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## DEPARTMENT OF AGRICULTURE

### Office of Energy Policy and New Uses

#### 7 CFR Part 2902

RIN 0503-AA34

#### Designation of Biobased Items for Federal Procurement

**AGENCY:** Departmental Management, USDA.

**ACTION:** Final rule.

**SUMMARY:** The United States Department of Agriculture (USDA) is amending the Guidelines for Designating Biobased Products for Federal Procurement, to add eight sections to designate items within which biobased products will be afforded Federal procurement preference, as provided for under section 9002 of the Farm Security and Rural Investment Act of 2002, as amended by the Food, Conservation, and Energy Act of 2008 (referred to in this document as “section 9002”). USDA is also establishing minimum biobased contents for each of these items.

**DATES:** This rule is effective November 17, 2010.

**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@usda.gov](mailto:biopreferred@usda.gov); phone (202) 205-4008. Information regarding the 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 items are designated under the authority of section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA), as amended by the Food, Conservation, and Energy Act of 2008 (FCEA), 7 U.S.C. 8102 (referred to in this document as “section 9002”).

#### II. Background

As part of the BioPreferred Program, USDA published, on February 10, 2010, a proposed rule in the **Federal Register** (FR) for the purpose of designating a total of nine items 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 75 FR 6795. This rulemaking is referred to in this preamble as Round 6 (RIN 0503-AA34).

In the proposed rule, USDA proposed designating the following nine items for the preferred procurement program: Disposable tableware; expanded polystyrene foam recycling products; heat transfer fluids; ink removers and cleaners; mulch and compost materials; multipurpose lubricants; office paper; topical pain relief products; and turbine drip oils.

Today’s final rule designates the proposed items (with the exception of office paper) within which biobased products will be afforded Federal procurement preference. USDA has determined that each of the items being designated under today’s 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 an item (a generic grouping of products) for preferred procurement under the BioPreferred Program, manufacturers of all products under the umbrella of that item, 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 item and must contain at least the minimum biobased content established for the designated item. When the designation of specific items is finalized, USDA will invite the manufacturers and vendors of these qualifying products to post information on the product, contacts, and performance testing 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 item. Once USDA designates an item, procuring agencies are required generally to purchase biobased products within these designated items where the purchase price of the procurement item exceeds \$10,000 or where the quantity of such items or of functionally equivalent items purchased over the preceding fiscal year equaled \$10,000 or more.

**Subcategorization.** Most of the items USDA is considering for designation for preferred procurement cover a wide range of products. For some items, there are subgroups of products within the item that meet different market requirements, uses and/or different performance specifications. Where such subgroups exist, USDA intends to create subcategories within the designated items.

During the development of the proposal, USDA considered the appropriateness of creating subcategories with the disposable tableware and the ink removers and cleaners items. At that time, however, USDA did not have sufficient information to justify creating subcategories within these items. In the

proposed rule, USDA requested additional information on the possibility of subcategorizing these two items. USDA did not receive any additional information on these items during the public comment period that could be used to support the creation of subcategories at this time. Thus, none of the items being designated today have subcategories. USDA will continue to consider additional information that may become available to support subcategorization of these items in the future.

*Overlap with the Environmental Protection Agency (EPA) Comprehensive Procurement Guideline (CPG) program for recovered content products under the Resource Conservation and Recovery Act (RCRA) section 6002.* Some of the products that are biobased items, designated for preferred procurement under the preferred procurement program, may also be products EPA has designated under the CPG for products containing recovered materials. Where that occurs, an EPA-designated recovered content product (also known as a “recycled content product” or “EPA-designated product”) has priority in Federal procurement over the qualifying biobased product as identified in 7 CFR 2902.2. In situations where it believes there may be an overlap, USDA is asking manufacturers of qualifying biobased products to provide additional product and performance information to Federal agencies 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. As this information becomes available, USDA will place it on the BioPreferred Web site with its catalog of qualifying biobased products.

In cases where USDA believes an overlap with EPA-designated recovered content products may occur, manufacturers are being asked to indicate the various suggested uses of their product and the performance standards against which a particular product has been tested. In addition, depending on the type of biobased product, manufacturers are being asked to provide other types of information, such as whether the product contains petroleum-based components and whether the product contains recovered materials. Federal agencies may also ask manufacturers for information on a product’s biobased content and its profile against environmental and health measures and life-cycle costs (such as the Building for Environmental and Economic Sustainability (BEES) analysis or ASTM Standard D7075 for

evaluating and reporting on environmental performance of biobased products). Such information will permit agencies to determine whether or not an overlap occurs.

Section 6002 of the RCRA requires a procuring agency purchasing an item designated by EPA generally to purchase such an item composed of the highest percentage of recovered materials content practicable. However, a procuring agency may decide not to purchase such an item based on a determination that the item fails to meet the reasonable performance standards or specifications of the procuring agency. An item with recovered materials content may not meet reasonable performance standards or specifications, for example, if the use of the item with recovered materials content would jeopardize the intended end use of the item.

Where a biobased item is used for the same purposes and to meet the same Federal agency performance requirements as an EPA-designated recovered content product, the Federal agency must purchase the recovered content product. For example, if a biobased hydraulic fluid is to be used as a fluid in hydraulic systems and because “lubricating oils containing re-refined oil” has already been designated by EPA for that purpose, then the Federal agency must purchase the EPA-designated recovered content product, “lubricating oils containing re-refined oil.” If, on the other hand, that biobased hydraulic fluid is to be used to address a Federal agency’s certain environmental or health performance requirements that the EPA-designated recovered content product would not meet, then the biobased product should be given preference, subject to price, availability, and performance considerations.

This final rule designates two items for preferred procurement for which there may also be an EPA-designated recovered content product. The first item is mulch and compost materials, which are also EPA-designated recovered content products “hydraulic mulch products” and “compost materials” under the “landscaping products” category of products. The second item is multipurpose lubricants, which, depending on how they are used, may be an EPA-designated recovered content product “re-refined lubricating oils.” EPA provides recovered materials content recommendations for these recovered content products in Recovered Materials Advisory Notice (RMAN) I. The RMAN recommendations for these CPG products can be found by accessing

EPA’s Web site <http://www.epagov/epaoswer/non-hw/procure/products.htm> and then clicking on the appropriate product name.

*Minimum Biobased Contents.* The minimum biobased contents being established with today’s rulemaking are based on products for which USDA has biobased content test data. In addition to considering the biobased content test data for each item, USDA also considers other factors when establishing the minimum biobased content. These other factors include: Public comments received on the proposed minimum biobased contents; product performance information to justify the inclusion of products at lower levels of biobased content; and the range, groupings, and breaks in the biobased content test data array. Consideration of this information allows USDA to establish minimum biobased contents on a broad set of factors to assist the Federal procurement community in its decision to purchase biobased products.

USDA makes every effort to obtain biobased content test data on multiple products within each item. For most designated items, USDA has biobased content test data on more than one product within a designated item. However, USDA must rely on biobased product manufacturers to voluntarily submit product information and, in some cases, USDA has been able to obtain biobased content data for only a single product within a designated item. As USDA obtains additional data on the biobased contents for products within these eight designated items, USDA will evaluate whether the minimum biobased content for a designated item will be revised.

USDA anticipates that the minimum biobased content of an item that is based on a single product is more likely to change as additional products in those items are identified and tested. In today’s final rule, the minimum biobased contents for one of the designated items (“expanded polystyrene foam recycling products”) is based on a single tested product. Given that only two biobased products have been identified in this item, and only one manufacturer supplied a sample for testing, USDA believes it is reasonable to set a minimum biobased content for this item based on the single data point.

For all items where additional information indicates that it is appropriate to revise a minimum biobased content established under today’s rulemaking, USDA will propose the change in a notice in the **Federal Register** to allow public comment on the proposed revised minimum biobased content. USDA will then

consider the public comments and issue a final rulemaking on the minimum biobased content.

*Future Designations.* In making future designations, USDA will continue to conduct market searches to identify manufacturers of biobased products within items. USDA will then contact the identified manufacturers to solicit samples of their products for voluntary submission for biobased content testing or for the BEES analytical tool. Based on these results, USDA will then propose new items for designation for preferred procurement.

USDA plans to identify approximately 10–15 items in each future rulemaking. USDA has developed a preliminary list of items for future designation. This list is available on the BioPreferred Web site. While this list presents an initial prioritization of items for designation, USDA cannot identify with certainty which items will be presented in each of the future rulemakings. In response to comments from other Federal agencies, USDA intends to give increased priority to those items that contain the highest biobased content. In addition, as the program matures, manufacturers of biobased products within some industry segments have become more responsive to USDA's requests for technical information than those in other segments. Thus, items with high biobased content and for which sufficient technical information can be obtained quickly may be added or moved up on the prioritization list. USDA intends to update the list of items for future designation on the BioPreferred Web site every six months, or more often if significant changes are made to the list.

*Exemptions.* In earlier item designation rules, USDA created exemptions from the preferred procurement program's requirements for procurements involving combat or combat-related missions and for spacecraft systems and launch support equipment. Since publication of those final rules in the **Federal Register**, and in response to comments from the Department of Defense (DoD), USDA has decided to create "blanket" exemptions for all items used in products or systems designed or procured for combat or combat-related missions, which will apply to all items designated for the procurement preference. These "blanket" exemptions can be found in subpart A of part 2902. Because these blanket exemptions are included in subpart A of part 2902, it is unnecessary to repeat them in the individual item designations in this final rule.

### III. Summary of Changes

As a result of the comments received on the proposed rule (*see* section IV), USDA has made two substantive changes to the rule. The proposed "office paper" item has been withdrawn from the group of items being designated for preferred procurement in today's final rulemaking. USDA has decided that the issues raised by the commenters regarding the designation of this item justify the withdrawal of the item from this rulemaking. In addition, USDA has revised the definition of the disposable tableware item to clarify that the item refers to tableware that is made of, or coated with, plastic resin.

### IV. Discussion of Public Comments

USDA solicited comments on the proposed rule for 60 days ending on April 12, 2010. USDA received comments from five commenters by that date. The comments were from an industry trade organization, three manufacturers, and one individual.

The five commenters submitted comments regarding the designation process in general and comments specific to the designation of disposable tableware and office paper. The three individual manufacturers also endorsed the comments submitted by the industry association.

In the remainder of this section, USDA first addresses two general comments that relate to the overall designation process. All of the specific comments related to the proposed designation of office paper and disposable tableware are presented next, followed by USDA's response to those comments.

#### *General Comments*

*Comment:* One commenter stated that the process to determine what products are eligible is not transparent. Product category consideration appears to be at the request of the manufacturer, as is consideration of specific products. There is no announcement when a manufacturer has submitted a request for consideration of their product as BioPreferred to enable other manufacturers the opportunity to submit data. How USDA makes a determination that a product warrants evaluation as a BioPreferred product is also not clear.

*Response:* USDA disagrees with the commenter's statement that consideration of items for designation in the BioPreferred Program is based on requests from the manufacturers of certain items. As discussed in the preamble to the proposed rule (75 FR 6801 and 6802), USDA uses a model to

identify and prioritize items for designation. Through this model, USDA has identified over 100 items for potential designation under the preferred procurement program. A list of these items and information on the model can be accessed on the BioPreferred Web site at <http://www.biopreferred.gov>. USDA has conducted extensive market research to identify manufacturers of biobased products and has requested product information from manufacturers as they have been identified. While the willingness of manufacturers to provide product information and samples for testing has been, and will continue to be, a factor in setting the priority for designating items, it is not the only consideration. The cost, performance, availability, and size of the market all play a role in selecting items for designation.

*Comment:* One commenter stated that USDA has apparently used the BEES analysis tool to meet at least part of its environmental information responsibilities. The BEES tool is designed to evaluate environmental and economic performance data for building products and does not represent best practices for evaluating paper products. Life cycle analysis (LCA) practitioners familiar with paper manufacturing have identified the BEES methodology as imprecise when applied to paper products. The commenter stated that results from the recent peer reviewed LCA study, performed at their request, indicate, for instance, that the carbon footprint of printing and writing papers is less than that indicated for the carton of "office paper" evaluated through the BEES analysis. Furthermore, the size of the database on which the BEES analysis was conducted renders the results meaningless in view of the size of the entire paper products marketplace. The commenter stated that care must be taken if USDA plans to use the BEES results in any meaningful manner.

*Response:* The commenter is correct that USDA has used the BEES analytical tool to analyze a sample of individual products within each designated item. The BEES tool has been used to measure environmental and economic performance of designated items since the inception of the BioPreferred Program. USDA acknowledges that there is a wide range of opinion regarding the value of the BEES analysis and is currently considering the role of the analysis in the BioPreferred Program.

In the preamble to the proposed rule (75 FR 6801), USDA stated that, in addition to the BEES analytical tool, manufacturers wishing to make similar

life-cycle information available may choose to use the ASTM Standard D7075 analysis. The ASTM Standard D7075 product analysis includes information on environmental performance, human health impacts, and economic performance. USDA is working with manufacturers and vendors to make this information available on the BioPreferred Web site in order to make the preferred procurement program more efficient.

#### *Office Paper and Disposable Tableware*

*Comments:* One commenter stated that when USDA chooses to evaluate a product category such as office paper or disposable tableware that has always been biobased, it is highly misleading and arbitrary to provide the USDA BioPreferred imprimatur to only those “new” products in the category that use different biobased raw materials. The commenter feels this implies that there is an inherent “good” in the alternatives not found in wood-based papers, which the USDA has not demonstrated and LCA does not support. The commenter stated that there is no suggestion in the legislative history of either the 2002 or 2008 Farm Bills that Congress intended any dislocation of existing biobased products. The commenter believes it is reasonable to conclude that by including the BioPreferred Program in the Energy Title in both statutes, Congress intended to encourage “new” biobased products as a replacement for fossil fuel-based products, not to displace or substitute for existing biobased products.

One commenter believes that USDA has ignored the evolution of the forest products industry since 1972 when applying the “mature market” definition to these products. The commenter states that USDA must consider how the significant changes made in fiber procurement and manufacturing technologies have resulted in different products than those produced in 1972. Increased environmental regulation has caused significant changes to paper to incorporate more recycled content, radically alter bleaching methods and chemicals, and facilitate high-speed printing, new inks (ink jet, toner, etc.) and other innovations. The way the wood-fiber is grown and harvested has also experienced substantial improvement over the past 40 years. The commenter believes USDA must take these developments into consideration in evaluating whether today’s wood-based office papers and tableware are the same as those that had “mature markets” in 1972.

One commenter stressed the need to collect and analyze further information

about the differentiation of these existing products as they were in the 1970s and in 2010. This is necessary to better understand USDA’s interpretation of the term “mature” apparently attached to these existing products. The commenter believes that products in a constant process of improvement via innovation should not be considered mature. For example, the average rotation age and composition of the wood fiber in these products have changed towards a more sustainable configuration in the last four decades.

One commenter stated that today’s wood-based office papers and disposable tableware meet and further the minimum biobased content requirements. In addition, they meet all of the goals of the BioPreferred Program: Improving demand for biobased products (wood-based paper utilizes vast amounts of biobased ingredients), stimulating economic growth in rural areas (paper manufacturing facilities are typically located in rural areas close to the raw material and are the economic foundation of their communities), and enhancing the Nation’s energy security (over 60 percent of the energy used to manufacture wood-based office papers in the United States comes from renewable, carbon neutral biomass).

One commenter stated that Section 9002(a)(3)(B)(v), 7 U.S.C. 8102(a)(3)(B)(v), directs the Secretary to “provide information as to \* \* \* the environmental and public health benefits of such [biobased] materials and items.” USDA has not considered whether the alternative fibers used to manufacture the alternative office papers and tableware are sustainably grown and managed. Credible sustainable forest management programs have assured the continuous improvement of forest management to provide for healthy forests in the years to come. In accepting alternative fiber papers into the BioPreferred Program, the commenter states USDA must make sure that it does not skew the market to such a degree that it would alter sustainable land use decisions.

The commenter stated that a classic example has been in the renewable energy field when the subsidies for corn-based ethanol led to additional rain forest destruction. The commenter further stated that because more corn was being grown in the U.S. for renewable fuel, it opened the market for non-U.S. grown soybeans which led farmers in South America to clear rain forests for agricultural lands.

The commenter states that if USDA considered sustainable management of paper fibers (whether wood or alternative) through a credible

sustainable fiber management program, some degree of confidence could be drawn that there will not be the unintended consequence of forest lands being cleared to grow kenaf, for instance.

One commenter stated that office papers designated as BioPreferred are intended for the same uses, meet the same performance requirements, and overlap with the EPA’s CPG program for recovered content products under the RCRA Section 6002. The CPG requirements apparently take precedence over the BioPreferred program; therefore, Federal agencies must purchase the recovered content product, making the BioPreferred designation superfluous for Federal procurement of these products.

One commenter stated that the definition of office paper—“paper products used in office printer and copier applications, writing, and coated papers for publications”—misapplies the term “coated publication papers.” Coated publication papers are those typically used in magazines and catalogs, not office machines. USDA needs to clarify what it intends by this definition. The commenter’s preferred definition is: “Office papers: Uncoated and coated paper products used in office printer and copier applications, and writing papers.”

One commenter stated that the performance standard identified for office papers—JCP A230—High Yield Coated Opaque Offset—may be appropriate for the sample paper evaluated for the proposal; however, it represents only a small minority of the type of papers used in office machines. The U.S. Government’s Joint Committee on Printing Paper Specifications includes a wide variety of standards for the specific type of paper needed. For instance, O-65(A) is the appropriate standard for Plain Copier Xerographic paper. Therefore, USDA should refer to the accurate paper performance specification depending on the specific paper required.

One commenter stated that wood-based products have very strong positive environmental attributes. The commenter stated that by proposing to endorse agricultural-based fiber over wood fiber, USDA will send an economic signal to forest landowners to grow more agriculture-based crops instead of trees. USDA has always favored more forest lands, not less, and this would be counter to that position. The commenter has completed an LCA of the Equal Offset grade, which fits the A230 designation, and found that when considering environmental impact, this paper is the best option as it uses less

water, wood fiber and GHG than A60 (uncoated freesheet).

One commenter stated that it is not beneficial to Americans to apply our country's finite technical, natural, and financial resources to replace an already existing biobased product like wood-based paper with paper made from hemp, kenaf, sugar cane, flax, cotton, and/or bamboo.

Three commenters suggested USDA delay its decision regarding inclusion of office papers and disposable tableware as designated items within the BioPreferred Program to allow in-depth consideration of the issues between USDA and representatives of the affected products. These issues also include other technical, specification and statutory issues that could be advanced prior to and during the review process.

*Response:* USDA considered the comments related to the proposed designation of office paper and disposable tableware and agrees with many of the points made by the commenters. USDA agrees with the commenters that several technical and policy issues need to be considered and resolved before the designation of the office paper item is finalized. USDA is, therefore, withdrawing the office paper item from the designations being finalized in today's rulemaking. USDA responses to specific issues raised by the commenters are presented in the following paragraphs.

USDA agrees that it is not the intent of the BioPreferred Program to replace a traditional biobased product with another "emerging" biobased product that performs the same function. USDA's intent in proposing to designate office paper was to encourage the development and use of office paper produced from fast-growing, sustainable fibers. USDA agrees with the commenters, however, that implementing the designation as proposed could result in the unintended replacement of paper produced exclusively from sustainably-grown forest products. Because of the comments that were received, USDA believes that more precise definitions and additional clarification are needed for the product category.

With regard to the commenter's concerns about the "mature market" issue, USDA acknowledges that the question of whether a product should be considered a mature market product is not always simply a matter of whether the product had a significant market share in 1972. In some cases the market share held by a biobased product in 1972 may have been taken over by petroleum-based synthetic products

during the 1980s or 1990s and the biobased alternative may truly be "emerging" again now. In other cases, significant feedstock and process changes have resulted in products that are very different from the products marketed in 1972. USDA agrees that, in the case of the proposed "office paper" item, more investigation is needed to adequately address the issue of whether today's products should be considered mature market products.

Commenters pointed out that the office paper category overlaps with an EPA recovered content product and stated that there would be no benefit in designating it under the BioPreferred program. USDA acknowledges that for some products (including this one) the priority given to recovered content products reduces the benefits that would otherwise be attributed to the BioPreferred program. USDA does not believe, however, that the CPG program eliminates the need to designate items for the BioPreferred program. As discussed at proposal, there is a wide range of performance requirements, such as biodegradability or compostability, that factor into purchasing decisions. USDA believes there are potential benefits to designating product categories in which qualified biobased products are found even though the product categories are covered by the CPG program.

Commenters also stated that USDA did not adequately analyze sustainability of the current methods of producing office paper from forestry products. USDA acknowledges that information on sustainability within the forestry and paper production industry was not investigated prior to proposing the item for designation. USDA agrees that consideration of such information would be beneficial and will work with industry stakeholders to obtain and evaluate such information.

Commenters also stated that there are numerous test methods and performance specifications that apply to office paper other than the one listed in the proposal preamble. USDA will communicate with stakeholders to gather a more complete list of applicable performance standards and test methods.

Based on the comments received, USDA has decided that designating the office paper item as proposed has the potential to create much confusion among Federal purchasing agents. A single designated item for office paper would be very broad and would include paper designed to serve a wide variety of common and specialty functions. There is also a wide range of performance requirements that would

have to be addressed in such a broad item. USDA will continue to consider the issues raised by the commenters, will work with the commenters and other industry stakeholders to resolve the issues, and plans to designate the item at a later date.

With regard to the designation of the disposable tableware item, USDA has clarified its intent that products within the item are those that are made of plastic or that have a plastic coating. The intent of designating this item is to encourage the use of disposable tableware made from, or coated with, resins derived from renewable biomass rather than petroleum-based resins. Thus, USDA believes that the designation of this item is appropriate and has clarified in the final rule that the item is defined as "Products made from, or coated with, plastic resins and used in dining, such as drink ware and dishware, including but not limited to cups, plates, bowls, and serving platters, and that are designed for one-time use. This item does not include disposable cutlery, which is a separate item."

Today's action finalizes the designation of eight items within which biobased products will be afforded Federal procurement preference. USDA encourages manufacturers, vendors, and purchasers of biobased products within these eight designated items to continue to submit information relative to products available within these items. If sufficient supporting information becomes available, USDA will consider amending today's rulemaking by creating subcategories within the items, raising (or lowering) the minimum biobased content, or other appropriate actions.

## V. Regulatory Information

### A. Executive Order 12866: Regulatory Planning and Review

This action has been determined significant for purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget. We are not able to quantify the annual economic effect associated with this final rule. As discussed in the proposed rule, USDA made extensive efforts to obtain information on the Federal agencies' usage within the eight designated items. These efforts were largely unsuccessful. Therefore attempts to quantify the economic impact of this 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 designated items if costs are "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 rulemaking. This assessment was based primarily on the offsetting nature of the program (an increase in biobased products purchased with a corresponding decrease in petroleum products purchased). Consideration was also given to the fact that agencies may choose not to procure designated items due to unreasonable costs.

### 1. Summary of Impacts

This rulemaking 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 items 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 rule. The 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 and costs of biobased products acceptable is unknown, it is impossible to quantify the actual economic effect of the rule.

### 2. Benefits of the Rule

The designation of these eight items 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; 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. On a national and regional level, this rule can result in expanding and strengthening markets for biobased materials used in these items.

### 3. Costs of the Rule

Like the benefits, the costs of this 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. Procurement costs for Federal agencies may rise as they evaluate the availability and relative cost of preferred products before making a purchase.

#### *B. Regulatory Flexibility Act (RFA)*

When an agency issues a final rule following a proposed rule, the Regulatory Flexibility Act (RFA, 5 U.S.C. 601–612) requires the agency to prepare a final regulatory flexibility analysis (5 U.S.C. 604). However, the requirement for a final regulatory flexibility analysis does not apply if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)).

USDA evaluated the potential impacts of its designation of these items 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, this rule will not have a significant economic impact on small governmental jurisdictions.

USDA anticipates that this program will benefit entities, both large and small, that manufacture or sell biobased products. For example, the designation of items 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 still in its infancy, however, 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 items designated by this rulemaking, the number is expected to be small. Because biobased products represent a small emerging market, 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 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 items being designated for preferred procurement in this rule are expected to be included under the following NAICS codes: 324191 (petroleum lubricating oil and grease manufacturing), 325211 (plastics materials and resin manufacturing), 325411 (medicinal and botanical manufacturing), 325612 (polish and other sanitation goods manufacturing), 325998 (other miscellaneous chemical products and preparation manufacturing), and 326150 (urethane and other foam product manufacturing). USDA obtained information on these six NAICS categories from the U.S. Census Bureau's Economic Census database. USDA found that the Economic Census reports about 3,513 companies within these six NAICS categories and that these companies own a total of about 4,271 establishments. Thus, the average number of establishments per company is about 1.2. The Census data also reported that of the 4,271 individual establishments, about 4,260 (99.7 percent) have less than 500 employees.

USDA also found that the overall average number of employees per company among these industries is about 55, with the plastics materials and resins segment reporting the highest average (about 90 employees per company). Thus, nearly all of the businesses fall within 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 items being designated, but believes that the impact will not be significant. Most of the items being designated in this rulemaking are 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 items being designated and selling significant quantities of those products to government agencies affected by this rulemaking to be relatively low. Also, this rule will not affect existing purchase orders and it will not preclude procuring agencies from continuing to purchase non-biobased items when biobased items do not meet the availability, performance, or reasonable price criteria. This 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 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 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 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 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 rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Provisions of this 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 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. Although there is no statutory requirement to do so, we believe that, in the long term, many state and local governments will implement similar purchase programs based on the BioPreferred Program. USDA has been charged by Congress to share information on the BioPreferred Program with State and local governments.

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

Today's 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 rule is currently approved under OMB control number 0503–0011.

*J. E-Government Act Compliance*

The Office of Procurement and Property Management 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 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 2902**

Biobased products, Procurement.

■ For the reasons stated in the preamble, the Department of Agriculture is amending 7 CFR chapter XXIX as follows:

**CHAPTER XXIX—OFFICE OF ENERGY**

**PART 2902—GUIDELINES FOR DESIGNATING BIOBASED PRODUCTS FOR FEDERAL PROCUREMENT**

■ 1. The authority citation for part 2902 continues to read as follows:

**Authority:** 7 U.S.C. 8102.

■ 2. Add §§ 2902.52 through 2902.60 to subpart B to read as follows:

Sec.	
2902.52	Disposable tableware.
2902.53	Expanded polystyrene foam recycling products.
2902.54	Heat transfer fluids.
2902.55	Ink removers and cleaners.
2902.56	Mulch and compost materials.
2902.57	Multipurpose lubricants.
2902.58	[Reserved]
2902.59	Topical pain relief products.
2902.60	Turbine drip oils.

**§ 2902.52 Disposable tableware.**

(a) *Definition.* Products made from, or coated with, plastic resins and used in dining, such as drink ware and dishware, including but not limited to cups, plates, bowls, and serving platters, and that are designed for one-time use. This item does not include disposable cutlery, which is a separate item.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 72 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 October 18, 2011, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased disposable tableware. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased disposable tableware.

**§ 2902.53 Expanded polystyrene (EPS) foam recycling products.**

(a) *Definition.* Products formulated to dissolve EPS foam to reduce the volume of recycled or discarded EPS items.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 90 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 October 18, 2011, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased EPS foam recycling products. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased EPS foam recycling products.

**§ 2902.54 Heat transfer fluids.**

(a) *Definition.* Products with high thermal capacities used to facilitate the transfer of heat from one location to another, including coolants or refrigerants for use in HVAC applications, internal combustion engines, personal cooling devices, thermal energy storage, or other heating or cooling closed-loops.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 89 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 October 18, 2011, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased heat transfer fluids. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased heat transfer fluids.

**§ 2902.55 Ink removers and cleaners.**

(a) *Definition.* Chemical products designed to remove ink, haze, glaze, and

other residual ink contaminants from the surfaces of equipment, such as rollers, used in the textile and printing industries.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 79 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 October 18, 2011, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased ink removers and cleaners. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased ink removers and cleaners.

**§ 2902.56 Mulch and compost materials.**

(a) *Definition.* Products designed to provide a protective covering placed over the soil, primarily to keep down weeds and to improve the appearance of landscaping. Compost is the aerobically decomposed remnants of organic materials used in gardening and agriculture as a soil amendment, and commercially by the landscaping and container nursery industries.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 95 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 October 18, 2011, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased mulch and compost materials. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased mulch and compost materials.

(d) *Determining overlap with an EPA-designated recovered content product.* Qualifying products within this item may overlap with the EPA-designated recovered content product: Landscaping products—“compost” and “hydraulic mulch”. USDA is requesting that manufacturers of these qualifying biobased products provide information on the USDA Web site of qualifying biobased products about the intended uses of the product, information on whether or not the product contains any recovered material, in addition to biobased ingredients, and performance

standards against which the product has been tested. This information will assist Federal agencies in determining whether or not a qualifying biobased product overlaps with EPA-designated landscaping products and which product should be afforded the preference in purchasing.

**Note to paragraph (d):** Biobased mulch and compost materials within this designated item can compete with similar landscaping products with recycled content. Under the Resource Conservation and Recovery Act of 1976, section 6002, the U.S. Environmental Protection Agency designated landscaping products containing recovered materials as items for which Federal agencies must give preference in their purchasing programs. The designation can be found in the Comprehensive Procurement Guideline, 40 CFR 247.15.

**§ 2902.57 Multipurpose lubricants.**

(a) *Definition.* Products designed to provide lubrication under a variety of conditions and in a variety of industrial settings to prevent friction or rust. Greases, which are lubricants composed of oils thickened to a semisolid or solid consistency using soaps, polymers or other solids, or other thickeners, are not included in this item. In addition, task-specific lubricants, such as chain and cable lubricants and gear lubricants, are not included in this item.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 88 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 October 18, 2011, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased multipurpose lubricants. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased multipurpose lubricants.

(d) *Determining overlap with an EPA-designated recovered content product.* Qualifying products within this item may overlap with the EPA-designated recovered content product: Re-refined lubricating oils. USDA is requesting that manufacturers of these qualifying biobased products provide information on the BioPreferred Web site about the intended uses of the product, information on whether or not the product contains any recovered material, in addition to biobased ingredients, and performance standards



against which the product has been tested. This information will assist Federal agencies in determining whether or not a qualifying biobased product overlaps with EPA-designated re-refined lubricating oils and which product should be afforded the preference in purchasing.

**Note to paragraph (d):** Biobased multipurpose lubricant products within this designated item can compete with similar multipurpose lubricant products with recycled content. Under the Resource Conservation and Recovery Act of 1976, section 6002, the U.S. Environmental Protection Agency designated re-refined lubricating oils containing recovered materials as items for which Federal agencies must give preference in their purchasing programs. The designation can be found in the Comprehensive Procurement Guideline, 40 CFR 247.11.

**§ 2902.58 [Reserved]**

**§ 2902.59 Topical pain relief products.**

(a) *Definition.* Products that can be balms, creams and other topical treatments used for the relief of muscle, joint, headache, and nerve pain, as well as sprains, bruises, swelling, and other aches.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 91 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 October 18, 2011, procuring agencies, in accordance with this part, will give a procurement preference for qualifying biobased topical pain relief products. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased topical pain relief products.

**§ 2902.60 Turbine drip oils.**

(a) *Definition.* Products that are lubricants for use in drip lubrication systems for water well line shaft bearings, water turbine bearings for irrigation pumps, and other turbine bearing applications.

(b) *Minimum biobased content.* The preferred procurement product must have a minimum biobased content of at least 87 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 October 18, 2011, procuring agencies, in accordance with this part,

will give a procurement preference for qualifying biobased turbine drip oils. By that date, Federal agencies that have the responsibility for drafting or reviewing specifications for items to be procured shall ensure that the relevant specifications require the use of biobased turbine drip oils.

Dated: October 12, 2010.

**Pearlie S. Reed,**

*Assistant Secretary for Administration, U.S. Department of Agriculture.*

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**FEDERAL RESERVE SYSTEM**

**12 CFR Part 261a**

**[Docket No. R-1313]**

**Privacy Act of 1974; Privacy Act Regulation**

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Final rule.

**SUMMARY:** The Board of Governors of the Federal Reserve System (Board) is issuing a final rule to amend its regulation implementing the Privacy Act of 1974 (Privacy Act). The primary changes concern the waiver of copying fees charged to current and former Board employees, and applicants for Board employment, for access to their records under the Privacy Act; the amendment of special procedures for the release of medical records to permit the Board's Chief Privacy Officer to consult with the Board's Employee Assistance Program counselor to determine whether the disclosure of medical records directly to the requester could have an adverse effect on the requester; changes to the time limits for responding to requests for access to information and amendment of records; and updates to the exemptions claimed for certain systems of records. In addition, the Board is proposing to make minor editorial and technical changes to ensure that the Board's regulation is consistent with the Board's published systems of records and is clearer.

**DATES:** This rule is effective October 18, 2010.

**FOR FURTHER INFORMATION CONTACT:** Brad Fleetwood, Senior Counsel, (202) 452-3721, Legal Division. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869.

**SUPPLEMENTARY INFORMATION:** The Board published a notice of proposed rulemaking to amend its regulation

implementing the Privacy Act in the **Federal Register**, 73 FR 25594, May 7, 2008. The proposed amendments: (1) Waived all copying fees in connection with any Privacy Act request by current or former Board employees and applicants for Board employment; (2) permitted the Chief Privacy Officer to consult with the Board's Employee Assistance Program counselor as well as the Board's physician to determine whether the disclosure of medical records directly to the requester could have an adverse effect on the requester; (3) required all requests for access (including requests made by current Board employees for access to their personnel records) to be submitted in writing to the Secretary of the Board; (4) lengthened the time limits for acknowledging (and where practicable, substantially responding to) an individual's request for access to information and making a determination on a request to amend an individual's record; (5) replaced the statutory exemptions listed in the Privacy Act with references to the relevant provisions in the Privacy Act; (6) updated the exemptions listed under 12 CFR 261a.12 to conform to the exemptions approved for each of the Board's Privacy Act systems of records; and (7) made minor editorial and technical changes for clarity and consistency with the Board's published systems of records.

In response to these proposed amendments, the Board received three public comments relating to the privacy of information held by banks and other financial institutions. Because the Board's Privacy Act regulation does not regulate the privacy of this information, the Board did not consider these comments relevant.

The Board's final rule adopts all of the amendments as proposed except that the Board has determined to revise the requirement that all requests for access be submitted in writing to the Secretary of the Board. This amendment was proposed to facilitate appropriate tracking and processing of all Privacy Act requests. However, after an internal review of this matter, the Board determined that because current and former employees frequently request access to records about themselves directly from Human Resources (HR) in person to require such employees to instead seek this information from the Secretary's Office in writing would be extremely burdensome. Any benefit from an increased ability to track these requests would be more than outweighed by the increased difficulty that employees would face in seeking information about themselves.