

LOURDES A. LEON GUERRERO
GOVERNOR



JOSHUA F. TENORIO
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UFISINAN I MAGA'HÅGAN GUÅHAN
OFFICE OF THE GOVERNOR OF GUAM

Transmitted via Electronic mail to:
officeofsenatormoylan@guamlegislature.org

July 25, 2022

Senator James Moylan
Suite 407 DNA Building
238 Archbishop Flores St.,
Hagåtña, Guam 96910

Re: Implementation of Direct Aid Programs Utilizing American Rescue Plan Act Funds

Senator Moylan,

I am writing in response to your letter dated July 12, 2022, in which you request that I implement the Recovery Income Support and Empowerment (“RISE”) Act amendment passed by the legislature in Public Law No. 36-53 and further urge adoption of new qualifications that would make direct aid programs using American Rescue Plan (“ARP”) Act funds available to a broader segment of the community, even offering to “make necessary amendments via legislation” in furtherance of this measure in the event I am unable to “make the changes on [my] end.” I note that, after you sent your letter, you introduced new legislation, Bill No. 326-36, proposing to again amend the RISE Act to remove the income eligibility requirement, and to disburse \$1000 to every individual on Guam who filed a tax return during the identified years or who files a non-filer form, or \$2000 for joint filers.

On July 18, 2022, six days after you sent your first letter, you sent yet another letter, stating your position that ARP funds can be used to fund a utility credit proposed in Bill No. 325-36, and stating that “after doing some research, [you] are not convinced in [my] administration’s position that the federal ARP can’t be utilized to fund this program.” Though you claim you are “simply asking for some honesty and documentation,” predictably, you have not shared your “research” on this matter.

The short response to your inquiries is this: do better research. Your position on this matter is ill-informed, and the actions you are advocating for are reckless and, worse, illegal. It is unfathomable that you, a candidate for Congress, seek to involve our island in blatant violation of federal law.

As you may recall, the RISE Act lapsed into law on December 29, 2020 as Public Law No. 35-136. The Act specifically provided in relevant part:

Section 2. Establishment of the Recovery Income Support and Empowerment (RISE) Program.

....

(d) Eligibility of RISE Program.

1. For purposes of this Section, the term eligible individual means any individual other than: (A) an individual employed by the government of Guam or the federal government at (sic) any time during the tax year 2020; (B) any individual who retired from the government of Guam or the federal government and was employed by the government of Guam or the federal government at any time during the tax year 2020[.]

....

(f) Limitations Based on Adjusted Gross Income. Individuals, to include individuals filing a joint return, whose adjusted gross income in the tax year 2020 exceeds the following maximum adjusted gross income shall not be eligible for the RISE Program:

1. Forty Thousand Dollars (\$40,000) in the case of an individual return; and
2. Eighty Thousand Dollars (\$80,000) in the case of a joint return.

....

Section 3. Implementation. The Department of Revenue and Taxation shall have thirty (30) working days from the date of identification of funds by *I Maga'hågan Guåhan* for the purposes of this Act to implement the Program.

....

Section 5. Funding. Notwithstanding any other provision of law, or rule or regulation, *I Maga'hågan Guåhan* is authorized to transfer up to Thirty Million Dollars (\$30,000,000), plus any additional amount needed for administrative costs, to the Department of Revenue and Taxation, for the purposes of this Act, as may be available from the following:

- a. Fiscal Year 2021 General Fund appropriations; and
- b. Any federal appropriations that can be used for the purposes of this Act.

No local funds may be used for this Program as long as federal funds that can be used for the purposes of this Act are available to encumber, obligate, or expend. Any funds transferred pursuant to this Act shall only be used for the purposes of this Act. Payments under this Act shall be required only if payments can be funded under a federal coronavirus relief package or such other federal funds as are appropriate and lawful.

Public Law No. 36-53 (the “RISE Act Amendment” or “RAA”), which you sponsored, amended the RISE Act, intending to “provide a moderate increase” in the payout to families intended to receive funds under the original RISE Act, and raising the payment to One Thousand dollars

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(\$1,000.00) for eligible individuals and Two Thousand dollars (\$2,000.00) for joint filers. The RAA did not amend the alternative funding source of FY2021 General Fund appropriations.

Both the RISE Act and the RAA were problematic when they were passed. Though both laws stated that funds may be transferred from FY21 General Fund appropriations, executive branch agencies had been shortchanged in the FY21 budget, and the transfer of \$30M from these agencies was plainly untenable even at the time of the original RISE Act. Further, by the express terms of both, the RISE Act and the RAA authorized but did not mandate payments in the event local funds were the only available funding source; payments were only “required” if they could be funded utilizing federal funds.

It is well-settled that the Legislature is not authorized to appropriate federal grant monies in the absence of specific Congressional authorization for such reappropriation. In the seminal case *Wong v. Camina*, the District Court of Guam considered whether federal grant monies were subject to local law requiring appropriation from the Guam Legislature. The court held, “[w]here these appropriations or grants completely fund a specific purpose without the need of local funding, and where the appropriation or grant does not provide for local legislative control, there is no authority for the Guam Legislature to assume the responsibility for reappropriating these funds.” The Legislature has no authority to “require” the use of federal funds received through the ARP.

Further, as discussed, the RISE Act and the RAA provide that payments are only required if they can be funded by federal funds as are appropriate and lawful. This language is repeated in the new legislation you have introduced, Bill No. 326-36. It is confounding that, in your new bill, you again require that federal funds must be spent in compliance with federal law and in the same breath propose that we spend federal funds in a manner that would violate federal law, a particularly interesting strategy for a person seeking to represent Guam in the U.S. House of Representatives.

To be clear, even assuming that the Guam Legislature is authorized to reappropriate funds provided in the CARES Act or the ARP, which it is not, **the payments contemplated in the RISE Act, the RAA, and especially in Bill No. 326-36, would violate federal law.**

Because you are a candidate for Guam’s only seat in Congress, I urge you to familiarize yourself with the federal law at issue so that you do not inadvertently call for action that blatantly violates the law in your effort to get elected. The Coronavirus State and Local Fiscal Recovery Funds (“SLFRF”), part of the broader American Rescue Plan Act, provides funds to U.S. jurisdictions to support response and recovery efforts for the COVID-19 public health emergency. However, jurisdictions are not given *carte blanche* to use funds at their whim. As with all federal grants, the use of ARP funds is subject to restrictions enumerated in the U.S. Department of Treasury’s SLFRF Final Rule (“Final Rule”), which came into effect on April 1, 2022, and which adopted the interim final rule published by U.S. Treasury on May 17, 2021, with amendments. States and territories are required to comply with mandatory periodic reporting requirements, and funds determined to have been used in violation of the final rule are subject to remediation and recoupment.

As discussed in the overview for the Final Rule, the rule recognizes “that the pandemic caused broad-based impacts that affected many communities, households, and small businesses across the country...the [F]inal [R]ule describes these as ‘impacted’ households, communities, small businesses, and nonprofits.” The Final Rule provides a broad framework by which recipient states and territories may identify populations that experienced pandemic impacts and design a targeted response to address the identified impact. Specifically, “impacted” entities are defined as follows:

those impacted by the disease itself or the harmful consequences of the economic disruptions resulting from or exacerbated by the COVID-19 public health emergency. For example, an individual who lost their job or a small business that saw lower revenue during a period of closure would both have experienced impacts of the pandemic.

In identifying a class that experienced an impact, recipient states or territories must identify the class and the impact the class faced. Then, recipients must document that those receiving the assistance fall within the identified class. As emphasized in the Overview for the Final Rule (“Overview”), there should be a relationship between the definition of the class and the proposed response. Designing a response to an identified pandemic impact experienced by a particular class requires that the proposed intervention be reasonably designed to benefit the identified class or individual that experienced the impact, and are both related to the impact and reasonably proportional to the extent and type of impact experienced. As provided in the Overview, “uses that bear no relation or are grossly disproportionate to the type or extent of the impact would not be eligible.” The Overview further explains that “reasonably proportional” requires that the scale of the response be proportional to the scale of the harm, and specifically explains that “it may not be reasonably proportional for a cash assistance program to provide a very small amount of aid to a group that experienced severe harm and a much larger amount to a group that experienced relatively little harm.”

To simplify administration, the Final Rule presumes that certain households and communities are “impacted” by the pandemic, and eligible for services that respond to the impact they experienced. The presumptive category that captures the broadest segment of the population are low-or-moderate income households, defined as households with income at or below 300 percent of the Federal Poverty Guidelines for the size of the household. As provided in the Final Rule Overview published by the U.S. Treasury, “recipients can always presume that a household earning below [the income limit for 300 percent of the Federal Poverty Guideline for household size]...is impacted by the pandemic and eligible for services to respond.”

As you may know, the U.S. Department of Health and Human Services (“HHS”) publishes annual Poverty Guidelines used to determine financial eligibility for government programs. Separate tables are provided for (1) the 48 contiguous states and the District of Columbia, (2) Alaska, and (3) Hawaii. The comments following the published 2022 guidelines note that the separate poverty guidelines for Alaska and Hawaii reflect Office of Economic Opportunity administrative practice beginning in 1966-1970. In GAO-10-240R *Poverty Determination in U.S. Insular Areas*, the U.S. Government Accountability Office (“GAO”), responded to congressional requests to examine how poverty guidelines are determined for the insular areas, including Guam. The GAO notes that

separate guidelines are issued for Alaska and Hawaii that are higher than the national guidelines, based on geographic variations in cost of living. Although separate guidelines are not issued for Guam or the other insular areas, HHS tasks the federal offices that administer specific programs relying on the guidelines for eligibility criterion to determine whether it would be appropriate to use the contiguous U.S. guidelines for such jurisdictions or to utilize another procedure.

Because HHS has not published poverty guidelines for Guam, the thresholds provided in Hawaii's poverty guidelines are utilized for local direct aid programs using ARP funds. As discussed, Hawaii's poverty guidelines support significantly broader populations than the thresholds established for the 48 contiguous states. For example, for the latest iteration of Prugrãman Salãppe', the Department of Administration published the following eligibility table, which, consistent with the Overview, tracks the 300% x the poverty guideline threshold for presumptive low- or moderate-income households:

HH SIZE	PER YEAR	PER MONTH
1	\$46,890	\$3,908
2	\$63,180	\$5,265
3	\$79,470	\$6,623
4	\$95,760	\$7,980
5	\$112,050	\$9,338
6	\$128,340	\$10,695
7	\$144,340	\$12,053
8	\$160,920	\$13,410
9	\$177,210	\$14,768
10	\$193,500	\$16,125
11	\$209,790	\$17,483
12	\$226,080	\$18,840
13	\$242,370	\$20,198
14	\$258,660	\$21,555

Under these standards, a household of 4 with household income of \$95,760 would qualify for direct aid. In contrast, the poverty guidelines published for the 48 contiguous states and the District of Columbia yields a much more restrictive result by which a household of 4 maximum household income of \$83,250 in order to qualify. As you can see, direct cash assistance programs are available to higher income households in Guam than they are in the contiguous 48 states.

It is because of these income thresholds for presumptive low-or-moderate income households identified in federal regulations that I have specifically tailored programs to capture as broad a group as possible while still complying with federal law. You have pointed out that other jurisdictions, like the CNMI, have established direct aid programs that will distribute cash aid to everyone, regardless of income or household size. Each jurisdiction will have to account for its own ARP spending. Guam's finances are in top shape. My administration has eliminated the general fund deficit through discipline and sound fiscal policy. We have allocated and spent federal funding distributed in the CARES Act without a single fiscal flag. I agree it would be far more popular to hand out \$1000 to every voter on Guam in an election year rather than those who meet

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established thresholds for low-or-moderate income. However, the Final Rule makes clear that funds used in violation of the final rule are subject to remediation and recoupment. I will not, as you ask, misuse federal funds to get elected, and saddle our island's children, and our children's children, with the burden of paying hundreds of millions of dollars back to the federal government when the use of these funds is ultimately audited.

In your July 12th letter, you referenced the ALL-RISE Program that I launched on August 13, 2021 in Executive Order No. 2021-18. In E.O. No. 2021-18, I specifically noted that the Interim Rule for ARP (at the time the Final Rule had not been issued) provided that ARP funds could be used to provide assistance to households and populations facing negative economic impacts due to COVID-19, including unemployment or increased food or housing insecurity. The Interim rule did not specify the use of the poverty guidelines to determine the income thresholds as the Final Rule provided, but it did provide the same presumption that low-or-moderate income households qualified for the aid. Because the income thresholds were not specified in the Interim Rule, and the RISE Act did not specifically address ARP requirements that funds were to be directed to individuals who suffered economically from COVID-19 and were of low-or-moderate income, in an abundance of caution, the ALL-RISE Program directed both an income threshold and self-attestation to ensure compliance with ARP requirements. In your letter, you asked me to amend the qualifications of the RISE Act within my authority. As it happens, that is exactly what I did in the ALL-RISE Program.

The Final Rule was issued on January 6, 2022, setting out the income thresholds for the low-or-moderate income presumptions discussed above. On February 22, 2022, I reactivated Prugrãman Salãppe', a Coronavirus Aid, Relief, and Economic Security Act ("CARES") era direct aid program ("Prugrãman Salãppe' 2"). Because Prugrãman Salãppe' 2 utilized ARP funds, we implemented the income thresholds provided in the Final Rule. On June 23, 2022, I further expanded Prugrãman Salãppe', to provide yet another round of direct aid to eligible households ("Prugrãman Salãppe' 3"). Between the ALL-RISE Program, Prugrãman Salãppe' 2, and Prugrãman Salãppe' 3, our Administration has distributed \$1600 in direct cash assistance to eligible households, exceeding the amount provided in the RISE Act and Bill No. 326-36, and exceeding the direct aid provided by the CNMI stimulus programs. And of course, our community has benefited from numerous other programs we have established utilizing ARP funds, including childcare and business grants, and rental assistance programs.

While I understand that you would like cash assistance given to "all families, and not just a certain percentage of the community," doing so would be clearly contrary to federal law. The Public Auditor noted a similar concern in his testimony before the Legislature in the Emergency Session on Bill No. 325-36 on July 20, 2022, during which he commended our Administration for being cautious in its use of federal funds, and stated that while he would himself appreciate the government paying for a portion of his power bill, "it really shouldn't happen." He confirmed that such assistance should be means tested and should only be provided for those who could not afford it.

Like the Public Auditor, I would not qualify for the presumptive group eligible to receive cash assistance under ARP, and I expect neither would you. We are, by design, excluded from the

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classes of people presumed to have suffered the negative economic impact of the pandemic, and the fact that you are advocating for the use of government funds to pay yourself is in extremely poor taste. Instead of engaging in petty politics, you should really read the Final Rule yourself. As noted, U.S. Treasury published it online six months ago, and it is only 437 pages long. Read the Final Rule and justify to me and the people of Guam how exactly you should qualify as low-or-moderate income within the meaning of the Final Rule such that you should be entitled to receive this aid.

In conclusion, Senator, let me be clear: I will not violate federal law no matter how many rapid-fire letters you write or bills you introduce asking me to do so. It is important that our leaders comply with the law. Our community deserves no less.

Senseremente,



LOURDES A. LEON GUERRERO

Maga'hågan Guåhan
Governor of Guam

cc via email: *Honorable* Joshua F. Tenorio, *Sigundo Maga'låhen Guåhan*