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THE AMERICAN RESCUE PLAN ACT: GUIDANCE FOR WISCONSIN COUNTIES IN IMPLEMENTATION OF THE LOCAL FISCAL RECOVERY FUND

June 15, 2021

President Biden signed the American Rescue Plan Act of 2021 ("ARPA") into law on March 11, 2021. ARPA is a $1.9 trillion federal spending package intended to provide economic and other relief related to the Covid-19 pandemic.

The Wisconsin Counties Association and its general counsel, von Briesen & Roper, s.c., have received many questions surrounding ARPA, interpretation of its terms, and its impact on counties. Below, please find comprehensive guidance for counties regarding the implementation of the Local Fiscal Recovery Fund, as prepared by WCA general counsel.

County officials are encouraged to review this guidance carefully with corporation counsel to ensure appropriate interpretation and otherwise assess the impact of any local rules, policies and regulations.

I. GENERAL OVERVIEW

The American Recovery Plan Act ("ARPA") appropriates a total of $362.0 billion in Coronavirus State and Local Fiscal Recovery funding, which will provide direct payments to state, local, territorial, and tribal governments. The funding is divided into four separate funds: the State Fiscal Recovery Fund ("SFRF"), the Local Fiscal Recovery Fund ("LFRF"), the Capital Projects Fund, and the Local Assistance and Tribal Consistency Fund. Generally, LFRF applies to the counties, whereas SFRF applies to state governments.

$130.2 billion is allocated for the LFRF to make payments to units of local government.[1] Funds will be available through December 31, 2024, and may cover costs from March 3, 2021, through December 24, 2024.

[1] Information on county-level allocations can be found here: https://www.naco.org/resources/featured/state-and-local-coronavirus-fiscal-recovery-funds#allocations

Key Dates

1. The Treasury portal is currently open for counties to register and request Recovery Funds
2. July 9, 2021: Deadline to submit comments on U.S. Treasury's Interim Final Rule
3. August 31, 2021: Deadline for counties to submit first Interim Report to U.S. Treasury
4. October 31, 2021: Deadline for counties to submit first Quarterly Project and Expenditure Report
5. December 31, 2024: Funds must be incurred and obligated
6. December 31, 2026: Funds must be expended to cover obligations and all work must be completed

FRF payments are to be provided in two tranches with the initial payment of 50% of the total allocation to be made within 60 days of enactment (March 11, 2021) and the remaining 50% of the allocation to be paid at least 12 months after the first payment.

On May 10, 2021, the United States Department of the Treasury published an Interim Final Rule ("Rule") to implement the FRF provisions of ARPA.

Generally, under the Rule, the FRF payments may only be spent for certain categories of eligible uses: (1) public health and economic impacts; (2) premium pay; (3) revenue loss; and (4) investments in infrastructure. The Rule also establishes various timelines and restrictions for the use of FRF payments. This Guidance will (a) provide an overview of the various eligible uses, timelines, and restrictions, focusing primarily on LFRF payments, which apply to county government; and (b) discuss state law considerations in county expenditure of LFRF funds.

Eligible Use of Funds

Under the Rule, the FRF payments may be used to cover costs incurred prior to December 31, 2024, for the following purposes:

1. ***Public Health and Economic Impacts:*** 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;

2. ***Premium Pay for Essential Workers:*** to respond to workers performing essential work during the COVID–19 public health emergency by providing **premium pay** to eligible workers of the metropolitan city, nonentitlement unit of local government, or county that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work;

3. ***Revenue Replacement for Government Services***: to replace **revenues lost** as a result of the public health emergency caused by the coronavirus pandemic, for the purposes of providing **government services**;

4. ***Investments in Infrastructure:*** to make necessary investments in water, sewer, or broadband **infrastructure**.

Restrictions and Limitations on the Use of Funds Regardless of Category

1. FRFs may not be used for deposit into any pension funds, except with regard to premium pay eligible uses which are part of payroll contributions.

2. SFRFs may not be used to either directly or indirectly offset a reduction in net tax revenue resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax or delays the imposition of any tax or tax increase.

3. FRFs are subject to pre-existing limitations provided in other Federal statutes and regulations. For example, FRFs may not be used as a non-Federal match for other Federal programs whose statute or regulations bar the use of Federal funds to meet matching requirements; payments from the FRFs may not be used to satisfy the State share of Medicaid.

Notably, the ARPA does not explicitly prohibit the use of LFRF funds (as opposed to SFRF funds) to offset a reduction in net tax revenue. However, the accountability and audit features associated with implementation of the ARPA program suggest counties should proceed with caution when considering implementation of a general tax reduction program. Concerns regarding state law levy limits also exist.

Accountability and Audit Features

i. Reporting Requirements

During the covered period, recipients must provide periodic reports to the Secretary providing detailed accounting of the uses of funds, all modifications to a State or Territory's tax revenue sources, and other information as required.

1. Interim Reports

a. Counties are required to submit one Interim Report, which will include the county's expenditures by category at the summary level
b. The Interim Report will be similar to that required under the CARES Act Coronavirus Relief Fund
c. The Interim Report will cover spending from the date the county receives LFRFs to July 31, 2021
d. The Interim Report is due by August 31, 2021
e. Treasury will release additional guidance on this report in the coming weeks

2. Quarterly Project and Expenditure Reports

a. Counties are required to submit quarterly project and expenditure reports, including financial data, information on contracts and subawards over $50,000, data elements related to specific eligible uses and other information regarding utilization of funds.

b. These reports will be similar to those associated with the CARES Act Coronavirus Relief Fund
c. The first report will cover spending from the date the county receives Funds to September 30, 2021
d. The first report is due by October 31, 2021

3. Recovery Plan Performance Reports

a. Counties with a population that exceed 250,000 residents are required to submit an Annual Recovery Plan Performance Report, including descriptions of projects funded and information on performance indicators and objectives of each award
b. The initial recovery plan will cover activity from the date the county receives Recovery Funds to July 31, 2021
c. Local governments (including counties) with less than 250,000 residents are not required to develop a Recovery Plan Performance Report
d. Recovery performance plan is due by August 31, 2021

In addition to reporting required on eligible uses, in each year of the reporting period, each State and territory (but not counties) will report to Treasury the following items:

1. Actual net tax revenue for the reporting year;
2. Each revenue-reducing change made to date during the covered period and the in-year value of each change;
3. Each revenue-raising change made to date during the covered period and the in-year value of each change;
4. Each covered spending cut made to date during the covered period, the in-year value of each cut, and documentation demonstrating that each spending cut is covered as prescribed under the Rule.

ii. Recoupment

Failure to comply with eligible uses shall require repayment to the Secretary in an amount equal to the amount of funds used in violation of eligible uses. Neither the Rule nor the Act identify any additional penalties or fines for failure to comply with eligible uses of FRFs besides recoupment.

Identification and Notice of Violations

Failure to comply with the restrictions on use will be identified based on reporting provided by the recipient. If the Treasury identifies a violation, it will provide written notice to the recipient along with an explanation of such amounts.

Request for Reconsideration

1. The recipient must submit a written request within 60 calendar days of receipt of notice of violation.
    a. The request must include an explanation of why the recipient believes that the finding of a violation or recoupable amount identified in the notice of recoupment should be reconsidered and identify all supporting reasons for the request.

2. Within 60 calendar days of receipt of the recipient's request for reconsideration, the recipient will be notified of the Secretary's decision to affirm, withdraw, or modify the notice of recoupment.

    a. The notification will include an explanation of the decision, including responses to the recipient's supporting reasons and consideration of additional information provided.

iii. Repayment

Any amounts subject to recoupment must be repaid within 120 calendar days of receipt of any final notice of recoupment or, if the recipient has not requested reconsideration, within 120 calendar days of the initial notice provided by the Secretary.

II. BREAKDOWN OF SPECIFIC ELIGIBLE USES OF SFRF/LFRF PAYMENTS

A. ELIGIBLE USE CATEGORY ONE: Public Health and Economic Impacts

As a general matter, under the Rule, to determine whether a program or service is considered to have addressed a public health and economic impact, the recipient (e.g., a county) should consider whether and how the proposed use would respond to the COVID-19 public health emergency.

As a part of this analysis, the recipient must:

1. Identify a need or negative impact of the COVID-19 public health emergency; and
2. Identify how the program, service or other intervention addresses the identified need or impact.

The Department of Treasury encourages—but does not mandate— uses of funds for low-income workers and communities and people of color.

As the analysis for a public health impact and an economic impact differ under the Rule, this outline will cover these concepts separately. Prior to committing payments, best practice dictates that the recipient specifically document how the usage complies with the various factors set forth for each eligible use, to avoid recoupment and maximize compliance.

i. Public Health Impacts

Prior to committing funds, recipients are advised to identify and document a specific effect of COVID-19 on public health, and assess how the use would respond to or address the identified need. Recipients may include immediate and long-term effects of COVID-19 in making this assessment.

The Rule provides several examples of uses that would comply with the public health impact requirements. This list is non-exhaustive, and other similar uses may be an option for counties and local government:

1. COVID-19 Mitigation and Prevention

a. A broad range of services and programming can be used to contain the spread of the virus, including:

   i. Vaccination programs, testing, quarantine programs, PPE purchases, enforcement of public health orders, and public communication efforts.

   ii. Support for prevention, mitigation and other services in congregate living facilities – includes nursing homes, incarceration setting, homeless shelters, and other group living facilities and settings like schools, sense worksites, incarceration settings, and in other public facilities.

   iii. Ventilation improvements in congregate settings, health care settings, or other key locations.

   iv. Public health surveillance, such as monitoring case trends, genomic sequencing for variants, enforcement of public health orders, public communication efforts, enhancement to health care capacity, including through alternative care facilities, purchases of personal protective equipment.

   v. Capital investments in public facilities to meet pandemic operational needs, such as physical plant improvements to public hospitals and health clinics or adaptations to public buildings to implement COVID-19 mitigation tactics.

2. Medical Expenses

a. COVID-19 linked medical expenses – including both near and long-term needs.

b. Care and services to address new COVID-19 variants and potentially serious symptoms like shortness of breath, multi-organ impacts, or post-intensive care syndrome.

3. Behavioral Health Care

a. To meet behavioral health needs exacerbated by the pandemic and respond to other public health impacts.

b. Includes mental health treatment, substance misuse treatment, other behavioral health services, hotlines or warmlines, crisis intervention, overdose prevention, infectious diseases prevention, and services outreach to promote access to physical or behavioral health, primary care and preventative medicine.

4. Public Health and Safety Staff Covered Payroll and Benefits

a. Includes payroll and covered benefits expense (leave, insurance, pension, worker comp, FICA taxes) for public safety, public health, health care, human services, and similar employees, to the extent that their services are devoted to mitigating

the COVID-19 public health emergency.[2]

b. Must be pro-rated to the portion of the employee's time that is dedicated to responding to the COVID-19 public health emergency.

c. For administrative convenience, the recipient may consider public health and safety employees to be entirely devoted to mitigating or responding to the COVID-19 public health emergency, and therefore fully covered, if the employee, or his or her operating unit or division, is primarily dedicated to responding to the COVID-19 public health emergency.

d. Recipients may consider other presumptions for assessing the extent to which an employee, division, or operating unit is engaged in activities that respond to the COVID-19 public health emergency, provided that the recipient reassesses periodically and maintains records to support its assessment, such as payroll records, attestations from supervisors or staff, or regular work product or correspondence demonstrating work on the COVID-19 response.

e. Recipients need not routinely track staff hours.

5. Expenses to Improve the Design and Execution of Health and Public Health Programs

a. Recipients may use FRFs to engage in planning and analysis in order to improve programs addressing the COVID-19 pandemic.
b. Includes use of targeted consumer outreach, improvements to data or technology infrastructure, impact evaluations, and data analysis.

6. Expenses to Address Disparities in Public Health Outcomes.

a. The COVID-19 pandemic has had a disproportionate impact on health outcomes in low-income and Native American communities.
b. A broad range of services and programs will be presumed to be responding to the public health emergency when provided in these communities.
c. Treasury will presume that certain types of services, set forth below, are eligible uses when provided in a Qualified Census Tract (QCT).[3]

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[2] In general, if an employee's wages and salaries are an eligible use of FRF, recipients may treat the employee's covered benefits as an eligible use of FRF, including costs of all types of leave (vacation, family-related, sick, military, bereavement, sabbatical, jury duty), employee insurance (health, life, dental, vision), retirement (pensions, 401(k)), unemployment benefit plans (federal and state), workers compensation insurance, and Federal Insurance Contributions Act (FICA) taxes (which includes Social Security and Medicare taxes).

[3] U.S. Department of Housing and Urban Development (HUD), Qualified Census Tracts and Difficult Development Areas, https://www.huduser.gov/portal/datasets/qct.html (last visited Apr. 26, 2021); U.S. Department of the Interior, Bureau of Indian Affairs, Indian Lands of Federally Recognized Tribes of the United States (June 2016), https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/webteam/pdf/idc1-028635.pdf (last visited Apr. 26, 2021).

d. Recipients may also provide these services to other populations, households, or geographic areas that are disproportionately impacted by the pandemic.
e. In identifying these disproportionately-impacted communities, recipients should be able to support their determination that the pandemic resulted in disproportionate public health or economic outcomes to the specific populations, households, or geographic areas to be served.
f. Recipients may use payments from FRFs to facilitate access to resources that improve health outcomes, including services that connect residents with health care resources and public assistance programs and build healthier environments, such as:
    i. Funding community health workers to help community members access health services to address the social determinants of health;
    ii. Funding public benefits navigators to assist community members with navigating and applying for available Federal, State, and local public benefits or services;
    iii. Housing services to support healthy living environments and neighborhoods conducive to mental and physical wellness;
    iv. Remediation of lead paint or other lead hazards to reduce risk of elevated blood lead levels among children; and
    v. Evidence-based community violence intervention programs to prevent violence and mitigate the increase in violence during the pandemic.

ii. Economic Impacts

In order to be considered an economic impact, the Rule requires that the usage be designed to address an economic harm resulting from or exacerbated by the public health emergency. Where there is a negative economic impact resulting from the public health emergency, local governments have broad latitude to choose whether and how to use the FRFs to respond to and address the negative economic impact.

In order to qualify as an economic impact usage, the recipient must address and document the following:

1. Whether and the extent to which, there has been an economic harm, such as loss of earnings or revenue, that resulted from the COVID-19 public health emergency and whether, and the extent to which, the use would respond or address this harm.

2. Consider whether an economic harm exists and whether this harm was caused or made worse by the COVID-19 public health emergency.

3. The harm can be immediate or delayed, but assistance or aid to individuals or businesses that did not experience a negative economic impact from the public health emergency would not be an eligible use.

4. Responses must be related and reasonably proportional to the extent and type of harm experienced.

5. Uses that bear no relation or are grossly disproportionate to type or extent of harm would not be eligible uses.

Examples of types of eligible funding that respond to the negative economic impact of COVID-19 include:

1. **Assistance to unemployed workers**
    a. Includes services like job training to accelerate rehiring of unemployed workers;
    b. May extend to workers unemployed due to the pandemic or the resulting recession, as well as workers already unemployed at the start of the pandemic.

2. **State unemployment insurance trust funds**
    a. May generally be used to replenish Unemployment Trust Funds to pre-pandemic levels.

3. **Assistance to households or populations facing negative economic impacts due to COVID-19**
    a. Food assistance;
    b. Rent, mortgage, or utility assistance;
    c. Counseling and legal aid to prevent eviction or homelessness;
    d. Cash assistance;
    e. Emergency assistance for burials;
    f. Home repairs, weatherization, or other needs;
    g. Internet access or digital literacy assistance; or
    h. Job training to address negative economic or public health impacts experienced due to a worker's occupation or level of training.
    i. Cash transfers must be reasonably proportional to the negative economic impact. Recipients are encouraged to use prior federal stimulus payment amounts as a guideline as to amounts that will be considered reasonably proportional. Cash transfers grossly in excess of the amount needed to address the negative economic impact identified by the recipient would not be considered to be a response to the COVID-19 public health emergency or its negative impacts. In particular, when considering the appropriate size of permissible cash transfers made in response to the COVID-19 public health emergency, State, local and Tribal governments may consider and take guidance from the per-person amounts previously provided by the Federal government in response to the COVID-19 crisis. Cash transfers that are grossly in excess of such amounts would be outside the scope of eligible uses under section 602(c)(1)(A) and 603(c)(1)(A) and could be subject to recoupment.
    j. Survivor's benefits to surviving family members of COVID-19 victims, or cash assistance to widows, widowers, and dependents of eligible COVID-19 victims.

4. **Expenses to improve the efficacy of economic relief programs**

a. Includes the use of data analysis, targeted consumer outreach, and improvements to data or technology infrastructure, and impact evaluations.

5. Small business and non-profits

a. Adopt safer operating procedures;
b. Weather periods of closure;
c. Mitigate financial hardship resulting from the COVID-19 public health emergency, including:
   i. Loans or grants to mitigate financial hardship such as decline in revenues or impacts of periods of business closure. For example, by supporting payroll and benefit costs, employee retention costs, mortgage, rent or utility costs, and other operating costs;
   ii. Loans, grants or in-kind assistance to implement COVID-19 prevention or mitigation tactics, such as physical plant changes to enable social distancing, enhanced cleaning efforts, barriers or partitions, or COVID-19 vaccination, testing or contract tracing programs; or
   iii. Technical assistance and counseling for business planning needs.
d. Recipients may consider additional criteria to target assistance to businesses in need, including small businesses, such as:
   i. Substantial decline in gross receipts (comparable to measures used to assess eligibility for the Paycheck Protection Program);
   ii. Other economic harm due to the pandemic;
   iii. Lack of access to credit; or
   iv. Businesses serving disadvantaged communities.

6. Rehiring State, Local and Tribal Government Staff

a. Payroll, covered benefits and other costs associated with rehiring public sector staff up to pre-pandemic level.

7. Aid to impacted industries disproportionately impacted by the pandemic, including

a. Tourism;
b. Travel;
c. Hospitality;
d. Other industries if due to COVID-19 pandemic, taking into consideration the following factors:
   i. Aid may be considered responsive to the pandemic if it supports businesses, attractions, business districts, and Tribal development districts operating prior to the pandemic and affected by required closures and other efforts to contain the pandemic. For example, a recipient may provide aid to support safe reopening of businesses in the tourism, travel, and hospitality industries that were closed during the COVID-19 public health emergency.
   ii. Aid may also be considered for a planned expansion or upgrade of tourism, travel and hospitality facilities that was delayed due to the pandemic.

iii. To facilitate transparency and accountability, the Rule requires that recipients publicly report assistance provided to private-sector businesses under this eligible use, including tourism, travel, hospitality and other impacted industries.

8. **Treasury will presume that certain services to low income and minority groups will be covered as economic impacts including:**
    a. Homelessness services, such as supportive housing and to improve access to stable, affordable housing among unhoused individuals;
    b. Affordable housing development;
    c. Housing vouchers and residential or housing navigation assistance;
    d. Expanded and enhanced early learning services, including pre-kindergarten, Head Start, and other similar programs;
    e. Assistance to high poverty school districts to advance equitable funding;
    f. Evidence-based educational services and practices, such as tutoring, summer, extended learning and enrichment;
    g. Evidence-based practices to address the social, emotional and mental health needs of students;
    h. New or expanded high-quality childcare;
    i. Social service programs, such as home visitation and services for pregnant women or families with young children; and
    j. Enhanced services for child welfare and foster youth.

iii. Impermissible Uses

The following uses would not be within the scope of the public health and economic impact category:

1. General infrastructure projects, unless responding to a specific pandemic public health need (e.g., investments in facilities for the delivery of vaccines) or a specific negative economic impact such as affordable housing in a QCT.

2. Contributions to rainy day funds, financial reserves, or similar funds.

3. Satisfaction of any obligations arising under or pursuant to a settlement agreement, judgment, consent decree, or judicially confirmed debt restructuring plan in a judicial, administrative, or regulatory proceeding, except to the extent the judgment or settlement requires the provision of services that would respond to the COVID-19 public health emergency.

B. ELIGIBLE USE CATEGORY TWO: PREMIUM PAY

Funds may be used by recipients to provide premium pay to eligible workers performing essential work during the public health emergency or to provide grants to third-party employers

with eligible workers performing essential work. Premium pay is intended to compensate essential workers for heightened risk due to COVID-19.

Under the premium pay eligible use category, FRFs can be used to:

1. Provide **premium pay** of up to $13 per hour per worker, in addition to a worker's usual wage or remuneration (up to $25,000 in total for any single worker) for workers employed by the county who perform essential work during the pandemic; or

2. Provide **grants to eligible third-party employers** that have eligible workers performing essential work.

An essential worker may receive both retrospective premium pay for prior work as well as prospective premium pay for current or ongoing work. Premium pay may not be used to reduce current pay and compensate for premium pay previously provided to the worker.

i. Essential Work

To be eligible for premium pay, employees must be engaged in **essential work**.

1. **Essential work is broadly defined as:**
    a. Involving regular in-person interactions or regular physical handling of items that were also handled by others, or
    b. Regular in-person interactions with patients, the public or coworkers of the individual that is performing the work.

2. **Essential work does not include telework or remote work.**

ii. Essential Workers

To be eligible for premium pay, the essential work must also be performed by an **essential worker**.

The term ‘essential worker’ means those workers needed to maintain continuity of operations of essential critical infrastructure sectors, including those who are critical to protecting the health and wellbeing of their communities. The Rule indicates the chief executive of each recipient has the discretion to add additional sectors to the following list, so long as additional sectors are deemed critical to protect the health and well-being of residents. Depending upon the county’s business organization, the chief executive would be the county executive, administrator, or board where applicable.

Some examples include but are not limited to:

1. Health care
2. Emergency response
3. Janitorial, sanitation, disinfection, and cleaning work
4. Maintenance work

5. Grocery stores, restaurants, farms, food production, and food delivery
6. Pharmacy
7. Biomedical research
8. Behavioral health work
9. Medical testing and diagnostics
10. Home and community-based health care or assistance with activities of daily living
11. Family or childcare
12. Social services and human services work
13. Public health and safety work
14. Vital services to tribes
15. Any work performed by an employee of a state, local or tribal government
16. Educational work, school nutrition and other work required to operate a school facility
17. Laundry work
18. Elections work
19. Solid waste or hazardous materials management, response and cleanup work
20. Dental care work
21. Transportation and warehousing
22. Work at hotels and commercial lodging facilities that are used for COVID-19 mitigation and containment
23. Work in a mortuary
24. Work in critical clinical research, development and testing necessary for COVID 19

Any premium pay or grants provided using the FRFs should prioritize compensation of lower income eligible workers that perform essential work.

iii. Practical Considerations for Premium Pay

1. Premium pay funding will end December 31, 2024.
2. Counties are advised to avoid open-ended raises without termination dates to avoid incurring obligations that will not be subject to ARPA funding.
3. To avoid unfunded mandates and entitlements to premium pay, counties are advised to grant one-time bonuses or raises for a short duration. A self-executing end date for any raise or premium pay plan should be explicitly earmarked in the policy.

iv. Reporting Requirement

1. If premium pay would put a worker above 150% of average state or county (whichever higher) annual wage for all occupations, the local government must provide to the Department of Treasury and make publicly available, a written justification of how the premium pay or grant is responsive to workers performing essential work during the Public Health emergency.

2. There are additional reporting requirements for grants to third-party employers, including public disclosure of grants provided.

Grants can be made to contracted-out services by a municipality or a third-party employer.

C. ELIGIBLE USE CATEGORY THREE: REVENUE LOSS

Recipients may use payments for the provision of government services to the extent of the reduction in revenue experienced due to the COVID-19 public health emergency. A recipient's reduction in revenue is measured relative to the revenue collected in the most recent full fiscal year prior to the emergency – for counties, 2019.

Recipients facing budget shortfalls can use payments from the FRFs to avoid cuts to government services and, thus, enable State, Local, and Tribal governments to continue to provide valuable services and ensure that fiscal austerity measures do not hamper the broader economic recovery. The Rule establishes a definition of "general revenue" for purposes of calculating a loss in revenue and by providing a methodology for calculating revenue lost due to the COVID-19 public health emergency.

i. General Revenue Definition

1. The Rule adopts a definition of "general revenue" based largely on the components reported under "General Revenue from Own Sources" in the Census Bureau's Annual Survey of State and Local Government Finances, and helps to ensure that the components of general revenue would be calculated in a consistent manner. By relying on a methodology that is both familiar and comprehensive, this approach minimizes burden to recipients and provides consistency in the measurement of general revenue across a diverse set of recipients.

2. Includes revenues collected by a recipient and generated from its underlying economy and would capture a range of different types of tax revenues, as well as other types of revenue that are available to support government services.

3. Generally, means money received from tax revenue, current charges, and miscellaneous general revenue.

4. Recipients should sum across all revenue streams covered as general revenue in the aggregate rather than by source. This minimizes administrative burden, and provides consistency and an accurate picture.

5. The Rule incorporates the Census Bureau's definition of tax revenue, defining current charges as "charges imposed for providing current services or for the sale of products in connection with general government activities." This definition includes revenues from sources such as:
    a. Public education institutions
    b. Public hospitals
    c. Tolls revenues
    d. Miscellaneous general revenue of all other general revenue of governments from their own sources (other than liquor store, utility, and insurance trust revenues), including:
        i. Rents

ii. Royalties
iii. Lottery proceeds
iv. Fines

General Revenue also includes:

1. Revenue from all tribal enterprises.

2. Intergovernmental transfers between State and local governments not pursuant to ARPA, CRF, or another Federal program.

ii. Exclusions from General Revenue

The definition of general revenue focuses on sources that are generated from economic activity and are available to fund government services, rather than a fund or administrative unit established to account for and control a particular activity.

The following is excluded from General Revenue:

1. Refunds and other correcting transactions
    a. Proceeds from issuance of debt or sale of investments;
    b. Agency or private trust transactions;
    c. Revenue generated by utilities and insurance trusts; or
    d. Intergovernmental transfers from the federal government, including federal transfers made via a state to a local government pursuant to ARPA, CRF, or another Federal program.

iii. Calculation of Loss

1. General Rule
    a. Compare actual revenue to a counterfactual trend representation of what could have been expected to occur in the absence of the pandemic.
    b. Start the counterfactual trend representation with the last full fiscal year prior to COVID-19 – the last full fiscal year before January 27, 2020, called the *base year revenue*.
    c. Assume growth at a constant rate in subsequent years.
    d. Use growth adjustment rate of either 4.1 percent per year or the recipient's average annual revenue growth over the three full fiscal years prior to COVID-19, whichever is **higher**.
    e. Recipients should calculate the extent of the reduction in revenue as of four points in time: December 31, 2020, 2021, 2022, and 2023.

2. **How to Calculate**
    a. Step 1: Identify revenues collected in the most recent full fiscal year prior to the public health emergency, the last full fiscal year before January 27, 2020, called the *base year revenue*. **Utilize the Forward Analytics ARPA Revenue Loss**

Calculator at https://bit.ly/3iLrFoq. You can also find it at www.forward-analytics.net.

b. Step 2: Estimate *counterfactual revenue*, which is equal to *base year revenue* * [(1 + *growth adjustment*) ^(*n*/12)], where *n* is the number of months elapsed since the end of the base year to the calculation date, and *growth adjustment* is the greater of 4.1 percent and the recipient's average annual revenue growth in the three full fiscal years prior to the COVID-19 public health emergency.
c. Step 3: Identify *actual revenue*, which equals revenues collected over the past twelve months as of the calculation date.
d. Step 4: The extent of the reduction in revenue is equal to *counterfactual revenue* less *actual revenue*. If actual revenue exceeds counterfactual revenue, the extent of the reduction in revenue is set to zero for that calculation date.

iv. Permissible Expenditures as Revenue Loss

The Act provides recipients with broad latitude to use FRFs for the provision of government services, including but not limited to:

1. Maintenance or pay-go funded building of infrastructure, including roads;

2. Modernization of cybersecurity, including hardware, software, and protection of critical infrastructure;

3. Health services;

4. Environmental remediation;

5. School or education services; or

6. Provision of police, fire and other public safety services.

Use on the following is excluded:

1. Interest or principal on any outstanding debt instrument, including, for example, short-term revenue or tax anticipation notes, or fees or issuance costs associated with the issuance of new debt.

2. Satisfaction of any obligation arising under or pursuant to a settlement agreement, judgment, consent decree, or judicially confirmed debt restructuring in a judicial, administrative, or regulatory proceeding, except if the judgment or settlement required the provision of government services. That is, satisfaction of a settlement or judgment itself is not a government service, unless the settlement required the provision of government services.

3. Replenishing financial reserves e.g. "rainy day funds."

D. ELIGIBLE USE CATEGORY FOUR: INVESTMENT IN INFRASTRUCTURE

Necessary investments include projects that are required to maintain a level of service that, at least, meets applicable health-based standards, or establishes or improves broadband service to unserved or underserved populations, and that is unlikely to be met with private sources of funds. ***Notably, investment in water, sewer, and broadband infrastructure does not need to be tied to the pandemic***.

The Department of Treasury encourages, but does not mandate, the use of project labor agreements that use prevailing wage and local hire provisions.

Davis-Bacon Act Implications

- In order for Davis-Bacon Act standards to apply, Congress must explicitly authorize prevailing wage rates on federally funded projects. See Davis-Bacon and Related Acts Compliance Manual, Section 15a02; see also 2 CFR Part 200, Appendix II(D) ("When required by Federal program legislation, all prime construction contracts awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act.") Unlike other federal statutes requiring prevailing wages—such as the American Recovery and Reinvestment Act, the National Housing Act, the Federal-Aid Highway Acts, and the Indian Self-Determination and Education Assistance Act—ARPA itself does NOT mandate application of prevailing wage rates for recipients. In the Interim Rule, Treasury has implicitly acknowledged this silence as to ARPA's prevailing wage rate mandates, stating that the use of prevailing wage rate is merely "encouraged." This lack of Congressional authorization of prevailing wage requirements provides a strong argument that Davis-Bacon does not apply to ARPA funded projects.
- Despite the above, there is some reason for caution. Immediately after stating that prevailing wages are merely "encouraged," Treasury notes that it will be engaging in an unspecified type of audit of recipients "on their workforce plans and practices related to water, sewer and broadband projects undertaken with Fiscal Recovery Funds." The Interim Rule provides that "additional guidance and instructions on the reporting requirements" will issue "at a later date."
- In a nutshell, we believe that Davis-Bacon does not apply as a function of ARPA alone, absent further guidance from Treasury.
- However, Davis-Bacon may apply if a project is being funded by other federal or covered sources.
- As a practical matter, Counties funding projects using ARPA funds should check to ensure whether any other federal funding is used on the project that would ordinarily subject the project to Davis-Bacon. If the county is confident that the project does not otherwise fall under Davis-Bacon, it may proceed to award funds and contracts without Davis-Bacon standards and practices, with the important caveat that Treasury may seek to administratively impose Davis-Bacon standards solely by virtue of ARPA.

More guidance will follow about reporting practices.

i. Water and Sewer Infrastructure

1. Investments and improvements to existing infrastructure in water and sewer include:
    a. Clean drinking water and services for the collection, and
    b. Treatment of wastewater and stormwater.

2. Wide latitude is given to identify investments in water and sewer infrastructure that are of highest priority for recipient communities, which may include projects on privately-owned infrastructure.
    a. Eligible uses of FRFs are generally aligned with the types or categories of projects that would be eligible to receive financial assistance through the Clean Water State Revolving Fund (CWSRF) or Drinking Water State Revolving Fund (DWSRF) funded projects.
    b. Projects to construct, improve, and repair wastewater treatment plants, control non-point sources of pollution, improve the resilience of infrastructure to severe weather events, create green infrastructure, protect bodies of water from pollution, or water infrastructure capital improvements, including the installation and replacement of failing treatment and distribution systems.
    c. Investments in a broad range of projects that improve drinking water infrastructure, such as building or upgrading facilities and transmission, distribution and storage systems, including replacement of lead service lines.
    d. Support for the consolidation or establishment of drinking water systems.
    e. Projects to construct publicly owned treatment infrastructure, manage and treat stormwater or subsurface drainage water, facilitate water reuse, and secure publicly owned treatment works, among other uses.
    f. Cybersecurity needs to protect water or sewer infrastructure.
    g. Efforts to address climate change.

ii. Broadband Infrastructure

Because recipients have a wide range of varied broadband infrastructure needs, eligible uses provide flexibility to identify the specific locations within recipient communities to be served and to otherwise design the project.

1. Use of funds should focus on locations that are unserved or underserved.
    a. Users are unserved or underserved if they lack access to a wireline connection capable of reliably delivering at least minimum speeds of 25 Mbps download and 3 Mbps upload.
    b. This benchmark is consistent with what the FCC and other Federal programs use to identify eligible areas to be served by programs to improve broadband services.

2. Eligible projects expected to deliver, upon completion, download and upload speeds of 100 Mbps. Where impracticable, upload speeds between at least 20 Mbps and 100 Mbps.

3. The Department of Treasury also encourages recipients to prioritize support for broadband networks owned, operated by, or affiliated with local governments, non-profits, and co-operatives—providers with less pressure to turn profits and with a commitment to serving entire communities.

4. Assistance to households facing negative economic impacts due to COVID-19 is also an eligible use, including internet access or digital literacy assistance.

5. Recipients are also encouraged to prioritize investments in fiber optic infrastructure where feasible.

TRANSFER OF FUNDS

A recipient receiving a payment of funds may transfer funds to the following:

1. A private nonprofit organization, a public benefit corporation involved in the transportation of passengers or cargo, or a special-purpose unit of State or local government; or

2. To the State in which it is located.

TIMELINE FOR USE OF FRF

1. FRFs may only be used to cover costs incurred from March 3, 2021, to December 31, 2024
    a. Recipients must have obligated FRFs by December 31, 2024- Obligated means orders placed for property and services, contracts and subawards made, and similar transactions completed. 2 C.F.R. §200.77.
    b. Counties may provide premium pay retroactively, dating back to the start of the public health emergency on January 27, 2020.
2. Period of performance will run to December 31, 2026
    a. Period of performance means the time during which the non-Federal entity may incur new obligations to carry out the work authorized by ARPA. 2 C.F.R. §200.77.

II. STATE LAW CONSIDERATIONS IN USE OF LFRF FUNDS

A. LEVY LIMIT IMPACT

As noted above, there are key differences between the allowed use of LFRF and SFRF funds. Among other differences is the fact that ARPA does not explicitly prohibit the use of LFRF funds to offset a reduction in net tax revenue.

That difference may result in counties considering proposing tax cuts and using eligible ARPA funds to "back fill" the cuts, presumably resetting the levy limit in following fiscal years. However, such a policy decision could carry with it considerable risk, including inadvertently

lowering statutory levy limits and triggering accountability and audit features associated with implementation of the ARPA program.

Section 66.0602 establishes limitations on the amount of property taxes a county may levy to support its budget. Specifically, "no political subdivision may increase its levy in any year by a percentage that exceeds the political subdivision's valuation factor." Wis. Stat. § 66.0602(2)(a). "[T]he base amount in any year, to which the limit under th[e] section applies, shall be the actual levy for the immediately preceding year." *Id*. Therefore, because the section does not contain an exception for funds from ARPA, supplanting levy funds with ARPA funds could result in a reduction in levy authority in future years. Furthermore, such a decision could also trigger accountability and audit features that could potentially result in a demand that the funds used to supplant levy funds be repaid, compounding the problem of a potentially lower levy limit in future years.

B. POSSIBLE SPENDING POWER LIMITATIONS ON WISCONSIN COUNTIES

It is well established Wisconsin counties are "creatures of the Legislature" and lack the explicit "home rule" powers enjoyed by Wisconsin cities and villages. However, as explained in more detail below, Wisconsin courts have allowed for certain activities on the part of counties so long as contemplated actions are undertaken for "public purpose." While direct authorization from the federal government likely establishes public purpose, counties are nonetheless encouraged to ensure compliance with state law by meticulously recording the public purpose associated with the allocation of ARPA funds, particularly those funds that are directly provided to non-profits associated with counties, such as economic development corporations, or private businesses under the auspices of ARPA's economic impacts category.

It is true counties, unlike cities and villages, derive their respective powers from the state. *See Frederick v. Douglas County*, 96 Wis. 411, 416-17, 17 N.W. 798 (1897) (citations omitted) ("Counties are, at most, but local organizations, which for the purposes of civil administration, are invested with a few functions characteristic of a corporate existence…[T]he statutes confer upon them all the powers they possess."). A 2017 Attorney General Opinion could be interpreted as limiting counties' ability to direct grants to nonprofits; however, Wisconsin courts have relied on "administrative home rule" to allow for numerous grants and allocations of funds, many of which would resemble the grant of ARPA funds to nonprofits or businesses affected by COVID contemplated by this analysis.

In 2017 the Attorney General opined that a county board is not authorized to appropriate money to a nonprofit food pantry. OAG-01-17. The Attorney General noted that "none of the twenty-five subsections of Wis. Stat. § 59.53 authorizes the appropriation of funds to nonprofits that operate food pantries." *Id*. at 2. Relying on an exclusionary canon of construction, the opinion explained that "[g]iven that the Legislature authorized appropriating money to nonprofits in certain circumstances, if the Legislature intended that county boards could appropriate money to nonprofit food pantries, it would have said so in the statute." *Id*.

While the 2017 Attorney General Opinion should be considered by counties when considering whether and how ARPA funds may be allocated, Wisconsin Statute and case law suggest that a county's ability to allocate such funds is broader than that proposed by OAG-01.17. Most

importantly, Wisconsin statute does in fact provide discretion in how counties carry out assigned duties and responsibilities.

Administrative home rule is a more limited form of statutory home rule but nevertheless allows that "[e]very county may exercise any organizational or administrative power, subject only to the constitution and to any enactment of the legislature which is of statewide concern and which uniformly affects every county." Wis. Stat. § 59.03(1). For purposes of giving counties "the largest measure of self-government under the administrative home rule," the counties' authority is to be liberally construed. Wis. Stat. § 59.04. And despite the Attorney General's 2017 opinion, the statutes make clear a county board may exercise organizational or administrative power "without limitation because of enumeration, and [the] powers shall be broadly and liberally construed and limited only by express language." Wis. Stat. § 59.51(1).

In addition to statutory support, numerous courts have commented on counties' authority under administrative home rule. In *Town of Grant v. Portage County*, the court concluded "the language in the Home Rule statute allows Portage County to provide the ambulance services to Town of Grant residents" and further that the county's action did not violate the four-part test relating to the exclusivity of certain state actions. 2017 WI App 69, ¶24, 378 Wis.2d 289, 903 N.W.2d 152. State law preempts local law if any of four factors are met: (1) whether the legislature has expressly withdrawn the power of a county to act in a specific area; (2) whether the county action logically conflicts with the state legislation; (3) whether the county action defeats the purpose of the state legislation; or (4) whether the county action goes against the spirit of the state legislation." *Id*., ¶25.

In *Hart v. Ament*, the Supreme Court determined Milwaukee County possessed the authority to transfer management of its public museum to a nonprofit corporation. Relying on the above sections of Chapter 59, the Court reasoned the sections "reflect a legislative intent to allow county governments to act on matters of local concern in any manner they deem appropriate." 176 Wis.2d 694, 702, 500 N.W.2d 312. It further noted "[c]ounties have broad authority to direct local matters" and "[b]y legislative mandate, this court is required to liberally construe a county's power to contract." *Id*. at 702-03; *see also Jackson County v. State, Dept. of Natural Resources*, 2006 WI 96, ¶19, 293 Wis.2d 497, 717 N.W.2d 713 (observing the county correctly asserted that Wis. Stat. § 59.03 is a broad grant of power to counties). Additionally, the court emphasized "if in the Milwaukee county board's judgment, the museum can be operated more efficiently and with less tax expenditure through a non-profit corporation, the county has the authority under [Chapter 59] to make those arrangements." *Id*. at 703.

While not case law, a recent Wisconsin Legislative Council memorandum provides additional support for the argument that counties possess a fair amount of flexibility when exercising power under the home rule authority. In response to the 2017 Attorney General Opinion, the memorandum advised that "a court may reasonably conclude that counties do have the authority to make a grant to a nonprofit organization for food pantry operation." *Id*. at 1. The memorandum in particular focused on the exclusionary canon of construction relied on by the Attorney General. It explained the Wisconsin Supreme Court "has emphasized the statutory language allowing county boards to exercise their administrative home rule authority 'without limitation because of enumeration' to conclude that counties' administrative home rule authority

empowers them to exercise powers other than those specifically enumerated in other statutory provisions." *Id*. at 2. With respect to preemption, the memorandum noted the author was "not aware of a state law that would arguably preempt a county grant of this type [and thus] it appears that a court would be likely to uphold the grant under the court's current case law." *Id*. at 3.

In addition to ensuring counties possess the authority to act pursuant to administrative home rule, they also must ensure that the transfer of ARPA funds meets the public purpose test. Here, Wisconsin case law is particularly instructive. First, it is important to note that the standard is a broad one: "[i]f any public purpose can be conceived which might rationally justify the expenditure, the constitutional test is satisfied." *Bishop v. City of Burlington*, 2001 WI App 154, ¶11, 246 Wis.2d 879, 631 N.W.2d 656. The test contains two parts. "In determining whether a public purpose exists, courts have considered whether the subject matter or commodity of the expenditure is one of 'public necessity, convenience, or welfare,' as well as the difficulty private individuals have in providing the benefit for themselves. *Town of Beloit v. County of Rock*, 2003 WI 8, ¶29, 259 Wis.2d 37, 657 N.W.2d 344 (*quoting State ex rel. Wisconsin Dev. Auth. V. Dammann*, 228 Wis. 147, 182, 277 N.W.2d 278 (1938)).

Additionally, courts will also look to see if the benefit to the public is direct or remote. *Id*. In holding that the town's expenditure of tax monies to develop and sell land in a subdivision did not violate the public purpose doctrine, the *Town of Beloit* court was relying on a long line of cases. *See State ex rel. v. Bowman v. Barczak*, 34 Wis.2d 57, 64-65, 148 N.W.2d 683 (1967) (determining the industrial development through the creation of separate county agencies and bond issues was a valid constitutional enactment as it related to a declaration of public purpose); *see also West Allis v. Milwaukee County*, 39 Wis.2d 356, 159 N.W.2d 36 (1968) (construction of incinerators and waste disposal facilities was considered a public purpose); *State ex rel. Warren v. Reuter*, 44 Wis.2d 201, 170 N.W.2d 790 (1969) (upholding financial aid to the private nonprofit corporation Marquette School of Medicine – now the Medical College of Wisconsin – on the grounds that public health is a public purpose); *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis.2d 32, 55-56, 205 N.W.2d 784 (1973) (upholding industrial bonding law because the protection of the economic interests of the general public fell within the scope of promotion of the general welfare); *Libertarian Party of Wis. v. State*, 199 Wis.2d 790, 546 N.W.2d 424 (1996) (upholding expenditure of public funds for the construction of the Milwaukee Brewers' Miller Park); *Alexander v. City of Madison*, 2001 WI App 208, 247 Wis.2d 576, 634 N.W.2d 577 (upholding city's expenditure of funds to increase the tax base and generally enhance the economic climate of the community).

C. ECONOMIC DEVELOPMENT UNDER WIS. STAT. § 59.57

Wisconsin counties are clearly empowered to utilize economic development corporations for purposes of enhancing economic competitiveness. In light of the above expectations, it is important to adhere to the requirements for economic and industrial development as outlined in Chapter 59. Counties "may appropriate money for and create a county industrial development agency or [appoint an executive officer and provide staff] to any nonprofit agency organized to engage or engaging in activities described in" the chapter. Wis. Stat. § 59.57(1).

The Legislature allowed for the creation of such agencies by finding "economic insecurity due to unemployment is a serious menace to the general welfare of not only the people of the affected

areas but of the people of the entire state." Wis. Stat. § 59.57(2)(b). It was further determined "means are necessary under which counties so desiring may create instrumentalities to promote industrial development and such purpose requires and deserves support from counties as a means of preserving the tax base and preventing unemployment." *Id*. Specifically, with respect to public purpose, "such purposes are hereby declared to be public purposes for which public money may be spent and the necessity in the public interest for the provisions herein enacted is declared a matter of legislative determination." *Id*. (emphasis added).

The scope of projects eligible for management by counties is broad. An industrial development project is defined as "any site, structure, facility, or undertaking comprising or being connected with or being a part of an industrial, manufacturing, commercial, retail, agribusiness, or service‒related enterprise established or to be established by an industrial development agency." Wis. Stat. § 59.57 (2)(c)3.

In addition, a county may "appropriate such sums of money as are necessary or advisable for the benefit of the agency and prescribe the terms and conditions of such appropriation." Wis. Stat. § 59.57 (2)(d)3.; *see also* Wis. Stat. § 59.57 (2)(f)1. and 3. ("the agency is granted all operating authority necessary or incidental to carrying out and effectuating the purposes of this subsection… [t]o grant financial aid and assistance to any industrial development project, which may be loans, contracts of sale and purchase, leases and such other transactions as are determined by the agency… to apply for and accept advances, loans, grants and contributions and other forms of financial assistance from the federal, state or county government).

D. NEXT STEPS FOR EMPLOYERS

Wisconsin Counties, unlike cities and villages, are restricted by statute in their spending powers. As set forth above, Wis. Stat. Sec. 59.53, which provides spending authority for counties, has been narrowly construed in a prior attorney general opinion. OAG-01-07. While not legally binding authority, and subject to some controversy in its conclusions, we have concerns that a Wisconsin state court may follow OAG-01-07 and narrowly construe Sec. 59.53 to restrict the ability of counties to directly spend ARPA funds, even though authorized by federal law.

In light of these concerns, we recommend that counties make use of Economic Development Corporations, which are specifically permitted under Wis. Stat. Sec. 59.57 for a broad variety of economic development purposes. These Economic Development Corporations can be granted the ARPA funds, and they will distribute the funds directly to recipients within the county, so long as the purpose fits with an eligible use category under ARPA.

The Economic Development Corporations should carefully follow the ARPA guidance, and oversight should be set up to audit these corporations to ensure they are properly documenting and distributing ARPA funds.