



# North Dakota Legislative Council

Prepared by the Legislative Council staff  
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## FEDERAL STATE FISCAL RECOVERY FUNDS - TREASURY DEPARTMENT GUIDELINES

On May 10, 2021, the United States Department of the Treasury issued its interim final rule containing the guidelines for use of the state fiscal recovery fund. The funds were allocated to states through H.R. 1319 of the 117<sup>th</sup> Congress, also known as the American Rescue Plan Act (ARPA) of 2021. North Dakota has been allocated \$1,010,880,757 for its state fiscal recovery fund.

Provisions of the Act identify allowable uses of funding from the state fiscal recovery fund, which is available for costs incurred through December 31, 2024, as follows:

- Costs related to the COVID-19 pandemic, including assistance to households, small businesses, nonprofits, and affected industries, such as tourism, travel, and hospitality;
- Premium pay of up to \$13 per hour in addition to base pay, up to a maximum of \$25,000, to state, territory, or tribal government workers who perform essential work during the COVID-19 pandemic, or provide grants to employers with employees who perform essential work, which is defined as work needed to maintain continuity of operations of critical infrastructure and other sectors designated by the Governor as critical to protect the health and well-being of residents;
- The cost of providing government services to the extent there was lost revenue as a result of the COVID-19 pandemic; and
- Investment costs in water, sewer, and broadband infrastructure.

Provisions of the Act preclude states from using this funding to make payments to pension plans or to reduce taxes directly or indirectly between March 3, 2021, and the last day of the fiscal year in which funds received have been spent or returned.

The Treasury Department interim rules provide guidelines on the use of the state fiscal recovery funds. The interim final rule document is available at the following link: <https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf>. The following is summary of the major provisions included in the guidelines:

### 1. Funds may be used for public health and economic impacts.

#### a. COVID-19 public health impacts and disparities in public health outcomes include:

- (1) COVID-19 mitigation and prevention, including vaccination programs; medical care; testing; contact tracing; support for isolation or quarantine; supports for vulnerable populations to access medical or public health services; public health surveillance; enforcement of public health orders; public communication efforts; enhancement to health care capacity, including through alternative care facilities; purchases of personal protective equipment; support for prevention, mitigation, or other services in congregate living facilities (e.g., nursing homes, incarceration settings, homeless shelters, group living facilities) and other key settings like schools; ventilation improvements in congregate settings, health care settings, or other key locations; enhancement of public health data systems; and other public health responses. Capital investments also may be made 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.
- (3) Behavioral health care, including mental health treatment, substance misuse treatment, other behavioral health services, hotlines or warmlines, crisis intervention, overdose prevention,

infectious disease prevention, and services or outreach to promote access to physical or behavioral health primary care and preventative medicine.

- (4) Public health and safety staff, including payroll and covered benefits expenses for public safety, public health, health care, human services, and similar employees, to the extent their services are devoted to mitigating or responding to the COVID-19 public health emergency. 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 operating unit or division, is dedicated primarily to responding to the COVID-19 public health emergency.
  - (5) Expenses to improve the design and execution of health and public health programs, including planning and analysis to improve programs addressing the COVID-19 pandemic, including targeted consumer outreach, improvements to data or technology infrastructure, impact evaluations, and data analysis.
  - (6) Funding community health workers to help community members access health services and services to address the social determinants of health.
  - (7) Funding public benefits navigators to assist community members with navigating and applying for available federal, state, and local public benefits or services.
  - (8) Housing services to support healthy living environments and neighborhoods conducive to mental and physical wellness.
  - (9) Remediation of lead paint or other lead hazards to reduce risk of elevated blood lead levels among children.
  - (10) Evidence-based community violence intervention programs to prevent violence and mitigate the increase of violence during the pandemic.
- b. Negative economic impacts include:
- (1) Assistance to unemployed workers, including job training.
  - (2) Deposits into state unemployment insurance trust funds to restore the prepandemic balances of the account as of January 27, 2020, or to pay back certain advances received under Title XII of the Social Security Act since January 27, 2020.
  - (3) Assistance to households or populations facing negative economic impacts due to COVID-19, including food assistance; rent, mortgage, or utility assistance; counseling and legal aid to prevent eviction or homelessness; certain cash assistance; emergency assistance for burials, home repairs, weatherization, or other needs; Internet access or digital literacy assistance; or job training.
  - (4) Expenses to improve the efficiency of economic relief programs, including data analysis, targeted consumer outreach, improvements to data or technology infrastructure, and impact evaluations.
  - (5) Assistance to small businesses and nonprofits, including assistance to adopt safer operating procedures, weather periods of closure, or mitigate financial hardship resulting from the COVID-19 public health emergency, including:
    - (a) Loans or grants to mitigate financial hardship, such as declines in revenues or impacts of periods of business closure by supporting payroll and benefits costs; costs to retain employees; mortgage, rent, or utilities costs; and other operating costs;
    - (b) 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 contact tracing programs; and
    - (c) Technical assistance, counseling, or other services to assist with business planning needs.
  - (6) Rehiring state, local, and tribal government staff, including payroll, benefits, and other costs associated with rehiring public sector staff, up to the prepandemic staffing level of the government.
  - (7) Aid to impacted industries, including tourism, travel, and hospitality aid including assistance to implement COVID-19 mitigation and infection prevention measures to enable safe resumption of tourism, travel, and hospitality services, which may include improvements to ventilation, physical barriers or partitions; signage to facilitate social distancing; provision of masks or personal protective equipment, or consultation with infection prevention professionals to develop safe

reopening plans. Aid to support safe reopening of businesses in the tourism, travel, and hospitality industries and to business districts that were closed during the COVID-19 public health emergency, as well as aid for a planned expansion or upgrade of tourism, travel, and hospitality facilities delayed due to the pandemic.

- (8) Investments in housing and neighborhoods, including:
  - (a) Services to address homelessness, such as supportive housing, and to improve access to stable, affordable housing among unhoused individuals;
  - (b) Affordable housing development to increase supply of affordable and high-quality living units; and
  - (c) Housing vouchers, residential counseling, or housing navigation assistance to facilitate household moves to neighborhoods with high levels of economic opportunity and mobility for low-income residents, to help residents increase their economic opportunity, and to reduce concentrated areas of low economic opportunity.
- (9) Funding to address educational disparities, including:
  - (a) New, expanded, or enhanced early learning services, including prekindergarten, Head Start, or partnerships between prekindergarten programs and local education authorities, or administration of those services;
  - (b) Assistance to high-poverty school districts to advance equitable funding across districts and geographies;
  - (c) Evidence-based educational services and practices to address the academic needs of students, including tutoring, summer, afterschool, and other extended learning and enrichment programs; and
  - (d) Evidence-based practices to address the social, emotional, and mental health needs of students.
- (10) Funding to promote healthy childhood environments, including:
  - (a) New or expanded high-quality child care;
  - (b) Home visiting programs to provide structured visits from parent educators and health and social service professionals to pregnant women or families with young children to offer education and assistance navigating resources for economic support, health needs, or child development; and
  - (c) Enhanced services for child welfare-involved families and foster youth to provide support and training on child development, positive parenting, coping skills, or recovery for mental health and substance use challenges.

## **2. Funds may be used for premium pay for essential workers.**

- a. An essential worker is defined as "a worker needed to maintain continuity of operations of essential critical infrastructure sectors and additional sectors as each Governor of a state or territory, or each tribal government, may designate as critical to protect the health and well-being of the residents of their state, territory, or tribal government." These workers include staff at nursing homes, hospitals, and home care settings; workers at farms, food production facilities, grocery stores, and restaurants; janitors and sanitation workers; truck drivers, transit staff, and warehouse workers; public health and safety staff; child care workers, educators, and other school staff; and social service and human services staff.
- b. Premium pay can be up to \$13 per hour in addition to wages or remuneration the worker otherwise receives and in an aggregate amount not to exceed \$25,000 per eligible worker. Premium pay also may be provided retrospectively for work performed at any time since the start of the COVID-19 public health emergency, if those workers have yet to be compensated adequately for work previously performed.

## **3. Funds may be used for general government services to the extent of lost revenue due to the COVID-19 pandemic.**

- a. General government services include maintenance or building of infrastructure, including roads; modernization of cybersecurity, including hardware, software, and protection of critical infrastructure; health services; environmental remediation; educational services; and the provision of police, fire, and other public safety services.

- b. General government services do not include expenses associated with repaying debt or satisfaction of a settlement agreement. Replenishing financial reserves (e.g., rainy day or other reserve funds) is not allowed.
- c. The calculation of lost revenue involves the following four steps:
  - (1) Identify revenues collected in the most recent full fiscal year prior to the public health emergency (i.e., last full fiscal year before January 27, 2020), called the base year revenue.
  - (2) Estimate counterfactual revenue, which is equal to base year revenue \*  $[(1 + \text{growth adjustment})^{(n/12)}]$ , 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 3 full fiscal years prior to the COVID-19 public health emergency.
  - (3) Identify actual revenue, which equals revenues collected over the past 12 months as of the calculation date.
  - (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 zero for that calculation date.
- d. The calculation is made as of the following dates:
  - (1) December 31, 2020;
  - (2) December 31, 2021;
  - (3) December 31, 2022; and
  - (4) December 31, 2023.

#### **4. Funds may be used for investments in water, sewer, or broadband infrastructure.**

- a. Water and sewer infrastructure projects include:
  - (1) 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; support the consolidation or establishment of drinking water systems; 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.
  - (2) Cybersecurity needs to protect water or sewer infrastructure, such as developing effective cybersecurity practices and measures for drinking water systems and publicly owned treatment works.
  - (3) Projects that conserve and reuse water or reduce the energy consumption of public water treatment facilities; "green" infrastructure projects that support stormwater system resiliency, including rain gardens that provide water storage and filtration benefits, and "green" streets, where vegetation, soil, and engineered systems are combined to direct and filter rainwater from impervious surfaces. In cases of a natural disaster, funds may be used for interconnecting water systems or rehabilitating existing wells during an extended drought.
- b. Broadband infrastructure projects include those that provide services meeting adequate speeds to unserved and underserved households and businesses. Users are considered 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. Assistance to households experiencing negative economic impacts due to COVID-19 also is an eligible use, including Internet access or digital literacy assistance.

#### **5. Restrictions on use of state fiscal recovery funds.**

- a. Funds may not be deposited into a pension fund. A "deposit" in this context is an extraordinary payment into a pension fund for the purpose of reducing an accrued, unfunded liability. More specifically, funds may not be used to make a payment into a pension fund if the payment reduces a liability incurred prior to the start of the COVID-19 public health emergency, and the payment occurs outside the recipient's regular timing for making such payments. Under this interpretation, a "deposit" is distinct from a "payroll contribution," which occurs when employers make payments into pension funds on regular intervals, with contribution amounts based on a pre-determined percentage of employees' wages and salaries.
- b. Funds may not be used to offset a reduction in net tax revenue.

- (1) The funds may not directly or indirectly offset a reduction in net tax revenue resulting from a change in law, regulation, or administrative interpretation during the covered period. If a state uses any of the funds to offset a reduction in net tax revenue, the state must repay an amount equal to the lesser of (i) the amount of the applicable reduction attributable to the impermissible offset and (ii) the amount received by the state or territory under the ARPA. Three sources of funds may offset a reduction in net tax revenue other than fiscal recovery funds--organic growth, increases in revenue (e.g., an increase in a tax rate), and certain cuts in spending. Even if fiscal recovery funds are not directly used to cover the costs of changes that reduce net tax revenue, those funds may be used in a manner inconsistent with the statute by indirectly being used to substitute for the state's funds that would otherwise have been needed to cover the costs of the reduction. Fiscal recovery funds may not be used to indirectly offset reductions in net tax revenue for which the recipient government has not identified other offsetting sources of funding.
- (2) The following process is used for determining whether, and the extent to which, fiscal recovery funds have been used to offset a reduction in net tax revenue:
  - (a) Each year, each recipient government must identify and value the changes in law, regulation, or interpretation that would result in a reduction in net tax revenue, as it would in the ordinary course of its budgeting process. The sum of these values in the year for which the government is reporting is the amount it needs to "pay for" with sources other than fiscal recovery funds (total value of revenue reducing changes).
  - (b) If the total value of the changes in the year for which the recipient government is reporting is below a minimum level, the recipient government need not identify any sources of funding to pay for revenue reducing changes and will not be subject to recoupment.
  - (c) The recipient government must consider the amount of actual tax revenue recorded in the year for which it is reporting. If the recipient government's actual tax revenue is greater than the amount of tax revenue received by the recipient for the fiscal year ending 2019, adjusted annually for inflation, the recipient government will not be considered to have violated the offset provision because there will not have been a reduction in net tax revenue.
  - (d) If the recipient government's actual tax revenue is less than the amount of tax revenue received by the recipient government for the fiscal year ending 2019, adjusted annually for inflation, in the reporting year the recipient government must identify any sources of funds that have been used to permissibly offset the total value of covered tax changes other than fiscal recovery funds. These are state tax changes that would increase any source of general fund revenue, such as a change that would increase a tax rate and spending reductions in areas not being replaced by fiscal recovery funds.
- c. Funds may not be used as nonfederal match for other federal programs whose statute or regulations bar the use of federal funds to meet matching requirements. For example, payments from the fiscal recovery funds may not be used to satisfy the state share of Medicaid.
6. **Transfers.** The Act allows states to transfer the fiscal recovery funds to other units of government or private entities. A state may transfer the funds to a subrecipient to carry out a qualifying program or project on behalf of the state. The state remains responsible for monitoring and overseeing the subrecipient's use of the fund to ensure the subrecipient complies with the federal requirements.
7. **Timeline for receipt of funds.** The Act allows the Treasury Department to withhold up to 50 percent of the amount allocated to each state for a period of up to 12 months from the date on which the state provides its certification. The determination of the withholding is based on the state's unemployment rate as of the date of the certification. Treasury will withhold 50 percent of the funds allocated to each state other than those with an unemployment rate that is 2.0 percentage points or more above its prepandemic (i.e., February 2020) level. States with an unemployment rate more than 2.0 percent above the prepandemic level will receive a single payment. States with an unemployment rate 2.0 percent or less than the prepandemic level will receive two payments, the second within 12 months of the first.
8. **Timeline for use of funds.** The Act requires the fiscal recovery funds to be used only for costs incurred by December 31, 2024. Treasury's interpretation of this provision is a state must use the funds for costs incurred after March 2, 2021, and obligated by December 31, 2024. The funds are available until December 31, 2026, which will provide recipients a reasonable amount of time to complete projects obligated by December 31, 2024.