

User's Guide to DOE's Property Interest in DOE Financial Assistance Awards

This document is a Q&A reference guide to highlight the most commonly asked questions related to DOE's interest in real property and equipment ("Award Property"), in DOE financial assistance awards. This non-binding document aims to provide high-level clarity for the public, including recipients, subrecipients, and their legal representatives and lenders on DOE's Award Property interest, especially for large-scale demonstration and deployment awards. This document is a summary of DOE's interest in Award Property. For a full description of DOE's interest, the reader should consult the applicable regulations and award terms.

1. What are the regulatory provisions that implement DOE's interest in real property and equipment acquired under an award ("Award Property")?

DOE's interest in Award Property (including the amount) is implemented through the federal financial assistance regulations, primarily 2 CFR § 200.1, 2 CFR §§ 200.310-16 and DOE specific regulation 2 CFR § 910.360 (applicable to for-profits only). The [2 CFR Part 200](#) and [2 CFR Part 910](#) regulations also cover the management and disposition of Award Property.

2. What does DOE's interest include?

Under DOE financial assistance awards (*i.e.*, grants and cooperative agreements), in general, DOE obtains an 'undivided reversionary interest' in Award Property equal to DOE's percentage of cost share in the award. The recipient or subrecipient, as appropriate, would hold conditional title to the Award Property subject to the requirements set forth in the federal regulations and the award. DOE's interest includes both Award Property directly funded by DOE's funding and Award Property funded with non-federal cost share (either in cash or in-kind) by a recipient or subrecipient. For example, if DOE's cost share in the award is 50%, DOE would hold a 50% undivided reversionary interest in the Award Property.

3. When does DOE's interest take effect?

Generally, DOE's interest in the Award Property takes effect when federal cost share dollars are used to purchase Award Property (e.g., a down payment for long lead equipment) or when the Award Property is purchased using non-federal cost share or contributed as non-federal cost share by a recipient or subrecipient (e.g., when the Award Property is formally identified as recipient or subrecipient non-federal cost share, typically through an invoice to DOE).

4. What rights does DOE's undivided reversionary interest give it in the Award Property and when can DOE assert these rights?

If the recipient or subrecipient fails to comply with the terms and conditions of the award (including the restrictions on the use and encumbrance of the Award Property described below),

DOE may take various actions set forth in the award and the applicable financial assistance regulations, such as suspension or termination of the award, imposition of special conditions on the award, etc.

One of these actions is the issuance of instructions to the recipient or subrecipient for the disposition of the Award Property in accordance with the financial assistance regulations. In addition, if the Award Property is no longer needed for the originally authorized purpose, the recipient or subrecipient must request disposition instructions from DOE. If disposition instructions are issued, the recipient or subrecipient is required to dispose of the Award Property consistent with those disposition instructions.

To facilitate third party financing of the Award Property, DOE will agree that while the award is in effect and DOE retains its reversionary interest in the Award Property, DOE will not assert its rights in the Award Property as long as the Award Property (1) is being used for the authorized purpose and (2) is not encumbered without DOE permission. DOE may enter into an agreement with financing provider(s), under which DOE may assert its rights consistent with terms of any such agreements.

5. How does DOE's interest in the Award Property end?

DOE's interest in the Award Property ends when the Award Property is either (i) disposed of in accordance with the financial assistance regulations, as described in the next paragraph, (ii) vested in the recipient or subrecipient or a successor in interest in accordance with applicable statutes noted in the second succeeding paragraph below and the terms of the award, or (iii) depreciated in value below a certain level specified in the financial assistance regulations.

In terms of disposition, the financial assistance regulations generally provide that when Award Property with a value greater than the amount specified in the regulations is disposed of, DOE is entitled to receive from the proceeds of such disposition an amount equal to DOE's cost share percentage in the award multiplied by the sales proceeds or fair market value of the property, as applicable. Property disposition may occur at closeout of the award, but it can also occur earlier if the property being disposed of is no longer needed for the originally authorized purpose or if the recipient or subrecipient fails to comply with the terms of the award, subject to DOE's agreement to limit the exercise of its rights in the Award Property while the award is in effect as described in question 4 above.

In terms of vesting, for certain awards DOE has authorization to vest unconditional title to Award Property in a recipient or subrecipient without compensation to DOE, including pursuant to (i) Section 309 of the Energy and Water Development and Related Agencies Act of 2023 (42 U.S.C. § 7274f-1), which authorizes DOE to vest unconditional title at the conclusion of the award period for energy development, demonstration and deployment projects funded under DOE appropriations that receive an initial award in fiscal year 2022 or later, (ii) Section 40322 of the Infrastructure Investment and Jobs Act ("IIJA") (42 U.S.C. § 18752) which authorizes DOE to vest unconditional title arising from advanced nuclear reactor awards, and (iii) 42 U.S.C. § 16291a, of the Consolidated Appropriations Act, 2014, which authorizes DOE to vest unconditional title for all programs funded under Fossil Energy appropriations. The requirements for implementing such vesting are generally set forth in the award terms.

6. What happens if DOE vests unconditional title prior to the end of the period of performance?

After DOE vests unconditional title to the Award Property in the recipient, subrecipient or a successor in interest without compensation to DOE, such entity may continue the award until the end of the scheduled period of performance or, in certain circumstances, may choose to end the award early. To ensure certain commitments remain operative for a period of time after an early termination of an award, an agreement between such entity and DOE may remain or be put in place to ensure continuing compliance, for an agreed period of time, with data reporting, community benefits commitments, intellectual property rights, continuation of the authorized use, and other such mutually negotiated obligations.

If DOE is aware that the senior financing providers have an interest in the Award Property and entered into an agreement with the senior financing providers regarding the Award Property, DOE will provide notice to the senior financing providers prior to vesting title if that is agreed to in the agreement between DOE and the financing provider.

7. How will DOE accommodate third party financing under financial assistance awards?

DOE will cooperate with the recipient and/or subrecipient and financing providers to establish arrangements, including a direct agreement between DOE and the financing providers (Government-Creditor Agreement), to provide reasonable clarity to the financing providers on the relationship between DOE's interest and the financing parties' interest in the Award Property, including with respect to the exercise of remedies. In certain award documentation, this agreement may be referred to as a "consent agreement" or another name. In this agreement DOE will, among other things, consent to a pari passu position with the senior financing providers with respect to the application of proceeds of any disposition of the Award Property, such that if DOE is entitled to a portion of such proceeds, such proceeds will be split ratably as follows: (a) DOE will receive an amount equal to DOE's cost share percentage in the award multiplied by the amount of such disposition proceeds and (b) the recipient or subrecipient (or the senior financing providers as secured lenders) will receive an amount equal to the recipient's or subrecipient's cost share percentage in the award multiplied by the amount of such disposition proceeds. If it is a for-profit recipient or, in certain cases, a "non-Federal entity" as defined in 2 CFR Part 200, and the amount of proceeds exceeds the amount of secured debt under the loan documents, then DOE will receive the excess until DOE receives its the fair market value multiplied by the DOE's cost share percentage.

8. What is in the Government-Creditor Agreement (GCA) ("consent agreement") between DOE and the financing providers?

Following a public comment period, the GCA template was released incorporating market feedback. The initial template GCA is primarily targeted at non-recourse or limited-recourse project financings with a single lender. DOE recognizes that there may be other financing structures and that technical adjustments will need to be made to accommodate these different forms of financings. Following the finalization of this document after the public comment, DOE

will develop subsequent versions of the GCA that account for other potential financing structures, such as a syndicate of lenders with a collateral agent, new or existing corporate-level debt, etc. Overall, the GCA, among other things, provides clarification on lenders rights and remedies with respect to DOE's interest in the property, and expectations and other reasonable protections in a DOE-funded project.

9. Will a UCC statement need to be filed?

Yes, although DOE's interest is not technically a security interest, prior to any reimbursement under the award or the Award Property being purchased or contributed as cost share by the recipient or subrecipient, a for-profit recipient or subrecipient must file a UCC financing statement against Award Property that constitutes equipment. Filing is required when the Federal share of the award is greater than \$1 million. DOE also intends to require UCC financing statements for any Award Property that it permits to be encumbered, regardless of recipient or subrecipient entity type.

The financing statement is intended to provide public notice 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 without the prior written approval of DOE. A for-profit recipient or subrecipient can either file a UCC-1 or UCC-3, as applicable, pursuant to 2 CFR § 910.360 and the terms of the award. DOE may require other types of recipients or subrecipients (e.g., not-for-profit entities, state or local agencies, etc.), to record appropriate public notice filings to indicate that real property or equipment has been acquired or improved with a federal award and that use and disposition conditions apply to the property.

10. What if the recipient or subrecipient has an existing debt facility that has all current and future assets pledged as collateral?

The recipient or subrecipient can, in conjunction with its lenders, review the applicable and relevant financing documents to determine if any action is required to account for DOE's undivided reversionary interest in the Award Property. For example, the recipient can determine whether it needs to obtain consent of or provide notice to its lender(s) under any negative pledge clauses, notice provisions, or other similar restrictions or requirements to account for DOE's unique interest.