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## DEPARTMENT OF ENERGY

### 2 CFR Part 901

#### 10 CFR Parts 600 and 606

RIN 1991-AB74

#### Nonprocurement Debarment and Suspension

**AGENCY:** Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The Department of Energy (DOE) is moving its regulations on nonprocurement debarment and suspension from their current location in title 10 of the Code of Federal Regulations (CFR) to title 2 of the CFR, and is adopting the format established by the Office of Management and Budget (OMB) in a notice of interim final guidance on nonprocurement debarment and suspension published in the **Federal Register** on August 31, 2005. In today's rule, DOE establishes a new 2 CFR part 901 that adopts OMB's final government-wide guidance on nonprocurement debarment and suspension and contains supplemental DOE nonprocurement debarment and suspension provisions. In addition, this rule removes 10 CFR part 606, the existing DOE nonprocurement debarment and suspension regulations, and makes a conforming change to 10 CFR part 600. These changes constitute an administrative simplification that makes no substantive change in DOE policy or procedures for nonprocurement debarment and suspension.

**DATES:** *Effective Date:* This final rule is effective on December 5, 2006.

**FOR FURTHER INFORMATION CONTACT:** Cynthia Yee, Office of Procurement and Assistance Management, Department of Energy, Mail Stop MA-61, 1000 Independence Avenue, SW., Washington, DC 20585, telephone 202-

287-1666 and e-mail: [Cynthia.yee@hq.doe.gov](mailto:Cynthia.yee@hq.doe.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Introduction

On May 11, 2004, OMB established title 2 of the CFR with two subtitles (69 FR 2627). Subtitle A, "Government-wide Grants and Agreements," contains OMB policy guidance to Federal agencies on grants and agreements. Subtitle B, "Federal Agency Regulations for Grants and Agreements," contains Federal agencies' regulations implementing the OMB guidance, as it applies to grants and other financial assistance agreements and nonprocurement transactions.

On August 31, 2005, OMB published interim final guidance for government-wide nonprocurement debarment and suspension in the **Federal Register** (70 FR 51863). The guidance was located in title 2 of the CFR as new subtitle A, chapter 1, part 180. The interim final guidance updated previous OMB guidance that was issued pursuant to Executive Order 12549, "Debarment and Suspension" (February 18, 1986), which gave government-wide effect to each agency's nonprocurement debarment and suspension actions. Section 6 of the Executive order authorized OMB to issue guidance to Executive agencies on nonprocurement debarment and suspension, including provisions prescribing government-wide criteria and minimum due process procedures. Section 3 directed Executive agencies to issue regulations implementing the Executive order that are consistent with the OMB guidelines. The interim final guidance at 2 CFR part 180 conforms the OMB guidance with the Federal agencies' November 26, 2003, update to the common rule on nonprocurement debarment and suspension (*see* 70 FR 51864). Although substantively the same as the common rule, OMB's interim final guidance was published in a form suitable for agency adoption, thus eliminating the need for each agency to repeat the full text of the OMB government-wide guidance in its implementing regulations. This new approach is intended to make it easier for recipients of covered transactions or respondents in suspension or debarment actions to discern agency-to-agency variations from the common rule language; reduce the volume of Federal regulations in the CFR; and streamline

the process for updating the government-wide requirements on nonprocurement debarment and suspension (70 FR 51864). On November 15, 2006, OMB published a final rule adopting the interim final guidance with changes (71 FR 66431).

This final rule places DOE's nonprocurement debarment and suspension regulations in subtitle B of title 2 of the CFR, along with other agencies' nonprocurement debarment and suspension rules. This action was required by the OMB interim final guidance, which is made final on November 15, 2006 (*see* 2 CFR 180.20, 180.25, 180.30 and 180.35). The new CFR part 901 adopts the OMB guidelines with additions and clarifications that DOE made to the common rule on nonprocurement suspension and debarment in the DOE rule published on November 26, 2003 (68 FR 66566-68). The substance of DOE's nonprocurement debarment and suspension regulations is unchanged. DOE is removing 10 CFR part 606, which was added to the CFR as part of the November 2003 common rule. DOE also is amending a provision in its Financial Assistance Rules (10 CFR 600.23) to update the reference to DOE's nonprocurement debarment and suspension regulations.

##### II. Procedural Requirements

###### A. Executive Order 12866

OMB has determined this rule to not be a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs within OMB.

###### B. Regulatory Flexibility Act of 1980

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19,

2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel's Web site: <http://www.gc.doe.gov>. DOE today is amending its nonprocurement debarment and suspension procedures. Because a general notice of proposed rulemaking is not required for this rulemaking, the Regulatory Flexibility Act requirements do not apply.

#### C. *Unfunded Mandates Act of 1995*

This regulatory action does not contain a Federal mandate that will result in the expenditure by State, local, and tribal governments, in aggregate, or by the private sector of \$100 million or more in any one year.

#### D. *Paperwork Reduction Act of 1995*

This final rule does not impose any new collection of information subject to review and approval by OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

#### E. *Federalism*

This regulatory action does not have Federalism implications, as set forth in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

#### F. *National Environmental Policy Act*

DOE has determined that this rule is covered under the Categorical Exclusion found in the Department's National Environmental Policy Act regulations at paragraph A.6 of Appendix A to Subpart D, 10 CFR Part 1021, which applies to rulemakings that are strictly procedural. Today's final rule makes non-substantive changes to DOE's nonprocurement debarment and suspension procedures. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

#### G. *Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well being. This rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it

is not necessary to prepare a Family Policymaking Assessment.

#### H. *Executive Order 12988*

With respect to the review of existing regulations and the promulgation of new regulations, Section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by Section 3(a), Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in Section 3(a) and Section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the final rule meets the relevant standards of Executive Order 12988.

#### I. *Treasury and General Government Appropriations Act, 2001*

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's notice under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

#### J. *Executive Order 13211*

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply,

Distribution, or Use," 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to the OMB, a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's regulatory action would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

#### K. *Congressional Notification*

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of today's rule prior to its effective date. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(2).

### III. **Approval of the Office of the Secretary of Energy**

Issuance of this final rule has been approved by the Office of the Secretary of Energy.

#### List of Subjects

##### 2 CFR Part 901

Administrative practice and procedure, Debarment and suspension, Grant programs, Reporting and recordkeeping requirements.

##### 10 CFR Part 600

Administrative practice and procedure, Assistance programs.

##### 10 CFR Part 606

Administrative practice and procedure, Debarment and suspension, Government contracts, Grant programs, Loan programs, Reporting and recordkeeping requirements.

Issued in Washington, DC on November 29, 2006.

**Edward R. Simpson,**

*Director, Office of Procurement and Assistance Management, Office of Management, Department of Energy.*

**David O. Boyd,**

*Acting Director, Office of Acquisition and Supply Management, National Nuclear Security Administration.*

■ Accordingly, DOE hereby amends subtitle B of title 2 and Chapter II of title 10 of the Code of Federal Regulations, as set forth below:

**Title 2—Grants and Agreements**

■ 1. Add Chapter 9, consisting of Part 901 to Subtitle B to read as follows:

**CHAPTER 9—Department of Energy**

**PART 901—NONPROCUREMENT DEBARMENT AND SUSPENSION**

Sec.

901.10 What does this part do?

901.20 Does this part apply to me?

901.30 What policies and procedures must I follow?

**Subpart A—General**

901.137 Who in the Department of Energy may grant an exception to let an excluded person participate in a covered transaction?

**Subpart B—Covered Transactions**

901.220 What contracts and subcontracts, in addition to those listed in 2 CFR 180.220, are covered transactions?

**Subpart C—Responsibilities of Participants Regarding Transactions**

901.332 What methods must I use to pass requirements down to participants at lower tiers with whom I intend to do business?

**Subpart D—Responsibilities of Federal Agency Officials Regarding Transactions**

901.437 What method do I use to communicate to a participant the requirements described in the OMB guidance at 2 CFR 180.435?

**Subpart E—H—[Reserved]**

**Subpart I—Definitions**

901.930 Debarment official (Department of Energy supplement to government-wide definition at 2 CFR 180.935).

901.950 Federal agency (Department of Energy supplement to government-wide definition at 2 CFR 180.910).

901.1010 Suspending official (Department of Energy supplement to government-wide definition at 2 CFR 180.1010).

**Subpart J [Reserved]**

**Authority:** Sec. 2455, Pub. L. 103–355, 108 Stat. 3327 (31 U.S.C. 6101 note); E.O. 12549 (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3 CFR, 1989 Comp., p. 235); 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*

**§ 901.10 What does this part do?**

This part adopts the Office of Management and Budget (OMB) guidance in subparts A through I of 2 CFR part 180, as supplemented by this part, as the DOE policies and procedures for nonprocurement debarment and suspension. It thereby gives regulatory effect for DOE to the OMB guidance as supplemented by this part. This part satisfies the requirements in section 3 of Executive Order 12549, “Debarment and Suspension” (3 CFR 1986 Comp., p. 189); Executive Order 12689, “Debarment and Suspension” (3 CFR 1989 Comp., p. 235); and section 2455 of the Federal Acquisition Streamlining Act of 1994, Pub. L. 103–355 (31 U.S.C. 6101 note).

**§ 901.20 Does this part apply to me?**

This part and, through this part, pertinent portions of the OMB guidance in subparts A through I of 2 CFR part 180 (see table at 2 CFR 180.100(b)) apply to you if you are a—

(a) Participant or principal in a “covered transaction” (see subpart B of 2 CFR part 180 and the definition of “nonprocurement transaction” at 2 CFR 180.970);

(b) Respondent in a DOE suspension or debarment action;

(c) DOE debarment or suspension official; and

(d) DOE grants officer, agreements officer, or other official authorized to enter into any type of nonprocurement transaction that is a covered transaction.

**§ 901.30 What policies and procedures must I follow?**

The DOE policies and procedures that you must follow are the policies and procedures specified in each applicable section of the OMB guidance in subparts A through I of 2 CFR part 180 and any supplemental policies and procedures set forth in this part.

**Subpart A—General**

**§ 901.137 Who in the Department of Energy may grant an exception to let an excluded person participate in a covered transaction?**

The Director, Office of Procurement and Assistance Management, DOE, for DOE actions, and the Director, Office of Acquisition and Supply Management, NNSA, for NNSA actions, may grant an exception permitting an excluded person to participate in a particular covered transaction. If the Director, Office of Procurement and Assistance Management, DOE, for DOE actions, and Director, Office of Acquisition and Supply Management, NNSA, for NNSA actions, grants an exception, the exception must be in writing and state

the reason(s) for deviating from the government-wide policy in Executive Order 12549.

**Subpart B—Covered Transactions**

**§ 901.220 What contracts and subcontracts, in addition to those listed in 2 CFR 180.220, are covered transactions?**

Although the OMB guidance at 2 CFR 180.220(c) allows a Federal agency to do so (also see optional lower tier coverage in the figure in the Appendix to 2 CFR part 180), DOE does not extend coverage of nonprocurement suspension and debarment requirements beyond first-tier procurement contracts under a covered nonprocurement transaction.

**Subpart C—Responsibilities of Participants Regarding Transactions**

**§ 901.332 What methods must I use to pass requirements down to participants at lower tiers with whom I intend to do business?**

You, as a participant, must include a term or condition in lower-tier transactions requiring lower-tier participants to comply with subpart C of the OMB guidance in 2 CFR part 180, as supplemented by this subpart.

**Subpart D—Responsibilities of Federal Agency Officials Regarding Transactions**

**§ 901.437 What method do I use to communicate to a participant the requirements described in the OMB guidance at 2 CFR 180.435?**

To communicate to a participant the requirements described in 2 CFR 180.435 of the OMB guidance, you must include a term or condition in the transaction that requires the participant’s compliance with subpart C of 2 CFR part 180, as supplemented by subpart C of this part, and requires the participant to include a similar term or condition in lower-tier covered transactions.

**Subpart E—H—[Reserved]**

**Subpart I—Definitions**

**§ 901.930 Debarment official (Department of Energy supplement to government-wide definition at 2 CFR 180.930).**

The Debarment Official for the Department of Energy, exclusive of NNSA, is the Director, Office of Procurement and Assistance Management, DOE. The Debarment Official for NNSA is the Director, Office of Acquisition and Supply Management, NNSA.

**§ 901.950 Federal agency (Department of Energy supplement to government-wide definition at 2 CFR 180.950).**

DOE means the U.S. Department of Energy, including the NNSA.

NNSA means the National Nuclear Security Administration.

**§ 901.1010 Suspending official (Department of Energy supplement to government-wide definition at 2 CFR 180.1010).**

The suspending official for the Department of Energy, exclusive of NNSA, is the Director, Office of Procurement and Assistance Management, DOE. The suspending official for NNSA is the Director, Office of Acquisition and Supply Management, NNSA.

**Subpart J—[Reserved]**

**Title 10—Energy**

**Chapter II, Subchapter H**

**PART 600—FINANCIAL ASSISTANCE RULES**

■ 2. The authority citation for part 600 continues to read as follows:

**Authority:** 42 U.S.C. 7101 *et seq.*; 31 U.S.C. 6301–6308; 50 U.S.C. 2401 *et seq.*, unless otherwise noted.

**§ 600.23 [Amended]**

■ 3. Section 600.23 of subpart A is amended by removing “10 CFR part 1036” and adding “2 CFR part 901” in lieu thereof.

**PART 606—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT)**

■ 4. Remove part 606.

[FR Doc. E6–20518 Filed 12–4–06; 8:45 am]

BILLING CODE 6450–01–P

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 13**

[Docket No. FAA–2006–26477]

**Rules of Practice in FAA Civil Penalty Actions**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule; technical amendment.

**SUMMARY:** We are amending the procedural regulations governing the FAA’s administrative assessment of civil penalties for violations of certain

provisions of the Federal aviation statute and the Federal hazardous materials. We are also amending the FAA’s procedural regulations governing non-civil penalty enforcement matters. These changes are necessary to update the regulations and to reflect statutory changes. The intended effect of these changes is to ensure that regulated parties have current and correct procedural information.

**DATES:** This rule is effective on December 5, 2006.

**FOR FURTHER INFORMATION CONTACT:** Vicki Sherman Leemon, Office of the Chief Counsel, Adjudication Branch, AGC–439, 800 Independence Avenue, SW., Washington, DC 20591; telephone 202/385–8227.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Administrator of the FAA may impose a civil penalty not exceeding specified amounts on a person, other than an individual acting as a pilot, flight engineer, mechanic or repairman, only after notice and an opportunity for hearing on the record under 49 U.S.C. 46301(d)(7)(A). The Administrator’s authority to assess civil penalties under 49 U.S.C. 46301(d) extends only to civil penalties that do not exceed the maximum amounts specified in 49 U.S.C. 46301(d)(8) as follows:

(a) \$50,000, if the violation was committed by a person before December 12, 2003 (the date of enactment of Vision 100—Century of Aviation Reauthorization Act);

(b) \$400,000 if the violation was committed by a person other than an individual or small business concern on or after December 12, 2003;

(c) \$50,000, if the violation was committed by an individual or small business concern on or after December 12, 2003.

To implement this civil penalty assessment authority, we issued procedural rules published at 14 CFR 13.16 and 14 CFR Part 13, subpart G (14 CFR 13.201–13.235). Section 13.16 of Part 13 includes the procedures we follow when notifying a person, other than an individual acting as a pilot, flight engineer, mechanic or repairman, about alleged violations and proposed civil penalties, and for that person to use to request a hearing before a Department of Transportation (DOT) administrative law judge. The hearing process is governed by the regulations included in 14 CFR 13.16 and 14 CFR part 13, subpart G. Under these rules, the Administrator, acting in her capacity as the FAA decisionmaker, resolves any appeals of initial decisions rendered by

an administrative law judge. See 14 CFR 13.16(j), 13.202 (definition of FAA decisionmaker), and 13.233(j).

We use 14 CFR 13.16 and 14 CFR Part 13, subpart G when assessing civil penalties not exceeding 49 U.S.C. 46301(d)(8)’s limits for violations arising from many different provisions of the Federal aviation statute. Specifically, we use these regulations when assessing civil penalties for violations of statutory provisions listed in the first sentence of 49 U.S.C. 46301(d)(2) or any of their implementing regulations. Under the first sentence of 49 U.S.C. 46301(d)(2), the Administrator may impose a civil penalty for violations of the following statutory provisions of any regulations implementing those provisions:

(a) Chapter 401 (except sections 40103(a) and (d), 40105, 40106(b), 40116, and 40117) of Title 49;

(b) Chapter 441 (except section 44109) of Title 49;

(c) Sections 44502(b) and (c) of Title 49;

(d) Chapter 447 (except sections 44717 and 44719–44723) of Title 49;

(e) Section 46301(b) of Title 49;

(f) Section 46302 (for a violation relating to section 46504) of Title 49;

(g) Section 46318 of Title 49;

(h) Section 47107(b) of Title 49.

Many of the statutory provisions listed in the first sentence of 49 U.S.C. 56301(d)(2) are aviation safety-related. *See e.g.*, 49 U.S.C. chapter 447, entitled “Safety Regulation,” and 49 U.S.C. 46301(b) prohibiting tampering with smoke detectors; *but see e.g.*, 49 U.S.C. 47107(b) conditioning the approval of airport development grant applications upon the receipt by the FAA of written assurances that local taxes on aviation fuel and public airport revenues will only be expended for certain purposes.

The procedural rules in 14 CFR 13.16 and 14 CFR part 13, subpart G, also apply when we assess a civil penalty not exceeding 49 U.S.C. 46301(d)(8)’s limits for violations of certain statutory provisions of the Federal aviation statute, or their implementing regulations, not listed in the first sentence of 49 U.S.C. 46301(d)(2). Persons who violate 49 U.S.C. 47528, 47529 or 47530, or any regulation issued under those sections, are subject to a civil penalty. Sections 47528 through 47530 of Title 49 prohibit the operation of certain aircraft when those aircraft do not comply with the Stage 3 noise levels (see 14 CFR part 91, subpart I). Section 47531 of Title 49 provides that a person violating one of those statutory provisions or implementing regulations is subject to the same civil penalty amounts and procedures under chapter