# REPORT
# STATE OF WISCONSIN
# JOINT SURVEY COMMITTEE ON TAX EXEMPTIONS
# 2023 SENATE BILL 266

[Introduced by Senator Quinn and cosponsored by Representative Summerfield]

This report relates to 2023 Senate Bill 266, relating to an income and franchise tax exemption for broadband expansion grants.

## GENERAL NATURE OF PROPOSAL

The bill provides an exemption from state income and franchise taxes for income received as a grant from the state or federal government for broadband expansion in this state. Current law provides an exemption for income received as an allocation from the federal Coronavirus Relief Fund for broadband expansion, and the bill provides that no person may claim the exemption under the bill for amounts claimed under the existing exemption with respect to the same broadband expansion grant. The exemption would first apply to tax years beginning after December 31, 2022.

## LEGALITY INVOLVED

The bill raises potential issues relating to the receipt of federal funds through the state fiscal recovery fund (SFRF) created under the federal American Rescue Plan Act (ARPA). In total, Wisconsin received $2.53 billion in SFRF funds. ARPA prohibits states from using SFRF funds "to either directly or indirectly offset reduction in [their] net tax revenue" that results from a change in law that "reduces any tax." [42 U.S.C. s. 802 (c) (2) (A).] This is sometimes referred to as the "tax offset" provision under ARPA.

### Treasury Determination

The question posed by the tax offset provision, in relation to the bill, is whether the U.S. Department of the Treasury (the Treasury) would determine there were insufficient funds from other sources to offset the reduction in revenue under the bill. The state Department of Administration (DOA) is responsible for reporting reductions in net revenue under ARPA. The department calculates that, as of August 28, 2023, the remaining margin for tax reductions before triggering potential recoupment is around $113 million for fiscal year 2023-24 and $319 million for fiscal year 2024-25. Meanwhile, the provisions in the bill are estimated to reduce revenue by **$25.3 million in 2024-25** and **$45.8 million in 2025-26**, as described below. Therefore, it appears unlikely that the Treasury would determine there were insufficient funds from other sources to offset the reduction caused by this bill.

### Federal Court Injunctions

In addition to the fact that an adverse determination from the Treasury appears unlikely, the outcomes in several recent court actions have cast doubt over the federal government's ability to enforce the tax offset provision under ARPA. Various states have filed lawsuits, individually or in combination with other states, against Treasury Secretary Janet Yellen and the Treasury, in relation to the enforcement of the provision.

Most significantly, the tax offset provision was held unenforceable by the U.S. Court of Appeals for the Eleventh Circuit, in *West Virginia v. U.S. Dep't of the Treasury*, 59 F.4th 1124 (11th Cir. 2023). The Eleventh Circuit upheld a lower court's order enjoining enforcement against 13 state plaintiffs. In its decision, the court affirmed that Congress is given spending authority in the Constitution and has the power to condition giving money to states on certain action, but that any conditions must be (among other factors) unambiguous. [*Id.* at 1140-41.] However, in this case, the court said the provision fails to provide a standard against which a state can assess whether it will reduce or has reduced net tax revenue, and it fails to define what a "direct or indirect offset" means. The court also said the novelty and scope of ARPA compounds those issues because the restriction is targeted at a state's entire budget. Ultimately, the Eleventh Circuit found in favor of the plaintiffs and upheld an injunction preventing the tax offset provision from being enforced against the 13 states. [*Id.* at 1144-47.]

Additionally, the U.S. Court of Appeals for the Sixth Circuit upheld an injunction blocking enforcement of the tax offset provision against Tennessee, one of the two state plaintiffs in *Kentucky v. Yellen*, 54 F.4th 325 (6th Cir. 2022). In its ruling on the merits, the Sixth Circuit found that the language of the offset provision was "impermissibly vague." [*Id.* at 330.] According to recent news reports, the Treasury has chosen not to appeal this decision.

Finally, in a lawsuit brought by Texas, Mississippi, and Louisiana, a federal district court in Texas upheld an injunction against enforcement of the tax offset provision against those states, in *Texas v. Yellen*, 597 F.Supp.3d 1005 (N.D. Tex. 2022). The court said it granted an injunction because the provision was coercive and commandeering. [*Id.* at 1012-15.] The U.S. Court of Appeals for the Fifth Circuit granted an appeal, and heard oral arguments on April 3, 2023, but the court has not yet released a decision.

In this case, if the Treasury sought recoupment of any SFRF funds expended by Wisconsin, as a result of the enactment of the bill, the state could contest the validity of the Treasury's action in court. This could include arguments against enforcement that have been successful in other jurisdictions.

## FISCAL EFFECT

The Department of Revenue estimates that the bill would result in a reduction in revenue of **$25.3 million in 2024-25** and **$45.8 million in 2025-26**. This estimate assumes: (1) the state will receive $1 billion from the federal Broadband Equity, Access, and Deployment (BEAD) grant; (2) 20 percent of the BEAD grant award will be allocated in 2024, with the remaining 80 percent allocated in 2025; and (3) 20 percent of the grant money will go to nontaxable entities such as a municipality. The bill's fiscal effect may increase or decrease based on the actual BEAD grant amount, timing of allocations, and make-up of recipients.

## PUBLIC POLICY INVOLVED

The Joint Survey Committee on Tax Exemptions finds that the tax exemption created in the bill is good public policy on a vote of Ayes, 7; Noes, 2.

**10/31/23** **JOINT SURVEY COMMITTEE ON TAX EXEMPTIONS**