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MEMORANDUM

August 15, 2022

TO: TRIBAL HOUSING CLIENTS

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP

RE: *Updated FAQs for the State and Local Fiscal Recovery Funds (FRF) Program under the ARP Act*

INTRODUCTION

On July 27, 2022, the U.S. Department of the Treasury (Treasury) updated its Frequently Asked Questions (FAQs) document¹ for its Final Rule² for the State and Local Fiscal Recovery Funds (FRF), a program established under the American Rescue Plan (ARP) Act. This memorandum summarizes the updates made to the FAQs.

Updates to the FAQs include new and revised questions related to affordable housing projects and loans, including expanded eligibility criteria, and new questions related to the application of the Office of Management and Budget (OMB) Uniform Guidance, 2 C.F.R. Part 200, to projects funded with FRF funds, including several questions related to projects funded under the governmental revenue replacement eligible use category.

UPDATED FAQs

\$10 million standard allowance. Under the prior version of the FAQs, recipients were given until April 30, 2022 to either calculate their actual revenue loss or elect a “standard allowance” of governmental revenue loss in the amount of \$10 million. Updated FAQ #3.1³ provides that recipients may update their revenue loss election, as appropriate, in future reporting cycles through the April 2023 reporting period. Upon update, any prior revenue loss election will be superseded.

¹ The updated FAQs are linked [here](#). In addition to the FAQs, Treasury released an “Affordable Housing How-To Guide” guidance document, linked [here](#), which includes a summary of FRF guidance on affordable housing and provides examples of how recipients can layer funds with federal resources.

² The Final Rule (published at 87 Fed. Reg. 4338 (Jan. 27, 2022)) is linked [here](#).

³ FAQs at 21.

Recipients continue to be required to employ a consistent methodology across the period of performance (i.e., to choose either the standard allowance or the full formula) and may not elect one approach for certain reporting years and the other approach for different reporting years.

Affordable housing. Updated FAQ #2.14⁴ provides a list of presumptively eligible affordable housing uses that respond to the negative economic impacts of the pandemic: (1) projects that would be eligible for funding under an expanded list of federal housing programs,⁵ and (2) projects for the development, repair, or operation of affordable rental housing meeting certain income and affordability requirements. Additionally, the FAQ discusses certain offerings of down payment assistance.

For the first presumption, affordable housing projects provided by a tribal government are presumptively eligible if they would qualify for the Indian Housing Block Grant (IHBG) program, the Indian Community Development Block Grant program (ICDBG), or the BIA Housing Improvement Program. FAQ 2.14 notes that investment agreements for the covered project or units must comply with certain requirements of the applicable federal housing program, including, e.g., resident income restrictions. For the second presumption, Treasury will presume that an investment in the development, repair, or operation of affordable housing units is eligible if the unit has a limited maximum income of 65% area median income (AMI), as imposed through a covenant, land use restriction agreement, or other enforceable legal requirement for a period of at least 20 years.⁶ Recipients may construct mixed-income housing, and use FRF funds up to the total development costs attributable to the qualifying affordable housing units.

Lastly, the updated FAQ provides that other affordable housing projects beyond these two categories may be eligible so long as they are related and reasonably proportional to addressing the pandemic's negative economic impacts and otherwise meet the Final Rule's requirements.

Loans or extensions of credit to support eligible uses. Updated FAQ #4.9⁷ maintains that recipients may use FRF funds to make loans that support an activity that is an eligible use of funds, so long as the FRF funds are obligated by December 31, 2024 and expended by December 31, 2026, and the cost of the loan is tracked and reported in accordance with the FAQs' requirements.

⁴ *Id.* at 10–13.

⁵ The extended list of programs include the Home Investment Partnerships Program; the Low-Income Housing Tax Credit; the Public Housing Capital Fund; Section 202 Supportive Housing for the Elderly Program and Section 811 Supportive Housing for Persons with Disabilities Program; Project-Based Rental Assistance; and Multifamily Preservation & Revitalization program. *Id.* at 11.

⁶ Jurisdictions may establish a longer period of affordability at their discretion. *Id.* at 12.

⁷ *Id.* at 33–36.

The updated FAQ adds a new bullet related to “loans to fund investments in affordable housing projects.”⁸ Under the “public health and negative economic impacts” eligible use category, recipients may use FRF funds to make loans to finance affordable housing projects, funding the full principal amount of the loan, if the loan and project meet certain articulated requirements, including, e.g., that the loan has a term of not less than 20 years; that the project being financed has an affordability period of not less than 20 years after the project or assisted units are available for occupancy after having received the FRF investment; and, for loans expected to be eligible for the Low-Income Housing Tax Credit (LIHTC), the project owner must agree (i) as a condition for accepting such loan, to waive any right to request a “qualified contract,”⁹ and (ii) to repay any loaned funds at the time the project becomes non-compliant for certain reasons.

The updated FAQ provides that eligible loans may be considered to be expended at the point of disbursement to the borrower, and repayments on such loans are not subject to program income rules. Loan modifications are permitted if the modifications do not result in repayment of all or substantially all funds to the lender prior to the end of the affordability period.

Replacement or placement of utility poles. New FAQ #6.17¹⁰ provides that the replacement or placement of utility poles is an eligible expenditure under the water, sewer, and broadband infrastructure eligible use category “when it is directly related to or part” of an otherwise eligible FRF infrastructure project, e.g., an eligible broadband infrastructure Rule. A project with the sole purpose to pay for the replacement or placement of utility poles, on the other hand, is not an eligible expenditure.

Buy America Preference requirements. New FAQ #6.18¹¹ provides that awards made under the FRF program are not subject to the “Buy America Preference” requirements of the Build America, Buy America Act, Section 70914. Similarly, new FAQ #6.19¹² provides that infrastructure projects funded **solely** with FRF award funds are not subject to the Buy America Preference requirements.

FAQ #6.19 also provides, however, that recipients may be subject to the Buy America Preference requirements when FRF funds are used on an infrastructure project in conjunction with funds from other federal programs that do require compliance with the Buy America Preference requirements. The FAQ encourages recipients to consult with the other awarding federal agency or agencies regarding the applicability of the Buy America Preference requirements.

⁸ *Id.* at 35.

⁹ As defined at 42 U.S.C. § 42(h)(6)(F). *Id.*

¹⁰ *Id.* at 42–43.

¹¹ *Id.* at 43.

¹² *Id.*

Applicability of NHPA § 106. New FAQ #6.20¹³ provides that Section 106 of the National Historic Preservation Act (NHPA) does not apply to Treasury’s administration of FRF funds. The FAQ provides that projects supported with FRF funds may be subject to Section 106, however, if they involve participation from other federal agencies, including, e.g., funding from other federal financial assistance programs, or are subject to receipt of approvals from other federal agencies.

Compliance and reporting requirements for subrecipients and beneficiaries. New FAQ #13.13¹⁴ points recipients to Treasury’s Compliance and Reporting Guidance¹⁵ and states that subrecipients are required to comply with all restrictions applicable to recipients, including audit requirements under the Single Audit Act. Beneficiaries, on the other hand, are not subject to these requirements. The FAQ provides that subrecipients receiving subawards of \$50,000 or more and certain beneficiaries that receive direct payments of \$50,000 or more in FRF funds are required to report detailed information in Treasury’s reporting portal.¹⁶

Reporting subrecipient information under the revenue loss eligible use category. New FAQ #13.14¹⁷ provides that recipients do not need to report subrecipient information for expenditures made under the revenue loss eligible use category,¹⁸ as Treasury’s interpretation is that a recipient’s use of revenue loss funds does not give rise to a subrecipient relationship.

Application of Uniform Guidance to revenue loss funds. New FAQ #13.15¹⁹ provides that Subparts A, B, C, and F of the Uniform Guidance, 2 C.F.R. Part 200, apply to expenditures made under the revenue loss eligible use category. The FAQ provides, however, that only a subset of the requirements in Subpart D and E apply to such uses of funds. The FAQ provides a thorough listing of the Uniform Guidance sections that do apply.

Use and disposition requirements for purchased assets. New FAQ #13.16²⁰ notes that FRF funds may be used to acquire various kinds of real and personal property. The FAQ provides that, except for property, supplies, or equipment acquired using revenue loss funds, recipients must follow the applicable provisions of the Uniform Guidance regarding property standards.

¹³ *Id.*

¹⁴ *Id.* at 52–53.

¹⁵ Linked [here](#).

¹⁶ FAQs at 53 (citing Treasury’s Compliance and Reporting Guidance at p. 21).

¹⁷ *Id.*

¹⁸ These expenditures are entered in Treasury’s reporting portal under Expenditure Category Group 6, “Revenue Replacement.” *Id.*

¹⁹ *Id.* at 53–55.

²⁰ *Id.* at 55–57.

The FAQ provides that during the period of performance, a recipient may use property, supplies, or equipment purchased or improved with SLFRF funds for a purpose other than the purpose for which it was purchased or improved, so long as such other purpose is also consistent with the eligible use requirements.

If a recipient changes the use of an asset to an ineligible use or sells the asset prior to the end of the period of performance, the FAQ provides that the recipient must follow the Uniform Guidance's disposition procedures. Similarly, if after the period of performance, an asset's use shifts outside the parameters of an eligible use category's eligible purposes (as set forth in a detailed table in the FAQ), recipients and subrecipients must follow the Uniform Guidance's disposition procedures.²¹

"Obligation" / "similar transactions that require payment". For purposes of the December 31, 2026 deadline to obligate funds, the Final Rule defines "obligation" to mean "an order placed for property and services and entering into contracts, subawards, and *similar transactions that require payment*."²²

New FAQ #13.17²³ provides that recipients may "obligate" funds through means other than contracts or subawards, including payroll costs. The FAQ provides that in these circumstances, recipients must follow state or local law and their own established practices and policies regarding when they are considered to have incurred an obligation and that govern those obligations are documented.

CONCLUSION

Please let us know if you have any questions regarding the topics discussed in this memorandum, or if you would like our assistance in analyzing the potential eligibility of proposed expenditures of FRF funds.

If you have any questions or would like further information on the topics raised in this report, please do not hesitate to contact Ed Clay Goodman (egoodman@hobbsstrauss.com or 503-242-1745).

²¹ The FAQ requires that recipients be able to substantiate their determinations on whether the use of an asset is authorized and to maintain a record of that determination in accordance with the financial assistance agreement associated with their award. *Id.* at 57.

²² *Id.* (citing 31 C.F.R. § 35.3) (emphasis added).

²³ *Id.*