



Federal Highway Administration

[Docket No. 2022-0023]

Waiver of Buy America Requirements for Electric Vehicle Chargers

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

ACTION: Notice.

SUMMARY: The Federal Highway Administration (FHWA) is establishing a temporary public interest waiver to waive Buy America requirements for steel, iron, manufactured products, and construction materials in electric vehicle (EV) chargers. This short-term, temporary waiver enables EV charger acquisition and installation to immediately proceed while also ensuring the application of Buy America to EV chargers by the phasing out of the waiver over time. On the effective date of this waiver, it will apply to all EV chargers manufactured by July 1, 2024, whose final assembly occurs in the United States, and whose installation has begun by October 1, 2024. Beginning with EV chargers manufactured on July 1, 2024, FHWA will phase out coverage under this waiver for those previously covered EV chargers where the cost of components manufactured in the United States does not exceed 55 percent of the cost of all components. This second phase will therefore apply to all EV chargers that are manufactured on or after July 1, 2024, whose final assembly occurs in the United States, and for which the cost of components manufactured in the United States is at least 55 percent of the cost of all components. For all phases, EV charger housing components that are predominantly steel and iron are excluded from the waiver and must meet current FHWA Buy America requirements. As of the effective date of this waiver, FHWA is also removing EV chargers from its existing general applicability waiver for manufactured products.

DATES: The temporary waiver is effective starting on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comments may be submitted to FHWA's Website via the link to this waiver on <https://www.fhwa.dot.gov/construction/contracts/waivers.cfm> by [INSERT DATE 5 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Brian Hogge, FHWA Office of Infrastructure, 202-366-1562, or via e-mail at Brian.Hogge@dot.gov. For legal questions, please contact Mr. David Serody, FHWA Office of Chief Counsel, 202-366-4241, or via e-mail at David.Serody@dot.gov. Office hours for FHWA are from 8 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

I. Background

A. Priorities of the Administration

The Biden-Harris Administration has laid out a bold vision for making transformative transportation investments to support job growth and reshape the U.S. transportation system, strengthen the U.S. economy and competitiveness, and support a sustainable energy and climate future. In January 2021, President Biden issued Executive Order (E.O.) 14008, titled "Tackling the Climate Crisis at Home and Abroad" (86 FR 7619, Feb. 1, 2021). This E.O. states that the U.S. faces "a climate crisis that threatens our people and communities, public health and economy, and starkly, our ability to live on planet Earth." The President directed the Federal Government "to organize and deploy the full capacity of its agencies to combat the climate crisis to implement a governmentwide approach that reduces climate pollution in every sector of the economy," including through the "deployment of clean energy technologies and

infrastructure.” The President has set the ambitious goal of building a national network of 500,000 EV chargers by 2030.¹

On November 15, 2021, the President signed into law the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117-58). The BIL makes the most transformative investment in EV charging in U.S. history, including \$5 billion over 5 years that will be made available under the new National Electric Vehicle Infrastructure (NEVI) Formula Program.² As outlined in statute, the purpose of the NEVI Formula Program is to “provide funding to States to strategically deploy EV charging infrastructure and to establish an interconnected network to facilitate data collection, access, and reliability.” See BIL, Division J, Title VIII, Highway Infrastructure Program heading, Paragraph (2). This purpose would be satisfied by creating a convenient, affordable, reliable, and equitable network of EV chargers throughout the country. The BIL also includes many additional funding and financing programs with eligibilities for EV charging infrastructure, including formula, discretionary, other allocated, and innovative finance programs.³ These historic investments across the Federal Government in EV charging under BIL will put the U.S. on a path to meeting the President’s goal for EV charging infrastructure and ensuring a convenient, reliable, affordable, and equitable charging experience for all users.

At the same time as the Administration seeks to ensure successful and timely delivery of EV infrastructure projects, the Administration also seeks to maximize the use of American made products and materials. In January 2021, President Biden issued E.O. 14005, titled “Ensuring the Future is Made in All of America by All of America’s

¹ White House Fact Sheet: Biden Administration Advances Electric Vehicle Charging Infrastructure (Apr. 22, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-biden-administration-advances-electric-vehicle-charging-infrastructure/>.

² See <https://highways.dot.gov/newsroom/president-biden-usdot-and-usdoe-announce-5-billion-over-five-years-national-ev-charging>.

³ Federal Funding is Available For Electric Vehicle Charging Infrastructure On the National Highway System, FHWA (April 22, 2022), available at https://www.fhwa.dot.gov/environment/alternative_fuel_corridors/resources/ev_funding_report_2022.pdf.

Workers” (86 FR 7475, Jan. 28, 2021). This E.O. states that the U.S. Government “should, consistent with applicable law, use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States.” The FHWA is committed to ensuring strong and effective Buy America implementation consistent with E.O. 14005.

B. FHWA Buy America Requirements

The FHWA’s existing Buy America requirements for steel, iron, and manufactured products are set forth at 23 U.S.C. 313 and 23 CFR 635.410. The FHWA also has a standing waiver under 23 U.S.C. 313(b), the Manufactured Products General Waiver, which has been in effect since 1983 and covers manufactured products that are not predominantly steel and iron and are funded under title 23, U.S.C.⁴ See 48 FR 53099 (Nov. 25, 1983). Thus, FHWA’s current Buy America requirements apply to FHWA-funded projects and require that all steel and iron that are permanently incorporated into a project must be produced in the United States unless a waiver is granted, including predominantly steel and iron components of a manufactured product. As applied to products other than iron and steel, the term “produced” in 23 U.S.C. 313 includes physical final assembly and manufacturing processes. This requirement applies to the obligation of funds authorized to carry out title 23, U.S.C. In addition, for all predominantly steel or iron materials, products, or components to be used in projects that involve the obligation of title 23, U.S.C. funds, all manufacturing processes, including application of coating, must occur in the U.S. Coating includes all processes which protect or enhance the value of the material to which the coating is applied. In addition, under 23 U.S.C. 313(h), the Buy America requirements apply to all contracts that are

⁴ As explained in Section III.A below, while the Manufactured Products General Waiver continues to remain in effect, FHWA is removing EV chargers, as defined below, from its coverage.

eligible for FHWA assistance regardless of the funding source if any contract within the scope of a determination under the National Environmental Policy Act (NEPA) involves an obligation of Federal funds.

The BIL also includes new Build America, Buy America (“BABA”) provisions to strengthen domestic manufacturing, which expand the coverage and application of Buy America preferences in Federal financial assistance programs for infrastructure. BIL, div. G sections 70901-27. The BABA applies those requirements to obligations made after May 14, 2022. BIL section 70914(a). However, BABA’s domestic content procurement preferences only apply 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. BIL section 70917(a)-(b). Where they do apply, BABA requires that funds for a Federal financial assistance program for infrastructure may not be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States. BIL section 70914(a). Under BABA, iron or steel products are considered to be produced in the United States if all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States. BIL section 70912(6)(A). Manufactured products are considered to be produced in the United States if (i) the manufactured product was manufactured in the United States; and (ii) the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation. BIL section 70912(6)(B). Finally, under BABA, a construction material is considered to be produced in the United States if all manufacturing processes for the construction material occurred in the United States. BIL section 70912(6)(C).

By statute at 23 U.S.C. 313, FHWA has domestic content preferences for steel, iron, and manufactured products, so the requirements under 23 U.S.C. 313 apply to steel, iron, and manufactured products instead of the requirements under BABA. As FHWA's existing Buy America requirement does not specifically cover construction materials, other than to the extent that such materials would already be considered iron, steel, or manufactured products, the Buy America preferences under section 70914 of BABA apply for construction materials. For the purpose of this notice, "Buy America requirements" refers to FHWA's existing requirements for steel, iron, and manufactured products under 23 U.S.C. 313 and requirements for construction materials under section 70914 of BABA.

The BABA further required the Office of Management and Budget (OMB) to issue guidance to assist in applying BABA's requirements. BIL section 70915. On April 18, 2022, OMB issued memorandum M-22-11, "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure" ("Implementation Guidance"). Section VII(b) of the Implementation Guidance states that "Federal agencies may wish to consider issuing a limited number of general applicability public interest waivers in the interest of efficiency and to ease burdens for recipients." Implementation Guidance at p. 10.

Under 23 U.S.C. 313(b) and section 70914(b) of BABA, FHWA may consider a Buy America waiver when either (i) the application of the requirements under 23 U.S.C. 313(b) and section 70914 of BABA would be inconsistent with the public interest; or (ii) when products are not produced in the United States in sufficient and reasonably available quantities of a satisfactory quality.⁵ This waiver is being issued on the basis of its consistency with the public interest.

⁵ Section 70914(b)(3) of BABA also provides a cost-based condition for a waiver, which FHWA's regulation addresses at 23 CFR 635.410(b)(3) through alternate bid procedures.

C. Summary of FHWA's Proposed Waiver of Buy America Requirements for EV Chargers

In order to ensure delivery and meaningful results on EV charging projects using Federal-aid highway funds throughout the U.S., FHWA issued a Notice of Proposed Waiver of Buy America Requirements for Electric Vehicle Chargers on August 31, 2022, at 87 FR 53539. The FHWA proposed a waiver of Buy America requirements with respect to steel, iron, manufactured products, and construction materials for EV chargers on FHWA-assisted infrastructure projects, on the basis that applying the domestic content preferences for these materials would be inconsistent with the public interest. 87 FR 53539. In doing so, FHWA also proposed removing EV chargers from the Manufactured Products General Waiver to allow for the uniform implementation of all Buy America requirements applicable to an EV charger. Through this proposed waiver, FHWA sought to treat EV chargers as manufactured products subject to their own, separate waiver. FHWA structured the proposed waiver to partially phase out over a specified timeframe to a domestic content threshold that is generally consistent with how manufactured products are covered under section 70914 of BABA. In proposing this waiver, FHWA considered information gathered from a November 24, 2021, Request for Information (RFI), published collectively by DOT and the U.S. Department of Energy. 86 FR 67115 (Nov. 24, 2021). In line with FHWA policy, Section 123 of Division A of Public Law 111-117, and Section 117 of Public Law 110-244, FHWA also included a link to the proposed waiver on its website.⁶

For the proposed waiver, FHWA proposed that the term “EV charger” include EV chargers and associated payment systems, distribution systems, telecommunications and networking equipment, energy storage systems, and other supporting equipment and systems that are (i) in the immediate vicinity of a charger or group of chargers and (ii)

⁶ See <https://www.fhwa.dot.gov/construction/contracts/waivers.cfm>.

essential to the function or operation of a charger or group of chargers. The FHWA proposed the term “charger” exclude parking areas adjacent to the EV chargers and lanes for vehicle ingress and egress.

In the proposed waiver, FHWA proposed to initially apply a complete waiver to EV chargers and all components of EV chargers that are installed in a project during calendar year 2022. The FHWA proposed to consider an EV charger as being “installed in a project” when the EV charger is permanently incorporated into or affixed to a Federal-aid funded infrastructure project. Following the initial proposed phase in calendar year 2022, FHWA proposed to partially phase-out the waiver in two steps during calendar year 2023. Beginning on January 1, 2023, FHWA proposed to remove from the waiver EV chargers whose final assembly does not occur in the United States. Beginning on July 1, 2023, FHWA proposed to additionally remove from the waiver EV chargers for which the cost of components manufactured in the U.S. does not exceed 25 percent of the cost of all components. Beginning on January 1, 2024, and thereafter, FHWA proposed to remove from the waiver EV chargers for which the cost of components manufactured in the U.S. does not exceed 55 percent of the cost of all components. The final waiver, which would be applicable only if final assembly occurred in the U.S. and the cost of components manufactured in the U.S. exceeded 55 percent of the cost of all components, was proposed as remaining in place until terminated by FHWA.

In the proposed waiver, FHWA proposed that the cost of components that are purchased when they are incorporated into an EV charger be determined by including the acquisition costs (including transportation costs to the place of incorporation into the end product) and any applicable duty (regardless of whether a duty-free certificate of entry is issued). The FHWA proposed that the cost of manufactured components include all costs associated with the manufacture of the component (including transportation costs and

quality testing), and allocable overhead costs, but FHWA proposed to exclude profits and any labor costs associated with the manufacture of the end product. The FHWA proposed that costs include costs incurred specifically for the contract; benefit both the contract and other work and can be distributed to each in reasonable proportion to the benefits received; or are necessary to the overall operation of the business, even if a direct relationship to any particular cost objective cannot be shown.

In the proposed waiver, FHWA requested comments on all aspects of the proposed waiver, including the definition of “EV charger;” the phases of the proposed schedule set forth in the proposed waiver; alternative dates and supporting information for alternative dates if applicable; whether there should be four phases as proposed; how many chargers would be fully compliant with BABA requirements at each phase of the proposed waiver and by the end of the 5-year NEVI Program and how many would not be compliant at each phase; the reliability of chargers; the cost completeness of chargers; production rates and capacity of chargers; the timing of delivery upon the order or purchase of chargers; whether industry expects its production rates and capacity for chargers to be consistent with the proposed schedule; how the proposed schedule or alternative dates impact installation schedules in the field; whether to establish different phase-out schedules for Direct Current Fast Charging (DCFC) chargers and Alternating-Current Level 1 (ACL1) and Level 2 (ACL2) chargers; the proposed meaning of cost of component; whether to use the installation date of the EV charger or some other date to determine which phase a given charger would be covered by; whether and how to apply FHWA’s existing Buy America requirement for iron and steel to any specific predominantly steel and iron EV charger components; and the reliable availability of such steel and iron components which are capable of complying with FHWA’s existing Buy America policy.

II. Summary of Major Changes Reflected in the Final Waiver

In light of the comments received on the proposed waiver demonstrating the inability of EV charger manufacturers to produce a steady and reliable supply of EV chargers, FHWA is making several changes to the timeline in the final waiver for multiple reasons described in further detail below, including to allow manufacturers additional time to domestically source components for their EV chargers:

1. FHWA is eliminating the proposed first phase in the proposed waiver, which would have applied a complete waiver of Buy America requirements to EV chargers and all components of EV chargers.⁷
2. The start date of the second phase of the proposed waiver (the first phase of the final waiver), which removes from the waiver EV chargers whose final assembly process does not occur in the U.S., will now occur on the effective date of this waiver instead of January 1, 2023, and the end date of this phase has been extended to June 30, 2024.⁸ In addition, during this phase, any housing components that are predominantly steel and iron must comply with existing FHWA Buy America steel and iron requirements, meaning that if predominantly iron and steel housing is used for the EV charger, the housing must be entirely manufactured in the United States according to FHWA standards.
3. The third phase of the proposed waiver, which would have removed from the waiver EV chargers for which the cost of components manufactured in the U.S. does not exceed 25 percent of the cost of all components, has been eliminated in the final waiver.⁹
4. The start date of the fourth phase of the proposed waiver (the second phase of the final waiver), which removes from the waiver EV chargers for which the

⁷ Throughout this notice, this phase will be referred to as the “complete waiver” phase.

⁸ Throughout this notice, this phase will be referred to as the “final assembly phase.”

⁹ Throughout this notice, this phase will be referred to as the “25 percent phase.”

cost of components manufactured in the U.S. does not exceed 55 percent of the cost of all components, has been extended from beginning on January 1, 2024, as in the proposed waiver, to beginning on July 1, 2024.¹⁰ In addition, any housing components that are predominantly steel and iron must continue to comply with FHWA Buy America steel and iron requirements, meaning that the housing must be entirely manufactured in the United States according to FHWA standards. The cost of predominantly steel and iron EV charger housing will also count towards determining whether 55 percent of the cost of all components are manufactured in the U.S.

5. As required under section 70914(d) of BABA, FHWA is clarifying that it will revisit this waiver and determine whether there is continued need for it within 5 years from the effective date of this notice. The FHWA will also publish RFIs every 6 months until the start of the 55 percent phase to acquire information about the state of the EV charging industry.
6. The proposed waiver also used the installation date of the EV charger to determine which phase of the waiver would apply to any given EV charger. The final waiver instead uses the date on which an EV charger is manufactured, which is defined in further detail below in Section III.C. However, any EV chargers manufactured before June 30, 2024, (the end of the final assembly phase) will need to begin installation by October 1, 2024, to be covered by this waiver.
7. The FHWA also has simplified and narrowed the definition of “EV charger” in a manner that will maximize the use of domestic goods, products, and materials. The proposed waiver defined “EV charger” to include EV chargers and associated payment systems, distribution systems, telecommunications

¹⁰ Throughout this notice, this phase will be referred to as the “55 percent phase.”

and networking equipment, energy storage systems, and other supporting equipment and systems: (i) in the immediate vicinity of a charger or group of chargers; and (ii) essential to the function or operation of a charger or group of chargers. The definition of “EV charger” as used in this final waiver only refers to the self-contained EV charging unit; it does not include associated equipment.

The reasons for these changes are discussed in more detail in the next section.

III. Response to Comments Received

The FHWA received 92 comments and 1 supplemental comment from 89 different commenters, including automobile manufacturers, EV charger manufacturers, EV charger installers, members of the steel and aluminum industries, labor organizations, private associations, public associations, local public agencies, State departments of transportation (State DOT), and several individuals. While several commenters raised objections to the waiver as proposed, most commenters were in favor of some version of a waiver of applicable Buy America requirements. The FHWA discusses the main objections to the proposed waiver and major categories of comments below.

In accordance with section 70916(c) of BIL, FHWA consulted with the National Institute of Standards and Technology’s Hollings Manufacturing Extension Partnership before issuing this waiver.

A. Applicability of FHWA’s Manufactured Products General Waiver to EV Chargers

The proposed waiver suggested removing EV chargers from FHWA’s Manufactured Products General Waiver. By doing so, the manufactured product content in EV chargers would be subject to the requirements of 23 U.S.C. 313, with this waiver serving to provide a phased approach to exempt certain chargers from these requirements over time. The FHWA stated that continuing to apply the Manufactured Products

General Waiver to EV chargers would be inconsistent with the objectives of BABA and is not supported by currently available information on domestic manufacturing capabilities. Removing EV chargers from the Manufactured Products General Waiver and issuing this final waiver allows all aspects of EV chargers to be covered by a single waiver and thus Buy America-compliant. The FHWA believes that individuals who take advantage of this waiver can avoid confusion and know the domestic content procurement preferences applicable to EV chargers.

The FHWA did not receive substantive comments objecting to this approach and is therefore removing EV chargers, as defined in this waiver, from FHWA's existing Manufactured Products General Waiver.

B. Opposition to the Proposed Waiver

Eight commenters, (the Steel Manufacturers Association (SMA), United Steelworkers, Nucor Corporation, Aluminum Extruders Fair Trade Committee (AEFTC), American Iron and Steel Institute (AISI), Alliance for American Manufacturing (AAM), BorgWarner, Inc., and the American Federation of Labor and Congress of Industrial Organizations) expressed that they did not support the proposed waiver, presenting various objections that are summarized below:

Indefinite Duration of Proposed Waiver: SMA and the Nucor Corporation criticized the proposed waiver as being of an indefinite duration, arguing that this was contrary to OMB's Implementation Guidance, which stated that waivers should be time-limited. United Steelworkers also noted that FHWA's Manufactured Products General Waiver remains in place after almost 40 years and was concerned that FHWA would similarly fail to narrow the proposed waiver after its initialization.

The FHWA Response: FHWA agrees that the waiver is not, and should not be, indefinite and, as clarified in more detail below, will review the waiver (including by providing an opportunity for public notice and comment) within 5 years of its issuance,

and will discontinue the waiver if it is found to no longer be in the public interest at that time, in accordance with section 70914(d) of BABA. The FHWA will also monitor the domestic supply of EV chargers throughout the course of this waiver and may choose to discontinue this waiver or make changes to the timeline described below if FHWA finds that there is a sufficient domestic supply of EV chargers available. Specifically, as further explained below, this waiver will only feature two phases: a final assembly phase and, after a phase-out period, a 55 percent phase. During the final assembly phase, FHWA will conduct biannual RFIs to assess industry progress on producing a charger that would be covered by the 55 percent phase and whether the EV charger industry is on track to meet the timeline set out in this waiver. Based on information received during these RFIs, FHWA may determine during the final assembly phase that domestic manufacturing capacity is able to produce a sufficient amount of chargers to meet the demand of recipients that would exist under the 55 percent phase. If this occurs, FHWA may discontinue the final assembly phase and proceed immediately to the 55 percent phase by phasing out from this waiver's coverage EV chargers for which the cost of components manufactured in the U.S. does not exceed 55 percent of the cost of all components.

Congressional Intent of Domestic Content Preferences: AISI and the Nucor Corporation argued that the proposed waiver was contrary to Congress' intent in establishing Buy America requirements, as these commenters believed that Congress intended Buy America requirements to cover all items made primarily of iron and steel. The SMA, AAM, and Nucor Corporation added that it is the Administration's policy to maximize the use of domestic steel, iron, manufactured products, or construction materials in federally funded infrastructure, not to use foreign items. Similarly, objecting commenters argued that the waiver is contrary to Congress' intent in passing BABA, noting the Congressional findings in section 70911 of BABA and stating that section

70914(a) required that FHWA ensure that Buy America requirements apply to iron, steel, manufactured products, and construction materials.

The FHWA Response: FHWA acknowledges that compliance with Buy America is both an Administration priority and required under Federal law. Also, EV chargers purchased using funds from the NEVI Formula Program established by Congress as part of BIL are to be administered under title 23, U.S.C.,¹¹ including the Buy America requirements under 23 U.S.C. 313. At the same time, however, FHWA does not believe that Congress envisioned applying FHWA's Buy America requirement (now codified at 23 U.S.C. 313) to EV chargers when it first enacted these requirements, starting in 1978 with the Surface Transportation Assistance Act of 1978 (Pub. L. 95-599). Rather, for the foreseeable future where this waiver is necessary to encourage domestic industry to ramp up production of EV chargers, it furthers Congressional intent for EV chargers purchased through the NEVI Program to more closely align with the requirements of BABA, which, like the NEVI Formula Program, was also established in BIL.

Pursuant to its authority under Buy America, FHWA believes it is in the public interest, as well as more in harmony with the Congressional intent behind BABA and the BIL, to waive certain Buy America requirements for a temporary period when FHWA is not convinced that manufacturers would be able to meet demand for Buy America-compliant EV chargers on FHWA-funded projects, which would threaten the ability for those infrastructure projects to be completed in a timely manner. The FHWA believes it most appropriate to carry out Congress' intent to timely complete EV charger infrastructure projects and ensure that the steel, iron, manufactured products, and construction materials used in infrastructure projects are produced in the United States through a specially tailored waiver that balances the need to have a supply of EV

¹¹ See BIL, Division J, Title VIII, Highway Infrastructure Program heading, Paragraph 2, twenty-fourth proviso.

chargers with the need to ramp up domestic production through a phased approach, which, during the 55 percent phase, will cover EV chargers in close alignment with the BABA standards for manufactured products. The FHWA also proposed and intends to implement a final waiver with a phased approach, which provides an incentive for manufacturers to shift toward domestic manufacturing processes to comply with the narrowing scope of the waiver.

Further, as discussed in more detail below, FHWA plans to exclude the housing, cabinet, or enclosure of an EV charger (hereinafter referred to as the “housing”) of EV chargers, if that component is predominantly steel or iron, from coverage under both phases of this waiver. Doing so gives effect to FHWA’s long-standing practice of excluding predominantly steel and iron components of manufactured products from the Manufactured Products General Waiver. This also seeks to remove uncertainty among recipients¹² and the EV charger industry over which components would need to comply with FHWA’s existing requirements for iron and steel. The FHWA believes that this final waiver therefore is consistent with the public interest and is justified pursuant to section 70914(b)(1) of BABA.

Presence of Buy America-Compliant EV Chargers: The eight commenters that objected to the proposed waiver also disputed points made in the notice justifying the proposed waiver and claimed that this meant that there was no public interest justification for the proposed waiver. The Nucor Corporation, AEFTC, and BorgWarner, Inc., for example, stated that there are existing EV chargers that are compliant with FHWA’s Buy America requirements and that a waiver would disadvantage these manufacturers that have already made significant investments to be Buy America-compliant. These commenters pointed to companies that responded in the 2021 RFI by stating that their EV

¹² When used in this notice, a recipient refers to direct recipients of FHWA financial assistance, subrecipients, and pass-through entities.

chargers met FHWA's Buy America requirements for steel and iron as well as other companies that have stated that they can meet FHWA's overall Buy America requirements.

The FHWA Response: While FHWA acknowledges the progress that some companies have made in manufacturing Buy America-compliant EV chargers, FHWA is still uncertain whether these companies can respond to the immediate demand for EV chargers that will result from programs under BIL, such as the NEVI Formula program and supply equipment that is certified as fully Buy America-compliant. The FHWA is also unsure if statements that existing EV chargers are Buy America-compliant are relying on the Manufactured Products General Waiver being available to cover non-domestic components that are not predominantly steel or iron. While some manufactures may be able to domestically assemble chargers at the present, FHWA is concerned that many manufacturers could not produce Buy America-compliant chargers without the Manufactured Products General Waiver being in effect. The FHWA believes, as noted above, that removing EV chargers from the Manufactured Products General Waiver aligns with the goals of Buy America requirements and seeks to ensure that EV chargers are produced with domestic manufactured components. Finally, FHWA seeks to reiterate that this waiver does not prohibit the purchase of Buy American-compliant EV chargers by a recipient if such chargers are available; the comments received, however, indicate a limited supply of EV chargers that is currently insufficient to ensure that EV charger infrastructure projects are delivered on time, which is the basis for this waiver.

Existing Buy America Processes: Similarly, commenters mentioned that FHWA has long-standing and well-developed regulatory and administrative rules related to the implementation and enforcement of Buy America requirements for steel and that suppliers on FHWA projects have needed to comply with these steel requirements for decades. According to these commenters, this history of compliance meant that there

should be no uncertainty and no additional time needed to comply with Buy America steel requirements as applied to EV chargers, contrary to what they argued was depicted in the proposed waiver.

The FHWA Response: FHWA agrees that there are steel suppliers who are highly knowledgeable about FHWA's Buy America requirements as they apply to steel. At the same time, EV chargers that are currently on the market may not have been designed to be compliant with FHWA's Buy America requirements, especially considering that they may have been designed with the belief that they would be covered by FHWA's Manufactured Products General Waiver. Further, they may contain steel components obtained from suppliers all over the world. The FHWA believes that the presence of steel in an EV charger does not mean that recipients could comply with Buy America requirements merely by complying with existing Buy America steel requirements. Further, it is not clear to FHWA that EV chargers that are currently available on the market use Buy America compliant steel, or that other aspects of the EV charger would not render them noncompliant with Buy America requirements without this waiver going into effect. Again, FHWA stresses that the purpose of this waiver is to encourage manufacturers of EV chargers to transition to a point where they utilize components manufactured in America, including those made out of steel. As noted below, while the housing of an EV charger is a specific component that when made predominantly of iron and steel does not need to be covered by this waiver, this is not true for all components of EV chargers.

Traceability of Steel Inputs: The Nucor Corporation, SMA, and AISI also argued that certifying that steel is Buy America-compliant is not new or difficult, contrary to how they claimed it was presented as a justification for the proposed waiver. These commenters stated that there is nothing unique about the steel used in EV chargers that would make Buy America certification more difficult, as mill test certificates for steel

inputs are routinely provided to distributors and fabricators that these commenters allege provide complete traceability throughout the distribution chain.

The FHWA Response: FHWA understands that steel producers have developed certain methods they use to certify that their steel is Buy America-compliant, but FHWA does not believe that this affects the need for this waiver. As set out in the proposed waiver, there is a need to establish compliance and certification processes focused specifically on EV chargers. The FHWA does not believe that just because there are existing processes for certifying that steel is Buy America-compliant intrinsically means that there are existing processes for certifying that the EV charger and all of its components are Buy America-compliant.

At the same time, as described in more detail below, FHWA does believe that these commenters make a valid point for predominantly steel and iron components of EV chargers that are widely available from domestic suppliers. This is one of the reasons why FHWA is excluding the housing of a charger if it is predominantly iron or steel from coverage under this waiver. The commenters' point, however, does not hold for other components that are not predominantly iron or steel and for which the ability for any small amount of steel to be accurately traced in them does not necessarily ensure that the EV charger is Buy America-compliant.

Environmental Impacts of Foreign Steel: The Nucor Corporation, SMA, and AISI further claimed that foreign steel is often produced and transported with significantly higher greenhouse gas emissions that would occur with domestic production and transportation, which they argued meant that allowing for the use of foreign steel would be counter to the environmental goals undergirding the purchase and installation of EV chargers.

The FHWA Response: Through this waiver, FHWA seeks to incentivize domestic manufacturers to ramp up production and make needed investments to build and

expand domestic production in order to support a sustainable energy and climate future. The FHWA does not intend for recipients of FHWA financial assistance to continue to rely on components manufactured overseas that might have steel in them to the extent practical once those components are manufactured and available in the United States; this is the intent behind the phase-out of chargers for the 55 percent phase and potential future phases. Further, while FHWA's existing Buy America requirements would apply to any steel or iron component of an EV charger, they would not cover the charger itself. The FHWA believes that this waiver, which, after a phase out period, waives Buy America requirements only for EV chargers where final assembly occurs in the U.S. and the cost of components manufactured in the U.S. exceeds 55 percent of the cost of all components, which would align with BABA's requirements for manufactured products, encourages recipients, their contractors, and subcontractors to utilize more domestic steel than under FHWA's existing Buy America requirements.

C. Applicability Date of Waiver and Waiver Phase-Out Periods

Thirty-three commenters recommended a different date of applicability than the installation date used in the proposed waiver.¹³ Commenters noted that there may be a significant difference in time between when a product is manufactured and when it is installed due to unforeseen circumstances, such as permitting delays, supply chain constraints, utility interconnection delays, delivery delays, prolonged adverse weather, potential workforce shortages, and routine certification and quality checks that commercial operators perform on industrial products before putting them into service. Such circumstances could result in EV chargers being manufactured during one phase of

¹³ Unlike the effective date, which is the date where this waiver's first phase would begin, the date of applicability refers to the date on which an event occurs that determines which phase of this waiver would cover a specific EV charger. For example, under this final waiver, an EV charger with a date of applicability of July 20, 2023, would need to have final assembly occur in the United States to be covered by this waiver. An EV charger with a date of applicability of July 20, 2024, on the other hand, would need to have final assembly occur in the United States and have at least 55 percent of the cost of all components manufactured in the United States to be covered by this waiver.

the proposed waiver (and consistent with the requirements in place during that phase) and installed in another, resulting in those chargers no longer being covered by this waiver and risking them not being Buy America-compliant. These commenters stated that relying on the installation date would prevent recipients, their contractors, subcontractors, and EV charger manufacturers from knowing which phase of the proposed waiver any given EV charger might be covered by, creating uncertainty and financial risk; commenters warned that this could discourage parties from moving forward with purchase decisions until the start of the 55 percent phase. The EV charger manufacturers also noted that they would not be able to certify with certainty that their EV chargers were covered by this waiver and therefore Buy America-compliant, as they would have no control over the date their chargers were installed. Finally, commenters pointed out that using the date of installation would potentially risk manufacturers either producing a glut of EV chargers that could not be used on FHWA-assisted projects or that manufacturers would delay producing chargers until those chargers would be compliant with the 55 percent phase to ensure their ability to be used in FHWA-funded projects.

In terms of alternatives, the most common suggestion made by commenters, including Wallbox, USA, Inc. (Wallbox), PowerCharge, bp pulse fleet, the Electric Vehicle Charging Association (EVCA), Tesla, Inc. (Tesla), the American Association of State Highway Traffic Officials (AASHTO), and the Associated General Contractors of America (AGC), recommended that FHWA use the manufacture date of the EV charger as the date of applicability. AASHTO noted that this would allow EV charger manufacturers to sell and install equipment that had been manufactured prior to this waiver's effective date. The AGC commented that using the manufacture date would reduce the opportunity for external factors to cause delays, as the manufacture date occurs at the beginning of the EV charger production process. Wallbox stated that using

the date of final assembly as the date of applicability could allow EV suppliers to streamline reporting and enforcement of Buy America requirements.

Eight commenters (including Revel Transit (Revel), EVgo, Electrify America, LLC (Electrify America), and FreeWire Technologies (FreeWire)) recommended that the date on which FHWA obligated funds be used as the date of applicability, arguing that it was more predictable than the date of installation. The Kansas Department of Transportation (KDOT) commented that using the date of obligation would allow recipients to move forward on EV charging infrastructure projects with an exact understanding of how this waiver would apply to their projects; EVgo similarly stated that this would ensure applicants for FHWA financial assistance would be aware of what phase of this waiver would be applicable to their project. The Maryland Department of Transportation (MDOT) stated that using the date of obligation would allow vendors to provide existing EV chargers for projects to enable those projects to be implemented as soon as possible.

Other commenters recommended using the date on which an EV charger is purchased as the date of applicability for this waiver and its phases. Volta Inc. (Volta) stated that the date a charger is purchased is the date at which vendors solidify pricing and orders with their suppliers. Shell USA, Inc. (Shell) commented that using the purchase date as the date of applicability would enable both the project applicant and their EV charger vendor or supplier to ascertain their ability to be covered under this waiver and its phases with a high degree of predictability.

Other suggestions for the date of applicability included the date on which a solicitation is released, the date where the funding agreement between the FHWA and awarded entity is executed, the date on which the submission of bids for the project is due, the date that the EV charger is shipped from the manufacturer, the date of delivery of

the EV charger, and to match the phase of the waiver with funding dedicated for specific fiscal years.

The FHWA Response: After reviewing the comments, FHWA agrees that relying on the date of installation to determine the date of applicability is impractical. Due to the current unavailability of Buy America-compliant EV chargers, as well as other factors noted by commenters such as the time to acquire proper permits and approvals that might delay installation after procurement of an EV charger, recipients of FHWA financial assistance who purchase EV chargers might not know when those chargers will be installed on their EV infrastructure projects at the time of purchase. Using the installation date as the date of applicability could mean that those recipients, their contractors, and subcontractors would face uncertainty over whether, by the time an EV charger is installed, that EV charger would still be covered by the phase of the waiver existing when the charger was purchased, which FHWA believes will determine how that charger is manufactured. The FHWA acknowledges that uncertainty surrounding when a procured EV charger will be installed could result in parties waiting to purchase EV chargers until the 55 percent phase of this waiver, which goes against the purpose of this waiver in promoting the timely delivery of EV infrastructure projects.

In considering alternative effective dates, FHWA acknowledges that the goal should be to provide certainty to EV charger manufacturers and to those purchasing EV chargers with Federal-aid funds that the EV charger they will manufacture, purchase, and install will comply with this waiver. For that reason, FHWA agrees with the plurality of commenters suggesting an alternative and believes that the most appropriate date of applicability would be the date on which an EV charger is manufactured. The FHWA considers the “date of manufacture” to be the date on which the EV charger, as defined further below, has its final assembly occur and is in an operational state. The manufacturer will be in the best position to know if their chargers comply with this

waiver, as they would be the ones to ensure that the chargers are domestically assembled or sourced. A purchaser can therefore be confident that, for example, if they enter into a purchase order for a charger that is domestically assembled to comply with the final assembly phase of this waiver, they will receive a charger compliant with this waiver so long as the manufacturer can manufacture a domestically assembled charger by June 30, 2024. If a manufacturer cannot, a purchaser can turn to another manufacturer to receive a charger that complies with this waiver.

To ensure the timely delivery of EV charger infrastructure projects, for EV chargers manufactured during this waiver's final assembly phase, FHWA expects recipients will begin installation of those EV chargers by October 1, 2024.

D. Timeline of Waiver

Removing Phases from the Waiver: The most common category of comment FHWA received on the proposed waiver was with respect to the phase-out timeline proposed. Of 89 unique commenters, 48 recommended an extension for the waiver. Of the other 41 commenters, 17 agreed with the need for a waiver without mentioning extending the proposed waiver's timelines, 5 had an unclear position, 3 did not mention extending the waiver's timeframes but instead requested that the waiver have a flexible duration, 2 argued that the final waiver should not have any phases, and the remaining 14 argued against a waiver entirely.¹⁴

The two commenters who argued that the final waiver should not have any phases, FreeWire and Broadband Telecom Power, Inc. (BTC Power), stated that the proposed phases were unnecessary, added compliance tracking challenges for the industry, and lacked commensurate benefit for EV charging projects. FreeWire also stated that they assumed some EV charger manufacturers would be able to more readily

¹⁴ Eight of these 14 commenters were the commenters mentioned in Section III.A. The remaining six presented objections against the waiver without providing substantive arguments as to their reasoning.

source components domestically than perform final assembly domestically. Instead of phases, BTC Power recommended that the waiver start on its effective date with the 55 percent phase.

The FHWA Response: FHWA does not agree that a single-phase approach would serve the public interest more than a waiver where coverage of certain chargers is gradually phased out through phases. As noted below, commenters raised many more concerns with domestically sourcing components than they did with ensuring that final assembly of EV chargers occurs in the United States, and FHWA believes that EV charger manufacturers will be able to assemble chargers domestically before they are able to ensure that 55 percent of components, by cost, are manufactured in the United States. The FHWA received no indication that there were manufacturers who would have more difficulty having final assembly of their chargers occur in the United States, beyond FreeWire's assumption, and FHWA does not believe the hypothetical existence of such companies justifies adding complexity to the waiver.

The FHWA also believes that the phased approach provides an incentive to manufacturers to ramp up production while, crucially, ensuring that there is a steady supply of EV chargers available that covered by this waiver and therefore Buy America-compliant. Having the waiver start at the 55 percent phase, like BTC Power suggested, risks having a limited supply of covered chargers at this waiver's effective date, which may unnecessarily delay EV charger infrastructure projects. Further, this waiver does not require that EV charger manufacturers create chargers that comply with any given phase; manufacturers may choose to ignore this waiver and produce otherwise Buy America-compliant chargers. What this waiver does is provide certainty to how manufacturers can achieve Buy America compliance and sets steps for them to reach a point where an EV charger would be covered if the EV charger met certain conditions similar to the requirements imposed on a manufactured product under BABA.

Extension of Waiver's Time Periods: Of the 48 commenters arguing for an extension of the waiver, there were various suggestions on how long that extension should be. Some commenters, such as AASHTO, argued for extending the dates of the final assembly, 25 percent, and 55 percent phases by 2 years from what was in the proposed waiver. Others, such as the Electric Drive Transportation Association and PowerCharge, recommended extended those same dates by 1 year from what was in the proposed waiver. Still others recommended extending those dates by 6 months from what was in the proposed waiver. Finally, many commenters argued for modifying the dates of the phase-out periods from the proposed waiver in non-uniform durations. Tesla, for example, recommended keeping the start of the final assembly phase on January 1, 2023, but recommended delaying the start of the 25 percent and 55 percent phases by 6 months. The Ford Motor Company (Ford), Wallbox, and Blink Charging Co. (Blink Charging) similarly recommended keeping the start of the final assembly phase at January 1, 2023, but recommended delaying the start of the 25 percent phase by 6 months and the start of the 55 percent phase by 1 year. Finally, several commenters also asked for FHWA to evaluate the progress of the EV charger industry and listen to feedback from recipients and the EV charger industry to determine whether phases should be subsequently extended.

These 48 commenters routinely mentioned that the proposed waiver's timeline was not achievable and that an extension was necessary to ensure that EV chargers which would be covered by this waiver would be available. Some commenters stated that EV charger manufacturers would not be able to domestically assemble EV chargers on the proposed waiver's timeframe. EVgo, for instance, stated that domestically assembled chargers would not be available at sufficient scale by January 1, 2023, and Electrify America commented that they thought domestic assembly of 150 kilowatt (kW) EV chargers would be underway industry-wide only by the latter half of 2023, with reliability

testing concluding and those chargers being available for purchase in 2024. EVgo further commented that it conducts up to a yearlong “qualification process” for new suppliers which requires a nearly produced or produced test unit.

Multiple members of the EV charging industry argued in favor of extending the proposed waiver’s timeframe, generally due to concerns with sourcing EV charger components domestically to allow a charger to be covered under the 55 percent phase.¹⁵ The only EV charger manufacturer who stated that they could meet the proposed waiver’s timeframes was ABB E-Mobility.

FreeWire requested an extension so that recipients and the EV charger industry could have time to complete a thorough assessment of the cost of components and to establish proper certifications. FreeWire also stated that FHWA was underestimating the complexity and long-lead time it would take to source components and that ongoing supply chain disruptions limited the availability of domestic components. For these reasons, FreeWire requested that all Buy America requirements become effective on July 1, 2024, one-and-a-half years after the final assembly phase and 6 months after the 55 percent phase would have started in the proposed waiver.

SK Signet commented that while domestic assembly might be achievable in the near future, some components are not available from domestic sources, while other components were available domestically but at vastly greater prices than foreign components. SK Signet recommended delaying the start of the final assembly phase until July 1, 2023, and the 55 percent phase until January 1, 2026.

Blink Charging stated that establishing sufficient domestic production, securing new suppliers, and validating the safety of their products takes time, which is amplified

¹⁵ As noted above, several members of the EV charging industry did not comment on the proposed waiver’s timeframe, including Tritium, Siemens, Enel X Way, TeraWatt, and FLO EV Charging. ChargePoint commented that a blanket waiver for ACL2 chargers should be extended until January 1, 2024, without making clear when subsequent phases for these chargers would start; this point is discussed in Section III.C further below. The bp pulse fleet did not comment either way, stating that it would rely on others to speak to the appropriate schedule.

by the ongoing equipment and materials shortages and shipment delays stemming from global supply chain constraints. Blink Charging further commented that these constraints are particularly acute for DCFC components and recommended a 1-year delay in phase-out dates.

Wallbox stated that it would be ready for final assembly in the U.S. shortly but that there were significant challenges facing the industry in terms of the procurement and sourcing of components, which would be exacerbated by the demand for components caused by the NEVI Formula Program. Wallbox suggested having the final assembly phase start on January 1, 2023, as proposed in the waiver, with subsequent phase-out periods each starting 1 year later. Wallbox did not clearly indicate that they could domestically assemble EV chargers by January 1, 2023; however, they hinted that they could and did not recommend an extension to the proposed waiver's January 1, 2023, date.

Volta, on the other hand, commented that they believed it possible to domestically assemble EV chargers by January 1, 2023, but thought that starting the 55 percent phase on January 1, 2024, was unreasonable based on its suppliers' low confidence of being able to produce an EV charger that could be covered by the 55 percent phase.

Among other companies, WiTricity stated that many EV charger components are not manufactured in the United States, which they stated would only happen if chargers were manufactured in sufficient volume to generate adequate demand. Tesla added that an extension to the timeline of the proposed waiver would allow manufactures time to fully assess their supply chains, calculate domestic content values, enter into new supply agreements, and reorient their supply chains.

Many State officials also argued in favor of extending the proposed waiver's timeframe for the same reasons mentioned by EV charger manufacturers.¹⁶ The AASHTO similarly claimed delays and increased costs could result if EV charging equipment providers were required to shift component sourcing to domestic suppliers, who may struggle with availability due to limited quantities of EV chargers and EV charger components and high demand. The AASHTO also commented that the practical ability for the industry to source American-made EV charger components would take longer than the proposed timeframe permitted.

State DOTs also requested the proposed timeline be extended due to the experience they have had in attempting to procure EV chargers. State DOTs pointed to the fact that orders placed for EV chargers remain unfilled after considerable time due to supply chain issues. The KDOT stated that they had heard from their stakeholders that wait times for some electrical components in EV chargers stretched to 60-80 weeks, even without considering the increased demand created by the investments under BIL. The KDOT also commented that although there are some manufacturers with currently available equipment that is Buy America-compliant, they did not believe there was adequate capacity yet to fill the rapidly expanding need for EV chargers.

In essence, these commenters stated that the current delay in producing EV chargers meant that chargers may be ready for purchase after some phases of the proposed waiver have already ended, with particular emphasis on this being the case for the first phase, which was proposed as ending on December 31, 2022. FreeWire stated that they doubted whether any States would complete the installation of NEVI projects before the first quarter of 2024, at the earliest. FreeWire also stated that they expected it

¹⁶ The AASHTO, the National Association of State Energy Officials, and a total of 18 State DOTs submitted comments, with all but one State DOT, the New Jersey Department of Transportation (NJDOT), indicating that the proposed timeline is not achievable. The NJDOT instead argued in favor of a temporary waiver without specifically commenting on its proposed timeframe.

to take State administrators several months to design and issue solicitations, with some States expected to take longer as they have indicated that they would take 1 to 2 years conducting further planning before beginning the procurement process. For the States that do issue solicitations for NEVI projects in the next several months, FreeWire commented that they expected the solicitation period to last several more months, with more time being taken for States to make awards. Similarly, EVgo commented that many States plan to solicit proposals for charging stations beginning in late 2022 and extending into early 2023. The Georgia Department of Transportation (GDOT) mentioned that it may not be ready to install EV chargers until well after 2022, with installation not expected to occur until 2024 at the earliest, meaning that the 2022 waiver period would be useless. The MDOT similarly commented that, to its knowledge, no State DOT or associated vendor would be able to benefit from the first phase of the waiver as the earliest dates for project awards they projected would be in the spring of 2023. East Bay Community Energy stated that the short timeframe of the first phase would likely have no impact on market acceleration, and Tesla commented that the first phase would provide little relief since States have not issued requests for proposals regarding EV charger deployment. Other issues raised by commenters to justify an extension of the proposed waiver's timeframe were the difficulty for EV charger manufacturers and their suppliers to understand the waiver; price volatility; the need to alter manufacturing processes; potentially increased demand for EV chargers from both the public and private sector, which may result in potentially increased cost; the additional time it would take to conduct safety and reliability testing on the newly domestically produced chargers; the necessary delay to ensure that there are suitable numbers of replacement parts; potential workforce issues; and the lack of a final rule from FHWA on the technical requirements for EV chargers under the NEVI Formula Program. Due to many of these factors, EVgo

stated that the limited number of chargers available and the significant expected increase in demand meant that chargers may not be available until late 2024 or early 2025.

In terms of the benefits of extending the proposed waiver's timeline, Siemens Corporation (Siemens) commented that a delay would be necessary to account for the limited supply of EV chargers that are currently available, and that the timeline of any waiver needed to consider the time it would take to procure, deliver, and install EV chargers in order for that waiver to have a meaningful effect. Similarly, General Motors (GM) stated that an extension would provide the time necessary to onshore supply chains, ramp up production, and conduct necessary testing of new chargers.

The FHWA Response: In terms of the complete waiver phase of the proposed waiver, FHWA does not agree with commenters that it is necessary to extend this phase beyond the date set out in the proposed waiver; FHWA instead believes that commenters indicated why this phase is not in the public interest. Commenters argued that the complete waiver phase as proposed, which would have occurred only in calendar year 2022, would start and end without a steady supply of EV chargers available for procurement. The FHWA disagrees with this assessment. For the purpose of this waiver, the question is whether there will be enough chargers available to satisfy the demand posed by recipients.

The purpose of the complete waiver phase in the proposed waiver was to provide time for EV charger manufacturers to domestically assemble a sufficient supply of chargers for when the first phase-out period occurred. Once EV charger manufacturers have such a supply available, FHWA believes it appropriate to phase out from this waiver's coverage all EV chargers that do not have final assembly occur in the United States. The EV charger manufacturers, who FHWA believes have the most insight as to when they can domestically assemble an EV charger, differed on what date they recommended for the final assembly phase to start. ChargePoint, Inc. (ChargePoint),

Blink Charging, and PowerCharge requested that this phase start in 2024; however, others, such as Volta and Wallbox, approved of the proposed date of January 1, 2023, for the start of the final assembly phase. Based on comments received, FHWA expects recipients to start to procure chargers in early 2023. The FHWA expects EV charger manufacturers who stated a preference for the final assembly phase to start on January 1, 2023, to be able to provide the limited number of chargers requested by recipients in early 2023. Throughout 2023, as more recipients seek to procure EV chargers, FHWA expects this demand to be met by increases in the number of domestically assembled chargers produced by EV charger manufactures.

As the proposed first phase-out date of January 1, 2023, has already occurred and, as described above, FHWA does not believe it necessary to delay this date, FHWA finds that a complete waiver phase would not be in the public interest.

Twenty-five Percent Phase: Other commenters criticized the 25 percent phase of the proposed waiver as being overly complex and burdensome. Several commenters pointed out that this phase would not assist in reaching the final 55 percent phase of the waiver. Enel X Way USA, LLC (Enel X Way) and Tritium commented that by eliminating the 25 percent phase, manufacturers would be provided more time to solidify the necessary partnerships, suppliers, and supply chain resources to ensure that EV chargers are covered by the 55 percent phase.

The FHWA Response: FHWA agrees that the 25 percent phase is unnecessary and would not serve the public interest. The FHWA initially proposed this phase to serve as a gradual step between having the waiver cover chargers whose final assembly process occurred in the United States and phasing out from coverage under this waiver EV chargers for which the cost of components manufactured in the United States does not exceed 55 percent of the cost of all components, leading to the 55 percent phase. The FHWA believed that doing so would incentivize manufacturers during the 25 percent

phase to make progress to reaching the point where they could produce chargers that would be covered by the 55 percent phase of the waiver. The FHWA intended that manufacturers would shift their processes to account for the 25 percent threshold and then shift again to account for the 55 percent threshold. Based on the comments received, FHWA no longer believes that manufacturers will make the initial shift to produce chargers that could be covered by the 25 percent phase. Instead, FHWA believes that manufacturers will simply shift their processes to produce EV chargers that are covered by the 55 percent phase, rendering the 25 percent phase pointless for many of them.

Further, for those manufactures that do attempt to take advantage of the existence of the 25 percent phase by altering their processes to produce EV chargers where the cost of components manufactured in the United States exceeds 25 percent of the cost of all components, FHWA is concerned that doing so may hinder these manufactures from producing EV chargers that could be covered by the 55 percent phase, which undermines this waiver's goal of incentivizing the production of EV chargers assembled and sourced in America. While FHWA wishes to incentivize companies to produce EV chargers that are Buy America-compliant as quickly as they are able to, starting with EV chargers that would be covered by the 55 percent phase, FHWA no longer believes that the 25 percent phase is a useful means in reaching this goal.

Start of 55 Percent Phase: With the removal of the complete waiver phase and the 25 percent phase, this waiver will start with the final assembly phase on its effective date and its first phase-out will occur at the start of the 55 percent phase. At this time, EV chargers covered by the final assembly phase for which the cost of components manufactured in the U.S. does not exceed 55 percent of the cost of all components will be removed from this waiver's coverage. Removing the 25 percent phase, however,

necessitates consideration of when to now end the final assembly phase and begin the first phase-out period that commences the 55 percent phase.

Commenters gave a wide range of dates for when the 55 percent phase should start, from January 1, 2024, to January 1, 2026. Again, FHWA finds the dates that EV charger manufactures suggested to be important considerations, as they will be the ones domestically sourcing chargers for the 55 percent phase. Many EV charger manufacturers, such as Tritium, Enel X Way, Siemens, and TeraWatt Infrastructure (TeraWatt), did not suggest an alternative to the 55 percent phase while making recommendations on other aspects of the proposed waiver, indicating tacit approval of FHWA's proposed date of January 1, 2024. Others, such as Wallbox, PowerCharge, Volta, and Blink Charging, suggested modifying this date to January 1, 2025. SK Signet was among the few commenters who argued for a proposed date of January 1, 2026.

The FHWA Response: Given the range of extension timelines suggested by commenters, FHWA believes it is appropriate to extend the date of the final assembly phase such that it ends on June 30, 2024. The first phase-out period under this final waiver, starting the 55 percent phase, where FHWA will remove from the waiver EV chargers for which the cost of components manufactured in the U.S. does not exceed 55 percent of the cost of all components, will therefore begin on July 1, 2024. This date is between the two dates proposed by the majority of EV charger manufacturers. Similar to the discussion on the final assembly phase, this should not affect manufacturers who recommended a start date for the 55 percent phase of January 1, 2024. For those that recommended later dates, this may serve to expedite the domestic sourcing process so these manufactures can compete with ones that are able to domestically source by January 1, 2024. In addition, FHWA notes that many manufacturers recommended a date for the start of the 55 percent phase at the same time as they recommended a new date for the start of the 25 percent phase. With the 25 percent phase removed, FHWA expects

manufactures to be able to modify their processes to produce chargers covered by the 55 percent phase faster, as these manufactures will not have to perform an additional modification of their processes to produce chargers that could be covered by the 25 percent phase. The FHWA believes that extending the start of this first phase-out for a year properly considers the concerns of many commenters regarding the time it takes to domestically source components, without extending the waiver for so long that it no longer provides a proper incentive for manufactures to comply with the Administration's goals of encouraging the domestic manufacturing and assembling of EV chargers. The FHWA expects all recipients to procure EV chargers during this phase, with many recipients that had already procured chargers in previous phases using this phase to procure additional chargers using NEVI Formula Program funds from additional years.

The FHWA will also regularly monitor the status of the domestic EV charger industry. If the industry is advancing with production of Buy America-compliant EV chargers faster than expected, FHWA may discontinue this waiver or alter this waiver's timelines accordingly. To accomplish this goal, FHWA will conduct biannual RFIs to receive information on the status of the EV charger industry during the final assembly phase, which may lead FHWA to commencing the first phase-out and starting the 55 percent phase earlier than July 1, 2024. If FHWA plans to modify this waiver, FHWA will provide adequate notice of its intention to do so. As required by section 70914(d) of BIL, 5 years from the effective date of this waiver, FHWA will also revisit this waiver to determine whether there is still a need to continue it or whether the domestic EV charger industry has advanced to a point where this waiver can be discontinued.

Removal of Defined Dates: Some commenters went further than merely extending the waiver and suggested that the inclusion of any sort of date would be inappropriate and that FHWA should base its waiver off of market research or other metrics. The Oklahoma Department of Transportation (OKDOT) requested FHWA

publish an RFI and conduct extensive research on the availability of the materials manufactured in the U.S. before phasing out the waiver. The GDOT commented that setting the duration of any phase in advance would be arbitrary and that the only baseline that should be used is EV charger production data. The National Association of Truck Stop Operators (NATSO) and the Society of Independent Gasoline Marketers of America (SIGMA) jointly commented that FHWA should waive Buy America requirements until it is clear that a competitive market of products that meet Buy America requirements are available at scale. The City of Dallas stated that any timeframe should be delayed until a predefined set of manufacturing and installation metrics are achieved. The AGC also agreed with using market research to identify manufacturing capacity for the purpose of setting phase out dates. The AGC argued that setting specific dates may encourage EV charger manufacturers to rush production to produce chargers before these dates, causing them to fail to test these chargers for safety and reliability. The AGC also commented that setting specific dates for the start of phases risk manufacturers failing to produce chargers that can be covered under a given phase.

The FHWA Response: FHWA disagrees with commenters suggesting that this waiver should not feature specific dates and believes that specific timeframes and phase-out dates are useful in providing recipients of FHWA financial assistance certainty as to the requirements that will apply at any given time for purchases of EV chargers. Waiver periods that are tied only to the results of contemporary market research may change suddenly, disrupting planning made by recipients, their contractors, and subcontractors. In addition, specific dates provide industry vendors with a clear timetable to encourage them to shift to manufacturing and assembling EV chargers domestically as quickly as possible. Again, FHWA is issuing this waiver both after considering the current and projected state of the market and to encourage an increase in domestic content within the market over time. While FHWA acknowledges that some EV charger manufacturers

may not be able to produce compliant chargers within the timeframe set out in this waiver, FHWA believes that delaying the phases of this waiver to account for such manufacturers goes against the purpose of Buy America requirements and the Administration's goals of realizing American production of EV chargers. In addition, FHWA intends to collect new information as it becomes available via biannual RFIs and, as detailed above, may enter into the 55 percent phase before the scheduled July 1, 2024, date depending on the information received.

Bifurcating Timeframes for ACL2 and DCFC Chargers: Several commenters brought up the differences between ACL1 and ACL2 chargers and DCFC chargers and argued that these differences justified different waiver timeframes for the two kinds of chargers. EVgo commented that ACL2 chargers contain fewer components and cost dramatically less than DCFC chargers. EVgo further commented that it expected the domestic DCFC charger market to take longer to develop to a point where those chargers could be produced domestically at scale than they expected for the domestic ACL2 charger market. EVgo claimed that DCFCs require more highly specialized manufacturing processes, that the ACL2 charger market is more robust currently than the DCFC charger market, and that the company expected demand to be lower for ACL2 chargers in the NEVI Formula Program. Electrify America commented that because ACL2 chargers have become relatively commoditized, unlike DCFC chargers which are a relatively new technology, there should be different phase-out schedules for the two kinds of chargers. Electrify America suggested that ACL2 chargers follow the proposed waiver phase-out schedule whereas DCFC chargers be permitted an extended schedule. ChargePoint, on the other hand, stated that supply chains were less advanced for ACL2 chargers than DCFC chargers due to a lack of prior demand for Buy America-compliant ACL2 chargers and recommended extending the waiver for ACL2 chargers until January 1, 2024, to account for that.

The FHWA Response: FHWA does not believe that there is a need to bifurcate this waiver's phase-out schedule for ACL2 chargers and DCFC chargers. To start with, the comments received on this issue differed in the basic notion of whether bifurcation was necessary to account for delays in the ACL2 charger market or delays in the DCFC charger market. Further, FHWA does not intend this waiver to be overly burdensome on recipients and believes that bifurcating phase-out periods would unnecessarily confuse recipients as to which waiver period a given charger may fall into, without providing any clear benefit.

E. 350 kW DCFC Chargers

Some commenters raised special concerns over 350kW DCFC chargers. These comments generally proceeded along the same path. First, these commenters stated that DCFC chargers are the best chargers to be purchased using NEVI Formula Program funds. Pilot Travel Centers LLC (Pilot), for instance, commented that Congress, FHWA, and States EV Deployment Plans clearly favored deployment of 350 kW DCFC chargers. In a joint comment, Pilot, GM, and EVgo further stated that recent investments in EV charging infrastructure illustrate a clear preference for 350 kW DCFC chargers and that this also matches a growing trend in the automotive industry. Commenters stated that if 350 kW DCFC chargers were not available at scale, States would instead purchase lower power chargers, such as 150 kW DCFC chargers that meet the proposed standards promulgated by FHWA for the NEVI Formula Program.¹⁷ These commenters believed that using 150 kW DCFC chargers instead of 350 kW DCFC chargers would result in an EV charging network inadequately prepared for the next generation of EVs.

¹⁷ The FHWA proposed regulations setting minimum standards and requirements for projects funded under the NEVI Formula Program on June 22, 2022. *See* 87 FR 37262. The FHWA proposed that the maximum power per DCFC charging port be at or above 150 kW, with each charging station capable of providing at least 150 kW per charging point.

Next, commenters stated that it was not possible for 350 kW DCFC chargers to comply with the proposed waiver's timeframe. The Alliance for Automotive Innovation mentioned that the proposed waiver did not give specific attention to 350 kW DCFC chargers, and the commenter believed that the same issues facing all EV chargers were especially pronounced for 350 kW DCFC chargers. A joint comment from NATSO and SIGMA mentioned that they were unaware of any data suggesting that Buy America-compliant 350 kW DCFC chargers were available at scale or will be available in time to meet the timelines in the proposed waiver and that FHWA should waive Buy America requirements for these chargers until it is clear that a competitive market of compliant products is available at scale.

To deal with this perceived concern, some commenters requested FHWA additionally extend its waiver schedule specifically for 350 kW DCFC chargers. The joint comment from the Pilot, GM, and EVgo requested a focused 1-year delay solely for 350 kW DCFC chargers given what they claimed were additional complexities and supply chain challenges facing these chargers.

The FHWA Response: FHWA does not agree that it is necessary to give special accommodations for 350 kW DCFC chargers in this waiver. The FHWA finds that the argument pushed by commentators in favor of such preference is flawed at its first premise. The FHWA proposed allowing 150 kW DCFC chargers to be used on NEVI Formula Program funded projects. Commenters in favor of special treatment for 350 kW DCFCs do so under the idea that these chargers should be purchased using NEVI Formula Program funds and that this waiver should encourage that. The FHWA believes that the rulemaking for the NEVI Formula Program, not this waiver, is the appropriate place to make that argument. This waiver is to encourage the domestic production of chargers that can be used on FHWA assisted projects and delaying this waiver's timeframe for 350 kW DCFC chargers does not comport with this goal.

F. Definition of “EV Charger”

Coverage of Waiver: In the proposed waiver, FHWA defined an “EV charger” as “EV chargers and associated payment systems, distribution systems, telecommunications and networking equipment, energy storage systems, and other supporting equipment and systems: (i) in the immediate vicinity of a charger or group of chargers; and (ii) essential to the function or operation of a charger or group of chargers.” The FHWA also stated that the term would not include parking areas adjacent to the EV chargers and lanes for vehicle ingress and egress.

Many commenters expressed concern over this proposed definition, with some suggesting that it be expanded while others stating that it was overly broad. In the former group, Ford asked for FHWA to consider including EV charging posts and cable management systems as part of the definition of “EV charger.” The KDOT suggested that the waiver also apply to other manufactured products that are external to the EV charger but in its immediate vicinity, as well as switchboards, switchgears, and panelboards. The MDOT recommended that manufactured components for battery storage and other alternative power sources, such as solar panels, be included in the definition of “EV charger,” although MDOT admitted doing so may cause confusion. ElectricFish similarly requested that the definition apply to battery storage systems.

In the opposite group, many commenters complained that the broad definition in the proposed waiver for “EV chargers” could cause confusion and delay. The AASHTO stated that this definition would muddy the parameters surrounding the waiver and complicate the determination of compliance when determining the cost of components for the 55 percent phase. General Motors stated that the broad proposed definition may cause project delays since equipment outside of the actual EV charger might have its own supply chain considerations, particular with respect to utility-related equipment. Volta similarly commented that systems and technologies not core to the EV charger itself,

such as wireless and telecommunications systems, are frequently not manufactured in the United States and that moving supply chains to the United States for these components would be extremely difficult and costly. Revel agreed, stating that the proposed definition could increase noncompliance with Buy America requirements because many of these systems and technologies are not produced domestically. In addition, TeraWatt noted that the EV charging market is not large enough to dictate a domestic shift to the telecommunications supply chain, potentially resulting in no Buy America-compliant telecommunications systems being available and, if the proposed definition is used, fewer Buy America-compliant EV chargers. The Zero Emission Transportation Association (ZETA) and Shell both noted that additional equipment encompassed by FHWA's proposed definition may implicate other domestic content procurement preferences, resulting in confusion by recipients, their contractors, and subcontractors and potential delays. BTC Power commented that including equipment beyond the EV charger would make it difficult for EV charger manufacturers to certify Buy America compliance, given that they might not necessarily have insight into the domestic content of pieces they don't manufacture themselves.

Finally, multiple commenters stated that the proposed definition of "EV charger" would disincentivize the integration of helpful features such as on-site renewable energy generation and energy storage systems in EV charging stations, since inclusion of such features would require them to be Buy America-compliant. Commenters presented concerns that such domestically produced technologies were not available and therefore may not be included in charging stations featuring EV chargers purchased with FHWA financial assistance. The ZETA noted that FHWA should encourage including on-site renewable energy generation in charging stations, which would be hindered if those technologies were required to be Buy America-compliant given that manufacturers were

unlikely to change their processes to domestically manufacture those technologies to support the minimal quantity involved in EV charging stations.

Commenters who suggested a narrower definition that FHWA originally proposed presented numerous options. The AASHTO recommended the definition only include the self-contained EV charging unit itself. Autel Energy (Autel) suggested that the definition should only apply to those components that are under the direct control of the EV charger manufacturer. Proterra recommended that FHWA limit Buy America requirements to items that are directly related to electric vehicle supply equipment. Revel suggested that the definition apply only to technologies or systems permanently affixed to the charger that are essential to the charger's function and operation. Finally, Shell commented that Buy America requirements should only apply to the portion of the project which the recipient deems eligible for EV infrastructure-related Federal-aid funding.

The FHWA Response: FHWA agrees with the number of commenters suggesting that the definition of "EV charger" should be narrower than what was presented in the proposed waiver. After reviewing the comments received, FHWA does not believe it is necessary to include the associated equipment specified in the proposed waiver as part of this final waiver. Such equipment will fall under FHWA's current Buy America requirements, which may include coverage under the existing Manufactured Products General Waiver. In this final waiver, FHWA will consider an "EV charger" as only the EV charger unit itself and the equipment contained inside it. As there are various configurations possible for EV chargers, FHWA is reliant on manufacturers to determine which components are within the EV charger and will therefore be covered by this waiver.

The FHWA believes that it is important to accelerate the domestic EV charger manufacturing industry and that it is feasible for manufacturers to onshore production in

the near future to take advantage of the increased funding for EV infrastructure projects. This waiver serves to incentivize that process. The FHWA does not believe, however, that such incentives exist for equipment associated with the EV charger that may have uses beyond EV charging infrastructure projects, such as telecommunications equipment; for these pieces of equipment, FHWA does not think that the same incentive exists to encourage their domestic production. Including them under the definition of “EV charger” would mean that final assembly of these pieces of equipment would need to occur domestically and many of them would need to be sourced domestically in order to be covered by this waiver, and FHWA does not believe the EV charger market is large enough to incentivize manufacturers of these additional pieces of equipment to domestically produce those pieces of equipment. Under the proposed definition of “EV charger,” this would mean that certain pieces of equipment associated with an EV charger could not be covered by this waiver, potentially leaving many EV charger stations noncompliant with Buy America requirements and hindering efforts to complete EV infrastructure projects. The FHWA believes that this possibility justifies narrowing the definition of “EV charger” than what was previously proposed.

In summary, FHWA is choosing to limit this waiver to the EV charger itself. The FHWA believes doing so keeps the waiver as simple as possible, compared to other suggested definitions. By limiting the definition to the EV charger itself, EV charger manufacturers will be able to determine if a charger is covered by this waiver, while also providing clarity to recipients, their contractors, and subcontractors when procuring chargers regarding how this waiver will cover those chargers. The FHWA also notes that much equipment associated with EV chargers is covered by FHWA’s Manufactured Products General Waiver and, for this reason, defining “EV charger” more narrowly should not prevent projects from being delivered on time.

Utility Equipment: Several commenters sought clarity on how this waiver would affect equipment used in utility relocations and upgrades. Autel questioned whether products used in utility upgrades would be covered by this waiver. The OKDOT commented that the proposed waiver did not address whether Buy America requirements extend to utility relocations and requested that utilities be excluded from Buy America requirements.

The FHWA Response: Based on the definition used for “EV charger” in this final waiver, equipment used in utility relocations and upgrades would generally not be covered by this waiver; instead, FHWA’s Buy America requirements would apply to such work. Further, FHWA does not believe it is necessary to treat utility-related work for EV charger infrastructure projects differently from utility-related work for other Federal-aid highway projects.

G. Treatment of Components

Defining Components of EV Chargers: Multiple commenters requested that FHWA clearly delineate what components are covered by this waiver. Siemens recommended that FHWA further define items that FHWA considers to be components of EV chargers for the purpose of computing the domestic content of those components. Tesla and the North Central Texas Council of Governments (NCTCOG) commented that FHWA should release a list of all components the proposed waiver would apply to. ABB E-Mobility, on the other hand, argued that FHWA should not create a list of what it considers to be a component of an EV charger because EV charger technology is developing rapidly, and components vary by manufacturer.

The FHWA Response: In general, any article, material, or supply that is directly incorporated into the end product (i.e., EV charger) is a component. Given the various ways that EV chargers are structured, and may be structured in the future, FHWA agrees

with ABB E-Mobility that it is not useful to define with particularity every component used in an EV charger.

Determining Cost of Components: Multiple commenters sought clarification regarding how to determine the cost of components to determine whether an EV charger is covered by the waiver. Enel X Way USA and Tritium recommended that the subassembly of foreign parts into components qualify as part of the manufacturing process which should be treated as part of the cost of a component. Tritium also suggested that manufacturers should be able to determine the cost of the component using their manufacturing costs. The NCTCOG asked whether the exclusion of labor costs associated with the manufacture of the end product also prohibited inclusion of labor costs associated with manufacture of components. Wallbox recommended adding the cost of labor towards final assembly as a cost of the component, and Tesla encouraged FHWA to include labor costs for components that are manufactured domestically and included in the final EV charger. Wallbox also recommended that FHWA clarify that all components used in final assembly, including components purchased by the manufacturer from upstream suppliers, count for domestic content calculations in the 55 percent phase. The National Electrical Manufacturers Association questioned whether Manufacturer Value Add or Substantial Transformation is part of the cost of a component.

The FHWA Response: FHWA does not believe that changes need to be made to how the cost of components are calculated from how was described in the proposed waiver. The FHWA proposed to determine the cost of components for this waiver using the same methodology used to calculate the cost of components for the Buy American statute under chapter 83 of title 41, U.S.C., which generally applies to supplies, construction, and services acquired for public use. The FHWA believes that utilizing existing definitions rather than creating new ones for this waiver provides more consistency across Federal agencies and more certainty to recipients, their contractors,

subcontractors, and EV charger manufacturers. Per the regulations implementing the Buy American statute, the Federal Acquisition Regulations (FAR), “cost of component” is defined in FAR 25.003 as: “(1) For components purchased by the contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product or construction material (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 (2) for components manufactured by the contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1)...plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.”¹⁸ As the Buy American statute is similar in its goals to Buy America, FHWA believes that relying on the definition for “cost of components” in FAR 25.003 is preferable to other methods, such as considering whether substantial transformation has occurred. For components purchased and then incorporated into an EV charger, the cost of that component would be the acquisition cost, including transportation costs to the place of incorporation (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 and then incorporated into an EV charger, the cost of that component would be all costs associated with the manufacture of the component, including transportation costs to the place of incorporation, plus allocable overhead costs, but excluding profit. To the extent that costs do not fit into this definition, FHWA will not consider them in determining whether an EV charger is covered by this waiver’s 55 percent phase. For instance, this would not cover Manufacturer Value Add as that is not a cost associated with the manufacture of the component.

¹⁸ See 48 CFR 25.003.

This definition would include the cost of subassembly of foreign parts into the component for components manufactured by the EV charger manufacturer as it is a cost associated with the manufacture of the component. For components purchased by the EV charger manufacturer, the cost of subassembly of foreign parts would be reflected in the acquisition cost of that component. Based on this definition, the cost of all components used in final assembly, whether manufactured or purchased by the EV charger manufacturer, will be considered when determining whether a charger is covered during the 55 percent phase of this waiver.

In terms of labor costs, for purchased components, FHWA expects the labor cost to be built into the acquisition cost of the component and it should not be accounted for separately. For manufactured components, labor costs associated with the manufacture of the end product will not be considered to be the cost of a component; however, the labor costs associated with the manufacture of the component itself will be. Such costs are costs associated with the manufacture of the component.

Applicability of Buy America Iron and Steel Requirements to Predominantly Iron and Steel Components of EV Chargers: Commenters disagreed over whether FHWA should apply existing Buy America requirements regarding iron and steel to primarily steel and iron components of EV chargers. On one side, commenters argued that FHWA should not apply such requirements to any specific predominantly iron or steel EV charger component. These commenters argued that doing so would complicate compliance and pose an undue burden on EV charger manufacturers in terms of time and cost. TeraWatt also noted that because EV chargers need to have their final assembly occur in the United States and meet the cost of component threshold set out in this waiver to be covered by it, there was no need to turn to FHWA's existing iron and steel requirements to ensure the expansion of domestic manufacturing capacity. The ZETA, Enel X Way, and NCTCOG argued that imposing FHWA's existing iron and steel

requirements under Buy America would create additional roadblocks to the completion of EV charging infrastructure projects. ABB E-Mobility argued that the domestic availability of steel for which all manufacturing processes occurs in the United States is limited and could be cost prohibitive when integrated into EV chargers and recommended FHWA not require that predominantly steel components use steel for which the entire manufacturing process occurs in the United States. The AGC further argued that singling out any specific component to be excluded from the waiver would provide unnecessary complications and potentially cause delays. Several commenters added that FHWA's current steel and iron requirements under 23 U.S.C. 313 should not apply to EV chargers at any point, claiming that while EV chargers may contain iron and steel components, they are not predominantly steel and iron. ChargePoint went further, recommending that FHWA exclude any steel and iron requirements indefinitely.

Other commenters disagreed and stated that FHWA's existing requirements for iron and steel under Buy America should apply to at least some EV charger components. Nucor and AISI, two opponents of the proposed waiver, agreed that the waiver should not apply to all components of an EV charger. These two commenters stated that the domestic steel industry has the capacity to supply steel for use in EV chargers and that products used in EV chargers, such as the EV charger's housing, are readily available from domestic steel producers. Tritium also stated that it was comfortable with excluding predominantly iron and steel components from coverage under this waiver if manufacturers were able to count these excluded components to meet the cost of component thresholds.

The FHWA Response: FHWA agrees with certain commenters that it is in the public interest to apply this waiver to all components of an EV charger. In general, except with respect to the housing of an EV charger, commenters to the proposed waiver did not provide sufficient information as to which components were predominantly iron

or steel. Without readily available information on which components are more often than not predominantly iron or steel to apply a categorical rule, FHWA does not find it appropriate to place the onus on manufacturers and recipients to sift through components one by one to determine which are predominantly iron or steel. By specifying which predominantly steel and iron components of an EV charger are expected to comply with current FHWA Buy America requirements, manufacturers and recipients will have certainty over which components are covered, which will allow for projects involving those chargers to be completed more expeditiously.

The FHWA believes, however, that it is practical to apply FHWA's existing Buy America requirements for predominantly iron or steel components to specifically identified components of an EV charger that are predominantly iron or steel. Based on comments received, the only component identified as potentially being predominantly iron or steel is an EV charger's housing. As indicated in the responses to the 2021 RFI, the housing may comprise over 50 percent of the costs of the charger. While other components may contain some amounts of iron and steel, the housing was the only component mentioned by commenters to the 2021 RFI as being predominantly iron and steel. In addition, ABB E-Mobility commented on the proposed waiver of the significant amounts of steel included in the housing.

After reviewing the comments received, FHWA believes that housing predominantly made of iron or steel should not be covered by this waiver and therefore must comply with existing FHWA Buy America requirements. The purpose of FHWA's Buy America requirements is to ensure that, where possible, iron and steel products are produced in the United States. The FHWA believes that waivers should be used sparingly; if a product would otherwise be covered by FHWA's iron and steel Buy America requirements, FHWA believes those requirements should apply to that product absent sufficient justification to the contrary. An EV charger's housing has been

repeatedly described to FHWA as being the single component with a significant percentage of its costs being comprised of the cost of its steel and iron. This also aligns with FHWA's existing treatment of predominantly iron and steel components of manufactured products. Current FHWA policy does not distinguish between predominantly iron and steel components of any manufactured product and predominantly iron and steel components of predominantly iron and steel manufactured products, and FHWA does not find it necessary to create such a distinction here. The FHWA agrees with Tritium, however, that if an EV charger does feature a housing that is predominantly iron or steel, FHWA will consider the cost of that cabinet when calculating the cost of components to determine whether the EV charger falls under this waiver during the 55 percent phase.

The FHWA does not believe that removing housings that are predominantly iron or steel from this waiver's coverage will cause an undue burden on EV charger manufacturers, contrary to what was argued by some commenters. Based on comments from the steel industry, there is an adequate amount of domestic steel available, and commenters did not present arguments that there was anything unique about an EV charger's housing that would prevent it from being sourced and assembled domestically, consistent with how other predominantly steel and iron components of manufactured products are treated regularly in Federal-aid highway projects.

H. Coverage of Subcomponents

Application of Waiver to Subcomponents: Commenters suggested that the domestic content provisions of this waiver should only apply at the component level, not at the subcomponent level. In essence, these commenters requested that when determining if EV chargers were covered by the 55 percent phase, FHWA should determine the cost of components manufactured in the United States without including the cost of subcomponents. According to these commenters, FHWA should allow for the

sourcing of subcomponents from international sources throughout the lifetime of this waiver due to the delay it would take manufacturers to either locate and substitute domestically sourced subcomponents or alter the designs of their chargers, the costs of doing so, the challenge to track and certify subcomponents, and their opinion that applying this waiver at the subcomponent level would not meaningfully further FHWA's domestic manufacturing goals. The ZETA added that they believe the standard of the 55 percent phase, where the waiver would cover EV chargers only if the cost of components manufactured in the United States exceeds 55 percent of the cost of all components, could only be achievable if subcomponents could be sourced internationally. ABB E-Mobility urged FHWA to state that subcomponents could be used without regard to their country of origin, arguing that there is a need to be able to source subcomponents internationally and that EV charging demand is unlikely to shift production of these subcomponents to the United States, considering the size of the EV charger industry. BTC Power recommended that FHWA should copy the regulatory definition the Federal Transit Administration uses for determining whether a manufactured product is considered produced in the United States, with 49 CFR 661.5(d)(2) stating that "[a] component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents."

The FHWA Response: To be covered by the initial phase of this waiver, the final assembly process of EV chargers must occur in the United States; this includes the incorporation of subcomponents into the final EV charger. It does not include the assembly of the subcomponent itself or the assembly of subcomponents into components. To be covered by the 55 percent phase, the cost of components manufactured in the United States must exceed 55 percent of the cost of all components. In alignment with the definition of "cost of components" in FAR 25.003, FHWA did not and does not intend for subcomponents to be considered when calculating the cost of components to

determine coverage under the 55 percent phase. While the cost of subcomponents may factor into the cost of components, the cost of subcomponents should not be separately calculated and used to determine whether a charger is covered by this waiver.

Exclusion of “Non-Substantial” Components: PowerCharge requested that non-substantial components of EV chargers, such as screws and clips, be exempt from the calculation of an EV charger’s steel and iron content.

The FHWA Response: FHWA does not believe this change is necessary. At all times that this waiver is active, it will cover EV chargers where final assembly occurs in the U.S. and, after the first phase-out period, where the cost of components manufactured in the U.S. exceeds 55 percent of the cost of all components. Screws and clips, which PowerCharge mentioned as “non-substantial components,” will many times be considered subcomponents, which, as mentioned above, are not included in calculations for the purpose of determining coverage under the 55 percent phase. Further, to the extent that a non-substantial component exists, is not manufactured domestically, and is included in an EV charger, that charger may still be covered under this waiver. Such components are likely to cost a de minimis amount, and, even at the 55 percent phase, this waiver still covers EV chargers for which the cost of components exceeds 55 percent of the cost of all components. The FHWA does not believe that including the costs of such components in calculating the costs of all components for the purpose of the 55 percent phase presents a significant burden to manufacturers and does not find it necessary to explicitly exclude minor components.

I. Buy America Processes

Standardized Certification Process: Commenters routinely requested that there be a standardized process to demonstrate compliance with Buy America requirements, with most of them suggesting that FHWA develop such a process. The AASHTO recommended developing a process for vendors to provide information about the

percentage of materials that are sourced domestically, as well as a consistent method for State DOTs to confirm the accuracy of such information. Blink Charging suggested FHWA establish a compliance and certification process specifically focused on EV chargers. The EVCA expressed concern about the potential lack of consistency if certification is not standardized at the Federal level. Wallbox suggested that a public or third-party entity be responsible for Buy America certification.

The FHWA Response: To the extent that many commenters suggested a Buy America certification process that extended beyond EV chargers, that falls outside the scope of this waiver. In terms of designing a certification process for EV chargers covered by this waiver, FHWA does not believe it necessary to alter its existing certification processes specifically for EV chargers. Doing so would create a separate certification process for EV chargers, which would cause unnecessary confusion and delay as recipients who are accustomed to FHWA's current certification process learn how this new process would work.

List of Buy America-Certified Products: Other commenters suggested that FHWA should maintain a list of Buy America compliant products, including Buy America compliant EV chargers.

The FHWA Response: Similarly, to the extent that these commenters suggested that FHWA maintain a list of Buy America-compliant products outside of EV chargers, that falls outside the scope of this waiver. In terms of compiling a list of which EV chargers are covered by this waiver, this waiver is not the appropriate place to require that EV charger manufacturers provide information to the Agency, nor, as mentioned above, does FHWA believe it should undertake its own certification process for EV chargers.

IV. Final Public Interest Waiver

Based on all the information available to FHWA, FHWA concludes that applying the Buy America requirements of 23 U.S.C. 313 for steel, iron, and manufactured products and section 70914 of BABA for construction materials to EV chargers on FHWA-assisted infrastructure projects would be inconsistent with the public interest. A waiver of these requirements under 23 U.S.C. 313(b)(1), 23 CFR 635.410(c), and section 70914(b) of BABA, structured to phase out over time, is thus appropriate. In addition, FHWA is removing EV chargers from being covered by the existing Manufactured Products General Waiver, starting on the date of this notice. In consideration of the foregoing, FHWA is issuing this waiver as stated below:

The FHWA will apply a waiver of Buy America requirements under 23 U.S.C. 313 and section 70914 of BABA to EV chargers and all components of EV chargers if final assembly occurs in the United States for all chargers that are manufactured from the effective date of this waiver until June 30, 2024. This phase applies only to EV chargers that are manufactured during this period and for which recipients begin installation by October 1, 2024. In addition, all predominantly steel and iron housing components are excluded from the waiver and must meet FHWA's Buy America requirements for steel and iron.

Starting on July 1, 2024, this waiver will not apply to EV chargers for which the cost of components manufactured in the United States does not exceed 55 percent of the cost of all components. This means that any EV chargers which are manufactured on and after July 1, 2024, would be covered by this waiver only if: (i) final assembly occurs in the United States; and (ii) the cost of components manufactured in the United States exceeds 55 percent of the cost of all components. All predominantly steel and iron housing components continue to be excluded from the waiver and must meet FHWA's Buy America requirements for steel and iron. The cost of any such housing shall be included as a cost of an EV charger's components when calculating whether the cost of

components manufactured in the United States exceed 55 percent of the cost of all components. The FHWA considers the “date of manufacture” to be the date on which the EV charger, as defined further below, has its final assembly occur and is in an operational state.

This waiver will remain in place until terminated by FHWA. In accordance with section 70914(d)(1) of BABA, FHWA will commence a review of this waiver no later than 5 years from the effective date of this waiver, at which time FHWA may discontinue this waiver if it is found to no longer be in the public interest. The FHWA, however, reserves the right to modify or shorten the duration of this waiver or any of its phases if it obtains information indicating that this waiver or any of its phases are no longer in the public interest. The FHWA will conduct RFIs every 6 months from this waiver’s effective date to July 1, 2024, to receive information on the state of the EV charger industry. This information may lead FHWA to amend this waiver to, for example, state that EV chargers are covered by this waiver only if final assembly occurs in the United States and the cost of components manufactured in the United States exceeds 55 percent of the cost of all components for waivers that are manufactured before July 1, 2024, with the results of the RFIs determining what this new date will be.

For the purpose of this waiver, FHWA considers the cost of a component to be based on whether it is purchased or manufactured when it is incorporated into the EV charger. The FHWA will use the standards in FAR 25.003 to determine the allowable costs included in purchased or manufactured components and will use the standards in FAR 31.201-4 to determine overhead costs that are generally allocable. In other words, FHWA will include acquisition costs (including transportation costs to the place of incorporation into the end product) and any applicable duty (regardless of whether a duty-free certificate of entry is issued) for purchased components. For manufactured components, FHWA will include all costs associated with the manufacture of the

component (including transportation costs and quality testing) and allocable overhead costs; FHWA will not include profits and any labor costs associated with the manufacture of the end product. The FHWA will consider allocable overhead costs to be (a) costs incurred specifically for the contract; (b) benefit both the contract and other work and can be distributed to each in reasonable proportion to the benefits received; or (c) are necessary to the overall operation of the business, even if a direct relationship to any particular cost objective cannot be shown.

For purpose of this waiver, FHWA defines “EV charger” to mean the EV charger unit itself and the equipment contained inside it. This definition does not include associated equipment external to the EV charger, parking areas adjacent to the EV charger, and lanes for vehicle ingress and egress. In addition, this waiver does not cover an EV charger’s housing (also known as its cabinet or enclosure) if it is comprised predominantly of steel or iron; however, the cost of housing comprised predominantly of steel and iron must be used in the cost of components calculation. For the purposes of this waiver, an EV charger’s housing is defined as the component of the EV charger that contains the electronics that convert electricity to direct current.

For any areas, products, or materials excluded from this waiver, FHWA’s existing Buy America requirements and policies will continue to apply, including the new requirement applicable to construction materials established under BABA. This means, for example, that the requirements of 23 U.S.C. 313 and section 70914 of BABA will apply to the housing of an EV charger if it is predominantly steel or iron. The FHWA will consider the cost of an EV charger’s housing when considering whether the cost of components manufactured in the United States exceeds 55 percent of the cost of all components in the EV charger, even if that housing is predominantly steel or iron and is not covered by this waiver. In other words, starting on July 1, 2024, the waiver will apply only to EV chargers for which the cost of all components, including the cost of the

housing if it is predominantly steel or iron, manufactured in the United States exceeds 55 percent of the cost of all components, including a housing that is predominantly steel or iron.

For purpose of this waiver, FHWA considers an EV charger to fall under the phase of the waiver that exists on the date when that EV charger was manufactured.

The OMB Implementation Guidance provides that, before granting a waiver in the public interest, to the extent permitted by law, Agencies shall assess whether a significant portion of any cost advantage of a foreign-sourced product is “the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products.” OMB Implementation Guidance at p. 12. E.O. 14005 at Section 5 includes a similar requirement for “steel, iron, or manufactured goods.” However, because the public interest waiver that FHWA is finalizing in this notice is not based on consideration of the cost advantage of any foreign-sourced steel, iron, or manufactured product content in EV chargers, there is not a specific cost advantage for FHWA to now consider.

In accordance with the provisions of Section 117 of the SAFETEA-LU Technical Corrections Act of 2008 (Pub. L. 110-244), FHWA is providing this notice as its finding that a waiver of Buy America requirements is appropriate. FHWA invites public comment on this finding for an additional 5 days following the date of publication of this notice. Comments may be submitted to FHWA’s Website via the link provided to the waiver page noted above by **[INSERT DATE 5 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Comments received during that period will be reviewed, but the finding will continue to remain valid. Those comments may influence FHWA’s decision to terminate or modify a finding.

Issued in Washington, DC under authority delegated in 49 CFR 1.85.

Shailen P. Bhatt,

Administrator,

Federal Highway Administration.

[FR Doc. 2023-03498 Filed: 2/17/2023 8:45 am; Publication Date: 2/21/2023]