



July 16, 2021

Submitted via www.regulations.gov

The Honorable Nellie Liang
Undersecretary for Domestic Finance
Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Re: RIN 1505-AC77; Docket No. TREAS-DO-2021-0008
Coronavirus State and Local Fiscal Recovery Funds

Dear Undersecretary Liang:

The National Council of Nonprofits (Council of Nonprofits) submits these comments in response to the Department of Treasury's request for comments on the above-referenced Interim Final Rule (IFR) to implement the Coronavirus State and Local Fiscal Recovery Funds established under the American Rescue Plan Act. The National Council of Nonprofits is the nation's largest network of nonprofits, with more than 25,000 organizational members. Our membership reflects the wide spectrum of charitable nonprofit missions, from arts to zoos and everything in between. In formulating these comments, we have relied on extensive communications and feedback from within our network and multiple colleague organizations representing subsector groups across the nonprofit sector.

In the IFR, "Treasury urges State, territorial, Tribal, and local governments to engage their constituents and communities in developing plans to use these payments, given the scale of funding and its potential to catalyze broader economic recovery and rebuilding." The National Council of Nonprofits agrees wholeheartedly. It is to this express end – engagement of communities and nonprofits in developing spending plans that will "catalyze broader economic recovery and rebuilding" – that the Council of Nonprofits, working in consultation with state associations of nonprofits and other partners, published the Special Report: [Strengthening State and Local Economies in Partnership with Nonprofits: Principles, Recommendations, and Models for Investing Coronavirus State and Local Fiscal Recovery Funds](#).¹

We prepared this special report, in consultation with state associations of nonprofits and other partners, with two particular audiences in mind. First, it provides state, local, and Tribal governments with [guiding principles](#) and [recommendations](#) on how to structure spending programs based on what did and didn't work under the Coronavirus Relief Funds last year, as well as [legal analysis](#) on eligible uses of the funds– based on the statute and the Interim Final Rule. The special report also shares nearly four dozen [successful models](#) of nonprofit relief from around the country that can be adapted to meet communities' greatest needs and promote constituents' wellbeing.

¹ [Strengthening State and Local Economies in Partnership with Nonprofits: Principles, Recommendations, and Models for Investing Coronavirus State and Local Fiscal Recovery Funds](#), National Council of Nonprofits, June 22, 2021.

The following comments identify items in the IFR that need to be clarified to implement the express intent of Congress –namely, that state, local, and Tribal governments may use the federal funds directly or through others, meaning that individual charitable nonprofits can be the target of recovery assistance as well as the provider of assistance to others. Specifically, we provide **document-wide observations** that extend throughout the IFR overview and rules, identify **technical corrections**, and answer **several questions** posed by Treasury in the IFR.

Introduction

Congress expressly declared in the [American Rescue Plan Act](#) (ARPA) that state, local, Tribal, and territorial governments may use their allocations of the \$350 billion in Coronavirus State and Local Fiscal Recovery Funds to provide “assistance to households, small businesses, **and nonprofits**, or to aid impacted industries” (emphasis added). The IFR and Treasury’s set of frequently asked questions ([Treasury Guidance FAQs](#)) provide a non-exhaustive list of how governments may use those federal funds to respond to pandemic needs and support the organizations, communities, and populations hit hardest by the COVID-19 crisis. Specifically, governments may use the Fiscal Recovery Funds directly or through others, meaning that individual charitable nonprofits can be the recipient of assistance as well as the provider of assistance to others.

Despite the clear intention of both the statute and Treasury’s supporting guidance that recipient governments can spend their allocations of Fiscal Recovery Funds in both of these ways –assistance relief for charitable organizations and assistance relief provided through nonprofits for others – too many state, local, and Tribal leaders have suggested otherwise. The IFR should be improved to make these two forms of relief abundantly clear because so many residents are depending on charitable nonprofits, which will be essential partners in order to “catalyze broader economic recovery and rebuilding” efforts in communities throughout the United States.

Nationwide and in every community in America, charitable nonprofits provide vital services and are a key part of the economy, employing more people than the construction, finance, and manufacturing industries.² During the pandemic, tens of millions more Americans than usual turned to charitable organizations for help – and nonprofits delivered. Yet while demand for nonprofit services skyrocketed and their costs increased, revenues declined for tens of thousands of nonprofits. Further, as of June 2021, nearly 700,000 nonprofit jobs still remain lost due to the pandemic,³ creating undue challenges particularly for women and communities of color disproportionately pushed out of the workforce due to no fault of their own. For communities and local economies to recover, governments need to invest in the work of nonprofits.

Document-Wide Matters

The IFR answers many questions that nonprofits and others have raised about the scope of the available relief. But by focusing primarily on the concerns and questions of recipient governments, the IFR downplays the significant opportunities and obligations that recipient governments have to fully realize and operationalize the potential of these resources. Here we present three matters of overarching or document-wide concern that we believe are essential clarifications: (1) uses allowed

² [Nonprofit Impact Matters](#), National Council of Nonprofits, Fall 2019.

³ [COVID-19 JOBS UPDATE, JUNE 2021 | An overall strong recovery, but a loss of 5,300 health care jobs](#), Chelsea Newhouse, Center for Civil Society Studies, July 13, 2021.

under the narrow 2020 Coronavirus Relief Fund also qualify as allowed under the broader 2021 Recovery Fund; (2) contracted-out services are *de facto* eligible uses; and (3) application of the OMB Uniform Guidance cost principles. Nonprofits and those they serve should not be at the mercy of officials incorrectly refusing to partner with nonprofits due to an abundance of caution to spend their new federal funds only on items explicitly identified in Treasury's guidance. We ask Treasury to make the appropriate revisions to add clarity.

1. Uses Allowed Under the Narrow 2020 Coronavirus Relief Fund Are Also Allowed Under the Broader 2021 Recovery Fund

It is well recognized that Congress authorized a much broader range of eligible uses of the 2021 ARPA Recovery Funds are much broader than it allowed under the 2020 CARES Act Coronavirus Relief Fund (CRF). In 2020, Congress directed that the \$150 billion from the CRF were to be used narrowly "to cover costs that are necessary expenditures incurred" due to COVID-19, "were not accounted for in the budget most recently approved" by such government, and were incurred between March 1 and December 30, 2020. Treasury guidance in 2020 further explained that the funds could also be used to "respond directly to the emergency" and address medical or public health needs as well as economic support for employment or business interruptions, including governments' share of unemployment costs and payments to the state unemployment insurance fund.⁴

As documented by the National Conference of State Legislatures,⁵ the National Council of Nonprofits,⁶ and others, governments meticulously followed the CARES Act dictates and developed essential, innovative programs to provide the intended relief under that statute.

When Congress enacted the American Rescue Plan Act, the clear intent of the Fiscal Recovery Funds was to go further than the CRF and provide greater flexibility to governmental recipients. According to the IFR Overview, the "Fiscal Recovery Funds are intended to provide support to State, local, and Tribal governments (together, recipients) in responding to the impact of COVID-19 and in their efforts to contain COVID-19 on their communities, residents, and businesses." Importantly, the Overview states, "The Fiscal Recovery Funds build on and expand the support provided to these governments over the last year, including through the Coronavirus Relief Fund (CRF)." Thus, because the Overview states that the 2021 Recovery Funds "build on" uses permitted under the 2020 CRF, the only logical conclusion is that CRF-authorized expenditures are a subset of the uses authorized under the Recovery Funds. Rather than rely on recipient governments to guessing correctly on their own, we believe it must be clearly stated.

Recommendation: Treasury should modify the Overview of the IFR to make clear that programs developed and funded under the CARES Act Coronavirus Relief Fund shall automatically be deemed eligible uses for Fiscal Recovery Fund expenditures under the ARPA. By so stating, Treasury and the

⁴ [Coronavirus Relief Fund for States, Tribal Governments, and Certain Eligible Local Governments](#), U.S. Department of Treasury, 88 Fed. Reg. Vol 10, page 4182, Jan. 15, 2021 (updating guidance issued on June 30, 2020, and later supplemented on September 2, 2020).

⁵ [State Actions on Coronavirus Relief Funds website](#), National Conference of State Legislatures, updated Jun. 17, 2021.

⁶ [Successful Models of Nonprofit Relief from Around the Country](#), National Council of Nonprofits, Jun. 22, 2021.

IFR can expedite the due diligence process that government recipients must follow and ensure that the funds are distributed with certainty and alacrity.⁷

2. Contracted-Out Services Are De Facto Eligible Uses

It should be commonly accepted that if recipient governments can spend Fiscal Recovery Funds on their own operations, then they can use Recovery Funds to pay for the same activities provided by charitable nonprofits on behalf of governments. Yet the IFR does not say so expressly. For example, IFR Section 35.6(b)(2) *Public Health and Safety Staff* declares as eligible uses of the funds: “Payroll and covered benefit expenses for public safety, public health, health care, human services, and similar employees to the extent that the employee’s time is spent mitigating or responding to the COVID-19 public health emergency.”⁸ Therefore, when governments enter into written agreements with nonprofits to provide those pandemic-related services – such as human services, health care, and public health – then those government should be able to use their Fiscal Recovery Funds to pay nonprofits. The fact that a government has chosen the efficiencies of relying on charitable nonprofits to provide those services should not alter the eligibility of those expenses for dedication of Fiscal Recovery Funds. That needs to be spelled out explicitly.

As a related matter, the IFR focuses on support for nonprofits only in the area of “assistance.” See IFR Section 35.6(b)(7) which appears, incorrectly, to limit support for nonprofits solely to organizational recovery: “Nonprofits. Assistance to nonprofit organizations, including loans, grants, in-kind assistance, technical assistance or other services, that responds to the negative economic impacts of the COVID-19 public health emergency.” In truth, governments at all levels rely heavily on charitable organizations to lift their loads, leverage relationships with and connect to communities that governments can’t reach and provide essential services in the place of governments. Nonprofits are not merely recipients of governmental support; they are typically partners in providing services and supports for their shared constituents.

Recommendation: The definitions of “Eligible employer” and “Eligible workers” in IFR Section 35.3 should be revised to clarify that nonprofit employers and their employees providing the critical services identified in the definition shall be deemed eligible expenditures under the IFR. Further, we ask that Section 35.6(b)(7) be revised to recognize that nonprofits are not just recipients of assistance, but also service providers working pursuant to grants and contracts on behalf of governments.

⁷ See [Recommendations for Designing and Managing Programs with Integrity](#), National Council of Nonprofits, June 22, 2021.

⁸ Further, in the Overview section of the IFR, Treasury acknowledges, “State, local and Tribal governments launched major efforts to address the economic impacts of the pandemic. These efforts have been tailored to the needs of their communities and have included expanded assistance to unemployed workers; food assistance; rent, mortgage, and utility support; cash assistance; internet access programs; expanded services to support individuals experiencing homelessness; support for individuals with disabilities and older adults; and assistance to small businesses facing closures or revenue loss or implementing new safety measures.” It goes on to provide, “In responding to the public health emergency and its negative economic impacts, State, local, and Tribal governments have seen substantial increases in costs to provide these services, often amid substantial declines in revenue due to the economic downturn and changing economic patterns during the pandemic.” Virtually all of the listed efforts have been performed by and through charitable nonprofits.

3. Application of the OMB Uniform Guidance Cost Principles

It is imperative that the IFR expressly state that grants and spending under the Fiscal Recovery Funds must reimburse charitable nonprofits for their indirect costs in providing services on behalf of governments. The IFR is correct in expressly stating that “payments from the Fiscal Recovery Funds as a general matter will be subject to the provisions of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR 200) (the Uniform Guidance), including the cost principles and restrictions on general provisions for selected items of cost.” As a result, the portions of grants and contracts for services funded through federal resources must pay nonprofits their actual costs; governmental recipients of Fiscal Recovery Funds are not free to “waive” or ignore this overriding policy priority.

Less clear from the above-quoted IFR text is whether governmental recipients may use Fiscal Recovery Funds to reverse years-long abuse of their nonprofit partners by dedicating reasonable resources to paying indirect costs for existing programs impacted by the pandemic. In 2020, for instance, New York’s governor suspended prompt payment laws and authorized government agencies to withhold up to 20 percent from amounts owed to nonprofit service providers, essentially requiring nonprofits to subsidize the state’s financial obligations for the duration of the pandemic.⁹ Certainly, Fiscal Recovery Funds should be available to pay the costs New York State incurred during the pandemic but has failed to pay.

Going forward, state, local, and Tribal governments should have the express authority to use Fiscal Recovery Funds to adopt policy changes that correct systemic underfunding of nonprofits performing human services and other programs on behalf of the governments. As documented by the federal Government Accountability Office,¹⁰ the National Council of Nonprofits,¹¹ and others, too often governments fail to pay nonprofits for the full costs of the services, costs which grew exponentially during the pandemic. The most common of these failures is not paying the organizations’ actual indirect costs. Those are the ordinary and necessary expenses of the organization – such as accounting, technology, rent – that are not specific to the program covered by a government grant, but costs shared across all operations. New York City has adopted the [Indirect Cost Rate Funding Initiative](#) to correct this systemic underfunding of nonprofit organizations, but the pandemic imposed significant stress on City finances, leading to budget proposals that would have restricted indirect cost reimbursements to just 70 percent of true costs. The relief under the ARPA has allowed [City leaders to reverse course](#) and ensure that nonprofit human services providers receive 100 percent of funding for their approved indirect costs this year.

Recommendation: Treasury should clarify in the IFR that payment of nonprofit indirect costs is required when federal funds are used to pay for services provided by charitable nonprofits on behalf of the governments, and that Fiscal Recovery Funds may also be used to correct systemic underfunding of the actual costs of providing services performed by nonprofits to respond to the public health emergency and mitigate its fiscal effects.

⁹ [No. 202.48: Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency](#), Office of the New York Governor, July 6, 2020.

¹⁰ [Nonprofit Sector: Treatment and Reimbursement of Indirect Costs Vary among Grants, and Depend Significantly on Federal, State, and Local Government Practices](#), Government Accountability Office, Report GAO-10-477, May 2010.

¹¹ [Toward Common Sense Contracting: What Taxpayers Deserve](#), National Council of Nonprofits, May 2014.

Technical Corrections

The IFR appears to equate small businesses with nonprofit organizations, often omitting direct reference to nonprofits, thereby creating confusion through omissions that can inadvertently harm nonprofits and those they serve by steering resources away rather than providing guidance on eligible uses of Fiscal Recovery Funds. It also uses outdated terminology in an inconsistent manner that should be corrected.

1. Omission of Nonprofit Examples

The IFR Overview attempts to provide easy-to-understand examples of eligible uses of Fiscal Recovery Funds, but the examples provided appear to reflect assumptions about nonprofits that do not apply or fail to provide adequate attention to charitable nonprofits as vital contributors to local economies and wellbeing. The IFR restates the language in the ARPA that governments may use the funds to provide relief to nonprofit organizations and then references “small businesses and non-profits[sic]” in the title of the section (page 26795). Throughout the description, however, the text only addresses “businesses” and “small businesses.”¹² The National Council of Nonprofits has received numerous calls from state and local governmental officials expressing doubt as to whether support for charitable nonprofits is indeed an eligible use of the Fiscal Recovery Funds. We believe the text in this section of the IFR Overview is a prime cause of that doubt.

The intent is clear from the statute that all of the substantive text quoted in the footnote, below, should apply equally to funds paid to support charitable nonprofits. The separate [Frequently Asked Questions](#) document from Treasury clarifies or corrects some of the misgivings we’ve expressed here. For example, the [answer to FAQ #7](#) states, “The Interim Final Rule contains 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 Fiscal Recovery Funds not explicitly listed.” The FAQs, however, do not have the same force of law as does the IFR.

Recommendation: Treasury should revise the text provided in the footnote to insert the term “and nonprofits” after “businesses” in each appearance.

The Term “Nonprofit”

The IFR correctly defines “Nonprofit” to mean “a nonprofit organization that is exempt from Federal income taxation and that is described in section 501(c)(3) of the Internal Revenue Code.” However, in at least five places in the IFR Overview, Treasury uses the outdated term “non-profit” to refer to charitable nonprofit organizations. As with the terms “to-day” and “e-mail,” modern usage has eliminated the hyphen from these common words.

Recommendation: We ask that Treasury correct the text of the Overview to replace “non-profit” wherever it appears with the defined and preferred term “nonprofit”.

¹² “State, local, and Tribal governments **may provide assistance to small businesses** to adopt safer operating procedures, weather periods of closure, or mitigate financial hardship resulting from the COVID-19 public health emergency....” (at page 26795). Later, the IFR advises, “Recipients may consider additional criteria to target assistance to **businesses** in need, **including small businesses**. Such criteria may include **businesses** facing financial insecurity, substantial declines in gross receipts (e.g., comparable to measures used to assess eligibility for the Paycheck Protection Program), or other economic harm due to the pandemic, as well as **businesses** with less capacity to weather financial hardship, **such as the smallest businesses**, those with less access to credit, or those serving disadvantaged communities” (at page 26795). Emphasis added throughout.

Responses to Selected Questions Presented

The National Council of Nonprofits will not respond to all 38 of the questions presented, opting to provide comments on those for which the expertise of the nonprofit community may be most helpful.

Other Types of Services or Costs

We note that Questions 1, 5, and 8 are substantially similar and will address them together.

Question 1: Are there other types of services or costs that Treasury should consider as eligible uses to **respond to the public health impacts** of COVID-19? Describe how these respond to the COVID-19 public health emergency.

Question 5: Are there other types of services or costs that Treasury should consider as eligible uses to **respond to the negative economic impacts** of COVID-19? Describe how these respond to the COVID-19 public health emergency.

Question 8: Are there other services or costs that Treasury should consider as eligible uses to **respond to the disproportionate impacts** of COVID-19 on low-income populations and communities? Describe how these respond to the COVID-19 public health emergency or its negative economic impacts, including its exacerbation of pre-existing challenges in these areas.

Response: As explained in the introduction of the Council of Nonprofits' recent [Special Report](#), the COVID-19 pandemic resurfaced an undeniable truth: charitable nonprofits and governments are natural partners, serving the same constituents in the same communities. The challenges of one are the challenges of all. Partnerships between the sectors allow for leveraging of resources, relationships, and strengths to serve communities even better. We urge the Treasury Department to consider using detailed, non-exclusive examples ([Successful Models](#)) as contained in the Special Report as it continues to catalogue the eligible types and services that nonprofits can provide utilizing Fiscal Recovery Funds.

In further response to these three questions, we refer to the Document-Wide Matter discussion above regarding the proper treatment of contracted-out services. There should be no doubt that the increased need for **mental health services** performed by nonprofit organizations in the past year is related to public health impacts (Question 1), negative economic impacts (Question 5), and to disproportionate impact of COVID-19 on low-income populations and communities (Question 8). The IFR references mental health services as eligible uses, but does not make clear that the use remains eligible regardless of whether provided by public or nonprofit employees. Similarly, the need for **domestic violence services** became much more acute than ever during the pandemic and remain needed, essential services. The same is true for people needing – and nonprofits providing – a wide range of services, including food, housing, jobs training and placement, and more.

Also, charitable nonprofits rarely limit themselves by subsector silo as they work to advance their missions. As seen in the Council of Nonprofits' Special Report, museums opened their doors to operate as schools. Orchestras and arts organizations adapted to virtual formats that enabled them to provide educational programming that helped teachers and parents keep students engaged. Similar examples can be found at nature conservancies that provided social distancing and shuttered nonprofit human services facilities switching to provide food preparation and delivery.

Recommendation: While the more examples of eligible uses the better, we ask Treasury to recognize in written guidance that nonprofits respond to meet evolving community needs and every community will face its own challenges and identify appropriate solutions that may not be obvious at the outset.

Unemployment Insurance Costs

Question 4 raises a question of enormous importance to charitable nonprofits because of the different treatment of these organizations under state laws.

Question 4: The Interim Final Rule permits deposits to Unemployment Insurance Trust Funds, or using funds to pay back advances, up to the pre-pandemic balance. What, if any, conditions should be considered to ensure that funds repair economic impacts of the pandemic and strengthen unemployment insurance systems?

Response: The National Council of Nonprofits greatly appreciates that Treasury makes clear in the IFR that governmental recipients are free to use the Fiscal Recovery Funds to bring their unemployment systems back up to pre-pandemic levels. They may deposit the funds into their unemployment trust funds (up to the level in January 2020) or pay off unemployment insurance advances from the U.S. Department of Labor. This is an important clarification because many states impose automatic unemployment tax increases on contributing employers when trust funds fall below certain levels. It's now clear that the tax hikes averted by paying into the unemployment trust funds (up to certain levels) will not run afoul of the ARPA provision preventing use of the money to provide tax cuts or delay tax hikes.

There are more issues related to unemployment systems than trust fund balances, however. State unemployment laws recognize three categories of employers for unemployment compensation purposes: **contributing employers** (most for-profit and some nonprofit employers that make quarterly payments into the state unemployment system for the approximate costs of what the state paid out to their former employees), **reimbursing employers** (charitable nonprofits and local and Tribal governments that self-insure and reimburse the state for actual costs for benefits paid to their former employees), and **exempt employers** (typically religious institutions and very small entities with very few employees).

Congress and many state policymakers recognized that the unprecedented nature of the COVID-19 pandemic required urgent adjustments to the unemployment insurance system. They acknowledged that no employer or employee should be held financially liable because of a worldwide crisis that was unanticipated and outside their control. Through the CARES Act of 2020, the federal government delayed, but did not cancel, any costs for *contributing employers*; covered only 50 percent of the costs charged to *reimbursing employers*; and fully covered the costs of *exempt employers*. The ARPA increased the coverage for reimbursing employers from 50 percent to 75 percent for five months in 2021, but left those employers on the hook for the remaining 25 percent of charges.

Contributing employers and reimbursing employers suffered from the exact same health and economic crisis. We feel strongly that they should be treated the same. Last year, several states agreed by saying it absolutely would be unfair for governments to protect one set of employers (contributing employers) from dramatic cost hikes while leaving the other set of employers (nonprofits and local and Tribal governments) financially liable for exactly the same unemployment costs. To correct that unfairness, about a dozen states provided needed relief to reimbursing

employers. Most did so by investing Coronavirus Relief Funds from the CARES Act. However, that relief has largely expired or must be revised to hold these innocent employers harmless from these pandemic-caused costs from which their contributing counterparts have been protected.

Recommendation: We strongly recommend that states provide the same level of protection granted to contributing employers – paying zero costs from the outset of the pandemic – to all reimbursing employers. We ask Treasury to make clear that this equal treatment can be achieved by states and localities by: (i) cancelling all unemployment bills charged to reimbursing employers for COVID-related layoffs; and (ii) repaying reimbursing employers for the amounts paid on unemployment costs charged to them since the declaration of the national emergency on March 13, 2020.¹³

The forgoing comments are based on the experiences and expertise of the networks of the National Council of Nonprofits throughout the United States. We welcome the opportunity to provide additional assistance to Treasury and to answer any questions that may arise.

Respectfully submitted,



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¹³ See examples of unemployment relief for employers in [Strengthening State and Local Economies in Partnership with Nonprofits](#), pages 8 – 10.