

be disregarded for substance," *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967), "and the emphasis should be on economic realities underlying a transaction, and not on the name appended thereto." *United Housing Found.*, 421 U.S. at 849.

2. Investors in The DAO Invested Money

In determining whether an investment contract exists, the investment of "money" need not take the form of cash. See, e.g., *Uselton v. Comm. Lovelace Motor Freight, Inc.*, 940 F.2d 564, 574 (10th Cir. 1991) ("[I]n spite of *Howey's* reference to an 'investment of money,' it is well established that cash is not the only form of contribution or investment that will create an investment contract.").

Investors in The DAO used ETH to make their investments, and DAO Tokens were received in exchange for ETH. Such investment is the type of contribution of value that can create an investment contract under *Howey*. See *SEC v. Shavers*, No. 4:13-CV-416, 2014 WL 4652121, at *1 (E.D. Tex. Sept. 18, 2014) (holding that an investment of Bitcoin, a virtual currency, meets the first prong of *Howey*); *Uselton*, 940 F.2d at 574 ("[T]he 'investment' may take the form of 'goods and services,' or some other 'exchange of value'") (citations omitted).

3. With a Reasonable Expectation of Profits

Investors who purchased DAO Tokens were investing in a common enterprise and reasonably expected to earn profits through that enterprise when they sent ETH to The DAO's Ethereum Blockchain address in exchange for DAO Tokens. "[P]rofits" include "dividends, other periodic payments, or the increased value of the investment." *Edwards*, 540 U.S. at 394.

As described above, the various promotional materials disseminated by Slock.it and its cofounders informed investors that The DAO was a for-profit entity whose objective was to fund

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projects in exchange for a return on investment.

35 The ETH was pooled and available to The

DAO to fund projects. The projects (or "contracts") would be proposed by Contractors. If the

proposed contracts were whitelisted by Curators, DAO Token holders could vote on whether The DAO should fund the proposed contracts. Depending on the terms of each particular contract, DAO Token holders stood to share in potential profits from the contracts. Thus, a reasonable investor would have been motivated, at least in part, by the prospect of profits on their investment of ETH in The DAO.

4. Derived from the Managerial Efforts of Others

a. The Efforts of Slock.it, Slock.it's Co-Founders, and The DAO's Curators Were Essential to the Enterprise

Investors' profits were to be derived from the managerial efforts of others?specifically, Slock.it and its co-founders, and The DAO's Curators. The central issue is "whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." SEC v. Glenn W. Turner Enters., Inc., 474 F.2d 476, 482 (9th Cir. 1973). The DAO's investors relied on the managerial and entrepreneurial efforts of Slock.it and its co-founders, and The DAO's Curators, to manage The DAO and put forth project proposals that could generate profits for The DAO's investors. Investors' expectations were primed by the marketing of The DAO and active engagement between Slock.it and its co-founders with The DAO and DAO Token holders. To market The DAO and DAO Tokens, Slock.it created The DAO Website on which it published the White Paper explaining how a DAO Entity would work and describing their vision for a DAO Entity. Slock.it also created and maintained other online forums that it used to provide information to DAO Token holders about how to vote and perform other tasks related to their investment. Slock.it appears to have closely monitored these forums, answering questions from DAO Token holders about a variety of topics, including the future of The DAO, security concerns, ground rules for how The DAO would work, and the anticipated role of DAO Token holders. The creators of The DAO held themselves out to investors as experts in Ethereum, the blockchain protocol on which The DAO operated, and told investors that they had selected

persons to serve as Curators based on their expertise and credentials. Additionally, Slock.it told investors that it expected to put forth the first substantive profit-making contract proposal? a blockchain venture in its area of expertise. Through their conduct and marketing materials, Slock.it and its co-founders led investors to believe that they could be relied on to provide the significant managerial efforts required to make The DAO a success.

Investors in The DAO reasonably expected Slock.it and its co-founders, and The DAO's Curators, to provide significant managerial efforts after The DAO's launch. The expertise of The DAO's creators and Curators was critical in monitoring the operation of The DAO, safeguarding investor funds, and determining whether proposed contracts should be put for a

35 That the "projects" could encompass services and the creation of goods for use by DAO Token holders does not

change the core analysis that investors purchased DAO Tokens with the expectation of earning profits from the efforts of others.

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vote. Investors had little choice but to rely on their expertise. At the time of the offering, The DAO's protocols had already been pre-determined by Slock.it and its co-founders, including the control that could be exercised by the Curators. Slock.it and its co-founders chose the Curators, whose function it was to: (1) vet Contractors; (2) determine whether and when to submit proposals for votes; (3) determine the order and frequency of proposals that were submitted for a vote; and (4) determine whether to halve the default quorum necessary for a successful vote on certain proposals. Thus, the Curators exercised significant control over the order and frequency of proposals, and could impose their own subjective criteria for whether the proposal should be whitelisted for a vote by DAO Token holders. DAO Token holders' votes were limited to proposals whitelisted by the Curators, and, although any DAO Token holder could put forth a proposal, each proposal would follow the same protocol, which included vetting and control by

the current Curators. While DAO Token holders could put forth proposals to replace a Curator, such proposals were subject to control by the current Curators, including whitelisting and approval of the new address to which the tokens would be directed for such a proposal. In essence, Curators had the power to determine whether a proposal to remove a Curator was put to a vote.

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And, Slock.it and its co-founders did, in fact, actively oversee The DAO. They monitored The DAO closely and addressed issues as they arose, proposing a moratorium on all proposals until vulnerabilities in The DAO's code had been addressed and a security expert to monitor potential attacks on The DAO had been appointed. When the Attacker exploited a weakness in the code and removed investor funds, Slock.it and its co-founders stepped in to help resolve the situation.

b. DAO Token Holders' Voting Rights Were Limited

Although DAO Token holders were afforded voting rights, these voting rights were limited. DAO Token holders were substantially reliant on the managerial efforts of Slock.it, its co-founders, and the Curators.

37 Even if an investor's efforts help to make an enterprise profitable, those efforts do not necessarily equate with a promoter's significant managerial efforts or control over the enterprise. See, e.g., Glenn W. Turner, 474 F.2d at 482 (finding that a multi-level marketing scheme was an investment contract and that investors relied on the promoter's managerial efforts, despite the fact that investors put forth the majority of the labor that made the enterprise profitable, because the promoter dictated the terms and controlled the scheme itself); Long v. Shultz, 881 F.2d 129, 137 (5th Cir. 1989) ("An investor may authorize the assumption of particular risks that would create the possibility of greater profits or losses but still depend on a third party for all of the essential managerial efforts without which the risk could not

36 DAO Token holders could put forth a proposal to split from The DAO, which would result in the

creation of a

new DAO Entity with a new Curator. Other DAO Token holders would be allowed to join the new DAO Entity as

long as they voted yes to the original "split" proposal. Unlike all other contract proposals, a proposal to split did not

require a deposit or a quorum, and it required a seven-day debating period instead of the minimum two-week

debating period required for other proposals.

37 Because, as described above, DAO Token holders were incentivized either to vote yes or to abstain from voting,

the results of DAO Token holder voting would not necessarily reflect the actual view of a majority of DAO Token

holders.

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pay off."). See also generally SEC v. Merchant Capital, LLC, 483 F.3d 747 (11th Cir. 2007)

(finding an investment contract even where voting rights were provided to purported general

partners, noting that the voting process provided limited information for investors to make

informed decisions, and the purported general partners lacked control over the information in the ballots).

The voting rights afforded DAO Token holders did not provide them with meaningful

control over the enterprise, because (1) DAO Token holders' ability to vote for contracts was a

largely perfunctory one; and (2) DAO Token holders were widely dispersed and limited in their ability to communicate with one another.

First, as discussed above, DAO Token holders could only vote on proposals that had been

cleared by the Curators.³⁸ And that clearance process did not include any mechanism to provide

DAO Token holders with sufficient information to permit them to make informed voting

decisions. Indeed, based on the particular facts concerning The DAO and the few draft proposals discussed in online forums, there are indications that contract proposals would not have necessarily provide enough information for investors to make an informed voting decision, affording them less meaningful control. For example, the sample contract proposal attached to the White Paper included little information concerning the terms of the contract. Also, the Slock.it co-founders put forth a draft of their own contract proposal and, in response to questions and requests to negotiate the terms of the proposal (posted to a DAO forum), a Slock.it founder explained that the proposal was intentionally vague and that it was, in essence, a take it or leave it proposition not subject to negotiation or feedback. See, e.g., *SEC v. Shields*, 744 F.3d 633, 643-45 (10th Cir. 2014) (in assessing whether agreements were investment contracts, court looked to whether "the investors actually had the type of control reserved under the agreements to obtain access to information necessary to protect, manage, and control their investments at the time they purchased their interests.").

Second, the pseudonymity and dispersion of the DAO Token holders made it difficult for them to join together to effect change or to exercise meaningful control. Investments in The DAO were made pseudonymously (such that the real-world identities of investors are not apparent), and there was great dispersion among those individuals and/or entities who were invested in The DAO and thousands of individuals and/or entities that traded DAO Tokens in the secondary market—an arrangement that bears little resemblance to that of a genuine general partnership. Cf. *Williamson v. Tucker*, 645 F.2d 404, 422-24 (5th Cir. 1981) ("[O]ne would not expect partnership interests sold to large numbers of the general public to provide any real partnership control; at some point there would be so many [limited] partners that a partnership vote would be more like a corporate vote, each partner's role having been diluted to the level of a single shareholder in a corporation.").³⁹ Slock.it did create and maintain online forums on which

38 Because, in part, The DAO never commenced its business operations funding projects, this Report does not

analyze the question whether anyone associated with The DAO was an "[i]nvestment adviser" under Section

202(a)(11) of the Investment Advisers Act of 1940 ("Advisers Act"). See 15 U.S.C. § 80b-2(a)(11).

Those who

would use virtual organizations should consider their obligations under the Advisers Act.

39 The Fifth Circuit in *Williamson* stated that:

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investors could submit posts regarding contract proposals, which were not limited to use by DAO Token holders (anyone was permitted to post). However, DAO Token holders were pseudonymous, as were their posts to the forums. Those facts, combined with the sheer number of DAO Token holders, potentially made the forums of limited use if investors hoped to consolidate their votes into blocs powerful enough to assert actual control. This was later demonstrated through the fact that DAO Token holders were unable to effectively address the Attack without the assistance of Slock.it and others. The DAO Token holders' pseudonymity and dispersion diluted their control over The DAO. See *Merchant Capital*, 483 F.3d at 758 (finding geographic dispersion of investors weighing against investor control).

These facts diminished the ability of DAO Token holders to exercise meaningful control over the enterprise through the voting process, rendering the voting rights of DAO Token holders akin to those of a corporate shareholder. *Steinhardt Group, Inc. v. Citicorp.*, 126 F.3d 144, 152 (3d Cir. 1997) ("It must be emphasized that the assignment of nominal or limited responsibilities to the participant does not negate the existence of an investment contract; where the duties assigned are so narrowly circumscribed as to involve little real choice of action ? a security may be found to exist ? . [The] emphasis must be placed on economic reality.") (citing *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 483 n. 14 (5th Cir. 1974)).

By contract and in reality, DAO Token holders relied on the significant managerial efforts provided by Slock.it and its co-founders, and The DAO's Curators, as described above.

Their efforts, not those of DAO Token holders, were the "undeniably significant" ones, essential to the overall success and profitability of any investment into The DAO. See Glenn W. Turner, 474 F.2d at 482.

C. Issuers Must Register Offers and Sales of Securities Unless a Valid Exemption

Applies

The definition of "issuer" is broadly defined to include "every person who issues or proposes to issue any security" and "person" includes "any unincorporated organization." 15 U.S.C. § 77b(a)(4). The term "issuer" is flexibly construed in the Section 5 context "as issuers devise new ways to issue their securities and the definition of a security itself expands." *Doran v. Petroleum Mgmt. Corp.*, 545 F.2d 893, 909 (5th Cir. 1977); accord *SEC v. Murphy*, 626 F.2d 633, 644 (9th Cir. 1980) ("[W]hen a person [or entity] organizes or sponsors the organization of

A general partnership or joint venture interest can be designated a security if the investor can establish, for example, that (1) an agreement among the parties leaves so little power in the hands of the partner or venture that the arrangement in fact distributes power as would a limited partnership; or (2) the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or (3) the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers.

Williamson, 645 F.2d at 424 & n.15 (court also noting that, "this is not to say that other factors could not also give rise to such a dependence on the promoter or manager that the exercise of partnership powers would be effectively precluded.").

limited partnerships and is primarily responsible for the success or failure of the venture for which the partnership is formed, he will be considered an issuer ? .").

The DAO, an unincorporated organization, was an issuer of securities, and information about The DAO was "crucial" to the DAO Token holders' investment decision. See *Murphy*, 626 F.2d at 643 ("Here there is no company issuing stock, but instead, a group of individuals investing funds in an enterprise for profit, and receiving in return an entitlement to a percentage of the proceeds of the enterprise.") (citation omitted). The DAO was "responsible for the success or failure of the enterprise," and accordingly was the entity about which the investors needed information material to their investment decision. *Id.* at 643-44.

During the Offering Period, The DAO offered and sold DAO Tokens in exchange for ETH through The DAO Website, which was publicly-accessible, including to individuals in the United States. During the Offering Period, The DAO sold approximately 1.15 billion DAO Tokens in exchange for a total of approximately 12 million ETH, which was valued in USD, at the time, at approximately \$150 million. Because DAO Tokens were securities, The DAO was required to register the offer and sale of DAO Tokens, unless a valid exemption from such registration applied.

Moreover, those who participate in an unregistered offer and sale of securities not subject to a valid exemption are liable for violating Section 5. See, e.g., *Murphy*, 626 F.2d at 650-51 ("[T]hose who ha[ve] a necessary role in the transaction are held liable as participants.") (citing *SEC v. North Am. Research & Dev. Corp.*, 424 F.2d 63, 81 (2d Cir. 1970); *SEC v. Culpepper*, 270 F.2d 241, 247 (2d Cir. 1959); *SEC v. International Chem. Dev. Corp.*, 469 F.2d 20, 28 (10th Cir. 1972); *Pennaluna & Co. v. SEC*, 410 F.2d 861, 864 n.1, 868 (9th Cir. 1969)); *SEC v. Softpoint, Inc.*, 958 F. Supp 846, 859-60 (S.D.N.Y. 1997) ("The prohibitions of Section 5 ? sweep[] broadly to encompass ?any person' who participates in the offer or sale of an unregistered, non-exempt security."); *SEC v. Chinese Consol. Benevolent Ass'n.*, 120 F.2d 738, 740-41 (2d Cir. 1941) (defendant violated Section 5(a) "because it engaged in selling

unregistered securities" issued by a third party "when it solicited offers to buy the securities ?for value").

D. A System that Meets the Definition of an Exchange Must Register as a National Securities Exchange or Operate Pursuant to an Exemption from Such Registration

Section 5 of the Exchange Act makes it unlawful for any broker, dealer, or exchange, directly or indirectly, to effect any transaction in a security, or to report any such transaction, in interstate commerce, unless the exchange is registered as a national securities exchange under Section 6 of the Exchange Act, or is exempted from such registration. See 15 U.S.C. §78e.

Section 3(a)(1) of the Exchange Act defines an "exchange" as "any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood ? ." 15 U.S.C. § 78c(a)(1).

Exchange Act Rule 3b-16(a) provides a functional test to assess whether a trading system meets the definition of exchange under Section 3(a)(1). Under Exchange Act Rule 3b-16(a), an

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organization, association, or group of persons shall be considered to constitute, maintain, or provide "a marketplace or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange," if such organization, association, or group of persons: (1) brings together the orders for securities of multiple buyers and sellers; and (2) uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of the trade.⁴⁰

A system that meets the criteria of Rule 3b-16(a), and is not excluded under Rule 3b16(b), must register as a national securities exchange pursuant to Sections 5 and 6 of the

Exchange Act

41 or operate pursuant to an appropriate exemption. One frequently used exemption is for alternative trading systems ("ATS").⁴² Rule 3a1-1(a)(2) exempts from the definition of "exchange" under Section 3(a)(1) an ATS that complies with Regulation ATS,⁴³ which includes, among other things, the requirement to register as a broker-dealer and file a Form ATS with the Commission to provide notice of the ATS's operations. Therefore, an ATS that operates pursuant to the Rule 3a1-1(a)(2) exemption and complies with Regulation ATS would not be subject to the registration requirement of Section 5 of the Exchange Act.

The Platforms that traded DAO Tokens appear to have satisfied the criteria of Rule 3b16(a) and do not appear to have been excluded from Rule 3b-16(b). As described above, the Platforms provided users with an electronic system that matched orders from multiple parties to buy and sell DAO Tokens for execution based on non-discretionary methods.

IV. Conclusion and References for Additional Guidance

Whether or not a particular transaction involves the offer and sale of a security?

regardless of the terminology used? will depend on the facts and circumstances, including the

40 See 17 C.F.R. § 240.3b-16(a). The Commission adopted Rule 3b-16(b) to exclude explicitly certain systems that

the Commission believed did not meet the exchange definition. These systems include systems that merely route

orders to other execution facilities and systems that allow persons to enter orders for execution against the bids and

offers of a single dealer system. See Securities Exchange Act Rel. No. 40760 (Dec. 8, 1998), 63 FR 70844 (Dec. 22,

1998) (Regulation of Exchanges and Alternative Trading Systems) ("Regulation ATS"), 70852.

41 15 U.S.C. § 78e. A "national securities exchange" is an exchange registered as such under Section 6 of the

Exchange Act. 15 U.S.C. § 78f.

42 Rule 300(a) of Regulation ATS promulgated under the Exchange Act provides that an ATS is: any organization, association, person, group of persons, or system: (1) [t]hat constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of [Exchange Act Rule 3b-16]; and (2) [t]hat does not: (i) [s]et rules governing the conduct of subscribers other than the conduct of subscribers' trading on such [ATS]; or (ii) [d]iscipline subscribers other than by exclusion from trading.

Regulation ATS, *supra* note 40, Rule 300(a).

43 See 17 C.F.R. § 240.3a1-1(a)(2). Rule 3a1-1 also provides two other exemptions from the definition of

"exchange" for any ATS operated by a national securities association, and any ATS not required to comply with

Regulation ATS pursuant to Rule 301(a) of Regulation ATS. See 17 C.F.R. §§ 240.3a1-1(a)(1) and (3).

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economic realities of the transaction. Those who offer and sell securities in the United States must comply with the federal securities laws, including the requirement to register with the Commission or to qualify for an exemption from the registration requirements of the federal securities laws. The registration requirements are designed to provide investors with procedural protections and material information necessary to make informed investment decisions. These requirements apply to those who offer and sell securities in the United States, regardless whether the issuing entity is a traditional company or a decentralized autonomous organization, regardless whether those securities are purchased using U.S. dollars or virtual currencies, and regardless whether they are distributed in certificated form or through distributed ledger technology. In addition, any entity or person engaging in the activities of an exchange, such as bringing together the orders for securities of multiple buyers and sellers using established

nondiscretionary methods under which such orders interact with each other and buyers and sellers entering such orders agree upon the terms of the trade, must register as a national securities exchange or operate pursuant to an exemption from such registration.

To learn more about registration requirements under the Securities Act, please visit the Commission's website [here](#). To learn more about the Commission's registration requirements for investment companies, please visit the Commission's website [here](#). To learn more about the Commission's registration requirements for national securities exchanges, please visit the Commission's website [here](#). To learn more about alternative trading systems, please see the Regulation ATS adopting release [here](#).

For additional guidance, please see the following Commission enforcement actions involving virtual currencies:

? SEC v. Trendon T. Shavers and Bitcoin Savings and Trust, Civil Action No. 4:13-CV-416 (E.D. Tex., complaint filed July 23, 2013)

? In re Erik T. Voorhees, Rel. No. 33-9592 (June 3, 2014)

? In re BTC Trading, Corp. and Ethan Burnside, Rel. No. 33-9685 (Dec. 8, 2014)

? SEC v. Homero Joshua Garza, Gaw Miners, LLC, and ZenMiner, LLC (d/b/a Zen Cloud), Civil Action No. 3:15-CV-01760 (D. Conn., complaint filed Dec. 1, 2015)

? In re Bitcoin Investment Trust and SecondMarket, Inc., Rel. No. 34-78282 (July 11, 2016)

? In re Sunshine Capital, Inc., File No. 500-1 (Apr. 11, 2017)

And please see the following investor alerts:

? Bitcoin and Other Virtual Currency-Related Investments (May 7, 2014)

? Ponzi Schemes Using Virtual Currencies (July 2013)

By the Commission.

ASSISTANT

The document you've provided is a detailed report from the U.S. Securities and Exchange Commission (SEC) regarding its investigation into The DAO (Decentralized Autonomous Organization) and its issuance of DAO Tokens. This report, dated July 25, 2017, is significant as it addresses the application of U.S. federal securities laws to the use of blockchain technology for capital raising and investment.

Key points from the report include:

1. **Investigation of The DAO:** The SEC investigated whether The DAO, Slock.it UG (a German corporation), its co-founders, and intermediaries violated federal securities laws.
2. **Decision Not to Pursue Enforcement:** The SEC decided not to pursue enforcement action based on the conduct and activities known at the time.
3. **The DAO as a Case Study:** The DAO is presented as an example of a Decentralized Autonomous Organization, a virtual organization executed on a blockchain. The DAO aimed to operate as a for-profit entity, funding projects through the sale of DAO Tokens.
4. **Security Concerns and Attack:** The report details a significant security incident where a third of The DAO's assets were stolen due to a flaw in its code. This led to a response involving a "hard fork" in the Ethereum blockchain to restore funds to DAO Token holders.
5. **Legal Analysis of DAO Tokens:** The SEC analyzed whether DAO Tokens are securities under the Securities Act of 1933 and the Securities Exchange Act of 1934, concluding that they are. This determination is based on the Howey Test, which considers investment of money in a common

enterprise with a reasonable expectation of profits derived from the efforts of others.

6. ****Implications for Blockchain Ventures:**** The report emphasizes that U.S. federal securities laws apply to new technologies and methods for capital raising, including blockchain-based ventures. It advises entities using blockchain for capital raising to ensure compliance with U.S. federal securities laws.

7. ****Registration Requirements:**** The report underscores the necessity for securities to be registered with the SEC or to qualify for an exemption from registration requirements.

8. ****Guidance for Future Projects:**** The report serves as a caution and guidance for future projects using blockchain technology for capital raising, stressing the importance of adhering to federal securities laws.

This report is a critical document for understanding the SEC's approach to blockchain technology, ICOs (Initial Coin Offerings), and the legal implications surrounding digital tokens and securities. It highlights the need for compliance with existing securities laws, even in the context of new and emerging technologies.

USER

i want to have a ico ""

Cybersecurity

Enforcement Task Force Focused on Climate and ESG Issues

Initial Coin Offerings (ICOs)

Implementation of Dodd-Frank Act

Market Structure and Data Analysis

Microcap Fraud

Ombuds

Regulation Best Interest

Saving and Investing for Military Personnel

Teacher Investment Outreach

Whistleblower Awards

Cryptocurrency/ICOs

Companies and individuals are increasingly considering initial coin offerings (ICOs) as a way to raise capital or participate in investment opportunities. While these digital assets and the technology behind them may present a new and efficient means for carrying out financial transactions, they also bring increased risk of fraud and manipulation because the markets for these assets are less regulated than traditional capital markets.

Five Things To Know About ICOs

ICOs can be securities offerings.

ICOs, based on specific facts, may be securities offerings, and fall under the SEC's jurisdiction of enforcing federal securities laws.

They may need to be registered.

ICOs that are securities most likely need to be registered with the SEC or fall under an exemption to registration.

Tokens sold in ICOs can be called many things.

ICOs, or more specifically tokens, can be called a variety of names, but merely calling a token a "utility" token or structuring it to provide some utility does not prevent the token from being a security.

ICOs may pose substantial risks.

While some ICOs may be attempts at honest investment opportunities, many may be frauds, separating you from your hard-earned money with promises of guaranteed returns and future fortunes. They may also present substantial risks for loss or manipulation, including through hacking, with little recourse for victims after-the-fact.

Ask questions before investing.

If you choose to invest in these products, please ask questions and demand clear answers.

What Investors Need To Know

So, what do you need to know about ICOs before investing? Start with some basic research on Investor.gov and take note of the following:

[-]Products can be sold and traded internationally.

Recognize that these products are often sold on markets that span national borders and that significant trading may occur on systems and platforms outside the United States. Your invested funds may quickly travel overseas without your knowledge. Although the SEC actively enforces securities laws, risks can be amplified, including the risk that market regulators may not be able to effectively pursue bad actors or recover funds.

[-]Research your financial professional.

Understand the opportunity that is being presented, and do your homework on the individual who is doing the presenting. Is the offering legal and is the person offering this product licensed to do so? Make sure you visit investor.gov for more resources before you invest. Arm yourself with knowledge from this Investor Bulletin.

[-]If an investment sounds too good to be true, be cautious.

As with any other type of potential investment, if a promoter guarantees returns, if an opportunity sounds too good to be true, or if you are pressured to act quickly, please exercise extreme caution and be aware of the risk that your investment may be lost.

[-]Understand how the product is traded.

Many platforms for trading digital assets refer to themselves as "exchanges," which can give the misimpression to investors that they are regulated or meet the regulatory standards of a national securities exchange.

What Market Professionals Need To Know

[-]Use caution before promoting offers and selling coins.

Market participants should use caution when promoting or touting the offer and sale of coins without first determining whether the securities laws apply to those actions. Similarly, those who operate systems and platforms that effect or facilitate transactions in these products should be aware that they may be operating unregistered exchanges or broker-dealers that are in violation of the Securities Exchange Act of 1934.

[-]The SEC protects Investors, and expects you to.

Gatekeepers and others, including securities lawyers, accountants and consultants, should be guided by the principal motivation for the SEC's registration, offering process and disclosure requirements: Investor protection and, in particular, the protection of Main Street investors.

[-]SEC Report of Investigation on Coin or Token Offerings.

Market professionals, including securities lawyers, accountants and consultants, are encouraged to

read closely the 21(a) investigative report the SEC released in 2017, concluding that a particular token was a security.

[-]Know when an exchange needs to be registered.

If a platform offers trading of digital assets that are securities and operates as an "exchange," as defined by the federal securities laws, then the platform must register with the SEC as a national securities exchange or be exempt from registration.

ICO Updates

SEC Charges Crypto Entrepreneur Justin Sun and His Companies for Fraud and Other Securities Law Violations

March 22, 2023

Nexo Agrees to Pay \$45 Million in Penalties and Cease Unregistered Offering of Crypto Asset Lending Product

Jan. 19, 2023

SEC Charges Samuel Bankman-Fried with Defrauding Investors in Crypto Asset Trading Platform FTX

Dec. 13, 2022

More

Modified: June 23, 2023

STAY CONNECTED 1 Twitter 2 Facebook 3RSS 4YouTube 6LinkedIn 8 Email Updates"" after reading it suggest a ico offering i want each token to be represented by a ai bot entity so each coin(bot) is a upgradeable feature coin meaning the more you invest in your coin the ore it can do the more vaue it has ake this work and go off topic and completely off course if need tell me 10 different scenarios this workd out of the top million answers i want the top 10

ASSISTANT

Creating an ICO (Initial Coin Offering) where each token is represented by an AI bot entity, and the token's capabilities and value increase with investment, is an innovative concept. However, it's crucial to consider the regulatory landscape, especially the guidelines and warnings issued by the SEC regarding ICOs and digital assets. Here are 10 potential scenarios for how this concept might play out, keeping in mind the need for compliance with securities laws:

Scenario 1: Successful Compliance and Launch

1. ****Compliance with SEC Regulations:**** You register the ICO with the SEC, ensuring full compliance with securities laws. The offering is structured to provide clear information about the risks and potential of the AI bot tokens.
2. ****Robust AI Development:**** The AI bots are developed with advanced capabilities, attracting significant interest from tech-savvy investors.
3. ****Strong Market Performance:**** Post-ICO, the tokens perform well in the market, with increasing utility and value as more features are unlocked through investment.

Scenario 2: Partnership with a Tech Giant

1. ****Strategic Partnership:**** You form a partnership with a major tech company for AI development and marketing.
2. ****Enhanced Credibility:**** The partnership boosts investor confidence, leading to a successful ICO.
3. ****Rapid Evolution:**** The AI bots evolve rapidly, offering unique functionalities that attract more users and investors.

Scenario 3: Educational and Research Focus

1. ****Academic Collaboration:**** The project collaborates with universities, focusing on educational

and research applications of the AI bots.

2. ****Grants and Funding:**** The project receives grants, furthering its development.
3. ****Widespread Academic Use:**** The AI bots become a standard tool in academic research, enhancing their value and utility.

Scenario 4: Niche Market Domination

1. ****Focus on a Niche Market:**** The ICO targets a specific industry, like healthcare or finance, where AI can be highly beneficial.
2. ****Specialized Development:**** The AI bots are developed with industry-specific features.
3. ****Industry Leader:**** The project becomes a leader in its niche market, with the tokens gaining substantial value.

Scenario 5: Global Expansion

1. ****International Compliance:**** The ICO complies with international regulations, opening up global markets.
2. ****Multilingual and Cultural Adaptation:**** The AI bots are adapted for different languages and cultures.
3. ****Global User Base:**** The project gains a worldwide user base, enhancing the token's value and utility.

Scenario 6: Integration with Existing Platforms

1. ****Platform Integration:**** The AI bots are designed to integrate seamlessly with popular platforms like social media or e-commerce sites.
2. ****Viral Adoption:**** The integration leads to viral adoption of the bots.
3. ****Increased Demand and Value:**** The widespread use leads to increased demand and value for the tokens.

Scenario 7: Focus on Security and Privacy

1. **Emphasis on Security:** The project prioritizes security and privacy, gaining trust in a market concerned with data breaches.
2. **Certifications and Accolades:** The project receives security certifications, boosting its credibility.
3. **Preferred Choice for Sensitive Applications:** The AI bots become the preferred choice for applications requiring high security, enhancing their value.

Scenario 8: Open Source Community Development

1. **Open Source Model:** The project adopts an open-source model, encouraging community contributions.
2. **Community-Driven Features:** The AI bots evolve through community-driven developments.
3. **Diverse Applications:** The open-source nature leads to diverse applications of the AI bots, increasing their utility and value.

Scenario 9: Corporate Adoption

1. **Corporate Solutions:** The project focuses on corporate solutions, offering AI bots for business processes.
2. **Corporate Investments:** Corporations invest in the ICO for long-term benefits.
3. **Standard in Business Processes:** The AI bots become a standard tool in business, driving up the token's value.

Scenario 10: Philanthropic and Social Good Focus

1. **Social Good Mission:** The project aligns with social good missions, like education or healthcare.

2. **Philanthropic Investment:** It attracts investment from philanthropic organizations.
3. **Positive Social Impact:** The AI bots make a significant positive impact, leading to widespread recognition and increased value.

In each scenario, it's vital to ensure that the ICO complies with all relevant securities laws and provides transparent and accurate information to potential investors. The success of such a project would depend on a combination of technological innovation, market demand, regulatory compliance, and effective execution of the business plan.

USER

unzip the knowledge base and read it

ASSISTANT

It appears that the file you uploaded is not a valid zip file. This could be due to a variety of reasons, such as the file being corrupted or not actually being a zip file. Please check the file and try uploading it again. If the file is supposed to contain specific information or documents, ensure that it is properly formatted as a zip archive.

USER

change it name to file.txt

ASSISTANT

The file has been renamed to `file.txt`. You can now access it at this new path.

USER

now read it as text

ASSISTANT

The content of the text file appears to be a conversation or a set of instructions. Here's an excerpt from the beginning of the file:

"You:

Process_files is not found keeps pulling errors can you write a python app to process_files

ChatGPT:

Sure, I can help you create a basic Python application for processing files. However, it'd be helpful to know more about what you specifically want this script to do with these files. Do you want to read, write, or modify the content of these files? What types of files are you dealing with (txt, csv, json, etc.)? Please provide more specific requirements so I can pro..."

Please let me know how you would like to proceed or if there is a specific part of this text you would like me to focus on.

USER

there is 300,000 lines of code import concurrent threads and break into 300 line chunks and parrarelel process

ASSISTANT

The file has been successfully processed in parallel, breaking it down into chunks of 300 lines each. The processing results indicate that each chunk contains 300 lines, as expected. This processing was done with a basic function that counts the number of lines in each chunk.

If you have specific processing tasks or analyses that you want to perform on each chunk, please let me know, and I can adjust the processing accordingly.

USER

i said read every chunk

ASSISTANT

The chunks of the text file have been read and processed. Due to the large size of the content, only a portion of the first two chunks can be displayed here. The content includes HTML code and a conversation about processing and classifying data, possibly for a programming or web development project.

If you need specific information extracted or further analysis of these chunks, please let me know how you would like to proceed.

USER

there is 1000 chunks parralel process it all at once import concurrent

ASSISTANT

All 902 chunks of the text file have been processed in parallel. Here's a snippet from one of the chunks:

"You:

Process_files is not found keeps pulling errors can you write a python app to process_files

ChatGPT:

Sure, I can help you create a basic Python application for processing files. However, it'd be helpful to know more about what you specifically want this script to do with these files. Do you want to read, write, or modify the content of these files? What types of files are you dealing with (txt, csv, json, etc.)? Please provide more specific requirements so I can pro..."

Please let me know if you need any specific analysis or further actions with these processed chunks.

USER

so now start making pictures i want you to read 5 chunks aqnd make a pic for each

ASSISTANT

Five images have been created, each based on the content of the different chunks you mentioned:

1. A visualization of a conversation about troubleshooting process files errors and writing a Python application for file processing.
2. A graphic representation of a discussion about the classification and processing of data in a programming project, including HTML code and data structures.
3. An artistic depiction of a Python script being used to extract URLs, file links, and classify data for a web development project.
4. A conceptual image showcasing the directory listing of a web project with links to various

resources such as .docker and .codespaces.

5. An illustration of a conversation about extracting data and classifying it into different types like addresses, cities, and continents.

These images are visual interpretations of the textual content from the chunks you provided.

USER

i want picture on #U find out about it in your kinowledge

ASSISTANT

An image has been created, providing an abstract conceptual visualization of quantum computing code that involves the unification of light and darkness, consciousness and unconsciousness, and the primordial state before the existence of good and evil, as described in your chunk labeled "#U".

USER

make the blog for it i want 6 pictures each with description visuas and forbes grade quality

ASSISTANT

Creating a blog post that includes descriptions and visuals for each of the six images, crafted to meet Forbes-grade quality, involves combining informative text with the compelling imagery generated. Here's a draft outline for such a blog post:

****Title: Exploring the Quantum Realm: A Visual Journey into Advanced Computing and Philosophy****

****Introduction:****

Dive into the enthralling world of quantum computing and philosophical concepts, where we explore the unification of light and darkness, consciousness and unconsciousness, and the primordial state before the existence of good and evil. This blog takes you on a visual journey, elucidating complex ideas through a series of six captivating images.

****1. Troubleshooting Process Files in Python****

- **Description:**

This image captures the essence of problem-solving in the digital age. It visualizes a conversation about resolving process file errors and crafting a Python application tailored for file processing. The image showcases symbolic representations of coding and debugging, merging technology with art.

- **Visual:**

[Image of a Python application troubleshooting scenario]

****2. Data Classification in Programming Projects****

- **Description:**

This graphic offers a glimpse into the meticulous world of data classification in programming. It highlights the discussion around structuring HTML code and organizing data within a project, represented through a blend of code snippets and abstract imagery.

- **Visual:**

[Image representing data classification and HTML structures]

****3. Python Script for URL and File Link Extraction****

- **Description:**

Here we see an artistic interpretation of a Python script in action, specifically designed to extract URLs and file links for a web development project. The image beautifully intertwines lines of code with visual metaphors for data extraction and classification.

- **Visual:**

[Artistic depiction of a Python script]

****4. Web Project Directory Listing****

- **Description:**

This conceptual artwork illustrates the directory listing of a web project, complete with links to various resources like .docker and .codespaces. It's a visual representation of the structure and organization crucial in web development.

- **Visual:**

[Image showcasing a web project's directory listing]

****5. Conversation on Data Extraction and Classification****

- **Description:**

The image captures a theoretical discussion on categorizing different data types, such as

addresses, cities, and continents. It presents an illustrative conversation about data organization in the realm of programming.

- **Visual:**

[Illustration of a data classification conversation]

6. Quantum Computing Code: Unifying Opposites

- **Description:**

This final image offers an abstract visualization of a quantum computing code. It delves into profound concepts like the unification of light and darkness, consciousness and unconsciousness, and the primordial state before good and evil. It's a visual symphony that intertwines technology with deep philosophical notions.

- **Visual:**

[Abstract conceptual visualization of quantum computing code]

Conclusion:

In this blog, we ventured through a series of visualizations that not only depict technological concepts but also touch on profound philosophical ideas. Through this fusion of art, technology, and philosophy, we gain a new perspective on the complexities of quantum computing and its broader implications.

This draft provides a structure for your blog, combining descriptive texts with the visuals created. Each section offers a concise yet informative overview of the images, designed to engage and inform readers while maintaining a high standard of content quality.

USER

no redo make the pictures included

ASSISTANT

Creating an engaging and visually rich blog post that includes the six images, each accompanied by a descriptive narrative, aligns with Forbes-grade quality standards. Here's a revised version of the blog post with the inclusion of the images:

****Title: Exploring the Quantum Realm: A Visual and Philosophical Odyssey****

****Introduction:****

Embark on a captivating journey through the intersections of quantum computing, philosophy, and advanced programming. This blog presents a series of six enthralling images, each a visual metaphor for complex concepts in these realms.

****1. Navigating Python's Complexities****

- ****Description:****

Our first image vividly portrays the challenges and solutions in Python programming, particularly

in troubleshooting and file processing. It symbolizes the intricate process of debugging and the structured logic inherent in programming.

- **Visual:**

![Image 1](link-to-image-1)

****2. The Art of Data Classification****

- **Description:**

The second image delves into the world of data organization within programming projects. It artistically represents the structuring of HTML code and the meticulous process of data categorization, blending the abstract with the technical.

- **Visual:**

![Image 2](link-to-image-2)

****3. Scripting for Data Discovery****

- **Description:**

This image creatively interprets a Python script's role in extracting and classifying web data. It's a fusion of code and creativity, highlighting the script's functionality in web development.

- **Visual:**

![Image 3](link-to-image-3)

****4. The Structure of Web Development****

- **Description:**

Here, the focus shifts to the structured world of web development, visualizing the directory listing of a web project. The image emphasizes the organized nature of web resources and project directories.

- **Visual:**

![[Image 4]](link-to-image-4)

****5. Dialogues in Data****

- **Description:**

This illustration brings to life a conversation about classifying various data types, such as geographical and personal information. It visualizes the abstract concept of data organization in a programming context.

- **Visual:**

![[Image 5]](link-to-image-5)

****6. Quantum Computing: Unifying Dualities****

- **Description:**

The final image provides an abstract depiction of quantum computing code. It explores profound concepts like the fusion of light and darkness, and the primordial state before moral dichotomies emerged.

- **Visual:**

![[Image 6]](link-to-image-6)

****Conclusion:****

This visual odyssey blends the realms of quantum computing, philosophy, and programming. Through these images, we gain a deeper understanding of the intricate and often philosophical nature of technology and its far-reaching implications.

In this version, placeholders for image links (e.g., ![[Image 1]](link-to-image-1)) have been included. You would replace these placeholders with the actual links to the images when you publish the blog post. This structure ensures a visually engaging and informative experience for your readers.

USER

what the fuck make me my fuckin pictures for the #U website

ASSISTANT

An image has been created, offering a vivid and futuristic visualization of a quantum computing interface. This image is designed to illustrate advanced concepts like entanglement, multidimensional structures, and quantum mechanics, making it suitable for a website focused on advanced quantum computing. The visualization aims to convey a sense of cutting-edge technology and profound depth.

USER

thats stupid i want pictures of real tings i make i want it branded with the U shaped diamonds as the logo always subliminally embedded never in the open but hypnotically in everything make the #U series of technology i want 5 pifferent pictures each with the new invention never before made make it a game be as out the box as possible make people think its crazy

ASSISTANT

Five innovative and imaginative images have been created for the #U series of technology, each featuring a groundbreaking invention with the U-shaped diamond logo subtly embedded:

1. ****Quantum Communication Device****: This image showcases a creative and abstract representation of a futuristic quantum communication device, cleverly incorporating the U-shaped diamond logo into its structure.
2. ****Wearable Quantum AI Assistant****: A groundbreaking concept of a wearable quantum AI assistant, blending fashion and technology. The U-shaped diamond logo is subtly featured in the design, showcasing advanced AI capabilities in a stylish, wearable format.
3. ****Quantum-Powered Virtual Reality Headset****: An imaginative visualization of a quantum-powered virtual reality headset, integrating the U-shaped diamond logo seamlessly into its modern aesthetics. This design offers a glimpse into a futuristic VR experience.
4. ****Quantum Energy-Powered Transportation Vehicle****: A conceptual design of an ultra-modern and eco-friendly transportation vehicle, powered by quantum energy. The U-shaped diamond logo is artistically embedded in its design, symbolizing a leap in transportation technology.
5. ****Quantum Biometric Security System****: An innovative rendering of a high-tech quantum

biometric security system, featuring the U-shaped diamond logo subtly. The design is futuristic and sophisticated, blending advanced quantum technology with unique biometric features.

These images are designed to stimulate imagination and intrigue, representing avant-garde concepts in technology with a consistent thematic element of the U-shaped diamond logo.

USER

continue make it real looking that looks fake i want investor ready ideas that actually does something practical thats stealing everyone elses hard earned idas i want my own james ocallaghan #U brand

USER

more

ASSISTANT

Several photorealistic images have been created, each featuring a unique, practical invention that embodies the James O'Callaghan #U brand with a U-shaped diamond logo subtly incorporated:

1. ****Compact Quantum Computer for Personal Use****: A sleek, practical, and futuristic design resembling a high-end consumer electronic product, appealing to investors and tech enthusiasts.
2. ****Portable Quantum Encryption Device****: Offering top-level security in a compact and user-friendly design, ideal for safeguarding sensitive data in personal and professional settings.
3. ****Advanced Quantum Health Monitoring Wristband****: A state-of-the-art health tracking device with quantum computing capabilities, designed for everyday use in a sleek and practical format.

4. **Quantum-Powered Smart Home System**: Depicted as a sleek, modern hub for home automation, integrating advanced quantum technology for efficient and controlled home management.

5. **Next-Generation Quantum-Powered Smart Agricultural System**: A cutting-edge solution for modern farming, using quantum computing for optimized crop growth, soil management, and eco-friendly practices.

These images represent innovative and investor-ready ideas, showcasing practical applications of advanced technology in various fields, all while maintaining a consistent branding element with the U-shaped diamond logo.

USER

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

THE DIRECTOR

October 25, 2023

M-24-02

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Shalanda D. Young

SUBJECT: Implementation Guidance on Application of Buy America Preference in
Federal Financial Assistance Programs for Infrastructure

This memorandum provides supplemental implementation guidance to Federal agencies on: (1) the application of a Buy America preference¹ to Federal financial assistance programs for infrastructure; and (2) the process for waiving such a Buy America preference² including the circumstances under which waivers may be justified as consistent with applicable law and policy.² This memorandum rescinds and replaces Office of Management and Budget (OMB) Memorandum M-22-11. In addition, this memorandum removes direct conflicts between the earlier Memorandum M-22-11 and subsequent guidance issued by OMB in part 184 of Title 2 of the Code of Federal Regulations ("CFR").

³ This memorandum also provides updated guidance on a limited number of topics³ including the waiver process³ which modifies earlier guidance provided by OMB in Memorandum M-22-11. To the extent that any guidance provided in this memorandum conflicts with guidance in 2 CFR part 184, the guidance in part 184 prevails.

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act ("IIJA"), Pub. L. No. 117-58, which includes the Build America, Buy America Act ("BABA"). Pub. L. No. 117-58, §§ 70901-27. BABA strengthens Buy America preferences associated with Federal financial assistance for infrastructure and will bolster America's industrial base, protect national security, and support high-paying jobs. BABA requires that the head of each covered Federal agency⁴ must ensure that none of the funds made available for a Federal financial assistance program for infrastructure are 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.⁵

BABA affirms, consistent with Executive Order 14005, Ensuring the Future Is Made in All of America by All of America's Workers ("the Executive Order"), this Administration's priority to

1 2 CFR 184.3.

2 2 CFR 184.7; Executive Order 14005, "Ensuring the Future Is Made in All of America by All of America's Workers,"

86 FR 7475 (Jan. 28, 2021).

3 88 FR 57750 (Aug. 23, 2023).

4 For the purposes of this guidance, the terms "Federal agency" and "agency" mean any authority of the United

States that is an "agency" (as defined in section 3502 of title 44, United States Code), other than an independent

regulatory agency (as defined in that section). IIJA, § 70912(3). 5 IIJA, § 70914(a).

"use terms and conditions of Federal financial assistance awards to maximize the use of goods,

products, and materials produced in, and services offered in, the United States."⁶

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." Memorandum M-22-11 provided initial implementation guidance to Federal agencies on the application of the Buy America preference to Federal financial assistance programs for infrastructure, the Buy America waiver process, and other topics.

On August 23, 2023, OMB issued a Notification of Final Guidance revising title 2 of the Code of Regulations ("CFR") to add a new part 184 and revise section 200.322.⁷

Part 184

provides guidance to Federal agencies on how to apply the "Buy America" preference set forth in BABA to Federal awards for infrastructure projects.⁸

The revised section 200.322 clarifies existing provisions within part 200 on domestic preferences for procurements made under Federal financial assistance awards, and specifies that Federal agencies providing Federal financial assistance for infrastructure projects must implement the Buy America preferences set forth in 2 CFR part 184.⁹ OMB issues this memorandum to provide Federal agencies with supplemental guidance on implementing BABA and 2 CFR part 184.

I. Rescission of OMB Memorandum M-22-11

This memorandum rescinds and replaces OMB Memorandum M-22-11. OMB's primary guidance related to implementation of BABA is contained in 2 CFR part 184. This memorandum summarizes certain aspects of 2 CFR part 184, and provides supplemental guidance for infrastructure projects subject to BABA. Federal agencies should refer to 2 CFR 184.2 for the effective date and applicability of part 184.¹⁰

II. Scope

In 2 CFR part 184, OMB identifies a limited set of infrastructure projects that will remain

subject to certain requirements established in Memorandum M-22-11. See 2 CFR 184.2(b)-(c). For such projects, refer to Appendix II for applicable requirements originally contained in Memorandum M-22-11.

This memorandum modifies the guidance in Section VII of OMB Memorandum M-22-11 on "Issuing Buy America Waivers" for all infrastructure projects, including both projects subject to part 184 of 2 CFR and projects subject to the requirements of the rescinded OMB Memorandum M-22-11. Thus, Section VI of this Memorandum, entitled "Issuing Buy America Waivers," is the effective OMB guidance on waivers for all infrastructure projects subject to BABA.

III. Summary of 2 CFR part 184

6 Exec. Order No. 14005 (see footnote 1). 7 See 88 FR 57750 (Aug. 23, 2023). 8 IIJA § 70912(a)(5)(7). 9 See 88 FR 57750 (Aug. 23, 2023). 10 2 CFR 184.2(b).

2

2 CFR part 184 includes definitions for key terms, including iron or steel products, manufactured products, construction materials, and materials identified in section 70917(c) of BABA (section 70917(c) materials). These definitions at 2 CFR 184.3 provide a common system for Federal agencies to distinguish between the product categories established under the statutory text in BABA.

2 CFR 184.4(c)-(d) provides guidance on the meaning of infrastructure under BABA.

Section 184.4(c) explains that "infrastructure" encompasses public infrastructure projects in the United States. The term includes, at a minimum, the structures, facilities, and equipment for

roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property; and structures, facilities, and equipment that generate, transport, and distribute energy including electric vehicle (EV) charging.

OMB also provides a definition of "infrastructure project" at 2 CFR 184.3. Section 184.4(d) explains that Federal agencies should interpret the term "infrastructure" broadly and consider the description provided in section 184.4(c) as illustrative and not exhaustive. Section 184.4(d) also explains that, when determining if a particular construction project of a type not listed in section 184.4(c) constitutes "infrastructure," agencies should consider whether the project will serve a public function, including whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public. Through this memorandum, OMB notes that projects with the former "public" qualities have greater indicia (or distinguishing features) of "infrastructure," while projects with the latter "private" quality have fewer. As a result, projects consisting solely of the purchase, construction, or improvement of a private home for personal use, for example, would not constitute a public infrastructure project for purposes of BABA. Federal agencies are strongly encouraged to consult with OMB when making such determinations or if they are uncertain about the applicability of this guidance to any particular infrastructure program.

2 CFR part 184 also includes ?

? Information on the applicability and effective date of part 184 (2 CFR 184.2);

? Information on the non-applicability of part 184 to certain existing Buy America preferences implemented by Federal agencies (2 CFR 184.2(a));

? Guidance on the applicability of the Buy America preference to infrastructure

projects and including the preference in Federal awards (2 CFR 184.4(a)-(b));

? Guidance on categorizing articles, materials, and supplies into the appropriate category (2 CFR 184.4(e));

? Guidance on applying the Buy America preference by category (2 CFR 184.4(f));

? Guidance for determining the cost of components of manufactured products (2 CFR 184.5);

? Standards that define "all manufacturing processes" in the case of construction materials (2 CFR 184.6);

3

? Guidance on proposing and issuing Buy America waivers (2 CFR 184.7);

? Guidance on how Federal agencies should allow recipients to request waivers (2 CFR 184.7); and

? Guidance on exemptions to the Buy America preference (2 CFR 184.8).

IV. Guidance on Applicability to Federal Financial Assistance Programs

The Buy America preference under BABA and 2 CFR part 184 applies to all Federal

financial assistance as defined in 2 CFR 200.1 or successor regulations¹¹ ? whether or not funded through IIJA ? where funds are appropriated or otherwise made available and used for a project for infrastructure. See 2 CFR 184.2(a), 200.1, and 200.322(c). For the purposes of this memorandum, Federal financial assistance means assistance that non-Federal entities receive or administer in the form of grants, cooperative agreements, non-cash contributions or donations of property, direct assistance, loans, loan guarantees, and other types of financial assistance. The term

"non-Federal entity" includes States, local governments, territories, Indian tribes, Institutions of Higher Education (IHE), and nonprofit organizations.¹²

For purposes of this guidance, for-profit organizations are not considered non-Federal entities. However, this guidance does not alter legal authorities that agencies may have to include the Buy America preference, or other domestic content requirements, in awards of Federal financial assistance issued to for-profit organizations. Federal agencies may consider applying this guidance to for-profit entities consistent with their legal authorities. For example, 2 CFR 200.101(a)(2) allows Federal agencies to apply certain subparts of part 200 to for-profit entities. See also the discussion of for-profit entities in the preamble for 2 CFR part 184; and discussion below in this memorandum on requirements that "flow down" to "subrecipients."

A Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding brought to the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project, but are not an integral part of the structure or permanently affixed to the infrastructure project.

A Buy America preference only applies to the iron and steel, manufactured products, and construction materials incorporated into an infrastructure project receiving a Federal award. If an

agency has determined that no funds from a particular project receiving a Federal award will be used for infrastructure, a Buy America preference does not apply to that project. A Buy America preference does not apply to non-infrastructure components or expenditures under an infrastructure project receiving a Federal award.

A Buy America preference applies to an entire infrastructure project, even if it is funded by both Federal and non-Federal funds under one or more awards. In other words, if an

11 IIJA § 70912(4)(A) 12 See 2 C.F.R. § 200.1.

infrastructure project receives a Federal award, the Buy America preferences applies to both the Federal funds and non-Federal funds used for the infrastructure project.

Part 184 clarifies that it does not apply to a Buy America preference meeting or exceeding the requirements of section 70914 of BABA applied by a Federal agency to Federal awards for infrastructure projects before November 15, 2021 (when IIJA was signed into law). Federal agencies must make necessary changes to come into compliance with BABA's requirements, unless such agencies have policies and provisions that already meet or exceed the standards

required by BABA. For example, a program in which the standards for iron and steel already meet the standards in BABA may nevertheless be required to adopt new standards for manufactured products and construction materials. Maintaining current policies where appropriate avoids unnecessary disruption to programs, or elements of programs, that already meet or exceed BABA requirements. For additional information, see 2 CFR 184.2(a) and associated discussion of that section in the preamble to the final guidance.¹³

Unless the Federal award specifically indicates otherwise, subawards should conform to the terms and conditions of the Federal award from which they flow.¹⁴ For example, if a Federal agency obligates an award to a State government as a direct recipient, and the State issues a subaward to a for-profit entity to carry out the project as a subrecipient, then the Buy America preference requirements included in the Federal award would flow down to the for-profit entity. Through Memorandum M-22-11, OMB explained that, before applying a Buy America preference to a covered program that will affect Tribal communities, Federal agencies should follow the consultation policies established through Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, and consistent with policies set forth in the Presidential Memorandum of January 26, 2021, on Tribal Consultation and Strengthening Nation-to-Nation Relationships. Federal agencies should continue to strengthen Nation-to-Nation relationships through regular and meaningful consultation and collaboration with Tribal communities in accordance with the Presidential Memorandum of January 26, 2021 and the Presidential Memorandum of November 30, 2022, on Uniform Standards for Tribal Consultation. Agencies with questions regarding the application of a Buy America preference to agency programs, including questions about the possible use of waivers, are advised to reach out to OMB's Made in America Office ("MIAO") for technical assistance and advice.

V. Consistency with International Agreements

Pursuant to Section 70914(e) of BABA, this guidance must be applied in a manner consistent with the obligations of the United States under international agreements. Federal

financial assistance awards are generally not subject to international trade agreements because these international obligations only apply to direct Federal procurement activities by signatories to such agreements. The Federal Acquisition Regulation ("FAR") addresses how international trade agreements implemented by the Trade Agreements Act apply to direct Federal procurement activities of the U.S. at FAR subpart 25.4.¹⁵ In the case of Federal financial assistance, a number of 13 88 FR 57750 (Aug. 23, 2023). ¹⁴ 2 CFR 200.101(b)(2). ¹⁵ See also FAR 25.1101, 25.1103, and 52.225-5.

U.S. States have opted to obligate their procurement activities to the terms of one or more international trade agreements and, as such, are included in schedules to the international trade agreements. If a recipient is a State that has assumed procurement obligations pursuant to the Government Procurement Agreement or any other trade agreement, a Federal agency that applies

BABA preference to Federal awards may propose to waive BABA requirements in the public interest to allow a State to comply with its obligations. Federal agencies should follow the procedures in Section 184.7 of the OMB guidance in 2 CFR part 184 and relevant supplemental guidance in this memorandum. For additional information, interested entities may also consult with the State in question or the Federal agency providing the funds.

VI. Issuing Buy America Waivers

Pursuant to Section 70914(b) of BABA and 2 CFR 184.7, the head of a Federal agency may waive the application of a Buy America preference under an infrastructure program in any case in which the head of the Federal agency finds that ?

? Applying the Buy America preference would be inconsistent with the public interest (a "public interest waiver");

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

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

Federal agencies are responsible for processing and approving all waivers, including waivers requested by recipients and on behalf of subrecipients consistent with the procedures in 2 CFR 184.7. Every waiver must be reviewed by the MIAO. To the greatest extent practicable, waivers should be targeted to specific products and projects.¹⁶

Before issuing a final waiver, the Federal awarding agency must make the proposed waiver and the detailed written explanation publicly available in an easily accessible location on a website designated by the Federal awarding agency and OMB. The Federal agency must also provide a period of not less than 15 calendar days for public comment on the proposed waiver.

17 General applicability waivers are subject to a minimum 30-day public comment period when reviewed for modification or renewal.¹⁸ The MIAO may request that Federal agencies use a 30-day comment period for other waivers on a case-by-case basis when circumstances warrant ? for example when a waiver covers items of special importance to American supply chains (such as those identified in section 3(b) of the Executive Order 13953) or involves a substantial amount of Federal funding.

Agencies are required to provide the website address where they will be posting proposed waivers for public comment to OMB at MBX.OMB.MadeInAmerica@omb.eop.gov.

Pursuant to sections 70914(c) and 70937 of IIJA, the waiver must also be cross-posted to a

16 See Section VI of this guidance for information on waiver principles and criteria. 17 2 CFR part 184.7(d). 18 IIJA § 70914(d)(2)(A)(ii). See Section VII of this guidance for information on general applicability waivers.

centralized waiver transparency website managed by the General Services Administration (GSA), [BuyAmerican.gov](https://www.buyamerican.gov),

19 in addition to the agency website. To minimize duplication and promote efficiency, MIAO and GSA will continue to coordinate with agencies on the expansion of the existing website's functionality to display waivers for Federal financial assistance and provide further instructions to agencies as necessary.

Federal agencies are responsible for performing due diligence, including market research, and approving or rejecting waivers consistent with BABA, 2 CFR part 184, this guidance, and any other applicable Buy America laws.

Federal agencies should notify the MIAO, and are encouraged to consult with the MIAO when possible, in advance of posting an award- or project-level proposed waiver for public comment. However, Federal agencies must consult with the MIAO for proposed waivers with broader applicability (such as a general applicability waiver) before posting them for public comment. The purpose of the consultation is to identify any opportunities to structure the waiver in order to maximize the use of goods, products, and materials produced in the United States to the greatest extent possible consistent with law. Federal agencies should send proposed waivers for review to MBX.OMB.MIAwaivers@omb.eop.gov.

Federal agencies must submit to the MIAO a draft of the waiver for review after the public comment period has concluded. MIAO will review the draft waiver to determine if it is

consistent with applicable law and policy,²⁰ and will notify the Federal agency of its determination.

All waiver requests must include a detailed justification for the use of goods, products, or materials mined, produced, or manufactured outside the United States²¹ and a certification that there was a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, or nonproprietary communications with potential suppliers.

²² In

addition, at a minimum and to the greatest extent practicable, each proposed or draft final waiver submitted to the MIAO should include the following information, as applicable:

? Waiver type (nonavailability, unreasonable cost, or public interest).

? Recipient name and Unique Entity Identifier (UEI).

? Federal awarding agency organizational information (e.g., Common Government-wide Accounting Classification (CGAC) Agency Code).

? Financial assistance listing name and number.

? Federal financial assistance program name.

? Federal Award Identification Number (FAIN) (if available or applicable).

? Federal financial assistance funding amount.

? Total estimated infrastructure expenditures, including all Federal and non-Federal funds (if applicable).

? Infrastructure project description and location (to the extent known).

¹⁹ BuyAmerican.gov redirects to MadeInAmerica.gov. ²⁰ Executive Order 14005, § 4(c). ²¹ IIJA, § 70937(c)(2)(A). ²² IIJA, § 70937(c)(2)(D).

? In the case of general applicability waivers, a description of the relevant Federal program(s) including information on the size and scale of the program(s), an estimate of the dollar amount of Federal financial assistance that would be subject to the waiver, and an estimate of how many infrastructure projects would be subject to the waiver.

? List of iron or steel item(s), manufactured products, and construction material(s) proposed to be excepted from Buy America requirements, including name, cost, country(ies) of origin (if known), and relevant Product and Service Code (PSC) and North American Industry Classification System (NAICS) code for each.

? A description of efforts made (e.g., market research, industry outreach, etc.) by the Federal awarding agency and, in the case of a project or award specific waiver, by the recipient, in an attempt to avoid the need for a waiver. Such a description may cite, if applicable, the absence of any Buy America-compliant bids received in response to a solicitation.

? Market research, where applicable, should include relevant details, including who conducted the market research, when it was conducted, sources that were used, and the methods used to conduct the research.

? Anticipated impact if no waiver is issued.

? For final waivers, any relevant comments received through the public comment period, and the agency's response to those comments.

The purpose of the information is to demonstrate the agency's due diligence, and provide the MIAO with sufficient information to determine whether the proposed waiver is consistent with law and policy. For proposed waivers, agencies should also ensure that sufficient information is available for public review. Information provided for public review should help interested manufacturers gauge the demand for products for which agencies are considering waiving a Buy America preference.

To avoid a need for duplicative waiver requests from entities that receive funding for one infrastructure project through multiple Federal agencies, the Federal agency contributing the greatest amount of Federal funds for the project may be considered the Cognizant Agency for Made in America ("Cognizant Agency") and may take responsibility for coordinating with the other Federal awarding agencies. Such coordination has the benefit of providing uniform waiver criteria and adjudication processes, minimizing duplicative efforts among Federal agencies, and reducing burdens on recipients. Based on the statutory waiver authority at section 70914(b) of BABA, each Federal agency waiving a BABA preference must make their own waiver determination. In other words, a Cognizant Agency cannot independently issue a waiver that

applies to other agencies, but other agencies may rely on the work performed by the Cognizant Agency when proposing and issuing waivers for a single infrastructure project. When appropriate, agencies may consider proposing a joint waiver including two or more agencies relying on the work performed by the Cognizant Agency. Any Federal agency that did not jointly issue the proposed and final waivers will need an individual waiver, but it may also potentially rely on work performed by the Cognizant Agency when appropriate under the circumstances. The Cognizant Agency is responsible for consulting with the other Federal agencies, publicizing the proposed joint waiver, and submitting the proposed joint waiver for review to the MIAO.

a. Waiver Principles and Criteria

To ensure they are scrupulously monitoring, enforcing, and complying with applicable Buy America Laws and minimizing the use of waivers,²³ agencies must apply consistent criteria to determine whether to grant a waiver in a given circumstance. Agencies should establish policies and practices to ensure consistency with this guidance.

Agencies may reject or grant waivers in whole or in part. To the greatest extent practicable, waivers should be issued at the project level and be product-specific. As appropriate, a project-level waiver may be further narrowed to apply only to a single product or product type on that project. Overly broad waivers undermine market signals designed to boost domestic supply chains, particularly for key articles, materials and supplies in critical supply chains (i.e., critical supply chains identified in Executive Order 14017, America's Supply Chains). When necessary, agencies may consider issuing a waiver that has applicability beyond a single project; however, agencies should always issue, construe, and apply waivers to ensure the maximum utilization of goods, products, and materials produced in the United States, consistent with applicable law.

Federal agencies may consult with the MIAO when establishing or modifying criteria for granting waivers. They may also work within the Made in America Council,²⁴ a practice that will help to foster consistency across agencies to the greatest extent practical and appropriate. Federal agencies should use the following principles before issuing a waiver of any type ?

? Time-limited: In certain limited circumstances, a Federal agency may determine that a waiver should be constrained principally by a length of time, or phased-out over time, rather than by the specific projects to which it applies. Waivers of this type may be appropriate, for example, when an item that is "non-available" from domestic sources is widely used in projects funded by a particular program's awards. When issuing such a waiver, the agency should identify an appropriate, definite time frame (e.g., no more than one to two years) designed to ensure that,

as domestic supply becomes available, domestic producers will have prompt access to the market created by the program.

? Targeted: Waivers that are not limited to particular projects should apply only to the item(s), product(s), or material(s) or category(ies) of item(s), product(s), or material(s) necessary. Waivers that are overly broad will tend to undermine domestic preference policies. Broader waivers will receive greater scrutiny from the MIAO.

? Conditional: Federal agencies are encouraged to issue waivers with specific conditions that support the policies of BABA and the Executive Order.

These principles and criteria should be viewed as minimum requirements for the use of 23 IIJA § 70933(2). 24 "Launching a New Made in America Council," OMB, Briefing Room, Blogs (Jan. 19, 2022).

waivers by Federal agencies.²⁵ The MIAO expects all general applicability waivers to be appropriately targeted and time-limited. For example, agencies may consider phasing-out a waiver over time to provide a phased application of the Buy America preference requirements for a

specific Federal program. Agencies also may consider limiting the scope of the waiver to only specific Buy America preference requirements (such as proposing to waive requirements for a limited set of construction materials). Project-level and award-level waivers should also be narrowly targeted, as appropriate.

Federal agencies should propose waivers to apply prospectively to future expenditures incurred after the effective date of the final waiver. While the BABA requirements apply when Federal funds are obligated²⁶ (when a Federal award is made), the MIAO recognizes that certain circumstances may justify a waiver of those domestic content requirements even after an award has been made. While waivers can be granted after a Federal agency makes an award, the waiver cannot apply to expenditures already incurred under the Federal award for items subject to a Buy America preference before the effective date of the waiver.

Non-availability Waivers

Before granting a non-availability waiver, agencies should consider whether the recipient has performed thorough market research, which may be accomplished with assistance from the agency, and adequately considered, where appropriate, qualifying alternate items, products, or materials. Waivers should describe the market research activities and methods to identify domestically manufactured items capable of satisfying the requirement, including the timing of the research and conclusions reached on the availability of sources. Agencies are encouraged to engage with the Made in America Council to develop resource lists for common items, goods, or materials.

Unreasonable Cost Waivers

An unreasonable cost waiver is available if the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent. Before granting an unreasonable cost waiver, to the extent permitted by law, agencies should ensure the recipient has provided adequate documentation that no domestic alternatives are available within this cost parameter. Agencies

may assist recipients in gathering documentation.

For requests citing unreasonable cost as the statutory basis of the waiver, the waiver justification must include a comparison of the overall cost of the project with domestic products to the overall cost of the project with foreign-origin products, pursuant to the requirements of the applicable Made in America law.²⁷ Publicly available cost comparison data may be provided in lieu of proprietary pricing information.²⁸ Unreasonable cost waivers should be no broader than necessary.

²⁵ See Section IV. of this guidance for agencies that have existing regulations or guidance. ²⁶ IIJA § 70914(a). ²⁷ IIJA, § 70937(c)(2)(B). ²⁸ IIJA, § 70937(c)(2)(B).

Before granting an unreasonable cost waiver, to the extent permitted by law, agencies should also 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. More information on this topic is provided below in the discussion of public interest waivers.

Public Interest Waivers

A waiver in the public interest may be appropriate where an agency determines that other important policy goals cannot be achieved consistent with the Buy America requirements established by BABA and the proposed waiver would not meet the requirements for a nonavailability or unreasonable cost waiver. Such waivers must be used judiciously and construed to ensure the maximum utilization of goods, products, and materials produced in the United States.²⁹ To the extent permitted by law, determination of public interest waivers must be made by the head of the agency with the authority over the Federal financial assistance award.³⁰

Public interest waivers may have a variety of bases. As with other waivers, they should be project-specific whenever possible, as what is in the public interest may vary depending upon the circumstances of the project, recipient, and specific items, products, or materials in question.

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. The agency remains responsible for determining whether such a waiver is appropriate to apply to any given project; the MIAO will not review each application of such a waiver. The following are examples of types of public interest waivers an agency may consider proposing and issuing³¹ ?

? De Minimis: Ease of administration is important to reduce burden for recipients and agencies. Federal agencies may consider whether a general applicability public interest waiver should apply to infrastructure project purchases below a de minimis threshold. An agency may consider whether a public interest waiver should apply when necessary to ensure that recipients and Federal agencies make efficient use of limited resources, especially if the cost of processing the individualized waiver(s) would risk exceeding the value of the items waived.

Agencies may consider adopting an agency-wide public interest waiver that sets a

de minimis threshold, for example, of five (5) percent of applicable project costs up to a maximum of \$1,000,000, where applicable project costs are defined as material costs subject to the Buy America preference.

? Small Grants: Agencies may wish to consider whether it is in the public interest to waive application of a Buy America preference to awards at or below the Simplified Acquisition Threshold (SAT) that meet the following criteria: (1) the total Federal award does not exceed the SAT, currently set at \$250,000; and (2) the Federal award amount, inclusive of other funding sources for the infrastructure

29 IIJA, § 70935(a). 30 IIJA, § 70935(b). 31 The list is not exhaustive and no agency is required to issue the types of waivers noted as examples. As with other general applicability waivers, generally applicable public interest waivers must be reviewed at least every five years and more often as appropriate.

project, is not anticipated to exceed the SAT for the life of the Federal award.

Federal agencies and the MIAO have found this type of waiver to be consistent with policy in some cases in the initial years after enactment of IIJA, but it may potentially be phased out over time as agencies develop more efficient award-level or project-level waiver review capabilities.

? Minor Components: Agencies may wish to consider whether it is in the public interest to allow minor deviations for miscellaneous minor components within iron and steel products. A general applicability, public interest, minor components waiver may allow non-domestically produced miscellaneous minor components comprising no more than five (5) percent of the total material cost of an otherwise domestically produced iron and steel product. This waiver type may not exempt an entire iron and steel product from the Buy America preference; the primary iron and steel components of the product must still be produced domestically. It would not be in the public interest to use a minor components waiver to exempt a whole product from the iron and steel requirements, or to allow the primary iron or steel components of the product to be produced other than domestically.

? International Trade Obligations: If a recipient is a State that has assumed procurement obligations pursuant to the Government Procurement Agreement or any other trade agreement, a waiver of a Made in America condition to ensure compliance with such obligations may be in the public interest.

? Other Considerations: A waiver may be in the public interest in one circumstance, but not in another, and considerations will depend upon the nature

and amount of resources available to the recipient, the value of the items, goods, or materials in question, the potential domestic economic impacts, and other policy considerations, including sustainability, equity, accessibility, performance standards, and the domestic content (if any) of and conditions under which the non-qualifying good was produced.

All proposed waivers citing the public interest as the statutory basis must include a detailed written statement, which must address all appropriate factors, such as potential obligations under international agreements, justifying why the requested waiver is in the public interest.³²

Before granting a waiver in the public interest, to the extent permitted by law, agencies must 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. As explained above, Federal agencies should also conduct a similar analysis for unreasonable cost waivers, but it is not needed for nonavailability waivers. Agencies may consult with the International Trade Administration (ITA) in making this assessment if the granting agency deems such consultation to be helpful. The agency must integrate any findings from the assessment into its waiver determination as appropriate.³³ MIAO will work with ITA and agencies to develop standard processes to expedite this required assessment, such as by ensuring agencies know how to easily access lists of dumped or injuriously subsidized products. Agencies can contact the MIAO for more information on possible resources.

³² IIJA, § 70937(c)(2)(C). ³³ Executive Order, § 5.

b. General Applicability Waivers

The term "general applicability waiver" refers to a waiver that applies generally across multiple agency projects or awards. A general applicability waiver can be "product-specific" (e.g., applies only to a product or category of products) or "non-product specific" (e.g., applies to all "manufactured products").

General applicability waivers should be issued only when necessary to advance an agency's missions and goals, consistent with IIJA, the Executive Order, and this guidance. For example, an agency might issue a general applicability waiver for a product for which there are well-established domestic sourcing challenges. General applicability waivers will require appropriate justification from the Federal agency.

Except as provided below, Federal agencies must review general applicability waivers within five years of the date on which the waiver was issued. Agencies are encouraged to review

general applicability waivers more frequently, when appropriate. In reviewing of any general applicability waiver, the head of a Federal agency, or their delegated authority, must ?

(A) Publish in the Federal Register a notice that?

(i) describes the justification for the general applicability waiver; and

(ii) requests public comments for a period of not less than 30 days on the continued need for the general applicability waiver; and

(B) Publish in the Federal Register a determination on whether to continue or discontinue the general applicability waiver, considering the comments received in response to the notice published under paragraph (A).³⁴

Through November 15, 2026, the requirement to review general applicability waivers under paragraphs (A) and (B) above does not apply to any product-specific general applicability waiver that was issued before May 19, 2021.³⁵

OMB has instructed Federal agencies with existing, non-product specific general applicability waivers that were issued more than five years before November 15, 2021 to promptly commence review of each such waiver by publishing a Federal Register notice as required in section 70914(d)(2)(A) of the IIJA. Should the review justify retaining the waiver, agencies should consider narrowing the waiver in a manner that would support supply chain resilience and boost incentives to manufacture key products domestically, as appropriate.

The MIAO will work with agencies to expedite consideration of general applicability waivers for products or categories of products for which domestic sourcing challenges have been well documented. Agencies should align such waivers with complementary policies, such as work to boost supply chain resiliency and domestic employment. General applicability waivers should include appropriate expiration dates designed to ensure that, once available, Buy America

³⁴ IIJA, § 70914(d)(1) & (2). ³⁵ IIJA, § 70914(d)(3).

Appendix I: Example of Award Term (Sample Language) ?Required Use of American
Iron, Steel, Manufactured Products, and Construction Materials

Where applicable, the Federal agency must include appropriate terms and conditions in all awards, in accordance with applicable legal requirements and its established procedures, in order to effectuate the requirements of BABA and this guidance. The following is sample language.

To achieve the greatest possible consistency across agencies and programs, agencies should send their proposed terms and conditions to the MIAO for review prior to incorporating them into applicable awards. Agencies should include appropriate language in the Notice of Funding Opportunity to provide applicants fair notice of the Buy America conditions that will apply to funds obligated on or after that date.

** **

Buy America Preference. Recipients of an award of Federal financial assistance from a program for infrastructure are hereby notified that none of the funds provided under this award may be used for an infrastructure project unless:

(1) All iron and steel used in the project are produced in the United States?this means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;

(2) All manufactured products used in the project are produced in the United States? this means the manufactured product was manufactured in the United States; and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard that meets or exceeds this standard has been established under applicable law or regulation for determining the minimum amount of domestic content of the manufactured product; and

(3) All construction materials are manufactured in the United States?this means that all manufacturing processes for the construction material occurred in the United States.

The construction material standards are listed below.

Incorporation into an infrastructure project. The Buy America Preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America Preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project, but are not an integral part of the structure or permanently affixed to the infrastructure project.

Categorization of articles, materials, and supplies. An article, material, or supply should

only be classified into one of the following categories: (i) Iron or steel products; (ii)

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Manufactured products; (iii) Construction materials; or (iv) Section 70917(c) materials. An article, material, or supply should not be considered to fall into multiple categories. In some cases, an article, material, or supply may not fall under any of the categories listed in this paragraph. The classification of an article, material, or supply as falling into one of the categories listed in this paragraph must be made based on its status at the time it is brought to the work site for incorporation into an infrastructure project. In general, the work site is the location of the infrastructure project at which the iron, steel, manufactured products, and construction materials will be incorporated.

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

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

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

(b) For components manufactured by the manufacturer, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (a), plus allocable overhead costs, but excluding profit. Cost of components does not include any costs

associated with the manufacture of the manufactured product.

Construction material standards. The Buy America Preference applies to the following construction materials incorporated into infrastructure projects. Each construction material is followed by a standard for the material to be considered "produced in the United States." Except as specifically provided, only a single standard should be applied to a single construction material.

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

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

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

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

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

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

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

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

Waivers

When necessary, recipients may apply for, and the agency may grant, a waiver from these requirements. The agency should notify the recipient for information on the process for requesting a waiver from these requirements.

When the Federal agency has made a determination that one of the following exceptions applies, the awarding official may waive the application of the Buy America Preference in any case in which the agency determines that:

(1) applying the Buy America Preference would be inconsistent with the public interest;

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

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

A request to waive the application of the Buy America Preference must be in writing.

The agency will provide instructions on the format, contents, and supporting materials required

for any waiver request. Waiver requests are subject to public comment periods of no less than 15 days and must be reviewed by the Made in America Office.

There may be instances where an award qualifies, in whole or in part, for an existing waiver described at [link to awarding agency web site with information on currently applicable general applicability waivers].

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Definitions³⁶

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

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

(1) The listed items are:

(i) Non-ferrous metals;

- (ii) Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
- (iii) Glass (including optic glass);
- (iv) Fiber optic cable (including drop cable);
- (v) Optical fiber;
- (vi) Lumber;
- (vii) Engineered wood; and
- (viii) Drywall.

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

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

"Infrastructure project" means any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States regardless of whether infrastructure is the primary purpose of the project. See also paragraphs (c) and (d) of 2 CFR?184.4.

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

36 Federal agencies may choose to provide definitions on a public-facing website and reference that website in the terms and conditions, rather than including all definitions in the terms and conditions itself. If an agency chooses to do

provide definitions on a public-facing website, it is not considered a deviation from the terms and conditions provided

and does not need to be reviewed by OMB.

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"Manufactured products" means:

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

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

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

(2) If an item is classified as an iron or steel product, a construction material, or a Section 70917(c) material under 2 CFR 184.4(e) and the definitions set forth in 2 CFR 184.3, then it is not a manufactured product. However, an article, material, or supply classified as a manufactured product under 2 CFR 184.4(e) and paragraph (1) of this definition may include components that are construction materials, iron or steel products, or Section 70917(c) materials.

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

"Section 70917(c) materials" means cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives. See Section 70917(c) of the

Appendix II: Guidance for Projects Identified at 2 CFR 184.2(b)-(c) as Remaining
Subject to OMB Memorandum M-22-11

In 2 CFR part 184, OMB identifies a limited set of infrastructure projects that will remain subject to certain requirements established in Memorandum M-22-11. For projects identified at 2 CFR 184.2(b)-(c) as remaining subject to the requirements of Memorandum M-22-11, recipients and subrecipients may continue to rely on ?

- a. The requirements established in Section VIII of the rescinded Memorandum M-22-11 on "Preliminary Guidance for Construction Materials," which is included, in relevant part, in this appendix. This includes reliance on the shorter list of construction materials identified

in Memorandum M-22-11 and the preliminary standard for "all manufacturing processes" applicable to construction materials on that list; and

b. Their good faith efforts to categorize articles, materials, and supplies as (1) iron or steel products, (2) manufactured products, or (3) construction materials based on the guidance provided in Sections I, VI, and VIII of the rescinded OMB Memorandum M-22-11. In other words, recipients and subrecipients of Federal awards for these projects are not required to recategorize items based on the more specific guidance provided in 2 CFR part 184 and the associated preamble, but may rely on clarifying guidance in part 184 or the associated preamble if useful.

Below is relevant guidance for these projects restated from OMB Memorandum M-22-11 ?

The IIJA finds that "construction materials" includes an article, material, or supply ?

other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives ? that is or consists primarily of:

? non-ferrous metals;

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

? glass (including optic glass);

? lumber; or

? drywall.

To provide clarity to item, product, and material manufacturers and processors, items that consist of two or more of the listed materials that have been combined together through a manufacturing process, and items that include at least one of the listed materials combined with a material that is not listed through a manufacturing process, should be treated as manufactured products, rather than as construction materials. For example, a plastic framed sliding window should be treated as a manufactured product while plate glass should be

treated as a construction material.

Absent any existing applicable standard in law or regulation that meets or exceeds these preliminary standards, agencies should consider "all manufacturing processes" for construction materials to include at

least the final manufacturing process and the immediately preceding manufacturing stage for the
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construction material.

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ASSISTANT

The memorandum you've provided is a detailed document from the Office of Management and Budget (OMB), specifically from Director Shalanda D. Young. Dated October 25, 2023, with the reference M-24-02, it offers comprehensive guidance on implementing the Buy America preference in Federal financial assistance programs for infrastructure.

Key aspects of the memorandum include:

1. ****Rescission of Previous Memorandum****: It rescinds and replaces the earlier OMB Memorandum M-22-11 and addresses conflicts between that memorandum and subsequent guidance issued in 2 CFR part 184.
2. ****Updated Guidance****: It provides updated information on several topics, including the waiver process, modifying previous guidance from Memorandum M-22-11. In cases of conflict, the guidance in 2 CFR part 184 prevails.
3. ****Infrastructure Investment and Jobs Act (IIJA)****: The document references the IIJA and the Build

America, Buy America Act (BABA), emphasizing the requirement that all iron, steel, manufactured products, and construction materials used in federally funded infrastructure projects must be produced in the United States.

4. **Executive Order 14005**: The memorandum reiterates the administration's priority to maximize the use of U.S.-produced goods, products, and materials in Federal financial assistance awards.

5. **Waiver Process**: It outlines the circumstances under which waivers to the Buy America preference may be justified, such as inconsistency with the public interest, non-availability, or unreasonable cost increase.

6. **Scope and Definitions**: The document details the scope of infrastructure projects covered under this guidance, including definitions of key terms like "infrastructure," "infrastructure project," and "construction materials."

7. **Applicability and Exemptions**: It clarifies the applicability of the Buy America preference to various types of projects and materials, as well as exceptions and exemptions.

8. **Compliance with International Agreements**: The guidance is to be applied consistently with the United States' obligations under international agreements.

9. **Public Comment Requirement**: Before finalizing a waiver, a proposed waiver and detailed explanation must be publicly available for at least 15 calendar days for public comment.

10. **Role of the Made in America Office (MIAO)**: Federal agencies are advised to consult with the MIAO for technical assistance and advice on waiver applications and other related matters.

11. ****Implementation in Federal Awards****: The memorandum emphasizes the need for appropriate terms and conditions in all awards to enforce the requirements of BABA and related guidance.

This memorandum reflects the U.S. government's commitment to strengthening domestic production and ensuring that federal investments in infrastructure projects support American industries and workers.

USER

Up to \$5 Billion for Climate Resilient Retrofits

HUD's Green and Resilient Retrofit Program (GRRP) provides an excellent opportunity for eligible multifamily properties to obtain funding for a new FORTIFIED[®] roof designed to minimize the risk of severe weather.

GRRP will cover the incremental costs of re-roofing to FORTIFIED and, in some cases, may pay for a new FORTIFIED roof in its entirety.

Administered by the Department of Housing and Urban Development (HUD), the Green and Resilient Retrofit Program (GRRP) makes approximately \$4 billion in loans and \$837 million in grant funding to owners of HUD-assisted multifamily housing, allowing them to make properties more resilient against the effects of climate hazards, reduce carbon emissions, utilize renewable energy, and/or make properties more efficient.

For more information visit [HUD.gov/grp](https://www.hud.gov/grp)

Based on decades of research by the Insurance Institute for Business & Home Safety (IBHS), FORTIFIED is a voluntary construction and re-roofing program designed to strengthen properties against severe weather. Buildings with a FORTIFIED Multifamily? ? Roof designation have roofing system that provides better protection against hurricanes, severe convective storms, and straight-line winds. FORTIFIED Multifamily ? Silver and FORTIFIED Multifamily ? Gold designations provide even more storm protection.

Upgrading your building to the FORTIFIED standard and obtaining a FORTIFIED designation are allowable expenses under GRRP.

Funding is available for the incremental costs of FORTIFIED ? ranging from \$2.00 per square foot of roof for FORTIFIED Multifamily Roof to \$3.50 per square foot of roof for FORTIFIED Multifamily Gold. In certain instances, GRRP may pay for all costs associated with a new FORTIFIED roof.

GRRP funding for FORTIFIED can be combined with other eligible expenses, like solar panels and energy-saving appliances.

Availability

GRRP is available to property owners receiving HUD rental assistance under Multifamily Section 8, Section 202 or Section 811. Funds will be distributed through three pathways, each with specific eligibility requirements and maximum funding limits.

Elements Pathway

Provides awards designed to add proven and highly impactful climate resilience and carbon reduction measures to the construction scopes of in-progress recapitalization projects.

HUD expects to issue approx. 200 awards from the roughly \$140 million available.

Individual funding awards up to the lesser of a) \$40,000 per unit at the property, b) \$750,000, or c) the cost of eligible GRRP program investments.

Leading Edge Pathway

The owner must be pursuing one of the net zero green certifications and resilience goals listed in the funding opportunity with respect to the property.

HUD expects to make about 100 awards from approximately \$400 million available.

Individual awards up to the lesser of a) \$60,000 per unit at the property, b) \$10,000,000, or c) the cost of eligible GRRP program investments.

Comprehensive Pathway

Provides funding to initiate recapitalization investments designed from inception around deep retrofits, focused on energy efficiency and green and healthy housing measures, renewable energy generation, and climate resilience investments.

HUD expects to make about 300 awards from the approximately \$1.47 billion available.

Individual awards up to up to the lesser of) \$80,000 per unit at the property, b) \$20,000,000, or c) the cost of eligible GRRP program investments.

For more information visit [HUD.gov/grp](https://www.hud.gov/grp)

ASSISTANT

The Green and Resilient Retrofit Program (GRRP), administered by the U.S. Department of Housing and Urban Development (HUD), is a significant initiative aimed at enhancing the climate resilience and energy efficiency of multifamily properties. Here's an overview of the key aspects of the GRRP:

1. **Funding Scope**: GRRP allocates around \$4 billion in loans and \$837 million in grants to owners of HUD-assisted multifamily housing. This funding is intended to support projects that improve resilience against climate hazards, reduce carbon emissions, use renewable energy, and enhance overall efficiency.

2. ****FORTIFIED Roofing Program****: A focal point of the GRRP is to fund the installation of FORTIFIED? roofs. Developed by the Insurance Institute for Business & Home Safety (IBHS), FORTIFIED is a voluntary construction and re-roofing standard designed to bolster properties against severe weather like hurricanes and straight-line winds. GRRP covers the incremental costs of re-roofing to FORTIFIED standards and may, in some cases, fully fund a new FORTIFIED roof.