



FACT SHEET
Broadband Technology Opportunities Program (BTOP)
BTOP's Sale/Lease Restriction, Indefeasible Rights-of-Use, and Fiber Swaps

Overview

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 awardees from "leasing facilities to another service provider for the provision of broadband services." See First NOFA at 33123; Second NOFA at 3810.

The Sale/Lease Restriction may apply to an indefeasible right-of-use (IRU) arrangement that a recipient or subrecipient wishes to convey to another party for the use of BTOP-funded facilities. If the Sale/Lease Restriction applies, the recipient must either request a project-specific waiver or comply with the terms of one of NTIA's partial programmatic waivers of the Sale/Lease Restriction, as described in the Special Award Conditions (SACs) attached to each BTOP Infrastructure or Comprehensive Community Infrastructure (CCI) award.

Application of the Sale/Lease Restriction to IRUs

The structure of an IRU determines whether the Sale/Lease Restriction applies. For example, the Sale/Lease Restriction does not affect an IRU for capacity that is structured as a **service agreement** because it is not a sale or lease of facilities; therefore, no waiver is necessary. Additionally, an IRU structured as an **operating lease** to another broadband service provider for the provision of broadband services would fall within the NOFAs' exception for leasing facilities to another service provider for the provision of broadband services.

However, an IRU structured as a **capital lease** normally will not fall within this general exception because, under Generally Accepted Accounting Principles (GAAP), the lessor treats the lease in a manner akin to the sale of a capital asset. Accordingly, when a recipient or subrecipient intends to convey an IRU in the form of a capital lease, or purchase agreement, the recipient must either:

- Notify NTIA in advance of the proposed transaction and obtain a project-specific waiver of the Sale/Lease Restriction from NTIA; or
- Take advantage of one of NTIA's partial programmatic waivers of the Sale/Lease Restriction, provided that the IRU falls within the scope of NTIA's partial programmatic waiver. The two "Sale/Lease IRU" SACs describe the terms of these waivers.

The First Sale/Lease IRU SAC

On February 25, 2011, NTIA granted a partial programmatic waiver of the Sale/Lease Restriction to the extent that recipients or subrecipients provide IRUs in BTOP-funded fiber optic networks to other broadband service providers for the provision of broadband service. The "Sale/Lease IRU SAC" attached to each Infrastructure or CCI award describes the conditions of the waiver. One of these conditions requires the purchaser of the IRU to provide broadband service and to adhere to BTOP's nondiscrimination and interconnection obligations. Sample IRU contract language is provided at the end of this Fact Sheet to assist recipients and subrecipients in properly accounting for the IRU SAC in their IRU contracts.





The Second Sale/Lease IRU SAC

On August 7, 2013, NTIA granted a second partial programmatic waiver of the Sale/Lease Restriction to the extent that recipients or subrecipients provide IRUs in BTOP-funded fiber optic networks for no more than six fiber strands, per customer per route, for the customer's own use. "Sale/Lease IRU SAC #2," which will be attached to each Infrastructure or CCI award, describes the conditions of the waiver. Under the terms of the waiver, the customer may or may not use the strands to provide broadband service. However, the waiver is only intended to apply where the customer will use the strands, and not where it will sub-lease them to other entities.

The checklists included with this Fact Sheet are intended to help recipients or subrecipients determine whether their transactions are structured in a manner that allows them to take advantage of the waiver described in one of the Sale/Lease IRU SACs. Recipients and subrecipients may take advantage of a Sale/Lease IRU SAC only if **all** of the conditions in the respective checklist are met.

If a recipient or subrecipient intends to sell or lease BTOP-funded assets in a lease transaction that does not meet all of the conditions of the Sale/Lease IRU SAC or Sale/Lease IRU SAC #2, the recipient or subrecipient must notify NTIA in advance of the proposed transaction and request a waiver.

Fiber Swaps

The Sale/Lease IRU SAC does not cover fiber swap arrangements (*i.e.*, in-kind exchanges of an IRU on one segment of fiber for an IRU on another segment of fiber). Therefore, if a recipient or subrecipient intends to engage in a fiber swap involving BTOP-funded facilities, the recipient or subrecipient must notify NTIA in advance of the proposed transaction and request a waiver.

In evaluating proposed fiber swaps, NTIA will consider the value of the fiber segments being exchanged to determine whether the transaction is for adequate consideration. Recipients or subrecipients must provide specific information concerning the assets to be exchanged and the methodology for valuing them. They also must explain why the transaction is in the best interests of the federal government and those served by the project. The BTOP nondiscrimination and interconnection provisions will apply to the assets the BTOP recipient obtains in the fiber swap transaction, and not to the assets that are provided to the other party.

Additional Resources

For additional information pertaining to the Sale/Lease Restriction and the BTOP nondiscrimination and interconnection requirements, please refer to the following resources:

- First NOFA, 74 Fed. Reg. 33014 (July 9, 2009), available at: http://www.ntia.doc.gov/files/ntia/publications/fr_bbnofa_090709.pdf
- Second NOFA, 75 Fed. Reg. 3792 (Jan. 22, 2010), available at: http://www.ntia.doc.gov/files/ntia/publications/fr_btopnofa_100115_0.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





Sale/Lease IRU SAC Checklist

Recipients and subrecipients may take advantage of the Sale/Lease IRU SAC only if **all** of the conditions in the checklist below are met. If a recipient or subrecipient intends to convey BTOP-funded assets in a lease transaction that does not meet either the criteria below or the criteria for Sale/Lease IRU SAC #2, the recipient must notify NTIA in advance of the proposed transaction and request a waiver.

- The facility to be leased must be a fiber optic facility (e.g., dark fiber, wavelengths, associated electronics)
- The purchaser must be a broadband service provider that will use the facilities to provide broadband service
- No entity or group of affiliated entities may: (i) obtain IRUs in a majority share of the capacity available for purchase at the time of the transaction on any fiber route constructed with BTOP funds; and/or (ii) cumulatively obtain a majority of the initial total capacity on any such fiber routes
- The IRU must not convey to the purchaser legal title to any property, such as fiber or other equipment
- The IRU must be provided in exchange for money, and not for other assets (i.e., not a fiber swap)
- The IRU agreement must: (i) require the purchaser to provide broadband service and adhere to BTOP's nondiscrimination and interconnection obligations (see sample language on the next page of this Fact Sheet); and (ii) advise the purchaser that failure to meet these conditions will result in revocation of the IRU
- The IRU agreement must acknowledge that the property is subject to the Federal Interest for its useful life. See 15 C.F.R. §§ 14.30-37 and 24.31-34 (as applicable)

Sale/Lease IRU SAC #2 Checklist

Recipients and subrecipients may take advantage of Sale/Lease IRU SAC #2 only if **all** of the conditions in the checklist below are met.

- The facility to be leased must be a fiber optic facility (e.g., dark fiber, wavelengths, associated electronics)
- The amount of fiber to be leased must be no more than six strands per customer per route
- The fiber must be for the customer's own use, which may (but is not required to) include the provision of broadband service
- No entity or group of affiliated entities may: (i) obtain IRUs in a majority share of the capacity available for purchase at the time of the transaction on any fiber route constructed with BTOP funds; and/or (ii) cumulatively obtain a majority of the initial total capacity on any such fiber routes
- The IRU must not convey to the purchaser legal title to any property, such as fiber or other equipment
- The IRU must be provided in exchange for money, and not for other assets (i.e., not a fiber swap)
- The IRU agreement must acknowledge that the property is subject to the Federal Interest for its useful life. See 15 C.F.R. §§ 14.30-37 and 24.31-34 (as applicable)





SAMPLE — IRU SAC Contract Language Regarding Nondiscrimination and Interconnection Obligations

ARTICLE 1. SPECIAL AWARD CONDITION LANGUAGE

1.1 Use; Nondiscrimination and Interconnection

- (a) In entering into this Agreement, Recipient will use the Recipient Fibers to provide broadband service.
- (b) In making use of the Recipient Fibers, Recipient will, consistent with the requirements governing the Broadband Technology Opportunities Program, 75 Fed. Reg. 3792 (Jan. 22, 2010):
- (i) adhere to the FCC's Open Internet Rules, 47 C.F.R. §§ 8.1 – 8.17, and any subsequent rulings related to such rules;
 - (ii) provide Internet connectivity directly or indirectly; and
 - (iii) offer interconnection, where technically feasible without exceeding current or reasonably anticipated capacity limitations, at reasonable rates and terms to be negotiated with requesting parties, which shall include both the ability to connect to the public Internet and physical interconnection for the exchange of traffic.
- (c) The Parties acknowledge and agree that the requirements in Article 1.1(b) do not apply to any facilities other than the Recipient Fibers, including, but not limited to, any of Recipient's existing network arrangements, except as may otherwise be required by applicable law.
- (d) The Parties acknowledge and agree that the FCC's Open Internet Rules referenced in Article 1.1(b)(i) are subject to judicial review in a case currently pending in the United States Court of Appeals for the D.C. Circuit, *Verizon v. FCC*, No. 11-1355 (D.C. Cir.). The Parties further acknowledge and agree that Recipient will have no contractual obligation to comply with the FCC's Open Internet Rules in the event those rules are vacated or otherwise held to be unlawful by a final court order.
- (e) Recipient certifies that it will use the Recipient Fibers to meet its current and reasonably anticipated broadband capacity needs and that it is not entering into this Agreement to acquire unnecessary capacity that would prevent other service providers from providing a competing broadband service. Based on such certification, the Parties acknowledge and agree that Recipient has shown that it would not be technically feasible to offer interconnection pursuant to Article 1.1(b)(iii) above and Recipient shall not be required to comply with this condition.
- (f) The Parties acknowledge and agree that any final, non-appealable order issued by either the FCC or NTIA finding that Recipient has violated the requirements in this Article 1.1 will result in the termination of this Agreement.

