

Legal & Use Framework for CRF:

- **Q:** What are custodial funds:
- **A:** Custodial funds are funds that come to the state from sources other than usual revenue sources (e.g. Federal government funds or special settlement funds). They are not subject to legislative appropriations and are administered directly by the Governor and the Executive Branch
 - **Analysis:** The question of whether funds are state funds (eg subject to legislative appropriation) or custodial is evaluated on a case-by-case basis. Courts generally look at factors including the source of funds, the degree of flexibility allowed in the process for how they should be allocated, and how much flexibility is permitted for the funds' ultimate purpose. A court would weigh all these non-exhaustive factors when considering whether funds are custodial or state funds.

- **Q:** Does the Governor have the ability to determine how to spend these funds?
- **A:** Yes
 - **Analysis:** the fund source, the limitations placed on how they can be spent, and the significant degree of federal oversight required all indicate that these are custodial in nature.
 - The Coronavirus Relief Funds under the CARES Act do not resemble previous federal allocations such as those provided to Colorado from the Jobs and Growth Tax Relief Reconciliation Act of 2003 (Jobs Act), which provided significantly more flexibility in how the funds could be used and significantly less federal oversight.
 - While the Governor has some discretion to determine how these funds can be spent, the overall purpose of the funds is highly inflexible, and reserved solely for three purposes:
 - Necessary expenditures due to COVID-19;
 - Activities not accounted for in the State's most recently approved budget; and
 - Costs incurred solely between March 1, 2020 and Dec. 30, 2020.
 - Unlike the Jobs Act, which permitted state's to use funds to support general government purposes, the CRF funds are limited to expenses that are new, unanticipated, and caused by COVID-19.
 - What's more, unlike the Jobs Act, which merely required pre-certification that the funds would be used for purposes permitted under the act, the CRF has far more complex oversight. For example, within the CARES Act, Congress included an appropriation of \$35 million for the Treasury Department inspector general to "carry out oversight and recoupment activities."

- **Q:** Are the uses of the CRF funds articulated by the Governor permitted under the CARES Act?

- **A: Yes**
 - **Analysis:** Each of the uses outlined by the Governor’s EO meets the parameters spelled out by the CARES Act that a state must use the funds from the Coronavirus Relief Fund to cover expenses that are necessary expenditures incurred due to the COVID-19 public health emergency, were not accounted for in the budget most recently approved as of March 27, 2020 (the date of enactment of the CARES Act) for the State, and were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.” The expenditures also follow the guidelines issued by the U.S. Treasury.
 - For example, the \$510 million directed toward Colorado’s public schools are specifically for “expenditures associated with actions to facilitate compliance with COVID-19-related public health measures including facilitating distance learning and social distancing for in-person contact hours, mitigating lost learning, and the provision of economic support in connection with the COVID-19 public health emergency to stimulate the economy by supporting Colorado’s workforce through increasing free instructional hours for our kindergarten through 12th grade education system, all of which are permitted under the Act and related Treasury guidance.

- **Q: Is it necessary that the Governor expend funds now, prior to the General Assembly reconvening on May 26?**
- **A: Yes.**
 - **Analysis:** The state and its local governments have incurred significant costs already.
 - Congress clearly intended for funds to be stimulative and spent as quickly as possible.
 - The state’s ability to respond to the continued pandemic relies on its ability to allocate resources toward critical activities now.
 - For example, the state’s allocation for medical expenses and public health expenses incurred or expected to be incurred in the State’s Disaster Emergency Fund, \$48 million transferred for FY 2019-20 and \$157 million set-aside for FY 2020-21. This includes amounts expected to be distributed to local public health agencies for COVID-19 response for activities such as contact tracing, which are necessary to continue to control the spread of the virus.

- **Q: Will the General Assembly have any authority over these fund uses**
- **A: Yes**
 - **Analysis:** The Governor is transferring \$70 million to the State’s General Fund for appropriation by the General Assembly.

- OSPB is submitting a number of informational supplemental requests to the JBC for their consideration.
- Funds allocated are subject to audit by the Office of the State Auditor.