



# Funding and Disclosure in the Time of COVID

Public finance tools, and disclosure considerations, for state and municipal issuers.

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# Funding and Disclosure in the Time of COVID

## Focus

A look at funding tools and disclosure considerations for state and municipal issuers and borrowers managing through the COVID-19 pandemic

- Required and Voluntary Disclosure
  - Required Event Notices
  - Voluntary Disclosure: Considerations, cautionary language
- Overview of CARES funding for municipalities
- Coronavirus Relief Funds: Eligible expenditures
- Looking ahead: CARES 2/Stimulus 4/5

# Timing

## Overview

The disclosure topic is most generally applicable so we will start with that. We also will follow with more specific topics in the following order, so that you can tune back in for topics of particular interest.

- Introduction and welcome
  - 11:00 to 11:05
- Required filings and voluntary disclosure
  - 11:05 to 11:35
- Overview of CARES funding for municipalities
  - 11:35 to 11:45
- Coronavirus Relief Funds: permitted expenditures
  - 11:45 to 12:00
- Looking ahead: CARES 2/Stimulus 4-5
  - 12:00 to 12:10
- Questions & Wrap Up
  - 12:10 to 12:30

# Logistics

## Zoom discussion

We are happy to be connecting with you virtually today for this discussion. A few notes regarding the format of the discussion:

- “Submit Questions” feature
  - Please send questions for our presenters via the Q&A feature
  - We will address in the course of the discussion, or during the wrap up
  - Please use the normal “chat” feature to report technical issues. The ability to “chat” with all participants has been turned off for this discussion.
- Participants are muted so everyone can hear
- The presentation is being recorded
  - Will be posted at <https://www.pacificallawgroup.com/covid-19-resources/webinars/>
- Feedback welcome
  - Please let us know if you have suggestions, including for future webinar topics
- We have applied for CLE credit, and CPE credit will be available, send an email to [mia.wiltse@pacificallawgroup.com](mailto:mia.wiltse@pacificallawgroup.com)





# Required Filings and Voluntary Disclosure

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# Required Filings and Voluntary Disclosure

## Overview

State and local governments are bearing significant costs responding to the COVID-19 public health emergency. Tax and other revenues have been affected by the sudden halt in business activity mandated by the public health emergency. As governmental entities develop budget and other information regarding the impact of COVID-19, it is important to be mindful regarding the scope of the antifraud requirements. Some event notices are required. Issuers also are considering whether to provide voluntary disclosures.

- Recent SEC pronouncements

- Staff Legal Bulletin
- Chair Statement

- Required Filings

- Annual filings
- Rule 15c2-12 Event Notices

- Voluntary Disclosure

- Considerations
- Cautionary language
- Examples

# SEC Staff Legal Bulletin

## **A caution regarding the scope of the antifraud requirements**

The SEC Office of Municipal Security (OMS) released a Staff Legal Bulletin summarizing existing law regarding the application of the antifraud requirements to public statements by issuers and borrowers

- Staff Legal Bulletin No. 21 (Feb. 7, 2020): Application of Antifraud Provisions to Public Statements of Issuers and Obligated Persons of Municipal Securities in the Secondary Market
  - Available at <https://www.sec.gov/municipal/application-antifraud-provisions-staff-legal-bulletin-21>
- Rule 10b-5 under Section 10(b) of the Securities Exchange Act
  - Applies to secondary market disclosures
  - Prohibits making any untrue statement of material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading
- Any public statement (at least by officials who may be viewed as having knowledge regarding the financial condition and operation of an issuer) may be reasonably expected to reach investors and therefore be subject to the antifraud requirements.

# SEC Staff Legal Bulletin

## **Focuses on the scienter standard and the total mix of information that affects whether a statement is material**

Noting that any public statement may be reasonably expected to reach investors, OMS also recognized the higher scienter standard that applies to secondary market disclosure, and that public statements can add to the total mix of information

- “Scienter” is a required element of a 10b-5 fraud violation
  - In connection with secondary market disclosures, scienter means willful fraud or reckless disregard
  - In contrast, the SEC has settled enforcement actions in connection with primary disclosure based on a mere negligence standard under Section 17 of the Securities Act.
- Total mix of information
  - Case law defines materiality: there is a substantial likelihood that a reasonable bond investor would consider it important in making an investment decision
  - There must be a substantial likelihood that a fact "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available"
- SLB also noted the importance of disclosure procedures but did not resolve the practical difficulty in reviewing all public statements made by a governmental entity and its officials that may be relevant to investors
  - *PRACTICE NOTE: The SLB is a statement of existing law and does not impose new requirements.*



# Statement on Municipal COVID-19 Disclosure

## Encourages Voluntary Disclosure

The recent statement of SEC Chair Jay Clayton and Rebecca Olsen, Director of the SEC Office of Municipal Securities, encourages voluntary disclosure of COVID-19 impacts and seeks to provide some assurances to issuers and borrowers in making a voluntary disclosure during this time of uncertainty

- Statement of two SEC officials

- May 4, 2020
- Available at <https://www.sec.gov/news/public-statement/statement-clayton-olsen-2020-05-04>
- Follows similar statement to corporate issuers

- “Today, in light of the potentially significant effects of COVID-19 on the finances and operations of many municipal issuers, we increase this focus and request that municipal issuers provide investors with as much information about their current financial and operating condition as is reasonably practicable. . . . We observe that, in today’s markets, the typical practice of providing historic financial information in the form of an annual information filing or similar disclosure may not enable investors to make informed assessments of the municipal issuer’s current and expected future financial condition.”

# Statement on Municipal COVID-19 Disclosure

## Encourages Disclosure of Current and Forward Looking Information

The statement noted the limited utility of historical information in the current environment and encourages disclosure of current and forward-looking information

- As stated on the prior slide, the statement requests that municipal issuers provide investors with as much information about their current financial and operating condition as is reasonably practicable
- “We also encourage municipal issuers to provide investors with forward-looking information regarding the potential future impact of COVID-19 on their financial and operating conditions.”

# Statement on Municipal COVID-19 Disclosure

## Seeks to Provide Assurance

While encouraging disclosure of current and forward-looking information regarding COVID-19 impacts, the statement seeks to provide some assurances to issuers and borrowers in making voluntary disclosures

- “We would not expect good faith attempts to provide appropriately framed current and/or forward-looking information to be second guessed by the SEC.”
- Suggests use of “meaningful cautionary language.”
  - Provides some examples of cautions that may be relevant
  - Notes “bespeaks caution” doctrine that provides some leeway with respect to forward-looking statements

# Required Filings on EMMA

**SEC Rule 15c2-12 (the “Rule”)** requires the underwriter to be certain that the issuer and/or obligated party has entered into a written undertaking to provide certain annual information and notice of certain events to investors on an ongoing basis

- Contractual obligation of the issuer and/or obligated party to provide:
  - Annual financial statements
    - Unaudited financial statements need to be filed by the deadline if audited information is unavailable, with audited information to follow
  - Annual operating or other information as stated in the undertaking
    - May be included in annual financial statements or filed separately
  - Notice of certain events within 10 business days of the notice of the occurrence of the event

# Required Filings on EMMA

**Notice of certain listed events must be provided within 10 business days of the occurrence of the event**

- Certain events must be noticed in all cases, such as:
  - Rating changes
  - Unscheduled draws on debt service reserves or credit enhancement reflecting financial difficulties
  - Defeasances and redemptions
  - Default, termination event, modification of terms, or similar events under the terms of a financial obligation, any of which reflect financial difficulties (included in undertakings for bonds issued after February 27, 2019)
    - Such as an interest rate or term modification to an existing loan
- Other events must be noticed *if material*, such as:
  - Non-payment related defaults, if material
  - Incurrence of a new financial obligation, if material (included in undertakings for bonds issued after February 27, 2019)
    - Such as a liquidity line of credit or other private placement



# Required Filings on EMMA

**Antifraud provisions should be kept in mind when preparing and reviewing required EMMA filings**

## COVID-19 Considerations

- Should anything else be said to make sure that the filing meets the antifraud standard?
  - Answer will depend on facts and circumstances
- COVID-19 PRACTICE TIP:
  - Any required filing could note that it is being filed pursuant to a continuing disclosure obligation to provide specific notice that a listed event has occurred **and be clear that it is not providing any other update of financial and operating conditions**
  - Cautionary language added to the notice also could state that the information is subject to change, and is provided only as of its date
    - Given the level of uncertainty associated with the COVID-19 pandemic and changing economic conditions, depending on the specific issuer circumstances, readers could be cautioned to expect material changes

# Voluntary Disclosure

## **Antifraud Requirements Apply Whenever an Issuer Speaks to the Market**

Public entities are subject to open public meetings and records laws and do not have the option of staying silent. The antifraud provisions apply any time an issuer speaks to the market.

Raises Two Questions:

- Should the information be shared specifically with investors?
  - Posting on
    - EMMA
    - Issuer's investor relations website
  - Regulation FD Considerations
    - Regulation FD, which prohibits selective disclosure by public companies, is not applicable to state and municipal issuers
    - It may be a good idea to avoid selective disclosure in the interests of fairness and transparency
- If not, should cautionary language or additional context be added to this information when it is shared with the public on its website, EMMA or at an open public meeting?

# Voluntary Disclosure

## Considerations; Potential Topics

As issuers work to understand the budgetary and other impacts of COVID-19, consider whether, when and how to share this information more specifically with investors. In the May 4, 2020 Statement, SEC Chair Clayton and OMS Director Olsen outlined potential topics to be addressed in COVID-19 disclosure.

- SEC Chair outlined potential topics
- Information re Impact of COVID-19 on Operations and Financial Condition. Disclosures should reflect the issuer's assessment of this state of affairs and outlook, and in particular municipal issuers should provide information regarding:
  - their current operational and financial status, including decreases in revenues and delays in collection of revenues;
  - how their COVID-19 response including efforts to protect the health and well-being of residents and employees has impacted their operational and financial condition, including un-budgeted costs; and
  - how their operational and financial condition may change as efforts to fight COVID-19 evolve
    - In these circumstances, comparisons to historical information may be relatively less significant
- Additional information
  - Information regarding sources of liquidity
  - Information regarding the availability of federal, state and local aid funding

# Voluntary Disclosure

## Cautionary notes

In the May 4, 2020 Statement, SEC Chair Clayton and OMS Director Olsen suggested that cautionary notes may be appropriate

- Cautionary notes

- a description of relevant facts or assumptions affecting the reasonableness of reliance on and the materiality of the information provided,
- a description of how certain important information may be incomplete or unknown, and
- the process or methodology (audited vs. unaudited) used by the municipal issuer to produce the information

# Voluntary Disclosure

## Cautionary notes

Consider including cautionary language in required and voluntary COVID-19 disclosure. Given the level of uncertainty associated with the COVID-19 pandemic and changing economic conditions, readers should be cautioned to expect material changes.

- Cautionary language examples should note:
  - The disclosure is a voluntary filing that is not required under a CDU,
  - The issuer is not undertaking to update the voluntary filing,
  - The information is subject to change, and
  - The filing provides specific information and does not purport to include all relevant information
- In addition, any information should be clearly dated as of its date.
- Any forward-looking statements should note the risks associated with forward-looking statements and any key assumptions.



# Voluntary Disclosure: Resources and Examples

- Municipal Securities Rulemaking Board Notice 2020-10, MSRB Provides Resources for Municipal Bond Investors about Potential Effects of COVID-19, dated May 26, 2020, available at <http://msrb.org/~media/Files/Regulatory-Notices/Announcements/2020-10.ashx??n=1>
- MSRB COVID-19 Information dashboard, available at <http://msrb.org/News-and-Events/COVID-19-Information.aspx>
- MSRB Municipal Securities Market COVID-19 Related Disclosure Summary (last updated May 26, 2020), available at <http://www.msrb.org/msrb1/pdfs/Municipal-Securities-Market-COVID-19-Related-Disclosure-Summary.pdf>
  - Updated list of primary market and continuing disclosures that reference COVID-19
- GFOA Guidance; COVID-19 Debt Service and Disclosures, available at <https://www.gfoa.org/gfoa-debt-committee-releases-urgent-member-guidance-covid-19-debt-service-and-disclosures>

# Voluntary Disclosure: Examples and Resources

## STATE OF WASHINGTON

### VOLUNTARY DISCLOSURE REGARDING PROJECTED COVID-19 NEAR GENERAL FUND-STATE REVENUE IMPACTS

DATED: MAY 7, 2020

*Relating to the following CUSIPs:*

**General Obligation Bonds:**

939745, 93974A, 93974B, 93974C, 93974D, 93974E, 938823

**COPs:** 939719, 939720

**TOP Lease Revenue Bonds:** 89054Q

**FYI Properties Lease Revenue Bonds:** 302716

**City of Aberdeen Bonds:** 003305

The State of Washington (the “State”) is filing this Voluntary Disclosure Notice (the “Notice”) regarding the developing impacts to the “General Fund–State” and “Near General Fund–State” revenue accounts associated with the novel coronavirus (“COVID-19”) pandemic. *Nothing contained in this Notice is, or should be construed as, a representation by the State that this Notice comprises all of the information that may be material to a decision to invest in, hold, or dispose of any of the securities issued by the State.*

The State of Washington, City of Seattle, King County, the Washington State Convention Center PFD and other issuers have filed COVID-19 updates. Available on EMMA.



# Overview of CARES funding for municipalities

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# CARES Funding Overview

## Overview of federal COVID-19 funding

The federal government has passed 3.5 bills providing COVID-19 relief, including (1) the Coronavirus Preparedness and Response Supplemental Appropriations Act of 2020, (2) the Families First Coronavirus Response Act, (3) the CARES Act and (3.5) the Paycheck Protection Program and Health Care Enhancement Act.

- Multiple pots of funds
- Multiple federal agencies
  - Supplemental appropriations to existing programs
  - Some new programs
- Common themes
  - Available to pay COVID-19 related expenditures
  - With few exceptions, not available to replace lost revenues

# Timeline of federal COVID-19 legislation

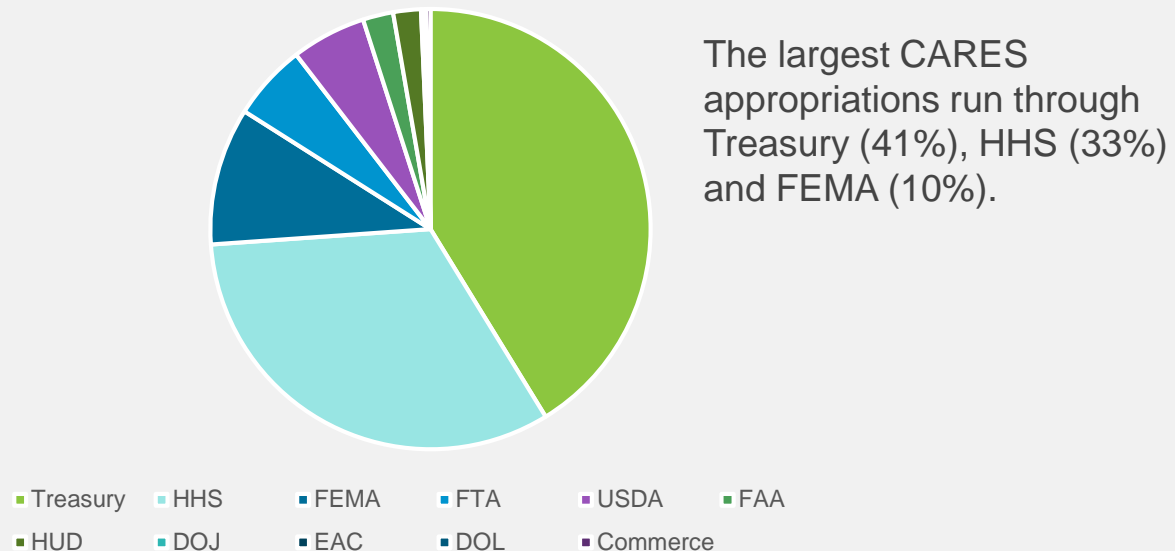
Date	Bill	Amount	Purpose
3/4/20	<a href="#">H.R. 6074: Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020</a>	\$ 8,300,000,000	Emergency funding for federal agencies to respond to the coronavirus outbreak related to developing a vaccine, medical supplies, grants for public health agencies, small business loans, and assistance for health systems in other countries. Allowed for temporarily waiving Medicare restrictions and requirements regarding telehealth services.
3/18/20	<a href="#">H.R. 6201: Families First Coronavirus Response Act</a> (FFCRA)	multi-billion	Guaranteed free coronavirus testing, established paid leave, enhanced unemployment insurance, expanded food security initiatives, and increased federal Medicaid funding.
3/27/20	<a href="#">H.R. 748: Coronavirus Aid, Relief, and Economic Security Act</a> (CARES)	\$ 2,000,000,000,000	\$1,200 to each American making \$75,000 a year or less, add \$600/week to unemployment benefits for four months, give \$100 billion to hospitals and health providers, make \$500 billion of loans or investments to businesses, states and municipalities, and \$32 billion in grants to the airline industry, and more.
4/24/20	<a href="#">H.R. 266: Paycheck Protection Program and Health Care Enhancement Act</a> (3.5)	\$ 484,000,000,000	A \$484 billion relief bill to replenish the Paycheck Protection Program (PPP), the Provider Relief Fund and to provide \$25B for testing.



# CARES Expenditures and Funding Sources

## CARES Funding Considerations

Each of the federal stimulus/COVID-19 bills provide funding for COVID-19 related expenditures. As a result, there may be overlapping sources of funding for a particular expenditure. Planning is required to combine multiple funding sources.



# CARES Funding Example: School Districts

## Overview of CARES Funding Targeted to School Districts

School districts are eligible for funding for COVID-19 related expenses from multiple CARES sources, including two specific pots of targeted funds.

- Two pots of funds
  - \$216M & \$56.7M
- First pot (“Elementary and Secondary School Relief”)
  - 90% (\$195M) as a sub-award to school districts using the Title I allocation methodology (a federal formula to schools that enroll higher numbers of low income students)
    - OSPI has posted a list of the estimated awards.
  - Other 10% is at OSPI discretion
  - Likely to be used for expenses related to remote learning such as equipment and teacher training
- Second pot
  - \$56.7M, will be distributed by the Governor
    - Awaiting word on how this will be spent.
  - Note that OSPI has posted accounting guidelines on its website to assist districts with identifying COVID-related expenditures
- Other sources available too (e.g. FEMA)

# CARES Funding Example: Counties

## A snapshot of the largest pots of funding for which counties may be eligible

Section/Page of CARES Act	Federal Agency	Purpose	Total Amount	Eligible Expenses
5001; 42 USC 301, Title VI	Treasury	State and local assistance	\$150,000,000,000	Costs that are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19). Must be unbudgeted as of March 27, 2020. <a href="https://www.pacificallawgroup.com/wp-content/uploads/2020/04/Eligible-Expenditures-for-Coronavirus-Relief-Funds.pdf">https://www.pacificallawgroup.com/wp-content/uploads/2020/04/Eligible-Expenditures-for-Coronavirus-Relief-Funds.pdf</a>
Division B, Title VIII, p. 750	Office of the Secretary of Health and Human Services	Healthcare Provider Relief Fund	\$100,000,000,000	Funding to health care providers for health care related expenses or lost revenues that are attributable to coronavirus: funds may not be used to reimburse expenses or losses that have been reimbursed from other sources or that other sources are obligated to reimburse
Division B, Title VI, p. 701 (see also Sections 16001 through 16003 of the CARES Act); 42 USC 5121 et seq.	FEMA	Additional funding for Disaster Relief Fund, with subcategories for specific purposes.	\$45,000,000,000	Reimbursable activities related to COVID-19 may include medical response, personal protective equipment, National Guard deployment, coordination of logistics, safety measures, and community services. Costs must be directly tied to the eligible work, adequately documented, reduced by insurance and other applicable credits, authorized under local laws, consistent with recipient's internal policies, and necessary and reasonable to accomplish the work properly and efficiently.
4003; 2 USC 661 et seq	Treasury	Financial market liquidity (includes Municipal Liquidity Facility)	\$35,000,000,000	Liquidity to states and eligible municipalities related to losses incurred as a result of coronavirus. Up to 3 year short term borrowing facility
Division B, Title VIII, p. 743 (relies on 42 U.S.C. 247d-3b and 42 U.S. 243)	Office of the Secretary of Health and Human Services	Public Health Emergency Preparedness	\$27,014,500,000	Funds may be used for grants for the construction, alteration, or renovation of non-federally owned facilities to improve preparedness and response capability at the State and local level
Division B TITLE XII DOT Emergency Appropriations p. 839	Federal Transit Administration	Transit Relief	\$25,000,000,000	To prevent, prepare for, and respond to COVID-19. Funds are made available as if they were made available under urbanized area grants (§ 5307) or rural area grants (§ 5311).
Division B, Title I, emergency appropriations for agricultural programs, p. 614; 7 USC 2013 et al	USDA	Additional funding for Supplemental Nutrition Assistance Program (SNAP)	\$15,810,000,000	Food services
Division B, Title XII, p. 832; 49 USC Chapter 471	Federal Aviation Administration	Grants-in-aid for airports	\$10,000,000,000	Airport expenditures for COVID-19. May not be used for any purpose not directly related to the airport. FAQ guidance posted at <a href="https://www.faa.gov/airports/cares_act/media/cares-act-airport-grants-faqs.pdf">https://www.faa.gov/airports/cares_act/media/cares-act-airport-grants-faqs.pdf</a>
Division B, Title I, p. 613; 42 USC 1751 et seq	USDA	Additional funds for Child Nutrition Programs	8,800,000,000	Food services

# Considerations

## CARES Funding Considerations

Each of the federal stimulus/COVID-19 bills provide funding for COVID-19 related expenditures. As a result, there may be overlapping sources of funding for a particular expenditure. Planning is required to combine multiple funding sources.

- A city or county will be eligible for a number of different CARES funding sources
  - Coronavirus Relief Funds
  - FEMA
  - CDBG
  - Etc.
- Timing, sequencing
  - Apply most restrictive first
    - Eligible expenditures
    - Timing of expenditures
  - Consider match requirements
- Documentation
  - Findings regarding reasonable need for expenditure to respond to COVID-19
  - Documentation of need
  - Documentation of expenditures





# Coronavirus Relief Funds: Permitted Expenditures

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# Coronavirus Relief Fund

## Overview

The CARES Act includes \$150 billion in Coronavirus Relief Funds for states and localities to pay necessary expenditures related to COVID-19. This is in addition to the \$35 billion Treasury provided to the Federal Reserve Bank to fund the Municipal Liquidity Facility.

- Paid directly to states and large general governments (over 500,000 population)
  - The payments have already been made to states, with up to 45% of the payment to large jurisdictions
- Washington Total allocation \$2,952,755,792.90
  - King County \$261,582,611.20
  - Pierce County \$157,912,031.30
  - Seattle city \$131,510,475.60
  - Snohomish County \$143,447,144.10
  - Spokane County \$91,224,219.50
  - Payment to the state \$2,167,079,311.20
    - Just 27% of the total was provided to the large direct jurisdictions
- The State (through DOC) has allocated almost \$300m to the other counties and cities
  - Minimum distribution: \$25K for cities; \$250K for counties
    - i.e., at this point about 37% has gone to local government (leaving about \$1.87b with the State)

# Eligible Expenditures

## Overview

The Coronavirus Relief Fund is available to pay unbudgeted expenses related to COVID-19.

- The CARES Act provides that funds may be used by a state, tribal government, or local government to cover only those costs that:
  - 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.
- Funds may be granted to other entities for eligible expenditures
  - For example, the Treasury FAQ made clear that a State receiving a payment may transfer funds to a local government to pay necessary expenditures incurred due to the public health emergency and that meet the other criteria.

# Eligible Expenditures: Due to COVID-19

## Overview

The Coronavirus Relief Fund is available to pay unbudgeted expenses related to COVID-19.

- Not available to replace lost revenue

- “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 “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 the State and local governments may use the funds to address secondary effects – including economic effects – of the COVID-19 public health measures
- 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

# Eligible Expenditures: Timing, Unbudgeted

## Overview

The Coronavirus Relief Fund is available to pay unbudgeted expenses related to COVID-19 between March and December 2020.

- Cost must be incurred between March 1, 2020 and December 30, 2020.
- Costs must not be accounted for in the state or local government budget most recently approved as of March 27, 2020 (i.e. be unbudgeted).
- The guidance interprets what expenditures are unbudgeted.
  - 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.”
  - Excludes subsequent supplemental appropriations or budget amendments made in response to COVID-19
  - Expenditures paid from reserves also are considered unbudgeted

# Eligible Expenditures: Examples

## Overview

The Coronavirus Relief Fund is available to pay unbudgeted expenses related to COVID-19 between March and December 2020. Treasury has provided guidance with a number of examples of eligible expenditures.

- Medical expenses
- Public health expenses
- 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
  - Presumption regarding public safety and public health employees (see later slide)
- Expenses of actions to facilitate compliance with COVID-19 related public health measures
- Any other COVID-19-related expenses reasonably necessary to the function of government that satisfy the Fund's eligibility criteria

# Examples of eligible expenditures

- COVID-19 testing
- Disinfection of public areas and other facilities
- Public safety measures undertaken in response to COVID-19
- Expenses to enable compliance with public health precautions
  - Food delivery to vulnerable residents.
  - Expenses to facilitate distance learning
  - Expenses to improve telework capabilities for public employees
  - Expenses of providing paid sick and paid family and medical leave to public employees
  - COVID-19-related expenses of maintaining state prisons and county jails, including as relates to sanitation and improvement of social distancing measures
  - Expenses for care for homeless populations provided to mitigate COVID-19 effects and enable compliance with COVID-19 public health precautions.
- Expenditures related to the provision of grants to small businesses to reimburse the costs of business interruption caused by required closures.

# Eligible Expenditures: Public Safety Payroll?

## **Additional guidance on public safety and public health payroll costs**

In its FAQ guidance, the Treasury noted that some costs may be presumed to be necessary expenditures – namely, certain public safety and public health payroll costs.

- **Question:**

- The Guidance says that funding can 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. How does a government determine whether payroll expenses for a given employee satisfy the “substantially dedicated” condition?

- **Response:**

- The Fund is designed to provide ready funding to address unforeseen financial needs and risks created by the COVID-19 public health emergency. For this reason, and as a matter of administrative convenience in light of the emergency nature of this program, a State, territorial, local, or Tribal government may presume that payroll costs for public health and public safety employees are payments for services substantially dedicated to mitigating or responding to the COVID-19 public health emergency, unless the chief executive (or equivalent) of the relevant government determines that specific circumstances indicate otherwise.



# Eligible Expenditures: Public Safety Payroll?

## A caution regarding whether the costs are unbudgeted

Although the guidance allows an entity to 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, cost also must be unbudgeted (e.g. for a substantially different use from any expected use of funds).

### • FAQ Guidance:

- Costs incurred for a “substantially different use” include, but are not necessarily limited to, costs of personnel and services that were budgeted for in the most recently approved budget but which, due entirely to the COVID-19 public health emergency, have been diverted to substantially different functions. This would include, for example:
  - the costs of redeploying corrections facility staff to enable compliance with COVID-19 public health precautions through work such as enhanced sanitation or enforcing social distancing measures;
  - the costs of redeploying police to support management and enforcement of stay-at-home orders; or
  - the costs of diverting educational support staff or faculty to develop online learning capabilities, such as through providing information technology support that is not part of the staff or faculty’s ordinary responsibilities.
  - Note that a public function does not become a “substantially different use” merely because it is provided from a different location or through a different manner. For example, although developing online instruction capabilities may be a substantially different use of funds, online instruction itself is not a substantially different use of public funds than classroom instruction.

# Small business and other grant programs

## Qualifying grant programs permitted

CRF funds may be used to provide grant funding to individuals and to businesses to address COVID-19 impacts.

- Emergency financial assistance to individuals/families directly impacted by COVID-19
  - Yes, if a government determines such assistance to be a necessary expenditure, structures to address need.
  - For example, assisting 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.
- Grants to small businesses to reimburse the costs of business interruption caused by required closures.
  - 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.
- Local example: City of Snoqualmie
  - Established the “COVID-19 Snoqualmie Rapid Relief Program”
    - Program will use CRF funds to provide working capital grants, up to \$10K each, to eligible small businesses, social service agencies, and community organizations to support local recovery efforts. Information available at <https://www.ci.snoqualmie.wa.us/700/Rapid-Relief-Program>

# Small business grants

## Considerations

The AG also has provided guidance for grants to individuals and small businesses in response to the public health emergency. Federally-funded grants also may have more latitude with respect to these constitutional concerns.

- Applicability of concerns to federal funds

- See 1973 AGO Op. No. 18, at 5 (constitutional provision on gift of public funds applied to federal grant that was “expressly made subject to applicable restrictions of state law”).

- Attorney General Opinion, April 6, 2020

- Small business grants
- AGO suggests that to help document the specific economic benefits to the public, local governments could ask any small business seeking funds for evidence of public benefit
  - E.g. the “number of jobs created or saved, the amount of tax revenue created or maintained, whether the business would pay wages or benefits to workers during the government shutdown, whether temporary funding would avoid risks like bankruptcy or permanent closure, or any other relevant information to assess public benefit.”

# Ineligible Expenditures: Examples

## Overview

The Coronavirus Relief Fund is available to pay unbudgeted expenses related to COVID-19 between March and December 2020. Treasury has provided guidance with a number of examples of ineligible expenditures.

- 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 or overtime
- Severance pay
- Legal settlements

# Ineligible Expenditures: Policy Riders

## Overview

The Coronavirus Relief Fund is available to pay unbudgeted expenses related to COVID-19 between March and December 2020. The statute includes language that makes the CRF subject to the policy riders that apply to certain federal public health funding.

- These riders include prohibitions on funding:

- abortion-related care (limited exceptions available)
- lobbying or publicity for federal, state, or local legislation or regulatory action
- advocacy of gun control or other restrictions on legal consumer products
- research using human embryos
- advocacy for the legalization of marijuana or other Schedule I drugs
- maintaining or establishing computer networks without blocks against pornography (with certain exceptions for law enforcement, criminal investigation, prosecutors and adjudicators)
- the Association of Community Organizations for Reform Now (ACORN)
- purchasing sterile needles or syringes for the hypodermic injection of illegal drugs

The policy riders also may require recipients disclose the percentage and dollar amounts of federal funding for programs in statements, press releases, RFPs, bid solicitations.

# Eligible Expenditures: Areas for Additional Guidance

## Overview

The U.S. Treasury has provided FAQ and other guidance on the use of Coronavirus Relief Funds, and has updated the FAQ since first published. State and local government groups continue to ask for additional guidance.

- **FEMA match**

- White House noted that CRF funds may be used by states for FEMA match
  - President Trump clarified for States that they may use CRF \$ to pay for FEMA's cost share requirements under the Stafford Act.

- **Utility relief**

- Note that FAQs disallows use for property tax relief
  - “Fund payments may not be used for government revenue replacement, including the provision of assistance to meet tax obligations.”
  - Concern is that is mechanism for applying funding to replace lost revenues
- More flexibility for utility relief?

- **Public safety payroll**

- How broad is the guidance intended to be?

- **Legislation (next section) focuses on making CRF retroactively available to replace lost revenue.**

# County CRF Funding Plan Examples

## County Plans for Coronavirus Relief Funds (per NACO database)

County	State	Summary
Brevard County	Florida	Public health programs, medical expenditures, public employee reassignment, future COVID-19 related expenditures, safety-net programs and services and a small business program, which will provide grants to small businesses to reimburse the costs of business interruptions or losses caused by required closures or compliance with social distancing guidelines. The County also plans to contract with a technical expert to ensure expenditures align with the U.S. Treasury's CRF guidelines.
Hennepin County	Minnesota	Health programs, additional costs incurred due to COVID-19 and other county functions that support residents, small businesses and nonprofits.
Hillsborough County	Florida	Workforce training, business recovery, social distancing strategies and safety-net programs and services. The County will distribute funds with the help of its Economic Development Corporation Recovery Task Force and other community partners.
Kern County	California	Local government costs, small business support and additional safety-net services. Local government costs will make up the majority of the county's total CRF payments - 108 million - and go towards public health order enforcement, sanitation, PPE, telecommuting public safety response, jail impacts and more.
Pierce County	Washington	\$67 million to public health response, \$30 million to economic stabilization and recovery, \$22 million to community response and resilience, \$15 million to government services and \$24 million in reserves in case the county faces other unforeseen COVID-19 expenses.

Source: NACO



# Coronavirus Relief Funds: Resources

## Overview

The U.S. Treasury has provided FAQ and other guidance on the use of Coronavirus Relief Funds, and has updated the FAQ since first published. The State Department of Commerce has also provided resources

- Federal guidance


- available at <https://home.treasury.gov/policy-issues/cares/state-and-local-governments>

- State resources

- Available at <https://www.commerce.wa.gov/serving-communities/local-government/covid-resiliency-grants/>

- Allocations (Updated 5-18-2020)
    - CRF Program Guidance
    - CRF Eligibility Cost Test
    - CRF Commerce Frequently Asked Questions
    - CRF A-19 Invoice Certification
    - CRF Activity Report
    - Setting up a SWV #: Office of Financial Management

- Other resources



# Looking ahead: CARES 2 or Stimulus 4/5

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# Looking Ahead: CARES 2/Stimulus 4 or 5?

## Further Congressional Action

Congressional leaders and the White House are negotiating additional COVID-19 relief. In addition, there is potential for infrastructure legislation, which may include municipal bond financing tools.

- CARES 2 or Stimulus 4 or 5 (depending on how you count 3.5)?
  - House Democrats HEROES
    - Messaging bill
  - Cassidy-Menendez SMART Act
  - Other
- Key features
  - State and local government relief, particularly to replace lost revenues
  - E.g. SMART Fund would provide \$500 billion to state, local and tribal governments
- Latest timing
- Note, potential for further action by the Fed under the CARES Act
  - Municipal liquidity facility
  - Longer term facility

# Looking Ahead: CARES 2/Stimulus 4 or 5?

## Further Congressional Action

Congressional leaders and the White House are negotiating additional COVID-19 relief. In addition, there is potential for infrastructure legislation, which may include municipal bond financing tools.

- Infrastructure Bill?
- Municipal bond provisions
  - Build America Bonds
  - Restoration of Tax-Exempt Advance Refundings
  - Increase bank qualified limit
  - Volume cap
- NABL, GFOA, NACO, NAST, others

# Next steps, in a time of uncertainty

## Expect Congress to act

Significant uncertainty as to timing and specific vehicle. State and local government aid a key feature, including to replace lost revenue.

## No clear consensus

- House HEROES bill
- Sen. McConnell bankruptcy comments
- A deal to be made with the White House

## Next steps

- Maintain flexibility for various scenarios
  - E.g. if CRF funds are later allowed to be used to replace lost revenues
  - Or if tax-exempt advance refundings are restored
- Bond ordinances,
  - Broad delegation language
    - Taxable or tax-exempt refundings
    - BAB-style interest subsidies
    - Bank qualification
- On going investor communications
  - Required filings
    - Opportunity to consider additional disclosure
  - Voluntary disclosure



# Wrap Up

## Thanks for joining us

We have posted a number of COVID-19 resources at <https://www.pacificlawgroup.com/covid-19-resources/>.

Please contact any of our public finance attorneys for further information.

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