

ALERT

BEAD Program: NTIA Issues Guidance for Demonstrating and Certifying Compliance with 'Build America, Buy America' (BABA) Requirements

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WHAT: On July 30, 2024, the National Telecommunications and Information Administration (NTIA) issued guidance on demonstrating compliance with the "Build America, Buy America" (BABA) domestic content requirements in connection with various federally-funded broadband programs – including the \$42.5 billion Broadband Equity, Access, and Deployment (BEAD) Program. As explained in a previous client alert, NTIA issued a limited waiver of the BABA requirements authorizing recipients and subrecipients receiving federal financial assistance under the BEAD Program to utilize certain manufactured products and construction materials produced outside of the United States. NTIA's latest guidance provides guidance for recipients and subrecipients to certify and report compliance with BABA requirements and the limited waiver for the BEAD Program, which applies to all funds expended by the BEAD Program award receipts from February 22, 2024, through February 21, 2029.

WHAT IT MEANS FOR INDUSTRY: There are two main components to the NTIA's latest guidance for compliance with BABA that recipients, subrecipients, and manufacturers participating in the BEAD Program should be cognizant of: (1) a requirement for manufacturers to **certify** compliance with the BABA requirements, including a mandatory requirement for manufacturers to provide a letter certifying BABA compliance, as well as an optional process for manufacturers to self-certify and have their products listed on the U.S. Department of Commerce website; and (2) a requirement for recipients and subrecipients to **report** on the use of "waived" foreign products used

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Practice Areas

Buy American and Trade Agreements Acts
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in BEAD-funded projects.

Mandatory Certification Requirement. Per NTIA's guidance, manufacturers **must** provide a certification letter to BEAD subrecipients certifying that all material and equipment subject to BABA meets the applicable BABA domestic manufacturing requirement. NTIA has provided a sample certification letter (available [here](#)) that includes the following certification:

I, (*company* representative), hereby certify that the following products and/or materials are in full compliance with the Build America Buy America (BABA) requirements and associated waiver for the Broadband Equity, Access, and Deployment Program (BEAD) as mandated by the Infrastructure Investment and Jobs Act (IIJA) Pub. L. No. 117-58, §§ 70901-52 and by the Department of Commerce.

NTIA's guidance instructs that BEAD recipients should obtain certifications from all contractors and vendors to document compliance with BABA. NTIA also cautions that failure to provide such documentation to Department personnel (e.g., auditors) could be deemed a violation of the recipient's financial assistance agreement and could potentially result in corrective action – including removing and replacing improperly purchased foreign-manufactured goods, reducing the amount of an award, withholding funds, terminating an award, or in the case of fraud, criminal investigation and prosecution.

Optional Self-Certification Process. In addition to the mandatory certification requirement, NTIA has established a voluntary process for manufacturers to self-certify BABA compliance using the intake form available [here](#). In submitting the form, an officer of the company certifies that 1) the products identified by the manufacturer are compliant with the domestic manufacturing requirements identified in the BABA waiver for the BEAD Program; and 2) the company is not listed on the U.S. Government debarment list. In order to address concerns that domestic manufacturers might be undercut by companies falsely claiming to comply with BABA, the intake form also includes a warning regarding the possible sanctions for a false certification:

The Department of Commerce is publishing and maintaining this list of manufacturers where an officer of the company has certified certain individual products it produces, subject to fine or imprisonment - under the Program Fraud Civil Remedies Act (31 U.S.C. § 3801 et seq.) and the False Claims Amendments Act of 1986 and the False Statements Accountability Act of 1996 (18 U.S.C. §§ 287 and 1001, respectively) – are compliant with the BABA waiver for the BEAD Program.

The Department of Commerce will maintain a public list of manufacturers that have completed the voluntary self-certification process, to assist recipients and subrecipients in identifying BABA-compliant products and materials for use on the BEAD Program. The first iteration of the list is expected in the coming weeks and will be updated on a regular basis.

Reporting Requirements. Finally, NTIA's latest guidance includes instructions for BEAD recipients and subrecipients to report on their use of foreign electronic products pursuant to the BEAD Program's limited BABA waiver – to include information regarding the category of product, as well as the country of origin. NTIA's guidance also includes separate reporting requirements for other broadband programs – including the

Connecting Minority Communities Pilot Program (CMC) and Middle Mile Grant Program (MMG) – to document the origin of products and materials used in those programs.

NTIA's certification and reporting framework provides important guidance regarding the application of the BABA requirements to the BEAD Program and other broadband grant programs. This guidance is in addition to the waiver guidance issued by NTIA in February 2024, as well as the BABA rules issued by OMB in October 2023 detailing standards for complying with the BABA requirements for various categories of products and materials used in infrastructure projects (see our previous alert [here](#)). Recipients and subrecipients of BEAD funds, as well as suppliers of products and materials used on BEAD-funded projects, should be careful to review this guidance, as well as the terms of their specific agreements, to ensure that they understand the scope of their compliance obligations. Wiley is continuing to track developments in this complex and often-changing area, so look to this space for further updates as these changes continue to be implemented.

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