




MEMORANDUM FOR: Assistant General Counsels
Chief Counsels
Bureau Counsels

FROM: Asha Mathew, Chief Counsel for Regulation 

DATE: November 29, 2010

RE: Discontinuing the Publication of Notices of Funding
Availability in the *Federal Register*

This memorandum announces the decision of the Office of the Assistant General Counsel for Legislation and Regulation (L&R), after consultation with the Federal Assistance Law Division (FALD) in the Office of the Assistant General Counsel for Finance and Litigation, to discontinue its policy requiring the publication, in the *Federal Register*, of Notices of Funding Availability (NOFAs) and other similar notices soliciting proposals for grants and cooperative agreements.

In response to inquiries from agencies at the Department, L&R and FALD explored the possibility of discontinuing its longstanding policy of publishing NOFAs and other similar notices in the *Federal Register*. After careful review, L&R decided to discontinue this policy to promote efficiency and cost effectiveness with grant programs. Pursuant to the Office of Management and Budget's (OMB's) memorandum,¹ all Federal agencies are currently required to post all details regarding grant opportunities on the website Grants.gov. In light of this OMB requirement, many other Federal agencies have since discontinued the practice of developing and publishing NOFAs² because the information contained in the NOFA is readily available on Grants.gov, and it was redundant to publish this information in the *Federal Register*. L&R determined that agencies within the Department of Commerce offering and managing grants may find it more efficient and cost effective to rely solely on the announcement posted on Grants.gov. Therefore, as of the date of this memorandum, agencies may discontinue the practice of developing and publishing NOFAs.

Before agencies implement this change in policy, they must be aware that Grants.gov is not the Federal Government's official method of providing legal constructive notice of agency policy to the public. The *Federal Register* is the Government's official method of

¹ See 68 FR 58146 (Oct. 8, 2003).

² For example, the National Archives and Records Administration recently proposed a rule to revise regulations to remove the requirement to publish a notice in the *Federal Register*. See 75 FR 17638 (Apr. 7, 2010).

legal notice to the public. Thus, there is the possibility, although very small, that an agency may be exposed to litigation for failing to provide adequate legal notice if it chooses to discontinue publishing NOFAs. The likelihood of such litigation is small given that any disgruntled grant applicant must have had constructive notice of the grant opportunity and requirements for its application to be rejected. However, agencies are advised to carefully consider the impact of discontinuing the publication of NOFAs, and to seek legal counsel from L&R or FALD if there are any concerns or questions regarding this change in policy.

Notwithstanding an agency's decision to implement the change in policy outlined in this memorandum, all grant programs must continue to develop Federal Funding Opportunity (FFO) announcements, which incorporate all substantive grant provisions, such as application requirements, evaluation criteria and selection procedures, and to make it available on Grants.gov pursuant to OMB's memorandum. With regard to L&R review of grant materials, FALD will forward to L&R those FFO announcements with funding that exceeds \$100 million and announcements for new grant programs, so that L&R may coordinate the review and clearance of those announcements with OMB.

The change in policy outlined in this memorandum does not supersede any statutory or regulatory requirements to publish a NOFA, or other similar notice, in the *Federal Register*. Agencies must still publish such notices if required to do so by any law or regulation.

If you have any questions, please do not hesitate to contact me at (202) 482-5942, or at AMathew@doc.gov.