

Summary

Interim Final Rule to implement the Coronavirus State and Local Fiscal Recovery Fund

Effective Date: The provisions in the [Interim Final Rule](#) are effective May 17, 2021.

Comment Due Date: July 16, 2021

Comments: Treasury seeks comment on all aspects of the [Interim Final Rule](#) and, to better facilitate public comment, has included specific questions throughout the Supplementary Information found in the interim rule.

Submitting comments: Please submit comments electronically through the [Federal eRulemaking Portal](#). The [interim rule](#) provides instruction for submitting written hard copy comments, however this method is discouraged due to processing and mail delays. All comments should be captioned with “Coronavirus State and Local Fiscal Recovery Funds Interim Final Rule Comments.” Please include your name, organization affiliation, address, email address and telephone number in your comments. Where appropriate, comments should include a short executive summary.

USE OF FUNDS

Overview

Section 602 and section 603 contain the same eligible uses; the primary difference between the two sections is that section 602 establishes a fund for States, territories, and Tribal governments and section 603 establishes a fund for metropolitan cities, non-entitlement units of local government, and counties.

Sections 602(c)(1) and 603(c)(1) provide that funds may be used:

- a) To respond to the public health emergency or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;
- b) To respond to workers performing essential work during the COVID-19 public health emergency by providing premium pay to eligible workers;
- c) For the provision of government services to the extent of the reduction in revenue due to the COVID-19 public health emergency relative to revenues collected in the most recent full fiscal year prior to the emergency; and
- d) To make necessary investments in water, sewer, or broadband infrastructure.

Excluded Uses:

Congress clarified two types of non-use.

- funds may not be used for, depositing funds into any pension fund.
- Funds may not be used to “directly or indirectly offset[ting] a reduction in the net tax revenue of [the] State or territory resulting from a change in law, regulation, or administrative interpretation.”

Spend Date: Treasury is interpreting the requirement in section 602 and section 603 that costs be incurred by December 31, 2024, to require only that recipients have obligated the Fiscal Recovery Funds by such date. The interim final rule adopts a definition of “obligation” that is based on the definition used for purposes of the Uniform Guidance, which will allow for uniform administration of this requirement and is a definition with which most recipients will be familiar. Payments from the Fiscal Recovery Funds are grants provided to recipients to mitigate the fiscal effects of the COVID-19 public health emergency and to respond to the public health emergency, consistent with the eligible uses enumerated in sections 602(c)(1) and 603(c)(1). The interim final rule thus permits funds to be used to cover costs incurred beginning on March 3, 2021. As set forth in the award terms, the period of performance will run until December 31, 2026, which will provide recipients a reasonable amount of time to complete projects funded with payments from the Fiscal Recovery Funds

Specifics on Eligible Uses

Treasury has provided information on eligible use through and interim rule and frequently asked questions document. Please refer to those documents for more detailed information. Use of funds must fit within the parameters laid out in the interim guidance that would fit into one of the 4 categories: public health and Economic impacts, premium pay, revenue reduction and investments in water, sewer or broadband.

1) Public Health and Economic Impacts

To assess whether a program or service is included in this category of eligible uses, a recipient should consider whether and how the use would respond to the COVID- 19 public health emergency. Assessing whether a program or service “responds to” the COVID-19 public health emergency requires the recipient to, first, identify a need or negative impact of the COVID-19 public health emergency and, second, identify how the program, service, or other intervention addresses the identified need or impact. Eligible uses under this category must be in response to the disease itself or the harmful consequences of the economic disruptions resulting from or exacerbated by the COVID-19 public health emergency.

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Treasury encourages recipients to provide assistance to those households, businesses, and non-profits in communities most disproportionately impacted by the pandemic.

a) Responding to COVID-19

Eligible Public Health Uses- To assess whether additional uses would be eligible under this category, recipients should identify an effect of COVID-19 on public health, including either or both of immediate effects or effects that may manifest over months or years, and assess how the use would respond to or address the identified need. The interim final rule identifies a non-exclusive list of uses that address the effects of the COVID-19 public health emergency, including:

- i) COVID-19 Mitigation and Prevention - Mitigation and prevention efforts for COVID-19 include vaccination programs; medical care; testing; contact tracing; support for isolation or

- quarantine; supports for vulnerable populations to access medical or public health services; public health surveillance (e.g., monitoring case trends, genomic sequencing for variants); enforcement of public health orders; public communication efforts; enhancement to health care capacity, including through alternative care facilities; purchases of personal protective equipment; support for prevention, mitigation, or other services in congregate living facilities (e.g., nursing homes, incarceration settings, homeless shelters, group living facilities) and other key settings like schools; ventilation improvements in congregate settings, health care settings, or other key locations; enhancement of public health data systems; and other public health response. Capital investments in public facilities to meet pandemic operational needs are allowable, such as physical plant improvements to public hospitals and health clinics or adaptations to public buildings to implement COVID-19 mitigation tactics.
- ii) Medical Expenses - State and local governments may need to continue to provide care and services to address these near- and longer-term needs.
 - iii) Behavioral Health Care -new or enhanced State, local, and Tribal government services may be needed to meet behavioral health needs exacerbated by the pandemic and respond to other public health impacts. These services include mental health treatment, substance misuse treatment, other behavioral health services, hotlines or warmlines, crisis intervention, overdose prevention, infectious disease prevention, and services or outreach to promote access to physical or behavioral health primary care and preventative medicine.
 - iv) Public Health and Safety Staff - The Fiscal Recovery Funds may be used for payroll and covered benefits expenses for public safety, public health, health care, human services, and similar employees, to the extent that their services are devoted to mitigating or responding to the COVID-19 public health emergency. For **administrative convenience**, the recipient may consider public health and safety employees to be entirely devoted to mitigating or responding to the COVID-19 public health emergency, and therefore fully covered, if the employee, or his or her operating unit or division, is primarily dedicated to responding to the COVID-19 public health emergency. Recipients may consider other presumptions for assessing the extent to which an employee, division, or operating unit is engaged in activities that respond to the COVID-19 public health emergency, provided that the recipient reassesses periodically and maintains records to support its assessment, such as payroll records, attestations from supervisors or staff, or regular work product or correspondence demonstrating work on the COVID-19 response. **Recipients need not routinely track staff hours.**
 - v) Expenses to Improve the Design and Execution of Health and Public Health Programs. State, local, and Tribal governments may use payments from the Fiscal Recovery Funds to engage in planning and analysis in order to improve programs addressing the COVID19 pandemic, including through use of targeted consumer outreach, improvements to data or technology infrastructure, impact evaluations, and data analysis.

Eligible Uses to Address Disparities in Public Health Outcomes - Treasury will presume that certain types of services, are eligible uses when provided in a Qualified Census Tract (QCT), to families living in QCTs, or when these services are provided by Tribal governments. Recipients

may also provide these services to other populations, households, or geographic areas that are **disproportionately impacted by the pandemic**. In identifying these disproportionately impacted communities, recipients should be able to support their determination that the pandemic resulted in disproportionate public health or economic outcomes to the specific populations, households, or geographic areas to be served.

Recipients may use payments from the Fiscal Recovery Funds to facilitate access to resources that improve health outcomes, including services that connect residents with health care resources and public assistance programs and build healthier environments, such as:

- Funding community health workers to help community members access health services and services to address the social determinants of health;
- Funding public benefits navigators to assist community members with navigating and applying for available Federal, State, and local public benefits or services;
- Housing services to support healthy living environments and neighborhoods conducive to mental and physical wellness;
- Remediation of lead paint or other lead hazards to reduce risk of elevated blood lead levels among children; and
- Evidence-based community violence intervention programs to prevent violence and mitigate the increase in violence during the pandemic

b. Responding to Negative Economic Impacts - Sections 602(c)(1)(A) and 603(c)(1)(A) describe several types of uses that would be eligible under this category, including assistance to households, small businesses, and nonprofits and aid to impacted industries such as tourism, travel, and hospitality. This category covers:

- i) Impacts on Households and Individuals
- ii) Impacts on Businesses
- iii) Impacts to State, Local, and Tribal Governments
- iv) Exacerbation of Pre-existing Disparities

Sections 602(c)(1)(A) and 603(c)(1)(A) permit use of payments from the Fiscal Recovery Funds to respond to the negative economic impacts of the COVID-19 public health emergency. Eligible uses that respond to the negative economic impacts of the public health emergency must be designed to address an economic harm resulting from or exacerbated by the public health emergency. In considering whether a program or service would be eligible under this category, the recipient should assess whether, and the extent to which, there has been an economic harm, such as loss of earnings or revenue, that resulted from the COVID-19 public health emergency and whether, and the extent to which, the use would respond or address this harm.⁸⁶ A recipient should first consider whether an economic harm exists and whether this harm was caused or made worse by the COVID-19 public health emergency.

Economic impacts may either be immediate or delayed, assistance or aid to individuals or businesses that did not experience a negative economic impact from the public health emergency **would not** be an eligible use under this category.

The eligible use must “respond to” the identified negative economic impact. Responses must be related and reasonably proportional to the extent and type of harm experienced; uses that bear no relation or are grossly disproportionate to the type or extent of harm experienced would not be eligible uses.

State, local, and Tribal governments are encouraged to use payments from the Fiscal Recovery Funds to respond to the direct and immediate needs of the pandemic and its negative economic impacts and, in particular, the needs of households and businesses that were disproportionately and negatively impacted by the public health emergency.

This category also **would not include** contributions to rainy day funds, financial reserves, or similar funds. This category would also **not include** payment of interest or principal on outstanding debt instruments, including, for example, short-term revenue or tax anticipation notes, or other debt service costs.

This category **would not** include satisfaction of any obligation arising under or pursuant to a settlement agreement, judgment, consent decree, or judicially confirmed debt restructuring plan in a judicial, administrative, or regulatory proceeding, except to the extent the judgment or settlement requires the provision of services that would respond to the COVID-19 public health emergency

The non-exclusive list of eligible uses listed below would respond directly to the economic or financial harms resulting from and or exacerbated by the public health emergency

- i) Assistance to Unemployed Workers.
- ii) State Unemployment Insurance Trust Funds
- iii) Assistance to Households
- iv) Expenses to Improve Efficacy of Economic Relief Programs
- v) Small Businesses and Non-profits
 - (1) Loans or grants to mitigate financial hardship
 - (2) Loans, grants, or in-kind assistance to implement COVID-19 prevention or mitigation tactics, such as physical plant changes to enable social distancing, enhanced cleaning efforts, barriers or partitions, or COVID-19 vaccination, testing, or contact tracing programs; and
 - (3) Technical assistance, counseling, or other services to assist with business planning needs.
- vi) Rehiring State, Local, and Tribal Government Staff
- vii) Aid to Impacted Industries - Treasury will presume that certain types of services, outlined below, are eligible uses when provided in a QCT, to families and individuals living in QCTs, or when these services are provided by Tribal governments. The interim final rule identifies a non-exclusive list of uses that address the disproportionate negative economic effects of the COVID-19 public health emergency, including:
 - (1) Building Stronger Communities through Investments in Housing and Neighborhoods
 - (a) Services to address homelessness such as supportive housing, and to improve access to stable, affordable housing among unhoused individuals;
 - (b) Affordable housing development to increase supply of affordable and high-quality living units; and

- (c) Housing vouchers, residential counseling, or housing navigation assistance to facilitate household moves to neighborhoods with high levels of economic opportunity and mobility for low-income residents, to help residents increase their economic opportunity and reduce concentrated areas of low economic opportunity.
- (2) Addressing Educational Disparities
 - (a) New, expanded, or enhanced early learning services, including pre-kindergarten, Head Start, or partnerships between pre-kindergarten programs and local education authorities, or administration of those services;
 - (b) Providing assistance to high-poverty school districts to advance equitable funding across districts and geographies;
 - (c) Evidence-based educational services and practices to address the academic needs of students, including tutoring, summer, afterschool, and other extended learning and enrichment programs; and
 - (d) Evidence-based practices to address the social, emotional, and mental health needs of students
- (3) Promoting Healthy Childhood Environments
 - (a) New or expanded high-quality childcare to provide safe and supportive care for children;
 - (b) Home visiting programs to provide structured visits from health, parent educators, and social service professionals to pregnant women or families with young children to offer education and assistance navigating resources for economic support, health needs, or child development; and
 - (c) Enhanced services for child welfare-involved families and foster youth to provide support and training on child development, positive parenting, coping skills, or recovery for mental health and substance use challenges.
- (4) Uses Outside the Scope of this Category- Certain uses would not be within the scope of this eligible use category, although may be eligible under other eligible use categories. A general infrastructure project, for example, typically would not be included unless the project responded to a specific pandemic public health need (e.g., investments in facilities for the delivery of vaccines) or a specific negative economic impact like those described above (e.g., affordable housing in a QCT). The ARPA explicitly includes infrastructure if it is “necessary” and in water, sewer, or broadband

2) Premium Pay

Fiscal Recovery Funds payments may be used by recipients to provide premium pay to eligible workers performing essential work during the COVID-19 public health emergency or to provide grants to third-party employers with eligible workers performing essential work. These are workers who have been and continue to be relied on to maintain continuity of operations of essential critical infrastructure sectors, including those who are critical to protecting the health and wellbeing of their communities. Sections 602(g)(2) and 603(g)(2) define eligible worker to mean “those workers needed to maintain continuity of operations of essential critical infrastructure sectors and additional sectors as each Governor of a State or territory, or each Tribal government, may designate as critical to protect the health and well-being of the residents of their State, territory, or Tribal government.” Examples of these workers include:

- Staff at nursing homes, hospitals, and home care settings;

- Workers at farms, food production facilities, grocery stores, and restaurants;
- Janitors and sanitation workers;
- Truck drivers, transit staff, and warehouse workers;
- Public health and safety staff;
- Childcare workers, educators, and other school staff; and
- Social service and human services staff.

As provided under sections 602(g)(2) and 603(g)(2), the chief executive of each recipient **has discretion to add additional sectors** to this list, so long as additional sectors are deemed critical to protect the health and well-being of a resident.

The Fiscal Recovery Funds will help respond to the needs of essential workers by allowing recipients to remunerate essential workers for the elevated health risks they have faced and continue to face during the public health emergency.

A worker **would not** be engaged in essential work and, accordingly may not receive premium pay, for telework performed from a residence.

A recipient **must consider** whether the pay or grant would “respond to” to the worker or workers performing essential work. Premium pay or grants must respond to workers performing essential work if it addresses the heightened risk to workers who must be physically present at a jobsite and, for many of whom, the costs associated with illness were hardest to bear financially.

Premium pay is defined as an amount up to \$13 per hour in addition to wages or remuneration the worker otherwise receives and in an aggregate amount not to exceed \$25,000 per eligible worker.

If premium pay would increase a worker’s total pay above 150 percent of their residing state’s average annual wage for all occupations, as defined by the Bureau of Labor Statistics’ Occupational Employment and Wage Statistics, or their residing county’s average annual wage, as defined by the Bureau of Labor Statistics’ Occupational Employment and Wage Statistics, whichever is higher, on an annual basis, the State, local, or Tribal government **must provide Treasury and make publicly available**, whether for themselves or on behalf of a grantee, **a written justification of how the premium pay** or grant is responsive to workers performing essential worker during the public health emergency.

The definition of premium pay also clarifies that **premium pay may be provided retrospectively** for work performed at any time since the start of the COVID-19 public health emergency, where those workers have yet to be compensated adequately for work previously performed

Contracts with a third party to perform essential work could be eligible to receive a grant to provide premium pay for these eligible workers.

3) Revenue Reduction

Recipients may use payments from the Fiscal Recovery Funds for the provision of government services to the extent of the reduction in revenue experienced due to the COVID-19 public health emergency. Sections 602(c)(1)(C) and 603(c)(1)(C) of the Act allow recipients facing budget shortfalls to use payments from the Fiscal Recovery Funds to avoid cuts to government services. Pursuant to sections 602(c)(1)(C) and 603(c)(1)(C) of the Act, a recipient’s reduction in revenue is measured relative to the revenue collected in the most recent full fiscal year prior to the emergency.

The interim final rule implements these provisions by establishing a definition of “general revenue” for purposes of calculating a loss in revenue and by providing a methodology for calculating revenue lost due to the COVID-19 public health emergency.

a) General Revenue

The interim final rule adopts a definition of “general revenue” based largely on the components reported under “General Revenue from Own Sources” in the Census Bureau’s Annual Survey of State and Local Government Finances, and for purposes of this interim final rule, helps to ensure that the components of general revenue would be calculated in a consistent manner.

The interim final rule defines the term “general revenue” to include revenues collected by a recipient and generated from its underlying economy and would capture a range of different types of tax revenues, as well as other types of revenue that are available to support government services. In calculating revenue, recipients should sum across all revenue streams covered as general revenue. To better measure the funds available for the provision of government services, the definition of general revenue **would include** intergovernmental transfers from States or local governments **other than** funds transferred pursuant to ARPA, CRF, or another Federal program.

General revenue **would exclude** refunds and other correcting transactions, proceeds from issuance of debt or the sale of investments, and agency or private trust transactions. General revenue **also would exclude** revenue generated by utilities and insurance trusts.

b) Revenue Loss

In general, recipients will compute the extent of the reduction in revenue by comparing actual revenue to a counterfactual trend representing what could have been expected to occur in the absence of the pandemic. This approach measures losses in revenue relative to the most recent fiscal year prior to the COVID-19 public health emergency by using the most recent pre-pandemic fiscal year as the starting point for estimates of revenue growth absent the pandemic. In other words, the counterfactual trend starts with the last full fiscal year prior to the COVID-19 public health emergency and then assumes growth at a constant rate in the subsequent years.

To minimize the administrative burden on recipients and taking into consideration the devastating effects of the COVID-19 public health emergency, any diminution in actual revenues relative to the counterfactual pre-pandemic trend would be presumed to have been due to the COVID-19 public health emergency.

Recipients may use a growth adjustment of either 4.1 percent per year or the recipient’s average annual revenue growth over the three full fiscal years prior to the COVID-19 public health emergency, whichever is higher. The option of 4.1 percent represents the average annual growth across all State and local government “General Revenue from Own Sources” in the most recent three years of available data.

Recipients should calculate the extent of the reduction in revenue as of four points in time: December 31, 2020; December 31, 2021; December 31, 2022; and December 31, 2023.

To calculate the extent of the reduction in revenue at each of these dates, recipients should follow a four-step process (See Interim Rule for illustration):

Step 1: Identify revenues collected in the most recent full fiscal year prior to the public health emergency (i.e., last full fiscal year before January 27, 2020), called the base year revenue.

Step 2: Estimate counterfactual revenue, which is equal to base year revenue * $[(1 + \text{growth adjustment})^{n/12}]$, where n is the number of months elapsed since the end of the base year to the calculation date, and growth adjustment is the greater of 4.1 percent and the recipient's average annual revenue growth in the three full fiscal years prior to the COVID-19 public health emergency.

Step 3: Identify actual revenue, which equals revenues collected over the past twelve months as of the calculation date.

Step 4: The extent of the reduction in revenue is equal to counterfactual revenue less actual revenue. If actual revenue exceeds counterfactual revenue, the extent of the reduction in revenue is set to zero for that calculation date.

c) Government Services

Government services can include, but are not limited to, maintenance or pay-go funded building of infrastructure, including roads; modernization of cybersecurity, including hardware, software, and protection of critical infrastructure; health services; environmental remediation; school or educational services; and the provision of police, fire, and other public safety services.

Expenses associated with obligations under instruments evidencing financial indebtedness for borrowed money **would not be considered the provision of government services**, as these financing expenses do not directly provide services or aid to citizens. Specifically, government services **would not include** interest or principal on any outstanding debt instrument, including, for example, short-term revenue or tax anticipation notes, or fees or issuance costs associated with the issuance of new debt.

Government services would also **not include** satisfaction of any obligation arising under or pursuant to a settlement agreement, judgment, consent decree, or judicially confirmed debt restructuring in a judicial, administrative, or regulatory proceeding, except if the judgment or settlement required the provision of government services.

Replenishing financial reserves (e.g., rainy day or other reserve funds) **would not be** considered provision of a government service, since such expenses do not directly relate to the provision of government services.

4) Investments in Water, Sewer or Broadband infrastructure

The interim final rule allows for a broad range of necessary investments in projects that improve access to clean drinking water, improve wastewater and stormwater infrastructure systems, and provide access to high-quality broadband service. Necessary investments are designed to provide an adequate minimum level of service and are **unlikely to be made** using private sources of funds.

Treasury **encourages** recipients to ensure that water, sewer, and broadband projects use strong labor standards, including project labor agreements and community benefits agreements that offer wages at or above the prevailing rate and include local hire provisions, not only to promote effective

and efficient delivery of high-quality infrastructure projects but also to support the economic recovery through strong employment opportunities for workers.

* Treasury will provide additional guidance and instructions on the reporting requirements at a later date.

a) Investment in Water and Sewer Infrastructure

The interim final rule provides governments with wide latitude to identify investments in water and sewer infrastructure that are of the highest priority for their own communities, **which may** include projects on privately-owned infrastructure.

The interim final rule does align eligible uses of the Fiscal Recovery Funds with the wide range of types or categories of projects that would be eligible to receive financial assistance through the Environmental Protection Agency's (EPA) Clean Water State Revolving Fund (CWSRF) or Drinking Water State Revolving Fund (DWSRF).

- i) CWSRF assistance include projects to construct, improve, and repair wastewater treatment plants, control non-point sources of pollution, improve resilience of infrastructure to severe weather events, create green infrastructure, and protect waterbodies from pollution.
- ii) DWSRF funds assist communities in making water infrastructure capital improvements, including the installation and replacement of failing treatment and distribution systems. In administering these programs, States must give priority to projects that ensure compliance with applicable health and environmental safety requirements; address the most serious risks to human health; and assist systems most in need on a per household basis according to State affordability criteria.

The Interim rule **does not** preclude recipients from applying their own additional project eligibility criteria.

Recipients may use Fiscal Recovery Funds to invest in a broad range of projects that improve drinking water infrastructure, such as building or upgrading facilities and transmission, distribution, and storage systems, including replacement of lead service lines.

Fiscal Recovery Funds may also be used to support the consolidation or establishment of drinking water systems. With respect to wastewater infrastructure, recipients may use Fiscal Recovery Funds to construct publicly owned treatment infrastructure, manage and treat stormwater or subsurface drainage water, facilitate water reuse, and secure publicly owned treatment works, among other uses.

Consistent with the CWSRF and DWSRF, Fiscal Recovery Funds may be used for cybersecurity needs to protect water or sewer infrastructure, such as developing effective cybersecurity practices and measures at drinking water systems and publicly owned treatment works.

Treasury encourages recipients to consider green infrastructure investments and projects to improve resilience to the effects of climate change.

b) Broadband Infrastructure

The interim final rule provides that eligible investments in broadband are those that are designed to provide services meeting adequate speeds and are provided to unserved and underserved households and businesses. Understanding that States, territories, localities, and Tribal governments have a wide range of varied broadband infrastructure needs, the interim final rule provides award recipients with flexibility to identify the specific locations within their communities to be served and to otherwise design the project

Eligible projects are expected to be designed to deliver, upon project completion, service that reliably meets or exceeds symmetrical upload and download speeds of 100 Mbps. There may be instances in which it would not be practicable for a project to deliver such service speeds because of the geography, topography, or excessive costs associated with such a project. In these instances, the affected project would be expected to be designed to deliver, upon project completion, service that reliably meets or exceeds 100 Mbps download and between at least 20 Mbps and 100 Mbps upload speeds and be scalable to a minimum of 100 Mbps symmetrical for download and upload speeds.

Recipients are also encouraged to prioritize investments in **fiber optic infrastructure** where feasible, as such advanced technology enables the next generation of application solutions for all communities.

Eligible projects are expected to focus on locations that are unserved or underserved. The interim final rule treats users as being unserved or underserved if they lack access to a wireline connection capable of reliably delivering at least minimum speeds of 25 Mbps download and 3 Mbps upload as households and businesses lacking this level of access are generally not viewed as being able to originate and receive high-quality voice, data, graphics, and video telecommunications.

In selecting an area to be served by a project, recipients are encouraged to avoid investing in locations that have existing agreements to build reliable wireline service with minimum speeds of 100 Mbps download and 20 Mbps upload by December 31, 2024, in order to avoid duplication of efforts and resources.

Recipients are also encouraged to consider ways to integrate affordability options into their program design. To meet the immediate needs of unserved and underserved households and businesses, recipients are encouraged to focus on projects that deliver a physical broadband connection by prioritizing projects that achieve last mile-connections. Treasury also encourages recipients to prioritize support for broadband networks owned, operated by, or affiliated with local governments, non-profits, and co-operatives—providers with less pressure to turn profits and with a commitment to serving entire communities.

RESTRICTIONS ON USE

To ensure that payments from the Fiscal Recovery Funds are used for these congressionally permitted purposes, the ARPA includes two provisions that further define the boundaries of the statute's eligible uses. Section 602(c)(2)(A) of the Act provides that States and territories may not "use the funds ... to either directly or indirectly offset a reduction in ... net tax revenue ... resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax ... or delays

the imposition of any tax or tax increase.” In addition, sections 602(c)(2)(B) and 603(c)(2) prohibit any recipient, including cities, non-entitlement units of government, and counties, from using Fiscal Recovery Funds for deposit into any pension fund.

1) Deposit into Pension Funds

The statute provides that recipients may not use Fiscal Recovery Funds for “deposit into any pension fund.” Treasury interprets “deposit” in this context to refer to an extraordinary payment into a pension fund for the purpose of reducing an accrued, unfunded liability.

The fund **may not** be used to:

- reduce a liability incurred prior to the start of the COVID-19 public health emergency, and
- if the payment occurs outside the recipient’s regular timing for making such payments.

A “deposit” is distinct from a “payroll contribution,” which occurs when employers make payments into pension funds on regular intervals, with contribution amounts based on a pre-determined percentage of employees’ wages and salaries.

Covered benefits include costs of all types of leave (vacation, family-related, sick, military, bereavement, sabbatical, jury duty), employee insurance (health, life, dental, vision), retirement (pensions, 401(k)), unemployment benefit plans (Federal and State), workers’ compensation insurance, and Federal Insurance Contributions Act taxes (which includes Social Security and Medicare taxes).

Pension fund means a defined benefit plan and does not include a defined contribution plan.

2) Offset a Reduction in Net Tax Revenue

Fiscal Recovery Funds **may not** directly or indirectly offset a reduction in net tax revenue resulting from a change in law, regulation, or administrative interpretation during the covered period. If the funds offset a reduction in net tax revenue, a State or territory must repay to the Treasury an amount equal to the lesser of (i) the amount of the applicable reduction attributable to the impermissible offset and (ii) the amount received by the State or territory under the ARPA.

A recipient government would only be considered to have used Fiscal Recovery Funds to offset a reduction in net tax revenue resulting from changes in law, regulation, or interpretation if, and to the extent that, the recipient government could not identify sufficient funds from sources other than the Fiscal Recovery Funds to offset the reduction in net tax revenue.

Three sources of funds that **may offset a reduction in net tax revenue** other than Fiscal Recovery Funds—organic growth, increases in revenue (e.g., an increase in a tax rate), and certain cuts in spending.

By focusing on the cost of changes that reduce net tax revenue—and how a recipient government is offsetting those reductions in constructing its budget over the covered period—the framework prevents efforts to use Fiscal Recovery Funds to indirectly offset reductions in net tax revenue for which the recipient government has not identified other offsetting sources of funding.

The Interim rule provides a framework for establishing a step-by-step process for determining whether, and the extent to which, Fiscal Recovery Funds have been used to offset a reduction in net tax revenue. The preamble to the interim rule provides a more detailed description (please see reduction in net tax revenue discussion. Steps used to guide the process include:

- a. Covered changes that reduce tax revenue. For each reporting year, a recipient government will identify and value covered changes that the recipient government predicts will have the effect of reducing tax revenue in a given reporting year, like the way it would in the ordinary course of its budgeting process.
- b. In excess of the de minimis. The recipient government will calculate the total value of all covered changes in the reporting year resulting in revenue reductions.

If the total value of the revenue reductions resulting from these changes is below the de minimis level, the recipient government will be deemed not to have any revenue-reducing changes for the purpose of determining the recognized net reduction. If the total is above the de minimis level, the recipient government must identify sources of in-year revenue to cover the full costs of changes that reduce tax revenue. The de minimis level is calculated as 1 percent of the reporting year's baseline.

- c. Safe harbor. The recipient government will then compare the reporting year's actual tax revenue to the baseline. If actual tax revenue is greater than the baseline, Treasury will deem the recipient government not to have any recognized net reduction for the reporting year, and therefore to be in a safe harbor and outside the ambit of the offset provision.
- d. Consideration of other sources of funding. The recipient government will identify and calculate the total value of changes that could pay for revenue reduction due to covered changes and sum these items. This amount can be used to pay for up to the total value of revenue-reducing changes in the reporting year. These changes consist of two categories:
 - i. Tax and other increases in revenue. The recipient government must identify and consider covered changes in policy that the recipient government predicts will have the effect of increasing general revenue in a given reporting year.
 - ii. Covered spending cuts. A recipient government also may cut spending in certain areas to pay for covered changes that reduce tax revenue, up to the amount of the recipient government's net reduction in total spending. These changes must be reductions in government outlays not in an area where the recipient government has spent Fiscal Recovery Funds.

Identification of amounts subject to recoupment. If a recipient government (i) reports covered changes that reduce tax revenue; (ii) to a degree greater than the de minimis ; (iii) has experienced a reduction in net tax revenue ; and (iv) lacks sufficient revenue from other, permissible sources to pay for the entirety of the reduction , then the recipient government will be considered to have used Fiscal Recovery Funds to offset a reduction in net tax revenue, up to the amount that revenue has actually declined.

Recoupment

Failure to comply with the restrictions on use contained in sections 602(c) and 603(c) of the Act may result in recoupment of fund.

1) Identification and Notice of Violations

Failure to comply with the restrictions on use will be identified based on reporting provided by the recipient. Treasury will collect information regarding eligible uses on a quarterly basis and on the tax offset provision on an annual basis. Treasury also may consider other information in identifying a violation, such as information provided by members of the public. If Treasury identifies a violation, it will provide written notice to the recipient along with an explanation of such amounts.

2) Request for Reconsideration

Under the interim final rule, a recipient may submit a request for reconsideration of any amounts identified in the notice provided by Treasury. If a recipient wishes to request reconsideration of any amounts identified in the notice, the recipient must submit a written request for reconsideration to the Secretary **within 60 calendar days of receipt of such notice**. The request must include an explanation of why the recipient believes that the finding of a violation or recoupable amount identified in the notice of recoupment should be reconsidered.

Within 60 calendar days of receipt of the recipient's request for reconsideration, the recipient will be notified of the Secretary's decision to affirm, withdraw, or modify the notice of recoupment.

3) Repayment

Any amounts subject to recoupment must be repaid **within 120 calendar days of receipt** of any final notice of recoupment or, if the recipient has not requested reconsideration, within 120 calendar days of the initial notice provided by the Secretary.

Payment

Payments in Tranches to Local Governments and Certain States Section 603 of the Act provides that the Secretary will make payments to local governments in two tranches, with the second tranche being paid twelve months after the first payment.

The Secretary has determined to provide in this interim final rule for withholding of 50 percent of the amount of Fiscal Recovery Funds allocated to all States (and the District of Columbia) **other than those** with an unemployment rate that is 2.0 percentage points or more above its pre-pandemic (i.e., February 2020) level. Based on data available at the time of public release of this interim final rule, this threshold **would result in most States being paid in two tranches**.

Transfers

Section 602(c)(3) provides that a State, territory, or Tribal government may transfer funds to a "private nonprofit organization . . . a Tribal organization . . . a public benefit corporation involved in the transportation of passengers or cargo, or a special-purpose unit of State or local government. The list of entities is not exclusive and a State, territorial, and Tribal government may transfer Fiscal Recovery Funds to other constituent units of government or private entities beyond those specified in the statute.

Recipient/Subrecipient - State, local, territorial, and Tribal governments that receive a Federal award directly from a Federal awarding agency, such as Treasury, are "recipients." A transferee receiving a

transfer from a recipient under will be a subrecipient. **Subrecipients are entities that receive a subaward from a recipient to carry out a program or project on behalf of the recipient with the recipient's Federal award funding.** The recipient remains responsible for monitoring and overseeing the subrecipient's use of Fiscal Recovery Funds and other activities related to the award to ensure that the subrecipient complies with the statutory and regulatory requirements and the terms and conditions of the award. Recipients **also remain responsible for reporting to Treasury on their subrecipients' use** of payments from the Fiscal Recovery Funds for the duration of the award.

1) Local to State Transfers

Section 603(c)(4) separately provides for transfers by a local government to its State or territory. A transfer under section 603(c)(4) will not make the State a subrecipient of the local government, and such Fiscal Recovery Funds may be used by the State for any purpose permitted under section 602(c) and will be bound by all of the use restrictions set forth in section 602(c) with respect to the use of those Fiscal Recovery Funds. The transfer results in a cancellation or termination of the award on the part of the transferor local government and a modification of the award to the transferee State or territory.

NONENTITLEMENT UNITS OF GOVERNMENT (NEU) / NON-GENERAL LOCAL GOVERNMENTS

\$19.53 billion in payments will be made to States to distribute the funds to non-entitlement units of local government (NEUs); local governments which generally have populations below 50,000. Section 603 requires Treasury to allocate and pay Fiscal Recovery Funds to the States and territories and requires the States and territories to distribute Fiscal Recovery Funds to NEUs based on population **within 30 days of receipt** unless an extension is granted by the Secretary.

Additional information on payments to NEUs and non-general local governments to be released soon.

1) NEUs

- a. Funding to NEUs in an amount that bears the same proportion as the population of the NEU bears to the total population of all NEUs in the State or territory, subject to a 75 percent cap.
- b. States are responsible for complying with the Fiscal Recovery Funds statutory requirement that distributions to NEUs not exceed 75 percent of the NEU's most recent budget. The most recent budget is defined as the NEU's **most recent annual total operating budget**, including its general fund and other funds, as of January 27, 2020. States and territories must permit NEUs without formal budgets as of January 27, 2020 to self-certify their most recent annual expenditures as of January 27, 2020 for the purpose of calculating the cap.
- c. States may not place additional conditions or requirements on distributions to NEUs, beyond those required by the ARPA and Treasury's implementing regulations and guidance. States may not provide funding on a reimbursement basis—e.g., requiring NEUs to pay for project costs up front before being reimbursed with Fiscal Recovery Funds payments.

2) Counties

- a. Treasury to make payments to counties but provides that, in the case of an amount to be paid to a county that is **not a unit of general local government**, the amount shall instead be paid to the State in which such county is located.
 - b. Such State shall distribute such amount to each unit of general local government within such county in an amount that bears the same proportion to the amount to be paid to such county as the population of such units of general local government bears to the total population of such county.
 - c. States may not place additional conditions or requirements on distributions to such units of general local government, beyond those required by the ARPA and Treasury's implementing regulations and guidance
- 3) Administrative Expenses/Extensions
- a. States and territories may use the Fiscal Recovery Funds to fund expenses related to administering payments to NEUs and units of general local government, as disbursing these funds itself is a response to the public health emergency and its negative economic impacts.
 - b. If a State or territory that requires more time to disburse Fiscal Recovery Funds to NEUs than the allotted 30 days, Treasury will grant extensions of not more than 30 days for States and territories that submit a certification in writing in accordance with section 603(b)(2)(C)(ii)(I). Additional extensions may be granted at the discretion of the Secretary.

REPORTING

States (defined to include the District of Columbia), territories, metropolitan cities, counties, and Tribal governments **will be required to submit one interim report** and thereafter **quarterly Project and Expenditure reports** through the end of the award period on December 31, 2026.

- 1) The interim report will include a recipient's expenditures by category at the summary level from the date of award to July 31, 2021 and, for States and territories, information related to distributions to non-entitlement units. Recipients must submit their interim report to Treasury by August 31, 2021. No entitlement units of local government are not required to submit an interim report.
- 2) The quarterly Project and Expenditure reports will include financial data, information on contracts and subawards over \$50,000, types of projects funded, and other information regarding a recipient's utilization of the award funds.

The reports will include the same general data (e.g., on obligations, expenditures, contracts, grants, and sub-awards) as required under CRF, with some modifications. Modifications will include updates to the expenditure categories and the addition of data elements related to specific eligible uses, including some of the reporting elements set forth in the interim rule.

The initial quarterly Project and Expenditure report will cover two calendar quarters from the date of award to September 30, 2021 and must be submitted to Treasury by October 31, 2021. The subsequent quarterly reports will cover one calendar quarter and must be submitted to Treasury **within 30 days after the end of each calendar quarter**.

Non-Entitlement Units of Government

Non-entitlement units of local government will be required to submit annual Project and Expenditure reports until the end of the award period on December 31, 2026.

The initial annual Project and Expenditure report for non-entitlement units of local government will cover activity from the date of award to September 30, 2021 and must be submitted to Treasury by October 31, 2021. The subsequent annual reports must be submitted to Treasury by October 31 each year.

Performance Reports (additional more specific guidance will be forthcoming)

States, territories, metropolitan cities, and counties with a population that exceeds 250,000 residents will also be required to submit an annual Recovery Plan Performance report to Treasury.

1) Content

The Recovery Plan Performance report will include key performance indicators identified by the recipient and some mandatory indicators identified by Treasury, as well as programmatic data in specific eligible use categories and the specific reporting requirements set forth in the interim rule.

Each jurisdiction will have some flexibility in terms of the form and content of the Recovery Plan Performance report, as long as it includes the minimum information required by Treasury.

2) Timing

The initial Recovery Plan Performance report will cover the period from the date of award to July 31, 2021 and must be submitted to Treasury by August 31, 2021. Thereafter, Recovery Plan Performance reports will cover a 12-month period, and recipients will be required to submit the report to Treasury within 30 days after the end of the 12-month period. The second Recovery Plan Performance report will cover the period from July 1, 2021 to June 30, 2022, and must be submitted to Treasury by July 31, 2022