

Access technology. SCI based its argument for reconsideration solely on the fact that the Commission did not consider an experimental report filed by SCI's parent company, ArrayComm, Inc. (ArrayComm). However, the Commission found that the report was not filed in the name of the real party in interest, was filed over a year later than SCI's original request, and was not appropriately referenced.

Ordering Clause

12. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by Advanced Cordless Technologies, Inc. and Corporate Technology Partners ARE DISMISSED; and that the petitions for reconsideration filed by Advanced MobileComm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc.; Ameritech; Nextel Communications, Inc.; Personal Communications Network Services of New York, Inc.; Qualcomm Incorporated; and Spatial Communications Inc. ARE DENIED IN PART and DISMISSED IN PART.

List of Subjects

47 CFR Part 2

Frequency allocation and radio treaty matters, General rules and regulations, Radio.

47 CFR Part 15

Communications equipment, Radio, Radio frequency devices.

47 CFR Part 24

Personal communications services.
Federal Communications Commission.
LaVera F. Marshall,
Acting Secretary.
[FR Doc. 94-31559 Filed 12-22-94; 8:45 am]
BILLING CODE 6712-01-M

47 CFR Part 76

[MM Docket No. 92-265; FCC 94-287]

Cable Television Act of 1992—Program Distribution and Carriage Agreements

AGENCY: Federal Communications Commission.

ACTION: Final Rule; petitions for reconsideration.

SUMMARY: In this Memorandum Opinion and Order (MO&O) the Commission addresses nine (9) petitions for reconsideration of the rules adopted in the First Report and Order in MM Docket 92-265 (First R&O), implementing section 19 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable

Act"). Specifically, we amend, affirm or clarify certain aspects of the implementing rules in order to ensure that competitors to cable distributors have fair and non-discriminatory access to video programming.

EFFECTIVE DATE: January 23, 1995.

FOR FURTHER INFORMATION CONTACT: Nancy Markowitz or Maura Cantrill, Cable Services Bureau, (202) 416-0800.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Memorandum Opinion and Order adopted November 10, 1994, and released December 9, 1994. A synopsis of the First Report and Order (First R&O) that was reconsidered in the MO&O may be found at 58 FR 27658 (May 11, 1993). This action will not add or decrease the public reporting burden. The full text of this Commission decision is available for inspection and copying during regular business hours in the FCC Reference Center (room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's duplication contractor, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Washington, DC 20037.

Synopsis of Memorandum Opinion and Order

I. Introduction

1. By this action, the Commission amends, clarifies or affirms certain aspects of its rule implementing the program access provisions on the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act).¹ This action is taken in response to nine (9) petitions for reconsideration of the rules adopted in the First Report and Order in MM Docket 92-265 (First R&O), 8 FCC Rcd 3359 (1993); 58 FR 27658 (May 11, 1993). This MO&O, disposes of all but one² of the petitions for reconsideration.

2. The 1992 Cable Act amended the Communications Act of 1934, in part, by adding among other things, new section 628. Section 628 is intended to foster the development of competition to traditional cable systems by governing the access by competing multichannel video programming distributors (MVPDs) to cable programming services. Section 628(b) prohibits "unfair methods of competition or unfair or

deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent" competing distributors from providing programming to their customers. Section 628(c) instructs the Commission to adopt regulations to specify particular conduct that is prohibited by subsection (b). Pursuant to that mandate, on April 1, 1993 the Commission adopted its First Report and Order, which set forth the Commission's program access rules and procedures to implement these statutory provisions.

II. Damages

3. Section 628(e) grants the Commission the authority, upon completion of the adjudication of a program access complaint, "to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming." 47 U.S.C. 548(e). In the First R&O, we stated that we did not believe that the 1992 Cable Act provided us with the authority to assess damages against a cable operator or programming vendor. Petitioners claim that the statute provides the Commission with broad authority to order appropriate remedies and that damages are appropriate remedies. Petitioners also argue that damages are a necessary incentive to comply with the program access provisions. In response to the petitions, we have reexamined the statute and the legislative history and we now conclude that section 628(e) provides the Commission with broad authority to order appropriate remedies, including damages. While we have determined that the statute's grant of power to the Commission to award appropriate remedies is broad enough to include damages, we are not persuaded that creating such a remedy for violations of the program access rules is necessary at this time. We believe that the sanctions available to the Commission, together with the program access complaint process are sufficient to deter entities from violating the program access rules. If, contrary to our expectations, it is brought to our attention that our current processes are not working, we will consider revisiting this issue.

III. Attribution Issues

4. The program access provisions in the 1992 Cable Act apply to cable operators, satellite cable programming vendors in which a cable operator has an attributable interest, and satellite broadcast programming vendors. 47 U.S.C. 548(b), (c)(2). In assessing vertical integration, the Commission stated in the First R&O that a cable

¹ Pub. L. No. 102-365, 106 Stat. 1460 section 19 (1992), amending Communications Act of 1934, section 208.

² The National Rural Telecommunications Cooperative's (NRTC) petition for reconsideration of the Commission's rule implementing section 628(c)(2)(C) of the Communications Act will be addressed in a separate MO&O.

operator would have an attributable interest in a programming vendor if the cable operator holds five percent or more of the stock of the programming vendor, whether voting or non-voting. In the interest of clarity and certainty, the Commission declined to adopt a behavioral test for assessing attributable interests. The Commission also declined to adopt an exemption based on a programming vendor's *de minimis* vertical interests, noting that the data in the record was insufficient to support a point at which a programming vendor's vertical interests no longer provide the incentives to favor their affiliated cable operators. First R&O, 8 FCC Rcd at 3371 n. 19.

5. Petitioners support their renewed request for a *de minimis* exemption to the attribution standard with an economic study which analyzes the profitability of discriminatory practices in terms of the potential for such discrimination successfully to induce customers to switch to the vertically integrated firm's cable system. The study concludes that there are no economic incentives for anticompetitive behavior by vertically integrated firms with small (under 5%) national subscriber levels. The Commission finds that the analysis in the economic study does not provide a sufficient basis for reversing our previous denial of this exemption. Moreover, in passing the program access provisions of the 1992 Cable Act, Congress was concerned with the ability of competing distributors to obtain access to programming and there is no indication that Congress intended the Commission to carve out various across-the-board exemptions to the program access rules.

6. Petitioners also sought exemptions to the attribution standard for minority-owned cable programming vendors, educational or informational programming, and marketing or technological experiments. The Commission has determined not to adopt a more flexible attribution rule for minority-owned programming vendors or the single majority shareholder provisions of the broadcast attribution standard. Among other reasons, the Commission does not believe that the adoption of such standards will further the goal of encouraging minority ownership or promote the public interest goal of programming diversity. Instead, we believe that it has the potential to affect the consistent application of the vertical integration standard and the program access rules. With respect to educational and informational type programming, the Commission recognizes Congress' intent to promote such programming; however,

we do not believe that altering the attribution standard is the most appropriate way of effectuating this policy. Moreover, we believe that altering the standard does not further diversity goals. Finally, the Commission recognizes the necessity for programmers to conduct marketing and technology experiments and demonstrations, however, to adopt the requested exemption to the rules would raise the potential for abuse and circumvention of the rules. In any event, we believe that the program access rules already accommodate the need for experiments and demonstrations, and a general exemption is unnecessary.

7. Petitioners challenge the Commission's determination in the First R&O rejecting the imposition of a showing of vertical integration in the specific market at issue as an element of a claim under section 628(c). We affirm our prior determination, noting that Congress was concerned with industry-wide influences that can occur even in the absence of a vertical relationship in a complainant's specific market.

IV. Competitive Harm or Hindrance to Access

8. Section 628(b) prohibits conduct "the purpose or effect of which is to hinder significantly or to prevent" any MVPD from distributing programming to subscribers or consumers. 47 U.S.C. 548(b). Section 628(c) requires the Commission to adopt regulations proscribing particular specified conduct. In the First R&O, the Commission determined that a complainant alleging a violation of section 628(b) must demonstrate that its ability to distribute programming to its customers has been hampered by the conduct. 8 FCC Rcd at 3374. However, with respect to complaints alleging violations of the rules adopted pursuant to Section 628(c), the Commission determined that the complainant need not demonstrate either specific or generalized harm to competition, rather the harm is implicit in the practices specified in the subsections of 628(c). *Id.* at 3377. In response to petitions to reconsider this determination, we affirm that there is no requirement to show harm in a complaint alleging violations of conduct prohibited by the rules adopted pursuant to Section 628(c).

V. Confidentiality

9. In the First R&O, the Commission established procedures for the adjudication of program access complaints, including a requirement that before filing a complaint the aggrieved MVPD must notify the potential defendant of his intent to file

the complaint based on conduct allegedly in violation of the rules and must wait at least ten days after notification before filing the complaint. 47 CFR 76.1003(a). In addition, within its program access rules, the Commission provided confidentiality protection for proprietary information submitted or generated in the course of adjudicating a complaint. 47 CFR 76.1003(h). The Commission's rule allows a party to designate materials as proprietary "if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)." 47 CFR 76.1003(h)(1). The rule also designates persons to whom the proprietary material may be disclosed only for use in the defense or prosecution of the complaint action.³

10. In response to petitions regarding the exchange of proprietary information at the pre-complaint notification stage, and the sensitive nature of certain proprietary information, we amend our rules relating to confidentiality protection of proprietary information. The Commission extends the confidentiality protection for proprietary information contained in §§ 76.1003 (h) and (i) to proprietary information that is exchanged among parties during the pre-complaint negotiation period required under § 76.1003(a). In addition, the Commission believes that there may be situations, due to the competitively sensitive nature of some information, where it is necessary to restrict access to a party's proprietary information to a smaller group of individuals than that provided under the current rules. Therefore, the Commission amends § 76.1003(h)(3) to provide that the Commission will entertain, subject to a proper showing, a party's request to restrict further access to proprietary information as specified by the party. The opposing party will have an opportunity to respond to such requests.

³ 47 CFR 76.1003(h)(2) provides that: Materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(i) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;

(ii) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or defense of the case;

(iii) Consultants or expert witnesses retained by the parties;

(iv) The Commission and its staff; and

(v) Court reporters and stenographers in accordance with the terms and conditions of this section.

VI. Cost Justification

11. Section 628(c)(2)(B) requires the Commission to promulgate regulations that prohibit a vertically integrated satellite cable programming vendor or a satellite broadcast programming vendor from discriminating in the price, terms and conditions in the sale and delivery of satellite cable or satellite broadcast programming. However, under section 628(c)(2)(B)(ii), a vertically integrated satellite cable programming vendor or a satellite broadcast programming vendor may establish different prices "to take into account differences in the cost of creation, sale, delivery, or transmission of * * * programming." 47 U.S.C. 548(c)(2)(B)(ii). In the First R&O, we adopted definitions and guidelines for permitted cost justifications for pricing differentials, including cost differences at the wholesale level among distributors. In connection with pricing based on differences in wholesale costs, we noted that the record supported the Notice's preliminary conclusion that delivery of programming to home satellite dish distributors may have a higher cost than service to other distributors using different delivery systems such as cable operators. First R&O, 8 FCC Rcd at 3406. In addition, we assessed whether a vendor may take into account cost differences incurred by distributors in providing service to subscribers, and concluded that this would be contrary to the purposes of the Act as it could artificially raise the retail price of programming and discourage the development of low-cost technologies. First R&O, 8 FCC Rcd at 3406.

12. Petitioners contend that the Commission should allow a programming vendor to consider the differences in distributors' costs, e.g. costs at the retail level. The Commission reaffirms its prior determination that a programming vendor may not take into account distributors' cost differences at the retail level. In response to a petition claiming that the Commission pre-judged questions regarding possible cost justifications for pricing differentials in sales to home satellite dish distributors, we state that we have not pre-judged the costs that may be involved in supplying programming to HSD distributors in any particular situation, but merely recognized that cost differentials can exist and may be used to justify a price differential.

VII. Effective Date/Application of the Rules

13. In First R&O, the Commission determined that the rules adopted under Section 628 apply prospectively to all

existing contracts, whether the contracts were executed before or after the effective date of the rules. The Commission based its determination on its belief that by expressly grandfathering only a narrow class of contracts in Section 628(h), Congress did not intend to exempt generally all existing contracts from the scope of the anti-discrimination requirements of section 628 and on the fact that the long term nature of many programming agreements would delay for several years the uniform implementation of the anti-discrimination rules. First R&O, 8 FCC Rcd at 3415. To avoid disruption to the market and to the entities involved, the Commission afforded the parties until November 15, 1993 (120 days after the effective date of the new rules) to bring their agreements into compliance. *Id.*; 47 CFR 76.1002(f). Petitioners contend that the rules should not apply to existing contracts. The Commission reaffirms its determination in the First R&O that only the narrow class of contracts, grandfathered by section 628(h) are exempt from the Commission's rules.⁴

VIII. Subdistribution Agreements

14. Subdistribution agreements are sales agreements between a programming vendor and, in most instances, a franchised cable operator, through which the franchised cable operator sells the vendor's programming

⁴ Three additional petitions were filed that relate to the effective date of the program access rules. The issues raised in those petitions are now moot. Specifically, a petition was filed contending that the program access rules against exclusive contracts should be deemed effective immediately upon the enactment of the 1992 Cable Act (December 4, 1992) or on the effective date of the Commission's program access rules (July 16, 1993) in contrast to delaying the effective date of the rules until the end of the 120 day renegotiation period that was provided for under the rules. Because the rules are now effective, the issue raised is moot. Another petition was filed requesting the Commission to specify a specific date before which any party intending to enforce an existing exclusive programming agreement must file an exclusivity petition. Petitioner contended that the 120-day renegotiation period before the program access rules became effective applies only to discrimination barred by the rules and not exclusive agreements. Because all existing contracts must be in compliance with the rules, this request also is moot. Finally, petitions were filed contending that distributors seeking to revise existing contracts should be required to demonstrate that the current contracts terms have the purpose or effect to harm the distributor's ability to compete. Petitioners contended that under this proposal only the contracts that create a potential for harm will need to be reformed, while other agreements can be brought into strict compliance with the rules as they come up for renewal, thereby avoiding administrative upheavals to programmers. The November 15, 1993 deadline by which all contracts were required to come into compliance with the Act and our rules has now passed and thus these issues are moot.

to competing MVPDs. In the First R&O, the Commission expressed its concern that in areas served and unserved by a cable operator a distributor's access to programming may be impaired by the use of subdistribution agreements. The Commission's rule 76.1002(c)(3) limited subdistribution agreements by prohibiting all subdistribution agreements in unserved areas and placing limitations on such agreements in served areas. These limitations prohibit the cable operator who subdistributes a vertically integrated programming service from requiring a competing MVPD to purchase additional or unrelated programming as a condition of such subdistribution; to provide access to private property in exchange for access to programming; or from charging a competing MVPD more for the programming than the programming vendor itself would be permitted to charge. The rule further requires any cable operator acting as a subdistributor to respond to a request for access to the programming by a competing MVPD within fifteen (15) days and requires that if its request is denied, the competing MVPD be permitted to negotiate directly with the satellite cable programming vendor or satellite broadcast programming vendor. 47 CFR 76.1002(c)(3)(iii).

15. Petitioner requested the Commission to clarify the rules on subdistribution agreements so that the same rules apply to served and unserved areas. We have determined that there is no need to prohibit all subdistribution arrangements in unserved areas, as long as no cable operator has exclusive subdistribution rights in unserved areas and, thus, an MVPD would have a choice of outlets for its programming needs. The requirement in § 76.1002(c)(3)(iii) to allow direct negotiations with the programmer is intended to make all subdistribution agreements in served areas nonexclusive. Therefore, the Commission amends its rules to clarify that nonexclusive subdistribution arrangements both in served and unserved areas are treated consistently and subject to the protection provided by the requirements of § 76.1002(c)(3)(iii).

IX. De minimis Price Differentials and Similarly Situated Distributors

16. In the First R&O, the Commission determined that in price discrimination cases, in order to conserve administrative resources and avoid protracted adjudication solely to resolve accounting issues, we will not require a vendor to justify the magnitude of a price differential between a complainant

and its competitor that is equal to or less than five cents per subscriber or five percent, whichever is larger, so long as the vendor provides sufficient reasons, justified by the statutory factors, for a difference in price. First R&O, 8 FCC Rcd at 3420. The Commission further determined that, although an MVPD can bring a discrimination claim merely by demonstrating that another MVPD with which it does or proposes to compete has received more favorable terms from the vertically integrated programming vendor, the competing MVPD identified by the complainant may not be a proper point of comparison. *Id.* at 3401. Therefore, the Commission determined that, in justifying the price, terms and conditions of a contract, a programming vendor may demonstrate that the proper comparison is between the complainant and a similarly-situated distributor, rather than the complainant and the competitor named in the complaint. *Id.* at 3401-02.

17. Petitioner sought, and we grant the request, for clarification that under § 76.1003(d), once a programmer has persuaded the Commission that a "similarly-situated" competitor is the proper focus for comparison, the same rationale would apply with respect to making a determination as to whether the price differential is *de minimis*. That is, the price charged or offered to the complainant will be compared to the price charged to the similarly-situated distributor.

X. Buying Groups

18. Section 628(c)(2)(B) allows a programming vendor to justify differences in price, terms or conditions of sale of programming on factors such as economies of scale or other efficiencies to the programming vendor due to the number of subscribers served by the distributor. In the First R&O, the Commission stated that in order to benefit from unitary treatment for purposes of subscriber volume, a buying group should offer advantages similar to a single distributor, including assurance of satisfactory financial performance. 8 FCC Rcd at 3411. The Commission adopted a definition of a buying group requiring the group to be financially liable for any fees due under a programming contract which it signs or whose members agree to joint and several liability. *Id.* at 3412; 47 CFR 76.1000(c).

19. Petitioners claimed that the definition of "buying group" in the rules offers little or no assurance that such buying group is capable of satisfying its financial obligations because it enable members of the group to shift all liability to the corporate

entity acting as the buying group, without requiring each member to agree to joint and several liability. While we affirm the definition of buying group in § 76.1000(c) as adopted, to address the concerns raised by the petitioning parties, we clarify that, in those situations where a seller has reasonable doubts about the financial stability and responsibility of the buying group, it may insist on appropriate assurances of creditworthiness. Buying groups could satisfy this burden through various measures, such as requiring each individual member of the group to guarantee to the group its pro rata share of the fees due under a programming contract.

XI. Competing Distributors

20. Section 628(c)(2)(B) requires the Commission to adopt regulations which prohibit discrimination in the prices, terms, and conditions of sale or delivery of programming. In the First R&O, the Commission determined that discrimination exists when the same programming is sold to a competing distributor at a different price without justification by one of the factors enumerated in section 628(c)(2)(B). To establish that another distributor is a competitor, the Commission requires some overlap in actual or proposed service area. First R&O, 8 FCC Rcd at 3400. The Commission received petitions for reconsideration with respect to the definition of competing distributor, requesting that the Commission require cable operators bringing complaints of discrimination to show a substantial (at least 50%) overlap with the service area of a competing MVPD. The Commission does not find that a change in the definition of a competing distributor is necessary or justified.

XII. Clarifying the First R&O

21. On our own motion, we take the opportunity in this Order to emphasize certain procedural requirements under the program access rules and clarify the discussion of those requirements in the First Report and Order.⁵ The Commission initially notes that the actual rules that set forth the procedural requirements for program access complaints are clear that they apply both to section 628(b) and section 628(c) cases. 47 CFR 76.1003(a)-(s). However, these procedural requirements are not consistently discussed throughout the text of the First Report and Order. The Commission emphasizes here that these procedural requirements are applicable

to every type of program access complaint.

22. For example, the First R&O discusses the requirement set forth in the rules that prior to filing a complaint, the complainant must notify the opposing party of its intention to file a complaint.⁶ This pre-complaint notice provision is applicable to all program access complaints. Similarly, the First R&O discusses the one year "statute of limitations" within which to bring complaints.⁷ This one year limit is applicable to all types of program access complaints. In addition, the First R&O discusses the contents of program access complaints and states that they must specify the relief requested.⁸ This requirement is applicable to all program access complaints.

XIII. Ordering Clauses

23. Accordingly, it is ordered, that the Petitions for Reconsideration are granted in part and denied in part, as indicated above and to the extent that Petitions raise issues concerning exclusive contracts with non-cable distributors, they will be disposed of in future orders.

24. It is further ordered that part 76 of the Commission's rules, 47 U.S.C. part 76, is amended, as set forth below.

List of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission.

LaVera F. Marshall,
Acting Secretary.

Amendatory Text

Part 76 of title 47 of the Code of Federal Regulations is amended as follows:

Part 76—Cable Television Service

1. The authority citation for part 76 continues to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 552 as amended, 106 Stat. 1460.

2. Section 76.1003 is amended by revising paragraph (h) to read as follows:

§ 76.1003 Adjudicatory proceedings.

* * * * *

⁵ See First R&O, 8 FCC Rcd at 3416, 3422, 3424. In addition, the general Complaint and Enforcement Procedures contain a notice requirement provision. *Id.* at 3389.

⁷ *Id.* at 3416, 3422, 3425. There also is a one year statute of limitations set out in the general Complaint and Enforcement Procedures. *Id.* at 3389.

⁸ *Id.* at 3389, 3422, 3425.

⁶ See 47 CFR 1.108.

(h) *Confidentiality of proprietary information.* (1) Any materials generated or provided by a party in connection with the pre-complaint notification procedure required under § 76.1003(a) and in the course of adjudicating a program access complaint under this provision may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. 552(b). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality will have the burden of demonstrating, by a preponderance of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in the FOIA.

(2) Except as provided in paragraph (h)(3) of this section, materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(i) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;

(ii) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or defense of the case;

(iii) Consultants or expert witnesses retained by the parties;

(iv) The Commission and its staff; and
(v) Court reporters and stenographers in accordance with the terms and conditions of this section.

(3) The Commission will entertain, subject to a proper showing, a party's request to further restrict access to proprietary information as specified by the party. The opposing party will have an opportunity to respond to such requests.

(4) The persons designated in paragraphs (h) (2) and (3) of this section shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to the information by the opposing party shall sign a notarized statement affirmatively stating, or shall certify under penalty of perjury, that the

individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(5) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraphs (h) (2) or (3) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(6) Upon termination of the complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the complaint proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

3. Section 76.1002 is amended by removing paragraph (c)(3)(i) and redesignating (c)(3)(ii) and (c)(3)(iii) as paragraphs (c)(3)(i) and (c)(3)(ii), respectively, and revising them to read as follows:

§ 76.1002 Specific unfair practices prohibited.

(c) *Exclusive contracts and other practices and arrangements.* * * *

(3) *Specific arrangements: subdistribution agreements.*—(i) *Unserved and served areas.* No cable operator shall enter into any subdistribution agreement or arrangement for satellite cable programming or satellite broadcast programming with a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, with respect to areas served or unserved by a cable operator, unless such agreement or arrangement complies with the limitations set forth in paragraph (c)(3)(ii) of this section.

(ii) *Limitations on subdistribution agreements.* No cable operator engaged in subdistribution of satellite cable programming or satellite broadcast programming may require a competing multichannel video programming distributor to:

(A) Purchase additional or unrelated programming as a condition of such subdistribution; or

(B) Provide access to private property in exchange for access to programming.

In addition, a subdistributor may not charge a competing multichannel video programming distributor more for said programming than the satellite cable programming vendor or satellite broadcast programming vendor itself would be permitted to charge. Any cable operator acting as a subdistributor of satellite cable programming or satellite broadcast programming must respond to a request for access to such programming by a competing multichannel video programming distributor within fifteen (15) days of the request. If the request is denied, the competing multichannel video programming distributor must be permitted to negotiate directly with the satellite cable programming vendor or satellite broadcast programming vendor.

* * * * *

[FR Doc. 94-31561 Filed 12-22-94; 8:45 am]
BILLING CODE 6712-01-M

DEPARTMENT OF ENERGY

48 CFR Parts 909, 952, and 970

RIN 1990-AA95

Acquisition Regulation; Alteration of Organizational Conflicts of Interest Regulations

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) today amends the Department of Energy Acquisition Regulation (DEAR) to clarify certain aspects of DOE's organizational conflicts of interest (OCI) regulations. The amended regulations are intended to make the OCI regulations more easily understood and more easily followed by DOE procurement, program, and legal personnel, DOE contractors, and entities proposing to do work for DOE or its contractors.

EFFECTIVE DATE: January 23, 1995.

FOR FURTHER INFORMATION CONTACT:

Robert M. Webb, U.S. Department of Energy, Procurement Policy Division (HR-521.1), 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-8264

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SUPPLEMENTARY INFORMATION:

- I. Background
 - A. Discussion
 - B. Section-by-Section Analysis
- II. Procedural Requirements

- A. Review under Executive Order 12291
- B. Review under the Regulatory Flexibility Act
- C. Review under the Paperwork Reduction Act
- D. Review under the National Environmental Policy Act
- E. Review under Executive Order 12612
- F. Review under Executive Order 12778

I. Background

A. Discussion

DOE is one of only two Federal agencies, the other being the Nuclear Regulatory Commission, that have a statutorily based OCI system. DOE's system is founded on section 401 of Pub. L. 95-39, as that statute applied to the Energy Research and Development Administration (codified at 42 U.S.C. Sec. 5918) and section 10 of Pub. L. 95-70, as that statute applied to the Federal Energy Administration (codified at 15 U.S.C. 789). On October 1, 1977, those two agencies and others were joined to form the Department of Energy.

The proposed rule soliciting comments on proposed changes leading to this final rule was published on July 16, 1993, at 58 FR 38340. As stated there, the proposed changes were intended to clarify the preexisting DOE OCI rule.

B. Section-by-Section Analysis

Comments were received from nine commenters: four corporations, two professional societies, one individual, and two DOE procurement organizations.

1. Definitions.

At 909.570-3, we proposed to delete the phrase "the principal purpose of which" from the definition of "evaluation services" and "technical consulting and management support services." We explained that DOE's organizational conflicts of interest system should apply to contracts even where these types of services are involved in contract performance but are not the principal purpose of the contract.

Four of the commenters took exception to this change with respect to "evaluation services," and two objected with respect to "technical consulting and management support services." One concern expressed was that there would be confusion on the part of the contractors as to whether "a particular contract is for evaluation services or activities." The solicitation and contract will contain the appropriate organizational conflicts of interest provisions when DOE has determined that a specific requirement involves either or both of these types of covered services.

The remaining commenters based their objections on a concern that the result would be that organizational conflicts of interest provisions would be applied when they were not appropriate. We disagree. It is clear that the "principal purpose" language was present to limit application of organizational conflicts of interest; however, it is apparent that contracts may have minor portions of the statement of work that deserve OCI attention. For example, a contract for guard services that would not be covered per se may contain provision for incidental services to develop a plan to enhance security at the facility. Clearly, the development of such a plan, were it procured under a separate contract, would on its own be considered either evaluation services or activities or technical consulting and management support services or both. The dangers of bias, depending upon a contractor's interests, and unfair competitive advantage are both present. In fact, the plan may serve as the basis for the procurement of security enhancements under a separate contract. Yet, because it is a comparatively small part of a larger contract under the definitions that were at 909.570-3, there would be no OCI coverage under the preexisting regulations. This result is untenable.

The concern for misapplication is best answered by looking at whether the scope of the contract includes services that are properly described as "evaluation services or activities" or "technical consulting and management support services." A contract would not be covered if there is no provision for assignment of such evaluative tasks within the scope of the contract. For example, if a security guard notices a security deficiency at the facility, he or she would be expected to bring it to the supervisor's attention in the normal course of business, and this would involve no OCI implication. The mere expression of an opinion or recommendation in the performance of a contract would not give rise to OCI coverage.

In the definition of "organizational conflicts of interest," the rule proposed to delete the phrase "either directly or indirectly, through a client relationship" and insert "reasonably" to guide any test of the existence of an organizational conflict of interest with regard to a specific offeror. Three commenters objected. One commenter was concerned that the remaining phrase describing the interests to be considered in determining the presence of an organizational conflict of interest may affect or be affected by "approved

technology transfer initiatives." The remaining phrase describing the interests to be taken into account is "past, present, or currently planned interests that relate to work to be performed under a Department contract." All interests, including "technology transfer initiatives" meeting that test should be evaluated by the Contracting Officer in making the OCI determination. However, one must remember that the mere existence of an interest relating to the work to be performed under the specific contract does not mean that an organizational conflict of interest is present.

A second commenter disagreed with the "relate to" language. The commenter was concerned that an offeror would be put in the position of "providing unlimited data which, as a threshold matter, may not be relevant to its capacity to give impartial advice or result in an unfair competitive advantage." We believe that the obligation to disclose interests that relate to the work to be performed under the proposed contract is clearer than the previous requirement which arguably was dependent upon whether the offeror considered the otherwise relevant interest to result in bias or an unfair competitive advantage. The analysis of the effect of the interest or interests is the responsibility of the contracting officer, and the proposer is not in the position of drawing an objective conclusion of the effect of an interest. More importantly, the contracting officer may determine the potential for bias or unfair competitive advantage, not from one interest, but from two or more interests, any of which alone would not be considered significant.

The third commenter did not agree with the proposed insertion of "reasonably" on the grounds that the "safe course for a contracting officer to take when faced with this standard is to conclude that virtually all situations may reasonably give rise to an OCI." We have deleted "reasonably," though its inclusion in the proposed rule was intended to help assure that consideration of interests would not be affected by remote relationships.

As will be discussed in more detail later, the standard that the contracting officer is to apply in making the determination as to the presence of an organizational conflict of interest is whether there is "little or no likelihood" of an organizational conflict. That test is taken from the underlying statutes and has formed the basis of the OCI determination since the promulgation of the implementing regulations.

2. Relationship of Interests

Three commenters took exception to the proposed substitution of the standard for contractual requirements that merit particular attention at 909.570-4(a). Previously, this standard was those contractual requirements that "call for the rendering of advice, or consultation or evaluation services, or similar activities that lay the direct groundwork for the Department's decisions * * *." The proposed rule substituted "*are expected to play a part in* * * *" (emphasis added).

All three comments were founded upon the same grounds, which are best represented by the comment of one of the three: "As proposed, this revision will cause activities that are only very tangentially related to be considered to create an OCI and will remove any rule of reason in determining when an OCI exists."

We disagree and have included the change. This language is not intended to describe when the contracting officer should determine that an organizational conflict of interest exists. We believe that the commenters have been misled by the change in the heading of 909.570-4, "Criteria for recognizing organizational conflicts of interest." In that particular part of the regulation, the material is intended to aid the contracting officer in determining whether a particular statement of work is subject to organizational conflicts of interest concerns. In other words, this guidance goes to whether the contracting officer would require that the solicitation include the organizational conflicts of interest solicitation provision at 952.209-70 and whether the model and final contracts would contain the clause at 952.209-72.

No comments were received about the other minor changes proposed to be made to 909.570-4(a) and 909.570-4(b)(4) and (b)(7).

No comments were made about the proposed changes to 909.570-5(a). These changes are mirrored in proposed changes to the solicitation provision and will be discussed there.

The rule proposed to create a new paragraph 909.570-5(b) from the content of the second half of paragraph (a). This new paragraph would modify the requirement for the submission of a new or updated disclosure for "all modifications * * * except those issued under the Changes clause" to those "that exercise an option or otherwise meaningfully extend the period of performance or add work of the type noted above to the contract." One commenter objected, apparently not recognizing that the required frequency

of new or updated disclosure would be reduced.

In addition, the OCI clause contains a requirement for postaward disclosure. If the contractor has fulfilled that responsibility, this requirement would be little more than a formality.

3. Avoidance and Mitigation

Five commenters disagreed with the proposed changes to 909.570-5(c). We believe they have misinterpreted the proposed changes. The changes consisted of the proposed deletion of the words "or mitigated" from the last portion of the sentence that had previously been 909.570-5(b) and the insertion at 909.570-5(c) of the sentence that states, "[a]n organizational conflict of interest has been avoided when the actions taken to remedy it result in there being little or no likelihood of an organizational conflict of interest."

The comments were based upon the belief that these changes deny the contracting officer the flexibility to mitigate a situation that has been determined to be an organizational conflict of interest. In fact, the applicable statute requires that an organizational conflict of interest, once identified, be avoided or award may not be made in the absence of a determination that award otherwise is in the best interests of the United States. The statute and implementing regulations have provided that "little or no likelihood of an organizational conflict of interest" is the standard or threshold for the decision as to whether a particular fact or facts amount to an organizational conflict of interest. Any greater likelihood amounts to an organizational conflict.

Mitigation, on the other hand, describes the situation in which the actions taken to remedy an organizational conflict of interest taken have not reduced the conflict of interest to the required level of "little or no likelihood." That result is not enough to allow an award, absent the public interest determination described above.

It was the intent of the added sentence to make it clear that the test for avoiding an organizational conflict was the same as the test for determining the existence of the organizational conflict initially, "little or no likelihood." In other words, there may be some remote possibility of an organizational conflict of interest, and the contracting officer may determine that an organizational conflict does not exist. If, on the other hand, having determined that an organizational conflict does exist, the contracting officer may determine that the steps taken to remedy the conflict reduce the concern to the level of "little

or no likelihood," which actions have thereby avoided the organizational conflict of interest.

This change then does not interfere with the exercise of discretion by the contracting officer in avoiding an identified organizational conflict of interest. Rather, it makes clear that the test for determining whether an organizational conflict of interest exists is the same, i.e., "little or no likelihood," whether it is applied in the original analysis or after having taken steps to remedy an organizational conflict of interest that was initially determined to exist.

4. Subsequent Bars

With regard to any bar of the successful firm from subsequent competitions, five commenters requested that the sentence of 909.570-6 requiring that "[t]his is a variable; and in no event shall an exclusion be stated which is not related to a specific expiration date or an event certain" be retained. We believe that this sentence is redundant in light of the two preceding sentences, i.e., "[s]uch notice shall specify the proposed extent and duration of any special restrictions to be imposed with respect to participation in subsequent acquisitions. A fixed term of reasonable duration is measured by the time required to eliminate what would otherwise constitute an unfair competitive advantage."

Two of the commenters took exception to the proposed addition to the last sentence. That addition was intended to make clear that the absence of a bar in a previous contract will not prohibit the contracting officer from considering the relationship of the two requirements as a basis for finding an organizational conflict of interest in the award of the second requirement, based upon bias or unfair competitive advantage. We believe this conclusion is statutorily directed. However, until now, the statement has not been made, and DOE contracting personnel may have been misled. We have retained all the changes to 909.570-6.

No comments were received to the proposed changes to 909.570-7.

5. Deletion of "the General Clause"

Two comments were received with regard to 909.570-8. One commenter objected to the proposed deletion of the provision for the general organizational conflicts of interest clause at 952.209-71. The commenter illustrated its position by referring to "standard architect-engineer/construction services, where disclosures are routinely required (both for prime contracts and subcontracts) where there are no

relevant facts which could give rise to an organizational conflict of interest and the contractor warrants that this is the case." We believe that generally a standard A-E contract, that is, a contract for design services, would not be subject to organizational conflicts of interest processing. Certainly, a requirement for technical consulting or management support services or evaluation services or activities involving an A-E firm would be covered, as it would for any entity. Were the requirement subject to OCI processing, the fact that the offeror represented that it had no relevant facts to disclose would have no bearing on which clause to use.

We are deleting the clause formerly at 952.209-71. The clause was an abbreviated version of the special clause. It (1) did not extend to affiliated entities of the contractor, (2) did not contain the bars in paragraphs (b)(1) and (b)(2) of the special clause, and (3) did not contain the prohibition against award of OCI covered subcontracts without the determination by the DOE contracting officer as to the proposed subcontractor's organizational conflicts of interest. We believe these omissions to be meaningful in the administration of the clause, and, the omission was not appropriate for contracts that are subject to organizational conflicts of interest processing.

The second commenter suggests the substitution of the word "duration" for "time period" as it appears in the last sentence of 909.570-8(b)(5) because "duration" may "tie to a completion of an activity rather than a date." We agree and have made the change.

6. "Little or no Likelihood"

Five commenters have proposed changes to 909.570-9. The first suggests that the phrase "or other means" which was proposed to be added to subparagraph (a)(3) also be added to subparagraph (a)(2) for consistency's sake. We have made this change but differently than suggested. The phrase has been added to subparagraph (a)(2), and the phrase "by an appropriate contract clause or other means" has been deleted from subparagraph (a)(3).

The other four commenters object to the proposed statement "[i]f the contracting officer determines that there is more than little or no likelihood of an organizational conflict of interest, then an organizational conflict of interest exists with regard to that particular offeror." The commenters express the view that the term "more than little or no likelihood" should be defined.

First, the previous proposed sentence states that a basic concept of the Department's organizational conflicts of

interest system is that an organizational conflict of interest does *not* exist if there is "little or no likelihood" of an organizational conflict of interest in the performance of the contract by the particular offeror being evaluated. That test is taken from sec. 401 of Pub. L. 95-39 (42 U.S.C. 5918(b)). The sentence preceding the sentence in question makes that point clear.

The sentence that has been objected to then states the obverse, *i.e.*, that, therefore, facts that indicate a *larger* likelihood of an organizational conflict than "little or no likelihood" then indicates the existence of an organizational conflict of interest with respect to the performance of the contract by the particular offeror being evaluated. These concepts are, like so many other legal and regulatory concepts, imprecise. The statute does not define the phrase "little or no likelihood," nor do we believe that any attempt by ourselves or others would make it more precise. We believe that facts may exist with respect to the offeror that could indicate a possibility, *i.e.*, "little likelihood," of an organizational conflict and yet the contracting officer not be bound to find one. In other words, the test does not require the absolute absence of possibility.

With this background, the sentence objected to is merely stating the other side of the proposition, which has always been the case. If the contracting officer determines that there is more than a "little likelihood" of an organizational conflict of interest, then one exists for the purpose of the DOE system, with the result that award may not be made unless the risk is reduced to the level of "little likelihood" or "no likelihood" by some manner of mitigation or that the statutorily required determination is made that award is in the public interest and that determination is published in the **Federal Register** in accordance with 909.570-9(a)(3). We believe that no definition of the phrase "more than little or no likelihood" is necessary. It merely describes the situation in which the contracting officer *cannot* reasonably say that there is "little or no likelihood" of an organizational conflict of interest with respect to the statement of work by a particular offeror.

One commenter did not agree with the proposed changes made at 909.570-10, wanting to retain the current language. We believe the proposed changes are more accurate than the current language and will be of greater assistance to contracting officers in the consideration of OCI situations occurring after contract award. We have,

therefore, adopted the proposed changes in the final rule.

7. Subcontracts

Two commenters objected to the proposed change at 909.570-12 which deleted the phrase "except that subcontractors shall not normally be required to submit the disclosure or representation if such subcontract is for supplies." The commenters believe that this deletion creates an uncertainty as to the intended meaning and that the deletion might suggest that the organizational conflicts of interest system might, in fact, apply to subcontracts for supplies.

We disagree. The system applies *per se* to those prime contracts and subcontracts that involve the providing of evaluation services or activities or technical consulting and management support services. This point is made clear in the proposed rule at 909.570-12 following the deletion of the phrase noted above by the addition of the phrase "*i.e.*, evaluation services or activities or technical consulting and management support services." A similar clarifying change has been made to paragraph (d)(1) of the clause at 952.909-72.

We believe that the DOE OCI system would apply to prime contracts or subcontracts for supplies only in the rarest instance. We made this change because we believe that the former language of DEAR 909.570-11 presented a greater danger of misapplication of the DOE OCI system to subcontracts for supplies than the revision resulting from this final rule.

8. Solicitation Provision

Five commenters disagreed with the proposed altering of the disclosure requirement in paragraph (a)(1) of the solicitation provision at 952.209-70. The change that appears there would require the disclosure of "all relevant facts * * * relating to the work described in the statement of work of this solicitation." In the proposed rule we deleted the phrase "bearing on whether the offeror has a possible conflict of interest." The commenters were concerned that without the qualifying phrase, the disclosure obligation is less clear and more open-ended.

We disagree. As explained in the preamble to the proposed rule, we believe the test of whether a relevant fact bears "on whether the offeror has a possible conflict of interest" adds a complicating and subjective test on top of a relatively simple identification of whether the offeror has an interest(s) that relates to the work to be performed

under the statement of work. We do not agree that this change results in an open-ended obligation to provide data. In order to identify relevant facts that bear upon a possible conflict of interest, the offeror must first identify relevant facts and then determine whether any of those facts, in its mind, bear upon a possible conflict of interest. This change merely does away with the second step. Relevant facts intuitively are those that relate to the statement of work, e.g., investments involving the technology, licensing agreements involving the technology, client relationships involving work like the work to be performed.

One commenter questioned the requirement for the offeror to provide a copy of the Securities and Exchange Commission's Form 10k, if it is required to file one. DOE's internal OCI procedures have called for contracting officers to acquire a copy of the Form 10k for over ten years. This comes under the statutory language "information otherwise available." It, along with the annual report, or comparable information from privately held corporations, is used to confirm the disclosure or representation of the offeror.

This change assures that the Form 10k will be forthcoming with the proposal, thereby saving time in acquiring the report. It is a report that is publicly available, for its intended purpose is to allow those who choose to avail themselves of it to make informed investment decisions. This is not a report that must be created in any way for submission to DOE. That commenter suggested that the contracting officer acquire the Form 10k from the Securities and Exchange Commission. We disagree. The offeror is in the best position to know whether it has the obligation to file it with the SEC and to provide it, if they have filed it with the SEC.

We are, however, simplifying the requirement such that the offeror need supply only the form and a list of attachments, rather than filing the attachments themselves.

One commenter noted that the exclusion of the clause at 952.209-71 will result in the use in all cases of the clause at 952.209-72, with the latter subjecting "all work to the bar." We agree, but each of the bars is conditional. If the qualifying condition does not occur then no bar is effective, even if the OCI clause is used.

Two commenters questioned the substitution of "meaningfully" for "substantially" in paragraph (g) of the clause at 952.209-72 with regard to the submission of a new or updated

disclosure or representation if the period of performance is extended. We have used the current term and have deleted "meaningfully" from the rule. We have, however, added the phrase "an option is to be exercised or the period of performance is otherwise significantly increased." This makes the provision consistent with the regulation at 909.570-5(b).

9. OCI Clause

Five commenters disagreed with the proposed changes to paragraph (c)(1) of the clause at 952.209-72. In that paragraph the post award obligation to disclose was clarified and made consistent with the change that calls for the offeror to disclose relevant facts. The previous language in paragraph (c)(1) required the contractor to disclose conflicts of interest that it discovers after award. Under the current language, in order to discover a conflict of interest, the offeror will have had to identify the interest initially and then judge whether that change presents a conflict of interest.

We believe that the proposed change simplifies this obligation. Only the change in facts, i.e., additional interests, changes in disclosed interests, will need to be identified by the contractor. The contracting officer will then be in a situation to evaluate the implications of the change in relevant facts on continued performance under the contract. To the extent that the contractor fulfills its obligations under this paragraph, the conditions for required disclosure under paragraph (g) will be dramatically reduced.

The essence of the concerns expressed here parallel those discussed earlier with regard to the change to the disclosure requirement, i.e., that the requirement has been made vaguer. We disagree. The obligation to describe relevant interests alone is simpler and requires less judgment by the offeror or contractor than the additional judgment as to which, if any, of those relevant facts, bear upon a possible organizational conflict of interest.

Three commenters then did not agree with the related changes proposed to be made to paragraph (c)(2), which states that a failure to report relevant interests known at the time of disclosure or representation may result in the termination of the contract for default. The current paragraph (c)(2) states that the termination for default may result where an organizational conflict of interest was known but not reported. We believe that the changed language presents the contractor with less risk than the current language. The determination of organizational conflict

of interest is inherently more subjective than the mere identification of relevant interests.

The final comment noted that the new title for the clause at 970.5204-36 contained a typographical error with the inclusion of "of" after "University." We have made this correction.

II. Procedural Requirements

A. Review Under Executive Order 12866

The Department of Energy has determined that today's regulatory action is not a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review," (58 FR 51735, October 4, 1993). Accordingly, this action was not subject to review under that executive order by the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

B. Review Under Executive Order 12778

Section 2 of Executive Order 12778 instructs each agency to adhere to certain requirements in promulgating new regulations and reviewing existing regulations. These requirements, set forth in sections 2(a) and (b)(2), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards (whether they be engineering or performance standards), and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation: specifies clearly any preemptive effect, effect on existing Federal law or regulation, and retroactive effect; describes any administrative proceedings to be available prior to judicial review and any provisions for the exhaustion of such administrative proceedings; and defines key terms. This final rule will have no preemptive effect; will not have any effect on existing Federal laws; and will only clarify the existing regulations on this subject. The revised clauses will apply only to contracts which are awarded after the effective date of the final rule, and, thus, will have no retroactive effect. Therefore, DOE certifies that this final rule meets the requirements of sections 2(a) and (b) of Executive Order 12778.

C. Review Under the Regulatory Flexibility Act

This final rule was reviewed under the Regulatory Flexibility Act of 1980, Pub. L. 96-354, which requires preparation of a regulatory flexibility analysis for any rule which is likely to have significant economic impact on a

substantial number of small entities. DOE certifies that this rule will not have a significant economic impact on a substantial number of small entities and, therefore, no regulatory flexibility analysis has been prepared.

D. Review Under the Paperwork Reduction Act

No new information collection or recordkeeping requirements are imposed by this rulemaking. Accordingly, no OMB clearance is required by the Paperwork Reduction Act of 1980 (44 U.S.C. 3501, *et seq.*).

E. Review Under Executive Order 12612

Executive Order 12612, 52 FR 41685 (October 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the national government and the States, and in the distribution of power and responsibilities among various levels of government. If there are sufficient substantial direct effects, then the Executive Order requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action.

Today's final rule revises certain policy and procedural requirements. However, DOE has determined that none of the revisions will have a substantial direct effect on the institutional interests or traditional functions of States.

F. Review Under the National Environmental Policy Act (NEPA)

DOE has concluded that this rule falls into a class of actions (categorical exclusion A5) that are categorically excluded from NEPA review because they would not individually or cumulatively have significant impact on the human environment, as determined by the Department's regulations (10 CFR Part 1021, Subpart D) implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321, 4331-4335, 4341-4347 (1976)). Therefore, this rule does not require an environmental impact statement or an environmental assessment pursuant to NEPA.

List of Subjects in 48 CFR Parts 909, 952, 970

Government procurement.

For the reasons set out in the preamble, Chapter 9 of Title 48 of the Code of Federal Regulations is amended as set forth below.

Issued in Washington, D.C., on December 12, 1994.

Richard H. Hopf,

Deputy Assistant Secretary for Procurement and Assistance Management.

PART 909—CONTRACTOR QUALIFICATIONS

1. The authority citation for Part 909 continues to read as follows:

Authority: 42 U.S.C. 7254; 40 U.S.C. 486(c).

Subpart 909.5—Organizational Conflicts of Interest

2. Section 909.500 is amended by adding the following as the second sentence:

§ 909.500 Scope of subpart.

* * * However, the coverage at FAR subpart 9.5 regarding marketing consultants does apply to DOE acquisitions.

3. Section 909.570-3 is amended by revising the definitions for "Evaluation services or activities," "Organizational conflicts of interest," and "Technical consulting and management support services" to read as follows:

§ 909.570-3 Definitions.

* * * * *

Evaluation services or activities means any work or effort involving the independent study of technology, process, product, or policy.

* * * * *

Organizational conflicts of interest means that a relationship or situation exists whereby an offeror or a contractor (including chief executives and directors, to the extent that they will or do become involved in the performance of the contract, and proposed consultants or subcontractors where they may be performing services similar to the services provided by the prime) has past, present, or currently planned interests that relate to the work to be performed under a Department contract and such interest or interests may reasonably (1) diminish an offeror's or contractor's capacity to give impartial, technically sound, objective assistance and advice, or (2) result in an offeror's or contractor's being given an unfair competitive advantage. It does not include the normal flow of benefits from the performance of the contract.

* * * * *

Technical consulting and management support services means any work or effort to provide internal assistance to any program element or other organizational component of the Department in the formulation or administration of its programs, projects,

or policies. Such services typically include assistance in the preparation of program plans; evaluation, monitoring, or review of other contractors' activities or proposals submitted by prospective contractors; preparation of preliminary designs, specifications, or statements of work; and may involve the contractor's being given access to data confidential to the Department or proprietary to others.

4. Section 909.570-4 is amended by revising the last sentence of paragraph (a) and by revising paragraphs (b)(4) and (b)(7) to read as follows:

909.570-4 Criteria for recognizing organizational conflicts of interest.

(a) * * * While it is difficult to identify, and to prescribe in advance, a specific method for avoiding all the various situations or relationships which might involve potential organizational conflicts of interest, Department personnel must pay particular attention to proposed contractual requirements which call for the rendering of advice, or consultation or evaluation services, or similar activities that are expected to play a part in the Department's decisions on future acquisitions; research, development, and demonstration programs; production activities; the formulation of departmental policy; and regulatory activities.

(b) * * *

(4) Contract performance involving access to information proprietary to third parties which cannot lawfully be used for purposes other than those authorized by those third parties.

* * * * *

(7) Contract performance involving the preparation and furnishing of advice to the Department on a regulatory matter where the contractor would be regulated or is providing, or is currently planning to provide, assistance on the same or similar matter to any organization regulated by the Department.

* * * * *

5. Section 909.570-5 is revised to read as follows:

909.570-5 Disclosure of organizational conflicts of interest.

(a) When submitting solicited and unsolicited proposals for (1) evaluation services or activities; (2) technical consulting and management support services; (3) research and development conducted pursuant to the authority of the Federal Energy Administration Act of 1974 (Pub. L. 93-275), as amended; and (4) other contractual situations where special organizational conflicts of interest provisions are noted in the solicitation and included in the

resulting contract, offerors shall be required to identify and disclose information about contracts, investments, and all other interests relating to the work to be performed under the proposed contract or complete the representation in accordance with 909.570-7.

(b) This requirement shall also apply to modifications of contracts of the types noted in paragraph (a) of this section that exercise an option or otherwise meaningfully extend the period of performance or add work, of the type noted in paragraph (a), to the contract. Where, however, a disclosure statement of the type required by the Organizational Conflicts of Interest Disclosure or Representation provision has previously been submitted with regard to the contract being modified, only an updating of such statement need be submitted. Information submitted by offerors pursuant to the disclosure requirement shall be treated by the Department, to the extent permitted by law, as confidential information to be used solely for OCI purposes.

(c) When the Government finds that an organizational conflict of interest exists or may exist with respect to an offeror or contractor, no award of a contract or contract modification covered by 909.570-7 shall be made until the organizational conflict of interest has been avoided, except as provided in 909.570-9. An organizational conflict of interest has been avoided when corrective actions taken to remedy it result in there being little or no likelihood of an organizational conflict of interest.

6. Section 909.570-6 is revised to read as follows:

909.570-6 Notices and representations: Action required of contracting officers.

The disclosure or representation required by 909.570-7 is designed to alert the contracting officer to situations or relationships which may constitute either present or anticipated organizational conflicts of interest with respect to a particular offeror or contractor. Another type of organizational conflict of interest may exist in that work to be performed will lead to a subsequent requirement with the result that the successful proposer on the current solicitation will be barred by operation of paragraph (b)(1)(i) of the clause at 952.209-72 from proposing on the later solicitation. Accordingly, whenever such potential conflicts are foreseeable by the Government, a special notice also shall be included in the solicitation informing the offerors (a) that such a potential conflict is foreseen and (b) of any special contract clause or

provision designed to avoid or mitigate such conflict that will be included in any resultant contract as required by 909.570-8(a). Such notice shall specify the proposed extent and duration of any special restrictions to be imposed with respect to participation in subsequent acquisitions. A fixed term of reasonable duration is measured by the time required to eliminate what would otherwise constitute an unfair competitive advantage. In the event a contractor, having performed on one contract, later seeks work that stems or may be deemed to stem directly (*i.e.*, arising out of or relating to) from prior performance, such contractor shall not be precluded from proposing on follow-on work unless the prior contract contained an appropriate follow-on restriction. Nevertheless, this absence of restriction shall not preclude the contracting officer from finding that, in light of performance of the prior contract, an organizational conflict of interest would or may exist.

7. Section 909.570-7 is revised to read as follows:

909.570-7 Disclosure or representation.

The contracting officer shall include the provision at 952.209-70, Organizational Conflicts of Interest-Disclosure or Representation, in all solicitations, including those for scope modifications, and offerors shall accordingly disclose or represent in their proposals, including unsolicited proposals for (a) evaluation services or activities; (b) technical consulting and management support services; (c) research and development conducted pursuant to the authority of the Federal Energy Administration Act of 1974 (Pub. L. 93-275), as amended; and (d) other contractual situations where special organizational conflicts of interest issues are identified. Section 909.570-15 of this part contains a suggested outline for the disclosure submission.

8. Section 909.570-8 is revised to read as follows:

909.570-8 Contract clauses.

(a) *Special contract clause.* The contracting officer shall include the clause at 952.209-72, Organizational Conflicts of Interest, in all contracts for evaluation services or activities or technical consulting and management support services.

(b) *Specially drafted contract clauses and provisions.* If it is determined from the nature of the proposed contract that a specifically identified, potential organizational conflict of interest may exist, the contracting officer may determine that such conflict can be

avoided through the use of an appropriate specially drafted additional contract clause. Examples of the types of clauses which may be employed include, but are not limited to, the following:

(1) Hardware exclusion clauses which prohibit the contractor's acceptance of production contracts following a related design contract previously performed by the contractor;

(2) Software exclusion clauses;

(3) Clauses which require the contractor (and/or certain of its key personnel) to avoid conduct deemed to cause an organizational conflict of interest;

(4) Clauses which provide for the protection of the confidentiality of data and guard against its unauthorized use; and

(5) Clauses that prohibit other segments or divisions of the contractor from becoming involved in the performance of the contract work or being in a position to influence such work. If deemed appropriate, the prospective contractor may be given the opportunity to negotiate the terms and conditions of the clause and its application including the extent and duration of any restrictions.

9. Section 909.570-9 is amended by revising the introductory text of paragraph (a) to read as follows and adding the phrase "or other means" after "by an appropriate contract clause" in the first sentence of paragraph (a)(3):

909.570-9 Evaluations, findings, and contract award.

(a) The contracting officer shall evaluate all relevant facts submitted by an offeror pursuant to the requirement of 909.570-6 and such other relevant information as may be available concerning possible organizational conflicts of interest. After evaluation of all such information in accordance with the criteria of 909.570-4, and prior to any award, the contracting officer shall make a finding as to whether a possible organizational conflict of interest may exist with respect to a particular offeror. If the contracting officer determines, in light of all relevant facts, that, with respect to a particular offeror, there is little or no likelihood of an organizational conflict of interest, then no organizational conflict of interest exists for purposes of making the contract award. Conversely, if the contracting officer determines, however, that there is more than little or no likelihood of an organizational conflict of interest, then an organizational conflict of interest exists with regard to that particular offeror. When formal

Source Evaluation Board procedures are applicable, the finding shall be made by the Source Selection Official. If the finding indicates that such conflicts exist, then the contracting officer shall:

* * * * *

10. Section 909.570-10 is revised to read as follows:

909.570-10 Action in lieu of termination.

If, after award, changes in relevant facts with respect to the awardee, whether based upon information supplied by the awardee or gathered from other sources, cause the contracting officer to conclude that an organizational conflict of interest exists and that it would not be in the best interest of the Government to terminate the contract as provided in the clause at 952.209-72(e), the contracting officer shall take every reasonable action to avoid or mitigate the effects of the conflict.

11. Section 909.570-12 is revised to read as follows:

909.570-12 Subcontractors and consultants.

The contracting officer shall require offerors and contractors to obtain for the Department a disclosure or representation in accordance with 909.570-7 from subcontractors and consultants whose subcontract calls for the performance of services similar to those provided by the prime contractor, i.e., evaluation services or activities or technical consulting and management support services. Such disclosure or representation may be submitted by the subcontractors and consultants directly to the contracting officer, and their disclosure or representation shall be treated by the Department, to the extent permitted by law, as confidential information to be used solely for OCI purposes. The contract clause at 952.209-72, entitled Organizational Conflicts of Interest, requires that the contractor (and each succeeding lower tier subcontractor) include that clause in subcontracts or consultant agreements involving work covered by this subpart.

12. Section 909.570-14 is amended by revising paragraphs (b)(4), (b)(5), (b)(7), (b)(8), and (b)(12); by adding the word "not" after "these companies may" in the last sentence of paragraph (b)(6); by replacing "suggests" with "produces" and by replacing "in requests" with "in a request" in the second sentence of paragraph (b)(9); and by adding a comma after "OCI" and removing the word "plants" in the fourth sentence of paragraph (b)(11). These amendments are set forth to read as follows:

909.570-14 Examples.

* * * * *

(b) * * *

(4) Company A prepares updated Government specifications for a standard refrigerator to be procured competitively. *Guidance.* Normally this would constitute an OCI. The contract should have contained the OCI clause barring Company A from competing for supply of a refrigerator based upon the specification it prepared.

(5) Company A designs or develops new electronics equipment under a DOE contract and delivers descriptive specifications as part of the final report. DOE then issues a solicitation for procurement of that electronics equipment including a statement of work that reflects the descriptive specifications. *Guidance.* Normally this would not constitute an OCI. The contract should have contained the OCI clause barring the company from competing to supply the electronics equipment.

* * * * *

(7) Prior to acquisition of Automatic Data Processing (ADP) Equipment, Company A is awarded a contract to develop software to automate a DOE function. *Guidance.* This situation will turn on whether the software that was developed might have limited the potential source for the equipment. If the answer were yes, the contract should have contained the OCI clause barring competition for the equipment. However, if the software were not so limited, this would not constitute an OCI, and Company A would not be barred from at least the initial ADP hardware acquisition necessary to accommodate the software developed under its development contract.

(8) Company A receives a contract to define the detailed performance characteristics a Government agency will use in the purchase of rocket fuels. The company has not developed the particular fuels. At the time the contract is awarded, it is clear to both parties that the performance characteristics arrived at will be used by the Government agency to choose competitively a contractor to develop the fuels. *Guidance.* Normally this would constitute an OCI, and Company A shall not be permitted to bid on the acquisition to develop the fuels.

* * * * *

(12) Firm A, because of its unique technical expertise, has been requested to assist the Department in the evaluation of proposals which will result from a competitive solicitation. Firm A also plans to submit a proposal in response to this same solicitation.

Guidance. Normally this would constitute a conflict, and Firm A should be precluded from participating in the solicitation. In a particular case, it may be desirable (e.g., when the competitive field is limited) to allow a separate division or affiliate of Firm A to submit a proposal. In such a case, of course, Firm A must obtain a waiver from the Department of Energy contracting officer and would not be permitted to participate in the evaluation of this proposal. Such evaluation would be performed by DOE or another DOE contractor.

909.570-15 [Amended]

13. Section 909.570-15 is amended by adding the phrase "interests and" after "currently planned" the second time that phrase appears in paragraph (a).

PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

14. The authority citation for part 952 continues to read as follows:

Authority: 42 U.S.C. 7254; 40 U.S.C. 486(c).

15. Section 952.209-70 is revised to read as follows:

952.209-70 Organizational conflicts of interest—disclosure or representation.

Contracting officers shall insert the following provision in solicitations in accordance with 909.570-7.

Organizational Conflicts of Interest—Disclosure or Representation (Dec. 1994)

(a) It is Department of Energy policy to avoid situations which place an offeror in a position where its judgment may be biased due to any past, present, or currently planned interest, financial or otherwise, that the offeror may have which relates to the work to be performed pursuant to this solicitation, or where the offeror's performance of such work may provide it with an unfair competitive advantage. (As used herein, "offeror" means the proposer or any of its affiliates or proposed consultants or subcontractors of any tier.) Therefore:

(1) As required by section 401 of Pub. L. 95-39 (42 U.S.C. 5918(a)) and section 10 of Pub. L. 95-70 (15 U.S.C. 789(a)), the offeror shall provide a statement which describes, in a concise manner, all relevant facts concerning any past, present, or currently planned interest (financial, contractual, organizational, or otherwise) relating to the work described in the statement of work of this solicitation. The offeror may also provide relevant facts that show how its organizational structure and/or management systems limit its knowledge of affiliates or other divisions or sections of the proposing entity and how that structure or system would avoid or mitigate an organizational conflict of interest.

(2) The proposing entity shall assure that any consultants and subcontractors,

identified in its proposal, which will perform services similar to those to be performed by the proposer, i.e., evaluation services or activities or technical consulting and management support services submit the same information as required by paragraph (a)(1) of this clause, either as part of the proposing entity's proposal, or directly to DOE prior to the time and date set for receipt of proposals, with identification of the solicitation and the offeror's proposal to which it relates.

(3) The proposing entity shall also assure that each of its chief officers or directors, if any, who will be directly involved in the actual performance of the contract, submit such information.

(4) The proposing entity shall promptly provide to the DOE contracting officer information concerning any changes, including additions, in its relevant facts reported under paragraph (a)(1) of this clause, that occur between the submission of its proposal and the award of the contract or the time that the proposer is notified that it is no longer under consideration for award.

(b) In the absence of any relevant interests referred to above, the offeror or others specified above, shall submit a statement certifying that to its best knowledge and belief no such facts exist relevant to the work to be performed.

(c) If the proposing entity has submitted a Securities and Exchange Commission Form 10k to that agency, it shall include a copy of the form and a list of all attachments as part of its business management proposal (or cost proposal if no business management proposal is required).

(d) The contracting officer will review the statement submitted and may require the submission of additional relevant information. All such information, and any other relevant information known to the Department, will be used to determine whether an award to the offeror may create an organizational conflict of interest with respect to the offeror's (1) being able to render impartial, technically sound, and objective assistance or advice, or (2) being given an unfair competitive advantage. If such a conflict is found to exist, the Department, at its sole discretion, may (1) impose appropriate conditions which avoid such conflict, (2) disqualify the offeror, or (3) determine that it is otherwise in the best interest of the United States to contract with the offeror in face of an organizational conflict after including appropriate conditions mitigating such conflict.

(e) The refusal to provide the disclosure or representation and any additional information as required shall result in disqualification of the offeror for award. The nondisclosure or misrepresentation of any relevant interest may also result in the disqualification of the offeror for award, or if such nondisclosure or misrepresentation is discovered after award, the resulting contract may be terminated for default. The offeror may also be disqualified from subsequent related Department contracts, and be subject to such other remedial action as may be permitted or provided by law or in the resulting contract. The attention of the offeror in complying with this provision is directed to 18 U.S.C. 1001.

(f) Depending on the nature of the contract activities, the offeror may, because of possible organizational conflicts of interest, propose to exclude specific kinds of work from the statement of work, unless the solicitation specifically prohibits such exclusion. Any such proposed exclusion by an offeror shall be considered by the Department in the evaluation of proposals, and if the Department considers the proposed excluded work to be an essential or integral part of the required work, the proposal may be rejected as unacceptable.

(g) No award shall be made until the disclosure or representation has been evaluated by the Government. Failure to provide the disclosure or representation will be deemed to be a minor informality, and the offeror shall be required to promptly correct the omission.

952.209-71 [Removed and reserved]

16. Section 952.209-71 is removed and reserved.

17. Section 952.209-72 is amended by revising the section heading to read as set forth below; by revising the prescription for use of the clause as set forth below; by revising the title of the clause as set forth below; by amending the subparagraph designators of paragraph (b)(2)(i) of the clause to read "(A)," "(B)," "(C)," and "(D)," respectively; by revising paragraphs (b)(2)(iii), (c), and (d)(1) of the clause to read as follows; and paragraph (g) is amended by replacing the word "significantly" with "meaningfully" and by adding the phrase "in accordance with the instructions of the contracting officer" at the end of the paragraph:

952.209-72 Organizational conflicts of interest.

The contracting officer shall include the following clause in all contracts for evaluation services or activities, technical consulting and management support services, research and development under the authority of the Federal Energy Administration Act, and other appropriate situations in accordance with 909.570-8.

Organizational Conflicts of Interest (Dec. 1994)

* * * * *

(b) * * *

(2) * * *

(iii) The contractor may use technical data it first produces under this contract for its private purposes consistent with subparagraphs (b)(2)(i) (A) and (D) of this clause and the patent, rights in data, and security provisions of this contract.

(c) Disclosure after award. (1) The contractor agrees that, if changes, including additions, to the relevant facts disclosed by it prior to award of this contract, occur during the performance of this contract, it shall make an immediate and full disclosure of such changes in writing to the contracting

officer. Such disclosure may include a description of any action which the contractor has taken or proposes to take to avoid or mitigate any resulting conflict of interest. The Department may, however, terminate the contract for convenience if it deems such termination to be in the best interest of the Government.

(2) In the event that the contractor was aware of facts relevant to the performance of this contract and did not disclose such facts to the contracting officer, DOE may terminate this contract for default.

(d) Subcontracts. (1) The contractor shall include this clause, including this paragraph, in contracts of any tier which involve performance of evaluation services or activities, or technical consulting and management support services as those terms are defined at 48 CFR (DEAR) 909.570-3. The terms "contract," "contractor," and "contracting officer" shall be appropriately modified to preserve the Government's rights.

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PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

18. The authority citation for part 970 continues to read as follows:

Authority: Sec. 161 of the Atomic Energy Act of 1954 (42 U.S.C. 2201), sec. 644 of the Department of Energy Organization Act, Pub. L. 95-91 (42 U.S.C. 7254), sec. 201 of the Federal Civilian Employee and Contractor Travel Expenses Act of 1985 (41 U.S.C. 420) and sec. 1534 of the Department of Defense Authorization Act, 1986, Pub. L. 99-145 (42 U.S.C. 7256a), as amended.

970.5204-36 [Amended]

19. Section 970.5204-36, Organizational conflicts of interest, is amended by revising the section heading to read "Preventing conflicts of interest in university research" and by revising the title of the clause contained therein to read "Preventing Conflicts of Interest in University Research (DEC 1994)."

[FR Doc. 94-31496 Filed 12-22-94; 8:45 am]
BILLING CODE 6450-01-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1801, 1803, 1804, 1806, 1807, 1808, 1812, 1815, 1819, 1822, 1825, 1829, 1833, 1835, 1837, 1842, 1844, 1852, 1853, and 1870

RIN 2700-AB38

NASA FAR Supplement Directive (NFSD) 89-17; Miscellaneous amendments

AGENCY: Office of Procurement, Acquisition Liaison Division, National Aeronautics and Space Administration (NASA).