

February 26, 2024

*Via Electronic Transmission*

Jeffrey A. Koses  
Senior Procurement Executive  
Office of Acquisition Policy  
Office of Governmentwide Policy  
United States General Services Administration  
1800 F Street NW  
Washington, DC 20405

Re: Comments on GSA Proposed Regulation re: Reduction of Single-Use Plastic Packaging

**Docket GSA-GSAR-2023-0028**

Dear Mr. Koses,

The Attorneys General of the District of Columbia, the Commonwealth of Massachusetts, California, Connecticut, Delaware, Illinois, Maryland, Minnesota, Oregon, Vermont, and Washington (collectively “States”) appreciate this opportunity to comment on the General Services Administration’s (“GSA”) proposal to amend the General Services Acquisition Regulation (“GSAR”) seeking to reduce single-use plastic packaging.<sup>1</sup>

In its proposed rule, which focuses exclusively on packaging, GSA suggests voluntary measures by which vendors of federal purchasers may self-identify if they offer single-use plastic free (“SUP-free”) packaging, which GSA defines to include both product and shipping containment material.<sup>2</sup> If a vendor (or “offeror”) chooses to use SUP-free packaging, GSA will permit those items to be associated with a new SUP-free packaging filter icon which will be available on one of GSA’s primary purchasing platforms, GSA Advantage!.

While we support GSA’s expressed goal to limit the federal government’s procurement of single-use plastics,<sup>3</sup> we are concerned that this “small step,”<sup>4</sup> at best, will hardly scratch the surface of the plastic waste crisis and, at worst, may inadvertently exacerbate it. Thus, we urge GSA to reevaluate and develop an entirely new, more stringent proposed rule detailing a broader process that will result in the eventual elimination of the procurement and acquisition of unnecessary<sup>5</sup> single-use plastics by the federal government. In addition, our comments provide

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<sup>1</sup> “General Services Administration, Acquisition Regulation: Reduction of Single-Use Plastic Packaging,” 88 Fed. Reg. 88,856 (Dec. 26, 2023).

<sup>2</sup> *Id.* at 88,862.

<sup>3</sup> See Letter from Attorneys General for the District of Columbia et al., to Gen. Servs. Admin. (Sept. 6, 2022), [https://oag.ca.gov/system/files/attachments/press-docs/2022-9-6%20Multistate%20Comments%20on%20GSA%20ANPR\\_.pdf](https://oag.ca.gov/system/files/attachments/press-docs/2022-9-6%20Multistate%20Comments%20on%20GSA%20ANPR_.pdf) [hereinafter “Multistate Comments on ANPR”].

<sup>4</sup> 88 Fed. Reg. at 88,856.

<sup>5</sup> GSA should prioritize eliminating unnecessary single-use plastic products – those for which plastic composition is not necessary for health and safety reasons. See Multistate Comments on ANPR, *supra* note 3.

recommendations related to specific provisions set forth in the current proposed rule to assist in developing a stronger, more effective new rule.

We submit the following comments for GSA’s consideration as the agency proceeds with determining the best pathways to help reduce unnecessary single-use plastics in government purchases.

## I. Introduction

It has been roughly a year and a half since the States submitted their Multistate Comments to GSA on its Advance Notice of Proposed Rulemaking (“ANPR”) on single-use plastics.<sup>6</sup> Since then, plastics production has not slowed down. In fact, the worldwide production of plastics continues to reach over 400 million tons per year and global plastic production is still on track to nearly triple by 2060.<sup>7</sup> Roughly two-thirds of the plastic that becomes waste is from short-lived products that are not reusable or recyclable, such as single-use plastics.<sup>8</sup> There is now more single-use plastic trash than ever before.<sup>9</sup> Single-use plastics account for approximately 35-40 percent of current plastic production.<sup>10</sup> This rapidly growing segment of plastic manufacturing is predicted to increase by another 30 percent by 2025.<sup>11</sup>

This pervasive problem has far-reaching consequences on our environment, communities, and our climate. The U.S. has one of the highest consumption rates in the world and removing single-use plastics from our society is proving to be a challenge.<sup>12</sup> As mentioned in our previous comments, pollution from single-use plastics is harming our states and municipalities.<sup>13</sup> Our States are spending millions of dollars to combat and clean up plastic waste.<sup>14</sup> In addition, our residents are suffering health impacts from the range of toxic pollutants emitted by plastic production and incineration facilities.<sup>15</sup> Thus, it is essential that the federal government step up to help eliminate unnecessary uses of plastics, especially single-use plastics.

GSA recognizes that the federal government is “the world’s single largest purchaser of goods and services, spending over \$694 billion in contracts in Fiscal Year 2022 alone.”<sup>16</sup> As such, GSA should use this opportunity to leverage the power of federal procurement to reduce

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<sup>6</sup> *Id.*

<sup>7</sup> *What is Plastic Pollution?*, UNITED NATIONS, <https://www.un.org/sustainabledevelopment/wp-content/uploads/2023/08/SDG-Explainers-Plastic-Pollution.pdf> (last visited Feb. 8, 2024).

<sup>8</sup> *Id.*

<sup>9</sup> Helen Cooper, *The true cost of plastic pollution: effects, impacts, and hopeful solutions*, MONTEREY BAY AQUARIUM (Nov. 20, 2023), <https://www.montereybayaquarium.org/stories/true-cost-plastic-pollution#:~:text=Despite%20conscientious%20efforts%20by%20some,plastic%20waste%20compared%20with%202019.>

<sup>10</sup> Landrigan, P.J, et al., *The Minderoo-Monaco Commission on Plastics and Human Health*, 89 ANN. GLOB. HEALTH, 2, 24 (Mar. 2023).

<sup>11</sup> *Id.* at 11.

<sup>12</sup> *The U.S. Progress with Single-Use Plastic Bans*, SEASIDE SUSTAINABILITY (Mar. 21, 2023), <https://www.seasidesustainability.org/post/the-u-s-progress-with-single-use-plastic-bans>.

<sup>13</sup> Multistate comments on ANPR, *supra* note 3, at 4-6.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> 88 Fed. Reg. at 88,859.

the amount of plastics purchased by agencies. Doing so will also serve as a catalyst for private industry to address plastic pollution.<sup>17</sup> For instance, GSA has recognized its ability to help support the market for low-cost clean energy and to “spark clean energy innovation” while also combating climate change by “electrifying the federal fleet and powering government operations.”<sup>18</sup> The prospect of combatting plastic pollution while sparking innovation exists here, too. Instead, with the current proposal GSA has passed that opportunity to industry with the hope that industry, on its own, will make the adjustments needed to reduce plastic waste. This voluntary compliance approach will not spur the change we need to address the plastic pollution crisis immediately. Nor does it take the significant step forward to reduce plastic waste that we hoped for—and need—in a procurement rulemaking. In addition, a mandatory GSA rule governing all offerors would create a level playing field, in terms of competition. Federal contractors would compete to shift away from plastics at the lowest cost. But the voluntary compliance approach GSA proposes will have the opposite result. Innovative companies incurring costs to reduce and/or replace plastics may find it hard to compete with companies still using low-cost single-use plastics.

These comments proceed as follows. In Part II, we note the far-reaching negative impacts from plastics. In Part III, we discuss States’ interests in strong regulations to minimize reliance on single-use plastics. In Part IV, we explain GSA’s authority to limit federal procurement of single-use plastics. In Part V, given the ineffectiveness, and potential unintended consequences of the current proposal, we urge GSA to start over and create a new proposal that will have a far greater impact on reducing single-use plastics. Lastly, in Part VI, we provide recommendations to clarify and strengthen specific provisions of the current proposal such as the proposed verification process and the proposed definitions of “plastic” and “single use plastic (SUP) free packaging,” which will be essential to creating a stronger, more effective new proposal.

## **II. Plastics Present More than Just a Waste Problem.**

For decades, most of our nation’s policies and regulations have focused on waste management after the disposal of plastics. Industry-run campaigns persuaded consumers that it was the public’s responsibility to clean up plastic pollution through efforts like recycling, even though industry knew that our country’s recycling infrastructure could not handle the amount of

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<sup>17</sup> See GSA ACQUISITION POLICY FED. ADVISORY COMM. (GAP FAC), RECOMMENDATIONS 2023-1, 28 (Spring 2023), <https://www.gsa.gov/system/files/GAP%20FAC%20RECOMMENDATION%20REPORT%202023-01%20%283%29.pdf> [hereinafter “FAC Report”]; Gen. Servs. Admin., GSA Order ADM 2800.12B, Change 138, 1 (Oct. 22, 2021),

[https://acquisitionstaging.gsa.gov/sites/default/files/archives/loose\\_leaf/GSAM\\_Latest\\_Change\\_Order\\_1382021528\\_0.pdf](https://acquisitionstaging.gsa.gov/sites/default/files/archives/loose_leaf/GSAM_Latest_Change_Order_1382021528_0.pdf). (referencing Executive Orders 13390, 14008, and 14030 which all describe utilizing federal procurement as a means to move the market towards sustainability).

<sup>18</sup> GSA Blog Team, *GSA’s role in supporting America’s economic recovery*, U.S. GEN. SERVS. ADMIN. (Jan. 27, 2023), <https://www.gsa.gov/blog/2023/01/27/gsas-role-in-supporting-americas-economic-recovery>.

plastic waste that was being produced.<sup>19</sup> After years of misinformation about the viability of plastics recycling, only 5-6 percent of plastics are actually recycled in the United States.<sup>20</sup>

As our nation battles the ever-increasing plastic waste problem, more information is emerging about the harms posed by plastics throughout their life cycle. We now know that plastics threaten public health and the environment at every stage—from the greenhouse gases (“GHG”) and air toxins emitted during production to the microplastic byproducts of disposal of plastics that find their way into our food and water resources.<sup>21</sup> Managing plastics is no longer solely a waste management issue; it is a significant public health concern.

For example, at the upstream stage, the production of virgin plastics requires the extraction of fossil fuels which results in air pollution and water pollution, exacerbating certain health impacts such as elevated cancer risks, adverse birth outcomes, and asthma.<sup>22</sup> The fossil fuels are then transported, refined, and processed in facilities causing more dire environmental and potential health impacts.<sup>23</sup> In many instances, these impacts are disproportionately felt by environmental justice communities.<sup>24</sup>

In addition, more studies have been released on the chemical hazards associated with plastics and the health risks they pose. Plastics, including the chemicals associated with them, can exist in our environment for centuries, polluting our soil and waterways and threatening

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<sup>19</sup> Allen D., et al, *The Fraud of Plastic Recycling*, CTR. FOR CLIMATE INTEGRITY, (Feb. 2024), <https://climateintegrity.org/uploads/media/Fraud-of-Plastic-Recycling-2024.pdf>. See also Laura Sullivan, et al., *The Myth of Plastic Recycling*, NPR (Dec. 12, 2022), <https://www.npr.org/2022/12/08/1141601301/the-myth-of-plastic-recycling>; Laura Sullivan, *Plastic Wars: Industry Spent Millions Selling Recycling – To Sell More Plastic*, NPR (Mar. 31, 2020), <https://www.npr.org/2020/03/31/822597631/plastic-wars-three-takeaways-from-the-fight-over-the-future-of-plastics>).

<sup>20</sup> GREENPEACE, CIRCULAR CLAIMS FALL FLAT AGAIN, 3 (2022), <https://www.greenpeace.org/usa/reports/circular-claims-fall-flat-again/>.

<sup>21</sup> CTR. FOR INT’L ENV’T LAW, PLASTIC & HEALTH: THE HIDDEN COSTS OF A PLASTIC PLANET, 5 (Feb. 2019), <https://www.ciel.org/wp-content/uploads/2019/02/Plastic-and-Health-The-Hidden-Costs-of-a-Plastic-Planet-February-2019.pdf>.

<sup>22</sup> Timothy Q. Donaghy, et al., *Fossil fuel racism in the United States: How phasing out coal, oil, and gas can protect communities*, 100 ENERGY RES. & SOCIAL SCI. 103104, 6 (June 2023).

<sup>23</sup> U.N. ENV’T. PROGRAMME, NEGLECTED: ENVIRONMENTAL JUSTICE IMPACTS OF MARINE LITTER AND PLASTIC POLLUTION, 17, 25 (2021).

<sup>24</sup> “Environmental justice” is defined by the Environmental Protection Agency (“EPA”) as the “fair treatment and meaningful involvement of all people regardless of race, color, national origin or income with respect to development, implementation, and enforcement of environmental laws, regulations and policies.” ENV’T PROTECTION AGENCY, EPA-300-B-1-6004, EJ 2020 ACTION AGENDA: THE U.S. EPA’S ENVIRONMENTAL JUSTICE STRATEGIC PLAN FOR 2016-2020, at 1 (Oct. 2016). For the purpose of this comment, the term “environmental justice community” refers to a community of color or community experiencing high rates of poverty that due to past and or current unfair and inequitable treatment is overburdened by environmental pollution, and the harms and risks from exposure to that pollution, because of past or current unfair treatment. See Donaghy, et al., *supra* note 22, at 6; Kimberly A. Terrell & Gianna St. Julien, *Air Pollution is linked to higher cancer rates among black or impoverished communities in Louisiana*, 17 ENV’T RES. LETTERS 1, 10–12 (2022) (discussing “Cancer Alley” and its 200 industrial facilities, including plastic plants, that have been directly linked with higher cancer rates among locals).

human health.<sup>25</sup> Exposure to plastics-related chemicals has been found to be harmful, even lethal, especially for those communities living near production facilities.<sup>26</sup> More than 13,000 chemicals have been identified and associated with plastics and plastic manufacturing across a wide range of applications.<sup>27</sup> Amongst these, 3,200 have been identified as chemicals of potential concern based on their hazardous properties (while many more have never been assessed).<sup>28</sup> Additionally, many plastics-associated chemical additives are highly toxic and include carcinogens, neurotoxicants, and endocrine disruptors,<sup>29</sup> such as per- and poly-fluoroalkyl substances (“PFAS”).<sup>30</sup> If, at any point throughout a plastic product’s life cycle, those chemicals are released, they can persist in the environment for long periods of time, bioaccumulate in the tissues of plants and animals, and travel long distances through the air and water,<sup>31</sup> resulting in many different and cumulative pathways for ecosystem and human exposure.<sup>32</sup>

To combat this growing concern, our States have consistently requested action by federal agencies to develop policies and regulations that will dramatically reduce plastic production, not just plastic waste, and that will prioritize innovative strategies to reduce overall plastic use, especially for single-use plastics.<sup>33</sup> Of course, our States caution against regrettable substitutions and recognize that certain alternatives may seem appealing, but have unintended consequences.<sup>34</sup> For example, plastics referred to as “bioplastics”<sup>35</sup> and plastics claimed to be “biodegradable” or “compostable” can result in more environmental harm than conventional plastic, depending on

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<sup>25</sup> Laura Parker, *Here’s How Much Plastic Trash Is Littering the Earth*, NAT’L GEOGRAPHIC (Dec. 20, 2018), <https://www.nationalgeographic.com/science/article/plastic-produced-recyclingwaste-ocean-trash-debris-environment> (“Plastic takes more than 400 years to degrade, so most of it still exists in some form.”).

<sup>26</sup> U.N. ENV’T PROGRAMME (UNEP), CHEMICALS IN PLASTICS: A TECHNICAL REPORT, 33 (2023), <https://www.unep.org/resources/report/chemicals-plastics-technical-report> [hereinafter “UNEP, *Chemicals in Plastics*”].

<sup>27</sup> *Id.* at 2, 7.

<sup>28</sup> *Id.*; GREENPEACE, FOREVER TOXIC: THE SCIENCE ON HEALTH THREATS FROM PLANT RECYCLING, 7 (2023), [https://prod.greenpeaceusa.info/usa/wp-content/uploads/2023/05/GreenpeaceUSA\\_ForeverToxic\\_ENG.pdf](https://prod.greenpeaceusa.info/usa/wp-content/uploads/2023/05/GreenpeaceUSA_ForeverToxic_ENG.pdf).

<sup>29</sup> Endocrine-disrupting chemicals mimic human hormones and impair the endocrine system. *See Toxic Loophole: Recycling Hazardous Waste Into New Products*, IPEN (2018), [https://ipen.org/sites/default/files/documents/TL\\_brochure\\_web\\_final.pdf](https://ipen.org/sites/default/files/documents/TL_brochure_web_final.pdf).

<sup>30</sup> Landrigan et al., *supra* note 10, at 2.; Tatum McConnell, *Recycling plastics “extremely problematic” due to toxic chemical additives: Report*, ENV’T HEALTH NEWS (June 1, 2023), <https://www.ehn.org/plastic-recycling-2660739413.html>.

<sup>31</sup> UNEP, *Chemicals in Plastics*, *supra* note 26, at 3, 27; Ctr. for Int’l Env’t Law, *Campaign Update: Plastic and Human Health: A Lifecycle Approach to Plastic Pollution*, <https://www.ciel.org/project-update/plastic-and-human-health-a-lifecycle-approach-to-plastic-pollution/> (last visited Feb. 20, 2024); CTR. FOR INT’L ENV’T LAW, PLASTIC HEALTH: THE HIDDEN COSTS OF A PLASTIC PLANET, 62 (Feb 2019), <https://www.ciel.org/wp-content/uploads/2019/02/Plastic-and-Health-The-Hidden-Costs-of-a-Plastic-Planet-February-2019.pdf>.

<sup>32</sup> UNEP, *Chemicals in Plastics*, *supra* note 26, at 26.

<sup>33</sup> *See* Letter from Attorneys General for California, et al. to the EPA on its Draft National Strategy to Prevent Plastic Pollution, at 2 (May 2023), [https://stateimpactcenter.org/files/AGActions\\_EPA-Draft-Plastics-Strategy-Comment-Letter-FinalBookmarks.pdf](https://stateimpactcenter.org/files/AGActions_EPA-Draft-Plastics-Strategy-Comment-Letter-FinalBookmarks.pdf) [hereinafter “Multistate Comments on Draft National Strategy”].

<sup>34</sup> *See id.* at 8, 9.

<sup>35</sup> “Bioplastic” is often used as an umbrella term that includes “bio-based plastic” (made from biological feedstock like corn), “biodegradable plastic” (conventional or bio-based plastic that can be broken down by bacteria or fungi into water, carbon dioxide, or naturally occurring minerals), and “compostable plastic” (can fully biodegrade under high-heat conditions at an industrial composting facility). GLOBAL ALLIANCE FOR INCINERATOR ALTERNATIVES, BIOPLASTIC 1 (2022), [https://static1.squarespace.com/static/5eda91260bbb7e7a4bf528d8/t/629f2abd81cae042c741ef4e/1654598333506/UNEA-publication-packet\\_bioplastic.pdf](https://static1.squarespace.com/static/5eda91260bbb7e7a4bf528d8/t/629f2abd81cae042c741ef4e/1654598333506/UNEA-publication-packet_bioplastic.pdf) [hereinafter “BIOPLASTIC”].

how they are made and what they are made of.<sup>36</sup> In order to avoid regrettable substitutions, GSA should consider the sustainability of alternatives to single-use plastics and incorporate risk assessment (e.g., reducing exposures and hazards of toxicants) and life cycle assessment approaches as the basis for its evaluation of which replacements for single-use plastics will provide the greatest environmental benefits.<sup>37</sup> And GSA should coordinate with other federal agencies, such as the Environmental Protection Agency (“EPA”), when evaluating potential alternatives. For now, it is essential for GSA to set forth a plan with clear deadlines to phase out the procurement of unnecessary single-use plastics—the worst culprit of plastic pollution. Unfortunately, the current proposal fails to do even that.

### **III. The States’ Have Strong Interests in Regulations that Will Effectively Reduce Plastic Pollution.**

As discussed in the multistate comments on the ANPR, the States have a strong interest in rigorous, effective rules that will reduce procurement of single-use plastics and help address the plastic pollution problems we are facing.<sup>38</sup> Due to the negative economic, social, and environmental impacts caused by plastic waste,<sup>39</sup> many states and localities have developed and implemented legislation and policies seeking to reduce the procurement and consumption of plastics, especially single-use plastic products.<sup>40</sup>

For example, in September 2023, Massachusetts Governor Maura Healey signed Executive Order No. 619: Eliminating the Purchase by the Executive Department of Single-Use Plastic Bottles (“E.O. 619”), to address the adverse impacts that production and disposal of those single-use plastics have on climate change, health, and environment.<sup>41</sup> Under E.O. 619, which was effective upon issuance, Massachusetts’s GSA-equivalent agency, the Operational Services Division (“OSD”), no longer allows purchases of single-use plastic bottles under 21 fluid ounces by any state executive office or agency, with limited exceptions.<sup>42</sup> Agencies are also required to submit summaries to OSD of the steps they have taken to comply with E.O. 619.<sup>43</sup> OSD is currently working to update its statewide contractor user guides, which already include drinking

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<sup>36</sup> See Multistate Comments on Draft National Strategy, *supra* note 33, at 8.

<sup>37</sup> Integrating risk assessment and life cycle assessment approaches that assess the impacts of specific materials and products from cradle-to-grave (e.g., energy and water consumption during production, air quality impacts, and microplastic and nanoplastic impacts of a material at the end of its lifecycle), can provide a reliable and holistic picture of each material’s true impacts to the environment and may help avoid unintended consequences. *Id.* at 9-10.

<sup>38</sup> Multistate Comments on ANPR, *supra* note 3, at 4-10.

<sup>39</sup> *Id.* at 4-6.

<sup>40</sup> *Id.* at 7-8.

<sup>41</sup> Executive Order No. 619: Eliminating the Purchase by the Executive Department of Single-Use Plastic Bottles (Sept. 21, 2023) (“E.O. 619”), § 2, <https://www.mass.gov/executive-orders/no-619-eliminating-the-purchase-by-the-executive-department-of-single-use-plastic-bottles>.

<sup>42</sup> *Id.* at § 4; Advisory Memo to Secretariat Agency Chief Procurement Officers, General Counsels, Chief Financials Officers, and Chiefs of Staff from Gary Lambert, Assistant Secretary for Operational Services, Re: Executive Order No. 619: Eliminating the Purchase by the Executive Department of Single-Use Plastic Bottles (Sept. 21, 2023) (“E.O. 619 Advisory Memo”), <https://www.mass.gov/doc/single-use-advisory-from-gary-lambert/download>. Agencies may justify purchase of single-use plastic water bottles only when: “1) No alternative is available or practicable; 2) Necessary to protect health, safety, and welfare; 3) Compliance with the EO would conflict with contract requirements or labor agreements in existence as of agreements solicited before September 21, 2023; 4) To prepare for an emergency....” E.O. 619, § 4.

<sup>43</sup> E.O. 619, § 3.



water cooler systems that are bottle-less or use refillable water dispenser bottles, to identify additional replacement products.<sup>44</sup> In Illinois, the legislature has recently taken several steps to reduce single-use plastics purchased by state agencies. For instance, the State Entities Single-Use Plastic Reporting Act prohibits Illinois state agencies from procuring disposable food containers made in whole or in part of polystyrene foam after January 1, 2025.<sup>45</sup> Additionally, in 2022 the state adopted a law prohibiting the procurement of single-use plastic disposable foodware for use at Illinois State parks and natural areas.<sup>46</sup> In Oregon, the City of Portland’s sustainable procurement ordinance provides guidance for the City on its procurement decisions in relation to plastics, packaging, and shipping materials.<sup>47</sup>

In addition, the District of Columbia’s Zero Waste DC Plan (“Plan”) includes a focus on transitioning from single-use products, “many of which are plastic,” towards reusable and refillable programs.<sup>48</sup> The Plan recommends adopting policies, by 2025, to phase out “the import, stocking, distribution, and sale of certain single-use plastics” (while providing exceptions for health and safety considerations), including a ban on certain problematic single-use plastics by 2030.<sup>49</sup> In Vermont, the State Office of Purchasing and Contracting administers the Environmentally Preferred Purchasing Program, which includes evaluation of life-cycle cost “beyond the cost of purchasing, to include installation, operation, maintenance, durability, and disposal of a particular product.”<sup>50</sup> Further, since July 1, 2020, Vermont stores and food service establishments have been prohibited from providing: 1) single-use plastic carryout bags, 2) expanded polystyrene food and beverage containers, 3) plastic straws, and 4) plastic stirrers.<sup>51</sup> And in California, SB 54 is on track to significantly reduce plastic packaging and foodservice products in the state by 2032.<sup>52</sup> SB 54 builds on previous legislation and policies that require that California state agencies procure environmentally preferable goods such as those containing recycled materials,<sup>53</sup> and prohibit food service operations located in state-owned facilities, concessionaries on state-owned property, and businesses under contract to provide food services to state agencies from dispensing food in food service packaging unless the packaging is

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<sup>44</sup> OSD, *Frequently Asked Questions: Eliminating the Purchase by the Executive Department of Single-Use Plastic Bottles*, 1 (Oct. 23, 2023), [https://www.mass.gov/doc/faqs-for-executive-departments/download?\\_ga=2.164627068.2104009610.1707743545-659743838.1705593746&\\_gl=1\\*lahktt\\*\\_ga\\*NjU5NzQzODM4LjE3MDU1OTM3NDY.\\*\\_ga\\_MCLPEGW7WM\\*M TcwNzc1MTQ4NS4xLjEuMTcwNzc1MTQ5Ny4wLjAuMA](https://www.mass.gov/doc/faqs-for-executive-departments/download?_ga=2.164627068.2104009610.1707743545-659743838.1705593746&_gl=1*lahktt*_ga*NjU5NzQzODM4LjE3MDU1OTM3NDY.*_ga_MCLPEGW7WM*M TcwNzc1MTQ4NS4xLjEuMTcwNzc1MTQ5Ny4wLjAuMA); Contract User Guide for GRO39, 7 (Jan. 8, 2024), <https://www.mass.gov/doc/gro39/download>, (guide for drinking water – general and emergency services).

<sup>45</sup> Ill. Public Act 103-170, [Ill. Gen. Assembly - Full Text of Public Act 103-0470 \(ilga.gov\)](http://www.ilga.gov/legislation/103/acts/103-170.htm).

<sup>46</sup> Ill. Public Act 102-1081, [Ill. Gen. Assembly - Full Text of Public Act 102-1081 \(ilga.gov\)](http://www.ilga.gov/legislation/102/acts/102-1081.htm).

<sup>47</sup> City of Portland, Or. City Code 5.33.080(A) (replaced by Ordinance 189878, effective Mar. 4, 2020).

<sup>48</sup> D.C. DEP’T OF PUBLIC WORKS, ZERO WASTE DC PLAN (Feb. 2024),

<https://lirms.dccouncil.gov/downloads/LIMS/54760/Introduction/RC25-0151-Introduction.pdf?Id=184692>.

<sup>49</sup> *Id.* at 12.

<sup>50</sup> State of Vt. Agency of Admin., Buildings & Gen. Servs., Office of Purchasing & Contracting, *Environmentally Preferred Purchasing (EPP)*, <https://bgs.vermont.gov/purchasing-contracting/forms/epp> (last visited February 22, 2024).

<sup>51</sup> See 10 V.S.A. §§ 6691-6700.

<sup>52</sup> See CalRecycle, *Recyclability Status of Covered Material Categories: SB 54 Report to the Legislature* (Dec. 2023), [https://d12v9rtnomnebu.cloudfront.net/diveimages/Jan\\_1\\_2024\\_SB\\_54\\_Report\\_to\\_Legislature.pdf](https://d12v9rtnomnebu.cloudfront.net/diveimages/Jan_1_2024_SB_54_Report_to_Legislature.pdf).

<sup>53</sup> See Cal. Pub. Res. Code, §§ 12400, et seq. (California Environmentally Preferable Purchasing Act of 2002); Cal. Exec. Order B-18-12 (Apr. 25, 2012) (requiring state agencies to “purchase and use environmentally preferable products that have a lesser or reduced effect on human health and the environment when compared with competing goods that serve the same purpose whenever they are applicable, perform well, and are cost-effective.”).

reusable, recyclable, or compostable, as determined by the California Department of Resources Recycling and Recovery.<sup>54</sup> Other states have sought to address plastic pollution via litigation against companies advertising single-use, non-recyclable plastics as recyclable.<sup>55</sup>

There is also strong interest by the public to see the federal government move forward with bold, strong policies that will ensure a reduction in plastic pollution. Recent polling conducted by Data for Progress demonstrates that people are concerned about plastic pollution, but lack confidence that industry will enact change on its own without accountability and government enforcement.<sup>56</sup> In November 2023, over 200 environmental, public health, and other NGOs sent a letter to the Biden administration calling for “strong and immediate action” to address the plastic waste crisis.<sup>57</sup> Among many calls to action, the letter specifically called on the Administration to use the government’s purchasing power as a way to reduce plastic production, consumption, and disposal.<sup>58</sup>

Federal leadership is necessary to address the nationwide problem of single-use plastic pollution. In accordance with Section 207 of President Biden’s Executive Order 14057 (“Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability”), agencies have been directed to take action “to reduce and phase out procurement of single-use plastic products, to the maximum extent practicable.”<sup>59</sup> In addition, the Federal Sustainability Plan directs the federal government to maximize procurement of sustainable products, as well as reduce waste, minimize use of toxic and hazardous chemicals, and drive markets for recycled products.<sup>60</sup>

Thus, Federal agencies, such as the EPA, the Department of the Interior (“DOI”), and the Federal Trade Commission (“FTC”),<sup>61</sup> have taken steps to revise current regulations and develop

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<sup>54</sup> See Cal. Pub. Res. Code §§ 42370, et seq. (Sustainable Packaging for the State of California Act of 2018); CalRecycle, *List of Approved Food Service Packaging*, <https://calrecycle.ca.gov/packaging/statefoodservice/list/>.

<sup>55</sup> See Complaint, *Minnesota v. Reynolds Consumer Products, et al.*, No. 62-CV-23-3104 (Minn. Dist. Ct. filed June 6, 2023); Complaint, *Connecticut v. Reynolds Consumer Products*, No. HHD-CV-22-6156769-S, (Conn. Dist. Ct. filed June 13, 2022).

<sup>56</sup> Data for Progress, *Polling Data on Plastic Pollution* (Feb. 2023), [https://www.filesforprogress.org/datasets/2023/3/dfp\\_plastic\\_pollution\\_tabs.pdf](https://www.filesforprogress.org/datasets/2023/3/dfp_plastic_pollution_tabs.pdf) (“Sixty percent of respondents – including half of Republicans – have little to no confidence in major industries and manufacturers to address plastic pollution without government enforcement”); Grace Adcox & Kevin Hanley, *Voters Express Concern About Plastic Pollution Strongly Supports Mitigation Proposals*, DATA FOR PROGRESS (Mar. 27, 2023), <https://www.dataforprogress.org/blog/2023/3/27/voters-express-concern-about-plastic-pollution-strongly-support-mitigation-proposals>.

<sup>57</sup> Letter to President Biden, Subject: Seeking Strong Administration Action to Address the Plastic Crisis, (Nov. 9, 2023), <https://www.nrdc.org/sites/default/files/2023-11/biden-letter-plastics-crisis-20231108.pdf>.

<sup>58</sup> *Id.*

<sup>59</sup> The White House Council on Env’tl Quality, *Implementing Instructions for Executive Order 14057 Catalyzing Clean Energy Industries and Jobs through Federal Sustainability*, at 50 (Aug. 2022), [https://www.sustainability.gov/pdfs/EO\\_14057\\_Implementing\\_Instructions.pdf](https://www.sustainability.gov/pdfs/EO_14057_Implementing_Instructions.pdf).

<sup>60</sup> The White House, *Federal Sustainability Plan* (Dec. 2021), <https://www.sustainability.gov/pdfs/federal-sustainability-plan.pdf>.

<sup>61</sup> FTC received public comments on its changes to the Green Guides for the Use of Environmental Claims. In opening the public comment period, the FTC Commissioner recognized the consumer misconceptions around plastics and noted that “many plastics that consumers believe they’re recycling actually end up in landfills.” Fed. Trade Comm’n, *Statement of Chair Lina M. Khan Regarding the Regulatory Review of the Guides for the Use of Environmental Marketing Claims* Commission File No. P954501 (Dec. 14, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/statement\\_of\\_chair\\_lina\\_m.\\_khan\\_re\\_green\\_guides\\_-\\_final.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/statement_of_chair_lina_m._khan_re_green_guides_-_final.pdf).



new rules to reduce plastic waste, some of which recognize the importance of action through procurement policies and regulations.<sup>62</sup> In its Draft National Strategy to Prevent Plastic Pollution, the EPA states that “the federal government should identify opportunities to reduce single-use, unrecyclable, difficult to recycle, or frequently littered products that it procures and evaluate pathways to phase out single-use, unrecyclable, or frequently littered products . . . .”<sup>63</sup> To this end, in September 2023, the DOI finalized its sustainable procurement plans to phase out single-use plastics on the 480 million acres of federal land within the next decade.<sup>64</sup> As part of the plan, DOI facilities have worked with concessionaries to reduce sales of single-use plastic bottles, as well as other single-use plastic items.<sup>65</sup> The plan also includes target dates and details on how single-use plastics will eventually be eliminated.<sup>66</sup> While the DOI’s phase-out plan will result in reduced plastic waste on national lands, GSA has the opportunity to have an even bigger impact on reducing single-use plastic procurement because it impacts all federal agencies.

It is now up to GSA to have the utmost impact on the plastic pollution crisis by creating a rigorous, effective regulation that will reduce overall federal procurement of single-use plastic products as soon as possible.

#### **IV. GSA Has Authority to Restrict Federal Purchases of Single-Use Plastic Packaging and Products.**

In Section V of these comments, the States urge GSA to use its statutory authority to develop a new, revised proposal that will phase out and eventually eliminate federal procurement of unnecessary single-use plastics, including packaging, pursuant to a clear timeline. As the federal agency responsible for centralized procurement services for the federal government, GSA has broad authority to establish regulations impacting federal procurement. Included in that authority is the ability to create a mandatory regulation restricting federal procurement of single-use plastics. Indeed, GSA recognized this authority within its current proposal,<sup>67</sup> but failed to take that approach based on what the States believe to be plainly inadequate reasons.<sup>68</sup>

The guiding principle for the Federal Acquisition System is to deliver the best value product or service to the customer, while maintaining the public’s trust and fulfilling public policy objectives.<sup>69</sup> Under 40 U.S.C. § 501, GSA is authorized to prescribe policies and methods

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<sup>62</sup> EPA, DRAFT NATIONAL STRATEGY TO PREVENT PLASTIC POLLUTION (Apr. 2023), [https://www.epa.gov/system/files/documents/2023-04/Draft\\_National\\_Strategy\\_to\\_Prevent\\_Plastic\\_Pollution.pdf](https://www.epa.gov/system/files/documents/2023-04/Draft_National_Strategy_to_Prevent_Plastic_Pollution.pdf) [hereinafter “EPA Draft National Strategy”]; “Guides for the Use of Environmental Marketing Claims”, 87 Fed. Reg. 77,766 (Dec. 20, 2022); Sec. of the Interior, Order No. 3407, Department-Wide Approach to Reducing Plastic Pollution (June 8, 2022), <https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3407.pdf>.

<sup>63</sup> EPA Draft National Strategy, *supra* note 62, at 18.

<sup>64</sup> Press Release: Interior Department Announces Progress to Phase Out Single-Use Plastics Across Public Lands (Sept. 28, 2023), <https://www.doi.gov/pressreleases/interior-department-announces-progress-phase-out-single-use-plastics-across-public>.

<sup>65</sup> U.S. Dep’t of Interior, *Reducing Single-Use Plastic Pollution*, <https://www.doi.gov/node/53956> (last visited Jan. 30, 2024).

<sup>66</sup> *See id.*

<sup>67</sup> 88 Fed. Reg. at 88,858.

<sup>68</sup> *See* discussion *supra* Part V.1, n.81.

<sup>69</sup> 48 CFR § 1.102.

that govern the acquisition and supply of goods for federal agencies.<sup>70</sup> The guidelines and requirements that describe the types of products and services that can be purchased by executive agencies are found in the Federal Acquisition Regulations (“FAR”)<sup>71</sup> and GSAR.<sup>72</sup> FAR Part 23 currently requires federal agencies to purchase sustainable products and services and to weigh environmental impacts when they undertake acquisition and procurement planning.<sup>73</sup> The GSAR contains additional agency acquisition policies and practices that implement and supplement the FAR.<sup>74</sup> For instance, when considering sustainable acquisition for products, the GSAR provides that it is the policy of GSA to consider “supporting environmental objectives such as waste reduction, source reduction . . . or maximum practicable recovered material content” as well as “waste reduction techniques.”<sup>75</sup>

Pursuant to its broad procurement authority, GSA has restricted federal procurement of specific products in the past for myriad reasons. For example, in 2020, GSA promulgated regulations that barred the federal government from buying goods or services from any company that uses products from Huawei Technologies and several other Chinese companies.<sup>76</sup> In addition, the Department of Defense, GSA, and NASA’s proposed “Sustainable Products and Services” procurement rule directs federal buyers to purchase sustainable products and services to the “maximum extent possible.”<sup>77</sup> That rule directs agencies to follow the EPA’s Recommendations of Specifications, Standards and Ecolabels for Federal Purchasing.<sup>78</sup> It also directs agencies to avoid procurement of products containing PFAS chemicals.<sup>79</sup> As discussed next, GSA should likewise make use of its broad authority over federal procurement to eliminate the procurement of single-use plastic products and packaging, except where plastic components are necessary to protect health and safety.<sup>80</sup>

## **V. The States Urge GSA to Promulgate a New Rulemaking that will Mandate a Transition Away from Federal Procurement of Single-Use Plastics.**

The States urge GSA to develop a new rule that will guarantee a reduction in, and eventual elimination of, federal procurement of single-use plastics. In the States’ view, the current proposal does not reflect the urgency associated with the plastic waste crisis and will

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<sup>70</sup> 40 U.S.C. § 501(b)(2)(A). *See also* 40 U.S.C. § 121 (c).

<sup>71</sup> Codified in Parts 1 through 53 of Title 48 of the Code of Federal Regulations which generally governs acquisitions of goods and services by executive branch agencies.

<sup>72</sup> GSAR 501.101 (2022) (“[C]ontains agency acquisition policies and practices, contract clauses, solicitation provisions, and forms that control the relationship between GSA and contractors and prospective contractors”).

<sup>73</sup> FAR 7.105(b)(17).

<sup>74</sup> *See* GSAM 523.101 (stating that “FAR part 23 requires GSA to purchase sustainable products and services); GSAR 501.101; *see* U.S. Gen. Servs. Admin., Acquisition Policy, “Acquisition Regulations” (last reviewed June 1, 2022), <https://www.gsa.gov/policy-regulations/policy/acquisition-policy/acquisition-regulations>. Neither the FAR nor the GSAR prohibit single-use plastic products, except for a prohibition on procuring non-degradable plastic ring carriers. *See* FAR 23.703(8).

<sup>75</sup> GSAR 511.002.

<sup>76</sup> FAR 52.204-25; Dave Nyczepir, *GSA pushes forward with ban on Huawei, ZTE in 2020*, FEDSCOOP (Dec. 31, 2019), <https://fedscoop.com/gsa-ban-huawei-zte/>.

<sup>77</sup> “Federal Acquisition Regulation: Sustainable Procurement”, 88 Fed. Reg. 51,672 (Aug. 3, 2023).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *See* Multistate Comments on ANPR, *supra* note 3.

instead exacerbate it. In particular, the voluntary compliance structure of the proposal—applying both to offerors and agencies—will not, as GSA appears to assume, effectuate any real change in the federal procurement of single-use plastics. It is similarly speculative to expect that the current proposal will spark innovation and corresponding reduction in single-use plastics consumption at the pace that our nation needs. In fact, a voluntary compliance model lacks incentives for companies to innovate. And those who do will likely face an uneven playing field because offerors who incur costs to develop single-use plastic free packaging or products may not be able to rely on a competitive (pricing) advantage, and thus may lose out during the competitive bidding process for procurement contracts. Moreover, voluntary compliance programs, such as the one proposed, often create the appearance of addressing a problem despite having little or no material effect on it. The States are concerned that the current proposal would do just that—serving as a distraction from the regulatory measures actually needed to reduce single-use plastic procurement.

Federal agencies and industry partners, alike, require GSA to provide a clear path forward so that their efforts to reduce procurement of single-use plastics can be focused on innovative, effective, and sustainable solutions. Unfortunately, in the current proposal, GSA has, in effect, punted the opportunity to leverage its authority over the federal government’s substantial purchasing power by proposing an entirely inadequate response to a looming public health hazard. Therefore, the States urge GSA to develop a new proposal that will set forth a clear transition to federal procurement of products and packaging free of single-use plastics. To facilitate that transition, GSA’s new proposal, at minimum, should include: (1) a schedule for phasing out all single-use plastic products, not just single-use plastic packaging, across GSA’s procurement programs by a set deadline, (2) an initial phase that will eliminate single-use plastics, with reasonable exceptions for products whose plastic composition is necessary for health or safety reasons, from GSA’s primary purchasing platform, GSA Advantage!, and (3) the immediate implementation of procurement guidance, regulatory provisions, and pilot programs to encourage offerors and federal purchasers to prioritize the procurement of single-use plastic free products.

*1. GSA’s New Proposal Should Focus on Phasing Out All Single-Use Plastic Products, Not Just Packaging, by a Date Certain.*

The States urge GSA to develop a rule that will phase out federal procurement of all types of single-use plastics. GSA claims—in a few barebones sentences without further explanation—that it has decided not to mandate use of single-use plastic free packaging due to concerns raised by commenters to the ANPR that items may fail to be properly packaged and could therefore be potentially damaged during delivery.<sup>81</sup> It similarly baldly asserts that “[t]here are no known alternatives to this rule that would accomplish the stated objectives . . . [without] being [dis]advantageous to either the GSA or industry due to excessive cost and burden.”<sup>82</sup> Such a vague and completely unqualified and unquantified concern, which GSA apparently applies in blanket form to the roughly 15 million products<sup>83</sup> available across GSA Advantage!, in no way

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<sup>81</sup> 88 Fed. Reg. at 88,858.

<sup>82</sup> *Id.* at 88,861.

<sup>83</sup> GSA, *Buyer Guidance*, [https://www.gsaadvantage.gov/images/products/elib/pdf\\_files/bgguide.pdf](https://www.gsaadvantage.gov/images/products/elib/pdf_files/bgguide.pdf) (“GSA Advantage contains over 15 million commercial products and services.”) (last visited Feb. 12, 2024).

constitutes a reasonable basis for declining to create a rule mandating a transition from single-use plastic packaging.<sup>84</sup> Indeed, in its current proposal, GSA acknowledges that single-use plastics have “an additional cost that is often not built into the proposed price.”<sup>85</sup> This is especially true considering the overall costs (e.g., cleanup, health impacts, etc.) from plastic pollution throughout its lifecycle. These costs not only harm the public but are also borne by the federal agencies that are also responsible for the cost of disposing the waste produced by single-use products. Industry should not be allowed to pass the costs onto consumers and the government, while also giving autonomy to police themselves under a scenario such as the current rule proposes.

Further, while GSA recognizes correctly that single-use plastic packaging is “a large portion of plastic waste,”<sup>86</sup> E.O. 14057 directs federal agencies more broadly to phase out single-use plastic products to the maximum extent possible.<sup>87</sup> Accordingly, last year, the GSA Acquisition Policy Federal Advisory Committee (“FAC”)<sup>88</sup> provided comprehensive policy recommendations in its report (“FAC Report”) to GSA regarding single-use plastics, including reduce single-use plastics and packaging.<sup>89</sup> Importantly, the FAC Report urges GSA to “[d]evelop and implement a strategy with numerical goals and timelines to phase out single-use plastic products across GSA.”<sup>90</sup> To this end, the FAC Report set forth a full description of recommendations for reducing single-use plastics and packaging, none of which has GSA incorporated in the current proposal.<sup>91</sup> By not setting forth a plan to also address other types of single-use plastic items, such as bottles, utensils, and other food service items, GSA is missing a large component of single-use plastic items contrary to the policy of significantly reducing federal procurement of single-use plastics set forth in E.O. 14057 and the FAC Report. And by ignoring these products, the current proposal creates the potential for perverse and inefficient results. For example, items consisting of a substantial amount of single-use plastic relative to

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<sup>84</sup> See *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (An agency must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”) (quotation and citation omitted).

<sup>85</sup> 88 Fed. Reg. at 88,856.

<sup>86</sup> *Id.*

<sup>87</sup> The White House Council on Env’tl Quality, Implementing Instructions for Executive Order 14057 Catalyzing Clean Energy Industries and Jobs through Federal Sustainability, at 50 (Aug. 2022), [https://www.sustainability.gov/pdfs/EO\\_14057\\_Implementing\\_Instructions.pdf](https://www.sustainability.gov/pdfs/EO_14057_Implementing_Instructions.pdf) (emphasis added).

<sup>88</sup> The FAC serves as an advisory body to GSA’s Administrator on how the agency can use its acquisition tools and authorities to target the highest priority federal acquisition challenges. The FAC’s initial focus is on driving regulatory, policy, and process changes required to embed climate and sustainability considerations in federal procurement. U.S. Gen. Servs. Admin., *GSA Acquisition Policy Federal Advisory Committee*, <https://www.gsa.gov/policy-regulations/policy/acquisition-policy/gsa-acquisition-policy-federal-advisory-committee> (last visited Fed. 13, 2024).

<sup>89</sup> *Id.* at Appendix C, 42. See *id.* at 26.

<sup>90</sup> FAC Report, *supra* note 17, at Appendix C, 41 (emphasis added).

<sup>91</sup> *Id.* at 26-27, 41-44. The FAC Report provided a range of recommendations including (i) “develop and implement a strategy with numerical goals and timelines to phase out single-use plastics across GSA,” (ii) coordinate with EPA and “identify existing sustainability standards or ecolabels already being used in federal purchasing that incentivize plastic waste reduction,” (iii) “[r]estrict the sale and distribution of single-use plastic waste bottles in GSA-owned buildings,” etc. *Id.* at Appendix C.

their plastic packaging, such as plastic utensils packaged in plastic film,<sup>92</sup> would continue to be available for purchase if packaged in paper.<sup>93</sup>

In addition, as the FAC recognizes, if implemented, such strong procurement policies will “enable the federal government to tap into innovative and efficient products” while also “spur[ring] economic growth and job creation” and “protect[ing] the environment.”<sup>94</sup> Indeed, the federal government has successfully leveraged its procurement authority to create beneficial changes in the economy before.<sup>95</sup> For example, the transition from gas-powered vehicles to electric vehicles accelerated when the federal government took a leadership role in the effort.<sup>96</sup> In addition, the automotive industry has made significant changes in part to comply with updated standards, including procurement standards, and there are more electric vehicles on the market now than ever before.<sup>97</sup>

Turning to the phase-out of single use plastics at issue here, there are different approaches that GSA may consider. If GSA is concerned with industry partners’ ability to immediately comply with a mandatory rule, it could provide a timeline for compliance rather than giving industry complete control in every product line over whether and when single-use plastic free material will be utilized. As recommended in our comments on the ANPR, GSA could utilize benchmark targets to allow time for industry to adjust.<sup>98</sup> Today, there exist a wide range of environmentally friendly alternatives to single-use plastics for industry to consider,<sup>99</sup>

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<sup>92</sup> For example, GSA Advantage! includes many offerings for heavy weight, disposable plastic utensils that are sold in plastic film packaging. *See, e.g.*, “Reflections Heavyweight Plastic Utensils,” [https://www.gsaadvantage.gov/advantage/ws/catalog/product\\_detail?gsin=11000092829201](https://www.gsaadvantage.gov/advantage/ws/catalog/product_detail?gsin=11000092829201) (last visited Feb. 20, 2024).

<sup>93</sup> A better approach would be to set agencies on a path toward purchasing reusable utensils as part of the agency’s waste disposal process.

<sup>94</sup> FAC Report, *supra* note 17, at 1.

<sup>95</sup> Exec. Order No. 14,057 (2021) (directing the federal government to end purchases of gas-powered vehicles by 2035 and directing 100% of light-duty federal acquisitions by 2027 be electric or plug-in electric); The White House, Fact Sheet: Biden-Harris Administration Announces New Private and Public Sector Investments for Affordable Electric Vehicles (Apr. 17, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/17/fact-sheet-biden-harris-administration-announces-new-private-and-public-sector-investments-for-affordable-electric-vehicles/>; David Shepardson, *US government agencies target purchasing 9,500 EVs in 2023* (July 19, 2023, 6:30 P.M.), <https://www.reuters.com/business/autos-transportation/us-government-agencies-target-purchasing-9500-evs-2023-2023-07-19/>.

<sup>96</sup> *See* White House, Fact Sheet: Biden-Harris Administration Announces New Standards and Major Progress for a Made-in-American National Network of Electric Vehicle Chargers (Feb. 15, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/15/fact-sheet-biden-harris-administration-announces-new-standards-and-major-progress-for-a-made-in-america-national-network-of-electric-vehicle-chargers/> (“Because of President Biden’s leadership and record federal investment, EV sales have tripled . . .”).

<sup>97</sup> *Id.* *See also* *Electric Vehicles – United States*, STATISTICA (last visited Feb. 8, 2024), [https://www.statista.com/outlook/mmo/electric-vehicles/united-states#:~:text=The%20Electric%20Vehicles%20market%20in,US%24161.6bn%20by%202028](https://www.statista.com/outlook/mmo/electric-vehicles/united-states#:~:text=The%20Electric%20Vehicles%20market%20in,US%24161.6bn%20by%202028;); Dan Gearino, *U.S. Electric Vehicles Sales are Poised to Rise a Lot in 2024, Despite What You May Have Heard*, INSIDE CLIMATE NEWS (Feb. 8, 2024), <https://insideclimatenews.org/news/08022024/inside-clean-energy-us-electric-vehicles-sales-are-poised-to-rise-in-2024/>.

<sup>98</sup> Multistate Comments on ANPR, *supra* note 3, at 16.

<sup>99</sup> *See id.* at 12-14. *But see supra* Part II (discussing the importance of integrating risk assessment and life cycle assessment approaches to avoid regrettable substitutions).

and GSA could work with other federal agencies such as EPA to determine appropriate substitutes for packaging and products and provide guidance for industry partners.

GSA could also consider identifying products or purchases that result in high volumes of single-use plastics and start to phase out those items first. Such a phased approach is already being taken by the DOI, which is phasing out single-use plastic products on national lands by 2032. Similarly, California’s landmark plastics reduction law, SB 54, includes the same target date by which all single-use consumer product packaging and plastic food serviceware sold in California must be recyclable or compostable with benchmark reduction targets in 2028 and 2030.<sup>100</sup> Another option to consider for phasing out plastics could be to require federal procurement of plastics containing a certain percentage of recycled content (e.g., only plastics that include 25-50% recycled plastics) leading to the goal of eliminating purchasing of all single-use plastics by a target date.<sup>101</sup> Any approach should, of course, prioritize phasing out products posing the greatest plastics-related harms based on, for example, the amount or type or combinations of plastics they incorporate or the percentage of federal procurement they comprise, as well as the availability of acceptable replacement products, and, where appropriate, whether health or safety considerations currently preclude the removal of the items.

As more cities and countries around the world expand their green procurement processes to reduce procurement of single-use plastics, there are also numerous international programs that GSA should look to in developing its own approach. For example, France’s National Action Plan on Green Procurement (2022-2025), prohibits central public authorities, as of January 1, 2022, from buying single-use plastics for use in the workplace and at workplace events.<sup>102</sup> Similarly, last month the Nigerian Federal Ministry of Environment banned procurement of single-use plastics in its own departments and agencies.<sup>103</sup> In response, the Lagos and Abia state governments have both followed suit with single-use plastics bans of their own.<sup>104</sup> GSA has provided no explanation in the current proposal as to why the United States cannot take comparable steps by promulgating a stronger rule at this time.

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<sup>100</sup> Cal. Pub. Res. Code § 42050; *see* CalRecycle, *Plastic Pollution Prevention and Packaging Producer Responsibility Act SB 54*, <https://calrecycle.ca.gov/packaging/packaging-epr/#:~:text=SB%2054%20establishes%20a%20new,California%20is%20recyclable%20or%20compostable> (last visited Feb. 20, 2024).

<sup>101</sup> *See* Ca. Pub. Res. Code § 14547 (2020); Ca. Pub. Res. Code §§ 42280-42288; N.J. P.L. 2021, c. 391 [N.J.S.A. 13:1E-99.135-157]; Wash. Senate Bill 5022 (2021); Wash. Senate Bill 5323 (2020). If GSA chooses to take this approach, however, it should make clear that plastic generated through so-called “advanced recycling” technologies does not qualify as recycled content. *See* Letter from the Attorneys General for Arizona, et al. to the EPA on Proposed Updates to Safer Choice Standard, 11-12 (Jan. 16, 2024), <https://www.azag.gov/sites/default/files/2024-01/Comments%20of%20Arizona%20et%20al%20on%20Proposed%20Updates%20to%20EPA%27s%20Safer%20Choice%20Standard.pdf> [hereinafter “Multistate Comments on Safer Choice Standard”].

<sup>102</sup> *See* Ministère de L’Economie Des Finances Et De La Relance, *Fin Du Plastique A Usage Unique* (Dec. 2021), [https://www.economie.gouv.fr/files/directions\\_services/dae/doc/guide\\_fin\\_plastique\\_a\\_usage\\_unique.pdf?v=1641455727](https://www.economie.gouv.fr/files/directions_services/dae/doc/guide_fin_plastique_a_usage_unique.pdf?v=1641455727); *see also* Ellen MacArthur Foundation, *The Government of France: Eliminate Problematic or Unnecessary Plastic Packaging and/or Product*, <https://www.ellenmacarthurfoundation.org/global-commitment-2021/signatory-reports/gov/the-government-of-france> (last visited Feb. 1, 2024).

<sup>103</sup> *See* Temitope O. Sogbanmu, *Nigeria’s plastic ban: why it’s good and how it can work*, THE CONVERSATION (Jan. 30, 2024), <https://theconversation.com/nigerias-plastic-ban-why-its-good-and-how-it-can-work-221770>.

<sup>104</sup> *Id.*



In sum, an approach that includes all single-use plastic products is consistent with, if not required by, the directives and recommendations that GSA develop a regulation that will phase out all single-use plastics, not just those associated with packaging. Therefore, the States join the FAC in recommending that GSA include a phase-out of all single-use plastic products across GSA's procurement programs in a new proposal to replace the current version.

2. *GSA Should Begin to Phase Out Single-Use Plastics by Eliminating Them from its Primary Procurement Platform.*

GSA should at the very least initiate a phase-out of all single-use plastic products by eliminating their availability to federal purchasers through its primary procurement platform, GSA Advantage! In the current proposal, GSA focuses on federal procurement through its Multiple Award Schedule (MAS) Contract or Federal Supply Schedules (FSS) ("FSS Program"), noting that it is "the premiere entry point for commercial contractors to sell products. . . to the Federal Government."<sup>105</sup> Although GSA did not provide any context for the proportion of single-use plastics procured through the FSS Program, or other possible avenues for federal procurement of such items, the FSS Program includes more than 14,000 contractors and more than 6.8 million products and services,<sup>106</sup> many of which are available through the GSA's primary procurement platform, GSA Advantage!.<sup>107</sup>

As discussed above, we urge GSA to consider eliminating federal procurement of single-use plastics in phases, and we recommend GSA begin with its primary procurement platform, GSA Advantage!. Within GSA's procurement programs there are various procurement platforms that allow federal agencies to conduct searches for orders.<sup>108</sup> GSA Advantage! is GSA's online shopping service for FSS contracts,<sup>109</sup> and has been referred to as "the government version of Amazon."<sup>110</sup> Although GSA has failed to provide any information as to the magnitude of single-use plastic procurement through this platform as part of the current proposal to assist commenters who are unfamiliar with federal procurement processes, the States have surmised from other sources that GSA Advantage! is GSA's primary procurement platform. It enables ordering agencies to search specific information, review delivery options, and place orders directly with FSS offerors, and is advertised to provide a one-stop-shop for large, commercial purchases.<sup>111</sup> It thus provides a good starting point for phasing out procurement of single-use plastics. However, instead of merely creating a new icon to identify single-use plastic free items on this platform, as GSA now proposes, GSA should promulgate a rule that will actually eliminate single-use plastic items from being offered on GSA Advantage!. This approach would

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<sup>105</sup> 88 Fed. Reg. at 88,589.

<sup>106</sup> *GSA Overview*.

<sup>107</sup> Stephanie Hagan, *What is GSA Advantage?*, WINVALE (Oct. 21, 2022), <https://info.winvale.com/blog/what-is-gsa-advantage> (stating that more than one million customers visit GSA Advantage! each week and over 30,000 orders are placed within that time frame).

<sup>108</sup> *See GSA Advantage!*, GEN. SERVS. ADMIN., [https://www.gsaadvantage.gov/advantage/ws/main/start\\_page?store=ADVANTAGE](https://www.gsaadvantage.gov/advantage/ws/main/start_page?store=ADVANTAGE) (last visited Feb. 23, 2024); *GSA eBuy!*, GEN. SERVS. ADMIN., <https://www.ebuy.gsa.gov/ebuy/> (last visited Feb. 23, 2024); *GSA eLibrary*, GEN. SERVS. ADMIN., <https://www.gsaelibrary.gsa.gov/ElibMain/home.do> (last visited Feb. 23, 2024).

<sup>109</sup> GSAR. 8.402: General (c)(1).

<sup>110</sup> Stephanie Hagan, *GSA Advantage! Best Practices*, WINVALE (May 26, 2021), <https://info.winvale.com/blog/gsa-advantage-best-practices>.

<sup>111</sup> GSAR. 8.402: General (c)(2).

not completely remove the ability for federal agencies to purchase single-use plastic items as they may go to a different GSA procurement program or perhaps outside of GSA's programs altogether if there is a specific item that requires the use of single-use plastics.<sup>112</sup> With GSA's goal to coordinate with industry and eventually limit the amount of single-use plastic procurement, phasing out those types of products from the GSA Advantage! initially provides for both. Phasing out single-use plastic products on GSA Advantage! allows time for offerors to decide whether they want to prioritize placing products on GSA Advantage! and thus change their products to include single-use plastic free packaging but does not completely eliminate an offeror's ability to offer their products to federal purchasers using other GSA programs or platforms. Offerors will not be required to make the necessary changes to product packaging unless they want to continue to utilize the benefits of GSA Advantage!. Offerors who choose not to provide single-use plastic free products can continue to make their products available to federal purchasers through other procurement channels but will forgo the benefits of providing their products on the GSA Advantage! platform.

In its revised proposal, we urge GSA to transition federal agencies away from these products by reducing the availability of single-use plastic items for federal procurement. As mentioned above, GSA could consider identifying the highest, most problematic single-use plastic items and phase those items out first and then work towards eliminating all single-use plastics on GSA Advantage!. After eliminating single-use products from GSA Advantage!, GSA could then progress to other avenues of federal procurement in the phase-out, or explain why it is choosing not to include any such other programs, so that the public can properly evaluate the extent to which the proposal addresses federal procurement of single-use plastics as a whole.<sup>113</sup> Importantly, GSA should develop a timeline, with benchmark goals, for when unnecessary single-use plastic packaging and products will be eliminated from other fora and then a date certain when federal procurement of such single-use plastics will cease completely.

3. *GSA Should, Immediately, Develop Guidance, Regulatory Provisions, and Pilot Programs to Encourage Federal Agencies and Offerors to Transition Away from Purchasing Single-Use Plastics, Including Packaging.*

Because GSA Advantage! is a large platform with 15 million services and products, the States understand that the elimination of single-use plastic products from the platform will not occur overnight. There are steps, however, that GSA can and should take immediately to facilitate the transition to single-use plastic free products outside of this rulemaking.

First, GSA should develop "special ordering procedures," pursuant to FAR 8.403(b), to impose more rigorous purchasing procedures within FSS Program subcategories or specific item numbers ("SINs") that contain a disproportionate number of single-use plastic products or

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<sup>112</sup> If a federal agency is not able to satisfy its purchasing requirements through the mandatory sources set forth in FAR 8.002 and FAR 8.003, then the agency may try to satisfy its purchasing requirements through non-mandatory sources as described in FAR 8.004.

<sup>113</sup> See *How to Buy Through Us*, GEN. SERVS. ADMIN., <https://www.gsa.gov/buy-through-us/getting-started-with-gsa-purchasing-programs/how-to-buy-through-us?gsaredirect=howtobuy> (last visited Feb. 23, 2024).

packaging.<sup>114</sup> For instance, in such categories, GSA could impose a requirement that agencies distribute their orders to include one or more offerors whose products and/or packaging are free of single-use plastics. Doing so would help reduce the amount of single-use plastic purchased by the federal government and encourage vendors and manufacturers to shift their offerings toward more sustainable products and packaging. Similarly, GSA could develop a requirement, similar to the items already required to be documented by an agency in an award under FAR 8.405-1(g), that agencies document whether their award decisions took into consideration whether the products purchased included single-use plastic or packaging and, where single-use plastic products or packaging are a part of the award, why the agency chose those products rather than any available single-use plastic free items.<sup>115</sup> Such a requirement would not only reinforce within agencies the availability of such products and the importance of purchasing them, but could also provide GSA with insight into the purchasing preferences of agencies for use in taking further steps to reduce procurement of single-use plastics.

Second, GSA should develop guidance for agencies, including model language for requests for proposals, and for offerors identifying preferred options for products and packaging that reduce or avoid single-use plastics. States are already using this kind of approach to direct agencies and offerors toward more sustainable options, particularly in the context of product packaging. For example, New York encourages agencies to adopt specific model packaging preferences when making purchasing decisions, ranging from, in order of preference, items that do not require any packaging to items with packaging that is “recyclable or biodegradable (compostable) [provided that] [b]iodegradable products should only be used in areas where a composting facility exists and will accept the material.”<sup>116</sup> Similarly, all bids submitted under Massachusetts’ new statewide contract for certain office supplies are prohibited from using packaging consisting of polystyrene packing peanuts and are “strongly discouraged” from using certain “difficult-to-recycle” plastic packaging, including “rigid polystyrene or polyurethane foam, polyvinyl chloride (PVC), or multi-material packaging.”<sup>117</sup> In addition, Massachusetts requires, “[t]o the greatest extent possible,” that all “contractors shall work with manufacturers to

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<sup>114</sup> FAR 8.403(b) provides that “GSA may establish special ordering procedures for a particular *schedule*. In this case, that *schedule* will specify those special ordering procedures.” (emphasis added). Under the Multiple Award Schedule Contract administered through the FSS Program, imposing such procedures for particular “subcategories” or “SINs” within the current 12 categories of products and supplies under that program likely represents the appropriate level of application.

<sup>115</sup> FAR 8.405-1(g) provides that:

*Minimum documentation.* The ordering activity shall document-

- (1) The schedule contracts considered, noting the contractor from which the supply or service was purchased;
- (2) A description of the supply or service purchased;
- (3) The amount paid;
- (4) When an order exceeds the simplified acquisition threshold, evidence of compliance with the ordering procedures at 8.405-1(d); and
- (5) The basis for the award decision.

<sup>116</sup> N.Y. State Off. of Gen. Servs., *GreenNY Specification: Model Packaging Language*, <https://ogs.ny.gov/greenny/model-packaging-language> (last visited Feb. 20, 2024).

<sup>117</sup> OSD, *Request for Response: Document Title: Office Supplies, Recycled Paper and Recycled Envelopes Agency Document Number: OFF53*, § 4.12.3.1, p12 (Nov. 30, 2023) (prohibiting packaging consisting of polystyrene packing peanuts and “strongly discouraging” certain “difficult-to-recycle” plastic packaging in bids for new statewide contract for certain office supplies). This document is available at <https://www.commbuys.com/bso/external/bidDetail.sdo?docId=BD-24-1080-OSD03-OSD03-92740&external=true&parentUrl=close>, in the attachment “OFF53 RFR” under the heading “File Attachments.”

supply packages and packing components that minimize packaging” and reserves the right to require contractors to report annually to the Commonwealth’s contracting agency, OSD, on their efforts to meet those and certain recycled content requirements.<sup>118</sup>

Third, we urge GSA to amend FAR 8.405-1(f) to include single-use plastic free packaging and products.<sup>119</sup> Currently, when placing an order, there are certain procedures set out to help a contracting federal officer determine which supplies are the best value. The FAR provides that “Federal agencies shall advance sustainable acquisition by ensuring that 95 percent of new contract actions for the supply of products . . . require that the products” meet a list of six (6) sustainable acquisition criteria.<sup>120</sup> GSA should include a specific reference to “single-use plastic free packaging and products.” A new provision in the FAR allowing federal purchasers—particularly agencies whose missions may be less driven by sustainability considerations—to consider single-use plastic free items in determining value would help reduce single-use plastic procurement.

Lastly, GSA should consider the implementation of pilot programs that might not require a full rulemaking process. We encourage GSA to follow the FAC’s recommendations and work with other agencies, such as EPA and DOI, to determine what types of pilot programs would work best for assisting GSA in its transition away from unnecessary single-use plastic products.<sup>121</sup> For example, the FAC Report recommended procurement pilot programs that may focus on a unique category or could be facility-specific.<sup>122</sup>

## **VI. GSA’s Current Proposal Requires Clarification and the Addition of Transparency Measures.**

As discussed above, the States’ primary recommendation in these comments is that GSA should develop a *new* proposal focused on the phase-out of single-use plastics as a whole, in all federal procurement. We also urge GSA, however, to clarify and expand upon several important aspects of the current proposal in that future proposal (or in any final rule following the current proposal, should GSA elect to proceed with its inadequate proposal despite our objections). In particular, several provisions of the current proposal, namely the proposed verification process, the application of the proposal to existing federal contracts, and aspects of the proposed definitions, are vague and lack the explanation that is necessary to permit the public to understand exactly what GSA is proposing and the basis for doing so.<sup>123</sup> In addition, we urge GSA in its new proposal to provide analysis of the reductions in procurement of single-use plastic that it anticipates will result from implementation of the proposal as well as transparency measures to ensure that GSA and the public are able to assess the extent of those reductions as implementation occurs.

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<sup>118</sup> *Id.*

<sup>119</sup> GSAR. 8-405-1(f)(7): Ordering procedures for supplies, and services not requirement a statement of work. *See also* GSA 8.405-3: Blanket purchase agreements (BPAs) (providing the same factors for determining the best value).

<sup>120</sup> FAR 23.103.

<sup>121</sup> *See* FAC Report, *supra* note 17, at 40.

<sup>122</sup> *Id.*

<sup>123</sup> *See State Farm*, 463 U.S. at 43.

**a. The Proposed Verification Process Will Not Guarantee Compliance for Single-Use Plastic Packaging or Products.**

The barebones process GSA proposes for verifying that products purchased by federal agencies meet its proposed single-use plastics free requirements is woefully inadequate. While a minimal verification process might work for some, straight-forward packaging materials, such as those that are made entirely of uncoated cardboard or paper, the verification process is not adequate to ensure compliance with all single-use plastic packaging items and certainly not for all single-use plastic products which GSA should be prepared to cover. The States are concerned that the proposed verification process—which is presented as proposed regulatory language with no explanation of why GSA has chosen the selected approach—not only will fail to ensure offerors comply with single-use plastic free requirements, but also will create confusion among federal purchasers and the public regarding verified products.

First, GSA’s proposed verification process provides no mechanism to adequately validate claims by offerors that their products conform with GSA’s SUP-free packaging requirements. The proposed regulatory language states that:

An offeror, in identifying an item with SUP-free packaging, must possess evidence or rely on a reasonable basis to substantiate the claim. The Government will accept an offeror’s claim of SUP-free packaging on the basis of possession of competent and reliable evidence. For any test, analysis, research, study, or other evidence to be “competent and reliable,” it must have been conducted and evaluated in an objective manner, using procedures generally accepted in the profession to yield accurate and reliable results.<sup>124</sup>

As a preliminary matter, it is difficult to provide sufficient feedback on this verification process because not only is the limited regulatory language proposed by GSA itself vague and confusing, GSA has provided no discussion of that language elsewhere in the proposal to explain how it intends for the verification process to work and why it chose this particular approach to verification in the context of addressing single-use plastic packaging. This omission is significant, as “[o]ne of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.”<sup>125</sup> GSA’s failure to meet that minimum rulemaking requirement for such an essential component of the proposal requires it to significantly revise its proposal before moving forward.<sup>126</sup>

Taking the proposed regulatory language on its face, however, it is unclear how GSA will actually verify a product is SUP-free, in accordance with its regulatory requirements. Will GSA accept that a product is SUP-free simply because an offeror claims to possess evidence that the product is SUP-free? “Possession” of evidence or an offerors’ statements that they have evaluated the evidence in an “objective manner” will not guarantee that a product complies with

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<sup>124</sup> 88 Fed. Reg. at 88,863.

<sup>125</sup> *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

<sup>126</sup> *See id.* at 2125.

SUP-free requirements.<sup>127</sup> It is also unclear whether GSA, the offeror, or a potentially biased, industry-sponsored-third party will review the “competent and reliable” evidence. In addition, GSA notes that the evidence must have been evaluated “using procedures generally accepted in the profession” but fails to define “profession” in the context of assessing whether packaging is “SUP-free” under the definitions proposed. If GSA intends for “profession” to refer to or include the plastics industry, it must revise its approach to ensure accountability. As noted above, there is currently a deep and warranted lack of public trust in the plastics industry’s ability and motivation to regulate itself.<sup>128</sup>

Second, by leaving compliance completely in the hands of the offerors, GSA creates the risk that offerors will intentionally (i.e. greenwash) or inadvertently market products as “SUP-free” to federal agencies when in fact they are not.<sup>129</sup> Often vendors may create their own labelling standard with little to no information about the product’s sustainable attributes or a vendor may receive certification from a self-declared, industry-chosen third party.<sup>130</sup> This may also result in creating confusion among federal purchasers and/or the public about certain products if they are seeing a product labeled as “SUP-free” on the GSA’s platform or offeror’s website, when the products in fact include plastic material. Many federal agencies may have internal sustainability policies under which they are attempting to make sustainable purchases, including purchases of products that do not include single-use plastic material. A faulty verification process, such as the one proposed, would impede federal agencies’ ability to make this type of purchase and create confusion among whether their purchase is the sustainable option or not. Accordingly, to prevent federal agencies from purchasing products, potentially at a premium, that do not meet GSA’s SUP-free packaging requirements, we strongly urge GSA to require use of an un-biased third-party certification or a federal equivalent.

To avoid confusion and faulty verification approval, the States have consistently advocated that certification or other similar labeling systems be based on an unbiased system that can adequately substantiate environmental claims.<sup>131</sup> This process could be modeled after other successful labeling standards such as the EPA-administered Energy Star.<sup>132</sup> The States acknowledge that implementing an adequate verification process can be difficult and resource heavy. But if GSA opts to rely on a voluntary plastics reduction strategy or otherwise relies on

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<sup>127</sup> A simple change of terms can help remedy this issue such as changing the terminology from “possess” to “produce” evidence “documenting” a reasonable basis to substantiate the claim. This would rightfully shift the burden to the provider to affirmatively document compliance.

<sup>128</sup> See *supra* Part II.

<sup>129</sup> See Erica Cirino, *False ‘greenwash’ solutions won’t help – we need to eliminate our use of plastics*, THE HILL (July 18, 2023, 9:30 A.M.), <https://thehill.com/opinion/energy-environment/4100211-those-green-solutions-to-plastics-pollution-arent-what-they-seem/>; *Self-Regulation & Greenwashing*, PLASTIC SOUP FOUND., <https://www.plasticsoupfoundation.org/en/plastic-problem/bogus-solutions/greenwashing/> (last visited Feb. 20, 2024).

<sup>130</sup> See Responsible Purchasing Network, *Environmental Claim Verification: Findings and Recommendations to the Massachusetts Operational Services Division*, 3 (July 2021), <https://www.mass.gov/doc/epp-environmental-claim-verification-report-rpn/download>.

<sup>131</sup> Multistate Comments on Draft National Strategy, *supra* note 33, at 10-12; Multistate Comments on Safer Choice Standard, *supra* note 101, at 15; Letter from the Attorneys General for California, et al. to the Federal Trade Commission on Green Guides Review, 15 (Apr. 24, 2023), <https://oag.ca.gov/system/files/attachments/press-docs/Comments%20to%20FTC%20re%20Green%20Guides%204.24.23.pdf>.

<sup>132</sup> About ENERGY STAR, ENERGY STAR, <https://www.energystar.gov/about?s=footer> (last visited Feb. 20, 2024).



labeling, it must develop a more adequate verification and substantiation process to enable informed purchasing decisions, improve transparency, and eliminate confusion among products.

**b. GSA Should Clarify How and When the Current Proposal Applies to Existing Federal Contracts.**

Under the current proposal, it is unclear how or when offerors with existing contracts in the FSS Program would add a SUP-free packaging option to those contracts. The GSAR provides that contracts under the FSS Program have an initial 5-year term and may be extended for up to three additional 5-year terms, to twenty years, total.<sup>133</sup> For existing contracts, GSA should specify whether immediate amendment of such contracts to add SUP-free packaging options will be permissible, or whether offerors must wait until the current 5-year term of the contract has expired. GSA's failure to explain the process and timing for such changes makes it difficult for the public to assess the pace at which even the entirely voluntary approach GSA has proposed would proceed. In doing so, we urge the GSA to allow any final rule to apply to existing contracts such that offerors are given a window of time to adjust orders mid-contract to allow agencies to modify their purchasing to include SUP-free packaging as quickly as possible.<sup>134</sup>

**c. Monitoring and Public Transparency of GSA and Other Agencies' Progress in Reducing Single-Use Plastic Procurement.**

Monitoring and transparency provisions are important to any federal regulatory program, and that is particularly so in the context of GSA's proposal to reduce single-use plastic in federal procurement. Without such provisions, the public—who have shown substantial concern about the harms caused by single-use plastics as well as the lack of accountability on the part of industry, absent government action<sup>135</sup>—will be left in the dark about whether GSA's efforts are making any difference. The States, therefore, strongly recommend that GSA develop a plan to track and publicize the degree to which federal purchases of single-use plastic free products and packaging change once a final proposal is implemented.

Doing so should be straight-forward given that GSA is presumably able to track purchase orders on GSA Advantage! that use the proposed SUP-free packaging icon. Ideally, GSA would collect data related to the number or volume of such purchases and, if possible, the types and amount of single-use plastic, in terms of weight, volume, or numerical quantity of particular items, that have been reduced in federal procurement based on the purchases made. GSA should also collect data on which agencies have made the most progress in shifting their purchases away

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<sup>133</sup> See 48 C.F.R. 552.238-116(a) (federal government may to extend the initial 5-year term of an FSS Program contract for an additional 5-year term up to three times). This is another example of GSA's failure to provide sufficient information—including even the length of the contract term for FSS Program contracts—to permit the public, which is likely to be unfamiliar with the details of the federal procurement process, to evaluate its current proposal. GSA should add this kind of basic information to a revised proposal that the States have requested.

<sup>134</sup> Offerors can modify their GSA contracts through a formal modification process. See FAR, Part 43.000, *et seq.* We encourage GSA to allow for a streamlined modification process to allow for contracts to be adjusted to comply with a SUP-free requirement.

<sup>135</sup> See *supra* Part II.

from single-use plastics, which will help to make agencies accountable for their procurement decisions and encourage more sustainable purchasing.

Further, GSA should summarize and publish this data—as well as data it collects on agency purchasing decisions relative to single-use plastics as part of the recommended special ordering procedure identified above—annually in a publicly available form on its website. Doing so would not only allow the public to understand the progress being made, but also provide valuable information to state and local procurement agencies for developing or expanding their own green procurement programs and to private sector entities who offer or are considering offering single-use plastic free products or packaging. Moreover, GSA should make use of that data to refine its plan for phasing out single-use plastic procurement, such as by targeting particular products for which few alternatives are available or agencies that have made less progress in reducing their procurement of single-use plastics.

**d. GSA Should Make Clarifying Amendments to Its Proposed Definitions.**

That GSA has modeled its proposed definitions after California’s SB 54 is a good first step to developing a comprehensive approach to addressing single-use plastic products and packaging in the federal procurement system. However, the States have a few recommendations to provide greater consistency in the treatment of single-use plastics and to account for problematic items, including bioplastics.

First, the States recommend that the definition of “Packaging” be broader than just “materials used to protect,” as GSA has proposed. Limiting “packaging” to the material used to protect an item may limit certain types of packaging that the current proposal should cover. Further, it is inconsistent with the broader definition of “single-use plastic (SUP) packaging” that GSA simultaneously proposes. Therefore, the States recommend the proposed definition for “Packaging” be broadened in the following way:

502.101 Definitions

Packaging means any separable and distinct material component used for the containment, protection, handling, delivery, or presentation of goods by the producer for the user or consumer, ranging from raw materials to processed good. ~~is the material used to protect an item.~~ Packaging includes, but is not limited to: brand packaging, ancillary packaging, grouped packaging, and redundant packaging.

...

Second, the States are concerned that the proposed definition of “Plastic” allows for certain so-called “bioplastics” and other unconventional plastic materials to be improperly labeled as “SUP-free,” despite posing many of the same environmental harms as petroleum-based plastics.<sup>136</sup> For example, “bioplastics”, or similar terms, are more energy-intensive, land-use-intensive, and cause more air pollution to manufacture than conventional plastic, and “biodegradable” plastics may actually only fragment more rapidly into microplastics when

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<sup>136</sup> See *supra* notes 33-35; see also Multistate Comments on Draft National Strategy, *supra* note 33, at 8.

released into a non-landfill environment.<sup>137</sup> Therefore, the States recommend GSA amend its definition of “Plastic” so that it specifically includes bioplastics in the following way:

502.101 Definitions

...

*Plastic* means synthetic or semisynthetic material chemically synthesized by the polymerization of organic substances that can be shaped into various rigid and flexible forms, and includes coatings and adhesives. “Plastic” includes, without limitation, “bioplastics” which includes bio-based plastic (plastic partly or entirely made from biological feedstock like corn), biodegradable plastic (conventional or bio-based plastic that can be broken down by bacteria or fungi into water, carbon dioxide, or naturally occurring minerals), and compostable plastic (plastic that can fully biodegrade under high-heat conditions at an industrial composting facility).<sup>138</sup> “Plastic” excludes natural rubber or naturally occurring polymers such as proteins or natural starches. ~~starches.~~

Lastly, without a definition for “single-use plastic” itself, the definition for “single-use plastic (SUP) free packaging” is incomplete. Therefore, the States recommend the GSA use a repetitive but inverse definition of “Single-use plastic (SUP) packaging.” For example, the States recommend the following:

502.101 Definitions

...

*Single-use plastic (SUP) free packaging* means product or shipping containment materials free of any single-use plastic used for the containment, protection, handling, delivery, or presentation of goods by a producer for a consumer with the intent of being disposed of immediately or soon after use. Disposal of the product means that it is routinely recycled, disposed of, or discarded after its contents have been used or unpackaged, and typically not refilled or otherwise reused by the producer. Packaging includes, but is not limited to ancillary packaging, brand/sales packaging, grouped packaging, and redundant packaging. Examples may include, but are not limited, to corrugated cardboard, paper products, and paper backed tape.

## VII. Conclusion

The plastic waste crisis demands more aggressive action by the federal government. When GSA published its ANPR in 2022, the States were encouraged by the prospect of the federal government leveraging its procurement authority to help reduce single-use plastic waste. We are disappointed, however, by the extremely limited scope of GSA’s current proposed rule. Not only does the proposal fall far short of the federal procurement approach needed to begin addressing the single-use plastic crisis facing our nation, it could do more harm than good by creating the illusion of progress while in fact acting as an impediment to strong, efficient initiatives that are

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<sup>137</sup> See BIOPLASTIC, *supra* note 35.

<sup>138</sup> *Id.*

actually focused on eliminating procurement of single-use plastics. Thus, the States urge GSA to begin again and develop a new proposed rule that will phase out, by a date certain, federal purchasing of unnecessary single-use plastic packaging and products across GSA's procurement programs.

Respectfully submitted,

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