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DEPARTMENT OF AGRICULTURE

Office of Procurement and Property Management

7 CFR Part 3201

RIN 0599-AA23

Guidelines for Designating Biobased Products for Federal Procurement

AGENCY: Office of Procurement and Property Management, USDA.

ACTION: Final rule.

SUMMARY: The U.S. Department of Agriculture (USDA) is amending its regulations concerning Guidelines for Designating Biobased Products for Federal Procurement to incorporate statutory changes to section 9002 of the Farm Security and Rural Investment Act (FSRIA) that went into effect when the Agricultural Act of 2014 (the 2014 Farm Bill) was signed into law on February 7, 2014.

DATES: This rule is effective **[insert date 30 days after publication in the FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Ron Buckhalt, USDA, Office of Procurement and Property Management, Room 361, Reporters Building, 300 7th St. SW, Washington, DC 20024; e-mail: [BioPreferred Support@amecfw.com](mailto:BioPreferredSupport@amecfw.com); phone (202) 205-4008.

Information regarding the federal biobased preferred procurement program (one part of the BioPreferred Program) is available on the Internet at <http://www.biopREFERRED.gov>.

SUPPLEMENTARY INFORMATION:

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**I. Executive Summary**

USDA is amending 7 CFR part 3201 to incorporate statutory changes to section 9002 of the Farm Security and Rural Investment Act made by enactment of the Agricultural Act of 2014 on February 7, 2014.

A. Summary of Major Provisions of the Final Rule

## 1. Revisions to the BioPreferred Program Definitions

USDA is amending 7 CFR 3201.2 by revising one definition and adding two new definitions for terms that are used in the Guidelines as a result of revisions to section 9002 made by the 2014 Farm Bill. USDA is revising the definition of "biobased product" to state that the term includes forest products that meet biobased content requirements, notwithstanding the market share the product holds, the age of the product, or whether the market for the product is new or emerging.

USDA is adding definitions for the terms "forest product" and "renewable chemical." These terms were defined in the text of the 2014 Farm Bill and USDA is proposing to add them verbatim to the BioPreferred Program Guidelines.

USDA is also deleting the current definition of "forestry materials" from section 3201.2. USDA is deleting the existing definition of the term "forestry materials" because the newly defined term "forest product" is more appropriate and, thus, will generally replace the existing term.

## 2. Addition of Reporting Requirements

USDA is also adding a new paragraph (b)(1)(iv) to section 3201.4 to require federal agencies to report the quantities and types of biobased products purchased. This new paragraph responds to specific language included in the 2014 Farm Bill and is intended to provide a means by which the effectiveness of the

BioPreferred Program can be measured.

### 3. Addition of Targeted, Biobased-only Purchasing Requirement

USDA is also adding a new paragraph (b)(4) to section 3201.4 "Procurement programs." This new paragraph adds the 2014 Farm Bill requirement that federal procuring agencies establish a targeted biobased-only procurement requirement under which the procuring agency must issue a certain number of biobased-only contracts when the agency is purchasing products, or purchasing services that include the use of products, that are included in a biobased product category designated by the Secretary.

### 4. Addition of Criteria for Evaluating "Innovative Approaches"

USDA is also adding paragraphs to section 3201.5 "Category designation" to expand the description of the procedures and considerations for designating product categories, including those product categories that were excluded from the BioPreferred Program under the previous mature market products exclusion. The Conference Report on the 2014 Farm Bill states: "It is the Managers' intention that all products in the program use innovative approaches in the growing, harvesting, sourcing, procuring, processing, manufacturing, or application of the biobased product." USDA is, therefore, incorporating criteria to be used when evaluating whether biobased products meet the requirement to use "innovative approaches."

## B. Costs, Benefits, and Transfers



<b>Type</b>	<b>Costs</b>	<b>Benefits</b>	<b>Transfers</b>
Quantitative	Unable to quantify at this time.	Unable to quantify at this time.	Unable to quantify at this time.
Qualitative	1. Costs of developing biobased alternative products; 2. Costs to gather and submit biobased product information for BioPreferred Web site;	Advances the objectives of the BioPreferred Program, as envisioned by Congress in developing the 2002, 2008, and 2014 Farm Bills.	1. Opens new (federal) market for biobased products that USDA newly designates. 2. Opportunity for newly developed biobased products to be publicized via BioPreferred Web site. 3. Loss of market share by manufacturers who choose not to offer biobased versions of products.

## **II. Authority**

The Guidelines for Designating Biobased Products for Federal Procurement (the Guidelines) are established under the authority of section 9002 of the Farm Security and Rural Investment Act of 2002 (the 2002 Farm Bill), as amended by the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill), and further amended by the Agricultural Act of 2014 (the 2014

Farm Bill), 7 U.S.C. 8102. (Section 9002 of the 2002 Farm Bill, as amended by the 2008 and the 2014 Farm Bills, is referred to in this document as "section 9002").

### **III. Background**

As originally enacted, section 9002 provides for the preferred procurement of biobased products by federal agencies. USDA proposed the Guidelines for implementing this preferred procurement program on December 19, 2003 (68 FR 70730-70746). The Guidelines were promulgated on January 11, 2005 (70 FR 1792), and are contained in 7 CFR part 3201, "Guidelines for Designating Biobased Products for Federal Procurement."

The Guidelines identify various procedures federal agencies are required to follow in implementing the requirements of section 9002. They were modeled in part on the "Comprehensive Procurement Guidelines for Products Containing Recovered Materials" (40 CFR part 247), which the Environmental Protection Agency (EPA) issued pursuant to the Resource Conservation Recovery Act ("RCRA"), 40 U.S.C. 6962.

On June 18, 2008, the 2008 Farm Bill was signed into law. Section 9001 of the 2008 Farm Bill included several provisions that amended the provisions of section 9002. USDA subsequently amended the Guidelines to incorporate those provisions of the 2008 Farm Bill (79 FR 44641).

The purpose of these amendments is to further revise the

Guidelines to incorporate additional changes to section 9002 that were included in the 2014 Farm Bill. These revisions to the Guidelines will not affect products that have already been designated for federal procurement preference. Any changes necessary to the existing designation status of products will be established by future rule-makings.

**IV. Summary of Changes**

As a result of public comments received on the proposed amendments to the Guidelines, USDA has made changes in finalizing the amendments. These changes are summarized in the remainder of this section. A summary of each comment received, USDA's response to the comment or group of related comments, and the rationale for any change made in the final rule is presented in section V.

A. 7 CFR 3201.2 - Definitions.

USDA is finalizing the proposed definitions with no changes.

B. 7 CFR 3201.4 - Procurement programs.

This section has been finalized as proposed.

C. 7 CFR 3201.5 - Category designation.

In the final rule, USDA added a sentence at 3201.5(b)(2) to clarify that evidence of an innovative approach will not be restricted to only those innovative criteria listed in the Guidelines and that consideration of other evidence will be on a case by case basis.

USDA also revised the proposed language in paragraph (b) (2) (i) and (ii) to add the word "biobased" to the description of products or materials that qualify under the first two criteria and also added a paragraph (b) (2) (i) (C) stating that products meet the criteria if the biobased content of the product or material makes its composition different from products or material used for the same historical uses or applications.

D. 7 CFR 3201.6 - Providing product information to federal agencies.

This section has been finalized as proposed.

**V. Discussion of Public Comments**

USDA solicited comments on the proposed amendments for 60 days ending on December 26, 2014. USDA received ten comments by that date. One of the comments was from an individual citizen, five were from industry trade groups, one was from a biobased product manufacturer, one was from an academic institution, and two were from federal agencies. The comments are presented below, along with USDA's responses, and are grouped by the Code of Federal Regulation (CFR) section numbers to which they apply.

A. General Comments on BioPreferred Program

Comment: Several commenters were supportive of USDA's efforts to include innovative forestry products in the BioPreferred Program and to encourage consumers to use biobased

products. One commenter stated that this inclusion will "promote the use of sustainable materials," enhance rural and national economic development, and "broaden the range of products included in the definition of "forest products" and "renewable chemicals."" Another commenter stated generally that the BioPreferred Program and its proposed changes are defined well.

Response: USDA appreciates the support of the commenters.

B. 7 CFR 3201.2 - Definitions.

Comment: One commenter agreed with USDA's proposed definitions for "Biobased product" and "Forest product." Another commenter stated that "biobased-only contracts" should be defined in the program Guidelines and provided a possible definition.

Response: USDA thanks the commenters for their input. Regarding the definition of "biobased-only contracts," USDA's Office of Procurement and Property Management (OPPM) will take the issue to the Interagency Sustainable Acquisition and Materials Management Practices Workgroup (SAMM). USDA OPPM, as part of the SAMM, will work with other agencies to determine whether a definition of biobased-only contracts is needed.

Comment: One commenter stated that the definition of "Biobased product" should be modified to include renewable chemicals. The commenter stated that renewable chemicals are

already included within the existing statutory and regulatory definition, and proposed that the regulatory definition needs to change to add "renewable chemical" so that the definition includes the words "intermediate ingredient, renewable chemical, or feedstock."

Response: USDA's believes that when definitions of key BioPreferred Program terms are provided in the Farm Bill language authorizing the Program, those definitions should be used without changes. The proposed definition of "biobased product" is taken verbatim from Section 9001 of the 2014 Farm Bill. USDA agrees with the commenter that renewable chemicals are an important segment of biobased products and is adding a stand-alone definition of "renewable chemical" to the Guidelines to clarify the inclusion of these products in the BioPreferred Program. The definition of "biobased product" has not been revised, however, and is being finalized as proposed.

C. 7 CFR 3201.4 - Procurement programs.

1. 7 CFR 3201.4(b) - Federal agency preferred procurement programs.

Comment: Three commenters stated that USDA should provide more guidance for federal agencies on how to establish the proposed targeted biobased-only procurement requirement and that USDA should specify what information this requirement needs to include. Two of the commenters stated that more guidance from

USDA and clearer definition of "Biobased Procurement" would limit "significant differences in implementation," "inconsistencies in the results of interagency assessment," and "green washing."

One commenter asked USDA to consider several questions, such as how it differs from other procurement programs, if it is only defined by having FAR Clause 52.223-1 or 52.223-2 in a contract, if buying a product with a "Biobased symbol" on GSA Advantage is enough, and if it excludes "other sustainability programs such as recycling or energy efficiency." This commenter also asked for more details on "applicability, data sources, standard data collection methods and consistent analysis of data collected."

Another commenter recommended that USDA work closely with the Sustainable Acquisition and Materials Management Practices Workgroup to provide guidance to federal agencies and their contractors on fulfilling the new reporting requirement. The commenter stated that this guidance should be "implemented via a policy directive from the Office of Management and Budget/OFPP [Office of Federal Procurement Policy]" such that overlapping reporting requirements and the reporting burden on federal agencies and their contractors are reduced.

Response: USDA appreciates the comments provided by these commenters and agrees with the commenters that communication,

coordination, and guidance will be needed to fully implement the biobased-only contracts requirement as well as the collection and reporting of data regarding biobased purchases. While USDA is committed to working with federal agencies to develop and implement procedures for complying with the requirements of the 2014 Farm Bill and the BioPreferred Program, those efforts will be separate from the current efforts to finalize the amendments to the Program Guidelines. USDA OPPM will take this 2014 Farm Bill requirement for biobased-only contracts to the interagency Sustainable Acquisition and Materials Management Practices (SAMM) Workgroup. OPPM, as part of the SAMM, will work with other agencies to develop guidance. Specific questions regarding how the procurement programs should work will be addressed with Workgroup members rather than in the context of these Guideline amendments.

2. §3201.4(b)(1)(iii) - Provisions for the annual review and monitoring of the effectiveness of the procurement program.

Comment: One commenter noted that this new reporting requirement creates an additional burden on federal agencies and their contractors because there is not an electronic means of effectively documenting this information at "the individual product level," specifying that the Federal Procurement Data System is not designed to do so.

Another commenter stated that USDA should decide which data

sources to use for collecting the annual biobased procurement results: "Federal Procurement Data System (FPDS), SAMM.gov, or General Services Administration and Defense Logistics Agency." In addition, the commenter indicated that USDA should issue a standard method for how the data will be collected and analyzed and that USDA should conduct the data review via a third-party.

A third commenter stated that for the proposed reporting requirement to be successful, it should be "codified in the Federal Acquisition Regulation and a specific reporting portal (such as the Federal Procurement Data System - Next Generation or the System for Award Management [SAM]) should be identified for agencies" to report the data. This commenter urged USDA to "take additional steps" to make sure that federal agencies fulfill the reporting requirement. The commenter suggested implementing a new feature in SAM that would allow federal agencies to report quantities and types of biobased products that they purchased, because there is already a FAR clause in SAM that requires prime contractors to report product types and dollar values of biobased products that are purchased annually.

Response: USDA appreciates the comments and recommendations offered by the commenters on the recordkeeping and reporting requirements. USDA agrees with the commenters that communication, coordination, and guidance will be needed to fully implement the requirements for the collection and

reporting of data regarding biobased purchases. Federal government-wide data on biobased product purchases are entered into the System for Award Management (SAM) by Contractors entering data into the BioPreferred portal. This is the automated procurement system that has officially been endorsed by the Chief Acquisition Officers Council, OFPP and the federal government agencies. USDA OPPM is using it to fulfill this requirement. Thus, while USDA is committed to working with federal agencies to develop and implement procedures for complying with the requirements of the 2014 Farm Bill and the BioPreferred Program, those efforts will be separate from the current efforts to finalize the amendments to the Program Guidelines.

3. §3201.4(b)(1)(iv) - Provisions for reporting quantities and types of biobased products purchased by the federal agency.

Comment: Two commenters provided feedback on what reporting data federal agencies should provide to USDA regarding their annual biobased-only purchases. One commenter recommended that USDA should first establish a baseline for the rate of biobased procurement for federal agencies and then examine this rate after each year. The same commenter stated that after determining this baseline, USDA should work with agencies to set an annual percentage growth rate goal. Another commenter stated that the reporting requirement should specify biobased

procurement quantities in "dollar values."

Response: As discussed in the response to the previous comment, USDA appreciates the input from the commenters but does not believe that it is appropriate to make any revisions to the proposed amendments to the Guidelines. Federal government-wide data on biobased product purchases are entered into the System for Award Management (SAM) by Contractors entering data into the BioPreferred portal. This is the automated procurement system that has officially been endorsed by the Chief Acquisition Officers Council, OFPP and the federal government agencies. USDA OPPM is using it to fulfill this requirement. There will be an amendment to the FAR requesting that FAR Clause 52.223-2 be revised to add quantities. As presently written, it requires the Contractor to report on product types and dollars to the SAM. USDA OPPM will seek to amend it to add quantities.

4. §3201.4(b)(4) - Targeted biobased-only procurement requirement.

Comment: Three commenters requested that USDA offer more details on how federal agencies should establish a set number of biobased-only contracts under this proposed requirement. One commenter inquired whether the goal for federal agencies to meet is a set number of contracts, a certain percentage of contracts with specific FAR clauses, or a certain value based on a total agency spend threshold. This commenter asked if specific

service contracts should be targeted, as well. Another commenter suggested that instead of stating in proposed §3201.4(b)(4) that a procuring agency should issue "a certain number of biobased-only contracts," that the proposed rule should state that the agency should issue "a minimum of 20" biobased contracts "annually, unless a lower or higher number is justified by market research on the availability of products." The same commenter suggested adding the following sentence at the end of the proposed rule §3201.4(b)(4), "Each procuring agency shall report the number of biobased-only contracts issued annually and the types and dollar values of biobased products purchased directly under these contracts or used by contractors in carrying out the services provided under the contracts." The third commenter advised that federal agencies should select a set amount of the current year's planned contracts to be biobased-only based on the previous year's purchase of products and services. The commenter also stated that, as an option, federal agencies could select the top 10 products based on their previous year's purchase of products and services to be biobased-only.

Response: USDA agrees with the commenters that additional guidance will be needed to fully implement the biobased-only contracts requirement. USDA will take this 2014 Farm Bill requirement for biobased-only contracts to the interagency SAMM

Workgroup. USDA, as part of the SAMM, will work with other agencies to develop guidance. While USDA is committed to working with federal agencies to develop and implement procedures for complying with the requirements of the 2014 Farm Bill and the BioPreferred Program, those efforts will be separate from the current efforts to finalize the amendments to the Program Guidelines.

D. 7 CFR 3201.5 - Category designation.

1. 7 CFR 3201.5(b)(2) - Innovative approach criteria.

Comment: Three commenters expressed support for USDA for allowing forestry and other traditional biobased products to be eligible for participation in the BioPreferred Program. Of these three commenters, two expressed overall support for the proposed criteria for demonstrating innovative approaches as a means of evaluating all biobased products that may be eligible for participation in the BioPreferred Program. One of the commenters stated that these proposed criteria are "reasonable and provide companies submitting products a clear and consistent manner to demonstrate the innovative nature of their product" and that they also allow manufacturers the ability to demonstrate innovation for products that are not easily categorized in the options that USDA outlined. The other commenter stated that these proposed criteria "will help expand the use of biobased products." The third commenter pointed out

that USDA only requires reviewing information for the proposed criterion in §3201.5(b)(2)(i) but not for any of the others; thus, the commenter asked what information USDA would review to “implement” the other proposed criteria. This commenter also questioned whether this proposed rule would be applied in a “multi-plant manufacturing scenario”: would it be applied at the product or at the manufacturing plant level, and would one plant’s compliance be sufficient for all plants?

Response: USDA thanks the commenters for their support of, and participation in, the BioPreferred Program. In response to the one commenter’s questions, the text that was proposed and is being finalized for paragraph (b)(2) identifies the criteria that USDA will use to determine a product’s eligibility to participate in the Program. USDA has specified in the text that product manufacturers may be asked to provide documentation to verify their claims that they are meeting any one of the criteria. Submitting an EPD is one of the means available for manufacturers to demonstrate that their biobased products meet the “innovative approach” criteria. Various other types of documentation are also acceptable. In evaluating whether the criteria have been met, USDA will work with manufacturers on a case by case basis to determine the most appropriate documentation. Also, USDA review of information to determine eligibility to participate in the BioPreferred Program is

product specific, but is independent of the actual manufacturing plant in which the product is produced. That is, if a manufacturer produces product A in two different locations and the product is otherwise identical, the manufacturer only has to apply for registration of their product once.

Comment: One commenter stated that the proposed rule in §3201.5(b)(2) is unclear and asked if it should be read with the current rule in §3201.5(b)(1) or if it would be "used independently to designate products." This commenter stated that the 2014 Farm Bill wording "implies the latter," while the proposed rule "implies the former." The commenter stated that a "federal preference program" should not endorse products on the grounds that they contain biobased ingredients and that they are "new and different" from the way products were manufactured historically instead of considering whether the products are better for the environment and human health, or perform better than those that are currently available. Additionally, this commenter recommended that USDA apply these proposed criteria in a manner such that federal agencies are not required to choose between a "biobased product that does not meet other federal purchasing requirements such as less-ozone-depleting" and a non-biobased product that meets these requirements within a particular product category when making purchasing decisions. This commenter was also concerned that the proposed criteria

§3201.5(b)(2) would “expand the reach” of the BioPreferred Program “beyond what was originally intended.” The commenter recommended that the proposed criterion for an Environmental Product Declaration (EPD) should merely supplement the product’s participation in the BioPreferred Program, instead of being a requirement for it.

Response: The amendments that were proposed and are being finalized by this final rule revise paragraph (b)(2) but do not change existing paragraph (b)(1). Paragraph (b)(1) states that USDA will establish a minimum biobased content for designated product categories and that the product categories will be listed in subpart B of part 3201. While USDA understands the commenter’s position regarding consideration of environment and human health impacts, the statutory requirements of the 2002 Farm Bill, as amended in the 2008 and 2014 Farm Bills, mandate that the BioPreferred Program promote and give a preference to the purchase of biobased products. USDA does not have the authority nor the resources to evaluate the life cycle environmental and human health impacts of biobased products compared to those of traditional petroleum based products. USDA does present manufacturer-supplied information regarding the performance of products in cases where the manufacturer provides such information. However, as with life cycle impacts, USDA does not have the statutory authority or the resources to

independently investigate the performance of products that participate in the Program.

Comment: One commenter expressed concern that the paragraph in §3201.5(b)(2) was written specifically for forestry products, which could cause issues for non-forestry ones. Thus, the commenter suggested clarifying the introductory paragraph in §3201.5(b)(2) by adding the word "biobased" in front of "product" and "products." The commenter also suggested clarifying §3201.5(b)(2)(i) and (ii) to read:

(i) *Product composition and applications.* (A) The biobased product or material is used or applied in applications that differ from historical applications; (B) The biobased product or material is grown, harvested, manufactured, processed, sourced, or applied in other innovative ways.; or (C) The biobased content of the product or material makes its composition different from products used for the same historical uses or applications.

(ii) *Manufacturing and processing.* (A) The biobased product or material is manufactured or processed using renewable, biomass energy or using technology that is demonstrated to increase energy efficiency or reduce reliance on fossil fuel based energy sources; or (B) The biobased product or material is manufactured or processed with technologies that ensure high feedstock material recovery and use; or

(C) The product or material is manufactured or processed in a way that adds biobased content.

Two additional commenters supported USDA in designating intermediate chemical categories according to "functional use" because it "offers transparent linkage to the established finished product categories of the Program, as well as recognizing their functional importance in the BioPreferred value chain." Each commenter provided the same list of "priority" intermediate chemical categories based upon functional use.

Response: USDA agrees with the commenter that certain edits to the proposed language add clarity to the rule and, thus, will revise the proposed language for the final rule. However, USDA disagrees with the commenter's recommendation to include the statement that the manufacturing and processing criteria should be revised to specifically include processes that "add biobased content." Many biobased products are made by replacing petroleum-based components of traditional products with biobased components, which could be characterized as adding biobased content, and these products would be covered by criterion (i)(C) in the commenter's edited paragraphs. Thus, there would be no benefit to adding a third item to the manufacturing and processing criterion.

2. §3201.5(b)(2)(iii) - Environmental Product Declaration.

Comment: One commenter provided USDA with two examples of a Type III EPD and noted that the EPD requires a product to meet "Product Category Rules." The commenter pointed out that this information "may or may not be available and would require time to develop." The commenter added that the "LCA related data" included in the EPD will assist in comparing products but inquired how federal agencies will use this data. Additionally, the commenter asked if there is an advantage to using this data as one means of defining "biobased purchasing."

Response: USDA points out that the proposal did not make it a "requirement" that a manufacturer submit an Environmental Product Declaration (EPD) to participate in the BioPreferred Program. Submitting an EPD is one of the means available for manufacturers to demonstrate that their biobased products meet the "innovative approach" criteria. Various other types of documentation are also acceptable. USDA also agrees that not all manufacturers have EPDs for their products and that the completion of an EPD can be time consuming. The purpose of requesting documentation such as, but not limited to, an EPD is to demonstrate that the manufacturer meet Congress' intention that "all products in the program use innovative approaches in the growing, harvesting, sourcing, procuring, processing, manufacturing, or application of the biobased product." Because not all manufacturers have performed an EPD, USDA does not

believe that it would be beneficial to require this type of data in defining "biobased purchases" by federal agencies. USDA's position is that purchases of biobased products that have been accepted into the BioPreferred Program and are, thus, listed in the Program's Biobased product catalog are eligible to be counted as "biobased purchases."

3. §3201.5(b)(2)(iv) - Raw material sourcing.

Comment: One commenter wanted USDA to take into account that a finished wood product may be sourced domestically or globally; thus, the commenter cautioned USDA that the criteria proposed in §3201.5(b)(2)(iv) do not "inadvertently create a technical barrier to trade" and do not exclude imported wood products that were harvested and exported legally in the US and in their country of origin. This commenter recommended that USDA recognize in the proposed rule that new certification schemes for forestry products develop every year; as such, the commenter encouraged USDA to include "new legality systems," for example, the Voluntary Partnership Agreements under the European Union's Forest Law Enforcement, Governance and Trade Action Plan as another way to demonstrate innovation. In addition, the commenter advised USDA to be aware that the definitions for "legal, responsible, or certified sources" are not applied such that innovation in forestry management and certification are not

considered. The commenter looked forward to “working closely with USDA” to help implement these rules.

Response: USDA agrees with the commenters that the proposed innovative criteria should not be considered as an all-inclusive list. USDA recognizes that sustainability advances are occurring worldwide and does not intend that new and valid certifications be excluded from consideration by the BioPreferred Program. In the final rule, USDA will clarify that evidence of an innovative approach will not be restricted to only those innovative criteria listed in the Guidelines and that consideration of other evidence will be on a case-by-case basis.

E. 7 CFR 3201.6 - Providing product information to Federal agencies.

No comments were received on the revisions proposed for this section.

## **VI. Regulatory Information**

A. Executive Orders 12866 and 13563: Regulatory Planning and Review

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the

importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a "non-significant regulatory action" under section 3(f) of Executive Order 12866. Accordingly, the final rule was not reviewed by the Office of Management and Budget.

#### 1. Need for the Rule

Today's final rule amends the BioPreferred Program Guidelines to establish the regulatory framework for the designation of product categories that were previously excluded from the federal procurement preference because they were mature market products. The designation of such products is specifically required under the Agricultural Act of 2014, which states that the Guidelines shall: "(vi) promote biobased products, including forest products, that apply an innovative approach to growing, harvesting, sourcing, procuring, processing, manufacturing, or application of biobased products regardless of the date of entry into the marketplace."

#### 2. Transfers

This rule advances the objectives of the BioPreferred Program, as envisioned by Congress in the 2002, 2008 and 2014 Farm Bills, by expanding the scope of products that may be considered for federal procurement preference. The entry into the BioPreferred Program of biobased products that were

previously considered to be mature market products will open a new federal market for biobased products that are designated by USDA and also provides newly developed biobased products to be publicized via the BioPreferred Web site. Thus, the rule is expected to increase demand for these products once designated, which, in turn, is expected to increase demand for those agricultural products that can serve as ingredients and feedstocks. This federal procurement preference will thus yield private benefits for businesses producing these ingredients and feedstocks.

Simultaneously, this action could reduce demand for products that do not receive federal procurement preference designation. Producers of biobased products, including intermediate ingredients and feedstocks, that are not so designated or producers of non-biobased products could face a loss of market share within federal procurement.

### 3. Costs

Manufacturers of biobased products will incur the actual costs of developing the biobased products as well as the costs to gather and submit the biobased product information for the BioPreferred Web site. The costs of developing and marketing new products are, in this case, a voluntary expense if manufacturers choose to pursue a share of the biobased product market.

Although this rule amends or establishes procedures for designating qualifying biobased product categories, no product categories are being designated today. The actual designation of biobased product categories under this program will be accomplished through future rulemaking actions and the effect of those rulemakings on the economy will be addressed at that time.

B. Regulatory Flexibility Act (RFA)

The RFA, 5 U.S.C. 601-602, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

Although the BioPreferred Program ultimately may have a direct impact on a substantial number of small entities, USDA has determined that this final rule itself does not have a direct significant economic impact on a substantial number of small entities. This rule directly affects federal agencies, which are required to consider designated products for purchase. In addition, private sector manufacturers and vendors of biobased products voluntarily may provide information to USDA through the means set forth in this rule. However, the rule

imposes no requirement on manufacturers and vendors to do so, and does not differentiate between manufacturers and vendors based on size. USDA does not know how many small manufacturers and vendors may opt to participate at this stage of the program.

As explained above, when USDA issues a proposed rulemaking to designate product categories for preferred procurement under this program, USDA will assess the anticipated impact of such designations, including the impact on small entities. USDA anticipates that this program will positively impact small entities that manufacture or sell biobased products. For example, once product categories are designated, this program will provide additional opportunities for small businesses to manufacture and sell biobased products to federal agencies. This program also will impact indirectly small entities that supply biobased materials to manufacturers. Additionally, this program may decrease opportunities for small businesses that manufacture or sell non-biobased products or provide components for the manufacturing of such products. It is difficult for USDA to definitively assess these anticipated impacts on small entities until USDA proposes product categories for designation. This rule does not designate any product categories.

C. Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights

This final rule has been reviewed in accordance with

Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and does not contain policies that have implications for these rights.

D. Executive Order 12988: Civil Justice Reform

This final rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. This rule does not preempt State or local laws, is not intended to have retroactive effect, and does not involve administrative appeals.

E. Executive Order 13132: Federalism

This final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The provisions of this rule do not have a substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various government levels.

F. Unfunded Mandates Reform Act of 1995

This final rule contains no federal mandates under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538, for State, local, and tribal governments, or the private sector. Therefore, a statement under section 202 of UMRA is not required.

G. Executive Order 12372: Intergovernmental Review of Federal Programs

For the reasons set forth in the Final Rule Related Notice

for 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), this program is excluded from the scope of the Executive Order 12372, which requires intergovernmental consultation with State and local officials. This program does not directly affect State and local governments.

H. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this final rule will not have substantial and direct effects on Tribal governments and will not have significant Tribal implications.

I. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 through 3520), the information collection under the Guidelines is currently approved under OMB control number 0503-0011.

J. E-Government Act Compliance

USDA is committed to compliance with the E-Government Act, which requires Government agencies, in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. USDA is implementing an electronic information system for posting

information voluntarily submitted by manufacturers or vendors on the products they intend to offer for federal preferred procurement under each designated item. For information pertinent to E-Government Act compliance related to this rule, please contact Ron Buckhalt at (202) 205-4008.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, that includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. USDA has submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register.

List of Subjects in 7 CFR Part 3201

Biobased products, Procurement.

For the reasons stated in the preamble, the Department of Agriculture is amending 7 CFR part 3201 as follows:

PART 3201 - GUIDELINES FOR DESIGNATING BIOBASED PRODUCTS FOR FEDERAL PROCUREMENT

1. The authority citation for part 3201 continues to read as follows:

Authority: 7 U.S.C. 8102.

2. Section 3201.2 is amended by:

- a. Revising the definition of "Biobased product";
- b. Removing the definition of "Forestry materials"; and
- c. Adding, in alphabetical order, definitions for "Forest product" and "Renewable chemical".

The revision and additions read as follows:

**§ 3201.2 Definitions.**

\* \* \* \* \*

Biobased product. (1) A product determined by USDA to be a commercial or industrial product (other than food or feed) that is:

(i) Composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials; or

(ii) An intermediate ingredient or feedstock.

(2) The term "biobased product" includes, with respect to forestry materials, forest products that meet biobased content

requirements, notwithstanding the market share the product holds, the age of the product, or whether the market for the product is new or emerging.

\* \* \* \* \*

Forest product. A product made from materials derived from the practice of forestry or the management of growing timber. The term "forest product" includes:

- (1) Pulp, paper, paperboard, pellets, lumber, and other wood products; and
- (2) Any recycled products derived from forest materials.

\* \* \* \* \*

Renewable chemical. A monomer, polymer, plastic, formulated product, or chemical substance produced from renewable biomass.

\* \* \* \* \*

3. Section 3201.4 is amended by revising paragraphs (b) (1) (i) through (iii) and adding paragraphs (b) (1) (iv) and (b) (4) to read as follows:

**§ 3201.4 Procurement programs.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) A preference program for purchasing qualified biobased

products;

(ii) A promotion program to promote the preference program;

(iii) Provisions for the annual review and monitoring of the effectiveness of the procurement program; and

(iv) Provisions for reporting quantities and types of biobased products purchased by the Federal agency.

\* \* \* \* \*

(4) No later than June 15, 2016, each Federal agency shall establish a targeted biobased-only procurement requirement under which the procuring agency shall issue a certain number of biobased-only contracts when the procuring agency is purchasing products, or purchasing services that include the use of products, that are included in a biobased product category designated by the Secretary.

\* \* \* \* \*

4. Section 3201.5 is amended by adding paragraph (b) (2) to read as follows:

**§ 3201.5 Category designation.**

\* \* \* \* \*

(b) \* \* \*

(2) In designating product categories and intermediate ingredient or feedstock categories for the BioPreferred Program, USDA will consider as eligible only those products that use

innovative approaches in the growing, harvesting, sourcing, procuring, processing, manufacturing, or application of the biobased product. USDA will consider products that meet one or more of the criteria in paragraphs (b)(2)(i) through (iv) of this section to be eligible for the BioPreferred Program. USDA will also consider other documentation of innovative approaches in the growing, harvesting, sourcing, procuring, processing, manufacturing, or application of biobased products on a case-by-case basis. USDA may exclude from the BioPreferred Program any products whose manufacturers are unable to provide USDA with the documentation necessary to verify claims that innovative approaches are used in the growing, harvesting, sourcing, procuring, processing, manufacturing, or application of their biobased products.

(i) *Product applications.* (A) The biobased product or material is used or applied in applications that differ from historical applications; or

(B) The biobased product or material is grown, harvested, manufactured, processed, sourced, or applied in other innovative ways; or

(C) The biobased content of the product or material makes its composition different from products or material used for the same historical uses or applications.

(ii) *Manufacturing and processing.* (A) The biobased product or material is manufactured or processed using renewable, biomass energy or using technology that is demonstrated to increase energy efficiency or reduce reliance on fossil-fuel based energy sources; or

(B) The biobased product or material is manufactured or processed with technologies that ensure high feedstock material recovery and use.

(iii) *Environmental Product Declaration.* The product has a current Environmental Product Declaration as defined by International Standard ISO 14025, Environmental Labels and Declarations - Type III Environmental Declarations - Principles and Procedures.

(iv) *Raw material sourcing.* (A) The raw material used in the product is sourced from a Legal Source, a Responsible Source, or a Certified Source as designated by ASTM D7612 - 10, Standard Practice for Categorizing Wood and Wood-Based Products According to Their Fiber Sources; or

(B) The raw material used in the product is 100% resourced or recycled (such as material obtained from building deconstruction); or

(C) The raw material used in the product is from an urban environment and is acquired as a result of activities related to

a natural disaster, land clearing, right-of-way maintenance, tree health improvement, or public safety.

\* \* \* \* \*

5. Section 3201.6 is amended by revising the first sentence of paragraph (a)(1) to read as follows:

**§ 3201.6 Providing product information to Federal agencies.**

(a) \* \* \*

(1) \* \* \* The Web site will, as determined to be necessary by the Secretary based on the availability of data, provide information as to the availability, price, biobased content, performance and environmental and public health benefits of the designated product categories and designated intermediate ingredient or feedstock categories. \* \* \*

\* \* \* \* \*

Dated: June 5, 2015.

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Gregory L. Parham,  
Assistant Secretary  
For Administration,  
U.S. Department of Agriculture.

6/15/2015]