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On behalf of the hundreds of state, county, local, and tribal government partners of the Biden-Harris Administration in delivering the federal Emergency Rental Assistance (ERA) program, we urge the Treasury Department to clarify that ERA grantees are not required to repay to Treasury any ERA payments made in good faith to landlords, utility providers, or tenants if such payments are later found to be suspect of fraud due to alleged misrepresentation by the applicant, so long as the grantee can demonstrate:

1. Payments were consistent with the grantees' written policies in accordance with Treasury and other relevant federal guidance;
2. The grantee has implemented reasonable controls to detect fraud before payment is made; and
3. The grantee made good faith efforts to recapture the funds once suspected fraud is identified.

Recent comments by Treasury officials during December 2022 online meetings, including during Treasury's December 2 ERA office hours, in response to questions from grantees have suggested that, regardless of a grantee's compliance with 2 CFR 200.303 on Internal Controls and OMB Circular A-123, Appendix C, Requirements for Program Integrity Improvement, such potentially improper payments are unallowable costs and thus must be repaid to Treasury in accordance with the Uniform Guidance at 2 CFR 200.410. This is of great concern to ERA grantees who have developed policies in keeping with Treasury's consistent encouragement that they allow for self-attestation of eligibility by applicants.

Many grantees that have implemented self-attestation policies, as Treasury has strongly encouraged in guidance and in the series of promising practices on Treasury's website. These grantees may find out after the fact that a payment should not have been made because of a misrepresentation on the application. While grantees have in place numerous protections against fraud, some applicants for programs like ERA in which self-attestation is allowed could thwart these protections.

Grantees have been taking all reasonable efforts to recover payments from applicants when this has occurred, including alerting Treasury's Office of the Inspector General and local law enforcement, but they are not always successful in achieving repayment from an applicant in these circumstances. Moreover, grantees are not themselves law enforcement or judicial entities and do not have the ability to say with certainty that a suspect payment was in fact fraudulent.

Treasury's suggestion that such payments require repayment creates a perverse disincentive for grantees to investigate and report suspected fraud. It also creates an incentive for grantees to run more conservative programs in the future with less administrative flexibilities, even if that means funding goes out more slowly and some households who should qualify are not served if they cannot provide proof of eligibility.

It is our understanding that Treasury has shown more leniency on repayments for other federal pandemic relief programs when fraud has been suspected. Moreover, Treasury's suggestion that suspect payments require repayment comes at a time when many grantees are outside of their ERA 1 performance period, and repayment would have potentially harmful financial ramifications to grantees that have been diligent partners in implementation of this unprecedented program.

We strongly urge Treasury to clarify in writing that grantees who have implemented policies and procedures consistent with Treasury guidance, 2 CFR 200.303, and OMB Circular A-123, Appendix C; followed those policies consistently in making ERA payments; and made good faith attempts to recapture funds from applicants who misrepresented their circumstances on their application will not be required to repay Treasury for such lost funds.

Grantees administered the ERA program in good faith with the expectation that Treasury would support them so long as they consistently followed the program guidance. Treasury must live up to this expectation.

Sincerely,

American Public Human Services Association
Council of State Community Development Agencies
National American Indian Housing Council
National Association of Counties
National Community Development Association
National Council of State Housing Agencies
National League of Cities