DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE WASHINGTON, D.C. 20224

GLS-1531-98
CASE No. GLS-116221-98
EGG:ETewel

DUM FOR NANCY RYMER
CHIEF, EDUCATION & ACCOUNTING RESOLUTION BRANCH

Dennis M. Ferrara
Assistant Chief Counsel (General Legal Services)
Internal Revenue Service

Low Income Taxpayer Clinics

This is in response to your request for assistance concerning IRS implementation of I.R.C. § 7526, authorizing a grant program for low income taxpayer clinics. We have outlined general principles of grant administration, funding of the program, and addressed the issue of Service authority to make grants to organizations that provide tax information for persons for whom English is a second language. As discussed below, we have concluded that the Service has discretionary authority to fund a grant program for clinics that represent or refer low income taxpayers for pro bono representation, and that such qualifying clinics may operate outreach programs for persons for whom English is a second language. In addition, as requested, we have provided guidance concerning threshold questions with regard to IRS interaction with outside stakeholders in developing and publicizing program guidance, including IRS use of the draft guidance and application materials jointly submitted by Nina Olson and Janet Spragens, clinic directors who spearheaded authorization for the program,[1] and Service participation in professional conferences and workshops.[2]

The new Code provision, added by section 3601 of the Restructuring and Reform

[1] Ms. Olson is Executive Director, The Community Tax Law Project, Richmond, Virginia. Ms. Spragens is a Professor of Law at the American University, Washington College of Law, and Director of the school's Federal Tax Clinic.

Act of 1998, Pub. L. 105-206 (July 22, 1998), provides for the authority of the Secretary to make grants, subject to the availability of appropriated funds, to provide matching funds for the development, expansion or continuation of qualified low-income taxpayer clinics (LITCs). A qualified LITC is defined as a clinic that represents low income taxpayers in controversies with the Service, or operates programs to inform individuals for whom English is a second language of their rights and responsibilities under the tax code. I.R.C. § 7526(b)(1)(A). The term "clinic" includes a clinical program at an accredited law, business or accounting school in which students represent low-income taxpayers in tax controversies, and an organization exempt under section 501(a) which satisfies the requirements of section 7526(b)(1) through representation of taxpayers or referral of taxpayers to qualified representatives. I.R.C. § 7526(b)(2). Unless otherwise provided by specific appropriation, no more than $6,000,000 per year (exclusive of costs of administering the program) may be allocated to grants. I.R.C. § 7526(c)(1). The aggregate amount of grants to a clinic for a year may not exceed $100,000. I.R.C. § 7526(c)(2).

Service's Role as Grantor

In contrast to the inherent authority of agencies to enter into procurement contracts to obtain goods and services, absent specific statutory authority agencies have no authority to enter into assistance relationships. Section 7526 of the Code sets forth the terms and conditions of the authorized assistance relationship between the Service and LITCs. As indicated above, grants of matching funds to qualifying clinics are authorized.

The Federal Grant and Cooperative Agreement Act, 31 U.S.C. § 6301 *et seq.*, distinguishes between two legal instruments or funding vehicles that an agency may use for an assistance relationship: (1) an agency is to use a grant agreement to transfer a thing of value to the recipient when substantial involvement between the agency and the grant recipient in carrying out the contemplated activity is not expected, 31 U.S.C. § 6304; (2) an agency is to use a cooperative agreement when substantial involvement is expected, 31 U.S.C. § 6305.

The term "grant" was used in the LITC program statute. In contrast, legislation for the Service's Tax Counseling for the Elderly program provides for agreements

---

[2] Additional questions have been raised concerning the grant program by clinic directors and by your staff, including administration of the statutory requirement that 90% of the taxpayers represented by the clinic have incomes which do not exceed 250% of the poverty level, the matching funds requirement, etc. We will address these issues in a separate memorandum.

with organizations for the purpose of providing training and technical assistance to prepare volunteers. *See* Pub. L. 95-600, § 163 (November 6, 1978). In contrast to the TCE program statute, there are no references in the LITC statute to Service involvement in the conduct of clinic activities, whether through training or technical assistance for clinic personnel, IRS publicity of clinic services, the provision of materials for the use of clinic personnel, or otherwise. The conferees adopted the House version of the LITC provision (apart from the increase in authorized grants from $2,000,000 to $6,000,000 and the expansion of clinics to include clinics sponsored by accounting and business schools). H.R. Rep. 599, 105th Cong. 2d Sess. 303 (1998).[3] The only assistance specifically authorized is the transfer of funds. Accordingly, it is our opinion that a grant agreement rather than a cooperative agreement is the appropriate vehicle for the new program. In addition, a grant vehicle which limits Service involvement in clinic programs will serve to minimize conflict of interest concerns that are raised by the clinic program.[4]

Grant Eligibility of Organizations that Conduct Programs for Persons for Whom English is a Second Language

You have asked whether the LITC program statute requires the Service to solicit grant applications from organizations that operate programs to inform individuals for whom English is a second language of their rights and responsibilities under the tax code, and if so, whether it would be appropriate to announce a percentage of total grant awards that the Service will seek to make to such organizations. As

---

[3] Moreover, since the Senate proposal provided that not more than 7.5% on the amount available for grants shall be allocated to such training and technical assistance programs, the intent of the Senate proposal was apparently limited to *grants* to training and technical assistance programs rather than as authority for a cooperative program of training and assistance activities related to clinic operations.

[4] In his testimony in connection with the Portman proposal, H.R. 2292, introduced July 30, 1997, the Chief Counsel strongly urged alternative funding to preclude the "inescapable appearance of a conflict of interest." Sept. 26, 1997, Statement of Chief Counsel Stuart L. Brown before the House Comm. on Ways and Means, Oversight Subcomm., 105th Cong., 1st Sess. See also April 17, 1997, Statement of Steven C. Salch, Chairman, Section of Taxation, ABA, before the National Commission on Restructuring the Internal Revenue Service, p. 21, noting "legitimate [agency] concerns about the propriety of ... assisting in disseminating information about the availability of ... pro bono services." The professional ethics rules applicable to lawyers recognize the conflict inherent in payment for a lawyer's services by a source other than the client, and permit such arrangements on the conditions that the client is informed of that fact and consents, and the arrangement does not compromise the lawyer's duty of loyalty to the client. *See* comment (10) to ABA Model Rule 1.7.

discussed below, while this issue not entirely free from doubt, based on the statutory language in conjunction with the legislative history of the provision, it is our opinion that the reference to such programs was intended to permit the use of grant funds for such educational activities *by clinics that represent or refer low income taxpayers for pro bono representation*, rather than to fund organizations that conduct outreach activities in the absence of a substantial representation or referral program.

As indicated above, statutory authority for the LITC program was enacted as part of the Internal Revenue Service Restructuring and Reform Act of 1998. Under the Act, a qualifying LITC is defined at I.R.C. § 7526(b)(1)(A) as a clinic that represents low income taxpayers, or operates programs to inform individual for whom English is a second language about their tax rights and responsibilities. The term "clinic" is further defined at I.R.C. § 7526(b)(2) to include a clinical program in which students represent low income taxpayers, and a tax-exempt organization which "satisfies the requirements of paragraph (1) through representation of taxpayers or referral of taxpayers to qualified representatives."

The development of the LITC provision occurred as follows. Following its study of IRS operations, the National Commission on Restructuring the Internal Revenue Service ("Restructuring Commission") proposed a new grant program, "requir[ing eligible clinics] as part of their work to perform outreach and education to populations that do not speak English as a first language." Report of the Restructuring Commission, "A Vision for a New IRS," App. I-4 (June 25, 1997). On February 26, 1997, the Commission heard Ms. Spragens testify concerning the need for IRS funding of clinical programs that provide low income taxpayer assistance in the controversy process. Ms. Spragens emphasized that the needs of low income individuals do not end with the filing of their tax return and, contrary to the perception of the public and of tax professionals, low income individuals have tax controversy problems. Ms. Spragens further testified that many potential clinic clients are individuals for whom English is not their first language, and who are desperate for assistance in navigating the tax administration system. She suggested that clinic operations will improve tax administration by serving as a trustworthy source of advice to an otherwise unrepresented population to concede meritless issues, and effectively representing this population in settlement negotiations and litigation of tax problems beyond their own abilities to resolve. H.R. 2292, introduced July 30,1997 by Commission Co-Chair Representative Rob Portman, included a new Code provision, I.R.C. § 7525, directing the Secretary to make grants to provide matching funds for the development, expansion, or continuation of qualified low income taxpayer clinics.[5] H.R. 2292 defined a qualified low income taxpayer clinic

[5] On July 31, 1997, Restructuring Commission Co-Chair Senator Kerrey

as a clinic that –

> **(I) represents low income taxpayers in controversies before the Internal Revenue Service,**
> **(ii) operates programs to inform individuals for whom English is a second language about their rights and responsibilities under this title, and**
> **(iii) does not charge more than a nominal fee for its services ... .**

I.R.C. § 7525(b)(1)(A), as proposed at H.R. 2292, § 313. As in the version ultimately enacted into law, § 313 further provided that the term "clinic" includes –

> **(A) a clinical program at an accredited law school in which students represent low income taxpayers in controversies arising under this title,[6] and**
>
> **(B) an organization exempt from tax under section 501(c) which satisfies the requirements of paragraph (1) through representation of taxpayers or referral of taxpayers to qualified representatives.**

Congressional consideration resulted in further finetuning of the restructuring bill, in H.R. 2676, introduced October 21, 1997, by House Ways and Means Committee Chairman Archer. In hearings that preceded the introduction of Chairman Archer's bill, Ms. Olson testified in detail concerning the operations of The Community Tax Law Project, a 501(c)(3) organization providing low income Virginia residents with pro bono legal representation in tax disputes (through direct representation or referral to a statewide panel of tax professionals who have agreed to provide representation free of charge) and educating low income individuals about their rights and responsibilities as taxpayers. As had Ms. Spragens in her earlier testimony before the Restructuring Commission, Ms. Olson recognized the needs of individuals for whom English is a second language. Ms. Olson further recommended expanding expressly qualified outreach activities to include programs for "traditionally low income populations," such as former welfare recipients newly entering the workforce.

As introduced on October 21, 1997, the LITC program, set forth at H.R. 2676,

---

introduced the companion Senate bill, S. 1096, containing the Restructuring Commission's proposal. The Senate did not take action on S. 1096 or on Senator Kerrey's subsequent attempts to introduce the reform legislation as amendments to H.R. 2646, the Education bill, on October 30, 1997, and March 19, 1998.

[6] The enacted provision refers to clinics sponsored by accounting and business schools, as well as law schools.

§ 361, was in large part identical to the Restructuring Commission proposal. However, Chairman Archer's proposal modified the definition of qualified LITC to make outreach activities for those for whom English is a second language optional rather than mandatory. As later passed by the House, and as enacted into law, H.R. 2676 provided that the term 'qualified low income taxpayer clinic' means a clinic that –

> (I) does not charge more than a nominal fee for its services ..., and
> (II)(I) represents low income taxpayers in controversies with the Internal Revenue Service, *or*
> (II) operates programs to inform individuals for whom English is a second language about their rights and responsibilities under this title.

I.R.C. § 7525(b)(1)(A) (emphasis added). House action on the proposal was speedy, and on November 5, 1997, H.R. 2676 was passed and referred to the Senate Finance Committee.

The Senate Finance Committee left the LITC provision largely unchanged. As reported, H.R. 2676, sec. 3601 retained the identical definition of qualified low income taxpayer clinic at then-proposed I.R.C. § 7526(b)(1)(A). S. Rep. No. 174, 105th Cong., 2d Sess. 94-95 (April 22, 1998). The reported bill minimally expanded the definition of clinic by revising I.R.C. § 7526(b)(2)((A) to include clinical programs at business or accounting schools. *Id.* at p. 94.

However, a significantly revised version of the LITC provision was included in H.R. 2676, as passed by the Senate on May 7, 1998. The Senate increased the overall limit from $3,000,000 to $6,000,000 for the new grant program and proposed authority for grants to "provide matching funds for ... qualified low income taxpayer clinics, including volunteer income tax assistance programs, and to provide training and technical assistance to support such clinics," at proposed I.R.C. § 7526(a). The Senate also revised the definition of qualifying LITC to include a clinic which "provides tax preparation assistance and tax counseling assistance to low income taxpayers, such as volunteer income tax assistance programs." Proposed I.R.C. § 7526(b)(1)(A)(III). Further, the Senate-passed bill expanded the definition of a clinic to include "a volunteer income tax assistance program which is described in section 501(c) and exempt from tax under section 501(a) and which provides tax preparation assistance and tax counseling assistance to low income taxpayers." Proposed I.R.C. § 7526(b)(2).

Our research has uncovered limited congressional debate concerning the LITC provision. Senator Boxer described the LITC provision as "ensur...[ing] that low income taxpayers, and taxpayers for whom English is a second language, receive

tax services at a nominal fee, further stating that, "Such clinics are essential if low-income taxpayers, and taxpayers who have minimal English proficiency are to be represented in controversies with the IRS." Cong. Rec. (May 7, 1998) S 4491.

The conferees rejected the Senate's proposed expansion of grant authority, adopting the House bill, except that clinical programs at business or accounting schools would be eligible for grants and the overall limit is $6,000,000. H.R. Rep. 599, 105th Cong., 2d Sess. 303 (June 24, 1998). The conference agreement was enacted into law.

We believe that since its introduction, the intent of the provision has remained unchanged and continues to be to support the representation of *low income taxpayers in the controversy process*. As indicated above, Congress rejected expansion of the LITC grant program to authorize grants to organizations that provide tax preparation assistance and general tax counseling for low income taxpayers. As enacted, the LITC provision reflects congressional recognition that individuals for whom English is a second language have unmet needs for representation in the tax controversy process and are likely potential clients of qualifying clinics. While the Portman proposal would have required qualifying clinics to conduct outreach for those for whom English is a second language, early in the consideration of the LITC proposal, the House revised the LITC provision to merely permit such outreach activities. In question is whether such outreach activities alone will qualify an organization for a grant under the LITC statute. We believe they will not.

No action was taken in either house of Congress to revise the Portman-proposed definition of clinic with respect to its inclusion of a tax-exempt organization that satisfies the requirements of I.R.C. § 7526(b)(1) through representation of taxpayers or referral of taxpayers to qualified representatives. I.R.C. § 7526(b)(2)(B). An appropriate reading in light of the testimony before Congress and the stated intent to authorize grants for the continuation of qualifying clinics is to read this prong of the definition as permitting grants to organizations that make referrals to pro bono panels in lieu of providing direct representation to clients. Read in this manner, the definition of qualified LITC is consistent with the information presented to Congress concerning clinic operations. That is, the provision permits grants to academic clinical programs in which students represent low income individuals, as well as clinics operated by non-school associated tax-exempt organizations. The latter category of clinics, as described in congressional testimony by Ms. Olson, may represent low-income clients or may make referrals of individuals to panels that have agreed to provide pro bono legal representation. Interpreted in this manner, all components of the statutory definition are given meaning appropriate to the apparent congressional intent to

provide federal funds to clinics that meet the needs of low income taxpayers in controversies. Further, this interpretation permits flexibility in clinic operations (to the extent that a qualified clinic may or may not conduct outreach programs for individuals for whom English is a second language, and may represent or refer the target population for representation at a nominal fee).

Interaction with Outside Stakeholders in Development of Program Guidelines and Application Package - Public Input, Circulation of Draft Guidance, Participation in Professional Conferences

As a follow-up to discussions with Mike Singleton of the Office of Public Liaison and Small Business Affairs, by letter dated July 21, 1998, Ms. Olson and Ms. Spragens submitted a statement describing the new provision in detail, including suggested interpretations of certain key concepts, and draft applications for both non-academic and academic grantees. You have asked whether there are any restrictions on Service use of the Olson/Spragens materials. In addition, you requested guidance concerning invitations informally extended to Service and Counsel employees to participate in a panel presentation on the LITC program at the upcoming American Bar Association conference in January 1999 and an American University workshop in February 1999.

Under the Administrative Procedure Act, 5 U.S.C. § 553(b), "notice and comment" procedures apply to rulemaking, providing an opportunity for public participation in the rulemaking process before a regulation becomes effective. A rule is broadly defined to mean "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4). Grant administration manuals have been considered "rules" by the courts. *See, e.g., Abbs v. Sullivan*, 756 F.Supp. 1172 (W.D.Wis. 1990). However, section 553 does not apply to regulations that involve matters relating to public property, loans, grants, benefits, or contracts. 5 U.S.C. § 553(a)(2). Although such "proprietary matters" may involve significant policy decisions that could benefit from the ventilation of public views, Congress deemed it appropriate to facilitate the issuance of such rules by dispensing with all procedural requirements. *See National Wildlife Federation v. Snow*, 561 F.2d 277 (D.C.Cir. 1976).[7]

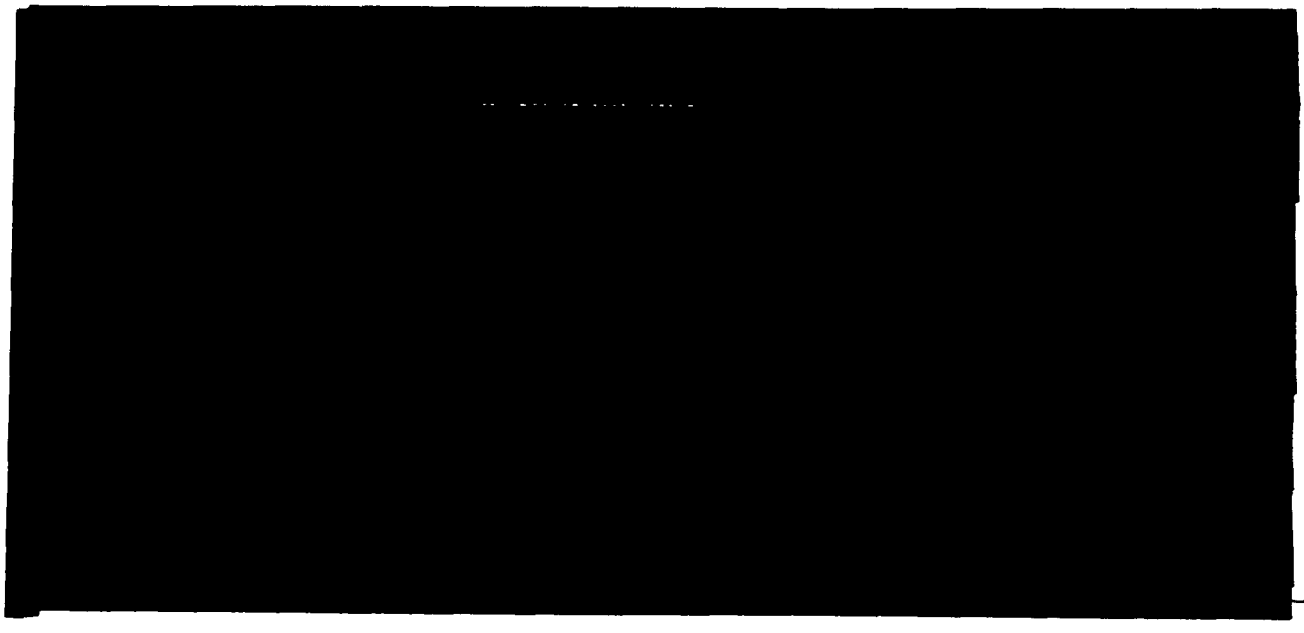
Apart from the APA, there are no statutory public notice requirements that would apply to the Service's LITC rules. In addition, the agency's rules with regard to

---

[7] In addition, except when notice or hearing is required by statute, the notice and comment procedures of 5 U.S.C. § 553(b) do not apply to interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice.

rulemaking contain no provisions that *require* notice and comment procedures other than when required under the APA. *See* 26 C.F.R. § 601.601(a)(2) (where required by 5 U.S.C. § 553 and in such other instances as may be desirable, notice of proposed rules are published for comment).

In our opinion, there are no legal or ethical restrictions that would preclude the Service from considering the views expressed by Ms. Olson and Ms. Spragens and making use of the materials provided in developing program guidelines and applications. As a matter of appropriations law, a suggested interpretation of the law is not a gift of property to the Service, which would require advance authorization from Treasury under the gift acceptance procedures, nor do we think it appropriate to treat the Olson/Spragens letter as the product of "voluntary services," i.e., uncompensated services for the Government, which are prohibited in the absence of statutory authorization.[8]



DP

[8] The Comptroller General has stated that if work to be performed by non-Federal workers would normally be performed by the sponsoring agency with its own personnel and appropriated funds, acceptance of free services to perform the same work would augment the agency's appropriation impermissibly. Comp. Gen. B-211079, B-211079-2 (January 2, 1987). However, it would be misguided and far beyond a reasonable reach of this principle of appropriations law to use it to preclude public input in the rulemaking process.

DP

[redacted] DP

With regard to IRS and Counsel participation in professional conferences and workshops, including the ABA and American University programs, it is our understanding that you view such participation as an opportunity to obtain feedback concerning draft program guidelines, which under your action plan will be announced in final to the public in April 1999. Based on the recognized benefits to the agency from communications with outside groups, it is longstanding Service policy to encourage the acceptance of speaking invitations on matters of concern to the Service. Policy Statement P-1-181. However, a speaking invitation will be declined if Service participation would indicate that the sponsor has a preferential relationship with the Service, *information not available to others is being provided to a preferred group*, or the conference is sponsored for profitmaking purposes. *Id.*; *see also* 5 C.F.R. §§ 2635.101(b)(8) (employees shall not give preferential treatment to any private organization or individual); 2635.703 (employees shall not allow the improper use of nonpublic information to further the private interests of another by knowingly unauthorized disclosure). Prior to publication, all regulations are confidential, and no information may be disclosed regarding the agency's position, except as permitted by the Commissioner, the Chief Counsel, and certain other high-level officials, on the basis of exceptional circumstances. *See* Policy Statement P-1-29. Proposed revenue rulings and revenue procedures similarly are confidential. See Policy Statement P-(11)-75. At meetings and conferences, Counsel may seek the comments of interested stakeholders regarding alternative approaches, so long as they do so generally *without disclosing the agency's expected position.* CCDM (30)1520:581.2.

[redacted] DP

Authorized Funding for the Program

The Fiscal Year 1999 Treasury Appropriation Act provides no earmarked funds for the LITC program. Pub. L. 105 -277 (October 21, 1998), 504-505. However, according to the Conference Report, $2,000,000 was included in the Processing, Assistance, and Management Appropriation for "low income taxpayer clinics ... to award matching grants to develop, expand, or continue qualifying low income

taxpayer clinics as authorized in Section 3601 of the RRA." H.R. Rep. No. 825, 105th Cong. 2d Sess. 1484 (1998). The conferees acted following criticism of the Service's more limited planned pilot program (contemplating a total of $400,000 in grants in fiscal year 1999). Representatives Nancy Johnson and Rob Portman urged that $2,000,000 in funding be provided in order that "this important program gets off the ground," and taxpayers who otherwise would be unrepresented are afforded the new taxpayer rights created by the RRA. See Letter dated September 18, 1998, to House Treasury-Postal Appropriations Subcommittee, Doc. 98-28749; 98 TNT 185-17.

While Conference Committee instructions should be carefully considered by the Service, such instructions are not legally binding.

> **[W]hen Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how funds are to be spent do not establish any legal requirements on federal agencies.**

55 Comp. Gen. 307, at 319 (1975). See also 64 Comp. Gen. 359 (1985) (directions in committee reports, floor debates and hearings, or statements in agency budget justifications are not legally binding on an agency unless they are incorporated, either expressly or by reference, in an appropriation act itself or in some other statute). Accordingly, neither the program statute[10] nor the Appropriation Act requires expenditures for grant awards to LITCs. Instead, based on the necessary expense doctrine, as GLS has previously advised (copy of memorandum dated attached), in the absence of line-item funding in the appropriation act, the Service's Processing, Assistance, and Management (PAM) appropriation may be used to fund the LITC program. It is our understanding that the Service recognizes the priority nature of the LITC grant program and is making reasonable and good faith efforts to fully implement the program in accordance with the Conference Committee directive. There are however significant practical difficulties in making a total of $2,000,000 in awards for fiscal year 1999, due to the necessary processes of developing program guidelines, soliciting and evaluating applications, as well as the statutory requirement of matching funds.

---

[10] As discussed above, the Portman proposal, H.R. 2292 (introduced July 30, 1997), 105th Cong., 1st Sess., provided at § 313 that the Secretary "shall" make LITC grants. However, the statute (and preceding versions passed by both houses of Congress) provides that the Secretary "may" make grants.

Time Limitations Applicable to Funding

Although multi-year grants are authorized under the program statute, I.R.C. § 7526(c)(3), the FY 1999 Treasury Appropriation Act provides no appropriation of multi-year funds for the LITC program, and accordingly LITC funding under the Act is available for obligation during the current fiscal year. *See generally*, GAO, *Principles of Federal Appropriations Law* (2d ed. 1991), 2-45-47. Under the bona fide needs rule, 31 U.S.C. § 1502(a), a fixed term appropriation is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period. The bona fide needs rule applies to grants and cooperative agreements just as it applies to other types of expenditures, and accordingly LITC grant awards made with fiscal year 1999 funds may not be used by the grantees for other than purposes related to fiscal year 1999. *See* 64 Comp. Gen. 359 (1985). As discussed in our memorandum dated December 9, 1998 (copy attached), it is our opinion that based on the broad statutory authorization of the LITC program and absence of any contrary indications of congressional intent, it is within the discretion of the agency to fund pre-application operating costs of grantees in fiscal year 1999 ("retroactive funding"). In addition, once the appropriation has been properly obligated, fiscal year 1999 funds may be used to fund expenses incurred by grantees after the fiscal year has ended, *so long as such expenses serve purposes related to fiscal year 1999. See* 20 Comp. Gen. 370 (1941) (fiscal year 1941 appropriation for the education of defense workers are available for expenditures in connection with courses beginning in 1941 although such courses are not completed until shortly after the end of the fiscal year). Thus, for example, fiscal year 1999 funding could be used for the cost of preparing reports required of grantees by the Service, but could not be used for the cost of preparing publicity related to fiscal year 2000 operations.

Conclusion

[redacted]

DP

Page withheld in full
Deliberative process privilege