

Department of Energy

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AUTHORITY: 42 U.S.C. 7101, *et seq.*; 31 U.S.C. 6301–6308; 50 U.S.C. 2401 *et seq.*; 2 CFR part 200.

SOURCE: 79 FR 76024, Dec. 19, 2014, unless otherwise noted.

Subpart A [Reserved]

Subpart B—General Provisions

§ 910.120 Adoption of 2 CFR part 200.

(a) Under the authority listed above, the Department of Energy adopts the Office of Management and Budget (OMB) Guidance in 2 CFR part 200, with the following additions. Thus, this part gives regulatory effect to the OMB guidance and supplements the guidance as needed for the Department.

(b) The additions include: Expanding the definition of non-Federal entity for DOE to include For-profit entities; adding back additional coverage from 10 CFR part 600 required by DOE statute; adding back coverage specific for For-Profit entities which existed in 10 CFR part 600 which still applies.

§ 910.122 Applicability.

(a) For DOE, unless otherwise noted in this part, the definition of Non-Federal entity found in 2 CFR 200.1 is expanded to include for-profit organizations in addition to states, local governments, Indian tribes, institutions of higher education (IHE), and nonprofit organizations.

(b) A for-profit organization is defined as one that distributes any profit

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not reinvested into the business as profit or dividends to its employees or shareholders.

[79 FR 76024, Dec. 19, 2014, as amended at 87 FR 15320, Mar. 18, 2022]

§910.124 Eligibility.

(a) *Purpose and scope.* This section implements section 2306 of the Energy Policy Act of 1992, 42 U.S.C. 13525, and sets forth a general statement of policy, including procedures and interpretations, for the guidance of implementing DOE officials in making mandatory pre-award determinations of eligibility for financial assistance under Titles XX through XXIII of that Act.

(b) *Definitions.* The definitions in Subpart A of 2 CFR part 200, including the definition of the term “Federal financial assistance,” are applicable to this section. In addition, as used in this section:

Act means the Energy Policy Act of 1992.

Company means any business entity other than an organization of the type described in section 501(c) (3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)).

Covered program means a program under Titles XX through XXIII of the Act. (A list of covered programs, updated periodically as appropriate, is maintained and published by the Department of Energy.)

Parent company means a company that:

(1) Exercises ultimate ownership of the applicant company either directly, by ownership of a majority of that company’s voting securities, or indirectly, by control over a majority of that company’s voting securities through one or more intermediate subsidiary companies or otherwise, and

(2) Is not itself subject to the ultimate ownership control of another company.

United States means the several States, the District of Columbia, and all commonwealths, territories, and possessions of the United States.

United States-owned company means:

(1) A company that has majority ownership by individuals who are citizens of the United States, or

(2) A company organized under the laws of a State that either has no par-

ent company or has a parent company organized under the laws of a State.

Voting security has the meaning given the term in the Public Utility Holding Company Act (15 U.S.C. 15b(17)).

(c) *What must DOE determine.* A company shall be eligible to receive an award of financial assistance under a covered program only if DOE finds that—

(1) Consistent with §910.124(d), the company’s participation in a covered program would be in the economic interest of the United States; and

(2) The company is either—

(i) A United States-owned company; or

(ii) Incorporated or organized under the laws of any State and has a parent company which is incorporated or organized under the laws of a country which—

(A) Affords to the United States-owned companies opportunities, comparable to those afforded to any other company, to participate in any joint venture similar to those authorized under the Act;

(B) Affords to United States-owned companies local investment opportunities comparable to those afforded to any other company; and

(C) Affords adequate and effective protection for the intellectual property rights of United States-owned companies.

(d) *Determining the economic interest of the United States.* In determining whether participation of an applicant company in a covered program would be in the economic interest of the United States under §910.124(c)(1), DOE may consider any evidence showing that a financial assistance award would be in the economic interest of the United States including, but not limited to—

(1) Investments by the applicant company and its affiliates in the United States in research, development, and manufacturing (including, for example, the manufacture of major components or subassemblies in the United States);

(2) Significant contributions to employment in the United States by the applicant company and its affiliates; and

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(3) An agreement by the applicant company, with respect to any technology arising from the financial assistance being sought—

(i) To promote the manufacture within the United States of products resulting from that technology (taking into account the goals of promoting the competitiveness of United States industry); and

(ii) To procure parts and materials from competitive suppliers.

(e) Information an applicant must submit.

(1) Any applicant for Federal financial assistance under a covered program shall submit with the application for Federal financial assistance, or at such later time as may be specified by DOE, evidence for DOE to consider in making findings required under §910.124(c)(1) and findings concerning ownership status under §910.124(c)(2).

(2) If an applicant for Federal financial assistance is submitting evidence relating to future undertakings, such as an agreement under §910.124(d)(3) to promote manufacture in the United States of products resulting from a technology developed with financial assistance or to procure parts and materials from competitive suppliers, the applicant shall submit a representation affirming acceptance of these undertakings. The applicant should also briefly describe its plans, if any, for any manufacturing of products arising from the program-supported research and development, including the location where such manufacturing is expected to occur.

(3) If an applicant for Federal financial assistance is claiming to be a United States-owned company, the applicant must submit a representation affirming that it falls within the definition of that term provided in §910.124(b).

(4) DOE may require submission of additional information deemed necessary to make any portion of the determination required by §910.124(b) 2.

(f) Other information DOE may consider.

In making the determination under §910.124(c)(2)(ii), DOE may—

(1) Consider information on the relevant international and domestic law obligations of the country of incorpora-

tion of the parent company of an applicant;

(2) Consider information relating to the policies and practices of the country of incorporation of the parent company of an applicant with respect to:

(i) The eligibility criteria for, and the experience of United States-owned company participation in, energy-related research and development programs;

(ii) Local investment opportunities afforded to United States-owned companies; and

(iii) Protection of intellectual property rights of United States-owned companies;

(3) Seek and consider advice from other federal agencies, as appropriate; and

(4) Consider any publicly available information in addition to the information provided by the applicant.

§910.126 Competition.

(a) *General.* DOE shall solicit applications for Federal financial assistance in a manner which provides for the maximum amount of competition feasible.

(b) *Restricted eligibility.* If DOE restricts eligibility, an explanation of why the restriction of eligibility is considered necessary shall be included in the notice of funding opportunity or, program rule. Such restriction of eligibility shall be:

(1) Supported by a written determination initiated by the program office;

(2) Concurred in by legal counsel and the Contracting Officer; and

(3) Approved, prior to award, by an approver at least one level above the Contracting Officer.

(c) *Noncompetitive Federal financial assistance.* DOE may award a grant or cooperative agreement on a noncompetitive basis only if the application satisfies one or more of the follow selection criteria:

(1) The activity to be funded is necessary to the satisfactory completion of, or is a continuation or renewal of, an activity presently being funded by DOE or another Federal agency, and for which competition for support would have a significant adverse effect

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on continuity or completion of the activity.

(2) The activity is being or would be conducted by the applicant using its own resources or those donated or provided by third parties; however, DOE support of that activity would enhance the public benefits to be derived and DOE knows of no other entity which is conducting or is planning to conduct such an activity.

(3) The applicant is a unit of government and the activity to be supported is related to performance of a governmental function within the subject jurisdiction, thereby precluding DOE provision of support to another entity.

(4) The applicant has exclusive domestic capability to perform the activity successfully, based upon unique equipment, proprietary data, technical expertise, or other such unique qualifications.

(5) The award implements an agreement between the United States Government and a foreign government to fund a foreign applicant.

(6) Time constraints associated with a public health, safety, welfare or national security requirement preclude competition.

(7) The proposed project was submitted as an unsolicited proposal and represents a unique or innovative idea, method, or approach that would not be eligible for financial assistance under a recent, current, or planned notice of funding opportunity, and if, as determined by DOE, a competitive notice of funding opportunity would not be appropriate.

(8) The responsible program Assistant Secretary, Deputy Administrator, or other official of equivalent authority has determined that making the award non-competitively is in the public interest. This authority cannot not be delegated.

(d) *Approval requirements.* Determinations of noncompetitive awards shall be:

(1) Documented in writing;

(2) Concurred in by the responsible program technical official and local legal counsel; and

(3) Approved, prior to award, by the Contracting Officer and an approver at least one level above the CO.

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(e) *Definitions.* For purposes of this section, the following definitions are applicable:

Continuation Award—A financial assistance award authorizing a second or subsequent budget period within an existing project period.

Renewal Award—A financial assistance award authorizing the first budget period of an extended project period.

[79 FR 76024, Dec. 19, 2014, as amended at 80 FR 57511, Sept. 24, 2015]

§910.127 Legal authority and effect.

(a) A DOE financial assistance award is valid only if it is in writing and is signed, either in writing or electronically, by a DOE Contracting Officer.

(b) Recipients are free to accept or reject the award. A request to draw down DOE funds constitutes the Recipient's acceptance of the terms and conditions of this Award.

[80 FR 57511, Sept. 24, 2015]

§910.128 Disputes and appeals.

(a) *Informal dispute resolution.* Whenever practicable, DOE shall attempt to resolve informally any dispute over the award or administration of Federal financial assistance. Informal resolution, including resolution through an alternative dispute resolution mechanism, shall be preferred over formal procedures, to the extent practicable.

(b) *Alternative dispute resolution (ADR).* Before issuing a final determination in any dispute in which informal resolution has not been achieved, the Contracting Officer shall suggest that the other party consider the use of voluntary consensual methods of dispute resolution, such as mediation. The DOE dispute resolution specialist is available to provide assistance for such disputes, as are trained mediators of other federal agencies. ADR may be used at any stage of a dispute.

(c) *Final determination.* Whenever a dispute is not resolved informally or through an alternative dispute resolution process, DOE shall mail (by certified mail) a brief written determination signed by a Contracting Officer, setting forth DOE's final disposition of such dispute. Such determination shall contain the following information:

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(1) A summary of the dispute, including a statement of the issues and of the positions taken by DOE and the party or parties to the dispute; and

(2) The factual, legal and, if appropriate, policy reasons for DOE's disposition of the dispute.

(d) *Right of appeal.* Except as provided in paragraph (f)(1) of this section, the final determination under paragraph (c) of this section may be appealed to the cognizant Senior Procurement Executive (SPE) for either DOE or the National Nuclear Security Administration (NNSA). The appeal must be received by DOE within 90 days of the receipt of the final determination. The mailing address for the DOE SPE is Office of Acquisition and Project Management, 1000 Independence Ave., SW., Washington, DC 20585. The mailing address for the NNSA SPE is Office of Acquisition Management, National Nuclear Security Administration (NNSA), 1000 Independence Ave. SW., Washington, DC 20585.

(e) *Effect of appeal.* The filing of an appeal with the SPE shall not stay any determination or action taken by DOE which is the subject of the appeal. Consistent with its obligation to protect the interests of the Federal Government, DOE may take such authorized actions as may be necessary to preserve the status quo pending decision by the SPE, or to preserve its ability to provide relief in the event the SPE decides in favor of the appellant.

(f) *Review on appeal.* (1) The SPE shall have no jurisdiction to review:

(i) Any preaward dispute (except as provided in paragraph (f)(2)(ii) of this section), including use of any special restrictive condition pursuant to 2 CFR 200.208 Specific Conditions;

(ii) DOE denial of a request for an Exception under 2 CFR 200.102;

(iii) DOE denial of a request for a budget revision or other change in the approved project under 2 CFR 200.308 or 200.403 or under another term or condition of the award;

(iv) Any DOE action authorized under 2 CFR 200.339, Remedies for Non-compliance, or such actions authorized by program rule;

(v) Any DOE decision about an action requiring prior DOE approval under 2

CFR 200.325 or under another term or condition of the award;

(2) In addition to any right of appeal established by program rule, or by the terms and conditions (not inconsistent with paragraph (f)(1) of this section) of an award, the SPE shall have jurisdiction to review:

(i) A DOE determination that the recipient has failed to comply with the applicable requirements of this part, the program statute or rules, or other terms and conditions of the award;

(ii) A DOE decision not to make a continuation award based on any of the determinations described in paragraph (f)(2)(i) of this section;

(iii) Termination of an award, in whole or in part, by DOE under 2 CFR 200.340(a)(1) and (2);

(iv) A DOE determination that an award is void or invalid;

(v) The application by DOE of an indirect cost rate; and

(vi) DOE disallowance of costs.

(3) In reviewing disputes authorized under paragraph (f)(2) of this section, the SPE shall be bound by the applicable law, statutes, and rules, including the requirements of this part, and by the terms and conditions of the award.

(4) The decision of the SPE shall be the final decision of DOE.

[79 FR 76024, Dec. 19, 2014, as amended at 87 FR 15320, Mar. 18, 2022]

§910.130 Cost sharing (EPACT).

In addition to the requirements of 2 CFR 200.306 the following requirements apply to research, development, demonstration and commercial application activities:

(a) Cost sharing is required for most financial assistance awards for research, development, demonstration and commercial applications activities initiated after the enactment of the Energy Policy Act of 2005 on August 8, 2005. This requirement does not apply to:

(1) An award under the small business innovation research program (SBIR) or the small business technology transfer program (STTR); or

(2) A program with cost sharing requirements defined by other than Section 988 of the Energy Policy Act of 2005 including other sections of the 2005 Act and the Energy Policy Act of 1992.

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(b) A cost share of at least 20 percent of the cost of the activity is required for research and development except where:

(1) A research or development activity of a basic or fundamental nature has been excluded by an appropriate officer of DOE, generally an Under Secretary; or

(2) The Secretary has determined it is necessary and appropriate to reduce or eliminate the cost sharing requirement for a research and development activity of an applied nature.

(c) A cost share of at least 50 percent of the cost of a demonstration or commercial application activity is required unless the Secretary has determined it is necessary and appropriate to reduce the cost sharing requirements, taking into consideration any technological risk relating to the activity.

(d) Cost share shall be provided by non-Federal funds unless otherwise authorized by statute. In calculating the amount of the non-Federal contribution:

(1) Base the non-Federal contribution on total project costs, including the cost of work where funds are provided directly to a partner, consortium member or subrecipient, such as a Federally Funded Research and Development Center;

(2) Include the following costs as allowable in accordance with the applicable cost principles:

(i) Cash;

(ii) Personnel costs;

(iii) The value of a service, other resource, or third party in-kind contribution determined in accordance with Subpart E—Cost Principles—of 2 CFR part 200. For recipients that are for-profit organizations as defined by 2 CFR 910.122, the Cost Principles which apply are contained in 48 CFR 31.2. See §910.352 for further information;

(iv) Indirect costs or facilities and administrative costs; and/or

(v) Any funds received under the power program of the Tennessee Valley Authority (except to the extent that such funds are made available under an annual appropriation Act);

(3) Exclude the following costs:

(i) Revenues or royalties from the prospective operation of an activity beyond the time considered in the award;

(ii) Proceeds from the prospective sale of an asset of an activity; or

(iii) Other appropriated Federal funds.

(iv) Repayment of the Federal share of a cost-shared activity under Section 988 of the Energy Policy Act of 2005 shall not be a condition of the award.

(e) For purposes of this section, the following definitions are applicable:

Demonstration means a project designed to determine the technical feasibility and economic potential of a technology on either a pilot or prototype scale.

Development is defined in 2 CFR 200.1.

Research is also defined in 2 CFR 200.1.

[79 FR 76024, Dec. 19, 2014, as amended at 84 FR 12049, Apr. 1, 2019; 87 FR 15320, Mar. 18, 2022]

§910.132 Research misconduct.

(a) A recipient is responsible for maintaining the integrity of research of any kind under an award from DOE including the prevention, detection, and remediation of research misconduct, and the conduct of inquiries, investigations, and adjudication of allegations of research misconduct in accordance with the requirements of this section.

(b) For purposes of this section, the following definitions are applicable:

Adjudication means a formal review of a record of investigation of alleged research misconduct to determine whether and what corrective actions and sanctions should be taken.

Fabrication means making up data or results and recording or reporting them.

Falsification means manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

Finding of Research Misconduct means a determination, based on a preponderance of the evidence, that research misconduct has occurred. Such a finding requires a conclusion that there has been a significant departure from accepted practices of the relevant research community and that it be knowingly, intentionally, or recklessly committed.

Inquiry means information gathering and initial fact-finding to determine whether an allegation or apparent instance of misconduct warrants an investigation.

Investigation means the formal examination and evaluation of the relevant facts.

Plagiarism means the appropriation of another person's ideas, processes, results, or words without giving appropriate credit.

Research misconduct means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results, but does not include honest error or differences of opinion.

Research record means the record of all data or results that embody the facts resulting from scientists' inquiries, including, but not limited to, research proposals, laboratory records, both physical and electronic, progress reports, abstracts, theses, oral presentations, internal reports, and journal articles.

(c) Unless otherwise instructed by the Contracting Officer, the recipient must conduct an initial inquiry into any allegation of research misconduct. If the recipient determines that there is sufficient evidence to proceed to an investigation, it must notify the Contracting Officer and, unless otherwise instructed, the recipient must:

(1) Conduct an investigation to develop a complete factual record and an examination of such record leading to either a finding of research misconduct and an identification of appropriate remedies or a determination that no further action is warranted;

(2) Inform the Contracting Officer if an initial inquiry supports an investigation and, if requested by the Contracting Officer thereafter, keep the Contracting Officer informed of the results of the investigation and any subsequent adjudication. When an investigation is complete, the recipient will forward to the Contracting Officer a copy of the evidentiary record, the investigative report, any recommendations made to the recipient's adjudicating official, and the adjudicating official's decision and notification of any corrective action taken or planned, and

the subject's written response to the recommendations (if any).

(3) If the investigation leads to a finding of research misconduct, conduct an adjudication by a responsible official who was not involved in the inquiry or investigation and is separated organizationally from the element which conducted the investigation. The adjudication must include a review of the investigative record and, as warranted, a determination of appropriate corrective actions and sanctions.

(d) DOE may elect to act in lieu of the recipient in conducting an inquiry or investigation into an allegation of research misconduct if the Contracting Officer finds that:

(1) The research organization is not prepared to handle the allegation in a manner consistent with this section;

(2) The allegation involves an entity of sufficiently small size that it cannot reasonably conduct the inquiry;

(3) DOE involvement is necessary to ensure the public health, safety, and security, or to prevent harm to the public interest; or,

(4) The allegation involves possible criminal misconduct.

(e) DOE reserves the right to pursue such remedies and other actions as it deems appropriate, consistent with the terms and conditions of the award instrument and applicable laws and regulations. However, the recipient's good faith administration of this section and the effectiveness of its remedial actions and sanctions shall be positive considerations and shall be taken into account as mitigating factors in assessing the need for such actions. If DOE pursues any such action, it will inform the subject of the action of the outcome and any applicable appeal procedures.

(f) In conducting the activities in paragraph (c) of this section, the recipient and DOE, if it elects to conduct the inquiry or investigation, shall adhere to the following guidelines:

(1) *Safeguards for information and subjects of allegations.* The recipient shall provide safeguards to ensure that individuals may bring allegations of research misconduct made in good faith to the attention of the recipient without suffering retribution. Safeguards include: Protection against retaliation;

fair and objective procedures for examining and resolving allegations; and diligence in protecting positions and reputations. The recipient shall also provide the subjects of allegations confidence that their rights are protected and that the mere filing of an allegation of research misconduct will not result in an adverse action. Safeguards include timely written notice regarding substantive allegations against them, a description of the allegation and reasonable access to any evidence submitted to support the allegation or developed in response to an allegation and notice of any findings of research misconduct.

(2) *Objectivity and expertise.* The recipient shall select individual(s) to inquire, investigate, and adjudicate allegations of research misconduct who have appropriate expertise and have no unresolved conflict of interest. The individual(s) who conducts an adjudication must not be the same individual(s) who conducted the inquiry or investigation, and must be separate organizationally from the element that conducted the inquiry or investigation.

(3) *Timeliness.* The recipient shall coordinate, inquire, investigate and adjudicate allegations of research misconduct promptly, but thoroughly. Generally, an investigation should be completed within 120 days of initiation, and adjudication should be complete within 60 days of receipt of the record of investigation.

(4) *Confidentiality.* To the extent possible, consistent with fair and thorough processing of allegations of research misconduct and applicable law and regulation, knowledge about the identity of the subjects of allegations and informants should be limited to those with a need to know.

(5) *Remediation and sanction.* If the recipient finds that research misconduct has occurred, it shall assess the seriousness of the misconduct and its impact on the research completed or in process. The recipient must take all necessary corrective actions. Such action may include but are not limited to, correcting the research record and as appropriate imposing restrictions, controls, or other parameters on research in process or to be conducted in the future. The recipient must coordi-

nate remedial actions with the Contracting Officer. The recipient must also consider whether personnel sanctions are appropriate. Any such sanction must be consistent with any applicable personnel laws, policies, and procedures, and must take into account the seriousness of the misconduct and its impact, whether it was done knowingly or intentionally, and whether it was an isolated event or pattern of conduct.

(g) By executing this agreement, the recipient provides its assurance that it has established an administrative process for performing an inquiry, mediating if possible, investigating, and reporting allegations of research misconduct; and that it will comply with its own administrative process and the requirements and definitions of 10 CFR part 733 for performing an inquiry, possible mediation, investigation and reporting of allegations of research misconduct.

(h) The recipient must insert or have inserted the substance of this section, including paragraph (g), in subawards at all tiers that involve research.

§910.133 Deviation authority.

(a) *General.* (1) A deviation is the use of any policy, procedure, form, standard, term, or condition which varies from a requirement of this part, or the waiver of any such requirement, unless such use or waiver is authorized or precluded by Federal statute. The use of optional or discretionary provisions of this part, including special restrictive conditions used in accordance with §910.372, exceptions under 2 CFR 200.102, and the waiver of the cost sharing requirements in §910.130 are not deviations. Awards to foreign entities are not subject to this section.

(2) A single-case deviation is a deviation which applies to one financial assistance transaction and one applicant, recipient, or subrecipient only.

(3) A class deviation is a deviation which applies to more than one financial assistance transaction, applicant, recipient, or subrecipient.

(b) *Conditions for approval.* The DOE/NNSA officials specified in paragraph (c) of this section may authorize a deviation only upon a written determination that the deviation is—

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(1) Necessary to achieve program objectives;

(2) Necessary to conserve public funds;

(3) Otherwise essential to the public interest; or

(4) Necessary to achieve equity.

(c) *Approval procedures.* (1) A deviation request must be in writing and must be submitted to the responsible DOE/NNSA Contracting Officer. An applicant for a subaward or a subrecipient shall submit any such request through the recipient.

(2) Except as provided in paragraph (c)(3) of this section—

(i) A single-case deviation may be authorized by the responsible HCA.

(ii) A class deviation may be authorized by the Director, Office of Acquisition Management, for DOE actions, and the Deputy Associate Administrator for the Office of Acquisition and Project Management for NNSA, for NNSA actions, or designee.

(3) Whenever the approval of OMB, other Federal agency, or other DOE/NNSA office is required to authorize a deviation, the proposed deviation must be submitted to the Director, Office of Acquisition Management, for DOE actions, and the Deputy Associate Administrator for the Office of Acquisition and Project Management for NNSA, for NNSA actions, or designee for concurrence prior to submission to the authorizing official.

(d) *Notice.* Whenever a request for a class deviation is approved, DOE/NNSA will identify this class deviation (as applicable) in the Notice of Funding Opportunity(s) that may be affected.

(e) *Subawards.* A recipient may use a deviation in a subaward only with the prior written approval of a DOE/NNSA Contracting Officer.

[85 FR 32979, June 1, 2020]

Subpart C [Reserved]

Subpart D—Post Award Federal Requirements for For-Profit Entities

§ 910.350 Applicability of 2 CFR part 200.

(a) As stated in 2 CFR 910.22, unless otherwise noted in this part, the definition of Non-Federal entity found in 2

CFR 200.1 is expanded for DOE to include for-profit organizations in addition to states, local governments, Indian tribes, institutions of higher education (IHE), and nonprofit organizations.

(b) A for-profit organization is defined as one that distributes any profit not reinvested into the business as profit or dividends to its employees or shareholders.

(c) Subpart D of 2 CFR part 910 contains specific changes to 2 CFR part 200 that apply only to For-Profit Recipients and, unless otherwise specified, subrecipients. In some cases, the coverage in Subpart D will replace the language in a specific section of 2 CFR part 200.

[79 FR 76024, Dec. 19, 2014, as amended at 87 FR 15320, Mar. 18, 2022]

§ 910.352 Cost Principles.

For For-Profit Entities, the Cost Principles contained in 48 CFR 31.2 (Contracts with Commercial Organizations) must be followed in lieu of the Cost principles contained in 2 CFR 200.400 through 200.476, except that patent prosecution costs are not allowable unless specifically authorized in the award document. This applies to For-Profit entities whether they are recipients or subrecipients.

[79 FR 76024, Dec. 19, 2014, as amended at 87 FR 15320, Mar. 18, 2022]

§ 910.354 Payment.

(a) For-Profit Recipients are an exception to 2 CFR 200.305(b)(1) which requires that non-Federal entities be paid in advance as long as certain conditions are met.

(b) For For-Profit Recipients who are paid directly by DOE, reimbursement is the preferred method of payment. Under the reimbursement method of payment, the Federal awarding agency must reimburse the non-Federal entity for its actual cash disbursements. When the reimbursement method is used, the Federal awarding agency must make payment within 30 calendar days after receipt of the billing, unless the Federal awarding agency reasonably believes the request to be improper.

§ 910.356 Audits.

See Subpart F of this part (Sections 910.500 through 910.521) for specific DOE regulations which apply to audits of DOE's For-Profit Recipients. For-Profit entities are an exception to the Single Audit requirements contained in Subpart F of 2 CFR 200 and therefore the regulations contained in 2 CFR 910 Subpart F apply instead.

§ 910.358 Profit or fee for SBIR/STTR.

(a) As authorized by 2 CFR 200.400 (g), DOE may expressly allow non-federal entities to earn a profit or fee resulting from Federal financial assistance.

(b) DOE allows a profit or fee to be paid under two of its financial assistance programs only: Small Business Innovation Research (SBIR) and Small Business Technology Transfer Research (STTR).

(c) Awards under these programs will contain a specific provision which allows a profit or fee to be paid.

(d) Profit or Fee is unallowable for all other DOE programs which award grants and cooperative agreements.

§ 910.360 Real property and equipment.

(a) *Prior approvals for acquisition with Federal funds.* Recipients may purchase real property or equipment with an acquisition cost per unit of \$5,000 or more in whole or in part with Federal funds only with the prior written approval of the contracting officer or in accordance with express award terms.

(b) *Title.* Unless a statute specifically authorizes and the award specifies that title to property vests unconditionally in the recipient, title to real property or equipment vests in the recipient, subject to all terms and conditions of the award and that the recipient shall:

(1) Use the real property or equipment for the authorized purposes of the project until funding for the project ceases, or until the real property or equipment is no longer needed for the purposes of the project, as may be determined by the contracting officer;

(2) Not encumber or permit any encumbrance on the real property or equipment without the prior written approval of the contracting officer;

(3) Use and dispose of the real property or equipment in accordance with

paragraphs (e), (f), and (g) of this section; and

(4) Properly record, and consent to the Department's ability to properly record if the recipient fails to do so, UCC financing statement(s) for all equipment purchased with Federal funds (Financial assistance awards made under the Small Business Innovation Research/Small Business Technology Transfer (SBIR/STTR) program are exempt from this requirement unless otherwise specified within the grant agreement); such a filing is required when the Federal share of the financial assistance agreement is more than \$1,000,000, and the Contracting Officer may require it in his or her discretion when the Federal share is less than \$1,000,000. These financing statement(s) must be approved in writing by the contracting officer prior to the recording, and they shall provide notice that the recipient's title to all equipment (not real property) purchased with Federal funds under the financial assistance agreement is conditional pursuant to the terms of this section, and that the Government retains an undivided reversionary interest in the equipment. The UCC financing statement(s) must be filed before the contracting officer may reimburse the recipient for the Federal share of the equipment unless otherwise provided for in the relevant financial assistance agreement. The recipient shall further make any amendments to the financing statements or additional recordings, including appropriate continuation statements, as necessary or as the contracting officer may direct.

(c) *Remedies.* If the recipient fails at any time to comply with any of the conditions or requirements of paragraph (b) of this section, then the contracting officer may:

(1) Notify the recipient of noncompliance in accordance with 2 CFR 200.339, which may lead to suspension or termination of the award;

(2) Impose special award conditions pursuant to 2 CFR 200.206 and 200.208 as amended by 910.372;

(3) Issue instructions to the recipient for disposition of the property in accordance with paragraph (g) of this section;

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(4) In the case of a failure to properly record UCC financing statement(s) in accordance with paragraph (b)(4) of this section, effect such a recording; and

(5) Apply other remedies that may be legally available.

(d) *Title to and Federal interest in real property or equipment offered as cost-share.* As provided in 2 CFR 200.306(h), depending upon the purpose of the Federal award, a recipient may offer the fair market value of real property or equipment that is purchased with recipient's funds or that is donated by a third party to meet a portion of any required cost sharing or matching. If a resulting award includes such property as a portion of the recipient's cost share, the recipient holds conditional title to the property and the Government has an undivided reversionary interest in the share of the property value equal to the Federal participation in the project. The property is treated as if it had been acquired in part with Federal funds, and is subject to the provisions of paragraph (b) of this section and to the provisions of 2 CFR 200.311 and 200.313.

(e) *Insurance.* Recipients must, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with Federal funds as provided to property owned by the recipient.

(f) *Additional uses during and after the project period.* Unless a statute and the award terms expressly provide for the vesting of unconditional title to real property or equipment with the recipient, the real property or equipment acquired wholly or in part with Federal funds is subject to the following:

(1) During the Project Period, the recipient must make real property and equipment available for use on other projects or programs, if such other use does not interfere with the work on the project or program for which the real property or equipment was originally acquired. Use of the real property or equipment on other projects is subject to the following order of priority:

(i) Activities sponsored by DOE grants, cooperative agreements, or other assistance awards;

(ii) Activities sponsored by other Federal agencies' grants, cooperative

agreements, or other assistance awards;

(iii) Activities under Federal procurement contracts or activities not sponsored by any Federal agency. If so used, use charges must be assessed to those activities. For real property or equipment, the use charges must be at rates equivalent to those for which comparable real property or equipment may be leased.

(2) After Federal funding for the project ceases, or if, as may be determined by the contracting officer, the real property or equipment is no longer needed for the purposes of the project, or if the recipient suspends work on the project, the recipient may use the real property or equipment for other projects, if:

(i) There are Federally sponsored projects for which the real property or equipment may be used;

(ii) The recipient obtains written approval from the contracting officer to do so. The contracting officer must ensure that there is a formal change of accountability for the real property or equipment to a currently funded Federal award; and

(iii) The recipient's use of the real property or equipment for other projects is in the same order of priority as described in paragraph (e)(1) of this section.

(iv) If the only use for the real property or equipment is for projects that have no Federal sponsorship, the recipient must proceed with disposition of the real property or equipment in accordance with paragraph (g) of this section.

(g) *Disposition.* (1) If, as determined by the contracting officer, an item of real property or equipment is no longer needed for Federally sponsored projects, or if the recipient has suspended work on the project, the recipient has the following options:

(i) If the property is equipment with a current per unit fair market value of less than \$5,000, it may be retained, sold, or otherwise disposed of with no further obligation to DOE.

(ii) If the property is equipment (rather than real property) and with the written approval of the contracting officer, the recipient may replace it with an item that is needed currently

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for the project by trading in or selling to offset the costs of the replacement equipment.

(iii) The recipient may elect to retain title, without further obligation to the Federal Government, by compensating the Federal Government for that percentage of the current fair market value of the real property or equipment that is attributable to the Federal participation in the project.

(iv) If the recipient does not elect to retain title to real property or equipment or does not request approval to use equipment as trade-in or offset for replacement equipment, the recipient must request disposition instructions from the responsible agency.

(2) If a recipient requests disposition instructions, the contracting officer must:

(i) For either real property or equipment, issue instructions to the recipient for disposition of the property no later than 120 calendar days after the recipient's request. The contracting officer's options for disposition are to direct the recipient to:

(A) Transfer title to the real property or equipment to the Federal Government or to a third party designated by the contracting officer provided that, in such cases, the recipient is entitled to compensation for its attributable percentage of the current fair market value of the real property or equipment, plus any reasonable shipping or interim storage costs incurred; or

(B) Sell the real property or equipment and pay the Federal Government for that percentage of the current fair market value of the property that is attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sale proceeds). If the recipient is authorized or required to sell the real property or equipment, the recipient must use competitive procedures that result in the highest practicable return.

(3) If the contracting officer fails to issue disposition instructions within 120 calendar days of the recipient's request, the recipient must dispose of the real property or equipment through the

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option described in paragraph (g)(2)(i)(B) of this section.

[80 FR 53237, Sept. 3, 2015, as amended at 87 FR 15320, Mar. 18, 2022]

§910.362 Intellectual property.

(a) *Scope.* This section sets forth the policies with regard to disposition of rights to data and to inventions conceived or first actually reduced to practice in the course of, or under, a grant or cooperative agreement made to a For-Profit entity by DOE.

(b) *Patents right—small business concerns.* In accordance with 35 U.S.C. 202, if the recipient is a small business concern and receives a grant, cooperative agreement, subaward, or contract for research, developmental, or demonstration activities, then, unless there are “exceptional circumstances” as described in 35 U.S.C. 202(e), the award must contain the standard clause in appendix A to this subpart, entitled “Patents Rights (Small Business Firms and Nonprofit Organizations)” which provides to the recipient the right to elect ownership of inventions made under the award.

(c) *Patent rights—other than small business concerns, e.g., large businesses—*

(1) *No Patent Waiver.* Except as provided by paragraph (c)(2) of this section, if the recipient is a for-profit organization other than a small business concern, as defined in 35 U.S.C. 201(h) and receives an award or a subaward for research, development, and demonstration activities, then, pursuant to statute, the award must contain the standard clause in appendix A to this subpart, entitled “Patent Rights (Large Business Firms)—No Waiver” which provides that DOE owns the patent rights to inventions made under the award.

(2) *Patent Waiver Granted.* Paragraph (c)(1) of this section does not apply if:

(i) DOE grants a class waiver for a particular program under 10 CFR part 784;

(ii) The applicant requests and receives an advance patent waiver under 10 CFR part 784; or

(iii) A subaward is covered by a waiver granted under the prime award.

(3) *Special Provision.* Normally, an award will not include a background patent and data provision. However,

under special circumstances, in order to provide heightened assurance of commercialization, a provision providing for a right to require licensing of third parties to background inventions, limited rights data and/or restricted computer software, may be included. Inclusion of a background patent and/or a data provision to assure commercialization will be done only with the written concurrence of the DOE program official setting forth the need for such assurance. An award may include the right to license the Government and third party contractors for special Government purposes when future availability of the technology would also benefit the government, *e.g.*, clean-up of DOE facilities. The scope of any such background patent and/or data licensing provision is subject to negotiation.

(d) *Rights in data—general rule.* (1) Subject to paragraphs (d)(2) and (3) of this section, and except as otherwise provided by paragraphs (e) and (f) of this section or other law, any award under this subpart must contain the standard clause in appendix A to this subpart, entitled “Rights in Data—General”.

(2) Normally, an award will not require the delivery of limited rights data or restricted computer software. However, if the contracting officer, in consultation with DOE patent counsel and the DOE program official, determines that delivery of limited rights data or restricted computer software is necessary, the contracting officer, after negotiation with the applicant, may insert in the award the standard clause as modified by Alternates I and/or II set forth in appendix A to this subpart.

(3) If software is specified for delivery to DOE, or if other special circumstances exist, *e.g.*, DOE specifying “open-source” treatment of software, then the contracting officer, after negotiation with the recipient, may include in the award special provisions requiring the recipient to obtain written approval of the contracting officer prior to asserting copyright in the software, modifying the retained Government license, and/or otherwise altering the copyright provisions.

(e) *Rights in data—programs covered under special protected data statutes.* (1)

If a statute, other than those providing for the Small Business Innovation Research (SBIR) and Small Business Technology Transfer Research (STTR) programs, provides for a period of time, typically up to five years, during which data produced under an award for research, development, and demonstration may be protected from public disclosure, then the contracting officer must insert in the award the standard clause in appendix A to this subpart entitled “Rights in Data—Programs Covered Under Special Protected Data Statutes” or, as determined in consultation with DOE patent counsel and the DOE program official, a modified version of such clause which may identify data or categories of data that the recipient must make available to the public.

(2) An award under paragraph (e)(1) of this section is subject to the provisions of paragraphs (d)(2) and (3) of this section.

(f) *Rights in data—SBIR/STTR programs.* If an applicant receives an award under the SBIR or STTR program, then the contracting officer must insert in the award the standard data clause in the General Terms and Conditions for SBIR Grants, entitled “Rights in Data—SBIR Program”.

(g) *Authorization and consent.* (1) Work performed by a recipient under a grant is not subject to authorization and consent to the use of a patented invention, and the Government assumes no liability for patent infringement by the recipient under 28 U.S.C. 1498.

(2) Work performed by a recipient under a cooperative agreement is subject to authorization and consent to the use of a patented invention consistent with the principles set forth in 48 CFR 27.201-1.

(3) The contracting officer, in consultation with patent counsel, may also include clauses in the cooperative agreement addressing other patent matters related to authorization and consent, such as patent indemnification of the Government by recipient and notice and assistance regarding patent and copyright infringement. The policies and clauses for these other

patent matters will be the same or consistent with those in 48 CFR part 927.

§ 910.364 Reporting on utilization of subject inventions.

(a) Unless otherwise instructed, a recipient that obtains title to an invention made under an award shall submit annual reports on the utilization or efforts to obtain utilization of the invention for at least 10 years from the date the invention was first disclosed to DOE (Utilization Reports). Utilization Reports shall include at least the following information:

- (1) Status of development;
- (2) Date of first commercial sale or use;
- (3) Gross royalties received by the recipient;
- (4) The location of any manufacture of products embodying the subject invention; and
- (5) Any such other data and information as DOE may reasonably specify.

(b) To the extent data or information supplied in a Utilization Report is considered by the recipient to be privileged and confidential and is so marked by the recipient, DOE agrees that, to the extent permitted by law, it shall not disclose such information to persons outside the Government.

[80 FR 53238, Sept. 3, 2015]

§ 910.366 Export Control and U.S. Manufacturing and Competitiveness.

(a) *Export Control.* Any recipient of any award for research, development and/or demonstration must comply with all applicable U.S. laws regarding export control.

(b) *U.S. Manufacturing and Competitiveness.* It is the policy of DOE to ensure that DOE-funded research, development, and/or demonstration projects foster domestic manufacturing. Funding opportunity announcements (FOAs), therefore, may require that applicants submit a “U.S. Manufacturing Plan” in their applications. Such FOAs may encourage U.S. Manufacturing Plans to include proposals by recipients and any sub-recipients to manufacture DOE-funded technologies in the United States; however, the FOAs will also state that these plans should not include requirements regarding the source of inputs used during the manu-

facturing process. Regardless of whether such plans will be part of the merit review criteria or a program policy factor, and to the extent legally permissible, all awards subject to this subpart, including subawards, for research, development, and/or demonstration, must include a provision that provides plans by the recipient and any sub-recipients to support manufacturing in the United States of technology developed under the award. The recipient and any subrecipients must agree to make those plans binding on any assignee or licensee or any entity otherwise acquiring rights to any subject invention or developed technology covered under the award. A recipient, subrecipient, assignee, licensee, or any entity otherwise acquiring the rights to any subject invention or developed technology may request a waiver or modification of U.S. manufacturing plans from DOE. DOE will determine whether to approve such a waiver in light of equitable considerations, including, for example, whether the requester satisfactorily shows that the planned support is not economically feasible and whether there is a satisfactory alternative net benefit to the U.S. economy if the requested waiver or modification is approved.

[80 FR 53239, Sept. 3, 2015]

§ 910.368 Change of control.

(a) Change of control is defined as any of the following:

- (1) Any event by which any individual or entity other than the recipient becomes the beneficial owner of more than 50% of the total voting power of the voting stock of the recipient;
- (2) The recipient merges with or into any entity other than in a transaction in which the shares of the recipient’s voting stock are converted into a majority of the voting stock of the surviving entity;
- (3) The sale, lease or transfer of all or substantially all of the assets of the recipient to any individual or entity other than the recipient in one or a series of related transactions;
- (4) The adoption of a plan relating to the liquidation or dissolution of the recipient; or

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(5) Where the recipient is a wholly-owned subsidiary at the time of award or novation, and the recipient's parent entity undergoes a change of control as defined in this section.

(b) When the Federal share of the financial assistance agreement is more than \$10,000,000 or DOE requests the information in writing, the recipient must provide the contracting officer with documentation identifying all parties who exercise control in the recipient at the time of award.

(c) When there is a change of control of a recipient, or the recipient has reason to know a change of control is likely, the recipient must notify the contracting officer within 30 days of its knowledge of such change of control. Such notification must include, at a minimum, copies of documents necessary to reflect the transaction that resulted or will result in the change of control, and identification of all entities, individuals or other parties to such transaction. Failure to notify the contracting officer of a change of control is grounds for suspension or termination of the award for failure to comply with the terms and conditions of the award.

(d) The contracting officer must authorize a change of control for the purposes of the award. Failure to receive the contracting officer's authorization for a change of control may lead to a suspension of the award, termination for failure to comply with the terms and conditions of the award, or imposition of special award conditions pursuant to 2 CFR 910.372. Special award conditions may include but are not limited to:

(1) Additional reporting requirements related to the change of control; and

(2) Suspension of payments due to the recipient.

[80 FR 53239, Sept. 3, 2015]

§910.370 Novation of financial assistance agreements.

(a) Financial assistance agreements are not assignable absent written consent from the contracting officer. At his or her sole discretion, the contracting officer may, through novation, recognize a third party as the successor in interest to a financial assistance agreement if such recognition is in the

Government's interest, conforms with all applicable laws and the third party's interest in the agreement arises out of the transfer of:

(1) All of the recipient's assets; or

(2) The entire portion of the assets necessary to perform the project described in the agreement.

(b) When the contracting officer determines that it is not in the Government's interest to consent to the novation of a financial assistance agreement from the original recipient to a third party, the original recipient remains subject to the terms of the financial assistance agreement, and the Department may exercise all legally available remedies under 2 CFR 200.339 through 200.343, or that may be otherwise available, should the original recipient not perform.

(c) The contracting officer may require submission of any documentation in support of a request for novation, including but not limited to documents identified in 48 CFR Subpart 42.12. The contracting officer may use the format in 48 CFR 42.1204 as guidance for novation agreements identified in paragraph (a) of this section.

[80 FR 53239, Sept. 3, 2015, as amended at 87 FR 15320, Mar. 18, 2022]

§910.372 Special award conditions.

(a) In addition to the requirements of 2 CFR 200.206, the following actions may require the use of Specific Conditions as identified in 2 CFR 200.208:

(1) Has not conformed to the terms and conditions of a previous award;

(2) Has a change of control as defined in §910.368;

(3) Fails to comply with real property and equipment requirements at §910.360; or

(4) Is not otherwise responsible.

[80 FR 53239, Sept. 3, 2015, as amended at 87 FR 15320, Mar. 18, 2022]

APPENDIX A TO SUBPART D OF PART 910—PATENT AND DATA PROVISIONS

1. Patent Rights (Small Business Firms and Nonprofit Organizations)
2. Patent Rights (Large Business Firms)—No Waiver
3. Rights in Data—General
4. Rights in Data—Programs Covered Under Special Protected Data Statutes

1. Patent Rights (Small Business Firms and Nonprofit Organizations)

(a) Definitions

Invention means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321 *et seq.*).

Made when used in relation to any invention means the conception or first actual reduction to practice of such invention.

Nonprofit organization is defined in 2 CFR 200.1.

Practical application means to manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are to the extent permitted by law or Government regulations available to the public on reasonable terms.

Small business firm means a small business concern as defined at section 2 of Public Law 85–536 (16 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in Government procurement and subcontracting at 13 CFR 121.3 through 121.8 and 13 CFR 121.3 through 121.12, respectively, will be used.

Subject invention means any invention of the Recipient conceived or first actually reduced to practice in the performance of work under this award, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d) must also occur during the period of award performance.

(b) Allocation of Principal Rights

The Recipient may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this Patent Rights clause and 35 U.S.C. 203. With respect to any subject invention in which the Recipient retains title, the Federal Government shall have a non-exclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the U.S. the subject invention throughout the world.

(c) Invention Disclosure, Election of Title and Filing of Patent Applications by Recipient

(1) The Recipient will disclose each subject invention to DOE within two months after the inventor discloses it in writing to Recipient personnel responsible for the administration of patent matters. The disclosure to DOE shall be in the form of a written report and shall identify the award under which the invention was made and the inventor(s). It

shall be sufficiently complete in technical detail to convey a clear understanding to the extent known at the time of disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to DOE, the Recipient will promptly notify DOE of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Recipient.

(2) The Recipient will elect in writing whether or not to retain title to any such invention by notifying DOE within two years of disclosure to DOE. However, in any case where publication, on sale, or public use has initiated the one-year statutory period wherein valid patent protection can still be obtained in the U.S., the period for election of title may be shortened by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3) The Recipient will file its initial patent application on an invention to which it elects to retain title within one year after election of title or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the U.S. after a publication, on sale, or public use. The Recipient will file patent applications in additional countries or international patent offices within either ten months of the corresponding initial patent application, or six months from the date when permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications when such filing has been prohibited by a Secrecy Order.

(4) Requests for extension of the time for disclosure to DOE, election, and filing under subparagraphs (c)(1), (2), and (3) of this clause may, at the discretion of DOE, be granted.

(d) Conditions When the Government May Obtain Title

The Recipient will convey to DOE, upon written request, title to any subject invention:

(1) If the Recipient fails to disclose or elect the subject invention within the times specified in paragraph (c) of this patent rights clause, or elects not to retain title; provided that DOE may only request title within 60 days after learning of the failure of the Recipient to disclose or elect within the specified times;

(2) In those countries in which the Recipient fails to file patent applications within the times specified in paragraph (c) of this Patent Rights clause; provided, however,

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that if the Recipient has filed a patent application in a country after the times specified in paragraph (c) of this Patent Rights clause, but prior to its receipt of the written request of DOE, the Recipient shall continue to retain title in that country; or

(3) In any country in which the Recipient decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in a reexamination or opposition proceeding on, a patent on a subject invention.

(e) Minimum Rights to Recipient and Protection of the Recipient Right To File

(1) The Recipient will retain a non-exclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the Recipient fails to disclose the subject invention within the times specified in paragraph (c) of this Patent Rights clause. The Recipient's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Recipient is a party and includes the right to grant sublicenses of the same scope of the extent the Recipient was legally obligated to do so at the time the award was awarded. The license is transferable only with the approval of DOE except when transferred to the successor of that part of the Recipient's business to which the invention pertains.

(2) The Recipient's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions at 37 CFR part 404 and the agency's licensing regulation, if any. This license will not be revoked in that field of use or the geographical areas in which the Recipient has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at discretion of the funding Federal agency to the extent the Recipient, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(3) Before revocation or modification of the license, the funding Federal agency will furnish the Recipient a written notice of its intention to revoke or modify the license, and the Recipient will be allowed thirty days (or such other time as may be authorized by DOE for good cause shown by the Recipient) after the notice to show cause why the license should not be revoked or modified. The Recipient has the right to appeal, in accordance with applicable regulations in 37 CFR part 404 and the agency's licensing regulations, if any, concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of its license.

(f) Recipient Action To Protect Government's Interest

(1) The Recipient agrees to execute or to have executed and promptly deliver to DOE all instruments necessary to:

(i) Establish or confirm the rights the Government has throughout the world in those subject inventions for which the Recipient retains title; and

(ii) Convey title to DOE when requested under paragraph (d) of this Patent Rights clause, and to enable the government to obtain patent protection throughout the world in that subject invention.

(2) The Recipient agrees to require, by written agreement, its employees, other than clerical and non-technical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Recipient each subject invention made under this award in order that the Recipient can comply with the disclosure provisions of paragraph (c) of this Patent Rights clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. The disclosure format should require, as a minimum, the information requested by paragraph (c)(1) of this Patent Rights clause. The Recipient shall instruct such employees through the employee agreements or other suitable educational programs on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) The Recipient will notify DOE of any decision not to continue prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response period required by the relevant patent office.

(4) The Recipient agrees to include, within the specification of any U.S. patent application and any patent issuing thereon covering a subject invention, the following statement: "This invention was made with Government support under (identify the award) awarded by (identify DOE). The Government has certain rights in this invention."

(g) Subaward/Contract

(1) The Recipient will include this Patent Rights clause, suitably modified to identify the parties, in all subawards/contracts, regardless of tier, for experimental, developmental or research work to be performed by a small business firm or nonprofit organization. The subrecipient/contractor will retain all rights provided for the Recipient in this Patent Rights clause, and the Recipient will not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractors' subject inventions.

(2) The Recipient will include in all other subawards/contracts, regardless of tier, for experimental, developmental or research work, the patent rights clause required by 2 CFR 910.362(c).

(3) In the case of subawards/contracts at any tier, DOE, the Recipient, and the subrecipient/contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subrecipient/contractor and DOE with respect to those matters covered by the clause.

(h) Reporting on Utilization of Subject Inventions

The Recipient agrees to submit on request periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Recipient or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Recipient and such other data and information as DOE may reasonably specify. The Recipient also agrees to provide additional reports in connection with any march-in proceeding undertaken by DOE in accordance with paragraph (j) of this Patent Rights clause. As required by 35 U.S.C. 202(c)(5), DOE agrees it will not disclose such information to persons outside the Government without the permission of the Recipient.

(i) Preference for United States Industry.

Notwithstanding any other provision of this Patent Rights clause, the Recipient agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the U.S. unless such person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the U.S. However, in individual cases, the requirement for such an agreement may be waived by DOE upon a showing by the Recipient or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the U.S. or that under the circumstances domestic manufacture is not commercially feasible.

(j) March-in-Rights

The Recipient agrees that with respect to any subject invention in which it has acquired title, DOE has the right in accordance with procedures at 37 CFR 401.6 and any supplemental regulations of the Agency to require the Recipient, an assignee or exclusive licensee of a subject invention to grant a non-exclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances and if the Recipient, assignee, or exclusive licensee refuses such a request, DOE has the

right to grant such a license itself if DOE determines that:

(1) Such action is necessary because the Recipient or assignee has not taken or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(2) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Recipient, assignee, or their licensees;

(3) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Recipient, assignee, or licensee; or

(4) Such action is necessary because the agreement required by paragraph (i) of this Patent Rights clause has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the U.S. is in breach of such agreement.

(k) Special Provisions for Awards With Nonprofit Organizations

If the Recipient is a nonprofit organization, it agrees that:

(1) Rights to a subject invention in the U.S. may not be assigned without the approval of DOE, except where such assignment is made to an organization which has as one of its primary functions the management of inventions, provided that such assignee will be subject to the same provisions as the Recipient;

(2) The Recipient will share royalties collected on a subject invention with the inventor, including Federal employee co-inventors (when DOE deems it appropriate) when the subject invention is assigned in accordance with 35 U.S.C. 202(e) and 37 CFR 401.10;

(3) The balance of any royalties or income earned by the Recipient with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions, will be utilized for the support of scientific or engineering research or education; and

(4) It will make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business firms and that it will give preference to a small business firm if the Recipient determines that the small business firm has a plan or proposal for marketing the invention which, if executed, is equally likely to bring the invention to practical application as any plans or proposals from applicants that are not small business firms; provided that the Recipient is also satisfied that the small business firm has the capability and resources to carry out its plan or proposal. The decision whether to give a preference in any specific case will be at the discretion of the Recipient. However, the Recipient agrees that the Secretary of Commerce may review

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the Recipient's licensing program and decisions regarding small business applicants, and the Recipient will negotiate changes to its licensing policies, procedures or practices with the Secretary when the Secretary's review discloses that the Recipient could take reasonable steps to implement more effectively the requirements of this paragraph (k)(4).

(l) Communications

All communications required by this Patent Rights clause should be sent to the DOE Patent Counsel address listed in the Award Document.

(m) Electronic Filing

Unless otherwise specified in the award, the information identified in paragraphs (f)(2) and (f)(3) may be electronically filed.

(End of clause)

2. Patent Rights (Large Business Firms)—No Waiver

(a) Definitions

DOE patent waiver regulations, as used in this clause, means the Department of Energy patent waiver regulations in effect on the date of award. See 10 CFR part 784.

Invention, as used in this clause, means any invention or discovery which is or may be patentable of otherwise protectable under title 35 of the United States Code or any novel variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*).

Patent Counsel, as used in this clause, means the Department of Energy Patent Counsel assisting the awarding activity.

Subject invention, as used in this clause, means any invention of the Recipient conceived or first actually reduced to practice in the course of or under this agreement.

(b) Allocations of Principal Rights

(1) Assignment to the Government. The Recipient agrees to assign to the Government the entire right, title, and interest throughout the world in and to each subject invention, except to the extent that rights are retained by the Recipient under subparagraph (b)(2) and paragraph (d) of this clause.

(2) Greater rights determinations. The Recipient, or an employee-inventor after consultation with the Recipient, may request greater rights than the nonexclusive license and the foreign patent rights provided in paragraph (d) of this clause on identified inventions in accordance with the DOE patent waiver regulation. Each determination of greater rights under this agreement shall be subject to paragraph (c) of this clause, unless otherwise provided in the greater rights determination, and to the reservations and conditions deemed to be appropriate by the Secretary of Energy or designee.

(c) Minimum Rights Acquired by the Government

With respect to each subject invention to which the Department of Energy grants the Recipient principal or exclusive rights, the Recipient agrees to grant to the Government: A nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced each subject invention throughout the world by or on behalf of the Government of the United States (including any Government agency); "march-in rights" as set forth in 37 CFR 401.14(a)(J)); preference for U.S. industry as set forth in 37 CFR 401.14(a)(I); periodic reports upon request, no more frequently than annually, on the utilization or intent of utilization of a subject invention in a manner consistent with 35 U.S.C. 202(c)(50); and such Government rights in any instrument transferring rights in a subject invention.

(d) Minimum Rights to the Recipient

(1) The Recipient is hereby granted a revocable, nonexclusive, royalty-free license in each patent application filed in any country on a subject invention and any resulting patent in which the Government obtains title, unless the Recipient fails to disclose the subject invention within the times specified in subparagraph (e)(2) of this clause. The Recipient's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Recipient is a part and includes the right to grant sublicenses of the same scope to the extent the Recipient was legally obligated to do so at the time the agreement was awarded. The license is transferable only with the approval of DOE except when transferred to the successor of that part of the Recipient's business to which the invention pertains.

(2) The Recipient may request the right to acquire patent rights to a subject invention in any foreign country where the Government has elected not to secure such rights, subject to the minimum rights acquired by the Government similar to paragraph (c) of this clause. Such request must be made in writing to the Patent Counsel as part of the disclosure required by subparagraph (e)(2) of this clause, with a copy to the DOE Contracting Officer. DOE approval, if given, will be based on a determination that this would best serve the national interest.

(e) Invention Identification, Disclosures, and Reports

(1) The Recipient shall establish and maintain active and effective procedures to assure that subject inventions are promptly identified and disclosed to Recipient personnel responsible for patent matters within 6 months of conception and/or first actual reduction to practice, whichever occurs first in the performance of work under this agreement. These procedures shall include the maintenance of laboratory notebooks or equivalent records and other records as are reasonably necessary to document the conception and/or the first actual reduction to

practice of subject inventions, and records that show that the procedures for identifying and disclosing the inventions are followed. Upon request, the Recipient shall furnish the Contracting Officer a description of such procedures for evaluation and for determination as to their effectiveness.

(2) The Recipient shall disclose each subject invention to the DOE Patent Counsel with a copy to the Contracting Officer within 2 months after the inventor discloses it in writing to Recipient personnel responsible for patent matters or, if earlier, within 6 months after the Recipient becomes aware that a subject invention has been made, but in any event before any on sale, public use, or publication of such invention known to the Recipient. The disclosure to DOE shall be in the form of a written report and shall identify the agreement under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and physical, chemical, biological, or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale, or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to DOE, the Recipient shall promptly notify Patent Counsel of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Recipient. The report should also include any request for a greater rights determination in accordance with subparagraph (b)(2) of this clause. When an invention is disclosed to DOE under this paragraph, it shall be deemed to have been made in the manner specified in Sections (a)(1) and (a)(2) of 42 U.S.C. 5908, unless the Recipient contends in writing at the time the invention is disclosed that it was not so made.

(3) The Recipient shall furnish the Contracting Officer a final report, within 3 months after completion of the work listing all subject inventions or containing a statement that there were no such inventions, and listing all subawards/contracts at any tier containing a patent rights clause or containing a statement that there were no such subawards/contracts.

(4) The Recipient agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Recipient each subject invention made under subaward/contract in order that the Recipient can comply with the disclosure provisions of paragraph (c) of this

clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by subparagraph (e)(2) of this clause.

(5) The Recipient agrees, subject to FAR 27.302(j), that the Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause.

(f) Examination of Records Relating to Inventions

(1) The Contracting Officer or any authorized representative shall, until 3 years after final payment under this agreement, have the right to examine any books (including laboratory notebooks), records, and documents of the Recipient relating to the conception or first actual reduction to practice of inventions in the same field of technology as the work under this agreement to determine whether—(i) Any such inventions are subject inventions; (ii) The Recipient has established and maintains the procedures required by subparagraphs (e)(1) and (4) of this clause; (iii) The Recipient and its inventors have complied with the procedures.

(2) If the Contracting Officer learns of an unreported Recipient invention which the Contracting Officer believes may be a subject invention, the Recipient may be required to disclose the invention to DOE for a determination of ownership rights.

(3) Any examination of records under this paragraph will be subject to appropriate conditions to protect the confidentiality of the information involved.

(g) Subaward/Contract

(1) The recipient shall include the clause PATENT RIGHTS (SMALL BUSINESS FIRMS AND NONPROFIT ORGANIZATIONS) (suitably modified to identify the parties) in all subawards/contracts, regardless of tier, for experimental, developmental, demonstration, or research work to be performed by a small business firm or domestic nonprofit organization, except where the work of the subaward/contract is subject to an Exceptional Circumstances Determination by DOE. In all other subawards/contracts, regardless of tier, for experimental, developmental, demonstration, or research work, the Recipient shall include this clause (suitably modified to identify the parties), or an alternate clause as directed by the contracting officer. The Recipient shall not, as part of the consideration for awarding the subaward/contract, obtain rights in the subrecipient's/contractor's subject inventions.

(2) In the event of a refusal by a prospective subrecipient/contractor to accept such a

clause the Recipient: (i) Shall promptly submit a written notice to the Contracting Officer setting forth the subrecipient/contractor's reasons for such refusal and other pertinent information that may expedite disposition of the matter; and (ii) Shall not proceed with such subaward/contract without the written authorization of the Contracting Officer.

(3) In the case of subawards/contracts at any tier, DOE, the subrecipient/contractor, and Recipient agree that the mutual obligations of the parties created by this clause constitute a contract between the subrecipient/contractor and DOE with respect to those matters covered by this clause.

(4) The Recipient shall promptly notify the Contracting Officer in writing upon the award of any subaward/contract at any tier containing a patent rights clause by identifying the subrecipient/contractor, the applicable patent rights clause, the work to be performed under the subaward/contract, and the dates of award and estimated completion. Upon request of the Contracting Officer, the Recipient shall furnish a copy of such subaward/contract, and, no more frequently than annually, a listing of the subawards/contracts that have been awarded.

(5) The Recipient shall identify all subject inventions of a subrecipient/contractor of which it acquires knowledge in the performance of this agreement and shall notify the Patent Counsel, with a copy to the contracting officer, promptly upon identification of the inventions.

(h) Atomic Energy

(1) No claim for pecuniary award of compensation under the provisions of the Atomic Energy Act of 1954, as amended, shall be asserted with respect to any invention or discovery made or conceived in the course of or under this agreement.

(2) Except as otherwise authorized in writing by the Contracting Officer, the Recipient will obtain patent agreements to effectuate the provisions of subparagraph (h)(1) of this clause from all persons who perform any part of the work under this agreement, except nontechnical personnel, such as clerical employees and manual laborers.

(i) Publication

It is recognized that during the course of the work under this agreement, the Recipient or its employees may from time to time desire to release or publish information regarding scientific or technical developments conceived or first actually reduced to practice in the course of or under this agreement. In order that public disclosure of such information will not adversely affect the patent interests of DOE or the Recipient, patent approval for release of publication shall be secured from Patent Counsel prior to any such release or publication.

(j) Forfeiture of Rights in Unreported Subject Inventions

(1) The Recipient shall forfeit and assign to the Government, at the request of the Secretary of Energy or designee, all rights in any subject invention which the Recipient fails to report to Patent Counsel within six months after the time the Recipient: (i) Files or causes to be filed a United States or foreign patent application thereon; or (ii) Submits the final report required by subparagraph (e)(3) of this clause, whichever is later.

(2) However, the Recipient shall not forfeit rights in a subject invention if, within the time specified in subparagraph (e)(2) of this clause, the Recipient: (i) Prepares a written decision based upon a review of the record that the invention was neither conceived nor first actually reduced to practice in the course of or under the agreement and delivers the decision to Patent Counsel, with a copy to the Contracting Officer, or (ii) Contending that the invention is not a subject invention, the Recipient nevertheless discloses the invention and all facts pertinent to this contention to the Patent Counsel, with a copy of the Contracting Officer; or (iii) Establishes that the failure to disclose did not result from the Recipient's fault or negligence.

(3) Pending written assignment of the patent application and patents on a subject invention determined by the Secretary of Energy or designee to be forfeited (such determination to be a final decision under the Disputes clause of this agreement), the Recipient shall be deemed to hold the invention and the patent applications and patents pertaining thereto in trust for the Government. The forfeiture provision of this paragraph (j) shall be in addition to and shall not supersede other rights and remedies which the Government may have with respect to subject inventions.

(End of clause)

3. Rights in Data—General

(a) Definitions

Computer Data Bases, as used in this clause, means a collection of data in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

Computer software, as used in this clause, means (i) computer programs which are data comprising a series of instructions, rules, routines or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations and (ii) data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created or compiled. The term does not include computer data bases.

Data, as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to administration, such as financial, administrative, cost or pricing, or management information.

Form, fit, and function data, as used in this clause, means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, as well as data identifying source, size, configuration, mating, and attachment characteristics, functional characteristics, and performance requirements; except that for computer software it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithm, process, formulae, and flow charts of the software.

Limited rights, as used in this clause, means the rights of the Government in limited rights data as set forth in the Limited Rights Notice of subparagraph (g)(2) if included in this clause.

Limited rights data, as used in this clause, means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

Restricted computer software, as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software; including minor modifications of such computer software.

Restricted rights, as used in this clause, means the rights of the Government in restricted computer software, as set forth in a Restricted Rights Notice of subparagraph (g)(3) if included in this clause, or as otherwise may be provided in a collateral agreement incorporated in and made part of this contract, including minor modifications of such computer software.

Technical data, as used in this clause, means data (other than computer software) which are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.

Unlimited rights, as used in this clause, means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

(b) Allocations of Rights

(1) Except as provided in paragraph (c) of this clause regarding copyright, the Government shall have unlimited rights in—

(i) Data first produced in the performance of this agreement;

(ii) Form, fit, and function data delivered under this agreement;

(iii) Data delivered under this agreement (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under this agreement; and

(iv) All other data delivered under this agreement unless provided otherwise for limited rights data or restricted computer software in accordance with paragraph (g) of this clause.

(2) The Recipient shall have the right to—

(i) Use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Recipient in the performance of this agreement, unless provided otherwise in paragraph (d) of this clause;

(ii) Protect from unauthorized disclosure and use those data which are limited rights data or restricted computer software to the extent provided in paragraph (g) of this clause;

(iii) Substantiate use of, add or correct limited rights, restricted rights, or copyright notices and to take over appropriate action, in accordance with paragraphs (e) and (f) of this clause; and

(iv) Establish claim to copyright subsisting in data first produced in the performance of this agreement to the extent provided in paragraph (c)(1) of this clause.

(c) Copyright

(1) Data first produced in the performance of this agreement. Unless provided otherwise in paragraph (d) of this clause, the Recipient may establish, without prior approval of the Contracting Officer, claim to copyright subsisting in data first produced in the performance of this agreement. When claim to copyright is made, the Recipient shall affix the applicable copyright notices of 17 U.S.C. 401 or 402 and acknowledgement of Government sponsorship (including agreement number) to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For such copyrighted data, including computer software, the Recipient grants to the Government, and others acting on its behalf, a paid-up nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government.

(2) Data not first produced in the performance of this agreement. The Recipient shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this agreement any data not first produced in the performance of this agreement and which contains the copyright

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notice of 17 U.S.C. 401 or 402, unless the Recipient identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in paragraph (c)(1) of this clause; provided, however, that if such data are computer software the Government shall acquire a copyright license as set forth in paragraph (g)(3) of this clause if included in this agreement or as otherwise may be provided in a collateral agreement incorporated in or made part of this agreement.

(3) Removal of copyright notices. The Government agrees not to remove any copyright notices placed on data pursuant to this paragraph (c), and to include such notices on all reproductions of the data.

(d) Release, Publication and Use of Data

(1) The Recipient shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Recipient in the performance of this agreement, except to the extent such data may be subject to the Federal export control or national security laws or regulations, or unless otherwise provided in this paragraph of this clause or expressly set forth in this agreement.

(2) The Recipient agrees that to the extent it receives or is given access to data necessary for the performance of this award, which contain restrictive markings, the Recipient shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the contracting officer.

(e) Unauthorized Marking of Data

(1) Notwithstanding any other provisions of this agreement concerning inspection or acceptance, if any data delivered under this agreement are marked with the notices specified in paragraph (g)(2) or (g)(3) of this clause and use of such is not authorized by this clause, or if such data bears any other restrictive or limiting markings not authorized by this agreement, the Contracting Officer may at any time either return the data to the Recipient or cancel or ignore the markings. However, the following procedures shall apply prior to canceling or ignoring the markings.

(i) The Contracting Officer shall make written inquiry to the Recipient affording the Recipient 30 days from receipt of the inquiry to provide written justification to substantiate the propriety of the markings;

(ii) If the Recipient fails to respond or fails to provide written justification to substantiate the propriety of the markings within the 30-day period (or a longer time not exceeding 90 days approved in writing by the Contracting Officer for good cause shown), the Government shall have the right to cancel or ignore the markings at any time after said period and the data will no longer be made subject to any disclosure prohibitions.

(iii) If the Recipient provides written justification to substantiate the propriety of the markings within the period set in paragraph (e)(1)(i) of this clause, the Contracting Officer shall consider such written justification and determine whether or not the markings are to be cancelled or ignored. If the Contracting Officer determines that the markings are authorized, the Recipient shall be so notified in writing. If the Contracting Officer determines, with concurrence of the head of the contracting activity, that the markings are not authorized, the Contracting Officer shall furnish the Recipient a written determination, which determination shall become the final agency decision regarding the appropriateness of the markings unless the Recipient files suit in a court of competent jurisdiction within 90 days of receipt of the Contracting Officer's decision. The Government shall continue to abide by the markings under this paragraph (e)(1)(iii) until final resolution of the matter either by the Contracting Officer's determination becoming final (in which instance the Government shall thereafter have the right to cancel or ignore the markings at any time and the data will no longer be made subject to any disclosure prohibitions), or by final disposition of the matter by court decision if suit is filed.

(2) The time limits in the procedures set forth in paragraph (e)(1) of this clause may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request thereunder.

(f) Omitted or Incorrect Markings

(1) Data delivered to the Government without either the limited rights or restricted rights notice as authorized by paragraph (g) of this clause, or the copyright notice required by paragraph (c) of this clause, shall be deemed to have been furnished with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of such data. However, to the extent the data has not been disclosed without restriction outside the Government, the Recipient may request, within 6 months (or a longer time approved by the Contracting Officer for good cause shown) after delivery or such data, permission to have notices placed on qualifying data at the Recipient's expense, and the Contracting Officer may agree to do so if the Recipient:

(i) Identifies the data to which the omitted notice is to be applied;

(ii) Demonstrates that the omission of the notice was inadvertent;

(iii) Establishes that the use of the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability with respect to the disclosure, use, or reproduction of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(2) The Contracting Officer may also:

(i) Permit correction at the Recipient's expense of incorrect notices if the Recipient identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized, or

(ii) Correct any incorrect notices.

(g) Protection of Limited Rights Data and Restricted Computer Software

When data other than that listed in paragraphs (b)(1)(i), (ii), and (iii) of this clause are specified to be delivered under this agreement and qualify as either limited rights data or restricted computer software, if the Recipient desires to continue protection of such data, the Recipient shall withhold such data and not furnish them to the Government under this agreement. As a condition to this withholding, the Recipient shall identify the data being withheld and furnish form, fit, and function data in lieu thereof. Limited rights data that are formatted as a computer data base for delivery to the Government are to be treated as limited rights data and not restricted computer software.

(h) Subaward/Contract

The Recipient has the responsibility to obtain from its subrecipients/contractors all data and rights therein necessary to fulfill the Recipient's obligations to the Government under this agreement. If a subrecipient/contractor refuses to accept terms affording the Government such rights, the Recipient shall promptly bring such refusal to the attention of the Contracting Officer and not proceed with the subaward/contract award without further authorization.

(i) Additional Data Requirements

In addition to the data specified elsewhere in this agreement to be delivered, the Contracting Officer may, at any time during agreement performance or within a period of 3 years after acceptance of all items to be delivered under this agreement, order any data first produced or specifically used in the performance of this agreement. This clause is applicable to all data ordered under this subparagraph. Nothing contained in this subparagraph shall require the Recipient to deliver any data the withholding of which is authorized by this clause, or data which are specifically identified in this agreement as not subject to this clause. When data are to be delivered under this subparagraph, the Recipient will be compensated for converting the data into the prescribed form, for reproduction, and for delivery.

(j) The recipient agrees, except as may be otherwise specified in this award for specific data items listed as not subject to this paragraph, that the Contracting Officer or an authorized representative may, up to three years after acceptance of all items to be delivered under this award, inspect at the Recipient's facility any data withheld pursuant to paragraph (g) of this clause, for purposes

of verifying the Recipient's assertion pertaining to the limited rights or restricted rights status of the data or for evaluating work performance. Where the Recipient whose data are to be inspected demonstrates to the Contracting Officer that there would be a possible conflict of interest if the inspection were made by a particular representative, the Contracting Officer shall designate an alternate inspector.

As prescribed in 2 CFR 910.362(d)(1), the following Alternate I and/or II may be inserted in the clause in the award instrument.

Alternate I:

(g)(2) Notwithstanding paragraph (g)(1) of this clause, the agreement may identify and specify the delivery of limited rights data, or the Contracting Officer may require by written request the delivery of limited rights data that has been withheld or would otherwise be withholdable. If delivery of such data is so required, the Recipient may affix the following "Limited Rights Notice" to the data and the Government will thereafter treat the data, in accordance with such Notice:

Limited Rights Notice

(a) These data are submitted with limited rights under Government agreement No. _____ (and subaward/contract No. _____, if appropriate). These data may be reproduced and used by the Government with the express limitation that they will not, without written permission of the Recipient, be used for purposes of manufacture nor disclosed outside the Government; except that the Government may disclose these data outside the Government for the following purposes, if any, provided that the Government makes such disclosure subject to prohibition against further use and disclosure:

(1) Use (except for manufacture) by Federal support services contractors within the scope of their contracts;

(2) This "limited rights data" may be disclosed for evaluation purposes under the restriction that the "limited rights data" be retained in confidence and not be further disclosed;

(3) This "limited rights data" may be disclosed to other contractors participating in the Government's program of which this Recipient is a part for information or use (except for manufacture) in connection with the work performed under their awards and under the restriction that the "limited rights data" be retained in confidence and not be further disclosed;

(4) This "limited rights data" may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the "limited rights data" be retained in confidence and not be further disclosed; and

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(5) Release to a foreign government, or instrumentality thereof, as the interests of the United States Government may require, for information or evaluation, or for emergency repair or overhaul work by such government. This Notice shall be marked on any reproduction of this data in whole or in part.

(b) This Notice shall be marked on any reproduction of these data, in whole or in part.

(End of notice)

Alternate II:

(g)(3)(i) Notwithstanding paragraph (g)(1) of this clause, the agreement may identify and specify the delivery of restricted computer software, or the Contracting Officer may require by written request the delivery of restricted computer software that has been withheld or would otherwise be withholdable. If delivery of such computer software is so required, the Recipient may affix the following "Restricted Rights Notice" to the computer software and the Government will thereafter treat the computer software, subject to paragraphs (e) and (f) of this clause, in accordance with the Notice.

Restricted Rights Notice

(a) This computer software is submitted with restricted rights under Government Agreement No. _____ (and subaward/contract _____, if appropriate). It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this Notice or as otherwise expressly stated in the agreement.

(b) This computer software may be—

(1) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(2) Used or copied for use in a backup computer if any computer or which it was acquired is inoperative;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of the derivative software are made subject to the same restricted rights;

(5) Disclosed to and reproduced for use by support service Recipients in accordance with paragraph (b)(1) through (4) of this clause, provided the Government makes such disclosure or reproduction subject to these restricted rights; and

(6) Used or copied for use in or transferred to a replacement computer.

(c) Notwithstanding the foregoing, if this computer software is published copyrighted computer software, it is licensed to the Government, without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause.

(d) Any other rights or limitations regarding the use, duplication, or disclosure of this computer software are to be expressly stated, in, or incorporated in, the agreement.

(e) This Notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of notice)

(ii) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

Restricted Rights Notice

Use, reproduction, or disclosure is subject to restrictions set forth in agreement No. _____ (and subaward/contract _____, if appropriate) with _____ (name of Recipient and subrecipient/contractor).

(End of notice)

(iii) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, it will be presumed to be published copyrighted computer software licensed to the government without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause, unless the Recipient includes the following statement with such copyright notice: "Unpublished—rights reserved under the Copyright Laws of the United States."

(End of clause)

4. Rights in Data—Programs Covered Under Special Data Statutes

(a) Definitions

Computer Data Bases, as used in this clause, means a collection of data in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

Computer software, as used in this clause, means

(i) computer programs which are data comprising a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations and

(ii) data comprising source code listings, design details, algorithms, processes, flow charts, formulae and related material that would enable the computer program to be produced, created or compiled. The term does not include computer data bases.

Data, as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer

software. The term does not include information incidental to administration, such as financial, administrative, cost or pricing or management information.

Form, fit, and function data, as used in this clause, means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability as well as data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements except that for computer software it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithm, process, formulae, and flow charts of the software.

Limited rights data, as used in this clause, means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

Restricted computer software, as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and confidential or privileged; or is published copyrighted computer software; including modifications of such computer software.

Protected data, as used in this clause, means technical data or commercial or financial data first produced in the performance of the award which, if it had been obtained from and first produced by a non-federal party, would be a trade secret or commercial or financial information that is privileged or confidential under the meaning of 5 U.S.C. 552(b)(4) and which data is marked as being protected data by a party to the award.

Protected rights, as used in this clause, mean the rights in protected data set forth in the Protected Rights Notice of paragraph (g) of this clause.

Technical data, as used in this clause, means that data which are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.

Unlimited rights, as used in this clause, means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(b) Allocation of Rights

(1) Except as provided in paragraph (c) of this clause regarding copyright, the Government shall have unlimited rights in—

(i) Data specifically identified in this agreement as data to be delivered without restriction;

(ii) Form, fit, and function data delivered under this agreement;

(iii) Data delivered under this agreement (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under this agreement; and

(iv) All other data delivered under this agreement unless provided otherwise for protected data in accordance with paragraph (g) of this clause or for limited rights data or restricted computer software in accordance with paragraph (h) of this clause.

(2) The Recipient shall have the right to—

(i) Protect rights in protected data delivered under this agreement in the manner and to the extent provided in paragraph (g) of this clause;

(ii) Withhold from delivery those data which are limited rights data or restricted computer software to the extent provided in paragraph (h) of this clause;

(iii) Substantiate use of, add, or correct protected rights or copyrights notices and to take other appropriate action, in accordance with paragraph (e) of this clause; and

(iv) Establish claim to copyright subsisting in data first produced in the performance of this agreement to the extent provided in paragraph (c)(1) of this clause.

(c) Copyright

(1) Data first produced in the performance of this agreement. Except as otherwise specifically provided in this agreement, the Recipient may establish, without the prior approval of the Contracting Officer, claim to copyright subsisting in any data first produced in the performance of this agreement. If claim to copyright is made, the Recipient shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship (including agreement number) to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For such copyrighted data, including computer software, the Recipient grants to the Government, and others acting on its behalf, a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government, for all such data.

(2) Data not first produced in the performance of this agreement. The Recipient shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this agreement any data that are not first produced in the performance of this agreement and that contain the copyright notice of 17 U.S.C. 401 or 402, unless the Recipient identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in paragraph (c)(1) of this clause; provided,

however, that if such data are computer software, the Government shall acquire a copyright license as set forth in paragraph (h)(3) of this clause if included in this agreement or as otherwise may be provided in a collateral agreement incorporated or made a part of this agreement.

(3) Removal of copyright notices. The Government agrees not to remove any copyright notices placed on data pursuant to this paragraph (c), and to include such notices on all reproductions of the data.

(d) Release, Publication and Use of Data

(1) The Receipt shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Recipient in the performance of this contract, except to the extent such data may be subject to the Federal export control or national security laws or regulations, or unless otherwise provided in this paragraph of this clause or expressly set forth in this contract.

(2) The Recipient agrees that to the extent it receives or is given access to data necessary for the performance of this agreement which contain restrictive markings, the Recipient shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the Contracting Officer.

(e) Unauthorized Marking of Data

(1) Notwithstanding any other provisions of this agreement concerning inspection or acceptance, if any data delivered under this agreement are marked with the notices specified in paragraph (g)(2) or (g)(3) of this clause and use of such is not authorized by this clause, or if such data bears any other restrictive or limiting markings not authorized by this agreement, the Contracting Officer may at any time either return the data to the Recipient or cancel or ignore the markings. However, the following procedures shall apply prior to canceling or ignoring the markings.

(i) The Contracting Officer shall make written inquiry to the Recipient affording the Recipient 30 days from receipt of the inquiry to provide written justification to substantiate the propriety of the markings;

(ii) If the Recipient fails to respond or fails to provide written justification to substantiate the propriety of the markings within the 30-day period (or a longer time not exceeding 90 days approved in writing by the Contracting Officer for good cause shown), the Government shall have the right to cancel or ignore the markings at any time after said period and the data will no longer be made subject to any disclosure prohibitions.

(iii) If the Recipient provides written justification to substantiate the propriety of the markings within the period set in subdivision (e)(1)(i) of this clause, the Contracting Officer shall consider such written justification and determine whether or not

the markings are to be cancelled or ignored. If the Contracting Officer determines that the markings are authorized, the Recipient shall be so notified in writing. If the Contracting Officer determines, with concurrence of the head of the contracting activity, that the markings are not authorized, the Contracting Officer shall furnish the Recipient a written determination, which determination shall become the final agency decision regarding the appropriateness of the markings unless the Recipient files suit in a court of competent jurisdiction within 90 days of receipt of the Contracting Officer's decision. The Government shall continue to abide by the markings under this subdivision (e)(1)(iii) until final resolution of the matter either by the Contracting Officer's determination become final (in which instance the Government shall thereafter have the right to cancel or ignore the markings at any time and the data will no longer be made subject to any disclosure prohibitions), or by final disposition of the matter by court decision if suit is filed.

(2) The time limits in the procedures set forth in paragraph (e)(1) of this clause may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request thereunder.

(f) Omitted or Incorrect Markings

(1) Data delivered to the Government without either the limited rights or restricted rights notice as authorized by paragraph (g) of this clause, or the copyright notice required by paragraph (c) of this clause, shall be deemed to have been furnished with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of such data. However, to the extent the data has not been disclosed without restriction outside the Government, the Recipient may request, within 6 months (or a longer time approved by the Contracting Officer for good cause shown) after delivery of such data, permission to have notices placed on qualifying data at the Recipient's expense, and the Contracting Officer may agree to do so if the Recipient—

(i) Identifies the data to which the omitted notice is to be applied;

(ii) Demonstrates that the omission of the notice was inadvertent;

(iii) Establishes that the use of the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability with respect to the disclosure, use, or reproduction of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(2) The Contracting Officer may also:

(i) Permit correction at the Recipient's expense of incorrect notices if the Recipient identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized; or

(ii) Correct any incorrect notices.

(g) Rights to Protected Data

(1) The Recipient may, with the concurrence of DOE, claim and mark as protected data, any data first produced in the performance of this award that would have been treated as a trade secret if developed at private expense. Any such claimed "protected data" will be clearly marked with the following Protected Rights Notice, and will be treated in accordance with such Notice, subject to the provisions of paragraphs (e) and (f) of this clause.

Protected Rights Notice

These protected data were produced under agreement no. _____ with the U.S. Department of Energy and may not be published, disseminated, or disclosed to others outside the Government until (Note:) The period of protection of such data is fully negotiable, but cannot exceed the applicable statutorily authorized maximum), unless express written authorization is obtained from the recipient. Upon expiration of the period of protection set forth in this Notice, the Government shall have unlimited rights in this data. This Notice shall be marked on any reproduction of this data, in whole or in part.

(End of notice)

(2) Any such marked Protected Data may be disclosed under obligations of confidentiality for the following purposes:

(a) For evaluation purposes under the restriction that the "Protected Data" be retained in confidence and not be further disclosed; or

(b) To subcontractors or other team members performing work under the Government's (insert name of program or other applicable activity) program of which this award is a part, for information or use in connection with the work performed under their activity, and under the restriction that the Protected Data be retained in confidence and not be further disclosed.

(3) The obligations of confidentiality and restrictions on publication and dissemination shall end for any Protected Data.

(a) At the end of the protected period;

(b) If the data becomes publicly known or available from other sources without a breach of the obligation of confidentiality with respect to the Protected Data;

(c) If the same data is independently developed by someone who did not have access to the Protected Data and such data is made available without obligations of confidentiality; or

(d) If the Recipient disseminates or authorizes another to disseminate such data without obligations of confidentiality.

(4) However, the Recipient agrees that the following types of data are not considered to be protected and shall be provided to the

Government when required by this award without any claim that the data are Protected Data. The parties agree that notwithstanding the following lists of types of data, nothing precludes the Government from seeking delivery of additional data in accordance with this award, or from making publicly available additional non-protected data, nor does the following list constitute any admission by the Government that technical data not on the list is Protected Data. (Note: It is expected that this paragraph will specify certain types of mutually agreed upon data that will be available to the public and will not be asserted by the recipient/contractor as limited rights or protected data).

(5) The Government's sole obligation with respect to any protected data shall be as set forth in this paragraph (g).

(h) Protection of Limited Rights Data

When data other than that listed in paragraphs (b)(1)(i), (ii), and (iii) of this clause are specified to be delivered under this agreement and such data qualify as either limited rights data or restricted computer software, the Recipient, if the Recipient desires to continue protection of such data, shall withhold such data and not furnish them to the Government under this agreement. As a condition to this withholding the Recipient shall identify the data being withheld and furnish form, fit, and function data in lieu thereof.

(i) Subaward/Contract

The Recipient has the responsibility to obtain from its subrecipients/contractors all data and rights therein necessary to fulfill the Recipient's obligations to the Government under this agreement. If a subrecipient/contractor refuses to accept terms affording the Government such rights, the Recipient shall promptly bring such refusal to the attention of the Contracting Officer and not proceed with subaward/contract award without further authorization.

(j) Additional Data Requirements

In addition to the data specified elsewhere in this agreement to be delivered, the Contracting Officer may, at any time during agreement performance or within a period of 3 years after acceptance of all items to be delivered under this agreement, order any data first produced or specifically used in the performance of this agreement. This clause is applicable to all data ordered under this subparagraph. Nothing contained in this subparagraph shall require the Recipient to deliver any data the withholding of which is authorized by this clause or data which are specifically identified in this agreement as not subject to this clause. When data are to be delivered under this subparagraph, the Recipient will be compensated for converting the data into the prescribed form, for reproduction, and for delivery.

(k) The Recipient agrees, except as may be otherwise specified in this agreement for

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specific data items listed as not subject to this paragraph, that the Contracting Officer or an authorized representative may, up to three years after acceptance of all items to be delivered under this contract, inspect at the Recipient's facility any data withheld pursuant to paragraph (h) of this clause, for purposes of verifying the Recipient's assertion pertaining to the limited rights or restricted rights status of the data or for evaluating work performance. Where the Recipient whose data are to be inspected demonstrates to the Contracting Officer that there would be a possible conflict of interest if the inspection were made by a particular representative, the Contracting Officer shall designate an alternate inspector.

As prescribed in 2 CFR 910.362(e)(2), the following Alternate I and/or II may be inserted in the clause in the award instrument.

Alternate I

(h)(2) Notwithstanding paragraph (h)(1) of this clause, the agreement may identify and specify the delivery of limited rights data, or the Contracting Officer may require by written request the delivery of limited rights data that has been withheld or would otherwise be withholdable. If delivery of such data is so required, the Recipient may affix the following "Limited Rights Notice" to the data and the Government will thereafter treat the data, in accordance with such Notice:

Limited Rights Notice

(a) These data are submitted with limited rights under Government agreement No. _____ (and subaward/contract No. _____, if appropriate). These data may be reproduced and used by the Government with the express limitation that they will not, without written permission of the Recipient, be used for purposes of manufacture nor disclosed outside the Government; except that the Government may disclose these data outside the Government for the following purposes, if any, provided that the Government makes such disclosure subject to prohibition against further use and disclosure:

(1) Use (except for manufacture) by Federal support services contractors within the scope of their contracts;

(2) This "limited rights data" may be disclosed for evaluation purposes under the restriction that the "limited rights data" be retained in confidence and not be further disclosed;

(3) This "limited rights data" may be disclosed to other contractors participating in the Government's program of which this Recipient is a part for information or use (except for manufacture) in connection with the work performed under their awards and under the restriction that the "limited

rights data" be retained in confidence and not be further disclosed;

(4) This "limited rights data" may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the "limited rights data" be retained in confidence and not be further disclosed; and

(5) Release to a foreign government, or instrumentality thereof, as the interests of the United States Government may require, for information or evaluation, or for emergency repair or overhaul work by such government. This Notice shall be marked on any reproduction of this data in whole or in part.

(b) This Notice shall be marked on any reproduction of these data, in whole or in part.

(End of notice)

Alternate II

(h)(3)(i) Notwithstanding paragraph (h)(1) of this clause, the agreement may identify and specify the delivery of restricted computer software, or the Contracting Officer may require by written request the delivery of restricted computer software that has been withheld or would otherwise be withholdable. If delivery of such computer software is so required, the Recipient may affix the following "Restricted Rights Notice" to the computer software and the Government will thereafter treat the computer software, subject to paragraphs (d) and (e) of this clause, in accordance with the Notice:

Restricted Rights Notice

(a) This computer software is submitted with restricted rights under Government Agreement No. _____ (and subaward/contract _____, if appropriate). It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (c) of this Notice or as otherwise expressly stated in the agreement.

(b) This computer software may be—

(1) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(2) Used or copies for use in a backup computer if any computer for which it was acquired is inoperative

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of the derivative software are made subject to the same restricted rights;

(5) Disclosed to and reproduced for use by Federal support service Contractors in accordance with paragraphs (b)(1) through (4) of this clause, provided the Government makes such disclosure or reproduction subject to these restricted rights; and

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(6) Used or copies for use in or transferred to a replacement computer.

(c) Notwithstanding the foregoing, if this computer software is published copyrighted computer software, it is licensed to the Government, without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause.

(d) Any other rights or limitations regarding the use, duplication, or disclosure of this computer software are to be expressly stated in, or incorporated in, the agreement.

(e) This Notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of notice)

(ii) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

Restricted Rights Notice

Use, reproduction, or disclosure is subject to restrictions set forth in Agreement No. _____ (and subaward/contract _____, if appropriate) with _____ (name of Recipient and subrecipient/contractor).

(End of notice)

(iii) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, it will be presumed to be published copyrighted computer software licensed to the Government without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause, unless the Recipient includes the following statement with such copyright notice: “Unpublished—rights reserved under the Copyright Laws of the United States.”

(End of clause)

[79 FR 76024, Dec. 19, 2014, as amended at 87 FR 15320, Mar. 18, 2022]

Subpart E—Cost Principles

§ 910.401 Application to M&O's.

In accordance with 48 CFR 970.3002-1 and 970.3101-00-70, a Federally Funded Research Center (FFRDC) which is also a designated DOE Management and Operating (M&O) contract must follow the cost accounting standards (CAS) contained in 48 CFR part 30 and must follow the appropriate Cost Principles contained in 48 CFR part 31.

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Subpart F—Audit Requirements for For-Profit Entities

GENERAL

§ 910.500 Purpose.

This Part follows the same format as 2 CFR 200.500. We purposely did not renumber the paragraphs within this part so that auditors and recipients can compare this to the single audit requirements contained in 2 CFR 200.500.

AUDITS

§ 910.501 Audit requirements.

(a) *Audit required.* A for-profit entity that expends \$750,000 or more during the non-Federal entity's fiscal year in DOE awards must have a compliance audit conducted for that year in accordance with the provisions of this Part.

(b) *Compliance audit.* (1) If a for-profit entity has one or more DOE awards with expenditures of \$750,000 or more during the for-profit entity's fiscal year, they must have a compliance audit for each of the awards with \$750,000 or more in expenditures. A compliance audit should comply with the applicable provisions in § 910.514—Scope of Audit. The remaining awards do not require, individually or in the aggregate, a compliance audit.

(2) If a for-profit entity receives more than one award from DOE with a sum total of expenditures of \$750,000 or more during the for-profit entity's fiscal year, but does not have any single award with expenditures of \$750,000 or more; the entity must determine whether any or all of the awards have common compliance requirements (*i.e.*, are considered a cluster of awards) and determine the total expenditures of the awards with common compliance requirements. A compliance audit is required for the largest cluster of awards (if multiple clusters of awards exist) or the largest award not in a cluster of awards, whichever corresponding expenditure total is greater. A compliance audit should comply with the applicable provisions in § 910.514—Scope of Audit. The remaining awards do not require, individually or in the aggregate, a compliance audit;

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(3) If a for-profit entity receives one or more awards from DOE with a sum total of expenditures less than \$750,000, no compliance audit is required;

(4) If the for-profit entity is a sub-recipient, 2 CFR 200.501(h) requires that the pass-through entity establish appropriate monitoring and controls to ensure the sub-recipient complies with award requirements. These compliance audits must be conducted in accordance with 2 CFR 200.514 Scope of audit

(c) *Program-specific audit election.* Not applicable.

(d) *Exemption when Federal awards expended are less than \$750,000.* A for-profit entity that expends less than \$750,000 during the for-profit's fiscal year in DOE awards is exempt from DOE audit requirements for that year, except as noted in § 910.503 Relation to other audit requirements, but records must be available for review or audit by appropriate officials of the Federal agency, pass-through entity, and Government Accountability Office (GAO).

(e) *Federally Funded Research and Development Centers (FFRDC).* Management of an auditee that owns or operates a FFRDC may elect to treat the FFRDC as a separate entity for purposes of this part.

(f) *Subrecipients and Contractors.* An auditee may simultaneously be a recipient, a subrecipient, and a contractor. Federal awards expended as a recipient are subject to audit under this part. The payments received for goods or services provided as a contractor are not Federal awards. The provisions of 2 CFR 200.331, Subrecipient and contractor determinations should be considered in determining whether payments constitute a Federal award or a payment for goods or services provided as a contractor.

(g) *Compliance responsibility for contractors.* In most cases, the auditee's compliance responsibility for contractors is only to ensure that the procurement, receipt, and payment for goods and services comply with Federal statutes, regulations, and the terms and conditions of Federal awards. Federal award compliance requirements normally do not pass through to contractors. However, the auditee is responsible for ensuring compliance for procurement transactions which are struc-

tured such that the contractor is responsible for program compliance or the contractor's records must be reviewed to determine program compliance. Also, when these procurement transactions relate to a major program, the scope of the audit must include determining whether these transactions are in compliance with Federal statutes, regulations, and the terms and conditions of Federal awards.

(h) *For-profit subrecipient.* Since this part does not apply to for-profit subrecipients, the pass-through entity is responsible for establishing requirements, as necessary, to ensure compliance by for-profit subrecipients to DOE Federal award requirements. The agreement with the for-profit subrecipient should describe applicable compliance requirements and the for-profit subrecipient's compliance responsibility. Methods to ensure compliance for Federal awards made to for-profit subrecipients may include pre-award audits, monitoring during the agreement, and post-award audits. See also 2 CFR 200.332, Requirements for pass-through entities.

[79 FR 76024, Dec. 19, 2014, as amended at 80 FR 57511, Sept. 24, 2015; 87 FR 15320, Mar. 18, 2022]

§ 910.502 Basis for determining DOE awards expended.

(a) *Determining Federal awards expended.* The determination of when a Federal award is expended must be based on when the activity related to the DOE award occurs. Generally, the activity pertains to events that require the non-Federal entity to comply with Federal statutes, regulations, and the terms and conditions of DOE awards, such as: Expenditure/expense transactions associated with awards including grants, cost-reimbursement contracts under the FAR, compacts with Indian Tribes, cooperative agreements, and direct appropriations; the disbursement of funds to subrecipients; the use of loan proceeds under loan and loan guarantee programs; the receipt of property; the receipt of surplus property; the receipt or use of program income; the distribution or use of food commodities; the disbursement of amounts entitling the for-profit entity

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to an interest subsidy; and the period when insurance is in force.

(b) *Loan and loan guarantees (loans).* Loan and loan guarantees issued by the DOE Loan Program Office corresponding to Title XVII of the Energy Policy Act of 2005, as amended, 42 U.S.C. 16511–16516 (“Title XVII”) are exempt from these provisions.

(1) Not applicable.

(2) Not applicable.

(3) Not applicable.

(c) Not applicable.

(d) *Prior loan and loan guarantees (loans).* See paragraph (b) of this section.

(e) *Endowment funds.* The cumulative balance of DOE awards for endowment funds that are federally restricted are considered DOE awards expended in each audit period in which the funds are still restricted.

(f) *Free rent.* Free rent received by itself is not considered a DOE award expended under this Part. However, free rent received as part of a DOE award to carry out a DOE program must be included in determining DOE awards expended and subject to audit under this part.

(g) *Valuing non-cash assistance.* DOE non-cash assistance, such as free rent, food commodities, donated property, or donated surplus property, must be valued at fair market value at the time of receipt or the assessed value provided by DOE.

(h) Not applicable.

(i) Not applicable.

(j) Not applicable.

[87 FR 15320, Mar. 18, 2022]

§910.503 Relation to other audit requirements.

(a) An audit conducted in accordance with this Part must be in lieu of any financial audit of DOE awards which a for-profit entity is required to undergo under any other Federal statute or regulation. To the extent that such audit provides DOE with the information it requires to carry out its responsibilities under Federal statute or regulation, DOE must rely upon and use that information.

(b) Notwithstanding paragraph (a) of this section, DOE, Inspectors General, or GAO may conduct or arrange for additional audits which are necessary to

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carry out its responsibilities under Federal statute or regulation. The provisions of this Part do not authorize any for-profit entity to constrain, in any manner, DOE from carrying out or arranging for such additional audits, except that DOE must plan such audits to not be duplicative of other audits of DOE. Any additional audits must be planned and performed in such a way as to build upon work performed, including the audit documentation, sampling, and testing already performed, by other auditors.

(c) The provisions of this Part do not limit the authority of DOE to conduct, or arrange for the conduct of, audits and evaluations of DOE awards, nor limit the authority of any Federal agency Inspector General or other Federal official.

(d) DOE to pay for additional audits. If DOE conducts or arranges for additional audits it must, consistent with other applicable Federal statutes and regulations, arrange for funding the full cost of such additional audits.

(e) Not applicable.

§910.504 Frequency of audits.

Audits required by this Part must be performed annually.

(a) Not applicable.

(b) Not applicable.

§910.505 Sanctions.

In cases of continued inability or unwillingness to have an audit conducted in accordance with this part, DOE and pass-through entities must take appropriate action as provided in 2 CFR 200.339, Remedies for noncompliance.

[79 FR 76024, Dec. 19, 2014, as amended at 87 FR 15321, Mar. 18, 2022]

§910.506 Audit costs.

See 2 CFR 200.425 Audit services.

§910.507 Compliance audits.

(a) *Program-specific audit guide available.* In some cases, a program-specific audit guide will be available to provide specific guidance to the auditor with respect to internal controls, compliance requirements, suggested audit procedures, and audit reporting requirements. A listing of current program-specific audit guides can be found

on the OMB website in the compliance supplement, in part 8, appendix VI, Program-Specific Audit Guides, which includes a website where a copy of the guide can be obtained. When a current program-specific audit guide is available, the auditor must follow generally accepted government auditing standards (GAGAS) and the guide when performing a compliance audit.

(b) *Program-specific audit guide not available.* (1) When a program-specific audit guide is not available, the auditee and auditor must conduct the compliance audit in accordance with GAAS and GAGAS.

(2) If audited financial statements are available, for-profit recipients should submit audited financial statements to DOE as a part of the compliance audit. (If the recipient is a subsidiary for which separate financial statements are not available, the recipient may submit the financial statements of the consolidated group.)

(3) The auditor must:

(i) Not applicable;

(ii) Obtain an understanding of internal controls and perform tests of internal controls over the DOE program consistent with the requirements of §910.514 Scope of audit;

(iii) Perform procedures to determine whether the auditee has complied with Federal statutes, regulations, and the terms and conditions of DOE awards that could have a direct and material effect on the DOE program consistent with the requirements of §910.514 Scope of audit;

(iv) Follow up on prior audit findings, perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the auditee in accordance with the requirements of §910.511 Audit findings follow-up, and report, as a current year audit finding, when the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding; and

(v) Report any audit findings consistent with the requirements of §910.516 Audit findings.

(4) The auditor's report(s) may be in the form of either combined or separate reports and may be organized differently from the manner presented in

this section. The auditor's report(s) must state that the audit was conducted in accordance with this part and include the following:

(i) An opinion (or disclaimer of opinion) as to whether the financial statement(s) (if available) of the DOE program is presented fairly in all material respects in accordance with the stated accounting policies;

(ii) A report on internal control related to the DOE program, which must describe the scope of testing of internal control and the results of the tests;

(iii) A report on compliance which includes an opinion (or disclaimer of opinion) as to whether the auditee complied with laws, regulations, and the terms and conditions of DOE awards which could have a direct and material effect on the DOE program; and

(iv) A schedule of findings and questioned costs for the DOE program that includes a summary of the auditor's results relative to the DOE program in a format consistent with §910.515 Audit reporting, paragraph (d)(1) and findings and questioned costs consistent with the requirements of §910.515 Audit reporting, paragraph (d)(3).

(c) *Report submission for program-specific audits.* (1) The audit must be completed and the reporting required by paragraph (c)(2) or (3) of this section submitted within the earlier of 30 calendar days after receipt of the auditor's report(s), or nine months after the end of the audit period, unless a different period is specified in a program-specific audit guide. Unless restricted by Federal law or regulation, the auditee must make report copies available for public inspection. Auditees and auditors must ensure that their respective parts of the reporting package do not include protected personally identifiable information.

(2) When a program-specific audit guide is available, the compliance audits must be submitted (along with audited financial statements if audited financial statements are available), to the appropriate DOE Contracting Officer as well as to the DOE Office of the Chief Financial Officer.

(3) When a program-specific audit guide is not available, the reporting

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package for a program-specific audit must consist of, a summary schedule of prior audit findings, and a corrective action plan as described in paragraph (b)(2) of this section, and the auditor's report(s) described in paragraph (b)(4) of this section. The compliance audit must be submitted (along with audited financial statements if audited financial statements are available), to the appropriate DOE Contracting Officer as well as to the DOE Office of the Chief Financial Officer.

(d) *Other sections of this part may apply.* Compliance audits are subject to:

(1) Section 910.500 Purpose through § 910.503 Relation to other audit requirements, paragraph (d);

(2) Section 910.504 Frequency of audits through § 910.506 Audit costs;

(3) Section 910.508 Auditee responsibilities and § 910.509 Auditor selection;

(4) Section 910.511 Audit findings follow-up;

(5) Section 910.512 Report submission, paragraphs (e) through (h);

(6) Section 910.513 Responsibilities;

(7) Section 910.516 Audit findings and § 910.517 Audit documentation;

(8) Section 910.521 Management decision; and

(9) Other referenced provisions of this part unless contrary to the provisions of this section, a program-specific audit guide, or program statutes and regulations.

[87 FR 15321, Mar. 18, 2022]

AUDITEES

§ 910.508 Auditee responsibilities.

The auditee must:

(a) Procure or otherwise arrange for the audit required by this Part in accordance with § 910.509 Auditor selection, and ensure it is properly performed and submitted when due in accordance with § 910.512 Report submission.

(b) Submit appropriate financial statements (if available).

(c) Submit the schedule of expenditures of DOE awards in accordance with § 910.510 Financial statements.

(d) Promptly follow up and take corrective action on audit findings, including preparation of a summary

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schedule of prior audit findings and a corrective action plan in accordance with § 910.511 Audit findings follow-up, paragraph (b) and § 910.511 Audit findings follow-up, paragraph (c), respectively.

(e) Provide the auditor with access to personnel, accounts, books, records, supporting documentation, and other information as needed for the auditor to perform the audit required by this Part.

§ 910.509 Auditor selection.

(a) *Auditor procurement.* When procuring audit services, the objective is to obtain high-quality audits. In requesting proposals for audit services, the objectives and scope of the audit must be made clear and the for-profit entity must request a copy of the audit organization's peer review report which the auditor is required to provide under GAGAS. Factors to be considered in evaluating each proposal for audit services include the responsiveness to the request for proposal, relevant experience, availability of staff with professional qualifications and technical abilities, the results of peer and external quality control reviews, and price. Whenever possible, the auditee must make positive efforts to utilize small businesses, minority-owned firms, and women's business enterprises, in procuring audit services as stated in 2 CFR 200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms, or the FAR (48 CFR part 42), as applicable.

(b) *Restriction on auditor preparing indirect cost proposals.* An auditor who prepares the indirect cost proposal or cost allocation plan may not also be selected to perform the audit required by this Part when the indirect costs recovered by the auditee during the prior year exceeded \$1 million. This restriction applies to the base year used in the preparation of the indirect cost proposal or cost allocation plan and any subsequent years in which the resulting indirect cost agreement or cost allocation plan is used to recover costs.

(c) *Use of Federal auditors.* Federal auditors may perform all or part of the work required under this Part if they

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comply fully with the requirements of this Part.

§910.510 Financial statements.

(a) *Financial statements.* If available, the auditee must submit financial statements that reflect its financial position, results of operations or changes in net assets, and, where appropriate, cash flows for the fiscal year audited. The financial statements must be for the same organizational unit and fiscal year that is chosen to meet the requirements of this Part. However, for-profit entity-wide financial statements may also include departments, agencies, and other organizational units that have separate audits in accordance with §910.514 Scope of audit, paragraph (a) and prepare separate financial statements.

(b) *Schedule of expenditures of DOE awards.* The auditee must prepare a schedule of expenditures of DOE awards for the period covered by the auditee's fiscal year which must include the total DOE awards expended as determined in accordance with §910.502 Basis for determining DOE awards expended. While not required, the auditee may choose to provide information requested by DOE and pass-through entities to make the schedule easier to use. For example, when a DOE program has multiple DOE award years, the auditee may list the amount of DOE awards expended for each DOE award year separately. At a minimum, the schedule must:

(1) List individual DOE programs. For a cluster of programs, provide the cluster name, list individual DOE programs within the cluster of programs. For R&D, total DOE awards expended must be shown by individual DOE award and major subdivision within DOE. For example, the National Institutes of Health is a major subdivision in the Department of Health and Human Services.

(2) Not applicable.

(3) Provide total DOE awards expended for each individual DOE program and the CFDA number. For a cluster of programs also provide the total for the cluster.

(4) Not applicable.

(5) Not applicable.

(6) Include notes that describe that significant accounting policies used in preparing the schedule, and note whether or not the for-profit entity elected to use the 10% de minimis cost rate as covered in 2 CFR 200.414 Indirect (F&A) costs.

§910.511 Audit findings follow-up.

(a) *General.* The auditee is responsible for follow-up and corrective action on all audit findings. As part of this responsibility, the auditee must prepare a summary schedule of prior audit findings. The auditee must also prepare a corrective action plan for current year audit findings. The summary schedule of prior audit findings and the corrective action plan must include the reference numbers the auditor assigns to audit findings under §910.516 Audit findings, paragraph (c). Since the summary schedule may include audit findings from multiple years, it must include the fiscal year in which the finding initially occurred. The corrective action plan and summary schedule of prior audit findings must include findings relating to the financial statements which are required to be reported in accordance with GAGAS.

(b) *Summary schedule of prior audit findings.* The summary schedule of prior audit findings must report the status of all audit findings included in the prior audit's schedule of findings and questioned costs. The summary schedule must also include audit findings reported in the prior audit's summary schedule of prior audit findings except audit findings listed as corrected in accordance with paragraph (b)(1) of this section, or no longer valid or not warranting further action in accordance with paragraph (b)(3) of this section.

(1) When audit findings were fully corrected, the summary schedule need only list the audit findings and state that corrective action was taken.

(2) When audit findings were not corrected or were only partially corrected, the summary schedule must describe the reasons for the finding's recurrence and planned corrective action, and any partial corrective action taken. When corrective action taken is significantly different from corrective action previously reported in a corrective action

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plan or in DOE's or pass-through entity's management decision, the summary schedule must provide an explanation.

(3) When the auditee believes the audit findings are no longer valid or do not warrant further action, the reasons for this position must be described in the summary schedule. A valid reason for considering an audit finding as not warranting further action is that all of the following have occurred:

(i) Two years have passed since the audit report in which the finding occurred was submitted to DOE;

(ii) DOE is not currently following up with the auditee on the audit finding; and

(iii) A management decision was not issued.

(c) *Corrective action plan.* At the completion of the audit, the auditee must prepare, in a document separate from the auditor's findings described in §910.516 Audit findings, a corrective action plan to address each audit finding included in the current year auditor's reports. The corrective action plan must provide the name(s) of the contact person(s) responsible for corrective action, the corrective action planned, and the anticipated completion date. If the auditee does not agree with the audit findings or believes corrective action is not required, then the corrective action plan must include an explanation and specific reasons.

§910.512 Report submission.

(a) *General.* (1) The audit must be completed and the reporting package described in paragraph (c) of this section must be submitted within the earlier of 30 calendar days after receipt of the auditor's report(s), or nine months after the end of the audit period. If the due date falls on a Saturday, Sunday, or Federal holiday, the reporting package is due the next business day.

(2) Unless restricted by Federal statutes or regulations, the auditee must make copies available for public inspection. Auditees and auditors must ensure that their respective parts of the reporting package do not include protected personally identifiable information.

(b) *Data collection.* See paragraph (b)(1) of this section:

(1) A senior level representative of the auditee (*e.g.*, director of finance, chief executive officer, or chief financial officer) must sign a statement to be included as part of the reporting package that says that the auditee complied with the requirements of this Part, the reporting package does not include protected personally identifiable information, and the information included in its entirety is accurate and complete.

(2) Not applicable.

(3) Not applicable.

(c) *Reporting package.* The reporting package must include the:

(1) Financial statements (if available) and schedule of expenditures of DOE awards discussed in §910.510 Financial statements, paragraphs (a) and (b), respectively;

(2) Summary schedule of prior audit findings discussed in §910.511 Audit findings follow-up, paragraph (b);

(3) Auditor's report(s) discussed in §910.515 Audit reporting; and

(4) Corrective action plan discussed in §910.511 Audit findings follow-up, paragraph (c).

(d) *Submission to DOE.* The auditee must electronically submit the compliance reporting package described in paragraph (c) of this section compliance audits must be submitted (along with audited financial statements if audited financial statements are available), to the appropriate DOE Contracting Officer as well as to the DOE Office of the Chief Financial Officer.

(e) *Requests for management letters issued by the auditor.* In response to requests by a Federal agency, auditees must submit a copy of any management letters issued by the auditor.

(f) *Report retention requirements.* Auditees must keep one copy of the reporting package described in paragraph (c) of this section on file for three years from the date of submission to DOE.

(g) Not applicable.

(h) Not applicable.

FEDERAL AGENCIES

§910.513 Responsibilities.

(a)(1) Not applicable.

(2) Not applicable.

(3) Not applicable.

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- (i) Not applicable.
- (ii) Not applicable.
- (iii) Not applicable.
- (iv) Not applicable.
- (v) Not applicable.
- (vi) Not applicable.
- (vii) Not applicable.
- (viii) Not applicable.
- (ix) Not applicable.
- (b) Not applicable.
- (1) Not applicable.
- (2) Not applicable.

(c) *DOE responsibilities.* DOE must perform the following for the awards it makes (See also the requirements of 2 CFR 200.211 Information contained in a Federal award):

(1) Ensure that audits are completed and reports are received in a timely manner and in accordance with the requirements of this Part.

(2) Provide technical advice and counsel to auditees and auditors as requested.

(3) Follow-up on audit findings to ensure that the recipient takes appropriate and timely corrective action. As part of audit follow-up, the DOE must:

(i) Issue a management decision as prescribed in §910.521 Management decision;

(ii) Monitor the recipient taking appropriate and timely corrective action;

(iii) Use cooperative audit resolution mechanisms (see 2 CFR 200.1, Cooperative audit resolution) to improve DOE program outcomes through better audit resolution, follow-up, and corrective action; and

(iv) Develop a baseline, metrics, and targets to track, over time, the effectiveness of the DOE's process to follow-up on audit findings and on the effectiveness of Compliance Audits in improving non-Federal entity accountability and their use by DOE in making award decisions.

- (4) Not applicable.
- (5) Not applicable.
- (i) Not applicable.
- (ii) Not applicable.
- (6) Not applicable.
- (7) Not applicable.
- (i) Not applicable.
- (ii) Not applicable.
- (iii) Not applicable.
- (iv) Not applicable.
- (v) Not applicable.
- (vi) Not applicable.

- (vii) Not applicable.
- (viii) Not applicable.

[79 FR 76024, Dec. 19, 2014, as amended at 87 FR 15321, Mar. 18, 2022]

AUDITORS

§910.514 Scope of audit.

(a) *General.* The audit must be conducted in accordance with GAGAS. The audit must cover the entire operations of the auditee, or, at the option of the auditee, such audit must include a series of audits that cover departments, agencies, and other organizational units that expended or otherwise administered DOE awards during such audit period, provided that each such audit must encompass the schedule of expenditures of DOE awards for each such department, agency, and other organizational unit, which must be considered to be a for-profit entity. The financial statements (if available) and schedule of expenditures of DOE awards must be for the same audit period.

(b) *Financial statements.* If financial statements are available, the auditor must determine whether the schedule of expenditures of DOE awards is stated fairly in all material respects in relation to the auditee's financial statements as a whole.

(c) *Internal control.* (1) The compliance supplement provides guidance on internal controls over Federal programs based upon the guidance in Standards for Internal Control in the Federal Government issued by the Comptroller General of the United States and the Internal Control—Integrated Framework, issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).

(2) In addition to the requirements of GAGAS the auditor must perform procedures to obtain an understanding of internal control over DOE programs sufficient to plan the audit to support a low assessed level of control risk of noncompliance for major programs.

(3) Except as provided in paragraph (c)(4) of this section, the auditor must:

(i) Plan the testing of internal control over compliance to support a low assessed level of control risk for the assertions relevant to the compliance requirements; and

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(ii) Perform testing of internal control as planned in paragraph (c)(3)(i) of this section.

(4) When internal control over some or all of the compliance requirements are likely to be ineffective in preventing or detecting noncompliance, the planning and performing of testing described in paragraph (c)(3) of this section are not required for those compliance requirements. However, the auditor must report a significant deficiency or material weakness in accordance with §910.516 Audit findings, assess the related control risk at the maximum, and consider whether additional compliance tests are required because of ineffective internal control.

(d) *Compliance.* (1) In addition to the requirements of GAGAS, the auditor must determine whether the auditee has complied with Federal statutes, regulations, and the terms and conditions of Federal awards that may have a direct and material effect.

(2) The principal compliance requirements applicable to most Federal programs and the compliance requirements of the largest Federal programs are included in the compliance supplement.

(3) For the compliance requirements related to Federal programs contained in the compliance supplement, an audit of these compliance requirements will meet the requirements of this part. Where there have been changes to the compliance requirements and the changes are not reflected in the compliance supplement, the auditor must determine the current compliance requirements and modify the audit procedures accordingly. For those Federal programs not covered in the compliance supplement, the auditor should follow the compliance supplement's guidance for programs not included in the supplement.

(4) The compliance testing must include tests of transactions and such other auditing procedures necessary to provide the auditor sufficient appropriate audit evidence to support an opinion on compliance.

(e) *Audit follow-up.* The auditor must follow-up on prior audit findings, perform procedures to assess the reasonableness of the summary schedule of prior audit findings prepared by the

auditee in accordance with §910.511 Audit findings follow-up paragraph (b), and report, as a current year audit finding, when the auditor concludes that the summary schedule of prior audit findings materially misrepresents the status of any prior audit finding. The auditor must perform audit follow-up procedures.

(f) Not applicable.

[87 FR 15322, Mar. 18, 2022]

§910.515 Audit reporting.

The auditor's report(s) may be in the form of either combined or separate reports and may be organized differently from the manner presented in this section. The auditor's report(s) must state that the audit was conducted in accordance with this part and include the following:

(a) An opinion (or disclaimer of opinion) as to whether the financial statements (if available) are presented fairly in all material respects in accordance with generally accepted accounting principles and an opinion (or disclaimer of opinion) as to whether the schedule of expenditures of DOE awards is fairly stated in all material respects in relation to the financial statements (if available) as a whole.

(b) A report on internal control over financial reporting and compliance with Federal statutes, regulations, and the terms and conditions of the DOE award, noncompliance with which could have a material effect on the financial statements. This report must describe the scope of testing of internal control and compliance and the results of the tests, and, where applicable, it will refer to the separate schedule of findings and questioned costs described in paragraph (d) of this section.

(c) A report on compliance and report and internal control over compliance. This report must describe the scope of testing of internal control over compliance, include an opinion or modified opinion as to whether the auditee complied with Federal statutes, regulations, and the terms and conditions of DOE awards which could have a direct and material effect and refer to the separate schedule of findings and questioned costs described in paragraph (d) of this section.

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(d) A schedule of findings and questioned costs which must include the following three components:

(1) A summary of the auditor's results, which must include:

(i) The type of report the auditor issued (if applicable) on whether the financial statements (if available) audited were prepared in accordance with GAAP (*i.e.*, unmodified opinion, qualified opinion, adverse opinion, or disclaimer of opinion);

(ii) Where applicable, a statement about whether significant deficiencies or material weaknesses in internal control were disclosed by the audit of the financial statements (if available);

(iii) A statement (if applicable) as to whether the audit disclosed any non-compliance that is material to the financial statements (if available) of the auditee;

(iv) Where applicable, a statement about whether significant deficiencies or material weaknesses in internal control over major programs were disclosed by the audit;

(v) The type of report the auditor issued on compliance (*i.e.*, unmodified opinion, qualified opinion, adverse opinion, or disclaimer of opinion);

(vi) A statement as to whether the audit disclosed any audit findings that the auditor is required to report under §910.516 Audit findings, paragraph (a);

(vii) Not applicable.

(viii) Not applicable.

(ix) Not applicable.

(2) Findings relating to the financial Statements (if available) which are required to be reported in accordance with GAGAS.

(3) Findings and questioned costs for DOE awards which must include audit findings as defined in §910.516 Audit findings, paragraph (a).

(i) Audit findings (*e.g.*, internal control findings, compliance findings, questioned costs, or fraud) that relate to the same issue should be presented as a single audit finding.

(ii) Audit findings that relate to both the financial statements (if available) and DOE awards, as reported under paragraphs (d)(2) and (3) of this section, respectively, should be reported in both sections of the schedule. However, the reporting in one section of the schedule may be in summary form with a ref-

erence to a detailed reporting in the other section of the schedule.

(e) Nothing in this part precludes combining of the audit reporting required by this section with the reporting required by §910.512 Report submission, paragraph (b), when allowed by GAGAS.

[87 FR 15322, Mar. 18, 2022]

§910.516 Audit findings.

(a) *Audit findings reported.* The auditor must report the following as audit findings in a schedule of findings and questioned costs:

(1) Significant deficiencies and material weaknesses in internal control over major programs and significant instances of abuse relating to major programs. The auditor's determination of whether a deficiency in internal control is a significant deficiency or material weakness for the purpose of reporting an audit finding is in relation to a type of compliance requirement for a major program identified in the Compliance Supplement.

(2) Material noncompliance with the provisions of Federal statutes, regulations, or the terms and conditions of DOE awards related to a major program. The auditor's determination of whether a noncompliance with the provisions of Federal statutes, regulations, or the terms and conditions of DOE awards is material for the purpose of reporting an audit finding is in relation to a type of compliance requirement for a major program identified in the compliance supplement.

(3) Known questioned costs that are greater than \$25,000 for a type of compliance requirement for a major program. Known questioned costs are those specifically identified by the auditor. In evaluating the effect of questioned costs on the opinion on compliance, the auditor considers the best estimate of total costs questioned (likely questioned costs), not just the questioned costs specifically identified (known questioned costs). The auditor must also report known questioned costs when likely questioned costs are greater than \$25,000 for a type of compliance requirement for a major program. In reporting questioned costs, the auditor must include information

to provide proper perspective for judging the prevalence and consequences of the questioned costs.

(4) Known questioned costs that are greater than \$25,000 for a DOE program, which is not audited as a major program. Except for audit follow-up, the auditor is not required under this Part to perform audit procedures for such a DOE program; therefore, the auditor will normally not find questioned costs for a program that is not audited as a major program. However, if the auditor does become aware of questioned costs for a DOE program that is not audited as a major program (*e.g.*, as part of audit follow-up or other audit procedures) and the known questioned costs are greater than \$25,000, then the auditor must report this as an audit finding.

(5) Not applicable.

(6) Known or likely fraud affecting a DOE award, unless such fraud is otherwise reported as an audit finding in the schedule of findings and questioned costs for DOE awards. This paragraph does not require the auditor to report publicly information which could compromise investigative or legal proceedings or to make an additional reporting when the auditor confirms that the fraud was reported outside the auditor's reports under the direct reporting requirements of GAGAS.

(7) Instances where the results of audit follow-up procedures disclosed that the summary schedule of prior audit findings prepared by the auditee in accordance with §910.511 Audit findings follow-up, paragraph (b) materially misrepresents the status of any prior audit finding.

(b) *Audit finding detail and clarity.* Audit findings must be presented in sufficient detail and clarity for the auditee to prepare a corrective action plan and take corrective action, and for DOE to arrive at a management decision. The following specific information must be included, as applicable, in audit findings:

(1) Federal program and specific Federal award identification including the CFDA title and number, and Federal award identification number and year. When information, such as the CFDA title and number or DOE award identification number, is not available, the

auditor must provide the best information available to describe the Federal award.

(2) The criteria or specific requirement upon which the audit finding is based, including the Federal statutes, regulations, or the terms and conditions of the DOE awards. Criteria generally identify the required or desired state or expectation with respect to the program or operation. Criteria provide a context for evaluating evidence and understanding findings.

(3) The condition found, including facts that support the deficiency identified in the audit finding.

(4) A statement of cause that identifies the reason or explanation for the condition or the factors responsible for the difference between the situation that exists (condition) and the required or desired state (criteria), which may also serve as a basis for recommendations for corrective action.

(5) The possible asserted effect to provide sufficient information to the auditee and DOE to permit them to determine the cause and effect to facilitate prompt and proper corrective action. A statement of the effect or potential effect should provide a clear, logical link to establish the impact or potential impact of the difference between the condition and the criteria.

(6) Identification of questioned costs and how they were computed. Known questioned costs must be identified by applicable CFDA number(s) and applicable DOE award identification number(s).

(7) Information to provide proper perspective for judging the prevalence and consequences of the audit findings, such as whether the audit findings represent an isolated instance or a systemic problem. Where appropriate, instances identified must be related to the universe and the number of cases examined and be quantified in terms of dollar value. The auditor should report whether the sampling was a statistically valid sample.

(8) Identification of whether the audit finding was a repeat of a finding in the immediately prior audit and if so any applicable prior year audit finding numbers.

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(9) Recommendations to prevent future occurrences of the deficiency identified in the audit finding.

(10) Views of responsible officials of the auditee.

(c) *Reference numbers.* Each audit finding in the schedule of findings and questioned costs must include a reference number in the format meeting the requirements of the data collection form submission required by §910.512 Report submission, paragraph (b) to allow for easy referencing of the audit findings during follow-up.

§910.517 Audit documentation.

(a) *Retention of audit documentation.* The auditor must retain audit documentation and reports for a minimum of three years after the date of issuance of the auditor's report(s) to the auditee, unless the auditor is notified in writing by DOE or the cognizant agency for indirect costs to extend the retention period. When the auditor is aware that the Federal agency or auditee is contesting an audit finding, the auditor must contact the parties contesting the audit finding for guidance prior to destruction of the audit documentation and reports.

(b) *Access to audit documentation.* Audit documentation must be made available upon request to the cognizant agency for indirect cost, DOE, or GAO at the completion of the audit, as part of a quality review, to resolve audit findings, or to carry out oversight responsibilities consistent with the purposes of this Part. Access to audit documentation includes the right of Federal agencies to obtain copies of audit documentation, as is reasonable and necessary.

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§910.519 Criteria for Federal program risk.

(a) *General.* The auditor's determination should be based on an overall evaluation of the risk of noncompliance occurring that could be material to the DOE program. The auditor must consider criteria, such as described in paragraphs (b), (c), and (d) of this section, to identify risk in Federal programs. Also, as part of the risk analysis, the auditor may wish to discuss a

particular DOE program with auditee management and DOE.

(b) *Current and prior audit experience.*

(1) Weaknesses in internal control over DOE programs would indicate higher risk. Consideration should be given to the control environment over DOE programs and such factors as the expectation of management's adherence to Federal statutes, regulations, and the terms and conditions of DOE awards and the competence and experience of personnel who administer the DOE programs.

(i) A DOE program administered under multiple internal control structures may have higher risk. The auditor must consider whether weaknesses are isolated in a single operating unit (*e.g.*, one college campus) or pervasive throughout the entity.

(ii) When significant parts of a DOE program are passed through to subrecipients, a weak system for monitoring subrecipients would indicate higher risk.

(2) Prior audit findings would indicate higher risk, particularly when the situations identified in the audit findings could have a significant impact on a DOE program or have not been corrected.

(3) DOE programs not recently audited as major programs may be of higher risk than Federal programs recently audited as major programs without audit findings.

(c) *Oversight exercised by DOE.* (1) Oversight exercised by DOE could be used to assess risk. For example, recent monitoring or other reviews performed by an oversight entity that disclosed no significant problems would indicate lower risk, whereas monitoring that disclosed significant problems would indicate higher risk.

(2) Federal agencies, with the concurrence of OMB, may identify Federal programs that are higher risk. OMB will provide this identification in the compliance supplement.

(d) *Inherent risk of the Federal program.* (1) The nature of a Federal program may indicate risk. Consideration should be given to the complexity of the program and the extent to which the Federal program contracts for goods and services. For example, Federal programs that disburse funds

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through third party contracts or have eligibility criteria may be of higher risk. Federal programs primarily involving staff payroll costs may have high risk for noncompliance with requirements of 2 CFR 200.430 Compensation—personal services, but otherwise be at low risk.

(2) The phase of a Federal program in its life cycle at the Federal agency may indicate risk. For example, a new Federal program with new or interim regulations may have higher risk than an established program with time-tested regulations. Also, significant changes in Federal programs, statutes, regulations, or the terms and conditions of Federal awards may increase risk.

(3) The phase of a Federal program in its life cycle at the auditee may indicate risk. For example, during the first and last years that an auditee participates in a Federal program, the risk may be higher due to start-up or close-out of program activities and staff.

(4) Programs with larger Federal awards expended would be of higher risk than programs with substantially smaller Federal awards expended.

[87 FR 15323, Mar. 18, 2022]

§ 910.520 Criteria for a low-risk auditee.

An auditee that meets all of the following conditions for each of the preceding two audit periods may qualify as a low-risk auditee and be eligible for reduced audit coverage.

(a) Compliance audits were performed on an annual basis in accordance with the provisions of this Subpart, including submitting the data collection form to DOE within the timeframe specified in § 910.512 Report submission. A for-profit entity that has biennial audits does not qualify as a low-risk auditee.

(b) The auditor's opinion on whether the financial statements (if available) were prepared in accordance with GAAP, or a basis of accounting required by state law, and the auditor's in relation to opinion on the schedule of expenditures of DOE awards were unmodified.

(c) There were no deficiencies in internal control which were identified as

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material weaknesses under the requirements of GAGAS.

(d) The auditor did not report a substantial doubt about the auditee's ability to continue as a going concern.

(e) None of the DOE programs had audit findings from any of the following in either of the preceding two audit periods:

(1) Internal control deficiencies that were identified as material weaknesses in the auditor's report on internal control as required under § 910.515 Audit reporting, paragraph (c);

(2) Not applicable.

(3) Not applicable.

[87 FR 15323, Mar. 18, 2022]

MANAGEMENT DECISIONS

§ 910.521 Management decision.

(a) *General.* The management decision must clearly state whether or not the audit finding is sustained, the reasons for the decision, and the expected auditee action to repay disallowed costs, make financial adjustments, or take other action. If the auditee has not completed corrective action, a timetable for follow-up should be given. Prior to issuing the management decision, the Federal agency may request additional information or documentation from the auditee, including a request for auditor assurance related to the documentation, as a way of mitigating disallowed costs. The management decision should describe any appeal process available to the auditee. While not required, DOE agency may also issue a management decision on findings relating to the financial statements (if they were available) which are required to be reported in accordance with GAGAS.

(b) As provided in § 910.513 Responsibilities, paragraph (c)(3), DOE is responsible for issuing a management decision for findings that relate to DOE awards it makes to for-profit entities.

(c) Not applicable.

(d) *Time requirements.* DOE must issue a management decision within six months of acceptance of the audit report. The auditee must initiate and proceed with corrective action as rapidly as possible and corrective action should begin no later than upon receipt of the audit report.

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(e) *Reference numbers.* Management audit finding in accordance with decisions must include the reference § 910.516 Audit findings paragraph (c). numbers the auditor assigned to each

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