



Updated Guidance Memorandum Regarding the Eligibility of Government Expenditures for Funding or Reimbursement from the Coronavirus Relief Fund as established by the CARES Act dated July 8 , 2020¹

Overview and Authority

The Delaware Department of Justice (“DDOJ”) provides the below guidance² (hereafter referred to as the “Guidance”) and FAQs to assist government entities

¹ While this Guidance focuses on eligibility under the CRF, we have elected to include content involving other federal funding sources established by the CARES Act. For ease of reference, we will divide guidance categories into separate, but sequentially numbered sections in the Frequently Asked Questions section below.

² This guidance memorandum is issued pursuant to the authority vested in the DDOJ at 29 *Del. C.* §§ 2504, 2505. This Guidance does not establish an attorney/client relationship and is not offered as a substitute for independent legal advice to entities not obligated to accept the representation of the DDOJ. This Guidance is based upon our review and synthesis of the following external documents: the United States Treasury’s Guidance for State, Territorial, Local, and Tribal Governments dated April 22, 2020 (hereafter referred to as the “UST Guidance”), Federal Funds Information for States’ Issue Brief 20-10, dated April 24, 2020 (entitled “Treasury Releases CRF Guidance” and hereafter referred to as the “FFIS Guidance”), the Congressional Research Office’s Report entitled “The Coronavirus Relief Fund (CARES Act Title V): Background and State and Local Allocations” (as updated April 14, 2020); the United States Treasury’s Coronavirus Relief Fund Frequently Asked Questions Updated as of May 4, 2020, May 28, 2020 and June 24, 2020, and the updated June 30, 2020 Coronavirus Relief Fund Guidance for State, Territorial, Local, and Tribal Governments.

within the State of Delaware in assessing whether certain expenses are eligible for funding through the CARES Act. On May 4, 2020, the United States Treasury (hereafter referred to as the “UST”) provided new guidance (hereafter referred to as the “UST Guidance” regarding eligible and ineligible use of the funds provided to the states via the Coronavirus Relief Fund (hereafter referred to as the “CRF”). We hereby adopt the May 4, 2020, May 28, 2020, June 24, 2020 and June 30, 2020, UST Guidance.

DDOJ issued its first Guidance Memorandum on May 1, 2020, its second Guidance Memorandum on May 7, 2020, its third Guidance Memorandum on June 5, 2020, and its fourth Guidance Memorandum on July 1, 2020 . This fifth Guidance Memorandum updates, consolidates, and incorporates previous guidance considering the UST’s June 30, 2020, guidance.

DDOJ is available to address questions and consult with a government entity’s legal counsel relating to this guidance. Local governments with questions about the eligibility of certain expenditures may email them to: COVID.DDJ@delaware.gov.

Guidance

The CRF, established through Section 5001 of the Act, offers a means of assistance for state and local governments. The CRF provides a total of \$150 billion in federal fiscal support for state and local governments, with eligibility dependent upon the location, level of government, and use of potential funds. Almost one month later, on April 22, 2020, UST issued a brief guidance document providing its interpretation of the provisions of the Act (hereafter the “UST Guidance”). UST later updated that guidance on May 4, 2020, on May 28, 2020 and again on June 24, 2020. The UST Guidance regarding state access to funds distributed from the CRF lays out an understandable, but incomplete, basic structure for determining whether an expense is eligible for payment with CRF funds.

While the State of Delaware has been left to interpret certain gaps in the UST Guidance, we agree with and rely upon the UST Guidance’s rule that payments from the Fund may only be used to cover costs that:

- A) are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (“COVID–19”);

B) were not accounted for in the budget most recently approved as of March 27, 2020 (the date of enactment of the CARES Act) for the State or government; and

C) were incurred during the period that begins on March 1, 2020 and ends on December 30, 2020.³

UST’s June 30, 2020 Guidance Regarding the Method for Compliance with the December 30, 2020 Deadline

In its guidance issued on June 30, 2020,⁴ the US Treasury expanded upon the initial guidance released on April 22, 2020, which provided that the cost of an expenditure is incurred when the recipient has expended funds to cover the cost.

UST has now clarified that for a cost to be considered to have been incurred, performance or delivery must occur during the covered period but payment of funds need not be made during that time (though it is generally expected that this will take place within 90 days of a cost being incurred). In all cases, it must be necessary that performance or delivery take place during the covered period.

Examples of how this could be applied:

- Lease of equipment or other property: Irrespective of when payment occurs, the cost of a lease payment shall be considered to have been incurred only for the period of the lease that is within the covered period.
- Cost of a good or service received during the covered period will not be considered eligible under section 601(d) if there is no need for receipt until after the covered period has expired.
- Goods delivered in the covered period need not be used during the covered period in all cases. For example, the cost of a good that must be delivered in December in order to be available for use in January could be covered using payments from the Fund.

³ See Section 601(d) of the Social Security Act, as added by section 5001 of the CARES Act. The UST Guidance states that “[a] cost is ‘incurred’ when the responsible unit of government has expended funds to cover the cost.”

⁴ June 30, 2020, UST Guidance at Pages 2-3.

- Cost of goods purchased in bulk and delivered during the covered period: These costs may be covered using payments from the Fund if a portion of the goods is ordered for use in the covered period, the bulk purchase is consistent with the recipient's usual procurement policies and practices, and it is impractical to track and record when the items were used.
- Durable goods: A recipient may use payments from the Fund to purchase a durable good that is to be used during the current period and in subsequent periods if the acquisition in the covered period was necessary due to the public health emergency.

UST has acknowledged that it is not always possible to estimate with precision when a good or service will be needed. Therefore, the touchstone in assessing the determination of need for a good or service during the covered period will be reasonableness at the time delivery or performance was sought, *e.g.*, the time of entry into a procurement contract specifying a time for delivery.

Similarly, in recognition of the likelihood of supply chain disruptions and increased demand for certain goods and services during the COVID-19 public health emergency, if a recipient enters into a contract requiring the delivery of goods or performance of services by December 30, 2020, the failure of a vendor to complete delivery or services by December 30, 2020, will not affect the ability of the recipient to use payments from the Fund to cover the cost of such goods or services if the delay is due to circumstances beyond the recipient's control.

This Guidance applies in a like manner to costs of subrecipients. Thus, a grant or loan, for example, provided by a recipient using payments from the Fund must be used by the subrecipient only to purchase (or reimburse a purchase of) goods or services for which receipt both is needed within the covered period and occurs within the covered period. The direct recipient of payments from the Fund is ultimately responsible for compliance with this limitation on use of payments from the Fund.

The UST Guidance lays out non-exclusive lists of examples of eligible and ineligible expenses. The UST Guidance lists, and we agree, that the following categories of expenses are *ineligible* for payment derived from the CRF:

- A) Expenses for the State share of Medicaid.⁵
- B) Damages covered by insurance.

⁵ See 42 C.F.R. § 433.51 and 45 C.F.R. § 75.306.

- C) Payroll or benefits expenses for employees whose work duties are not substantially dedicated to mitigating or responding to the COVID-19 public health emergency.
- D) Expenses that have been or will be reimbursed under any federal program, such as the reimbursement by the federal government pursuant to the CARES Act of contributions by States to State unemployment funds.
- E) Reimbursement to donors for donated items or services.
- F) Workforce bonuses other than hazard pay or overtime.
- G) Severance pay.
- H) Legal settlements.

Another important aspect of the UST Guidance is that CRF Funds may not be used to fill gaps in government revenue. Therein, the UST Guidance provides:

Funds may not be used to fill shortfalls in government revenue to cover expenditures that would not otherwise qualify under the statute. Although a broad range of uses is allowed, revenue replacement is not a permissible use of Fund payments.

The FFIS Guidance provides an interpretation of the phrase “broad range of uses” as follows:

Expenditures must be used for “actions to respond to the public health emergency.” These may include direct spending, such as medical or public health needs, and “second-order” spending such as economic support for employment or business interruptions.

As stated in the Congressional Research Office’s Report entitled “The Coronavirus Relief Fund (CARES Act Title V): Background and State and Local Allocations” (as updated April 14, 2020) at page 2:

Coronavirus Relief Fund payments may not be used to *directly* account for revenue shortfalls related to the COVID-19 outbreak. Such funds, however, may *indirectly* assist with revenue shortfalls in cases where expenses paid for by the Coronavirus Relief Fund would otherwise widen the gap between government outlays and receipts. For instance, if \$3 billion in Coronavirus Relief Fund assistance is sent to a government with revenues that are \$10 billion lower than expected and

\$5 billion in new COVID-19-related expenses, that assistance will reduce the fiscal gap (from \$15 billion to \$12 billion) by the same amount regardless of whether it applies to revenues or spending. Only in cases where governments have revenue shortfalls and less related spending than the program provides are governments limited by the eligible purpose restrictions. For instance, in that same example but with no new COVID-19-related expenses, the government could not use Coronavirus Relief Fund assistance despite its decrease in revenues.

We adopt the FFIS Guidance’s interpretation of the UST Guidance’s use of the phrase “broad range of uses” as part of this Guidance.

In addition to the interpretations in the aforementioned documents, we have interpreted the UST Guidance’s use of the term “[n]ot accounted for in the most recently approved budget.” It is our guidance that the term “not accounted for” provision applies when: 1) the category of expenses was not included in the government entity’s last operating budget act (including any other legislative act appropriating money for the operation of the government entity), or 2) the category of expenses was previously included in the government entity’s last operating budget act, but at an amount less than the expenses actually incurred as caused by the government entity’s response to the Coronavirus Pandemic. It is our opinion, that given the broad purposes of the Act and the CRF, funds provided to government entities through the CRF are specifically intended to “bridge the gap” between reasonably anticipated government expenses based on assumptions made before the Coronavirus Pandemic and those expenses in excess of those assumptions which are caused by the Coronavirus Pandemic. On May 28, 2020, UST provided the following additional detail regarding how recipients should determine whether an expense was “not accounted for” because the expense is a “substantially different use” of funds as follows:

Costs incurred for a “substantially different use” include, but are not necessarily limited to, costs of personnel and services that were budgeted for in the most recently approved budget but which, due entirely to the COVID-19 public health emergency, have been diverted to substantially different functions. This would include, for example, the costs of redeploying corrections facility staff to enable compliance with COVID-19 public health precautions through work such as enhanced sanitation or enforcing social distancing measures; the costs of redeploying police to support management and enforcement of stay-

at-home orders; or the costs of diverting educational support staff or faculty to develop online learning capabilities, such as through providing information technology support that is not part of the staff or faculty's ordinary responsibilities. Note that a public function does not become a "substantially different use" merely because it is provided from a different location or through a different manner. For example, although developing online instruction capabilities may be a substantially different use of funds, online instruction itself is not a substantially different use of public funds than classroom instruction.

We appreciate that government entities may operate differently with respect to the procurement and availability of insurance coverage. If a government entity is insured in a manner that covers any of the losses associated with the categories of eligible expenses, it is likely that such expenses are ineligible for CRF funding. Government entities are encouraged to seek legal counsel to assess ineligibility regarding insurance coverage.

Government expenses associated with "[p]ayroll expenses for public safety, public health, health care, human services, and similar employees whose services are substantially dedicated to mitigating or responding to the COVID19 public health emergency" are generally eligible for CRF funding. For the purpose of this Guidance, "substantially dedicated" means: 1) the employee is performing work - whether within or in addition to the routine requirements of the employee's job classification- caused by or in furtherance of the government entity's response to the Coronavirus Pandemic, 2) the employee is performing work outside the routine hours required of the employee caused by or in furtherance of the State's response to the Coronavirus Pandemic, or 3) the employee has been deployed to work as a direct result of the need to backfill other employees who are "substantially dedicated" as defined herein and such employee is working outside the routine hours required of the backfilling employee.

In its May 28, 2020 Guidance, UST stated that government recipients should "keep records sufficient to demonstrate that the amount of Fund payments to the government has been used in accordance with section 601(d) of the Social Security Act." Additionally, UST advised that CRF payments made by Treasury to State,

territorial, local,⁶ and Tribal governments are “not considered to be grants but are ‘other financial assistance’ under 2 C.F.R. § 200.40 . . .” and:

are considered to be federal financial assistance subject to the Single Audit Act (31 U.S.C. §§ 7501-7507) and the related provisions of the Uniform Guidance, 2 C.F.R. § 200.303 regarding internal controls, §§ 200.330 through 200.332 regarding subrecipient monitoring and management, and subpart F regarding audit requirements.

DOJ recommends that any entity receiving CRF funds consult with appropriate fiscal and auditing subject matter experts before applying for or receiving any CRF funds. A failure to comply with the documentation and other prophylactic obligations of the Single Audit Act or any of the applicable CFR provisions could substantially inhibit a recipient’s or subrecipient’s ability to justify expenses or defend itself in the event of a recoupment effort by UST. Subrecipients of the State of Delaware should be aware that any failure to comply with these provisions may result in the State withdrawing approval of previously awarded funds or a state-level recoupment action by the State of Delaware. DOJ also recommends that any transaction expending CRF funds expressly state a brief recitation of stated basis for eligibility and a statement that the recipient or subrecipient has determined that each of the requirements of Section 601(d) of the Social Security Act are factually and legally supported.

⁶ Importantly, UST advised that subrecipients, here local units of government receiving funds from an entity that directly received CRF funds from UST, are obligated to comply with the Single Audit Act. Accordingly, localities are strongly urged to consult legal counsel and access fiscal expertise necessary to understand and comply with the obligations associated with the Single Audit Act and relevant provisions of the CFR.

Frequently Asked Questions⁷

Government Expenditures FAQ

1) May CRF funds be used to pay for the purchase of face shields, nitrile gloves, gowns, N95 masks, respirators, safety glasses, sanitizer, sanitizer supplies, Tyvek suits, surgical masks, thermometers, hospital equipment, temperature systems, bouffant surgical caps, and care package items (soaps, wipes, bandanas, etc.)?

Answer: Yes, so long as these items are purchased to mitigate the effects of the Coronavirus Pandemic or prevent the spread of COVID-19 disease and were not already funded as items in the government entity's last budget act.

2) We have waived co-pays for our employees regarding coronavirus testing, telemedicine access, and other services. May we recover the costs of these waived co-payments through accessing CRF funds?

Answer: Yes, so long as the waiver was not previously included in the government entity's last budget act and the purpose of the waiver was to encourage employees to access testing at the first possible opportunity or in order to prevent the spread of COVID-19 disease by limiting the necessity of employees appearing at healthcare facilities or offices.

⁷ The answers provided in this Frequently Asked Questions ("FAQ") do not constitute legal advice and are not a substitute for consultation with independent legal counsel. The factual scenarios presented in these questions and the answers are substantially simplified for the purpose of accessibility and ease of use. Additionally, DDOJ is interpreting federal guidance and other external sources of information which -while somewhat helpful- are incomplete. In most instances, factual distinctions at a more granular level will affect the ultimate legal conclusion regarding eligibility for CRF and other federal funding. To that end, this guidance offers a starting point for discussions with independently retained legal counsel and an entity's chief fiscal officer. This Guidance **does not** provide a "safe harbor" which excuses compliance with federal, state, or local law. This FAQ will be periodically updated, but recipients are advised to remain current on UST Guidance as they are issued.

3) May CRF funds be used to pay for extra or additional janitorial or cleaning services necessary to sanitize or disinfect areas occupied or used by our government?

Answer: Yes. These expenses were not budgeted for and are directly caused by the government's need to mitigate the spread of coronavirus and COVID-19 disease relating to visitors to government facilities and government employees.

4) May we purchase equipment and services necessary to allow our employees to work remotely?

Answer: Yes, so long as the need for remote work is caused by the Coronavirus Pandemic or adherence to emergency orders relating to the public health emergency in our state.⁸

5) Our Police Agency has experienced a significant increase in overtime usage that we can directly relate to our response to the Coronavirus Pandemic. May we recover the cost of this portion of overtime through accessing CRF funds?

Answer: Yes, as described, to the extent that such overtime was not previously accounted for in the government entity's most recent budget act.

6) We would like to give a bonus to our first responders. May we pay for that bonus with CRF funds?

Answer: No, bonuses are expressly listed as ineligible in the UST Guidance. Notably though, the UST excludes Hazard Pay and Overtime from this ineligibility category. Accordingly, while bonuses are prohibited, government entities are likely permitted to access CRF funding for overtime and hazard duty pay so long as these expenses are caused by the government entity's response to the Coronavirus Pandemic and not accounted for in the government entity's last budget act. We note

⁸ *But see* the May 4, 2020 UST Guidance at Page 3 regarding limitations on the use of employee stipends to support remote working: (“unless the government were to determine that providing assistance in the form of a stipend is an administrative necessity, the government should provide such assistance on a reimbursement basis to ensure as much as possible that funds are used to cover only eligible expenses.”). The phrase “administrative necessity” is not specifically defined. In our view, its plain meaning is evident, and its use is subject to the discretion of the chief executive officer of the government recipient.

that most government entities have previously defined Hazardous Duty and Overtime, either by statute, ordinance, regulation, rule, or collective bargaining agreement. In our view, a deviation from any existing definition of Hazardous Duty or Overtime for the purpose of evading CRF ineligibility would result in significant liability and certain UST recoupment efforts. Merely calling a bonus “hazardous duty” pay does not make it an eligible expenditure. The UST Guidance dated May 4, 2020 and May 28, 2020 both define hazard pay as “additional pay for performing hazardous duty or work involving physical hardship, *in each case that is related to COVID-19.*” (emphasis added). Accordingly, Hazardous Duty pay must be tied to a quantifiable amount of *actual work already performed*, as opposed to a stipend provided to a class of employees based solely on their status and without respect to a quantifiable measure of work already performed. The May 28, 2020 UST Guidance expressly states that payments from the Fund may *not* be used “to cover across-the-board hazard pay for employees working during a state of emergency.”

7) We would like to use CRF Funds to establish a grant program to assist restaurants, taverns, and bars, who are suffering from financial distress due to the Coronavirus Pandemic and the requirement that these businesses close their dine-in facilities. May we fund these grants through the CRF?

Answer: Yes, unless the distressed businesses have available business interruption coverage. Similarly, CRF funds may not be used to cover the same costs already provided for by separate federal or state funding. For the purposes of this answer, businesses that have purchased business interruption insurance policies that exclude coverage for epidemics and pandemics are eligible to receive the kinds of grants referenced in the question. It is suggested that government entities condition any such grant eligibility upon certification that: 1) the business does not have available business interruption insurance or has a business interruption insurance policy that excludes coverage for losses resulting from the Coronavirus Pandemic, and 2) that the grant will not be used to cover expenses that have been or will be reimbursed under any other federal program. In the May 4, 2020 UST Guidance, UST addressed grant programs to small businesses as follows:

[g]overnments have discretion to determine what payments are necessary. A program that is aimed at assisting small businesses with the costs of business interruption caused by required closures should be tailored to assist those businesses in need of such assistance. The amount of a grant to a small business to reimburse the costs of business interruption caused by required closures would also be an eligible

expenditure under section 601(d) of the Social Security Act, as outlined in the Guidance.

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Fund payments may be used for economic support in the absence of a stay-at-home order if such expenditures are determined by the government to be necessary. This may include, for example, a grant program to benefit small businesses that close voluntarily to promote social distancing measures or that are affected by decreased customer demand as a result of the COVID-19 public health emergency. ta

Additionally, the May 28, 2020 UST Guidance clarifies that the use of CRF Funds “may be used for economic support in the absence of a stay-at-home order if such expenditures are determined by the government to be necessary.”

8) Our City was sued by a business that claimed we improperly forced it to close and after trial the business received a verdict in its favor. May we use CRF funds to pay damages in that matter?

Answer: No. The May 4, 2020 UST guidance lists legal settlements as ineligible for CRF funding. In our view, the payment of a judgment is not materially different than paying for a settlement. For this reason, we believe paying a judgement as described above may not be funded by accessing the CRF. Similarly, we do not believe that the payment of an opposing party’s attorney fees via the CRF is permitted.

9) Our municipality ordered certain equipment in late February in response to the developing situation with Covid-19 and subsequently paid for that equipment in early April. Are those expenses eligible for reimbursement with CRF funds?

Answer: Yes, based on current UST Guidance. CRF eligibility extends to costs “incurred” between March 1, 2020 and December 30, 2020. The May 4, 2020 UST Guidance states that “[a] cost is ‘incurred’ when the responsible unit of government has expended funds to cover the cost.”

10) Do local governments have to return unspent CRF funds?

Answer: Yes. All CRF amounts that have not been used to pay for eligible expenses by December 30, 2020 must be returned.

11) Who determines whether CRF payments are used for eligible purposes?

Answer: The Inspector General of the Department of the Treasury has ultimate responsibility for monitoring and overseeing the use of CRF funds. Findings of fraud, waste, or abuse with respect to CRF funding may result in civil or criminal proceedings. The State of Delaware Department of Justice’s Division of Fraud and Consumer Protection and Division of Civil Rights and Public Trust have jurisdiction to investigate violations of the State of Delaware’s False Claims and Reporting Act and sole jurisdiction to investigate and prosecute violations of the criminal and civil provisions of the Delaware Code relating to governmental misconduct. There are several such provisions relating to financial misconduct, fraud, perjury, official misconduct, theft of services, and other statutory prohibitions.

12) May we draw CRF funds to cover expenses associated with employees entitled to monetize accrued compensatory leave earned during the Governor’s declared state of emergency?

Answer: While the UST Guidance renders employee bonuses ineligible for CRF funding, it is our view that the provision of compensatory time is not functionally or legally different from the provision of overtime or hazardous duty pay, both of which are expressly excluded from UST’s guidance regarding employee bonus ineligibility. For this reason, it is our view that unanticipated compensatory time awarded to public employees working outside their routine hours is likely eligible for reimbursement as long as such employees’ work duties are substantially dedicated to mitigating or responding to the COVID-19 pandemic. In light of the UST’s May 28, 2020 guidance, public employers should be careful to assess whether award of unanticipated compensatory time for work performed that is substantially dedicated to mitigating or responding to the COVID-19 pandemic also satisfies the “substantially different use” requirements.

13) We have seen DDOJ’s initial opinion regarding how to interpret the phrase “substantially dedicated” regarding CRF accessibility for certain payroll expenses, how does the May 4, 2020 UST Guidance change DDOJ’s interpretation?

Answer: We adopt the flexible approach offered by the May 4, 2020 UST Guidance. Therein, the UST advised as follows:

The [CRF] is designed to provide ready funding to address unforeseen financial needs and risks created by the COVID-19 public health emergency. For this reason, and as a matter of administrative

convenience in light of the emergency nature of this program, a State, territorial, local, or Tribal government may presume that payroll costs for public health and public safety employees are payments for services substantially dedicated to mitigating or responding to the COVID-19 public health emergency, unless the chief executive (or equivalent) of the relevant government determines that specific circumstances indicate otherwise.

* * *

The [UST] Guidance provides examples of broad classes of employees whose payroll expenses would be eligible expenses under the Fund. These classes of employees include public safety, public health, health care, human services, and similar employees whose services are substantially dedicated to mitigating or responding to the COVID-19 public health emergency. Payroll and benefit costs associated with public employees who could have been furloughed or otherwise laid off but who were instead repurposed to perform previously unbudgeted functions substantially dedicated to mitigating or responding to the COVID-19 public health emergency are also covered. Other eligible expenditures include payroll and benefit costs of educational support staff or faculty responsible for developing online learning capabilities necessary to continue educational instruction in response to COVID-19-related school closures. Please see the [UST] Guidance for a discussion of what is meant by an expense that was not accounted for in the budget most recently approved as of March 27, 2020.

Based on the additional content from the UST on this issue, it appears that UST prefers a broad definition of the term “substantially dedicated” and that there is general deference to the Governor and County Executive as to when not to determine that public health and public safety payroll expenses are *not* “substantially dedicated.” We agree that this term may, and should, be broadly interpreted. UST’s May 28, 2020 Guidance provides further context to our answer:

The Fund is designed to provide ready funding to address unforeseen financial needs and risks created by the COVID-19 public health emergency. For this reason, and as a matter of administrative

convenience in light of the emergency nature of this program, a State, territorial, local, or Tribal government may presume that payroll costs for public health and public safety employees are payments for services substantially dedicated to mitigating or responding to the COVID-19 public health emergency, unless the chief executive (or equivalent) of the relevant government determines that specific circumstances indicate otherwise.

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The Guidance provides examples of broad classes of employees whose payroll expenses would be eligible expenses under the Fund. These classes of employees include public safety, public health, health care, human services, and similar employees whose services are substantially dedicated to mitigating or responding to the COVID-19 public health emergency. Payroll and benefit costs associated with public employees who could have been furloughed or otherwise laid off but who were instead repurposed to perform previously unbudgeted functions substantially dedicated to mitigating or responding to the COVID-19 public health emergency are also covered. Other eligible expenditures include payroll and benefit costs of educational support staff or faculty responsible for developing online learning capabilities necessary to continue educational instruction in response to COVID-19-related school closures. Please see the Guidance for a discussion of what is meant by an expense that was not accounted for in the budget most recently approved as of March 27, 2020.

The UST's June 24, 2020, guidance further clarifies that the entire payroll cost of an employee whose time is substantially dedicated to mitigating or responding to the COVID-19 public health emergency is eligible, not just the portion of the time spent on mitigating or responding to the COVID-19 public health emergency, provided that such payroll costs are incurred by December 30, 2020. An employer may also track time spent by employees related to COVID-19 and apply Fund payments on that basis but would need to do so consistently within the relevant agency or department.⁹

⁹ June 24, 2020, UST Guidance at Page 9.

14) We purchased a large amount of PPE through CRF funding, but now realize that it is more than we need, and we'd like to donate the excess to a local hospital. Are we required to resell the PPE and reimburse the CRF instead of donating what we no longer need?

Answer: No. If the purchase of the asset was consistent with the limitations on the eligible use of funds provided by section 601(d) of the Social Security Act, the recipient may retain the purchased asset. Accordingly, a subsequent donation is not prohibited nor will it render a transaction ineligible for CRF funding.

15) What rules apply to the proceeds from the sale or other disposition of assets acquired using CRF funds?

Answer: If such assets are disposed of prior to December 30, 2020, the proceeds would be subject to the restrictions on the eligible use of CRF funds. Additionally, all transactions involving the use or disposition of CRF funds must comply with the Single Audit Act (31 U.S.C. §§ 7501-7507) and the applicable provisions of the Uniform Guidance, 2 C.F.R. § 200.303 regarding internal controls, §§ 200.330 through 200.332 regarding subrecipient monitoring and management, and subpart F regarding audit requirements.

16) We have already applied for and received funding which fully covers certain specifically identified CRF-eligible expenses, may I seek additional funding for these same expenses?

Answer: No. Once CRF funding has been received to cover an identified and quantified expense, a government entity is prohibited from acquiring additional CRF funding for that same expense. Most, if not all, other sources of federal and state funding have identical prohibitions. Government entities should exercise due care in ensuring that expenses aggregated for the purpose of requesting CRF funding are not duplicated or repeated in subsequent applications for funding. Additionally, CRF funding may not be used to pay otherwise CRF eligible expenses that have been or will be reimbursed under any federal program.

Nonprofit Organizations FAQ

17) Can nonprofit organizations borrow money to cover payroll expenses?

Answer: Yes, the Paycheck Protection Program under the CARES ACT makes funds available to qualifying 501(c)(3) nonprofit organizations with 500 or fewer employees. Nonprofits can borrow 2.5 times of monthly payroll expenses, up to \$10

million. The funds can be used to cover 1) qualified payroll costs; 2) rent and utilities; and, 3) interest on mortgage and debt obligations. Qualifying payroll costs include salaries, vacation, parental, family, medical or sick pay, severance payments, healthcare benefits, retirement benefits and state and local employment taxes.¹⁰

18) Can nonprofit organizations apply for loan forgiveness under the CARES Act?

Answer: Yes, nonprofit organizations may apply for loan forgiveness. Loan repayments will be eligible to be deferred for least six months but not more than one year and the interest rate is capped at 4%. Prepayment penalties are waived. In addition, nonprofit organizations are eligible for forgiveness of the total amount spent on payroll costs and mortgage interest, rent and utility payments between February 15, 2020 and June 30, 2020.¹¹

19) Does the CARES ACT provide donation incentives for charitable giving?

Answer: Yes, the CARES ACT lifts the limitations on charitable contributions by individuals who itemize, from 60% of adjusted gross income to 100% and for corporations by increasing the limitation from 10% to 25% of taxable income.¹²

20) Are nonprofit organizations included in Economic Injury Disaster Grants under the CARES ACT?

Answer: Yes, the CARES ACT includes \$10 billion for the federal Small Business Administration (SBA) to provide emergency grants until Dec. 31, 2020. Nonprofits seeking immediate relief can receive a \$10,000 emergency advance within three days after applying for the EIDL grant.¹³

21) Are nonprofit organizations eligible for tax credits?

Answer: Yes, nonprofit organizations that are not participating in the Paycheck Protection Loan Program are eligible for a refundable payroll tax credit up to a \$5,000 per employee for nonprofits where operations were fully or partially

¹⁰ https://www.thenonproffitimes.com/npt_articles/7-ways-cares-act-financially-supports-nonprofits/

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

suspended due to a COVID-19 shutdown order or whose gross receipts declined by more than 50% when compared to the same quarter in the prior year.¹⁴

22) Are nonprofit organizations eligible for relief to pay unemployment benefits?

Answer: Yes, the CARES ACT includes a specific section allowing those nonprofits that have opted to pay unemployment benefits under the reimbursement method (i.e. self-funded) to be reimbursed for half of the costs incurred through the end of 2020 to pay unemployment benefits.¹⁵

23) May Fund payments be provided to non-profits for distribution to individuals in need of financial assistance, such as rent relief?

Answer: Yes, non-profits may be used to distribute assistance. Regardless of how the assistance is structured, the financial assistance provided would have to be related to COVID-19.

24) Are there longer-term loans available for larger nonprofit organizations?

Answer: Yes, depending on eligibility to participate in the Economic Stabilization Fund. The Economic Stabilization Fund authorized by the CARES ACT provides \$500 billion for economic stabilization in the forms of loans, loan guarantees and investments to organizations affected by COVID-19. Nonprofits that are not eligible to participate in the Paycheck Protection Program might be eligible to participate in the Economic Stabilization Fund including those nonprofits with more than 500 employees. The funds must be used to retain employees and restoring the compensation and benefit levels.¹⁶

¹⁴ *Id.*

¹⁵ <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.xml#toc-H2848843CC2C9474B874623BAD926B540>

¹⁶ https://www.thenonproffitimes.com/npt_articles/7-ways-cares-act-financially-supports-nonprofits/

25) Is National Endowment grant funding available through the CARES Act?

Answer: Yes. The CARES ACT granted \$75 million to the National Endowment for the Humanities for grants up to \$300,000 per organization to preserve and sustain cultural programs. The grants are based on job retention.¹⁷

26) Are nonprofit organizations eligible for funding necessary to defray revenue decline under the CARES ACT?

Answer: Yes, nonprofit organizations may be eligible for discretionary funding provided to state and local governments for expenditures incurred due to the Coronavirus pandemic resulting from revenue decline.¹⁸ Nonprofit organizations providing goods or services to local governments would be more likely to receive such funding.

27) May recipients use Fund payments to remarket the recipient's convention facilities and tourism industry?

Answer: Yes, if the costs of such remarketing satisfy the requirements of the CARES Act. Expenses incurred to publicize the resumption of activities and steps taken to ensure a safe experience may be needed due to the public health emergency.¹⁹ Expenses related to developing a long-term plan to reposition a recipient's convention and tourism industry and infrastructure would not be incurred due to the public health emergency and therefore may not be covered using payments from the Fund.

28) May a State provide assistance to farmers and meat processors to expand capacity, such to cover overtime for USDA meat inspectors?

Answer: If a State determines that expanding meat processing capacity, including by paying overtime to USDA meat inspectors, is a necessary expense incurred due to the public health emergency, such as if increased capacity is necessary to allow farmers and processors to donate meat to food banks, then such expenses are eligible expenses²⁰, provided that the expenses satisfy the other requirements set forth in

¹⁷ <https://www.neh.gov/news/neh-receives-75-million-distribute-cultural-institutions-affected-coronavirus>

¹⁸ Section 5001, Title V of the CARES Act.

¹⁹ June 24, 2020, UST Guidance at Page 8.

²⁰ June 24, 2020, UST Guidance at Page 9.

section 601(d) of the Social Security Act outlined in the Guidance.

29) May funds be used to satisfy non-federal matching requirements under the Stafford Act?

Answer: Yes, payments from the Fund may be used to meet the non-federal matching requirements for Stafford Act assistance to the extent such matching requirements entail COVID-19-related costs that otherwise satisfy the Fund's eligibility criteria and the Stafford Act. Regardless of the use of Fund payments for such purposes, FEMA funding is still dependent on FEMA's determination of eligibility under the Stafford Act.²¹

²¹ June 24, 2020, UST Guidance at Page 8.