from that definition, or whether it would be more appropriate to exclude a narrower class of non-profit educational and charitable organizations. One commenter expressed the view that excluding all non-profit organizations from the definition of that term would invite efforts to circumvent the purpose of section 2306.

The Department has concluded that the definition of ''company'' should not exclude all not-for-profit organizations, but should instead exclude educational or charitable organizations.

Accordingly, § 600.501 defines ''company'' as ''any business entity other than an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. § 501(c)(3)).'' This definition is intended to include corporations, general or limited partnerships, sole proprietorships, joint ventures, and other forms of business entities. It is not intended to include governmental entities. Not-for-profit corporations and associations are included unless they are educational or other institutions qualified under section 501(c)(3) of the Internal Revenue Code.

One commenter noted that the term ''affiliates'' is not defined in the proposed rule and suggested that a definition be added. Section 600.503, in which the term is used, simply provides that investment and employment in the U.S. by affiliates may be considered in assessing whether the applicant's participation is in the economic interests of the U.S. Accordingly, the Department does not believe that a technical definition of ''affiliates'' is necessary.

Another commenter suggested a change to the definition of ''parent company'' to clarify that, in the case of indirect control, each company in a series must have a majority control of its subsidiary. Such a rigid approach could permit use of organizational structures designed to circumvent effective review under section 2306. Therefore, the definition has not been modified.

C. Economic Interest Determination

Several comments were received concerning the scope of Departmental discretion in determining whether a company's participation is in the economic interest of the United States. One commenter, asserting that DOE has substantial discretion in this area, suggested that this determination should include a comparison of the records of applicant companies in particular areas, for example, in the area of providing U.S. jobs. A second commenter asserted that economic interest assessments must not be based simply on static comparisons among applicants. This same commenter emphasized that the Department should be flexible in the factors it considers in every case and should consider all available evidence in making its economic interest determination. A third commenter agreed, taking the position that the Department's economic interest determination should not be too narrowly focused. As an example, the third commenter noted that in certain cases there could be a clear economic benefit to the United States even though some prospective awardees have no presence in the United States and could not be expected to have any in the future.

Determinations concerning the economic interest of the United States will be based on consideration of all available evidence. The statement of policy provides that any evidence that shows that an award would be in the economic interest of the United States can be considered. The Department also agrees with the position that economic interest assessments should not be based on comparisons among applicants.

Several commenters cautioned that, in applying the economic interest criteria, DOE should not impose performance requirements or other similar conditions on applicants, directly or indirectly. Some of these comments refer to U.S. Government obligations under the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures and the WTO Agreement on Trade-Related Investment Measures, which prohibit import substitution requirements and local purchasing requirements, respectively. The policy statement does not impose performance requirements or other similar conditions on applicants.

D. Section 2306(2)(B) Determination

One commenter recommended that the sole basis for DOE's finding should be the outcome of proceedings conducted by the Office of the United States Trade Representative under section 301 of the Trade Act of 1974, as amended. This commenter notes that the Congress and the Executive Branch have established a comprehensive system of identifying, evaluating and eliminating foreign trade barriers under section 301. This commenter argues that such an approach would ensure that all concerned parties have an opportunity to express views; would ensure predictable results; and would ensure that DOE's finding supports U.S. market-opening efforts. Another commenter argued that DOE should consider evidence of compliance or non-compliance with laws and international agreements affecting trade, and should not limit its analysis to the outcome of section 301 proceedings. DOE agrees that section 301 proceedings are an important factor in making the necessary finding, but consideration of relevant evidence that is not produced as a result of a section 301 proceeding also is appropriate.

One commenter urged DOE to consider whether U.S.-owned firms have non-discriminatory market access in making its determinations. The criteria contained in section 2306(2)(B) of EPACT address comparable access to research opportunities, comparable investment opportunities and adequate and effective intellectual property protections. Section 2306(2)(B) does not provide for DOE to consider whether U.S.-owned firms have access to comparable trade opportunities in the relevant foreign country.

E. Comparable Access to Research Opportunities

One commenter stated that it would defy common sense to find that a parent company incorporated in a country with no similar research program satisfies the requirements of section 2306. At the public hearing, the same commenter stated that section 2306 of EPACT requires DOE to disqualify any applicant if the applicant is headquartered in a country that has no comparable research program.

Section 2306(2)(B) directs DOE to consider whether a foreign country affords U.S. companies ''opportunities, comparable to those afforded to any other company, to participate in any joint venture similar to those authorized under this Act.'' 42 U.S.C. 13525(2)(B). This finding relates to whether there is discrimination against U.S.-owned firms relative to other firms with regard to access to any foreign-government-sponsored programs comparable to those covered under EPACT. The law does not provide for a finding that a foreign country has comparable energy research and development programs.

F. Comparable Access to Investment Opportunities

One commenter stated that DOE should not limit its review to whether U.S.-owned firms have a legal right to foreign investment opportunities under international agreements. The commenter stated that DOE should not find an affected applicant eligible to participate in a DOE covered program unless U.S. firms have actual investment opportunities in the country of the applicant's parent company that are comparable to the opportunities