

## **U.S. Treasury Issues Final Guidance for the American Rescue Plan Act’s Coronavirus State and Local Fiscal Recovery Fund**

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The United States Department of the Treasury released its highly anticipated Final Rule for the Coronavirus State and Local Fiscal Recovery Fund (“SLFRF”) on January 6, 2022. Despite its length, the 437 page Final Rule is generally more flexible than the prior Treasury guidance and in many cases makes it easier for local governments to spend the COVID-19 relief funds they are receiving under the American Rescue Plan Act.

The Final Rule begins, as it must, by reiterating the statutory requirements established by Congress in the American Rescue Plan Act. Local Fiscal Recovery Fund money must be used for expenditures that fall within one of the four permissible statutory categories: (1) to respond to the COVID-19 Public Health Emergency and its negative economic impacts; (2) to provide a wide range of government services (subject to limited exceptions) to the extent of the local government’s reduction in revenue due to the COVID-19 pandemic in comparison to the most recently completed full fiscal year before the pandemic; (3) to make necessary expenditures in water, sewer or broadband infrastructure; or (4) to provide premium pay to certain essential workers. Although the Treasury has the ability to interpret and enforce these standards, it has no power to eliminate or change them.

The Final Rule will make it easier to spend funds in the government services/lost revenue category, which was already the most flexible and least restrictive category. Under ARPA, entities with lost revenue due to the pandemic, in comparison to their last full fiscal year prior to the pandemic, have a broad ability to spend Local Fiscal Recovery Fund money on a wide range of governmental services, even those that are unrelated to COVID-19. For example, although local governments generally cannot spend funds on road construction and repair under the other ARPA categories, they are permitted to do so under the government services/lost revenue category. After the Interim Final Rule was released in May 2021, some local governments were frustrated because they could not show a revenue loss in comparison to their last full fiscal year prior to the pandemic and, therefore, were unable to make expenditures in the less restrictive government services/lost revenue category. The Final Rule provides relief to those local governments by permitting them to claim a “standard allowance” of \$10 million in the government service/lost revenue category. Local governments with more than \$10 million in lost revenue continue to be able to access government service/lost revenue dollars to the full extent of their lost revenue. Granting all local governments the flexibility to spend \$10 million in the more flexible government services/lost revenue category is a welcome development for local governments, but it arguably goes beyond the scope of ARPA itself, which permits local governments to spend funds on “the provision of government services to the extent of the reduction in revenue” of that local government “due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year” of the local government prior to the COVID-19 public health emergency. However, Congress will very likely enact the \$10 million minimum amount into law in the near future with the expected passage of the State, Local, Tribal, and Territorial Fiscal Recovery, Infrastructure, and Disaster Relief Flexibility Act (S.B. 3011/ H.R. 5735) (“Flexibility Act”). The Flexibility Act has strong bipartisan support and passed the Senate without opposition. It is currently pending in committee in the House of Representatives and has 138 co-sponsors, drawn from both parties, with only 218 votes needed to pass the Act. Even with the increased flexibility to spend up to \$10

million in the more flexible government services/revenue loss category even without any lost revenue, local governments will still need to comply with Treasury reporting and contracting requirements, refrain from making prohibited expenditures, document all ARPA expenditures appropriately, and meet other applicable guidelines.

The Final Rule also provides relief for local governments that will not be using the standard allowance because they have more than \$10 million in lost revenue. In its original guidance, Treasury permitted local governments to measure their current revenue against their entity-wide revenue in the last full fiscal year prior to the pandemic (calendar year 2019 for many local governments) with 4.1% annual increases built into that benchmark. For example, under the prior guidance a local government with \$1 million in revenue in 2019 would measure its 2020 revenue against a \$1,041,000 benchmark and its 2021 revenue against a \$1,083,681 benchmark. Under the Final Rule the growth factor has been increased to 5.2% per year, which will result in higher lost revenue totals and a corresponding increased ability to make expenditures in the government services/lost revenue category. Under the example provided above, a local government with \$1 million in entity wide revenue in 2019 would compare its 2020 revenue against a \$1,052,000 benchmark and its 2021 revenue against a \$1,106,704 benchmark. Local governments that experienced revenue increases at an average annual rate higher than 5.2% in the three most recent fiscal years prior to the pandemic (calendar years 2017, 2018 and 2019 for most local governments) can utilize that higher revenue growth percentage instead of the 5.2% amount.

For the first time, local governments now have the option to disregard revenue generated by tax increases adopted prior to the Final Rule's January 6, 2021 release date. This will enable many local governments that had no lost revenue under the prior Treasury guidance because they recently increased taxes to demonstrate lost revenue and spend an equivalent amount in the government services/lost revenue category.

Under the Final Rule local governments also have an increased ability to spend funds in the COVID-19 response category. The Final Rule simplifies the process and broadens the standard for determining that households and communities are "impacted" or "disproportionately impacted" by the COVID-19 pandemic, which are eligible for an expanded range of services. Unlike the prior Treasury guidance, the Final Rule provides specific definitions of key terms. A low or moderate income household is presumed to be impacted by the COVID-19 pandemic. A moderate income household is one with an annual income that is no more than 300% of the Department of Health and Human Services ("HHS") Federal Poverty Guidelines or no more than 65% of the Area Median Income (median family income), as determined by the Department of Housing and Urban Development ("HUD"), for a household of the same size in that county. An even greater array of services can be provided to households deemed to be disproportionately affected by the COVID-19 pandemic. Although the prior Treasury guidance focused most of its discussion regarding disproportionately impacted communities on low income "Qualified Census Tracts" the Final Rule goes beyond that analysis to also include not only low-income households and communities but also households that qualify for certain federal benefits. Low-income households are defined as households with an annual income no greater than 185% of the HHS Federal Poverty Guidelines or households with annual incomes no greater than 40% of the Area Median Income for a household of the same size in that county.

There are also some developments regarding the use of SLFRF money to cover payroll costs as part of their COVID-19 response. Local governments already had the ability to use funds to get their employee headcount back to the level it was at on January 27, 2020. The Final Rule confirms that funds can be used to cover wage and payroll costs needed to hire or rehire employees to fill budgeted full-time equivalent positions that existed on January 27, 2020, but that were unfilled or eliminated as of March 3, 2021. Under the Final Rule a local government can instead use funds to increase the number of its budgeted full-time equivalent employees up to the difference between 107.5% of the number of its budgeted full-time equivalent employees on January 27, 2020, and the number of its budgeted full-time equivalent employees on March 3, 2021. This option will permit local governments that did not see a decrease in their budgeted positions to actually increase their number of full-time equivalent employees using SLFRF money.

As part of their COVID-19 response, local governments continue to be able to use SLFRF money to cover the full wage and payroll costs for employees or units that are deemed to be “primarily dedicated” to the COVID-19 response (defined as spending more than half of their time on COVID-19 related activities) and to cover wage and payroll costs for time spent on COVID-19 related activities by other employees. However, unlike the situation that existed in late 2020 with the CARES Act Coronavirus Relief Fund money, there is no automatic presumption that 100% of police and fire and other public safety public health payroll costs can be covered with SLFRF funds. A determination that an employee or unit is primarily dedicated to the COVID-19 response must be periodically reassessed and supported by records maintained by the local government.

Using funds to restore pay reductions that occurred due to the pandemic, prevent layoffs that would otherwise be necessary, or make additional payments intended to retain employees subject to limits set forth in the Final Rule are new permissible payroll costs.

The Final Rule also clarifies the standards that should be used in evaluating potential capital expenditures that are part of a local government’s response to COVID-19, and suggests that under the right circumstances funds can potentially be used for a variety of capital expenditures including, but not limited to, those related to affordable housing, childcare facilities, schools and hospitals.

The Final Rule also permits an expanded array of infrastructure expenditures, including an increased ability to use funds for lead water line replacement, additional stormwater projects, residential wells and rehabilitation of dams and reservoirs necessary for the provision of drinking water.

As the Treasury had previously clarified, local governments have until December 31, 2024 to “obligate” their SLFRF funds. Funds are deemed to be obligated if an order has been placed or a contract has been entered into for the use of the funds. Assuming that funds are properly obligated by the December 31, 2024 deadline, local governments have until December 31, 2026 to actually spend the money. This flexibility will be useful for many infrastructure and capital projects, which can take years to complete.

The Final Rule will take effect on April 1, 2022. Although the Interim Final Rule issued in May 2021 will remain in effect until then, local governments have the option to start taking advantage of the increased flexibility provided by the Final Rule now.

The attorneys at Campbell Durrant have assisted numerous recipients of American Rescue Plan Act and CARES Act Coronavirus Relief Fund money and are prepared to assist with questions regarding the use of Local Fiscal Recovery Fund money.