



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

November 9, 2023

Via email

Dear Tribal Leader:

As the Point of Contact for Tribal Consultation for the U.S. Department of the Treasury (Treasury), I invite you to an expedited consultation on the Coronavirus State and Local Fiscal Recovery Funds (SLFRF) [Interim Final Rule](#) (2023 Obligation IFR), released today on Treasury's website. The 2023 Obligation IFR amends the definition of obligation in Treasury's program regulations at 31 CFR part 35. This consultation will be held virtually on Wednesday, November 29, 2023, 2:00 p.m. – 5:00 p.m. EDT. [You may register for the consultation here.](#)

Background

The [SLFRF](#) program, authorized by the American Rescue Plan Act¹, allocates \$20 billion for Tribal governments across the country to support their response to and recovery from the COVID-19 public health emergency. In May 2021, Treasury published an interim final rule implementing the SLFRF program, and in January 2022, Treasury published a final rule (2022 Final Rule). In September 2023, Treasury published an additional interim final rule to implement the changes made to the program by the Consolidated Appropriations Act, 2023 (2023 IFR). On November 09, 2023, Treasury issued the [2023 Obligation IFR](#) to amend the definition of "obligation" set forth at 31 CFR 35.3, to provide additional flexibility to Tribes and other recipients. The 2023 Obligation IFR also clarifies the application of the statutory obligation deadline of December 31, 2024, to subrecipients and contractors, and provides guidance on the circumstances under which contracts and subawards entered into prior to the obligation deadline may be amended or replaced. The eligible use categories, as discussed in the [2022 Final Rule](#) and the [2023 IFR](#), remain unchanged. Recipients may continue to use SLFRF funds in alignment with the [2022 Final Rule](#) and the [2023 IFR](#).

Sections 602 and 603 of the Social Security Act provide that recipients may only use SLFRF funds to cover costs incurred by the recipient by December 31, 2024. Treasury implemented this statutory requirement by providing that a cost is considered incurred if a recipient has incurred an obligation by December 31, 2024. Treasury defined "obligation" as "an order placed for property and services and entering into contracts, subawards, and similar transactions that require payment".² In addition, Treasury set the period of performance as ending on December 31, 2026, which serves as the

¹ P.L. 117-2 (Mar. 11, 2021).

² 31 CFR 35.3.

deadline by which recipients must expend obligated SLFRF funds, except for a Surface Transportation or Title I project under which the funds must be expended by September 30, 2026.³

The 2023 Obligation IFR revises the definition of “obligation” and provides other guidance and clarifications described below. Tribal governments should refer to the [2023 Obligation IFR](#) for details.

Summary:

- **Definition of “obligation”:** Described below, Treasury amends the definition of “obligation” to provide additional flexibility to recipients and explains that defining the phrase “costs incurred” by reference to Tribal resolution, or recipient appropriation, budget, or allocation processes does not provide a standard that could be applied consistently across all recipients.
- **Compliance and Administrative Costs:** Tribes shared with Treasury that they anticipate difficulty allocating SLFRF funds to satisfy administrative and other legal requirements applicable to the SLFRF program after the obligation deadline of December 31, 2024. The expenses associated with these requirements include payroll and benefits of personnel responsible for compliance, reporting, and expenses to maintaining records. Under the revised definition of “obligation,” a Tribe or other recipient of SLFRF is now considered to have incurred an obligation by December 31, 2024, with respect to complying with requirements under federal law or regulation or a provision of the SLFRF award terms and conditions. This includes expenditures related to reporting and compliance requirements, Single Audit costs, record retention and internal control requirements, property standards, and environmental compliance requirements.

This means that, per the revised definition of obligation, these eligible costs can be met without having to enter into a contract, subaward or similar transactions that require payment, and can be expended between January 1, 2025, and December 31, 2026. See the justification for compliance, administrative, and personnel requirements below that must be followed in order to cover these expenditures after December 31, 2024.

- **Obligating personnel costs:** Provides new guidance that recipient personnel costs necessary to comply with administrative requirements and to close out the SLFRF award are allowable after December 31, 2024.
- **Indirect cost rate:** Clarifies that recipients may continue to charge their current negotiated indirect cost rate agreement established with their federal cognizant agency, or use the de minimis rate of 10 percent of modified total direct costs pursuant to 2 CFR 200.414(f), after December 31, 2024.
- **Justification for compliance, administrative, and personnel costs:** Provides new guidance that if a Tribe or other recipient elects to take advantage of the

³ The Consolidated Appropriations Act, 2023 provided that SLFRF funds used for Surface Transportation projects and Title I projects must be expended by September 30, 2026. See the [2023 IFR](#).

expenditure flexibilities for compliance, administrative, and personnel costs related to support compliance and SLFRF award closeout in accordance with the revised definition of “obligation,” it must provide a justification with expenditure estimates to Treasury by April 30, 2024, and report at award closeout the final amount expended for those costs .

- **Application of obligation deadline to subrecipients and contractors:** Clarifies that subrecipients are not subject to the obligation deadline of December 31, 2024. Treasury also makes clear that contractors are not subject to this deadline. The obligation deadline applies to a Tribe or other recipients of SLFRF funds. A cost is considered to have been incurred once a recipient enters into a subaward or contract, such that subrecipients and contractors do not need to take additional steps to obligate SLFRF funds after entering into the contract with the recipient. It remains the case that all obligated funds must be expended by the Tribe and other recipients and any subrecipients by the period of performance end date of December 31, 2026. In the case of SLFRF funds used under the Title I projects and Surface Transportation projects eligible use categories, all funds must be expended by September 30, 2026. Tribes and other recipients must comply with the Uniform Guidance regarding the timing of payment to subrecipients as provided in 2 CFR 200.305.
- **Contract and subaward amendments:** Clarifies that Tribes and other recipients may not re-obligate funds or obligate additional funds after the obligation deadline. For example, it would be unallowable if a contractor requests a change order due to a cost increase that requires a contract amendment after December 31, 2024.
- **Contract and subaward replacements:** Clarifies that after December 31, 2024, Tribes and other recipients are permitted to replace a contract or subaward entered into prior to December 31, 2024, if:
 1. The Tribe or other recipient terminates the contract or subaward because of the contractor or subrecipient’s default, the contractor or subrecipient goes out of business, or because the recipient otherwise determines that the contractor or subrecipient will not be able to perform under the contract or carry out the subaward; or
 2. The recipient and contractor or subrecipient mutually agree to terminate the contract or subaward for convenience; or
 3. The Tribe or other recipient terminates the contract or subaward for convenience if the contract or subaward was not properly awarded (for example, if the contractor was not eligible to receive the contract), there is clear evidence that the contract or subaward was improper, the recipient documents its determination that it was not properly awarded, and the original contract or subaward was entered into by the recipient in good faith. A contract is considered made in good faith if the parties followed standard procurement or subaward practices, as applicable, and the

contract or subaward was not entered into for the purpose of evading the obligation deadline.

If any of the three situations described above are present and as a result, the recipient re-obligates SLFRF funds to a new contractor or subrecipient after the December 31, 2024, obligation deadline, the recipient will be considered to have used its funds to cover an obligation incurred prior to the obligation deadline. Obligated SLFRF funds must still be spent or liquidated by December 31, 2026, expenditure deadline.

Consultation Content

Pursuant to Executive Order 13175, President Joseph R. Biden's Presidential Memorandum for Tribal Consultation and Strengthening Nation to Nation Relationships; the Presidential Memorandum on Uniform Standards for Tribal Consultation; and Treasury's Action Plan for Tribal Consultation and Collaboration, Treasury is commencing an expedited consultation⁴ on the 2023 Obligation IFR for the SLFRF program to inform the development of a final rule.

Specifically, Treasury requests the assistance of Tribal leaders on the following topics:

1. The 2023 Obligation IFR provides new guidance that costs to satisfy administrative and other legal requirements applicable to the SLFRF program after the obligation deadline of December 31, 2024, has passed may be allowable with justification.
 - a) What other ways does your Tribe expect to incur administrative and other costs apart from those listed in the 2023 Obligation IFR?
 - b) With regard to payroll and benefits, personnel costs that are necessary to comply with administrative requirements and closeout are allowable after December 31, 2024, with justification.
 - i. What established practices and policies does your Tribe follow to account for payroll for individuals involved in program closeout?
 - ii. What questions, comments, or recommendations does your Tribe have regarding payroll for employees who are not assigned to program closeout activities?
2. New guidance is provided in the 2023 Obligation IFR regarding contract and subaward amendments and replacements.

⁴ Treasury ordinarily provides 30 days' notice prior to a consultation and a 30-day comment period following the consultation. Due to the upcoming SLFRF obligation and expenditure deadlines, this consultation is being held on an expedited timeline to ensure Tribal leader feedback is received to inform the development of final guidance. This amendment will enable Tribes and other recipients to complete their internal budgeting processes in time to meet the statutory deadline to incur costs by December 31, 2024.

- a) The 2023 Obligation IFR makes clear that contract amendments to increase obligations after December 31, 2024, is not permissible. What comments or questions does your Tribe have regarding the implementation of this requirement?
 - b) The 2023 Obligation IFR provides specific situations where a recipient may, after December 31, 2024, use SLFRF funds to replace a contract or subaward entered into prior to December 31, 2024. Are there situations that are not identified in the criteria that your Tribe has comments about?
3. What other questions or comments, if any, do Tribal governments have regarding the 2023 Obligation IFR?

[Register here for the consultation.](#)

We respectfully request that each Tribe register one person to participate in the consultation. All others are welcome to register as listen-only participants.

In addition to a Tribal consultation, Treasury is accepting written or electronic comments received by December 22, 2024, 11:59 p.m. Alaska Time. Please submit written comments at tribal.consult@treasury.gov.

Please note that consultations are off the record and not for press purposes.

We will send out an Agenda and a list of registered speakers on or before Wednesday, November 29, 2023.

We hope that you will be able to join us for this important discussion and value your participation.

Sincerely,

Chief Lynn Malerba
Treasurer
Point of Contact for Tribal Consultation
U.S. Department of the Treasury