

May [REDACTED], 2023

DeDe Rutberg  
Made in America Office  
Office of Management and Budget  
725 17<sup>th</sup> Street NW  
Washington, D.C. 20503

**RE: Comments on Proposed Amendments to 2 CFR 184 and 200 to implement the Build America, Buy America Act provisions of the Infrastructure Investment Act**

Submitted via email to [diana.s.rutberg@omb.eop.gov](mailto:diana.s.rutberg@omb.eop.gov)

Dear Ms. Rutberg,

The American Seed Trade Association (ASTA) is pleased to provide these comments to the Office of Management and Budget (OMB) in response to the request for public comment on the proposed “Guidance for Grants and Agreements” (the “Proposed Guidance”) and the implementation of the Build America, Buy America Act (BABA) provisions of the Infrastructure Investment and Jobs Act (IIJA).<sup>1</sup>

Founded in 1883, ASTA is one of the oldest trade organizations in the United States. Its membership consists of over 700 companies involved in seed production and distribution, plant breeding, and related industries in North America. ASTA member companies research, develop, produce and distribute all varieties of seeds—including grasses, forages, flowers, vegetables, row crops, and cereals. ASTA membership includes approximately 85% of all private U.S. seed companies operating in the U.S. Ninety-five percent of ASTA’s active members are small businesses that report annual sales of less than \$15 million. Quality seed products from ASTA members directly support seeding, planting, revegetation, and other environmental initiatives for infrastructure projects at the federal, state, and local levels.

ASTA has specific concerns about the application of BABA “Buy America” requirements to seed products. As discussed below, classifying seed products as either “construction material” or “manufactured products” would disrupt the industry’s global supply chain, create market confusion as to compliant products, and make significantly less seed available for use in federally-funded projects, thereby undermining the success of the U.S. seed industry. ASTA therefore requests that OMB exclude seed products from BABA requirements or, if such exclusion is not possible, issue a non-availability waiver for these products.

**Seed Products Should Remain Exempt from BABA Requirements**

The 2021 BABA<sup>2</sup> expanded the application of “Buy America” domestic sourcing requirements to all federal financial assistance programs for infrastructure. Covered infrastructure projects now must use iron, steel, manufactured products, and construction materials that are produced in the United States.

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<sup>1</sup> Infrastructure Investment and Jobs Act, Public Law No. 117-58 (2021) [hereinafter “IIJA”].

<sup>2</sup> The IIJA codifies the BABA as Division G, Title IX.

OMB guidance issued to date broadly classifies these items such that seed products—which historically have been excluded from Buy America requirements—may have to comply with BABA requirements for infrastructure programs. ASTA urges OMB to take immediate action to clarify that seed products remain exempt from BABA requirements.

### **A. Construction Materials**

OMB should clarify that seed products are not “construction materials” under the BABA. The Proposed Guidance defines “construction materials” as “articles, materials, or supplies incorporated into an infrastructure project” that are or consist primarily of one or a combination of seven enumerated materials: (i) non-ferrous metals; (ii) plastic and polymer-based products; (iii) glass; (iv) fiber optic cable; (v) optical fiber; (vi) lumber; or (vii) drywall.<sup>3</sup>

Seed is not, and never has been, classified as any of the seven materials outlined in the Proposed Guidance. Nor is seed even considered a “construction material” in the traditional sense; instead, that term typically has been reserved for materials such as wood, metals, bricks, concrete, cement, plastics, and aggregates. Rather, at a basic level, seeds are agricultural products comprised of a plant embryo and protective coat. Seed therefore clearly does not meet the proposed definition of “construction materials” and should be excluded from any and all BABA requirements applicable to construction materials. For these reasons ASTA also discourages any future expansion of the term “construction materials” to include seed products.

### **B. Manufactured Products**

OMB likewise should clarify that seed products do not meet the definition of “manufactured products” as used in the BABA. The proposed guidance defines “manufactured product” to mean “articles, materials, or supplies incorporated into an infrastructure project that: (1) Do not consist wholly or predominantly of iron or steel or both; and (2) Are not categorized as a construction material (as defined in this section).”<sup>4</sup> The BABA requires manufactured products be “manufactured in the United States” such that “the cost of the product’s components mined, produced, or manufactured in the United States exceeds 55 percent of the total cost of the product’s components.”<sup>5</sup> ASTA is deeply concerned that this broad definition of “manufactured product” could extend to seeds, an agricultural product that historically is not considered to be manufactured.

ASTA member companies will encounter real and serious supply chain barriers for seed if required to comply with the 55% cost of components threshold. The movement of seed globally for breeding, research, development and multiplication is critical for the introduction of new, high performing varieties for infrastructure projects. Unlike the products that are the target of this regulation, the seed industry is dependent on specific environmental and climatic conditions that necessitate international movement for the success of the industry. Because seed production is largely dependent on counter-seasonal production these products often must cross several international borders before reaching their final destination in the United States or elsewhere. As such, it is not always possible to relocate seed from one country to another without encountering significant limitations on the biological viability of seeds. This global nature of the supply chain will complicate the U.S. seed industry’s ability to

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<sup>3</sup> Guidance for Grants and Agreements, 88 Fed. Reg. 8,374, 8,377 (Feb. 9, 2023).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

provide innovative, high-performing seed for federally-funded projects if these products must comply with the 55% cost of components threshold for manufactured products under the BABA.

It is also important to understand that most seed applied to federal projects is a combination of various species that undergo processing to produce the final “complete” specification. Due to the complex nature of seed supply chains, it is not uncommon for some of these species to be grown and processed internationally before undergoing final blending or bagging in the United States. In fact, many U.S. seed companies necessarily must send seed stock to international partners, such as Canada and Mexico, for research and multiplication before it is returned to the U.S. for further processing and packaging. Such products may be unable to comply with the cost of components threshold for manufactured products. Eliminating or discouraging such products from use in federally-funded infrastructure products would strain the U.S. seed industry’s capabilities to produce specific seed varieties in the amounts required to timely meet project deadlines.

Defining seed as a “manufactured product” for BABA purposes is also likely to create market confusion regarding the scope of other regulations and international trade obligations, as agricultural products are subject to unique trade and regulatory requirements. For example, implementation of this restriction could reduce opportunities for federally-funded infrastructure projects to use and benefit from species that are critical to complying with federal Clean Water Act provisions. In terms of international trade obligations, the United States-Mexico-Canada Agreement (USMCA), for example, establishes a critical regulatory framework and set of commitments for cooperation between North American countries that is vital for the U.S. seed industry. And although Section 70914(e) of the IIJA states that BABA requirements “shall be applied in a manner consistent with the United States obligations under international agreements,”<sup>6</sup> there is no guidance as to how this will work in practice. Applying BABA requirements to the seed industry likely will have a detrimental impact on these crucial trading relationships while significantly disrupting the global supply chain.

Contributing to this market confusion, ASTA is also concerned that some States have already classified seed as “manufactured products” in their interpretations of BABA requirements. For example, some State-level departments of transportation have begun classifying grasses, legumes, and other cover crop seeds as “manufactured products” for purposes of BABA compliance, while others continue to adhere to the long-standing historical exclusion of seed from Buy America/Buy American preferences. This disparate treatment across the federally-funded landscape introduces unnecessary uncertainty and administrative burden for the U.S. seed manufacturers who supply, and their customers who use, seed products for infrastructure-related projects. It is therefore critical that OMB act urgently to establish clear and consistent criteria and definitions for “manufactured products” across all agencies, programs, and funding methods. In particular, future iterations of regulation and guidance at the federal and state levels should expressly exclude seed from any interpretation of BABA requirements.

Finally, ASTA also firmly believes that the application of Buy America requirements to seed is unnecessary in light of the fact that the vast majority of seed currently supplied to federally-funded projects is grown in the U.S. or Canada, notwithstanding any multiplication or processing that may occur internationally. Existing federal law such as the Federal Seed Act also requires seed tags to

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<sup>6</sup> IIJA § 70914; see also OMB, M-22-11, *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure* (Apr. 18, 2022) (confirming that BABA “must be applied in a manner consistent with the obligations of the United States under international agreements”), available at <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>.

include the “origin of seed,” which focuses on the location where the seed was grown and not where it was blended, processed, or packaged—“manufacturing” processes that would factor into the cost of components calculation to determine seed origin under BABA requirements.

### **If Seed Products Are Not Exempt from BABA, Waivers Must Be Made Available**

To the extent that OMB does not expressly exclude seed from BABA requirements as requested above, ASTA urges OMB to waive seed from BABA compliance. Classifying seed as “construction material” or a “manufactured product” would necessitate the broad waiver of these products on a non-availability basis while domestic production ramps up to meet federal, state, and local infrastructure needs. As explained above, the seed used in support of federally-funded projects often undergoes significant research, development, and multiplication processes that necessarily must occur in Canada, Mexico, or elsewhere globally. This process is critical to producing the unique seed varieties, in the required amounts, that are necessary to meet federal specifications. And because seed supply typically is planned several growing cycles prior to estimated need, the sudden application of BABA requirements would provide insufficient time for the U.S. seed industry to pivot their growth production and supply chains to meet the needs of federally-funded infrastructure programs.

Moreover, there is precedent for waiving the application of Buy America requirements to seed.<sup>7</sup> Issuing a similar general applicability waiver for seed here would mitigate the threat to seed supply that otherwise is likely to arise if seed products are classified as “construction materials” or “manufactured products” under the BABA. ASTA therefore requests that OMB carefully consider the unique global production and supply chain challenges faced by the U.S. seed industry and issue a non-availability waiver for seed.

### **Conclusion**

ASTA appreciates the opportunity to provide these comments on OMB’s ongoing rulemaking pursuant to the implementation of BABA requirements. ASTA stands ready and willing to provide any additional information on the U.S. seed industry that may be useful to OMB. If you have any questions or if ASTA can be of any assistance, please feel free to contact me at any time. We very much appreciate your attention to this matter.

Sincerely,

[ASTA signatory]

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<sup>7</sup> For example, under Federal Aviation Administration (FAA) infrastructure projects that did not exempt seed, the FAA has issued waivers exempting T-901 seed, hydroseeding, and fertilizer from Buy American requirements under 49 U.S.C. § 50101(b). See Federal Aviation Administration, Project Specific Buy American Waivers Issued, at 51, 83 (May 2, 2023), *available at* [https://www.faa.gov/airports/aip/buy\\_american/media/project-specific-buy-american-waivers-issued.pdf](https://www.faa.gov/airports/aip/buy_american/media/project-specific-buy-american-waivers-issued.pdf).