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APPENDIX B TO PART 37—WHAT TYPE OF INSTRUMENT IS A TIA AND WHAT STATUTORY AUTHORITIES DOES IT USE?

**Appendix B to Part 37-What Type of Instrument is a TIA and What Statutory Authorities Does it Use?**

A. A TIA may be either a type of cooperative agreement or a type of "assistance transaction other than a grant or cooperative agreement," depending on its patent-rights provision. It is awarded under the statutory authority of 10 U.S.C. 2358, 10 U.S.C. 2371, or both, as explained in the paragraphs B through E of this Appendix and illustrated in the table below.

| | The TIA's patent provision complies with Bayh-Dole | The TIA's patent provision varies from what is possible under Bayh-Dole |
|---|---|---|
| 1. The TIA does not include recovery of funds provision | The TIA is a type of cooperative agreement, under 10 U.S.C. 2358(b)(1). | The TIA is a type of assistance transaction other than a grant or cooperative agreement, under 10 U.S.C. 2371. |
| 2. The TIA includes recovery of funds provision | The TIA is a type of cooperative agreement, under 10 U.S.C. 2358(b)(1). It uses recovery of funds authority of 10 U.S.C. 2371. | The TIA is a type of assistance transaction other than a grant or cooperative agreement, under 10 U.S.C. 2371. It also uses the recovery of funds authority of 10 U.S.C. 2371. |

B. A TIA is a type of cooperative agreement whenever its patent-rights provision complies with the Bayh-Dole statute (Chapter 18 of Title 35, U.S.C.), as shown in the preceding table. The authority to award the TIA is 10 U.S.C. 2358, in addition to any program-specific statute that may provide authority to award cooperative agreements. The TIA also may use the authority of 10 U.S.C. 2371 to include a recovery of funds provision that requires the recipient, as a condition for receiving support under the agreement, to make payments to the Department of Defense or other Federal agency.

C. A TIA becomes a type of assistance transaction other than a grant or cooperative agreement when its patent-rights provision is less restrictive than is possible under Bayh-Dole. The authority to award the instrument is 10 U.S.C. 2371, as well as any program-specific authority to provide assistance. Note that the agreements officer's judgment that the execution of the research project warrants a less restrictive patent provision than is possible under Bayh-Dole is sufficient to satisfy the statutory condition in 10 U.S.C. 2371 for use of an assistance transaction other than a cooperative agreement or grant (i.e., that it is not feasible or appropriate to use a standard grant or cooperative agreement to carry out the project). The TIA also may include a recovery of funds provision, as authorized by 10 U.S.C. 2371.

D. From a practical point of view, an agreements officer need not decide while he or she is negotiating the terms and conditions with the recipient whether a TIA is a cooperative agreement or an assistance transaction other than a grant or cooperative agreement. The agreements officer must make that decision when the agreement is finalized, based upon a comparison of the patent provision with what is required by Bayh-Dole.

E. In making that comparison, the agreements officer should consult with legal counsel and remember that most Bayh-Dole requirements apply only to small business firms and nonprofit organizations (note that a consortium that is not formally incorporated is neither a small business firm nor a nonprofit organization). There are only two requirements of Bayh-Dole, in 35 U.S.C. 202(c)(4) and 203 that directly apply to cooperative agreements with other than small business firms and nonprofit organizations. A 1984 amendment to Bayh-Dole, at 35 U.S.C. 210(c), makes those two portions apply. The 1984 amendment otherwise states that Bayh-Dole does not preclude agencies from complying with a 1983 Presidential Statement of Government Patent Policy (incorporated by reference in Executive Order 12591). The President in that statement authorized Federal agencies to tailor cooperative agreements with for-profit firms other than small businesses, in ways that would waive rights of the Government or obligations of the performer under Bayh-Dole, if they determined that:

1. "The interests of the United States and the general public will be better served thereby as, for example, where this is necessary to obtain a uniquely or highly qualified performer; or"

2. "The award involves co-sponsored, cost sharing, or joint venture research and development, and the performer, co-sponsor or joint venturer is making substantial contribution of funds, facilities or equipment to the work performed under the award."