ARPA Funds

Frequently Asked Questions

March 30, 2022

This FAQ is intended to answer common questions Ohio Counties may have related to the use of Coronavirus Local Fiscal Recovery Funds made available through the American Rescue Plan Act (referred to herein as "ARPA Funds").

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Section 1 — Eligible Uses of Funds

Q 1.1: What are the kinds of expenditures for which the County can use its ARPA Funds?

A: The County may use ARPA Funds for one of four statutory purposes:

1. To respond to the COVID-19 public health emergency or its negative economic impacts;
2. To respond to workers performing essential work during the COVID-19 public health emergency by providing premium pay to such eligible workers of the recipient, or by providing grants to eligible employers that have eligible workers who performed essential work;
3. For the provision of government services, to the extent of the reduction in revenue of such recipient due to the COVID–19 public health emergency, relative to revenues collected in the most recent full fiscal year of the recipient prior to the emergency; or
4. To make necessary investments in water, sewer, or broadband infrastructure.

Q 1.2: What is the deadline for the County to use its ARPA Funds?

A: The County must ***obligate*** ARPA Funds by December 31, 2024. The County must then actually pay out all ARPA Funds before December 31, 2026; unexpended funds are then subject to recapture or return.

Q 1.3: The Final Rule requires a determination that a public safety employee is primarily dedicated to responding to COVID-19 in order to use State and Local Fiscal Recovery Funds ("SLFRF") to pay for salaries and benefits. May revenue loss funds, under the 3rd bucket of use, pay for public safety employee salaries and benefits regardless of whether they are primarily dedicated to responding to COVID-19?

A: Yes. Generally speaking, services provided by the recipient governments are "government services" under the Final Rule, unless Treasury has stated otherwise. According to the Treasury, government services "include, but are not limited to, maintenance or pay-go funded building of infrastructure, including roads; modernization of cybersecurity, including hardware, software, and protection of critical infrastructure; health services; environmental remediation; school or educational services; *and the provision of police, fire, and other public safety services*" [our emphasis added].

Q 1.4: It is our understanding that Revenue Replacement funds can be used to cover the cost of existing employees and county operations, even if they are not substantially dedicated to COVID. We would like this verified and determine that Revenue Replacement can be used for any current county expense as long as it is not for one of the ineligible uses (Debt, Extra Pension payments, lost revenue due to tax reduction, etc.).

A: Confirmed. Irrespective of the method of deeming or calculating revenue loss resulting from the pandemic, local government recipients have "broad latitude to use funds for government services up to their amount of revenue loss." According to the Treasury, government services include, but are not limited to, maintenance or pay-go funded building of infrastructure, including roads; modernization of cybersecurity, including hardware, software, and protection of critical infrastructure; health services; environmental remediation; school or educational services; and the provision of police, fire, and other public safety services. As you note, such broad swath of activities remain subject to the Final Rule's Restrictions on Use, which are applicable to every SLFRF dollar spent. These Restrictions on Use are divided into: (i) *statutory restrictions* set forth under ARPA and (ii) so-called *other restrictions*. Finally, as to the use of any ARPA funds, the local government must encumber its Local Fiscal Recovery Funds no later than December 31, 2024, with full pay-out on such encumbrances (i.e., purchase orders) by December 31, 2026.

Q 1.5: Assuming that a recipient properly identifies an amount that qualifies as use for government services "to the extent of a revenue reduction" and thus properly dedicates that amount of money to other governmental purposes. Are the only federal limitations then on the use of the funds those that involve prohibited categories of use (i.e. placement in pension or rainy-day funds, or payment of debt, etc.)

A: Throughout its issued guidance and the Final Rule, the U.S. Treasury outlines Restrictions on Use for ARPA Funds, which are applicable to every SLFRF dollar spent. These Restrictions on Use are divided into two categories: (i) statutory restrictions set forth under ARPA and (ii) so-called other restrictions. These Restrictions on Use are placed on

any expenditure of ARPA Funds, regardless of what bucket of eligibility they fall under. Below is a breakdown of each Restrictions on Use category:

1. Statutory Restrictions Under the ARPA
    a. Offsetting a Reduction in Net Tax Revenue (states and territories only)
    b. Deposits into Pension Funds (all government recipients)
2. Other Restrictions on Use
    a. Debt Service and Replenishing Reserves
    b. Settlements and Judgments
    c. General Restrictions
        i. A recipient may not use its Fiscal Recovery Funds for a program, service, or capital expenditure that includes a term or condition that undermines efforts to stop the spread of the COVID-19 virus.
        ii. A recipient may not use ARPA funds in violation of the conflict of interest requirements contained in the federal award's terms and conditions or in the Uniform Guidance, including any self-dealing or violation of ethics rules.
        iii. A recipient must maintain awareness of non-ARPA requirements that may apply under federal, state, and local laws and regulations. State and local procurement, contracting, and conflicts-of-interest laws and regulations may apply. Other federal, state, and local laws may prohibit discrimination on the basis of race, color, national origin, sex, (including sexual orientation and gender identity), religion, disability, or age, or familial status (having children under the age of 18).

Q 1.6: What happens when a recipient already has identified a revenue loss for 2020 and used ARPA Funds under the revenue replacement category but now wants to use the flexibility of the $10 million standard allowance? Is it allowable to switch to the new method? If so, does the amount of funds previously spent under the revenue replacement category count against the $10 million limit?

A: If a recipient has identified a revenue loss for 2020 and used ARPA Funds under the revenue replacement category they may switch to the $10 million standard allowance, but any funds previously spent under the revenue replacement category will count against the $10 million limit.

Once a recipient has adopted the $10 million standard allowance we recommend that they not switch to the revenue replacement category.

Keep your audit files and expenditure documentation intact for pre-January 6, 2022 SLFRF expenditures. And then pivot to the revenue replacement method for all other expenditures, if desired and up to the standard allowance, for those expenses that (1) occur after March 3, 2021 (the commencement of the "covered period" under the SLFRF) *and* (2) after January 6, 2022.

Note there is language in the U.S. Treasury's Final Rule guidance that could be read to allow the local government to have spent its ARPA Funds for expenses going back to March 3, 2021, under the 3rd bucket's revenue replacement basis of use.

A more conservative approach, however, is for the County to freely spend under the 3rd bucket of use only after January 6, 2022 (when the Final Rule was issued).

Q 1.7: Can the county use ARPA Funds under the revenue replacement category to support road and bridge construction even though these services are not considered a general revenue fund expense?

A: Yes. Although general infrastructure projects are not considered responsive to COVID-19 (and therefore ineligible under the 1st bucket of use), general road and bridge construction projects can be covered with ARPA Funds if the local government uses the 3rd bucket (provision of government services) as a basis for the use of funds. Irrespective of the method of determining revenue loss, local governments may deploy such amounts to the provision of government services, which Treasury defines generally as the "services provided by the recipient governments … unless Treasury has stated otherwise." Note Treasury lists in its non-exhaustive list of "government services" the "maintenance or pay-go funded building of infrastructure, including roads[.]" That said, such broad swath of activities remain subject to the Final Rule's Restrictions on Use, which are applicable to every SLFRF dollar spent.

Q 1.8: If we use revenue replacement (i.e., the 3rd bucket of eligible use) for a construction project, do we still have to do the written explanation and comparison to two other projects?

A: No. If a construction project is funded using revenue replacement as the basis for the eligible use of funds under the 3rd bucket, the local government is *not* required to prepare and submit a written explanation and comparison to two other projects. (Such requirement only attaches if ARPA Funds were used for capital projects under the 1st bucket of eligibility, in response to COVID-19's negative public health or economic impacts). Under this 3rd bucket, the project must constitute the provision of a government service and the funded amount must otherwise be within the local government's standard allowance or calculated revenue loss amount.

Q 1.9: It is our understanding that we can't combine ARPA Funds and borrowed funds to finance a construction project. Is this also true if using Revenue Replacement for a construction project?

A: Among the restrictions on local governments' use of their ARPA Funds, the U.S. Treasury has reiterated, several times, that such ARPA Funds are not to be used to pay debts. Note: "Debt service is not an eligible use of funds either to respond to the public health emergency or its negative economic impacts or as a provision of government services to the extent of revenue loss." The U.S. Treasury stresses that it is carrying these restrictions into the Final Rule: "Treasury, in the final rule, has retained these restrictions and is clarifying that these restrictions on the use of the ARPA Funds apply to all eligible use categories." The U.S. Treasury's clarifying remarks include this statement: "The interim

final rule provided that funds may be used for costs incurred beginning on March 3, 2021, which Treasury has maintained in the final rule. Use of funds for debt service on indebtedness issued prior to March 3, 2021 necessarily entails using funds for costs incurred during prior time periods, rather than the present response to the public health emergency and its negative economic impacts or to provide government services."

The concern here is that of fungibility. That is, the interchangeability of the local government's ARPA Funds and its bond sale proceeds. Keep in mind the future audit of SLFRF expenditures, by either or both the Auditor of State and the Inspector General of the U.S. Treasury. A savvy auditor, seeing in the local government's CAFR that it issued debt to finance a particular project, will then see the local government spending its ARPA Funds on the very same project. And she will ask, "Show me the bond issuance documents, and show me the SLFRF-paid invoices." A comparison of the two sets of docs may cause the auditor to drill down into the project file, seeking to determine if the ARPA Funds were misspent in service of a debt-financed project.

As an alternative, phasing could be a possible way to structure a multi-source project with borrowed funds. Please see Q 3.3 below for considerations specific to phasing a project using ARPA Funds.

In regards to combining ARPA Funds and with non-borrowed funds, Treasury clarified in the Final Rule that recipients may fund a project with both ARPA funds and other sources of funding, provided that the costs are eligible costs under each source program and are compliant with all other related statutory and regulatory requirements and policies.

Q 1.10: Can revenue replacement funds be used for new jail construction or renovation, or the construction of other types of county facilities?

A: Yes. If using revenue replacement as the basis for the eligible use of funds under the 3rd bucket, ARPA Funds may be used towards construction and/or renovation of a county jail or other county facility. Under this 3rd bucket, the project must constitute the provision of a government service and the funded amount must otherwise be within the local government's standard allowance or calculated revenue loss amount. And the project is subject to the Final Rule's Restrictions on Use of funds.

Section 2 — Procurement

Q 2.1: Does the County need to comply with the Uniform Guidance when using ARPA Funds?

A: Yes. Because ARPA Funds are federal funds, the County's purchases using ARPA Funds are subject to the federal procurement requirements set forth in the Uniform Guidance.

Q 2.2: Which procurement rules does the County follow when there is a conflict or inconsistency between state procurement law and the Uniform Guidance?

A: Counties must comply with ***both*** state and federal law, where possible. In many areas, the processes required are the same. However, in the event of an inconsistency, the County must follow the more restrictive process.

For example, there is a disconnect between state and federal law on the bidding threshold:

Under $10,000	State and federal law agree; no competition necessary.
Between $10,000 and $50,000	Federal law is more restrictive; County must solicit "adequate" number of quotes.
Over $50,000	State law is more restrictive; competitive procurement required.

Note, this table is intended only to demonstrate the disconnect between the dollar thresholds under R.C. 307.86 and the Uniform Guidance. For a more thorough comparison of the procurement rules, including the exceptions that apply to competitive procurement under each, please see the *Comparison of State and Federal Law* published by CCAO and prepared by Bricker & Eckler.

Q 2.3: Can the County do anything to minimize the disconnect between the state and federal bidding thresholds?

A: Yes. Federal regulations allow for the increase of the $10,000 micro-purchase threshold to a higher amount, up to $50,000, where doing so is consistent with state law. Because the bidding threshold in R.C. 307.86 is $50,000, the County may set its micro-purchase to $50,000 as well.

A: To do so, the County must follow a self-certification process. To self-certify, the County must:

1. Maintain documentation to be made available to a Federal awarding agency (U.S. Treasury for ARPA Funds) and auditors in accordance with 2 C.F.R. 200.334; and
2. State the following within the self-certification resolution:
    a. A justification for the higher threshold;
    b. A clear identification of the new, higher threshold; and
    c. Any one of the following:
        i. A statement that the County qualifies as a low-risk auditee, in accordance with the criteria in § 200.520 for the most recent audit (documentation must be attached to the resolution to support this statement); or
        ii. A statement that the County has conducted an annual internal institutional risk assessment to identify, mitigate, and manage financial risks (documentation must be attached to the resolution to support this statement); or
        iii. A statement that a higher threshold is consistent with state law.

The self-certification must be made by the County on an annual basis.

Q 2.4: Can the County participate in a cooperative purchasing program when using its ARPA Funds?

A: Generally speaking, yes, with some caveats. Under the Uniform Guidance, the County is actually "encouraged" to use cooperative purchasing agreements, where doing so may result in cost savings. However, when doing so, the County is responsible to ensure that the underlying contract procured by the cooperative agency was procured in accordance with the Uniform Guidance requirements.

State law, however, restricts the use of cooperative purchasing in certain circumstances. For example, the Ohio Attorney General has opined that the County may not participate in a joint purchasing program based on R.C. 9.48 for "construction services." R.C. 9.48 is also the statutory basis for purchases through the GSA, and thus the AG Opinion would suggest that "construction services" should not be procured through the GSA. Rather, "construction services" must instead be procured through the unit-price framework set by R.C. 167.081.

Additionally, communications from officials in the office of the Auditor of State have called into question whether the State Term program under R.C. 125.04 can be used for ARPA funded-projects, as the official observed that the process used by the State of Ohio for the underlying procurements for the program may not comply with Uniform Guidance. While the Auditor of State has not issued a formal opinion on this matter, Counties should use caution and consult with legal counsel before using ARPA Funds for purchases made through the State Term program.

Section 3 — Construction & Capital Improvements

Q 3.1: Are ARPA-funded construction projects subject to the Davis-Bacon Act?

A: No. The U.S. Treasury has stated that the Davis-Bacon Act requirements (including the obligation to pay ***federal*** prevailing wage rates) do not apply to projects funded ***solely*** with ARPA Funds. However, the County is nonetheless obligated to pay state prevailing wage under Chapter 4115 of the Ohio Revised Code. Further, if a project will be funded in part by ARPA Funds and in part by another source of federal funds, the Davis-Bacon Act may apply.

Q 3.2: If a County has already entered into a Construction Manager at Risk or Design-Build contract for a construction project (and that project would be an eligible use of ARPA Funds), what additional steps are necessary to ensure that ARPA Funds can be applied to that project in compliance with federal Uniform Guidance?

A: The County will only be able to use ARPA Funds for this project if the initial procurement of the Construction Manager at Risk or Design-Builder was compliant with the Uniform Guidance. Fortunately, the proposal-based process outlined under R.C. 9.33 et seq. and R.C. 153.65 et seq. for procurement of a "best value" construction manager at risk or design-builder, respectively, is substantively analogous to the proposal-based process required by Uniform Guidance to select a "most advantageous" firm.

The agreement with the construction manager at risk or design-builder, however, will need to include the necessary contract provisions to comply with Uniform Guidance, so an amendment to the contract is likely necessary. Additionally, when looking at retroactive application of ARPA Funds, funds may only be used for costs incurred after March 3, 2021.

Q 3.3: May a County use ARPA Funds for a subsequent phase of a multi-phased construction project (assuming the project is an eligible use of ARPA Funds) and what procurement rules apply to such phasing of a project?

A: Yes. Phased projects are allowable under ARPA and the Uniform Guidance. Application of the Uniform Guidance, however, is dependent on how the subsequent phase of the project is delivered. For example, if the phases of a project are completed through separate contracts, the Uniform Guidance will apply only to the contract being funded with ARPA Funds because the Uniform Guidance is applied on a per-contract basis. If, on the other hand, the subsequent phase is delivered by an amendment or a change order to the initial phase, then Uniform Guidance will retroactively apply, as there is only one contract. Thus, the initial phase must have been procured in conformity with Uniform Guidance to be compliant.

Q 3.4: Is the selection procedure for design professionals under R.C. 153.65 *et seq.* compliant with the competitive selection requirements of the Uniform Guidance?

A: Yes. The Uniform Guidance denotes a qualifications-based selection process similar to the process under R.C. 153.65 et seq. Specifically, 2 C.F.R. § 200.230(b)(2)(iv) provides that "the [County] may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby [the A/E]'s qualifications are evaluated and the most qualified [A/E] is selected, subject to [later] negotiation of fair and reasonable compensation." Thus, because the Uniform Guidance allows for selection of an A/E without consideration of price in the limited context of A/E services, use of the process under R.C. Chapter 153 would comply with federal law.

Section 4 — Broadband

Q 4.1: Under what circumstances may a recipient use ARPA Funds to support a broadband project, given the preference in the Treasury rules for *fiber-optic infrastructure*?

A: Under ARPA, recipient governments may use ARPA Funds to make "necessary investments in . . . broadband infrastructure." A recipient may use ARPA Funds to make investments in broadband infrastructure if (A) the project is designed to provide service to households and businesses with an identified need for such infrastructure, (B) subject to limited exceptions, the infrastructure is designed to reliably meet or exceed symmetrical 100 Mbps download speed and upload speeds upon completion; and (C) the recipient requires service providers using the broadband infrastructure to deliver service to households to participate in a qualifying affordability plan set out in the Final Rules in order to assure affordability for consumers.

The final regulations have taken a more flexible approach when defining necessity for broadband infrastructure. For example, necessity may be demonstrated by service speeds below symmetrical 100 Mbps download and upload speeds, poor reliability in service, or a lack of affordable service in an area.

Treasury has expressed a preference for *fiber-optic infrastructure* wherever feasible. This is in recognition that fiber-optic infrastructure is reliably capable of achieving the necessary download and upload speeds today and is efficiently scalable to meet future needs as well. For this reason, recipients are encouraged to prioritize investments in projects that are designed to provide service to locations not currently served by a wireline connection that reliably delivers at least 100 Mbps of download speed and 20 Mbps of upload speed. That said, projects that include investments in wireless connections still may be appropriate in certain cases, depending on the facts and circumstances of the project. Projects that achieve last-mile connection also are encouraged by Treasury, but middle-mile connections are permitted where efforts are made to ensure that there are other commitments in place to fund new and or improved last-mile service.

Q 4.2: Can a County use its ARPA Funds to co-fund broadband projects through the Ohio Residential Broadband Expansion Grant Program administered by the Development Services Agency under Sections 122.40 through 122.4077 of the Ohio Revised Code?

A: Probably, but there are issues that a County exploring this option should consider, as this is a complicated question with no clear guidance from the state or federal level.

By way of background, the Ohio Residential Broadband Expansion Grant Program is a state grant program intended to help internet carriers fund the "cost gaps" for expansion into areas where the geographic challenges present too much of a logistical and financial hurdle for private broadband providers to expand services into those areas. Specifically, it allows the carriers to apply for grants, and the funding is prioritized for projects that can bring high-speed internet to households that do not currently have access. The Program is administered by the Development Services Agency and completed applications are sent to the Broadband Expansion Program Authority for final review and award of grants.

Counties have a role in the application process. Counties may request the Agency to solicit applications from broadband providers for program grants for eligible projects in the municipal corporations and townships of the County. Alternatively, a provider may make application directly to the Agency without the County's solicitation.

While the program, alone, would only bring State grant funding, Section 122.4020 of the Revised Code also allows the County to co-fund these projects. From a procurement standpoint, the County's state law compliance is satisfied by co-funding under this statue.

However, when ARPA Funds are the source of the co-funding, Uniform Guidance must also be satisfied. This is the hurdle that must be cleared, and the challenging part of the analysis. There are a few possible ways in which a County might meet the federal requirements that can be explored.

First, the County could directly issue an RFP for a broadband company to provide the services. This process would satisfy the County's requirements under 2 C.F.R. §

200.320(b)(2). The consideration here is that because this route involves two separate procurements by two separate entities, there is a possibility that the County's evaluation through its RFP may not match the selection through the State process.

As a second possibility, the County could consider the procurement of the broadband company by the State as a cooperative purchase (piggybacking off of the State's contract under the grant) under 2 C.F.R. § 200.318(e). The consideration here is that the State's selection must have complied with Uniform Guidance for the County to piggyback off of it. Looking at the Uniform Guidance requirements, the DSA process is publicized, identifies evaluation criteria, and is awarded based on price and technical ability. The DSA process, however, is not the *typical* RFP procedure and has some unique characteristics, and, unfortunately, neither the federal authorities nor state authorities have issued an opinion or guidance on whether the DSA process ultimately complies with Uniform Guidance. The County, therefore, would need to be confident in this determination before proceeding.

Finally, the County could consider sub-granting its ARPA Funds to the broadband company selected by the state process. In this instance, the Uniform Guidance would not apply to the County's sub-grant. However, the consideration here is that the broadband company, as a sub-recipient of the grant, would then need to comply with Uniform Guidance.

As noted, this is a complex issue, and heavily dependent on the facts of the potential broadband project to be funded. Interested Counties should work with legal counsel to ensure these projects are performed in compliance with Uniform Guidance.

Section 5 — Personnel

Q 5.1: As it relates to restoring public sector employment, what positions should count towards the "pre-pandemic baseline" budgeted FTE level as of January 27, 2020? For example, if the Sheriff's department has employees that are paid from multiple funds, not just the general fund, should the county include all of these FTEs regardless of the funding source? Or is it advisable to only use FTEs supported by the county general funds to calculate the baseline for the 1.075 multiplier for adding employees?

A: A local government recipient may include all positions budgeted for, as of January 27, 2020, in its calculation regardless of funding source.

The Final Rule specifies that ARPA Funds used to bolster public sector capacity by restoring public sector employment is an eligible use under the SLFRF's 1st bucket use, as a response to COVID-19's negative public health and economic impacts.

Under the Final Rule's 1st bucket eligible use analysis, recipients must choose between two options to restore pre-pandemic employment, the second of which applies with respect to calculating a "pre-pandemic baseline." A first of four steps, the Final Rule defines "pre-pandemic baseline" to mean "the recipient's budgeted FTE level on January 27, 2020". The "budgeted FTE level" on January 27, 2020 is further defined to include "*all budgeted positions*, filled and unfilled" [our emphasis added]. The Final Rule makes no distinction between positions based upon funding source. So long as the position was budgeted for,

as of January 27, 2020, the recipient may include the position in its calculation of the "pre-pandemic baseline."

Section 6 — Administration and Audit Costs

Q 6.1: Under Treasury's FAQ Item 11 in connection with the CARES Act, CARES Act funding could be used to pay for audit costs for the CARES Act portion of a recipient's Single Audit. Moreover, in Treasury's FAQ Item 2.2 in connection with ARPA funding, we may presume that most costs eligible under CARES Act are also eligible under ARPA. So, if the CARES Act audit did not take place until *after* March 3, 2021, and a recipient no longer has CARES Act funding available to pay those costs, may that recipient use ARPA funds to pay for CARES Act audits as a way to mitigate the economic impact of the pandemic on the recipient since it is an added cost a recipient would not have had but-for the pandemic?

A: "No" as a response to COVID-19 under the 1st bucket of eligible use; "yes" if the local government uses the 3rd bucket as a basis for the use of funds. The 1st bucket of eligible use under the SLFRF is related to responding to the negative economic impact of the public health emergency having occurred during the "covered period" (i.e., after March 3, 2021). Although the 1st bucket of use specifically allows for administrative expenses to improve local government recipients' effective service delivery, such use must be related to the ARPA's federal stimulus provisions, not previous federal stimulus schemes: "recipients may use funds for direct and indirect administrative costs for administering *the SLFRF program* and projects funded *by the SLFRF program*" [our emphasis added]. The cost of the CARES Act audit may be offset, however, using revenue replacement as the basis for the eligible use of funds under the 3rd bucket, as such audit costs constitute "government services."