NATIONAL LEAGUE OF CITIES
CITIES STRONG TOGETHER

July 1, 2021

Office of the Undersecretary for Domestic Finance
Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Docket Number: TREAS-DO-2021-0008
Docket Name: Coronavirus State and Local Fiscal Recovery Funds Interim Final Rule Comments

Dear Sir or Madam:

The National League of Cities (NLC) appreciates the opportunity to comment on the interim final rule to implement the Coronavirus State Fiscal Recovery Fund and the Coronavirus Local Fiscal Recovery Fund established under the American Rescue Plan Act. NLC is the nation's foremost resource and non-partisan advocate for municipal governments and their leaders, representing all of America's 19,000 cities, towns, and villages. On behalf of municipal governments, NLC thanks the Administration and Members of Congress for the urgently needed relief provided by the American Rescue Plan Act (ARPA). NLC is also grateful to the U.S. Department of Treasury for publishing an Interim Final Rule (IFR) that addresses many of the issues and concerns raised by local elected officials following enactment of ARPA. The ARPA and the IFR both recognize cities are essential for emergency response and economic recovery in response to the unprecedented harm of the coronavirus emergency.

From the outset of the coronavirus emergency, NLC worked closely with local elected officials from cities of every size to educate federal lawmakers about local government responsibilities and practices; and the hardship resulting from unavoidable revenue declines and unbudgeted emergency expenditures stemming from federal, state, and local efforts to contain the spread of COVID-19. The Coronavirus Local Fiscal Recovery Fund (CLFRF) is an urgent and necessary lifeline for local governments that NLC is deeply grateful for. At the same time, the CLFRF is not equal to the losses endured by local governments. Collectively, municipal governments sustained a $90 billion shortfall to one year revenues as a result of the coronavirus emergency. Under the American Rescue Plan Act, municipal governments will receive $65.1 billion over two years to address COVID-19 related harm.

In considering NLC's comments, we urge Treasury to recognize that the collective losses experienced by local governments are too large to be fully offset by grants from the CLFRF. As a result, it is reasonable to foresee that thousands of local governments will continue to operate at some level of reduced capacity throughout most of the lifespan of the program.

(202) 626-3000 660 North Capitol St. NW Suite 450 | Washington, DC 20001 www.nlc.org

NLC's comments generally fall under three types of requests:

1.) Additional flexibilities to help address hardships that are greater or more costly than a municipality's CLFRF grant can meet;
2.) Improved direction and clarity for local governments operating in good faith at reduced capacities; and
3.) Reconsideration of certain rules that appear to be out of step with Congressional intent, or where unanticipated circumstances warrant reexamination.

Public Health and Economic Impacts

As noted in the Interim Final Rule, the American Recovery Plan Act provides for two broad policy goals: to meet pandemic response needs and to rebuild a stronger, more equitable economy as the country recovers. The Act makes all 19,000+ municipal governments part of the solution to achieving those goals through the Coronavirus Local Fiscal Recovery Fund.

In general, NLC expects the first set of obligations or expenditures approved by local governments will be directed toward stabilizing and restoring government operations and services. Other initial expenditures will likely also reflect activities that already appear as line items in municipal budgets, or to advance activities that local governments are already supporting.

NLC appreciates the non-exhaustive lists of eligible activities identified in the Interim Final Rule and applauds Treasury for providing significant flexibility in addressing public health impacts and economic harm related to the coronavirus emergency. In addition to flexibility, there is significant need for additional direction to localities to carry-out activities under this category that may be outside what some local governments consider typical public duties.

For instance, laudable activities like directly intervening in personal fiscal decline, or "providing immediate economic stabilization for households and businesses", will be perceived by many local governments as a new, or atypical, duty or responsibility. Moreover, it is not universally intuitive or apparent what kind of activities can be undertaken to "address the systemic public health and economic challenges that may have contributed to more severe impacts of the pandemic among low-income communities and people of color".

As the Administrator of Coronavirus Local Fiscal Recovery Funds, the U.S. Treasury, in conjunction with other relevant agencies, should provide direction or point to a set of proven practices to assist local governments undertaking activities within this expenditure category for the first time.

As Treasury revises and finalizes the Interim Final Rule, NLC offers the following recommendations to clarify language and offers further comments and explanation below in response to Treasury's specific questions related to public health and economic harm:

- The Interim Final Rule appears to allow substantially the same expenditures as are allowable under the Community Development Block Grant Program (CDBG), as well as expenditures that are beyond the scope of CDBG. The Interim Final Rule also relies on existing programs, like the

Clean Water and Drinking Water State Revolving Fund (SRF) programs, to help grantees identify and align eligible expenditures. The Final Rule should extend that type of alignment with existing programs to the public health and economic harm category. NLC recommends the Final Rule should unambiguously state that eligible expenditures under the Community Development Block Grant program and the Brownfields Utilization, Investment and Local Development (BUILD) Act are also eligible expenditures under the public health and economic impact category. Alternatively, Treasury could further incentivize spending for the benefit of residents in Qualified Census Tracts by establishing that CDBG or BUILD Act permitted expenditures will be considered eligible expenditures of CLFRF grant funds within Qualified Census Tracts. Such eligibility would significantly assist NEU municipalities, who will naturally seek advice on CLFRF grant spending from state and local community development agencies. By aligning only the expenditure eligibilities, without imposing any new limitations or regulations on this category beyond those required by the ARP Act, NEU's and state and local community development agencies could work together to make CLFRF expenditures that provide immediate economic stabilization for households and businesses, and improve prospects for long term recovery.

- The Final Rule should provide absolute clarity on the transferability of grant funds. The Interim Final Rule makes it clear that state and local governments can transfer funds to smaller or constituent local governments within their jurisdiction. It is not clear if smaller or constituent local governments can transfer funds in the same manner to the larger units of government in which they reside. For the benefit of small units of local government with limited capacities to carry out expenditures under this category, local governments should be permitted to transfer grant dollars, and responsibility for those dollars, to a larger city, a county, or their state to carry out activities that benefit the residents of such small local governments. Among other things, such transfer authority would incentivize regional interventions for markets that are also regional, such as the housing market, the jobs market, etc. NLC recommends Treasury incorporate plain language that communicates a transfer of grant funds between different local units of government is permitted whenever a grantee determines such transfers will result in eligible expenditures that benefit (*but not necessarily exclusively benefit*) the residents within the grantees jurisdiction.

- The Final Rule should clarify that activities addressing behavioral health and well-being include both acute and chronic care, and a variety of services including support groups that do not often directly accept insurance payments.

- The Final Rule should create a safe harbor for residents that stand to lose benefits as a result of aid provided by CLFRF grants, which are one-time emergency funds, as the IRS has done for recipients of Child Tax Credit payments. The IRS website states plainly:
    - Even if you have $0 in income, you can receive advance Child Tax Credit payments
    - Advance Child Tax Credit payments are not income
    - Advance Child Tax Credit payments cannot be counted as income when determining if you or anyone else is eligible for benefits or assistance, or how much you or anyone else can receive, under any federal program or under any state or local program financed in whole or in part with federal funds.

- These programs also cannot count advance Child Tax Credit payments as a resource for purposes of determining eligibility for at least 12 months after you receive it.

As noted in the Interim Final Rule, prior to the coronavirus emergency many parents were unable to afford or access high-quality child care, which is a significant obstacle to opportunities for full-employment. A very real issue for families in poverty is rigid income limits that can cause recipients of one-time aid to lose long-term benefits. Families and individuals receiving limited cash assistance for CLFRF eligible activities should not be required to count that assistance as income to the greatest extent possible. If, for instance, direct aid under ARPA cannot be excused from calculations of taxable income, the Treasury Department should still make every effort to excuse aid provided under ARPA from counting against programmatic or benefits income limits. The consequences of counting such aid as income, such as losing long-term benefits as a consequence of receiving short term emergency relief, contributes to disparities rather than addresses disparities as encouraged in the interim final rule.

- Where early learning is mentioned, the Final Rule should clarify early learning begins at birth rather than PreK. Infants and toddler care is more expensive than PreK and is harder to find.

- The Final Rule should provide additional direction to local governments for property acquisition. Property acquisition for the development of affordable housing should be permitted in areas other than Qualified Census Tracts, including buying properties in floodplains to facilitate the relocation of residents and properties near public transit or public resources that contribute to economic mobility. Please provide additional direction and clarity to grantees that determine property acquisition would alleviate economic impacts of the COVID-19 Public Health Emergency that localities can use CLFRF grants for that purpose.

- The Final Rule should provide additional direction and clarity related to affordable housing development. Local governments rarely undertake housing construction directly, and instead enact activities or policies that incentivize private developers to build needed housing. The Final Rule should expand on the types of activities and conditions that would be permitted under expenditures for affordable housing.

- The Final Rule should permit local governments to use a portion of CLFRF grants to establish local equity funds. Such funds, once established, would obligate dollars toward addressing long-standing, systemic inequities, and racial disparities. To incentivize such funds, Treasury should consider the deposit of grant dollars into such funds as dollars spent, so that both grant dollars and locally derived funds could be co-mingled and serve as a long-term source of funds to support the long-term work of racial equity.

- The Interim Final Rule creates ambiguity as to the time limits on using CLFRF money to pay for expenses related to COVID-19 response. Many of these expenses were incurred during calendar year 2020, but the Interim Final Rule can be read as limiting the use of CLFRF funds to costs incurred after March 3, 2021. Specifically, §35.5(a) of the Interim Final Rule states "[a] recipient may only use funds to cover costs incurred during the period beginning March 3, 2021, and ending December 31, 2024, for one or more of the purposes enumerated in sections

602(c)(1) and 603(c)(1)…." §35.5(b) goes on to define *Costs incurred* as "[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 a cost by December 31, 2024." These dates seem to conflict with §35.3 – which defines the *COVID-19 public health emergency* as "the period beginning on January 27, 2020 and until the termination of the national emergency concerning the COVID-19 outbreak declared pursuant to the National Emergencies Act." Many of the eligible uses defined in both statute and the Interim Final Rule are to respond to the public health emergency. For instance, most of the eligible uses under §35.6(b)(1) are expenses local governments incurred during the height of the COVID-19 public health emergency, including:

- §35.6(b)(1)(x) Expenses for acquisition and distribution of medical and protective supplies, including sanitizing products and personal protective equipment;
    - *While local governments continue to acquire and distribute medical and protective supplies, the bulk of these were purchased prior to March 3, 2021 – due to the nature of the public health emergency*
- §35.6(b)(1)(xi) Expenses for disinfection of public areas and other facilities in response to the COVID-19 public health emergency;
    - *While local governments continue to disinfect public areas and other facilities, a lot of expenses were incurred prior to March 3, 2021 – due to the nature of the public health emergency*
- §35.6(b)(1)(xiv) Expenses for providing paid sick and paid family and medical leave to public employees to enable compliance with COVID-19 public health precautions
    - *Local governments incurred these costs before and after March 3, 2021*

ARPA does not put a limit on the starting date for reimbursement for these costs. (there is an ending date of December 31, 2024.) Please clarify whether APRA funds can be used to cover costs described in Section 35.6(b) of the Interim Final Rule that were incurred by a City after January 27, 2020 but before March 3, 2021, consistent in section 35.3 and the statue. A simple fix could be to reference the definition of the COVID-19 Public Health Emergency in section 35.6(b) of the final rule to clarify that CLFRF grants can be used to cover costs incurred during that period.

Premium Pay

The interim final rule defines essential work, which is eligible for premium pay, as work involving regular in-person interactions or regular physical handling of items that were also handled by others. Sections 602(g)(2) and 603(g)(2) of the American Rescue Plan Act define eligible worker to mean ''those workers 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 protecting the health and well-being of the residents of their state, territory, or Tribal government.'' The IFR states that sectors eligible for premium pay include healthcare, public health and safety, childcare, education, sanitation, transportation, and food production and services, and other sectors that are deemed critical to protect the health and well-being of residents.

As Treasury revises and finalizes the Interim Final Rule, NLC offers the following recommendations to clarify language and offers further comments and explanation below in response to Treasury's specific questions related to premium pay:

- The Final Rule provides a detailed list of who is eligible for premium pay, and indicates police, fire, and emergency medical service personnel are among those eligible for premium pay. The Treasury should consider using the Bureau of Labor Statistics Standard Occupational Classification (SOC) program to designate broader sectors as eligible for premium pay.

- For states and local governments that are lifting certain restrictions related to the COVID-19 pandemic, the Treasury guidance should provide clear direction regarding the duration of the premium payment. The final guidance should also provide direction on how local governments should calculate premium pay for irregular categories of employment such as volunteer firefighters and public safety staff who may be compensated differently than hourly wage staff.

- The Final Rule should also provide clear direction on how local governments track and report premium pay allocations to non-government employment sectors eligible for premium pay grants, and if employers should withhold federal, state and local taxes from the premium pay.

Budget Calculations and Revenue Loss

Unavoidable revenue shortfalls and unbudgeted emergency expenditures are the primary and most immediate harm facing local governments related to the Coronavirus emergency. NLC estimates that municipal governments were subject to a collective $90 billion shortfall to one-year revenues as a result of economic decline related to the coronavirus emergency[1]. For local governments, unavoidable revenue shortfalls have struck at the heart of their capacity to both carry out emergency response and participate in economic recovery. Municipal job cuts, and the resulting loss of capacity, have real-world consequences for residents, households, and small businesses.

Household services have had to be scaled back, resulting in quality-of-life declines. According to NLC's City Fiscal Conditions 2020 report, nearly 8 in 10 finance officers said their cities were less able to meet the needs of their communities in 2020 than in 2019[2]. A December update to NLC's survey of municipal officials found that 90% of municipal governments have experienced a revenue decrease of 21%, and 76% have experienced an expenditure increase of 17%, on average[3]. For households, among other things this means reductions in waste collection and recycling programs, delays in permitting for home construction and renovation, longer wait times inspections and licensing, reduced services for households that rely on public transit, and pausing plans for utility build-out for new housing construction.

[1] Over Two Thirds of Cities Say Condition Will Worsen Without Federal Stimulus, NLC
[2] City Fiscal Conditions 2020, NLC
[3] Over Two Thirds of Cities Say Condition Will Worsen Without Federal Stimulus, NLC

Contractors that do business with local governments and small businesses at the heart of main street have also been harmed by declines in local government operations. The deepest cuts from the pandemic have not showed on the stock market but on the Main Streets of cities and towns across America. Given that local governments contract months and years ahead, this means that without robust revenue replacement expenditures, budget cuts will increasingly reveal themselves to businesses that bid for work in the months ahead, slow-downs in inspections, costly opening and re-opening day delays, and associated loss of wages for employees.

Without the Coronavirus Local Fiscal Recovery Funds under the American Rescue Plan Act, there is no question that local capacity to administer essential programs and services, including emergency relief, will decline. NLC urges the U.S. Treasury Department to reconsider limitations on the calculation of revenue loss under the interim rule to better address legitimate losses as Congress intended.

As Treasury revises and finalizes the Interim Final Rule, NLC offers the following recommendations to clarify language and offers further comments and explanation below in response to Treasury's specific questions related to revenue loss:

- The Final Rule should permit municipal governments to calculate losses based on the locality's fiscal year or the calendar year. For cities that do not budget on the calendar year, the calendar year requirement produces results that may not accurately capture one-year losses resulting from the coronavirus emergency. Moreover, for auditing purposes, cities are audited on their fiscal year rather than the calendar year. This recommendation also stands for reporting requirements, which should permit cities to report on their fiscal year, rather than a calendar year.

- The Final Rule should permit municipal governments to include revenue and losses from municipally-owned utilities when calculating lost revenue. The interim final rule explicitly excludes revenue from municipal utilities from the calculation of general revenue and general revenue from own sources. However, the interim final rule posits an incorrect assumption that all municipal utilities are subsidized by local government general fund revenues. The overwhelming feedback of local governments on this issue is the opposite - municipal utility revenue subsidizes municipal budget general funds in states where this is not otherwise prohibited. Conversely, in states where there is a legal restriction on using utility revenue to provide for the general fund, the moratorium on service disconnection during the pandemic created a shortfall in utility revenues for many cities. This shortfall was often covered from the city's general fund and would have added to the overall revenue shortfall that cities should be allowed to account for under ARPA. In our view, revenue losses stemming from utility losses or protective action like shut-off moratoriums are losses Congress intended to address under the expenditure category of revenue replacement.

- The Final Rule should provide greater clarity on reporting for expenditures under the revenue loss category. In our view, once revenue losses are calculated, the "expenditure" in question is an expenditure to replace lost revenue as permitted by the Act. Local governments should not be required to track expenditures beyond deposit into the municipal budget general fund

because any expenditure from the general fund is an expenditure for local government operations and services. For local governments operating at reduced capacity, the ability to track ARP grant dollars separately from own-sources of revenue within a single general fund is a significant practical challenge. For cities in this circumstance, they may need to resort to onerous practices like maintaining a second "ARP Grant" budget to track dollars under the revenue loss category. NLC is not recommending dollars under the revenue loss category be released from the prohibition on certain general expenditures identified under the Act.

- The Final Rule should permit flexibility with regard to revenue streams enacted after the base year or in direct response to the coronavirus emergency. Cities and towns should be entitled to the use their CLFRF grant to address the full measure of their revenue loss. A full measure of revenue loss related to the coronavirus emergency should permit local governments to exclude new taxes taking effect in subsequent years or new sources of revenue not in the base year from the calculation of revenue loss. For example, a number of cities enacted new taxes to address revenue shortfalls caused by the pandemic. These cities should not be punished for taking steps to protect their fiscal health. The measure of the shortfall should be what would have been generated in the absence of the pandemic. We request that Treasury clarify that cities that enacted new taxes during either the base year of subsequent years be allowed to use alternative methods of determining revenue shortfalls that excludes this revenue.

- The Final Rule should reconsider the prohibition on depositing CLFRF grant funds into reserve accounts. Local governments that drew on their reserves for unbudgeted expenditures, or to cover revenue losses, directly related to the coronavirus emergency should be permitted to restore the reserves used for that purpose. Cities and towns funded programs and services responding to the coronavirus emergency directly from their reserve fund. As a result, the original purposes of those reserves, such as infrastructure maintenance or climate resiliency, have been deferred until the reserves can be restored with own-sources of revenue. As pointed out in the interim final rule, it can take years for a city to recover to the point it is generating sufficient revenue to restore reserves. During the intervening period before reserves are restored, otherwise moderate setbacks may be allowed to persist and grow into full new crisis. Similarly, reserve funds impact municipal credit ratings. Cities that are unable to restore their reserves in a short time frame risk increased borrowing costs, which is an additional cost that will be borne by taxpaying residents.

- The Final Rule should permit flexibility with regard to expenses related to debt. If a local government borrowed funds to respond to the coronavirus emergency, or to cover losses related to the coronavirus emergency in order to balance their budget as required by law, CLFRF grant funds should be permitted to pay down the principal and interest on that debt.

- The Final Rule should demonstrate complete allocation of dollars appropriated for the Coronavirus Local Fiscal Recovery Fund. Section 603(b)(2)(C)(iii) of the Act and the Interim Final Rule provide that each NEU's total award is capped at 75 percent of its total annual budget. And that if an NEU's total allocation is found to be more than 75 percent of the NEU's reference budget, the State must return the amount of the allocation in excess of the NEU's reference

budget to Treasury. The Act and the IFR are silent on the treatment of returned municipal grant funds. NLC urges Treasury to reallocate any grant funds returned as a result of the 75% cap limitation on NEU's to municipalities on a basis that adheres to original allocation principles.

Investments in Infrastructure

- **Water and Sewer Recommendations**

  The Interim Final Rule explains "water and sewer" to mean a broad range of projects that improve access to clean drinking water, improve wastewater and stormwater infrastructure systems. NLC appreciates that the Interim Final Rule provides local governments with wide latitude to identify investments in water and sewer infrastructure that are of the highest priority for their own communities. NLC also appreciates that stormwater projects are expressly eligible, including through the Green Project Reserve.

  To achieve this intended flexibility while providing clarity on the types of projects that can be funded, Treasury's Interim Final Rule aligns types of eligible projects with the wide range of projects that can be supported by the U.S. Environmental Protection Agency's Clean Water State Revolving Fund (CWSRF) and Drinking Water State Revolving Fund (DWSRF). Additionally, the Interim Final Rule outlines several other types of water, sewer and stormwater projects that are allowed or that local decisionmakers are encouraged to consider funding, including lead pipe replacement; green infrastructure and projects to address climate change; cybersecurity needs to protect water or sewer infrastructure; and projects to assist those most negatively impacted from the coronavirus pandemic.

  As Treasury revises and finalizes the Interim Final Rule, NLC offers the following recommendations to clarify language and offers further comments and explanation below in response to Treasury's specific questions related to "water, sewer" infrastructure.

  - The Final Rule should expressly state that the local government is responsible for determining project eligibility for drinking water, wastewater and stormwater projects under the eligible project categories of the Clean Water and Drinking Water State Revolving Fund (SRF) programs.

  - The Final Rule should expressly state that determining project eligibility should be based on the Federal project categories and definitions for the SRF programs, and not based on each State's eligibility or definitions.

  - The Final Rule should explicitly state that projects to be funded with Fiscal Recovery Funds do not need to apply for funding from the applicable State Clean Water or Drinking Water SRF program and that Fiscal Recovery Funds will be provided for eligible projects as grants not loans.

  - The Final Rule should allow Fiscal Recovery Funds to be used for projects eligible under the Secure Water Act.

- The Final Rule should expressly cite consumer incentive programs designed to implement water use efficiency, conservation, green infrastructure, reuse and other distributed Clean Water and Drinking Water SRF eligible projects as authorized uses of Fiscal Recovery Funds.

- The Final Rule should expressly state which other federal programs would be triggered by the use of CLFRF grant funds for infrastructure projects. Treasury has made clear that use of these funds for a project is not a major federal action for the purposes of the National Environmental Policy Act ("NEPA"), and that Davis-Bacon prevailing wage requirements would not be applicable to an SLFRF grant expenditure alone, but it is not clear which other schemes would apply. If the only applicable requirements are those listed on the Unit Award Terms and Conditions document provided to CLFRF recipients, please so state.

- **Broadband Infrastructure Recommendations**
  The American Rescue Plan Act also provides for ""necessary investments in ... broadband infrastructure." Treasury defines "necessary investments" to be those "designed to provide services meeting adequate speeds and are provided to unserved and underserved households and businesses." Treasury further defines "unserved and underserved" to encompass users that "lack access to a wireline connection capable of reliably delivering at least minimum speeds of 25 Mbps download and 3Mbps upload." NLC appreciates that the Interim Final Rule emphasizes the need for modern broadband infrastructure capable of supporting modern and future anticipated uses by funding projects capable of 100Mbps symmetrical service. We also appreciate Treasury's recognition of the importance of addressing barriers to broadband adoption beyond access to infrastructure by granting communities the flexibility to use funds on digital inclusion services, such as digital literacy assistance and affordability assistance for households facing negative economic impacts from the pandemic.

  However, we believe that the Interim Final Rule contains concerning limitations that, if not addressed, will ultimately discourage communities from taking advantage of this eligible use category when deciding how to allocate relief dollars. In particular, the definition of "unserved and underserved" would, on its face, appear to limit investment to a very small portion of the country, particularly if communities use the Federal Communications Commission's broadband availability maps and data as a basis for decision-making. The FCC estimates that over 90% of the nation is "covered" by 25/3Mbps service based on its Form 477 data, but this estimate greatly overestimates the actual service available within areas smaller than a Census tract. This threshold also does not take into account other barriers to broadband access, including service affordability.

  Further, the use of 25/3 Mbps as a threshold is not reflective of the minimum speeds necessary to conduct normal activities of daily life. The FCC definition of broadband service at 25/3 Mbps has been well outpaced by modern technological demands since its establishment in 2015. As Treasury itself notes, this service threshold is already inadequate for households with more than one inhabitant trying to use video conferencing or content sharing activities online. If localities are unable to invest in broadband infrastructure in areas with some degree of existing 25/3 Mbps service, areas with objectively inadequate service are likely to miss out on much-needed improvements, and some anticipated projects may be logistically impossible for communities to

apply American Rescue Plan funds on, if these projects require more holistic buildout across a neighborhood, jurisdiction or region.

As Treasury revises and finalizes the Interim Final Rule, NLC offers the following recommendations to clarify language and offers further comments and explanation below in response to Treasury's specific questions related to broadband infrastructure.

- The Final Rule should increase the speed threshold for "underserved" to encompass all areas without 100/100 Mbps service to align with modern broadband usage needs and patterns and ensure a "donut hole" of locations with marginal service is not inadvertently created.

- The Final Rule should specify that eligible investments are those that prioritize or focus on providing services at adequate speeds to unserved and underserved households and businesses, to ensure that communities are clearly able to choose the projects and network designs that make sense locally, rather than being forced to find ways to serve individual locations scattered around a jurisdiction in isolation.

- Treasury should clarify that certain outdated technologies, such as copper, by definition do not meet the threshold for reliable wireline broadband service and that areas served by these outdated technologies can be presumed to be unserved or underserved.

- Treasury should clarify that local governments have flexibility to determine if a location is "reliably" served, including whether service is affordable for residents, whether network performance meets current needs, including resident and business experiences of network speeds or latency during key use times (such as the school/work day), whether end users report reliable service, and using data sources local governments choose, including local maps, resident surveys, and other methods.

- Treasury should clarify that eligible projects are not required to solely provide service to unserved and underserved locations and may also provide service to areas with existing wireline 25/3 Mbps service to meet project feasibility requirements, provided that they prioritize addressing the needs of residents disproportionately impacted by the COVID-19 pandemic.

- Treasury should clarify that if a jurisdiction lacks unserved or underserved areas, that jurisdiction may still use funds in the broadband eligible use category.

Questions: Investments in Infrastructure

Question 18: What are the advantages and disadvantages of aligning eligible uses with the eligible project type requirements of the DWSRF and CWSRF? What other water or sewer project categories, if any, should Treasury consider in addition to DWSRF and CWSRF eligible projects? Should Treasury consider a broader general category of water and sewer projects?

NLC supports aligning eligible uses of Fiscal Recovery Funds with DWSRF and CWSRF eligibilities, which presents several advantages. First, DWSRF and CWSRF eligibilities are familiar to local water managers and there are numerous examples of DWSRF and CWSRF eligible projects. Second, as the Interim Final Rule outlines, DWSRF and CWSRF eligibilities cover a broad range of project types, including climate resilient strategies such as conservation, efficiency, and green infrastructure; our recommendations for highlighting the benefits of using Fiscal Recovery Funds for these specific project types are explained in more detail below. Third, as the Interim Final Rule also outlines, authorizing Fiscal Recovery Funds to be used for projects eligible for DWSRF and CWSRF ensures projects are necessary for the community.

While we have not identified any disadvantages to aligning eligible uses with the eligible project type requirements of the DWSRF and CWSRF, we recommend that the Interim Final Rule explicitly state that projects to be funded with Fiscal Recovery Funds do not need to apply for funding from the applicable state DWSRF or CWSRF programs and that Fiscal Recovery Funds will be provided for eligible projects as grants not loans. Further, to ensure local water managers maintain the "flexibility for award recipients to direct funding to their own particular needs and priorities" and are not precluded from "applying their own additional project eligibility criteria" as stated in the Interim Final Rule, we also recommend that the Interim Final Rule clarify that applicable project eligibilities include the full range of project types defined at section 1383(c) of Title 33 of the Federal Water Pollution Control Act and 300j-12(a)(2) of Title 42 of the Safe Drinking Water Act and that any narrower eligibilities or priorities defined by an applicable state-administered DWSRF or CWSRF program would not limit a local government's ability to fund projects that align with the Clean Water Act and Safe Drinking Water Act eligibilities.

In addition to water and sewer project categories eligible under the DWSRF and CWSRF, we recommend that the Interim Final Rule allow Fiscal Recovery Funds to be used for projects eligible under section 10364(a)(1) of Title 42 of the Secure Water Act. The Secure Water Act authorizes climate resilient projects that may not otherwise be authorized by the DWSRF and CWSRF, including projects: (1) to accelerate the adoption and use of advanced water treatment technologies to increase water supply; (2) to enhance water management, including increasing the use of renewable energy in the management and delivery of water not only at POTWs; (3) to achieve the prevention of the decline of species that the United States Fish and Wildlife Service and National Marine Fisheries Service have proposed for listing under the Endangered Species Act of 1973; (4) to achieve the acceleration of the recovery of threatened species, endangered species, and designated critical habitats that are adversely affected by Federal reclamation projects or are subject to a recovery plan or conservation plan under the Endangered Species Act of 1973; (5) to improve the condition of a natural feature; (6) to address any climate-related impact to the water supply of the United States that increases ecological resiliency to the impacts of climate change; and (7) to plan for or address the impacts of drought. (42 U.S.C. 10364(a)(1).) As with projects eligible for DWSRF and CWSRF, Congress has already determined that projects eligible for funding under the Secure Water Act are necessary to the nation's water future and resilient local water management and are less likely to be addressed with private sources of funding.

Given the breadth of the project types eligible under the DWSRF, CWSRF and Secure Water Act, we do not recommend that the Interim Final Rule include a broader general category of water and sewer projects. These existing definitions of necessary water, sewer, and stormwater projects provide clear guidance for local decisionmakers that will be implementing the Fiscal Recovery Funds while outlining a wide range of projects that protect public health and the environment while building resilience to the impacts of climate change from which local decisionmakers can choose depending on their community's particular needs and circumstances. In contrast, including a broader general category of water and sewer projects in the Interim Final Rule may invite confusion and inconsistent use of Fiscal Recovery Funds across communities.

Question 20: What new categories of water and sewer infrastructure, if any, should Treasury consider to support State, local, and Tribal governments in mitigating the negative impacts of climate change? Discuss emerging technologies and processes that support resiliency of water and sewer infrastructure. Discuss any challenges faced by States and local governments when pursuing or implementing climate resilient infrastructure projects.

To mitigate the impacts of climate change and meet manifold 21st century water management challenges facing local leaders, what is considered "water infrastructure" must extend to onsite, localized, and distributed water infrastructure strategies. Onsite installations and technologies distributed throughout a community include localized green stormwater strategies, water use efficiency measures, watershed restoration, lead line replacements, and onsite reuse such as:

• Indoor high-efficiency appliances and fixtures	• Turf replacement and water-wise landscape
• Rainwater harvesting	• Green roofs
• Smart irrigation controllers	• Urban forests
• Customer-side leak detection devices	• Advanced onsite reuse systems
• Graywater systems	• Bioswales
• Rain gardens	• Permeable pavement

Indeed, these distributed strategies are infrastructure—they provide water supply, treat drinking water, and effectively manage wastewater and stormwater in concert with centralized

infrastructure. Their flexibility and adaptability build resilience to intensifying flooding and water supply limitations as well as increased wildfires caused by climate change. In contrast with conventional systems, localized water infrastructure also provides multiple benefits to communities that mitigate climate change impacts, including reducing urban heat island effects, reducing greenhouse gas emissions, increased energy efficiency, and resilience to wildfires.

Distributed approaches are also often less expensive than conventional approaches keeping rates affordable. Critically, green and distributed strategies provide lasting economic benefits, including near-term permanent local green jobs and local economic development. Localized options go a long way in addressing water equity issues by providing ways to locate needed water infrastructure improvements in neighborhoods and communities that have previously disproportionately born the impacts of challenges like combined sewer overflows and flooding and are also most in need of the co-benefits of localized solutions such as urban greening, improved air quality, and reduced heat islands. Because by their nature localized strategies are distributed across the community, they provide significant opportunity to ensuring the just distribution of costs and benefits among water utilities' stakeholders.

Because the vast majority of land in an urban setting is privately owned, to capture the full water management potential, and co-benefits, of localized infrastructure, municipalities and special districts must encourage private property owners to install these solutions on their property. Accordingly, investments in distributed infrastructure strategies are often made in the form of subsidies, financial incentives, and rebates for consumers, including private businesses, commercial, industrial and institutional enterprises, residences, and other public entities (such as local parks, schools, transportation agencies, etc.). Such subsidies and financial incentives are already eligible project types under the DWSRF and CWSRF. However, this eligibility is not widely understood and a major barrier to implementing innovative, localized strategies is access to large-scale funding for consumer subsidies.

Thus, to clarify Treasury's guidance that Fiscal Recovery Funds can be used for water use efficiency, conservation, and green infrastructure and "projects on privately-owned infrastructure," we recommend that the Interim Final Rule expressly cite consumer incentive programs designed to implement water use efficiency, conservation, green infrastructure, reuse, and other distributed DWSRF and CWSRF eligible projects as authorized uses of Fiscal Recovery Funds. And consistent with Treasury's encouragement that local decisionmakers direct Fiscal Recovery Funds to lead service line replacements and green projects, we recommend Treasury also encourage local water managers to apply Fiscal Recovery Funds to these authorized incentive programs to invest in onsite, clean and green water strategies.

Question 22: What are the advantages and disadvantages of setting minimum symmetrical download and upload speeds of 100 Mbps? What other minimum standards would be appropriate and why?

NLC applauds Treasury's efforts to ensure that federal resources are spent on broadband infrastructure that meets or exceeds anticipated needs. Many municipal broadband

investments have focused on buildouts that meet or exceed this standard, with an increasing number of these networks aspiring to or exceeding 1 Gbps symmetrical service. The National League of Cities would further recommend that Treasury consider an affordability standard for determining whether a community is unserved or underserved as well as a condition for receiving ARPA funding.

Question 23: Would setting such a minimum be impractical for particular types of projects? If so, where an on what basis should those projects be identified? How could such a standard be set while also taking into account the practicality of using this standard in particular types of projects? In addition to topography, geography, and financial factors, what other constraints, if any, are relevant to considering whether an investment is impracticable?

In addition to topography, geography, and financial factors, Treasury should consider ways to accommodate certain projects intended to address particularly vulnerable populations not well-served by traditional wireline home subscription options. For example, in neighborhoods with a high level of housing instability, older housing stock that will be difficult to connect directly via wireline service (including older multifamily dwellings), and high numbers of residents experiencing barriers to accessing existing broadband affordability programs, some communities have found greater success in providing subsidized fixed wireless service throughout those neighborhoods. In some cases, these technologies may not provide 100/100 Mbps service. While a reliable, dedicated home or business wireline connection is the ideal, Treasury should take care not to exclude projects such as free neighborhood mesh networks, which have played a key role in providing a reliable connection to residents in need throughout the COVID-19 pandemic emergency and will continue to be necessary long after the emergency ends.

Question 24: What are the advantages and disadvantages of setting a minimum level of service at 100 Mbps download and 20 Mbps upload in projects where it is impracticable to set minimum symmetrical download and upload speeds of 100 Mbps? What are the advantages and disadvantages of setting a scalability requirement in these cases? What other minimum standards would be appropriate and why?

As noted above, while the program should prioritize funding infrastructure that achieves the greatest performance (set as a threshold of 100/100 Mbps service), in some cases, the best project for a community's current needs and challenges may not currently meet that service threshold. To better accommodate these projects, Treasury should consider encouraging localities to prioritize projects that plan to accommodate technology upgrades over time, without requiring scalability to 100/100 Mbps.

Question 25: What are the advantages and disadvantages of focusing these investments on those without access to wireline connection that reliably delivers 25 Mbps download by 3 Mbps upload? Would another threshold be appropriate and why?

NLC supports focusing investments on those residents and businesses in greatest need, and the importance of access to a fixed connection. The experiences of local governments and school districts that have distributed mobile hotspots to address the digital divide during the pandemic have shown that they are at best a partial solution and have strained to meet network needs during peak use periods. However, the 25/3 Mbps threshold does not adequately address the needs of residents who are, in practice, underserved by available broadband options. In particular, this threshold is inadequate for a now-common use case: multiple household members needing to engage in simultaneous activities placing high demands on bandwidth, such as multiple adults conducting remote work, or multiple children completing remote school or homework activities.[4] Given the Interim Final Rule's focus on building infrastructure that will continue to provide value into the future, it makes no sense to preclude investment in areas with service that falls between the 25/3 Mbps threshold and the 100/100 Mbps goal. Ideally, Treasury should consider amending the Final Rule to designate these locations as "underserved," while continuing to designate places lacking 25/3 Mbps service as "unserved."

Additionally, focusing strictly on the existence of wireline infrastructure capable of providing 25/3 Mbps service misses an important element of the digital divide in many communities: affordability. While programs such as the Emergency Broadband Benefit serve an important role in connecting these households, communities wishing to establish public broadband infrastructure for other reasons, such as providing free service to entire housing complexes, building neighborhood gap networks, or creating or expanding free wi-fi service in certain areas. Residents with difficulties consistently accessing wireline connections at home, such as unstably housed residents, unhoused residents, and those encountering barriers to enrolling in subsidy programs due to lack of documentation depend on these options. For these reasons, if Treasury maintains the 25/3 Mbps threshold in the Final Rule, NLC encourages the agency to clarify that localities without unserved and underserved areas under that definition are still able to make broadband investments focused on supporting residents and populations impacted by the COVID-19 pandemic.

Question 26: What are the advantages and disadvantages of setting any particular threshold for identifying unserved or underserved areas, minimum speed standards or scalability minimum? Are there other standards that should be set (e.g., latency)? If so, why and how? How can such threshold, standards, or minimum be set in a way that balances the public's interest in making sure that reliable broadband services meeting the daily needs of all Americans are available throughout the country with the providing recipients flexibility to meet the varied needs of their communities?

Local governments should be given significant flexibility in identifying those neighborhoods or areas most in need of broadband investment. By limiting investment to unserved and underserved areas and defining those areas narrowly, the requirements for the broadband infrastructure eligible use category come into conflict with the Fiscal Recovery Fund's aim of assisting local governments in addressing the public health and economic impacts of the COVID-

[4] Comment from Boston, Chicago, Los Angeles, Washington, Montgomery County, MD; U.S. Conference of Mayors; TCCFUI

19 pandemic. The Interim Final Rule grants wide latitude to local governments in determining those impacts and tailoring solutions to prioritize disproportionately impacted populations and communities in other eligible uses and should do the same for broadband investments.

As noted in the Interim Final Rule, "different communities and their members may have a broad range of internet needs and...those needs may change over time." While some communities have undertaken substantial speed test and mapping initiatives prior to or during the pandemic, or resident surveys to gather data on user experience from existing networks, these data gathering efforts take time and money to complete. Treasury can assist local leaders by clarifying that locally-developed maps, surveys, and other forms of data as selected by the locality are valid tools for determining the "reliability" of a connection and identifying areas in need, without applying a prescriptive set of criteria around measured network speeds or latency. Treasury should also clarify that completing these assessments is an eligible use of funds. Treasury should clarify further that local governments are not required to rely upon FCC Form 477 data or providers' advertised offerings when determining if an area is unserved or underserved.

Thank you for the opportunity to submit comments on this urgent and groundbreaking program. If you have any questions regarding our response, I encourage you to reach out to Irma Esparza-Diggs, Senior Executive and Director of Federal Advocacy, NLC, at 202-626-3176, diggs@nlc.org; or Michael Wallace, Legislative Director for Housing, Community, and Economic Development, NLC, at 202-626-3025, wallace@nlc.org.

Sincerely,

Clarence E. Anthony
CEO & Executive Director