Memorandum

To: Gabe Amo, White House Office of Intergovernmental Affairs
From: Shelby Kerns, Executive Director
Date: March 18, 2021
Subject: American Rescue Plan Fiscal Recovery Funds Implementation Questions and Concerns

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On behalf of National Association of State Budget Officers (NASBO) members, thank you for the opportunity to provide questions and feedback on the implementation of the Coronavirus State and Local Fiscal Recovery Funds in the American Rescue Plan Act (ARPA or ARP Act). As the chief financial advisors to governors of the states and territories, NASBO members believe these proactive conversations will translate to a smoother implementation that will benefit states and citizens.

The following feedback was gathered from NASBO members in response to your inquiry. A few key items that I would like to bring to your attention are:

- In order to provide necessary budgetary assistance to states, revenue loss should be calculated using growth/inflation factors and/or pre-pandemic revenue projections, rather than actual revenue receipts. It should also not be calculated as a net across funds and sources.
- Restrictions on tax cuts should recognize many states had enacted or were contemplating changes prior to the passage of this act. It should also recognize many states used the tax system to provide assistance to individuals and businesses to combat the effects of the pandemic.
- Flexibility in defining "respond to the public health emergency….or its negative economic impacts" and for infrastructure spending is key to states' ability to maximize use of funds.
- All State allocations should be released at once. Withholding funds hinders states' ability to respond to the economic conditions and complicates the state budgeting process.

What questions do your members have about the permissible uses of the funds?

1. How do states measure reductions in revenues?
    a. Will states be allowed to measure revenue loss as loss from pre-pandemic revenue projections?
    b. Can states replace revenue loss in specific revenue categories or funds, or must the loss be net (e.g., can states replace meal and bed tax loss or must it be netted against increased sales tax?)?

c. Will states measure the reduction in revenue for each fiscal year that funds are utilized against fiscal 2019 (the "most recent fiscal year of the state prior to the emergency")?
d. How is "provision of government services" defined?
e. Can states transfer directly to the general fund to offset qualifying revenue reductions? If not, states' ability to offset revenue reductions is limited.
f. Can monies be used to eliminate a planned cost reduction action, such as statewide furloughs or reductions-in-force?
g. Can 2020 short-term cash-flow borrowing from MLF or in the bond market be considered presumptive evidence of reduction in revenue, especially if CSFR funds are used directly to pay back the borrowing?
h. Can revenue reductions that occurred prior to the effective date of the ARP Act or March 3, 2021 be taken into account in determining the reduction in revenues under this section?
i. What will be the reporting requirements for CSFR funds received to cover reductions in revenues? Will there be a requirement to track expenditures made with those funds or will it be sufficient to simply identify such funds as replacement funds for reduced state revenues?
j. If a State as a whole did not lose revenue, but some state-supported entities did (i.e. zoos, museums) can these funds be used to replace that lost revenue? Is this allowable even if the State has unreserved general funds that could be used to support those entities?
k. How does the revenue replacement provision apply to local property taxes? More specifically, as property taxes in at least one state are split into two "buckets" (the traditional 2.5% levy growth allowed and exempt "new growth") there may be municipalities that lost out on potential "new growth" revenue as a result of COVID-19 – does the revenue replacement provision of ARPA provide flexibility to allow replacement of anticipated revenue that was lost?
l. States should be allowed a growth factor as states had budgeted based upon planned revenue growth.
m. Comparisons should be in real, not nominal, dollars.
n. Revenue from tax increases adopted between FY 2019 and FY 2025 should not be included in comparisons.

2. Can states cover allowable expenses that occurred prior to the passage of the act (ie, unemployment benefits paid prior to enactment, an expense on February 15, 2021, etc)?
3. Does the December 31, 2024, deadline mean obligated or fully expensed?
4. Do water, sewer, and broadband infrastructure projects need to be *completed* by December 31, 2024?
5. Will it be up to the state to determine if an investment in water, sewer or broadband infrastructure is "necessary?"
6. What components of the project will be eligible use of funds for an infrastructure project? Construction costs and capital expenditures? Can the infrastructure funds cover land acquisition and implementation costs? Does the government entity need to own the infrastructure at the end of construction?
7. Are water infrastructure projects limited to community water systems?
8. Are water diversion projects allowable?
9. Are uses for broadband purposes limited to infrastructure?
10. Will the definition of "infrastructure" extend beyond water, sewer, and broadband to things like repair and renovation of State and local facilities?

11. In terms of the “water, sewer, and broadband infrastructure” eligible use, can these CSFRF funds be used to seed pooled revolving loan funds to fund subsidized loans to local units of government?
12. Would state-run hospitals qualify under the economic impact use of funds?
13. How are infrastructure, negative economic impact, essential work, and response to COVID-19 defined?
14. Does the premium pay use apply to both public and private employers?
15. Will essential workers need to track their time specifically spent on COVID mitigation to qualify for premium pay?
16. Will specific guidance on who will be deemed an eligible worker be provided?
17. Who determines whether an expenditure is in response to the emergency? Will spending plans need to be pre-approved?
18. Will the government entities have a quick mechanism for Treasury to “approve” grant programs prior to government entity release for application?
19. Will grants to address “negative economic impact” need to be for projects that address the condition that caused the “negative economic impact” or can the funds be used for projects that mitigate or eliminate conditions that will cause “negative economic impact” in the future?
20. Will “respond to the public health emergency” be only for incurred expenses for direct COVID response or can it be used to help mitigate future infectious disease support/mitigation?
21. If the public health emergency expires before December 31, 2024, will the use of these funds to “respond to the public health emergency” continue to be an allowable expense?
22. Will the funds used for premium pay be eligible for any potential fringe benefits associated with the pay such as pension, medical, taxes, etc.?
23. Will premium pay be eligible for work performed since March 20, 2020? Will eligibility for the premium pay expire when the public health emergency has expired?
24. How will “critical capital projects” be defined and must the projects that use these funds be complete by December 31, 2024?
25. Can ARP funds be used as state match for Medicaid eligible expenses?
26. Can ARP funds be used as state match for FEMA eligible expenses?
27. Since CSFR funds can be used to fund government services up to an amount of revenue lost due to COVID-19, if a state used this funding as revenue replacement for education services would it count towards U.S. Department of Education maintenance of effort (MOE) requirements?
28. Will the state and its subrecipients be able to charge an indirect rate to the ARP awards?
29. What restrictions will Treasury impose on such financial assistance programs?
30. Will any restrictions be imposed on the use of fiscal recovery funds to respond to public health emergencies (e.g. assistance to households)? Will it be possible to fund existing assistance programs, such as ones set up using CRF or ERA, with these dollars?
31. Are increased Medicaid costs, including higher caseloads, allowable costs as a response to the public health emergency or its negative economic consequences?
32. What are the documentation requirements sufficient to demonstrate that aid to households, small businesses, nonprofits, or impacted industries such as tourism, travel, and hospitality are in response to the public health emergency?
33. In terms of the “water, sewer, and broadband infrastructure” eligible use, are units of government allowed to fund ongoing maintenance efforts for these infrastructure types?

Are there specific examples of desired spending that your members have raised?

34. Transfers to UI Trust Funds to be exempt from the language prohibiting uses that delay a tax increase.
35. Transportation infrastructure projections and/or replacement of transportation revenues to be an allowable use.
36. Revenue loss due to conformity with federal tax provisions, such as deductibility of PPP expenses and UI benefits, to be an allowable use.
37. Revenue loss should be calculated using a growth/inflationary factor and/or pre-Covid revenue projections.
38. When calculating revenue loss, states should be able to take into account the reductions in revenue that have occurred since the beginning of the COVID-19 public health emergency.
39. Tax cuts contemplated prior to the passage of the bill should be excluded.
40. Capitalization of infrastructure revolving loan programs should be considered expenditure of funds.
41. Obligation of funds for infrastructure should be considered expenditure of funds.
42. Use for public safety and public health personnel expenditures, as was allowed under the Coronavirus Relief Fund, with coverage of similarly situated personnel paid pursuant to a contract with a third party service provider explicitly included.
43. Use of $500 per student, as was allowed under the Coronavirus Relief Fund.
44. Repayment of UI loans, including interest, from the U.S. Department of Labor.
45. A definition of eligible costs "to respond to the public health emergency…or its negative economic impacts" that is no more restrictive than uses allowed for the Coronavirus Relief Fund.
46. Assistance to institutions of higher education including replacement of lost tuition, fee, and event revenues.
47. Use for economic development activities, such as capital projects, worker training, etc., that are intended to encourage general economic activity to mitigate the negative economic impact of the pandemic.
48. Use for public health infrastructure that can help the state respond to future pandemics, such as a new public health laboratory and IT infrastructure. The public health emergency has illustrated this need.
49. Treasury should treat the interest on these funds in the same way as it did interest for CRF.
50. It would be helpful if funds could be used to cover costs prior to enactment, possibly aligning with the beginning date for the Coronavirus Relief Fund.
51. Repayment of short-term cashflow borrowings transacted due to the 'negative economic impact' of Covid-19 should be presumptively eligible to be covered with CSFR funds.
52. States need broad discretion to determine the necessity for and parameters of economic assistance programs. The states should be able to base support programs on factors other than costs incurred, including such factors as income losses, factors taken into account for business interruption insurance coverage, or other factors that may result in financial harm. This flexibility should be explicitly authorized in guidance.
53. Repayment of the MLF borrowing or other 2020 cash-flow borrowings should be deemed an eligible expenditure of CSFR funds.
54. Allow stimulus payments to industries or individuals by use of tax data for administrative convenience, separate from the tax provisions.
55. Infrastructure should be interpreted as broadly as possible to allow states to solve local issues such as housing, public health capacity, etc.
56. Treasury should fully release funds as soon as possible, rather than holding up to half from states, to remove uncertainty in the budgeting process.

What questions do your members have about the restrictions on the use of funds?

57. How will the Treasury measure and determine an action that “directly or indirectly offset a reduction in net tax revenue” and it was the use of Coronavirus State Fiscal Recovery Fund money that was used to perform?
58. Does this restriction apply to sales tax holidays routinely offered by a state? To those implemented in response to economic conditions?
59. Are non-general fund tax/fee sources included in the “net revenue” calculations?
60. Does the limitation on depositing funds in a pension fund extend to payments on the unfunded accrued liability or debt associated with pension system?
61. If a state increases its Earned Income Tax Credit (EITC), but also increases other taxes to offset this increase, how will Treasury determine if a state has “directly or indirectly offset a reduction in the net tax revenue of such State . . . from a change in law, regulation, or administrative interpretation during the covered period . . . .”
62. Do the net tax revenue adjustments only apply within the same type of tax?
63. If a tax credit or other tax reduction is proposed prior to the federal act being signed would it be considered to not be related to the additional federal funds or, if enacted after the federal act was signed, will Treasury consider it to be a "direct or indirect" tax reduction related to the federal funds?
64. Does the restriction on tax reductions also apply to local governments? If so, does that prevent states from increasing state funding to local governments that may result in a reduction in local property taxes?
65. Does “local governments” include school districts and college districts?
66. What obligation, if any, does state government have with regard to local government decisions related to tax reductions?
67. If a state enacts overall tax increases in a budget bill or other legislation for a future year does that offset any tax decreases it may also enact in a budget bill or other legislation?
68. Does it matter if tax increases occur in one piece of legislation and tax decreases occur in separate legislation if it affects the same tax and/or fiscal year?
69. What is the timeframe considered from how a “tax reduction” is calculated? By tax year? State fiscal year? Federal fiscal year?
70. Does the type of “tax reduction” matter? That is, are/would targeted tax reductions (e.g. Earned Income Tax Credit) be treated differently than across the board ones?
71. Are reductions in all types of state taxes included here (income, sales, corporate, excise, utility, etc.)?
72. Please provide any explanation you can about how the restriction on states cutting taxes will work in practice.
73. Can a state that indexes its Earned Income Tax Credit (EITC) to the federal EITC use CSFRF to offset the additional costs caused by the expansion of the federal EITC in ARPA?
74. Can a state fund tax credits, for example for employer-run training programs or enhanced employee benefits, as an efficient means of allocating CSFRF federal funds without running afoul of the prohibition on use of funds for tax cuts?
75. Is use of the funding for direct payments to small businesses, seniors, and other adversely affected local taxpayers considered an ineligible tax cut, and therefore ineligible use?

What concerns do your members have based on their experience deploying funding from the Coronavirus Relief Fund established by the CARES Act?

76. Support reporting infrastructure that allows for batch uploads and other important labor-saving measures for ***all states, territories, and other reporting entities***.
77. The lack of consistent and timely guidance hampered CRF implementation. It is important that Treasury issue definitive guidance as quickly as possible to allow for timely budgeting decisions at the state level.
78. There were not opportunities for states to weigh in on the guidance setting process.
79. Treasury also did not communicate guidance changes clearly. For example, revisions to FAQs or contradictory, new information, could not be easily tracked. Changes in policy should be clearly flagged and dated.
80. Treasury should define simple, clear reporting and recordkeeping requirements before states begin spending money. The implementation of reporting and recordkeeping requirements after money has been received is burdensome.
81. Treasury should require no more than the current reporting and recordkeeping requirements for the Coronavirus Relief Fund, and should look for ways to reduce them. States have developed systems for reporting on these funds and requiring entirely new requirements will be unnecessarily burdensome. Treasury management should consult with states and localities about the implementation of CRF reporting so that it can understand and learn from that process. A technical working session would be helpful so that Treasury does not repeat mistakes or unnecessarily create additional burdens.
82. Treasury should clearly spell out, at the outset, which provisions of the Uniform Guidance apply to these funds. Relatedly, Treasury should confirm, clarify, and expand on the principle established in the CRF Guidance that organizations that receive payments to cover the negative economic impacts of COVID-19 are beneficiaries, not subrecipients, for purposes of the Uniform Guidance. This will aid in the provision of assistance to impacted organizations.
83. If the state solely acts as a conduit to provide ARP moneys to local governments, the state should not be considered a pass-through entity as defined in Uniform Guidance. This would ease an administrative burden on states when they have no to little latitude on which entities receive ARP.
84. Treasury should clarify the role of Treasury OIG in the administration of these new funds. Specifically, it would appear from the ARP that the Treasury OIG does not define reporting or recordkeeping requirements, or determine whether a use was eligible or not. Treasury should confirm that.

What concerns or questions do your members have about the timing of distributions?

85. When will states know if the funds will be distributed in one or two allocations? This has a significant impact on the ability of states to plan and budget.
86. Other than the recoupment of funds provision would there be any other factors that prohibit a state from getting the complete balance of their allocation?
87. How will a state's unemployment rate be used to determine whether to withhold a portion of its allocation? Will there be thresholds whereby a certain percentage is withheld?
88. The Act permits Treasury to withhold portions of funds from states. Does Treasury intend to do that? If so, what are the criteria for withholding funds and for how long will they be withheld?
89. The Act provides that Treasury cannot distribute the second tranche of funds to local governments until at least 12 months after it provides the first tranche. What is Treasury's plan on the distribution of the second tranche to local governments?

90. Will these funds be available soon enough to use for cash flow purposes if necessary due to the delay in the federal tax deadline to May 17?

Do you have suggestions as to how you would like to receive information about the funds?

91. Treasury should send regular emails with updates to any guidance documents or other pertinent information on the use of the funds. Treasury should also host periodic office hours or workshops to receive feedback and take questions for recipients.

What information do your members need in order to spend the resources most effectively?

92. Clear interpretations of allowable uses on the front end.
93. Will non-federal entities treat income on ARP advances as program income, similar to CRF advances?

What can U.S. Treasury do to be most helpful to recipients throughout implementation?

94. Standardize FS425 grant reporting form for Fiscal Recovery Funds. Do not use same criteria as for CRF as that is extremely difficult to track and categorize for state governments.
95. Follow standard reporting dates. Current reporting deadlines fall before state quarters have closed. Would be more helpful if the deadline was the end of the following month to allow for books to close and be reconciled prior to reporting.
96. Standardize data collection requirements on the front end and what will be timing for "periodic" reports.
97. If upon audit, it's determined that ARP was used for ineligible purposes, if other eligible costs are identified, allow the ineligible costs to be replaced with eligible ones.
98. Being able to get preliminary approval from Treasury on specific proposed expenditures would be very helpful in some cases.
99. Have clear procurement and contracting rules and guidance, especially with regard to infrastructure and capital projects.
100. Ensuring all states have an assigned contact at Treasury to provide information on what is allowable.

What other aspects of the program or statute will your members most need additional clarity around?

101. Certification
    a. What is the expected timing of this certification process?
    b. What level of detail is required for certification of funds by the U.S. Treasury?
102. Reporting
    a. Will the ARP be considered federal financial assistance and subject to the Single Audit Act and reporting on the schedule of expenditures of federal awards?
    b. Will there be a programmatic piece to the reporting or only a financial report?
    c. Will the non-entitlement local governments who receive the funds through the State be required to report directly to the Treasury, or will they report to the State?
    d. Treasury required CRF to be reported on at or above $50,000 expenditures. Will a similarly granular level of reporting be required for these funds?
    e. If a state or local government transfers funds to nonprofits, will the nonprofits be required to report? What will the chain of reporting look like for those sub-recipients?
103. State administration of the Local Fiscal Recovery Fund
    a. To what extent is this payment to the State under Section 603 for the benefit of the non-entitlement units of local government a "grant" or "financial assistance" subject to the

federal Uniform Guidance (2 CFR 200)? Do local governments need to have a SAM.gov registration?

b. Will Treasury specify which population estimate (data source) states must use in distributing local recovery funds to units of local government on a population basis?
c. How will the capped amount for non-entitlement units of government be defined? States do not have ready access to total budget amounts for non-entitlement areas of local government.
d. Will Treasury provide a full run of estimated allocations, including for non-entitlement local governments with overlapping populations (such as villages within towns)? If such a run will not be provided, what process should states use for making such allocations, and how should an individual residing in both a town and a village be counted for population purposes?
e. Will there be a central repository for non-entitlement local governments to submit their "most recent budgets adopted as of January 27, 2020" for the purposes of determining eligible allocations, or will the collection of such information be the responsibility of the states?
f. For clarity, is the "most recent budget adopted as of January 27, 2020" the same as the "local budget year that includes January 27, 2020"?
g. Can a state distribute the first tranche amount based on the pro rata share and "true up" on the second tranche to ensure no non-entitlement unit of government goes over the cap?
h. When will Treasury notify states whether funds for nonentitilement units of government will be received in one or two distributions?
i. Will Treasury provide a breakdown of amounts by local entity or is this the responsibility of the state?
j. Will non-entitlement units of government track and report their spending or will this be a responsibility of the state?
k. Are states responsible for monitoring allowable uses of local recovery funds by entitlement units of local government? Non-entitlement units of local government?
l. What restrictions will be placed on funds transferred from a county or non-entitlement unit of local government to a state? May the state treat the funds as though they were part of the initial CSFRF allocation?
m. If a county or non-entitlement unit of local government transfers their allocation to a state, does the state become a subrecipient of that entity? What are the reporting requirements in that scenario?
n. What is the recommended procedure for coordinating water, sewer, and broadband projects? These are often coordinated at a state or regional level. May a state charge a county or non-entitlement unit of local government from their CLFRF allotment for projects that cross municipal or county lines? Put a different way, may a county or non-entitlement unit of local government deposit funds from the CLFRF in a state or regional fund to address water, sewer, and broadband projects?
o. What are the subrecipient management and monitoring responsibilities expected of the state, if any? In particular, what are the subrecipient management, monitoring, and reporting responsibilities expected of the state for units of local government that receive CLFRF through the state? Alternatively, if the state chooses to institute a monitoring and reporting framework of local CLFRF recipients, is that prohibited by federal law or guidance?

104. Capital Projects Funds
    a. What are the mechanics of these funds? Will there be a certification or application?
    b. Does the capital projects fund extend to transportation infrastructure?
105. Maintenance of Effort (MOE) for ARP Elementary and Secondary School Emergency Relief (ESSER)
    a. Who (Governor, Secretary of Education, etc) will certify?
    b. Who will request the waiver?
    c. What is the magnitude of variation that requires a waiver (ie, if it's less than half a percent, is a waiver needed?)
    d. Will proportionality be measured by appropriation or actual expenditures? Appropriation is an easier metric, actual expenditures can include spending from carry over, prior-year encumbrances, etc.
    e. Do the terms "state support" and "state's overall spending" refer to the state's general fund and/or education funds? What is the definition of "support for education"?
    f. Is the denominator for computing education spending proportions based on general/education fund spending or total funds spending?
    g. At what points in time will MOE compliance be tested?
    h. Can corrective measures be taken/appropriated to bring the state into compliance if they are found not to be?
    i. What is the penalty for not being in compliance with the MOE requirement?
    j. Will there be reporting requirements and, if so, who will be responsible for reporting?
    k. Will further guidance be issued by the U.S. Department of Education regarding the MOE included in the ARP Act (as well the Coronavirus Response and Relief Supplemental Appropriations (CRRSA) Act, 2021)?
106. Section 9641 of ARPA (which establishes a credit against applicable employment taxes for employers who pay sick leave and offer job protection for COVID-related reasons)
    a. What does it mean for an employer to fail "to comply with any requirement of such Act (determined without regard to section 5109 thereof) with respect to paid sick time (as defined in section 5110 of such Act)"? Does that mean that in order to claim the credit, an employer must offer 10 days leave for qualifying reasons (prorated for part-time employees), at regular wages up to $511 per day (or 2/3rds/$200 per day for family leave) in order to qualify for the credit? Could an employer offer full time employees only 5 days' leave with a maximum value of $850, for example, and still claim the credit, provided they were otherwise compliant with provisions of EPSL?

We look forward to working with you, and to continuing conversations on implementation of the American Rescue Plan.