

as follows: I, (Name of Governor or designee), (ADD TITLE on behalf of the Governor of the (State or Commonwealth) of \_\_\_\_, do hereby certify that I am opposed to the enactment or enforcement of a law that conforms to 23 U.S.C. 159(a)(3)(A) and that the legislature of the (State or Commonwealth) of \_\_\_\_, has adopted a resolution expressing its opposition to such a law.

(2) Until a State has been determined to be in compliance with the requirements of 23 U.S.C. 159(a)(3)(B) and this regulation, the certification shall include a copy of the resolution.

(d) The Governor or their designee shall submit an electric copy of the certification to its respective FHWA Division Administrator. The FHWA Division Administrator shall retain an electronic copy and forward an electronic copy to both the FHWA Office of Safety and the FHWA Office of the Chief Counsel.

(e) Any changes to the certification or supplemental information necessitated by the review of the certifications as they are forwarded, State legislative changes that affects State compliance of this section, or changes in State enforcement activity shall be submitted within 90 days of the change being effective.

#### **§ 192.6 Period of availability of withheld funds.**

Funds withheld under § 192.4 from apportionment to any State will not be available for apportionment to the State and shall lapse immediately.

#### **§ 192.7 Procedures affecting States in noncompliance.**

(a) If FHWA determines that the State is not in compliance with 23 U.S.C. 159(a)(3), the State will be advised of the funds expected to be withheld under § 192.4 from apportionment, as part of the advance notice of apportionments required under 23 U.S.C. 104(e). This notification will normally occur not later than 90 days before the beginning of the fiscal year for which the sums to be apportioned are authorized. The State may, within 30 days of its receipt of the advance notice of apportionments, submit documentation demonstrating its compliance. Documentation shall be submitted electronically to the FHWA Division Administrator for that State. The FHWA Division Administrator shall retain an electronic copy and forward an electronic copy to both the FHWA Office of Safety and the FHWA Office of the Chief Counsel.

(b) Each fiscal year, each State determined not to be in compliance

with 23 U.S.C. 159(a)(3), based on FHWA's final determination, will receive notice of the funds being withheld under § 192.4 from apportionment, as part of the certification of apportionments required under 23 U.S.C. 104(e), which normally occurs on October 1 of each fiscal year.

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## **GENERAL SERVICES ADMINISTRATION**

### **41 CFR Part 102-39**

[FMR Case 2019-102-01; Docket No. GSA-FMR-2019-0015; Sequence No. 1]

RIN 3090-AK11

### **Federal Management Regulation; Replacement of Personal Property Pursuant to the Exchange/Sale Authority**

**AGENCY:** Office of Government-wide Policy, General Services Administration (GSA).

**ACTION:** Proposed rule.

**SUMMARY:** GSA is proposing to amend the Federal Management Regulation (FMR) to clarify the exchange/sale provisions to improve the application of this important authority across Federal agencies. The related FMR part Replacement of Personal Property to the Exchange/Sale Authority was last revised November 1, 2011.

**DATES:** Interested parties should submit comments in writing on or before April 19, 2022.

**ADDRESSES:** Submit comments in response to FMR Case 2019-102-01 to *Regulations.gov* at <https://www.regulations.gov>. Enter "FMR Case 2019-102-01" under the heading "Enter Keyword or ID" and select "Search". Select the link "Submit a Comment" that corresponds with "FMR Case 2019-102-01". Follow the instructions provided at the "Comment Now" screen. Please include your name, company name (if any), and "FMR Case 2019-102-01" on your attached document.

All comments received will be posted without change, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov> approximately two to three days after submission to verify posting.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact William Garrett, Director, Personal Property

Policy Division, Office of Government-wide Policy, Office of Asset and Transportation Management (MA), at 202-368-8163 or [william.garrett@gsa.gov](mailto:william.garrett@gsa.gov). For information pertaining to status or publication schedules, contact the Regulatory Secretariat (MVCB), 202-501-4755. Please cite FMR Case 2019-102-01.

#### **SUPPLEMENTARY INFORMATION:**

#### **A. Authority and Background of This Program**

Personal property includes a wide variety of Government items such as computers, office equipment, furniture, and vehicles, as well as more specialized items specific to agencies, such as medical equipment for the U.S. Department of Veterans Affairs (VA) and medical helicopters for the U.S. Army. The Federal Government owns and manages more than a trillion dollars of personal property. In Fiscal Year (FY) 2020, Federal agencies reported approximately \$1.9 trillion in capitalized personal property assets under their control. Over time, agencies' personal property may no longer adequately perform the task for which it was acquired. 40 United States Code (U.S.C.) § 503 authorizes agencies to exchange (trade-in) or sell such property still needed to meet mission needs and apply the exchange allowance or sale proceeds to acquire similar replacement property.

Such transactions are known as personal property "exchange/sale" transactions. These transactions facilitate the replacement of personal property by allowing agencies to offset the cost of new, similar property, resulting in savings to agency funds. Without this authority, agencies would have to expend the full purchase price of new personal property from appropriations, while depositing the proceeds from the disposition of worn property in the U.S. Treasury. Because exchange/sale transactions provide agencies with opportunities to save costs, it is important that agencies using this authority establish policies, processes, and procedures with effective controls, in order to ensure that they meet applicable requirements and are good stewards of Government resources.

GSA's regulations at 41 Code of Federal Regulations (CFR) Part 102-39 describe the terms, conditions, and reporting requirements for exchanges and sales of personal property. The personal property exchange/sale authority in FMR § 102-39.60 allows agencies to replace property that is not excess or surplus, *i.e.*, the property is still needed to meet the agency's continuing mission. In addition,

agencies must meet the following requirements to use the exchange/sale authority:

- The property exchanged or sold is similar to the property acquired.
- The personal property exchanged or sold was not acquired for the principal purpose of later exchanging it or selling it using the authority. For example, an agency cannot purchase a more costly piece of equipment than necessary to meet mission needs for the sole reason that it will deliver a higher value when sold using this exchange/sale authority.

- Proceeds from the sale can only be put toward the purchase of similar replacement property and cannot be used for services. In other words, an agency can use proceeds from the sale of a vehicle to purchase a new vehicle, but it cannot use proceeds to hire a mechanic to repair an existing vehicle.

- Proceeds from sale are available during the same fiscal year (FY) the property was sold and the following FY for replacement property. This means that for an item sold in FY 2021, an agency has the rest of FY 2021, as well as FY 2022 to purchase a replacement item. If agencies do not spend these funds by the end of the next FY, monies are to be deposited in the U.S. Treasury as miscellaneous receipts, except as otherwise authorized by law. Such legal authority may, for example, take the form of an authorized revolving fund where the rules of the program allow use of funds beyond the restrictions of the FMR.

- Agencies are prohibited from using the authority to replace certain types of property as detailed in FMR § 102–39.60 (weapons, nuclear ordinances, etc.).

Agencies may choose between two transaction methods to replace property, the exchange (trade-in) method or the sale method, but must determine which method provides the greatest return to the Government, including factoring in administrative and overhead expenses. A typical exchange occurs when the original manufacturer delivers a replacement item to the agency and removes the item being replaced. The manufacturer applies a trade-in credit (an allowance) for the purchase of the replacement item. If the sale method is used, the agency receives the sale proceeds for the sale of the item and applies those proceeds to the purchase of the replacement personal property.

If contemplating an exchange/sale, agencies are guided to follow a process similar to the disposal process for excess property by making it available to other Federal agencies and state agencies by posting it to GSAXcess at <https://gsaxcess.gov/>. This is GSA's website for reporting, searching, and

selecting property. This process allows other Federal agencies or state agencies to obtain the property for the price required by the reporting agency to help fund the acquisition of replacement property under the exchange/sale authority.

Agencies are required to submit a summary report to GSA through the GSA Personal Property Reporting Tool (PPRT), <https://www.property.reporting.gov/PPRT/PPRTLogin>, at the end of each FY on the type, the quantity, the exchange allowances and/or sale proceeds, as applicable, and the original acquisition cost of items for both exchange and sale transactions. Agencies with no transactions during a FY must submit a negative report. Ultimately, agencies decide whether to use the exchange/sale authority to replace property in their inventories.

## B. Changes Proposed by This Rule and Expected Impact

In 2018, the Government Accountability Office (GAO) Report 19–33, “GSA and VA Have Opportunities to Improve the Exchange/Sale Process”, identified confusion among some agencies on the use of the exchange/sale authority which could be alleviated by, among other actions, revising FMR Part 102–39. In addition to amending the exchange/sale regulations found in FMR Part 102–39 with this rule, GSA published FMR Bulletin B–48, “Exchange/Sale Financial Accounting,” December 18, 2018, and other guidance, frequently asked questions, best practices, and deviation request procedures all of which can be found at [www.gsa.gov/exchangesale](http://www.gsa.gov/exchangesale).

- GSA is proposing to revise the definition of “similar” in FMR § 102–39.20 to more narrowly tailor one of the criteria of “similar” to require that replacement property fall within a defined Federal Supply Classification (FSC), which can be found at <https://public.logisticsinformation.service.dla.mil/H2/search.aspx>, as opposed to an FSC Group. A FSC Group is a two-digit number that categorizes types of property, whereas a FSC is a four-digit number that further categorizes types of property within the FSC Group. For example, FSC Group 12 is for Fire Control Equipment. Within FSC Group 12, there are FSCs that further categorize this type of property, e.g., FSC 1210—Fire Control Directors. GSA observes that not all property within the same broad FSC Group would reasonably be considered “similar.” Further, another criterion to meet the definition of “similar” is being updated to reflect that items will be

deemed to be “similar” for the purposes of an exchange/sale transaction if the assets are designed or constructed for the same general purpose, regardless of the assigned FSC. Only one of the criteria in this definition needs to be met for the property to be considered “similar” and eligible for an exchange/sale transaction.

- Amend FMR § 102–39.25 to allow all provisions in this part to be subject to deviation except for those mandated by statute and FMR § 102–39.80.

- Amend the question in FMR § 102–39.40 and clarify the difference between the exchange/sale authority and the more frequently used excess/surplus disposal process. The primary difference is that personal property disposal under the excess/surplus process does not allow for the use of proceeds or allowances (if any), in acquiring replacement similar assets. Exchange/sale property is replacement property that is non-excess and non-surplus, meaning the agency has a continuing need for the property, but the specific item(s) are no longer suitable to the need and must be replaced, and therefore are not reported to GSA as excess or surplus for transfer or donation purposes.

- Revise the “prohibited list” at FMR § 102–39.60 by removing FSC Groups 42, Firefighting, rescue, and safety equipment; 51, Hand tools; and 54, Prefabricated structure and scaffolding (FSC 5410 Prefabricated and Portable Buildings, FSC 5411 Rigid Wall Shelters, and FSC 5419 Collective Modular Support System only). The restrictions remaining in this section involve assets which are inherently dangerous or pose a significant public health or safety concern.

- Remove “. . . , except medicinal chemicals” from FMR § 102–39.60 as these are categorized under FSG 65, not FSG 68.

- Amend FMR § 102–39.65 to clarify that an exchange or sale under this FMR part may occur after the acquisition of the replacement property. For example, if a Magnetic Resonance Imaging (MRI) machine is needed for use daily, the replacement machine may be acquired and installed before the existing machine is removed and exchanged or sold. If the existing machine is sold, in accordance with agency policy, the funds may be returned to the appropriation used to acquire the replacement machine. If the existing machine is exchanged, in accordance with agency policy, the agency agreement with the entity providing the replacement must document the responsibilities of both parties to execute this transaction.

- Update FMR § 102–39.80 by adding parallel language from the edits to FMR § 102–39.25 that states that no deviations will be granted to this section.

- Update the reporting policy and processes in FMR § 102–39.85 to reflect the use of a new online reporting tool and reporting requirements.

- Add FMR § 102–39.90 in accordance with the recommendations of GAO Report 19–33 to provide additional guidance to agencies, such as reminding agencies of the publication of Bulletin B–48 and the guidance available at the GSA website on this exchange/sale topic.

According to GSA's annual summary data, 27 agencies reported using the exchange/sale authority and received a total of about \$2.8 billion in exchange allowances or sale proceeds from fiscal year 2016 through fiscal year 2020. While many agencies used the authority, a few agencies, particularly GSA, together accounted for about 88 percent of all allowances and proceeds. Specifically, 5 of 27 agencies reported nearly all exchange allowances and sale proceeds. GSA accounted for about \$1.5 billion of about \$2.8 billion (or about 55 percent) of reported allowances and proceeds across the federal government. Four other agencies—the Departments of Homeland Security, Agriculture, Defense, and the Interior—accounted for about \$899 million (or about 32 percent) of the total. The other 22 agencies using the authority reported about \$340 million (or about 12 percent) in exchange allowances or sales proceeds over the 5-year period. Finally, agencies reported using the sale method more than the exchange method. Sales by agencies accounted for about \$2.5 billion (or about 91 percent), while use of the exchange method accounted for about \$247 million (or about 9 percent) of total transactions reported, primarily due to GSA's reporting more use of the sale method over the exchange method.

While some agencies reported hundreds of millions of dollars in exchange allowances and sale proceeds, the data show that 8 federal agencies—including the Department of Labor and the Office of Personnel Management—reported relatively few transactions, which totaled less than \$200,000 in exchange allowances and sales proceeds.

By using the exchange/sale authority, agencies have an opportunity to be good stewards of government property by efficiently replacing needed property, including high-value items, that serves critical and continuing requirements to meet agency missions. GSA expects these proposed amendments to increase

agency flexibility and understanding of this program. GSA believes these proposed amendments will help agencies take better advantage and increase the use of this authority, thereby becoming more effective stewards of government property and replenishing property more efficiently.

### C. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This proposed rule is not anticipated to be a significant regulatory action, and therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

### D. Congressional Review Act

OIRA has determined that this rule is not a “major rule” as defined by 5 U.S.C. 804(2). Additionally, this rule is excepted from Congressional Review Act reporting requirements prescribed under 5 U.S.C. 801 since it relates to agency management or personnel.

### E. Regulatory Flexibility Act

This proposed rule will not have a significant economic impact on a substantial number of entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*

### F. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FMR do not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Reporting requirements are only addressed to Federal agencies regarding their Federal personal property transactions.

### List of Subjects in 41 CFR Part 102–39

Replacement of personal property pursuant to the exchange/sale authority;

Government property management; surplus Government property.

**Krystal J. Brumfield,**

*Associate Administrator, Office of Government-wide Policy.*

For the reasons set forth in the preamble, GSA proposes to amend 41 CFR part 102–39 as set forth below:

■ 1. The authority for part 102–39 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 40 U.S.C. 503.

### PART 102–39—REPLACEMENT OF PERSONAL PROPERTY PURSUANT TO THE EXCHANGE/SALE AUTHORITY

■ 2. Amend § 102–39.20, in the definition of “Similar,” by revising paragraphs (2) and (4) to read as follows:

#### § 102–39.20 What definitions apply to this part?

\* \* \* \* \*

*Similar* \* \* \*

(2) Fall within a single Federal Supply Classification (FSC) (includes any and all forms of property within an FSC); or

\* \* \* \* \*

(4) Are designed or constructed for the same general purpose (includes any and all forms of property regardless of the FSC to which they are assigned).

**Note 1 to § 102–39.20:** Only one of the criteria in this definition needs to be met for the property to be considered “similar” and eligible for an exchange/sale transaction.

\* \* \* \* \*

■ 3. Revise § 102–39.25 to read as follows:

#### § 102–39.25 Which exchange/sale provisions are subject to deviation?

All of the provisions in this part are subject to deviation (upon presentation of adequate justification) except for those mandated by statute, as described in the Note to § 102–39.60(a), and § 102–39.80. See the link on “Exchange/Sale” at [www.gsa.gov/personalpropertypolicy](http://www.gsa.gov/personalpropertypolicy) for additional information on requesting deviations from this part.

■ 4. Revise § 102–39.40 to read as follows:

#### § 102–39.40 How does the exchange/sale authority differ from the disposal process for excess/surplus personal property?

(a) The primary difference from your perspective is that sales proceeds or exchange allowances may be used to acquire similar replacement personal property that is still needed under the exchange/sale authority as described in this part; whereas under the more frequently used excess/surplus disposal process, you would not be able to use sales proceeds or exchange allowances

to acquire replacement personal property.

(b) Your use of the exchange/sale authority is optional and should be considered when needed replacement assets may be acquired under the provisions of this part. If exchange/sale is not practicable (for example, if conducting an exchange/sale transaction is not cost effective), you should dispose of the property through the excess/surplus disposal process by reporting the property as excess, as addressed in Part 102–36 of this chapter.

(c) In the excess/surplus disposal process, any net proceeds from the sale of surplus property generally must be forwarded to the miscellaneous receipts account at the United States Treasury, and thus would not be available to you for use in acquiring similar replacement property or for any other purpose. You may use the exchange/sale authority in the acquisition of personal property even if the acquisition is under a services contract, as long as the property acquired under the services contract is similar to the property exchanged or sold (e.g., for a service life extension program (SLEP), exchange allowances or sales proceeds would be available for replacement of similar items, but not for services).

■ 5. Amend § 102–39.60 by revising paragraph (a) to read as follows:

**§ 102–39.60 What restrictions and prohibitions apply to the exchange/sale of personal property?**

\* \* \* \* \*

- (a) The following FSC Groups of personal property:
- 10 Weapons.
  - 11 Nuclear ordinance.
  - 44 Furnace, Steam Plant, and Drying Equipment; and Nuclear Reactors (FSC Class 4470, Nuclear Reactors only).
  - 68 Chemical and chemical products.
  - 84 Clothing, individual equipment, and insignia.

**Note to 102–39.60(a):** Under no circumstances will deviations be granted for FSC Class 1005, Guns through 30mm. Deviations are not required for Department of Defense (DoD) property in FSC Groups 10 (for classes other than FSC Class 1005), or any other FSC Group, for which the applicable DoD demilitarization requirements and any other applicable regulations and statutes are met.

\* \* \* \* \*

- 6. Amend § 102–39.65 by—
- a. Removing “and” at the end of paragraph (d);
  - b. Redesignating paragraph (e) as paragraph (f); and
  - c. Adding a new paragraph (e).
- The addition reads as follows:

**§ 102–39.65 What conditions apply to the exchange/sale of personal property?**

\* \* \* \* \*

(e) Your agency documents at the time of exchange or sale (or at the time of acquiring the replacement property if acquisition precedes the exchange or sale) that the exchange allowance or sale proceeds will be applied to the acquisition of replacement property; and

\* \* \* \* \*

■ 7. Amend § 102–39.80 by adding a sentence at the end of the section to read as follows:

**§ 102–39.80 What are the accounting requirements for exchange allowances or proceeds of sale?**

\* \* \* Under no circumstances will deviations be granted to for § 102–39.80.

■ 8. Revise § 102–39.85 to read as follows:

**§ 102–39.85 What information am I required to report?**

You must submit, within 90 calendar days after the close of each FY, an exchange/sale report using the online Personal Property Reporting Tool template found at <https://www.property.reporting.gov/PPRT/PPRTlogin>. This template provides the specific information needed for your agency's report. You can contact the GSA Help Desk at [help.PPRT@gsa.gov](mailto:help.PPRT@gsa.gov) if you need assistance accessing the online reporting tool. All reports, including negative reports, must be submitted electronically through the Personal Property Reporting Tool. Transactions involving books and periodicals in your libraries need not be reported.

■ 9. Add § 102–39.90 to read as follows:

**§ 102–39.90 Where do I obtain additional information?**

Additional information is provided at the GSA websites [www.gsa.gov/bulletin](http://www.gsa.gov/bulletin) and [www.gsa.gov/exchangesale](http://www.gsa.gov/exchangesale).

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