



Department of Energy

April 25, 2022

RE: Updates and Clarifications Regarding Certain U.S. Manufacturing Requirements in DOE Funding Agreements

Dear Stakeholders:

I write you today to provide important updates and clarifications regarding DOE's implementation of its Determination of Exceptional Circumstances (DEC) issued in June 2021 that strengthened domestic manufacturing requirements for recipients of Department of Energy (DOE) funding agreements to better ensure DOE funded technologies lead to products made by American workers, help to secure domestic supply chains and bolster U.S. economic and national security.

BACKGROUND: While the transition of technologies from federally funded research and development has been an important engine for economic growth over the past century, too often the transition of these technologies has resulted in manufacturing being offshored. At DOE we have witnessed a number of industries and the manufacturing of variety of DOE-funded technologies offshored to locations outside the U.S. For example, despite having funded many of the solar and energy storage breakthroughs over the past forty years, the U.S. only accounts for approximately 1% of worldwide photovoltaic shipments and only 8% of global electric vehicle lithium-ion cell production.^{1,2} While the reasons for these results are complex and multi-dimensional, DOE has determined that exceptional circumstances are present, driven, in part, by the statutory U.S. Preference clause in 35 U.S.C. 204 - an inadequate tool for addressing the practice of "Invent it Here. Make it There."

The U.S. Preference clause contains textual limitations in that its domestic manufacturing requirements only apply to inventions that are *exclusively licensed to a third party*, and even then, *only apply to use and sale in the U.S.* Case examples provided in our recently updated FAQs³ illustrate how these statutory limitations allow valuable U.S. taxpayer-funded technologies to be easily offshored to the detriment of U.S. manufacturing, American labor and industry, and domestic supply chain security.⁴

Thus, under these exceptional circumstances, the Department has repeatedly been faced with the decision of whether to continue to rely on the manufacturing requirement in the U.S. Preference clause, which has been difficult to enforce and has allowed DOE funded technologies to be offshored, or to implement an enhanced but tailored U.S. manufacturing requirement that would better serve the U.S. economic objectives envisioned by Bayh-Dole. The inadequate safeguards of the U.S. Preference provision, combined with the hypercompetitive race to develop several critical and emerging technologies made it clear that DOE had to take action to support critical domestic supply chains and protect the rights of American taxpayers. Thus,

¹ NREL Solar Industry Update, David Feldman et al., citing 2004-2020: Paula Mints. "Photovoltaic Manufacturer Capacity, Shipments, Price & Revenues 2020/2021." SPV Market Research. Report SPV-Supply9. April 2021

² DOE National Blueprint for Lithium Batteries (June 2021) citing Lithium-Ion Battery Megafactory Assessment", Benchmark Mineral Intelligence, March 2021. Available for purchase. <https://www.benchmarkminerals.com/megafactories>

³ [DOE DEC FAQ \(updated 3.9.2022\)](#)

⁴ Our updated FAQs also provide examples of how our enhanced manufacturing provisions have kept important critical and emerging technologies here in America.

beginning in 2013, DOE instituted a series of narrowly tailored DEC's to enhance U.S. manufacturing requirements in certain DOE funding awards.⁵

The reality is that the nation currently sits at a unique technological, economic, and geopolitical crossroads in which the erosion of the U.S. manufacturing base and an urgent need to secure U.S. supply chains for a wide-range of critical and emerging technologies are exacerbated by aggressive near-peer state actors. These state actors have strategically positioned themselves to dominate the manufacturing of, and/or supply chains for, next generation technologies for their own economic and military benefit, all to the detriment of American workers and U.S. national, economic, and energy security. Accordingly, we find ourselves not only in an exceptional circumstance but one that is vitally urgent. Ensuring taxpayer-funded technologies support the U.S. economy and secure domestic supply chains is critical to our national interests in ways not envisioned forty years ago when Bayh-Dole was enacted.

DOE'S RESPONSE TO STAKEHOLDER ENGAGEMENT: DOE sincerely appreciates feedback from its stakeholder communities on this important issue, including the feedback received during a number of stakeholder engagement sessions held in the summer and fall of 2021, which included a widely attended webcast on July 23, 2021 that was organized with the help of the Bayh-Dole Coalition. As many of you are already aware, in September 2021, DOE published materials on its website further explaining the DEC while also providing a variety of clarifications in a published set of FAQs that were issued as a direct result of the stakeholder engagement sessions.^{6,7} Despite these efforts to address stakeholder concerns and clarify DOE's policies, it has become apparent that the change of control language in our U.S. Competitiveness provision, and lingering confusion regarding whether that clause requires DOE to review or approve licenses, would benefit from additional clarity.

Change of Control Language: As DOE noted in its FAQs posted in September 2021, the Department has been considering potential modifications to the change of control language to provide additional clarity and address stakeholder concerns. As a result of stakeholder feedback and as part of our effort to incorporate the DEC into the terms and conditions of our awards, DOE reevaluated this language and decided to modify the change of control language in the standard U.S. Competitiveness Clause required by the DEC. Specifically, DOE removed the original change of control language that required DOE approval of certain change of control transactions and substituted a diligence and notice requirement.⁸ More specifically, the new default language reads as follows: "In the event that the Recipient or other such entity receiving rights in the Subject Invention undergoes a change in ownership amounting to a controlling interest, the Recipient or other such entity receiving rights shall ensure continual compliance with the requirements of this paragraph (m) and shall inform DOE, in writing, of the change in ownership within 6 months of the change."⁹ DOE believes this modified language properly balances the need to protect taxpayer rights while maintaining the core rights of small business firms and nonprofit organizations to commercialize their federally funded technologies.

⁵ DOE's enhanced U.S. manufacturing requirements act as an initial floor (that can be modified or waived when appropriate) that allows balance based on demonstrated business realities.

⁶ <https://www.energy.gov/gc/us-manufacturing>

⁷ <https://www.energy.gov/gc/articles/frequently-asked-questions-faqs>

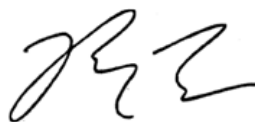
⁸ The DEC's language allows DOE to make administrative change to the U.S. Competitiveness Provision to clarify funding agreement requirements and reduce requirements of the provision as appropriate.

⁹ A copy of the newly revised standard U.S. Competitiveness Clause that will be used in DOE Science and Energy financial assistance agreements (i.e. grants and cooperative agreements) with Bayh-Dole entities is attached as Appendix A. This revised clause has already been inserted into our updated financial assistance terms and conditions and DOE is working to make similar clarifications applicable to our M&O contracts.

Concerns Regarding the Approval of Licenses: In our FAQs published in September of 2021, DOE stated that: “DOE has no intention to routinely review and/or approve exclusive and/or non-exclusive licenses contemplated or executed by Bayh-Dole entities. DOE understands and respects that small business, academic, and non-profit entities need flexibility to negotiate and execute licensing arrangements without significant encumbrances or federal micromanagement so that federally funded technology can be effectively transferred to the marketplace.” Despite this clarification it appears some stakeholders continue to assert that: “If a licensor wants to issue an exclusive license, the DOE must provide its approval prior to the transfer of rights.”¹⁰ Let me be clear, the modified U.S. Competitiveness Clause **does not** require awardees to get DOE approval of their exclusive or non-exclusive licenses.¹¹ In fact, the modified U.S. Competitiveness requirement in Appendix A of the DEC (provided below) has one purpose and one purpose only: to create a robust and enforceable U.S. manufacturing provision to better ensure DOE funded innovation is substantially manufactured here in America to the extent that it is commercially feasible.

DOE is hopeful that the stakeholder community will welcome these clarifications and embrace DOE’s decision to support critical domestic supply chains and better ensure that valuable innovations funded by the taxpayer result in technologies and products that are manufactured by U.S. labor and industry. While DOE will make this letter widely available to the stakeholder community, we also ask that you broadly share these clarifications and updates with your constituents and members.

Sincerely,



Brian J. Lally
Assistant General Counsel for
Technology Transfer and Intellectual Property

¹⁰ AUTM DOE DEC Survey Results dated February 9, 2022.

¹¹ The modified clause **does not** require approval of licenses and the only time DOE expects the possibility of reviewing a license to arise, is as part of a formal compliance review (historically significantly less than 0.5% of DOE awards) to ensure requirements are being properly flowed down and abided by.

Appendix A: Updated U.S. Competitiveness Provision

(m) U.S. Competitiveness (rev. March 2022)

The Recipient agrees that any products embodying any subject invention or produced through the use of any subject invention will be manufactured substantially in the United States unless the Recipient can show to the satisfaction of DOE that it is not commercially feasible. In the event DOE agrees to foreign manufacture, there will be a requirement that the Government's support of the technology be recognized in some appropriate manner, e.g., alternative binding commitments to provide an overall net benefit to the U.S. economy. The Recipient agrees that it will not license, assign or otherwise transfer any subject invention to any entity, at any tier, unless that entity agrees to these same requirements. In the event that the Recipient or other such entity receiving rights in the Subject Invention undergoes a change in ownership amounting to a controlling interest, the Recipient or other such entity receiving rights shall ensure continual compliance with the requirements of this paragraph (m) and shall inform DOE, in writing, of the change in ownership within 6 months of the change. The Recipient and any successor assignee will convey to DOE, upon written request from DOE, title to any subject invention, upon a breach of this paragraph (m). The Recipient will include this paragraph (m) in all subawards/contracts, regardless of tier, for experimental, developmental or research work.