

**DEPARTMENT OF TRANSPORTATION****Federal Transit Administration****49 CFR Part 661**

[Docket No. FTA-2005-23082]

RIN 2132-AA90

**Buy America Requirements; End Product Analysis and Waiver Procedures****AGENCY:** Federal Transit Administration (FTA), DOT.**ACTION:** Second notice of proposed rulemaking.

**SUMMARY:** The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) requires the Federal Transit Administration (FTA or the Agency) to make certain changes to the Buy America requirements. This Second Notice of Proposed Rulemaking (SNPRM) proposes a publication process for public interest waivers to provide an opportunity for public comment; a clarification of Buy America requirements with respect to microprocessor waivers; new provisions to permit post-award waivers; clarifications in the definition of "end products" with regards to components and subcomponents, major systems, and a representative list of end products; a clarification of the requirements for final assembly of rolling stock and a list of representative examples of rolling stock items; expanding FTA's list of eligible communications, train control, and traction power equipment; and an update of the debarment and suspension provisions to bring them into conformity with statutory amendments made by SAFETEA-LU.

**DATES:** Comments must be submitted by January 29, 2007. Late filed comments will be considered to the extent practicable. FTA will also hold a public hearing in Washington, DC, to receive comments for the docket. The date and time of that hearing will be published as a separate **Federal Register** document.

**ADDRESSES:** You may submit comments [identified by DOT DMS Docket Number FTA-2005-23082] by any of the following methods:

*Federal Rulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

*Web Site:* <http://dms.dot.gov>. Follow the instructions for submitting comments on the DOT electronic docket site.

*Fax:* 202-493-2251.

*Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, PL-401, Washington, DC 20590-0001.

*Hand Delivery:* Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Instructions:* You must include the agency name (Federal Transit Administration) and Docket number (FTA-2005-23082) or the Regulatory Identification Number (RIN) for this rulemaking at the beginning of your comments. You should submit two copies of your comments if you submit them by mail. If you wish to receive confirmation that FTA received your comments, you must include a self-addressed stamped postcard. Note that all comments received will be posted, without change, to <http://dms.dot.gov> including any personal information provided and will be available to internet users. Please see the Privacy Act section of this document.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:****I. Background**

On November 28, 2005, the Federal Transit Administration (FTA) published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** (70 FR 71246) that discussed several proposals mandated by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59, August 10, 2005), and proposed to provide further clarification of existing FTA decisions on Buy America. Due to the complexity of many of the Buy America issues addressed in the NPRM and the divergence of opinion in important areas, FTA issued a final rule that addressed fewer subjects than addressed in the NPRM. (71 FR 14112, Mar. 21, 2006.) These more routine topics covered in the final rule included: (1) Administrative review; (2) the definition of "negotiated procurement;" (3) the definition of "contractor;" (4) repeal of the general waiver for Chrysler vans; (5) certification under negotiated procurements; (6) pre-award and post-award review of rolling stock purchases; and (7) miscellaneous corrections and clarifications to the Buy America regulations.

This Second Notice of Proposed Rulemaking (SNPRM) will address six issues identified in the NPRM but not covered in the final rule, and one new one: (1) A publication process for public interest waivers to provide an opportunity for public comment; (2) a clarification of Buy America requirements with respect to microprocessor waivers; (3) new provisions to permit post-award waivers; (4) clarifications in the definition of "end products" with regards to (a) components and subcomponents, (b) major systems, and (c) a representative list of end products; (5) a clarification of the requirements for final assembly of rolling stock and a list of representative examples of rolling stock items; (6) expanding FTA's list of eligible communications, train control, and traction power equipment; and (7) an update of the debarment and suspension provisions to bring them into conformity with statutory amendments made by SAFETEA-LU.

**1. Published Justification for Public Interest Waivers**

In the first NPRM, FTA proposed amending 49 CFR 661.7(b) to implement the SAFETEA-LU requirement that FTA publish justifications for public interest waivers in the **Federal Register** and provide for notice and comment.

**A. Comments Received**

FTA received ten comments, two of which were identical. Four commenters stated that FTA's proposal created a two-step process of waiver review. These commenters expressed concern that a two-step process would cause delay. One commenter noted in particular that the proposed process would have the effect of providing multiple opportunities for filing comments, would significantly lengthen the procurement process, would adversely affect the contract schedule, and would introduce additional uncertainty in the procurement process. One commenter stated an unduly long processing time would have a negative impact on cost and competition. Another commenter expressed concern that in cases involving construction contracts, where design and/or construction might be underway, and the "notice and comment process" would delay projects, inducing engineers and builders to offer less effective substitutes in order to avoid the delay from a notice and comment process.

**B. Commenter Proposals**

Four commenters provided alternatives to FTA's proposal. One

commenter recommended FTA post “notification of every public interest waiver request received by FTA in the **Federal Register**, with information on finding the request on the FTA Internet site and submitting comments. After a suitable public comment period has passed, FTA should post its decision to the FTA Internet site.” Similarly, two other commenters recommended FTA post notification of all requests for public interest waivers in the **Federal Register** at one time, along with a request for public comment, thus, creating a single comment period rather than two. Each of these four commenters, however, omitted any mention of SAFETEA-LU’s requirement to publish waiver “justification” in the **Federal Register** for notice and comment. Two other commenters noted this, stating that “the legislators clearly wanted the waiver’s justification to be published” with an opportunity to comment on it.

Commenters offered additional suggestions for streamlining the waiver application process. One commenter recommended the following: FTA should restrict receipt of comments on the initial waiver request to immediately affected parties; to handle comments by e-mail; to commit to a fixed time period for releasing the written justification in the event a waiver request is granted; to limit the comment period to one week after the publication date in the **Federal Register**; and to limit the time for confirmation of FTA’s determination to one week. Another commenter recommended FTA limit the comment period to ten days after **Federal Register** publication, and that FTA post its final decision on the FTA Web site within seven days. One commenter suggested that 30 days would be a reasonable time for review of FTA’s proposed waiver decision with supporting justification.

Two commenters recommended that FTA publish grantees’ written waiver requests and justifications in the **Federal Register**, with an opportunity to comment on them. Two other commenters expressed concern that FTA not release confidential or proprietary information, which might be provided to support a waiver request, during the waiver application process. One commenter noted the importance of protecting the names of prospective contractors while procurement is underway. This commenter specifically recommended FTA not disclose names of any prospective contractors in the notice and comment process.

The majority of commenters also recommended FTA continue its internal practice of publishing all waiver

decisions on the FTA Web site ([http://www.fta.dot.gov/legal/buy\\_america/14328?ENG\\_HTML.htm](http://www.fta.dot.gov/legal/buy_america/14328?ENG_HTML.htm)), including denials. One commenter noted that lessons learned from disapprovals lead to a better understanding and application of the Buy America requirements.

#### C. FTA Response

FTA agrees that SAFETEA-LU requires it to publish its “justification” in the **Federal Register** for notice and comment. FTA disagrees, however, that it should also publish grantees’ written justifications in the **Federal Register**. SAFETEA-LU does not require this. Moreover, FTA notes that several commenters expressed a legitimate concern that publishing a grantee’s waiver request and justification in the **Federal Register** could result in an unwanted dissemination of confidential business information. Furthermore, FTA disagrees with the comment that it should post “notification of every public interest waiver request received in the **Federal Register**, with information on finding the request on FTA’s Internet site and submitting comments.” This and other comments that recommend FTA publish all requests for public interest waivers in the **Federal Register**, misconstrue the unequivocal language in SAFETEA-LU, which requires FTA to publish only a written justification in the **Federal Register**.

While several commenters complain of a “two-step” process for waiver approval, none explain how FTA can simultaneously publish a notice of waiver request and the justification for it in a single **Federal Register** notice while still providing the public an opportunity to comment on the waiver request. As a matter of fact, combining these processes would negate any comments received on the waiver request because FTA would have already made a decision. Therefore, FTA declines to adopt this proposal.

In addition, as explained in the NPRM, FTA believes the plain language of SAFETEA-LU, and its legislative history, expressly requires FTA to issue a written justification and publish it in the **Federal Register**, only in instances where the justification supports a waiver request. *See* 49 U.S.C. 5323(j)(3); *see also* H.R. Conf. Rep. No. 109–203, at 952 (2005).

FTA shares the concern of many commenters who state that the proposed rule could cause delay by creating a so-called “two-step” process for waiver approvals. FTA will endeavor to implement a rule in a way that minimizes delays. It should be noted

that any potential delay resulting from the requirement to publish a justification in the **Federal Register** applies only in instances where the justification supports granting the waiver, as explained earlier.

Under the current Buy America process, FTA’s Chief Counsel has been delegated with the responsibility to issue public interest waivers, soliciting comments via the FTA Web site and concurrent notification to the American Public Transportation Association (APTA). As FTA explained in the first NPRM: “This process functions well. The relevant industries and grantees actively respond and provide valuable information to FTA.” In fact, FTA relies heavily on the public comments it receives during the comment period for waiver requests. For this reason, FTA disagrees with a commenter’s suggestion FTA should limit the receipt of comments on the waiver request to “immediately-affected parties.” To the contrary, FTA finds that frequent and wide-ranging public comment is an invaluable part of the Buy America process.

Because FTA relies on public input in making Buy America determinations, SAFETEA-LU’s requirement to publish justifications of public interest waivers in the **Federal Register** necessarily creates a multi-step process. FTA interprets the term “justification” in this context as a preliminary decision, which explains the rationale for granting a waiver. FTA believes that in order to issue a well reasoned justification, it should first receive preliminary comment from the public on the waiver request. Such comments would form the basis of the justification.

#### D. FTA Proposal

Accordingly, FTA believes SAFETEA-LU requires the following process: (1) Post notification of the public interest waiver request on FTA’s Web site and solicit comments on the request; (2) based on the comments received, prepare a justification that explains the rationale for approving a waiver request; (3) publish the justification in the **Federal Register** for notice and comment within a reasonable time; and (4) issue a final decision on FTA’s Web site regarding the waiver request, based on comments received in response to the published justification. It should be noted that upon review of the **Federal Register** comments, FTA may ultimately determine that a waiver is *not* in the public interest, and deny the request. FTA believes that this methodology would create a total processing time of about 30 calendar days. FTA requests comment on this

new process for granting public interest waiver requests, including the proposed processing time.

## 2. Microcomputer/Microprocessor Waivers

In the NPRM, FTA requested comment on its proposal to implement the SAFETEA-LU requirement to “clarify” that any waiver of the Buy America requirements for a microprocessor, computer, or microcomputer, applies “only to a device used solely for the purpose of processing or storing data” and does not extend to the product or device containing a microprocessor, computer, or microcomputer.

### A. Comments Received

FTA received sixteen comments on this issue, three of which concurred outright with FTA’s proposed change to the regulation without further substantive comment. Nine commenters appeared to endorse FTA’s proposed change to the microcomputer waiver, but raised an additional issue about “input/output” facilities or devices. For example, one commenter noted that “FTA has dropped a significant phrase, ‘input/output,’ facility from past practices.” This commenter then recommended that “existing regulatory practices must be continued to avoid significant disruption in the industry.” Four other commenters similarly recommended that FTA make clear that input/output devices or facilities are covered by the waiver. Citing the Conference Report for SAFETEA-LU (H.R. Conf. Rep. No. 109–203, *supra*), one of these commenters noted that in directing FTA to clarify the microprocessor waiver, Congress did not intend for FTA to change its current regulatory treatment of microcomputer equipment.

On the other hand, four other commenters opposed including “input/output” devices in the microcomputer waiver and provided comments that interpreted this matter entirely differently. The commenters congratulated FTA for purportedly “dropping” input/output facilities or devices from waiver coverage, or, recommended that FTA drop such devices from the scope of the waiver. Two of these comments also recommended FTA not include “software” in the proposed “definition” of computers, microcomputers, and other equipment covered by the waiver. The two comments also appeared to request that FTA clarify that what is “exempt” under the microprocessor waiver can not be counted as either foreign or domestic for purposes of Buy

American content calculations in rolling stock procurements.

### B. Commenter Proposals

One commenter proposed amending Appendix A to 49 CFR 661.7(b) by adding a sentence clarifying that if an “end product (e.g., a fare card system) contains a microcomputer,” the microcomputer is exempt from the requirements of Buy America, but the rest of the end product is not. This commenter also recommended that if a microcomputer is exempt from Buy America, FTA should make clear whether the device is counted as domestic or foreign when calculating the costs of an end product.

Another commenter proposed an alternative version of the microcomputer waiver that includes a “hardware definition” of microprocessor, as follows: “[t]his general waiver does not extend to a product or device which merely uses microprocessor circuit chip(s) imbedded in the material or uses one or more printed circuit board assemblies consisting of microprocessor circuit chip(s) either as a group of separate items or as a single integrated microcomputer unit for controlling its end function which is not used solely for the purpose of processing or storing data.” A final comment made note of FTA’s proposed changes to the microcomputer waiver, but did not appear to either approve or disapprove of FTA’s proposal.

### C. FTA Response

Regarding the “input/output” facility issue raised by nine commenters, it is unclear why so many of these commenters believe FTA “dropped” input/output devices from the microcomputer waiver in the first NPRM. The current version of the general waiver at 49 CFR 661.7, Appendix A, does not include the term “input/output” facility. It merely states that, “microcomputer equipment, including software, of foreign origin can be procured by grantees.” 49 CFR 661.7, Appendix A. Likewise, FTA’s proposed language in the first NPRM does not mention “input/output” facilities or devices. Rather, that term is mentioned in a separate definition of a microcomputer, which FTA referred to in the NPRM. See 50 FR 18760, May 2, 1985 (“A basic microcomputer includes a microprocessor, storage, and *input/output facility*, which may or may not be on one chip.”) (Emphasis added.)

In clarifying that the waiver applied to devices “used solely for the purpose of processing or storing data,” as required by SAFETEA-LU, commenters

may have interpreted this to mean that “input/output” facilities were somehow excluded from waiver coverage. Such is not the case. FTA agrees with the commenter who noted that in directing FTA to clarify the microcomputer waiver, Congress did not intend for FTA to change its current regulatory treatment of microcomputer equipment. See H.R. Conf. Rep. No. 109–203, at 952 (2005) (“In directing the Secretary to issue new regulations regarding microprocessors, computers, or microcomputers, there is no intent to change the existing regulatory treatment of software or of microcomputer equipment.”) While it is arguable whether FTA’s definitions of “computer system” and “microcomputer” are outdated and should be modified to reflect a twenty-year advance in technology, FTA believes Congress’ clear intent is not to change these definitions in this rulemaking.

### D. FTA Proposal

Accordingly, since FTA’s existing regulatory definition of a microcomputer already includes an “input/output facility” as one of its component items, consistent with Congressional intent not to change the definitions in this rulemaking, FTA believes it is unnecessary to further amend the regulation to reiterate that input/output facilities or devices are covered by the waiver. Furthermore, in keeping with the above Congressional guidance, FTA does not agree with recommendations to eliminate “software” from the scope of the microcomputer waiver.

FTA also disagrees with the recommendation that it should clarify whether equipment subject to the microcomputer waiver is counted as foreign or domestic in calculating component content in rolling stock procurements. That change is unnecessary because FTA’s regulation already dictate that components subject to the microcomputer waiver are counted as domestic in rolling stock procurements. See, 49 CFR 661.7(f).

### 3. Post-Award Waivers

FTA sought comment in the first NPRM on its proposal to create a post-award non-availability waiver. Under FTA’s current regulation, a bidder or offeror that certifies compliance with Buy America is “bound by its original certification” and “is not eligible for a waiver of those requirements.” 49 CFR 661.13(c). The proposed language would allow grantees to request a non-availability waiver after contract award where a bidder or offeror had originally certified compliance with the Buy

America requirements in good faith, but can no longer comply with its certification and contractual obligations due to commercial impossibility or impracticability. To implement the SAFETEA-LU requirement for post-award waivers, FTA proposed amending 49 CFR 661.7(c)(3).

#### A. Comments Received

FTA received eight comments on this proposal, one of which concurred with FTA's proposed change to the regulation, without further substantive comment. A second commenter noted some minor variations in language between the proposed rule in the "Supplementary Information" section of the NPRM, and the actual proposed amendment of 49 CFR part 661. This commenter then stated that the actual proposed amendment, "appears to address this requirement." FTA presumes the commenter is referring to the requirement of SAFETEA-LU.

#### B. Commenter Proposals

The six remaining commenters endorsed the concept of a post-award waiver, but felt that FTA's proposal was unnecessarily complex or unduly restrictive. Three commenters proposed the following alternative language:

Waivers based on non-availability may be granted when the Administrator or the Administrator's designee is satisfied that the applicable certificate of Buy America compliance was made reasonably and in good faith and that intervening circumstances have made compliance with that certification impossible or commercially impracticable.

Another commenter proposed similar language, as follows:

The Administrator may grant a non-availability waiver under section 661.7(c) in any case in which a contractor has originally certified compliance with the Buy America requirements in good faith, but can no longer comply with its certification. The Administrator will grant this non-availability waiver only if the grantee provides sufficient information which indicates that the original certification was made in good faith and that the item to be procured cannot now be obtained domestically due to commercial impossibility or impracticability.

Five commenters stated that in deciding whether to grant a post-award waiver, FTA's consideration of the status of other competitors was immaterial and beyond the statutory intent of SAFETEA-LU. These commenters argued that FTA's proposal forecloses a potential waiver when, after contract award and discovery that supplies are unavailable, another bidder or offeror who certified compliance is still able to supply domestic products or

materials. The five commenters argued that this would force a grantee and its winning contractor, in spite of their good faith, to be "held economic hostage" to a frustrated competitor who had obtained limited remaining domestic supplies through exclusive distribution agreement or other arrangement. According to these commenters, the situation would result in significant cost increases, as the grantee would be forced to terminate its contract and procure with the compliant contractor, with no effective competition to assure reasonable pricing.

Two commenters noted that FTA's discussion of the waiver proposal encompassed both commercial impossibility and impracticability "due to price." These two commenters argued that the provision should allow waiver under *any* commercial impracticability, not just due to price. A third commenter suggested that in determining the monetary value of the "commercially impracticable" criteria, the "current 25 percent price differential figure within the waivers might be a reasonable benchmark for consideration."

None of the commenters discussed or questioned the meaning of the term "impossibility." However, a fourth commenter argued that FTA should not require grantees to produce evidence of changed market conditions that demonstrate the non-availability of materials or supplies after contract award in order to obtain a post-award waiver. Furthermore, this commenter stated that the grantee should not have to demonstrate the impossibility or impracticability of completing the third party contract. The commenter emphasized that such a requirement would prove burdensome to grantees, and goes beyond the stated provisions of SAFETEA-LU.

#### C. FTA Response

FTA agrees with the commenters who recommended that the proposed language in the NPRM should be simplified. In fact, FTA favors the alternative post-award waiver provision proposed by one commenter, as it matches in tone and language the existing non-availability waiver found in 49 CFR 661.7(c).

The intent of Buy America is to safeguard American jobs by requiring that "steel, iron, and manufactured goods used in the [FTA-funded] project are produced in the United States." 49 U.S.C. 5323(j). Buy America is not intended to protect any particular contractor or supplier. In deciding whether to grant a post-award waiver, therefore, FTA should not deliberately

ignore the status of other bidders or offerors who are Buy America compliant and can furnish domestic material or products on an FTA-funded project. Concluding otherwise would violate the legislative intent behind Buy America.

Therefore, commenters' disagreement notwithstanding, FTA believes the status of other bidders or offerors on an FTA-funded procurement may be a relevant factor in deciding whether to grant a post-award waiver. For example, if a winning contractor is unable to comply with its Buy America certification due to commercial impossibility or impracticability, but a second low bidder who certified compliance is available to provide domestic material or products at a reasonable price, FTA believes it would be appropriate to take that into account when deciding whether to grant the waiver request.

Moreover, FTA is mindful that a decision on a post-award waiver could adversely impact a grantee's project schedule and budget, as several commenters have stated. Therefore, it is FTA's intent to consider "all appropriate factors on a case-by-case basis," in deciding whether to grant a post-award waiver. Such factors may include project schedule and budget. It will be the grantee's responsibility to point out such factors to FTA in requesting a post-award waiver.

FTA disagrees with the comment suggesting FTA not require grantees to produce evidence of "impossibility or impracticability of completing the third party contract," *i.e.*, evidence of changed market conditions, which would demonstrate the non-availability of materials or supplies after contract award. FTA notes no other commenter made this suggestion or otherwise disagreed with the concept of using commercial impossibility or impracticability as the applicable standard for granting a post-award waiver. In addition, while the commenter would have FTA do away with requiring a grantee to produce specific evidence of commercial impossibility or impracticability in support of a waiver request, the commenter offered no alternative methodology or standard which would guard against potential abuse of the post-award waiver. Accordingly, FTA does not adopt the commenter's recommendations.

In fact, FTA believes further clarification of what constitutes "commercial impracticability" is warranted but disagrees with the several commenters who suggested that impracticability should not be limited "due to price," but should apply to *any*

commercial impracticability and with the one commenter who suggested that in determining the monetary value of what constitutes “commercial impracticability,” that the “current 25 percent price differential figure,” referring to the price-differential waiver at 49 CFR 661.7(d), “might represent a reasonable benchmark.”

As stated in this SNPRM, FTA prefers to base any regulatory requirements on existing precedents in public contracting law and practice. For example, in *Raytheon Co. v. White*, 305 F.3d 1354, 1667 (Fed. Cir. 2002), the U.S. Court of Appeals for the Federal Circuit defined “commercial impracticability,” in part, as follows:

A contract is commercially impracticable when performance would cause “extreme and unreasonable difficulty, expense, injury, or loss to one of the parties.” *Restatement (Second) of Contracts* § 261 cmt. d (1981).  
\* \* \*

A contract is said to be commercially impracticable when, because of unforeseen events, “it can be performed only at an excessive and unreasonable cost,” *Int’l Elecs. Corp. v. United States*, 227 Ct.Cl. 208, 646 F.2d 496, 510 (1981), or when “all means of performance are commercially senseless,” *Jennie-O Foods, Inc. v. United States*, 217 Ct.Cl. 314, 580 F.2d 400, 409 (1978). Whether performance of a particular contract would be commercially senseless is a question of fact. Cf. *Maxwell Dynamometer Co. v. United States*, 181 Ct.Cl. 607, 386 F.2d 855, 870 (1967). A contractor is not entitled to relief “merely because he cannot obtain a productive level sufficient to sustain his anticipated profit margin.” *Natus Corp. v. United States*, 178 Ct.Cl. 1, 371 F.2d 450, 457 (1967).

FTA believes this “commercially senseless” standard, as articulated in Federal case law, represents the appropriate standard for determining commercial impracticability in Buy America post-award waivers. Therefore, when questions arise as to what constitutes commercial impracticability or impossibility in a specific post-award waiver request, FTA will rely on the precedents established in Federal contract law for guidance.

#### D. FTA Proposal

In the new proposal, FTA steps away from the language in the first NPRM because it is persuaded by the issues raised by commenters who stated the language included in the first NPRM should not be included in a final rule. FTA agrees and believes the better approach is to require the grantee, in making a request for a post-award waiver, to provide specific evidence of a contractor’s good faith and evidence justifying the post-award waiver. This evidence may include information about

the origin of the product or materials, invoices, or other relevant solicitation documents as requested and that the item to be procured cannot now be obtained domestically due to commercial impossibility or in practicability. Additionally, when determining whether conditions exist to grant a post-award waiver, FTA will consider all appropriate factors on a case-by-case basis. FTA requests comments on this new proposal to modify the post-award waiver procedures.

#### 4. “End Products”

FTA’s initial NPRM sought comments on two alternative definitions of the term “end product.” The first proposed definition comes from FTA’s current, long-standing practice whereby the end product of a procurement is the deliverable item specified by the grantee in the third party contract. Under this so-called “shifting” methodology, the same item may be an end-product, a component, or a subcomponent, depending on the article specified in the third party contract, with resulting differences in the applicability of Buy America requirements to the same item based on its characterization as an end product, component or subcomponent. Applying this shifting approach, FTA’s first proposed definition stated: “End product means any item subject to 49 U.S.C. 5323(j) that is to be acquired by a grantee, as specified in the overall project contract.”

The second proposed definition was based on the definition of end product in the Buy American Act, 41 U.S.C. 10a–10d, as implemented in the Federal Acquisition Regulation (FAR) Part 25. Under this second definition, FTA proposed to abandon the “shifting” methodology in favor of one where the end products do not shift, and components and subcomponents retain their designation. FTA’s second proposed definition stated: “End product means any article, material, supply, or system, whether manufactured or unmanufactured, that is acquired for public use under a federally funded third party contract.” A list of representative end products is included at Appendix A to this section.

FTA’s second proposed definition includes the term “system” and mentions a “list of representative end products.” FTA will address these two important issues separately in the SNPRM; that is, whether a “system” should be included as an end product, and what items should be included on a representative list of end products.

#### 4a. “End Product” Under the Non-Shift Approach

##### A. Comments Received

FTA received twenty-one comments on the definition of “end product.” Four commenters expressly endorsed retaining some form of FTA’s current “shifting” methodology. All four of these commenters are transit operators receiving FTA funds, three of whom are among the largest transit operators in the country.

One of the commenters who specifically supported FTA’s first proposed definition noted a discrepancy between the proposed rule in the “Supplementary Information” section of the NPRM, and the actual proposed amendment of 49 CFR part 661, to the effect that the proposed amendment omits the clause, “A list of representative end products is included at Appendix A to this section.” FTA agrees that this sentence should have been included in the proposed amendment. Furthermore, this same commenter stated that the second “non-shifting” proposed definition of end product “would substantially reduce much of the current flexibility in the Buy America program.” A second commenter stated that to “rigidly fix the nature of a component at the time a vehicle is purchased would create massive uncertainty in the marketplace.”

A third commenter, a large transit operator, expressed “grave concerns” about abandoning FTA’s long standing shifting methodology in favor of one where the end products do not shift. According to the commenter, such a change in methodology would undermine the basic purpose of the Buy America rule, which is to encourage the creation of American jobs. The commenter explained that the shifting methodology encourages American job creation by providing an incentive for manufacturers of end product components to invest in domestic facilities for after market support. A manufacturer of rail car equipment, for example, would have an incentive to invest in domestic facilities in order to achieve Buy America compliance when selling former “components” as “end products” in an after market procurement.

The commenter also stated that the alternative proposal cannot be practically implemented. Such a new methodology would necessarily place great reliance on the accompanying list of end product items. The commenter explained that the burden for transit agencies to track the status of rolling stock component items (as either foreign

or domestic) from the time of their original purchase would be untenable given that “the useful life of a rail car can exceed 30 years.”

This commenter argued that the “non-shift” methodology would not, in fact, create consistency. Again, using the example of a rail car manufacturer, the commenter explained that it is the manufacturer who decides in each particular case whether a given component should be of domestic or foreign manufacture in order for the end product to meet the sixty percent domestic content requirement for rolling stock [forty percent of the components, by cost, may be foreign]. Thus, any typical component of a rail car could be “of foreign manufacturer in one specific instance and \* \* \* of domestic manufacturer in another, even when foreign cars are manufactured by the same rail car builder.”

A fourth commenter, also a large transit operator, raised similar arguments to support its endorsement of the shifting approach to end products. This commenter also stated that abandonment of the shifting methodology would create a disincentive for manufacturers to establish domestic facilities to support after market purchases, but added that the lack of domestic facilities “will create longer lead times on acquiring replacement parts.”

#### B. Commenter Proposals

One commenter suggested FTA revisit its application of the end product definition as it applies to construction projects, specifically, that the “deliverable of the project” as described in the contract should be viewed as the end product, with structures such as terminals and stations to be considered as components. Furthermore, the commenter suggested that FTA should not apply the Buy America requirements “for the minimal use of iron or steel products where the cost of the foreign sourced item is less than a particular dollar threshold.” Such an approach, according to the commenter, would be consistent with the application of Buy America used by the Federal Highway Administration, and would foster uniformity within the U.S. Department of Transportation.

Another commenter appeared to endorse the “shift” approach to end product analysis and suggested the following definitions:

“Any item subject to 49 U.S.C. 5323(j) that is to be acquired by a grantee, as specified in the overall project contract and which is ready to provide its intended end function or use without any further manufacturing or assembly change(s).” Or,

“End product means any article, material, supply, or system, whether manufactured or unmanufactured, that is acquired for public use under a federally funded third party contract and which is ready to provide its intended end function or use without any further manufacturing or assembly change(s). A list of representative end products is included at Appendix A.”

This commenter stated that this proposed definition would clarify that an end product is something that will not require further changes and can function with appropriate mounting and interconnection for its input and output without further manufacturing or assembly.

Of the sixteen remaining commenters, three did not specifically comment on the issue of “shift/non-shift,” but focused instead on whether a “system” should be included as an end product, or recommended that certain products be included in the list of representative end products. Another commenter requested FTA “strike the end product definition as written,” but did not identify which of the two proposed definitions to strike.

Twelve commenters expressly favored the second definition—the “non-shift” approach—to end product analysis. The primary reason given for eliminating the shift methodology, as this commenter put it, is to “achieve reasonable predictability for the business community.” Commenters also stated that knowing particular items will always be designated as an end product, a component, or a subcomponent would enhance stability in the transit industry, enable proposers to plan and price proposals more accurately, and would allow transit agencies to obtain better prices.

One of the twelve commenters addressed the concerns of some grantees that abandonment of the “shift” approach in rolling stock procurements would discourage manufacturers from establishing domestic facilities for after market support; and would thereby create an overwhelming recordkeeping burden on public transit agencies and suppliers. Specifically, the commenter recommended that in adopting a “non-shift” methodology to end product analysis, FTA should retain its current practice of treating replacement parts as manufactured products rather than as rolling stock.

The commenter stated that treating replacement parts under the rolling stock standard, instead, would prove unworkable and would impose crushing recordkeeping requirements on transit agencies. This is so because transit agencies would have to track the origins of every component and sub-component

of their rolling stock end products, no matter how old, to determine if they should replace foreign and domestic components and subcomponents with like foreign and domestic replacement parts—a task that becomes impossible or excessively burdensome where vehicles and components may each contain a varied combination of foreign and domestic parts.

On the other hand, treating replacement parts under the manufactured product standard rather than the rolling stock standard would obviate the need to maintain detailed parts lists, according to the commenter. While acknowledging that some in the transit community advocate treating replacement parts as manufactured end products, per the terms of a contract and current FTA practice, the commenter advocated a different approach. Using the example of a replacement bus engine, the commenter would treat this as “a manufactured product *component*, regardless of the individual contract terms.”

For rolling stock replacement parts, the commenter stated that the optimal course of action for maintaining consistency and avoiding undue administrative burden “is in consistently applying the end product, component, and sub-component labels.” Because replacement parts manufacturers are already accustomed to having their products treated as manufactured products, the commenter states that its approach “will not represent the kind of sea change likely to disrupt the supply industry.”

Addressing the topic of replacement parts, another commenter recommended that “all spare parts be exempt from the Buy America requirements.” While acknowledging that such an approach may circumvent the objectives of Buy America, the commenter argued that “it will increase competition and should result in lower costs to the grantee.”

Twelve commenters who supported a “non-shift” approach expressed differences of opinion on a proposed definition of end product. For example, five commenters favored FTA’s proposed non-shift definition of end product, which is based on the Buy American Act, used for direct Federal procurements. Three of these commenters stated that consistency of definitions in publicly funded contracts is a benefit.

Seven commenters disagreed with FTA’s proposed definition. Some of these commenters characterized FTA’s proposed definition as overly broad or insufficiently descriptive. One commenter proposed an alternative definition, as follows:

"a structure, vehicle, or similar item that has a distinct use, function, or purpose, consistent with the representative list at Appendix A."

However, several commenters specifically disagreed with this proposed definition, as it did not include the term "system."

A second commenter proposed a "non-shift" definition of end product, by specifically amending 49 CFR 661.11(s) to read as follows:

"an end product is a system, structure, vehicle, or similar item that has a distinct use, function, or purpose, consistent with the representative list at Appendix A subject to 49 U.S.C. 5323(j) that is to be acquired by a grantee, as specified in the overall project contract."

Two commenters, in identical fashion, proposed the following definition:

"any material item or assembly that is manufactured or assembled for the purpose of performing a specific function, and is usually specified as a separate or stand alone assembly or line item component in a system, and it is covered by its own individual performance warranty and can function independently in differing operating environments. A list of representative end products is included in Appendix A."

In proposing this definition, these two commenters stated that end products are usually specified as stand alone assemblies (line item or separate descriptions) and are sold with individual performance warranties and can function independently in differing service environments.

Two commenters criticized the "shift" approach to end product analysis, but did not propose alternative definitions. One of these commenters stated that FTA's proposed "shift" definition is not consistent with Congressional intent, as it allows for system end products. The other commenter advocated eliminating the "shift" approach. While not offering a definition of end product, the commenter suggested that an "individual items" may be considered as end products if any of the following criteria are present: (1) Separate line item pricing for individual elements is involved; (2) Performance warranties for individual or separable product elements are involved; (3) The procured items are regularly sold separately; and (4) The procured items can function separately.

#### C. FTA Response

Upon careful analysis and review of the comments received on the end product issue, FTA concurs with the majority of commenters who recommended FTA adopt a "non-shift"

approach to end product analysis. FTA finds the commenters' argument especially compelling that such an approach would (1) Foster reasonable predictability and stability in the transit business community, (2) enable offerors and bidders to price proposals more accurately, and (3) allow transit agencies to obtain better prices to be especially compelling. Further, FTA is mindful of the concerns expressed by commenters who opposed abandoning the current "shift" approach, as this change could lead to enormous administrative burdens on grantees and result in the potential loss of American jobs. FTA believes there is a straightforward solution that can address these concerns.

The commenters who opposed the "non-shift" approach focused their comments almost entirely on the effect of such a change in the market for rolling stock replacement parts. FTA agrees with the "grave concerns" expressed by some commenters on this issue. Keeping track of after market rolling stock components would not only prove to be an impossible burden for grantees, it also and could very well discourage parts suppliers from sourcing in the United States. However, these concerns rest on the assumption that FTA would treat replacement parts under the rolling stock standard (*i.e.*, where sixty percent of the subcomponents of a component, by cost, must be domestic, but forty percent may be foreign-sourced). The better approach, as one commenter suggested and others endorsed, is for FTA to continue to treat rolling stock replacement parts under the manufactured products standard, which requires that one hundred percent of components be of domestic manufacture. FTA agrees with this recommendation.

By continuing to treat replacement parts under the manufactured products standard in 49 CFR 661.5, suppliers must still manufacture replacement components in the United States, thus preserving American jobs. In addition, grantees will not have to engage in the burdensome recordkeeping requirements that a change to a rolling stock standard for replacement parts would entail. As one commenter stated, "[r]eplacement parts manufacturers are already accustomed to their products being treated as manufactured products so this will not represent the kind of sea change likely to disrupt the supply industry." FTA agrees, and believes that this approach should alleviate grantees' concerns about procuring replacement parts under a "non-shift" end product standard.

#### D. FTA Proposal

Here is how FTA believes a "non-shift" approach to end product analysis would work in rolling stock procurement. First, when procuring end products such as rail cars or buses, there would be little or no difference in the Buy America requirements under a "non-shift" approach from the current "shift" method. In either case, under FTA's Buy America requirements for rolling stock, 49 U.S.C. 5323(j)(2)(C) and 49 CFR 661.11, sixty percent of all components, by cost, must be of U.S. origin, and final assembly of the vehicle must take place in the United States. Furthermore, FTA's audit requirements, which state that a recipient purchasing rolling stock must conduct, or cause to be conducted, a pre-award and a post-delivery audit to verify compliance with Buy America would remain the same. See 49 CFR part 663.

Any change between the "non-shift" and "shift" approaches to end product analysis would occur primarily in the procurement of replacement parts. Under FTA's current Buy America methodology, if a grantee procures a replacement part for a bus, rail car, or other rolling stock end product, then the general requirements for manufactured products found at 49 CFR 661.5 apply. In that case, the replacement part component, such as a bus engine, "shifts" to become an end product and all manufacturing processes for the engine must take place in the United States. All of the components of the engine must be manufactured domestically, regardless of the origin of the subcomponents. See decision letter from FTA to Hubner Manufacturing Corporation (stating the current Buy America standard for rolling stock replacement parts) (March 14, 2000).

Under the proposed "non-shift" methodology, what would change specifically is that the replacement part, in this example a bus engine, would always remain a component instead of "shifting" to being an end product. Using the manufactured product standard, this would mean the replacement part component, *i.e.*, the bus engine, would still have to be manufactured in the United States, but its subcomponents could be foreign sourced. To further illustrate this concept, under FTA's current "shift" methodology, a replacement bus engine acquired for a mid-life overhaul is the end product; the pistons assemblies are components; and connecting rods are subcomponents, which may be foreign sourced. Under the proposed "non-shift" model, the replacement bus engine remains a component, which



must be manufactured in the United States. But the replacement piston assemblies are now subcomponents, which may be foreign sourced.

With adoption of a “non-shift” approach to manufactured end products, similar results would apply. For example, when procuring a manufactured end product such as a mobile vehicle lift, there would be little or no difference in the Buy America requirements under a “non-shift” approach from the current “shift” method. In either case, all of the manufacturing processes for the vehicle lift end product must take place in the United States and all of the components of the product must be of U.S. origin. See 49 CFR 661.5(d)(1). Additionally, a component “is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents.” 49 CFR 661.5(d)(2).

As with the example of the bus engine, however, there would be a change in the subcomponent requirements for replacement parts for manufactured end products such as a mobile vehicle lift. What would be considered a component under the current “shift” approach would become a subcomponent under the “non-shift” approach, and may be foreign-sourced.

With products that are made primarily of steel and iron such as track-work or a steel bridge, there would be absolutely no change in the Buy America requirements between the current “shift” approach and the proposed “non-shift” methodology. In either case, the requirements are clear: “all steel and iron manufacturing processes must take place in the United States,” whether the item is an end product, a component, or a subcomponent. See 49 CFR 661.5(b)(emphasis added).

In short, FTA foresees a change in the Buy America requirements resulting from adoption of the “non-shift” approach to end product analysis primarily in the procurement of replacement parts for rolling stock and manufactured products. While this change may permit an increase in the level of foreign sourced subcomponents for replacement parts, FTA believes the benefits of the new approach more than outweigh the possible disadvantages. FTA agrees with one commenter who stated that for rolling stock replacement parts, in particular, the proposed “non-shift” approach represents “the optimal course of action for balancing consistency and administrative burden.”

To conclude, FTA believes a “non-shift” approach to end product analysis will achieve the goals of enhancing

consistency, stability, and favorable price structures in the transit industry with minimal disruption to current practices while still maintaining the legislative intent of Buy America.

Having proposed adoption of the “non-shift” methodology, the task remains to shape a workable definition of end product. Additionally, in drafting a definition of end product, FTA believes the end product definition should be consistent with the current definition of “component” in 49 CFR 661.3, which states: “*Component* means any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location.” Thus, FTA seeks comments on its proposal to modify the definition of end product in 49 CFR 661.3.

#### 4b. “System” as an “End Product”

In defining the term “end product,” SAFETEA-LU requires that “the procurement of systems” be addressed “to ensure that major system procurements are not used to circumvent the Buy America requirements.” In light of this requirement, the NPRM sought comment on whether FTA should continue its longstanding practice of including “systems” as definable end products. Furthermore, FTA sought comment on a proposed definition of system, which is based on the “functional test” for interconnected systems from the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. 1202, heading 8474, used in customs law. FTA’s proposed definition of system stated: “System means a machine, product, or device, or a combination of such equipment, consisting of individual components, whether separate or interconnected by piping, transmission devices, electrical cables or circuitry, or by other devices, which are intended to contribute together to a clearly defined function.”

In addition, FTA also sought comment on whether the same or different Buy America requirements should apply to open architecture versus proprietary system end products.

#### A. Comments Received

FTA received nineteen comments on the issue of system end products. Eight commenters opposed including systems as end products. Two comments, which were identical, expressed concern that FTA’s proposed definition could be “stretched to include a whole ‘system’ of disconnected but related end products, such as buses, garages, access roads, bus shelters,” which could lead to distortions in the Buy America

requirements. Another commenter objected that including a system in the end product definition could result in “gamesmanship,” thereby eliminating American jobs. A fifth commenter offered similar views that including a system as an end product allows “foreign suppliers to circumvent the intent of Congress with respect to Buy America compliance.”

One other commenter, whose views were fully endorsed by a yet another commenter, stated that including a system as an end product would violate Congress’ stated intent in SAFETEA-LU that “system procurements not be used to circumvent Buy America requirements.” The commenter explained that under FTA’s historical interpretation of the Buy America requirements, “end products” are made up of components and subcomponents. For manufactured products, components must be domestically produced, but subcomponents may be foreign sourced.

Using the example of fare collection equipment, the commenter pointed out that an automated fare collection system is comprised of ticket vending machines, fare gates, computers, software, and like items. By designating an automated fare collection system as an end product, the ticket vending machine, for example, would be a component, and must be manufactured domestically. The ticket handling assembly that goes into the ticket vending machine would be a subcomponent, and may be foreign sourced. Under a “non-system” approach to Buy America analysis, however, the ticket vending machine is the end product and the ticket handling assembly is a component, and both items would have to be manufactured domestically.

The commenter went on to state that including a “major system” as an end product results in designation of critical equipment as components, rather than as end products, thereby dramatically increasing the quantity of foreign-manufactured equipment that may be incorporated into a procured system. This is so where systems are end products and an item “should be designated properly as a component is pushed ‘downstream’ and becomes a subcomponent,” that may be foreign sourced. It is this situation, according to the commenter, that Congress sought to avoid.

The commenter stated further that if equipment must be domestically made when not purchased as part of a system, but may be foreign sourced when part of a system procurement, then the system procurement “has been used to



circumvent the Buy America requirement.” The risk of such circumvention is more pronounced when procuring manufactured goods, as distinct from rolling stock products. The commenter added that “enshrining” system end products in regulation would induce manufacturers to source cheaper products off shore, resulting in “the exportation of American jobs and capital.” Similarly, the commenter faulted FTA’s proposed list of representative end products for including systems.

#### B. Commenter Proposals

The above commenter asserted that the definition of “end product” is not objectionable if it includes only those items which may be considered as a single manufactured product if manufactured in a U.S. facility. To facilitate this approach, the commenter proposed clarifying the existing regulatory definition of end product as “any item subject to 49 U.S.C. 5323(j) that is to be acquired by the grantee, as specified in the overall project contract,” by adding the following language to the regulatory text:

Notwithstanding the characterization of a system as an end product by a grantee in its project contract procuring manufactured products, the system shall not be considered the end product where (1) The solicitation provides separate line item pricing for individual product elements and the owner retains the right to materially add or subtract quantities of individual product elements, (2) the solicitation provides for performance warranties for individual or separable product elements (other than warranties relating to degraded mode operation), thereby demonstrating that individual elements can fully perform independently, or (3) items identified in the solicitation that constitute the system are regularly sold separately (other than in the context of replacement parts) and can function independently of the system. In solicitations where circumstances described in (1), (2), or (3) above are present, then those individual items or elements identified in the solicitation shall be considered end products rather than part of any system.

In addition, the commenter suggested FTA consider the following clarifying language:

Example of manufacturing products that have sometimes been treated by grantees as end products, based upon a system characterization, which would no longer be treated as end products under this definition include fare collection and distribution, security and access control, vehicle location, passenger information and signage products (unless such signage provides system-wide information rather than just location specific information). Further, FTA should eliminate fare collection systems from the proposed list of end products in the appendix to the

regulation; so that it is clear that separable fare collection products with separable performance warranties do not constitute an end product merely because they are purchased as part of a larger procurement described as a “system.”

The commenter proposed a representative list of “proper end products” to include in the regulation, which FTA has summarized, as follows:

End Products: transit/coach/shuttle buses; trolley replicas; subway rail cars; light rail cars; destination displays or signs; audio announcement devices; wheelchair restraint devices; mobile video surveillance equipment; vehicle power generation devices; vehicle fire suppression devices; route or run displays or signs; video recorders and cameras; audio recorder, player, or transmission device; GPS and vehicle location devices; electrical control and multiplexing devices; voice enunciation devices; operator input/output displays and devices; automatic passenger counting equipment; automated gates and turnstiles; vehicle location devices; fareboxes; automated ticketing/fare card machines; ticket/fare card validators; ticket/fare card encoding equipment.

Another commenter offered similar views that an end product system could be so large, and incorporate so many different levels and types of equipment that relatively major items now considered to be components, and subject to the Buy America requirements, would become subcomponents not subject to the Buy America requirements. The commenter added that FTA’s proposal is “contrary to the statutory requirement that the definition of end product ensure major system procurements are not used to circumvent the Buy America requirements.”

In contrast to the foregoing, the ten remaining commenters recommended including a system as a definable end product. Six commenters endorsed FTA’s proposed definition of system, which limits system end products to those that are intended to provide a “clearly defined function.” One commenter recommended that the following language be added after the clause “clearly defined function,” to wit: “necessary to fulfill the function as defined.” The commenter suggested this change would “minimize the tendency to add ancillary items to a “system.” Another commenter noted simply that “[a]ddition of this definition [of system] reflects the requirements of SAFETEA-LU.”

Of the reasons given in support of FTA’s proposal, several commenters noted that the concept of system end products has long precedent in FTA-funded procurements for both rolling stock and manufactured products. These

commenters also stated that nothing in SAFETEA-LU or its legislative history indicates that Congress intended to preclude a system as an end product. Referring to the legislative history of SAFETEA-LU, one of these commenters pointed out that Congress specifically rejected at least two proposals that would have effectively treated all identifiable items or discrete elements of a system procurement as end products. According to the commenter, Congress rejected these proposals so as not to substantially alter current FTA practice. Rather, SAFETEA-LU instructed FTA to develop a rule that would cure potential abuses without eliminating system procurements, or fundamentally change the agency’s long-standing Buy America practices.

This commenter endorsed FTA’s proposed definition of “system,” which employs a functional test to make clear that a system is an end product only where the system provides a “clearly defined function.” The commenter felt FTA’s definition “protects against the bundling of a host of unrelated independent functions into a ‘super system’ that would undermine the Buy America rules.” The commenter agreed with another comment which recommended FTA provide some examples (based on FTA precedents) of “super systems” that would not qualify as end products. Furthermore, the commenter stated that for manufactured items, requiring the end product, “and all components” be of U.S. manufacture, would ensure that substantial processing and labor all occur in the United States.

A third commenter, who also endorsed FTA’s proposed definition of system, recommended that FTA make clear in its regulatory guidance that if products in a particular application, which must necessarily perform on an integrated basis with other products constitute a portion of the same acquisition, then the products together constitute a system end product. The commenter offered the following examples of “high-end systems” that should be referenced as end products: (1) Communication based train control systems; (2) automatic train supervision systems; (3) passenger information and communication systems; (4) CCTV (closed circuit television) systems; (5) traction power systems; (6) automatic interlocking systems; (7) access control systems; (8) intelligent video systems; and (9) intrusion detection systems. Such systems may be covered by performance warranties for the system as a whole. The commenter stated, however, that discrete elements of a system may also be covered by

warranties, which are intended to ensure a level of functionality in a degraded mode that results from the failure of another product in the same system. The commenter stated that the existence of such "separable warranties" should not defeat an end product characterization. The commenter recommended FTA consider such warranty information as an indication that a system is an end product.

The above commenter also recommended FTA not make any distinction between open architecture and proprietary systems. The commenter stated the key question to consider is whether products perform and operate on an integrated basis. The intellectual property rights, if any, which pertain to products is a separate legal question that does not necessarily relate to integration of system equipment.

Another commenter recommended a two-pronged approach to defining "system," in order to provide a ceiling on what may be bundled into a particular end product and to discourage any gamesmanship that sidesteps the Buy America requirements. First, the commenter stated the representative listing of products in Appendix A of the current 49 CFR part 661 should include proper end products, whether or not referred to as "systems." Second, the commenter recommended the definition of "system" be expanded to provide guidance on what is *not* a proper end product. For example, "an entire transit 'system' that includes stations, track work, and vehicles, would constitute an impermissibly broad end product system according to the commenter. The commenter added that providing such "negative definitions" of system in the rule would prove more instructive than any positive definition and would reinforce the ceiling on bundling. Another commenter fully concurred with these comments.

In similar fashion, one commenter recommended FTA develop a "list of high level systems or end products that are commonly purchased and require that systems or end products on this list must be treated as end products for the purpose of meeting Buy America requirements even if the contract calls for a higher level system of which two or more listed items would be components." To meet these criteria, the commenter recommended that the end product definition be revised to read: "The following is a list of items \* \* \* that are representative end products subject to the requirements of Buy America as end products even if they

are to be acquired by a grantee as part of a larger overall project." The commenter stated that adoption of its recommendation would prevent a grantee from acquiring a "transportation system" of trains, buses, and fare collection equipment, and treating these major items as components of system procurement. The commenter also suggested that based on its recommendations, FTA would have "no reason" to distinguish between proprietary and open architecture systems.

Another commenter similarly recommended against creation of "super system" end products that do not meet the Buy America requirements. Such a situation could lead to foreign "dumping" of manufactured products into the U.S. transit market.

#### C. FTA Response

FTA agrees with the majority of commenters who recommended FTA should continue its longstanding practice of including a "system" as a definable end product. Based on the plain language of SAFETEA-LU and its legislative history, FTA also agrees with those commenters who stated that by requiring FTA to develop a rule to "ensure that major system procurements are not used to circumvent the Buy America requirements," Congress did not intend to expressly prohibit the designation of system end products. Rather, SAFETEA-LU instructs FTA to develop a rule that would cure potential abuses, without eliminating system procurements or drastically changing FTA's long-standing Buy America practices. FTA proposes to contain the potential for abuse by defining a "system" as the minimum set of components and interconnections needed to perform all of the functions specified by the grantee in its procurement. All second and subsequent system elements proposed by the supplier to meet the site capacity specified by the grantee would be additional end products applied to the original system. In addition, the second and subsequent sites in a procurement addressing multiple geographic sites would be additional end products applied to the original system.

Furthermore, as FTA explained in the NPRM, and as commenters subsequently noted, the concept of system end products is of long standing at FTA, and is a concept well grounded in Federal public contract law. *See* FTA's Buy America regulation at 49 CFR 661.11(r), which addresses "[i]f a system is being procured as an end product" (emphasis added). *See also*, *Brown Boveri Corp.*, B-187252, 56

Comp. Gen. 596, May 10, 1997 (a Government Accountability Office (GAO) case involving the Buy American Act, where the end product of the procurement was a sodium pump-drive system in a nuclear power plant); *Matter of: Dictaphone Corp.*, B-191,383, May 8, 1978, 78-1 CPD 343 (GAO decision under the Buy American Act where the end product of the procurement was a "Central Dictation System," and the various elements of the system, such as transcribers and recorders were components of the system, rather than separate end products); and *Bell Helicopter Textron, Inc. v. Adams*, 493 F. Supp. 824, 833 (D.D.C. 1980) (the court ruled that the contract end product under the Buy American Act was a helicopter "system" consisting of five components).

#### D. FTA Proposal

For the foregoing reasons, FTA proposes to retain the application of a "system" in the definition of "end product." FTA agrees with a commenter who noted FTA's proposed definition will "protect against the bundling of a host of unrelated independent functions into a 'super system' that would undermine the Buy America rules." Most importantly, as FTA explained in the NPRM, FTA will carefully review system procurements in Buy America cases to determine whether an integrated system actually exists, and, if so, which items of equipment constitute the system. This review process will further serve to avoid the problem of "super systems." FTA already employs a longstanding model to determine if a system is "too large" and must be broken down into separate, multiple end products. Thus, the concerns expressed by commenters that an end product system could be so large, and incorporate so many different levels of equipment such as stations, track, vehicles, fare collection equipment, etc., so as to circumvent the requirements of Buy America, are adequately addressed. Under FTA's Buy America methodology, if a purported end product is too large, *i.e.*, composed of what FTA traditionally considers as separate end products such as structures, vehicles, fare collection equipment, etc., FTA will break it down into constituent end products. This reflects FTA's understanding that a single procurement may indeed contain multiple end products, each of which must independently meet the requirements of Buy America. Nonetheless, FTA is mindful that heightened scrutiny of Buy America requirements is warranted in the area of system procurements.

In response to FTA's request for comment on whether different Buy America requirements should apply to open architecture versus proprietary system end products, one commenter recommended FTA not make any distinction between the two. The commenter stated that the key question to consider is whether products perform and operate on an integrated basis. The intellectual property rights, if any, which pertain to products is a separate legal question that does not necessarily relate to integration. FTA agrees with these comments, and will not implement a distinction in regulation between open architecture versus proprietary system end products.

FTA received many helpful comments on its proposed definition of "system" to further refine it. For example, commenters suggested FTA should consider whether performance warranties apply to an integrated system (regardless of whether components are separately warranted); whether products perform on an integrated basis with other products in a system, or are operated independently of associated products in the system; or whether transit agencies routinely procure a product separately (other than as replacement or spare parts). Based on these suggestions, FTA seeks comments on its proposal to revise the definition of "system" in 49 CFR 661.3.

#### 4c. Representative List of End Products

To comply with the SAFETEA-LU requirement to include a "representative list" of end products, FTA sought comment on a proposed list of representative end products. As FTA explained in the first NPRM, the proposed list is not meant to be all-inclusive. Rather, it describes general "representative" categories of end products.

##### A. Comments Received

FTA received thirteen substantive comments on this issue. Of these, nine commenters proposed their own lists of end products, components, or subcomponents, which were often extensive and reflected particular industries. Comments offering such lists may be viewed online at <http://dms.dot.gov/> or physically in the DOT's Docket Management Facility, *supra*, Docket Number 23082, entries: 3–4, 9, 11–13, 16, and 21–22.

Two comments, which were identical, stated FTA's representative list "in Appendix A can quickly be outdated by technology (e.g., the current list refers to wheelchair lifts, but most buses now use ramps)." A third commenter suggested that for "manufactured end products,"

FTA clarifies whether "infrastructure projects" include "[a]luminum and elastomeric/non-metal products." A fourth commenter stated FTA's proposed list of end products is "far from comprehensive and is itself subject to interpretation." The commenter noted that for construction procurements, by including "lifts, hoists and elevators" as end products along with building structures, the question is raised as to the status of "building components such as roofs, HVAC equipment, etc."

##### B. Commenter Proposals

One commenter stated FTA's proposed representative list was overly broad, without instructional value, and, therefore, insufficient. Instead, the commenter recommended FTA implement a "comprehensive" list of representative end products, components, and subcomponents in Appendix A to 49 CFR part 661. The commenter further stated that Appendix A should be "regularly supplemented as new or changing end products, components, sub-components, and manufacturing processes enter the marketplace." Such proposed supplemental changes should be posted for public comment, prior to final decision. The commenter also suggested that the list of items in Appendix A should consist of concrete examples, rather than mere descriptive terms. The commenter proposed a new version of Appendix A, which can be found in the docket at entry number 21.

Three commenters disagreed with the proposal that FTA adopt a "comprehensive" list of end products, components, and subcomponents to be constantly updated. These commenters felt that attempting to identify a "comprehensive list" from the universe of potential end products, components, and subcomponents typically acquired in transit procurements, and then constantly updating this list, is unrealistic and burdensome to grantees. In substantially similar statements, two commenters noted that the previous commenter was unable to achieve consensus from its membership on this issue, or on its proposed "comprehensive list."

Instead of a "comprehensive list," the three commenters agreed with FTA's inclusion of a "representative" list of end products in Appendix A. The commenters supported the suggestion FTA include some "illustrative" examples of end products in Appendix A. Commenters stated that these examples should be drawn from published FTA decisions.

##### C. FTA Response and Proposal

FTA agrees with the commenters who recommended FTA implement a "representative" list of end products rather than a "comprehensive" list as some commenters suggested for two reasons. First, SAFETEA-LU requires the Secretary to "develop a list of *representative* items that are subject to the Buy America requirements" (emphasis added). By use of the term "representative" rather than "comprehensive," FTA believed that Congress did not intend that the list be exhaustive. Second, FTA agrees that it would be unrealistic to develop a comprehensive list and keep it "constantly updated" as some commenters suggested. The examples of "comprehensive" lists offered by commenters, which were often very lengthy, highly detailed, and seldom uniform, exemplify the difficulty of creating such a list.

FTA believes it is impractical to attempt to produce an exhaustive "comprehensive" list of every conceivable end product, component, and subcomponent in the transit industry. Instead, the better approach is to develop a representative list that is not meant to be all-inclusive. An example of this practical approach are the representative lists of typical bus and rail car components found in Appendices B and C to 49 CFR 661.11. FTA's proposed representative list of end products is similarly reflective of the broad scope of transit end products with which Buy America is concerned.

Several commenters recommended FTA provide "illustrative" examples of typical end products. In fact, FTA believes that its proposed list accurately reflects the type of end products FTA typically reviews in its Buy America practices. For example, FTA recently reviewed a procurement for a "hybrid-electric shuttle bus." Rather than enumerate this specific vehicle type in the regulation, a "hybrid-electric shuttle bus" is clearly a "vehicle," and, thus, a rolling stock end product within the meaning of 49 CFR 661.3 and the proposed representative list of end products in Appendix A. Thus, FTA believes it is unnecessary to enumerate every conceivable type of bus in the list of end products, whether the bus is a trolley replica, hybrid-electric, or standard diesel model, as one commenter recommended.

In another example from an actual procurement that underwent Buy America review, "manganese steel frogs" are a type of special track-work, and thus, a steel end product. Again, FTA sees no need to specifically add the

term “manganese steel frog” or even “frog” to the list of representative end products, as this type of product is already covered under the term “track-work.” In short, FTA’s proposed representative list of general end products is intended to cover innumerable designations of specific items.

FTA seeks comments on its proposal to add an Appendix A to 49 CFR 661.1 to include a representative list of end products.

#### 5. Definition of “Final Assembly”

In the first NPRM, FTA sought comment on its proposal to amend the definition of “final assembly” in 49 CFR part 661 for rolling stock procurements; to incorporate the “minimum requirements” of final assembly for rail cars and buses as stated in the March 18, 1997, Dear Colleague letter, C–97–03 (incorporated as section 3035 of the Transportation Equity Act for the 21st Century (TEA–21) (Pub. L. 105–178)); and to further clarify those requirements. FTA based its proposed definition on its March 18, 1997, Dear Colleague letter.

#### A. Comments Received and Commenter Proposals

FTA received nine comments on this issue. One comment, which three other comments endorsed, recommended several changes to FTA’s proposed definition, to make it consistent with the lists of typical components for rail cars and buses in 49 CFR 661.11(b) and (c). The comment proposed the following revisions to FTA’s proposed rule (the commenter’s proposed inserted text is underlined; proposed deletions are in brackets):

*Rail Cars:* In the case of the manufacture of a new, remanufactured, or overhauled rail car, final assembly would typically include, as a minimum, [the following operations:] installation and interconnection of the *typical Rail Car Components listed in 661.11 (c), including but not limited to the following items:* car bodies or shells, *car-body wiring, car-borne power plants, if any,* propulsion control equipment, propulsion cooling equipment, *friction* brake equipment, energy sources for auxiliary *equipment* and controls, heating and air conditioning *equipment, interior and exterior lighting equipment, coupler equipment and coupler control system,* communications equipment, pneumatic and electrical systems, door and door control systems, passenger seats, passenger and cab interiors, destination signs, wheelchair lifts, or *other equipment required to permit handicapped access to the rail car,* motors, wheels, axles, [and] gear [units]boxes or integrated motor/gear units, suspensions, truck frames and chassis. *Final Assembly activities shall also include the inspection and verification of all installation*

and interconnection work; and the in-plant testing of the [stationary product] *rail car* to verify all functions. *In the case of articulated vehicles, the interconnection of the car bodies or shells shall also be included as work to be performed at the final assembly site.*

*Buses:* In the case of a new, remanufactured, or overhauled bus, final assembly would typically include, at a minimum, the installation and interconnection of the *typical Bus Components listed in 661.11 (b), including but not limited to the following items:* car bodies or shells, the engine and transmission (drive train), axles, *propulsion control system, axles,* chassis, and wheels, including the cooling and braking systems; the installation and interconnection of the heating and air conditioning equipment; the installation of pneumatic and electrical systems, door systems, passenger seats, passenger grab rails, destination signs, wheelchair lifts; and road testing. *Final Assembly activities shall also include final inspection, repairs and preparation of the vehicles for delivery. In the case of articulated vehicles, the interconnection of the car bodies or shells shall also be included as work to be performed at the final assembly site.*

Two other comments, which are identical, recommended the following changes to the Bus section of FTA’s proposed definition by: (1) Moving the word “chassis” just after the word “shells;” (2) replace the words “suspensions, steering mechanisms and wheels,” where chassis had been; (3) replace the words “(drive train)” by “(propulsion components, including inverters and controllers) and energy storage device (if used)” —to accommodate hybrid electric buses; and (4) replace “wheelchair lift” to “wheelchair lift/ramp” —to accommodate low floor bus components. Another commenter recommended FTA’s proposed reference to “motors” and “gear units” be modified to read “motors, gear units or integrated motor/gearbox.”

Additionally, a commenter noted that the March 18, 1997, Dear Colleague letter contained the following provision, which the commenter recommended should be added to the proposed definition of final assembly in Appendix D of 49 CFR 661.11:

If a manufacturer’s final assembly processes do not include all the activities that are typically considered the minimum requirements, it can request a Federal Transit Administration (FTA) determination of compliance. FTA will review these requests on a case-by-case basis to determine compliance with Buy America.

This commenter also found the following language in FTA’s proposed definition to be ambiguous: “installation and interconnection of car bodies or

shells.” The commenter felt that this language could be interpreted to mean that various sections of the car body or bus shell are to be assembled at the final assembly location. The commenter recommended FTA either delete the language or replace it with the phrase, “the installation and interconnection of intercar or bus articulations or coupling systems.” The commenter suggested that the term “suspensions, frames and chassis” should be clarified. The commenter also recommended that the term “door control systems” replace the current “door systems.” Finally, the commenter recommended FTA consider a previously rescinded Dear Colleague letter issued on September 25, 1997, C–97–18, as it raised “valid issues concerning the need for flexibility in determining compliance with final assembly requirements.”

#### B. FTA Response and Proposal

FTA concurs with the comment, which FTA quoted in full above, recommending several changes to FTA’s proposed definition of “final assembly” for rail cars and buses. FTA notes that several of the proposed changes were also mentioned by other commenters, such as using the terms “door control systems” and “integrated motor/gear units” in lieu of the designations proposed in the first NPRM. In addition, FTA agrees that the definition of final assembly should refer back to 49 CFR 661.11(b) and (c) for the bus and rail car components that must be incorporated into the end product at the final assembly location.

FTA also agrees with the comment recommending that the following language from the March 18, 1997, Dear Colleague Letter should be added to the definition of “final assembly:”

If a manufacturer’s final assembly processes do not include all the activities that are typically considered the minimum requirements, it can request an Federal Transit Administration (FTA) determination of compliance. FTA will review these requests on a case-by-case basis to determine compliance with Buy America.

FTA, however, disagrees with the commenter who stated that the phrase “installation and interconnection of car bodies or shells” is ambiguous. FTA also declines to adopt the language of a previously rescinded Dear Colleague letter of September 25, 1997, C–97–18, as the commenter suggested.

Based on the above, FTA seeks comments on its proposal to adopt Appendix D to 49 CFR 661.11 per the above commenter’s recommendation.

## 6. Communication, Train Control, and Traction Power Equipment

FTA sought comment on three substantive proposals to the Buy America requirements for rolling stock in 49 CFR 661.11. In the first of these proposals, FTA sought comment on whether it should continue to find that the items of communication equipment listed in 49 CFR 661.11 include wayside equipment, *i.e.*, communication equipment that is not in or on a vehicle, but nevertheless subject to the rolling stock standard. FTA also sought comment on whether the items of train control, communication, and traction power equipment listed in 49 CFR 661.11(t), (u), and (v) should be deleted and whether any new items should be added to these lists to reflect new technology.

In addition, FTA sought comment on whether the term “communication equipment” should be clarified in the Buy America regulations to reflect continuing changes in technology and advances in systems integration. In particular, FTA posed the question whether “communication equipment” should be limited to equipment whose primary function is communication “with or between people” versus “machine to machine” interface.

### A. Comments Received

FTA received eight comments on these three proposals. Three commenters urged FTA not to modify its interpretation of communication equipment listed in 49 CFR 661.11 as including wayside equipment. No commenter opposed this interpretation.

Two commenters, who submitted identical comments, agreed with FTA’s proposal that “communication equipment” should be limited to equipment whose primary function is to facilitate communication “with or between people” versus “machine to machine” interface. Three commenters opposed this proposal. These commenters argued that such a distinction is unnecessary, ineffective, or illogical. Several commenters pointed out that many communications networks often support both capabilities; and that it cannot be said whether equipment primarily supports one purpose or the other.

### B. Commenter Proposals

One commenter recommended that FTA change or delete the following listed items in 49 CFR 661.11(t), (u), and (v): Under 49 CFR 661.11(v)(2), “Primary AC transformer rectifiers” be changed to “Primary AC Rectifier Transformers;” the language “at central

control” be deleted from 49 CFR 661.11(v)(4), which states “Traction power console and CRT display system at central control;” and the language “Power rail” be deleted from 49 CFR 661.11(v)(17), which states “Power rail insulators.” The commenter also recommended that FTA delete the following pieces of equipment entirely in section 661.11(v): (9) Facility step down transformers; (10) Motor control centers (facility use only); (21) Connectors, tensioners, and insulators for overhead power wire systems; and (22) Negative drainage boards.

The above commenter and another recommended that the following items be added to the lists of equipment in 49 CFR 661.11(t), (u), and (v), as follows:

49 CFR 661.11(t) [train control equipment]: (1) Propulsion Control Systems; (2) Cab Signaling; (3) ATO Equipment; (4) ATP Equipment; (5) Wayside Transponders; (6) Trip Stop Equipment; (7) Wayside Magnets; (8) Cab Displays; (9) Speed Measuring Devices; (10) Car Axle Counters; and (11) Communication Based Train Control (CBTC).

49 CFR 661.11(u) [communication equipment]: (1) Antennas; (2) Wireless Telemetry Equipment; (3) Passenger Information Displays; (4) Communications Control Units; (5) Communication Control Heads; (6) Wireless Intercar Transceivers; (7) Multiplexers; (8) SCADA Systems; (9) LED Arrays; (10) [APTA added] Screen Displays such as LEDs and LCDs; (11) Fiber-optic transmission equipment; (12) Frame or cell based multiplexing equipment; and (13) Communication system network elements.

49 CFR 661.11(v) [traction power equipment]: (1) Surge Arrestors; (2) Protective Relaying; and (3) Bimetallic Power Transmission System (BPTS) Equipment.

One commenter recommended that the following items be added to the list of traction power equipment in 49 CFR 661.11(v): Main transformers, transfer switches, bonds, and power rail.

Another commenter suggested the following items be added to the list of communications equipment in 49 CFR 661.11(u): (1) Fiber Optic Transmission Equipment; (2) Frame or cell-based multiplexing equipment; and (3) Communication system network elements. This commenter also recommended that aluminum conducting rail, which is referred to as Bimetallic Power Transmission System (BPTS), be added to the list of traction power equipment in 49 CFR 661.11(v).

A final commenter proposed various miscellaneous “corrections and clarification” on such issues as (1)

FTA’s Buy America Web site be binding; (2) a standard “tariff exemption” form be added to 49 CFR 661.11; (3) spare parts be 60% domestic; (4) a U.S. components’ domestic manufacturing costs count toward a vehicle; (5) administrative and overhead costs be counted towards components; (6) the general requirements of § 661.5 not apply to remanufactured or overhauled vehicles; (7) manufacturers not be required to provide recipients with hard copies of Buy America calculations; and (8) grantees not be allowed to require both 49 CFR 661.5 and 661.11 requirements on rolling stock contract. FTA views these comments to be non-responsive.

### C. FTA Response

FTA agrees with the commenters who recommended that FTA continue its longstanding interpretation that items of communication equipment listed in 49 CFR 661.11 include wayside equipment, and, thus, are subject to the rolling stock standard. FTA notes that no commenter opposed this interpretation.

FTA also concurs with the commenters who argued that “communication equipment” should not be limited to equipment whose primary function is to facilitate communication “with or between people” versus “machine to machine” interface. FTA finds commenters’ argument particularly convincing that communication networks frequently support both capabilities (*i.e.*, human to human interaction and machine to machine interface) either directly or indirectly and that it cannot always be said whether communication equipment primarily supports one purpose or the other. FTA’s review of prior Buy America decisions involving communication equipment support these conclusions. Therefore, FTA will not make such a distinction in the Buy America regulations at this time. FTA will continue to carefully scrutinize, on a case-by-case basis, whether technology may properly be characterized as “communication equipment” within the meaning of the rolling stock provisions of 49 U.S.C. 5323(j) and 49 CFR 661.11.

Regarding proposed changes to train control, communication, and traction power equipment in 49 CFR 661.11(t), (u), and (v), respectively, FTA notes that only one commenter recommended deleting enumerated items. FTA declines to do so, absent a specific showing as to why specific items of equipment should be deleted from the lists in 49 CFR 661.11.

However, FTA agrees to add certain items of equipment, as recommended by several commenters. With respect to two

proposed items of equipment, "Propulsion Control Systems" and "Cab Displays," FTA believes the former functions more as part of traction power equipment, rather than as train control equipment. With respect to "Cab Displays," this type of equipment is already an integral part of a vehicle, and does not need to be separately listed.

#### D. FTA Proposal

Accordingly, FTA seeks comments on its proposal to amend 49 CFR 661.11(t), (u), and (v), respectively, by adding the following: *(t) train control equipment*; cab signaling, ATO equipment, ATP equipment, wayside transponders, trip stop equipment, wayside magnets, speed measuring devices, car axle counters, communication based train control (CBTC); *(u) communication equipment*; antennas, wireless telemetry equipment, passenger information displays, communications control units, communication control heads, wireless inter-car transceivers, multiplexers, SCADA systems, LED arrays, screen displays such as LEDs and LCDs, fiber-optic transmission equipment, frame or cell based multiplexing equipment, communication system network elements; and *(v) traction power equipment*; propulsion control systems, surge arrestors, protective relaying.

FTA notes that several commenters recommended that aluminum composite conducting rail, otherwise known as Bimetallic Power Transmission (BPTS) Equipment, which is a combination of an aluminum conductor and a stainless steel abrasion-resistant cap, be considered as traction power equipment, and added to the list of items at 49 CFR 661.11(v). FTA's current regulation at 49 CFR 661.11(w) states that "[t]he power or third rail is not considered traction power equipment and is thus subject to the requirements of 49 U.S.C. 5323(j) and the requirements of 49 CFR 661.5." Regardless whether BPTS equipment is made primarily from aluminum, steel, or some other material, 49 CFR 661.11(w) expressly precludes it from being considered as traction power equipment if it is used as the "power or third rail". If BPTS third rail is not made primarily of steel, it would be treated as a "manufactured product" under 49 CFR 661.5(d).

#### 7. Statutory Update

Section 3023 of SAFETEA-LU amended 49 U.S.C. 5323(j)(6) (as redesignated by SAFETEA-LU) by striking "Intermodal Surface Transportation Efficient Act of 1991 (Public Law 102-240, 105 Stat. 1914)" and inserting "Federal Public

Transportation Act of 2005". This SNPRM proposes to amend 49 CFR 661.18 to conform to this statutory change.

### XI. Regulatory Analyses and Notices

#### A. Statutory/Legal Authority for This Rulemaking

This SNPRM is authorized under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59), which amended section 5323(j) and (m) of title 49, United States Code and required FTA to revise its regulations with respect to Buy America requirements.

#### B. Executive Order 12866 and DOT Regulatory Policies and Procedures

This SNPRM is a nonsignificant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. This SNPRM is also nonsignificant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034, Feb. 26, 1979). This SNPRM imposes no new compliance costs on the regulated industry; it merely clarifies terms existing in the Buy America regulations and adds terms consistent with SAFETEA-LU.

#### C. Executive Order 13132

This SNPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This SNPRM does not include any regulation that has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

#### D. Executive Order 13175

This SNPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this SNPRM does not have tribal implications and does not impose direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

#### E. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act (5 U.S.C. 601-611) requires each agency to analyze regulations and proposals to assess their impact on small businesses and other small entities to determine

whether the rule or proposal will have a significant economic impact on a substantial number of small entities. This SNPRM imposes no new costs. Therefore, FTA certifies that this proposal does not require further analysis under the Regulatory Flexibility Act. FTA requests public comment on whether the proposals contained in this SNPRM have a significant economic impact on a substantial number of small entities.

#### F. Unfunded Mandates Reform Act of 1995

This SNPRM does not propose unfunded mandates under the Unfunded Mandates Reform Act of 1995. If the proposals are adopted into a final rule, it will not result in costs of \$100 million or more (adjusted annually for inflation), in the aggregate, to any of the following: State, local, or Native American tribal governments, or the private sector.

#### G. Paperwork Reduction Act

This SNPRM proposes no new information collection requirements.

#### H. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document may be used to cross-reference this action with the Unified Agenda.

#### I. Environmental Assessment

The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321-4347), requires Federal agencies to consider the consequences of major Federal actions and prepare a detailed statement on actions significantly affecting the quality of the human environment. There are no significant environmental impacts associated with this SNPRM.

#### J. Privacy Act

Anyone is able to search the electronic form for all comments received into any of our dockets by the name of the individual submitting the comments (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78) or you may visit <http://dms.dot.gov>.

**List of Subjects in 49 CFR Part 661**

Grant programs-transportation, Public transportation, Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, 49 CFR part 661 of the Code of Federal Regulations is proposed to be amended as follows:

**PART 661—BUY AMERICA REQUIREMENTS—SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982, AS AMENDED**

1. The authority citation for part 661 continues to read as follows:

**Authority:** 49 U.S.C. 5323(j) (formerly sec. 165, Pub. L. 97–424; as amended by sec. 337, Pub. L. 100–17; sec. 1048, Pub. L. 102–240; sec. 3020(b), Pub. L. 105–178; and sec. 3023(i) and (k), Pub. L. 109–59); 49 CFR 1.51.

2. Revise § 661.3 to read as follows:

**§ 661.3 Definitions.**

As used in this part:

*Act* means the Surface Transportation Assistance Act of 1982 (Pub. L. 97–424), as amended.

*Administrator* means the Administrator of FTA, or designee.

*Component* means any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location.

*Contractor* means a party to a third party contract other than the grantee.

*End product* means any vehicle, structure, product, article, material, supply, or system, which directly incorporates constituent components at the final assembly location, that is acquired for public use under a Federally-funded third party contract, and which is ready to provide its intended end function or use without any further manufacturing or assembly change(s). A list of representative end products is included at appendix A to this section.

*FTA* means the Federal Transit Administration.

*Grantee* means any entity that is a recipient of FTA funds.

*Manufactured product* means an item produced as a result of the manufacturing process.

*Manufacturing process* means the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials.

*Negotiated procurement* means a contract awarded using other than sealed bidding procedures.

*Rolling stock* means transit vehicles such as buses, vans, cars, railcars, locomotives, trolley cars and buses, and ferry boats, as well as vehicles used for support services.

*System* means a machine, product, or device, or a combination of such equipment, consisting of individual components, whether separate or interconnected by piping, transmission devices, electrical cables or circuitry, or by other devices, which are intended to contribute together to a clearly defined function. In determining whether a system constitutes an end product, or is instead made up of independent end products, the Administrator will consider all appropriate factors on a case-by-case basis. Such factors may include whether performance warranties apply to an integrated system (regardless of whether components are separately warranted); whether products perform on an integrated basis with other products in a system, or are operated independently of associated products in the system; or whether transit agencies routinely procure a product separately (other than as replacement or spare parts).

*United States* means the several States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

**Appendix A to § 661.3—End Products**

The following is a list of representative end products that are subject to the requirements of Buy America. This list is representative, not exhaustive.

(1) *Rolling stock end products:* All individual items identified as rolling stock in § 661.3 (e.g., buses, vans, cars, railcars, locomotives, trolley cars and buses, ferry boats, as well as vehicles used for support services); train control, communication, and traction power equipment that meets the definition of end product at § 661.3 (e.g., a communication or traction power system).

(2) *Steel and iron end products:* Items made primarily of steel or iron such as structures, bridges, and track work, including running rail, contact rail, and turnouts.

(3) *Manufactured end products:* Infrastructure projects not made primarily of steel or iron, including structures (terminals, depots, garages, and bus shelters), ties and ballast; contact rail not made primarily of steel or iron; fare collection equipment; computers; information, security, and data processing equipment; mobile lifts, hoists, and elevators.

3. In § 661.7:

a. Revise paragraph (b) and add new paragraph (c)(3) to read as set forth below; and

b. Amend appendix A to § 661.7 by removing paragraphs (b) and (c) and adding new paragraph (b) to read as set forth below.

**§ 661.7 Waivers.**

\* \* \* \* \*

(b) Under the provision of section 165(b)(1) of the Act, the Administrator may waive the general requirements of section 165(a) if the Administrator finds that their application would be inconsistent with the public interest. In determining whether the conditions exist to grant this public interest waiver, the Administrator will consider all appropriate factors on a case-by-case basis, unless a general exception is specifically set out in this part. When granting a public interest waiver, the Administrator shall issue a detailed written statement justifying why the waiver is in the public interest. The Administrator shall publish this justification in the **Federal Register**, providing the public with a reasonable time for notice and comment of not more than seven calendar days.

(c) \* \* \*

(3) After contract award, the Administrator may grant a non-availability waiver under this paragraph, in any case in which a bidder or offeror originally certified compliance with the Buy America requirements in good faith, but can no longer comply with its certification. The Administrator will grant a non-availability waiver only if the grantee provides sufficient evidence that the original certification was made in good faith and that the item to be procured cannot now be obtained domestically due to commercial impossibility or impracticability. In determining whether the conditions exist to grant a post-award non-availability waiver, the Administrator will consider all appropriate factors on a case-by-case basis.

\* \* \* \* \*

**Appendix A to § 661.7—General Waivers**

\* \* \* \* \*

(b) Under the provisions of § 661.7 (b) and (c) of this part, a general public interest waiver from the Buy America requirements applies to microprocessors, computers, microcomputers, or software, or other such devices, which are used solely for the purpose of processing or storing data. This general waiver does not extend to a product or device which merely contains a microprocessor or microcomputer and is not used solely for the purpose of processing or storing data.

4. Amend § 661.11 by removing and reserving paragraph (s), adding paragraphs (t)(14) through (t)(22), (u)(18)



through (u)(30), and (v)(28) through (30), and adding a new Appendix D, to read as follows:

**§ 661.11 Rolling stock procurements.**

\* \* \* \*

(t) \* \* \*

- (14) Cab Signaling;
- (15) ATO Equipment;
- (16) ATP Equipment;
- (17) Wayside Transponders;
- (18) Trip Stop Equipment;
- (19) Wayside Magnets;
- (20) Speed Measuring Devices;
- (21) Car Axle Counters;
- (22) Communication Based Train

Control (CBTC).

(u) \* \* \*

- (18) Antennas;
- (19) Wireless Telemetry Equipment;
- (20) Passenger Information Displays;
- (21) Communications Control Units;
- (22) Communication Control Heads;
- (23) Wireless Intercar Transceivers;
- (24) Multiplexers;
- (25) SCADA Systems;
- (26) LED Arrays;
- (27) Screen Displays such as LEDs and LCDs for communication systems;
- (28) Fiber-optic transmission equipment;
- (29) Fiber-optic transmission equipment;
- (30) Frame or cell based multiplexing equipment; 13) Communication system network elements.

(v) \* \* \*

- (28) Propulsion Control Systems;
- (29) Surge Arrestors;
- (30) Protective Relaying.

\* \* \* \*

**Appendix D to § 661.11—Minimum Requirements for Final Assembly**

(a) *Rail Cars*: In the case of the manufacture of a new, remanufactured, or overhauled rail car, final assembly would typically include, as a minimum, installation and interconnection of the typical Rail Car Components listed in § 661.11, Appendix C, including but not limited to the following items: car bodies or shells, chassis, carbody wiring, car-borne power plants or power pick-up equipment, energy management and storage devices, articulation equipment, propulsion control equipment, propulsion cooling equipment, friction brake equipment, energy sources for auxiliary equipment and controls, heating and air conditioning equipment, interior and exterior lighting equipment, coupler equipment and coupler control system, communications equipment, pneumatic systems, electrical systems, door and door control systems, passenger seats, passenger interiors, cab interiors, destination signs, wheelchair lifts (or other equipment required to permit handicapped access to the rail car), motors, wheels, axles, gear boxes or integrated motor/gear units, suspensions, truck frames and chassis. Final Assembly activities shall also include the inspection and verification of all installation and interconnection work; and the in-plant testing of the rail car to verify all functions. In the case of articulated vehicles, the interconnection of the car bodies or shells shall be included as work to be performed by the manufacturer as part of vehicle delivery.

(b) *Buses*: In the case of a new, remanufactured, or overhauled bus, final assembly would typically include, at a minimum, the installation and interconnection of the typical Bus Components listed in § 661.11, Appendix B, including but not limited to the following items: car bodies or shells, the engine and

transmission (drive train), axles, energy management and storage devices, articulation equipment, propulsion control system, chassis, and wheels, cooling system, and braking systems; the installation and interconnection of the heating and air conditioning equipment; the installation of pneumatic system and the electrical system, door systems, passenger seats, passenger grab rails, destination signs, wheelchair lifts or ramps and other equipment required to make the vehicle accessible to persons with disabilities, and road testing. Final Assembly activities shall also include final inspection, repairs and preparation of the vehicles for delivery. In the case of articulated vehicles, the interconnection of the car bodies or shells shall be included as work to be performed by the manufacturer as part of vehicle delivery.

(c) If a manufacturer's final assembly processes do not include all the activities that are typically considered the minimum requirements, it can request a Federal Transit Administration (FTA) determination of compliance. FTA will review these requests on a case-by-case basis to determine compliance with Buy America.

**§ 661.18 [Amended]**

5. Amend § 661.18 introductory text by removing "the Intermodal Surface Transportation Efficiency Act of 1991" and in its place add, "the Federal Public Transportation Act of 2005".

Issued in Washington, DC this 22nd day of November, 2006.

**James S. Simpson,**

*Administrator.*

[FR Doc. E6–20166 Filed 11–29–06; 8:45 am]

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