

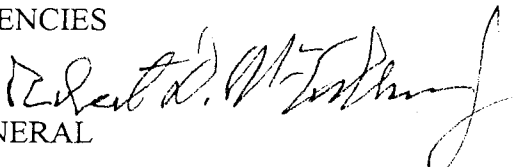


The Associate Attorney General

Washington, D.C. 20530

July 22, 2005

MEMORANDUM TO: DIRECTORS  
STATE ADMINISTERING AGENCIES

FROM: ROBERT D. McCALLUM, JR.   
ASSOCIATE ATTORNEY GENERAL

RE: IMPLEMENTATION OF 28 C.F.R. PART 38

This memorandum concerns implementation by State Administering Agencies of the requirements of 28 C.F.R Part 38, the Department of Justice (DOJ) regulation governing "Equal Treatment for Faith Based Organizations," which was adopted on January 21, 2004 at 69 Federal Register 2836.<sup>1</sup> The Department has recently been asked whether the Department requires that sub-recipients of formula funding have tax-exempt nonprofit status under 26 U.S.C. 501(c)(3).

The short answer: No; with one exception, formula grants administered by the DOJ and open to nonprofits do not require that applicants have been granted federal tax-exempt status.

In those programs in which nonprofit organizations are eligible subrecipients, only one formula grant statute administered by DOJ,<sup>2</sup> including the Office of Justice Programs and the Office on Violence Against Women, specifies how an organization must document its nonprofit status in order to be eligible for a subgrant of formula funds. All other grant statutes have other methods of determining the nonprofit status of an organization. As an example, the S.T.O.P. Violence Against Women Formula Grant Program administered by OVW3 is a program in which nonprofit organizations are eligible subrecipients. 28 C.F.R. § 38.2(g) notes that in grant programs in which an applicant must show that it is a nonprofit organization, an organization that is applying for a sub-award under any formula grant program can establish its nonprofit status in any one of four separate methods:

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<sup>1</sup> A summary of the regulation entitled "Equal Treatment for Faith-based Organizations," 28 C.F.R. Part 38, can be obtained by visiting <http://www.ojp.usdoj.gov/fbci/reginfo>. State Administering agencies are invited to review the regulation in its entirety, particularly as it concerns the funding of inherently religious activities.

<sup>2</sup> See discussion infra re JJDP Act for the one exception.

<sup>3</sup> 42 U.S.C. § 3796gg - 3796gg-5

- (1) Proof that the Internal Revenue recognizes the applicant has the status of a 501(c)(3);
- (2) A statement from a State taxing body or the State secretary of state certifying that:
  - (i) The organization is a nonprofit organization operating within the State; and
  - (ii) No part of its net earnings may lawfully benefit any private shareholder or individual;
- (3) A certified copy of the applicant's certificate of incorporation or similar document that clearly establishes the nonprofit status of the applicant; or
- (4) Any item described in (1) through (3) if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

The Juvenile Justice and Delinquency Prevention (JJDP) Act, Pub. L. No. 93-415, Title I, is the only formula grant statute administered by the Office of Justice Programs (OJP) clearly indicating that only organizations with 501(c)(3) status are eligible for a subgrant as a nonprofit organization. In its definitional section, codified at 42 U.S.C. § 5603(23), the JJDP Act clearly indicates that “the term ‘nonprofit organization’ means an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 [26 U.S.C. § 501(c)(3)] that is exempt from taxation under section 501(a) of the Internal Revenue Code of 1986 [26 U.S.C. § 501(a)].” Accordingly, by statute, any subgrant of JJDP funds that goes to a nonprofit organization must go to an organization that enjoys 501(c)(3) recognition from the Internal Revenue Service.

The eligibility of nonprofits without 501(c)(3) is an important element of the Department’s implementation of the President’s Faith-based and Community Initiative as it provides State Administering Agencies with the flexibility to support grass roots community organizations and groups, whether faith-based or not, that serve crime victims and ex-offenders, and help to prevent crime.

If you have further questions regarding these requirements, discuss them with your state’s grant manager.