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VIA ELECTRONIC MAIL

MEMORANDUM NO. 09A-2021

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TO: Tribal Clients

FROM: Sonosky, Chambers, Sachse, Miller & Monkman, LLP

RE: Use of Coronavirus State and Local Fiscal Recovery Funds

The American Rescue Plan Act (ARPA) established the Coronavirus State and Local Fiscal Recovery Funds to be administered by the Department of Treasury.¹ The State Fiscal Recovery Fund contains a \$20 billion set aside for federally-recognized Tribal governments. This Fund is similar although not identical to the Coronavirus Relief Fund established in last year's CARES Act. Importantly, ARPA expands the permissible uses for these funds that are broader than last year's requirements. Thus, with certain exceptions,² if the use was allowable under the CARES Act and earlier Treasury Guidance, it remains an eligible use under ARPA. We write to provide Tribal-specific guidance about the ARPA statute and the current Treasury guidance.

Treasury issued an Interim Final Rule on May 10, 2021, expanding the eligible uses listed in the ARPA statute.³ Treasury is seeking comments on its Interim Final Rule until July 16, 2021. If your Tribe is contemplating a specific use that is not covered by the provisions described below, or if you desire more clarification from Treasury on a contemplated use, we encourage you to

¹ See American Rescue Plan Act (ARPA), H.R. 1319, Pub. L. No. 117-2, Sec. 9901 (2021).

² The standard for eligibility of public health and safety payrolls has been updated and the new guidance clarifies that expenses related to the issuance of tax-anticipation notes are not an eligible use of funds.

³ The Treasury Department's Interim Final Rule was then published in the Federal Register on May 17, 2021. See <https://www.govinfo.gov/content/pkg/FR-2021-05-17/pdf/2021-10283.pdf>.

SONOSKY, CHAMBERS, SACHSE, MILLER & MONKMAN, LLP

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submit written comments.⁴ We cannot say for certain when a Final Rule will issue, but we anticipate it will be sometime next fall. Treasury also created an FAQ document to address frequently asked questions, and Treasury indicated it will continue updating this document from time to time.⁵

This is general guidance. There will be many unique and different situations presented as Tribes apply the complex COVID-19 funding rules to their individual projects. Please contact us if you are unsure about a particular situation. It is much easier and much less expensive to avoid a problem up front than to try to solve the problem after an audit or call from the Treasury Office of Inspector General. If cost is an issue, you should note that obtaining legal, accounting, or other compliance advice is an eligible use of ARPA funds.

A. ARPA Statutory Allowed Uses.

Congress provided the following four broad categories of allowable uses for Fiscal Recovery Funds:

- (A) to respond to the public health emergency with respect to the Coronavirus Disease 2019 (COVID–19) or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality;
- (B) to respond to workers performing essential work during the COVID–19 public health emergency by providing premium pay to eligible workers of the State, territory, or Tribal government that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work;
- (C) for the provision of government services to the extent of the reduction in revenue of such State, territory, or Tribal government due to the COVID–19 public health emergency relative to revenues collected in the most recent full fiscal year of the State, territory, or Tribal government prior to the emergency; or
- (D) to make necessary investments in water, sewer, or broadband infrastructure.

ARPA, § 9901(a) (adding a new Sec. 602(c)(1)). These funds may be used for costs incurred by December 31, 2024. *Id.* ARPA specifically allows transfer of these funds to a private nonprofit organization or a tribal organization to be used for the same statutory purposes. *Id.* (new Sec. 602(c)(3)). In Part C below, we elaborate upon the eligible uses for which Tribes may expend

⁴ Comments may be submitted here: <https://www.regulations.gov/commenton/TREAS-DO-2021-0008-0002>.

⁵ The Treasury FAQ document is available here: <https://home.treasury.gov/system/files/136/SLFRPFAQ.pdf> (last updated May 27, 2021).

ARPA Fiscal Recovery Funds.⁶

Note: ARPA provides that a tribal government may have to repay funds that are not spent for allowable uses. *See id.* (new Sec. 602(e) (“Any State, territory, or Tribal government that has failed to comply with subsection (c) *shall be required to repay to the Secretary* an amount equal to the amount of funds used in violation of such subsection”) (emphasis added).

Thus, it is important to take the time to make sure your planned expenditures comply with the statutory and Treasury guidance.

B. Tracking, Documentation and Compliance Issues.

As we noted previously, **it is critically important that Tribes carefully track and account for the expenditures of the ARPA Fiscal Recovery Funds.**

Tribes will have to report quarterly on these funds and may be subject to audit months or years down the road. Already, several Tribes have been subject to additional scrutiny from the Treasury Office of Inspector General for CARES Act expenditures. It is quite possible that current Tribal leadership or employees may have moved on by the time Treasury asks questions. It is critical that you have the documentation in place for an outsider to read and understand your justification for these expenditures, and Treasury requires this documentation to be retained for a period of five years after all funds have been expended or returned to Treasury, whichever is later. We also provide the following accounting and administrative suggestions:

1. Separate Accounts. We recommend Tribes establish a separate bank account or subaccount to separately account for the ARPA Fiscal Recovery Funds that are received and how those funds are spent. When charges are booked to the ARPA Fiscal Recovery Funds account, the documentation should identify in detail what the expenditure was for and why it was an eligible use.

2. Separately Track Other COVID-19 Funds. Tribes should also separately account for all the other special COVID-19 relief funds received from other federal agencies or sources as a result of ARPA, the supplemental FY 2021 Appropriations Act, and all other special COVID appropriations. You may receive additional COVID-related funds from the Bureau of Indian Affairs, Indian Health Service, the HHS Provider Relief Fund, HUD, the Agriculture Food Distribution program, the Administration on Aging Elders’ Nutrition Program, and Head Start, among other federal programs. You may receive funds from other Treasury-administered programs, such as the Homeowner Assistance Fund, the Emergency Rental Assistance Program, and the soon-to-be-opened Capital Projects Fund.

Each type of funds often carries its own distinct restrictions on use and timelines for

⁶ These statutory uses are elaborated upon in Treasury’s Interim Final Rule (31 CFR § 35.6(b)-(e)) (eligible uses), found on pages 26821-26823 of the May 17 Federal Register. Relevant definitions are set out at 31 CFR § 35.3, on pages 26819-26821. Additional guidance and explanation is included in the Supplementary Information section to the May 17th Federal Register.

expenditure, and most require some sort of direct or indirect link to the COVID-19 public health emergency. We recommend that you document the use of each type of COVID-19 funds separately and that you do not mix the various funds. It is important not to duplicate expenditures across different sources of funding.

3. Ensuring Compliance. Many Tribes are receiving large amounts of funds from the Fiscal Recovery Fund. These amounts come with additional obligations, such as the need for an annual audit. The Treasury guidance makes clear that the OMB Uniform Guidance, 2 C.F.R. Part 200, including the cost principles, applies to these funds.

Note: this is different than the CARES Act funds. Many sections of the Uniform Guidance were waived due to the compressed timeline to spend those funds. If your Tribe has not reviewed or updated its Financial Management or Procurement policies in quite some time, we recommend doing so before starting to make large expenditures of funds to make sure that they comply with the OMB Uniform Guidance. Thus, Tribes will need to follow the Part 200 Uniform Guidance and their own procurement rules when purchasing goods and services paid for with ARPA Fiscal Recovery Funds. See 2 CFR §§ 200.317-200.327 regarding general procurement standards. Failure to follow the Uniform Guidance and the applicable Tribal procurement policies may result in audit findings. We also recommend you obtain accounting and legal assistance to make sure you remain in compliance with all rules and regulations that apply. Some of this planning could take some time, so it will be important to make sure that any such planning is taken into consideration when determining whether a particular project or program will comply with the statutory timeframes.

C. Other Allowable Expenditures

Treasury's guidance expands upon the categories of eligible expenditures in the ARPA statute. In addition to the statutory categories and in "recognition of the disproportionate impacts of the COVID-19 pandemic on health outcomes" in Native American communities, the Treasury guidance provides that the following categories will be presumed to be "responding to the public health emergency" when provided by Tribal governments:

- Addressing health disparities and the social determinants of health;
- Building stronger neighborhoods and communities;
- Addressing educational disparities exacerbated by COVID-19; and
- Promoting healthy childhood environments.

Below, we elaborate on the categories of eligible uses in ARPA and the Treasury guidance. There are certain limitations on these uses in the current Treasury guidance. Within each of the categories stated below, Tribal governments have broad flexibility to decide how best to use these funds to meet the needs of their communities.

1. Public Health Expenses

This category of expenditures includes:

- COVID-19 related expenses of public hospitals, clinics, and similar facilities, such as for additional personal protect equipment, supplies, costs to renovate health facilities or open alternative care sites to keep COVID-19 patients and others separate or reduce the risk of transmission, or to enhance health care capacity.
- Expenses related to COVID-19 mitigation efforts, including contact tracing, genomic sequencing for variants, support for those in isolation or quarantine, support for vulnerable populations to access care, and enforcement of public health orders.
- Capital investments in public facilities to meet pandemic operational needs, such as ventilation improvements to hospitals and clinics or adaptations to public buildings.
- Medical expenses, including those for COVID-19 testing and vaccination, and for treatment of those with “long COVID.”
- Behavioral health care, including costs of fighting large increases in mental health issues exacerbated by the pandemic and social distancing, such as depression and anxiety, and substance abuse or misuse.
- Payroll and benefits expenditures for certain public health and safety staff, including public health, health care, public safety, human services, and similar employees whose services are devoted to mitigating or responding to the COVID-19 public health emergency, or for the portion of their time dedicated to COVID-19 purposes.
- Costs of public health communication efforts and increasing public health data systems.
- Costs for medical and epidemiological research related to COVID-19 and the efficacy of vaccines, long term impacts of the disease, etc.

Tribes should consider exhausting other resources that have narrower restrictions for these types of costs before spending the Fiscal Recovery Funds, such as funding received from the Indian Health Service specifically for COVID-19 testing and vaccination, from Health and Human Services (HHS) or CDC for additional healthcare costs due to COVID-19, from SAMHSA or HRSA to respond to increased mental health needs caused by COVID-19-related job losses and social distancing, etc.

The Treasury guidance suggests that for this category, Tribes should identify an effect of COVID-19 on public health, whether immediate or ones that may manifest over a period of months or years, and assess and document how the use would response or address that need. This justification can include using payments to address health pre-existing disparities that have been exacerbated by the pandemic and providing services to improve health incomes and build healthier environments.

2. Addressing Negative Economic Impacts

This category of expenditures includes:

- Addressing the negative harm done to workers, including those suffering from job losses or decreased work due to the pandemic. This may include job training to assist these workers in getting rehired, or unemployment costs.
- Economic support for households, including cash payments (*see below*), or direct or in-kind assistance for basic living essentials, such as food, housing, utilities, childcare, or for home repairs and weatherization. This may also include legal assistance to prevent eviction or homelessness, burial assistance, internet access or digital literacy training, or job training.
- Support for small businesses, non-profits, and industries that were hit especially hard by the pandemic, such as tourism, travel, and hospitality. This may include loans or grants to mitigate financial hardship caused by declining revenues or business closures, loans or grants for COVID-19 mitigation tactics, technical assistance for business planning, or safe reopening plans.
- Payroll, covered benefits and other costs associated with rehiring public sector (governmental) staff up to the pre-pandemic government staffing level.

Per capita payments are not allowed. We know many Tribes are interested in providing direct cash payments or additional financial assistance for their members. The Treasury guidance *does* allow for cash transfers to households, but the Tribe must still consider and document whether, and the extent to which, the household has experienced a negative economic impact from the pandemic and the payments must be reasonably proportional to the negative economic impact they are intended to address.

Instead, a Tribe making direct payments will need an application or information gathering process to verify how the household receiving ARPA funds was harmed by COVID-19 and that links the amount provided with that harm. In terms of amounts, the Treasury guidance suggests Tribes consider the per person amounts previously provided by the federal government in response to the COVID-19 crisis.

Specifically, the federal government provided three separate “stimulus” payments of \$1,200, \$600, and \$1,400, respectively, for a total of \$3,200 per person that satisfied certain income

thresholds. By way of example, the guidance notes that “a cash transfer program may focus on unemployed workers or low- and moderate-income families, which have faced disproportionate economic harms due to the pandemic.” Thus, a Tribal “assistance to households” program funded with Fiscal Recovery Funds should provide a means to document whether Tribal applicants were or are unemployed as a result of the pandemic or are a low- or moderate-income household negatively impacted by the pandemic. The guidance states that cash payments made that are grossly in excess of the federal stimulus amounts are not eligible and are subject to recoupment. The guidance also allows Tribes to provide survivor benefits to surviving family members of COVID-19 victims, or cash assistance to widows, widowers and dependents of eligible COVID-19 victims.

This cash assistance may be in addition to other assistance to households provided by the Tribe, such as those for food, housing, or childcare needs. According to recent IRS guidance, none of this financial assistance to Tribal members is taxable, nor does it need to be reported by the Tribal government.⁷

Overall, any use in this category must be designed to address an economic harm caused by or exacerbated by the COVID-19 pandemic. This includes considering the extent which there has been an economic harm, such as loss of earnings or revenue, due to the pandemic, and the extent to which the proposed use would address that harm.

3. Replacement of Lost Public Sector Revenue:

These funds may be used to cover expenses to continue providing government services in cases where the government suffered a reduction in revenue due to the pandemic. The Treasury guidance provides a formula for Tribes to calculate lost revenues—certain revenues may be taken into account (those considered “general revenue from own sources”) while others are excluded. A Tribe’s reduction in revenues is measured relative to the revenue collected during fiscal year 2019, the last full fiscal year prior to the pandemic. The other factor in calculating lost revenues is the average annual revenue growth over the three years prior to the pandemic. The Interim Rule proposes that a government may use a static 4.1% growth rate or the government’s actual average revenue growth over the three years prior to the pandemic, whichever is higher.

We recommend seeking guidance from an accountant or your in-house finance staff if you would intend to use ARPA funds for these purposes.

4. Expenses to Provide Premium Pay for “Essential Workers”:

The statute allows for “premium pay” for “essential workers,” but this is a limited benefit. Specifically, premium pay (or hazard pay) is defined as up to an increase of \$13 per hour, and not to exceed \$25,000 per eligible worker. This benefit is meant to be targeted at lower income

⁷ See Draft FAQs for Payments by Indian Tribal Governments to their Individual Members Under COVID-Relief Legislation and Notice of Tribal Consultation, *available at* <https://www.irs.gov/government-entities/indian-tribal-governments/draft-faqs-for-payments-by-indian-tribal-governments-to-their-individual-members-under-covid-relief-legislation-and-notice-of-tribal-consultation>.

workers. If the increase in hourly wage causes the worker's salary to exceed 150% of the greater of the State or county average wage, additional justification is required that shows how that pay is necessary to respond to the needs of these workers.

The benefit is targeted at those workers who have and will bear the greatest health risks because of the services they provide, including health care workers, education and childcare workers, transportation workers, sanitation workers, grocery and food production workers, social service and human services staff, and public health and safety workers. Tribes have the discretion to add additional types of workers to this list, so long as they are deemed critical to protect the health and well-being of their communities. Any additional categories of workers deemed critical by a Tribe should be well documented. The Treasury guidance defines "essential work" as "work involving regular in-person interactions or regular physical handling of items that were also handled by others." Tribes must also be mindful of other defined terms in the Treasury guidance such as "Eligible employer," and "Eligible Workers." See 31 CFR 35.3 (definitions). Across-the-board bonuses are not allowed, nor can premium pay be provided for those that teleworked from home.

Tribes are allowed to use the funds to offer *retrospective* premium pay, which means increases in pay for periods already worked since January 31, 2020, when the public health emergency began. This is in recognition that many essential workers have not yet received additional compensation for the hazardous work they performed.

5. Water, Sewer and Broadband Infrastructure.

ARPA says water, sewer, and broadband infrastructure are allowable expenses. The Treasury guidance clarifies that this infrastructure should be for community facilities necessary to respond to COVID-19 and that general infrastructure improvements are not allowable. And, unlike the CARES Act restrictions, eligible infrastructure projects may continue past the December 31, 2024 date so long as all the funds for that work have been obligated by that date and the project is completed by December 31, 2026.

This category includes a broad range of projects that improve access to clean drinking water, improve wastewater and stormwater infrastructure, and provide access to high-quality broadband services in areas where these services are unlikely to be supported by private sources. This includes building or upgrading facilities and transmission, distribution, and storage systems, and replacing lead service lines. Treasury will seek information on workforce plans and encourage governments conducting these projects to use strong labor standards. There will be additional reporting requirements and separate guidance for these projects at a later time. As to water and sewer projects, the Treasury guidance suggests alignment with standards provided by existing EPA programs and efforts to address climate change. As to broadband projects, the expectation in most areas is that upon completion, the service should reliably meet or exceed symmetrical upload and download speeds of 100 Mbps, to allow for use of internet for schooling, healthcare, and business needs.

6. Addressing Health Disparities, Access to Resources that Improve Health Outcomes and Services to Address the Social Determinants of Health.

This category of eligible uses of funds for Tribal governments includes funding community health workers or public benefits navigators to help community members access health services and connect residents with health care resources and public assistance programs. This includes remediation of environmental hazards, such as lead paint or other lead hazards, and housing services to support healthy living environments. These funds may be used for evidence-based community violence intervention programs to prevent violence and mitigate the increased levels of violence caused by the pandemic.

7. Building Stronger Neighborhoods and Communities.

This category of eligible uses of funds for Tribal governments includes supportive housing and other services for individuals experiencing homelessness to improve access to stable, affordable housing; development of affordable housing to increase supply; and housing vouchers, counseling, and navigation assistance to connect low-income residents to areas with greater economic opportunities.

8. Addressing Educational Disparities Exacerbated by COVID-19.

This category of eligible uses of funds for Tribal governments includes expanding or enhancing early learning services, including pre-K and Head Start programs; assistance to high poverty school districts; and educational services, summer school, afterschool, or tutoring for at-risk students and to provide extended learning and enrichment programs; and services to address the social, emotional and mental health needs of students.

9. Promoting Healthy Childhood Environments.

This category of eligible uses of funds for Tribal governments includes new or expanded childcare programs; home visiting programs for health, parent educators, and social services professionals to interact with pregnant women or families with young children and offer support with navigating resources, health needs and child development; and enhanced services for child welfare-involved families and foster youth.

10. Fraud, Scams, and Con Artists.

Last, a strong word of caution is warranted. The Fiscal Recovery Fund and the historic investment in Indian Country that Congress made in ARPA presents enormous opportunity for Tribes. But frauders, scammers, and illegitimate businesses will also see this as an opportunity to take advantage. We have already seen multiple instances where Tribes were defrauded of CARES Act funding through a variety of schemes and scams.

Remember: if it sounds too good to be true, it probably is. Exercise caution and due diligence before making purchases from vendors you do not know. Follow your procurement rules when purchasing goods or services using Fiscal Recovery Funds. Check references for vendors

and do not send funds until you are certain that the vendor is genuine. Make sure that the Tribe is protected in case of fraud or theft by vendors and—regrettably—even your own employees. To the extent possible, consider obtaining crime/fraud insurance, fidelity bonding, and employee dishonesty insurance.

Tribes are likely to receive proposals for investing ARPA funds until they are spent. Please consider talking with your banker about ways to protect these funds, including how to safely invest the funds, and how to implement fiscally prudent payment, accounting, and financial management policies.

We know of large and small Tribes that lost CARES Act funds to scams and frauds, and at the end of the day the Tribe is still responsible for these funds. Please be careful to ensure these funds go to the communities they were intended to serve.

D. Conclusion.

This memorandum is meant to provide general guidance on the eligible uses of the ARPA Fiscal Recovery Funds. However, it does not and could not address every individual project or idea. Overall, Tribes have the discretion to choose how to spend these funds in the way that will best serve the local needs of their communities in responding to the COVID-19 pandemic. That said, these choices will be scrutinized through quarterly reporting requirements, audits, and perhaps by the Office of Inspector General.

The threat of recoupment is real. Please let us know how we can assist you as you create new programs, write policies, or develop justifications for your Tribal choices.

Sincerely,

SONOSKY, CHAMBERS, SACHSE,
MILLER & MONKMAN, LLP

/s/ Rebecca A. Patterson

By: Rebecca A. Patterson
Richard D. Monkman