, per day.

(f) 49 App. U.S.C. 6(10) (1988), Interstate Commerce Act: $1,659 per offense and $78 per day after the first day.

(g) 49 App. U.S.C. 16(8) (1988), Interstate Commerce Act: $16,590 per violation, per day.

(h) 49 App. U.S.C. 19a(k) (1988), Interstate Commerce Act: $1,659 per offense, per day.

(i) 49 App. U.S.C. 20(7)(a) (1988), Interstate Commerce Act: $1,659 per offense, per day.

[FR Doc. 2025–00516 Filed 1–13–25; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 635

[Docket No. FHWA–2023–0037]

RIN 2125–AG13

Buy America Requirements for Manufactured Products

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

ACTION: Final rule.

SUMMARY: This final rule amends FHWA's Buy America regulation to terminate FHWA's general waiver for manufactured products and establish Buy America requirements for manufactured products with respect to Federal-aid highway projects. The standards for applying Buy America to manufactured products are generally consistent with the Office of Management and Budget's (OMB) guidance implementing the Build America, Buy America Act (BABA) provisions of the Infrastructure Investment and Jobs Act (also known as the Bipartisan Infrastructure Law (BIL)).

DATES: This final rule is effective March 17, 2025.

FOR FURTHER INFORMATION CONTACT: For questions about this final rule, please contact Mr. Brian Hogge, FHWA Office of Infrastructure, 202–366–1562, or via email at *Brian.Hogge@dot.gov*. For legal questions, please contact Mr. David Serody, FHWA Office of Chief Counsel, 202–366–4241, or via email at *David.Serody@dot.gov*. Office hours for FHWA are from 8:00 a.m. to 4:30 p.m., eastern time (E.T.), Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This document, the notice of proposed rulemaking (NPRM), all comments received, and all supporting material may be viewed online at *www.regulations.gov* using the docket number listed above. Electronic retrieval assistance and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of Federal Register's website at *www.federalregister.gov* and the U.S. Government Publishing Office's website at *www.GovInfo.gov*.

I. Executive Summary

FHWA is required, by statute, to ensure that all projects funded under title 23 of the United States Code (U.S.C.) (Federal-aid projects) use only steel, iron, and manufactured products that are produced in the United States. 23 U.S.C. 313. FHWA refers to these requirements as ''Buy America'' requirements. In other words, FHWA's Buy America requirement for manufactured products mandates that all such products used on Federal-aid projects must be ''produced in the United States.'' 23 U.S.C. 313. The Buy America requirement for manufactured products has existed in some form since the enactment of the Surface Transportation Assistance Act of 1978 (1978 STAA), Public Law 95–599 (1978), with those requirements being modified close to their current form by section 165 of the Surface Transportation Assistance Act of 1982 (1982 STAA), Public Law 97–424 (1983).

In 1983, following the passage of the 1982 STAA, FHWA determined that it would be in the public interest to waive the Buy America requirements for manufactured products, with that waiver known as the Manufactured Products General Waiver. *See* 48 FR 1946 (Jan. 17, 1983); 48 FR 53099 (Nov. 25, 1983). Under the Manufactured Products General Waiver, manufactured products that were permanently incorporated into Federal-aid projects did not need to be produced domestically, apart from predominantly iron or steel components of manufactured products.

Through this rule, FHWA is establishing specific dates on which the Manufactured Products General Waiver will be terminated and is amending its Buy America regulation at 23 CFR 635.410 to establish standards regarding Buy America requirements that will apply to manufactured products on Federal-aid projects. These standards are substantially similar to those established by OMB that apply to manufactured products subject to BABA.[1] This means that to be considered ''produced in the United States'' and therefore Buy America-compliant, manufactured products must

[1] 2 CFR part 184 established in 88 FR 57750 (Aug. 23, 2023) and M–24–02 (Oct. 25, 2023).

be manufactured in the United States (''final assembly requirement'') and have greater than 55 percent of the manufactured product's components, by cost, be mined, produced, or manufactured in the United States (''55 percent requirement'').

Under this final rule, a manufactured product is defined as an article, material, or supply that has been processed into a specific form and shape, or combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies. If, however, an article, material, or supply meets this definition but could also be classified as an iron or steel product, excluded material, or other product category as specified by law or in 2 CFR part 184, that article, material, or supply is not a manufactured product. Further, mixtures of excluded materials delivered to a work site without final form for incorporation into a project are also not manufactured products. For the purpose of this rule, an article, material, or supply is generally only subject to one set of requirements. For example, a manufactured product is only subject to FHWA's Buy America requirements for manufactured products in § 635.410(c), meaning that the product must meet the final assembly and 55 percent requirements. An iron or steel product, on the other hand, must meet FHWA's existing Buy America requirements for iron and steel in § 635.410(b), generally requiring that all manufacturing processes, including application of a coating, for these materials must occur in the United States. *See* 23 CFR 635.410(b)(1)(ii).

Pursuant to § 635.410(c)(2)(i), however, precast concrete products that are classified as manufactured products must have their predominantly iron or steel components meet FHWA's Buy America requirements for iron and steel.[2] Similarly, pursuant to § 635.410(c)(2)(ii), the cabinets or other enclosures of intelligent transportation systems (ITS) and other electronic hardware systems that are installed in the highway right of way or other real property and classified as manufactured products must comply with FHWA's Buy America requirements for iron and steel if the cabinet or enclosure is predominantly iron or steel. These specified manufactured products must also comply with FHWA's Buy America requirements for manufactured products. However, the predominantly iron or steel components for precast concrete and the predominantly iron or steel cabinet or enclosure for ITS and other electronic hardware systems will be considered for the purpose of the 55 percent content requirement.

The requirements established in this rule are substantially similar to those proposed in the NPRM. 89 FR 17789 (March 12, 2024). FHWA notes, however, that the final assembly requirement will become effective for Federal-aid projects obligated on or after October 1, 2025. The Manufactured Products General Waiver will remain in place until this date. In addition, unlike the NPRM, the 55 percent requirement will subsequently become effective for Federal-aid projects obligated on or after October 1, 2026. This means that, to be Buy America-compliant, for Federal-aid projects obligated on or after October 1, 2026, all manufactured products permanently incorporated into the project must both be manufactured in the United States and have the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States be greater than 55 percent of the total cost of all components of the manufactured product.

The regulatory impact analysis (RIA) prepared for this final rule pursuant to Executive Order (E.O.) 12866, as amended by E.O. 14094, is available in the rulemaking docket. The RIA estimates the costs and benefits associated with establishing Buy America requirements for manufactured products. The RIA discusses anticipated benefits of the rule qualitatively, as they could not be quantified. Expected benefits include protecting and expanding domestic manufacturing, increasing supply chain resiliency, and increasing consistency in applying domestic content procurement preferences for manufactured products between FHWA and other Federal agencies that are subject to the requirements of BABA. Expected costs of this rule relate to increased material costs for manufactured products used in Federal-aid highway construction projects, project delay, and the administrative costs to FHWA and recipients of FHWA financial assistance. FHWA is able to quantify only increased material costs and the administrative costs to FHWA and recipients of FHWA financial assistance. FHWA estimates the increased material costs for manufactured products permanently incorporated into Federal-aid projects to range from $41 million to $980 million per year. FHWA further estimates an additional $167,000 per year in increased FHWA administrative costs and an additional $22 million per year in increased administrative costs to recipients of FHWA financial assistance. FHWA estimates the 10-year cost of this rule to range from $545 million to $8,466 million at a 2 percent discount, with annualized costs of $61 million to $942 million.

II. Background and Regulatory History

A. History of the Manufactured Products General Waiver

FHWA's Buy America requirements were first established in 1978 by section 401 of the 1978 STAA, which imposed a Buy America requirement to certain unmanufactured and manufactured articles, materials, and supplies. Following enactment of the 1978 STAA, FHWA issued an emergency rule to implement the Buy America requirement of section 401; that rule temporarily waived the provisions of section 401 to all products and materials other than structural steel. *See* 43 FR 53717 (Nov. 17, 1978).

In 1980, following the issuance of that emergency rule, FHWA issued an NPRM to establish regulations implementing section 401 of the 1978 STAA. 45 FR 77455 (Nov. 24, 1980). In that NPRM, FHWA proposed to extend the coverage of Buy America requirements to all steel construction materials used in highway construction projects, while excluding all other materials and products from being subject to Buy America. 45 FR 77455. Prior to the 1980 rulemaking being finalized, Congress enacted the 1982 STAA, which instituted new Buy America requirements that are similar to those that exist today. Section 165(a) established Buy America requirements for all steel, cement,[3] and manufactured products used on Federal-aid projects, requiring that they be produced in the United States.[4] In 2005, Congress codified the current Buy America requirements for steel, iron, and manufactured products at 23 U.S.C. 313, and those Buy America requirements remain in effect today.[5]

In late 1983, FHWA issued its final rule implementing section 165 of the 1982 STAA, creating its current Buy America regulations at 23 CFR 635.410.[6]

[2] As described in more detail in the discussion of 23 CFR 635.410(c)(1)(iv) below, while precast concrete may be considered a manufactured product, wet concrete delivered to a work site is not a manufactured product, as wet concrete is a mixture of excluded materials delivered to a work site without final form.

[3] The Buy America requirement for cement was eliminated by Congress in 1984. *See* Public Law 98–229.

[4] Congress also added a Buy America requirement for iron in 1991. *See* Public Law 102–240.

[5] *See* section 1903 of Public Law 109–59.

[6] FHWA's regulations implementing Buy America have also remained consistent since 1983, apart from reacting to statutory changes by removing a

Continued

48 FR 53099 (Nov. 25, 1983). In this rule, FHWA found that a waiver of Buy America requirements for manufactured products was in the public interest, thereby creating the Manufactured Products General Waiver. 48 FR 53102. FHWA stated that product manufacturers did not generally express approval of applying Buy America requirements to manufactured products. *Id.* at 53101. For those that did, FHWA stated that they were primarily opposed to unfair foreign trade practices. *Id.* Rather than apply Buy America requirements for manufactured products to remedy this concern, FHWA stated that unfair practices could be instead addressed through import laws. *Id.* at 53102. Further, FHWA determined that it was not the intent of Congress in enacting the 1982 STAA for FHWA to apply a Buy America requirement to manufactured products; FHWA noted that it had consistently waived manufactured products from coverage under Buy America laws and Congress did not specifically direct a change in that policy by enacting the 1982 STAA. *Id.* at 53101–02. FHWA thus interpreted that to mean that not all manufactured products had to be covered by the Buy America requirements of section 165. *Id.* Finally, FHWA stated that materials and products other than steel, cement, asphalt, and natural materials comprised a small percent of the highway construction program; that other manufactured products were minimally used and there would be little economic effect to applying Buy America requirements to them; and that it would be difficult and administratively burdensome to identify the various materials comprising manufactured products and trace their origin. *Id.* at 53102.

B. Build America, Buy America Act

On November 15, 2021, the President signed the BIL (Pub. L. 117–58) into law. The BIL includes BABA, which expands the coverage and application of domestic content procurement preferences in Federal financial assistance programs for infrastructure. BIL, div. G sections 70901–70927. Among other requirements, BABA mandates that all iron, steel, manufactured products, and construction materials used in projects supported by funds made available for a Federal financial assistance program for infrastructure be produced in the United States. BABA section 70914. The BABA, however, provides that this mandate applies to iron, steel, manufactured products, and construction materials only to the extent that a domestic content procurement preference that meets the requirements of section 70914 does not already apply. BABA section 70917(a)–(b). As FHWA has an existing statutory Buy America requirement for steel, iron, and manufactured products at 23 U.S.C. 313, BABA's savings provision results in FHWA applying its existing Buy America requirements under 23 U.S.C. 313 to iron, steel, and manufactured products, not the requirements of BABA. FHWA does, however, apply BABA's domestic content procurement preference to construction materials.

Under BABA, all manufactured products must be ''produced in the United States.'' BABA section 70914. For manufactured products, BABA defines ''produced in the United States'' to mean that (1) the manufactured product was manufactured in the United States and (2) the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation. BABA section 70912(6)(B).

The BABA also expresses a general policy preference against general applicability waivers like the Manufactured Products General Waiver. For example, section 70913(c) of BABA requires Federal Agencies to identify ''deficient programs,'' which includes programs subject to general applicability waivers. Section 70914(d) of BABA also requires Federal Agencies to review existing general applicability waivers by publishing in the **Federal Register** a document that: (i) describes the justification for the general applicability waiver; and (ii) requests public comments on the need for the waiver. Following consideration of comments received, BABA then requires Federal Agencies to publish in the **Federal Register** a determination on whether to continue or discontinue the general applicability waiver. BABA section 70914(d)(2)(B). On March 17, 2023, FHWA initiated the review required by section 70914(d) of BABA for the Manufactured Products General Waiver, publishing in the **Federal Register** at 88 FR 16517 a notice and request for comments on the waiver (''2023 RFC'').

C. OMB's Guidance on BABA

On August 23, 2023, at 88 FR 57750, OMB revised its guidance in title 2 of the CFR to add a new part 184 that provides additional guidance on implementing BABA.[7] Part 184 includes definitions for key terms, including iron or steel products, predominantly of iron or steel or a combination of both, manufactured products, component, and manufacturer. 2 CFR 184.3. In line with section 70912(6)(B) of BABA, 2 CFR 184.3 states that a manufactured product is ''produced in the United States'' if the product was manufactured in the United States and the cost of components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard that meets or exceeds this standard has been established under applicable law or regulation for determining the minimum amount of domestic content of the manufactured product. Part 184 also provides guidance for determining the cost of components of manufactured products. Pursuant to 2 CFR 184.5, in determining whether the cost of components for manufactured products is greater than 55 percent of the total cost of all components, there are two standards depending on the origin of the component. For components purchased by the manufacturer, the cost of the component is the acquisition cost, including transportation costs to the place of incorporation into the manufactured product (whether or not such costs are paid to a domestic firm) and any applicable duty (whether or not a duty-free entry certificate is issued). 2 CFR 184.5(a). For components manufactured by the manufacturer, the cost of the component is all costs associated with the manufacture of the component, including transportation costs described in 2 CFR 184.5(a), plus allocable overhead costs, but excluding profit and any costs associated with the manufacture of the manufactured product. 2 CFR 184.5(b).

Part 184 also states that an article, material, or supply should be classified as only either an iron or steel product, manufactured product, construction material, or section 70917(c) material, that the classification must be made based on the status of the material at the time it is brought to the work site for incorporation into an infrastructure project, and that the material must meet

reference to a Buy America requirement for cement (49 FR 18820 (May 3, 1984)) when Congress removed that requirement and adding a reference to a Buy America requirement for iron (58 FR 38973 (July 21, 1993)) after Congress added that requirement.

[7] Throughout this document, references to part 184 refer to both the text in 2 CFR part 184 and the preamble published at 88 FR 57750 in the **Federal Register**.

the Buy America standards for only the single category in which it is classified. 2 CFR 184.4(e) and (f). Part 184 defines a section 70917(c) material as cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives. 2 CFR 184.3. These materials are named section 70917(c) materials in 2 CFR part 184 because they are referred to in section 70917(c) of BABA.

As stated earlier, part 184 does not, by its own terms, apply to FHWA's Buy America requirements for steel, iron, and manufactured products; it applies only to FHWA's domestic content procurement preference for construction materials. 2 CFR 184.2(a). Part 184 does, however, apply to all Federal financial assistance programs for infrastructure that are administered by Federal agencies that did not have a domestic content procurement preference for steel, iron, and manufactured products meeting or exceeding BABA's requirements.

On October 25, 2023, OMB issued memorandum M–24–02, ''Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure'' (''OMB Implementation Guidance'').[8] Section VI of the Implementation Guidance warns against overly broad waivers, stating that they ''undermine market signals designed to boost domestic supply chains, particularly for key articles, materials, and supplies in critical supply chains,'' and that ''[w]aivers that are overly broad will tend to undermine domestic preference policies.'' Section VI also states that public interest waivers of domestic content procurement preferences ''must be used judiciously and construed to ensure the maximum utilization of goods, products, and materials produced in the United States.''

D. Notice of Proposed Rulemaking

Based on the comments received to the 2023 RFC, and after considering the President's policy, as embodied E.O. 14005, ''Ensuring the Future is Made in All of America by All of America's Workers,'' to maximize the use of goods, products, and materials produced in the United States; the intent of Congress, as expressed in BABA's preference against general applicability waivers; the purpose and goals of domestic content procurement preferences and waivers; and FHWA's original rationale for issuing the Manufactured Products General Waiver, FHWA proposed to discontinue the Manufactured Products General Waiver and proposed regulatory standards for applying Buy America to manufactured products should the waiver be discontinued. 89 FR 17789 (Mar. 12, 2024).[9]

In proposing to discontinue the Manufactured Products General Waiver, FHWA noted that the intent of Congress, as expressed in sections 70933 and 70935 of BABA, and the President's policy for the Federal Government, as expressed in section 1 of E.O. 14005, is that Federal agencies should use terms and conditions in Federal financial assistance awards to maximize the use of goods, products, and materials produced in the United States, which would not be consistent with continuing the Manufactured Products General Waiver. *Id.* at 17795. FHWA also noted that continuing the waiver would undermine the purposes that domestic content procurement preferences, such as FHWA's Buy America requirement, are intended to serve. *Id.* Further, FHWA considered the Implementation Guidance's policy on waivers, that they should not be overly broad in order to ensure that they appropriately convey market signals on where the domestic supply chain can be bolstered and that they should be time-limited to ensure that, once available, Buy America-compliant materials can receive appropriate consideration for inclusion in federally funded projects. *Id.* Again, FHWA noted that the Manufactured Products General Waiver was inconsistent with these principles. *Id.*

FHWA further observed that the Manufactured Products General Waiver was overly broad, disincentivizing manufacturers from domestically producing manufactured products by broadly covering all products, even those that are or could be produced domestically. *Id.* at 17795–96. Finally, FHWA noted that the waiver fails to provide domestic manufacturers with knowledge of the current gaps in the domestic manufacturing sector by covering all manufactured products, failing to provide market signals that distinguish between manufactured products that are domestically produced and those that are not. *Id.* at 17796. FHWA observed that this lack of clarity hinders manufacturers who wish to enter the market from understanding the competitive landscape, again disincentivizing them from attempting to provide domestic manufactured products on Federal-aid projects. *Id.* FHWA stated its belief that, in line with OMB's Implementation Guidance, waivers should aim to proactively encourage domestic manufacturing by providing clear market signals about which markets domestic manufacturers can enter with the reasonable expectation that their products could adequately compete for use on Federal-aid projects. *Id.*

Accordingly, in the NPRM, FHWA stated its belief that the Manufactured Products General Waiver is overly broad, no longer in line with the purpose of domestic content procurement preferences and waivers, and therefore no longer in the public interest. *Id.* FHWA thus proposed to discontinue the Manufactured Products General Waiver. *Id.*

In the NPRM, FHWA acknowledged that discontinuing the Manufactured Products General Waiver and applying Buy America requirements to manufactured products may result in cost increases, project delays, and product unavailability if not done carefully. *Id.* To mitigate this concern, FHWA stated that it would consider proposing targeted waivers. *Id.* Accordingly, FHWA published a Request for Information (RFI), seeking specific and detailed information on what products are not and cannot be produced in the United States in the near future. *Id.* at 17796–97. FHWA stated in the NPRM that, based on the information received from this RFI, it would propose time-limited and targeted waivers covering domestically unavailable products if it would be appropriate to do so. *Id.* at 17797.

FHWA also stated that were the Manufactured Products General Waiver to be rescinded, manufactured products would fall under the coverage of DOT's ''Waiver of Buy America Requirements for De Minimis Costs and Small Grants'' (''De Minimis and Small Grants Waiver''). 88 FR 55817 (Aug. 16, 2023). The De Minimis Costs and Small Grants Waiver would then waive the application of FHWA's Buy America requirements for manufactured products under a single financial assistance award for which (1) the total value of non-compliant products is no more than the lesser of $1 million or 5 percent of total applicable costs [10] for the project (''departmental de minimis waiver''); or (2) the total amount of Federal financial assistance applied to the project,

[8] *https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf.*

[9] Throughout this document, the NPRM refers to both FHWA's proposal to discontinue the Manufactured Products General Waiver and to propose standards for applying Buy America to manufactured products.

[10] Per the De Minimis Costs and Small Grants Waiver, ''total applicable project costs'' are defined as the cost of materials used in the project that are subject to a domestic preference requirement, including materials that are within the scope of an existing waiver.

through awards or subawards, is below $500,000 (''small grants waiver''). 88 FR 55820.

At the same time as FHWA proposed discontinuing the Manufactured Products General Waiver, the NPRM proposed adopting standards that would define, per the language in 23 U.S.C. 313, when a manufactured product is ''produced in the United States.'' *Id.* In doing so, FHWA recognized that while it had the discretion to define Buy America requirements for manufactured products, those standards would have to meet or exceed those under BABA.[11] *Id.* To minimize burden and ensure consistency with other Federal agencies implementing BABA, FHWA proposed to adopt standards closely similar to those under BABA. *Id.* Thus, FHWA proposed to adopt the definition of when a manufactured product is ''produced in the United States'' that is found in section 70912(6)(B) of BABA. *Id.* FHWA proposed to replace current § 635.410(c), which discusses the process for requesting a Buy America waiver and the procedures FHWA will take to respond to that request, with a new paragraph that would discuss these Buy America requirements for manufactured products. *Id.* at 17799.

Further, FHWA proposed to replace mentions of ''steel or iron materials'' and ''steel and iron materials'' in § 635.410(b) with the single phrase of ''iron or steel products,'' which FHWA proposed to define at § 635.410(c)(1)(ii). FHWA did not otherwise propose to modify the application of the current Buy America requirements to steel and iron in § 635.410(b).

FHWA received 136 comments to the NPRM and 41 comments to the RFI from State departments of transportation (State DOTs), local governments, manufacturers, associations, and individual citizens. FHWA first discusses comments on the proposal to rescind the Manufactured Products General Waiver.

III. Rescission of the Manufactured Products General Waiver

Many commenters to the NPRM and RFI expressed their opinion on whether FHWA should finalize its proposal to discontinue the Manufactured Products General Waiver. While many of these comments are similar to those submitted to the 2023 RFC and discussed in the NPRM, FHWA summarizes them below.

A. Comments in Favor of Rescinding the Manufactured Products General Waiver

Generally, commenters in favor of recission argued that doing so would have positive economic impacts. These commenters argued that rescinding the waiver would stimulate economic growth, create and protect American jobs, and restore America's manufacturing base. Commenters in favor of rescinding the waiver also stated that doing so would fortify America's domestic supply chains, increasing national security by minimizing dependence on foreign sources and preventing supply chain shocks due to foreign pressures. Such commenters argued that fortifying domestic supply chains may even curb the rising cost of materials.

Those in favor of rescission further argued that doing so is important to domestic manufacturers and workers, ensuring that taxpayer funds go to U.S. businesses. FHWA received comments from manufacturers stating that they produce manufactured products domestically but have to compete with cheaper foreign products on Federal-aid projects. Commenters stated that, contrary to the current situation, rescinding the waiver would provide domestic manufacturers and workers the first opportunity to supply products on Federal-aid projects. Commenters, particularly manufacturers, also argued that rescinding the waiver would both incentivize domestic manufacturers to onshore production and incentivize current domestic manufacturers and manufacturers who might onshore in the near future to increase their domestic manufacturing capacity. Commenters also indicated that manufacturers may be waiting for regulatory certainty before increasing domestic capacity.

Other commenters espoused their belief in the benefits of domestically produced products themselves, stating they are of higher quality and manufactured with improved labor and environmental standards versus foreign products. Commenters further argued that domestic manufacturing is likely to spur innovation and the development of new technologies.

Commenters in favor of rescission further pressed that the Manufactured Products General Waiver is inconsistent with the Administration's priorities, the clear text of 23 U.S.C. 313, and the congressional intent of BABA. With respect to BABA, such commenters argued that the findings in section 70911, the requirement in section 70914 to apply requirements to manufactured products, the definition of ''deficient programs'' in sections 70912 and 70913(c), and the requirement for Federal agencies to review existing waivers of general applicability in section 70914(d) all indicated congressional disapproval of existing waivers of general applicability like the Manufactured Products General Waiver.

Finally, commenters in favor of rescinding the Manufactured Products General Waiver argued that it is inconsistent with the purpose of waivers of domestic content procurement preferences. Such commenters stated that waivers of domestic content procurement preferences should be transparent, targeted, time-limited, and used only when necessary; these commenters argued that the Manufactured Products General Waiver is inapposite to these principles as it covers all manufactured products for an indeterminate period of time. Commenters continued that the overbroad nature of the Manufactured Products General Waiver makes the current supply of domestic products unclear, disincentivizing manufacturers from attempting to produce manufactured products domestically.

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

Some commenters in favor of continuing the Manufactured Products General Waiver expressed opposition to domestic content procurement preferences entirely, stating that they run counter to free trade agreements and negatively affect the economies of countries that use them.

For those specifically suggesting that FHWA maintain the Manufactured Products General Waiver, many argued that there will be an insufficient number of Buy America-compliant manufactured products, either because of a lack of current supply or because the current supply would be insufficient given the increased demand for compliant products that would result if the waiver were rescinded. Some commenters suggested that some products and components may never be able to be produced domestically, due, for example, to a lack of domestic raw materials or prohibitive environmental regulations.

In comments to the NPRM and RFI, commenters expressed particular concern over the domestic availability of certain products, as listed below.

- luminaires (including light-emitting diode (LED) luminaires)
- LED lighting systems
- road weather information systems

[11] Per section 70917(a) and (b) of BABA, BABA's domestic content procurement preferences apply unless a Federal Agency has a domestic content procurement preference that meets or exceeds the requirements of section 70914 of BABA. This means that were FHWA to enact less stringent Buy America requirements to manufactured products than in BABA, both those requirements and BABA's requirements would become effective, essentially raising the requirements to BABA's level of stringency.

- bridge joints and bearing pads
- video imaging systems
- video imaging vehicle detection system
- closed-circuit television cameras
- permanent crash cushions
- generators
- pumps and other products used in pump stations
- spread spectrum radios
- electronic screening equipment
- electronic message signs
- rolled erosion control products
- traffic signals and signal systems
- traffic buttons
- traffic signal controllers
- traffic cabinets
- lane use control signals
- pedestrian crossing beacons
- traffic sensors
- other products in traffic management systems
- environmental sensors
- avalanche control systems
- aeration equipment
- battery backup systems
- retroreflective sheeting
- ultraviolet disinfection equipment
- crossarms and crossarm braces
- railroad ties
- railroad spikes and other supports
- precast concrete
- rolling stock
- various other ITS technologies and electrical equipment
- various other information communication technologies and network communication devices
- various pieces of utility equipment

FHWA notes, however, that some products commenters described as being unavailable domestically were described by others as being available. FHWA also notes that it has not made any determinations on whether these items would be considered manufactured products under the standards promulgated in this final rule, and that some could be classified as iron or steel products or construction materials, or as components of manufactured products, rather than manufactured products themselves. FHWA discusses how to determine the classification of a single item below in the analysis of § 635.410(c)(2).

Commenters also argued that rescinding the waiver would increase the cost of manufactured products and the cost of the projects using them. Commenters generally stated that this cost increase would be caused by reducing the supply of manufactured products that could be used on Federal-aid projects by removing the ability to use foreign products. Commenters also indicated that costs may increase if imposing Buy America requirements for manufactured products limited the number of compliant manufacturers to the point where monopolies for certain products formed. Commenters also argued that foreign products are, on average, less costly than domestically produced products, noting that, otherwise, domestic products would already be used in Federal-aid projects and Buy America requirements would be unnecessary. Further, commenters argued that the imposition of Buy America requirements on manufactured products may incentivize manufacturers to use more expensive domestic components to ensure that their products meet the 55 percent requirement. Certain commenters also stated that project costs would increase from higher bid prices due to contractors pricing the risk of not procuring compliant manufactured products into their bids. Other commenters raised concern that project costs may increase because there would be fewer bidders, as some contractors may not place bids if they are unsure about procuring compliant products.

Commenters also raised concerns about the increased costs that imposing Buy America requirements on manufactured products may cause to contractors and manufacturers. Commenters stated that costs to contractors could increase from a lack of compliant products, producing delays that could result in increased incidental costs and the costs of repeated demobilization and mobilization. Similarly, commenters also raised concern over the imposition of penalties related to contract administration if contractors were unable to acquire compliant products. Other commenters stated that the imposition of requirements would require manufacturers to redevelop, redesign, and resource their products, all of which trigger increased costs.

Commenters also questioned whether the new requirements would increase the amount of domestically manufactured products at all. Such commenters contended that manufactured products make up a minor portion of the total material cost of Federal-aid projects, which they alleged indicated that the market for any Buy America-compliant manufactured products may be too small to incentivize onshoring. In addition, these commenters argued that products that would be Buy America-compliant may not be competitive in the global market, further reducing the incentive for manufacturers who compete internationally to onshore production. In short, these commenters stated that manufactured products are not used in Federal-aid projects in large enough quantities to justify the additional costs that they alleged would be triggered by imposing Buy America requirements on manufactured products.

In addition, commenters in favor of retaining the Manufactured Products General Waiver argued that removing the waiver and imposing Buy America requirements on manufactured products may cause project delay or cancellation. Such commenters argued that reducing the supply of products that could be used on Federal-aid projects is likely to create material shortages. If a Buy America-compliant product is unavailable, commenters warned that contracting agencies would need to either acquire a waiver to procure a non-compliant product, which would require time and cost to try to procure; wait for the product to be produced domestically; or redesign the project. Commenters also noted the delay in developing projects that would result from the time needed for contracting agencies to modify contract specifications and bid documents, for contractors to prepare bids based on the new requirements, and for manufacturers to produce sufficient amounts of compliant products.

Commenters also raised concerns that imposing Buy America requirements on manufactured products may hinder the ability of contracting agencies and contractors to change project design or scope quickly, given the inability to turn to foreign products. Similarly, manufacturers presented concerns that imposing requirements would prevent them from being able to quickly switch to foreign suppliers if required by circumstances.

Overall, many commenters opposing removing the Manufactured Products General Waiver and imposing Buy America requirements on manufactured products argued that doing so would result in fewer projects or projects of lesser quality. These commenters alleged that by making projects more costly and causing increased project delays and potential cancellations, imposing Buy America requirements on manufactured products would result in contracting agencies being able to complete fewer projects. This would then eliminate the benefits such projects would otherwise bring, such as safety, quality of life, sustainability, resiliency, and economic development improvements. Commenters also argued that imposing requirements may result in modifications to projects that would reduce their benefits, stating that contracting agencies and contractors may attempt to avoid using manufactured products on projects to

avoid triggering the new requirements. In addition, commenters complained that imposing Buy America requirements on manufactured products would exacerbate the current obstacles facing the construction industry, such as the unavailability of certain products, supply chain disruptions, inflation and other price increases, and labor shortages.

Another common criticism raised by commenters involved the administrative burden of ensuring compliance with new requirements. Commenters protested the time and difficulty they thought would be needed to trace the origin and cost of components, particularly on smaller companies and disadvantaged business enterprises. Commenters also raised concerns that it may be laborious to identify the cost and origin of components as manufacturers may not know this information, have an incentive to provide this information, or want to provide detailed and potentially proprietary information on their products. These commenters further argued that this process of identifying components would be unduly burdensome when purchasing products from third parties. Commenters also raised the concern that, because the proposed Buy America standards require that more than 55 percent of components, by cost, must be produced in the United States, the fluctuation in the cost of components may result in sudden changes to whether a product is compliant. Other commenters raised concerns over the administrative burden to test and reevaluate new, compliant products. In general, commenters argued that these concerns are particularly heightened because parties are still adjusting to the burden caused by the addition of BABA's construction material requirements.

A different set of concerns was raised by commenters who procure manufactured products for both Federal-aid projects and other projects. In general, many of these commenters stated that their process was to procure manufactured products in large quantities to be used for later projects, some of which may be federally funded but some of which might not be. Such commenters stated that imposing Buy America requirements on manufactured products would likely require them to procure products on a project-specific basis, which would increase costs and cycle times; purchase only Buy America-compliant products, which may result in the compatibility concerns described below; or maintain inventories of both Buy America-compliant and non-compliant products. These commenters stated that this last option would result in more variability, necessitating increased training and knowledge to complete common maintenance, repair, and replacement functions and to manage infrastructure. Commenters also expressed concern that procuring compliant and non-compliant products would require more physical space to house and segregate the products.

Those in favor of retaining the Manufactured Products General Waiver also expressed concern that domestic components and products will not be compatible with currently used components, products, and systems. These commenters warned that a lack of compatibility between existing non-compliant components, products, and systems and compliant components and products may necessitate the complete replacement of products or systems when a component or product has to be replaced. Commenters also argued that imposing requirements on manufactured products may prevent entities from using specialized products that are necessary to meet regulatory requirements or required specifications if such products are not domestically produced.

Other commenters that were in favor of maintaining the Manufactured Products General Waiver, contrary to those in favor of rescinding the waiver, argued that foreign products may be of higher quality than domestic products, have a track record of quality that domestic products lack, be more technologically advanced or innovative, or have reduced environmental impacts. Commenters raised particular concerns that, in order to meet the proposed Buy America requirements, manufacturers may opt to incorporate lower-quality domestic components into their products. Commenters warned that imposing requirements on manufactured products may also stifle economic development of manufacturers, leading to job loss.

Finally, commenters argued that the problems with imposing Buy America requirements to manufactured products would not be solved through the application of the De Minimis and Small Grants waiver. These commenters stated that projects procuring manufactured products may not be covered by the De Minimis and Small Grants waiver because the project heavily involves the procurement of manufactured products or the procurement of manufactured products is itself the focus of the project, or because the project simply is of too large a scale. Commenters also criticized the burden needed to track the costs of materials for purpose of the departmental de minimis waiver, particularly for utilities.

C. FHWA Response

FHWA again notes that many of the comments received to the NPRM reflect the same concerns commenters made in response to the 2023 RFC. As stated in the NPRM, FHWA does not believe they reflect justified reasons to continue the Manufactured Products General Waiver without change. In general, these comments do not reflect concern over rescinding the Manufactured Products General Waiver entirely, but the effect such rescission may have on specific products or categories of products if rescission of the waiver results in them not being domestically produced in sufficient quantities. For instance, FHWA does not believe that commenters claiming that there will not be sufficient numbers of Buy America-compliant products justifies retaining the waiver; it, instead, calls for manufacturers, recipients of FHWA financial assistance, and FHWA to work together to identify the products that are not in fact domestically manufactured in sufficient amounts and for FHWA to issue waivers for those products. As described in more detail in section V, below, FHWA intends to mitigate this concern by phasing in the requirements of this rule, analyzing which products and categories of products may require waivers, and issuing waivers if appropriate.

To take another example, while FHWA understands that some Buy America-compliant manufactured components and products will not be compatible with existing components, products, and systems, FHWA does not find this a sufficient reason to continue the Manufactured Products General Waiver in its entirety, given that the Manufactured Products General Waiver sweeps much more broadly than just products that are replacing existing products and systems. This may be a reason to consider granting a product-specific waiver, but FHWA does not believe it justifies maintaining the Manufactured Product General Waiver's coverage of unrelated products. Similarly, FHWA does not believe that the fact that some entities may use specialized products or that some specific products may be preferred by entities justifies retaining the Manufactured Product General Waiver for unrelated products; they, at best, are reasons for considering waivers for specific products when these specific occurrences arise.

Similarly, many commenters argued that because domestic manufacturers

will not spring up to provide Buy America-compliant products and components, removing the Manufactured Products General Waiver will result in negative consequences, such as higher costs, reduced flexibility, and potential project delays and cancellations. FHWA does not believe that this concern justifies maintaining the Manufactured Products General Waiver; it suggests that were domestic manufacturers not to emerge, FHWA should consider issuing waivers for products of limited domestic availability. Again, as described in more detail in section V, FHWA believes it important to first consider the impacts of this final rule on manufacturers before issuing any waivers. As provided in E.O. 14005 and section 70911 of BABA concerning the benefits of Buy America in general, this rule will provide a powerful incentive for manufacturers to onshore production that does not currently exist under the Manufactured Products General Waiver. During the transition period before the new Buy America requirements for manufactured products become effective, FHWA will be able to more fully analyze the extent of this onshoring. In the event that a market for some manufactured products does not develop, FHWA will be able to identify those products and consider waivers accordingly.

Overall, FHWA does not believe that these arguments answer FHWA's concern, discussed in the NPRM, that the Manufactured Products General Waiver is overly broad and no longer in line with the purpose of domestic content procurement preferences and waivers. Instead, they suggest either that commenters believe that no categories of manufactured products will ever be domestically produced in sufficient quantities or that commenters believe that the overbroad nature of the Manufactured Products General Waiver is justified because of the issues that specific products or categories of products may face when complying with Buy America requirements.

Based on comments from manufacturers who currently produce domestic products and who stated that they would increase capacity if the waiver were rescinded, FHWA believes that at least some manufactured products will be domestically produced in sufficient quantities. Further, FHWA does not believe that continuing the overbroad Manufactured Products General Waiver is necessary because of the difficulties some products or categories of products may face in complying with Buy America requirements. FHWA understands the concern that some products may not be domestically available; FHWA further believes this concern is heightened for certain ITS and other electronic products, utility products, and products used in railroad work. As stated in the NPRM, however, FHWA believes that the more preferable approach is to issue waivers, as appropriate, for those products and categories of products. In this way, such targeted waivers can provide manufacturers with insight into market demand that can trigger investments into domestic manufacturing in specific products, which cannot happen under the Manufactured Products General Waiver. FHWA believes that this approach can ensure that manufactured products needed for Federal-aid projects are available while also providing an opportunity to domestic manufacturers who can provide manufactured products to these projects where a waiver is not needed. FHWA discusses its intended process for implementing such waivers, where necessary, in section IV.

FHWA does recognize that some concerns over removing the Manufactured Products General Waiver and imposing Buy America requirements on manufactured products apply regardless of whether domestic manufacturers ever produce sufficient amounts of domestic products. These include concerns that imposing such requirements is contrary to free trade agreements; that imposing Buy America requirements will inherently increase the cost of all products that are not currently compliant and require manufacturers to redevelop, redesign, and resource their products; that projects may be delayed as parties modify contract specifications and bid documents and contractors prepare bids; and the administrative burden of imposing new requirements.

Some of these concerns inherently reflect the fact that FHWA is imposing new Buy America requirements on Federal-aid projects. For instance, FHWA believes it apparent that many manufacturers will have to shift to making products compliant with requirements that would otherwise not exist; that contract specifications and bid documents will have to be changed to include new requirements, and that contractors will need time to prepare bids after considering the new requirements; and that the new requirements will pose administrative burden on those responsible with complying with them. FHWA acknowledges the burden that such activities could place on affected parties, but FHWA believes that the overall public interest in the policies behind Buy America (as described in E.O. 14005 and section 70911 of BABA) is better served by considering these issues when determining the date on which to first apply the new Buy America requirements as well as the need for potential future waivers rather than whether to rescind the Manufactured Products General Waiver and impose Buy America requirements at all. Were these concerns sufficient to continue the Manufactured Products General Waiver, the waiver would seemingly be required to remain in effect indefinitely, even if there were sufficient sources of all manufactured products used on Federal-aid projects. FHWA does not believe this can be a sensible outcome. FHWA believes that the better approach is to allow for time for affected parties to set up processes to handle the change in regulatory requirements, which FHWA intends to do by implementing the final assembly and 55 percent requirements over time, as described in more detail below in section V.

FHWA also acknowledges, as explained in more detail in the RIA, that rescinding the Manufactured Products General Waiver and applying Buy America requirements to manufactured products may lead to an increase in cost in some products. While the price of products and components may increase, FHWA believes that this is the natural result of achieving the goal of increasing domestic manufacturing, as stated in E.O. 14005 and BABA.[12] Were domestic products available at the same or a lower price than foreign products, FHWA would expect contracting agencies to purchase domestic products even if no Buy America requirements existed, creating a domestic supply of manufactured products. The fact that commenters indicated that this is not the case demonstrates that contracting agencies procure foreign products because they are less expensive than domestic alternatives. The imposition of domestic content procurement preferences should thus be expected to increase the cost of procuring the projects covered by those preferences. For manufactured products where manufactures onshore production of Buy America-compliant products, FHWA expects that the increase of the cost of the products will occur alongside

[12] FHWA does not believe it is likely that manufacturers will use more expensive domestic components than necessary to ensure that their products have 55 percent of components, by cost, be produced in the United States. FHWA believes that such manufacturers would not be competitive in a market with other manufacturers who use less expensive domestic components.

the creation of domestic manufacturing jobs. For manufactured products where manufacturers elect not to onshore production, FHWA intends to issue waivers to allow for the continued use of lower-priced foreign products, reducing or eliminating any burden from cost increases. While FHWA cannot determine at this point the extent to which manufacturers will onshore specific products, FHWA believes that this rulemaking will either have no effect on the cost of products or result in both increases in product costs and in increases in domestic manufacturing jobs.

FHWA also acknowledges commenters who expressed opposition to Buy America requirements on the grounds that such requirements are counter to free trade agreements. Many free trade agreements, such as the United States-Mexico-Canada Agreement (USMCA), expressly exempt grants, loans, cooperative agreements, and other forms of Federal financial assistance from coverage. Other trade agreements, such as the World Trade Organization Agreement on Government Procurement, specifically exclude highway and mass transit projects from coverage. To the extent that FHWA's Buy America requirements would conflict with a trade agreement, FHWA believes that specific situation may justify a waiver of the requirements; FHWA does not believe that it would justify a waiver of Buy America requirements to all manufactured products.[13]

Finally, FHWA again notes that, once Buy America requirements apply to manufactured products, such products may be exempted by the De Minimis and Small Grants waiver. FHWA acknowledges that the De Minimis and Small Grants waiver will not exempt all manufactured products from Buy America requirements, as that was not the intention of the De Minimis and Small Grants waiver. As stated in the NPRM, the purpose of that waiver is to prevent the recission of the Manufactured Products General Waiver from affecting ''small projects and projects using limited amounts of manufactured products.'' *Id.* at 17797.

In conclusion, after a careful review of all the comments received to the 2023 RFC and NPRM, FHWA believes that the Manufactured Products General Waiver is no longer in the public interest and is rescinding it for all recipients of FHWA financial assistance. As discussed in more detail in section V, FHWA recognizes that some products and categories of products may not be currently domestically produced in sufficient amounts. Rather than continue the Manufactured Products General Waiver, FHWA intends to analyze which products and categories of products may require waivers, and issue waivers where appropriate.

IV. General Comments

FHWA next discusses general issues raised by commenters regarding the final rule. Section V then includes a discussion of specific regulatory provisions of the final rule.

Process for Rescission of Waiver

Comment: In the NPRM, FHWA proposed to rescind the Manufactured Products General Waiver and, at the same time, issue time-limited and targeted waivers covering any manufactured products that FHWA determines are not currently produced in the United States and might not be able to be produced in the United States in the near future. Some commenters argued that FHWA should rescind the Manufactured Products General Waiver only when these time-limited and targeted waivers are in place. Others stated that FHWA should institute a delayed effective date for the rescission of the Manufactured Products General Waiver in general, and then set later effective dates for the application of Buy America requirements to particular products. Still other commenters argued for a different model, stating that FHWA should apply Buy America requirements to specific manufactured products based on their availability. Under this approach, FHWA would not set an effective date for the final rule upfront but rather gradually narrow the scope of the Manufactured Products General Waiver as FHWA removes specific manufactured products from its coverage as they become domestically available; FHWA would thus only fully rescind the waiver when suppliers could demonstrate the ability to provide Buy America-compliant versions of all manufactured products used on Federal-aid projects. Other commenters suggested that FHWA should proceed with a stepped approach, first identifying products that are Buy America-compliant and applying Buy America requirements to them, then identifying products that are manufactured in the United States and applying the final assembly requirement to them, and finally identifying products that are manufactured in the United States and meet the 55 percent requirement and apply both the manufactured and 55 percent requirements to them. Other approaches raised by commenters include that FHWA should rescind the waiver for products only when there is a clear basis for expecting the emergence of U.S. sources, that FHWA should prioritize industry use cases and applications that are high value in national security where necessary investments are made domestically, and that FHWA should allow contracting agencies to continue to use existing systems and product sources while requiring them to study and develop a transition plan towards procuring Buy America-compliant products.

FHWA Response: After reviewing the comments, FHWA concludes that the best approach is a transition to the final assembly and 55 percent requirements for Federal-aid projects. FHWA believes that this approach is similar to the approach discussed in the NPRM, where FHWA proposed to issue waivers at the same time as it would rescind the Manufactured Products General Waiver.

While the NPRM indicated that FHWA would issue waivers at the same time as it issued a final rule, FHWA believes, after analyzing the comments received, that it is not necessary to issue waivers at this time. Based on comments received, FHWA recognizes that there are both domestic manufacturers of products used in Federal-aid projects and products for which there are no domestic manufacturers at the moment. For the latter group, FHWA does not believe it necessary to issue waivers at this time, as FHWA believes doing so will negatively affect onshoring that would otherwise be incentivized by the promulgation of this final rule. FHWA believes that by stating that it will impose the final assembly requirement on October 1, 2025, and the 55 percent requirement on October 1, 2026, manufacturers will be incentivized to begin onshoring production.

FHWA does not believe that it is sensible to continue to apply the Manufactured Products General Waiver but only remove products from its coverage when it is shown that those products are domestically produced in sufficient amounts. Under this approach suggested by many commenters, Buy America requirements would not apply to manufactured products until a domestic market for those products has emerged. FHWA, however, does not believe it reasonable to apply Buy America requirements, which are designed to incentivize domestic production, only after domestic

[13] For instance, the OMB Implementation Guidance states: ''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.''

production has been established. In addition, it is unclear if domestic markets for manufactured products would ever develop in this scenario; commenters did not provide sufficient evidence that manufacturers would onshore production if there were no immediate incentive to do so. FHWA finds it equally likely in such a scenario that the majority of manufacturers would elect not to onshore and that the Manufactured Products General Waiver would apply indefinitely for some products. That is not FHWA's intention; while there may be some manufactured products that require time-limited, targeted waivers, FHWA believes that those waivers should be granted when the incentive of Buy America requirements has failed to function, not when manufacturers have chosen to continue producing products abroad because FHWA has actively chosen to weaken that incentive.

FHWA disagrees with commenters that it should only apply the final assembly and the 55 percent requirement to products when they are shown to meet them. For the same reasons stated above, FHWA believes that doing so removes the incentive for manufacturers to comply with the requirements. FHWA believes that Buy America requirements should apply to all manufactured products unless it can be shown that the specific products or categories of products require a waiver based on the conditions in 23 U.S.C. 313(b).

Transition Period for Requirements

Comments: In the NPRM, FHWA sought comment on whether a transition period would be needed for its proposed Buy America requirements for manufactured products. This transition period would provide time between the publication of the final rule and the date on which the Buy America requirements for manufactured products would come into effect, requiring them to be produced in the United States. If commenters believed such a period was necessary, FHWA requested comment on what commenters believed the effective date of the proposed Buy America requirements should be.

A small number of commenters argued that FHWA should not provide any sort of transition period, and that the proposed Buy America requirements should be effective immediately when the final rule became effective. These commenters argued that the Manufactured Products General Waiver was in effect for over 40 years, so it was necessary to act expediently to avoid continuing what these commenters viewed as its negative effects. These commenters also stated that BABA was enacted in November 2021, so affected parties had time to prepare for the imposition of Buy America requirements to manufactured products. Finally, these commenters argued that affected parties had additional time to prepare for the imposition of Buy America requirements to manufactured products as DOT and other Federal agencies employed various phase-in waivers for BABA's requirements.

Other commenters suggested that FHWA provide a transition period for the imposition of Buy America requirements for all manufactured products, with commenters presenting various lengths that they believed were appropriate. Two commenters suggested a period of 180 days, one commenter suggested a transition period of 6 months, one commenter suggested a period of 9 months, four commenters suggested a period of 1 year, one commenter suggested a period of 1 year after FHWA puts in place any product-specific waivers, six commenters suggested a period of 18 months, one commenter suggested a period of between 18 and 24 months, one commenter suggested a period of 2 years, one commenter suggested a period of 2 years for Federal awards obligated after the effective date of the final rule, one commenter suggested a period of 30 months, seven commenters suggested a period of 3 years, one commenter suggested a period of 38 months, one commenter suggested a period of 4 years, and two commenters suggested a period of 5 years.[14] In addition, one commenter suggested that the Manufactured Product General Waiver should be continued for at least a few more years and another suggested that FHWA should delay implementation of any requirements for 3 to 5 years.[15]

Commenters gave various reasons for why they believed a transition period was necessary. These include that DOT imposed a phase-in period for BABA's construction material requirements; [16] that other Federal agencies imposed a phase-in period for BABA's requirements; the time required for FHWA to formulate, review, and approve any product-specific waivers, including the time for FHWA to determine which products used on Federal-aid projects are BABA-compliant and conduct market research on those that are not; the time required for FHWA to provide any guidance on the new requirements; the time required for manufacturers, contractors, and contracting agencies to determine if the products they manufacture and use are compliant with the new requirements; the time for manufacturers, contractors, and contracting agencies to update and modify their current Buy America processes, including the time to set up systems for compliance, train personnel and other stakeholders on the new requirements and processes, rewrite standard specifications, materials lists, and bid documents, and modify any guidance documents; the time for manufacturers to onshore domestic production of manufactured products and components, including the time for manufacturers to exit long-term leases, contracts, and other obligations manufacturers might have overseas, establish domestic manufacturing sites and supply chains, redesign products, test and certify products; the time for manufacturers to produce a sufficient amount of compliant products to have on hand; the time for project designers to incorporate the new Buy America requirements into future projects; the time for affected parties to understand and process how the new requirements will impact the design, construction, and costs of future projects; the time for contracting agencies to test and approve newly designed manufactured products; the time for contracting agencies and contractors to identify new vendors and adjust any product occurs; the time for affected parties to consume their stock of existing manufactured products and retire existing contractual agreements; and the time for contracting agencies and contractors to stockpile materials.

FHWA Response: After reviewing the comments received, FHWA believes that a transition period is necessary for the reasons identified by commenters to implement the new Buy America requirements, and FHWA thus disagrees

[14] In addition, one commenter stated that FHWA should withdraw its proposed rule and continue its general applicability waiver for eighteen months and another commenter stated that FHWA should review the Manufactured Products General Waiver after 5 years. As neither commenter indicated that FHWA would rescind the Manufactured Products General Waiver at the end of these time periods, FHWA does not view these comments as commenting on a proposed transition period, but rather comments arguing that FHWA should continue the Manufactured Products General Waiver. FHWA's response to comments arguing to continue the Manufactured Products General Waiver can be found in section IV.

[15] Other commenters stated what they believed the effective date should be for specific categories of manufactured products. While useful in providing information on the necessity of waivers for those specific products, FHWA does not believe it appropriate to base the effective date of imposing Buy America requirements on all manufactured products on the effective date for specific products.

[16] *See* 87 FR 31931 (May 25, 2022), issuing a general waiver of the BABA requirements for DOT-funded programs for a period of 180 days.

with commenters arguing against the imposition of any such period. While FHWA understands the urgency some commenters feel to rescind the Manufactured Products General Waiver, FHWA believes it must do so with consideration of the issues raised by commenters to ensure that affected parties are ready to apply Buy America requirements to manufactured products used on Federal-aid projects. Further, FHWA does not believe that the fact that BABA was enacted in November 2021 and that other Federal agencies have imposed phase-in waivers for its requirements justifies not having a transition period for the imposition of FHWA's Buy America requirements. While BABA was enacted in November 2021, FHWA has been consistent in stating that, due to section 70917(a)–(b), BABA's manufactured product requirements do not apply to Federal-aid projects.[17] FHWA thus does not believe it reasonable to now state that contracting agencies, contractors, and manufacturers should have been preparing for the implementation of Buy America requirements on manufactured products on Federal-aid projects because BABA applied a domestic content procurement preference to manufactured products on projects funded by other agencies.[18] Similarly, FHWA does not find it reasonable to believe that contracting agencies, contractors, and manufacturers should have been preparing for the implementation of Buy America requirements on manufactured products on Federal-aid projects during transitional waivers granted by other agencies for other programs.

In determining the appropriate time to apply the new Buy America requirements, FHWA carefully reviewed the different periods suggested and the reasoning behind them. Based on this review, FHWA believes that it is appropriate to have a longer transition period for the 55 percent requirement than the final assembly requirement, given that many of the reasons provided by commenters for why a transition period is needed do not apply or apply with less force to the imposition of the final assembly requirement. For instance, determining whether a product is manufactured in the United States is much simpler and clearer than determining whether more than 55 percent of its components, by cost, are produced in the United States. Similarly, FHWA expects the time for manufacturers to shift production to be compliant with the final assembly requirement to be much less than the time needed to be compliant with the 55 percent requirement, which requires shifting supply chains and component manufacturing to the United States. Further, FHWA does not believe that a manufacturer's decision to shift manufacturing products from overseas to the United States will impact the product itself to the same degree as changing the source of the product's components; thus, FHWA does not believe that requiring products to be manufactured in the United States will result in the same effects to project development that the 55 percent requirement may.

At the same time, FHWA recognizes that even imposing this final assembly requirement will require contracting agencies, contractors, and manufacturers to devote time to modifying their processes to account for this new requirement. FHWA acknowledges that these parties may be required to update standard specifications, material lists, and bid documents; modify guidance documents; and identify new vendors that can provide products meeting the final assembly requirements. After considering the range of transition periods suggested by commenters and the reasoning behind those dates, FHWA believes it appropriate to apply the final assembly requirement for Federal-aid projects on October 1, 2025. While this is on the lower end of the range of dates suggested by commenters, FHWA notes that commenters suggested ranges for the transition periods of both the final assembly and 55 percent requirements. As FHWA believes that many of the concerns raised by commenters reflect more heavily concerns with implementing the 55 percent requirement, FHWA believes that a choice on the lower end of the suggested range is appropriate. Based on the comments received, FHWA believes that this will provide time for contracting agencies, contractors, and manufacturers to be prepared for the imposition of the final assembly requirement with minimal disruption to the construction of Federal-aid projects. Simultaneously, FHWA believes that this date will provide an incentive for manufacturers to begin moving final assembly of manufactured products to the United States.

At the same time, FHWA recognizes that some manufacturers may not ultimately move final assembly of their products to the United States and that domestic companies may not emerge that manufacture certain products in the United States. For that reason, from the effective date of this rule to October 1, 2025, FHWA will monitor the status of the domestic market of manufactured products that can comply with the final assembly requirement. Based on FHWA's analysis, FHWA may choose to delay the start date for the final assembly requirement by issuing a temporary waiver of the final assembly requirement for manufactured products if more time is needed to onshore domestic production; however, FHWA maintains that it is important for this rulemaking to send out a clear market signal to begin that process of onshoring, even if it takes longer than FHWA currently expects. While commenters suggested a shorter transition period before imposing the final assembly requirement may be possible, such a shorter period may not provide FHWA time to properly monitor changes in the market and adjust accordingly.

FHWA believes that a longer transition period is necessary before imposing the 55 percent requirement. Based on the range of comments received on the preferred duration of a transition period, from 6 months to 5 years, FHWA finds it reasonable to begin the 55 percent requirement for Federal-aid projects on October 1, 2026. At this point, starting on October 1, 2026, manufactured products permanently incorporated into Federal-aid projects will need to comply with both the final assembly and 55 percent requirements. FHWA believes that a transition period ending on September 30, 2026, for the 55 percent requirement, which also serves as a transition period for the full imposition of FHWA's Buy America requirements for manufactured products, reflects the general middle ground of dates suggested by commenters. FHWA believes that a shorter transition period may not give contracting agencies, contractors, and manufacturers time to

[17] *See https://www.fhwa.dot.gov/construction/contracts/buyam_qa_baba_pre10232023.cfm.*

[18] FHWA recognizes that there may be entities that produce or utilize products in some projects that are covered by FHWA's Buy America statute and in other projects that are covered by BABA or Buy America requirements applicable to other DOT agencies. Indeed, FHWA believes that one of the benefits of imposing Buy America requirements on manufactured products that are similar to the requirements in BABA is the uniformity provided to contracting agencies, contractors, and manufacturers. At the same time, FHWA believes, based on the comments received to the NPRM, that contracting agencies, contractors, and manufacturers that are involved in Federal-aid projects have not completely shifted their processes and production of products used on Federal-aid projects to be BABA-compliant. Thus, while uniformity may provide some benefits to certain entities and products in the future, FHWA believes that there is a current lack of uniformity. In short, FHWA does not believe that the transition period given for BABA should be thought of as serving as a transition period for FHWA's Buy America requirements for manufactured products.

adjust to the new requirements. Conversely, FHWA believes that a longer transition period may not send the proper market signals to manufacturers to incentivize them to begin onshoring as soon as they are able to. FHWA believes that the transition period should reflect the minimum amount of time for affected parties to ready themselves for the new requirements. While some parties may desire a longer timeframe, FHWA believes that transition period through September 30, 2026, before imposing the 55 percent requirement provides this minimum amount of time.

FHWA nonetheless will monitor the status of the domestic market and the progress contracting agencies, contractors, and manufacturers are making to ready themselves for the imposition of the 55 percent requirement. FHWA may modify the start date of the 55 percent requirement based on information received by issuing a temporary, time-limited waiver of its Buy America requirements for manufactured products. In addition, prior to imposing the 55 percent requirement, FHWA intends to continue to perform market research, analyzing the effects issuance of this final rule has on the domestic market for manufactured products and listening to affected parties, including any parties requesting prospective waivers of the 55 percent requirement. Based on that research and considering the comments to the RFI and any future RFIs, FHWA may propose targeted waivers covering products that do not meet the 55 percent requirement prior to those requirements taking effect.

As discussed in more detail below, the start date for the final assembly and 55 percent requirements being promulgated in this final rule means that all Federal-aid projects obligated on or after those dates are subject to the applicable requirements.

FHWA emphasizes that while the final assembly requirement does not begin until October 1, 2025, and the 55 percent requirement does not begin until October 1, 2026, the other regulatory changes in this final rule become operative for all Federal-aid projects obligated on or after March 17, 2025. This means that for all Federal-aid projects obligated on or after March 17, 2025, all iron or steel products, as defined in § 635.410(c)(1)(iii), must comply with FHWA's Buy America requirements for steel and iron in § 635.410(b). This also means that, for all Federal-aid projects obligated on or after March 17, 2025, per § 635.410(c)(2), articles, materials, and supplies should be classified as an iron or steel product, a manufactured product, or another product as specified by law or in 2 CFR part 184; an article, material, or supply must not be considered to fall into multiple categories. In other words, starting for all Federal-aid projects obligated on or after March 17, 2025, all iron or steel products must comply only with § 635.410(b) and all manufactured products must comply only with § 635.410(c), with the final assembly and 55 percent requirements taking effect later.

In addition, for Federal-aid projects obligated on or after October 1, 2025, manufactured products must comply with the final assembly requirement, and for Federal-aid projects obligated on or after October 1, 2026, manufactured products must generally comply with both the final assembly and 55 percent requirements.

As stated in the NPRM, FHWA does not intend for these new Buy America requirements to supplant current FHWA waivers that cover specific manufactured products. *See* 89 FR 17798. As noted in the NPRM, FHWA's Buy America requirements for manufactured products are substantively similar to those in FHWA's Electric Vehicle (EV) Charger Waiver, which waives FHWA's Buy America requirements to EV chargers under certain circumstances.[19] Specifically, the EV Charger Waiver waives FHWA's Buy America requirements for EV chargers manufactured on or after March 23, 2023, and before July 1, 2024, if final assembly of the charger occurs in the United States and installation of the charger began by October 1, 2024. The EV Charger Waiver further waives FHWA's Buy America requirements for EV chargers manufactured on or after July 1, 2024, if final assembly of the charger occurs in the United States and more than 55 percent of the charger's components, by cost, are manufactured in the United States. For all EV chargers covered by the waiver, if the charger's housing is predominantly iron or steel, it is not covered by the EV Charger Waiver and that housing must meet FHWA's existing Buy America requirements for steel and iron.

Presently, EV chargers covered by the EV Charger Waiver should either have already begun installation or be compliant with both the final assembly and 55 percent requirements. FHWA does not intend for its imposition of Buy America requirements to all manufactured products through this rulemaking to require EV chargers that have already begun installation to be pulled out of the ground, nor to set less stringent Buy America requirements on EV chargers than those that already exist under the EV Charger Waiver. FHWA therefore intends the EV Charger Waiver to continue to apply to EV chargers procured in FHWA funded projects, not the requirements and transition period set in this final rule. FHWA nonetheless notes that, for projects obligated on or after October 1, 2026, the requirements that apply to EV chargers and those that apply to other manufactured products will effectively be the same.

In addition, besides manufactured products covered by existing FHWA waivers, per § 635.410(c)(2)(i) and (ii), precast concrete products classified as manufactured products using the definition in § 635.410(c)(1)(iv) and ITS and other electronic hardware systems that are installed in the highway right of way or other real property and classified as manufactured products using the definition in § 635.410(c)(1)(iv) are subject to requirements on a different timeline than other manufactured products. For precast concrete products classified as manufactured products, components of the precast concrete products that consist wholly or predominantly of iron or steel or a combination of both, as defined in § 635.410(c)(1)(vi), must continue to comply with FHWA's existing Buy America requirements for iron and steel at § 635.410(b) in every Federal-aid project. Precast concrete products will then have to additionally comply with the final assembly requirement and the 55 percent requirement for Federal-aid projects obligated on or after October 1, 2026. This same timeframe applies to the application of the requirements in § 635.410(c)(2)(ii). The cabinets or other enclosures of ITS and other electronic hardware systems that are installed in the highway right of way or other real property and classified as manufactured products per § 635.410(c)(1)(iv) that consist predominantly of iron or steel or a combination of both, as defined in § 635.410(c)(1)(vi), must continue to comply with FHWA's existing Buy America requirements for iron and steel at § 635.410(b) in all projects. The systems must then additionally comply with the final assembly requirement for Federal-aid projects obligated on or after October 1, 2025, and the 55 percent requirement for Federal-aid projects obligated on or after October 1, 2026.

FHWA discusses the requirements in § 635.410(c)(2)(i) and (ii) in more detail below. FHWA notes that the specified steel and iron components of these products should currently be compliant

[19] Waiver of Buy America Requirements for EV Chargers, 88 FR 10619, February 21, 2023.

with FHWA's existing Buy America requirements for iron and steel if they are used on Federal-aid. FHWA is therefore continuing its existing requirements for these products and components without break, and FHWA is not adding any additional requirements in this respect.

Effect on Projects in Development

Comments: In the NPRM, FHWA sought comment on whether there should be a buffer period for certain projects that are in development that have not had Federal awards obligated or authorized but have relied on the Manufactured Products General Waiver in project development. FHWA notes that this is distinct from the question regarding the transition period for the new Buy America requirements. The issue of the effect of rescission on projects in development concerns which projects, at the start of imposition of the final assembly requirement and later the 55 percent requirement, are subject to those requirements based on their developmental status at the time.

Commenters presented various views regarding what they believed was the appropriate point in project development to apply the new Buy America requirements for manufactured products. Some commenters suggested that the requirements should not apply to projects in the design stage at the time the requirements become effective; these commenters argued that doing so would avoid costly redesigns that delay construction and allow project designers to begin designing projects knowing which requirements would apply to those projects.

Other commenters argued that the requirements should not apply to projects that have already gone out for advertisement or already solicited applications. Such commenters stated that this approach enables bidders and applicants to estimate project costs more accurately and prevents those costs from exceeding application estimates; in addition, these commenters stated that if price is a factor in award selection, this approach avoids reopening advertisements and solicitations and delaying awards. Commenters also stated that this would enable bidders and applicants to evaluate the domestic availability of manufactured products before responding to advertisements or solicitations, allowing the project to avoid delays that might occur if awarded contractors had to search for compliant products or potentially redesign the project. Commenters presented similar reasons for why any new requirements should not apply to projects that have already opened bidding when the new requirements become effective. One commenter argued that the requirements should not apply to projects that have been put out to bid or are put to bid within one year of final agency action, stating that this would allow contracting agencies to rely on the Manufactured Products General Waiver for projects already in the developmental process and avoid the loss of time and money that would occur if they had to be redesigned or rebid.

Still other commenters argued that any new Buy America requirements for manufactured products should not apply to projects already obligated or authorized at the time the requirements become effective; such commenters stated that this would allow projects to be completed on time without significant cost changes and allow contracting agencies to include appropriate language in their contracts.

Various commenters also suggested that the new Buy America requirements for manufactured products should not apply to projects already in the procurement phase to prevent unnecessary delays; that they should not apply to contracts already executed; that they should not apply to products already purchased prior to the final rule's effective date; that they should not apply to material procurement contracts for at least eighteen months after the final rule is issued; and that they should not apply to products purchased prior to the start dates of the requirements, provided that they are installed at least twelve months after delivery as parties may have acquired non-compliant products with long lead times.

Finally, some commenters argued that any new requirements should not apply to projects at any stage in the project development process at the time the new requirements become effective. Commenters favoring this broad approach stated that it would avoid the loss of time and money that would occur if projects had to be redesigned or rebid.

FHWA Response: After carefully reviewing the comments received, FHWA believes that the most appropriate choice is to have the new Buy America requirements for manufactured products apply to all Federal-aid projects obligated after the start dates of the requirements.[20] This means that Federal-aid projects must comply with the final assembly requirement if obligated on or after October 1, 2025, and must comply with both the final assembly and 55 percent requirements if obligated on or after October 1, 2026. Federal-aid projects that have already obligated FHWA financial assistance before October 1, 2025, do not need to comply with the final assembly or 55 percent requirements. FHWA believes that the point of obligation represents a clear point after which Federal requirements, including Buy America, apply to a project. By applying FHWA's requirements at the point of obligation, FHWA also believes this aligns with the date on which Federal requirements, including FHWA's requirements, are generally triggered for a project. This is in contrast to more nebulous points suggested by commenters, such as the start of project development or design. While FHWA recognizes that some Federal-aid projects may be currently being designed based on the existing Manufactured Products General Waiver, FHWA believes that delaying the start dates of the Buy America requirements on manufactured products will allow changes to be made to those projects, if necessary, during the transition period to minimize disruption.

Similarly, for Federal-aid projects using advance construction (AC), FHWA believes that the new Buy America requirements for manufactured products should become effective for Federal-aid projects where FHWA approves the AC designation by the applicable start date.[21] This means that for Federal-aid projects where FHWA approves the AC designation on or after October 1, 2025, the project must comply with the final assembly requirement. For Federal-aid projects where FHWA approves the AC designation on or after October 1, 2026, the project must comply with the final assembly and 55 percent requirements. For Federal-aid projects where FHWA approves the AC designation on or after October 1, 2025, but before October 1, 2026, the project must comply with the final assembly requirement but does not need to comply with the 55 percent requirement.

Per 23 U.S.C. 115(a)(2), a project proceeding under AC must generally be in accordance with all procedures and requirements applicable to the project. FHWA accordingly believes that, before requesting AC approval, a State DOT should be aware that the approval for the project will require the project to proceed in accordance with the Federal procedures and requirements generally

[20] FHWA discusses comments on projects using alternate delivery methods below.

[21] Pursuant to 23 U.S.C. 115, AC allows a State DOT to begin work and incur costs that can later be reimbursed with Federal funding after FHWA approves a request to convert the AC from eligible for funding to an obligation to fund and reimburse.

applicable to the project, including Buy America requirements for manufactured products. In addition, FHWA believes that the date of AC approval represents a clear point that makes clear to all affected parties which requirements apply to a given project.

Buffer Period for Projects in Development Using Alternate Delivery Methods

Comments: In the NPRM, FHWA also requested comment on the appropriate buffer period, if any, for alternate project delivery methods. These alternative delivery methods are where contracts are awarded and work is authorized and obligated in phases, such as with design-build. Under this delivery method, FHWA may, for instance, obligate funds for the design phase of a project and then later obligate funds for the construction phase of a project.

Commenters presented various arguments as to when any new Buy America requirements for manufactured products should take effect for projects using alternate delivery methods. Some commenters suggested that the requirements should not apply to the physical construction phase if FHWA financial assistance is obligated before the effective date of the new requirements or, similarly, that the requirements should only apply to new awards issued prior to the design and development phase. Other commenters relatedly suggested that the requirements should not apply to projects that have been initiated before the final rule's effective date, using the earliest obligation date for any phase of the project to serve as the date of initiation. Such commenters argued that this would allow projects to continue to rely on the Manufactured Products General Waiver when the project's estimates, designs, and scope have been prepared based on that waiver. Commenters stated that this would also prevent retroactive adjustments after contractors or consultants have been selected, which could otherwise cause delays, and avoid requirements from changing when a project advances from preconstruction to construction. Other commenters suggested that requirements should not apply to projects that have issued a Request for Qualifications (RFQ), stating that this would prevent wasting efforts taken by funding recipients to develop a cost estimate in advance of issuing the RFQ and ensure that the project is delivered as initially envisioned. Other commenters suggested that the new Buy America requirements for manufactured products should not apply to projects using alternate delivery methods when those projects have already entered the procurement phase or should be determined at the contracting officer's discretion.

FHWA Response: FHWA has carefully analyzed the comments regarding alternate delivery methods. FHWA believes that the new Buy America requirements for manufactured products should apply to all Federal-aid projects where a contract providing for both the preconstruction (such as preliminary design under a design-build contract) and construction phases is in place, but the construction phase has not been obligated by the time of this final rule's start dates. In other words, for Federal-aid projects using alternate delivery methods, if the construction phase of the project is obligated on or after October 1, 2025, the project must comply with the final assembly requirement, even if funds have been obligated for preconstruction phases prior to October 1, 2025. Similarly, if the construction phase for a Federal-aid project using alternate delivery methods is obligated on or after October 1, 2026, the project must comply with the final assembly and 55 percent requirements, even if funds have been obligated for preconstruction phases prior to this date.

While FHWA understands the opinion expressed by commenters to allow projects that have been obligated funds for preconstruction work to continue to rely on the Manufactured Products General Waiver if such obligation occurs prior to this rule's start dates, FHWA believes that the focus point should be on the obligation of funds for construction. In addition, FHWA generally believes that the transition period in this final rule should allow many Federal-aid projects currently in design to proceed to construction by the time the new requirements become effective. For Federal-aid projects that do not, the delayed start dates for the requirements will provide the necessary time for changes to occur to prepare for the imposition of the new requirements. FHWA has concerns that allowing Federal-aid projects to be covered by the Manufactured Products General Waiver if they are in preconstruction stages when the final assembly and 55 percent requirements become effective may be used to delay the full application of the new Buy America requirements for manufactured products, allowing foreign products to be purchased even when domestic ones are available. FHWA does not intend to disrupt the progress of projects but also does not intend to continue to allow the Manufactured Products General Waiver continue longer than needed; FHWA believes that allowing Federal-aid projects that have FHWA financial assistance obligated for construction before the start dates of this final rule provides an appropriate middle ground.

Compliance

Comments: In the NPRM, FHWA stated that it was not proposing any required method of compliance to ease the burden that tracking the origin and cost of components may pose. FHWA requested comment on any specific provisions that it should consider in easing the administrative burden in demonstrating compliance with the Buy America requirements for manufactured products.

Many commenters nonetheless indicated that they desired FHWA to specifically clarify what constitutes compliance, such as what level of detail is required to prove compliance and what penalties FHWA could bring about in cases of noncompliance. These commenters further suggested that FHWA should clearly state who is responsible for tracking and providing information on the compliance of manufactured products. One commenter, however, agreed with FHWA that not prescribing any specific method of compliance will ease administrative burden.

Commenters desiring FHWA to clarify a specific method of compliance suggested various possible methods. One commenter suggested that FHWA should allow recipients of FHWA financial assistance to rely on a fair inference that a manufactured product meets Buy America requirements, such as by relying on a certification, absent material evidence to the contrary. Other suggested that FHWA should clarify that a certification from a contractor or manufacturer would demonstrate compliance. Some commenters also suggested that FHWA itself should provide certification forms. Other commenters went further, suggesting that FHWA should itself certify manufactured products as compliant or develop a list of manufactured products that are compliant with its standards. Finally, some commenters stated that once a product in a product line is certified as compliant, that certification should cover other products from that product line for a certain period of time.

FHWA Response: After analyzing the comments received on this topic, FHWA believes that commenters did not indicate that they desired FHWA to prescribe a specific form of compliance but rather sought clarification on what might constitute compliance. While not

prescribing any form of compliance, FHWA believes that the manufacturer will be in the best position to certify that a specific product meets these requirements. FHWA notes, however, that recipients of FHWA financial assistance are ultimately responsible for compliance with FHWA's Buy America requirements. FHWA therefore believes that the recipient is in the best position to determine the best form of any certification.

Due to the nature of the Buy America requirements for manufactured products, each product's compliance must be determined individually. Given that the compliance of products might change, FHWA does not believe that it is in a position to certify compliance or have a list of compliant products; a product from one product line may be compliant at one point and that same product may then become non-compliant later in a different product line based on choices made by the manufacturer. Any certification from FHWA would only provide a brief snapshot of a specific manufactured product, which would be minimally helpful for other parties seeking to procure similar products. FHWA instead believes that it is more appropriate for parties to consult with product manufacturers, who are in the best position to provide current information on the compliance of their products.

In determining the proper remedy for resolving an after-the-fact discovery of the incorporation of noncompliant manufactured products, FHWA intends to follow the same process as it does for determining the remedy for a discovery of the incorporation of noncompliant iron or steel. FHWA will review relevant information to determine the appropriate resolution, which may include removing the noncompliant products, making the noncompliant products non-participating, or determining that all project costs are ineligible.[22]

Scope of Buy America Requirements

Comments: In the NPRM, FHWA noted that 23 U.S.C. 313(h) requires FHWA's Buy America requirements to apply to all contracts that are eligible for FHWA assistance, regardless of the funding source for the specific contracts, if any contract within the scope of a finding, determination, or decision under the National Environmental Policy Act (NEPA) is funded with amounts made available to carry out title 23, U.S.C. In the NPRM, FHWA stated that because of this provision, were FHWA to rescind the Manufactured Products General Waiver and impose Buy America requirements for manufactured products, those Buy America requirements would apply to all contracts eligible for FHWA financial assistance for a project carried out within the scope of the applicable finding, determination, or decision under NEPA so long as one contract for the project is funded with amounts made available to carry out title 23, U.S.C.

Commenters expressed confusion over the scope of FHWA's Buy America requirements under 23 U.S.C. 313(h) versus BABA's domestic content procurement preferences. For instance, commenters suggested that certain manufactured products are not used in infrastructure projects or are not integral to the construction of an infrastructure project and therefore should not be covered by any Buy America requirements. Commenters representing utility companies in particular argued that FHWA's Buy America requirements for manufactured products should not apply to utility relocations, stating that the utility relocation is not an infrastructure project, that the utility company does not receive any Federal funds for the relocation but is only reimbursed for its costs, and that the involvement of the utility company in the project is involuntary.

Other commenters, particularly those involved in the electric vehicle (EV) charging industry, expressed confusion over how 23 U.S.C. 313(h) functions if the NEPA determination is a categorical exclusion (CE). These commenters suggested that 23 U.S.C. 313(h) would require them to seek a NEPA determination on a project's scope, even though the project is an approved CE, to determine the applicability of Buy America requirements.

FHWA Response: FHWA wishes to clarify that 23 U.S.C. 313(h) represents a unique Buy America provision that is exclusive to FHWA. This provision applies to FHWA's Buy America statute, not other domestic content procurement preferences, such as those in BABA; thus, FHWA's Buy America requirements will be different from those applied by other Federal agencies.

Under 23 U.S.C. 313(h), FHWA's Buy America requirements, including its Buy America requirement for manufactured products, apply not just to the Federal-aid project itself but also to contracts under the scope of the applicable NEPA finding, determination, or decision. This means that a manufactured product does not need to be integral to the Federal-aid project itself to be subject to FHWA's Buy America requirements. For instance, with respect to FHWA's existing Buy America requirements for iron and steel, FHWA has long made clear that 23 U.S.C. 313(h) requires that all utility work eligible for FHWA financial assistance must meet its Buy America requirements for iron and steel, even if FHWA does not fund the utility work.[23] Given that 23 U.S.C. 313(h) applies to manufactured products to the same extent as it does to iron and steel, FHWA thus believes that it is clear that these new requirements will similarly apply to all utility work eligible for FHWA financial assistance. In other words, a manufactured product must comply with the Buy America requirements if it is permanently incorporated into the Federal-aid project or if it is permanently incorporated as part of work done under a contract within the scope of the applicable NEPA finding, determination, or decision of a Federal-aid project and is eligible for FHWA financial assistance. FHWA discusses the issue of permanent incorporation in more detail below when discussing the introductory text to § 635.410(c).

With respect to commenters raising concerns about the applicability of CEs to 23 U.S.C. 313(h), FHWA notes that a CE is a form of a NEPA finding, determination, or decision. FHWA would not require or believe it necessary for a party to seek a further NEPA determination after obtaining an approved CE solely for the purpose of determining the extent of Buy America requirements under 23 U.S.C. 313(h). The CE itself would dictate the scope; all contracts eligible for FHWA financial assistance under the scope of the CE would need to comply with FHWA's Buy America requirements if one such contract received Federal-aid funding.

V. Section-by-Section Discussion

Section 635.410(b) — Recipient

Comments: FHWA proposed to remove the word ''State'' in existing § 635.410(b)(2) and (3) and (d) and replace it with the word ''recipient.'' FHWA also proposed to use the word ''recipient'' throughout § 635.410(c). One commenter requested that FHWA provide a definition of the word ''recipient,'' stating that it was unclear whether this term referred to the contracting agency, contractor, manufacturer, or a combination of such entities.

[22] *See* Q#48 of FHWA's Buy America Q and A for Federal-aid Program for more information: *https://www.fhwa.dot.gov/construction/contracts/buyam_qageneral.cfm.*

[23] *https://www.fhwa.dot.gov/utilities/buyam.cfm.*

FHWA Response: For the purpose of the final rule, the word ''recipient'' in § 635.410(b), which discusses FHWA's Buy America requirements for iron and steel, refers to the recipient of FHWA financial assistance. The change to ''recipient'' in § 635.410(b) and (d) from ''State'' is simply meant to reflect that rather than providing funds to States, FHWA also provides discretionary grant funds directly to other entities, such as local governments and metropolitan planning organizations. In addition, FHWA notes that its current Buy America requirements apply to Territorial governments, who receive funding from FHWA through the Territorial Highway Program under 23 U.S.C. 165(c). The definition of ''State'' for purposes of § 635.410 does not include such Territories, even though such Territories are subject to the same Buy America requirements as States. *See* 23 CFR 635.403(f); 23 U.S.C. 101(a)(28). In making this change, FHWA does not intend to change the existing practice as it currently applies to States.

Section 635.410(b)—Iron or Steel Products

Comments: FHWA proposed to maintain its existing Buy America requirements for steel and iron found in § 635.410(b), with the only change being replacing references to ''steel and iron materials'' and ''steel or iron materials'' with the phrase ''iron or steel products.'' FHWA further proposed to define ''iron or steel products'' in § 635.410(c)(1)(iii). This change was meant to create a distinction between the category of iron and steel materials and manufactured products that may contain iron and steel. FHWA discusses the effect of this change in further detail when discussing § 635.410(c)(2) below.

With respect to the requirements in § 635.410(b), FHWA received several comments on § 635.410(b)(4), which allows for a de minimis amount of foreign iron and steel to be used in Federal-aid projects. Under this provision, foreign iron and steel can be used in a Buy America-compliant project if the cost of such materials does not exceed 0.1 percent of the total contract cost or $2,500, whichever is greater. Commenters expressed confusion over how this de minimis provision would apply to manufactured products and how it is connected with the departmental de minimis waiver. Other commenters suggested changes to the de minimis provision in § 635.410(b)(4), such as by setting a total contract cost above the current $2,500 figure. Other commenters argued that FHWA should codify the departmental de minimis waiver in the regulatory text, similar to how the de minimis provision is currently codified at § 635.410(b)(4).

In addition, one commenter stated that the proposed language in § 635.410(b)(1)(ii), that all manufacturing processes for iron or steel products must occur in the United States, could suggest that all manufacturing processes for components of the products that are not made of iron or steel must be domestically produced. This commenter suggested modifying the language to state that ''if iron or steel products are to be used, all manufacturing processes of the iron or steel components, including application of a coating, for these materials must occur in the United States.''

FHWA Response: FHWA is clarifying that § 635.410(b)(4) only applies to iron or steel products; it does not apply to materials properly classified as manufactured products under § 635.410(c)(1)(iv). The de minimis provision applicable to manufactured products is found in the departmental de minimis waiver. Other comments discussing changes to existing § 635.410(b)(4) or codifying the departmental de minimis waiver in § 635.410 are beyond the scope of this rulemaking.

With respect to changes made to § 635.410(b)(1)(ii), FHWA notes that the current language states that all manufacturing processes for steel or iron materials must occur in the United States. FHWA does not intend for its change in language, from ''steel or iron materials'' to ''iron or steel products'' to change the scope of the requirements in § 635.410(b)(1)(ii) with respect to the category of iron or steel products. The intent is for FHWA's current Buy America steel and iron requirements, codified in § 635.410(b), to continue to apply to all steel and iron in a product classified as an iron or steel product. The only functional change FHWA is making in § 635.410(b)(1)(ii) is to distinguish between iron or steel products and manufactured products that contain iron and steel. FHWA also notes that the language used in § 635.410(b)(1)(ii) substantially mirrors the language used in 2 CFR 184.3 to determine when an iron or steel product is manufactured in the United States.

Existing § 635.410(c)

Comments: In the NPRM, FHWA proposed to replace the current § 635.410(c), which discusses the process for requesting Buy America waivers and the procedures FHWA will take to respond to that request, with a new paragraph detailing FHWA's Buy America requirements for manufactured products.

FHWA received multiple comments expressing concern with removing existing § 635.410(c). Commenters stated their reservations with this approach, arguing that it appeared FHWA was removing the ability for recipients of FHWA financial assistance to request Buy America waivers. These commenters also indicated that FHWA should codify its waiver process in its Buy America regulation, similar to how it is done by OMB in 2 CFR 184.7. Other commenters also expressed dissatisfaction with FHWA's current Buy America waiver process and suggested what they viewed as potential solutions.

FHWA Response: FHWA did not intend for removing current § 635.410(c) to remove the ability for recipients of FHWA financial assistance to request Buy America waivers. The authority for recipients to request waivers is found in 23 U.S.C. 313(b), and FHWA is not altering, nor could it alter, that ability through this rule. As stated in the NPRM, FHWA made the choice to remove existing § 635.410(c) because the current provision is out of date and does not reflect FHWA's current statutory requirements regarding waivers, FHWA's current organizational structure, or FHWA's current procedure for processing waivers. FHWA believes that recipients of FHWA financial assistance understand the current Buy America waiver process and therefore does not believe that codifying this process is necessary.

FHWA also notes that comments on modifying its current waiver process are out of the scope of this rulemaking.

Section 635.410(c)—Introductory Text

Comments: In § 635.410(c), FHWA proposed to state that manufactured products used and permanently incorporated in Federal-aid highway construction projects must be produced in the United States. Commenters, particularly those representing the utility industry, questioned what it meant for a manufactured product to be permanently incorporated into a Federal-aid project. These commenters argued that utility infrastructure that is being relocated, replaced, or modified does not become a permanent part of the Federal-aid project because it is being relocated, replaced, or modified only to accommodate project construction. Other commenters also suggested that FHWA should clarify that its Buy America requirements do not apply to existing in-use equipment.

FHWA Response: FHWA chose the language used in § 635.410(c) for FHWA's Buy America requirements for manufactured products to align with the language currently in § 635.410(b)(1)(i) regarding FHWA's Buy America requirements for steel and iron. FHWA intends for the standard for permanent incorporation of manufactured products to be the same as FHWA currently uses to determine whether steel and iron is permanently incorporated. In other words, FHWA would apply its Buy America requirements to iron, steel, and manufactured products permanently incorporated into Federal-aid projects. The requirements do not apply to steel, iron, or manufactured products used on a temporary basis on Federal-aid projects, meaning when contract specifications provide that the iron, steel, and manufactured products used on the project either must be removed at the end of the project or may be removed at the contractor's convenience. FHWA believes that continuation of this current policy, along with the discussion of 23 U.S.C. 313(h) above, should provide the necessary guidance on whether the relocation, replacement, or modification of utilities constitutes permanent incorporation of the products. In short, any contract or agreement involving utility work that uses any amount of Federal-aid Highway Program funding must comply with FHWA's Buy America requirements, including the new requirement for manufactured products.[24]

In terms of applicability of the Buy America requirements to manufactured products to existing in-use equipment, FHWA also notes that the final assembly requirement will apply to all Federal-aid projects obligated on or after October 1, 2025, and the 55 percent requirement will apply to all Federal-aid projects obligated on or after October 1, 2026. Where FHWA's Buy America requirements for manufactured products apply, all permanently incorporated manufactured products must be produced in the United States.

Section 635.410(c)(1)(ii) — Excluded Materials

Comments: In the NPRM, FHWA defined ''excluded materials'' as ''section 70917(c) materials as defined in 2 CFR 184.3.'' Under 2 CFR 184.3, ''section 70917(c) materials'' are defined as ''cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives.'' Commenters suggested that FHWA should, instead of cross-referencing to 2 CFR 184.3, provide a definition of the terms ''aggregates,'' ''aggregate binding agents,'' and ''additives'' in the regulatory text of § 635.410.

FHWA Response: As noted in the NPRM, section 70917(c) of BABA does not explicitly comment on whether excluded materials could be considered manufactured products. By providing a definition of excluded materials and then stating in the definition of manufactured products that excluded materials cannot be manufactured products, FHWA seeks to make clear, in alignment with 2 CFR part 184, that excluded materials are not, standing alone, manufactured products. As stated in more detail below when discussing § 635.410(c)(1)(iv), FHWA believes that excluded materials may nonetheless constitute components of manufactured products when combined with other materials, including other excluded materials, to create a manufactured product. In other words, excluded materials may be standalone materials, and this not subject to FHWA's Buy America requirements for manufactured products, or components of manufactured products, and thus the manufactured product would be subject to the final assembly and 55 percent requirement. For manufactured products containing excluded materials as components, the excluded material must be considered in determining whether the manufactured product has more than 55 percent of its components, by cost, produced in the United States.

In terms of determining whether an excluded material is itself not a manufactured product, FHWA views an aggregate as a broad category of particulate matter, such as stone, sand, or gravel. FHWA views aggregate binding agents as materials used to bind together small aggregates, and FHWA views additives as materials added to other materials to improve their properties. FHWA, however, does not believe that a definition more specific than this is necessary for the purpose of this rulemaking; FHWA doubts that aggregates, aggregate binding agents, or additives will generally be considered standalone manufactured products. If such outlier cases occur, FHWA believes they are more appropriately dealt with on a case-by-case basis or through the issuance of future guidance.

Section 635.410(c)(1)(iii), (vi) — Iron or Steel Products

Comments: In the NPRM, FHWA defined ''iron or steel products'' as articles, materials, or supplies that consist wholly or predominantly of iron or steel or a combination of both. FHWA further defined ''predominantly of iron or steel or a combination of both'' as a material where the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. Both of these definitions mirror the definitions of the terms in 2 CFR part 184.

Commenters raised concerns regarding the difficulty in evaluating the steel and iron content of products to determine whether those products would be considered manufactured products, and subject to the new Buy America requirements for manufactured products, or iron or steel products, and subject to the existing Buy America requirements for iron and steel. These commenters suggested that it may be difficult for recipients of FHWA financial assistance to determine the cost of the iron and steel content of a product. One commenter suggested that FHWA allow recipients to use another metric, such as weight percentage, to determine how to classify a product, arguing that determining the weight of iron and steel in a product is easier to determine than the cost of the iron and steel.

FHWA Response: FHWA believes that adopting a definition that distinguishes between iron or steel products and manufactured products that contain iron or steel is important to allow contracting agencies, contractors, and manufacturers to understand which requirements apply to a given material. FHWA acknowledges that recipients of FHWA financial assistance may need to consult with manufacturers to determine the cost of a product's iron or steel content. FHWA, however, believes that using the standard proposed, which is the standard under BABA and 2 CFR part 184, provides a single standard that applies to iron or steel products across Federal agencies; this is important to provide certainty to contracting agencies, contractors, and manufacturers regarding the requirements that apply to a given material no matter the Federal agency that is funding the procurement of the material.

Section 635.410(c)(1)(iv) — Distinguishing Manufactured Products From Other Materials

Comments: In the NPRM, FHWA proposed to define a manufactured product as an article, material, or supply that has been processed into a specific form and shape, or combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or

[24] *See https://www.fhwa.dot.gov/utilities/buyam.cfm* for more information on the application of Buy America requirements to utility work on projects.

supplies. FHWA noted, however, that if an item is classified as an iron or steel product, an excluded material, or other product category as specified by law or in 2 CFR part 184, it should not be classified as a manufactured product.

Commenters expressed confusion about what materials should be classified as manufactured products, with one commenter requesting FHWA to clarify whether FHWA's definition meant that a manufactured product included all permanent materials or products incorporated into a project outside of the categories specifically listed in the definition. Other commenters requested for FHWA to specifically state that certain materials are not manufactured products and therefore not subject to FHWA's Buy America requirements. One commenter requested clarity on the meaning of FHWA's statement in the preamble to the NPRM that ''products brought to the work site in an unprocessed or minimally processed state, such as topsoil, compost, and seed, would not be considered manufactured products'' and that ''non-manufactured or raw materials mixed off of the work site with other non-manufactured or raw materials of similar types would not necessarily result in the mixed material brought to the work site being classified as a manufactured product if it remains in an unprocessed or minimally processed state, such as minimally-processed fill dirt.''

Other commenters requested that FHWA provide clarity on distinguishing between manufactured products and construction materials. Certain commenters requested that FHWA specifically classify specific products as either a manufactured product or a construction material. Commenters in particular raised concerns over how to classify construction materials that have articles, materials, supplies, or binding agents added to them, as the definition of ''construction material'' in 2 CFR 184.3 states that minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the combined material as a construction material. Such commenters requested that FHWA define when a construction material has minor additions and should be classified as a construction material versus when a construction material has non-minor additions and should be classified as a manufactured product. One commenter requested that FHWA provide a list of manufactured products that include construction materials that have undergone non-minor additions for this purpose. Other commenters requested that FHWA clearly state that a product that is a combination of two construction materials should be classified as a manufactured product, not a construction material.

FHWA Response: The definition of ''manufactured product'' has two steps. First, to be a manufactured product, the material must either (1) be processed into a specific form and shape; or (2) combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies. Like OMB, FHWA finds it necessary to have a positive definition for what constitutes a ''manufactured product.'' For example, FHWA would not classify a raw material as a manufactured product because it is not manufactured under FHWA's meaning of the term. Raw materials are not (1) processed into a specific form and shape; or (2) combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.

In terms of determining whether a material is processed into a specific form and shape, FHWA wishes to make clear that some materials, like raw materials, are not processed into a specific form and shape. Alternatively, some products may exist in such a minimally processed state that they should not be considered ''processed into a specific form and shape,'' such as topsoil, which should not be considered a manufactured product.

For the purpose of determining whether a material is combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies, FHWA clarifies that some materials may be combined with other materials but produce a product that lacks different properties than the individual materials. 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 because the fill dirt does not have different properties than its individual components.

In short, some materials may not be classified as a manufactured product under this first step. A material properly classified as a manufactured product under this first step is then analyzed under the second step of the definition. Under this second step, a material is excluded from classification as a manufactured product if it could also be classified as an iron or steel product, an excluded material, or other product category as specified by law or in 2 CFR part 184. Except for a specific subset of products discussed in § 635.410(c)(2)(i) and (ii), below, FHWA intends for materials to be classified as only one category of material and, based on that classification, only subject to one set of requirements, as applicable to the classification.

FHWA recognizes that without this second step, certain materials could be viewed as both manufactured products under the first step and as another category, which would make it unclear what requirements applied to that material. For instance, a material could be considered a manufactured product under the first step of the definition but also contain such a high amount of iron and steel to be considered an iron or steel product, such as might be the case for some vehicles. This second step makes clear that such a material is properly classified as an iron or steel product and subject to FHWA's Buy America requirements for iron and steel under § 635.410(b), not FHWA's Buy America requirements for manufactured products under § 635.410(c).[25] Similarly, a material that falls under the definition of an excluded material could also be considered a manufactured product under the first step of the definition of ''manufactured product,'' such as cement. Again, in such a case, such a material would be properly classified as an excluded material, not a manufactured product. As excluded materials are not subject to any Buy America requirements standing alone, such a material would not have any domestic content procurement preference placed on it. To use another example, certain materials classified as construction materials under 2 CFR 184.3 could also be considered a manufactured product under the first step of the definition of ''manufactured product,'' such as fiber optic cable. Once more, such a material is properly classified as a construction material and is subject to BABA's construction material requirements under 2 CFR part 184, not FHWA's Buy America requirements for manufactured products.

FHWA acknowledges that, to determine whether a material should be classified as a construction material or manufactured product during this step two, parties need to understand the definition of what constitutes a construction material in 2 CFR 184.3. Per 2 CFR 184.3, a construction material is an article, material, or supply that consists of only one of the following

[25] This rule applies generally to manufactured products. FHWA discusses the specific exceptions to it below when discussing § 635.410(c)(2)(i) and (ii).

eight items: non-ferrous metals; plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables); glass (including optic glass); fiber optic cable (including drop cable); optical fiber; lumber; engineered wood; or drywall. In addition, these eight materials may have minor additions of articles, materials, supplies, or binding agents added to them and remain properly categorized as a construction material. In discussing minor additions in 2 CFR part 184, OMB did not provide a specific definition but instead stated that ''Federal agencies should exercise reasonable discretion in applying this term within their respective Federal financial assistance programs for infrastructure.'' 88 FR 57767. FHWA does not believe that this rulemaking, which concerns FHWA's requirements for manufactured products under 23 U.S.C. 313, is the proper place to define what constitutes non-minor additions for the purpose of determining whether a material should be considered a construction material; if necessary, FHWA would instead seek to do so through additional guidance.

FHWA notes that a material properly classified as a manufactured product under this two-step definition may include components that, on their own, would be categorized as iron or steel products, excluded materials, construction materials, or other categories of products. FHWA emphasizes that it is the classification of the material itself that determines whether it is a manufactured product versus an iron or steel product, excluded material, or construction material. For example, a traffic light may contain iron and steel components and glass, a construction material, as a component. In determining how to classify the traffic light, the first step is to determine whether the traffic light is processed into a specific form and shape or combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies. The second step is to determine whether the traffic light itself should be classified as an iron or steel product, excluded material, or other product category as specified by law or in 2 CFR part 184. The fact that components of the traffic light might be iron or steel products or construction materials may be relevant to determining the proper classification of the traffic light; for example, if the iron or steel components represent more than 50 percent of the cost of all the traffic light's components, the traffic light should be classified as an iron or steel product. It is important to note, however, that merely containing such iron or steel components and construction materials as components does not mean that the traffic light is automatically classified as an iron or steel product or a construction material. This determination must be made by looking at the specific definition applicable to each category of material.

If a material meets the definition of a manufactured product under the first step and is not excluded under the second step, it is properly classified as a manufactured product, unless it is a mixture of excluded materials delivered to a work site without final form for incorporation into a project, as discussed below in the analysis of § 635.410(c)(1)(iv). FHWA reiterates, however, that a material properly classified as a manufactured product is only subject to FHWA's Buy America requirements for manufactured products if the material is permanently incorporated into a Federal-aid project.

FHWA believes that this guidance should allow contracting agencies, contractors, and manufacturers to properly determine the proper classification of articles, materials, and supplies.

Section 635.410(c)(1)(iv) — Excluded Materials

Comments: Under FHWA's definition of a manufactured product, discussed in detail above, an excluded material, by itself, should not be classified as a manufactured product. FHWA stated in the NPRM, however, in alignment with 2 CFR part 184, that excluded materials may constitute a component of a manufactured product when combined with other materials, including other excluded materials. If a manufactured product contains components that are excluded materials, those excluded materials must be considered in determining whether 55 percent of the product's components, by cost, are produced in the United States. FHWA once again, notes, however, that mixtures of excluded materials delivered to a work site without final form for incorporation into a project are not considered manufactured products; comments on this topic are discussed in detail below.

Some commenters expressed opposition to having a combination of excluded materials be classified as a manufactured product. Others expressed opposition to applying a Buy America requirement to excluded materials in any form. One commenter requested that FHWA should make it clear in the final rule that excluded materials do not have a Buy America requirement placed on them.

FHWA Response: FHWA clarifies that, consistent with 2 CFR part 184, an individual item listed in section 70917(c) of BABA that is brought to the work site for permanent incorporation into a Federal-aid project should be classified as an excluded material and not subject to a Buy America requirement. For example, cement brought to the work site for permanent incorporation into a Federal-aid project is not subject to FHWA's Buy America requirements. If the individual excluded material is combined with another excluded material, such as cement combined with aggregates, that combined material should be considered to be a manufactured product, assuming that it means the definition of a manufactured product in § 635.410(c)(1)(iv). In this case, each excluded material (the cement and aggregates) is a component of the manufactured product and must be considered when determining whether 55 percent of the components, by cost, of the product are produced in the United States. On the other hand, an excluded material combined with the same excluded material would remain an excluded material and not be subject to FHWA's Buy America requirements. In short, a Buy America preference may apply to excluded materials as a component of a manufactured product; it cannot apply to an excluded material standing alone.

FHWA agrees with OMB that the language in section 70917(c) of BABA indicates that Congress did not intend for excluded materials to be considered construction materials and did not intend excluded materials, standing alone, to be classified as manufactured products. *See* 88 FR 57771–73. In addition, FHWA agrees with OMB that section 70917(c) does not prevent excluded materials from being components of manufactured products and considered the same as any other component of a manufactured product. *See id.* at 57772. FHWA further believes that it is useful to align the treatment of excluded materials under FHWA's Buy America requirements with the requirements of these materials under 2 CFR part 184 where appropriate. FHWA believes that this promotes uniformity for contracting agencies, contractors, and manufacturers operating between different Federal Agency programs and will allow for these entities to build up a greater amount of experience with these requirements.

Section 635.410(c)(1)(iv)—Reference to Construction Materials

Comments: In the definition of manufactured product, FHWA stated that: ''If an item is classified as an iron or steel product, an excluded material, or other product category as specified by law or in 2 CFR part 184, then it is not a manufactured product.'' Many commenters suggested that FHWA should remove the reference to ''other product category as specified . . . in 2 CFR part 184'' and instead just list the specific construction materials referenced in 2 CFR part 184.

FHWA Response: Pursuant to section 70915(b) of BABA, OMB is given the authority to determine which construction materials are covered by BABA's requirements and to define the manufacturing processes that must occur in the United States for those construction materials. As stated above, except for specific products, described in more detail in the discussion of § 635.410(c)(2)(i) and (ii), below, FHWA believes that materials should be classified as only one category of material and, based on that classification, be subject to only one set of requirements, as applicable to the classification. The purpose of referring to ''other product category as specified by law or in 2 CFR part 184'' is to make clear that products that could be classified as both another category and a manufactured product should not be considered manufactured products and are not subject to FHWA's Buy America requirements for manufactured products. Thus, items classified as construction materials by OMB are not properly classified as manufactured products and are not subject to FHWA's Buy America requirements for manufactured products. Given that OMB has the authority to define construction materials and thereby impose BABA's construction material requirements on them, FHWA does not find it appropriate to separately list construction materials in its own regulation.

Section 635.410(c)(1)(iv)—Mixtures of Concrete or Asphalt Delivered to a Job Site Without Final Form

Comments: In the definition of manufactured products in the NPRM, FHWA stated that ''[m]ixtures of concrete or asphalt delivered to a job site without final form for incorporation into a project are not a manufactured product.'' Many commenters stated that FHWA should clarify that this exception should apply to all mixtures of excluded materials, not just mixtures of concrete or asphalt. Other commenters suggested that FHWA should reference a ''work site'' instead of a ''job site,'' given that § 635.410(c)(2) stated that classification of a material should occur based on its status at the time it is brought to the work site for incorporation into an infrastructure project. Still other commenters disagreed, stating that FHWA should clarify that the exemption should apply to mixtures delivered to or proximate to a work site. Finally, some commenters opposed treating mixtures of concrete or asphalt without final form from those that are in a settled form, contesting that there is no reason to treat the two differently.

FHWA Response: In the preamble to 2 CFR part 184, OMB stated: ''In the case of section 70917(c) materials, OMB clarifies . . . to the extent that 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.'' 88 FR 57772. In the NPRM, FHWA stated its agreement with OMB on this topic and that FHWA intended for its proposed regulations to have the same reach as 2 CFR part 184 in this respect.

FHWA disagrees with commenters suggesting that settled mixtures of excluded materials should not be considered manufactured products like FHWA proposed for unsettled mixtures of excluded materials. FHWA agrees with OMB that unsettled mixtures are not processed into a specific shape or form like settled mixtures. *Id.* While settled mixtures may have different properties than individual excluded materials, FHWA agrees with OMB that it is more appropriate to only treat excluded materials that have set or dried into a particular shape or form prior to reaching the work site as manufactured products. FHWA also notes that aligning its Buy America requirements with the BABA requirements in 2 CFR part 184 will promote uniformity and allow contracting agencies, contractors, and manufacturers that work with different Federal agencies a greater ability to increase their knowledge of how these requirements work.

FHWA does agree with commenters that the language in the final rule should better reflect the intent of OMB. For this reason, FHWA believes it appropriate to modify its regulatory text to make clear that this exception applies to all mixtures of excluded materials without final form. FHWA also agrees that it is appropriate to reference a ''work site'' instead of a ''job site,'' given that is the language used by OMB and the language included in § 635.410(c)(2). FHWA intends the use of ''work site'' in § 635.410(c)(1)(iv) to mirror the use of ''work site'' in § 635.410(c)(2). Thus, the work site is generally the location of the infrastructure project at which the mixture will be incorporated; however, there may be circumstances where it is more appropriate for the work site to be considered to be broader than the location of the infrastructure project. As the definition of the work site will depend on the specific project and material being delivered, FHWA does not believe it necessary to state that the mixtures can be delivered proximate to a work site.

Section 635.410(c)(1)(vii)—Produced in the United States

Comments: In the NPRM, FHWA defined when a manufactured product was ''produced in the United States'' and thereby when a manufactured product would be compliant with FHWA's Buy America requirements. FHWA proposed to adopt the definition of ''produced in the United States'' found in section 70912(6)(B) of BABA, which would require a manufactured product be manufactured in the United States and the cost of components of the manufactured product that are mined, produced, or manufactured in the United States be greater than 55 percent of the total cost of all components of the manufactured product. FHWA stated in the NPRM that it believed it was required by BABA to adopt general standards that meet or exceed those under BABA. Further, FHWA stated in the NPRM that it was proposing to choose requirements similar to BABA's manufactured product requirements to minimize the burden placed on contracting agencies, contractors, and manufacturers. FHWA also stated that aligning its Buy America requirements for manufactured products with those applicable to manufactured products under BABA would provide consistency between the two regimes.

Some commenters noted the benefit of aligning FHWA's Buy America requirements for manufactured products with BABA's domestic content procurement preference for manufactured products, with one manufacturer stating that similar standards would enable it to use the same compliant products in projects subject to BABA and FHWA's Buy America statute. Other commenters suggested various other methods for FHWA to determine when a manufactured product is ''produced in the United States.'' One commenter stated that the requirements should vary based on product or product type.

Others suggested that FHWA should allow products to be sourced from countries for which the United States has trade agreements. One commenter argued that FHWA should remove the 55 percent requirement altogether.

Other commenters sought clarification over how to determine whether a manufactured product was produced in the United States under FHWA's proposed standards. Commenters questioned how to determine when a product was manufactured in the United States for the purpose of the final assembly requirement. Commenters also sought clarification on how to determine if a component was mined, produced, or manufactured in the United States for the purpose of meeting the 55 percent requirement.

FHWA Response: FHWA believes its Buy America requirements for manufactured products must meet or exceed those under BABA pursuant to section 70917(a) and (b) of BABA, that choosing requirements meeting BABA's is the minimally burdensome option, and that doing so allows for the benefit of consistency between projects subject to FHWA's Buy America requirements and those subject to BABA.

With respect to what it means for a product to be manufactured in the United States, and what it means for a component to be mined, produced, or manufactured in the United States, FHWA intends for the requirements to reflect the same principles found in BABA and the Federal Acquisition Regulation (FAR). FHWA intends to issue further guidance on these topics in the future. FHWA notes, however, that the manufactured and 55 percent requirements apply to the manufactured product itself, not the components of a manufactured product. For example, a component of a manufactured product does not need more than 55 percent of its components—the subcomponents of the manufactured product –by cost, to be mined, produced, or manufactured in the United States.

Section 635.410(c)(2) – Buy America Requirements for Iron and Steel

Comments: In the NPRM, FHWA proposed for an article, material, or supply to only be classified as an iron or steel product, a manufactured product, or other products as specified by law or in 2 CFR part 184. FHWA further proposed that an iron or steel product must meet FHWA's existing Buy America requirements for iron and steel in § 635.410(b). Finally, FHWA proposed that, except as otherwise provided in § 635.410(c)(2)(i) and (ii), an article, material, or supply should not be considered to fall into multiple categories.

Several commenters expressed confusion about what it meant for a material to meet the requirements of § 635.410(b). Others expressed confusion over whether the rule would require that predominantly iron and steel components of manufactured products be compliant with § 635.410(b).

Commenters representing the iron and steel industry expressed opposition to not requiring predominantly iron or steel components of manufactured products to be subject to FHWA's Buy America requirements for iron and steel. These commenters stated that this would be contrary to longstanding FHWA practice. They further stated their belief that not requiring predominantly iron or steel components of manufactured products to meet FHWA's Buy America requirements for steel and iron would be in conflict with BABA's savings provision, arguing that, pursuant to the savings provision in section 70917(a) and (b) of BABA, BABA cannot be used to modify an agency's existing requirements that meet or exceed BABA's. These commenters argued that BABA's savings provision does not merely allow FHWA to preserve its existing Buy America policies but explicitly preserves such policies. Commenters also argued that they believed changing Buy America policies is in conflict with BABA's intent to expand the application of Buy America requirements.

Commenters further argued that legislative history demonstrates that Congress intended the 1982 STAA to cover all steel products, including steel components of manufactured products. Commenters also pointed to a statement in the **Federal Register** notice where FHWA instituted the Manufactured Products General Waiver which they believed indicated that FHWA acknowledged Congress' intent in expanding Buy America coverage to include all steel products. At the time, FHWA stated: ''Congressional concern that Federal money spent to improve highways should also aid U.S. industry is apparent in the first sentence of Section 165, which requires the Secretary of Transportation to ensure that funds authorized for Federal-aid highway projects would only buy U.S.-made steel. The FHWA therefore has expended the Buy America rule to include all steel products.'' *See* 48 FR 53102. Finally, commenters opposed to FHWA changing current policy argued that doing so would harm the domestic steel and iron industry and would allow foreign steel and iron to be used, which they stated was unfairly traded and higher-emitting.

Other commenters, however, argued for removing the policy of applying FHWA's Buy America requirements to predominantly iron and steel to iron and steel components of manufactured products. These commenters stated that the current policy is creating a burden on contracting agencies, contractors, and manufacturers, as well as marketplace confusion as FHWA's policy does not apply to projects subject to BABA. One commenter stated that the history of iron and steel of components is not generally tracked, making compliance with the current policy difficult.

FHWA Response: FHWA does not intend for its Buy America requirements on manufactured products to substantially modify its existing Buy America requirements for iron and steel, codified at § 635.410(b). For manufactured products containing sufficient amounts of iron and steel, by cost, to be classified as ''iron or steel products'' under the definition in § 635.410(c)(1)(iii), FHWA believes that those products are properly subject to FHWA's existing Buy America requirements for iron and steel. Accordingly, FHWA is making clear in § 635.410(c)(2) that such iron or steel products remain covered by FHWA's existing Buy America requirements for iron and steel in § 635.410(b). Under these requirements, pursuant to § 635.410(b)(1)(ii), all manufacturing processes of the iron or steel product, including application of a coating, must generally occur in the United States.[26]

FHWA, however, is making clear what products are subject to its existing steel and iron requirements and what are subject to its new manufactured product requirements. Except for the specific products and components discussed below, FHWA believes that manufactured products containing predominantly iron or steel components should not be subject to both FHWA's existing steel and iron requirements and its new manufactured product

[26] Under FHWA's Buy America requirements for iron or steel, a recipient of FHWA financial assistance can demonstrate compliance through other methods as well. For instance, § 635.410(b)(2) allows a recipient to satisfy the requirements through having standard contract provisions mandating the use of domestic materials and products, including steel and iron materials, to the same or greater extent as the provisions of § 635.410(b). Per § 635.410(b)(3), recipients may also demonstrate compliance with FHWA's Buy America requirements for iron and steel through including alternate bid provisions in conformance with that provision. Finally, FHWA notes, as stated above, that the de minimis provision for iron or steel products under § 635.410(b)(4) continues to apply to iron or steel products.

requirements. In other words, for Federal-aid projects, predominantly iron or steel components of a product classified as a manufactured product do not need to comply with FHWA's Buy America requirements for iron and steel; the manufactured product itself only needs to comply with FHWA's Buy America requirements for manufactured products. FHWA believes that, with the imposition of Buy America requirements for manufactured products, it is generally unnecessary to continue to apply Buy America requirements to predominantly iron and steel components of those manufactured products. Manufacturers may continue to use domestically manufactured iron and steel components for the purpose of meeting the 55 percent requirements, and FHWA expects manufacturers of products with more costly iron and steel components to continue to do so. FHWA is not, however, imposing a requirement that predominantly iron and steel components, no matter the value, must be domestically manufactured. FHWA believes, however, that for iron and steel components of lesser costs, it would be unduly burdensome to require tracking the origin and cost of these components as well as other components that are higher priced, which would be necessary to meet the 55 percent requirements.[27]

Further, requiring all predominantly iron and steel components to be domestically produced would create discrepancies between FHWA's Buy America requirements and BABA's requirements, which FHWA seeks to avoid when not justified. Under BABA, an article, material, or supply should not be considered to fall into multiple categories and must meet the specific Buy America preference for only the single category in which it is classified. *See* 2 CFR 184.4(e) and (f). Maintaining FHWA's current policy would result in some materials being BABA-compliant but not Buy America-compliant. As stated below in the discussion of § 635.410(c)(2)(i) and (ii), FHWA believes that there may be some products and components for which the continued application of this policy may be justified, and the departure from BABA's requirements, based on the circumstances surrounding the manufacture of the products and components. FHWA does not believe that the same rationale exists for all predominantly steel and iron components, no matter what size or what cost, in all manufactured products.

FHWA does not believe that requiring manufactured products containing predominantly iron and steel components to generally be subject to only FHWA's Buy America requirements for manufactured products is contrary to BABA's savings provision in section 70917(a) and (b) of BABA. Section 70917(a) of BABA states that BABA ''shall apply to a Federal financial assistance program for infrastructure only to the extent that a domestic content procurement preference as described in section 70914 does not already apply to iron, steel, manufactured products, and construction materials.'' Section 70917(b) states that nothing in BABA ''affects a domestic content procurement preference for a Federal financial assistance program for infrastructure that is in effect and that meets the requirements of section 70914.'' FHWA interprets these provisions to mean that BABA only applies to FHWA's programs only to the extent that a domestic content procurement preference for iron, steel, manufactured products, and construction materials meeting or exceeding the requirements of section 70914 does not already exist. Further, FHWA interprets section 70917(b) to mean that, where a domestic content procurement preference for iron, steel, manufactured products, and construction materials meeting or exceeding the requirements of section 70914 does exist, BABA has no effect on such domestic content procurement preferences.

FHWA also disagrees that the legislative history of the 1982 STAA demonstrates that Congress intended the 1982 STAA to cover all steel components of manufactured products.

Similarly, FHWA finds commenters' reference to FHWA's statement in the **Federal Register** notice that created the Manufactured Products General Waiver as failing to indicate congressional intent to apply Buy America requirements for steel to all steel components. In that statement, FHWA said that congressional intent in section 165 of the 1982 STAA indicated that its Buy America requirements for steel should extend to all steel products. *See* 48 FR 53102. At the time, FHWA was referencing the fact that it had previously applied its Buy America requirements for steel to only structural steel when implementing section 401 of the 1978 STAA, and that it was then applying its Buy America requirements for steel to all steel products.

Finally, FHWA believes that the effects of this rule on the domestic iron and steel industries will be minimal. Currently, predominantly iron and steel components of manufactured products used on Federal-aid projects are required to be produced domestically. FHWA believes it likely that, where such components represent a large cost of the manufactured product, manufacturers will continue to use such domestically produced components. Doing so will allow manufacturers to more easily satisfy the 55 percent requirement, while requiring minimal changes to product design. For less expensive iron and steel components, FHWA believes that manufacturers should have the option to replace them in their products with foreign components. FHWA agrees with commenters that tracing the origin of the iron and steel for these minor components is burdensome and, given their cost, does not provide sufficient value to the iron and steel industry to justify these burdens.

Section 635.410(c)(2) — Classification at the Work Site

Comments: In the NPRM, FHWA proposed the classification of an article, material, or supply into a specific category to be based on its status at the time it is brought to the work site for incorporation into an infrastructure project; this classification would then determine which requirements, if any, the article, material, or supply would be subject to. In addition, FHWA proposed to state that the work site is generally the location of the infrastructure project at which the iron or steel product or manufactured product will be incorporated.

Many commenters expressed confusion over how to distinguish between a component of a manufactured product and the manufactured product itself. Commenters were particularly concerned when components for a product were brought to the work site separately, with commenters expressing confusion over the fact that a material may be seemingly classified differently depending on whether its components

[27] FHWA notes that recipients of FHWA financial assistance may need to track the cost of iron or steel components of a material to determine whether that material is properly classified as an iron or steel product or a manufactured product. In situations where the iron and steel content of a material is close to 50 percent of the total cost of all its components, this may require tracking the cost of components of lesser costs. If the material is properly classified as an iron or steel product, FHWA's Buy America requirements for iron and steel would require the iron and steel components, including the iron and steel components of lesser cost, to be domestically manufactured; however, larger, components that are not iron or steel would not need to be domestically produced. Alternatively, if the material is properly classified as a manufactured product, the origin of the iron and steel components of lesser cost would not need to be tracked. In either case, FHWA expects the burden of tracking the origin and cost of all components of lesser cost to be more burdensome than the requirements under this final rule.

are assembled on or away from the work site. Some commenters wondered whether bringing components separately to a work site and assembling them there would result in the components constituting a kit for a manufactured product versus separate manufactured products. In contrast, other commenters stated that FHWA should not adopt a principle that components can be brought to a work site separately but still be considered a kit and classified as a single manufactured product; such commenters stated there is no authority in title 23, U.S.C. for FHWA to adopt such a principle. Commenters similarly argued that FHWA should not adopt a method for classification that would allow a system to be classified as a single manufactured product; however, other commenters pushed for the opposite. Finally, some commenters argued that FHWA should not base classification on the status of a product when it is brought to the work site at all but instead on the status of a product when it is procured.

FHWA Response: FHWA believes that it is essential to set a point at which an article, material, or supply is classified into a specific category—whether that be an iron or steel product, a manufactured product, or any category specified in law such as a construction material—or not classified into any category. For manufactured products, this point is especially important to distinguish between the manufactured product itself and its components. FHWA believes that the point chosen by OMB, when the product is brought to the work site, appropriately allows for distinguishing among systems, which would be comprised of multiple manufactured products with Buy America requirements applied to each; manufactured products; and components. FHWA is concerned that alternative points of classification may lead to diluting the Buy America requirements. For instance, allowing for classification at the point a material is incorporated into a project may result in multiple manufactured products, iron or steel materials, and construction materials being combined together and classified as one single manufactured product. In particular, this kind of classification could result in iron and steel products generally being considered components of manufactured products, thereby functionally eliminating FHWA's longstanding requirement that all iron and steel products must be produced in the United States. FHWA further notes that were it to choose a different point, that could result in certain materials being classified differently under FHWA's Buy America requirements versus under 2 CFR part 184; this, in turn, may lead to multiple, different requirements applying to the same material. To ensure uniformity, FHWA believes it appropriate to classify materials at the same point as is done by Federal agencies subject to BABA.

FHWA recognizes, however, that certain manufactured products may be acquired for incorporation into an infrastructure project from a single manufacturer or supplier as separate components, which are then assembled together to form a single product at the work site. FHWA refers to such products as ''kits.'' FHWA, in alignment with OMB, believes that these kits should be classified as a single manufactured product; the individual components of the kit should not, in other words, be classified as separate manufactured products when they are brought to the work site. [28] FHWA believes that this approach avoids a situation where contractors are incentivized to assemble a kit offsite and then bring the finished product to the work site, even if it is inefficient to do so. FHWA further disagrees with commenters suggesting that this notion of kits is prohibited by title 23, U.S.C. Again, FHWA is not suggesting that multiple manufactured products can be brought to the work site, assembled into one system or finished project, and then only be subject to FHWA's Buy America requirements for manufactured products. FHWA is merely reflecting the notion, echoed by commenters, that while the point of classification is important to prevent the classification system from being abused to dilute the stringency of Buy America requirements, it should also not result in the same product being classified differently purely by the location where it is assembled.

FHWA notes that the concept of kits has similarities with the idea of classifying a product based on its status at the time of procurement. FHWA emphasizes, however, that a kit represents a single product purchased from a single manufacturer or supplier. FHWA believes that classifying a product based on its status at the time of procurement may allow for the classification of entire systems as a single manufactured product, which would dilute the stringency of the Buy America requirements and not be in concert with classification under 2 CFR part 184.

[28] *See* 88 FR 57776 for OMB's discussion of kits.

Section 635.410(c)(2)(i), (ii) — Specified Products

Comments: In the NPRM, as stated above, FHWA proposed to generally require that iron or steel materials only comply with FHWA's existing Buy America requirements for iron and steel found in § 635.410(b) and that manufactured products only comply with FHWA's manufactured product requirements found in § 635.410(c). In § 635.410(c)(2)(i), however, FHWA proposed to require precast concrete products that are classified as manufactured products to have all predominantly iron or steel components comply with FHWA's existing Buy America requirements for iron and steel. Similarly, in § 635.410(c)(2)(ii), FHWA proposed to require the cabins or other enclosures of ITS and other electronic hardware systems installed in the highway right of way or other real property and classified as manufactured products, if predominantly iron or steel, to comply with FHWA's existing Buy America requirements for iron and steel.

Multiple commenters expressed opposition to the separate requirements placed on these specific manufactured products in § 635.410(c)(2)(i) and (ii). These commenters argued that such separate requirements prevented uniformity of FHWA's Buy America requirements to all manufactured products and uniformity with BABA's requirements for manufactured products. Commenters also argued that manufacturers do not know the ultimate owner of items when manufacturing and shipping them. Thus, commenters argued that these separate requirements created risks of non-compliance if a contractor purchases a product that is BABA-compliant but not compliant with § 635.410(c)(2)(i) or (ii), as the contractor may not know whether the product needs to be BABA-compliant versus FHWA-compliant when purchasing the product or may receive the wrong version of the product from the manufacturer. Another commenter argued that manufacturers would merely shift from using iron and steel to other materials where possible to avoid these requirements.

Commenters representing the iron and steel industry argued that there is no distinction between iron and steel in the specific products referenced in § 635.410(c)(2)(i) and (ii) and the iron and steel in the components of other manufactured products. These commenters argued that there is no reason to require the iron and steel in the specific products referenced in § 635.410(c)(2)(i) and (ii) to be domestically produced but not the iron

and steel in other products. Finally, commenters sought clarification over the definition of ''intelligent transportation systems and other electronic hardware systems'' found in § 635.410(c)(2)(ii).

FHWA Response: FHWA generally believes that a single material, if classified as an iron or steel product, should only be subject to its Buy America requirements for iron and steel in § 635.410(b); if classified as a manufactured product, FHWA generally believes the product should only be subject to its Buy America requirements for manufactured products in § 635.410(c). FHWA also believes, however, that iron or steel components of precast concrete and iron or steel enclosures of ITS and other electronic hardware systems installed in the highway right of way or other real represent unique situations justifying FHWA to generally apply its Buy America requirements for manufactured products to the products as a whole and its Buy America requirements for iron and steel to specific components.

As stated in the NPRM, FHWA believes that the products referenced in § 635.410(c)(2)(i) and (ii) are regularly used in highway construction projects and that manufacturers have formed longstanding supply chains to incorporate Buy America-compliant iron or steel components into them. FHWA believes that these products are currently used extensively in Federal-aid projects, where, currently, all their predominantly iron and steel components are required to comply with FHWA's Buy America requirements for iron and steel. FHWA further believes that the iron and steel in the precast concrete and the iron and steel in the enclosures of ITS and other electronic hardware systems represent a significant portion of the value of those manufactured products.[29] FHWA thus believes that the requirements of § 635.410(c)(2)(i) and (ii) will have a limited impact on the manufacture of these specifically-referenced products. While FHWA acknowledges that the requirements that apply to these products are distinct from those that apply to other manufactured products under FHWA's Buy America regulation and BABA, FHWA believes this is justified by the significant market for these products solely within FHWA's funding programs. FHWA therefore believes that manufacturers of these products will be incentivized to produce products compliant with these unique requirements in sufficient amounts and that contractors should be able to determine whether any particular product is compliant with FHWA's regulations.

FHWA emphasizes that the specific requirements of § 635.410(c)(2)(i) and (ii) apply only to the specifically referenced products and components. While FHWA understands that the iron and steel in these products is similar to the iron and steel in all manufactured products, FHWA believes that the specific nature of these products, as stated above, justifies different requirements from other manufactured products.

With respect to ''intelligent transportation systems and other electronic hardware systems,'' FHWA clarifies that its requirements in § 635.410(c)(2)(ii) apply to the cabinets or other enclosures of the physical electronic hardware system, or other physical ITS, if (1) the system is classified as a manufactured product under § 635.410(c)(1)(iv); (2) the system is installed in the highway right of way or other real property; and (3) the cabinets or other enclosures of such system consists wholly or predominantly of iron or steel or a combination of both. Where the requirements of § 635.410(c)(2)(ii) do apply, the cabinet or other enclosure must comply with FHWA's existing Buy America requirements for iron and steel, meaning that all iron and steel of the cabinet or other enclosure must be domestically produced.

Finally, for the components specified in § 635.410(c)(2)(ii), FHWA is modifying a reference from components that are ''manufactured predominantly or iron or steel or a combination of both'' to components that ''consist wholly or predominantly of iron or steel or a combination of both.'' FHWA does not intend this to be a substantive change but instead to mirror the language used in the definition of ''iron or steel products.'' Through this change, FHWA seeks to make clear that the determination of whether components of precast concrete products or the cabinets or other enclosures of intelligent transportation systems and other electronic hardware systems that are installed in the highway right of way or other real property should be determined as iron or steel products and subject to FHWA's Buy America requirements for iron and steel should be based on the same definition that iron or steel products are subject to generally.

Section 635.410(c)(3) — Cost of Components

Comments: In § 635.410(c)(3), FHWA proposed to determine whether the cost of components for manufactured products is greater than 55 percent of the total cost of all components through the same method as used under 2 CFR 184.5 for projects subject to BABA. Per 2 CFR 184.5(a), the cost of a component purchased by the manufacturer is the acquisition cost, including transportation costs to the place of incorporation into the manufactured product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued). For components manufactured by the manufacturer, 2 CFR 184.5(b) the cost of a component is all costs associated with the manufacture of the component, including transportation costs as described in 2 CFR 184.5(a), plus allocable overhead costs, but excluding profit; the cost of such components also does not include any costs associated with the manufacture of the manufactured product. FHWA copied this definition verbatim into proposed § 635.410(c)(3).

Some commenters disagreed with FHWA's approach to determining the cost of components entirely, requesting that FHWA should allow additional costs to factor into the cost of any component, including the cost of domestic manufacturing, the cost of software and firmware, the value added at each manufacturing stage, the cost of the intellectual property, and the cost of the research and development for the product. One commenter argued that the cost of components should be determined at the overall system level.

Other commenters sought clarification on FHWA's proposed definition. Commenters expressed confusion over what were allowable manufacturing costs for the component versus unallowable manufacturing costs for the manufactured product. Others sought clarification over what FHWA meant by allocable overhead costs.

FHWA Response: FHWA disagrees with commenters suggesting that FHWA depart from the standard used in 2 CFR 184.5 to determine the cost of components. FHWA believes that uniformity with BABA's requirements is important and beneficial where appropriate to ensure that manufactured products are compliant under FHWA's Buy America statute and BABA and to allow for contracting agencies, contractors, and manufacturers to build up a greater amount of experience with these requirements.

[29] For example, as indicated in the responses to an RFI published collectively by DOT and the U.S. Department of Energy, the housing of an EV charger may comprise over 50 percent of the costs of the charger. 86 FR 67115 (Nov. 24, 2021).

FHWA notes that § 635.410(c)(3)(ii) differentiates between costs associated with the manufacture of a component, which are to be considered in determining the cost of the component, and costs associated with the manufacture of the manufactured product, which are not. Costs associated with the manufacture of the manufactured product itself, outside of the cost to manufacture a component, should not be considered in valuing the component. For example, the cost of assembling the component into the manufactured product is a cost of manufacturing the manufactured product, not a cost of manufacturing the component.

Finally, FHWA is correcting an error in the proposed regulatory text, where § 635.410(c)(3)(ii) made reference to ''paragraph (a) of this section.'' That reference is from 2 CFR 184.5(b) and refers to 2 CFR 184.5(a). FHWA is thereby correcting the reference to § 635.410(c)(3)(i) to properly align with 2 CFR part 184.

VI. Rulemaking Analyses and Notices

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

The OMB has determined that this rulemaking is a significant regulatory action within the meaning of E.O. 12866, as amended by E.O. 14094.

A more detailed discussion of the economic analysis associated with this rulemaking can be found in the RIA, which is available on the docket. The RIA estimates the costs and benefits associated with imposing Buy America requirements to manufactured products. The expected benefits of this rule relate to protecting and expanding domestic manufacturing, increasing the resiliency of supply chains, and increasing consistency in applying domestic content procurement preferences for manufactured products between FHWA and other Federal agencies that are subject to BABA's requirements. None of these benefits have been quantified.

The costs of this rule relate to increased material costs for manufactured products used in highway construction projects, administrative costs to FHWA and recipients of FHWA financial assistance, and potential delays in project delivery. FHWA estimates that total costs associated with this rule, between FY 2026 and FY 2035, will range from $545 million to $8,466 million at a 2 percent discount rate. The estimated increase in material costs for manufactured products ranges from $41 million to $980 million per year. Much of the wide range of uncertainty surrounding the estimates stems from the difficulty of estimating (1) the fraction of inputs to highway construction that are manufactured products; (2) the fraction of manufactured products that are currently domestically supplied but fail to meet the 55 percent requirement; and (3) the likely price premiums for purchasing manufactured products that would be compliant with this rule, compared to non-compliant manufactured products currently used in highway construction. FHWA further estimates an additional $167,000 per year in increased FHWA administrative costs to cover the salary and employer-provided benefits of an additional Federal employee to help administer the Buy America program. We also estimate an additional $22 million per year in administrative costs to recipients of FHWA financial assistance related to verifying product compliance. Those costs do not include additional administrative costs related to setting up systems to track compliance or applying for any project-specific waivers that may be necessary based on specific circumstances.

The 10-year discounted totals of these costs are provided in the table below at a 2 percent discount rate. The rest of the costs could not be quantified with the information available.

Category	10-Year total at 2%
Benefits:	
Promote Domestic Manufacturing.	Not quantified.
Supply Chain Resiliency	Not quantified.
Consistency	Not quantified.
Total Benefits	Not quantified.
Costs:	
Materials Costs	$361 to $8,282.
FHWA and State Administrative Costs.	$184.
Other Administrative Costs	Not quantified.
Project Delay	Not quantified.
Negative Secondary Impacts	Not quantified.
Total Costs	$545 to $8,466.
Annualized Costs	$61 to $942.

Annualized costs are $61 million to $942 million per year at a 2 percent discount rate, $60 million to $932 million per year at a 3 percent discount rate, and $58 million to $890 million per year at a 7 percent discount rate.

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

B. Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), FHWA has evaluated the effects of this rule on small entities and has determined that it is not anticipated to have a significant economic impact on a substantial number of small entities. This rule would impose Buy America requirements for manufactured products on recipients of FHWA financial assistance, including States, local governments, and other grant recipients. These recipients are primarily States, who receive apportioned funding from FHWA, and who are not included in the definition of small entity set forth in 5 U.S.C. 601.

FHWA believes the projected impact on small entities that utilize FHWA funding would be negligible. This final rule will require such small entities to purchase manufactured products that are manufactured in the United States and have the cost of components that are mined, produced, or manufactured in the United States be greater than 55 percent of the total cost of all components of the manufactured product under contracts subject to FHWA's Buy America requirements. FHWA acknowledges that some Buy America-compliant manufactured products may be more expensive than manufactured products that are non-compliant. Thus, this final rule may result in increased project costs. To the extent this rule requires expenditures by State, local governments, and other grant recipients on Federal-aid projects, they are reimbursable. In addition, to the extent that small governmental jurisdictions expend additional funds to purchase Buy America-compliant manufactured products, based on FHWA's regulatory impact analysis, FHWA does not believe that any additional expenditure would be economically significant.

FHWA recognizes that small businesses, as defined by 5 U.S.C. 601(3), who are also considered small entities, may be affected indirectly by this final rule when they seek to provide manufactured products to recipients of FHWA financial assistance who are subject to the new Buy America requirements. For small businesses not currently compliant with FHWA's Buy America requirements for manufactured products who wish to provide Buy America-compliant products, they may need to change manufacturing processes or component suppliers. Small entities

that may be impacted indirectly by a rulemaking, however, are not subject to analysis under the Regulatory Flexibility Act. *See* Mid-Tex Electric Cooperative, Inc. v. Federal Energy Regulatory Commission, 773 F.2d 327 (D.C. Cir. 1985).

Therefore, FHWA certifies that the action would not have a significant economic impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act of 1995

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

D. Executive Order 13132 (Federalism Assessment)

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

E. 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. FHWA has determined that this rule does not contain collection of information requirements for the purposes of the PRA.

F. National Environmental Policy Act

FHWA has analyzed this rule pursuant to the NEPA and has determined that it is categorically excluded under 23 CFR 771.117(c)(2), which applies to the promulgation of rules, regulations, and directives. Categorically excluded actions meet the criteria for categorical exclusions under the Council on Environmental Quality regulations and under 23 CFR 771.117(a) and normally do not require any further NEPA approvals by FHWA. This rule will establish Buy America requirements for manufactured products. FHWA does not anticipate any adverse environmental impacts from this final rule, and no unusual circumstances are present under 23 CFR 771.117(b).

G. Executive Order 13175 (Tribal Consultation)

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

H. Executive Order 12898 (Environmental Justice)

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

I. Regulation Identifier Number

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

List of Subjects in 23 CFR Part 635

Grant programs—transportation, Highways and roads, Reporting and recordkeeping requirements.

Issued under authority delegated in 49 CFR 1.85.

Gloria M. Shepherd,

Executive Director, Federal Highway Administration.

For the reasons stated in the preamble, FHWA amends title 23, Code of Federal Regulations, part 635, as set forth below:

PART 635—CONSTRUCTION AND MAINTENANCE

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

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

Subpart D—General Material Requirements

■ 2. Amend § 635.410 by:
■ a. Removing the words ''steel or iron materials'' and adding, in their place, the words ''iron or steel products'' in paragraph (b)(1);
■ b. Removing the word ''State'' and adding in its place the word ''recipient'' in paragraphs (b)(2) and (3);
■ c. Removing the words ''steel and iron materials'' and adding, in their place, the words ''iron or steel products'' in paragraphs (b)(2), (3), and (4);
■ d. Revising paragraph (c); and
■ e. Removing the word ''State'' and adding in its place the word ''recipient'' in paragraph (d).

The revision reads as follows:

§ 635.410 Buy America requirements.

* * * * *

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

(1) The following definitions apply to this section:

(i) *Component* means an article, material, or supply, whether

manufactured or unmanufactured, incorporated directly into a manufactured product or, where applicable, an iron or steel product.

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

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

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

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

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

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

(A) For projects obligated on or after October 1, 2025, the product was manufactured in the United States; and

(B) For projects obligated on or after October 1, 2026, the product was manufactured in the United States and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product.

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

(i) With respect to precast concrete products that are classified as manufactured products, components of precast concrete products that consist wholly or predominantly of iron or steel or a combination of both shall meet the requirements of paragraph (b) of this section. The cost of such components shall be included in the applicable calculation for purposes of determining whether the precast concrete product is produced in the United States.

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

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

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

(ii) For components manufactured by the manufacturer, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (c)(3)(i) of this section, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the manufactured product.

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

* * * * *

[FR Doc. 2024–31350 Filed 1–13–25; 8:45 am]
BILLING CODE 4910–22–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 10028]

RIN 1545–BR07

Certain Partnership Related-Party Basis Adjustment Transactions as Transactions of Interest

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final rule.

SUMMARY: This document contains final regulations that identify certain partnership related-party basis adjustment transactions and substantially similar transactions as transactions of interest, a type of reportable transaction. Material advisors and certain participants in these transactions are required to file disclosures with the IRS and are subject to penalties for failure to disclose. The final regulations affect participants in these transactions as well as material advisors.

DATES:

Effective date: These regulations are effective on January 14, 2025.

Applicability date: For the date of applicability, *see* § 1.6011–18(h) and (i).

FOR FURTHER INFORMATION CONTACT: Concerning these final regulations, contact Elizabeth Zanet of the Office of Associate Chief Counsel (Passthroughs and Special Industries), (202) 317–6007 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Authority

This document amends the Income Tax Regulations (26 CFR part 1) by adding final regulations under section 6011 of the Internal Revenue Code (Code). The document adds § 1.6011–18 to identify certain partnership related-party basis adjustment transactions and substantially similar transactions as transactions of interest, a type of