

ALERT

Treasury Department Releases Guidance for the Coronavirus Capital Projects Fund

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The U.S. Department of the Treasury (Treasury) released its Guidance for the Coronavirus Capital Projects Fund (Capital Projects Fund) for States, territories, and tribal governments, as created by Section 9901 of the American Rescue Plan Act of 2021 (American Rescue Plan).

This Alert highlights key aspects of the Guidance as they relate to States, territories, freely associated states, as well as Tribal governments.

The American Rescue Plan authorized \$10 billion to Treasury to provide payments to States, territories, and Tribal Governments to “carry out critical capital projects directly enabling work, education, and health monitoring, including remote options, in response to the public health emergency with respect to the Coronavirus Disease (COVID-19).” While the statute provides flexibility for the funds to be used for any capital projects designed to directly enable work, education, and health monitoring, the guidance makes it clear that investments made by the Capital Projects Fund will primarily be for “high-quality” broadband infrastructure, including network devices and equipment.

Eligible states, territories, and freely associated states have from now until December 27, 2021 to submit applications for their Capital Projects Fund allocation, with the deadline of September 24, 2022 to submit a detailed Grant Plan. Tribal governments have until June 1, 2022 to apply for Capital Projects Fund funding. All funds must be expended by December 31, 2026, which is the end of the period of performance.

Authors

Shawn H. Chang
Partner
202.719.4456
schang@wiley.law
Charles McKee
Partner
202.719.4545
cmckee@wiley.law

Practice Areas

Telecom, Media & Technology

Capital Projects Fund for States and Territories

The American Rescue Plan limits eligible applicants for a Capital Projects Fund grant only to states, territories, freely associated states, and Tribal governments. However, Fund Recipients may award funds to Subrecipients, including other levels of government, non-profits, private entities, as well as local governments that own, operate, or are affiliated with a broadband network. Treasury has already published on its website the allocation for each Eligible Applicant.

Presumptively Eligible Projects

The Guidance clarifies that general infrastructure projects such as highways, bridges, transit systems, and ports are ineligible under the Capital Projects Fund program. General construction and improvement of hospitals and traditional schools are not presumed to be eligible but could be eligible if they otherwise meet the project eligibility criteria. The following types of Capital Projects are presumptively eligible:

- **Broadband Infrastructure Projects**

- *Speed Requirements.* The construction and deployment of broadband infrastructure projects are presumptively eligible if the infrastructure is designed to deliver, upon project completion, service that reliably meets or exceeds 100 Mbps download speed and between 20 Mbps and 100 Mbps upload speed while being scalable to a minimum symmetrical speed of 100 Mbps for both download and upload speeds. Recipients are strongly encouraged to focus on projects that will achieve last-mile connections and to prioritize investments in fiber-optic infrastructure. Treasury also encourages Recipients to focus on broadband networks that are owned, operated by, or affiliated with local governments, non-profits, and co-operatives. Recipients are encouraged to address affordability as a barrier to Internet adoption and are required to publish the description of their process for considering affordability in their project selection process. Recipients are also encouraged to require that services provided by a Capital Projects Fund-funded Broadband Infrastructure Project (BIP) include at least one low-cost option offered at speeds that are sufficient for a household with multiple users to simultaneously telework and engage in remote learning. Recipients are required to report pricing data as part of program performance and monitoring.
- *Participation in Emergency Broadband Benefit.* Recipients are required to ensure that the service provider for a completed Capital Projects Fund-funded BIP participate in the federal Emergency Broadband Benefit (EBB) program for low-income households so that eligible subscribers of the Capital Projects Fund-funded service offerings may apply the EBB discounts toward the cost of the service. Once the FCC's EBB program has been terminated, Treasury will identify any additional programs in which the service provider must participate to meet this requirement. The Guidance specifically states that such requirement will not lead to the service provider becoming designated as an eligible telecommunications carrier (ETC).
- *Supply Chain.* The guidance includes a reminder that investments in Capital Projects using the Fund must comply with Section 889 of the 2019 National Defense Authorization Act (NDAA) prohibiting the use of grant funds to procure or otherwise obtain certain telecommunications services or

equipment provided or produced by certain designated entities owned or controlled by the People's Republic of China.

- **Critical Need.** Finally, Recipients must explain why the communities they have identified to be served by BIP have a critical need for such projects, such as access, affordability, reliability, and/or consistency. To the extent Recipients are proposing to deploy broadband to locations where there are already existing federal or state funding commitments for wireline broadband services of at least 100 Mbps download/20 Mbps upload, the Recipient is responsible for ensuring that the funds will be used for complementary purposes only. Recipients are encouraged to use all available datasets when determining the communities to be served by BIP. In evaluating such data, Recipients may consider a variety of factors, including whether the existing service is being delivered by legacy technologies, and the actual experience of current broadband customers.
- **Digital Connectivity Technology Projects.** The Guidance permits the purchase and/or installation of devices and equipment, including equipment installed as part of a public Wi-Fi infrastructure, to be funded by the Capital Projects Fund where affordability has been identified by the Recipient as a barrier to broadband adoption and use. Similar to other COVID-19 broadband assistance programs created by Congress last year, the permitted devices and equipment for the Fund are limited to laptops, tablets, and desktop personal computers distributed either under a short- or long-term loan or to be made available to use in public facilities. The Recipients or Subrecipient must retain ownership of the equipment.
- **Multi-Purpose Community Facility Projects.** The guidance permits projects to construct or improve full-service community schools, libraries, and community health centers that will directly enable work, education, and health monitoring.

Case-by-Case Review

In addition to the presumptively eligible Capital Projects, a Recipient may propose a different use of funds if it meets each of the following statutory criteria:

- the Project invests in capital assets designed to directly enable work, education, and health monitoring;
- the Project will be designed to address a critical need that results from or was made apparent or exacerbated by the COVID-19 public health emergency; and
- the Project is designed to address a critical need in the community to be served by it.

Therefore, under case-by-case review, the Capital Project Fund resources will likely be reserved for publicly accessible assets such as community centers and libraries.

- **Capital Assets Designed to Directly Enable Work, Education, and Health Monitoring.** The Guidance specifies that "Capital Project" means the construction, purchase, and installation of, and/or improvement to capital assets where the cost of such assets are capitalized or depreciated, including ancillary costs necessary to put the capital assets to use. Buildings, towers, digital devices and

equipment, fiber-optic lines, and broadband networks are all examples of capital assets, while “ancillary costs” include Project costs related to Project planning and feasibility, broadband installation, and community engagement, broadband adoption, digital literacy, and training associated with a planned or completed Project funded by the program. An eligible Capital Project must be designed to directly enable all three activities (work, education, and health monitoring) if the Project is designed to, upon completion, be used by community members, including enabling employment opportunities, activities to acquire knowledge and/or skills, and telemedicine appointments with a healthcare provider.

- **Critical Need as a Result of COVID-19.** Recipients are expected to first identify one or more impediments to participation in work, education, and health monitoring that “resulted from or were made apparent or exacerbated” by the COVID-19 public health emergency and then identify how the Capital Project Fund would remediate such impediments. The Guidance specifically recognizes that the pandemic has laid bare “the limitations on access to high-quality, affordable, and reliable Internet experienced by many Americans, including individuals living in rural America, Tribal communities, and low- and moderate-income communities.” Recognizing the lack of high-quality Internet for access to services as a “common impediment” experienced by communities across the country, the Guidance provides that Projects that enable remote access to services have met this second criteria.
- **Critical Need in the Community.** Recipients are required to assess and identify communities with a critical need for a Capital Project and may choose to consider any available data taking into consideration the existing capacity, service quality, and ability to meet any relevant health, safety, or performance standards for the relevant service to be provided.

Eligible and Ineligible Costs

- **Eligible Costs.** The Guidance provides a non-exhaustive list of eligible costs, including costs of repair, rehabilitation, construction, improvement, and acquisition of real property, equipment, and facilities; long-term leases of facilities required to provide qualifying broadband service; personnel costs; ancillary costs necessary to operationalize and put the capital assets to full use, including costs to increase broadband adoption and improve digital literacy; and costs associated with collecting and measuring performance. Project costs are not limited to new construction and can involve improvements and repairs to buildings.
- **Ineligible Costs.** Ineligible Project costs include acquisition of spectrum licenses, operating expenses other than grant administration costs, short-term operating leases, payment of interest or principal or outstanding debt instruments, among others.
- **Eligible Period.** A Recipient may use funds to cover costs incurred during the period beginning March 15, 2021, for one or more eligible Projects. Pre-award costs incurred after March 15, 2021, but prior to execution of the Grant Agreement are also eligible if they were incurred pursuant to the negotiation of and in anticipation of the Capital Projects Fund award and are “necessary for the efficient and timely performance of the Project.”

Grant Process for States, Territories, and Freely Associated States

The Guidance provides a detailed summary of the steps that states, territories, and freely associated states must take to access the Capital Projects Fund grant funding. In general, states, territories, and freely associated states must submit an application to Treasury establishing Applicant eligibility, execute a Grant Agreement with Treasury, and then submit Grant Plans to Treasury before September 24, 2022. The Application and Grant Plan must demonstrate that funds will be used for eligible Capital Projects, including how the funds will address critical needs of the communities to be served, and demonstrate that program performance will be measured in a robust manner through a program evaluation plan.

Capital Projects Fund for Tribal Governments

Treasury issued a separate Guidance outlining the Capital Projects Fund availability for Tribal Governments. The program description of the Fund for Tribal Governments is largely consistent with the Guidance provided for states, territories, and freely associated states. However, Tribal Governments are not required to submit a separate Grant Plan as the application also serves as the Grant Plan. Following the execution of a Grant Agreement with the Treasury, Tribal Governments may be required to submit additional information.

Wiley's Telecom, Media & Technology practice has the unparalleled experience and expertise to assist clients with evolving broadband grant developments. For more information about the Capital Projects Fund or any of the associated programs, please contact one of the authors listed on this summary.

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Scott Bouboulis, a Law Clerk at Wiley Rein LLP, contributed to this alert.