



## **Guidance Memorandum No. 2 Regarding the Eligibility of Government Expenditures for Funding or Reimbursement from the Coronavirus Relief Fund as established by the CARES Act.<sup>1</sup>**

**May 7, 2020**

### **Overview and Authority**

The Delaware Department of Justice (“DDOJ”) provides the below guidance<sup>2</sup> (hereafter referred to as the “Guidance”) and FAQs to assist government entities 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

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<sup>1</sup> 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.

<sup>2</sup> 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); and the United States Treasury’s “Coronavirus Relief Fund Frequently Asked Questions Updated as of May 4, 2020.”

(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 UST Guidance. DDOJ Guidance Memorandum No. 2 incorporates DDOJ Guidance Memorandum No. 1 issued May 1, 2020, but only to the extent consistent with the content herein.

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](mailto:COVID.DDJ@delaware.gov).

### **Frequently Asked Questions<sup>3</sup>**

#### **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.

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<sup>3</sup> 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.

**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.

**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.<sup>4</sup>

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<sup>4</sup> *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.

**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 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 defines 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.

**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.

**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 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 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.

**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.

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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.

**14) We purchased a large amount of PPE though 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.

**16) We have already applied for and received funding to cover 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.

### **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.<sup>5</sup>

**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.<sup>6</sup>

**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.<sup>7</sup>

**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.<sup>8</sup>

**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 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.<sup>9</sup>

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<sup>5</sup> [https://www.thenonproffitimes.com/npt\\_articles/7-ways-cares-act-financially-supports-nonprofits/](https://www.thenonproffitimes.com/npt_articles/7-ways-cares-act-financially-supports-nonprofits/)

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

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

Answer: Yes, the CARES ACT includes a specific section allowing nonprofits to be reimbursed for half of the costs incurred through the end of 2020 to pay unemployment benefits, including self-funded unemployment benefits.<sup>10</sup>

**23) 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.<sup>11</sup>

**24) 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.<sup>12</sup>

**25) 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.<sup>13</sup> Nonprofit organizations providing goods or services to local governments would be more likely to receive such funding.

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<sup>10</sup> <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.xml#toc-H2848843CC2C9474B874623BAD926B540>

<sup>11</sup> [https://www.thenonprofittimes.com/npt\\_articles/7-ways-cares-act-financially-supports-nonprofits/](https://www.thenonprofittimes.com/npt_articles/7-ways-cares-act-financially-supports-nonprofits/)

<sup>12</sup> <https://www.neh.gov/news/neh-receives-75-million-distribute-cultural-institutions-affected-coronavirus>

<sup>13</sup> Section 5001, Title V of the CARES Act.