LOW-INCOME HOME ENERGY ASSISTANCE

Information Memorandum

U.S. Department of
Health and Human Services
Family Support Administration
Office of Community Services
370 L'Enfant Promenade, S.W.
Washington, D.C. 20447

Transmittal No. FSA-IM-91-8 **Date** 12/27/90

TO: LOW INCOME HOME ENERGY ASSISTANCE PROGRAM (LIHEAP) GRANTEES AND OTHER INTERESTED PARTIES

SUBJECT: LIHEAP Administrative Costs

PURPOSE: To provide, in one place for easy reference, copies of federal statutory and regulatory provisions concerning grantees' costs of planning and administering the Low Income Home Energy Assistance Program

CONTENT: The LIHEAP statute limits the amount of LIHEAP funds that grantees may use for planning and administration. The LIHEAP statute is the Low Income Home Energy Assistance Act of 1981, title XXVI of Public Law 97-35, as amended by the Human Services Reauthorization Acts of 1984, 1986, and 1990 (Public Laws 98-558, 99-425, and 101-501).

The federal regulations for the Department of Health and Human Services (HHS) block grant programs, including LIHEAP, provide clarification and interpretation regarding LIHEAP grantees' use of LIHEAP funds for costs of planning and administration. These regulations are found at Part 96 of Title 45 of the Code of Federal Regulations (45 CFR Part 96).

The preamble to the HHS block grant regulations, as originally published July 6, 1982, and the preamble to the final rule published October 13, 1987, amending the block grant regulations, provide additional guidance regarding use of LIHEAP funds for costs of planning and administration.

Also, documents relating to the petroleum overcharge funds distributed to states and territories explain requirements regarding use of these funds for administrative costs under LIHEAP.

This information memorandum contains copies of the statutory and regulatory provisions listed below. All of these provisions were published previously, and copies were distributed previously to LIHEAP grantees.

- Low Income Home Energy Assistance Act, as amended--section 2605(b)(9);

- Department of Health and Human Services Block Grant Regulations--45 CFR 96.88;
- A portion of the preamble to the final rule published October 13, 1987, amending the HHS block grant regulations--52 FR 37961-37964;
- A portion of the preamble to the HHS block grant regulations published July 6, 1982--47 FR 29477;
- Portions of documents relating to use of petroleum overcharge funds for LIHEAP administrative costs:
  - Section 155(f) of Public Law 97-377;
  - Part of a notice providing guidance to LIHEAP grantees on use of "Warner Amendment" funds--48 FR 6086;
  - Part of a notice providing guidance to LIHEAP grantees on use of "Exxon" funds--51 FR 33809;
  - Part of a notice providing guidance to LIHEAP grantees on use of "Stripper Well" funds--52 FR 26742.

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Attachments

Section 2605(b)(9) of the Low Income Home Energy Assistance Act of 1981, as amended (42 U.S.C. 8624(b)(9))

Under section 2605(b) of the LIHEAP statute, LIHEAP grantees must certify to 14 "assurances"; assurance 9 pertains to planning and administrative costs.

APPLICATIONS AND REQUIREMENTS

SEC. 2605.

* * * * * * *

(b) As part of the annual application required by subsection (a), the chief executive officer of each State shall certify that the State agrees to—

* * * * * * *

(9) provide that—

(A) the State may use for planning and administering the use of funds under this title an amount not to exceed 10 percent of the funds payable to such State under this title for a fiscal year and not transferred pursuant to section 2604(f) for use under another block grant; and

(B) the State will pay from non-Federal sources the remaining costs of planning and administering the program assisted under this title and will not use Federal funds for such remaining cost;

Note: Shown above is the current version of section 2605(b)(9). The current wording of paragraph (A) of section 2605(b)(9) has been in effect since fiscal year 1986. From FY 1982 through FY 1985, paragraph (A) provided that, "in each fiscal year, the State may use for planning and administering the use of funds available under this title an amount not to exceed 10 percent of its allotment under this title for such fiscal year." The wording of paragraph (B) of section 2605(b)(9) has remained unchanged since FY 1982, the first year of the LIHEAP block grant.

45 CFR 96.88 in the HHS block grant regulations

This provision relating to administrative costs under the LIHEAP program is in Subpart H of the federal regulations for the HHS block grant programs. It was published October 13, 1987, as an amendment to the block grant regulations.

§ 96.88 Administrative costs.

(a) *Costs of planning and administration.* Any expenditure for governmental functions normally associated with administration of a public assistance program must be included in determining administrative costs subject to the statutory limitation on administrative costs, regardless of whether the expenditure is incurred by the State, a subrecipient, a grantee, or a contractor of the State.

(b) *Administrative costs for territories and Indian tribes.* For Indian tribes, tribal organizations and territories with allotments of $20,000 or less, the limitation on the cost of planning and administering the low-income home energy assistance program shall be 20 percent of funds payable and not transferred for use under another block grant. For tribes, tribal organizations and territories with allotments over $20,000, the limitation on the cost of planning and administration shall be $4,000 plus 10% of the amount of funds payable (and not transferred for use under another block grant) that exceeds $20,000.

[52 FR 37967, Oct. 13, 1987]

From the preamble to the final rule amending the HHS block grant regulations, published October 13, 1987, at 52 Federal Register 37961-37964

Section 96.88 Limitations on LIHEAP administrative costs.

(a) *Costs of planning and administration.* The statute for the low-income home energy assistance program includes an express limitation on the percent of funds that may be used for

planning and administering the program. In our final rules of July 6, 1962, we declined to define administrative costs for the block grants. Rather, in accordance with the intent of the block grant statutes, the regulation allows States to determine in the first instance which expenses constitute administrative costs chargeable to block grant funds.

While the final rule did not provide a detailed definition of planning and administrative costs, it did include guidance to grantees regarding the determination of administrative costs.

First, § 6.30 refers to State laws and procedures as governing the expenditure of block grant funds.

> Except where otherwise required by Federal law or regulation, a State shall obligate and expend block grant funds in accordance with the laws and procedures applicable to the obligation and expenditure of its own funds.

Guidance issued by the Office of Management and Budget on September 22, 1981 to States indicated that the State's usual definition of administrative costs would apply to the block grant.

Second, the preamble to the block grant regulations of July 6, 1982, established a standard of review for grantee interpretations of block grant provisions.

> Accordingly, when an issue arises as to whether a State has complied with * * * the statutory provisions, * * * the Department will ordinarily defer to the State's interpretation of * * * the statutory provisions. Unless the interpretation is clearly erroneous, State action based on that interpretation will not be challenged by the Department.

In late 1982, responding to an inquiry from a governor who requested an interpretation of administrative costs, the Secretary stated:

> * * * any reasonable interpretation by the states will be acceptable. Our standard for this and other interpretations is whether the state practice is clearly erroneous. It is difficult to imagine that a definition of administrative costs that is consistent with state practice could be considered clearly erroneous.

Third, the preamble to the block grant regulations of July 6, 1982 states:

> In the final analysis, the state must determine which expenses constitute administrative costs chargeable to grant funds on a case-by-case basis, subject to review on the same basis as other state interpretations of the block grant statutes. This decision will be based upon the intrinsic nature of each program and the standard accounting procedures followed by each state. As a general matter, administrative costs are all the costs of program administration, whether they could be considered direct or indirect costs under categorical grants.

This guidance provided grantees with maximum flexibility to define administrative costs consistent with the broad statutory guidelines. The Department declined to provide additional guidance in the regulations because we believed that the meaning of the statute was sufficiently clear.

Since that time, in carrying out the compliance function assigned to the Department by statute, we have learned of misunderstandings on the part of some states and tribes as to (1) whether the costs of planning and administration incurred by subgrantees, local administering agencies and contractors must be considered in assessing compliance with the statutory limits on administrative costs, and (2) what costs are normally associated with the administration of a public assistance program.

We have been addressing these issues in enforcement proceedings. This is a lengthy process which could lead to withholding or ordering repayment of funds found not to have been expended in accordance with the statute. Currently, the Department is reviewing decisions of several grantees to exclude certain costs from the administrative cost limitation. We are concerned that a number of grantees are incurring substantial costs that may eventually be subject to repayment under section 2605(g) of the LIHEAP statute.

Based on these concerns, we decided to clarify this provision by regulation, rather than through audit or compliance reviews of individual grantees.

The notice of proposed rulemaking included a § 96.88 that stated:

Section 96.88 Administrative costs

> (a) *Costs of planning and administration.* Any expenditure for governmental functions normally associated with administration of a public assistance program, such as taking applications, determining eligibility and benefits, and monitoring the assistance provided, must be included in determining administrative costs subject to the statutory limitation on administrative costs, regardless of whether the expenditure is incurred by the state, a subrecipient, a grantee, or a contractor of the state.

The section was intended to clarify the administrative cost limitation in two ways. First, it stated that the limit applied to costs incurred in administration of the program, regardless of whether they were incurred by the state, a subrecipient, a grantee, or a contractor of the state. Second, it defined administrative costs as those expenditures normally associated with administration of a public assistance program, including taking applications, determining eligibility and benefits, and monitoring the assistance provided.

The Department received approximately 100 comments on the proposed language. Only a few comments contested the aspect of the proposed language that required administrative costs from all program levels to be included in the determination of state adherence with the statutory limit on administrative costs. One comment stated that since Congress did not specifically include subrecipients, grantees, and contractors of states in the definition of "state" in section 2603(8) of the LIHEAP statute, it must not have intended that these entities be included under the administrative cost limitation.

We disagree. There is no indication in the statute or legislative history that Congress intended this interpretation. Where Congress has intended to apply the administrative cost limits to expenditures at the State level only, it has done so explicitly. For example, the limitation on administrative costs under the community services block grant clearly applies only to the State level expenditures. By failing to include similar language in the LIHEAP statute, we conclude that Congress intended to limit aggregate administrative costs, regardless of whether they are incurred at the State or subrecipient level. We have maintained that aspect of the proposed rule in the final rule.

Almost all of the remaining comments on this section objected to our attempt to clarify functions that are administrative. The comments demonstrated considerable variation in the kinds of activities that might be included in the functions listed in the proposed regulation. Because the inclusion of these functions in regulation might unintentionally have infringed on state prerogatives to define administrative costs in a manner consistent with the statute, we are removing from the final rule the reference to the specific functions.

We are concerned, however, that many of the comments reflected a lack of understanding of the strict limits placed on administrative costs by the statute. While we are not including the list of specific functions in the final rule, nonetheless, we believe that the costs associated with those functions, i.e., taking applications, determining eligibility and benefit levels, and monitoring the assistance provided, are normally administrative in a predominantly cash assistance program, such as LIHEAP. Consequently, we will

carefully assess any other categorization of these costs in our compliance reviews and in our reviews of audit findings.

We recognize that a grantee's program may include a variety of benefits and administrative structures. For example, a grantee may provide cash assistance, services, and in-kind benefits. Certain activities associated with one type of benefit may be administrative, while a similar activity associated with another may not be. We will continue to examine grantee programs on a case-by-case basis, looking in particular to other State programs that provide analogous benefits to determine the appropriateness of the State's definition of administrative costs for LIHEAP.

Some comments mistakenly assumed that "outreach" was included in our proposed definition of administrative costs and asserted that outreach is directly related to service delivery rather than to administration. We agree that outreach activities are not intrinsically administrative and therefore we excluded this term from the proposed list. In some cases, the term refers to providing general information to the public about the existence of the LIHEAP program. In others, cited in a number of comments, the term includes such activities as budget counselling, energy education, arranging deferred or budget payment arrangements with energy providers, and other services directly related to the purpose of the statute. The term encompasses activities that are administrative and others that are not. We will review the appropriateness of a grantee's definition of outreach costs during compliance reviews and audits.

Several comments objected to the issuance of any Departmental regulation in the area of administrative costs. Several cited the Secretary's letter of July 15, 1982 (see above) as stating a policy not to regulate block grant administrative costs. The Secretary's letter indicates that the Department at that time had decided against further definition of administrative costs. However, for the reasons stated above, we believe that clarification of the issue of administrative costs is clearly warranted.

Two comments apparently held that all costs incurred by subrecipients, subgrantees, and contractors are program costs because they are closely associated with the delivery of services. Similarly, a number of comments asserted that expenditures related to the functions listed in the proposed rule are directly related to serving clients and are, therefore, "program" or "program support" rather than administration.

We disagree with these comments for three reasons. First, this interpretation is inconsistent with the preamble to the final block grant regulations. This stated that the grantees' determination of administrative costs is based upon the intrinsic nature of each program and the standard accounting procedures followed by each grantee, rather than on the type of agency.

Second, these comments characterize LIHEAP as a service program. While we recognize that certain aspects of LIHEAP involve the delivery of services, in fact, the largest expenditure of LIHEAP funds is for cash assistance. As we indicated earlier, a grantee must determine which expenses constitute administrative costs chargeable to the grant funds based upon the nature of the program and the standard accounting procedures for analogous programs followed by the grantee.

Third, costs associated with determining whether an applicant may receive assistance or assessing whether subgrantees or contractors are following the grantee's plan and procedures are intrinsically administrative in the context of a public assistance program. As noted in the preamble to the block grant regulations of July 6, 1982, the limit upon administrative expenditures is indicative of congressional intent that a very high percentage of a grantee's funds be paid to recipients as benefits or direct services to carry out the purpose of the statute.

A number of comments assumed that the regulatory definition would require expenditure of ninety percent of a grantee's funds for cash assistance and weatherization materials and ten percent for all other costs, and that as a consequence the subrecipients would not have the financial resources to properly or effectively operate their programs. These comments also contended that such an interpretation would hurt the most vulnerable clients, including the elderly and handicapped, and necessitate operation of LIHEAP as a centralized, "pass-through welfare program" and a subsidy for utility companies.

The LIHEAP statute imposes a strict limit on administrative costs. Our compliance reviews and review of audits demonstrate that most grantees are implementing their programs successfully within the statutory limit on administrative costs. A few grantees are not in compliance with this provision and may have to modify their programs to meet the statutory limitation on administrative costs or to fund the excess administrative cost from non-Federal funds. This is unavoidable under the current statute. As noted in the preamble to the July 6, 1982 final regulation:

> There is some indication that Congress intended that states use non-Federal funds to administer block grant programs where necessary. For example, section 2605(b)(9)(B) of the Act expressly requires that states use non-federal funds for planning and administering the low-income home energy assistance program where a state's costs for those activities exceed 10 percent of the state's allotment.

Several comments appeared to assume that only the costs of materials could be considered as non-administrative costs under the Low-Income Weatherization Assistance Program of the Department of Energy. As a matter of practice, the Department usually will not question the categorization of costs used by a grantee for weatherization under section 2605(k) when such funds are expended by a grantee under an approved Low-Income Weatherization Assistance Program plan—provided that such expenditures are otherwise consistent with the LIHEAP statute. (See our comments concerning § 96.86 of these regulations.)

Several local service providers assumed that the limit on administrative costs was imposed by regulation, rather than statute. They claimed that they could not properly operate energy assistance programs under this limitation. As previously indicated, the Department has no discretion to vary the limitation on administrative costs for states. Most States are operating within these limits and we do not believe that the statute has imposed an unreasonable limit. We have several activities under way to assist States and tribes to exchange information on ways to reduce administrative costs.

A number of comments cited dictionary definitions of "administration" as "management of affairs" in contesting the proposed definition. When a dictionary definition frequently is relevant to clarifying congressional intent, it must be considered in context with other relevant statutory and regulatory guidance.

Several comments contended that our definition of administrative costs would limit the resources available to prevent error, fraud, and abuse. As we indicated above, the limit on administrative funds is imposed by statute. Even though the statute imposes requirements on grantees that may necessitate the expenditure of additional funds, the Department does not have the legal authority to alter the amount available for administering LIHEAP.

A number of comments referred to certain other Federal programs or regulations and claimed that policies or regulations applicable to these programs supported the exclusion of the activities we cited in the proposed regulation from consideration as administrative costs. We contacted the Federal agency responsible for administering each of the programs cited in the comments, e.g., Job Training Partnership Act, Urban and Mass Transit Authority, Federal Highway Administration, Head Start, Medicaid, and Aid to Families with Dependent Children. Most of the programs cited are not cash assistance programs and therefore do not provide adequate basis for defining administrative costs. Under the AFDC program, which as a cash assistance program may be analogous to LIHEAP, the activities cited in the proposed rule—taking applications, determining eligibility and benefits, monitoring assistance provided—are, in fact, considered administrative costs.

Finally, we note that none of the comments cited grantee laws and procedures or administrative cost definitions in analogous State-funded asssitance programs (e.g., general assistance) in support of the position that the functions cited in the proposedt rule are administrative in nature. Section 96.30 clearly establishes that the laws and procedures that govern the use of a grantee's own funds will determine the appropriateness of the obligation and expenditure of block grant funds, unless those laws and procedures are inconsistent with the block grant statute or regulations. As we indicated earlier, in reviewing grantee compliance with the statutory limit on administrative costs, we will continue to rely substantially upon the laws and procedures of the grantee.

(b) *Administrative costs of territories and Indian tribes.* Experience has shown that each grantee incurs certain basic administrative costs in developing and implementing a LIHEAP program. The statute requires that each state limit these planning and administrative expenditures to no more than 10 percent of the funds payable to it and not transferred for use under other block grants. As the LIHEAP allotments to the States are substantial, the 10 percent ceiling on planning and administrative costs allows each State sufficient funds for these purposes.

Some tribes and territories, however, receive relatively small LIHEAP allotments and the flat 10 percent limitation on planning and administrative expenditures may not be sufficient to cover the basic costs of developing and implementing their program. Accordingly, we have concluded that the 10 percent limitation on planning and administrative expenditures is not appropriate to tribal grantees. *See* 45 CFR 96.42(a). Similarly, with respect to certain territorial grantees, we have concluded that a different limitation on planning and administrative expenditures would, pursuant to 42 U.S.C. 8623(b)(2), be consistent with the statutory limitation on planning and administrative expenditures. Consequently, we are modifying the limitations on planning and administrative expenditures for tribal and territorial grantees. For tribal and territorial grantees whose funds payable are $20,000 or less, the limitation on the cost of planning and administering the program is 20 percent of the funds payable under the LIHEAP program and not transferred for use under another block grant. For tribal and territorial grantees whose funds payable are over $20,000, the limitation is $4,000 plus 10 percent of the amount of the funds payable and not transferred that exceed $20,000.

The revised limit is based upon estimates for costs associated with audit, personnel, plan development, and overhead. Audit costs considered the cost of an audit apportioned among Federal programs audited by a tribe under the Single Audit Act, allowing a minimum of $300. Personnel costs were based on two hours of processing time per application at a salary of $7 per hour. A figure equal to fifteen percent of personnel costs was allowed for overhead and costs associated with completing and submitting the grant application.

We received several comments suggesting that the administrative limitation be increased for all grantees or for all small grantees, including States. The administrative cost limitation is imposed on States by statute and the Secretary has no authority to waive any of the statutory provisions for States. The Department does have authority under the statute to define the rights and responsibilities of territories and Indian tribes.

We believe this regulation provides the increased flexibility necessary for small grantees to administer their LIHEAP programs.

From the preamble to the HHS block grant regulations, published July 6, 1982, at 47 Federal Register 29477

The HHS block grant regulations--and the preamble to these regulations--were originally published on July 6, 1982. As originally published, the regulations themselves contained no provisions relating specifically to administrative costs.

Administrative Costs

We received many requests for a detailed definition of "administrative costs." States were concerned that the Act's 10 percent limitations on administrative costs for certain block grants (or 5 percent limitation in the case of the administrative costs at the State level under the community services block grant) would not be sufficient to cover the cost of providing services under the block grant programs. We decline to restrict the States with a definition of this term. In the final analysis, the State must determine which expenses constitute administrative costs chargeable to grant funds on a case-by-case basis, subject to review on the same basis as other State interpretations of the block grant statutes. This decision will be based upon the intrinsic nature of each program and the standard accounting procedures followed by each State. As a general matter, administrative costs are all the costs of program administration, whether they would be considered direct or indirect costs under categorical grants. There is some indication that Congress intended that States use non-Federal funds to administer block grant programs where necessary. For example, section 2605(b)(9)(B) of the Act expressly requires that States use non-Federal funds for planning and administering the low-income home energy assistance program where a State's costs for those activities exceed 10 percent of the State's allotment. The same condition applies to administrative expenditures under the preventive health and health services and the alcohol and drug abuse and mental health services block grants by virtue of sections 1904(d) and 1914(d) of the Public Health Service Act. The consistent imposition of limits upon administrative expenditures under the various block grants is indicative of congressional intent that States devote a very high percentage of their block grant funds to direct payments or services.

Provisions relating to use of petroleum overcharge funds for LIHEAP administrative expenses

Petroleum overcharge funds--also known as petroleum violation escrow funds or PVE funds--come from settlements of cases of overcharges which violated petroleum price control legislation and regulations in effect from 1973 to 1981. About $4 billion in oil overcharge funds that could not be reimbursed to the parties directly injured by the violations have been distributed to the states, the District of Columbia, and the territories by the Department of Energy (DOE). The largest distributions have been of "Exxon" and "Stripper Well" funds.

Section 155(f) of Public Law 97-377, enacted December 21, 1982

Section 155 of Public Law 97-377 is often referred to as the Warner Amendment. It provided authority to the Secretary of Energy to disburse designated petroleum violation escrow funds to states, the District of Columbia, and territories for use under LIHEAP and four energy conservation programs administered by DOE. Pursuant to section 155, DOE announced the disbursement of $200 million on January 31, 1983. Section 155(f) prohibits use of these funds for administrative expenses.

Sec. 155.

* * * * * * *

(f) No funds disbursed under this section may be used for any administrative expenses of the Department of Energy or of any State, whether incurred in connection with any energy conservation program or otherwise.

From a notice providing guidance to LIHEAP grantees on use of Warner Amendment funds, published at 48 Federal Register 6086 on February 9, 1983

2. *No escrow funds may be used for administration.* Under section 2605(b)(8) of Pub. L. 97-35, a State may use up to 10% of its LIHEAP allotment for planning and administration. Under section 155(f) of Pub. L. 97-377, however, no escrow funds may be used for administrative expenses. Although these provisions appear to be inconsistent, we believe that they can be reconciled. If a State uses escrow funds for LIHEAP purposes, the funds may be considered part of the allotment to which the 10% limitation on administrative expenses applies, since the escrow funds are to be used as if they were LIHEAP funds. Funds actually used for administrative expenses, however, must not be escrow funds.

From a notice providing guidance to LIHEAP grantees on use of Exxon petroleum overcharge funds, published at 51 Federal Register 33809 on September 23, 1986

A court order provided for distribution and use of Exxon oil overcharge funds in accordance with section 155 of Public Law 97-377. DOE announced distribution of almost $2.1 billion in Exxon funds on March 6, 1986. (Several parts of the Federal Register notice of September 23, 1986, which do not concern administrative costs, were corrected in a notice published October 6, 1986, at 51 FR 35566.)

> No Exxon funds may be used for administration. Under section 2605(b)(9) of Pub. L. 97-35 as amended, a State may use up to 10% of its LIHEAP funds [payable for a fiscal year and not transferred for use under another HHS block grant] for planning and administration. Under section 155(f) of Pub. L. 97-377, however, no Exxon funds may be used for administration expenses. Although those provisions appear to be inconsistent, we believe that they can be reconciled. If a State uses Exxon funds for LIHEAP purposes, the funds may be considered part of the LIHEAP allotment to which the 10% limitation on administrative expense applies, since the Exxon funds used for LIHEAP are to be used as if they were LIHEAP funds. Funds actually used for administrative expenses, however, must not be Exxon funds.

From a notice providing guidance to LIHEAP grantees on use of Stripper Well settlement funds, published at 52 Federal Register 26742 on July 16, 1987

Under a court-approved settlement agreement, DOE has disbursed about $1.3 billion in Stripper Well oil overcharge funds in a number of distributions, from August 1986 to the present. Additional Stripper Well distributions are expected to be made in the future. LIHEAP is one of the many programs under which these funds may be used.

(3) The *Stripper Well* settlement explicitly authorizes States to use funds for administrative expenses. Paragraph II.B.3.f.iii of the settlement agreement provides that States shall be entitled to expend for administrative expenses up to the amounts permitted by Federal legislation governing the programs cited in the *Stripper Well* agreement. Under section 2605(b)(9) of Pub. L. 97-35 as amended, a State may use for planning and administration up to 10% of its LIHEAP funds payable within a particular fiscal year, and not transferred for use under another block grant. The 10% limitation applies to the total of appropriated funds, including *Stripper Well* and *Exxon* funds, except that no *Exxon* funds may be used for administrative expenses. *Stripper Well* funds disbursed through the LIHEAP program increase the base upon which the 10% limitation on administrative expenses applies.