



OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION

Advisory Opinion # AO – 2010-004

SUBJ: Inclusion of Costs in PAI Subgrant Threshold under 45 CFR Part 1627

DATE: September 13, 2010

Questions Presented

The Office of Legal Affairs has been asked whether both costs and compensation for services or just compensation for services exclusive of costs are counted toward the \$25,000 threshold for PAI expenditures which must be treated as subgrants for the purposes of 45 C.F.R. Part 1627.

Brief Answer

In determining whether payments to a private attorney in connection with a fee-for-service arrangement reach the \$25,000 threshold triggering the subgrant requirements of 45 C.F.R. Part 1627, the recipient must count payments for both costs/expenses as well as the compensation paid to the attorney for the attorney's professional services.

Factual Background

A recipient has entered into fee-for service arrangement agreement with various private attorneys in the recipient's service area to provide legal services to eligible clients upon referral from the recipient. A number of these arrangements provide for payments for compensation for professional services of just under \$25,000, plus payments for the attorney's costs and expenses in connection with the services provided. Although the compensation for services is less than \$25,000, the payments for costs result in the total amount of payments made pursuant to these arrangements being in excess of \$25,000. The question has been raised as to whether these arrangements qualify as subgrants pursuant to the terms of LSC's subgrant rule at 45 C.F.R. Part 1627.

Analysis

Pursuant to regulations found at 45 C.F.R. Part 1627, recipients must obtain prior approval of LSC before entering into subgrants involving LSC funds. 45 C.F.R. §1627.3(a). Under the regulations, a "subgrant" is "any transfer of Corporation funds from a recipient which qualifies the organization receiving such funds as a subrecipient . . ." 45 CFR §1627.2(b)(2). An organization receiving funds from a recipient generally qualifies as a subrecipient if it receives

Corporation funds to conduct activities related to the recipient's "programmatic activities." 45 C.F.R. §1627.2(b)(1). The regulation goes on to specify that such "programmatic activities" are those that the recipient might otherwise be expected to engage in itself, such as representation of eligible clients. *Id.*

Although this general definition would appear to cover services provided by a private attorney or law firm to eligible clients referred by a recipient pursuant to a fee-for-service arrangement (typically via contract or judicare arrangements as part of a recipient's "Private Attorney Involvement (PAI) program pursuant to 45 C.F.R. Part 1614), the regulation distinguishes between some such services and others, depending on the amount of LSC funds expended. *Id.* Specifically, the regulation provides that:

[s]uch [programmatic] activities would not normally include those that are covered by a fee-for service arrangement, such as those provided by a private law firm or attorney representing a recipient's clients on a contract or judicare basis, *except that any such arrangement involving more than \$25,000 would be included.*

Id. (emphasis added). Thus, where the expenditure of LSC funds for a fee-for-service PAI arrangement is below the \$25,000 threshold, the regulation provides for an exception and the subgrant requirements do not apply. However, for PAI fee-for-service arrangements valued at more than \$25,000 the exception no longer applies and such arrangements are subgrants under the rule.¹ *Id.*

With the \$25,000 threshold, the question is raised as to whether the regulation intends the threshold to apply only to the payments to law firms and private attorneys for their professional services or to all payments made pursuant to such fee-for-service agreements. On its face, the regulation makes no such distinction between payments which are compensation for professional services and payments made to cover costs and expenses incurred by the law firm or private attorney in carrying out the duties under the fee-for-service arrangement. Rather, the language of the regulation is "arrangement involving more than \$25,000" – a more general and inclusive formulation. Moreover, even to the extent that there could be said to be some ambiguity in the regulatory text, there is nothing in the regulatory history which would suggest that the threshold applies only to those payments to law firms or private attorneys which are compensation for professional services and not also to payments for costs or expenses made in connection with such professional services.

In explaining PAI fee-for-service arrangement exception in §1627.2(b)(1), the Corporation stated in the preamble to the final rule adopted in 1983, "The exception for *transfers of funds* to private attorneys or law firms on a fee-for-service or judicare basis [contain in the proposed version of the rule] is retained, but is limited to transfers of no more than \$25,000; thus

¹ The Corporation included the exception for smaller PAI fee-for-service arrangements "because of the multiplicity of approvals that would be required if a typical judicare or fee-for-service program were covered." 48 Fed. Reg. 54206, at 54207 (Preamble to Final Rule, November 30, 1983). The Corporation determined that the "large number of approvals routinely required does differentiate such program from other types of subgrants." *Id.*

transfers to private attorneys or law firms in excess of \$25,000 are considered subgrants” and “\$25,000 limit was added on the same logic, as there can, obviously be only a small number of *such expenditures over \$25,000* by a recipient.” 48 Fed. Reg. at 54207 (emphasis added). The use of generic terms such as “any arrangement involving more than \$25,000” and “transfers . . . in excess of \$25,000” and “expenditures over \$25,000” imply that no distinction is made as to whether the payment is for services or expenses, provided that the payment is made pursuant to a fee-for-service arrangement. Indeed, whether providing payment for an expense or compensation for services provided, the recipient is still making a transfer or expenditure of funds. In addition, for transfers not subject to any threshold limit (non-PAI arrangements), there is no such differentiation; that is, a transfer of funds to a subrecipient organization which is not a law firm or private attorney providing PAI services is a subgrant regardless of whether the expenditure provides compensation for services or payment for costs and expenditures.

Moreover, the purpose of the subgrant rule is to “promote accountability for Corporation funds and the observance of the provisions of the Legal Services Corporation Act and the Corporation’s regulations adopted pursuant thereto. . . .” 45 C.F.R. §1627.1. Differentiating between Corporation funds expended to provide compensation and funds provided to provide reimbursement of costs, for the purpose of application of the subgrant rule would appear to frustrate rather than further that purpose.

Accordingly, when a recipient enters into a PAI fee-for-service arrangement with a law firm or private attorney and the total of the recipient’s expenditure of LSC funds pursuant to such arrangement exceeds \$25,000, the transfer of LSC funds is a subgrant for which prior approval must be sought. In addition, the law firm or private attorney is a subrecipient for the purpose of the regulation and the use of the LSC funds is subject to all restrictions as provided in 45 CFR §1610.7.

A handwritten signature in black ink, appearing to read 'Mattie Cohan', with a long horizontal flourish extending to the right.

Mattie Cohan
Senior Assistant General Counsel