December 19, 2023

Jessica Milano
Office of Recovery Programs
Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Re: Coronavirus State and Local Fiscal Recovery Funds Obligation Interim Final Rule Comments
RIN 1505-AC83
Submitted via www.regulations.gov

Dear Ms. Milano,

I appreciate this opportunity to provide comments on the interim final rule on Coronavirus State and Local Fiscal Recovery Funds ("SLFRF") Obligations REG-120080-22, ("The Revised SLFRF Rules"). The Revised SLFRF Rules change the definition of "obligation" such that some administrative, compliance, and reporting costs of state and local governments receiving funds ("The Recipient Governments" or "The Recipients") through the SLFRF are considered obligated at such time as The Recipients simply estimate, document, and report such estimates to the Treasury.[1] This change – if permitted to stand – would in many cases effectively extend the deadline to legally commit SLFRF funds through 2026 instead of through 2024, as required under statute.[2] Treasury does not offer a defensible justification for this change, and the Revised SLFRF Rules should therefore be reversed.

Moreover, the Department of the Treasury ("Treasury") released the Revised SLFRF Rules on November 17, 2023, and they went into effect almost immediately on the next business day. The rushed rulemaking process did not allow the public or Congress to review the significant changes made by this rule before they went into effect, in violation of the Administrative Procedure Act (APA) and the Congressional Review Act (CRA). Under the CRA, major rules such as The Revised SLFRF Rules cannot go into effect until 60 days after submission to Congress to give Congress time to review and potentially disapprove of the rule.[3] Similarly, under the APA, rules may not go into effect before a 30-day comment period, except in narrow circumstances that do not apply in the present case.[4] Treasury's clear violations of the rulemaking process are further cause to throw out the Revised SLFRF Rules.

Summary of Legislation

The SLFRF funds were originally authorized under the March 11, 2021 legislation known as the American Rescue Plan Act (ARPA).[5] The SLFRF funds include approximately $350 billion of federal appropriation funding made available to states, territories, tribal governments and local governments through the end of 2024 "to mitigate the fiscal effects stemming from the public health emergency with respect to the Coronavirus Disease.[6] Approximately $220 billion was made available to states, territories

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[1] Department of the Treasury, *Federal Register*, RIN 1505–AC83, Volume 88, No. 222, November 20, 2023, p. 80586, https://www.federalregister.gov/documents/2023/11/20/2023-25067/coronavirus-state-and-local-fiscal-recovery-funds.
[2] 42 U.S.C. §802(c)(5)(E) and §803(c)(6)(D).
[3] 5 U.S.C.§801(a)(3).
[4] 5 U.S.C. §553(d).
[5] H.R. 1319, American Rescue Plan Act of 2021, https://www.congress.gov/bill/117th-congress/house-bill/1319/text.
[6] 42 U.S.C. §802(a) and 42 U.S.C. §803(a).

and tribal governments, while the remaining approximately $130 billion was made available to local governments.[7]

Under the legislation SLFRF funds could be used to respond to the negative impacts of COVID-19, including by providing assistance to households, small businesses, and affected industries, to provide "essential workers" with premium pay, or to replace lost revenue used to provide government services (up to the greater or $10 million or the amount of revenue lost due to COVID-19).[8] Under the ARPA, costs had to be incurred by The Recipient by December 31, 2024 to be eligible.[9]

Under the Infrastructure Investment and Jobs Act bill signed into law on November 15, 2021, the SLFRF funds could be used for a list of 27 types of infrastructure projects.[10] Funds provided for such projects would "*remain available for obligation* through December 31, 2024… except that no amount of funds may be expended after September 30, 2026."[11] This would allow, for example, The Recipient to sign a contract with a contractor in 2024 on a two-year project where payments would be completed by September 30, 2026.

Summary of the Revised SLFRF Rules

Treasury originally defined "obligation" as ''an order placed for property and services and entering into contracts, subawards, and similar transactions that require payment," following the definition of financial obligations in 2 CFR 200.1.[12]

Under the Revised SLFRF Rules, Treasury is amending the definition of "obligation" by adding an additional sentence at the end of the definition stating, "An obligation also means a requirement under federal law or regulation or provision of the award terms and conditions to which a recipient becomes subject as a result of receiving or expending funds."[13] In the rule, Treasury describes how this includes expenditures (including personnel costs) used for: (1) reporting and compliance requirements; (2) Single Audit costs; (3) record retention and internal control requirements; (4) property standards; (5) environmental compliance requirements; and (6) civil rights and nondiscrimination requirements.[14]

Under the new rules, to use SLFRF funds for these administrative, compliance, and reporting purposes, a Recipient must simply estimate the amount of SLFRF funds it will use for such purposes, document a "reasonable justification" for the estimate, report that amount to Treasury by April 30, 2024 with an explanation of how it was determined, and report upon award closeout the final amount spent for these uses.[15] As a result of Treasury's definition change, Recipients may receive certain federal payments that have not been obligated by the deadline provided in 42 U.S.C. §802(c)(5)(E) and §803(c)(6)(D).

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[7] *Ibid.*
[8] 42 U.S.C. §802(c)(1)(A)-(C) and 42 U.S.C. §803(c)(1)(A)-(C).
[9] 42 U.S.C. §802(c)(1) and 42 U.S.C. §803(c)(1).
[10] H.R. 3684, Infrastructure Investment and Jobs Act, https://www.congress.gov/bill/117th-congress/house-bill/3684. 42 U.S.C. §802(c)(5)(B) and 42 U.S.C. §803(c)(6)(A).
[11] 42 U.S.C. §802(c)(5)(E) and 42 U.S.C. §803(c)(6)(D).
[12] Department of the Treasury, Federal Register, RIN 1505–AC83, Volume 88, No. 222, November 20, 2023, p. 80586.
[13] Department of the Treasury, Federal Register, RIN 1505–AC83, Volume 88, No. 222, November 20, 2023, p. 80589.
[14] Department of the Treasury, Federal Register, RIN 1505–AC83, Volume 88, No. 222, November 20, 2023, p. 80586.
[15] *Ibid.*

Comments

Comment #1: The Revised SLFRF Rules fail to faithfully interpret the intended meaning of "obligation."

The SLFRF legislation requires that, except as provided in three paragraphs, governments shall only use SLFRF funds to cover costs *incurred by* the Recipient Government by December 31, 2024.[16] The exceptions provided in the three paragraphs are for: (1) transfers of funds to a private nonprofit, Tribal organization, public benefit corporation involved in transportation, or a special-purpose unit of state or local government; (2) using funds to satisfy non-Federal matching requirements for an authorized Bureau of Reclamation project; and (3) using funds for certain specified infrastructure projects.[17] In the case of the funds used for infrastructure projects, the legislation requires that funds *be obligated* for a use by December 31, 2024 and that such funds may not be expended after September 30, 2026.[18]

The definition, common understanding, and Latin origins of the word "obligate" all connote a legal or moral binding. Where the term has been used in U.S. law and regulations, the U.S. Code and the Code of Federal Regulations have been in accord with this general meaning. This is true of obligations related to appropriations:[19]

> *An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of:*
>
> *(1) A **binding** agreement between an agency and another person (including an agency) that is—*
>   - *A. In writing, in a way and form, and for a purpose **authorized by law**; and*
>   - *B. Executed before the end of the period of availability for obligation of the appropriation or fund used for specific goods to be delivered, real property to be bought or leased, or work or service to be provided;*
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> *(2) A loan **agreement** showing the **amount and terms** of repayment;*
> *(3) An order **required by law** to be placed with an agency;*
> *(4) An **order issued under a law** authorizing purchases without advertising…*
> *(5) A grant or subsidy payable;*
>   - *A. From appropriations made for payment of, or contributions to, amounts **required** to be paid in specific amounts **fixed by law** or under formulas **prescribed by law**.*
>   - *B. Under an agreement **authorized by law**;*
>   - *C. Under plans **approved** consistent with and **authorized by law**;*
>
> *(6) A **liability** that may result from pending litigation;*
> *(7) Employment or services of persons or expenses of travel **under law**;*
> *(8) Services provided by public utilities; or*
> *(9) **Other legal liability** of the government against an available appropriation or fund.*

Unmistakable from this is the idea that for government appropriations to be considered obligated, the government must be legally bound to make payments. An obligation cannot be discarded or go unpaid without facing legal and/or financial consequences.

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[16] 42 U.S.C. §802(c)(1) and 42 U.S.C. §803(c)(1).
[17] 42 U.S.C. §802(c)(3)-(5) and 42 U.S.C. §803(c)(3)-(6).
[18] 42 U.S.C. §802(c)(5)(E) and 42 U.S.C. §803(c)(6)(D).
[19] 31 U.S.C. §1501(a). See also Principles of Federal Appropriations Law, Third Edition (Washington, DC: United States Government Accountability Office, 2006) Volume II, Chapter 7 ("Obligation of Appropriations ") https://www.gao.gov/assets/2019-11/202819.pdf (the "Red Book").

Prior to the changes under the Revised SLFRF Rules, Treasury had defined obligation as, "an order placed for property and services and entering into contracts, subawards, and similar transactions that require payment," following the definition of financial obligations in 2 CFR 200.1. Again, this is consistent with the notion of a legal binding – Once an order has been placed or a contract has been signed, payment is required.

However, under the Revised SLFRF Rules, governments would be allowed to estimate certain future administrative, compliance, and reporting costs (including payroll and benefit costs associated with those activities) that they anticipate incurring and to count those costs as obligations if reported to Treasury by April 30, 2024.[20] The very fact that that these costs must be estimated shows that funds have *not* yet been obligated. Indeed, since personnel costs likely comprise a substantial portion of the administrative, compliance, and reporting costs at issue, the amount ultimately expended will depend on the future productivity of the individuals performing these tasks (in some cases government employees). Even if it could be showed that the governments receiving SLFRF funds *would be* required by the federal government to satisfy these administrative requirements, the Recipient governments are *not* obligated to expend any specific amount. If the Recipient government spends its resources efficiently on administrative compliance and if the personnel assigned to such activities work productively, costs can be controlled and minimized. Of course, governments may have little incentive to ensure work is performed efficiently, because higher estimated cost of the activities will potentially lead to higher payments from the SLFRF funds to the Recipient Governments.

Treasury offers no compelling rationale for why the revised definition of "obligation" is more accurate or more closely follows the intent of the legislation. Instead, Treasury merely notes that "Recipients have identified for Treasury that they anticipate difficulty using SLFRF funds to satisfy administrative and other legal requirements applicable to the SLFRF after the obligation deadline has passed."[21] This is inadequate justification for imposing on federal taxpayers a multi-billion dollar financial burden. It is Treasury's responsibility to faithfully interpret and execute the law as written, not to act as advocates for more expansive redistributive policies.[22]

Comment #2: The Revised SLFRF Rules should be withdrawn because Treasury failed to follow required Congressional Review Act (CRA) procedures for major rules. (Treasury fails to justify its claim that the Revised SLFRF Rules do not constitute a major rule.)

The CRA requires that regulatory agencies put new rules through a more stringent review process if they constitute major rules. Major rules are those that are likely to result in an annual effect on the economy of $100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, or innovation.[23] The Revised SLFRF Rules make significant changes to a $350 *billion* government slush fund, so in fact, they are very likely to result in an effect on the economy of much more than $100 million, making this a major rule. Treasury never offers a justification for why it thinks that the Revised SLFRF Rules do not constitute a major rule, stating only, "This rule is not a major rule for purposes of the Congressional Review Act (5 U.S.C. 801 et seq.)."[24]

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[20] Department of the Treasury, Federal Register, RIN 1505–AC83, Volume 88, No. 222, November 20, 2023, p. 80586.
[21] *Ibid.*
[22] U.S. Constitution article II, Section 3.
[23] 5 U.S.C. §801 and §804(2).
[24] Department of the Treasury, Federal Register, RIN 1505–AC83, Volume 88, No. 222, November 20, 2023, p. 80588.

Of the $350 billion appropriated under the SLFRF, according to Treasury's latest quarterly report, only $198 billion had been obligated as of June 30, 2023.[25] That leaves more than $150 billion of funding unobligated. A de facto extension of the period for governments to determine how to use those funds through the redefinition of the term "obligation" could easily enable *tens of billions* of dollars of federal funding that otherwise would remain unspent.[26] This would obviously exceed the $100 million threshold to qualify as a major rule. Even if in a given year, the changes under the Revised SLFRF Rules only affect 0.07% of the currently unobligated funds, the $100 million annual threshold would still be met.

Treasury's own statement in the Revised SLFRF Rules that says:[27]

> "*…there is an urgent need for [State & Local governments] to undertake the planning necessary for sound fiscal policy making, which requires clarity on how SLFRF funds will augment and interact with existing budgetary resources*"

is at odds with the notion that the rule changes will have an impact of less than $100 million.

If the total economic impact of the Revised SLFRF Rules is less than $100 million, then the average impact to the budgets of governments in the 50 states (accounting for funding for District of Columbia, territories, and tribal governments) would be less than $2 million. That is a drop in the bucket relative to the size of government budgets. Governments in almost every state have combined (state and local) annual budgets that are at least in the tens of *billions* of dollars, if not more than $100 billion. If this is *not* a major rule, then that would imply that for the typical government that about two pennies would be at stake for every $1,000 of budgetary resources.[28] Uncertainty over such a relatively minor amount would not present an "urgent" challenge for state and local budgeters who routinely deal with notoriously volatile revenues.[29]

Comment #3: The Revised SLFRF Rules should be withdrawn because they fail to follow required APA rulemaking procedures. Treasury failed to establish that the good cause exception applies.)

Under the APA, Treasury should have provided public notice and offered a minimum of a 30-day comment period *prior to* implementing the Revised SLFRF Rules.[30] Treasury's failure to do so is unlawful, and therefore the rule should be withdrawn.

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[25] U.S. Department of Treasury, "July Reporting Data Through June 30, 2023," July 2023, https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-funds/recipient-compliance-and-reporting-responsibilities (accessed December 13, 2023).

[26] Paul Winfree, "The Bidenomics Slush Fund: How $350 Billion is Being Misappropriated," Economic Policy Innovation Center, December 3, 2023, https://epicforamerica.org/publications/bidenomics-slush-fund/ (accessed December 14, 2023).

[27] Department of the Treasury, Federal Register, RIN 1505–AC83, Volume 88, No. 222, November 20, 2023, p. 80588.

[28] As of 2021, annual state and local government expenditures were $4.5 trillion. 100 million is 0.022 percent of 4.5 trillion. However, this overstates the share of state and local expenditures that would have to be at stake to cross the $100 million threshold because state and local government budgets will almost certainly be larger in 2024 to 2026 than they were in 2021. U.S. Census Bureau, "2021 State & Local Government Finance Historical Datasets and Tables," https://www.census.gov/data/datasets/2021/econ/local/public-use-datasets.html (accessed December 13, 2023).

[29] The state average standard deviation of the annual percent change in state general revenues was about six percent between 2006-15. Kim Rueben and Megan Randall, "Revenue Volatility" Urban Institute, November 2017, https://www.taxpolicycenter.org/sites/default/files/publication/149171/revenue-volatility_1.pdf (accessed December 13, 2023).

[30] 5 U.S.C. §553(d).

Treasury improperly claims the "good cause exception" to the APA. According to Treasury there is an exception to the APA:

> *"when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."*[31]
>
> Treasury goes on to argue that the good cause exception should apply because:
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> *"Congress authorizes recipients to use SLFRF funds for costs incurred for eligible purposes by December 31, 2024. Given the rapidly approaching deadline, there is an urgent need for recipients to undertake the planning necessary for sound fiscal policymaking."*[32]
>
> A "rapidly approaching deadline" is not a valid good cause exception. Time has not sped up, so this deadline is approaching at exactly the same speed that all other deadlines "approach." If there was an urgent need for rulemaking (there isn't) that would only mean that Treasury failed to put forth the rulemaking in a timely fashion. There has been no recent legislation or other unforeseeable circumstances that Treasury can cite or has cited that would provide good cause for Treasury to not issue rules according to the requirements laid out in the APA. The good cause exception does not apply.

Comment #4: The Revised SLFRF Rules should be withdrawn because they fail to follow required APA rulemaking procedures. Treasury failed to establish that the SLFRF is a grant.)

Treasury also improperly claims that the APA doesn't apply to the Revised SLFRF Rules because "the APA provides that the requirements of 5 U.S.C. 553 do not apply to the extent that there is involved . . . a matter relating to agency . . . grants" (ellipses follow Treasury's usage).[33]

The Revised SLFRF Rules take for granted that the SLFRF funds are a grant program. In the rules, Treasury never asserts that the SLFRF funds are a grant program, even though the grant exception cited in 5 U.S.C. §553(a) would only apply if the SLFRF fund is a grant program. Treasury fails to establish that the SLFRF funds constitute a grant program.

Grant programs have targeted, narrowly prescribed uses, typically with detailed programmatic requirements. For example, grants may be given for certain research areas, environmental projects, educational programs, or poverty relief that follow program rules and criteria. The Collins English Dictionary defines grant as "an amount of money that a government or other institution gives to an individual or an organization *for a particular purpose* such as education or home improvements."[34] Merriam Webster defines a grant as "something granted, especially: a gift (as of land or money) for a *particular purpose*.[35]

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[31] Department of the Treasury, Federal Register, RIN 1505–AC83, Volume 88, No. 222, November 20, 2023, p. 80588.

[32] *Ibid.*

[33] Department of the Treasury, Federal Register, RIN 1505–AC83, Volume 88, No. 222, November 20, 2023, p. 80587.

[34] https://www.collinsdictionary.com/us/dictionary/english/grant (accessed December 18, 2023).

[35] https://www.merriam-webster.com/dictionary/grant#:~:text=2%20of%202-,noun,%3A%20something%20granted (accessed December 18, 2023).

In contrast, the appropriation of SLFRF funds offer Recipients wide flexibility in how they use the funds, with the broad purpose being to "mitigate the fiscal effects stemming from the public health emergency with respect to the Coronavirus Disease."[36] However, most of the SLFRF funds distributed do not even fall into the broad purpose of responding to negative fiscal effects from COVID-19, since few state and local governments have suffered *any* lost revenues as a result of COVID-19 (see Comment #5).

A review of the approximately 48,000 uses of SLFRF funds that Treasury reported shows that the uses fall into 83 categories covering everything from housing assistance to rehabilitation of commercial properties to contributions to unemployment insurance trust funds to broadband projects. Some of the categories are as vague and all-encompassing as revenue replacement for the "provision of government services" and premium pay for "public sector employees."[37]

The most common broad categories of use of SLFRF funds have been general revenue replacement, followed by responding to negative economic impacts. These two vaguely defined categories account for more than 75% of obligated SLFRF funds to date.[38] The seemingly open-ended uses being allowed for SLFRF funds are unlike any other program that is considered a grant program. An appropriation to governments to be used by the deadline *however Recipients choose* would not be considered grant programs, and neither should the SLFRF funds.

The legislation describing the SLFRF funds never uses the word "grant" in a way that would suggest that the SLFRF payments to governments constitute a grant program.[39] Neither do the regulations that Treasury promulgated describing the SLFRF funds.[40] Even Treasury's *117-page* rule on SLFRF issued January 27, 2022 never refers to the federal payments to state and local governments under the SLFRF funds as grants or as the governments receiving funds as grantees. The 2022 rule refers to the governments receiving funds as "recipients." In contrast, in the limited instances that states use SLFRF funds to provide grants, the rule refers to *those parties* receiving funds from the state and local governments as "grantees." For example, on page 4399, it says, "…the *recipient* [state/local government] must provide, whether for themselves or on behalf of a *grantee*, written justification to Treasury detailing how the award responds to eligible workers performing essential work."[41] This implies that the state and local governments are *not* considered grantees under the SLFRF.[42]

As justification for claiming that SLFRF is exempt from APA, Treasury cites *Center for Auto Safety* v. *Tiemann* and *National Wildlife Federation* v. *Snow*, but these cases both involved the federal highway grant program and in neither case did the parties dispute that the federal highway program was in fact a grant program.[43] District Judge Charles R. Richey notes in his memorandum opinion for the *Center for Auto Safety* v. *Tiemann* case that:

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[36] 42 U.S.C. §802(a)(1) and 42 U.S.C. §803(a)(1).
[37] U.S. Department of Treasury, "July Reporting Data Through June 30, 2023," July 2023, https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-funds/recipient-compliance-and-reporting-responsibilities (accessed December 13, 2023).
[38] According to the Treasury tables, $149.8 billion out of $198.2 billion of obligated funds through June 30, 2023 are in either the expenditure category group of Revenue Replacement or Negative Economic Impacts.
[39] 42 U.S.C. §802 and §803.
[40] 31 C.F.R. 35.
[41] Department of the Treasury, Federal Register, RIN 1505–AC77, Volume 87, No. 18, January 27, 2022, p. 4338-4454, https://www.federalregister.gov/documents/2022/01/27/2022-00292/coronavirus-state-and-local-fiscal-recovery-funds.
[42] (To be clear, the mere fact that a few Recipient Governments chose to use the funds provided under SLFRF to form grants does not make SLFRF itself a grant program.)
[43] Department of the Treasury, Federal Register, RIN 1505–AC83, Volume 88, No. 222, November 20, 2023, p. 80588.

"Plaintiffs do not deny that the federal-aid highway program is a grant program. They maintain, however, that the grants exemption must be construed very narrowly."[44]

These cases are largely irrelevant to the case of the Revised SLFRF Rules until and unless Treasury first establishes that the SLFRF funds comprise a grant program. Since Treasury did not do so, it has failed to establish that the APA exception for grants applies.

Comment #5: The Revised SLFRF Rules fail to advance (and even work against) the stated purpose of the SLFRF: To mitigate the fiscal effects of the COVID-19 public health emergency.

The original intent of the SLFRF funds were to "to mitigate the fiscal effects stemming from the public health emergency with respect to the Coronavirus Disease (COVID–19)."[45] Given that the COVID-19 "public health emergency" has long since subsided and given than states are in a better fiscal position now than before the pandemic, there is simply no justification for Treasury applying a dubious change in the definition of "obligation" in order to prolong or expand SLFRF payments.

The Revised SLFRF Rules will allow governments to spend more using federal resources in 2025 and 2026, multiple years after the end of the pandemic. President Joe Biden signed a joint resolution declaring the formal end of the COVID-19 public health emergency on April 10, 2023.[46] Realistically, COVID-19 should not have been labeled a public health emergency beyond 2021 at the latest. By the middle of 2021, most Americans had already had COVID-19 at least once and had gained some level of immunity to the virus either naturally, through the vaccines, or both. Americans, by and large, had moved on and went back to their day-to-day lives. The American economy seemed to be recovering well by early- to mid-2021. In each of the three quarters from Q4 2020 through Q2 2021, real GDP grew at an annualized rate of between 4.2% and 6.2%.[47] In mid-2021 the S&P 500 was 1,000 points (about 30%) higher than at the start of the pandemic. As high and persistent inflation ensued in the last half of 2021, it should have been clear to economic policymakers that further government stimulus was not only unneeded; it would be deeply counterproductive.

Additional (unlawful) payments from the federal government *to state and local governments* to mitigate the fiscal effects of COVID-19 are especially indefensible. Since COVID-19 began, states have experienced historic increases in revenues and have been left deciding how to use or save all their surplus funds. The 28.3% growth in state and local government receipts between 2019 and 2021 was the highest two-year growth in nearly half a century (since there was a 29.4% growth in receipts between 1971 and 1973). Besides the 2019 - 2021 growth rate, the 2020 - 2022 growth rate of 19.0% was the highest in over 35 years dating back to 1983 - 1985.[48] Table 1 below shows the two-year growth rate of state and local government receipts over the previous 25 two-year periods.

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[44] Memorandum Opinion of Judge Charles R. Richey, Center for Auto Safety v. Tiemann, 414 F. Supp. 215 (D.D.C. 1976) (U.S. District Court for the District of Columbia, April 28, 1976), accessed via Justia U.S. Law, https://law.justia.com/cases/federal/district-courts/FSupp/414/215/1442775/.
[45] 42 U.S.C. § 802(a)(1).
[46] H.J.Res.7, Public Law 118-3 Relating to a National Emergency Declared by the President on March 13, 2020, April 10, 2023, https://www.congress.gov/bill/118th-congress/house-joint-resolution/7.
[47] Bureau of Economic Analysis, Table 1.1.6. Real Gross Domestic Product, Chained Dollars, https://www.bea.gov/itable/national-gdp-and-personal-income (accessed December 14, 2023).
[48] Bureau of Economic Analysis. Table 3.3: State and Local Government Current Receipts and Expenditures, https://apps.bea.gov/iTable/?reqid=19&step=2&isuri=1&categories=survey (accessed December 14, 2023).

Table 1: Growth in State & Local Government Receipts 1996-2022

Two-Year Period	Growth in State & Local Government Receipts
2019 - 2021	**28.3%**
2020 - 2022	**19.0%**
2003 - 2005	16.8%
2018 - 2020	**16.5%**
2004 -2006	15.0%
2002 - 2004	13.9%
1998 - 2000	13.4%
1997 - 1999	12.5%
1996 - 1998	11.2%
2017 - 2019	11.0%
1999 - 2001	10.7%
2005 - 2007	10.7%
2013 - 2015	10.6%
2012 - 2014	9.8%
2016 - 2018	9.0%
2001 - 2003	8.6%
2014 - 2016	7.6%
2000 - 2002	6.3%
2015 - 2017	6.0%
2009 - 2011	5.9%
2011 - 2013	5.7%
2006 - 2008	5.5%
2008 - 2010	4.1%
2010 - 2012	3.1%
2007 - 2009	0.7%
Period includes COVID year(s)	

Source: Bureau of Economic Analysis. Table 3.3: State and Local Government Current Receipts and Expenditures

Meanwhile, the federal government is swimming in red ink. The national debt is nearly $34 trillion, or over $250,000 per U.S. household. In the past 12 months alone, the federal government has accrued about $2.5 trillion of new debt. In the past four years – dating back to just before the pandemic began – it has accrued nearly $11 trillion of new debt.[49]

Any new transfer of federal funds to state and local governments now (let alone in 2025 or 2026) will not mitigate the fiscal effects stemming from COVID-19. There is no active public health emergency, and states are already in a strong fiscal position. Such transfers would only serve to accelerate and exacerbate the federal fiscal crisis that is looming if Congress fails to get its fiscal house in order soon.

Comment #6: SLFRF funds should not be allowed for contract replacements after December 31, 2024

[49] U.S. Department of the Treasury, Monthly Treasury Statements, https://www.fiscal.treasury.gov/reports-statements/mts/ (accessed December 14, 2023). (For the months January 2020, July 2023, and November 2023.)

The Revised SLFRF Rules allow contract replacements after December 31, 2024 if any of three broad scenarios occur: (1) The Recipient [government] terminates the contract because the contractor goes out of business or because the Recipient determines the contractor cannot perform the contract; (2) The Recipient and contractor mutually agree to terminate the contract for convenience; or (3) The Recipient terminates the contract for convenience if the contract was improperly awarded but was awarded by the Recipient in good faith.[50]

It is logically impossible that any replacement contract entered into after December 31, 2024 can use funds that were obligated by December 31, 2024. If a replacement contract is not in effect by the obligation deadline, clearly the recipient government is under no legal obligation to pay such amounts that are not yet promised to another party. If a Recipient Government chooses to terminate a contract in 2025 or 2026 (*even "for convenience"*) and then enters into a new one then it has clearly obligated funds after the deadline. In such an event, the Recipient Government should be denied SLFRF funding for that contract, and Treasury should recoup any payments that the Recipient had previously received from Treasury related to the terminated contract (along with interest payments).

Comment #7: To the extent that Treasury recoups SLFRF payments from governments that overstate the funds they are due, Treasury should require that the recipients pay back interest.

The SLFRF legislation requires the repayment of funds that Recipients of SLFRF funds do not expend by the applicable deadlines. The current Treasury regulations do not explicitly provide that when the federal government recoups payments from Recipients that interest will be due on such repayments. This is especially problematic with the Revised SLFRF Rules, which allow Recipients to estimate the funds needed to cover certain administrative purposes and then requires the Recipient to repay any excess amounts above that the Recipient but does not ultimately expend. If there is no interest or penalty attached to overestimates that results in overpayments by Treasury to Recipients, then Recipients will have an incentive to overestimate the funds they will use. Any overpayments from the Treasury to Recipients are effectively interest-free loans at a time when interest rates have climbed markedly since the pandemic.

Conclusion & Comment #8: The Revised SLFRF Rules continue a troubling pattern of Treasury failing to faithfully execute laws as written.

The Revised SLFRF Rules are the latest in an egregious pattern of Treasury (and other federal agencies) failing to faithfully execute the law as written. Faithful interpretation of the law is not optional for executive branch agencies. It is a constitutional imperative. Section 3 of Article II of the U.S. Constitution charges the President of the United States to "take Care that the Laws be faithfully executed."

Here are just a few other recent examples of Treasury's selective or "creative" interpretations of the law:

1. **Clean Vehicle Tax Credits:** Treasury has taken numerous steps to expand the availability of the green tax credits passed into law in the Inflation Reduction Act, perhaps most notably the clean vehicle tax credit.[51]
    a. In December 2022, Treasury announced that it would delay issuance of guidance on the battery component rules, so the critical-mineral country requirements would not take

[50] Department of the Treasury, Federal Register, RIN 1505–AC83, Volume 88, No. 222, November 20, 2023, p. 80587.

[51] Preston Brashers, Congressional Testimony: The Inflation Reduction Act a Year in Review, Testimony Before the House Subcommittee on Health Care and Financial Services, September 14, 2023, https://oversight.house.gov/hearing/the-inflation-reduction-act-a-year-in-review/congressional-testimony-preston-brashers-the-inflation-reduction-act/.

effect until later in 2023. The IRS finally provided the rulemaking on April 17, 2023, meaning that EV sales between January 1 and April 16 could qualify for the credits even if the EVs failed the domestic content requirements.

b. The IRA did not impose the same strict domestic content and assembly requirements on commercial EVs as for other EVs purchased by consumers. The IRS then created a regulatory loophole by stipulating that EVs that businesses lease to consumers are to be considered commercial vehicles. As a result, the eligibility restrictions related to critical-mineral content, final assembly location, and income limitations can be circumvented by leasing EVs instead of purchasing them.

c. The IRS further opened the door for foreign automakers to qualify for the EV credits by taking an expansive interpretation of the term "free trade agreement." Japan does not have comprehensive free trade agreements with the United States, yet they will apparently be counted as having a free trade agreement because the countries signed extremely narrow trade deals covering EV minerals.

2. **Premium Tax Credit:** Treasury concocted a new affordability test for health insurance coverage to determine eligibility for the Premium Tax Credit that appeared nowhere in statute. As a result, millions of additional dependents were made eligible for the credits, likely costing other taxpayers billions of dollars per year.[52]

3. **Third-Party Payment Network Reporting Rule**: Treasury has twice (for 2023 and now for 2024) delayed implementation of legislation that lowered from $20,000 to $600 the annual transaction threshold at which Venmo and other payment applications are required to report transactions to the IRS.[53] Although the legislation is certainly problematic, the effective date was not ambiguous, Congress passed the law, and President Biden signed it. Therefore, barring legislation that reverses it, the IRS was obligated to implement the law when it went into effect, not to delay implementation until the next presidential administration.

Each of these examples is an abuse of executive power and undemocratic in the sense that unelected federal bureaucrats are effectively changing the law in a way that Congress would not or at least has not. The Revised SLFRF Rules are especially egregious and undemocratic, though, because Treasury enacted the new rules without allowing time for public comments or Congressional review. Treasury rammed through the new rules right before a holiday without following legally required procedures under the APA and the CRA – laws that are intended to ensure regulatory transparency and accountability to the public and to their representatives in Congress. Treasury should acknowledge its error and reverse these new rule changes.

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[52] Doug Badger, Public Comment Letter on the Notice of Proposed Rulemaking on the Affordability of Employer Coverage for Family Members of Employees, https://www.regulations.gov/comment/IRS-2022-0006-0070 (accessed December 14, 2023).

[53] Internal Revenue Service, "IRS announces delay in Form 1099-K reporting threshold for third party platform payments in 2023; plans for a threshold of $5,000 for 2024 to phase in implementation," News Release, November 21, 2023, https://www.irs.gov/newsroom/irs-announces-delay-in-form-1099-k-reporting-threshold-for-third-party-platform-payments-in-2023-plans-for-a-threshold-of-5000-for-2024-to-phase-in-implementation (accessed December 14, 2023). Internal Revenue Service, "IRS announces delay for implementation of $600 reporting threshold for third-party payment platforms' Forms 1099-K," News Release, December 23, 2022, https://www.irs.gov/newsroom/irs-announces-delay-for-implementation-of-600-reporting-threshold-for-third-party-payment-platforms-forms-1099-k (accessed December 14, 2023).