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# Sanctuary Jurisdictions and Select Federal Grant Funding Issues: In Brief

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March 16, 2017

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

R44789

## Summary

On January 25, 2017, President Donald J. Trump issued Executive Order (EO) 13768, “Enhancing Public Safety in the Interior of the United States.” Among other things, the EO raises questions regarding whether, and to what extent, federal agencies will withhold federal grant funds that would have otherwise been awarded to a designated “sanctuary jurisdiction.” Under the EO, the Secretary of Homeland Security (Secretary) is directed to designate a jurisdiction as a sanctuary jurisdiction at his discretion, and to the extent consistent with law, for those jurisdictions found to have willfully refused to comply with 8 U.S.C. 1373, “Communication between government agencies and the Immigration and Naturalization Service.”

Among other things, the EO raises questions regarding potential restrictions of federal grant funding for sanctuary jurisdictions. This report discusses several questions that might be raised regarding the implementation of the executive order by federal grant-making agencies (also known as “federal awarding agencies”) and the impact on federal grant funding for designated sanctuary jurisdictions.

Because of the complexity of implementing a centralized policy such as the EO through the decentralized structure of federal grants administration practices, there is uncertainty in determining the impact of the EO on federal grant funding for sanctuary jurisdictions. This could be affected by the discretion exercised by the Attorney General and the Secretary in defining a “federal grant,” determining which programs are exempted because of providing necessary funding for law enforcement purposes, and determining what constitutes a “sanctuary jurisdiction.” The impact of the EO on federal grant funding could also be affected by how federal grant awarding agencies utilize discretion in administering the grant programs, including review of eligibility and conditioning federal grant awards.

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## Overview

On January 25, 2017, President Donald J. Trump issued Executive Order (EO) 13768, “Enhancing Public Safety in the Interior of the United States.” Among other things, the EO raises questions regarding whether, and to what extent, federal agencies will withhold federal grant funds that would have otherwise been awarded to a designated “sanctuary jurisdiction.” Under the EO, the Secretary of Homeland Security (Secretary) is directed to designate a jurisdiction as a sanctuary jurisdiction at his discretion, and to the extent consistent with law, for those jurisdictions found to have willfully refused to comply with 8 U.S.C. 1373, “Communication between government agencies and the Immigration and Naturalization Service.”<sup>1</sup>

Among other things, the EO raises questions regarding potential restrictions of federal grant funding for sanctuary jurisdictions. Legal questions about how the EO can be construed and questions involving what constitutes a sanctuary jurisdiction have been raised and are discussed in other CRS products.<sup>2</sup> This report discusses several questions that might be raised regarding the implementation of the executive order by federal grant-making agencies (also known as “federal awarding agencies”) and the impact on federal grant funding for designated sanctuary jurisdictions.

## Federal Grants to Sanctuary Jurisdictions

The EO directs the Attorney General and the Secretary to ensure that designated sanctuary jurisdictions are not eligible for federal grants, except for those grants deemed necessary for law enforcement purposes by the Attorney General or the Secretary. Several questions may arise regarding grant-related implementation of the EO, including what constitutes a federal grant, which federal grant programs are affected, whether and how grant recipients residing in a sanctuary jurisdiction might be affected, how the EO will be implemented through the administration of federal grant programs, and when grant funding might be affected.

### What is a federal grant?

One critical element in determining the impact of the EO on federal grant funding to designated sanctuary jurisdictions is how a federal grant is defined. The Office of Management and Budget (OMB) defines a federal grant award as, “the federal financial assistance that a non-federal entity receives directly from a federal awarding agency or indirectly from a pass-through entity.”<sup>3</sup> Federal grant awards are generally provided through execution of a grant agreement or a cooperative agreement that sets forth the terms and conditions of the award.

Two federal sources provide detail on federal grant outlays. The FY2017 Historical Tables of the Budget of the United States Government includes data on total outlays for grants to state and local governments.<sup>4</sup> This data includes outlays that “constitute income to state and local

<sup>1</sup> *Federal Register*, Vol. 82, No. 18, January 30, 2017, pp. 8799-8803.

<sup>2</sup> For a discussion of the legal aspects of the EO, see CRS Legal Sidebar WSLG1741, *Plan to Restrict Federal Grants to “Sanctuary Jurisdictions” Raises Legal Questions*, by Brian T. Yeh. For a discussion of sanctuary jurisdictions, see CRS Insight IN10653, *Sanctuary Jurisdictions: Congressional Action and President Trump’s Interior Enforcement Executive Order*, by William A. Kandel.

<sup>3</sup> 2 CFR, §200.38(a)(1).

<sup>4</sup> Office of Management and Budget, *FY2017 Historical Tables: Budget of the U.S. Government*, Table 12.1 Summary Comparison of Total Outlays for Grants to State and Local Governments: 1940-2021, at <https://www.gpo.gov/fdsys/> (continued...)

governments to help finance their services and their income transfers for payments for individuals.”<sup>5</sup> The estimated FY2017 outlays for grants to state and local governments are \$596.7 billion.<sup>6</sup> OMB issues uniform guidance to federal agencies on government-wide policies and procedures for the awarding and administration of grants and agreements under 2 C.F.R., *Grants and Cooperative Agreements*.<sup>7</sup> In addition, the Catalog of Federal Domestic Assistance lists at least 998 federal programs defined as project grants, formula grants or cooperative agreements.<sup>8</sup> The EO directs the Attorney General and the Secretary to utilize their discretion in ensuring that sanctuary jurisdictions are not eligible for federal grants, which will presumably require the Attorney General and the Secretary to define “federal grant.”

## Which federal grant programs are affected?

The determination of which federal grant programs are affected will be based on how the Attorney General and the Secretary define “federal grants” and which programs are exempted based upon a determination by the Attorney General or the Secretary that the program provides grant funding for law enforcement purposes. A broad interpretation of “federal grant” could include any federal grant outlay to designated sanctuary jurisdictions regardless of which federal agency administers the grant program. A more narrow interpretation of the definition of “federal grant” could limit the affected grant programs to those programs directly administered by the Attorney General and the Secretary. Additionally, the way the EO is implemented by the federal agencies could potentially affect the scope of the impact of the EO.

## Will grant recipients residing in designated sanctuary jurisdictions be ineligible for federal grants?

The EO states that designated sanctuary jurisdictions are not eligible for federal grants with certain exemptions, but does not provide sufficient detail regarding what a “sanctuary jurisdiction” is to enable a determination regarding which federal grant recipients might be impacted. Federal grant awards are not always provided based upon a designation of the recipient as a “city” or a “state.” In some cases, federal grant awards are provided to communities meeting certain characteristics, such as “entitlement communities” that are provided funding under the Community Development Block Grant.<sup>9</sup> This raises the question of whether federal grant recipients who reside in a designated sanctuary jurisdiction, such as an entitlement community, would also be deemed ineligible.

Additionally, it is unclear how grant funding would be affected if only a portion of a city or state falls within a designated sanctuary jurisdiction, particularly in areas where cities and communities encompass a regional area where there are shared services and shared responsibilities for

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pkg/BUDGET-2017-TAB/pdf/BUDGET-2017-TAB.pdf.

<sup>5</sup> Office of Management and Budget, *FY2017 Historical Tables: Budget of the U.S. Government*, p. 21.

<sup>6</sup> Office of Management and Budget, *FY2017 Historical Tables: Budget of the U.S. Government*, Table 12.1 Summary Comparison of Total Outlays for Grants to State and Local Governments: 1940-2021, at <https://www.gpo.gov/fdsys/pkg/BUDGET-2017-TAB/pdf/BUDGET-2017-TAB.pdf>.

<sup>7</sup> 2 C.F.R. §200 et seq.

<sup>8</sup> Catalog of Federal Domestic Assistance, at <http://www.cfda.gov>.

<sup>9</sup> For a discussion of entitlement communities under the Community Development Block Grant program, see CRS Report R43520, *Community Development Block Grants and Related Programs: A Primer*, by Eugene Boyd.

implementing federal laws. For example, federal grant applicants might include a county, a city designated as a sanctuary jurisdiction that resides in the county, and a non-sanctuary jurisdiction suburb outside the city but within the county. Since there is no uniform set of characteristics defining grant recipients, it is likely that there will be implementation issues in applying a designation of a sanctuary jurisdiction to every federal grant program.

## **How will federal agencies implement the EO?**

Federal agencies have broad authority to administer federal grant programs within statutory parameters. This authority includes evaluating grant applicant eligibility and imposing conditions and terms on federal grant awards.

### **Eligibility for federal grants**

The EO specifies that designated sanctuary jurisdictions become ineligible for federal grants. Under existing OMB guidance, federal agencies are required to conduct a review of the eligibility of the potential grant recipient prior to making a federal award.<sup>10</sup> This evaluation includes a review of the risks posed by the grant application, including, “the applicant’s ability to effectively implement statutory, regulatory, or other requirements imposed on non-federal entities.”<sup>11</sup> At the federal awarding agency’s discretion, the “other requirements imposed on non-federal entities” could possibly be interpreted to include compliance with 8 U.S.C. 1373. Should that be the case, designated sanctuary jurisdictions could be deemed ineligible for the federal grant programs administered by that federal agency. However, it is also possible that the federal agencies might utilize their discretion in administering the grant program to more narrowly interpret the “other requirements” to mean only those requirements that directly relate to the specific grant program. It is conceivable that this “relationship test” could be inconsistently applied across federal agencies and programs unless clear guidance is provided by the Attorney General and the Secretary. This potential for inconsistency may be attributed to the decentralized structure of federal grant-making laws and correspondingly decentralized ways in which federal agencies administer grant programs.

### **Conditioning federal grant awards**

Pursuant to OMB guidance, federal awarding agencies must “manage and administer the federal award in a manner so as to ensure that federal funding is expended and associated programs are implemented in full accordance with U.S. statutory and public policy requirements: including, but not limited to, those protecting public welfare, the environment, and prohibiting discrimination.”<sup>12</sup> Additionally, OMB guidance as promulgated in 2 C.F.R. states that:

Federal awarding agencies must incorporate the following general terms and conditions either in the federal award or by reference, as applicable ... [n]ational policy requirements. These include statutory, executive order, other Presidential directive, or regulatory requirements that apply by specific reference and are not program-specific.<sup>13</sup>

As a consequence of this guidance, all federal awarding agencies would be expected to incorporate an executive order into the awarding of federal grant funds. The issuance of the EO

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<sup>10</sup> 2 C.F.R. §200.205(c)(5).

<sup>11</sup> Ibid.

<sup>12</sup> 2 C.F.R. §200.300(a).

<sup>13</sup> 2 C.F.R. §200.210(b)(ii).

could be interpreted as a national policy requirement and therefore, pursuant to OMB guidance, all federal awarding agencies would be required to incorporate compliance with 8 U.S.C. 1373 into the conditions of the federal grant awards.

Federal awarding agencies are also required to impose general terms and conditions on federal grant recipients through grant agreements and cooperative agreements.<sup>14</sup> Should federal agencies implement the EO by conditioning federal grant awards, the funding would still be awarded to a designated sanctuary jurisdiction, but once the federal grant award period has expired, the grantee would be evaluated to determine compliance with all of the conditions of the grant award. Should the grantee be found to be noncompliant with any of the conditions, including potentially 8 U.S.C. 1373, then that determination could potentially affect their eligibility for subsequent federal grant awards.

## **When will federal grant funding be affected?**

Federal grants are awarded through execution of a grant agreement or a cooperative agreement. The terms and conditions of a grant agreement are set at the time the grant agreement is initially executed. Federal agencies would therefore likely incorporate changes to the conditions of the grant award for grant agreements executed after the EO was issued. Given that federal agencies have yet to award all of the FY2017 appropriated grant funds, the implementation of the EO could include FY2017 appropriations.

## **Concluding Remarks**

Because of the complexity of implementing a centralized policy such as the EO through the decentralized structure of federal grants administration practices, there is uncertainty in determining the impact of the EO on federal grant funding for sanctuary jurisdictions. The impact could be affected by the discretion exercised by the Attorney General and the Secretary in defining a “federal grant,” determining which programs are exempted because of providing necessary funding for law enforcement purposes, and determining what constitutes a “sanctuary jurisdiction.” The impact of the EO on federal grant funding could also be affected by how federal grant awarding agencies utilize discretion in administering the grant programs, including review of eligibility and conditioning federal grant awards

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<sup>14</sup> 2 C.F.R. §200.210(b).