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DEPARTMENT OF AGRICULTURE

Office of Procurement and Property Management

7 CFR Part 3201

RIN 0599-AA27

Designation of Product Categories for Federal Procurement

AGENCY: Office of Procurement and Property Management,  
USDA.

ACTION: Final rule.

SUMMARY: The U.S. Department of Agriculture (USDA) is amending the Guidelines for Designating Biobased Products for Federal Procurement to add 12 sections that designate product categories within which biobased products will be afforded Federal procurement preference by Federal agencies and their contractors.

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

FOR FURTHER INFORMATION CONTACT: Karen Zhang, USDA, Office of Procurement and Property Management, 1400 Independence Ave. SW., Washington, DC 20250; e-mail:

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Information regarding the Federal preferred procurement program (one part of the BioPreferred Program) is available

on the Internet at <http://www.biopreferred.gov>.

SUPPLEMENTARY INFORMATION: The information presented in this preamble is organized as follows:

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**I. Authority**

These product categories are designated 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".)

## **II. Background**

As part of the BioPreferred Program, USDA published, on January 13, 2017, a proposed rule in the Federal Register (FR) for the purpose of designating a total of 12 product categories for the preferred procurement of biobased products by Federal agencies (referred to hereafter in this FR notice as the "preferred procurement program"). This proposed rule can be found at 82 FR 4206. This rulemaking is referred to in this preamble as Round 11 (RIN 0599-AA24).

The term "product category" is used as a generic term in the designation process to mean a grouping of specific products that perform a similar function. As originally finalized, the Guidelines included provisions for the designation of product categories that were composed of finished, consumer products such as mobile equipment hydraulic fluids, penetrating lubricants, or hand cleaners and sanitizers.

The 2008 and 2014 Farm Bills directed USDA to expand the scope of the Guidelines to include the designation of product categories composed of intermediate ingredients and

feedstock materials. Specifically, the 2008 Farm Bill stated that USDA shall "designate those intermediate ingredients and feedstocks that are or can be used to produce items that will be subject" to the Federal preferred procurement program. The term "intermediate ingredient and feedstock" is defined in the Farm Bill as "a material or compound made in whole or in significant part from biological products, including renewable agricultural materials (including plant, animal, and marine materials) or forestry materials, that are subsequently used to make a more complex compound or product." The term "intermediates" is used in the titles of the product categories being designated today to distinguish these categories from the finished, consumer products previously designated by USDA. Although the Federal government does not typically purchase large quantities of intermediate ingredients and feedstock materials, designating such materials represents a means to identify and include finished products made from such designated materials in the Federal preferred procurement program. In the proposed rule, USDA proposed designating the following 12 product categories for the preferred procurement program:

Intermediates - Plastic Resins; Intermediates - Chemicals;

Intermediates - Paint and Coating Components; Intermediates - Textile Processing Materials; Intermediates - Foams; Intermediates - Fibers and Fabrics; Intermediates - Lubricant Components; Intermediates - Binders; Intermediates - Cleaner Components; Intermediates - Personal Care Product Components; Intermediates - Oils, Fats, and Waxes; and Intermediates - Rubber Materials.

This final rule designates the proposed product categories within which biobased products will be afforded Federal procurement preference. USDA has determined that each of the product categories being designated under this rulemaking meets the necessary statutory requirements; that they are being produced with biobased products; and that their procurement will carry out the following objectives of section 9002: to improve demand for biobased products; to spur development of the industrial base through value-added agricultural processing and manufacturing in rural communities; and to enhance the Nation's energy security by substituting biobased products for products derived from imported oil and natural gas.

When USDA designates by rulemaking a product category for preferred procurement under the BioPreferred Program, manufacturers of all products under the umbrella of that

product category that meet the requirements to qualify for preferred procurement can claim that status for their products. To qualify for preferred procurement, a product must be within a designated product category and must contain at least the minimum biobased content established for the designated product category. With the designation of these specific product categories, USDA invites the manufacturers and vendors of qualifying products to provide information on the product, contacts, and performance testing for posting on its BioPreferred Web site, <http://www.biopreferred.gov>. Procuring agencies will be able to utilize this Web site as one tool to determine the availability of qualifying biobased products under a designated product category. Once USDA designates a product category, procuring agencies are required generally to purchase biobased products within the designated product category where the purchase price of the procurement product exceeds \$10,000 or where the quantity of such products or of functionally equivalent products purchased over the preceding fiscal year equaled \$10,000 or more.

Minimum Biobased Contents. The minimum biobased contents being established with this rulemaking are based on products for which USDA has biobased content test data.

USDA obtains biobased content data in conjunction with product manufacturer's applications for certification to use the USDA Certified Biobased Product label. Products that are certified to display the label must undergo biobased content testing by an independent, third party testing lab using ASTM D6866, "Standard Test Methods for Determining the Biobased Content of Solid, Liquid, and Gaseous Samples Using Radiocarbon Analysis". These test data become part of the BioPreferred Program database and their use in setting the minimum biobased content for designated product categories results in a more efficient process for both the Program and manufacturers of products within the product categories.

Overlap with EPA's Comprehensive Procurement Guideline program for recovered content products under the Resource Conservation and Recovery Act (RCRA) Section 6002. Some of the products that are within biobased product categories designated for Federal preferred procurement under this program may also be within categories the Environmental Protection Agency (EPA) has designated under the EPA's Comprehensive Procurement Guideline (CPG) for products containing recovered (or recycled) materials. Because this rule designates intermediate ingredient product categories

rather than categories of finished, consumer-use products, USDA does not believe that there is a direct overlap between these categories and CPG categories. However, if such an overlap situation is discovered, USDA is asking manufacturers of qualifying biobased products to make additional product and performance information available to Federal agencies conducting market research to assist them in determining whether the biobased products in question are, or are not, the same products for the same uses as the recovered content products.

Federal Government Purchase of Sustainable Products.

The Federal government's sustainable purchasing program includes the following three mandatory preference programs for designated products: the BioPreferred Program, the EPA's Comprehensive Procurement Guideline for products containing recovered materials, and the Environmentally Preferable Purchasing program.

Other Preferred Procurement Programs. Federal

procurement officials should also note that many biobased products may be available for purchase by Federal agencies through the AbilityOne Program (formerly known as the Javits-Wagner-O'Day (JWOD) program). Under this program, members of organizations including the National Industries

for the Blind (NIB) and SourceAmerica (formerly known as the National Industries for the Severely Handicapped) offer products and services for preferred procurement by Federal agencies. A search of the AbilityOne Program's online catalog ([www.abilityone.gov](http://www.abilityone.gov)) indicated that the types of intermediate ingredient product categories being designated in this final rule are not available through the AbilityOne Program. USDA notes, however, that if such materials are offered at some point in the future, their procurement through the AbilityOne Program would further the objectives of both the AbilityOne Program and the Federal preferred procurement program.

Outreach. To augment its own research, USDA consults with industry and Federal stakeholders to the Federal preferred procurement program during the development of the rulemaking packages for the designation of product categories. USDA consults with stakeholders to gather information used in determining the order of product category designation and in identifying: Manufacturers producing and marketing products that are categorized within a product category being designated; performance standards used by Federal agencies evaluating products to be procured; and warranty information used by manufacturers

of end user equipment and other products with regard to biobased products.

### **III. Discussion of Public Comments**

USDA solicited comments on the proposed rule for 90 days ending on April 13, 2017. USDA received eight comments by that date. Four of the comments were from manufacturers of biobased products, and four were from trade associations. The comments are presented below, along with USDA's responses, and are shown under the product categories to which they apply.

#### General Process Comments

Comment: One commenter believes that the scope of the proposed intermediate categories is too broad and that the proposed categories are too widely defined. The commenter recommends categorizing intermediates based on functional use descriptions. Further, the commenter notes that by defining intermediates according to their function in finished products, USDA can refine the minimum percent biobased content required for each group.

Response: USDA agrees that the scope of many of the proposed intermediate ingredient product categories is broad. That is by design. There were, however, several factors that had to be considered in creating the product

categories. USDA first considered the primary rationale for the designation of these intermediate ingredients. Section 9002 directs USDA to designate intermediate ingredients and also to designate finished products made from those intermediate ingredients. The designation of intermediate ingredients as proposed was intended to facilitate the future designation of the finished products that are made from the intermediate ingredients. USDA believes that the designation of finished products made from intermediate ingredients will provide a significant boost in the market for these products. The Federal government is not expected to purchase significant quantities of intermediate materials even after they are designated for the preferred procurement.

USDA also had to consider the potentially conflicting goals of keeping the proposed number of intermediate ingredient product categories reasonable while creating a mechanism for the subsequent designation of as many finished product categories as possible. The decision was made that one way to accomplish this was to define many of the intermediate ingredient product categories broadly. One example of this is the proposed category of "intermediate ingredients - plastic resins." There are

numerous types of biobased plastic resins either already in use or under development. These resins are then used to make a vast number of biobased plastic finished products. USDA chose to propose a product category that included essentially all plastic resins to be as inclusive as possible.

Another significant factor that affected USDA's decision-making when creating the intermediate ingredient product categories was the availability of product data. USDA created more specific product categories where data were available to support creating those categories. For example, USDA had data supporting the designation of categories specifically for biobased ingredients that are used in the manufacturing of finished products in the textiles, lubricants, cleaners, and personal care industries. Thus, the decision was made to go with a broad definition in hopes that most, if not all, biobased chemicals that are used as intermediate ingredients would be covered.

Finally, USDA points out that the BioPreferred Program has traditionally created product categories that are defined by their function and intends to continue to do so when creating product categories for the finished products

that are made from the intermediate ingredients being designated in this rulemaking. USDA has taken the approach that for the designation of intermediate ingredients, however, the designation of broadly defined categories is more reasonable and more inclusive than attempting to create a very large number of function-specific categories.

Comment: One commenter recommends that a validation study be performed to better understand the ranges of inaccuracies of the test method, ASTM D6866, across a number of intermediates and products.

Response: USDA relies on ASTM and the relevant stakeholder committee to confirm the validity of the test method. ASTM D6866 underwent a review and revision during 2016, and USDA is confident that the method yields results that are reliable.

Comment: One commenter supports the designation of intermediate product categories and encourages USDA to develop a more efficient mechanism for adding future new product categories. The commenter acknowledges that the Federal government may not acquire significant amounts of biobased intermediates, but the commenter believes that having product categories that cover renewable chemicals used in final products allows for greater flexibility in

the acquisition of biobased products and easier identification of biobased products that would qualify as biobased under the Program.

Further, the commenter notes that the development of biobased products and renewable chemicals is occurring at a rapid pace. Thus, the commenter encourages USDA to explore opportunities to streamline the process of designating new product categories.

Response: USDA appreciates the commenter's support for the proposed designation of intermediate ingredient product categories. USDA agrees that innovation is constantly occurring in the biobased products industry; the development of these biobased intermediate ingredients, and the products made from them, is progressing rapidly. The process of designating new product categories is one that USDA is constantly seeking to improve. USDA will continue to evaluate changes to the Program that have the potential to streamline the process for designating product categories.

Comment: One commenter supports the purpose and implementation of the USDA BioPreferred Program and acknowledges the challenge of identifying the wide range of biobased intermediate ingredients and feedstock materials.

The commenter encourages USDA to carefully review the technical information it receives regarding finished products that are being made from these intermediates or feedstocks. The commenter believes that after reviewing this technical information, USDA may want to consider adjusting the definitions, setting subcategories, or adjusting the minimum biobased content requirements for the twelve proposed intermediates categories.

The commenter also supports the use of subcategories at the finished product level and not at the intermediate ingredient or feedstock material level. Further, the commenter believes USDA should consider the need to create subcategories to allow for variations in the minimum biobased content of different end use products. When setting the minimum biobased content for finished products, the commenter encourages USDA to verify that there are products within a given category or subcategory that are commercially available.

The commenter believes that the designation of intermediate categories will have a positive impact on many small businesses that are now using or would like to use biobased materials in their finished products.

The commenter also believes that the designation of

intermediate ingredients and feedstocks will allow small businesses easy access to useable information on the types and categories of biobased materials that are available for use in finished products. The commenter states that the use of biobased materials is one way for small businesses to distinguish themselves in both the government and private sector marketplaces.

The commenter also supports and encourages USDA to continue and expand outreach efforts as stated in the Federal Register.

Response: USDA thanks the commenter for their support of the BioPreferred Program and for their suggestions on technical considerations such as revising the definitions, creating subcategories, and adjusting the minimum biobased contents of the intermediate ingredient product categories. USDA is aware that the information used to support the designation of these intermediate ingredient product categories is often a small sample of the universe of knowledge related to a specific biobased technology or material. As additional information becomes available, USDA will evaluate the need to revise or adjust the technical components of the rulemaking (such as definitions, subcategories, and minimum biobased content

requirements). If such revisions or adjustments are found to be warranted, USDA will undertake a new rulemaking to amend the Guidelines as needed. In the case of upcoming rulemakings to designate finished products, USDA will continue to gather and evaluate technical information from the biobased products industry to support the decisions that go into the rulemaking.

USDA appreciates the support for the approach of defining product categories at the finished product level as opposed to the intermediate ingredient level. As discussed earlier, USDA believes that broad definitions of the intermediate ingredient product categories and, subsequently, more specific functional definitions at the finished product category level is a reasonable approach.

USDA also appreciates the commenter's statements regarding the positive impact of the BioPreferred Program and biobased products on the industry's small businesses.

**Intermediates - Plastic Resins**

Comment: One commenter suggests that the proposed definition be amended to include polymers.

Response: Although the name of the product category was not changed, USDA has revised the proposed definition of this product category to include the term "polymers."

Comment: One commenter supports designating the proposed intermediates - plastic resins category. The commenter believes that the proposal to certify intermediates has the potential to streamline the certification process for future finished products.

Response: USDA thanks the commenter for their support of the proposed designation of the intermediate ingredients product categories.

Comment: One commenter believes the minimum biobased content should be set at 17%. The commenter states that there are commercial plastic films available that contain 20% biobased content, and these films are stronger than films made from petro-based resins. The commenter believes that setting the minimum biobased content at 17% could have a significant positive impact by encouraging more recycling of films and bags.

Response: USDA did not revise the proposed minimum biobased content for this product category. As discussed in the Preamble to the proposed rule, USDA has data from over 60 manufacturers who make about 150 biobased plastic resins. These resins are used to make a wide variety of finished products. The biobased contents of the resins in the database range from 25 percent to 100 percent. USDA

believes that setting the minimum biobased content requirement for this product category at 22 percent is reasonable. USDA also points out that the product mentioned by the commenter (plastic film) is already included in the designated product category "Films" found in § 3201.27. The Films product category includes subcategories for semi-durable films and non-durable films and the minimum biobased content requirements are 45 percent and 85 percent, respectively.

#### **Intermediates - Chemicals**

Comment: One commenter states that the proposed intermediates - chemicals category is too widely defined as it includes reactants, building block chemicals, secondary chemicals, and chemicals with specific functional properties. Moreover, the commenter believes that the proposed minimum of 22 percent gives no incentive for chemical producers to increase biobased content. The commenter recommends that USDA instead categorize by function, which will allow for increased minimums for several functional classes.

Response: As discussed in previous responses, USDA believes that creating more specific definitions based on the product's function is more appropriate for the finished

products made from intermediate ingredients. USDA also believes that the goal of including as many renewable chemicals in the Program as possible is best met by being more inclusive when designating the intermediate ingredient product categories. USDA also believes that for the broadly defined product category setting the minimum biobased content at the proposed 22 percent level is appropriate and that competition among manufacturers will tend to drive the actual biobased contents higher than the required minimum. Maintaining the level at 22 percent will also allow many chemical producers to participate in the Program while they make technological improvements that increase the biobased content rather than excluding them from the Program as they strive for improvement. USDA also believes that it is appropriate to set more specific minimum biobased content requirements at the finished product level. The consumers of finished products are expected to be the motivating force that encourages manufacturers to increase the biobased content of the products they make and hope to sell. USDA believes that the most reasonable approach is to include a wide range of intermediate ingredients in the Program and then let the demand for finished products with high biobased contents

encourage advances in intermediate ingredients.

Comment: One commenter suggests that the proposed definition be amended to include viscosity reducers, rheology modifiers, adhesion agents, polyols, and polymers.

Response: The definition, as proposed, was not intended to be an all-inclusive list. USDA agrees with the commenter that the materials they listed are reasonable additions to the proposed definition and has revised the final definition to include them. However, USDA points out that the list is still not considered to be all-inclusive. It is likely that biobased intermediate ingredients exist that are not specifically included in the definition and it is USDA's intention that they be eligible for preferred procurement under the Program.

#### **Intermediates - Paint and Coating Components**

Comment: One commenter suggests that the proposed definition be amended to include humectants/open time additives, coalescent alkyd latex resins, and polymers.

Response: The definition, as proposed, included examples of the types of components intended to be covered by the product category and was not intended to be an all-inclusive list. USDA agrees with the commenter that the materials they listed are reasonable additions to the

proposed definition and has revised the final definition to include them. However, USDA points out that the list is still not considered to be all-inclusive. It is likely that biobased intermediate ingredients exist that are not specifically included in the definition and it is USDA's intention that they be eligible for preferred procurement under the Program.

#### **Intermediates - Foams**

Comment: One commenter states that foams are used in a wide variety of products, and as such, there is a wide variety of foams with biobased contents that have been developed to meet the performance needs of the foam containing products. The commenter believes that the proposed intermediates - foams category is one for which USDA should establish subcategories based on the types of end uses and corresponding performance requirements of the foams. Further, the commenter believes that USDA should set minimum biobased contents for these subcategories, noting that the proposed 22% minimum for intermediates - foams will be too high for some applications.

Response: USDA thanks the commenter for their input regarding this proposed product category. USDA also agrees that this product category certainly includes a wide

variety of products used to make a large number of finished products. As the commenter pointed out, USDA requested information from intermediate ingredient manufacturers on finished products made from their intermediates.

Unfortunately, for the product category intermediates-foams, no additional information was provided. USDA is, therefore, finalizing this product category as proposed; however, USDA is continuing the process of gathering data to support the upcoming designation of finished products made from these designated intermediate ingredients. As additional product data are obtained and evaluated, USDA will consider revisions or adjustments that may need to be made in this (and all other) intermediate ingredient product categories. Such revisions could include creating subcategories, clarifying changes to the definitions, or adjustments to the required minimum biobased content.

#### **Intermediates - Binders**

Comment: One commenter suggests that the proposed definition be amended to include "binders are generally polymers or polymer precursors (such as epoxies) and include the polymeric materials used to formulate coatings, adhesives, sealants and elastomers." The commenter also believes that the proposed definition should include

adhesives and glues that are finished products.

Response: USDA has revised the proposed definition to include the phrase recommended by the commenter. As discussed earlier, USDA agrees that including examples in the definitions may provide more clarity but cautions that such examples are not intended to be all-inclusive or to restrict the definition so that it only applies to those examples.

USDA disagrees with the commenter's suggestion to revise the proposed definition so that it includes finished product adhesives and glues. These types of products will be included in the upcoming rulemaking that designates finished products made from designated intermediate ingredients.

#### **Intermediates - Cleaner Components**

Comment: One commenter notes that the proposed intermediates - cleaner components category includes a wide range of substances that perform very different functions in cleaning products. The commenter further states that this definition does not include an exhaustive list of cleaning ingredients.

Response: As discussed in previous responses, USDA has intentionally established intermediate ingredient

product categories that are very broad in scope. The commenter is also correct that the definitions do not attempt to include exhaustive lists of materials that are covered by the definition. Examples of the types of materials that fit within the definition are provided in most cases. Because of the continuing technological advances within the biobased products industry, USDA does not believe it is reasonable to attempt to create exhaustive or all-inclusive lists of materials that could result in the exclusion of materials still under development.

**Intermediates - Personal Care Product Components**

Comment: One commenter states that the personal care product industry and the cleaning industry use many of the same ingredients. Thus, the commenter believes that the proposed intermediates - personal care product components category overlaps with the proposed intermediates - cleaner components category and is redundant.

Response: USDA agrees that there is a strong probability that some intermediate ingredients may be used in both the personal care product components and the cleaner components categories. Because many of the intermediate ingredient materials being designated are very

basic, multi-purpose chemicals, their use in multiple finished product categories is expected. There are also expected to be some ingredients that are unique to one category or the other. USDA believes that creating these intermediate ingredient product categories (and others with potential overlapping materials) will ultimately make the process of cataloging product information simpler for the BioPreferred Program and will make it easier for manufacturers of finished products, Federal procuring officials, and the consuming public, to identify and locate biobased products that are available to them.

**Intermediates – Oils, Fats and Waxes**

Comment: One commenter notes that the proposed minimum biobased content is lower than the content found naturally in oils, fats, and waxes.

Response: USDA evaluated data on 24 intermediate ingredient materials within this category. These materials ranged in biobased content from 68 percent to 100 percent. The proposed 65 percent minimum biobased content was based on the sample with the lowest biobased content. Raw materials that are 100 percent fats and oils derived from animals and plants would be expected to be essentially 100 percent biobased. However, it is likely that many of the

products that would fall into this category have been modified, blended, or in some way altered in the process of extracting or refining them. It is also likely that the commercial products that are produced within this category are a combination of ingredients, not all of which may be 100 percent biobased. Because of these possibilities, USDA has not changed the minimum biobased content proposed for this product category.

Comment: One commenter suggests that the proposed definition be amended to include proteins and carbohydrates.

Response: USDA has not revised the proposed definition because the term "oils, fats, and waxes" is believed to be sufficiently broad to cover the materials that are expected to be found in this product category. Also, proteins and carbohydrates are, generally, chemically different from oils, fats, and waxes. Oils, fats, and waxes are typically made up of long carbon chains where proteins and carbohydrates have a lower carbon to non-carbon molecule ratio. USDA believes that the types of intermediate ingredient materials derived from proteins and carbohydrates are more likely to be included in the intermediate - chemicals product category.

## **New Categories**

Comment: One commenter suggests designating a product category for "can liners." The commenter notes that the Federal government uses a large number of can liners and that can liners are typically made from non-biobased materials. Thus, the commenter believes that there would be significant benefit in designating a "can liners" category in the next round.

Another commenter believes that it is important to have a product category designation for FSC code 4253 Hazardous Material Spill Containment and Clean-up Equipment.

Response: USDA thanks the commenters for their interest in the BioPreferred Program and their suggestions regarding possible new product categories. The product categories suggested by these commenters will be evaluated along with the potential categories of finished products made from designated intermediate ingredients. USDA plans to propose a rulemaking action that will identify those categories selected for possible designation and the public will be invited to submit comments.

## **IV. Summary of Changes**

After consideration of the public comments received in

response to the proposed rule, USDA made several changes in the final rule. These changes are summarized below.

In the final rule, USDA has revised the definition of the categories intermediates - plastic resins, intermediates - chemicals, intermediates - paint and coating components, and intermediates - binders as explained in the following paragraph. These changes were made to clarify or add examples of intermediates that can be included in each of these categories.

The definition for the intermediate - plastic resins category has been revised to include the term "polymers." The definition for the intermediates - chemicals category has been revised to list additional materials such as viscosity reducers, rheology modifiers, adhesion agents, polyols, and polymers. Additional examples of paint and coating components, such as humectants, open time additives, and polymers, have been added to the definition of the intermediates - paint and coating components category. The intermediates - binders category definition has been revised to expand on the types of chemicals that typically make up binders. Additionally, the definition has been expanded to include examples of materials that binders can be used to formulate. The definition for this

category has been revised to include the phrase "binders are generally polymers or polymer precursors (such as epoxies) and include the polymeric materials used to formulate coatings, adhesives, sealants and elastomers."

## **V. Regulatory Information**

### A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Executive Order 12866, as supplemented by Executive Order 13563, requires agencies to determine whether a regulatory action is "significant." The Order defines a "significant regulatory action" as one that is likely to result in a rule that may: "(1) Have an annual effect on the economy of \$100 million or more or adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates,

the President's priorities, or the principles set forth in this Executive Order.”

This final rule has been determined by the Office of Management and Budget to be not significant for purposes of Executive Order 12866. We are not able to quantify the annual economic effect associated with this final rule. As discussed in the preamble to the proposed rulemaking, USDA made extensive efforts to obtain information on the Federal agencies' usage within the 12 designated product categories. These efforts were largely unsuccessful. Therefore, attempts to determine the economic impacts of this final rule would require estimation of the anticipated market penetration of biobased products based upon many assumptions. In addition, because agencies have the option of not purchasing biobased products within designated product categories if price is “unreasonable,” the product is not readily available, or the product does not demonstrate necessary performance characteristics, certain assumptions may not be valid. While facing these quantitative challenges, USDA relied upon a qualitative assessment to determine the impacts of this final rule. Consideration was also given to the fact that agencies may choose not to procure designated items due to unreasonable

price.

#### 1. Summary of Impacts

This final rule is expected to have both positive and negative impacts to individual businesses, including small businesses. USDA anticipates that the biobased preferred procurement program will provide additional opportunities for businesses and manufacturers to begin supplying products under the designated biobased product categories to Federal agencies and their contractors. However, other businesses and manufacturers that supply only non-qualifying products and do not offer biobased alternatives may experience a decrease in demand from Federal agencies and their contractors. USDA is unable to determine the number of businesses, including small businesses that may be adversely affected by this final rule. The final rule, however, will not affect existing purchase orders, nor will it preclude businesses from modifying their product lines to meet new requirements for designated biobased products. Because the extent to which procuring agencies will find the performance, availability and/or price of biobased products acceptable is unknown, it is impossible to quantify the actual economic effect of the rule.

#### 2. Benefits of the Final Rule

The designation of these 12 product categories provides the benefits outlined in the objectives of section 9002: to increase domestic demand for many agricultural commodities that can serve as feedstocks for production of biobased products, and to spur development of the industrial base through value-added agricultural processing and manufacturing in rural communities. On a national and regional level, this final rule can result in expanding and strengthening markets for biobased materials used in these product categories.

### 3. Costs of the Final Rule

Like the benefits, the costs of this final rule have not been quantified. Two types of costs are involved: costs to producers of products that will compete with the preferred products and costs to Federal agencies to provide procurement preference for the preferred products. Producers of competing products may face a decrease in demand for their products to the extent Federal agencies refrain from purchasing their products. However, it is not known to what extent this may occur. Pre-award procurement costs for Federal agencies may rise minimally as the contracting officials conduct market research to evaluate the performance, availability and price reasonableness of

preferred products before making a purchase.

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.

USDA evaluated the potential impacts of its designation of these product categories to determine whether its actions would have a significant impact on a substantial number of small entities. Because the preferred procurement program established under section 9002 applies only to Federal agencies and their contractors, small governmental (city, county, etc.) agencies are not affected. Thus, the final rule will not have a significant economic impact on small governmental jurisdictions.

USDA anticipates that this program will affect entities, both large and small, that manufacture or sell biobased products. For example, the designation of product

categories for preferred procurement will provide additional opportunities for businesses to manufacture and sell biobased products to Federal agencies and their contractors. Similar opportunities will be provided for entities that supply biobased materials to manufacturers.

The intent of section 9002 is largely to stimulate the production of new biobased products and to energize emerging markets for those products. Because the program is focused on innovative developments within the biobased products industry, which is still in its infancy, it is unknown how many businesses will ultimately be affected. While USDA has no data on the number of small businesses that may choose to develop and market biobased products within the product categories designated by this rulemaking, the number is expected to be small because this industry is still materializing. As such, USDA anticipates that only a small percentage of all manufacturers, large or small, are expected to develop and market biobased products. Thus, the number of small businesses manufacturing biobased products affected by this rulemaking is not expected to be substantial.

The Federal preferred procurement program may decrease opportunities for businesses that manufacture or sell non-

biobased products or provide components for the manufacturing of such products. Most manufacturers of non-biobased products within the product categories being designated for Federal preferred procurement in this rule are expected to be included under the following NAICS codes: 324191 (petroleum lubricating oil and grease manufacturing), 325320 (pesticide and other agricultural chemicals manufacturing), 325411 (medicinal and botanical manufacturing), 325412 (pharmaceutical preparation manufacturing), 325510 (paint and coating manufacturing), 325612 (polish and other sanitation goods manufacturing), and 325620 (toilet preparation manufacturing). USDA obtained information on these seven NAICS categories from the U.S. Census Bureau's Economic Census database. USDA found that the Economic Census reports about 4,756 companies within these 7 NAICS categories and that these companies own a total of about 5,374 establishments. Thus, the average number of establishments per company is about 1.13. The Census data also reported that of the 5,374 individual establishments, about 5,228 (97.3 percent) have fewer than 500 employees. USDA also found that the overall average number of employees per company among these industries is about 92 and that the pharmaceutical

preparation manufacturing segment (with an average of about 250) is the only segment reporting an average of more than 100 employees per company. Thus, nearly all of the businesses meet the Small Business Administration's definition of a small business (less than 500 employees, in most NAICS categories).

USDA does not have data on the potential adverse impacts on manufacturers of non-biobased products within the product categories being designated, but believes that the impact will not be significant. Most of the product categories being designated in this rulemaking are not typical consumer products widely used by the general public and by industrial/commercial establishments that are not subject to this rulemaking. Thus, USDA believes that the number of small businesses manufacturing non-biobased products within the product categories being designated and selling significant quantities of those products to government agencies affected by this rulemaking will be relatively low. Also, this final rule will not affect existing purchase orders and it will not preclude procuring agencies from continuing to purchase non-biobased products when biobased products do not meet the availability, performance, or reasonable price criteria. This final rule

will also not preclude businesses from modifying their product lines to meet new specifications or solicitation requirements for these products containing biobased materials.

After considering the economic impacts of this final rule on small entities, USDA certifies that this action will not have a significant economic impact on a substantial number of small entities.

While not a factor relevant to determining whether the final rule will have a significant impact for RFA purposes, USDA has concluded that the effect of the rule will be to provide positive opportunities to businesses engaged in the manufacture of these biobased products. Purchase and use of these biobased products by procuring agencies increase demand for these products and result in private sector development of new technologies, creating business and employment opportunities that enhance local, regional, and national economies.

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 would 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. Provisions of this final rule will 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 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 does not significantly or uniquely affect "one or more Indian tribes ... the relationship between the Federal Government and Indian tribes, or ... the distribution of power and responsibilities between the Federal Government and Indian tribes." Thus, no further action is required under Executive Order 13175.

I. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 through 3520), the information collection under this final rule 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 allows for posting information voluntarily submitted by manufacturers or vendors on the products they intend to offer for preferred procurement under each designated product category at <http://www.biopreferred.gov>. For information pertinent to E-Government Act compliance related to this rule, please contact Karen Zhang at (202) 401-4747.

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 chapter XXXII as follows:

Chapter XXXII - Office of Procurement and Property Management

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. Add §§ 3201.108 through 3201.119 to subpart B to read as follows:

Sec.

- 3201.108 Intermediates - Plastic Resins.
- 3201.109 Intermediates - Chemicals.
- 3201.110 Intermediates - Paint and Coating Components.
- 3201.111 Intermediates - Textile Processing Materials.
- 3201.112 Intermediates - Foams.
- 3201.113 Intermediates - Fibers and Fabrics.
- 3201.114 Intermediates - Lubricant Components.
- 3201.115 Intermediates - Binders.
- 3201.116 Intermediates - Cleaner Components.
- 3201.117 Intermediates - Personal Care Product Components.
- 3201.118 Intermediates - Oils, Fats, and Waxes.
- 3201.119 Intermediates - Rubber Materials.

§3201.108 Intermediates - Plastic Resins.

(a) Definition. Intermediates - Plastic Resins are materials that are typically viscous liquids with the ability to harden permanently and may exist in liquid or solid (powder or pellets) states. Intermediates - Plastic

Resins may be used in a variety of finished products neat, consisting of a single resin or polymer, or a homogeneous blend of two or more neat resins or polymers, or a composite, containing two or more distinct materials such as fiber-reinforced resins. Additionally, Intermediates - Plastic Resins may be used in finished products as additives such as plasticizers, pigments, thermal stability agents, or impact modifiers.

(b) Minimum biobased content. The Federal preferred procurement product must have a minimum biobased content of at least 22 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) Preference compliance date. No later than July 10, 2019, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased Intermediates - Plastic Resins. By that date, Federal agencies responsible for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased Intermediates - Plastic Resins.

§ 3201.109 Intermediates - Chemicals.

(a) Definition. Intermediates - Chemicals are those used as reactants for organic synthesis reactions rather than for their functional properties in a chemical mixture; those used as building block chemicals and secondary chemicals such as glycerol, succinic acid, propanediol, and monomers such as lactic acid and propylene; those used for specific functional properties during manufacturing of other products such as pH regulators, flocculants, precipitants, neutralizing agents, emulsifiers, viscosity reducers, rheology modifiers, adhesion agents, detergents, wetting agents, foaming agents, or dispersants; those that are added to end-use products for their specific functional properties including polyols, polymers, and solvents for thinning and drying applications but excluding solvents used for cleaning; and those used for dyes, pigments, and scents including flavorings for non-food products such as lip balm.

(b) Minimum biobased content. The Federal preferred procurement product must have a minimum biobased content of at least 22 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) Preference compliance date. No later than July 10, 2019, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased Intermediates - Chemicals. By that date, Federal agencies responsible for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased Intermediates - Chemicals.

§ 3201.110 Intermediates - Paint and Coating Components.

(a) Definition. Intermediates - Paint and Coating Components are ingredients used to formulate finished waterborne or solvent borne paint and coating products. Examples of Intermediates - Paint and Coating Components include binders, pigments, thickeners, curing agents, modifiers, humectants, open time additives, alkyd latex resins, polymers, polyols, reactive oligomers, or reactive diluents.

(b) Minimum biobased content. The Federal preferred procurement product must have a minimum biobased content of at least 22 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) Preference compliance date. No later than July 10, 2019, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased Intermediates - Paint and Coating Components. By that date, Federal agencies responsible for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased Intermediates - Paint and Coating Components.

§3201.111 Intermediates - Textile Processing Materials.

(a) Definition. Intermediates - Textile Processing Materials are used to treat or finish textiles for the purposes of altering textile characteristics such as color, fading, wrinkle resistance, texture, or moisture management.

(b) Minimum biobased content. The Federal preferred procurement product must have a minimum biobased content of at least 22 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) Preference compliance date. No later than July 10, 2019, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased

Intermediates - Textile Processing Materials. By that date, Federal agencies responsible for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased Intermediates - Textile Processing Materials.

§ 3201.112 Intermediates - Foams.

(a) Definition. Intermediates - Foams are dry polymer foams used for non-construction purposes, such as cushions for furniture.

(b) Minimum biobased content. The Federal preferred procurement product must have a minimum biobased content of at least 22 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) Preference compliance date. No later than July 10, 2019, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased Intermediates - Foams. By that date, Federal agencies responsible for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased Intermediates - Foams.

§ 3201.113 Intermediates - Fibers and Fabrics.

(a) Definition. Intermediates - Fibers and Fabrics encompasses plant and animal fibers, fibers made from plant-derived polymers that are not yet formed into more complex products such as carpet or fabrics, fabrics made from natural fibers, fabrics made from synthetic fibers, or fabrics made from a blend of the two. These materials are used to manufacture finished products such as clothing, upholstery, or drapes.

(b) Minimum biobased content. The Federal preferred procurement product must have a minimum biobased content of at least 25 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) Preference compliance date. No later than July 10, 2019, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased Intermediates - Fibers and Fabrics. By that date, Federal agencies responsible for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased Intermediates - Fibers and Fabrics.

§3201.114 Intermediates - Lubricant Components.

(a) Definition. Intermediates - Lubricant Components are ingredients that used specifically to formulate finished lubricant products. Examples of Intermediates - Lubricant Components include base oils, base fluids, additives, or friction modifiers.

(b) Minimum biobased content. The Federal preferred procurement product must have a minimum biobased content of at least 44 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) Preference compliance date. No later than July 10, 2019, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased Intermediates - Lubricant Components. By that date, Federal agencies responsible for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased Intermediates - Lubricant Components.

§ 3201.115 Intermediates - Binders.

(a) Definition. Intermediates - Binders are materials used to provide cohesiveness throughout an entire

finished product. Binders are generally polymers or polymer precursors (such as epoxies) and include the polymeric materials used to formulate coatings, adhesives, sealants, and elastomers. The product category does not include adhesives and glues that are finished products used to attach the surfaces of two or more distinct and separate components to one another.

(b) Minimum biobased content. The Federal preferred procurement product must have a minimum biobased content of at least 47 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) Preference compliance date. No later than July 10, 2019, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased Intermediates - Binders. By that date, Federal agencies responsible for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased Intermediates - Binders.

§ 3201.116 Intermediates - Cleaner Components.

(a) Definition. Intermediates - Cleaner Components

are intermediate ingredients used specifically for formulating finished cleaning products. Examples of Intermediates - Cleaner Components include chelating agents, surfactants, hydrotropes, fatty acids, or solvents.

(b) Minimum biobased content. The Federal preferred procurement product must have a minimum biobased content of at least 55 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) Preference compliance date. No later than July 10, 2019, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased Intermediates - Cleaner Components. By that date, Federal agencies responsible for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased Intermediates - Cleaner Components.

§3201.117 Intermediates - Personal Care Product Components.

(a) Definition. Intermediates - Personal Care Product Components are ingredients used to formulate finished personal care products. Examples of Intermediates - Personal Care Product Components include surfactants,

oils, humectants, emollients, or emulsifiers.

(b) Minimum biobased content. The Federal preferred procurement product must have a minimum biobased content of at least 62 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) Preference compliance date. No later than July 10, 2019, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased Intermediates - Personal Care Product Components. By that date, Federal agencies responsible for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased Intermediates - Personal Care Product Components. §3201.118 Intermediates - Oils, Fats, and Waxes.

(a) Definition. Intermediates - Oils, Fats, and Waxes include raw or modified fats and oils derived from plants or animals.

(b) Minimum biobased content. The Federal preferred procurement product must have a minimum biobased content of at least 65 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of

the weight (mass) of the total organic carbon in the finished product.

(c) Preference compliance date. No later than July 10, 2019, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased Intermediates - Oils, Fats, and Waxes. By that date, Federal agencies responsible for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased Intermediates - Oils, Fats, and Waxes.

§3201.119 Intermediates - Rubber Materials.

(a) Definition. Intermediates - Rubber Materials are used in finished products such as rubber gloves, vehicle tires, footwear, sports apparel and equipment, bedding and pillow foams, tubing, catheters, gasketing, or cosmetic adhesives and bases.

(b) Minimum biobased content. The Federal preferred procurement product must have a minimum biobased content of at least 96 percent, which shall be based on the amount of qualifying biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the finished product.

(c) Preference compliance date. No later than July

10, 2019, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased Intermediates - Rubber Materials. By that date, Federal agencies responsible for drafting or reviewing specifications for products to be procured shall ensure that the relevant specifications require the use of biobased Intermediates - Rubber Materials.

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U.S. Department of Agriculture  
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