

Designation of Biobased Items for Federal Procurement

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On July 22, 2011, the U.S. Department of Agriculture ("USDA") finalized a proposed rule that designates certain items for inclusion in the USDA's *BioPreferred Program* ("Program"). See 76 Fed. Reg. 43808 (July 22, 2011). Under the Program, the USDA designates categories of biobased products that are afforded preference by Federal agencies and their contractors when making purchasing decisions. The purpose of the Program is to promote the increased purchase and use of biobased products. The Program is also intended to promote economic development while reducing adverse environmental and health impacts.

Background of the Program and Biobased Products

The Program was created by Section 9002 of the *Farm Security and Rural Investment Act of 2002* ("FSRIA") and expanded by the *Food, Conservation, and Energy Act of 2008* ("FCEA"). In addition, Presidential Executive Order 13514, *Federal Leadership in Environmental, Energy, and Economic Performance*, mandates the purchasing of biobased products.

The FSRIA defines biobased products as commercial or industrial products (other than food or feed) that are composed in whole, or in significant part, of biological products, renewable agricultural materials (including plant, animal, and marine materials), or forestry materials. This definition was extended by the FCEA to include biobased intermediate ingredients or feedstocks.

Biobased Product Designation

In order to designate items for preferred procurement, Section 9002 requires the USDA to consider both the availability of items and the economic and technological feasibility of using those items. In particular, the USDA evaluates the general commercial use and life-cycle costs associated with items proposed for designation. To aid its evaluation, the USDA utilizes analytical tools, such as ASTM Standard D7075 and Building for Environmental and Economic

Sustainability ("BEES"), for evaluating and reporting on environmental performance of biobased products.

In addition, biobased products must meet or exceed the minimum biobased content standards established by the USDA for the applicable product category in order to receive a Certified Biobased Product label from the USDA. Minimum biobased content is generally based on biobased content test data that is provided by manufacturers who volunteered the resources required to submit sample data. However, the USDA also considers other factors, including public comments received, product performance information, and the overall range of tested biobased contents with items of similar value. Further, the USDA looks to see if an item with lower biobased content has unique performance or attributes that would justify setting the minimum biobased content at a level that would include these products. In situations where the USDA has not established minimum biobased content standards for a product category, companies may apply for the Certified Biobased Product label if the product or package contains a minimum of 25 percent biobased content.

Once the USDA designates an item, procuring agencies generally are required to purchase biobased products within these designated items where the purchase price of the procurement item exceeds \$10,000. In addition, the requirement to purchase items extends to situations where the quantity of such items or the functionally equivalent items purchased over the preceding fiscal year equaled \$10,000 or more.

Subcategorization of Biobased Items

According to the USDA's BioPreferred website, there are currently 50 product categories of designated items in the Program. In addition to those categories, there are subsets of products within the designated items that have different and individual characteristics or performance specifications. In these situations, the USDA creates subcategories that have their own minimum biobased content standards. If information is not available to justify the creation of a subcategory, the USDA will hold off any subcategory designation until sufficient additional information is received.

Finalizing the Proposed Rule

The final rule, which goes *into effect August 22, 2011*, revises a proposed rule to amend the USDA's *Guidelines for Designating Biobased Products for Federal Procurement*. In particular, the final rule adds 14 newly designated biobased items for federal procurement preference under the Program. These 14 designated items are as follows:

- Animal repellents
- Bath products
- Bioremediation materials
- Compost activators and accelerators
- Concrete and asphalt cleaners
- Cuts, burns, and abrasions ointments
- Dishwashing products
- Erosion control materials
- Floor cleaners and protectors
- Hair care products
- Interior paints and coatings
- Oven and grill cleaners
- Slide way lubricants
- Thermal shipping containers

The final rule takes into consideration public comments from manufactures as well as government agencies in response to the proposed rule, which was issued November 23, 2010. In particular, the final rule revises the definitions of bath products, concrete and asphalt cleaners, and floor cleaners and protectors to avoid overlap with previously designated items. Further, certain items, such as interior paint coatings, were designated into subcategories.



Investigation Program Opportunities

Attorneys in Reed Smith's Public Policy & Infrastructure practice, within the Global Regulatory Enforcement Group, are prepared to assist clients interested in learning more about the BioPreferred Program. Our attorneys are available to counsel manufacturers on the USDA's designation and evaluation processes. Please do not hesitate to contact Christopher L. Rissetto, Leslie A. Monahan, or any of the lawyers with our Global Regulatory Enforcement Group with any questions.

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