DEPARTMENT OF ENERGY

Office of Policy

10 CFR Part 600

[Docket No. PO-RM-95-101]

Financial Assistance Rules: Eligibility Determination for Certain Financial Assistance Programs

AGENCY: Department of Energy. **ACTION:** Notice of proposed rulemaking and public hearing.

SUMMARY: The Department of Energy (Department or DOE) today gives notice of a proposed general statement of policy to guide DOE officials in making eligibility determinations required by section 2306 of the Energy Policy Act of 1992. The proposed general statement of policy includes procedures and interpretations related to the statutory limits placed by section 2306 on eligibility to receive financial assistance under DOE programs authorized by Titles XX through XXIII of that Act. **DATES:** Written comments (9 copies) must be received by DOE on or before April 24, 1995. A public hearing will be held on April 19, 1995 beginning at 9:30 a.m. at the address listed below. Requests to speak must be received by April 17, 1995, by calling (202) 586-3012.

ADDRESSES: Written comments and requests to speak must be submitted to: Dr. Robert C. Marlay, Office of Science Policy, Office of Policy, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, D.C. 20585, (202) 586– 3012.

Telecopied comments will not be accepted. The public hearing will be held in Room 1E-245, U.S Department of Energy, 1000 Independence Avenue SW., Washington, D.C. 20585, See Section V. for additional information concerning public comment procedures. FOR FURTHER INFORMATION CONTACT: Dr. Robert C. Marlay, Office of Science Policy (Mail Stop PO-81), Office of Policy, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, D.C. 20585, (202) 586-3900. Paul Sherry, Esq., Office of General Counsel (Mail Stop GC-61), U.S. Department of Energy, 1000 Independence Avenue SW., Washington, D.C. 20585, (202) 586-2440.

SUPPLEMENTARY INFORMATION:

I. Background

This notice sets forth a proposed general statement of policy, including

procedures and interpretations, concerning implementation of the requirements of section 2306 of the Energy Policy Act of 1992 (EPAct) (42 U.S.C. 13525). The general statement of policy, when finalized, will guide implementing DOE officials in making a special eligibility determination prerequisite to a financial assistance award to a company under Titles XX through XXIII of EPAct. Those titles relate to research, development, demonstration and commercialization programs in diverse areas of energy efficiency, energy supply, and related basic research.

The Department has decided to adopt a general statement of policy and to codify that policy in the part of the Code of Federal Regulations containing the Department's financial assistance regulations. Such a codified policy statement is needed to communicate guidance on these implementation issues to Departmental officials and potential DOE program applicants. This policy statement applies only to DOE's implementation of section 2306 of EPAct; it is not intended to apply to any other agency or to the implementation of any other statutory eligibility requirement.

The eligibility restrictions addressed in this policy statement apply to a broad range of DOE programs (see list of covered programs below), many of which pre-dated enactment of EPAct. These programs are conducted by a large number of program and contracting officials located in regional and field offices as well as DOE headquarters. This policy statement provides uniform guidance for DOE officials and for applicants to the broad array of covered programs.

Section 2306 does not require the Department to conduct a rulemaking. Further, notice and comment rulemaking is not required by law for general statements of policy. However, DOE has chosen to publish the proposed general statement of policy in the **Federal Register** in order to ensure a full opportunity for public comment and input prior to finalizing the policy. Section 2306 provides for a two-part

Section 2306 provides for a two-part determination. An applicant must be found to satisfy the conditions of both parts in order to be eligible.

The first part, set out in section 2306(1), involves a finding with regard to whether an award to the applicant would be in the economic interest of the United States. 42 U.S.C. 13525(1). The statute provides some illustrative examples of the kinds of evidence that would support such a finding: Investments in the United States in research, development, and manufacturing; significant contributions to employment in the United States; and agreements, with respect to any technology arising from financial assistance provided, to promote the manufacture within the United States of products resulting from that technology and to procure parts and materials for such manufacture from competitive suppliers.

The second part of the determination, section 2306(2), involves two subparts, one of which must be satisfied. 42U.S.C. 13525(2). The first subpart is satisfied if the applicant is a "United States-owned company." The second subpart is satisfied if the applicant is found to be incorporated in the United States and the applicant's parent company is incorporated in a foreign country that: (a) Affords opportunities to United States-owned companies comparable to those afforded to any other company with regard to access to government-supported joint ventures in energy research and development; (b) affords opportunities to United Statesowned companies comparable to those afforded to any other company with regard to general investment opportunities; and (c) affords adequate and effective protection to intellectual property rights owned by United Statesowned companies.

None of the statutory terms used in section 2306 is defined by EPAct, and the legislative history sheds no light on the intended meaning of such terms. Consequently, the Department's proposed interpretations are based on the common usage of these terms, as informed by their usage in similar contexts.

The Department is of the view that the proposed general statement of policy sets forth a reasonable decisionmaking framework for the guidance of implementing officials. If any of the provisions of the policy would be unreasonable as applied, those officials would have the discretion to depart from its terms based upon particular facts and circumstances. Department officials must, in all cases, comply with the requirements of the statute.

II. Applicability of Eligibility Requirements

Section 2306's eligibility requirements apply to applicants for "financial assistance under Titles XX through XXIII of this Act." 42 U.S.C. 13525. EPAct does not define "financial assistance." Consistent with the Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. 6301–6308, and the practices of other Executive agencies, DOE currently defines financial assistance instruments to include grants