

## U.S. Treasury Issues Final Rule for State and Local Fiscal Recovery Funds: Overview of the Final Rule

---

On January 6, 2022, the U.S. Department of the Treasury (Treasury) issued its [Final Rule](#) regarding the State and Local Fiscal Recovery Funds (SLFRF) program funded by the American Rescue Plan Act (ARPA). The Final Rule adopts and amends the Interim Final Rule that was issued on May 17, 2021. Treasury describes the Final Rule as delivering “broader flexibility and greater simplicity in the program, responsive to feedback in the comment process.”

**Effective Date; Applicability.** The Final Rule becomes effective on April 1, 2022. Funds spent consistent with the requirements of the Interim Final Rule are compliant so long as the Interim Final Rule is in effect, and funds spent consistent with the Final Rule also are compliant regardless of when the funds were spent.

**Key Provisions.** The Final Rule includes key changes to eligible uses for the funds in each of the four primary eligibility categories.

- Replacing Public Sector Revenue Loss. The Final Rule allows recipients to make a binding election to either (1) select a standard allowance of up to \$10 million for revenue loss (not to exceed the recipient’s total award amount) or (2) complete a full revenue loss calculation. The methodology for calculating loss is also adjusted, including to take into account the effect of tax cuts and tax increases. Under this eligibility category, recipients may use the funds for “government services,” which generally include any service traditionally provided by a government, unless otherwise stated by Treasury. The Final Rule provides a number of examples of traditional government services: construction of schools and hospitals, road building and maintenance, other infrastructure, health services, general government administration, staff and administrative facilities, environmental remediation, and police, fire and other public safety services (including purchasing fire trucks and police vehicles). The Final Rule includes streamlined reporting and compliance requirements for funds used under this category.
- Addressing Public Health and Negative Economic Impacts. The Final Rule makes a number of changes to the category of eligible uses that address the public health and negative economic impacts of COVID-19.
  - o *Capital Projects.* The Final Rule makes clear that recipients can use SLFRF funds for capital expenditures that respond to the public health or negative economic impacts of the pandemic, so long as the expenditure is related and reasonably proportional to the pandemic’s impact, and reasonably designed to benefit the impacted individual or group. Larger capital projects require written justification and, in some cases, submittal of the written justification to Treasury. Projects with total capital expenditures less than

\$1 million benefit from a safe harbor that does not require written justification. Projects with total capital expenditures between \$1 million and \$10 million require written justification and, if the use is not a Treasury-enumerated use, the written justification must be submitted to Treasury as part of the recipient's regular reporting. Projects with total capital expenditures of \$10 million or more must submit a written justification to Treasury as part of the recipient's regular reporting. The Final Rule outlines the topics, and alternatives, to be addressed in the written justification, and notes that certain capital facilities are presumed to be ineligible.

- *Simplifying Presumptions.* To simplify the process of, first, identifying eligible COVID-19 public health and negative economic impacts and, second, using the funds to respond to the impact, the Final Rule includes presumed impacts and non-exhaustive lists of enumerated eligible uses.
  - *Presumed Impacts.* The Final Rule allows recipients to rely on a broader set of presumptions in determining whether households and communities have been “impacted” or “disproportionately impacted” by the pandemic. Treasury also determined that some of the enumerated uses included in the Interim Final Rule as eligible uses only when provided to those disproportionately impacted by the pandemic also should be eligible when provided to those “merely” impacted by the pandemic.
    - The following households and communities are presumed to be impacted by the pandemic: low- or-moderate income households or communities; households that experienced unemployment, increased food or housing insecurity, or that qualify for the Children’s Health Insurance Program, Childcare Subsidies through the Child Care Development Fund Program, or Medicaid; for the purpose of providing affordable housing programs, households that qualify for the National Housing Trust Fund and Home Investment Partnerships Program; and for the purpose of providing services to address lost instructional time in K-12 schools: any student that lost access to in-person instruction for a significant period of time. The Final Rule defines low income as 185 percent of the Federal Poverty Guidelines (FPG) for the size of household, or 40 percent of the Area Median Income (AMI) for the county and size of household. Moderate income is 300 percent of FBG or 65 percent of the AMI, although the Final Rule, as noted, defers to certain federal housing program definitions for affordable housing program purposes.
    - The Final Rule identifies the following households, communities, small businesses and nonprofits as presumed to be disproportionately

impacted: low-income households or communities; households residing in, and small businesses and nonprofits operating in, qualified census tracts; households that qualify for certain federal assistance programs; households receiving services provided by tribal governments and small businesses or nonprofits operated by Tribal governments or on Tribal lands; and households residing in or receiving services from, and small businesses or nonprofits operating in, U.S. territories.

- The Final Rule also provides guidance for identifying other impacted or disproportionately impacted classes and how to support those determinations.
- *Enumerated Uses.* The Final Rule provides non-exhaustive lists of eligible uses in response to both public health and negative economic impacts. The use of SLFRF funding for enumerated eligible uses is presumed reasonably proportionate unless the use is grossly disproportionate to the harm. Eligible uses in response to the public health emergency are organized based on four types of public health problems: COVID-19 mitigation and prevention, medical expenses, mental health treatment, behavioral health care (including substance use treatment and other behavioral health), and preventing and responding to violence including gun violence. Eligible uses to address negative economic impacts are organized by beneficiary type (household, small business and nonprofit), and include an additional standalone eligibility category for aid to travel, tourism, hospitality, and other impacted industries.
- *Expanded Uses in Impacted Communities.* The Final Rule broadens the eligible uses for SLFRF funding in impacted communities to include more specifically affordable housing, childcare, early learning, and services to address learning loss during the pandemic.
- *Community Development/Revitalization in Disproportionately Impacted Communities.* The Final Rule broadens the eligible uses for SLFRF awards in disproportionately impacted communities to include certain community development and neighborhood revitalization activities.
- *Impacted Industries.* The Final Rule continues to allow funds to be used to provide aid to impacted industries that faced substantial impacts from the pandemic. The Final Rule presumes that an industry in the travel, tourism, or hospitality sectors is impacted and includes guidance for determining if other industries are impacted. Treasury encourages aid to impacted industries to be first used for operational expenses.

- *Public Sector.* The Final Rule clarifies use of the funds to address impacts to public sector payroll. Funds may continue to be applied to payroll and covered benefits costs of public safety, public health and human services staff for the portion of the employee’s time spent responding to COVID-19. For administrative convenience, recipients may consider these employees entirely devoted to responding to COVID-19 if the employee, or the employee’s operating unit or division, is “primarily dedicated” to COVID-19 response. The Final Rule allows use of funds to re-hire employees to pre-pandemic levels and provides additional flexibility to hire additional employees (up to 7.5 percent budgeted FTEs above pre-pandemic baseline levels) and to hire for different positions from those that existed pre-pandemic. The Final Rule also allows use of SLFRF funding to address COVID-19 public health and negative economic impacts by providing additional funding for furloughed employees and employees who experienced pay cuts, to maintain current compensation levels (adjusted for inflation), to avoid layoffs, for worker retention incentives, and for related administrative costs. The Final Rule also allows use of SLFRF funding to improve the efficacy of public health and economic program service delivery.
  
- *Eligibility Framework for Uses beyond Enumerated Uses.* The Final Rule includes a framework for recipients to use to identify uses beyond the enumerated eligible uses and to respond to impacts without relying on the presumed impacts. The framework outlines the steps required to identify the COVID-19 public health or economic impact and to design a program, service or capital expenditure that addresses or responds to the impact. The framework requires that the response be related and reasonably proportional to the harm, and reasonably designed to benefit the impacted individual or class, and includes relevant definitions.
  
- Premium Pay. The Final Rule clarifies use of funds for premium pay. SLFRF funds may be used to provide premium pay to eligible workers performing essential work during the pandemic. The Final Rule includes a non-exhaustive list of eligible sectors and occupations to identify eligible workers, and further notes that eligible workers also must be performing essential work (meaning, generally, non-remote work that involves interactions with patients, the public, or coworkers or physical handling of items handled by patients, the public, or coworkers). The Final Rule expands the share of eligible workers who can receive premium pay without a written justification.
  
- Broadband, Water and Sewer Infrastructure. The Final Rule expands the list of eligible broadband and water and sewer infrastructure investments. In addition to the DWSRF and CWSRF-eligible projects that are generally presumed to be necessary investments, the Final Rule lists additional stormwater infrastructure, private well and septic projects, lead remediation, and certain rehabilitations of dams and reservoirs as eligible if the project is a necessary

infrastructure investment. The Final Rule broadens the range of eligible broadband infrastructure projects and outlines applicable technical standards, and the Final Rule allows cybersecurity investments including cybersecurity modernization of existing and new broadband infrastructure without regard to speed delivery standards.

The Final Rule outlines prohibited uses, including use for debt service, to replenish financial reserves, to make a pension fund deposit, or, in general, to satisfy a settlement or judgment. The Final Rule also notes that SLFRF funds may not be used for a project that conflicts with or contravenes the purpose of ARPA. That is, SLFRF funds may not be used to undermine COVID-19 mitigation practices and may not be used in violation of various applicable federal laws and regulations.

**Concluding Thoughts.** The Final Rule includes a number of helpful clarifications and provides additional flexibility to recipients in many respects. The Final Rule is lengthy (the adopting release is 437 pages, with a 44 page “[overview](#)”), in part because Treasury elected to enumerate detailed lists of eligible uses and presumed impacts rather than providing solely principles-based guidance. In general, the Final Rule provides a more straightforward approach for recipients that are applying the funds based on revenue loss. The Final Rule also is helpful for recipients that are applying funds to enumerated uses in response to presumed impacts. Other approaches will require careful review under the frameworks and other guidance in the Final Rule. In all cases, it will take some time for recipients to confirm whether their existing and proposed uses of SLFRF funding comply with the Final Rule and to consider whether to re-allocate existing or proposed uses in response to the additional flexibility. If you have any questions, please contact:

---

Jamie Lisagor	<a href="mailto:Jamie.Lisagor@pacificalawgroup.com">Jamie.Lisagor@pacificalawgroup.com</a>	206.245.1734
Stacey Lewis	<a href="mailto:Stacey.Lewis@pacificalawgroup.com">Stacey.Lewis@pacificalawgroup.com</a>	206.245.1714
Sarah Washburn	<a href="mailto:Sarah.washburn@pacificalawgroup.com">Sarah.washburn@pacificalawgroup.com</a>	206.245.1747
Tobias Tobler	<a href="mailto:Tobias.Tobler@pacificalawgroup.com">Tobias.Tobler@pacificalawgroup.com</a>	206.602.1215
Justin McCarthy	<a href="mailto:Justin.McCarthy@pacificalawgroup.com">Justin.McCarthy@pacificalawgroup.com</a>	206.602.1232

---

Dated: January 7, 2022

*A Note: This publication is for informational purposes and does not provide legal or investment advice. It is not intended to be used or relied upon as legal advice in connection with any particular situation or facts. The information herein is provided as of the date it is written.*

*Copyright © 2022 Pacifica Law Group LLP. All rights reserved.*

To subscribe to our mailing list, please contact Mia Wiltse at [Mia.Wiltse@pacificalawgroup.com](mailto:Mia.Wiltse@pacificalawgroup.com).