December 20, 2023

Submitted via regulations.gov
Office of Recovery Programs
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Coronavirus State and Local Fiscal Recovery Funds Obligation Interim Final Rule Comments TREAS-DO-2023-0013-0001

Dear Ms. Milano:

On behalf of the nation's counties, cities and government finance officers, we appreciate the opportunity to provide comments in response to the Interim Final Rule (IFR) to amend the definition of "obligation" (Obligation IFR) set forth in the U.S. Treasury Department's (Treasury) regulations with respect to the Coronavirus State and Local Fiscal Recovery Fund (SLFRF) established under the American Rescue Plan Act (ARPA) of 2021.

Collectively, our organizations represent the nation's 3,069 counties, 19,000 cities, towns and villages and more than 22,000 government finance officials. The Government Finance Officers (GFOA), National Association of Counties (NACo), and National League of Cities (NLC) (The Coalition) work to support our members when it comes to the implementation of federal legislation and programs. Since the release of the Obligation IFR, our members have been extremely interested in providing feedback to Treasury about the impacts this new regulation would have on our communities and residents.

Since the enactment of ARPA and Treasury's subsequent January 2022 Final Rule, local governments have been on the frontlines of investing these critical dollars in programs and services to not only address the impacts of the COVID-19 pandemic but the other activities that help our residents and communities achieve health and thriving lives. Even after the Final Rule was published, counties across the country took great care to incorporate extensive community input into Recovery Plans before making any investments with SLFRF funds. Local governments have used feedback from town hall sessions, community briefings, engagement surveys, meetings with community partners, and public comment periods to help inform the investments they are making with these crucial federal funds. This substantial undertaking has also meant that SLFRF prime recipients have been acutely concerned over the timing and distribution of these funds.

Local budget cycles are most often dictated by state law and are not uniform across the country, whether it be the length or timing of the budget cycle. About 95 percent of counties' budgets and 24 percent of cities' budgets are on an annual basis. Another 38 percent of counties' budget and 54 percent of cities' budget on a July 1-June 30 cycle and would be limited from authorizing the expenditure of funds beyond July 1, 2025, nearly 1.5 years before the ARPA SLFRF expenditure deadline.

Similarly, local governments have processes and procedures for annual operating budgeting cycles, paired with annual reconciliation for spending and an annual audit window that was somewhat disrupted by different timing and sequences for reconciliation of financial information to Treasury. For example, counties and cities across the country have reported that they emphasized the importance of flexibility in eligible uses and the difficulty small jurisdictions face in obligation and investing funds in a short timeframe.

Fundamentally, the resolution we have consistently requested from Treasury has not been addressed by this IFR. As direct recipients of SLFRF, our members are working to ensure effective spending of the ARPA funds to achieve legislative intent. However, establishing the final "expenditure" deadline for the spending of ARPA funds two years after the "obligation" deadline presents a unique challenge for prime recipients. Local governments' policy objectives of spending in an operating budget window of one year cannot be reconciled with a two-year spend window. Offering prime recipients workable flexibility would allow them to spend accordingly and with an impact on their communities.

The differences in timing between local government administration and Treasury's general administration of the program – both in timing of rule development as well as in reporting and compliance sequencing – have proved difficult for the administration of the SLFRF. When the Obligation IFR was introduced, the concept of timing was an especially poignant challenge for our members. Direct recipients who planned to invest SLFRF funds in government services between the obligation deadline of December 31, 2024, and the spending deadline of December 31, 2026, are frustrated with the timing of this IFR, as many have prepared the processes needed to close out ARPA in their communities. Introducing such a comprehensive shift of local ARPA administration because of this IFR causes a significant obstacle in closeout compliance and guidance.

In The Coalition's comments sent to Treasury's Office of Recovery Programs in September 2023, along with state and local industry partners, we requested more specific guidance on the definition of "obligation." Many state and local governments have various policies and procedures that determine when a government has obligated funds. We suggested that one example of an obligation could include "a recipient's internal memorandum of understanding or directive that would be executed prior to December 31, 2024, between departments to implement ARPA-funded programs through December 31, 2026." We note that in the Obligation IFR, Treasury seems to try to provide more specific guidance but does not create greater flexibility for governments that do not have their own policies. Worse, it further restricts those governments that have been following local practices and policies that were already in place.

In addition to the comments above, after consultation with thousands of SLFRF direct recipients, The Coalition has the following feedback on the Obligation IFR as currently written:

<u>Advantages/Benefits of the Obligation IFR</u>

1. GFOA, NACo, and NLC appreciate Treasury's attention to the complexities presented in operationally addressing program-funded positions. However, many programs established to address ARPA programs require administration of those programs throughout the covered period. The IFR addresses these challenges in flexibility by clarifying that subrecipients are not subject to

subrecipient monitoring. Likewise, we appreciate clarification with respect to payroll costs for compliance, monitoring, oversight, reporting, and auditing incurred and spent between 12/31/2024 and 12/31/2026.

Disadvantages/Concerns with the Obligation IFR:

1. **Definition of Cost Incurred:** The primary disadvantage to prime recipients is that the Obligation IFR does not revise the rule to define "costs incurred" by reference to recipient appropriation, budget, or allocation processes. This means that direct recipients may never be able to satisfy the definition of obligation as it relates to SLFRF dollars, despite following state or local law, or their own policies. Prior to the issuance of the Obligation IFR, the projects were satisfied, and the funding was considered obligated. Under the proposed Obligation IFR, circumstances of funding due to the new definition of "obligation" is uncertain. FAQ #13.17 of Treasury's own Final Rule: Frequently Asked Questions notes:

   > *"Treasury recognizes that recipients may obligate funds through means other than contracts or subawards…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 how those obligations are documented. For example, a recipient may have incurred an obligation even though the recipient and its employee may not have entered in an employment contract.*"

   The new guidance effectively renders FAQ #13.17 void. Many direct recipients have referred to FAQ #13.17 and utilized state and local laws and policies to determine whether they have incurred an obligation. Thus, under the new Obligation IFR, local governments are no longer in compliance despite their true intent of complying with Treasury's original guidance. Now, to comply with the proposed IFR, local governments will be forced to backtrack their original processes and follow Treasury's more limiting definition.

2. **Payroll and Personnel Costs:** For payroll/personnel costs, it is problematic that the Obligation IFR does not allow for program/project support staff funded by SLFRF dollars to be treated similarly to staff who fall under the revised definition of assisting in meeting requirements under federal law or regulation or a provision of the SLFRF award terms and conditions. Specifically, the clause "when work was performed" is especially concerning and limiting for local governments**.** As currently written, the Obligation IFR would prohibit local governments from continuing their efforts to mitigate the negative impacts of the COVID-19 pandemic on their communities. The January 2022 Final Rule allowed cities and counties to obligate funds by December 31, 2024, and expend those funds by December 31, 2026, for Government Employment and Rehiring Public Sector Staff. Numerous cities and counties utilize the second option (to increase full-time equivalent employees up to 7.5 percent) to provide additional support to their communities. Those positions include administrative staff across three departments to administer the SLFRF programs, sheriff's office deputies, deputy constables, clerks for justices of the peace, and assistant criminal district attorneys.

   Since the obligation IFR prohibits cities and counties from changing policies adopted before March 2021, local governments will not be able to fund the positions authorized under SLFRF. Numerous cities and counties obligate personnel costs when the work is performed. The obligation IFR will not allow them to obligate personnel costs. Thus, local governments will be forced to lay off program/project support staff before the December 31, 2024, deadline since they will fail to meet the definition of obligation for any work performed in 2025 and 2026**.**

To address this issue, Treasury should consider allowing for the pre-obligation of these payroll costs or creating a formula like what was done for general revenue loss, which would address any misconceptions about different methodologies being used to calculate pre-obligation of salaries. Furthermore, local governments should be granted the ability to obligate funds through direct action by the governing body to authorize positions and funds for those positions through December 31, 2026.

3. **Discrepancies between direct recipients and subrecipients:** The IFR creates a disparity between direct recipients and subrecipients, as subrecipients are given far greater flexibility in meeting the obligation deadline, whereas direct recipients are hindered in the use of funds. For example, as discussed in the second bullet point above, subrecipients do not face the same constraints for paying program staff that direct recipients do for work after December 31, 2024.

4. **Deadline for expenditure estimates:** Under the IFR, recipients are required to submit expenditure estimates to Treasury by April 30, 2024. This deadline for expenditure estimates creates a significant hurdle in recipients being able to utilize the advantage in the amendment to the definition of obligation announced in the Obligation IFR, articulated above. The requirement to estimate the amount of SLFRF funds to cover some administrative and legal requirements after the obligation deadline has passed must be submitted to Treasury by April 2024. This leaves insufficient time for fund recipients to calculate accurate estimates and is exacerbated by the lack of experience and training in providing these. In addition, due to the changing guidance and short timeframe given to direct recipients to react and adjust based on the Obligation IFR, and the understanding that more changes may have to be made after the Final Rule comes out, we would appreciate more time for recipients to respond to the April 2024 deadline for cost estimates.

Considering these first-priority disadvantages, our members have commented on other points of confusion in the new IFR. For example, in contract management, which is a major consideration for capital projects using SLFRF funds, there is still some confusion about contingency funds to prepare for the 2024-2026 window. Are contingency funds considered obligated? Although it was described in several preparation webinars that "obligation" does not include change orders that were not included in the original contract, the question of how to account for contingency funds was never answered.

In general, many of our members have concluded that the best corrective course of action resulting from this IFR is to assign their spending to 6.1, Government Services. However, if local governments decide to redirect spending towards 6.1, Government Services, this will inadvertently diminish the narrative about how local governments actually invested SLFRF funds to spur economic recovery, revitalize America's infrastructure and protect our nation's public health and safety.

Thank you again for the opportunity to comment on Treasury's Obligation IFR. We stand ready to provide any additional information you may require and look forward to working with you on this matter. Please reach out to Emily Brock at ebrock@gfoa.org, Eryn Hurley at ehurley@naco.org, and Mike Gleeson at gleeson@nlc.org if you have any questions.

Sincerely,

Chris Morrill
Executive Director/CEO
Government Finance Officers Association

Matthew D. Chase
CEO/Executive Director
National Association of Counties

Clarence E. Anthony
CEO and Executive Director
National League of Cities