LEGAL SERVICES

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MEMORANDUM April 30, 2020

SUBJECT: Cares Act RPLs (Work Order No. 31-LS1794)

TO: Representative Chris Tuck
Attn: Aurora Hauke

FROM: Megan A. Wallace MAW
Director

Linda Bruce
Assistant Revisor

Meera Caouette
Legislative Counsel

You have asked for a review of the RPLs submitted by the governor on April 21, 2020.

I. RPL Process

As previously advised, the authority to submit an RPL is found under AS 37.07.080(h), which provides:

> (h) The increase of an appropriation item based on additional federal or other program receipts not specifically appropriated by the full legislature may be expended in accordance with the following procedures:
>
> (1) the governor shall submit a revised program to the Legislative Budget and Audit Committee for review;
>
> (2) 45 days shall elapse before commencement of expenditures under the revised program unless the Legislative Budget and Audit Committee earlier recommends that the state take part in the federally or otherwise funded activity;
>
> (3) should the Legislative Budget and Audit Committee recommend within the 45-day period that the state not initiate the additional activity, the governor shall again review the revised program and if the governor determines to authorize the expenditure, the governor shall provide the Legislative Budget and Audit Committee with a statement of the governor's reasons before commencement of expenditures under the revised program.

Under AS 37.07.080(h), an increase in an appropriation item based on federal receipts that is not specifically appropriated by the full legislature may be expended by the governor under certain conditions. If the governor submits the increase of an appropriation item to LB&A for approval and LB&A approves the expenditure, the governor may authorize the expenditure. If LB&A does not approve the expenditure, the governor may still authorize expenditures if the governor provides a statement of the reasons for the expenditure. Keep in mind that AS 37.07.080(h) only permits LB&A to consider an "increase of an appropriation item" not a new appropriation, so an existing appropriation item must be identified before one can begin to consider whether particular program receipts are "additional" to that item.

Operating appropriations bills have routinely appropriated federal receipts that exceed the amount appropriated in the operating appropriations bill subject to program review under AS 37.07.080(h). This "catch-all" appropriation in the appropriations bill is necessary to set out the treatment of additional federal money received after the appropriations bills are enacted and allows the LB&A review process to operate by making the appropriations that LB&A is not authorized to make.[1]

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).[2]

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 that the CARES Act money can be specifically considered to supplement. Even if you accept that AS 37.07.080(h) can be used to increase any federal receipt authority, AS 37.07.080(h) cannot be used to increase an appropriation that did not appropriate any federal funds or to create a new appropriation.[3]

The catch-all appropriations in the operating budgets are conditioned on compliance with the provisions of AS 37.07.080(h). To the extent that any of the RPLs below do not comply with AS 37.07.080(h), the governor lacks the authority to expend those funds, even after expiration of the 45-day waiting period.

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[1] This approach has not been tested in the Alaska Supreme Court.

[2] *See* sec. 32, Ch. 1, FSSLA 2019; sec. 37, Ch. 8, SLA 2020.

[3] To my knowledge, this issue has not been litigated.

II. CARES Act federal guidance

This office previously advised that it seemed clear from the CARES Act itself that the emergency funding cannot be used to supplement existing budget items that are unrelated to the emergency or to supplant state funds. This has now been confirmed through guidance formally issued by the U.S. Department of Treasury, which states:

> The requirement that expenditures be incurred "due to" the public health emergency means that expenditures must be used for actions taken to respond to the public health emergency. These may include expenditures incurred to allow the State, territorial, local, or Tribal government to respond directly to the emergency, such as by addressing medical or public health needs, as well as expenditures incurred to respond to second-order effects of the emergency, such as by providing economic support to those suffering from employment or business interruptions due to COVID-19-related business closures. Funds may not be used to fill shortfalls in government revenue to cover expenditures that would not otherwise qualify under the statute. Although a broad range of uses is allowed, revenue replacement is not a permissible use of Fund payments.

Any funds that are appropriated from the CARES Act, whether through legislative appropriation or through the RPL process, must be expended with the above guidance in mind. The funds appropriated may not simply be used as revenue replacement and "must be used for actions taken to respond to the public health emergency."

Therefore, it does not appear that municipalities can use CARES Act funds appropriated to them for purposes such as school bond debt reimbursement, which is an expense unrelated to the public health emergency and that had been previously appropriated and vetoed. There is a risk that if the CARES Act funds are not properly expended, they will need to be repaid to the federal government. Specifically, the CARES Act provides:

> (f) INSPECTOR GENERAL OVERSIGHT; RECOUPMENT.—
> "(1) OVERSIGHT AUTHORITY.—The Inspector General of the Department of the Treasury shall conduct monitoring and oversight of the receipt, disbursement, and use of funds made available under this section.
> "(2) RECOUPMENT.—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 subsection (d), 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. Amounts recovered under this subsection shall be deposited into the general fund of the Treasury.
> "(3) APPROPRIATION.—Out of any money in the Treasury of the United States not otherwise appropriated, there are appropriated to the

> Office of the Inspector General of the Department of the Treasury, $35,000,000 to carry out oversight and recoupment activities under this subsection. Amounts appropriated under the preceding sentence shall remain available until expended.
>
> "(4) AUTHORITY OF INSPECTOR GENERAL.—Nothing in this subsection shall be construed to diminish the authority of any Inspector General, including such authority as provided in the Inspector General Act of 1978 (5 U.S.C. App.).

In a set of Frequently Asked Questions from the U.S. Department of Treasury, it states:

> May a State receiving a payment transfer funds to a local government? Yes, provided that the transfer qualifies as a necessary expenditure incurred due to the public health emergency and meets the other criteria of section 601(d) of the Social Security Act. Such funds would be subject to recoupment by the Treasury Inspector General if they have not been used in a manner consistent with section 601(d) of the Social Security Act.

Thus, any money appropriated by the legislature to local governments is subject to repayment if not expended by the local governments in accordance with the above federal guidance.

III. Analysis of RPLs

The governor has proposed several RPLs, to authorize expenditures of the CARES Act funds. In general, in multiple RPLs, the governor identifies appropriations from both Ch. 1, FSSLA 2019 (HB 39) (FY 20) and Ch. 8, SLA 2020 (HB 205) (FY 21) as appropriation authority. Those are separate appropriations for separate fiscal years. The governor cannot accurately cite to two separate appropriation bills and label those as an appropriation item for increase as "multi-year funding." At a minimum, to comply with AS 37.07.080(h), it is our recommendation that the RPLs should be amended to specifically identify how much the appropriation in Ch. 1, FSSLA 2019 (HB 39) (FY 20) is to be increased and how much the appropriation in Ch. 8, SLA 2020 (HB 205) (FY 21) is to be increased.[4] While the legislature can appropriate funds for multiple fiscal years, through a language appropriation, this is not easily accomplished through the RPL process.[5]

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[4] The governor attempts to create a multi-year appropriation in RPLs # 08-2020-0250, 08-2020-0251, 05-2020-0074, 05-2020-0075, 05-2020-0076, 08-2020-0054, 12-2020-4049, 25-2020-8771, 25-2020-8772, and 45-2020-0002.

[5] Based on conversations with Legislative Finance, it appears that the RPL process has been previously utilized to provide for multi-year funding. However, the legal issues surrounding that issue have not been previously analyzed by this office.

With respect to the RPLs submitted, Legislative Finance has advised that:

> While the requested RPL is for a multi-year FY20 and FY21 appropriation, the proposed change can only be to the FY20 appropriation. If any of these funds are unspent in FY20, and there is need for additional authority in FY21, an FY21 RPL or supplemental appropriation will be necessary to expend these funds in that fiscal year.

To the extent that the governor does not concur in Legislative Finance's determination that the unamended RPLs can only be used to increase the FY 20 appropriations, there is a risk that there will remain disagreement as to the governor's FY 21 expenditure authority if approved by the committee. To the extent possible, I recommend that this issue be resolved in advance of LB&A's approval of the RPLs.[6]

Other than the multi-year funding issue described above, RPLs # 05-2020-0074, 05-2020-0075, 05-2020-0076, 12-2020-4049, 25-2020-8766, and 45-2020-0002 do not present any other legal issues, are consistent with the underlying appropriation sought to be increased, and are otherwise eligible for increase under the RPL process.

The RPLs below, however, present more substantial legal issues.

1) RPL #08-2020-0250 - Community Assistance Payments - $562,500,000

The governor cites appropriations to the Department of Commerce, Community, and Economic Development (DCCED), community and regional affairs, as appropriation authority. These appropriations contain federal receipt authority. The governor also cites AS 29.60.850 - 29.60.879 as statutory authority for this expenditure. This statutory authority provides for community assistance payments through the community assistance fund. However, the governor did not cite the appropriations that carry out the community assistance program as the appropriation authority for the RPL (there is no FY 20 community assistance appropriation, and the FY 21 community assistance appropriation contains no federal funding that would make it eligible for RPL process). The appropriations made to DCCED do not specifically carry out the purposes of AS 29.60.850 - 29.60.879, and the DCCED appropriations are not for community assistance payments. The governor also cites AS 37.05.315 (grants to municipalities) as statutory authority for this RPL. However, the DCCED appropriations identified are not grants to municipalities; those appropriations are usually contained in the capital budget.

In addition, based on testimony by OMB before the House Finance Committee on April 24, 2020, the governor did not exclusively utilize the formula for funding provided in AS 29.60.850 - 29.60.879. Indeed, the governor developed a new formula utilizing portions of the community assistance program in combination with data collected by

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[6] One option might include a statement on the record that OMB and the governor concede that if additional FY 21 receipt authority is necessary, they will submit another RPL or will make a supplemental budget request.

DCCED. This formula is not set out in statute or regulation. The governor has cited no authority, and there does not appear to be any, that would allow for the governor to develop the new community assistance payment formula used in this RPL, absent legislative action.

Based on the foregoing, in my opinion, this RPL does not comply with AS 37.07.080(h), as it is not an increase to an existing appropriation item, but instead attempts to create a new appropriation, which requires legislative action. As stated above, any CARES Act funds appropriated to municipalities "must be used for actions taken to respond to the public health emergency."

2) **RPL #08-2020-0251 - Small Business Relief - $300,000,000**

The governor cites DCCED, investments, as the appropriation authority. These appropriations contain no federal receipt authority. Therefore, there is no federal receipt authority to increase by RPL and for that reason alone this RPL does not comply with AS 37.07.080(h).

Further, the purpose of this appropriation does not appear to be for providing small business loans, especially to the extent proposed. The RPL proposes:

> The Investments Section of the Department of Commerce, Community and Economic Development will temporarily bolster their existing loan programs to provide support to struggling small businesses and may distribute funding through the reimbursable services agreement (RSA) process to the Alaska Housing Finance Corporation (AHFC), and the Alaska Industrial Development and Export Authority (AIDEA) as needs arise.

If AHFC and AIDEA are going to make loans, the legislature might consider appropriating funds directly to those entities. This RPL also does not comply with AS 37.07.080(h), and appears to create a new appropriation, which requires legislative action. The CARES Act guidance from the U.S. Department of Treasury specifically authorizes payments to small businesses, noting that eligible expenditures include those "related to the provision of grants to small businesses to reimburse the costs of business interruption caused by required closures."

3) **RPL #08-2020-0054 - COVID - 19 Economic Stimulus for Alaskan Fisheries - $100,000,000**

The governor cites DCCED, executive administration, commissioner's office, as the appropriation authority. There is not any federal funding attached to these appropriations. In addition, the funding for this allocation is primarily for personal services funded from interagency receipts. There is no money appropriated to the grants line. It is unclear why the governor cited this as appropriation authority. Because there is no federal funding attached to the appropriation, there is no federal receipt authority to increase by RPL. Therefore, this RPL does not comply with AS 37.07.080(h).

The legislature did not contemplate the commissioner making these types of stimulus payments. The statutory authority cited, AS 44.33.020, only provides the general duties of the department. Because there is no statutory authority specifically outlining a program for fishery stimulus payments, the legislature may need to specifically allocate how these funds are to be dispersed. In my opinion, this RPL attempts to create a new appropriation, which requires legislative action.

4) **RPL #25-2020-8771 - Statewide Aviation and Rural Airport System CARES FAA Funding - $49,000,000**

This RPL increases the amounts appropriated in the fiscal year 2020 and fiscal year 2021 operating budgets to the Department of Transportation and Public Facilities for administration and support and allocated to the commissioner's office by a total of $49 million.[7] According to the RPL, "CARES Act Airport Grants will be used for statewide aviation and rural airport system operating and maintenance expenses, where additional expenditure needs have occurred due to the COVID-19 public health emergency." The RPL provides that the federal funds will increase the funding allocated to the commissioner's office for fiscal years 2020 and 2021 and the commissioner will allocate the funding to state owned airports. There does not appear to be federal funding attached to these appropriations and, as a result, there is no federal receipt authority to be increased through the RPL process. In addition, the funding for these allocations is primarily for personal services.

As statutory authority for the RPL, the governor cites AS 37.20.010 and AS 44.42.060.[8] While these statutes authorize the governor and the commissioner to accept federal funds on behalf of the state, an expenditure of federal funds must be consistent with the purpose of the underlying appropriation. The purposes of the appropriations cited in this RPL do not appear to provide for operating and maintenance expenses associated with state owned airports. Thus, the expenditures described in the RPL appear to be inconsistent

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[7] *See* sec. 1, Ch. 1, FSSLA 2019, page 32, lines 30 - 31; sec. 1, Ch. 8, SLA 2020, page 32, lines 24 - 25.

[8] AS 37.20.010 provides:

> The governor is authorized to accept on behalf of the state all federal grants and transfers of property of an emergency, transitional, or omnibus nature upon conditions imposed by the federal government.

AS 44.42.060 provides:

> The commissioner may apply for and accept, on behalf of the state, grants from the federal government or an agency of it, or from another state, a foundation, or any person, for any of the functions or purposes of the department.

with the purposes of the appropriation authority cited. Additionally, note that this RPL cites appropriations from multiple fiscal years and requests "multi-year" funding, which likely cannot be accomplished through the RPL process. In sum, the funding described in the RPL does not appear to supplement the underlying appropriations cited and, because there are no federal funds attached to those appropriations, there is insufficient authority for the RPL and it is likely improper.

5) RPL #25-2020-8772 - MSCVC & Whittier Access and Tunnel 5001(d) CARES funding - $3,034,100

This RPL increases the amounts appropriated in the fiscal year 2020 and fiscal year 2021 operating budgets to the Department of Transportation and Public Facilities for administration and support and allocated to the commissioner's office by a total of $3,034,100.[9] According to the RPL, "[f]unding will be used to cover unbudgeted and unanticipated personal services costs and expenditures related to ensuring continuity of operations and program delivery within this appropriation." The RPL provides that the federal funds will increase the funding allocated to the commissioner's office for fiscal years 2020 and 2021 and the commissioner will allocate the funding to measurement standards and commercial vehicle compliance (MS/CVC), northern region highway and aviation, and Whittier access and tunnel. There does not appear to be federal funding attached to these appropriations and, as a result, there is no federal receipt authority to be increased through the RPL process. In addition, the funding for these allocations is primarily for personal services.

The governor cites AS 37.20.010 and AS 44.42.060 as statutory authority. While these statutes authorize the governor and the commissioner to accept federal funds on behalf of the state, an expenditure of federal funds must be consistent with the purpose of the underlying appropriation. Expenses related to MS/CVC, northern region highway and aviation, and Whittier access and tunnel do not appear to be within the scope of the appropriations cited in the RPL. Thus, the expenditures described in the RPL appear to be inconsistent with the purposes of the appropriation authority cited. Additionally, note that this RPL cites appropriations from multiple fiscal years and requests "multi-year" funding, which likely cannot be accomplished through the RPL process. In sum, the funding described in the RPL does not appear to supplement the underlying appropriations cited and, because there are no federal funds attached to those appropriations, there is insufficient authority for the RPL and it is likely improper.

If you have any questions, please advise.

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[9] *See* sec. 1, Ch. 1, FSSLA 2019, page 32, line 31; sec. 1, Ch. 8, SLA 2020, page 32, line 25.