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Subject: Request for Information re: U.S Department of Energy Audit Guidance: For-Profit Recipients for Fiscal Year 2011

Ms. Krizanovic:

3M Company appreciates the opportunity to provide comments on the proposed U.S Department of Energy Audit Guidance applicable to For-Profit Recipients for Fiscal Year 2011, which was published in the Federal Register for comments on December 21, 2011 (the "DOE Draft Fiscal Year 2011 Audit Guidance").

#### Introduction

3M Company (3M<sup>®</sup>) is a commercial company, headquartered in St. Paul Minnesota, with total annual sales in excess of \$27 billion. 3M has over 80,000 employees, has 45 different technology platforms, spends over \$1.4 billion per year on internal research, and sells over 55,000 different commercial products.

3M performs a small number of R&D agreements with several different U.S. Government agencies. 3M is currently performing R&D projects under nine different Department of Energy ("DOE") grants and cooperative agreements. Examples of these R&D projects include development of fuel cells, battery components, and various types of renewable energy sources.

3M recently received proposed modifications to several of these DOE grants, cooperative agreements, and subawards, the purposes of which were to incorporate the DOE's current guidance for conducting independent audits of for-profit recipients for fiscal year 2010 as a reportable action, and to make the independent auditor's report available to the Contracting Officer in accordance with 10 CFR 600.316.

3M reviewed DOE's current guidance for conducting independent audits of for-profit recipients for fiscal year 2010, including Parts I through IV, and the numerous DOE Policy Flashes that supplement and further explain the current audit guidance (hereafter collectively called the "DOE Fiscal Year 2010 Audit Guidance"). 3M determined that the DOE Fiscal Year 2010 Audit Guidance imposes significant new and costly requirements on for-profit recipients and subrecipients of DOE awards. These new and costly requirements

are not contained in 10 CFR 600.316, "Audits," which regulation is incorporated by reference and made a part of 3M's existing DOE awards and subawards.

Legally, DOE financial assistance agreements are contracts. The parties agree to a set of terms and conditions that are applicable to the contract. New requirements cannot be added to an existing contract by one party without the agreement of the other party. DOE financial assistance agreements are no different in this regard than any other type of contract.

Due to the fact that 3M's acceptance of the DOE Fiscal Year 2010 Guidance into 3M's existing DOE awards and subawards would impose significant new and costly requirements on those awards and subawards, 3M has not agreed to accept the proposed modifications to 3M's existing DOE awards and subawards. Acceptance of the requirements of the DOE Fiscal Year 2010 Audit Guidance in existing DOE awards and subawards would significantly reduce the funding available to perform the R&D projects under such awards and subawards, and would put completion of their originally planned R&D projects at risk.

In general, the DOE Draft Fiscal Year 2011 Guidance is problematic for the same reasons as the DOE Fiscal Year 2010 Guidance.

#### Comments regarding the DOE Draft Fiscal Year 2011 Audit Guidance

**1. Many, if not most, of the for-profit recipients of existing DOE awards are already complying with all of the requirements for having annual independent audits made of their existing DOE awards. These requirements are contained in 10 CFR 600.316 in the for-profit recipients' existing DOE awards. 10 CFR 600.316 generally requires the for-profit recipient's Federal cognizant agency (e.g., DCAA) to conduct the audit.**

10 CFR 600.316, "Audits," which is included in existing DOE awards made to for-profit recipients, reads in pertinent part as follows:

##### 600.316 - Audits.

(a) Any recipient that expends \$500,000 or more in a year under Federal awards must have an audit made for that year by an independent auditor, in accordance with paragraph (b) of this section. **If a recipient is currently performing under a Federal award that requires an audit by its Federal cognizant agency, that auditor must perform the independent audit.** The audit generally should be made a part of the regularly scheduled, annual audit of the recipient's financial statements.

(b) The auditor must determine and report on whether:

(1) The recipient has an internal control structure that provides reasonable assurance that it is managing Federal awards in compliance with Federal laws and regulations and the terms and conditions of the awards.

(2) Based on a sampling of Federal award expenditures, the recipient has complied with laws, regulations, and award terms that may have a direct and material effect on Federal awards.

The Defense Contract Audit Agency (DCAA) is 3M's Federal cognizant agency referred to in paragraph (a) above. Each year DCAA performs audits under 3M's Federal awards that require an audit. Therefore, 10 CFR 600.316(a) requires that DCAA conduct the annual independent audits of 3M's DOE awards and subawards.

Each year, before DCAA begins its annual incurred cost audit of 3M's Federal awards, it checks with DOE to determine if they want their financial assistance agreements to be included in the audit. The answer is always yes. After DCAA conducts the annual incurred cost audit, it copies the applicable DOE Contracting Officers on the results of the audit.

Therefore, the requirement in 3M's existing DOE awards in 10 CFR 600.316 for an annual independent audit to be conducted by DCAA of 3M's DOE awards is being fully met. This is likely the case for many if not most of the other for-profit recipients of existing DOE awards

## **2. The DOE Draft Fiscal Year 2011 Audit Guidance cannot be made to unilaterally apply to existing DOE awards to for-profit recipients.**

The requirements in the DOE Fiscal Year 2011 Audit Guidance are clearly new and not contained in 10 CFR 600.316 or elsewhere in existing DOE awards to for-profit recipients, as shown by the following:

In March 2011, the DOE Inspector General issued a report entitled "Audit Report Solar Technology Pathway Partnerships Cooperative Agreements (OAS-M-11-02)." The report noted that 10 CFR 600.316 contains insufficient guidance for independent audits of for-profit recipients

*Page 3:*

*"Problems with financial monitoring were caused by insufficient Department guidance concerning audits of for-profit organizations receiving financial assistance. While there is existing guidance on audit requirements for Federal assistance to states, local governments and non-profit entities, **such guidance does not exist for for-profit entities.** For example, the Department's Guide to Financial Assistance (the Guide) describes in detail the Department's processes for tracking, collecting, reviewing and following up on audits of states, local governments, and non-profit entities; however, the Guide is silent on audits of for-profit organizations required under 10 CFR 600.316. Additionally, although the cooperative agreements referenced the Federal regulations, they did not specifically explain the audit requirement, provide guidance about how the audits are to be conducted, or include the audits in the checklist of required documentation to be submitted by recipients. Program officials acknowledged that they had not required recipients to conduct internal control and compliance audits, **citing the lack of guidance.**"*

*Page 3:*

*"Program officials also stated their belief that DCAA audits of costs incurred provided similar benefits to the annual internal control and compliance audit requirement and met their financial oversight needs. However, the main focus of DCAA cost incurred audits is not on determining if*

*a recipient has an internal control structure that provides reasonable assurance that it has managed awards in compliance with Federal regulations and the terms and conditions of the awards, as required by 10 CFR 600.316. Instead, these audits focus primarily on determining whether expenditures are reasonable, allowable, not specifically prohibited, and thus, allowable*

Page 10:

***"The Reporting Requirements Checklist (DOE F 4600.2) included in all financial assistance awards, including cooperative agreements, defines the recipients' financial reporting requirements."***

*"Consistent with the Department's Policy Flash 2011-46, the Department is in the process of updating the Reporting Requirements Checklist (DOE F 4600.2) for current awards to for-profit recipients, to include audit reporting consistent with 10 CFR 600.316."*

Page 11:

*"The DOE Guide to Financial Assistance is currently being updated to provide directions to DOE's financial assistance personnel on the audit requirements and use of the **new audit guidance**."*

The above quoted sections clearly show that the requirements in the DOE Fiscal Year 2010 Audit Guidance are new, not included in 10 CFR 600.316 or in existing DOE awards to for-profit recipients. Therefore, the DOE Fiscal Year 2010 Audit Guidance is not applicable to existing DOE awards to for-profit recipients, unless the recipient has agreed to accept the DOE Fiscal Year 2010 Guidance requirements in a modification made to its existing DOE award.

The DOE Draft Fiscal Year 2011 Audit Guidance is a revised version of the DOE Fiscal Year 2010 Audit Guidance. Therefore, the requirements in the DOE Draft Fiscal Year 2011 Audit Guidance are also new and not contained in 10 CFR 600.316.

As previously mentioned, legally DOE financial assistance agreements are contracts. The parties agree to a set of terms and conditions that are applicable to the contract. New requirements cannot be added to an existing contract by one party without the agreement of the other party. DOE financial assistance agreements are no different in this regard than any other type of contract.

The DOE Draft Fiscal Year 2011 Audit Guidance reads in part as follows:

*"The requirements and guidance set forth in this Audit Program are effective for all for-profit recipients' 2011 fiscal years (i.e., for any fiscal year ending in 2011) and thereafter."*

It would be inequitable for DOE to impose these significant new and costly audit requirements on existing DOE awards, beginning in fiscal year 2011. The estimated costs to perform existing DOE awards were prepared based upon the requirements in the DOE solicitations that resulted in such awards. The requirements contained in the DOE Draft Fiscal Year 2011 Audit Guidance were obviously not included in these solicitations.

Therefore, recipients of DOE awards included no factor in their estimated costs to perform their existing DOE awards to pay to have these annual independent audits performed.

If DOE imposed these new and costly independent requirements on existing DOE awards to for-profit recipients, this would result in a significant reduction in the funding available for the recipients to perform the R&D projects under their DOE awards, which would defeat the basic purpose of the awards. Completion of many of the R&D projects under existing DOE awards would be placed at risk.

**3. The requirement for for-profit recipients to have annual audits conducted by public accounting firms will result in significant additional costs to perform DOE awards and is of questionable benefit.**

3M obtained bids from several different public auditing firms to perform annual audits in accordance with DOE's Fiscal Year 2010 Audit Guidance. The lowest bid 3M received from a public auditing firm to perform an independent audit of 3M's then existing nine DOE awards and subawards over a three year period of performance was \$365,000 (including allocable indirect costs). This would be a huge additional cost of questionable benefit.

DOE should conduct a cost/benefit and risk analysis to determine if it is worth the huge additional cost to impose these significant new and costly independent audit requirements on existing and new DOE awards. These independent audit requirements appear to be unique to DOE financial assistance agreements. 3M is unaware of similar independent audit requirements being made applicable to financial assistance agreements made by other federal agencies to for-profit recipients. 3M is also unaware of similar independent audit requirements being made applicable to procurement contracts awarded by any agency, including DOE.

If DOE's for-profit recipients are required to accept the DOE Draft Fiscal Year 2011 Audit Guidance in their existing DOE awards, the recipients would be required to cost share the enormous additional costs of these annual audits under their existing DOE awards. The for-profit recipients of existing DOE awards would also be forced to incur significant additional administrative costs to implement and comply with the new requirements. The additional costs would be shared with DOE in accordance with the cost sharing formulas in such DOE awards. The DOE recipients would, however, likely only recover a small proportion of the additional administrative costs

This would result in significant reductions in the funding available to perform the R&D projects under the DOE awards. DOE and the recipients of existing DOE awards would, therefore, need to revise by mutual agreement the statements of work in the awards to reflect the significant reductions in funding available to perform the R&D projects. In

many cases, completion of the originally planned R&D project would be placed at risk. This is a lose-lose proposition for both DOE and the recipients of existing DOE awards.

If, after performing a cost/benefit and risk analysis, DOE decides to still go forward with imposing these new independent audit requirements on for-profit recipients, they should be made to apply only to new DOE awards issued after the effective date of the new requirements published in the Federal Register.

#### **4. The issuance of the DOE Draft Fiscal Year 2011 Audit Guidance violated Executive Orders 12866 and 13563.**

The DOE Fiscal Year 2010 Audit Guidance, in DOE's own words in the above DOE Inspector General Audi Report, "supplements" the requirements in 10 CFR 600.316. Both the DOE Fiscal Year 2010 Audit Guidance and the similar DOE Draft Fiscal Year 2011 Audit Guidance make significant new and costly changes to the requirements of 10 CFR 600.316.

The DOE Draft Fiscal Year 2011 Audit Guidance is, therefore, a "significant regulatory action" within the meaning of Section 3(f)(3) of Executive Order 12866 because it would "materially alter the budgetary impact of entitlements, grants, users fees, or loan programs, or the rights and obligations of recipients thereof."

Therefore, DOE's Draft Fiscal Year 2011 Audit Guidance should have first been issued for public comments as proposed changes to the regulation at 10 CFR 600.316 and not as separate "guidance" for conducting independent audits of for-profit recipients under 10 CFR 600.316. This is because DOE's New Audit Guidance is subject to Executive Order 12866, "Regulatory Planning and Review," and Executive Order 13563, "Improving Regulation and Regulatory Review," both of which require that all new proposed significant regulations, including changes to existing regulations, be made subject to (i) a cost-benefit analysis, and (ii) public review and comment before they can be issued in final form.

Changing regulations by "guidance" runs contrary to current Administration policy and bypasses the application of required processes DOE and other federal agencies must follow before adopting new regulations (including publication for notice and comment, adherence to the direction included in Executive Orders 12866 and 13563, etc.) There is no doubt that effectively overriding the existing 10 CFR 600.316 regulation would constitute a significant regulatory action within the meaning of Executive Orders 12866 and 13563.

Since the requirements in Executive Orders 12866 and 13563 have not been met, the DOE Draft Fiscal Year 2011 Audit Guidance should be withdrawn. Thereafter, if DOE decides to reissue the DOE Draft Fiscal Year 2011 Audit Guidance, it needs to do so as a proposed

change to the 10 CFR 600.316 regulation in accordance with the requirements in Executive Orders 12866 and 13563.

#### **5. The Issuance of the DOE Draft Fiscal Year 2011 Audit Guidance violated the Paperwork Reduction Act.**

The DOE Draft Fiscal Year 2011 Audit Guidance is also subject to the Paperwork Reduction Act (44 USC 3501-3521) (the “PRA”) because it would impose new reporting and record keeping requirements that are subject to the PRA. Before requiring or requesting information from the public, the PRA requires Federal agencies (a) to seek public comment on proposed collections, and (b) to submit proposed collections for review and approval by the Office of Management and Budget (OMB). OMB’s Office of Information and Regulatory Affairs (OIRA) reviews agency information collection requests for approval or disapproval. When OMB approves an information collection, it assigns an OMB control number that the agency must display on the information collection.

For purposes of the PRA, OMB regulations define “information” as “any statement or estimate of fact or opinion, regardless of form or format, whether in numerical, graphic, or narrative form, and whether oral or maintained on paper, electronic or other media.” 5 CFR 1320.3(h). This includes requests for information to be sent to the Government, such as forms (e.g., the IRS 1040) and written reports (e.g., grantee performance reports).

The DOE Draft Fiscal Year 2011 Audit Guidance, which clearly imposes a significant new information collection burden on the general public, would be implemented by modifying DOE’s standard form titled “Federal Assistance Reporting Checklist and Instructions for R&D Projects, DOE F 4600.2. This new form would require the recipient to submit annual reports of audited financial statements and compliance audits performed by public accounting firms in accordance with the DOE Draft Fiscal Year 2011 Audit Guidance.

DOE must comply with the requirements of the PRA before the DOE Draft Fiscal Year 2011 Audit Guidance can be validly issued. Therefore, the DOE Draft Fiscal Year 2011 Audit Guidance should be withdrawn for this additional reason. Thereafter, if DOE decides to reissue the DOE Draft Fiscal Year 2011 Audit Guidance, the requirements of the Paperwork Reduction Act must be followed.

#### General Comments

**1. The DOE Draft Fiscal Year 2011 Audit Guidance contains several requirements to be audited against that aren’t contained in existing DOE awards to for-profit recipients. Three examples are provided in subparagraphs (a), (b), and (c) below.**

(a) Pages 29 -31 of Section II, General Compliance Supplement:

**Compliance Requirements**

*"A pass-through entity is responsible for:*

*" - Award Identification – At the time of the award, identifying to the subrecipient the Federal award information (i.e., CFDA title and number, award name and number, if the award is research and development, and name of Federal awarding agency) and applicable compliance requirements.*

*"- During-the-Award Monitoring – Monitoring the subrecipient’s use of Federal awards through reporting, site visits, regular contact, or other means to provide reasonable assurance that the subrecipient administers Federal awards in compliance with laws, regulations, and the provisions of contracts or grant agreements and that performance goals are achieved.*

*"- Subrecipient Audits – (1) Ensuring the subrecipient takes timely and appropriate corrective action on all audit findings. In cases of continued inability or unwillingness of a subrecipient to have the required audits, the pass-through entity should take appropriate action using sanctions.*

*"- Pass-Through Entity Impact – Evaluating the impact of subrecipient activities on the pass-through entity’s ability to comply with applicable Federal regulations.*

*"During-the-Award Monitoring*

*"Monitoring activities normally occur throughout the year and may take various forms, such as:*

*- Reporting – Reviewing financial and performance reports submitted by the subrecipient.*

*- Site Visits – Performing site visits at the subrecipient to review financial and programmatic records and observe operations.*

*- Regular Contact – Regular contacts with subrecipients and appropriate inquiries concerning program activities."*

10 CFR 600.331, "Requirements," which is included in the terms and conditions of 3M’s existing DOE awards, does not include the above requirements for (i) award identification to the subrecipient, or (ii) monitoring subrecipients.

Only those DOE awards that are funded with Recovery Act funds contain special Recovery Act clauses that include the above requirement for award identification to subrecipients.

In addition, 10 CFR 301(b)(2), "Subawards," which is included in the terms and conditions of DOE awards to for-profit recipients, does not include any requirements for award identification to subrecipients or monitoring subrecipients.

(b) Pages 29 -31 of Section II, General Compliance Supplement, Section C, Cash Management, includes the following:

(1) **CASH MANAGEMENT**

**"Compliance Requirements (Page 6 of Section II General Compliance Supplement)**

When entities are funded on a reimbursement basis, program costs must be paid for by entity funds before reimbursement is requested from DOE. "

If the section quoted above is intended to mean that the recipient cannot bill for allowable indirect costs incurred until they are actual paid, it is inconsistent with paragraph b in the

Special Provision titled “Payment Procedures” included in DOE financial assistance agreements awarded to for-profit recipients, which reads as follows:

*“b. Requesting Reimbursement. Requests for reimbursements must be made through the ASAP system. Your requests for reimbursement should coincide with your normal billing pattern, but not more frequently than every two weeks. Each request must be limited to the amount of disbursements made for the Federal share of direct project costs and the proportionate share of allowable indirect costs incurred during that billing period.”*

If the intent of the above audit requirement is only to confirm the recipient has been billing DOE for its direct costs after it has paid them out of recipient funds, plus the proportionate share of allowable indirect costs incurred during the billing period, the above audit requirement needs to be clarified to be consistent with paragraph b of the Special Provision titled “Payment Procedures.”

(c) Page 9 of Section II, “General Compliance Supplement,” Section D, “Equipment and Real Property Management,” includes the following:

“Suggested Audit Procedures – Compliance

“1. *Depreciation of Equipment and Real Property*

*a. Verify that the appropriate amount of depreciation cost is charged to DOE awards in accordance with Regulation 48 CFR 9904.409.”*

The requirement to comply with 48 CFR 9904.409 applies only to procurement contracts that are subject to Cost Accounting Standards, which don’t apply to financial assistance agreements. Many if not most of the for-profit recipients of DOE financial assistance agreements do not have any CAS-covered procurement contracts. Therefore, the above audit item should be removed or modified to apply only to DOE for-profit recipients that also hold CAS- covered contracts.

**3. The DOE Draft Fiscal Year 2011 Audit Guidance contains several requirements that are inconsistent with 10 CFR 600.300. The following are examples:**

(a) 10 CFR 600.316, “Audits,” reads in pertinent part as follows:

*(a) Any recipient that expends \$500,000 or more in a year under Federal awards must have an audit made for that year by an independent auditor, in accordance with paragraph (b) of this section. If a recipient is currently performing under a Federal award that requires an audit by its*

**Federal cognizant agency, that auditor must perform the independent audit.** *The audit generally should be made a part of the regularly scheduled, annual audit of the recipient's financial statements.*

*(b) The auditor must determine and report on whether:*

*(1) The recipient has an internal control structure that provides reasonable assurance that it is managing Federal awards in compliance with Federal laws and regulations and the terms and conditions of the awards.*

*(2) Based on a sampling of Federal award expenditures, the recipient has complied with laws, regulations, and award terms that may have a direct and material effect on Federal awards.*

*(d) (3) If DOE is not the Federal agency with the predominate fiscal interest in the recipient, coordinate with the agency that has the predominate federal interest.*

As highlighted above, 10 CFR 600.316 provides that when a for-profit recipient of a DOE award is currently performing under a Federal award that requires an audit to be performed by its Federal cognizant agency, the recipient of the DOE award is required to have an independent audit performed annually by its Federal cognizant agency. However, DOE's Draft Fiscal Year 2011 Audit Guidance includes no reference to this requirement. Despite what 10 CFR 600.316 says, the DOE Draft Fiscal Year 2011 Audit Guidance would require that an annual independent audit be performed by a public accounting firm (instead of by its Federal cognizant agency) using the new DOE Draft Fiscal Year 2011 Audit Guidance. Therefore, 10 CFR 600.316 and the DOE Draft Fiscal Year 2011 Audit Guidance conflict on this point.

The DOE Draft Fiscal Year 2011 Audit Guidance is silent in addressing the second sentence of Regulation 10 CFR 600.316 (a) which requires, "If a recipient is currently performing under a Federal award that requires an audit by its Federal cognizant agency, that auditor must perform the independent audit." The DOE Draft Fiscal Year 2011 Audit Guidance's required due date for the annual independent audit report, and the lack of communication between Department of Energy (DOE) and Federal cognizant agencies (specifically the Defense Contract Audit Agency (DCAA)) makes compliance with both 10 CFR 600.316 (a) and the DOE Draft Fiscal Year 2011 Audit Guidance virtually impossible.

The DOE Draft Fiscal Year 2011 Audit Guidance due dates are impractical to meet if audits of allowable costs/cost principles must be performed by DCAA. For example, 3M has cost reimbursement procurement contracts which contain FAR 52.216-7, "Allowable Cost and Payment." This FAR clause requires an annual final indirect cost rates submission, which triggers an annual incurred cost audit by DCAA. The FAR clause requires the submission of an adequate final indirect cost rate proposal within six months of fiscal year end. DCAA has a back log of incurred cost audits and it normally takes several years before the audit is performed. For example, for 3M the last fiscal year audited by

DCAA is 2007. The DOE Draft Fiscal Year 2011 Audit Guidance requires the independent audit report to be submitted within six months of fiscal year end. DOE recipients that must use their Federal cognizant agency cannot comply with the due date in the DOE Draft Fiscal Year 2011 Audit Guidance.

Communication must occur between DOE and the Federal cognizant agency if the DOE Draft Fiscal Year 2011 Audit Guidance is to be incorporated into other Federal cognizant audit agencies' audit programs. DCAA incurred cost audit procedures, DCAA Contract Audit Manual Chapter 6, are comprehensive and include most provisions of the DOE Draft Fiscal Year 2011 Audit Guidance. However, based on risk assessment, DCAA may elect not to perform all audit steps for a given DOE for-profit recipient in a given fiscal year.

If it is mandatory that all of steps in the DOE Draft Fiscal Year 2011 Audit Guidance must be performed on DOE awards to for-profit recipients, this requirement must be communicated by DOE to DCAA. The DOE recipient cannot dictate DCAA's audit, only DOE can. Based on 3M's earlier discussions with DCAA, they were unaware of DOE's DOE Fiscal Year 2010 Audit Guidance, which makes it unlikely for DOE recipients who must use their Federal cognizant agency to comply with the DOE Draft Fiscal Year 2011 Audit Guidance.

The purpose of the 10 CFR 600.316 (a) requirement that the DOE recipient's Federal cognizant agency must perform the independent audit is mostly likely to avoid duplication of effort (cost) and to obtain quality audits. For example, 3M has cost reimbursement awards from four different Federal Government agencies. It would be highly ineffective and costly, both from the DOE recipients' and Government's standpoint, to have four different groups perform four different audits of basically the same data.

3M's DCAA audit group has the knowledge, training and experience to perform Government cost reimbursement agreement compliance audits. Most certified public accountants do not currently have that same expertise. Therefore, the DOE Draft Fiscal Year 2011 Audit Guidance must address the requirements, timing and coordination of audits when the audits must be performed by the DOE recipient's Federal cognizant agency.

**(b) Inconsistency between the \$500,000 trigger threshold in 10 CFR 600.316 and the \$500,000 trigger threshold on pages 4 and 5 of Section I, General Audit Program.**

The \$500,000 threshold in 10 CFR 600.316, which triggers the requirement for an independent audit, is applicable under 10 CFR 600.316 when the recipient expends a total of \$500,000 or more in a year under all of its awards and subawards made by any Federal agency. In contrast, the \$500,000 threshold in the DOE Draft Fiscal Year 2011 Audit Guidance only applies if the recipient expends a total of \$500,000 or more in a year under

DOE awards. Expenditures under DOE subawards and awards and subawards made by other federal agencies don't count towards meeting the \$500,000 threshold.

The same audit requirements in 10 CFR 600.316 for for-profit recipients are found in similar financial assistance regulations of other federal agencies applicable to for-profit recipients. Why does DOE believe it needs to add, for DOE awards to for-profit recipients, the more stringent audit requirements in the DOE Draft Fiscal Year 2011 Audit Guidance? 3M is unaware of any other federal agency that makes more stringent audit requirements applicable to for-profit recipients than those contained in 10 CFR 600.316.

(c) On pages 5 – 7 of Section II, “General Compliance Supplement,” Section B, “Allowable Costs/Cost Principles,” appears to require the public accounting firm to duplicate the efforts of the cognizant Federal agency auditor (e.g., DCAA) to audit allowable costs/cost principles when the recipient is currently performing under a Federal award that requires an audit by its cognizant Federal agency (10 CFR 600.316).

The same is true for Section E, Matching, Level of Effort, Earmarking, on pages 11-14.

(d) On page 17 of Section II, General Compliance Supplement, Section G, Procurement and Suspension and Debarment, reads in part as follows:

“Non-Federal entities are prohibited from contracting with or making subawards under covered transactions to parties that are suspended or debarred or whose principals are suspended or debarred. “Covered transactions” include those procurement contracts for goods and services awarded under a nonprocurement transaction (e.g., grant or cooperative agreement) that are expected to equal or exceed \$25,000 or meet certain other specified criteria. 2 CFR Section 180.220 lists the specified criteria.”

The \$25,000 threshold specified above appears to conflict with the simplified acquisition threshold (\$150,000) specified in Section 7, Debarment and Suspension, in Appendix B to Subpart D of Part 600—Contract Provisions, which applies to for-profit recipients and reads as follows:

“7. *Debarment and Suspension (E.O.s 12549 and 12689—* Contract awards that exceed the simplified acquisition threshold and certain other contract awards must not be made to parties listed on nonprocurement portion of the General Services Administration's Lists of Parties Excluded from Federal Procurement and Nonprocurement Programs in accordance with E.O.s 12549 (3 CFR, 1986 Comp., p. 189) and 12689 (3 CFR, 1989 Comp., p. 235),“Debarment and Suspension.” This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than E.O. 12549. Contractors with awards that exceed the small purchase threshold must provide the required certification regarding its exclusion status and that of its principals.”

Section 7 above also appears to conflict with 10 CFR 600.305, Debarment and Suspension, which applies to for-profit recipients, which requires recipients to comply with the

nonprocurement debarment and suspension common rule implemented in 2 CFR 180 and 901, which restricts subawards and contracts for \$25,000 or more with certain parties debarred, suspended or otherwise ineligible from or ineligible for participation in Federal assistance programs.

**4. The DOE Draft Fiscal Year 2011 Audit Guidance requires that an annual audit be performed for each of the recipient's fiscal years during which work is performed under the award. It is likely that the periods of performance of many DOE awards will often include a relatively small amount of work in one of the fiscal years. For example, assume that a DOE award has a period of performance of 24 months. It is almost certain that work will be performed during three of the recipient's fiscal years. The DOE should consider eliminating the requirement for an annual audit to be performed for a fiscal year when the period of performance in the fiscal year is small, e.g., one month or less.**

**5. The period of performance of DOE awards are commonly extended due to unexpected delays, etc. This will likely result in the period of performance of the award being extended into a recipient's fiscal year that hasn't been priced for conducting an independent audit. The requirement for an independent audit should not apply to these unpriced fiscal years.**

### **Conclusion**

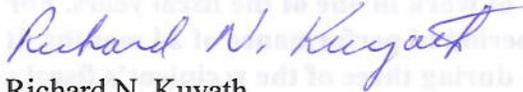
3M believes that DOE's New Audit Guidance places an additional and unnecessary burden upon DOE for-profit recipients and the benefits, in terms of assurance of proper use of the public funds, are outweighed by the significant cost and effort involved, particularly with respect to low dollar value DOE awards.

In conclusion, for the reasons discussed above, DOE's Draft Fiscal Year 2011 Audit Guidance should be withdrawn immediately. DOE should then reconsider whether the DOE Draft Fiscal Year Audit Guidance should be issued at all, or in modified form. This should be done taking into consideration President Obama's February 2, 2011 Executive Order 13563, "Improving Regulation and Regulatory Review," which requires federal agencies to consider the benefits, costs and burdens when preparing and issuing regulations.

3M again thanks DOE for giving it the opportunity to comment on the DOE Draft Fiscal Year 2011 Audit Guidance.

Sincerely,

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Conclusion

3M believes that DOE's new Audit Guidance places an additional and unnecessary burden upon DOE for-profit recipients and the benefits, in terms of assurance of proper use of the public funds, are outweighed by the significant cost and effort involved, particularly with respect to low dollar value DOE awards.

In conclusion, for the reasons discussed above, DOE's Draft Fiscal Year 2011 Audit Guidance should be withdrawn immediately. DOE should then reconsider whether the DOE Draft Fiscal Year Audit Guidance should be issued at all, or in modified form. This should be done taking into consideration President Obama's February 5, 2011 Executive Order 13527, "Improving Regulation and Regulatory Review," which requires federal agencies to consider the benefits, costs and burdens when preparing and issuing regulations.