

## Memorandum 2022-45

**Emergency-Related Reforms: Informational Report**

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In May 2020, in response to the COVID-19 pandemic, the Commission<sup>1</sup> decided to devote part of its resources to studying legal issues related to the public health crisis.<sup>2</sup>

In 2021, the Commission was authorized to study the following topic:

Whether the law should be revised to provide special rules that would apply to an area affected by a state of disaster or emergency declared by the federal government, a state of emergency proclaimed by the Governor under Section 8625 of the Government Code, or a local emergency proclaimed by a local governing body or official under Section 8630 of the Government Code. ...<sup>3</sup>

The Commission commenced work on this study in 2022.<sup>4</sup> At its March 2022 meeting, the Commission directed the staff to proceed with preparation of an informational report discussing different approaches in emergency laws.<sup>5</sup> Since then, the Commission has considered a proposed method and structure for the report and discussed alternative approaches used in different emergency laws, focusing on state-level emergency proclamations and powers.<sup>6</sup>

This memorandum continues the discussion of emergency law issues, concentrating on emergency spending issues.

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1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. See Minutes (May 2020), p. 3; see also Memorandum 2020-19 and its supplements.

3. 2021 Cal. Stat. res. ch. 108 (ACR 24 (Chau)).

4. See Memoranda 2022-12, 2022-21; see also Memorandum 2022-3, pp. 29-30, 46; Minutes (Jan. 2022), p. 3.

5. See Minutes (Mar. 2022), p. 4.

6. See Memorandum 2022-27; Memorandum 2022-35 and its First Supplement.

## OPERATIONAL ELEMENTS

Memorandum 2022-27 identified three main procedural steps in emergency law:

- (1) Establishing a state of emergency.
- (2) Exercise of emergency powers during a state of emergency.
- (3) Termination of a state of emergency.

Memorandum 2022-27 addressed different approaches taken in laws relating to the establishment of a state of emergency. The first supplement to Memorandum 2022-35 focused on (nonfiscal) powers during a state of emergency.

This memorandum discusses fiscal issues related to a state of emergency. More specifically, this memorandum addresses the mechanisms used in emergency spending generally and addresses emergency spending authority in California's law, focusing on the spending authorities used during the COVID-19 pandemic.

### PRESENTATION OF EMERGENCY SPENDING ISSUES IN THIS MEMORANDUM

Initially, the staff anticipated addressing fiscal emergency powers in the same manner as other emergency powers (providing a comparative analysis of fiscal powers conferred by the main emergency laws in different states). Upon further research, the staff concluded that doing so would provide an incomplete picture of how emergency spending works in practice. While emergency laws typically provide the Governor with some authority related to state funds and resources, emergency spending overall is a more complex structure, which can involve both state funds set aside in advance of an emergency (or unanticipated circumstances more broadly) and federal funds or additional state funds made available in response to an emergency (e.g., supplemental appropriations). State law may provide different rules and authorities depending on the source of the funds and those rules will not necessarily be found in the state's emergency law.

Rather than compare the fiscal provisions of the different states' emergency laws, this memorandum summarizes a report describing the mechanisms for emergency spending used in the states. As described in the following section, state emergency spending can involve a combination of funding mechanisms.

This memorandum also discusses a report, prepared by the Legislative Analyst's Office, that discusses California's emergency spending for COVID-19 in connection with the 2021-22 budget. The report contains a helpful overview of

California’s emergency spending authorities. This report identifies the key spending authorities used for the COVID-19 emergency and makes recommendations for adjusting the relevant spending authorities to facilitate legislative oversight. The recommendations address both general emergency spending rules, as well as specific provisions related to COVID-19 spending proposed for the 2021-22 budget.

#### EMERGENCY SPENDING PRACTICES IN DIFFERENT STATES

A report prepared by Pew Charitable Trusts in mid-2020 provides a helpful description of the mechanisms different states (and the District of Columbia) use to pay for natural disasters.<sup>7</sup> The report applies to disaster spending generally (i.e., some of the reported findings apply to disaster spending in the absence of a declared emergency). The report specifically notes that the “study did not examine budgeting practices for public health emergencies, [but] states are employing some of these tools in response to the COVID-19 pandemic, according to the National Conference of State Legislatures.”<sup>8</sup>

#### **Role of States in Funding Disaster Costs**

The report discusses disaster spending at different levels of government (local, state, and federal), but focuses on state-level rules. The report describes the roles of the different levels of government in funding disaster response:

When the costs from natural disasters such as storms, earthquakes, and wildfires exceed a local government’s capacity to respond, states must be ready to step in with resources, personnel, and financial support for affected areas. And for larger disasters, states can request a presidential declaration, which makes federal funds available to supplement state and local resources.

... Even in major disasters, states often must pay upfront for costs that are later partially or fully reimbursed by the federal government.

And as disasters become more expensive, frequent, and severe, states are under increasing pressure from federal policymakers—who are seeking to manage their own rising costs—to invest more in

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7. Pew Charitable Trusts, *How States Pay for Natural Disasters in an Era of Rising Costs: A Nationwide Assessment of Budgeting Strategies and Practices* (May 2020), available at <https://www.pewtrusts.org/-/media/assets/2020/05/how-states-pay-for-natural-disasters-in-an-era-of-rising-costs.pdf> (hereafter, “Pew Report”).

8. *Id.* at 1.

emergency management capabilities, fiscal reserves, recovery programs, and cost-saving mitigation activities.<sup>9</sup>

### *Federal Funding for Disasters*

As indicated in the quoted language above, federal funding<sup>10</sup> may be available in disasters. The Robert T. Stafford Disaster Relief and Emergency Assistance Act (commonly referred to as the Stafford Act) appears to be the main statutory authority for federal financial assistance for disasters.<sup>11</sup> This law requires a presidential declaration of an emergency or major disaster (which typically occurs after a request from an affected state or tribal government).<sup>12</sup>

The California Emergency Services Act includes special rules that apply in situations where there are both state and federal declarations.<sup>13</sup> In that instance, the law authorizes the Governor to take certain actions to secure federal financial assistance for the state, including, among other things, the authority to accept federal grants and to enter an agreement pledging to fund a state share.<sup>14</sup>

It is important to note that, when the state receives federal funding, there may be state rules for spending those funds. A report by the Legislative Analyst's Office discusses this issue:

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.

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9. *Id.*

10. When a state receives federal disaster funding, the state is generally obligated to provide a share of the funds. See, e.g., Federal Emergency Management Agency ("FEMA") Press Release, FEMA Announces 90/10 Cost Share Adjustment (Mar. 18, 2022), *available at* <https://www.fema.gov/press-release/20220318/fema-announces-9010-cost-share-adjustment> (noting standard 75% federal cost share and identifying 90% and 100% federal cost shares that apply in specified emergency situations).

11. See FEMA, A Guide to the Disaster Declaration Process and Federal Disaster Assistance, *available at* [https://www.fema.gov/pdf/rrr/dec\\_proc.pdf](https://www.fema.gov/pdf/rrr/dec_proc.pdf); see also Congressional Research Service, The Stafford Act Emergency Declaration for COVID-19, Report IN11251 (Mar. 13, 2020), *available at* <https://crsreports.congress.gov/product/pdf/IN/IN11251>; <https://www.fema.gov/disaster/how-declared>; Congressional Research Service, The Disaster Relief Fund: Overview and Issues, Report R45484 (Updated Jan. 20, 2022), *available at* <https://sgp.fas.org/crs/homesec/R45484.pdf>.

12. See <https://www.fema.gov/disaster/how-declared>.

Regarding emergency funding, one difference between an emergency and a major disaster appears to be the amount of federal financial assistance that may be available. For emergencies, federal assistance is limited to \$5 million. *Id.* For a major disaster, no dollar limit is noted.

13. Gov't Code § 8654.

14. Gov't Code § 8654(a)(4), (5).

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 [Joint Legislative Budget Committee] 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.<sup>15</sup>

## **Disaster Funding Mechanisms at the State Level**

The Pew Report discusses five “common natural disaster-funding mechanisms” that were previously identified by the U.S. Governmental Accountability Office and in earlier Pew research. Each of the mechanisms is discussed below, along with a brief description of its character, the number of states that use it, and information about the use of the mechanism in California.<sup>16</sup>

### *Statewide Disaster Accounts*

Statewide disaster accounts are specialized accounts that can provide money for state or local disaster expenditures. These accounts would be funded in advance for disaster preparedness.

According to the Pew Report, “46 states and the [District of Columbia] have a disaster account to cover costs incurred by state and sometimes local governments.”<sup>17</sup>

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15. Legislative Analyst’s Office, *The 2021-22 Budget: Improving Legislative Oversight of Emergency Spending Authorities* p. 5 (Mar. 2021), available at <https://lao.ca.gov/reports/2021/4393/Oversight-Emergency-Spending-030221.pdf> (hereafter, “LAO Report”).

16. See generally Pew Report, *supra* note 7, pp. 1-2, 4; see also *id.* at 6, 12, 14, 15.

For more information regarding legislation in different states to make supplemental appropriations or transfers into reserve or rainy day funds during the COVID-19 pandemic, see <https://www.ncsl.org/research/fiscal-policy/state-fiscal-responses-to-covid-19.aspx>.

17. Pew Report, *supra* note 7, p. 1.

California has multiple disaster accounts (similar to 11 other states and the district). The report identifies three California disaster accounts: the Disaster Assistance Fund, Disaster Relief Fund, and Disaster Response-Emergency Operations Account.<sup>18</sup> One of those accounts, the Disaster Response-Emergency Operations Account, is addressed in more detail later in this memorandum.<sup>19</sup>

### *Rainy Day Funds*

Rainy day funds (or reserves) are pools of money set aside (in advance) in case of budget shortfalls or other unanticipated circumstances. Different states may place different restrictions on the use of these funds (in some cases, rainy day funds may not be available for disaster spending). Similar to the statewide disaster accounts, these funds are preemptively allocated and bolster fiscal disaster preparedness.

“[Thirty-five] states [including California] and the district can use rainy day funds to cover disaster-related costs.”<sup>20</sup>

### *Supplemental Appropriations*

Supplemental appropriations are a means for the Legislature to responsively provide disaster funding (as needed).

“Every state and the district can use supplemental appropriations to fill shortfalls caused by disasters.”<sup>21</sup>

### *Transfer Authority*

Transfer authority (which can be granted to the Governor or another designated entity or official) provides a means to responsively adjust the budget to dedicate additional resources to disaster response.

“[Forty-two] states and the district designate an official or entity with transfer authority—the power to move funds within state government—for disaster purposes.”<sup>22</sup>

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18. *Id.* at 6, 9. The report included the appropriations to each account for fiscal year 2018. Those appropriations are as follows:

- Disaster Assistance Fund - \$0 (may have funds from prior years)
- Disaster Relief Fund – Unfunded (no funds from prior years)
- Disaster Response-Emergency Operations Account - \$1,000,000

See *id.* at 7, 9.

19. See discussion of “California Disaster Assistance Act” *infra*.

20. Pew Report, *supra* note 7, p. 12; see also *id.* at 2, 4, 13, 14.

21. *Id.* at 2; see also *id.* at 4, 14.

22. *Id.* at 2; see also *id.* at 4, 15-18.

California allows the Governor to move money to pay for disasters. Roughly 20 other states also confer this power on the Governor alone.<sup>23</sup>

### *State Agency Budgets*

State agency budgets can set aside funding for disasters preemptively or agencies may be permitted to responsively redirect money from other programs to fund disaster needs. Different agencies may have different authority to redirect funds (this authority may be limited to agencies whose charge involves, for instance, emergencies or infrastructure). The authority to redirect agency funds to disaster response may also be conditioned on a declared state of emergency.

“Every state and the district permit agencies to use their own budgets for disaster needs.”<sup>24</sup> However, different states impose different conditions on how and when agencies can use their budgets for disaster spending.<sup>25</sup>

California has rules that permit a select group of state agencies to spend agency resources on an emergency. California also provides modified rules for agency spending when an emergency has been declared.<sup>26</sup>

### *States’ Use of Different Disaster Funding Mechanisms*

As the numbers above suggest, the different mechanisms are used in combination with one another to comprise a state’s disaster funding system. Overall, Pew reports that “all 50 states and Washington, D.C., make use of at least three of the five mechanisms, while 46 states and the district employ at least four.”<sup>27</sup> As indicated above, California uses all five of these mechanisms for its disaster funding.<sup>28</sup>

## CALIFORNIA BUDGET PROCESS

Before discussing California’s emergency spending authorities, it might be helpful to briefly describe the state’s budget process, which is the primary way the executive branch gets spending authority.<sup>29</sup>

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23. *Id.* at 16-17.

24. *Id.* at 2; see also *id.* at 4, 18-22.

25. *Id.* at 18-22.

26. *Id.* at 20-21.

27. *Id.* at 1.

28. See *id.* at 5; see also *id.* at 6, 9, 13, 14, 16, 18, 20.

29. See <https://dof.ca.gov/budget/budget-act/> (“The State Constitution (Article XVI, Section 7) provides that money may be drawn from the Treasury only through an appropriation made by law. ... The Budget Act is the predominant method by which appropriations are made accounting for about 65% of total expenditure authorizations.”). In addition to the Budget Act, methods of

The budget includes provisions that provide authority relevant to emergency spending. In addition, California’s Constitution includes provisions that provide special rules relevant to emergencies and spending.

### **Summary of Budget Process<sup>30</sup>**

Very briefly, in January, the Governor is required to submit a proposed budget to the Legislature for the upcoming fiscal year (the state’s fiscal year runs from July 1–June 30). Between January and June, the Legislature holds hearings on the budget and the Legislative Analyst’s Office prepares a series of reports to assist the Legislature as it considers the budget. The Legislature has until June 15 to pass the budget. The budget bill becomes law as soon as it is signed.

### **Contents of Budget**

In addition to actual appropriations of funds, the budget act includes provisions that provide supporting rules for appropriations and expenditures.<sup>31</sup> These rules are referred to as budget control sections (and the control section number corresponds to the section number in the budget act).<sup>32</sup> A number of control sections are carried over year to year, although control sections can also be added or removed, as needed.<sup>33</sup> The LAO Report on emergency spending, discussed later in this memorandum, identifies a few control sections that provide

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appropriation include the State Constitution, bills that contain a specific appropriation, codified provisions that provide for ongoing continuous appropriations, and ballot measures. *Id.*

30. See generally California Senate, “The Budget Process: A Citizen’s Guide to Participation” pp. 2-3, 9 (Sept. 2014), *available at* [https://www.senate.ca.gov/sites/senate.ca.gov/files/the\\_budget\\_process.pdf](https://www.senate.ca.gov/sites/senate.ca.gov/files/the_budget_process.pdf) (hereafter, “The Budget Process”).

31. See generally <https://dof.ca.gov/budget/budget-act>. According to this page:

The sections [of the Budget Act] following Section 2.00 to the last section are generally referred to as the general control sections. The term “general” is used as the provisions usually apply to a number of agencies or on a statewide basis. The origin of the term “control” was likely due to the fact that many of these sections were for the purpose of legislative restrictions on the spending authorized by appropriations included in Section 2.00. However, these sections do more than restrict expenditures. [In fact], they may provide for more flexibility by authorizing adjustments to appropriations. Other uses of control sections have been to (1) provide explanatory information, (2) provide for transfers between funds (3) allow adjustments for retirement contributions, and (4) allow authority for actions to accomplish specified expenditures, savings, personnel adjustments, etc.

32. See *id.* (providing a list of commonly known/used control sections); see also <https://dof.ca.gov/wp-content/uploads/budget/budget-analyst-guide/Commonly-Used-Control-Sections-to-Revise-Budgets.pdf>.

33. For carry-over control sections, see *supra* notes 31, 32. For new control sections, see, e.g., Sections 11.90, 11.95 (related to federal Coronavirus funding) in State of California Governor’s Budget: Final Budget Summary 2020-21 (prepared by Dep’t of Finance), *available at* <https://www.dgs.ca.gov/-/media/Divisions/OSP/Publications/Governors-Budget-Final-Budget-Summary-2020-21-ADA.pdf?la=en&hash=A2856707D92133C9F394FF0F2B8999205DB923FF>.



authority related to emergency spending and some proposed control section provisions specifically related to COVID-19 spending.<sup>34</sup>

One key feature of budget control sections is that they exist for the term of the budget. The following year, the budget control section could either be adjusted or simply not included in the budget if the rule is no longer necessary or aspects of the rule should be changed. For longer-term emergencies (extending through multiple fiscal years), including emergency spending rules as budget control sections may allow for more flexibility to adjust or eliminate those rules in future fiscal years.

In addition to the main budget act, the overall budget can include numerous pieces of related legislation, including “budget bill juniors” (amendments to the budget) and trailer bills that include necessary statutory amendments to implement the budget.<sup>35</sup>

### **Constitutional Rules Related to Emergencies and Spending**

California has several important constitutional provisions related to emergency spending.<sup>36</sup>

One of those provisions is the state appropriations limit (commonly referred to as the “Gann Limit”).<sup>37</sup> The purpose of this limit “is to keep real (inflation adjusted) per-person government spending under 1978-79 levels.”<sup>38</sup> However, certain emergency spending is exempt from the Gann limit:

In the event an emergency is declared by the Governor, appropriations approved by a two-thirds vote of the legislative body of an affected entity of government to an emergency account for expenditures relating to that emergency shall not constitute appropriations subject to limitation. As used in this paragraph, “emergency” means the existence, as declared by the Governor, of

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34. See discussion of “Control Sections of the State Budget” *infra*.

35. See “The Budget Process,” *supra* note 30, at 7 (“If substantive statutory law must be amended in order to implement the budget, these statutory changes must also be passed by each house. Such bills are known as ‘trailer bills,’ as they ‘trail’ the budget and are processed separately from the main budget bill.”); <https://calbudgetcenter.org/resources/glossary-of-state-budget-terms/> (defining “Budget Bill Jr.” as an informal term referring to “any budget bill that amends the Budget Act.”); see also, e.g., 2022 Cal. Stat. ch. 3 (SB 113); 2022 Cal. Stat. ch. 45 (AB 178).

36. See “The Budget Process,” *supra* note 30, p. 18.

37. Cal. Const. art. XIII B, § 1 (“The total annual appropriations subject to limitation of the State and of each local government shall not exceed the appropriations limit of the entity of government for the prior year adjusted for the change in the cost of living and the change in population, except as otherwise provided in this article.”); see generally Legislative Analyst’s Office, The State Appropriations Limit (April 2021), available at <https://lao.ca.gov/reports/2021/4416/SAL-042121.pdf> (hereafter, “LAO Gann Report”).

38. LAO Gann Report, *supra* note 37, p. 3.

conditions of disaster or of extreme peril to the safety of persons and property within the State, or parts thereof, caused by such conditions as attack or probable or imminent attack by an enemy of the United States, fire, flood, drought, storm, civil disorder, earthquake, or volcanic eruption.<sup>39</sup>

Another constitutional provision establishes a process where the Governor can proclaim a fiscal emergency to address a situation where revenues, expenditures, or both deviate substantially from budgeted projections. That provision provides, in part:

(1) If, following the enactment of the budget bill ..., the Governor determines that, for that fiscal year, General Fund revenues will decline substantially below the estimate of General Fund revenues upon which the budget bill for that fiscal year, as enacted, was based, or General Fund expenditures will increase substantially above that estimate of General Fund revenues, or both, the Governor may issue a proclamation declaring a fiscal emergency and shall thereupon cause the Legislature to assemble in special session for this purpose. The proclamation shall identify the nature of the fiscal emergency and shall be submitted by the Governor to the Legislature, accompanied by proposed legislation to address the fiscal emergency.

(2) If the Legislature fails to pass and send to the Governor a bill or bills to address the fiscal emergency by the 45th day following the issuance of the proclamation, the Legislature may not act on any other bill, nor may the Legislature adjourn for a joint recess, until that bill or those bills have been passed and sent to the Governor.

...<sup>40</sup>

#### EMERGENCY SPENDING IN CALIFORNIA

As part of California's budget process for fiscal year 2021-22, the Legislative Analyst's Office ("LAO") prepared a report, entitled "Improving Legislative Oversight of Emergency Spending Authorities" ("LAO Report").<sup>41</sup> Although the report focuses on the 2021-22 budget and COVID-19 spending, it also includes more general recommendations related to the Governor's emergency spending authorities.

The discussion below provides a brief summary of emergency spending authorities used for COVID-19 (as described by the report), followed by the LAO recommendations to reform emergency spending generally.

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39. Cal. Const. art. XIII B, § 3(c)(2).

40. Cal. Const. art. IV, § 10(f).

41. See *supra* note 15.

## Authorities Used for COVID-19 Emergency Spending in California

The LAO Report describes the main authorities used for emergency spending during the COVID-19 pandemic. Those authorities include:

- The California Emergency Services Act, which has been the focus of the statutory analysis presented in this study to date.
- The California Disaster Assistance Act, which establishes the Disaster Response-Emergency Operations Account.
- Control sections from the state budget, which can allow the Governor to spend unanticipated federal funds or to shift emergency funds within the state budget.

Each of these authorities will be described individually in more detail below.

### *California Emergency Services Act*

The California Emergency Services Act (“CESA”) grants the Governor broad authority “to make expenditures from any fund legally available in order to deal with actual or threatened conditions of a state of war emergency, state of emergency, or local emergency.”<sup>42</sup>

The LAO Report notes that existing law does not require the Governor “to obtain approval from or provide notification (or other information) to the Legislature when using the spending authorities specified in CESA.”<sup>43</sup> On a related note, the Report indicates that the Governor has provided periodic reports on COVID-19 spending even though these reports are not legally required. The Report, however, also raises concerns about the sufficiency of the content and frequency of the reports.<sup>44</sup>

The LAO Report also notes, as a matter of practice, the Governor, when using this CESA authority for COVID-19 spending, has transferred the money into the Disaster Response-Emergency Operations Account (discussed below).<sup>45</sup>

### *California Disaster Assistance Act*

The California Disaster Assistance Act establishes the Disaster Response-Emergency Operations Account (“DREOA”). The funds in the account are continuously appropriated without regard to fiscal years and can be allocated by

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42. Gov’t Code § 8645.

43. LAO Report, *supra* note 15, p. 4.

44. *Id.* at 9.

45. LAO Report, *supra* note 15, p. 10.

the Director of Finance to state agencies for “disaster response operation costs.”<sup>46</sup> The costs must be incurred in relation to an emergency proclaimed by the Governor.<sup>47</sup>

One important aspect of DREOA is that it includes a legislative notification requirement for the allocation of funds. Specifically, for allocations of funds from the account, the Director of Finance must notify the Chairperson of the Joint Legislative Budget Committee (“JLBC”) and the chairpersons of the fiscal committees of each house.<sup>48</sup>

Another important aspect of DREOA, and the California Disaster Assistance Act as a whole, is that this emergency spending authority is meant to address situations that could not be addressed through the normal budget process. Specifically, the LAO Report refers to the intent of the act “that emergency-related activities be funded through the budget process.”<sup>49</sup> By statute, DREOA can only be used for a limited time (120 days) after an emergency proclamation. While that time period can be extended, the statute prohibits extensions beyond a certain timeframe (roughly, the timeframe after the first extension cannot extend into a subsequent fiscal year).<sup>50</sup>

The LAO Report recommends that the Legislature require all emergency spending augmentations come from DREOA. The report notes that this recommendation is consistent with what has occurred in practice (i.e., the Governor, when using CESA authority, has transferred emergency funds into DREOA, despite the lack of a clear legal obligation to do so). The LAO Report notes that “{u}nder 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.”<sup>51</sup>

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46. Gov’t Code § 8690.6(a). “Disaster response operation costs” are defined as “costs that are immediate and necessary to deal with an ongoing or emerging crisis.” *Id.*

47. *Id.*

48. *Id.* § 8690.6(b).

49. LAO Report, *supra* note 15, pp. 6 (“According to the administration, including [certain COVID-19 related] funds in the proposed budget is intended to honor the intent of CDAA that emergency-related activities be funded through the budget process.”), 9.

50. Gov’t Code § 8690.6(a) (authorizes allocations for activities occurring within 120 days of an emergency proclamation); see also *id.* § 8690.6(c) (which allows extensions of the time limit for 120-day increments, so long as those extensions do not extend beyond the end of the fiscal year in which notice of the first extension was given or the date of enactment for the Budget Act for the fiscal year following the fiscal year in which the first notice of extension was issued, whichever is later).

51. LAO Report, *supra* note 15, p. 10.

The LAO makes this recommendation “[i]n order to ensure that emergency spending augmentations authorized under CESA and DREOA are tracked and follow the same requirements for legislative notification and reporting.”<sup>52</sup> The LAO also makes the following additional recommendations regarding DREOA and emergency spending:

- **“Establish an Amount for DREOA in the Budget.”**<sup>53</sup> This recommendation is offered “[i]n 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.”<sup>54</sup>
- **“Require Advanced Notification to Transfer Additional Funds Into DREOA.”**<sup>55</sup> This recommendation is offered “[i]n order to maintain [the Governor’s flexibility to address situations where additional emergency funding (i.e., in excess of budgeted amount in DREOA) is needed]—while also ensuring the Legislature is involved in spending decisions that could impact the overall structure of the state budget.” The LAO also suggests different notification periods (depending on the amount at issue or whether the transfer is made in advance of an emergency), as well as a process for waiver or reduction of the notification period in urgent situations.<sup>56</sup>
- **“Require Reporting on DREOA Allocations and Expenditures.”**<sup>57</sup> This recommendation is offered “to ensure that the Legislature has complete information on emergency spending.” The LAO suggests two different reporting requirements: (1) a requirement that JLBC be notified when DREOA funds are allocated to a department and (2) monthly reports on all planned and actual emergency spending from Department of Finance to the JLBC.<sup>58</sup>

In short, the LAO appears to believe that DREOA, with some refinements, offers a helpful tool to consolidate and reallocate funds needed for emergency response and to facilitate oversight of emergency spending.

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52. *Id.* at 10.

53. *Id.* at 11.

54. *Id.* at 11.

55. *Id.* at 11.

56. *Id.* at 11.

57. *Id.* at 11.

58. *Id.* at 11-12.

For the notification of funds allocated to a department, the notification must include the amount and the expected use of the funds. *Id.* at 11.

### *Control Sections of the State Budget*

The LAO Report discusses Control Section 28, which is described as “standard language” for the budget.<sup>59</sup> Control Section 28 allows for the expenditure of unanticipated federal funds (and other unanticipated nonstate funds) subject to certain conditions. In particular, Control Section 28 only allows the funds to be spent if the funds:

- 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.<sup>60</sup>

Control Section 28 also requires a 30-day notification to the JLBC to allocate funds that exceed a specified threshold.<sup>61</sup>

The LAO Report describes supplemental legislation that amended the 2019-20 budget to make additional general fund money available for COVID-19 spending and add a control section (Control Section 36) governing the use of these funds.<sup>62</sup> This provision both appropriates money and includes notification rules prior to expenditure of the appropriated funds. As enacted, Control Section 36 provided:

Notwithstanding any other law, \$500,000,000 is hereby appropriated from the General Fund to any item for any purpose related to the March 4, 2020 proclamation of a state of emergency upon order of the Director of Finance. Funds appropriated in this section may not be expended prior to 72 hours after the Director of Finance notifies the Joint Legislative Budget Committee in writing of the purposes of the planned expenditure. The chairperson of the Joint Legislative Budget Committee or the chairperson’s designee may shorten the 72-hour period by written notification. The amount of the appropriation in this section may be increased in increments of \$50,000,000 no sooner than 72 hours after the Director of Finance notifies the Joint Legislative Budget Committee of the need for the increase. The chairperson of the Joint Legislative Budget Committee or the chairperson’s designee may shorten the 72-hour period by

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59. LAO Report, *supra* note 15, p. 5; see also, e.g., Section 28.00 of recent budget acts: 2022 Cal. Stat. ch. 43 (SB 154); 2021 Cal. Stat. ch. 21 (AB 128); 2020 Cal. Stat. ch. 7 (AB 89); 2019 Cal. Stat. ch. 23 (AB 74).

60. LAO Report, *supra* note 15, p. 5.

61. *Id.*

62. *Id.* at 4.

written notification. The total appropriation under this section shall not exceed \$1,000,000,000.<sup>63</sup>

The LAO Report notes that Control Section 36 was not included in the 2021-22 budget act.<sup>64</sup>

The LAO Report also discusses newly-proposed control sections included in the Governor's proposed 2021-22 budget to provide COVID-19 spending flexibility. The LAO Report presents and discusses proposed control sections:

- **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.<sup>65</sup>

The LAO analyzed and made recommendations about each of these provisions.<sup>66</sup>

### Status of Codified Provisions Discussed in LAO Report

The staff reviewed the CESA and DREOA provisions discussed in the LAO Report. Those provisions have not been amended since the preparation of the LAO Report.

#### MORE RECENT CHANGES

Since the preparation of the LAO Report, there have been legislative changes related to emergency funding. The staff has not reviewed these recent changes comprehensively, but one such change is noted below.

In early 2022, Senate Bill 113, an economic relief trailer bill, was enacted.<sup>67</sup> Among other things, that bill created the California Emergency Relief Fund and allocated money to that fund for COVID-19-related purposes.<sup>68</sup> It is unclear what,

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63. 2020 Cal. Stat. ch. 2, § 2 (SB 89 (Committee on Budget and Fiscal Review)).

64. LAO Report, *supra* note 15, p. 4.

65. *Id.* at 8 (Figure 2).

66. See *id.* at 12; see also 2021 Cal. Stat. ch. 21, §§ 11.91, 11.92.

67. 2022 Cal. Stat. ch. 3.

68. Gov't Code § 8654.2. This section is found in the California Emergency Services Act, but is currently codified in an article related to Wildfire Mitigation Financial Assistance. The staff

if any, relationship there might be between this fund and the DREOA, discussed above.

#### COMPARATIVE ANALYSIS OF EMERGENCY FISCAL AUTHORITY

As noted above, the comparative analysis of emergency laws is unlikely to provide a complete picture of emergency spending authorities. Expanding that research to include state budgets and constitutional provisions would be a significant undertaking. And, even after doing that work, the provisions in different states may not be comparable in a useful way, since different states may utilize or rely more heavily on different emergency funding mechanisms.

And, importantly, the LAO, an office with expertise on budgeting and spending, has made specific recommendations for California's emergency spending authorities, with the goal of improving legislative oversight of emergency spending.

**In light of these issues, the staff would recommend against preparing a comparative analysis of emergency spending authorities across different states.**

Respectfully submitted,

Kristin Burford  
Staff Counsel

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understands that this provision was intended to be included in the preceding article (General Fiscal Provisions).