Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Commonwealth of Virginia
Docket No. A-16-22
Decision No. 2876
June 21, 2018

DECISION

The Commonwealth of Virginia (Virginia) appealed a determination by the Department of Health and Human Services (HHS), Cost Allocation Services (CAS) that Virginia must repay the federal government $31,231,220 relating to billed central services costs claimed by Virginia under multiple federal grants for fiscal years (FYs) 2009-2014. CAS determined that Virginia owes $29,809,619 for the federal share of transfers from self-insurance funds, rebates from vendors, and various other identified revenues and credits, and $1,421,601 in imputed interest. The parties agree that Virginia must refund the federal share of the various revenues and credits, but dispute how to calculate the amounts due. Virginia disputes $9,761,534 of the total amount identified by CAS, consisting of $8,339,933 of the principal amount and the entire imputed interest amount.

For the reasons discussed below, we sustain CAS's determination.

Legal Background

A. Cost principles for state governments

Federal regulations and Office of Management and Budget (OMB) cost principles govern whether costs claimed by states under federal awards are allowable. Relevant in this case, OMB Circular A-87, codified at 2 C.F.R. pt. 225, contained the "Cost Principles for State, Local and Indian Tribal Governments.[1] HHS developed "A Guide for State, Local

[1] In December 2013, OMB consolidated the contents of Circular A-87 and other circulars into one streamlined set of cost principles and audit requirements for federal awards, currently published in 2 C.F.R. Part 200. 78 Fed. Reg. 78,590 (Dec. 26, 2013); *see also* 79 Fed. Reg. 75,871, 75,875 (Dec. 19, 2014) (promulgating regulations in 45 C.F.R. Part 75 which make the cost principles published in 2 C.F.R. Part 200 applicable, with certain amendments, to HHS programs and supersede the Uniform Administrative Requirements for grants to states at 42 C.F.R. Part 92). The relevant concepts of the cost principles remain unchanged. Consistent with CAS's October 23, 2015 determination notice, we cite to the codification of OMB Circular A-87 at 2 C.F.R. pt. 225.

and Indian Tribal Governments" (ASMB C-10) to assist states in applying the cost principles.[2] 2 C.F.R. pt. 225, Appendix (App.) C ¶ A.2; CAS Ex. 4.

Under the cost principles, the "total cost" of a federal award consists of allowable direct and allocable indirect costs, "less applicable credits." 2 C.F.R. pt. 225, App. A ¶ D.1. "Applicable credits" are --

> Those receipts or reduction of expenditure-type transactions that offset or reduce expense items allocable to the Federal award as direct or indirect costs. Examples of such transactions are: Purchase discounts, rebates or allowances, recoveries or indemnities on losses, insurance refunds or rebates, and adjustments of overpayments or erroneous charges. To the extent that such credits accruing to or received by the [non-Federal entity] relate to allowable costs, they shall be credited to the Federal award either as a cost reduction or cash refund, as appropriate.

Id. App. A ¶ C.4. To be allowable under federal awards, costs must be "adequately documented." *Id.* App. A ¶ C.1.j.

B. Central services costs

States provide certain services, such as motor pools, information technology, and accounting, to operating agencies and departments on a centralized basis. 2 C.F.R. pt. 225, App. C ¶ A.1. States may allocate central services costs to operating agencies and programs on a reasonable basis (Section I costs) or bill benefitting agencies and programs on a fee-for-service or similar basis (Section II costs). *Id.* App. C ¶¶ B.1, B.2. The revenues that a state collects from its state agencies through billed central services may be accounted for through an internal service fund (ISF), which the state uses to finance those services.

A state's contributions to a reserve for certain self-insurance programs are allowable subject to limitations, including that "[e]arnings or investment income on reserves must be credited to those reserves." *Id.* App. B ¶ 22.d.(2). When "funds are transferred from a self-insurance reserve to other accounts (e.g., general fund), refunds shall be made to the Federal Government for its share of funds transferred, including earned or imputed interest from the date of transfer." *Id.* App. B ¶ 22.d.(5).

[2] Currently available at https://rates.psc.gov/fms/dca/s&l.html and referenced under the revised regulations at 2 C.F.R. pt. 220, App. V.A.2.

For each billed central service activity, the state must separately account for all revenues (including imputed revenues) generated by the service, expenses incurred to furnish the service, and profits and losses. *Id*. App. C ¶ G.1. With respect to billing rates, the cost principles provide:

> Adjustments of billed central services. Billing rates used to charge Federal awards shall be based on the estimated costs of providing the services, including an estimate of the allocable central service costs. A comparison of the revenue generated by each billed service (including total revenues whether or not billed or collected) to the actual allowable costs of the service will be made at least annually, and an adjustment will be made for the difference between the revenue and the allowable costs. These adjustments will be made through one of [several methods, including a] cash refund to the Federal government ….

Id. App. C ¶ G.4.

C. The cost allocation plan negotiation process

To ensure that a state identifies and assigns central services costs to benefitted activities on a reasonable and consistent basis, a state must submit before the start of each fiscal year a proposed central services cost allocation plan, also referred to as a statewide cost allocation plan (SWCAP),[3] for review, negotiation, and approval by an assigned federal "cognizant agency" on behalf of all federal agencies. 2 C.F.R. pt. 225, App. C; ASMB C-10, pt. 6. HHS is the cognizant federal agency for Virginia, and CAS is the HHS component responsible for reviewing, negotiating and approving Virginia's SWCAPs.

A SWCAP includes a projection of the next year's Section I, allocated central services costs, as well as a reconciliation of actual allocated central services costs to the estimated costs used for the most recently completed year. 2 C.F.R. pt. 225, App. C ¶ D.1; CAS Ex. 3 ¶ 4. The state also submits accounting information for Section II, central services costs billed to state agencies and charged to federal awards for the most recently completed year. 2 C.F.R. pt. 225, App. C ¶ E.3; CAS Ex. 3 ¶ 4; VA Ex. E ¶ 5.

In addition to negotiating the SWCAP for the coming fiscal year, the parties negotiate the amount of any cash payback owed to the federal government for the prior year's billed costs (e.g., for over-billings, rebates, or transfers from ISFs to the General Fund). CAS Ex. 3 ¶ 6; VA Supp. Br. at 5; VA Ex. E ¶ 6. To establish the payback amount requires a determination of the federal financial participation (FFP) percentage(s) used to calculate the federal share of any overbilling, ISF transfer, rebate, or other activity. *Id.* The

[3] Virginia uses the term "statewide indirect cost allocation plan" or SICAP to describe its central services cost allocation plan. This decision uses the term used by CAS, statewide cost allocation plan or (SWCAP).

SWCAP does not include language requiring the application of a specific methodology to determine the FFP percentage(s), but any methodology used must be consistent with the applicable cost principles. CAS Ex. 3 ¶ 8.

D. Central services documentation requirements

"All costs and other data used to distribute the costs included in" a SWCAP must "be supported by formal accounting and other records that will support the propriety of the costs assigned to Federal awards." 2 C.F.R. pt. 225, App. C ¶ A.1. A state must maintain specific types of documentation to support its billed central service costs. *Id.* App. C ¶ E.3. For each ISF "or similar activity with an operating budget of $5 million or more," the state must provide a balance sheet for each fund based on individual accounts contained in the governmental unit's accounting system; a revenue/expenses statement, with revenues broken out by source; a listing of all non-operating transfers into and out of the fund; a description of the methodology used to charge the costs of each service to users; and a schedule comparing total revenues generated by the service to the allowable costs of the service. *Id.* App. C ¶ E.3.b.

For each self-insurance fund, the plan must include a balance sheet; a statement of revenue and expenses (including a summary of billings and claims paid by agency); a list of all non-operating transfers into and out of the fund; and a description of the procedures used to charge or allocate fund contributions to benefitted activities. *Id.* App. C ¶ E.3.c.

For all ISFs, self-insurance funds and fringe benefit funds, including those under $5 million, the state must submit a schedule of retained earnings that shows: the beginning balance for the fiscal year; actual and imputed revenues; working capital reserve, contributed capital; and OMB Circular A-87 allowable costs adjusted for (among other things) capital expenditures, depreciation, non-recognized transfers, bad debts, SWCAP allocations, and actual or imputed earnings on monthly cash balances and replacement reserves. ASMB C-10 ¶¶ 4.7, 4.8, Question 4-7.

The cognizant federal agency has the flexibility to modify or expand the documentation requirements on a case-by-case basis. 2 C.F.R. pt. 225, App. C ¶ E. "The data and information that a cognizant agency can require is subject to reasonableness." ASMB C-10 ¶ 4.8, Question 4-4.

Case Background

A. Virginia's prior appeal

The issues raised in this appeal relate in part to an earlier dispute, which arose from an HHS Office of Inspector General (I.G.) audit of Virginia's ISF balances for FYs 1993 through 1997. The I.G. "identified $15.3 million in over-recoveries and recommended

that [Virginia] refund this amount to the Federal government." VA Ex. E1, at 1. Based on the I.G. recommendation and additional information provided by Virginia, CAS determined that Virginia was obligated to reimburse the federal government $14.6 million for the federal share of the over-recoveries. *Id.*[4] Virginia made a partial payment and appealed the remaining balance to the Board. *Id.*

While the appeal was pending, Virginia proposed a revised methodology to calculate the federal share of the over-recoveries. Virginia "originally calculated the FFP rates by dividing the total Federal expenditures for each year by the combined expenditures (total Federal and [Virginia] expenditures)." VA Ex. E1, at 3. Virginia then applied the "resulting percentage … to ISF balances to calculate the Federal share of over-recoveries." *Id.* Virginia's revised methodology excluded certain pass-through program expenditures from the calculation because administrative costs are not charged to pass-through expenditures. *Id.* The Board stayed the case to permit CAS and the I.G. to evaluate the "reasonableness" of the revised methodology and rates. *Id.* at 2, 4.

The I.G. conducted the review and concluded that Virginia's "revised calculation" was "no more precise than the method originally used" but "represent[ed] a reasonable lower limit for FFP" in light of the available documentation. *Id.* at 1. Even with the removal of pass-through expenditures, the I.G. found, "[u]sing Federal expenditures divided by total expenditures only approximates the share of over-recoveries and may include amounts which distort the Federal share." *Id.* at 4. The I.G. stated, "The most accurate method to calculate FFP rates is to trace ISF over-recoveries [or actual billings] back to the actual funding sources" or "each ISF client." *Id.* at 2, 4. This method could not be used for the period then at issue, however, "because of the lack of complete accounting information." *Id.* at 1.

To settle the case, the parties ultimately agreed on the FFP "in the princip[al] and interest amounts relating to appropriation transfers and overbillings" for ISFs for FYs 1993 through 1997. VA Ex. A, at 1. In addition, the parties "agreed to use the methodology (i.e., the exclusion of Federal and State pass-through program expenditures) developed to arrive at [the] settlement to determine the FFP for appropriation transfers and over billings for" FYs 1998 through 2000. *Id.* They further agreed, however, that after FY 2000, Virginia "will look for alternative methods to calculate the Federal share for those type[s] [of] situations." *Id.*

[4] Prior to 2014, CAS was called the Division of Cost Allocation. We refer to the HHS component as CAS for ease of reading.

B. The 2001-2011 period

From 2001 through mid-2011, the CAS Mid-Atlantic Field Office was responsible for reviewing Virginia's SWCAPs and negotiating the federal payback amounts on Section II costs. Beginning with FY 2001, Virginia used a flat-rate, statewide FFP rate payback methodology that was "designed to apply to overbillings resulting from interagency transactions." VA Ex. E ¶ 19. The methodology compared federally funded interagency expenditures with total interagency expenditures to produce a single annual FFP rate that Virginia applied to all over-recoveries. Virginia's Indirect Cost Coordinator, Department of Accounts, P.W., described the methodology in a March 13, 2002 e-mail to the CAS Mid-Atlantic Field Office as follows:

> The new methodology extracts all [interagency transfers] which are payments between state agencies. This data is then sorted by all debits to expenditures which are represented by transaction code 380. A transaction code in the state system determines which accounts in the accounting system are to be debited and credited. When we pull all transaction code 380 debits to expenditures this does not include any transaction codes associated with pass through funds. The Department of Accounts has pass through procedures in place for state agencies to use when recording pass through transactions which have their own distinctive transaction codes. By extracting only transaction code 380 payments there are no pass through payments included. All debits to expenditures are then sorted by federal and nonfederal funds to determine the appropriate shares.

VA Ex. E2.

In May 2002, P.W. e-mailed to CAS a one-page document titled "Methodology Used to Calculate Federal and Nonfederal Participation Rate Percentages to Be Applied to Over/Under Recoveries of Internal Service Funds." VA Ex. E3, at 1, 2. The document explained that Virginia "maintains a database of all CARS (Commonwealth Accounting and Reporting System) transactions on network servers (repository)," and "[d]etailed transaction information is downloaded daily [and] reconciled to the general ledger weekly." *Id.* at 2. "To determine federal and nonfederal percentages," Virginia extracted multiple data elements from the repository monthly and loaded them into an Excel spreadsheet. *Id.* The document described the following steps: (1) "The original download is sorted by transaction code"; (2) "All transaction codes that debit expenditures are then pulled and sorted by fund"; (3) "All federal and nonfederal funds are separated"; (4) "The transaction dollars in the amount column are summed by fund and divided by the total of federal and nonfederal funds to obtain the percentage share"; (5) "The federal percentage is then applied to any over/under recoveries during for [sic] the fiscal year to derive the amount payable to the federal government." *Id.*

Beginning in 2007, Virginia established a second FFP rate methodology exclusively to derive the federal share of small purchase charge card (SPCC) rebates. VA Ex. E ¶ 20. Virginia states that it "implemented the SPCC FFP Rates methodology … rather than use the Statewide FFP Rate since that rate is derived from interagency transactions, while the SPCC program involves a broader segment of state expenditures." VA Reply at 8.

In 2010, CAS approved Virginia's "use of the statewide rate for determining FFP in utilities rebate[s]." VA Ex. E26.[5]

Applying Virginia's statewide FFP rate and SPCC refund methodologies, the CAS Mid-Atlantic Field Office and Virginia agreed to the cash payback amounts for the federal share of appropriation transfers and overbillings to Virginia's General Fund from ISFs and self-insurance funds for FYs 1999 through 2008, and rebate calculations through FY 2009. VA Exs. E4 – E23.[6]

C. The 2011-2015 Period

In 2011, CAS's Central States Field Office assumed responsibility for reviewing, negotiating and approving Virginia's SWCAPs. CAS assigned T.H., a National Specialist, to work with Virginia. CAS Ex. 2 ¶ 10; VA Ex. E ¶ 28. In a written declaration filed in this appeal, T.H. states that in September 2011, he reviewed Virginia's 2009 SWCAP files, which showed that "Virginia used a statewide FFP rate of 12.64% for all repayments to the federal government." CAS Ex. 2 ¶ 10. T.H. says that he decided to conduct a review of the rate because he thought it "was low based on [his] experience in other states[.]" *Id.* In addition, Virginia was using the same rate of FFP to apply to "an increasing variety of different situations" since 2007, including Virginia Information Technologies Agency (VITA) IFA contracts; VITA 2 percent Debt Recovery Surcharge; Department of General Services (DGS) Procurement; various rebates; Health Insurance Fund interest earnings retained by the General Fund; and Risk Management Fund interest earnings retained by the General Fund. CAS Ex. 2 ¶ 37. In October 2011,

[5] Virginia asserted in its opening brief that it "ha[d] not modified its FFP methodology at any time between 1993 and 2014; except once," in 2007, when it adopted and obtained CAS approval for the separate methodology for SPCC rebates. VA Br. at 3. Virginia's Reply Brief and Supplemental Brief, however, describe the statewide FFP rate methodology that focused on interagency transfers as a "new" methodology developed by Virginia and approved by CAS after the parties settled the earlier appeal. *See, e.g.,* VA Reply at 2. CAS "does not dispute that for FYs 2001-2009, Virginia used the FFP methodology it described in Virginia Exhibit E2." CAS Supp. Br. at 4.

[6] Although the parties did not reach an agreement on the cash payback amounts for the Section II, billed costs for the subsequent period, CAS approved Virginia's SWCAPs for 2011-2014 for the Section I and Section II costs that were not in dispute "so that Virginia would be able to submit claims" for the undisputed costs. CAS Ex. 3 ¶ 20, Att. C (Nov. 19, 2012 letter from CAS to Virginia approving SWCAPs for FYs 2012 and 2013 and noting Section II issues remaining unresolved for FYs 2010 and 2011).

T.H. made a site visit to Virginia, during which Virginia representatives provided him a copy of the "FFP rate Methodology used to Calculate Federal and Nonfederal Participation Rate Percentages." VA Exs. E ¶ 31, E24.[7]

One month later, in November 2011, T.H. exchanged e-mails with P.W. about documentation relating to Virginia's calculation of the FY 2010 statewide FFP rate. CAS Ex. 2 ¶ 12, Att. A; VA Ex. E ¶ 33; VA Ex. E30. T.H. asked P.W. to provide a worksheet showing Virginia's calculation of the rate. *Id.* In response, P.W. sent a worksheet that showed total nonfederal expenditures and total federal expenditures, but did not break out information by individual departments or agencies. *Id.* P.W. advised T.H. that there were "individual workbooks that range from 8,000 to 11,000 plus KB each[8] that support each of the numbers for each month of the fiscal year," and she offered to provide T.H. any of that detailed information. *Id.* T.H. states that "[b]ecause this worksheet included no information for individual departments and agencies, [he] requested and received the Excel workbooks" for December 2009 and June 2010. CAS Ex. 2 ¶ 12; *see also* VA Exs. E ¶ 34, E31, E32. T.H. states that he found the workbooks, containing thousands of lines of data categorized by numerical codes instead of words and with variations in the format of dates, agency numbers and names, "too voluminous and poorly labeled for review." CAS Ex. 2 ¶ 13.

Consequently, on November 29, 2011, T.H. sent P.W. an e-mail stating: "We are going to need to look at some other data for calculating ffp on the attached worksheet." CAS Ex. 2 ¶ 14 and Att. C; VA Exs. E ¶ 36, E34. That worksheet, which Virginia had provided, listed annual figures for each of the following categories from FY 1993 through FY 2010: appropriation transfers associated with each ISF; profits by ISF; and total annual federal share of the ISF profits and transfers for each year based on the application of the statewide FFP rate for the corresponding year. CAS Ex. 2, Att. C. The worksheet also showed rebates, by category, for FYs 2007 through 2010 and Virginia's determination of the federal share. *Id.* Specifically, T.H. asked for the following information:

> Appropriation Transfers, Profits: For each organization with a transfer, with the exception of Risk Management, Consolidated Lab, and Payroll Service Bureau, list total revenue and cost by billing rate/category for 2009 and 2010.

[7] P.W. states in her written declaration filed in these proceedings that most of the visit was spent discussing VITA issues. VA Ex. E ¶ 32.

[8] We read this statement as describing individual Excel workbooks ranging in size from 8,000 to more than 11,000 kilobytes.

> Rebates: For each of the three rebates listed for 2010, provide the total expenditures, by customer department, of the expenditure categories that generated the rebates.

Id. P.W. transmitted multiple electronic files in response to T.H.'s request. VA Exs. E ¶ 37 and n.2, E34-E40.

Approximately ten months later, in September 2012, T.H. requested, and P.W. provided, copies of Virginia's "Calculation of Federal Refund Amount for Charge Card Rebates" worksheets and the "Calculation of Federal Share" worksheets for FY 2010 and FY 2011. CAS Ex. 2 ¶ 15, Atts. D and E. The SPCC rebate worksheets provided expenditures and rebate amounts by state agency (CAS Ex. 2, Att. D), whereas the worksheets for appropriation transfers, profits, rebates and VITA amounts did not (CAS Ex. 2, Att. E).

T.H. also conducted a site visit in Richmond in September 2012, during which the parties discussed Virginia's annual statewide FFP rates and the removal of certain expenditures from the SPCC methodology. CAS Ex. 2 ¶ 16; VA Ex. E ¶ 42.

As of March 2013, the parties had not reached consensus on the federal payback amounts. On March 27, 2013, Virginia representative S.L. wrote in an e-mail to T.H. that S.L. "wanted to touch base with [T.H.] regarding [his] review of … Virginia's federal payback decisions." VA Ex. E43, at 4. With respect to the statewide FFP rate methodology, S.L. stated, "We have evaluated our current [FFP] rate processes that consider amounts paid internally from agency to agency and believe these provide the appropriate basis for our federal payback amounts." *Id.* S.L. continued, "We do not think there is a need to deviate from our current approach which has been in place since 1998." *Id.* With respect to the SPCC methodology, S.L. stated that Virginia believed that the "most appropriate methodology" was to remove certain expenditure payment types (i.e. payroll disbursements to localities, and debt service disbursements) from the numerator of the payback calculation because these types of payments cannot be made using the SPCC methodology. *Id.*

In July 2013, Virginia provided CAS with a proposed "federal payback schedule for the current payment," which "incorporated a few changes based upon [T.H.'s] September 2012 office visit." CAS Ex. 2, Att. F. The schedule included "imputed interest for the 2011, 2012, and 2013 payment amounts using Virginia's State Treasury annual interest rate," a change in the calculation of the VITA surcharge "[a]s agreed during the office visit," and a modification to the ISF profit calculation "to report amounts net of the 60 day working capital balance," as CAS "suggested during the office visit …." *Id.* Because "there was no consensus reached regarding possible modifications to the" SPCC payback calculation, "Virginia used the historically approved method to perform these calculations." *Id.*

Representatives of the parties met on August 18, 2015, at which time CAS provided Virginia an alternative calculation of the amount of cash to be returned to the federal government for the various transfers, profits, rebates and other activities. The parties did not reach an agreement on the federal payback amounts due for the FY 2009 through FY 2014 period. VA. Ex. E ¶¶ 53-56; CAS Ex. 2 ¶¶ 30-35.

CAS's Determination

By decision dated October 23, 2015, CAS determined that Virginia was required to return $31,231,220 to the federal government, for the federal share of multiple activities for FYs 2009-2014 and imputed interest calculated to November 22, 2015. CAS Ex. 1, at 1, 4. The activities that CAS identified consisted of:

- Transfers from self-insurance funds (Risk Management and Health Insurance Fund) for which refunds are specifically required under 2 C.F.R. Part 225, App. B ¶ 22(5).
- Self-insurance funds (Risk Management and Health Insurance Fund) not receiving interest earned on their invested cash as required pursuant to 2 C.F.R. Part 225, App. B ¶ 22(2) and (5).
- Rebates obtained from vendors (VITA – Industrial Funding Adjustment; DGS – Procurement; SPCC Rebate; and Virginia Dominion Power Rebate) not credited to federally funded programs as required under 2 C.F.R. Part 225, App. A ¶ C.1 and C.4.
- Prior years' ISF losses recovered by charging a surcharge to current service billings: VITA – Debt Recovery Surcharge, not permitted under 2 C.F.R. Part 225, App. C ¶ G.
- Miscellaneous Transfers (State Surplus; Consolidated Lab; Payroll Service Bureau; Federal Surplus; Engineering; Central Warehouse) for which repayment was required under 2 C.F.R. Part 225, App. C ¶ G.

CAS Ex. 1.[9]

With respect to the amounts owed to the federal government, the decision stated that in the years since Virginia's prior appeal, CAS has "routinely required states to compute Federal share on methods which are much more probative of the specific circumstances of the situation requiring a refund to the Federal government." *Id.* at 4. Virginia's "method for calculating the Federal share due for" the SPCC rebate, CAS stated, "starts

[9] The notice stated that CAS had delayed requesting cash for FYs 2009-2014 until it had determined what action to take for "the apparent over recoveries of profits and transfers from the same" ISFs for FYs 1993 – 2008, and, as discussed during the parties' August 18, 2015 meeting, "no action [would] be taken concerning this issue" for FYs 1993-2008. CAS Ex. 1, at 1.

to approach but does not achieve the methods used to calculate Federal share in other states." *Id.*

During its review of Virginia's calculations, CAS further stated, Virginia had provided data for two months for all items other than SPCC rebates. *Id.* CAS staff, however, found the "volume of data, lack of summarization and inadequate labeling rendered the information unusable" for the purpose of determining the amounts of cash owed the federal government. *Id.*

The decision next described how CAS staff had determined the repayment amounts based on the available information that Virginia had provided. CAS stated that it was not using Virginia's proposed FFP percentages for items other than the SPCC rebates because the data provided by Virginia about the rates was in an unacceptable format. In addition, CAS stated that its staff believed the percentages were "significantly less than the actual Federal share for these items [would be] using more probative methods," and, consequently, "would not result in an equitable repayment" to the federal government. *Id.* CAS also considered, and rejected, using total schedule of expenditures of federal awards (SEFA)[10] percentages "because they do not appear to have appropriate adjustments" and using those rates "would be inequitable" to Virginia. *Id.*

The decision then explained that CAS was "using the Federal share calculations provided for" the SPCC rebates, "despite using Single Audit Report – [SEFA] with inadequate adjustments." *Id.* CAS noted that the "calculations include some cost data by specific agencies for expense categories not normally requiring adjustment if a pure SEFA calculation is used." *Id.* The "SPCR [small purchase charge card rebate] percentages fall between the two percentages produced by the methods" that CAS "rejected using," however, and CAS staff "believe are the reasonable alternative to be used since more probative calculations are not available." *Id*.

Virginia appealed CAS's determination.[11] Of the total amount of $31,231,220 that CAS determined Virginia must repay the federal government for fiscal years 2009-2014, Virginia disputes $9,761,534, which accounts for $8,339,933 in principal and $1,421,601 in imputed interest. In January 2016, Virginia paid the federal government $21,469,686, the "uncontested amount." VA Br. at 2 n.1.

[10] SEFA "is also often referred to as 'Total Federal Expenditures.'" CAS Ex. 2, at 8 n.4.

[11] After the initial round of briefing, the Board issued an Order to Develop the Record, asking the parties to provide additional information and briefing to facilitate the Board's decision-making. The parties filed supplemental briefs and exhibits responding to the Board Order. The administrative record of this appeal includes Virginia's Brief, Reply Brief, Supplemental Brief and Exhibits A-H; and CAS's Response Brief, Supplemental Brief, and Exhibits 1-4.

Analysis

A. Introduction

Virginia argues that CAS's determination is based on the Central States Field Office representatives' "fundamental misunderstanding" of Virginia's methodologies for calculating the federal share of various transfers, rebates and other activities. VA Reply Br. at 4; VA Supp. Br. at 1. Virginia contends that its statewide FFP rate methodology and SPCC rebate methodology, both of which the CAS Mid-Atlantic Field Office approved in the past, are entitled to deference and could not be changed without notice or agreement by both parties. VA Br. at 5; VA Supp. Br. at 5. Therefore, Virginia says, any change in methodology should apply prospectively, not retroactively. VA Br. at 8. Virginia further asserts that it has provided sufficient argument, explanations and evidence to justify its methodologies. Virginia argues that, in the event the Board sustains CAS's calculations, CAS should be estopped from collecting imputed interest on the payback amounts because CAS's inaction caused the delays in resolving the dispute. VA Reply at 15-16. Lastly, Virginia proposes an alternative methodology for the parties to use prospectively. VA Supp. Br. at 7-9.

We address below why we reject Virginia's arguments. We further explain that the governing regulations and cost principles required Virginia to maintain and produce detailed accounting records and data to show that its methodologies produced precise and equitable allocations of the federal payback amounts for each of the different situations for which a refund was due. Notwithstanding Virginia's general explanations as to why its methodologies are reasonable, Virginia did not provide CAS, or produce during this appeal, data in a usable format that would enable this situation-specific analysis. Accordingly, we conclude that CAS reasonably rejected Virginia's determination of the amounts due. We further explain that in light of the limited available documentation, CAS's calculations of the federal payback amounts reflect a reasonable exercise of administrative discretion by the cognizant federal agency. Finally, we describe why Virginia is required to pay imputed interest on the principal amounts and why the Board will not adjudicate whether the parties should use Virginia's proposed alternative methodology for future periods.

B. CAS was not obligated to defer to the use of methodologies that it accepted for prior periods to calculate the federal payback due for FYs 2009 through 2014.

Virginia argues that during the eight years following its prior appeal, it "enjoyed a relationship based on mutual understanding and trust with [the CAS Mid-Atlantic Field Office]." VA Reply at 4. When CAS oversight moved to the Central States Field Office in 2011, Virginia contends, the representatives of that office did not understand Virginia's methodologies and caused "unwarranted and unexpected delay in issuance of a determination letter" that "unfairly burdens Virginia taxpayers." VA Br. at 5. Virginia

also asserts that from "2011 through September 2015," it was consistently responsive to the Central States Field Office's inquiries but "received no notice, challenge, or guidance from the … office regarding the calculation of the FFP rate"; and, the "first written challenge to Virginia's methodology was made in the October 23, 2015 Final Decision." VA Br. at 3; VA Reply at 5. Virginia says that its methodologies, long-recognized to be reasonable and equitable, are entitled to deference, and "a sound methodology that has been approved and determined compliant by [CAS] for two decades should not be changed without notice." VA Reply at 14; VA Br. at 5-6.

The parties' agreement to use Virginia's methodologies to calculate the federal payback amounts for prior periods did not obligate CAS to accept those methodologies to calculate the amounts due for FYs 2009 through 2014. As Virginia acknowledges, there was "no specific wording in the [SWCAPs] 'requiring' the application of a specific methodology" to calculate the payback amounts. VA Supp. Br. at 5. Virginia also does not point to any regulation or policy that would preclude CAS from further scrutinizing the previously-accepted methodologies or requiring Virginia to use a more precise and equitable methodology for the FY 2009 through FY 2014 period. Rather, the applicable regulations, described above, establish a process through which each state and the cognizant federal agency annually negotiate the amount of any cash payback owed to the federal government for the prior year's billed central services costs. 2 C.F.R. pt. 225, App. C. The regulations, we agree with CAS, impose "no obligation to use the same methodology from year to year," and provide that each year, either party "may propose changes to the methodology for calculating the FFP." CAS Ex. 3 ¶ 8. Thus, when heightened scrutiny of a methodology that CAS previously accepted reveals that the methodology may not be equitable to the federal government, it is appropriate for CAS to ask the state to provide more detailed information and data to justify its calculations or to develop a more probative methodology.

In addition, we reject Virginia's argument that the methodology that CAS used to determine the amounts due may only apply prospectively because Virginia did not have notice of that methodology until it received CAS's final written decision in 2015. The Board previously has held in the context of a dispute over the federal share of a state's overpayments for billed central services costs that there is "nothing fundamentally wrong with applying a methodology to determine a disallowance amount," even if a state "did not have advance notice of what specific methodology would be used." *Ark. Dep't of Info. Sys.*, DAB No. 2010, at 42 (2006), *appeal dismissed*, No. 4-06-cv-0262 (E.D. AR W.D. May 30, 2007). So long as the state has an adequate opportunity to provide additional information and to dispute the methodology before the Board, as was given to Virginia here, the state cannot reasonably complain that it was prejudiced by a lack of notice of how CAS would compute the amounts it would require the state to repay for the overcharges and other activities. Moreover, as in *Arkansas*, the methodology that CAS employed here "does not establish a rule for future conduct," but is a determination of the

amounts owed by Virginia for prior years "under the particular circumstances here … and is subject to review by the Board based on the record before us." *Id.*

Furthermore, the record does not support Virginia's claim that it had no notice before 2015 that its flat-rate, statewide FFP methodology would not be approved by CAS for FYs 2009 through 2014. We note that the I.G.'s February 2000 assessment of Virginia's proposed revised methodology for determining the federal share of over-recoveries for FYs 1993 through 1997 described the limitations of using any FFP flat-rate, statewide methodology to determine the federal share of over-recoveries for multiple ISFs. Such a methodology, the I.G. stated, could serve –

> only to estimate the Federal share of the ISF over-recoveries since the actual sources of over-recoveries may not be directly related to the Federal share of total expenditures. [Virginia] divided Federal expenditures by total expenditures to calculate the Federal percentage of the expenditures. However, ISF over-recoveries resulted from actual transactions between specific ISFs and agencies which used each ISF's services. Using Federal expenditures divided by total expenditures only approximates the share of over-recoveries and may include amounts which distort the Federal share.

VA Ex. E1, at 4. As the I.G. then made clear, "The most accurate method to calculate FFP rates is to trace ISF over-recoveries [or actual billings] back to the actual funding sources" or "each ISF client." *Id.* at 2, 4. While the more accurate method could not be used for the FYs 1993 through 1997 period "because of the lack of complete accounting information" for that period, the I.G's assessment gave Virginia notice that CAS might in subsequent periods require situation-specific FFP rates and refuse to accept a flat-rate, statewide methodology for all ISF overbillings and other activities. *Id.* at 1, 4. In fact, the I.G. specifically recommended that CAS and Virginia negotiate to arrive at a mutually agreeable methodology or rates for future periods. *Id.* at 5.

CAS's November 2011 and later communications with Virginia also gave notice to Virginia that CAS's continued acceptance of Virginia's statewide FFP rate methodology was, at the very least, contingent on Virginia producing fund and agency-specific accounting records and data to substantiate its calculations. As described above, in November 2011, T.H. asked Virginia for activity and individual department-specific information to support its FY 2010 statewide FFP rate, which appeared low to T.H. based on his experiences working with other states. Although Virginia provided a worksheet showing total nonfederal expenditures and total federal expenditures by month and samples of Virginia accounting system downloads, the information did not break down costs relating to each situation, and the data provided was "too voluminous and poorly labeled for review." CAS Ex. 2 ¶¶ 12, 13, Att. B; VA Exs. E ¶¶ 33-36, E30-E32. Consequently, T.H. specified in his November 29, 2011 e-mail that Virginia should produce for each fund with a transfer (with certain identified exceptions), a list of total

revenue and cost by billing rate/category, and for each rebate, the total expenditures, by customer department, of the expenditure categories that generated the rebates. CAS Ex. 2 ¶ 14, Att. C; VA Exs. E ¶ 36, E34.

CAS's requests for documentation were supported by the governing cost principles and consistent with CAS's routine practice of requiring states to prepare a separate worksheet for each situation for which a repayment to the federal government is due. 2 C.F.R. pt. 225, App. C ¶¶ A.1, E., E.3.; CAS Ex. 1, at 4; CAS Ex. 2 ¶ 7. As summarized in CAS's final determination and explained in T.H.'s declaration, in the years after Virginia's earlier appeal, CAS routinely requested states to "include data to calculate FFP that is limited specifically to the situation for which the repayment is to be made." CAS Ex. 2 ¶ 8; CAS Ex. 1, at 4. CAS also asks states to gather data from the state agencies that charged the costs to federally funded programs. CAS Ex. 2 ¶ 8. By "[c]alculating FFP specific to the situation, using either expenditures or revenue," T.H. states, CAS "can arrive at a more precise calculation of FFP which is equitable to both the state and the federal government." *Id.* ¶ 9; *accord Ala. Dep't of Fin.*, DAB No. 1635, at 23 (1997) (concluding that the state's calculations of the federal share of transferred self-insurance reserve funds were more probative than a national estimate because they attempted to trace federal funds actually received by the state and local agencies and actually deposited into the fund), *aff'd, Ala. v. Shalala*, 124 F. Supp. 2d 1250 (M.D. Ala. 2000). T.H. notes, if "the State only uses total expenditures amounts, then determining the FFP is more difficult as you have to take into account categories of expenses that are included in that total which may distort the calculation of FFP." CAS Ex. 2 ¶ 9. Furthermore, evaluating "expenses by category also provides CAS with a worksheet where [CAS] can review the FFPs of individual, federally funded agencies to see if they appear to be reasonable." *Id.*

The fact that CAS at one time or as part of prior negotiations may have accepted less detailed, summary documentation in support of a state's ISF expenditures does not oblige CAS to accept only summary documentation in a subsequent period or bar CAS from requesting additional information or data about a state's use of federal funds. *Idaho Div. of Fin. Mgmt.*, DAB No. 1822, at 15 (2002). The applicable cost principles, detailed above, specify that a cognizant federal agency may modify or expand the documentation required to support ISF and other costs on a case-by-case basis. 2 C.F.R. pt. 225, App. C ¶ E; ASMB C-10 ¶ 4.8, Question 4-7. In addition, the level of documentation that CAS may ask a state to produce "may depend on the history of negotiations with that state or on other factors, such as information from a state audit, that affect the degree of confidence the negotiator has in the state's figures." *Ark. Dep't of Info. Sys.*, DAB No. 2010, at 22 (citing ASMB C-10 ¶ 4.5). "This is a matter of judgment," and if a state "is not forthcoming in providing information and/or the information provided indicates that federal requirements are not being met, it is perfectly appropriate for [CAS] to seek more information[.]" *Id.* Here, CAS reasonably asked Virginia to prepare a worksheet for each situation for which a repayment to the federal government was due, for supporting

data in a usable format, and for data from the state agencies that charged the costs to federally funded programs. CAS Ex. 2 ¶¶ 7, 8, 9, 14. According to CAS, however, Virginia never provided the specific information and data.

Virginia argues that, contrary to CAS's allegations, it consistently and timely responded to all of CAS's inquiries, "provided any information that [CAS] requested," and was never told by CAS that the information sent was inadequate. VA Reply Br. at 1; VA Ex. E ¶ 40. Virginia has not, however, proffered evidence showing that it produced the detailed information and data, in a usable format, that CAS requested in order to evaluate the payback amounts associated with each ISF, self-insurance fund, rebate or other activity. Virginia's exhibits include copies of the e-mails that P.W. sent to T.H. in response to his November 2011 requests but not the attachments to the e-mails.[12] VA Exs. E ¶ 37, n.2, E34-E39. P.W.'s declaration describes the attachments obliquely as "information that was supplied to the Department by state internal service fund or self-insurance fund agencies pursuant to Federal Regulations" and which "had previously been provided" to T.H. VA Ex. E ¶ 37. Neither the declaration nor Virginia's briefs describe how the data it provided was in a format that would have enabled CAS to determine the accuracy of Virginia's statewide flat-rate FFP methodology. In light of the absence of evidence to the contrary, we have no reason to doubt CAS's characterization of the data that Virginia provided as too voluminous and insufficiently labelled for review.

With respect to Virginia's SPCC FFP rate calculations, CAS found, on review of the documentation provided by Virginia, that starting in 2010, Virginia began to make new "nonmonetary" and "major object code" reductions to the "SEFA Expenditures" (numerator) of the calculation, but seemingly still included these costs in the "Total Expenditures" (denominator); this apparently skewed the FFP percentage to Virginia's advantage. CAS Ex. 2 ¶¶ 18, 43-48, Atts. L-1, D, J. In addition, S.L.'s March 27, 2013 e-mail to CAS revealed that the parties disagreed about Virginia's proposed removal of payroll costs, disbursements to localities, and debt service disbursements from the numerator of the payback calculation on the basis that "these types of payments cannot be made using the SPCC." VA Ex. E43, at 4; VA Ex. E, ¶ 48. P.W.'s later, July 17, 2013 e-mail to CAS transmitting Virginia's calculation of the federal payback schedule stated, "Since there was no consensus reached regarding possible modifications to the [SPCC]

[12] Virginia did not include the attachments in its appeal file because, it stated, the attachments were "too voluminous to print"; but Virginia offered to provide copies of the attachments to the Board via zip files. VA Ex. E, ¶ 37, n.2. We did not ask for those files, however, because Virginia has had ample opportunity to demonstrate that the data it provided were in a format that would have permitted CAS to conduct a meaningful review, but has failed to do so. Moreover, we question how simply providing the Board on appeal copies of attachments that CAS long ago said were not in a usable format would enhance our ability to perform a meaningful review on appeal. CAS produced sample printouts of the spreadsheets provided that demonstrate their opacity (T.H. Declaration, Attachment B), while Virginia did not produce an example of corresponding data to show how it could be interpreted or used meaningfully. To date, Virginia has not provided that data in a usable format.

payback calculation, Virginia used the historically approved method to perform these calculations." VA Ex. E43, at 1. The SPCC federal share worksheets that Virginia provided for 2012 through 2014 reflected that change; however, Virginia's worksheets for 2010 and 2011 still used the numbers adjusted after removing those object codes. CAS Supp. Br. at 8-9 (citing CAS Ex. 1, Att. 1B, 1D, 1E, 1F, 1G, 1K, 1L, 1M; VA Ex. E44, at 2-3); CAS Ex. 2 ¶ 46, Att. D.

Thus, the regulations, cost principles and evidence do not support Virginia's claim that its methodologies are entitled to deference because CAS accepted their use to determine the federal payback amounts for prior periods. Nor does the record show that the CAS Central States Field Office representatives failed to grasp Virginia's rationale for using a methodology that focused exclusively on interagency transactions or why Virginia used a different methodology to determine the federal payback associated with SPCC rebates. Instead, the parties' communications demonstrate that CAS's rejection of Virginia's calculations was based on Virginia's failure to produce usable information and data, at the agency and individual-department level, which would have enabled CAS to assess whether the statewide FFP rate methodology identified repayment amounts that were equitable to the federal government. The record also shows why CAS concluded in its final determination that Virginia's federal share calculations provided for SPCC included "inadequate adjustments."

C. Virginia has not met its burden to support its calculations of the federal payback amounts due for FYs 2009 through 2014.

A "basic principle of grants law," long recognized by the Board, "is that recipients of federal grant funds bear the burden of documenting the allowability of their charges to those funds." *Idaho*, DAB No. 1822, at 13. In disputes involving cost allocation plans and the return or set-off of funds already received, a federal grantee likewise bears the burden to substantiate the allowability of its costs and its methods for allocating those costs to its federal awards. *Council for Econ. Opportunities in Greater Cleveland*, DAB No. 1980, at 9 n.11 (2005) ("In general, the burden is on a recipient of federal grant funds to justify both the allowability of its costs, and the methods used to allocate those costs to its federal awards."); *Ark. Dep't of Info. Sys.*, DAB No. 2010, at 6-7; *Vanderbilt Univ.*, DAB No. 903 (1987) (University had a burden under the applicable cost principles to demonstrate that alternative bases for allocating certain costs result in a more equitable allocation than the "standard" methodology); *Md. Dep't of Human Res.*, DAB No. 1886 (2003); *NJ Dep't of Human Servs.*, DAB No. 1797 (2001). "This fundamental principle of grant law," the Board has explained, "ultimately derives from the requirement that federal funds may be expended only for the purposes for which they were appropriated, and no other, absent specific legal authority otherwise." *Ark. Dep't of Info. Sys.*, DAB No. 2010, at 8 (citing U.S.C.A. Const. Art. I § 9, cl. 7 (Appropriations Clause); 31 U.S.C.A. § 1301(a)).

Virginia argues that it has met "its burden of proof by providing, through its briefs, and exhibits, explanation, and evidence to justify its calculation of the FFP rate and to explain why a different calculation must be applied to [SPCC] transactions." VA Supp. Br. at 1. Virginia explains in its briefs and exhibits that its statewide FFP rate methodology for overbillings and transfers focuses solely on interagency transactions, which are an "appropriate foundation for calculating federal payback amounts" because they "are the source of potential overbillings." VA Reply at 2, VA Supp. Br. at 5.[13] "Because excess recoveries cannot conceivably occur on non-interagency transactions (e.g., pass-through funds)," Virginia states, its methodology "excludes non-interagency transactions." VA Supp. Br. at 2.

With respect to evidence to support its calculations, Virginia refers to the "data samples" that it provided to the Texas office in 2011, which were attached to P.W.'s e-mails to T.H. VA Supp. Br. at 6 (citing VA Exs. E30-E32). Virginia also says in its Supplemental Brief, "As CAS knows from Virginia's communications to them, Virginia's computations have always used agency-specific expenditures data." VA Supp. Br. at 6. Moreover, Virginia argues that CAS "fail[ed] to identify any errors in Virginia's calculations or methodology or provide any explanations or supporting documentation to explain its claim that Virginia's methodology results in an unfair payback." VA Supp. Br. at 2. Virginia therefore contends that the Board should accept its determination that $21,469,686, which it has already paid, is the federal payback amount due for FY's 2009 through 2014. VA Br. at 2 n.1.

We conclude that Virginia has not met its burden. Virginia has provided a rational explanation why its statewide FFP rate methodology uses "interagency transactions (i.e., transactions in which one state agency charges another agency for goods or services provided)" and excludes pass-through expenditures. VA Reply at 7. Because "overbillings to the federal government in this category can only involve interagency expenditures," Virginia logically asserts, its "Statewide FFP methodology compares *federally-funded* interagency expenditures with *total* interagency expenditures." VA Reply at 7 (emphasis by Virginia) (citing VA Ex. E ¶ 19.a). Notwithstanding its rationale for using data relating only to interagency expenditures, Virginia nevertheless has failed to provide documentation to demonstrate that its application of the *same, statewide FFP rate* to numerous, varying scenarios results in a reasonably precise determination of the amounts for which Virginia must repay the federal government.

[13] Virginia explains, "In two instances, the Dominion Power and Department of General Service's Partners in Procurement expenditures rebates, there is no direct correlation to specific agencies," but "CAS approved use of the Statewide FFP rate [for those items] since it provided a reasonable default repayment basis in the absence of detailed records." VA Exs. E ¶ 22, E26.

As discussed above, Virginia has not produced evidence showing that it provided CAS with the requested, situation-specific information and data, in a usable format, that would have enabled CAS to evaluate whether Virginia's calculations were reasonable and equitable to both parties. Nor has Virginia produced that information and data in the course of this appeal. We note that Virginia states in its supplemental brief that, "[a]s CAS knows from Virginia's communications to them, Virginia's computations have always used agency-specific expenditures data." VA Supp. Br. at 6. In a footnote to the statement, Virginia says it "has prepared a file that contains the agency-specific data to support Virginia's [statewide FFP rate] computation." VA Supp. Br. at 6 n.5. Virginia did not, however, provide that file with its brief or even suggest that the data in it are labelled and organized in a format sufficient for CAS or the Board to review.[14]

Moreover, Virginia has not explained why it could not produce the requested agency-specific data in accessible form or shown that the data would not be available from its accounting systems. Indeed, the agency-specific data produced by Virginia in support of the SPCC methodology (discussed below) support an inference that such data were available and could have been produced to CAS or the Board, had Virginia chosen to do so. *See* CAS Ex. 1, at 16-21.

Furthermore, the parties' communications beginning in 2011, detailed above, belie Virginia's allegations that CAS has failed to identify problems with Virginia's calculations or explain why Virginia's methodologies result in unfair payback amounts. Moreover, in this appeal, CAS has provided a concrete example of how the federal government would not have received an equitable share of the various activities for which a repayment is due using Virginia's "one-size-fits-all" statewide FFP rate methodology. CAS Ex. 2 ¶¶ 40, 41, Att. I at 5-6. Specifically, correspondence between the parties regarding the repayment of FFP for overbillings caused by inaccurate equipment inventory surveys shows that in June 2010, Virginia repaid the federal government $1,526,139 for overbillings during FYs 2007 through 2009. CAS Ex. 2, ¶ 40, Att. I at 5. Notably, detailed spreadsheets attached to the correspondence show that Virginia determined the federal share for the overbillings based on agency-specific data and that the FFP rate for the total overbillings ($5,444,131) was 28.03 percent. *Id.* Had Virginia "applied the same flat rate, statewide FFP [rates] that it used for all other expense categories" to the overbillings due to inaccurate equipment inventory surveys, "the repayment to the federal government would have been less than 50% of what the government was actually repaid." CAS Ex. 2 ¶ 41, Att. I at 6.

[14] Virginia also says in the footnote that the "agency-specific data for the SPCC is provided on a flash drive," which "is impossible to attach … to this electronic filing." VA Supp. Br. at 5, n.5. "Therefore," Virginia continues, "the flash drive will be mailed to CAS under separate cover concurrent with this filing." *Id.*

In sum, Virginia has had ample opportunity to provide information and data to show that its methodologies and calculations produced a reasonable and equitable allocation of the federal payback amounts for each situation for which a repayment was due. Having failed to produce this information and data, Virginia has not met its burden of proof on appeal to substantiate its claims.

D. CAS's methodology for determining the federal share of transfers, credits and other items reflects a reasonable exercise of agency discretion and expert judgment under the circumstances.

As stated in CAS's final determination, Virginia's failure to produce the situation-specific information and data that CAS requested left CAS with limited alternatives for calculating reasonable federal repayment amounts. CAS Ex. 1, at 4; CAS Ex. 2 ¶ 24. CAS ultimately considered three options for calculating FFP rates: (1) Use the statewide FFP rates calculated by Virginia for all categories other than SPCC rebates; (2) Divide the "Federal Refund Amount" by the "Small Purchase Charge Card Rebate" on Virginia's SPCC Rebate worksheets; or (3) Divide the "SEFA Expenditures" by "Total Expenditures" listed on Virginia's SPCC Rebate Worksheets. CAS Ex. 2 ¶ 24; CAS Ex. 1, at 9, 11, 16-21. After comparing the different options, CAS decided to use the "Federal Refund Amount" divided by the "Small Purchase Charge Card Rebate" on Virginia's SPCC worksheets to determine the payback amounts. CAS Ex. 2 ¶ 25; CAS Ex. 1, at 4.

Despite Virginia's failure to produce the information and data requested by CAS and necessary to meet its burden of proof on appeal, Virginia contends that the Board should reject CAS's determination of the federal payback amounts due because CAS's methodology is "not an equitable or probative methodology from which to determine an appropriate percentage of the federal share." VA Reply Br. at 13; VA Ex. E at 17. Virginia argues that CAS's use of the SPCC "methodology is not an appropriate way to calculate the payback rate for inter-agency transfers" because "SPCC is not used as a payment method between state agencies." VA Supp. Br. at 6. In other words, Virginia says, CAS's use of the SPCC rates is "flawed because it uses amounts associated with charge card spending at individual agencies to determine the amounts to be paid back for all of [the payback scenarios], which bear no probative relationship whatsoever to charge card spending." VA Supp. Br. at 7.

These arguments do not establish a basis for disturbing CAS's calculations of the amount of cash Virginia must refund the federal government. The Board previously has held that to "the extent that an adverse determination reflects a reasonable exercise of programmatic discretion or expert judgment, the Board will ordinarily not interfere." *Univ. of Cal.*, DAB No. 2662, at 11 (2015) (citing *Okla. Dep't of Human Servs.*, DAB No. 963, at 6-7 (1988) (holding, in a dispute involving a cost allocation plan approved by the cognizant agency, that the Board would defer to agency expertise "absent a

compelling reason for concluding that the approved plan was improper")); *S.D. Dep't of Social Servs.*, DAB No. 465, at 4 (1983) ("This Board has often held that it will not substitute its discretion for that of the Agency where the Agency's decision is in accordance with the rules and the Agency's exercise of its discretion is reasonable."); *Cal. Dep't of Health Servs.*, DAB No. 170, at 10 (1981) ("Where a matter involves an exercise of programmatic judgment, the Board will not normally interfere."), *aff'd, Cal. v. Settle*, 708 F.2d 1380 (9th Cir. 1983). In addition, the Board "has long-recognized that CAS (formerly known as the Division of Cost Allocation), acting in its capacity as a federal cognizant agency, has expertise in cost accounting and in evaluating the adequacy and fairness of an organization's methods of cost allocation." *Univ. of Cal.*, DAB No. 2662, at 11 (citing *Neb. Health & Human Servs. Sys.*, DAB No. 2110, at 18 (2007)).

Here, CAS has provided a sound basis for rejecting the federal share percentages proposed by Virginia for all items except the SPCC rebate. Most importantly and as detailed above, the information that Virginia provided to support its FFP rates was "in a format unacceptable to determine" whether the rates produced an equitable allocation of the federal payback amount. CAS Ex. 1, at 4. Furthermore, based on its experience with other states and expertise in evaluating cost allocation methods, CAS observed that the percentages appeared to be "significantly less than the actual Federal share for these items using more probative methods would be and would not result in an equitable repayment to the Federal government." *Id*. In addition, CAS reasonably rejected the alternative method of using total SEFA expenditure FFP rates because the resulting percentages would be inequitable to Virginia. *Id.*

With respect to the method on which it ultimately relied, CAS states that the overall SPCC FFP methodology was not "ideal." CAS Ex. 2 ¶ 26. Nevertheless, CAS articulated a reasonable basis for using that methodology. Specifically, the SPCC rebate data was similar to the agency-specific information that CAS used in other states, and the SPCC rebate was the only category for which Virginia gave CAS agency-specific expense data. *Id.* Moreover, the SPCC "percentages [fell] between the … percentages produced by the methods [CAS] rejected using" and were "the reasonable alternative to be used since more probative calculations are not available." CAS Ex. 1, at 4; CAS Ex. 2, Att. G.

Accordingly, applying the Board's above-described standards for evaluating agency determinations in this case, we conclude that CAS's assessments of the alternative methods for calculating the amounts due and CAS's ultimate decision to rely on SPCC percentages reflects a reasonable exercise of agency discretion and expert judgment under the circumstances. In light of the lack of information and data necessary to produce more precise determinations of the payback amounts due, we conclude that CAS reasonably estimated the federal share of the ISF overbillings, transfers and other activities.

E. Virginia is responsible for paying imputed interest on the repayment amounts.

Virginia contends that, even accepting CAS's determination of the federal payback amounts for the FY 2009 through FY 2014 period, Virginia should not be required to pay imputed interest on such amounts because the delay in identifying the amounts due was caused by CAS's "failure to timely complete audits, issue instructions, or issue single-year determinations." VA Reply at 15. Therefore, Virginia asserts, "CAS should be estopped from collecting interest when its inaction was the cause of the delay in payment." *Id.* Furthermore, Virginia says that it did not intentionally overcharge federal programs, nor could it have known that CAS would change its approval of Virginia's methodology. Virginia also asserts that the interest rate CAS imposed will have a significant detrimental economic impact. *Id.* at 15-16.

Even if we were to accept Virginia's allegations as true, the Board has consistently held that it lacks the power to grant equitable relief because it is bound by all applicable laws and regulations. *See, e.g*., *Kan. Dep't of Admin.*, DAB No. 2845, at 12 (2018) (equitable defenses of unclean hands, stale claims, laches, waiver and estoppel are "not cognizable in this forum"), *appeal docketed*, C.A. No. 6:18-cv-01104 (D. Kan. Mar. 29, 2018); *Econ. Opportunity Comm'n of Nassau Cnty., Inc*., DAB No. 2731, at 7 (2016) ("Board has consistently held that it 'has no authority to waive a disallowance based on equitable principles'" (quoting *Municipality of Santa Isabel*, DAB No. 2230, at 10-11 (2009)); *accord Bedford Stuyvesant Restoration Corp*., DAB No. 1404, at 20 (1993)); 45 C.F.R. § 16.14. We therefore cannot consider Virginia's request for equitable relief here.

With respect to CAS's authority to assess imputed interest on the federal share of the various transfers, rebates and other activities, the relevant cost principles expressly provide that when "funds are transferred from a self-insurance reserve to other accounts (e.g., general fund), refunds shall be made to the Federal Government for its share of funds transferred, including earned or imputed interest from the date of transfer." 2 C.F.R. pt. 225, App. B ¶ 22.d.(5); *see also id.* App. C ¶ E.3.b.(1) (listing "interest earned" as source of ISF revenue). In addition, federal agencies have long been able to disallow interest on federal funds retained by a state grantee as an "applicable credit" within the meaning of the cost principles. *See, e.g., W. Va. Dep't of Admin.,* DAB No. 1465, at 4 (1994), *aff'd, West Virginia v. United States Dep't of Health & Human Servs.,* 2009 WL 3245568 (S.D. W.Va. Sept. 30, 2009) ; 2 C.F.R. pt. 225, App. A ¶ D.1. The Board previously noted that "the 1993 proposed revision to OMB Circular A-87 gave 'earnings or imputed earnings on reserves' as one of the examples of 'applicable credits.'" *Ark. Dep't of Info. Sys.,* DAB No. 2010, at 44 n.26 (citing 58 Fed. Reg. 55,212, 55,216 (Aug. 19, 1993)). "Interest income falls within the plain meaning of the definition of 'applicable credit,'" the Board explained, "since earnings derived from federal funds are clearly receipts which offset grant costs, and the Board has held in a variety of contexts that interest is an applicable credit within the meaning of OMB Circular A-87." *Id.* (citing *Okla. Office of State Fin.*, DAB No. 1668 (1998), *aff'd, Okla. Office of State Fin.*

v. United States, 292 F.3d 1261 (10th Cir. 2002), *cert. denied, Okla. v. Thompson*, 537 U.S. 1188 (2003); *W. Va. Dep't of Admin.*, DAB No. 1465; *Pa. Office of the Budget*, DAB No. 1234 (1991), *aff'd*, 996 F.2d 1505 (3d Cir. 1993), *cert. denied*, 510 U.S. 1010 (1993)).

Based on the well-settled law and cost principles, we sustain CAS's assessment of imputed interest in this case.

F. The Board is not authorized to adjudicate Virginia's proposed alternative methodology for prospective use.

Finally, Virginia proposes in its supplemental brief that an alternative, "new methodology be enacted prospectively and a certification be signed as evidence of the agreement between Virginia and CAS." VA Supp. Br. at 7. Virginia sets out a new FFP rate formula which, it says, "could be implemented consistently across various payback scenarios" and "does not deviate from the fundamentals currently associated with" Virginia's statewide FFP rate methodology. *Id.* Virginia further explains that the formula proposed for future periods is "based on the General Ledger expenditure data and focuses on the nature of the disbursement." *Id.* at 8.

We do not have the authority to adjudicate Virginia's proposal. "The Board's essential function, as established by the regulations that define the scope of its jurisdiction, is to resolve disputes about the merits of an adverse federal agency determination." *Univ. of Cal.*, DAB No. 2662, at 10 (citing 45 C.F.R. § 16.8(a)(2) (requiring an appellant to provide a written statement "concerning why the respondent's final decision is wrong")); *id.*, Part 16, App. A, ¶ D (stating that the Board "reviews final written decisions" in cost allocation and rate disputes). "In general, the Board (1) resolves factual disputes that are relevant to the grounds upon which the adverse determination is based and (2) decides whether the determination is supported by legally valid and sufficient grounds and otherwise complies with applicable statutes and regulations." *Id.* (citing 45 C.F.R. §§ 16.11(a) (discussing the procedures available when there are "material facts in dispute") and 16.14 (stating that "[t]he Board shall be bound by all applicable laws and regulations")). Thus, the Board has explained, it "does not make de novo decisions about the merits of award recipients' cost rate proposals." *Id.* (citing *Univ. of Cal. Indirect Cost Rate*, DAB No. 40, at 6 (1977)).

Here, the scope of our review is circumscribed by CAS's final written decision as to the federal payback amounts due for FYs 2009 through 2014. Since Virginia proposes that its revised methodology be "enacted prospectively" and no final HHS agency determination addressing that methodology subject to Board review has been rendered, we do not address it further in this decision. We note only that the proper venue for discussion of prospective rates for future budget years remains the annual negotiation process between Virginia and CAS.

Conclusion

Based on the foregoing discussion, we sustain CAS's October 23, 2015 determination.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Susan S. Yim
Presiding Board Member