DEPARTMENT OF AGRICULTURE

Office of Procurement and Property Management

7 CFR Parts 3201 and 3202

Rural Business-Cooperative Service

7 CFR Part 4270

[Docket No. RBS–22–BUSINESS–0004]

RIN 0570–AB05

Biobased Markets Program

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Proposed rule; request for comments.

SUMMARY: The Rural Business-Cooperative Service (RBCS or the Agency), an agency of the Rural Development (RD) mission area within the U.S. Department of Agriculture (USDA), is issuing a proposed rule with request for comments to adopt changes from the Agriculture Improvement Act of 2018 (2018 Farm Bill). These proposed changes include the merger of the Guidelines for Designating Biobased Products for Federal Procurement and the Voluntary Labeling Program for Biobased Products into one streamlined regulation, Biobased Markets (BioPreferred) Program. The plain language summary of the proposal is available on *Regulations.gov* in the docket for rulemaking.

DATES: Comments are due on or before March 25, 2024.

ADDRESSES: Information regarding the BioPreferred® Program is available at *https://www.biopreferred.gov.*

Comments may be submitted on this rulemaking using the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.

All submissions must include the Agency name, Docket Number and Regulatory Information Number (RIN). Also, submissions should be identified as ''Redesignation of the BioPreferred Program.''

FOR FURTHER INFORMATION CONTACT: Vernell Thompson, Procurement Analyst, USDA RD, 1400 Independence Avenue SW, Washington, DC 20250–1522, STOP 3250; email: *vernell.thompson@usda.gov;* phone (202) 720–4145.

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

I. Authority

The USDA Biobased Markets Program, called the BioPreferred® Program, is established under the authority of section 9002 of the Farm Security and Rural Investment Act (FSRIA) of 2002 (Pub. L. 107–171) (the 2002 Farm Bill), as amended by the Food, Conservation, and Energy Act of 2008 (Pub. L. 10–246) (the 2008 Farm Bill), the Agricultural Act of 2014 (Pub. L. 113–79) (the 2014 Farm Bill), and the Agriculture Improvement Act of 2018 (Pub. L. 115–334) (the 2018 Farm Bill). Section 9002 of the 2002 Farm Bill, as amended by the 2008, 2014, and 2018 Farm Bills, is referred to in this proposed rule as section 9002 of FSRIA.

II. Background

The Agency is proposing to implement the amendments made to section 9002 of FSRIA by the 2018 Farm Bill by combining the Guidelines for Designating Biobased Products for Federal Procurement (7 CFR part 3201) and the Voluntary Labeling Program for Biobased Products (7 CFR part 3202), the legacy rules of the BioPreferred Program, into one regulation, 7 CFR part 4270, and proposing to make amendments as outlined in section IV of this proposed rule.

The legacy rules established the two core initiatives of the BioPreferred Program. part 3201 detailed the rules for the procurement of Biobased Products by Federal agencies and their contractors, established the process for designating categories of Biobased Products for preferred Federal procurement, maintained the list of Designated Product Categories, and outlined the requirements for Biobased Products to qualify for preferred Federal procurement. Part 3202 established the rules for manufacturers and vendors of Biobased Products to become certified to use the USDA Certified Biobased Product Label (Label) and provided rules for maintaining certification and utilizing the Label. With this rulemaking, the Agency is proposing to merge the legacy rules into one streamlined regulation which will facilitate the objective of the BioPreferred Program, which is to encourage the increased use of Biobased Products in all market sectors. Additionally, the Agency believes these changes will benefit BioPreferred Program Stakeholders by implementing process improvements and tying the two initiatives more closely together, making it easier to qualify for both initiatives.

III. Organization of the Rule

To help the public locate existing regulatory provisions found in the new rule, the Agency provides the following table showing sections under the new BioPreferred Program regulations and where the information and requirements were previously located in the legacy regulations.

TABLE 1—BIOPREFERRED PROGRAM CFR SECTIONS

New biopreferred program regulation section number and title	Current (legacy) regulations section numbers and titles
§ 4270.1 Purpose and Scope.	§ 3201.1 Purpose and scope. § 3202.1 Purpose and scope.
§ 4270.2 Definitions	§ 3201.2 Definitions. § 3202.2 Definitions.
§ 4270.3 Applicability	§ 3201.3 Applicability to Federal procurements. § 3202.3 Applicability.

TABLE 1—BIOPREFERRED PROGRAM CFR SECTIONS—Continued

New biopreferred program regulation section number and title	Current (legacy) regulations section numbers and titles
§ 4270.4 Criteria for Eligibility.	§ 3202.4 Criteria for product eligibility to use the certification mark. § 3201.5 Category designation.
§ 4270.5 Procurement programs.	§ 3201.4 Procurement programs.
§ 4270.6 Category designation.	§ 3201.5 Category designation. § 3202.5 Initial approval process.
§ 4270.7 Determining Biobased Content.	§ 3201.7 Determining biobased content.
§ 4270.8 [Reserved].	
§ 4270.9 Initial Approval Process.	§ 3202.5 Initial approval process. § 3202.8 Violations.
§ 4270.10 [Reserved].	
§ 4270.11 Requirements Associated with Promotional Certification Materials.	§ 3202.7 Requirements associated with the certification mark.
§ 4270.12 Violations of Program Requirements.	§ 3202.8 Violations.
§ 4270.13 Appeal Process.	§ 3202.6 Appeal processes.
§ 4270.14 Reporting and Recordkeeping.	§ 3201.6 Providing product information to Federal agencies. § 3201.8 Determining price, environmental and health benefits, and performance. § 3202.9 Recordkeeping requirements.
§ 4270.15 Oversight and Monitoring.	§ 3202.10 Oversight and monitoring.
§ 4270.99 OMB Control Number.	

IV. Summary of Proposed Changes

A. Section 4270.1 Purpose and Scope

The purpose of this proposed rule is to establish procedures and guidelines for the implementation of the BioPreferred Program by combining the purpose and scope of §§ 3201.1 and 3202.1 into one.

B. Section 4270.2 Definitions

The Agency is combining the definitions sections of §§ 3201.2 and 3202.2 into one and amending as follows:

a. *Merged Definitions Only.* The following definitions were merged from §§ 3201.2 and 3202.2 without revisions or substantial revisions: ASTM International (ASTM), Biobased Content, Biodegradability, Biological Products, Complex Assembly, Days, Federal agency, Forest Product, formulated product, FSRIA, Ingredient, ISO, ISO 9001 Conformant, Other Entity, Renewable Chemical, Secretary, and USDA. The following terms do not occur anywhere throughout the proposed rule other than in specific other definitions (term indicated in parenthesis): Forest Product (Biobased Product), Renewable Chemical (Biobased Product), and Biological Products (Biobased Product and Intermediate Ingredient or Feedstock). Defining these terms associated with these specific definitions is important to the Agency to provide context and clarity.

b. *Removal of Existing Definitions.* The Agency is removing the definitions for BEES, Biobased components, Designated Intermediate Ingredient or Feedstock category, Diluent, Engineered wood products, EPA-designated recovered content product, FCEA, Filler, Forest thinnings, Functional unit, Manufacturer, Neat product, Program manager, Relative price, Small and emerging private business enterprise, Sustainably managed forests, and Vendor because these terms are not referenced in the combined rule.

c. *Revising Existing Definitions.* The Agency is revising the following definitions:

1. *Agricultural materials.* The Agency is making minor changes to clarify this definition by including a complete list of exclusions commensurate with section 9002 of FSRIA. The Agency believes that by adding this clarification, interested parties will be able to find these exclusions more easily. This term does not occur anywhere throughout the proposed rule other than in the specific definitions for Biobased Product and Intermediate Ingredient or Feedstock. The Agency believes it is important to define this as a standalone term to provide context and clarity.

2. *Applicable minimum biobased content.* The Agency is amending this definition to note that the Applicable Minimum Biobased Content is the level set by USDA that a product must meet or exceed to qualify for both the Federal procurement preference and use of the Label. This change is necessary because the combined rule provides one set of requirements to qualify for both the Federal procurement preference and the use of the Label. Previously, the term was defined only with respect to the use of the Label.

3. *Biobased product.* The Agency is amending this definition to include Renewable Chemicals, as directed by section 9002 of FSRIA. In addition to this change, the Agency is also amending the definition of Biobased Product to clarify that, for the purposes of the BioPreferred Program, the term does not include motor vehicle fuels, heating oils, or electricity. Motor vehicle fuels, heating oils, and electricity have always been excluded from participating in the BioPreferred Program by statute, and the Agency believes that by adding this clarification to the definition of Biobased Product, interested parties will be able to find these exclusions more easily.

4. *Certification icon.* The Agency is changing the term ''Certification mark artwork'' to ''Certification Icon,'' and the definition for this term is being amended such that Certification Icon refers only to the circular logo that depicts the symbols of the sun, the soil, and the aquatic environments rather than to the complete Label. The Agency believes this change will make it easier to clarify what artwork can be used for Program participants and Other Entities wishing to promote Certified Biobased Products.

5. *Certified biobased product.* The Agency is amending the definition of Certified Biobased Product to describe that certified products are eligible for preferred Federal procurement and that they have been approved to display the Label. The Agency believes this change, in conjunction with the process changes described in this preamble, will satisfy the requirement of section 9002 of FSRIA to establish one integrated process through which products can both be determined to be eligible for preferred Federal procurement and approved to use the Label.

6. *Designated product category.* The Agency is amending this definition to include that Certified Biobased Products that meet the criteria for at least one designated category will be eligible for the procurement preference. The Agency is also amending the definition to state that these categories will be identified in the Register of Designated Categories on the BioPreferred Program website at *https://www.biopreferred.gov* and the Agency is adding the term Register of Designated Categories to refer to the list of product categories that have been designated for the procurement preference. Designated Product Categories were identified in 7 CFR part 3201, subpart B. Because of this, the process for adding and amending designated categories required the Agency to go through the rulemaking process, which made such changes time consuming. The Agency believes that by identifying Designated

Product Categories on the BioPreferred Program website at *https://www.biopreferred.gov* rather than in the CFR, the Agency will be able to make changes to Designated Product Categories more readily.

7. *Designated representative.* The Agency is amending this definition to clarify that a Designated Representative is an entity that has been authorized to act on behalf of a Participating Organization throughout the certification process, rather than only when affixing the Label to the Certified Biobased Product.

8. *Intermediate Ingredient or Feedstock.* The Agency is amending this definition to use the new term Participating Organization in place of manufacturer or vendor. The definition is otherwise unchanged.

9. *Procuring Agency.* The Agency is amending this definition to clarify that the term Procuring Agency applies to businesses contracting with any Federal agency to perform work under the contract, rather than applying to persons contracting with any Federal agency. The Agency believes this change will make it clear that the term applies to business entities and not individuals.

10. *Qualified biobased product.* The Agency is amending this definition to state that Designated Product Categories will be found on the BioPreferred Program website at *https://www.biopreferred.gov.*

11. *Stakeholder.* The Agency is changing the term Relevant Stakeholder to Stakeholder. The Agency believes it is redundant to specify Relevant Stakeholders as the term Stakeholder implies relevancy. The definition is otherwise unchanged.

12. *USDA Certified Biobased Product Label.* The Agency is amending the term Certification Mark to be referred to as USDA Certified Biobased Product Label, and the definition for this term is being amended to include figures depicting the Label. The Agency believes this change will eliminate any confusion caused by using the general term Certification Mark to refer to the Label.

d. *Adding New Definitions.* The agency is adding the definitions below. An explanation for the addition of these definitions is provided.

1. *Biobased content testing.* The Agency is defining this term because it is regularly used when the Agency discusses testing and verifying the Biobased Content of a product for the purposes of participating in the BioPreferred Program.

2. *Certified application.* The Agency is defining this term because it is regularly used when the Agency discusses participating in the BioPreferred Program with Program Stakeholders. The Agency believes defining this term will help Stakeholders understand the term in context more readily.

3. *Defined product category.* The Agency is adding this term to refer to a category that has been established for a specified grouping of Biobased Products with similar characteristics and intended uses. The Agency is adding this term to provide a distinction between the Other product category and product categories that have been established for a specified grouping of Biobased Products. Although these changes are not required by section 9002 of FSRIA, the Agency believes the added term and definition will provide clarity to the rule.

4. *Innovative criteria.* This term is regularly used when the Agency discusses participating in the BioPreferred Program with Program Stakeholders. The Agency believes defining this term will help Stakeholders understand the terms in context more readily.

5. *Parent product.* This term is regularly used when the Agency discusses participating in the BioPreferred Program with Program Stakeholders. The Agency believes defining this term will help Stakeholders understand the terms in context more readily.

6. *Participating organization.* The Agency is defining this term to replace the previously defined terms manufacturer and vendor. This new term describes entities that have completed steps to participate in the BioPreferred Program, including manufacturers and vendors of Biobased Products. The term vendor has caused some confusion in the past as it was not clear what qualified an entity as a vendor of a unique Biobased Product in contrast to a retailer that sells Other Entities' Biobased Products. The Agency believes that using the term Participating Organization will reduce this confusion for Stakeholders.

7. *Prequalification.* This term is regularly used when the Agency discusses participating in the BioPreferred Program with Program Stakeholders. The Agency believes defining this term will help Stakeholders understand the terms in context more readily.

8. Register of Designated Categories. This term is being added to refer to the list of product categories that have been designated for the procurement preference. The Agency believes defining this term will help Stakeholders readily identify and locate the list of Designated Product Categories as it will no longer be embedded in the BioPreferred Program's regulation.

C. Section 4270.3 Applicability

This proposed rule combines and consolidates the applicability sections of the BioPreferred Program's legacy rules, §§ 3201.3 and 3202.3. Additionally, the Agency is adding language to clarify who may participate respective of a given branded product. Over the years of implementing the BioPreferred Program, the Agency has received numerous questions regarding whether a given branded product could participate under multiple organizations, and the Agency believes this change will help clarify this question for Stakeholders. Otherwise, no major changes are being made.

D. Section 4270.4 Criteria for Eligibility

This proposed rule incorporates information from § 3202.4 with the revisions discussed below. Part 3201 did not have a section for criteria for product eligibility to use the Label.

a. *Biobased Product.* In this proposed rule, the Agency is clarifying that, to demonstrate that a product meets the definition of a Biobased Product, the Biobased Content of all products for which an application for certification is submitted must undergo Biobased Content Testing as described in § 4270.7 of this proposed rule. One of the goals of this proposed rule is to establish one set of rules for any Biobased Product to be qualified for the Federal procurement preference established by section 9002 of FSRIA and to be eligible to display the Label. Under part 3202, the Agency established a well-defined process through which Participating Organizations may apply to have their Biobased Products certified; this process requires the product to undergo Biobased Content Testing to demonstrate that the product meets the definition of a Biobased Product. Under § 3201.7, Participating Organizations were similarly required to undergo Biobased Content Testing to demonstrate that the product meets the minimum requirements; however, under § 3201.7, Participating Organizations would self-certify that the testing was completed and the product met the requirements. Through the years of implementing these rules, Stakeholders, including Federal purchasers, have provided feedback expressing uncertainty in this self-certification method due to the lack of oversight. The Agency believes that requiring Biobased Products to have their Biobased Contents tested and confirmed through a well-defined process will allow

Federal agencies to make more informed decisions when evaluating Biobased Products for purchase. Additionally, in recent years, the Agency has found that most organizations interested in participating in the BioPreferred Program elect to undergo Biobased Content Testing so that they may display the Label in addition to becoming qualified for the Federal procurement preference. Therefore, the Agency believes it is reasonable and fair to require that all Biobased Products undergo Biobased Content Testing to participate in the BioPreferred Program. Participation in the BioPreferred Program is voluntary; if an organization wishes to market their Biobased Product to Federal agencies without undergoing Biobased Content Testing through the BioPreferred Program, they may do so, provided the product meets the two other criteria for eligibility. It is not a requirement that a Biobased Product participates in the BioPreferred Program to be qualified for the Federal procurement preference.

1. *Products that are qualified for preferred Federal procurement but not certified as of the date of publication for this rule.* Due to this change in requirements for Biobased Content Testing, the Agency is including provisions in this proposed rule to provide a grace period for Participating Organizations with products that are qualified for preferred Federal procurement but not certified to use the Label. These Qualified Biobased Products will continue to remain eligible to participate in the BioPreferred Program for three years following [DATE OF PUBLICATION OF THIS FINAL RULE IN THE **FEDERAL REGISTER**] unless the product is reformulated or discontinued before three years have passed, whichever comes first. To remain eligible to participate in the BioPreferred Program after the three-year period, these products will be required to submit an application and complete the certification process as described in § 4270.9 of this proposed rule. The Agency believes it is necessary to implement a grace period for such Participating Organizations to conform to the updated BioPreferred Program rules as the Agency's goal is not to preclude any Participating Organization from being able to continue to participate in the BioPreferred Program.

2. *Exclusions.* The Agency is adding products that are intended to be ingested or inhaled such as pharmaceuticals or nutraceuticals to the list of types of products that are excluded from participating in the BioPreferred Program. Food and animal feed are already excluded by definition and, previously, it was unclear whether these exclusions include any type of product that is ingested, such as pharmaceuticals and nutraceuticals. The Agency believes it is reasonable to exclude products that are intended to be ingested or inhaled as an extension of excluding food and feed.

b. *Minimum Biobased Content.* The rule uses the language from § 3202.4(b) with no significant revisions.

1. *Products that fall under one or more defined product categories.* Section 3202.4(b)(1) established this section as Qualified Biobased Products. The rule defines a Qualified Biobased Product as one that meets the definition and Applicable Minimum Biobased Content criteria for one or more Designated Product Category, which may include the Other category. Section 3202.4(b)(1) was intended to refer specifically to products that fall into one or more Defined Product Category, not including the Other category. The Agency is renaming the Qualified Biobased Products section to Products that fall under one or more defined product categories to preserve the intent of § 3202.4(b)(1).

i. *Product is within a single product category.* The rule uses the language from § 3202.4(b)(1)(i) with a modification to indicate where the minimum Biobased Content for the defined project category can be found. In § 3202.4(b)(1)(i) the minimum Biobased Content specified for the item was found within the regulation, and the revised rule modifies this by having the defined project category found in the Register of Designated Categories on the BioPreferred Program website at *https://www.biopreferred.gov*.

ii. *Product is within multiple product categories.* The rule uses the language from § 3202.4(b)(1)(ii) with a modification to where the minimum Biobased Content is specified for the defined project category is found. This rulemaking modifies this by having the defined project category found in the Register of Designated Categories on the BioPreferred Program website at *https://www.biopreferred.gov*. This rulemaking also clarifies that a product that falls under more than one Defined Product Category must meet the minimum Biobased Content requirement for the category that most closely describes the product's primary intended use. The Agency believes this change from the legacy rules will help ensure that products meet the minimum Biobased Content requirements for the most appropriate category, and it will provide the Agency a regulatory basis for determining if a product that may fall under multiple defined categories is eligible to participate.

2. *Products that do not meet the definition of at least one Defined Product Category.* The rule uses some of the language from § 3202.4(b)(2) with modifications. In this proposed rule, the Agency is setting the minimum Biobased Content requirement for products that do not meet the definition of at least one Defined Product Category at 30 percent. Previously, the minimum Biobased Content requirement for products that do not meet the definition of at least one Defined Product Category was set at 25 percent. Given the technology advances that have taken place in the ten years since the previous minimum was set, the Agency believes it is reasonable to raise that minimum to 30 percent. The Agency believes this change will encourage Biobased Product manufacturers to incorporate more biobased feedstocks in products that are otherwise not biobased without setting the minimum so high that utilizing biobased feedstocks becomes unfeasible.

The Agency is proposing a process to evaluate products that do not fall under a Defined Product Category using the procedure outlined in § 4270.6 for adding new product categories to the Register of Designated Categories. The requirement that a product must be at or above its Applicable Minimum Biobased Content to participate in the BioPreferred Program is consistent with the legacy rules of the BioPreferred Program. The Agency believes this requirement is necessary so that the Label is not used to promote products with de minimis Biobased Content.

c. *Innovative Criteria.* The rule uses the language from §§ 3201.5(b)(2) and 3202.4(c) with a few modifications. The last sentence of the first paragraph was modified to add ''or revoke''. The Agency is adding this language to clarify that products must meet one or more Innovative Criteria throughout the life of the certification, and failure to do so may result in the product's certification being revoked. The Agency believes this change will help Participating Organizations better understand the requirements for maintaining product certification.

The rule uses the list of Innovative Criteria from §§ 3201.5(b)(2)(i) through (iv) and 3202.4(c)(1) though (4) with a few modifications. Since the implementation of the Innovative Criteria requirement, the Agency has learned that many manufacturers use technologies that reduce waste during the manufacturing process, which allows the manufacturing process to be more sustainable. The Agency believes these practices represent an innovative

approach to manufacturing products in a similar manner to using technologies that ensure high feedstock material recovery and use as described in §§ 3201.5(b)(2)(ii)(B) and 3202.4(c)(2)(ii), and therefore, the Agency is adding reducing waste to the previously established language.

The rule modifies the language from §§ 3201.5(b)(2)(iv)(C) and 3202.4(c)(4)(iii) to include agricultural wastes in the example for clarity. Through the years of implementing the Innovative Criteria requirement, the Agency has received multiple inquiries about whether using agricultural waste is considered a form of recycling. Since the implementation of the Innovative Criteria requirement, the Agency has found this criterion codified at § 3202.4(c)(4)(iii) to be too restrictive. The Agency believes the distinction that the raw material come from an urban environment eliminates many products from meeting this criterion even if the raw material used in the product is obtained in a manner that otherwise meets this criterion. Thus, in this proposed rule, the Agency is amending this criterion as codified at § 4270.4(c)(4)(iii).

Additionally, in this proposed rule the Agency is adding an innovative criterion at § 4270.4(c)(4)(iv) to allow more opportunities for products that are made from a variety of biobased raw materials to demonstrate that the raw material is obtained or processed in an innovative or ethical manner as prescribed by industry standards, which ultimately may make it easier for organizations to show that their Biobased Products meet the eligibility criteria. The Agency is also providing some examples of how a product could meet this new criterion. For example, a manufacturer that makes a laundry detergent formulated using surfactants derived from palm oil could meet this innovative criterion by showing that their palm oil has received certification from the Roundtable on Sustainable Palm Oil, verifying that the palm oil has been ethically and sustainably sourced. As another example, a manufacturer of biobased water bottles that are Cradle to Cradle Certified® through the Cradle to Cradle Products Innovation Institute could meet this innovative criterion. Products that are Cradle to Cradle Certified® are assessed for environmental and social performance to determine if the certification's standards are met across five performance categories: material health, material reutilization, renewable energy and carbon management, water stewardship, and social fairness.

E. Section 4270.5 Procurement Programs

a. *Integration into the Federal procurement framework.* The rule uses the language from § 3201.4(a) with no revisions.

b. *Federal agency preferred procurement programs.* The rule uses language from § 3201.4(b) with some amendments for clarification. The amendments are discussed below.

Section 3201.4(b)(1) established guidelines for implementing the procurement requirements associated with Biobased Products set forth by section 9002 of FSRIA. In this rulemaking, the Agency is clarifying that Federal agencies are required to maintain and implement procurement programs to ensure that Qualified Biobased Products are being purchased to the maximum extent practicable. Also, the Agency is clarifying the language from § 3201.4(b)(1)(ii) to state that these procurement programs must include a training program, previously referred to as a promotion program, to educate the Federal agency and its contractors on the requirements. The Agency believes the meaning of the term promotion program was unclear, which made it difficult for Federal agencies to implement the requirement. The Agency believes the term training program is more appropriate in this context, and the Agency has provided further explanation of the purpose of the training program for additional context.

The Agency is also clarifying the language from § 3201.4(b)(1)(iv), that the procurement program must include provisions for reporting quantities and types of Biobased Products purchased by the Federal agency and its contractors through the BioPreferred Program Portal in the System for Award Management (*https://sam.gov*), as specified under the requirements in 48 CFR 52.223–2 (Federal Acquisition Regulation (FAR)). While both Federal agencies and their contractors have always been required to report quantities and types of Biobased Products purchased, the Agency believes specifying that this requirement applies to Federal contractors as well as Federal agencies will lead to more accurate reporting of Biobased Product purchases. Additionally, the Agency believes that clarifying in the rule to whom Federal agencies and their contractors must report their biobased purchases will also lead to more complete reporting of Biobased Product purchases. The Agency hopes that more accurate and complete reporting on the purchasing of Biobased Products by Federal agencies and their contractors will allow the Agency to better determine the impact of the BioPreferred Program on Federal purchasing and vice versa.

This proposed rule adds a new provision as § 4270.5(b)(1)(v) that calls for Federal agencies review and elimination of specifications that prohibit the purchasing of Biobased Product. This new provision is being added to emphasize the primary goal of the procurement program to ensure that Qualified Biobased Products are purchased to the maximum extent practicable.

The Agency is modifying the language previously found in § 3201.4(b)(2)(i)(B), which stated that Federal agencies will adopt a policy of awarding contracts to the vendor offering a Qualified Biobased Product composed of the highest percentage of Biobased Content possible except when such products ''fail to meet performance standards set forth in the applicable specifications. . . .'' The Agency is rewording this language for clarity to say, ''fail to meet performance standards for the use to which they will be put. . . .''

Similarly, the Agency is modifying the language previously found in § 3201.4(b)(2)(i)(C), which states Federal agencies will adopt a policy of awarding contracts to the vendor offering a Qualified Biobased Product composed of the highest percentage of Biobased Content possible except when such products ''are available only at an unreasonable price.'' The Agency is rewording this for clarity to say, ''are not available at a reasonable price.'' The exception itself is stipulated by section 9002 of FSRIA. It is up to the discretion of the Federal agency or contractor to determine what price is reasonable.

This proposed rule adds a new provision as § 4270.5(b)(2)(iii) that calls for the preference program development by Federal agencies to include a policy of documenting and reporting cases where it is not possible to set specifications and award contracts in such a way that is consistent with section 9002 of FSRIA and the requirements in this proposed rule. Asking Federal agencies to document and report when they are unable to procure Qualified Biobased Products will help the Agency identify potential weaknesses in the requirements associated with Designated Product Categories or with the BioPreferred Program rules. The Agency believes receiving such feedback is vital to improving the effectiveness of the BioPreferred Program and the effectiveness of the preferred Federal purchasing initiative in particular.

Also, the Agency is modifying the language previously found in § 3201.4(b)(4) to clarify that Federal agencies should continue to establish annual targeted biobased-only procurement requirements. Previously, the language implied that this activity was completed once, with a deadline of June 15, 2016, when the activity is meant to be an ongoing practice to be evaluated each year.

c. *Procurement specifications.* This rulemaking is using some of the language from § 3201.4(c). This section is being modified because the Agency is making updates to the guidelines to Federal agencies for ensuring their procurement programs are updated when there are changes or additions to Designated Product Categories. The Agency is directing Federal agencies to ensure that their specifications for the use of Qualified Biobased Products are consistent with the guidelines provided in this proposed rule no later than six months after a Designated Product Category is finalized and listed on the BioPreferred Program's website (*https://www.biopreferred.gov*), as discussed in section IV.F of this preamble. Previously, under § 3201.4(c), Federal agencies were instructed to ensure their specifications require the use of Qualified Biobased Products ''within a specified timeframe.'' The specified timeframe was included under 7 CFR part 3201, subpart B for each individual Designated Product Category. Typically, the specified timeframe had been set as a period of one year. Shortening the timeframe from one year to six months helps ensure that new categories are established in a timely manner, and the Agency believes six months is a reasonable timeframe for Federal agencies to review and update specifications.

F. Section 4270.6 Category Designation

The Agency is making significant changes to the language in § 3201.5. The 2018 Farm Bill instructed the Agency to create one expedited process through which products may be determined to be eligible for a Federal procurement preference and approved to use the Label. The Agency evaluated options for satisfying those requirements, and, in developing the revised procedure, the Agency was able to accomplish the 2018 Farm Bill directives and establish a process that requires less time and fewer resources.

a. *Procedure.* The Agency will maintain a Register of Designated Categories on the BioPreferred Program website (*https://www.biopreferred.gov*) rather than in the Code of Federal Regulations (CFR) as was previously done in 7 CFR part 3201, subpart B. The Register of Designated Categories will include the category's name, description, required minimum Biobased Content, and the date the category was finalized as a designated category. The Register of Designated Categories will include a list of all Designated Product Categories, including categories of finished, consumer product categories; Intermediate Ingredient and Feedstock (including Renewable Chemicals) categories; and categories that include Complex Assembly products. There will be two types of Designated Product Categories: defined product categories, which are product categories that have been established for a specified grouping of Biobased Products with similar characteristics and intended uses, and the undefined product category that is used to categorize new types of products while the Agency evaluates the viability of designating a new Defined Product Category for those products.

Under § 3201.7, products were determined to be eligible for a Federal procurement preference if the product met the requirements for one or more Designated Product Category. Under § 3202.4, Biobased Products that did not meet the requirements for at least one Designated Product Category could participate in the voluntary labeling initiative of the BioPreferred Program under catalog categories, *i.e.,* categories that were established for the BioPreferred Program's product catalog but that were not eligible for preferred Federal procurement. After this proposed rule takes effect, it is the Agency's intention, to the extent practicable, to designate all product categories for preferred Federal procurement, including previously established catalog categories. Additionally, the Agency intends to designate another category in which products that do not meet the definition of a Defined Product Category can be placed and still be eligible for preferred Federal purchasing. With this change, all products will fall under at least one Designated Product Category, making all products eligible for preferred Federal procurement. The Agency believes this change, in combination with the changes to the initial approval process as discussed in section IV.I of this preamble, will satisfy the 2018 Farm Bill directive to establish a single process to determine eligibility for preferred Federal purchasing and approval to display the Label.

Further, the Agency believes the updates to the category designation process will facilitate the process for creating or updating Designated Product Categories in the future, so that specific product category requirements can be revised as new data is gathered. As the Designated Product Categories were imbedded in 7 CFR part 3201, subpart B, it was difficult to make timely updates and additions due to the sometimes lengthy rulemaking process. Rather than listing Designated Product Categories in the BioPreferred Program's regulation, the Agency will maintain the Register of Designated Categories on the BioPreferred Program website *https://www.biopreferred.gov*. The Agency believes this change will expedite the process to designate new product categories and amend existing Designated Product Categories. Additionally, this change will give the Agency the ability to investigate category suggestions from BioPreferred Program Stakeholders, and then use that information to create or update designated categories in a timely manner. The ability to make updates to Designated Product Categories in a timely manner is especially important because the Biobased Product industry is constantly evolving.

i. *Adding new product categories to the Register of Designated Categories.* The Agency will use the data gathered during the product application process to determine if a new defined product category should be established. This aspect of the category designation process is the same as was used for establishing new Designated Product Categories requirements under the BioPreferred Program's legacy rules, § 3201.5(a). When the Agency determines that creating a new Defined Product Category is appropriate, the Agency will create a category name, definition, and required minimum Biobased Content for the new category based on the product or products that fall within the new category, and the category will be added to the Register of Designated Categories with a provisional status. The provisional category requirements will be in place for a period of six months following the addition of the new Defined Product Category to the Register of Designated Categories. During that time, any product that falls within the category based on the category definition and has a Biobased Content of at least 30 percent or within 30 percentage points of the provisional minimum, whichever is higher, will be considered for inclusion. The Agency believes this provision will prevent products from being excluded from participation if the provisional category requirements are too restrictive initially. Under the revised category

designation procedure, there will no longer be a proposed rule with a public comment period to introduce new Designated Product Categories as described in § 3201.5(a)(3).

After the provisional period is over, the Agency will re-evaluate the provisional category name, description, and required minimum Biobased Content based on the new data gathered during the provisional period. At that time, the Agency will make final the Defined Product Category name, description, and minimum Biobased Content, and the category will no longer be considered provisional. While the Agency encourages Procuring Agencies to begin giving a procurement preference for Qualified Biobased Products that fall within provisionally designated categories, the Agency recognizes that Procuring Agencies may need time to become familiar with the requirements of provisionally designated categories. Therefore, no later than six months after a finalized product category is added to the Register of Designated Categories, Procuring Agencies will be required to give a procurement preference for Qualified Biobased Products that fall within Designated Product Categories. In total, Procuring Agencies have a period of one year from the time a provisionally designated category is added to the Register of Designated Categories to the time they are required to give procurement preference to products that fall within that category, which is consistent with the period of time allowed before a Designated Product Category became effective under § 3201.5(a)(3).

ii. *Revising defined product categories on the Register of Designated Categories.* In this proposed rule, the Agency is also establishing a process for revising Designated Product Categories. The Agency will periodically evaluate the need to update Designated Product Categories included in the Register of Designated Categories by reviewing the category names, definitions, required minimum Biobased Contents, subcategories, and the need for the category or subcategory. If the data support making updates, the Agency will amend the category and publish the updated category to the Register of Designated Categories and Procuring Agencies will be required to give a procurement preference for Qualified Biobased Products that fall within the amended Designated Product Category within six months.

2. *Public Comments.* This is a new section created using some of the language from § 3201.5(a)(3). Interested parties (such as product manufacturers or industry and Federal Stakeholders) may submit comments to the Agency through the BioPreferred Program website (*https://www.biopreferred.gov*) regarding establishing new categories or amending an existing category at any time. BioPreferred Program Stakeholders and other interested parties provide valuable insight and data during the category designation process, and as such, the Agency believes it is important to maintain a process through which interested parties can provide comments to the Agency.

3. *Continued eligibility.* The rule establishes this section as Continued eligibility. As in § 3202.5(d)(2)(iii), if the required minimum Biobased Content for a category is revised, products that fall within the category will remain certified or qualified, as applicable, as long as the product meets the new minimum Biobased Content level. In some cases, a participant may need to reformulate a product if the participant wishes to continue participating in the BioPreferred Program and the product no longer meets the applicable required minimum Biobased Content. The Agency believes it is important to allow participants with such products adequate time to be able to address potential product changes after the Agency has notified them that a change is required to remain eligible. If a product no longer meets the minimum Biobased Content after a category revision, the Agency will notify the Participating Organization in writing via email. The Participating Organization will then have 120 days to notify the Agency of their intent to reformulate their product to meet the requirements, and then the participant will be allowed another 120 days, increased from 60 days in § 3202.5(d)(2)(iii), to reapply for certification. The Agency believes this timeframe is more reasonable as a participant may need to reformulate a product.

Participating Organizations that reapply for certification as instructed will be allowed to continue using their existing Label until they receive the new notice of certification from the Agency. The Agency is clarifying in this proposed rule that that the certification for products that no longer meet the required minimum will expire if the participant does not notify the Agency of their intent to reformulate within 120 days or if the participant does not reapply for certification within an additional 120 days. The Agency believes this addition is necessary to clarify the consequences of no action when a participant is informed that their product no longer meets the required minimum Biobased Content.

b. *Considerations.* This rulemaking uses the language from § 3201.5(b)(1) and (2) with no significant revisions.

G. Section 4270.7 Determining Biobased Content

a. *Certification requirements.* In this rulemaking, the language from § 3201.7(a) was used with some modifications. As discussed in section IV.D, under part 3202 the Agency has established a well-defined process through which Participating Organizations demonstrate that their products meet the certification requirements. The process includes submitting an application for certification to the Agency so that the Agency can determine if the certification requirements are met, whereas under § 3201.7(a), Participating Organizations self-certify that the requirements are met. Based on feedback from BioPreferred Program Stakeholders, the Agency believes there is more transparency in having the Agency verify that the certification requirements are met than allowing Participating Organizations to self-certify, and therefore is adding language to indicate that an application for certification must be submitted. The Agency is also modifying the language from § 3201.7(a) to clarify that meeting the requirements for a Designated Product Category means the product must meet both the category's definition and minimum Biobased Content requirements.

b. *Minimum Biobased Content.* The language from § 3201.7(b) was used with no significant modifications.

c. *Determining Biobased Content.* The language from § 3201.7(c) was used with no significant modifications.

1. *General.* The language from § 3201.7(c)(1) was used with minimal modifications. The name of this section was ''Biobased products, Intermediate Ingredients or Feedstocks'' but is being revised to ''General.''

The Agency deliberated adopting other methods for measuring or determining Biobased Content (such as measuring organic and inorganic carbon or biomass content) other than through the ASTM D6866 test method, which has been used by the Agency to measure Biobased Content since the inception of the BioPreferred Program. The Agency believes the ASTM D6866 test method for measuring Biobased Content is still the best method for the purposes of the BioPreferred Program.

2. *Complex assemblies.* From § 3201.7(c)(3), Complex Assembly products only had one option for

manufacturers to test the Biobased Content of the product. This rule provides two options for manufacturers, which is by equation or proportional sampling.

i. *Equation.* The language from § 3201.7(c)(3) was used with no changes.

ii. *Proportional sampling.* This rulemaking is adding a second option for measuring the Biobased Content of a Complex Assembly product by using proportional sampling. For proportional sampling, the manufacturer must sub-sample (by weight) each distinct material or component within the Complex Assembly product and combine the sub-samples into a single sample that can be analyzed using the ASTM D6866 test method. This method allows for a single ASTM D6866 analysis of a composite sample that is representative of the full Complex Assembly product. For example, if a Complex Assembly product is composed of three distinct components: component A weighing 50 grams, component B weighing 30 grams, and component C weighing 20 grams. The product can be sub-sampled to obtain a single 20-gram composite sample suitable for analysis by combining 10 grams of component A, 6 grams of component B, and 4 grams of component C. The Agency added this provision to this proposed rule to mirror the options that are included in the ASTM D6866 test method, which is the method the BioPreferred Program uses to measure Biobased Content. Additionally, the Agency believes adding this option to the rule will clarify for manufacturers that this option for testing Complex Assembly products is acceptable for certification.

d. *Products and Intermediate Ingredients or Feedstocks with the same formulation.* The language from § 3201.7(d) was used but modified to clarify the situations in which products that have essentially the same formulation and Biobased Content may be eligible to share Biobased Content test data. The Agency currently allows such products to share Biobased Content test data through test exemption or through family applications, whichever is applicable as described below, and the Agency believes adding this to the BioPreferred Program's regulation will help prospective participants understand when additional Biobased Content Testing is not needed. This change simply ratifies and clarifies the Agency's existing policies for such products.

1. *Test Exemptions.* This rulemaking is adding this as a new section. In some cases, products and Intermediate Ingredients may have essentially the same formulation but are marketed under more than one brand name. In these cases, Biobased Content data may be shared between the products. In situations where a new product for an interested party is seeking certification is composed of the same Ingredients and has the same Biobased Content as a product that has already been certified and tested by a company the interested party has a direct relationship with, the interested party may apply for a test exemption by referencing the Certified Application of the certified product. This allows the interested party to certify their product without having the product tested again. For example, Company A has received certification for a hand wash product that is sold both as a consumer product and is sold to Company B, who rebrands the product to sell to consumers. Company B may apply to certify their branded product through test exemption and referencing Company A's Certified Application.

2. *Families.* This rulemaking is adding this as a new section. In situations where a Participating Organization is seeking certification for two or more products that are composed of the same Ingredients and have the same Biobased Content but are marketed under more than one brand name, the products may share testing information by being grouped in a family. Biobased Content test data must only be obtained for one of the products within the family, and test data will apply to all products within the family. For example, Company A makes a formulation that they sell as a glass cleaner under one brand name and as an all-purpose cleaner under a second brand name. Company A may group these two products in a family; either the glass cleaner or the all-purpose cleaner will undergo Biobased Content Testing, and the test results will apply to both products within the family.

H. Section 4270.8 [Reserved]

This rulemaking is adding this as a new reserved section to accommodate additional requirements that may be included in future Farm Bills.

I. Section 4270.9 Initial Approval Process

In this proposed rule, the Agency is making process improvements and updates to the initial approval process to create one expedited process through which products may be determined to be eligible for a Federal procurement preference and approved to use the Label. The approval process will be the same for all products regardless of whether the applicant wishes for the product to be eligible for a Federal procurement preference, approved to use the Label, or both. This means that organizations who wish to have their Biobased Products participate in the BioPreferred Program must submit an application for certification for each product, and each product will be required to undergo Biobased Content Testing to confirm the product's Biobased Content.

This proposed rule establishes the approval process by using the approval process that was established in § 3202.5 with some minor improvements for clarification. The Agency believes this is the best process to implement for the combined BioPreferred Program rules because Participating Organizations are already familiar with it, and the Agency has been able to simplify and streamline the process over the past several years of implementation.

a. *Application.* The proposed rule uses the language from § 3202.5(a) with some minor modifications. The Agency acknowledges that Biobased Products that meet the eligibility criteria as previously described will be considered qualified for preferred Federal procurement regardless of the product's certification status. However, products will not be listed on the BioPreferred Program website (*https://www.biopreferred.gov*) as certified or qualified products unless the product has completed the application process. The Agency believes requiring all products to undergo Biobased Content Testing is reasonable as participation in the BioPreferred Program is voluntary.

1. *General content.* The information being asked for as part of the initial approval process in this proposed rule is the same information that was previously asked for in § 3202.5(a)(1), with minimal modifications and some additional information.

In this proposed rule, the Agency added language to clarify that the contact information provided must include the name, mailing address, email address, and telephone number of the applicant. This information is already included in the current application process, and the Agency is promulgating it in the rule with this added language.

The Agency is requesting that applicants provide the biobased source(s) of the raw materials used in the product. This is due, in part, to the correction factors used by ASTM D6866 to account for the differing exposure to atmospheric carbon-14 during the biobased raw material's growth. Without the requested information, the product's Biobased Content cannot be accurately

measured. The Agency believes it is reasonable to request biobased raw material information as applicants will not be required to disclose any specific Ingredient or formulation information, and the biobased raw material information the Agency gathers will not be made available to the public. Applicants may choose not to disclose biobased raw material information if they are uncomfortable doing so; however, the Agency notes that it is in the interest of the applicant to disclose biobased raw material information so that the test results are as accurate as possible.

The Agency is also requesting that the applicants provide the estimated Biobased Content of the product, which is used to preliminarily determine whether the product meets the applicable Biobased Content requirements. This information is currently requested during the application process, and the Agency is promulgating it in the rule with this added language.

The Agency is requesting that the applicant provide a web link to their website (if available). The Agency uses web links provided by the applicant to confirm the information in their application, allowing the Agency to make more informed decisions about the appropriate product category or categories the product will fall under. This information is currently requested during the application process, and the Agency is promulgating it in the rule with this added language.

2. *Commitments.* This proposed rule combines the language from § 3202.5(a)(2) and (3) with no significant modifications to create this section.

b. *Evaluation of applications.*

1. *Initial evaluation.* This proposed rule is establishing this section as initial evaluation. As previously described under § 3202.5(b)(1), the Agency will evaluate each application to determine if it is a complete application (*i.e.,* that it contains all the required information). Applications will be evaluated on a first come first served basis. In this proposed rule, the Agency is making updates to note that the evaluation process may take up to 90 days to complete. If after evaluating the application the Agency determines the application is incomplete, it will contact the applicant via email and provide an explanation of the deficiencies in the application, as is consistent with § 3202.5(b)(1). In this proposed rule, the Agency is clarifying that if no response is received within 90 days after the Agency attempts to ask the applicant clarifying questions about their application, the Agency will inactivate the application. The Agency currently follows this procedure as a working policy, and the Agency believes codifying this practice in the BioPreferred Program's rule may encourage more applicants to respond in a timely manner.

2. *Prequalification.* This rulemaking is establishing this section as Prequalification.

i. When the Agency determines that an application is complete, it will provide a written response to inform the applicant of whether the application has been conditionally approved (*i.e.,* prequalified) to move forward to testing or has been disapproved. Depending on the responsiveness of the applicant, the Agency will provide the written response to notify the applicant of approval or disapproval within 90 days after the receipt of a complete application. If at any time after the Agency notifies the applicant that the application has been conditionally approved any of the information provided in the application changes, the applicant is required to inform the Agency of the change.

Under § 3202.5(b)(2)(i), the Agency estimated that it could take up to 60 days to complete the evaluation process. However, the Agency believes it is reasonable to increase the amount of time to 90 days for the evaluation process because the number of applications the BioPreferred Program receives has been steadily increasing over the past several years. Additionally, the Agency anticipates that the number of applications it receives may increase slightly because this proposed rule will require all interested parties to submit an application regardless of whether they are interested in preferred Federal procurement or certification to display the Label.

ii. The Agency is also making updates to the application evaluation process in the rule to clarify at what point in the process Biobased Content Testing occurs. In this proposed rule, the Agency is adding that applications that have been conditionally approved, or prequalified, may move on to Biobased Content Testing. Test results that are obtained prior to the application being conditionally approved or obtained in a manner that does not comply with the rules established by this proposed rule will not be accepted. Previously, it was not clearly stated in the rule whether applicants were permitted to test at any point during the application process, or if applicants were required to wait until a specific step. The Agency believes that by specifically listing this step in the rule, it will cut down on the number of organizations who mistakenly send in their product for Biobased Content Testing prior to being approved to do so by the Agency.

iii. As under § 3202.5(b)(2)(ii), the Agency will issue a notice of certification before the use of the USDA Certified Biobased Product Label can begin. This section was updated to clarify that if the Biobased Content Testing shows that the product meets or exceeds the Applicable Minimum Biobased Content requirements, the Agency will issue a notice of certification.

iv. This section uses the language from § 3202.5(b)(2)(iii) with no significant modifications.

c. *Notice of Certification.* The process for issuing notices of certification or denial is unchanged from the legacy rules in this proposed rule. The Agency will issue a notice of certification to the applicant after it confirms that the test results document an acceptable Biobased Content. A notice of certification must be issued before the use of the Label can begin, and at that point, the applicant may advertise that the product is a Certified Biobased Product. The notice of certification will include the date the certification was issued, name of the product or products (in the case of product families) covered by the certification, and certified Biobased Content of the product(s).

1. The Agency has clarified in this proposed rule that if at any time, during the application process or after a product has been certified, any of the information provided during the initial application process changes, the applicant must notify the Agency of the change within 30 days. This is the same as in § 3202.5(c)(5); however, in this proposed rule, the Agency is emphasizing this requirement by adding that failure to notify the Agency of any changes may be considered a violation of BioPreferred Program rules. It is vital to the credibility of the BioPreferred Program that applicants provide updates to the Agency whenever they occur. If after reviewing the test results, the Agency determines that the product does not meet the Applicable Minimum Biobased Content requirements, the Agency will issue a notice of denial of certification and will inform the applicant of each criterion not met.

2. After receiving a notice of certification, the applicant may request to display a Biobased Content percentage that is lower than the content measured by the ASTM D6866 test results, as long as the requested Biobased Content to be displayed is still at or above the applicable required minimum Biobased Content. The applicant must submit such requests to

the Agency in writing via email. The Agency will review the request, and if approved, notify the applicant in writing via email and issue a revised notice of certification that will include the requested Biobased Content. The Agency currently follows this procedure as a working policy.

3. This proposed rule uses language from § 3202.5(b)(2)(iii) with minimal modifications to clarify that a denial of certification will be issued after Biobased Content Testing has occurred if the test results show the product does not meet the Applicable Minimum Biobased Content requirement.

d. *Term of Certification.*

1. *General.* This proposed rule uses language from § 3202.5(d)(1) with modifications. This rulemaking establishes this section as General.

After evaluating the term of certification and the audit practices implemented by § 3202.10(d), the Agency determined the best way to improve the existing audit procedures was to greatly simplify them. In lieu of establishing a revised audit procedure for periodically retesting Certified Biobased Products, the Agency is updating the term of certification for products participating in the BioPreferred Program. Previously, the audit procedure called for the retesting of products that had been certified for more than five years during audits that were scheduled to take place every six years. Instead, in the proposed rule, the Agency is implementing a term of certification of five years for all Certified Biobased Products, except in special cases as discussed below, after which time, participants will be required to renew their certification. Certifications will automatically expire for participants that do not renew their certification following the newly established process. The effective (beginning) date of the product certification is the date noted in the notice of certification. Based on feedback the Agency has received from BioPreferred Program participants over the years of implementing the BioPreferred Program, the Agency believes five years is a reasonable amount of time for a term of certification. The applicant will be notified 90 days before the certification expires, at which time, the Certified Biobased Product must be retested in accordance with the procedure described in section IV.G of this preamble.

i. Because of these updates to the term of certification, this proposed rule includes new provisions for what happens if a product's certification is not renewed within the timeframe allowed. If the Certified Biobased Product is not retested and the certification is not renewed within the 90 days, the product certification will expire. Once a product's certification expires, the product will no longer be a Certified Biobased Product, and the product information will be removed from the BioPreferred Program website (*https://www.biopreferred.gov*). Because certifications that are not renewed would automatically expire, it will not be necessary for the Agency to revoke certifications for products that do not participate in audits.

ii. Similarly, due to the updates to the term of certification, this proposed rule includes new provisions for what happens if a Participating Organization wishes to renew certification for a product whose certification has lapsed. If a Participating Organization whose product certification has expired wishes to renew the certification, the participant must follow the procedures required for initial certification. These provisions are consistent with the conditions for reinstating certification as described by § 3202.8(c)(2)(iii).

iii. This proposed rule uses language from § 3202.5(d)(2)(iv) with minimal modifications.

iv. This proposed rule uses language from § 3202.5(d)(2)(v) with minimal modifications.

2. *Reformulations.* This proposed rule includes provisions for the term of certification of Certified Biobased Products that are reformulated. If at any time during the term of certification a Certified Biobased Product is reformulated, the Participating Organization must notify the Agency of the change and how the change affects the Certified Biobased Product's Biobased Content. The Agency will evaluate the changes and inform the participant if retesting is required. This is very similar to § 3202.5(d)(2)(i) through (iii); however, it was previously unclear whether participants were required to inform the Agency of all formulation changes or only changes that result in the Biobased Content of the Certified Biobased Product being reduced to a level below that reported in the Certified Application. The Agency believes the proposed determination about whether a formulation change will require retesting should be made by the Agency.

i. The proposed rule uses the language from § 3202.5(d)(2)(i) with minimal modifications for this section. The original language referred to changes to the product formulation. This proposed rule refers to changes to the product formulation as well as to raw materials. This language was added to clarify that changes to the raw materials are considered changes to the product formulation.

ii. The proposed rule is using the language from § 3202.5(d)(2)(ii) with minimal modifications for this section. The original language only considered changes to the product formulation that resulted in the Biobased Content of the product increasing from the level reported in the Certified Application. The proposed rule also includes ''and the raw materials are not significantly changed'' because it was previously unclear if changes to the raw materials were considered to be a change to the product formulation. The Agency believes this added language will clarify these situations.

iii. If the applicable required minimum Biobased Content for a product to participate in the BioPreferred Program is revised by USDA, this proposed rule directs the Participating Organizations to follow the requirements specified in § 4270.6(a)(3) of the proposed rule (see section IV.Fa.3. of preamble). This is consistent with the requirements previously set forth in § 3202.5(d)(2)(iii), with minimal modifications as discussed in section IV.Fa.3. of the preamble. Because this process is described in an earlier section of the proposed rule, the Agency is referring to that section rather than repeating the language.

3. *Test Exemptions.* Because the Agency is implementing a new five-year term of certification, it was necessary to also examine the term of certification for Certified Biobased Products that are certified via test exemption. Test exempt Certified Biobased Products share the Biobased Content test results with the parent Certified Biobased Product. To avoid situations where a test exempt Certified Biobased Product remains certified after the parent Certified Biobased Product's certification has expired, the Agency is stipulating that the test exempt certification will expire at the same time as the Certified Application of the parent Certified Biobased Product. For example, if a parent Certified Biobased Product was certified on October 1, 2020, its certification will expire on October 1, 2025 unless renewed. If a test exempt application was submitted referencing this parent Certified Biobased Product on July 1, 2023, the test exempt certification will still also expire on October 1, 2025. Consequently, this means that test exempt certifications may be active for less than five years before expiring.

4. *Special Considerations.*

i. As previously discussed, the streamlined application process the

Agency is proposing to implement with this proposed rule will require participants to submit an application for certification for each product, and all products will be required to undergo Biobased Content Testing to confirm the product's Biobased Content. Under §§ 3201.7(a) and 3202.5(a), only products that are participating in the voluntary labeling initiative are required to be associated with an application for certification and undergo Biobased Content Testing. Consequently, as previously discussed in section IV.Da.1. of the preamble, under part 3201 there are products that are participating in the BioPreferred Program as products that are qualified for preferred Federal procurement but not certified to use the Label. The Agency believes these products should be allowed to continue participating in the BioPreferred Program under the legacy rules during a grace period while the Participating Organization works to conform to the updated BioPreferred Program requirements. In this proposed rule, the Agency is proposing to establish a grace period of three years, during which, participants with Biobased Products that are qualified but not certified must provide the Agency with ASTM D6866 test data that has been obtained within the past five years. Participants who provide the requested test data to the Agency will be issued a notice of certification corresponding to each product for which testing data is submitted. The normal term of certification as discussed above will then apply.

ii. Participants who do not submit the requested test data to the Agency within the specified timeframe will be required to submit an application for certification and have their products tested. If certification is not completed within three years of publication of this rule, these Biobased Products will no longer be listed as Qualified Biobased Products on the BioPreferred Program website (*https://www.biopreferred.gov*).

iii. This proposed rule also includes special considerations for Certified Biobased Products that have been certified for five or more years as of [DATE OF PUBLICATION OF THIS FINAL RULE]. For those Certified Biobased Products, the Agency is also implementing a three-year grace period for the participant to renew the certification, at which point, the normal term of certification of five years will apply. If an application for renewal is not completed within three years, the product certification will expire. At that time, the product will no longer be a Certified Biobased Product, and the product information will be removed from the BioPreferred Program website (*https://www.biopreferred.gov*). The Agency's goal is not to prohibit any Participating Organization from being able to continue to participate in the BioPreferred Program, and the Agency believes a three-year grace period will prevent affected participants from not being able to adjust to the updated rules quickly enough.

J. Section 4270.10 [Reserved]

This proposed rule is adding this as a new reserved section to accommodate additional requirements that may be included in future Farm Bills.

K. Section 4270.11 Requirements Associated With Promotional Certification Materials

a. *How participation in the BioPreferred Program can be promoted.* The Agency is establishing this section as ''How participation in the BioPreferred program can be promoted.'' In addition to establishing requirements associated with using the Label, the Agency is also establishing guidelines for using other materials associated with promoting Certified Biobased Products. One of the Agency's goals in implementing the BioPreferred Program is to increase public awareness of Biobased Products. To that end, the Agency believes it is important for Participating Organizations and their Designated Representatives as well as Other Entities to utilize the Label and other promotional certification materials. The Agency also believes it is important to establish standard guidelines for Participating Organizations and Other Entities who wish to promote the BioPreferred Program and certified and Qualified Biobased Products. This is important to maintain the distinctiveness and recognizability of the Label and other promotional certification materials. The Agency maintains and regularly updates a USDA BioPreferred Program Brand and Marketing Guidelines document found on the BioPreferred Program website (*https://www.biopreferred.gov*) that is intended to be a user-friendly summary and explanation of the requirements and brand standards set forth in this proposed rule. Additional clarification on the requirements associated with promotional certification materials may be provided in the USDA BioPreferred Program Brand and Marketing Guidelines, which will be made available to Participating Organizations through the BioPreferred Program website (*https://www.biopreferred.gov*).

1. *Participating Organizations.* This proposed rule uses the language from § 3202.7(a)(1) with no significant modifications.

2. *Other Entities.* This proposed rule uses the language from § 3202.7(a)(2)(i) with some clarification. This proposed rule clarifies that Other Entities who wish to use promotional materials associated with the BioPreferred Program may do so through a partnership agreement with the Agency. This is the Agency's current practice, and this language is being added to the rule to promulgate the practice.

The language from § 3202.7(a)(2)(ii) has been split into three sections in this rule. In § 4270.11(b)(2)(i) of the proposed rule, the Agency is revising the language from § 3202.7(a)(2)(ii) to indicate that Other Entities may use the Certification Icon rather than the Label. The Label is intended to be used by Participating Organizations in relation to the specific certification product it corresponds to, whereas the Certification Icon can be used by Other Entities in their own catalogs, procurement databases, etc., to identify Certified Biobased Products. Section 4270.11(b)(2)(ii) and (iii) of the proposed rule use the remaining language from § 3202.7(a)(2)(ii) with no significant modifications.

b. *Correct usage of the USDA Certified Biobased Product Label and other promotional certification materials.*

1. This section uses the language from § 3202.7(b)(1) with no significant modifications.

2. This section uses the language from § 3202.7(b)(2) with no significant modifications.

3. This section uses the language from § 3202.7(b)(3) with minimal modifications. The Agency is modifying the language to clarify that, when educating the public about the Label, the watermarked sample version of the Label may be used without reference to a specific Biobased Product.

4. This section uses the language from § 3202.7(b)(4) with no significant modifications.

5. This section uses the language from § 3202.7(b)(5) with no significant modifications.

6. This section uses the language from § 3202.7(b)(6) with minimal modification. Over the years of implementing the BioPreferred Program, the Agency has received inquiries regarding whether the Label may be embossed or stamped onto certified products, and therefore, the Agency is adding embossing and stamping as examples to this section.

7. This section uses the language from § 3202.7(b)(7) with no significant modifications.

c. *Incorrect usage of the USDA Certified Biobased Product Label and other promotional certification materials.*

1. This section uses the language from § 3202.7(c)(1) with no significant modifications.

2. The proposed rule is adding this section to emphasize that the Label may not be used in a way that does not maintain the integrity of the Label and the BioPreferred Program.

3. This proposed rule is adding this section to clarify that the word ''BioPreferred'' must not be used as a descriptor for anything other than the BioPreferred Program, including, but not limited to, products, categories, and companies. The BioPreferred Program name, the word ''BioPreferred'', and the phrase ''USDA Certified Biobased Product'' are not interchangeable. For example, Certified Biobased Products may not be referenced as being ''BioPreferred products''. The word ''BioPreferred'' is trademarked by the Agency, and as such, its use is closely controlled. The Agency believes this addition will help reduce misuse of the word ''BioPreferred''.

4. This section uses the language from § 3202.7(c)(2) with no significant modifications.

5. This section uses the language from § 3202.7(c)(3), with additional language to clarify that the BioPreferred Program name, in addition to the Label, may not be used to imply endorsement by the Agency.

6. This section uses the language from § 3202.7(c)(4), with additional language to clarify that the BioPreferred Program name, in addition to the Label, may not be used in any form that could be misleading to the consumer.

7. This section uses the language from § 3202.7(c)(5), with additional language to clarify that the BioPreferred Program name, in addition to the Label, may not be used in a manner disparaging to the Agency or any other government body.

8. This section uses the language from § 3202.7(c)(6), with additional language to clarify that the BioPreferred Program name and the word ''BioPreferred'', in addition to the Label, may not be altered or incorporated into any other label or logo designs.

9. This section uses the language from § 3202.7(c)(7), with an additional example to clarify that the Label may not be used in email signatures.

10. This section uses the language from § 3202.7(c)(8), with additional language to clarify that the BioPreferred Program name and the word ''BioPreferred'', in addition to the Label, may not be used in any company name, logo, product name, service, or website.

11. This section uses the language from § 3202.7(c)(9), with additional language to clarify that the BioPreferred Program name and the word ''BioPreferred'', in addition to the Label, may not be used in a manner that violates any of the applicable requirements in this rule.

d. *Imported products.* This section uses the language from § 3202.7(d) with no significant modifications.

e. *Elements of the USDA Certified Biobased Product Label.* This proposed rule is establishing this section as Elements of the USDA Certified Biobased Product Label using language from § 3202.7(e) with no significant modifications.

f. *Physical aspects of the USDA Certified Biobased Product Label.* This proposed rule uses language from § 3202.7(f) with some modification. As in § 3202.7(f), the Agency does not allow the Label elements to be altered, cut, separated into components, or distorted in appearance or perspective. In this proposed rule, the Agency requires one of the two Label versions to be used, depending on the need of the Participating Organization.

1. This section uses the language from § 3202.7(f)(1) with minimal modifications. This proposed rule clarifies in this section that the Label colors to be applied will be stipulated in the USDA BioPreferred Program Brand and Marketing Guidelines located on the BioPreferred Program website (*https://www.biopreferred.gov*).

2. This section uses the language from § 3202.7(f)(3) with no significant modifications.

g. *Placement of the USDA Certified Biobased Product Label.* This proposed rule uses language from § 3202.7(g) with minimal modification. The Agency is updating language from § 3202.7(g)(3)(i) and (ii) to clarify that the Label may be used anywhere on an advertising page where all products on the page are Certified Biobased Products with the same Biobased Content; otherwise, the Label must be placed in close proximity to its corresponding Certified Biobased Product to avoid confusion.

h. *Minimum size and clear space requirements for the USDA Certified Biobased Product Label.* This proposed rule uses language § 3202.7(h) with no significant modification.

i. *Where to obtain copies of the promotional certification materials.* This proposed rule uses language from § 3202.7(i) with no significant modification.

L. Section 4270.12 Violations of Program Requirements

In this proposed rule, the Agency is simplifying the violations process that was outlined by § 3202.8. Although the decision to participate in the BioPreferred Program is voluntary, compliance with the BioPreferred Program's requirements and specifications is essential to the success of the BioPreferred Program. In this proposed rule, the Agency identifies types of violations that may occur and the actions that such violations may result in, which are the same as defined under the legacy rules. The Agency is revising and simplifying the actions taken after violations are identified in this proposed rule. Both the types of violations being identified, and any penalties associated with a violation would be applied on a per product basis. If a certification for a Certified Biobased Product is revoked following the identification of a violation, the affected organization may file an appeal as described in section IV.M of this preamble.

a. *General.* This proposed rule uses the language from § 3202.8(a) with no significant changes.

b. *Types of violations.* This proposed rule uses the language from § 3202.8(b) with no significant changes.

1. *Biobased Content violations.* This proposed rule uses the language from § 3202.8(b)(1) with some amendments. The intention of this section was to allow the Agency the ability to request that a Certified Biobased Product be re-tested at any time in the event concerns regarding the validity of the Certified Biobased Product's Biobased Content arise. The language included in § 3202.8(b)(1) used the phrase ''random testing,'' which could be understood to mean Certified Biobased Products will be chosen for re-testing at random. The Agency believes the change in language in this rulemaking will help clarify that specific Certified Biobased Products may be selected for re-testing to confirm no violations have occurred.

For § 4270.12(b)(1)(B), the proposed rule uses language from § 3202.8(b)(1)(ii)(B) with some modification. The Agency is clarifying in this proposed rule that if the Participating Organization elects to retest the product in question, the Agency reserves the right to select the sample that will be submitted for Biobased Content Testing. Because the Biobased Content Testing taking place under these circumstances would be the result of violations of BioPreferred Program rules, the Agency believes this addition will lead to increased

transparency in the sample selection process, which will allow the Agency to have greater confidence in the re-testing results.

2. *USDA Certified Biobased Product Label violations.* This proposed rule uses language from § 3202.8(b)(2)(i) through (iii) with no significant modifications.

The Agency is including an additional example of a USDA Certified Biobased Product Label violation in this proposed rule as § 4270.12(b)(2)(iv) that says using an image or icon other than the official USDA Certified Biobased Product Label in association with certification claims constitutes a violation. Over the years of implementing the BioPreferred Program, the Agency has come across instances where a manufacturer has used an icon or mark other than the Label in association with claims that the product is certified through the BioPreferred Program. Using an image other than the Label cause consumers to question the validity of the claim, and the Agency believes it is vital to the success of the BioPreferred Program that the Label is used correctly and consistently with claims of certification.

3. *Application violations.* This proposed rule uses language from § 3202.8(b)(3) with no significant modifications.

4. *BioPreferred Program website violations.* This proposed rule uses language from § 3202.8(b)(4) with no significant modifications.

c. *Noncompliance and escalation of actions.* The violations described in § 4270.12(b) of the proposed rule are in noncompliance with this proposed rule. The Agency believes it is necessary to simplify the process for handling these violations that was established by § 3202.8(c).

1. *Noncompliance.* This proposed rule is establishing this section as Noncompliance. In this proposed rule, the Agency is adding provisions that allow the Agency to work with the Participating Organization in violation of Program rules to resolve the violation. In contrast, under the § 3202.8(c) the Agency was required to issue a series of formal notices of violation over the course of several months prior to being able to take action to resolve the violation. Under this proposed rule, when a violation is identified, the Agency will notify the Participating Organization or Other Entity, in writing via email, that they are in noncompliance with the BioPreferred Program's regulations. In the written notification, the Agency will identify the violation(s) and any actions that must be taken to resolve the noncompliance. The Agency may remove the product or company information from the BioPreferred Program website (*https://www.biopreferred.gov*) until the noncompliance is corrected. Removing the product from the BioPreferred Program website (*https://www.biopreferred.gov*) without issuing a notice of violation or revoking product certification allows the Agency to reinstate the product more easily if/when the participant does make the necessary updates.

2. *Violation.* This proposed rule is establishing this section as Violation. For those violations that may be considered major, or when Participating Organizations fail to make necessary updates and the Agency wishes to escalate the consequences, the Agency is maintaining a formal violation process that ends in revocation of the product's certification if no action is taken. The Agency is simplifying the formal violations process established in § 3202.8(c) to a two-step process. In the first step, the Agency will issue a notice of violation in writing via email. Participants who receive a notice of violation must correct the violation within 30 days from receipt of the notice of violation.

3. *Suspension and Revocation.* This proposed rule is establishing this section as Suspension and Revocation. Rather than having two individual steps for suspension and revocation, as is the case in § 3202.8(c)(1) and (2), respectively, this proposed rule combines suspension and revocation activities into a single step. Through the years of implementing the BioPreferred Program, the Agency has found that having a multi-step, protracted process for suspending and revoking certification often reduces the likelihood that a participant will respond or resolve the violation because deadlines are forgotten or communications are missed. The Agency believes streamlining the suspension and revocation process into a single communication will help create a sense of urgency on the part of participants who wish to resolve the identified violation, and it will reduce the Agency's burden of completing the revocation process in cases where the participant is not incentivized to resolve the identified violation.

Similar to the process formerly described by § 3202.8(c)(1)(i), after receiving the notice of violation, if the participant fails to make the required corrections within 30 days, the Agency will take a second step by notifying the participant via email and certified mail, as appropriate, of the continuing violation, and the certification for that product will be suspended. Under § 3202.8(c)(1)(i), participants were given 90 days to respond to a notice of suspension; the Agency is shortening this to 30 days in this proposed rule because the Agency intends to use the noncompliance step (rather than the suspension and revocation step) to attempt to resolve the issue with the participant. The Agency has found that having an extended timeframe at the suspension step reduces the likelihood that the violation will be resolved because so much time passes between official communications, and the Agency believes 30 days is a more appropriate timeframe. Additionally, the Agency has updated this process to stipulate that the notice of suspension and revocation will be sent via certified mail, as appropriate, so that the Agency can be sure that the notice is received by the participant. The Agency will make every effort to send notices of suspension and revocation to valid contacts, but ultimately, it is up to the Participating Organization to update the Agency when their contact information changes.

As in § 3202.8(c)(1)(i), this proposed rule states that as of the date the participant receives the notice suspending product certification, the participant and any Designated Representatives must discontinue printing any product labels that include the Label. When the Agency suspends a product's certification, the Agency will remove the product from the BioPreferred Program website (*https://www.biopreferred.gov*).

This proposed rule uses language from § 3202.8(c)(1)(ii) with no significant modifications.

The language from § 3202.8(c)(2)(i) and (ii) are being combined in this proposed rule into § 4270.12(c)(3)(iii). For the reasons previously stated, under this proposed rule, participants will be notified of suspension and revocation through a single notice. If the participant fails to correct the violation within 30 days from receipt of the notice of suspension, the certification for that product will be revoked automatically. As of that date, the product will no longer be listed on the BioPreferred Program website (*https://www.biopreferred.gov*) as a Certified Biobased Product or as a product qualified for preferred Federal procurement, and the participant must discontinue printing any product labels that include the Label, as is the case under § 3202.8(c)(2)(ii). The participant may continue to sell any current stock of the product that already includes the Label. After that stock has been

depleted, the participant must discontinue use of the Label.

This proposed rule uses language from § 3202.8(c)(2)(iii) with no significant modification.

4. *Other remedies.* This proposed rule uses language from § 3202.8(c)(3) with no significant modification.

M. Section 4270.13 Appeal Process

This proposed rule includes provisions for appeal to the Agency by a Participating Organization that has received a notice of suspension and revocation from the Agency. Under § 3202.6, a Participating Organization could appeal to the Agency a decision made at any point in the certification process. In this proposed rule, the Agency is limiting the decisions Participating Organizations may appeal to revocations of certification only because the Agency makes every effort to resolve any issues or questions that arise during the application process up to and after product certification through direct communication with the Participating Organization. Thus, the Agency believes it is not necessary to have a formal appeal process for any decisions other than revocations of certification.

a. *Filing an appeal.* This proposed rule establishes this section as Filing an appeal.

1. This section uses the language from § 3202.6(a)(1) with modifications. Section 3202.6(a)(1) stated that the appeals go to the Program Manager, but this proposed rule modifies this by having the appeals go to the Agency The Agency is making this change so that the appeal review process is not tied to a single individual or a single job title. The Agency believes this change will allow appeals to be processed efficiently regardless of whether a specific job title is used. Section 3202.6(a)(1) also instructed appeals to be filed in writing and provided a mailing address to the Program Manager of USDA Voluntary Labeling Program for Biobased Products, but this rulemaking modifies this by requiring that appeals be made in writing via email to the BioPreferred Program's email address as noted on the BioPreferred Program website (*https://www.biopreferred.gov*). The Agency believes this change will allow for appeals to be reviewed more efficiently as physical mail may be delayed or lost.

2. This proposed rule uses the language from § 3202.6(a)(2) with no modifications.

b. *Reviewing appeals.* This rulemaking establishes this section as Reviewing appeals.

1. This section uses the language from § 3202.6(b)(3) with modifications. Modifications include revising some of the language to align with the new rule definitions for Participating Organization, participant, and USDA Certified Biobased Product Label, as well as revising references to the ''notice of suspension'' to the ''notice of suspension and revocation'' due to the changes discussed in section IV.L3.). Additionally, this proposed rule clarifies that if the appeal is sustained, the Participating Organization may immediately resume selling and distributing the Certified Biobased Product with the Label in addition to immediately resuming affixing the Label to the Certified Biobased Product. This was language added to make it clear for participants whose appeal is granted when they may resume selling the product in question.

2. If the Agency denies a participant's appeal, then the notice of suspension and revocation stands. This is the current practice when an appeal is denied, and the Agency is promulgating this practice by adding it to this proposed rule.

c. *Appeals of decisions made on appeals.* This proposed rule establishes this section as Appeals of decisions made on appeals. The proposed rule uses the language from § 3202.6(d) with modifications. The proposed rule instructs the appellant to address their appeals to the USDA Rural Business Cooperative Service Administrator instead of the Assistant Secretary for Administration. This change was made because the BioPreferred Program is now housed under the Rural Development Rural Business Cooperative Service mission area rather than under Departmental Management. Also, in this section the term Program Manager was changed to USDA so that the appeal review process is not tied to a single individual or a single job title.

N. Section 4270.14 Reporting and Recordkeeping

In this proposed rule, the Agency combines §§ 3201.6, 3201.8, and 3202.9 into one section and is making minimal modifications. The Agency recognizes that Participating Organizations may consider some of the information requested for reporting and recordkeeping to be confidential. The Agency notes that information claimed as confidential by the participant will not be released and that individual participant data will not be reported. Only summary information regarding the benefits and impacts of the entire Program will be released.

a. *Providing product information to Federal agencies.* This proposed rule establishes this section as Providing product information to Federal agencies.

1. *Informational website.* This proposed rule uses language from § 3201.6(a) with no significant modifications.

i. *Product information.* This proposed rule uses language from § 3201.6(a)(1) with no significant modifications.

ii. *Providing information on price and environmental and health benefits.* This proposed rule uses language from § 3201.8(a) with no significant modifications.

iii. *Industry standards test information.* In this proposed rule, the Agency is clarifying that relevant industry standard test information is included in the product information supplied by the participant. Otherwise, this proposed rule uses language from § 3201.8(b) with no significant modifications.

iv. *Biodegradability information.* This proposed rule uses language from § 3201.8(c). In this proposed rule, the Agency is including an additional ASTM Biodegradability standard, ASTM D5988 (Standard Test Method for Determining Aerobic Biodegradation of Plastic Materials in Soil), to make the list of Biodegradability standards more complete.

2. *Advertising, labeling, and marketing claims.* This proposed rule uses language from § 3201.6(b) with no significant modifications.

b. *Records.* This proposed rule uses language from § 3202.9(a) with no significant modifications.

1. This proposed rule uses language from § 3202.9(a)(1) with no significant modifications.

2. This proposed rule uses language from § 3202.9(a)(2) with some modifications. The Agency is clarifying in this proposed rule that Participating Organizations must maintain record of the notice of certification for each Certified Biobased Product, not just the date of certification. Maintaining record of the notice of certification helps the Agency efficiently review and resolve any disputes that arise regarding the validity of a certification or the term of certification for a specific Certified Biobased Product.

3. This proposed rule uses language from § 3202.9(a)(3) with no significant modifications.

c. *Record retention.* This proposed rule uses language from § 3202.9(b) with no significant modifications.

O. Section 4270.15 Oversight and Monitoring

a. *General.* The proposed rule uses the language from § 3202.10(a) with no significant modifications.

b. *Biobased Content Testing.* The proposed rule uses the language from § 3202.10(b) with no significant modifications.

c. *Inspection of records.* The proposed rule uses the language from § 3202.10(c) with no significant modifications.

d. *Audits.* The Agency has determined the need to simplify the BioPreferred Program's audit procedure established under § 3202.10(d). The audit procedures in § 3202.10(d) involved three stages that were scheduled to take place every other calendar year (bi-annually). The first stage (§ 3202.10(d)(1)) required Participating Organizations to confirm that their product and company information remains unchanged. The second stage (§ 3202.10(d)(2)) involved a random sampling of Certified Biobased Products to confirm the accuracy of the Biobased Content percentages claimed. The third stage (§ 3202.10(d)(3)) required manufacturers of Certified Biobased Products that have been certified for five years or more to have their products retested at their expense to confirm that the certified Biobased Content remains valid.

In this proposed rule, the Agency has simplified the audit process by eliminating the second stage audits. Instead, the Agency will reserve the right to request that a Certified Biobased Product undergo testing to confirm the Certified Biobased Product's certified Biobased Content at any time. The Agency believes it is unnecessary to have a dedicated audit for this type of confirmation testing as the Agency does not anticipate this to occur frequently. Similarly, the Agency is eliminating the third stage audit in favor of implementing a limited term of certification for Certified Biobased Products. Finally, the Agency is updating the first stage audit (now called an annual desk audit) so that it will occur annually. During this annual desk audit, the Agency will require Participating Organizations to verify that their company, contact, and product information supplied during the application process remain valid. Audit activities will take place through the BioPreferred Program website (*https://www.biopreferred.gov*). Given that Participating Organizations are required to update the Agency of product and contact updates when they occur, annual desk audits should take very little time for Participating Organizations to complete, as Participating Organizations will simply be asked to confirm that their product and contact information is up to date. The Agency believes it is necessary to have such an audit annually for two reasons. First, it helps maintain the credibility of the BioPreferred Program by ensuring the product information included on the BioPreferred Program website (*https://www.biopreferred.gov*) is current and accurate. Second, it helps ensure that Participating Organizations keep the Agency updated when a change of contact occurs.

Participating Organizations may be asked to provide additional supplemental information during annual audits. If during an annual desk audit, a participant indicates that their product or company information needs to be updated, these updates will be incorporated into the BioPreferred Program website (*https://www.biopreferred.gov*). If it is indicated that a product is no longer manufactured, the product will be removed from the BioPreferred Program website (*https://www.biopreferred.gov*). Participating Organizations that fail to complete an annual desk audit will be in noncompliance with the requirements set forth in this new proposed rule, and the Participating Organization and associated product information will be removed from the BioPreferred Program website (*https://www.biopreferred.gov*). The Agency reserves the right to revoke product certification as a result of failing to participate in an audit.

P. Section 4270.99 OMB Control Number

The Office of Management and Budget (OMB) Control numbers for the legacy rules are as follows: 0570–0071 (part 3202) and 0570–0073 (part 3201). These existing OMB Control Numbers will be discontinued and a new OMB Control Number will be obtained for part 4270.

V. Executive Orders/Acts

A. Executive Order 12866—Classification

This rulemaking has been determined to be not significant for purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget (OMB).

B. Executive Order 12372—Intergovernmental Consultation

This program is not subject to the requirements of Executive Order 12372, Intergovernmental Review of Federal Programs, as implemented under 2 CFR part 415.

C. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended), the Agency invites comments on this information collection for which it intends to request approval from OMB.

Comments on this document must be received by March 25, 2024.

Comments are invited on (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumption used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques on other forms of information technology.

Comments may be submitted by going to the Federal eRulemaking Portal. Go to *https://www.regulations.gov* and in the ''Search Documents'' box, enter the Docket Number or the RIN provided above in this document, and click the ''Search'' button.

Title: 7 CFR part 4270.

OMB Control Number: 0570–NEW.

Abstract: The BioPreferred Program was established by section 9002 of FSRIA. The BioPreferred Program will establish guidelines for (1) designating categories of products that are, or can be, produced with biobased Intermediate Ingredients or feedstocks and whose procurement by procuring agencies and other relevant Stakeholders will carry out the objectives of section 9002 of FSRIA; (2) establishing criteria for eligibility and the process through which Biobased Products can participate in the BioPreferred Program, be subject to preferred Federal procurement, and be eligible to display the USDA Certified Biobased Product Label; (3) establish specifications for the correct and incorrect uses of the USDA Certified Biobased Product Label and Certification Icon, which apply to Participating Organizations and Other Entities; and (4) establish actions for noncompliance.

The information required for the BioPreferred Program is similar to much of the information currently being required under the legacy rules. Under the legacy rules, the current information being collected is approved under OMB Control numbers 0570–0071 (part 3202) and 0570–0073 (part 3201). This regulation combines the legacy rules into one regulation and streamlines the requirements. The following estimates are based on the average over the first 3 years the Program is in place.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 10.3234 hours per response.

Respondents: Private entities.

Estimated Number of Respondents: 520.

Estimated Number of Responses per Respondent: 2.0096.

Estimated Total Annual Burden on Respondents: 10,788.

Copies of this information collection may be obtained from Katherine Anne Mathis, Regulatory Management Division, Rural Development Innovation Center, U.S. Department of Agriculture, 1400 Independence Ave. SW, Stop 0793, Washington, DC 20250; telephone: 202–713–7565; email: *katherine.mathis@usda.gov.* All responses to this information collection and recordkeeping notice will be summarized and included in the request for OMB approval. All comments also become a matter of public record.

D. National Environmental Policy Act

In accordance with the National Environmental Policy Act of 1969, Public Law 91–190, this proposed rule has been reviewed in accordance with 7 CFR part 1970. The Agency has determined that (i) this action meets the criteria established in 7 CFR 1970.53(f); (ii) no extraordinary circumstances exist; and (iii) the action is not ''connected'' to other actions with potentially significant impacts, is not considered a ''cumulative action'' and is not precluded by 40 CFR 1506.1. Therefore, the Agency has determined that the action does not have a significant effect on the human environment, and therefore neither an Environmental Assessment nor an Environmental Impact Statement is required.

E. Regulatory Flexibility Act

The proposed rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). The undersigned has determined and certified by signature on this document that this rulemaking will not have a significant economic impact on a substantial number of small entities since this rulemaking action does not involve a new or expanded Program nor does it require any more action on the part of a small business than required of a large entity.

F. Executive Order 12988—Civil Justice Reform

This proposed rule has been reviewed under Executive Order 12988. In accordance with this rule: (1) unless otherwise specifically provided, all State and local laws that conflict with this rulemaking will be preempted; (2) no retroactive effect will be given to this rulemaking except as specifically prescribed in the rule; and (3) administrative proceedings of the National Appeals Division of the Department of Agriculture (7 CFR part 11) must be exhausted before bringing suit in court that challenges action taken under this rule.

G. Unfunded Mandates Reform Act (UMRA)

Title II of the UMRA, Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal Governments and on the private sector. Under section 202 of the UMRA, Federal agencies generally must prepare a written statement, including cost-benefit analysis, for proposed and Final Rules with ''Federal mandates'' that may result in expenditures to State, local, or tribal Governments, in the aggregate, or to the private sector, of $100 million or more in any year. When such a statement is needed for a rule, section 205 of the UMRA generally requires a Federal agency to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule.

This rulemaking contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for State, local, and tribal Governments or for the private sector. Therefore, this rulemaking is not subject to the requirements of sections 202 and 205 of the UMRA.

H. Executive Order 13132—Federalism

The policies contained in this rulemaking do not have any substantial direct effect on States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Nor does this rulemaking impose substantial direct compliance costs on state and local governments. Therefore, consultation with the States is not required.

I. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

This Executive order imposes requirements on RBCS in the development of regulatory policies that have tribal implications or preempt tribal laws. RBCS has determined that the rule does not have a substantial direct effect on one or more Indian tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and Indian tribes. Thus, this rulemaking is not subject to the requirements of Executive Order 13175. If tribal leaders are interested in consulting with RBCS on this rule, they are encouraged to contact USDA's Office of Tribal Relations or RD's Native American Coordinator at: *AIAN@usda.gov* to request such a consultation.

J. E-Government Act Compliance

RD is committed to the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

K. Civil Rights Impact Analysis

RD has reviewed this rulemaking in accordance with USDA Regulation 4300–4, Civil Rights Impact Analysis, to identify any major civil rights impacts the rule might have on Program participants on the basis of age, race, color, national origin, sex, disability, marital or familial status. Based on the review and analysis of the rule and all available data, issuance of this proposed rule is not likely to negatively impact low and moderate-income populations, minority populations, women, Indian tribes or persons with disability, by virtue of their age, race, color, national origin, sex, disability, or marital or familial status. No major civil rights impact is likely to result from this proposed rule.

L. USDA Non-Discrimination Statement

In accordance with Federal civil rights laws and USDA civil rights regulations and policies, the USDA, its Mission Areas, agencies, staff offices, employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Program information may be made available in languages other than English. Persons with disabilities who require alternative means of communication to obtain program information (*e.g.,* Braille, large print,

audiotape, American Sign Language) should contact the responsible Mission Area, agency, or staff office; or the 711 Relay Service.

To file a program discrimination complaint, a complainant should complete a Form AD–3027, USDA Program Discrimination Complaint Form, which can be obtained online at *https://www.usda.gov/sites/default/files/documents/ad-3027.pdf* from any USDA office, by calling (866) 632–9992, or by writing a letter addressed to USDA. The letter must contain the complainant's name, address, telephone number, and a written description of the alleged discriminatory action in sufficient detail to inform the Assistant Secretary for Civil Rights (ASCR) about the nature and date of an alleged civil rights violation. The completed AD–3027 form or letter must be submitted to USDA by:

a. *Mail:* U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; or

b. *Fax:* (833) 256–1665 or (202) 690–7442; or

c. *Email: program.intake@usda.gov*

List of Subjects in 7 CFR Parts 3201, 3202, and 4270

Biobased products, Business and industry, Government procurement.

For the reasons stated in the preamble, USDA is proposing to amend chapters XXXII and XLII of title 7 of the Code of Federal Regulations as follows:

CHAPTER XXXII—OFFICE OF PROCUREMENT AND PROPERTY MANAGEMENT

PART 3201 [Removed and Reserved]

■ 1. Under the authority of 5 U.S.C. 301 and 7 U.S.C. 8102, remove and reserve part 3201.

PART 3202 [Removed and Reserved]

■ 2. Under the authority of 5 U.S.C. 301 and 7 U.S.C. 8102, remove and reserve part 3202.

CHAPTER XLII—RURAL BUSINESS-COOPERATIVE SERVICE

■ 3. Add part 4270, consisting of §§ 4270.1 through 4270.99 to read as follows:

PART 4270—USDA BIOBASED MARKETS PROGRAM: FEDERAL PROCUREMENT AND VOLUNTARY LABELING

Sec.

Authority: 7 U.S.C. 8102.

§ 4270.1 Purpose and scope.

(a) This part sets forth the procedures and guidelines for the implementation of the USDA Biobased Markets Program, called the BioPreferred® Program, established by section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA) as amended by the Food, Conservation, and Energy Act of 2008, and further amended by the Agricultural Act of 2014, and the Agriculture Improvement Act of 2018 (Pub. L. 107–171, 116 Stat. 476, 7 U.S.C. 8102).

(b) The guidelines in this part establish:

(1) A process for designating categories of products that are, or can be, produced with biobased Intermediate Ingredients or feedstocks and whose procurement by procuring agencies and other relevant Stakeholders will carry out the objectives of section 9002 of FSRIA;

(2) The criteria for eligibility and the process through which Biobased Products can participate in the BioPreferred Program, be subject to preferred Federal procurement, and be eligible to display the USDA Certified Biobased Product Label;

(3) Specifications for the correct and incorrect uses of the USDA Certified Biobased Product Label and Certification Icon, which apply to Participating Organizations and Other Entities; and

(4) Actions that constitute noncompliance with this part.

§ 4270.2 Definitions.

Agricultural materials. Plant, animal, and marine matter, raw materials or residues used in the manufacturing of a commercial or industrial product excluding food, feed, motor vehicle fuel, heating oil, and electricity.

Applicable minimum biobased content. The required Biobased Content level set by USDA that a product must meet or exceed to qualify for the Federal procurement preference and use of the USDA Certified Biobased Product Label.

ASTM International (ASTM). A nonprofit organization, formerly known as American Society for Testing and Materials, 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 recent, biologically derived organic carbon in the material or product expressed as a percent of weight (mass) of the total organic carbon in the material or product.

Biobased content testing. The testing that is performed to verify a product's biobased Content. For products participating in the BioPreferred Program, 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(s). (1) A product determined by USDA to be a commercial or industrial product (other than food or feed) that is:

(i) Composed, in whole or in significant part, of Biological Products, including renewable domestic Agricultural Materials, Renewable Chemicals, and forestry materials; or

(ii) An Intermediate Ingredient or Feedstock.

(2) The term Biobased Product includes, with respect to forestry materials, Forest Products that meet Biobased Content requirements, notwithstanding the market share the product holds, the age of the product, or whether the market for the product is new or emerging. For the purposes of the BioPreferred Program, the term Biobased Product does not include motor vehicle fuels, heating oils, or electricity.

Biodegradability. A quantitative measure of the extent to which a material is capable of being decomposed by biological agents, especially bacteria.

Biological products. Products derived from living materials.

Certification icon. The distinctive image, as shown in Figure 1, that depicts the symbols of the sun, the soil, and the aquatic environments to be used with USDA's permission to identify Certified Biobased Products. The icon will be used in materials including, but not limited to, advertisements, catalogs, procurement databases, websites, and promotional and educational materials. The colors used in the Certification Icon can be found in the USDA BioPreferred Program Brand and Marketing Guidelines available on the BioPreferred Program website (*https://www.biopreferred.gov*).

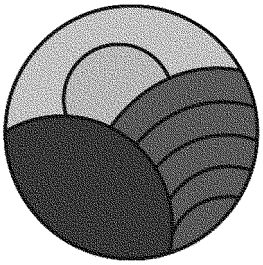

Figure 1. Certification Icon. (Note: Actual Size Will Vary Depending on Application)

Certified application. An application for a Biobased Product to participate in the BioPreferred Program that has completed all steps of the certification process, including an initial Prequalification review and Biobased Content Testing as required, and has received a notice of certification.

Certified biobased product. A Biobased Product that is eligible for preferred Federal procurement because it meets the definition and Applicable Minimum Biobased Content criteria for one or more Designated Product Categories as specified in the Register of Designated Categories, and for which the Participating Organization has received approval from USDA to utilize the USDA Certified Biobased Product Label.

Complex assembly. A system of distinct materials and components assembled to create a finished product with specific functional intent where some or all of the system components contain some amount of biobased material or feedstock.

Days. As used in this part means calendar Days.

Defined product category. Any product category that has been established for a specified grouping of Biobased Products with similar characteristics and intended uses. A Defined Product Category includes a description of the product characteristics that fall within the category. The other product category is not a Defined Product Category.

Designated product category. A grouping of Biobased Products, including finished products, Intermediate Ingredients or Feedstocks, and Complex Assemblies, identified in the Register of Designated Categories on the BioPreferred Program website (*https://www.biopreferred.gov*). Certified or Qualified Biobased Products that meet the criteria for at least one designated category are eligible for the procurement preference established under section 9002 of FSRIA.

Designated representative. An entity authorized by a Participating Organization to act on their behalf to obtain certification or to affix the USDA Certified Biobased Product Label to the Participating Organization's Certified Biobased Product or its packaging or perform other marketing functions.

Federal agency. Any executive agency or independent establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, the Architect of the Capitol, and any activities under the Architect's direction).

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

(1) Pulp, paper, paperboard, pellets, lumber, and other wood products; and

(2) Any recycled products derived from forest materials.

Formulated product. A product that is prepared or mixed with other Ingredients, according to a specified formula and includes more than one Ingredient.

FSRIA. The Farm Security and Rural Investment Act of 2002, Public Law 107–171, 116 Stat. 134 (7 U.S.C. 8102).

Ingredient. A component, or a part of a compound or mixture, that may be active or inactive.

Innovative criteria. Benchmark for demonstrating new and emerging approaches in the growing, harvesting, sourcing, procuring, processing, manufacturing, or application of the Biobased Product. Biobased Products must meet one of the Innovative Criteria as defined by USDA to be eligible for preferred Federal procurement and to display the USDA Certified Biobased Product Label.

Intermediate ingredient or feedstock. A material or compound made in whole or in significant part from Biological Products, including renewable Agricultural Materials (including plant, animal, and marine materials) or forestry materials that have undergone value added processing (including thermal, chemical, biological, or a significant amount of mechanical processing), excluding harvesting operations, offered for sale by a Participating Organization and that is subsequently used to make a more complex compound or product.

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 the requirements of the ISO 9001 standard, but that is not required to be ISO 9001 certified. ISO 9001 refers to the ISO'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.

Other entity. Any person, group, public or private organization, or business other than USDA or Participating Organizations that may wish to use the USDA Certified Biobased Product Label or Certification Icon in informational or promotional material related to a Certified Biobased Product.

Parent product. The Certified Biobased Product in a test exempt relationship that was originally tested for certification. A test exempt product references the Certified Application of its Parent Product.

Participating organization. An entity that has completed the steps required to have a Certified and/or Qualified Biobased Product under the BioPreferred Program. Participants can include entities that perform the necessary chemical and mechanical processes to make a Biobased Product, and entities that offer for sale Biobased Products that they do not manufacture but that are marketed and sold under their own brand.

Prequalification. The step during the certification process at which an application is conditionally approved pending the product undergoing Biobased Content Testing.

Procuring agency. Any Federal agency that is using Federal funds for procurement or any business contracting with any Federal agency with respect to work performed under the contract.

Qualified biobased product(s). A product that is eligible for preferred Federal procurement because it meets the definition and Applicable Minimum Biobased Content criteria for one or more Designated Product Categories as specified in the Register of Designated Categories.

Register of Designated Categories. The list of product categories that are eligible for the procurement preference established under section 9002 of FSRIA, including the category name, description, required minimum Biobased Content, and date of finalization. The Register of Designated Categories can be found on the BioPreferred Program website at *https://www.biopreferred.gov.*

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

Secretary. The Secretary of the United States Department of Agriculture.

Stakeholder. Individuals or officers of state or local government organizations, private non-profit institutions, or organizations, and private businesses or consumers.

USDA. The United States Department of Agriculture.

USDA Certified Biobased Product label. A combination of the Certification Icon (as defined in this part); one of three statements identifying whether the USDA certification applies to the product, the package, or both the product and package; and the letters ''FP'' to indicate that the product is within a Designated Product Category and eligible for preferred Federal procurement. The distinctive image, as shown in Figures 2, 3, and 4, identifies products as USDA Certified Biobased Products. The colors used in the USDA Certified Biobased Product Label can be found in the USDA BioPreferred Program Brand and Marketing Guidelines available on the BioPreferred Program website (*https://www.biopreferred.gov*). The USDA Certified Biobased Product Label is owned and its use is managed by USDA (standard trademark law definition applies).

Figure 2: USDA Certified Biobased Product Label (Note: Actual Size Will Vary Depending on Application)

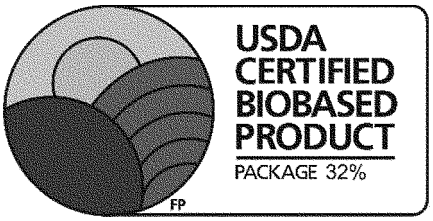

Figure 3: USDA Certified Biobased Package Label (Note: Actual Size Will Vary Depending on Application)

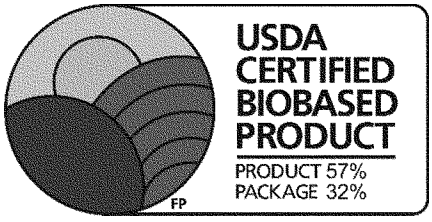

Figure 4: USDA Certified Biobased Product & Package Label (Note: Actual Size Will Vary Depending on Application)

§ 4270.3 Applicability.

(a) *Applicability to Federal procurements*—(1) *Applicability to procurement actions.* The guidelines in this part apply to all procurement actions by Procuring Agencies involving product categories designated by USDA in this part, where the Procuring Agency makes purchases of $10,000 or more of one of these products during a fiscal year, or where the quantity of such products or of functionally equivalent products purchased during the preceding fiscal year was $10,000 or more. The $10,000 threshold applies to Federal agencies as a whole rather than to agency subgroups such as regional offices or subagencies of a larger Federal department or agency.

(2) *Exception for procurements subject to Environmental Protection Agency (EPA) regulations under the Solid Waste Disposal Act.* For any procurement by any Procuring Agency that is subject to regulations of the Administrator of the EPA under section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (40 CFR part 247), these guidelines do not apply to the extent that the requirements of this part are inconsistent with such regulations.

(3) *Procuring products composed of the highest percentage of Biobased Content.* Section 9002(a)(2) of FSRIA (7 U.S.C. 8102(a)(2)) requires Procuring Agencies to procure Qualified Biobased Products composed of the highest percentage of Biobased Content practicable. Procuring agencies may decide not to procure such Qualified Biobased Products if they are not reasonably priced or readily available or do not meet specified or reasonable performance standards.

(4) *Incidental purchases.* This part does not apply to purchases of Qualified Biobased Products that are unrelated to or incidental to Federal funding (*i.e.,* purchases that are not the direct result of a contract or agreement with persons supplying products to a Procuring Agency or providing support services that include the supply or use of products).

(5) *Exemptions.* The following applications are exempt from the preferred procurement requirements of this part:

(i) Military equipment, which are products or systems designed or procured for combat or combat-related missions.

(ii) Spacecraft systems and launch support equipment.

(b) *Applicability to Participating Organizations and Other Entities*—(1) *Participating Organizations.* The requirements in this part apply to all prospective Participating Organizations who wish to participate in the BioPreferred Program. Those wishing to participate in the BioPreferred Program are required to obtain and maintain product certification. USDA will allow only one owner or Designated Representative of a branded product to participate. Participating Organizations may not obtain product certification for a product using a brand name owned by a separate organization unless they are acting on behalf of the brand owner, with their approval, as a Designated Representative.

(2) *Other Entities.* The requirements in this part apply to Other Entities who wish to use the USDA Certified Biobased Product Label or Certification Icon in promoting the sales or the public awareness of Certified Biobased Products.

§ 4270.4 Criteria for eligibility.

A product must meet each of the criteria specified in paragraphs (a) through (c) of this section to be eligible to participate in the BioPreferred Program.

(a) *Biobased Product.* The product for which certification is sought must be a Biobased Product as defined in § 4270.2. Products must undergo Biobased Content Testing as described in § 4270.7 to confirm the products meet or exceed the applicable minimums.

(1) *Products that are qualified for preferred Federal procurement but not certified as of the date of publication of this rule.* If the product is qualified for preferred Federal procurement through the BioPreferred Program as of [DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], the product will remain eligible under the legacy rules, which can be found on the BioPreferred Program website (*https://www.biopreferred.gov*), until the product is reformulated, discontinued, or until [DATE THREE YEARS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**], whichever comes first. These products must follow the procedures described in § 4270.9 before [DATE THREE YEARS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**] to remain eligible.

(2) *Exclusions.* Motor vehicle fuels, heating oil, and electricity are excluded by statute from this Program. For the purposes of this Program, food, animal feed, and products intended to be ingested or inhaled such as pharmaceuticals or nutraceuticals are also excluded.

(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) and (2) of this section.

(1) *Products that fall under one or more Defined Product Categories*—(i) *Product is within a single product category.* If the Biobased Product is within a single Defined Product Category that, at the time the application for certification is submitted, has been designated by USDA for preferred Federal procurement, the Applicable Minimum Biobased Content requirement for the product is the minimum Biobased Content specified for the Defined Product Category as found in the Register of Designated Categories on the BioPreferred Program website at *https://www.biopreferred.gov.*

(ii) *Product is within multiple product categories.* If the Biobased Product is marketed within more than one Defined Product Category identified for preferred Federal procurement at the time the application for certification is submitted and uses the same packaging for each use, the product's Biobased Content must meet or exceed the specified minimum Biobased Content for each of the applicable product categories, as found in the Register of Designated Categories on the BioPreferred Program website at *https://www.biopreferred.gov,* to become certified in each category. If the product's Biobased Content does not meet the specified minimum Biobased Content for the category that most closely matches the product's primary intended use, the product is not eligible to participate.

(2) *Products that do not meet the definition of at least one Defined Product Category.* If the Biobased Product does not meet the definition of a Defined Product Category that has been designated by USDA at the time the application for certification is submitted, the Applicable Minimum Biobased Content is 30 percent. USDA will evaluate such products as described in § 4270.6 to determine the viability of designating a new product category. If a new category is subsequently designated for preferred Federal procurement, the Applicable Minimum Biobased Content will become, as of the effective date indicated in the Register of Designated Categories, the minimum Biobased Content specified for the newly Defined Product Category.

(c) *Innovative Criteria.* In determining eligibility for certification under the BioPreferred Program, USDA will consider as eligible only those products that use innovative approaches in the growing, harvesting, sourcing, procuring, processing, manufacturing, or application of the Biobased Product. USDA will consider products that meet one or more of the criteria in paragraphs (c)(1) through (4) of this section to be eligible for certification. USDA will also consider other documentation of innovative approaches in the growing, harvesting, sourcing, procuring, processing, manufacturing, or application of Biobased Products on a case-by-case basis. USDA may deny or revoke certification for any products whose manufacturers are unable to provide USDA with the documentation necessary to verify claims that innovative approaches are used.

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

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

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

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

(ii) The Biobased Product or material is manufactured or processed with technologies that reduce waste and ensure high feedstock material recovery and use.

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

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

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

(iii) The raw material used in the product is acquired as a result of activities related to a natural disaster, debris clearing, right-of-way maintenance, tree health improvement, or public safety; or

(iv) The raw material used in the product is grown, harvested, manufactured, processed, sourced, or applied in other sustainable and ethically sourced ways as determined by USDA. Examples include but are not limited to rainforest and habitat conservation, wildlife protection, ethical workplace practices, and adherence to environmental management systems, such as ISO 14001.

§ 4270.5 Procurement programs.

(a) *Integration into the Federal procurement framework.* The Office of Federal Procurement Policy, in cooperation with USDA, has the responsibility to coordinate this policy's implementation in the Federal procurement regulations. These guidelines are not intended to address full implementation of these requirements into the Federal procurement framework. This will be accomplished through revisions to the Federal Acquisition Regulation.

(b) *Federal agency preferred procurement programs.* (1) Each Federal agency will maintain and implement a procurement program that will assure that Qualified Biobased Products are purchased to the maximum extent practicable and that is consistent with applicable provisions of Federal procurement laws. Each procurement program will contain:

(i) A preference program for purchasing Qualified Biobased Products;

(ii) A training program to educate the Federal agency and its contractors on the requirements for purchasing Qualified Biobased Products;

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

(iv) Provisions for reporting quantities and types of Biobased Products purchased by the Federal agency and its contractors through the BioPreferred Program Portal in the System for Award Management (*https://sam.gov*) as required by 48 CFR 52.223–2; and

(v) Provisions for reviewing and eliminating specifications that prohibit the purchasing of Qualified Biobased Products.

(2) In developing their preference program, Federal agencies will adopt one of the following options, or a substantially equivalent alternative, as part of the procurement program:

(i) A policy of awarding contracts on a case-by-case basis to the vendor offering a Qualified Biobased Product

composed of the highest percentage of Biobased Content practicable except when such products:

(A) Are not available within a reasonable timeframe;

(B) Fail to meet performance standards for their intended use, or the reasonable performance standards of the Federal agency; or

(C) Are not available at a reasonable price.

(ii) A policy of setting minimum Biobased Content specifications in such a way as to assure that the required Biobased Content of Qualified Biobased Products is consistent with section 9002 of FSRIA and the requirements of the guidelines in this part.

(iii) A policy of documenting and reporting cases where it is not possible to award contracts and set specifications in such a way that is consistent with section 9002 of FSRIA and the requirements of this part.

(3) In implementing the preference program, Federal agencies will treat as eligible for the preference Biobased Products from designated countries, as that term is defined in 48 CFR 25.003 (Federal Acquisition Regulation), provided that those products otherwise meet all requirements for participation in the preference program.

(4) Each Federal agency will continue to establish an annual targeted biobased-only procurement requirement under which the Procuring Agency will issue a certain number of biobased-only contracts when the Procuring Agency is purchasing products, or purchasing services that include the use of products, that are included in a Biobased Product category designated by the Secretary.

(c) *Procurement specifications.* Federal agencies that have the responsibility for drafting or reviewing specifications for products procured by Federal agencies will ensure that their specifications require the use of Qualified Biobased Products, consistent with the guidelines in this part. These specifications must be put in place no later than six months after a designated category of products is finalized and added to the Register of Designated Categories. USDA will identify the allowable time frame for specifications to be put in place in the Register of Designated Categories found on the BioPreferred Program website at *https://www.biopreferred.gov.* The Biobased Content of Qualified Biobased Products within a Designated Product Category may vary considerably from product to product based on the mix of Ingredients used in its manufacture. In procuring Qualified Biobased Products, the percentage of Biobased Content should be maximized, consistent with achieving the desired performance for the product.

§ 4270.6 Category designation.

(a) *Procedure.* Designated Product Categories are found in the Register of Designated Categories on the BioPreferred Program website (*https://www.biopreferred.gov*).

(1) *General.* In designating product categories, USDA will designate categories composed of generic groupings of specific products, Intermediate Ingredients or Feedstocks, or Complex Assemblies and will identify the minimum Biobased Content for each listed category or subcategory. As product categories are designated for procurement preference, they will be added to the Register of Designated Categories on the BioPreferred Program website at *https://www.biopreferred.gov.*

(i) *Adding new product categories to the Register of Designated Categories.* If a product does not fall within a Defined Product Category that has been designated by USDA at the time the application for certification is submitted, the Applicable Minimum Biobased Content is 30 percent, and it will be listed in the other product category. USDA will evaluate the viability of designating new product categories to categorize products in the other product category more appropriately, following the procedure described in paragraphs (a)(1)(i)(A) through (D) of this section.

(A) New Defined Product Categories that are identified during the category evaluation process will be added to the Register of Designated Categories on the BioPreferred Program website (*https://www.biopreferred.gov*). Using the data gathered during the certification process, USDA will establish a provisional category name, definition, and minimum Biobased Content for each new product category based on the product(s) that fall within the new category.

(B) The provisional minimum will be in place for a period of six months following the addition of the new Defined Product Category to the Register of Designated Categories. During that time, any product that falls within the category based on the category definition and has a Biobased Content that is either at least 30 percent or within 30 percentage points of the provisional minimum, whichever is higher, will be considered for inclusion.

(C) After a period of six months following the addition of the new product category to the Register of Designated Categories, USDA will re-evaluate the provisional category name, description, and minimum Biobased Content based on the data gathered during the year. At that time, USDA will make final the product category name, description, and minimum Biobased Content, and the category will no longer be considered provisional.

(D) Procuring agencies, in accordance with this part, are encouraged to give a procurement preference for Qualified Biobased Products that fall within provisionally designated categories and are required to give a procurement preference for Qualified Biobased Products that fall within designated categories no later than six months after the finalized product category is added to the Register of Designated Categories. By that date, Federal agencies responsible for products to be procured will ensure that the relevant specifications require the use of Biobased Products that fall within the designated categories.

(ii) *Revising Defined Product Categories on the Register of Designated Categories.* USDA will periodically evaluate the need to update the product categories included in the Register of Designated Categories by reviewing items including, but not limited to, the category names, definitions, minimum Biobased Contents, subcategories, and the need for the category or subcategory. If the data support making updates, USDA will amend the category and publish the updated category to the Register of Designated Categories. No later than six months after the amended category is published to the Register of Designated Categories, procuring agencies, in accordance with this part, will give a procurement preference for Qualified Biobased Products that fall within the amended designated category. By that date, Federal agencies responsible for products to be procured will ensure that the relevant specifications require the use of Biobased Products that fall within the designated categories.

(2) *Public comments.* Interested parties, including manufacturers, vendors, groups of manufacturers and/or vendors, and trade associations may propose an alternative Applicable Minimum Biobased Content for a new, provisional, defined, or Designated Product Category by, in consultation with USDA, developing 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 products that fall within that category to be certified.

(3) *Continued eligibility.* If the applicable required minimum Biobased Content for a product to be eligible to participate in the BioPreferred Program is revised by USDA, the product will remain certified or qualified, as applicable, only if it meets the new minimum Biobased Content level. In those cases where the Biobased Content of a certified or qualified product fails to meet the new minimum Biobased Content level, USDA will notify the Participating Organization that their certification is no longer valid. Such Participating Organizations must notify USDA of their intent to increase the Biobased Content of their product to a level at or above the new minimum Biobased Content level within 120 Days and must re-apply for certification within an additional 120 Days if they wish to continue to participate in the Program. The affected product's certification will expire if the Participating Organization does not notify USDA of the intent to reformulate within 120 Days or if the Participating Organization does not re-apply within the additional 120 Days. Participating Organizations who have re-applied for certification may continue using the existing USDA Certified Biobased Product Label until they receive notification from USDA on the results of their re-application for certification.

(b) *Considerations.* (1) In designating product categories, USDA will consider the availability of Qualified Biobased Products and the economic and technological feasibility of using such products, including price. USDA will gather information on individual Qualified Biobased Products within a category and extrapolate that information to the category level for consideration in designating categories.

(2) In designating product categories for the BioPreferred Program, USDA will consider as eligible only those products that use innovative approaches in growing, harvesting, sourcing, procuring, processing, manufacturing, or application of the Biobased Product. USDA will consider products that meet one or more of the criteria in § 4270.4(b)(1) and (2) to be eligible for the BioPreferred Program. USDA will also consider other documentation of innovative approaches in growing, harvesting, sourcing, procuring, processing, manufacturing, or application of Biobased Products on a case-by-case basis.

§ 4270.7 Determining Biobased Content.

(a) *Certification requirements.* For any Biobased Product seeking to participate in the BioPreferred Program, prospective Participating Organizations must submit an application as specified in § 4270.9 and confirm that the product meets the Applicable Minimum Biobased Content requirements and the definition for the Defined Product Category within which the Biobased Product falls. Paragraph (c) of this section addresses how to determine Biobased Content.

(b) *Minimum Biobased Content.* Unless specified otherwise in the designation of a particular product category, the minimum Biobased Content requirements in a specific category designation refer to the organic carbon portion of the product, and not the entire product.

(c) *Determining Biobased Content.* Verification of Biobased Content must be based on third party ASTM/ISO compliant test facility testing using the ASTM Standard Method D6866 (Standard Test Methods for Determining the Biobased Content of Solid, Liquid, and Gaseous Samples Using Radiocarbon Analysis). ASTM Standard Method D6866 determines Biobased Content based on the amount of biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the product.

(1) *General.* Biobased Content will be based on the amount of biobased carbon in the product as a percent of the weight (mass) of the total organic carbon in the product.

(2) *Complex Assemblies*—(i) *Equation.* The Biobased Content of a Complex Assembly product, where the product has n components whose Biobased Content and organic carbon content can be experimentally determined, may be calculated using the following equation:

$$Biobased\ Content\ of\ Product = \frac{\sum_{i=1}^{n} M_i * BBC_i * OCC_i}{\sum_{i=1}^{n} M_i * OCC_i}$$

Where:

M_i = mass of the nth component
BCC_i = biobased carbon content of the nth component (%)
OCC_i = organic carbon content of the nth component (%)

(ii) *Proportional sampling.* The Biobased Content of a Complex Assembly product may be determined by sub-sampling (by weight) each organic constituent in a proportion representative of its content within the assembly and combining the sub-samples into a measurable quantity so that a single ASTM D6866 analysis of the combined sub-samples is representative of the assembly.

(d) *Products and Intermediate Ingredients or Feedstocks with the same formulation.* In the case of products and Intermediate Ingredients or Feedstocks that are essentially the same formulation but marketed under more than one brand name, Biobased Content test data may be shared as specified in paragraphs (d)(1) and (2) of this section.

(1) *Test exemptions.* In situations where a new product for which certification is sought is composed of the same Ingredients and has the same Biobased Content as a product that has already been certified and tested by a company that the interested party has a direct relationship with, the interested party may apply for a test exemption by referencing the Certified Application of the certified Parent Product in lieu of having the new product undergo Biobased Content Testing using ASTM D6866.

(2) *Families.* In situations where a Participating Organization is seeking certification for two or more products that are composed of the same Ingredients and have the same Biobased Content but are marketed for different uses or under more than one brand name, the products may be grouped in a family. Biobased Content test data must only be obtained for one of the products in the family, and the test data will apply to all products within the family.

§ 4270.8 [Reserved]

§ 4270.9 Initial approval process.

(a) *Application.* Prospective Participating Organizations seeking USDA approval to use the USDA Certified Biobased Product Label and to become qualified for preferred Federal procurement for an eligible Biobased Product must submit an application for each Biobased Product or product family. USDA has developed a standardized application form that must be used. The standardized application form and instructions are available on the BioPreferred Program website (*https://www.biopreferred.gov*). The contents of an acceptable application are as specified in paragraphs (a)(1) and (2) of this section.

(1) *General content.* The applicant must provide the information as specified in paragraphs (a)(1)(i) though (viii) of this section.

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

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

(iii) Intended uses of the product.

(iv) The biobased source(s) of the raw materials used in the product.

(v) Information to document that one or more of the Innovative Criteria specified in § 4270.4(c) has been met.

(vi) The corresponding Designated Product Category classification for preferred Federal procurement.

(vii) The estimated Biobased Content of the product.

(viii) A web link directly to the applicant's website (if available).

(2) *Commitments.* The applicant must verify in the application that the product for which use of the USDA Certified Biobased Product Label is sought is a Biobased Product as defined in § 4270.2. The applicant must also agree to statements in the application that commit the applicant to submitting to USDA the information specified in paragraph (a)(1)(i) through (viii) of this section, some of which USDA will post to the BioPreferred Program website (*https://www.biopreferred.gov*), and to providing USDA with up-to-date information on this website.

(b) *Evaluation of applications*—(1) *Initial evaluation.* USDA will evaluate each application to determine if it contains the information specified in paragraph (a) of this section and to determine compliance with the criteria specified in § 4270.4. If USDA determines that the application is incomplete, USDA will contact the applicant via email with an explanation of the application's deficiencies. Once the deficiencies have been addressed, the applicant may respond to USDA with an explanation of how the application's deficiencies were addressed for re-evaluation by USDA, and USDA will update the application as needed. If the applicant does not provide a response within 90 Days, USDA will make the application inactive.

(2) *Prequalification.* (i) USDA will provide a written response to each applicant as quickly as practicable, no later than 90 Days after the receipt of a complete application, depending on the responsiveness of the applicant. The written response will inform the applicant of whether the application has been conditionally approved, or prequalified, to move forward to Biobased Content Testing or has been disapproved. After notification that the application has been conditionally approved, if any of the information specified in paragraphs (a)(1)(i) through (viii) of this section has changed, the applicant must provide updates to USDA (for posting by USDA on the BioPreferred Program website).

(ii) For those applications that are conditionally approved to move forward, Biobased Content Testing must be completed as described in § 4270.7. Test results obtained prior to the application being conditionally accepted or obtained in a manner that does not comply with this part cannot be accepted.

(iii) After Biobased Content Testing has been completed, USDA will evaluate the results and determine if the product meets the criteria described in § 4270.4(b). For those applications that meet the criteria described in § 4270.4(b), USDA will issue a notice of certification, as specified in paragraph (c) of this section. A notice of certification must be issued before the use of the USDA Certified Biobased Product Label can begin.

(iv) For those applications that are disapproved, USDA will inform the applicant in writing of each criterion not met.

(c) *Notice of certification.* Once USDA confirms that the test results document an acceptable Biobased Content, USDA will issue a notice of certification to the applicant that includes the date of certification, name of the product(s) covered by the certification, and certified Biobased Content of the product(s). Upon receipt of a notice of certification, the applicant may begin using the USDA Certified Biobased Product Label on the Certified Biobased Product and may advertise that the product is a Certified Biobased Product. Paragraph (c)(1) of this section presents the procedures for revising the information provided under paragraphs (a)(1)(i) through (viii) of this section after a notice of certification has been issued.

(1) If at any time, during the application process or after a product has been certified, any of the information specified in paragraphs (a)(1)(i) through (viii) of this section changes, the applicant must notify USDA of the change within 30 Days. Such notification must be provided in writing via email to USDA. Failure to notify USDA of any change made to a Certified Biobased Product may result in the violation actions described in § 4270.12.

(2) After receiving the notice of certification, the Participating Organization may request to display a Biobased Content percentage that is lower than the content measured by the ASTM D6866 test results but is greater than or equal to the applicable category minimums. Such requests must be sent in writing via email to USDA and must be approved by USDA.

(3) If, after reviewing the test results, USDA determines that the product does not meet the Applicable Minimum Biobased Content, USDA will issue a notice of denial of certification and will inform the applicant in writing via email of each criterion not met.

(d) *Term of certification*—(1) *General.* The effective date of certification is included in the notice of certification from USDA. Except as specified in paragraphs (d)(1)(iii) and (iv) and (d)(2) through (4) of this section, certifications will remain in effect for five years. The applicant will be notified 90 Days before the certification expires, at which time, the product must be re-tested in accordance with the procedure as specified in § 4270.7.

(i) If the certification is not renewed within the 90 Days, the product certification will expire, the product will no longer be a Certified Biobased Product, and the product information will be removed from the BioPreferred Program website (*https://www.biopreferred.gov*).

(ii) If a Participating Organization whose product certification has expired wishes to renew the certification, the participant must follow the procedures required for original certification.

(iii) All certifications are subject to periodic USDA auditing activities, as described in § 4270.15. If a Participating Organization fails to participate in such audit activities or if such audit activities reveal Biobased Content violations, as specified in § 4270.12, the certification will be subject to suspension and revocation according to the procedures specified in § 4270.12(c)(3).

(iv) If USDA discovers that a certification has been issued for an ineligible product as a result of errors on the part of USDA during the approval process, USDA will notify the Participating Organization in writing that the certification is revoked effective 30 Days from the date of the notice.

(2) *Reformulations.* If at any time during the term of certification a Certified Biobased Product is reformulated, the participant must notify USDA of the change. USDA will consider the changes and inform the participant if re-testing is required as specified in paragraphs (d)(2)(i) through (iii) of this section.

(i) If the product formulation or raw materials of a Certified Biobased Product are changed such that the

Biobased Content of the product is reduced to a level below that reported in the Certified Application, the existing certification will no longer be valid for the product under these revised conditions and the Participating Organization and its Designated Representatives must discontinue affixing the USDA Certified Biobased Product Label to the product and must not initiate any further advertising of the product using the USDA Certified Biobased Product Label. USDA will consider a product under such revised conditions to be a reformulated product, and the Participating Organization 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 Biobased Product is changed such that the Biobased Content of the product is increased from the level reported in the Certified Application, and the raw materials are not significantly changed, the existing certification will continue to be valid for the product.

(iii) If the applicable required minimum Biobased Content for a product to participate in the BioPreferred Program is revised by USDA, Participating Organizations must follow the requirements specified in § 4270.6(a)(3).

(3) *Test exemptions.* For those products that are exempt from Biobased Content Testing as described in § 4270.7, the test exempt certification will expire at the same time as the Certified Application of the Parent Product.

(4) *Special considerations.* (i) For those Participating Organizations who have Qualified Biobased Products that are not certified as of the date of publication of this rule, USDA will solicit Biobased Content test data obtained using the ASTM D6866 test method. Participants who provide USDA with ASTM D6866 test data that has been obtained within the past five years from the date of publication of this rule and whose products meet the requirements as described in § 4270.4 will receive certification for their products covered by the test data. The term of certification as described in paragraph (d)(1) of this section will then apply.

(ii) Participants who have Qualified Biobased Products that are not certified as of [DATE OF PUBLICATION OF THIS FINAL RULE IN THE **FEDERAL REGISTER**] and do not provide recent ASTM D6866 test results within three years of the publication of this rule will be required to have their products tested and certified as described in § 4270.7. If certification is not completed within three years of the publication of this rule, these Biobased Products will no longer be listed as Qualified Biobased Products on the BioPreferred Program's website (*https://www.biopreferred.gov*) and will be removed from the BioPreferred Program's website (*https://www.biopreferred.gov*).

(iii) For those participants who have Certified Biobased Products that have been certified for more than five years as of the date of publication of this rule, USDA will require that the certification be renewed as described in paragraph (d)(1) of this section within three years of [DATE OF PUBLICATION OF THIS FINAL RULE IN THE **FEDERAL REGISTER**]. If an application for renewal is not completed within three years, the product certification will expire, the product will no longer be a Certified Biobased Product, and the product information will be removed from the BioPreferred Program website (*https://www.biopreferred.gov*).

§ 4270.10 [Reserved]

§ 4270.11 Requirements associated with promotional certification materials.

(a) *How participation in the BioPreferred Program can be promoted.* Guidance on promoting participation in the BioPreferred Program is provided in paragraphs (a)(1) and (2) of this section. USDA will evaluate additional requests for uses of promotional materials or references to the Program and will offer guidance on the BioPreferred Program website (*https://www.biopreferred.gov*).

(1) *Participating Organizations.* Only Participating Organizations that have received a notice of certification, or Designated Representatives of the Participating Organization, may utilize certification materials provided by the BioPreferred Program. A Participating Organization who has received a notice of certification for a product under this part:

(i) May use the USDA Certified Biobased Product Label (in one of the approved variations, as applicable) on the product, its packaging, and other related materials including, but not limited to, advertisements, catalogs, specification sheets, procurement sheets, procurement databases, promotional material, websites, or user manuals for that product, according to the requirements set forth in this section.

(ii) Is responsible for the manner in which the USDA Certified Biobased Product Label is used by its companies, as well as its Designated Representatives, including advertising agencies, marketing and public relations firms, and subcontractors.

(2) *Other Entities.* Other Entities who have entered into a partnership agreement with USDA may use the BioPreferred Program's promotional certification materials to advertise or promote Certified Biobased Products in materials including, but not limited to, advertisements, catalogs, procurement databases, websites, and promotional and educational materials. Other Entities may use:

(i) The Certification Icon;

(ii) The phrase ''USDA Certified Biobased Product/Package/Product & Package,'' as applicable; and

(iii) 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 product is certified or endorsed by USDA.

(b) *Correct usage of the USDA Certified Biobased Product Label and other promotional certification materials.* (1) The USDA Certified Biobased Product Label can be affixed only to Certified Biobased Products and their associated packaging.

(2) The USDA Certified Biobased Product Label may be used in material including, but not limited to, advertisements, catalogs, procurement databases, websites, and promotional and educational materials to distinguish certified products from those that are not certified. The USDA Certified Biobased Product Label 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) When educating the public about the USDA Certified Biobased Product Label, the watermarked sample version of the USDA Certified Biobased Product Label may be used without reference to a specific Biobased Product. For example, the following or similar claims are acceptable: ''Look for the 'USDA Certified Biobased Product Label.' It means that the product meets USDA standards for the minimum amount of Biobased Content and the manufacturer or vendor has provided relevant information on the product to be posted on the BioPreferred Program website (*https://www.biopreferred.gov*).'' This exception allows Participating Organizations or Other Entities to use a sample USDA Certified Biobased Product Label in documents such as corporate reports, but only in an informative manner, not as a statement of product certification.

(4) The USDA Certified Biobased Product Label may appear next to a picture of the Certified Biobased Product(s) or text describing it.

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

(6) The USDA Certified Biobased Product Label may be embossed, stamped, or used as a watermark provided the use does not violate any BioPreferred Program brand standards or usage restrictions specified in this part.

(7) The text portion of the USDA Certified Biobased Product Label 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 USDA Certified Biobased Product Label and other promotional certification materials.* (1) The USDA Certified Biobased Product Label will not be used on any product that has not been certified by USDA as a ''USDA Certified Biobased Product.''

(2) The USDA Certified Biobased Product Label will not be used in a way that does not maintain the integrity of the label and the BioPreferred Program.

(3) The word ''BioPreferred'' will not be used as a descriptor for anything other than the Program, including but not limited to products, categories, and companies. The BioPreferred Program name, the word ''BioPreferred,'' and the phrase USDA Certified Biobased Product are not interchangeable. For example, certified products may not be referenced as being ''BioPreferred products.''

(4) The USDA Certified Biobased Product Label will not be used on any advertisements or informal materials where both Certified Biobased Products and non-certified products are shown unless it is clear that the USDA Certified Biobased Product Label applies to only the Certified Biobased Product(s).

(5) The BioPreferred Program name and the USDA Certified Biobased Product Label will not be used to imply endorsement by USDA or the BioPreferred Program of any particular product, service, or company.

(6) The BioPreferred Program name and the USDA Certified Biobased Product Label will not be used in any form that could be misleading to the consumer.

(7) The BioPreferred Program name and the USDA Certified Biobased Product Label will not be used by manufacturers or vendors of Certified Biobased Products in a manner disparaging to USDA or any other government body.

(8) The BioPreferred Program name, the word ''BioPreferred,'' the USDA Certified Biobased Product Label, and the Certification Icon will not be altered or incorporated into other label or logo designs.

(9) The USDA Certified Biobased Product Label will not be used on business cards, company letterhead, company stationary, or email signatures.

(10) The BioPreferred Program name, the word ''BioPreferred,'' the USDA Certified Biobased Product Label, and the Certification Icon will not be used in, or as part of, any company name, logo, product name, service, or website, except as may be provided for in this part.

(11) The BioPreferred Program name, the word ''BioPreferred,'' the USDA Certified Biobased Product Label, and the Certification Icon will not be used in a manner that violates any of the applicable requirements contained in this part.

(d) *Imported products.* The USDA Certified Biobased Product Label can be used only with a product that is certified by USDA under this part. The USDA Certified Biobased Product Label 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) *Elements of the USDA Certified Biobased Product Label.* The USDA Certified Biobased Product Label will consist of the Certification Icon, the Biobased Content percentage, the letters ''FP'' to indicate that the product is qualified for preferred Federal procurement, and one of the three variations of text specified in paragraphs (e)(1) through (3) of this section, as applicable.

(1) USDA Certified Biobased Product: Product.

(2) USDA Certified Biobased Product: Package.

(3) USDA Certified Biobased Product: Product & Package.

(f) *Physical aspects of the USDA Certified Biobased Product Label.* The USDA Certified Biobased Product Label elements may not be altered, cut, separated into components, or distorted in appearance or perspective. The USDA Certified Biobased Product Label must appear only in the colors specified in paragraphs (f)(1) and (2) of this section unless approval is given by USDA for an exception.

(1) A multi-color version of the USDA Certified Biobased Product Label is preferred. The USDA Certified Biobased Product Label colors to be applied will be stipulated in the ''USDA BioPreferred Program Brand and Marketing Guidelines'' document available on the BioPreferred Program website (*https://www.biopreferred.gov*).

(2) Black or white outline versions of the USDA Certified Biobased Product Label are acceptable.

(g) *Placement of the USDA Certified Biobased Product Label.* (1) The USDA Certified Biobased Product Label 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 USDA Certified Biobased Product Label will 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, websites, and promotional and educational materials, the USDA Certified Biobased Product Label must appear near a picture of the product or text describing it.

(i) If all products on a page are Certified Biobased Products with the same Biobased Content percentage, the USDA Certified Biobased Product Label may be placed anywhere on that page.

(ii) If a page contains a mix of Certified Biobased Products and non-certified Biobased Products, the USDA Certified Biobased Product Label will be placed in close proximity to the Certified Biobased Products. An individual USDA Certified Biobased Product Label near each Certified Biobased Product may be necessary to avoid confusion.

(h) *Minimum size and clear space requirements for the USDA Certified Biobased Product Label.* (1) The USDA Certified Biobased Product Label may be sized to fit the individual application as long as the correct proportions are maintained, and all elements of the USDA Certified Biobased Product Label remain legible.

(2) The USDA Certified Biobased Product Label must be surrounded by a border of clear space that must be of sufficient width to offset it from surrounding images and text to avoid confusion. If a one-color outline version of the USDA Certified Biobased Product

Label is used, the USDA Certified Biobased Product Label must appear on a solid background that is a contrasting color.

(i) *Where to obtain copies of the promotional certification materials.* The USDA Certified Biobased Product Label and other associated promotional materials including the USDA BioPreferred Program Brand and Marketing Guidelines are available at the BioPreferred Program website (*https://www.biopreferred.gov*).

(ii) [Reserved]

§ 4270.12 Violations of program requirements.

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 § 4270.13. If certification for a product is revoked, the Participating Organization whose certification has been revoked may seek re-certification for the product specified under the provisions in § 4270.9.

(b) *Types of violations.* Actions that will be considered violations of this part include, but are not limited to, the examples as described in paragraphs (b)(1) through (4) of this section:

(1) *Biobased Content violations.* USDA reserves the right to request occasional testing of Certified Biobased Products without notice to compare the Biobased Content of the tested product with the product's Applicable Minimum Biobased Content and the Biobased content reported in its Certified Application. Such testing will be conducted using ASTM Method D6866 in accordance with the procedures discussed in § 4270.7.

(i) If the 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 the testing shows that the Biobased Content is less than that reported in the product's Certified Application but is still equal to or greater than its Applicable Minimum Biobased Content(s), USDA will provide written notification to the Participating Organization. The participant 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 participant can submit a new application to use the Biobased Content reported to it by USDA in the written notification.

(B) Alternatively, the participant may submit a new application and elect to retest the product in question. If the participant elects to retest the product, it must test a sample of the current product, and the procedures in § 4270.9 must be followed. USDA reserves the right to select the sample that will be submitted for retesting.

(2) *USDA Certified Biobased Product Label violations.* (i) Any usage or display of the USDA Certified Biobased Product Label that does not conform to the requirements specified in § 4270.10.

(ii) Affixing the USDA Certified Biobased Product Label to any product prior to issuance of a notice of certification from USDA.

(iii) Affixing the USDA Certified Biobased Product Label to a Certified Biobased Product during periods when certification has been suspended or revoked.

(iv) Using an image or icon other than the official USDA Certified Biobased Product Label in association with certification claims.

(3) *Application violations.* Knowingly providing false or misleading information in any application for certification of a Biobased Product.

(4) *BioPreferred Program website violations.* Failure to provide USDA with updated information when the information for a Certified Biobased Product becomes outdated or when new information for a Certified Biobased Product becomes available.

(c) *Noncompliance and escalation of actions.* Any identified violations as described in paragraphs (b)(1) through (4) are considered noncompliance with this part. USDA will respond to noncompliance though actions that include, but are not limited to, the examples as described in paragraphs (c)(1) through (4).

(1) *Noncompliance.* USDA will provide the applicable Participating Organization and any Other Entity involved, as known to USDA, written notification of any noncompliance identified by USDA, as well as actions that should be taken to resolve the noncompliance. USDA may remove the product or company information from the BioPreferred Program website (*https://www.biopreferred.gov*) until the noncompliance is corrected. If satisfactory resolution of the noncompliance is not reached, USDA will consider the noncompliance to be a violation of this part and may pursue further action as discussed in paragraphs (c)(2) through (4) of this section.

(2) *Violation.* USDA will first issue a notice of violation. Entities who receive a notice of violation for any violation must correct the violation(s) within 30 Days from receipt of the notice of violation. If the entity receiving a notice of violation is a Participating Organization, USDA will also issue notices of suspensions and revocations, as discussed in paragraph (c)(3) of this section. USDA reserves the right to further pursue action against these entities as provided in paragraph (c)(4) of this section. If the entity receiving a notice of violation is an Other Entity (*i.e.,* not a Participating Organization), then USDA may pursue action according to paragraph (c)(4) of this section.

(3) *Suspension and revocation.* (i) If a violation is applicable to a Participating Organization and the participant fails to make the required corrections within 30 Days of receipt of a notice of violation, USDA will notify the participant, via email and certified mail as appropriate, of the continuing violation, and the certification for that product will be suspended. As of the date that the participant receives a notice of suspension, the participant and their Designated Representatives must not affix the USDA Certified Biobased Product Label to any of that product or associated packaging not already labeled and must not distribute any additional products bearing the USDA Certified Biobased Product Label. USDA will both remove the product information from the BioPreferred Program website (*https://www.biopreferred.gov*) 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 participant whose USDA product certification has been suspended makes the required corrections and notifies the USDA that the corrections have been made, the participant and their Designated Representatives may, upon receipt of USDA approval of the corrections, resume use of the USDA Certified Biobased Product Label. USDA will also restore the product information to the BioPreferred Program website (*https://www.biopreferred.gov*).

(iii) If, following the 30-Day period, the participant does not make the required corrections, the certification for that product will be revoked. As of that date, the participant must not affix the USDA Certified Biobased Product Label to any of that product not already labeled. In addition, the participant and

their Designated Representatives are prohibited from further sales of the product to which the USDA Certified Biobased Product Label is affixed, and the product will no longer be listed on the BioPreferred Program website (*https://www.biopreferred.gov*) as a product qualified for preferred Federal procurement.

(iv) If a participant whose product certification has been revoked wishes to participate in the BioPreferred Program again, the participant must follow the procedures required for the original certification specified in § 4270.9.

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

§ 4270.13 Appeal process.

Participating Organizations whose product certification has been revoked may appeal to USDA.

(a) *Filing an appeal.* (1) Appeals to the Agency must be filed within 30 Days of receipt by the appellant of a notice of suspension and revocation. Appeals must be filed in writing via email to the BioPreferred Program's email address as noted on the BioPreferred Program website (*https://www.biopreferred.gov*).

(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 the applicable Program regulations, policies, or procedures, or otherwise was not proper.

(b) *Reviewing appeals.* (1) If USDA sustains a Participating Organization's appeal of a notice of suspension and revocation, the participant and its Designated Representative(s) may immediately resume affixing the USDA Certified Biobased Product Label to the Certified Biobased Product and sell and distribute the Certified Biobased Product with the USDA Certified Biobased Product Label. In addition, USDA will reinstate the product's information to the BioPreferred Program website (*https://www.biopreferred.gov*).

(2) If USDA denies a participant's appeal of a notice of suspension and revocation, then the notice of suspension and revocation stands.

(c) *Appeals of decisions made on appeals.* Appeals of any of the BioPreferred Program's decisions may be made to the Rural Business Cooperative Service Administrator. Appeals must be made, in writing, within 30 Days of receipt of USDA's decision and addressed to: Rural Business Cooperative Service Administrator, 1400 Independence Avenue SW, Washington, DC 20250–1522 STOP 3250. If the Rural Business Cooperative Service Administrator sustains an appeal, the provisions of paragraph (b) of this section will apply.

§ 4270.14 Reporting and recordkeeping.

(a) *Providing product information to Federal agencies*—(1) *Informational website.* An informational USDA website implementing section 9002 of FSRIA can be found at: *https://www.biopreferred.gov*. USDA will maintain a web-based information site for participating originations with Certified Biobased Products and Federal agencies to exchange information, as described in paragraphs (a)(1)(i) through (iv) of this section as applicable.

(i) *Product information.* The website will, as determined to be necessary by the Secretary based on the availability of data, provide the information specified in § 4270.9. USDA encourages Federal agencies to utilize this website to obtain current information on designated categories, contact information for Participating Organizations, and access to information on product characteristics relevant to procurement decisions. In addition to any information provided on the website, participants are expected to provide relevant information to Federal agencies, subject to the limitations specified in paragraph (a)(1)(ii) of this section, with respect to product characteristics, including verification of such characteristics if requested.

(ii) *Providing information on price and environmental and health benefits.* Federal agencies may not require Participating Organizations with Certified Biobased Products to provide procuring agencies with more data than would be required of other manufacturers or vendors offering products for sale to a Procuring Agency (aside from data confirming the Biobased Contents of the products) as a condition of the purchase of Biobased Products from the participant. USDA encourages industry Stakeholders to provide information on environmental and public health benefits based on industry accepted analytical approaches including, but not limited to, material carbon footprint analysis, the International Standards Organization (ISO) 14040, the ASTM International life-cycle cost method (E917) and multi-attribute decision analysis (E1765), and the British Standard Institution PAS 2050. USDA will make such Stakeholder-supplied information available on the BioPreferred Program website (*https://www.biopreferred.gov*).

(iii) *Industry standards test information.* The product information will include any relevant industry standard test information as supplied by the participant. In assessing performance of a Certified Biobased Product, USDA requires that procuring agencies rely on results of performance tests using applicable ASTM, ISO, Federal or military specifications, or other similarly authoritative industry test standards. Such testing may be conducted by a laboratory compliant with the requirements of the standards body. The procuring official will decide whether performance data must be brand-name specific in the case of products that are essentially of the same formulation.

(iv) *Biodegradability information.* If Biodegradability is claimed by a participant with a Certified Biobased Product as a characteristic of that product, USDA requires that, if requested by procuring agencies, these claims be verified using the appropriate, product-specific ASTM Biodegradability standard(s). Such testing must be conducted by an ASTM/ISO-compliant laboratory. The procuring official will decide whether Biodegradability data must be brand-name specific in the case of products that are essentially of the same formulation. ASTM Biodegradability standards include:

(A) D5338 (Standard Test Method for Determining Aerobic Biodegradation of Plastic Materials Under Controlled Composting Conditions);

(B) D5864 (Standard Test Method for Determining the Aerobic Aquatic Biodegradation of Lubricants or Their Components);

(C) D5988 (Standard Test Method for Determining Aerobic Biodegradation of Plastic Materials in Soil);

(D) D6006 (Standard Guide for Assessing Biodegradability of Hydraulic Fluids);

(E) D6400 (Standard Specification for Compostable Plastics) and the standards cited therein;

(F) D6139 (Standard Test Method for Determining the Aerobic Aquatic Biodegradation of Lubricants of Their Components Using the Gledhill Shake Flask);

(G) D6868 (Standard Specification for Biodegradable Plastics Used as Coatings on Paper and Other Compostable Substrates); and

(H) D7081 (Standard Specification for Non-Floating Biodegradable Plastics in the Marine Environment).

(2) *Advertising, labeling, and marketing claims.* Participating Organizations are reminded that their advertising, labeling, and other marketing claims, including claims regarding health and environmental benefits of the product, must conform to the 16 CFR part 260 (Federal Trade Commission Guides for the Use of Environmental Marketing Claims). For further requirements on marketing claims associated with the BioPreferred Program, refer to the ''USDA BioPreferred Program Brand and Marketing Guidelines'' found on the BioPreferred Program website (*https://www.biopreferred.gov*).

(b) *Records.* Participating Organizations will maintain records documenting compliance with this part for each product that has received a notice of certification, as specified in paragraphs (b)(1) through (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 notice of 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 were tested.

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

(c) *Record retention.* For each Certified Biobased Product, records kept under paragraphs (a) and (b) of this section must be maintained for at least three years beyond the end of the certification period (*i.e.,* three years beyond the date the product's term of certification expires). 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.

§ 4270.15 Oversight and monitoring.

(a) *General.* USDA will conduct oversight and monitoring of Participating Organizations, Designated Representatives, and Other Entities involved with the BioPreferred Program to ensure compliance with this part. This oversight may include, but not be limited to, conducting facility visits to Participating Organizations that have Certified Biobased Products and their Designated Representatives. Participating Organizations are required to cooperate fully with all USDA audit efforts for the enforcement of the BioPreferred Program requirements.

(b) *Biobased Content Testing.* USDA will conduct Biobased Content Testing of Certified Biobased Products as described in § 4270.12(b)(1) to ensure compliance with this part.

(c) *Inspection of records.* Participating Organizations must allow Federal representatives access to the records required under § 4270.14 for inspection and copying during normal business hours.

(d) *Audits.* USDA will conduct an annual desk audit on an ongoing basis to verify that the product and company information supplied by Participating Organizations remain valid. Through the BioPreferred Program website (*https://www.biopreferred.gov*), Participating Organizations will be asked to confirm that they still manufacture the product, that the formulation remains the same, and that the information described under § 4270.9(a)(1) remains valid. Participants may also be asked for additional supplemental information.

(1) If a Participating Organization indicates that their product or company information needs to be updated during an annual desk audit, these updates will be incorporated into the BioPreferred Program website (*https://www.biopreferred.gov*). If it is indicated that a product is no longer manufactured, the product information will be removed from the BioPreferred Program website (*https://www.biopreferred.gov*).

(2) If a Participating Organization fails to complete an annual desk audit, the participant will be considered to be in noncompliance with this part, and the Participating Organization and associated product information will be removed from the BioPreferred Program website (*https://www.biopreferred.gov*). USDA reserves the right to revoke product certification for failure to participate in an audit.

§§ 4270.16—4270.98 [Reserved]

§ 4270.99 OMB control number.

The information collection requirements in this part are approved by the Office of Management and Budget (OMB) and assigned OMB control number 0570–NEW.

Xochitl Torres Small,

Deputy Secretary, United States Department of Agriculture.

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