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December 20, 2023

Jessica Milano, Chief Recovery Officer
Office of Recovery Programs
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Via: Federal Rulemaking Portal

Re: Coronavirus State and Local Fiscal Recovery Funds 2023 Interim Final Rule Comments

Dear Ms. Milano:

Thank you for the opportunity to comment on the interim final rule (IFR) concerning the definition of "Obligation" as it pertains to the State and Local Fiscal Recovery Fund (SLFRF) established by the American Rescue Plan Act (ARPA) of 2021. We sincerely appreciate the willingness of U.S. Department of Treasury officials to hearing our concerns that timely guidance was needed on the term obligation, and we appreciate the issuance of the interim final rule.

We would like to highlight a few concerns and disadvantages regarding the revised definition of obligation and follow with some of the positives/advantages provided in the revision.

Concerns/Disadvantages

While the premise of the IFR is appreciated, the guidance is complicated and nuanced and will be difficult for local governments, especially those without a sophisticated knowledge of grants, to interpret and apply. The inability to fully understand the nuances of the IFR may expose some small governments to noncompliance and questioned costs.

There also appears to be an intentional distinction between direct recipients and subrecipients regarding the application of the obligation deadline. Treasury has specifically exempted subrecipients from the deadline. Therefore, recipients that use subrecipients and subcontractors for conducting project work would have an additional two years through December 31, 2026, for project completion. However, this same timeline is unavailable to recipients who chose, based on the existing guidance at the time, to directly administer their own programs.

The two-year spend window has been a unique challenge for states in trying to carry out the intended purpose of the program, and we believe that the revision to the definition of obligation may have resulted in unintended outcomes, particularly with regard to program salaries. The clause "when work was performed" may cause some communities to lay off ARPA-funded program positions by the end of FY2024. These staff are desperately needed to carry out these important ARPA-supported activities through the spend date of December 31, 2026. Given that many governments obligate their funds when work is performed, governments will have no choice but to lay off many ARPA employees. We believe this is contrary to the objectives of ARPA and Treasury's desire to establish guidelines that will continue to make a significant difference in the lives of millions of Americans, contribute to a strengthening of local communities, and expand economic opportunities through ARPA-funded programs.



The term “obligation” continues to mean an order placed for property and services and entry into contracts, subawards, and similar transactions that require payment. However, under the revised definition, a recipient is also considered to have incurred an obligation by December 31, 2024, with respect to a requirement under federal law or regulation or a provision of the SLFRF award terms and conditions to which the recipient becomes subject as a result of receiving or expending SLFRF funds. Recipients may still experience difficulty using SLFRF funds to complete critical oversight and program implementation without the ability to cover direct program personnel costs, as the IFR provides that the revised definition can only be used for costs related to six specified areas:

- Reporting and compliance requirements
- Single Audit costs
- Record retention and internal control requirement
- Property standards
- Environmental compliance requirements
- Civil rights and nondiscrimination requirements

Recipients have already started projects that address the disproportionate impacts and other complex issues resulting from the COVID-19 pandemic. These types of projects may include capital expenditures that require longer timelines to finalize, as well as direct, programmatic personnel costs to implement and oversee such projects. Much of Treasury’s discussion in the Obligation IFR focuses on the extended time periods needed to implement water, sewer and broadband infrastructure projects, and thus why Treasury has set the end of the period of performance as December 31, 2026. However, projects falling under the Public Health and Negative Economic Impacts expenditure categories, such as those focused on affordable housing, mental health and substance use services, and medical facilities for disproportionately impacted communities, also require extended implementation timelines.

Further, it appears the interim final rule would override previous guidance set forth by Treasury in its Frequently Asked Question (FAQ) 13.17. This FAQ afforded state and local governments some flexibility in determining what constitutes an obligation and the timing of such. FAQ 13.17 states that

“Treasury recognizes that recipients may obligate funds through means other than contracts or subawards, for example in the case of payroll costs. In these circumstances, recipients must follow state or local law and their own established practices and policies regarding when they are considered to have incurred an obligation and how those obligations are documented.”

The language provided in FAQ 13.17 allowed state and local governments to “follow their own established practices and policies” regarding when an obligation is incurred. Many state and local governments that utilize state/local laws to obligate funds and budgets for staff have been committed to conduct some projects through December 2026. Some governments developed policies around those commitments based on FAQ 13.17. Revenue replacement projects, by the nature of this expenditure category, were intended to serve as a flexible funding source.

Under the revised definition, an “obligation” continues to include an order placed for property and services and entry into contracts, subawards, and similar transactions that require payment. For some states, obligations are managed and funds are encumbered based on a state’s fiscal year basis. In any given fiscal year, the amount of funding obligated to a subaward is encumbered in the state financial system in that fiscal year. Future year subaward commitments are not encumbered until the beginning of that fiscal year to which they apply. However, the future year amounts are contractually provided for, and amounts housed in procurement records upon the initiation of the contract or grant agreement.



We believe that Treasury should clarify that once an order is placed for property and services, that the obligation will continue for the length of the contract or subaward. This will ensure that future year contractual amounts, not encumbered in the recipient's financial system as of December 31, 2024, constitute valid obligations.

Lastly, in Part II "amendment to definition of obligation" and section 35.5 "return of funds," it states that the estimated costs "to cover the cost of meeting such a requirement" (program admin costs) must be reported by April 30, 2024. It may be difficult for some states to estimate funds for these costs eight months prior to the obligation deadline of December 31, 2024. We believe it would be more reasonable to require these specified costs to be estimated by December 31, 2024, which would result in them being reported to Treasury in the portal by January 31, 2025.

Positives/Advantages

We commend Treasury for listening to the concerns voiced by state and local governments and for anticipating some of the difficulties in using SLFRF funds to satisfy administrative and legal requirements after the obligation deadline has passed and prior to the deadline for expenditures.

We also thank Treasury for responding to recipients' questions with clarity on amendment and replacement of contracts and subawards. Treasury provided examples where recipients are **permitted to** replace a contract or subaward. The opportunities for a path forward in these circumstances are helpful. The clarification that the recipient must still meet the same expenditure deadline provides a framework for planning and resolving these issues.

We also appreciate that the interim rule allows for immediate implementation so that recipients have a greater opportunity to satisfy the requirements of the funding awards.

Conclusion

Thank you for the opportunity to provide our views and for taking our concerns into consideration. We look forward to the forthcoming guidance from Treasury regarding closeout and specific deadlines by which recipients must return funds not obligated or expended. Any clarification and flexibility that can be built into that guidance would be appreciated. Additionally, as much lead time as possible is helpful.

States are very appreciative of the intended flexibility provided and are striving to use the SLFRF monies in a manner that meets the intention of Congress and the United States Treasury. Please feel free to reach out to our representative in Washington, Cornelia Chebinou, at cchebinou@nasact.org or (202) 989-6801 should you have any questions or desire additional information.

Sincerely,

Greg Griffin, State Auditor of Georgia
NASACT President, 2023-24