

Informational Item 3

Legal Update

OFFICE OF JUSTICE PROGRAMS
ADDITIONAL GUIDANCE REGARDING COMPLIANCE WITH 8 U.S.C. § 1373

1. *Why is OJP using Byrne/JAG grant funds to enforce 8 U.S.C. § 1373?*

Authorizing legislation for the Byrne/JAG grant program requires that all grant applicants certify compliance both with the provisions of that authorizing legislation and all other applicable federal laws. The Office of Justice Programs has determined that 8 U.S.C. § 1373 (Section 1373) is an applicable federal law under the Byrne/JAG authorizing legislation. Therefore, all Byrne/JAG grant applicants must certify compliance with all applicable federal laws, including Section 1373, as part of the Byrne/JAG grant application process.

2. *Does OJP's guidance on 8 U.S.C. § 1373 impact FY 2016 funding?*

No FY 2016 or prior year Byrne/JAG or SCAAP funding will be impacted. However, OJP expects that JAG and SCAAP recipients will use this time to examine their policies and procedures to ensure they will be able to submit the required assurances when applying for JAG and SCAAP funding in FY 2017. As previously stated, our goal is to ensure that our JAG and SCAAP recipients are in compliance with all applicable laws and regulations, including Section 1373, not to withhold vitally important criminal justice funding from states and localities like yours.

3. *What is the process of determining if a recipient of JAG or SCAAP funds is not in compliance with 8 U.S.C. § 1373?*

As OJP has previously stated, our goal is to ensure that JAG and SCAAP recipients are in compliance with all applicable laws and regulations, including Section 1373. If OJP becomes aware of credible evidence of a violation of Section 1373, the recipient must agree to undertake a review to validate its compliance with 8 U.S.C. § 1373. If the recipient determines that it is in compliance with Section 1373 at the time of review, then it must submit documentation that contains a validation to that effect and includes an official legal opinion from counsel (including related legal analysis) adequately supporting the validation. If the recipient determines that it is not in compliance with Section 1373 at the time of review, then it must take sufficient and effective steps to bring it into compliance and submit documentation that details the steps taken, contains a validation that the recipient has come into compliance, and includes an official legal opinion from counsel (including related legal analysis) adequately supporting the validation. Failure to remedy any violations could result in a referral to the Department of Justice Office of the Inspector General, the withholding of grant funds or ineligibility for future OJP grants or subgrants, or other administrative, civil, or criminal penalties, as appropriate.

4. *What will happen if a recipient of JAG or SCAAP funds is found to be out of compliance with 8 U.S.C. § 1373?*

If a recipient is found out of compliance with Section 1373, the recipient must take sufficient and effective steps to bring it into compliance and submit documentation that details the steps taken, contains a validation that the recipient has come into compliance, and includes an official legal opinion from counsel (including related legal analysis) adequately supporting the validation. Failure to remedy any violations could result in a referral to the Department of Justice Inspector

General, the withholding of grant funds or ineligibility for future OJP grants or subgrants, suspension or termination of the grant, or other administrative, civil, or criminal penalties, as appropriate.

As previously stated, our goal is to ensure that our JAG and SCAAP recipients are in compliance with all applicable laws and regulations, including Section 1373, not to withhold vitally important criminal justice funding from states and localities like yours.

5. Does OJP expect State Administering Agencies or their subgrantees to submit additional certifications specific to 8 U.S.C. § 1373?

No, OJP does not expect grantees to submit additional assurances in FY 2016, nor does OJP expect grantees to require additional assurances from subgrantees, unless the grantees choose to do so. However, OJP expects that JAG grantees and subgrantees will use this time to examine their policies and procedures to ensure they will be able to submit the required assurances when applying for JAG funding in FY 2017.

6. Will a locality risk its entire Byrne/JAG funding if it refuses to certify compliance with federal law, including 8 U.S.C. § 1373?

Yes, a JAG grantee is required to assure and certify compliance with all applicable federal statutes, including Section 1373, as well as all applicable federal regulations, policies, guidelines and requirements, as a prerequisite to obtaining funding. OJP expects that JAG recipients will use this time to examine their policies and procedures to ensure they will be able to submit the required assurances when applying for JAG funding in FY 2017. By providing this additional guidance and the prior guidance on 8 U.S.C. § 1373, the Department has made clear that its goal is to ensure that our JAG and SCAAP recipients are in compliance with all applicable laws and regulations, including Section 1373, not to withhold vitally important criminal justice funding from states and localities like yours.

7. Will a State risk its entire Byrne/JAG funding if a subgrantee is found to be out of compliance?

No, only the jurisdiction that fails to comply with Section 1373 is at risk for not being funded after being provided an opportunity to correct its policies or practices. It is the State's legal responsibility as the prime grantee to monitor its subgrantees adequately and take appropriate action if 1) a subgrantee does not certify compliance with Section 1373, or 2) the State becomes aware (after making the subaward) of credible evidence of a violation of Section 1373 by a subgrantee. In general, however, a subgrantee's continuing violation would not ordinarily result in imposition of penalties against the State, or put the State's entire Byrne/JAG funding at risk. If the State disburses funds to an ineligible subgrantee, however, such that the State itself could be said to have participated in the violation (e.g. by having made the subaward knowing that the subgrantee was ineligible) or failed to take appropriate action to remedy a violation, then that State would be responsible for repayment of the dispersed funding.

In addition, if OJP becomes aware of credible evidence that a subgrantee may be in violation of Section 1373, OJP will forward that evidence to the State, and the State will need to take steps to determine if the subgrantee is in violation, and (if it is) to require the subgrantees to take

sufficient and effective steps to bring it into compliance and submit documentation that details the steps taken, contains a validation that the subgrantee has come into compliance, and includes an official legal opinion from counsel (including related legal analysis) adequately supporting the validation.

Additional guidance regarding compliance with Section 1373 can be found at:

Question and Answer document provided to all JAG grantees and SCAAP recipients on July 7, 2016: https://www.bja.gov/ProgramDetails.aspx?Program_ID=59.

DOJ Office of the Inspector General Memorandum posted on July 28, 2016 at: <https://oig.justice.gov/reports/2016/1607.pdf>.