Congress of the United States
Washington, DC 20515

December 18, 2023

The Honorable Dr. Janet Yellen
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

RE: Comment on RIN 1505-AC83, "Coronavirus State and Local Fiscal Recovery Funds."

Dear Secretary Yellen,

On March 11, 2021, the American Rescue Plan Act of 2021 ("ARPA") was signed into law, creating, among other things, the State and Local Fiscal Recovery Funds program to help provide relief from the harmful effects of the COVID-19 pandemic. ("SLFRF").[1] On November 20, 2023, the U.S. Department of the Treasury published a new Interim Final Rule titled, "Coronavirus State and Local Fiscal Recovery Funds" ("IFR"), which unlawfully changes definitions that are crucial to the proper operation of the SLFRF program.[2] Specifically, the rule unlawfully changes the statutory definition of "obligation" and unlawfully adds a new key definition for "Return of funds."[3]

This comment discusses multiple deficiencies with the Department's SLFRF IFR: **(I)** the IFR unlawfully exacerbates the waste of taxpayer dollars in the SLFRF program; **(II)** the IFR is inconsistent with the American Rescue Plan Act of 2021 ("ARPA"), which created the SLFRF program; **(III)** the IFR fails to comply with the Administrative Procedure Act ("APA"); **(IV)** the IFR fails to comply with the Congressional Review Act ("CRA"); **(V)** the IFR fails to comply with the Anti-Deficiency Act ("ADA"); and **(VI)** the IFR fails to adhere to coding conventions that facilitate fulsome congressional oversight of the SLFRF program.

I. The IFR unlawfully exacerbates the waste of taxpayer dollars in the SLFRF program.

Congress designed the SLFRF to "support [the state and local] response to and recovery from the COVID-19 public health emergency," but much of that funding is being used for projects that have little if anything to do with relieving or recovering from the pandemic.

[1] American Rescue Plan Act of 2021, P.L. 117-2, § 9901, codified at 42 U.S.C. § 802 and 803 (2021).
[2] Coronavirus State and Local Fiscal Recovery Funds, 88 FR 80584 (Nov. 20, 2023), codified at 31 C.F.R. pt. 35 subpart A (2023).
[3] *Id*. at 80589.

For example, "more than $185 million has been approved for projects related to golf courses (such as updating irrigation systems or buying golf carts), more than $400 million has gone to improve swimming pools, almost $80 million has gone to sports stadiums, $34 million has gone to building tennis and pickleball courts, $10 million has gone to rodeos, and one town even got $15 million to install showers and a commercial kitchen at a site to host the circus and local flea market. $4 million even went to the Field of Dreams in Iowa where Major League Baseball hosts its annual late-summer game!"[4]

The list of inappropriate uses of SLFRF funds goes on and on. What's more, those inappropriate uses and this unilateral extension of time to obligate funds conveniently coincide with this final year of the Biden Administration's first term in office, further raising the question of whether these funds are being properly deployed around the country. With approximately 44 percent, or $152 billion SLFRF dollars as yet unobligated, it is absolutely vital that Treasury exercise tremendous care in its management of the program, not engage in wanton, unilateral rulemakings that unlawfully expand the period for obligation of SLFRF funds.

It is abundantly clear that Treasury is attempting, through this immediately effective and final rulemaking, to wall off money from Congress as we seek offsets to new Federal expenditures. Approximately $90 billion of the original $350 billion appropriation has not been approved through an adopted budget, which will likely be impacted by the rule. As one recent report noted, roughly $13 billion could be swept up in the "administrative" use obligation carve-out under the Hoarding Rule.[5]

The effects of this rule are staggering, further underscoring the ensuing points about Treasury's failure to comply with, *e.g.*, ARPA, the APA, the CRA, and other overlapping requirements. Treasury must immediately withdraw this unlawful rulemaking.

II. The IFR is inconsistent with the American Rescue Plan Act of 2021 ("ARPA"), which created the SLFRF program.

Federal departments and agencies are required to provide the legal authority for new rulemakings.[6] Accordingly, regulations typically begin with a reference to the statutory imperative and authority for the rulemaking. In this instance, however, Treasury failed to identify a statutory authority for its promulgation of this IFR.[7] To our minds, that is not a surprise

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[4] Paul Winfree and Brittany Madni, Econ. Pol. Innov. Ctr., "The Bidenomics Slush Fund: How $350 Billion is Being Misappropriated (Dec. 3, 2023)," https://epicforamerica.org/publications/bidenomics-slush-fund/.
[5] *Id.*
[6] 5 U.S.C. § 553(b)(2).
[7] *See* Coronavirus State and Local Fiscal Recovery Funds, 88 FR 80584, 80585, 80586, 80587, 80588 (Nov. 20, 2023). Later, at 80589, the Department notes that the authority citation already found in the Code of Federal Regulations will remain there ("The Secretary shall have the authority to issue such regulations as may be necessary or appropriate to carry out this section." 42 U.S.C. 802(f)"), but that says nothing of the statutory authority for *this specific regulatory action*. Rather, it speaks generally to the authority that purportedly supports everything in this section of the Code amended by this regulation. If

because Congress clearly did not provide the authority to issue regulations that directly contravene our clear statutory instructions.

In creating the SLFRF to help address the economic fallout of the COVID-19 pandemic, Congress was very clear about the time boundaries for the SLFRF program. Specifically, Congress said in ARPA, "***except as provided*** in paragraph (3), a State, territory, or Tribal government ***shall only*** use the funds provided under a payment made under this section, or transferred pursuant to section 603(c)(4), to cover costs incurred by the State, territory, or Tribal government, ***by December 31, 2024***" (emphasis added).[8] Indeed, Treasury recognized this limit in the preamble of its IFR when it said, *e.g.*, "Sections 602 and 603 of the Social Security Act provide that SLFRF funds may only be used to cover costs incurred by December 31, 2024."[9]

"The text of a statute or rule is the primary, essential source of its meaning."[10] Here, the plain text of ARPA is extremely simple to apprehend. A date certain for incurring a cost, or obligation, is provided in the SLFRF's organic statute. That text is then supplemented by longstanding appropriations law concerning the manner in which federal funds are to be obligated.[11] Treasury has provided no explanation or justification for its contravention of these clear statutory directives. It has not explained or justified why it unlawfully amends the definition of "obligation" and effectively permitted obligations to be made beyond December 31, 2024, if they are simply reported to Treasury by April 2024.

For the purposes of funding provided by the SLFRF, an obligation is "an order placed for property and services entering into contracts, subawards [subcontracts], and similar transactions that require payment."[12] This IFR inappropriately amends that definition to include any additional costs of "terms and conditions" that are associated with approved programs and activities *beyond* the statutorily provided deadline of December 31, 2024. Specifically, the definition of "obligation" is amended as follows, "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] These can include several requirements with which state and local governments may have to comply to spend the money. For example, it covers: reporting and compliance requirements, single audit costs, record retention and internal control requirements, property standards, environmental compliance requirements, and civil rights and nondiscrimination requirements.

Despite the fact that Congress was clear, and Treasury recognizes that Congress was clear, Treasury's IFR further contravenes the statute by asserting:

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that same statutory provision provides the authority and direction for this rulemaking, Treasury must say so and provide a good, clear, legal justification. Each regulation must stand, if at all, on its own terms.

[8] American Rescue Plan Act of 2021, P.L. 117-2, § 9901, codified at 42 U.S.C. § 802 and 803.

[9] Coronavirus State and Local Fiscal Recovery Funds, 88 FR 80584, 80585 (Nov. 20, 2023).

[10] Unif. Statute & Rule Construction Act § 19 (1995).

[11] *See* 31 U.S.C. § 1341(a)(1).

[12] 31 C.F.R. § 35.3.

[13] Coronavirus State and Local Fiscal Recovery Funds, 88 FR 80584, 80589 (Nov. 20, 2023).

> To take advantage of this additional flexibility, recipients must (1) determine the amount of SLFRF funds the recipient estimates it will use to cover such expenditures, (2) document a reasonable justification for this estimate, (3) ***report that amount to Treasury by April 30, 2024, with an explanation of how the amount was determined***, and (4) report at award closeout the final amount expended for these costs.[14]

The text of the CFR was likewise amended – and, confoundingly, given immediate effect – to include the following new definition for "Return of funds":

> A recipient must return any funds that have not been obligated by December 31, 2024, pursuant to orders placed for property and services or entry into contracts, subawards, and similar transactions that require payment ***other than funds in the amount reported to Treasury by April 30, 2024***, as the estimate of funds that the recipient will expend to comply with 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. […] ***A recipient must return funds in the amount reported to Treasury by April 30, 2024, as referenced above, but not expended by December 31, 2026***, other than administrative expenses necessary to close out the award.[15]

The IFR's new April 30, 2024, reporting deadline unlawfully extends the statutory requirement to obligate funds beyond the established deadline of December 31, 2024, by two years. The IFR would enable funds to be obligated post-December 31, 2024, through December 31, 2026. Treasury has not articulated a statutory authority or justification for this change wrought by the IFR. It has not supplied Congress or the public with any reasons or rationale. It has unlawfully contravened the plain language of the statute. Consequently, the IFR should be withdrawn by the Department.

III. The IFR fails to comply with the Administrative Procedure Act ("APA").

ARPA and later statutory related amendments to the SLFRF are not the only statutory requirements that bear on Treasury's ability to issue regulations concerning the program. Other requirements, such as the Administrative Procedure Act ("APA"), must also be followed by the Department when promulgating new regulations.[16] Those overlapping statutory requirements must be construed harmoniously with ARPA so as to give effect to the requirements of all of the relevant statutes.[17] Indeed, the APA was passed long before ARPA, and by its terms a "[s]ubsequent statute may not be held to supersede or modify" the requirements of the APA unless done so expressly.[18] Here, the Department failed to follow not only the black letter of ARPA, but also those additional statutory requirements that serve as rules on our regulators.

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[14] *Id*. at 80586.
[15] *Id*. at 80589.
[16] *See generally* 5 U.S.C. § 553.
[17] *See, e.g*., *Vimar Seuros Y Reaseguros, S.A. v. M/V Sky Reffer*, 515 U.S. 528, 533 (1995); *Radzanlower v. Touche Ross & Co*., 426 U.S. 148, 154-55(1976).
[18] 5 U.S.C. § 559.

The APA generally requires Treasury to promulgate substantive (legislative) regulations through the issuance of regulatory proposals on which the public can first provide comment, not through final and immediately effective rules.[19] Indeed, publication of a final rule generally "shall be made not less than 30 days before its effective date."[20] In this IFR, Treasury asserts that its rule is exempt from the requirement to provide prior notice and comment because it has "good cause" to skip that process.[21] It also claims the Department is not required to provide prior notice and comment because the rule relates to grants and is therefore exempt from the APA's requirements. These exceptions are "narrowly construed and only reluctantly countenanced."[22] Further, "They are neither mandatory nor intended to discourage agencies from using public participation procedures. On the contrary, when Congress enacted the APA, it encouraged agencies to use the notice-and-comment procedure in some excepted cases, and many agencies routinely do so in making certain kinds of exempted rules."[23]

The "good cause" exemption from APA notice and comment is extremely narrow, and the Department does not satisfy it with this IFR.[24] Typically this exemption is reserved for true emergencies such as national security events, public health emergencies, and the like. It is not to be used simply because an agency believes its rule is important or urgent. Here, the Department invokes the "good cause" exemption but fails to provide a meaningful, adequate justification.[25] Rather than demonstrating reasoned decision-making for its decision to short circuit the regulatory process,[26] Treasury simply asserts that the "rapidly approaching deadline" of ***December 31, 2024***, creates a "statutory urgency and practical necessity" to "forego the ordinary notice-and-comment rulemaking."[27] This assertion mocks the purpose and requirements of the, as well as the common sense of Congress and the public. Treasury has failed to show why this purportedly imminent deadline, set more than two and a half years ago by Congress, provides Treasury with "good cause" to skip prior notice and comment in this rulemaking.

Treasury also asserts that its rule is exempt from the requirement to provide prior notice and comment because it pertains to federal grants is therefore exempt from the APA rulemaking requirements under the general exemption for rules that pertain to "agency management or

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[19] *Id*. at § 553(b)-(c).
[20] *Id*. at § 553(d).
[21] This assertion is an attempt to avail itself of the narrow exemption found at 5 U.S.C. § 553(b)(3)(B)(3)(B).
[22] *Am. Fed'n of Gov't Emps., AFL-CIO v. Block*, 655 F.2d 1153 (D.C. Cir. 1981).
[23] ADMIN. CONF. OF THE U.S., SOURCEBOOK, https://sourcebook.acus.gov/wiki/Administrative_Procedure_Act/view.
[24] *See generally* Congressional Research Service, "The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action (2016)," https://crsreports.congress.gov/product/pdf/R/R44356.
[25] *See* Coronavirus State and Local Fiscal Recovery Funds, 88 FR 80584, 80588 (Nov. 20, 2023).
[26] Treasury must engage in "reasoned decisionmaking" when issuing new regulations. *See, e.g., Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 52 (1983). Further, because Treasury is "changing its course … [it] is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Id.* Treasury's failure to follow these APA common law standards indicates the IFR is arbitrary, capricious, and an abuse of discretion. 5 U.S.C. § 706(2)(A).
[27] *Id*.

personnel or to public property, loans, grants, benefits, or contracts."[28] However, an extraordinary amount of federal regulatory activity pertaining to federal contracts, benefits, and grants regularly goes through proper notice-and-comment prior to finalization and effectiveness.

Consider, for example, the many regulations of the Federal Acquisition Regulatory Council ("FAR Council"), which by their own terms apply only to federal contracts across the Federal government. Those actions are routinely subject to APA notice-and-comment. The same is true for most Federal benefit rules. In like manner, Federal Departments and agencies almost always go through notice and comment for the setting of regulatory definitions, timelines, standards, and other requirements related to grants.[29] Notice and comment for these types of rules is a well-accepted best practice that ought to be followed by Treasury.[30] Treasury has failed to show why its rulemaking ought to be exempt from the standard practice and requirement followed by other departments and agencies. It appears Treasury is simply groping for a new exemption for its regulations to maintain its longstanding practice of skipping prior notice-and-comment.[31] The Supreme Court has made clear that it will not "carve out an approach to administrative review good for tax law only," so Treasury should not attempt to forge its own anomalous approach to these APA exemptions.[32]

IV. The IFR fails to comply with the Congressional Review Act ("CRA").

The Congressional Review Act ("CRA") clearly states, "Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—(i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of

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[28] 5 U.S.C. § 553(a)(2).
[29] *See, e.g.*, https://www.federalregister.gov/documents/2023/07/05/2023-13819/veteran-and-spouse-transitional-assistance-grant-program; https://www.federalregister.gov/documents/2023/10/25/2023-23344/changes-related-to-insurance-requirements-in-multi-family-housing-mfh-direct-loan-and-grant-programs; https://www.federalregister.gov/documents/2023/05/16/2023-10220/proposed-priorities-requirements-definitions-and-selection-criteria-perkins-innovation-and; https://www.federalregister.gov/documents/2023/05/24/2023-10631/rural-business-development-grant-rbdg-regulation-tribes-and-tribal-business-references-to-provide; https://www.federalregister.gov/documents/2023/07/13/2023-14600/health-and-human-services-grants-regulation; https://www.federalregister.gov/documents/2022/09/15/2022-18995/uniform-procedures-for-state-highway-safety-grant-programs.
[30] ADMIN. CONF. OF THE U.S., RECOMMENDATION 69-8, ELIMINATION OF CERTAIN EXEMPTIONS FROM THE APA RULEMAKING REQUIREMENTS (Adopted Oct. 21-22, 1969), https://www.acus.gov/sites/default/files/documents/69-8.pdf; Improving the Administrative Process: A Report to the President-Elect of the United States (2016), 69 ADMIN. L. REV. 205 (2017), https://www.americanbar.org/content/dam/aba/administrative/administrative_law/Final%20POTUS%20Report%2010-26-16.authcheckdam.pdf.
[31] *See generally* Kristin E. Hickman, Unpacking the Force of Law, 66 Vanderbilt Law Review 465 (2019), https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1296&context=vlr.
[32] *Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44 (2011).

the rule."[33] A "major rule" is defined as any rule that "has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more[.]"[34]

Astonishingly, Treasury claims this IFR does not meet the economic threshold for a major rule—which is a false assertion. Congress provided $350 billion to the SFLRF program. The most recent Treasury data indicate that state and local government have obligated about $198 billion of about $240 billion in approved projects.[35] That means that some 44% of the $350 billion provided by Congress have not yet been obligated by state and local governments but must be obligated by December 31, 2024. The annual effects discussed in the IFR are likely to be in the *billions* of dollars, which is well above the $100 million threshold for major rules.

That notwithstanding, Treasury's IFR baldly asserts modest economic effects to be measured only in the millions of dollars. If the rule is likely to have such modest effects, why is Treasury rushing to complete it more than a year before all funds are required to be obligated? Treasury is clearly trying to accelerate the use of these billions of dollars of ***COVID-19 relief*** funds, walling them off from Congress as we seek offsets for future expenditures.

Treasury's regulation includes no written justification for this decision apart from its claim that because the rule is purportedly exempt from the APA's rulemaking requirements, it is exempt from the CRA.[36] That is an insufficient justification for this determination. As already explained, the APA does not provide "good cause" for this rulemaking. Further, it should be noted that the CRA does not provide exemption for contract and grant rules, so Treasury's claims in that regard, though dubious in the extreme, have no bearing on its independent obligation to follow the requirements of the Congressional Review Act. Those CRA obligations include, of course, the requirement to delay the effective date of major rules (*e.g*., those with $100 million+ of annualized effects) such as this one for 60 days from the date of finalization.[37]

Though Treasury does not articulate it in this or almost any rule, another likely reason Treasury believes this regulation has few economic effects is because it generally attributes the economic effects of its regulations to statutes, not its own regulations.[38] In doing so, it advances the legal fiction that Treasury does not need to designate regulations like this as "major" because it believes the statute implemented by the regulation is the sole or primary driver of any

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[33] 5 U.S.C. § 801(a)(1)(A).
[34] *Id* at § 804(2).
[35] Paul Winfree and Brittany Madni, Econ. Pol. Innov. Ctr., "The Bidenomics Slush Fund: How $350 Billion is Being Misappropriated (Dec. 3, 2023)," https://epicforamerica.org/publications/bidenomics-slush-fund/.
[36] Coronavirus State and Local Fiscal Recovery Funds, 88 FR 80584, 80587 (Nov. 20, 2023).
[37] 5 U.S.C. § 801(a)(3).
[38] *See generally* Government Accountability Office, "Regulatory Guidance Processes[:] Treasury and OMB Need to Reevaluate Long-standing Exemptions of Tax Regulations and Guidance (2016)," *https://www.gao.gov/assets/gao-16-720.pdf* ("IRS and Treasury officials told us that they rarely recommend to OIRA that tax regulations are major under CRA or economically significant under E.O. 12866 because of their view that any economic impact of a tax regulation generally comes from the underlying statute, and not the regulation. According to IRS and Treasury officials (and as explained in the CCDM), most of the economic impact is rooted in the tax code and therefore beyond Treasury or IRS's discretion to control.")

economic effects. That is frequently an incorrect determination, but whatever the case may generally be, it is absolutely incorrect with respect to this IFR.

This SLFRF IFR is a purely discretionary regulatory action by Treasury. There was no recent statutory directive to make these changes, nor is any such directive referenced by the Department. Indeed, this IFR was promulgated in direct contravention of statutory requirements. As explained in this comment and elsewhere,[39] these discretionary policy choices bear directly on the likely disposition of ***billions*** of taxpayer dollars entrusted to the U.S. Department of the Treasury. The economic effects of this regulation are quintessential "major rule" effects. Because the effects of this regulation are likely in the billions of dollars, and because the rule does not satisfy the narrow "good cause" exemption from ordinary APA requirements, this rule must be designated as "major" under the CRA, with all of the attendant procedural implications.

V. The IFR fails to comply with the Anti-Deficiency Act ("ADA").

The Anti-Deficiency Act prohibits Treasury from expending and obligating funds in a manner inconsistent with its direction Congress. For example, the ADA makes clear that Treasury may not "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation," and it may likewise not "involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."[40]

Here, by changing the definition of "obligation" and adding a new definition for "return of funds" to the SLFRF program, Treasury is potentially putting itself afoul of these and other ADA requirements. Treasury has provided no explanation or justification for how these purely discretionary policy choices comport with the ADA. It must immediately do so or withdraw these regulations.

VI. The IFR fails to adhere to coding conventions that facilitate fulsome congressional oversight of the SLFRF program.

We, along with the Government Accountability Office, must increase oversight of the Executive Branch's use of emergency COVID-19 funding. A significant amount of activity on this front is underway, but more is required.[41] The SLFRF fund is one program that requires additional oversight. As has been explored, it does not appear that President Biden and Treasury are properly managing the SLFRF program, and indeed are now seeking to unlawfully and unilaterally expand it for apparently political purposes. We cannot tolerate that.

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[39] *See generally* Editorial, "Treasury's Hidden Stash of Covid Cash," Wall St. J., Dec. 3, 2023, https://www.wsj.com/articles/treasurys-hidden-stash-of-covid-cash-pandemic-emergency-spending-7acab302; Paul Winfree and Brittany Madni, Econ. Pol. Innov. Ctr., "The Bidenomics Slush Fund: How $350 Billion is Being Misappropriated (Dec. 3, 2023),"
https://epicforamerica.org/publications/bidenomics-slush-fund/.
[40] 31 U.S.C. § 1341(a)(1).
[41] *See generally* Government Accountability Office, "Coronavirus Oversight,"
https://www.gao.gov/coronavirus.

Treasury must adopt and require the use of data coding conventions that facilitate oversight from Congress and the Government Accountability Office. For example, Treasury should require the use of Federal Information Processing Standard codes, or FIPS codes, for organizing SLFRF data. Such information is necessary for Congress, the GAO, and the public to monitor and ensure compliance with the SLFRF program.

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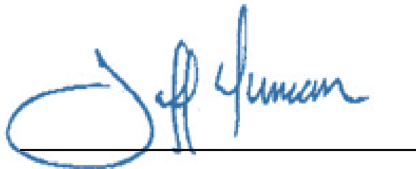
Secretary Yellen, we urge you to withdraw the interim final rule titled, "Coronavirus State and Local Fiscal Recovery Funds," promulgated on November 20, 2023. It violates numerous statutory and other obligations and causes tremendous waste of precious taxpayer dollars.

Thank you in advance for your timely and thoughtful response to this comment.

Sincerely,

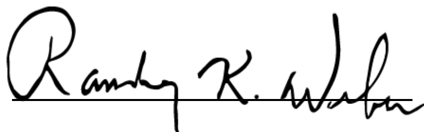
Ben Cline
Member of Congress

Kevin Hern
Member of Congress

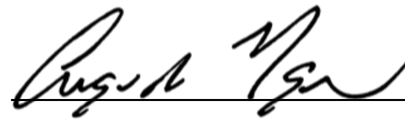


Jeff Duncan
Member of Congress

Michael Cloud
Member of Congress



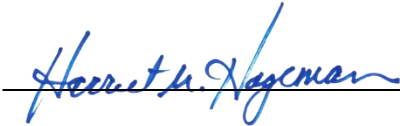
Randy Weber
Member of Congress



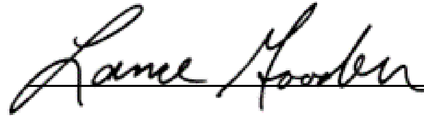
August Pfluger
Member of Congress

Beth Van Duyne
Member of Congress

Ralph Norman
Member of Congress



Harriet M. Hageman
Member of Congress



Lance Gooden
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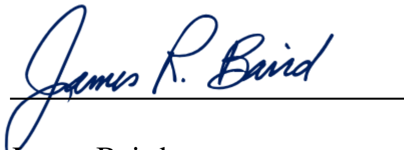
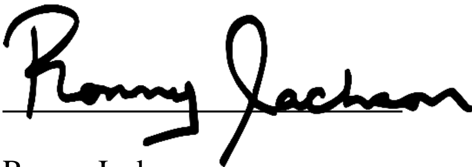


James Baird
Member of Congress



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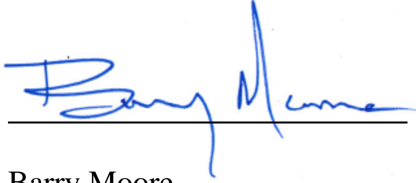
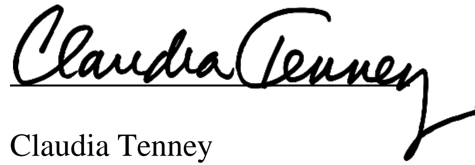
Member of Congress



Barry Moore
Member of Congress



Claudia Tenney
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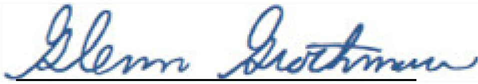
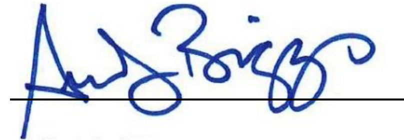
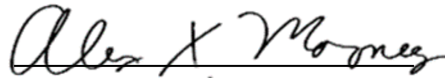


Glenn Grothman
Member of Congress



Andy Biggs
Member of Congress

Eli Crane
Member of Congress



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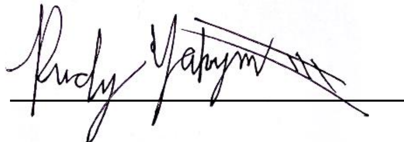
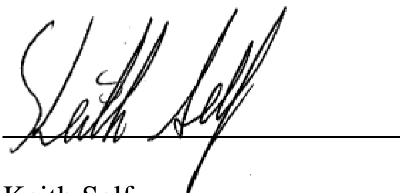
Member of Congress



Rudy Yakym
Member of Congress

Bob Good
Member of Congress

Erin Houchin
Member of Congress



Keith Self
Member of Congress

Troy Balderson
Member of Congress

Cc:
Jessica Milano, Chief Recovery Officer, Office of Recovery Programs, U.S. Department of the Treasury
Angel Nigaglioni, Deputy Assistant Secretary for Legislative Affairs (Appropriations & Management)
The Honorable Eugene Louis Dodaro, Comptroller General, U.S. Government Accountability Office