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Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

RE: Coronavirus State and Local Fiscal Recovery Funds Interim Final Rule Comments

Ms. Richards,

Thank you for the opportunity to comment on the Coronavirus State and Local Fiscal Recovery Funds Interim Final Rule ("IFR"). For years, Associated General Contractors of America ("AGC") has worked with the Department of the Treasury ("Treasury") and other federal entities to ensure that our nation has the high-quality infrastructure it needs now and in the future. Federal investment in infrastructure can play an essential role in rebuilding our economy and creating well-paying jobs for the American people.

AGC is the leading association in the construction industry representing more than 27,000 firms, including union and open-shop general contractors and specialty-contracting firms. Many of the nation's service providers and suppliers are associated with AGC through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, factories, warehouses, highways, bridges, tunnels, airports, water infrastructure facilities, locks, dams, defense facilities, multi-family housing projects, and more.

An outline of AGC's recommendations is as follows:

I. Clarify Language to Promote Capital Investments in Infrastructure that Will Spur Economic Recovery.
  - **A.** Treasury Should Explicitly Include "Fuel Tax" Revenues as an Example of "General Revenue" that Can be Eligible for Relief Funds to Cover "General Revenue" Losses.
  - **B.** Clarify and Expand the List of Eligible Capital Investments in Public Facilities and Buildings.

II. Expand Use of Eligible Infrastructure Funding for Water Financing Programs.

III. Abandon Initiatives to Include Reporting Requirements that Go Beyond the Statutory Authorization Provided by and Congressional Intent behind the American Rescue Plan Act
  - **A.** Treasury Should Abandon any Efforts to Include Reporting Requirements that Encourage Government-mandated Project Labor Agreements.
  - **B.** Treasury Should Abandon any Efforts to include Reporting Requirements that Establish Local Hire Goals.

C. Treasury Should Abandon any Efforts to Include Reporting Requirements that Expand Davis-Bacon Prevailing Wages Beyond the Status Quo Established under Existing Federal Laws.

IV. Limit Burdensome, Yet-To-Be Disclosed Reporting Requirements.

V. Increase Flexibility and Transparency in both the Formulas and Recoupment Processes

A. Provide the Option of a Narrative Explanation in Substitution-or in Addition-to any Formula which Treasury has Promulgated.
B. Publish on a Public-Facing Website Treasury's Decision Whether to Recoup Recovery Funds on Every "Request for Reconsideration."
C. Treasury Should Extend the Period Local Government Must Pay Recoupment to a Minimum of One Calendar Year from the Final Notice of Recoupment.

VI. Conclusion

AGC provides the following recommendations to ensure these reporting requirements do not upend the expeditious and efficient distribution of recovery funds while providing for free and open competition to our nation's businesses and workers.

I. Clarify Language to Promote Capital Investments in Infrastructure that Will Spur Economic Recovery.

Investment in our nation's infrastructure is critical to rebuilding our economy and creating well-paying jobs for the American people. AGC commends Treasury for its recognition that capital investments are important to create safe and efficient working environments. Much of our nation's public infrastructure is aging and ill-suited to protect against the spread of airborne diseases like COVID-19. Likewise, the COVID-19 pandemic and accompanying travel restrictions negatively impacted many sources of state, local, territorial, and Tribal sources of revenue.

AGC provides the following recommendations for Treasury to clarify in the IFR regarding capital infrastructure investment eligibility and ensure the expeditious of recovery funds.

A. Treasury Should Explicitly Include "Fuel Tax" Revenues as an Example of "General Revenue" that Can be Eligible for Relief Funds to Cover "General Revenue" Losses.

Treasury should explicitly state that the terms "tax revenue" and "general revenue" includes lost revenue used for transportation infrastructure such as, but not limited to, the fuel tax (also known as the "gas tax" or "motor fuels tax"). The lack of clarity has caused confusion among several local governments and state departments of transportation ("State DOTs") , leading to the incorrect assertion that these recovery funds are prohibited by Treasury from being used to replenish lost revenue from state and local governments' fuel taxes and other fees that fund state and local transportation infrastructure These revenues provide the lion's share of investment in transportation infrastructure for these entities. Treasury should explicitly state that recovery funds are eligible for use to replace lost fuel tax revenue, as the preamble states that the definition of "General Revenue" is based on, but not identical to, the Census Bureau's concept of "General Revenue from Own Sources." This definition is found in the Census Bureau's Annual Survey of State and Local Government Finances. General Revenue includes revenue from taxes, current charges, and miscellaneous general revenue. However, it excludes refunds and other correcting transactions, proceeds from issuance of debt or the sale of investments, agency or private trust transactions, and revenue generated by utilities and insurance trusts. According to the Census Bureau's Annual Survey, "motor fuel tax"—listed as T13—under general revenue as a "selective sales tax."[1] Like the IFR the Census Bureau also separates taxes—like the fuel tax—from utilities and insurance trust revenue, two revenue generating sources the IFR prohibits these recovery funds from being eligible to use by local governments. AGC agrees that fuel tax is separate and distinct from revenue sources like utilities and insurance trusts. **Therefore, Treasury should explicitly state that recovery funds may be used to replace lost fuel tax revenue by State, local, and Tribal governments.**

Such an explicit reference to "fuel tax" makes sense given Treasury's preamble statement allowing for the use of these funds to cover revenue losses for government services, including roads. As noted in the preamble of the IFR, "Government services can include, but are not limited to, maintenance or pay-go funded building of infrastructure, including roads. . ."[2] Many recipient governments utilize fuel tax-generated revenues to fund, at least in some part, investment in maintaining or building roads. Explicitly including lost fuel tax revenues as an example of "general revenue" would help reduce confusion among government recipients.

Furthermore, an equivalent tax to the fuel tax is explicitly listed an example of eligible use by Treasury in its Frequently Asked Questions ("FAQ"). Treasury's FAQ gives the example that "…parking fees would be classified as a Current Charge for the purpose of the Census Bureau's Annual Survey, and the IFR concept of "General Revenue" includes all Current Charges. Therefore, parking fees would be included in the Interim Final Rule's concept of "General Revenue."" Likewise, the fuel tax is similar to the parking fee example as both rely on the public to travel for it to generate revenue, are derived from the public's use of automobiles, and were directly and negatively diminished by the COVID-19 pandemic and accompanying restrictions on travel.

Congress specifically allowed for these recovery funds to be used "[f]or the provision of government services to the extent of the reduction in revenue due to the COVID–19 public health emergency relative to revenues collected in the most recent full fiscal year prior to the emergency." The reduction in revenue from the fuel tax due to the COVID-19 pandemic is well documented. Likewise, the need for investments in roads and bridges are equally documented and are critical in economic recovery. U.S. Department of Transportation Secretary Pete Buttigieg testified to Congress that the American Rescue Plan, "has some flexibility in it that I do think can be used to support to a significant degree those road budgets that have been impacted."

The negative effects of the COVID-19 pandemic impacted—and continues to impact—all State DOTs and local governments' transportation budgets as Americans drove less and subsequently paid less in fuel taxes. According to the Federal Highway Administration, in April 2020, at the height of the COVID-19 pandemic, vehicle miles traveled on all public roads was down nearly 40% from April 2019. For example, motor fuel tax revenues are the largest single source of

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[1] U.S. Census Bureau. *State Government Finances: Methodology for Summary Tabulations.* (2005) Retrieved from: www2.census.gov/programs-surveys/gov-finances/technical-documentation/classification-manual/methodology_for_summary_tabulations.pdf

[2] Coronavirus State and Local Fiscal Recovery Funds; Treasury Department, 86 FR 26786, 26801 (May 17, 2021)

Maryland's Transportation Trust Fund. That Fund was negatively impacted by as much as a fifty percent decline in traffic. Maryland DOT estimates that its budget will be out of balance in both state fiscal years 2020 and 2021, requiring significant spending reductions to bring it back into balance.[3] In many states, the decline in transportation revenues translated into real delays in undertaking new transportation projects. For instance, the Kentucky Transportation Cabinet did not hold bid lettings for new transportation construction contracts in April or May of 2020.[4]

Investing in transportation infrastructure increases productivity, as new efficiencies in transporting goods and services boost the productive capacity of businesses. In turn, increased productivity drives economic growth—every dollar spent on public transportation infrastructure investment is estimated to increase U.S. Gross Domestic Product (GDP) by roughly $3 via job creation, system improvements, and stimulated aggregate demand.[5] A study by the Federal Reserve Bank of San Francisco found that every $1 spent from federal highway funds increases the recipient state's GDP by $2 over 10 years, although the multiplier can be as high as $8, depending upon the specific characteristics of the project.[6] **It is clear that Treasury should explicitly state that recovery funds may be used to replace lost fuel tax revenue, and other fees that fund transportation infrastructure, as it is the type of revenue envisioned by Congress, it constitutes a tangible loss in revenue, and will effectively aid in the economic recovery of local governments and provide well-paying jobs for American workers.**

B. Clarify and Expand the List of Eligible Capital Investments in Public Facilities and Buildings.

AGC supports Treasury's inclusion of capital investments in public buildings as eligible for use of recovery funds by local governments. Treasury provides a non-exhaustive list of eligible capital investments such as "physical plant improvements to public hospitals and health clinics or adaptations to public buildings to implement COVID-19 mitigation tactics." AGC agrees that these types of investments are of paramount importance. Treasury should further and explicitly expand the list of eligible capital improvements to help clarify to state, local, territorial and Tribal governments the need to invest in and retrofit all facilities where there is a high frequency of gathers or with frequent interactions with the public.

Heightened public health needs and investments are required to help protect the public against COVID-19 and future pathogens. Capital investments in public buildings, government buildings, and new buildings are important in this regard. These facilities should be clearly listed as eligible for investment of recovery funds by local governments. For example, many state, local, territorial and Tribal government buildings were built decades ago with antiquated designs that results poor ventilation and air circulation. We now know that these types of buildings are

[3] Maryland Department of Transportation, Letter to Congressional Delegation, April 20, 2020, available at: https://policy.transportation.org/wp-content/uploads/sites/59/2020/04/MD-April-20.pdf
[4] This information was reported to AGC by its members who perform work for the Kentucky Transportation Cabinet.
[5] National Association of Manufacturers, Catching Up: Greater Focus Needed to Achieve a More Competitive Infrastructure, 2014, available at: https://www.infrastructureusa.org/catching-up-greater-focus-needed-toachieve-a-more-competitive-infrastructure/
[6] Sylvain Leduc and Daniel Wilson, Roads to Prosperity or Bridges to Nowhere? Theory and Evidence on the Impact of Public Infrastructure Investment, 2012, available at: https://www.journals.uchicago.edu/doi/abs/10.1086/669173?mobileUi=0&

failing to protect people from COVID-19 and other air-borne diseases. Capital investments should be made to retrofit these types of buildings.

Likewise, many public schools are several decades old and face the same structural challenges. Furthermore, many public buildings were designed without taking into account the need for social distancing. In many of these buildings, social distancing is practically impossible. For example, many fire department buildings are designed for the inhabitants to dwell in close quarters for long periods of time. Many firefighters are volunteers, as a consequence they are exposed to the public as well as co-workers at their employment. Many fire department buildings also house other first-responders—such as emergency medical services—that are in the same confined building. AGC appreciates Treasury's recognition that capital investments in buildings is critical to combating the COVID-19 pandemic and are eligible for use of these rescue funds. **State, local, and Tribal governments would be better served by Treasury expanding and clarifying the broad extent of capital investments that are allowed by the IFR.**

II. Expand Use of Eligible Infrastructure Funding for Water Financing Programs

AGC supports the inclusion of water and sewer infrastructure projects—as well as broadband and all other forms of infrastructure investments—to be eligible for funding under the Coronavirus State and Local Fiscal Recovery Funds. The U.S. Environmental Protection Agency ("EPA") estimates that the capital investment needs for safe drinking water and wastewater treatment infrastructure are roughly $744 billion over the next 20 years.[7] One of the primary sources of federal funding for drinking water and wastewater infrastructure are the highly successful, but chronically underfunded, Clean Water State Revolving Fund ("CWSRF") and Drinking Water State Revolving Fund ("DWSRF"). AGC supports the IFR providing the local governments wide latitude to identify investments in water and sewer infrastructure that are of the highest priority for their own communities, which may include projects on privately-owned infrastructure. AGC agrees with the IFR that the same eligibilities as those under the EPA's CWSRF and DWSRF because—unlike the workforce plans and practices reporting requirements mentioned previously—it allows for predictability and certainty for both the public and private sectors.

AGC recommends that Treasury expands eligibility for federal funds under the IFR beyond the CWSRF and DWSRF to other water infrastructure investment programs as well. Specifically, Treasury should include the projects eligible for federal funds through the Harbor Maintenance Trust Fund, the Inland Waterway Trust Fund, and other related sources of federal and locally sponsored water resource infrastructure projects. This is in keeping with Treasury's IFR which allows "…recipients to presume that any diminution in actual revenue relative to the expected trend is due to the COVID-19 public health emergency."

The negative effects on our nation's inland waterways, ports, and harbors are well documented. The pandemic caused disruption of the global supply chain and many transportation industries were severely impacted in practically every way. For example, the Inland Waterways Trust Fund was down $9 million in 2020, with the total amount going into the trust fund being $112.38 million versus $121.25 from the

[7] The EPA's estimate includes $271 billion for wastewater infrastructure and $473 billion for drinking water infrastructure. See EPA, Clean Watersheds Needs Survey (CWNS) Report to Congress—2012, 2016, https://www.epa.gov/cwns; and EPA, Drinking Water Infrastructure Needs Survey and Assessment: Sixth Report to Congress, 2018, https://www.epa.gov/dwsrf/what-infrastructure-needs-survey-and-assessment.

previous year.[8] This decline was a direct result of COVID-19 causing a decrease in the number of people driving automobiles requiring less petroleum to be shipped through the inland waterways. In November of 2020 commercial cargo volumes had declined and caused waterborne trade to decrease by 5.5% compared to 2019, and the total value of trade dropped by 12.7%.[9] This decline sharply reversed course in the December 2020. However, the quick surge in demand resulted in container shortages causing further disruption in the supply chain and dampening the economic recovery. Importantly, ensuring that inland waterways and other water navigation remains viable is important to our economy and environment.

Water resource infrastructure is critical to the U.S. economy, Americans' quality of life, and will aid in our nation's recovery. Water resource infrastructure yields high returns on investment. Spending just above $5 billion a year generates an estimated net benefit of $87.1 billion in economic development, a 16-to-1 return, and $27.3 billion in revenue to the U.S. Treasury, a 5-to-1 return.[10] Inland waterways transportation generates fewer emissions than other forms of transportation—a single barge can move a ton of cargo 647 miles using only a gallon of fuel.[11] Our ports, harbors, and inland waterways play an essential role in moving goods domestically and internationally. Harbors maintained by the U.S. Army Corps of Engineers ("Corps") handle 95 percent of America's import and export trade, while the inland waterways system moves freight at half the cost of rail and one-tenth the cost of truck transportation. Critically, between 2008 and 2017, Corps projects prevented an estimated $87.3 billion in average annual damage, and every dollar invested in Corps flood risk management projects yields nearly $10 in potential savings.[12] Water infrastructure projects support jobs in the construction industry, but also generates and sustains jobs in other industries. According to the Waterways Council, Inc., America's inland waterways alone sustains 541,000 barge transportation jobs and annually generate more than $1 billion in new job income.[13] Recent events, such as the many devastating natural disasters and increased global competition, further underscore the importance of investing in our nation's water resources infrastructure. **Treasury should expand the eligible funding mechanisms to include Harbor Maintenance Trust Fund, the Inland Waterway Trust Fund, and other related sources of federal and locally sponsored water resource infrastructure projects.**

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[8] U.S. Army Corps of Engineers. *Five-year Review and Update of the Inland and Intracoastal Waterways Capital Investment Strategy Report*. December 2020.

[9] State of the U.S. Maritime Industry: Impacts of the COVID-19 Pandemic. Hearing before the House Transportation & Infrastructure Committee Subcommittee on Coast Guard & Marine Transportation. 117th Cong. 3 (2021) (testimony of Mario Cordero on behalf of American Association of Port Authorities).

[10] Kruse, J., Protopapas, A., and Olson, L. *A Modal Comparison of Domestic Freight Transportation Effects on the General Public* 2001–2009. National Waterways wastewater infrastructure and $473 billion for drinking water infrastructure. See EPA, Clean Watersheds Needs Survey (CWNS) Report to Congress—2012, 2016, https://www.epa.gov/cwns; and EPA, Drinking Water Infrastructure Needs Survey and Assessment: Sixth Report to Congress, 2018, https://www.epa.gov/dwsrf/what-infrastructure-needs-survey-and-assessment.

[10] U.S. Army Corps of Engineers. *Five-year Review and Update of the Inland and Intracoastal Waterways Capital Investment Strategy Report*. December 2020.

Foundation, Texas A&M Transportation Institute, 2012.

[11] Stockton, Steven l. The Military Engineer. *The Nation's Water Infrastructure*. Retrieved from: http://themilitaryengineer.com/index.php/tme-articles/tme-magazine-online/item/455-the-nation%E2%80%99s-water-infrastructure.

[12] U.S. Army Corps of Engineers. *Flood Risk Mgmt: Economic Impact*. Retrieved from https://www.iwr.usace.army.mil/Missions/Value-to-the-Nation/Flood-Risk-Mgmt/Flood-Risk-Economic-Impact/.

[13] Waterways Council, Inc. (2020) *Waterways System*. Retrieved from https://waterwayscouncil.org/waterways-system.

III. Abandon Initiatives to Include Reporting Requirements that Go Beyond the Statutory Authorization Provided by and Congressional Intent behind the American Rescue Plan Act

Treasury should not move forward with reporting requirements for which Congress both provided no explicit authorization in the American Rescue Plan Act ("ARPA") and go well beyond what Congress intended. In one just sentence, Treasury puts forth its plans for three separate reporting requirements that are not explicitly authorized and violate the intent of Congress, including: (A) encouraging government-mandated project labor agreements in connection with infrastructure projects; (B) encouraging local hire provisions; and (C) encouraging the expansion of prevailing rates beyond established law. The relevant text states:

> "Treasury encourages recipients to ensure that water, sewer, and broadband projects use strong labor standards, including project labor agreements and community benefits agreements that offer wages at or above the prevailing rate and include local hire provisions, not only to promote effective and efficient delivery of high-quality infrastructure projects but also to support the economic recovery through strong employment opportunities for workers."[14]

As explained in greater detail below, Treasury should abandon efforts to put forth such reporting requirements. Given the enormous scale and scope of the Coronavirus State and Local Recovery Funds, it is critical that Treasury is clear and avoids confusion with extraneous language that goes beyond its statutory authority and congressional intent.

Apart from the reasons given below, it is important to note that Congress passed the ARPA under the budget reconciliation process put forth by the Congressional Budget Act of 1974. Under this legislative process in the Senate, legislation cannot violate a procedural rule called the "Byrd Rule." In short, the Byrd rule prohibits inclusion of a matter unrelated to the deficit reduction goals of the reconciliation process.[15]

These three reporting requirements could not be included in the ARPA under the Byrd Rule because they would produce a change in outlays or revenues which is merely incidental to the nonbudgetary components of the provision. Therefore, Treasury's preamble statement foreshadowing its intent to encourage the use of government-mandated project labor agreements, local hire requirements, and prevailing wage laws beyond their legal scope not only go beyond the explicit ARPA statutory text and Treasury's legal authority, but also would have been prohibited from inclusion by the legislative process that enacted the ARPA into law.

A. Treasury Should Abandon any Efforts to Include Reporting Requirements that Encourage Government-Mandated Project Labor Agreements.

As stated above, Treasury should abandon any reporting requirement that encourages government-mandated project labor agreements ("PLAs") in connection with infrastructure

[14] Coronavirus State and Local Fiscal Recovery Funds; Treasury Department, 86 FR 26786, 26802 (May 17, 2021)

[15] For further information on the reconciliation process, see CRS Report RL30862, *The Budget Reconciliation Process: The Senate's "Byrd Rule"*.

projects because it would go beyond the authority granted to Treasury under ARPA and congressional intent.

Despite Treasury's assertion, there are no widely published studies establishing that the use of PLAs has consistently lowered the cost, shortened the completion time, or improved the quality of construction of public projects. While case studies have had varying results, research regarding the impact of PLA use on the economy or efficiency of projects in general is inconclusive. In a 1998 study by the agency then called the Government Accounting Office, the agency reported that it could not document the alleged benefits of past mandates for PLAs on federal projects and that it doubted such benefits could ever be documented due to the difficulty of finding projects similar enough to compare and the difficulty of conclusively demonstrating that performance differences were due to the PLA versus other factors.[16] The Congressional Research Service reached the same conclusion in a report issued in July 2010.[17] Government mandates for PLAs—even when competition, on its face, is open to all contractors—can have the effect of limiting the number of competitors on a project, increasing costs to the government and, ultimately, the taxpayers.

More importantly, nowhere in the text of the ARPA is there any reference to encouraging project labor agreements or to its efficiency as described in the preamble of the IFR. Treasury appears to make these assertions on its own accord without any statutory or qualitative support. If a PLA would benefit the construction of a particular project, the construction contractors otherwise qualified to perform the work would be the first to recognize that fact, and they would be the most qualified to negotiate such an agreement in the course of collective bargaining. **Accordingly, Treasury should abandon any efforts to include reporting requirements that encourage government-mandated PLAs. Treasury should instead defer to the contractor's judgment as to whether a PLA is appropriate for a given project.**

For background, in 2009, President Obama issued E.O. 13502[18] encouraging federal agencies to utilize PLAs on certain federal construction projects. While AGC neither supports nor opposes contractors' voluntary use of PLAs, AGC is opposed to any government mandate for contractors' use of PLAs. AGC strongly supports free and open competition for publicly funded work and believes that the lawful labor relations policies and practices of private construction contractors should not be a factor in a government agency's selection process. AGC believes that neither a public project owner nor its representative should compel any firm to change its lawful labor policies or practices to compete for or perform public work, as PLAs effectively do. Government mandates for PLAs can restrain competition, drive up costs, cause delays, lead to jobsite disputes, and disrupt local collective bargaining.

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[16] U.S. Government Accounting Office, *Project Labor Agreements: The Extent of Their Use and Related Information*, GAO/GGD-98-82.

[17] U.S. Congressional Research Service Report R41310, *Project Labor Agreements*, by Gerald Mayer.

[18] Office of the President, Executive Order 13502: Use of Project Labor Agreements for Federal Construction Projects, Washington, D.C., February 6, 2009, as of October 16, 2020: https://www.govinfo.gov/content/pkg/FR-2009-02-11/pdf/E9-3113.pdf

B. <u>Treasury Should Abandon any Efforts to include Reporting Requirements that Establish Local Hire Goals.</u>

Treasury should abandon any reporting requirement that encourages local hire mandates in connection with infrastructure projects because it would go beyond the authority granted to Treasury under ARPA and congressional intent. AGC and its members are committed to recruiting more people—particularly from disadvantaged areas and communities—into high-paying, middle class, construction careers. Unfortunately, local hire requirements are not effective for placing disadvantaged workers into construction careers, nor do they help construction firms address the chronic challenge of finding enough qualified workers to hire.

Local hire programs create arbitrary local hiring goals that are not based on any analysis of whether the local workforce is qualified to work in construction. As a result, many firms are obliged to hire workers who are neither qualified to work, or interested, in construction. Local hire mandates let elected officials off the hook for having failed to make the necessary investments in career and technical education programs. A majority of construction firms report having a difficult time finding enough qualified workers to hire, most firms would be thrilled to hire local workers. But too many communities have cut back on workforce preparation. As a result, local workers lack the basic skills needed—including passing a drug test—to qualify for construction careers.

A local hire requirement may make for good sound bites, but they are not sound policy. As a program designed to entice more people from disadvantaged communities into high-paying, middle class construction careers, these mandates do not work. There is a better way to get local workers into high-paying construction careers that last a lifetime. The most effective way to get local residents into construction careers is to actually prepare them for those careers. Boosting investments in career and technical education, and holding those programs accountable for their performance, will accomplish two important goals. First, it will signal to students and families that construction careers are worth pursuing. Second, it will provide local workers with a base set of skills that will make them qualified, and attractive, for construction careers.

Public officials should support, and finance, initiatives designed to recruit more local residents into construction careers. These campaigns are designed to not just reach workers, but their families and influencers, to ensure they understand the many benefits of high-paying construction careers. Public officials should support industry-led efforts to make construction workplaces more inclusive and welcoming for all workers. AGC, for example, launched its nationwide Culture of CARE program in 2020 to provide training and educational materials to member firms to help ensure any worker would feel welcome on a job site. **Accordingly, Treasury should abandon any efforts to include reporting requirements that establish local hire goals on infrastructure projects.**

C. <u>Treasury Should Abandon any Efforts to Include Reporting Requirements that Expand Davis-Bacon Prevailing Wages Beyond the Status Quo Established under Existing Federal Laws.</u>

Treasury should abandon any reporting requirement that encourages recipient governments to offer wages at or above the Davis-Bacon Act ("Davis-Bacon") wage rate on infrastructure projects funded with these recovery funds beyond Davis-Bacon or related Acts-covered infrastructure projects because it is unsupported by the statutory text, usurps long-established federal law, and is beyond Treasury's authority. Since 1931, Davis-Bacon has required contractors engaging in certain federal construction projects pay workers on such projects not less than the locally prevailing wage for comparable work.[19] Treasury should adhere to long-established laws governing Davis-Bacon rates and not attempt to upend the status quo under existing federal law.

AGC supports fair wages for construction contractors and does not advocate for repeal of Davis-Bacon or its related Acts. However, it can be difficult to discern which prevailing wage an employer should apply. Construction projects that extend beyond a limited geographical area can trigger different prevailing wages. The amorphous nature of some construction jobs means it is not always clear which prevailing wages should apply, leaving business—especially small businesses—at risk of being liable. For example, the construction of a road that crosses a county line may cause a different wage rate based on which side of the line the construction employee is working. Another example showing the difficulty of maritime work, depending on where a ship is along the Mississippi River a worker doing the exact same job will be classified differently if the boat drifts into another jurisdiction. For instance, a worker on a hopper dredge removing barnacles form the side of a ship will be classified in one part of the river as a "Diver" and paid a certain rate, and in another part of the river as a "Deckhand" and paid a different rate.

Lastly, different rates can apply to different buildings on the same federal property. For example, in some jurisdictions—such as in California—the retrocession of partial jurisdiction will determine whether federal or California prevailing rates apply depending on where the work is being done on a military base. The risk of liability for failing to pay the specific prevailing wage is difficult on jobsites such as these with no clear defining lines of jurisdiction.

For these and other reasons, AGC supports revisions to Davis-Bacon and implementing regulations that simplify compliance requirements yields a more timely and appropriate wage determination process and provide additional resources for survey department operations. However, Treasury should not extend prevailing wages beyond its long-established legal authority. **Accordingly, Treasury should abandon any efforts to include reporting requirements that expand Davis Bacon prevailing wages beyond the status quo established under existing federal laws.**

In summation, Treasury's inclusion of reporting requirements that encourage these mandates not only go beyond the statutory text of and congressional intent behind ARPA but will also cause confusion and ultimately make it more difficult for recipient governments to efficiently spend recovery funds and goes against the stated intent of the IFR.

IV. Limit Burdensome, Yet-To-Be Disclosed Reporting Requirements

U.S. taxpayers deserve to know that their tax dollars are spent wisely and for their intended purposes. Reporting requirements are important to meeting that need but must be balanced with meeting the need for swiftly employing these funds to recover from the greatest public health emergency in generations. The statute provides state, local, territorial, and Tribal governments maximum flexibilities to respond to and recover from the pandemic. While the preamble and IFR contemplate reporting

[19] For further information on the reconciliation process, see CRS Report 94-908, *Davis-Bacon: The Act and the Literature.*

requirements—which will be used to not only inform taxpayers, but also allow Treasury to conduct oversight to potentially claw back what it deems inappositely utilized funds—neither provide any details as to what those requirements are. This is incredibly problematic.

Yet-to-be released reporting requirements will serve as a barrier to putting these funds to work in an expeditious and efficient manner. The preamble states that "[i]n order to provide public transparency on whether projects are using practices that promote on-time and on-budget delivery, Treasury will seek information from recipients on their workforce plans and practices related to water, sewer, and broadband projects undertaken with Fiscal Recovery Funds. Treasury will provide additional guidance and instructions on the reporting requirements at a later date." Consequently, critical questions are immediately raised regarding the yet-to-be released reporting requirements. What type of information will on workforce and practices will Treasury require? How long will the information remain on the public-facing website? Will Treasury guarantee the protection of proprietary information? How frequently will Treasury require updates on such information? Will Treasury veto certain contractors or will it defer to eligible governments' decision?

Treasury states the IFR's purpose is to "facilitate swift and effective implementation." However, Treasury risks jeopardizing these goals with vague or evolving reporting requirements. Recent examples of the negative effects of these requirements are easily shown. As many experienced under the Paycheck Protection Program ("PPP"), the ever-changing requirements issued by Treasury and the Small Business Administration ("SBA") needlessly caused delays, diminished recovery efforts, and ultimately slowed the implementation of the program.

It began with a series of Frequently Asked Questions ("FAQs") that SBA has posted on its website, many of which had to do more about the certification of small business borrowers. As time went by, SBA's FAQs on the certification expanded and went beyond the statute and SBA's own interim final rules. Disappointingly, SBA posted its very first of these FAQs only after many borrowers had already signed and submitted their applications. By April 16, 2020, nearly one-third of the successful applicants for PPP loans in all of 2020 had already signed and submitted their certifications. By May 15, 2020, that number had climbed to almost 50%. When the FAQs finally appeared, they did little to dispel the confusion surrounding the certification. Indeed, if anything, they increased the confusion. The consequences diminished the effectiveness of the PPP, caused public and administrative confusion, and needlessly cost businesses time and money during the economic crisis. Treasury should seek to avoid something like this from occurring with these recovery funds.

Transparency and clear requirements are important to providing for free and open competition to our nation's businesses and accountability to the American people. However, unpredictability and onerous reporting requirements will undermine any infrastructure investments and will preclude small businesses from benefiting. Construction has long been a well-regulated industry, ensuring that workers are safe, and the environment is protected. Construction projects typically involve large numbers of workers, heavy equipment, procurement of supplies, strict schedules, and many other factors that require the construction industry needing more predictability than many other industries. Predictability is badly needed for economic relief to reach our nation's small business which are currently most vulnerable to the current economic crisis brought about by the Covid-19 epidemic; ensure efficient use of taxpayer funds by limiting delays; and will expediate the recovery of our economy. Businesses of all types—especially small businesses—are confronted with an unparalleled crisis that threatens them both financially as well as the health, safety, and welfare of themselves and employees. These businesses should not be burden or distracted with new and onerous regulations and reporting requirements during this crisis. **Treasury should quickly promulgate any additional guidance and instructions on reporting requirements and make efforts to minimize the burden on the eligible governments and recipient businesses.**

V. Increase Flexibility and Transparency in both the Formulas and Recoupment Processes

AGC appreciates the extensive lengths Treasury has gone to help state, local, territorial, and Tribal governments develop a clear methodology for calculating revenue lost due to the COVID-19 public health emergency. As explained below AGC recommends some additional improvements to this analysis to ensure that fairness is applied to the diverse characteristics and experiences of the recipient governments. The American people deserve transparency and accountability in how these recovery funds are spent. Likewise, Treasury can take steps to increase its own transparency in its decisions. AGC provides the following recommendations regarding Treasury's formulas and recoupment process

A. Provide the Option of a Narrative Explanation in Substitution—or in Addition—to any Formula which Treasury has Promulgated.

The ARPA restricts the use of recovery funds to the amount a recipient government's reduction in revenue. This reduction is measured relative to the revenue collected in the most recent full fiscal year prior to the emergency. In order to assist recipient governments, the IFR sets forth mathematical formulas to calculate the extent of the reduction in revenue, as well as formulas to determine whether use of funds would be subject to recoupment. While these formulas are helpful in local entities to determine how best to allocate recovery funds, it may be too rigid for the diverse number of State, local, and Tribal governments to capture the true nature of revenue loss. Allowing these state, local, territorial and Tribal governments ample opportunity to explain its use of recovery funds is key to ensuring equity. This is especially important considering the IFR implements a process for recouping under certain conditions. The unexpected fiscal burden on recipient governments that are made to repay recovery funds could place these governments in a worse position than it was before taking the funds. **In the interest of equity to these governments Treasury should allow recipients to provide the option of a narrative explanation in substitution—or in addition—to any formula that Treasury has promulgated. These narratives should be judged based on the totality of the circumstances presented by the local governments.**

B. Publish on a Public-Facing Website Treasury's Decision Whether to Recoup Recovery Funds on Every "Request for Reconsideration."

The IFR sets out an appeal process for recipients to "request for reconsideration" any amounts that Treasury has deemed failure to comply with the restrictions that results in recoupment of recovery funds. The reconsideration process should be more transparent for recoupment of funds from the recipient governments. As it is written, the request for reconsideration is less transparent than Treasury is requiring from private recipients related to water, sewer, and broadband infrastructure projects. **Treasury should publish on a public-facing website its decisions to recoup or not recoup recovery funds on every "Request for Reconsideration."**

This increased transparency will ensure consistency in Treasury's decisions and equity among the recipient governments. This transparency will allow other governments to understand the boundaries that Treasury has set for the use of funds. There is little risk to proprietary information or other privacy concerns since the decisions from Treasury will be public information and would be subject to a Freedom of Information Act ("FOIA"). The increased transparency will save time and government efficiency rather than needlessly forcing the public to go through the FOIA process which will take away time and resources from Treasury.

C. Treasury Should Extend the Period Local Government Must Pay Recoupment to a Minimum of One Calendar Year from the Final Notice of Recoupment.

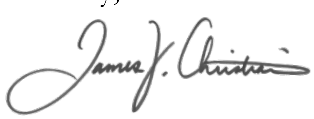
Finally, IFR requires an unnecessarily speedy deadline— a mere 120 days—for recoupment funds to be repaid by the recipient governments. Since Treasury will be monitoring this program for the next several years it is reasonable to allow a longer period of time for recipients to payback the funds. It could have negative consequences particularly to small or under resourced local and Tribal governments if it must quickly pay back potentially a large amount of funds it had not budgeted to pay. **Treasury should extend the period local governments must pay recoupment for a minimum of one calendar year from the final notice of recoupment.**

These simple improvements to the formula and recoupment processes will help ensure the equitable, expeditious, efficient, and transparent distribution of recovery funds.

VI. Conclusion

AGC appreciates the opportunity to share our insight with you and help advance our common goals of rebuilding our economy and creating well-paying jobs for the American people. If you would like to discuss this matter with us further, please do not hesitate to contact AGC.

Sincerely,



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