U.S. Treasury Issues Guidance Regarding American Rescue Plan Act Funding for Local Governments

By David E. Mitchell, Esq. and Jonathan Whalen, Esq.
Campbell Durrant, P.C., PELRAS Attorneys

On May 10, 2021, the United States Department of the Treasury issued its initial guidance and draft regulations regarding the proper use of Coronavirus Local Fiscal Recovery Fund money being distributed to municipalities under the American Rescue Plan Act ("ARPA"). Although the initial guidance raises some new questions, it provides several important answers and fills in some critical gaps in the statutory language.

ARPA permits local governments receiving Coronavirus Local Fiscal Recovery Fund money to use it for expenditures incurred through December 31, 2024 that fall within four permissible categories. Municipalities have the discretion to spend money on as many or as few of the four categories as they decide.

The first category of permissible expenditures is to respond to the COVID–19 public health emergency or its negative economic impacts, including but not limited to "assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality[.]" This will permit municipalities to cover many of their own COVID–19 related costs as well as giving them the option to provide assistance to individuals, non-profits, municipal authorities and small businesses within their community. Examples of permissible expenditures include vaccination-related expenses, purchase of personal protective equipment, modifying public facilities to improve air circulation, grants to small businesses and non-profits, and many other types of expenditures to alleviate the effects of the pandemic. In general, the same types of expenditures that were permitted under the CARES Act Coronavirus Relief Fund in 2020 are permissible expenditures under ARPA, subject to two important exceptions. First, although ARPA funds can be used for a municipality's payroll costs to the extent necessary to restore the size of its workforce to pre-pandemic levels, in Treasury's initial guidance there is no blanket rule permitting ARPA funds to be used for all public safety payroll costs, which was the case under the final version of Treasury's CARES Act Coronavirus Relief Fund guidance. Under ARPA, funds can be used for payroll and certain benefits costs of "public safety, public health, health care, human services, and similar employees" but only "to the extent that their services are devoted to mitigating or responding to the COVID–19 public health emergency." The Treasury has further indicated that a 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." Treasury will likely provide additional clarification and examples regarding how employees can meet the "primarily dedicated" standard. In addition, unlike CARES Act Coronavirus Relief Fund money, ARPA funds may not be used in connection with tax anticipation loans.

The second permissible category of expenditures is "to respond to workers performing essential work during the COVID–19 public health emergency by providing premium pay to eligible workers" who are "performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work." Treasury's guidance indicates that rather than being limited to governmental employees, such funds can be used to provide premium pay to essential workers such as nursing home employees, food service workers, truck drivers, childcare workers and others on the front lines during the pandemic performing "work involving regular in-person interactions or regular physical handling of items that were also handled by others." Treasury further expresses an expectation that such funding will be directed to lower wage workers and it will require a written justification if premium pay would "increase a worker's total pay above 150 percent of the average annual wage" within the state or county. Recipients should carefully evaluate their internal needs and the needs of residents, businesses and non-profits in their community before deciding to offer such premium pay. The potential impact on pension benefits and other ongoing costs should also be carefully evaluated.

The third category that ARPA Coronavirus Local Fiscal Recovery Fund money may be spent on is "for the provision of government services to the extent of the reduction in revenue" of the governmental recipient "due to the COVID–19 public health emergency relative to revenues collected in the most recent full fiscal year" of the governmental recipient "prior to the emergency." In other words, if the recipient experienced a COVID–19 related reduction in revenue in comparison to the last complete fiscal year prior to the COVID–19 pandemic (calendar year 2019 in most cases), the ARPA Coronavirus Local Fiscal Recovery Fund money can be used to provide nearly any "government service." Thus, to the extent that a municipality has a qualifying revenue loss, that would provide a basis for using ARPA funds on virtually any governmental service (with the exception of certain pension costs).

The fourth and final category of permissible expenditures under ARPA is "to make necessary investments in water, sewer, or broadband infrastructure." Treasury's guidance answers a frequently asked question by confirming that stormwater projects are permissible uses of ARPA funds. Treasury's guidance also provides some additional time to actually complete the work. Although funds must be "obligated" by December 31, 2024, a recipient has until December 26, 2026 to complete the payment process.

ARPA specifically indicates that governmental recipients may not “use funds made available under this section for deposit into any pension fund.” The Treasury interprets this statutory language to prohibit only “extraordinary payments” into a pension plan for the purpose of reducing an accrued, unfunded liability. ARPA funds cannot be paid into a pension plan if the payment would reduce a liability incurred prior to the start of the COVID–19 public health emergency and “the payment occurs outside the recipient’s regular timing for making such payments.” Treasury’s guidance specifically permits recipients to use ARPA funds to cover pension costs of employees who qualify to have their payrolls costs covered by ARPA. The ability to use ARPA funds on ordinary pension costs under certain circumstances is a welcome clarification that will be beneficial to municipalities.

The attorneys at Campbell Durrant assisted numerous recipients of CARES Act Coronavirus Relief Fund money in 2020 and are prepared to assist with questions regarding the use of ARPA Coronavirus Local Fiscal Relief Fund money.