

Breakout Session

**CARES Act Funding:
What's Next (and what to watch for...)**

Edward "Ted" Waters

August 28, 2020

DISCLAIMER

These materials have been prepared by the attorneys of Feldesman Tucker Leifer Fidell LLP. **The opinions expressed in these materials are solely their views and not necessarily the views of Feldesman Tucker Leifer Fidell LLP.**

The materials are being issued with the understanding that the authors are not engaged in rendering legal or other professional services. **If legal assistance or other expert assistance is required, the services of a competent professional should be sought.**

COPYRIGHT NOTICE OF ORIGINAL MATERIALS

- These slides are being made available to you and your organization as a participant of an FTLF training program. You are ONLY permitted to duplicate, reproduce and/or distribute these materials within your organization.
- Note: a membership organization may not consider its members to be “within the organization” for purposes of sharing materials.
- **These slides may not be otherwise photocopied, reproduced, duplicated, and/or distributed outside your organization and/or posted on a website without prior written permission from the authors.**
- Any other use or disclosure is a violation of federal copyright law and is punishable by the imposition of substantial fines.
- Copyright is claimed in all original material, including but not limited to these slides and other resources or handouts provided in connection to this training, exclusive of any materials from federal laws and regulations and any documents published by the federal government.

PRESENTER: EDWARD “TED” WATERS



Contact Information:

Ewaters@ftlf.com

(202) 466-8960

- Well known for his expertise in federal grants, government reimbursement, payment and administrative issues, and his strategic handling of organizations facing crises, Ted has been selected again as a “Super Lawyer” for Health Care in Washington, DC.
- Ted has been counsel to countless Head Start programs and other recipients of federal grants as well as state, national and regional grantee associations in the past 25 years. During his time at the Firm, he has represented clients in front of federal and State courts, legislative bodies, administrative tribunals, Offices of Inspector General and federal agencies.
- Ted has been Managing Partner of Feldesman Tucker since 2003 and has taught the first law school class in the country on federal grant programs at the George Washington University School of Law for the past several years. He is a member of the National Grants Management Association (NGMA) where he served on the Board for many year and served two terms as Chair and is also a member of the National Association of College and University Attorneys (NACUA).

AGENDA

COVID-19 Funding Streams and HR Example

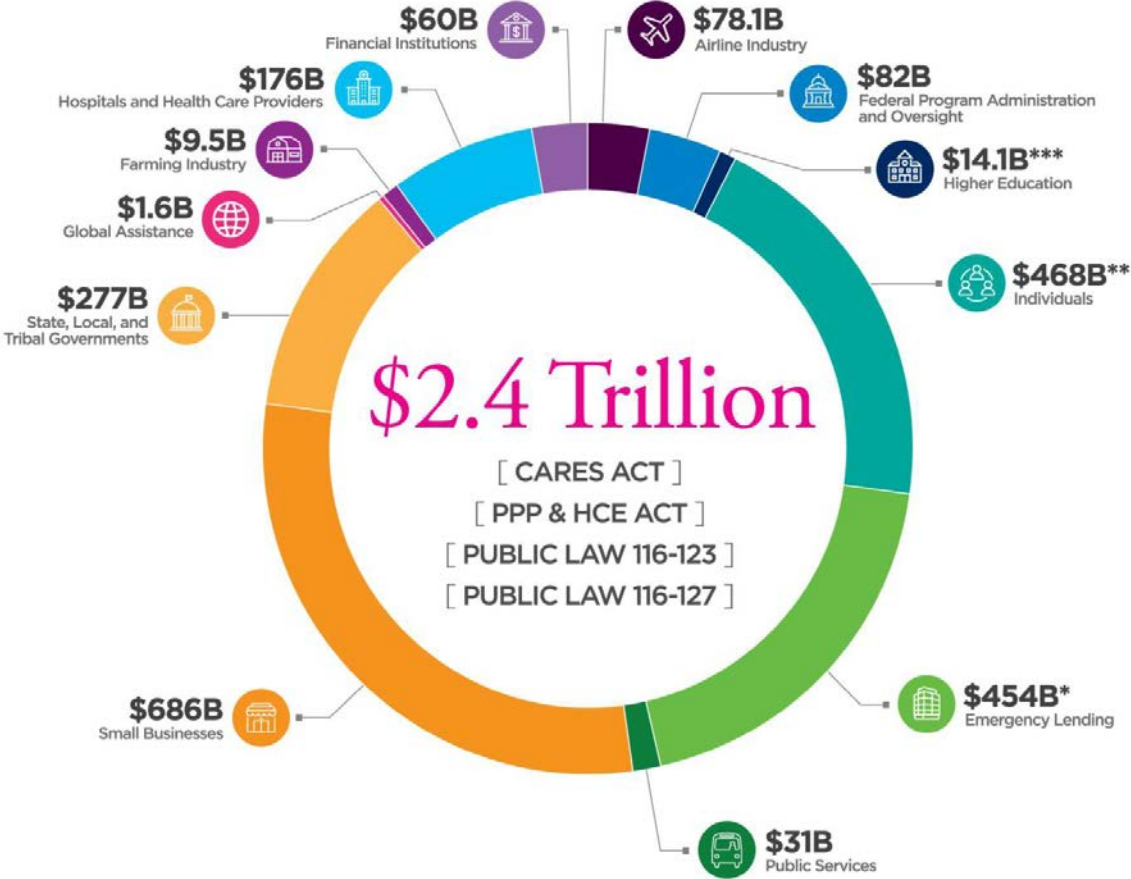
Other Considerations as You Expend Funds

The Look Ahead for CARES Act Oversight

Five “Big” Congressional Actions

THE MONEY

(GRAPHIC SOURCE: [HTTPS://PANDEMIC.OVERSIGHT.GOV/](https://pandemic.oversight.gov/))



FIVE KEY ENACTMENTS

Five Key Statutes:

1. Coronavirus Preparedness and Response Supplemental Appropriations Act, P.L. 116-123 (March 6, 2020)
2. Families First Coronavirus Response Act (“FFCRA”), P.L. 116-127 (March 18, 2020)
3. Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), P.L. 116-136 (March 27, 2020)
4. PPP and Healthcare Enhancement Act, P.L. 116-139 (April 24, 2020)
5. PPP Flexibility Act, P.L. 116-142 (June 6, 2020)

1. CORONAVIRUS PREPAREDNESS AND RESPONSE SUPPLEMENTAL APPROPRIATIONS ACT

March 6, 2020: \$8.3 billion

Notable Items:

- \$3.4 billion to capitalize the Public Health and Social Services Emergency Fund
 - (Included earmark of \$100 million to Community Health Center program, which has already been distributed by HRSA through a no-FOIA/no-application formula. Practice point for grant managers – budgets to be submitted after the fact.)
- \$2.2 billion to CDC
- \$836 million to NIH
- Approximately \$1 billion for international efforts (State, USAID, International Disaster Assistance)

2. FAMILIES FIRST CORONAVIRUS RESPONSE ACT (“FFCRA”)

March 18, 2020: Approximately \$2 billion

Notable Items:

- Note: this statute contained appropriations but was not primarily for the purpose of those appropriations.
- Public Health and Social Services Emergency Fund: \$1 billion (coordination with CMS for claims from providers for COVID-19 related items)
- Food security: \$500 million to WIC, \$100 million to The Emergency Food Assistance Program (“TEFAP”), \$100 million for grants to certain territories, and \$250 million to Admin for Community Living (within ACF) for nutrition services for older Americans
- Indian Health Service: \$64 million for COVID-related health items
- DoD Operations: \$82 million for COVID-related health items

3. CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (“CARES ACT”)

March 27, 2020: Approximately \$2 trillion

Notable Items:

- HHS
 - \$100 billion to the Public Health and Social Services Emergency Fund (response activities, payments to providers, etc.)
 - \$4.3 billion to CDC
 - \$80 million to FDA for countermeasures
 - Approx. \$2 billion in extension funding to HRSA health centers
 - \$1.32 billion additional COVID-19 funding to HRSA for health centers
 - \$425 million to SAMHSA
 - \$90 million to HRSA for RWHAP
 - Expansion of certain rural health programs
 - \$955 million to ACF’s ACL Aging and Disability Services Programs
 - \$1 billion for CSBG
 - \$900 million for LIHEAP
 - \$750 million for Head Start

3. CARES ACT (CONT.)

Notable Items:

- FEMA: \$45 billion for disaster relief and fed assist. related to COVID-19
- DoD: \$1 billion for Defense Production Act procurements
- Treasury: \$500 billion for relief to states and businesses through various programs, \$32 billion for air carrier programs
- SBA: \$562 billion for 7(b) disaster loans, and approx. \$349 billion for the PPP
- HUD: \$5 billion for CDBG, \$4 billion for homeless assistance, \$685 million for public housing agencies
- Agriculture: Approx. \$35 billion for food assistance
- DOL ETA: \$345 million for dislocated worker assistance
- Bureau of Indian Affairs: \$453 million for COVID-19 related operational costs

3. CARES ACT (CONT.)

Notable Items:

- Original Source of the:
 - Coronavirus Relief Fund (“CRF”)
 - Funding to states, local governments, and Tribal governments
 - Provider Relief Fund (“PRF”)
 - Funding to health care providers
 - Higher Education Emergency Relief Fund (“HEERF”)
 - Funding largely to higher ed (and indirectly to students)

4. PAYCHECK PROTECTION PROGRAM (“PPP”) AND HEALTHCARE ENHANCEMENT ACT (“HCE”)

April 24, 2020: Over \$400 billion more

Notable Items:

- Additional \$310 billion appropriated to the PPP (up to \$659 billion)
- Additional \$75 billion appropriated to the Public Health and Social Services Emergency Relief Fund for purposes of the Provider Relief Fund
- Additional \$25 billion appropriated to the PHSSERF for other activities, such as testing funding to states, additional funding to NIH and CDC, and funding to Community Health Centers

5. PPP FLEXIBILITY ACT

June 6, 2020: Adjusted PPP parameters

Notable Items:

- 24-week “covered period” authorized
- Payroll costs “minimum” reduced to 60%
- Additional Exceptions/Safe Harbors for FTE reductions, including inability to re-hire due to compliance with OSHA/CDC COVID-related guidelines

OMB Flexibilities (Changing Over Time) and Agency Implementation

OMB MEMORANDA

- OMB Memoranda:
 - Memo 20-11 (March 9, 2020)
 - Memo 20-17 (March 19, 2020)
 - Authorized awarding agencies to provide flexibilities for: “recipients affected by the loss of operational capacity and increased costs due to the COVID-19 crisis.” (So, essentially everybody – largely superseding 20-11)
 - Memo 20-26 (June 18, 2020)
 - Rescinded most flexibilities of Memo 20-17. Discussed below.
- OMB Memo 20-17: 13 Suggested Flexibilities
 1. *System for Award Management (“SAM”) Registration Flexibility.* Permitting relaxation of the requirement for active SAM registration at the time of award
 2. *Waiver of Notice of Funding Opportunity Announcement Requirements.* Permitting publication for less than the typical thirty-day minimum

OMB MEMORANDA

3. *Pre-Award Cost Authorization*. Permitting authorization of pre-award costs incurred between January 20, 2020 and the award date.
4. *No-Cost Extensions*. Permitting authorization of no-cost extensions for awards ending between March 31, 2020 and December 31, 2020.
5. *Simplified Continuation Award Applications/Requests*. Permitting abbreviated statements and submissions from grantees seeking continuation funding for subsequent budget periods within ongoing project periods.
6. *Acknowledgement of Ongoing Salary/Wage and Fringe Costs and Potential Project Resumption Costs*. Permitting agencies to liberally construe federal grant management regulations to allow (i) ongoing grantee salary and fringe costs during the public health emergency and (ii) project resumption costs upon cessation of the national health emergency.
7. *Expanding Allowability for Costs of Cancelled Activities*. Permitting allowability of costs incurred due to cancellation of events.
8. *Waiver of Prior Approval Requirements*. Permitting waiver of any prior approval requirements “as necessary to effectively address the response.”
9. *Waiver of Certain Procurement Requirements*. Permitting waiver of the prohibition against administrative state and local geographic preferences and small business contracting preferences.

OMB MEMORANDA

10. Delayed Submission of Financial, Performance and Other Reports.

Permitting extension of up to three months beyond normal due dates for reports.

11. Extension of Currently Approved Indirect Cost Rates. Permitting the extension of current indirect cost rates for up to one year without submission of a rate proposal, as well as extension of deadlines to submit final rate proposals for prior periods.

12. Delayed Submission of Closeout Reports. Permitting delayed submission of final reports for up to one year after the end of performance.

13. Delayed Submission of Single Audit Act Audit Reports. Permitting, and, in fact, encouraging agencies to permit, an extension of Single Audit Act Audit Report submissions for twelve months.

OMB MEMO 20-26

- Prior Memos Phased Out:
 - Memos 20-17 and 20-20 expired June 16, 2020
 - Memo 20-11 expired July 26, 2020
 - Memo 20-26 is all that remains
- Memo 20-26 Provides For:
 - Salaries item extended to September 30, 2020, but with additional restrictions:
 - “Awarding agencies may allow recipients to continue to charge salaries and benefits to active Federal awards consistent with the recipients' policy of paying salaries (under unexpected or extraordinary circumstances) from all funding sources, Federal and non-Federal. . . Due to the limited funding resources under each federal award to achieve its specific public program goals, awarding agencies must inform recipients to exhaust other available funding sources to sustain its workforce and implement necessary steps to save overall operational costs (such as rent renegotiations) during this pandemic period in order to preserve Federal funds for the ramp-up effort. Recipients should retain documentation of their efforts to exhaust other funding sources and reduce overall operational costs.”
 - Audit report submission deadline extension item continued
 - 6-month extension for audits normally due March 30, 2020 to June 30, 2020
 - 3-month extension for audits normally due July 1, 2020 to September 30, 2020
 - » (Note: memo appears to have typo of July 31, 2020 for commencement of 3-month extension)

KEY ISSUE (REMAINS)

PERSONNEL COSTS IN THE SOCIAL DISTANCING WORLD

- This is a very big question for a lot of grantees . . . We have all gone through the following:
 - Can I charge salaries and fringes when people are not working, even teleworking? They normally would *not* let us do that.
 - Will those costs later be disallowed as unreasonable?
 - But, it's a national emergency, and Congress just passed several laws to ensure people are paid even if they cannot work – and is paying for those costs with federal funds through forgivable loans and tax credits – does that change things?
 - I wish OMB had been more explicit on this point . . .
 - I wonder what my agency is saying.

YES, LOOK TO AGENCY GUIDANCE SAMPLES HERE

NIH has been (reasonably) very clear:

Q: “Can a recipient continue to pay personnel costs under awards in the event of an emergency?”

A: “Through September 30, 2020, charging salaries, regardless of whether it is for academic or summer appointments, to NIH grants when no work is being performed is allowable if your organization’s policy allows for the charging of salaries and benefits to currently active awards (under unexpected or extraordinary circumstances) from all funding sources, Federal and non-Federal. . .”

“ . . . Recipients must exhaust other available funding sources to sustain its workforce and implement necessary steps to save overall operational costs (such as rent renegotiations) during this pandemic period in order to preserve Federal funds for grant supported activities. Recipients must retain documentation of their efforts to exhaust other funding sources and reduce overall operational costs.”

<https://grants.nih.gov/faqs - /covid-19.htm?anchor=question55769>

YES, LOOK TO AGENCY GUIDANCE SAMPLES HERE

HRSA has been pretty clear:

Q: "Can we use grant funds to pay salaries for staff on the budget who are not in the office due to closures because of COVID-19?"

A: "Yes. Per guidance issued by Office of Management and Budget (OMB) M-20-26, HRSA recipients may continue to charge salaries and benefits to currently active awards consistent with their organization's policy of paying salaries under unexpected or extraordinary circumstances from all funding sources, federal and non-federal through September 30, 2020.

"During the COVID-19 emergency, internal controls over time and effort documentation and reporting under 45 CFR 75.430 may be adjusted for staff unable to report for work; however, recipients must document that they are following their organizational policy for charging salaries during unexpected and extraordinary circumstances and they must be able to substantiate federal funds expended in accordance with HRSA guidance (this FAQ) as adopted and permitted by all applicable OMB memos.

"Recipients must maintain appropriate records and cost documentation as required by 45 CFR § 75.302 - Financial management and standards for financial management systems and 45 CFR § 75.361 - Retention requirement for records to substantiate the charging of any salaries and other project activities costs related to interruption of operations or services."

<https://www.hrsa.gov/grants/manage-your-grant/COVID-19-frequently-asked-questions>

YES, LOOK TO AGENCY GUIDANCE SAMPLES HERE

ACF:

Information Memorandum IM-ACF-OA-2020-02, Appendix A (July 24, 2020):

“To the extent permitted by law, ACF will allow recipients to continue to charge salaries and benefits to their currently active awards consistent with the recipients' policy of paying salaries (under unexpected or extraordinary circumstances) from all funding sources, Federal and non-Federal. Recipients will be permitted to amend or create emergency policies in order to put emergency contingencies in place. ACF will allow other allowable costs (e.g., program-related, allocable, reasonable) that are necessary to resume activities supported by the award to be charged to their awards, consistent with applicable Federal cost principles and the benefit to the project. In order to avoid subsequent disallowances or disputes based on unreasonableness or non-allocability, the recipient may seek the prior written approval of their cognizant agency or from ACF for indirect costs in advance of the incurrence of special or unusual costs. . .”

“ . . . Due to the limited funding resources under each Federal award to achieve its specific program goals, ACF reminds recipients to exhaust other available funding sources to sustain its workforce and implement necessary steps to save overall operational costs (such as rent negotiations) during this pandemic period in order to preserve Federal funds for an eventual ramping-up effort.”

https://www.acf.hhs.gov/sites/default/files/assets/im_acf_oa_2020_02_flexibility_guidance_final.pdf

CONSIDERATIONS AND TAKE-AWAYS

- Take-aways:
 - Must have (or expeditiously implement) a policy for extraordinary leave in emergency situations.
 - It must apply equally to federally funded and non-federally funded work.
 - Flexibility currently only runs through September 30, 2020 (under Memo 20-26).
 - With Memo 20-26, increased emphasis on using other available funds.
 - Consider seeking advance approval of costs incurred under that policy pursuant to 2 CFR § 200.407.

Other than HR, What Else to Think About?

1. WHAT IS THE PURPOSE OF THE FUNDS?

- Specific Funds mean just that, they are specific to a particular need spelled out by Congress
- Executive Branch agencies do not (unless Congress said so) have the authority to “repurpose” COVID-19 funds if unused
- In contrast, your base grant has a broad purpose and can be used in carryover for those same purposes
 - So even if COVID-19 dollars carryover, still must be used for pandemic response

2. CARES Common Reporting Obligations

CARES COMMON REPORTING

SEC. 15011. (a) In this section—

(1) the terms “agency”, “appropriate congressional committees”, “Committee”, “covered funds”, and “Coronavirus response” have the meanings given those terms in section 15010;

(2) the term “covered recipient”—

(A) means any entity that receives large covered funds; and

(B) includes any State, the District of Columbia, and any territory or possession of the United States; and

(3) the term “large covered funds” means covered funds that amount to more than **\$150,000**.

REPORTING BY COVERED ENTITIES (SEC. 15011(B))

(2) Not later than 10 days after the end of each calendar quarter, each covered recipient shall submit to the agency and the Committee a report that contains—

(A) the total amount of large covered funds received from the agency;

(B) **the amount of large covered funds received that were expended or obligated for each project or activity;**

(C) a detailed list of all projects or activities for which large covered funds were expended or obligated, including—

(i) the name of the project or activity;

(ii) a description of the project or activity; and

(iii) the estimated number of jobs created or retained

by the project or activity, where applicable; and

(D) detailed information on any level of subcontracts or subgrants awarded by the covered recipient or its subcontractors or subgrantees, to include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006 (31 U.S.C. 6101 note) allowing aggregate reporting on awards below \$50,000 or to individuals, as prescribed by the Director of the Office of Management and Budget.

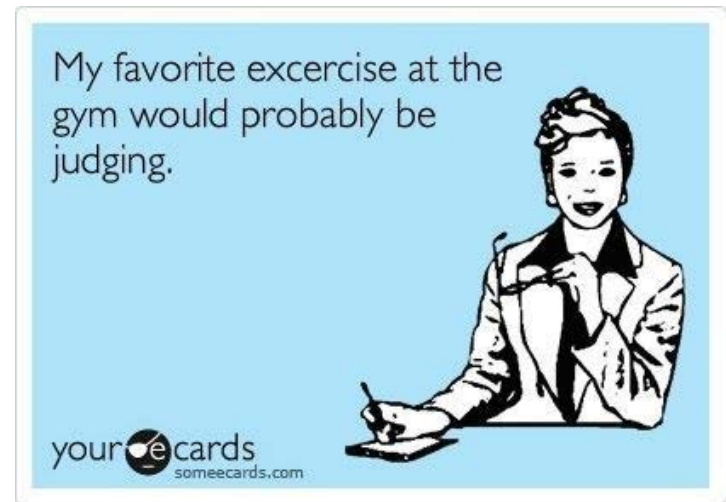
WHAT ARE YOU SAYING IN YOUR REPORTS (AND HOW ARE YOU GATHERING INFORMATION)?

- Have you set up appropriate cost centers to capture allowable costs of these special funding streams? What will the audit trail show?
- Be careful with cost allocation questions – are you charging shared resources to CARES and other funding? Do you have a cost allocation plan? What is the allocation base?
- Preserve working papers so you know where the numbers came from such as jobs created or retained for _____ activity (back to time and effort).
- REMEMBER – “it was an emergency” won’t cut it.

LASTLY, PURCHASING ISSUES

- Review and maintain procurement procedures – Will you be sole sourcing goods and services using emergency exception? How will you document need to dispense with free and open competition?
- Refresh team on equipment inventory rules – don't let SF428 reporting surprise you. Consider equipment use at home and anything you may be giving to people you serve.

Oversight



PANDEMIC RESPONSE ACCOUNTABILITY COMMITTEE (PRAC)

- Cares Act created a Pandemic Response Accountability Committee (PRAC) composed of federal Offices of Inspector General:
 - ... to “promote transparency and conduct and support oversight of covered funds and the Coronavirus response to (1) prevent and detect fraud, waste, abuse, and mismanagement; and (2) mitigate major risks that cut across program and agency boundaries.” Among the Committee’s responsibilities is development of a user-friendly website to foster greater accountability and transparency in the use of these funds.
- Pandemic Response Accountability Committee has oversight into all spending under the CARES Act.

CARES ACT OVERSIGHT FIRST 90 DAYS

- Launched pandemic.oversight.gov with features such as the Contract Spending for Pandemic Relief dataset and map;
- Issued a report highlighting the Top Challenges Facing Federal Agencies;
- Released 21 public oversight reports;
- Conducted investigations, which have resulted in 36 arrests or indictments and 4 fraud civil actions; and
- Initiated 74 ongoing oversight projects.

PANDEMIC.OVERSIGHT.GOV

- A compendium of completed PRAC and OIG reports that relate to the government's pandemic response and recovery efforts, as well as relevant reports issued by the U.S. Government Accountability Office (GAO), are available at pandemic.oversight.gov.
- In July, Michael E. Horowitz (DOJ IG), Acting Chair of the PRAC, announced the release of the PRAC's Strategic Plan for 2020 through 2025.
- Key point, initially there were some actions to limit PRAC authority but those have been reversed. The PRAC has authority to oversee all funds including treasury.

ONE OTHER EXAMPLE...

- HHS OIG Workplan includes review of \$50B of Provider Relief Funds - <https://oig.hhs.gov/reports-and-publications/workplan/summary/wp-summary-0000472.asp>
- Are these grants or what? Do cost principles apply? To what exactly? Guidance changing weekly... such as
- Per CFDA listing, these are “C - Direct Payments for Specified Use”

COVERED BY SINGLE AUDIT

Are Provider Relief Fund payments fund payment to non-Federal entities (states, local governments, Indian tribes, institutions of higher education, and nonprofit organizations) subject to Single Audit? (Modified 7/30/2020)

Provider Relief Fund General and Targeted Distribution payments (CFDA 93.498) and Uninsured Testing and Treatment reimbursement payments (CFDA 93.461) to non-Federal entities are Federal awards and must be included in determining whether an audit in accordance with 45 CFR Part 75, Subpart F is required (*i.e.*, annual *total federal awards expended* are \$750,000 or more).

<https://www.hhs.gov/coronavirus/cares-act-provider-relief-fund/faqs/provider-relief-fund-general-info/index.html>
[- terms-conditions](#)

WHAT ABOUT COST PRINCIPLES?

“The following 2CFR policy requirements apply to this assistance listing:

Subpart B, General provisions

Subpart D, Post Federal; Award Requirements

Subpart E, Cost Principles

Subpart F, Audit Requirements

The following 2CFR policy requirements are excluded from coverage under this assistance listing:

Subpart C, Pre-Federal Award Requirements and Contents of Federal Awards”

<https://beta.sam.gov/fal/ea5f4f8503fe498cbf46eb6db65a2d08/view?keywords=93.498>

Questions

CONTACT INFORMATION

Edward “Ted” Waters

EWaters@ftlf.com

Feldesman Tucker Leifer Fidell LLP

1129 20th Street N.W. – Suite 400

Washington, DC 20036

(202) 466-8960

www.feldesmantucker.com

Learning.ftlf.com