



MYTHS AND FACTS ABOUT ADVANCE PAYMENTS FOR THE WEATHERIZATION ASSISTANCE PROGRAM

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MYTHS:

- (1) The Department of Energy (DOE) Financial Assistance Rule, 10 C.F.R. § 600.220(a), excuses states from complying with advance payment provisions that apply to Weatherization Assistance Program (WAP) funds.
- (2) Treasury regulations and Treasury-State Agreements prescribe payment methods to be used by the states to disburse WAP funds to subgrantees.
- (3) When a state advances WAP funds to a subgrantee, the subgrantee is required by federal regulations to spend those funds within three days pursuant to the so-called "three-day rule."
- (4) Both nonprofit and local government subgrantees may keep interest earned on advance payment of federal funds.

FACTS:

- (1) The DOE Financial Assistance Rule requires states to pay WAP subgrantees in advance as long as certain requirements discussed in detail below are met.
- (2) Neither Treasury regulations nor Treasury-State Agreements prescribe payment methods to be used by the states to disburse funds to subgrantees. Rather, Treasury regulations govern transfers of funds by the federal government to states for federal assistance programs and, in certain circumstances discussed below, provide for Treasury-State Agreements regarding funding methods agreed to by the states and the federal government. Whether or not a state's Weatherization program is subject to that state's Treasury-State Agreement, the state and the federal government would be required to use a cash advance method of payment because the DOE Financial Assistance Rule requires the DOE to advance WAP funds to the states and requires states to advance funds to subgrantees as long as the requirements discussed in detail below are met.
- (3) Federal regulations do not require WAP subgrantees to spend funds advanced to them by a state within three days of receipt of those funds from the state.
- (4) For both nonprofit and local government subgrantees, interest earned on federal advances deposited in interest bearing accounts must be returned to the federal government. However,



both nonprofit and local government subgrantees may retain a small, designated amount of interest earned per year as set forth below for administrative expenses.

DISCUSSION:

Background: DOE Advance Payment Regulations

The DOE's WAP regulations specifically state that WAP grant awards must comply with the DOE Financial Assistance Rule.¹ The Rule expressly requires the DOE to advance grant funds to the states and the states to pay nonprofit subgrantees and local government subgrantees in advance as long as certain requirements are met.²

The Rule also requires that states "expend and account for grant funds in accordance with [s]tate laws and procedures for expending and accounting for its own funds" and that subgrantees have in place fiscal management "[p]rocedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees [which] must be followed whenever advance payment procedures are used."³

In order to be paid in advance, nonprofit subgrantees must maintain or demonstrate the willingness to maintain: (i) written procedures that minimize the time elapsing between the transfer of funds and disbursement by the subgrantee and (ii) financial management systems that meet the standards for fund control and accountability as established by the regulations.⁴ The state may convert a nonprofit subgrantee from advance payment to reimbursement whenever the subgrantee no longer meets the criteria for advance payment.⁵ However, any such conversion may be accomplished only after the state has advised the subgrantee in writing of the reasons for the proposed action and has provided a period of at least 30 days within which the subgrantee may take corrective action or provide satisfactory assurances of its intention to take such action.⁶ These requirements are similar to those states must follow when imposing special award conditions.⁷

States are also required to pay local government subgrantees in advance as long as: (i) the subgrantees maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of funds and disbursement by the subgrantees and (ii) the state has not determined them to be "high risk" and therefore subject to payment on a reimbursement basis.⁸ However, a state may only place a local government subgrantee on "high risk" status for certain reasons.⁹ When the state places the subgrantee on "high risk" status, the state must notify the subgrantee as early as possible, in writing, of the (i) conditions related to the subgrantee's "high risk" status, (ii) the corrective actions which must be taken before the subgrantee will be removed from "high risk" status, (iii) the time allowed for the subgrantee to complete the corrective actions, and (iv) the method the subgrantee should follow for requesting reconsideration of status.¹⁰

Myth #1: DOE Financial Assistance Rule, 10 C.F.R. § 600.220(a), excuses states from complying with advance payment provisions.

Some parties have misinterpreted a provision in the DOE Financial Assistance Rule, 10 C.F.R. § 600.220(a), as excusing states from complying with the Rule as to the timing of payments. This provision generally addresses the tracking and accounting of federal grant funds and does not affect the timing or payment method of grant funds transferred to subgrantees by states. Section 600.220(a) concerns financial management systems and provides generally that states must “expend and account for grant funds in accordance with state laws and procedures for expending and accounting for its own funds . . .”¹¹ However, the clear intent of section 600.220(a) is that states must use at least as much care in safeguarding and accounting for Federal funds as in safeguarding and accounting for the states’ own funds. Thus, section 600.220(a) permits a state to use the same accounting and tracking procedures that it uses for its own financial management system so long as those procedures are consistent with federal requirements. That the focus of section 600.220(a) is on procedures for tracking and accounting for funds is evident from subsections 600.220(a)(1) and (2), which provide that the “[f]iscal control and accounting procedures of the State, as well as its subgrantees . . . must be sufficient to . . . [p]ermit preparation of reports required by this part and the statutes authorizing the grant, and . . . [p]ermit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.”¹² Moreover, because the payment of funds is addressed specifically in two other provisions of the DOE Financial Assistance Rule, sections 600.122 and 600.221, those specific provisions control on the issue of payments over more general provisions such as section 600.220 pursuant to the legal principle that the specific controls over the general.¹³

Myth #2: Treasury regulations and Treasury-State Agreements prescribe payment methods to be used by the states to disburse funds to subgrantees.

Some parties also contend that a state’s method of payment to subgrantees is affected by the Treasury Department regulations at 31 C.F.R. part 205. The main purpose of these regulations, which implement the Cash Management Improvement Act and address the use of Treasury-State Agreements, is to reduce (i) the time between transfer and disbursement of federal funds to states and (ii) the amount of interest owed by the states and federal government in connection with fund transfers.¹⁴ The standard Treasury-State Agreement applies to major federal assistance programs; whether a grant program is a major federal assistance program is determined on a state-by-state basis using a sliding-scale, monetary formula.¹⁵ The Treasury-State Agreement and the Treasury regulations do not prescribe payment methods to be used by the states to disburse funds to subgrantees.¹⁶ Rather, the Treasury regulations govern transfers of funds by the federal government to states for federal assistance programs and provide for Treasury-State Agreements regarding funding methods agreed to by the states and the federal government.¹⁷

The DOE Financial Assistance Rule discussed above references the Treasury Department regulations and the Treasury-State Agreements in the context of the basic standard that payment

methods should minimize the lapse of time between transfer of the funds and disbursement.¹⁸ Even though the Treasury regulations do not directly affect the subsequent transfer of funds by states to subgrantees, a Treasury-State Agreement may indirectly affect the transfer of funds by the state to the subgrantee through the payment method used by the federal government to transfer funds to the state.¹⁹ For example, if a state and the federal government agree to use a cash advance method, then the state would also need to use the cash advance method to disburse funds to subgrantees in order to minimize the lapse in time between the transfer of funds and disbursement, as required by the Treasury regulations.

If a state's weatherization program, is determined to be a major federal assistance program and consequently is subject to that state's Treasury-State Agreement, the state and the federal government would be required to use a cash advance method of payment because the DOE Financial Assistance Rule requires the DOE to advance WAP funds to the states and requires states to advance funds to subgrantees as long as the previously discussed requirements are met.²⁰ Therefore, regardless of whether a state's weatherization program is governed by a Treasury-State Agreement, advance payments are required.

For these reasons, the position that states can elect to follow their own payment timing procedures ignores the plain language of the DOE Financial Assistance Rule that states and their WAP subgrantees are to be paid in advance.²¹

Myth #3: When a state advances WAP funds to a subgrantee, the subgrantee is required by federal regulations to spend those funds within three days pursuant to the so-called "three-day rule."

No federal regulation exists requiring subgrantees receiving funds from the state to spend WAP funds within three days of receiving the funds. At most the DOE Financial Assistance Rule requires subgrantees to have in place fiscal management "[p]rocedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees [which] must be followed whenever advance payment procedures are used."²²

Confusion may exist as to the so-called "three-day rule" because Treasury regulations governing Treasury-State Agreements require that when a cash advance funding technique is used as part of a Treasury-State Agreement, a "Federal Program Agency transfers the actual amount of Federal funds to a State that will be paid out by the State, in a lump sum, not more than three business days prior to the day the State issues checks or initiates EFT payments."²³ However, if a Treasury-State Agreement applies, the Treasury regulations do not address the time frame within which a subgrantee must spend payment advanced to it by the state.

Myth #4: Both nonprofit and local government subgrantees may keep interest earned on advance payment of federal funds.

According to the DOE Financial Assistance Rule, nonprofit subgrantees shall maintain advances of federal funds in interest bearing accounts, unless (i) they receive less than \$120,000 in federal awards per year, (ii) the best reasonably available interest bearing account would not be expected to earn interest in excess of \$250 per year on federal cash balances or (iii) the depository would require an average or minimum balance so high that it would not be feasible within the expected federal and non-federal cash resources.²⁴ The Rule expressly requires that interest earned on federal advances deposited in the interest bearing accounts shall be remitted annually to the Health and Human Services (HHS) Payment Management System through an electronic medium such as the FEDWIRE Deposit system or via a check.²⁵ The Rule permits nonprofit subgrantees to retain interest amounts up to \$250 per year for administrative expense.²⁶

As to local government subgrantees, the Rule also requires the prompt (at least quarterly) return of interest earned on advances to the federal agency and permits subgrantees to keep interest amounts up to \$100 per year for administrative expenses.²⁷

¹ See 10 C.F.R. § 400.2; The DOE Financial Assistance Rule is located at 10 C.F.R. part 600.

² See 10 C.F.R. §§ 600.122(b), 600.221(c).

³ 10 C.F.R. § 600.220(a), (b)(7); see also 10 C.F.R. §§ 600.104, 600.121(b)(5) for similar language about minimizing time lapse for nonprofits receiving funds directly from the federal government.

⁴ See 10 C.F.R. § 600.122(c).

⁵ See 10 C.F.R. § 600.122(n).

⁶ See 10 C.F.R. § 600.122(n).

⁷ See 10 C.F.R. § 600.114.

⁸ See 10 C.F.R. § 600.221.

⁹ See 10 C.F.R. § 600.221.

¹⁰ See 10 C.F.R. § 600.212.

¹¹ 10 C.F.R. § 600.220(a).

¹² 10 C.F.R. §§ 600.220(a)(1), (a)(2).

¹³ See, e.g., *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957).

¹⁴ See 31 C.F.R. pt. 205.

¹⁵ See 31 C.F.R. §§ 205.1, 205.3, 205.5.

¹⁶ See 31 C.F.R. § 205.9.

¹⁷ See 31 C.F.R. §§ 205.1, 205.6.

¹⁸ See 10 C.F.R. §§ 600.221(b), 600.104, 600.122(a).

¹⁹ See 31 C.F.R. §§ 205.6, 205.9, 205.11, 205.12.

²⁰ See 10 C.F.R. §§ 600.104, 600.12(b)(5), 600.122(a), 600.220(b)(7), 600.221(b).

²¹ See 10 C.F.R. §§ 600.221, 600.122.

²² 10 C.F.R. § 600.220(b)(7); see also 10 C.F.R. §§ 600.104, 600.121(b)(5) for similar language about minimizing time lapse for nonprofits receiving funds directly from the federal government.

²³ 31 C.F.R. § 205.12(b)(4).

²⁴ See 10 C.F.R. § 600.122(k).

²⁵ See 10 C.F.R. § 600.122(l).

²⁶ See 10 C.F.R. § 600.122(l).

²⁷ See 10 C.F.R. § 600.221(l).