

For-profit comments and responses

U.S. Department of Energy Audit Guidance: For-Profit Recipients

***Comments and Responses to U.S. Department of Energy Request for Information
Federal Register Notice 2011-32622***

Note that the comment categories do not correlate to the lettered sections of the guidance, ie Comment Category A does not correspond with Section A of either part of the guidance .)

Comment Category A: Clarification of whether we are requesting a single audit.

Two commenters felt that the guidance should state that DOE wants a single audit report per recipient. Commenter 1 stated that the guidance under Part I, of the Draft 2011 'U.S. Department of Energy Audit Guidance: For-Profit Recipients' (hereafter referred to as Part I), Section E is still unclear and should specifically state that the auditor should always issue a single consolidated audit report regardless of how many financial assistance awards were audited. Commenter 5 objected to the change in definition of a DOE award, also in Part I, Section E, which says that the term 'award' does not apply multiple awards with the same CFDA number. They stated that this is a significant difference from the 2010 guidance and will result in additional costs to the prime recipients.

Response: DOE's intent is not that there will always be a single audit per recipient. DOE feels that audits should be combined to the extent possible but is leaving it up to the discretion of the auditor, in consultation with the recipient, whether the compliance requirements of the awards are similar enough that they should be combined in a single audit report. In response to the second comment, we agree that the guidance should not specifically state that awards under the same CFDA number cannot be aggregated in a single report.

When the auditor and recipient decide that an aggregate report is appropriate, the auditor can give an opinion at the aggregate level but should include data from all awards in its sampling.

Comment Category B: Clarification of the Term 'expended'.

Commenter 1 stated that several of their recipients considered 'expended' in Part I, Section H, to mean when they received reimbursement from DOE for invoices submitted for payment. They felt that DOE funds should be considered expended

when they are incurred (accrued) and put on the recipient's books and records in accordance with generally accepted accounting principles. They requested that this term be clarified in this section.

Commenter 2 edited the source document to add the following text to define 'expended'. "For entities on an accrual basis of accounting, activities should be counted as expended if the transaction has been recorded on the recipient's books at or as of the end of the period under examination."

Response: In order to address both of these comments, DOE will add the following text: "Funds should be considered expended when they are incurred (accrued) and put on the recipient's books in accordance with generally accepted accounting principles. It is immaterial whether the recipient has yet been reimbursed by DOE for the expenditure'.

Comment Category C: Emphasize compliance instead of financial information

Commenter 1 suggested re-ordering bullets under Section R. Since this is not a financial audit, the first two items listed should not concern financial statements.

Response: Deleted second bullet on auditors comment on financial statements and moved the first bullet to the end of this section.

Comment Category D: Clarify requirement for schedule of expenditures

Commenter 1 stated that the form 'Schedule of Expenditures of DOE Federal Awards' mentioned in Part II, Section H of the guidance is not listed as a required form on the Reporting Requirements Checklist. Commenter 1 also noted that the descriptions of the level of detail required by the 'Schedule of Expenditures of DOE Federal Awards' is inconsistent between Part I, Sections N and R, and Part II, Section H, of the guidance.

Comment 6 also noted the inconsistency between the description of what needs to be included in the 'Schedule of Expenditures of DOE Federal Awards' in the Part I and Part II of the guidance. In addition Commenter 6 requested that DOE should request the same level of detail in 'Schedule of Expenditures of DOE Federal Awards' which they receive from DCAA which includes a detailed schedule of cumulative allowable costs by cost element.

Response: The form is not included on the reporting requirements checklist because it is not a form and is not required on any awards other than for-profits which require 316 audits. Since this is not a financial audit, the phrase 'by cost element' will be removed in Part II, Section H. All sections should be changed to include the following definition of what should be included in the Schedule of

Expenditures of DOE Federal Awards: "1. CFDA number; 2. DOE award number; and 3. Expenditures for each award for the fiscal year being audited".

Comment Category E: Clarify Coverage of Indirect Rates

In Part II, Section B, Commenter 3 requested clarification in the case where an indirect cost rate was specified in the budget justification and not in the terms and conditions of an award. In this case, should the auditor assess the approved rate and any subsequent true-up of actual costs incurred to that rate or should the auditor proceed by auditing the rates used to charge the project as represented in submitted reimbursement requests?

In Part I, Section Commenter 1 suggested adding specific language requiring the auditor to review and assess whether the recipient is submitting the Annual Indirect Cost Proposal as required by the Reporting Requirements Checklist.

Response:

The intent of the 10 CFR600.316 audit is not to duplicate the effort of the Cognizant Federal agency in negotiating and determining the correct indirect cost rate. This audit should focus on the application of the negotiated rate.

Comment Category F: Eliminate redundancy between sections C and E

Commenter 2 edited Part I of the source document to move parts of Section E to section C and eliminate redundancy between these 2 sections.

Response:

DOE agrees to the proposed changes.

Comment Category G: Scope of audit

Commenter 2 added new text in Section C of Part I which lists items that should be included in the scope of the audit including: internal control systems, federal award expenditures, receipts and revenues, in-kind contributions, assets and liabilities, and activities and non-accounting actions.

Response:

DOE does not agree to this change. The items listed place too much emphasis on financial items for a compliance audit.

Comment Category H: Audit objectives and materiality threshold

Commenter 2 added new text to Section E of Part I which states that the objectives of the guidance are to ensure that 1) recipient has internal controls in place to assure compliance with Federal laws, regulations, and the terms and conditions of the award and 2) recipient has complied with the laws, regulations, and award terms that may have a material effect on DOE Federal awards. The commenter went into further details on how the auditor can assure that the above objectives are met.

Response:

We have combined Sections E and Q into new Section called Audit Scope and Objectives.

Comment Category I: Auditor Responsibilities

Commenter 2 renamed Section Q of Part I to 'Further Guidance on Auditor Responsibilities. They added details about what should be included in the review of internal control systems, compliance with laws, regulations, and other agreements, and substantive testing of costs and receipts.

Response:

We have combined Sections E and Q into new Section called Audit Scope and Objectives.

Comment Category J: Audit Reporting

Commenter 2 added additional text to section R of Part I which includes more details on what should be included in the actual audit report. This includes discussion of the opinion (or disclaimer of opinion) in reference to the recipient's internal control structure and on the opinion (or disclaimer of opinion) in reference to the recipient's compliance with laws, regulations, and provisions. The commenter specifically mentioned provisions of contracts or grant agreements.

Response:

DOE partially concurs. The reference to contracts should be eliminated and 'grant' should be changed to financial assistance. Some of the new information which the commenter added was duplicative of information already included in Section S of Part I.

Comment Category K: Subrecipient reporting

Commenter 3 had questions about subrecipient reporting including what the due dates are now and who the reports are submitted to. They also had a question

about who is responsible for management decisions pertaining to findings identified in audit reports of subrecipients.

Response:

DOE's regulations do not require compliance audits of subrecipients.

Comment Category L: Definition of 'segment' of a company.

In Part I, Section E, commenter 3 had a question on the definition of a segment of a corporation and whether this would exclude subsidiary companies.

Response:

As explained in the guidance: 'Auditors shall use professional discretion in determining the corporate level at which to perform the audit.' The guidance goes on to say that: '(A company "segment" for the purposes of this guidance is defined under Regulation 48 CFR 9904.403-30(4) as one of two or more divisions, product departments, plants, or other subdivisions of an organization reporting directly to a home office, usually identified with responsibility for profit and/or producing a product or service.)' The previous section will be changed to say that the reference to 48 CFR is a useful reference only.

DOE cannot make the determination for the auditor or recipient about what constitutes a 'segment' of a company. In general terms whatever section of the company is spending the funds should be the auditee.

Comment category M: Procurement activity and 'reasonable cost' standard

Commenter 3 stated that that in Part II, Section G, the guidance omits recommended audit procedures for procurement activities. They ask if DOE has guidance regarding what documentation should be maintained to demonstrate that the "reasonable cost" standard has been met.

Response:

We do not have any additional guidance to add beyond that specified in 10 CFR 600.331. The regulations do not explicitly establish how the auditee is to demonstrate that the met the reasonable cost standard.

Comment category N: ARRA reporting requirements

In Part II, Section H, commenter 3 asks if the OMB Memorandum 10-34 on ARRA reporting should be followed instead of the two OMB memoranda referenced in the guidance.

Response:

We will remove references to specific OMB documents. The auditor must review the ARRA reporting requirements contained in the terms and conditions of award, including the Reporting Requirements Checklist, and audit the recipient based on that information.

In reviewing Part II, Section H, we also noticed references to the Payment Management System (PMS) which DOE does not use. Those references will be deleted.

Comment Category O: Reducing requirements may not reduce effort

Commenter 5 noted that the compliance areas which were deleted in Part II, such as the Davis Bacon Act and the Endangered Species Act, may not have been material to some auditees in FY 2010. Therefore removing these sections may not result in a reduction of effort. The commenter does say that deletion of the cash management compliance requirement could result in less audit effort.

Response:

The Department reviewed the FY 2010 audit reports and retained those sections which had the most significant findings. Deletion of the requirement for audits by subrecipients should reduce the overall burden.

Comment Category P: Impact on Audits underway

Commenter 5 restated their comment that was already covered under comment category A. In addition, they stated that the audit fee for the 2011 audit would have already been agreed to between the recipient and their audit firm based on the audit scope included in the FY 2010 guidance. They further state that in the case of public companies, as required by Sarbanes-Oxley, the audit related fees must be agreed to in advance with the auditee's audit committee. Commenter 5 also stated that DOE did not communicate with the recipients that the FY 2011 guidance would cause additional burden to them.

Response:

With the removal of the language the commenter objected to in comment category A, we feel that the requirements of the revised 2011 guidance will be less burdensome than those of the FY 2010 guidance. DOE did instruct the procurement offices that we would be revising the audit guidance based on comments received on the FY 2010 audit process and our reviews of the submitted audit reports.

For audits for the recipient's FY 2011 only, the due date will be September 30, 2012 regardless of when the recipient's FY ended.

Comment Category Q: Timeliness of Issuing Final 2011 guidance

Commenter 5 says that the final FY 2011 guidance issued by DOE needs to specifically address recipients which may have already begun or completed their FY 2011 audits based on the FY 2010 guidance. Commenter 5 repeated their comment which we have already addressed in comment category A. Commenter 5 feels that DOE the final DOE guidance should only apply to recipient's whose fiscal years end after a certain cutoff date.

Commenter 7 says that the guidance is being issued too late in the FY.

Response:

The recipient must submit an audit that complies with 10 CFR 600.316 and substantially follows the guide.

For audits for the recipient's FY 2011 only, we are extending the due date to September 30, 2012 regardless of when the recipient's FY ended.

Comment Category R: This was combined with Comment Category D.

Comment Category S: DCAA is already doing audits which comply with 10 CFR 600.316

Commenter 4 quoted 10 CFR 600.316 which states that if the recipient had a Federal cognizant audit agency, that agency must perform the 10 CFR 600.316 audit. The recipient's audit agency is DCAA. They also quoted the section of 10 CFR 600.316 which discusses the compliance requirements to federal laws and regulations along with the terms and conditions of the award. The recipient stated that they were already meeting all of the requirements of 10 CFR 600.316 by having their annual financial audits performed by DCAA.

Commenter 7 says that many of the areas audited are unnecessary or a duplication of work performed by DCAA. For example, auditing of business controls.

Response:

DOE does not agree with this assessment. DCAA does not normally do compliance audits as described by 10 CFR 600.316. The recipient must submit an audit that complies with 10 CFR 600.316 and substantially follows the guide. If the recipient is in receipt of an audit from DCAA or other Government agency that is believes complies, it may submit that audit.

Comment Category T: DOE cannot apply guidance unilaterally to existing awards

Commenter 4 quoted IG report OAS-M-11-02 from 2011 where DOE was cited for not conducting compliance audits of for profit recipients. This was blamed on lack of guidance from DOE on how to implement 10 CFR 600.316. The commenter also quoted the section of the GAO report which states that DCAA incurred cost audits do not focus on compliance with applicable regulations and the terms and conditions of the award. The commenter goes on to state that since the agreements between DOE and its recipients are in effect contracts that no terms and conditions can be added by one party without the agreement of the other party.

Response:

One of DOE's responses to the IG report quoted was to develop the guidance which the commenter does now not want to follow. DOE has determined that the only way to ensure that recipients are complying with the compliance requirements of 10 CFR 600.316 is to have an audit performed by an Independent Auditor.

The 316 audit requirement is not a new requirement. Subpart D of 10 CFR 600 was added to the Financial Assistance Regulations back in the mid-2000 (2004 or 2005) time frame. All current and active awards to For-profit organizations are required to comply with 10 CFR 600.316. The guidance is simply expanding upon the existing requirement and providing clarity and insight to the Recipient and independent auditor as to the scope and depth of the required compliance audit. Before DOE issued its first guidance in FY 2010, DOE received many inquiries from recipients and auditors about how they should comply with this requirement.

Comment Category U: Requirement will result in significant costs and is of questionable benefit

Commenter 4 stated that DOE should do a cost/benefit analysis to determine if it is worth the additional costs to have compliance audits performed. They state that these requirements are unique to DOE financial assistance and do not exist for any other Federal agency or for procurement awards. They further state that recipients will be required to cost share the additional unanticipated costs. The net result will be a reduction in funding available for programmatic purposes which will place their projects at risk.

Response:

The 316 audit requirement is not a new requirement. Subpart D of 10 CFR 600 was added to the Financial Assistance Regulations back in the mid-2000 (2004 or 2005)

time frame which was before a cost/benefit analysis was required. All current and active awards to For-profit organizations are required to comply with 10 CFR 600.316.

Comment Category V: DOE is violating Exec Orders since this is a 'significant' regulatory action

Commenter 4 stated that they consider that the guidance issued is a significant change in the regulations and thus violates Executive Orders 12866 and 13563. They indicated that the guidance falls within the meaning of significant impact as defined by Section 3(f) (3) of Executive Order 12866 since it would "materially alter the budget impact of...grants..." Commenter 4 said that DOE is attempting to change our regulations through guidance and therefore the guidance should be withdrawn until the regulations are changed.

Response:

The 316 audit requirement is not a new requirement. The Department developed the Audit Guidance for For-Profit Recipients to run parallel to OMB Circular A-133. It was DOE's intent to provide a cost-effective method for the for-profit companies to utilize in meeting their audit requirements. The guidance was intended to provide assistance to recipients and audit firms in complying with the requirements of 10 C.F.R. 600.316.

Comment Category W: Guidance violates PRA

Commenter 4 says that the audit guidelines violate the Paperwork Reduction Act (PRA) since this imposes new reporting and recordkeeping requirements on the general public. The commenter states that DOE should withdraw the 2011 guidelines until PRA requirements are met.

Response:

The 316 audit requirement is not a new requirement. Subpart D of 10 CFR 600 was added to the Financial Assistance Regulations back in the mid-2000 (2004 or 2005) time frame. All current and active awards to For-profit organizations are required to comply with 10 CFR 600.316. The volume and content of the data collected falls within the parameters of DOE's current PRA.

Comment Category X: Guidance contains requirements to audit items not in DOE awards

Commenter 4 referenced parts of Part II of the guidance and said that there were 3 areas which added additional requirements or conflict with already existing provisions of the award or regulations.

1. On page 29 (Section I) of Part II, recipients are not currently required to make award identification to subrecipients or monitor subrecipients
2. On page 6 (Section C) of Part II, the guidance states that 'when entities are funded on a reimbursement basis, program costs must be paid for by entity funds before reimbursement is requested from DOE'. However in the payment terms included in the award, it says that the recipient may request reimbursement for a 'proportionate share of allowable indirect costs incurred...'
3. On page 9 (Section D) in Part II, the guidance refers to 48 CFR 9904.409 in reference to depreciation however the commenter says that this only applies to procurement contracts subject to the CAS.

Response:

For the commenters first comment, we have removed the reference to making award identification to subrecipients. We added language clarifying what is required in a audit of monitoring of subrecipients.

For the commenters second comment, the audit guidance refers to the timing of the payment to the recipient, the payment terms in the award discuss the composition of the costs that are allowable under the terms of the award

We have clarified the reference to depreciation.

Comment Category Y: Guidance is inconsistent with 10 CFR 600.300

Commenter 4 repeats their comment which was already covered in Comment category S. In addition, commenter 4 says:

1. That the due dates are impractical if we are dependent on DCAA and that DOE needs to talk to DCAA about the additional burden imposed by the 316 audits.
2. The \$500K audit threshold in 10 CFR 600.316 applies to 'any Federal funds' while the audit guidance threshold only applies to DOE funds which the commenter says makes this a more stringent requirement.
3. In addition, Commenter 4 feels that page 5 (section B) of part II duplicates the efforts of the cognizant federal agency in auditing allowable costs.
4. There is an inconsistency between Part G of Part II (which defines the threshold over which a 'covered transaction' cannot be made to an entity or individual in EPLS as \$25K [as specified in 2CFR 180]) and Appendix B to Part D of 10 CFR 600 (which

uses the term 'simplified acquisition threshold' as the threshold). As the commenter states, the current simplified acquisition threshold is \$150K.

Commenter 7 says that the timing of the compliance audit is of concern in future since the incurred cost audits are not due until 6 months after the year end.

Response:

1. DOE does not agree. DCAA does not normally do compliance audits as described by 10 CFR 600.316. DOE is not requesting that they do so. Therefore we are not limited by the backlog at DCAA.
2. Applying the threshold to DOE funds only actually makes the audit threshold less stringent since only those recipients with over \$500K in DOE expenditures are required to obtain a compliance audit. The amount of DOE expenditures is subset of the total Federal expenditures.
3. DOE does not agree that this is a duplication of effort.
4. DOE agrees that the threshold in the audit guidance should be changed to the 'simplified acquisition threshold' (SAT) instead of specifying an exact dollar amount since the SAT as defined in the FAR is subject to change. The changes to 2 CFR which would correct this are currently on hold by OMB. Therefore the references to 2 CFR 180 in the guidance should be changed to Appendix B to Part D of 10 CFR 600, item 7.

In response to commenter 7's comment, the DCAA audits are often received well after 6 months after the end of the FY. We are not requiring that these audits be completed before the compliance audit. As stated in number 1 above, we are not limited by the backlog at DCAA.

Comment Category Z: Audit requirement should not apply to performance period of less than one month in a FY or to unpriced FYs.

Commenter 4 stated that the audit requirement should not apply if the performance period during that fiscal year is a month or less in length.

Commenter 4 also stated that performance periods for DOE awards are commonly extended due to unexpected delays which may result in an extension into a fiscal year that has not been priced for conducting an independent audit thus the audit should be waived for this unpriced year.

Response:

DOE does not agree with the commenter. In the unlikely event that the recipient expends at least \$500K of DOE's funds in a month or less, an audit is required.

In addition, the recipient should not be allowed to use a non-cost extension as an excuse to avoid an audit. If they expend \$500K in the fiscal year, the audit requirement applies.