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PROCEEDINGS AND DEBATES OF THE 98th CONGRESS, FIRST SESSION

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Senate

FRIDAY, NOVEMBER 18, 1983

By Mr. DOLE (for himself, Mr. LAXALT, and Mr. DECONCINI):

S. 2171. A bill to amend title 35 of the United States Code for the purpose of creating a uniform policy and procedure concerning patent rights in inventions developed with Federal assistance, and for other purposes; to the Committee on Finance.

UNIFORM PATENT PROCEDURES ACT OF 1983

Mr. DOLE. Mr. President, I am pleased to send to the desk for appropriate reference, on behalf of myself and Senators LAXALT and DECONCINI, the Uniform Patent Procedures Act of 1983. This legislation is designed to encourage the commercialization of inventions created pursuant to reseach and development work sponsored by the Federal Government under grant or contract; as such, it is a direct response to the challenge posed to America's economic future by foreign technological competition.

As we are all painfully aware, the lead that the United States has enjoyed over the past 30 years in technological innovation is under increasing jeopardy as our international competitors develop expertise in the research and development skills essential to the creation of new, high technology industries. The last 10 years, in particular, have witnessed a steady erosion of our competitive position in a number of important fields of endeavor, including automobile manufacturing, electronics, and steel production. While we embrace this competition as healthy and to be desired, we must nevertheless insure that our Government's policies encourage—not discourage—the development and marketing of inventions made by American entrepreneurs.

We have heard a lot of talk lately about the need for an industrial policy. To date, most of this talk has centered on proposals that I believe are unworkable at worst and highly speculative, at best—such as the creation of [illegible] high technology industries. The last 10 years, in particular, have witnessed a steady erosion of our competitive position in a number of important fields of endeavor, including automobile manufacturing, electronics, and steel production. While we embrace this competition as healthy and to be desired, we must nevertheless insure that our Government's policies encourage—not discourage—the development and marketing of inventions made by American entrepreneurs.

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The bill I send to the desk would eliminate this waste by allowing all contractors clear ownership of the inventions they make under Government research and development contracts and grants, while protecting the legitimate rights of the agencies to use the discoveries royalty free. In this way, it would encourage the private marketing of new discoveries and thus stimulate innovation. Of course, the agencies would have the power to require delivery of title to patents to the Government where special circumstances indicate that such action is in

sor research and development work under Federal grants and contracts.

The bill is modeled after legislation that former Senator Bayh and I sponsored in the 96th Congress, the University and Small Business Patent Procedures Act of 1980. That landmark legislation reformed agency patent procurement procedures that apply to research and development contracts with universities and small businesses in order to make possible greater commercialization of the breakthrough inventions that often result from such arrangements. Prior to the passage of that bill—now Public Law 96-517, university invention disclosures had shown a steady decline. Now, such disclosures are up, university and industry collaboration is at an alltime high, and many new technologies—such as the recent advances in gene engineering—are creating new opportunities for economic advancement while improving the quality of life.

What the 1980 law accomplished for universities and small businesses, this new legislation would accomplish for all contractors with the Government, regardless of size. It would end, once and for all, the frustrating bureaucratic maze which has hindered the retention of patent discoveries by the private sector and thereby inhibited the commercialization of those discoveries. With the Government now funding approximately 70 percent of the basic research done in the United States, we can no longer tolerate the abysmally low rate of commercialization that accompanies Federal ownership of new inventions. For example: Compared to a licensing rate of 33 percent for university-developed inventions, the Government has licensed less than 4 percent of inventions owned by it to the private sector for commercial use. This is primarily because of chaotic and inefficient agency patent procurement policies that strangle innovation with redtape.

The bill I send to the desk would eliminate this waste by allowing all contractors clear ownership of the inventions they make under Government research and development contracts and grants, while protecting the legitimate rights of the agencies to use the discoveries royalty free. In this way, it would encourage the private marketing of new discoveries and thus stimulate innovation. Of course, the agencies would have the power to require delivery of title to patents to the Government where special circumstances indicate that such action is in

try, in which politics rather than economics would inevitably be the predominate concern, we should let the private enterprise system do what it does best—produce new products and jobs that the public wants and needs. That is what this bill would do.

Mr. President, I send to the desk for inclusion in the RECORD at the conclusion of these remarks a brief summary of the bill's principal objectives, a sectional analysis, and the text of the legislation. I ask that these materials be printed in full for the use of my colleagues. As a member of the Judiciary Subcommittee on Patent, Copyright, and Trademark Law, I will be working closely with the chairman of that subcommittee, Senator MATHIAS, in organizing hearings upon the legislation and I will be working diligently for early action upon it in the next session of this Congress.

Thank you, Mr. President.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

SUMMARY OF UNIFORM PATENT PROCEDURES ACT OF 1983

The bill would standardize agency patent procurement policies and procedures, and encourage private sector development of new discoveries made under a federal research and development contract, in the following specific ways:

It creates a presumption in favor of contractor ownership of new inventions developed under federal R&D contracts;

It prohibits agencies from requiring the surrender of so-called "background rights"[1] as a pre-condition to obtainment of a federal R&D contract except where the agency head personally determines that such rights are essential to the accomplishment of agency purposes in the contract;

It streamlines the procurement procedures, establishes one policy for all government agencies, and conforms that policy to the principles of Public Law 96-517;

It eliminates existing provisions of law that unnecessarily complicate the procurement process.

UNIFORM PATENT PROCEDURES ACT OF 1983: SECTIONAL ANALYSIS

Section 1: Title.

Section 2: Conforms Pub. L. 96-517 chapter designations to U.S.C.A. codification.

Section 2(a): Adds a new chapter to Title 35, US.C., the provisions of which would do the following:

Section 212: States the policy objective of the Act, to "insure that all inventions made with federal support are used in a manner to promote free competition and enterprise."

Section 213: Definitions used in the Act.

Section 214: Authorizes the Secretary of Commerce to issue implementing regulations for the Act.

Section 215: Provides that federal contractors may automatically own inventions they make under Government R&D unless:

(1) it is determined that the discovery is needed for foreign intelligence or counterintelligence purposes;

(2) the contractor is not located in the U.S., or is a foreign government; or

(3) it is determined on a case-by-case basis that exceptional circumstances require federal ownership.

Such determinations will be made in writing and filed with the Secretary of Commerce to prevent abuse of these exceptions to contractor ownership. In cases of abuse, the Secretary shall notify the Administrator of the Office of Federal Procurement Policy who may issue guidelines ending such practices.

This section also provides that, in instances where the contractor does not elect to file a patent application in the United States or abroad, the agency may then assert ownership it it desires to do so.

In addition, Section 215 also stipulates that the agency may use a subject invention royalty free and can require that it be kept updated on utilization of the contractor.

Section 216: Provides that agencies may force contractors to grant licenses to competitors for using an invention made under federal R&D if effective steps are not being taken toward commercialization; to alleviate serious health or safety needs not being satisfied by the contractor; or to meet requirements for public use specified by federal regulations not being satisfied by the contractor. Agency determinations on mandatory licenses may be appealed by the contractor within 60 days to the United States Claims Court.

Section 217: Protects contractors from the threat that agencies might require them to give up privately developed technologies to competitors in order to secure a contract, unless specifically approved by the agency head. Such determinations can be made only after an agency hearing with prompt notification to the contractor.

Section 2b: Chapter headings redesignated.

Section 2c: Repeals certain limitations placed upon university licensing by present law, in order to encourage more collaboration between industry and universities.

Section 3: Repeals old patent policies so that this Act may be implemented uniformly.

Section 4: Specifies that nothing in this Act shall be construed to grant any civil or criminal immunity from any antitrust law of the United States.

Section 5: Provides that the Act becomes effective six months after enactment, and authorizes agencies to apply its provisions to pre-existing contracts where deemed appropriate.

Section 6: Provides that the Secretary of Commerce shall report to the Congress within 24 months, and every two years thereafter, on the implementation of this Act along with any recommendations for legislative or administrative changes.

S. 2171

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Uniform Patent Procedures Act of 1983".

SEC. 2. (a) Chapter 38 of title 35, United States Code, as added by Public Law 96-517, 94 Stat. 3018, is redesignated as chapter 18 of such title and all references to such chapter 38 shall be considered references to chapter 18.

(b) Part II of title 35, United States Code, is amended by inserting chapter 18, as redesignated herein, after chapter 17 of such title.

(c) The table of chapters for title 35 is amended by redesignating chapter 38 as chapter 18 and inserting such chapter and section designations at the end of part II.

SEC. 3. (a) Section 35 of the United States Code is amended by adding after chapter 18, as redesignated herein, a new chapter as follows:

"CHAPTER 19—PATENT RIGHTS IN INVENTIONS MADE WITH FEDERAL ASSISTANCE BY OTHER THAN SMALL BUSINESS FIRMS OR NONPROFIT ORGANIZATIONS

"Sec.
"212. Policy and objectives.
"213. Definitions.
"214. Responsibilities.
"215. Disposition of rights.
"216. March-in rights.
"217. Background rights.

"§ 212. Policy and objectives

"In addition to the policy and objectives set forth in section 200 of this title, it is the further policy and objective of the Congress to ensure that all inventions made with Federal support are used in a manner to promote free competition and enterprise.

"§ 213. Definitions

"As used in this chapter, the term—

"(1) 'Administrator' means the Administrator of the Office of Federal Procurement Policy or his or her designee;

"(2) 'contract' means any contract, grant, or cooperative agreement entered into between any Federal agency (other than the Tennessee Valley Authority) and any person other than a small business firm or nonprofit organization (as defined in section 201 of this title) where a purpose of the contract is the conduct of experimental, developmental, or research work; such term includes any assignment, substitution of parties or subcontract of any tier entered into or executed for the conduct of experimental, developmental, or research work in connection with the performance of that contract;

"(3) 'contractor' means any person or entity (other than a Federal agency, nonprofit organization, or small business firm, as defined in section 201 of this title) which is a party to the contract;

"(4) 'Federal agency' means an executive agency (as defined in section 105 of title 5, United States Code), and the military departments (as defined in section 102 of title 5, United States Code);

"(5) 'Government' means the Government of the United States of America;

"(6) 'invention' means any invention or discovery which is or may be patentable or otherwise protectable under this title, or any novel variety of plant which is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321 et seq.);

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

"(8) 'Secretary' means the Secretary of Commerce or his or her designee; and

"(9) 'subject invention' means any invention of a contractor conceived or first actually reduced to practice in the performance of work under a contract: *Provided*, That, in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act (7 U.S.C. 2401(d)) must also occur during the period of contract performance.

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[1] "Background rights" refers to the contractor's interest in inventions and technical data which were not developed pursuant to a federal R&D contract, but which pre-dated that contract. It has been a common agency practice to automatically require federal contract participants to surrender such interests to the agency as a condition of obtaining a federal R&D contract.

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PROCEEDINGS AND DEBATES OF THE 97th CONGRESS, FIRST SESSION

Vol. 127 WASHINGTON, THURSDAY, SEPTEMBER 24, 1981 No. 134

House of Representatives

SMALL BUSINESS AND INNOVATION

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from New York (Mr. LAFALCE) is recognized for 15 minutes.

Mr. LAFALCE. Mr. Speaker, our Nation faces an innovation and productivity gap that is threatening to overwhelm our economy and put us at a competitive and technological disadvantage in world markets. Strong and prompt action is required if we are to get back the productive and innovative edge that will allow our economy to grow rather than stagnate, create new jobs rather than lose them, and compete rather than retreat.

Last week, the House Small Business Oversight Subcommittee, which I chair, held hearings on legislation that would be a major step toward solving these problems. Specifically, the legislation would strengthen the role of small, technology-based firms in federally funded research and development programs and actively promote innovation by these types of companies.

The hearings heard compelling testimony on the need for this legislation. I especially want to bring to your attention the testimony of one witness who discussed the sorry history of the failure of the executive branch to promote innovation. He presented clearly the case for why Congress has to act to direct Government agencies to award a fair share of their R. & D. funds to small business to stimulate innovative research.

When reading these remarks, three points should be remembered. Small, high-technology companies have been generators of most pioneering innovations over the past three decades. The Federal Government finances 56 percent of all research and development activities in the United States. Yet small business receives only 4 percent of the Federal R. & D. money. This is an intolerable situation that Congress must end.

The following is the testimony presented by Jere W. Glover, general counsel of the National Council on Industrial Innovation:

STATEMENT OF JERE W. GLOVER

Mr. Chairman and members of the Subcommittee, thank you for asking me to testify.

Today you are discussing an area dear to my heart—"Small Business and Innovation." During the past four years I have been involved with the issue of small business and innovation in a variety of ways. My first involvement was as counsel to Congressman John Breckinridge's Subcommittee on Antitrust, Consumers and Employment of the House Small Business Committee. I later went to work for Milt Stewart as his Deputy Chief Counsel for Interagency Activities. I served as SBA's representative on President Carter's Domestic Policy Review on Industrial Innovation and as staff to the Office of Adovcacy's task force on small business and innovation. I was also Advocacy liaison with the varipus Congressional committees concerning legislation, including S. 1860 and H.R. 5607, the Innovation Acts of 1980. On July 11, 1981, I left advocacy and entered the private practice of law. I also serve as General Counsel to the National Council on Industrial Innovation and am appearing on behalf of the Council.

Throughout my inmvolvement in this area, it has become obvious to me that without strict, specific legislative direction to the government agencies with research and development funds, small business will not receive a fair share of the innovation funding. I recognize that my position is contrary to that of most government agencies. Notwithstanding what any government official has said or says about their willingness to do it voluntarily, in my opinion it is imperative that there be specific, direct legislation requiring agencies to award a fair share of their procurement research and development awards to small business. The Federal Government finances 56 percent of all research and development activities in the U.S. How the government spends its R. & D. dollars is of critical importance to the future not only of small business but of this country. Let me ask the Committee to consider the question Congressman Breckinridge put to witnesses in the 1978 hearing:

"If small business accounts for over 50 percent of all innovations, and does it 24 times more efficiently, why doesn't small business receive at least 50 percent of the Federal R. & D. dollars?

Let me go through some of the history of innovation of small business and the government as I know it—some 25 years of unfulfilled promises. As I mentioned, my first involvment was in hearings conducted by the House Small Business Committee in joint session with the Senate Small Business Committee concerning underutilization of small business. During these hearings, the Small Business Committee called a number of government agencies to testify. Each official was asked what his agency had done, would do, and could do for small business. All we heard from the agencies was that the major issues were being "studied."—studies and more studies. Remember that several other congressional committees had held hearings on the issue of innovation during the late 1960s and early 1970s. In fact, as far back as 1967, an exhaustive report on innovation was issued by the Commerce Department. It detailed the importance of small business and innovation and made numerous recommendations. Nothing happened. Nine years later a blue ribbon task force of government employees was selected to review the issue and develop recommendations to increase innovation. This panel studied innovation in great detail. The solution to increasing innovation was obvious—help small busiesses make innovations by giving them more R. & D. funds. Nothing happened. The OMB task force assigned to encourage utilization of small business in

[1] The OMB report (which I will refer to as the OMB March 10, 1977 Memorandum) was not issued finally until September 1978. When asked what happened to it, the comment was simply "It must have slipped through the cracks." Unfortunately, small businesses have been slipping through the cracks in the area of procurement, and especially R. & D. procurement, for some time. OMB did not issue this March 10th Memorandum for a year and a half because it was not that important to OMB. When it was finally issued, it was because the director of the Office of Federal Procurement Policy was requested to testify before thé Small Business Committee and explain why it had not been issued. Miraculously, within five days of his receiving that letter, the memorandum was located and issued.

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the R. & D. activities issued a report which was circulated to a number of government agencies.[1] According to this report, small business was the most efficient and productive supplier of research and development dollars, yet less than 4 percent of total R. & D. procurements went to small business. Still nothing happened. Professor Richard Morse summed up the government's actions toward small business from 1967 until 1977 better than I could:

"In 1967, as members of the Panel on Innovation and Inventions, several of us were involved with the preparation of a study for the Secretary of Commerce under the direction of Dr. Robert A. Charple. This report was widely disseminated both here and abroad. . . . .

"No effective U.S. legislative or executive action has resulted from this study other than to initiate endless other studies which often plow ground which has already been investigated. . . ."

Turning to the joint Senate and House hearings on small business and innovation it is important to note that in every government agency officials explained that they could not understand why small business had not received a larger share of the R. & D. procurement and they all promised to do better. Let me recount for you some of the events that happened after these 1978 Congressional hearings. Remember that both Jordan Baruch, Assistant Secretary of Commerce for Science and Technology and Frank Press, the President's science adviser, testified that they would find out why small business wasn't doing better in the area of R. & D. awards and report back to the committee. During these hearings, both officials stated that they did not want to take any action until they had completed yet another exhaustive government-wide and private industry investigation into the issue of innovation. So they launched into one of the most extensive and comprehensive reviews of government innovation ever conducted by the government. Dozens of business leaders from across the country were asked to serve on panels and to present their views on what was needed to be done to encourage industrial innovation in the United States. It's interesting that even after these hearings and statements on the importance of small business to innovation, no small businessmen were named to this industrial innovation group. Finally, after an inquiry was made from Congress as to why small business and even SBA had been excluded from the domestic policy review on innovation, SBA and several small businessmen were named. I was appointed as SBA's lead representative to the domestic policy review.

Remembering Richard Morse's previous testimony, I went into the task with a commitment to try to make sure that this domestic policy review was different from previous government studies. I, along with almost a hundred government officials, began the task. After months of toiling in the vineyards of government policy procedures, the domestic policy review finally made its recommendations in March 1979. This was, if you remember, some nine months after the key government officials had promised to rush out the report to help small businesses. What came out of the domestic policy review was an October 31, 1979 memorandum from the president to the government agencies. Turning to that memorandum, I think it's important to note that one of the key recommendations was that the SBIR program currently being considered affect all federal agencies. The one thing everyone in the domestic review agreed on was that small business procurement and the SBIR program should be expanded. So here finally was a strong pronouncement from the President on the importance of small business in innovation and a strong directive regarding federal procurement.

Unfortunately, merely because the President directs something to be done does not insure that it will be done, as I soon found out. Some six months later, when I inquired as to what agencies were doing in this regard, I observed puzzled glances. What program, what memorandum, what Presidental directive? For example, I was a representative at a government-wide meeting on the President's memorandum when I asked which agencies had implemented the President's directive and what its current status was. I was disappointed to find that with the exception of the Department of Defense, which was beginning to undertake such a program, not one single additional agency had taken any steps to implement the Presidental directive. The same agencies that had been "studying" the problem to death for 12 years, that had received blue ribbon reports telling them to improve the innovation process by involving more small businesses that had been nudged by Congress in countless hearings, were now ignoring the President. But the story goes on.

As a result of that meeting, I was directed to prepare a memorandum for the Secretary of Commerce again transmitting the Presidential directive to all the government agencies and, insisting on immediate implementation. I promptly prepared such a memo and submitted it to the SBA official responsible for transmitting it to the Secretary of Commerce and his assistants. I'm attaching a copy of this memorandum for the committee's review. You will notice it is marked "Draft". Unfortunately, this memorandum apparently was never transmitted nor was any other similar directive ever sent to the various government agencies reiterating the President's orders. So please forgive me if I sound a little jaded when I tell you that, quite frankly, you are never going to get any of these agencies off dead center without legislation.

The dozens of private citizens and government officials who spent their time on the domestic policy review, various study groups and on task forces have all wasted their time.[2]

Remember: Not only is small business being harmed by the government's continued failure to act, but so is the taxpayer. These short-sighted and wasteful government practices are depriving the economy of sorely-needed economic growth and squandering taxpayer's dollars. Small Business has been found to be 24 times more cost effective at innovating than large firms. Let me now show you why it is my opinion, based on four difficult frustrating years of attempting to improve the plight of small business, that there must be mandatory requirements to change the government's way of doing business.

I've attached a copy of a table to my testimony which shows the procurement awards of small businesses by agency in the most recent year available—1980. Compare the agencies' performance in 1980 with their performance in 1974 or 1975. In between we had the studies, the hearings, and the Presidential directive.[4] Take a look at the numbers: Despite numerous hearings, promises by government officials, and even Presidential directives, nothing changed. Small business had a mere token of the R. & D. awards—less than four percent in 1975, and has the same mere token—less than four percent—today.

The record of the five administrations since 1967 shows nothing but stalling and willful neglect. This Congress must say once and for all no more meetings, no more task forces, no more domestic policy reviews, no more blue ribbon intergovernmental panels, no more discussion, no more promises and no more lies. There is now going to be a change in the law. Every appropriate agency must, at a bare minimum, establish an SBIR program.

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[4] The Office of Advocacy's role in the area of small business and innovation was extensive. Milton Stewart made innovation one of this top priorities. A task force of small business innovators was established under the Office of Advocacy's authority. After several days of intensive meetings, these individuals came up with a number of recommendations. The Office of Advocacy prepared a report of these recommendations, transmitted to the Congress, which printed this report. Subsequently, Chairman Neal Smith and Gaylord Nelson requested staff briefings on the recommendations of the task force and the Office of Advocacy assisted in drafting legislation in the Senate S. 1860 and in the House H.R. 5607. As you will perhaps remember, those bills were endorsed by the White House Conference and became one of the top fifteen recommendations at the conference.

National Security Information

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This Order prescribes a uniform system for classifying, declassifying, and safeguarding national security information. It recognizes that it is essential that the public be informed concerning the activities of its Government, but that the interests of the United States and its citizens require that certain information concerning the national defense and foreign relations be protected against unauthorized disclosure. Information may not be classified under this Order unless its disclosure reasonably could be expected to cause damage to the national security.

NOW, by the authority vested in me as President by the Constitution and laws of the United States of America, it is hereby ordered as follows:

Part 1

Original Classification

Section 1.1 *Classification Levels.*

(a) National security information (hereinafter "classified information") shall be classified at one of the following three levels:

(1) "Top Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.

(2) "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.

(3) "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security.

(b) Except as otherwise provided by statute, no other terms shall be used to identify classified information.

(c) If there is reasonable doubt about the need to classify information, it shall be safeguarded as if it were classified pending a determination by an original classification authority, who shall make this determination within thirty (30) days. If there is reasonable doubt about the appropriate level of classification, it shall be safeguarded at the higher level of classification pending a determination by an original classification authority, who shall make this determination within thirty (30) days.

Sec. 1.2 *Classification Authority.*

(a) *Top Secret.* The authority to classify information originally as Top Secret may be exercised only by:

(1) the President;

(2) agency heads and officials designated by the President in the **Federal Register**; and

(3) officials delegated this authority pursuant to Section 1.2(d).

(b) *Secret.* The authority to classify information originally as Secret may be exercised only by:

(1) agency heads and officials designated by the President in the **Federal Register**;

(2) officials with original Top Secret classification authority; and

(3) officials delegated such authority pursuant to Section 1.2(d).

(c) *Confidential.* The authority to classify information originally as Confidential may be exercised only by:

(1) agency heads and officials designated by the President in the **Federal Register**;

(2) officials with original Top Secret or Secret classification authority; and

(3) officials delegated such authority pursuant to Section 1.2(d).

(d) *Delegation of Original Classification Authority.*

(1) Delegations of original classification authority shall be limited to the minimum required to administer this Order. Agency heads are responsible

for ensuring that designated subordinate officials have a demonstrable and continuing need to exercise this authority.

(2) Original Top Secret classification authority may be delegated only by the President; an agency head or official designated pursuant to Section 1.2(a)(2); and the senior official designated under Section 5.3(a)(1),[1] provided that official has been delegated original Top Secret classification authority by the agency head.

(3) Original Secret classification authority may be delegated only by the President; an agency head or official designated pursuant to Sections 1.2(a)(2) and 1.2(b)(1); an official with original Top Secret classification authority; and the senior official designated under Section 5.3(a)(1),[1] provided that official has been delegated original Secret classification authority by the agency head.

(4) Original Confidential classification authority may be delegated only by the President; an agency head or official designated pursuant to Sections 1.2(a)(2), 1.2(b)(1) and 1.2(c)(1); an official with original Top Secret classification authority; and the senior official designated under Section 5.3(a)(1),[1] provided that official has been delegated original classification authority by the agency head.

(5) Each delegation of original classification authority shall be in writing and the authority shall not be redelegated except as provided in this Order. It shall identify the official delegated the authority by name or position title. Delegated classification authority includes the authority to classify information at the level granted and lower levels of classification.

(e) *Exceptional Cases.* When an employee, contractor, licensee, or grantee of an agency that does not have original classification authority originates information believed by that person to require classification, the information shall be protected in a manner consistent with this Order and its implementing directives. The information shall be transmitted promptly as provided under this Order or its implementing directives to the agency that has appropriate subject matter interest and classification authority with respect to this information. That agency shall decide within thirty (30) days whether to classify this information. If it is not clear which agency has classification responsibility for this information, it shall be sent to the Director of the Information Security Oversight Office. The Director shall determine the agency having primary subject matter interest and forward the information, with appropriate recommendations, to that agency for a classification determination.

Sec. 1.3 *Classification Categories.*

(a) Information shall be considered for classification if it concerns:

(1) military plans, weapons, or operations;

(2) the vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security;

(3) foreign government information;

[1] **Editorial Note:** The correct citation is Section 5.3(a).

(4) intelligence activities (including special activities), or intelligence sources or methods;

(5) foreign relations or foreign activities of the United States;

(6) scientific, technological, or economic matters relating to the national security;

(7) United States Government programs for safeguarding nuclear materials or facilities;

(8) cryptology;

(9) a confidential source; or

(10) other categories of information that are related to the national security and that require protection against unauthorized disclosure as determined by the President or by agency heads or other officials who have been delegated original classification authority by the President. Any determination made under this subsection shall be reported promptly to the Director of the Information Security Oversight Office.

(b) Information that is determined to concern one or more of the categories in Section 1.3(a) shall be classified when an original classification authority also determines that its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security.

(c) Unauthorized disclosure of foreign government information, the identity of a confidential foreign source, or intelligence sources or methods is presumed to cause damage to the national security.

(d) Information classified in accordance with Section 1.3 shall not be declassified automatically as a result of any unofficial publication or inadvertent or unauthorized disclosure in the United States or abroad of identical or similar information.

Sec. 1.4 *Duration of Classification.*

(a) Information shall be classified as long as required by national security considerations. When it can be determined, a specific date or event for declassification shall be set by the original classification authority at the time the information is originally classified.

(b) Automatic declassification determinations under predecessor orders shall remain valid unless the classification is extended by an authorized official of the originating agency. These extensions may be by individual documents or categories of information. The agency shall be responsible for notifying holders of the information of such extensions.

(c) Information classified under predecessor orders and marked for declassification review shall remain classified until reviewed for declassification under the provisions of this Order.

Sec. 1.5 *Identification and Markings.*

(a) At the time of original classification, the following information shall be shown on the face of all classified documents, or clearly associated with other forms of classified information in a manner appropriate to the medium involved, unless this information itself would reveal a confidential

source or relationship not otherwise evident in the document or information:

(1) one of the three classification levels defined in Section 1.1;

(2) the identity of the original classification authority if other than the person whose name appears as the approving or signing official;

(3) the agency and office of origin; and

(4) the date or event for declassification, or the notation "Originating Agency's Determination Required."

(b) Each classified document shall, by marking or other means, indicate which portions are classified, with the applicable classification level, and which portions are not classified. Agency heads may, for good cause, grant and revoke waivers of this requirement for specified classes of documents or information. The Director of the Information Security Oversight Office shall be notified of any waivers.

(c) Marking designations implementing the provisions of this Order, including abbreviations, shall conform to the standards prescribed in implementing directives issued by the Information Security Oversight Office.

(d) Foreign government information shall either retain its original classification or be assigned a United States classification that shall ensure a degree of protection at least equivalent to that required by the entity that furnished the information.

(e) Information assigned a level of classification under predecessor orders shall be considered as classified at that level of classification despite the omission of other required markings. Omitted markings may be inserted on a document by the officials specified in Section 3.1(b).

Sec. 1.6 *Limitations on Classification.*

(a) In no case shall information be classified in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interest of national security.

(b) Basic scientific research information not clearly related to the national security may not be classified.

(c) The President or an agency head or official designated under Sections 1.2(a)(2), 1.2(b)(1), or 1.2(c)(1) may reclassify information previously declassified and disclosed if it is determined in writing that (1) the information requires protection in the interest of national security; and (2) the information may reasonably be recovered. These reclassification actions shall be reported promptly to the Director of the Information Security Oversight Office.

(d) Information may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act (5 U.S.C. 552) or the Privacy Act of 1974 (5 U.S.C. 552a), or the mandatory review provisions of this Order (Section 3.4) if such classification meets the requirements of this Order and is accomplished personally and on a document-by-document basis by the agency head, the deputy agency head, the senior

agency official designated under Section 5.3(a)(1),[1] or an official with original Top Secret classification authority.

Part 2

Derivative Classification

Sec. 2.1 *Use of Derivative Classification.*

(a) Derivative classification is (1) the determination that information is in substance the same as information currently classified, and (2) the application of the same classification markings. Persons who only reproduce, extract, or summarize classified information, or who only apply classification markings derived from source material or as directed by a classification guide, need not possess original classification authority.

(b) Persons who apply derivative classification markings shall:

(1) observe and respect original classification decisions; and

(2) carry forward to any newly created documents any assigned authorized markings. The declassification date or event that provides the longest period of classification shall be used for documents classified on the basis of multiple sources.

Sec. 2.2 *Classification Guides.*

(a) Agencies with original classification authority shall prepare classification guides to facilitate the proper and uniform derivative classification of information.

(b) Each guide shall be approved personally and in writing by an official who:

(1) has program or supervisory responsibility over the information or is the senior agency official designated under Section 5.3(a)(1);[1] and

(2) is authorized to classify information originally at the highest level of classification prescribed in the guide.

(c) Agency heads may, for good cause, grant and revoke waivers of the requirement to prepare classification guides for specified classes of documents or information. The Director of the Information Security Oversight Office shall be notified of any waivers.

Part 3

Declassification and Downgrading

Sec. 3.1 *Declassification Authority.*

(a) Information shall be declassified or downgraded as soon as national security considerations permit. Agencies shall coordinate their review of classified information with other agencies that have a direct interest in the subject matter. Information that continues to meet the classification requirements prescribed by Section 1.3 despite the passage of time will continue to be protected in accordance with this Order.

[1] **Editorial Note:** The correct citation is Section 5.3(a).

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5.3(a)(1),[1] or an official with origi-

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(b) Information shall be declassified or downgraded by the official who authorized the original classification, if that official is still serving in the same position; the originator's successor; a supervisory official of either; or officials delegated such authority in writing by the agency head or the senior agency official designated pursuant to Section 5.3(a)(1).[1]

(c) If the Director of the Information Security Oversight Office determines that information is classified in violation of this Order, the Director may require the information to be declassified by the agency that originated the classification. Any such decision by the Director may be appealed to the National Security Council. The information shall remain classified, pending a prompt decision on the appeal.

(d) The provisions of this Section shall also apply to agencies that, under the terms of this Order, do not have original classification authority, but that had such authority under predecessor orders.

Sec. 3.2 *Transferred Information.*

(a) In the case of classified information transferred in conjunction with a transfer of functions, and not merely for storage purposes, the receiving agency shall be deemed to be the originating agency for purposes of this Order.

(b) In the case of classified information that is not officially transferred as described in Section 3.2(a), but that originated in an agency that has ceased to exist and for which there is no successor agency, each agency in possession of such information shall be deemed to be the originating agency for purposes of this Order. Such information may be declassified or downgraded by the agency in possession after consultation with any other agency that has an interest in the subject matter of the information.

(c) Classified information accessioned into the National Archives of the United States shall be declassified or downgraded by the Archivist of the United States in accordance with this Order, the directives of the Information Security Oversight Office, and agency guidelines.

Sec. 3.3 *Systematic Review for Declassification.*

(a) The Archivist of the United States shall, in accordance with procedures and timeframes prescribed in the Information Security Oversight Office's directives implementing this Order, systematically review for declassification or downgrading (1) classified records accessioned into the National Archives of the United States, and (2) classified presidential papers or records under the Archivist's control. Such information shall be reviewed by the Archivist for declassification or downgrading in accordance with systematic review guidelines that shall be provided by the head of the agency that originated the information, or in the case of foreign government information, by the Director of the Information Security Oversight Office in consultation with interested agency heads.

(b) Agency heads may conduct internal systematic review programs for classified information originated by their agencies contained in records determined by the Archivist to be permanently valuable but that have not been accessioned into the National Archives of the United States.

[1] **Editorial Note:** The correct citation is Section 5.3(a).

(c) After consultation with affected agencies, the Secretary of Defense may establish special procedures for systematic review for declassification of classified cryptologic information, and the Director of Central Intelligence may establish special procedures for systematic review for declassification of classified information pertaining to intelligence activities (including special activities), or intelligence sources or methods.

Sec. 3.4. *Mandatory Review for Declassification.*

(a) Except as provided in Section 3.4(b), all information classified under this Order or predecessor orders shall be subject to a review for declassification by the originating agency, if:

(1) the request is made by a United States citizen or permanent resident alien, a federal agency, or a State or local government; and

(2) the request describes the document or material containing the information with sufficient specificity to enable the agency to locate it with a reasonable amount of effort.

(b) Information originated by a President, the White House Staff, by committees, commissions, or boards appointed by the President, or others specifically providing advice and counsel to a President or acting on behalf of a President is exempted from the provisions of Section 3.4(a). The Archivist of the United States shall have the authority to review, downgrade and declassify information under the control of the Administrator of General Services or the Archivist pursuant to sections 2107, 2107 note, or 2203 of title 44, United States Code. Review procedures developed by the Archivist shall provide for consultation with agencies having primary subject matter interest and shall be consistent with the provisions of applicable laws or lawful agreements that pertain to the respective presidential papers or records. Any decision by the Archivist may be appealed to the Director of the Information Security Oversight Office. Agencies with primary subject matter interest shall be notified promptly of the Director's decision on such appeals and may further appeal to the National Security Council. The information shall remain classified pending a prompt decision on the appeal.

(c) Agencies conducting a mandatory review for declassification shall declassify information no longer requiring protection under this Order. They shall release this information unless withholding is otherwise authorized under applicable law.

(d) Agency heads shall develop procedures to process requests for the mandatory review of classified information. These procedures shall apply to information classified under this or predecessor orders. They shall also provide a means for administratively appealing a denial of a mandatory review request.

(e) The Secretary of Defense shall develop special procedures for the review of cryptologic information, and the Director of Central Intelligence shall develop special procedures for the review of information pertaining to intelligence activities (including special activities), or intelligence sources or methods, after consultation with affected agencies. The Archivist shall develop special procedures for the review of information accessioned into the National Archives of the United States.

(f) In response to a request for information under the Freedom of Information Act, the Privacy Act of 1974, or the mandatory review provisions of this Order:

(1) An agency shall refuse to confirm or deny the existence or non-existence of requested information whenever the fact of its existence or non-existence is itself classifiable under this Order.

(2) When an agency receives any request for documents in its custody that were classified by another agency, it shall refer copies of the request and the requested documents to the originating agency for processing, and may, after consultation with the originating agency, inform the requester of the referral. In cases in which the originating agency determines in writing that a response under Section 3.4(f)(1) is required, the referring agency shall respond to the requester in accordance with that Section.

Part 4

Safeguarding

Sec. 4.1 *General Restrictions on Access.*

(a) A person is eligible for access to classified information provided that a determination of trustworthiness has been made by agency heads or designated officials and provided that such access is essential to the accomplishment of lawful and authorized Government purposes.

(b) Controls shall be established by each agency to ensure that classified information is used, processed, stored, reproduced, transmitted, and destroyed only under conditions that will provide adequate protection and prevent access by unauthorized persons.

(c) Classified information shall not be disseminated outside the executive branch except under conditions that ensure that the information will be given protection equivalent to that afforded within the executive branch.

(d) Except as provided by directives issued by the President through the National Security Council, classified information originating in one agency may not be disseminated outside any other agency to which it has been made available without the consent of the originating agency. For purposes of this Section, the Department of Defense shall be considered one agency.

Sec. 4.2 *Special Access Programs.*

(a) Agency heads designated pursuant to Section 1.2(a) may create special access programs to control access, distribution, and protection of particularly sensitive information classified pursuant to this Order or predecessor orders. Such programs may be created or continued only at the written direction of these agency heads. For special access programs pertaining to intelligence activities (including special activities but not including military operational, strategic and tactical programs), or intelligence sources or methods, this function will be exercised by the Director of Central Intelligence.

(b) Each agency head shall establish and maintain a system of accounting for special access programs. The Director of the Information Security Oversight Office, consistent with the provisions of Section 5.2(b)(4), shall have non-delegable access to all such accountings.

Sec. 4.3 *Access by Historical Researchers and Former Presidential Appointees.*

(a) The requirement in Section 4.1(a) that access to classified information may be granted only as is essential to the accomplishment of authorized and lawful Government purposes may be waived as provided in Section 4.3(b) for persons who:

(1) are engaged in historical research projects, or

(2) previously have occupied policy-making positions to which they were appointed by the President.

(b) Waivers under Section 4.3(a) may be granted only if the originating agency:

(1) determines in writing that access is consistent with the interest of national security;

(2) takes appropriate steps to protect classified information from unauthorized disclosure or compromise, and ensures that the information is safeguarded in a manner consistent with this Order; and

(3) limits the access granted to former presidential appointees to items that the person originated, reviewed, signed, or received while serving as a presidential appointee.

Part 5

Implementation and Review

Sec. 5.1 *Policy Direction.*

(a) The National Security Council shall provide overall policy direction for the information security program.

(b) The Administrator of General Services shall be responsible for implementing and monitoring the program established pursuant to this Order. The Administrator shall delegate the implementation and monitorship functions of this program to the Director of the Information Security Oversight Office.

Sec. 5.2 *Information Security Oversight Office.*

(a) The Information Security Oversight Office shall have a full-time Director appointed by the Administrator of General Services subject to approval by the President. The Director shall have the authority to appoint a staff for the Office.

(b) The Director shall:

(1) develop, in consultation with the agencies, and promulgate, subject to the approval of the National Security Council, directives for the implementation of this Order, which shall be binding on the agencies;

(2) oversee agency actions to ensure compliance with this Order and implementing directives;

(3) review all agency implementing regulations and agency guidelines for systematic declassification review. The Director shall require any regulation or guideline to be changed if it is not consistent with this Order or implementing directives. Any such decision by the Director may be appealed

to the National Security Council. The agency regulation or guideline shall remain in effect pending a prompt decision on the appeal;

(4) have the authority to conduct on-site reviews of the information security program of each agency that generates or handles classified information and to require of each agency those reports, information, and other cooperation that may be necessary to fulfill the Director's responsibilities. If these reports, inspections, or access to specific categories of classified information would pose an exceptional national security risk, the affected agency head or the senior official designated under Section 5.3(a)(1) [1] may deny access. The Director may appeal denials to the National Security Council. The denial of access shall remain in effect pending a prompt decision on the appeal;

(5) review requests for original classification authority from agencies or officials not granted original classification authority and, if deemed appropriate, recommend presidential approval;

(6) consider and take action on complaints and suggestions from persons within or outside the Government with respect to the administration of the information security program;

(7) have the authority to prescribe, after consultation with affected agencies, standard forms that will promote the implementation of the information security program;

(8) report at least annually to the President through the National Security Council on the implementation of this Order; and

(9) have the authority to convene and chair interagency meetings to discuss matters pertaining to the information security program.

Sec. 5.3 *General Responsibilities.*

Agencies that originate or handle classified information shall:

(a) designate a senior agency official to direct and administer its information security program, which shall include an active oversight and security education program to ensure effective implementation of this Order;

(b) promulgate implementing regulations. Any unclassified regulations that establish agency information security policy shall be published in the **Federal Register** to the extent that these regulations affect members of the public;

(c) establish procedures to prevent unnecessary access to classified information, including procedures that (i) require that a demonstrable need for access to classified information is established before initiating administrative clearance procedures, and (ii) ensure that the number of persons granted access to classified information is limited to the minimum consistent with operational and security requirements and needs; and

(d) develop special contingency plans for the protection of classified information used in or near hostile or potentially hostile areas.

[1] **Editorial Note:** The correct citation is Section 5.3(a).

Sec. 5.4 *Sanctions.*

(a) If the Director of the Information Security Oversight Office finds that a violation of this Order or its implementing directives may have occurred, the Director shall make a report to the head of the agency or to the senior official designated under Section 5.3(a)(1) [1] so that corrective steps, if appropriate, may be taken.

(b) Officers and employees of the United States Government, and its contractors, licensees, and grantees shall be subject to appropriate sanctions if they:

(1) knowingly, willfully, or negligently disclose to unauthorized persons information properly classified under this Order or predecessor orders;

(2) knowingly and willfully classify or continue the classification of information in violation of this Order or any implementing directive; or

(3) knowingly and willfully violate any other provision of this Order or implementing directive.

(c) Sanctions may include reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions in accordance with applicable law and agency regulation.

(d) Each agency head or the senior official designated under Section 5.3(a)(1) [1] shall ensure that appropriate and prompt corrective action is taken whenever a violation under Section 5.4(b) occurs. Either shall ensure that the Director of the Information Security Oversight Office is promptly notified whenever a violation under Section 5.4(b) (1) or (2) occurs.

Part 6

General Provisions

Sec. 6.1 *Definitions.*

(a) "Agency" has the meaning provided at 5 U.S.C. 552(e).

(b) "Information" means any information or material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government.

(c) "National security information" means information that has been determined pursuant to this Order or any predecessor order to require protection against unauthorized disclosure and that is so designated.

(d) "Foreign government information" means:

(1) information provided by a foreign government or governments, an international organization of governments, or any element thereof with the expectation, expressed or implied, that the information, the source of the information, or both, are to be held in confidence; or

(2) information produced by the United States pursuant to or as a result of a joint arrangement with a foreign government or governments or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence.

[1] **Editorial Note:** The correct citation is Section 5.3(a).

(e) "National security" means the national defense or foreign relations of the United States.

(f) "Confidential source" means any individual or organization that has provided, or that may reasonably be expected to provide, information to the United States on matters pertaining to the national security with the expectation, expressed or implied, that the information or relationship, or both, be held in confidence.

(g) "Original classification" means an initial determination that information requires, in the interest of national security, protection against unauthorized disclosure, together with a classification designation signifying the level of protection required.

Sec. 6.2 *General.*

(a) Nothing in this Order shall supersede any requirement made by or under the Atomic Energy Act of 1954, as amended. "Restricted Data" and "Formerly Restricted Data" shall be handled, protected, classified, downgraded, and declassified in conformity with the provisions of the Atomic Energy Act of 1954, as amended, and regulations issued under that Act.

(b) The Attorney General, upon request by the head of an agency or the Director of the Information Security Oversight Office, shall render an interpretation of this Order with respect to any question arising in the course of its administration.

(c) Nothing in this Order limits the protection afforded any information by other provisions of law.

(d) Executive Order No. 12065 of June 28, 1978, as amended, is revoked as of the effective date of this Order.

(e) This Order shall become effective on August 1, 1982.

RONALD REAGAN

THE WHITE HOUSE,
April 2, 1982.

Editorial Note: The President's statement of Apr. 2, 1982, on signing Executive Order 12356 is printed in the *Weekly Compilation of Presidential Documents* (vol. 18, p. 431).

Executive Order 12357 of April 6, 1982

Sinai Support Mission

By the authority vested in me as President by the Constitution and statutes of the United States of America, including Chapter 6 of Part II of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2348, 2348a–2348c), and Section 6 of the Special International Security Assistance Act of 1979 (22 U.S.C. 3404), Section 2 of Executive Order No. 11896, as amended, is further amended by adding thereto the following:

"(f) The functions vested in the President by Section 6 of the Special International Security Assistance Act of 1979 (22 U.S.C. 3404) are delegated to the Director.

"(g) The Director shall, as soon as possible after the Multinational Force and Observers becomes operational on April 25, 1982, phase-out the activities of the Mission in the Sinai and terminate all functions of the Mission not later than September 30, 1982.

"(h) The Secretary of State shall be responsible after September 30, 1982 for any residual actions which may be necessary to conclude matters initiated by the Sinai Support Mission.".

RONALD REAGAN

THE WHITE HOUSE,
April 6, 1982.

Executive Order 12358 of April 14, 1982

Presidential Commission on Drunk Driving

By the authority vested in me as President by the Constitution of the United States of America, and in order to aid the States in their fight against the epidemic of drunk driving on the Nation's roads, it is hereby ordered as follows:

Section 1. *Establishment.* There is hereby established the Presidential Commission on Drunk Driving. The Commission shall be composed of no more than 26 members appointed by the President. In addition, the Majority Leader of the Senate and the Speaker of the House of Representatives are invited to designate two Members of each House to participate. The President shall designate a Chairman from among the members of the Commission.

Sec. 2. *Functions.* The Commission shall undertake to:

(a) heighten public awareness of the seriousness of the drunk driving problem;

(b) persuade States and communities to attack the drunk driving problem in a more organized and systematic manner, including plans to eliminate bottlenecks in the arrest, trial and sentencing process that impair the effectiveness of many drunk driving laws;

(c) encourage State and local officials and organizations to accept and use the latest techniques and methods to solve the problem; and

(d) generate public support for increased enforcement of State and local drunk driving laws.

Sec. 3. *Administration.*

(a) The heads of Executive agencies shall, to the extent permitted by law, provide the Commission with such information on drunk driving and highway safety issues and such other support as it may request for the effective performance of its functions.

Joseph P. Allen
Director of Training, Marketing
and Economic Development

NATIONAL
TECHNOLOGY TRANSFER
CENTER

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One Hundred Fourth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Wednesday, the third day of January, one thousand nine hundred and ninety-six

An Act

To amend the Stevenson-Wydler Technology Innovation Act of 1980 with respect to inventions made under cooperative research and development agreements, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "National Technology Transfer and Advancement Act of 1995".

SEC. 2. FINDINGS.

The Congress finds the following:

(1) Bringing technology and industrial innovation to the marketplace is central to the economic, environmental, and social well-being of the people of the United States.

(2) The Federal Government can help United States business to speed the development of new products and processes by entering into cooperative research and development agreements which make available the assistance of Federal laboratories to the private sector, but the commercialization of technology and industrial innovation in the United States depends upon actions by business.

(3) The commercialization of technology and industrial innovation in the United States will be enhanced if companies, in return for reasonable compensation to the Federal Government, can more easily obtain exclusive licenses to inventions which develop as a result of cooperative research with scientists employed by Federal laboratories

SEC. 3. USE OF FEDERAL TECHNOLOGY.

Subparagraph (B) of section 11(e)(7) of the Stevenson-Wydler Technology Innovation Act of 1980 (15 U.S.C. 3710(e)(7)(B)) is amended to read as follows

"(B) A transfer shall be made by any Federal agency under subparagraph (A), for any fiscal year, only if the amount so transferred by that agency (as determined under such subparagraph) would exceed $10,000."

SEC. 4. TITLE TO INTELLECTUAL PROPERTY ARISING FROM COOPERATIVE RESEARCH AND DEVELOPMENT AGREEMENTS.

Subsection (b) of section 12 of the Stevenson-Wydler Technology Innovation Act of 1980 (15 U.S.C. 3710a(b)) is amended to read as follows

"(b) ENUMERATED AUTHORITY.—(1) Under an agreement entered into pursuant to subsection (a)(1), the laboratory may grant, or

(B) A transfer shall be made by any Federal agency under subparagraph (A), for any fiscal year, only if the amount so transferred by that agency (as determined under such subparagraph) would exceed $10,000."

SEC. 4. TITLE TO INTELLECTUAL PROPERTY ARISING FROM COOPERATIVE RESEARCH AND DEVELOPMENT AGREEMENTS.

Subsection (b) of section 12 of the Stevenson-Wydler Technology Innovation Act of 1980 (15 U.S.C. 3710a(b)) is amended to read as follows

"(b) ENUMERATED AUTHORITY.—(1) Under an agreement entered into pursuant to subsection (a)(1), the laboratory may grant, or

agree to grant in advance, to a collaborating party patent licenses or assignments, or options thereto, in any invention made in whole or in part by a laboratory employee under the agreement, for reasonable compensation when appropriate. The laboratory shall ensure, through such agreement, that the collaborating party has the option to choose an exclusive license for a pre-negotiated field of use for any such invention under the agreement or, if there is more than one collaborating party, that the collaborating parties are offered the option to hold licensing rights that collectively encompass the rights that would be held under such an exclusive license by one party. In consideration for the Government's contribution under the agreement, grants under this paragraph shall be subject to the following explicit conditions:

"(A) A nonexclusive, nontransferable, irrevocable, paid-up license from the collaborating party to the laboratory to practice the invention or have the invention practiced throughout the world by or on behalf of the Government. In the exercise of such license, the Government shall not publicly disclose trade secrets or commercial or financial information that is privileged or confidential within the meaning of section 552(b)(4) of title 5, United States Code, or which would be considered as such if it had been obtained from a non-Federal party.

"(B) If a laboratory assigns title or grants an exclusive license to such an invention, the Government shall retain the right—

"(i) to require the collaborating party to grant to a responsible applicant a nonexclusive, partially exclusive, or exclusive license to use the invention in the applicant's licensed field of use, on terms that are reasonable under the circumstances; or

"(ii) if the collaborating party fails to grant such a license, to grant the license itself.

"(C) The Government may exercise its right retained under subparagraph (B) only in exceptional circumstances and only if the Government determines that—

"(i) the action is necessary to meet health or safety needs that are not reasonably satisfied by the collaborating party;

"(ii) the action is necessary to meet requirements for public use specified by Federal regulations, and such requirements are not reasonably satisfied by the collaborating party; or

"(iii) the collaborating party has failed to comply with an agreement containing provisions described in subsection (c)(4)(B).

This determination is subject to administrative appeal and judicial review under section 203(2) of title 35, United States Code.

"(2) Under agreements entered into pursuant to subsection (a)(1), the laboratory shall ensure that a collaborating party may retain title to any invention made solely by its employee in exchange for normally granting the Government a nonexclusive, nontransferable, irrevocable, paid-up license to practice the invention or have the invention practiced throughout the world by or on behalf of the Government for research or other Government purposes.

judicial review under section 203(2) of title 35, United States Code.

"(2) Under agreements entered into pursuant to subsection (a)(1), the laboratory shall ensure that a collaborating party may retain title to any invention made solely by its employee in exchange for normally granting the Government a nonexclusive, nontransferable, irrevocable, paid-up license to practice the invention or have the invention practiced throughout the world by or on behalf of the Government for research or other Government purposes.

"(3) Under an agreement entered into pursuant to subsection (a)(1), a laboratory may—

"(A) accept, retain, and use funds, personnel, services, and property from a collaborating party and provide personnel, services, and property to a collaborating party;

"(B) use funds received from a collaborating party in accordance with subparagraph (A) to hire personnel to carry out the agreement who will not be subject to full-time-equivalent restrictions of the agency;

"(C) to the extent consistent with any applicable agency requirements or standards of conduct, permit an employee or former employee of the laboratory to participate in an effort to commercialize an invention made by the employee or former employee while in the employment or service of the Government; and

"(D) waive, subject to reservation by the Government of a nonexclusive, irrevocable, paid-up license to practice the invention or have the invention practiced throughout the world by or on behalf of the Government, in advance, in whole or in part, any right of ownership which the Federal Government may have to any subject invention made under the agreement by a collaborating party or employee of a collaborating party.

"(4) A collaborating party in an exclusive license in any invention made under an agreement entered into pursuant to subsection (a)(1) shall have the right of enforcement under chapter 29 of title 35, United States Code.

"(5) A Government-owned, contractor-operated laboratory that enters into a cooperative research and development agreement pursuant to subsection (a)(1) may use or obligate royalties or other income accruing to the laboratory under such agreement with respect to any invention only—

"(A) for payments to inventors;

"(B) for purposes described in clauses (i), (ii), (iii), and (iv) of section 14(a)(1)(B); and

"(C) for scientific research and development consistent with the research and development missions and objectives of the laboratory.".

SEC. 5. DISTRIBUTION OF INCOME FROM INTELLECTUAL PROPERTY RECEIVED BY FEDERAL LABORATORIES.

Section 14 of the Stevenson-Wydler Technology Innovation Act of 1980 (15 U.S.C. 3710c) is amended—

(1) by amending subsection (a)(1) to read as follows:

"(1) Except as provided in paragraphs (2) and (4), any royalties or other payments received by a Federal agency from the licensing and assignment of inventions under agreements entered into by Federal laboratories under section 12, and from the licensing of inventions of Federal laboratories under section 207 of title 35, United States Code, or under any other provision of law, shall be retained by the laboratory which produced the invention and shall be disposed of as follows:

"(A)(i) The head of the agency or laboratory, or such individual's designee, shall pay each year the first $2,000, and thereafter at least 15 percent, of the royalties or other payments to the inventor or coinventors.

"(ii) An agency or laboratory may provide appropriate incentives, from royalties, or other payments, to laboratory

shall be disposed of as follows:

"(A)(i) The head of the agency or laboratory, or such individual's designee, shall pay each year the first $2,000, and thereafter at least 15 percent, of the royalties or other payments to the inventor or coinventors.

"(ii) An agency or laboratory may provide appropriate incentives, from royalties, or other payments, to laboratory

employees who are not an inventor of such inventions but who substantially increased the technical value of such inventions.

"(iii) The agency or laboratory shall retain the royalties and other payments received from an invention until the agency or laboratory makes payments to employees of a laboratory under clause (i) or (ii).

"(B) The balance of the royalties or other payments shall be transferred by the agency to its laboratories, with the majority share of the royalties or other payments from any invention going to the laboratory where the invention occurred. The royalties or other payments so transferred to any laboratory may be used or obligated by that laboratory during the fiscal year in which they are received or during the succeeding fiscal year—

"(i) to reward scientific, engineering, and technical employees of the laboratory, including developers of sensitive or classified technology, regardless of whether the technology has commercial applications;

"(ii) to further scientific exchange among the laboratories of the agency;

"(iii) for education and training of employees consistent with the research and development missions and objectives of the agency or laboratory, and for other activities that increase the potential for transfer of the technology of the laboratories of the agency;

"(iv) for payment of expenses incidental to the administration and licensing of intellectual property by the agency or laboratory with respect to inventions made at that laboratory, including the fees or other costs for the services of other agencies, persons, or organizations for intellectual property management and licensing services; or

"(v) for scientific research and development consistent with the research and development missions and objectives of the laboratory.

"(C) All royalties or other payments retained by the agency or laboratory after payments have been made pursuant to subparagraphs (A) and (B) that is unobligated and unexpended at the end of the second fiscal year succeeding the fiscal year in which the royalties and other payments were received shall be paid into the Treasury.";

(2) in subsection (a)(2)—

(A) by inserting "or other payments" after "royalties"; and

(B) by striking "for the purposes described in clauses (i) through (iv) of paragraph (1)(B) during that fiscal year or the succeeding fiscal year" and inserting in lieu thereof "under paragraph (1)(B)";

(3) in subsection (a)(3), by striking "$100,000" both places it appears and inserting "$150,000";

(4) in subsection (a)(4)—

(A) by striking "income" each place it appears and inserting in lieu thereof "payments";

(B) by striking "the payment of royalties to inventors" in the first sentence thereof and inserting in lieu thereof "payments to inventors";

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(3) in subsection (a)(3), by striking "$100,000" both places it appears and inserting "$150,000";

(4) in subsection (a)(4)—

(A) by striking "income" each place it appears and inserting in lieu thereof "payments";

(B) by striking "the payment of royalties to inventors" in the first sentence thereof and inserting in lieu thereof "payments to inventors";

(C) by striking "clause (i) of paragraph (1)(B)" and inserting in lieu thereof "clause (iv) of paragraph (1)(B)";

(D) by striking "payment of the royalties," in the second sentence thereof and inserting in lieu thereof "offsetting the payments to inventors,"; and

(E) by striking "clauses (i) through (iv) of"; and

(5) by amending paragraph (1) of subsection (b) to read as follows:

"(1) by a contractor, grantee, or participant, or an employee of a contractor, grantee, or participant, in an agreement or other arrangement with the agency, or".

SEC. 6. EMPLOYEE ACTIVITIES.

Section 15(a) of the Stevenson-Wydler Technology Innovation Act of 1980 (15 U.S.C. 3710d(a)) is amended—

(1) by striking "the right of ownership to an invention under this Act" and inserting in lieu thereof "ownership of or the right of ownership to an invention made by a Federal employee"; and

(2) by inserting "obtain or" after "the Government, to".

SEC. 7. AMENDMENT TO BAYH-DOLE ACT.

Section 210(e) of title 35, United States Code, is amended by striking ", as amended by the Federal Technology Transfer Act of 1986,".

SEC. 8. NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY ACT AMENDMENTS.

The National Institute of Standards and Technology Act (15 U.S.C. 271 et seq.) is amended—

(1) in section 10(a)—

(A) by striking "nine" and inserting in lieu thereof "15"; and

(B) by striking "five" and inserting in lieu thereof "10";

(2) in section 15—

(A) by striking "Pay Act of 1945; and" and inserting in lieu thereof "Pay Act of 1945;"; and

(B) by inserting "; and (h) the provision of transportation services for employees of the Institute between the facilities of the Institute and nearby public transportation, notwithstanding section 1344 of title 31, United States Code" after "interests of the Government"; and

(3) in section 19—

(A) by inserting ", subject to the availability of appropriations," after "post-doctoral fellowship program"; and

(B) by striking "nor more than forty" and inserting in lieu thereof "nor more than 60".

SEC. 9. RESEARCH EQUIPMENT.

Section 11(i) of the Stevenson-Wydler Technology Innovation Act of 1980 (15 U.S.C. 3710(i)) is amended by inserting "loan, lease, or" before "give".

SEC. 10. PERSONNEL.

The personnel management demonstration project established under section 10 of the National Bureau of Standards Authorization Act for Fiscal Year 1987 (15 U.S.C. 275 note) is extended indefinitely

Act of 1980 (15 U.S.C. 3710(i)) is amended by inserting "loan, lease, or" before "give".

SEC. 10. PERSONNEL.

The personnel management demonstration project established under section 10 of the National Bureau of Standards Authorization Act for Fiscal Year 1987 (15 U.S.C. 275 note) is extended indefinitely

SEC. 11. FASTENER QUALITY ACT AMENDMENTS.

(a) SECTION 2 AMENDMENTS.—Section 2 of the Fastener Quality Act (15 U.S.C. 5401) is amended—

(1) by striking subsection (a)(4), and redesignating paragraphs (5) through (9) as paragraphs (4) through (8), respectively;

(2) in subsection (a)(7), as so redesignated by paragraph (1) of this subsection, by striking "by lot number"; and

(3) in subsection (b), by striking "used in critical applications" and inserting in lieu thereof "in commerce".

(b) SECTION 3 AMENDMENTS.—Section 3 of the Fastener Quality Act (15 U.S.C. 5402) is amended—

(1) in paragraph (1)(B) by striking "having a minimum tensile strength of 150,000 pounds per square inch";

(2) in paragraph (2), by inserting "consensus" after "or any other";

(3) in paragraph (5)—

(A) by inserting "or" after "standard or specification," in subparagraph (B);

(B) by striking "or" at the end of subparagraph (C);

(C) by striking subparagraph (D); and

(D) by inserting "or produced in accordance with ASTM F 432" after "307 Grade A";

(4) in paragraph (6) by striking "other person" and inserting in lieu thereof "government agency";

(5) in paragraph (8) by striking "Standard" and inserting in lieu thereof "Standards";

(6) by striking paragraph (11) and redesignating paragraphs (12) through (15) as paragraphs (11) through (14), respectively;

(7) in paragraph (13), as so redesignated by paragraph (6) of this subsection, by striking ", a government agency" and all that follows through "markings of any fastener" and inserting in lieu thereof "or a government agency"; and

(8) in paragraph (14), as so redesignated by paragraph (6) of this subsection, by inserting "for the purpose of achieving a uniform hardness" after "quenching and tempering".

(c) SECTION 4 REPEAL.—Section 4 of the Fastener Quality Act (15 U.S.C. 5403) is repealed.

(d) SECTION 5 AMENDMENTS.—Section 5 of the Fastener Quality Act (15 U.S.C. 5404) is amended—

(1) in subsection (a)(1)(B) and (2)(A)(i) by striking "subsections (b) and (c)" and inserting in lieu thereof "subsections (b), (c), and (d)";

(2) in subsection (c)(2) by striking "or, where applicable" and all that follows through "section 7(c)(1)";

(3) in subsection (c)(3) by striking ", such as the chemical, dimensional, physical, mechanical, and any other";

(4) in subsection (c)(4) by inserting "except as provided in subsection (d)," before "state whether"; and

(5) by adding at the end the following new subsection:

"(d) ALTERNATIVE PROCEDURE FOR CHEMICAL CHARACTERISTICS.—Notwithstanding the requirements of subsections (b) and (c), a manufacturer shall be deemed to have demonstrated, for purposes of subsection (a)(1), that the chemical characteristics of a lot conform to the standards and specifications to which the

(5) by adding at the end the following new subsection:

"(d) ALTERNATIVE PROCEDURE FOR CHEMICAL CHARACTERISTICS.—Notwithstanding the requirements of subsections (b) and (c), a manufacturer shall be deemed to have demonstrated, for purposes of subsection (a)(1), that the chemical characteristics of a lot conform to the standards and specifications to which the

manufacturer represents such lot has been manufactured if the following requirements are met:

"(1) The coil or heat number of metal from which such lot was fabricated has been inspected and tested with respect to its chemical characteristics by a laboratory accredited in accordance with the procedures and conditions specified by the Secretary under section 6.

"(2) Such laboratory has provided to the manufacturer, either directly or through the metal manufacturer, a written inspection and testing report, which shall be in a form prescribed by the Secretary by regulation, listing the chemical characteristics of such coil or heat number.

"(3) The report described in paragraph (2) indicates that the chemical characteristics of such coil or heat number conform to those required by the standards and specifications to which the manufacturer represents such lot has been manufactured.

"(4) The manufacturer demonstrates that such lot has been fabricated from the coil or heat number of metal to which the report described in paragraphs (2) and (3) relates.

In prescribing the form of report required by subsection (c), the Secretary shall provide for an alternative to the statement required by subsection (c)(4), insofar as such statement pertains to chemical characteristics, for cases in which a manufacturer elects to use the procedure permitted by this subsection.".

(e) SECTION 6 AMENDMENT.—Section 6(a)(1) of the Fastener Quality Act (15 U.S.C. 5405(a)(1)) is amended by striking "Within 180 days after the date of enactment of this Act, the" and inserting in lieu thereof "The".

(f) SECTION 7 AMENDMENTS.—Section 7 of the Fastener Quality Act (15 U.S.C. 5406) is amended—

(1) by amending subsection (a) to read as follows:

"(a) DOMESTICALLY PRODUCED FASTENERS.—It shall be unlawful for a manufacturer to sell any shipment of fasteners covered by this Act which are manufactured in the United States unless the fasteners—

"(1) have been manufactured according to the requirements of the applicable standards and specifications and have been inspected and tested by a laboratory accredited in accordance with the procedures and conditions specified by the Secretary under section 6; and

"(2) an original laboratory testing report described in section 5(c) and a manufacturer's certificate of conformance are on file with the manufacturer, or under such custody as may be prescribed by the Secretary, and available for inspection.";

(2) in subsection (c)(2) by inserting "to the same" after "in the same manner and";

(3) in subsection (d)(1) by striking "certificate" and inserting in lieu thereof "test report"; and

(4) by striking subsections (e), (f), and (g) and inserting in lieu thereof the following:

"(e) COMMINGLING.—It shall be unlawful for any manufacturer, importer, or private label distributor to commingle like fasteners from different lots in the same container, except that such manufacturer, importer, or private label distributor may commingle like fasteners of the same type, grade, and dimension from not more than two tested and certified lots in the same container during repackaging and plating operations. Any container which contains

"(e) COMMINGLING.—It shall be unlawful for any manufacturer, importer, or private label distributor to commingle like fasteners from different lots in the same container, except that such manufacturer, importer, or private label distributor may commingle like fasteners of the same type, grade, and dimension from not more than two tested and certified lots in the same container during repackaging and plating operations. Any container which contains

fasteners from two lots shall be conspicuously marked with the lot identification numbers of both lots.

"(f) SUBSEQUENT PURCHASER.—If a person who purchases fasteners for any purpose so requests either prior to the sale or at the time of sale, the seller shall conspicuously mark the container of the fasteners with the lot number from which such fasteners were taken.".

(g) SECTION 9 AMENDMENT.—Section 9 of the Fastener Quality Act (15 U.S.C. 5408) is amended by adding at the end the following new subsection:

"(d) ENFORCEMENT.—The Secretary may designate officers or employees of the Department of Commerce to conduct investigations pursuant to this Act. In conducting such investigations, those officers or employees may, to the extent necessary or appropriate to the enforcement of this Act, exercise such authorities as are conferred upon them by other laws of the United States, subject to policies and procedures approved by the Attorney General.".

(h) SECTION 10 AMENDMENTS.—Section 10 of the Fastener Quality Act (15 U.S.C. 5409) is amended—

(1) in subsections (a) and (b), by striking "10 years" and inserting in lieu thereof "5 years"; and

(2) in subsection (b), by striking "any subsequent" and inserting in lieu thereof "the subsequent".

(i) SECTION 13 AMENDMENT.—Section 13 of the Fastener Quality Act (15 U.S.C. 5412) is amended by striking "within 180 days after the date of enactment of this Act".

(j) SECTION 14 REPEAL.—Section 14 of the Fastener Quality Act (15 U.S.C. 5413) is repealed.

SEC. 12. STANDARDS CONFORMITY.

(a) USE OF STANDARDS.—Section 2(b) of the National Institute of Standards and Technology Act (15 U.S.C. 272(b)) is amended—

(1) in paragraph (2), by striking ", including comparing standards" and all that follows through "Federal Government";

(2) by redesignating paragraphs (3) through (11) as paragraphs (4) through (12), respectively; and

(3) by inserting after paragraph (2) the following new paragraph:

"(3) to compare standards used in scientific investigations, engineering, manufacturing, commerce, industry, and educational institutions with the standards adopted or recognized by the Federal Government and to coordinate the use by Federal agencies of private sector standards, emphasizing where possible the use of standards developed by private, consensus organizations;".

(b) CONFORMITY ASSESSMENT ACTIVITIES.—Section 2(b) of the National Institute of Standards and Technology Act (15 U.S.C. 272(b)) is amended—

(1) by striking "and" at the end of paragraph (11), as so redesignated by subsection (a)(2) of this section;

(2) by striking the period at the end of paragraph (12), as so redesignated by subsection (a)(2) of this section, and inserting in lieu thereof "; and"; and

(3) by adding at the end the following new paragraph:

"(13) to coordinate Federal, State, and local technical standards activities and conformity assessment activities, with private sector technical standards activities and conformity assess-

(2) by striking the period at the end of paragraph (12), as so redesignated by subsection (a)(2) of this section, and inserting in lieu thereof "; and"; and

(3) by adding at the end the following new paragraph:

"(13) to coordinate Federal, State, and local technical standards activities and conformity assessment activities, with private sector technical standards activities and conformity assess-

ment activities, with the goal of eliminating unnecessary duplication and complexity in the development and promulgation of conformity assessment requirements and measures.".

(c) TRANSMITTAL OF PLAN TO CONGRESS.—The National Institute of Standards and Technology shall, within 90 days after the date of enactment of this Act, transmit to the Congress a plan for implementing the amendments made by this section.

(d) UTILIZATION OF CONSENSUS TECHNICAL STANDARDS BY FEDERAL AGENCIES; REPORTS.—

(1) IN GENERAL.—Except as provided in paragraph (3) of this subsection, all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments.

(2) CONSULTATION; PARTICIPATION.—In carrying out paragraph (1) of this subsection, Federal agencies and departments shall consult with voluntary, private sector, consensus standards bodies and shall, when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources, participate with such bodies in the development of technical standards.

(3) EXCEPTION.—If compliance with paragraph (1) of this subsection is inconsistent with applicable law or otherwise impractical, a Federal agency or department may elect to use technical standards that are not developed or adopted by voluntary consensus standards bodies if the head of each such agency or department transmits to the Office of Management and Budget an explanation of the reasons for using such standards. Each year, beginning with fiscal year 1997, the Office of Management and Budget shall transmit to Congress and its committees a report summarizing all explanations received in the preceding year under this paragraph.

(4) DEFINITION OF TECHNICAL STANDARDS.—As used in this subsection, the term "technical standards" means performance-based or design-specific technical specifications and related management systems practices.

SEC. 13. SENSE OF CONGRESS.

It is the sense of the Congress that the Malcolm Baldrige National Quality Award program offers substantial benefits to

United States industry, and that all funds appropriated for such program should be spent in support of the goals of the program.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

February 10, 1982

CIRCULAR No. A-124

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Patents - Small Business Firms and Nonprofit Organizations

1. Purpose. This Circular provides policies, procedures, and guidelines with respect to inventions made by small business firms and nonprofit organizations, including universities, under funding agreements with Federal agencies where a purpose is to perform experimental, developmental, or research work.

2. Rescissions. This Circular supersedes OMB Bulletin 81-22 effective March 1, 1982.

3. Authority. This Circular is issued pursuant to the authority contained in 35 U.S.C. §206 (§6 of P.L. 96-517, "The Patent and Trademark Amendments of 1980").

4. Background. After many years of public debate on means to enhance the utilization of the results of Government funded research, Public Law 96-517 was enacted. This Act gives nonprofit organizations and small businesses, with limited exceptions, a first right of refusal to title in inventions they have made in performance of Government grants and contracts. The Act takes precedence over approximately 26 conflicting statutory and administrative policies.

Under the Act, the Office of Federal Procurement Policy (OFPP) is responsible for the issuance of the regulations implementing 35 U.S.C. §202-204 after consultation with the Office of Science and Technology Policy (OSTP). On July 2, 1981, OMB Bulletin 81-22 was issued to provide interim regulations while agency and public comments were sought. Based on a review of these comments, this Circular is issued to establish permanent implementing regulations and a standard patent rights clause.

5. Policy and Scope. This Circular takes effect on March 1, 1982, and will be applicable to all funding agreements with small business firms and domestic nonprofit organizations executed on or after that date. This includes

a review of these comments, this Circular is issued to establish permanent implementing regulations and a standard patent rights clause.

5. Policy and Scope. This Circular takes effect on March 1, 1982, and will be applicable to all funding agreements with small business firms and domestic nonprofit organizations executed on or after that date. This includes

subcontracts at any tier made after March 1, 1982, with small business firms and nonprofit organizations even if the prime funding agreement was made prior to March 1, 1982. Unless prohibited by law, agencies are encouraged to treat subject inventions made under funding agreements made prior to July 1, 1981, in substantially the same manner as contemplated by P.L. 96-517 and this Circular for inventions made under funding agreements entered into subsequent to July 1, 1981. This can be accomplished through the granting of waivers of title on terms and conditions substantially similar to those set forth in the standard clause of Attachment A.

Agencies should be alert to determining whether amendments made after March 1, 1982, to funding agreements entered into prior to July 1, 1981, result in new funding agreements subject to this Circular and the Act. Renewals and continuations after March 1, 1982, of funding agreements entered into prior to July 1, 1981, should be normally treated as new funding agreements.

This Circular is intended to establish uniform and coordinated implementation of 35 U.S.C. §200-206 so as to foster the policy and objectives set forth in 35 U.S.C. §200.

6. Definitions. As used in this Circular --

a. The term "funding agreement" means any contract, grant, or cooperative agreement entered into between any Federal agency, other than the Tennessee Valley Authority, and any contractor for the performance of experimental, developmental, or research work funded in whole or in part by the Federal Government. Such term includes any assignment, substitution of parties, or subcontract of any type entered into for the performance of experimental, developmental, or research work under a funding agreement, as herein defined.

b. The term "contractor" means any person, small business firm or nonprofit organization that is a party to a funding agreement.

c. The term "invention" means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code.

d. The term "subject invention" means any invention of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement.

e. The term "practical application" means to manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system; and, in each case, under such

d. The term "subject invention" means any invention of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement.

e. The term "practical application" means to manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system; and, in each case, under such

conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

f. The term "made" when used in relation to any invention means the conception or first actual reduction to practice of such invention.

g. The term "small business firm" means a small business concern as defined at section 2 of Public Law 85-536 (15 U.S.C. §632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this Circular, the size standards for small business concerns involved in Government procurement and subcontracting at 13 CFR 121.3-8 and 121.3-12, respectively, will be used.

h. The term "nonprofit organization" means universities and other institutions of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. §501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. §501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

7. Use of the Patent Rights (Small Business Firm or Nonprofit Organization) (March 1982) Clause.

a. Each funding agreement awarded to a small business firm or domestic nonprofit organization which has as a purpose the performance of experimental, developmental or research work shall contain the "Patent Rights (Small Business Firm or Nonprofit Organization) (March 1982)" clause set forth in Attachment A with such modifications and tailoring as may be authorized in Part 8, except that the funding agreement may contain alternative provisions--

(1) when the funding agreement is for the operation of a Government-owned research or production facility; or

(2) in exceptional circumstances when it is determined by the agency that restriction or elimination of the right to retain title to any subject invention will better promote the policy and objectives of Chapter 38 of Title 35 of the United States Code; or

(2) in exceptional circumstances when it is determined by the agency that restriction or elimination of the right to retain title to any subject invention will better promote the policy and objectives of Chapter 38 of Title 35 of the United States Code; or

(3) when it is determined by a Government authority which is authorized by statute or executive order to conduct foreign intelligence or counterintelligence activities that the restriction or elimination of the right to retain title to any subject invention is necessary to protect the security of such activities.

b. (1) Any determination under Part 7.a.(2) of this Circular will be in writing and accompanied by a written statement of facts justifying the determination. The statement of facts will contain such information as the funding Federal agency deems relevant and, at minimum, will (i) identify the small business firm or nonprofit organization involved, (ii) describe the extent to which agency action restricted or eliminated the right to retain title to a subject invention, (iii) state the facts and rationale supporting the agency action, (iv) provide supporting documentation for those facts and rationale, and (v) indicate the nature of any objections to the agency action and provide any documentation in which those objections appear. A copy of each such determination and written statement of facts will be sent to the Comptroller General of the United States within 30 days after the award of the applicable funding agreement. In cases of determinations application to small business firms, copies will also be sent to the Chief Counsel for Advocacy of the Small Business Administration.

(2) To assist the Comptroller General to accomplish his or her responsibilities under 35 U.S.C. §202, each Federal agency that enters into any funding agreements with nonprofit organizations or small business firms during the applicable reporting period shall accumulate and, at the request of the Comptroller General, provide the Comptroller General or his or her duly authorized representative the total number of prime funding agreements entered into with small business firms or nonprofit organizations that contain the patent rights clause of Attachment A during each period of October 1 through September 30, beginning October 1, 1982.

c. (1) Agencies are advised that Part 7.a. applies to subcontracts at any tier under prime funding agreements with contractors that are other than small business firms or nonprofit organizations. Accordingly, agencies should take appropriate action to ensure that this requirement is reflected in the patent clauses of such prime funding agreements awarded after March 1, 1982.

(2) In the event an agency has outstanding prime funding agreements that do not contain patent flow-down provisions consistent with either this Circular or OMB Bulletin 81-22 (if it was applicable at the time the funding

appropriate action to ensure that this requirement is reflected in the patent clauses of such prime funding agreements awarded after March 1, 1982.

(2) In the event an agency has outstanding prime funding agreements that do not contain patent flow-down provisions consistent with either this Circular or OMB Bulletin 81-22 (if it was applicable at the time the funding

agreement was awarded), the agency shall take appropriate action to ensure that small business firms or domestic nonprofit organization subcontractors under such prime funding agreements that received their subcontracts after July 1, 1981, will receive rights in their subject inventions that are consistent with P.L. 96-517 and this Circular. Appropriate actions might include (i) amendment of prime contracts and/or subcontracts; (ii) requiring the inclusion of the clause of Attachment A as a condition of agency approval of a subcontract; or (iii) the granting of title to the subcontractor to identified subject inventions on terms substantially the same as contained in the clause of Attachment A in the event the subcontract contains a "deferred determination" or "acquisition by the Government" type of patent rights clause.

d. To qualify for the clause of Attachment A, a prospective contractor may be required by an agency to certify that it is either a small business firm or a domestic nonprofit organization. If the agency has reason to question the status of the prospective contractor as a small business firm or domestic nonprofit organization, it may file a protest in accordance with 13 C.F.R. 121.3-5 if small business firm status is questioned or require the prospective contractor to furnish evidence to establish its status as a domestic nonprofit organization.

8. Instructions for Modification and Tailoring of the Clause of Attachment A.

a. Agencies should complete the blank in paragraph g.(2) of the clause of Attachment A in accordance with their own or applicable Government-wide regulations such as the FPR or DAR. The flow-down provisions of the clause cited by the agency should, of course, reflect the requirement of Part 7.c.(1).

b. Agencies should complete paragraph 1. "Communications" at the end of the clause of Attachment A by designating a central point of contact for communications on matters relating to the clause. Additional instructions on communications may also be included in paragraph 1.

c. Agencies may replace the italicized or underlined words and phrases with those appropriate to the particular funding agreement. For example "contract" could be replaced by "grant", "contractor" by "grantee", and "contracting officer" by "grants officer." Depending on its use, "Federal agency" can be replaced either by the identification of the agency or by the specification of the particular office or official within that agency.

words and phrases with those appropriate to the particular funding agreement. For example "contract" could be replaced by "grant", "contractor" by "grantee", and "contracting officer" by "grants officer." Depending on its use, "Federal agency" can be replaced either by the identification of the agency or by the specification of the particular office or official within that agency.

d. When the agency head or duly authorized designee determines at the time of contracting with a small business firm or nonprofit organization that it would be in the national interest to acquire the right to sublicense foreign governments or international organizations pursuant to any existing treaty or agreement, a sentence may be added at the end of paragraph b. of the clause of Attachment A as follows:

> "This license will include the right of the Government to sublicense foreign governments and international organizations pursuant to the following treaties or international agreements: _____; or pursuant to any future treaties or agreements with foreign governments or international organizations."

The blank in the above should be completed with the names of applicable existing treaties or international agreements. The above language is not intended to apply to treaties or agreements that are in effect on the date of the award which are not listed. The above language may be modified by agencies by deleting the reference to future treaties or agreements or by otherwise more narrowly defining classes of future treaties or agreements. The language may also be modified to make clear that the rights granted to the foreign government or international organization may be for additional rights beyond a license or sublicense if so required by the applicable treaty or international agreement. For example, in some cases exclusive licenses or even the assignment of title in the foreign country involved might be required. Agencies may also modify the language above to provide for the direct licensing by the contractor of the foreign government or international organization.

e. To the extent not required by other provisions of the funding agreement, agencies may add additional subparagraphs to paragraph (f) of the patent rights clause of Attachment A to require the contractor to do one or more of the following:

(1) Provide periodic (but no more frequently than annually) listings of all subject inventions required to be disclosed during the period covered by the report;

(2) Provide a report prior to the close-out of a funding agreement listing all subject inventions or stating that there were none;

(3) Provide notification of all subcontracts for experimental, developmental, or research work; and

disclosed during the period covered by the report;

(2) Provide a report prior to the close-out of a funding agreement listing all subject inventions or stating that there were none;

(3) Provide notification of all subcontracts for experimental, developmental, or research work; and

(4) Provide, upon request, the filing date, serial number and title; a copy of the patent application; and patent number and issue date for any subject invention in any country in which the contractor has applied for patents.

Part 9. Publication or Release of Invention Disclosures

a. 35 U.S.C. §205 provides as follows:

> "Federal agencies are authorized to withhold from disclosure to the public information disclosing any invention in which the Federal Government owns or may own a right, title, or interest (including a nonexclusive license) for a reasonable time in order for a patent application to be filed. Furthermore, Federal agencies shall not be required to release copies of any document which is part of an application for patent filed with the United States Patent and Trademark Office or with any foreign patent office."

b. To the extent authorized by 35 U.S.C. §205, agencies shall not disclose to third parties pursuant to requests under the Freedom of Information Act (FOIA) any information disclosing a subject invention for a reasonable time in order for a patent application to be filed. With respect to subject inventions of contractors that are small business firms or nonprofit organizations, a reasonable time shall be the time during which an initial patent application may be filed under paragraph c. of the clause of Attachment A or such other clause that may be used in the funding agreement. However, an agency may disclose such subject inventions under the FOIA, at its discretion, after a contractor has elected not to retain title or after the time in which the contractor is required to make an election if the contractor has not made an election within that time. Similarly, an agency may honor an FOIA request at its discretion if it finds that the same information has previously been published by the inventor, contractor, or otherwise. If the agency plans to file itself when the contractor has not elected title, it may, of course, continue to avail itself of the authority of 35 U.S.C. §205.

c. As authorized by 35 U.S.C. §205, Federal agencies shall not release copies of any document which is part of an application for patent filed on a subject invention to which a small business firm or nonprofit organization elected to retain title.

d. A number of agencies have policies to encourage public disse. ination of the results of work supported by the

shall not release copies of any document which is part of an application for patent filed on a subject invention to which a small business firm or nonprofit organization elected to retain title.

d. A number of agencies have policies to encourage public disse. ination of the results of work supported by the

agency through publication in Government or other publications of technical reports of contractors or others. In recognition of the fact that such publication, if it included descriptions of a subject invention, could create bars to obtaining patent protection, it is the policy of the executive branch that agencies will not include in such publication programs, copies of disclosures of inventions submitted by small business firms or nonprofit organizations, pursuant to paragraph c. of the clause of Attachment A, except that under the same circumstances under which agencies are authorized to release such information pursuant to FOIA requests under Part 9.b. above, agencies may publish such disclosures.

e. Nothing in this Part is intended to preclude agencies from including in the publication activities described in the first sentence of Part 9.d., the publication of materials describing a subject invention to the extent such materials were provided as part of a technical report or other submission of the contractor which were submitted independently of the requirements of the patent rights provisions of the contract. However, if a small business firm or nonprofit organization notifies the agency that a particular report or other submission contains a disclosure of a subject invention to which it has elected or may elect title, the agency will use reasonable efforts to restrict its publication of the material for six months from date of its receipt of the report or submission or, if earlier, until the contractor has filed an initial patent application. Agencies, of course, retain the discretion to delay publication for additional periods of time.

f. Nothing in this Part 9 is intended to limit the authority of agencies provided in 35 U.S.C. §205 in circumstances not specifically described in this Part 9.

10. Reporting on Utilization of Subject Inventions.

a. Paragraph h. of the clause of Attachment A provides that agencies have the right to receive periodic reports from the contractor on utilization of inventions. In accordance with such instructions as may be issued by the Department of Commerce, agencies shall obtain such information from their contractors. Pending such instructions, agencies should not impose reporting requirements. The Department of Commerce and the agencies, in conjunction with representatives of small business and nonprofit organizations, shall work together to establish a uniform periodic reporting system.

b. To the extent any such data or information supplied by the contractor is considered by the contractor, or its licensee or assignee, to be privileged and confidential and is so marked, agencies shall not, to the extent permitted by

business and nonprofit organizations, shall work together to establish a uniform periodic reporting system.

b. To the extent any such data or information supplied by the contractor is considered by the contractor, or its licensee or assignee, to be privileged and confidential and is so marked, agencies shall not, to the extent permitted by

35 U.S.C. §202(c)(5), disclose such information to persons outside the Government.

11. Retention of Rights by Inventor. Agencies which allow an inventor to retain rights to a subject invention made under a funding agreement with a small business firm or nonprofit organization contractor, as authorized by 35 U.S.C. §202(d), will impose upon the inventor at least those conditions that would apply to a small business firm contractor under paragraphs d.(ii) and (iii); f.(4); h.; i.; and j. of the clause of Attachment A.

12. Government Assignment to Contractor of Rights in Invention of Government Employee. In any case when a Federal employee is a co-inventor of any invention made under a funding agreement with a small business firm or nonprofit organization and the Federal agency employing such co-inventor transfers or reassigns the right it has acquired in the subject invention from its employee to the contractor as authorized by 35 U.S.C. 202(e), the assignment will be made subject to the same conditions as would apply to the contractor under the clause of Attachment A.

13. Exercise of March-in Rights.

a. The following procedures shall govern the exercise of the march-in rights of the agencies set forth in 35 U.S.C. §203 and the clause at Attachment A.

b. Whenever an agency receives information that it believes might warrant the exercise of march-in rights, before initiating any march-in proceeding in accordance with the procedures of Part 13.c.-h. below, it shall notify the contractor in writing of the information and request informal written or oral comments from the contractor. In the absence of any comments from the contractor within 30 days, the agency may, at its discretion, proceed with the procedures below. If a comment is received, whether or not within 30 days, then the agency shall, within 60 days after it receives the comment, either initiate the procedures below or notify the contractor, in writing, that it will not pursue march-in rights based on the information about which the contractor was notified.

c. A march-in proceeding shall be initiated by the issuance of a written notice by the agency to the contractor and its assignee or exclusive licensee, as applicable, stating that the agency is considering the exercise of march-in rights. The notice shall state the reasons for the proposed march-in in terms sufficient to put the contractor on notice of the facts upon which the action would be based and shall specify the field or fields of use in which the agency is considering requiring licensing. The notice shall advise the

c. A march-in proceeding shall be initiated by the issuance of a written notice by the agency to the contractor and its assignee or exclusive licensee, as applicable, stating that the agency is considering the exercise of march-in rights. The notice shall state the reasons for the proposed march-in in terms sufficient to put the contractor on notice of the facts upon which the action would be based and shall specify the field or fields of use in which the agency is considering requiring licensing. The notice shall advise the

contractor (assignee or exclusive licensee) of its rights, as set forth in this Circular and in any supplemental agency regulations. The determination to exercise march-in rights shall be made by the head of the agency or designee, except as provided in part 13.j. below.

d. Within 30 days after receipt of the written notice of march-in, the contractor (assignee or exclusive licensee) may submit, in person, in writing, or through a representative, information or argument in opposition to the proposed march-in, including any additional specific information which raises a genuine dispute over the material facts upon which the march-in is based. If the information presented raises a genuine dispute over the material facts, the head of the agency or designee shall undertake or refer the matter to another official for fact-finding.

e. Fact-finding shall be conducted in accordance with the procedures established by the agency. Such procedures shall be as informal as practicable and be consistent with principles of fundamental fairness. The procedures should afford the contractor the opportunity to appear with counsel, submit documentary evidence, present witnesses and confront such persons as the agency may present. A transcribed record shall be made and shall be available at cost to the contractor upon request. The requirement for a transcribed record may be waived by mutual agreement of the contractor and the agency. Any portion of a fact-finding hearing that involves testimony or evidence relating to the utilization or efforts at obtaining utilization that are being made by the contractor, its assignee, or licensees shall be closed to the public, including potential licensees.

f. The official conducting the fact-finding shall prepare written findings of fact and transmit them to the head of the agency or designee promptly after the conclusion of the fact-finding proceeding. A copy of the findings of fact shall be sent to the contractor (assignee or exclusive licensee) by registered or certified mail.

g. In cases in which fact-finding has been conducted, the head of the agency or designee shall base his or her determination on the facts found, together with any other information and argument submitted by the contractor (assignee or exclusive licensee), and any other information in the administrative record. The consistency of the exercise of march-in rights with the policy and objectives of 35 U.S.C. §200-206 and this Circular shall also be considered. In cases referred for fact-finding, the head of the agency or designee may reject only those facts that have been found that are clearly erroneous. Written notice of the determination whether march-in rights will be exercised shall be made by the

information and argument submitted by the contractor (assignee or exclusive licensee), and any other information in the administrative record. The consistency of the exercise of march-in rights with the policy and objectives of 35 U.S.C. §200-206 and this Circular shall also be considered. In cases referred for fact-finding, the head of the agency or designee may reject only those facts that have been found that are clearly erroneous. Written notice of the determination whether march-in rights will be exercised shall be made by the

head of the agency or designee and sent to the contractor (assignee or exclusive licansee) by certified or registered mail within 90 days after the completion of fact-finding or the proceedings will be deemed to have been terminated and thereafter no march-in based on the facts and reasons upon which the proceeding was initiated may be exercised.

h. An agency may, at any time, terminate a march-in proceeding if it is satisfied that it does not wish to exercise march-in rights.

i. The procedures of this Part shall also apply to the exercise of march-in rights against inventors receiving title to subject inventions under 35 U.S.C. §202(d) and, for that purpose, the term "contractor" as used in this Part shall be deemed to include the inventor.

j. Notwithstanding the last sentence of Part 13.c., a determination to exercise march-in in cases where the subject invention was made under a contract may be made initially by the contracting officer in accordance with the procedures of the Contract Disputes Act. In such cases, the procedures of the Contract Disputes Act will apply in lieu of those in Parts 13.d.-g. above (except that the last sentence of Part 13.e. shall continue to apply). However, when the procedures of this Part 13.j. are used, the contractor, assignee, or exclusive license will not be required to grant a license and the Government will not grant any license until after either: (1) 90 days from the date of the contractor's receipt of the contracting officer's decision, if no appeal of the decision has been made to an agency board of contract appeals, or if no action has been brought under Section 10 of the Act within that time; or (2) the board or court, as the case may be, has made a final decision in cases when an appeal or action has been brought within 90 days of the contracting officer's decision.

k. Agencies are authorized to issue supplemental procedures, not inconsistent herewith, for the conduct of march-in proceedings.

14. Appeals.

a. The agency official initially authorized to take any of the following actions shall provide the contractor with a written statement of the basis for his or her action at the time the action is taken, including any relevant facts that were relied upon in taking the action:

(1) A refusal to grant an extension under paragraph c.(4) of the clause of Attachment A.

written statement of the basis for his or her action at the time the action is taken, including any relevant facts that were relied upon in taking the action:

(1) A refusal to grant an extension under paragraph c.(4) of the clause of Attachment A.

(2) A request for a conveyance of title under paragraph d. of the clause of Attachment A.

(3) A refusal to grant a waiver under paragraph i. of the clause of Attachment A.

(4) A refusal to approve an assignment under paragraph k.(1) of the clause of Attachment A.

(5) A refusal to approve an extension of the exclusive license period under paragraph k.(2) of the clause of Attachment A.

b. Each agency shall establish and publish procedures under which any of the agency actions listed in Part 14.a. above may be appealed to the head of the agency or designee. Review at this level shall consider both the factual and legal basis for the action and its consistency with the policy and objectives of 35 U.S.C. §200-206 and this Circular.

c. Appeals procedures established under Part 14.b. above shall include administrative due process procedures and standards for fact-finding at least comparable to those set forth in Part 13.e.-g. of this Circular whenever there is a dispute as to the factual basis for an agency request for a conveyance of title under paragraph d. of the clause of Attachment A, including any dispute as to whether or not an invention is a subject invention.

d. To the extent that any of the actions described in Part 14.a. are subject to appeal under the Contracts Dispute Act, the procedures under that Act will satisfy the requirements of Parts 14.b. and c. above.

15. Licensing of Background Patent Rights to Third Parties.

a. A funding agreement with a small business firm or a domestic nonprofit organization will not contain a provision allowing a Federal agency to require the licensing to third parties of inventions owned by the contractor that are not subject inventions unless such provision has been approved by the agency head and a written justification has been signed by the agency head. Any such provision will clearly state whether the licensing may be required in connection with the practice of a subject invention, a specifically identified work object, or both. The agency head may not delegate the authority to approve such provisions or to sign the justification required for such provisions.

b. A Federal agency will not require the licensing of third parties under any such provision unless the agency head determines that the use of the invention by others is

agency head. Any such provision will clearly state whether the licensing may be required in connection with the practice of a subject invention, a specifically identified work object, or both. The agency head may not delegate the authority to approve such provisions or to sign the justification required for such provisions.

b. A Federal agency will not require the licensing of third parties under any such provision unless the agency head determines that the use of the invention by others is

necessary for the practice of a subject invention or for the use of a work object of the funding agreement and that such action is necessary to achieve practical application of the subject invention or work object. Any such determination will be on the record after an opportunity for an agency hearing, and the contractor shall be given prompt notification of the determination by certified or registered mail.

16. Administration of Patent Rights Clause.

a. It is important that the Government and the contractor know and exercise their rights in subject inventions in order to ensure their expeditious availability to the public, to enable the Government, the contractor, and the public to avoid unnecessary payment of royalties, and to defend themselves against claims and suits for patent infringement. To attain these ends, contracts should be so administered that:

(1) Inventions are identified, disclosed, and an election is made as required by the contract clause.

(2) The rights of the Government in such inventions are established;

(3) When appropriate, patent applications are timely filed and prosecuted by contractors or by the Government;

(4) The rights in patent applications are documented by formal instruments such as licenses or assignments;

(5) Expeditious commercial utilization of such inventions is achieved.

b. With respect to the conveyance of license or assignments to which the Government may be entitled under the clause of Attachment A, agencies should follow the guidance provided in 41 CFR 1-9.109-5 or 32 CFR 9-109.5.

c. In the event a subject invention is made under funding agreements of more than one agency, at the request of the contractor or on their own initiative, the agencies shall designate one agency as responsible for administration of the rights of the Government in the invention.

17. Modification of Existing Agency Regulations.

a. Existing agency patent regulations or other published policies concerning inventions made under funding agreements shall be modified as necessary to make them

designate one agency as responsible for administration of the rights of the Government in the invention.

17. Modification of Existing Agency Regulations.

a. Existing agency patent regulations or other published policies concerning inventions made under funding agreements shall be modified as necessary to make them

consistent with this Circular and 35 U.S.C. §200-206. Agency regulations shall not be more restrictive or burdensome than the provisions of this Circular.

b. After March 1, 1982, this Circular and 35 U.S.C. §200-206 shall take precedence over any conflicting agency regulations or policies.

18. Lead Agency Designation. In order to assist the Office of Federal Procurement Policy to ensure that 35 U.S.C. §200-206 and this Circular are implemented in a uniform and consistent manner, the following responsibilities are assigned to the Department of Commerce (hereafter referred to as "The Department"). Other agencies shall fully cooperate and assist in the carrying out of these responsibilities:

a. The Department will monitor agency regulations and procedures for consistency with the Act and this Circular, and it shall provide recommendations to OFPP and agencies whenever it finds inconsistencies.

b. The Department will consult with representatives of 19 agencies and contractors to obtain advice on --

(1) the development of the periodic reporting system required under Part 10 of this Circular, and

(2) changes in this Circular which may be needed based on actual experience under the Circular.

c. The Department will accumulate, maintain, and publish such statistics and analysis on utilization and activities under this Circular and under Government patent policies and practices generally, as may be agreed to between the Department and OFPP.

d. The Department will make recommendations to OFPP on changes that may be needed in this Circular.

19. Sunset Review Date. This Circular shall have a policy review no later than three years from the date of its issuance.

20. Inquiries. All questions or inquiries should be submitted to the Office of Management and Budget, Office of Federal Procurement Policy, telephone number (202) 395-6810.

Donald E. Sowle
Administrator

David A. Stockman
Director

submitted to the Office of Management and Budget, Office of Federal Procurement Policy, telephone number (202) 395-6810.

Donald E. Sowle
Administrator

David A. Stockman
Director

ATTACHMENT A
CIRCULAR A-124

The following is the standard patent rights claused to be used in funding agreements as provided in Part 7.

PATENT RIGHTS (Small Business Firms and Nonprofit Organizations) (March 1982)

a. Definitions

(1) "Invention" means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code.

(2) "Subject Invention" means any invention of the contractor conceived or first actually reduced to practice in the performance of work under this contract.

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

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

(5) "Small Business Firm" means a small business concern as defined at Section 2 of Public Law 85-536 (15 U.S.C. §632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in Government procurement and subcontracting at 13 C.F.R. 121.3-8 and 13 C.F.R. 121.3-12, respectively, will be used.

(6) "Nonprofit Organization" means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 USC §501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 USC §501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

...education or higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 USC §501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 USC §501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

b. Allocation of Principal Rights

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

c. Invention Disclosure, Election of Title and Filing of Patent Applications by Contractor.

(1) The contractor will disclose each subject invention to the Federal agency within two months after the inventor discloses it in writing to contractor personnel responsible for patent matters. The disclosure to the agency shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the agency, the contractor will promptly notify the agency of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the contractor.

(2) The contractor will elect in writing whether or not to retain title to any such invention by notifying the Federal agency within twelve months of disclosure to the contractor; provided that in any case where publication, on sale or public use has initiated the one year statutory period wherein valid patent protection can still be obtained in the United States, the period for election of title may be shortened by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3) The contractor will file its initial patent application on an elected invention within two years after election or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The contractor will file patent applications in additional countries within either ten months of the corresponding initial patent application or six months from the date

(3) The contractor will file its initial patent application on an elected invention within two years after election or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The contractor will file patent applications in additional countries within either ten months of the corresponding initial patent application or six months from the date

permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) Requests for extension of the time for disclosure to the agency, election, and filing may, at the discretion of the funding Federal agency, be granted.

d. Conditions When the Government May Obtain Title.

(1) The contractor will convey to the Federal agency, upon written request, title to any subject invention:

(i) If the contractor fails to disclose or elect the subject invention within the times specified in c. above, or elects not to retain title.

(ii) In those countries in which the contractor fails to file patent applications within the times specified in c. above; provided, however, that if the contractor has filed a patent application in a country after the times specified in c., above, but prior to its receipt of the written request of the Federal agency, the contractor shall continue to retain title in that country.

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

e. Minimum Rights to Contractor

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

(2) The contractor's domestic license may be revoked or modified by the funding Federal agency to the extent necessary to achieve expeditious practical application

contract was awarded. The license is transferable only with the approval of the funding Federal agency except when transferred to the successor of that party of the contractor's business to which the invention pertains.

(2) The contractor's domestic license may be revoked or modified by the funding Federal agency to the extent necessary to achieve expeditious practical application

of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions in the Federal Property Management Regulations. This license will not be revoked in that field of use or the geographical areas in which the contractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of the funding Federal agency to the extent the contractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

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

f. Contractor Action to Protect the Governments Interest

(1) The contractor agrees to execute or to have executed and promptly deliver to the Federal agency all instruments necessary to (i) establish or confirm the rights the Government has throughout the world in those subject inventions to which the contractor elects to retain title, and (ii) convey title to the Federal agency when requested under paragraph d. above, and to enable the Government to obtain patent protection throughout the world in that subject invention.

(2) The contractor agrees to require, by written agreement, its employees, other than clerical and non-technical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the contractor each subject invention made under contract in order that the contractor can comply with the disclosure provisions of paragraph c. above, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the

each subject invention made under contract in order that the contractor can comply with the disclosure provisions of paragraph c. above, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the

information required by c.(1) above. The contractor shall instruct such employees through employee agreements or other suitable educational programs on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

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

(4) The contractor agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention, the following statement, "This invention was made with Government support under (identify the contract) awarded by (identify the Federal agency). The Government has certain rights in this invention."

g. Subcontracts

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

(2) The contractor will include in all other subcontracts, regardless of tier, for experimental, developmental or research work the patent rights clause required by (cite section of agency implementing regulations, FPR, or DAR).

(3) In the case of subcontracts, at any tier, when the prime award with the Federal agency was a contract (but not a grant or cooperative agreement), the agency, subcontractor, and the contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and the Federal agency with respect to those matters covered by this clause.

h. Reporting on Utilization of Subject Inventions

The contractor agrees to submit on request periodic reports no more frequently than annually on the utilization of

parties created by this clause constitute a contract between the subcontractor and the Federal agency with respect to those matters covered by this clause.

h. Reporting on Utilization of Subject Inventions

The contractor agrees to submit on request periodic reports no more frequently than annually on the utilization of

a subject invention or on efforts at obtaining such utilization that are being made by the contractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the contractor, and such other data and information as the agency may reasonably specify. The contractor also agrees to provide additional reports as may be requested by the agency in connection with any march-in proceeding undertaken by the agency in accordance with paragraph j. of this clause. To the extent data or information supplied under this section is considered by the contractor, its licensee or assignee to be privileged and confidential and is so marked, the agency agrees that, to the extent permitted by 35 USC §202(c)(5), it will not disclose such information to persons outside the Government.

i. Preference for United States Industry

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

j. March-in Rights

The contractor agrees that with respect to any subject invention in which it has acquired title, the Federal agency has the right in accordance with the procedures in OMB Circular A- __ (and agency regulations at ____) to require the contractor, an assignee or exclusive licensee of a subject invention to grant a non-exclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the contractor assignee, or exclusive licensee refuses such a request, the Federal agency has the right to grant such a license itself if the Federal agency determines that:

(1) Such action is necessary because the contractor or assignee has not taken, or is not expected to

right to grant such a license itself if the Federal agency determines that:

(1) Such action is necessary because the contractor or assignee has not taken, or is not expected to

take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use.

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

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

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

k. Special Provisions for Contracts with Non-profit Organizations

If the contractor is a non-profit organization, it agrees that:

(1) Rights to a subject invention in the United States may not be assigned without the approval of the Federal agency, except where such assignment is made to an organization which has as one of its primary functions the management of inventions and which is not, itself, engaged in or does not hold a substantial interest in other organizations engaged in the manufacture or sale of products or the use of processes that might utilize the invention or be in competition with embodiments of the invention provided that such assignee will be subject to the same provisions as the contractor);

(2) The contractor may not grant exclusive licenses under United States patents or patent applications in subject inventions to persons other than small business firms for a period in excess of the earlier of:

(i) five years from first commercial sale or use of the invention; or

(ii) eight years from the date of the exclusive license excepting that time before regulatory agencies necessary to obtain premarket clearance, unless on a case-by-case basis, the Federal agency approves a longer exclusive license. If exclusive field of use licenses are granted, commercial sale or use in one field of use will not be deemed commercial

the invention; or

(ii) eight years from the date of the exclusive license excepting that time before regulatory agencies necessary to obtain premarket clearance, unless on a case-by-case basis, the Federal agency approves a longer exclusive license. If exclusive field of use licenses are granted, commercial sale or use in one field of use will not be deemed commercial

sale or use as to other fields of use, and a first commercial sale or use with respect to a product of the invention will not be deemed to end the exclusive period to different subsequent products covered by the invention.

(3) The contractor will share royalties collected on a subject invention with the inventor; and

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

1. Communications. (Complete According to Instructions at Part 8.b. of this Circular).

END OF CLAUSE

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

February 10, 1982

CIRCULAR No. A-124

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Patents - Small Business Firms and Nonprofit Organizations

1. Purpose. This Circular provides policies, procedures, and guidelines with respect to inventions made by small business firms and nonprofit organizations, including universities, under funding agreements with Federal agencies where a purpose is to perform experimental, developmental, or research work.

2. Rescissions. This Circular supersedes OMB Bulletin 81-22 effective March 1, 1982.

3. Authority. This Circular is issued pursuant to the authority contained in 35 U.S.C. §206 (§6 of P.L. 96-517, "The Patent and Trademark Amendments of 1980").

4. Background. After many years of public debate on means to enhance the utilization of the results of Government funded research, Public Law 96-517 was enacted. This Act gives nonprofit organizations and small businesses, with limited exceptions, a first right of refusal to title in inventions they have made in performance of Government grants and contracts. The Act takes precedence over approximately 26 conflicting statutory and administrative policies.

Under the Act, the Office of Federal Procurement Policy (OFPP) is responsible for the issuance of the regulations implementing 35 U.S.C. §202-204 after consultation with the Office of Science and Technology Policy (OSTP). On July 2, 1981, OMB Bulletin 81-22 was issued to provide interim regulations while agency and public comments were sought. Based on a review of these comments, this Circular is issued to establish permanent implementing regulations and a standard patent rights clause.

5. Policy and Scope. This Circular takes effect on March 1, 1982, and will be applicable to all funding agreements with small business firms and domestic nonprofit organizations executed on or after that date. This includes

a review of these comments, this Circular is issued to establish permanent implementing regulations and a standard patent rights clause.

5. Policy and Scope. This Circular takes effect on March 1, 1982, and will be applicable to all funding agreements with small business firms and domestic nonprofit organizations executed on or after that date. This includes

subcontracts at any tier made after March 1, 1982, with small business firms and nonprofit organizations even if the prime funding agreement was made prior to March 1, 1982. Unless prohibited by law, agencies are encouraged to treat subject inventions made under funding agreements made prior to July 1, 1981, in substantially the same manner as contemplated by P.L. 96-517 and this Circular for inventions made under funding agreements entered into subsequent to July 1, 1981. This can be accomplished through the granting of waivers of title on terms and conditions substantially similar to those set forth in the standard clause of Attachment A.

Agencies should be alert to determining whether amendments made after March 1, 1982, to funding agreements entered into prior to July 1, 1981, result in new funding agreements subject to this Circular and the Act. Renewals and continuations after March 1, 1982, of funding agreements entered into prior to July 1, 1981, should be normally treated as new funding agreements.

This Circular is intended to establish uniform and coordinated implementation of 35 U.S.C. §200-206 so as to foster the policy and objectives set forth in 35 U.S.C. §200.

6. Definitions. As used in this Circular --

a. The term "funding agreement" means any contract, grant, or cooperative agreement entered into between any Federal agency, other than the Tennessee Valley Authority, and any contractor for the performance of experimental, developmental, or research work funded in whole or in part by the Federal Government. Such term includes any assignment, substitution of parties, or subcontract of any type entered into for the performance of experimental, developmental, or research work under a funding agreement, as herein defined.

b. The term "contractor" means any person, small business firm or nonprofit organization that is a party to a funding agreement.

c. The term "invention" means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code.

d. The term "subject invention" means any invention of a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement.

e. The term "practical application" means to manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system; and, in each case, under such

a contractor conceived or first actually reduced to practice in the performance of work under a funding agreement.

e. The term "practical application" means to manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system; and, in each case, under such

conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

f. The term "made" when used in relation to any invention means the conception or first actual reduction to practice of such invention.

g. The term "small business firm" means a small business concern as defined at section 2 of Public Law 85-536 (15 U.S.C. §632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this Circular, the size standards for small business concerns involved in Government procurement and subcontracting at 13 CFR 121.3-8 and 121.3-12, respectively, will be used.

h. The term "nonprofit organization" means universities and other institutions of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. §501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. §501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

7. Use of the Patent Rights (Small Business Firm or Nonprofit Organization) (March 1982) Clause.

a. Each funding agreement awarded to a small business firm or domestic nonprofit organization which has as a purpose the performance of experimental, developmental or research work shall contain the "Patent Rights (Small Business Firm or Nonprofit Organization) (March 1982)" clause set forth in Attachment A with such modifications and tailoring as may be authorized in Part 8, except that the funding agreement may contain alternative provisions--

(1) when the funding agreement is for the operation of a Government-owned research or production facility; or

(2) in exceptional circumstances when it is determined by the agency that restriction or elimination of the right to retain title to any subject invention will better promote the policy and objectives of Chapter 38 of Title 35 of the United States Code; or

(2) in exceptional circumstances when it is determined by the agency that restriction or elimination of the right to retain title to any subject invention will better promote the policy and objectives of Chapter 38 of Title 35 of the United States Code; or

(3) when it is determined by a Government authority which is authorized by statute or executive order to conduct foreign intelligence or counterintelligence activities that the restriction or elimination of the right to retain title to any subject invention is necessary to protect the security of such activities.

b. (1) Any determination under Part 7.a.(2) of this Circular will be in writing and accompanied by a written statement of facts justifying the determination. The statement of facts will contain such information as the funding Federal agency deems relevant and, at minimum, will (i) identify the small business firm or nonprofit organization involved, (ii) describe the extent to which agency action restricted or eliminated the right to retain title to a subject invention, (iii) state the facts and rationale supporting the agency action, (iv) provide supporting documentation for those facts and rationale, and (v) indicate the nature of any objections to the agency action and provide any documentation in which those objections appear. A copy of each such determination and written statement of facts will be sent to the Comptroller General of the United States within 30 days after the award of the applicable funding agreement. In cases of determinations application to small business firms, copies will also be sent to the Chief Counsel for Advocacy of the Small Business Administration.

(2) To assist the Comptroller General to accomplish his or her responsibilities under 35 U.S.C. §202, each Federal agency that enters into any funding agreements with nonprofit organizations or small business firms during the applicable reporting period shall accumulate and, at the request of the Comptroller General, provide the Comptroller General or his or her duly authorized representative the total number of prime funding agreements entered into with small business firms or nonprofit organizations that contain the patent rights clause of Attachment A during each period of October 1 through September 30, beginning October 1, 1982.

c. (1) Agencies are advised that Part 7.a. applies to subcontracts at any tier under prime funding agreements with contractors that are other than small business firms or nonprofit organizations. Accordingly, agencies should take appropriate action to ensure that this requirement is reflected in the patent clauses of such prime funding agreements awarded after March 1, 1982.

(2) In the event an agency has outstanding prime funding agreements that do not contain patent flow-down provisions consistent with either this Circular or OMB Bulletin 81-22 (if it was applicable at the time the funding

reflected in the patent clauses of such prime funding agreements awarded after March 1, 1982.

(2) In the event an agency has outstanding prime funding agreements that do not contain patent flow-down provisions consistent with either this Circular or OMB Bulletin 81-22 (if it was applicable at the time the funding

agreement was awarded), the agency shall take appropriate action to ensure that small business firms or domestic nonprofit organization subcontractors under such prime funding agreements that received their subcontracts after July 1, 1981, will receive rights in their subject inventions that are consistent with P.L. 96-517 and this Circular. Appropriate actions might include (i) amendment of prime contracts and/or subcontracts; (ii) requiring the inclusion of the clause of Attachment A as a condition of agency approval of a subcontract; or (iii) the granting of title to the subcontractor to identified subject inventions on terms substantially the same as contained in the clause of Attachment A in the event the subcontract contains a "deferred determination" or "acquisition by the Government" type of patent rights clause.

d. To qualify for the clause of Attachment A, a prospective contractor may be required by an agency to certify that it is either a small business firm or a domestic nonprofit organization. If the agency has reason to question the status of the prospective contractor as a small business firm or domestic nonprofit organization, it may file a protest in accordance with 13 C.F.R. 121.3-5 if small business firm status is questioned or require the prospective contractor to furnish evidence to establish its status as a domestic nonprofit organization.

8. Instructions for Modification and Tailoring of the Clause of Attachment A.

a. Agencies should complete the blank in paragraph g.(2) of the clause of Attachment A in accordance with their own or applicable Government-wide regulations such as the FPR or DAR. The flow-down provisions of the clause cited by the agency should, of course, reflect the requirement of Part 7.c.(1).

b. Agencies should complete paragraph l. "Communications" at the end of the clause of Attachment A by designating a central point of contact for communications on matters relating to the clause. Additional instructions on communications may also be included in paragraph l.

c. Agencies may replace the italicized or underlined words and phrases with those appropriate to the particular funding agreement. For example "contract" could be replaced by "grant", "contractor" by "grantee", and "contracting officer" by "grants officer." Depending on its use, "Federal agency" can be replaced either by the identification of the agency or by the specification of the particular office or official within that agency.

officer" by "grants officer." Depending on its use, "Federal agency" can be replaced either by the identification of the agency or by the specification of the particular office or official within that agency.

d. When the agency head or duly authorized designee determines at the time of contracting with a small business firm or nonprofit organization that it would be in the national interest to acquire the right to sublicense foreign governments or international organizations pursuant to any existing treaty or agreement, a sentence may be added at the end of paragraph b. of the clause of Attachment A as follows:

> "This license will include the right of the Government to sublicense foreign governments and international organizations pursuant to the following treaties or international agreements: _____; or pursuant to any future treaties or agreements with foreign governments or international organizations."

The blank in the above should be completed with the names of applicable existing treaties or international agreements. The above language is not intended to apply to treaties or agreements that are in effect on the date of the award which are not listed. The above language may be modified by agencies by deleting the reference to future treaties or agreements or by otherwise more narrowly defining classes of future treaties or agreements. The language may also be modified to make clear that the rights granted to the foreign government or international organization may be for additional rights beyond a license or sublicense if so required by the applicable treaty or international agreement. For example, in some cases exclusive licenses or even the assignment of title in the foreign country involved might be required. Agencies may also modify the language above to provide for the direct licensing by the contractor of the foreign government or international organization.

e. To the extent not required by other provisions of the funding agreement, agencies may add additional subparagraphs to paragraph (f) of the patent rights clause of Attachment A to require the contractor to do one or more of the following:

(1) Provide periodic (but no more frequently than annually) listings of all subject inventions required to be disclosed during the period covered by the report;

(2) Provide a report prior to the close-out of a funding agreement listing all subject inventions or stating that there were none;

(3) Provide notification of all subcontracts for experimental, developmental, or research work; and

(2) Provide a report prior to the close-out of a funding agreement listing all subject inventions or stating that there were none;

(3) Provide notification of all subcontracts for experimental, developmental, or research work; and

(4) Provide, upon request, the filing date, serial number and title; a copy of the patent application; and patent number and issue date for any subject invention in any country in which the contractor has applied for patents.

Part 9. Publication or Release of Invention Disclosures

a. 35 U.S.C. §205 provides as follows:

> "Federal agencies are authorized to withhold from disclosure to the public information disclosing any invention in which the Federal Government owns or may own a right, title, or interest (including a nonexclusive license) for a reasonable time in order for a patent application to be filed. Furthermore, Federal agencies shall not be required to release copies of any document which is part of an application for patent filed with the United States Patent and Trademark Office or with any foreign patent office."

b. To the extent authorized by 35 U.S.C. §205, agencies shall not disclose to third parties pursuant to requests under the Freedom of Information Act (FOIA) any information disclosing a subject invention for a reasonable time in order for a patent application to be filed. With respect to subject inventions of contractors that are small business firms or nonprofit organizations, a reasonable time shall be the time during which an initial patent application may be filed under paragraph c. of the clause of Attachment A or such other clause that may be used in the funding agreement. However, an agency may disclose such subject inventions under the FOIA, at its discretion, after a contractor has elected not to retain title or after the time in which the contractor is required to make an election if the contractor has not made an election within that time. Similarly, an agency may honor an FOIA request at its discretion if it finds that the same information has previously been published by the inventor, contractor, or otherwise. If the agency plans to file itself when the contractor has not elected title, it may, of course, continue to avail itself of the authority of 35 U.S.C. §205.

c. As authorized by 35 U.S.C. §205, Federal agencies shall not release copies of any document which is part of an application for patent filed on a subject invention to which a small business firm or nonprofit organization elected to retain title.

d. A number of agencies have policies to encourage public dissemination of the results of work supported by the

shall not release copies of any document which is part of an application for patent filed on a subject invention to which a small business firm or nonprofit organization elected to retain title.

d. A number of agencies have policies to encourage public dissemination of the results of work supported by the

agency through publication in Government or other publications of technical reports of contractors or others. In recognition of the fact that such publication, if it included descriptions of a subject invention, could create bars to obtaining patent protection, it is the policy of the executive branch that agencies will not include in such publication programs, copies of disclosures of inventions submitted by small business firms or nonprofit organizations, pursuant to paragraph c. of the clause of Attachment A, except that under the same circumstances under which agencies are authorized to release such information pursuant to FOIA requests under Part 9.b. above, agencies may publish such disclosures.

e. Nothing in this Part is intended to preclude agencies from including in the publication activities described in the first sentence of Part 9.d., the publication of materials describing a subject invention to the extent such materials were provided as part of a technical report or other submission of the contractor which were submitted independently of the requirements of the patent rights provisions of the contract. However, if a small business firm or nonprofit organization notifies the agency that a particular report or other submission contains a disclosure of a subject invention to which it has elected or may elect title, the agency will use reasonable efforts to restrict its publication of the material for six months from date of its receipt of the report or submission or, if earlier, until the contractor has filed an initial patent application. Agencies, of course, retain the discretion to delay publication for additional periods of time.

f. Nothing in this Part 9 is intended to limit the authority of agencies provided in 35 U.S.C. §205 in circumstances not specifically described in this Part 9.

10. Reporting on Utilization of Subject Inventions.

a. Paragraph h. of the clause of Attachment A provides that agencies have the right to receive periodic reports from the contractor on utilization of inventions. In accordance with such instructions as may be issued by the Department of Commerce, agencies shall obtain such information from their contractors. Pending such instructions, agencies should not impose reporting requirements. The Department of Commerce and the agencies, in conjunction with representatives of small business and nonprofit organizations, shall work together to establish a uniform periodic reporting system.

b. To the extent any such data or information supplied by the contractor is considered by the contractor, or its licensee or assignee, to be privileged and confidential and is so marked, agencies shall not, to the extent permitted by

establish a uniform periodic reporting system.

b. To the extent any such data or information supplied by the contractor is considered by the contractor, or its licensee or assignee, to be privileged and confidential and is so marked, agencies shall not, to the extent permitted by

35 U.S.C. §202(c)(5), disclose such information to persons outside the Government.

11. Retention of Rights by Inventor. Agencies which allow an inventor to retain rights to a subject invention made under a funding agreement with a small business firm or nonprofit organization contractor, as authorized by 35 U.S.C. §202(d), will impose upon the inventor at least those conditions that would apply to a small business firm contractor under paragraphs d.(ii) and (iii); f.(4); h.; i.; and j. of the clause of Attachment A.

12. Government Assignment to Contractor of Rights in Invention of Government Employee. In any case when a Federal employee is a co-inventor of any invention made under a funding agreement with a small business firm or nonprofit organization and the Federal agency employing such co-inventor transfers or reassigns the right it has acquired in the subject invention from its employee to the contractor as authorized by 35 U.S.C. 202(e), the assignment will be made subject to the same conditions as would apply to the contractor under the clause of Attachment A.

13. Exercise of March-in Rights.

a. The following procedures shall govern the exercise of the march-in rights of the agencies set forth in 35 U.S.C. §203 and the clause at Attachment A.

b. Whenever an agency receives information that it believes might warrant the exercise of march-in rights, before initiating any march-in proceeding in accordance with the procedures of Part 13.c.-h. below, it shall notify the contractor in writing of the information and request informal written or oral comments from the contractor. In the absence of any comments from the contractor within 30 days, the agency may, at its discretion, proceed with the procedures below. If a comment is received, whether or not within 30 days, then the agency shall, within 60 days after it receives the comment, either initiate the procedures below or notify the contractor, in writing, that it will not pursue march-in rights based on the information about which the contractor was notified.

c. A march-in proceeding shall be initiated by the issuance of a written notice by the agency to the contractor and its assignee or exclusive licensee, as applicable, stating that the agency is considering the exercise of march-in rights. The notice shall state the reasons for the proposed march-in in terms sufficient to put the contractor on notice of the facts upon which the action would be based and shall specify the field or fields of use in which the agency is considering requiring licensing. The notice shall advise the

issuance or a written notice by the agency to the contractor and its assignee or exclusive licensee, as applicable, stating that the agency is considering the exercise of march-in rights. The notice shall state the reasons for the proposed march-in in terms sufficient to put the contractor on notice of the facts upon which the action would be based and shall specify the field or fields of use in which the agency is considering requiring licensing. The notice shall advise the

contractor (assignee or exclusive licensee) of its rights, as set forth in this Circular and in any supplemental agency regulations. The determination to exercise march-in rights shall be made by the head of the agency or designee, except as provided in part 13.j. below.

d. Within 30 days after receipt of the written notice of march-in, the contractor (assignee or exclusive licensee) may submit, in person, in writing, or through a representative, information or argument in opposition to the proposed march-in, including any additional specific information which raises a genuine dispute over the material facts upon which the march-in is based. If the information presented raises a genuine dispute over the material facts, the head of the agency or designee shall undertake or refer the matter to another official for fact-finding.

e. Fact-finding shall be conducted in accordance with the procedures established by the agency. Such procedures shall be as informal as practicable and be consistent with principles of fundamental fairness. The procedures should afford the contractor the opportunity to appear with counsel, submit documentary evidence, present witnesses and confront such persons as the agency may present. A transcribed record shall be made and shall be available at cost to the contractor upon request. The requirement for a transcribed record may be waived by mutual agreement of the contractor and the agency. Any portion of a fact-finding hearing that involves testimony or evidence relating to the utilization or efforts at obtaining utilization that are being made by the contractor, its assignee, or licensees shall be closed to the public, including potential licensees.

f. The official conducting the fact-finding shall prepare written findings of fact and transmit them to the head of the agency or designee promptly after the conclusion of the fact-finding proceeding. A copy of the findings of fact shall be sent to the contractor (assignee or exclusive licensee) by registered or certified mail.

g. In cases in which fact-finding has been conducted, the head of the agency or designee shall base his or her determination on the facts found, together with any other information and argument submitted by the contractor (assignee or exclusive licensee), and any other information in the administrative record. The consistency of the exercise of march-in rights with the policy and objectives of 35 U.S.C. §200-206 and this Circular shall also be considered. In cases referred for fact-finding, the head of the agency or designee may reject only those facts that have been found that are clearly erroneous. Written notice of the determination whether march-in rights will be exercised shall be made by the

or exclusive licensee), and any other information in the administrative record. The consistency of the exercise of march-in rights with the policy and objectives of 35 U.S.C. §200-206 and this Circular shall also be considered. In cases referred for fact-finding, the head of the agency or designee may reject only those facts that have been found that are clearly erroneous. Written notice of the determination whether march-in rights will be exercised shall be made by the

head of the agency or designee and sent to the contractor (assignee or exclusive licensee) by certified or registered mail within 90 days after the completion of fact-finding or the proceedings will be deemed to have been terminated and thereafter no march-in based on the facts and reasons upon which the proceeding was initiated may be exercised.

h. An agency may, at any time, terminate a march-in proceeding if it is satisfied that it does not wish to exercise march-in rights.

i. The procedures of this Part shall also apply to the exercise of march-in rights against inventors receiving title to subject inventions under 35 U.S.C. §202(d) and, for that purpose, the term "contractor" as used in this Part shall be deemed to include the inventor.

j. Notwithstanding the last sentence of Part 13.c., a determination to exercise march-in in cases where the subject invention was made under a contract may be made initially by the contracting officer in accordance with the procedures of the Contract Disputes Act. In such cases, the procedures of the Contract Disputes Act will apply in lieu of those in Parts 13.d.-g. above (except that the last sentence of Part 13.e. shall continue to apply). However, when the procedures of this Part 13.j. are used, the contractor, assignee, or exclusive license will not be required to grant a license and the Government will not grant any license until after either: (1) 90 days from the date of the contractor's receipt of the contracting officer's decision, if no appeal of the decision has been made to an agency board of contract appeals, or if no action has been brought under Section 10 of the Act within that time; or (2) the board or court, as the case may be, has made a final decision in cases when an appeal or action has been brought within 90 days of the contracting officer's decision.

k. Agencies are authorized to issue supplemental procedures, not inconsistent herewith, for the conduct of march-in proceedings.

14. Appeals.

a. The agency official initially authorized to take any of the following actions shall provide the contractor with a written statement of the basis for his or her action at the time the action is taken, including any relevant facts that were relied upon in taking the action:

(1) A refusal to grant an extension under paragraph c.(4) of the clause of Attachment A.

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written statement of the basis for his or her action at the time the action is taken, including any relevant facts that were relied upon in taking the action:

(1) A refusal to grant an extension under paragraph c.(4) of the clause of Attachment A.

(2) A request for a conveyance of title under paragraph d. of the clause of Attachment A.

(3) A refusal to grant a waiver under paragraph i. of the clause of Attachment A.

(4) A refusal to approve an assignment under paragraph k.(1) of the clause of Attachment A.

(5) A refusal to approve an extension of the exclusive license period under paragraph k.(2) of the clause of Attachment A.

b. Each agency shall establish and publish procedures under which any of the agency actions listed in Part 14.a. above may be appealed to the head of the agency or designee. Review at this level shall consider both the factual and legal basis for the action and its consistency with the policy and objectives of 35 U.S.C. §200-206 and this Circular.

c. Appeals procedures established under Part 14.b. above shall include administrative due process procedures and standards for fact-finding at least comparable to those set forth in Part 13.e.-g. of this Circular whenever there is a dispute as to the factual basis for an agency request for a conveyance of title under paragraph d. of the clause of Attachment A, including any dispute as to whether or not an invention is a subject invention.

d. To the extent that any of the actions described in Part 14.a. are subject to appeal under the Contracts Dispute Act, the procedures under that Act will satisfy the requirements of Parts 14.b. and c. above.

15. Licensing of Background Patent Rights to Third Parties.

a. A funding agreement with a small business firm or a domestic nonprofit organization will not contain a provision allowing a Federal agency to require the licensing to third parties of inventions owned by the contractor that are not subject inventions unless such provision has been approved by the agency head and a written justification has been signed by the agency head. Any such provision will clearly state whether the licensing may be required in connection with the practice of a subject invention, a specifically identified work object, or both. The agency head may not delegate the authority to approve such provisions or to sign the justification required for such provisions.

b. A Federal agency will not require the licensing of third parties under any such provision unless the agency head determines that the use of the invention by others is

work object, or both. The agency head may not delegate the authority to approve such provisions or to sign the justification required for such provisions.

b. A Federal agency will not require the licensing of third parties under any such provision unless the agency head determines that the use of the invention by others is

necessary for the practice of a subject invention or for the use of a work object of the funding agreement and that such action is necessary to achieve practical application of the subject invention or work object. Any such determination will be on the record after an opportunity for an agency hearing, and the contractor shall be given prompt notification of the determination by certified or registered mail.

16. Administration of Patent Rights Clause.

a. It is important that the Government and the contractor know and exercise their rights in subject inventions in order to ensure their expeditious availability to the public, to enable the Government, the contractor, and the public to avoid unnecessary payment of royalties, and to defend themselves against claims and suits for patent infringement. To attain these ends, contracts should be so administered that:

(1) Inventions are identified, disclosed, and an election is made as required by the contract clause.

(2) The rights of the Government in such inventions are established;

(3) When appropriate, patent applications are timely filed and prosecuted by contractors or by the Government;

(4) The rights in patent applications are documented by formal instruments such as licenses or assignments;

(5) Expeditious commercial utilization of such inventions is achieved.

b. With respect to the conveyance of license or assignments to which the Government may be entitled under the clause of Attachment A, agencies should follow the guidance provided in 41 CFR 1-9.109-5 or 32 CFR 9-109.5.

c. In the event a subject invention is made under funding agreements of more than one agency, at the request of the contractor or on their own initiative, the agencies shall designate one agency as responsible for administration of the rights of the Government in the invention.

17. Modification of Existing Agency Regulations.

a. Existing agency patent regulations or other published policies concerning inventions made under funding agreements shall be modified as necessary to make them

17. Modification of Existing Agency Regulations.

a. Existing agency patent regulations or other published policies concerning inventions made under funding agreements shall be modified as necessary to make them

consistent with this Circular and 35 U.S.C. §200-206. Agency regulations shall not be more restrictive or burdensome than the provisions of this Circular.

b. After March 1, 1982, this Circular and 35 U.S.C. §200-206 shall take precedence over any conflicting agency regulations or policies.

18. Lead Agency Designation. In order to assist the Office of Federal Procurement Policy to ensure that 35 U.S.C. §200-206 and this Circular are implemented in a uniform and consistent manner, the following responsibilities are assigned to the Department of Commerce (hereafter referred to as "The Department"). Other agencies shall fully cooperate and assist in the carrying out of these responsibilities:

a. The Department will monitor agency regulations and procedures for consistency with the Act and this Circular, and it shall provide recommendations to OFPP and agencies whenever it finds inconsistencies.

b. The Department will consult with representatives of 19 agencies and contractors to obtain advice on --

(1) the development of the periodic reporting system required under Part 10 of this Circular, and

(2) changes in this Circular which may be needed based on actual experience under the Circular.

c. The Department will accumulate, maintain, and publish such statistics and analysis on utilization and activities under this Circular and under Government patent policies and practices generally, as may be agreed to between the Department and OFPP.

d. The Department will make recommendations to OFPP on changes that may be needed in this Circular.

19. Sunset Review Date. This Circular shall have a policy review no later than three years from the date of its issuance.

20. Inquiries. All questions or inquiries should be submitted to the Office of Management and Budget, Office of Federal Procurement Policy, telephone number (202) 395-6810.

Donald E. Sowle
Administrator

David A. Stockman
Director

Federal Procurement Policy, telephone number (202) 395-6810.

Donald E. Sowle
Administrator

David A. Stockman
Director

The following is the standard patent rights clause to be used in funding agreements as provided in Part 7.

PATENT RIGHTS (Small Business Firms and Nonprofit Organizations) (March 1982)

a. Definitions

(1) "Invention" means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code.

(2) "Subject Invention" means any invention of the contractor conceived or first actually reduced to practice in the performance of work under this contract.

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

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

(5) "Small Business Firm" means a small business concern as defined at Section 2 of Public Law 85-536 (15 U.S.C. §632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in Government procurement and subcontracting at 13 C.F.R. 121.3-8 and 13 C.F.R. 121.3-12, respectively, will be used.

(6) "Nonprofit Organization" means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 USC §501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 USC §501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

under section 501(a) of the Internal Revenue Code (26 USC §501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

b. Allocation of Principal Rights

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

c. Invention Disclosure, Election of Title and Filing of Patent Applications by Contractor.

(1) The contractor will disclose each subject invention to the Federal agency within two months after the inventor discloses it in writing to contractor personnel responsible for patent matters. The disclosure to the agency shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the agency, the contractor will promptly notify the agency of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the contractor.

(2) The contractor will elect in writing whether or not to retain title to any such invention by notifying the Federal agency within twelve months of disclosure to the contractor; provided that in any case where publication, on sale or public use has initiated the one year statutory period wherein valid patent protection can still be obtained in the United States, the period for election of title may be shortened by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3) The contractor will file its initial patent application on an elected invention within two years after election or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The contractor will file patent applications in additional countries within either ten months of the corresponding initial patent application or six months from the date

application on an elected invention within two years after election or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The contractor will file patent applications in additional countries within either ten months of the corresponding initial patent application or six months from the date

permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) Requests for extension of the time for disclosure to the agency, election, and filing may, at the discretion of the funding Federal agency, be granted.

d. Conditions When the Government May Obtain Title.

(1) The contractor will convey to the Federal agency, upon written request, title to any subject invention:

(i) If the contractor fails to disclose or elect the subject invention within the times specified in c. above, or elects not to retain title.

(ii) In those countries in which the contractor fails to file patent applications within the times specified in c. above; provided, however, that if the contractor has filed a patent application in a country after the times specified in c., above, but prior to its receipt of the written request of the Federal agency, the contractor shall continue to retain title in that country.

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

e. Minimum Rights to Contractor

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

(2) The contractor's domestic license may be revoked or modified by the funding Federal agency to the extent necessary to achieve expeditious practical application

contractor's business to which the invention pertains.

(2) The contractor's domestic license may be revoked or modified by the funding Federal agency to the extent necessary to achieve expeditious practical application

of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions in the Federal Property Management Regulations. This license will not be revoked in that field of use or the geographical areas in which the contractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of the funding Federal agency to the extent the contractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

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

f. Contractor Action to Protect the Governments Interest

(1) The contractor agrees to execute or to have executed and promptly deliver to the Federal agency all instruments necessary to (i) establish or confirm the rights the Government has throughout the world in those subject inventions to which the contractor elects to retain title, and (ii) convey title to the Federal agency when requested under paragraph d. above, and to enable the Government to obtain patent protection throughout the world in that subject invention.

(2) The contractor agrees to require, by written agreement, its employees, other than clerical and non-technical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the contractor each subject invention made under contract in order that the contractor can comply with the disclosure provisions of paragraph c. above, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the

contractor can comply with the disclosure provisions of paragraph c. above, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the

information required by c.(1) above. The contractor shall instruct such employees through employee agreements or other suitable educational programs on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

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

(4) The contractor agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention, the following statement, "This invention was made with Government support under (identify the contract) awarded by (identify the Federal agency). The Government has certain rights in this invention."

g. Subcontracts

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

(2) The contractor will include in all other subcontracts, regardless of tier, for experimental, developmental or research work the patent rights clause required by (cite section of agency implementing regulations, FPR, or DAR).

(3) In the case of subcontracts, at any tier, when the prime award with the Federal agency was a contract (but not a grant or cooperative agreement), the agency, subcontractor, and the contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and the Federal agency with respect to those matters covered by this clause.

h. Reporting on Utilization of Subject Inventions

The contractor agrees to submit on request periodic reports no more frequently than annually on the utilization of

-- those matters covered by this clause.

h. Reporting on Utilization of Subject Inventions

The contractor agrees to submit on request periodic reports no more frequently than annually on the utilization of

a subject invention or on efforts at obtaining such utilization that are being made by the contractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the contractor, and such other data and information as the agency may reasonably specify. The contractor also agrees to provide additional reports as may be requested by the agency in connection with any march-in proceeding undertaken by the agency in accordance with paragraph j. of this clause. To the extent data or information supplied under this section is considered by the contractor, its licensee or assignee to be privileged and confidential and is so marked, the agency agrees that, to the extent permitted by 35 USC §202(c)(5), it will not disclose such information to persons outside the Government.

i. Preference for United States Industry

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

j. March-in Rights

The contractor agrees that with respect to any subject invention in which it has acquired title, the Federal agency has the right in accordance with the procedures in OMB Circular A- __ (and agency regulations at ____) to require the contractor, an assignee or exclusive licensee of a subject invention to grant a non-exclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the contractor assignee, or exclusive licensee refuses such a request, the Federal agency has the right to grant such a license itself if the Federal agency determines that:

(1) Such action is necessary because the contractor or assignee has not taken, or is not expected to

right to grant such a license itself if the Federal agency determines that:

(1) Such action is necessary because the contractor or assignee has not taken, or is not expected to

take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use.

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

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

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

k. Special Provisions for Contracts with Non-profit Organizations

If the contractor is a non-profit organization, it agrees that:

(1) Rights to a subject invention in the United States may not be assigned without the approval of the Federal agency, except where such assignment is made to an organization which has as one of its primary functions the management of inventions and which is not, itself, engaged in or does not hold a substantial interest in other organizations engaged in the manufacture or sale of products or the use of processes that might utilize the invention or be in competition with embodiments of the invention provided that such assignee will be subject to the same provisions as the contractor);

(2) The contractor may not grant exclusive licenses under United States patents or patent applications in subject inventions to persons other than small business firms for a period in excess of the earlier of:

(i) five years from first commercial sale or use of the invention; or

(ii) eight years from the date of the exclusive license excepting that time before regulatory agencies necessary to obtain premarket clearance, unless on a case-by-case basis, the Federal agency approves a longer exclusive license. If exclusive field of use licenses are granted, commercial sale or use in one field of use will not be deemed commercial

(ii) eight years from the date of the exclusive license excepting that time before regulatory agencies necessary to obtain premarket clearance, unless on a case-by-case basis, the Federal agency approves a longer exclusive license. If exclusive field of use licenses are granted, commercial sale or use in one field of use will not be deemed commercial

sale or use as to other fields of use, and a first commercial sale or use with respect to a product of the invention will not be deemed to end the exclusive period to different subsequent products covered by the invention.

(3) The contractor will share royalties collected on a subject invention with the inventor; and

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

1. Communications. (Complete According to Instructions at Part 8.b. of this Circular).

END OF CLAUSE

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

OFFICE OF MANAGEMENT AND BUDGET
OFFICE OF FEDERAL PROCUREMENT POLICY

Circular No. A-124, Patents -- Small Firms And Non-Profit Organizations

Agency: Office of Federal Procurement Policy, Office of Management and Budget.

Action: Final Rule.

Summary: This Circular, issued pursuant to the authority contained in P.L. 96-517, sets forth policies, procedures and a standard clause for executive branch agency use with regard to inventions made by small business firms and non-profit organizations and universities under funding agreements (contracts, grants and cooperative agreements) with Federal agencies where a purpose is to perform experimental, developmental and research work. This supersedes OMB Bulletin No. 81-22 and reflects public comments received on OMB Bulletin No. 81-22.

Effective Date: March 1, 1982.

For Further Information Contact: Mr. Fred H. Dietrich, Associate Administrator, Office of Federal Procurement Policy, 726 Jackson Place, N.W., Washington, D.C. 20503, (202) 395-6810.

Supplementary Information: This Circular is a revision of OMB Bulletin No. 81-22 which was issued on July 1, 1981, accompanied by a request for comments from the public and Federal agencies. Approximately 138 comments were received from individuals, universities, nonprofit organizations, industrial concerns, and Federal agencies.

Copies of all the comments are available on record at OFPP. A compilation of summaries of the comments organized by Bulletin section along with a rationale for their disposition can be obtained by writing to: Fred Dietrich, address as above.

The Bulletin has been reformated for easier reading and simplified reference to its provisions. For example, the standard clause has been moved from the body of the Circular to Attachment A. Instructions and policies on the use of the standard clause have been consolidated in Part 7. Instructions for modification or tailoring of the clause have been consolidated in Part 8. Other general policies relating to the clause or the Act have been treated in separate parts.

reformated for easier reading and simplified reference to its provisions. For example, the standard clause has been moved from the body of the Circular to Attachment A. Instructions and policies on the use of the standard clause have been consolidated in Part 7. Instructions for modification or tailoring of the clause have been consolidated in Part 8. Other general policies relating to the clause or the Act have been treated in separate parts.

Some of the more significant changes that were made as a result of the comments are discussed below. Explanations are also given as to why certain comments were not adopted.

I. Comments Relating to Policy and Scope Sections

A. Subcontracts

A number of comments indicated that more clarification on the application of the Circular to subcontracts was needed. Revisions were made in Part 5 and Part 7c. to address this concern.

B. Limitation to Funding Agreements Performed in the United States

There were also a large number of comments questioning the limitation of the Bulletin to funding agreements performed in the United States. The Circular has been revised to eliminate any distinctions based on where the funding agreement is performed. However, the definition of "nonprofit organization" at 35 USC 201 has been interpreted to cover only domestic nonprofit organizations. The definition of "small business" in SBA regulations which are referenced in the Act excludes foreign business. A strong argument can be made that the Congress did not include foreign nonprofits. For example, that part of the statutory definition referencing organizations "qualified under a State nonprofit organization statute" clearly is limited to U.S. organizations. Similarly, that part of the definition referencing Section 501 of the Tax Code manifest an intention to cover U.S. based organizations, since foreign corporations are not subject to U.S. tax except if they are doing business in the United States.

C. Inventions Made Prior to July 1, 1981

Part 5 of the Circular was revised, as suggested by commentors, to encourage agencies to treat inventions made under funding agreements predating the Act in a manner similar to inventions under the Act, if such action is consistent with law.

D. Collaborative Research and "De minimus" Recommendations

There were several comments that some "de minimus" standard be established to define a threshold contribution of government funding to the making of a jointly funded invention below which the Circular regulations should not apply. These recommendations were rejected as being inconsistent with the

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Act which does not define subject invention in terms of the size of the government financial contribution in making the invention.

These comments appear to be based on a concern that the Circular does not provide adequate guidance on the obligations of a recipient of government research funds when such research is closely related to other research sponsored by an industrial concern. Since one of the primary purposes of P.L. 96-517 is to foster cooperative research arrangements among government, universities and industry in order to more effectively utilize the productive resources of the nation in the creation and commercialization of new technology, it is important to remove any doubt as to the propriety of such cooperative arrangements and the proper application of the Circular to them.

Traditionally there have been no conditions imposed on research performers by the government which would preclude them from accepting research funding from other sources to expand, to aid in completing or to conduct separate investigations closely related to research activities sponsored by the government. Such complex funding arrangements are a necessity given the limited financial resources of individual sponsors, the unpredictable nature and continual expansion of research, the sharing of expensive resources, and the dynamic interactions among scientists at research institutions.

Notwithstanding the right of research organizations to accept supplemental funding from other sources for the purpose of expediting or more comprehensively accomplishing the research objectives of the government sponsored project, it is clear that the Act would remain applicable to any invention "conceived or first actually reduced to practice in performance" of the project. Separate accounting for the two funds used to support the project in this case is not a determining factor.

To the extent that a non-government sponsor establishes a project which, although closely related, falls outside the planned and committed activities of a government funded project and does not diminish or distract from the performance of such activities, inventions made in performance of the non-government sponsored project would not be subject to the conditions of the Act. An example of such related but separate projects would be a government sponsored project having research objectives to expand scientific understanding in a field with a closely related industry sponsored project having as its objectives the application of such new knowledge to develop usable new technology. The time relationship in

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conducting the two projects and the use of new fundamental knowledge from one in the performance of the other are not important determinants since most inventions rest on a knowledge base built up by numerous independent research efforts extending over many years. Should such an invention be claimed by the performing organization to be the product of non-government sponsored research and be challenged by the sponsoring agency as being reportable to the government as a "subject invention", the challenge is appealable as described in Part 14.c.

An invention which is made outside of the research activities of a government funded project but which in its making otherwise benefits from such project without adding to its cost, is not viewed as a "subject invention" since it cannot be shown to have been "conceived or first actually reduced to practice" in performance of the project. An obvious example of this is a situation where an instrument purchased with government funds is later used, without interference with or cost to the government funded project, in making an invention all expenses of which involve only non-government funds.

E. Reports to the General Accounting Office

In response to the comment of one agency, Part 7.b.(2) was amended to avoid the necessity of agencies that do not enter into research grants or contracts with nonprofit organizations or small businesses from having to make reports to the Comptroller General.

F. Right to Sublicense Foreign Governments

Several commentators expressed concern that the optional language authorized for addition to the standard clause to permit sublicensing in accordance to treaties or international agreements was too open-ended. In response to this Part 8.d. now requires that existing treaties and international agreements be identified when the optional language is used. However, in view of the broad wording of the statute, agencies may continue to use the optional language for "future" treaties at their discretion. However, specific language has been added to encourage agencies to drop the reference to future treaties unless shown to be in the national interest.

One agency also expressed the concern that the language in the Bulletin was too limited and implied only a right to sublicense, whereas some international agreements call for more extensive rights. Section 8.d. has been revised to make clear that more than the right to sublicense can be taken.

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G. Publication or Release of Invention Disclosures

Some agencies expressed the concern that the language in Part 5.b.(4) of the Bulletin required agencies to delay publication for excessive periods. Careful review of the language of Part 5.b (4) indicated that it needed to be restructured to more clearly distinguish between situations where the publication of technical reports was involved and situations where the release or publication of invention disclosures provided as required under the standard clause was involved. Part 9 has been revised to distinguish between the two and to clarify the policies in the two situations.

H. Reporting on Utilization of Subject Inventions

In response to the comments of one agency and to minimize the burden on contractors, Part 10 provides that agencies shall not implement their rights to obtain utilization reports under the standard clause until a Government-wide reporting format is established. This will be one of the first tasks of the Department of Commerce as lead agency.

Also adopted was the recommendation of one commentor that utilization reports be afforded maximum protection from disclosure as authorized by P.L. 96-517. Accordingly, language was revised to provide that such reports "shall not" be disclosed under FOIA to the extent permitted by 35 USC 202(c.) (5).

I. Procedures for Exercise of March-in Rights

35 USC 203 requires that march-in rights be exercised in accordance with OFPP regulations. There were extensive comments on the procedures included in the Bulletin and a number of changes have been made as a result of the comments. Several agencies felt the procedures were too formal and cumbersome. Some universities were also concerned that there did not appear to be a way for an agency to reject a march-in without going into a full-blown procedure. To address these concerns part 13.b. was added to provide for an informal and rapid agency decision making process as to whether or not to begin a more formal proceeding. Part 13.h. was also added to make clear that an agency could discontinue a proceeding at any time it is satisfied that march-in is not warranted. This emphasizes that march-in is strictly a matter for agency discretion. Even though an agency may begin march-in because of the complaints of a third-party, that third party does not have standing and cannot insist on either the initiation or continuation of a march-in proceeding.

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A number of universities asked that time limits be placed on the duration of a march-in proceeding. It is not believed to be practical to place an overall time limit on a march-in proceeding, particularly since delays in fact-finding might be the result of contractor requests for delays. However, Part 13.b. includes a procedure for informal agency decision-making, as noted above, with specified time restraints. In addition, Part 13.g. places a 90 day time limit on the issuance of a determination after fact-finding is completed.

Several universities also recommended that march-in determinations be appealable to the lead agency. However, this recommendation was not adopted. It is believed the procedures established will ensure that march-ins are only exercised after careful consideration. Contractors may also appeal any arbitrary decisions or those not conducted in accordance with proper procedures to the courts.

Part 13.j. was added to clarify the relationship of the procedures of the Contract Disputes Act to the march-in procedures of Part 13 c. -g. to the extent a determination to march-in is considered a contract dispute.

Several universities also recommended that march-in proceedings be closed to the public where confidential information might be disclosed. Language has been included in Part 13.e. to require this. The information on utilization obtained as part of a march-in is considered within the scope of the utilization information which agencies are required to obtain the right to under 35 USC 202(c)(5), and the same statutory exclusion from disclosure is applicable to it. It can also be expected that the same information would be trade-secret information exempt from public disclosure.

J. Appeals

As a result of a number of comments, it was determined that the appeals provisions of Part 5.g. of the Bulletin did not address the full scope of appealable decisions and that particularly in forfeiture cases more detailed procedures should be followed. Part 14 has been revised accordingly. However, other recommendations to allow appeal to the lead agency were not adopted since a number of agencies were concerned that this would interfere with their prerogatives.

Since it is anticipated that in contract situations a number of these actions would be subject to the Contract Disputes Act, language was added to Part 14 to expressly acknowledge that procedures under that Act would fully comply with the requirements established in Part 14.

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K. Multiple Sources of Agency Support

One university suggested that there was a need for additional guidance in cases when a subject invention can be attributed to more than one agency funding agreement. To address this concern Part 16c. was added to require agencies to select one agency to administer a given subject invention when there have been multiple agencies providing support. It is intended that only that agency could then exercise march-in or take other actions under the clause. It would be a matter between the agencies as to how any actions of the selected agency would be coordinated with the others.

L. Lead Agency

Bulletin 81-22 noted that the lead agency concept was under discussion and solicited comments on this matter. The Department of Commerce has been selected as the new lead agency based on its prior experience and wide ranging interest in technology transfer, productivity, innovation and Government patent policy. The lead agency will, among other assignments, review agency implementing regulations; disseminate and collect information; monitor administrative or compliance measures; evaluate the P.L. 96-517's implementation; and recommend appropriate changes to OMB/OFPP.

M. Optional Clause Language at Section 5b.(1)(Vi) of the Bulletin

The most commented upon aspect of the Bulletin was the optional reporting language authorized by Part 5.b.(1)(vi). Approximately 70 comments were received from universities and nonprofit organizations objecting to its use. The premises underlying the rationale for the optional language was brought in question by a number of commentors. Many others made the point that the use of the clause would undermine their licensing efforts, result in nonreporting of inventions by inventors, and would generally be counterproductive. By way of contrast no agency provided any rationale for the need for these provisions.

In view of the comments and lack of any established need for the optional language, part 5.b.(1)(vi) of the Bulletin has been eliminated from the final Circular. As will be discussed, below, some changes have been made to paragraph c. of the standard clause of Attachment A of the Circular that relate to the issues raised by the optional language.

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II. Comments on Standard Patent Rights Clause

A. Paragraph b. - License to State and Local Governments

One agency suggested that the right to license state and local governments be made part of the standard rights of the Government. This, however, has not been done since the granting of licenses to state and local governments is not consistent with P.L. 96-517. That statute defines the Government's license rights, and any expansion of these rights, would have to be justified under the "exceptional circumstances" language of 35 USC 202 on a case-by-case basis. It is not anticipated that the taking of such rights would ordinarily be consistent with the policy and objectives of the Act since such licenses have acted as a disincentive to general commercialization. Thus, while appearing to be useful to state and local governments such licenses have actually acted to their disadvantage to the extent they have precluded private development of inventions useful to state and local governments.

B. Paragraph c. - Reporting, Election, and Disclosure

There were a number of comments on various aspects of paragraph c. As a result some changes have been made. In general, these changes were designed to provide a reasonable accommodation to the interests of several agencies in obtaining early knowledge of inventions and to minimize the possibility of statutory bars being created in situations where the agency might wish to seek patents if the contractor does not elect rights. Thus, the reporting period was lowered from six months to two months after contractor personnel become aware of the invention. Paragraph (c)(1) also contains revised language to ensure that contractors keep the agency informed as to initiation of the one year statutory period within which a patent application must be filed in order to obtain a valid patent in the United States. The period in which an agency may require an election of rights has also been increased from 45 days prior to a U.S. statutory bar to 60 days. However, the requirements that a contractor also file 45 days prior to the bar date has been eliminated, but paragraph (c)(3) has been revised to require the contractor to file before the U.S. bar date in all cases. It is believed that it would be rare for a contractor to elect and not file within this time. It is also expected that an interested agency should be able to discuss with a contractor its plans for filing. If the contractor has subsequently changed its mind, the agency should be able to either convince the contractor to rescind its election or to take title under paragraph (d) on the grounds that the contractor has, in effect, abandoned its application. Should any real problems in this area develop in the future, consideration would be

agency should be able to discuss with a contractor its plans for filing. If the contractor has subsequently changed its mind, the agency should be able to either convince the contractor to rescind its election or to take title under paragraph (d) on the grounds that the contractor has, in effect, abandoned its application. Should any real problems in this area develop in the future, consideration would be

given to tightening up the clause provisions to cover cases when a contractor elects but makes no progress towards the timely preparation for filing.

One commentor expressed the concern that the clause requires a contractor to file foreign patents if it elects rights. It should be clear that while there is an implicit obligation to file an initial patent application when an election is made, the language is not intended to require the filing of foreign applications. Instead, it is intended to establish a cut-off point so that the sponsoring agency can file foreign applications if the contractor decides not to.

In short, the clause provisions have been written to ensure that agencies are able to make U.S. filings in cases when contractors have received reports from their inventors in time to allow this but are not themselves interested. Where such initial filings have been made, the clause is designed to protect the opportunity for the filing of foreign patents in cases when a bar was not created prior to the initial filing. However, it has been determined to be unreasonable to require contractors to forfeit domestic rights because publication creates an immediate bar to valid patent protection in some foreign countries.

C. Paragraph k

There were several comments on paragraph k. Some commentators were apparently unaware that these restrictions are required by P.L. 96-517. One commentator incorrectly interpreted paragraph k. (2) as requiring agency approval of exclusive licenses to large firms, whereas the language only requires approval of licenses to such firms which would exceed the five and eight year periods in the statute.

Probably the most significant comments in this area were related to the use of the word "any" in paragraph k. (3). It was pointed out that the use of the word "any" could be interpreted as requiring sharing of gross royalties, whereas many universities have sharing formulas based on net royalties. In response to these comments, the word "any" has been dropped since it is not in the statutory language. The intent is that nonprofit organizations share either on a net or gross basis in accordance with their usual policies.

There were also a few comments that some minimum sharing formula be established. However, this suggestion was rejected as being inconsistent with the legislative intent as manifest on p. 33 of Senate Report 96-480.

... comments that some minimum sharing formula be established. However, this suggestion was rejected as being inconsistent with the legislative intent as manifest on p. 33 of Senate Report 96-480.

Paragraph 1 -- Communications

A new paragraph has been added at the end of the clause in which agencies are instructed to designate a central point of contact for administration of the clause. This paragraph was added as a result of a number of comments suggesting this in lieu of the provision in the bulletin that contact points be indentified throughout the clause whenever notices or communications to the agency were required.

OMB Circular No.A-124 follows.

Donald E. Sowle
Administrator