

# Program Income & Federal Interest



August 27, 2024

## Policy Disclaimer

This presentation is for informational purposes only and is intended solely to assist with better understanding the Program Income and Federal Interest regulations and other requirements relevant to recipients of Broadband Infrastructure Program awards. The guidance does not and is not intended to supersede, modify, or otherwise alter applicable statutory or regulatory requirements, or the specific application requirements set forth in the program's Notice of Funding Opportunity (NOFO).

In all cases, statutory and regulatory mandates, and the requirements set forth in the program's NOFO, shall prevail over any inconsistencies contained in the information presented.



# Program Income

# Overview

## Purpose:

- This presentation will provide guidance on the appropriate calculation, use, management, and reporting of program income for the National Telecommunications and Information Administration's (NTIA) Middle Mile Grant Program (MM).
- This presentation is not a substitute for the terms and conditions of specific MM awards, including:
  - the Uniform Administrative Requirements found at 2 Code of Federal Regulations (C.F.R.) Part 200; and
  - the DOC Financial Assistance Standard Terms and Conditions.

## Program Income Overview:

- Recipients and subrecipients of MM grants may generate and receive program income as a result of these Federally-funded projects.
- The definition of program income and guidelines for its use can be found in the Uniform Administrative Requirements at 2 C.F.R. §§ 200.1 and 200.307.
- MM recipients and subrecipients must:
  - account for any program income received as a result of their MM project during the award period;
  - utilize that program income in one of the ways allowed by their award terms and conditions and/or the Uniform Administrative Requirements, regardless of whether the originally-approved MM project budget included anticipated program income.

## Disclaimer:

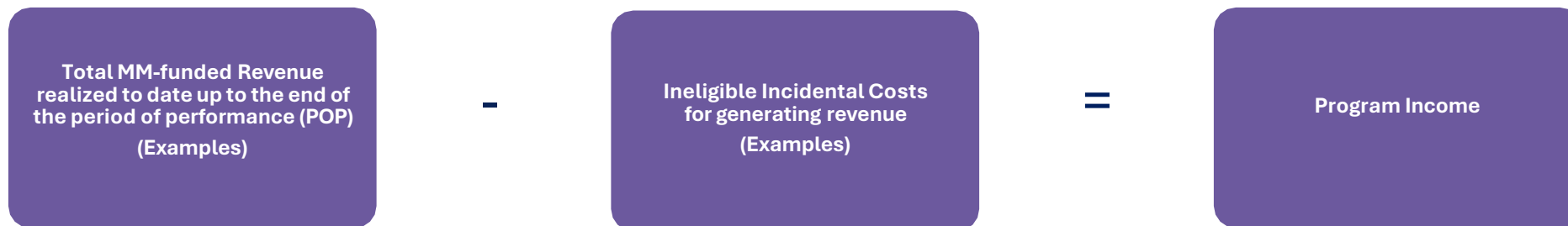
Should this presentation and the terms of a specific MM award differ, the terms and conditions of the specific MM award will govern.

# Calculating Program Income

Program income is defined in 2 C.F.R. § 200.1 as gross income earned by a grant recipient directly generated by a supported activity or earned as a result of a Federal award during the period of performance, except as provided by 2 C.F.R. § 200.307(f), which concerns income after the period of performance. Program income includes but is not limited to income from fees for services performed, the use or rental of real or personal property acquired under Federal awards, the sale of commodities or items fabricated under a Federal award, license fees and royalties on patents and copyrights, and principal and interest on loans made with Federal award funds. For more information, see 2 C.F.R. §§ 200.1 and 200.307.

## Period When Program Income Rules Apply:

There are no Federal requirements governing the disposition of income earned after the period of performance, unless the Federal awarding agency regulations or the terms and conditions of the Federal award provide otherwise. See 2 C.F.R. § 200.307(f).



# Permissible Uses of Program Income

A recipient or subrecipient shall retain any program income generated during the award period and use it in one of the following ways: **(1)** add it to the funds committed to the project by NTIA and the recipient for eligible project costs; **(2)** use it to finance the non-Federal share of the project; or **(3)** deduct it from the total allowable project costs, reducing the Federal and non-Federal dollars required for the project

Recipients must calculate program income according to a methodology listed in 2 C.F.R. § 200.307(e):

**Addition:** Program income may be added to the Federal award by the Federal agency and the non-Federal entity. The program income must be used for the purposes and under the conditions of the Federal award. See 2 C.F.R. § 200.307(e)(2).

**Cost sharing or matching:** Program income may be used to meet the cost sharing or matching requirement of the Federal award. The amount of the Federal award remains the same. See 2 C.F.R. § 200.307(e)(3).

**Deduction:** Ordinarily program income must be deducted from total allowable costs to determine the net allowable costs. Program income must be used for current costs unless the Federal awarding agency authorizes otherwise. Program income that the non-Federal entity did not anticipate at the time of the Federal award must be used to reduce the Federal award and non-Federal entity contributions rather than to increase the funds committed to the project. See 2 C.F.R. § 200.307(e)(1).

# Additive Method

MM recipients are encouraged to add program income to the funds committed to the project (the “Additive Method”) and spend it on eligible costs of the project, including additional eligible activities that meet the purposes of the award. The same restrictions on eligible costs that apply to MM Federal and matching funds also apply to program income utilized under the Additive Method. As a result of this rule, recipients of MM awards may not use program income to pay operating expenses of the project (with the exception of certain specifically authorized operating lease costs).

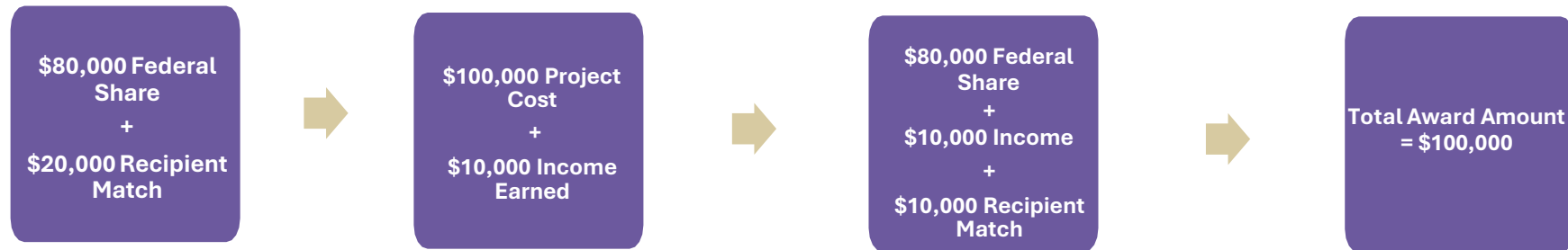
A recipient may utilize program income under the Additive Method to enhance the original project. A MM recipient may propose to purchase equipment with greater capacity or reliability. Note, however, that recipients must consider the potential timeframe for requesting approval of the project changes and demonstrating compliance with all environmental requirements.

A recipient may utilize program income under the Additive Method to fund eligible costs of the project that were not included in the original budget. For example, an Infrastructure recipient may propose to spend program income on overtime labor that is necessary to meet project deadlines.



# Cost-Sharing Method

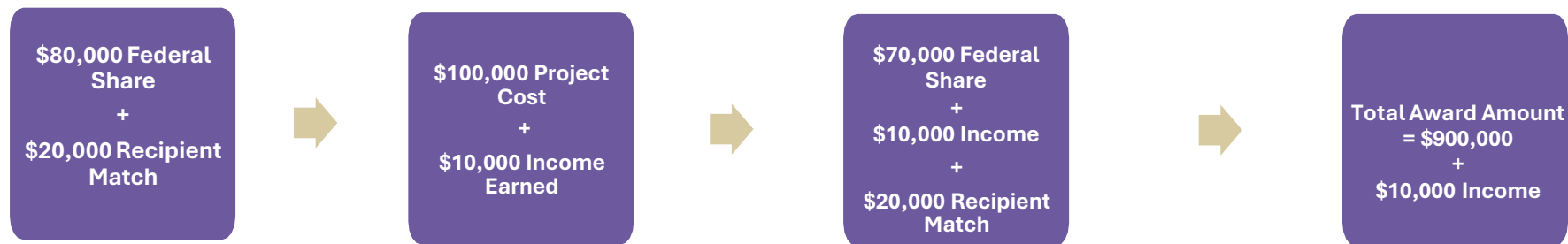
MM recipients may utilize program income to finance the required non-Federal matching share of the project (the “Cost- Sharing Method”). Recipients may also use program income to repay the principal balance (but not the interest) on a loan they secured to pay for the non-Federal cash match. The same restrictions on eligible costs that apply to MM Federal and matching funds also apply to program income utilized under the Cost-Sharing Method. Recipients may use program income for the non-Federal matching share by identifying the anticipated program income and submitting revised budget documentation reflecting the proposed changes. In evaluating such requests, NTIA will consider whether replacing a previously anticipated contribution with program income would reduce the impact of the project.





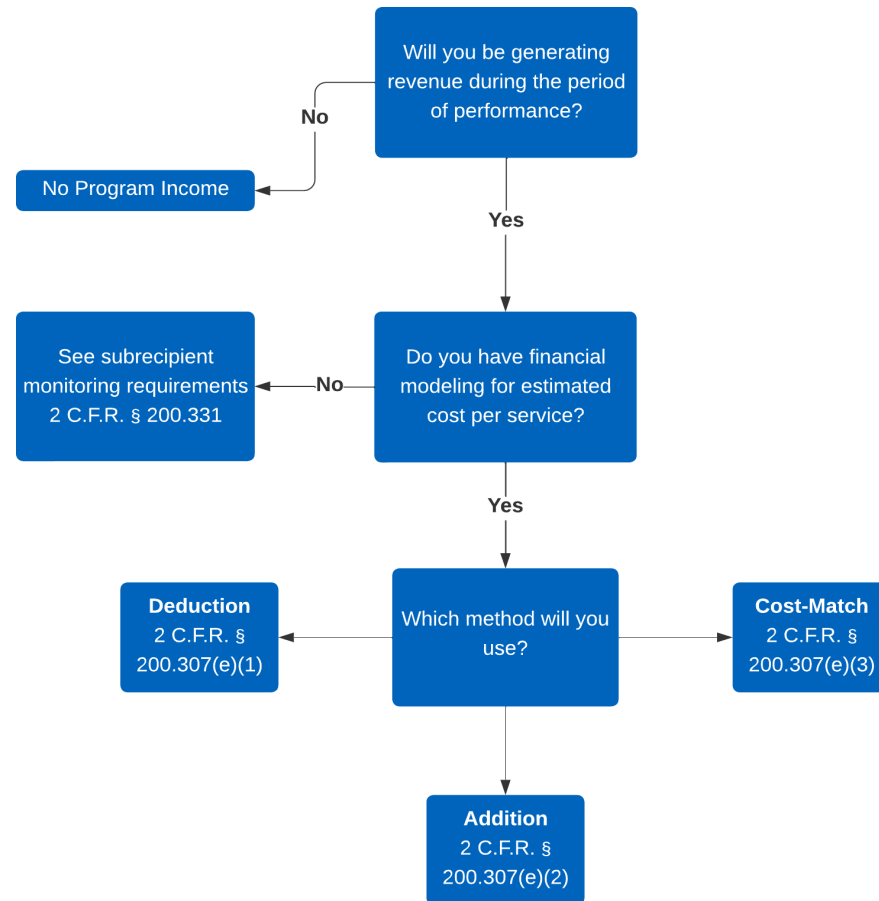
# Deductive Method

If program income cannot be utilized for additional eligible project costs or to finance the non-Federal share of the project, the recipient must deduct the program income from the total allowable costs of the project (the “Deductive Method”). In this case, the recipient will be unable to draw down the full amount of the original Federal award.



# Determining Program Income

If program income cannot be utilized for additional eligible project costs or to finance the non-Federal share of the project, the recipient must deduct the program income from the total allowable costs of the project (the “Deductive Method”). In this case, the recipient will be unable to draw down the full amount of the original Federal award.



# Gross Income Resulting from the Award

Program income includes any revenue recognized by the recipient or subrecipient during the award period that exists due to the MM project.

Program income includes income from fees for services performed, from license fees and royalties on patents and copyrights, from the use or rental of real or personal property acquired with grant funds, and from the sale of commodities or items fabricated under a grant agreement.

Recipients should account for program income in a manner consistent with the accounting methodology used in their normal business operation and in a consistent manner across the project.

- Recipients and subrecipients should calculate income as program income if it is directly traceable in whole or in part to the MM project.
- When income results partly from the MM project and partly from the recipient's existing operations, then the recipient must develop a justifiable methodology to calculate the pro-rated portion of the income to the MM project.
- Income earned by contractors or third parties is not program income unless it is passed through to the grant recipient or subrecipient.

# Examples of Program Income

- Income from sale of previously unavailable services provided through MM-funded (including in-kind or match-funded) facilities.
- Incremental income from the sale of upgraded services provided through MM-funded (including in-kind or match-funded) facilities.
- Income from leasing MM-funded (or match-funded) facilities, such as dark or lit fiber indefeasible rights-of-use (IRUs), conduit or tower space, or rights-of-way.
- Fees charged for classes where the instructor or the equipment used in the class is funded by the MM award.
- Fees that a recipient or subrecipient collects for printing or other services offered on MM-funded computers.

# Subrecipients, Vendors, and Third Parties

Program income requirements flow down from recipients to subrecipients. All of the responsibilities relating to program income also apply to all subrecipients of an award.

- For example, if the grant has paid for equipment that the recipient transfers to a subrecipient and the subrecipient uses the equipment to provide a service that generates income, then the recipient must report the income.
- Recipients also must monitor their subrecipients' receipt and expenditures of program income.

Program income requirements do not, however, flow down to vendors or apply to third parties who happen to earn income as a result of the MM project.

- For example, if a last mile service provider (who is not a subrecipient) leases capacity on a MM middle mile network operated by a MM recipient, the amount that the service provider pays to the recipient in exchange for this capacity is program income.
- However, income that the service provider receives from its own last mile customers is not program income.

# Examples of Deducting Costs Incident to Program Income

- An Infrastructure recipient may incur electricity costs to operate a MM-funded microwave tower. This cost is an operating cost which is not an eligible expense to be charged to the award. However, a proportional share of the electricity cost may be deducted from the program income that the recipient receives from offering services on that tower.

Some costs may be incurred only partially for the purpose of generating program income related to the MM award. For example, an Infrastructure recipient may have certain fixed costs of operating a Network Operations Center that serves both the MM-funded network and non-MM facilities. In such cases, recipients must develop a consistent and justifiable methodology for allocating costs between MM-related and non-MM-related activities.

# Managing Program Income

Recipients are expected to manage program income in a consistent, documented manner that is consistent with their accounting methodology and all applicable regulations.

The Uniform Administrative Requirements state that a recipient must disburse available program income before making additional drawdowns. However, this provision must be read in conjunction with the proportionality requirement in the DOC Financial Assistance Standard Terms and Conditions, § A.03.b, which requires only that matching funds be spent at the same general rate as Federal funds. Thus, a recipient that is using program income as its cost match may draw down additional Federal funds before expending all available program income, as long as that program income is not necessary to meet the proportionality requirement.

Note that if program income has been recognized on the recipient's books, but the recipient has not yet received the cash, then the program income is not "available," so the recipient is not restricted from making additional drawdowns.

# Reporting Program Income

Recipients must report program income on Form SF-425 and in the MM Performance Progress Report (PPR). How program income is reported on the SF-425 depends upon whether the recipient uses the Additive, Cost-Sharing, or Deductive Method for utilizing program income. On the PPR, recipients report total program income consistent with the way that they report program income and expenditures on the SF-425.





# Federal Interest

# Overview

## **Purpose:**

The uniform requirements governing the management and disposition of real property, equipment, supplies, and intangible property acquired or improved, in whole or in part, under a federal financial assistance award are set forth in 2 C.F.R. §§ 200.310 to 200.316 (as applicable), and are incorporated into the terms and conditions of all MM Awards.

Under these regulations, each recipient and subrecipient of a MM award holds all real property, equipment, and intangible property that are acquired or improved with a MM award in trust as a trustee for the beneficiaries of the MM project under which the property was acquired or improved. See 2 C.F.R. § 200.316.

This trust relationship exists throughout the duration of the useful life of the MM Property, as determined by NTIA in accordance with the Estimated Useful Life Schedule, during which time NTIA retains an undivided equitable reversionary interest in the MM Property (the “Federal Interest”).

## Overview (Cont.)

During the duration of the Federal Interest, the recipient or subrecipient shall not:

- Sell, lease, transfer, assign, convey, hypothecate, mortgage, or otherwise convey any interest in the MM Property without the prior written approval of the Grants Officer.
- Use the MM Property for purposes other than the purposes for which the award was made without the prior written approval of the Grants Officer.
- Fail to comply with Federal laws and regulations, Department of Commerce policies, Executive Orders, and Office of Management and Budget (OMB) Circulars that are incorporated into the terms and conditions of the award.

# Scope of the Federal Interest Documentation Requirement

Each recipient or subrecipient of a MM grant award must execute and file in the appropriate office(s) documentation of the Federal Interest with respect to the acquisition or improvement, in whole or in part, of MM Property. See 2 C.F.R. § 200.316.

The obligations of the recipient or subrecipient with respect to the Covered MM Property **remain in effect for the entire useful life of the Covered MM Property.**

Failure to properly and timely file and maintain such documentation of the Federal Interest may result in appropriate enforcement action under a MM award, including, but not limited to, disallowance of the cost of acquisition or improvement by NTIA.

Recipients and subrecipients are not required to document or record evidence of the Federal Interest in previously acquired real or personal property that is donated to the project as a recipient, subrecipient or third party in-kind matching contribution to the extent that such property is not subsequently improved under a MM award.

The requirements to document and record evidence of the Federal Interest in Covered MM Property apply equally to recipients and subrecipients of MM grant awards.

# Documentation of Federal Interest for Covered Property

This group of slides discuss the approaches for documenting the Federal Interest in real property, fixtures, equipment and/or intangible personal property.

These slides also discuss:

- (i) timing requirements for the recording or filing of the applicable Federal Interest documentation;
- (ii) requirements for an attorney certification pertaining to the execution and recording or filing of the applicable Federal Interest documentation; and
- (iii) requirements for the submission of the Federal Interest documentation to NTIA/MM, all of which apply to Covered MM Property regardless of its character.

In some cases, state or local law may vary from the general approaches described here. In such cases, the recipient or subrecipient should ensure that it complies with any additional or different requirements of state or local law and should describe its compliance with these requirements in its attorney certification.

# Real Property

To document the Federal Interest in Covered MM Property consisting of real property, the recipient or subrecipient must prepare and properly record a “Covenant of Purpose, Use and Ownership” (“Covenant”).

The Covenant differs from a traditional mortgage lien in that it does not establish a traditional creditor relationship requiring the periodic repayment of principal and interest to MM. Rather, pursuant to the Covenant, the recipient or subrecipient acknowledges that it holds title to the Covered MM Property in trust for the public purposes of the MM financial assistance award and agrees, among other commitments, that it will repay the Federal Interest if it disposes of or alienates an interest in the Covered MM Property or uses it in a manner inconsistent with the public purposes of the MM award, during the useful life of the Covered MM Property.

The Covenant must be properly recorded in the real property records in the jurisdiction in which the real property is located in order to provide public record notice to interested parties that there are certain restrictions on the use and disposition of the Covered MM Property during its useful life and that NTIA retains an undivided equitable reversionary interest in the Covered MM Property to the extent of its participation in the MM project, i.e. the Federal Interest.

# Fixtures and Personal Property

To the extent that the Covered MM Property consists of fixtures or personal property other than supplies (both tangible, such as equipment, or intangible, such as licenses or permits), the recipient or subrecipient must record UCC-1 forms with the appropriate state office in accordance with that state's codification of the Uniform Commercial Code (UCC), Article 9 (for personal property not affixed to land) and/or recorded in the real property records of the jurisdiction where the real property is located if for assets affixed to the land.

The recipient or subrecipient should consult the law of the state where the asset is located to determine whether it should be classified as real or personal property.

UCC forms may differ slightly from state to state. These forms are usually available from an attorney, a bank's loan department, or an office supply store and may be available online in some states.

# Useful Life Schedule

Will be provided



# Federal Documentation Requirements

## Real Property vs. Fixtures and Personal Property

Type of Covered MM Property	Approach to Documenting the Federal Interest
<b>Real Property (land and improvements, structures, appurtenances, except movable machinery and equipment)</b>	<ul style="list-style-type: none"> <li>• Properly executed and recorded Covenant of Purpose, Use and Ownership; in the case of land leases, easements, rights-of-way, or other non-fee simple interests in real property, the recipient's interest should be as long as the useful life of any property deployed or installed thereon, unless other terms acceptable to NTIA have been approved in writing by the Grants Officer. The recipient must ensure that either the associated agreement acknowledges the Federal Interest in the property, which should provide for a right of assignment, if the recipient fails to act in accordance with the terms and conditions of the MM award, or that a covenant that acknowledges the Federal Interest is recorded.</li> <li>• The recipient or subrecipient should consult applicable state law to determine whether a particular asset should be classified as either real or personal property.</li> </ul>
<b>Fixtures (personal property so affixed to the land that it is legally considered part of the realty)</b>	<ul style="list-style-type: none"> <li>• UCC-1 filed in the jurisdiction where the real property is located, renewed as necessary for as long as the useful life of the fixture; in case of land leases, easements, rights-of-way, or other non-fee simple interests in real property, the recipient's interest must be as long as the useful life of the fixture deployed or installed thereon, unless other terms acceptable to NTIA have been approved in writing by the Grants Officer. The recipient must ensure that either the associated agreement acknowledges the Federal Interest in the property, which should provide for a right of assignment if the recipient fails to act in accordance with the terms and conditions of the MM award, or that a covenant that acknowledges the Federal Interest is recorded.</li> <li>• The recipient or subrecipient should consult applicable state law to determine whether a particular asset should be classified as either real or personal property.</li> </ul>
<b>Personal Property, both tangible and intangible</b>	<ul style="list-style-type: none"> <li>• UCC-1 filed in the central filing office as directed under the State's Uniform Commercial Code, Art. 9, noting the Federal Interest in the personal property, renewed as necessary for as long as the estimated useful life of the property; or if another legal filing scheme preempts the UCC, then in accordance with such requirements. In the case of capital leases of personal property (including, where applicable, indefeasible right-of-use (IRU) agreements), the recipient must ensure that either the associated agreement acknowledges the Federal Interest in the property, which should provide for a right of assignment if the recipient fails to act in accordance with the terms and conditions of the MM award, or that a UCC-1 that acknowledges the Federal Interest is recorded.</li> <li>• The recipient or subrecipient should consult applicable state law to determine whether a particular asset should be classified as either real or personal property.</li> </ul>

# Timing Requirements

Documentation of the Federal Interest is to be perfected and recorded/filed in accordance with state and/or local law concurrent with or as soon as reasonably possible following any purchase, lease or other acquisition or improvement of Covered MM Property, but in any event not later than closeout of the grant and before any sale or lease of the property. The recipient must account for any real or personal property acquired or improved with Federal funds as part of the award closeout procedures. See 2 CFR §§ 200.311; 200.313; 200.315; and 200.344, as applicable.

The recipient or subrecipient shall execute and record all documentation necessary to maintain the Federal Interest for the useful life of the Covered MM Property. If the MM grant award is amended to include additional or materially different Covered MM Property, the recipient or subrecipient is required to file additional UCC-1 documentation covering such Covered MM Property and to amend any existing files. New and/or amended UCC-1 documentation must be retained in the recipient's or subrecipient's grant files and provided to NTIA as soon as reasonably possible following such new or amended filings.

A recipient or subrecipient must also timely file continuation statements for personal property for the duration of the Federal Interest under the terms of the award. The recipient or subrecipient should first consult its counsel if it has any questions and then follow up with its assigned MM FPO if further guidance is needed.

# Attorney Certification

The recipient or subrecipient must obtain a certification from counsel, licensed by the state within which the filings were made, that the Covenant and/or UCC documentation, as applicable, has been properly executed and recorded or filed (as the case may be) in accordance with state law.

## Federal Interest Documentation

The recipient or subrecipient must provide the Grants Office with: (1) a copy of the instruments reflecting the documentation of the Federal Interest, specifically the recorded Covenant(s) and/or the filed UCC documents with the recording or filing stamp and information clearly visible; and (2) the attorney certification(s) described above. The recipient or subrecipient should submit this documentation via email to [ugam@nist.gov](mailto:ugam@nist.gov), with the award number and “Federal Interest” referenced in the subject line. The recipient or subrecipient must maintain in their grants files copies of the instruments reflecting the documentation of the Federal Interest, specifically the recorded Covenant(s) and/or the filed UCC documents with the recording or filing stamp and information clearly visible.

# Federal Interest Determination Question

**For purposes of determining the amount of the Federal Interest, may a recipient or subrecipient designate certain facilities as purchased or constructed solely with Federal Funds and certain other facilities as purchased or constructed solely with matching non-federal funds?**

No. The amount of the Federal Interest on a particular piece of real or personal property acquired or improved with funds made available through a MM financial assistance award is computed as the percentage of the then current fair market value of the property that is attributable to NTIA's participation in the MM project.

# End Slide

Contact information

