

Billing Code 6450-01-P

DEPARTMENT OF ENERGY

10 CFR Parts 600, 603, 609, and 611

RIN 1990-AA36

Procedures for Submitting to the Department of Energy Trade Secrets and Commercial or Financial Information that is Privileged or Confidential

AGENCY: Office of the General Counsel, Department of Energy (DOE).

ACTION: Notice of proposed rulemaking; request for comment.

SUMMARY: DOE proposes to standardize across its various programs procedures for the submission and protection of trade secrets and commercial or financial information that is privileged or confidential, where such information is submitted by applicants for various forms of DOE assistance (including financial assistance such as grants, cooperative agreements, and technology investment agreements, as well as loans and loan guarantees). The procedures that would be established across DOE programs are modeled after existing procedures DOE uses to process loan applications submitted to DOE's Advanced Technology Vehicles Manufacturing Incentive Program.

DATES: Comments on these proposed procedures must be postmarked by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested parties may submit comments, identified by Regulation Identifier Number (RIN) 1990-AA36, by any of the following methods:

1. Federal eRulemaking Portal: www.regulations.gov. Follow the instructions for submitting comments.
2. E-mail: 1990-AA36@hq.doe.gov. Include RIN 1990-AA36 in the subject line of the message.
3. Postal Mail: Office of the General Counsel, U.S. Department of Energy, Room 6A-245, 1000 Independence Avenue, S.W., Washington, DC 20585-0121. Please submit one signed paper original and include RIN 1990-AA36 on your submission.
4. Hand Delivery/Courier: Office of the General Counsel, U.S. Department of Energy, Room 6A-245, 1000 Independence Avenue, S.W., Washington, DC 20585-0121. Telephone: (202) 586-5281. Please submit one signed paper original and include RIN 1990-AA36 on your submission.

FOR FURTHER INFORMATION CONTACT: Daniel Cohen, Assistant General Counsel for Legislation, Regulation and Energy Efficiency, U.S. Department of Energy, 1000 Independence Avenue, S.W., Washington, DC 20585-0121. Telephone: (202) 586-9523. E-mail: 1990-AA36@hq.doe.gov. Include RIN 1990-AA36 in the subject line of the message.

SUPPLEMENTARY INFORMATION: DOE provides assistance to eligible applicants through a number of different programs. This assistance can take the form of financial assistance (i.e., grants, cooperative agreements, and technology investment agreements), loan guarantees, and direct loans, among others. DOE has consistently sought to protect trade secrets and commercial or financial information that is privileged or confidential submitted by applicants for these forms of assistance, but the procedures required of applicants when submitting such information can vary. DOE proposes procedures for the submission to DOE of trade secrets and commercial or financial information that is privileged or confidential meant to standardize DOE's procedures for processing and handling applicant submissions containing such information. The procedures proposed in this rulemaking are modeled after existing procedures DOE uses to process loan applications submitted to DOE's Advanced Technology Vehicles Manufacturing Incentive Program.

DOE proposes minor changes to the Notice of Restriction on Disclosure and Use of Data in 10 CFR 600.15(b)(1), as well as corresponding changes to 10 CFR 600.15(a) and 600.15(b)(2) and (3). These changes are intended to allow for cross reference from other portions of Subpart H (specifically, Parts 609—Loan Guarantees for Projects that Employ Innovative Technologies and 611—Advanced Technology Vehicles Manufacturer Assistance Program) while recognizing that Part 600 does not otherwise apply to loans and loan guarantees.

DOE proposes to amend 10 CFR 600.15(b)(1) to require a party submitting information to DOE, at the time of submission, to identify and assert a claim of exemption regarding information it considers to be trade secrets or commercial or financial information that is

privileged or confidential such that the information would be exempt from disclosure under the Freedom of Information Act (FOIA, 5 U.S.C. 552). This claim of exemption must be made by placing the following notice on the first page of the application or other document and specifying the page or pages to be restricted: “Pages [____] of this document may contain trade secrets or commercial or financial information that is privileged or confidential and exempt from public disclosure. Such information shall be used or disclosed only for evaluation purposes or in accordance with a financial assistance or loan agreement between the submitter and the Government. The Government may use or disclose any information that is not appropriately marked or otherwise restricted, regardless of source.”

To further protect trade secrets and commercial or financial information that is privileged or confidential, DOE also proposes to add a requirement in section 600.15(b)(1) that each page containing such data must be specifically identified and marked with text that is similar to the following: “May contain trade secrets or commercial or financial information that is privileged or confidential and exempt from public disclosure.” In addition, each line or paragraph containing trade secrets or commercial or financial information that is privileged or confidential on the page or pages on which this statement appears must be marked with brackets or other clear identification, such as highlighting.

DOE acknowledges that the marking procedures set forth above may not be feasible on unalterable forms submitted through Grants.gov. In such cases only, DOE proposes that submitters include in a cover letter or the project narrative a notice containing language substantially similar to the following: “Forms [____] may contain trade secrets or commercial or financial information that is privileged or confidential and exempt from public disclosure. Such

information shall be used or disclosed only for evaluation purposes or in accordance with a financial assistance or loan agreement between the submitter and the Government. The Government may use or disclose any information that is not appropriately marked or otherwise restricted, regardless of source.” The cover letter or project narrative must also specify the particular information on such forms that the submitter believes to be trade secrets or commercial or financial information that is privileged or confidential.

DOE also proposes to amend 10 CFR 603.850 to require that the markings affixed to data for technology investment agreements that may contain trade secrets or commercial or financial information that is privileged or confidential conform to the marking requirements of 10 CFR 600.15.

DOE further proposes that the regulations implementing its loan guarantee program for projects that employ innovative technologies under Title XVII of the Energy Policy Act of 2005 (42 U.S.C. 16511-16514) cross-reference 10 CFR 600.15. These regulations are set forth at 10 CFR Part 609. DOE proposes to establish the same marking requirements as described above for any information submitted through the Title XVII loan application process, including pre-applications, applications, and any additional information provided by loan applicants. Similarly, DOE proposes that the regulations implementing its Advanced Technology Vehicles Manufacturing (ATVM) Incentive Program at 10 CFR Part 611 cross-reference 10 CFR 600.15. DOE already applies to the ATVM program procedures virtually identical to those proposed in this notice. DOE here proposes to establish the marking requirements described above in the program’s implementing regulations.

Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of a final regulatory flexibility analysis (FRFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking” 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel’s website (www.gc.doe.gov).

DOE has reviewed today’s proposed rule under the Regulatory Flexibility Act and certifies that, if adopted, the rule would not have a significant impact on a substantial number of small entities. While DOE recognizes that some applicants for assistance may be small businesses according to SBA size standards, DOE believes that the impact on such applicants of the proposed rule would not be significant. The proposed rule does not change the information applicants are required to submit to apply for the various forms of DOE assistance. It merely

instructs applicants how to mark information that they believe to be trade secrets or commercial or financial information that is privileged or confidential.

C. Review Under the Paperwork Reduction Act

The information collection requirements for the various forms of assistance to which the marking requirements in this proposed rule would apply have been approved under OMB Control Numbers 1910-0400 (Financial Assistance Regulations) and 1910-5134 (Title XVII loan guarantee program).

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act

In this proposed rule, DOE proposes procedures for the submission of information relating to various forms of assistance, including grants, cooperative agreements, technology investment agreements, loans, and loan guarantees. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this proposed rule is a procedural rule covered by Categorical Exclusion A6 under 10 CFR Part 1021, subpart D, which applies to any rulemaking that is strictly procedural in

nature. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review under Executive Order 13132

Executive Order 13132, “Federalism,” 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have other federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has considered today’s proposed rule in accordance with Executive Order 13132 and its policy and determined that this proposed rule setting forth requirements for the marking of trade secrets and commercial or financial information that is privileged or confidential, if adopted, would not preempt State law or have any federalism impacts. No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform,” imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors

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

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. For proposed regulatory actions likely to result in a rule that may cause expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish estimates of the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b).) UMRA also requires Federal agencies to develop an effective process to permit timely input by elected

officers of State, local, and Tribal governments on a proposed “significant intergovernmental mandate.” In addition, UMRA requires an agency plan for giving notice and opportunity for timely input to small governments that may be affected before establishing a requirement that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. (62 FR 12820.) (This policy is also available at <http://www.gc.doe.gov>). Today’s proposed rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of \$100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

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

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights,” 53 FR 8859 (March 18, 1988), that this regulation would not result in any takings which might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's notice under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866 or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that today's regulatory action, which would establish marking requirements for information submitted to DOE that the submitter believes to be trade secrets or commercial or financial information that is privileged or confidential, is not a significant energy action because the proposed standards are not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects for the proposed rule.

L. Review Under the Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy, issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. DOE has determined that today's proposed rule does not contain any influential or highly influential scientific information that would be subject to the peer review requirements of the OMB Bulletin.

Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rule.

List of Subjects in 10 CFR Parts 600, 603, 609, and 611

Accounting, Administrative practice and procedure, Colleges and universities, Confidential business information, Energy, Government contracts, Grant programs, Hospitals, Indians, Intergovernmental relations, Loan programs, Lobbying, Nonprofit organizations, Penalties, Reporting and recordkeeping requirements.

Issued in Washington, DC, on March 7, 2011.



Steven Chu
Secretary of Energy

For the reasons stated in the preamble, DOE proposes to amend Subchapter H, Assistance Regulations, of Chapter II of Title 10, Code of Federal Regulations, to read as set forth below:

PART 600—FINANCIAL ASSISTANCE RULES

1. The authority citation for Part 600 continues to read as follows:

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

2. Section 600.15 is revised to read as follows:

§ 600.15 Authorized uses of information.

(a) *General.* Information contained in applications shall be used only for evaluation purposes unless such information is generally available to the public or is already the property of

the Government. The Trade Secrets Act, 18 U.S.C. 1905, prohibits the unauthorized disclosure by Federal employees of trade secret and confidential business information.

(b) *Treatment of application information.* (1) An application or other document, including any unsolicited information, may include technical data and other data, including trade secrets and commercial or financial information that is privileged or confidential, which the applicant does not want disclosed to the public or used by the Government for any purpose other than application evaluation.

(i) To protect such data, the submitter must mark the cover sheet of the application or other document with the following Notice:

Notice of Restriction on Disclosure and Use of Data

Pages [] of this document may contain trade secrets or commercial or financial information that is privileged or confidential and is exempt from public disclosure. Such information shall be used or disclosed only for evaluation purposes or in accordance with a financial assistance or loan agreement between the submitter and the Government. The Government may use or disclose any information that is not appropriately marked or otherwise restricted, regardless of source.

(ii) To further protect such data, except as otherwise provided in paragraph (b)(1)(iii) of this section, each page containing trade secrets or commercial or financial information that is privileged or confidential must be specifically identified and marked with text similar to the following:

May contain trade secrets or commercial or financial information that is privileged or confidential and exempt from public disclosure.

In addition, each line or paragraph containing trade secrets or commercial or financial information that is privileged or confidential must be marked with brackets or other clear identification, such as highlighting.

(iii) In the case where a form for data submission is unalterable, such as certain forms submitted through Grants.gov, submitters must include in a cover letter or the project narrative a notice like the following:

Forms [____] may contain trade secrets or commercial or financial information that is privileged or confidential and exempt from public disclosure. Such information shall be used or disclosed only for evaluation purposes or in accordance with a financial assistance or loan agreement between the submitter and the Government. The Government may use or disclose any information that is not appropriately marked or otherwise restricted, regardless of source.

The cover letter or project narrative must also specify the particular information on such forms that the submitter believes contains trade secrets or commercial or financial information that is privileged or confidential.

(2) Unless DOE specifies otherwise, DOE shall not refuse to consider an application or other document solely on the basis that the application or other document is restrictively marked in accordance with paragraph (b)(1) of this section.

(3) Data (or abstracts of data) specifically marked in accordance with paragraph (b)(1) of this section shall be used by DOE or its designated representatives solely for the purpose of evaluating the proposal. The data so marked shall not be disclosed or used for any other purpose except to the extent provided in any resulting assistance agreement, or to the extent required by law, including the Freedom of Information Act (5 U.S.C. 552) (10 CFR Part 1004). The Government shall not be liable for disclosure or use of unmarked data and may use or disclose such data for any purpose.

(4) This process enables DOE to follow the provisions of 10 CFR 1004.11(d) in the event a Freedom of Information Act (5 U.S.C. 552) request is received for the data submitted, such that information not identified as subject to a claim of exemption may be released without obtaining the submitter's views under the process set forth in 10 CFR 1004.11(c)

PART 603—TECHNOLOGY INVESTMENT AGREEMENTS

3. The authority citation for Part 603 continues to read as follows:

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

4. Section 603.850 is revised to read as follows:

§ 603.850 Marking of data.

To protect the recipient's interests in data, the TIA should require the recipient to mark any particular data that it wishes to protect from disclosure as specified in 10 CFR 600.15(b).

PART 609—LOAN GUARANTEES FOR PROJECTS THAT EMPLOY INNOVATIVE TECHNOLOGIES

5. The authority citation for Part 609 continues to read as follows:

Authority: 42 U.S.C. 7254, 16511-16514.

6. Section 609.4 is amended by revising the introductory text to read as follows:

§ 609.4 Submission of Pre-Applications.

In response to a solicitation requesting the submission of Pre-Applications, either Project Sponsors or Applicants may submit Pre-Applications to DOE. The information submitted in or in connection with Pre-Applications will be treated as provided in 10 CFR 600.15 and must be marked as provided in 10 CFR 600.15(b). Pre-Applications must meet all requirements specified in the solicitation and this part. At a minimum, each Pre-Application must contain all of the following:

* * * * *

7. Section 609.5 is amended by revising paragraph (d) to read as follows:

§ 609.5 Evaluation of Pre-Applications.

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(d) After the evaluation described in subsection (c) of this section, DOE will determine if there is sufficient information in the Pre-Application to assess the technical and commercial viability of the proposed project and/or the financial capability of the Project Sponsor and to assess other aspects of the Pre-Application. DOE may ask for additional information from the Project Sponsor during the review process and may request one or more meetings with the Project Sponsor. Any additional information submitted will be treated as provided in 10 CFR 600.15 and must be marked as provided in 10 CFR 600.15(b).

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8. Section 609.6 is amended by revising paragraph (a) to read as follows:

§ 609.6 Submission of Applications.

(a) In response to a solicitation or written invitation to submit an Application, an Applicant submitting an Application must meet all requirements and provide all information specified in the solicitation and/or invitation and this part. The information submitted in or in connection with Applications will be treated as provided in 10 CFR 600.15 and must be marked as provided in 10 CFR 600.15(b).

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9. Section 609.7 is amended by revising paragraph (c) to read as follows:

§ 609.7 Programmatic, technical and financial evaluation of Applications.

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(c) During the Application review process DOE may raise issues or concerns that were not raised during the Pre-Application review process where a Pre-Application was requested in the applicable solicitation. Any additional information submitted to DOE will be treated as provided in 10 CFR 600.15 and must be marked as provided in 10 CFR 600.15(b).

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PART 611—ADVANCED TECHNOLOGY VEHICLES MANUFACTURER ASSISTANCE PROGRAM

10. The authority citation for Part 611 continues to read as follows:

Authority: Pub.L. 110-140 (42 U.S.C. 17013), Pub. L. 110-329.

11. Section 611.101 is amended by revising the introductory text to read as follows:

§ 611.101 Application.

The information and materials submitted in or in connection with applications will be treated as provided in 10 CFR 600.15 and must be marked as provided in 10 CFR 600.15(b). An application must include, at a minimum, the following information and materials:

* * * * *

12. Section 611.103 is amended by revising paragraph (a) to read as follows:

§ 611.103 Application evaluation.

(a) *Eligibility screening.* Applications will be reviewed to determine whether the applicant is eligible, the information required under §611.101 is complete, and the proposed loan complies with applicable statutes and regulations. DOE can at any time reject an application, in whole or in part, that does not meet these requirements. Any additional information submitted to DOE will be treated as provided in 10 CFR 600.15 and must be marked as provided in 10 CFR 600.15(b).

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