

TRIBAL GUIDANCE FOR THE USE OF CORONAVIRUS RELIEF FUNDS

The Department of Treasury has made payments to Tribes¹ from the \$8 billion Coronavirus Relief Fund (“CRF Funds”). We write to provide additional, Tribal-specific guidance regarding how these funds may be spent.

Treasury has released its own *Guidance* and *Frequently Asked Questions* documents regarding the use of these funds.² Our Tribal Guidance is meant to be read alongside the Treasury documents. We hope this will help Tribes consider appropriate uses for CRF Funds. That said, we cannot guarantee that Treasury or your auditors will agree with our interpretation. We will update this document if Treasury issues additional clarifications that impact our assessments below.

This is general guidance. There will be many unique and different situations presented as Tribes apply the complex COVID-19 funding rules. Please contact us if you are unsure about a particular situation. It is much easier, and much less expensive, to avoid a problem up front than to try to solve the problem after an audit.

A. Statutory Restrictions.

Congress placed restrictions on how CRF Funds may be spent. Specifically, the Act states:

USE OF FUNDS—A State, Tribal government, and unit of local government shall use the funds provided under a payment made under this section to cover only those costs of the State, Tribal government, or unit of local government that—

(1) are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID–19);

(2) were not accounted for in the budget most recently approved as of the date of enactment of this section for the State or government; and

¹ We use the term “Tribe” throughout this document to refer to Tribal entities receiving distributions from the \$8 billion Tribal set-aside in the COVID Relief Fund. There is currently a dispute over which Tribal entities are eligible for payments from the Fund and this guidance is not meant to state an opinion on that issue. Instead, we aim to provide information for any entity that ultimately receive payments from the Fund.

² Treasury’s Guidance can be found at <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Guidance-for-State-Territorial-Local-and-Tribal-Governments.pdf> and here: <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Frequently-Asked-Questions.pdf>.

(3) were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.

Pub. L. 116-136, § 601(d).

Thus, the CARES Act has three important restrictions on spending CRF Funds: the expenditures (1) must be necessary due to COVID-19; (2) must not have been in the Tribe's most recent budget (i.e., not routine, previously budgeted expenditures); and (3) must be incurred from March 1 to December 30, 2020. The CARES Act further provides:

If the Inspector General of the Department of the Treasury determines that a State, Tribal government, or unit of local government has failed to comply (with the use of funds section), the amount equal to the amount of funds used in violation of such subsection shall be booked as a debt of such entity owed to the Federal Government.

Id. § 601(f).

This means that if Treasury determines that a Tribe's CRF Funds were not used for an allowable purpose, the Tribe may be required to return those funds to Treasury. Thus, it is important to make sure the funds are spent for an allowable purpose, or the Tribe may need to pay Treasury back after an audit. If the CRF Funds have been spent, repayment will have to come from other Tribal funds.

B. Track and Document the CRF Funds and Other CARES Act Funds.

It is critically important that Tribes carefully track and account for the expenditures of the CRF Funds. We believe there is a high likelihood that many Tribes will be subject to an audit by the Treasury Inspector General regarding the use of CRF Funds.

1. Separate Accounts. We recommend Tribes establish a separate bank account or subaccount to separately account for the CRF Funds that are received and how those funds are spent. When charges are booked to the CRF account, the documentation should identify in detail what the expenditure was for and how it was linked to COVID-19 (more on this below).

2. Other COVID-19 Funds. Additionally, Tribes are receiving COVID-19 relief funds from other federal sources, including the Bureau of Indian Affairs, Indian Health Service, the HHS Provider Relief Fund, HUD, the Agriculture Food Distribution program, the Administration on Aging Elders' Nutrition Program, and Head Start, among others.

These funds also have restrictions on use and usually require a direct tie to the COVID-19 public health emergency. We recommend that you document the use of other COVID-19 Funds and do not mix the various funds. You are not required to use CRF Funds as a last resort, but you cannot use CFR Funds for expenses that are being reimbursed through another funding source or program.

Relatedly, we know a number of Tribes have entered into MOUs with FEMA or States to allow for reimbursement of expenses pursuant to the Stafford Act. Tribes must be careful to avoid duplicate reimbursement. An expenditure reimbursed under the Stafford Act cannot also be an allowable CRF expenditure, and vice versa.

3. Return or Pass-Through Excess CRF Funds. Some Tribes have told us that they may not be able to use all their CRF Funds for allowable purposes in the short time frame the CARES Act requires for expenditure.

There are two available options: (1) the Tribe can return any excess CRF Funds to Treasury or (2) pass the CRF Funds through to Tribal entities that can make allowable use of the funds. For example, a Tribe that is not able to spend all its CRF Funds for general operations could pass the excess through to its Tribal health program to help pay for COVID-19 related expenditures or to local governments for allowable expenditures.

C. Allowable Expenditures

Treasury's guidance and FAQs discuss six categories of eligible expenditures for the use of CRF Funds. Below, we elaborate on these six categories with a focus on Tribal governments.

These categories are not mutually exclusive. Some expenses may be eligible under several categories Treasury has identified.

1. Direct Medical Expenses

This category of expenditures is self-explanatory:

- COVID-19 related expenses of public hospitals, clinics, and similar facilities.
- Expenses of establishing public medical facilities and other measures to increase COVID-19 treatment capacity (including mitigation measures), 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.

a. Other resources. A Tribe should consider exhausting other resources that may have narrower restrictions for these types of costs before spending the CRF Funds, such as funding received from the Indian Health Service specifically for COVID-19 testing and diagnostics, from Health and Human Services (HHS) or CDC for additional healthcare costs due

to COVID-19, from SAMHSA or HRSA to respond to increased mental health needs caused by COVID-19-related job losses or to pay for the increased cost of providing care using non-traditional service delivery mechanisms, such as telemedicine.

b. Medical construction/capital improvements. If a Tribe wishes to use CRF Funds for medical construction, the Tribe should carefully document that the construction is needed to address COVID-19 treatment capacity or improve COVID-19 mitigation measures relating to public health.

Medical construction projects could include improving water and sanitation systems to ensure that people have potable water and other facilities to wash their hands and comply with CDC guidelines regarding COVID-19 mitigation. It could include redesign and remodeling costs of existing facilities to improve social distancing and minimize contacts with internal clinic surfaces, or temporary facilities or the COVID-19-related conversion of existing facilities, such as opening tents next to medical facilities for drive-by testing or isolated COVID-19 treatment or for facilities to treat or quarantine patients.

c. Short timeframe. We want to underscore in this context the narrow window to spend CRF Funds. Costs cannot be used for expenses that will occur next year. The funds need to be spent on costs incurred by December 30, 2020.

d. Revenue losses are not allowable expenses. Please note that as of this writing CRF Funds may **not** be used to make up for lost income or lost government revenues due to COVID-19. There are currently bills proposed in Congress that may change that and we will update this document should those go through.

2. Public Health Expenses

This category of expenditures relates to public health expenditures:

- Expenses for communication and enforcement by 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 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.

a. Community events and facilities. Items within this category include expenses necessary to manage events in the community, *i.e.*, food distribution, testing, or other supply distribution events that occur because of the COVID-19 public health emergency. This should include costs of utilizing school gyms or vacant hotel rooms to quarantine patients, to house vulnerable individuals (such as the homeless), or otherwise to take measures to mitigate the spread of the disease.

b. Disinfectants and cleaning. The cost of disinfecting and cleaning public areas include Tribal businesses and facilities accessible to the public, such as Tribal hotels, casinos, convenience stores, and parks, along with Tribal buildings and other Tribal facilities.

Tribes preparing for fishing season may use CRF Funds to install additional hand sanitizing or hand washing stations on docks, or masks for fishermen getting off boats and entering public areas and towns. Increased costs for additional cleaning of boat launch areas, public restrooms, or other areas that may need near-constant disinfecting during high use times are allowable.

c. Supplies and storage. This category includes the purchase and storage of COVID-19-related supplies. CRF Funds may be used to pay the costs of storage for these supplies, such as refrigeration or additional warehouse space or temporary staging facilities. For Tribes affected by interruptions due to shipments caused by COVID-19 (such as the bankruptcy of one of the major rural air carriers in Alaska), funds can be used to cover the increased transport costs to barge supplies or hiring a chartered flight to deliver mail, food and other essential goods.

d. Public safety. Additional costs to the Tribe of enforcing curfews or stay at home orders are allowable. Costs of setting up incident command centers or partnering with local governments on COVID-19 response are allowable.

3. Payroll expenses for public safety, public health, health care, human services, and similar employees whose services are substantial dedicated to mitigating or responding to the COVID-19 public health emergency.

This category has generated many questions. Treasury has issued guidance on what it means to be “substantially dedicated” to COVID-19 response, but Treasury’s guidance is far from clear and is subject to change.

a. Payroll for dedicated staff. We suggest that Tribes consider any staff member dedicating more than 50% of their time to mitigating or responding to the COVID-19 public health emergency is “substantially dedicated” to COVID-19 response and therefore be an eligible CRF expenditure under the Treasury guidelines. Hazard pay is allowable.

1. Administrative staff. We think “similar employees” includes staff necessary to administer and manage the CRF Funds, such as the Tribal finance staff or administrative team. For some positions, this may require detailed tracking of time spent on COVID-19-related or non-COVID-19 tasks. Several Tribes have asked whether specific time employees spend on COVID-19 tasks are reimbursable. This is where a threshold is important. For instance, if the Finance Director is spending 3 out of 40 hours each week on COVID-19 matters, that would not likely meet the **substantially** dedicated standard and would not likely be reimbursable from the Fund. But, if that same Finance Director is spending 25 out of 40 hours each week on COVID-19 tasks, then it would likely be an allowable expenditure.

2. Special purpose staff. Payroll costs for Tribal project staff who are solely dedicated to COVID-19-related matters are allowable. For instance, the Treasury FAQs give the example that conducting a recovery planning project or recovery coordination office would be an eligible expenditure. To the extent the Tribe hires grant writers specifically to target COVID-19 funds, those costs would be allowable. Or, if the Tribe hires staff solely to do food distribution for impacted community members, that would be allowable.

b. COVID-19-related leave costs. CRF Funds can be used to pay for COVID-19-related leave, even for employees that are not substantially dedicated to COVID-19 response. CRF Funds can be used for expenses associated with compliance with the Families First Coronavirus Response Act leave mandates (both the two weeks of paid emergency sick leave and the expanded Family Medical Leave Act for parents who are home—and cannot telework—because children are not in school). Any increased unemployment insurance or worker’s compensation costs due to COVID-19 are allowable CRF expenditures.

4. Expenses of actions to facilitate compliance with COVID-19 related public health measures:

- 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 closing to enable compliance with COVID-19 precautions.
- Expenses to improve telework capabilities for public employees to enable compliance with COVID-19 public health precautions.
- COVID-19 related expenses of maintaining detention/jail facilities, including as relates to sanitation and improvement of social distancing measures, to enable compliance with COVID-19 public health precautions.
- Expenses for care for homeless populations to mitigate COVID-19 effects and enable compliance with COVID-19 public health precautions.

a. Broadband and hardware. Allowable expenses under this category include, we think, securing broadband or improving internet capacity in areas of a Tribal community that do not have currently have reliable access. Hardware, e.g., laptops, desktops, wireless hot spots, as well as subsidizing or funding the cost of internet services for individual Tribal members and/or their households could also be eligible, provided the expenditures are tied to distance learning and telework. Again, the Tribe should document that this kind of infrastructure is necessary to facilitate Tribal members' and employees' distance learning and telework due to the COVID-19 public health emergency.

b. Food. The purchase and delivery of food and food storage equipment, such as freezers for Tribal members, are allowable expenditure if COVID-19 is interrupting normal food supply chains or deliveries or to support social distancing mandates in the tribal community. If a Tribe has a Tribal cattle or buffalo herd and determines a take is in the interest of public health, these costs, including the cost of the animal and the butchering costs, are allowable CRF Fund expenditures.

c. Public health infrastructure. This category encompasses the water and sewer infrastructure improvements, expansions and upgrades we mentioned earlier, so long as necessary to facilitate compliance with COVID-19 mitigation measures and completed within the expenditure period.

d. Public facility mitigation. Costs associated with improving COVID-19 mitigation in public facilities, such as Tribal administration buildings, stores, casinos, hotels, clinics are allowable CRF expenditures. We think this includes installing Plexiglas at stores or around slot machines, purchasing touchless scanning thermometers or inserts for thermometers that are being used repeatedly, upgrading air handling systems to mitigate the spread of the COVID-19 virus, replacing surfaces with easier to disinfect materials, purchasing masks and gloves for employees who interact with the public, and increased PPE and cleaning equipment for janitorial and custodial staff.

e. Detention facilities. Tribes may expend CRF Funds to cover COVID-19 related costs in detention facilities. This can include costs in maintaining social distancing, cleaning, disinfecting, and testing. Tribes may choose to release lower-level offenders under electronic monitoring or house arrest programs instead to relieve some of the burden within the facility. The costs of that monitoring or for transitional or alternative housing facilities would be an allowable expenditure.

5. 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 businesses interruption caused by required closures.
- Expenditures related to a Tribal government payroll support program.

a. Grants to small businesses. Many are familiar with the SBA’s paycheck protection program for small businesses and the stimulus checks provided by the government to individuals. This category allows for Tribes to establish similar programs to help support small businesses, families and individuals impacted by the COVID-19 public health emergency.

For instance, a Tribe could establish a grant program for small businesses owned by the Tribe or Tribal members to pay costs due to business interruption, such as paying furloughed staff or rent while their business is shut down. Tribal businesses including convenience stores, hotels, campgrounds, restaurants, and casinos, as well as individual Tribal members’ businesses that suffered a loss of revenues due to closure or had decreased business because of the COVID-19 public health emergency, could be eligible for such a grant.

Under such a grant program, the Tribe would need to define what businesses are “small business,” and similarly define the eligibility criteria. The recipient could then use the grant to satisfy debt and pay staff, to the extent those expenses are not already covered by other federal relief funds. We would be pleased to assist Tribes interested in developing a grant program consistent with Treasury’s guidance.

b. Emergency family assistance. Tribes could establish a Tribal grant program to provide emergency financial assistance to Tribal members and families impacted by the loss of income due to COVID. This could include rent, mortgage, utility bills, and food expenses. Treasury’s FAQs specifically states that “Such assistance should be structured in a manner to ensure as much as possible, within the realm of what is administratively feasible, that such assistance is necessary.” Again, we believe the suppling meat from tribal herds or purchasing and distributing fish from tribal fishermen would be allowable expenditures.

c. Grant program forms. We recommend that if a Tribe is going to establish a grant program of this type that the Tribe create a form for Tribal members to use to apply for assistance. The form should require them to verify that their income has been impacted by COVID-19 and they need assistance. If a Tribe has a general welfare program, this new grant program would be a temporary expansion of that program. Administrative costs, including the costs of repurposing current staff or hiring additional staff to run this program, would also be allowable.

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

This is a fairly broad catch-all for expenditures due to COVID-19 not already covered by the other categories. The key here is that the Tribe must determine the expense is “reasonably necessary” for the function of government during the COVID-19 public health emergency. This could include, we think, costs of extra Council meetings to take up resolutions due to COVID-19, the costs of additional legal fees to answer COVID-19-related questions, or the costs of additional cleaning in Tribal building to facilitate work done on-site by essential employees. If you are unsure of whether certain expenses would qualify, feel free to reach out for additional guidance.

7. Nonexclusive examples of ineligible expenditures.

The following is a list of examples of costs that according to Treasury guidance would not be eligible expenditures of payments from the Fund.

- Damages covered by insurance. This is because costs that have been covered from other sources are not allowable expenditures.
- Payroll or benefits expenses for public employees whose work duties are not substantially dedicated to mitigating or responding to the COVID-19 public health emergency. Again, given the statutory limits, expenditures for public employees' payroll must be tied to those working substantially on matters related 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. Again, there can be no duplicate reimbursement for a program.
- Reimbursement to donors for donated items or services. Again, costs covered from other sources are not allowable.
- Workforce bonuses other than hazard pay or overtime linked to responding to the COVID-19 public health emergency. These regular or non-COVID-related bonuses are not required due to COVID.
- Severance pay. We believe Treasury would take the position this pay is not required due to COVID.
- Legal settlements. Similarly, we believe Treasury would view such settlements as not required due to COVID.

D. Conclusion.

Our guidance document, like the Treasury documents, is far from exhaustive. We hope these examples clarify the types of CRF Fund expenses that are allowable, and would be pleased for the opportunity to assist you in determining how the CRF Funds can be used to meet your Tribe's individual needs. Please let us know how we can help.

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