UCC Financing Statement Process for For-Profit Recipients (Prime and Sub)

REGULATIONS:

UCC Financing Statements:

Per 2 CFR 910.360 (Real Property and Equipment) when a piece of equipment is purchased by a for-profit recipient or subrecipient with Federal Funds, and when the Federal share of the financial assistance agreement is more than $1,000,000, the recipient or subrecipient must:

(4) Properly record, and consent to the Department's ability to properly record if the recipient fails to do so, UCC financing statement(s) for all equipment purchased with Federal funds (Financial assistance awards made under the Small Business Innovation Research/Small Business Technology Transfer (SBIR/STTR) program are exempt from this requirement unless otherwise specified within the grant agreement); such a filing is required when the Federal share of the financial assistance agreement is more than $1,000,000, and the Contracting Officer may require it in his or her discretion when the Federal share is less than $1,000,000. These financing statement(s) must be approved in writing by the Contracting Officer prior to the recording, and they shall provide notice that the recipient's title to all equipment (not real property) purchased with Federal funds under the financial assistance agreement is conditional pursuant to the terms of this section, and that the Government retains an undivided reversionary interest in the equipment. The UCC financing statement(s) must be filed before the Contracting Officer may reimburse the recipient for the Federal share of the equipment unless otherwise provided for in the relevant financial assistance agreement. The recipient shall further make any amendments to the financing statements or additional recordings, including appropriate continuation statements, as necessary or as the Contracting Officer may direct.

Cost Share:

The non-federal cost share portion of the project (20% for research and development projects; 50% for demonstration and commercialization projects) is addressed in 2 CFR 910.360 (d): Title to and Federal interest in real property or equipment offered as cost-share. As provided in 2 CFR 200.306(h), depending upon the purpose of the Federal award, a recipient may offer the fair market value of real property or equipment that is purchased with recipient's funds or that is donated by a third party to meet a portion of any required cost sharing or matching. If a resulting award includes such property as a portion of the recipient's cost share, the recipient holds conditional title to the property and the Government has an undivided reversionary interest in the share of the property value equal to the Federal participation in the project. The property is treated as if it had been acquired in part with Federal funds, and is subject to the provisions of 2 CFR 910.360 paragraph (b) and to the provisions of 2 CFR 200.311 and 200.313. Hence, any equipment donated by the recipient or any member of the project team as “cost share” will be treated as if it were purchased with Federal funds at the cost sharing proportion specified in the award type.

Equipment:

Per 2 CFR 200.33 Equipment means tangible personal property (including information technology systems) having a useful life of more than one year and a per-unit acquisition cost which equals or exceeds the lesser of the capitalization level established by the non-Federal entity for financial statement purposes, or $5,000.

Equipment Components:

If the recipient has purchased equipment (as defined above) but the equipment in question is/are components or subcomponents of a greater whole (assembled) piece of equipment, the Contracting Officer must determine whether the assembly components should each have their own individual UCC Financing Statements, or, whether the assembled whole unit alone (made up of the component equipment) should have a single UCC Financing Statement. This determination is best made by employing the following logic: can the piece of "equipment" in question function, or be resold, as a "stand-alone" unit? [For example, in a desktop workstation set up, a printer needs a computer to "work" but it's still a functional unit in and of itself without the computer attached. However, in the workstation computer, the central processing unit (CPU) chip that is the heart of the computer is necessary for the computer to function, but cannot function by itself, and is not worth much by itself. So, in this example, the printer would be equipment that required its own UCC Financing Statement, but the CPU inside the computer (assembled components) would not. In an analogous fashion, an alternator is a required piece of equipment for a vehicle (the whole) to operate, but by itself cannot function, and is not particularly valuable. Hence, the car would be required to have a UCC Financing Statement, but the alternator would not.]

IMPLEMENTATION:

If a for-profit recipient or subrecipient wishes to purchase a piece of equipment for their project, and the per-unit dollar value of said equipment is $5,000 or more, and the Federal share of the financial assistance agreement is more than $1M, the recipient or subrecipient must file a UCC financing statement.

A UCC financing statement is essentially a lien on the piece of equipment, which states that the Federal government has an undivided reversionary interest in the equipment, and as such, the equipment cannot be sold or used as collateral for a loan (encumbered).

It is DOE's position that the for-profit recipient or subrecipient must file the UCC financing statement(s) (for the relevant state or territory in which the equipment is located) and pay the costs for such filings.

The initial UCC financing statement is filed using the UCC1. For additional pieces of equipment not specified in the award budget, TBD equipment, or equipment needed in future budget periods, the recipient can file an amendment to the original UCC1 financing statement, by submitting the UCC3 financing statement amendment.

Each UCC financing statement or amendment is to be filed with the applicable state or territorial UCC office, in which the piece of equipment will reside. Each state and territory, although employing the same UCC1 financing statement and/or UCC3 financing statement amendment, will have slightly different instructions as to where to file, and the prices that are charged for each filing. [For instance, the cost of filing a UCC1 financing statement in FL is $35 for the first page and $3 for each additional page, but in TX the cost is $5 for the first page, $15 for two pages, and a flat $30 fee for all filings over 3 pages.] In order to determine what charges apply and what offices are involved, it is recommended that the recipient perform an internet search employing the terms "**UCC Financing Statement X**", where X is the state in which the piece of equipment will be located. Additionally, some states have on-line versions of the UCC1 and UCC3 which cost less, but are character limited. Hence, it is incumbent upon the recipient to find the least cost method of submitting the required UCC financing statements and/or amendments for the particular state or territory in which the equipment will be located.

Note: All costs associated with filing UCC financing statements, UCC financing statement amendments, and UCC financing statement terminations, are allowable and allocable costs to be charged to the Federal award.

At a minimum, the recipient must have stated in their UCC financing statement in block 4. (collateral) the following sentence:

> "Title to all equipment (not real property) purchased with Federal funds under this financial assistance agreement is conditional pursuant to the terms of 2 CFR 910.360, and the Federal government retains an undivided reversionary interest in the equipment at the Federal cost-share proportion specified in the award terms and conditions."

Additionally, all equipment purchased with a per unit cost of $5,000 or more should be listed on the UCC financing statement [block 4. in UCC1 (financing statement), block 8. in UCC3 (financing statement amendment)] with a physical description, serial number, or other means of identification, as well as the unique Federal Award Identification Number (award number) in block 8. of the UCC1 or block 10. of the UCC3.

<u>PROGRAMMATIC CONSIDERATIONS:</u>

The recipient should be informed as soon as possible about the ramifications of UCC financing statements on any equipment at the end of the award (project period). At the end of the award, if the recipient is not granted "continued use" of the equipment by the CO, the recipient will have to:

1. "Buy out" DOE for its percentage of FMV (to continue using the equipment)
2. "Sell" the equipment and pay DOE for its percentage of FMV

The recipient should be informed of the implications of UCC financing statements on any debt financing as early as possible in order to avoid complications with their business plan. The technology office representative(s) should explain to potential applicants and extant recipients the mechanics of filing UCC financing statements, as well as any potential impact to the project's financing. If there is debt financing of the project (loans), the lender(s) would want to be aware of DOE's secured creditor position which the UCC financing statement "perfects", and potentially adjust any loan, rate, or collateral requirements of debt financing instruments.

If the recipient wishes to avoid filing UCC financing statements for equipment associated with the project, and additionally wishes to obviate any potential issues with the "continued use" of said equipment past the period of performance (end of the project), they may elect to purchase all equipment outright with their own funds (no Federal dollars or cost share contributions) outside of the financial assistance agreement and charge the DOE a "use fee" for said equipment for the duration of its use on the award.

If the Program Office, Contracting Officer, and Legal Counsel determine that debt financing is the only viable means for a project to proceed, DOE can subordinate its rights to the equipment in question, so that the debt financiers have a preferential creditor position. Additionally, in very rare circumstances, the DOE Contracting Officer can agree to let the Recipient's creditor encumber the equipment with prior written approval. However, neither of these options should be employed unless there is **no alternative way to salvage the project**, as the subordination of DOE property rights and/or relinquishment of a secured creditor position both fail to protect the interests of DOE and the taxpayer funds allocated to it.

REQUIREMENTS:

1. The financing statement(s) must be approved in writing by the Contracting Officer prior to being filed with the relevant state UCC office, and shall provide notice that the recipient's title to all equipment (not real property) purchased with Federal funds under the financial assistance agreement is conditional pursuant to the terms of 2 CFR 910.360, and that the Federal government retains an undivided reversionary interest in the equipment. A description of all of the equipment should be included as well (as described above).

2. The recipient must file the UCC financing statement(s) and amendments with the applicable state or territorial UCC office before the Contracting Officer may reimburse the recipient for the Federal share of the equipment, unless otherwise provided for in the relevant financial assistance agreement.

3. The for-profit recipient or subrecipient must submit a copy of the approved and filed UCC financing statement and/or amendment to the PMC. This is associated with a

check box on the Federal Assistance Reporting Checklist, which will have “A” (Within (5) calendar days after the event or as specified) selected.

So, in order to be reimbursed for purchasing a piece of equipment, the recipient must send the Contracting Officer a copy of their proposed UCC financing statement with the language specified in 1. above, receive the approval of the Contracting Officer for the UCC financing statement, and finally, submit a copy of the filed, approved, UCC financing statement to the PMC, at which point the recipient may be reimbursed for the equipment purchase.

In the case of a for-profit recipient or subrecipient, in which the project requires the purchase of extremely expensive equipment or equipment with a long lead-time, and the recipient is financially incapable of doing so, or if requiring the recipient to purchase the equipment outright, upfront, would endanger the success of the project, per 2 CFR 910.360:

> The UCC financing statement(s) must be filed before the Contracting Officer may reimburse the recipient for the Federal share of the equipment **unless otherwise provided for in the relevant financial assistance agreement**.

So, one can draft a term in the Terms and Conditions of the award, specifying front-loading of this cost, or partially reimbursing the recipient for the equipment prior to filing the UCC financing statement associated with the equipment.

PROCESS

1. Send the for-profit recipient the email (below in italics) regarding equipment purchases and UCC financing statement and UCC financing statement amendments:

This is to notify [Prime Recipient Name] that effective October 5, 2015 for-profit prime recipients and for-profit subrecipients under Cooperative Agreement [DE-EE000XXXX] with the Department of Energy are subject to 2 CFR 910.360. For-profit prime recipients and subrecipients with an award in excess of $1M in Federal funds may purchase real property or equipment with a per unit acquisition cost of $5,000 or more in whole or in part with Federal funds only with the prior written approval of the Contracting Officer or in accordance with express award terms.

For-profit subrecipients shall submit the UCC financing statements to the prime recipient, who will, in turn, provide them to DOE in the method stated below.

Pursuant to the requirements of 2 CFR 910.360 (b)(4), the non-Federal entity must properly record Uniform Commercial Code (UCC) financing statement(s) for all equipment purchased with Federal funds. These financing statement(s) must be approved in writing by the Contracting Officer prior to the recording, and they shall provide notice that the recipient's title to all equipment (not real property) purchased with Federal funds under the financial assistance *agreement is conditional pursuant to the terms of this section, and that the Government retains an undivided reversionary interest in the equipment.*

The UCC financing statement(s) must be filed before the Contracting Officer may reimburse the recipient for the Federal share of the equipment unless otherwise provided for in the relevant financial assistance agreement. For-profit prime recipients and subrecipients shall further make any amendments to the financing statements or additional recordings, including appropriate continuation statements, as necessary or as the Contracting Officer may direct.

At a minimum, the recipient must have stated in their UCC financing statement in block 4. (collateral) the following sentence:

> *"Title to all equipment (not real property) purchased with Federal funds under this financial assistance agreement is conditional pursuant to the terms of 2 CFR 910.360, and the Federal government retains an undivided reversionary interest in the equipment at the Federal cost-share proportion specified in the award terms and conditions."*

Additionally, all equipment purchased with Federal funds should be listed on the UCC financing statement [block 4. in UCC1 (financing statement), block 8. in UCC3 (financing statement amendment)] with a physical description, serial number, or other means of identification, as well as the unique Federal Award Identification Number (award number) in block 8. of the UCC1 or block 10. of the UCC3.

Per 2 CFR 910.360 (d) any equipment which is contributed by the prime recipient, sub recipient, or other member of the DOE funded project as Cost Share will be treated as if it were purchased with Federal funds at the cost sharing proportion specified by the award type.

Prior to filing the UCC financing statement with your state, please send a draft copy of the UCC financing statement to the DOE Project Officer listed in Block 15 of the Assistance Agreement form and the DOE Award Administrator listed on page 2 of the Assistance Agreement form. The DOE Contracting Officer assigned to your award will then review the UCC financing statement for sufficiency. Once you receive written Contracting Officer approval via email, you may proceed with filing the form with the appropriate agency in the state where the equipment will reside.

Please upload the final UCC financing statement that has been filed with your state to the EERE PMC website (https://www.eere-pmc.energy.gov/SubmitReports.aspx) as 'Other' and notify the DOE Project Officer and DOE Award Administrator via email that the form has been uploaded.

Once the final form that has been filed with your state has been uploaded to the EERE PMC website, a request for reimbursement may be submitted to DOE.

2. Ensure that a draft UCC1 financing statement or UCC3 financing statement amendment(s) is sent to the DOE Project Officer, Financial Assistance Specialist, and

Contracting Officer for written approval, prior to the purchase of any equipment with a per unit fair market value of $5,000 or more.

3. Instruct the for-profit recipient to file the Contracting Officer approved UCC1 financing statement or UCC3 financing statement amendment(s) with the relevant UCC office, in whichever state or territory the equipment will be located.

4. Ensure that the for-profit recipient submits a copy of their approved and filed UCC1 financing statement or UCC3 financing statement amendment(s) to the PMC for all equipment purchases in excess of $5,000 (per unit value) prior to reimbursement.

5. Ensure that the for-profit recipient maintains active UCC financing statements on all subject equipment. UCC financing statements and financing statement amendments have a five (5) year life. If the project period is longer than five years, the for-profit recipient must continue the UCC financing statements and / or financing statement amendments in order to keep the equipment lien(s) active [See Continuation, below].

6. Ensure that at the end of the project period, the for-profit recipient is provided disposition instructions, if requested, for all equipment acquired in whole or part with DOE funding, and ensure that the for-profit recipient terminates the UCC financing statement liens to allow for property disposition [See Termination, below].

7. **NOTE:** If, at the end of the project period, the Contracting Officer determines that the recipient will be allowed "continued use" of the equipment, per 2 CFR 910.360 (b)(1), the UCC financing statement liens must be "continued" for the duration of the useful service life of the equipment (a UCC 3 financing statement amendment for "continuation" must be filed every five (5) years) [See Continuation, below] or until the current fair market value of the equipment falls below $5,000 as determined and approved of by the Contracting Officer.

CONTINUATION:

UCC financing statements and financing statement amendments have a five (5) year life, and as such should be continued if the project period of performance exceeds the life of the UCC financing statement. To continue a UCC financing statement, the recipient must file a UCC financing statement amendment (UCC 3) and check box number 4. "continuation" which will extend the life of the UCC financing statement for the additional period provided by applicable law (5 years). The continuation filing references the original UCC financing statement or UCC financing statement amendment which was first filed for the equipment in question. However, should the Contracting Officer so desire it, the equipment can be specified by checking the "Restate covered collateral" box in number 8. of the UCC financing statement amendment, and including the same physical description and / or serial numbers of the equipment. Additionally, if filing a continuation UCC financing statement, the recipient should type the unique financial assistance identification number (award number) in block number 10. of the UCC financing statement amendment. Once the draft UCC financing statement amendment for continuation is completed, the recipient should follow the same process for submitting it, as was done for the initial UCC financing statement as detailed in **PROCESS** (above).

TERMINATION:

UCC financing statements are terminated in a similar manner to filing a UCC financing statement amendment for a continuation, but the recipient should check box number 2. Termination. The continuation filing references the original UCC financing statement or UCC financing statement amendment which was first filed for the equipment in question. However, should the Contracting Officer so desire it, the equipment can be specified by checking the "Restate covered collateral" box in number 8. of the UCC financing statement amendment, and including the same physical description and / or serial numbers of the equipment. Additionally, if filing a termination, the recipient should type the unique financial assistance identification number (award number) in block number 10. of the UCC financing statement amendment. Once the draft UCC financing statement amendment for termination is completed, the recipient should follow the same process for submitting it, as was done for the initial UCC financing statement as detailed in **PROCESS** (above).

DISPOSITION:

When original or replacement equipment acquired under a Federal award is no longer needed for the original project or program or for other activities currently or previously supported by a Federal awarding agency, except as otherwise provided in Federal statutes, regulations, or Federal awarding agency disposition instructions, the non-Federal entity must request disposition instructions from the Federal awarding agency if required by the terms and conditions of the Federal award in accordance with 2 CFR 910.360. Items of equipment with a current per unit fair market value of $5,000 or less may be retained, sold or otherwise disposed of with no further obligation to the Federal awarding agency.