



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 October 6, 2020¹

The Delaware Department of Justice (“DDOJ”) provides the below guidance² (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 (hereafter referred to as the “UST”) provided new guidance (hereafter referred to as

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, June 24, 2020, July 8, 2020 and September 2, 2020, and the United States Treasury’s Coronavirus Relief Fund Guidance for State, Territorial, Local, and Tribal Governments, updated June 30, 2020 and September 2, 2020.

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, June 30, 2020, September 2, 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, its fourth Guidance Memorandum on July 1, 2020, and its fifth Guidance Memorandum on July 8, 2020. This sixth Guidance Memorandum updates, consolidates, and incorporates previous guidance considering the UST’s September 2, 2020, guidance.

On September 21, 2020, the UST’s Office of Inspector General (“OIG”) issued revised FAQs related to reporting and recordkeeping by prime recipients of CRF payments. In Delaware, there are only two prime recipients: the State of Delaware and New Castle County. As of September 1, 2020 prime recipients will begin reporting Coronavirus Disease 2019 (COVID-19) related costs incurred from March 1, 2020 to December 30, 2020 in the UST’S Grant Solutions portal.³

Prime recipients, among other things, are required to list and provide information for all projects they plan to complete with the CRF payments, including project name, project description and status of completion. Prime recipients must also associate each project with obligations and expenditures and provide details for all contracts, grants, loans and transfers to other governmental recipients in excess of \$50,000, including the identity of the “subrecipient” of all such transactions. Transactions below that threshold, as well as all payments to individuals, may be reported on an aggregate basis. The first quarterly report covering the period March 1, 2020 through June 30, 2020 was due on September 21, 2020. Thereafter, quarterly reporting is due no later than 10 days after the end of each calendar quarter.

It is important to note that a prime recipient’s reporting obligations to UST are distinct from prime recipients’ and subrecipients’ obligations to adequately document the proper use and disposition of all CRF funding for audit-related

³ UST OIG’s September 21, 2020 FAQs may be accessed at: <https://2k4nj3p959z35d47i3rgaw4l-wpengine.netdna-ssl.com/wp-content/uploads/2020/09/Treasury-OIG-CRF-FAQs-September-2020-Updates-pdf.pdf> Additional UST OIG resources are available at: <https://www.treasury.gov/about/organizational-structure/ig/Pages/CARES-Act-Reporting-and-Record-Keeping-Information.aspx>

purposes, including all expenditures reported on an aggregate basis.

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, 2020.⁴

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."

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

In its guidance issued on June 30, 2020,⁵ 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.
- 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

⁵ June 30, 2020, UST Guidance at Pages 2-3.

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.⁶
- B) Damages covered by insurance.⁷
- 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.

⁶ See 42 C.F.R. § 433.51 and 45 C.F.R. § 75.306.

⁷ 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.

- 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, 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.

On September 2, 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:

UST considers the requirement that payments from the Fund be used only to cover costs that were not accounted for in the budget most recently approved as of March 27, 2020, to be met if either (a) the cost cannot lawfully be funded using a line item, allotment, or allocation within that budget or (b) the cost is for a substantially different use from any expected use of funds in such a line item, allotment, or allocation. As an example, Treasury stated that the costs of redeploying 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 would be a substantially

different use. 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.

If an employee is not substantially dedicated to mitigating or responding to the COVID-19 public health emergency, his or her payroll and benefits expenses may not be covered in full with payments from the Fund; however, a portion of such expenses may be able to be covered. A government agency may 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. This means, for example, that a government could cover payroll expenses allocated on an hourly basis to employees’ time dedicated to mitigating or responding to the COVID-19 public health emergency. This result provides equitable treatment to governments that, for example, instead of having a few employees who are substantially dedicated to the public health emergency, have many employees who have a minority of their time dedicated to the public health emergency.

In response to questions regarding which employees are within the scope of this accommodation, UST supplemented its guidance to clarify that public safety employees would include police officers (including state police officers), sheriffs and deputy sheriffs, firefighters, emergency medical responders, correctional and detention officers, and those who directly support such employees such as dispatchers and supervisory personnel. Public health employees would include employees involved in providing medical and other health services to patients and supervisory personnel, including medical staff assigned to schools, prisons, and other such institutions, and other support services essential for patient care (e.g., laboratory technicians) as well as employees of public health departments directly engaged in matters related to public health and related supervisory personnel.

Benefits⁸ of an employee who is substantially dedicated to mitigating or responding to the COVID-19 public health emergency may generally be covered in full using payments from the Fund to the extent incurred between March 2 and December 30, 2020.

⁸ Benefits include, but are not limited to, the costs of all types of leave (vacation, family-related, sick, military, bereavement, sabbatical, jury duty), employee insurance (health, life, dental, vision), retirement (pensions, 401(k)), unemployment benefit plans (federal and state), workers compensation insurance, and Federal Insurance Contributions Act (FICA) taxes (which includes Social Security and Medicare taxes).

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,⁹ 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.

DDOJ 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. DDOJ 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.

UST’s September 2, 2020 Supplemental Guidance on Use of Funds to Cover Administrative Costs

In the latest UST Guidance regarding the use of Coronavirus Relief Funds (“CRF”), the UST advises the States that certain administrative costs related to grants received by two categories of large institutions are not administered in the

⁹ 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.

same manner as they would be if they were related to a traditional grant of federal monies.

In this section of the UST guidance, the UST discusses “indirect costs” typically covered by OMB’s Guidance for Grants and Agreements, Part 200, *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*. 2 C.F.R. § 200.414 (Indirect (F&A) Costs) (“OMB Guidance”). Under the OMB Guidance, the indirect costs covered by this provision involve “F&A” costs for just two categories of grant recipients: major institutions of higher education (“IHE’s”) and major non-profit organizations (receiving more than \$10 million in direct Federal funding). Therefore, this UST guidance applies only to a *very limited subset* of CRF recipients. The typical indirect costs include depreciation on buildings and equipment; facility/building operating costs; salaries and expenses of executive officers; personnel administration and accounting. 2 C.F.R. § 200.414(b).

Under the OMB Guidance, indirect costs may be negotiated, but once a federally negotiated rate is accepted, it must be applied uniformly for all Federal awards received by the IHE or major non-profit. With the current UST Guidance, this requirement is modified. The recipients may not use the negotiated rate to their indirect costs associated with CRF awards. It appears that the indirect costs must be specifically accounted for.

The significant aspects of this section of the UST Supplemental Guidance, however, relate to the ability to classify certain indirect costs as direct costs. If administrative personnel time related to the COVID-19 public health emergency is tracked consistently across individual departments, then it becomes an eligible *direct* cost covered by CRF grants. In addition, any entity subject to the Single Audit Act may use monies from the CRF grant to cover a reasonably proportionate share attributable to the cost of the audits.

As with all other awards of CRF monies, these indirect costs may not be covered by another federal grant. If, however, there is an administrative compliance expense (such as an audit) related to an eligible CRF expense incurred by December 30, 2020, the IHE or major non-profit may incur the expense after that date. The grant recipient will have until the quarter ending September 2021 to report such use to the UST OIG.

Frequently Asked Questions¹⁰

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.

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.

¹⁰ 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.

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.¹¹

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 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

¹¹ *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.

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.

* * *

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.

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 UST OIG 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 DDOJ’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: As set forth in the UST's September 2, 2020 Guidance, benefits, including compensatory leave, of an employee who is substantially dedicated to mitigating or responding to the COVID-19 public health emergency may generally be covered in full using payments from the Fund to the extent incurred between March 1 and December 30, 2020. For this reason, it is our view that unanticipated compensatory time awarded to public employees working outside their routine hours is 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 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 September 2, 2020 UST Guidance change DDOJ's interpretation?

Answer: As noted in the September 2, 2020 UST Guidance, although UST has not developed a precise definition of what "substantially dedicated" means given that there is not a precise way to define this term across different employment types, UST has provided, as an administrative accommodation, that a government agency may presume that public health and public safety employees meet the substantially dedicated test, unless the chief executive (or equivalent) of the relevant government determines that specific circumstances indicate otherwise. This means that, if this presumption applies, work performed by such employees is considered to be a substantially different use than accounted for in the most recently approved budget as of March 27, 2020. All costs of such employees may be covered using payments from the Fund for services provided during the period that begins on March 1, 2020 and ends on December 30, 2020.

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. 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.

17) May the State impose restrictions on transfers of funds to local governments?

Answer: Yes, to the extent that the restrictions facilitate the State's compliance with the requirements set forth in section 601(d) of the Social Security Act and other applicable requirements, such as the Single Audit Act. Other restrictions, such as restrictions on reopening that do not directly concern the use of CRF

funding, are not permissible.

18) May CRF funding recipients incur expenses associated with the safe reopening of schools?

Answer: Yes. CRF funding may be used to cover costs associated with providing distance learning (*e.g.*, the cost of laptops to provide to students) or for in-person learning (*e.g.*, the cost of acquiring personal protective equipment for students attending schools in-person or other costs associated with meeting COVID-19 guidelines). As an administrative convenience, per UST's CRF Frequently Asked Questions, as updated on September 2, 2020, UST will presume that expenses of up to \$500 per elementary and secondary school student are eligible expenditures, such that schools do not need to document the specific use of funds up to that amount.

19) May CRF funding recipients upgrade critical public health infrastructure, such as providing access to running water for individuals and families in rural areas to allow them to maintain proper hygiene and defend themselves against COVID-19?

Answer: Yes. CRF funding may be used to upgrade public health infrastructure, such as providing individuals and families access to running water to help reduce the further spread of COVID-19. Expenses associated with such upgrades must be incurred by December 30, 2020. Recipients should consult UST's Guidance, as updated on June 30, 2020, regarding when a cost is considered to be incurred for purposes of the CARES Act.

20) How does a recipient address the requirement that the allowable expenditures not be accounted for in the budget most recently approved as of March 27, 2020, once the government enters its new budget year on July 1, 2020 (for governments with June 30 fiscal year ends) or October 1, 2020 (for governments with September 30 year ends)?

Answer: According to UST's CRF Frequently Asked Questions, as updated on September 2, 2020, the "budget most recently approved" as of March 27, 2020, provides the spending baseline against which expenditures should be compared for purposes of determining whether they may be covered with CRF funding. This spending baseline will carry forward to a subsequent budget year if a recipient enters a different budget year between March 27, 2020 and December 30, 2020. The spending baseline may be carried forward without adjustment for inflation.

21) Does the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, apply to projects supported by payments from the CRF fund?

Answer: Per UST’s CRF Frequently Asked Questions, as updated on September 2, 2020, NEPA does not apply to UST’s administration of the CRF. UST has advised that projects supported with CRF payments may still be subject to NEPA review if they are also funded by other federal financial assistance programs.

22) What entities are “prime recipients” required to report to UST?

Answer: The State of Delaware and New Castle County are the only entities required to report in UST’s GrantSolutions portal.

23) Who is a “subrecipient” for CRF-related reporting purposes?

Answer: For purposes of reporting in the GrantSolutions portal, a “subrecipient” is any entity to which a prime recipient issues a contract, grant, loan, direct payment, or transfer to another government entity of \$50,000 or more.

24) If the State of Delaware distributes funds in excess of \$50,000 to an agency or department of the State, is such agency or department considered to be a prime recipient or a subrecipient?

Answer: An agency or department of the State of Delaware is considered part of the State, in its capacity as prime recipient, as all such agencies and departments are part of the same legal entity that received a direct CRF payment from UST. Expenditures that a State agency or department incurs with CRF proceeds must be collected and reported in the GrantSolutions portal by the State, as prime recipient.

25) Are prime recipients required to report on an accrual or cash basis?

Answer: The prime recipient should report on an accrual basis, unless the prime recipient’s practice is traditionally to report on a cash basis for all financial reporting.

26) How many levels of subrecipient data are prime recipients required to report in GrantSolutions?

Answer: The prime recipient is required to report on the first sub-recipient level only. For example, the State enters into a grant with “Entity A” to provide assistance to small business. For reporting purposes, the State must report the details of the grant with Entity A as an obligation. As Entity A provides assistance to small businesses, the State must report the assistance provided as expenditures

to the obligation. Details of the small businesses that received funding are not required for UST reporting purposes but *must be maintained for documentation and audit purposes*.

27) At what level will the UST OIG audit?

Answer: UST OIG will audit at the prime recipient level. UST OIG may also audit subrecipients as part of the audit of a prime recipient. All recipients may be subject to DDOJ investigation for fraud, waste, or abuse involving CRF proceeds.

28) If a prime recipient provides small business assistance grants to hundreds of small businesses, what records would the prime recipient need to provide to UST OIG to show that the disbursements are eligible expenses related to the public health emergency due to COVID-19?

Answer: The prime recipient is responsible for determining the level and detail of documentation needed to satisfy eligibility requirements. UST OIG has indicated that a prime recipient must have “some proof” that each small business was impacted by the public health emergency and thus eligible for CRF funding.

29) What documentation is required to support the use of CRF funding to reimburse payroll expenses for employees who are presumed to be “substantially dedicated” to mitigating the public health emergency?

Answer: Prime recipients must maintain and make available to UST OIG payroll records for the covered period, March 1 through December 30, 2020. Records include general and subsidiary ledgers used to account for the receipt and disbursement of CRF funding and payroll, time and human resource records to support costs incurred for payroll expenses. This documentation is necessary to support payroll reimbursement amounts using CRF proceeds, generally; it is not needed to support the presumption that public health and safety payroll is substantially dedicated to mitigating the COVID-19 emergency.

30) Can CRF funds be used for goods or services that are expected to be delivered or performed after December 30, 2020?

Answer: In general, no. UST Guidance states both (a) the need for the good or service must exist during the covered period and (b) performance or delivery must take place during the covered period. And discussions with UST have revealed that UST considers December 30, 2020 to be a firm deadline. That said, UST Guidance recognizes that it may not be possible to precisely estimate when goods or services

may be needed and also that delays may cause the delivery to occur after the covered period. While delays in performance or delivery that are beyond the recipient's control are generally excused, the critical issue is, at the time the contract is entered into, whether it was reasonable to have the need for, and expect performance or delivery of, the good or service during the covered period.

31) Can CRF funds be used for multi-part projects involving goods or services that are expected to be delivered or performed partially within the covered period and also partially after December 30, 2020?

Answer: Current UST Guidance is unclear for this question. If a project serves a need that exists during that covered period and it involves multiple parts with some parts reasonably expected to be delivered or performed before December 30, 2020 and where some parts *may* be delivered or performed after that date, there is a risk that the costs of the goods and services that are performed or delivered after December 30, 2020 may be found ineligible for CRF funds. The primary question will be the reasonableness of the expectation, at the time the contract was entered into, that certain parts of the project will be completed on or before December 30, 2020. To fully avoid this risk, in any multi-part project where there is an expectation that certain goods and services may likely be delivered or performed after the covered period, we recommend using alternative funds for the costs of those goods and services. That said, in a multi-part project where, at the time the contract is entered into, there is a reasonable expectation that the goods or services for certain parts *cannot be delivered or performed until after December 30, 2020*, in this circumstance, UST Guidance is clear that costs of those parts are not CRF-eligible.

Nonprofit Organizations FAQ

1) 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 \$10million. 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.¹²

¹² https://www.thenonproffitimes.com/npt_articles/7-ways-cares-act-financially-supports-nonprofits/

2) 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, 2020.¹³

3) 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.¹⁴

4) 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.¹⁵

5) 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.¹⁶

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

6) 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.¹⁷

7) 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.

8) 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.¹⁸

¹⁷ <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.xml#toc-H2848843CC2C9474B874623BAD926B540>

¹⁸ https://www.thenonproffitimes.com/npt_articles/7-ways-cares-act-financially-supports-nonprofits/

9) 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.¹⁹

10) 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.²⁰ Nonprofit organizations providing goods or services to local governments would be more likely to receive such funding.

11) 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.²¹ 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.

12) 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

¹⁹ <https://www.neh.gov/news/neh-receives-75-million-distribute-cultural-institutions-affected-coronavirus>

²⁰ Section 5001, Title V of the CARES Act.

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

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 expenses²², provided that the expenses satisfy the other requirements set forth in section 601(d) of the Social Security Act outlined in the Guidance.

13) 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.²³

²² June 24, 2020, UST Guidance at Page 9.

²³ June 24, 2020, UST Guidance at Page 8.