



ARPA Final Rule - The "B-sides collection": Affordable housing development

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With the U.S. Treasury's January 2022 release of its Final Rule^[1] in the use of American Rescue Plan Act^[2] (ARPA) funds, we began publishing this series of articles reviewing the lesser publicized aspects of that guidance (hence, the "B-sides" moniker). In this edition, we address the Treasury's *presumed eligible* use of federal stimulus funding in the development of affordable housing, and the limited scope under which *private, for-profit entities* may receive *transfers* of ARPA funds to carry out such ends.

The ARPA statute and the Final Rule direct the use of funds according to four buckets, of which the first is relevant to affordable housing activities: as a response to the negative economic impacts of the pandemic.^[3]

When using funds under this first bucket, ARPA recipients must satisfy the Treasury's two-part framework: (1) there must be a negative public health or economic impact resulting from or exacerbated by COVID; and (2) the response must be designed to address the identified health or economic impact, which such response must be "reasonably proportional" (i.e., the scale of the response as compared to the scale of the harm).^[4]

Key to this guidance, in the context of this article, is the Treasury's clear-as-day statement: "This test may be met by affordable housing projects – which may involve large expenditures and capital investments – if the developments increase the supply of long-term affordable housing for low-income households[.]"^[5]

Simply put, the Treasury presumes a beneficiary is impacted or disproportionately impacted by the public health emergency or its negative economic impacts "if funds are to be used for affordable housing programs, [and] qualify for the National Housing Trust

Fund (12 U.S.C. 4568) or the Home Investment Partnerships Program (42 U.S.C. 12721 *et seq.*).”[6]

Here, then, the Treasury’s Final Rule expands the extent to which affordable housing is an eligible response to the pandemic, with the eligibility presumption toggled by *adherence to federal housing programs, rather than project location*. (The Interim Rule presumed only affordable housing activities in Qualified Census Tracts were eligible.)

Another key to this guidance is the Treasury’s clear distinction between beneficiaries of ARPA funds and subrecipients. We know *transfers*, pursuant to which local governments seek to implement a public health or negative economic impact response, are to subrecipients.[7] The inclusion of *for-profit entities* in eligible projects under the HTF and the HOME programs therefore allow for the use of ARPA funds to be granted to for-profit developer entities under the first eligible use bucket, as a response to COVID-19, in the context of affordable housing activities. This is a limited opportunity in which for-profits may receive transfers of ARPA funds to carry out government programs; the statute otherwise limits transfers only to a (i) private nonprofit organization, (ii) public benefit corporation involved in the transportation of passengers or cargo or (iii) special-purpose unit of state or local government.[8]

The developer must comply with all applicable requirements of the Final Rule, award terms and conditions, and uniform guidance. This includes adhering to certain protocols if affordable housing projects funded with ARPA involve capital expenditures, which requirements we addressed in [an earlier article](#).

[1] 31 C.F.R. Part 35.

[2] H.R. 1319, Public Law 117-2.

[3] U.S. Treasury, Final Rule, Supplementary Information, at pages 4-5: “(a) To respond to the public health emergency or its **negative economic impacts, including assistance to households**, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality” [emphasis added].

[4] See 31 C.F.R. 35.6(b)(1); see also U.S. Treasury, Final Rule, Supplementary Information, at pages 21 – 22, and at page 194.

[5] U.S. Treasury, Final Rule, Supplementary Information, at page 106.

[6] 31 CFR 35.6(b)(2)(i); and see U.S. Treasury, Final Rule, Supplementary Information, at page 103. The operative rule provision is as follows:

“(2) *Identified harms: Presumptions of impacted and disproportionately impacted beneficiaries*. A recipient may rely on the following presumptions to identify beneficiaries presumptively impacted or disproportionately impacted by the public health emergency or its negative economic impacts for the purpose of providing a response under subparagraph (b)(1) or (b)(3):

(i) ... *if funds are to be used for affordable housing programs, qualify for the National Housing Trust Fund (12 U.S.C. 4568) or the Home Investment Partnerships Program (42 U.S.C. 12721 et seq.)*”

[7] U.S. Treasury, Final Rule, Supplementary Information, at pages 209-211, and at page 28: “the organization... is serving as the vehicle for reaching the beneficiaries.”

[8] ARPA, Title IX Sec. 602(c)(3) and Sec. 603(c)(3).

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