

MEMORANDUM



JOINT BUDGET COMMITTEE

TO Members of the Joint Budget Committee
FROM Amanda Bickel, JBC Staff, in consultation with Carolyn Kampman, Staff Director, and Ed DeCecco, Legislative Legal Services
DATE May 12, 2021
SUBJECT Overview of Federal Guidance Concerning the Coronavirus State Fiscal Recovery Fund Established Under the American Rescue Plan Act

On May 10, 2021, the federal Department of the Treasury issued an Interim Final Rule and other guidance for the Coronavirus State and Local Fiscal Recovery Funds that were authorized in the American Recovery Plan Act of 2021 (ARPA). While some additional guidance is still expected to be forthcoming, the Interim Final Rule and related guidance provides sufficient information that Colorado should be able to move forward with decisions on how to use these funds. This memo excerpts and summarizes some of the most significant components of the guidance, which may be read in full at the following link: <https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf>.

Other supplementary information, including fact sheets and responses to frequently asked questions are also available on the website at: <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-funds>.

HOW MUCH

- **The state government will receive \$3,828,761,789.90 in Coronavirus State Fiscal Recovery Funds.**
- Local governments--counties, larger municipalities, and smaller (nonentitlement) units of government--will all receive discrete allocations of Coronavirus Local Fiscal Recovery Funds. Funding for nonentitlement entities will flow through the State, but the federal government will specify the amounts each entity receives.

WHEN

- **A state may use the funds for costs incurred from March 3, 2021 through December 31, 2024. A cost is considered to be incurred if the state has an obligation for the cost by December 31, 2024. Obligations must be expended by December 31, 2026.**
- Because Colorado's unemployment rate has increased more than 2.0 percent between February 2020, when it was 2.8 percent, and the current 6.4 percent, Colorado is expected to receive funding in a single tranche. This differs from the majority of states and all local governments, which will receive funding in two tranches.
- The federal government has now opened a portal through which states and localities may request the fiscal recovery funds. The law requires that a state receive the funds within 60 days of certification by the state's authorized representative. Based on the process for the Coronavirus Relief Funds authorized under the CARES Act, we anticipate that the Controller will provide certification as Colorado's authorized representative and that the funds will then be deposited to the State quickly.

MAY 12, 2021

HOW MAY FUNDS BE SPENT?

The ARPA includes the following statutory language regarding how the Coronavirus State and Local Fiscal Recovery Funds may be expended:

- “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.**”

The law also specifies that eligible uses do **not** include:

- “depositing funds into any pension fund” or
- “directly or indirectly offset[ing] a reduction in the net tax revenue of [the] State or territory resulting from a change in law, regulation, or administrative interpretation.”

The Interim Final Rule provides further explanation. The remainder of this memorandum provides additional details concerning:

- each of the four allowable expenditure categories listed above;
- the prohibition on using funds to offset a reduction in tax revenue; and
- reporting requirements.

USE (A): TO RESPOND TO THE PUBLIC HEALTH EMERGENCY OR ITS NEGATIVE ECONOMIC IMPACTS

“The Interim Final Rule implements these provisions by identifying a non-exclusive list of programs or services that may be funded as responding to COVID-19 or the negative economic impacts of the COVID-19 public health emergency, along with considerations for evaluating other potential uses of the Fiscal Recovery Funds not explicitly listed.”¹

The guidance includes an extensive list in the Interim Final Rule, which can be reviewed on pages 138 through 140 of the Interim Fiscal Rule. These are in the following categories, which are supplemented with additional information from the guidance:

- *COVID Response and Prevention*. Includes expenses related to vaccination programs and sites; COVID-19-related expenses of public hospitals, clinics and similar facilities; COVID-19 related expenses in congregate living facilities (e.g., long-term care facilities, incarceration settings, homeless shelters); expenses of establishing temporary public medical facilities to increase COVID-19 treatment capacity, including related capital costs; costs of COVID-19 testing, monitoring, and contact tracing; emergency response related to COVID-19; expenses for establishing and operating public telemedicine capabilities for COVID-19-related treatment; expenses for communication related to COVID-19; expenses for medical supplies and disinfection

¹ U.S. Department of the Treasury, 31 CFR Part 35, *Coronavirus State and Local Fiscal Recovery Funds, Interim Final Rule*, May 9, 2021, pp. 10-11.

activities in response to COVID-19; expenses for technical assistance on mitigation of COVID-19-related threats to public health and safety; costs for providing quarantining; payments to provide paid sick leave for public employees; costs for treatment for long-term symptoms of COVID-19; expenses to improve ventilation systems in congregate setting and public facilities; expenses related to enhancing public health data systems, and mental health treatment, substance misuse treatment, and other behavioral health services.

- *Public Health and Safety Staff* payroll and covered benefits to the extent the employee's time is spent mitigating or responding to the COVID-19 public health emergency.
- *Hiring State and Local Government Staff*. Costs associated with the recipient increasing the number of its employees up to the number of employees that it employed on January 27, 2020.
- *Contributions to State Unemployment Insurance Trust Funds* up to the level required to restore the Unemployment Trust Fund to its balance on January 27, 2020, or to pay back advances received for the payment of benefits beginning January 27, 2020.
- *Assistance to Small Business and Nonprofits*. Includes loans, grants, in-kind assistance, technical assistance, or other services that respond to the negative economic impacts of the COVID-19 public health emergency.
- *Assistance to Households*. Assistance programs, including cash assistance programs that respond to the public health emergency. Treasury's FAQs identify the following as allowable assistance programs: food assistance; rent, mortgage, or utility assistance; counseling and legal aid to prevent eviction or homelessness; cash assistance; emergency assistance for burials, home repairs, weatherization, or other needs; internet access or digital literacy assistance; job training to address negative economic or public health impacts experienced due to a worker's occupation or level of training. Cash transfers must be reasonably proportional to the negative economic impact they are intended to address.²
- *Aid to Impacted Industries*. Aid to tourism, travel, hospitality, and other impacted industries that responds to the negative economic impacts of the COVID-19 public health emergency. Treasury's FAQs note that for aid to industries other than tourism, travel, and hospitality, recipients must consider the extent of the impact compared to tourism, travel, and hospitality and whether the impacts were due to COVID-19.³
- *Expenses to Improve Efficacy of Public Health or Economic Relief Programs*. Administrative costs associated with the recipient's COVID-19 public health emergency assistance programs.
- *Survivor's Benefits*. Benefits for the surviving family members of individuals who have died from COVID-19.
- *Disproportionately Impacted Populations and Communities*. A program, service, or other assistance that is provided in a Qualified Census Tract (as defined), that is provided to households and populations living in a Qualified Census Tract, or that is provided to other households, businesses, or populations disproportionately impacted by the COVID-19 public health emergency. This includes:
 - Programs or services that facilitate access to health and social services (e.g., assistance accessing public benefits, remediation of lead paint);
 - Programs or services that address housing insecurity, lack of affordable housing or homelessness (e.g., development of affordable housing or provision of housing vouchers);

² *Coronavirus State and Local Fiscal Recovery Funds, Frequently Asked Questions* (As of May 10, 2021), #9.

³ *Ibid.*, #14.

- Programs or services that address or mitigate the impacts of the public health emergency on education (e.g., new or expanded early learning services, assistance to high poverty school districts, educational and evidence-based services to address academic, social, emotional, and mental health needs); and
- Programs or services that address or mitigate the impacts of the public health emergency on childhood health or welfare (e.g., new or expanded childcare, home health, education, and social service visits to individuals with young children, and services for child welfare-involved families and foster youth).

The supplementary materials to the Interim Final Rule add a test for determining whether a state may use the funds for a program, service, or other intervention that is not enumerated in the rule. First, the state must 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 need or impact.⁴

USE (B): TO RESPOND TO WORKERS PERFORMING ESSENTIAL WORK DURING THE COVID-19 PUBLIC HEALTH EMERGENCY BY PROVIDING PREMIUM PAY TO ELIGIBLE WORKERS

“A recipient may use funds to provide premium pay to eligible workers of the recipient who perform essential work or to provide grants to eligible employers, provided that any premium pay or grants provided...must respond to eligible workers performing essential work during the COVID-19 public health emergency. A recipient uses premium pay or grants provided...to respond to eligible workers performing essential work during the COVID-19 public health emergency if it prioritizes low-and moderate-income persons.”⁵

Premium pay is defined as “an amount of up to \$13 per hour that is paid to an eligible worker, in addition to wages or remuneration the eligible worker otherwise receives, for all work performed by the eligible worker during the COVID-19 public health emergency” and is subject to various other restrictions.⁶

The definition of essential work includes a list of industries recognized as essential critical infrastructure (e.g., healthcare, childcare, education, sanitation, transportation, and food production and services). It excludes teleworking from a residence but includes regular-in person interactions with patients, the public, or coworkers or the physical handling of items that were by others.⁷ Moreover, the state is encouraged to consider providing the premium pay retroactively for work already performed during the pandemic.⁸

USE (C): PROVISION OF GOVERNMENT SERVICES TO THE EXTENT OF REVENUE LOSS

REVENUE LOSS

As summarized in the document:

⁴ *Coronavirus State and Local Fiscal Recovery Funds, Interim Final Rule*, May 9, 2021, p. 10.

⁵ *Ibid.* p. 143.

⁶ *Ibid.* pp. 48-50.

⁷ *Ibid.* p. 132.

⁸ *Coronavirus State and Local Fiscal Recovery Funds, Frequently Asked Questions* (As of May 10, 2021), #9

MAY 12, 2021

“Recipients will compute the extent of reduction in revenue by comparing actual revenue to a counterfactual trend representing what could have plausibly been expected to occur in the absence of the pandemic. The counterfactual trend begins with the last full fiscal year prior to the public health emergency (as required by statute) and projects forward with an annualized growth adjustment...”⁹

The approach assumes that “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.”¹⁰

- The guidance requires that “In calculating revenue loss, recipients will look at general revenue in the aggregate, rather than on a source-by-source basis...”¹¹ It adopts a definition of “general revenue” that is based on, but not identical to, the Census Bureau’s annual Survey of State and Local Government Finances definition of “general revenue from own sources”. The definition includes most revenues but excludes intergovernmental transfers from the federal government, certain adjustments, proceeds from sale of debt, and revenue generated by utilities and insurance trusts.¹²
- The *Interim Final Rule* provides specific instructions for how to determine revenue loss. “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:
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.”¹³

It is important to note that **the amount that may be used for this purpose is based on the actual revenue compared to the counterfactual revenue as of the four dates. It is not based on forecasted revenue deficits.**

The rule includes the following graphical illustration of how the calculation is to operate.

⁹ *Coronavirus State and Local Fiscal Recovery Funds, Interim Final Rule*, pp. 118-119.

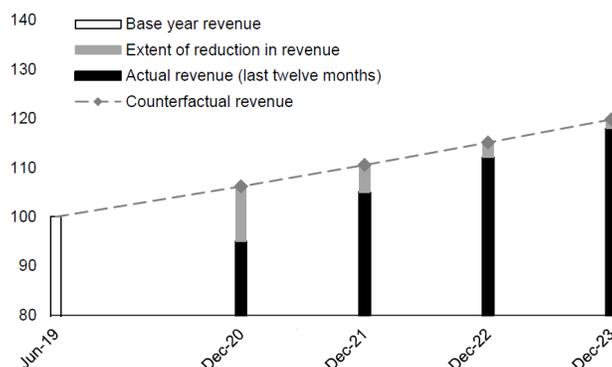
¹⁰ *Ibid.*, p. 57.

¹¹ *Ibid.*, pp. 119.

¹² *Ibid.*, pp. 55-56.

¹³ *Ibid.*, pp. 58-59.

MAY 12, 2021



Source: U.S. Department of Treasury, *Coronavirus State and Local Fiscal Recovery Funds, Interim Final Rule*, May 9, 2021, p. 59.

USE OF FUNDS - PROVISION OF GOVERNMENT SERVICES

The guidance specifies that uses of funds that are provided based on revenue loss:

“[These sections] of the Act provide recipients with broad latitude to use the Fiscal Recovery Funds for the provision of 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.”¹⁴

There are some limitations:

- “...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...[or] any obligation arising under or pursuant to a settlement agreement...In addition, replenishing financial reserves (e.g., rainy day or other reserve funds) would not be considered provision of government service.”¹⁵
- Further, ARPA prohibits "depositing funds into any pension fund". The guidance clarifies that entities may use the federal funds to make payments for pension benefits that are typically part of staff benefit packages but not to make extraordinary payments into pension funds for reducing an accrued unfunded liability.

USE (D): TO MAKE NECESSARY INVESTMENTS IN WATER, SEWER, OR BROADBAND INFRASTRUCTURE.

The rule adds significant detail and restrictions to the statutory provision allowing use of funds for these purposes.

¹⁴ Ibid., p. 60.

¹⁵ Ibid., p. 60.

“A recipient may use funds to make investments in:

(1) *Clean Water State Revolving Fund and Drinking Water State Revolving Fund investments.* Projects or activities of the type that would be eligible under section 603(c) of the Federal Water Pollution Control Act (33 U.S.C. 1383(c)) or section 1452 of the Safe Drinking Water Act (42 U.S.C. 300j-12); or,

(2) *Broadband.* Broadband infrastructure that is designed to provide service to unserved or underserved households and businesses and that is designed to, upon completion

(A) Reliably meet or exceed symmetrical 100 Mbps download speed and upload speeds; or

(B) In cases where it is not practicable, because of the excessive cost of the project or geography or topography of the area to be served by the project,...to reliably meet or exceed 100 Mbps download speed and between at least 20 Mbps and 100 Mbps upload speed; and be scalable to a minimum of 100 Mbps download speed and 100 Mbps upload speed.”¹⁶

PROHIBITION ON USING FUNDS TO OFFSET A REDUCTION IN TAX REVENUE

ARPA prohibits using these funds to offset a reduction in net tax revenue resulting from a change in law, regulation, or administrative interpretation from March 3, 2021 through the last day of the fiscal year in which the funds provided have been spent. The guidance explains how violation of this rule will be determined. “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.”¹⁷ The rule lays out the following procedure:

- “First, each year, each recipient government will identify and value the changes in law, regulation, or interpretation that would result in a reduction in net tax revenue, as it would in the ordinary course of its budgeting process. The sum of these values in the year for which the government is reporting is the amount it needs to “pay for” with sources other than Fiscal Recovery Funds (total value of revenue reducing changes).
- Second,...if the total value of the changes in the year for which the recipient government is reporting is below a de minimis level...the recipient government need not identify any sources of funding to pay for revenue reducing changes...
- Third,...If the recipient government’s actual tax revenue is greater than the amount of tax revenue received by the recipient for the fiscal year ending 2019, adjusted annually for inflation [by the Bureau of Economic Analysis’s Implicit Price Deflator], the recipient government will not be considered to have violated the offset provision because there will not have been a reduction in net tax revenue.
- Fourth, if the recipient government’s actual tax revenue is less than the amount of tax revenue received by the recipient government for the fiscal year ending 2019, adjusted annually for inflation, in the reporting year the recipient government will identify any sources of funds that have been used to permissibly offset the total value of covered tax changes other than Fiscal Recovery Funds, [including state taxes or spending cuts]...

¹⁶ Ibid., pp. 143-144.

¹⁷ Ibid. pp. 81-82.

- Finally, if there are any amounts that could be subject to recoupment, Treasury will provide notice to the recipient government of such amounts.”¹⁸

Thus, if the General Assembly enacts a tax credit, exemption, deduction, rate reduction or other tax expenditure that reduces state tax revenue, it may reduce the total amount of Fiscal Recovery Funds that the State may keep and expend depending on the results of this 4-part test.

REPORTING REQUIREMENTS

“States...are required to submit one interim report [from the date of the award through July 31, 2021] and thereafter quarterly Project and Expenditure reports through the end of the award period on December 31, 2026.... 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 those submitted by recipients of the [Coronavirus Relief Funds], with some modifications... 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.”¹⁹

“States... will also be required to submit an annual Recovery Plan Performance report to Treasury. The Recovery Plan Performance report will provide the public and Treasury information on the projects that recipients are undertaking with program funding and how they are planning to ensure project outcomes are achieved in an effective, efficient, and equitable manner... 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 described in the sections above. 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.”²⁰

¹⁸ Ibid. pp. 83-85.

¹⁹ Ibid., pp. 110-111.

²⁰ Ibid., p. 112.