James Malloy

From: Kristen Gagalis <kgagalis@andersonkreiger.com>
Sent: Monday, August 22, 2022 1:06 PM
To: James Malloy; Carolyn Kosnoff
Cc: Mina S. Makarious
Subject: RE: ARPA/ SLFRF Funds Analysis

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Jim and Carolyn,

You asked us to look into whether ARPA State and Local Fiscal Recovery Fund (SLFRF) funds could be used to provide seed money for the Affordable Housing Trust that the Town is considering creating. The short answer is, unfortunately, probably not. Although all SLFRF guidance highlights the leeway that local governments have in using SLFRF funds to support affordable housing, such leeway does not seem to include putting money in a trust where the ultimate use of the funds may be some time far into the future.

Affordable Housing in FAQs

The short version of the SLFRF FAQs addresses affordable housing in section 2.14, or pages 10-13 here. The list of eligible affordable-housing uses of SLFRF funds does not list placing funds in a trust, but since this list is explicitly non-exhaustive, that does not necessarily provide a determinative answer. However, these FAQs do explicitly say that "other affordable housing projects, beyond those eligible under the presumptions described above, may also be eligible uses of SLFRF funds under the final rule if they are related and are reasonably proportional to addressing the negative economic impacts of the pandemic *and otherwise meet the final rule's requirements*" (emphasis added). Thus, we must still address the question of whether placement in a trust by the applicable deadlines complies with the final rule.

"Liquidated" or "Expended" by 12/31/26

Under SLFRF guidelines, all funds that a recipient (the Town) or subrecipient (i.e., an entity that receives a subaward from the Town) receives under SLFRF must be used to pay a cost "incurred" between March 3, 2021 and December 31, 2024, and must be **expended** or liquidated by December 31, 2026. Interestingly, the statute does define the term "Incurred" Title 31 Subtitle A Part 35 Subpart A § 35.5 (b) as follows: "***Costs incurred.*** A cost shall be considered to have been incurred for purposes of paragraph (a) of this section if the recipient has incurred an obligation with respect to such cost by December 31, 2024." However, the neither the statute nor the guidelines or FAQs define the term "liquidated" or "expended," (both of which are used interchangeably to describe the 2026 deadline.)

Even if putting funds in a Trust counts as expending those funds, the applicable costs must still be incurred by December 31, 2024, as stated above. Thus, it seems as though the only way to abide by both the 2024 incurment and the 2026 expenditure deadlines, while still putting the funds in a Trust, would be to begin projects before the end of 2024 that would be paid for with debt service funded by the Trust. Unfortunately, debt service is explicitly excluded under the final rule: "For all recipients, funds may not be used for debt service" Final Rule, pg 10. [31 CFR Part 35 RIN 1505-AC77]. (https://home.treasury.gov/system/files/136/SLFRF-Final-Rule.pdf).

Trust = Expenditure Elsewhere

It is also worth noting that elsewhere in the final rule, putting the money in a Trust is an allowable expenditure. For example, "[u]nder the interim final rule, a recipient may use funds to make deposits into its account of the Unemployment Trust Fund established under section 904 of the Social Security Act (42 U.S.C. § 1104) up to the level needed to restore the pre-pandemic balance of such account as of January 27, 2020 or to pay back advances received under Title XII of the

Social Security Act (42 U.S.C. § 1321) for the payment of benefits between January 27, 2020 and May 17, 2021. These costs support the solvency of the unemployment insurance system and, ultimately, unemployment insurance benefits provided to unemployed workers during the pandemic… In the final rule, Treasury is maintaining the inclusion of this eligible use category. Because unemployment insurance trust funds directly fund benefits to unemployed workers, maintaining the solvency of the trust fund is critical to the continued provision of assistance to unemployed workers. Further, funds deposited into the trust fund must be used as assistance to unemployed workers, an eligible use of SLFRF funds." Final Rule, pg 118. [31 CFR Part 35 RIN 1505-AC77]. (https://home.treasury.gov/system/files/136/SLFRF-Final-Rule.pdf).

However, elsewhere in the rule, other types of long-term funds are not eligible expenditures. For example, "a recipient… may not use funds for deposit into any pension fund." Title 31 Subtitle A Part 35 Subpart A § 35.7 Pensions. (https://www.ecfr.gov/current/title-31/subtitle-A/part-35/subpart-A).

Arguably, the types of expenses that would be incurred by a Housing Trust, like those incurred by an unemployment insurance fund, would be almost perfectly aligned with SLFRF's purposes. Thus, one could possibly make an argument that deposit into a housing trust is equivalent to deposit in an unemployment trust. However, as previously discussed, since the Trust did not exist pre-pandemic, it would be difficult to argue that deposits into the Trust would be needed "to restore the pre-pandemic balance" of the account.

Subrecipient v. Beneficiary

One last possible route to use SLFRF funds for a housing trust would be classifying the Trust as a "beneficiary" rather than a "subrecipient" of the funds. This distinction matters because a subrecipient is "subject to subrecipient monitoring and reporting requirements," whereas a beneficiary is not subject to those requirements. Final Rule pg. 210. In order for the Trust to be considered a beneficiary, the Town's rationale for providing the funds to the Trust would have to be "for the purpose of *directly benefitting*" the Trust "as a result of experiencing a… negative economic impact of the pandemic." In other words, the Trust could only be considered a beneficiary if it had taken a financial hit due to COVID-19 between January, 2021 and December 31, 2024 (the dates between which COVID- related impacts would have to have been incurred).

Given that the Trust does not yet exist, the Town cannot show that the Trust's balance was impacted by COVID. However, were the Town instead to put the money into LexHab as it currently exists, it could potentially make the argument that LexHab is a beneficiary rather than a subrecipient and thereby make it not subject to the same monitoring and reporting requirements. However, this would be a fact-based analysis and would require more information about the particulars of LexHab's finances, especially during the pandemic

Best,

Kristen

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