Brustein & Manasevit, PLLC
Attorneys at Law

Timeliness of Spending (Tydings, Liquidation, Linking)

Bonnie Graham and Michael Brustein

bgraham@bruman.com

www.bruman.com

Virtual Spring Forum 2022

Planning for Uninterrupted Crises

COVID Funding Deadlines

So much money, so little time ….

The Clock is Ticking … ESSER/GEER

- **CARES**: SEA must award funds within one year of receiving them (between April-June 2021)
- **CRRSAA**: SEA must award funds within one year of receiving them (January 2022)
- **ARP**: SEA must award the 90% to LEAs as soon as possible, within 60 days of the SEA receiving the funds
  - Funds not allocated to LEAs by formula must be awarded within one year of receiving them (April-May 2022)

Definition of “awarded” … ESSER/GEER

- For the 90 percent to LEAs, when the SEA **subgrants** the funds
- For the SEA reserve, when the SEA awards a contract or subgrant, or when it retains funds to provide direct services
  - Can include budget/plan for funds

The Clock is Ticking … ESSER/GEER

	CARES	CRRSA	ARP
Start Date	March 13, 2020	March 13, 2020	March 13, 2020
Statutory End	Sept 30, 2021	Sept 30, 2022	Sept 30, 2023
Tydings Period	Sept 30, 2022	Sept 30, 2023	Sept 30, 2024
Liquidation Period	Jan 30, 2023	Jan 30, 2024	Jan 30, 2025

Definition of “obligate” … 34 CFR 76.707

Type of Obligation	When Obligation Occurs
Acquisition of Property	Date of binding written commitment
Personal Services by Employee	When services are performed
Personal Services by Contractor	Date of binding written commitment
Travel	When travel is taken
Approved Pre-Agreement Cost	On the first day of the grant or subgrant performance period.

The Clock is Ticking … HEERF

- "Congress did not specify a performance period for HEERF grantees. … [T]he Department made the decision that institutions must expend grant funds within one year from the date when the Department processed the most recent obligation of funds."
- With ARP, adjusted period to allow unobligated funds from CARES/CRRSAA to follow the 1-year ARP deadline.
  - Different start/end dates for all colleges

The Clock is Ticking … HEERF

- ED changed its mind. Now is providing all HEERF grantees an award period through **June 30, 2023**
  - Applies to all awards with more than $1,000 unobligated (does not apply to closed awards)
  - Is not considered a “no cost extension”
  - Cites to 34 CFR 75.250(a) – authorizing a project period up to 60 months

Tydings Amendment (Carryover)

GEPA 421(b)

The General Rule, GEPA 421(b)

Notwithstanding any other provision of law, unless enacted in specific limitation of the provisions of this subsection, **any funds** from appropriations to carry out any programs to which this chapter is applicable during any fiscal year, **which are not obligated and expended by educational agencies** or institutions prior to the beginning of the fiscal year succeeding the fiscal year for which such funds were appropriated **shall remain available for obligation and expenditure** by such agencies and institutions **during such succeeding fiscal year**.

Exceptions to the General Rule

- Program restrictions, ESSA Sec. 1126(c) (limits TI-A carryover to 15%); Perkins V, Sec. 133(b) (requires states to redistribute unobligated balances at the end of academic year; no carryover at local level)
- Tydings does not apply at local level if funding distributed by competition (1999 OGC Memo)
  - 21st CCLC; Adult Ed

Carryover, 34 CFR 76.710

- State or subgrantee shall use carryover funds in accordance with:
- (a) The Federal statutes and regulations that apply to the program and are in effect for the carryover period; and
- (b) Any State plan, or application for a subgrant, that the State or subgrantee is required to submit for the carryover period.

Can ED extend the Tydings/ carryover period? (GEPA Waivers)

- Not without statutory authorization
  - CARES Act – provided ED authority to waive GEPA and extend period of availability for FY 2018 program funds under:
    - ESEA, Perkins, Adult Ed, IDEA
  - ESEA Sec. 8401 – ED used this authority to extend the period for FY 2019 Title programs

Liquidation

The General Rule, 2 CFR 200.344(b)

Unless the Federal awarding agency or pass-through entity authorizes an extension, a non-Federal entity must liquidate all financial obligations incurred under the Federal award no later than **120 calendar days** after the end date of the period of performance as specified in the terms and conditions of the Federal award.

Exceptions to the General Rule

- Subrecipients must provide the pass-through with closeout report and final accounting within **90 days**; effectively shortens the liquidation period?
  - 200.344(a)
- Federal awarding agency <u>or</u> pass-through entity may authorize an extension of the liquidation period

Liquidation Extensions

- Proof of valid obligation within the period
- Will not approve:
  - Accounting adjustments that move obligations/ expenditures across programs or subgrantees
  - Adjustments that move expenditures from State / local accounts to federal programs, unless intended for the federal program (charged to federal account) and adjustment is for reimbursement
  - Adjustments that change the basic nature of the grantee's underlying accounting system

Liquidation Extensions (cont.)

- Other considerations before approving request:
  - Past performance of the grantee
  - High-risk status
  - Single audits
- Generally, will not approve requests beyond 18 months (closely scrutinize requests beyond 12 months)
  - Exception for lengthy construction contracts
- Funds revert to the Federal Treasury and are no longer available to grantees 5 years after the deadline for obligation of funds at the federal level (31 USC 1552(a))

Linking

De-obligate;

Re-obligate

Appeal of State of California

- At issue: over $1 million in Title I-A and Migrant funding
- <u>ED's argument</u>: Funds must be obligated and "linked" during the Tydings period
- <u>California's argument</u>: First-in, first-out accounting allows the state to link expenditures to an earlier grant period, so long as the underlying obligation is timely

Appeal of State of California, Panel Decision

This Panel finds that the requirement of the state or subgrantee to "obligate" the grant funds means that the state or subgrantee must identify the specific expenditures and/or obligations for which the funds are to be used and requires the funds to be obligated by the end of the carryover period, i.e., the state or subgrantee must have actual expenditures and/or obligations linked or tied to the specific grant.

- … California's failure to link the expenditures with the source of the funds until more than six months after the close of the period during which the grant or subgrant funds could properly have been obligated constitutes an improper use or reassignment of those funds

Appeal of State of California, Dkt 12(122)83, Secretary Decision, 1987

- California appealed the decision to the Secretary; Secretary overturned the Panel decision

Appeal of State of California, Dkt 12(122)83, Secretary Decision, 1987

- An obligation may be charged to a specific source of funds after those funds are no longer available for obligation--i.e., after the so-called Tydings period--“so long as there is clear and unambiguous documentation showing that the transaction giving rise to the obligation occurred before the relevant Tydings cutoff date.”

"The legally relevant question [is] when the obligation arose, not in what account such obligation may have been legally recorded."

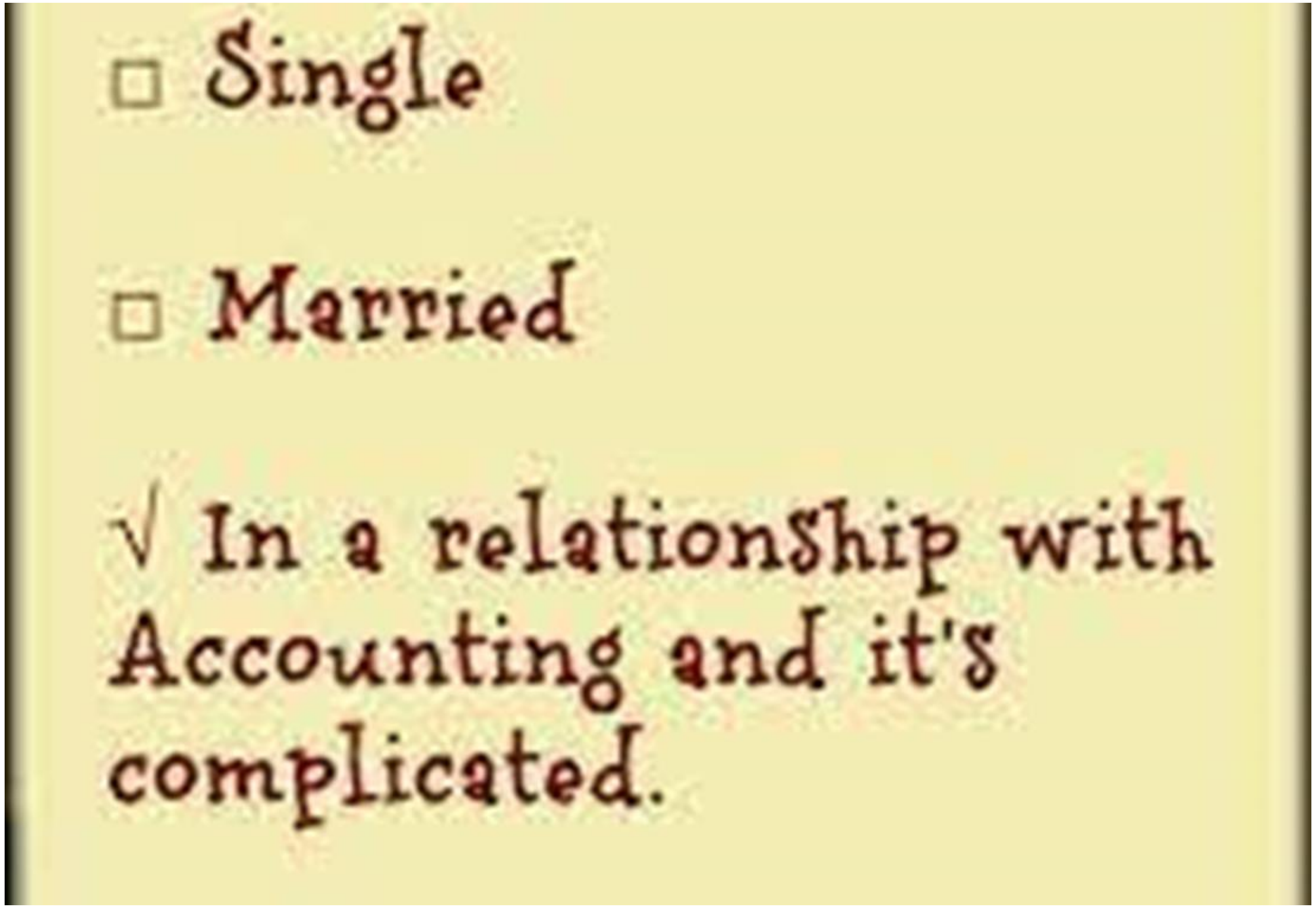
Appeal of State of California, Dkt 12(122)83, Secretary Decision, 1987

Linking – Moving Obligations Forward

1. Identify obligations that could have been charged to later grant year, but weren't. E.g., 2020-2021 costs that could be moved to 2021-2022.
2. De-obligate those costs, and re-obligate to the subsequent period creating an unspent balance in the prior year (2020-2021 has unspent balance)
3. Link other allowable obligations to the prior year (2020-2021).

Linking – Moving Obligations Backward

1. Identify obligations that could have been charged to a prior grant year, but weren't
2. De-obligate those costs (21-22), and re-obligate to the earlier period (20-21), creating an unspent balance in the current year. Repeat, as necessary. E.g., move 20-21 cost back to 19-20, etc.
3. If moving obligations backwards to previously unspent grant award in which Tydings has closed (19-20), will need to ask ED for a late liquidation in order to add linked obligations and draw funds on the prior year (19-20).


Single
Married
√ In a relationship with Accounting and it's complicated.

Key Takeaways

- To extend the period to <u>obligate</u> funds, need a GEPA waiver from ED (requires statutory authority)
- To extend the period to <u>liquidate</u> funds, need federal or pass-through entity approval (requires valid obligation)
- Grantees may "link" current expenditures to earlier grant periods through first in, first out accounting; or make other accounting adjustments as appropriate

LEGAL DISCLAIMER

This presentation is intended solely to provide general information and does not constitute legal advice or a legal service. This presentation does not create a client-lawyer relationship with Brustein & Manasevit, PLLC and, therefore, carries none of the protections under the D.C. Rules of Professional Conduct. Attendance at this presentation, a later review of any printed or electronic materials, or any follow-up questions or communications arising out of this presentation with any attorney at Brustein & Manasevit, PLLC does not create an attorney-client relationship with Brustein & Manasevit, PLLC. You should not take any action based upon any information in this presentation without first consulting legal counsel familiar with your particular circumstances.

SAVE THE DATE!!!

Brustein & Manasevit, PLLC

Fall Forum 2022

November 30 – December 2, 2022

Cosmopolitan Hotel

Clark County, NV