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MEMORANDUM

April 10, 2020

SUBJECT: Expenditure of CARES Act funds

TO: Senator Bill Wielechowski
Attn: Sonja Kawasaki

FROM: Megan A. Wallace
Director

MAW

You have asked for an opinion regarding the governor's authority to expend federal funds received by the state under the CARES Act, including whether the governor may utilize the RPL process. You also asked whether the funds could be used to increase the 2020 permanent fund dividend, or to cover the costs of school bond debt reimbursement, community assistance, or REAA funding.

Discussion

Section 5001 of the Coronavirus Aid, Relief, and Economic Security Act (CARES) Act provides for \$150,000,000,000 in payments to be made to states, tribal governments, and units of local governments.¹ Under this section, payments will be issued to states on a proportional basis, but will be no less than \$1,250,000,000 billion per state. The funds may only be used to "cover only those costs of the [s]tate . . . that are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19)."²

The relevant language provides:

(c) PAYMENT AMOUNTS.—

(1) IN GENERAL.—Subject to paragraph (2), the amount paid under this section for fiscal year 2020 to a State that is 1 of the 50 States shall be the amount equal to the relative population proportion amount determined for the State under paragraph (3) for such fiscal year.

(2) MINIMUM PAYMENT.—

¹ H.R. 748, 118th Congress, Second Session (amending the Social Security Act (42 U.S.C. 301 et seq.) by inserting "Title VI-Coronavirus Relief Fund").

² *Id.* at sec. 601(d).

(A) IN GENERAL.—No State that is 1 of the 50 States shall receive a payment under this section for fiscal year 2020 that is less than \$1,250,000,000.

* * *

(d) 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

(3) were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.³

In sum, the CARES Act provides that funds may only be spent on qualifying COVID-19 expenses that were not accounted for in the budget most recently approved as of the date of enactment of the CARES Act. The CARES Act was enacted on March 27, 2020. As of that date, the Alaska State Legislature had approved the fiscal year 2020 budget and the fiscal year 2021 mental health budget.⁴ At the time of enactment of the CARES Act, the Alaska State Legislature had not yet enacted the fiscal year 2020 supplemental budget or the fiscal year 2021 operating budget.

It is my understanding that additional guidance regarding qualifying expenditures under the CARES Act is forthcoming from the federal government. Without this additional information, or specific proposals from the governor on planned expenditures of these funds, it is difficult to provide any specific advice on the proper expenditure of these funds. It seems clear from the CARES Act itself, however, that the emergency funding cannot be used to supplement existing budget items that are unrelated to the emergency.

³ Section 5001 also includes a provision that provides:

(b) APPLICATION OF PROVISIONS.—Amounts appropriated for fiscal year 2020 under section 601(a)(1) of the Social Security Act (as added by subsection (a)) shall be subject to the requirements contained in Public Law 116–94 for funds for programs authorized under sections 330 through 340 of the Public Health Service Act (42 U.S.C. 254 through 256).

42 U.S.C. 254 – 256 establishes federal health care grant programs and requirements.

⁴ See ch. 1, FSSLA 2019; ch. 2, SSSLA 2019; and ch. 2, SLA 2020.

Federal receipts, regardless of the purpose, are subject to appropriation under art. IX, sec. 13 of the Alaska Constitution.⁵ Recently, the legislature passed legislation extending the governor's declaration of a public health emergency and approving the following financing plan:

PUBLIC HEALTH DISASTER EMERGENCY; FINANCING PLAN. (a) Under AS 26.23.020(k), the Alaska State Legislature approves this financing plan for the declaration of a public health disaster emergency issued by the governor on March 11, 2020, as extended by sec. 2 of this Act, and provides that the following appropriations and authorizations may be used to cope with the public health disaster emergency:

- (1) the appropriations made in sec. 8, ch. 2, SLA 2020;
 - (2) the appropriations made in sec. 10, SCS CSHB 234(FIN), Department of Health and Social Services, Thirty-First Alaska State Legislature;
 - (3) the authorization made in sec. 1, CCS HB 205, Department of Health and Social Services, Thirty-First Alaska State Legislature, allowing for up to \$20,000,000 in transfers between all appropriations made in the Department of Health and Social Services, except for transfers from the Medicaid services appropriation;
 - (4) the appropriations made in CCS HB 205, Department of Health and Social Services, Thirty-First Alaska State Legislature,
 - (A) of federal receipts received during the fiscal year ending June 30, 2021, for Medicaid services; and
 - (B) to the Department of Health and Social Services public health emergency response for the purpose of responding to the novel coronavirus disease (COVID-19) public health disaster emergency; and
 - (5) the appropriation made in CCS HB 205, Thirty-First Alaska State Legislature, to the disaster relief fund under AS 26.23.300(a).
- (b) The governor may not expend more than a cumulative total of \$10,000,000 of the assets of the disaster relief fund under AS 26.23.020(h) - (k) or 26.23.300(b) in response to the declaration of a public health disaster emergency issued by the governor on March 11, 2020, as extended by sec. 2 of this Act.
- (c) Notwithstanding AS 26.23.050(b), the expenditure of state funds to cope with the effects of the declaration of a public health disaster emergency issued by the governor on March 11, 2020, as extended by sec.

⁵ Under art. IX, sec. 13, "[n]o money may be withdrawn from the treasury except in accordance with appropriations made by law."

2 of this Act, is limited to the appropriations and expenditure authority identified in (a) and (b) of this section.^[6]

The above financing plan, which has not yet been enacted into law, provides the governor broad authority to expend federal receipts received during the fiscal year 2020 "for response and mitigation of COVID-19" within the Department of Health and Social Services, division of public health, in response to the public health disaster emergency. Specifically, sec. 8(a), ch. 2, SLA 2020, the mental health budget, contains the following receipt authority for federal funds:

(a) The amount of federal receipts received during the fiscal year ending June 30, 2020, for response and mitigation of COVID-19, estimated to be \$9,000,000, is appropriated to the Department of Health and Social Services, division of public health, emergency programs, for responding to and mitigating the risk of a COVID-19 outbreak in the state for the fiscal years ending June 30, 2020, and June 30, 2021.

In addition, to the appropriations contained in the mental health budget, the fiscal year 2020 and 2021 operating budgets contain open-ended federal receipt authority for federal funds deposited into the disaster relief fund.⁷ However, as provided in the above financing plan under SB 241, the governor's expenditure authority from the disaster relief fund will be limited to "a cumulative total of \$10,000,000 of the assets of the disaster relief fund under AS 26.23.020(h) - (k) or 26.23.300(b) in response to the declaration of a public health disaster emergency."⁸

With the exception of the appropriation to the disaster relief fund described above, under existing fiscal year 2020 and 2021 legislative appropriations, the governor lacks the authority to expend the federal receipts deposited into the state treasury under the CARES Act on state programs outside of the Department of Health and Social Services, division of public health.⁹ As discussed below, it is possible that the governor will seek

⁶ Section 3, CCS SB241, 31st Alaska State Legislature. This bill has not yet been enacted into law. It was transmitted to the governor on March 31, 2020, and is due back from the governor on April 17, 2020.

⁷ Section 38(c), ch. 8, SLA2020 ("The amount of federal receipts received for disaster relief during the fiscal year ending June 30, 2021, estimated to be \$9,000,000, is appropriated to the disaster relief fund (AS 26.23.300(a)). The same receipt authority was also contained in the fiscal year 2020 operating budget. *See* sec. 33(c), ch. 1, FSSLA 2019.

⁸ Section 3, CCS SB241, 31st Alaska State Legislature.

⁹ It is unclear whether the CARES Act federal receipts would even be eligible for deposit into the disaster relief fund, or whether they would simply be deposited into the general

to utilize the RPL process under AS 37.07.080(h) for additional expenditure authority. If the legislature wishes to specifically appropriate the CARES Act funds, it may reconvene its session and do so.

1. Limitations of the RPL process for expenditure of CARES Act funds.

According to Legislative Finance, the CARES Act funds are expected to be directly deposited into the general fund on or about April 24, 2020. Under art. IX of the Alaska Constitution, those fund must be appropriated before they can be expended. Under AS 37.07.080(h), the governor may authorize the increase of an appropriation item when there is "additional federal or other program receipts not specifically appropriated by the full legislature" if he submits a revised program to the Legislative Budget and Audit Committee (LB&A) and either receives LB&A approval for the additional expenditure or waits 45 days before beginning to expend the additional program receipts. This statute provides a system of review ("RPL") for additional program receipts so long as there is an independent appropriation that the new money will supplement. It cannot be considered as an appropriation itself, since it was enacted as part of a substantive bill which made other substantive changes to the way the state handles budgeting and appropriations.¹⁰

While the RPL process under AS 37.07.080(h) is typically utilized during the interim, the statute is silent as to whether this process can be utilized while the legislature is still in session but at an extended recess. Given these unprecedented circumstances, and in light of the fact that the legislature has already passed and enacted the fiscal year 2020 supplemental budget and the fiscal year 2021 operating budget, it seems unlikely that a court would invalidate action taken under AS 37.07.080(h) while the legislature is at an extended recess with no expected return date. This would, however, be a matter of first impression.

fund. Also, please note that sec. 1, ch. 8, SLA2020 does allow for up to \$20,000,000 in transfers between all appropriations made in the Department of Health and Social Services (DHSS), except for transfers from the Medicaid services appropriation. Therefore, it may be possible for the governor to transfer up to \$20,000,000 of federal receipts received under the CARES Act between other appropriations within DHSS. The financing plan in SB 241 also provided the governor the authority to expend certain state funds and open-ended federal receipt authority for Medicaid. Medicaid funds are not included in the CARES Act payments that are the subject of this memorandum.

¹⁰ To treat subsection (h) as an appropriation would violate the confinement clause of the state constitution which requires that appropriations be made in bills confined to appropriations. Article II, sec. 13, Constitution of the State of Alaska. It also would be vulnerable to attack as a delegation to the governor of the legislature's power of appropriation. *State v. Fairbanks North Star Borough*, 736 P.2d. 1140 (Alaska 1987).

With respect to the RPL process itself, both the fiscal year 2020 and fiscal year 2021 operating budgets appropriate federal receipts that exceed the amounts otherwise appropriated in those budgets, which the governor may seek to utilize as an appropriation for the CARES Act money. The appropriations state, in pertinent part,

Federal receipts . . . that exceed the amounts appropriated by this Act are appropriated conditioned on compliance with the program review provisions of AS 37.07.080(h).¹¹

This language appropriates money that is in excess of amounts otherwise appropriated in the operating budget. The operating budgets, however, do not appropriate any CARES Act money. There is no underlying appropriation to which the CARES Act money can be specifically considered to supplement.

The governor, however, may argue that AS 37.07.080(h) can be used to increase any federal receipt authority, not just appropriations of CARES Act money.¹² In my opinion, however, an additional appropriation is necessary before the governor may be authorized to expend CARES Act money on state programs outside the Department of Health and Social Services, division of public health.¹³ As previously stated, LB&A is not authorized to make an appropriation, since that would be an unconstitutional delegation of legislative authority to a committee and violate the confinement clause

Under AS 37.07.080(h) the rejection or disapproval of a proposed RPL by LB&A does not prevent the governor from expending the federal funds as he originally proposed. The appropriations of unanticipated federal funds made by sec. 32, ch. 1, FSSLA 2019 and sec. 37, ch. 8, SLA 2020 are contingent upon the governor complying with the program review provisions of AS 37.07.080(h). Compliance with the program review provisions of AS 37.07.080(h) requires that the governor submit a revised program to LB&A for review, that 45 days elapse before the commencement of expenditures under the revised program, and that if LB&A rejects the governor's proposal for distribution of the funds and if the governor intends to proceed with the proposed expenditures contrary to the advice of LB&A, the governor must review the revised program and provide LB&A with a statement of reasons for proceeding with the expenditure.

The effect of AS 37.07.080(h) is to require that LB&A be informed of the proposed expenditure and provide LB&A the opportunity to comment on the proposed expenditure, and, if appropriate, advise the governor to follow another course of action for expenditure

¹¹ See sec. 32, ch. 1, FSSLA 2019; sec. 37, ch. 8, SLA2020.

¹² In my opinion, AS 37.07.080(h) cannot be used to increase an appropriation that did not appropriate any federal funds. To my knowledge, this issue has not been litigated.

¹³ See sec. 8, ch. 2, SLA 2020.

of the funds. The governor is not obligated to follow any advice provided by LB&A and may proceed with his original course of action in spite of disapproval by LB&A. If LB&A approves the expenditure of the funds, the governor can expend the funds immediately without waiting until the end of the 45 days. LB&A does not have the authority to compel the governor to expend funds in a particular manner or to stop the governor from expending funds.¹⁴

2. Use of the CARES Act money for an increased 2020 permanent fund dividend.

The CARES Act provides that the payments issued to states may only be used for "necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19)."¹⁵ While states have not yet received guidance from the federal government regarding qualifying expenditures under the CARES Act, it seems unlikely that payment of a permanent fund dividend, which is already provided for in the state budget, would qualify as a necessary COVID-19 expenditure. Furthermore, as noted above, the appropriation for the 2020 permanent fund dividend does not include an appropriation of federal receipts. In addition, there is no appropriation of federal receipts that the governor can seek to increase under AS 37.07.080(h). Accordingly, in order to use CARES Act funds for a permanent fund dividend, assuming that is an acceptable use under the Act, an additional legislative appropriation would be necessary. The governor lacks any authority to act unilaterally.

3. Use of the CARES Act money for the costs of school bond debt reimbursement, community assistance, or REAA funding.

You have also asked about the ability of the governor to use the CARES Act money to cover the costs of school bond debt reimbursement, community assistance, or REAA funding. For the same reasons the CARES Act money cannot be used to increase the amount of the permanent fund dividend, the governor likely lacks the authority to utilize the federal funds to cover the costs of school bond debt reimbursement, community assistance, or REAA funding. Not only are the costs of these state programs not COVID-19 related expenditures, they were included in the operating budget for fiscal year 2021, recently vetoed by the governor, and there are no existing federal receipt appropriations that the governor could seek to increase under the AS 37.07.080(h) RPL process.

Conclusion

For the reasons discussed above, if the governor seeks to expend CARES Act money for costs unrelated to COVID-19, state programs outside the Department of Health and Social Services, division of public health, or outside the authority provided for

¹⁴ I can provide more specific analysis in the event the governor submits an RPL request to LB&A.

¹⁵ Section 5001, H.R. 748, 118th Congress, Second Session.

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expenditure from the disaster relief fund, litigation may be necessary. The legislature may also wish to specifically appropriate the CARES Act money by reconvening its regular session or calling a special session later this year.

Please let me know if you have additional questions on this matter.

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