

DOE Trade Secrets Rule Summary

The Rule

The new rule will establish certain marking requirements for the submission of trade secrets and other commercial or financial information that is privileged or confidential.¹ It will:

- Require applicants for DOE assistance to include a notice on the application cover sheet that the document may contain trade secrets or other confidential business information, identifying the pages on which such information is located.
- Require similar marking for each page containing such information, as well as marking of the specific information the applicant believes to be exempt from disclosure under FOIA.
- Allow a modified method of identifying such information in application documents submitted through an online system (e.g., www.grants.gov).
- Standardize these requirements across DOE's financial assistance regulations (10 C.F.R. Part 600), as well as its regulations governing technology investment agreements (Part 603), loan guarantees (Part 609), and the ATVM program (Part 611).

Benefits of the Rule

The rule – which is modeled on the successful approach currently used by the Department's ATVM program – will significantly simplify DOE's FOIA process. Although the Department will still generally be required to confer with an applicant prior to releasing information in response to a FOIA request, the rule establishes a presumption that information not so marked is subject to disclosure. This will **streamline the FOIA review and conferral process.**² Moreover, by ensuring that confidential information is appropriately marked at the time of its submission to DOE, the rule will **give applicants greater assurance that their information will not be inadvertently disclosed.**

Background

On March 11, 2011, the Department issued a notice of proposed rulemaking proposing to standardize across various DOE programs procedures for the submission and protection of trade secrets and other confidential business information submitted in applications for DOE assistance (e.g., grants, cooperative agreements, technology investment agreements, loans, and loan guarantees). During the 30 day comment period, DOE received no comments on the proposal. It is therefore now finalizing the rule as proposed in the March 11, 2011 notice.³

¹ The Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4), exempts from disclosure "trade secrets and commercial or financial information that is privileged or confidential."

² Although DOE will still generally confer with the submitter prior to release, the rule will establish a presumption that information not marked is not considered by the submitter to be exempt from disclosure. DOE will still consider arguments that information not marked is nevertheless exempt from disclosure, but may require the submitter to make a compelling showing why information not originally marked should be treated as exempt.

³ DOE is also coordinating to ensure consistency with its implementation of Executive Order 13556, which establishes a Government-wide program for managing controlled unclassified information.