

The 2021-22 Budget: Improving Legislative Oversight of Emergency Spending Authorities

Summary

Governor Has Broad Powers to Declare Emergencies and Authorize Related Spending. State law gives the Governor broad powers to declare emergencies and allocate funds to support related activities. For example, the Department of Finance (DOF) can allocate funds from the Disaster-Response Emergency Operations Account (DREOA) to state departments for emergency costs with minimal legislative notification requirements. Furthermore, the California Emergency Services Act allows the Governor to spend any available funds to respond to an emergency with no legislative notification. The administration has made extensive use of these authorities during the state of emergency declared on March 4, 2020 in response to the coronavirus disease 2019 (COVID-19) pandemic. Under current law, the authority to use DREOA for COVID-19-related activities expires on June 30, 2021.

Governor's Proposals for COVID-19 Emergency Spending and Authority. The Governor proposes to extend the use of DREOA for COVID-19 response activities through 2021-22. The Governor also proposes budget Control Section 11.91 that allows DOF to (1) shift between various departments \$1.4 billion in funds proposed in the 2021-22 budget for COVID-19-related activities and (2) spend federal and private funds on COVID-19-related activities.

Governor's Proposals Raise Various Concerns. Under the Governor's proposal to extend the use of DREOA for COVID-19 response, there would be no reasonable checks and balances on the Governor's COVID-19 spending authority. Specifically, the administration would have access to nearly unlimited funding in the budget year while having minimal requirements to notify the Legislature when funds are accessed and no requirement to report on how funds are actually spent on the state's COVID-19 response. Our concerns with the proposed extension are reflective of the larger problems associated with the state's existing emergency spending authorities that allow the Governor to spend an essentially unlimited amount of funds on emergency-related activities with very little opportunity for legislative oversight.

Recommendations. Given the scale and nature of the COVID-19 emergency, it is reasonable to give the Governor some flexibility in spending funds for related activities. However, additional checks and balances on this flexibility are necessary for COVID-19 spending, as well as all future state emergencies. Accordingly, we propose a series of recommendations to help achieve this outcome. First, we recommend the Legislature adopt legislation to make fundamental changes to the Governor's overall emergency spending authorities. Second, we recommend the Legislature consider a new budget control section process specific for COVID-19-related augmentations in 2021-22. Third, we recommend modifying the Governor's proposed authority to transfer funds budgeted for COVID-19-related activities to require legislative notification. Fourth, we recommend rejecting the Governor's proposed flexibility to spend federal and private funds.

INTRODUCTION

Current state law gives the Governor broad powers to declare emergencies and to allocate state and federal funds to support activities related to declared emergencies. These authorities are designed to give the administration flexibility to rapidly react to emergencies. The Governor has made extensive use of these authorities to support the state's response to the coronavirus disease 2019 (COVID-19) pandemic. In addition, the Governor's 2021-22 budget includes various proposals to modify, extend, and expand these emergency spending authorities to facilitate the planned expenditure of at least \$1.8 billion from the General Fund on COVID-19-related activities. (The

administration expects that a significant portion of these expenditures will be reimbursed by federal emergency funds in the future.)

In this report, we describe the Governor's broad powers to declare an emergency and to spend both state and federal funds for emergency-related activities, as well as how these powers have been used during the COVID-19 pandemic. Next, we describe the Governor's budget proposals to modify, extend, and expand these powers to respond to the pandemic in 2021-22. Finally, we assess these proposals and make associated recommendations to ensure sufficient legislative oversight.

BACKGROUND

GOVERNOR HAS BROAD POWERS TO DECLARE EMERGENCIES AND AUTHORIZE RELATED STATE SPENDING

Authority to Declare State of Emergency

Declaration Allows for Certain Response Efforts. State law authorizes the Governor to declare an emergency when there exist conditions of disaster or extreme peril to the safety of people and property caused by various conditions such as fire, flood, storm, and epidemic. Once an emergency is declared, state law gives the Governor significant authority in directing state departments to respond to the emergency. A declaration of a state of emergency is required for many types of federal assistance. For instance, it is a prerequisite for the state to request that the President make a major disaster or emergency declaration, which provides opportunities for the state to seek financial assistance from the federal government.

State of Emergency Declared for COVID-19.

On March 4, 2020, Governor Newsom declared a state of emergency due to the COVID-19 pandemic. This emergency declaration authorized the administration to use various emergency powers to respond to the pandemic, including emergency spending authorities, which we discuss in more detail below. At the time this report was written, the state remains under the March 4 emergency declaration.

Various Authorities for Spending Outside of Normal Appropriation Process

Spending Typically Authorized by Legislature...

The California Constitution entrusts the Legislature with the power of appropriation, including the responsibility of appropriating funds in the annual state budget and other legislation. In both circumstances, proposed spending is typically evaluated through legislative processes that include committee hearings where members of the Legislature can ask questions, vote to make changes to spending proposals put forward by the administration, and hear from the public and other stakeholders about the potential impacts of those

decisions. These processes provide checks and balances on the Governor's implementation authority and provide the Legislature with the ability to exercise oversight to ensure state expenditures are appropriate and consistent with legislative priorities. However, the time frame for these processes can span over several months. For example, state law requires the Governor to propose an annual budget by January 10 and gives the Legislature until June 15 to adopt a budget, though other bills authorizing spending can be enacted on a shorter time frame.

...But Spending on Emergencies Can Circumvent These Processes. Given the urgency of emergencies, spending decisions during emergencies go through markedly different processes than the ones described above. Specifically, current state law provides the Governor with flexibility to spend funds to respond to emergencies without going through the state's typical appropriation processes.

California Disaster Assistance Act (CDA) Authorizes Spending From Special Disaster and Emergency Account. CDA, which was first enacted in 1974, was later modified to establish the Disaster Response-Emergency Operations Account (DREOA) as a subaccount of the Special Fund for Economic Uncertainties (SFEU). (The SFEU is the state's discretionary budget reserve of the General Fund.) CDA authorizes the Department of Finance (DOF) to transfer funds from the SFEU to DREOA and allocate funds from DREOA to state departments for emergency response and recovery costs. CDA specifies that funds are allocated from DREOA upon notification of the Joint Legislative Budget Committee (JLBC) by DOF. However, there is no requirement on the type of information that must be included in the notification.

CDA initially limits the use of DREOA for each emergency to 120 days following the Governor's declaration of the emergency. However, the Governor can extend the use of DREOA for emergency-related activities in 120-day increments generally through the end of the fiscal year in which the first 120-day extension was made—even if the declared state of emergency has ended. In this way, DREOA funds are available for recovery operations that last beyond the state of emergency. The Legislature established the limit on use of DREOA on the basis that, if the administration

needs to spend on an emergency beyond the time allowed under state law, it could seek funds for the emergency-related activities through the state's annual budget process. This ensures that such expenditures are subject to the normal checks and balances.

Governor Has Made Extensive Use of DREOA During Pandemic. DREOA has been the primary way the administration has allocated state funds for COVID-19-related activities. As of February 24, 2021, DOF had transferred a total of \$7.2 billion to DREOA, and has allocated a significant portion of that amount to various departments. Future transfers into DREOA are likely as the administration continues to fund COVID-19-related activities during the remainder of 2020-21. (We note that a significant share of these costs are likely to be offset by federal emergency funds, which we discuss in greater detail later in this report.)

Since declaring the COVID-19 emergency, the Governor has extended the use of DREOA for COVID-19-related activities three times. The current 120-day authorization to use DREOA expires on June 24, 2021. Because the Governor extended the use of DREOA for the COVID-19 emergency on July 1, 2020, the administration can continue to extend the use of DREOA for this emergency through the end of 2020-21, even if the COVID-19 state of emergency ends before that time. However, absent a change in state law, the administration would be unable to use DREOA for COVID-19-related activities after June 30, 2021, even if the state of emergency persists.

California Emergency Services Act (CESA) Provides Extensive Authorities. CESA, which was enacted in 1970, provides extensive emergency powers, including spending authorities, to the Governor for the duration of a declared emergency. In particular, CESA allows the Governor to:

- Spend any available funds to respond to an emergency. When redirecting special funds dedicated for a specific purpose, state law requires that the funds be repaid. However, no specific time line for repayment is specified.
- Direct state departments to spend funds appropriated for specific purposes—including

those unrelated to an emergency—on emergency response.

- Use state department personnel, property, equipment, and appropriations to respond to an emergency.

Under existing law, the Governor is not required to obtain approval from or provide notification (or other information) to the Legislature when using the spending authorities specified in CESA. For example, the Governor does not have to identify the amount of funds spent or redirected for emergency response, as well as the specific activities that were funded. Unlike DREOA, the Governor can only use the authorities in CESA while the specified state of emergency is in place.

Governor Has Used CESA in Different Ways During Pandemic. The administration has used its authority under CESA to shift resources and funds to support COVID-19-related activities. For example, the administration identified over 3,000 employees as available for redirection to “contract tracing” activities—conducting case investigations and notifying people who may have been exposed to the virus of the need to quarantine. As of December 2020, roughly 1,900 state employees were redirected to assist with these efforts. In addition, the California Department of Corrections and Rehabilitation has shifted funds budgeted for support of the inmate population to various COVID-19-related activities to reduce the spread of the virus in state prisons. We also note that the Governor issued Executive Order N-41-20 on April 1, 2020 indicating he would use his authority under CESA to transfer funds from other legally available state funds into DREOA in order to spend more on COVID-19-related activities, as needed. However, the extent to which the Governor has made use of this authority to date is unclear.

Spending Authority for Specific Emergencies Like COVID-19. The Legislature has also periodically provided emergency spending authority to the Governor for specific emergencies through one-time budget actions or legislation. For example, Chapter 2 of 2020 (SB 89, Committee on Budget and Fiscal Review) amended the *2019-20 Budget Act* to (1) make available up to \$1 billion from the General Fund for COVID-19-related activities and

(2) add Control Section 36 authorizing DOF to allocate these funds to departments. Unlike DREOA or CESA, Control Section 36 required DOF to notify JLBC 72 hours prior to allocating funds, though provided that the 72-hour requirement could be waived upon the approval of JLBC. DOF allocated a total of \$826.8 million to departments through Control Section 36 in 2019-20. Control Section 36 is not included in the *2020-21 Budget Act*.

GOVERNOR HAS BROAD AUTHORITY TO ALLOCATE FEDERAL FUNDS FOR EMERGENCIES

Federal Funding Available in Emergencies

Federal Declarations Allow for Federal Assistance. The federal government provides states with significant amounts of funding for emergency-related activities, often through the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act). This act governs the President’s authority to declare disasters and establishes assistance programs administered by the Federal Emergency Management Agency (FEMA). At the request of a Governor, the President can make an emergency declaration when there is natural or man-made event or other circumstance beyond the capacity of state and local governments to respond. When the President declares an emergency, limited federal financial assistance is generally available to states and local governments up to \$5 million. In emergencies caused by natural events that are so severe they are beyond the capability of state and local governments to respond, a Governor can request that the President make a major disaster declaration. A wide range of federal assistance programs are available under a major disaster declaration. Most notably, states can receive FEMA reimbursement for certain emergency response costs, usually in the amount of 75 percent of eligible costs. Federal assistance during emergencies can also be provided through federal legislation passed in order to respond to a specific emergency.

Federal Funds Have Been Imperative to the State's COVID-19 Response

Federal Declarations and Reimbursements for Pandemic Spending. On March 13, 2020, the President declared the COVID-19 pandemic a national emergency under the Stafford Act. On March 22, 2020 the President declared the COVID-19 pandemic a major disaster for California. These declarations allow the state to seek reimbursement for eligible costs, with FEMA typically reimbursing 75 percent of the costs. We note that the federal government has indicated that it will reimburse the state for a higher share of eligible costs—up to 100 percent—for COVID-19-related activities. However, not all state spending on COVID-19-related activities is eligible for reimbursement.

Federal Legislation Has Provided Additional Emergency Assistance. Congress passed five separate pieces of federal legislation in 2020 to provide additional federal funding related to COVID-19. They are: the Coronavirus Preparedness and Response Supplemental Appropriations Act (which became law on March 6); the Families First Coronavirus Response Act (March 18); the Coronavirus Aid, Relief, and Economic Security (CARES) Act (March 27); the Paycheck Protection Program and Health Care Enhancement Act (April 24); and the Consolidated Appropriations Act of 2021 (December 27).

Federal Funding to State So Far Exceeds \$150 Billion. Including both legislation and administrative actions, the federal government has provided more than \$150 billion to the state government for COVID-19-related relief. (This estimate excludes tens of billions of dollars that also flowed directly to individuals and businesses, for example, through the paycheck protection program.) For much of this funding, for example, with federal funds for unemployment insurance, the state has a very limited policy-setting role in directing how the funding is spent. For other funding, however, the state government can provide more direction. For example, the CARES Act dedicated \$9.5 billion to the state from the Coronavirus Relief Fund (CRF), which involved many conditions, but nonetheless provided the state substantial flexibility in how the funds were directed.

State Law Allows Federal Funds to Be Allocated in Various Ways

Federal Funding Appropriated in the Annual Budget Act. Without legislative approval, the administration generally does not have authority to spend money from the federal government. As such, like General Fund, special funds, and all other state funds, federal funds received by the state are appropriated in the annual budget process. For example, the budget includes authority for the state to accept federal funds, such as reimbursements from FEMA for emergency-related spending.

Control Section 28 Provides Broad Authority to Appropriate Unanticipated Federal Funds. Sometimes the state receives money from the federal government after the budget has been passed. To address this issue, the budget includes standard language in Control Section 28 giving the administration flexibility to spend unanticipated federal funds. (Control Section 28 also gives the administration flexibility to spend unanticipated nonstate funds, such as private funds donated for emergency-related activities.)

Under Control Section 28, the funds can only be spent if they:

- Were unanticipated at the time the budget was passed.
- Must be spent in the current fiscal year.
- Would be expended for a purpose consistent with state law.
- Are made available to the state under conditions permitting their use only for a specified purpose.
- Would not impose on the state a requirement to spend other state funds for any program or purpose.

In addition, the administration must provide a 30-day notification to JLBC to allocate funds above certain amounts. However, the Legislature allows for an expedited notification process should the need to distribute the funding be pressing. The administration has used this expedited process to distribute federal funds during the pandemic.

Federal Funding for COVID-19 Generally Allocated Through Control Section 28 and Regular Budget Process. The administration has allocated significant federal funding for COVID-19 through Control Section 28. For example, in January 2021, the administration notified JLBC it was spending roughly \$6 billion in federal funding for education through Control Section 28. In other

cases, the Legislature has allocated federal funding for COVID-19 in budget-related legislation, as is typical for federal funding that does not meet the conditions under Control Section 28. For example, the 2020-21 budget appropriated the \$9.5 billion in CRF monies to a variety of purposes, including to local governments and school districts.

GOVERNOR'S PROPOSALS FOR COVID-19 EMERGENCY SPENDING AND AUTHORITY

The Governor's budget includes three major proposals intended to provide resources for COVID-19-related activities in 2021-22. First, the Governor proposes control section language to extend his authority to use DREOA for COVID-19-related activities through the end of the budget year. Second, the Governor's budget proposes \$1.4 billion from the General Fund in 2021-22 to support specific departments' COVID-19-related activities, along with control section language allowing the administration to shift these funds between departments during the budget year. Third, the proposed budget includes control section language allowing the administration to spend federal and private funds on COVID-19-related activities. We describe each of these proposals in more detail below.

Extension of Authority to Use DREOA for COVID-19 Through 2021-22. As previously mentioned, under current state law, the administration would be unable to use DREOA for COVID-19-related activities after June 30, 2021, even if the state of emergency persists. The Governor's budget includes a new Control Section 11.92 that allows the administration to extend the use of DREOA through June 30, 2022 (the end of the budget year). The administration estimates that it will use this authority to allocate \$406 million for COVID-19-related activities. This funding would support (1) contact tracing (\$143.8 million), (2) emergency operation costs (\$177.5 million), and (3) hospital and medical surge preparation (\$84.5 million). According to the administration, these funds are not allocated to

specific departments in the proposed budget as it is currently unclear which departments will be engaged in these activities. Instead, funding would be allocated through DREOA as departments' roles become clear. By extending the use of DREOA, the administration would have maximum authority to allocate more than \$406 million for COVID-19-related activities from DREOA. (The administration expects that a significant portion of these costs will be reimbursed by federal funds in the future.)

Appropriation of \$1.4 Billion for COVID-19-Related Activities and Authorization to Shift Funds. The Governor's budget proposes a total of \$1.4 billion from the General Fund to support COVID-19-related activities in 2021-22 in nine specific departments, as shown in **Figure 1** on the next page. (The administration expects that a significant portion of these costs will be reimbursed by federal funds in the future.) According to the administration, including these funds in the proposed budget is intended to honor the intent of CDAA that emergency-related activities be funded through the budget process.

In addition, the Governor's budget proposes Control Section 11.91, which consists of two components. The first component of Control Section 11.91 authorizes DOF to shift the \$1.4 billion proposed for COVID-19-related activities during the budget year. Specifically, DOF would be able to transfer funds between the nine departments with COVID-19 allocations, as well as to three departments without such allocations—the Governor's Office of Planning and Research, the Emergency Medical Services Authority, and the

Military Department. According to the administration, these three departments are likely to be engaged in COVID-19-related activities, but it has yet to identify what those activities would be. Under the proposed language, DOF would not be required to notify or seek approval from the Legislature when shifting funds.

Authority to Spend Federal and Private Funds.

The second component of Control Section 11.91 authorizes DOF to adjust departments’ budgets to allow them to spend federal and private funds for COVID-19-related activities. Specifically, it allows DOF to (1) increase federal trust fund authority for COVID-19-related activities for any department and (2) create new items of appropriation to allow departments to receive and spend federal and/or private funds for COVID-19-related activities. However, the control section would only permit these adjustments if the received funds met various conditions. Specifically, funds could only be spent if they:

- Support the state’s response to the COVID-19 public health emergency.
- Would be expended for a purpose consistent with state law.

- Are made available to the state under conditions permitting their use only for COVID-19-related activities.
- Would not impose on the state a requirement to spend state funds for any program or purpose.

Some of these conditions are similar to those that must be met for federal funds or private funds to be allocated through the existing Control Section 28, which typically governs the appropriation of unanticipated federal or private funds. However, the proposed Control Section 11.91 process differs from Control Section 28. Most notably, DOF would not be required to notify the Legislature in advance of allocating federal or private funds to departments, irrespective of the amount of funding involved. According to the administration, this is intended to streamline the allocation process.

Summary of Proposed Budget Control Sections. As discussed above, the Governor’s budget proposes two new control sections— 11.92 and 11.91 —that would provide the administration with significant flexibility in spending state, federal, and private funds on COVID-19 response activities. **Figure 2** on the next page summarizes the key provisions of each new control section.

Figure 1

Governor’s Budget Provides \$1.4 Billion General Fund for COVID-19-Related Activities
2021-22 (In Millions)

Department	Description	Amount
Public Health	Statewide testing, primarily at the Valencia Branch Lab, including specimen collection.	\$820.5
Corrections and Rehabilitation	Testing, treatment, surge capacity, and vaccination of staff and incarcerated persons.	281.3
Governor’s Office of Emergency Services	California Disaster Assistance Act grant funds to reimburse local governments for certain coronavirus disease 2019 (COVID-19) response costs.	119.8
General Services	Hotels for health care workers, housing for vulnerable people released from prison and agricultural workers, and specimen transportation.	84.4
State Hospitals	Increased operating costs primarily related to increased sanitation, purchase of personal protective equipment, and testing staff and patients.	52.0
Developmental Services	Surge sites for individuals served by the Department of Developmental Services who have been exposed to or are at high risk of COVID-19.	36.7
Board of State and Community Corrections	Probation department supervision of people released from prison to county supervision.	12.1
Veterans Affairs	Increased operating costs primarily related to increased sanitation, purchase of personal protective equipment, and testing staff and residents.	5.3
Social Services	Rapid Response program to support services to immigrants.	5.0
Total		\$1,417.1

Figure 2**Governor's Proposed Control Sections for COVID-19 Spending Flexibility**

Control Section	Description
11.92	Extends ability of administration to use DREOA for COVID-19-related activities through 2021-22, providing flexibility to spend more funding than the level identified in the budget.
11.91—First Component	Allows DOF to transfer funds budgeted for COVID-19-related activities between departments with COVID-19 budget items.
11.91—Second Component	Allows DOF to create new budget items and augment department budgets to allow them to spend federal and private funds for COVID-19-related activities.

COVID-19 = coronavirus disease 2019; DREOA = Disaster-Response Emergency Operations Account; and DOF=Department of Finance.

GOVERNOR'S PROPOSALS RAISE VARIOUS CONCERNS

Extension of DREOA Authority Problematic

New Control Section Limits Legislative Oversight of COVID-19 Response. Under the proposal, there would be no reasonable checks and balances on the Governor's COVID-19 spending authority. Specifically, the administration would have access to nearly unlimited funding in the budget year while having minimal requirements to notify the Legislature when funds are accessed and no requirement to report on how funds are actually spent on the state's COVID-19 response. As such, the Governor could notify the Legislature that DREOA funds will be used for a certain purpose, but then decide to spend those funds on entirely unrelated purposes, so long as the expenditures were made on activities related to COVID-19. While the administration has provided information on COVID-19-related spending that is not required by statute, we find that adequate information is still lacking, as discussed in the box on the next page.

Action Needed to Provide Appropriate Mechanism to Fund COVID-19-Related Activities. While we find the Governor's proposal to be problematic, we find that some action is needed. Given the magnitude as well as the extended and continually evolving nature of the COVID-19 pandemic, it is reasonable that the administration will continue to need flexibility to allocate funds for COVID-19-related activities on

an emergency basis in 2021-22. For example, it is possible that the state could experience a spike in infections requiring the state to rapidly allocate resources to minimize loss of life. In addition, it is possible that the administration might need to quickly take unexpected steps to facilitate vaccine distribution. However, if the use of DREOA is not extended or an alternative source of funding is not established, the administration could end up using CESA spending authorities as long as the COVID-19 state of emergency remains in place. The use of CESA to fund COVID-19-related activities would be even more problematic in terms of oversight and accountability because CESA has no legislative notification or reporting requirements.

Reexamination of Governor's Overall Emergency Spending Authorities Warranted. Our concerns with the Governor's proposal to extend DREOA for COVID-19 response are reflective of the larger problems associated with the state's existing emergency spending authorities overall. As discussed earlier in this report, these spending authorities are extremely broad and allow the Governor to spend an essentially unlimited amount of funds on emergency-related activities with very little opportunity for the Legislature to provide effective oversight. For example, as noted above, CESA spending authorities have no legislative notification or reporting requirements. As such, the Governor could—without any legislative oversight—reallocate to emergency response activities any

legally available funds in the state treasury as well as any available state employees and resources during a state of emergency. If such a redirection took place on a large enough scale, it could have serious consequences, such as undermining the structure and condition of the state budget. This is a considerable unilateral power for the Governor to wield without any meaningful checks or balances.

Proposed Flexibility Prevents Legislative Oversight of Budgeted Funds

We find that the administration's proposal to budget \$1.4 billion for COVID-19-related

activities is a step in the right direction of providing transparency on planned expenditures and honors CDAA's intent that funding for extended emergencies be included in the budget act. However, the first component of the proposed Control Section 11.91 that allows the administration to shift between departments funds budgeted for COVID-19-related activities, provides so much flexibility that it would be difficult for the Legislature to know how these budgeted funds will actually be spent, or even which departments will ultimately receive the funds as it includes no legislative notification requirements. For example, the Legislature could approve the 2021-22 budget with the understanding that specific departments

Governor Has Provided Fiscal Updates, but Information Remains Limited

The administration has provided periodic reports to the Legislature to update the total estimated pandemic-related costs even though such reports are not required under the California Disaster Assistance Act or California Emergency Services Act. However, the information provided has been inadequate for the Legislature to conduct meaningful oversight. This is because the information often:

- **Lacks Adequate Details on Planned and Actual Spending.** Much of the information provided on planned coronavirus disease 2019 (COVID-19)-related spending lacks adequate details. For example, the November 2020 fiscal update provided by the Department of Finance includes only brief descriptions or categories of planned spending (such as \$105 million in "other staffing and operational costs" for the California Department of Corrections and Rehabilitation). In addition, the administration has provided very little information on how funds were actually spent. Without information on planned and actual spending, it is difficult for the Legislature to understand what activities the funds are supporting or whether the administration's response approach is likely to be effective or is consistent with legislative priorities.
- **Not Provided Consistently.** While the administration committed in August 2020 to providing monthly updates on COVID-19-related spending, it has provided these updates less frequently. In addition, the information is not provided in a consistent format. This makes it difficult to compare reports to easily identify changes or trends.
- **Does Not Appear to Reflect All Planned Spending.** The administration does not appear to include planned COVID-19-related expenditures in its fiscal updates in cases where it has not entered into contracts or made public announcements of the expenditures. For example, the administration provided a COVID-19 fiscal update on August 14, 2020 that did not include the estimated cost—potentially reaching \$1.7 billion—of a testing laboratory contract that the Governor announced on August 26. Including the cost of this contract in the August 14 report would have provided a more complete picture of planned expenditures.

and activities will receive specified funding levels, but the administration would have the ability—without notifying the Legislature—to transfer funds to support a very different mix of activities that may not align with legislative priorities. In addition, Control Section 11.91 allows the administration to transfer COVID-19-related funds to three departments that currently have no proposed COVID-19 response activities—resulting in the Legislature having no information on how the funds would be used if transferred to these departments. While some flexibility to transfer funds between departments could be necessary—given that the actual needs and costs for certain response activities could be different than currently assumed—it is critical for the Legislature to maintain oversight of such transfers.

Control Section Provides Too Much Authority to Spend Federal and Private Funds

The second component of the proposed Control Section 11.91, which would allow the administration to spend new federal or private funds without legislative approval or notification, would represent a significant expansion of already fairly broad authority. The existing language of Control Section 28 provides the administration with similar authority to allocate federal funds but includes legislative notification and the requirement the funding be unanticipated at the time the budget was passed. Because the second component of the proposed Control Section 11.91 would not include these conditions, the administration's request represents an overreach of administrative authority.

RECOMMENDATIONS

Given the scale and nature of the COVID-19 emergency, we think it is reasonable to give the Governor some flexibility in spending funds for related activities in the budget year. However, we think that additional checks and balances on this flexibility are necessary for COVID-19 spending, as well as all future state emergencies. Accordingly, we propose a series of recommendations to help achieve this outcome. First, we recommend the Legislature adopt legislation to make fundamental changes to the Governor's overall emergency spending authorities. Second, we recommend the Legislature consider a new budget control section process specific for COVID-19-related augmentations in 2021-22. Third, we recommend the Legislature modify the Governor's proposed authority to transfer funds budgeted for COVID-19-related activities to require legislative notification. Fourth, we recommend the Legislature reject the Governor's proposed flexibility to spend federal and private funds.

Reform Emergency Spending Authorities to Include Checks and Balances

Require All Emergency Augmentations Come From DREOA. In order to ensure that emergency spending augmentations authorized under CESA and DREOA are tracked and follow the same requirements for legislative notification and reporting, we recommend that the Legislature require all emergency augmentations come from DREOA. Under this recommendation, the Governor could still redirect any legally available state funds to emergency response-related activities through CESA. However, these funds would first have to be deposited into DREOA. (We recommend additional checks and balances on the Governor's authority to transfer funds into DREOA below.) Having all emergency augmentations coming from the same account would ensure that a consistent process governs all emergency augmentations. We note that in practice, the current administration already does this by first transferring emergency funds into DREOA when using its CESA spending authority.

Establish an Amount for DREOA in the Budget. In order to (1) ensure that the Governor can access a reasonable amount of funding for emergencies, (2) give the Legislature input into the level of funding available for emergency expenditures, and (3) minimize the chance that emergency spending will undermine the state budget structure or condition, we recommend establishing the total initial level of funding authorized each year for emergencies in the state budget. This amount would be budgeted in DREOA with the funds available to the Governor to respond to emergencies. As we discuss below, the Governor would only be authorized to augment departmental budgets from the account by notifying the Legislature when such allocations are made.

Require Advanced Notification to Transfer Additional Funds Into DREOA. In some years, the Governor may need to exceed the amount of emergency funding budgeted in DREOA. In order to maintain this flexibility—while also ensuring the Legislature is involved in spending decisions that could impact the overall structure of the state budget—we recommend that the Legislature require advanced notification before additional funds can be transferred into DREOA, including when funds are deposited into DREOA using CESA authority. The notifications should be provided to JLBC, since most midyear budget changes and current DREOA notifications go through JLBC. The amount of advanced notification and the information provided to the Legislature could vary depending on different factors. For example, the Legislature could:

- **Establish Shorter Notification Period for Smaller Transfers Tied to Ongoing Emergencies.** Transfers below a specified dollar threshold that are tied to ongoing emergencies and are accompanied by details on how the funds would be spent could have a shorter notification time frame, such as 72 hours. (The dollar threshold could be established in consultation with the administration based on historical emergency spending needs.) This is because such transfers would have less significant budgetary implications. Moreover, the required details on how the funds would be spent

allows the Legislature to effectively evaluate the request in a shorter time frame. In addition, given that the emergency would be ongoing in such a circumstance, the need for funds could be urgent.

- **Establish Longer Notification Period for Larger Transfers or Transfers Made Proactively Before Emergencies.** In other cases, the Governor may want to transfer large sums into DREOA if the balance becomes low or there is a known risk of potential emergencies. In this case, a longer notification period would be warranted, such as 30 or 45 days, to allow the Legislature to conduct more oversight of the transfer and its budgetary implications. For example, the Legislature could hold an oversight hearing within this longer time frame.
- **Request Waiver of Notification Time Frame in Urgent Circumstances.** If the Governor found it necessary to transfer funds to respond urgently to protect lives or property, a process could be established to allow the Governor to request a waiver to shorten the time frame specified for advanced notification. For example, the administration could request JLBC to waive the 72 hour notification time frame mentioned above if there was sufficient urgency, such as to address immediate threats to people or property. If JLBC approved a waiver of the time frame, the administration would be able to transfer the funds immediately, or after a shortened time frame specified by JLBC.

Require Reporting on DREOA Allocations and Expenditures. In order to ensure that the Legislature has complete information on emergency spending, we recommend the Legislature create two different reporting requirements:

- **Notification of DREOA Allocations to Departments.** We recommend the Legislature require DOF to notify JLBC at the time funds are allocated from DREOA to departments, including the amount allocated to each department and details on how the funds will be used. This would allow the Legislature to remain up to date on the administration's

emergency response activities and exercise greater legislative oversight of them.

- **Monthly Reports on Planned and Actual Spending.** We recommend requiring DOF to provide monthly emergency expenditure reports. For each emergency-related activity, the monthly reports should show, at a minimum, all planned and actual emergency spending by state entities, including expenditure of funds allocated from DREOA, federal funds, and private funds, as well as the expenditure of funds budgeted for emergency response or redirected within departmental budgets to respond to an emergency. This information should include a description of the specific activities funded. This would provide the Legislature—and the public—with the information necessary to conduct oversight of how the Governor spends funds during emergencies.

Consider Budget Control Section Process for COVID-19-Related Augmentations

In view of our recommended changes to the state's overall emergency spending authorities, the Legislature could consider approving the Governor's proposed Control Section 11.92 to extend the use of DREOA for COVID-19-related activities through 2021-22, as it would be well positioned to conduct oversight of COVID-19-related spending. However, given the unprecedented magnitude of the COVID-19 pandemic and the broad scale of the state's emergency response, the Legislature may wish to have a greater level of involvement, specifically with regard to COVID-19-related spending. In this case, the Legislature could consider rejecting Control Section 11.92 and instead create a different budget control section process specific for COVID-19-related augmentations. This process could be similar to the Control Section 36 process included in the *2019-20 Budget Act*. If the Legislature were to choose this option, the control section should (1) specify the total amount of funding available for allocation and (2) the process for the Governor to notify the Legislature of planned allocations of that funding to departments, such as by requiring

advanced notification to JLBC. For example, the Legislature could make the \$406 million the administration is proposing for augmenting COVID-19-related spending available through such a control section. Under this approach, the amount spent on COVID-19 could only be increased with an amendment to the budget.

Modify Proposed Flexibility to Shift Budgeted Funds by Requiring Legislative Notification

The Legislature will want to evaluate the merits of each individual COVID-19 budget proposal that makes up the total \$1.4 billion proposed, including whether the proposal is justified, consistent with legislative priorities, and reflects the level of resources needed for the appropriate department to carry out the specific activity. For funding the Legislature approves, we recommend providing the administration flexibility to shift funds among the various proposed COVID-19-related activities. However, we recommend the Legislature modify the first component of Control Section 11.91 to require DOF to notify the Legislature when funds are transferred between items. This will facilitate legislative oversight by allowing the Legislature to be informed of changes to the planned use of the funds before they are spent.

Reject Proposed Flexibility to Spend Federal and Private Funds

We recommend rejecting the second component of Control Section 11.91 that would allow the administration to spend new federal or private funds without legislative approval or notification. This proposal represents a significant expansion of already fairly broad authority and represents an overreach of administrative authority. If the Legislature rejects the Governor's proposal, the administration would instead need to allocate these funds through Control Section 28, as is the state's typical practice. While the administration's proposal was intended to expedite the Control Section 28 process, we find no need for this as the Legislature can already expedite the process, and has done so a number of times during the pandemic.

LAO PUBLICATIONS

This report was prepared by Jessica Peters and Ann Hollingshead, and reviewed by Drew Soderborg and Anthony Simbol. The Legislative Analyst's Office (LAO) is a nonpartisan office that provides fiscal and policy information and advice to the Legislature.

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