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Treasury Provides Added Flexibility and Clarity With Final ARPA Rule.

State and local advocates seemed generally pleased with final guidelines for the relief law's $350 billion pandemic aid program. The rules offer a big win for smaller localities in particular.

State and local governments receiving pandemic aid payments under a $350 billion federal program gained new flexibility and further clarity with how they can use the funding, under a final rule that the U.S. Treasury Department issued this week.

The 437-page rule-making document released Jan. 6 provides additional information on how aid recipients can spend money from the American Rescue Plan Act on capital expenditures, employee pay and water, sewer and broadband projects, among other areas.

Treasury is also giving governments an option to put up to $10 million of their relief payments towards revenue losses, enabling them to spend the money on a broad range of general government expenses without jumping through administrative hoops outlined in an earlier version of the rule. This is a major win for many smaller communities.

State and local government advocacy groups that have been tracking the development of the rule and urging Treasury to make specific tweaks seemed generally pleased with the final product.

"It is a really well thought out, put together final rule that provides a lot of flexibility," said Eryn Hurley, deputy director of government affairs for the National Association of Counties.

Emily S. Brock, director of the Government Finance Officers Association's federal liaison center echoed that view. "They did an excellent job in expanding in a lot of areas," she said, referring to the Treasury Department. "It was a really thoughtful approach," she added. "They did a lot of stakeholder outreach."

Treasury in May released an "interim final rule," which served as a foundation for the final draft. The department said it received over 1,500 comments on the interim guidelines. The final rule will officially take effect on April 1. But aid recipients can begin following the final guidelines now, ahead of the effective date, Treasury said.

States and localities were free to begin spending the aid funding under the interim final rule. Although some places have held back, awaiting the final regulations. Many officials are leery of doing anything that might run afoul of the federal rules for spending the money, potentially resulting in clawbacks or other repercussions.

"There's already been a ton of investment," said Hurley. "With the final rule coming out we'll see that pattern continue."

Revenue Losses

The text of the American Rescue Plan Act and subsequent Treasury rule-making specify categories of eligible spending for the state and local aid program.

Broadly these include: Responding to the pandemic (both the health and economic fallout); providing “premium pay” to workers doing “essential” work during the health crisis; water, sewer and broadband projects; and backfilling government revenue losses due to Covid-19.

The revenue loss category is the most flexible, giving states and localities a great deal of leeway to use their aid on a variety of general government expenses in an amount equal to revenue losses that they calculate based on a formula included in the Treasury guidance.

Under the final rule, governments can automatically spend up to $10 million under this category.

“That was huge for us,” said Hurley.

This is significant for smaller communities in particular. For some, it will unlock the possibility of using their entire aid allotment under the most flexible terms the program provides. And they can do so without completing the revenue loss formula, which some officials had described as complicated and time consuming to work through.

Hurley noted that there are about 2,100 counties that fall into this camp and have awards that are under the $10 million mark.

For governments that will have to complete the revenue loss formula, one concern that emerged earlier in the rule-making process was that a requirement to calculate losses based on calendar years as opposed to fiscal years would add to the administrative burdens.

But Treasury explained that it has made adjustments in the final rule to give recipients “the option to choose whether to calculate revenue loss on a fiscal year or calendar year basis,” with the caveat that they must choose one of the two options and stick with it.

Capital Spending and Payroll

The Government Finance Officers Association noted that the final rule expanded a list of uses for how governments can use the funding to respond to the pandemic and its economic effects. This included clarifying that aid recipients can use the money for certain capital expenses, such as building affordable housing, child care facilities, schools, hospitals and other projects.

State and local government groups have pressed for even greater flexibility here, that would permit the money to go more freely towards transportation-oriented projects. The rule doesn’t go that far. But Brock said with the latest changes, “you have a lot of opportunity.”

Additionally, the final rule expands the share of eligible workers who can receive “premium pay,” without a written explanation of why they should qualify. This pay is meant for workers who took on added burdens on the job due to the pandemic.

The range of “eligible” workers that can qualify here is broad and not limited to the public sector. It includes not only workers in fields like health care, emergency response, child care and education, but also grocery and elections workers and transportation and warehousing.

But people in these professions must also meet certain criteria outlined in the rule for them to be eligible for premium pay programs that state and local governments might choose to set up using the federal funds. The allowable bonus pay is also capped at $13 an hour, or a maximum of $25,000 per worker.

In addition to premium pay, Treasury highlighted that its final rule provides governments with a broader set of options to use their aid to restore public employment, and to retain existing employees.

Funding recipients can either hire employees for positions that were filled as of Jan. 27, 2020 but unfilled or cut as of March 3, 2021. Or, they can use their relief dollars to increase the number of budgeted, full-time equivalent employees to 7.5% above their pre-pandemic baseline.

The second option, Treasury says, is meant to account "for the continued underinvestment in state and local governments since the Great Recession."

States and localities can also use the funding to offset pay cuts or lost pay due to furloughs that public employees experienced due to the pandemic, to maintain pay levels in order to avoid layoffs, and to provide retention incentives.

These provisions are notable given that governments have been struggling in a hot job market to recruit and keep workers for certain positions. Public sector employment at the state and local level is also still down compared to where it was before the pandemic hit.

Other Areas

The final rule also includes updates and clarifications related to water, sewer and broadband spending.

For example, Treasury makes clear that funding can be used under this eligible set of expenses on certain projects involving culvert repairs, private wells, dam and reservoir upgrades and preventing contamination in drinking water from lead pipes.

With broadband, the interim final rule specified that areas with internet download speeds of 25 mbps and upload speeds of 3 mbps were eligible for projects. The final rule expands eligibility, opening the door for investments in areas with 100/20 mbps speeds.

Hurley pointed out that the final rule, in contrast to the interim guidance, expands the set of households and communities that are considered to be adversely affected by the pandemic, where aid recipients can direct funds in certain ways without additional analysis to justify that spending.

Treasury made clear that state and local government aid recipients are still barred from dumping their aid into "rainy day" reserve funds, using it for debt service payments, or depositing it into pension funds to pay down liabilities.

The rule also specifies that states cannot use their funding to "directly or indirectly" offset reductions in tax revenue resulting from changes in law or policy, beginning on March 3 of last year. The law's restrictions around offsetting tax reductions have been facing legal challenges brought by multiple states.

An overview of the final Treasury rule can be found here.

Route Fifty

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