



FACT SHEET
Broadband Technology Opportunities Program
Sale, Lease, Transfer, Disposition, and Mortgage of Infrastructure Project Assets

This fact sheet provides general guidance on the sale and lease of assets funded under the National Telecommunications and Information Administration's (NTIA) Broadband Technology Opportunities Program (BTOP) for Broadband Infrastructure (BI) or Comprehensive Community Infrastructure (CCI) projects. This fact sheet is not a substitute for the terms and conditions of specific BTOP awards, including the Notices of Funds Availability, the Department of Commerce's (DOC's) Uniform Administrative Requirements found at 15 Code of Federal Regulations (C.F.R.) Parts 14 and 24, and the Special Award Conditions. Should this fact sheet and the BTOP award terms differ, the terms and conditions of a specific BTOP award govern.

Overview

It is NTIA's goal for BTOP-funded networks to remain in use for the purposes of the award for their estimated useful life. NTIA recognizes that in some cases, recipients or subrecipients may propose transactions that involve a change in the ownership of award-funded assets or the lease of a substantial portion of those assets. For example:

- A recipient could propose to transfer all of its assets to an affiliated corporate entity for tax-related reasons, with little or no intended effect on the actual operation of the network.
- A recipient could propose to sell or lease all of the grant-funded assets to another entity with greater organizational capacity to ensure that the assets are fully utilized.
- A recipient could propose to sell some grant-funded assets to another entity because the recipient is in need of cash and those assets are not essential to operate the remaining network.
- A recipient could propose to replace grant-funded equipment with newer equipment.
- A recipient could propose to take out a loan against grant-funded assets.

These and other scenarios require review from NTIA and the National Oceanic and Atmospheric Administration (NOAA) Grants Officer to ensure that the federal interest is adequately protected. This Fact Sheet describes the procedures to follow and the factors to consider when contemplating a sale, lease, transfer, or mortgage of BTOP-funded assets. ***These instructions apply to assets purchased with BTOP funds, cash matching funds, and real property or equipment contributed as in-kind match.***

Applicable Terms and Conditions of the Award

Several different terms and conditions of the award restrict sales, leases, transfers, and mortgages of BTOP-funded real property and equipment. These are discussed below.

Sale/Lease Restriction

Both BTOP Notices of Funds Availability (NOFAs) prohibit the sale or lease of award-funded broadband facilities or equipment during their useful life unless NTIA grants a waiver. See Notice of Funds Availability and Solicitation of Applications, 74 Fed. Reg. 33014, 33123 (July 9, 2009) ("First NOFA"); Notice of Funds Availability and Solicitation of Applications, 75 Fed. Reg. 3792, 3810 (Jan. 22, 2010) ("Second NOFA"). This prohibition (the "Sale/Lease Restriction") is not intended to limit infrastructure recipients from leasing facilities to another service provider for the provision of broadband services where the lease is an operating lease. See First NOFA at 33123; Second NOFA at





3810. The Sale/Lease Restriction also is not meant to restrict a transfer of control of the awardee. See Second NOFA at 3810.

Unless otherwise specified in the terms of the waiver, a sale, lease, or transfer pursuant to a waiver of the Sale/Lease Restriction does not remove the federal interest in the property or relieve the purchaser or transferee of a duty to comply with the nondiscrimination and interconnection requirements applicable to the award.

DOC Uniform Administrative Requirements

In addition to the Sale/Lease Restriction contained in the First and Second NOFAs, the DOC Uniform Administrative Requirements contain provisions governing the use and disposition of grant-funded equipment and real property. See 15 C.F.R. §§ 14.32, 14.34-37, 24.31-34. These provisions specify that the property shall be used for its originally authorized purpose for as long as it is needed. They then describe when such property may be used for other federally funded projects and set out the disposition requirements a recipient must follow in cases when the property is no longer needed. In many cases, the disposition requirements include sale of the property and repayment of the federal share to the federal government.

The DOC Uniform Administrative Requirements provide that a recipient shall not dispose of or encumber real property without approval of the Grants Officer. See 15 C.F.R. §§ 14.32(a), 24.31(b). Additionally, non-profits, commercial entities, hospitals, and institutions of higher education may not encumber equipment during its useful life without approval. See 15 C.F.R. § 14.34(c).

Disposition of the property pursuant to the DOC Uniform Administrative Requirements extinguishes the Federal interest in the property.

Security Interest Special Award Condition

The "Security Interest in Real Property including Broadband Facilities and Equipment" Special Award Condition (Security Interest SAC) attached to each BI and CCI award reinforces recipients' compliance obligations with respect to the federal interest in the property. The SAC provides that, for the estimated useful life of the real property, facilities, or equipment, the recipient will not sell, transfer, convey, or mortgage any interest in the real property including broadband equipment acquired or improved in whole or in part with federal funds made available under the award, nor shall the recipient use the real property including broadband facilities and equipment for purposes other than the purposes for which the award was made, without the prior written approval of the Grants Officer. The SAC further provides that such approval may be withheld until such time as the recipient first pays for the federal share of the property to NTIA.

Sale, Lease, or Transfer with a Continued Federal Interest

In some cases, a recipient may wish to sell, lease, or transfer its BTOP-funded assets to another party that is willing to commit to use them for the purposes of the BTOP award. If such a transaction is proposed prior to the end of the performance period, the recipient must notify NTIA and the NOAA Grants Officer and request prior approval. After closeout of the award, the property holder is responsible for notifying NTIA and the NOAA Grants Officer and requesting prior approval of the transaction.

As noted above, the Sale/Lease Restriction in the First and Second NOFAs prohibits the sale or lease of award-funded broadband facilities or equipment during their useful life unless NTIA grants a waiver. See First NOFA at 33123; Second NOFA at 3810. The Sale/Lease Restriction applies to all transactions that change title to the assets, including, but not limited to, a transfer to an affiliated entity (parent company, subsidiary, fully co-owned entity, or





related government department). Accordingly, NTIA and NOAA must be notified of such transactions and have the opportunity to review them. However, the Sale/Lease Restriction does not apply to a change of control, such as a stock sale, that does not change the title to the property. After the end of the performance period, a recipient is not required to notify NTIA and NOAA of such changes in control.

Each NOFA sets out different conditions under which NTIA may approve a waiver of the Sale/Lease Restriction:

- First NOFA: NTIA will consider a waiver of the Sale/Lease Restriction if:
 - a) The transaction is for adequate consideration;
 - b) The purchaser or lessee agrees to fulfill the terms and conditions relating to the project after such sale or lease; and
 - c) Either: (i) the sale or lease is set forth in the original application and is part of the applicant's proposal for funds; or (ii) NTIA waives this provision for any sale or lease occurring after the tenth year from the date of issuance of the grant award. (NTIA may waive the ten-year restriction under extraordinary circumstances and when it is in the best interest of the Federal government.)
- Second NOFA: NTIA will consider a waiver of the Sale/Lease Restriction if:
 - a) The transaction is for adequate consideration;
 - b) The purchaser or lessee agrees to fulfill the terms and conditions relating to the project after such sale or lease; and
 - c) The transaction would be in the best interests of those served by the project.

To request prior approval for a sale, lease, or transfer before the end of the award performance period, a recipient should submit an Award Action Request (AAR). After the end of the performance period, the entity holding the property should submit its request for prior approval via BTOP@ntia.doc.gov and mail a copy of its request to the two addresses below:

BTOP Prior Approvals

NTIA
Room 4887
1401 Constitution Ave NW
Washington, DC 20230

NOAA Grants Officer

Broadband Technology Opportunities Program
1325 East West Highway
SSMC II
Ninth Floor
Silver Spring, MD 20910

A petition for waiver of the Sale/Lease Restriction must include supporting documentation and justification regarding why the petition should be granted. The request should, at a minimum, identify the BTOP grant (e.g., by grant award number and name of recipient), state the name of the party that currently holds the assets and its relationship to the





project (e.g., recipient or subrecipient), describe the assets at issue, describe the proposed transaction, and provide contact information for NTIA and/or Grants Office staff to follow up with questions.¹

Sale or Transfer of Assets with a Continued Federal Interest

As noted above, an entity that intends to sell or transfer title to BTOP-funded assets must notify NTIA and NOAA and request prior approval, including a waiver of the Sale/Lease Restriction. Alternatively, the entity may consider whether a disposition of the assets, discussed in the section below, is more appropriate.

In evaluating whether a transaction is for adequate consideration, NTIA will consider the nature of the transaction and whether consideration is normally warranted. For example, the merger of a corporate subsidiary into a parent company does not involve consideration to the subsidiary.

NTIA and the NOAA Grants Officer will also review whether the transaction is in the best interest of the Federal government. The purchaser or transferee must acknowledge the Federal interest in the assets and, after the transaction, file new documentation to provide notice of the Federal interest in the assets now held by the transferee. The purchaser or transferee must agree to comply with the requirements of the original award, including nondiscrimination and interconnection obligations, with respect to the facilities transferred. In evaluating whether a transaction is in the best interest of the Federal government, NTIA will consider the effect of the transaction on the beneficiaries and the service area of the funded project.

Lease of Assets

An entity that intends to lease BTOP-funded assets to another entity must notify NTIA and NOAA and request prior approval, including a waiver of the Sale/Lease Restriction. However, there are two exceptions where notification and prior approval are not required:²

- EXCEPTION #1: BI and CCI recipients may, without prior approval, lease facilities to another service provider for the provision of broadband services where the lease is an operating lease. See First NOFA at 33123; Second NOFA at 3810. A capital lease is considered akin to a sale and does not fall within this exception.
- EXCEPTION #2: NTIA has issued two programmatic waivers of the Sale/Lease Restriction that apply to indefeasible-right-of-use (IRU) arrangements on fiber optic networks. For an explanation of these waivers, please see the Fact Sheet on BTOP's Sale/Lease Restriction, Indefeasible Rights-of-Use, and Fiber Swaps at http://www2.ntia.doc.gov/files/btopsale-leaseirufactsheet_final_112612.pdf. No prior approval is required to take advantage of these programmatic waivers.

Disposition of Assets

Where BTOP-funded equipment or real property is no longer needed (or can no longer be used) for the purposes of the award, the DOC Uniform Administrative Requirements control the disposition of assets.

¹ To the extent that requesters believe that the information they are providing is confidential, they may make a request for such information to be kept private and identify any information they believe should not be released to the public. They should also provide both a redacted and an unredacted version of their documents. Note, however, that the Recovery Act requires substantial transparency and that NTIA may not necessarily approve such requests. If NTIA does approve, NTIA will keep information in the waiver request and in these additional documents private from public disclosure to the extent permitted by law, including the Freedom of Information Act, as amended (5 U.S.C. 552), the Trade Secrets Act, as amended (18 U.S.C. 1905), and the Economic Espionage Act of 1996 (18 U.S.C. 1831 et seq.).

² NTIA may issue further exceptions through programmatic memorandums. This Fact Sheet will be updated for any such future exceptions.





Real Property Disposition

If BTOP-funded real property is no longer needed (or can no longer be used) for the project's purposes, and the estimated useful life has not expired, the recipient must request disposition instructions from NTIA and the NOAA Grants Officer. See 15 C.F.R. §§ 14.32(c), 24.31(c). Recipients should send a request for disposition instructions to NTIA and the NOAA Grants Officer, accompanied by a Form SF-429,³ at the addresses above.

The Grants Officer may take one of the following actions:

- Permit the recipient to retain title to the property after compensating the federal government for that percentage of the current fair market value of the property attributable to federal participation in the project.
- Direct the recipient to sell the property and pay the federal government for that percentage of the current fair market value or sales proceeds attributable to the federal participation in the project (after deducting actual sale and fix-up expenses from the sales proceeds). When the recipient is authorized or required to sell the property, proper sales procedures shall be established that provide for competition to the extent practicable and result in the highest possible return.
- Direct the recipient to transfer title to the federal government or to an eligible third party and compensate the recipient for its attributable percentage of the current fair market value of the property.

Equipment Disposition

When a recipient no longer needs the equipment, the equipment may be used for other activities in accordance with the following standards. Equipment with a current per-unit fair market value of less than \$5,000 may be retained, sold, or otherwise disposed of with no further obligation to the awarding agency. See 15 C.F.R. §§ 14.34(g), 24.32(e)(1). For equipment with a current fair market value of \$5,000 or more, the recipient may retain the equipment for other uses, provided that compensation is made to the Department of Commerce operating unit or its successor. See 15 C.F.R. §§ 14.34(g), 24.32(e)(2). Recipients should report the retained equipment on Form SF-428, including Forms SF-428-C and SF-428-S.⁴ Recipients should submit the forms by mail to the NOAA Grants Officer at the address above and by email to their federal program officer, and must repay the federal share of the fair market value through Automated Standard Application for Payment (ASAP) account. If a recipient no longer has access to its ASAP account, inform the NOAA Grants Officer and determine whether to contact Treasury to temporarily reopen the account or remit payment to NTIA via FEDWIRE or some other mechanism.⁵

If the recipient will not retain the equipment, the regulations that apply to disposition of the equipment depend upon the type of recipient organization.

- **State entities** may dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. See 15 C.F.R. § 24.32(b). Recipients must report the disposition on Form SF-428, including SF-428-C and SF-428-S.

³ The SF-429 is available at http://www.whitehouse.gov/omb/grants_forms/.

⁴ The SF-428 and its attachments are available at http://www.whitehouse.gov/omb/grants_forms/.

⁵ Recipients whose BTOP awards are still active should remit payment through their Automated Standard Application for Payment (ASAP) accounts. Otherwise, Recipients should transfer the funds via Fedwire to the "National Telecommunications and Information Administration." Additional information regarding the Fedwire system is available at <https://www.frbervices.org/fedwire/index.html>.





- **Local government entities and tribal governments** may sell equipment with a current per unit fair market value over \$5,000 and repay the federal share of the current market value or proceeds to NTIA. See 15 C.F.R. § 24.32(e)(2). Recipients must report the disposition on Form SF-428, including SF-428-C and SF-428-S.
- **Non-profits, commercial entities, hospitals, and institutions of higher education** must request disposition instructions from NTIA and the Grants Officer at the addresses above for equipment with a current per unit fair market value over \$5,000 which is no longer needed for the project. The request must be accompanied by a Form SF-428, including a request for disposition instructions on Form SF-428-C and a list of the equipment on Form SF-428-S. The Grants Officer has several options, including (a) reimbursing the recipient for its share and instructing the recipient to ship the equipment elsewhere, or (b) requiring the recipient to sell the equipment and repay the federal share of the proceeds. See 15 C.F.R. § 14.34(g).

If a recipient disposes of a portion of its network, NTIA reserves the right to evaluate whether the use of the remaining network is serving the originally authorized purposes.

Asset Disposition Prior to the End of the Award

Normally, when a recipient repays the federal share of BTOP funded assets to the government, the proceeds are not available for use by the recipient and must be returned to the Treasury.

Replacement of Equipment

When acquiring replacement equipment, the recipient may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of NTIA and the NOAA Grants Officer. See 15 C.F.R. §§ 14.34(e), 24.32(c)(4). The request should be accompanied by a Form SF-428, with a request on Form SF-428-C to replace the equipment and a list of the equipment on Form SF-428-S.

Mortgage of BTOP-Funded Property

NTIA retains an undivided equitable reversionary interest in BTOP-funded property. A holder of BTOP-funded property that wishes to use that property as collateral for a loan must obtain permission from NTIA and the NOAA Grants Officer prior to doing so and must ensure that the lender's interest is subordinate to NTIA's federal interest in the property.

To request prior approval for a loan before the end of the award performance period, a recipient should submit an AAR. After the end of the performance period, the entity holding the property should submit its request for prior approval via BTOP@ntia.doc.gov and mail a copy of its request to the addresses above.

The request should, at a minimum, identify the BTOP grant (e.g., by grant award number and name of recipient), state the name of the party that currently holds the assets and its relationship to the project (e.g., recipient or subrecipient), describe the assets at issue, describe the proposed transaction, and provide contact information for NTIA and/or Grants Office staff to follow up with questions.

Standard of Review for Encumbering BTOP-funded Assets

The Department of Commerce's regulations impose a property trust relationship under which a grantee holds any property acquired using grant funds. The trust relationship and property usage requirements are enforced against





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the recipient in both standard and special award conditions. However, neither the Department of Commerce Financial Assistance Standard Terms and Conditions nor the award-specific special award conditions provide a standard of review for reviewing requests to mortgage BTOP assets or enter into arrangements where BTOP assets are used to secure a loan with an interest subordinate to NTIA's interest.

The following criteria will be applied to assess the merits of such future requests that NTIA and NOAA may receive.

1. The recipient must demonstrate a need for the loan and that they have explored alternatives to encumbering the BTOP-funded assets;
2. The recipient must demonstrate that the loan will support the continued financial sustainability of the BTOP-funded project;
3. The loan request and accompanying documentation must adequately preserve the federal interest in the BTOP-funded assets during their useful life;
4. The loan must further the BTOP program purposes and the recipient must demonstrate that no unjust enrichment will result from obtaining and executing against the loan; and
5. There is a reasonable expectation, as determined by NTIA, that the recipient will not default on its obligations

Questions and Additional Resources

If recipients have any questions about this guidance, they may contact their NTIA Federal Program Officer or the NOAA Grants Officer.

For additional guidance, please refer to the following resources:

- Round One NOFA, § IX.C.2, 74 Fed. Reg. 33104, 33123 (July 9, 2009), available at http://www.ntia.doc.gov/files/ntia/publications/fr_bbnofa_090709.pdf.
- Round Two NOFA, § IX.C.2, 75 Fed. Reg. 3792, 3810 (Jan. 22, 2010), available at http://www.ntia.doc.gov/files/ntia/publications/fr_btopnofa_100115_0.pdf.
- Department of Commerce Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, Other Non-Profit and Commercial Organizations, 15 CFR §§ 14.32, 14.34-37, http://www2.ntia.doc.gov/files/award_docs/15cfr14.pdf.
- Department of Commerce Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, 15 CFR §§ 24.31-34, http://www2.ntia.doc.gov/files/award_docs/15cfr24.pdf.
- BTOP Useful Life Schedule, available at http://www2.ntia.doc.gov/files/fact_sheet_useful_life_schedule_082510_v1.pdf.
- BTOP Nondiscrimination and Interconnection Obligations Fact Sheet, available at: http://www2.ntia.doc.gov/files/Interconnection_Nondiscrimination_11_10_10_FINAL.pdf
- BTOP Federal Interest Documentation Requirements Fact Sheet, available at: http://www2.ntia.doc.gov/files/fact_sheet_federal_interest_082510_v2_1.pdf
- Fact Sheet on BTOP's Sale/Lease Restriction, Indefeasible Rights-of-Use, and Fiber Swaps, available at http://www2.ntia.doc.gov/files/btopsale-leaseirufactsheet_final_112612.pdf

