



Guidance Memorandum No. 1 Regarding the Eligibility of Government Expenditures for Funding or Reimbursement from the Coronavirus Relief Fund as established by the CARES Act.

May 1, 2020

Overview and Authority

In the coming weeks, Delaware’s complete share of \$150 billion in direct assistance will arrive from the Coronavirus Aid, Relief, and Economic Security Act (CARES Act; P.L. 116-136), signed into law on March 27, 2020. The funding source is the Coronavirus Relief Fund (hereafter referred to as the “CRF”). The Delaware Department of Justice (“DDOJ”) provides the below guidance¹ (hereafter referred to as the “Guidance”) and FAQs to assist government entities within the

¹ 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”), and 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).

State of Delaware in assessing whether certain expenses are eligible for funding through the CARES Act.²

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.³ Almost one month later, on April 22, 2020, the United States Treasury issued a brief guidance document providing its interpretation of the provisions of the Act (hereafter the "UST Guidance"). 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

² "The Coronavirus Relief Fund (CARES Act Title V): Background and State and Local Allocations", Congressional Research Office's (as updated April 14, 2020), at p. 1.

³ *Id.*

C) were incurred during the period that begins on March 1, 2020 and ends on December 30, 2020.⁴

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.
- 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.

⁴ 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.”

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

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.

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.

Frequently Asked Questions⁶

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.)?

⁶ The answers provided herein 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 which -while somewhat helpful- is incomplete. In most instances, factual distinctions at a more granular level will affect the ultimate legal conclusion regarding eligibility for CRF funding. To that end, this guidance offers government entities a starting point for discussions with their retained legal counsel and chief fiscal officers. This Guidance **does not** provide a “safe harbor” which excuses compliance with federal, state, or local law. This FAQ will be periodically updated.

Answer: Yes, so long as these items are purchased in order 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 with regard to 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.

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.

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. The UST Guidance lists bonuses as ineligible for CRF funding. 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 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 "hazard pay" does not make it an eligible expenditure.

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. 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.

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 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 City 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 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 CFR 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.

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 employees working outside their routine hours is likely eligible for reimbursement based on the facts in this question.