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7 CFR Part 2904
Voluntary Labeling Program for Biobased Products; Final Rule

DEPARTMENT OF AGRICULTURE

7 CFR Part 2904

RIN 0503–AA35

Voluntary Labeling Program for Biobased Products

AGENCY: Departmental Management, USDA.

ACTION: Final rule.

SUMMARY: The U.S. Department of Agriculture (USDA) is establishing a voluntary labeling program for biobased products under section 9002 of the Farm Security and Rural Investment Act of 2002, as amended by the Food, Conservation, and Energy Act of 2008. Under the voluntary labeling program, a biobased product, after being certified by USDA, can be marketed using the "USDA Certified Biobased Product" label. The presence of the label will mean that the product meets USDA standards for the amount of biobased content and that the manufacturer or vendor has provided relevant information on the product for the USDA BioPreferred Program Web site. This final rule applies to manufacturers and vendors who wish to participate in the voluntary labeling component of the BioPreferred Program. The final rule also applies to other entities (*e.g.,* trade associations) that wish to use the label to promote biobased products.

DATES: This final rule is effective February 22, 2011.

FOR FURTHER INFORMATION CONTACT: Ron Buckhalt, USDA, Office of the Assistant Secretary for Administration, Room 361, Reporters Building, 300 7th Street, SW., Washington, DC 20024; *e-mail: biopreferred@usda.gov;* phone (202) 205–4008. Information regarding the Federal Biobased Products 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

Today's final rule establishes the voluntary labeling program for biobased products 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

Overview of Section 9002. Section 9002 establishes a program for the Federal procurement of biobased products by Federal agencies and a voluntary program for the labeling of biobased products. These two programs, referred to collectively by USDA as the BioPreferred℠ Program, are briefly discussed below.

Federal Procurement of Biobased Products. Section 9002 requires Federal agencies to develop procurement programs that give a preference to the purchase of biobased products (hereafter referred to in this **Federal Register** notice as the "Federal 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 items [1] when the cumulative purchase price of the item(s) 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. Each Federal agency and contractor must procure biobased products at the highest content levels within each product category unless the agency determines that the items are not reasonably available, fail to meet applicable performance standards, or are available only at an unreasonable price.

The final guidelines for the Federal preferred procurement program were published in the **Federal Register** on January 11, 2005 (70 FR 1792). The guidelines are contained in 7 CFR part 2902, "Guidelines for Designating Biobased Products for Federal Procurement."

Part 2902 is divided into two subparts, "Subpart A—General," and "Subpart B—Designated Items." Subpart A addresses the purpose and scope of the guidelines and their applicability, provides guidance on product availability and procurement, defines terms used in part 2902, and addresses affirmative procurement programs and USDA funding for testing. Subpart B identifies product categories and specifies their minimum biobased contents, the effective date of the procurement preference for biobased products within each product category, and other information (*e.g.,* biodegradability). USDA is responsible for designating biobased items at the highest practicable biobased content levels for the Federal agencies' preferred procurement programs.

As part of the Federal preferred procurement program, section 9002 also requires USDA to provide information to Federal agencies on the availability, relative price, performance, and environmental and public health benefits of products within such product categories and, as applicable under section 9002(e)(1)(C), to recommend the minimum level of biobased content to be contained in the products within a product category.

To date, USDA has identified 50 product categories in a variety of applications, including cafeteria ware, personal and institutional cleaning products, construction products, and lubricants and greases. There are presently approximately 5,100 individual BioPreferred Products (products that are within product categories that are eligible for Federal preferred procurement) within these 50 product categories.

Voluntary Labeling Program. Section 9002 also requires USDA to establish a 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"). 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

[1] The term "designated item" refers to product categories (generic groupings of products that perform the same function) within which the products have been afforded a procurement preference by Federal agencies under the BioPreferred Program. For example, under the designated product category "mobile equipment hydraulic fluid," all brands and grades of hydraulic fluid formulated for use in mobile equipment and meeting the specified minimum biobased content are included in the procurement preference program.

entities and the general public. In establishing this program, USDA must identify the criteria to determine those products on which the certification mark may be used and must develop 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.

In developing the voluntary labeling program, USDA held discussions with other agencies that have implemented labeling programs, such as the "ENERGY STAR®" program implemented by the U.S. Department of Energy and the U.S. Environmental Protection Agency (EPA). USDA has also consulted with representatives of the Department of Agriculture's National Organic Program and others of the Agricultural Marketing Service. Further, USDA consulted the Federal Trade Commission (FTC), which issues the "Guides for the Use of Environmental Marketing Claims" to ensure that the provisions of the voluntary labeling program are consistent with the Guides. USDA also held a public meeting on July 22, 2008, to seek input on the content and use of the certification mark from the public and industry stakeholders.

As part of the BioPreferred Program, on July 31, 2009, USDA published a proposed rule for the voluntary labeling program for biobased products under the authority of section 9002. This proposed rule can be found at 74 CFR 38295.

The following section of the preamble presents a summary of the changes that have been made to the rule as a result of USDA's consideration of the comments that were received on the proposed rule. Section IV presents a summary of the public comments received on the proposed voluntary labeling program and USDA's responses to the comments.

III. Summary of Changes

As a result of comments received on the proposed rule (section IV), USDA made changes to the rule, which are summarized below. USDA discusses the rationale for these changes in section IV.

Minimum biobased content. For finished biobased products that are not within the designated product categories and for intermediate ingredients or feedstocks that are also not within the designated product categories, USDA has lowered the applicable minimum biobased content from the proposed 51 percent to 25 percent.

Mature market products. As a result of USDA consideration of public comments concerning the difficulty of implementing case-by-case exemptions, USDA has decided to categorically exclude mature market products from the labeling program at this time.

Preliminary notice of violations. USDA has added a provision to the rule to provide manufacturers and vendors with a preliminary notice of violation.

Initial approval process. Based on a commenter's recommendation that USDA allow representative biobased content testing for products with similar biobased contents but slightly different formulations, USDA has agreed to allow representative content testing to suffice if the product's formulation does not vary by more than 3 percent for multiple products.

IV. Discussion of Public Comments

USDA solicited comments on the proposed rule for 60 days ending on September 29, 2009. USDA received comments from 25 commenters by that date. These comments were from individuals, manufacturers, and trade organizations.

Who can apply for the certification mark?

Comments: One industry commenter states that vendors, especially those who sell private-labeled manufactured products, should be allowed to apply for biobased labeling. An example is a product that has been labeled by the manufacturer for one purpose; and the vendor would like to package it under its private label and for a different application (*e.g.,* a road dust suppressant labeled by the manufacturer, could be labeled by a vendor as a "COAL dust control agent" under the vendor's private label). The latter product may require slight modifications by the manufacturer or be exactly the same. The vendor would use the documentation that the manufacturer has established along with additional information to apply for separate labeling.

One industry commenter supports both manufacturers and vendors being eligible to apply for the certification mark and stated that this approach provides the maximum flexibility for all participants.

One industry organization commenter and one industry commenter support manufacturers, but not vendors, being eligible to apply for the certification mark. The commenters state that it is the manufacturers who have the information on product composition (*e.g.,* whether a product meets the definition of a biobased product) and biobased content (*e.g.,* testing results on the formulated product). Having both vendors and manufacturers apply will result in USDA having to process many more applications for no reason. Furthermore, it is critical that manufacturers maintain control over who uses the certification mark on their products. Having a proliferation of vendors apply for the mark without the knowledge of the manufacturer will lead to confusion and potential misunderstandings.

One individual commenter does not believe it would be a good idea to allow vendors to be eligible to obtain the certification marks. The commenter pointed out that, as noted in the proposed rule, it is the manufacturer and not the vendor who determines a product's formulation and production process. In addition, some manufacturers have become very upset when finding out that some vendors of their products were participating in the BioPreferred Program without their knowledge. The commenter envisions lawsuits arising when allowing vendors to apply for labels without documented consent from the manufacturer.

Response: USDA continues to believe that the goals of the voluntary labeling program can be achieved, and the beneficial impacts of the BioPreferred Program can be increased, if both manufacturers and vendors are allowed to market and promote the manufacturers' biobased products with a credible biobased product labeling program. For example, many vendors purchase products from manufacturers and then repackage or offer these products as private label items. Allowing these vendors into the program will increase the number of biobased products in the market, thus furthering the goals of the program. Therefore, USDA will allow vendors as well as manufacturers to participate in the program as long as they meet all program requirements.

Applicable Minimum Biobased Contents

Comment: One industry commenter states that he believes that a minimum biobased content of 50 percent should be required for products not within product categories that have been identified for Federal preferred procurement. Requiring half or more of a product's content to be biobased will bring credibility to the certification mark and prevent potential "greenwashing" by allowing lower biobased content product manufacturers to advertise the certification mark.

Products containing less than 50 percent biobased content can still be identified through the BioPreferred designation process for Federal preferred procurement.

One industry commenter recommends that USDA consider lowering the biobased content level to 20 percent for intermediate ingredients and feedstocks to be eligible to receive the BioPreferred certification mark. The commenter has commercialized a family of unsaturated polyester resins that are used to fabricate fiberglass-reinforced and particulate reinforced composites used in an increasingly wide variety of applications in the transportation and building and construction industries. The biobased content in these commercially-available resins falls in the 8 to 22 percent range. They currently have developmental products with biobased content in the 30 to 40 percent range. The commenter recommends that the biobased content eligibility cut-off for a label be set at 20 percent, not only for these types of products but for chemical intermediates and feedstocks in general. The commenter believes that this level will stimulate further consumption of existing resins and incentivize companies to continue to develop biobased resins with even higher biorenewable content.

One industry organization commenter believes that for finished products that do not fall within an existing product category identified for Federal preferred procurement the default biobased content percentage should be lower (*e.g.,* 25 percent). More flexibility is needed in setting a default standard for finished biobased products that have not yet been identified for Federal preferred procurement. This is a new industry that is creating a range of end products, each of which needs to meet different performance standards depending upon the type of product. It is not always possible to meet accepted industry performance standards and achieve a 51 percent or greater biobased content.

One industry organization supports a minimum biobased content of anywhere between 20 and 51 percent for both intermediate ingredients and products that do not fall within an existing product category identified for Federal preferred procurement.

Two industry commenters believe the proposed 51 percent minimum biobased content is inappropriately high. One of the commenters states that they understand the desire to establish the highest possible biobased content, but that performance requirements in many applications cannot be met with such high biobased content. The commenter suggested that USDA review the minimum biobased contents that USDA has set for products within the existing product categories identified for Federal preferred procurement, and establish a minimum for products not within those categories which would be more inclusive than the proposed 51 percent. The commenter stated that this would allow program expansion without greatly increasing the administrative burden. The commenter stated that, for example, if the minimum biobased content was set at 20 percent, then 44 of the 49 categories of identified items would meet this criterion. Selecting 51 percent appears to be arbitrary as there is no rationale provided in the proposed rulemaking for this minimum. The commenter further stated that USDA has developed a rigorous process for identifying the BioPreferred Products that have been identified for Federal preferred procurement. The BioPreferred Products to date represent a reasonably sized "sample" of biobased products currently on the market. Selecting a minimum biobased content of 20 percent for the labeling program covers at least 90 percent of the product categories identified for preferred procurement to date by USDA. The other commenter notes that the existing minimums for several of the product categories are well below that 51 percent threshold and states that if the bar had been set so high when products within these categories were being developed, it could have inhibited that development. Additionally, these products were developed even before the incentive from USDA. To the degree that the USDA program will incentivize future development, setting the bar this high could inhibit that same development. The commenter believes it might be more realistic to set the default minimum biobased content somewhere in the lower end of the range (15 to 20 percent) of the minimum biobased contents specified for product categories already included in the BioPreferred Program, with the expectation that most products' biobased contents will increase as technology advances.

Two industry organization commenters and one industry commenter state that USDA's proposed approach to establishing and enforcing biobased content levels does not take into account the imprecision in the analytical testing method used to determine biobased content or manufacturing variations in the production of different batches of products or small formulation changes.

On the first point, the ASTM D6866 test method has precision of +/− 3 percent on the mean biobased content reported. Because of this, USDA has previously recognized the need for flexibility when establishing minimum biobased content levels for BioPreferred Products. The commenters urge that USDA take the same approach in the labeling rule. Products should be eligible for certification if their biobased content falls within 3 percentage points of the minimum content level and should be considered in compliance if their content falls within 3 percentage points of their label statement. Manufacturers should not have to reapply for certification if their product's biobased content falls within 3 percentage points of their label statement.

On the second point, the commenter stated that in any manufacturing process there will be some production variation. Also, small changes can be made to formulas over time. Therefore, the commenters urge USDA to allow a manufacturer applying for a label certification to establish a biobased content for the purpose of the label that may be below the actual D6866 test results in order to account for manufacturing variations. The commenter stated that, as currently written, the applicant does not appear to have that flexibility. The proposed rule appears to require that the percentage biobased content used for the label be exactly what is reported in the lab test results submitted with the application.

One industry commenter stated that he supports allowing intermediate ingredients such as biobased plastic resin to be eligible for the voluntary labeling program and that, for those products, the certification mark should reference the product's biobased content, with a minimum of 50 percent biobased content.

One industry organization commenter requests clarification of the definition of "intermediate ingredients or feedstocks," but states that he supports a required biobased content level of anywhere within 20 to 50 percent for intermediate ingredients and for the final products that are not within product categories identified for Federal preferred procurement. The commenter also supports the inclusion of biobased intermediates as eligible to receive the certification mark under the current rulemaking.

Response: The majority of the public comments received on the proposed 51 percent minimum biobased content for finished biobased products, as well as intermediate ingredients and feedstocks, that are not within product categories

identified for Federal preferred procurement recommended that the level be lowered. Based on USDA consideration of these public comments, as well as other factors, USDA has reconsidered the applicable minimum biobased content requirement and concluded that a 25 percent minimum biobased content is more appropriate.

As pointed out by the commenters, several product categories that have been identified for Federal preferred procurement have applicable minimum biobased contents less than the 51 percent minimum that had been proposed for (1) finished biobased products and (2) intermediate ingredients or feedstocks that are not within product categories that have been identified for Federal preferred procurement. For example, "general purpose laundry products" which were identified in Round 4 of the "Designation of Biobased Items for Federal Procurement" have an applicable minimum biobased content level of 34 percent, 17 percent lower than the proposed biobased content minimum for certification.

USDA considered the fact that, on a global basis, many other entities promoting the development and use of biobased products recognize those products that have biobased contents of less than the proposed 51 percent. For example, two European Union independent certifying organizations, DIN–CERTCO (Germany) and AB Vincotte (Belgium), specify 20 percent as the minimum acceptable biobased content for products they certify as biobased. The Japan BioPlastics Association, which certifies biobased products for Japan, Korea, and China, specifies 25 percent as the minimum acceptable biobased content for products they certify as biobased.

USDA also considered that adopting a lower minimum biobased content criteria for these products will allow a greater number of new biobased products to receive the benefits of the label. This, in turn, is expected to lead to increase sales of those biobased products. In addition, many of these new products will increase in biobased content over time with advances in materials engineering and technology. For example, the biobased foam used in automobiles originally had a biobased content in the 5 to 10 percent range but has now increased to over 30 percent biobased.

Therefore, USDA believes that lowering the applicable minimum biobased content for both finished products and intermediate materials that are not at present BioPreferred Products would further the goals of the program and allow for a greater number of biobased products to use the certification mark. This will create more visibility for the labeling program, helping to achieve the goals of the program, and further encourage emerging markets because it will, as one commenter noted, "incentivize future development."

Because of the variability in product testing, as noted by one commenter, USDA is setting the minimum biobased content levels for products eligible for the Federal preferred procurement program 3 percent lower than that of the tested product upon which the minimum level is based. However, for the labeling program, the 25 percent minimum biobased content is not based on testing of an actual product, but is a USDA policy decision based on consideration of the factors described above. Applicants must meet the minimum biobased content percentage they report for a product and should take the testing variability into account when applying for product certification. As such, a manufacturer or vendor may want to claim a more conservative biobased content percentage for a product in its application for certification to use the label. Thus, to ensure that test results consistently meet or exceed the biobased content stated in the application, manufacturers may want to claim a biobased content 3 to 5 percent lower than test results have indicated.

Comment: Two industry organization commenters urge USDA to clearly specify the procedure and steps by which an applicant can request an exception to any specific minimum biobased content chosen for the final rule.

Response: USDA is working to standardize this process and anticipates that it will be similar to the process used to set product minimum biobased contents for eligible products in the Federal preferred procurement program. Such a process would include identifying similar biobased products and their manufacturers and determining biobased contents for similar biobased products. USDA recognizes the difficulties involved in collecting biobased contents, due in large part to the unpredictability of manufacturer and vendor participation in providing products for testing. However, similar to the process used in the Federal preferred procurement program, the establishment of alternative minimum biobased contents for the labeling program will require a measure of flexibility to address the variability in product type and level of industry development. In general, the number of samples that should be obtained for the biobased content analysis would depend on the number of manufacturers of a product and similar products available. USDA would expect applicants to coordinate with program officials to identify and agree upon a reasonable number of samples for the analysis. Emphasis would be focused on obtaining the maximum number of samples possible without restricting the analysis process.

The Labeling of "Complex Products"

Comment: Three industry organizations strongly agree with USDA that complex products are finished products, are separate and distinct from biobased products, and should be included in the BioPreferred Program's labeling program. The commenters support including "complex products" in the labeling effort. The commenters believe that complex products can be included in the rule even in the absence of a test method to determine the overall biobased content of a complex product. If a complex product, such as a car, includes components that contain biobased products (*e.g.,* seats, headliners, dashboards), it is not practical, or even meaningful, to test and or calculate the overall biobased content of the car. Rather, there should be an option to label the components with the biobased content. Two of the commenters state that one approach for doing this would allow a component (*e.g.,* seat) that contained a "USDA Certified Biobased Product" to be eligible to use the certification mark. For example, if the foam used to make the seat had a certification to use the mark then that certification could be carried through to the seat. The mark could read: "Seat: Contains Foam with XX Percent Biobased Content." Another approach would be to allow the component to be tested separately for biobased content or a weighted average of the biobased ingredients could be calculated and if it met the default percentage it would be eligible for the certification mark. If it did not, the manufacturer or vendor could apply to USDA for an "alternative applicable minimum biobased content."

Three commenters propose that, to determine the biobased content of a complex product, an interim approach would be to (1) take a weighted sum (*e.g.,* weight of component 1 × new carbon content of the feedstock material used in component 1 + weight of component 2 × new carbon content of the feedstock material used in component 2; etc. until all components have been included) and then (2) normalize this number by the total

weight of the complex product. Consistent with USDA's current requirements, the new carbon content should be determined using ASTM D6866.

These commenters recommend that, as a long term approach, USDA continue to consult with ASTM to gather information on complex products to proceed with the development of a method that can be used to determine the biobased content of these products. Once an acceptable test method is available, the commenters agree that USDA should amend the voluntary labeling rule to allow for the labeling of complex products.

One industry commenter states that care should be taken to not complicate the labeling process. A wind generator that uses biobased grease or gear lubricants, and biobased composites for the blades should indicate that the blades are biobased and the gear lube is biobased. Trying to qualify what percent of the total wind generator is biobased would complicate the process.

One industry commenter suggests modifying the term "complex products" in the labeling program to "complex finished products" to avoid any confusion with polymer systems. The commenter believes that "complex finished products" can be included in the rule even in the absence a test method to determine the overall biobased content of a complex finished product.

One individual commenter believes that, for complex products, it would be unwise to base the biobased content on weighted averages for the biobased content of all the biobased components. This approach would be too costly for some product manufacturers to consider and could hinder participation in the program. In addition, the total error associated with the weighted average will increase considerably (due to cumulative errors) as the number of components within a complex product increases. As a result, the total error associated with any given item (or between individual products within an item) will be product-specific, which is undesirable from a designation perspective.

One industry commenter states that many of these complex products will contain components manufactured from biobased and non-biobased materials. In some cases, the use of biobased intermediate ingredients or feedstocks in components may not represent a significant amount of the finished product (*i.e.,* contains less than 51 percent biobased content). However, the use of biobased materials may represent a significant improvement for the finished product that should be encouraged.

One industry commenter also believes that it is important to look at subcategories as well as categories of products because there are often performance requirements that place limits on the amount of biobased materials that can be used for certain specific applications within the same product categories. For example, the amount of biobased content in foam used in automotive seating can vary from the amount used in foam seating for sofas due to performance requirements.

Response: USDA appreciates the comments on this subject but has decided it is best not to include complex products in the voluntary labeling program at this time. USDA recognizes the importance of complex products but believes there are many issues to be resolved before such products can be included in and recognized by the labeling program. These issues include establishing a minimum biobased content and other criteria for approval, development of an acceptable test procedure to determine the biobased content of complex products, and the appropriate certification mark content and placement. USDA does not want to delay the implementation of the labeling program for other categories of more simple, finished products while this development work for the labeling of complex products is being completed.

The Labeling of "Mature Market Products"

Comment: Six commenters agree with USDA's proposal that products that are considered to be "mature market products" (*i.e.,* products that had significant market penetration in 1972) should not be eligible for participation in the labeling program of the BioPreferred Program as mature market products could affect the entry of new (*i.e.,* post-1972) biobased products into market segments in which mature products already have significant market shares. The commenters believe that inclusion of "mature market products" would be counter to USDA's objective to promote development and adoption of new technologies and biobased products.

Two of the commenters questioned why the date of 1972 was selected as the cut-off year for products to be included in the "mature market" category and one commenter requested that USDA provide additional information including defense and rationale regarding the selection of 1972. The commenter notes that USDA may decide to allow manufacturers of mature market products to appeal and states that USDA should make clear the information regarding the criteria by which a manufacturer of mature market products can appeal, the details of the appeal process and how USDA will determine if an appeal is approved or not. The commenter also recommends that if manufacturers of "mature market products" are allowed to appeal, then the appeal process should include a public comment period to allow the public to review the appeal and to submit comment about it.

Two commenters recommend that USDA not allow manufacturers of biobased products to appeal, on a case-by-case basis, the exclusion of their mature market products. The commenters state that, in enacting section 9002, Congress made it clear that the purpose of the program, including the labeling program, was to grow the market for new biobased products. The value of the certification mark for manufacturers and vendors of these products is to inform consumers that these new and innovative products are available and that USDA has certified the biobased content. The "currency" of being a new and innovative product loses its meaning and quickly the label may become "devalued." Furthermore, mature market products have other already-established, and well known labels (like the cotton logo and FSC certification for wood and paper products) that they can use. The commenters recommended that any government label for mature market products be developed separately and under different authority than Section 9002.

One industry commenter states that the labeling of mature products would harm the BioPreferred Program's labeling process in the early stages. A 5- to 10-year delay before such mature products are allowed to be included and labeled would be helpful.

Two commenters are concerned that the proposed regulations exclude mature market products from the program, except on a case-by-case basis, and could be interpreted as excluding forestry materials that fit properly within the definition of biobased products in the authorizing legislation.[2] One of the commenters believes such an

[2] The definition of "biobased products" found in the 2008 Farm Bill is as follows: "The term 'biobased product' means a product determined by the Secretary to be a commercial or industrial product (other than food or feed) that is—(A) composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials; or (B) an intermediate ingredient or feedstock."

exclusion would be arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. 706. Additionally, the commenter believes the proposed certification mark violates the consumer advertising rules of the FTC.

This commenter, and another individual commenter, believe that the exclusion of mature market products from automatic inclusion in the voluntary labeling program should be eliminated for the following reasons:

- There is no legitimate difference between new and mature products in a voluntary public information program;
- There is no guidance on recognizing a product as "new";
- The proposal provides for a case-by-case determination that would allow some mature market products to use the voluntary label; and
- USDA assumes that Congress intended that the voluntary label program exclude mature market products, but the legislative history does not reflect this interpretation.

One of the commenters states that USDA needs to understand that even "mature" products can be "renewed" through innovations and following new industry standards such as sustainable forestry management programs.

One industry commenter suggests that USDA extend applicability of the label to all biobased products. Alternatively, USDA should amend the proposed language on the label to clearly designate it as intended for emerging market products only.

One nonprofit organization commenter has concerns about the nature of this label on the consumer market especially where it might lead a consumer to make assumptions about the overall sustainability of their purchase. The BioPreferred Program seems to provide a quantitative basis to the natural content. However, the commenter believes that exceptions for materials like wool or cotton for rugs, for example, could mislead a consumer to make a less environmentally preferable choice if they relied on the certified biobased product certification mark.

One industry commenter believes that specifically excluding the mature market products will establish a system that creates the perception that USDA endorses the use of "new" products over mature market products, even if the new products contain less biobased materials than a competing mature product. This will, in turn, encourage consumers to make purchasing decisions that are counter to Congressional intent. For example, a paper plate, which USDA has characterized as a "mature market" product, could not use a certified biobased label despite the fact that it is made with close to 100% biobased material. On the other hand, a new plastic plate that is composed of only 51% corn-based PLA could qualify for the certification mark under USDA's proposed rule. This would be both confusing and misleading to the consumer resulting in the conclusion that the conspicuous use of a USDA-backed certification mark on the plastic plate constitutes a government endorsement. The consumer may also conclude that forestry practices, no matter how sustainable, are less environmentally preferable to synthetic polymers made from agricultural products. The commenter believes that excluding mature products will provide an unfair competitive disadvantage for these products and severely discount the environmental contributions of biobased forest products.

One industry commenter states that since the label will be limited to a small pool of biobased products, they are concerned that the proposed label will increase customer confusion in an already chaotic labeling environment. Consumers will have no basis to determine why one biobased product carries the certification mark and one does not. While the designation between emerging and mature market products may be acceptable in a relatively closed Federal purchasing system, expanding this concept to the broad consumer marketplace under a simplistic labeling scheme will only increase consumer confusion. The proposed on-product USDA label does not provide clarification that it is intended for emerging market products only. A consumer, looking at a mature market biobased product, will have no idea why it is not (or cannot be) USDA certified as biobased.

One environmental group commenter states that he does not understand why the labeling program would exclude mature market products while allowing biobased labeling of more recent entrants in the same market. This has the effect of favoring one biobased product over another based solely on their market maturity, rather than being based on any rational criteria related to reduced use of fossil fuels, carbon cycle benefits, or environmental sensitivity. The commenter states that the rules should be amended to avoid punishing environmentally favorable "mature" products, while encouraging environmentally less favorable "new" market entrants.

Response: USDA received numerous comments both for and against the exclusion of mature market products from the voluntary labeling program. While USDA has carefully considered the comments received on the subject, the intent of section 9002, as described in the conference report accompanying FSRIA, "is to stimulate the production of new biobased products and to energize emerging markets for those products." Thus, USDA believes it is appropriate for the guidelines to exclude products having mature markets from the program.

The conference report does not specifically state whether the language quoted above refers to only the Federal preferred procurement program, the voluntary labeling program, or both. However, USDA believes that the widespread labeling of mature market products could negatively affect the entry of new biobased products into market segments in which mature products already have significant market shares. Therefore, USDA continues to believe that it is reasonable to exclude mature market products from the labeling program, as it has done for the Federal preferred procurement program.

Regarding the 1972 cutoff year, as explained in the preamble to the final guidelines, the oil supply and price shocks that began in this country around 1972 provided the impetus for sustained serious new development of biobased alternatives to fossil-based energy and other products. Additionally, there was a return to existing, perhaps neglected or under-utilized, biobased products. Thus, at its discretion, USDA has selected 1972 as the baseline year in its mature market guidance, consistent with the approach taken for the Federal preferred procurement program. In using 1972 as a point in time standard, rather than a dividing line between two eras, USDA believes this can provide for the identification (for Federal preferred purchasing) and labeling of some products that would otherwise be excluded.

The Appropriate Lengths for the Certification Periods

Comment: Four commenters recommend that certifications should remain valid as long as the certified product is manufactured. However, any change that would have any effect on the new carbon content and impact biobased content would necessitate the product being retested and recertified using ASTM D6866. Since USDA will be implementing an audit and enforcement program, this program should be adequate to ensure that applicants remain in compliance with the BioPreferred Program.

One industry commenter states that the appropriate length of certification in the early stages should be longer (5 years) and once the industry matures, reduced to 3 years. A simple annual response to a survey by USDA indicating that there have not been any changes to the labeled product could help USDA monitor products that are discontinued and keep the vendors active.

Response: Most commenters agree with USDA's proposal that a product's certification should remain valid indefinitely unless USDA raises the minimum biobased content requirements for that specific product or the formulation of the product changes such that it falls below the minimum biobased content allowed for that product to be labeled. USDA has received no additional data or information to consider changing its decision in this regard and is making no change to the proposed regulation based on these comments.

Preliminary Notice of Violations

Comment: Two industry commenters support USDA adding a provision to allow for the Agency to issue "preliminary" notices of violation before violation notices are issued. It is a sensible safety valve to add to the regulations to prevent triggering violation notices prematurely. This step can provide time to allow a manufacturer or vendor to work with USDA to clarify whether, due to confusion or misinformation, a violation really has not occurred. Also, if there was a paperwork or recordkeeping error it could be corrected in response to a preliminary notice without triggering a violation notice and all its consequences.

Response: USDA agrees with the commenters and will include a provision for a preliminary notice of violation. Doing so will give manufacturers and vendors the opportunity to work with USDA to make corrections or clear up any issues which might place the manufacturer or vendor in violation. USDA believes that the labeling program is designed to encourage the production, marketing, and distribution of biobased products, not to be punitive in nature, and the use of a preliminary notice of violation will best serve the goals of the program.

Biobased Content Testing Facilities

Comment: Four commenters agree with USDA's proposal requiring that biobased content testing facilities be ISO 9001 conformant to promote data and results credibility. This would ensure that the manufacturer is complying with some basic quality requirements. One commenter believes ISO 17025 will be too demanding.

Two industry commenters also state that they support allowing biobased content to be tested by any third-party ASTM/ISO compliant test facility.

One industry organization commenter believes that USDA should not select a single standard, such as ISO 9001 or ISO 17025, for biobased content testing laboratories but rather should allow for the biobased content testing to be done by any third party ASTM/ISO compliant testing facility. The USDA Guidelines for Item Designation take this approach and the labeling rule should be consistent with the testing facility provisions in the Guidelines.

One individual commenter recommends that neither ISO certification nor ISO compliance should be a requirement. The commenter states that there are basically only two labs in the country that are performing biobased content determinations for the BioPreferred Program, and no new radiocarbon testing labs with interest in performing biobased content measurements have ever started up. Since there are so few suitable labs available, the commenter does not believe USDA should risk restricting the field further. The focus should be on qualifications rather than ISO compliance.

Response: USDA continues to believe that it is in the best interest of the labeling program that biobased testing be performed by ISO 9001 conformant testing facilities. This will ensure that biobased products using the certification mark meet the high standards of the program. USDA believes it is important that the presence of the certification mark on a product will clearly indicate that the product is one for which credible information is available as to the biobased content, consistently measured across labeled products, as use of the ASTM radioisotope test D6866 standard will provide.

Contents and Appearance of the Certification Mark

Comment: Three commenters agree that the material (*e.g.,* product, packaging or both product and packaging) to which the label applies should be clearly identified, and believe that USDA's suggested wording for "product" and "packaging" is clear.

One industry commenter states that he has no issues with the "FP" on the USDA certified biobased product graphic (i.e., the certification mark) and that as long as the program includes an educational campaign that describes the mark, there should be no consumer confusion about what it means.

Two commenters believe the way the "FP" lettering is placed on the certification mark may not be adequate to distinguish the products that are eligible for Federal preferred procurement. One commenter states that the "FP" visually seems to disappear on the mark. Also the letters "FP" are not likely to have any identifiable meaning to either Federal employees or the general public without an outreach and education program on what "FP" means and how the Federal preferred procurement program works. The commenter does believe that it is important for Federal buyers to have an easy way to recognize products that fall within designated product categories. The commenter suggests that the following language be on the final label (under the text that now reads "USDA Certified Biobased Product") for BioPreferred Products currently eligible for Federal preferred procurement: "Federal BioPreferred Designated Product." In addition, the commenter recommends implementing a targeted outreach and education campaign to Federal buyers to educate them on the meaning of the label for a product eligible for preferred Federal purchasing versus a product likely to be labeled that is not currently eligible.

Two commenters oppose the proposed "FP" designator to indicate that a product is eligible for Federal preferred procurement. One of the commenters does not believe that the "FP" designator is necessary to inform Federal procurement officials about these items because these officials already have access to a list of the products eligible for Federal procurement preference. The commenters believe that consumers will not recognize the "FP" lettering on products, nor will they understand that these products, or similar products, have undergone life cycle costs and environmental performance analyses. Incorporation of the "FP" lettering may confuse the consumer regarding the purpose of the certification mark and will unnecessarily clutter and interfere with what is otherwise needs to be a clean, simple graphic.

One commenter believes that the certification mark will provide little benefit to the average consumer and that using "FP" will tend to confuse matters, while another commenter believes that the "FP" information is irrelevant to the labeling program as currently proposed.

Four commenters disagree with the inclusion on the certification mark of information on product performance, life-cycle costs and environmental and

human health effects of the labeled products. The commenters believe trying to add this information would likely make the certification mark confusing to purchasers, is beyond the scope of the labeling program, and is not authorized by the statute.

One industry commenter states that the Farm Bill requires USDA to look at environmental impacts beyond biobased content as one of four criteria for the Federal preferred procurement program but that they do not think that this should be required for the voluntary labeling program. Biobased products manufacturers should be encouraged to provide additional environmental information and USDA should provide space on the website to communicate this rather than requiring it on, or near, the certification mark. If additional marketing claims are to be made on the package for purpose of communicating with consumers, this would fall under the jurisdiction of the FTC.

One industry commenter states that printing sustainability information on a bag or package is an issue that needs further consideration. This adds more cost and ink to each bag of insulation which may go to landfill or be recycled. This information is normally included in product literature and specifications. It is also typically on the website of the manufacturer. It is more sustainable to provide product information in this manner than to print it on the package.

Three commenters support including the percentage biobased content on the certification mark. One of these commenters believes this provides another critical way in which purchasers can select products that have the highest biobased content possible. Another commenter states that by displaying the percent biobased content, the consumer is able to make a purchasing decision based on actual content.

One industry organization commenter states that there is not complete agreement among manufacturers on whether biobased content should appear on the certification mark. The commenter believes that USDA should carefully weigh the pros and cons of this label content issue. One approach would be not to list any content information on the certification mark because the mark will only be used on products that met the minimum biobased content established by USDA. Another approach would be to add the words "Meets or Exceeds USDA Minimum Biobased Content." Another approach would be to give manufacturers the option of listing the biobased content percent on the mark or simply stating "Meets or Exceeds the USDA Minimum Biobased Content." If USDA requires that a specific biobased content percent be placed on the certification mark, then flexibility should be given to manufacturers to use a number that reflects testing and manufacturing variability, as long as the number equals or exceed the minimum content requirement.

One industry commenter states that including only the biobased content on the certification mark implies that only that criterion is relevant. USDA determines the minimum acceptable biobased content based on several factors, including commercially available offerings, performance requirements in the application, etc. Such multi-factor considerations have lead to a wide range of minimum acceptable biobased contents, from 7 to 95 percent, across the range of product categories and applications. If the certification mark exclusively highlights the biobased content, this could send a misleading signal to the consumer that biobased content is the only relevant factor. The commenter suggests that, instead of including the percent biobased content on the mark, include the BioPreferred Program website URL in that proposed location on the label/artwork. This would encourage consumers to become more informed about the program. Individual manufacturers would still have the option of including additional information regarding biobased content elsewhere on the package, separate from the label itself. Such claims would be subject to the guidance from the FTC "Guides for the Use of Environmental Marketing Claims."

One industry commenter suggests that including the biobased content on the label be left to the discretion of the various companies. The commenter states that the current state-of-the-art of biobased analytic calculation remains not very accurate and this could open the doors to issues when a specific number will be indicated on a certification mark.

One industry commenter states that as long as the products meet the minimum biobased content set by USDA, what relevance does "Product: x percent biobased" add? This would lead to a "specmanship" competition in the market.

One industry commenter recommended the following options for including the percent biobased content on the label (listed in order of preference):

A. Allow the manufacturers the option of listing the biobased content or the wording "Meets or Exceeds USDA Minimum Biobased Content";

B. Require the listing of actual biobased percent of the product (within the tolerance of standard test variability); or,

C. If manufacturing variability of actual percent content is a significant issue, then require a numerical percent value, but rather than requiring listing actual percent or the minimum required percent, the manufacturer has the option of stating a percent content higher than the minimum but lower than their "normal" tested value.

The commenter states that the BioPreferred Program would benefit by requiring one of the above label alternatives as they would serve as a continual incentive for manufacturers to maximize their biobased content. Conversely, it could be a deterrent to add lower cost non-renewable blends to a level just above the minimum allowed.

One biobased industry commenter would like to see a very simple label without the specific biobased content. The minimum biobased content is established for BioPreferred Products and for other products it will be 51 percent unless USDA approves an alternative. Therefore, a supplier simply needs to certify that their product meets the minimum standard for that product(s) and USDA needs to enforce to that biobased content level. If a company has a higher biobased content than that minimum, then they can market that product in their literature as such.

One industry commenter believes that the logo is quite large and that USDA should reconsider the size. Product labels have limited space, and the graphic as shown in the draft voluntary labeling rule, is overly large. Although the label can be reduced, it would be to the point of not being readable or recognizable.

One industry organization commenter supports the proposed requirement that the BioPreferred Program's Web site address either be on or in close proximity to the label. Directing people to the site will be a good way to educate them about biobased products and what the certification mark means.

One environmental group commenter states that the label should include a detailed information box adjacent to the logo, so the consumer knows the source of the bioproducts, the energy inputs used in their manufacture, and if any native ecosystems were degraded in the production process.

One industry organization commenter believes that products that use the biobased product label must also state on the label the biological components of the product.

One industry organization commenter believes that the information USDA proposes be included is reasonable and should be legible on the vast majority of products. For products that may be too small to affix the certification mark in a legible form, USDA should consider authorizing the use of a separate "hang tag" containing the certification mark information that could be attached to the product. This approach would address the small product issue without the need to change the overall design of the mark artwork and accompanying statement.

One individual commenter believes that, in order to better accommodate labeling of small products (*e.g.,* lip balm), it would be advantageous to also offer a version of the certification mark that does not contain the words "USDA Certified Biobased Product." Such a mark would be intended only for products where it would be very problematic to use the certification mark as currently proposed.

One industry commenter states that he believes USDA should budget an extensive education campaign to generate brand awareness of the certification mark both within Government and to the public. Similarly, brand guidelines should be developed to ensure proper stewardship of the mark.

One industry commenter states that the certification mark must be in full compliance with the FTC's Guides on the Use of Environmental Marketing Claims. The commenter also states that consumer testing must be undertaken to determine whether the intent of the certification mark is clearly understood.

Two industry commenters recommend that USDA develop and make available with its certification mark a simple set of guidelines regarding the proper usage of the mark and accompanying text to ensure a legible and consistent presentation of this information.

Response: As stated in the proposed rule, USDA will create guidelines to address recommended certification mark size, given the variability in biobased product and packaging dimensions. These guidelines are referred to in the proposed rule as the "Marketing Guides." These guides/guidelines will be available to manufacturers and vendors of labeled products to provide expanded discussions of, and guidance on resolving, implementation issues that may arise related to certification mark use. For example, USDA anticipates that there will be questions related to the best way to apply the certification mark on very small products, such as those within "lip care products", a product category whose products are identified for preferred Federal purchasing. USDA believes that the Marketing Guides, which can be updated frequently, are the most efficient way to keep certification mark users informed of guidance provided by USDA in response to implementation issues that arise. Additional information on sustainability and other data will be Web-hosted, not affixed to the mark.

Additionally, USDA consulted the FTC, which issues the "Guides for the Use of Environmental Marketing Claims" to ensure that the provisions of the voluntary labeling program were consistent with the Guides. If manufacturers or vendors include environmental claims about biobased products on their products/packaging (beyond the application of the certification mark) these statements and/or marketing language may be flagged and forwarded to the FTC for their review and follow-up.

Further, while USDA appreciates the concerns of commenters who would like to see more environmental and performance information on the certification mark, USDA believes that the certification mark needs to be kept as simple as possible to maintain legibility and clarity. Adding further information to the mark will only make it more difficult to read and understand, lessening the impact of the label and the BioPreferred Program.

While some commenters believed that the "FP" acronym proposed to appear on the certification mark was confusing, others believed that the acronym would be helpful to Federal procurement officials and also informative to the general public. Some commenters felt the biobased content percentage proposed to appear on the certification mark was confusing and/or misleading, and felt that a large-scale outreach and educational campaign may be necessary to educate potential buyers on the meaning and purpose of this information. USDA considered the comments related to the proposed content of the certification mark and believes that the mark would be most informative if it includes both the "FP" (if the product has been designated for Federal preferred procurement) and the biobased content percentage, as proposed. Also, to ensure that the certification mark clearly indicates whether it applies to the product, the packaging, or both, the mark will be available in the following variations: "USDA Certified Biobased Product", "USDA Certified Biobased Product: Package", or "USDA Certified Biobased Product & Package", to be used as appropriate.

Timeframe for Correcting Violations

Comment: Four commenters agree with USDA's recommendation for 30- and 60-day periods (from the date the notice of violation is received) for the offending party to correct violations before a notice of suspension or other remedy is sought. Two of the commenters state that to provide more flexibility, USDA could consider adding a provision for case-by-case extensions of the 30- and 60-day periods to deal with special or extenuating circumstances (such as late reporting by a lab).

One industry commenter states that notice of violations should be given 30 days to respond and 60 to 90 days to correct.

One industry association commenter proposes a 60-day time period to correct violations pertaining to biobased content to ensure adequate timing to correct any identified issues. In addition, the commenter agrees with USDA's recommendation for a 60-day period for the offending party to correct all other violations before a notice of suspension or other remedy is sought.

Response: Most of the commenters addressing this issue agreed with the proposed 60-day time period for correcting violations. However, USDA recognizes that as the voluntary labeling program is not a regulatory program but a market development program, USDA needs to be as understanding as possible while maintaining a firm date of enforcement. For these reasons, USDA has decided to allow 90 days for the correction of a violation once a notice of violation is received.

Recordkeeping

Comment: Four commenters support USDA's proposal that appropriate records be kept in order to allow USDA to verify all information associated with the labeling program and that these records be kept for at least 3 years beyond the end of the label certification period.

One commenter supports USDA's plan to require documentation supporting claims made on product packaging about the environmental and human health effects, life cycle costs, sustainability benefits, and performance of their products. This is especially important given the widespread misuse of biodegradability claims, and unsubstantiated compostability claims, being made by product manufacturers. When including claims regarding compostability on the certification mark or product packaging, manufacturers

should have to detail the specific environment in which the product will fully biodegrade and for which they can provide documentation.

One of the commenters states that records should not be required to be kept for analyses of environmental, health, sustainability benefits, life cycle costs, or product performance because these are outside the scope of the labeling program. Even if manufacturers or vendors are making specific claims in these areas, USDA does not have jurisdiction to enforce the validity of such claims. Also, records should not be required to be kept for formulation changes that are not relevant to the label criteria, such as changes in non-biobased ingredients, or changes in biobased ingredients that do not result in greater than a 3 percent change in the formula.

Response: Most of the commenters agreed with the recordkeeping requirements that USDA has proposed for the rule. USDA disagrees with the commenter who claims that the requirement to keep documentation to support environmental, health, sustainability benefits, life cycle costs, or product performance claims is outside the jurisdiction of USDA. Because the labeling of biobased products is voluntary, USDA believes that making the use of the label contingent upon keeping such documentation is justified and reasonable. If a labeled biobased product also includes such claims of product benefits without proper justification and documentation of the benefits, then UDSA believes that the integrity of the label is compromised. Thus, USDA does not believe that manufacturers who make such product benefit claims without documentation should be allowed to include the Certified Biobased Product label on their products.

Regarding the commenter's concern about formulation changes, USDA's intent is that manufacturers must keep records of changes in the product formulation that result in the products biobased content changing. USDA has clarified the text of the recordkeeping provisions in the final rule to limit the recordkeeping to formulations that affect the biobased content of the product.

Benefits and Costs

Comment: Three commenters agree that the benefits outweigh the costs of the program (*e.g.,* testing, submitting applications and associated information, and recordkeeping). One of the commenters adds that USDA must take great care to ensure that it emphasizes the collection and use of complete, technically sound information on which to base its decisions.

Response: The commenters generally agreed with the goals of the program and did not offer any specific data or suggestions that would necessitate any changes to the program.

Comment: One environmental group commenter states that USDA should prepare an environmental impact statement (EIS) to show the environmental impacts of these proposed rules and alternatives. The commenter also states that this program should avoid creating incentives to transfer of large acreage from bio-diverse "conservation reserve programs" to monocropping for biobased products and that the consequences must be disclosed in a National Environmental Policy Act (NEPA) analysis.

Response: While the commenter's concerns are appreciated, USDA believes that the rule complies with all regulatory requirements and does not agree that any additional NEPA analysis, such as an EIS, is also required.

Application Fee

Comment: Three commenters state that a proposed future application fee of $500 is reasonable as long as the fee is allocated towards a certification mark auditing and/or monitoring program.

One individual commenter states some fee is justified to help with implementing portions of the labeling program but that many companies are reluctant to participate in the BioPreferred Program because they are not convinced that doing so will increase product sales significantly. The commenter states that the economic benefits of participating in the BioPreferred Program are yet to be verified, so any fee should not exceed $500.

One commenter does not support imposition of any future labeling fees that would unduly burden companies, particularly small- and medium-size biobased product manufacturers. An application fee could cause an economic burden for companies with multiple products and small- and medium-size companies, and discourage them from applying for the label. For companies with multiple products, fees can add up quickly and adding another $500 per product on top of the testing fees could put the labeling program out of reach for many companies, particularly small- and medium-size companies.

Response: While most commenters support the collection of a fee, particularly if the proceeds from this fee supported efforts to audit/monitor compliance with the voluntary labeling program, USDA is not currently authorized to impose an application fee and, thus, cannot do so. USDA has, however, included in today's final rule the regulatory text necessary to implement a $500 application fee. The effective date of the fee provision is pending until USDA is granted the legislative authority to impose the fee. A **Federal Register** notice will be issued amending the final rule to add the effective date of the application fee provisions once the authority is granted.

General Comments

Comment: One environmental group states that the proposed rules over-generalize the benefits of biobased products and fail to recognize that some biobased products are more preferred than others. The commenter states that these rules raise the prospect of "greenwashing" by potentially misleading the public into thinking that some products are environmentally benign when they are not benign, relative to existing products or alternatives.

Response: While USDA appreciates the commenter's concerns, the purpose of the voluntary labeling program is to promote and increase the use of biobased products as defined in the rule. The labeling program is designed to support this goal by recognizing manufacturers and vendors that produce and market products that utilize biobased materials and by encouraging consumers outside the Federal Government to purchase such products. It is not USDA's intent to mislead or otherwise misinform the public about the potential benefits of one particular product over another. In addition, manufacturers and vendors are required to post certain information about their products on USDA's Web-hosted BioPreferred Program site.

Comment: One industry organization and two industry commenters state that Congressional intent in enacting section 9002 was to stimulate the development of a value-added biobased products industry with a focus on expanding demand for new uses and applications. This purpose was made even clearer when Congress enacted the 2008 Farm Bill and changed the name of the section 9002 program to the "Biobased Markets Program." To grow the market for biobased products, it is essential to recognize the role of the entire value chain, from feedstocks (*e.g.,* soy, corn, canola, sunflowers) to intermediate ingredients (*e.g.,* polyols, resins, biosolvents) to formulated products (*e.g.,* cleaners, lubricants, insulation, foams, plastics) to finished products

that contain biobased components (*e.g.,* chairs or bedding with biobased foam).

One industry commenter states that the voluntary labeling program presents the opportunity for USDA to affect stakeholders within the bioproducts/biomaterials value chain and create additional market pull for the biobased intermediates upon which the final products are based. Intermediates are derived more directly from agricultural products and encompass the transformational technologies that enable the final products to have biobased content. This is the essential link in converting agricultural feedstock to final products. Including intermediates along with final products is also critical to the success of the BioPreferred Program.

Response: USDA agrees with the commenters and has included intermediate ingredients and feedstocks in its proposed and final definition of "biobased product."

Definitions

Comment: One industry organization commenter states that to avoid ambiguity, USDA should include a definition of what is considered a "complex product" in the Definitions section of the rule.

One industry organization commenter and one industry commenter recommend that USDA include vendors, distributors, and re-packagers under the definition of "Designated Representative." As part of the application process, manufacturers could provide USDA with a list of the "designated representatives" who would be using the certification mark. USDA should also allow certified manufacturers to update this list from time to time without requiring that a new application being submitted. Finally, if a vendor, distributor, or re-packager is included as a "Designated Representative," they should be held directly accountable by USDA for any violations in how they use the certification mark or any changes they make to a product's biobased content that violates the use of the mark. Section 2904.7 of the proposed rule would need to be modified to make sure that manufacturers are not held responsible for the way the mark is used by the vendors, distributors, or re-packagers that are listed as "Designated Representatives." It is important that USDA hold the vendors, distributors, and re-packagers to the same standards that they will hold the manufacturer and use the same enforcement mechanisms against those entities if a violation occurs. In addition, USDA should clarify the definition of "Manufacturer" to include any "vendor" that alters a product. Such a vendor should be considered a formulator and formulators should be considered manufacturers.

Two industry organization commenters state that the proposed labeling contains a definition of "Intermediate Ingredients or Feedstocks" that varies from the statutory definition. USDA adds the following language to the definition: "For the purposes of this subpart, intermediate ingredients or feedstocks do not include raw agricultural or forestry materials, but represent those materials that can be put into a new cycle of production and finishing processes to create finished materials, ready for distribution and consumption." The commenter states that USDA provides no justification for this additional language, the language is inconsistent with the statute, and it should not be included in the labeling program rule.

Two commenters state that the proposed labeling rule's definition of "Intermediate Ingredients or Feedstocks" needs more clarity. One of the commenters states that all of the currently designated items appear to be finished products (*e.g.*, something a consumer could buy) and that he does not understand how any intermediate itself could be identified as a BioPreferred Product (a product eligible for preferred Federal purchasing). The commenter asked whether polymers would be considered to be intermediates, since they would be converted into finished products which may be eligible for Federal preferred procurement.

One individual commenter states that a biobased product is defined as a commercial or industrial product that is A) composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials, or B) an intermediate ingredient or feedstock. The commenter believes USDA should consider removing part "B" from the definition since it is redundant. The commenter believes that anything falling into part B will also fall within the definition provided in part A.

One commenter feels it is very important that the Agency carefully define what "renewable" means. Without a specific definition, the commenter felt, a surge in biobased agriculture could spawn a severe uptick in unsustainable agriculture, the use of genetically modified organisms, and toxic farming chemicals that would be even more polluting to the land and water. The commenter stated that this has already been the case with corn-based fuels and industrialized farming. The commenter suggests adding these definitions to the renewable criteria—"Bio material is (1) grown in a sustainable manner, including in relation to soils, waterways, forests, and animals, (2) does not take away from the natural biodiversity of the material in the wild, organic, and farmed environments, (3) does not pollute or degrade soils and waterways as materials are grown and managed, and (4) genetically modified plants should not be acceptable as renewable."

Response: USDA is in the process of completing a "term definitions" section on the BioPreferred Program Web site and will consider the various comments received on the definitions in the development of that section. Regarding the comment concerning the definition of a "complex product", a complex product is a finished, consumer product composed of many different types of components. Today's rule does not contain provisions to allow for the labeling of complex products.

Regarding the definition of "biobased product," USDA makes no change to this definition as it thinks it is important to point out that for the purposes of this subpart "intermediate ingredients or feedstocks" can meet the definition of a "biobased product."

Regarding the definition of "intermediate ingredients or feedstocks," one commenter opposed USDA's proposed addition of the following language to the statutory definition: "For the purposes of this subpart, intermediate ingredients or feedstocks do not include raw agricultural or forestry materials, but represent those materials that can be put into a new cycle of production and finishing processes to create finished materials, ready for distribution and consumption." USDA proposed the definition that included this sentence to clarify that it does not intend for the label to be used on raw, unprocessed agricultural or forestry materials such as corn kernels, soybeans, or forestry thinnings. However, once these raw materials have been "processed" into feedstock materials such as corn starch, soybean oil, or wood fibers, they can be labeled as intermediate ingredients or feedstocks if they meet the other criteria for certification. USDA does not believe that the proposed definition is inconsistent with the statutory language that states that an intermediate ingredient or feedstock means "* * * a material or compound *made* in whole or in significant part *from* biological products * * *."

Criteria for Obtaining Certification

Comment: One industry organization commenter recommends that USDA clarify and explicitly state whether domestic biobased carbon content is required. On "Criteria for Obtaining Certification," biobased product is defined with the language "including renewable domestic agricultural materials." The commenter states that it appears that domestic versus foreign source new carbon content is irrelevant in the label application.

Response: The regulations implementing the biobased preference program under 7 CFR 2902.2 define biobased products as "A product determined by USDA to be a commercial or industrial product (other than food or feed) that is composed, in whole or in significant part, of biological products or renewable domestic agricultural materials (including plant, animal, and marine materials) or forestry materials."

Subsequent amendments to 7 CFR 2902.4(b)(3) clarify that biobased products from any designated country would receive the same preference extended to U.S.-sourced biobased products.

As stated in CFR 2902.4(b)(3) "In implementing the preference program, Federal agencies shall treat as eligible for the preference biobased products from 'designated countries', as that term is defined in section 25.003 of the Federal Acquisition Regulation, provided that those products otherwise meet all requirements for participation in the preference program."

Designated countries include countries that have entered into specific trade agreements with the United States (such as the North American Free Trade Agreement [NAFTA]) or offer reciprocal equal treatment to U.S.-sourced goods. However, manufacturers and vendors must register their products with USDA in order to qualify as an approved supplier of biobased products.

Comment: One environmental group commenter states that an additional criterion should be included in the labeling evaluation. The commenter states that production of the biobased product should not result in net reduction in biological carbon storage in ecosystems such as forests, woodlands, rangelands, grasslands, wetlands, croplands, waterways, etc.

Response: USDA appreciates the commenter's concerns but believes that these concerns fall outside the scope of the voluntary labeling program.

Criteria for Obtaining Certification—Criterion 1: Biobased Product

Comment: One industry consultant commenter states that the USDA Certified Biobased Product Label implies a biobased product results in climate change impact reduction and energy/environmental security compared to non-biobased products. However, this is not backed up by a product life-cycle analysis.

Response: The aims of the labeling program are to increase the purchase and use of sustainable biobased products while providing "green" jobs and new markets for farmers, manufacturers, and vendors. USDA is hosting an informational BioPreferred Program Web site and requires manufacturers and vendors to provide relevant information concerning their products for posting on this site so that purchasers may access the information for use in making purchasing decisions.

Comment: One environmental group commenter states that the proposed criteria for Biopreferred Products include: "Renewable domestic agricultural materials and forestry materials." These criteria raise some important questions such as: (i) Does the word "renewable" describe just agricultural products, or also forestry materials? It should be clarified that renewable modifies both agriculture and forestry products.

(ii) What is the definition of renewable? Products derived from logging mature and old-growth forests, or habitat of imperiled or declining species, or short-rotation logging are not renewable and should be excluded.

Response: The statutory definition refers to "biological products, including renewable domestic agricultural materials and forestry materials." 7 U.S.C. 8101(4). USDA considers the qualifier "domestic," as well as the qualifier "renewable," to apply to both agricultural materials and forestry materials. The Guidelines for implementing the BioPreferred Program include the following definition for the term "forestry materials": "materials derived from the practice of planting and caring for forests and the management of growing timber. Such materials must come from short rotation woody crops (less than 10 years old), sustainably managed forests, wood residues, or forest thinnings." Thus, products derived from mature and old growth forests would be excluded.

Criteria for Obtaining Certification—Criterion 2: Minimum Biobased Content

Comment: One industry organization commenter states that it should be made clear at the beginning of the rule with a definition or in every criterion that biobased content is verified based on an analytical test (ASTM Method D6866).

Response: USDA points out that the definition of "biobased content" in this subsection clearly states that "For BioPreferred Products (products that have been identified for Federal preferred procurement), the biobased content shall be defined and determined as specified in the applicable section of subpart B of part 2902. For all other products, the biobased content is to be determined using ASTM Method D6866, Standard Test Methods for Determining the Biobased Content of Solid, Liquid, and Gaseous Samples Using Radiocarbon Analysis."

Comment: One industry organization commenter states that criterion 2 seems to duplicate criterion 1. The commenter states that the term "significant part" (from criterion 1) would be the same as "at or above its applicable minimum biobased content" (from criterion 2). The commenter states that criterion 2 needs to be more clear to distinguish it from criterion 1.

Response: USDA continues to believe that it is important to retain the language of both Criterion 1 and Criterion 2. Criterion 1 states that a biobased product must be composed "in whole or significant part of biological products, including renewable domestic agricultural materials and forestry materials; or (B) an intermediate ingredient or feedstock." Criterion 2 expands upon this criterion by further explaining how "significant" is determined for each type of product within the three biobased product groups: BioPreferred Products (those that have been identified for preferred Federal purchasing), finished biobased products that are not currently BioPreferred Products, and products that are intermediate ingredients or feedstocks that are also not currently recognized as BioPreferred Products.

Comment: One industry organization commenter believes that any biobased claim on a product with less than 95 percent biobased content should not be permitted to use the "artwork" or certification mark. It may, however, state "made with * * *" based on the amount of biobased material verified in the product where the claim is being made (not in small print that is not readily apparent to the consumer). While this was partially addressed by requiring the product statement with the artwork, allowing the use of the artwork is misleading. This program will mislead consumers into thinking they are purchasing a biobased product that has better attributes than other products.

Response: USDA continues to believe that the goal of program is to encourage the production and purchase of biobased products. Rather than being exclusionary, USDA thinks it is important to set the minimum biobased content for items at levels that will allow for a larger number of participants while maintaining meaningful standards. This will further the goals of the program by allowing for greater manufacturer and vendor participation, greater purchasing and, as a consequence, greater awareness of the BioPreferred Program.

Comment: One individual commenter noted that ASTM test method D6866 has been renamed for simplicity and to better reflect the broad applicability of the test method. The final rule should reflect this change. The title of the method is now "Standard Test Methods for Determining the Biobased Content of Solid, Liquid, and Gaseous Samples Using Radiocarbon Analysis."

Response: USDA agrees with the commenter and has revised the rule to reflect this test method name change.

Criteria for Obtaining Certification—Criterion 2: Minimum Biobased Content—Products That Are Intermediate Ingredients or Feedstocks That Are Not Within Product Categories Identified for Federal Preferred Procurement

Comment: One industry association commenter states that USDA has provided a definition of "intermediate ingredients or feedstocks" that varies from the statutory definition.[3] In the proposed rule, USDA adds the following language to the definition, "For the purposes of this subpart, intermediate ingredients or feedstocks do not include raw agricultural or forestry materials, but represent those materials that can be put into a new cycle of production and finishing processes to create finished materials, ready for distribution and consumption." USDA provides no justification for this additional language which is ambiguous and should not be included in the labeling rule.

Response: USDA believes that the additional language does not change the definition in any significant way, but simply further clarifies USDA's intent to exclude raw agricultural or forestry materials from the labeling program at this time. USDA further believes that it is important to include this language in the regulatory text (*i.e.,* the text of part 2904) rather than only presenting it in the preamble.

Comment: One industry commenter states that, as proposed, the default minimum for intermediate ingredients and feedstocks is equal to the default minimum for finished products. Regardless of what the default minimum is in the final rule, it is still unclear how the minimum biobased content of a feedstock translates into the minimum biobased content of the final product. If the feedstock is above the minimum, but the finished product is below the minimum due to other non-biobased ingredients, would that finished product be eligible? Conversely, if a feedstock were below the minimum, but the finished product above the minimum due to other biobased ingredients, would that finished product be eligible for the certification mark? The commenter requested that USDA provide additional clarity on this matter.

Response: The commenter asks if the feedstock is above the minimum, but the finished product is below the minimum due to other non-biobased ingredients, is the finished product eligible? No, the finished product in this example would not be eligible for use of the certification mark as the finished product would not meet the 25 percent minimum biobased content requirement. However, any biobased component of the finished product with a minimum 25 percent biobased content itself would be eligible for use of the mark as a biobased feedstock. Alternatively, if a finished product composed of several biobased feedstocks of varying percentages of biobased content has a biobased content in sum that equals or exceeds 25 percent, this finished product would be eligible for use of the mark, though not all of its individual components may be eligible.

Criteria for Obtaining Certification—Alternative Minimum Biobased Content Analysis

Comment: One industry commenter agrees with the proposal to have a procedure whereby manufacturers, vendors, and trade associations can request an alternative minimum biobased content for products which are not within a designated category. The commenter encouraged USDA to ensure that this procedure be as streamlined as possible and suggested that leveraging the designation process may be a route to streamlining.

One industry commenter opposes the concept of allowing manufacturers to apply for alternative applicable minimum biobased contents.

One industry organization commenter agrees with USDA's approach to the establishment of alternative minimum contents for the labeling program. However, the commenter states that the proposed rule provides the opportunity to request that USDA approve an alternative to the default content percentage for finished products that do not fall within a USDA designated item category but that the proposed rule language does not provide this same option for intermediate ingredients and feedstocks. The preamble to the rule indicates that USDA intended that the same option be available for intermediate ingredients and feedstocks. The commenter strongly supports this provision for finished products as well as intermediate ingredients and feedstocks and requests that USDA correct the final rule language so the "alternative applicable minimum biobased content" provision is included for intermediate ingredients and feedstocks.

Response: USDA continues to believe that offering a procedure whereby manufacturers, vendors, and trade associations can request an alternative minimum biobased content for products is in the best interest of the labeling program. USDA agrees with the commenter that the intent of the program is to allow, under consultation with USDA, an alternative minimum biobased content for intermediate ingredients and feedstocks as well as finished products that are not currently BioPreferred Products. USDA has revised the appropriate rule language (section 2904.4) to reflect this intent.

Initial Approval Process—Justification for Required Information

Comment: One biobased industry commenter states that the proposed rule requires that each finished product be tested under ASTM D6866. The commenter states that they have eight hydraulic oils that can be listed under the program and each has exactly the same feedstock as the biobased content. The commenter recommends that they be able to certify in a lab per the proposed rule the common feedstock (in this case vegetable oil) as biobased and then be able to use that feedstock as a basis to calculate finished product biobased content. The commenter states that the number of products they have, given that many have only very slightly different viscosities and additives, will result in more testing costs than needed and cause them to carefully evaluate whether they should list them on the program based on the testing costs. The

[3] The definition of "intermediate ingredient or feedstock" found in the 2008 Farm Bill is as follows: "The term 'intermediate ingredient or feedstock' means a material or compound made in whole or in significant part from biological products, including renewable agricultural materials (including plant, animal, and marine materials) or forestry materials, that are subsequently used to make a more complex compound or product."

commenter thinks this recommendation ensures the program standards are met and allows a low cost of participation.

Response: USDA agrees with the commenter's recommendation and will allow representative content testing to suffice provided the product formulation does not vary more than 3 percent for multiple products with a common feedstock. This will facilitate manufacturers and vendors more rapidly and economically adding more biobased products to the labeling program without unnecessary regulatory obstacles.

Initial Approval Process—BEES/Life Cycle Analysis

Comment: One industry commenter states that designated biobased products were required to be evaluated using life cycle assessment (LCA), specifically using the Building for Environmental and Economic Sustainability (BEES) analyses. With the BEES analyses, purchasers have been able to better understand the environmental impacts and aspects of biobased products. By undertaking BEES analyses, biobased product manufacturers have been able to set themselves apart from other manufacturers in their proactive stance toward environmental issues, thereby generating environmental awareness in the biobased community and beyond. The commenter is very concerned that the proposed labeling program has eliminated the requirement to perform an LCA. The commenter presented the following concerns:

A. Biobased products potentially have significant impacts on climate change, biodiversity, food security, and many other impact categories. Without the application of LCA to these products, it is impossible to tell what actions should be pursued to make these products more environmentally friendly.

B. By omitting the requirement for an LCA-based labeling program, USDA is losing a major opportunity toward the global competitiveness of U.S. Agricultural Products.

C. USDA's proposed biobased certification mark does not follow the international consensus standards on Ecolabels (the ISO 14020 series) because it does not take environmental life cycle consideration into account.

D. USDA is missing an opportunity to build overall LCA capacity and competitiveness in the U.S. Requiring LCAs of biobased products would help supply U.S. average data on their environmental impacts.

The commenter urges USDA to reconsider the elimination of environmental LCAs from their biobased products labeling scheme. Its inclusion made the program a strong driver for sustainability and helped biobased American products be more competitive not only through Federal purchases but also in national and international markets.

One environmental group states that the rules should reflect the carbon consequences of the underlying production processes, including long-term, life-cycle effects. The simple fact of being biobased does not guarantee that a product is preferred from the standpoint of environmental or social values. It is far better to conduct a more comprehensive evaluation of the life-cycle impacts of alternative products.

Response: USDA has given extensive consideration to the subject of LCA and, specifically, the BEES analysis. This subject was the primary topic of a public meeting hosted by USDA in Washington, DC on January 5, 2010 (visit the BioPreferred Program Web site to read a transcript of the meeting). Opinions vary widely among Federal agency personnel, industry representatives, members of the academic community, and the general public regarding the accuracy of, and the usefulness of, the results of these analyses. USDA is currently continuing its efforts to formulate a final decision on any requirements to perform LCA analyses on products in conjunction with the BioPreferred Program. At this time, USDA is performing BEES analyses on a small number of sample products within each product category as part of the identification of product categories for Federal preferred procurement. For the voluntary labeling program, the only requirement is that claims made by manufacturers regarding the environmental or life cycle benefits of their labeled products must be supported by appropriate documentation. USDA believes this requirement is a reasonable way to discourage false or undocumented claims on labeled products. Once USDA has made a final decision about the role of LCA or environmental analyses for products identified and certified by the BioPreferred Program, that decision and any associated requirements for participants in the program will be announced in the **Federal Register** with an opportunity for public comment.

Violations—Audit Program

Comment: One industry organization commenter believes that USDA should, as proposed, implement its own audit program, with particular focus on ensuring that the biobased content of the products actually being marketed with the certification mark meet the minimum criteria. USDA's enforcement program should also be directed to take action against those who use the certification mark or create a similar label of their own and place it on products without the USDA biobased product certification. The commenter urges USDA to add explicit language to its proposed rule to cover violations and enforcement mechanisms for "Use of the Certification Mark Without Certification," which would include using the certification mark or a facsimile or other artwork or statements that imply a product is a "USDA Certified Biobased Product" when it is not. In addition, USDA should work closely with the FTC to encourage FTC to pursue its enforcement authority against any stakeholder who makes misleading or false claims that state or imply that they have USDA certification to use the certification mark when they do not.

To maintain the integrity of the mark, one industry commenter supports a strong and fair product audit and certification mark enforcement program and believes that USDA should, as proposed, implement its own audit program and the $500 fee suggested should be used to set up such program.

One individual commenter does not believe it is a good use of taxpayer dollars to inspect manufacturer and vendor facilities (including their records, etc.) as part of a random audit program. This will be very costly and time consuming, at a time when the public eye on government waste is at a high point. The commenter states that simply visiting retail facilities and testing the biobased content of labeled products purchased from those facilities is the best way to conduct the audit program. That approach will address the most important aspects of an audit program.

One nonprofit organization states that, as with any labeling program, they do not believe that affidavits from manufacturers suffice for label certification and that without adequate verification, testing and inspection that a program of this size would not be able to maintain integrity over time and ultimately would cloud an already murky green labeling marketplace.

Response: USDA received several comments for and against the imposition of an auditing requirement. USDA continues to believe that adequate recordkeeping and auditing are necessary to ensure the standards of the program and will work with other agencies, as appropriate, to make certain that manufacturers and vendors comply with all labeling program regulations.

Violations—Other Remedies

Comment: One government agency commenter states that, if a manufacturer of a labeled product were found to be in violation of the labeling rule requirements, USDA could supply the name of the manufacturer to the General Services Administration (GSA) and they would add the name to the Excluded Parties List. This list is checked by buyers as part of a responsibility determination before making an award, so if the manufacturer's/vendor's name is on the list, they would not be awarded a contract with the Federal government.

Response: The proposed rule (at 74 FR 38316) already includes the penalty suggested by the commenter. It states that, in cases of violations, "* * * USDA may pursue suspension or debarment of the entities involved in accordance with part 3017 of this title." As of the publication date of the proposed rule, part 3017 provided for the inclusion of a name on GSA's Excluded Parties List System once the party is suspended or debarred.

V. Regulatory Information

A. Executive Order 12866: Regulatory Planning and Review

Executive Order 12866 requires agencies to determine whether a regulatory action is "significant." This final rule has been reviewed under Executive Order (EO) 12866 and has been determined to be significant. Today's rule establishes a voluntary labeling program that allows manufacturers and vendors of certified biobased products to use the "USDA Certified Biobased Product" certification mark. Although the labeling program is voluntary, there will be costs associated with meeting the criteria for, and applying for, certification to use the label.

1. Costs of the Rule

The primary costs associated with participating in this program are those for developing applications, testing to document the biobased content of products, providing information to USDA for posting by USDA on the USDA BioPreferred Program Web site, maintaining applicable records, and redesigning the product packaging to incorporate the certification mark. USDA estimates that the combined annualized cost of the voluntary program to manufacturers and vendors would average approximately $2,813,811 per year for the first three years of the program. USDA estimates an average of 352 manufacturers and vendors per year will submit applications to participate in the labeling program for the first three years of the program. This yields an average annualized cost per manufacturer/vendor of approximately $7,994.

The level of presumed impact is not expected to exceed $100 million because of the offsetting nature of the voluntary labeling program (*i.e.,* an increase in demand for biobased products is likely to be offset by a decrease in demand for non-biobased products). While USDA believes that the program is likely to have a widespread effect on the marketplace (including shifting purchases away from non-biobased products toward the purchase of biobased products), it is not expected to have a widespread adverse effect on the economy. Additional information regarding the primary industry sectors expected to be affected by today's final rule is presented under the discussion of the Regulatory Flexibility Act below.

2. Benefits of the Rule

As an integral part of USDA's BioPreferred Program, the voluntary labeling program may raise public awareness of, and increase the demand for, biobased products. While the benefits of the labeling program are not quantifiable at this time, an increased demand for biobased products will, in turn, achieve the benefits as 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, today's final rule may result in expanding and strengthening markets for biobased materials used in these items. The program is also expected to promote economic development for biobased product manufacturers and vendors by creating new jobs and providing new markets for farm commodities.

B. Regulatory Flexibility Act (RFA)

Under the RFA, an agency is required to prepare an initial 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 can certify that the rule will not have a significant economic impact on a substantial number of small entities, and the agency can provide a factual basis to support the certification. Based upon its assessment of the projected impact of this rulemaking, USDA 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. Of these three types of entities, the labeling requirements in today's rulemaking would be applicable to small businesses only. For purposes of assessing the impacts on small entities, a small business is defined by the RFA using the definitions for small business based on Small Business Administration (SBA) size standards, which vary depending on the type of business (e.g., less than 500 employees, less than 1,000 employees). Most of the manufacturing companies and vendors associated with products within items that USDA has designated or proposed for designation would qualify as small businesses under SBA guidelines.

To assess the potential effects of this rulemaking on small businesses, USDA conducted a review of U.S. Census Bureau data compiled by the Small Business Administration's (SBA) Office of Advocacy. USDA identified six North American Industrial Classification System (NAICS) categories under which many biobased products are manufactured: Petroleum lubricating oil and grease manufacturing, plastics material and resin manufacturing, soap and other detergent manufacturing, urethane and other foam product (except polystyrene) manufacturing, carpet and rug mills manufacturing, and fertilizer manufacturing. USDA then used the Census Bureau data to determine the number of small businesses in those categories and the average total receipts for those businesses. This data and the associated analysis was valuable in determining whether the rulemaking would have a significant economic impact on a substantial number of small businesses. Based upon the data and accompanying analysis, USDA identified 2,493 small businesses in the six identified manufacturing categories. The total receipts for these small businesses averaged $11.4 million. USDA will note, however, that this average receipt data does not convey the differences between certain manufacturing categories, such as those reflected between the plastics materials and carpet manufacturing sectors. Additional information supporting USDA's analysis is available in the following table. USDA requests comments on the quality of this analysis and ways to improve it.

NAICS category *	Number of small businesses	Small business total receipts ($ in thousands)	Average small business receipts ($ in thousands)
Petroleum lubricating oil and grease manufacturing	261	3,354,088	12,850.91
Plastics material and resin manufacturing	475	10,929,491	23,009.45
Soap and other detergent manufacturing	623	5,351,973	8,590.65
Urethane and other foam product (except polystyrene) manufacturing	413	2,815,231	6,816.54
Carpet and rug mills manufacturing	258	1,733,880	6,720.47
Fertilizer manufacturing	463	4,133,533	8,927.72

* Information provided in this table is available on the SBA's Office of Advocacy Web site and was derived from the U.S. Census Bureau's 2007 Survey of Business Owners. The information can be found at: *http://www.sba.gov/advo/research/data.html#susb.*

Census Bureau data on firm size also indicates that, collectively, more than 91 percent of the firms in the six categories meet the SBA definition of small business. Despite the high percentage of program participants that will be small businesses, the total number of small businesses affected by this rulemaking will not be substantial. USDA estimates that 352 manufacturers and vendors will apply to participate in the program annually. That number would represent around 14 percent of the total small businesses identified in the six NAICS categories identified above. The 14 percent figure can likely be further reduced when considering that the six NAICS categories represent only product manufacturing and not product vendors. In addition, the 352 manufacturers and vendors cited above does not reflect solely small businesses since large businesses will also be eligible to participate in the program.

The benefit-cost analysis USDA conducted for the rule, discussed in Section VI.A.1. above, indicates that the annualized cost associated with participating in the voluntary labeling program is about $7,994 on average and, relative to total receipts by small businesses in the NAICS categories where many biobased products are manufactured, appears not to represent an undue burden in most cases.

In some cases, however, where a small business may experience a burden of conducting multiple biobased content tests as a result of manufacturing multiple biobased products, USDA has decided to reduce the testing burden. As indicated earlier in the preamble of this rule, USDA has agreed to allow representative product testing for products with a similar formulation. This allowance should further reduce any undue burden faced by small businesses participating in the program.

Moreover, participation in the voluntary labeling program would provide manufacturers and vendors a marketing advantage over those who choose not to participate. This marketing advantage could lead to greater sales, thus offsetting some of the costs associated with participating in the labeling program.

Finally, the program requirements for the voluntary labeling program are applicable to all manufacturers and vendors of biobased products seeking to use the certification mark under this program, regardless of the size of their business. For instance, all manufacturers and vendors are required to submit an application, conduct certain testing, and provide to USDA certain information that USDA will post to the BioPreferred Program Web site. These requirements are necessary to certify biobased products and are independent of the size of the manufacturer or vendor. The integrity of the labeling program would be compromised if biobased products manufactured by small businesses were allowed to be subject to different criteria in order to reduce costs to small businesses.

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 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.

E. Unfunded Mandates Reform Act of 1995

This rule contains no federal mandates as defined 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.

F. Executive Order 12372: Intergovernmental Review of Federal Programs

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

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

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. The rule does not impose any mandate on tribal governments or impose any duties on these entities. Thus, no further action is required under Executive Order 13175.

H. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 through 3520), the information collection provisions associated with this final rule have been submitted to the Office of Management and Budget (OMB) for approval as a new collection and assigned OMB number 0503–XXXX. In the publication of the proposed rule on July 31, 2009, USDA solicited comments on the estimated burden. USDA received no public comment letters in response to this solicitation. This information collection requirement will not become effective until approved by OMB. Upon approval of this information collection, USDA will publish a notice in the **Federal Register**.

I. E-Government Act Compliance

USDA is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to government information and services, and for other purposes. For

information pertinent to E-Government Act compliance related to this rule, please contact Ron Buckhalt at (202) 205–4008.

J. Small Business Regulatory Enforcement Fairness Act

The rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. 804(2). This rule will not have an annual effect on the economy of $100 million or more; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

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 2904

Biobased products, Labeling.

For the reasons stated in the preamble, the U.S. Department of Agriculture (USDA) is amending 7 CFR chapter XXIX as follows:

CHAPTER XXIX—OFFICE OF ENERGY, DEPARTMENT OF AGRICULTURE

■ 1. A new part 2904 is added to chapter XXIX to read as follows:

PART 2904—VOLUNTARY LABELING PROGRAM FOR BIOBASED PRODUCTS

Sec.

2904.1 Purpose and scope.
2904.2 Definitions.
2904.3 Applicability.
2904.4 Criteria for product eligibility to use the certification mark.
2904.5 Initial approval process.
2904.6 Appeals process.
2904.7 Requirements for the use of the certification mark.
2904.8 Violations.
2904.9 Recordkeeping requirements.
2904.10 Oversight and monitoring.

Authority: 7 U.S.C. 8102.

PART 2904—VOLUNTARY LABELING PROGRAM FOR BIOBASED PRODUCTS

§ 2904.1 Purpose and scope.

The purpose of this part is to set forth the terms and conditions for voluntary use of the "USDA Certified Biobased Product" certification mark. This part establishes the criteria that biobased products must meet in order to be eligible to become certified biobased products to which the "USDA Certified Biobased Product" mark can be affixed, the process manufacturers and vendors must use to obtain and maintain USDA certification, and the recordkeeping requirements for manufacturers and vendors who obtain certification. In addition, this part establishes specifications for the correct and incorrect uses of the certification mark, which apply to manufacturers, vendors, and other entities. Finally, this part establishes actions that constitute voluntary labeling program violations.

§ 2904.2 Definitions.

Applicable minimum biobased content. The biobased content at or above the level set by USDA to qualify for use of the certification mark.

ASTM International (ASTM). American Society for Testing and Materials is a nonprofit organization that provides an international forum for the development and publication of voluntary consensus standards for materials, products, systems, and services.

Biobased content. The amount of biobased carbon in the material or product expressed as a percent of weight (mass) of the total organic carbon in the material or product. For BioPreferred Products (products that have been identified for Federal preferred procurement), the biobased content shall be defined and determined as specified in the applicable section of subpart B of part 2902. For all other products, the biobased content is to be determined using ASTM Method D6866, Standard Test Methods for Determining the Biobased Content of Solid, Liquid, and Gaseous Samples Using Radiocarbon Analysis.

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

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

(2) An intermediate ingredient or feedstock. For the purposes of this subpart, the term 'biobased product' does not include motor vehicle fuels, heating oil, electricity produced from biomass, or any mature market products.

BioPreferred Product. A biobased product that meets or exceeds minimum biobased content levels set by USDA, and that is found within any of the product categories that have been identified, in subpart B of 7 CFR part 2902, whose products within are eligible for Federal preferred procurement/purchasing.

Certification mark. A combination of the certification mark artwork (as defined in this subpart); one of three statements identifying whether the USDA certification applies to the product, the package, or both the product and package; and, where applicable, the letters "FP" to indicate that the product is within a designated product category and eligible for Federal preferred procurement. The certification mark is owned, and its use is managed by, USDA (standard trademark law definition applies).

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.)

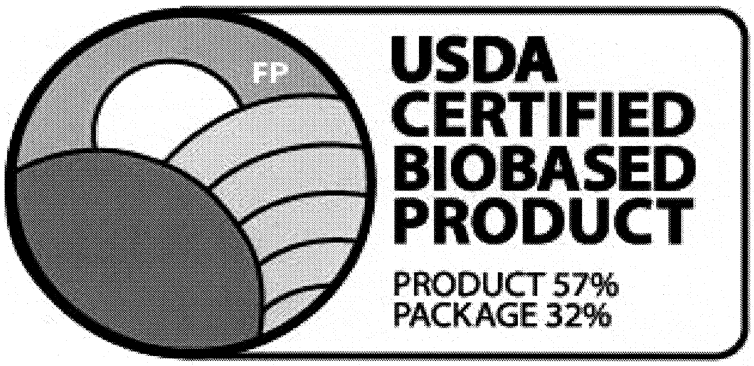

Figure 3. USDA Certified Biobased Product & Package Certification Mark

(Note: actual size will vary depending on application.)

Certified biobased product. A biobased product for which the manufacturer or vendor of the product has received approval from USDA to affix to the product the "USDA Certified Biobased Product" certification mark.

Days. As used in this part means calendar days.

Designated item. For the purposes of this part means product categories (generic groupings of products that perform the same function) within which the products have been afforded a procurement preference by Federal agencies under the BioPreferred Program. These BioPreferred Products have been identified for Federal preferred procurement under subpart B of part 2902 of this title.

Designated representative. An entity authorized by a manufacturer or vendor to affix the USDA certification mark to the manufacturer's or vendor's certified biobased product or its packaging.

Intermediate ingredients or feedstocks. Materials or compounds made in whole or in significant part from biological products, including renewable agricultural materials (including plant, animal, and marine materials) or forestry materials, that are subsequently used to make a more complex compound or product. For the purposes of this subpart, intermediate ingredients or feedstocks do not include raw agricultural or forestry materials, but represent those materials that can be put into a new cycle of production and finishing processes to create finished materials, ready for distribution and consumption.

ISO. The International Organization for Standardization, a network of national standards institutes working in partnership with international organizations, governments, industries, business, and consumer representatives.

ISO 9001 conformant. An entity that meets all of the requirements of the ISO 9001 standard, but that is not required to be ISO 9001 certified. ISO 9001 refers to the International Organization for Standardization's standards and guidelines relating to "quality management" systems. "Quality management" is defined as what the manufacturer does to ensure that its products or services satisfy the customer's quality requirements and comply with any regulations applicable to those products or services.

Manufacturer. An entity that performs the necessary chemical and/or mechanical processes to make a final marketable product.

Mature market products. Biobased products that are not eligible for Federal preferred procurement or labeling as defined under subpart B of part 2902 of this title because they had significant national market penetration in 1972.

Other entity. Any person, group, public or private organization, or business other than USDA, or manufacturers or vendors of biobased products that may wish to use the "USDA Certified Biobased Product" certification mark in informational or promotional material related to a certified biobased product.

Program Manager. The manager of the BioPreferred Program.

USDA. The United States Department of Agriculture.

Vendor. An entity that offers for sale final marketable biobased products that are produced by manufacturers.

§ 2904.3 Applicability.

(a) *Manufacturers, vendors, and designated representatives.* The requirements in this part apply to all manufacturers and vendors, and their designated representatives, who wish to participate in the USDA voluntary labeling program for biobased products. Manufacturers and vendors wishing to participate in the voluntary labeling program are required to obtain and maintain product certification.

(b) *Other entities.* The requirements in this part apply to other entities who wish to use the certification mark in promoting the sales or the public awareness of certified biobased products.

§ 2904.4 Criteria for product eligibility to use the certification mark.

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

(a) *Biobased product.* The product for which certification is sought must be a biobased product as defined in § 2904.2 of this part.

(b) *Minimum biobased content.* The biobased content of the product must be equal to or greater than the applicable minimum biobased content, as described in paragraphs (b)(1) through (b)(4) of this section.

(1) *BioPreferred Products.*

(i) *Product is within a single product category.* If the product is within a single product category that, at the time the application for certification is submitted, has been designated by USDA for Federal preferred procurement, the applicable minimum biobased content is the minimum biobased content specified for the item as found in subpart B of 7 CFR part 2902.

(ii) *Product is within multiple product categories.* If a biobased product is marketed within more than one product category identified for preferred Federal purchasing, uses the same packaging for each product, and the applicant seeks certification of the product, the product's biobased content must meet or exceed the specified minimum biobased content for each of the applicable product categories in order to use the certification mark on the product. However, if the manufacturer packages the product differently for each product category, then the applicable minimum biobased contents are those established under paragraph (b)(1)(i) of this section for each product category for which the applicant seeks to use the certification mark.

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

(i) If the product is not an intermediate ingredient or feedstock, and is not within a product category eligible for Federal preferred procurement at the time the application for certification is submitted, the applicable minimum biobased content is 25 percent. 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 product to be labeled.

(ii) If a product certified under paragraph (b)(2)(i) of this section is within a product 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 2902.

(3) *Products that are intermediate ingredients or feedstocks.*

(i) If the product is an intermediate ingredient or feedstock 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. 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 intermediate ingredient or feedstock product to be labeled.

(ii) If a product certified under paragraph (b)(3)(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 2902.

§ 2904.5 Initial approval process.

(a) *Application.* Manufacturers and vendors seeking USDA approval to use the certification mark for an eligible biobased product must submit a USDA-approved application for each biobased product. A standardized application form and instructions are available on the USDA BioPreferred Program Web site (*http://www.biopreferred.gov*). The contents of an acceptable application are as specified in paragraphs (a)(1) through (a)(4) of this section.

(1) *General content.* The applicant must provide contact information and product information including all brand names or other identifying information, biobased content and testing documentation, intended uses, and, if applicable, the corresponding product category classification for Federal preferred procurement. The applicant must attach to the application documentation demonstrating that the reported biobased content was tested by a third-party testing entity that is ISO 9001 conformant.

(2) *Certifications.* The applicant must certify in the application that the product for which use of the certification mark is sought is a biobased product as defined in § 2904.2 of this part.

(3) *Commitments.* The applicant must sign a statement in the application that commits the applicant to submitting to USDA the information specified in paragraph (c)(1) through (c)(4) of this section, which USDA will post to the USDA BioPreferred Program Web site, and to providing USDA with up-to-date information for posting on this Web site.

(4) *Application fee.* Effective (date to be added after authority to collect fee is granted), applicants must submit an application fee of $500 with each completed application for certification. Instructions for submitting the application fee are available on the USDA BioPreferred Program Web site (*http://www.biopreferred.gov*), along with the application form and instructions.

(b) *Evaluation of applications.* (1) USDA will evaluate each application to determine if it contains the information specified in paragraph (a) of this section. If USDA determines that the application is not complete, USDA will return the application to the applicant with an explanation of its deficiencies. Once the deficiencies have been addressed, the applicant may resubmit the application, along with a cover letter explaining the changes made, for re-evaluation by USDA. USDA will evaluate resubmitted applications separately from first-time applications, and those with the earliest original application submittal date will be given first priority.

(2)(i) USDA will evaluate each complete application to determine compliance with the criteria specified in § 2904.4. USDA will provide a written response to each applicant within 60 days after the receipt of a complete application, informing the applicant of whether the application has been conditionally approved or has been disapproved.

(ii) For those applications that are conditionally approved, a notice of certification, as specified in paragraph (c) of this section, must be issued before the use of the certification mark can begin.

(iii) For those applications that are disapproved, USDA will issue a notice of denial of certification and will inform the applicant in writing of each criterion not met. Applicants who receive a notice of denial of certification may appeal using the procedures specified in § 2904.6.

(c) *Notice of certification.* After notification that its application has been conditionally approved, the applicant must provide to USDA (for posting by USDA on the USDA BioPreferred Program Web site) the information specified in paragraphs (c)(1) through (c)(4) of this section. Once USDA confirms that the information is received and complete, USDA will issue a notice of certification to the applicant. Upon receipt of a notice of certification, the applicant may begin using the certification mark on the certified biobased product.

(1) The product's brand name(s), or other identifying information.

(2) Contact information, including the name, mailing address, email address, and telephone number of the applicant.

(3) The biobased content of the product.

(4) A hot link directly to the applicant's Web site (if available).

(d) *Term of certification.*

(1) The effective date of certification is the date that the applicant receives a notice of certification from USDA. Except as specified in paragraphs (d)(2)(i) through (d)(2)(iii) 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)(i) If the product formulation of a certified product is changed such that the biobased content of the product is reduced to a level below that reported in the approved application, the existing certification will not be valid for the product under the revised conditions and the manufacturer or vendor, as applicable, and its designated representatives must discontinue affixing the certification mark to the product and must not initiate any further advertising of the product using the certification mark. USDA will consider a product under such revised conditions to be a reformulated product, and the manufacturer or vendor, as applicable, must submit a new application for certification using the procedures specified in paragraph (a) of this section.

(ii) If the product formulation of a certified product is changed such that the biobased content of the product is increased from the level reported in the approved application, the existing certification will continue to be valid for the product.

(iii) If the applicable required minimum biobased content for a product to be eligible to display the certification mark is revised by USDA, manufacturers and vendors may continue to label their previously certified product only if it meets the new minimum biobased content level. In those cases where the biobased content of a certified product fails to meet the new minimum biobased content level, USDA will notify the manufacturer or vendor that their certification is no longer valid. Such manufacturers and vendors must increase the biobased content of their product to a level at or above the new minimum biobased content level and must re-apply for certification within 60 days if they wish to continue to use the certification mark. Manufacturers and vendors who have re-applied for certification may continue using the existing certification mark until they receive notification from USDA on the results of their re-application for certification.

§ 2904.6 Appeal processes.

An applicant for certification may appeal a notice of denial of certification to the Program Manager. Entities that have received a notice of violation, and manufacturers and vendors of certified biobased products who have received a notice of suspension or revocation, may appeal to the Program Manager.

(a)(1) Appeals to the Program Manager must be filed within 30 days of receipt by the appellant of a notice of denial of certification, a notice of violation, a notice of suspension, or a notice of revocation. Appeals must be filed in writing and addressed to: Program Manager, USDA Voluntary Labeling Program for Biobased Products, Room 361, Reporters Building, 300 Seventh Street, SW., Washington, DC 20024.

(2) All appeals must include a copy of the adverse decision and a statement of the appellant's reasons for believing that the decision was not made in accordance with applicable program regulations, policies, or procedures, or otherwise was not proper.

(b)(1) If the Program Manager sustains an applicant's appeal of a notice of denial of certification, USDA will issue a notice of certification to the applicant for its biobased product.

(2) If the Program Manager sustains a manufacturer's or vendor's appeal of a notice of violation, USDA will rescind the notice and no further action will be taken by USDA.

(3) If the Program Manager sustains a manufacturer's or vendor's appeal of a notice of suspension, the manufacturer, vendor, and their designated representative(s) may immediately resume affixing the certification mark to the certified biobased product and USDA will reinstate the product's information to the USDA BioPreferred Program Web site.

(4) If the Program Manager sustains a manufacturer's or vendor's appeal of a notice of revocation, the manufacturer or vendor, and its designated representatives may immediately resume affixing the certification mark to the certified biobased product and sell and distribute the certified biobased product with the certification mark. In addition, USDA will reinstate the product's information to the USDA BioPreferred Program Web site.

(c) If the Program Manager sustains a manufacturer's or vendor's appeal of its product's exclusion from the program, the manufacturers or vendors may then apply for certification to use the certification mark on that product, as specified in § 2904.5(a) of this part.

(d) Appeals of any of the Program Manager's decisions may be made to the USDA Assistant Secretary for Administration. Appeals must be made, in writing, within 30 days of receipt of the Program Manager's decision and addressed to: Assistant Secretary for Administration, Room 209A, Whitten Building, 1400 Independence Avenue, SW., Washington, DC 20250–0103. If the Assistant Secretary for Administration sustains an appeal, the provisions of paragraph (b) of this section will apply.

§ 2904.7 Requirements associated with the certification mark.

(a) *Who may use the certification mark*?

(1) *Manufacturers and vendors.* Only manufacturers and vendors who have received a notice of certification, or designated representatives of the manufacturer or vendor, may affix the official certification mark (in one of the three variations, as applicable) to the product or its packaging. A manufacturer or vendor who has received a notice of certification for a product under this part:

(i) May use the certification mark on the product, its packaging, and other related materials including, but not limited to, advertisements, catalogs, specification sheets, procurement databases, promotional material, Web sites, or user manuals for that product, according to the requirements set forth in this section; and

(ii) Is responsible for the manner in which the mark is used by its companies, as well as its designated representatives, including advertising agencies, marketing and public relations firms and subcontractors.

(2) *Other entities.*

(i) Other entities may use the mark to advertise or promote certified biobased products in materials including, but not limited to, advertisements, catalogs, procurement databases, Web sites, and promotional and educational materials, as long as the manufacturer or vendor of the product, or one of their designated representatives, has affixed the mark to the product or its packaging.

(ii) Other entities may use the certification mark; the phrase "USDA Certified Biobased Product/Package/Product & Package," as applicable; and the BioPreferred Program name in general statements as described in paragraph (b) of this section, as long as the statements do not imply that a non-certified biobased product is certified.

(b) *Correct usage of the certification mark.*

(1) The certification mark can be affixed only to certified biobased products and their associated packaging.

(2) The certification mark may be used in material including, but not limited to, advertisements, catalogs, procurement databases, Web sites, and promotional and educational materials to distinguish products that are certified for use of the label from those that are not certified. The certification mark may be used in advertisements for both certified biobased products and non-certified/labeled products if the advertisement clearly indicates which products are certified/labeled. Care must be taken to avoid implying that any non-certified products are certified.

(3) The certification mark may be used without reference to a specific certified biobased product only when informing the public about the purpose of the certification mark. For example, the following or similar claim is acceptable: "Look for the 'USDA Certified Biobased Product' certification mark. It means that the product meets USDA standards for the amount of biobased content and the manufacturer or vendor has provided relevant information on the product to be posted on the USDA BioPreferred Program Web site." This exception allows manufacturers, vendors, and other entities to use the certification mark in documents such as corporate reports, but only in an informative manner, not as a statement of product certification.

(4) The certification mark may appear next to a picture of the product(s) or text describing it.

(5) The certification mark must stand alone and not be incorporated into any other certification mark or logo designs.

(6) The certification mark may be used as a watermark provided the use does not violate any usage restrictions specified in this part.

(7) The text portion of the certification mark must be written in English and may not be translated, even when the certification mark is used outside of the United States.

(c) *Incorrect usage of the certification mark.*

(1) The certification mark shall not be used on any product that has not been certified by USDA as a "USDA Certified Biobased Product."

(2) The certification mark shall not be used on any advertisements or informational materials where both certified biobased products and non-certified products are shown unless it is clear that the certification mark applies to only the certified biobased product(s).

(3) The certification mark shall not be used to imply endorsement by USDA or the BioPreferred Program of any particular product, service, or company.

(4) The certification mark shall not be used in any form that could be misleading to the consumer.

(5) The certification mark shall not be used by manufacturers or vendors of

certified products in a manner disparaging to USDA or any other government body.

(6) The certification mark shall not be used with an altered certification mark or incorporated into other label or logo designs.

(7) The certification mark shall not be used on business cards, company letterhead, or company stationery.

(8) The certification mark shall not be used in, or as part of, any company name, logo, product name, service, or Web site, except as may be provided for in this part.

(9) The certification mark shall not be used in a manner that violates any of the applicable requirements contained in this part.

(d) *Imported products.* The certification mark can be used only with a product that is certified by USDA under this part. The certification mark cannot be used to imply that a product meets or exceeds the requirements of biobased programs in other countries. Products imported for sale in the U.S. must adhere to the same guidelines as U.S.-sourced biobased products. Any product sold in the U.S. as a "USDA Certified Biobased Product/Package/ Product & Package" must have received certification from USDA.

(e) *Contents of the certification mark.* The certification mark shall consist of the certification mark artwork, the biobased content percentage, and one of the three variations of text specified in paragraphs (e)(1) through (e)(3) of this section, as applicable.

(1) USDA Certified Biobased Product.

(2) USDA Certified Biobased Product: Package.

(3) USDA Certified Biobased Product & Package.

(f) *Physical aspects of the certification mark.* The certification mark artwork may not be altered, cut, separated into components, or distorted in appearance or perspective. Certification marks that are applied to biobased products that have been designated for preferred Federal procurement will include the letters "FP" as part of the certification mark artwork. The certification mark must appear only in the colors specified in paragraphs (f)(1) through (f)(3) of this section, unless approval is given by USDA for an exception.

(1) A multi-color version of the certification mark is preferred. The certification mark colors to be applied will be stipulated in the "Marketing Guides" document available on the USDA BioPreferred Program Web site (*http://www.biopreferred.gov*).

(2) A one-color version of the certification mark may be substituted for the multi-color version as long as the one color used is one of the multi-color choices reapplied without modification. Further guidance on the one-color certification mark application will also be detailed in the "Marketing Guides."

(3) A black and white version of the certification mark is acceptable.

(g) *Placement of the certification mark.*

(1) The certification mark can appear directly on a product, its associated packaging, in user manuals, and in other materials including, but not limited to, advertisements, catalogs, procurement databases, and promotional and educational materials.

(2) The certification mark shall not be placed in a manner that is ambiguous about which product is a certified biobased product or that could indicate certification of a non-certified product.

(3) When used to distinguish a certified biobased product in material including, but not limited to, advertisements, catalogs, procurement databases, Web sites, and promotional and educational materials, the certification mark must appear near a picture of the product or the text describing it.

(i) If all products on a page are certified biobased products, the certification mark may be placed anywhere on the page.

(ii) If a page contains a mix of certified biobased products and non-certified products, the certification mark shall be placed in close proximity to the certified biobased products. An individual certification mark near each certified biobased product may be necessary to avoid confusion.

(h) *Minimum size and clear space recommendations for the certification mark.*

(1) The certification mark may be sized to fit the individual application as long as the correct proportions are maintained and the certification mark remains legible.

(2) A border of clear space must surround the certification mark and must be of sufficient width to offset it from surrounding images and text and to avoid confusion. If the certification mark's color is similar to the background color of the product or packaging, the certification mark in a contrasting (i.e., black, white) color may be used.

(i) *Where to obtain copies of the certification mark artwork.* The certification mark artwork is available at the USDA BioPreferred Program Web site *http://www.biopreferred.gov*.

§ 2904.8 Violations.

This section identifies the types of actions that USDA considers violations under this part and the penalties (e.g., the suspension or revocation of certification) associated with such violations.

(a) *General.* Violations under this section occur on a per product basis and the penalties are to be applied on a per product basis. Entities cited for a violation under this section may appeal using the provisions in § 2904.6. If certification for a product is revoked, the manufacturer or vendor whose certification has been revoked may seek re-certification for the product using the procedures specified under the provisions in § 2904.5.

(b) *Types of violations.* Actions that will be considered violations of this part include, but are not limited to, the following specific examples:

(1) *Biobased content violations.* The Program Manager will utilize occasional random testing of certified biobased products to compare the biobased content of the tested product with the product's applicable minimum biobased content and the biobased content reported by the manufacturer or vendor in its approved application. Such testing will be conducted using ASTM Method D6866. USDA will provide a copy of the results of its testing to the applicable manufacturer or vendor.

(i) If USDA testing shows that the biobased content of a certified biobased product is less than its applicable minimum biobased content, then a violation of this part will have occurred.

(ii) If USDA testing shows that the biobased content is less than that reported by the manufacturer or vendor in its approved application, but is still equal to or greater than its applicable minimum biobased content(s), USDA will provide written notification to the manufacturer or vendor. The manufacturer or vendor must submit, within 90 days from receipt of USDA written notification, a new application for the lower biobased content. Failure to submit a new application within 90 days will be considered a violation of this part.

(A) The manufacturer or vendor can submit in the new application the biobased content reported to it by USDA in the written notification.

(B) Alternatively, the manufacturer or vendor may elect to retest the product in question and submit the results of the retest in the new application. If the manufacturer or vendor elects to retest the product, it must test a sample of the current product.

(2) *Certification mark violations.*

(i) Any usage or display of the certification mark that does not conform to the requirements specified in § 2904.7.

(ii) Affixing the certification mark to any product prior to issuance of a notice of certification from USDA.

(iii) Affixing the certification mark to a certified biobased product during periods when certification has been suspended or revoked.

(3) *Application violations.* Knowingly providing false or misleading information in any application for certification of a biobased product constitutes a violation of this part.

(4) *USDA BioPreferred Program Web site violations.* Failure to provide to USDA updated information when the information for a certified biobased product becomes outdated or when new information for a certified biobased product becomes available constitutes a violation of this part.

(c) *Notice of violations and associated actions.* USDA will provide the applicable manufacturer or vendor or their designated representatives and any involved other entity known to USDA written notification of any violations identified by USDA. USDA will first issue a preliminary notice that apparent violations have been identified. If satisfactory resolution of the apparent violation is not reached within 30 days from receipt of the preliminary notice, USDA will issue a notice of violation. Entities who receive a notice of violation for a biobased content violation must correct the violation(s) within 90 days from receipt of the notice of violation. Entities who receive a notice of violation for other types of violations also must correct the violation(s) within 90 days from receipt of the notice of violation. If the entity receiving a notice of violation is a manufacturer, a vendor, or a designated representative of a manufacturer or vendor, USDA will pursue notices of suspensions and revocation, as discussed in paragraphs (c)(1) and (c)(2) of this section. USDA reserves the right to further pursue action against these entities as provided for in paragraph (c)(3) of this section. If the entity receiving a notice of violation is an "other entity" (*i.e.,* not a manufacturer, vendor, or designated representative), then USDA will pursue action according to paragraph (c)(3) of this section. Entities that receive notices of suspension or revocation may appeal such notices using the procedures specified in § 2904.6.

(1) *Suspension.*

(i) If a violation is applicable to a manufacturer, vendor, or designated representative and the applicable entity fails to make the required corrections within 90 days of receipt of a notice of violation, USDA will notify the manufacturer or vendor, as appropriate, of the continuing violation, and the USDA certification for that product will be suspended. As of the date that the manufacturer or vendor receives a notice of suspension, the manufacturer or vendor and their designated representatives must not affix the certification mark to any of that product, or associated packaging, not already labeled and must not distribute any additional products bearing the certification mark. USDA will both remove the product information from the USDA BioPreferred Program Web site and actively communicate the product suspension to buyers in a timely and overt manner.

(ii) If, within 30 days from receipt of the notice of suspension, the manufacturer or vendor whose USDA product certification has been suspended makes the required corrections and notifies USDA that the corrections have been made, the manufacturer or vendor and their designated representatives may, upon receipt of USDA approval of the corrections, resume use of the certification mark. USDA will also restore the product information to the USDA BioPreferred Program Web site.

(2) *Revocation.*

(i) If a manufacturer or vendor whose USDA product certification has been suspended fails to make the required corrections and notify USDA of the corrections within 30 days of the date of the suspension, USDA will notify the manufacturer or vendor that the certification for that product is revoked.

(ii) As of the date that the manufacturer or vendor receives the notice revoking USDA certification, the manufacturer or vendor and their designated representatives must not affix the certification mark to any of that product not already labeled. In addition, the manufacturer or vendor and their designated representatives are prohibited from further sales of product to which the certification mark is affixed.

(iii) If a manufacturer or vendor whose product certification has been revoked wishes to use the certification mark, the manufacturer or vendor must follow the procedures required for original certification.

(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 7 CFR part 3017. 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.

§ 2904.9 Recordkeeping requirements.

(a) *Records.* Manufacturers and vendors shall maintain records documenting compliance with this part for each product that has received certification to use the label, as specified in paragraphs (a)(1) through (a)(3) of this section.

(1) The results of all tests, and any associated calculations, performed to determine the biobased content of the product.

(2) The date the applicant receives certification from USDA, the dates of changes in formulation that affect the biobased content of certified biobased products, and the dates when the biobased content of certified biobased products was tested.

(3) Documentation of analyses performed by manufacturers to support claims of environmental or human health benefits, life cycle cost, sustainability benefits, and product performance made by the manufacturer.

(b) *Record retention.* For each certified biobased product, records kept under paragraph (a) of this section must be maintained for at least three years beyond the end of the label certification period (*i.e.,* three years beyond the period of time when manufacturers and vendors cease using the certification mark). Records may be kept in either electronic format or hard copy format. All records kept in electronic format must be readily accessible, and/or provided by request during a USDA audit.

§ 2904.10 Oversight and monitoring.

(a) *General.* USDA will conduct oversight and monitoring of manufacturers, vendors, designated representatives, and other entities involved with the voluntary product labeling program to ensure compliance with this part. This oversight will include, but not be limited to, conducting facility visits of manufacturers and vendors who have certified biobased products, and of their designated representatives. Manufacturers, vendors, and their designated representatives are required to cooperate fully with all USDA audit efforts for the enforcement of the voluntary labeling program.

(b) *Biobased content testing.* USDA will conduct biobased content testing of certified biobased products, as described in § 2904.8(b)(1) to ensure compliance with this Part.

(c) *Inspection of records.* Manufacturers, vendors, and their designated representatives must allow Federal representatives access to the records required under § 2904.9 for

inspection and copying during normal Federal business hours.

Dated: January 10, 2011.

Pearlie S. Reed,

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

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