

# **American Rescue Plan Act Local Fiscal Recovery Fund and the Final Rule**

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# American Rescue Plan Act Statutory Categories

- Under ARPA, the Coronavirus Local Fiscal Recovery Fund provides funds: (1) to respond to the COVID-19 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”; (2) for the “provision of government services” to the extent of the revenue reduction due to the COVID-19 public health emergency; (3) for optional “premium pay” for certain essential workers (capped at a maximum of \$13 per hour/\$25,000 per individual); (4) to make “necessary investments in water, sewer, or broadband infrastructure.”

# American Rescue Plan Local Fiscal Recovery Fund

- CLFRF money can be used to cover eligible expenditures through December 31, 2024.
- The Final Rule reconfirms that as long as an obligation has been incurred by December 31, 2024, payment can be made through December 31, 2026.
- “Obligation means an order placed for property and services and entering into contracts, subawards, and similar transactions that require payment.”
- There continues to be no need to actually receive goods or services by December 31, 2024, so long as they have been ordered or are under contract.

# Government Services/Lost Revenue Changes

- Under the Interim Final Rule issued in May 2021, local governments with no revenue loss were unable to take advantage of the more flexible and less restrictive revenue loss/government services category.
- The Final Rule allows local governments to make a one-time election to claim a standard allowance of \$10 million in the government service/lost revenue category, even without any revenue loss.
- 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.

# Government Services/Lost Revenue Changes

- Granting all local governments the flexibility to spend \$10 million in the more flexible government services/lost revenue category is a welcome development, but it arguably goes beyond the scope of ARPA itself, which permits local governments to spend funds on government services “to the extent of the reduction in revenue.”
- However, Congress will very likely confirm the \$10 million minimum amount 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).

# Government Services/Lost Revenue Changes

- The Flexibility Act passed the Senate without opposition and has strong bipartisan support in the House of Representatives, with 146 co-sponsors from both parties and 218 votes needed to pass.
- Even with the increased flexibility to spend up to \$10 million in the more flexible government services/revenue loss category, local governments will still need to comply with Treasury reporting and contracting requirements, comply with Single Audit requirements, refrain from making prohibited expenditures, and document all ARPA expenditures appropriately.

# Government Services/Lost Revenue Changes

- 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.
- The Interim Final Rule 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.
- 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.

# Government Services/Lost Revenue Changes

- **Interim Final Rule:** 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.
- **Final Rule:** 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 5.2%.

# ARPA: Determining Lost Revenue

- Revenue is determined on an entity-wide basis.
- Federal funds, including those received directly from the federal government and those passed through a state to a local government, are excluded from revenue.
- Intergovernmental transfers from a state not involving federal funds must be counted as revenue.

# ARPA: Determining Lost Revenue

- In the Final Rule, Treasury “has maintained the presumption that a reduction in a recipient’s revenue is due to the public health emergency.”
- A reduction in revenue due to the public health emergency generally does not include a revenue reduction due to a local government’s own discretionary actions.

# ARPA: Determining Lost Revenue

- Under the Final Rule recipients can make a one-time election to disregard any revenues resulting from tax increases adopted during the period running from January 27, 2020 to January 6, 2022.
- Under this option, amounts of tax decreases during the same period must be added to revenue.
- Any changes in revenue caused by tax increases or decreases adopted after January 6, 2022 “will not be treated as due to the public health emergency.”

# ARPA: Determining Lost Revenue

- Revenue from included sources in Fiscal Year 2019: \$100 million. This is the base year.
- To compare to revenue as of 12/31/20, apply 5.2% growth factor (or if higher, average three year revenue growth rate).
- $\$100 \text{ million} \times 1.052 = \$105.2 \text{ million}$  base as of 12/31/20.
- Revenue from included sources in Fiscal Year 2020: \$90 million.
- Lost revenue =  $\$105.2 \text{ million} \text{ minus } \$90 \text{ million} = \$15.2 \text{ million}$ .

# Responding to the Public Health Emergency

- Expenditures to respond to the public health emergency or its negative economic impacts must be reasonably proportionate to the harm caused or exacerbated by the pandemic or its negative economic impacts.
- The responses to COVID-19 specifically listed in § 35.6 of the Final Rule are presumed to be reasonably proportionate.

# Responding to the Public Health Emergency

COVID-19 mitigation and prevention that is consistent with CDC recommendations and guidance, including:

- Vaccination programs and incentives;
- Testing programs;
- Contact tracing;
- Isolation and quarantine;
- Mitigation and prevention practices in congregate settings;
- Acquisition and distribution of medical equipment for prevention and treatment of COVID-19, including personal protective equipment;

# Responding to the Public Health Emergency

- COVID-19 prevention and treatment expenses for public hospitals or health care facilities, including temporary medical facilities;
- Establishing or enhancing public health data systems;
- Installation and improvement of ventilation systems in congregate settings, health facilities, or other public facilities;
- Assistance to small businesses, nonprofits, or impacted industries to implement mitigation measures;

# Responding to the Public Health Emergency: Medical Expenses

Medical expenses related to testing and treating COVID-19 that are provided consistent with CDC recommendations and guidance including:

- Emergency medical response expenses;
- Treatment of long-term symptoms or effects of COVID-19;
- Costs to medical providers or to individuals for testing or treating COVID-19.

# Responding to the Public Health Emergency: Behavioral Health

Behavioral health care, including:

- Prevention;
- Treatment;
- Emergency or first-responder programs;
- Harm reduction;
- Supports for long-term recovery;
- Behavioral health facilities and equipment.

The commentary refers to harms exacerbated or caused by the pandemic.

# Responding to the Public Health Emergency

- Preventing and responding to increased violence resulting from the public health emergency, including community violence intervention programs, or responding to increased gun violence resulting from the public health emergency, including police payroll associated with community policing strategies.

# Responding to the Public Health Emergency

Assistance to households and individuals, including:

- Development, repair, and operation of affordable housing and services or programs to increase long-term housing security;
- Financial services that facilitate the delivery of Federal, State, or local benefits for unbanked and underbanked individuals;
- Benefits for the surviving family members of individuals who have died from COVID-19, including cash assistance to surviving spouses or dependents of individuals who died of COVID-19;
- Assistance for individuals who want and are available for work, including those who are unemployed or underemployed.

# Responding to the Public Health Emergency

Assistance to households and individuals, including:

- Assistance for food; emergency housing needs; burials, home repairs, or weatherization; internet access or digital literacy; cash assistance; and assistance accessing public benefits;
- Paid sick, medical, or family leave programs, or assistance to expand access to health insurance;
- Childcare, early learning services, home visiting, or assistance for child welfare involved families or foster youth;
- Programs to address the impacts of lost instructional time for students in kindergarten through twelfth grade.

# Responding to the Public Health Emergency

- Additional services to communities disproportionately impacted by the COVID-19 public health emergency, including assistance accessing or applying for public benefits or services, remediation of lead paint or other lead hazards, violence intervention programs and programs or services that address housing insecurity, aid to high poverty school districts, and new or expanded child care services.
- Treasury's analysis is now much broader than its prior focus on Qualified Census Tracts.

# Disproportionately Impacted Communities

- 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.
- 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.

# Responding to the Public Health Emergency: Disproportionate Impact

- Households and populations residing in a Qualified Census Tract;
- Low-income households and populations;
- Households that qualify for Temporary Assistance for Needy Families (TANF”), the Supplemental Nutrition Assistance Program (“SNAP”), Free and Reduced Price School Lunch and/or Breakfast programs , Medicare Part D Low-income Subsidies, Supplemental Security Income, Head Start, Early Head Start, the Special Supplemental Nutrition Program for Women, Infants, and Children, Section 8 Vouchers, the Low-Income Home Energy Assistance Program (“LIHEAP”), Pell Grants, and, if funds are used to address educational disparities, Title I eligible schools.

# Disproportionately Impacted Communities

- 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 Service's ("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.
- Low income households are defined as households with an annual income no greater than 185 percent 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.

# Responding to the Public Health Emergency

Programs provided to a disproportionately impacted household, population, or community, including:

- Services to address health disparities;
- Housing vouchers and relocation assistance;
- Investments in communities to promote improved health outcomes and public safety such as parks, recreation facilities, and programs that increase access to healthy foods;
- Capital expenditures and other services to address vacant or abandoned properties;
- Services to address educational disparities; and
- Facilities and equipment related to the provision of these services to the disproportionately impacted household, population, or community.

# Responding to the Public Health Emergency

- “Recipients developing a program that serves specific households (e.g., a subsidy for internet access, a childcare program) may measure income at the household level.”
- “Recipients providing a service that reaches a general geographic area (e.g., a park) may measure median income of that area.”

# Responding to the Public Health Emergency: Classes

- “The interim final rule allowed, and the final rule maintains, the ability for recipients to demonstrate a public health or negative economic impact on a class and to provide assistance to beneficiaries that fall within that class.”
- “A recipient “may identify such impacts for a class of households, small businesses, or nonprofits. In such cases, the recipient need only demonstrate that the household, small business, or nonprofit is within the relevant class.”

# Responding to the Public Health Emergency: Classes

- ““For example, a recipient could determine that restaurants in the downtown area had generally experienced a negative economic impact and provide assistance to those small businesses to respond.”
- “When providing this assistance, the recipient would only need to demonstrate that the small businesses receiving assistance were restaurants in the downtown area.”
- “The recipient would not need to demonstrate that each restaurant served experienced its own negative economic impact.”

# COVID-19 Response: Supporting Travel, Tourism and Hospitality and Other Impacted Industries

- Under ARPA and the Final Rule, funds may be used to assist tourism, travel, hospitality, and other impacted industries.
- Such funds may be used “for programs, services, or capital expenditures, including support for payroll costs and covered benefits for employees, compensating returning employees, support for operations and maintenance of existing equipment and facilities, and technical assistance.”

# COVID-19 Response: Supporting Travel, Tourism and Hospitality and Other Impacted Industries

- Other impacted industries may include “a broad sector that encompasses a number of sub-industries” or may be limited to a specific sub-industry. Treasury does encourage the identification of “narrow and discrete” industries.
- Aid can be targeted to industries in a specific geographic area.
- The industries assisted are expected to have had a negative impact due to the pandemic that is comparable to that suffered by the travel, tourism and hospitality industries.

# COVID-19 Response: Supporting Travel, Tourism and Hospitality and Other Impacted Industries

- “An industry is presumed to be impacted if the industry experienced employment loss of at least 8 percent.”
- Even if that standard is not met, aid can still be provided if it can be demonstrated (using relevant major economic indicators or otherwise) that the industry is experiencing comparable or worse economic impacts as the national tourism, travel, and hospitality industries as of January 6, 2022 “and that the impacts were generally due to the COVID-19 public health emergency.”

# ARPA and Governmental Payroll

- Governmental payroll including benefits costs can be covered under the lost revenue/government services category.
- However, the ability to cover payroll costs under the other ARPA categories is much more limited.

# COVID-19 Response: Payroll Expenditures

- 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.
- 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 and 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.

# COVID-19 Response: Payroll Expenditures

- 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 also has the option to 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 new 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.

# COVID-19 Response: Payroll Expenditures

- 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.
- Although extraordinary deposits into pension funds continue to be prohibited, under the Final Rule covered benefits may include, but are not limited to, the 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 (including Social Security and Medicare taxes).

# COVID-19 Response: Capital Expenditures

- The Final Rule clarifies the standards that should be used in evaluating potential capital expenditures that are part of a local government's response to COVID-19.
- 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.

# COVID-19 Response: Capital Expenditures

- The Final Rule clarifies the standards that should be used in evaluating potential capital expenditures.
- Written justifications are required for capital projects that cost more than \$1 million and must address the following issues:
  - i) Describe the harm or need to be addressed;
  - (ii) Explain why a capital expenditure is appropriate; and
  - (iii) Compare the proposed capital expenditure to at least two alternative capital expenditures and demonstrate why the proposed capital expenditure is superior.
- “Where relevant, recipients should compare the proposal against the alternative of improving existing capital assets already owned or leasing other capital assets.”

# Definition of Non-Profit

- The statute refers to a broad definition of non-profit in the McKinney Vento Act.
- The Interim Final Rule defined non-profit more narrowly, as “a nonprofit organization that is exempt from Federal income taxation and that is described in section 501(c)(3) of the Internal Revenue Code.”
- The Final Rule define “non-profit” as “a nonprofit organization that is exempt from Federal income taxation and that is described in section 501(c)(3) or 501(c)(19) of the Internal Revenue Code.”

# Definition of Small Business

- A small business must have “no more than 500 employees, or if applicable, the size standard in number of employees established by the Administrator of the Small Business Administration for the industry in which the business concern or organization operates”; and
- Is a small business concern as defined in section 3 of the Small Business Act, 15 U.S.C. 632 (“independently owned and operated and which is not dominant in its field of operation”).

# Expanded Infrastructure Permissible Expenditures

- 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.
- The Flexibility Act would also expand permissible uses of ARPA funding to include more types of infrastructure projects such as roads and bridges and expenditures related to disaster recovery.

# Infrastructure Permissible Expenditures

- **Clean Water State Revolving Fund projects.** Projects that would be eligible under section 603(c) of the Federal Water Pollution Control Act;
- **Additional stormwater projects.** Projects to manage, reduce, treat, or recapture stormwater or subsurface drainage water regardless of whether such projects would improve water quality if the project would be eligible under section 603(c)(5) of the Federal Water Pollution Control Act;
- **Drinking Water State Revolving Fund projects.** Projects or activities of the type that would be eligible under section 1452 of the Safe Drinking Water Act (42 U.S.C. 300j-12) and related EPA regulations.

# Infrastructure Permissible Expenditures

- **Additional lead remediation and household water quality testing:**  
Projects to address lead in drinking water or provide household water quality testing that the EPA would be authorized to establish under designated sections of the Safe Drinking Water Act.
  - Lead service line replacement projects must replace “the full length of the service line and may not replace only a partial portion of the service line”;
  - Recipients have the discretion to determine income eligibility of homeowners served by lead service line replacement projects.

# Infrastructure Permissible Expenditures

- **Drinking water projects to support increased population.**
- **Dams and reservoirs.** Rehabilitation of dams and reservoirs where the “the primary purpose of the dam or reservoir is for drinking water supply.”
- **Private wells.** Rehabilitation of private wells, testing to identify contaminants, and treatment and remediation to address contamination in private wells, if the project meets certain requirements.

# Infrastructure Permissible Expenditures: Broadband

- Broadband infrastructure “designed to provide service to households and businesses with an identified need, as determined by the recipient.”
- Broadband infrastructure must reliably meet or exceed symmetrical 100 Mbps download speed and upload speeds.
- If not practicable due to excessive cost, geography or topography, then must: (A) Reliably meets 100 Mbps download speed and at least 20 Mbps upload speed; (B) Be scalable to a minimum of 100 Mbps download speed and 100 Mbps upload speed.

# Infrastructure Permissible Expenditures: Broadband

- Service providers must meet certain requirements intended to ensure access to low income households.
- Cyber security projects “designed to improve the reliability and resiliency of new and existing broadband infrastructure” including “the addition or modernization of network security hardware and software tools designed to strengthen cybersecurity for the end-users” are permissible ARPA broadband expenditures.

# ARPA and Pensions

- ARPA specifically indicates that governmental recipients may not use funds “for deposit into any pension fund.”
- However, 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.”
- However, the Treasury’s guidance specifically permits recipients to use ARPA funds to cover pension costs of employees who qualify to have their payroll costs covered by ARPA.

# ARPA and Pensions

- “Deposit means an extraordinary payment of an accrued, unfunded liability.”
- “The term deposit does not refer to routine contributions made by an employer to pension funds as part of the employer’s obligations related to payroll, such as either a pension contribution consisting of a normal cost component related to current employees or a component addressing the amortization of unfunded liabilities calculated by reference to the employer’s payroll costs.”

# ARPA: Prohibited Uses

- Permissible uses of SLFRF funds do not include contributions to rainy day funds, financial reserves, or similar funds.
- Permissible revenue replacement expenditures “would 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.”

# ARPA: Prohibited Uses

- Permissible uses of revenue replacement funds also do 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.”

# ARPA Premium Pay

- Under ARPA’s premium pay for “essential work” the term “eligible workers” means “those workers needed to maintain continuity of operations of essential critical infrastructure sectors” and additional sectors designated by the local government’s chief executive officer “as critical to protect the health and well-being” of residents.
- “Premium pay” is “an amount of up to \$13 per hour above regular wages “for all work performed by the eligible worker during the COVID–19 public health emergency” capped at \$25,000 total per individual.

# ARPA Premium Pay

- All governmental workers who worked during the pandemic are potentially eligible for premium pay.
- Premium pay is a mandatory subject of bargaining and be aware of the potential impact on pension benefits, depending on the terms of your plan.
- Grants can also be made to other employers to provide premium pay for their eligible workers.
- Unlike other ARPA expenditures, which are limited to expenditures incurred on or after March 3, 2021, premium pay can be granted retroactively to the start of the COVID-19 pandemic (January 27, 2020 for federal purposes). Due to a Pennsylvania Constitutional provision, paying premium pay to government employees prospectively rather than retroactively is recommended.

# Premium Pay: Essential Work

Essential work means work that:

- (1) Is not performed while teleworking from a residence; and
- (2) Involves either:
  - (i) Regular in-person interactions with patients, the public, or coworkers of the individual that is performing the work; or
  - (ii) Regular physical handling of items that were handled by, or are to be handled by patients, the public, or coworkers of the individual that is performing the work.

# Premium Pay

- The Final Rule indicates that premium pay programs should prioritize low and moderate income workers.
- If premium pay would result in an individual receiving more than 150% of the average wage for the State or County, whichever is higher, then a written justification must be submitted to the Treasury, unless the employee is an FLSA non-exempt employee.
- Written justification should address issues such as the employees' "duties, health, or financial risks faced due to COVID-19, and why the recipient determined that the premium pay was responsive despite the worker's higher income."