



## Legislative Council Staff

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## Memorandum

**This is not a legal opinion.**

March 17, 2020

TO: Interested Persons

FROM: Greg Sobetski, Principal Economist, 303-866-4105

SUBJECT: TABOR Emergency Provisions

### Summary

On March 11, 2020, Governor Polis issued Executive Order D 2020 003,<sup>1</sup> declaring a disaster emergency pursuant to state law due to the presence of coronavirus disease 2019 (COVID-19). The disaster emergency declaration triggers certain provisions in the Colorado Constitution and state law.

This memorandum presents information on emergency fiscal provisions in Article X, Section 20, of the Colorado Constitution (TABOR). Specifically, it discusses the emergency reserve and emergency taxation provisions contained in subsections (5) and (6) of TABOR, respectively.

### TABOR Emergency Reserve

Subsection (5) of TABOR requires the state and all local governments to maintain an emergency reserve. For 1995 and subsequent years, the emergency reserve must equal at least 3 percent of fiscal year spending,<sup>2</sup> excluding bonded debt service. The state emergency reserve is specified annually in the Long Bill headnote and is usually made up of specific cash fund balances and capital assets. For FY 2019-20, the reserve as set in the 2019 Long Bill is \$449.6 million, of which \$271.0 million is liquid assets and \$178.6 million is capital assets.

**Use of emergency reserve.** TABOR specifies that the reserve is "[t]o use for declared emergencies only[...]."<sup>3</sup> TABOR defines "emergency" to exclude economic conditions, revenue shortfalls, or salary or fringe benefit increases.<sup>4</sup>

<sup>1</sup>Online here: <https://drive.google.com/file/d/1szJfU9WF36-ICVgRhXMAAnJdlQyTSG83e/view>

<sup>2</sup>Fiscal year spending is a legal term used in TABOR to denote the amount of revenue that TABOR allows the state to retain and either spend or save each year.

<sup>3</sup>Colo. Const. art. X, §20 (5).

<sup>4</sup>Colo. Const. art. X, §20 (2)(c).

State law<sup>5</sup> clarifies what constitutes a declared emergency for the purposes of TABOR, allowing the emergency reserve to be expended upon:

- (a) passage of a joint resolution by a two-thirds majority of both chambers and approved by the governor; or
- (b) the declaration of a disaster emergency by the governor.

According to the Office of Legislative Legal Services (OLLS), previous use of the emergency reserve has usually, and perhaps always, occurred upon the declaration of a disaster emergency by the governor, rather than a joint resolution. On March 11, 2020, Governor Polis declared a disaster emergency by executive order pursuant to the specific state law referenced in the TABOR implementing legislation.<sup>6</sup> An "epidemic" is specifically included in the relevant definition of a disaster for the purposes of this section.

**Expenditure and repayment of emergency reserve.** There is little statutory guidance about how the emergency reserve is to be expended and repaid. Based on conversations with OLLS, staff understands that cash fund balances in the emergency reserve can be expended to respond to the emergency once a declaration has been issued. Capital assets identified in the emergency reserve would need to be liquidated in order to be used.

There is no specific repayment schedule for the reserve. However, the constitutional requirement that the state maintain an emergency reserve would continue to exist for future fiscal years. For example, if the emergency reserve were to be depleted in full or in part during FY 2019-20, the 2020 Long Bill would still need to identify an emergency reserve for FY 2020-21. If the declared emergency continued into FY 2020-21, expenditures could be made from that year's emergency reserve to respond to the disaster.

## Emergency Taxes

Subsection (6) of TABOR allows the imposition of emergency taxes without prior voter approval in certain circumstances. Most importantly, emergency tax revenue may be spent only after the emergency reserve is depleted. Since the FY 2019-20 emergency reserve includes capital assets, emergency tax revenue could be spent only after those assets were liquidated and after the resulting proceeds were spent.

Imposition of an emergency tax requires a two-thirds vote of both chambers both to declare the emergency and to impose the tax. TABOR requires an emergency to be declared by the legislature in order to impose an emergency tax; declaration by the governor alone is insufficient. Emergency tax revenue must be spent on the emergency or refunded to taxpayers. Emergency tax revenue is exempt from the spending limit in subsection (7) of TABOR and the refund requirement for exceeding an estimate in subsection (3)(c) of TABOR. An emergency tax must be submitted to voters for approval within 60 days of its imposition, and ends thereafter if it is not approved.

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<sup>5</sup>Section 24-77-104 (3), C.R.S.

<sup>6</sup>Section 24-33.5-704 (4), C.R.S.