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DEPARTMENT OF AGRICULTURE

Office of Procurement and Property Management

7 CFR Part 3202

RIN 0599-AA22

Voluntary Labeling Program for Biobased Products

AGENCY: Office of Procurement and Property Management, USDA.

ACTION: Final rule.

SUMMARY: The U.S. Department of Agriculture (USDA) is amending its regulations concerning the Voluntary Labeling Program for Biobased Products, to incorporate statutory changes to section 9002 of the Farm Security and Rural Investment Act (the 2002 Farm Bill) 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; phone (202) 205-4008.

Information regarding the Voluntary Labeling Program for

Biobased Products (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:

I. Executive Summary

USDA is amending 7 CFR part 3202 to incorporate the 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. USDA is also finalizing amendments that clarify the rules under which the voluntary labeling program operates. The remainder of this section presents a brief

summary of the amendments to the existing voluntary labeling program rules and Section IV of this preamble presents more detailed discussions.

A. Summary of Major Provisions of the Final Rule

1. Revisions to section 3202.2 "Definitions"

USDA is amending 7 CFR 3202.2 by deleting the definitions of "BioPreferred Product," "Designated item," and "Mature market products." USDA is also revising the definitions of "Biobased product," "Certification mark artwork," and "Intermediate ingredient or feedstock" and adding new definitions for "Designated product category," "Forest product," "Qualified biobased product," and "Renewable chemical." These changes are being made to bring the voluntary labeling rule up to date with the BioPreferred Program Guidelines and the 2014 Farm Bill.

2. Revisions to section 3202.4 "Criteria for product eligibility to use the certification mark"

USDA is adding a paragraph and subparagraphs to section 3202.4 that describe the biobased content criteria for complex assemblies. Procedures for designating complex assemblies for the federal preferred procurement initiative have been added to the BioPreferred Program Guidelines and this final rule updates the voluntary labeling program rules to include these products.

USDA is also adding paragraphs to section 3202.4 to present the criteria for evaluating whether products use "innovative

approaches." The Conference Report on the 2014 Farm Bill states that "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, adopting criteria to be used when evaluating whether biobased products meet the requirement to use "innovative approaches."

3. Revisions to section 3202.5 "Initial approval process"

USDA is amending paragraph (a)(1) to specifically address situations where a manufacturer seeks certification for a new product that is composed of the same biobased ingredients and has the same biobased content as a previously certified product. In these cases, where a new product for which certification is sought is composed of the same biobased ingredients and has the same biobased content as a product that has already been certified, the manufacturer may, in lieu of having the new product tested, self-declare the biobased content of the new product by referencing the tested biobased content of the certified product. Certification of the original product must have been obtained by either the manufacturer of the new product or by the supplier of the biobased ingredients used in the new product. This provision will result in reduced biobased content testing, and thus a cost savings, for manufacturers who use the same biobased ingredients to formulate products that differ in

size or shape or that are marketed for different applications.

USDA is also amending paragraph (c)(5) to state that manufacturers wishing to change the name of their company or the name of a certified product must notify USDA in writing within 30 days of making such changes.

USDA is also amending paragraph (d)(2) to clarify that, although certifications do not have a predetermined expiration date, they are subject to mandatory periodic auditing activities and to suspension or revocation if biobased content violations are identified. USDA is amending this paragraph to allow for the revocation of a certification if it is discovered that certification was issued as a result of error(s) on the part of USDA during the approval process.

4. Revisions to section 3202.8 "Violations"

USDA is amending paragraph 3202.8(c)(3) to correct an error in a reference cited in the paragraph. The reference to 7 CFR part 3017 is incorrect. The appropriate references are 2 CFR part 417 and 48 CFR subpart 9.4.

5. Revisions to section 3202.10 "Oversight and monitoring"

USDA is adding a new section 3202.10(d) that identifies three auditing efforts that will be ongoing for the voluntary labeling program. The 2014 Farm Bill contained specific language authorizing USDA to perform auditing and compliance

activities necessary to ensure that the label is used only on products that meet the established eligibility criteria.

USDA expects to conduct audits of the voluntary labeling program on an ongoing basis with audit activities conducted every other calendar year (bi-annually). Audit activities will include three stages and will be conducted in sequential order. Stage 1 was conducted in 2012, Stage 2 will be conducted in 2014, and Stage 3 will be conducted in 2016. In 2018, the sequence will start over with Stage 1.

Stage 1 auditing includes contacting all participants via email and requesting that they complete a "Declaration of Conformance Form." Program participants are asked to confirm that they still manufacture the product and that the formulation and manufacturing processes remain the same.

Stage 2 auditing consists of a random sampling of certified products to confirm the accuracy of biobased content percentages claimed. The participants whose products are selected will be required to submit product samples to be tested by independent testing labs at USDA expense.

Stage 3 auditing requires manufacturers of products that have been certified for 5 years or more to have their products re-tested at their expense to confirm that the biobased content remains at or above the level at which the product was originally certified.

USDA believes that the audit program outlined above will be a valuable tool in ensuring the integrity of the program and compliance with the voluntary labeling program rules.

B. Costs, Benefits, and Transfers

Type	Costs	Benefits	Transfers
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 Voluntary Labeling Program for Biobased Products was 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

Section 9002 establishes a program for preferred procurement of biobased products by federal agencies and a voluntary program for the labeling of biobased products. These two programs are referred to collectively by USDA as the BioPreferred® program.

Under the preferred procurement program, federal agencies and their contractors are required to purchase biobased products, as defined in regulations implementing the statute, that are within designated product categories when the cumulative purchase price of the products to be procured is more than $10,000 or when the quantities of functionally equivalent items purchased over the preceding fiscal year equaled $10,000 or more. The final rules under which the preferred procurement program operates are found at 7 CFR part 3201, "Guidelines for Designating Biobased Products for Federal Procurement." In a separate rulemaking, the provisions of the Guidelines are being amended to reflect the provisions of the 2014 Farm Bill.

The final rules for the voluntary labeling program, under which USDA authorizes manufacturers and vendors of biobased products to use a "USDA Certified Biobased Product" label (hereafter referred to in this preamble as "the certification mark"), are found at 7 CFR part 3202. The voluntary labeling program is intended to encourage the purchase and use of biobased products by reaching beyond the federal purchasing community and promoting the purchase of biobased products by commercial entities and the general public. In establishing this program, USDA identified the criteria to determine those products on which the certification mark may be used and developed specific requirements for how the mark can be used. It is USDA's intent that the presence of the certification mark on a product will mean that the labeled product is one for which credible factual information is available as to the biobased content, consistently measured across labeled products by use of the American Society of Testing and Materials (ASTM) radioisotope test D6866.

On July 31, 2009, USDA published a proposed rule for the voluntary labeling program under the authority of section 9002 (74 FR 38296-01). The voluntary labeling program final rule was promulgated on January 20, 2011 (76 FR 3790-01).

On February 7, 2014, the 2014 Farm Bill was signed into law and included several provisions that amended the provisions of

section 9002. The primary purpose of these rule amendments is to revise the voluntary labeling program final rule to incorporate changes to section 9002 that were included in the 2014 Farm Bill. USDA is also finalizing certain clarifying amendments to the program rules based on several years of operating experience. These amendments will not affect the status of products that have already been certified by USDA to display the certification mark. However, when Stage 3 of the auditing program (7 CFR part 3202, section 3202.10) is conducted in 2016, manufacturers whose product certification is at least 5 years old will incur additional costs of about $400 per certified product for biobased content re-testing.

IV. Summary of Changes

As a result of public comments received on the proposed amendments to the Voluntary Labeling Program regulations, 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 3202.2 - Definitions.

USDA is finalizing the proposed definitions with no changes.

B. 7 CFR 3202.4 – Criteria for product eligibility to use the certification mark.

USDA revised the proposed language in paragraph (c)(2) to add the word "biobased" to the description of products or materials that qualify under criterion 1 and also added a paragraph (iii) 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.

In the final rule, USDA added a sentence at 3202.4(c)(4) 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.

C. 7 CFR 3202.5 – Initial approval process.

This section has been finalized as proposed.

D. 7 CFR 3202.8 - Violations.

This section has been finalized as proposed.

E. 7 CFR 3202.10 – Oversight and monitoring.

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 eight comments by that date. One of the comments was from an individual

citizen, five were from industry trade groups, one was from an academic institution, and one was from a biobased product manufacturer. 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: One commenter expressed concern that the proposed amendments to the Voluntary Labeling Program will "reduce consumer protection." The commenter did not specify which part of the proposed amendments she was referring to but stated that she expects the government to inform and protect her and not to create an easier process for "controversial production activities including ongoing use and further development of GMO's."

Response: USDA appreciates the commenter's interest in the BioPreferred Program but disagrees with the idea that the proposed amendments might reduce consumer protection. The purpose of the voluntary labeling program is to inform the consumer regarding the biobased content of certified products. USDA does not make or specifically endorse any claims of performance nor consumer protection or risks. The BioPreferred Program also does not evaluate or investigate the use of genetically modified organisms (GMOs) and the use of such materials is neither defended nor endorsed by the Program.

Comment: Another commenter recommended including in the Voluntary Labeling Program biochar and the process used to produce this material. The commenter described briefly what biochar is and how it may be produced. In addition, the commenter provided USDA with a research paper that may provide background information on this material.

Response: USDA agrees with the commenter and notes that a biochar product has already been certified to display the label. No change to the proposed rule language is required in response to this comment.

B. 7 CFR 3202.2 - Definitions.

Comment: One commenter stated their agreement with USDA's proposed definitions for "Biobased product," "Certification mark artwork," and "Forest product" and none of the commenters provided adverse comments.

Response: USDA appreciates the support of the commenters.

C. 7 CFR 3202.4 – Criteria for product eligibility to use the certification mark.

Comment: One commenter believed 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.

Response: While USDA understands the commenter's position, 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, particularly those using "innovative approaches." 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 asked USDA 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 certification of biobased products to display the label 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 certification once and the manufacturer may select a sample for biobased content testing from either manufacturing plant. USDA believes that this procedural question is adequately covered in the Program operating procedures and has not made changes to the actual rule language.

1. 7 CFR 3202.4(b)(4) – Finished products that are complex assemblies

Comment: One commenter stated that calculating the biobased content of a complex assembly is complicated and recommended that USDA provide extra guidance via written communication or webinars for companies interested in receiving certification to display the USDA Certified Biobased Product label on products that would be considered complex assemblies. The commenter explained that because "complex products" have not yet been designated as a product category for federal procurement preference they should meet or exceed the default 25% minimum biobased content requirement to receive certification to display the USDA Certified Biobased Product label. The commenter stated that companies and stakeholders will need assistance from USDA to determine appropriate eligibility conditions to "support a proposed alternative

applicable minimum biobased content."

Response: USDA appreciates the support expressed by the commenter regarding the labeling of complex assemblies and agrees that additional guidance for applicants would be beneficial. As the labeling of complex assemblies is initiated, USDA will prepare training materials that will be provided to applicants. USDA routinely provides training and guidance materials to applicants seeking to certify their products and will expand the coverage of such materials as the BioPreferred Program expands. No revisions to the proposed rule language are expected as a result of this comment.

2. 7 CFR 3202.4(c) – Innovative approach

Comment: One commenter expressed concern that §3202.4(c) was written specifically for forestry products, which may cause issues for non-forestry products. The commenter suggested clarifying the first paragraph in §3202.4(c) by adding the word "biobased" in front of "product" and "products." The commenter also suggested clarifying §3202.4(c)(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."

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.

3. 7 CFR 3202.4(c)(3) – Environmental Product Declaration

Comment: One commenter was concerned that the proposed criterion for an Environmental Product Declaration (EPD) would "expand the reach" of the BioPreferred Program "beyond what was originally intended." This commenter added that the EPD should merely supplement the product's participation in the BioPreferred Program, instead of being a requirement for it.

A second 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: In response to both commenters, USDA points out that the proposal did not make it a "requirement" that a manufacturer submit an 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. Also, in response to the

second commenter, USDA 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."

4. 7 CFR 3202.4(c)(4) – 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 §3202.4(c)(4) 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 their country of harvest. This commenter recommended that USDA recognize in the proposed rule that new certification measures

for forestry products develop every year and 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 in a manner that prevents innovation in forestry management and certification." 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.

D. 7 CFR 3202.5 – Initial approval process.

Comment: While one commenter specifically supported this section of the proposed rule, another expressed concern regarding a manufacturer's ability to waive testing via ASTM D6866 and to self-declare its product's biobased content by

referencing the tested biobased content of a product that has already been certified if both products share the same biobased ingredients and biobased content. The commenter indicated that this approach would work smoothly if these products are made by the same manufacturer; however, "complications" could arise if the manufacturers are different. Thus, the commenter suggested that USDA clarify how manufacturers are supposed to proceed and recommended that USDA make sure this proposed approach does not cause the manufacturer of the initially certified product to have a disadvantage, as that manufacturer "would carry the entire burden and cost of testing." Thus, the commenter stated that USDA should consider any obligations that the manufacturer of the initially certified product may have to check the biobased content of the new product before sharing its certification. The commenter added that because USDA has not provided guidance on the conditions in which certifications may be shared, USDA should be "proactive" in doing so to address any questions that manufacturers will have.

The same commenter stated appreciation for the proposed rule but recommended that USDA develop methods for downstream companies that use USDA Certified Biobased chemicals/products in their formulations. The commenter stated that companies that choose to blend USDA Certified Biobased chemicals/products in

their products should be able to display the USDA Certified Biobased Product label.

Response: USDA agrees with the commenter that the "self-declare" procedure should not result in a situation where one manufacturer is relieved of the cost of testing the biobased content of their product at the expense of another manufacturer without permission. The proposed rule language restricts the use of this provision to (1) manufacturers seeking certification of additional products they manufacture that have the same formulation as a previously certified product and (2) manufacturers whose products are made from certified intermediate ingredients in those cases where the manufacturer of the certified intermediate ingredient gives permission to use the test results from their product. It is not OPPM's intention that one manufacturer be allowed to use the test results from another manufacturer without the approval and cooperation of the party who paid for the testing. USDA also points out that the commenter's statement regarding "downstream" companies is addressed by USDA plans to designate for federal procurement those finished products that are made from designated intermediate ingredients and feedstock materials. USDA does not believe the any changes in the proposed rule language are necessary as a result of this comment.

E. 7 CFR 3202.8 - Violations.

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

F. 7 CFR 3202.10 – Oversight and monitoring.

Comment: One commenter expressed support specifically for USDA's periodic auditing activities.

Response: USDA appreciates the commenter's support for the auditing plans as described in the proposed rule.

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

This final rule amends the voluntary labeling program rules

to establish the regulatory framework for the labeling of products that were previously excluded from the program 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. Costs, Benefits and 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 certified to display the USDA Certified Biobased Product certification mark. The entry into the voluntary labeling program of biobased products that were previously considered to be mature market products provides newly developed biobased products the opportunity to be publicized via the BioPreferred Web site. Thus, the rule is expected to increase demand for these products, which, in turn, is expected to increase demand for those agricultural products that can serve as ingredients and feedstocks. This expansion of the voluntary labeling program will, thus, yield private benefits for businesses producing these ingredients and feedstocks.

Simultaneously, this action could reduce demand for competing products that are not eligible for the voluntary labeling program. Producers of biobased products, including intermediate ingredients and feedstocks, that are not certified for labeling or producers of non-biobased products could face a loss of market share within both the public and federal agencies. USDA does not have sufficient information on the expected extent of this potential loss of market share to assign a dollar value to this impact.

As part of the Stage 3 auditing process to be conducted during calendar year 2016, manufacturers of biobased products that have been certified for five or more years will be required to have their products biobased content re-tested. We estimate that the cost for product re-testing is about $300 to $400 per product. The labeling program was implemented in 2011 and only those products that were certified during 2011 will incur the re-testing cost of the Stage 3 audit to be conducted during 2016. There were 1,338 applications for certification received during 2011 and USDA estimates that 1,000 of the products represented by those applications continue to display the label under the original certification. Thus, the total estimated cost of the auditing effort to all manufacturers is expected to be, at most, $400,000 (1,000 products X $400 per test) during 2016. Considering that this total cost would be spread over

several hundred manufacturers making these products and that no additional re-testing costs are expected until the year 2022, USDA believes that the cost to any one manufacturer is reasonable.

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 voluntary labeling program ultimately may have a direct impact on a substantial number of small entities, USDA has determined that this final rule itself will not have a direct significant economic impact on a substantial number of small entities. 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 in the voluntary labeling

program. USDA anticipates that this program will positively impact small entities which manufacture or sell biobased products by allowing them to display the certification mark and to list their products in the BioPreferred Program web site catalog. However, 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, however, not possible for USDA to definitively assess these anticipated impacts on small entities.

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 voluntary labeling program is currently approved under OMB control number 0503-0020.

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 3202

Biobased products, Procurement

For the reasons stated in the preamble, the Department of Agriculture is amending 7 CFR part 3202 as follows:

PART 3202 – VOLUNTARY LABELING PROGRAM FOR BIOBASED PRODUCTS

1. The authority citation for part 3202 continues to read as follows:

Authority: 7 U.S.C. 8102.

2. In § 3202.2:

a. Revise the definition of “Biobased product”;

b. Remove the definition of “BioPreferred Product”;

c. Revise the definition of “Certification mark artwork”;

d. Remove the definition of “Designated item”;

e. Add in alphabetical order definitions of “Designated product category” and “Forest product”;

f. Remove the definition of “Intermediate ingredients or feedstocks”;

g. Add in alphabetical order a definition of “Intermediate ingredient or feedstock”;

h. Remove the definition of “Mature market products”; and

i. Add in alphabetical order definitions of Qualified biobased product” and “Renewable chemical”.

The revisions and additions read as follows:

§ 3202.2 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.

* * * * *

Certification mark artwork. The distinctive image, as shown in Figures 1 – 3, that identifies products as USDA Certified.

Figure 1. USDA Certified Biobased Product Certification Mark
(Note: actual size will vary depending on application)

Figure 2. USDA Certified Biobased Product: Package Certification Mark
(Note: actual size will vary depending on application

Figure 3. USDA Certified Biobased Product & Package Certification Mark
(Note: actual size will vary depending on application

* * * * *

Designated product category. A generic grouping of biobased products, including those final products made from designated intermediate ingredients or feedstocks, or complex assemblies identified in subpart B of 7 CFR part 3201, that is eligible for the procurement preference established under section 9002 of FSRIA.

* * * * *

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.

* * * * *

Intermediate ingredient or feedstock. 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 have undergone value added processing (including thermal, chemical, biological, or a significant amount of mechanical processing), excluding harvesting operations, offered for sale by a manufacturer or vendor and that is subsequently used to make a more complex compound or product.

* * * * *

Qualified biobased product. A product that is eligible for federal preferred procurement because it meets the definition and minimum biobased content criteria for one or more designated product categories, or one or more designated intermediate ingredient or feedstock categories, as specified in subpart B of 7 CFR part 3201.

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

* * * * *

3. Section 3202.4 is amended by revising the introductory text and the headings for paragraphs (b)(1) and (2) and adding paragraphs (b)(4) and (c) to read as follows:

§ 3202.4 Criteria for product eligibility to use the certification mark.

A product must meet each of the criteria specified in paragraphs (a) through (c) of this section in order to be eligible to receive biobased product certification.

* * * * *

(b) * * *

(1) Qualified Biobased Products. * * *

(2) Finished biobased products that are not Qualified Biobased Products. * * *

* * * * *

(4) Finished products that are complex assemblies. (i) If the product is a complex assembly, as defined in subpart A of 7 CFR part 3201, that is not eligible for federal preferred procurement at the time the application for certification is submitted, the applicable minimum biobased content is 25 percent. The biobased content shall be determined using the procedures specified in § 3201.7(c)(3) of this chapter. Manufacturers, vendors, groups of manufacturers and/or vendors, and trade associations may propose an alternative applicable minimum biobased content for the product by developing, in consultation with USDA, and conducting an analysis to support the proposed alternative applicable minimum biobased content. If approved by USDA, the proposed alternative applicable minimum

biobased content would become the applicable minimum biobased content for the complex assembly to be labeled.

(ii) If a product certified under paragraph (b)(4)(i) of this section is within a category that USDA subsequently designates for federal preferred procurement, the applicable minimum biobased content shall become, as of the effective date of the final designation rule, the minimum biobased content specified for the item as found in subpart B of 7 CFR part 3201.

(c) Innovative approach. In determining eligibility for certification under 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 (c)(1) through (4) of this section to be eligible for certification. 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 deny certification for 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.

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

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

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

(2) Manufacturing and processing. (i) 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

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

(3) 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.

(4) Raw material sourcing. (i) 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

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

(iii) 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.

4. Section 3202.5 is amended by:

a. Revising paragraph (a)(1);

b. Adding a sentence to the end of paragraph (c) introductory text;

c. Adding paragraph (c)(5);

d. Revising paragraph (d)(1); and

e. Adding paragraphs (d)(2)(iv) and (v).

The revisions and additions read as follows:

§ 3202.5 Initial approval process.

(a) * * *

(1) General content. The applicant must provide contact information and product information including all brand names or other identifying information, intended uses of the product, information to document that one or more of the innovative

approach criteria specified in section 3202.4(c) has been met, and, if applicable, the corresponding product category classification for federal preferred procurement. The applicant must also provide a sample of the product to be analyzed by a third-party, ISO 9001 conformant, testing entity for determination of the biobased content. In situations where a new product for which certification is sought is composed of the same biobased ingredients and has the same biobased content as a product that has already been certified, the manufacturer may, in lieu of having the new product tested, self-declare the biobased content of the new product by referencing the tested biobased content of the original certified product. Certification of the original product must have been obtained by either the manufacturer of the new product or by the supplier of the biobased ingredients used in the new product.

(c) * * * Paragraph (c)(5) of this section presents the procedures for revising the information provided under paragraphs (c)(1) through (4) of this section after a notice of certification has been issued.

* * * * *

(5) If at any time, during the application process or after a product has been certified, any of the information specified in paragraphs (c)(1) through (4) of this section changes, the applicant must notify USDA of the change within 30

days. Such notification must be provided in writing to USDA.

(d) * * *

(1) The effective date of certification is the date on which the applicant receives a notice of certification from USDA. Except as specified in paragraphs (d)(2)(i) through (d)(2)(v) of this section, certifications will remain in effect as long as the product is manufactured and marketed in accordance with the approved application and the requirements of this subpart.

(2) * * *

(iv) All certifications are subject to USDA periodic auditing activities, as described in § 3202.10(d). If a manufacturer or vendor of a certified biobased product fails to participate in such audit activities or if such audit activities reveal biobased content violations, as specified in § 3202.8(b)(1), the certification will be subject to suspension and revocation according to the procedures specified in § 3202.8(c).

(v) If USDA discovers that a certification has been issued for an ineligible biobased product as a result of errors on the part of USDA during the approval process, USDA will notify the product's manufacturer or vendor in writing that the certification is revoked effective 30 days from the date of the notice.

5. Section 3202.8 is amended by revising paragraph (c)(3) to read as follows:

§ 3202.8 Violations.

* * * * *

(c) * * *

(3) Other remedies. In addition to the suspension or revocation of the certification to use the label, depending on the nature of the violation, USDA may pursue suspension or debarment of the entities involved in accordance with 2 CFR part 417 and 48 CFR subpart 9.4. USDA further reserves the right to pursue any other remedies available by law, including any civil or criminal remedies, against any entity that violates the provisions of this part.

6. Section 3202.10 is amended by adding paragraph (d) to read as follows:

§ 3202.10 Oversight and monitoring.

* * * * *

(d) Audits. USDA expects to conduct audits of the voluntary labeling program on an ongoing basis with audit activities conducted every other calendar year (bi-annually). Audit activities will include three stages and will be conducted in sequential order as follows:

(1) Stage 1 auditing includes contacting all participants via email and requesting that they complete a "Declaration of

Conformance Form." Program participants are asked to confirm that they still manufacture the product and that the formulation and manufacturing processes remain the same. Participants are also asked to list all active products and advise the USDA of any complaints regarding the claim of the biobased content. The first Stage 1 auditing activity was completed in 2012 and the second Stage 1 audit will be conducted in 2018.

(2) Stage 2 auditing consists of a random sampling of certified products to confirm the accuracy of biobased content percentages claimed. The participants whose products are selected will be required to submit product samples to be tested by independent testing labs at USDA expense. The first Stage 2 auditing activity began in 2014 and is scheduled to be completed during 2015 and the second Stage 2 audit will be conducted in 2020.

(3) Stage 3 auditing requires manufacturers of products that have been certified for 5 years or more to have their products re-tested at their expense to confirm that the biobased content remains at or above the level at which the product was originally certified. The first Stage 3 auditing activity is scheduled to be completed during 2016 and the second Stage 3 audit will be conducted in 2022.

Dated: June 5, 2015.

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Gregory L. Parham,

Assistant Secretary
For Administration,
U.S. Department of Agriculture.

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