

CARES Act Update:

Eligible Expenditures for Coronavirus Relief Funds

The CARES Act created the Coronavirus Relief Fund (“CRF”) to provide \$150 billion for payments to states, tribal governments, and units of local government for fiscal year 2020. The payments have already been made to states. Large local governments (populations of over 500,000) also received direct distributions.¹

The following provides an overview of eligible expenditures for CRF amounts. Since our initial alert describing the guidance released by the U.S Treasury Department (“Treasury”), Treasury has updated its FAQ guidance. **This article has been updated to reflect the updated guidance, including the most recent FAQ guidance issued on May 28, 2020.** The guidance now includes a specific direction to states to share 45 percent of the amount received with smaller local governmental entities, confirms that federal single audit, internal controls and sub-recipient monitoring and management requirements apply, and include a few additional illustrative examples of eligible uses.

Treasury distributed a total of \$2.95 billion to Washington entities as follows: \$2.17 billion to the State, \$262 million to King County, \$158 million to Pierce County, \$132 million to the City of Seattle, \$143 million to Snohomish County and \$91 million to Spokane County. The amount sent to King County was reduced by Treasury by the \$132 million provided to Seattle, to reflect the overlapping population. As of May 18, 2020, the State has allocated almost \$300 million to the smaller counties and cities.²

The CARES Act provides that funds may be used by a state, tribal government, or local government to cover only those costs that meet the following three requirements:

- are necessary expenditures incurred due to the COVID-19 public health emergency;
- were not accounted for in the state or local government budget most recently approved as of March 27, 2020; and
- were incurred between March 1, 2020 and December 30, 2020.

Treasury Department Guidance regarding Eligible Expenditures³

On April 22, 2020, the U.S. Treasury Department released guidance setting forth its interpretation of what expenditures meet these three statutory requirements.

Incurring due to the COVID-19 Public Health Emergency

The guidance interprets the term “incurred due to the COVID-19 public health emergency” to include both expenses incurred directly to respond to the emergency “as well as expenditures incurred to respond to second-order effects of the emergency, such as by providing economic support to those suffering from employment or business interruptions due to COVID-19-related business closures.” This language makes clear not only that the State and local governments may use the funds to address secondary effects –

¹ See methodology at <https://home.treasury.gov/system/files/136/Census-Data-and-Methodology-Final.pdf>

² <https://deptofcommerce.app.box.com/s/cq8de48g63pcdqm6dy59igbnch1zv4ph>

³ <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Guidance-for-State-Territorial-Local-and-Tribal-Governments.pdf>

including economic effects – of the COVID-19 public health mitigation measures, but also that the State and local governments may use the funds to make grants for these purposes.

Necessary Expenditures; No Replacement of Lost Revenues

The guidance states that funds must be used for expenditures and may not be used to replace lost revenues. “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 guidance interprets the term necessary “broadly” and defers to the reasonable judgment of state and local government officials to determine whether an expenditure is reasonably necessary for its intended use.

As further detailed in the FAQ guidance summarized below, expenditures that operate to replace lost governmental revenues are generally ineligible. For example, CRF funds may not be used to provide assistance to property owners to pay property taxes, and CRF funds cannot be paid to the county or city utility to replace unpaid utility fees. But the guidance provides some more flexible examples of eligible expenditures (as exceptions to this general rule) of using CRF funds to provide assistance specifically designed to prevent foreclosures as part of an eviction and homelessness prevention program, and of providing subsidy payments to utility rate payers “to provide grants to individuals facing economic hardship to allow them to pay their utility fees and thereby continue to receive essential services.”

Unbudgeted

The guidance interprets what expenditures are unbudgeted, e.g. “were not accounted for in the state or local government budget most recently approved as of March 27, 2020.” If “(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” the cost can be considered unbudgeted.

The “most recently approved budget” is interpreted to refer to the “enacted budget for the relevant fiscal period” and to exclude subsequent supplemental appropriations or budget amendments made in response to COVID-19. Expenditures paid from reserves also are considered unbudgeted.

Illustrative Examples

The guidance includes a number of nonexclusive, illustrative examples of eligible expenditures. The chart included at the end of this article lists the illustrative eligible expenditures, together with relevant notes for the additional FAQ guidance Treasury has since provided.

The guidance also includes a few examples of ineligible expenses. Examples of ineligible expenses include the State share of Medicaid; damages covered by insurance; payroll or benefits expenses for employees whose work duties are not substantially dedicated to mitigating or responding to the COVID-19 public health emergency; 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; reimbursement to donors for donated items or services; workforce bonuses other than hazard pay (defined in the FAQ guidance to mean additional pay for performing hazardous duty or

work involving physical hardship, in each case that is related to COVID-19) or overtime; severance pay; and legal settlements.

The CARES Act also makes the funds subject to the policy riders that apply to federal public health funding, such as the Hyde Amendment. The FAQ guidance adds federal single audit, internal controls and sub-recipient monitoring and management requirements as summarized below.

Treasury Department FAQ Guidance⁴ - New Update as of May 28, 2020

On April 22, 2020, the U.S. Treasury Department released FAQ guidance. Initially, the FAQ guidance addressed just four questions.⁵ The FAQ guidance has been updated periodically, and significantly expanded, with the most recent update on May 28, 2020. The following outlines some of the more significant questions answered. Other answers are included as notes to the chart of eligible expenditure examples that follows this article.

Role of State in Sharing Allocation with Smaller Counties and Cities

Initially, the FAQ noted Congressional intent that the funds be shared with local governments, and provided that states may transfer funds to a local government to cover eligible expenses. As updated on May 28, 2020, the FAQ provides specific direction that states should share 45 percent of the amount the state received (after Treasury deducted the amount sent directly to large local governments) with local governments with populations of 500,000 or less to be used for eligible expenditures. The FAQ includes the following example:

For example, a State received the minimum \$1.25 billion allocation and had one county with a population over 500,000 that received \$250 million directly. The State should distribute 45 percent of the \$1 billion it received, or \$450 million, to local governments within the State with a population of 500,000 or less.

Following this example, 45 percent of the \$2.2 billion received by the State of Washington (after Treasury's deductions for direct payments to the larger local governments), or \$975 million, should be shared with local governments with populations of 500,000 or less. As of May 18, 2020, the State had allocated almost \$300 million to the smaller counties and cities, and had previously indicated that additional allocations would be made, probably in a more targeted manner.⁶

In addition to directing states to share 45 percent of the amount received with smaller local governments the FAQ guidance notes that states may impose restrictions on transfers of funds to local governments to the extent necessary to facilitate the state's compliance with the requirements applicable to the funds, but cautioned that other restrictions are not permissible.

⁴ <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Frequently-Asked-Questions.pdf>

⁵ The FAQ guidance previously made clear that any funds not spent by December 30, 2020 will be required to be returned to the Treasury, furthered Congressional intent that the funds be shared with local governments, including smaller local governments by providing that the State may transfer funds to a local government to cover eligible expenses, noted that purchased assets may be retained and provided that the state or local government should keep sufficient records to demonstrate that funds were properly spent.

⁶ Note that, based on press reports, most other states had shared less, and some had not yet shared funds with local government at all. Washington State's allocations to counties and cities are being managed by the State Department of Commerce, which has established a website of helpful resources at <https://www.commerce.wa.gov/serving-communities/local-government/covid-resiliency-grants/>.

Use of Funds for Public Health and Public Safety Payroll Costs

The guidance states that CRF funds may be used to meet payroll expenses for 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.

The FAQ provide further administrative flexibility with respect to public health and public safety payroll costs in particular. The FAQ states that ... “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.” This language provides significant flexibility to make a determination that public health and public safety payroll expenditures are eligible expenditure, if the expenditures also meet the “unbudgeted” requirement.

The FAQ guidance on what can be considered unbudgeted, or not accounted for in the most recently approved fiscal year budget, is less clear. The guidance states that a cost can be considered unbudgeted if the cost is “for a substantially different use from any expected use of funds in such a line item, allotment, or allocation.” The FAQ guidance explains that costs incurred for a substantial different use include (as an illustrative example) “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.”

The FAQ warns, however, that a function provided from a different location or through a different manner is not a substantially different use merely because of these differences, giving the example that although “developing online instruction capabilities may be a substantially different use of funds, online instruction itself is not a substantially different use of public funds than classroom instruction.” Applying this guidance to public health and public safety payroll costs, it would be helpful to make clear how personnel is being redeployed to address COVID-19, including enabling compliance with public health measures. Payroll costs for public health and public safety personnel who are now responsible for carrying out—including supporting compliance with—the public health response should meet this requirement.

Use of Interest Earnings

The FAQ addresses the use of interest earnings on CRF funds. The guidance notes that funds may be deposited to interest bearing accounts. If the funds are separately invested, interest earnings must be used only for eligible expenditures for the funds. More flexibility is provided where funds are commingled for investment purposes: “If a government deposits Fund payments in a government’s general account, it may use those funds to meet immediate cash management needs provided that the full amount of the payment is used to cover necessary expenditures.”⁷

⁷ Fund payments are not subject to the Cash Management Improvement Act of 1990, as amended, described at <https://www.fiscal.treasury.gov/cmia/>

Assets Purchased with CRF Funds

The FAQs allow use of CRF funds to purchase assets that are reasonably necessary to respond to COVID-19, and make clear that governments may retain purchased assets. If purchased assets are sold or disposed of prior to December 30, 2020, however, the sale or disposition proceeds must be applied to eligible expenditures.

Reporting and Audit Requirements

The May 28, 2020 update to the FAQ guidance provides significantly more detail regarding the reporting and auditing requirements applicable to CRF funds. The FAQs make clear that CRF payments are considered federal financial assistance for purposes of the federal Single Audit Act.⁸ Certain related provisions of the Uniform Guidance apply, specifically:

- internal controls requirements,⁹
- requirements for sub-recipient monitoring and management,¹⁰ and
- audit requirements.¹¹

For the purposes of determining whether a government has met the threshold for purposes of the single audit requirement, payments to sub-recipients are included. Entities, including sub-recipients, are subject to a single audit (or program specific audit, if applicable)¹² when \$750,000 or more in federal awards are spent during their fiscal year. Costs of the audit are eligible expenses.¹³

The use of CRF funds is subject to review, and recoupment in the event the funds are found to have been spent improperly. The state or large local government that received the direct payment is responsible for recoupment of amounts transferred to other entities and therefore is held responsible for the compliance by grant and other recipients with applicable requirements.

Summary

State and local government costs that have been incurred¹⁴ or will be incurred prior to December 30, 2020 may be eligible for funding, depending on the nature of the expenditure. Although the guidance does not permit state and local governments to use CRF to replace lost tax or other revenues, the guidance does provide some flexibility to allocate the funds to a range of expenditures. Eligible expenses are not limited to the direct expenses of responding to COVID-19, but include expenditures to address secondary, including economic, impacts associated with Stay at Home orders and other public health measures.

⁸ 31 U.S.C. §§ 7501-7507.

⁹ 2 C.F.R. § 200.303.

¹⁰ §§ 200.330 through 200.332.

¹¹ 2 CFR Subpart F - Audit Requirements.

¹² Pursuant to 2 C.F.R. § 200.501(a).

¹³ Subject to allocations under 2 C.F.R. § 200.425.

¹⁴ Per the guidance a “cost is ‘incurred’ when the responsible unit of government has expended funds to cover the cost.”

Coronavirus Relief Fund – Treasury Guidance Regarding Eligible Expense Examples

Category of Eligible Expense Examples	Treasury Examples of Eligible Expenses	Applicable FAQ Notes
Medical expenses	<ul style="list-style-type: none"> • COVID-19-related expenses of public hospitals, clinics, and similar facilities. • Expenses of establishing temporary public medical facilities and other measures to increase COVID-19 treatment capacity, including related construction costs. • Costs of providing COVID-19 testing, including serological testing. • Emergency medical response expenses, including emergency medical transportation, related to COVID-19. • Expenses for establishing and operating public telemedicine capabilities for COVID-19-related treatment. 	<div style="border: 1px solid black; padding: 5px; margin-bottom: 10px;"> <p>Governments may use CRF payments to support public or private hospitals for necessary COVID-19 expenditures... Funds also may be used to assist individuals who have been laid off due to COVID-19 and have lost their health insurance with enrolling in a government program.</p> </div> <div style="border: 1px solid black; padding: 5px;"> <p>Expenses associated with contract tracing also are eligible.</p> </div>
Public health expenses	<ul style="list-style-type: none"> • Expenses for communication and enforcement by State, territorial, local, and Tribal governments of public health orders related to COVID-19. • Expenses for acquisition and distribution of medical and protective supplies, including sanitizing products and personal protective equipment, for medical personnel, police officers, social workers, child protection services, and child welfare officers, direct service providers for older adults and individuals with disabilities in community settings, and other public health or safety workers in connection with the COVID-19 public health emergency. • Expenses for disinfection of public areas and other facilities, e.g., nursing homes, in response to the COVID-19 public health emergency. • Expenses for technical assistance to local authorities or other entities on mitigation of COVID-19-related threats to public health and safety. • Expenses for public safety measures undertaken in response to COVID-19. • Expenses for quarantining individuals. 	<div style="border: 1px solid black; padding: 5px; margin-bottom: 10px;"> <p>Costs to address increase in solid waste as a result of the public health emergency, such as relates to the disposal of used personal protective equipment, would be an eligible expenditure.</p> </div> <div style="border: 1px solid black; padding: 5px;"> <p>CRF payments may be used for the expenses of, for example, establishing temporary public medical facilities and other measures to increase COVID-19 treatment capacity or improve mitigation measures, including related construction costs.</p> </div>

Category of Eligible Expense Examples	Treasury Examples of Eligible Expenses	Applicable FAQ Notes
<p>Payroll expenses for 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.</p> <p>Expenses of actions to facilitate compliance with COVID-19-related public health measures.</p>	<p><i>See FAQ guidance for public safety and public health presumption and for when public health and public safety payroll costs can be considered unbudgeted.</i></p> <div data-bbox="464 435 1073 708" style="border: 1px solid black; padding: 5px; margin: 10px 0;"> <p>The FAQs note that 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 within this definition.</p> </div> <ul style="list-style-type: none"> • Expenses for food delivery to residents, including, for example, senior citizens and other vulnerable populations, to enable compliance with COVID-19 public health precautions. • Expenses to facilitate distance learning, including technological improvements, in connection with school closings to enable compliance with COVID-19 precautions. • Expenses to improve telework capabilities for public employees to enable compliance with COVID-19 public health precautions. • Expenses of providing paid sick and paid family and medical leave to public employees to enable compliance. • COVID-19-related expenses of maintaining state prisons and county jails, including as relates to sanitation and improvement of social distancing measures, to enable compliance. • Expenses for care for homeless populations provided to mitigate COVID-19 effects and enable compliance with COVID-19 public health precautions. 	<div data-bbox="1167 228 1997 496" style="border: 1px solid black; padding: 5px; margin-bottom: 10px;"> <p>With respect to public health and public safety staff, the FAQs state that “as a matter of administrative convenience in light of the emergency nature of this program, a ... government <u>may presume</u> 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 determines that specific circumstances indicate otherwise. “</p> </div> <p>But, to be “unbudgeted” costs of personnel and services that were budgeted for in the most recently approved budget must, due entirely to the COVID-19 public health emergency, have been <u>diverted to substantially different functions</u>.</p>
		<p>Note that the cost of broadband projects that would not be expected to increase capacity to a significant extent until the need for distance learning and telework have passed would not be necessary due to the public health emergency and thus would <u>not</u> be eligible uses of Fund payments</p>
		<p>Payments to provide emergency financial assistance to individuals/families directly impacted by a loss of income due to the COVID-19 public health emergency are permitted. Assistance could include a program to assist individuals with payment of overdue rent or mortgage payments to avoid eviction or foreclosure or unforeseen financial costs for funerals and other emergency individual needs.</p>

Category of Eligible Expense Examples

Treasury Examples of Eligible Expenses

Applicable FAQ Notes

Expenses associated with the provision of economic support in connection with the COVID-19 public health emergency.

- Expenditures related to the provision of grants to small businesses to reimburse the costs of business interruption caused by required closures.
- Expenditures related to a State, territorial, local, or Tribal government payroll support program (but note that use of payments from the Fund to cover payroll or benefits expenses of public employees are limited to those employees whose work duties are substantially dedicated to mitigating or responding to the COVID-19 public health emergency, per above and per FAQ).
- Unemployment insurance costs related to the COVID-19 public health emergency if such costs will not be reimbursed by the federal government pursuant to the CARES Act or otherwise.

Any other COVID-19-related expenses reasonably necessary to the function of government that satisfy the Fund’s eligibility criteria.

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.

Fund payments may be used for unemployment insurance costs incurred by the recipient as an employer (for example, as a reimbursing employer) related to the COVID-19 public health emergency if such costs will not be reimbursed by the federal government pursuant to the CARES Act or otherwise. Increased workers compensation cost to the government due to the COVID-19 public health emergency incurred during the period beginning March 1, 2020, and ending December 30, 2020, is an eligible expense.

State and local government organizations continue to advocate for additional federal funding and other financing tools to address COVID-19 impacts, specifically to address the steep decline in sales tax and other revenues resulting from the sudden halt in business activity necessitated by the COVID-19 public health emergency, as part of CARES 2 or other stimulus legislation.

If you have any questions regarding this information, please contact us. Additional COVID-19 resources are available on our website at <https://www.pacificallawgroup.com/covid-19-resources/>.

Alison Benge	Alison.Benge@pacificallawgroup.com	206.602.1210
Deanna Gregory	Deanna.Gregory@pacificallawgroup.com	206.245.1716
Stacey Lewis	Stacey.Lewis@pacificallawgroup.com	206.245.1714
Jon Jurich	Jon.Jurich@pacificallawgroup.com	206.245.1717
Faith Li Pettis	Faith.Pettis@pacificallawgroup.com	206.245.1715
Will Singer	Will.Singer@pacificallawgroup.com	206.602.1216

Dated: May 29, 2020.

A Note: This publication is for informational purposes and does not provide legal advice. It is not intended to be used or relied upon as legal advice in connection with any particular situation or facts. The information herein is provided as of the date it is written. Copyright © 2020 Pacifica Law Group LLP. All rights reserved.

To subscribe to our mailing list, please contact Mia Wiltse at Mia.Wiltse@pacificallawgroup.com.