

DEPARTMENT OF ENERGY
Financial Assistance Regulations
Other Transaction Regulation

Date: December 17, 2024
No: FAL 2025-04
No: OTL 2025-01



FINANCIAL ASSISTANCE LETTER / OTHER TRANSACTION LETTER

This Financial Assistance Letter and Other Transaction Letter is issued under the authority of the Senior Procurement Executives of DOE and NNSA. It is intended for use by the procurement professionals of DOE, primarily Contracting and Grants Officers, and other officials of DOE that participate in the acquisition process. Other parties are welcome to its information, but definitive interpretation of its effect on DOE solicitations, Funding Opportunity Announcements, Awards, and other related procedures and actions may only be made by DOE Contracting and Grants Officers.

Subject: Guidance for the Implementation of Section 40322 of the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58 in Notices of Funding Opportunities, Financial Assistance Awards, and Other Transaction Authority Agreements

References:

Section 40322(b) of the Infrastructure Investment and Jobs Act (IIJA)¹, Pub. L. No. 117-58, amending section 12(c)(7)(B) of the Stevenson-Wydler Technology Innovation Act of 1980, codified at 15 U.S.C. § 3710a(c)(7)(B)

Section 40322(c) of the IIJA, Pub. L. No. 117-58, amending section 646(g)(5) of the DOE Organization Act, codified at 42 U.S.C. § 7256(g)(5)

Section 3001(d) of the Energy Policy Act of 1992, Pub. L. No. 102-486, codified at 42 U.S.C. § 13541(d)

Section 1005(3), (4) of the Energy Policy Act of 2005, Pub. L. No. 109-58, codified at 42 U.S.C. § 16395(3), (4)

2 C.F.R. § 910.362(e)(1) and Appendix A to Subpart D of Part 910 - Patent and Data Provisions, including the standard data clause "Rights in Data - Programs Covered Under Special Protected Data Statutes"

10 C.F.R. § 603.845 and 10 C.F.R. § 600.325(e) "Rights in Data - Programs Covered Under Special Protected Data Statutes"

When is this Financial Assistance Letter (FAL)/Other Transaction Letter (OTL) effective?

This FAL/OTL is effective upon issuance.

¹ Also known as the Bipartisan Infrastructure Law (BIL).

When does the FAL/OTL expire?

This FAL/OTL remains in effect until superseded or canceled.

Who is the intended audience?

Department of Energy (DOE) and National Nuclear Security Administration (NNSA) Grants Officers (GOs), Contracting Officers and Agreement Officers. Any reference in this guidance to a Grants Officer should be understood to include Contracting Officer and Agreements Officer, unless otherwise indicated.

Who are the points of contact?

For DOE questions, contact the Contract and Financial Assistance Policy Division at DOE_OAPMPolicy@hq.doe.gov.

For NNSA questions, contact NNSA Office of Policy and Oversight Division, Policy & Oversight Branch (NA-PAS-111) at (505) 845-5639 or Reina.Serino@nnsa.doe.gov.

What is the purpose of this FAL/OTL?

The purpose of this FAL/OTL is to provide information and guidance regarding the authority under the IIJA to extend the existing data protection authority for data first produced in the performance of an award from five years to up to thirty years which applies, by statute, to research, development, demonstration, and commercial application programs, projects and activities under the Energy Policy Acts of 1992 and 2005 (jointly referred to as “EPAAct”) and to other transactions for research, development and demonstration projects under 42 U.S.C. § 7256(g)(5) (research, development and demonstration are collectively, “RD&D”).

What is the background information?

The data protection authority of the Stevenson-Wydler Technology Innovation Act of 1980 (“the Stevenson-Wydler Act”) applies to RD&D activities under the EPAAct authority. Before enactment of the IIJA, the Stevenson-Wydler Act provided for a period of data protection of up to five years from public disclosure of certain data resulting from research and development activities.²

Section 40322(b) of the IIJA amends the Stevenson-Wydler Act to allow for extended data protection for a total period of not more than thirty years. The extended data protection period is only authorized “if the agency determines that the nature of the information protected against dissemination, including nuclear technology, could reasonably require an extended period of that protection to reach commercialization.”

² The Energy Policy Act of 1992 extended research and development to include demonstration. 42 U.S.C. § 13451(d).

The data protection authority of the DOE Organization Act under 42 U.S.C. § 7256(g) applies to RD&D activities under other transaction (“OT”) agreements. Before enactment of the IIJA, the DOE Organization Act (as amended prior to the IIJA) provided for a period of data protection of up to five years after the date on which the information is developed.

Section 40322(c) of the IIJA amends the DOE Organization Act to allow for extended data protection for up to thirty years after the date on which the information is developed. The extended data protection period is only authorized “if the Secretary determines that the nature of the technology under the transaction, including nuclear technology, could reasonably require an extended period of protection from disclosure to reach commercialization.”

Different from 42 U.S.C. §7256(g), the data protection authority of the DOE Organization Act under 42 U.S.C. §7256(a) applies to RD&D activities under the EAct authority.

The IIJA provides that the extended data protection authority applies to Stevenson-Wydler Act agreements, and thus RD&D activities under the EAct authority, in effect on or after November 14, 2021, and OT agreements authorized under 42 U.S.C. § 7256(g), in effect on or after November 15, 2021.

Accordingly, the purpose of this FAL/OTL is to implement the extended data protection authority in the IIJA in (1) financial assistance awards and OT agreements under 42 U.S.C. § 7256(a) for RD&D under EAct authority; and (2) OT agreements under 42 U.S.C. § 7256(g)(5).

What are the instructions/guidance of this FAL/OTL?

Sections

- A. Applicability
- B. Definitions
- C. Determination that Information/Technology Could Reasonably Require an Extended Protection Period to Reach Commercialization
- D. Processing Requests and Approvals Required
- E. Appropriate Notice in NOFOs and Implementation in Awards and OT Agreements
 - 1. DOE/NNSA Funding Program Requests for Extended Data Protection
 - 2. Selectee and Recipient Requests for Extended Data Protection
 - 3. Implementation of Extended Data Protection in Awards

Attachments

- Attachment 1. Funding Program Request for Extended Period of Data Protection
- Attachment 2. Selectee or Recipient Request for Extended Period of Data Protection

A. Applicability

This FAL/OTL applies to all DOE/NNSA Notices of Funding Opportunities (NOFOs)^{3,4} and financial assistance awards for RD&D activities authorized, at least in part, by EAct, in effect on or after November 14, 2021. This FAL/OTL also applies to OT agreements under 42 U.S.C. § 7256(a) for RD&D activities authorized, at least in part, by EAct, in effect on or after November 14, 2021. This FAL/OTL also applies to OT agreements authorized under 42 U.S.C. § 7256(g) in effect on or after November 15, 2021.⁵

For an award or an agreement in effect as of the effective dates above, and prior to the effective date of this FAL/OTL, extended data protection may be requested and approved, if appropriate, even if the corresponding NOFO to the award or agreement did not identify the availability of extended data protection. Although not required to request or receive extended data protection, NOFOs should identify the availability of extended data protection, if applicable, for consistency to all applicants.

This FAL/OTL can be applied to any federal financial assistance⁶ for RD&D programs, projects and activities where any request for extended data protection of greater than five years and not more than thirty years, given the nature of the information or technology, could be reasonably required to reach commercialization, is in accordance with the EAct authority, 42 U.S.C. § 7256(g)(5) authority, or any other extended data protection provision.

B. Definitions

Protected Data means technical data or commercial or financial data first produced in the performance of the award or agreement which, if it had been obtained from and first produced by a non-federal party, would be a trade secret or commercial or financial information that is privileged or confidential under the meaning of 5 U.S.C. § 552(b)(4) and which data is marked as being protected data by a party to the award or agreement.

C. Determination that Information/Technology Could Reasonably Require an Extended Protection Period to Reach Commercialization

³ Notices of Funding Opportunities (NOFOs) include any issuance used to announce funding opportunities that would result in the award of a discretionary grant, cooperative agreement, technology investment agreement, or other transaction agreement, whether it is called a funding opportunity announcement, program announcement, program notice, solicitation, broad agency announcement, research announcement, notice of program interest, or something else. See 10 C.F.R. § 600.8.

⁴ Notices of Funding Opportunities superseded Funding Opportunity Announcements. Office of Mgmt. & Budget, Exec. Office of the President, OMB Memorandum M-24-11, Reducing Burden in the Administration of Federal Financial Assistance (2024).

⁵ Because the IJA provides that the extended data protection authority applies to Stevenson-Wydler Act agreements in effect on or after November 14, 2021, the same retroactive application applies to this FAL/OTL for RD&D activities authorized, at least in part, by EAct.

⁶ 2 C.F.R. § 200.1

An extended period of data protection, i.e., more than five years but not to exceed thirty years, is authorized if DOE/NNSA “determines that the nature of the information protected against dissemination, including nuclear technology, could reasonably require an extended period of that protection to reach commercialization” in accordance with 15 U.S.C. § 3710a(c)(7)(B)(ii). Similarly, an extended period of data protection of more than five years and for up to thirty years, is only authorized “if the Secretary determines that the nature of the technology under the transaction, including nuclear technology, could reasonably require an extended period of protection from disclosure to reach commercialization,” in accordance with 42 U.S.C. § 7256(g)(5).

A request for such extended data protection may be initiated by a selectee or recipient, or by a DOE/NNSA funding program (“Funding Program”) directly. Funding Program requests may apply to one or more awards under a single NOFO, all awards under a single NOFO, certain categories of data/technology under a single NOFO, a particular NOFO topic area, or awards not under a NOFO. In addition, a Funding Program request may be directed to multiple NOFOs, certain categories of data/technology across multiple awards and NOFOs, or entire projects/programs (referred to as a “class extended data protection request”). Program offices may use the suggested templates attached as Attachments 1 and 2 for Funding Program and selectee/recipient requests, respectively, or other similar documentation such as a memorandum.

To facilitate the required DOE/NNSA determination, Funding Programs or selectees/recipients should provide a reasonable written justification identifying the categories of Protected Data, including any software source code, that could reasonably require an extended period of protection to reach commercialization, and specific reasons for the extended protection period. These reasons may address factors such as the maturity of the technology, development timeframe, market and economic considerations, competitiveness concerns, technical issues, national and economic security, e.g., risk of malign foreign actors acquiring the technology (and thus negatively impacting the ability to commercialize the technology), or any other reason why the requested period of protection could be reasonably required to reach commercialization. Selectee/recipients may include a technology commercialization plan to support their requests, which may include a commercialization timeline and proposed contractual commitments to commercialize the technology in the U.S. The determination under 15 U.S.C. § 3710a(c)(7)(B)(ii) is based on the “nature of the *information*” and the determination under 42 U.S.C. § 7256(g)(5) is based on the “nature of the *technology*.” The determination should be made with an awareness of the relevant IJJA section and this differing language.

D. Processing Requests and Approvals Required

Extended data protection requests from selectees/recipients should be directed to the DOE/NNSA Award Grants Officer (“GO”). The GO should forward extended data protection requests to the cognizant Funding Program and the cognizant DOE/NNSA Patent Counsel (“Patent Counsel”). Requests must be approved by the GO⁷ with the concurrence of the Funding

⁷ GO approval may be provided as part of a funding program’s existing funding opportunity announcement approval processes, or as part of existing award negotiations and issuance processes, as applicable.

Program (Technology Office Director or NOFO manager for awards, OT agreements or NOFOs) and Patent Counsel in writing.

Extended data protection requests from a Funding Program should be requested by a Technology Office Director or NOFO manager for awards, agreements or NOFOs. These Funding Program requests should be directed to the DOE/NNSA NOFO Grants Officer (“NOFO GO”) or GO as appropriate. The NOFO GO or GO should forward the extended data protection requests to the cognizant Patent Counsel. Requests must be approved by the NOFO GO or GO with the concurrence of Patent Counsel in writing.

Extended data protection requests from a Funding Program for larger requests, such as class extended data protection requests as described in Section C, should be approved by a suitable program level such as the Assistant Secretary, the Deputy Assistant Secretary or Acting Assistant Secretary in writing. Such class extended data protection requests will also require GC-62 Assistant General Counsel written concurrence (unless delegated to the cognizant DOE Patent Counsel), in addition to DOE/NNSA NOFO GO approval, and DOE Patent Counsel concurrence.

Extended data protection requests for greater than twenty years will also require GC-62 Assistant General Counsel written concurrence (unless delegated to the cognizant DOE Patent Counsel). DOE Patent Counsel are encouraged to consult with GC-62 for extended data protection requests on which DOE Patent Counsel are concurring, especially those requests with larger periods of data protection.

Different from NOFOs, awards and OT agreements under 42 U.S.C. § 7256(a) under EPO Act authority, extended data protection requests for OT agreements under 42 U.S.C. § 7256(g)(5) require a determination by the Secretary or the Secretary’s delegation.⁸

DOE/NNSA approval should not be unreasonably withheld if the request includes a description of the Protected Data categories and a reasonable justification that the requested period of protection to reach commercialization could be required for such categories and the relevant program concurs on its application. However, DOE/NNSA may approve a protection period that is different from the period requested (not to exceed thirty years). In addition, DOE/NNSA may require a more detailed justification for its determination for requested protection periods of more than ten years. In reviewing the categories of Protected Data, DOE/NNSA should consider the potential positive and negative consequences of protecting the information or technology beyond five years, e.g., limited rights to disclose, publish, and disseminate such information during the protection period, and DOE/NNSA program requirements, which may include factors other than commercialization, to ensure that DOE/NNSA and the public’s interests are appropriately protected. Extended data protection, if granted, shall not impact any obligations under the patent clause of the award, including the timely reporting and title election of subject

⁸ Note that while extended data protection requests under the EPO Act authority require a determination by the “agency,” extended data protection requests under OT agreements under 42 U.S.C § 7256(g) authority require a determination by the “Secretary” (§ 40322(c); 42 U.S.C. § 7256(g)(5)(A)(ii)) or an authorized delegee to the extent permitted by law. 42 U.S.C. § 7256(g)(9).

inventions. To the extent that there is any conflict between the Patent Rights and Rights in Data – Programs Covered Under Special Protected Data Statutes clauses, the Patent Rights clause takes precedence. If a recipient fails to comply with the obligations in the Patent Rights clause, e.g., a subject invention is not timely reported to DOE/NNSA, DOE/NNSA may decrease, or remove entirely, the extended data protection period related to that subject invention or under the award at the DOE/NNSA’s sole discretion.

Dispositions of all extended data protection requests should be retained in the award case file.

GC-62 Assistant General Counsel written approvals of extended data protection requests provided before issuance of this FAL/OTL shall remain effective.

E. Appropriate Notice in NOFOs and Implementation in Awards and OT Agreements

If awards issued under a NOFO will provide recipients with the right to mark data as Protected Data, Funding Programs may (1) request approval for extended data protection in the resulting awards before the issuance of a corresponding NOFO using the suggested template in Attachment 1, or other similar documentation, as discussed in Sections C and D of this FAL/OTL, (2) give selectees/recipients the option to request extended data protection during award negotiations or during the performance of the award using the suggested template in Attachment 2, or other similar documentation, or (3) not provide extended data protection at all, therefore permitting up to a maximum five-year data protection period only.⁹

1. DOE/NNSA Funding Program Requests for Extended Data Protection

If a Funding Program requests an extended period of data protection, and such request is approved as described in Section D, the NOFO should include the following or similar language:

For this NOFO, the funding program has determined that an extended period of protection (more than five years and not to exceed thirty years) for certain data first produced under the resulting awards is reasonably required to reach commercialization in accordance with 15 U.S.C. § 3710a(c)(7)(B)(ii) and the Energy Policy Acts of 1992 and 2005, or 42 U.S.C. § 7256(g)(5) for Other Transaction Authority agreements, if applicable. Information regarding the categories of data and period of protection will be provided during the negotiation process.

2. Selectee and Recipient Requests for Extended Data Protection

If a Funding Program wishes to allow selectees/recipients to request extended data protection, the NOFO should include the following or similar language:

For this NOFO, selectees and recipients may request an extended period of

⁹ If a program inadvertently leaves out a discussion of extended data protection in a NOFO, extended data protection can still be extended to individual awardees on a case-by-case basis with the approval of GC-62 and G with concurrence from the cognizant program manager.

protection (more than five years and not to exceed thirty years) for certain data first produced under the resulting awards if reasonably required to reach commercialization in accordance with 15 U.S.C. § 3710a(c)(7)(B)(ii) and the Energy Policy Acts of 1992 and 2005, or 42 U.S.C. § 7256(g)(5) for Other Transaction Authority agreements, if applicable. Further direction will be provided during the negotiation process upon request.

3. Implementation of Extended Data Protection in Awards and OT Agreements

Approved extended data protection periods will be implemented in award terms and conditions by identifying the approved protection period in the protected rights notice in the award data clause consistent with 2 C.F.R. § 910.362(e) for financial assistance awards or other transaction agreements under 42 U.S.C. § 7256(a) or 10 C.F.R. § 603.845 (as amended or succeeded) for other transaction agreements under 42 U.S.C. § 7256(g)(5). In addition, where there are multiple protection periods for different data categories, the award or agreement should identify the Protected Data categories and corresponding data protection periods.

Attachments:

Attachment 1. Funding Program Request for Extended Period of Data Protection

Attachment 2. Selectee or Recipient Request for Extended Period of Data Protection