

reduction in time it would take under this proposal for APHIS to initiate and complete an evaluation of the animal disease status of a region. Based on the information presented in the analysis, we expect that decreasing the amount of time and APHIS resources required to initiate and complete such an evaluation would not have a significant economic effect on the entities affected. We invite comment on our economic analysis, which is posted with this proposed rule on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov) and may also be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT**.

#### Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule is adopted: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

#### Paperwork Reduction Act

This proposed rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

#### List of Subjects in 9 CFR Part 92

Animal diseases, Imports, Livestock, Poultry and poultry products, Region, Reporting and recordkeeping requirements.

Accordingly, we propose to amend 9 CFR part 92 as follows:

#### **PART 92—IMPORTATION OF ANIMALS AND ANIMAL PRODUCTS; PROCEDURES FOR REQUESTING RECOGNITION OF REGIONS**

1. The authority citation for part 92 continues to read as follows:

**Authority:** 7 U.S.C. 1622 and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

2. In § 92.2, paragraphs (a) through (f) are revised to read as follows:

#### **§ 92.2 Application for recognition of the animal health status of a region.**

(a) The representative of the national government(s) of any country or countries who has the authority to make such a request may request that APHIS recognize the animal health status of a region.<sup>1</sup> Such requests must be made in

English and must be sent to the Administrator, c/o National Center for Import and Export, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737–1231. (Where possible, include a copy of the request and accompanying information in electronic format.)

(b) Requests for recognition of the animal health status of a region, other than requests submitted in accordance with paragraph (c) of this section, must include, in English, the following information about the region. More detailed information regarding the specific types of information that will enable APHIS to most expeditiously conduct an evaluation of the request is available at [address to be added in final rule] or by contacting the Director, Sanitary Trade Issues Team, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737.

(1) Scope of the evaluation being requested.

(2) Veterinary control and oversight.

(3) Disease history and vaccination practices.

(4) Livestock demographics and traceability.

(5) Epidemiological separation from potential sources of infection.

(6) Surveillance.

(7) Diagnostic laboratory capabilities.

(8) Emergency preparedness and response.

(c) Requests for recognition that a region is historically free of a disease based on the amount of time that has elapsed since the disease last occurred in a region, if it has ever occurred, must include, in English, the following information about the region. More detailed information regarding the specific types of information that will enable APHIS to most expeditiously conduct an evaluation of the request is available at [address to be added in final rule] or by contacting the Director, Sanitary Trade Issues Team, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737. For a region to be considered historically free of a disease, the disease must not have been reported in domestic livestock for at least the past 25 years and must not have been reported in wildlife for at least the past 10 years.

(1) Scope of the evaluation being requested.

(2) Veterinary control and oversight.

(3) Disease history and vaccination practices.

(4) Disease notification.

region on its own initiative. In such cases, APHIS will follow the same evaluation and notification procedures set forth in this section.

(5) Disease detection.

(6) Barriers to disease introduction.

(d) A list of those regions that have requested APHIS' recognition of their animal health status is available at [address to be added in final rule].

(e) If, after review and evaluation of the information submitted in accordance with paragraph (b) or (c) of this section, APHIS believes the request can be safely granted, APHIS will indicate its intent and make its evaluation available for public comment through a document published in the **Federal Register**.

(f) APHIS will provide a period of time during which the public may comment on its evaluation. During the comment period, the public will have access to the information upon which APHIS based its evaluation, as well as the evaluation itself. Once APHIS has reviewed all comments received, it will make a final determination regarding the request and will publish that determination in the **Federal Register**.

\* \* \* \* \*

Done in Washington, DC, this 19th day of December 2011.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2011–33206 Filed 12–27–11; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF ENERGY

### 10 CFR Part 719

### 48 CFR Parts 931, 952 and 970

RIN 1990–AA37

#### **Contractor Legal Management Requirements; Acquisition Regulations**

**AGENCY:** Office of General Counsel, Department of Energy.

**ACTION:** Notice of proposed rulemaking and opportunity for public comment.

**SUMMARY:** The Department of Energy (DOE or Department) is proposing to revise existing regulations covering contractor legal management requirements. Conforming amendments are also proposed to the Department of Energy Acquisition Regulation (DEAR). The proposed regulations will provide rules for handling of legal matters and associated costs by certain contractors whose contracts exceed \$100,000,000 as well as legal counsel retained directly by the Department for matters in which costs exceed \$100,000.

**DATES:** DOE will accept comments, data, and information regarding this notice of

<sup>1</sup> Additionally, APHIS may choose to initiate an evaluation of the animal health status of a foreign

proposed rulemaking (NOPR) no later than February 27, 2012.

**ADDRESSES:** Any comments submitted must identify this NOPR on Contractor Legal Management Requirements, and provide regulatory information number (RIN) 1990-AA37. Comments may be submitted using any of the following methods:

1. *Federal eRulemaking Portal:* [www.regulations.gov](http://www.regulations.gov). Follow the instructions for submitting comments.

2. *Email:* [DOE.719comments@hq.doe.gov](mailto:DOE.719comments@hq.doe.gov). Include RIN 1990-AA37 in the subject line of the message.

3. *Mail:* Lisa Pinder, Administrative Assistant, U.S. Department of Energy, Office of General Counsel, GC-60, 1000 Independence Ave. SW., Washington, DC 20585. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.

4. *Hand Delivery/Courier:* Ms. Lisa Pinder, Administrative Assistant, U.S. Department of Energy, GC-60, 1000 Independence Ave. SW., Washington, DC, 20585. Telephone: (202) 586-5426. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No faxes will be accepted.

For further information on how to submit a public comment, review other public comments and the docket, contact Ms. Lisa Pinder (202) 586-5426 or by Email: [lisa.pinder@hq.doe.gov](mailto:lisa.pinder@hq.doe.gov).

**FOR FURTHER INFORMATION CONTACT:** Mr. Eric Mulch, Attorney-Adviser, U.S. Department of Energy, Office of General Counsel, 1000 Independence Avenue SW., Washington, DC, 20585-0121. Telephone: (202) 287-5746. Email: [eric.mulch@hq.doe.gov](mailto:eric.mulch@hq.doe.gov).

#### SUPPLEMENTARY INFORMATION:

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#### I. Background

The Department's high dollar contracts that include cost reimbursable

elements generally make legal costs, including the cost of litigation, allowable if reasonable and incurred in accordance with the applicable cost principles and contract clauses. Consequently, the Department has an ongoing obligation to monitor, supervise, and control the legal costs that it reimburses.

The Department has a long history of overseeing aspects of its contractors' management of legal matters and costs. This practice was formalized in 1994 when the Department published an interim Acquisition Letter as an interim policy in the **Federal Register** (59 FR 44981). The interim Acquisition Letter was finalized as a Policy Statement on April 3, 1996 (61 FR 14763). This Policy Statement was followed by a formal rulemaking which added part 719, Contractor Legal Management Requirements, to Title 10 of the Code of Federal Regulations with an effective date of April 23, 2001 (66 FR 4616, 66 FR 19717).

Today's proposed rule revises the current contractor legal management requirements found in part 719, in Chapter 10 of the Code of Federal Regulations. The revisions reflect lessons learned by the Department during the years since implementing part 719. The part establishes regulations to monitor and control legal costs and to provide guidance to aid contractors and the Department in making determinations regarding the reasonableness of outside legal costs, including the costs associated with litigation. Today's amendments to part 719 and the associated portions of the Department of Energy Acquisition Regulation (DEAR) are designed to clarify and streamline existing requirements, improve efficiency of contractor legal management, and facilitate oversight over the expenditure of taxpayer dollars.

Today's proposed rules and guidance slightly expands the coverage of the existing regulations. The proposed rules cover all outside legal costs incurred under the Department's Management and Operating (M&O) contracts, non-management and operating cost reimbursement contracts exceeding \$100,000,000, and non-management and operating contracts exceeding \$100,000,000 that include cost reimbursable elements exceeding \$10,000,000. The proposed rules delete current requirements limiting applicability of the part to contracts involving work performed at facilities owned or leased by the Department. Part 719 would continue to apply to legal counsel retained directly by the Department where the legal costs over

the life of the matter for which counsel has been retained are expected to exceed \$100,000. The proposed rules also delete the current coverage exception for legal matters handled through retrospective insurance arrangements and make certain portions of the rules applicable to such arrangements.

The proposed regulations continue to require contractor submission of legal management plans, staffing and resource plans, and engagement letters under specific circumstances and set forth the requirements for these submissions. Today's proposed rules require contractors to submit proposed legal settlements requiring Contractor payment of \$25,000 or more for Department review and approval. Currently, common practice requires contractors to obtain permission from Department counsel to enter a settlement agreement requiring Contractor payment of \$50,000 or more. The Department is seeking public comment regarding the proposed reduction of the threshold to \$25,000 and the proposed inclusion of the requirement in the regulations. In order to streamline and simplify the regulations related to contractor litigation, requirements related to initiation, defense, and settlement of litigation have been removed from the DEAR and consolidated in part 719. The proposed rule moves much of the material currently located in the Appendix to part 719 to the part, itself.

The proposed part 719 continues to identify certain costs that generally would be considered unallowable. Certain categories of costs that require Departmental pre-approval in order to be considered for reimbursement are also identified. The proposed rules provide that compliance with part 719 is a prerequisite for allowability of legal costs, but notes that compliance with the part does not guarantee that costs will be determined to be allowable. All costs, whether or not identified as specifically allowable or unallowable, are still subject to the rules of allowability in the Federal Acquisition Regulation (FAR) and the DEAR.

The Department also proposes changes to the DEAR. The changes correspond to the proposed substantive changes to part 719 as well as clarify and streamline the DEAR provisions related to contractor legal management. The proposed rules require inclusion of 48 CFR 952.231-71, Insurance—Litigation and Claims, or 48 CFR 970.5228-1, Insurance—Litigation and Claims, in the majority, but not all contracts, to which part 719 applies. Both Insurance—Litigation and Claims

clauses have been revised to delete requirements related to contractor initiation or defense of litigation that are proposed for consolidation in part 719.

## II. Summary of the Proposed Rule

Subpart A, sections 719.1–719.8, includes general provisions. The subpart provides definitions and addresses applicability of the part. Section 719.3 states that the part covers all Management and Operating (M&O) contracts, non-management and operating cost reimbursement contracts exceeding \$100,000,000, and non-management and operating contracts exceeding \$100,000,000 that include cost reimbursable elements exceeding \$10,000,000. Sections 719.3 and 719.4 make it clear that any contract exceeding \$100,000 that the Department awards directly to retained legal counsel are subject to compliance with the rules. Sections 719.5 and 719.6 describe types of contracts and legal matters not covered by the part. The proposed rules include coverage of certain retrospective insurance arrangements that are excluded from coverage under the current rules. Procedures for exceptions or deviations from the part are set out in section 719.7. In the case of a Department contract, the determination would be made by the Department's General Counsel; in the case of a National Nuclear Security Administration (NNSA) contract, it would be made by the NNSA General Counsel. Section 719.8 states that the sharing of certain information between contractors and the Department does not waive any applicable privilege.

Subpart B, sections 719.10–719.17, describes the requirements for submission of a legal management plan, staffing and resource plan, and annual legal budget. The subpart describes what is to be included in the plans and in the budget. The proposed rules modify the current requirements for legal management plans, in response to lessons learned by the Department and to ensure adequate oversight of contractor legal management. Section 719.11 provides that contractors must submit a legal management plan within 60 days following execution of a contract with the Department or upon request of the contracting officer. Section 719.15 sets out a requirement for submission of a staffing and resource plan for significant matters (those with legal costs estimated to exceed \$100,000 over the life of the matter or as determined by Department Counsel). Section 719.16 requires submission of the staffing and resource plan no later than 30 days after the filing of an answer or a dispositive motion in lieu

of an answer in a significant matter involving litigation, 30 days after a determination that the cost is expected to exceed \$100,000, or 30 days after notification by Department Counsel that a matter is considered significant, whichever is sooner. Section 719.17 requires submission of an annual legal budget for existing or anticipated significant matters.

Subpart C, sections 719.20–719.21, describes the requirements for engagement letters. Engagement letters must be prepared and submitted to Department Counsel for matters where costs are expected to exceed \$25,000. Section 719.21 states the requirements for engagement letters. Section 719.21(b)(3) requires the contractor to include the right of the government to inspect, copy and audit documentation of billable fees and other records where the Department is reimbursing the legal costs. Section 719.21(b)(8) requires that the engagement letter set forth an agreement that retained counsel will prepare a staffing and resource plan in accordance with the part. Section 719.21(b)(11) requires that the engagement letter include a requirement that a specific certification be included in invoices. This certification requirement is currently set forth in the Attachment to the part.

Subpart D, sections 719.30–719.35, describes the requirements related to contractor initiation of offensive or defensive litigation, including appeals, and for contractor settlement of legal matters. Current part 719 addresses initiation and defense of litigation in the Appendix to the part. Today's proposed rules delete these portions of the Appendix and move all requirements regarding initiation and notification of litigation to subpart D. The proposed regulations move requirements related to initiation and notification of litigation from the DEAR Insurance—Litigation and claims clauses, 48 CFR 952.231–71 and 48 CFR 970.5228–1, to part 719, subpart D, in order to clarify the requirements and streamline the regulations. Requirements regarding Departmental approval of contractor settlements are currently included in contractor legal management plans. The proposed rules regulate requirements related to contractor settlement of legal matters for the first time. Section 719.33 requires that a contractor obtain permission from Department Counsel to enter a settlement agreement requiring Contractor payment of \$25,000 or more. Section 719.34 lists documentation that must be submitted with a contractor's request to settle a matter.

Subpart E, sections 719.40–719.47, describes the policies and limitations

for reimbursement of legal costs associated with retained legal counsel. Section 719.40 makes clear that compliance with part 719 is a prerequisite for allowability of legal costs. Sections 719.42–719.44 describe categories of costs that are unallowable or which require special treatment or advance approval. Section 719.43 describes the treatment of outside counsel travel costs. Section 719.45 of the proposed rules makes certain aspects of part 719 applicable to subcontractors and retrospective insurance carriers. Retrospective insurance arrangements are currently excluded from coverage of the current part 719 and the Department is seeking public comment regarding the proposed coverage of retrospective insurance carriers. Coverage of such carriers is proposed in order to ensure consistent management of all contractor legal management costs that may be reimbursed by the Department. Among the proposed requirements is Departmental approval of retrospective insurance carrier settlements of matters involving payment of \$25,000 or more. Section 719.46 clearly states that costs covered by the part are subject to audit. Section 719.47 describes what happens when more than one Departmental contractor is party to a legal matter.

Subpart F, sections 719.50–719.52, discusses the roles and responsibilities of Department Counsel. Section 719.50 discusses the limitations of Department Counsel authority. Sections 719.51 and 719.52 set forth parameters for Department Counsel coordination with DOE and NNSA Offices of General Counsel.

The Appendix to part 719 discusses expectations related to alternative dispute resolution. The Appendix also makes clear that there is no presumption of reasonableness attached to incurrence of costs by a contractor and notes that the reasons underlying incurrence of a legal cost may affect its allowability. The Attachment to part 719 includes a model bill format for contractor use.

The Department is also proposing corresponding changes to the DEAR. The clause prescription at 48 CFR 931.205–19 is revised to prescribe insertion of the clause at 48 CFR 952.231–71 in (1) non-management and operating cost reimbursement contracts exceeding \$100,000,000, and (2) non-management and operating contracts exceeding \$100,000,000 that include cost reimbursable elements exceeding \$100,000,000. The clause prescription at 48 CFR 970.2803–2 is revised to prescribe insertion of the clause at 48 CFR 970.5228–1 in all management and

operating contracts. Both prescriptions are revised to clarify that the prescribed clauses are to be inserted instead of the clause at 48 CFR 52.228-7. The Insurance—Litigation and claims clauses at 48 CFR 952.231-71 and 48 CFR 970.5228-1 are revised to reflect the above described consolidation of requirements related to initiation and notification of litigation in subpart D of part 719. Other changes to the clauses are included to simplify and clarify their requirements. The cost principle at 48 CFR 931.205-33 is revised to reflect the amended applicability of the DEAR Insurance—Litigation and claims clauses and to clarify the requirement for contractor compliance with part 719 when the part is applicable to a particular contract.

### III. Procedural Requirements

#### A. Review Under Executive Orders 12866 and 13563

This regulatory action has been determined not to be a significant regulatory action under Executive Order 12866, Regulatory Planning and Review, 58 FR 51735, October 4, 1993. Accordingly, this proposed rule is not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget.

DOE has also reviewed this regulation pursuant to Executive Order 13563, issued on January 18, 2011 (76 FR 3281 (Jan. 21, 2011)). Executive Order 13563 is supplemental to and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, agencies are required by Executive Order 13563 to: (1) Propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing

economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. DOE believes that today's NOPR is consistent with these principles, including the requirement that, to the extent permitted by law, agencies adopt a regulation only upon a reasoned determination that its benefits justify its costs and, in choosing among alternative regulatory approaches, those approaches maximize net benefits.

#### B. Review Under Executive Order 12988

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

#### C. Review Under the Regulatory Flexibility Act

This proposed rule has been reviewed under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, which requires preparation of an initial regulatory flexibility analysis for any rule that must be proposed for public comment and is likely to have a significant economic impact on a substantial number of small entities. The proposed rule would not have a significant economic impact on small entities because it imposes no significant burdens.

Accordingly, DOE certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis has been prepared.

#### D. Review Under Paperwork Reduction Act

The proposed rule would require each covered contractor to submit a legal management plan that describes the contractor's practices for managing legal matters for which it procures the services of retained legal counsel. Under certain circumstances staffing and resource plans, annual legal budgets, and engagement letters are required to be submitted to the Department. Documentation related to initiation of litigation and settlement of legal matters may also be required. This collection of information is required for the Department to determine whether to approve reimbursement of contractors' litigation and other legal expenses.

Under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection has been reviewed and assigned a control number by Office of Management and Budget (OMB). The existing regulations at 10 CFR part 719 have been assigned OMB control number 1910-5115, 75 FR 38514-02.

The Department is submitting to the Office of Management and Budget (OMB), simultaneously with the publication of this proposed rule, information explaining the proposed amendments to the current collection of information for review and approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

#### E. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this proposed rule falls into a class of actions which would not individually or cumulatively have significant impact on

the human environment, as determined by DOE's regulations, 10 CFR Part 1021, Subpart D, implementing the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321 *et seq.*

Specifically, this proposed rule is categorically excluded from NEPA review because the amendments to the DEAR would be strictly procedural (categorical exclusion A6). Therefore, this proposed rule does not require an environmental impact statement or environmental assessment pursuant to NEPA.

#### *F. Review Under Executive Order 13132*

Executive Order 13132, 64 FR 43255, August 4, 1999, imposes certain requirements on agencies formulating and implementing policies or regulations that preempt state law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the states and carefully assess the necessity for such actions. DOE has examined today's proposed rule and has determined that it would not preempt state law and would not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

#### *G. Review Under the Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995, Public Law 104-4, requires a federal agency to perform a detailed assessment of costs and benefits of any rule imposing a federal mandate with costs to state, local or tribal governments, or to the private sector, of \$100 million or more in any single year. This rulemaking does not impose a federal mandate on state, local or tribal governments or on the private sector.

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

Section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105-277, requires federal agencies to issue a Family Policymaking Assessment for any rule or policy that may affect family well-being. This proposed rule would have no impact on family well being.

#### *I. Review Under Executive Order 13211*

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply,

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

This proposed rule is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

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

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

#### **List of Subjects**

##### *10 CFR Part 719*

Government contracts, Legal services, Reporting and recordkeeping requirements.

##### *48 CFR Parts 931, 952 and 970*

Government contracts, Government procurement.

Issued in Washington, DC, on December 16, 2011.

**Steven Chu,**  
*Secretary of Energy.*

For the reasons set out in the preamble, the Department of Energy (DOE) proposes to amend Chapter III of Title 10 and Chapter 9 of Title 48 of the Code of Federal Regulations as set forth below:

## **Title 10—Energy**

### **Chapter III—Department of Energy**

1. Part 719 is revised to read as follows:

#### **PART 719—CONTRACTOR LEGAL MANAGEMENT REQUIREMENTS**

Sec.

##### **Subpart A—General Provisions**

- 719.1 What is the purpose of this part?  
719.2 What are the definitions of terms used in this part?  
719.3 What contracts are covered by this part?  
719.4 Are law firms that are retained by contract by the department covered by this part?  
719.5 What contracts are not covered by this part?  
719.6 Are there any types of legal matters not included in the coverage of this part?  
719.7 Is there a procedure for exceptions or deviations from this part?  
719.8 Does the provision of protected documents from the contractor to the department constitute a waiver of privilege?

##### **Subpart B—Legal Management Plan, Staffing and Resource Plan and Annual Legal Budget**

- 719.10 Who must submit a Legal Management Plan?  
719.11 When must a Legal Management Plan be submitted or revised?  
719.12 What information must be included in the Legal Management Plan?  
719.13 Who at the department receives and reviews the Legal Management Plan?  
719.14 Will the department notify the contractor concerning the adequacy or inadequacy of the submitted Legal Management Plan?  
719.15 What are the requirements for a staffing and resource plan?  
719.16 When must the staffing and resource plan be submitted?  
719.17 Are there any budgetary requirements?

##### **Subpart C—Engagement Letter**

- 719.20 When must an engagement letter be used?  
719.21 What are the required elements of an engagement letter?

##### **Subpart D—Requests From Contractor To Initiate, Defend and Settle Legal Matters**

- 719.30 In what circumstances may the contractor initiate litigation, including appeals from adverse decisions?  
719.31 When must the contractor initiate litigation against third parties?  
719.32 What must the contractor do when it receives notice that it is a party to litigation?  
719.33 In what circumstances must the contractor seek permission from the department to enter a settlement agreement?  
719.34 What documentation must the contractor provide to department counsel when it seeks permission to enter a settlement agreement?

719.35 When must the contractor provide a copy of an executed settlement agreement?

**Subpart E—Reimbursement of Costs**  
**Subject to This Part**

719.40 What effect do the regulations of this part have on cost allowability?

719.41 How does the department determine whether fees are reasonable?

719.42 What categories of costs are unallowable?

719.43 What is the treatment for travel costs?

719.44 What categories of costs require advance approval?

719.45 Are there any special procedures or requirements regarding subcontractor and retrospective insurance carrier legal costs?

719.46 Are costs covered by this part subject to audit?

719.47 What happens when more than one contractor is party to a matter?

**Subpart F—Department Counsel**

719.50 What authority does department counsel have?

719.51 What information must be forwarded to the general counsel's office concerning contractor submissions to department counsel under this part?

719.52 What types of field actions must be coordinated with the general counsel?

Appendix A to Part 719—Guidance for Legal Resource Management

**Authority:** 42 U.S.C. 2201, 5814, 5815 and 7101, *et seq.*; 50 U.S.C. 2401, *et seq.*

**Subpart A—General Provisions**

**§ 719.1 What is the purpose of this part?**

This part facilitates management of retained legal counsel and Contractor legal costs, including litigation and legal matter costs. It requires the Contractor to develop a Legal Management Plan, to document the analysis used to decide when to utilize outside counsel, and to document what law firm or individual attorney will be engaged as outside counsel. This part also requires the Contractor to document the terms of the engagement with retained legal counsel. Payment of law firm invoices and reimbursement of Contractor legal costs under Covered Contracts is subject to compliance with this part.

**§ 719.2 What are the definitions of terms used in this part?**

For purposes of this part:

*Alternative dispute resolution* includes, but is not limited to, processes such as mediation, neutral evaluation, mini-trials and arbitration.

*Contractor* means any person or entity with whom the Department contracts for the acquisition of goods or services.

*Covered contracts* means those contracts described in § 719.3 of this part.

*Days* means calendar days.

*Department* means the Department of Energy (DOE), including the National Nuclear Security Administration (NNSA).

*Department Counsel* means the attorney in the DOE or NNSA field office, or Headquarters office, designated as the contracting officer's representative and point of contact for a Contractor or for Department retained legal counsel, for purposes of this part.

*General Counsel* means the DOE General Counsel for DOE legal matters and the NNSA General Counsel for NNSA legal matters.

*Legal costs* means, but is not limited to, administrative expenses associated with the provision of legal services by retained legal counsel; the costs of legal services provided by retained legal counsel; the costs of the services, if the services are procured in connection with a legal matter, of accountants, consultants, experts or others retained by the Contractor or by retained legal counsel; and any similar costs incurred by retained legal counsel or in connection with the services of retained legal counsel.

*Legal Management Plan* means a document required by subpart B of this part describing the Contractor's practices for managing legal costs and legal matters for which it procures the services of retained legal counsel.

*Legal matter* means any particular legal issue, or aggregate of legal issues associated with a particular subject area, e.g., employee benefits, immigration, taxation, for which the Contractor retains legal counsel, including but not limited to litigation.

*Litigation* means a proceeding to which the Contractor is a party in state or federal court or before a state or federal administrative body or an arbitrator.

*Retained legal counsel* means a licensed attorney working in the private sector who is retained by a Contractor or the Department to provide legal services.

*Retrospective insurance* means any insurance policy under which the premium is not fixed, but is subject to adjustments based on actual losses incurred or paid (e.g. claims, settlements, damages, and legal costs).

*Settlement agreement* means a written agreement between a Contractor and one or more parties pursuant to which one or more parties waives the right to pursue a legal claim in exchange for something of value.

*Significant matters* means legal matters, including litigation, involving significant issues as determined by Department Counsel, and any legal matter where the amount of any legal

costs, over the life of the matter, is expected to exceed \$100,000.

*Staffing and Resource Plan* means a statement prepared in accordance with subpart B of this part by retained legal counsel that describes the method for managing a significant matter.

**§ 719.3 What contracts are covered by this part?**

(a) This part covers three categories of contracts:

(1) All management and operating contracts;

(2) Non-management and operating cost reimbursement contracts exceeding \$100,000,000; and

(3) Non-management and operating contracts exceeding \$100,000,000 that include cost reimbursable elements exceeding \$10,000,000 (e.g., contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed \$10,000,000 or time and materials contracts where the materials portions exceed \$10,000,000).

(b) This part also covers contracts otherwise not covered by paragraph (a) of this section but which contain a clause requiring compliance with this part.

(c) This part also covers any contract the Department awards directly to retained legal counsel exceeding \$100,000.

**§ 719.4 Are law firms that are retained by contract by the department covered by this part?**

Legal counsel retained under fixed rate or other type of contract by the Department to provide legal services must comply with the following if the legal costs over the life of the matter for which counsel has been retained are expected to exceed \$100,000:

(a) Requirements related to Staffing and Resource Plans in subpart B of this part;

(b) Cost guidelines in subpart E of this part; and

(c) Engagement letter requirements in subpart C of this part if the retained legal counsel subcontracts legal work valued at \$25,000 or more (e.g., a law firm retained by the Department subcontracts with another law firm to provide \$26,000 in discovery-related legal work).

**§ 719.5 What contracts are not covered by this part?**

This part does not cover any contract under which the Department is not responsible for directly reimbursing the Contractor for legal costs, such as fixed price contracts.

**§ 719.6 Are there any types of legal matters not included in the coverage of this part?**

Matters not covered by this part include:

- (a) Matters handled by counsel retained by an insurance carrier, except under Retrospective Insurance in accordance with § 719.45;
- (b) Routine intellectual property law support services; and
- (c) Routine workers and unemployment compensation matters.

**§ 719.7 Is there a procedure for exceptions or deviations from this part?**

(a) Requests for exceptions or deviations from this part must be made in writing to Department Counsel and approved by the General Counsel. If an alternate procedure is proposed for compliance with an individual requirement in this part, that procedure must be included in the written request by the Contractor.

(b) The General Counsel may authorize exceptions. The General Counsel may also establish exceptions to this part based on current field office and Contractor practices that satisfy the purpose of these requirements.

(c) Exceptions to this part that are also a deviation from the Department of Energy Acquisition Regulation (DEAR) cost principles (see subpart D of this part) must be approved by the Senior Procurement Executive of DOE or NNSA as applicable. Written requests from Contractors for a deviation from a cost principle must be submitted to the contracting officer, with a copy provided to Department Counsel.

**§ 719.8 Does the provision of protected documents from the contractor to the department constitute a waiver of privilege?**

Contractors are required to provide detailed information about third-party claims and litigation to the Department. The Department and its Contractors typically share common legal and strategic interests relating to pending or threatened litigation. The common interest between the parties is rooted in the fact that the Department reimburses Contractors for allowable costs incurred when litigation is threatened or initiated against Contractors. To the extent documents associated with compliance with this part (e.g. Staffing and Resource Plans, invoices, engagement letters, settlement authority requests, and draft pleadings) are protected from disclosure to third parties because the items constitute attorney work product and/or involve attorney client communications, the Contractor's provision of these items to the Department does not constitute a waiver of privilege. As long as the

Department and the Contractor share a common interest in the outcome of legal matters, this mutual legal interest permits the parties to share privileged material without waiving any applicable privilege.

**Subpart B—Legal Management Plan, Staffing and Resource Plan and Annual Legal Budget**

**§ 719.10. Who must submit a Legal Management Plan?**

Contractors who are parties to contracts identified under § 719.3(a) and (b) must submit a Legal Management Plan.

**§ 719.11 When must a Legal Management Plan be submitted or revised?**

(a) Contractors must submit a Legal Management Plan to Department Counsel within 60 days following award of the contract. The deadline for submitting the Legal Management Plan may be extended by the contracting officer.

(b) Contractors must submit a revised Legal Management Plan upon request of the contracting officer within 60 days of receipt of the contracting officer's request.

**§ 719.12 What information must be included in the Legal Management Plan?**

The Legal Management Plan must include the following items:

(a) A description of the Contractor's in-house counsel resources at the time the Legal Management Plan is submitted, including areas of expertise and levels of experience of each legal staff member and an explanation of the types of matters expected to be handled in-house.

(b) A description of the legal matters that may necessitate engagement of retained legal counsel.

(c) A description of the factors the Contractor will consider in determining whether to handle a particular matter utilizing retained legal counsel.

(d) An outline of the factors the Contractor must consider in selecting retained legal counsel, including:

- (1) Cost;
- (2) Past performance of previously retained counsel;
- (3) Particular expertise in a specific area of the law;
- (4) Familiarity with the Department's activity at the particular site and the prevalent issues associated with facility history and current operations;
- (5) Location of retained legal counsel relative to:

- (i) The site involved in the matter,
- (ii) Any forum in which the matter will be processed, and
- (iii) The location where a significant portion of the work will be performed;

(6) Experience as an advocate in alternative dispute resolution procedures such as mediation;

(7) Actual or potential conflicts of interest; and

(8) The means and rate of compensation (e.g., hourly billing, fixed fee, blended fees).

(e) A description of the system that the Contractor will use to review each matter in litigation to determine whether and when alternative dispute resolution is appropriate.

(f) A description of the role of in-house counsel in cost management.

(g) A description of the Contractor's process for review and approval of invoices for legal costs.

(h) A description of the Contractor's strategy for interaction with, and supervision of retained legal counsel.

(i) A description of the procedures the Contractor will employ in order to seek timely approval from Department Counsel to settle any legal matters as required by § 719.34 of this part;

(j) A description of the Contractor's strategy for keeping Department Counsel apprised of all legal matters covered by this part (e.g., regularly scheduled meetings and written communications).

(k) A description of procedures providing for earliest possible notification to the Department of the likely initiation of any legal matter involving class actions, radiation or toxic substance exposure, the safeguarding of classified information, and any other matters involving issues which the Contractor has reason to believe are of general importance to the Department or the government as a whole.

(l) A description of the procedures the Contractor will employ to ensure that unallowable costs are not submitted for Department reimbursement.

**§ 719.13 Who at the department receives and reviews the Legal Management Plan?**

Contractors must submit a Legal Management Plan to Department Counsel. If the Contractor has not been notified of the assignment of Department Counsel, the Contractor must submit the Legal Management Plan to the contracting officer and the DOE Deputy General Counsel for Litigation and Enforcement or the NNSA Deputy General Counsel as appropriate.

**§ 719.14 Will the department notify the contractor concerning the adequacy or inadequacy of the submitted Legal Management Plan?**

The contracting officer or Department Counsel will notify the Contractor within 30 days of the Contractor's submission of the plan of any non-



compliances or inadequate information relating to requirements in § 719.12. The Contractor must correct matters identified within 30 days of notification.

**§ 719.15 What are the requirements for a staffing and resource plan?**

(a) For significant matters, the Contractor must require retained legal counsel to prepare a Staffing and Resource Plan. The Contractor must then forward the Staffing and Resource Plan to Department Counsel.

(b) Retained legal counsel retained directly by the Department subject to this part must prepare a Staffing and Resource Plan and forward it to Department Counsel.

(c) A Staffing and Resource Plan must describe the following:

(1) Major phases likely to be involved in the handling of the matter;

(2) Timing and sequence of such phases;

(3) Projected cost for each phase of the representation; and

(4) Detailed description of resources that the retained legal counsel intends to devote to the representation.

(d) For significant matters in litigation, in addition to the generalized annual budget required by § 719.17, a Staffing and Resource Plan must include a budget, broken down by phases, including at a minimum the following phases:

(1) Matter assessment, development and administration;

(2) Pretrial pleadings and motions;

(3) Discovery;

(4) Trial preparation and trial; and

(5) Appeal.

(e) The Contractor must obtain Department Counsel approval before incurring retained legal counsel costs in excess of costs listed in the budget developed pursuant to paragraph (c) of this section.

**§ 719.16 When must the staffing and resource plan be submitted?**

(a) The Contractor or retained legal counsel must submit the Staffing and Resource Plan to Department Counsel within 30 days after the filing of an answer or a dispositive motion in lieu of an answer, 30 days after a determination that the cost is expected to exceed \$100,000, or 30 days after notification from Department Counsel that a matter is considered significant, whichever is sooner.

(b) Department Counsel may state objections to the Staffing and Resource Plan within 30 days of receipt of a Staffing and Resource Plan. When an objection is stated, retained legal counsel has 30 days to revise the Staffing and Resource Plan to satisfy the objection.

(c) Contractors must require retained legal counsel to update Staffing and Resource Plans annually or more frequently if there are significant changes in the matter. The Contractor must submit the Staffing and Resource Plan updates to Department Counsel. Similarly, Department retained legal counsel must submit to Department Counsel annual Staffing and Resource Plan updates or more frequent updates if there are significant changes in the matter.

(d) When it is unclear whether a matter is significant, the Contractor must consult with Department Counsel on the question.

**§ 719.17 Are there any budgetary requirements?**

(a) Contractors required to submit a Legal Management Plan must also submit an annual legal budget to Department Counsel.

(b) The annual legal budget must include cost projections for existing or anticipated significant matters, at a level of detail reflective of the types of billable activities and the stage of each such matter.

(c) For informational purposes for both the Contractor and Department Counsel, the Contractor must submit a report to Department Counsel comparing its budgeted and actual legal costs within 30 days of the conclusion of the period covered by each annual legal budget. The Department recognizes, however, that there may be departures from the annual budget beyond the control of the Contractor.

**Subpart C—Engagement Letters**

**§ 719.20 When must an engagement letter be used?**

Contractors must submit the terms of a proposed engagement letter between it and proposed retained legal counsel, to Department Counsel when the proposed retained counsel is expected to provide \$25,000 or more in legal services for a particular matter. A copy of the executed engagement letter must be submitted to Department Counsel upon execution.

**§ 719.21 What are the required elements of an engagement letter?**

(a) The engagement letter must require retained legal counsel to assist the Contractor in complying with this part and any supplemental guidance distributed under this part.

(b) At a minimum, the engagement letter must include the following:

(1) A process for review and documented approval of all billing by a Contractor representative including the timing and scope of billing reviews.

(2) A statement that provision of records to the Government is not intended to constitute a waiver of any applicable legal privilege, protection, or immunity with respect to disclosure of these records to third parties. An exemption for specific records may be obtained where Contractors can demonstrate that a particular situation may provide grounds for a waiver.

(3) A requirement that the Contractor, the Department, and the Government Accountability Office have the right, upon request, at reasonable times and locations to inspect, copy, and audit all records documenting billable fees and costs.

(4) A statement that all records must be retained for a period of six (6) years and three (3) months after the final payment or after final case disposition, whichever is later.

(5) Identification of all attorneys and staff who are assigned to the matter and the rate and basis of their compensation (i.e., hourly rates, fixed fees, contingency arrangement) and a process for obtaining approval of temporary adjustments in staffing levels or identified attorneys.

(6) An initial assessment of the matter, along with a commitment to provide updates as necessary.

(7) A description of billing procedures, including frequency of billing and billing statement format.

(8) A statement setting forth agreement that the retained legal counsel will prepare a Staffing and Resource Plan in accordance with the requirements of § 719.15.

(9) A statement setting forth agreement to consider alternative dispute resolution at as early a stage as possible and thereafter as appropriate where litigation is involved.

(10) A statement setting forth agreement that retained legal counsel must comply with the cost guidelines in subpart E of this part.

(11) A statement setting forth agreement that retained legal counsel will provide a certification concerning the costs submitted for reimbursement. The certification that must be included in bills or invoices submitted by retained legal counsel must appear as follows: “Under penalty of law, [the representative] acknowledges the expectation that the bill will be paid by the Contractor and that the Contractor will be reimbursed by the Federal Government through the U.S. Department of Energy, and, based on personal knowledge and a good faith belief, certifies that the bill is truthful and accurate, and that the services and charges set forth herein comply with the terms of engagement and the policies set



forth in the Department of Energy's regulation and guidance on Contractor legal management requirements, and that the costs and charges set forth herein are necessary." The certification must be signed and dated by a representative of the retained legal counsel. Invoices must be submitted in conformance with the model bill format which is set forth in the Attachment to the Appendix to this part.

(12) A statement setting forth agreement to identify and address promptly any professional conflicts of interest.

(c) There may be additional requirements for an engagement letter based on the needs of the Contractor or the Departmental element requiring the services of the Department retained legal counsel.

#### **Subpart D—Requests From Contractor Counsel To Initiate, Defend and Settle Legal Matters**

##### **§ 719.30 In what circumstances may the contractor initiate litigation, including appeals from adverse decisions?**

The Contractor may not initiate litigation (including counterclaims) or appeals from adverse decisions, without the prior written authorization of Department Counsel.

(a) The following information must be provided to Department Counsel in connection with a Contractor request to initiate litigation:

- (1) Identification of the proposed parties;
- (2) The nature of the proposed action;
- (3) Relief sought;
- (4) Venue;
- (5) Proposed representation and reason for selection;
- (6) An analysis of the issues and the likelihood of success, and any time limitation associated with the requested approval;
- (7) The estimated costs associated with the proposed action, including whether outside counsel has agreed to a contingent fee arrangement;
- (8) Whether, for any reason, the Contractor will assume any part of the costs of the action;
- (9) A description of any attempts to resolve the issues that would be the subject of the Litigation, such as through mediation or other means of alternative dispute resolution; and
- (10) A discussion regarding why initiating Litigation would prove beneficial to the Contractor and to the Department.

(b) Department Counsel should advise the contracting officer concerning each request and should provide assistance to the contracting officer in

communicating the Department's decision to the Contractor.

##### **§ 719.31 When must the contractor initiate litigation against third parties?**

The Contractor must, upon the request of the contracting officer, initiate litigation against third parties including proceedings before administrative agencies, in connection with the contract. The Contractor shall proceed with such litigation in good faith and as directed from time to time by Department Counsel.

##### **§ 719.32 What must the contractor do when it receives notice that it is a party to litigation?**

(a) The Contractor shall give the contracting officer and Department Counsel immediate notice in writing of any legal proceeding, including any proceeding before an administrative agency, filed against the Contractor arising out of the performance of the contract and provide a copy of all relevant filings and any other documents that may be requested by the contracting officer and/or Department Counsel. The Department Counsel will direct the Contractor as to:

- (1) Whether or not the Contractor may proceed with the defense of the litigation, and any applicable conditions;
- (2) Whether the Contractor must authorize the Government to defend the action;
- (3) Whether the Government will take charge of the action; or
- (4) Whether the Government must receive an assignment of the Contractor's rights.

(b) The Contractor shall proceed with such litigation in good faith and as directed from time to time by the Department Counsel.

(c) If the costs and expenses associated with the claim against the Contractor are potentially allowable under the contract, the Contractor shall:

- (1) Authorize Department representatives to collaborate with Contractor in-house counsel or DOE/NNSA-approved outside counsel in settling or defending the claim; or counsel for any associated insurance carrier in settling or defending the claim if retrospective insurance applies or the amount of liability claimed exceeds the amount of insurance coverage; and
- (2) Authorize Department representatives to settle the claim or to defend or represent the Contractor in and/or to take charge of any litigation, if required by the Department, except where the liability is covered by bond or is insured by an insurance policy other than retrospective insurance.

##### **§ 719.33 In what circumstances must the contractor seek permission from the department to enter a settlement agreement?**

The Contractor must obtain permission from Department Counsel to enter a settlement agreement if the settlement agreement requires Contractor payment of \$25,000 or more. Obtaining this approval does not represent a determination that the settlement amount and/or the Legal Costs incurred in connection with the underlying legal matter will be determined to be allowable.

##### **§ 719.34 What documentation must the contractor provide to department counsel when it seeks permission to enter a settlement agreement?**

The Contractor must provide a written statement to the Department Counsel that includes the following information, as applicable:

- (a) The amount of any proposed monetary settlement payment.
- (b) Titles and docket numbers associated with the case(s) for which the Contractor is seeking approval to settle;
- (c) The procedural history of the case(s) or issue(s);
- (d) A narrative description of the legal claims or allegations at issue in the matter and any background information that explains events that precipitated the initiation of the matter;
- (e) A description of the history of the settlement discussions;
- (f) A description of the terms of the proposed settlement agreement or requested settlement authority and the rationale for the Contractor entering into the proposed agreement;

(g) If the proposed total monetary settlement amount would be allocated among multiple plaintiffs, a list of the plaintiffs and the amount of money each would receive pursuant to the proposed settlement agreement as well as an explanation as to why the settlement amount is different for any particular plaintiff, if appropriate;

(h) A description as to why settlement of the matter is in the best interest of the Department; and

(i) Any additional supporting documents requested by Department Counsel.

##### **§ 719.35 When must the contractor provide a copy of an executed settlement agreement?**

A Contractor must provide a copy of an executed settlement agreement within seven (7) days of execution.

### Subpart E—Reimbursement of Costs Subject to This Part

#### § 719.40 What effect do the regulations of this part have on cost allowability?

Contractor and retained legal counsel compliance with this part is a prerequisite for allowability of legal costs. However, compliance with this part does not guarantee that legal costs will be determined to be allowable. Only the contracting officer has the authority to determine allowability of costs.

#### § 719.41 How does the department determine whether fees are reasonable?

In determining whether fees or rates charged by retained legal counsel are reasonable, the Department may consider:

(a) Whether the lowest reasonably achievable fees or rates (including any currently available or negotiable discounts) were obtained from retained legal counsel;

(b) Whether lower rates from other firms providing comparable services were available;

(c) Whether alternative rate structures such as flat, contingent, and other innovative proposals, were considered; and

(d) The complexity of the legal matter and the expertise of the law firm in this area.

#### § 719.42 What categories of costs are unallowable?

(a) Specific categories of unallowable costs are contained in the cost principles at 48 CFR (FAR) part 31, 48 CFR (DEAR) part 931 and 48 CFR 970.31. See also 41 U.S.C. 4304;

(b) Costs that are customarily or already included in billed hourly rates are not separately reimbursable.

(c) Interest charges that a Contractor incurs on any outstanding (unpaid) bills from retained legal counsel are not reimbursable.

#### § 719.43 What is the treatment for travel costs?

(a) Travel and related expenses must at a minimum comply with the restrictions set forth in 48 CFR 31.205–46, or 48 CFR (DEAR) 970.3102–05–46, as appropriate, to be reimbursable.

(b) Travel time may be allowed at a full hourly rate for the portion of time during which retained legal counsel performs legal work for which it was retained; any remaining travel time shall be reimbursed at 50 percent of the full hourly rate, except that in no event will travel time spent working for other clients be allowable. Also, for long distance travel that could be completed by various methods of transportation,

e.g., car, train, or plane, costs charged by retained legal counsel or any agent of retained legal counsel will be considered reasonable only if the individuals charge no more travel time than it would take to utilize the fastest mode of transportation that is cost-effective. For example, if retained legal counsel travels for 10 hours by train when a cost-effective flight that would take two hours to get to the same destination is available, the attorney may charge a maximum of two hours for the time spent traveling.

#### § 719.44 What categories of costs require advance approval?

(a) To be considered for reimbursement, costs for the following require advance written approval from Department Counsel or the submission of subsequent specific justification to Department Counsel when circumstances out of the Contractor's control make advance approval unobtainable:

(1) Computers or general application software, or non-routine computerized databases specifically created for a particular matter. For costs associated with the creation and use of computerized databases, Contractors and retained legal counsel must ensure that the creation and use of computerized databases is necessary and cost-effective. Use of databases originally created by the Department or its Contractors for other purposes, but that can be used to assist a Contractor or retained legal counsel in connection with a particular matter, should be considered. Contractors and retained legal counsel must ensure that DOE is provided the discretion to obtain unlimited access to and dominion over any computers or general application software, or non-routine computerized databases specifically created for a particular matter;

(2) Charges for materials or nonattorney services exceeding \$5,000;

(3) Secretarial and support services, word processing, or temporary support personnel;

(4) Attendance by more than one attorney at a deposition, court hearing or interview;

(5) Expert witnesses and consultants;

(6) Trade publications, books, treatises, background materials, and other similar documents;

(7) Professional or educational seminars and conferences;

(8) Preparation of bills or time spent responding to questions about bills from either the Department or the Contractor;

(9) Food and beverages when the attorney or consultant is not on travel status and away from the home office;

(10) Pro hac vice admissions; and  
(11) Time charged for law students' or interns' services.

(b) Requests for fee increases by retained legal counsel other than those under contract directly with the Department must be sent in writing to the Contractor, who will review the request for reasonableness. If the Contractor determines the request is reasonable, the Contractor must seek approval for the increase from Department Counsel and the contracting officer before it authorizes any increase. Contractors should attempt to lock in rates for partners, associates and paralegals for at least a two year period.

#### § 719.45 Are there any special procedures or requirements regarding subcontractor and retrospective insurance carrier legal costs?

(a) The Contractor must have a monitoring system for subcontractor legal matters likely to reach \$100,000 over the life of the matter when the Contractor's contract with the subcontractor provides that the Contractor will reimburse the subcontractor's legal costs resulting from the subcontractor's performance under its contract. The purpose of this system is to enable the Contractor to perform the same type and level of analysis and review of subcontractor legal management practices that the Department can perform of the Contractor's legal management practices. The monitoring system is intended to enable the Contractor to keep the Department informed about significant subcontractor legal matters, including significant matters in litigation. The Contractor is responsible for answering questions raised by the Department concerning significant subcontractor legal matters.

(b) Contractors must submit informational copies of subcontractor invoices for legal services to Department Counsel.

(c) Insurance carriers that provide insurance coverage to Contractors pursuant to retrospective insurance are "subcontractors" for purposes of this part.

(d) In addition to the requirements set forth in paragraphs (a) and (b) of this section, the Contractor shall require any insurance carrier with whom the Contractor enters into a retrospective insurance arrangement after the effective date of this part, including any policy renewals, to provide to the Contractor for prior approval a staffing and resource plan for all legal matters that are expected to exceed \$100,000 in cost. The staffing and resource plan submitted by the insurance carrier must

contain all of the items described in § 719.15, including, but not limited to, a description of the major phases and timing and sequence of events anticipated in handling the matter, and a corresponding budget breakdown.

(e) When the insurance carrier retains outside counsel and outside counsel is expected to provide \$25,000 or more in legal services for a particular matter, the Contractor shall require the insurance company to provide it with a copy of any engagement letter that outlines the terms of the arrangement between the insurance company and the law firm it retains to defend lawsuits that are covered by retrospective insurance. The engagement letter must contain all of the items described in § 719.21.

(e) The Contractor shall require the insurance company to request prior permission from the Contractor to enter into settlement agreements with third parties involving payment of \$25,000 or more. The Contractor shall require the insurance carrier to submit all documentation described in § 719.34, and to provide the contractor with a copy of the executed settlement agreement within seven days of execution, which the Contractor will promptly forward to Department Counsel. The Contractor shall not authorize the insurance carrier to enter into any settlement agreement involving payment of \$25,000 or more without obtaining the approval of the Department Counsel.

(f) Staffing and resource plans and engagement letters required under this section must be reviewed and approved by the Contractor and approved by Department Counsel.

(g) All legal costs incurred by insurance carriers under retrospective insurance are subject to audit pursuant to § 719.46. The Contractor shall provide reviewed costs and status updates for all matters handled by retrospective insurance carriers in accordance with § 719.51.

**§ 719.46 Are costs covered by this part subject to audit?**

All costs covered by this part are subject to audit by the Department, its designated representative, or the Government Accountability Office. See § 719.21.

**§ 719.47 What happens when more than one contractor is a party to a matter?**

(a) If more than one Contractor is a party in a particular matter and the issues involved are similar for all the Contractors, a single legal counsel designated by the General Counsel must either represent all of the Contractors or serve as lead counsel, when the rights

of the Contractors and the Government can be effectively represented by a single legal counsel, consistent with the standards for professional conduct applicable in the particular matter. Contractors may propose to the General Counsel their preference for the individual or law firm to perform as the lead counsel for a particular matter.

(b) If a Contractor, having been afforded an opportunity to present its views concerning joint or lead representation, does not acquiesce in the designation of one retained legal counsel to represent a number of Contractors, or serve as lead counsel, then the legal costs of such Contractor are not reimbursable by the Department, unless the Contractor demonstrates that it was reasonable for the Contractor to incur such expenses.

**Subpart F—Department Counsel**

**§ 719.50 What authority does department counsel have?**

(a) Department Counsel will receive written delegated authority from the contracting officer to serve as the contracting officer's representative for legal matters.

(b) Actions by Department Counsel may not exceed the responsibilities and limitations as delegated by the contracting officer. Delegated contracting officer representative authority shall not be construed to include the authority to execute or modify the contract or resolve any contract dispute arising under the contract. Additional discussion of the authority and limitation of contracting officers can be found at 48 CFR 1.602–1, and contracting officer's representatives at 48 CFR (DEAR) 942.270–1. The clause, Technical Direction, 48 CFR (DEAR) 952.242–70, also discusses the responsibilities and authority of a contracting officer's representative.

**§ 719.51 What information must be forwarded to the general counsel's office concerning contractor submissions to department counsel under this part?**

Department Counsel must submit through the General Counsel reporting system, the reviewed costs and status updates for all matters involving retained counsel, including but not limited to Contractor litigation. The reports are to be received by the 15th day of the month following the end of each quarter of the fiscal year.

**§ 719.52 What types of field actions must be coordinated with the general counsel?**

(a) Requests from Contractors for exceptions or deviations from this part must be submitted to the contracting

officer and Department Counsel, and approved by the General Counsel or his or her designee.

(b) Requests from Contractors for approval to initiate or defend litigation, or to appeal from adverse decisions, where legal issues of first impression, sensitive issues, issues of national significance to the Department or of broad applicability to the Government that might adversely impact its operations are involved must be coordinated by Department Counsel with the General Counsel or his/her designee.

(c) Department Counsel must inform the General Counsel of any significant matter, as defined in this part, and must coordinate any action involving a significant matter with the General Counsel, or his/her designee, as directed by the General Counsel or his/her designee.

**Appendix A to Part 719—Guidance for Legal Resource Management**

*Management and Administration of Outside Legal Services*

- 1.0 Alternative Dispute Resolution
- 2.0 Cost Allowability Issues
- 2.1 Underlying Cause for Incurrence of Costs

*Attachment—Contractor Litigation and Legal Costs, Model Bill Format*

*Management and Administration of Outside Legal Services*

This guidance is intended to assist Contractors, contracting officers and retained legal counsel in managing the costs of outside legal services.

*1.0 Alternative Dispute Resolution*

Contractors are expected to evaluate all matters for appropriate alternative dispute resolution (ADR) at various stages of an issue in dispute, e.g., before a case is filed, during pre-discovery, after initial discovery and during pre-trial. This evaluation should be done in coordination with the Department's ADR liaison if one has been established or appointed or Department Counsel if an ADR liaison has not been appointed. Contractors, Contractor counsel, and Department Counsel are also encouraged to consult with the Department's Director of the Office of Conflict Prevention and Resolution. The Department anticipates that mediation will be the principal and most common method of Alternative Dispute Resolution. Agreement to arbitrate should generally be consistent with the Administrative Dispute Resolution Act (incorporated in part at 5 U.S.C. 571, *et seq.*) and Department guidance issued under that Act. When a decision to arbitrate is made, a statement fixing the maximum award amount should be agreed to in advance by the participants.

*2.0 Cost Allowability Issues*

A determination of cost reasonableness depends on a variety of considerations and circumstances. 48 CFR 31.201–3 establishes that no presumption of reasonableness is

attached to the incurrence of costs by a Contractor.

### 2.1 Underlying Cause for Incurrence of Costs

While 10 CFR part 719 provides procedures associated with incurring and monitoring legal costs, the evaluation of the reason for the incurrence of the legal costs, e.g., liability, fault or avoidability, is a

separate issue. The reason for the Contractor incurring costs may impact the allowability of the Contractor's legal costs. In some cases, the final determination of allowability of legal costs cannot be made until a matter is fully resolved. In certain circumstances, contract and cost principle language may permit conditional reimbursement of costs pending the outcome of the legal matter. Whether the Department makes conditional

reimbursements or withholds any payment pending the outcome, legal costs ultimately reimbursed by the Department must comply with the applicable cost principles, the terms of the contract, and part 719.

### Attachment—Contractor Litigation and Legal Costs, Model Bill Format

#### 1. Model Bill Format

## I—FOR FEES

Date of service	Description of service	Name or initials of attorney	Approved rate	Time charged	Amount (rate × time)
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(See Note 1 to this table).

## II—FOR DISBURSEMENTS

Date	Description of disbursement	Amount
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(See Note 2 to this table).

**Note 1—Description of Service:** All fees must be itemized and described in sufficient detail and specificity to reflect the purpose and nature of the work performed (e.g., subject matter researched or discussed; names of participants of calls/meetings; type of documents reviewed).

**Note 2—Description of Disbursement:** Description should be in sufficient detail to determine that the disbursement expense was in accordance with all applicable Department policies on reimbursement of Contractor legal costs and the terms of engagement between the Contractor and the retained legal counsel. The date the expense was incurred or disbursed should be listed rather than the date the expense was processed. The following should be itemized: copy charge (i.e., number of pages times a maximum of 10 cents per page); fax charges (date, phone number and actual amount); overnight delivery (date and amount); electronic research (date and amount); extraordinary postage (e.g., bulk or certified mail); court reporters; expert witness fees; filing fees; outside copying or binding charges; temporary help (assuming prior approval).

**Note 3—Receipts:** Receipts for all expenses equal to or above \$75 must be attached.

## Title 48—Federal Acquisition Regulations System

### Chapter 9—Department of Energy

#### PART 931—CONTRACT COST PRINCIPLES AND PROCEDURES

2. The authority citation for part 931 continues to read as follows:

**Authority:** 42 U.S.C. 7101, et seq.; 50 U.S.C. 2401, et seq;

3. Section 931.205–19 is revised to read as follows:

#### 931.205–19 Insurance and indemnification.

(f) The contracting officer shall insert the clause at 952.231–71, Insurance-litigation and claims, instead of the clause at 48 CFR 52.228–7, in

(1) Non-management and operating cost reimbursement contracts exceeding \$100,000,000, and

(2) Non-management and operating contracts that include cost reimbursable elements exceeding \$100,000,000, for example, contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed \$100,000,000 or time and materials contracts where the materials portions exceed \$100,000,000.

4. Section 931.205–33 is revised to read as follows:

#### 931.205–33 Professional and consultant service costs.

(g) If the clause at 48 CFR 952.231–71 or the clause at 48 CFR 970.5228–1 is included in the contract, or the contract is a non-management and operating contract exceeding \$100,000,000 that includes cost reimbursable elements exceeding \$10,000,000 (for example, contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed \$10,000,000 or time and materials contracts where the materials portions exceed \$10,000,000), litigation and other legal costs are only allowable if both: incurred in accordance with 10 CFR part 719, Contractor Legal Management Requirements; and not otherwise made unallowable by law, regulation, or the terms of the contract.

## PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. The authority citation for part 952 continues to read as follows:

**Authority:** 42 U.S.C. 7101 et seq. and 50 U.S.C. 2401 et seq.

6. Section 952.231–71 is revised to read as follows:

#### 952.231–71 Insurance-litigation and claims.

As prescribed in 931.205–19(f), insert the following clause in applicable non-management and operating contracts:

#### Insurance—Litigation and Claims (XX 20XX)

(a) The Contractor must comply with 10 CFR part 719, Contractor Legal Management Requirements.

(b)(1) Except as provided in paragraph (b)(2) of this clause, the Contractor shall procure and maintain such bonds and insurance as required by law or approved in writing by the Contracting Officer.

(2) The Contractor may, with the approval of the Contracting Officer, maintain a self-insurance program in accordance with FAR 28.308; provided that, with respect to workers' compensation, the Contractor is qualified pursuant to statutory authority.

(3) All bonds and insurance required by this clause shall be in a form and amount and for those periods as the Contracting Officer may require or approve and with sureties and insurers approved by the Contracting Officer.

(c) The Contractor agrees to submit for the Contracting Officer's approval, to the extent and in the manner required by the Contracting Officer, any other bonds and insurance that are maintained by the Contractor in connection with the performance of this contract and for which the Contractor seeks reimbursement. If an insurance cost (whether a premium for

commercial insurance or related to self-insurance) includes a portion covering costs made unallowable elsewhere in the contract, and the share of the cost for coverage for the unallowable cost is determinable, the portion of the cost that is otherwise an allowable cost under this contract is reimbursable to the extent determined by the Contracting Officer.

(d) Except as provided in paragraph (f) of this clause, or specifically disallowed elsewhere in this contract, the Contractor shall be reimbursed—

(1) For that portion of the reasonable cost of bonds and insurance allocable to this contract required in accordance with contract terms or approved under this clause, and

(2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance without regard to the limitation of cost or limitation of funds clause of this contract.

(e) The Government's liability under paragraph (d) of this clause is subject to the availability of appropriated funds. Nothing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

(f)(1) Notwithstanding any other provision of this contract, the Contractor shall not be reimbursed for liabilities to third parties, including contractor employees, and directly associated costs which may include but are not limited to litigation costs, counsel fees, judgment and settlements—

(i) Which are otherwise unallowable by law or the provisions of this contract, including the cost reimbursement limitations contained in 48 CFR part 31, as supplemented by 48 CFR 970.31;

(ii) For which the Contractor has failed to insure or to maintain insurance as required by law, this contract, or by the written direction of the Contracting Officer; or

(iii) Which were caused by Contractor managerial personnel's—

(A) Willful misconduct;

(B) Lack of good faith; or

(C) Failure to exercise prudent business judgment, which means failure to act in the same manner as a prudent person in the conduct of competitive business; or, in the case of a non-profit educational institution, failure to act in the manner that a prudent person would under the circumstances prevailing at the time the decision to incur the cost is made.

(2) The term "contractor's managerial personnel" is defined in the Property clause in this contract.

(g)(1) All litigation costs, including counsel fees, judgments and settlements shall be properly allocated, segregated and excluded by the Contractor. If the Contracting Officer provisionally disallows such costs, then the Contractor may not use funds advanced by DOE under the contract to finance the litigation.

(2) Punitive damages are not allowable unless the act or failure to act which gave rise to the liability resulted from compliance with specific terms and conditions of the contract or written instructions from the Contracting Officer.

(3) The portion of the cost of insurance obtained by the Contractor that is allocable

to coverage of liabilities referred to in paragraph (f) of this clause is not allowable.

(h) The Contractor may at its own expense and not as an allowable cost procure for its own protection insurance to compensate the Contractor for any unallowable or non-reimbursable costs incurred in connection with contract performance.

(End of clause)

## **PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS**

7. The authority citation for part 970 continues to read as follows:

**Authority:** 42 U.S.C. 2201; 2282a; 2282b; 2282c; 42 U.S.C. 7101 et seq.; 50 U.S.C. 2401, et seq.

8. Section 970.2803–2 is revised to read as follows:

### **970.2803–2 Contract clause.**

The contracting officer shall insert the clause at 970.5228–1, Insurance—Litigation and Claims, instead of the clause at 48 CFR 52.228–7, in all management and operating contracts. Paragraphs (f)(3)(C) and (g)(2) of that clause apply to a nonprofit contractor only to the extent specifically provided in the individual contract.

9. Section 970.5228–1 is revised to read as follows:

### **970.5228–1 Insurance—litigation and claims.**

As prescribed in 970.2803–2, insert the following clause:

#### **Insurance—Litigation and Claims (XX 20XX)**

(a) The Contractor must comply with 10 CFR part 719, Contractor Legal Management Requirements.

(b)(1) Except as provided in paragraph (b)(2) of this clause, the Contractor shall procure and maintain such bonds and insurance as required by law or approved in writing by the Contracting Officer.

(2) The Contractor may, with the approval of the Contracting Officer, maintain a self-insurance program in accordance with FAR 28.308; provided that, with respect to workers' compensation, the Contractor is qualified pursuant to statutory authority.

(3) All bonds and insurance required by this clause shall be in a form and amount and for those periods as the Contracting Officer may require or approve and with sureties and insurers approved by the Contracting Officer.

(c) The Contractor agrees to submit for the Contracting Officer's approval, to the extent and in the manner required by the Contracting Officer, any other bonds and insurance that are maintained by the Contractor in connection with the performance of this contract and for which the Contractor seeks reimbursement. If an insurance cost (whether a premium for commercial insurance or related to self-insurance) includes a portion covering costs made unallowable elsewhere in the contract, and the share of the cost for coverage for the

unallowable cost is determinable, the portion of the cost that is otherwise an allowable cost under this contract is reimbursable to the extent determined by the Contracting Officer.

(d) Except as provided in paragraph (f) of this clause, or specifically disallowed elsewhere in this contract, the Contractor shall be reimbursed—

(1) For that portion of the reasonable cost of bonds and insurance allocable to this contract required in accordance with contract terms or approved under this clause, and

(2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance without regard to the clause of this contract entitled "Obligation of Funds."

(e) The Government's liability under paragraph (d) of this clause is subject to the availability of appropriated funds. Nothing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

(f)(1) Notwithstanding any other provision of this contract, the Contractor shall not be reimbursed for liabilities to third parties, including contractor employees, and directly associated costs which may include but are not limited to litigation costs, counsel fees, judgments and settlements—

(i) Which are otherwise unallowable by law or the provisions of this contract, including the cost reimbursement limitations contained in 48 CFR part 31, as supplemented by 48 CFR 970.31;

(ii) For which the Contractor has failed to insure or to maintain insurance as required by law, this contract, or by the written direction of the Contracting Officer; or

(iii) Which were caused by Contractor managerial personnel's—

(A) Willful misconduct;

(B) Lack of good faith; or

(C) Failure to exercise prudent business judgment, which means failure to act in the same manner as a prudent person in the conduct of competitive business; or, in the case of a non-profit educational institution, failure to act in the manner that a prudent person would under the circumstances prevailing at the time the decision to incur the cost is made.

(2) The term "contractor's managerial personnel" is defined in the Property clause in this contract.

(g)(1) All litigation costs, including counsel fees, judgments and settlements shall be properly allocated, segregated and excluded by the Contractor. If the Contracting Officer provisionally disallows such costs, then the Contractor may not use funds advanced by DOE under the contract to finance the litigation.

(2) Punitive damages are not allowable unless the act or failure to act which gave rise to the liability resulted from compliance with specific terms and conditions of the contract or written instructions from the Contracting Officer.

(3) The portion of the cost of insurance obtained by the Contractor that is allocable to coverage of liabilities referred to in paragraph (f) of this clause is not allowable.

(h) The Contractor may at its own expense and not as an allowable cost procure for its

own protection insurance to compensate the Contractor for any unallowable or non-reimbursable costs incurred in connection with contract performance.

(End of clause)

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## NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 701, 703, 723, and 742

RIN 3133-AD98

### Eligible Obligations, Charitable Contributions, Nonmember Deposits, Fixed Assets, Investments, Member Business Loans, and Regulatory Flexibility Program

**AGENCY:** National Credit Union  
Administration (NCUA).

**ACTION:** Proposed rule with request for  
comments.

**SUMMARY:** NCUA proposes to eliminate the Regulatory Flexibility Program (RegFlex) to provide regulatory relief to Federal credit unions. NCUA also proposes to remove or amend related rules to ease compliance burden while retaining certain safety and soundness standards. Those rules pertain to eligible obligations, charitable contributions, nonmember deposits, fixed assets, investments, and member business loans.

**DATES:** Send your comments to reach us on or before February 27, 2012. We may not consider comments received after the above date in making our decision on the proposed rule.

**ADDRESSES:** You may submit comments by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *NCUA Web Site:* <http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx> Follow the instructions for submitting comments.

- *E-mail:* Address to [regcomments@ncua.gov](mailto:regcomments@ncua.gov). Include “[Your name] Comments on Proposed Rule 742, Regulatory Flexibility Program” in the e-mail subject line.

- *Fax:* (703) 518-6319. Use the subject line described above for e-mail.
- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.

- *Hand Delivery/Courier:* Same as mail address.

*Public Inspection:* You can view all public comments on NCUA’s Web site

at <http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx> as submitted, except for those we cannot post for technical reasons. NCUA will not edit or remove any identifying or contact information from the public comments submitted. You may inspect paper copies of comments in NCUA’s law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518-6546 or send an e-mail to [OGCMail@ncua.gov](mailto:OGCMail@ncua.gov).

#### FOR FURTHER INFORMATION CONTACT:

Chrisanthy Loizos, Staff Attorney, Office of General Counsel, at the above address or telephone (703) 518-6540, or Matthew J. Biliouris, Director of Supervision, or J. Owen Cole, Director, Division of Capital Markets, Office of Examination and Insurance, at the above address or telephone (703) 518-6360.

#### SUPPLEMENTARY INFORMATION:

- I. Background
- II. The Rule as Proposed
- III. Section-by-Section Analysis
- IV. Regulatory Procedures

### I. Background

#### a. Why is NCUA proposing this rule?

On July 11, 2011, President Obama issued Executive Order 13579, ordering independent agencies, including NCUA, to consider whether they can modify, streamline, expand, or repeal existing rules to make their programs more effective and less burdensome.<sup>1</sup> Consistent with the spirit of the Executive Order and as part of NCUA’s Regulatory Modernization Initiative, the NCUA Board (Board) has decided to propose a rule that streamlines its regulatory program by eliminating RegFlex. The proposed rule would relieve regulatory burden on Federal credit unions (FCUs) because they would no longer need to engage in any process for a RegFlex designation. In addition, FCUs that are currently not RegFlex eligible would receive regulatory relief because the proposal extends to them most of the flexibilities previously available only to RegFlex FCUs.

#### b. What is RegFlex?

RegFlex relieves FCUs from certain regulatory restrictions and grants them additional powers if they have demonstrated sustained superior

performance as measured by CAMEL rating and net worth classification. 12 CFR 742.1. An FCU may qualify for RegFlex treatment automatically or by application to the appropriate regional director. 12 CFR 742.2. Specifically, an FCU automatically qualifies when it has received a composite CAMEL rating of “1” or “2” during its last two examinations and has maintained a net worth classification of “well capitalized” under part 702 of NCUA’s rules for the last six quarters. If an FCU is subject to a risk-based net worth (RBNW) requirement under part 702, it also qualifies for RegFlex treatment when it has remained “well capitalized” for the last six quarters after applying the applicable RBNW requirement. An FCU that does not automatically qualify may apply for a RegFlex designation with the appropriate regional director. 12 CFR 742.2(a) and (b).

The Board established RegFlex in 2002. 66 FR 58656 (Nov. 23, 2001). Since then, NCUA has amended RegFlex a number of times to increase available relief for FCUs from a variety of regulatory restrictions, reduce the criteria to obtain RegFlex status, or enhance safety and soundness for FCUs. 71 FR 4039 (Jan. 25, 2006); 72 FR 30247 (May 31, 2007); 74 FR 13083 (Mar. 26, 2009); 75 FR 66298 (Oct. 28, 2010).

The current RegFlex rule provides RegFlex FCUs with relief from restrictions in the following six areas or “flexibilities”: (1) Charitable contributions; (2) nonmember deposits; (3) fixed assets; (4) zero-coupon investments; (5) borrowing repurchase transactions; and (6) commercial mortgage related securities. It also provides an additional flexibility by specifically authorizing the purchase of obligations from federally insured credit unions beyond those an FCU may purchase under the NCUA’s eligible obligations rule, § 701.23.

### II. The Rule as Proposed

#### a. How would this rule change RegFlex and reduce regulatory burden on FCUs?

NCUA proposes to eliminate RegFlex and the charitable contributions rule, and amend the rules that apply to eligible obligations, nonmember deposits, fixed assets, and investments. With this proposal, the Board intends to enable FCUs to engage in the activities permitted by the existing RegFlex rule. As of June 30, 2011, there are 4,534 FCUs, 2,764 of which are RegFlex FCUs. The proposed changes would extend regulatory relief to the remaining 1,770 FCUs that do not currently enjoy a RegFlex designation. NCUA requests

<sup>1</sup> President Obama also signed the Plain Writing Act of 2010 (Pub. L. 111-274) into law on October 13, 2010 “to improve the effectiveness and accountability of Federal agencies to the public by promoting clear Government communication that the public can understand and use.” This preamble is written to meet plain writing objectives.