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MEMORANDUM

May 28, 2021

TO: Tribal Health Clients

FROM: Hobbs, Straus, Dean & Walker, LLP

RE: *Update on American Rescue Plan Fiscal Recovery Fund Guidance*

On May 17, 2021, the U.S. Department of the Treasury (Treasury) published an Interim Final Rule on the Coronavirus State and Local Fiscal Recovery Funds (FRF) established by the American Rescue Plan (ARP) Act.¹ Treasury also launched a new webpage for Tribal governments,² and it released an FRF Frequently Asked Questions (FAQ) document.³ As we have previously reported, Tribal governments will receive a total of \$20 billion in FRF monies. FRF monies are distributed directly to Tribes from Treasury and are separate from the Indian Health Service ARP funding that we have previously reported on.

Treasury's Interim Final Rule codifies its guidance regarding permissible FRF expenditures at 31 C.F.R. Part 35, and explicitly authorizes a number of health care related expenditures. Treasury's Interim Final Rule seeks comment on the rule itself and a series of questions. Comments on the Interim Final Rule are due on July 16, 2021. Please let us know if you would like assistance preparing comments.

Timeline for FRF Expenditures

Under Treasury's Interim Final Rule, FRF monies must: (1) be used to cover costs that are incurred beginning on March 3, 2021 and ending on December 31, 2024, (2) be obligated by a government by December 31, 2024, and (3) be expended by December 31, 2026.⁴ Treasury explains that it is providing a performance period that runs through December 31, 2026 to provide governments with a reasonable amount of time to

¹ U.S. Dep't of Treasury, *Interim Final Rule: Coronavirus State and Local Fiscal Recovery Funds*, 86 Fed.Reg. 26786 (May 17, 2021).

² TREASURY.GOV, *Coronavirus State and Local Fiscal Recovery Funds for Tribal Governments*, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-fund/tribal-governments>.

³ U.S. Dep't of Treasury, *Coronavirus State and Local Fiscal Recovery Funds Frequently Asked Questions* (May 27, 2021) [hereinafter "FRF FAQ"], <https://home.treasury.gov/system/files/136/SLFRPFAQ.pdf>.

⁴ 86 Fed.Reg. at 26811, 26821 (31 C.F.R. § 35.5).

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complete projects.⁵ Recipients must return any funds not obligated by December 31, 2024 and any funds not expended by December 31, 2026 to cover such obligations.⁶

Overview of Permissible FRF Expenditures

The ARP establishes four categories of permissible FRF expenditures: (1) expenses to respond to the public health or economic impacts of COVID-19; (2) providing premium pay for essential workers; (3) funding government services to the extent there has been lost revenue due to COVID-19; and (4) for necessary investments in water, sewer, or broadband infrastructure.⁷ Treasury states that "[w]ithin the eligible use categories, ... governments have flexibility to determine how best to use payments from the FRF to meet the needs of their communities and populations."⁸ Additionally, Tribes may transfer funds to other entities, including Tribal organizations and special-purpose units of government, in which case "the transferee must abide by the restrictions on use applicable to the transferor."⁹

FRF Public Health Expenditures

The ARP provides that FRF monies may be spent "to respond to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19) or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality[.]"¹⁰ Treasury states that this language allows governments "to meet the wide range of public health and economic impacts of the COVID-19 public health emergency."¹¹

To the extent that Tribal governments are interested in using FRF monies for expenses not listed by Treasury, they should: (1) "identify a need or negative impact of the COVID-19 public health emergency"; and (2) "identify how the program, service, or other intervention addresses the identified need or impact."¹²

The Interim Final Rule provides a non-exclusive list of expenditures that Treasury considers permissible FRF public health expenditures.¹³ These include:

⁵ *Id.* at 26811.

⁶ *Id.* at 26821 (31 C.F.R. § 35.5(c)).

⁷ 42 U.S.C. § 802(c)

⁸ 86 Fed.Reg. at 26788.

⁹ 42 U.S.C. § 802(c)(3).

¹⁰ *Id.* § 802(c).

¹¹ 86 Fed.Reg. at 26788.

¹² *Id.*

¹³ *Id.* at 26790–26791, 26821–26822 (31 C.F.R. § 35.6(b)(1)–(2)).

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- *COVID-19 mitigation and prevention*, including a "broad range of services and programming" are eligible, including vaccination programs, support for isolation and quarantining, paid sick and family leave, medical and public health supports for vulnerable populations, enforcement of public health orders, enhancement to health care capacity, purchases of personal protective equipment, assistance to congregate living facilities and other key settings such as schools, enhancement of public health data systems, capital investments to public facilities to mitigate spread, and other programs.¹⁴
- *Medical expenses*, including care and services for both short-term and long-term needs of persons infected with COVID-19.¹⁵
- *Behavioral health care* services to meet needs exacerbated by the pandemic and to respond to other public health impacts, including mental health treatment, substance misuse treatment, and promoting outreach and access to physical or behavioral health primary care and preventative medicine.¹⁶
- *Public health safety and staff* payroll costs may be covered by the FRF "to the extent that their services are devoted to mitigating or responding to the COVID-19 public health emergency."¹⁷ Treasury states, however, that "[r]ecipients need not routinely track staff hours."¹⁸ Additionally, for administrative convenience, governments may consider public health and safety employees to be entirely devoted to the public health emergency, and their full payroll costs may be covered if the employee or his or her operating division or unit is over 50% dedicated to responding to the public health emergency.¹⁹ Governments may also "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[.]"²⁰
- *Expenses to improve the design and execution of health and public health programs*, including targeted consumer outreach, improving data or technology infrastructure, impact evaluations, and data analysis.²¹

¹⁴ *Id.* at 26790.

¹⁵ *Id.*

¹⁶ *Id.* at 26791.

¹⁷ *Id.* Note that this language is different from the Coronavirus Relief Fund (CRF) guidance which stated that employees must be "substantially dedicated" to responding to or mitigating the public health emergency.

¹⁸ *Id.*

¹⁹ *Id.*; FRF FAQ at 8.

²⁰ 86 Fed.Reg. at 26791.

²¹ *Id.*

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Treasury's Interim Final Rule also emphasizes the need to address disparities in public health outcomes, including the disproportionate impact of the pandemic on Native communities.²² To this end, Treasury provides that the following services will be presumed to be permissible FRF uses when provided by Tribal governments:

- 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 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.²³

Treasury has also noted in its FRF FAQ that if direct public health expenditures would have been considered eligible for funding under the Coronavirus Relief Fund (CRF), then they will generally continue to be eligible.²⁴ Treasury notes two differences from its CRF guidance: that it has updated the standard for eligibility of public health and safety payrolls, and that expenses related to the issuance of tax-anticipation notes are not eligible.²⁵

Other Permissible Expenditures

Treasury identifies a number of other permissible expenditures that may be useful to Tribal health programs.

Economic Assistance. Treasury provides a non-exclusive list of expenditures permissible to address the economic impacts of the public health emergency, including the costs of rehiring government employees to pre-pandemic staffing levels, including payroll, covered benefits, and other costs associated with rehiring.²⁶ Additionally,

²² *Id.*

²³ *Id.* at 26791, 26822 (31 C.F.R. § 35.6(b)(12)(i)).

²⁴ FRF FAQ at 3.

²⁵ *Id.* Treasury's CRF guidance required payroll expenses to be for staff "substantially dedicated" to mitigating or responding to the emergency. FRF guidance provides payroll may be paid "to the extent that ... services are devoted to mitigating or responding to the COVID-19 public health emergency."

²⁶ *Id.* at 26795.

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Treasury will presume Tribal government expenditures to promote healthy childhood environments are permissible, including home visiting programs.²⁷

Premium Pay. Tribal health programs may use FRF monies to provide premium pay for public health workers engaged in work that involves "[r]egular, in-person interactions with patients, the public, or coworkers," or "[r]egular physical handling of items that were also handled by, or are to be handled by" others.²⁸ Eligible workers may receive up to \$13 per hour in addition to the pay they otherwise receive for all work performed during the COVID-19 public health emergency, not to exceed \$25,000 per worker.²⁹ Premium pay may be paid retrospectively for any time worked since the beginning of the public health emergency as well as for current or ongoing work.³⁰ Premium pay must prioritize low- and moderate-income persons.³¹

Revenue Replacement. FRF monies may be used "for the provision of government services to the extent of the reduction in revenue[.]"³² This is the most flexible category of spending eligibility, as dollars that are calculated to be replacing lost revenue may be used for any governmental purpose, including for facilities construction, expanding services, or other Tribal health program needs.³³ Lost revenue is calculated at the Tribal government level based on a formula provided by Treasury.³⁴

Infrastructure Investment. FRF monies may be used "to make necessary investments in water, sewer, or broadband infrastructure."³⁵ Treasury interprets this to mean that recipients may expend FRF monies on water or sewer projects or activities of the type that would be eligible for funding under the Clean Water State Revolving Fund³⁶ or the Drinking Water State Revolving Fund,³⁷ which was established by the Safe

²⁷ *Id.* at 26795–26796.

²⁸ *Id.* at 26798, 26820; 42 U.S.C. § 802(c)(1)(B).

²⁹ 42 U.S.C. § 802(g)(3).

³⁰ 86 Fed.Reg. at 26798–26799; *see generally, id.* at 26822 (31 C.F.R. § 35.6(c)).

³¹ *Id.* at 26822 (31 C.F.R. § 35.6(c)). If premium pay increases total wages and remuneration above 150% of the higher of the State or County average annual wage, then the recipient must report how the premium pay responds to eligible workers performing essential services. 86 Fed.Reg. at 26822 (31 C.F.R. § 35.6(c)).

³² 42 U.S.C. § 802(c)(1)(C).

³³ FRF monies may not be used for servicing debt or satisfying settlements or judgements in most situations. 86 Fed.Reg. at 26801.

³⁴ *Id.* at 26800, 26821–26823 (31 C.F.R. § 35.6(d)).

³⁵ 42 U.S.C. § 802(c).

³⁶ *See* <https://www.epa.gov/cwsrf/learn-about-clean-water-state-revolving-fund-cwsrf#eligibilities>.

³⁷ *See* https://www.epa.gov/sites/production/files/2019-10/documents/dwsrf_eligibility_handbook_june_13_2017_updated_508_versioni.pdf.

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Drinking Water Act.³⁸ FRF monies may also be used for "[b]roadband infrastructure that is designed to provide service to unserved or underserved households and businesses."³⁹

Reporting and Recoupment

Tribal governments must provide an interim report to Treasury by August 31, 2021 that provides a summary of expenditures by category from the date of the award to July 31, 2021.⁴⁰ Tribal governments must also provide quarterly Project and Expenditure reports to Treasury.⁴¹ Treasury will provide recipients with written notice of amounts subject to recoupment and the basis for recoupment at any time prior to December 31, 2026.⁴² Recipients will then have 60 days to request reconsideration, and within another 60 days Treasury will provide a final determination of amounts subject to recoupment.⁴³

Conclusion

If you would like additional information or assistance drafting comments, please contact Elliott Milhollin (emilhollin@hobbsstrauss.com or 202-822-8282), Geoff Strommer (gstrommer@hobbsstrauss.com or 503-242-1745), or Akilah Kinnison (akinnison@hobbsstrauss.com or 202-822-8282).

³⁸ 86 Fed.Reg. at 26802, 26823 (31 C.F.R. § 35.6(e)(1)).

³⁹ *Id.* at 26823 (31 C.F.R. § 35.6(e)(2)). Service should either provide 100Mbps download/upload speeds or, where not practicable, 100 Mbps download speed and 20–100 Mbps upload speed and be scalable up to 100 Mbps upload speeds. *Id.*; see also 86 Fed.Reg. at 26804.

⁴⁰ *Id.* at 26814.

⁴¹ *Id.*

⁴² *Id.* at 26823 (31 C.F.R § 35.10).

⁴³ *Id.* at 26812, 26824 (31 C.F.R § 35.10(d)).