

# United States Senate

WASHINGTON, DC 20510

December 12, 2023

Jessica Milano  
Chief Recovery Officer  
Office of Recovery Programs  
U.S. Department of the Treasury  
1500 Pennsylvania Ave. NW  
Washington, D.C. 20220

The Honorable Adewale Adeyemo  
Deputy Secretary  
U.S. Department of the Treasury  
1500 Pennsylvania Ave. NW  
Washington, D.C. 20220

Dear Ms. Milano and Deputy Secretary Adeyemo,

During the week of Thanksgiving, the U.S. Department of Treasury issued an interim final rule (Rule)<sup>1</sup> redefining the definition of “obligation” with respect to the Coronavirus State and Local Fiscal Recovery Funds (SLFRF). This Rule is an insult to our basic rules of statutory construction and interpretation, as well as a complete misuse of our limited tax dollars. As our nation’s debt is nearly \$34 trillion—over \$255,000 per taxpayer—Treasury must discard the Rule immediately.

Authorized under the American Rescue Plan Act of 2021 (ARPA)<sup>2</sup>, the SLFRF provided \$350 billion to state and local governments “to mitigate the fiscal effects stemming from the public health emergency with respect to the Coronavirus Disease (COVID-19).”<sup>3</sup> The intention of the SLFRF was to provide monies to state, local, and tribal governments to replace revenue shortfalls that may have been caused during the pandemic. ARPA permitted state and local governments to use the SLFRF for specific purposes, including for programs that:

- respond to the COVID-19 public health emergency or its negative economic impacts, including assistance to households, small businesses, nonprofits, and impacted industries;
- provide grants to employers or premium pay to workers performing essential work during the COVID-19 public health emergency;
- provide for general government services to the extent of reductions in government revenues due to the COVID-19 public health emergency, relative to the most recent year prior to the emergency; and
- make necessary investments in water, sewer, or broadband infrastructure.

Congress intentionally permitted state and local governments expansive uses for the SLFRF funds. However, Congress provided a clear restriction: “a State, territory, or Tribal government shall only use the funds provided under a payment made under this section . . . to cover costs incurred by the State,

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<sup>1</sup> Coronavirus State and Local Fiscal Recovery Funds, 88 FR 80584 (Nov. 20, 2023).

<sup>2</sup> P.L. 117-2 (Mar. 11, 2021).

<sup>3</sup> See American Rescue Plan Act of 2021, P.L. 117-2, Section 9901, codified at 42 U.S.C. 802 and 803.

territory, or Tribal government, by December 31, 2024.”<sup>4</sup> Treasury established that a cost is incurred “if the recipient has incurred an obligation with respect to such cost by December 31, 2024.”<sup>5</sup> An obligation requires that “an order [must be] placed for property and services and entering into contracts, subawards, and similar transactions that require payment.”<sup>6</sup> In short, funds must be obligated by December 31, 2024, and then expended by September 30, 2026.

Many recipients have already understood the requirements and spent funding under the SLFRF. Per a recent Government Accountability Office report, all states (including the District of Columbia) reported obligating 60 percent (\$118.3 billion) and spending 45 percent (\$88.2 billion) of the SLFRF.<sup>7</sup> Further, localities reported obligating 54 percent (\$67.5 billion) and spending 38 percent (\$47.9 billion) of their awards. Though there are serious concerns about waste within the SLFRF,<sup>8</sup> it does not appear that recipients have had difficulty obligating or spending funding.

Given this, Treasury’s most recent Rule to allow an extension of SLFRF spending is quite confounding. In the Rule, Treasury has attempted to modify the definition of “obligation” beyond the statutory limits of the original Act. Under the new Rule, Treasury has redefined “obligation” to include costs that have not been obligated or incurred before the December 31, 2024 deadline.<sup>9</sup> As a result, recipients may continue to use SLFRF funds for costs related to compliance and administrative requirements, even if the costs have not been incurred before the obligation deadline. This outcome is mind-bending and deeply concerning.

While Treasury may assert that this new definition of “obligation” simply provides “additional flexibility” to recipients, this redefining tortures the construction of “obligation” beyond the sensible plain meaning of the word. Black’s Law Dictionary defines an obligation as “a formal, binding agreement or acknowledgment of a liability to pay a certain amount or to do a certain thing for a particular person or set of persons; [especially] a duty arising by contract.”<sup>10</sup> Furthermore, Congress has established that an obligation shall only occur when “supported by documentary evidence” of a binding agreement or purchase.<sup>11</sup> Mere days before Treasury issued the Rule, the U.S. Government Accountability Office (GAO), which issues legal opinions to federal agencies on appropriations law, released a report regarding the SLFRF. In the report, GAO defined an obligation as “a *definite* commitment that creates a legal liability of the government for the payment of goods and services ordered or received. . . . An obligation occurs, for example, when an order is placed, a contract is signed, a grant is awarded, or a service is purchased.”<sup>12</sup> As is clear by these definitions, there must be a present and definite agreement for an obligation to occur—not a future intention to come to an agreement. Therefore, Treasury’s new

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<sup>4</sup> *See id.*

<sup>5</sup> 31 CFR 35.5(b).

<sup>6</sup> 31 CFR 35.3.

<sup>7</sup> U.S. Gov’t Accountability Off., GAO-24-106753, COVID-19 Relief: States’ and Localities’ Fiscal Recovery Funds Spending as of March 31, 2023 (2023), <https://www.gao.gov/products/gao-24-106753>.

<sup>8</sup> Brian Slodysko, State lawmakers used coronavirus relief money to fund new hotels, ballparks and ski slopes, *FORTUNE* (Mar. 23, 2022).

<sup>9</sup> 80586 (“Recipients will not have incurred an obligation (to make many of these types of expenditures prior to the obligation deadline.)”)

<sup>10</sup> “Obligation” Definition, Black’s Law Dictionary (11th ed. 2019).

<sup>11</sup> See 31 U.S.C. § 1501.

<sup>12</sup> U.S. Gov’t Accountability Off., GAO-24-106152, COVID-19 Relief Funds: State Experiences Could Inform Future Federal Relief Funding, 30 n. 45 (2023), <https://www.gao.gov/assets/d24106152.pdf>.

definition—permitting recipients to make future agreements to spend SLFRF funds in 2025 and 2026—stretches the word “obligation” outside of any plain use of English.

It is imperative that Treasury rescind this Rule immediately. ARPA was clear that SLFRF recipients have until December 31, 2024 to obligate their funding, and until December 31, 2026 to liquidate those obligations. With our national debt hitting unprecedented levels, the federal government must act as responsible stewards of the taxpayer’s dollars. An extension of COVID-19 era programs is especially perplexing as this Administration ended the federal Public Health Emergency for the pandemic on May 11, 2023.<sup>13</sup> If Treasury continues with this tortured definition of obligation, Congress will have no choice but to introduce a resolution of disapproval under the *Congressional Review Act*.

Sincerely,



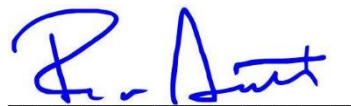
Eric S. Schmitt  
United States Senator



Mike Braun  
United States Senator



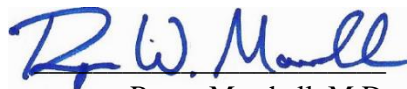
Ron Johnson  
United States Senator



Rick Scott  
United States Senator



Mike Lee  
United States Senator



Roger Marshall, M.D.  
United States Senator

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<sup>13</sup> Press Release, *Fact Sheet: End of the COVID-19 Public Health Emergency*, U.S. Department of Health & Human Services (May 9, 2023).