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Myths and Facts about Advance Payments for the Weatherization Assistance Program

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May 2009, Updated March 2018

Over the years, confusion has persisted as to the payment rules that apply to federal Department of Energy (DOE) Weatherization Assistance Program (WAP) grants. This publication addresses common misconceptions about the payment rules that apply to DOE WAP.

MYTH	FACT
The DOE WAP is a block grant; therefore, a state has the authority to disregard federal requirements and follow its own rules for issuing payments on either an advance or reimbursement basis.	DOE WAP is not a block grant. However, regardless of the type of grant a state receives from the federal government, the state must comply with the federal authorizing statute establishing the funding, any federal regulations promulgated by the federal agency, and any applicable cross-cutting federal requirements identified by the federal government.
The DOE Financial Assistance Rule, 2 C.F.R. § 200.302(a), excuses states from complying with advance payment provisions that apply to WAP funds.	The DOE Financial Assistance Rule, 2 C.F.R. § 200.302(a), 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. The DOE Financial Assistance Rule, 2 C.F.R. § 200.305(b)(1), on the other hand, specifically requires states to pay WAP subgrantees, other than for-profits, in advance as long as certain conditions are met.
Treasury regulations and Treasury-State Agreements prescribe payment methods to be used by states to disburse WAP funds to subgrantees.	Neither Treasury regulations nor Treasury-State Agreements prescribe payment methods to be used by 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, provide for Treasury-State Agreements regarding funding methods agreed to by the states and the federal government.

MYTH	FACT
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."	Federal regulations do not require a DOE WAP subgrantee to spend funds advanced to it by a state within three days of receipt of those funds from the state; however, a subgrantee must minimize the time elapsing between the transfer of funds to it by the state and disbursement of those funds.
Subgrantees may keep all interest earned on advance payment of federal funds.	Subgrantees must return to the federal government interest over $500 earned on federal advances deposited in interest-bearing accounts.

Discussion:

Background: Advance Payment Regulations

The DOE WAP regulations specifically require WAP grant awards to comply with the DOE Financial Assistance Rule codified as the Office of Management and Budget (OMB) Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards (Uniform Guidance).[1] The DOE Financial Assistance Rule/Uniform Guidance expressly requires that **all non-federal entities** (which include nonprofit organizations and local governments[2]), other than states and for-profit entities, **must be paid in advance**, provided certain conditions are met.[3] Payments made to states are excluded because they are governed by "Treasury-State CMIA agreements and default procedures codified at 31 C.F.R. Part 205 'Rules and Procedures for Efficient Federal-State Funds Transfers' and TFM 4A-2000 Overall Disbursing Rules for All Federal Agencies."[4]

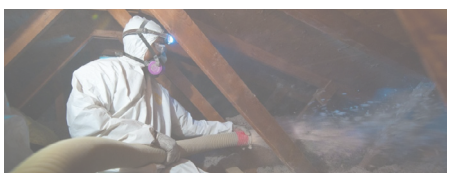
To be paid in advance, non-federal entities must maintain or demonstrate the willingness to maintain both: (i) written procedures that minimize the time elapsing between the transfer of funds and disbursement by the subgrantee and

[1] *See* 10 C.F.R. § 400.2; 2 C.F.R. § 910.122; WPN 15-1 Program Year 2014 Weatherization Grant Guidance, p. 2 (Jan. 16, 2015) (explaining that, effective December 26, 2014, the DOE Financial Assistance Rule located at 10 C.F.R. Part 600 was superseded by the Financial Assistance regulations at 2 C.F.R. Part 200 and any related DOE specific regulations at 2 C.F.R. Part 910. Any new awards issued after December 26, 2014 must comply with 2 C.F.R. Part 200).

[2] 2 C.F.R. §§ 200.69 (definition of "Non-federal entity") and 910.122 (DOE regulation including for-profit organizations in the definition of "Non-federal entity").

[3] 2 C.F.R. § 200.305(b)(1); *see also* 2 C.F.R. § 910.354(a) (stating that "For-Profit Recipients are an exception to 2 CFR 200.305(b)(1) which requires that non-Federal entities be paid in advance as long as certain conditions are met").

[4] 2 C.F.R. § 200.305(a); *see* Preamble to the Uniform Guidance final rule, 78 Federal Register 78589, 78597 (Dec. 26, 2013), which explains that Section 200.305 was "revised to more accurately reflect the requirements in 31 U.S.C. chapter 65 and implementing Treasury Department regulations in 31 CFR Part 205 Rules And Procedures For Efficient Federal- State Funds Transfers. All requirements for **payments to states** are set forth in 31 CFR Part 205. Accordingly, the payment section now covers payments to states in paragraph (a) and refers to the Treasury requirements." (emphasis added).



(ii) financial management systems that meet the standards for fund control and accountability as established by the regulations.[5] The federal awarding agency or pass-through entity may convert a non-federal entity from advance payment to reimbursement whenever a non-federal entity no longer meets the criteria for advance payment.[6] When the reimbursement method is used, the federal awarding agency or pass-through entity must make payment within 30 calendar days after receipt of the billing, unless the federal awarding agency or pass-through entity reasonably believes the request to be improper.[7] A federal awarding agency or pass-through entity that converts a non-federal entity to a reimbursement basis as a specific condition must follow the rules for notifying the non-federal entity of the condition and must promptly remove the condition once the issue that prompted the conversion is corrected.[8]

MYTH #1: DOE WAP is a block grant; therefore, a state has the authority to disregard federal requirements and follow its own rules for issuing payments on either an advance or reimbursement basis.

As described in more detail below, DOE WAP is not a block grant. However, whether DOE WAP is a block grant is irrelevant to the advance payment analysis and **in no way impacts** a state's obligation to comply with the federal requirements applicable to the program.

States **must pay** WAP subgrantees (other than for-profit entities) on an advance basis as long as certain conditions are met because the WAP federal authorizing legislation and federal regulations require states to do so.[9] The authorizing legislation for DOE WAP specifically grants the Secretary of DOE the authority to promulgate regulations to facilitate the program.[10] Pursuant to this authority, the DOE issued WAP regulations located at 10 C.F.R. Part 440 which require WAP grant awards to comply with "the DOE Financial Assistance Rule (10 C.F.R. Part 600) and . . . [s]uch other procedures applicable to [WAP] as DOE may from time to time prescribe for the administration of financial assistance."[11] Effective December 26, 2014, the DOE Financial Assistance Rule was superseded by the Uniform Guidance regulations at 2 C.F.R. Part 200 and any related DOE specific regulations at 2 C.F.R. Part 910.[12] New awards issued after December 26, 2014, must comply with 2 C.F.R. Part 200.[13] DOE's annual WAP Grant Guidance continually makes clear that the DOE Financial Assistance Rule/ Uniform Guidance applies to WAP funds.[14] As discussed throughout this publication, the DOE Financial Assistance Rule/ Uniform Guidance expressly requires that all non-federal entities, excluding states and for-profits, **must be paid** in advance provided certain conditions are met.[15]

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[5] *See* 2 C.F.R. § 200.305(b)(1).

[6] *See* 2 C.F.R. § 200.305(b)(3).

[7] *See* 2 C.F.R. § 200.305(b)(3).

[8] *See* 2 C.F.R. §§ 200.305(b)(3) and 200.207(c).

[9] *See* 2 C.F.R. §§ 200.305(b)(1) and 910.354(a).

[10] *See* 42 U.S.C. § 6838(b)(1).

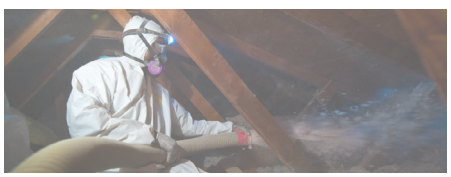
[11] 10 C.F.R. §§ 400.2(c) and (d).

[12] *See* WPN 15-1 Program Year 2014 Weatherization Grant Guidance, p. 2 (Jan. 16, 2015) (explaining that effective December 26, 2014, the DOE Financial Assistance Rule located at 10 C.F.R. Part 600 was superseded by the Financial Assistance regulations at 2 C.F.R. Part 200 and any related DOE specific regulations at 2 C.F.R. Part 910. Any new awards issued after December 26, 2014, must comply with 2 C.F.R. Part 200).

[13] *See Id.*

[14] 2 C.F.R. § 910.120; *see, e.g.,* WPN 18-1 Program Year 2018 Weatherization Grant Guidance, p. 2 (Dec. 18, 2017).

[15] *See* 2 C.F.R. § 200.305(b)(1).



The DOE WAP grant is often incorrectly characterized as a block grant because the funding for the program flows through the states. However, not all federal funds that flow through the states are block grants.[16]

The Government Accountability Office (GAO), in its *Principles of Federal Appropriations Law* (also known as the Red Book) explains that the two major types of federal grants issued to a state are categorical grants and block grants.[17] Categorical grants may be formula or project grants. A formula grant is allocated on the basis of a distribution formula prescribed by statute or regulation and is used only for specific programs or for narrowly defined activities.[18] Although block grants are usually distributed to states on the basis of a formula, they differ from categorical formula grants in that block grants also permit funds to be used for a variety of activities within a broad functional area, increase a state's spending flexibility, and reduce federal control.[19]

Neither the WAP federal authorizing statute nor the federal WAP regulations describe or establish DOE WAP as a block grant.

Neither the WAP federal authorizing statute nor the federal WAP regulations describe or establish WAP as a block grant. Rather DOE grant guidance consistently refers to DOE WAP as a "formula" grant and requires both recipients and subrecipients to comply with specific federal requirements.[20] As a formula grant, DOE WAP is distinguished from block grants by the following characteristics: funds may only be used for narrowly defined, prescribed activities and recipients (grantees and subgrantees) are subject to specific federal requirements including a number of cross-cutting requirements.

However, even if DOE WAP were a block grant, it would still be subject to applicable federal requirements. As explained by the GAO:

> Block grants reduce federal involvement in that they transfer much of the decision-making to the grantee and reduce the number of separate grants that must be administered by the federal government. **It is a misconception, however, to think that block grants are "free money" in the sense of being totally free from federal "strings."**[21]

The Red Book explains further that restrictions on the use of block grant funds may derive from the program legislation and are not necessarily limited to those contained in that legislation.[22] The Red Book subsequently concludes that:

> the block grant mechanism does not totally remove federal involvement nor does it permit the circumvention of federal laws applicable to the use of grant funds. In this latter respect, a block grant is legally no different from a categorical grant.[23]

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[16] *GAO Principles of Federal Appropriations Law*, Volume II, 3rd Ed., Chapter 10, p. 60 –63 which also describes block and other types of categorical grants.

[17] *See* A Glossary of Terms Used in the Federal Budget Process (Supersedes AFMD-2.1.1), GAO-05-734SP (Sep. 1, 2005), p. 60.

[18] *See Id.*; see also *GAO Principles of Federal Appropriations Law*, Volume II, 3rd Ed., Chapter 10, p. 60 – 62.

[19] *GAO Principles of Federal Appropriations Law*, Volume II, 3rd Ed., Chapter 10, p. 60 – 62.

[20] See DOE Program Year Weatherization Grant Guidance issued at the beginning of each calendar year which may be accessed on https://www.energy.gov/eere/wipo/weatherization-program-guidance.

[21] *GAO Principles of Federal Appropriations Law*, Volume II, 3rd Ed., Chapter 10, p. 62 – 63.

[22] *See Id.*

[23] *GAO Principles of Federal Appropriations Law*, Volume II, 3rd Ed., Chapter 10, p. 63.



Thus, as previously stated, the DOE WAP grant designation in no way impacts a state's obligation, as a recipient of the funding, to comply with federal requirements, including paying non-federal entities (other than for-profits) on an advance basis.

MYTH #2: The DOE Financial Assistance Rule, 2 C.F.R. § 200.302(a), excuses states from complying with advance payment provisions that apply to WAP funds.

Some parties have misinterpreted the DOE Financial Assistance Rule, 2 C.F.R. § 200.302(a), as excusing states from compliance with the method and timing of payments set forth in 2 C.F.R. § 200.305(b)(1). However, section 200.302(a) 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.

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Section 200.302(a) concerns financial management systems and provides that states must "expend and account for the federal award in accordance with state laws and procedures for expending and accounting for the state's own funds . . ."[24] The clear intent of section 200.302(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 200.302(a) permits a state to use the same accounting and tracking procedures that it uses for its own financial management systems so long as those procedures are consistent with federal requirements. That the focus of section 200.302(a) is on procedures for tracking and accounting for funds is evident from language of the provision, which provides that:

> the state's and the other non-Federal entity's financial management systems . . . must be sufficient to permit the preparation of reports required by general and program-specific terms and conditions; and the tracing of funds to a level of expenditures adequate to establish that such funds have been used according to the Federal statutes, regulations, and the terms and conditions of the Federal award.[25]

Moreover, the payment of funds (including the method and timing of payments) is addressed specifically by two other provisions, 2 C.F.R. sections 200.305 and 910.354, which require non-federal entities other than states and for-profits to be paid in advance. Under the legal principle that the specific controls over the general, those specific provisions control on the issue of payments over the more general language of section 200.302.[26]

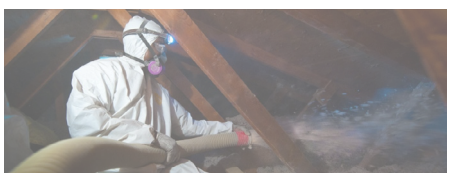
MYTH #3: Treasury regulations and Treasury-State Agreements prescribe payment methods to be used by states to disburse funds to subgrantees.

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 establish the use of Treasury-State Agreements, is to address (i) the time between transfer and

[24] 2 C.F.R. § 200.302(a).

[25] 2 C.F.R. § 600.302(a).

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



disbursement of federal funds to states and (ii) the amount of interest owed by the states and federal government in connection with fund transfers.[27] 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.[28] The Treasury-State Agreement and the Treasury regulations do not prescribe payment methods to be used by the states to disburse funds to subgrantees.[29] 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.[30]

The Treasury-State Agreement and the Treasury regulations do not prescribe payment methods to be used by the states to disburse funds to subgrantees.

The DOE Financial Assistance Rule/Uniform Guidance references the Treasury Department regulations and the Treasury-State Agreements only as they relate to the payment requirements governing the transfer of funds from the federal government to a state.[31] If a state's DOE WAP is determined to be a major federal assistance program and consequently is subject to that state's Treasury-State Agreement, the federal government and the state would likely be obligated to use a cash advance method of payment because the DOE Financial Assistance Rule/Uniform Guidance requires states to advance funds to subgrantees (other than for-profits) as long as certain conditions are met.[32]

MYTH #4: 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 WAP funds from a state to spend those funds within three days of receipt. At most, the DOE Financial Assistance Rule/Uniform Guidance requires non-federal entities (both grantees and 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."[33]

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."[34] However, neither a Treasury-State Agreement nor the Treasury regulations govern the time frame within which a subgrantee must spend payment advanced to it by the state. As previously explained, Treasury-State Agreements and Treasury regulations solely address payment transfers from the federal government to the state.

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[27] *See* 31 C.F.R. Part 205.

[28] *See* 31 C.F.R. §§ 205.1, 205.3 and 205.5.

[29] *See* 31 C.F.R. § 205.9.

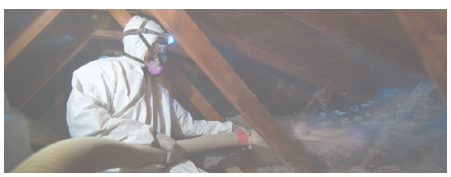
[30] *See* 31 C.F.R. §§ 205.1 and 205.6.

[31] *See* 2 C.F.R. § 200.305(a).

[32] *See* 2 C.F.R. §§ 200.305(b)(1) and 910.354(a).

[33] 2 C.F.R. §§ 200.302(b)(5) and 200.305(b).

[34] 31 C.F.R. § 205.12(b)(4).



MYTH #5: Subgrantees may keep all interest earned on advance payment of federal funds.

According to the DOE Financial Assistance Rule/Uniform Guidance, non-federal entities must generally maintain advances of federal funds in interest-bearing accounts and may only retain up to $500 per year in interest on federal funds for administrative expenses.[35] The DOE Financial Assistance Rule/Uniform Guidance expressly requires that interest over $500 earned on federal advances deposited in the interest-bearing accounts be remitted annually to the Department of Health and Human Services (HHS) Payment Management System through an electronic medium using either Automated Clearing House (ACH) network or a Fedwire Funds Service payment.[36] The DOE Financial Assistance Rule/Uniform Guidance permits subgrantees to retain interest amounts up to $500 per year for administrative expenses.

This e-News Bulletin article is part of the Community Services Block Grant (CSBG) Legal Training and Technical Assistance (T/TA) Center. It was created by Community Action Program Legal Services, Inc. (CAPLAW) in the performance of the U.S. Department of Health and Human Services, Administration for Children and Families, Office of Community Services Cooperative Agreement – Grant Award Number 90ET0467-01-00. Any opinion, findings, conclusions, or recommendations expressed in this material are those of the author(s) and do not necessarily reflect the views of the U.S. Department of Health and Human Services, Administration for Children and Families.

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[35] *See* 2 C.F.R. § 200.305(b)(8), (9).

[36] *See* 2 C.F.R. § 200.305(b)(9).